DUQUESNE LAW REVIEW OF THE
THOMAS R. KLINE SCHOOL OF LAW

JOHN AND LIZ MURRAY EXCELLENCE IN SCHOLARSHIP LECTURE

PROFESSIONAL ARTICLES

STUDENT ARTICLES

VOLUME 63, NUMBER 2 SUMMER 2025

Duquesne Law Review

Volume 63, Number 2, Summer 2025

John and Liz Murray Excellence in Scholarship Lecture

Professional Articles

Student Articles

Duquesne Law Review is published in Pittsburgh, Pennsylvania. Correspondence may be addressed to: *Duquesne Law Review*, Thomas R. Kline School of Law of Duquesne University, 600 Forbes Avenue, Pittsburgh, Pennsylvania 15282.

The subscription price is $30.00 per volume. Subscription inquiries should be addressed to the attention of the Business Manager. Subscriptions will be cancelled only after the entire volume for which the subscription has been entered is printed and delivered. Subscriptions are automatically renewed unless otherwise stipulated. Subscribers should report non-receipt of an issue within six months of its mailing. After six months, replacement issues will not be provided free of charge.

This issue is available from *Duquesne Law Review* at $10.00 per copy for three years from its initial printing. Archived issues are available through William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068, at $18.00 per copy. Back issues can also be found in electronic format on HeinOnline, http://heinonline.org/.

Citations conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 21st ed. 2020). Readers are invited to submit manuscripts for possible publication. Manuscripts should be addressed to the attention of the Executive Articles Editors. Readers are also invited to submit letters to the Editor in response to the works contained herein. Letters to the Editor should be addressed to the attention of the Editor-in-Chief.

Duquesne Law Review

Volume 63

DUQUESNE UNIVERSITY
SCHOOL OF LAW
2024-2025

Administration

APRIL M. BARTON, B.S., J.D.
Dean, and Professor of Law

ELLA A. KWISNEK, B.A., J.D., M.S.Ed.
Associate Dean for Students and Associate Professor of Legal Skills

ANN L. SCHIAVONE, B.A., J.D.
Associate Dean for Academic Affairs and Associate Professor of Law

TARA WILLKE, B.A., J.D.
Associate Dean for Strategic Academic Programs and Professor of Law

RICHARD HEPPNER, B.A., M.A., Ph.D, J.D.
Associate Dean for Faculty Scholarship, Assistant Professor of Law

KATHERINE NORTON, B.S., J.D.
Associate Dean for Faculty Scholarship, Director of Clinical and International Programs and Assistant Professor of Law

Full-Time Faculty

STEVEN BAICKER-MCKEE, B.A., J.D.
Joseph A. Katarincic Chair of Legal Process and Civil Procedure and Associate Professor of Law

DAN BREAN, B.S., J.D.
Intellectual Property Expert in Residence

Honorable THOMAS CORBETT, J.D.
Distinguished Executive in Residence

KARA DEMPSEY, B.A., M.S.W., J.D.
Director of the Youth Advocacy Clinic, Tribone Center for Clinical Legal Education, Assistant Professor of Clinical Legal Education

RICHARD GAFFNEY Jr., B.A., M.B.A., J.D.
Director of Advanced Analytics and Associate Professor of Legal Skills

LAUREN GAILEY, B.A., B.S.B.A., J.D.
Visiting Assistant Professor

KENNETH G. GORMLEY, B.A., J.D.
Duquesne University President and Professor of Law

RICHARD HEPPNER, B.A., M.A., Ph.D, J.D.
Associate Dean for Faculty Scholarship, Assistant Professor of Law

MARYANN HERMAN, B.A., J.D.
Director of Academic Excellence and Associate Professor of Legal Skills

WILSON R. HUHN, B.A., J.D.
Professor of Law

DAVID JAMISON, B.A., M.A., J.D.
Distinguished Faculty Fellow

RONA KAUFMAN, B.A., J.D., LL.M.
Associate Professor of Law

STEPHEN KAUFMAN, B.A., J.D.
Distinguished Faculty Fellow

ELLA A. KWISNEK, B.A., J.D., M.S.Ed.
Associate Dean for Students and Associate Professor of Legal Skills

Honorable CONOR, LAMB, J.D.
Distinguished Lecturer of Law

BRUCE S. LEDEWITZ, B.S.F.S., J.D.
Adrian Van Kaam Endowed Chair in Scholarly Excellence and Professor of Law

JAN M. LEVINE, B.A., J.D.
Professor of Law

JACQUELINE LIPTON, B.A., LL.B., LL.M. M.F.A., Ph.D.
Associate Professor of Law

ASHLEY LONDON, B.A., J.D.
Director of Bar Studies and Assistant Professor of Law

EUGENE MAZO, B.A., M.A., Ph.D., J.D.
Associate Professor of Law, Associate Professor of Political Science

MARISSA MEREDITH, B.A., J.D.
Assistant Professor of Law

APRIL L. MILBURN-KNIZNER, B.A., J.D.
Associate Director of Bar Studies and Assistant Professor of Legal Skills

BRIAN MILLER, B.A., J.D.
Assistant Professor of Law

JOSEPH SABINO MISTICK, B.A., J.D.
Associate Professor of Law

MEGAN MONTCALM, B.A., J.D.,
Director of Academic Excellence and Assistant Professor of Legal Skills

JANE CAMPBELL MORIARTY, B.A., J.D.
Carol Los Mansmann Chair in Faculty Scholarship, and Professor of Law

DANA NEACSU, LL.M., Ph.D., M.L.S., D.E.A., LL.B
Director of Duquesne Kline Law Library, and Associate Professor of Legal Skills

KATHERINE NORTON, B.S., J.D.
Associate Dean for Faculty Scholarship, Director of Clinical and International Programs and Assistant Professor of Law
DAVID NOWS, B.A., J.D.
Assistant Professor of Law
WESLEY OLIVER, B.A., J.D., LL.M., J.S.D.
Director of Criminal Justice Program, and Professor of Law
GRACE W. ORSATTI, B.S., J.D.
Director of the Externship and Pro Bono Program and Assistant Professor of Clinical Legal Education
JOHN T. RAGO, B.A., J.D.
Associate Professor of Law
ANN L. SCHIAVONE, B.A., J.D.
Associate Dean for Academic Affairs and Associate Professor of Law
Honorable THOMAS SAYLOR, B.A., Masters of Law, J.D.
Chief Justice Emeritus and Kline Center Jurist-in-Residence
RYAN WILLIAMS, B.A., J.D.
Associate Professor of Law
TARA WILLKE, B.A., J.D.
Associate Dean for Strategic Academic Programs and Professor of Law

Law Librarian Faculty
AMY LOVELL, B.A., M.L.S.
Assistant Director for Resource Development and Metadata Services
KATHLEEN LYNCH, B.A., J.D., M.I.L.S.
Faculty Research and Outreach Services Librarian, and Adjunct Professor
DANA NEACSU, LL.M., Ph.D., M.L.S., D.E.A., LL.B
Director of Duquesne Kline Law Library, and Associate Professor of Legal Skills
CHARLES SPROWLS, B.S.I.S., M.L.I.S.
Head of Information Access and Student Services, and Adjunct Professor

Emeritus Faculty
ROBERT S. BARKER, B.A., M.A., J.D.
Professor Emeritus
NICOLAS CAFARDI, Ph.B, M.A., J.D., J.C.L., J.C.D.
Dean Emeritus
MARTHA JORDAN, B.S., LL.M., J.D.
Professor Emerita
MAUREEN LALLY-GREEN, B.S., J.D.
Professor Emerita
FRANK Y. LIU, LL.B., M.C.J., M.L.S.
Professor Emeritus
NANCY PERKINS, B.S., J.D.
Professor Emeritus
RAYMOND SEKULA, B.S.B.A., LL.M., J.D.
Professor Emeritus
MARK YOCHUM, B.A., J.D.
Professor Emeritus

Adjunct Faculty
JOSEPH ALFE, J.D., LL.M.
ROBERT S. BARKER, B.A., M.A., J.D.
KATIE E. BUTLER, B.S., B.A., J.D.
LAUREN CATALANO, B.A., J.D.
THOMAS COCCHI, B.S., J.D.
ROBERT F. DALEY, B.S., J.D.
MATTHEW DEBBIS, B.S., J.D.
Honorable JEFFERY DELLER, B.A., J.D.
ELIZABETH A. DELOSA, J.D., B.A.
Managing Attorney for the Pennsylvania Innocence Project's Pittsburgh Office
JENNIFER DIGIOVANNI, B.A., J.D.
LAWRENCE A. DINARDO, B.A., M.Div., M.Ch.A, J.C.L.
MARK DUNN, B.A., M.P.M.
REBECCA B. EDMISTON, B.S., J.D.
NICHOLE EHRHEART, B.S., J.D.
THOMAS FARRELL, B.A., J.D.
ERIC W. GETTENY, B.A., J.D., CIPM
PETER GIGLIONE, B.A., J.D.
Coordinator of Trial Advocacy Program
JOHN D. GOETZ, B.A., J.D.
ALLEN B. GORDON, B.A., J.D.
MORGAN GRAY, B.A., J.D., Ph.D.
ROSALYN GUY-MCCORKLE, J.D.
JUDITH HALE, B,A., M.P.A.
Honorable THOMAS M. HARDIMAN B.A., J.D.
ELISABETH R. HEALEY, Ph.D., J.D.
Honorable ELLIOT HOWSIE, B.S., M.S., J.D.
JALILA JEFFERSON-BULLOCK, B.A., M.S., J.D.
TURHAN JENKINS, B.A., J.D.
ERIN R. KARSMAN, B.A., J.D.
Director of Thomas R. Kline Center for Judicial Education and Director of the Appellate Program
SHANICKA KENNEDY, B.A., J.D.
AMY KERLIN, B.A., J.D.
KENNETH KILBERT, B.A., J.D.
CARL KRASIK, A.B., J.D.
ROBERT KRAVETZ, B.A., J.D.
ROBERT KREBS, B.A., J.D.
DANIEL KUNZ, B.S., M.B.A., J.D.

Honorable MAUREEN E. LALLY-GREEN, B.S., J.D.
DOROTHEE M. LANDGRAF, LL.M
GREGORY LANDGRAF, J.D., CPA/ABV, CGMA, CFE
JAMIE LATRONICA, B.S., J.D.
KATHLEEN LYNCH, B.A., J.D., M.I.L.S.
Faculty Research and Outreach Services Librarian, and Adjunct Professor
CATHERINE MARTIN, B.A., J.D.
JESSYCA PHILIPPE MCCARL, B.S., LL.M., J.D.
W. THOMAS MCGOUGH, Jr., B.A., J.D.
MARTIN MCKOWN, B.S., J.D.
RYAN MEYERS, B.A., M.P.A.
KARY MOORE, B.A., J.D.
DANIELLE MRDJENOVICH, B.S., J.D.
JULIAN NEISER, B.A., J.D.
MATTHEW NEWMAN, B.S., J.D.
JACQULYN OBARA, B.S., J.D.
BRAZITTE POOLE, B.A., M.S., J.D.
JOSEPH PRITCHARD, B.S., J.D.
SOPHIE ROBIN-OLIVIER, LL.M., Ph.D.
CARMEN ROBINSON, J.D.
THOMAS D. SALUS, B.S., J.D.
Honorable THOMAS SAYLOR, B.A., Masters of Law, J.D.
Chief Justice Emeritus and Kline Center Jurist-in-Residence
DAVID SCHRAMM, B.S., J.D.
SAMUEL SIMON, B.S., J.D.
MARCY SMOREY-GIGER, B.S., M.S., J.D.
PATRICK SOREK, B.A., J.D., LL.M.
CHARLES SPROWLS, B.S.I.S., M.L.I.S.
Head of Information Access and Student Services, and Adjunct Professor
DAVID SPURGEON, B.A., J.D.
STACEY STEINER, J.D.
LEEANN SYME, B.S., J.D.
SAMANTHA TAMBURRO, M.S., J.D.
STEPHEN VAN METER, B.A., J.D.
Honorable DAVID N. WECHT, B.S., J.D.

Cooperation and Resistance to Entrenched Power: Some Preconditions for a Constitutional Democracy

Martha Minow[*]

INTRODUCTION

"Remember[,] Democracy never lasts long. It soon wastes[,] exhausts[,] and murders itself. There never was a Democracy [y]et, that did not commit suicide."[1] So wrote John Adams after he served as president of the United States. Historical evidence and current events support his view.[2] From the death of democracy in ancient Athens and Rome to the rise of Nazi tyranny out of the twentieth century German Weimar Republic, history offers many examples not only of the ending of democratic governance but of the manipulation and undoing of self-rule.[3] Even Athenian statesman Pericles,

---

* 300th Anniversary University Professor, Harvard University. Presented as the Murray Lecture, Thomas R. Kline School of Law of Duquesne University (Oct. 31, 2024). Thanks to Max Sterling for comments and research assistance and to Daniel Albert-Rozenberg and Denis Fedin for research and discussions.

1. Letter from John Adams, Second President of the United States, to John Taylor, United States Senator from Virginia (Dec. 17, 1814) (available at https://founders.archives.gov/documents/Adams/99-02-02-6371).

2. *Over a Billion Have Voted in 2024: Has Democracy Won?*, THE ECONOMIST (Oct. 6, 2024), https://www.economist.com/international/2024/10/06/over-a-billion-have-voted-in-2024-has-democracy-won. A global test for democracies across the globe has marked the year 2024 with elections in sixty-seven countries with a total population of about 3.8 billion people. *See id.*

3. *See generally* EDWARD J. WATTS, MORTAL REPUBLIC: HOW ROME FELL INTO TYRANNY (2018); ERIC D. WEITZ, WEIMAR GERMANY: PROMISE AND TRAGEDY (expanded ed. 2018); Richard Tada, *The End of Athenian Democracy: How the City-State's Democracy Was Destroyed*, HISTORYNET (Nov. 17, 2017), https://www.historynet.com/the-end-of-athens/.

elected democratically and known for the golden age of Athenian democracy, manipulated the Athenian citizenry.[4]

Warning signs of the demise of contemporary regimes of constitutional democracy are plentiful.[5] Freedom of speech, protection of minority groups, and viable elections across the globe have diminished over the past eighteen years, as measured by the nonpartisan Freedom House.[6] In many nations organized as constitutional democracies, governments and powerful private actors curb individual rights in the name of national security, manipulate mass media and elections, demonize critics, and spread corruption. These are the elements identified by Yale professor Timothy Snyder in his historical lessons on tyranny.[7]

During 2024, sixty-four countries—comprising nearly half the population of the world—held national elections, with many moving to or preserving autocratic or single-party rule.[8] Populist public figures in many nations seem to read from the same playbook: blame others, attack immigrants, foment social divisions, and demonize any source of authority other than themselves.[9] Overwhelming majorities of voters across opposing parties in the United States viewed the electoral process in the 2024 presidential election as fair and effective, marking improvement from the 2020 election that prompted more than sixty court challenges though no findings of widespread fraud.[10] Nonetheless, surveyed adults identified

---

4. Lawrence Torcello, *This Is How Historians Predicted the Failure of Democracy*, NAT'L INT. (Nov. 13 2019), https://nationalinterest.org/blog/buzz/how-historians-predicted-failure-democracy-95686.

5. *See* STEPHEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 3, 5–8 (2018) [hereinafter LEVITSKY & ZIBLATT I].

6. Yana Gorokhovskaia & Cathryn Grothe, *The Mounting Damage of Flawed Elections and Armed Conflict*, FREEDOM HOUSE (Feb. 2024), https://freedomhouse.org/report/freedom-world/2024/mounting-damage-flawed-elections-and-armed-conflict; Yana Gorokhovskaia et al., *Still Not Safe: Transnational Freedom in 2022*, FREEDOM HOUSE (Apr. 2023), https://freedomhouse.org/issues/countering-authoritarianism.

7. TIMOTHY SNYDER, THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA 16 (2018).

8. Linda Colley, *A Constitution Nowhere and Everywhere*, N.Y. REV. OF BOOKS (Oct. 17, 2024), https://www.nybooks.com/articles/2024/10/17/a-constitution-nowhere-and-everywhere-cambridge-constitutional-history-uk/ (reviewing THE CAMBRIDGE CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM (Peter Cane & H. Kumarasingham eds. 2023)).

9. Steven Rosenfeld, *Leading Civil Rights Lawyer Shows 20 Ways Trump Is Copying Hitler's Early Rhetoric and Policies*, COMMON DREAMS (Aug. 9, 2019), https://www.commondreams.org/views/2019/08/09/leading-civil-rights-lawyer-shows-20-ways-trump-copying-hitlers-early-rhetoric-and (discussing BERT NEUBORNE, WHEN AT TIMES A MOB IS SWAYED: A CITIZEN'S GUIDE TO DEFENDING OUR REPUBLIC (2019)).

10. *Voters' Evaluations of the 2024 Election Process*, PEW RSCH. CTR. (Dec. 4, 2024), https://www.pewresearch.org/politics/2024/12/04/voters-evaluations-of-the-2024-election-process/ (95% in 2024 reported the process went satisfactorily compared with only 59% in 2020, reflecting shifts in views by Trump voters). On challenges to the 2020 presidential election, see *Results of Lawsuits Regarding 2020 Elections*, CAMPAIGN LEGAL CTR.,

political turmoil and the presidential election of 2024 in the United States as leading sources of stress and nearly two-thirds felt their rights were under attack.[11] More than two-thirds also reported worries about democracy's future, with both Republicans and Democrats expressing beliefs that the candidate from the opposing party posed threats to democracy.[12] Little discussed, though, has been what most concerns me: the preconditions for effective self-government in the United States seem either weak or missing in action.

By "preconditions," I mean the critical ingredients of the society affecting the reliability (in actuality and as perceived) of the institutions and operations of constitutional democracy. "*Constitutional* democracy" is my focus because majority rule alone does not capture the promise of self-government. Protections of rights for individuals and for members of minority groups are also key if rule by the people is to include all. Also critical for durable democracy are investments in the design of institutions that can check power and ambitions of those given positions of authority.[13]

Even ardent supporters of constitutional democracy emphasize the daunting challenges to make it work at any time and any place. That is why attention to preconditions matters. Someone once said: "Expect the worst; you'll never be disappointed." I prefer this: "Expect the best, plan for the worst, and prepare to be surprised."[14] Clues to needed preconditions can be found in scholarly and popular

---

https://campaignlegal.org/results-lawsuits-regarding-2020-elections (last visited Feb. 2, 2025).

11. AM. PSYCH. ASS'N, STRESS IN AMERICA 2024: A NATION IN POLITICAL TURMOIL 1 (Oct. 2024), https://www.apa.org/pubs/reports/stress-in-america/2024/2024-stress-in-america-full-report.pdf.

12. Monica Potts, *Americans Think Democracy Is in Peril in the 2024 Election*, ABC NEWS (Feb. 1, 2024, 4:51 PM), https://abcnews.go.com/538/americans-democracy-peril-2024-election/story?id=106803471 (reporting surveys and polls). Political polarization extends as right-wing commentators blame "the Left" for mangling democracy's guardrails even as left-leaning observers warn of jeopardy to democracy's guardrails from views and conduct by their opponents. *Compare* Kimberley A. Strassel, *The Left's Mangled Guardrails*, WALL ST. J. (Jan. 17, 2025), https://www.wsj.com/opinion/the-lefts-mangled-guardrails-joe-biden-trying-to-kill-democracy-in-the-name-of-saving-it-391c72a3 (discussing Department of Justice prosecutions and Democratic-led Congress use of subpoenas and impeachment of President Trump), *with* Michael Waldman, *Keep the Guardrails Intact*, BRENNAN CTR. FOR JUST. (Nov. 13, 2024), https://www.brennancenter.org/our-work/analysis-opinion/keep-guardrails-intact (discussing statements by President-Elect Donald Trump and candidates for his cabinet).

13. *See* Dennis C. Mueller, *Constitutional Democracy: An Interpretation*, *in* UNDERSTANDING DEMOCRACY: ECONOMIC AND POLITICAL PERSPECTIVES 65–66 (Albert Breton, Gianluigi Galeotti, Pierre Salmon & Ronald Wintrobe eds., 2011), https://www.cambridge.org/core/books/abs/understanding-democracy/constitutional-democracy-an-interpretation/81492CD3561A932DAD994633B264A078.

14. *See Denis Waitley Quotes*, AZ QUOTES, https://www.azquotes.com/quote/547631 (last visited Feb. 2, 2025).

writings.[15] This Article explores two essentials: cooperation, including respect for election results and general trust in social and political institutions, as well as countering entrenched political and economic power held by particular individuals, groups, or parties. The topics are linked. One source of jeopardy to cooperation and trust in institutions is the perception—and the reality—of systematic unfairness and self-dealing by those in charge. Another risk grows when society's institutions and practices seem systematically resistant to change, foreclosing opportunities for those not in charge. In that spirit, let's first consider commitment to accept electoral loss as a predicate in constitutional democracy—and its absence as a warning sign for the system's viability.

I. ACCEPTING ELECTORAL LOSSES

A democracy, political scientists tell us, is a "system in which parties lose elections."[16] This of course means that the members of the parties—and their candidates—accept the verdict of elections. This should be the case for constitutional democracies as well—democracies that limit the power of majorities in order to protect individuals and minority groups and also limit governmental power in general.[17] People in a working constitutional democracy try to elevate certainty in immediate results and respect for the overall system over a self-interest in winning. If candidates and parties do not endorse certainty of results and acceptance of the system, then conflict

15. A broader investigation addressing historical and cross-cultural elements of social order, societal transitions from autocracy to democracy, and democratic collapse is the project others have pursued. *See, e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022); DOUGLASS C. NORTH, JOHN JOSEPH WALLIS, & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009); RITCHIE ROBERTSON, THE ENLIGHTENMENT: THE PURSUIT OF HAPPINESS 1680-1790 (2021); Joseph V. Femia, *Barrington Moore and the Preconditions for Democracy*, 2 BRIT. J. POL. SCI. 21 (1972); NAT'L RSCH. COUNCIL, THE TRANSITION TO DEMOCRACY: PROCEEDINGS OF A WORKSHOP (1991), https://nap.nationalacademies.org/read/1755/chapter/1; Wolfgang G. Weber & Christine Unterrainer, *The Analysis of Preconditions for the Fostering of Democratic Behavioural Orientation in Business Organizations – The ODEM Questionnaire (POPD)*, *in* DEMOCRATIC COMPETENCES AND SOCIAL PRACTICES IN ORGANIZATIONS 118 (Wolfgang G. Weber, Michael Thoma, Annette Ostendorf & Lynne Chisholm eds., 2012); Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy,"* 94 TEX. L. REV. 1527 (2016).

16. Henry Farrell, *Why Do Election Losers Accept Their Losses? What We Learn from a Minimalist View of Democracy*, GOOD AUTH. (Sept., 27, 2023), https://goodauthority.org/news/why-do-election-losers-accept-their-losses/ (quoting political scientist Adam Przeworski).

17. A civics education guide puts the elements well. *See Constitutional Democracy*, CTR. FOR CIVIC EDUC., https://www.civiced.org/lesson-plans/constitutional-democracy (last visited Feb. 2, 2025).

and even chaos ensue, unraveling the democratic system. A downward spiral surges if each party and each person refuses to recognize electoral losses.[18] Game theorists show through repeated experiments that reciprocation and cooperation lead to better outcomes in competitive circumstances except in activities that never repeat.[19] Accepting electoral losses is central to the peaceful transition of power expected by democratic elections and needed for social and political stability.

Athletes learn that accepting loss is the first requirement for games to proceed and research shows that "athletes who accept loss are best prepared to win."[20] Acknowledging and dealing with loss in any competition requires emotional maturity and self-control. In athletic and other games, learning to accept results is a continuing topic of instruction and guidance as critical for each new generation. Profess disappointment. Recognize that self-worth is not summed up by winning. Learn from loss and prepare to try again. These are the tried-and-true lines of advice from coaches and experienced players in games ranging from soccer to chess and video games.[21] Following the rules and even demonstrating forgiveness and generosity toward other competitors produces stability and promotes the welfare of all: these are the findings of scholars and practitioners.[22]

Accepting the announced results of even close elections has been a treasured norm in the United States, with memorable examples of concessions by Theodore Roosevelt in 1912 and Al Gore in 2000.[23]

---

18. *See* ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 13 (1991).

19. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 30–31, 64, 128–29 (1984). This work started with a two-party game where individuals are given options of protecting their own interests or cooperating with the opponent (for example, in no smoking, or in confessing to wrongdoing). *Id.* at 21–23, 129; *see* Nicole Player, *The Morality and Practicality of Tit for Tat*, 2 PHIL. POL. & ECON. REV. 9, 9 (2023), https://pressbooks.lib.vt.edu/app/uploads/sites/47/2023/03/PPER-Volume-2-2023.pdf.

20. Michael Brown, *Research Shows that Athletes Who Accept Loss Are Best Prepared to Win*, MED. PRESS (Apr. 8, 2016), https://medicalxpress.com/news/2016-04-athletes-loss.html.

21. *See* Natalie Coyle, *How to Deal with Video Game Losses*, PSYCH. & VIDEO GAMES (Aug. 6, 2020), https://platinumparagon.info/losing-at-video-games/; Noël Studer, *Why Losing at Chess Hurts So Much (and the Antedote)*, NEXT LEVEL CHESS, https://nextlevelchess.blog/why-losing-at-chess-hurts-so-much-and-the-antidote/ (last visited Feb. 2, 2025); *5 Strategies to Overcome Defeat and Get More Wins*, ACES NATION, https://www.acesnation.org/blog/5-ways-to-overcome-defeat-and-get-more-wins (last visited Feb. 2, 2025); *see also* Manu Kapur, *Productive Failure in Learning Math*, 38 COGNITIVE SCI. 1008, 1008–09 (2014).

22. *See* AXELROD, *supra* note 19, at 138.

23. David Priess, *The Powerful Norm of Accepting the Results of a Presidential Election*, LAWFARE (Oct. 9, 2020, 2:06 PM), https://www.lawfaremedia.org/article/powerful-norm-accepting-results-presidential-election; *see also* DEIRDRE NANSEN MCCLOSKEY, BOURGEOIS EQUALITY: HOW IDEAS, NOT CAPITAL OR INSTITUTIONS, ENRICHED THE WORLD, at xxv (2016) ("Gore's wanting the good of his country came out of his personal and social ethics . . . . So did the acceptance by other Democrats of his defeat . . . . We honor [people like Gore].").

Andrew Jackson in 1824 and Samuel Tilden in 1876 accepted results in starkly contested and close elections in deference to the constitutional system.[24] Today, the norm of accepting election results is in jeopardy in the United States. After the refusal of President Donald Trump to accept the results of the 2020 election, a growing number of Republic Party leaders, current candidates, and members indicate that they would not accept the 2024 results unless Donald Trump became the winner.[25] Although this view was not tested as the 2024 election went for Donald Trump, such refusal to accept disliked results affects voters and indeed, voters in all parties.[26] Because acceptance of the results of the 2024 U.S. election reflected the margins and also victory by the candidate and party that had disputed the 2020 election, the problem is not over. Indeed, similar refusals to accept election returns are emerging in other countries.[27]

If there were any doubts, the events of January 6, 2020 demonstrate dangers of violence from the refusal to accept election results. Acceptance of election results is a predicate for the operation of a constitutional democracy. Norm-breaking unfortunately stimulates more norm-breaking.[28] Refusal to accept election results is not only bad sportsmanship, but rejection of the collective enterprise and its rules and principles. Denial of election loss weakens a constitutional democracy and also is a symptom of other missing predicates.

---

24. Priess, *supra* note 23. Some evidence of willingness to support the system persists even among partisans in the United States, but the declining numbers in this category contribute to outside evaluations downgrading the country from a democracy to a struggling democracy. *See* Gloria Danqiao Cheng, Serena Does & Margaret Shih, *Partisan Differences in Perceived Levels of Democracy Across Presidential Administrations*, 11 HUMANS. & SOC. SCIS. COMMC'NS., article no. 1177, 2024, at 1–2, 8, https://doi.org/10.1057/s41599-024-03451-1 ("[S]ome Trump supporters perceived Congress's confirmation of Biden's victory as being good for democracy, which was opposite to the response their losing status would predict.").

25. Nicola Narea, *America's Looming Election Crisis, Explained in 3 Charts*, VOX (Sept. 20, 2024, 7:00 AM), https://www.vox.com/politics/372863/2024-election-lies-trump-overturn-harris (reporting on survey results); *see* Tom Nichols, *The Moment of Truth*, THE ATL. (Oct. 9, 2024), https://www.theatlantic.com/magazine/archive/2024/11/george-washington-nightmare-donald-trump/679946/.

26. *See* Carla Fried, *Winning Buoys One's Perception of Democracy, but Even Some Losers Appreciate the Process*, UCLA ANDERSON REV. (Oct. 2, 2024), https://anderson-review.ucla.edu/winning-buoys-ones-perception-of-democracy-but-even-some-losers-appreciate-the-process/.

27. Jesse Yeung, Stefano Pozzebon & Tara John, *Venezuela Is Wracked with Protests and Election Uncertainty. Here's What to Know*, CNN, https://www.cnn.com/2024/07/30/americas/venezuela-protests-election-explainer-intl-hnk/index.html (July 31, 2024, 2:46 PM).

28. Niels Rosenquist, *How Tit-for-Tat Game Theory Hacked Politics*, THE BULWARK (June 10, 2019), https://www.thebulwark.com/p/how-tit-for-tat-game-theory-has-hacked-politics (example of both Republic and Democratic party approaches to judicial nominations). Inflexibility and defection from cooperative activity can undermine the practices of mutuality. *See* N.W. Barber, *Why Entrench?*, 14 INT'L J. CONST. L. 325, 343 (2016).

II. COOPERATION

Denial of election loss is a symptom of a larger failure: a failure to see one's long-term self-interest implicated in cooperation with others. Cooperation is a basic human practice that reflects self-interest as well as concern for others. The self-interest dimension of cooperation reflects awareness that we are all "repeat players," building patterns of reciprocity now will help next time around. Evolutionary biologists and anthropologists document the benefits of cooperation for humans and other species.[29]

Researchers have found that children as young as six-years old faced with a limited resource discover ways to cooperate and share without prompting. Adults may have more trouble cooperating due to distrust across social groups.[30] Obstacles to collaboration in business settings apparently are common among adults where they work in silos, where they fear risk or loss of control, and where leaders fail to stress the benefits of cooperation.[31] Yet successful leaders know how vital collaborative spirit and actions are to success in businesses and other organizations.[32] Students who share notes and study together do better in school.[33] Cooperation whether between individual people or across nations is not always easy, however, and calls for practice and continual renewal of relationships and trust.[34] Cooperation also can be promoted by a prompt to think

---

29. *See generally* LEE CRONK & BETH L. LEECH, MEETING AT GRAND CENTRAL: UNDERSTANDING THE SOCIAL AND EVOLUTIONARY ROOTS OF COOPERATION (2012); MARK PAGEL, WIRED FOR CULTURE: THE NATURAL HISTORY OF HUMAN COOPERATION (2012); NICHOLA RAIHANI, THE SOCIAL INSTINCT: HOW COOPERATION SHAPED THE WORLD (2021); CHARLES STANISH, THE EVOLUTION OF HUMAN CO-OPERATION: RITUAL AND SOCIAL COMPLEXITY IN STATELESS SOCIETIES (2017).

30. *Compare* Rebecca Koomen & Esther Herrman, *An Investigation of Children's Strategies for Overcoming the Tragedy of the Commons*, 2 NATURE HUM. BEHAV. 348, 348–55 (2018) (children spontaneously cooperating), *with* Michael Muthukrishna, Patrick Francois, Shayan Pourahmadi & Joseph Henrich, *Corrupting Cooperation and How Anti-Corruption Strategies May Backfire*, 1 NATURE HUM. BEHAV., article no. 138, 2017, at 1, https://www.nature.com/articles/s41562-017-0138, *and* Brad Pinter et al., *Reduction of Interindividual-Intergroup Discontinuity: The Role of Leader Accountability and Proneness to Guilt*, 93 J. PERSONALITY & SOC. PSYCH. 250, 250–65 (2007).

31. HARVARD BUS. REV. ANALYTIC SERVS., HOW COLLABORATION WINS: LEADERSHIP, BENEFITS, AND BEST PRACTICES 1 (2007), https://hbr.org/resources/pdfs/comm/citrix/HowCollaborationWins.pdf (reporting on survey responses from 491 business leaders globally).

32. Benjamin F. Jones, *The Science Behind the Growing Importance of Collaboration*, KELLOGGINSIGHT (Sep. 6, 2017), https://insight.kellogg.northwestern.edu/article/the-science-behind-the-growing-importance-of-collaboration.

33. *See* HAROLD PASHLER ET AL., NAT'L CTR. FOR EDUC. RSCH., ORGANIZING INSTRUCTION AND STUDY TO IMPROVE STUDENT LEARNING 30 (2007), https://files.eric.ed.gov/fulltext/ED498555.pdf.

34. ANDREW ZITCER, PRACTICING COOPERATION: MUTUAL AID BEYOND CAPITALISM 211, 216 (2021) (drawing on case studies); *see generally* HEIDI K. GARDNER & IVAN A. MATVIAK, SMARTER COLLABORATION: A NEW APPROACH TO BREAKING DOWN BARRIERS AND

about benevolent behavior.[35] As a practice in a variety of social and economic settings, cooperation permeates organizations and activities outside of national politics.[36]

Democratic governance is actually a "fair system of cooperation over time," as philosopher John Rawls put it.[37] In a fair system of cooperation, grounded in a principle of reciprocity, citizens accept its rules and principles "provided that everyone else likewise accepts them."[38] Achieving that degree of acceptance and participation is fundamental to the enterprise. Seeing benefits—such as economic stability and avoidance of war—can strengthen commitments to democratic governments.[39] As history suggests, constitutional democracies do not succeed over time without agreements by potential rivals to respect the wins and losses that ensue.[40] And individual careers as well as national well-being strengthen when rivals participate in forging policies together.[41]

Perhaps most essential is the sense of being in the same boat. Mutual concern—an understanding that one's own fate is connected to what happens to others—should inform the effort governing the group that includes oneself and others. As Dr. Martin Luther King, Jr. memorably said, "[w]e may have all come on different ships, but we're in the same boat now."[42] A sense of shared project—perhaps bolstered by a common political identity or common history—can

---

TRANSFORMING WORK (2022) (individuals at workplaces); THOMAS KALINOWSKI, WHY INTERNATIONAL COOPERATION IS FAILING: HOW THE CLASH OF CAPITALISMS UNDERMINES THE REGULATION OF FINANCE (2019) (nations and global institutions).

35. Valerio Capraro, Conor Smyth, Kalliopi Mylona & Graham A. Niblo, *Benevolent Characteristics Promote Cooperative Behaviour Among Humans*, 9 PLOS ONE, no. 8, 2014, at 3–5, https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0102881&type=printable.

36. *See* BERNARD E. HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 12 (2023) (examples and theoretical argument for expanding on those examples).

37. JOHN RAWLS, POLITICAL LIBERALISM 15 (1993).

38. *Id.* at 16. The willingness to play by the rule, for Rawls, may be conditional on others being willing to do the same. *Id.* at 49.

39. *See* Michael Doyle, *Why They Don't Fight: The Surprising Endurance of the Democratic Peace*, FOREIGN AFFS. (June 18, 2024), https://www.foreignaffairs.com/world/why-they-dont-fight-doyle; Dani Rodrik, *Participatory Politics, Social Cooperation, and Economic Stability*, 90 AM. ECON. REV. 140, 140–44 (2000).

40. LEVITSKY & ZIBLATT I, *supra* note 5, at 8–9 (lessons from comparative politics); *see also* Juliet Hooker, *Winning Isn't Everything, Especially in Democracy*, PRINCETON UNIV. PRESS (Nov. 8, 2023), https://press.princeton.edu/ideas/winning-isnt-everything-especially-in-democracy.

41. *See, e.g.*, DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 280, 304 (2005) (historical example of President Lincoln employing rivals in his cabinet).

42. Andrew Christensen, *MLK: Words to Live By*, THE LIBR. AT WASH. & LEE L. SCH. (Jan. 20, 2020), https://lawlib.academic.wlu.edu/2020/01/20/mlk-words-to-live-by/ (original capitalization not preserved).

help, but the belief in a shared future is even more important.[43] That sensibility does not thrive in a politically polarized environment, especially where the polarization infiltrates the information people encounter and even the sports and teams people support.[44]

The very facts of political contests can exacerbate polarization, yet such contests are part and parcel of constitutional democracies. Political activities in any democracy involve contests and competition; those processes cannot proceed unless participants for the most part accept and adhere to the basic norms of the system. Distinguishing between competition built into democratic elections and defection from the project altogether requires comprehension, commitment, and guards against corrosion.[45] Philosopher Andreas Schendler drew on his experiences in Mexico, Austria, and Hungary when he recently explained that "[b]reaches of basic norms are instances of *foul play* which are not to be confused with the *rough play* of combative democratic adversaries who battle each other *within* the basic rules of democratic competition."[46] In Massachusetts, where I live, the dominance of the Democratic party, with essentially one-party rule across the branches and within the two houses of the legislature, has prompted a ballot initiative that would empower the state auditor to investigate the legislative branch.[47] But

43. *See* Larry Kramer, *Democracy in the Age of Fragmented Identity*, LONDON SCH. OF ECON. & POL. SCI. (Oct. 21, 2024), https://blogs.lse.ac.uk/politicsandpolicy/democracy-in-the-age-of-fragmented-identity/ (on shared political identity); Martha Minow, *Fragments or Ties? The Defense of Difference*, *in* FRACTIOUS NATION? UNITY AND DIVISION IN CONTEMPORARY AMERICAN LIFE 67–78 (Jonathan Rieder & Stephen Steinlight eds., 2003) (on the possibility that partially-shared identities, cutting across lines of difference, can provide the requisite sense of commonality).

44. Jerry Brewer, *How Grievance Splintered American Sports*, WASH. POST (May 30, 2024, 9:30 AM), https://www.washingtonpost.com/sports/interactive/2024/american-sports-grievance-culture/; Jade Tran, *The Stigmatization and Polarization of Music: "Did You See Their Spotify Wrapped?"*, OBSERVER U. MD. (Dec. 20, 2022), https://www.theobserverumd.org/post/the-stigmatization-and-polarization-of-music-did-you-see-their-spotify-wrapped; Judy Woodruff, Connor Seitchik & Ethan Dodd, *Exploring the Links Between Political Polarization and Declining Trust in News Media*, PBS NEWS (July 31, 2024, 6:25 PM), https://www.pbs.org/newshour/show/exploring-the-links-between-political-polarization-and-declining-trust-in-news-media.

45. In his farewell address, President Obama said that the American journey to freedom and democratic values are at risk "when we allow our political dialogue to become so corrosive that . . . Americans with whom we disagree are seen not just as misguided but as malevolent." President Barack Obama, Farewell Address (Jan. 10, 2017), https://obamawhitehouse.archives.gov/Farewell.

46. Andreas Schedler, *Democratic Reciprocity*, 29 J. POL. PHIL. 252, 257 (2020).

47. As drafted, the proposal would "open up legislative activities like compliance with employee training rules, cybersecurity practices, and purchasing policies to an audit, according to the Tufts study. Other activities, like votes, debates, committee assignments, and policy priorities would still remain blocked from an audit even if Question 1 passes." Ross Cristantiello, *Question 1: Should Voters Empower the Auditor to Look into the Legislature*, BOSTON.COM (Oct. 4, 2024), https://www.boston.com/news/local-news/2024/10/04/question-1-2024-ma-ballot-audit-legislature/. It passed, with 72% of the voters in favor, but the

that is not likely to solve the problem, which is the absence of compromise and collaboration across differences between political parties and even within the same party.[48] Frustration with deadlock generates proposals to alter the system and perhaps to abandon it.

Human beings do not follow rules or cooperate all of the time. Short-term thinking and the sense that "we are not in this for the long-haul" also undermine cooperative commitments. To proceed without devolving into perpetual deadlock or foul play, people participating in democratic governance need qualities of forgiveness or forbearance.[49] Just as families and other intimate groups learn to give apologies and forgive one another, groups within a society can bring attitudes of forgiveness—and let go of resentments—to reduce conflicts and increase chances for collaborations.[50]

Are there risks in moderating tit-for-tat behavior in politics? Yes: the moderating principle of "democracy-preserving reciprocity" must not produce a perpetually losing side.[51] That, over time, could spark violent revenge. The moderating reciprocity "must seek middle ground between passive suffering and retaliatory violence."[52] Cooperative and reciprocal behavior can engender a virtuous cycle, strengthening trust over time. Yet vicious circles of distrust in ongoing relationships create even more vicious and emotional cycles.[53] Biases about perceived differences such as differences in political views, race, religion, region, and class interfere with trust and

---

legislature has taken steps to block the investigatory work. Josh Landes, *Mass. Democratic Leaders Continue to Be at Odds Over Legislative Audit as 2025 Session Opens*, WAMC NE. PUB. RADIO (Jan. 9, 2025, 12:16 PM), https://www.wamc.org/news/2025-01-09/mass-democratic-leaders-continue-to-be-at-odds-over-legislative-audit-as-2025-session-opens.

48. *See* Lisa Kashinsky, *A Handful of States are Headed to One-Party Rule—and Its Drama*, POLITICO (Nov. 2, 2022, 4:30 AM), https://www.politico.com/news/2022/11/02/one-party-rule-midterm-elections-00064535.

49. *Id.*

50. TERRY D. HARGRAVE & NICOLE E. ZASOWSKI, FAMILIES AND FORGIVENESS: HEALING WOUNDS IN THE INTERGENERATIONAL FAMILY 3–4 (2d ed. 2016); Gregory R. Maio, Geoff Thomas, Frank D. Fincham & Katherine B. Carnelley, *Unraveling the Role of Forgiveness in Family Relationships*, 94 J. PERSONALITY & SOC. PSYCH. 307, 307–08, 316–17 (2008); Craig W. Blatz & Catherine Philpot, *On the Outcomes of Intergroup Apologies: A Review*, 4 SOC. & PERSONALITY PSYCH. COMPASS 995, 995 (2010). *See* Ryan Fehr & Michele J. Gelfand, *When Apologies Work: How Matching Apology Components to Victims' Self-Construals Facilitates Forgiveness*, 113 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 37, 37 (2010) (on relationships between self-understandings and effective apologies); Michael E. McCullough, Everett L. Worthington, Jr. & Kenneth C. Rachal, *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCH. 321, 321–336 (1997) (on the role of empathy in forgiveness within families).

51. Schedler, *supra* note 46, at 253.

52. *Id.* at 253, 271.

53. Frédérique E. Six & Dominika Latusek, *Distrust: A Critical Review Exploring a Universal Distrust Sequence*, 13 J. TRUST RSCH. 1, 1–2 (2023).

cooperation especially when amplified by leaders or media.[54] Believing that one's own success depends on another's failure is apparently associated with less willingness to help others.[55]

Centuries of insights and research by psychologists, sociologists, game theorists, economists, and historians—as well as philosophers and theologians—underscore the significance of cooperation and reciprocity.[56] Researchers have shown how benefits of cooperation can be taught, but learning about benefits from cooperation is less successful in environments of misinformation and dissonant information.[57] More importantly, mere knowledge of the importance of empathy, cooperation, and respect to both one's own success and to collective projects does not, however, produce or sustain the qualities of empathy, cooperation, or respect. What does? Maybe because I am a teacher, I look to education and access to reliable sources of information as preconditions for constitutional democracy. Yet education in general offers no guarantee of cooperative behavior or democratic commitments.[58] Columnist Brett Stephens recently

---

54. Richard Weissbourd, Milena Batanova, Eric Torres, Joseph McIntyre & Sawsan Eskander, *Do Americans Really Care For Each Other? What Unites Us—And What Divides Us*, HARV. GRADUATE SCH. OF EDUC. (Dec. 2021), https://mcc.gse.harvard.edu/reports/do-americans-care-about-each-other.

55. Lily Chernyak-Hai & Shai Davidai, *"Do Not Teach Them How to Fish": The Effect of Zero-Sum Beliefs on Help Giving*, 151 J. EXPERIMENTAL PSYCH. GEN. 2466, 2466 (2022).

56. John Mikhail, *Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism*, *in* UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 174 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) ("from an early age human infants are naturally empathetic, helpful, generous, and informative") (quoting Felix Warneken & Michael Tomasello, *Varieties of Altruism in Children and Chimpanzees*, 13 TRENDS IN COGN. SCIS. 397, 401 (2009)); *see also* Kristina R. Olson & Elizabeth S. Spelke, *Foundations of Cooperation in Young Children*, 108 COGN. 222, 222–30 (2008); ARISTOTLE'S NICOMACHEAN ETHICS (Robert C. Bartlett & Susan D. Collins trans., 2011) (benefits of reciprocity in justice and in market exchanges); MARCEL HÉNAFF, THE PHILOSOPHERS' GIFT: REEXAMINING RECIPROCITY (Jean-Louis Morhange trans., 2019); Luc Arrondel & André Masson, *Altruism, Exchange or Indirect Reciprocity: What Do the Data on Family Transfers Show?*, *in* 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 974 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944); Linda D. Molm, David R. Schaefer & Jessica L. Collett, *The Value of Reciprocity*, 70 SOC. PSYCH. Q. 199 (2007).

57. *See* Roderick M. Kramer, Jane Wei & Jonathan Bendor, *Golden Rules and Leaden Worlds: Exploring the Limitations of Tit-for-Tat as a Social Decision Rule*, *in* SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 177 (John M. Darley, David M. Messick & Tom R. Tyler eds., 2001); Player, *supra* note 19.

58. *See* Margot Stern Strom, *A Work in Progress*, *in* WORKING TO MAKE A DIFFERENCE: THE PERSONAL AND PEDAGOGICAL STORIES OF HOLOCAUST EDUCATORS ACROSS THE GLOBE 92 (Samuel Totten ed., 2002), https://www.facinghistory.org/sites/default/files/2022-08/Founding_Facing_History_Margot_Stern_Strom.pdf. Margot Stern Strom, who started the educational organization, Facing History and Ourselves, often commented (drawing from Jacob Branowski's *Science and Human Values* (rev. ed., 1965) and others) that the Nazi regime was built by very educated people, so the question is what kind of moral dimension is in the education? She quotes:

noted that "[w]hen people argue that education is the answer to bigotry, they often forget that bigotry is a moral failing, not an intellectual one—and few people are more dangerous than educated bigots."[59] Simply increasing access to information does not help democratic processes or the collaboration it requires if it is false, misleading, or fueling social divisions.[60]

Instead, some promise lies in deliberate, specific efforts to engage in practice and behaviors while cultivating beliefs that strengthen cooperation and reciprocity. Compassion, empathy, and mutuality build on capacities present in developing infants.[61] Children who have experiences of repeated interactions with the same other children can engage in and find value in expanding cooperative activities.[62] Parents and other adults have demonstrated how to promote skills and attitudes supporting cooperation and mutual respect among children.[63] Explicit efforts to promote these skills and

---

> Dear Teacher, I am a survivor of a concentration camp. My eyes saw what no man should witness: Gas chambers built by learned engineers. Children poisoned by educated physicians. Infants killed by trained nurses. Women and babies shot and burned by high school and college graduates. So I am suspicious of education. My request is: Help your students become more human. Your efforts must never produce learned monsters, skilled psychopaths, educated Eichmanns. Reading, writing, arithmetic are important only if they serve to make our children more human.

Id. at 75–76 (quoting HAIM G. GINOTT, TEACHER & CHILD: A BOOK FOR PARENTS AND TEACHERS 317 (1972)).

59. Bret Stephens, Opinion, *The Year American Jews Woke Up*, N.Y. TIMES (Oct. 4, 2024), https://www.nytimes.com/2024/10/04/opinion/israel-jews-antisemitism.html.

60. Ullrich Ecker et al., *Misinformation Poses a Bigger Threat to Democracy Than You Might Think*, NATURE (June 5, 2024), https://www.nature.com/articles/d41586-024-01587-3.

61. Rodolfo Cortes Barragan & Carol S. Dweck, *Rethinking Natural Altruism: Simple Reciprocal Interactions Trigger Children's Benevolence*, 111 PROC. NAT'L ACAD. SCIS. U.S. 17071, 17071 (2014); Andreas Domberg, Bahar Köymen & Michael Tomasello, *Children's Reasoning with Peers in Cooperative and Competitive Contexts*, 36 BRIT. J. DEV'T PSYCH. 64 (2018). Studies of child development indicate capacities for reciprocal relationships and for compassion that in turn assist mental and physical thriving. *See* Judith V. Jordan, *The Meaning of Mutuality*, WELLESLEY CTRS. FOR WOMEN (1986), https://growthinconnection.org/wp-content/uploads/2021/03/1986MeaningofMutuality.pdf; Ellen E. Lee et al., *Compassion Toward Others and Self-Compassion Predict Mental and Physical Well-being: A 5-year Longitudinal Study of 1090 Community-Dwelling Adults Across the Lifespan*, 11 TRANSLATIONAL PSYCHIATRY, no. 397, 2021, at 1; *05: Five Strategies for Raising Kind Kids with Dr. Rick Weissbourd*, CARING MAG. (June 24, 2019), https://caringmagazine.org/05-five-strategies-for-raising-kind-kids-with-harvards-dr-rick-weissbourd/.

62. Peter R. Blake, David G. Rand, Dustin Tingley & Felix Warneken, *The Shadow of the Future Promotes Cooperation in a Repeated Prisoner's Dilemma for Children*, 5 SCI. REPS., article no. 14559, 2015, at 1, 2.

63. *See, e.g.*, Tanya Broesch & Erin Robbins, *Building a Cooperative Child: Evidence and Lessons Cross-Culturally*, 13 GLOB. DISCOURSE 417 (2023); Nadya Chernyak, Paul L. Harris & Sara Cordes, *A Counting Intervention Promotes Fair Sharing in Preschoolers*, 93 CHILD DEV. 1365 (2022); Maite Garaigordobil, Laura Berrueco & Macarena-Paz Celume, *Developing Children's Creativity and Social-Emotional Competencies Through Play: Summary of Twenty Years of Findings of the Evidence-Based Interventions "Game Program,"* 10 J. INTELL., article no. 77, 2022, at 1; Tom Sharpe, Marty Brown & Kim Crider, *The Effects of a Sportsmanship*

attitudes can nurture capacities to listen, to welcome interdependence, and to manage shame, envy, or other emotions that get in the way of cooperation.[64] Medical schools and other professional training look to evidence-based practices in supporting compassion, empathy, and respect among new generations of professionals.[65] Experiencing respect from teachers and fellow students also enhances student achievement and growth.[66] One scholar reviewed long periods of history and concluded that "[w]hen a society or its elite earnestly wants the rules of the game to work, and talks *about* them a lot, and scolds violators from an early age, the constitutions usually do work[.]"[67]

Constitutional democracies need to make collective investments in this work—supporting parents and teachers—while resisting temptations of indoctrination or coercion.[68] When societies experience distrust and division, however, reliance solely on parents and teachers may be insufficient in building cooperative and respective relationships. Beyond education in homes and schools, investing in cooperation and respect across individuals and groups probably

---

Curriculum Intervention on Generalized Positive Social Behavior of Urban Elementary Students, 28 J. APPLIED BEHAV. ANALYSIS 401 (1995).

64. *See* Bruce Feiler, *Forget Independence: 3 Ways to Teach Children Cooperation*, PSYCH. TODAY (Nov. 20, 2023), https://www.psychologytoday.com/us/blog/the-nonlinear-life/202311/forget-independence-3-ways-to-teach-children-cooperation; Katri Pardon, Arniika Kuusisto & Lotta Uusitalo, *Teaching Kindness and Compassion: An Exploratory Intervention Study to Support Young Children's Prosocial Skills in an Inclusive ECEC Setting*, 13 EDUC. SCIS., article no. 1148, 2023, at 1; Jennifer Breheny Wallace, Opinion, *Forget Independence. Teach Your Kids This Instead.*, WASH. POST (Aug. 14, 2023), https://www.washingtonpost.com/opinions/2023/08/14/jennifer-wallace-interdependence-happy-successful-kids/. For empirical research on how teens conceive of respect for others, see Tina Malti, Joanna Peplak & Linlin Zhang, *The Development of Respect in Children and Adolescents*, 85 MONOGRAPHS SOC'Y RSCH. CHILD DEV. 7 (2020). Research indicates that shame can interfere with cooperation. Ana Carolina da Cunha Fortes & Vinícius Renato Thomé Ferreira, *The Influence of Shame in Social Behavior*, 6 REVISTA DE PSICOLOGIA DA IMED 25, 25–27 (2014), https://pdfs.semanticscholar.org/839b/674c08ba4ddfe90900ff01fb83889e37bd3c.pdf.

65. William T. Branch, Jr., *Viewpoint: Teaching Respect for Patients*, 81 ACAD. MED. 463, 463–67 (2006); Stephen Murphy-Shigematsu, *Respect and Empathy in Teaching and Learning Cultural Medicine*, 25 J. GEN. INTERN. MED. (SUPPL. 2) S194, S194–95 (2010). *See* Helen Riess, *Empathy Can Be Taught and Learned with Evidence-Based Education*, 39 EMERG. MED. J. 418, 418–19 (2021).

66. LINDA DARLING-HAMMOND & CHANNA M. COOK-HARVEY, LEARNING POL'Y INST., EDUCATING THE WHOLE CHILD: IMPROVING SCHOOL CLIMATE TO SUPPORT STUDENT SUCCESS 8 (2018), https://learningpolicyinstitute.org/sites/default/files/product-files/Educating_Whole_Child_REPORT.pdf.

67. MCCLOSKEY, *supra* note 23, at xxiv–xxv.

68. Jeffrey Aaron Synder, *Education and Indoctrination*, THE POINT (Sept. 1, 2022), https://thepointmag.com/politics/education-and-indoctrination/ (indoctrination closes off open inquiry). Acknowledging continual debates over what values should be taught in schools should not prevent efforts to cultivate both empathy and critical thinking. Alfie Kohn, *How Not to Teach Values: A Critical Look at Character Education*, PHI DELTA KAPPAN (Feb. 1997), https://www.alfiekohn.org/article/teach-values/.

requires preventing, or else tackling, sources of social division and distrust that undermine beliefs and behaviors needed for constitutional democracies to work. One short list of current sources of social distrust includes: "public- and private-sector corruption, poisonous public rhetoric, governments' inability to provide essential security and human services, breakdowns in the rule of law, rising economic inequality, perceptions that neither individual voices nor votes matter, and the sense that elites and the powerful have rigged the system[.]"[69] These sources of distrust express the concerns of large numbers of people in this nation and elsewhere. The understandable human response to threats and stress is to try to find safety through defensive behavior or by fleeing. Psychologically, this takes the form of the "fight-or-flight" response to a perceived threat.[70] Similar patterns can appear amid polarized politics and even contribute to civil war.[71]

To overcome such contributors to distrust and division requires more than teaching people how to cooperate and respect others. Confronting and redressing the actual sources of distrust and division will be at least as important as working to instill values of compassion and empathy in students if constitutional democracy has a real chance to succeed. Unless people can see how they benefit for themselves and their descendants from the work of the government and its institutions—or see leaders and neighbors putting the greater good above their own self-interest—distrust is likely to spiral downward.[72] Calling for sacrifice of personal freedom in order to obtain the benefits of stability, security, and protection of individual rights—the premise of the social contract theories that laid the ground for modern constitutional democracies—will not secure

69. Kristin M. Lord, *Six Ways to Repair Declining Social Trust*, STAN. SOC. INNOVATION REV. (Jan. 31, 2019), https://ssir.org/articles/entry/six_ways_to_repair_declining_social_trust; *see also* William Hawes, Book Review, *The System: Who Rigged It, How We Fix It*, N.Y. J. OF BOOKS (June 3, 2020), https://www.nyjournalofbooks.com/book-review/system-who-rigged (reviewing ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT (2020)).

70. *What Is the Fight, Flight, Freeze, or Fawn Response?*, CLEVELAND CLINIC (July 22, 2024), https://health.clevelandclinic.org/what-happens-to-your-body-during-the-fight-or-flight-response.

71. Peter T. Coleman & Pearce Godwin, *Americans Are Tired of Political Division. Here's How to Bridge It*, TIME (Mar. 30, 2023, 7:00 AM), https://time.com/6266873/american-political-division-courage-challenge/. In a joint effort bridging Democrats and Republicans, these authors have framed a process that engages people in practicing speaking honestly within trusted groups, working to redress political estrangement within relationships, and then turning to address shared community issues. *Id.*

72. *See* TRUST AND GOVERNANCE 82, 86 (Valerie Braithwaite & Margaret Levi eds., 1998); John C. Knapp, *Introduction*, *in* FOR THE COMMON GOOD: THE ETHICS OF LEADERSHIP IN THE 21ST CENTURY, at xi–xviii (2007); Samuel Wilson & James McCalman, *Re-imagining Ethical Leadership as Leadership for the Greater Good*, 35 EUR. MGMT. J. 151, 151–54 (2017).

support from people who feel alienated and excluded from the system itself. Hence, a vital precondition for a viable constitutional democracy is demonstrable guards against the frustrations and distrust surrounding what appears to be "a rigged system."[73]

III. AGAINST ENTRENCHMENT

The familiar idea of "a rigged system" implies not only dishonesty of individuals but also public and private corruption—the palpable misuse of political power for private gain, and systematic unfairness with predictable winners and losers.[74] Unfairness of this type most likely involves entrenchment of some interests and groups in power and wealth. An electoral system, a legislative process, an economic system, or the methods affecting educational and job opportunities can each seem "rigged" even to people with opposing political leanings.[75]

Believing that the economic and political systems are rigged also can leave people feeling hopeless or furious.[76] Perceptions of entrenched interests erode trust in the projects of self-governance and invite populist appeals hostile to constitutional democracies. Evidence of corruption by leaders undermines political trust in societies across the globe.[77] Even the delivery of services benefiting a community do not overcome perceptions of unfairness that

---

73. *See* Joseph E. Stiglitz, *The American Economy Is Rigged and What We Can Do About It*, SCI. AM. (Nov. 1, 2018), https://www.scientificamerican.com/article/the-american-economy-is-rigged/.

74. Doron Navot, *Political Corruption*, *in* GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 9605–06 (Ali Farazmand ed., 2d ed. 2023); James L. Newell, *Definitions of Political Corruption, and Why Study Corruption*, *in* CORRUPTION IN CONTEMPORARY POLITICS: A NEW TRAVEL GUIDE 6 (2018).

75. Consider the work of Robert Reich, ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT (2020); *see* Saurin Parikh, *Book Summary: The System by Robert B. Reich*, SAURIN PARIKH BLOG (Dec. 17, 2021), https://saurinparikh.com/2021/12/17/the-system-robert-reich/ (reviewing REICH, *supra*); Charles L. Zelden, *History Shows that Our Elections Are Rigged—Just Not the Way Donald Trump Thinks They Are*, ORG. OF AM. HISTORIANS (Nov. 7, 2016), https://www.oah.org/process/zelden-voting-3/ (discussing Republican party-led voter suppression efforts); Philip Bump, *Trump Insists His Trial Was Rigged . . . Just Like Everything Else*, WASH. POST (May 31, 2024), https://www.washingtonpost.com/politics/2024/05/31/trump-rigged-conviction-election/ (Donald Trump's use of "rigged system" to describe election and judicial system); Elizabeth Warren, *How to Fix Our Rigged Tax System*, WASH. POST (Aug. 12, 2021), https://www.washingtonpost.com/opinions/2021/08/12/elizabeth-warren-tax-system-infrastructure/.

76. *See* Clara Blustein Lindholm, *Two Tips for Talking About America's Rigged Systems*, FRAMEWORKS (June 21, 2024), https://www.frameworksinstitute.org/article/two-tips-for-talking-about-americas-rigged-systems/.

77. Tom W.G. van der Meer, *Political Trust and the "Crisis of Democracy,"* OXFORD RSCH. ENCYC. OF POL. (Jan. 25, 2017), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-77.

jeopardized perceived legitimacy of a government.[78] Thus, personal and social qualities such as cooperation and societal trust will be inadequate unless the constitutional democracy holds promise to prevent or counter corruption and entrenched power.[79]

To enable self-government and to protect minority groups and views, a constitutional democracy must promise to prevent a limited group of individuals from persistently controlling the government and other sources of power. Otherwise, even if the system gets established, it will lose widespread legitimacy if large numbers of people in the society fail to engage in self-governance over time. Countering that danger requires effective vigilance against ensconcing a minority group in continual power to benefit themselves and those they favor. To guard against such risks, the constitutional democracy must anticipate and prevent how powerful minority groups could block criticism and change and prevent reliable means for self-governance and rights for all. Political winners are

78. This problem has been documented outside of democratic societies. *See* Tarek Abou Jaoude, *The Grey Areas of Political Illegitimacy*, 43 THIRD WORLD Q. 2413, 2418 (2022) ("[The] rule of one group over another is often a legacy of previous forms of unfair representation (e.g.[,] colonialism) [and] only serves to further threaten the state's legitimacy. In many of those cases, performance-based legitimacy is again overshowed by the absence of societal legitimacy in the eyes of the 'oppressed' group, making the actor illegitimate from their perspective."). On the sense of futility associated with systemic barriers to justice, see Abi Adams-Press & Jeremias Adams-Prassl, *Systemic Unfairness, Access to Justice and Futility: A Framework*, 40 OXFORD J. LEGAL STUD. 561 (2020). One scholar suggests that indignation is produced for ordinary citizens in democracies due to the remoteness from political power. *See generally* Jeffrey Edward Green, *Why Ordinary Citizenship Is Second-Class Citizenship*, *in* THE SHADOW OF UNFAIRNESS: A PLEBEIAN THEORY OF LIBERAL DEMOCRACY (2016). On resentment related to political treatments of racial differences, see Theodore R. Johnson, *The Role of Racial Resentment in Our Politics*, THE BULWARK (Feb. 10, 2022), https://www.thebulwark.com/p/the-role-of-racial-resentment-in-our-politics (widening partisan differences in white voters' attitudes towards blacks).

79. This is a topic related to but different from what if any provisions of a constitution should be unamendable ("entrenched"). *See generally* MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE (2009) (arguing against unamendable constitutional provisions in a democracy, with lessons from history and political theories); *see* Barber, *supra* note 28, at 325–26; *see also* Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008) (examining how ordinary laws can become entrenched and foundational). On unamendable provisions in the United States' Constitution, see U.S. CONST. art. V (removing from the amendment process the allocation of two senators for each state unless the state itself agrees to fewer). This provision affects not only the allocation of senators in Congress, but also selection of presidents because the mechanisms of the Electoral College are pegged to the number of representatives and senators in each state. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."). The Constitution also specified that prior to 1808, there could be no amendment to the restriction on Congressional power to alter the importation of enslaved persons (the slave trade). *See* U.S. CONST. art. I, § 9, cl. 1; *see also* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 717 & n.3 (1981).

understandably tempted to burrow in and lock-up political processes to the advance of themselves and their cronies and interests. Guarding the danger that permanent winners pose in politics and in structures of opportunity governing access to education, housing, and wealth therefore is a precondition for constitutional democracy.[80]

A. Politics

To deliver on the promises of self-governance, equal respect, and free opportunities, a constitutional democracy should in appearance and actuality hold genuine promise to eliminate permanent social castes, including persistent inequalities along economic, racial, ethnic, or religious lines.[81] Protection of minorities of any sort against potentially tyrannical majorities is a precondition and a goal. At the same time, by design, accident, or manipulation, a constitutional system may produce powerful minorities, leading to entrenched power rather than to open opportunities—and a constitutional democracy needs to prevent powerful minorities from taking over.

Fixed control by minorities is the conclusion that many draw by looking at how the political system in the United States was designed or how it has evolved. Political scientists Steven Levitsky and Daniel Ziblatt argue that the framers of the U.S. Constitution sought to avoid majority-backed tyranny, but overcorrected.[82] The system by design enables a minority to impose its will on the democratic majority, even if disguised as lawful workings of the system.[83] Incumbent state officials—organized as a political party or representing a distinct minority of the society—have authority to establish and oversee election rules. Thus, those in state office

---

80. *See* Colley, *supra* note 8 (describing "moneyed and plutocratic lobbies" have come to exercise undue political weight).

81. Nolen Deibert, *Protecting the Rights of Religious Minorities Is Crucial to Protecting Democracy Itself*, FREEDOM HOUSE (Dec. 7, 2023), https://freedomhouse.org/article/protecting-rights-religious-minorities-crucial-protecting-democracy-itself; Tyrone Grandison, *Racism Is the Greatest Threat to Democracy Today*, FULCRUM (June 15, 2020), https://thefulcrum.us/big-picture/racism-in-america; Oren M. Levin-Waldman, How Inequality Undermines Democracy, E-INT'L RELS. (Dec. 10, 2016), https://www.e-ir.info/2016/12/10/how-inequality-undermines-democracy/; Andrew Yeo et al., *Democracy and Inequality*, BROOKINGS (Dec. 2022), https://www.brookings.edu/articles/democracy-and-inequality/; *see also* ASPA Task Force, *American Democracy in an Age of Rising Inequality*, 2 PERSPS. ON POL. 651 (2004).

82. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 169–81 (2023) [hereinafter LEVITSKY & ZIBLATT II].

83. *Id.* at 172 ("America risks descending into minority—an unusual and undemocratic situation in which a party that wins fewer votes than its rivals nevertheless maintains control over key levers of political power.").

govern who can vote and how votes are collected in districts drawn to benefit the incumbents and their party. Those in federal offices deploy procedures such as the filibuster in the U.S. Senate that insulate minority views from majority push-back.[84] Elected officials in some systems may also control media and hence the flow of information. Illustrating these patterns, Professors Levitsky and Ziblatt draw on examples from Europe and South America while underscoring developments particular to the United States.[85]

Many features of the United States' system can be traced to the compromises needed to enact the governing document; some of the features reflect changing circumstances. For example, the grant of two senators for each state—a provision established as unamendable—may have offered a reasonable way to ensure representation of both small and large states in 1787.

Without some protections, small states would not ratify the constitution. Hence, the document gave both Delaware and Virginia the same number of senators, even though at the time Virginia's population was thirteen times the population of Delaware.[86] Fast forward to 2024. Contrasting proportions of represented populations by state have grown to a daunting scale over time. With the expansion to fifty states and population growth, the disparity has grown considerably.[87] As a result, a U.S. Senator in the least populous state represents 576,851 people while the U.S. Senator from the most populated state represents nearly forty million people.[88]

---

84. *See* PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 105 (2019) ("Democracy is supposed to prevent the entrenchment of power. Unlike autocrats, the leaders of a functioning democracy know that the voters may remove them at the next election, and it is this insecurity that is expected to make the government responsive and accountable to the people. If political incumbents can manipulate at will the rules governing elections, their own authority, and individual liberties, they may be able to insulate themselves from challenge. So democracy ideally uses entrenchment of one kind (rules) to prevent entrenchment of another kind (power).").

85. LEVITSKY & ZIBLATT II, *supra* note 82, at 60–64 (discussing German election of Adolf Hitler and Hungary's selection of Victor Orban who rewrote the constitution and packed the constitutional court). Similarly, Kim Lane Scheppele calls it "constitutional coup" when a nation's electoral system satisfies formal legal requirements but substantively manifests anti-constitutional results by electing individuals who oppose and seek to undermine democracy. Kim Lane Scheppele, *Constitutional Coups in EU Law*, *in* CONSTITUTIONALISM AND THE RULE OF LAW 446 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017).

86. Dan Balz, Clara Ence Morse & Nick Mourtoupalas, *The Hidden Biases at Play in the U.S. Senate*, WASH. POST (Nov. 17, 2023, 6:00 AM), https://www.washingtonpost.com/politics/interactive/2023/us-senate-bias-white-rural-voters/.

87. *Id.* In 2022, two senators per state meant that one voter in Wyoming has similar representation as fifty-nine voters in California. The Learning Network, *What's Going on in This Graph? Senate Representation by State*, N.Y. TIMES, https://www.nytimes.com/2022/10/27/learning/whats-going-on-in-this-graph-nov-9-2022.html (Dec. 9, 2022).

88. Olive Munson, *What State Has the Lowest Population? The Top 10 Least-Populated States in the US.*, USA TODAY, https://www.usatoday.com/story/news/2023/01/02/what-state-has-lowest-population-us-states-ranked-population/10476960002/ (Oct. 23, 2024, 9:33 AM)

By design, the guarantee of an equal number of Senators for small and large states affects not only the allocation of votes in the Senate, but also the selection of presidents. Under the United States Constitution, the mechanism for electing a president depends on the Electoral College, which is set by the number of representatives and senators in each state.[89] As a result, the majority voting across the country did not select the president in 2000, nor in 2016.[90] That is because the Electoral College gives more weight to the votes of some states than the votes of others. Over 60% of Americans have consistently supported eliminating the Electoral College and members of both parties have done so for over fifty years. Currently, however, most Democrats favor the change while Republicans are nearly evenly divided.[91] These present-day differences in attitudes held by members of the two major political parties no doubt reflect the demographic patterns. Democrats are concentrated in the most populous states while Republicans are dominant in states with smaller populations. Thus, Democrats face structural disadvantages in both the Senate and the Electoral College where more rural areas dominate.[92] A large racial difference exists as well; in less populated states, white populations dominate. Author Paul Starr notes that "[b]y 2040, according to demographic projections, 30[%] of the population, spread over the less urbanized states, will choose 70[%] of the Senate[.]"[93]

Although the Electoral College and its make-up are specified in the U.S. Constitution, the states have a say over how to allocate their electoral votes. For example, Maine and Nebraska currently depart from the "winner-take-all" allocation adopted by the rest. Instead, Maine and Nebraska follow the statewide popular vote.[94] Other states could also choose to follow the popular vote in selecting

(based on 2020 U.S. Census); *Representatives and Senators in Congress*, GOVTRACK.US, https://www.govtrack.us/congress/members (last visited Mar. 15, 2025).

89. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

90. Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2024), https://www.pewresearch.org/short-reads/2024/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/.

91. *Id.*; *see also* Jill Lepore, *The United States' Unamendable Constitution*, THE NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution.

92. *See* STARR, *supra* note 84, at 201.

93. *Id.*

94. *Distribution of Electoral Votes*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/allocation (last visited Feb. 2, 2025).

electors thereby bypassing the imbalance in the Electoral College. This is the strategy taken by the National Popular Vote Interstate Compact that started in the mid-2000s. The compact requires participating states to enact a state law awarding its own electoral votes to the presidential candidate who wins the national popular vote in that state. The compact is designed to take effect only when enough states have joined so that their electoral votes would make up the total 270 electoral votes presently needed for a presidential candidate to prevail.[95] That way, both the popular vote and the electoral votes from those states would decide the presidential election. But because the states yet to enact the Compact would lose their current outsized power, the Compact has stalled. Even if the Compact receives the requisite state participation, it would face a potential constitutional objection as an alteration of the Electoral College mechanism without following the procedure for amending the constitution.

Meanwhile, the underlying facts show that state congressional districts tilt the representation for two reasons. The first stems from 1929 legislation setting a ceiling for the number of members of the House of Representatives. As populations shift and grow, some states have to give up numbers of representatives to another state that has gained more population.[96] Second, states have power to redraw district lines and regularly do so, often to advantage the political party in control of the state legislature. This practice of "gerrymandering" commonly permits partisan advantage.[97] Despite lawsuits challenging the practice as unfair, the Supreme Court has deemed the practice "a political question" outside the bounds of judicial review.[98] Partisan gerrymandering entrenches the power of one political party. And by drawing districts to have majorities of one party, the primary elections—where frequently only the most devoted members of the party vote—often lead each party to pursue candidates with more extreme views. This produces increasing polarization and stalemates inside the state and federal legislatures. It also leads to lower interest and weaker candidates in the districts

95. Kinsey Crowley & Joey Garrison, *Can the Electoral College Be Abolished? About the Push for a National Popular Vote*, USA TODAY, https://www.usatoday.com/story/news/politics/elections/2024/10/10/abolish-electoral-college-popular-vote-tim-walz/75591810007/ (Oct. 18, 2024, 2:59 PM).

96. Danielle Allen, *Our Democracy Is Menaced by Two Dragons. Here's How to Slay Them*, WASH. POST (July 20, 2023), https://www.washingtonpost.com/opinions/2023/07/20/gerrymandering-electoral-college-solution-democracy/.

97. Rucho v. Common Cause, 588 U.S. 684, 711, 713–14 (2019).

98. *Id.* at 718.

lacking a real contest over party control.[99] Whatever the substantive policies of political parties preferred by these practices, the practical effect locks in the controlling party as the winner of elections and renders compromises with another party and different interests less likely.[100]

Currently in the United States, politicians holding offices in most states work to reduce the influence of the opposing party. Two techniques are by now familiar: "cracking," dividing up the opposing party's voters into different districts so they cannot muster a majority, and "packing," drawing district lines to bunch together politically aligned groups in fewer districts so that even when they have a majority, they have fewer seats.[101] Both of these gerrymandering techniques lead to more seats for the party drawing the lines; both make it less likely that voters of different views will need to converge on candidates. Making primary challenges—which draw the most partisan voters—the only real political contests results in "safe districts" that lack real competition and insulate candidates and the parties from needing to serve the entire community.

Once elected, representatives from gerrymandered districts are generally less willing to collaborate on policies with people from other parties. Doing so would tag the incumbent as unfaithful to the party. Compromise would make a representative more vulnerable to a primary challenge in the next election. A journalist studied the situation and concluded that "[p]artisan districts sending partisan representatives to the US House is a major reason for Washington gridlock in recent years."[102]

Inside Congress, the results are not pretty. Elected officials preside over a national legislature with internal rules making even debate over policies difficult and hence erecting tall barriers to policy changes. The design of committees and their leadership selection, the powers given to the speaker of the House and the majority leader of the Senate, and even the schedule confining legislative

---

99. *See* Christopher T. Kenny et al., *Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition*, 120 PROC. NAT'L ACAD. SCIS. U.S., article no. 25, 2023, at 1; Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* (Univ. Chi. Pub. L. & Legal Theory, Working Paper No. 695, 2019), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2154&context=public_law_and_legal_theory.

100. Dana Bash, Abbie Sharpe & Ethan Cohen, *How Gerrymandering Makes the US House Intensely Partisan*, CNN POL., https://www.cnn.com/2022/01/25/politics/gerrymandering-us-house-partisan/index.html (Jan. 25, 2022, 2:33 PM).

101. *Gerrymandering*, INST. FOR MATHEMATICS & DEMOCRACY, https://mathematics-democracy-institute.org/gerrymandering/#3 (last visited Apr. 10, 2025) (discussing "packing" and "cracking").

102. Bash, Sharpe & Cohen, *supra* note 100.

working days to three rather than five each week contribute to the dysfunction of the Congress. The practices also perpetuate existing power arrangements within and beyond the national government.[103] The collection of policies and practices is a recipe for entrenchment.

Secure in its dominance of a state, the party in power can work to suppress voters from the opposing party, use campaign finance laws to its own benefit and to the detriment of opponents, and adopt procedural rules making it more difficult to alter any policy.[104] Law professors Daryl Levinson and Benjamin Sachs observe that the pattern of recent gerrymandering of congressional districts is mirrored in changes in public-sector labor law.[105] These changes weaken labor unions and the political party historically receiving their support.[106]

Power arrangements are influenced also by wealthy individuals and companies. Campaign finance practices in the United States at the same time allow a "combination of regressive policies with a lenient system of political finance" creating the "conditions for the mutual reinforcement of economic and political disparities[.]"[107] Campaign finance rules allow those with wealth to have outsize influence on not only campaigns but the policies and practices of government.[108] In his farewell address, President Joe Biden warned of a new oligarchy—ultra-rich individuals—jeopardizing democracy and individual rights.[109] As an example, a brief message by tech

103. Paul Kane, *Former Lawmakers Have Ideas on Fixing Congress. Will Anyone Listen?*, WASH. POST (Apr. 27, 2024), https://www.washingtonpost.com/politics/2024/04/27/congress-polarization-bipartisanship/.

104. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 415–16 (2015); *see also* STARR, *supra* note 84, at 202.

105. Levinson & Sachs, *supra* note 104, at 432–38.

106. Bash, Sharpe & Cohen, *supra* note 100.

107. Valentino Larcinese & Alberto Parmigiani, *Uninhibited Campaign Donations Risks Creating Oligarchy*, PROMARKET (Dec. 1, 2023), https://www.promarket.org/2023/12/01/uninhibited-campaign-donations-risks-creating-oligarchy/; *see also Dark Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money/dark-money (last visited Feb. 2, 2025) (exploring rules permitting secrecy in campaign funding).

108. *See* Pat Akey, Tania Babina, Greg Buchak & Ana-Maria Tenekedjieva, *The Impact of Money in Politics on Labor and Capital: Evidence from* Citizens United v. FEC 2–6 (Nat'l Bureau Econ. Rsch., Working Paper No. 31481, 2023) (finding new set of companies making campaign contributions and influencing policy after Supreme Court decision loosened restrictions on corporate campaign contributions); Alexandra Jacobo, *Billionaires Pour Nearly $2 billion into US Election, Amplifying Calls for Wealth Taxes and Campaign Finance Reform*, NATION OF CHANGE (Oct. 30, 2024), https://www.nationofchange.org/2024/10/30/billionaires-pour-nearly-2-billion-into-us-election-amplifying-calls-for-wealth-taxes-and-campaign-finance-reform/ (stating that the 150 wealthiest American families spent $1.9 billion on the 2024 presidential election).

109. President Joe Biden, Farewell Address (Jan. 15, 2025), https://www.nytimes.com/2025/01/15/us/politics/full-transcript-of-president-bidens-farewell-address.html.

billionaire in support of then-candidate Donald Trump, Elon Musk apparently side-lined a spending bill.[110] When small numbers of people and organizations can lock up economic and political power, their actions can support the sense that "the system is rigged." And those who know how to exploit a rigged system can both exacerbate the problem and appeal to grievances about the system.[111]

Other ostensibly democratic countries witness politicians altering the political system to their own advantage. Those elected to office may try to block or undermine competitors. Efforts to counter such practices can make matters worse. For example, requiring higher voting thresholds for leadership offices can in effect install leaders who cannot be dislodged and even pave the way for autocratic figures.[112] Unfortunately, the United States example offers a cautionary tale about how a constitutional system can fall prey to manipulation by incumbents or political parties. The system's elements could be changed but the high bar for constitutional amendments is made all the more difficult because of gerrymandering; under Article V, a constitutional amendment must be proposed either by a two-thirds vote in both the House of Representatives and the Senate or by a convention summoned at the request of two-thirds of the state legislatures; ratification of a proposed amendment in turn requires three-quarters of the states or ratifying conventions in three-quarters of the states.

A further contentious element of the system unfolding in the United States involves the federal courts and especially the Supreme Court. The expansion of power and influence wielded by the U.S. Supreme Court were hardly imagined by the framers. Judicial review—the ability of the Court to strike down actions of the elected

---

See Nicholas Riccardi & Ali Swenson, *As Biden Warns of an 'Oligarchy,' Trump Will Be Flanked by Tech Billionaires at His Inauguration*, AP, https://apnews.com/article/oligarchy-musk-bezos-zuckerberg-trump-biden-altman-putin-3ade224cccfb287f7fadaeac42b76e3d (Jan. 16, 2025, 8:04 PM). Mega-wealthy individuals contributed to both Democratic and Republican candidates in 2024. *Id.*

110. Amber Phillips, *What Is an Oligarchy? The Warning Biden Issued in His Farewell, Explained*, WASH. POST (Jan. 16, 2025), https://www.washingtonpost.com/politics/2025/01/16/oligarchy-us-definition-biden-farewell-speech/.

111. David Corn, *There Is a Very Good Reason Why Trump Believes Everything Is Rigged*, MOTHER JONES, https://www.motherjones.com/politics/2024/01/donald-trump-oligarch-in-chief-rigged-business-record/ (last visited Feb. 2, 2025) (in business, Trump "was a master of gaming the system"). In some kinds of rigged systems, wealthy people support those in charge in exchange for acquiring even more wealth for themselves. In others, wealthy people use their resources to arrange policies and practices of government to their advantage. *Id.* "Trump has taken that further, merging his business interests fully with politics and his attempt to dominate the American political system." *Id.*

112. Reuven Shapira, *Preventing Leaders' Autocratic Entrenchment by Exponential Super-Majority Threshold Escalators*, 5 FRONTIERS IN POL. SCI., no. 1, 2023, https://www.frontiersin.org/journals/political-science/articles/10.3389/fpos.2023.1173646/full.

branches as unconstitutional—was little discussed by the Constitution's planners. The Supreme Court rarely exercised this practice over the nation's first century. Its expansion of power occurred as part of the backlash against reforms enacted after the Civil War.[113] The Supreme Court remains the branch least responsive to elections, with its members accorded life tenure. Nominated by the president with confirmation requiring a Senate majority, Supreme Court justices are hardly outside of political processes. But they can serve well past the time that the appointing president and confirming Senators are in office. Hence the justices enjoy distinct remoteness from accountability to the public or indeed, to anyone but themselves.

In recent decades, the Supreme Court has increasingly rejected legislation and executive action taken by state or federal officials as unconstitutional. In matters ranging from reproductive decision-making[114] to partisan gerrymandering,[115] and from regulation of guns[116] to the immunities of a president from criminal liability,[117] results from the Supreme Court's use of judicial review depart dramatically from the views held by elected officials and by voters. When federal courts strike down actions of elected branches, democratic views are overturned, and democratic accountability shrinks. Perhaps unsurprisingly, the selection of justices has become a highly politicized process, involving considerable campaigning and financial contributions by political parties and other groups.

Partisan divisions have affected the very timing of Senate confirmation steps, altering the composition of the Supreme Court. For example, the internal rules of the Senate and the particular decisions of its leader, Senator Mitch McConnell, blocked a sitting

113. *See* Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2034 (2022).

114. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.").

115. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

116. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 71 (2022) ("New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.").

117. *See* Trump v. United States, 603 U.S. 593, 609 (2024) ("[A]n Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.").

president's ability to appoint a Supreme Court candidate preventing consideration of Judge Merrick Garland.[118] Even though eleven months remained before a new president would be in place, the Senate never took up the vote on Judge Garland and Senator McConnell characterized the incident as his proudest moment.[119] Once in office, President Donald Trump quickly nominated a candidate who was promptly considered and confirmed by the Senate.[120]

Then, during his initial four-year term, President Trump had two further openings on the Supreme Court while his party controlled the Senate. As a result, a president who did not receive a majority in the popular vote appointed three justices who were confirmed by senators who themselves represented less than 45% of the electorate. Once again, the Constitution's protections for small, less populated states governs both the Electoral College and the composition of the Senate.[121] Those three justices provided critical votes in ending constitutional protection for women's reproductive choices and in rejecting gun control legislation.[122] The Court's majority did so by announcing its adherence to "history and tradition" as the guide to constitutional interpretation over dissents elaborating selective uses of "history" and "tradition" by the majority.[123] Once more, the system includes the exceeding difficulty of amending the U.S. Constitution and the failure of modern efforts to revise the amendment process.[124] Designing a constitution to guard against sudden change can help promote stability.[125] But barriers to change, unmovable results contrary to majority views: these

118. Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55 (2016); Ron Elving, *What Happened with Merrick Garland and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

119. Elving, *supra* note 118. For further details, see Eric Bradner, *Here's What Happened when Senate Republicans Refused to Vote on Merrick Garland's Supreme Court Nomination*, CNN, https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html (Sept. 19, 2020, 8:16 PM).

120. Bradner, *supra* note 119.

121. Al From, *The Challenge to Democracy—Overcoming the Small State Bias*, BROOKINGS (July 6, 2022), https://www.brookings.edu/articles/the-challenge-to-democracy-overcoming-the-small-state-bias/.

122. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 71 (2022).

123. *Dobbs*, 597 U.S. at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *Bruen*, 597 U.S. at 22.

124. *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022).

125. *See* Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631, 632 (2017).

characteristics of a "rigged system" are hard to dispel and so then is the distrust of broad constituencies.

In his book, *Entrenchment: Wealth, Power, and the Constitution of Democratic Societies*, Paul Starr observes, "[t]here is nothing so much to be feared in politics as the other side permanently getting its way, and no temptation greater than the opportunity to get one's own way decisively and for good."[126] Entrenched power is antithetical to constitutional democracy, or it should be. Practices persistently blocking opportunities in politics for some members of the society similarly seem poisonous and at odds with a democracy meant to be grounded in rights of freedom and equality. The same goes for continual foreclosure of opportunities in economics and society, for a precondition for a constitutional democracy is believable prospects for genuine opportunities for all members of the society.

B. Opportunity Structures

Along with prevention of political entrenchment, we must consider measures to ensure genuine economic and social opportunities. Most societies in human history have not established pathways of opportunities for all of their members. Hierarchical status assigned at birth or by politics, slavery, tyrannical governments, wars, imperialism: these are the ashes from which dreams of democracy grew. Even with the creation of constitutional democracy, however, entrenched power and wealth of privileged groups can permeate a society. Arrangements locking privileged status in place can extend through the economy and even through supposedly meritocratic institutions such as higher education.[127] The options available for people to pursue and achieve their goals—including for work, status, and wealth—to many living in the twenty-first century seem to be or are in fact "rigged."[128]

---

126. STARR, *supra* note 84, at xi.

127. *See* DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE, at ix–x (2019); MICHAEL J. SANDEL, TYRANNY OF MERIT: CAN WE FIND THE COMMON GOOD? 7 (2020).

128. Lauren Chadwick, *A Majority of People Across the World Agree that Society Is 'Broken'—Survey*, EURONEWS (Sept. 13, 2019, 1:47 PM), https://www.euronews.com/2019/09/13/a-majority-of-people-across-the-world-agree-that-society-is-broken-survey. Such views are themselves affected by political narratives from both right- and left-perspectives. *See* JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM vi–xx (2d ed. 2019) (showing the shift of risk to individuals who make greater investments in education and housing but have to bear the costs when the investments do not pay off); Pepper D. Culpepper, Ryan Shandler, Jae-Hee Jung & Taeku Lee, *'The Economy Is Rigged': Inequality Narratives, Fairness, and Support for Redistribution in Six Countries*, COMPAR. POL. STUD., 2024, at 1–32 (an OnlineFirst publication, available online at https://journals.sagepub.com/doi/10.1177/00104140241252072).

Social scientists call the framework of available options the opportunity structure. Dominant institutions and norms as well as laws compose the opportunity structure of a society.[129] A society seeking to establish a constitutional democracy will have trouble securing support if the existing framework systematically locks some groups out of opportunities for education, housing, or jobs. Similar hazards arise for established constitutional democracies. Perceptions of systemic unfairness and frustrated hopes for entire communities put a constitutional democracy under great strain. Especially when the people's actual experiences conflict with the constitution's promises of individual rights and equal treatment, cynicism and disaffection grow as do divergent explanations.[130] Again, present conditions in the United States provide a sobering case study.

The struggle for civil rights for African Americans in the United States is often offered as evidence that the constitutional democracy works.[131] The litigation effort to reject public school segregation of school children by race did succeed with the 1954 historic decision of *Brown v. Board of Education*, but social resistance, judicial termination of implementation remedies, and voluntary efforts followed.[132] This failure to follow through and implement declared rights reflected the power of resistance efforts by those who were white and wealthier than those school children trapped in

129. Deepa Narayan & Patti Petesch, *Agency, Opportunity Structure and Poverty Escapes*, *in* 1 MOVING OUT OF POVERTY: CROSS-DISCIPLINARY PERSPECTIVES ON MOBILITY 1–2, 15 (Deepa Narayan & Patti Petesch eds., 2007); *see* Marta Latorre-Catalán, *Opportunity Structure*, *in* THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL THEORY 1–2 (2017).

130. Some blame red-tape and faulty goals of income inequality, *e.g.*, Rea Hederman & David Azerrad, *Defending the Dream: Why Income Inequality Doesn't Threaten Opportunity*, HERITAGE FOUND. (Sept. 13, 2012), https://www.heritage.org/poverty-and-inequality/report/defending-the-dream-why-income-inequality-doesnt-threaten-opportunity; others focus on barriers to educational access, job creation, and disparities in wealth and income, *e.g.*, Stefan Boncinelli, *Income Inequality and Social Mobility: Examining Economic Opportunities for All*, 25 J. ECON. & ECON. EDUC. RSCH., no. 6, 2024, at 1–3.

131. For recent reflections in this vein, see Geoffrey R. Stone, Brown v. Board of Education*: Why Do We Need Constitutional Rights?*, 4 AM. J. L. & EQUALITY 26, 33 (2024). Others point to the history for lessons about the limitations of constitutional democracy. *See, e.g.*, FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY (Peter F. Lau ed., 2004). Still others criticize the Supreme Court's role as exceeding its authority. *E.g.*, GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 3 (1982).

132. *Compare* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting "separate but equal" approach to Fourteenth Amendment Equal Protection in the context of public schools), *with* Milliken v. Bradley, 418 U.S. 717, 746–47, 752–53 (1974) (rejecting school desegregation remedy including suburban as well as Detroit school districts), Missouri v. Jenkins, 515 U.S. 70, 100–02 (1995), *and* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (rejecting voluntary use of race in student assignment to bring enrollments in individual schools in alignment with the racial composition of the entire school district).

inadequate schools.[133] Initial resistance, including violence, paved the way for more subtle and insidious patterns undermining steps toward racial equality. Capitulation by the courts is especially disappointing as racial desegregation of schools—when actually enforced—produced dramatic successes.[134] When low-income individuals have had the chance to move to neighborhoods with educational, employment, and transportation opportunities, profound improvements in lifetime earnings and other achievements have resulted.[135]

The history of official and unofficial segregation of housing by race and poverty in the United States underscores the pervasiveness of entrenched interests, closing off opportunities.[136] Patterns of separation and exclusion by race have risen over past decades.[137] Starkly different housing and educational opportunities by race and class spell notable differences in the life chances for individual children.[138] As one example, residential zoning rules requiring large individual lots produce expensive housing that is in turn linked to

---

133. *See* MICHELLE ADAMS, THE CONTAINMENT: DETROIT, THE SUPREME COURT, AND THE BATTLE FOR RACIAL JUSTICE IN THE NORTH 30 (2025); MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S CONSTITUTIONAL LANDMARK 22–32 (2010); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN AMERICA (2010); Michelle Adams & Derek W. Black, *Equality of Opportunity and the Schoolhouse Gate*, 134 YALE L.J. 2302 (2019) (reviewing JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2018)).

134. RUCKER C. JOHNSON & ALEXANDER NAZARYAN, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS 18, 21–23 (2019); Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16664, 2015); Sarah J. Reber, *School Desegregation and Educational Attainment for Blacks* 2–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13193, 2007).

135. Raj Chetty, Nathaniel Hendren & Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 856 (2016). Opportunities may come with improvements through investments in government housing in gentrifying neighborhoods, as well. John A. Powell, *Moving (Both People and Housing) to Opportunity*, NYU FURMAN CTR. (May 2016), https://furmancenter.org/research/iri/essay/moving-both-people-and-housing-to-opportunity ("An opportunity-based approach does not always recommend a mobility strategy over a place-based approach, but rather directs attention to communities of opportunity. When public housing rehabilitation occurs in gentrifying neighborhoods with access to public transportation, it can be used to connect residents to opportunity and improve life chances while reducing displacement.").

136. *See* ADAMS, *supra* note 133, at xxi–xxvii (discussing Detroit's segregation struggle); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at vii–xvii (2017); *see* Powell, *supra* note 135.

137. Carrie Spector, *70 Years After* Brown v. Board of Education*, New Research Shows Rise in School Segregation*, STAN. GRADUATE SCH. OF EDUC. (May 6, 2024), https://ed.stanford.edu/news/70-years-after-brown-v-board-education-new-research-shows-rise-school-segregation.

138. Ann Owens & Peter Rich, *Little Boxes All the Same? Racial-Ethnic Segregation and Educational Inequality Across the Urban-Suburban Divide*, 9 RUSSELL SAGE FOUND. J. SOC. SCIS. 26, 26–27 (2023).

greater educational opportunities than what is available to people living in housing without such requirements.[139] Highway placements and real estate practices, movement of factories off-shore, and decisions by courts and public officials halted racial integration and etched patterns of ongoing racial inequities.[140]

Poverty and unemployment, beyond race-based practices, have in the United States produced contexts for a high level of opioid use, destroying families and lives of many, often in predominantly white communities.[141] Seeing opportunities foreclosed may be why the United States is experiencing what some call "deaths of despair," affected by substance abuse in the short-term but more over a longer time span, demonstrating surrender to blocked options.[142] Nobel-prize winning economist Joseph Stiglitz points out that since 1970, incomes for Americans in the top 1% have quadrupled while incomes for the bottom 90% have stagnated.[143] A "wealth defense industry" of lawyers, accountants, and lobbyists have constructed systems of taxation, regulation and inheritance that permit this result.[144] Although income inequality moderated slightly in the United States in recent years, as of 2024, a mere 0.1% of Americans (involving about 131,000 households) owned nearly 14% of the nation's wealth.[145] Meanwhile, most of the civil litigation cases in the nation involve debts with businesses and banks represented by lawyers arrayed against individuals, commonly lacking legal representation and not even defending themselves in court due to lack of knowledge and resources.[146]

---

139. *See, e.g.*, Angie Schmitt, *Brookings: Suburban-Style Zoning Linked to Educational Inequality*, STREETSBLOG SF (Apr. 27, 2012, 11:14 AM), https://sf.streetsblog.org/2012/04/27/brookings-suburban-style-zoning-linked-to-educational-inequality.

140. *See generally* DOUGLAS S. MASSEY & NACY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD (2020); ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010).

141. ROBIN GHERTNER & LINCOLN GROVES, U.S. DEPT. OF HEALTH & HUMAN SERVS., THE OPIOID CRISIS AND ECONOMIC OPPORTUNITY: GEOGRAPHIC AND ECONOMIC TRENDS 1–3 (2015), https://aspe.hhs.gov/sites/default/files/private/pdf/259261/ASPEEconomicOpportunityOpioidCrisis.pdf.

142. Stiglitz, *supra* note 73 ("Economist Ann Case and 2015 Nobel laureate in economics Angus Deaton describe one of the main causes of rising morbidity—the increase in alcoholism, drug overdoses and suicides—as 'deaths of despair' by those who have given up hope.").

143. *Id.*

144. STARR, *supra* note 84, at 190.

145. Riccardi & Swenson, *supra* note 109.

146. Ruth Rosenthal & Lester Bird, *How Too Many State Policies Fail Americans Sued for Debt*, PEW CHARITABLE TRS. (Dec. 19, 2024), https://www.pewtrusts.org/en/research-and-analysis/articles/2024/12/19/how-too-many-state-policies-fail-americans-sued-for-debt.

The framers of the United States Constitution anticipated corruption and bribery. They hoped to prevent corruption by fashioning selection processes to favor leaders who seek to advance the greater good and by pitting ambition against ambition, dividing governmental power between branches and between central and state authorities. Nonetheless, over time, the political system has become less reflective of the entire population, with the increasingly unrepresentative nature of the Senate and the Electoral College, and the incumbents' uses of gerrymandering, election practices, and campaign finance rules, closing opportunities for those not in power. Some in the United States—and also in European nations—feed the public fears of immigrants and stoke racial tensions arousing fears of whites becoming outnumbered by other groups.[147]

Studies of many countries demonstrate problems for constitutional democracy in the face of persistent inequality of wealth and power.[148] Perpetual inequality means not only groups unable to break into or stay in the middle class but also those incapable of voicing their concerns through voting or other political channels even as those with wealth can use their resources and connections to influence policies.[149] Perceptions of corruption can jeopardize people's views of the government.[150] Unscrupulous leaders can appeal to grievances and create scapegoats while undermining institutions devoted to democracy and rights. Understanding of these risks should motivate efforts to prevent or redress conditions that jeopardize and undermine constitutional democracies.[151]

IV. CONCLUSION

In exploring these issues, I have canvassed a variety of sources addressing preconditions in societies that seek to adopt democratic governance and in constitutional democracies backsliding and

147. *See* STARR, *supra* note 84, at 187–89.

148. Yeo et al., *supra* note 81 (comparing Asian countries).

149. *Id.*; *see also* Sam Hickey & Sarah Bracking, *Exploring the Politics of Chronic Poverty: From Representation to a Politics of Justice?*, 33 WORLD DEV. 851, 851–65 (2005).

150. *See* SARAH DIX, KAREN HUSSMANN & GRANT WALTON, U4 ANTI-CORRUPTION RES. CTR., RISKS OF CORRUPTION TO STATE LEGITIMACY AND STABILITY IN FRAGILE SITUATIONS 1 (2012), https://www.u4.no/publications/risks-of-corruption-to-state-legitimacy-and-stability-in-fragile-situations.pdf.

151. Thomas Carothers & Benjamin Press, *Understanding and Responding to Global Democratic Backsliding* (Carnegie Endowment for Int'l Peace, Working Paper, 2022), https://carnegie-production-assets.s3.amazonaws.com/static/files/Carothers_Press_Democratic_Backsliding_v3_1.pdf.

faltering.[152] As I conclude, let me share that democracy defenders agree that its basic predicates include:

1) acceptance of election results to ensure peaceful transitions after the voting is done;

2) peaceful co-existence even amid social, political, and religious differences, sufficient to support inclusive political debate among people with different affiliations and views;

3) adequate capacity and stability for families or other social groups providing care for children and the elderly as both ingredients and goals of self-governance and social continuity;

4) freedoms for individuals to form and maintain private associations, organizations, and religions as training grounds for self-governance as well as bulwarks of freedom against the power of the state;[153]

5) genuine promise to eliminate permanent social castes, including persistent inequalities along economic, racial, ethnic, or religious lines,[154] and

6) effective vigilance against entrenchment of power and corruption, blocking criticism and change, preventing reliable means for self-governance and rights for all.

Without the norm of respect for election returns, the peaceful transition of government expected by a constitutional democracy cannot proceed. Without fundamental commitments to cooperate, democratic governance cannot take place. Governmental, social, and economic structures that entrench the rule by a minority and

152. Sources consulted diverge in methods and schools of thought but converge around some or all of the elements identified in the text. *E.g.*, Michael Baumann & Reinhard Zintl, *Social and Cultural Preconditions of Democracy: A Framework for Discussion*, *in* PRECONDITIONS OF DEMOCRACY 19–74 (Geoffrey Brennan, Michael Baurmann & Reinhard Zintl eds., 2006); Toby S. James, *Real Democracy: A Critical Realist Approach to Democracy and Democratic Theory*, 46 NEW POL. SCI. 228 (2024). Older sources examining democracy and modernization have triggered disagreements. Nat'l Rsch. Council, *Transitions to Democracy in Africa*, *in* DEMOCRATIZATION IN AFRICA: AFRICAN VIEWS, AFRICAN VOICES 12 (Sahr John Kpundeh ed., 1992). *Compare, e.g.*, BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD (1966), *with* Joseph V. Femia, *Barrington Moore and the Preconditions for Democracy*, 2 BRIT. J. POL. SCI. 21 (1972), *and* Terry Karl, *Getting to Democracy: Plenary Session II: A Research Perspective*, in THE TRANSITION TO DEMOCRACY: PROCEEDINGS OF A WORKSHOP 29 (1991).

153. *See* PETER BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 159 (Michael Novak ed., 1996).

154. *See* sources cited *supra* note 81.

that foreclose economic and educational opportunities for recognizable groups undermine the chance for belief in the project of democratic governance—as well as the individual freedom and equality it is supposed to advance. Absent dramatic changes, the preconditions for a constitutional democracy are fragile or absent in the United States—and the existing system appears to block investment in those very preconditions.

It does not have to be this way. Human beings created and operate the systems that exist and can create something better. Visions of self-government, rights, freedom, and equal opportunities to learn and thrive have animated hopes for constitutional democracies for generations and still inspire people around the world. The framers of the United States Constitution tried to learn from ancient Greece and Rome, as well as from political theorists closer to their era. John Adams' assertion that democracy never lasts long and "soon wastes, exhausts, and murders itself" remains a sobering warning, but the people—we—can decide for ourselves what paths to choose.[155] We can see historical patterns and learn from them. We can see through scapegoating and leaders who wish to divide us. We can push for the preconditions of cooperation and reciprocation; we can demand genuine political contests and realistic opportunities rather than entrenched power.

Let's learn from Nelson Mandela, who fought to end Apartheid and build a constitutional democracy in South Africa; he said, "[m]ay your choices reflect your hopes, not your fears."[156]

155. *See* Letter from John Adams to John Taylor, *supra* note 1.

156. This quote is commonly attributed to Nelson Mandela. *See* Quote by Nelson Mandela, GOODREADS, https://www.goodreads.com/quotes/956662-may-your-choices-reflect-your-hopes-not-your-fears (last visited Feb. 2, 2025); *see also* WILLIAM JENNINGS BRYAN, LIFE AND SPEECHES OF HON. WM. JENNINGS BRYAN 63 (1900) ("Destiny is not a matter of chance; it is a matter of choice. It is not a thing to be waited for; it is a thing to be achieved."); Quote by John F. Kennedy, AZ QUOTES, https://www.azquotes.com/quote/156170 (last visited Feb. 2, 2025) ("Things do not happen. Things are made to happen.").

Democratic Consciousness as the Key Precondition for a Constitutional Democracy

*Bruce Ledewitz**

Dean Martha Minow is a marvel. We began teaching at about the same time, she in 1981 and I in 1980, she at Harvard Law School and I at the then Duquesne University School of Law. I have watched her career unfold from afar with admiration. Few law professors in American history have made more contributions to the public good than Dean Minow.

So, it comes as no surprise that in delivering her address for the Duquesne Kline School of Law's John and Liz Murray Excellence in Scholarship Lecture Series, Dean Minow has ably set forth several preconditions for constitutional democracy. In terms of the subtitle of an earlier version of her address, these are comprised of social trust, respecting differences, and avoiding entrenchment.[1] These three goals remain at the heart of her address. Indeed, they are crucial at this constitutional moment in American history.

And they are related, just as Dean Minow argues in her lecture. The lack of social trust in America is endemic and obviously cannot be repaired without each side respecting the other and showing a willingness to allow the other side a fair opportunity to obtain power. With this much, I am in complete agreement.

But when, at the end of the address, Dean Minow lists the preconditions for constitutional democracy in greater detail, respecting differences does not occupy a sufficiently central role. The reference to it—"peaceful co-existence even amid social, political, and religious differences, sufficient to support inclusive political debate among people with different affiliations and views"[2]—lacks the necessary emphasis on the need for genuine openness to the views of others.

So, I would like to offer a friendly amendment to her list. Perhaps the key precondition for constitutional democracy in general, and

---

* Professor of Law and Adrian Van Kaam C.S.Sp. Endowed Chair in Scholarly Excellence, Thomas R. Kline School of Law of Duquesne University. My thanks to my research assistants, Jason Whiting and Megan Penn, for their assistance in preparing this comment.

1. Martha Minow, *Cooperation and Resistance to Entrenched Power: Some Preconditions for a Constitutional Democracy*, 63 DUQ. L. REV. 315 (2025).

2. Minow, *supra* note 1, at 345.

this is certainly the case today, is the willingness and ability to see things from the perspective of one's political opponents. That is the consciousness I am referring to in the title of this comment: *Democratic Consciousness as the Key Precondition for a Constitutional Democracy*.

Listening and understanding differences is a skill that law schools in particular should always teach since one cannot effectively engage an argument and defeat it unless one genuinely understands it. That is why law students are taught to argue both sides in oral argument competitions.

But in democratic life, listening and understanding are crucial in a different way. The goal of politics in a democracy is not defeating one's opponents, Carl Schmitt notwithstanding.[3] The goal of debate in a democracy is finding common ground and compromise. To be repeat players, as Dean Minow puts it.[4] To cooperate. That means actually appreciating that one's own side does not have all the truth and learning.

I would judge that I am mostly in political agreement with Dean Minow, so I am probably not the person to offer an application of this standard. But I would like to try to reconsider her address from such a perspective. How would a Republican supporter of President Donald Trump view her remarks? The incapacity of the political left to do this may have something to do with Trump's continuing political success and the continuing failure of the Democratic Party to build a durable national governing coalition.

This perspective of listening to the other side does not mean that we should accept falsehoods. The first specific precondition for a constitutional democracy that Dean Minow offers is "Accepting Electoral Losses."[5] In 2020, Donald Trump did not do that. Instead, he told outrageous lies of fraud about a normal, indeed well-run, election and has convinced millions of his supporters that the 2020 Presidential election was stolen from him. Trump continued to repeat this lie during the 2024 presidential campaign.

We should not accept this falsehood as a kind of point of view that one must indulge. We know the stolen election claim is false for many reasons, including the inherent implausibility of the claim, the inability of the Trump legal team to produce any evidence of

---

3. In *The Concept of the Political*, Schmitt regards the political as the realm of "friend" and "enemy:" "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy." CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., Rutgers Univ. Press 1976) (1932).

4. Minow, *supra* note 1, at 319.

5. *Id.* at 317.

instances of fraud, and the large settlements that media companies, especially FOX, have had to pay for repeating the most outrageous of these claims, involving partisan programming of voting machines.[6]

But I do mean by openness to other perspectives that we should see even this lie in context, as it might appear to a Trump supporter. A Trump supporter would be aware of an earlier, equally weird, election denial by Democrats. I am referring to the decision of the Hillary Clinton presidential campaign in 2016 to join the Jill Stein Green Party challenge to the 2016 Wisconsin presidential election result on an equally implausible, and vague, theory of voting machine tampering.[7] That challenge was as implausible as Trump's complaints in 2020 and equally lacking in actual evidence.

A Republican supporter of Trump would also be aware of partisan efforts to bend election law in ways that favored Democratic Party candidates for office in 2020. One such effort that I am familiar with was the infamous three-day voting extension granted by four Democratic Justices on the Pennsylvania Supreme Court,[8] which led to the sequestration of those ballots.[9] In a tight election, those few extra ballots that arrived after Pennsylvania statutory law permitted, could have changed the outcome in what had been predicted to be a close election result in Pennsylvania.

A Republican supporter of Trump would also be aware that in voting to reject Biden electors in January 2021, Republican members of Congress were not the first to baselessly vote to reject properly selected presidential electors. Democratic Party members of Congress have also done that to dramatize vague claims that election results were improper for some reason.[10]

Finally, a Republican supporter of Trump would note that Democrats routinely claimed that there was something fishy about the

---

6. David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Reach $787M Settlement Over Election Claims*, ASSOCIATED PRESS (Apr. 18, 2023, 8:32 PM), https://apnews.com/article/fox-news-dominion-lawsuit-trial-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe.

7. David E. Sanger, *Hillary Clinton's Team to Join Wisconsin Recount Pushed by Jill Stein*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/26/us/politics/clinton-camp-will-join-push-for-wisconsin-ballot-recount.html.

8. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020).

9. *Justice Alito Orders Pennsylvania Officials to Separate Ballots that Arrived After Election Day*, ASSOCIATED PRESS (Nov. 6, 2020, 8:42 PM), https://www.pbs.org/newshour/politics/justice-alito-orders-pennsylvania-officials-to-separate-ballots-that-arrived-after-election-day.

10. In 2005, thirty-two Democrats in Congress challenged the electors in Ohio over claims of voter suppression. Sonny Bunch, *Democrats Contest Ohio Electoral Vote, But Bush Officially Re-elected*, ROLL CALL (Jan. 7, 2005, 8:18 AM), https://rollcall.com/2005/01/07/democrats-contest-ohio-electoral-vote-but-bush-officially-re-elected/.

Trump win in 2016, especially noting claims that were made by Democrats about Russian interference and last-minute voting law changes in several states. Former President Jimmy Carter, for example, said this in 2019:

> There's no doubt that the Russians did interfere in the election, and I think the interference, although not yet quantified, if fully investigated would show that Trump didn't actually win the election in 2016. He lost the election, and he was put into office because the Russians interfered on his behalf.[11]

What is the point of this exercise in looking at things as the other side might see them? Am I suggesting that Republicans and Democrats are equally at fault for the dismal state of American constitutional democracy? Not at all, but that is not the point. Dean Minow is right to say that "Accepting Electoral Losses" is the most basic precondition for constitutional democracy.[12] Democrats and Republicans have both broken that norm with false claims concerning the democratic illegitimacy of their opponent's election. It does not matter if Republicans have done that to a much greater extent, and with much more damage to the democratic fabric of American public life, than have Democrats. If we want things to change, we all have to stop violating this norm. How can we do that if only one side has to own up to its failures? It is obviously a more persuasive argument to Republicans that both sides have to end the practice of election denial if Democrats admit that they have also engaged in that tactic. The point of this exercise of seeing things from the perspective of one's opponent is to change things for the better, not to assign relative blame for the state of affairs we have now.

This same exercise in political openness can be run to much the same effect with many other points that Dean Minow makes. So, for example, Dean Minow's second major point is the indispensability of cooperation for constitutional democracy. Cooperation, quoting John Rawls, requires that "citizens accept its rules."[13] This is absolutely right. Constitutional democracy will fail if long-standing political norms are broken. And it is fair to note that Trump is a norm violator, including his refusal to attend the Presidential Inauguration of Joe Biden, his successor.

---

11. Warren Fiske, *Fact-check: Did Democrats Suggest that the 2016 Presidential Election was Stolen*, POLITIFACT (Oct. 10, 2022 7:44 AM), https://www.statesman.com/story/news/politics/politifact/2022/10/10/2016-election-fact-check-democrats-hillary-clinton-bernie-sanders/69548196007/.

12. Minow, *supra* note 1, at 318.

13. *Id.* at 319 (quoting JOHN RAWLS, POLITICAL LIBERALISM 15 (1993)).

But, what about the Democrats? It is arguable whether Senate Majority Leader Mitch McConnell did, as Dean Minow suggests, violate the norm of reciprocity in blocking a vote on the Supreme Court nomination of then-Judge Merrick Garland—perhaps that was merely the sort of "rough play" that is permissible, as opposed to Dean Minow's category of "foul play"—but there is no doubt that in calling for term limits for Supreme Court Justices and raising the specter of Court-packing, Democrats are trying to change the rules.[14] The fact that Democrats feel justified in doing this because of claimed norm violations by Republicans does not alter the fact that this is still norm violation.

Then there is the general question of who or what is the entrenched power that Dean Minow says must be resisted as a precondition to constitutional democracy. We can all agree that "constitutional democracy must promise to prevent a limited group of individuals from persistently controlling the governments and other sources of power."[15] But Dean Minow seems to suggest that this problem is defined by "moneyed and plutocratic lobbies."[16] This might imply that wealthy Republicans are the problem.

A Republican might argue otherwise: that wealthy Democrats are the people who really are entrenched and in control of the culture through academia, philanthropy, education, and liberal corporate elites. Conservative New York Times columnist Ross Douthat describes this alliance as "the seeming integration of all sorts of institutions, public and private, academic and governmental, in a common political-ideological front" that facilitates the spread of radical ideas.[17] Similarly, several commentators have described Trump's presidential election victory as a protest against entrenched elites associated with the left.[18]

---

14. David French, Opinion, *Supreme Court Reform Is in the Air*, N.Y. TIMES (Oct. 10, 2024), https://www.nytimes.com/2024/10/10/opinion/harris-supreme-court.html.

15. Minow, *supra* note 1, at 330.

16. *Id.* at 330 n.80 (quoting Linda Colley, *A Constitution Nowhere and Everywhere*, N.Y. REV. OF BOOKS (Oct. 17, 2024), https://www.nybooks.com/articles/2024/10/17/a-constitution-nowhere-and-everywhere-cambridge-constitutional-history-uk/ (reviewing THE CAMBRIDGE CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM (Peter Cane & H. Kumarasingham eds. 2023))).

17. Ross Douthat, Opinion, *Who Abandoned Liberalism First, the Populists or the Establishment?*, N.Y. TIMES (Nov. 1, 2024), https://www.nytimes.com/2024/11/01/opinion/liberals-populists.html.

18. *See* Daniel McCarthy, Opinion, *This Is Why Trump Won*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/opinion/donald-trump-2024-election.html; David Brooks, Opinion, *Voters to Elites: Do You See Me Now?*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/opinion/trump-elites-working-class.html; Simon Jenkins, *Yes, Trump Is Awful. But if There's a Silver Lining, It's a Chance for Progressives to Reflect on What They Got Wrong*, THE GUARDIAN (Nov. 8, 2024),

Dean Minow assumes that, *in other countries*, "organized as constitutional democracies," backsliding and fracturing is accomplished as "governments and powerful private actors curb individual rights in the name of national security, manipulate mass media and elections, demonize critics, and spread corruption"—but not in the United States.[19] She believes that elected officials in other societies "control media and hence the flow of information."[20] But, was it not the Biden Administration that encouraged social media platforms to remove what it called misinformation?[21] And could not a critic of vaccine policies see that as the manipulation of mass media and controlling information? This might be the face of entrenched power in the United States.

The kind of ideological integration that Douthat is pointing to was on display during the COVID-19 epidemic. In my book, *The Universe Is on Our Side*, I told the story of Dr. Graham Snyder of UPMC, who in July 2020, tried to convince the public, correctly as it turned out, that the virus had already mutated so as to become significantly less lethal.[22] His view did not match the prevailing ideological consensus and so he was marginalized.[23] Similarly, public health officials told the public that demonstrations were dangerous during the pandemic, until the rise of the Black Lives Matter movement, when many such experts changed their tune.[24] And in the most enduring example of ideological uniformity, the lab leak theory of the origin of the virus has gone from a conspiracy theory to be deplatformed to a real possibility, although the origin of the virus remains a matter of debate.[25]

This ideological solid front continued to be evident during the 2024 presidential campaign. In the last week of that campaign, two damaging comments referencing garbage were made by representatives of the candidates: comedian Tony Hinchcliffe made a joke at former president Donald Trump's Madison Square Garden rally to the effect that Puerto Rico is a "floating island of garbage," and, in

---

https://www.newsbreak.com/share/3666567766237-yes-trump-is-awful-but-if-there-s-a-silver-lining-it-s-a-chance-for-progressives-to-reflect-on-what-they-got-wrong-simon-jenkins.

19. Minow, *supra* note 1, at 315–16.

20. *Id.* at 330.

21. Murthy v. Missouri, 603 U.S. 43, 51–53, 76 (2024) (dismissing for lack of standing).

22. BRUCE LEDEWITZ, THE UNIVERSE IS ON OUR SIDE: RESTORING FAITH IN AMERICAN PUBLIC LIFE 77 (2021).

23. *Id.*

24. Dan Diamond, *Suddenly, Public Health Officials Say Social Justice Matters More Than Social Distance*, POLITICO (June 4, 2020, 5:19 PM), https://www.politico.com/news/magazine/2020/06/04/public-health-protests-301534.

25. Sheryl Gay Stolberg & Benjamin Mueller, *Lab Leak or Not? How Politics Shaped the Battle Over Covid's Origin*, N.Y. TIMES (Mar. 19, 2023), https://www.nytimes.com/2023/03/19/us/politics/covid-origins-lab-leak-politics.html.

response, President Biden called Trump's supporters garbage.[26] But, as National Review writer Brittany Bernstein complained, the media condemned the former remark and immediately treated the second remark as merely a misspoken gaffe.[27]

However entrenched power is regarded, there would also be dispute about Dean Minow's argument that constitutional structures enable, or at least prevent, the amelioration of it—that the Constitution allows a political minority to wield power. Historically, at least, this has not always been so. During the 1960s, the same Congressional structures that Dean Minow laments passed the 1964 Civil Rights Act and the 1965 Voting Rights Act and the same Supreme Court that she criticizes issued a series of decisions striking blows against racial discrimination and in support of various vulnerable minorities.[28]

Times have changed, of course, and the structure of the Senate and the related structure of the Electoral College is certainly today substantially aiding the Republican Party to attain and keep political power. But partly, this results from the failure of the Democratic Party to succeed, or even really to try, to become a genuinely national political party. With Trump calling for high, general tariffs, which agricultural interests have traditionally opposed,[29] it should have been possible for the Democratic Party to make inroads in the farm belt and in rural farming areas generally during the 2024 election.[30] But the Democratic Party has little presence in many such places and not much credibility. That political failure is not the result of any structural deficiency in the Constitution. There is a political reason that representing states, rather than solely population, in the Senate and Electoral College generally hurts Democrats.

---

26. Brittany Bernstein, *One Final 'Republican Pounce' Before Election Day*, NAT'L REV. (Nov. 4, 2024, 2:56 PM), https://www.nationalreview.com/news/one-final-republicans-pounce-before-election-day.

27. *Id.* To be fair, other observers complained about treating the Biden comment as equivalent. Gabriel Hays, *Dem Rep Fires Back at CNN Host for Comparing Biden's 'Garbage' Line to Comic's Puerto Rico Joke*, FOX NEWS (Oct. 30, 2024, 11:00 AM), https://www.foxnews.com/media/dem-rep-fires-back-cnn-host-comparing-bidens-garbage-line-comics-puerto-rico-joke.

28. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Reed v. Reed, 404 U.S. 71 (1971); Graham v. Richardson, 403 U.S. 365 (1971).

29. *See, e.g.*, Katie Lobosco, *Farmers Get Impatient with Trump's Trade War: 'This Can't Go On,'* CNN, https://www.cnn.com/2019/05/13/politics/farmers-china-tariffs-trump/index.html (May 13, 2019, 6:16 PM).

30. Alan Rappeport, *U.S. Farmers Brace for New Trump Trade Wars Amid Tariff Threats*, N.Y. TIMES (Nov. 4, 2024), https://www.nytimes.com/2024/11/04/us/politics/farmers-trump-china-tariffs.html.

Nor is it really the case that current Supreme Court decision-making frequently and "increasingly reject[s] legislation and executive action taken by state or federal officials as unconstitutional."[31] In returning the issue of abortion to the political realm by overturning *Roe*[32] and *Casey*,[33] for example, the *Dobbs* decision[34] certainly did not do that, as Republicans are learning to their regret. *Dobbs* ushered in a new era of effective pro-choice political activity, increasing democratic accountability on the issue of abortion.[35]

Arguably, this is also true of Supreme Court decisions reducing the power of the Administrative State. Of course, it has been argued that the real result of decisions like *Loper Bright*[36] have been to increase the power of the courts and not Congress or the people.[37] But this criticism assumes that Congress is incapable of stepping in and expressly forming policy for administrative agencies. If this is true, it is the result not so much of the structure of the Senate as it is the power of the Senate filibuster, which could be changed at any time by a simple majority in the Senate. The filibuster is not a constitutional impediment to majority rule.

It is true that in the area of gun rights[38] and religious liberty,[39] the Court arguably has been limiting the power of majorities to govern. But gun users and religious believers are themselves minorities that could be said to merit protection from prevailing majorities. It is certainly not clear that gun owners and religious believers are entrenched elites. If the vigorous civil society that Dean Minow concludes is another one of the preconditions for constitutional democracy[40] to exist, judicial decisions like these may be necessary.

---

31. Minow, *supra* note 1, at 338.

32. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

33. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled in part by Dobbs*, 597 U.S. 215.

34. *Dobbs*, 597 U.S. 215.

35. *Ballot Tracker: Outcome of Abortion-Related State Constitutional Amendment Measures in 2024 Election*, KFF, https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/ (Nov. 6, 2024) ("Since the Supreme Court's *Dobbs* decision overturning *Roe v. Wade*, voters in 16 states have weighed in on constitutional amendments regarding abortion. In 2024, 10 states voted on abortion measures that sought to affirm that the state constitution protects the right to abortion.").

36. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

37. *See* Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024, 3:20 PM), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab.

38. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

39. *See, e.g.*, Carson v. Makin, 596 U.S. 767 (2022).

40. Minow, *supra* note 1, at 344–45 ("[D]emocracy defenders agree that its basic predicates include: . . . freedoms for individuals to form and maintain private associations,

The one area where Dean Minow anticipates a broad overlap of interests and the potential building of a bipartisan coalition is in her precondition of promising to eliminate castes, "economic, racial, ethnic and religious."[41] She also mentions the need to create genuine opportunities for all and links the failure to do this to the deaths of despair[42] that are often associated with predominantly white, working-class rural areas. Such areas are regarded as the heart of Trump country and Trump broke onto the political scene in 2016 by opposing the same "rigged system" that Dean Minow also inveighs against.

We tend to think of some problems of caste and unequal opportunity as predominately legal problems of discrimination—race and gender discrimination for example—and other forms of caste—restrictions on economic opportunities, for example—as more matters of national policy. In this sense, the Biden Administration's effort to revitalize rural areas through forms of industrial policy[43] would be seen as an appropriate non-legal opportunity structure, to use Dean Minow's term.

But this is a false distinction on both sides. Race and gender discrimination are also responsive to large scale political reforms. Family leave policies are one such example.

On the other side, one trend that is restricting economic opportunity today is credentialism—the tendency of companies to require college degrees for a wide variety of entry-level and other jobs that could easily be done by persons with only high school degrees.[44] In some of these requirements, companies are negligently using a college degree as a proxy for clear thinking and expression, instead of searching for those qualities directly among job applicants.[45]

---

organizations, and religions as training grounds for self-governance as well as bulwarks of freedom against the power of the state[.]").

41. *Id.* at 344 (concluding that a basic predicate of democracy is the "genuine promise to eliminate permanent social castes, including persistent inequalities along economic, racial, ethnic, or religious lines").

42. *Id.* at 342 (quoting Joseph E. Stiglitz, *The American Economy is Rigged and What We Can Do About It*, SCI. AM. (Nov. 1, 2018), https://www.scientificamerican.com/article/the-american-economy-is-rigged/).

43. *See* Anthony F. Pipa & Zoe Swarzenski, *The Potential of the CHIPS and Science Act for Rural America*, BROOKINGS (Sept. 29, 2022), https://www.brookings.edu/articles/the-potential-of-the-chips-and-science-act-for-rural-america/.

44. *See* Brandon Busteed, *We Don't Value Education. We Value the Credential.*, FORBES, https://www.forbes.com/sites/brandonbusteed/2020/10/17/we-dont-value-education-we-value-the-credential/ (Oct. 17, 2020, 6:57 AM).

45. This continues to happen despite commitments from corporate America to reduce credentialism. *See* Cheryl Winokur Munk, *Workers Without Degrees Are Not Getting as Many Good Job Offers as It Seems*, CNBC, https://www.cnbc.com/2024/02/19/job-posts-for-workers-without-degrees-are-booming-but-not-the-hiring.html (Feb. 19, 2024, 10:16 PM).

One opportunity structure that would alleviate this problem would be federal legislation that prohibits credential requirements unless they could be shown to satisfy the business necessity test.[46] Such a change would be beneficial for society in a variety of ways. It would increase opportunities for people who cannot, or do not wish to, attend college, thus reducing their expenses. And it would force open talent pools for business that are now overlooked.

It is not clear to me what religious castes Dean Minow aims to eliminate. There is undoubtedly some religious discrimination in America. At the present moment, both Muslims and Jews are complaining about discrimination and hostile environments on college campuses. But this is a temporary situation exacerbated by the war in Gaza and I am not sure this is what Dean Minow has in mind.

In some recent Supreme Court cases, religious believers have complained of being excluded from government contracts because of a clash between secular ideology and religious faith.[47] But, again, this seems like a fairly limited series of disputes. In general, religious belief seems to occupy a strong position in America and is not a subjugated caste.

The last area of entrenchment that Dean Minow mentions is the tendency of entrenched power to block criticism.[48] The First Amendment protection of freedom of speech has been a bulwark against this possibility in the United States. But in recent years, two trends have weakened that protection. On the one hand, Americans report in polling that they are reluctant to express their views in public on certain sensitive matters because of their fear of vociferous criticism, or worse.[49] We call this problem cancel culture.

Perhaps related to this issue is the decline, especially among the young, of support for, and commitment to, freedom of speech.[50] University campuses must remain hotbeds of criticism of prevailing norms so that the greater society can benefit from these criticisms. Campuses must be free from any sort of intellectual orthodoxy, whether this is imposed by fearful Administrators, powerful alumni and supporters, or peer pressure.

---

46. The current situation would be improved even with application of the more lenient jobs-related test. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 932 (1993).

47. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 526–28 (2021).

48. Minow, *supra* note 1, at 330, 345.

49. Editorial Board, Opinion, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html.

50. Jacob Mchangama, *People Want Free Speech—for Themselves*, FOREIGN POL'Y (Jun. 8, 2021), https://foreignpolicy.com/2021/06/08/people-want-free-speech-for-themselves/ ("Young people (18-34 years old) are less supportive of free speech than older generations . . . .").

The decline in support of free speech is related to the other issue I want to raise about Dean Minow's address. Young people today may have fallen away from faith in free speech because they no longer believe that open discussion leads to truth, or even leads the participants closer to truth. They may not even believe there is such a thing as truth. Every position may just reflect power relations intrinsic to that position.

If this is the case, it dooms Dean Minow's overall project because there could never be genuine liberation from entrenched power. One could only hope to defeat one form of entrenched power by imposing a different form of entrenched power.

This decline in faith in open debate may also be why it is so difficult for us to look at things from an opponent's point of view. Why should I do that if we are merely opponents? Only if we are both truth seekers might we have something in common worth sharing. Only a shared search for truth elevates politics above a zero-sum game in which one side's victory is the other side's loss. That pessimistic view is short-sided. Actually, bipartisan cooperation can yield win-win solutions that benefit many if not all participants.

Admittedly, this is not an easily maintained perspective in today's highly polarized world. According to Dean Minow, the problem of partisanship lies in the sources of distrust: "Unless people can see how they benefit for themselves and their descendants from the work of the government and its institutions—or see leaders and neighbors putting the greater good above their own self-interest—distrust is likely to spiral downward."[51]

But I wonder if the problem today is not the opposite way around—not that failure of government leads to distrust, but that because of distrust, people do not see the benefits of the work of government. How else to account for the deep unhappiness of the American people with regard to the economy? The Economist Magazine calls the American economy "The Envy of the World"[52] while at the same time The Economic Times reports that "Americans give the economy poor marks, say under Biden-Harris it has been very

51. Minow, *supra* note 1, at 328.

52. *America's Economy Is Bigger and Better Than Ever*, THE ECONOMIST (Oct. 17, 2024), https://www.economist.com/leaders/2024/10/17/americas-economy-is-bigger-and-better-than-ever.

bad."[53] By many accounts, the one-sided, negative view of American economic performance is why Trump won.[54]

Perhaps some of this disparity can be ascribed to ordinary people measuring the economy differently from the way economists measure it—being more concerned with the price of eggs and housing affordability than with overall economic growth, for example. But it remains true that Trump enjoyed great political success describing the conditions in America as terrible in a variety of ways while objective conditions did not seem to warrant these descriptions. As the liberal economist Paul Krugman likes to remind his readers, "[w]hen Ronald Reagan's re-election campaign proclaimed 'It's morning again in America,' both unemployment and inflation were substantially higher than they are now."[55]

The disconnect between voter perception and actual conditions is so great that Vice-President Kamala Harris did not even try to run on the successes of the Biden Administration of which she was a part. Those successes included some of the very policies that Trump was proposing—current record levels of domestic oil and gas production[56] and reindustrialization of the heartland.[57] Biden's low approval ratings, which remained at around 37%,[58] seemed to preclude any attempt by Harris to tout Biden's successes.

The question is not whether Biden did a good or a bad job. The question is whether any objective assessment of his administration would have justified a voter reaction this extreme. If the answer to that question is no, or might be no, it is worth asking: what might account for these political realities?

One can see the same kind of disconnect between objective conditions and subjective reactions when considering the deaths of despair referred to by Dean Minow. It is true that economic downturns

53. *Americans Give the Economy Poor Marks, Say Under Biden-Harris It Has Been Very Bad*, THE ECON. TIMES, https://economictimes.indiatimes.com/news/international/us/americans-give-the-economy-poor-marks-say-under-biden-harris-it-has-been-very-bad/articleshow/114556386.cms (Oct. 24, 2024, 3:34 AM).

54. Jeff Stein, Abha Bhattarai & Annie Gowen, *Voter Anger over Economy Boosts Trump in 2024, Baffling Democrats*, WASH. POST, https://www.washingtonpost.com/business/2024/11/06/economy-biden-trump-voters/ (Nov. 6, 2024).

55. Paul Krugman, Opinion, *Leopards Are Telling You That They Will Eat YOUR Face*, N.Y. TIMES (Oct. 31, 2024), https://www.nytimes.com/2024/10/31/opinion/trump-musk-mike-johnson.html.

56. Robert Rapier, *U.S. Oil and Gas Production Are Ahead of Last Year's Record Pace*, FORBES (Apr. 26, 2024, 2:33 PM), https://www.forbes.com/sites/rrapier/2024/04/26/us-oil-and-gas-production-are-ahead-of-last-years-record-pace/.

57. Peter S. Goodman, *Why There's Hope for U.S. Factory Towns Laid Low by the 'China Shock'*, N.Y. TIMES (Nov. 1, 2024), https://www.nytimes.com/2024/11/01/business/economy/china-us-trade-tariffs.html.

58. *57% of Americans Disapprove of the President*, REUTERS, https://www.reuters.com/graphics/USA-BIDEN/POLL/nmopagnqapa/ (Sept. 5, 2024).

can lead to increases in suicide and other self-destructive behavior. This occurred at the start of the Depression, for example.[59] But current economic conditions do not rival those of the 1930s, or even the period from 2008 to 2012. Real wages for high school graduates have fallen over time but unemployment has not been high. There should not be the kind of desperation that generates deaths of despair. But there unquestionably is.

This despair can be ascribed to long-term factors such as the decline of organized religion and other communal structures leading to social isolation and loneliness.[60] But again, I believe that gets the story backward. The obvious answer to me is that the lack of faith comes first. Americans today lack a coherent story of the meaning of human existence after the Death of God. We no longer reflexively agree with Dr. Martin Luther King, Jr., that the arc of the moral universe is long, but it bends toward justice.[61] We are more likely to believe that we have to bend the universe to try to get justice,[62] if there is even any such thing as a universal-like justice. We have lost the sense that the universe is on our side.

How does this relate to democratic consciousness? On one level, the relationship is obvious. Dr. King was able to motivate large numbers of people in the face of ferocious opposition because of his deep underlying faith that history would vindicate the struggle. This confidence makes it easier to play by the rules. If, in contrast, a person believes that everything is merely political struggle, it makes more sense to try to change the rules to favor one's position. So, faith in the future means that cooperation will pay off.

But there is a deeper meaning to King's claim. The *Brown*[63] case did not just succeed. It actually became an American creed. Bending toward justice does not simply imply political success. It implies a change in the overall context. It promises that people will see the meaning of justice differently in the future. That is why King ended his "I Have a Dream" speech with the complete acceptance of people

59. JOINT ECON. COMM. REPUBS., LONG-TERM TRENDS IN DEATHS OF DESPAIR 4, 6 (2019), https://www.jec.senate.gov/public/_cache/files/0f2d3dba-9fdc-41e5-9bd1-9c13f4204e35/jec-report-deaths-of-despair.pdf.

60. Juana Summers, Vincent Acovino & Christopher Intagliata, *America Has a Loneliness Epidemic. Here are 6 Steps to Address it*, NPR (May 2, 2023, 3:21 PM), https://www.npr.org/2023/05/02/1173418268/loneliness-connection-mental-health-dementia-surgeon-general.

61. MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 252 (James M. Washington ed., 1986).

62. In a trustworthy indicator of cultural mood, there is even a t-shirt you can purchase with the message, "The Arc of the Moral Universe Isn't Gonna Bend Itself." *See* TEEPUBLIC, https://www.teepublic.com/t-shirt/15970924-the-arc-of-the-moral-universe-isnt-gonna-bend-itse (last visited Feb. 9, 2025).

63. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

of color, not the defeat of his enemies: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[64]

How could such a change occur unless people actually changed their minds and perspectives? That is the point of democratic consciousness. I want to understand the people who oppose me so as to make it easier for them to become my allies. I'm not trying to convince my opponents through an argument. I'm trying to lessen the distance between us. When Lincoln said "[w]e are not enemies, but friends,"[65] he was not referring to short-term political differences but was referring to our shared future—we are all "in the same boat" as Dean Minow quotes King.[66]

This recognition is both reassuring and daunting. Reassuring because it is actually true that the universe is on our side and bends toward justice. We are all in this together. We do want the same things. But daunting, all the same, because people today find that so hard to believe.

The fundamental precondition for constitutional democracy is that America experiences the spiritual renewal of faith in the future. With that change, democratic consciousness emerges. As democratic consciousness emerges, constitutional democracy can endure. Without all of that, constitutional democracy may be impossible.

64. Martin Luther King, Jr., I Have a Dream Speech at the Lincoln Memorial (Aug. 28, 1963) (transcript available at https://www.npr.org/transcripts/122701268).

65. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (transcript available at https://avalon.law.yale.edu/19th_century/lincoln1.asp).

66. Minow, *supra* 1, at 322.

Medium Matters in Preparing for Law Practice: Critical e-Reading

Amanda L. Sholtis[*]

* Associate Professor of Law and Assistant Director of Legal Methods at Widener University Commonwealth Law School. Thank you, Dean andré cummings and Commonwealth Law School, for supporting this work with a research grant. I am grateful for my colleagues at the Institute for Law Teaching and Learning's Works-in-Progress Workshop (2023) and their feedback on an outline of this Article. I am also indebted to the Board and participants of the Legal Writing Institute's Sirico Scholars Workshop (2024) for their suggestions and encouragement. Particularly, thank you, Professor Lisa Eichhorn, for your comments on a draft. To Jane Grisé, many thanks for carving time out of your retirement to discuss this project. Finally, I want to recognize the law students that contributed to this Article. Thank you, members of the Duquesne Law Review, in particular, Jeffrey Chmay, Brian Davis, and Katherine Staley. The editing process was a pleasure. Also, I worked with two fantastic Research Assistants, Reese Rosso and Cassidy Hartle. Thank you both for all you did.

"If our goal as legal educators is to prepare students for practice, they need to read like legal experts or practicing attorneys."[1]

INTRODUCTION

You are probably reading this article from a screen.[2] As few as ten years ago, you might have read it in the bound journal. Does it matter whether you read it on paper, your cell phone, or a laptop? Should lawyers and law students consider the mediums from which they read legal text? The answer to both questions is yes. Medium matters when it comes to "reading like a lawyer."[3] It also matters for those educating future lawyers.

Teaching students how to read like lawyers is foundational to preparing them for practice.[4] Lawyers read while researching and "to prepare for interviews, counseling sessions, [and] negotiations[.]"[5] They read to prepare for trial and oral arguments.[6] They read as they write, edit, and review material from opposing counsel.[7] Lawyers read more than just law.[8] "Corporate lawyers read governance materials, contracts, financial disclosures, and

---

1. Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 BYU EDUC. & L.J. 53, 57 [hereinafter Christensen, *The Paradox of Legal Expertise*].

2. This Article explores reading text in digital format and uses the terms "reading from a screen," "e-reading," and "digital reading" interchangeably. These terms assume the individual reads from some type of electronic device, whether it is an e-reader, cell phone, tablet, or computer. Also, e-reading encompasses many types of text, including webpages, e-books, pdfs, and scans of printed materials. E-reading does not necessarily equate with online reading, which depends upon the reader's internet connection. Individuals can e-read text that they downloaded; therefore, an internet connection is not required for all e-reading.

3. In 2005, Professor Ruth Ann McKinney published the first book devoted to teaching law students how to read legal material like practicing lawyers. RUTH ANN MCKINNEY, READING LIKE A LAWYER: MASTERING THE ART OF READING LAW LIKE AN EXPERT (1st ed. 2005). This book is now in its third edition. RUTH ANN MCKINNEY, READING LIKE A LAWYER: MASTERING THE ART OF READING LAW LIKE AN EXPERT (3d ed. 2022) [hereinafter MCKINNEY, READING LIKE A LAWYER, 3d ed.]. One of the first scholars to identify the connection between legal-reading processes and legal education was Dr. James Stratman. In 1991, he argued that "to make students better legal writers, they must be led to explore actively how lawyers and law 'consumers' think while they read." James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reading Protocols*, 1 J. LEGAL WRITING INST. 35, 36 (1991). Dr. Stratman went on to study how assuming professional-role scenarios impacted law students' reading and analytical skills. James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection*, 34 DISCOURSE PROCESSES 57, 57–90 (2010).

4. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at ix.

5. Jay A. Mitchell, *Reading (in the Clinic) Is Fundamental*, 19 CLINICAL L. REV. 297, 297 (2012).

6. *Id.*

7. *Id.*

8. *Id.*; *see also* Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 LEGAL WRITING: J. LEGAL WRITING INST. 63, 73–75 (2016).

transaction closing documents. Environmental lawyers read administrative records and technical studies. Intellectual property lawyers read patents. Criminal lawyers read police reports. Tax lawyers read letter rulings. Litigators read motions, briefs, transcripts, and the diverse documents produced in discovery."[9]

Not only do lawyers read a lot, they are "paid to read."[10] Clients expect lawyers to be expert critical readers.[11] Critical reading, also known as "deep reading," means that lawyers engage in an "array of sophisticated processes that propel comprehension [when reading] and that include inferential and deductive reasoning, analogical skills, critical analysis, and insight."[12] Today, lawyers are also e-readers. Until the late 1980s, practicing lawyers read almost everything on paper.[13] With the advent of word-processing software for personal computers and computer-assisted legal research, lawyers began reading from screens.[14] Over the last forty years, computer technology has quickly and comprehensively changed the medium through which most attorneys read.[15] While lawyers were gravitating towards digital reading before the Covid-19 pandemic, it became ingrained during pandemic lockdowns.[16] Today, most law firms rely on remote computing access, digital document storage systems, e-mail, and messaging apps.[17] Lawyers "are reading more legal documents on screens – and only on screens."[18]

---

9. Mitchell, *supra* note 5, at 297.

10. *Id.*

11. *See* JANE BLOOM GRISÉ, CRITICAL READING FOR SUCCESS IN LAW SCHOOL AND BEYOND 3–4 (2d ed. 2022) [hereinafter GRISÉ, CRITICAL READING FOR SUCCESS].

12. NAOMI S. BARON, HOW WE READ NOW: STRATEGIC CHOICES FOR PRINT, SCREEN, AND AUDIO 11 (2021) (quoting Maryanne Wolf & Mirit Barzillai, *The Importance of Deep Reading*, 66 EDUC. LEADERSHIP, no. 6, March 2009, at 33). Lawyers use critical-reading strategies to evaluate text and solve problems. LEAH M. CHRISTENSEN, ONE L OF A YEAR: HOW TO MAXIMIZE YOUR SUCCESS IN LAW SCHOOL 24–25 (2012) [hereinafter CHRISTENSEN, ONE L OF A YEAR].

13. ROBERT DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN 1 (2013), https://adjtlaw.com/wp-content/uploads/2020/06/Legal-Writing-for-the-Rewired-Brain.pdf.

14. *See* Sarah R. Boonin & Luz E. Herrera, *From Pandemic to Pedagogy: Teaching the Technology of Lawyering in Law Clinics*, 68 WASH. U. J.L. & POL'Y 109, 112 (2022) (discussing the increasing use of the personal computer in legal practice); Ellie Margolis & Kristen Murray, *Using Information Literacy to Prepare Practice-Ready Graduates*, 39 U. HAW. L. REV. 1, 9–11 (2016) (describing the digitizing of legal research).

15. Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMMC'N & RHETORIC: JALWD 1, 1 (2015).

16. Boonin & Herrera, *supra* note 14, at 109–10; *see also* Nicole Black, *Easy E-Filing: Services Designed to Help Attorneys File Documents Accurately and Correctly*, ABA J. (June 28, 2022), https://www.americanbar.org/groups/journal/articles/2022/easy-e-filing-services-designed-to-help-attorneys-file-document/.

17. Boonin & Herrera, *supra* note 14, at 113.

18. David Hricik & Karen J. Sneddon, *Screen Time: Legal Documents in the Digital Age*, DEL. LAW., Summer 2020, at 14; *see also* Sinsheimer & Herring, *supra* note 8, at 84.

E-reading is an integral part of the judiciary as well. In 2005, federal courts adopted the Case Management/Electronic Case Files system, which allowed judges and attorneys to access and file documents electronically.[19] The Covid-19 pandemic also affected e-filing systems with many jurisdictions quickly adopting them if they were not already in place.[20] All federal courts, except for the United States Supreme Court, require represented parties to e-file.[21] Of the ten most populous states, eight require e-filing for all represented parties and two have optional e-filing.[22] While there has not been a national study conducted yet, a 2015 article by Professor Ellie Margolis reported growing evidence that judges and law clerks prefer to read briefs from iPads.[23]

To be ready for paperless practice, law graduates must be competent critical e-readers. Most likely, many are not. Unlike prior generations, many law students are entering law school without sufficient critical reading skills[24] and they are not developing these skills throughout their legal education.[25] Additionally, the unique challenges posed by reading complex, legal texts from screens only exacerbates students' critical-reading struggles.[26] Likely, many students are not even aware of these unique challenges when reading from screens or the need to adjust how they approach such reading tasks.[27] There is good news. The e-reading problem is fixable. Critical reading, regardless of the medium, is a learnable skill.[28] Also, since e-reading touches every aspect of legal education, every legal educator has the opportunity (and responsibility) to ensure that law students are effectively reading digital texts.[29] The beginning of this

19. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 279.

20. Black, *supra* note 16.

21. FED. R. APP. P. 25(a)(2)(B)(i). The Supreme Court requires both paper and electronic filing. SUP. CT. R. 29(1), 29(7).

22. *See* CA. R. CT. 8.71(a) (California); FLA. R. GEN. PRAC. & JUD. ADMIN. 2.525(c)(1) (Florida); GA. R. SUP. CT. 13(1)(a) (Georgia); ILL. SUP. CT. R. 9(a) (Illinois); M.C.R. 1.109(G)(3)(f) (Michigan); N.Y. CT. APP. R. PRAC. §§ 500.1(n), 500.2(a) (New York); N.C. R. APP. P. 26(a) (North Carolina); TEX. R. APP. P. 9.2(c)(1) (Texas) (requiring represented parties to e-file). *But see* OHIO R. APP. P. 13(A) (Ohio); PA. SUP. CT. IOP § 7(a) (West 2021) (Pennsylvania) (e-filing is optional).

23. Margolis, *supra* note 15, at 11–12.

24. *See infra* notes 46–62 and accompanying text.

25. *See infra* notes 204–08 and accompanying text.

26. *See infra* notes 107–61 and accompanying text.

27. *See infra* notes 186–94 and accompanying text.

28. *See infra* notes 195–203 and accompanying text.

29. *See* Carolyn V. Williams, *#CriticalReading #WickedProblem*, 44 S. ILL. U. L.J. 179, 183 (2020) (arguing that teaching critical reading skills to students is part of preparing them to be lawyers so the responsibility falls to everyone in legal education); Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29, 72 (2018) (advocating for critical reading instruction to be incorporated throughout the law school curriculum); Patrick Meyer, *The*

Article explores how students learn to read like lawyers in law school and how such learning is more difficult for students reading from screens. Then, this Article urges law schools to provide critical e-reading instruction and offers practical suggestions for how to do so.

I. LEARNING TO READ LIKE A LAWYER IS "HARDER THAN HELL"[30]

From the first day of law school, students read judicial opinions as part of the case method.[31] By graduation, a law student will have spent over 1,550 hours reading appellate court opinions in casebooks.[32] While the case method has been criticized for numerous reasons,[33] from a reading perspective, it is problematic because it treats students, as novice legal readers, like experts.[34] Not surprisingly, first-year students struggle with their reading assignments.[35] Best-selling author, Scott Turow, recounted his experience in 1975:

Google Effect, Multitasking, and Lost Linearity: What We Should Do, 42 OHIO N.U. L. REV. 705, 728 (2016) (suggesting law professors "plan to teach students how to conduct meaningful reading both online and in print").

30. SCOTT TUROW, ONE L 30 (Farrar, Straus and Giroux 1988) (1977).

31. Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 131 (1994). Throughout the first year and beyond, students also read statutes, regulations, and various secondary materials. Connie Lenz, *Affordable Content in Legal Education*, 112 LAW LIBR. J. 301, 309 (2020).

32. Catherine J. Cameron, *In the Eyes of the Law Student: Determining Reading Patterns with Eye-Tracking Technology*, 45 RUTGERS L. REC. 39, 39 (2017).

33. *See, e.g.*, Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 81 (2002) (discussing criticism of case method/Socratic method as "it hinders student learning by causing psychological distress, focusing on a narrow range of skills, and disadvantaging women and people of color"); Maureen F. Fitzgerald, *Rite of Passage: The Impact of Teaching Methods of First Year Law Students*, 42 LAW TCHR. 60, 80–84 (2008) (summarizing research results that teaching practices in the first year of legal education have a negative impact on students, including psychological distress, demoralization, emotional detachment or alienation, and disengagement); Rachel Gurvich et al., *Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. REV. F. 118, 132–38 (2023) (reviewing problems with using "Socratic/case method as the default method for teaching law," including it "was developed for a different set of students and at a time when we knew far less than we know today about how people learn"); Robert Minarcin, *OK Boomer—The Approaching DiZruption of Legal Education by Generation Z*, 39 QUINNIPIAC L. REV. 29, 31–32 (2020) (discussing the heavy focus on legal analysis through the case method with Socratic method resulting "in a shared perspective among new lawyers that they were taught to think like a lawyer, but did not learn how to be a lawyer").

34. Beth A. Brennan, *Explicit Instruction in Legal Education: Boon or Spoon?*, 52 U. MEM. L. REV. 1, 39 (2021). It is also problematic because research suggests lawyers in practice devote "far less time to reading judicial opinions than do law students[.]" Sinsheimer & Herring, *supra* note 8, at 81.

35. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 3 & n.1 (observing that new law students discover their reading assignments are different from their undergraduate reading experiences because, from the first day, law students read primary authority, unlike the secondary authority commonly found in most undergraduate textbooks).

> Tried tonight to read a case for the first time. It is harder than hell.
>
> . . .
>
> OK. It was nine o'clock when I started reading. The case is four pages long and at 10:35 I finally finished. It was something like stirring concrete with my eyelashes. I had no idea what half the words meant. I must have opened *Black's Law Dictionary* twenty-five times and I still can't understand many of the definitions. There are notations and numbers throughout the case whose purpose baffles me. And even now I'm not crystal clear on what the court finally decided to do.
>
> . . .
>
> I feel overheated and a little bit nervous. I wouldn't be quite so upset if I weren't going to be reading cases every day and if understanding them weren't so important.[36]

Almost fifty years later, law students are still stressed about reading. In her book, *Reading Like a Lawyer*, Professor McKinney relates that her students have compared case reading to "a foreign language immersion course held in the foreign country and conducted completely in the new language."[37] I have asked my own first-year students to describe in one word what it is like to read cases as a new law student. The most popular responses were "difficult," "challenging," "confusing," "overwhelming," and "brutal."[38]

Law professors may forget how difficult it is to read as a novice. Law students encounter unfamiliar terms in appellate opinions like "de novo" and "mens rea," while familiar words, like "offer" and "assault" now have particular meanings.[39] Many students lack the background knowledge necessary for comprehension.[40] For example, they may struggle with the procedural histories in opinions because they have not yet internalized how civil and criminal cases are litigated. Finally, law students cannot simply read for

---

36. TUROW, *supra* note 30, at 30–31.

37. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 8.

38. Unpublished Poll Results of First-year Students in Section NP1 of Legal Methods I at Widener University Commonwealth Law School (Aug. 28, 2023) (on file with author) [hereinafter 2023 Poll of Commonwealth Law 1Ls] (anonymous student survey).

39. Sherry L. Leysen, *Brain Plasticity and the Impact of the Electronic Environment in Law and Learning*, 30 LEGAL REFERENCE SERVS. Q. 255, 271 (2011); Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching to 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 25 (2002).

40. Leysen, *supra* note 39, at 271; Lasso, *supra* note 39, at 25.

understanding.[41] Law school "homework" involves combining the basic comprehension skills of regular reading with the skills of evaluation and problem solving.[42] Law professors expect students to "read with vigor and with accuracy, critically examining words in the context of action taken by the courts and legislatures, challenging assumptions, finding patterns, generating new ideas."[43] Then, once in classrooms and clinics, students must dissect, hypothesize about, synthesize, and apply the complex material they read.[44] Consequently, regarding reading, many law students feel disoriented and defeated.[45]

II. LEARNING TO READ LIKE A LAWYER MAY BE MORE CHALLENGING FOR TODAY'S LAW STUDENTS

Beyond the age-old challenges that law school reading presents, current and future law students may struggle even more than past generations with reading in general.[46] Experts suggest three reasons as to why. First, there has been a cultural shift towards viewing information as entertainment and people's brains are changing as a result.[47] Americans are reading less and watching more videos.[48] To avoid cognitive overload due to all the information that Americans consume, individuals are learning to process information quickly and at a shallow level. [49] "[O]ne thing is clear: our attention is being chopped into shorter intervals and that is

41. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 51.
42. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 3.
43. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 51.
44. *See* Patricia Grande Montana, *Bridging the Reading Gap in the Law School Classroom*, 45 CAP. U. L. REV. 433, 433–34 (2016) ("Law students need to be able to read the law to understand rules, explain legal principles, identify issues, solve legal problems, and advocate persuasively.").
45. *See* Jane Bloom Grisé, *Critical Reading Instruction: The Road to Successful Legal Writing Skills*, 18 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 259, 270 (2016) [hereinafter Grisé, *Critical Reading Instruction*] ("Students often blame themselves for their comprehension challenges rather than attributing their difficulties to the complexity of the texts.").
46. Williams, *supra* note 29, at 189; Jane Bloom Grisé & Dorothy Evensen, *Getting It Right from the Start*, 91 TENN. L. REV. 53, 67 n.94 (2024).
47. MARYANNE WOLF, READER, COME HOME: THE READING BRAIN IN A DIGITAL WORLD 74–75 (2018).
48. Williams, *supra* note 29, at 191 ("Generation Zers prefer to obtain new knowledge from watching YouTube videos rather than reading."); Jeffrey M. Jones, *Americans Reading Fewer Books than in Past*, GALLUP (Jan. 10, 2022), https://news.gallup.com/poll/388541/americans-reading-fewer-books-past.aspx (reporting declines in reading by Americans greatest among college graduates who are reading an average of six fewer books per year).
49. WOLF, *supra* note 47, at 74–75.

probably not a good thing for thinking deeper thoughts."[50] This cultural shift is negatively affecting Americans' abilities to read deeply.[51]

Second, law students may struggle because they lack basic critical-reading skills.[52] *In their prior education, many law* students "hav[e] not been explicitly taught how to make the jump from comprehension readers to critical readers."[53] With funding of primary and secondary schools tied to student performance on standardized tests, educators are incentivized to teach to the test.[54] "[P]reparation focused on excelling at standardized tests deprives students of the skills to 'read critically, synthesize rules, or analyze material to the extent required in law school.'"[55] The situation does not improve when students engage in undergraduate study. Students have become less patient with the time it takes to understand demanding texts and increasingly adverse to expending the effort needed to read deeply.[56] Many students are doing less of the assigned reading in colleges and universities than students did in the past.[57] In response, undergraduate professors are reducing the amount and complexity of assigned reading and increasing the number of audio and video assignments.[58] Consequently, many students are coming

50. *Id.* at 71–72 (quoting the co-author of a study of how much digital information the average person consumes a day). The average attention span for an adult is five minutes, half of what it was ten years ago. *Id.* at 81.

51. *Id.* at 62 (reflecting that our culture "rewards immediacy, ease, and efficiency" and the "demanding time and effort" involved in critical reading and thinking make them "increasingly embattled entit[ies]"); BARON, *supra* note 12, at 79 (observing the vast amounts of time individuals spend on social media is resulting in shallower readers with decreased attention spans).

52. Williams, *supra* note 29, at 182 (exploring why a "majority of incoming law students lack adequate critical reading skills"); Montana, *supra* note 44, at 433 (examining "the underprepared law student" with particular focus on students' lack of critical reading skills); Graham, *supra* note 29, at 72 (stating today's students come to law school "with two particular barriers to their reading success (1) lack of practice in reading complex or lengthy pieces of writing and (2) over-reliance on technology"); Brett A. Brosseit, *Charting the Course: An Empirically Based Theory of the Development of Critical Thinking in Law Students*, 26 ALB. L.J. SCI. & TECH. 143, 156 (2016) (describing incoming law students' deficiencies in critical reading skills).

53. Williams, *supra* note 29, at 203.

54. *Id.* at 200–01.

55. *Id.* at 201 (quoting Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 338 (1997)).

56. WOLF, *supra* note 47, at 92.

57. BARON, *supra* note 12, at 53 (describing the results of a 2021 survey of faculty at institutions in the United States and Norway).

58. Naomi S. Baron & Anne Mangen, *Doing the Reading: The Decline of Long Long-Form Reading in Higher Education*, 42 POETICS TODAY 253, 274 (2021).

to law school ill equipped to read at the deep level necessary for *legal learning and problem solving.*[59]

Third, law students may struggle with critical reading because students at all levels of education experienced significant learning losses as a result of the Covid-19 pandemic.[60] These deficits have persisted for several years and are not learning gaps, but learning chasms.[61] According to a 2021 survey, 58% of college students felt unprepared for college, 46% said they took longer to complete course work than in pre-Covid years, 65% reported feeling unmotivated, and 58% said they have difficulty concentrating.[62] The learning chasm will affect law students' readiness for law school for years to come as they work their way through the educational system and the system adjusts to students' deficits.

III. LEARNING TO READ LIKE A LAWYER FROM A SCREEN CAN MAKE THINGS EVEN HARDER

Regardless of whether law students are engaged in online, in-person, or hybrid programs,[63] all students are e-reading as part of their legal education. While students read chiefly from casebooks, these casebooks may be paper, digital, or both.[64] Legal education publishers offer casebooks in "print and digital packages with supplementary materials and quizzes, print with digital access, traditional

59. Brosseit, *supra* note 52, at 156.

60. Bastian A. Betthäuser, Anders M. Bach-Mortensen & Per Engzell, *A Systematic Review and Meta-Analysis of the Evidence on Learning During the COVID-19 Pandemic*, 7 NATURE HUM. BEHAV. 375, 380 (2023).

61. *Id.* at 379.

62. Inside Higher Ed & College Pulse, *Student Success Beyond Covid-19—How Has COVID-19 Impacted Students' Academic Success?*, KAPLAN (2021), https://reports.collegepulse.com/student-voice-student-success.

63. While legal education has lagged behind other disciplines in providing access to remote learning, Covid-19 lockdowns propelled law schools into online delivery. Jessie Wallace Burchfield, *Tomorrow's Law Libraries: Academic Law Librarians Forging the Way to the Future in the New World of Legal Education*, 113 LAW LIBR. J. 5, 26–27 (2021); Emma Wood & Misty Peltz-Steele, *Legal Education – Open Your Casebooks Please: Identifying Open Access Alternatives to Langdell's Legacy*, 43 W. NEW ENG. L. REV. 103, 106 (2021). Law school deans believe that online delivery will remain in legal education. Karen Sloan, *Law School Deans Say Online Course Work Is Here to Stay*, REUTERS (Apr. 5, 2022, 5:18 AM), https://www.reuters.com/legal/legalindustry/law-school-deans-say-online-course-work-is-here-stay-2022-04-05/. Post-pandemic, the American Bar Association changed its accreditation standards and increased the permissible number of distance-learning credits to fifty percent for students seeking J.D.s. James Leipold, *Access to Legal Education Expanded Through Increased Distance Learning*, LSAC (Aug. 17, 2023), https://www.lsac.org/blog/access-legal-education-expanded-through-increased-distance-learning. Accredited law schools may seek approval from the ABA to provide J.D. programs entirely online. *Distance Education*, ABA (Dec. 19, 2024), https://www.americanbar.org/groups/legal_education/resources/distance_education/.

64. Lenz, *supra* note 31, at 312–13; Wood & Peltz-Steele, *supra* note 63, at 104.

print, and digital-only versions."[65] Publishers are continuously revamping and enhancing e-casebooks "to be hyperlinked, highlightable, searchable, and in other ways clickable or malleable."[66] Some professors provide students with free or low-cost e-casebooks through various platforms such as the Center for Computer-Assisted Legal Instruction (CALI), H2O, LawCarta, and Semaphore Press, among others.[67] Beyond e-casebooks, professors often post links to digital articles and documents on course pages in Canvas and Blackboard or embed links to them in syllabi.[68] Most law students research using LexisNexis and Westlaw exclusively.[69] When law students read materials from law libraries, likely, they do so digitally. All law libraries have been shifting from print to digital collections.[70] They offer students study aids, traditionally available in print, through digital subscriptions to collections from Aspen, LexisNexis, and West Academic.[71] Finally, when students read as part of clinics and externships, they read like practicing lawyers, i.e., on screens.[72]

After law school, graduates e-read during bar-exam preparation and, in two years, will take paperless bar exams. The major commercial bar-prep companies provide substantive content, exam practice questions, and feedback on practice questions that must be read digitally.[73] In 2024, both Kaplan and Themis provided its course-takers with print books along with digital question banks.[74]

---

65. Lenz, *supra* note 31, at 313.

66. Wood & Peltz-Steele, *supra* note 63, at 114.

67. Lenz, *supra* note 31, at 317–19. CALI, through its eLangdell Press, publishes peer-reviewed, open-access law school texts. *Id.* at 317. H2O, part of the Library Innovation Law at Harvard Law School, provides free e-casebooks and course materials developed by law professors. *Id.* at 318. LawCarta hosts various free or low-cost digital casebooks. *Id.* Semaphore Press publishes low-cost e-casebooks. *Id.* In addition, law professors may provide access to e-casebooks through "SSRN, personal websites, organizational websites, and academic websites." *Id.* at 319.

68. Lenz, *supra* note 31, at 319; Wood & Peltz-Steele, *supra* note 63, at 110, 139–40.

69. KENT C. OLSON ET AL., PRINCIPLES OF LEGAL RESEARCH 12–13 (3d ed. 2020) (ebook); PETER JAN HONIGSBERG & EDITH HO, GILBERT LAW SUMMARY ON LEGAL RESEARCH, WRITING & ANALYSIS 76 (13th ed. 2019) (ebook).

70. Burchfield, *supra* note 63, at 13.

71. *See* ASPEN LEARNING LIBR., https://aspenlearninglibrary.com/ (last visited Mar. 11, 2025); LEXISNEXIS DIGIT. LIBR., https://www.lexisnexis.com/en-us/products/digital-library.page (last visited Mar. 11, 2025); *West Academic Study Aids Collection*, W. ACAD., https://subscription.westacademic.com/ (last visited Mar. 11, 2025).

72. *See* Boonin & Herrera, *supra* note 14, at 109–10.

73. *See BarBri Bar Review*, BARBRI, https://www.barbri.com/bar-review-course/bar-review-course-details/ (last visited Mar. 11, 2025); Carson Lang, *Kaplan vs Themis Bar Review*, TEST PREP INSIGHT, https://testprepinsight.com/comparisons/kaplan-vs-themis-bar-review/#j2 (last updated Jan. 2, 2025) [hereinafter Lang, *Kaplan vs Themis*].

74. Lang, *Kaplan vs Themis*, *supra* note 73.

Kaplan also provided digital flashcards.[75] BarBri provided digital-only book sets to its enrollees.[76] Those who want both digital and print books from BarBri must pay an additional $1000.[77] Also, in 2026, NextGen bar takers in nine jurisdictions will read everything related to the exam from a screen.[78] NextGen takers will not receive exam materials on paper, but will access the materials from their laptops or computers in testing centers.[79] As of publication of this Article, thirty-six jurisdictions will administer a paperless bar exam in 2028.[80] Likely, most jurisdictions will administer a paperless bar exam by 2029.[81]

While digital reading permeates all aspects of legal education, law schools have not explored the impact it is having on students' learning. Not that print reading is superior for education and e-reading is bad;[82] but, individuals inherently read each medium differently. As law students delve into the complex material assigned in law school, they may not realize that reading from screens can exacerbate their struggles to read critically and they can e-read better if they adjust.

A. E-reading Differs from Print Reading

Learning to "[read] well involves not only critical inquiry and thought, but also paying acute attention to the materials [used.]"[83]

---

75. Carson Lang, *Kaplan Bar Review*, TEST PREP INSIGHT, https://testprepinsight.com/reviews/kaplan-bar-review/#j3 (last updated Jan. 1, 2025).

76. *BarBri Bar Review*, *supra* note 73.

77. *Id.*

78. NAT'L CONF. BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 23 (2021), https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf. The first administration of the NextGen bar exam will be in Connecticut, Guam, Idaho, Maryland, Missouri, Northern Mariana Islands, Oregon, Virgin Islands, and Washington in 2026. *NextGen (July 2026)*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/nextgen (last visited Mar. 11, 2025).

79. NAT'L CONF. BAR EXAM'RS, *supra* note 78, at 23.

80. *NextGen (July 2026)*, *supra* note 78 (showing Alaska, Arizona, Colorado, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming will join the original eight NextGen jurisdictions).

81. *See Implementation Timeline*, NAT'L CONF. BAR EXAM'RS, https://nextgen-barexam.ncbex.org/about/implementation-timeline/ (last visited Mar. 11, 2025) (showing final administration of the Multistate Bar Exam, Multistate Essay Exam, and Multistate Performance Test will be in 2028). After 2028, the National Conference of Bar Examiners will only administer the NextGen Bar Exam; therefore, jurisdictions will either adopt it or create their own bar exam materials. *Id.*

82. BARON, *supra* note 12, at 209 ("Print is no panacea for learning. And digital is no inherent villain. Much of the issue is the mental attitude we bring to reading.").

83. JENAE COHN, SKIM, DIVE, SURFACE: TEACHING DIGITAL READING 6 (2021).

Humans have been reading print since about 800 B.C.[84] With print, text is static.[85] The reader follows the author's intended direction as their eyes navigate across the page, line-by-line, through the entire text.[86] Print-reading is also a sensory experience. The reader feels the weight of the tome, may run a finger along the margin, and can inhale the scent of the pages.[87] While print is often idealized, especially in education,[88] it is not a perfect medium. Print can be difficult or impossible to access for those with certain disabilities.[89]

84. Lasso, *supra* note 39, at 4 n.2 ("[t]he evolution from an oral to a textural culture arguably began around 800 B.C. with the use of alphabetic print on papyrus by the Greeks."). In the sixteenth century, mass-produced printed text became widely available following Johannes Gutenberg's invention of the printing press. *Id.* at 4. "Gutenberg's legacy was only possible because of the influence of inventions from China and nations in the Ottoman Empire. Plus, access to both print's raw materials and printing technology itself emerges from long legacies of colonization, ones that undermined the material and intellectual labor of people of color." COHN, *supra* note 83, at 36.

85. Lasso, *supra* note 39, at 8.

86. Debra Moss Curtis & Judith R. Karp, *In a Case, on the Screen, Do They Remember What They've Seen? Critical Electronic Reading in the Law Classroom*, 30 HAMLINE L. REV. 247, 251 (2007); *see* BARON, *supra* note 12, at 10.

87. BARON, *supra* note 12, at 15; Rob Errera, *Printed Books vs. eBooks Statistics, Trends and Facts*, TONER BUZZ (Dec. 11, 2024), https://www.tonerbuzz.com/blog/paper-books-vs-ebooks-statistics/ ("Reading a printed book is a tactile experience. You feel it, you smell it, and you remember it.").

88. *See* BARON, *supra* note 12, at 41.

89. *See* COHN, *supra* note 83, at 113–14 (explaining that many disabled readers rely upon text-to-speech functions and the ability to change the appearance of font to help them with deep reading); Perri Ormont Blumberg, *Why Baby Boomers Love the Kindle—and Millennials Don't*, WALL ST. J. (July 11, 2023, 2:05 PM), https://www.wsj.com/articles/why-baby-boomers-love-the-kindleand-millennials-dont-e28c1eae (reporting that a reader with arthritis in her hands could read e-books more comfortably than hard copy because pages are easier to turn digitally); Ramona McLaughlin & Cheryl Kamei-Hannan, *Paper or Digital Text: Which Reading Medium Is Best for Students with Visual Impairments?*, 112 J. VISUAL IMPAIRMENT & BLINDNESS 337, 346–47 (2018) (concluding that students with visual impairments may benefit from reading on electronic tablets because they can adjust the font size, style, color and contrast); Suzy Stueben & Edward L. Vockell, *Reformatting Text for Learners with Disabilities*, 33 EDUC. TECH. 46, 46–47 (1993) (explaining that the ability to adjust font size, style, and spacing between lines, words, and letters of digital text can help individuals with learning disabilities and dyslexia read more easily); *but see* Gal Ben-Yehudah & Adi Brann, *Pay Attention to Digital Text: The Impact of the Media on Text Comprehension and Self-Monitoring in Higher-Education Students with ADHD*, 89 RSCH. DEVELOPMENTAL DISABIL. 120 (2019) (concluding that higher-education students with ADHD had a more difficult time understanding digitally displayed text than did their peers without ADHD).

Printed texts can be heavy and inconvenient to transport,[90] expensive,[91] and harmful to the environment to produce.[92]

E-reading is a relatively new phenomenon[93] and is gaining in popularity.[94] Most digital text is dynamic.[95] Even e-reading devices designed to replicate print include features such as online dictionaries, find/search functions, and text-to-speech capabilities.[96] Most digital text extends beyond the screen so readers must scroll through content without a sense of where it ends.[97] It may also be embedded with hyperlinks.[98] In contrast to print readers, e-readers may consume text how they want depending upon their scrolls and clicks.[99] While no two e-readers will take identical paths through the digital text, most will skim.[100] When first engaging with digital text, individuals usually scan the text in an "F" pattern or zig-zag style.[101] They may "word spot" through the text, often along the left-

90. *See* Errera, *supra* note 87 (noting benefits of e-books include "lack of a physical object" that takes up no physical shelf space and "very little" computer-memory space).

91. *See* BARON, *supra* note 12, at 29 (for example, paper-textbook costs have risen 1,041% between 1977 and 2015); DUBOSE, *supra* note 13, at 2 (paper files are very expensive for businesses to maintain); *but see* Errera, *supra* note 87 (stating that early in e-publishing, digital books were priced much below print versions; however, current prices between the two mediums are much closer).

92. *See* Hricik & Sneddon, *supra* note 18, at 18; Errera, *supra* note 87 (concluding "eBooks leave little to no carbon footprint" compared to print books but "discarded e-read[ing devices] lead to toxic electronic waste").

93. Lasso, *supra* note 39, at 6.

94. Zuhal Çeliktürk Sezgin, *Systematic Analysis of Digital Reading Studies in the Digital Age*, 9 PARTIC. EDUC. RSCH. 233, 233 (2022); *see* Errera, *supra* note 87 ("By 2029, the global physical book market is projected to serve approximately 1.9 billion readers, while e-reader users are expected to reach 1.2 billion by 2027.").

95. Sezgin, *supra* note 94, at 235.

96. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 285–86.

97. Curtis & Karp, *supra* note 86, at 250.

98. *Id.* at 256.

99. Fei Victor Lim & Weimin Toh, *How to Teach Digital Reading?*, 14 J. INFO. LITERACY 24, 27 (2020).

100. WOLF, *supra* note 47, at 77.

101. *Id.* While the "F" pattern is the most common, several other scanning patterns exist, including:

- **Layer-cake pattern** occurs when the eyes scan headings and subheadings and skip the normal text below. A gaze plot or heat map of this behavior will show horizontal lines, reminiscent of a cake with alternating layers of cake and frosting.
- **Spotted pattern** consists of skipping big chunks of text and scanning as if looking for something specific, such as a link, digits, a particular word or a set of words with a distinctive shape (such as an address or signature).
- **Marking pattern** involves keeping the eyes focused in one place as the mouse scrolls or finger swipes the page, like a dancer fixates on an object to keep balance as she twirls. Marking happens more on mobile than on desktop.
- **Bypassing pattern** occurs when people deliberately skip the first words of the line when multiple lines of text in a list start all with the same word(s).
- **Commitment pattern** consists of fixating on almost everything on the page. If people are highly motivated and interested in content, they will read all the text in a paragraph or even an entire page.

hand side to grasp the context.[102] Then, they will dart to the conclusion at the end and may sometimes return to the text for additional details.[103] As with print, digital text has drawbacks. The amount of information available to the e-reader can be overwhelming and disorienting.[104] Reading from screens, many of which emit their own light, may cause eye strain and headaches.[105] Finally, e-reading involves the "risk[s] of pop-up ads, dying batteries, and power failures."[106]

Table IIA Comparison of Print and Digital Reading

Print	**Digital**
Linear	F-Pattern or Zig Zag
Author-Directed	Reader-Directed
Static	Dynamic
Visual, Tactile, Olfactory	Visual & Sometimes Tactile
Has Volume & Weight; Not Dependent on Power	Portable, Convenient, & Accessible with Power Source
Select and Limited Information	Unlimited Information
Costs Associated with Printing and Shipping	Typically Less Expensive than Print
Viewed with Reflected Light	Viewed with Emitted Light Except for E-Ink Devices
Environmental Impact	Environmentally Friendlier

Kara Pernice, *F-Shaped Pattern of Reading on the Web: Misunderstood, But Still Relevant (Even on Mobile)*, NIELSEN NORMAN GRP. (Nov. 12, 2017), https://www.nngroup.com/articles/f-shaped-pattern-reading-web-content/. For images of these patterns, see *4 Types of Eye Tracking Patterns: How People (Don't) Read on Web*, CREATIVE HANDLES, https://creativehandles.com/blog-posts/79/4-types-of-eye-tracking-patterns-how-people-don-t-read-on-web [https://perma.cc/DPB9-67BG] (last visited July 13, 2023).

102. WOLF, *supra* note 47, at 77.

103. *Id.*

104. *See* BARON, *supra* note 12, at 12 (explaining the searching and scanning of digital texts are the brain's responses to an information-intensive environment); Hricik & Sneddon, *supra* note 18, at 16 (discussing how a reader can become disoriented when scrolling or clicking though a digital text).

105. *See* DUBOSE, *supra* note 13, at 4 (comparing print, which is viewed with reflected light, with digital text, which is viewed from a screen emitting its own light).

106. Errera, *supra* note 87.

B. Law Students May Struggle to Read Digital Text as Deeply as They Do Print

Scientific study of digital reading is in its infancy.[107] So far, much of the research has focused on the differences between reading in print and from a screen.[108] These studies have yielded conflicting conclusions as to whether one medium is better than the other for educational purposes,[109] and the conflicting results likely stem from differences in methodology among studies.[110] For example, the type and number of questions that study-subjects are asked, the length and content of the texts used, and the screen sizes used by subjects, among other factors, can affect study outcomes.[111] The summary of research that follows is focused on studies most closely related to the close, critical reading that law students and lawyers do.

Studies indicate that print is best suited for reading long, detailed, informational texts,[112] like appellate court opinions. Effective critical reading is almost always associated with print.[113] Several meta-analyses, which are scholarly reviews of numerous studies for overall trends, conclude that readers generally demonstrate better retention and comprehension when reading text in print rather than when reading the same text from a screen.[114] One 2021 study of undergraduate students reading a scientific text explored why print readers usually demonstrate better comprehension than screen readers.[115] Researchers tracked the undergraduate students' eye movements while reading and observed that the digital readers seldom re-read the text.[116] In contrast, print readers spend about

---

107. Sezgin, *supra* note 94, at 234.

108. *Id.* at 245–46.

109. Yu-Cin Jian, *Reading in Print Versus Digital Media Uses Different Cognitive Strategies: Evidence from Eye Movements During Science-Text Reading*, 35 READING & WRITING 1549, 1550 (2022). Studies from the early 2000s seem to suggest readers' comprehension was similar when reading print and digital text. BARON, *supra* note 12, at 79. Recently, research suggests that print is better for reading comprehension. *Id.*

110. BARON, *supra* note 12, at 75.

111. *Id.* at 75–76; Jian, *supra* note 109, at 1550.

112. BARON, *supra* note 12, at 79, 83–84 (explaining in reading research that long texts are 500 or more words); COHN, *supra* note 83, at 100 (For studies testing readers' comprehension of informational texts, as opposed to narrative texts, "the screen proved to be more consistently an inferior option[.]").

113. BARON, *supra* note 12, at 12–13; James B. Levy, *Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School*, 19 CHAP. L. REV. 241, 293 (2015).

114. BARON, *supra* note 12, at 79; Ymkje E. Haverkamp et al., *Is It the Size, Movement, or Both? Investigating Effects of Screen Size and Text Movement on Processing, Understanding, and Motivation When Students Read Informational Text*, 36 READING & WRITING 1589, 1590 (2022); COHN, *supra* note 83, at 12.

115. Jian, *supra* note 109, at 1562.

116. *Id.* at 1563.

half their time on a first-pass read and equal time re-reading specific sections of text.[117]

Regarding essay exam questions and deposition transcripts, where readers need to recall details about when and where events take place within a timeline, print readers again have an advantage over screen readers.[118] Meta-analytic studies show that individuals recall more details after reading print text than they do after reading digital text.[119] In one study, adults read long narrative texts (10,800 words) for an hour from either a print book or a Kindle e-reader.[120] There were no hyperlinks and multi-media content in the digital version of the text.[121] When answering general questions about the overall point of the piece, print and digital readers performed equally.[122] Also, participants' level of engagement with the text did not differ depending upon the medium.[123] However, when recalling particular details about the chronological timeline of the story and the location of these details in the text, the print readers outperformed the screen readers.[124]

Digital texts are better than printed texts in cases where readers are searching and reviewing multiple sources simultaneously,[125] such as performing legal research online.[126] Research shows that the ability to search and quickly toggle between documents makes digital research easier and more efficient than print research.[127] Additionally, studies indicate that it may be easier for individuals to read several digital documents at once when they have background knowledge about the topic.[128] This may explain why attorneys who have been in practice for several years, and have more legal knowledge, appear to have an easier time searching and scanning digital sources than do law students, who are digital natives.[129]

---

117. *Id.* at 1562.
118. *See* BARON, *supra* note 12, at 84.
119. *Id.* at 83.
120. Anne Mangen et al., *Comparing Comprehension of a Long Text Read in Print Book and on Kindle: Where in the Text and When in the Story?*, 10 FRONTIERS PSYCH. 1, 7 (2019).
121. *Id.* at 9.
122. *Id.* at 7.
123. *Id.*
124. *Id.*
125. BARON, *supra* note 12, at 84, 103.
126. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 273.
127. BARON, *supra* note 12, at 103.
128. *Id.* at 109–11.
129. Liesel Spencer & Elen Seymour, *Reading Law: Motivating Digital Natives to 'Do the Reading,'* 23 LEGAL EDUC. REV. 177, 179 (2013) (explaining digital familiarity should not be mistaken with digital literacy, i.e., the ability to find, evaluate, organize, use, and communicate digital information).

In seeking to explain why individuals usually understand and retain complex material better when they read it in print than from screens, researchers have set forth two theories. First, certain aspects of digital reading make it more challenging for individuals to read deeply in that medium. Second, many individuals assume that text on a screen will be easier to read than printed materials, and therefore, devote less time and effort when e-reading.

1. Aspects unique to the digital environment may adversely affect how deeply students read

Researchers hypothesize that certain characteristics associated with screen reading make it more challenging for individuals to read deeply in that medium. While digital devices do not force individuals to read quickly, "the technology is designed to enable–and entice–us to do so."[130] Certain facets of e-reading, like scrolling, clicking on hyperlinks, and light-emitting screens, likely contribute to individuals reading more quickly and less deeply than they would read in print.[131] The remainder of this section details how aspects of the digital environment impact a reader's critical-reading abilities.

- **Unlimited information from light-emitting screens.** Researchers find that individuals "power brows[e]," rather than read line-by-line when engaging with digital text.[132] While people have "searched and skimmed for centuries when reading print[,][133] the scanning and selective reading associated with e-reading are the brain's strategic response to an information-intensive environment."[134] Researchers believe people inherently read digital text more quickly and less deeply to conserve mental energy and focus and avoid information overload.[135] Additionally, individuals may scan digital text, rather than read it line-by-line, because screens can be hard on

130. BARON, *supra* note 12, at 12.
131. *Id.*
132. Williams, *supra* note 29, at 198; *see* WOLF, *supra* note 47, at 80 (explaining that the rapid, shallow reading and thinking people do when reading from screens is beginning to "bleed over" to when they read in print).
133. BARON, *supra* note 12, at 227.
134. *Id.* at 12; COHN, *supra* note 83, at 107.
135. BARON, *supra* note 12, at 12. In the early days of digital reading, individuals read from screens more slowly than they did from print, in part due to poor screen resolutions, challenging line lengths and fonts, and difficulties scrolling. Nanna Inie et al., *Interacting with Academic Readings — A Comparison of Paper and Laptop*, 4 SOC. SCIS. & HUMANS. OPEN, no. 1, 2021, at 2 (Article No. 100226).

eyes.[136] Individuals blink 50% less when reading from screens.[137] Eyestrain may explain why digital readers are less likely to finish the material they read, and when they finish, are less likely to re-read it.[138] Therefore, the nature of the screen itself may adversely affect a reader's comprehension.[139]

- **Scrollable format**. The fluid nature of digital text, its lack of "fixity," and lack of tactile feedback as to where readers are in a text, as compared to print, impact e-readers' abilities to remember where details are within a text.[140] Scrolling distorts the spatial layout of the material and makes it more difficult for the mind to encode the information.[141] It also zaps readers' energy because of the cognitive effort needed to focus on the text and how the reader is moving through it.[142] In contrast, print provides a visual and tactile sense of progress—print readers see and feel how far they have read and how much they have to go.[143] When reading in print, the mind visually maps the material and the individual often remembers generally where an idea appeared on a page.[144] These mental maps lead to better understanding of the text's structure, which enhances comprehension and recall.[145] Also, print allows readers to more easily read recursively, back-tracking and re-reading portions, which aids in their understanding of the overall text.[146]

---

136. Mangen et al., *supra* note 120, at 2 (explaining that individuals may read more quickly on screens because they shine light directly into eyes while reading on paper is done with reflected light).

137. Daniel Porter, *Digital Devices and Your Eyes*, AM. ACAD. OPHTHAL. (Oct. 15, 2024), https://www.aao.org/eye-health/tips-prevention/digital-devices-your-eyes.

138. Levy, *supra* note 113, at 295; *but see* Mangen et al., *supra* note 120, at 2 (explaining that e-reading devices designed to mimic paper have readability equal to, and occasionally better than, print).

139. *See* Jian, *supra* note 109, at 1562 (hypothesizing that readers' comprehension in print may be better than digital text because of visual fatigue from LCD screens compared to paper or e-ink readers); Levy, *supra* note 113, at 295 (suggesting that e-reading behaviors imply that screens are for "one-off" reading, while print is for deep and slow reading).

140. Mangen et al., *supra* note 120, at 8.

141. Haverkamp et al., *supra* note 114, at 3; Hricik & Sneddon, *supra* note 18, at 16.

142. BARON, *supra* note 12, at 87; MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 276.

143. Mangen et al., *supra* note 120, at 3.

144. Meyer, *supra* note 29, at 720; Hricik & Sneddon, *supra* note 18, at 16.

145. Levy, *supra* note 113, at 296 (explaining that printed books provide a better sense of chronology and organization than screens because there is a physical movement through the text, both visually and tactually).

146. Mangen et al., *supra* note 120, at 8.

- **Absent or cumbersome annotating features**. It is fairly easy to annotate print by highlighting, underlining, and writing notes in the margins.[147] Even e-readers designed to replicate print with annotation features do not provide the same haptic experience as does print.[148] One recent study found that university students highlighted paper and digital text in similar amounts; however, these students made significantly fewer notes on the digital text than they did in paper.[149] Annotating may assist in deep reading because it slows down reading speed and allows the reader to interact with the text.[150]

- **Hyperlinks**. Research shows that hyperlinks divide the reader's attention resulting in strained cognitive abilities, decreased learning, and weakened understanding.[151] Having to make repeated decisions of whether to click on hyperlinks distracts the reader and expends valuable memory that could be used to focus on content.[152] Hyperlinks can also lead a reader off task[153] and result in a reader feeling overwhelmed with information.[154]

- **Digital distractions and multi-tasking**. Device notifications and pop-up ads affect reading comprehension.[155] Research shows that when readers are interrupted, their ability to connect and synthesize information across the entire passage is impaired.[156] Digital devices also make it easier to respond to notifications and switch back and forth between

147. BARON, *supra* note 12, at 2.

148. Levy, *supra* note 113, at 295; *see* Meyer, *supra* note 29, at 721 (explaining that the sense of touch positively impacts cognition while reading).

149. Inie et al., *supra* note 135, at 12.

150. BARON, *supra* note 12, at 36; Hricik & Sneddon, *supra* note 18, at 16; *but see* Inie et al., *supra* note 135, at 13 (concluding that there was no statistically significant difference in memory scores for students who highlighted and made notes and those who did not, both on paper and laptops).

151. Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 788 (2015). In one study, the test group with the fewest hyperlinks in an online text had the highest recall of the material. Meyer, *supra* note 29, at 717. The test participants said the hyperlinks disrupted their reading, they had difficulty deciding which links to click, and they felt disoriented while reading in a nonlinear fashion. *Id.*

152. Meyer, *supra* note 29, at 717.

153. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 271–72.

154. Meyer, *supra* note 29, at 717–18 (discussing that a common coping mechanism for information overload is to ignore information without processing it).

155. *Id.* at 711; *see* DUBOSE, *supra* note 13, at 5 (discussing how lawyers "work in the most distraction-prone workplace in the history of mankind.").

156. Williams, *supra* note 29, at 193.

reading and other tasks.[157] More readers tend to multi-task when they read on screens compared to paper.[158] Multi-tasking while reading can overwhelm the working memory and decrease the reader's ability to concentrate.[159] It increases the likelihood of making mistakes and decreases the likelihood of retaining the information read.[160] Finally, because the brain needs time to adjust each time the reader switches tasks, multi-tasking also makes the reading process longer.[161]

2. Many students' inherent assumptions about digital texts may cause them to read with less effort and attention

Scholars theorize that the primary difference between print and digital reading may actually lie in the way the reader thinks about the medium, not necessarily how the reader cognitively processes the text.[162] Based upon the medium of their reading materials, individuals inherently develop an initial assessment of reading tasks before they begin and use this assessment to regulate their reading processes.[163] Many readers assume educational, printed materials call for careful, slow, and close reading; therefore, they read the materials this way.[164] When tested on what they read in print, individuals generally demonstrate deeper understanding of printed material.[165] In contrast, many individuals view digital text as easier to

157. Newell, *supra* note 151, at 767.

158. Virginia Clinton-Lisell, *Stop Multitasking and Just Read: Meta-analyses of Multitasking's Effects on Reading Performance and Reading Time*, 44 J. RSCH. READING 787, 790 (2021); Meyer, *supra* note 29, at 711 (reporting that 85% of American undergraduate students surveyed said they multi-tasked when reading online compared to 26% of students that indicated they multi-tasked when reading paper copy).

159. Williams, *supra* note 29, at 192–93.

160. *Id.*; Clinton-Lisell, *supra* note 158, at 789. The greatest decreases in accuracy occur when individuals are multi-tasking while completing intellectually demanding work. Newell, *supra* note 151, at 770.

161. Clinton-Lisell, *supra* note 158, at 788; Newell, *supra* note 151, at 768 (explaining multi-tasking involves "switch cost," which is the time the brain needs to change from one task to another. The more complex or cognitively-similar tasks are, the longer the brain needs to switch between the tasks.).

162. *See* Jian, *supra* note 109, at 1552, 1562 (concluding that the primary differences between reading print versus digital text may lie in the reader's metacognitive regulation rather than the reader's cognitive processes); COHN, *supra* note 83, at 13 (quoting Kretzschmar study that "the skepticism towards digital reading media . . . may reflect a general cultural attitude towards reading in this manner rather than measurable cognitive effort during reading[.]").

163. Ladislao Salmerón et al., *Relation Between Digital Tool Practices in the Language Arts Classroom and Reading Comprehension Scores*, 36 READING & WRITING 175, 176 (2023); Jian, *supra* note 109, at 1563 (describing an eye-movement study in which the individuals reading print showed more selective and intentional reading behaviors, reflecting that they employed metacognitive strategies because the reading material was on paper).

164. BARON, *supra* note 12, at 80; Jian, *supra* note 109, at 1562.

165. Jian, *supra* note 109, at 1563.

understand and read, even if the content is complex.[166] Therefore, readers of digital materials usually dedicate less time, attention, and effort than they would if they were reading print.[167] When e-reading, they usually discard familiar print-based reading strategies for boosting comprehension.[168] Digital readers also tend to overestimate their comprehension of the material, which impacts how they regulate their reading.[169] In the many studies where print reading was superior to e-reading for critical reading, researchers did not control for subjects' attitudes, motivation, or prior study habits.[170] When researchers took readers' mindsets into account, studies show that screen readers performed as well on tests as print readers.[171]

The majority of college and graduate students think that print is superior to digital text for learning; therefore, they prefer to read in print.[172] Generally, students report it is easier to focus, they remember more, and they are more likely to re-read when reading in print.[173] Students' preferences for print may extend beyond the pragmatic and include an emotional component.[174] Surveys of undergraduate students show that many "find comfort and pleasure" reading books in print.[175] Informal surveys of my first-year students align with these findings—75% of which said they preferred print materials when reading for classes in school.[176] Only 16% of students preferred reading educational materials digitally and 9% did not prefer one medium over the other.[177] One student noted, "I prefer print because holding a book gets me into the mindset of

166. BARON, *supra* note 12, at 217 (explaining that many students perceive digital materials as requiring less time and energy to read).

167. *See id.* at 205, 81; Jian, *supra* note 109, at 1552–53, 1562.

168. Lim & Toh, *supra* note 99, at 28.

169. Salmerón et al., *supra* note 163, at 176; Agnieszka Ślęzak-Świat, *Complementarity of Reading from Paper and Screen in the Development of Critical Thinking Skills for 21st-Century Literacy*, 5 THEORY & PRAC. SECOND LANG. ACQUISITION 75, 90 (2019).

170. COHN, *supra* note 83, at 12–13.

171. Lim & Toh, *supra* note 99, at 27; BARON, *supra* note 12, at 88–92.

172. BARON, *supra* note 12, at 77 (summarizing the results of two major studies of undergraduate and graduate students conducted between 2013 and 2016); COHN, *supra* note 83, at 68–70 (reviewing surveys of undergraduate and graduate students conducted between 2008 and 2018); Errera, *supra* note 87 (citing 2021 survey that revealed 68% of readers between eighteen and twenty-nine years old in the United States prefer print books).

173. BARON, *supra* note 12, at 77; Ślęzak-Świat, *supra* note 169, at 78.

174. COHN, *supra* note 83, at 68.

175. *Id.*

176. 2023 Poll of Commonwealth Law 1Ls, *supra* note 38.

177. *Id.* In 2022, 97.3% of my first-year students reported purchasing or renting the majority of their law school textbooks in print. Unpublished Poll Results of First-year Students in Section NP1 of Legal Methods I at Widener University Commonwealth Law School (Aug. 18, 2022) (on file with author) [hereinafter 2022 Poll of Commonwealth Law 1Ls] (anonymous student survey).

work/studying."[178] Some of my students explained that it is easier to highlight and annotate print, reading print provides a welcomed respite from the screens they use in daily life, and it is easier to find a particular page in print during class.[179] My students also liked the feel of physical books too.[180] The culture around hardbound books, including libraries and bookstores, contributes to students' feelings "that print offers fixity, permanence, and authenticity."[181]

Nevertheless, digital reading materials are gaining popularity among law students. A small study showed that law students are currently divided over preferences for print versus digital casebooks.[182] Preferences for digital text over print emerge when students consider the cost of materials, impact on the environment, searchability, and convenience.[183] Law students note that e-casebooks help them stay organized.[184] Most law students, even those reading casebooks in print, type their case briefs and outlines.[185] E-casebooks allow students to keep their textbooks housed with all their study materials.

C. Law Students (and Their Professors) May Not Appreciate that the Struggle to e-Read is Real

While many law students prefer to read in print, they likely think of themselves as strong e-readers. Generally, students are overconfident in what they genuinely understand when reading from screens.[186] Most legal educators share this overconfidence in their students' abilities because these students have done a great deal of e-reading in their K-12 and undergraduate educations.[187] Educational institutions across the world have been rapidly incorporating

178. 2022 Poll of Commonwealth Law 1Ls, *supra* note 177.

179. *Id.*; 2023 Poll of Commonwealth Law 1Ls, *supra* note 38.

180. 2022 Poll of Commonwealth Law 1Ls, *supra* note 177; 2023 Poll of Commonwealth Law 1Ls, *supra* note 38.

181. COHN, *supra* note 83, at 76.

182. Seonghee Lee et al., Extended Abstract, *A Case Study on H20 OpenCasebook: Uncovering Digital Reading in Law School*, 2023 CHI. CONF. HUM. FACTORS COMPUTING SYS., Article No. 373, at 3 (Apr. 23–28, 2023) (study of twenty-one respondents either currently enrolled in law school or recent graduates).

183. *Id.* at 3–4; *see* COHN, *supra* note 83, at 79 (citing research that "even when students state a *preference* for reading print, they may very well opt to read in digital spaces out of convenience, accessibility, and efficiency").

184. 2022 Poll of Commonwealth Law 1Ls, *supra* note 177.

185. Lee et al., *supra* note 182, at 4.

186. Ślęzak-Świat, *supra* note 169, at 90.

187. *See* Kara Arundel, *Survey: Use of Print-Only Materials in Classrooms Likely to Dwindle*, K-12 DIVE (Aug. 29, 2022), https://www.k12dive.com/news/exclusive-use-of-print-materials-in-classrooms-likely-to-dwindle/630606/ (observing that students learn from mostly digital or a mix of digital or print materials); *see also* Sezgin, *supra* note 94, at 233–34 (reporting that the use of digital texts has become the norm in primary school education).

digital reading into education under the "assumption" that screens will improve students' motivation and learning.[188] With the Covid-19 pandemic and its aftermath, using digital-only reading materials increased in K-12 education.[189]

What law students and faculty may not appreciate is that despite increased e-reading in K-12 education, and students' frequent cell phone use, students' abilities to navigate through and understand digital texts do not develop from mere exposure.[190] Savvy social media use does not equate to knowing how to effectively search a digital database or utilize the functions within PDF editors to annotate digital readings.[191] Critical e-reading is a learned skill that "requires sustained guidance" to develop.[192] Either students are not learning digital-reading strategies or they are not remembering them.[193] As a result, younger readers struggle more than older readers to understand text read from screens.[194]

IV. DESPITE THE CHALLENGES, STUDENTS CAN BECOME COMPETENT CRITICAL E-READERS WITH INSTRUCTION

Critical reading skills do not develop organically.[195] Individuals learn to become better readers depending upon what they read, in what medium they read, and how they are taught to read.[196] In her book on the reading brain in a digital world, Dr. Maryanne Wolf recommends teaching students to read effectively both in print and from screens—"building a biliterate brain."[197] Scholars who have studied critical reading in law school conclude that all law students can learn how to critically read legal texts and they benefit from doing so.[198] By adopting print-based, critical-reading strategies,

188. Salmerón et al., *supra* note 163, at 176.

189. Arundel, *supra* note 187. A survey of pre-K-12 teachers and administrators across the United States showed that classes using print materials exclusively dropped to 1% during pandemic-related school closures. *Id.* In the spring of 2022, the number of print-exclusive classes rose to 5%, which was far less than the 22% of classes that used all-print materials during the 2018-2019 school year. *Id.*

190. COHN, *supra* note 83, at 100; Mangen et al., *supra* note 120, at 2.

191. COHN, *supra* note 83, at 15.

192. *Id.* at 97.

193. *See id.* at 15, 100.

194. *Id.* at 100; *see also* BARON, *supra* note 12, at 81–82 (relating recent studies of undergraduate students show they tend to read digital text faster than they do print, comprehend less when reading digital than print text, and their comprehension worsens when reading digital text under time pressure).

195. *See* COHN, *supra* note 83, at 83–87; Lim & Toh, *supra* note 99, at 27–28.

196. WOLF, *supra* note 47, at 19.

197. *Id.* at 169.

198. *See* CHRISTENSEN, ONE L OF A YEAR, *supra* note 12, at 22; DOROTHY H. EVENSEN ET AL., DEVELOPING AN ASSESSMENT OF FIRST-YEAR LAW STUDENTS' CRITICAL CASE READING AND REASONING ABILITY: PHASE 2, at 39 (2009) (noting that students' varying degrees of case

students read law more accurately, efficiently, and effectively.[199] In one study, law students who received instruction in traditional critical-reading skills demonstrated better comprehension of legal texts than students who did not.[200] In contrast, another multi-year study found that law students, left on their own without instruction in critical reading skills, "do not appear to improve their case reading and reasoning abilities over their [three] years of [traditional] legal education[.]"[201] While researchers have yet to study the benefits of teaching students to e-read critically in law schools, existing studies show that this type of instruction benefits students in other higher education settings.[202] Thus, law students, too, can presumably learn to read digital text as effectively as they do print if they become mindful of the brain's natural response to reading on a screen. They can also counter the physical challenges of reading from a screen, i.e., scrolling, distractions, and fatigue, by learning to adopt certain strategies.[203]

Unfortunately, critical-reading instruction in both mediums is lacking in law schools. Most casebook, experiential, and clinical courses do not explicitly address or assess critical-reading skills.[204] Typically, critical-reading instruction is provided before or at the beginning of the first semester of law school during orientation, as part of academic-support courses or workshops, or in legal-writing courses.[205] The goal is to assist students as they transition to law study; however, most of the instruction is not in enough detail, or over a long enough period, for students to master critical reading techniques.[206] Even if the critical-reading instruction provided is

---

reading and reasoning abilities could be equalized through explicit instruction in critical reading skills).

199. Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603, 647 (2007); GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 333.

200. Grisé, *Critical Reading Instruction*, *supra* note 45, at 271; *see also id.* at 300 (noting that critical reading instruction also improves students' legal writing).

201. EVENSEN ET AL., *supra* note 198, at 39.

202. *See* BARON, *supra* note 12, at 133–34.

203. *See* COHN, *supra* note 83, at 129–31; Lim & Toh, *supra* note 99, at 29.

204. *See* Williams, *supra* note 29, at 221 ("[C]asebook faculty . . . believe their job to be fine-tuning law students' critical reading skills rather than introducing or developing these skills."); Mitchell, *supra* note 5, at 298 (discussing the lack of clinical teaching and lawyering skills scholarship on critical reading and suggesting one of the reasons may be that clinicians assume students learn to critically read law during the first year of law school).

205. Grisé, *Critical Reading Instruction*, *supra* note 45, at 303; Williams, *supra* note 29, at 219 (explaining that "few first year legal writing courses have enough time to focus on critical reading skills in . . . depth"); *see also* Association of Academic Support Educators, AASE Individual Survey Results 2023, at 2, 6, 10, 13 (2023) (on file with author) (reporting that many law schools include critical reading instruction in pre-orientation, orientation, or as part of an academic support course or workshop for first-year students).

206. Grisé, *Critical Reading Instruction*, *supra* note 45, at 303.

temporarily effective, it is rarely reviewed or reinforced after a law student's first semester.[207] Compounding these problems, law schools rarely teach students strategies for reading on a screen, even when the instruction itself is provided online.[208]

Because e-reading does not naturally nurture slow, deep thinking, scientists suggest teaching e-reading skills "hand-in-hand" with "critical thinking skills."[209] Any faculty member teaching students to "think like lawyers" should also teach them to e-read like lawyers. Law schools should provide students with numerous opportunities to hone their critical e-reading skills because these skills require sustained practice. Returning to the topic in various contexts during their education helps students recognize that the skill transfers to all types of legal reading.[210] Fortunately, critical e-reading instruction connects naturally to various parts of the law school experience. It ties into what is already being provided on critical reading at the beginning of law school. In addition, faculty can teach or reinforce critical e-reading skills in any course, including experiential courses and clinical experiences,[211] workshops and

207. *See* Williams, *supra* note 29, at 219 ("If critical reading is taught in law school at all, it is often taught by legal writing professors or academic support staff in short orientation programs.").

208. *See Zero-L Course Syllabus*, ZERO-L HARV. L. SCH., https://online.law.harvard.edu/wp-content/uploads/2024/02/HLS_B2C_Zero-L_Course_Syllabus_Short-FINAL-ua.pdf (last visited Mar. 11, 2025) (introductory online course teaching how to read a case and statute but does not appear to discuss the differences between reading in print or on a screen); Steven Foster, *Advanced Reading for Law School*, CALI, https://www.cali.org/lesson/19488 (last visited Mar. 11, 2025) (online lesson on legal reading strategies that does not address medium of text); Melissa A. Hale, *Primary v. Secondary Sources: Why Is Reading Cases So Hard?*, CALI, https://www.cali.org/lesson/19475 (last visited Mar. 11, 2025) (online lesson demonstrating how to read case law and does not discuss print/digital strategies); Purchase Page for Katherine B. Brem's Interactive Legal Research and Writing Lessons: Objective Writing – Analyzing a Single Case, W. ACAD., https://www.westacademic.com/Modular-Legal-Research-Writing-Objective-Writing-Analyzing-a-Single-Case-Brem-9781685610524 (last visited Mar. 11, 2025) (online module discussing how to read and brief a case in a digital lesson but does not discuss print/digital reading strategies); Purchase Page for Carolyn Williams' Interactive Legal Research and Writing Lessons: Common Law Research – Critically Reading Caselaw, W. ACAD., https://www.westacademic.com/Modular-Legal-Research-Writing-Common-Law-Research-Reading-Briefing-Cases-Williams-9781685613907 (last visited Mar. 11, 2025) (online module suggesting students read in print or on a tablet but does not provide strategies for digital reading). *But see* KRISTEN KONRAD TISCIONE, LEGAL WRITING: FROM ADVICE TO ADVOCACY, A CONTEMPORARY APPROACH 26–28 (2021) (textbook addressing advantages and disadvantages to reading law in print and online).

209. Ślęzak-Świat, *supra* note 169, at 90.

210. *See* Brennan, *supra* note 34, at 30–31 (explaining that students must encounter a new concept on at least three occasions to learn it and learning a skill in different parts of an education can help ingrain it in students minds).

211. *See* Mitchell, *supra* note 5, at 319–22 (providing suggestions for how clinicians can assist in students' development as critical readers); Boonin & Herrera, *supra* note 14, at 135 (discussing how clinics provide students with opportunities to develop their critical thinking, which could include reading material remotely from screens).

professional development opportunities, and bar preparation courses provided by law schools. Students can practice critical e-reading skills within law school activities such as law review and moot court.

Those who object to incorporating e-reading instruction into courses, clinics, and workshops dismiss the importance of this foundational skill for law school and practice. The responsibility cannot fall solely upon the shoulders of professors within a*cademic support and legal research and writing programs.*[212] Anyone who is "an expert reader of [the] law" and is interested in preparing students to effectively practice law is qualified to teach critical e-reading skills.[213] No special training is necessary.[214] Any faculty member "can affirmatively *teach* strong reading strategies by exposing students to the reading strategies they need to use when reading law and/or by modeling for students how an expert puts those strategies into practice in a legal context."[215] Without instruction and practice throughout their legal education, students may not become competent critical e-readers.[216]

V. SMALL STEPS THAT WILL GO A LONG WAY IN HELPING STUDENTS DEVELOP CRITICAL E-READING SKILLS

Regardless of your role within your institution, you have various opportunities to introduce or reinforce critical e-reading skills with students. You can share what you know about reading from screens, discuss the strategies you use to read digital text effectively, and provide students with opportunities to grow in their critical e-reading abilities.[217]

A. Know the Mediums that Your Students Are Using to Read

As a legal educator, you are likely a digital immigrant, born before personal computers and cell phones were integral parts of daily

212. *See* Brosseit, *supra* note 52, at 149 (discussing how "law school academic support programs cannot address the widespread fundamental deficits in critical thinking among incoming students"); Williams, *supra* note 29, at 219 (explaining that critical reading cannot be taught exclusively in academic support and legal writing courses because that "shuts off discussion with other stakeholders about critical reading deficiency so there is no shared understanding or shared commitment to solutions").

213. RUTH ANN MCKINNEY, READING LIKE A LAWYER: MASTERING THE ART OF READING LAW LIKE AN EXPERT 5 (2d ed. 2022) [hereinafter MCKINNEY, TEACHER'S MANUAL] (providing a manual and teaching guidelines for using Professor McKinney's casebook).

214. *Id.*

215. *Id.*

216. *See* COHN, *supra* note 83, at 163.

217. *See* MCKINNEY, TEACHER'S MANUAL, *supra* note 213, at 5.

life.[218] Print was likely a large part of your education, and you prefer print for learning.[219] You probably believe that your students also prefer to learn in print.[220] It is possible you do not know what mediums your students use for your courses. You can help your students by taking stock of how they are reading without passing judgment on their choices.[221] Observe students inside and outside the classroom or clinic. Many students may be reading from casebooks in class, but are they taking notes on their laptops during class? Are they reading from screens outside of class most of the time? Ask your students how they read and prefer to read school materials.[222]

If your students are e-reading in your courses or clinics, familiarize yourself with how they are experiencing the content. Many students e-read some portion of course material using their cell phones, so use your phone, in addition to your computer, to view your course content.[223] Examine what you post to Canvas, Blackboard, or TWEN. Access the popular study aids associated with your courses through the digital platforms. Familiarize yourself with how to navigate within these digital texts and how to annotate them. Understand the features that accompany your casebook in its digital form, many of which are interactive.[224] Address any impediments students may face when accessing your digital reading.[225]

---

218. Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation's Research and Analysis*, 18 BARRY L. REV. 167, 176 (2012).

219. *See id.* at 177.

220. Wood & Peltz-Steele, *supra* note 63, at 111.

221. *See* COHN, *supra* note 83, at 87–88.

222. You can poll students as to:

- whether they purchased/rented the course textbook in print, as an e-book, or the printed book/e-book packaged together;
- whether they purchased/rented the majority of their law school textbooks in print, as e-books or print/digital books packaged together;
- how they prefer to read materials for courses in school (in print or digitally);
- why they prefer reading school materials in a particular medium (print/digital);
- if they read school material digitally, do they read from a laptop, tablet, and/or cell phone;
- how do they take notes on pre-class reading assignments (by hand on paper, tablet, or e-ink device or type on digital device); and
- how they would prefer to interact with materials distributed during class time—on paper or digitally.

223. *See* James M. Lang, *How to Become a Mobile-Mindful Teacher*, CHRON. HIGHER EDUC. (May 15, 2023), https://www.chronicle.com/article/how-to-become-a-mobile-mindful-teacher.

224. *See* Wood & Peltz-Steele, *supra* note 63, at 114. Aspen Publishing's Connected eBooks allow students to sync annotations and highlights with case-briefing and outlining functions. Aspen Publ'g, *Connected eBooks*, CASEBOOK CONNECT, https://www.casebookconnect.com/connectedeBooks (last visited May 31, 2024).

225. *See* Lang, *supra* note 223.

B. Mindfully Consider Reading Mediums and Provide Students with Options

Professors often determine the medium through which students read. A professor may post a reading as a PDF on Canvas, ban laptops in the classroom, or provide students with paper exam materials for the final exam. When you assign reading materials, go beyond considering the costs for students[226] and factor in what medium may be best for students depending upon where they are in their legal education, how and why students may read from a particular medium, and how students might read the material once they are in practice.

1. When requiring reading, consider the pros and cons of reading in particular mediums

Every reading experience in law school need not be a digital one.[227] Thoughtfully consider the advantages and drawbacks of a medium for certain learning tasks. Professors of first-year courses may want to afford students more opportunities to read in print as students adjust to reading the law. First-year students usually have more detailed annotation systems than do 2Ls and 3Ls.[228] It may be easier for 1Ls to understand and annotate when reading from paper. Professors in upper-level courses and clinics may seek to provide students with more opportunities to read digital text, especially when working with materials similar to those they will read in practice.

When assigning digital materials, consider its complexity and length. If you provide lengthy e-reading assignments to students, it is best to do so with e-books and PDFs, to the extent possible.[229] These formats are easier to e-read than is a scanned version of printed text.[230] When assigning digital text with hyperlinks, it is

---

226. *See* Lee et al., *supra* note 182, at 1 ("Casebooks in law school are a significant financial burden to law students."). A Civil Procedure casebook published by Aspen Publishing is $352.00 for the print and $264.00 for the eBook only. Purchase Page for Civil Procedure: A Coursebook, Fifth Edition, ASPEN PUB'G, https://aspenpublishing.com/products/glannon-civpro5 (last visited Mar. 11, 2025). West Academic publishes a Civil Procedure casebook for $316.00 for the print and eBook, $296 for the print version, and $222.00 for the eBook only. Purchase Page for Cross, Abramson, and Deason's Civil Procedure: Cases, Problems, and Exercises, 5th, W. ACAD., https://www.westacademic.com/Cross-Abramson-and-Deasons-Civil-Procedure-Cases-Problems-and-Exercises-5th-9798887867311 (last visited Mar. 11, 2025).

227. *See* COHN, *supra* note 83, at 25.

228. Lee et al., *supra* note 182, at 4.

229. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 284.

230. *See id.*

best to limit the number of hyperlinks within the assignment and break the assignment into smaller chunks until students have a firm grasp of the material.[231] The more structure and fewer links in a reading, the easier it will be for students to navigate through the document, which improves comprehension and retention of the material.[232] To assist students with mental mapping when reading digital text, ensure that PDFs have page numbers.[233] If using a digital document that has embedded page numbers, highlight the page numbers in the document before posting it or instruct students to highlight the page numbers before they read.[234] If you rely solely on digital texts in your courses or clinics, you may need to invest time in helping students e-read effectively so that they get the most out of their reading.[235]

With quizzes, mid-term exams, and final exams, it may be more beneficial for first-year students to read questions in print. Research shows readers of print demonstrated better comprehension of material over digital readers when a time limit for the task was imposed.[236] Print readers also recalled chronologies of events in texts better than digital readers.[237] Nevertheless, after the first year of law school, and especially during bar-exam preparation, students should have opportunities to take paperless quizzes and assessments. This will help them prepare for the all-digital bar exam.

2. When possible, allow students to choose the medium through which they read

To enhance students' learning, some law professors have experimented with banning laptops in their classrooms.[238] Research indicates that students taking notes by hand have better comprehension and recall of material than those typing notes.[239] Thus, note-taking on paper coincides better with a goal of most law professors, which is to encourage students to selectively capture key points

231. *See* Meyer, *supra* note 29, at 729.
232. *See id.*
233. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 284.
234. *Id.*
235. *See* Lenz, *supra* note 31, at 317. For ideas on how to equip students to read digital texts, see discussion *infra* Sections V.C. and V.D.
236. COHN, *supra* note 83, at 99. In contrast, readers of print and digital materials showed similar comprehension when reading was self-paced. *Id.*
237. *See supra* text accompanying notes 118–24.
238. Jessica de Perio Wittman & Kathleen (Katie) Brown, *Taking on the Ethical Obligation of Technology Competency in the Academy: An Empirical Analysis of Practice-Based Technology Training Today*, 36 GEO. J. LEGAL ETHICS 1, 45 (2023).
239. Graham, *supra* note 29, at 81; Levy, *supra* note 113, at 281.

rather than transcribe the classroom discussion.[240] Also, without digital distractions, students may be more engaged in learning.[241] Finally, digital notes may hamper students' abilities to synthesize course material because students can simply cut and paste their notes into course outlines.

Digital bans suggest devices can be harmful to learning and are not important in law practice.[242] They avoid the challenges associated with the devices rather than confronting them.[243] Banning devices mandates that students use a particular medium not only inside the classroom but to prepare for classes as well. They must read and take notes for those classes in print. It is "unfair, perhaps hypocritical," for professors that assign e-reading materials to prohibit students from accessing these materials on devices in class.[244] Even if professors do not specifically assign a medium for pre-class reading, students may only have access to the course casebook in a digital format. With a laptop ban in place, these students cannot read their e-casebooks during class.

Digital-reading scholar Dr. Jenae Cohn discourages professors from banning devices in their classrooms.[245] Dr. Cohn explains that knowing what to take down when taking notes is not something that is innately known or improved by mandating students do it by hand.[246] Also, she explains that the studies on hand-written notes are problematic because they excluded an entire segment of the population— individuals with disabilities—who need digital devices for note-taking.[247] Rather than banning screens, Dr. Cohn recommends that professors teach students how to effectively capture notes, regardless of the medium they use.[248] To prepare for practice, where devices are integral, students need to learn how to use and manage devices and limit the distractions.[249] When requiring students to read before and during class, make both paper and digital options available, if possible. Students may choose to e-read because it is more affordable, portable, environmentally friendly, and

240. Mark Yates, *Text Is Still a Noun: Preserving Linear Text-Based Literacy in an e-Literate World*, 18 J. LEGAL WRITING INST. 119, 138 (2012).
241. *Id.* at 148.
242. de Perio Wittman & Brown, *supra* note 238, at 45.
243. Yates, *supra* note 240, at 148.
244. Newell, *supra* note 151, at 808.
245. COHN, *supra* note 83, at 16–18.
246. *Id.* at 17–18.
247. *Id.* at 16–17 (noting device bans, with exceptions for students with learning accommodations, "problematically reveal" the students with disabilities).
248. *Id.* at 18.
249. Yates, *supra* note 240, at 138.

accessible than printed books.[250] Also, think about how students' choices of reading mediums may affect their abilities to participate. For example, if a student buys digital-only access of the casebook and your final exam is open book, will exam software block that student's ability to access the e-casebook?[251]

C. Cultivate Students' e-Reading Mindsets and Empower Them to Choose a Reading Medium

Most individuals have an intuitive preference for reading certain material either in print or digitally,[252] and can likely articulate why they prefer one medium over the other. Students may not appreciate that science often supports their preferences. Making students aware of the mindsets associated with print and screen reading empowers them to select the best medium under the circumstances.[253] "When students develop the agency to question, consider, and critique their means of learning," their learning is usually "deeper."[254] Where students do not have a choice in medium, awareness of how the brain responds to digital versus printed text can help them adjust so they e-read effectively.[255]

Below are a few suggestions on how to educate students on reading mindsets and encourage them to thoughtfully select their reading mediums.

- Curate reading resources for students.[256] You may recommend the books *Reading Like a Lawyer* or *Critical Reading for Success in Law School and Beyond*, which provide information and strategies for effectively reading from screens in law school and law practice.[257] On your course web page, post a link to a podcast series that discusses the impact digital reading has on critical thinking skills and suggests how to critically e-read

250. *See* COHN, *supra* note 83, at 6–7, 89.
251. *See* Lenz, *supra* note 31, at 314.
252. Ślęzak-Świat, *supra* note 169, at 90.
253. COHN, *supra* note 83, at 24–25, 89–90; Kristen E. Murray, *Take Note: Teaching Law Students to Be Responsible Stewards of Technology*, 70 CATH. U. L. REV. 201, 202 (2021) (arguing that "law schools have a duty" to help students develop tech skills, which "means granting students a certain degree of autonomy over their own learning while also encouraging thoughtful deployment of technology as a matter of their professional development.").
254. COHN, *supra* note 83, at 121.
255. *Id.* at 86.
256. *Id.* at 22–23.
257. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 259–82; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 277–300.

effectively.[258] You could also post excerpts of this article or links to infographics about digital versus print reading.[259]

- Create a discussion board asking students to post about their preferences for print or digital text. Additionally, ask students whether they prefer to read digital text from a computer screen, tablet, or cell phone. Encourage students to explain their preferences as part of their posts.[260]

- Model informed decision-making regarding reading medium. Explain why you provide materials in certain mediums to students.[261] This helps students develop a reading mindset and may help dissuade students from viewing digital texts as less valuable than print.[262] Additionally, tell students about your reading preferences. Do you prefer to read certain things, like statutes, in print because it is easier to flip back and forth between sections? Tell students how you adapt to e-reading when you do not have a choice of medium.

- Encourage students to practice reading in a different medium when the opportunity arises. If students create their case briefs and take class notes on digital devices, suggest they try writing these by hand for a week. Propose they print digital course outlines and writing assignments so that they can study from or edit on paper. Students that have both digital and print copies of casebooks can experiment with reading for class with both mediums.

- When students are learning legal research, suggest that they mindfully consider if and when to print their research

---

258. *See, e.g.*, Halle Hara, *Introduction: Make the Most of Your Investment in Case Reading*, LAW SCH. PLAYBOOK, https://www.lawschoolplaybook.com/podcast (last visited Mar. 11, 2025).

259. For two helpful infographics, see Ola Kowalczyk, *Reading in the 21st Century – Digital and Print Compared (Infographic)*, EBOOK FRIENDLY (Sept. 21, 2023), https://ebookfriendly.com/reading-21st-century-digital-vs-print-infographic/; Nicholas C. Rossis, *Digital Reading Benefits*, WORDPRESS: NICHOLAS C. ROSSIS BLOG (Jan. 29, 2018), https://nicholasrossis.wordpress.com/2018/01/29/digital-reading-benefits/ (infographic titled "Paper vs. Digital").

260. *See* MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 281–82 (listing questions to help students consider the pros and cons of digital e-reading); MCKINNEY, TEACHER'S MANUAL, *supra* note 213, at 54–55 (providing information for questions posed in book that professors could use to respond to students' discussion posts).

261. For example, our Legal Methods faculty recommend that students buy or rent *The Bluebook* in print because it may be easier for 1Ls to use as they learn legal citation over the digital version.

262. *See* Curtis & Karp, *supra* note 86, at 262 (explaining how students tend to attribute more value to print than digital materials).

results. Research and source collecting are easier to do digitally; however, studies suggest that individuals demonstrate a more integrated comprehension of multiple sources when they read them in print than from a screen.[263] Consequently, you may want to discuss with students whether to print certain sources in order to effectively synthesize the law.

- Assign half of your students to prepare for class by reading in print and the other half to read from screens. Engage in a short in-class discussion regarding their experiences, the differences between digital and print reading, and why students may read in one medium over the other depending upon the reading task.

D. *Equip Students with Critical e-Reading Strategies*

Regardless of what law students may have learned about reading earlier in their educations, "when they encounter new texts in a new environment, they may need reminding about what tools are at their disposal to break down those tasks, interpret them, and analyze them from their own perspectives."[264] Helping students develop critical e-reading skills frees up space in their working memories that they can then devote to thinking.[265] When teaching critical e-reading strategies, you should be explicit, provide information in small chunks, provide practice, and assess skill development.[266] Some ideas as to how to do this follow.

1. Encourage Students to Use Print-based Strategies When e-Reading

Many traditional, print-based strategies will also help law students critically e-read linear text.[267] Unfortunately, there is a tendency for students to abandon print-based strategies when reading digitally.[268] Communicate to students that critical reading is challenging regardless of the medium.[269] Urge them to use the print-based strategies that lawyers use when students are reading from

263. BARON, *supra* note 12, at 110.
264. COHN, *supra* note 83, at 15–16.
265. *See* Brennan, *supra* note 34, at 7–8.
266. *See id.* at 47–54.
267. BARON, *supra* note 12, at 57; Lim & Toh, *supra* note 99, at 28.
268. *See* Lim & Toh, *supra* note 99, at 28.
269. *See* WOLF, *supra* note 47, at 13 ("There are no shortcuts for becoming a good reader.").

screens.[270] These strategies are part of the three stages of reading: pre-reading, active reading, and post-reading.[271] In the pre-reading stage, lawyers appreciate their purpose for reading.[272] They scan text to get an overview and preview the main points.[273] They get a sense of the energy and time that will be required to actively read the material.[274] Next, in the active reading stage, lawyers read and re-read closely with their purpose in mind.[275] They approach texts "flexibly" by "varying both the order of their reading and the time allotted to different sections" of the text.[276] They monitor their understanding and energy level.[277] They question what they are reading and connect it with what they already know about the topic.[278] They often annotate by highlighting, underlining, and taking notes.[279] Finally, post-reading, many lawyers take notes to memorialize the significant parts of the text, note their impressions, and record any need for further clarification.[280]

Utilizing print-based strategies will help students better understand and analyze legal texts on screens.[281] Many resources exist for law students seeking to improve these traditional reading

---

270. *See* Christensen, *The Paradox of Legal Expertise*, *supra* note 1, at 56. Professor Christensen conducted an empirical study of how attorneys and law students read judicial opinions. *Id.* at 53. She concluded that attorneys read differently than law students. *Id.* at 70. Attorneys spent more time using "rhetorical reading strategies, i.e., reading with a purpose, contextualizing, and connecting with their prior experience with the law" while reading than did the law students. *Id.* She observed that the attorneys, as "experts" in reading judicial opinions, "(1) . . . used the purpose of the reading to read more effectively and efficiently; (2) . . . used their prior experience to enhance their understanding of the case; (3) . . . situated themselves within the context of the case; (4) . . . evaluated the opinion; and (5) . . . read flexibly." *Id.*

271. Curtis & Karp, *supra* note 86, at 278. While there are three reading stages, critical reading is a recursive, not a linear, process. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 167.

272. Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies Are Altering the Millennial Generation's Brain and Impacting Legal Education*, 16 SMU SCI. & TECH. L. REV. 409, 435 (2013) [hereinafter Dalton, *Their Brains on Google*].

273. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 62, 101; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 87.

274. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 69; Curtis & Karp, *supra* note 86, at 278.

275. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 291.

276. Christensen, *The Paradox of Legal Expertise*, *supra* note 1, at 82.

277. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 262.

278. *Id.*

279. Curtis & Karp, *supra* note 86, at 276, 281.

280. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 62.

281. *See* BARON, *supra* note 12, at 91.

skills.[282] Guidance is also available as to how to incorporate these print-reading strategies into your teaching.[283]

2. Inform Students that Print-based Strategies Are Not Enough When e-Reading

To deeply read and evaluate digital texts, students must employ strategies beyond the print-based ones.[284] They can minimize the physical differences between print and digital text by adopting five unique strategies. Students can improve their understanding and recall when e-reading by slowing down their reading, anchoring to a page, facilitating focus, utilizing digital-reading tools, and monitoring their energy and recharging when needed.

a. Slow Down

Students can employ certain techniques to counter the brain's natural tendency to scan digital text. They should approach complex material like they would reading it in print—slowly, line-by-line, across the entire page.[285] It helps to stop and check for understanding after reading each page.[286] Additionally, taking notes can slow reading speed and improve comprehension.[287] Ideally, students should paraphrase when taking notes and do so on paper or a separate device to reduce the temptation to cut and paste digital material into their notes.[288]

b. Anchor to a "Page"

Students should establish a "grounded sense of place" when reading from screens, especially when it involves scrolling.[289] Grounding

---

282. *See, e.g.*, MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11; sources cited *supra* note 208.

283. *See* MCKINNEY, TEACHER'S MANUAL, *supra* note 213, at 7–8 (guidance for non-legal writing, legal writing, and clinical faculty, student services personnel, academic support professionals, and mentors and peer tutors); JANE BLOOM GRISÉ, TEACHER'S MANUAL TO CRITICAL READING FOR SUCCESS IN LAW SCHOOL AND BEYOND 9–11 (2022) [hereinafter GRISÉ, TEACHER'S MANUAL] (guidance for orientation programs, academic support courses, legal writing and non-legal writing courses, L.L.M. programs, and bar preparation programs).

284. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 261 n.6; COHN, *supra* note 83, at 6.

285. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 280–81.

286. COHN, *supra* note 83, at 227; BARON, *supra* note 12, at 136.

287. COHN, *supra* note 83, at 162; MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 268 & n.24.

288. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 296; MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 268.

289. *See* BARON, *supra* note 12, at 135.

can improve understanding and reduce cognitive fatigue.[290] The goal is to create a mental map of the document and digitally page through a document.[291] Students can maintain a sense of where they are in a document by keeping the document's Table of Contents open on the side of the screen, when this function is available.[292] For web pages, students can save them as PDF documents to create fixed pages of material.[293] When reading text with embedded page numbers, circling or highlighting the page numbers helps with anchoring to the page.[294] When students research on Westlaw or Lexis, they may want to read the PDF versions of opinions, when available, because they are set in page format and do not have embedded page numbering or hyperlinks.[295]

To anchor to a page, students should e-read from the largest screen possible. Reading from a computer screen or tablet is typically better than reading from a cell phone because more text is visible, and less scrolling is required. Students can also adjust the font type and size to maximize the amount of text they are comfortable seeing at one time on the screen.[296] Finally, students should stay anchored to the text when reading it for the first time and avoid clicking on hyperlinks.[297] When revisiting the text during a second read, students may click hyperlinks if they have a good reason.[298] To avoid getting lost when clicking on hyperlinks, students should take notes on where links lead or open links in new tabs on their web browsers.[299]

c. Facilitate Focus

Students can improve focus, efficiency, and comprehension while reading from screens, but it requires discipline and will power.[300] They must eliminate digital distractions and direct their attention

290. *Id.*; Meyer, *supra* note 29, at 717.
291. Haverkamp et al., *supra* note 114, at 1591; BARON, *supra* note 12, at 136 (explaining that students should "page down" instead of scroll).
292. *See* GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 297.
293. *See* MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 276 (suggesting readers choose a format with page breaks).
294. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 284.
295. *Id.*
296. BARON, *supra* note 12, at 136–37.
297. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 287.
298. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 272; COHN, *supra* note 83, at 162.
299. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 282; MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 272 n.29.
300. Newell, *supra* note 151, at 796–97.

solely to the reading task.[301] Students should deal with digital business before they start reading.[302] After texting, e-mailing, and checking social media, they should close all tabs except for the reading material and online dictionaries. Students should turn notifications off on all devices, including their cell phones, and put cell phones out of sight.[303] To aid in concentration, students can set up an auto-reply to incoming text messages letting senders know that the student is busy and will respond later.

d. Utilize Digital-Reading Tools

Most digital reading platforms include several tools to engage with the text.[304] When students encounter unfamiliar words, as they will likely do as novice legal readers, they should stop and use the built-in online dictionary, if there is one, or look up the terms in online dictionaries open in web browser tabs. Also, most digital documents are searchable. Encourage students to find key words related to their reading purpose. When previewing or reviewing judicial opinions, they can search for words like "issue," "question," "hold," "conclude," "rule," and "test."[305] If the text is editable, encourage students to adjust the format so it is more comfortable for them to read.[306] Students may change the font type, font size, background color, line length, or number of columns.[307] Students may zoom in or out of the document. They can also adjust the brightness of their screens. When reading statutes and regulations, students can circle or highlight conjunctions, add numbering, and break the text into pieces.[308] If it helps students to listen to the text instead of reading it visually, they can utilize the text-to-speech feature.[309] Finally, for students using e-casebooks, encourage them to utilize the accompanying tools. They may have access to quizzes to test their understanding of material.

---

301. *See* Dalton, *Their Brains on Google*, *supra* note 272, at 434; Lim & Toh, *supra* note 99, at 29.

302. Newell, *supra* note 151, at 796; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 288.

303. *See* BARON, *supra* note 12, at 212.

304. In addition to features available within digital reading platforms, students also have the option to utilize programs and software to take notes or create diagrams/mind maps. COHN, *supra* note 83, at 297–98. Students may also engage in these activities with pen and paper.

305. Curtis & Karp, *supra* note 86, at 256, 280; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 293–94.

306. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 269.

307. *Id.*

308. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 292–93.

309. *Id.* at 293.

Encourage students to annotate digital text as much, if not more, than they do print. Students tend not to annotate digital texts, perhaps because they do not know how.[310] Show students how to annotate, going beyond highlighting and symbols, to adding margin notes and summary comments.[311] Students may use digital pens or the keyboard and mouse. Adding their own notes will help students check their understanding and read the digital text more deeply.[312] Writing or typing the definitions of unfamiliar words on the text itself will help them build their legal vocabulary. Since novice legal readers tend to over highlight material,[313] encourage students to "unhighlight" during re-reads as their understanding of what is important improves.

e. Monitor Energy Levels and Take Breaks

Critical e-reading is mentally draining.[314] It can also lead to eye strain.[315] Urge students to monitor their physical and mental energy levels and recharge themselves when depleted. To refresh mental energy, students can employ a version of the Pomodoro technique.[316] Before reading, they can set a timer for thirty to forty-five minutes.[317] When the timer rings, they take a five-minute break.[318] After four cycles, students should take a twenty- to thirty-minute break.[319] To reduce eye strain, students can use the "20-20-20" rule.[320] Eye professionals recommend that every twenty minutes, e-readers should look away from their screens and at an object twenty feet away for twenty seconds.[321] Students can also keep screens at about arm's length away while reading and wear their eyeglasses instead of their contacts.[322] During all breaks, students should

310. *See* Lim & Toh, *supra* note 99, at 28–29; BARON, *supra* note 12, at 139.
311. *See* COHN, *supra* note 83, at 184; BARON, *supra* note 12, at 139 (explaining that digital annotation skills need to be taught and nurtured).
312. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 291.
313. Montana, *supra* note 44, at 453.
314. MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 262; BARON, *supra* note 12, at 136.
315. Porter, *supra* note 137.
316. Bryan Collins, *The Pomodoro Technique Explained*, FORBES, https://www.forbes.com/sites/bryancollinseurope/2020/03/03/the-pomodoro-technique/ (Dec. 10, 2021, 8:30 AM).
317. *Id.*; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 282.
318. Collins, *supra* note 316; GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 282.
319. *See* Collins, *supra* note 316.
320. *See* Kaitlyn Wells & Zoe Vanderweide, *The Best Blue-Light Blocking Glasses*, N.Y. TIMES WIRECUTTER, https://www.nytimes.com/wirecutter/reviews/best-blue-light-blocking-glasses/ (Jan. 2, 2025).
321. *Id.*
322. *See id.*

avoid screens.[323] Tech-free breaks give students' eyes and minds time to reset and replenish themselves.[324] Finally, some suggestions in the preceding paragraphs will also help students conserve energy. Monotasking, anchoring to a page, and adjusting screen visuals can make e-reading less taxing.

3. Provide Students with Learning Opportunities with Critical e-Reading

To help students internalize critical e-reading skills, legal educators should provide students with opportunities to practice and receive feedback on these skills.[325] These opportunities afford students and you with information on students' progress in skill development.[326] Suggestions for how to do so follow.

- Depending on the course topic, for example, discovery in Civil Procedure, discuss how attorneys perform reading tasks i.e., e-discovery. Ask students in which medium they would prefer to read certain material and why. Prompt students to suggest how they can read effectively on screens if they only have the digital option in practice.[327]

- In the beginning of the semester, poll students about how they read digital text for their courses. Ask them what device they usually use to e-read for class; how long they read before stopping; about their ability to focus while reading from screens; and what they do when taking a study break?[328] Discuss their answers and suggest students adopt critical e-reading strategies from this Article. Poll students again mid-to-late semester. Note if students' e-reading skills are improving.

- Model how you critically e-read and digitally annotate a document by reading aloud and voicing your thought process.[329] Because digital annotation can take more effort, students will benefit from seeing you demonstrate the value of this

323. GRISÉ, CRITICAL READING FOR SUCCESS, *supra* note 11, at 282; MCKINNEY, READING LIKE A LAWYER, 3d ed., *supra* note 3, at 275–76.
324. *See* Dalton, *Their Brains on Google*, *supra* note 272, at 437; Porter, *supra* note 137.
325. Brosseit, *supra* note 52, at 166.
326. *See id.*
327. *See* COHN, *supra* note 83, at 89–90.
328. GRISÉ, TEACHER'S MANUAL, *supra* note 283, at 73.
329. *See* Montana, *supra* note 44, at 452; MCKINNEY, TEACHER'S MANUAL, *supra* note 213, at 14–15 (providing suggestions for how to do a read aloud).

tool.[330] The "read aloud" need not take up class time. You can record a video and re-post it to your course webpage each year.

- Provide reading guides for digital texts you assign.[331] Include estimated reading times so students can evaluate whether they are e-reading too quickly.[332] Estimated reading times also help students plan for when they will read to maximize focus and energy levels. Provide questions that encourage students to think critically about the material.[333] These questions can also be the foundation for class discussion.[334] Encourage students' use of digital tools in the guide. For example, ask students to search for certain words or concepts within the text and then have students explain how these concepts are connected.[335]

- Create the opportunity for students to compare focused and distracted e-reading with an exercise done inside or outside of the classroom. First, instruct students to time themselves while e-reading three pages of material. Before they start, they should turn on visual and audio notifications on all devices, including their cell phones. While reading, ask students to send at least one email and one text message. When they finish reading, students should note how long they took to read, their mood and energy levels, and the main point of the passage. Next, direct students to follow the suggestions in the "Facilitate Focus" section of this Article while reading an additional three pages. Again, after reading, have students report their reading time, mood and energy levels, and the main point of the material. Follow up the exercise with a discussion, either in-class or on an online discussion board. Ask students for their observations and whether they found the focus suggestions helpful. Elicit ideas on how they can improve their focus and efficiency while e-reading.

---

330. *See* BARON, *supra* note 12, at 139.

331. *See* Curtis & Karp, *supra* note 86, at 277.

332. *See* Lang, *supra* note 223. For help in estimating e-reading times for material, see the Estimating Details within Workload Estimator of the Wake Forest University Center for the Advancement of Teaching. *Estimation Details*, WAKE FOREST UNIV., https://cat.wfu.edu/resources/workload/estimationdetails/ (last visited Mar. 11, 2025).

333. *See* Montana, *supra* note 44, at 453.

334. *See* Kris Franklin & Rory Bahadur, *Directed Questions: A Non-Socratic Dialogue About Non-Socratic Teaching*, 99 U. DET. MERCY L. REV. 1, 4–8 (2021) (describing the "Directed Questions method" in which students answer professor-posed questions while reading to prepare for class and those questions form the basis of class discussion).

335. *See* COHN, *supra* note 83, at 168–69.

- Assign students to digitally annotate an e-reading assignment asynchronously in small groups.[336] Students should highlight, underline, and/or write notes and questions in margins of a single document using digital annotation tools.[337] They should also read and react to the annotations of others. Social annotation allows students to practice using the tools and observe the thinking strategies of others.[338] By reviewing the final annotated document, you gain insight into students' understanding of the material and digital annotation skills.[339]

- Assess students' understanding and retention of material through no-stakes or low-stakes quizzes.[340] Depending upon the platform through which students e-read, questions may be embedded within the text or immediately after it.[341] Students' performance on quizzes provides them and you with feedback on students' understanding of the material. After an assessment, instruct students on the five e-reading strategies and encourage them to use them to enhance their critical e-reading.

- For upper-level students, deliver a mid-term or final exam like the NextGen bar exam. Provide all exam materials digitally. Prepare students for the digital-delivery by exploring what annotation tools are available while taking the exam. During a review session or on a discussion board, ask students to suggest strategies for how to best approach a fully digital exam.

E. Remain Informed about E-Reading Research and Tools

Research and technology around e-reading will continue to advance.[342] For example, experts had suggested that e-readers use blue-light glasses to ease eye strain.[343] Recently, researchers have

336. *See* BARON, *supra* note 12, at 140; COHN, *supra* note 83, at 192–95.

337. *See* BARON, *supra* note 12, at 140 (listing free digital annotation tools available for communally annotating a document, including Google docs, Hypothes.is, NowComment, and Perusall); *see also* COHN, *supra* note 83, at 192.

338. COHN, *supra* note 83, at 186.

339. BARON, *supra* note 12, at 140.

340. *Id.* at 138.

341. *See* Curtis & Karp, *supra* note 86, at 283.

342. BARON, *supra* note 12, at 123.

343. *See* Karen Kwon, *Do Blue-Light Glasses Help with Eyestrain?*, SCI. AM. (Aug. 24, 2023), https://www.scientificamerican.com/article/do-blue-light-glasses-help-with-eyestrain/; Gretchen Kelly, *Are Blue Light-Blocking Glasses a Must-Have?*, MAYO CLINIC HEALTH SYS. (July 5, 2022), https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/are-blue-light-blocking-glasses-a-must-have.

concluded that these glasses are ineffective.[344] To make the best decisions for how to equip students to effectively e-read the law, stay up-to-date on e-reading science, students' e-reading abilities, and the technology available.

CONCLUSION

Medium matters when reading as a lawyer. The legal profession has embraced critical e-reading because it provides "mobility, portability, accessibility, and searchability."[345] Medium also matters when teaching students to think and read as lawyers do. All law students are struggling to analyze legal texts while reading them from screens. They can, with help, learn to become effective critical e-readers. Because e-reading touches every aspect of legal education,[346] all educators, regardless of what they teach, should equip students with these skills so they are prepared for paperless practice.

344. *See* Kwon, *supra* note 343; Kelly, *supra* note 343 (discussing that it is an e-reader's tendency to stare without blinking, and not the blue-light of screens, that causes eye strain).

345. Mary Beth Beazley, *Writing for a Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 DUQ. L. REV. 415, 422 (2016).

346. The methods used by law schools to ensure that their graduates have the e-reading skills vital to paperless practice will vary and depend upon the unique interests and values of each institution.

The Hidden Cost of Retirement Savings Tax Incentives: Policies Aimed at Helping Everyday Americans Instead Provide a Tax Shelter for the Wealthy

Joy Sabino Mullane[*]

ABSTRACT

This Article explores the hidden cost of providing tax relief for retirement savings. While the social goal of helping Americans to save for retirement and in meaningful amounts is worthwhile, most of the tax benefits accrue to the wealthiest taxpayers who do not need assistance in saving for retirement. Instead, the ultrawealthy use a variety of means to shelter massive amounts of investment growth inside tax-preferred retirement accounts. Congress should continue to encourage retirement savings among rank-and-file Americans. However, at this time of historically high budget deficits, Congress needs to close loopholes and enact targeted reforms to prevent the unnecessary leakage of revenue that serves no purpose other than to subsidize the rich and help make them even richer.

[*] Professor of Law, Villanova University Charles Widger School of Law. For helpful comments and conversations, I am grateful to the participants at the 27th Annual Critical Tax Conference. Special thanks to Rachel Feil, Troy Keenan, Tyler Lee, and Caitlin Paterson for excellent research assistance.

I. INTRODUCTION

The ultrawealthy do not need many tricks up their sleeves to grow their wealth without the burden of taxes. The tax code candidly establishes tax preferences favoring the wealthy, encompassing everything from lower capital gains tax rates that almost exclusively benefit the wealthy to the wealth transfer tax exemptions and related provisions that can shield massive sums of accumulated wealth from being taxed for many generations. Included in this mix is something less obvious: tax preferences for retirement savings.

The concept of a post-work phase of life (i.e., retirement) can be traced back to ancient civilizations, but it has not always been subsidized by the government. A little over a century ago, Congress explicitly decided to subsidize saving for retirement by providing tax savings for employer-provided retirement plans.[1] As time moved on, Congress decided that the tax system should also encourage Americans to save for a post-work phase of life through accounts independent from employers.[2] Today, both employer-sponsored workplace plans and independent individual account plans receive tax benefits. Specifically, money saved for retirement is subject to less federal income tax, provided primarily in the form of tax-free accumulation of investment returns. In other words, investment gains on funds set aside for retirement in approved vehicles are not taxed while inside the vehicle, allowing for more overall growth.[3]

On the surface, tax incentives to encourage Americans to save now for their later retirement needs seems to have little to do with the ultrawealthy who are unlikely to be unable to fund their basic needs independently. Tax preferences for retirement savings are touted as incentives to help regular folks save for retirement—and they do to a limited extent. However, the reality is that the overwhelming majority of the tax benefits from retirement plans accrue to the wealthy who never plan to use their investments to fund their retirement needs or wants.[4] Instead, the retirement savings tax preferences allow them to accelerate and shield the growth rate of their wealth, enabling them to pass on more wealth to the next generation of their families.

Enormous sums of tax revenue have been sacrificed in the push to encourage saving for retirement. Tax incentives for retirement

1. *See infra* Part II. This was at a time when few Americans paid any taxes at all.
2. *See infra* Part III.
3. The system of rules governing the tax and tax operations are complex and discussed *infra* Part II.B.
4. *See infra* Part II.B.

savings are the second largest tax expenditure. The Joint Committee on Taxation projects the cost to the federal government to be $431.4 billion in foregone revenue for 2025.[5] That price tag is not inherently a problem if it is serving a wider governmental purpose such as helping vulnerable Americans prepare for income security in retirement.

Some individuals, however, have been able to tax shelter billions of dollars. In 2021, ProPublica, a nonprofit news organization, explored the rise of massive Roth IRAs—one type of tax-preferred retirement account. ProPublica uncovered that "tech mogul Peter Thiel has the largest known Roth IRA, worth $5 billion as of 2019."[6] He was able to accomplish this by taking a small salary as an executive of startup companies; this allowed him to stay below certain income limits for contributing to a Roth IRA. He then directed his Roth IRA to invest in various pre-IPO stocks at low value that would later explode in value—tax free—when they went public.[7]

After the story was published, Congress requested more IRA data. The results showed:

> the staggering amount of money socked away in tax-free mega Roth accounts: more than $15 billion held by just 156 Americans. The new data also shows that the number of Americans with traditional and Roth IRAs worth over $5 million tripled, to more than 28,000, between 2011 and 2019.[8]

While these account balances obviously belong to the wealthiest taxpayers—as your average American is unlikely to be able to accumulate a balance that high in any account much less a Roth IRA that is subject to stricter limitations—what should stand out is the magnitude of retirement tax incentives that are being used to support those who are not in need of income support in retirement. It is time for Congress to reassess how it incentivizes retirement savings, including consideration of how the system evolved into serving mostly the needs of the ultrawealthy.

---

5. JOINT COMM'N ON TAX'N, JCX-48-24, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2024-2028, at 31 (Dec. 11, 2024).

6. Justin Elliott et al., *Lord of the Roths: How Tech Mogul Peter Thiel Turned a Retirement Account for the Middle Class into a $5 Billion Tax-Free Piggy Bank*, PROPUBLICA (June 24, 2021, 5:00 AM), https://www.propublica.org/article/lord-of-the-roths-how-tech-mogul-peter-thiel-turned-a-retirement-account-for-the-middle-class-into-a-5-billion-dollar-tax-free-piggy-bank.

7. *Id.*

8. Justin Elliott et al., *The Number of People with IRAs Worth $5 Million or More Has Tripled, Congress Says*, PROPUBLICA (July 28, 2021, 1:27 PM), https://www.propublica.org/article/the-number-of-people-with-iras-worth-5-million-or-more-has-tripled-congress-says.

These days, many people—especially the wealthiest—view retirement plans not so much as a vehicle to provide for sustenance post-working life but as an estate planning vehicle to rapidly accumulate and shelter wealth from tax to transfer to others upon their death. This Article will explore how this happened and what to do about it. Part II sets forth the background on key aspects of retirement policy and income security before considering to what extent retirement savings incentives have been effective. In short, most Americans are not saving enough, if at all, while most of the tax benefits accrue to the wealthy. Part III then considers the evolution and rise of mega retirement accounts. Part IV discusses options for reforming the rules regulating tax preferred retirement savings accounts. Part V concludes that, despite how frequently Congress enacts legislation to encourage retirement savings among rank-and-file workers, it must do more to reform the system and close loopholes that allow for the ultrawealthy to legally evade taxes on billions of dollars sitting in mega retirement accounts.

II. The Evolution of Encouraging Retirement Income Security

This Part sets the stage for examining the rise of mega retirement accounts. It does so by briefly describing the historical evolution of retirement and the use of tax incentives to encourage savings. It then considers to what extent government-subsidized retirement savings strategies are achieving their stated goals.

A. Evolving Notions of, and Preparation for, Retirement

The concept of retirement is ancient but has evolved significantly. The notion of an extended period of post-work years in which one can pursue recreational activities is relatively recent. In pre-modern times, most people worked as long as they could, often until death.[9] If they could not work, they relied on their wealth, if they had any, to meet their needs, otherwise they were dependent on their descendants or charity.[10] There were no workplace retirement benefits as we conceive of them today or individual incentives for one to save for their own retirement and fund a period of leisure.

9. For a thorough examination of retirement systems in ancient times, see Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 Elder L.J. 245 (2004). For a more modern examination, see Michael Doran, *The Great American Retirement Fraud*, 30 Elder L.J. 265 (2023).

10. *See* Dilley, *supra* note 9.

The earliest retirement benefits were public benefits (i.e., provided by the government) and typically dispensed in exchange for military service.[11] Military pensions have a long history in Western civilization, dating back to before the Christian era.[12] They have often been used as a means of attracting, retaining, and motivating military personnel.[13] In other words, they were an inducement to serve.

Likewise, in what is now known as the United States of America, the earliest retirement benefits were public pensions provided by local colonial governments for disabled and retired military personnel.[14] The American colonies provided pensions to disabled men who were injured while defending the colonists and their property from native uprisings.[15] Later, during the Revolutionary War, these pensions were extended to members of the militia and naval personnel.[16] On something akin to the national level, the Continental Congress also established pensions for its army and navy forces independent of the actions of the colonial legislatures.[17]

During the nineteenth century, retirement plans were slowly extended to civilian state and local employees, but it was not until the twentieth century that civilian retirement benefits became widespread among both public and private employers.[18] That spread was

---

11. *See* ROBERT L. CLARK ET AL., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 1–2 (2003).

12. *See id.* at 25–27. During the reign of Emperor Augustus, Roman soldiers were eligible for a retirement pension after serving a specific number of years. *Id.* at 26–27. Augustus implemented significant reforms in the Roman military, including establishing a standing professional army known as the Roman Imperial Army. *Id.* As part of these reforms, retirement benefits for soldiers, known as "honesta missio" or "honest discharge," were introduced. *Id.* Under the system of "honesta missio," soldiers who served a minimum of twenty years in the Roman military were eligible for an honorable discharge and a retirement pension. *Id.* The pension typically included a grant of land or a monetary reward to provide for the retired soldier's future well-being. *Id.* at 27.

13. *See id.* at 41. "These early plans were structured to attract, retain, and motivate employees. They were used in conjunction with mandatory retirement policies to induce or require workers to retire without forcing older persons into destitution." *Id.*

14. For a discussion of military pensions in the American Colonies, see *id.* at 31–32.

15. *See id.*

16. *See id.* at 34–35. During the early history of American military pensions, both the American Army and Navy offered pension plans for their service members. *Id.* at 34. Interestingly, the two branches' systems were funded from noticeably different sources. *Id.* The army pension was funded through a "pay-as-you-go" system, which was supplemented by a federal fund; on the other hand, the naval pension took inspiration from pirates, as the pension fund was, in part, supplemented by the value confiscated by the navy. *Id.* at 34–35.

17. *See id.* The Continental Congress used pensions to provide replacement income for soldiers injured during battle, to offer performance incentives, to arrange for orderly retirements, and to respond to political pressures. *Id.*

18. *See id.* at 193, 200. Massachusetts established the first retirement pension plan for general state employees in 1911. *Id.* at 193. The Massachusetts plan was initially a model for subsequent public sector pensions, but it was ultimately replaced by the standard defined benefit plan in which the pension annuity was based on years of service and end-of-career

ignited in 1920 with the enactment of the Federal Employees Retirement Act, which established retirement and disability benefits for federal civil service employees.[19] As with military pensions, the aim of offering civilian pension benefits was to attract and retain a qualified workforce in federal service by offering retirement security and disability protection.[20] Shortly after the rise of pension coverage for civilian federal employees, an increasing number of state and local employees were included in their governments' pension plans.[21]

A different type of federal retirement and disability program was enacted in 1935 in response to the social and economic challenges of the Great Depression, which left millions of Americans unemployed and in dire financial circumstances.[22] The resulting Social Security program provides income support and benefits to eligible individuals and their families.[23] It is primarily aimed at providing economic security during retirement, but it also offers disability benefits and survivor benefits.[24] It is important to note that Social Security benefits alone may not be sufficient to maintain a comfortable lifestyle, and additional personal savings and retirement

---

earnings. *Id.* at 200. As of 1930 only six states had anything like a civil service pension plan for their employees. *Id.* at 193. Many of these early plans for civilian employees were disability plans; those that were retirement plans were largely funded by contributions by the employee themselves. *Id.* at 167. Eventually some states began to establish government-funded pension plans for state employees, but most were limited to teachers. *Id.*

19. *See Chronology*, SOC. SEC. ADMIN., https://www.ssa.gov/history/1900.html (last visited Mar. 11, 2025); CLARK ET AL., *supra* note 11, at 157–66 (discussing the early history of pensions for federal workers and the political debate around federal pension plans). Under the Federal Employees Retirement Act, federal workers qualified for retirement benefits based on an employee's age, length of service, average salary, and type of job. *See* CLARK ET AL., *supra* note 11, at 163–64. Before then, Congress granted pensions to federal employees on a case-by-case basis. *See id.* at 157. Benefits were financed with contributions from both the federal government and its employees. *See id.* at 159.

20. For a discussion of the goals of military pension programs, see *supra* note 16. *See* CLARK ET AL., *supra* note 11, at 159 (discussing what proponents of the act proposed as benefits of the act).

21. *See* CLARK ET AL., *supra* note 11, at 200 ("While public sector pensions at the state and local level were far from universal by the 1920s, they did cover a substantial proportion of public sector workers, and that proportion was growing rapidly in the early decades of the twentieth century.").

22. *See* Jon C. Dubin, *The Color of Social Security: Race and Unequal Protection in the Crown Jewel of the American Welfare State*, 35 STAN. L. & POL'Y REV. 104, 106 (2024). President Franklin Delano Roosevelt believed the Social Security Act of 1935 to be the "crown jewel" of the New Deal. *See id.* President Roosevelt "described the bill's 'main objectives' as to protect 'the security of the men, women, and children of the Nation against certain hazards and vicissitudes of life' and provide a 'more equitable . . . means' for addressing 'the consequence of economic insecurity.'" *Id.*

23. *See Benefit Types*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits (last visited Mar. 11, 2025) (giving an overview of benefits provided by the Social Security Administration).

24. *See id.*

planning are often recommended.[25] Social Security is funded through mandatory payroll taxes, where both employers and employees contribute a portion of their earnings.[26]

Private employers began introducing pensions during the late-nineteenth and early-twentieth centuries as well.[27] In 1875, the American Express Corporation created the first formal, private employer-provided pension for civilian workers in the United States.[28] While that was a significant step, momentum was slow with private employers. Twenty-five years later there were only a handful of private companies that provided retirement benefits; the ones that did were primarily railroads and financial institutions.[29]

It is worth nothing that many of the early private sector pension plans were not very generous compared to today's private pension benefits.[30] They were often funded with only employee contributions, resulting in relatively small payouts.[31] Significantly, they could be terminated at any time by the employer.[32] Even where employers funded the benefits, there were no guarantees or safeguards in place to secure employees' retirement payment expectations.[33]

---

25. *See infra* Part II.

26. *See* SOC. SEC. ADMIN., WILL SOCIAL SECURITY BE THERE FOR ME? (2023), https://www.ssa.gov/pubs/marketing/fact-sheets/will-social-security-be-there-for-me.pdf. These taxes go into the Social Security Trust Funds, which are used to pay out benefits to eligible individuals. *See id.*

27. *See generally* STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS (1997).

28. *See* CLARK ET AL., *supra* note 11, at 5 ("America's first formal, nonmilitary, employer-provided pension plan was created by the American Express Corporation in 1875. By the turn of the century, only a handful of private companies had adopted retirement pension plans—primarily railroads, public utilities, and financial institutions. There were only 12 private pension plans in 1900.").

29. For a discussion of early American private pension plans, see CLARK ET AL., *supra* note 11.

30. *See* CLARK ET AL., *supra* note 11, at 6. For example, the General Electric Company's plan offered workers 1.5% of their average pay over the last ten years. *See id.* at 6. Based on this system "even if wages and salaries increased with tenure, the plan would yield an annual pension of less than 30[%] of the worker's pay during the final year on the job." *Id.* The authors note that the "plan offered by the General Electric Company was typical [for the time.]" *Id.*

31. *See id.* at 5. "These plans were generally noncontributory, paid relatively small retirement benefits, and could be terminated at the discretion of the employer." *Id.*

32. *See id.*

33. *See id.* Even compared to the public pensions of the time, private pension plans offered little in safeguards or protections for the employees who may have relied on them. *See id.* at 6. During the early twentieth century, public pensions offered disability/injury pension payments for service members who could no longer work. *See id.* at 5. These pensions were supplied by Congress since the days of the revolution. *See id.* at 6. Meanwhile, private plans were often "covered by the good will of employers, and when that proved inadequate workers had to turn to the common law associated with negligence liability." *Id.* Injured workers, or their surviving family members, were forced to go through the courts, if employers decided not to pay out pensions, traditionally having to operate under a negligence theory to receive any form of payment. *See id.*

Overall, the system lacked many protections that are in place today that aim to ensure employees receive their promised benefits.[34] Nevertheless, pension coverage began expanding rapidly after World War II in response to many factors such as "higher individual [federal income] tax rates, changes in collective bargaining regulations concerning pensions, and national economic policies that enacted wage . . . controls [but] excluded pension payments."[35] Combined, pensions were a way for employers to legally provide employees with more compensation, and to do so in a tax-favored way to boot.

The retirement plan landscape changed again in the late 1970s. Up until then, retirement plans offered by public and private employers alike were overwhelmingly of the "defined benefit" variety—what most people typically think of as a traditional pension plan.[36] The defined benefit pension plan is so named because it provides a specific, predetermined benefit amount to participants upon retirement; generally, a monthly income payable for life.[37] That amount is usually based on a specific formula and tied to factors such as years of service, final average salary, and a benefit accrual rate.[38] The employer bears the primary responsibility for funding the plan with enough contributions to ensure that there are sufficient assets to cover promised future benefit payments.[39] The plan assets are

34. *Id.* at 5. "By 1916, there were roughly 117 private pension plans in existence and that number [continued to grow.]" *Id.* (citations omitted). Still, "[o]nly about 15[%] of the private labor force was covered by a pension in 1940." *Id.* at 6.

35. *Id.* at 6–7. *See* Joy Sabino Mullane, *Perfect Storms: Congressional Regulation of Executive Compensation*, 57 VILL. L. REV. 589, 603–06 (2012) (discussing wage control laws between the 1940s and the 1970s and the scrutinization of executive compensation during this era).

36. *See* Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007) ("From the 1930s through the mid-1970s, defined benefit (DB) pension plans were the predominant form of private pension arrangement and defined contribution (DC) plans played a distinctly secondary, supplementary role."); *see also* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455–56 (2004) [hereinafter *The Defined Contribution Paradigm*] (discussing the structure of defined benefit plans when compared to the alternative of defined contribution plans).

37. *See* Patricia A. McCoy, *Degrees of Intermediation*, 50 WAKE FOREST L. REV. 551, 558–59 (2015) (discussing the structure of defined benefit plans in the context of the "longevity risk" placed upon the provider).

38. *See* Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683, 687–88 (2000) (discussing the traditional calculations that are made for a defined benefits plan).

39. *See* Jonathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 L. REV. MICH. ST. U. DET. C.L. 187, 193–94 (discussing how defined benefit plans are often underfunded, specifically highlighting how public sector defined benefit plans are severely underfunded). Since employers are responsible for funding defined benefit plans, without a direct contribution from the employee, who is progressively earning a right to future compensation, it is common for these plans to be underfunded due

invested and managed by professionals hired by the employer, with the goal being to generate returns that will support the promised benefits and ensure the long-term sustainability of the plan.[40]

Today, the most common type of retirement plan is a "defined contribution" plan.[41] With these plans, the contributions made by either or both the employer and employee are defined, but the ultimate benefit is not predetermined.[42] Each plan participant in a defined contribution plan has an individual account where the contributions, investment gains, and investment losses are recorded.[43] The individual participant bears the responsibility for investment decisions; participants can choose how their contributions are invested or they can opt for a default investment option.[44] As such, the participant bears the investment risk and must manage their contributions and investment strategy to achieve their retirement goals.[45] In other words, the final benefit amount available for

---

to either underfunding by the employer or the decline in value of the investment portfolio, which holds the assets used to fund the plan. *Id.*

40. For a discussion of the funding of defined benefit plans, see *supra* note 38.

41. *See* Eli R. Stoltzfus, *Defined Contribution Retirement Plans: Who Has Them and What Do They Cost?*, 5 BUREAU LAB. STAT.: BEYOND THE NUMBERS, no. 17, 2016, at 1–2 (" In today's economy, defined contribution retirement plans are the most prevalent type of employer-sponsored retirement benefit plans in private industry in the United States."); JOHN J. TOPOLESKI ET AL., CONG. RSCH. SERV., R43439, WORKER PARTICIPATION IN EMPLOYER-SPONSORED PENSIONS: DATA IN BRIEF AND RECENT TRENDS 6 (2024) (finding roughly 50% of all private sector employees participate in a defined contribution plan).

42. *See* Matthew Venhorst, Note, *Helping Individual Investors Do What They Know Is Right: The Save More for Retirement Act of 2005*, 13 CONN. INS. L.J. 113, 117–19 (2007) (discussing the mechanics of defined contribution plans as well as the consequences of the shift from defined benefit plans to defined contribution plans) Presently, there are many different defined contribution savings vehicles. *See also* TOPOLESKI ET AL., *supra* note 41, at 1 (describing multiple retirement plans which qualify as a defined contribution plan). Some of them are employer-sponsored and some are independent from employment. *See Retirement Plans for Self-Employed People*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/retirement-plans-for-self-employed-people (last updated Aug. 20, 2024). With regard to employer-sponsored plans, both employers and employees may contribute to the plan, and there may be options for matching contributions from the employer based on a predetermined formula. *See* Venhorst, *supra*, at 117–18. Defined contribution plans are often portable, meaning that participants can carry their account balances with them if they change jobs. *See Rollovers of Retirement Plan and IRA Distributions*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/rollovers-of-retirement-plan-and-ira-distributions (last updated Aug. 20, 2024). They have the option to roll over the funds into another retirement plan or an individual retirement account (IRA). *See id.*

43. *See* Forman, *supra* note 39, at 202–03 (discussing how employees bear the risk of investment and management of their own portfolio under defined contribution plans). Under defined contribution plans, employees are in charge of their own investment portfolios. *See id.* at 202. This often leads to employees often investing too conservatively, which results in a lessened payout. *Id.*

44. For a discussion of employee control over their investment portfolios under defined contribution plans, see *supra* note 39. Employees are typically provided with a range of investment options, such as mutual funds, stocks, bonds, or target-date funds.

45. For a discussion of employee control over their investment portfolios under defined contribution plans, see *supra* note 39.

retirement is based on the account balance at that time, derived from the cumulative effects of the contributions made and the investment performance of the account.[46]

Defined contribution plans played a distinctly secondary, supplementary role until they started rising in prominence during the 1980s after the passage of the Revenue Act of 1978.[47] The Act specifically added Section 401(k) to the Internal Revenue Code, which allowed for the creation of what is now commonly referred to as a 401(k) plan.[48] It is worth noting that while the 401(k) plan was the first widespread defined contribution retirement plan, there were other forms of defined contribution plans before it. For example, individual retirement accounts (IRAs) were introduced in the 1970s, which also operate on a defined contribution basis.[49] However, Section 401(k) marked a significant milestone in the ability for employers to offer defined contribution plans and shift the onus of saving primarily to workers.[50]

Due to changes in laws governing employer-sponsored retirement plans, as well as societal evolution in the workforce, employers and their workers started shifting the way in which they saved for retirement.[51] By the 1990s the situation had reversed: defined contribution plans, specifically 401(k) plans, became the predominant means for saving.[52] Today, the country has moved from the defined

---

46. When participants reach retirement age, they can typically choose from various distribution options. These may include lump-sum withdrawals, systematic withdrawals, annuity options, or a combination thereof. The options available are subject to different tax implications and plan rules.

47. *See* Estreicher & Gold, *supra* note 36, at 331; *see also* Joy Sabino Mullane, *Incidence and Accidents: Regulation of Executive Compensation Through the Tax Code*, 13 LEWIS & CLARK L. REV. 485, 538 (2009). "In 1985, retirement savings assets totaled $2.3 trillion, of which defined contribution-type assets (including IRAs) were only $0.7 trillion or about [30%]. By 2007, total retirement assets were $17.6 trillion, of which defined contribution-type assets (including IRAs) were $9.2 trillion or roughly [52%]." *Id.* (internal footnotes omitted).

48. *See* I.R.C. § 401(k) (1978).

49. *See* Ausher M.B. Kofsky, *Rehabilitating Frankenstein's Monster: Repairing the Public Policy of the Roth IRA*, 80 ALB. L. REV. 161, 165–66, 174 (2017) (discussing the structure of IRA plans and the political and economic climate leading up to the introduction of IRA plans in 1978).

50. There are different pros and cons with defined contribution plans. While these plans offer flexibility and portability, allowing individuals to take control of their retirement savings, they also place all the burdens and risks on employees often resulting in less overall being saved for individuals' retirements. For additional discussion of the burden defined contribution plans place on employees, see *supra* note 39.

51. *See* 29 U.S.C. § 1001(a) (discussing the growth in prevalence of employee benefit plans, which in part, resulted in Congress passing the Employee Retirement Income Security Act (ERISA)).

52. *See* Melissa Phipps, *The History of Pension Plans in the U.S.*, THE BALANCE, https://www.thebalancemoney.com/the-history-of-the-pension-plan-2894374 (July 31, 2021). Because of tax deferral benefits for highly compensated employees who wanted to shelter

benefit paradigm of employer-provided pensions to a defined contribution paradigm of individual saving accounts,[53] some of which are independent from employers.[54] Newer defined contribution plans like health savings accounts (HSAs) and Section 529 educational savings accounts (529 plans) also provide a tax-preferred means of saving for more than just retirement. Defined benefit plans still exist, but they are now limited primarily to public employers and certain private industries.[55]

---

more of their paychecks from taxes, 401(k)s and other defined contribution plans gained popularity. *See id.*

53. *See The Defined Contribution Paradigm*, *supra* note 36, at 453.

> Pension cognoscenti have frequently remarked on the stagnation of defined benefit pensions and the concomitant rise of defined contribution plans. I suggest that, over the last generation, something even more fundamental has occurred, something that can justly be called a paradigm shift. Americans today primarily conceive of and implement retirement savings in the form of individual accounts. Such accounts have become primary instruments of public policy, not just for retirement savings, but increasingly for health care and education as well.

Id.; *see also* Daniel I. Halperin, *Special Tax Treatment for Employer-Based Retirement Programs: Is It "Still" Viable as a Means of Increasing Retirement Income? Should It Continue?*, 49 TAX L. REV. 1, 24–27 (1993). *See generally The Defined Contribution Paradigm*, *supra* note 36 (exploring causes underlying defined contribution paradigm and speculating as to its future).

54. A recent report by the Congressional Research Service summarized the shift as follows:

> By 2021, among private-sector workers, 15% had access to and 11% participated in DB plans, while 65% had access to and 51% participated in DC plans. This shift has occurred for a number of reasons. For employers, DC plans may be administratively easier and their costs tend to be both lower and more predictable than DB plans. For employees, the shorter vesting requirements and portability of DC plan balances at job change or retirement are advantageous features. However, because DC plans, unlike DB plans, do not provide a guaranteed benefit for life, this shift has raised concerns about whether households are adequately saving for retirement.

JOHN J. TOPOLESKI & ELIZABETH A. MYERS, CONG. RSCH. SERV., R47152, PRIVATE-SECTOR DEFINED CONTRIBUTION PENSION PLANS: AN INTRODUCTION (2022) (citing summary).

55. *See* PENSION BENEFIT GUAR. CORP., PENSION INSURANCE DATA BOOK 2003, at 16 (2004); U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-817, DEFINED BENEFIT PENSIONS: PLAN FREEZES AFFECT MILLIONS OF PARTICIPANTS AND MAY POSE RETIREMENT INCOME CHALLENGES (2008) [hereinafter DEFINED BENEFIT PENSIONS] (citing inside cover); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO 08-223, STATE AND LOCAL GOVERNMENT RETIREE BENEFITS: CURRENT FUNDED STATUS OF PENSION AND HEALTH BENEFITS 4 (2008) [hereinafter GOVERNMENT RETIREE BENEFITS] ("With few exceptions, defined benefit pension plans still provide the primary pension benefit for most state and local workers. About 90[%] of full-time state and local employees participated in defined benefit pension plans as of 1998."). As defined contribution plans have risen in prominence, defined benefit plans have faded from prominence; from 1985 to 2002, the total number of defined benefit plans insured by the Pension Benefit Guaranty Corporation decreased from a high of more than 114,000 to 32,321. *See* PENSION BENEFIT GUAR. CORP., *supra*, at 16. In addition, pension plan freezes, where the plan either ceases future benefit accruals or to admit new participants, "are fairly common today." DEFINED BENEFIT PENSIONS, *supra* (citing inside cover). The last bastion of defined benefit plans is governmental employers. *See* GOVERNMENT RETIREE BENEFITS, *supra*, at 4. But a few states do now "offer defined contribution or other types of plans as the primary retirement instrument." *Id.*; *see also* Estreicher & Gold, *supra* note 36, at 331–32. As 401(k)s and other defined contribution plans gained popularity, defined benefit plans decreased in popularity and usage amongst large private-sector companies. *See id.*

While there are a variety of retirement savings vehicles currently available, many rank-and-file workers still are not investing in them at all. Among those who are investing, many are not saving in meaningful amounts. As discussed more below, most retirement savings tax benefits accrue to the wealthy, some of whom are now amassing mega accounts. The next section looks more closely at the current state of retirement savings before stepping back to show how we got here and offering some potential solutions.

B. Assessment of the Effectiveness of Tax Incentives for Retirement Savings

1. Incentivizing Retirement: The Tax Angle

A general principle in computing federal income tax liability is that each individual employee is taxed on the amount he or she receives as compensation for performing services; however, there are exceptions.[56] For policy reasons, Congress excludes some forms of compensation from taxation and defers taxation on other forms of compensation to later years. The Code is often used not only as a means of raising revenue, but also as a means of implementing social policy.[57] With regard to the latter, the Code contains various provisions that are designed to reward taxpayers for engaging in activities that Congress views as desirable and penalize taxpayers for engaging in activities that Congress views as undesirable.[58] To

56. I.R.C. § 61(a)(1) (2006); *see also* Treas. Reg. § 1.61-1(a) (as amended in 2003) ("Gross income includes income realized in any form, whether in money, property, or services."); Treas. Reg. § 1.162-2(d) (1960) (compensation paid other than in cash). Very few Americans—only the wealthiest—were subject to any federal income tax until its application was significantly expanded in the 1940s. *See Understanding Taxes*, IRS, http://www.irs.gov/app/understandingTaxes/teacher/whys_thm02_les05.jsp [https://perma.cc/6EH4-S2AQ] (last visited Mar. 11, 2025). From the inception of the modern income tax in 1913 to the beginning of U.S. involvement in World War II in 1940, at most only about 5% of working Americans paid any income tax at all. *See id.* This was due, in large part, to the high exemption level set by the income tax laws, under which no income tax was due. Once an individual's taxable income rose above the exemption level, the tax rate structure was progressive. The individual federal income tax system did not become more broadly applicable until the Revenue Act of 1942. *See id.* Thereafter, approximately 50–75% of American workers paid federal income tax. *See id.*; *see also Erisa 40 Timeline Alternate*, U.S. DEP'T LAB., https://www.dol.gov/featured/erisa40/timeline/alternative (last visited Mar. 11, 2025) ("The demands of war production put almost every American back to work, but the war's cost still exceeded tax revenue. President Roosevelt's Victory Tax (as the Revenue Act of 1942 came to be known) levied progressive taxes on nearly 75[%] of American workers.").

57. *See generally* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) (assessing logic of using tax laws to accomplish policy goals).

58. *See generally* Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343 (1989) (discussing rewards and penalties in the income tax system); Kurt Hartmann, Comment, *The Market for Corporate Confusion: Federal Attempts*

affect nontax taxpayer behavior, Congress enacts provisions that alter, what would otherwise be the normal operating tax rules, in order to either incentivize or discourage that conduct.[59] Incentives may take the form of "deductions, credits, exclusions, exemptions, deferrals, and preferential rates."[60] These types of provisions operate to reduce the costs of engaging in certain activities, in theory making those activities more attractive to taxpayers.[61] In this way, the federal government foregoes taxes that it would otherwise collect and have available to spend.[62] Roughly forty years ago, Stanley Surrey called these types of provisions "tax expenditures" because they can be viewed as "special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives."[63]

Contributions to retirement savings made by an employer on behalf of an employee as well as compensation that an employee elects to invest in a retirement plan would ordinarily be taxable compensation income if not for rules exempting taxation.[64] In varying ways, depending on the type of retirement plan, participants are the

---

to Regulate the Market for Corporate Control Through the Federal Tax Code, 6 DEPAUL BUS. L.J. 159 (1993) (discussing rewards and penalties in the income tax system).

59. The phrase "normal operating tax rules" is used in this Article to refer to the already existing rules that would apply to determine the tax consequences in the absence of a subsequently enacted rule clearly prescribing different treatment in order to encourage the taxpayer to undertake a certain nontax action; it is not meant to refer to a comparison of current rules to a normative income tax. *Cf.* EDWARD D. KLEINBARD, RETHINKING TAX EXPENDITURES 8 (2008), https://www.jct.gov/getattachment/c2ab7398-e821-4f10-9638-73bd89c34807/Rethinking_Tax_Expenditures-3552.pdf ("[I]n many cases, it is not possible to identify in a neutral manner the terms of the 'normal' tax to which present law should be compared."). The incentivizing provisions that are the focus of this Article are referred to as tax incentives leading to tax-favored treatment, even though they are not labeled as such by the statute, because they operate as rewards and are not aimed at measuring a taxpayer's net income or raising revenue. *See id.*

60. Surrey, *supra* note 57, at 706; *see also* Zolt, *supra* note 58, at 343 ("Congress encourages good conduct by providing special tax statuses, rates, exclusions, deductions, or credits.").

61. *See* Zolt, *supra* note 58, at 343–44.

62. *See* Hartmann, *supra* note 58, at 169 ("[A] tax [benefit] serves as the functional equivalent of a direct government subsidy for the particular activity.").

63. Surrey, *supra* note 57, at 706. It should be noted, however, that a number of commentators are critical of the utility of the tax expenditure label. *See, e.g.*, *The Defined Contribution Paradigm*, *supra* note 36, at 519 ("There are those who dispute in general the utility of the tax expenditure label[.]") (citation omitted); KLEINBARD, *supra* note 59, at 8–11 (proposing a new approach to classifying tax provisions as tax expenditures that is aimed at responding to the criticisms of traditional tax expenditure analysis); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1187 (discussing some of the academic criticisms of the tax expenditure label).

64. Ryan Bubb et al., *A Behavioral Contract Theory Perspective on Retirement Savings*, 47 CONN. L. REV. 1317, 1329–30 (2015) (discussing the income tax effects on both employers and employees under employer sponsored defined contribution plans).

beneficiaries of retirement savings tax expenditures.[65] The first retirement tax expenditures were enacted shortly after the federal income tax was introduced; Congress expressly authorized a deferral of income tax on some employer-sponsored pensions in the Revenue Act of 1921.[66] This Act allowed for income tax deferral on pension contributions and the investment earnings on those contributions until workers received benefits in retirement.[67]

Having more money in your hand from not paying taxes and being allowed to have the investment earnings grow tax free makes saving for retirement cheaper. For example, setting aside the impact of other federal or state taxes, assume someone in the 22% marginal federal income tax bracket earns $1,000 of compensation income. If the taxpayer invests the money in a taxable account or spends it, they will pay taxes on the initial $1,000 in the amount of $220, leaving them with $780 to invest or spend. If, instead, the taxpayer chooses to contribute the $1,000 to a traditional tax preferred retirement savings vehicle (e.g., a 401(k) or traditional IRA), then the full $1,000 is invested and, further, the investment return on the $1,000 is allowed to grow tax-free. Combined, these preferences allow for a more rapid increase in a taxpayer's account balance.

Tax-preferences for retirement savings are significant tax benefits. They are one of the largest tax expenditures, projected by the Joint Committee on Taxation to cost the federal government $431.4 billion in foregone revenue in 2025 alone.[68] That is revenue that

---

65. *See infra* Parts II.B and III.

66. Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 227, 247; *see* Brian A. Benko, *The Regulatory Systems for Employee Benefits*, 63 TAX LAW. 239, 244 (2010) (discussing tax incentives created by the Revenue Act of 1921).

67. *See History of EBSA and ERISA*, EMP. BENEFITS SEC. ADMIN., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (last visited Mar. 11, 2025). "To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements." *Id.* Note that employers are able to deduct their contributions to the plan as compensation business expenses. *See* Mullane, *supra* note 47, at 502–03. Put differently, "[i]f the qualification requirements are met, employees receive two principal tax benefits. First, contributions to the plan are not included in the employee's income until received by the employee at some later date. Second, investment earnings on the contributions accumulate tax-free and are not subject to tax until later distributed to the employee." *Id.* (internal footnotes omitted). Today, there are income tax exclusions provided for a wide variety of employee benefits such as payments an employer makes to provide the employee with health insurance or qualified discounts the employer provides on the purchase of its products. *See* I.R.C. § 106 (2006) (employer contributions to an accident and health plan); I.R.C. § 132(a) (2) & (c) (2006) (qualified employee discount).

68. JOINT COMM'N ON TAX'N, *supra* note 5, at 31. In addition to retirement benefits, the largest tax expenditures are related to health care exclusions, the nontaxation of imputed rental income, and reduced tax rates for dividends and long-term capital gains. *See*

would otherwise have been collected as income tax if not for the retirement savings preferences.[69] A logical question to ask here is: why would the government forgo that tax revenue for the purpose of encouraging individuals to choose to save for retirement? One answer is that helping to ensure that a growing elderly population has the means to provide for itself is a good unto itself. In this situation, however, the government theoretically benefits as well by preventing or reducing the future drain on public resources of an elderly population unable to meet its own financial needs.

Since the Great Depression, when many elderly were visibly impoverished and suffering, the government has endeavored to prevent that from happening again. Social Security was enacted to be an economic security safety net for the elderly.[70] Although the Great Depression affected all segments of society, it impacted the elderly the most.[71] Before the Great Depression, the elderly were already significantly more likely to end up in government-run poorhouses or charitable almshouses.[72] The Great Depression only exacerbated the situation as existing savings were wiped out and jobs were lost.[73]

Social Security provides benefits as early as age sixty-two, and it has been instrumental in lifting the elderly population above the poverty line.[74] That poverty line, however, is low; for an individual in 2024, the federal poverty level was $15,060.[75] Social Security replaces more of the working-life income for those in the lowest quintile, but for others above that level there is a larger gap between what Social Security provides and a retiree's pre-retirement

---

Frequently Asked Questions Regarding Tax Expenditures, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures (last visited Mar. 11, 2025).

69. This includes contributions amounts that would otherwise be the subject of tax in the hands of the taxpayer, as well as the tax-free investment returns that would have otherwise been taxed if the contributions had been invested in taxable accounts.

70. HARRY R. MOODY, ABUNDANCE OF LIFE: HUMAN DEVELOPMENT POLICIES FOR AN AGING SOCIETY 110–11 (1988) (discussing policy reasons for implementing social welfare programs for elderly populations).

71. *See* DORA L. COSTA, THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880–1990, at 112–13 (1998) (discussing the living conditions of the elderly population during the Great Depression).

72. *See id.*

73. CAROLE HABER & BRIAN GRATTON, OLD AGE AND THE SEARCH FOR SECURITY: AN AMERICAN SOCIAL HISTORY 165 (1993) ("The extended job searches of the unemployed often exhausted savings and forced them to rely on family or friends. In the Great Depression, as banks failed, mortgages were defaulted, and pension and insurance plans were wiped out, aging men and women lost their planned security for old age and families were once again forced to deal with the issue of old-age support.").

74. *See supra* Part II.A.

75. *Federal Poverty Level (FPL)*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ (last visited Mar. 11, 2025).

income. The amount that Social Security pays out depends on a variety of factors, including what age the recipient begins receiving benefits, but as of January 2024, the average monthly benefit check was roughly $1,907 or $22,884 for the year.[76] The maximum benefit one could receive if they began collecting at age sixty-five (most begin earlier) was $3,822 or $45,864 for the year.[77] With costs of living increasing, especially for health care, there is no doubt that it is prudent for most Americans to be saving for their own retirement to help bridge the gap between Social Security and their pre-retirement standard of living, as well as protecting against outliving their assets.[78]

Tax-free accumulation benefits are the principal mechanism Congress has been using to encourage that retirement savings behavior, as all qualified plans of various types receive that benefit regardless of whether tax-subsidization begins before retirement contributions are made (i.e., traditional vehicles) or after (i.e., Roth vehicles).[79] The idea is that the lure of tax-free accumulation is a significant enough incentive to get people to save who otherwise might not, and also to encourage people who already save modestly to save more. While the rules governing retirement plans and their tax treatment have continued to evolve over time, that foundational tax structure—of allowing tax-free accumulation—has remained in place. The principal changes have revolved around providing more types of retirement accounts and, in general, allowing for increasing amounts to be tax sheltered in retirement accounts.

---

76. *What Is the Average Monthly Benefit for a Retired Worker?*, SOC. SEC. ADMIN., https://faq.ssa.gov/en-us/Topic/article/KA-01903 [https://perma.cc/AY6W-L89G] (last visited July 7, 2024).

77. *What Is the Maximum Social Security Retirement Benefit Payable?*, SOC. SEC. ADMIN., https://faq.ssa.gov/en-us/Topic/article/KA-01897 [https://perma.cc/DCD3-XM29] (last visited July 7, 2024) ("The maximum benefit depends on the age you retire. For example, if you retire at full retirement age in 2024, your maximum benefit would be $3,822. However, if you retire at age [sixty-two] in 2024, your maximum benefit would be $2,710. If you retire at age [seventy] in 2024, your maximum benefit would be $4,873.").

78. The exception, as discussed more *infra* Parts II.B.2 and II.B.3, would be the poorest Americans who have no disposable income and for whom Social Security provides the strongest wage replacement in later years. The Bureau of Labor Statistics recently released data showing:

> In 2022, total average annual household expenditures for retirees were $54,975. Retirees spent a higher proportion of their income than average on healthcare, $7,505. Among other expenses were $11,186 for shelter and $8,065 for transportation. Food at home expenses averaged $4,938 for a retiree's household compared with $2,412 for food away from home. Life and other personal insurance plans accounted for $451 of total expenditures.

Kerry Farrell & Joana Allamani, *1974 – 2024: Celebrating 50 Years of Protected Retirement Plans*, U.S. BUREAU OF LAB. STAT. (Mar. 2024), https://www.bls.gov/spotlight/2024/celebrating-50-years-of-protected-retirement-plans/.

79. *See generally* Doran, *supra* note 9.

Even with tax incentives available, barriers remain that prevent individuals from saving for retirement at all, let alone at an adequate level to support retirement needs. The next section explores these barriers and some of the congressional responses to overcome them.

2. Barriers to Saving and Congressional Responses: The (Largely) Tax Angle

From an individual perspective, the most basic purpose of saving for retirement is to ensure that one has enough money to pay their expenses when they reduce the amount they work or cease working entirely. Retirement income security has historically been viewed as a three-legged stool comprised of Social Security, employer-sponsored retirement savings, and individual savings.[80] More recently, some have viewed it more as a pyramid. While different versions of the pyramid exist, common components are: Social Security, employer-sponsored retirement savings, personal savings and investments, home ownership, and other sources of income.[81]

Social Security is the most certain of these categories, and it acts as the base from which individuals can build on for their retirement income security.[82] As mentioned above, Social Security has been especially successful in significantly reducing old-age poverty.[83] A recent study conducted by the Center on Budget and Policy Priorities concluded that Social Security "lift[s] more people above the poverty line than any other program in the United States."[84] Put differently, "[w]ithout Social Security, the poverty rate for those aged [sixty-five] and over would meet or exceed 40[%] in one-fourth of states; with Social Security, it is less than 10[%] in over two-thirds of

80. *See generally* LARRY DEWITT, SSA HISTORIAN'S OFF., RESEARCH NOTE #1: ORIGINS OF THE THREE-LEGGED STOOL METAPHOR FOR SOCIAL SECURITY (1996), https://www.ssa.gov/history/stool.html.

81. *See generally* BRIAN J. HANEY, THE RETIREMENT INCOME PYRAMID 21–35 (2020).

82. Social Security is projected to no longer be able to pay full promised benefits starting in 2035. Tami Luhby, *Social Security Will Not Be Able to Pay Full Benefits in 2035 if Congress Doesn't Act. Medicare Has a Little More Time*, CNN, https://www.cnn.com/2024/05/06/politics/social-security-trust-fund-benefits/index.html (May 6, 2024, 6:51 PM). Without legislative changes, taxes collected from current workers will be able to pay roughly 83% of promised benefits to retirees at that time. *Id.*

83. *See supra* Part II.B.1.

84. Kathleen Romig, *Social Security Lifts More People Above the Poverty Line Than Any Other Program*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/social-security/social-security-lifts-more-people-above-the-poverty-line-than-any-other [https://perma.cc/F4Y5-WUSM] (Jan. 31, 2024).

states."[85] Keep in mind, though, that the poverty line is a very modest $15,060 for an individual in 2024.[86]

Notwithstanding the foregoing, Social Security faces some real actuarial challenges. It is projected to no longer be able to pay full promised benefits starting in 2035.[87] Without legislative changes, taxes collected from current workers will be able to pay only roughly 83% of promised benefits to retirees at that time.[88] Medicare is also facing a significant budget shortfall as medical expenses continue to rise.[89]

These economic factors are compounded by the fact that the elderly, on average, are spending a greater number of years in retirement than ever before. Age sixty-five is traditionally viewed as retirement age.[90] According to the latest data available from the U.S. Centers for Disease Control and Prevention (CDC), a man who reached age sixty-five in 2018 could expect to live until 84.2 years old and a woman could expect to live to 86.6.[91] On a national scope, those aged sixty-five and older comprise a growing share of the total population. The U.S. Census Bureau projects that in 2035 people aged sixty-five and older will outnumber persons under the age of eighteen for the first time in U.S. history.[92]

Certainly, one could choose, in theory, to continue working past sixty-five to maintain their standard of living. However, some are

---

85. *Id.*

86. *Poverty Guidelines*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVAL., https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines [https://perma.cc/4FY6-H5D6] (last visited July 7, 2024).

87. *See supra* note 82.

88. *Id.*

89. *Id.*

90. *See* Angela N. Antonelli, *The Aging of America: A Changing Picture of Work and Retirement*, GEO. CTR. FOR RET. INITIATIVES (Mar. 2018), https://cri.georgetown.edu/the-aging-of-america-a-changing-picture-of-work-and-retirement/ (discussing how the increasing American life-expectancy has put additional strains on retirement programs).

91. Elizabeth Arias et al., *United States Life Tables, 2021*, NAT'L VITAL STAT. REPS., Nov. 7, 2023, at 17, 19, https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-12.pdf.

92. *See* Press Release No. CB18-41, U.S. Census Bureau, Older People Projected to Outnumber Children for First Time in U.S. History (Mar. 13, 2018), https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html. Elderly share of population will rise from 17% to 23% by 2050. *See* Mark Mather & Paola Scommegna, *Fact Sheet: Aging in the United States*, PRB (Jan. 9, 2024), https://www.prb.org/aging-unitedstates-fact-sheet/ (citing data from *2023 National Population Projections Datasets*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/2023/demo/popproj/2023-popproj.html (Nov. 9, 2023)). Not only are those aged sixty-five and over projected to comprise a greater share of the population, but by 2050 this age group is projected to be significantly more racially and ethnically diverse. *See id.* (also citing data from *2023 National Population Projections Datasets*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/2023/demo/popproj/2023-popproj.html (Nov. 9, 2023)) ("Between 2022 and 2050 the share of the older population that identifies as non-Hispanic white is projected to drop from 75% to 60%.").

physically unable to continue working, and of those who are able, they may have trouble keeping or otherwise obtaining a job.

In the end, there are many reasons why it is wise to save independently for the senior years regardless of whether one is officially retired from the workforce. As previously discussed, the government encourages this retirement saving by providing tax incentives—principally in the form of tax-free accumulation—to help individuals have the means to provide for themselves in old age and thereby also reduce the potential strain on public resources.[93] However, even with encouragement, there are and have always been barriers to average Americans choosing to save or saving at an adequate level. Reasons vary, but two primary categories are (1) having access to a workplace plan, and (2) meaningful participation.

Congress has been actively addressing these barriers over the last couple of decades. There have been meaningful improvements through legislation such as the Pension Protection Act of 2006, the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001, the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), and the Setting Every Community Up for Retirement Enhancement Act of 2022 (SECURE 2.0).[94] However, as discussed in this Article, over the last fifty years, each piece of legislation incrementally improving the retirement savings outlook for average Americans has contained aspects that have been more beneficial to the ultrawealthy. These tax giveaways have sheltered enormous sums of money that the ultrawealthy can also then transfer—in a largely tax-preferred way—to their beneficiaries at their death. Congress has repeatedly chosen not to close such loopholes or otherwise limit the rules that allow for this massive wealth accumulation and transmission. So, while removing barriers has led to modest improvements for the lower-to-upper middle classes, the most significant and costliest benefits have accrued to the ultrawealthy.

93. *See supra* Part II.B.1.

94. *See* Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 789; Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. 107-16, §§ 601–666, 115 Stat. 38; Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. 116-94, Div. O, 133 Stat. 3137; SECURE 2.0 Act of 2022, Pub. L. 117-328, Div. T, 136 Stat. 5275.

a. Access

About half of the private sector workforce has access to an employer sponsored retirement plan; meaning roughly half does not.[95] It has been that way for many decades. Workers whose employers do not offer retirement benefits can certainly open an individual retirement account (IRA) on their own; however, that takes not only more initiative and effort but, for many, also raises concerns about choosing the right type of IRA, a good IRA custodian, and making wise investment decisions.[96]

IRAs also have lower contribution limits and thus, on their face, a more limited ability to accumulate savings than a workplace plan. However, those who generally want to contribute more also tend to earn more, and those higher-than-average wage workers often have employers who sponsor retirement plans. Meanwhile, for those who are self-employed (including independent contractors and gig workers) and more financially savvy than the average worker, there are other options with higher contribution limits, such as the Simplified Employee Pension (SEP) IRA plan, Individual 401(k), the Savings Incentive Match Plan for Employees (SIMPLE) IRA, profit sharing plan, or money purchase plan. In the end, low-to-moderate income employees left with only an IRA as a savings option generally have less opportunity to accumulate more on a tax-favored basis due, in part, to contribution limits.[97]

Congress recently focused on increasing access to workplace plans as part of two larger pieces of legislation: the SECURE Act of 2019 and SECURE 2.0 of 2022.[98] In the SECURE Act, this was done by requiring 401(k) plans to cover a larger segment of workers, including certain part-time workers; this requirement was expanded

95. From the 1980s through the 2010s, in any given year roughly half the private sector workforce had access to a workplace retirement plan, although fewer chose to participate. More recently, the percentage of the workforce with retirement plan access has been on the rise. *See* TOPOLESKI & MYERS, supra note 54 ("In 2021, about 68% of the U.S. private-sector workforce had access to and 51% participated in pension plans through their employers.") (citing summary); AARP, *New AARP Research: Nearly Half of Americans Do Not Have Access to Retirement Plans at Work*, PR NEWSWIRE (July 13, 2022, 9:30 PM), https://www.prnewswire.com/news-releases/new-aarp-research-nearly-half-of-americans-do-not-have-access-to-retirement-plans-at-work-301585809.html ("Nearly half of workers in the U.S. do not have access to a retirement plan at work, according to a new AARP study. Nearly 57 million people — 48% of American private sector employees ages [eighteen] to [sixty-four] — work for an employer that does not offer either a traditional pension or a retirement savings plan.").

96. Many small businesses do not offer retirement plans to their employees, and individuals who work in part-time, contract, or gig economy jobs may not have access to employer-sponsored plans. *See* AARP, *supra* note 95.

97. *See infra* Part III.

98. SECURE Act, Pub. L. 116-94, Div. O, 133 Stat. at 3137; SECURE 2.0 Act, Pub. L. 117-328, Div. T, 136 Stat. at 5275.

in SECURE 2.0 to cover more workers and apply to 403(b) plans.[99] In addition, SECURE 2.0 increased pre-existing tax credits for small employers who establish a retirement plan for their employees to encourage more employers to offer a plan.[100]

b. Meaningful Participation

Even workers who have access to a workplace plan may choose not to participate in the plan. On average, 25% choose not to participate.[101] Researchers have considered why one would choose not to participate. Reasons vary but typical ones include: (i) not having enough disposable income after servicing basic expenses and debts, plus other competing financial priorities, (ii) lacking investment education and feeling intimidated or overwhelmed by investment decisions, (iii) not wanting to take active steps to initiate enrollment in a plan such as filling out paperwork and making decisions (i.e., inertia), and (iv) not wanting to lose access to funds in the event of emergency needs.[102]

In 2006, Congress first officially authorized employers to automatically enroll workers in their retirement plan in the Pension Protection Act.[103] This increases participation rates because workers need to actively opt out of such plans; automatic enrollment makes inertia work in favor of savings. Still, automatic enrollment is a plan feature employers had to choose to adopt, and many did not. According to various surveys, until recently, only 50–60% of employers who offer retirement plans utilized automatic enrollment.[104] SECURE 2.0 now mandates automatic enrollment (subject to a few exceptions) for all new 401(k) and 403(b) plans.

But even for those workers who choose to participate in their workplace plan or who are auto-enrolled, they still may not be funding their account at an adequate level to provide for their needs

99. It now includes those who work at least 500 hours per year for three consecutive years. *See* SECURE Act § 112, 133 Stat. at 3153; SECURE 2.0 Act § 125, 136 Stat. at 5314.

100. *See* SECURE 2.0 Act §§ 102, 111, 136 Stat. at 5277, 5293–94.

101. Maria G. Hoffman et al., *New Data Reveal Inequality in Retirement Account Ownership*, U.S. CENSUS BUREAU (Aug. 31, 2022), https://www.census.gov/library/stories/2022/08/who-has-retirement-accounts.html.

102. John A. Turner & Satyendra Verma, *Why Some Workers Don't Take 401(K) Plan Offers: Inertia Versus Economics* 8–9 (Ctr. for Rsch. on Pensions & Welfare Policies, Working Paper No. 56, 2007). In general, the retirement plan system can be complex and confusing for many individuals. The rules, regulations, and various plan options can be overwhelming, leading to a lack of understanding and engagement. This complexity can hinder effective retirement planning and decision-making. *Id.* at 11.

103. Pension Protection Act of 2006, Pub. L. 109-280, § 902, 120 Stat. 780, 1033.

104. Stephen Miller, *401(k) Auto-Enrollment Proves Popular*, SHRM (Apr. 7, 2022), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/401k--auto-enrollment-proves-popular.aspx.

throughout retirement. One remedy for that is automatic escalation. This feature operates to automatically increase the amount of employee salary deferrals contributed into a retirement plan over time in a prescribed manner so that more is saved over time as wages and salaries increase. The Pension Protection Act expressly authorized automatic escalation features; recently, SECURE 2.0 went further and mandated automatic escalation of employee deferral rates.[105]

The Pension Protection Act also approved other plan features that help to assist with common barriers to participation. Subject to regulation by the Labor Department's Employee Benefits Security Administration (EBSA), retirement plan fiduciaries could choose certain default alternative investments for participants who are uncomfortable choosing their investments on their own or who fail to do so. Meanwhile, automatic rollover protects against employees liquidating their retirement accounts when they leave their job by automatically rolling over their account into another qualified retirement vehicle such as an IRA.

Both SECURE Acts worked more recently to make it easier for employees to commit to contributing to their retirement plans by also making it easier to make penalty-free withdrawals in certain cases of emergency or significant life events.[106] Collectively, subject to limits and qualifications, the SECURE Acts added penalty-free withdrawals covering birth, adoption, terminal illness, and with respect to situations involving domestic abuse or federally-declared disasters.[107]

Combined, these are significant steps addressing some of the issues impeding meaningful participation rates. Automatic enrollment intervenes to shift natural inertia in favor of participation and a default investment plan makes it easier for those hesitant to make their own investment decisions. Automatic escalation helps savings keep pace with pay raises. More flexibility to make penalty-free withdrawals in the event of emergencies or significant life events makes it easier for employees to choose to set aside—or allow to be set aside automatically—money today knowing that they will be able to use it tomorrow if a need arises.

---

105. Pension Protection Act § 902, 120 Stat. at 1033; SECURE 2.0 Act § 101, 136 Stat. at 5275.

106. Pension-linked Emergency Savings Accounts (PLESA) inside a retirement plan allow for easier withdrawals of modest amounts to deal with short term emergencies without being penalized. *See* SECURE 2.0 Act § 127, 136 Stat. at 5317–18.

107. *Id.* § 311, 136 Stat. at 5347 (qualified birth or adoption); § 314, 136 Stat. at 5349 (domestic abuse victims); § 326, 136 Stat. at 5359 (terminal illness); § 331, 136 Stat. at 5361 (federally-declared disasters).

Responding to another participation barrier—having the disposable resources to save—Congress enacted the Saver's Credit as part of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001.[108] It is aimed at low-to-moderate-income individuals and families.[109] Those who qualify may receive a tax credit of up to 50% for contributions made to an eligible retirement account, with a maximum of $1,000 of contribution credit.[110] The credit is applied to the taxpayer's income tax liability, thus lowering it.[111] When first enacted, it was non-refundable; meaning, it could reduce the amount of taxes owed but could not result in a refund beyond the amount of taxes owed.[112] This has led to the retirement benefit being underutilized, as, statistically, the vast majority of low-to-middle-income taxpayers do not have tax liability greater than the $1,000 maximum, if any liability at all.[113]

The Saver's Credit was also modified by SECURE 2.0 to turn it into a refundable credit called the Saver's Match.[114] It will be effective beginning in 2027.[115] The Saver's Match differs in several ways from its predecessor, most notably as a refundable tax credit that

---

108. *See* Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. 107-16, § 618(a), (b)(1), 115 Stat. 38, 106–08 (codified at I.R.C. § 402A (West 2025)). The Saver's Credit was initially introduced as a part of the EGTRRA and was then made a permanent part of the tax code by the Pension Protection Act of 2006. *See* Pension Protection Act § 833, 120 Stat. at 1003 (codified at I.R.C. § 25B (West 2025)).

109. *See* I.R.C. § 25B(a), (b)(1)–(2) (West 2025) (establishing the threshold annual income requirements to benefit under the Saver's Credit); *id.* § 25B(b)(3) (noting the income limits are adjusted annually for inflation).

110. *See* BRENDA MCDERMOTT, CONG. RSCH. SERV., IF11159, THE RETIREMENT SAVINGS CONTRIBUTION CREDIT AND THE SAVER'S MATCH (2023), https://crsreports.congress.gov/product/pdf/IF/IF11159 (noting that joint filers are entitled to up to $2,000 in Saver's Credit returns); *see generally* Adi Libson, *Confronting the Retirement Savings Problem: Redesigning the Saver's Credit*, 54 HARV. J. ON LEGIS. 207, 228 (2017) (discussing Saver's Credit eligibility); *Retirement Savings Contributions Credit (Saver's Credit)*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit (Aug. 20, 2024) (providing background information on the Saver's Credit and tables by which Saver's Credit eligibility can be determined).

111. *See* Libson, *supra* note 110, at 228 ("The tax benefit provided by the SC is in addition to the standard tax benefits provided to retirement contributions, which exempt the investment income from taxation of capital income in Roth IRA accounts or defer tax collection to time of withdrawal for contributions to IRA accounts by enabling a deduction at the time of contribution.") (footnotes omitted).

112. *See* EGTRRA § 618, 115 Stat. at 106 (Saver's Credit titled "Nonrefundable Credit to Certain Individuals for Elective Deferrals and IRA Contributions").

113. *See* MCDERMOTT, *supra* note 110 (noting that only 5.7% of eligible taxpayers claimed the credit in 2021, with an average credit of $191).

114. SECURE 2.0 Act of 2022, Pub. L. 117-328, Div. T, §§ 103(a), (f), 136 Stat. 5275, 5279, 5286 (codified at I.R.C. § 6433) (creating the Saver's Match and establishing that the Saver's Match will be effective December 31, 2026, respectively).

115. *Id.* § 103(f), 136 Stat. at 5286.

does not require individual tax liability.[116] Such a change allows for all low-to-middle income taxpayers to be eligible for the Saver's Match no matter the amount they owe in yearly taxes. The percentage of credit returned to individuals under the Saver's Match does not employ the rigid maximum AGI model that was used under the Saver's Credit, but rather gradually diminishes the matching percentage based on AGI.[117] The current Saver's Credit and future Saver's Match are decent, although modest, incentives for those low-to-moderate taxpayers who are able to set aside funds now, but disposable income issues remain for the most financially vulnerable.[118]

While individual employees may opt out of automatic enrollment or escalation features, the Pension Protection Act, EGTRRA, and the SECURE Acts aim, in part, to increase worker access to retirement plans and to support more meaningful savings. The next section considers to what extent the tax incentives and tax initiatives combine to affect retirement saving levels.

3. Effectiveness of Retirement Savings Incentives

Assessing the effectiveness of retirement savings incentives in preparing individuals for retirement income security depends, in part, on how you define success. Is it that more people are saving than otherwise would have saved but for incentives? Or that people are saving greater amounts than they would have but for incentives? Maybe it should be that the greatest increases in people saving, or amounts saved, are coming from the low-to-moderate income part of the population that is most at risk of not having enough financial security in retirement? Perhaps it should be that the tax expenditure for retirement incentives is mostly being used by those who most need the incentive—to put it colloquially, that it is money well spent. Many of these questions are hard to answer with

116. *See* John Scott & Kim Olson, *Federal Saver's Match Could Benefit Millions of Low- to Moderate-Income Americans*, PEW (Apr. 12, 2024), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2024/04/federal-savers-match-could-benefit-millions-of-low-to-moderate-income-americans.

117. *See* 26 U.S.C. § 6433(b) (noting that the applicable percentage baseline is 50% with reductions occurring at different AGI thresholds depending on filing status). *See also* MCDERMOTT, *supra* note 110 (graphing the way in which phaseouts occur depending on AGI). In addition, SECURE 2.0 allows employers to treat employee student loan repayments as if they were retirement plan contributions, thus qualifying them for potential matching contributions that are deposited into the employee's retirement account. *See* SECURE 2.0 Act § 110, 136 Stat. at 5290–93 (setting forth the principle that student loan repayments can be viewed as contributions to a retirement plan).

118. *See* MCDERMOTT, *supra* note 110.

certainty, and each has been or could be the singular focus of academic study.

Even where studies agree about definite positive outcomes—as they are with automatic enrollment increasing participation rates—that does not necessarily mean that the current retirement system, including tax incentives, is structured optimally. It is well understood that the retirement savings tax benefits are "upside down." Meaning, that the tax incentives disproportionately benefit higher-income over lower-income individuals.[119] Due to the progressive nature of the income tax system, lower-income individuals may not have substantial tax liability, which means they may not fully benefit from the tax deductions or credits related to retirement savings. On the other hand, higher-income individuals who have more significant tax liabilities, and are taxed at higher marginal rates, tend to benefit more from the tax advantages of qualified retirement savings. This is upside down because wealthier individuals, who generally have less difficulty saving for retirement, receive more substantial tax breaks compared to those who might need greater incentives to bolster their retirement savings.

Studies do generally demonstrate that there are more Americans saving more for retirement than ever before. Nevertheless, a closer look reveals that there are wide disparities within the aggregate view. There are many variables affecting how much one may save for retirement, including gender, education level, wage and salary, industry, employer size, race and ethnicity, and age.[120] Without question, the lowest-income Americans do not significantly participate in tax-preferred retirement savings plans of any type. Savings in defined contribution-type tax-preferred vehicles "tend[] to increase with families' income and net worth."[121] Further, "[b]aby boomers, men and non-Hispanic White and Asian individuals are the most likely to own retirement accounts."[122]

---

119. *See generally* U.S. DEP'T OF TREAS., ADVANCING EQUITY THROUGH TAX REFORM: EFFECTS OF THE ADMINISTRATION'S FISCAL YEAR 2025 REVENUE PROPOSALS ON RACIAL WEALTH INEQUALITY (2024), https://home.treasury.gov/system/files/131/Advancing-Equity-through-Tax-Reform-FY2025.pdf. The Department of Treasury's focus on racial wealth inequality naturally considers the income gaps amongst different racial groups and provides insight as to how tax incentives are beneficial for higher-income individuals. *See generally id*.

120. *See, e.g.*, *Employer-Based Retirement Plan Access and Participation Across the 50 States*, PEW (Jan. 13, 2016), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2016/employer-based-retirement-plan-access-and-participation-across-the-50-states.

121. *See* Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Feb. 2009, at A23.

122. Hoffman et al., *supra* note 101.

Thus, in the end, retirement savings are on the rise, but not necessarily for those who would most benefit from saving more. Many lower-to-moderate income Americans do not save enough to maintain their standard of living in retirement. Several studies show that a significant portion of the population has limited savings or no savings at all. Again, this gap is attributed to various factors, including low incomes or little disposable income, competing financial priorities, lack of financial literacy, and limited access to retirement plans.

One of the world's largest investment companies, Vanguard, annually assesses "the saving behaviors of nearly [five] million DC plan participants across Vanguard's business."[123] Vanguard recently reported that the average retirement account balance was roughly $112,572, while the median account balance was $27,376.[124] These numbers alone—without more context—have limited utility. Account balances for younger workers should generally be less than those approaching retirement, and they would drag down the overall average. In terms of retirement readiness, looking at the balances of those nearing retirement is more insightful. For those aged between fifty-five and sixty-four in the Vanguard report, the average account balance was $207,000; however, the median account balance was $71,168. These median amounts would contribute minimal income in retirement. For example, on average, a $50,000 annuity would pay approximately "$330 monthly" for the rest of one's life if one purchased the annuity at age sixty-five and began taking payments immediately.[125]

Viewing balances not only from the perspective of age but also from income level is meaningful in trying to assess likely points of greater retirement income insecurity. While Vanguard also assessed balances based on some income levels,[126] a recent

123. VANGUARD, HOW AMERICA SAVES 2023, at 4 (2023), https://perma.cc/4PTE-99XM.

124. *Id.* at 10, 51.

125. Shawn Plummer, *Annuity Calculator: How Much Do Annuities Pay Per Month?*, THE ANNUITY EXPERT, https://www.annuityexpertadvice.com/annuity-calculator-2/ (last visited Mar. 11, 2025).

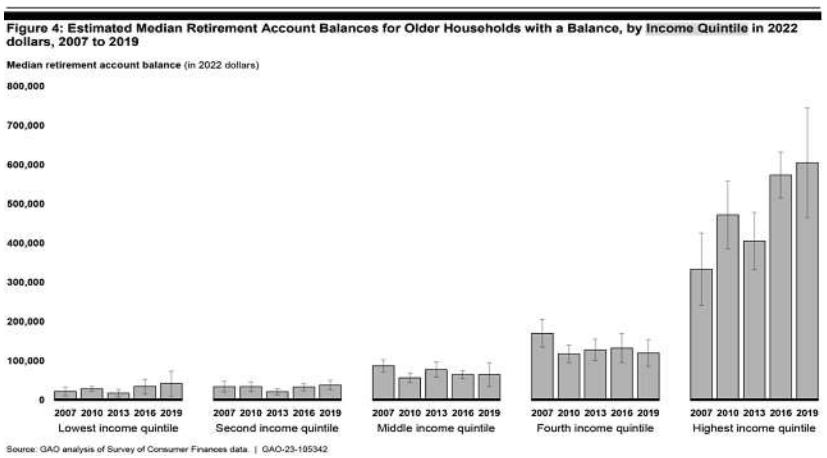
126. *See* VANGUARD, *supra* note 123, at 53–54. From an income level perspective, a recent Vanguard study of its $5 million participants reported the following:

Income Level	**Average Balance**	**Median Balance**
<$15,000	$20,765	$4,033
$15,000–$29,999	$13,871	$4,568
$30,000–$49,999	$28,672	$11,556
$50,000–$74,999	$66,918	$31,064
$75,000–$99,999	$113,617	$58,665
$100,000–$149,999	$186,066	$104,155
$150,000+	$340,245	$201,301

Government Accountability Office (GAO) study assessed this (and other factors) on a more national and longitudinal basis.[127] The GAO study focused on the households of workers aged fifty-one to sixty-four over a twelve-year period (2007–2019). Regarding retirement account balances, it found:

> Among those with a retirement account balance, the median balance was substantially larger in 2019 than in 2007 for high-income households. For all but the highest income group, there was no detectable difference between the median balances in 2019 and 2007 (see fig. 4). The median balance for high-income households compared to middle-income households was significantly greater over this period. Specifically, in 2019 the median for high-income households was about [nine] times that of middle-income households (about $605,000 and $64,300, respectively). While in 2007, the median for high-income households was about [four] times that of middle-income households (about $333,000 and $86,800, respectively).[128]

To put it bluntly and more succinctly, the median retirement account balance for the vast majority of households remained roughly the same over the twelve-year period from 2007 to 2019; only high-income households experienced an increase in their median balance.[129] A helpful figure depicts the sharp contrast between those at the higher end and everyone else:



130

127. *See generally* U.S. GOV. ACCOUNTABILITY OFF., GAO-23-105342, RETIREMENT ACCOUNT DISPARITIES HAVE INCREASED BY INCOME AND PERSISTED BY RACE OVER TIME (2023) [hereinafter RETIREMENT ACCOUNT DISPARITIES].

128. *Id.* at 13 (internal citations omitted).

129. *Id.*

130. *Id.* at 14.

In addition to the lack of growth over time for all but the highest quintile, it is helpful to see that the difference between the values of the lowest and highest quintile balances is significant. It makes sense that wealthier taxpayers would save more. Bearing in mind, though, that these balances are supported by tax preferences makes the difference more significant. Regarding that aspect, the GAO reported that "[h]ouseholds in the top fifth income group received over 60[%] of the benefits of the income tax expenditure. In contrast, the bottom two income groups combined received under 5[%] of the benefits."[131] Even the GAO's report obscures the story of the amount of wealth supported by tax expenditures for the highest 1% or .01% of taxpayers nestled within the highest quintile.

In the end, it appears that those who would most benefit from saving more have not been sufficiently incentivized to do so or they are running into other savings barriers. Thus, high-income taxpayers are disproportionately enjoying the retirement savings tax incentives. High-income taxpayers are not only saving larger amounts on a tax-preferred basis but also are saving more money by having a tax-preferred vehicle available to park their funds; setting income aside on a tax-preferred basis saves taxpayers in a higher tax bracket more per dollar than a lower income worker. As a result, the tax benefits to the high-income group are compounded.

While it is too soon to have meaningful data on the effects from the SECURE Acts, participation rates and savings amounts should both increase to some extent. However, even if the SECURE Acts are widely successful in encouraging more average Americans to save for retirement or in greater amounts, the projected increase in cost (from foregone tax revenue) would still be quite modest in comparison to the overall cost of the retirement savings tax preferences afforded to the wealthy.[132] The SECURE Acts also contribute to exacerbating the disproportionality through provisions that increase the amount of allowable contributions for older participants ("catch up" contributions) and push back the date certain plan participants must begin taking withdrawals from their account; combined, these provisions allow those with means to shelter more for longer.

---

131. *Id.* at 122.

132. *See* JOINT COMM. ON TAX'N, JCX-3-22, ESTIMATED REVENUE EFFECTS OF H.R. 2954, AS AMENDED, THE "SECURING A STRONG RETIREMENT ACT OF 2022," SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MARCH 29, 2022: FISCAL YEARS 2022 - 2031 (2022), https://www.jct.gov/publications/2022/jcx-3-22/ (The JCT speculates that the Saver's Match, alone, will lead to the IRS losing $7.5 billion between 2027 and 2031, an average of $1.8 billion per year).

On the one hand, as a general proposition, high-income workers tend to naturally save more and thus need little, if any, incentive. Conversely, many commentators point out that while those in the lowest quintile have the least disposable income to save and receive the fewest retirement savings tax benefits, they disproportionately benefit from Social Security's redistributive structure.[133] Thus, even though the lowest income quintile is the most economically vulnerable in general, Social Security does a better job of replacing the working life wages for this segment of the population, in theory helping adjust the fairness scale; however, that still does not justify the exorbitant tax expenditures subsidizing the savings of the ultrawealthy. The remaining income groups—the middle-income quintiles—are squeezed between less Social Security wage replacement, with reduced disposable income to save for the future, and less meaningful incentives to save than the highest income quintile.

In the end, research studies repeatedly confirm that most Americans are not saving enough to meet basic needs in retirement. For example, in 2023 the GAO reported that "an estimated 29[%] of households aged [fifty-five] and over had neither retirement account balances nor defined benefit pension plans in 2016."[134] In 2018, a study from the National Institute on Retirement Security found "68.3[%] of individuals age [fifty-five] to [sixty-four] have retirement savings equal to less than one times their annual income, which is far below what they will need to maintain their standard of living over their expected years in retirement."[135] In general, the overall retirement savings picture tends to be even more bleak for minorities and single women.[136]

Every year, the Employee Benefits Research Institute (EBRI) conducts a Retirement Confidence Survey (RCS) to "gauge[] the views and attitudes of working-age and retired Americans regarding retirement, their preparations for retirement, their confidence

---

133. *See How Do Benefits Compare to Earnings?*, NAT'L ACAD. OF SOC. INS., https://www.nasi.org/learn/social-security/how-do-benefits-compare-to-earnings/ (last visited Mar. 11, 2025).

134. *See* RETIREMENT ACCOUNT DISPARITIES, *supra* note 127, at 5; *see also* U.S. GOV. ACCOUNTABILITY OFF., GAO-19-442R, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS, AN UPDATE 1 (2019).

135. JENNIFER ERIN BROWN ET AL., NAT'L INST. ON RET. SEC., RETIREMENT IN AMERICA: OUT OF REACH FOR WORKING AMERICANS? 1 (2018), https://www.nirsonline.org/wp-content/uploads/2018/09/FINAL-Report-.pdf.

136. *See* RETIREMENT ACCOUNT DISPARITIES, *supra* note 127, at 15, 21 (titling section "Racial Disparities in the Percentage of Households with Retirement Account Balances and Median Balances Persisted from 2007 through 2019"); David C. John, *Disparities for Women and Minorities in Retirement Saving*, BROOKINGS (Sept. 1, 2010), https://www.brookings.edu/testimonies/disparities-for-women-and-minorities-in-retirement-saving/.

with regard to various aspects of retirement, and related issues."[137] The 2023 RCS confirms that most workers conclude that they will need to supplement Social Security with savings. EBRI agrees with the workers' views, concluding that a significant percentage of households will likely run short of money in retirement.[138] Despite all the foregone revenue aimed at incentivizing retirement savings, those who most need it are still missing out.

Meanwhile, the wealthy are accumulating mega retirement accounts worth many millions and even billions of dollars. These wealthy Americans are using retirement plans to build wealth tax-free, allowing them to transfer more wealth at death that continues to receive some measure of tax preference by utilizing high exemption levels and various estate planning strategies. This is upside down. The government is leaking money in various ways to benefit those who least need the tax breaks or incentives. The next section discusses the rise of these mega retirement accounts.

III. THE EVOLUTION OF MEGA ACCOUNTS

Mega tax-sheltered workplace accounts for high-income taxpayers have been possible from the very beginning. With no contribution limits in place initially, employers could reward their high earners generously. For a long time, these were more typically defined benefit plans—the prevailing workplace plan until the 1990s.

Today, there are contribution limits in place for all qualified plans—defined contribution and defined benefit—in part to constrain the revenue loss to the government and in part to limit the extent to which higher-paid employees benefit from the tax preferences compared with lower-paid employees. Nevertheless, overall contribution limits have always been generous, such that those able

137. *See Earlier Retirement Confidence Surveys*, EBRI, https://www.ebri.org/retirement/retirement-confidence-survey/earlier-retirement-confidence-surveys (last visited Mar. 11, 2025); EBRI & GREENWALD RSCH., 2024 RETIREMENT CONFIDENCE SURVEY 2, https://www.ebri.org/docs/default-source/rcs/2024-rcs/2024-rcs-release-report.pdf?sfvrsn=2447072f_2 ("The RCS is the longest-running survey of its kind, measuring worker and retiree confidence about retirement, and is conducted by the Employee Benefit Research Institute (EBRI) and Greenwald Research.").

138. *See* Craig Copeland, *Changes in Retirement Security from SECURE 1.0 and 2.0: Evidence from EBRI's Retirement Security Projection Model®*, EBRI (July 25, 2024), https://www.ebri.org/content/changes-in-retirement-security-from-secure-1.0-and-2.0--evidence-from-ebri-s-retirement-security-projection-model. Approximately 40% of households will run short of money in retirement. *See id.*

to max out both their and their employer's contributions, while investing wisely, can amass significant account balances over time.[139]

However, more newly created tax-preferred retirement savings vehicles, not tied to employers and with much lower contribution limits, are proving to be even more lucrative for some of the ultrawealthy. This Part tells the story of how successive pieces of legislation, which, on their face, aimed at helping average Americans save for retirement, ultimately paved the way for some of today's largest tax-preferred retirement savings accounts for the ultrawealthy. As the most significant developments have been with respect to defined contribution type arrangements, the scope of discussion is largely limited to those.[140]

A. Employee Retirement Income Security Act of 1974 (ERISA)

The first significant piece of legislation regulating retirement plans (as well as welfare plans) was the Employee Retirement Income Security Act of 1974 (ERISA). ERISA legislated broadly, covering everything from plan design to plan administration. This section will address overall retirement plan safeguards, the introduction of a new retirement savings vehicle, and certain constraining rules such as early withdrawal limitations, required minimum distributions, and contributions limits.

1. Retirement Plan Safeguards

After years of retirement plan scandals ranging from insider self-dealing to benefit plans going bankrupt—often eviscerating promised benefits—ERISA established new rules and enhanced existing rules to protect the interests of employees participating in employer-sponsored benefit plans.[141] These protections included

139. For the highest-level executives, these can still pale in comparison to other financial workplace benefits: everything from salaries to NQDC. *See* Mullane, *supra* note 47, at 502–03, 521–22.

140. Nevertheless, defined benefit plans—particularly cash balance defined benefit plans post-1996—still play a role in accumulating, in the aggregate, incredible wealth in tax-preferred savings vehicles. *See generally* Daniel J. Hemel & Steve Rosenthal, *Mega-IRAs, Mega-401(k)s, and Other Mega-Retirement Accounts: Statement for the Record* 2 (U. Chi. L. Sch., Working Paper No. 936, 2021), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2615&context=law_and_economics.

141. *See* Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.); *see also History of EBSA and ERISA*, *supra* note 67 ("The provisions of Title I of ERISA, which are administered by the U.S. Department of Labor, were enacted to address public concern that funds of private pension plans were being mismanaged and abused."); *Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement/erisa (last visited Mar. 11, 2025) ("In general, ERISA does not cover plans established or

fiduciary standards for those who manage and control retirement plans, prohibiting the misuse of funds, and requiring plan fiduciaries to act in the best interests of plan participants and beneficiaries.[142] ERISA also established minimum standards for vesting employee benefits.[143] Further, it required comprehensive reporting and disclosure of plan information to plan participants and the government regarding key plan features, funding status, financial statements, and information about investment options.[144] Importantly, ERISA provided participants with legal recourse in the case of plan violations or breaches of fiduciary duty, allowing participants to bring lawsuits to recover benefits or enforce their rights under the law.[145]

ERISA also amended the Internal Revenue Code ("Tax Code") in a variety of ways. Among them, it reinforced various coverage and nondiscrimination rules. These rules are designed to ensure that employers who sponsor a plan for their employees—that qualifies for tax benefits—do so in a broad-based manner.[146] For example, requirements include that the plan cover rank-and-file employees in addition to higher-paid executives, and also that the plan does not discriminate in favor of more highly compensated employees regarding participation, contributions, or benefits.[147] In other words,

---

maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable workers compensation, unemployment or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of nonresident aliens or unfunded excess benefit plans."). "ERISA covers retirement plans (including traditional defined benefit pension plans and individual account plans such as 401(k) plans) and welfare benefit plans (e.g., employment based medical and hospitalization benefits, apprenticeship plans, and other plans described in section 3(1) of Title I)." *History of EBSA and ERISA*, *supra* note 67. *See generally* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 739 (2001) (discussing the scandals and issues leading up to enactment of ERISA).

142. *See* ERISA §§ 401–409, 88 Stat. at 874–86.

143. *Id.* § 203, 88 Stat. at 854.

144. *See id.* § 1021, 88 Stat. at 935.

145. *Id.* §§ 409, 501, 502, 88 Stat. at 886, 891–93. ERISA also authorizes the Department of Labor (DOL) to enforce compliance with the law's provisions. *Id.* §§ 504, 3004, 88 Stat. at 893, 998–99.

146. By meeting all the various requirements set forth in section 401(a) of the Tax Code—including coverage and nondiscrimination rules—a retirement plan becomes "qualified" and can provide tax advantages to both employers and employees. The qualification status allows employers to deduct their contributions to the plan as business expenses, and employees can choose to defer taxes on their contributions and investment gains until they withdraw the funds in retirement. *See* Mullane, *supra* note 47, at 502–03. Put differently, "[i]f the qualification requirements are met, employees receive two principal tax benefits. First, contributions to the plan are not included in the employee's income until received by the employee at some later date. Second, investment earnings on the contributions accumulate tax-free and are not subject to tax until later distributed to the employee." *Id.* (footnotes omitted).

147. In other words, the plan must cover rank-and-file employees in addition to executives and benefits must be provided under the plan in a nondiscriminatory fashion. *See* I.R.C. §§

Congress wanted to ensure that, to the extent it was foregoing tax revenue, the resulting tax benefits would help average Americans and not only the wealthy.[148]

To be sure, Congress always intended for highly compensated employees to benefit from tax preferred employer-sponsored (i.e., workplace) retirement plans. The view was that these higher paid employees would demand tax-preferred retirement benefits and in so doing would compel employers to offer a plan to employees more broadly. With the nondiscrimination and coverage rules, the goal, at least in theory, was to deliver meaningful tax benefits to rank-and-file employees as an inducement for them to save, while also not disproportionately benefitting the wealthy to an egregious extent (as they do not generally need an incentive to save).

While there are always criticisms, overall, these safeguards were viewed positively and helped stabilize workplace retirement plans.[149]

2. A New Retirement Savings Vehicle: Individual Retirement Accounts

In addition to stabilizing workplace retirement plans, ERISA introduced into the Tax Code a new retirement savings vehicle not connected to the workplace: what is now referred to as the traditional Individual Retirement Account (TIRA).[150] This type of account is an option for providing individuals a tax-advantaged way to choose to save for retirement on their own; for example, a TIRA would be available in the case of an employee whose employer does not sponsor a retirement plan.[151] In the beginning, only employees without a workplace plan were eligible to contribute to a TIRA.

---

401 (a) & (m) (nondiscrimination), 410(b) (2006) (coverage) (discussing other qualification requirements including rules regarding funding and vesting); I.R.C. §§ 401(a), 411, 412 (2006) (stating that qualifying plans must have rules determining when employees become entitled to the funds in their retirement accounts; these rules typically require a minimum period of service before full vesting). The nondiscrimination rules were first introduced in the Revenue Act of 1942.

148. *See* 29 U.S.C. § 1001 (discussing congressional findings of fact, which influenced the passing of ERISA); *see also* Brooks Richardson, *Health Care: ERISA Preemption and HMO Liability—A Fresh Look at ERISA Preemption in the Context of Subscriber Claims Against HMOs*, 49 OKLA. L. REV. 677, 678 (1996) (discussing the extent of the American workforce covered under ERISA-governed plans).

149. ERISA also established requirements for the funding of defined benefit pension plans. Plan Termination Insurance: ERISA created the Pension Benefit Guaranty Corporation (PBGC), a federal agency that provides a safety net for participants in defined benefit pension plans. The PBGC ensures pension benefits, up to certain limits, in case a pension plan is terminated without sufficient funds to meet its obligations.

150. *See* ERISA § 2002, 88 Stat. at 958–64.

151. *See id.*

Eligibility was later extended to all taxpayers with earned income, regardless of access to a workplace plan, as part of the Economic Recovery Tax Act of 1981.[152]

Like other defined contribution plans, a TIRA allows individuals to make contributions, subject to limits, to their account and receive tax benefits. Contributions to a TIRA are typically tax-deductible in the year they are made and the investment gains within the account grow tax-deferred until the funds are withdrawn during retirement.[153] Withdrawals from TIRAs are subject to income tax at the time of distribution.[154]

As noted in Part II, defined contribution plans place primary responsibility for investment decisions on the individual participant. The law allows for broad investment choices, as there is no limited list of approved investments.[155] There are, however, a small number of investments that are prohibited. For example, no part of a retirement fund can be invested in life insurance contracts.[156] However, most retirement savings accounts do not have access to the broadest array of investment options; employer-sponsored plans, IRAs, and self-directed IRAs tend to have a different menu of possible investment options.

In the context of employer-sponsored plans, the investment options available are chosen by the employer, or alternatively an administrator that the employer hires, both of whom are constrained by fiduciary responsibilities to plan participants under ERISA. These duties include acting prudently when it comes to offering investment options. As such, a typical investment lineup includes an assortment of stock and bond mutual funds, and more recently, target-date funds.[157]

TIRAs are not sponsored by an employer; they are held by a financial institution, such as Vanguard or Fidelity, that acts as the

---

152. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

153. *See* I.R.C. § 219; *Retirement Topics – IRA Contribution Limits*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-ira-contribution-limits (last updated Aug. 20, 2024).

154. I.R.C. § 408(d).

155. *See Retirement Plan Investments FAQs*, IRS, https://www.irs.gov/retirement-plans/retirement-plan-investments-faqs (last updated Aug. 20, 2024).

156. *See* I.R.C. § 408(a)(3). In addition, investment in collectibles, such as art, antiques, gems, or alcoholic beverages is also prohibited, or any item further specified by the DOL Secretary. *See id.* § 408(m). Certain coins and precious metals are also prohibited, subject to some exceptions. *See id.*

157. These days, "[c]ertain plans, such as 401(k) plans, that permit participant-directed investment can avoid some fiduciary responsibilities if participants are offered at least three diversified options for investment, each with different risk/return factors." *Retirement Plan Investments FAQs*, *supra* note 155 (citing 29 C.F.R. § 2550.404c-1).

required trustee or custodian for the account.[158] While still constrained by the same prohibited investment rules for other qualified retirement savings plans, these institutions generally make available a much broader menu of investment options to IRA account holders than can be found in the typical employer-sponsored plan. Nevertheless, some investments considered to be more unique than stocks, bonds, or mutual or exchange-traded funds (ETFs) are still not readily available to the average account holder. To invest in what are referred to as "alternative" investments, an individual needs to establish what is commonly referred to as a "self-directed" (SD)-IRA.[159]

Technically, any IRA is self-directed where the owner makes the investment decisions instead of having the investments managed by someone else. However, this label has come to refer to an account where the custodian allows the owner to invest in less commonly owned assets such as private equity, private placements, promissory notes, or real estate. Anyone can own a SD-IRA, but they require greater initiative to find the proper custodian, more expertise in the desired area of investment, and more active management by the account owner. The appeal of the SD-IRA is the potential to realize significantly higher returns than with more conventional stock and bond market assets.[160]

3. Tax Code Constraints: Early Withdrawals, Required Minimum Distributions, and Contribution Limits

a. Early Withdrawals

As the purpose of providing tax benefits is to encourage workers to save for their retirement years, a 10% penalty tax (in addition to normal income taxes) was imposed for withdrawing funds from one of these accounts too early.[161] In general, an "early withdrawal" is one that occurs before reaching age fifty-nine and one half.[162] The penalty did not apply if the distribution was attributable to the taxpayer becoming disabled, but the exceptions have been greatly expanded since 1974.[163] Among other situations, there are now

158. *See* I.R.C. § 408 (m); § 1.408–2.
159. Kat Tretina, *Self-Directed IRA: Invest in Alternative Assets for Retirement*, FORBES ADVISOR, https://www.forbes.com/advisor/retirement/self-directed-ira/ (Dec. 1, 2023, 6:50 PM).
160. *Id.*
161. I.R.C. § 72(q).
162. *Id.*
163. *See* Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958–64.

exceptions, subject to limits, for qualified birth and adoption expenses, higher education expenses, first-time home purchases, certain medical expenses, domestic abuse situations, emergency expenses, and certain situations involving disability or terminal illness.[164]

b. Required Minimum Distributions

On the flip side of early withdrawals is required minimum distributions (RMDs)—rules mandating that individuals begin taking distributions from their accounts once they reach a certain age.[165] The purpose of RMDs is to ensure that individuals do not indefinitely defer taxes on retirement account balances and that funds in these accounts are eventually distributed and taxed. The distribution amounts are calculated based on the account balance and the owner's life expectancy as determined by IRS tables.[166] The formula is designed to exhaust the funds over the owner's actuarial life expectancy.[167] In other words, if everything worked perfectly according to the tables, then the last distribution would be made shortly before the account owner passed away: no sooner and no later. However, the reality is that many retirees will need to withdraw more than the minimum and will run out of their savings before their life ends. Others will take only the minimum and invest aggressively, with the aim of leaving a sizeable fund to their beneficiaries.

The specific age at which RMDs must begin depends on the type of retirement account and the individual's circumstances, such as whether they are the original owner of the account, or whether it is an inherited account. For workplace plans, originally there was

---

164. *See* I.R.C. § 72(t).

165. *See* Tax Reform Act of 1986 (TRA86), Pub. L. No. 99-514, § 1121, 100 Stat. 2085, 2464–66 (instituting mandatory distributions from qualified contribution plans once the individual has reached a specified age). In amending I.R.C. § 4974, TRA86 established that the required beginning date of required minimum distributions is April 1 the year following the calendar year in which the individual turns seventy and one half. *Id.* § 1121(2)(b), 100 Stat. at 2465.

166. *See Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)*, IRS, https://www.irs.gov/publications/p590b (Sept. 10, 2024) (providing tables through which individuals can calculate what required minimum distributions they must withdraw from their IRAs). These tables cover all contingencies concerning RMDs from IRAs, including inheritance, jointly held IRAs, and different structuring of beneficiaries to an IRA. *See RMD Comparison Chart (IRAs vs. Defined Contribution Plans*), IRS, https://www.irs.gov/retirement-plans/rmd-comparison-chart-iras-vs-defined-contribution-plans (May 2, 2024) (noting the similarities between IRAs and other contribution plans, while noting the few differences relating to RMDs). Of note, defined contribution plans necessitate RMDs the year the individual retires, if the plan allows. *Id.*

167. *See Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)*, *supra* note 166 (Uniform Lifetime Table).

some minor variation in the RMD starting date, with workers generally allowed to defer distributions until a separation from service. For TIRAs, ERISA set for RMDs to begin at age seventy and one half. Subsequently, the Tax Reform Act of 1986 established the seventy-and-one-half rule for all retirement plan participants regardless of whether they have retired.[168]

Recently, the RMD starting date was pushed back twice in quick succession: first to age seventy-two and then to seventy-three (and will again to seventy-five starting in 2033).[169] This was in response to advocates who argued that people are generally living longer and spending more years in retirement, and thus there should be more flexibility in planning the timing of withdrawal. Delaying the starting date for RMDs allows the funds within retirement accounts to continue growing tax-deferred for a longer period. This can potentially result in larger account balances and more substantial distributions when RMDs eventually begin. In theory, this prevents exhaustion of assets before they are potentially most needed in the last stages of life. However, most retirees start taking distributions long before they are required to because they need the money to pay for basic expenses. On the other hand, it is important to note that there is no requirement to spend RMDs, so those who do not need to use the funds may always choose to reinvest them in taxable investment vehicles. The reality is that the delayed start of RMDs mostly benefits the wealthy who do not need to dip into their tax-preferred savings.

c. Contribution Limits

Because foregoing tax revenue in favor of providing tax benefits affects the federal budget, limits as to how much one can contribute to a tax-preferred savings vehicle on a pre-tax basis were established. Over time, the limits have moved up and down on a time-adjusted basis but have remained generous overall for workplace

168. *See supra* note 165 for discussion of TRA86 establishing seventy and one half as the required age to take RMDs from their retirement accounts.

169. *See* Setting Every Community Up for Retirement Enrichment (SECURE) Act of 2019, Pub. L. No. 116-94, Div. O, § 114, 133 Stat. 3137, 3156 (prior to SECURE 2.0) (establishing that the age RMDs are required is no longer seventy and one half, but seventy-two); SECURE 2.0 Act of 2022, Pub. L. No. 117-328, Div. T, § 107, 136 Stat. 5275, 5289 (codified at I.R.C. § 401(a)(9)(C)(v)) (stating that RMDs start at age seventy-three, beginning in 2023, and seventy-five after 2032). RMD start dates may vary depending on various factors such as employment status, the type of retirement plan, and whether the account holder is a business owner or a beneficiary of an inherited retirement account. *Id.*

plans.[170] Individual accounts, by contrast, have maintained comparably lower limits.

When first introduced in ERISA, taxpayers were required to have earned income while also lacking access to a workplace plan to be eligible to make contributions to a TIRA.[171] The maximum amount that could be contributed on an annual basis was initially set at $1,500 (about $10,000 in today's dollars) or 15% of earned income, whichever was less.[172] Seven years later, the Economic Recovery Tax Act of 1981 expanded IRA eligibility to all persons with earned income, regardless of whether they also had access to and participated in a workplace plan. The maximum annual contribution limit was also increased to $2,000 (about $13,300 in today's dollars) or 100% of earnings. TIRA ownership increased as a result. However, the Tax Reform Act of 1986 contracted eligibility to contribute to a TIRA for taxpayers with access to a workplace retirement plan (WRP); for these taxpayers, the contribution limit may be reduced or eliminated, depending on the amount of a taxpayer's modified adjusted gross income (MAGI).[173]

---

170. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (reducing contribution limits); *see also* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (freezing contribution limits). More recent legislation has increased the limits and provided for inflation adjustment. *See* SECURE 2.0 Act, § 109, 136 Stat. at 5290 (providing an inflation adjustment for catch-up contribution limits); *see also* I.R.S. Notice 2024-80, 2024-47 I.R.B. 1120, https://www.irs.gov/pub/irs-irbs/irb24-47.pdf (providing cost of living adjustments for 2025's contribution limits). Although previous laws stopped TIRA contributions at age seventy and one half, you can now contribute at any age. *See* SECURE Act, § 107, 133 Stat. at 3148. However, required minimum distribution (RMD) rules still apply at seventy and one half or seventy-two (seventy-three in 2023), depending on when you were born. I.R.C. § 401(a)(9)(C).

171. *See* Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958.

172. *See id.* Shortly after ERISA was enacted, modest contributions were allowed to be made on behalf of non-working spouses. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1501, 90 Stat. 1520, 1734 (allowing a spousal contribution up to $250 based on the earned income of their working spouse). Later legislation increased the contribution limit to equal that of the working spouse. *See* Small Business Job Protection Act of 1996, Pub. L. No 104-188, § 1427, 110 Stat. 1755, 1802.

173. *See* Tax Reform Act of 1986 (TRA86), Pub. L. No. 99-514, § 1131, 100 Stat. 2085, 2476. For TIRAs: If you are not covered by an employer-sponsored retirement plan: In this case, your MAGI is calculated by taking your Adjusted Gross Income (AGI) and making certain modifications, such as adding back any deductions taken for TIRA contributions and certain other adjustments. *See* I.R.C. § 219. If you are covered by an employer-sponsored retirement plan: If you or your spouse (if filing jointly) are covered by an employer-sponsored retirement plan, such as a 401(k), the calculation of MAGI becomes more complex. It involves additional modifications based on your filing status and income level. *See id.* The IRS provides specific worksheets and guidelines to determine the MAGI in these cases. *See Publication 590-A (2024), Contributions to Individual Retirement Arrangements (IRAs)*, IRS, https://www.irs.gov/publications/p590a#en_US_2024_publink100025076 (Mar. 10, 2025).

For the 2024 tax year, the general contribution limit is $7,000,[174] but Americans who are aged fifty or older can contribute an additional $1,000 in catch-up contributions (or $8,000 in the aggregate).[175] If neither the taxpayer nor spouse are covered by a WRP, then contributions are fully deductible up to the limit.[176] However, if a single taxpayer or married taxpayers are each covered by a WRP, then a full deduction is only allowed if MAGI is less than $77,000 (single) or $123,000 (joint).[177] Above that, the deduction is phased out until it is eliminated when MAGI is over $87,000 (single) or $143,000 (joint).[178] Different limits apply if one spouse is covered by a WRP and one is not, or if spouses are filing separately.[179]

The introduction of the TIRA option was significant in terms of expanding access to tax-favored retirement savings opportunities for those with earned income who did not have a workplace retirement plan. It also empowered individuals, with or without access to a workplace plan, to choose on their own to save more for retirement. These were the early days in a shift of emphasis away from employer responsibility to individual responsibility, with tax-favored assistance, to save for retirement.

This shift exploded with the enactment of Section 401(k) in the Revenue Act of 1978.[180] Section 401(k) plans are employer-sponsored (i.e., workplace) plans but otherwise function similarly to IRAs, with many of the same tax and nontax ERISA rules generally applying. These and other workplace plans have always had contribution limits that are meaningfully higher than TIRAs (and, presently, other IRAs as well).[181]

For example, the 401(k) plan annual limit of combined employer and employee contributions for 2024 is $69,000 (or the full amount of employee's compensation, if less).[182] The limit for the portion

174. I.R.C. § 219(b)(5)(C) (deductible amount indexed for inflation); I.R.S. Notice 2024-80, *supra* note 170 ($7,000 indexed contribution limit).

175. I.R.C. § 219(b)(5)(B).

176. *See IRA Deduction Limits*, IRS, https://www.irs.gov/retirement-plans/ira-deduction-limits (last updated Aug. 2, 2024).

177. *Id.*

178. *Id.*

179. *Id.*

180. Of course, there are some 401(k) plan-specific variations. For example, some additional potential exemptions from the early withdrawal penalty. *See* I.R.C. § 72(t)(2)(A)(v) (excluding 10% additional tax on early distributions for employees separating from service after turning fifty-five years of age); *see also* I.R.C. § 72(t)(2) (outlining multiple exceptions to the early distribution penalty).

181. *See generally* Colleen E. Medill, *Targeted Pension Reform*, 27 J. LEGIS. 1, 25–28 (2001) (discussing contribution limits for different types of retirement plans).

182. *See* I.R.S. Notice 2023-75, 2023-47 I.R.B. 1256, https://www.irs.gov/pub/irs-irbs/irb23-47.pdf.

allocable to an employee's elective deferral is $23,000 (an additional $7,500 in catch-up contribution is allowed for employees aged fifty and over).[183] Also, employers alone may contribute up to 25% of an employee's compensation, subject to the annual maximum. For 2024, with an annual limit of $69,000 (not including employee contributions or catch-up contributions), the 25% compensation limit would be reached at $276,000. More recently, if a plan allows for it, an employee can contribute beyond the elective deferral limit on an after-tax (i.e., nondeductible) basis.

Again, this is in contrast to the TIRA maximum contribution of $7,000 ($8,000 for those aged fifty or over).[184] Thus, for those without access to a workplace plan and the capability to manage a self-directed account, opportunities for tax-favored savings are still more limited.

4. Mega Account Progression

Although ERISA established contribution limits for workplace accounts and independent tax-preferred accounts, they can both accumulate significant wealth. Mega workplace plan growth occurs primarily through high contribution limits, while independent tax-preferred accounts are more dependent on strategic alternative investment opportunities for mega growth. A temporary wrinkle for some regarding the latter path was the initial requirement under ERISA that a taxpayer lack access to a workplace plan to open a SD-TIRA. However, that restriction was removed by the Economic Recovery Tax Act of 1981. As discussed in the next section, the Tax Reform Act of 1986 then imposed more stringent eligibility requirements and contribution limits for TIRAs but ultimately those did not create a significant barrier to mega accounts due to introduction of a new retirement savings vehicle that undermined those contraction efforts. In the end, the self-directed individual account option was the first step toward one branch of the mega accounts of today. The scope of growth potential has continued to expand over time with the introduction of more defined contribution savings vehicles with the capacity to invest in alternative assets.

183. *See id.*; *see also infra* Part III.D. SECURE Act changes to catch up contribution rules.
184. *See* I.R.C. § 219. The contribution limit may be reduced or eliminated, depending on various factors. *Id.* § 415.

5. In Sum

Overall, ERISA made workplace retirement plans safer for all workers, most notably through its fiduciary protections, disclosure and reporting requirements, and legal recourse for participants. These were most important for those workers who would be more dependent on their retirement funds to meet basic needs in their older years. Other key aspects of ERISA that were beneficial for rank-and file workers were requiring earlier vesting of benefits and amending the tax code in an effort to limit plan discrimination in benefits and coverage. Introducing RMDs was significant, in principle, for reinforcing that funds in qualified retirement plans were for retirement, not tax-free estate planning accounts; nevertheless, from the outset, the RMD start date was set too late in life to have a meaningful impact in diminishing an account value prior to death for those who are wealthy enough to resist withdrawals until their seventies.

The introduction of the TIRA was meaningful for first extending access to tax- preferred retirement savings for average Americans whose employers did not offer a workplace plan. However, inside this legislation that introduced these positive measures was the vehicle that would also act as the starting point for one branch of today's mega accounts (individual accounts). As for the other branch (workplace plans), contribution limits—which on their face sound like a good idea—remained too generous to be a significant constraint on mega workplace plan account growth.

B. Tax Reform Act of 1986

1. Relevant Reforms

The Tax Reform Act of 1986 (TRA86) is one of the most significant pieces of tax legislation in the history of the United States.[185] It comprehensively overhauled the Internal Revenue Code and reformed the federal income tax system; it aimed to simplify the tax code, promote fairness, and generate revenue for the government.[186] For all it covered, TRA86 made few changes to retirement plans;

185. Tax Reform Act of 1986 (TRA86), Pub. L. No. 99-514, 100 Stat. 2085.

186. *See* JOINT COMM'N ON TAX'N, JCS-10-87, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 6–11 (May 15, 1987); *see also generally* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH (Vintage Books 1988) (1987). Among other things, the Act reduced tax rates and eliminated or modified many deductions and preferences. While subsequent tax legislation has made numerous changes to the Code, the 1986 Code remains the current version (as amended).

nevertheless, they were impactful.[187] As noted previously, TRA86 standardized the minimum distribution requirements across retirement plans and contracted TIRA eligibility, but most significantly, it created a new individual retirement savings option: the non-deductible IRA (NDIRA).[188]

The TRA86 altered TIRA in two significant ways. First, for taxpayers with access to a workplace retirement plan, the TIRA contribution limit could be reduced or eliminated, depending on the amount of a taxpayer's MAGI.[189] This would leave high earners without a tax-favored way to save outside of their workplace plan. Thus, TRA86 also enacted an initially less favorable individual option for tax-favored saving by allowing for nondeductible contributions to be made to an IRA for those who exceed the limits for deductible contributions; this retirement savings option is commonly referred to as the NDIRA.[190]

TIRA contributions are tax-deductible, meaning that individuals can deduct their contributions from their taxable income, potentially reducing their tax liability. Conversely, NDIRAs limit or eliminate the deductibility of IRA contributions for certain individuals based on their income and participation in employer-sponsored retirement plans. While contributions to NDIRAs do not provide an upfront tax deduction, the earnings on the contributions are still allowed to grow tax-deferred until withdrawal—and that tax-free accumulation still provides an overall benefit. Upon distribution, the portion allocable to the after-tax contribution is nontaxable, while the portion allocable to the tax-deferred investment return is taxable. For 2024, the maximum contribution limit for both

187. *See generally* Jialu L. Streeter, *How Do Tax Policies Affect Individuals and Businesses?*, STAN. INST. FOR ECON. POL'Y RSCH. (Oct. 2022), https://siepr.stanford.edu/publications/policy-brief/how-do-tax-policies-affect-individuals-and-businesses (tracing the impact of TRA86 on modern tax cuts and its relationship to retirement tax policy).

188. *See* TRA86 §§ 1121–1123, 100 Stat. at 2464–75 (enacting minimum distribution requirements); *id.* § 1102, 100 Stat. at 2414–17 (permitting nondeductible contributions to be made to individual retirement plans). TRA86 also modified some pre-existing rules, expanding contribution limits and strengthening nondiscrimination rules. *See id.* § 1106, 100 Stat. at 2420–26 (contribution limits); *id.* § 1111, 100 Stat. at 2435–40 (nondiscrimination rules to integrated plans). In addition, TRA86 introduced administrative changes to streamline retirement plan administration, simplify reporting requirements, and enhance plan oversight. *Id.* §§ 1501–1504, 1561–1569, 100 Stat. at 2732–43, 2761–64. These changes aimed to make it easier for employers to offer retirement plans and manage them effectively.

189. *See id.* § 1101, 100 Stat. at 2411–14 (limiting contributions for those in pension plans); *id.* § 1106, 100 Stat. at 2420–26 (income limitations).

190. *See* I.R.C. § 408.

deductible and non-deductible IRA contributions is $7,000 ($8,000 for those aged fifty or older).[191]

Significantly, TRA86 also enacted two penalty taxes that were in effect from 1987 to 1997 and aimed at limiting the tax benefits of retirement savings above certain thresholds. First, aggregate annual withdrawals or distributions to a participant from a qualified plan (workplace or individual) in excess of roughly $150,000 (about $432,000 in today's dollars) were subject to a 15% surtax.[192] Second, a 15% surtax was also imposed on the estate of a plan participant if aggregate qualified plan (workplace or individual) balances at death were in excess of roughly $1 million (about $2,806,000 in today's dollars).[193]

2. Mega Account Progression

On its face, the Tax Reform Act of 1986 did little to expand the already existing potential for mega accounts. Indeed, surtaxes were imposed on what were deemed excessive distributions (during life) or accumulations (at death). Furthermore, access to a TIRA was income-restricted, and the alternative NDIRA stripped away pre-tax contributions. Nevertheless, the addition of the NDIRA option was a step that, when combined with subsequent developments, would ultimately lead to tax strategies that provide an avenue for the enormous investment growth in mega retirement accounts to be shielded from taxes.

3. In Sum

In general, TRA86 took steps to reduce the overall tax burden on lower- and middle-income Americans by, for example, reducing tax rates and increasing the standard deduction. In theory, this frees up more income to be allocated to savings. Nevertheless, other provisions of TRA86 would eventually lead to more opportunities for mega accounts for the ultrawealthy.

---

191. *See* I.R.C. § 219(b)(5)(C) (deductible amount indexed for inflation); I.R.S. Notice 2024-80, *supra* note 170 ($7,000 indexed contribution limit); I.R.C. § 219(b)(5)(B)(ii) (catch-up contributions for individuals over age fifty allows for an additional $1,000 in contributions).

192. John B. Shoven & David A. Wise, *The Taxation of Pensions: A Shelter Can Become a Trap* 6 (Nat'l Bureau of Econ. Rsch., Working Paper 5815, 1996) ("The $150,000 figure was left unchanged between 1987 and 1995, but was raised to $155,000 for 1996" before it was eliminated in 1997.); *see also* U.S. DEP'T OF TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 166 (Feb. 2016).

193. *See* Shoven & Wise, *supra* note 192, at 7.

C. The Taxpayer Relief Act of 1997

1. Relevant Reforms

The Taxpayer Relief Act of 1997 (TRA97) ushered in yet another new retirement savings vehicle: the Roth IRA.[194] This new type of IRA was named after its champion, Senator Roth.[195] Roth IRAs turned around many of the above tax rules surrounding taxation and required withdrawal of tax-favored retirement funds. They offer different tax advantages compared to TIRAs: primarily, a tax-free income stream during retirement. Unlike TIRAs, where contributions are tax-deductible but distributions are taxable, Roth IRA contributions are made with after-tax money and qualified withdrawals are tax-free.[196] In short, this provides taxpayers with an important tax benefit timing choice: pay taxes on contributions in the present and enjoy tax-free withdrawals in the future (Roth IRA) or enjoy tax-deductible contributions in the present and pay taxes on withdrawals in the future (TIRA).

All qualified plans benefit from the growth potential of tax-free accumulation of investment returns on funds invested inside such accounts. Harvard tax professor, Daniel Halperin, long ago demonstrated that if all variables are held constant, such as tax rates, then it makes no difference which path is chosen—neither path will reduce the overall amount of taxes being paid.[197] However, our tax laws and individual situations are not static. Thus, conventional wisdom says that a Roth IRA is best suited for a taxpayer who expects to be in a higher tax bracket when withdrawals will be made. Conversely, a TIRA is best suited for a taxpayer who expects to be in the same or lower tax bracket when withdrawals will be made. This can be a difficult choice for some low- and middle-income taxpayers with little or no discretionary income: either save less now in a Roth to pay upfront taxes or save more in a traditional account and perhaps pay more taxes later.

Significantly, the TRA97 also allowed some taxpayers to convert their existing TIRAs to Roth IRAs. Converting to a Roth IRA is a

---

194. Taxpayer Relief Act of 1997 (TRA97), Pub. L. No. 105-34, 111 Stat. 788. *See* Daniel Kurt, *When Did Roth IRAs Start?*, INVESTOPEDIA, https://www.investopedia.com/history-roth-iras-5220565 (Nov. 6, 2024).

195. This type of IRA was so named because it was sponsored and championed by Republican Senator William Roth (Delaware). Kurt, *supra* note 194. It was enacted as I.R.C. § 408A.

196. *See generally* Warren B. Hrung, *Information, the Introduction of Roths, and IRA Participation* 3–4 (Off. of Tax Analysis, Working Paper 91, 2004) (discussing the emergence of Roth IRAs and their deviations from TIRAs).

197. *See* Daniel I. Halperin, *Interest in Disguise: Taxing the "Time Value of Money,"* 95 YALE L.J. 506, 520–24 (1986) (demonstrating this principle with an example).

taxable event; income taxes are due on the value of pretax contributions and any earnings therefrom. Thus, it was not realistic for many lower income families to convert due to the possible resulting tax burden. Conversely, higher-income taxpayers were specifically excluded; those with MAGI over $100,000 were ineligible to convert, as well as married taxpayers filing separately. However, lack of access for the wealthiest taxpayers did not last long. Of significant importance in the growth of mega IRA accounts, the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) removed the income cap for Roth IRA conversions beginning in 2010, making Roth IRAs available to all taxpayers (including married taxpayers filing separately).[198]

The Roth structure was subsequently extended to workplace plans in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).[199] Like their predecessor Roth IRAs, these Roth workplace plans allow participants to make after-tax contributions (subject to limits) to their retirement accounts, and qualified distributions from these accounts are tax-free in retirement. Initially, Roth contributions were available only for employee deferrals, but the SECURE Act later authorized Roth employer contributions. It is important to note that employers still need to choose to adopt a Roth option to offer to employees, but presently, most employers who sponsor retirement plans choose to do so.[200] Where employers allow it, employees may also choose to convert from a traditional workplace plan to a Roth plan.

Another significant difference with the Roth IRA is that there are no mandatory RMDs during the account owner's lifetime.[201] This allows individuals to continue growing their Roth IRA assets tax-free for as long as they choose and potentially pass on the account to their beneficiaries. However, a Roth IRA owner may also choose to withdraw funds, without needing to pay taxes or any penalties, if the owner is at least fifty-nine and one half years old and it also

198. Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA), Pub. L. No. 109-122, 120 Stat. 345.

199. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, § 617, 115 Stat. 38, 103–06 (creating Roth 401(k)s, Roth 403(b)s, Roth 457s, and Roth Thrift Savings Plan).

200. *See* Greg Iacurci, *88% of Employers Offer a Roth 401(k)—Almost Twice as Much as a Decade Ago. Here's Who Stands to Benefit*, CNBC (Dec. 16, 2022, 11:24 AM), https://www.cnbc.com/2022/12/16/88percent-of-employers-offer-a-roth-401k-how-to-take-advantage.html ("About 88% of 401(k) plans allowed employees to save in a Roth account in 2021[.]").

201. Roth IRA beneficiaries may need to take RMDs to avoid penalties. *See Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)*, *supra* note 166 (imposing RMDs that apply to TIRAs to Roth beneficiaries).

has been at least five years from the beginning of the year for which the account was set up and contributions began.[202] Before age fifty-nine and one half, an owner may withdraw principal from the Roth at any time without paying any taxes, as taxes have already been paid on those funds; earnings on the principal may be subject to normal income and penalty taxes. This allows for maximum flexibility in utilizing or accumulating Roth funds. Notably, RMDs for Roth workplace plans were not eliminated until SECURE 2.0, effective 2024.

Similar to TIRAs, there are income limits and contribution limits associated with Roth IRAs. Individuals at any age with earned income, and their non-working spouse if filing a joint tax return, are eligible to contribute to a Roth IRA so long as their modified adjusted gross income (MAGI) is within certain limits. The calculation of MAGI for Roth IRA contribution limits is similar to that for TIRAs but the thresholds are different. If your MAGI exceeds the specified thresholds, your ability to contribute to a Roth IRA may be reduced or eliminated. For 2024, contributions are fully deductible if MAGI is less than $138,000 (single) or $218,000 (joint), and partially deductible if MAGI is between $138,000 and $153,000 (single) or $218,000 and $228,000 (joint); no contributions are allowed if MAGI is over $153,000 (single) or $228,000 (joint).[203] Rules are stricter if you are married filing separately: partially deductible for MAGI up to $10,000 and no deduction for MAGI more than $10,000. The 2024 contribution limit for both traditional and Roth IRAs is $7,000. Americans who are fifty or older can contribute an additional $1,000 in catch-up contributions ($8,000 in the aggregate).

The subsequently enacted Roth workplace plans are subject to the same higher contribution limits as traditional workplace defined contribution qualified plans, with no income limit. Participants can also choose to make contributions—not salary deferrals—with after-tax dollars up to the higher overall limit if the plan allows for it.

Benefitting all qualified—and making all of the Roth developments even more beneficial—was TRA97's repeal of the 15% surtax

202. Before those threshold requirements are met, earnings may be subject to a 10% penalty tax unless the withdrawal qualifies for an exception. *See id.* (stating general 10% penalty tax principal and exceptions).

203. *See* Evan Cooper et al., *Your Guide to IRA Contribution Limits for 2024*, CNN UNDERSCORED, https://www.cnn.com/cnn-underscored/money/ira-contribution-limits [https://perma.cc/9VSY-G8UT] (Oct. 21, 2024, 3:51 PM).

on excess retirement distributions and excess retirement accumulations.[204]

2. Mega Account Progression

The introduction of Roth accounts created a path that could be even more beneficial for creating a mega account than a self-directed nondeductible IRA, as Roths provided post-contribution growth that was sheltered for life and without any required withdrawals. However, the contribution limits and opportunities to rollover from a traditional to a Roth account initially were also constrained by an income limit. Rollovers accelerated significantly when the rollover income limit was removed starting in 2010; the ability to convert a traditional account into a Roth account made contribution income limits essentially meaningless and caused mega accounts to explode. Consider the following two examples.

First, assume an entrepreneur who is temporarily accepting a low base salary is under the Roth income contribution limits. Assume further that this individual is able to invest in an asset that currently has a low value but one that is expected to increase in value dramatically in the not-too-distant future (e.g., pre-IPO stock). The entrepreneur could open a self-directed Roth IRA, invest in the stock through the Roth IRA, and then sit back and watch the account value skyrocket from thousands of dollars to millions, while all the investment gains are sheltered from tax for life and beyond (to some greater or lesser extent).

Alternatively, assume an entrepreneur is earning more than the Roth income contribution limits and thus is unable to open a Roth account. Instead, the entrepreneur opens a self-directed NDIRA and has it invest in an asset that currently has a low value but one that is expected to increase in value dramatically in the not-too-distant future (e.g., pre-IPO stock). Shortly after creating the NDIRA, while the account value is still low, the entrepreneur converts the NDIRA to a Roth IRA. No taxes are due upon conversion because there has been no investment growth in the account. The entrepreneur can then sit back and watch the account value skyrocket from thousands of dollars to millions, while all the investment gains are sheltered from tax for life and beyond (to some greater or lesser extent).

This second strategy is called a backdoor Roth IRA. It is used by wealthy individuals to contribute to a Roth IRA even if their income

204. *See* Taxpayer Relief Act of 1997 (TRA97), Pub. L. No. 105-34, § 1073, 111 Stat. 788, 948–49.

exceeds the limits for direct Roth IRA contributions. This strategy takes advantage of the nondeductible TIRA—where there is no income limit—and then converts those contributions into Roth IRA contributions. If executed correctly, the conversion process should result in roughly the same overall tax consequences as contribution directly to a Roth IRA—something that, of course, a high-income taxpayer would be prohibited to do directly. Thus, for the wealthiest taxpayers, backdoor Roth IRAs still allow access to tax-free accumulation, with growth potential that cannot be diminished by RMDs since there is no such requirement with Roths. The account can continue to grow until death, when it can then pass to a designated beneficiary. The beneficiary may also continue to accumulate funds income tax-free for a period of time, determined by reference to the beneficiary's relationship to the original account owner.[205]

In addition, extension of the Roth option to workplace plans in subsequent legislation, including the ability to convert from traditional plans, allows for significantly more contributions to be sheltered from tax for life and beyond. This tax-sheltered accumulation was further enhanced by the repeal of the 15% surtax of excess retirement accumulations, which "allows individuals to compile unlimited tax-subsidized retirement savings with impunity."[206]

3. In Sum

The enactment of Roth IRAs was more controversial than for TIRAs or NDIRAs. This was largely because Roth IRAs departed from the typical tax structure for retirement savings plans. While proponents claimed the benefits that attached to this type of account would attract more Americans to save for retirement,[207] critics were concerned that Roth IRAs would primarily attract and benefit wealthier families who did not need government assistance in providing for their retirement income security.[208] Critics were also concerned about the effects such plans would have on the federal budget in the long run—concerns that resurfaced as the Roth structure was extended to workplace plans.

---

205. *See generally Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs)*, *supra* note 166.

206. *See* Doran, *supra* note 9, at 265–347.

207. 143 CONG. REC. S6684 (daily ed. June 27, 1997) (statement of Sen. William Roth) ("[Roth IRA] offers a long-term predictable savings program for millions of families with fluctuating incomes, and who do not have employer retirement plans.").

208. *Id.* at S6709 (statement of Sen. Jeff Bingaman) ("[I]t's not fair and not good policy to provide a tax windfall to the rich and do nothing for those who are struggling to save smaller sums; those less wealthy taxpayers will continue to pay tax on any distribution.").

Overall, Roth plans (workplace or individual) provide individuals with an additional retirement savings tool that offers tax-free distributions, flexibility, no RMDs, and potential significant estate planning benefits due to a combination of these attributes. In combination with the use of other retirement plans, Roth plans offer individuals an opportunity to diversify their retirement savings and have maximum flexibility to manage their tax liability in retirement more efficiently. For the ultrawealthy, these plans are an incredibly beneficial financial planning tool to help build tax-sheltered mega accounts.

D. Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) & Setting Every Community Up for Retirement Enhancement Act of 2022 (SECURE 2.0)[209]

The SECURE Acts are the most recent legislative acts to focus on retirement savings. As discussed above, collectively, they introduced new initiatives and expanded pre-existing ones to encourage increased and wider retirement savings among low-to-middle income workers. They encouraged broader workplace plan participation by mandating expanded worker coverage, increased employer credits, mandated automatic enrollment and automatic escalation for new 401(k) and 403(b) plans, expanded the scope of penalty-free early withdrawals, and revamped the nonrefundable Saver's Credit into a refundable Saver's Match program beginning in 2027. In addition, SECURE 2.0 allows employers to treat employee student loan repayments as if they were retirement plan contributions, thus qualifying them for potential matching contributions that are deposited into the employee's retirement account.[210]

However, these Acts also continued the trend of securing more benefits for the upper classes. SECURE 2.0 added even higher catch-up contribution opportunities for those aged sixty to sixty-three who have the disposable wealth to contribute beyond the already high contribution and initial catchup limits.[211] For those over a set income limit, it also required that any catch-up contributions be made to a Roth account.[212] The SECURE Act and SECURE 2.0

209. Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. No. 116-94, Div. O, 133 Stat. 3137; Setting Every Community Up for Retirement Enhancement (SECURE 2.0) Act of 2022, Pub. L. No. 117-328, Div. T, 136 Stat. 5275.

210. *See* SECURE 2.0 Act § 110, 136 Stat. at 5290–93 (setting forth the principle that student loan repayments can be viewed as contributions to a retirement plan).

211. *See id.* § 109, 136 Stat. at 5290 (increasing catch-up contribution limits for participants ages sixty to sixty-three).

212. *See id.* § 603, 136 Stat. at 5391–92.

also pushed the RMD starting date for traditional plans back to the age of seventy-two and then to seventy-three (and what will be seventy-five starting in 2033), respectively.[213] This allows more time for savings to grow tax-free for those who do not need to use their plan savings for current retirement expenses. Similarly, the SECURE Act eliminated the age limit for making contributions to TIRAs—Roth IRAs had no such limit, allowing older workers to keep adding to their tax-favored savings vehicle of choice.[214]

Further, the SECURE 2.0 Act provides another "backdoor" for Roths. Specifically, a path was created for unused 529 education savings account (a "529 plan") funds to roll over to a Roth IRA for a 529 plan beneficiary, up to a lifetime limit of $35,000. For purposes of this rollover, the Roth IRA income limits to contribute do not apply.

The taxation of 529 plans is already similar to Roth IRAs. Contributions to 529 plans are not deductible, but growth is tax-free, as are withdrawals, so long as they are for qualified higher education expenses; nonqualified withdrawals are subject to normal taxes on the investment growth plus a 10% penalty. Prior to SECURE 2.0, options were limited for unused funds: use the funds for another beneficiary or incur the nonqualified withdrawal taxes. Now, however, some unused funds can be rolled into a Roth IRA.[215]

IV. OPTIONS FOR REFORM

These days, many workers dream of a long period of retirement filled with leisure activities. Jokes abound about moving to Florida, going on senior cruises, and playing golf every day. Despite decades of messaging and legislative reforms, the reality is that many are unable to save enough to fulfill even more modest retirement dreams, whether it is because they still lack access to a workplace plan, are hesitant to set up an IRA, or do not have the means to set aside funds for the future that are needed to provide for today.

For those with the means and desire to save, there are more tax-favored choices than ever before. The precise tax treatment depends on the specific type of plan, although the common thread is tax-free accumulation. TIRAs, workplace plans, or self-employed plans offer possible tax-deductible contributions and tax-free accumulation, with taxes due upon withdrawal in retirement. Roth IRAs,

213. For further discussion of both SECURE and SECURE 2.0's impact on RMDs, see *supra* note 169 and accompanying text.

214. *See* SECURE Act § 107, 133 Stat. at 3148–49 (repealing maximum age for IRA contributions).

215. Any remaining unused funds can still be used for a new 529 plan eligible beneficiary.

workplace plans, or self-employed plans, on the other hand, involve after-tax contributions and provide tax-free accumulation and withdrawals in retirement. In the middle is the non-deductible IRA where contributions are made after-tax, investment growth is tax-free, and withdrawals are comprised of nontaxable and taxable components. A simple representative summary is as follows:

	Contributions	**Investment Growth**	**Withdrawals**
Traditional	Deductible	Tax-free Accumulation	Taxable
Nondeductible IRA	Taxable	Tax-free Accumulation	Partially Taxable
Roth	Taxable	Tax-free Accumulation	Tax-free

Of course, there are theoretical limits on the tax system's generosity. All qualified plans are subject to annual limits for the maximum amounts that can be contributed on a tax-advantaged basis.[216] In general, the contribution limits for employer-sponsored and some self-employed plans are significantly more generous than for individual accounts. If maxed out from generous employer contributions and lesser employee deferrals (if any), those higher limits can lead to massive account balances over time. The most likely recipients of that magnitude of employer contributions are the highest paid workers. There is also a new strategy available for highly paid employees whose employers are not maxing out a workplace plan on their behalf; it is now possible for employees to make additional post-tax contributions—not salary deferrals—directly to a Roth 401(k) up to the overall contribution limit and without being hindered by income limits.[217]

Ironically, even with significantly lower contribution limits, individual accounts can potentially accumulate larger account balances even faster with proper planning to take advantage of various self-directed account and conversion options. As identified above, there have been evolving ways to leverage a seemingly modest

216. It is important to note that these contribution limits were subject to certain qualifications and restrictions. For example, the contribution limits could be further reduced based on factors such as an individual's MAGI and whether they were covered by a workplace retirement plan. Compensation may also be deferred under a nonqualified plan, where there are no express limits. Nonqualified plans are largely beyond the scope of this Article, *but see* Mullane, *supra* note 47.

217. The employer's plan must allow for this. For mainstream discussion of this strategy, see Neal Templin, *This Little-Known 'Mega Backdoor' Strategy Is Gaining in Popularity—and Can Seriously Boost Your Savings*, BARRON'S (May 18, 2024, 4:00 AM), https://www.barrons.com/articles/mega-backdoor-roth-conversions-retirement-661c4581.

contribution into a mega account. These involve investing in a low-value asset, such as a pre-IPO stock or investment-fund carried interests, either directly into a Roth IRA or, if unable, into a NDIRA and timely converting to a Roth. Recent mainstream media reporting has begun to regularly introduce these (and related) methods to wider audiences, with headlines like: "*How to Get More Dollars Into Tax-Sheltered Roth Accounts*, *Mega backdoor Roth conversions can boost tax-free growth if you avoid these mistakes*,"[218] "*Are You Using the Right Tax Breaks to Boost Investment Returns?*,"[219] or "*This Little-Known 'Mega Backdoor' Strategy is Gaining in Popularity—and Can Seriously Boost Your Savings*."[220]

Put succinctly, for workplace plans the contribution limits are generous and for non-workplace plans the investment planning opportunities are generous. Overall, these retirement savings tax subsidies cost the government billions of dollars annually in foregone revenue. That cost is not inherently a problem if it is serving a wider governmental purpose such as helping vulnerable Americans prepare for income security in retirement: "[t]he core purpose of retirement tax subsidies should be to protect the economic security of lower- and moderate-income seniors."[221] But, as discussed above, the people significantly saving more are the wealthiest Americans. "Not only do a larger share of high-income households have retirement accounts, but the average balance in those accounts also far exceeds that of accounts held by lower-income savers."[222] These wealthier Americans are part of a class of taxpayers that are the least vulnerable and do not need government assistance to prepare for retirement income security.

Congress has enacted legislation—at least every decade for fifty years—taking steps to improve the retirement savings opportunities for low-to-upper middle-income taxpayers. Those steps have led to modest improvements. The resulting legislation, however, often

---

218. Laura Saunders, *How to Get More Dollars Into Tax-Sheltered Roth Accounts*, WALL STREET J. (June 28, 2024, 5:30 AM), https://www.wsj.com/personal-finance/how-to-get-more-dollars-into-tax-sheltered-roth-accounts-daf30bdd.

219. Laura Saunders, *Are You Using the Right Tax Breaks to Boost Investment Returns?*, WALL STREET J. (Aug. 16, 2024, 5:30 AM), https://www.wsj.com/personal-finance/taxes/roth-ira-401k-hsa-529-8a0ffdd8.

220. Templin, *supra* note 217.

221. CARL DAVIS & ELI BYERLY-DUKE, INST. ON TAX'N & ECON. POL'Y, STATE INCOME TAX SUBSIDIES FOR SENIORS 2 (2023), https://sfo2.digitaloceanspaces.com/itep/ITEP-State-Income-Tax-Subsidies-for-Seniors-2023.pdf; *see also generally* Michael J. Graetz, *Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 855 (1987) (discussing what the goals should be of any national retirement security policy).

222. Jean Ross, *Tax Breaks for Retirement Savings Do Not Help the Workers Who Need Them Most*, CTR. FOR AM. PROGRESS (May 20, 2022), https://www.americanprogress.org/article/tax-breaks-for-retirement-savings-do-not-help-the-workers-who-need-them-most/.

ends up enabling the wealthy to grow even wealthier. As discussed above, too often enshrined in legislation that legitimately benefits low-to-middle-income taxpayers to a modest extent, are provisions that significantly benefit the wealthy. This is a gross misallocation of tax expenditure funds away from those most in need to those least in need.

We need to re-think our approach to retirement savings incentives. Despite the abundance of accounts and rules, there is generally only one approach: offer a tax benefit to everyone willing to save (or whose employer will save on their behalf) but impose income limits or limits on how much can be saved: the latter of which is often avoidable with strategic planning. This is a blunt instrument. A more precise approach might be more effective; one that targets different income groups with differing incentives, meaningful limits, and tax consequences. Building out such a regime would be a radical shift, and thus it would be harder to gain political traction and take longer to get off the ground than more moderate proposals. However, a good starting point could be measures that reduce the flow of the most significant tax expenditures to wealthier taxpayers who do not need incentives to save for the future. From there, other reforms could redirect the resulting freed-up resources toward taxpayers who need more help saving for retirement.

To begin, options to constrain the ineffective leakage of retirement savings should include, eliminating all conversions, further limiting investment options, establishing cutoffs for tax-free accumulation benefits, and modifying the tax consequences of retirement plan balances at the death of the participant.[223]

A. Eliminate Conversions

Conversions are an important step in some of the strategies for creating mega accounts. Congress is aware of this and has considered limits. None have successfully passed. For example, the Build Back Better bill, passed by the House but not the Senate, eventually would have prohibited taxpayers with MAGI of over $400,000 (or $450,000 if married and filing jointly) from converting pre-tax savings (traditional) into a Roth.[224] It also would have prohibited conversions of 401(k) after-tax contributions into a Roth.[225]

---

223. Two of these categories (limiting investment options and a cutoff) were briefly addressed by Hemel & Rosenthal, *supra* note 140, at 10.

224. H.R. REP. NO. 117-130, book 1, at 1296–99 (2021) (Committee on the Budget report to accompany H.R. 5376 (Build Back Better Act)).

225. *See id.*

Ultimately, Congress has chosen not to block mega accounts in this way. There are several significant policy issues with allowing this strategy to continue. It seems too obvious that a loophole that allows one to accomplish something indirectly that one is not allowed to do directly should be shut down. Furthermore, along the lines of what has been discussed so far, this windfall for the wealthy is a poor use of foregone tax money that is to be used to incentivize those with the least means to do so to save for retirement; it is an especially significant waste given the current state of the nation's budget. Making the situation worse, these retirement assets will likely never be taxed because of the high estate tax exemption and proper estate planning those in this situation are able to undertake. All in all, this is a gross misuse of retirement plan tax preferences piggybacking on a weakening estate tax to transfer more wealth essentially tax free.

Frankly, there is no policy rationale sufficient to justify the allowance of any conversions. If someone could not qualify originally through the direct route, they should not be able to convert their way into a Roth. If, instead, one could not afford to make post-tax contributions but now is able to, then (1) the mere fact that they have moved up the economic ladder to such an extent is a reward unto itself, and (2) they will still enjoy the benefit of tax-free accumulation from their already existing pre-tax accounts. These taxpayers—who are now in a better financial position—may want to protect their assets from future increased tax consequences by converting, but there is no policy rationale supporting this move: it does not generate increased savings among those most vulnerable, it enables those wealthy enough to undertake a taxable conversion to pay less taxes overall. Nevertheless, these individuals are still beneficiaries of retirement savings tax preferences, and the government need do no more. Note that disallowing conversions does not prevent those of more moderate means from contributing to a Roth initially if able to do so. In the end, it does not undermine retirement savings for taxpayers to stick with their earlier retirement savings choices, all of which still receive tax benefits; but it should save the government from unnecessarily foregoing tax revenue.

B. Limit Investment Options

Even if conversions are disallowed, that is not enough to prevent significant tax sheltering in mega accounts. Self-directed accounts (e.g., NDIRAs or Roths) that can invest in pre-IPO or other non-publicly traded assets that can explode in value later would remain

an option. Accordingly, to limit the tax system subsidizing the wealthiest taxpayers in this way, all tax-preferred retirement accounts should be prohibited from holding non-publicly traded assets.[226] There is no rationale that sufficiently justifies allowing the tax system to subsidize the wealthiest taxpayers who can stuff their accounts with non-publicly traded assets.

C. Establish Tax-Free Accumulation Cutoffs

The above limitations would be meaningful steps to curb the abuse of tax-preferred retirement savings vehicles. Still, mega accounts could still proliferate among the wealthy. The only way to prevent that would be to set a cap (that would be indexed for inflation) on how much can accumulate tax-free, in the aggregate, across all tax-preferred retirement savings vehicles. In 2016, President Obama and Vice President Biden proposed a cap on tax-free accumulation once aggregate savings in plans reached a threshold amount.[227] After that, no more contributions could be made but the existing account could continue to grow tax-free. Although imperfect, this approach puts a real limit on the extent to which the tax system would subsidize retirement savings.

D. Modify Tax Consequences at Death

An area for reform that ought not be overlooked is the role tax-preferred retirement savings play in estate planning. This should be the subject of a separate article viewing this topic from that perspective more expansively. While some recent changes have tightened the estate planning benefits by limiting the extent to which beneficiaries can continue to accumulate inherited funds tax-free, this area is ripe for further reforms—some that could limit the tax advantages for the wealthy and others that could perhaps motivate the middle class to save more.

Some options for limiting the tax advantages would be reviving a version of the historic surtax on aggregate plan balances above a certain amount at death. A simple approach would be linking the rate and threshold to the estate tax rate and exemption level.

---

226. *See, e.g.*, Hemel & Rosenthal, *supra* note 140, at 10 ("While we do not think that a majority of mega-IRAs arise from 'stuffing' strategies, there is no reason for Congress to allow 'stuffing' in the first place. A ban on non-publicly traded assets in IRAs, 401(k)s, and other defined contribution plans would limit both stuffing and self-dealing (i.e., improper transactions between an IRA and its owner).").

227. The cap was set at an amount that translated to "a maximum balance of approximately $3.4 million for a [sixty-two]-year-old." *Id.* at 9.

However, with the exemption level already at a historic high for transferring wealth at death tax-free, a better approach would be to set the threshold lower by linking it to the lifetime cutoff discussed in the previous subsection.

An additional option would be eliminating the tax-free growth status of accounts at the death of the owner, with limited exceptions for certain classes of beneficiaries as well as for lower-income beneficiaries. Removing the tax-free growth status immediately once funds are no longer needed to support the retirement of the participant makes sense outside of certain beneficiaries such as a spouse, minor child of the deceased account holder, or a disabled or chronically-ill individual.[228] Conversely, allowing for continued tax-free accumulation for low-income beneficiaries could encourage more savings by, and transfers to, those who will likely need the most financial support in retirement.

V. CONCLUSION

Congress provides tax incentives for certain retirement savings to encourage individuals to save for their retirement. This promotes long-term financial security for the participating individuals and benefits society more generally. More specifically, Congress seeks to help bridge the gap between how much Americans would ordinarily choose to save for retirement and how much they will likely need in retirement. By providing tax incentives, Congress seeks to make it more financially advantageous for individuals to choose to save and to save more. Increasing individual savings reduces reliance on public assistance during retirement years, easing the burden on government-funded social welfare programs and thus the rest of society. Therefore, encouraging individuals to save for retirement helps support the larger collective system aiming to provide basic old-age security.[229] The current retirement plan system, however, functions sub-optimally because not enough Americans are saving or saving enough, and instead, most tax benefits accrue to the wealthy.

The ultrawealthy, however, generally do not need encouragement to make plans for financial security throughout their lives. Thus,

228. Note that this is a slightly narrower category than "eligible designated beneficiaries" (an EDB) within the meaning of the new SECURE Act rules that eliminated the option to extend tax-free growth significantly for everyone but EDB; other beneficiaries are subject to a ten-year limit. *See* I.R.C. § 401(a)(9)(H)(i)&(ii). An EBD is a spouse or minor child of the deceased account holder, a disabled or chronically ill individual, or an individual who is not more than ten years younger than the original owner. *See* I.R.C. § 401(a)(9)(E)(ii).

229. *See infra* Part II.

something is seriously amiss when the most significant retirement tax expenditures are allocated to the wealthy to benefit both from tax-free accumulation during life and tax-favorable transfers at death. This undermines the purpose and goals of retirement policy. Overall, there should be more support for the lower income quintiles, enhanced incentives for the middle, and more stringent limits that constrain the tax-giveaway to the rich.

The misuse of retirement vehicles allows for the inappropriate tax-free accumulation and tax-favorable transfer of wealth to future generations. Now is the time for Congress to act to put the country on better financial footing by realigning retirement tax incentives to help those who are vulnerable, not those who are privileged.

Undermining Procedural Justice Through the Voluntary Act Doctrine: from the First Year Law Curricula to Concrete Law, *People v. Decina* as a Legal Caselaw History

Joshua Kastenberg

INTRODUCTION

Robert Cover, a former Yale Law professor, once posited that law takes place in a "field of pain and death."[1] Cover's statement rings true with many of the nation's criminal trials—even those where the defendant did not intend to harm any person. In the past four years alone, two trials have been widely reported in which the defendants were charged with negligence crimes that resulted in the deaths of other human beings. In 2021, Alec Baldwin, while on a movie set in Bonanza City, New Mexico, unintentionally shot and killed Halyna Hutchins, a cinematographer.[2] Although the prosecutor initially violated the Constitution's prohibition against *ex post facto* charging, Baldwin was ultimately charged with involuntary manslaughter, which, under New Mexico law, carried with it an eighteen month maximum jail sentence.[3] Notwithstanding the prosecution's later failure to comply with state and federal constitutional discovery requirements leading to the trial judge dismissing the case, the court acknowledged that Baldwin had pointed a loaded gun in the direction of Hutchins and a bullet fired from the gun killed her.[4] This act carries with it some degree of negligence, albeit perhaps not criminal negligence if Baldwin had relied on enough viable information to believe that the weapon was safe.[5] In another case, in 2024, in Southern California, a jury convicted Rebecca Grossman, a "wealthy socialite," of vehicular manslaughter under California law for killing two children in a crosswalk with her vehicle.[6] Grossman had voluntarily consumed some amount of

---

1. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985).

2. *See, e.g.*, Julia Jacobs, *Alec Baldwin and Others Could Face Charges in 'Rust' Shooting, D.A. Says*, N.Y. TIMES, https://www.nytimes.com/2022/09/26/arts/alec-baldwin-rust-shooting-charges.html, (Jan. 19, 2023).

3. In New Mexico, an *ex post facto* criminal law is defined as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed." *See* State v. Alderette, 804 P.2d 1116, 1119 (N.M. Ct. App. 1990). On the later charges against Baldwin, see Julia Jacobs, *'Rust' Prosecutors Downgrade Charges for Baldwin*, N.Y. TIMES, Feb. 21, 2023, at A17.

4. *See* Meg James, *Behing the Spectacular Collapse of the Alec Baldwin 'Rust' Shooting Prosecution*, L.A. TIMES, https://www.latimes.com/entertainment-arts/business/story/2024-07-13/alec-baldwin-trial-tossed-misconduct-evidence (July 13, 2024, 3:32 PM).

5. *See* Michael Finnegan, *Key Question at Alec Baldwin's Criminal Trial: Is He to Blame for Halyna Hutchins' Death?*, L.A. TIMES, https://www.latimes.com/california/story/2023-01-19/alec-baldwin-rust-shooting-criminal-charges-legal-ramifications (Jan. 19, 2023, 3:18 PM).

6. Richard Winton, *No New Trial for Rebecca Grossman. Judge Cites Booze, Speed, Warning in Upholding Murder Conviction*, L.A. TIMES (June 3, 2024, 1:24 PM), https://www.latimes.com/california/story/2024-06-03/judge-rejects-convicted-murderer-rebecca-grossmans-bid-for-a-new-trial. Some media reporting referred to Grossman as a "wealthy socialite." *See* Neil Blincow, *LA Socialite Rebecca Grossman Who Plowed into Two Boys Killing Them Both Asks Court to Approve Lawyer Despite Major 'Conflict of Interest,'*

alcohol prior to driving and she was in a car race with a paramour when she struck and killed the two children.[7] Both Baldwin and Grossman's voluntary actions led to their prosecutions. That is, Baldwin voluntarily and knowingly pointed a gun at another person without personally inspecting the weapon and Grossman voluntarily raced another vehicle at a high rate of speed without regard for the lives of others.[8]

For over a century there have been convictions based upon criminal negligence that withstood appeals where the defendant never intended to hurt anyone, and one in particular, *People v. Decina*—a 1956 New York Court of Appeals decision—is cited over one hundred times in the nation's appellate courts for highlighting the "voluntary act principle."[9] *Decina* also appears in the first-year law student casebooks for the same purpose.[10] However, this Article proposes that there are considerations surrounding *Decina* that both appellate decisions and casebooks fail to acknowledge and that this failure results in reinforcing or even creating societal biases against undesirable categories of persons.

One notable consideration of *Decina* that is missing from the appellate decisions and casebooks alike is that there was mass news reporting on the crime—which could be labeled as sensationist reporting—preceding the trial.[11] The mass news reporting might

---

DAILY MAIL, https://www.dailymail.co.uk/news/article-13432107/LA-socialite-Rebecca-Grossman-asks-court-approve-lawyer-conflict-interest.html (May 17, 2024, 10:28 PM); Jaysha Patel & Sid Garcia, *Rebecca Grossman Case: Opening Statements More than 3 Years After Boys Killed in Westlake Village*, ABC NEWS (Jan. 27, 2024), https://abc7.com/trial-rebecca-grossman-jury-selection-los-angeles-dui-crash/14329648/.

7. Dan Laden-Hall, *Socialite Gets 15 Years to Life for Killing Young Brothers in Hit-and-Run*, DAILY BEAST (June 11, 2024, 7:06 AM), https://www.thedailybeast.com/socialite-rebecca-grossman-gets-15-years-for-boys-hit-and-run-deaths/.

8. On Baldwin, see Graham Bowley, Julia Jacobs & Marc Tracy, *Lights, Camera, Weapons Check? Actors Worry After Baldwin Charges*, N.Y. TIMES, Jan. 20, 2023, at A1. On Grossman, see Michael Levenson, *Philanthropist Gets 15 Years to Life in Hit-and-Run Murder of 2 Boys*, N.Y. TIMES (June 11, 2024), https://www.nytimes.com/2024/06/11/us/rebecca-grossman-hit-run-sentenced.html.

9. *See* State v. Papse, 362 P.2d 1083, 1087–88 (Idaho 1961); People v. Rissley, 795 N.E.2d 174, 183 (Ill. 2003); People v. Wilson, 572 N.E.2d 937, 943 (Ill. 1991); State v. Jenkins, 39 P.3d 47, 56 (Kan. 2002).

10. On the casebooks, see CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 153–57 (4th ed. 2019); BENNETT CAPERS, ROGER A. FAIRFAX, JR. & ERIC J. MILLER, CRIMINAL LAW: A CRITICAL APPROACH 204–06 (2023); and JOSEPH KENNEDY, CRIMINAL LAW: CASES, CONTROVERSIES, AND PROBLEMS 130–33 (2d ed. 2022). Kennedy notes that "cases such as Decina are difficult because a broad expansion of the time frame of the offense essentially eliminate the voluntary act presumption." *Id.* at 135.

11. For a comment on media sensationalism in the 1950s, see JEREMY AGNEW, SENSATIONAL NEWS: THE RISE OF LURID JOURNALISM IN AMERICA, 1830-1930, at 10–11 (2024). Although his time-period of study ended a quarter of a century prior to Decina, Agnew noted:

partly explain why *Decina* became prominent, including why the case went to a criminal trial and how it was shaped on appeal.

Another consideration of *Decina* that does not appear in the casebooks or appellate decisions is the status of epileptics at the time and how the charging, trials, and appellate processes treated a person who had been a member of a pariah class, albeit a class that was becoming more socially accepted. The author of one prominent casebook (which I have assigned to my students since 2018) issued a paper that illustrates how race and the law can be incorporated into the criminal law curriculum to improve students' understanding of the law's impact on society while briefly stating in a footnote that *Decina* "offers students the opportunity to analyze whether a person with epilepsy acts voluntarily if he drives into four schoolchildren during an epileptic seizure."[12] It might even be appropriate to consider that minorities with disabilities are discriminated against at a higher rate than non-minorities with disabilities.[13] This Article will illustrate how *Decina* offers a much greater study, including how discrimination generally shapes the law and possibly reinforces or creates biases.

In 1957, two medical professionals noted that in regard to epilepsy, "the public is confused by misinformation and little correct information" leading society to consider the condition a "taint and believe it to be associated with insanity."[14] Thirty years prior to *Decina*, an article in the *Journal of the American Institute of Criminal Law and Criminology* lamented the harmful interchangeability of epilepsy with insanity as a legal categorization.[15] The article's author pointed out an irony that the law considered the epileptic to be responsible for their crimes at all times while the insane are never responsible.[16]

> Many have enjoyed . . . the thrill of reading a creepy story and the resulting sensation of fear and goosebumps . . . . Similarly reading stories in the newspapers about dreadful crimes or gruesome accidents could induce a certain amount of fear in the reader . . . . These sorts of fears were not unique to New York or the time period. The same type of fear arose in America in the 1950s with the rise of youth culture, the emergence of the adolescent category of "teenager," and an increase in juvenile delinquency.

Id. at 10.

12. Cynthia Lee, *Race and the Criminal law Curriculum*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES n.21 (Devon Carbado, Emily Houh & Khiara M. Bridges eds., online ed. 2022).

13. *See, e.g.*, A.H. Neufeldt, *Empirical Dimensions of Discrimination against Disabled People*, 1 HEALTH & HUM. RIGHTS 174, 174 (1995).

14. Frank Risch & Augustus S. Rose, *Community Plan for Epileptics*, 72 PUB. HEALTH REPS. 813, 813 (1957).

15. L. Pierce Clark, *A Critique of the Legal, Economic and Social Status of the Epileptic*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 218, 219 (1926).

16. *Id.*

The theory of Emil Decina's guilt is simple. While Decina did not intend on taking a life or causing harm, he had an epileptic seizure while driving—a condition with which he was previously diagnosed—that resulted in the death of others and thus, he knew of a condition that should have led him to avoid driving altogether.[17] In 1992, the Pennsylvania Superior Court, in *Commonwealth v. Cheatham*, summarized Decina's criminality as "his knowledge of his epilepsy and his choice to drive amount[ed] to culpable negligence."[18] State and federal appellate courts have also cited to *Decina* to determine when a doctor-patient privilege protects the statements of a patient who becomes a defendant, and it is noteworthy that Decina's conviction was overturned because the prosecutor and the trial court had violated New York's doctor-patient privilege laws.[19] However, the development of this privilege is not the subject of this Article.

Decina provides, to both the law and to society in general, a far broader consideration than either an examination of the voluntary act doctrine's relationship to negligence crimes or to the doctor-patient privilege's evolution. The New York Court of Appeals' decision and the people involved in it gives our contemporary law and society a historical study of procedural justice; an illustration of how bias shapes both society and prosecutorial discretion; and, how negligence crimes may exist as a reflection of societal pressures. Decina's trial, conviction, and subsequent appeals also evidence how social opinions are shaped by media, and in turn, became part of the national criminal law standards. This Article does not argue that *Decina* was wrongly charged and convicted. Indeed, the New York Court of Appeals' decision represents a basis for justifying the rightful prosecution of persons such as Baldwin and Grossman. But at the same time, *Decina* should remind prosecutors, defense counsel, and the courts that some prosecutions may reinforce, or even build, societal biases. *Decina* has never been analyzed in this light.

This Article is divided into four sections. Section I presents the background of *Decina* through newspaper reporting, as well as a

17. KENNEDY, *supra* note 10, at 140; *see also* Robert Fine & Gary Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 BUFF. L. REV. 749, 754 (1967).

18. 615 A.2d 802, 806 (Pa. Super. Ct. 1992). The Superior Court is a statewide, intermediate appellate court, consists of not less than seven judges, and has jurisdiction as provided by the Constitution or by the General Assembly. *See* PA. CONST. art. V, § 3.

19. On Decina's conviction being overturned, see People v. Decina, 152 N.Y.S.2d 169 (N.Y. 1956). For a fuller explanation of Decina and the privilege, see PAUL DAVID HOROWITZ, 4 BENDER'S NEW YORK EVIDENCE § 160.03 n.64; *see, e.g.*, People v. Rivera, 33 N.E.3d 465, 467–68 (N.Y. 2015); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257–58 (N.D. Ill. 1981); State v. Deases, 518 N.W.2d 784, 788 (Iowa 1994); and Chandler v. Denton, 741 P.2d 855, 865–66 (Okla. 1987).

brief analysis of the New York law under which Decina was prosecuted. Both the media reporting as well as the governmental and public knowledge of driving dangers are important to understand the context in which the prosecutor determined to bring charges against Decina and how the case was prosecuted and shaped on appeal. Section II details the general jurisprudence on how the voluntary act doctrine was applied to criminal negligence decisions prior to *Decina*. This section serves as a nuanced barometer to show how *Decina* slightly broadened the voluntary act principle over a disfavored class of persons. Section III describes *Decina*'s traverse through New York's appellate courts, including the personalities involved. When juxtaposed against Sections I and II, it becomes evident that the New York Court of Appeals' decision is scant in its approach to the law and possesses an *indicia* of being outcome determinative. Section IV provides a snapshot history of how *Decina* has become cemented into modern jurisprudence. This Article concludes, as noted above, with the admonition that *Decina* was not wrongfully decided, but rather, that it serves as a justification for taking criminal negligence cases to trial only where there is an understanding of the possibility to reinforce, or even create, societal biases against categories of disfavored persons, and in particular here, disabled persons.

* * * * *

Before proceeding, there are two terms of particular importance to this Article: "voluntary act" and "procedural justice." In 1952, the Court held, in *Morissette v. United States*, that "crime, [is] a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand."[20] Per the Model Penal Code, there can be no crime without a voluntary act and therefore involuntary acts or movements, such as a convulsion or conduct during hypnosis, cannot form the basis of a crime.[21]

---

20. 342 U.S. 246, 251–52 (1952).

21. MODEL PENAL CODE § 2.01 (AM. L. INST. 1962) (Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act).

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

To illustrate, in *Fain v. Commonwealth*, an 1879 case that detailed the voluntary act principle, the defendant fell asleep in a hotel lobby with a gun in his possession and his companion shook him to wake him up.[22] Startled, the defendant's immediate reaction was to fire the gun, killing his companion.[23] In regard to the defendant's claim of being asleep at the time of the shooting, the Kentucky Supreme Court held that "if, as claimed, the appellant was unconscious when he fired the first shot, it cannot be imputed to him as a crime."[24] Thus, *Fain* stands for the principle that a person who commits a crime while sleepwalking or in a non-self-induced blackout state cannot be said to have voluntarily acted.[25] On the other hand, a person who voluntarily intoxicates themself is not absolved of criminal wrongdoing.[26] For example, in a case where a person makes the claim that their medication coupled with alcohol caused them to be intoxicated, rather than the alcohol use alone, that person is not absolved from driving while intoxicated because they voluntarily put themselves in a position to become intoxicated.[27]

Procedural justice has varying definitions in different contexts, but for the purpose of this Article, the term means that the applicable law was followed and that both the defendant and the

---

Id. For a history of the Model Penal Code and its importance in influencing criminal law, see MARKUS D. DRUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 1–10 (2d ed. 2015).

22. 78 Ky. 183, 184–85 (1879).

23. *Id.* at 185–86.

24. *Id.* at 189. The state supreme court also observed that in regard to a defense of mistake:

> Nor is he guilty if partially conscious, if, upon being partially awakened, and finding the deceased had hold of him and was shaking him, he imagined he was being attacked, and believed himself in danger of losing his life or of sustaining great bodily injury at the hands of his assailant, he shot in good faith, believing it necessary to preserve his life or his person from great harm. In such circumstances, it does not matter whether he had reasonable grounds for his belief or not. He had been asleep, and could know nothing of the surrounding circumstances. In his condition he may have supposed he was assailed for a deadly purpose, and if he did, he is not to be punished because his half-awakened consciousness deceived him as to the real facts.

Id.

25. *See, e.g.*, McClain v. State, 678 N.E.2d 104, 109 (Ind. 1997); Haskell v. Berghuis, 695 F. Supp. 2d 574, 591 (E.D. Mich. 2010) ("Automatism has been recognized by courts as a valid defense bearing on the voluntariness of an otherwise criminal act." (quoting Haynes v. United States, 451 F. Supp. 2d 713, 724 (D. Md. 2006))); Riley v. Commonwealth, 675 S.E.2d 168, 175 (Va. 2009) ("Where not self-induced, unconsciousness is a complete defense to a criminal homicide." (quoting Greenfield v. Commonwealth, 204 S.E.2d 414, 417 (Va. 1974))); State v. Jones, 527 S.E.2d 700, 706 (N.C. Ct. App. 2000) ("Unconsciousness is a complete defense to a criminal charge because it precludes both a specific mental state and a voluntary act.").

26. *See, e.g.*, *Riley*, 675 S.E.2d at 176 (citing Gills v. Commonwealth, 126 S.E. 51, 53 (Va. 1925)).

27. *See, e.g.*, Kessler v. State, 125 S.W.2d 308, 309 (1938). "A person who gets himself in a condition whereby he may become intoxicated from a lesser quantity of whisky than it would ordinarily take to produce intoxication is nevertheless intoxicated from the use of whisky." *Id.*

community believed that a fair trial occurred.[28] The term also includes the decision of the prosecutor to charge a defendant being relegated to enforcing the law as it is known at the time and not yielding to other impulses, such as the public's pressure to prosecute.[29] Emil Decina, the focus of this Article, was the center of widespread news reporting that assessed him as guilty in front of an all-male jury. He was also prosecuted at a time in which both the state legislature and Congress had accused citizens in Decina's hometown of Buffalo of having ties to the Communist Party of the United States.[30] When the newspapers reported on him not testifying in his own defense or presenting defense witnesses, he had no direct connection to persons accused of ties to communism, but the highlighting of his assertion against self-incrimination does bring to mind that similar reporting was done in regard to suspected communists.[31]

Procedural justice is a fairly recent concept in criminal law and certainly was not a consideration at the time of *Decina*.[32] Moreover, *Decina* was decided before the Americans with Disabilities Act came into existence, which protected certain classes of disabled persons in employment and sought to end discrimination against persons covered by the Act.[33] It was not, after all, until the 1960s that a disability rights movement came into being.[34] That is, it was unlikely there were any organizations advocating disability rights

28. In developing this definition, see Rosales-Mireles v. United States, 585 U.S. 129, 144 (2018) (a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings); Commonwealth v. Gaines, 240 N.E.3d 193, 212 (Mass. 2024) (explaining that the purpose of full discovery compliance is to ensure that "the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."); Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 848–49 (Mass. 2021) (Kafker, J., concurring).

29. *See, e.g.*, Ariz. Att'ys for Crim. Just. v. Ducey, 638 F. Supp. 3d 1048, 1073 n.18 (D. Ariz. 2022); Price v. Commonwealth, 849 S.E.2d 140, 145 (Va. Ct. App. 2020). In *Price*, the prosecutor had a conflict of interest in that she represented the former spouse of the defendant in a divorce proceeding and prosecuted the defendant for assault. 849 S.E.2d at 145. The appellate judges noted "[t]he prosecutor is obligated to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *Id.* (internal quotation marks omitted).

30. *See, e.g.*, ROBERT JUSTIN GOLDSTEIN, DISCREDITING THE RED SCARE 119–20 (2016).

31. *See, e.g.*, RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 3–5 (1990).

32. *See, e.g.*, People v. Campos, 128 N.E.3d 1009, 1024 (Ill. App. Ct. 2019); United States v. Ky. Bar Ass'n, 439 S.W.3d 136, 157 (Ky. 2014); *Ariz. Att'ys*, 638 F. Supp. 3d at 1073 n.18; *In re* Spencer, 524 P.3d 57, 65 (Kan. 2023).

33. *See* Robert E. Rains, *A Pre-history of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Limitations*, 11 ST. LOUIS U. PUB. L. REV. 185, 185 (1992).

34. DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 11 (2001).

that had the power to come to Decina's defense.[35] At the time of *Decina*, organizations such as the National Organization for Retarded Citizens and the United Cerebral Palsy Association were just coming into being.[36] One scholar has stated that, in regard to plea bargaining, there are several factors that contribute to perceptions of procedural justice, including whether the people involved have opportunities to tell their sides of the story, whether the authorities act in a manner that indicates neutrality and trustworthiness, and whether those involved are treated with dignity and respect.[37] These same factors can be used to gauge whether the continuation of the voluntary act principle, as developed by the New York Court of Appeals in *Decina*, and as taught and used over time, meets these principles of procedural justice, particularly when it is viewed through the lens of a person belonging to a societally discriminated group.[38]

I. THE SETTING OF *DECINA*: MASS-MEDIA AND THE LAW OF NEW YORK

As a member of a disfavored class of persons, Decina was unlikely to be accorded any even-handed treatment in the press at the time of his first trial. According to one scholar of journalism and history, Buffalo's media and its nearby city newspapers "enshrined the white, middle-class, native-born reader as the paragon spectator and citizen and relegated all other populations to peripheral roles."[39] Decina, while not a racial minority member, was a child of Italian immigrants, did not fight in World War II, and was a person equated with the feeble-minded. Buffalo's economy was in the first stages of decline, but generous military defense contracts somewhat ameliorated the effects of other long-standing corporations leaving the city.[40] In other words, Buffalo was important to the national defense and Decina, who worked at the defense manufacturer Bell

35. RICHARD K. SCOTCH, FROM GOODWILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 34 (1984).

36. *Id.* Scotch observed that disability rights were generally centered on blind persons who "had a high participation rate" in society. *Id.* at 28.

37. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 411 (2008).

38. *See, e.g.*, Francis X. Shen, *The Overlooked History of Neurolaw*, 85 FORDHAM L. REV. 667, 676 (2016).

39. JULIA GUARNERI, NEWSPRINT METROPOLIS: CITY PAPERS AND THE MAKING OF MODERN AMERICANS 145 (2017).

40. MARK GOLDMAN, CITY ON THE EDGE: BUFFALO, NEW YORK 150–52 (2007); *see also* NEIL KRAUS, RACE, NEIGHBORHOODS, AND COMMUNITY POWER: BUFFALO POLITICS, 1934–1977, at 36 (2000).

Aircraft, was a part of it.[41] Perhaps, at first glance, this is of minor import but the decision to charge Decina and the jury's deliberations took place in an era where the nation's security seemed precarious and he was a worker in the defense industry.

The law under which Decina was prosecuted was two decades old by the time of his trial. In 1936, the New York legislature enacted penal law Section 1053-a as a unique vehicular homicide statute.[42] It carried a maximum five-year sentence, which was appreciably less than that of the older second-degree manslaughter statute that prosecutors had charged for vehicular homicide cases in the past.[43] At the time, second-degree manslaughter carried a maximum fifteen-year sentence.[44] One of the earliest reported cases arose from a bartender named Fred Gutman who, according to the *New York Times*, drove his car on the wrong side of the street and killed two people.[45] In 1936, the Second Appellate Division upheld Gutman's conviction without any discussion on the law.[46] But while New York's legislature updated its criminal law to promote safer driving, in March 1954, the legislature balked against the governor and refused to vote for mandatory driver's insurance.[47] The legislature also did not enact mandatory automobile safety tests, in spite of the governor's urging.[48]

Both the press reporting on Decina throughout his trial and sentencing and the penal law applicable to the case serve as one barometer to assess the procedural justice aspects of the voluntary act principle and prosecutorial discretion to try the case. The media reporting is self-evident in the sense that during the period between the event and the trial, there was widespread coverage of Decina, which by its nature presented him as guilty. The media did not

41. On Bell, see ANN MARKUSEN ET AL., THE RISE OF THE GUNBELT: THE MILITARY REMAPPING OF INDUSTRIAL AMERICA 58–62 (1991).

42. *See* S. 1256, 159th Sess. (N.Y. 1936) (Print No. 1462). The current New York statute governing vehicular homicide is listed as § 125.10. N.Y. PENAL LAW § 125.10 (McKinney 1965); *see also* People v. Decina, 138 N.E.2d 799, 808 (N.Y. 1956) (Desmond, J., dissenting); Fine & Cohen, *supra* note 17, at 754.

43. S. 1256, 159th Sess. (N.Y. 1936) (Print No. 1462). In 1874, the New York Court of Appeals determined that the difference between murder and manslaughter is that the former requires proof of an intent to kill, and the latter occurs when there is an unlawful taking of life without the specific intent to do so. Slatterly v. People, 58 N.Y. 354, 358 (1874).

44. *See, e.g.*, People v. Pulce, 43 A.D.2d 745, 745 (N.Y. App. Div. 1973); People v. Kern, 149 A.D.2d 187, 207–08 (N.Y. App. Div. 1989).

45. *Guilty in Auto Death: Queens Bartender Convicted of Manslaughter for Crash*, N.Y. TIMES, May 12, 1936, at 20.

46. People v. Gutman, 249 A.D. 656, 656 (N.Y. App. Div. 1936).

47. Leo Egan, *Dewey Defeated on Car Insurance in Senate, 29 to 26*, N.Y. TIMES, Mar. 20, 1954, at 1.

48. Leo Egan, *Final Day Hectic: Delay in Auto Tests Is Approved, Watchdog Group Is Set Up*, N.Y. TIMES, Apr. 3, 1955, at 1.

fairly report on Decina and failed to include relevant, positive stories such as Decina's possession of driver's insurance despite it not being legally required—this fact was not reported until after a settlement was made.[49] At the same time, the application of the penal law based upon its past use also evidences that the prosecution had a lower bar of proof against Decina (and other similarly disabled persons) than it did as a general rule.

A. News Reporting

The news media can often have an impact on the entire process of a criminal trial—from a prosecutor's decision to charge a defendant, to the verdict of a jury trial, and through the appellate process.[50] This impact of the news media is what Professor Frank Luther Mott penned in his *tour-de force* history of American journalism when he stated that "[c]rimes and disasters, always important in the news, had their share of headlines in the 1950's. Crime in the United States increased in greater proportion than the population during the decade."[51] And a more contemporary scholar of journalism and history has pointed out that "significant research indicates that jurors render more guilty verdicts when exposed to pretrial publicity."[52] Notably, the prosecutor who decided to charge Emil Decina and the judges involved in the trial and appellate process were all elected officials. A third scholar posited, "the public regards elected judiciaries as more legitimate than appointed [and] supports judges who promise to decide cases in a manner consistent with majority preferences."[53] Although this Article does not include the campaign promises and election platforms of the prosecutor and judges in the case, the newspaper reporting serves as an illustration of the public pressures that led to Decina's prosecution and eventual conviction. And while the appellate court would overturn

49. *$37,500 Awarded 7 in Accident*, N.Y. TIMES, Nov. 29, 1955, at 41.

50. Skilling v. United States, 561 U.S. 358, 369–70 (2010). For a focus on pretrial publicity see, for example, Irvin v. Dowd, 366 U.S. 717, 726–27 (1961); Rideau v. Louisiana, 373 U.S. 723, 732 (1963); Sheppard v. Maxwell, 384 U.S. 333, 354 (1966); and Estes v. Texas, 381 U.S. 532, 578 (1965).

51. FRANK LUTHER MOTT, AMERICAN JOURNALISM, A HISTORY: 1690–1960, at 845 (1964). Mott's influence in the law remains. *See* Kimbrough v. Kahn, No. 18-CIV-82-Z-BR, 2020 WL 10963979, at *13 n.115 (N.D. Tex. Apr. 8, 2020); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the rehearing *en banc*).

52. *See* Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 246 (2007) (citing Solomon M. Fulero, *Afterword: The Past, Present, and Future of Applied Pretrial Publicity Research*, 26 LAW & HUM. BEHAV. 127 (2002)).

53. Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RSRV. L. REV. 1045, 1083 (2021).

Decina's conviction on the basis of a violation of the doctor-patient privilege, the appellate decisions in Decina's case placed a higher, albeit nuanced, voluntary act burden on disabled persons than in other jurisdictions.

Between March 15 and April 17, 1955, newspapers across the country reported on Decina's guilt in the deaths of the young children in a manner that lowered him into a pariah status.[54] As an example, the *Syracuse Journal Herald* reported that Decina was the third epileptic driver that year to kill other people while driving.[55] Worse, the newspaper claimed that Decina had omitted his medical condition on his driver's license renewal in 1953.[56] This claim—that Decina's license renewal application did not inform the state that he was subject to blackouts—was repeated in newspapers as far away as San Antonio.[57] Whether the omission was true or not, it painted Decina in a bad light. In none of these articles was it mentioned that Decina had driver's insurance, which was not mandated by the state. The possession of insurance might have colored him in a more responsible light in the press.

The reporting on Decina can, in light of world events at the time, be labelled as a media frenzy. The United States Supreme Court addressed the issue of the media entering into juror deliberations, but not the overall power of the press to influence potential jurors. In 1892, the Court, in *Mattox v. United States*, decided that a jury's deliberations could only focus on the evidence admitted at trial and not on external information in the press.[58] And New York courts had gone further than the Supreme Court in addressing the impact of news reporting on criminal trials. Given the widespread reporting on Decina's acts prior to trial, one might wonder why outside media influence did not become an issue at trial.

For over a century, New York courts have understood that media influence had the possibility of undermining fair trials.[59] In 1841, in *People v. Webb*, the Supreme Court of Judicature in Otsego County – the predecessor to the modern trial court - recognized that

---

54. *See, e.g.*, *Driver in Tragic 'Blackout' Eyed*, SAN ANTONIO EXPRESS, Mar. 17, 1955, at 8D; *Condition of Decina Under Study*, DAILY REV. (Towanda (Pa.)), Mar. 16, 1955, at 1; *Careening Auto Kills Three Girls on Sidewalk, Crashes into Store*, PRESS TELEGRAM (Long Beach (Cal.), Mar. 15, 1955, at A3; *Runaway Auto Kills 3 Girls*, MORNING HERALD (Hagerstown (Md.)), Mar. 15, 1955, at 8.

55. *'Blackout' Driver Held in Death; State's Third Such Case in Year*, SYRACUSE J. HERALD, Apr. 14, 1955, at 20.

56. *Id.*

57. *Driver in Tragic 'Blackout' Eyed*, *supra* note 54, at 8D.

58. Mattox v. United States, 146 U.S. 140, 149 (1892).

59. *See, e.g.*, People v. Diamond, 36 Misc. 71, 76 (N.Y. Sup. Ct. 1901); People v. Hyde, 75 Misc. 407, 415 (N.Y. Sup. Ct. 1912); People v. George, 109 A.D. 111, 115 (N.Y. App. Div. 1905).

news reporting had the capability of denying to a defendant in a criminal trial the right to a fair trial by prejudicing a jury.[60] Judge Esek Cowan, writing for the court, determined that in instances of overarching news reporting, even where prospective jurors believed they could be impartial, there would be too much uncertainty that the defendant would receive a fair trial.[61] In addition to being a judge, Cowen was a respected and influential scholar that helped shape judicial authority in the first half of the nineteenth century.[62] State appellate courts, including the Illinois Supreme Court, have cited to Cowen as late as 2021.[63] Cowen insisted that "above all, would it be dangerous to require that [the defendant] should risk his trial by a panel selected from a community already sought to be influenced by the course of the press."[64]

New York courts continued to recognize the potential dangers of the media in 1928, in *People v. Lucas*, where the New York Supreme Court in Monroe County held that a defendant should not be required to defend himself in "a general adverse atmosphere freighted with prejudice and bias to such an extent that his presumption of innocence becomes a fiction and a fair and impartial trial becomes a farce."[65] *Lucas* is noteworthy for reasons similar to *Decina*, in that the defendant in *Lucas*—a medical practitioner who combined his religious faith with the practice of medicine—was publicly stigmatized by the press after being charged for practicing medicine without a license along with nine other charges over a five-year period.[66] Judge Adolph Rodenbeck, who presided in *Lucas*, ordered a change of venue in the trial, and further observed that "prejudice is often

60. 1 Hill 179, 183 (N.Y. 1841). The Supreme Court of Judicature was established in 1691 during the colonial period as an appellate court. *See* HENRY W. SCOTT, THE COURTS OF THE STATE OF NEW YORK 116 (Lawbook Exch. 2001) (1909). However, this court continued its existence and later became known as the "Supreme Court" in 1846. *Id.*

61. *Webb*, 1 Hill at 183–84. Judge Cowan noted:

> It is the very thing which the law seeks to avoid, when it is seen that the party may, and probably will be drawn into a trial by a jury, who, under an influence of which they may themselves be hardly conscious—an influence which perhaps no human sagacity can detect—may pronounce a verdict against him, and conclude his rights forever.

Id. at 184.

62. *Esek Cowen, 1878-1844*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/figure/esek-cowen/ (last visited Jan. 28, 2024); *see generally* ESEK COWEN, A TREATISE ON THE CIVIL JURISDICTION OF THE JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK (3d ed. 1844); ESEK COWEN, NOTES TO PHILLIPPS' TREATISE ON THE LAW OF EVIDENCE (1839); *see also* WAYNE FRANKLIN, JAMES FENIMORE COOPER: THE LATER YEARS, 239–40 (2017) (detailing Cowen's judging in the author's libel suit).

63. *See, e.g.*, People v. Fane, 190 N.E.3d 787, 793 (Ill. 2021) (relying on Cowen to continue the justification for instructing juries on the unreliability of uncorroborated accomplice testimony).

64. *Webb*, 1 Hill at 184.

65. 131 Misc. 664, 668–69 (N.Y. Sup. Ct. 1928).

66. *Id.* at 665.

an insuperable barrier to the fair and impartial administration of the law. Its influence is subtle, insidious and often unconsciously warps the judgment and blinds the intelligence of those surrounded by its atmosphere."[67] Rodenbeck, like Cowen, was a respected legal scholar whose imprint on the law extended beyond his trial court rulings.[68] He had served as the Mayor of Rochester in 1915 and was a delegate at the state's constitutional convention that resulted in a new state constitution in 1925.[69] Rodenbeck also coauthored, with Roscoe Pound, (future Justice) Louis Brandeis, and Charles Eliot to publish a comprehensive study on the administration of justice across the country.[70]

The media reporting surrounding Decina's trial was particularly acute. On Tuesday, March 15, 1955, the *Buffalo Evening News* ran the headline "China Reds Want War, Dulles Warns."[71] The Korean War had only been in an armistice for less than two years and there were signs that the United States might enter into a new war against the Peoples' Republic of China over that nation's determination to collapse the allied Republic of China.[72] Underneath that headline of potential war, the newspaper placed a headline "Driver Whose Car Killed 3 Little Girls Tells of Blacking Out."[73] Several other stories reported on the event in the *Buffalo Evening News*' same March 15, 1955 edition. For example, one news story appeared under the headline "Two Children Injured by Runaway Auto Still in Coma at Hospital," and another story was placed under a headline "Woke Up . . . Inside Some Place, He Says in Statement."[74] The *Buffalo Evening News* ran ten different stories on the tragic deaths and injuries on March 15 alone.[75] It reported that Decina

---

67. *Id.* at 669.

68. *See, e.g.*, ADOLPH J. RODENBECK, THE ANATOMY OF THE LAW: A LOGICAL PRESENTATION OF THE PARTS OF THE BODY OF THE LAW (1925).

69. *Stimson to Head Platform Drafters: Sub-Committee of Nine Will Submit Republican Views on Revision*, N.Y. TIMES, July 25, 1914, at 6.

70. *See* CHARLES ELIOT, LOUIS BRANDEIS, MOORFIELD STOREY, ROSCOE POUND & ADOLPH RODENBECK, PRELIMINARY REPORT ON THE EFFICIENCY IN THE ADMINISTRATION OF JUSTICE (1914). It has been noted that the Preliminary Report was influential in court consolidation. *See* Sue K. Dosal, Mary C. McQueen & Russell R. Wheeler, *"Administration of Justice is Archaic"—The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions*, 82 INDIANA L. REV. 1293, 1301 (2007).

71. *China Reds Want War, Dulles Warns*, BUFF. EVENING NEWS, Mar. 15, 1955, at 1.

72. *Id.*

73. *Driver Whose Car Killed 3 Little Girls Tells of Blacking Out*, BUFF. EVENING NEWS, Mar. 15, 1955, at 1.

74. *Two Children Injured by Runaway Auto Still in Coma at Hospital*, BUFF. EVENING NEWS, Mar. 15, 1955, at 1; *'Woke Up . . . Inside Some Place,' He Says in Statement*, BUFF. EVENING NEWS, Mar. 15, 1955, at 1.

75. *Tragedy Snarls Rush Traffic in Delaware as Drivers Stop*, BUFF. EVENING NEWS, Mar. 15, 1955, at 21; *'It Is So Awful,' Sobs Mother of 11-Year-Old Crash Victim*, BUFF.

had caused the "second worst traffic accident in the city's history."[76] The death of the children and descriptions of Decina quickly appeared in newspapers both far and wide.[77]

A local historian recently noted that the *Buffalo Evening News* had always "played an enormous role in politics and everybody was always careful to pay deference" to the newspaper.[78] The newspaper's editors were quick to find fault, not only with Decina, but with New York's traffic enforcement and driver's license system. "It's a sad commentary on our thinking that it takes a shocking tragedy such as visited Buffalo Monday afternoon to make us realize that there are people who have no business driving an automobile, and that the unwary pedestrian is a ceaseless target of the careless, drunken, or unfit driver," the editors argued.[79] "The needless slaughter of three little girls and the critical injury of two more children by a driver who, by his own admission, was physically unfit to operate a motor vehicle should awaken the citizens of Buffalo to the constant threat to their lives of themselves, and their children."[80] The editors then called on judges to stop fining drivers for dangerous conduct and instead, sentence traffic offenders to jail or permanently suspend their licenses.[81]

The following day, the *Buffalo Evening News* reported that Decina pled "innocent" to a charge of criminal negligence.[82] The newspaper provided details of Decina's life, including that he had been struck by a car at the age of seven while crossing the street on his way home from school and that he attended Saint Mary's School

---

EVENING NEWS, Mar. 15, 1955, at 21; *No Another Like It in the City's History*, BUFF. EVENING NEWS, Mar. 15, 1955, at 22; *Tragedy's Impact Also Is Felt by Decina's Family*, BUFF. EVENING NEWS, Mar. 15, 1955, at 23; *Teachers and Pupils at School 81 Ready to Help in Any Way*, BUFF. EVENING NEWS, Mar. 15, 1955, at 23; *Year's Death Toll Already Twice That at Same Date in 1954*, BUFF. EVENING NEWS, Mar. 15, 1955, at 23; *Iris Ascanazy, Mrs. Hattie Miller, Betty Scheuer, Bonnie Scheuer: Suffered Shock or Injury When Auto Made Its Fatal Leap Over Curbing on Delaware Ave.*, BUFF. EVENING NEWS, Mar. 15, 1955, at 23; *'Wall Seemed to Be Caving In' When Auto Hit Delicatessen*, BUFF. EVENING NEWS, Mar. 15, 1955, at 24; *Two Girls Ill, Remained Home and Thus Avoided the Crash*, BUFF. EVENING NEWS, Mar. 15, 1955, at 24; *Lesson in Tragedy*, BUFF. EVENING NEWS, Mar. 15, 1955, at 28.

76. *No Another Like It in the City's History*, *supra* note 75, at 22.

77. *See, e.g.*, *Runaway Auto Kills 3 Girls*, SAN ANTONIO EXPRESS, Mar. 15, 1955, at 1A; *Careening Car Kills 3 Girls, Hits 2 Others*, CHI. DAILY TRIB., Mar. 15, 1955, at 8; *Runaway Car Kills 3 Girls*, AMARILLO DAILY NEWS (Tex.), Mar. 15, 1955, at 19; *Sidewalk Tragedy in Buffalo*, CEDAR RAPIDS GAZETTE, Mar. 15, 1955, at 26.

78. DIANA DILLAWAY, POWER FAILURE: POLITICS, PATRONAGE, AND THE ECONOMIC FUTURE OF BUFFALO, NEW YORK 55 (2006).

79. *Lesson in Tragedy*, *supra* note 75, at 28.

80. *Id.*

81. *Id.*

82. *Plea of Innocent Entered by Decina in Crash Fatal to 3*, BUFF. EVENING NEWS, Mar. 16, 1955, at 1.

for the Deaf through high school.[83] The reporting continued that, after graduating high school, the Bell Aircraft Corporation hired him as a riveter where he was described by coworkers as "a conscientious workman." The newspaper quoted his co-workers, leaving the impression that Decina was smart enough to know that he should not drive but did so anyways. "I bowled with him for two years on a team [and] [h]e never drank," was one quote. Another described him as "extremely intelligent though he sometimes gave a different impression because of his handicap." Finally, the newspaper reported that he had a single traffic infraction in which he paid a one-dollar fine for "driving the wrong way in a one-way street four years ago."[84] The influential Buffalo newspaper's reporting was very one-sided and painted Decina in a very negative light.

Outside of Buffalo, the New York newspapers portrayed Decina as guilty. The *Norwich Sun* reported on its front page that doctors were investigating Decina's background[85] just under the major headline warning that President Dwight Eisenhower would consider using the atomic bomb.[86] Placing Decina's story on the same page as the country's potential use of a bomb that could kill millions of people illuminates the immense public interest in Decina's conduct. On March 16, the *Syracuse Post Standard* described Decina's responsibility under the headline, "'Blacked Out', Claims Driver of Death Car."[87] The *Canandaigua Daily Messenger* informed its readers under the front-page headline, "doctors explore past of driver of death car" and reported that Decina "suffered frequent convulsions."[88]

Nationally, the press also asserted Decina's guilt, giving additional context to the term "frenzy."[89] On March 15, 1955, the *Chicago Tribune* reported on its eighth page, under the headline, "Careening Car Kills 3 Girls, Hits Two Others," that Emil Decina "33, an employee of Bell Aircraft corporation," had driven his car into five young girls on their way home from school.[90] This event, which

83. *Id.*
84. *Id.*
85. *Doctors Check Death Car Driver's History*, NORWICH SUN (N.Y.), Mar. 16, 1955, at 1.
86. *Eisenhower See U.S. Atom Bomb Use in Wartime*, NORWICH SUN (N.Y.), March 16, 1955, at 1.
87. *'Blacked Out,' Claims Driver of Death Car*, SYRACUSE POST STANDARD, Mar. 16, 1955, at 3.
88. *Doctors Explore Past of Driver of Death Car*, DAILY MESSENGER (Canandaigua, N.Y.), Mar. 16, 1955, at 1.
89. *See generally* RICHARD L. FOX ET AL., TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY (2d ed. 2007); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996).
90. *Careening Car Kills 3 Girls, Hits 2 Others*, *supra* note 77, at 8.

resulted in the deaths of four children, occurred not in Chicago, but in Buffalo, New York, over five-hundred miles away. The *Tribune's* writers noted that District Attorney John Dwyer had charged Decina with criminal negligence in the operation of a vehicle as a result of Decina being "subject to epileptic attacks" and for knowing of his condition before deciding to drive.[91]

As one example of egregious reporting, the *Logansport (Indiana) Press* placed its March 15, 1955 frontpage article on Decina adjacent to a headline that read "Judge Orders Provoo Released: Treason Defendant's Rights Damaged by Delays, He Finds."[92] John David Provoo had been a prisoner of war held by the Japanese military in World War II and was accused of aiding the enemy and convicted in federal court.[93] While Provoo's conviction was later overturned,[94] placing Decina's story alongside one of a person who was accused of betraying the nation illuminates Decina's negative status in the public eye. And even worse, there was also an ironic similarity between Provoo and Decina in that both suffered from childhood brain injuries.[95]

The press reporting continued through the trial and consistently portrayed Decina as guilty. On April 1, 1955, the *Buffalo Evening News* reported that Decina had been indicted earlier in the day and maintained his plea of innocence despite his condition.[96] The next day, the *Saranac (Lake Adirondack) Daily Enterprise* reported that although Decina pled not guilty, he was blacked-out at the time of the deaths of the children.[97] After the first jury "deadlocked" in June, the *Syracuse Herald* emphasized, in an article claiming his guilt titled "Jury Dismissed in Trial of Driver Who Killed," that Decina "did not take the stand and there were no defense

---

91. *Id.* John F. Dwyer served as district attorney for Erie County, and in 1959 was elected to the Supreme Court. *See John F. Dwyer*, N.Y. TIMES, May 26, 1970, at 40.

92. *See Careening Car Kills 3 On Walk*, LOGANSPORT PRESS (Ind.), Mar. 15, 1955, at 1; *Judge Orders Provoo Released: Treason Defendant's Rights Damaged by Delays, He Finds*, LOGANSPORT PRESS (Ind.), Mar. 15, 1955, at 1.

93. *Free of Treason Taint, Provoo Would Re-enlist*, N.Y. TIMES, Mar. 16, 1955, at 5; George Rossman & Richard B. Allen, *What's New in the Law: The Current Product of Courts, Departments and Agencies*, 41 A.B.A. J. 854, 856 (1955); Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 720–21 (1956).

94. United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954); Barak Kushner, *Treacherous Allies: The Cold War in East Asia and American Postwar Anxiety*, 45 J. CONTEMP. HIST. 812, 835–41 (2010).

95. *TRIALS: Case of the Buddhist Sergeant*, TIME MAG. (Nov. 24, 1952, 12:00 AM), https://time.com/archive/6619675/trials-case-of-the-buddhist-sergeant/.

96. *Decina Is Indicted in Death of 4 Girls, Pleads Innocent*, BUFF EVENING NEWS, Apr. 1, 1955, at 1.

97. *"Blacked Out" Driver Blamed*, ADIRONDACK DAILY ENTER. (Saranac Lake, N.Y.), Apr. 2, 1955, at 1.

witnesses."[98] On September 17, 1955, the *Syracuse Post-Standard* placed an article on its frontpage under the headline "Driver Convicted in Killing Four Girls," and noted that this time, it was an all-male jury that convicted Decina after twelve hours of deliberation.[99] Evidencing a national interest, the *Chicago Tribune* too reported on its second page that Decina had been convicted.[100]

In 1961, the managing editor of the *Louisville (KY) Times* wrote, in the *Journal of Criminology & Police Science*, that in terms of crime reporting "there are very few fields of journalistic enterprise in which we fail so thoroughly to dig under the surface."[101] Two years later, the Louisiana State University Press published *The Press in Perspective*, a book consisting of the writings of several leading journalists and editors.[102] Alan Barth, an influential *Washington Post* reporter, penned in an essay titled "Government and the Press" that most newspapers had not "cried out" against the invasion of rights and that "[m]any, indeed, have applauded it . . ."[103] American Broadcasting Company (ABC) news analyst, Elmer Davis, in his essay titled "Must We Mislead the Public?," observed that while objectivity is a praiseworthy ideal, it was not always followed.[104] The reporting on Decina was neither complete, accurate, nor objective.

After the New York Court of Appeals issued its decision on November 29, 1956, the *Washington Post* reported that the appellate court reversed Decina's conviction on the basis of a violation of the doctor-patient relationship but permitted a new trial to go forward.[105] The *New York Times* likewise informed its readers that the appellate court "ruled" that the "blackout driver" was culpable.[106] The *Washington Post* proved more accurate than the *New York Times* for the obvious reason that it was up to another jury to determine whether Decina was, in fact, criminally liable for the deaths of the four young children. Neither national newspaper,

98. *Jury Dismissed in Trial of Driver Who Killed 4*, SYRACUSE HERALD J., June 25, 1955, at 5.

99. *Driver Convicted in Killing of 4 Girls*, THE POST-STANDARD (Syracuse), Sept. 17, 1955, at 1.

100. *Jury Convicts Driver Whose Car Killed Four*, CHI. TRIB., Sept. 17, 1955, at 2.

101. Norman E. Isaacs, *The Crime of Present Day Crime Reporting*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI., 405, 408 (1961).

102. *See generally* MARQUIS CHILDS ET AL., THE PRESS IN PERSPECTIVE (Ralph D. Casey ed., 1963) [hereinafter PRESS IN PERSPECTIVE].

103. Alan Barth, *The Government and the Press*, *in* PRESS IN PERSPECTIVE 77.

104. Elmer Davis, *Must We Mislead the Public?*, *in* PRESS IN PERSPECTIVE 59.

105. *Blackout Driver Prosecution Upheld*, WASH. POST, Nov. 30, 1956, at C13.

106. *'Blackout' Driver Ruled Culpable*, N.Y. TIMES, Nov. 30, 1956, at 24.

however, reported on the legal aspects of the case, let alone the fact that Decina was innocent until proven guilty.

B. New York and Vehicular Manslaughter

In 1939, in *People v. Gardner*, a New York appellate court upheld the constitutionality of Section 1053-a.[107] The appellant in *Gardner* argued that terms such as "culpable negligence" and "reckless driving" were unconstitutionally vague, but the court disagreed and explained that second-degree manslaughter caselaw predating the statute had clearly defined these two terms.[108] However, the only evidence presented to the grand jury in securing the indictment against Gardner was that the passengers in his car believed that he had been driving at an excessive speed prior to the accident that killed one of the passengers.[109] The court ultimately determined that this evidence was not sufficient to sustain an indictment under Section 1053-a.[110]

Also in 1939, in *People v. Jackson*, a New York appellate court held that where a conviction was obtained by circumstantial evidence under Section 1053-a, the prosecution had to prove beyond a reasonable doubt that the driver was at fault and exclude to a moral certainty every reasonable hypothesis of innocence.[111] In *Jackson*, the defendant argued that he was not driving the vehicle, but the state produced circumstantial evidence based upon the location of the bodies after the wreckage to argue that he was in control of the vehicle at the time of its collision into an oil tank.[112] The circumstantial evidence was not enough to form proof beyond a reasonable doubt of culpable negligence, let alone overcome the voluntary act requirement.[113] Arguably, then, a driver who ignored speed limits was not, on the basis of the ignorance alone, guilty of culpable negligence and a prosecutor would have to prove that the speed with another factor formed the culpable negligence standard.

---

107. 255 A.D. 683 (N.Y. App. Div. 1939).
108. *Id.* at 685.
109. *Id.* at 687.
110. *Id.*
111. 255 A.D. 688, 689 (N.Y. App. Div. 1939).
112. *Id.* at 691. The appellate court noted:
> The positions of the bodies are described here in more than usual detail because of the emphasis placed upon this branch of the proof by the prosecution. In fact in presenting the case to the jury the district attorney relied upon the theory that the positions in which the bodies were found established beyond a reasonable doubt that the defendant was in the driver's seat and operating the LaSalle car at the time of the collision.

Id.
113. *Id.* at 692.

In 1942, the County Court of Kings County, in *People v. Brucato*, dismissed an indictment under Section 1053-a based upon the defendant's statements to a police officer.[114] The defendant had killed a pedestrian after hitting her with his truck and informed a police officer that the deceased, elderly woman, had stepped into the street when he was only one-hundred feet away and that he "became paralyzed" and "panicky" and was unable to stop his truck.[115] Judge Samuel Leibowitz, presiding at Brucato's trial, determined that because there was no evidence that Brucato had been speeding, was intoxicated, or "zig-zagging," the prosecutor did not present a prima facie case of culpable negligence and, as a result, the indictment was defective.[116] Judge Leibowitz had gained national attention when earlier in his career he defended nine young African-American males in Tennessee in what became known as the "Scottsboro Boys" case.[117] Judge Leibowitz placed into *Brucato* a foreshadowing of *Decina.*[118] "It may be that this defendant should not because of nervous or mental deficiency be permitted to operate a motor vehicle upon the highways[,]" Leibowitz noted.[119] "It may be that because of such disqualification his permit to operate such vehicle should be revoked."[120]

In *People v. Bearden*, in 1943, the New York Court of Appeals determined that evidence indicating that the defendant's car collided with another car—in this case a taxi—in which two victims were killed was not enough to prove culpable negligence under the statute.[121] There was no evidence of speeding or intoxication on the defendant's part, and, moreover, no evidence that the defendant violated traffic laws such as disregarding a red-light.[122] Two years earlier, the County Court of Queens County determined that a defendant who engaged in a drag race with another driver could not be criminally liable for the death of others when his car did not strike another person.[123] In 1951, in *People v. Kreis*, the state's highest court once more sustained the general rule that excessive speed

114. 32 N.Y.S.2d 689 (Cnty. Ct. 1942).
115. *Id.* at 690.
116. *Id.*
117. *Judges: Jurist Before the Bar*, TIME MAG. (Nov. 15, 1963, 12:00 AM), https://time.com/archive/6810829/judges-jurist-before-the-bar/. Leibowitz had also represented Alphonse Capone and other suspected organized crime figures. *Id.*
118. 32 N.Y.S.2d at 690.
119. *Id.* at 691.
120. *Id.*
121. 49 N.E.2d 785, 787–88 (N.Y. 1943).
122. *Id.*
123. People v. Lemieux, 176 Misc. 305, 306 (N.Y. Cnty. Ct. 1941).

alone cannot form the basis for a conviction under Section 1053-a.[124] This represents the sum total of reported appellate decisions from the inception of the law to the time of *Decina*.

II. VOLUNTARY ACT JURISPRUDENCE AND DRIVING EPILEPTICS BEFORE *DECINA*

New York had long established the voluntary act principle by the time Emil Decina went to trial. In 1881, the New York Court of Appeals held that "if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own volunary [sic] act."[125] In contrast, the Supreme Court of New York County overturned a perjury conviction in 1942 on the basis that the voluntary act principle applied to making a known false statement and determined that if the defendant did not know the statement to be false at the time of making it, he could not be convicted of a voluntary act.[126] This decision presents an interesting and important contrast with the intoxication premise. If a person operates a vehicle while drunk and kills another person, the voluntary act is the alcohol consumption coupled with driving.[127] But Decina's conduct is more analogous to the perjury premise in the sense that there would have to be proof that, at the specific time he drove, he knew he presented a danger to others. If that had been the case, the prosecution would have had to prove that Decina had enough warning ahead of time to make a choice to drive beyond the generalized knowledge of his condition.

A. Context: Motorist Safety Efforts and Studies

In 1911, Charles Jacob Babbitt published *The Law Applied to Motor Vehicles*—one of the first books on automobiles.[128] Babbitt, who influenced early motor vehicle laws, focused on foreseeability when

124. 100 N.E.2d 179, 182 (N.Y. 1951).

125. Flanigan v. People, 86 N.Y. 554, 559–60 (1881); *see also* People v. Rogers, 18 N.Y. 9, 21 (1858).

126. People v. Smilen, 33 N.Y.S.2d 803, 805–06 (Sup. Ct. 1942).

127. *See, e.g.*, State v. Newman, 302 P.3d 435, 443–44 (Or. 2013).

128. CHARLES JACOB BABBITT, THE LAW APPLIED TO MOTOR VEHICLES: WITH A COLLECTION OF ALL THE REPORTED CASES DECIDED DURING THE FIRST TEN YEARS OF THE USE OF MOTOR VEHICLES UPON THE PUBLIC THOROUGHFARES (1911). Babbitt was influential in shaping early automobile laws. *See* McWright v. Providence Tel., Co., 131 A. 841, 843–44 (R.I. 1926) (establishing right of passing cars); Detroit Taxicab & Transfer Co. v. Callahan, 1 F.2d 911, 912 (6th Cir. 1924) (A taxicab driver is expected to be a skilled workman with knowledge of road conditions.); Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 231–32 (Miss. 1962) (backing up an automobile places a duty on a driver to have a clear view behind the car).

summarizing criminal negligence as it related to the operation of a vehicle: "it is the essence of negligence that the injury caused by it should not have been foreseen as likely to arise in the immediate case."[129] Babbitt argued that the omission of prudently operating a motor vehicle, like that of a negligent railroad conductor, was enough to sustain a charge of culpable negligence.[130] A driver who operates a vehicle at excessive speed in a rural area is less culpable, according to Dr. Francis Wharton, a medical professional cited by Babbitt, than a driver who does so in a crowded street.[131] Babbitt posited that in regard to intoxication or sleeping while in control of a vehicle, there would be a presumption of negligence, but the prosecution would still have to prove that the negligence was culpable.[132] Finally, Babbitt argued that an unforeseen illness or a mistake in judgment were not a basis for establishing culpable negligence.[133] There was nothing in the book on epilepsy, but it was clear for Babbitt that for a driver to be held criminally negligent, the driver would have to know of a condition at the specific time that their conduct resulted in a foreseeable death to establish liability.

In 1924, with the support of President Calvin Coolidge, Secretary of State Herbert Hoover initiated the National Conference on Street and Highway Safety with the purpose of encouraging state legislatures to enact uniform law.[134] The attendees and participants included officers from the American Automobile Association, the insurance industry, and the Chamber of Commerce.[135] The report pointed out that there were 22,600 automobile deaths and 678,000 serious personal injuries from the previous year. "If the death and disaster that now fall upon innocent people, through the year and over our country as a whole, were concentrated into one calamity we would shudder at the tremendous catastrophe[,]" the Conference exclaimed.[136] The blame, the Conference concluded, rested on the individual drivers for "incompetence, carelessness, and recklessness[.]"[137] To that end, the Conference recommended that states

129. BABBITT, *supra* note 128, at 633 (quoting FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 168 (W.M. Draper Lewis ed., 10th rev. ed. 1896)).

130. *Id.* at 634 (citing Commonwealth v. Hartwell, 128 Mass. 415, 415 (1880)).

131. *Id.* at 636–37.

132. *Id.* at 641 (citing Schafer v. Gilmer, 13 Nev. 330, 337 (1878)). *Schafer* did not originate from a motor vehicle incident, but was rather a civil case arising from a stage-coach injury. 13 Nev. at 337.

133. BABBITT, *supra* note 128, at 641–42.

134. HERBERT HOOVER, DEP'T OF COM., FIRST NATIONAL CONFERENCE ON STREET AND HIGHWAY SAFETY 5 (1924). On the conference, see Norman Damon, *The Action Program for Highway Safety*, 320 ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1958, at 15, 17–18.

135. HOOVER, *supra* note 134, at 4.

136. *Id.* at 5.

137. *Id.* at 9.

deny the ability to drive to persons who lacked the physical and mental fitness to do so and bar non-English speakers from driving at all.[138] The report called on the states to vigorously prosecute reckless drivers.[139]

The problem of reckless driving did not dissipate during the time between the report and *Decina*. In 1930, the Secretary of Commerce reported that 33,060 persons had died the prior year in automotive deaths compared to the total of 97,000 accidental deaths from all causes.[140] Roughly one-third of these deaths involved pedestrians and of this number, over one-quarter were children.[141] In 1935, the National Safety Council published in its national magazine that the most common cause of the 35,000 auto deaths the prior year was a lack of sleep and that driving long hours was "a common practice on American highways."[142] In 1949, the Council reported that there were 32,000 automobile deaths the prior year.[143] In most of these cases, tired and intoxicated drivers appeared to be the problem and no report to date mentioned epilepsy.

B. Motorist Responsibility and the Voluntary Act

Courts in other jurisdictions varied on motorist responsibility and the voluntary act principle in general. For instance, in 1914, the Michigan Supreme Court held that the fact that a motorist was speeding in violation of the law was not enough to prove culpable negligence in a child pedestrian's death.[144] The court instead determined that there had to be "wantonness and disregard of the consequences" on the part of the defendant.[145] This ruling gave speeding drivers a degree of a haven from criminal prosecution for criminal negligence that would not be available to Decina. In comparison, an epileptic—like Decina—was afforded less protections than a speeding motorist because at all times he was assumed to live in a state of danger to others when he drove. There is great irony in this heightened standard for a person with a disability versus a person who made the deliberate and intentional choice to drive over

138. *Id.* at 17.
139. *Id.*
140. ROBERT P. LAMONT, DEP'T OF COM., REPORT OF THE COMMITTEE ON TRAFFIC ACCIDENT STATISTICS 11, 12 (1930).
141. *Id.* at 28–29.
142. NAT'L SAFETY COUNCIL, TOO LONG AT THE WHEEL: A STUDY OF EXHAUSTION AND DROWSINESS AS THEY AFFECT TRAFFIC ACCIDENTS 2–5 (1935).
143. PRESIDENT'S HIGHWAY SAFETY CONFERENCE, INVENTORY AND GUIDE FOR ACTION 1 (1948).
144. People v. Barnes, 148 N.W. 400, 405, 407 (Mich. 1914).
145. *Id.* at 407.

the speed limit. This still may be true since a chronic speeder has some protections under the rules of evidence that prevent character evidence to come before the jury.[146]

In 1931, the Michigan Supreme Court explained that there was a clear difference between a motorist falling asleep behind the wheel and a motorist who either knew of the likelihood of sleeping or put himself in a situation or condition in which he or she would fall asleep—the prior being simple negligence and the latter, criminal negligence.[147] In other words, a person who voluntarily drives when they have suffered a sleeplessness spell or consumed alcohol has voluntarily driven knowing of a future dangerous condition whereas a person who inadvertently falls asleep has not committed a crime because they did not voluntarily drive a car with an appreciation of the potential danger.[148]

In 1906, in *Lewis v. Amorous*, the Georgia Court of Appeals pointed out the nature of human conduct in relation to the (then) new invention of the automobile.[149] The court explained that "[i]t is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them[,]" pointing out that the automobile itself when not in operation is "harmless."[150] The court in *Amorous* set an important precedent in regard to operating a motor vehicle in essentially holding that a driver bears a duty to protect persons both inside and outside of other vehicles, including pedestrians.[151] Of course, *Amorous* was decided in Georgia's appellate system and not New York's, and by the time of *Decina*, New York's courts had issued a robust number of decisions on driver liability. Even so, *Amorous* recognized a duty of care for drivers to safeguard pedestrians.

In 1948, the Wisconsin Supreme Court, in *Eleason v. Western Casualty & Surety Company*, held that the state's prohibition on adults with epilepsy driving permitted a decedent's widow to prevail against a tortfeasor where the tortfeasor was an epileptic who drove a truck that struck and killed the defendant.[152] Because the state had an outright prohibition against epileptics driving motor vehicles, the court determined that the driver's lack of compliance

146. *See, e.g.*, Rubinger v. State, 98 So. 3d 659, 663 (Fla. Dist. Ct. App. 2012).
147. People v. Robinson, 235 N.W. 236, 236–37 (Mich. 1931).
148. *Id.*
149. 59 S.E. 338, 340 (Ga. Ct. App. 1907).
150. *Id.* The court also lamented that because of the low pay of the state's judges, few jurists had ever ridden in an automobile. *Id.*
151. *See, e.g.*, Fielder v. Davison, 77 S.E. 618, 619 (Ga. 1913) (finding that, in the absence of statute, liability for operating vehicles is based on negligence).
152. 35 N.W.2d 301, 302–03 (Wis. 1948). Interestingly, the trial judge in dismissing the case determined that epilepsy was "an act of God," and therefore the insurer was not required to pay damages to the decedent's widow. *Id.* at 303.

with the law was proof of liability because if he had followed the law, "he would not have placed himself in a position to injure [the deceased]."[153] *Eleason* is a civil matter rather than criminal, but it does evidence the environment of ostracizing epileptics at the time. It is, however, noteworthy that the law in Wisconsin—like that in New York—assumed that an epileptic adult would know at all times that they were a danger to drive, but for a person who fell asleep behind the wheel, the prosecution would have to provide evidence that there were warning signs of the potential to fall asleep to the defendant driver at the specific time they decided to drive.[154]

Pennsylvania, like Wisconsin, also had an outright bar on epileptics operating a vehicle. In 1942, in *Commonwealth v. Irwin*, the Pennsylvania Supreme Court held that while a competent person could not, under the law, be deprived of the right to operate a motor vehicle, a person afflicted with epilepsy was, by common agreement, "'incompetent or unable to exercise reasonable and ordinary control over a vehicle' on the public highway."[155] In *Irwin*, Kenneth Irwin challenged the Department of Revenue's refusal to issue him a license even though he had not experienced an epileptic seizure since 1932.[156] A state trial judge ordered the Department of Revenue to issue Irwin a driver's license but the decision was later overturned.[157] The decision in *Irwin* demonstrates the unwillingness to view a person with an epilepsy diagnosis as anything other than a danger on the roadways despite minimal, if any, symptoms.

In 1942, in *People v. Freeman*, a California appellate court reversed a driving-related negligent homicide conviction.[158] James A. Freeman consumed "two highballs of Seven-up and whiskey," felt ill before driving his car, and collided with another vehicle in which one person was killed and the other injured.[159] Freeman claimed to have simply fallen asleep behind the wheel, which was corroborated by a post-accident alcohol test administered by a hospital that pronounced him sober.[160] But Freeman had also been diagnosed with

153. *Id.* However, the court recognized that the driver did not specifically know he had epilepsy but rather was subject to blackouts. *Id.*

154. *Id.* For similar jurisprudence in other jurisdictions, see, for example, State v. Mundy 90 S.E.2d 312, 315 (N.C. 1955) (citing People v. Robinson, 235 N.W. 236, 236–37 (Mich. 1931); Johnson v. State, 4 So. 2d 671, 672 (Fla. 1941)).

155. 29 A.2d 68, 69–70 (Pa. 1942).

156. *Id.* at 69.

157. *Id.* There was scant reporting on Irwin but see *Lenhart Appeal Argued Before Supreme Court*, SOMERSET DAILY AM. (Pa.), Oct. 2, 1942, at 3. However, on this page, there was an ad which read: "Is Epilepsy Inherited? What Causes It? A Booklet containing the opinions of famous doctors . . . will be sent FREE while they last, to any reader . . . ." *Id.*

158. 142 P.2d 435, 440 (Cal. Dist. Ct. App. 1943).

159. *Id.* at 436.

160. *Id.* at 437.

epilepsy and had "recurring violent headaches" and unconscious spells prior to the accident.[161] The appellate court determined that the proper jury instruction was whether Freeman knew that at the specific time he drove that he presented a danger to others.[162] *Freeman* presents a different, and perhaps more evenhanded, voluntary act standard than *Decina*.

In 1954, one year before Decina drove his vehicle, the Kentucky Supreme Court issued *Smith v. Commonwealth*.[163] In *Smith*, the defendant knew he was subject to blackouts and subsequently killed a pedestrian while driving, but it is unclear from the decision whether a blackout caused the accident.[164] It was not until after the accident that he was diagnosed as being an epileptic, but the court held that it was proper for a jury to consider whether "by driving he manifested a willful indifference to the safety of others[.]"[165] However, the court overturned the conviction because the trial judge had fashioned an instruction that would have prohibited persons with physical disabilities, such as Smith, from ever driving due to their disability.[166] Thus, the issue was whether at the specific time Smith drove he voluntarily did so with the narrowed knowledge to the immediate timeframe that he presented a danger to others. Less than a half-decade after *Decina's* issuance, a commentator noted that there was no uniformity across the states as to how vehicle deaths were prosecuted in the state courts—which was also true in regard to epileptic drivers alleged to have caused deaths.[167]

III. DECINA'S APPEALS: THE LEGAL-POLITICAL DIMENSION

Between 1906 and 1938, the New York Court of Appeals struck down 136 laws in violation of the state constitution—many of which violated the individual rights of defendants.[168] Decina would not be one of these defendants. Judge Lee Ottaway presided over Decina's trial that resulted in his conviction in September 1955 and sentenced Decina to two years in jail.[169] Ottaway had served on the trial bench since 1944 and attended Cornell Law School, graduating

161. *Id.*
162. *Id.* at 438.
163. 268 S.W.2d 937, 939 (Ky. 1954).
164. *Id.*
165. *Id.*
166. *Id.*
167. Jack Barker, Comment, *The Fallacy and Fortuity of Motor Vehicle Homicide*, 41 NEB. L. REV. 793, 797 (1962).
168. HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 88 (Nancy Roberts et al. eds., 2d ed. 1998).
169. *Death Car Driver Sent to Attica*, SYRACUSE HERALD J., Oct. 1, 1955, at 2.

in 1908.[170] In 1924, he was elected to a Chautauqua County judgeship and during his first term he also assumed the duties of a Children's Court judge.[171]

One of the features of *Decina* not mentioned in the casebooks is that Decina went to trial in June 1955, but the jury deadlocked while Justice Hamilton Ward presided.[172] In this first trial, two jurors were women, whereas in Decina's second trial in September, there was an all-male jury.[173] As a matter of procedural justice, this point bears important mention because it occurred at a time when New York's jury selection system—which permitted the *de facto* exclusion of women—came under attack in the United States Supreme Court.[174] That is, Decina was not convicted by a jury of his peers, but rather, by a jury system that discouraged women from participating in the jury process. Thus, in addition to the fact that Decina was a member of a disfavored class of person, he was also denied a jury that reflected the true voting population of Buffalo, New York.

A. People v. Decina*: The Fourth Appellate Division*

There is an interesting feature to the Fourth Appellate Division's *Decina* decision that is absent from the Court of Appeals. The intermediate court—located in Buffalo—cited to an array of cases to support its decision in a manner that the highest court, as noted further below, would not emulate. On May 25, 1956, Judge Francis D. McCurn authored the first published ruling in Decina's appeal.[175] Born in 1889 in Westernmill, New York, McCurn graduated from Syracuse University College of Law in 1915.[176] In 1934, Governor Herbert Lehman, a Democrat, appointed McCurn to the trial bench

---

170. *Lee Ottway, 73, Ex-Justice, Dead: Served State Supreme Court, 1944 to 1958—Concerned with Children's Problems*, N.Y. TIMES, Mar. 11, 1961, at 21.

171. *Id.*

172. *Jury Is Deadlocked in Negligence Trial of Emil Decina*, NORWICH SUN (N.Y.), June 25, 1955, at 1; *Reckless Driver Who Killed Four Little Girls Found Guilty; Faces Fine, Jail*, NORWICH SUN (N.Y.), Sept. 17, 1955, at 1.

173. *Jury Is Deadlocked in Negligence Trial of Emil Decina*, *supra* note 172, at 1; *Reckless Driver Who Killed Four Little Girls Found Guilty; Faces Fine*, *supra* note 172, at 1; *see also Jury Dismissed in Trial Of Driver Who Killed 4*, *supra* note 98, at 5.

174. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131–32 (1994); Fay v. New York, 332 U.S. 261, 289 (1947).

175. People v. Decina, 1 A.D.2d 592, 597 (N.Y. App. Div. 1956).

176. *Francis M'Curn, Former Justice: Lehman Appointee Who Sat in Corruption Case Dies*, N.Y. TIMES, Sept. 18, 1971, at 32 (writing that McCurn was born in Westernville, not Westernmill); *see also Biography of Francis D. McCurn*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/francis-d-mccurn/ (last visited Jan. 30, 2025).

after McCurn lost an election to become the Mayor of Syracuse.[177] In addition to McCurn, the Fourth Appellate Division consisted of Henry J Kimball, John C. Wheeler, Alger Williams, and Earle C. Bastow.[178] Kimball was admitted to the bar in 1913 after graduating from Cornell Law School and, in 1931, he was elected as a county judge on the Republican Party slate. In 1938, he was elected as a trial judge and, in 1948, Governor Thomas Dewey, a fellow Republican, appointed him to the appellate bench.[179] Born in 1886, Wheeler also earned his law degree at Cornell and had been elected as a trial judge before Dewey appointed him to the appellate bench in 1950.[180] Williams was born in 1898 and joined a small firm in 1921. In 1946, he was elected to a trial judge position as a Republican.[181] In 1954, Dewey appointed him to the appellate court.[182] Bastow was the only judge who had served as a prosecutor.[183] After graduating from Albany Law School in 1921, he worked in private practice but, in 1932, he was hired as an assistant district attorney in Utica and, in 1942, the local voters elected him as district attorney.[184] In 1947, he was elected to the trial bench and, in 1953, Dewey appointed him to the appellate court.[185] Thus, with the exception of McCurn, Dewey appointed all of the Fourth Division's judges.

A note on Dewey and New York politics bears mention. Dewey was a popular three-term New York governor (1943–54), but he was also the Republican Party's unsuccessful presidential nominee in 1944 and 1948.[186] When, in 1946, Dewey was reelected to a second

177. *McCurn Named as Justice*, N.Y. TIMES, Jan. 23, 1934, at 2. For information on Lehman as a "New Deal" Democratic Governor, see DUANE TANANBAUM, HERBERT H. LEHMAN: A POLITICAL BIOGRAPHY 61–93 (2016). *See also Robertson and McCurn Forces Launch Campaign*, SYRACUSE HERALD, Oct. 24, 1934, at 12.

178. *Decina*, 1 A.D.2d at 592, 599 (listing judges of the Fourth Appellate Division).

179. *See Biography of Henry J. Kimball*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/henry-j-kimball/ (last visited Jan. 30, 2025).

180. *See Biography of John C. Wheeler*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/john-c-wheeler/ (last visited Jan. 30, 2025).

181. *See Biography of Alger A. Williams*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/alger-a-williams/ (last visited Jan. 30, 2025).

182. *See id.*

183. *See Biography of Earle C. Bastow*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/earle-c-bastow-2/ (last visited Jan. 30, 2025).

184. *Id.*

185. *Id.*; *see also Supreme Court Justice Henry J. Kimball Introduced Earl Bastow of Utica, Former District Attorney of Oneida County and Candidate for Supreme Court Justice*, SYRACUSE HERALD J., Sept. 27, 1947, at 3; *Governor Renames 4: Judges Get New 5-Year Terms in Appellate Division*, N.Y TIMES, Dec. 29, 1961, at 21.

186. *See* ANDREW E. BUSCH, TRUMAN'S TRIUMPHS: THE 1948 ELECTION AND THE MAKING OF POSTWAR AMERICA 45–47 (2012); MICHAEL BOWEN, THE ROOTS OF MODERN CONSERVATISM: DEWEY, TAFT, AND THE BATTLE FOR THE SOUL OF THE REPUBLICAN PARTY 15–56 (2011).

term, he won by the largest margin in New York's history at that time.[187] Importantly, Dewey had campaigned repeatedly on being tough on crime.[188] Prior to becoming governor in 1943, he had been a United States Attorney for a short-period and then New York County's district attorney.[189] Dewey was a strong supporter of civil rights as well as the United States becoming a member of the United Nations—something that his Republican opponents disagreed with—and he focused his prosecutions on organized crime where he earned a reputation as a fearless enemy of the mafia.[190] Although Dewey was known as a "crimefighter," he was unable to convince the New York legislature to enact a mandatory automobile insurance law on the very day that a grand jury indicted Decina.[191] Dewey had tried to convince the state legislature to pass tougher automobile inspection codes as well as to mandate insurance.[192] Thus, the political climate surrounding driving in combination with the mass reporting at Decina's trial is notable. The state legislature did not desire to make it more difficult for citizens of driving age to drive generally, despite possible safety benefits to doing so, and the courts adjudicating Decina's case operated in an environment of intense public attention on the issue in the midst of legislative inaction.

Decina appealed on the basis that he did not intend for an accident to occur and therefore was not culpably negligent.[193] In this regard, while he had admitted at trial to the facts contained in the indictment against him in his demurer, he argued that those facts did not substantiate an indictment in the first place.[194] In its decision not to quash the indictment, the appellate court concluded that the prosecution needed only to prove that Decina was aware of his medical condition, which made it foreseeable that he would lose

187. RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES 466 (1982).

188. *See* MARY M. STOLBERG, FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE, AND THE LEGACY OF THOMAS E. DEWEY 243, 247 (1995).

189. BUSCH, *supra* note 186, at 45.

190. *See, e.g.*, A.J. BAIME, DEWEY DEFEATS TRUMAN: THE 1948 ELECTION AND THE BATTLE FOR AMERICA'S SOUL 81–97 (2020); STOLBERG, *supra* note 188, at 3–5 (noting "Dewey was not the only prosecutor battling organized crime, but he garnered the most attention, largely because he was in New York City").

191. *See* Henry Leader, *Session Called Standoff for Harriman, GOP*, NORWICH SUN (N.Y.), Apr. 2, 1955, at 1; *Jury Indicts Death Car Driver*, NORWICH SUN (N.Y.), Apr. 2, 1955, at 1; *see also* Leo Egan, *Dewey Defeated on Car Insurance in Senate, 29 to 26: G.O.P. Opposition, Democratic Maneuvering Bar Forced Policies—New Move Today*, N.Y. TIMES, Mar. 20, 1954, at 1, 9.

192. Douglas Dales, *Dewey Asks Law for Auto Safety: Would Make Car Inspection Mandatory—Bill Offers New Plan for Insurance Pool*, N.Y. TIMES, Jan. 21, 1954, at 22.

193. People v. Decina, 1 A.D.2d 592, 593 (N.Y. App. Div. 1956).

194. *Id.*

control of his vehicle.[195] The court relied upon the 1927 New York Court of Appeals decision, *People v. Angelo*, for the proposition that when a person operates a motor vehicle with a condition known to her or him that had a probability of causing danger to the public, the person "evinces" a "disregard of the consequences which may ensue from the act, and indifference to the rights of others."[196] Under this doctrine, a person who is knowingly subject to a loss of functions that are important to the safe operation of a motor vehicle is also culpably negligent when the loss of function is a cause of an accident.

A brief history of *Angelo*, however, is important to understanding *Decina* because it did not involve a driver's medical condition. Rather, *Angelo* arose from an accident involving two cars. Michael Angelo's Cadillac collided with a Ford that resulted in the death of a passenger in the Ford.[197] A jury decided that Angelo had driven "carelessly and in a culpably negligent manner," at "a rate of speed . . . found to be excessive."[198] The Fourth Division, in overturning Angelo's conviction, determined that the trial judge had issued erroneous instructions to the jury that left the jury with the impression that "slight negligence" could also be "culpable negligence."[199] The court noted that there had to be a clear demarcation between the category of ordinary negligence, which was associated with tort law, and the higher standard of culpable negligence required to constitute a crime.[200]

New York's highest court, in its review of Angelo's conviction, first made it clear that when the taking of a life occurs by an accident, the taking of a life was not a crime so long as the accident occurred in the course of a lawful activity done with ordinary caution.[201] Unlike the lower courts that reviewed Angelo's appeal, the New York Court of Appeals provided a history of culpable

195. *Id.*
196. *Id.* (citing People v. Angelo (*Angelo III*), 159 N.E. 394, 396 (N.Y. 1927)).
197. People v. Angelo (*Angelo I*), 126 Misc. 448, 449 (NY. Sup. Ct. 1926).
198. People v. Angelo (*Angelo II*), 219 A.D. 646, 647 (N.Y. App. Div. 1927).
199. *Id.* at 648. The Fourth Division noted:

> The word 'culpable,' in the phrase 'culpable negligence,' is something more than a mere epithet; it suggests or indicates some such meaning as criminal, and its use was intended to mark a distinction of some sort between the negligence which is merely a tort, paid for by money damages, and the negligence which is a crime, an offense against society, which must be paid for by penal punishment. The same negligent act may be both a tort and a crime, but there may be negligent acts that are torts, and not crimes.

Id.
200. *Id.* at 649.
201. *Angelo III*, 159 N.E. at 395.

negligence, dating back to 1664.[202] Out of this history, the appellate court determined that culpable negligence was defined as a "disregard of the consequences which may ensue from the act, and indifference to the rights of others."[203] This was the definition of culpable negligence at the time of *Decina*. Under this definition, one might conclude that a momentarily distracted driver who committed the same act as Decina was not culpably negligent, while Decina, who knew of his epilepsy, was culpably negligent.

The Fourth Division in deciding *Decina* also had the benefit of a recent decision from the Second Division, located in Brooklyn.[204] In *People v. Eckert*, the Second Division determined that when a driver has knowledge of his or her physical or medical condition that could create a danger to others, this personal knowledge is enough to satisfy the culpable negligence standard for the purpose of Section 1053-a.[205] *Eckert* is a brief appellate decision. The lower trial court, in its published decision, provided the facts underlying the offense.[206] Like Decina, Eckert was indicted for criminal negligence in the operation of a motor vehicle resulting in the death of another, and he too had been diagnosed with epilepsy.[207] Eckert, however, had a different defense to the indictment than Decina. He had tried to pass a truck on a state road that "was of insufficient width to allow automobiles proceeding in the same direction to pass one another without leaving the paved portion of the road[.]"[208] Eckert lost control of his vehicle once it left the paved part of the road and his car crashed into a bus stop, killing a woman who was waiting for a bus.[209] Thus, Eckert was able to argue that he lost control of his car when it left the road, but he thought it was reasonably safe to pass the truck and therefore he was not culpably negligent.[210]

The trial court, in *Eckert*, looked to two jurisdictions that had issued decisions from similar facts. In 1951, the New Jersey Supreme Court, in *State v. Gooze*, determined that because Samuel Gooze's doctor cautioned him that, as a result of his Ménière's disease, he should not drive without others present in the front of the car, this knowledge was enough to sustain a conviction for vehicular

202. *Id.*
203. *Id.* at 396.
204. People v. Decina, 1 A.D.2d 592, 593 (N.Y. App. Div. 1956) (citing People v. Eckert, 1 A.D.2d 903 (N.Y. App. Div. 1956)).
205. *Eckert*, 1 A.D.2d at 903–04.
206. *See generally* People v. Eckert, 208 Misc. 93 (N.Y. Cnty. Ct. 1955).
207. *Id.* at 94.
208. *Id.* at 94–95.
209. *Id.* at 95.
210. *Id.*

homicide.[211] Gooze, like Decina and Eckert, had blacked out while driving and a person was killed as a result of a collision with Gooze's vehicle.[212] In contrast, the South Dakota Supreme Court, in *Espeland v. Green*, determined that a seventy-four year old defendant who knew he occasionally blacked out was not liable as a matter of civil tort to a passenger who knew of the defendant's condition before voluntarily riding as a passenger.[213]

Even beyond the criminal versus tort divide, the facts in *Eckert* were more aligned with *Gooze* than with *Espeland*. The victim in *Eckert* was an innocent pedestrian standing at a bus stop and assumed no risk. A doctor had previously warned Eckert that he was unfit to drive and Eckert clearly ignored this warning.[214] This was dispositive to the appellate court that noted:

> unless the defendant herein had received the warning of the doctor referred to in the indictment or there was some other legal evidence from which a jury would be justified in finding that he knew the gravity of his illness and the possible consequences of his driving, the indictment should be dismissed.[215]

The Fourth Division held that because Decina, like Eckert and Gooze, had been warned of a medical condition, a finding of culpable negligence was sustainable.[216] But this did not end the appellate inquiry into the appeal because there was another significant issue. After Decina's arrest, the police took him to a local hospital due to his injuries and appearance of being in a dazed state.[217] While at the hospital and still under arrest, he provided his medical history to a treating physician and the physician was permitted to testify

---

211. 81 A.2d 811, 813 (N.J. Super. Ct. App. Div. 1951). Ménière's disease is an ear condition that results in vertigo. *See What Is Ménière's Disease?*, NAT'L INST. ON DEAFNESS & OTHER COMMC'N DISORDERS, https://www.nidcd.nih.gov/health/menieres-disease (Aug. 15, 2024).

212. *Gooze*, 81 A.2d at 813.

213. 54 N.W.2d 465, 465–66 (S.D. 1952). The South Dakota Supreme Court criticized *Gooze* in writing into *Espeland*:

> We observe a fallacy in the reasoning of the New Jersey court where it states: 'It was reasonably foreseeable that *if* he 'blacked out' or became dizzy without warning, its probable consequences might well be injury or death to others[.'] Certainly in the case at bar and also under the facts of the case in which the New Jersey court so reasoned, the question whether or not the black-out would occur was a most important factor in determining the probability of injurious consequences and the occurrence of the black-out therefore should not be treated as an assumed fact in measuring the defendant's conduct.

Id. at 469.

214. People v. Eckert, 1 A.D.2d 903, 904 (N.Y. App. Div. 1956).

215. People v. Eckert, 208 Misc. 93, 99 (N.Y. Cnty. Ct. 1955).

216. People v. Decina, 1 A.D.2d 592, 594 (N.Y. App. Div. 1956).

217. *Id.*

for the prosecution over Decina's objection.[218] The physician understood that the prosecutors were going to charge Decina with a crime, but he testified that one of the purposes of his questions to Decina was for the purpose of medical treatment.[219] As a result, the physician's testimony should have been suppressed from the jury on the basis that it was privileged.[220] This led to the Fourth Division overturning Decina's conviction and ordering a retrial.[221]

B. People v. Decina *as Authored by Judge Froessel: The New York Court of Appeals*

The appellate court's majority decision rested on a simple principle: Decina knew he had epilepsy and decided to drive anyway, and thus, the deaths of the four children were a natural and foreseeable outcome of his decision.[222] The plain language of a singular sentence summarizes the voluntary act principle as applied to Decina: "With this knowledge, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue."[223] Because Decina knew he was subject to an epileptic blackout and had driven alone, the court concluded that he met the very definition of "culpable negligence" under Section 1053-a.[224] But no citations to caselaw or statute followed this statement, and, as the dissent later pointed out, the statute under which Decina had been convicted had never been used against drivers suffering an infirmity.[225] Thus, *Decina*, which has become so prominent in caselaw and in legal education, was created without any historic basis at all, and certainly without the support of prior caselaw or statutory interpretation that would normally justify such a decision.[226]

---

218. *Id.*

219. *Id.* at 595–96. However, the treating physician altered his previous testimony on the point of whether his questions to Decina were for the purpose of medical treatment. *Id.* at 596.

220. *Id.* at 597.

221. *Id.*

222. People v. Decina, 138 N.E.2d 799, 803 (N.Y. 1956). The majority noted, "[a]ssuming the truth of the indictment, . . . [Decina] knew he was subject to epileptic attacks and seizures that might strike at any time. He also knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction." *Id.*

223. *Id.* at 803–04.

224. *Id.* at 804.

225. *Id.* at 807–08 (Desmond, J., concurring in part and dissenting in part).

226. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994); RICHARD A. POSNER, HOW JUDGES THINK 39 (2008) (reasoning that the doctrines of precedent and *stare decisis* are structured to motivate judges and

How the appellate court arrived at this decision in the environment at the time cannot be fully known without understanding the judicial motivations to do so, and this is not fully possible without personal letters, statements, or speeches from the judges themselves. Luckily here, in addition to the social and political environment at the time, including the media frenzy and discrimination against epileptics, a judicial biography—for the reasons noted above—can provide some context.[227] Seven judges served on the New York Court of Appeals at the time of *Decina* with Albert Conway. Conway was a delegate to the 1928 Democratic Party Convention that nominated New York's governor, Al Smith, as the party's presidential candidate. [228] He also was a law school professor at the Brooklyn Law School.[229] In 1930, (then) Governor Franklin Roosevelt appointed him to the trial bench, and, in 1950, New York City's democratic party leadership advanced his name to become the party's nominee for governor, but Conway resisted their lobbying.[230] In 1940, he was elected to a fourteen-year term on the state's highest appellate court.[231] During his tenure as chief judge, Conway was responsible for modernizing the judiciary and developing a judicial means for removing inefficient and corrupt judges—Conway supported the legislative proposal that Ottaway had objected.[232] He also authored an opinion that upheld the power of the state to remove teachers who refused to answer inquiries into whether they had ties or sympathies to communism.[233] Coupled with his association to state electoral politics, his views on communism as a danger may evidence a greater attitude of the role of a judge partly upholding social order.

Conway was joined by Marvin Dye, a fellow Democrat. Lehman appointed Dye to the state's court of claims in 1940.[234] Four years

---

to raise the cost of judicial error so as to make judges more careful in deciding cases and explaining the reasons for their decisions in written opinions).

227. *See, e.g.*, Melvin I. Urofsky, *Beyond the Bottom Line: The Value of Judicial Biography*, 1998 J. SUP. CT. HIST. 143, 148.

228. Charles W. Froessel, *Albert Conway—Chief Judge of the Court of Appeals: A Tribute*, 34 ST. JOHN'S L. REV. 2, 4–6 (1959).

229. *Judge Albert Conway, 80 Dead; Headed State Court of Appeals*, N.Y. TIMES, May 19, 1969, at 47.

230. Froessel, *supra* note 228, at 4–6. Conway was also thought of as a Democratic candidate for governor in 1950, but he declared he would remain on the bench. *See, e.g.*, *Conway Declares He's Not Candidate for Governorship*, N.Y. TIMES, Sept. 2, 1950, at 1, 9; *Conway, Pecora Favored as Ticket by City Democrats*, N.Y. TIMES, Aug. 1, 1950, at 1, 23.

231. Froessel, *supra* note 228, at 4.

232. *Id.* at 1–2.

233. *See* Daniman v. Bd. of Educ., 119 N.E.2d 373, 377 (N.Y. 1954)

234. *See* BERNARD S. MEYER, BURTON C. AGATA & SETH H. AGATA, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1932–2003, at 22 (2006).

later, Dye was elected to the highest court.[235] Adrian Burke, like Conway and Dye, was a Democrat.[236] Burke had managed Robert F. Wagner's successful campaign for New York City mayor in 1953 before being elected to the appellate court the next year.[237] Stanley Fuld appears to be one exception in regard to political affiliation. He served as a prosecutor under Dewey and when Dewey became governor, he appointed Fuld to the bench.[238] Fuld then ran as a Republican for the appellate court in 1946.[239] The other exception was John Van Voorhis who Dewey also appointed to the appellate court in 1953.[240] However, the next year he ran for office with the endorsement of both parties.[241]

Charles W. Froessel had served as an assistant district attorney in Queens County and successfully ran for the state's highest court as a Democrat in 1949.[242] He had an incredibly distinguished career, so much so that he has had a moot court competition named after him, and he served as an interim dean after his retirement from the bench.[243] The New York Bar Association also has an award named for him.[244] Froessel was born into a poor family, his father having died when he was young, and he attended college and law school on a part-time basis.[245] In World War I, he served as a naval officer and, following the war, as the legal counsel to the Sheriff of Queens County, New York. After he became an assistant district attorney, he prosecuted a notorious case, a spousal murder for insurance fraud conviction that resulted in a death sentence.[246] He also was employed in the United States Department of Justice during the Franklin Roosevelt administration and was elected as a state trial judge in 1937.[247] Thus, most of his attorney career was in the prosecution of crimes.

---

235. *Id.*
236. *Id.* at 24.
237. *Id.*
238. *Id.* at 16
239. *Id.*
240. *Id.* at 24
241. *Id.*
242. *Id.* at 23.
243. *See generally 48th Annual Charles W. Froessel Intramural Moot Court Competition*, N.Y. L. SCH., https://www.nyls.edu/events/48th-annual-charles-w-froessel-intramural-moot-court-competition/ (last visited Jan. 31, 2025).
244. *See Biography of Charles William Froessel*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/charles-william-froessel/ (last visited Jan. 31, 2025).
245. *Id.*
246. *Id.*
247. *Id.*

Charles Desmond, who dissented in *Decina*, was elected to the appellate court as a Democrat in 1940 and then reelected in 1954.[248] There is an irony that Desmond dissented against the majority that included Conway. A *New York Times* headline from August 30, 1950 that read "2 Democrats Left in Governor Race" educated its readers that Desmond and Conway were leading in polling to become the state's next Democrat candidates for governor.[249] When he became chief judge in 1965, the *New York Times* titled him "an Unsolemn Judge" who rose from being the son of a saloon-keeper who was raised in childhood above a bar, to the state's highest bench.[250] The state's highest appellate court then was more of a mixed political entity than the intermediate court, but it was still a part of the state's electoral system and thus, still attuned to electoral attitudes.

In writing for the majority, Froessel began the decision with a brief recitation of the facts leading up to the death of the children. He stressed that March 15, 1955 was "a bright, sunny day" and described Delaware Avenue as "[sixty] feet wide."[251] Following these two predicates, he noted that Decina's car "swerved" onto the other side of the road and achieved a speed of between "[fifty] or [sixty] miles per hour" and then recounted that one witness testified that Decina had his hand over his head and another witness testified that Decina's "left arm bent over the wheel, and his right hand extended toward the door."[252] Turning to the victims, Froessel noted that, of the six girls walking, five were struck by Decina's car and concluded by explaining that the car continued past another viaduct before it came to a stop inside of a store with its horn blowing.[253]

Froessel descriptively stated that several fires had been ignited as a result of the car striking other objects and that Decina was observed "stooped over in the car" and "bobbing a little."[254] He then described other witness' statements about Decina as varying between appearing "dazed" and "unconscious."[255] Although Froessel noted witness observations, perhaps the most damning direct

248. MEYER, AGATA & AGATA, *supra* note 234, at 15.

249. Warren Moscow, *2 Democrats Left in Governor Race: Nomination Is Expected to Go to Desmond or Conway, With Lynch Dropping Behind*, N.Y. TIMES, Aug. 30, 1950, at 24.

250. *An Unsolemn Judge: Charles Stewart Desmond*, N.Y. TIMES, Apr. 15, 1965, at 26. The New York Times noted he attended Canisius College and then earned his law degree at the University of Buffalo. *Id.*

251. People v. Decina, 138 N.E.2d 799, 800 (N.Y. 1956).

252. *Id.* at 800–01.

253. *Id.* at 801.

254. *Id.*

255. *Id.* "To one witness he appeared dazed, to another unconscious, lying back with his hands off the wheel. Various people present shouted to defendant to turn off the ignition of his car, and 'within a matter of seconds the horn stopped blowing and the car did shut off.'" *Id.*

evidence of guilt in the eyes of the majority was that Decina told an injured woman in the store—after she "pressed" him for an answer—that he had "blacked out from the bridge."[256] Finally, Froessel found it important to not only stress that this recitation of facts was "virtually undisputed," he also stressed that Decina neither presented a defense nor did he testify in his own defense.[257] Notably on this point, in 1947, the Supreme Court determined, in *Adamson v. California*, that it was not a Fourteenth Amendment violation for a prosecutor in a state trial to stress to a jury that the defendant not taking the stand was evidence of the defendant's guilt.[258]

Froessel continued, explaining that after the police handcuffed Decina, he was taken to the hospital and the police handed a "pink slip" to the hospital supervisor explaining that Decina was under arrest and would likely be charged for the deaths of three or four persons.[259] One day later, after another doctor had treated Decina, Dr. Wechter read and explained the contents of the "pink slip" to Decina in the presence of a hospital staff member and a police officer.[260] At trial, Froessel noted, Dr. Wechter insisted that he saw Decina in his professional capacity as a doctor, but not for the purpose of treatment.[261] Dr. Wechter then diagnosed Decina with "Jacksonian epilepsy."[262] It was through Dr. Wechter's testimony that the jury was informed of Decina's past medical history, and that this past history had been related by Decina during the course of their discussion.[263] The facts were clear, as Decina conceded, that he operated the vehicle and blacked-out before striking the children. Neither this nor his knowledge of his own epilepsy was in dispute. But foreseeability was certainly a contended factor, and this would go to the heart of whether Decina committed a voluntary act covered by the statute.

---

256. *Id.*

257. *Id.* The court wrote, "The foregoing evidence was adduced by the People, and is virtually undisputed[—]defendant did not take the stand nor did he produce any witnesses." *Id.*

258. 332 U.S. 46, 50–53 (1947). The Court expressly overturned *Adamson* in *Griffin v California*, in which it was determined that a prosecutor's comment regarding a defendant's decision not to testify violated the Fourteenth Amendment. 380 U.S. 609, 615 (1965).

259. *Decina*, 138 N.E.2d at 801.

260. *Id.* at 801–02.

261. *Id.* Froessel pointed out, however, that on cross examination in a prior trial, Dr. Wechter testified: "the information he obtained was pursuant to his duties as a physician; that the purpose of his examination was to diagnose defendant's condition; that he questioned the defendant for the purpose of treatment, among other things; that in the hospital they treat any patient that comes in." *Id.*

262. *Id.* at 803.

263. *Id.*

C. Judge Desmond's Dissent

Judge Desmond dissented from the majority's decision that Decina's conduct constituted a crime.[264] He argued that because Decina suffered from a blackout, he was no longer operating the vehicle at all and was therefore not guilty of culpable negligence.[265] "Horrible as this occurrence was and whatever necessity it may show for new licensing and driving laws, nevertheless this indictment charges no crime known to the New York statutes. Our duty is to dismiss it," Desmond began the dissent.[266] Although Desmond did not discuss either the rule of lenity or the narrow reading of criminal statutes, his dissent essentially focused on this point.[267] He did not argue that epileptics had the right to drive or that laws criminalizing Decina's conduct could not be legislatively enacted. Rather, he argued that because Decina was not conscious, he was not, therefore, in operation of the vehicle.[268] If the majority's decision were correct in law, Desmond reasoned, then a driver who was prone to "fits of sneezing" or diabetes could also be held criminally liable because of the possibility of an accident.[269] But, he countered, not only was there no proof that the legislature intended this application of the law, the public's understanding of Section 1053-a, which was defined in *Angelo*, was that culpable negligence was defined by how a car was driven—i.e. a human consciously operating the vehicle.[270] Were it otherwise, then any motorist who suffered "a serious malady or infirmity" could not drive without being under constant criminal liability because culpable negligence would extend to the moment they moved their vehicle.[271]

---

264. *Id.* at 807 (Desmond, J., dissenting).

265. *Id.* Judge Desmond penned: "Culpably negligent driving . . . necessarily connotes and involves consciousness and volition. The fatal assault by this car was after and because of defendant's failure of consciousness." *Id.* at 808.

266. *Id.* at 807–08.

267. *Id.* at 808–09; *see also* Bifulco v. United States, 447 U.S. 381, 387 (1980) (discussing the rule of lenity); Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (further discussion on the rule of lenity).

268. *Decina*, 138 N.E.2d at 808.

269. *Id.* Desmond argued, "[e]pilepsy, coronary involvements, circulatory diseases, nephritis, uremic poisoning, diabetes, Meniere's syndrome, a tendency to fits of sneezing, locking of the knee, [and] muscular contractions" were all common conditions that "may cause loss of control of a vehicle for a period long enough to cause a fatal accident." *Id.* at 808–09.

270. *Id.* at 809.

271. *Id.*

IV. *DECINA*: VOLUNTARY ACTS, CRIMINAL NEGLIGENCE, AND CONTEMPORARY USAGE

In 1939, the first modern criminal law casebook was assigned to Columbia Law School students.[272] Authored by law professors Herbert Wechsler and Jerome Michael, *Criminal Law and its Administration* was the first casebook to successfully synthesize social science materials with cases.[273] The format and focus of Wechlser and Michael's book became a common feature in the casebooks that followed.[274]

Jerome Hall authored his first edition of *General Principles of Criminal Law* in 1947, nine years before *Decina*.[275] Hall, at the time, was a distinguished service professor at the Indiana University School of Law specializing in criminal law.[276] *Decina* is noted four times in the second edition of *General Principles*, indicating, perhaps, that it was an extremely important, if not revolutionary, decision. The first mention occurs in a footnote in an effort to distinguish the culpability of a person who is grossly intoxicated from a person who labored under a mental deficiency.[277] The footnote uses an entire paragraph from Froessel's majority decision that equated an inebriate with an epileptic who had a knowledge of his condition.[278] Seventy-five pages later, in discussing *mens rea*, Hall defined the term by pointing to Decina as "implied in cases where an epileptic seizure occurred just prior to the commission of the harm in issue[.]"[279] Hall, in differentiating epilepsy from the traditional view of voluntariness, advised that penal liability began earlier than the act of the crime itself.[280] It was in the third mention, however, where Hall made an extraordinary concession regarding *Decina* in stating that defendants such as Decina did not engage in a crime to attain specific goals and therefore the criminal law on this point was "a compromise between the imposition of liability . . . and the total exculpation required by the defendant's actual state of mind at the time he committed the harm in issue."[281] Otherwise,

---

272. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO. ST. J. CRIM. L. 217, 218 (2009).
273. *Id.*
274. *Id.* at 241–42.
275. *See generally* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1947).
276. *Id.*; *see also* Wolfgang Saxon, *Jerome Hall, 91, Legal Scholar Who Was Professor and Author*, N.Y. TIMES, Mar. 11, 1992, at 31.
277. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 107 n.10 (2d ed. 1960).
278. *Id.* (citing People v. Decina, 138 N.E.2d 799, 804 (N.Y. 1956)).
279. HALL, *supra* note 277, at 181.
280. *Id.*
281. *Id.* at 537.

a defendant like Decina would have complete exculpation from criminal liability.[282] In short, Hall assumed in his writing that an epileptic person was on notice of their condition at all times, implying that with no warning, a blackout or seizure was likely.

In 1969, there were sixteen criminal law casebooks in use in the nation's law schools.[283] Absent from the modern casebooks, however, at least in regard to *Decina*, was any consideration of social or procedural justice. Where this absence began is hard to discover, although Hall's *General Principles* is a reasonable starting point. However, hard as it might be to discover the absence of any consideration that *Decina* might have been tainted by politics, poorly supported (which it was), or bereft of procedural justice (which it was), this was not always fore-ordained.

A. From Early Scholarship and Bias Warnings to . . . the Future

In 1956, professor of law, Roscoe L. Barrow, and medical school professor and psychiatrist, Howard D. Fabing, published *Epilepsy and the Law*, a widely-read book that argued that legal limitations against epileptics were often based on popular prejudices rather than medical science.[284] That same year, twenty-eight states still had sterilization laws on their books directed at epileptics and several states restricted marriages of epileptics.[285]

Barrow and Fabing argued that less than 20% of epilepsy cases were "disabling" and most epileptics were able to live normal, productive lives.[286] In spite of this, they recognized that "epileptics continue to live under anachronistic legal restraints imposed sixty years ago and in a social climate which associates epilepsy with idiocy and insanity."[287] *Epilepsy and the Law* contains a chapter on driver's license laws that begins with the admonition that such laws "become [the] warp and woof of the epileptic's discriminatory sackcloth."[288] The authors recognized the importance of highway safety but argued that most epileptics were safe drivers when treated. that the decision to issue a license was often too arbitrary when in the

---

282. *Id.* at 546.

283. GERHARD O.W. MUELLER, CRIME, LAW AND THE SCHOLARS: A HISTORY OF SCHOLARSHIP IN AMERICAN CRIMINAL LAW 137 (1969). Mueller noted that the modern casebook has its origins with Weschler and Hall. *Id.* at 113.

284. *See generally* ROSCOE L. BARROW & HOWARD D. FABING, EPILEPSY AND THE LAW: A PROPOSAL FOR LEGAL REFORM IN THE LIGHT OF MEDICAL PROGRESS (1956).

285. Shen, *supra* note 38, at 676 (citing William G. Lennox, *Epilepsy and the Epileptic*, 162 J. AM. MED. ASS'N 118, 119 (1956)).

286. BARROW & FABING, *supra* note 284, at 2.

287. *Id.*

288. *Id.* at 35.

hands of state administrators and, in some states, the outright denial of licenses had a deleterious effect on epileptics who should be entrusted to drive.[289]

Barrow and Fabing's book had some impact on the law. In 1957, the Court of Common Pleas in Pennsylvania County in *In re E.P. Marriage License* cited to *Epilepsy and the Law* in determining that an epileptic was entitled to be married under Pennsylvania law because the dangers of his condition were not "overawing."[290] Judge Desmond's dissent in *Decina* also cited to *Epilepsy and the Law* to argue that, without better laws, Emil Decina could not be said to have violated the law based upon "mere future possibilities or probabilities."[291] One book review positively concluded that the book could aid legislatures in preventing discrimination against epileptics.[292] However, the review also noted that a "reasonable man" standard remained appropriate for cases in which a person knowingly posed a risk to the public.[293] Still, there was a reality that some legislative prohibitions against epileptics were likely to foster discrimination by embedding old prejudices into the law.

Several law review articles and articles in academic and peer reviewed journals referenced *Decina* in the first decade after its issuance.[294] In 1958, the *Cleveland-Marshall Law Review* published Irwin N. Perr's article titled "Epilepsy and the Law."[295] Perr was not a legal scholar, but rather, he had been a medical school professor who had served as a psychiatrist in the Air Force as well as the director of psychiatry at San Quentin Prison in California before becoming a law student at Cleveland-Marshall the year of the article's publication.[296] Perr began his article with the admonition that because "epilepsy is a disease which has plagued mankind from

289. *Id.* at 45–49.

290. 8 Pa. D. & C.2d 598, 606 (Orphans' Ct. 1957).

291. People v. Decina, 138 N.E.2d 799, 809 (N.Y. 1956) (Desmond, J., concurring in part and dissenting in part).

292. William J. Curran, Book Review, 10 J. LEGAL EDUC., 419, 421 (1958) (reviewing BARROW & FABING, *supra* note 284).

293. *Id.*

294. *See, e.g.*, Ronald Patrick Smith, Note, *Criminal Law: Criminal Responsibility of Epileptic Driver Who Causes Death When Stricken with Sudden Epileptic "Blackout,"* NOTRE DAME L. REV. 688, 703–04 (1957) (criticizing the notion of "once an epileptic, always an epileptic" and advocating deference to the medical profession over who is safe to drive); J. Ll. J. Edwards, *Automatism and Criminal Responsibility*, 21 MOD. L. REV. 375, 382 n.36 (1958); Sanford J. Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645, 657 (1963) (pointing out that some courts allowed for a defendant to argue that epilepsy was a basis to raise a defense based on unconsciousness). Fox cited to *Decina* as an exception. *See id.* at 647 n.13.

295. Irwin N. Perr, *Epilepsy and the Law*, 7 CLEV.-MARSHALL L. REV. 280, 280 (1958).

296. *Id.* at 280 n.1. Perr apparently remained a psychiatrist. *See Mental Competency Hearing for Kallinger Is Canceled*, N.Y. TIMES, June 27, 1976, at 28.

time immemorial," modern views of the disease were "encrusted with attitudes born of a more primitive age."[297] Although he conceded, citing to *Decina*, that persons with epilepsy and other conditions with known frequent blackouts should not drive. He pointed out that, statistically, persons with coronary disease and diabetics were just as likely to suffer blackouts as persons with epilepsy and concluded that legislatures and prosecutors had made a choice over who to permit to drive and who to punish—epileptics were clearly singled out.[298]

B. Normalization of Bias through Legal Education: Decina *in the Present Times*

In 2009, the Oxford University Press published *Criminal Law Conversations* in which one prominent scholar presented arguments on aspects of criminal law—such as preventive detention and the difficulties of deterrence as a distributive principle—while other scholars presented counter-arguments and criticisms.[299] In a chapter titled "Interpretive Construction in the Substantive Criminal Law," Stanford law professor (and former vice dean) Mark Kelman began a discussion on the voluntary act doctrine and negligence crimes, and included *Decina* as an example of an instance where a defendant commits a voluntary act knowing that the act carried the risk of an involuntary harm.[300] Before Professor Kelman addressed *Decina*, he acknowledged that crimes and the people involved in them have a history that causes us—knowingly or not—to assess them to our present.[301] He then noted that there was a close linkage in timing between the voluntary act and the deaths of the children in Decina.[302] This timeframe approach to *Decina* has come under criticism by other scholars, including Michael S. Moore, who called it vacuous because the issue of voluntariness is whether there is a voluntary act accompanied by a *mens rea* and a causation between the two.[303] Kelman and Moore present philosophical differences, but

297. Perr, *supra* note 295, at 280.
298. *Id.* at 294, 296.
299. *See generally* CRIMINAL LAW CONVERSATIONS (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler-Ferzan eds., 2009) [hereinafter CRIMINAL LAW CONVERSATIONS].
300. *Id.* at 207, 212–14.
301. *Id.* at 208. Kelman wrote: "We put people on trial. People exist over time; they have long involved personal histories. We prosecute particular acts—untoward incidents—that these people commit. But even these incidents have a history: Things occur before or after incidents that seem relevant to our judgment of what the perpetrator did." *Id.* at 208–09.
302. *Id.* at 212–13.
303. MICHAEL S. MOORE, ACT AND CRIME, THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 35–36 (2010).

they do not answer how *Decina* came into the criminal law and why it has remained such a focal point. Furthermore, there is no consideration within this argument as to whether *Decina* changed the voluntary act principle and possibly enabled a cementing of bias into the law by enabling prosecutions of persons who suffer maladies, neurological conditions, or even gender identity conditions that are often demeaned through state law.

Kelman juxtaposed the rule on voluntary acts in *Decina* with those of another case, *Martin v. State*.[304] In the 1944 Alabama decision, Cephus Martin was a notorious inveterate drunk, but on the occasion in issue he was drunk in his own home.[305] The police took him into custody and then into the public where they charged him with public drunkenness.[306] Martin voluntarily drank alcohol, but he did not voluntarily go into public as a drunk.[307] Thus, it was the police who made the crime occur. However, Alice Ristoph, one of Kelman's critics, expressed that a construction of voluntariness in regard to *Decin*a was, like most constructions, based upon "instincts, [and] dispositions to dispense harm or mercy or (as was probably the case in *Decina*) the emotional impacts of children's deaths."[308] That is, Emil Decina was taken to trial because of prosecutorial discretion based on public pressure.

Another, albeit, not overtly stated criticism of Kelman could be inferred from Professor Joseph Kennedy who authored the recent casebook, *Criminal Law: Cases, Controversies, and Problems* where he noted that "[c]ases such as *Decina* are difficult because a broad expansion of the time frame of the offense essentially eliminate[s] the voluntary act presumption."[309] That is, at some point, the distance between the voluntary act—in this case, the decision to drive while being diagnosed as an epileptic—and the injury to others is not relegated to immediacy. In none of these criticisms is there even the merest mention of social bias against classes of persons being cemented into the law through prosecutorial discretion.

The deficit of discussion on *Decina* began in Hall's *General Principles of Criminal Law* and continued into more legal casebooks

304. CRIMINAL LAW CONVERSATIONS, *supra* note 299, at 212 (citing to Martin v. State, 17 So. 2d 427 (Ala. Ct. App. 1944)).

305. *Id.*; *Martin*, 17 So. 2d at 427.

306. CRIMINAL LAW CONVERSATIONS, *supra* note 299, at 212.

307. *Id.* Professor Paul Litton criticized Kelman's analysis, pointing out that at no time did Martin present a risk to the public through his voluntary acts. *See* Paul Litton, *Unexplained, False Assumptions Underlie Kelman's Skepticism*, *in* CRIMINAL LAW CONVERSATIONS, *supra* note 299, at 218–19.

308. Alice Ristroph, *Interpretive Construction and Defensive Punishment Theory*, *in* CRIMINAL LAW CONVERSATIONS, *supra* note 299, at 225.

309. KENNEDY, *supra* note 10, at 135.

frequently assigned to first-year law students—all of which remain bereft of background on *Decina* that is important to procedural justice.[310] One can look to Wayne LaFave and Austin Wakeman Scott's 1986 casebook *Criminal Law* and find that *Decina* is listed in a footnote without much explanation, and then on a page in which the following statement is made: "the conduct of one knowing he is subject to sudden seizures of epilepsy and yet drives a car."[311] *Decina* is prominent in Rollin M. Perkins and Ronald Boyce's *Cases and Materials on Criminal Law and Procedure*.[312] There is only a portion of the decision presented with no discussion on how it might have changed the law or the conditions under which it was decided. Likewise, in Phillip E. Johnson's 1990 casebook, *Criminal Law: Cases and Materials*, *Decina* is provided as an example of a voluntary act decision with very little historic analysis.[313]

This continues into the present. Cynthia Lee and Angela Harris, in their *Criminal Law: Cases and Materials*, present *Decina* in the barest form, leaving out that he was twice tried and the nature of an all-male jury.[314] Likewise, Bennett Capers, Roger A. Fairfax, Jr., and Eric J. Miller, in their *Criminal Law: A Critical Approach*, do not touch on the potential for bias or present a historic analysis of the case.[315] And Joseph Kennedy in his *Criminal Law: Cases, Controversies, and Problems* notes that "[c]ases such as *Decina* are difficult because a broad expansion of the time frame of the offense could essentially eliminate the voluntary act presumption."[316] Three prominent casebooks are, of course, just a sample of the legal academy's approach to *Decina*, and one can examine other criminal law books to make the point that *Decina*'s legal history and procedural justice implications are absent from legal educational discourse.

Professor Claire Finkelstein has observed that "[c]ases like *Decina* have led scholars to charge that the criminal law's voluntariness requirement is arbitrary."[317] She presented one argument

310. *See, e.g.*, JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 155 (9th ed. 2021) (relegating *Decina* to case excerpts and then asking the reader: Did Decina commit a punishable act?).

311. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 393, 671 n.20 (2d ed. 1986)

312. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 306–08 (6th ed. 1984).

313. PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 52–54 (4th ed. 1990).

314. LEE & HARRIS, *supra* note 10, at 153–60.

315. CAPERS, FAIRFAX, JR. & MILLER, *supra* note 10, at 204–06.

316. KENNEDY, *supra* note 10, at 135.

317. Claire Finkelstein, *Involuntary Crimes, Voluntarily Committed*, *in* CRIMINAL LAW THEORY: DOCTRINE OF THE GENERAL PART 143, 146 (Stephen Shute & A.P. Simester eds., 2002).

from another scholar that voluntariness is contingent on the length of the "time-frame" a court will consider. That is, if Decina generally knew of his epilepsy and drove, then he voluntarily drove knowing of a condition that could harm others and therefore he was guilty.[318] On the other hand, in a narrower time-frame, the courts would only consider the defendant's conduct at the time of the criminal violation—i.e. actions while driving the vehicle in that instance—in which case Decina would not have been guilty.[319] She also observed that another school of thought was if Decina had known of his condition at the time he drove, then he already possessed the requisite *mens rea* for vehicular manslaughter, which is a general intent crime. Therefore, the timeframe is irrelevant to the crime.[320] Nowhere in her discussion and analysis is there an examination of how bias may have led to the charge, conviction, and appeals in *Decina*. This is particularly true in her critique of Professor Michael Moore, who likewise does not consider bias when he compares Cephus Martin—the drunk—with Emil Decina.[321] That is, Martin was a drunk who was boisterous in his own house and, given his background and the treatment of known drunks generally, it was foreseeable that the police would come to his house. We do not know of Martin's condition other than he was a loud drunk, but the law excused him on the voluntariness issue, perhaps, because he was not a member of a disfavored class of person.

Finkelstein's chapter is in a book titled *Criminal Law Theory* and it is unlikely that many first-year law students are assigned this book to read since it is geared more toward upper-level law students and scholars. In David C. Brody, James A. Acker, and Wayne Logan's, 2001 *Criminal Law*, parts of the appellate decision are included followed by five "notes and questions"—none of which seek out the potential for bias against Decina.[322] In 2016, Guyora Binder authored *Criminal Law* and noted the basic holding of *Decina* but provided little in the way of analysis as to how Decina was treated or what effects of the case might be.[323] The work of E. Thomas Sullivan and Richard S. Frase referenced *Decina* and noted only that

318. *See id.* at 146–47.
319. *Id.* at 147.
320. *Id.* at 148.
321. *See id.* at 151.
322. DAVID C. BRODY, JAMES R. ACKER & WAYNE A. LOGAN, CRIMINAL LAW 196–99 (2001).
323. GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 126–27 (Dennis Patterson ed., 2016). In 2021, John Kaplan, Robert Weisberg, and Guyor Binder presented, in a section titled anticipating voluntariness, the barest facts taken from the published case, but again, there are no comments on prosecutorial discretion, bias, media reporting, or procedural justice. *See* KAPLAN, WEISBERG & BINDER, *supra* note 310, at 155.

while a person is not morally blameworthy for a bodily movement that is the product of epilepsy, sleep, unconsciousness, or other unwilled process, such a person can sometimes be blamed for a prior voluntary and culpable act: in *Decina*, an epileptic's decision to drive a car knowing that a seizure could occur at any time.[324]

As for law review articles, the focus on *Decina* remains, it appears, largely trapped in evaluating a defendant's overall knowledge of his or her condition at the time they act. For instance, in a 1988 *California Law Review* article titled, "A Causation Approach to Criminal Omissions," the author observed that a healthy reckless driver would be held culpable based upon an assessment of conduct at the time of the accident, but an epileptic driver would be culpable for simply driving.[325] Only one law review article appears to have observed that *Decina* triumphed in the criminal law over *Freeman*.[326] Another more recent observation of *Decina*, in regard to "time framing" is that, if taken to an extreme, one could argue that Decina was guilty of attempted murder for simply driving during the times he did not actually kill or harm anyone.[327]

C. Recent Caselaw as a Mirror of Legal Education

The Illinois appellate courts have twice cited to *Decina* since 2009. In *People v. Sanders*, the Illinois Court of Appeals reviewed a defendant's failure to timely apply for post-conviction relief.[328] In analogizing to Decina's voluntariness to drive given a known condition, the judges on that court determined that while it might be true that a defendant's perceived futility in filing a post-conviction motion resulted in the delay, the decision not to file was still voluntary.[329] The same appellate court almost contemporaneously issued *People v. Botsis*, a case that arose from a death caused by an unconscious motorist.[330] At trial, it was adduced that Spyridon Botsis had

---

324. E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 124 (2009).

325. Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 584 & n.121 (1988).

326. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 345–46 345 n.356 (2002).

327. *See* Claire Finkelstein & Leo Katz, *Contrived Defenses and Deterrent Threats: Two Facets of One Problem*, 5 OHIO ST. J. CRIM. L. 479, 487 (2008).

328. 911 N.E.2d 1096, 1098–99 (Ill. Ct. App. 2009).

329. *Id.* at 1112.

330. 902 N.E.2d 1092 (Ill. Ct. App. 2009). The appellate court began its decision by characterizing the death in a similar vein to *Decina*: "At around 3:45 p.m. on January 30, 2005, defendant Spyridon Botsis was driving to work on Lake Cook Road when he lost consciousness. Defendant's car crossed from the westbound lane of traffic into the eastbound lane and hit several other cars, killing Vanessa Grimes and injuring Sharon Tracy." *Id.* at 1094. A jury found Botsis guilty and sentenced him to three years in jail. *Id.*

a history of fainting spells and had been involved in traffic accidents in the past.[331] Several doctors had also advised him not to operate a motor vehicle.[332] In spite of this advice and knowledge, Botsis drove anyway, which the appellate court determined was answerable by citing to *Decina*.[333] There were no dissenting judges in *Botsis*, and more importantly, Botsis, unlike Decina, was prosecuted under a statute specifically designed for his conduct.[334]

In 2012, the Michigan Supreme Court, in *People v. Likine*, briefly referenced *Decina* when it reviewed a conviction for the felony charge of a failure to pay child support.[335] The state justices noted that the criminal law cannot hold someone liable when a defendant is powerless to prevent a criminal action, but can find liability for an omission, or, a failure to act.[336] The use of *Decina* in a case concerning a criminal failure to pay child support evidences the strength of the decision in the present. In 2019, the Kennebec County Superior Court in Maine addressed an appeal from a defendant driver who killed a pedestrian in *State v. Bilodeau*.[337] The trial court recognized that Andrew Bilodeau, like Emil Decina, had a driver's license but that he had slow movements as a result of cerebral palsy, which resulted in difficulty braking his car.[338] Additionally, Bilodeau informed the police that he had cataracts and trouble seeing clearly as well as a driving history of collisions with objects.[339] The trial court, in addressing Bilodeau's motion for acquittal, determined that it could find no Maine caselaw on-point, and turned to *Decina* to uphold the defendant's conviction based upon his voluntary act of driving while severely disabled.[340] None of the recent studies or decisions appear to address the procedural justice implications of *Decina* either.

---

331. *Id.* However, unlike in *Decina*, Botsis' mother, rather than a doctor, testified against him. *Id.*

332. *Id.* at 1095.

333. *Id.* at 1098.

334. *Id.* at 1097 (citing 720 ILL. COMP. STAT. ANN. 5/9-3(a) (West 2006)).

335. 823 N.W.2d 50, 66 n.48 (Mich. 2012).

336. *Id.* at 66. For a critique of *Likine*, see Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 320 (2020). *Likine* notes the discrimination inherent in the state court's holding. *See id.*

337. No. CR-18-508, 2019 WL 4248453, at *1 (Me. Super. June, 27, 2019), *aff'd* 237 A.3d 156 (Me. 2020).

338. *Id.* at *4.

339. *Id.* at *2.

340. *Id.* at *4, *5 n.1. After examining Judge Desmond's dissent in *Decina*, the trial court determined that as Bilodeau had not raised a due process argument, the defendant was also not entitled to relief. *Id.* at *5 n.1.

CONCLUSION

In *City of Grants Pass v. Johnson*, a case that involved the issue of homelessness as an involuntary status, the Supreme Court upheld the criminalization of sleeping in public spaces.[341] Justice Clarence Thomas, in his concurrence, would have had the Court go further and overturn *Robinson v. California*, a 1963 decision in which the Court determined that status crimes generally were unconstitutional.[342] If the voluntary act of sleeping in public can be criminalized, it is difficult to know the bounds of the voluntary act doctrine, but currently, it remains quite broad. Emil Decina belonged to a social pariah class, and he was convicted under a statute that had not been specifically designed for his wrongdoing. As Judge Desmond pointed out in his dissent, the New York Court of Appeals' affirmance of Decina's conviction under Section 1053-a expanded the statute beyond its legislatively intended use. That is, the majority determined that Decina should have known he was a danger to public safety at all times, rather than at the specific time of his act. His trial and appeal were quickly accomplished in a media frenzy and during a time where his condition was, in over twenty state laws, equated with imbecility and subject to sterilization. Since the decision, *Decina* has received an incomplete study in the law school curriculum and the courts. This is particularly concerning because *Decina* continues to be brought to the attention of generations of future lawyers by casebook authors without the proper context surrounding the decision.

Emil Decina's legal history is not merely important for the preservation of a significant event in the law. It is also important because it provides an examination into how social biases and public pressures may take an ordinary person into a system that denies them, and others, procedural justice. In a time when state legislatures are stigmatizing transgendered persons, a president freely ridicules disabled persons, and laws target immigrant communities including with the renewed threat of family separations, how the New York Court of Appeals crafted the voluntary act doctrine should remind us that prosecutorial discretion, and a judiciary willing to accept this discretion, may result in doctrines that are facially sound, but open up the criminal law to greater discrimination. At a minimum, first-year law students who will one day fill positions in the areas of criminal law, the judiciary, and legal academia should be

341. 603 U.S. 520, 560–61 (2024).

342. *Id.* at 562 (Thomas, J., concurring) (citing Robinson v. California, 370 U.S. 660 (1962)).

provided with a fuller view of Emil Decina's path through the courts which has heretofore been lacking.

Digital Vinegar Syndrome: A Media Access Problem and Possible Legal Solutions

Brian Davis

I. INTRODUCTION

> The Library exists ab aeterno. No reasonable mind can doubt its truth, whose immediate corollary is the future eternity of the world. Man, the imperfect librarian, may be the work of chance or of malevolent demiurges; the universe, with its elegant endowment of shelves, of enigmatic volumes, of indefatigable ladders for the voyager, and of privies for the seated librarian, can only be the work of god.
>
> - Jorge Luis Borges, The Library of Babel[1]

Vinegar Syndrome is the degradation and deterioration of cellulose acetate plastic film.[2] When those types of film are not preserved properly, they shrink, they embrittle, their gelatin emulsion buckles, and they begin to smell like vinegar.[3] The process, a death knell to any film, accelerates the onset of decay to the point of no return.[4] If there is only one version of a film experiencing vinegar syndrome, it is likely lost forever.[5] The process cannot happen to digital media. Or, metaphorically, can it? When there is no physical record, can lack of access to digital media cause it to disappear?

The issue is simple: the onset of streaming has caused, and will continue to cause, damage to filmmakers and the consuming public by restricting access to media. The author concedes that he fights an uphill battle in trying to save media heritage. In 1993, Librarian of Congress James H. Billington thought the same.[6] But this Article seeks to change minds and establish a framework to solve the issue. By making legislative and regulatory changes to the United States Tax Code, various federal statutes, and regulations, policymakers

---

1. JORGE LUIS BORGES, FICCIONES 80–81 (1969).
2. *Vinegar Syndrome*, NAT'L FILM PRES. FOUND., https://www.filmpreservation.org/preservation-basics/vinegar-syndrome [https://perma.cc/9LGA-P6F4] (last visited Aug. 13, 2024).
3. *Id.*
4. *Id.*
5. *Id.*
6. *See* James H. Billington, *A Study of the Current State of American Film Preservation: Volume 1*, LIBR. CONG., https://www.loc.gov/programs/national-film-preservation-board/preservation-research/film-preservation-study/current-state-of-american-film-preservation-study/ [https://perma.cc/FFB3-MP93] ("This is an 'HTML' version of volume 1 of Film Preservation 1993 originally published in June 1993. This version contains most of the text and footnotes but no charts, or tables from the report. Limited complimentary written copies of volume 1 can be obtained from sleg@loc.gov"). Specifically, Billington wrote, "[t]hat the United States is fighting a losing battle to save its film heritage is clearest from a sobering, often-noted historical fact. Current efforts of preservationists begin from the recognition that a great percentage of American film has already been irretrievably lost--intentionally thrown away or allowed to deteriorate." *Id.*

can torniquet the issue before it becomes a further problem. The solutions are backed by the organized and acknowledged belief that art and culture deserve preservation. Further, the places in which art and culture are preserved must be protected because the collection of art and culture exists as an art form in itself. To the extent that the law can assist in this protection and preservation, legal thinkers must deploy it meaningfully.

Those who study and practice the law rely on protection of the "Library" or the "Archive" just as much as those who collect physical media for its inherent artistic value. Indeed, it has been a trend in legal history that, "once the beneficiaries of legal resources began to demand their legal rights, the law became increasingly responsive to their demands."[7] Media consumers and artists similarly must demand rights to their corporeal library.[8]

This Article argues that, to solve the media access crisis, everyone should have the right of access to art; in other words, everyone should have the right to a library, the right to an archive. Everyone should have the right to preserve culture. This Article expands on these principles by providing a two-step solution. The first step of the solution involves a policy mindset change to media restriction by examining the history of preservation, cultural heritage, and art law and the rhetoric of each to establish authenticity for their movements.[9] After all, the law recognizes cultural values.[10] Caroline Frick, Media Historian and Associate Professor in the Radio-TV-Film Department at The University of Texas at Austin, describes film preservation as "the overall complex of procedures, principles, techniques[,] and practices necessary for maintaining the integrity, restoring the content[,] and organizing the intellectual experience of a moving image on a permanent basis."[11] These principles were long promoted by noted film preservationists.[12] Martin Scorsese echoed the promotion of these principles while discussing past preservation failures: "due to chemical decomposition, wear, fires (more prevalent during the era of nitrate, which was extremely flammable), or some combination thereof, fifty percent of pre-1950

7. James J. Fishman, *The Emergence of Art Law*, 26 CLEV. ST. L. REV. 481, 487 (1977).

8. Consumers and artists are grouped together in this article because, although the law affects these two groups differently, these are the groups most affected by media restriction.

9. *See infra* Section III.

10. *See* CAROLINE FRICK, SAVING CINEMA: THE POLITICS OF PRESERVATION 4 (2011) (suggesting that film preservation advocates, over the past three decades, have effectively leveraged the concept of "cultural heritage" to "sway congressional support" and prompt Congress to pass laws).

11. *Id.* at 10.

12. *See id.* at 4–5.

American cinema and eighty percent of American silent cinema had been lost. Gone. Forever."[13]

Essentially, failure to preserve media results in loss of history. As society becomes increasingly service-dominated and leisure-oriented, historicity becomes omnipresent.[14] Indeed, "legal change most often mirrors society's broader social, political, and economic developments. As society becomes more complex, the law evolves to meet additional needs, often by becoming more specialized."[15] The next step in artist and consumer preservation movements is that of physical media protection. Streaming is affecting the rights inherent in these movements faster than what the law can handle.[16] Thus, the new framework that this Article creates takes rhetoric from preservation, cultural heritage, and art law to establish a new archival right for artists and consumers.[17]

The second step of the solution implements the mindset change and prompts action directed by Congress, the Department of Treasury, and the Librarian of Congress.[18] Actions taken by these entities would reduce the temptation observably felt by media corporations to restrict content.[19]

This Article contains two main sections, each with subparts. Section II will explain the media restriction problem, why it is understudied, and why current law is not helping the situation.[20] Section III provides a solution in three parts. Section III, Part A discusses the history of preservation and the theoretical underpinnings of four related movements: (1) building and monument preservation, (2) early film preservation and the colorization debates of the 1990s, (3) cultural heritage and art law, and (4) consumer rights.[21] These four movements provide a pre-existing theoretical backbone for media availability and the right to archive. Section III, Part B fuses

13. Martin Scorsese, *Film Preservation: A Dire Need*, BRITANNICA, https://www.britannica.com/topic/Film-Preservation-A-Dire-Need-2119175 [https://perma.cc/LXV5-M73R] (last visited Aug. 13, 2024).

14. FRICK, *supra* note 10, at 17. Historicity, in contradistinction with history, requires a study of the previous methods used by preservationists.

15. Fishman, *supra* note 7, at 481.

16. For instance, "one of the hot [legal] debates that remains in the United States, like in other countries, is 'value gap' in the chain of income earned through streaming." Irene Calboli, *Legal Perspectives on the Streaming Industry: The United States*, 70 AM. J. COMP. L. i220, i234 (2022). Specific to television streaming, Disney has been accused of "keeping the lion share of streaming revenues" generated by its older shows by classifying them as "home videos." *Id.* at i235. Accordingly, "it does not seem that the 'value gap' concern has been addressed in the United States to date." *Id.*

17. *See infra* Section III.B.

18. *See infra* Section III.C.

19. *See infra* Section III.

20. *See infra* Section II.

21. *See infra* Section III.A.

these movements into one legal right: the right to archive.[22] Section III, Part C discusses how Congress, the Department of Treasury, and the Librarian of Congress can take steps toward solving the problem.[23] Section IV provides a brief conclusion.[24]

II. THE PROBLEM

A. Disappearing Media

Disney recently removed digital video disc (DVD) and Blu-ray sales in Australia.[25] In 2024, Best Buy began to phase out DVD sales, both in-store and online.[26] To most, this removal comes alongside the tides of change. DVDs are on their way out due to technological obsolescence that occurs when "a technical product or service is no longer needed or wanted even though it could still be in working order. Technological obsolescence generally occurs when a new product has been created to replace an older version."[27] The erratic American (and global) marketplace is characterized by its short attention span[28] and its emphasized value on convenience.[29] As such, it is not surprising to find the general viewing public interested in streaming platforms and disinterested in protecting and preserving physical media and the issue of its removal.[30] After all, streaming

22. *See infra* Section III.B.

23. *See infra* Section III.C.

24. *See infra* Section IV.

25. Nick Bythrow, *Disney Strikes Major Blow Against Physical Media, Stops DVD & Blu-Ray in Australia*, SCREENRANT (July 31, 2023), https://screenrant.com/disney-movies-dvd-physical-media-releases-cancelled/ [https://perma.cc/KZW9-S8TB]. Disney "removed" these products by permanently halting sales. *Id.*

26. Alexandra Simon, *Best Buy Phasing Out DVD Sales*, KARE 11 (Oct. 16, 2023, 3:02 PM), https://www.kare11.com/article/news/local/best-buy-stop-selling-dvds-in-store-online/89-0e538747-24c1-493e-ac77-a9909ee3e634 [https://perma.cc/G3V8-2C88]; Kamiah Johnson, *Physical Media Is Important; Here's Why*, UNIV. CAL. SAN DIEGO GUARDIAN (June 2, 2024), https://ucsdguardian.org/2024/06/02/physical-media-is-important-heres-why/ [https://perma.cc/R29K-BQF5] ("Best Buy has already announced they are no longer selling physical media, but we need to ensure they don't die out. The future of cinema is at stake."). Target also confirmed it was removing DVDs from its stores. Emma Roth, *Target Confirms It's All but Completely Ditching DVDs in Physical Stores*, THE VERGE (Apr. 19, 2024, 5:04 PM), https://www.theverge.com/2024/4/19/24135140/target-dvds-physical-media-selling-stop [https://perma.cc/2HHP-9W5S].

27. *Technological Obsolescence*, MONASH BUS. SCH., https://www.monash.edu/business/marketing/marketing-dictionary/t/technological-obsolescence [https://perma.cc/PWB4-3J9Z] (last visited Aug. 13, 2023).

28. Gary Crowdus & Peter Becker, *Providing a Film Archive for the Home Viewer: An Interview with Peter Becker of The Criterion Collection*, 25 CINÉASTE, no. 1, 1999, at 47, 48.

29. Arian Goudar, *Opinion: Physical Media Provides Protection when Digital Copies Can't*, SHORTHORN (Apr. 13, 2022), https://www.theshorthorn.com/opinion/opinion-physical-media-provides-protection-when-digital-copies-can-t/article_e2c9354a-b68e-11ec-a674-ff6b27b364b9.html [https://perma.cc/B59M-6L6H].

30. *Id.*

has become so pervasive that in 2022 alone Americans streamed over nineteen million years of content.[31] The problem lies with this convenience. In accepting the new product—streaming (or generally, digital media)—consumers necessarily dispense with physical media and its function as an artistic, cultural, and historical heuristic for society.[32] Further, physical media as a form of tangible property is difficult to take away.[33] Digital media, on the other hand, is not so permanent. When you purchase a digital film, you purchase a license to view it; you do not purchase the film itself.[34]

The film industry is also harmed by the arrival of purely digital media. Before the astronomical rise of streaming, the film industry profited from continued DVD sales after films left the theaters.[35] Now that DVD sales are decreasing,[36] the film industry must rely more heavily on the success of blockbuster films like *Avengers: Endgame*[37] and *Avatar: The Way of Water*[38] while also using these films as a loss leader for subscription services.[39] This trend has threatened the accessibility to lost art and media, to both the artist and the consumer long-term.[40] For the artist, their art becomes entirely reliant on the success of streaming platforms because many movies and television shows are produced exclusively for streaming services as an incentive to draw in subscribers.[41] For the consumer, access to media is threatened when a streaming service faces

31. *Streaming Unwrapped: 2022 Was the Year of Original Content*, NIELSEN (Jan. 2023), https://www.nielsen.com/insights/2023/streaming-unwrapped-2022-was-the-year-of-original-content/ [https://perma.cc/B5AL-EQVG].

32. *See* Tyler Hummel, *The Film Industry Is Damaged by the Death of Physical Media*, LEADERS (July 25, 2023), https://leaders.com/news/entertainment/the-film-industry-is-damaged-by-the-death-of-physical-media/ [https://perma.cc/FU7U-HSN5].

33. Goudar, *supra* note 29.

34. *Id.*

35. Hummel, *supra* note 32.

36. At some point in the predicted future, that sales number will be zero. As an example, DVD and Blu-ray sales in 2022 were estimated at $1.58 billion, which was a 20% decline from 2021's $1.97 billion. Christopher Hutton, *End of an Age: DVDs Are Heading Down the VHS Path of Extinction*, WASH. EXAM'R (Oct. 14, 2023), https://www.washingtonexaminer.com/news/2435119/end-of-an-age-dvds-are-heading-down-the-vhs-path-of-extinction/ [https://perma.cc/892L-QHY3].

37. AVENGERS: ENDGAME (Walt Disney Studios Motion Pictures 2019).

38. AVATAR: THE WAY OF WATER (Twentieth Century Studios 2022).

39. Hummel, *supra* note 32. A "loss leader" is a product that companies sell at below cost to get a consumer to buy other products that are large profit centers. For example, from the mid-1990s to the mid-2000s, Best Buy and Circuit City would sell CDs and DVDs for $7–10 attempting to lure customers into buying washing machines. Sonny Bunch, *Theatrical as a Loss-Mitigator for Streaming*, BULWARK (Mar. 24, 2023), https://plus.thebulwark.com/p/theatrical-as-a-loss-mitigator-for [https://perma.cc/Y3P2-7HU7].

40. Hummel, *supra* note 32.

41. *Id.*

instability.[42] Take, for example, the films and television shows "*The World According to Jeff Goldblum* . . . and the Bryan Cranston movie *The One and Only Ivan*—[both of] which were removed as part of a $1.5 billion tax write-off."[43] Because the content was never made physical, now it is likely permanently inaccessible to the public.[44] Disney purchased 20th Century Fox in 2019 for $71.3 billion and is now restricting its film archive too.[45] For example, Disney refused to license repertory[46] bookings for some classics like *Home Alone*[47] and *Alien*[48] because Disney corporate policy forbids showing classic films at first-run theaters to maximize profit for newer films.[49]

The most prevalent and current symptom of this restriction is that back catalog titles from streaming services disappear from the platform.[50] In July 2023, Disney removed a sci-fi family adventure film called *Crater* from its streaming service, Disney+, less than two months after its release.[51] Two months before that, in May 2023, Disney removed *Willow* and over fifty other titles.[52] Disney CFO Christine McCarthy stated that the decision to delete those titles

---

42. *See* Goudar, *supra* note 29 ("Many examples emphasize the risk of buying digital films, including the lapse of distribution rights or the bankruptcy of a rightsholder.").

43. Hummel, *supra* note 32. "Removed" operates differently here compared to how Disney removes its DVDs from shelves at stores. Here, Disney is removing these titles by withdrawing them from its streaming library so that subscribers are unable to view them. *See id.*

44. *Id.*

45. Emily St. James, *Here's What Disney Owns After the Massive Disney/Fox Merger*, VOX (Mar. 20, 2019, 1:10 PM), https://www.vox.com/culture/2019/3/20/18273477/disney-fox-merger-deal-details-marvel-x-men [https://perma.cc/NE4E-YQ9X].

46. "Repertory" is a term of art in the film industry which describes the purchase of a film license for repeated showings. *See* Tom Brueggemann, *Disney Is Refusing to Let Some Theaters License Repertory Bookings of Classic Fox Films*, INDIEWIRE (Sept. 6, 2019, 9:00 AM), https://www.indiewire.com/features/general/disney-classic-fox-library-repertory-bookings-1202170485/ [https://perma.cc/7494-VPGN].

47. HOME ALONE (Twentieth Century Fox 1990).

48. ALIEN (Twentieth Century Fox 1979).

49. Brueggemann, *supra* note 46. It just so happens that most of Disney's newer films are shown initially on their subscription service Disney+ for a period of time, pressuring viewers to subscribe to watch while simultaneously undercutting home video releases. Hummel, *supra* note 32.

50. Thomas Doherty, *Why'd That Movie Disappear? Welcome to Streaming's Memory Hole Era*, HOLLYWOOD REP. (Aug. 11, 2022, 2:26 PM), https://www.hollywoodreporter.com/business/digital/whyd-that-movie-disappear-welcome-to-streamings-memory-hole-era-1235197486/ [https://perma.cc/HZJ2-YKDW]. *The Witches* and *American Pickle* were two such titles that disappeared from HBO Max. *Id.* Doherty asks whether a generation raised on the instant access and unlimited options of streaming will be in for a rude awakening when they realize that the corporations that own the films they enjoy can scrap them as they see fit. *Id.*

51. Radhamely De Leon, *Disney+ Just Deleted 'Crater,' a Brand New Sci-Fi Movie That Premiered Less Than 2 Months Ago*, DECIDER (July 5, 2023, 5:20 PM), https://decider.com/2023/07/05/disney-plus-deleted-crater/ [https://perma.cc/RU6S-GU5T].

52. *Id.*

from its platform aligned with Disney's "approach to content curation."[53] But Eliza Skinner, the head writer on the show *Earth to Ned*, thought this removal was inherently malicious.[54] Skinner had no idea her show was to be permanently removed by Disney until she received a text in the show's writer group chat.[55] According to Skinner, the writers were not receiving residual royalties from the show due to its classification as a variety series, but Skinner viewed the loss differently.[56] She viewed it as the devaluation of her art.[57] Skinner analogized the streaming library to a museum: "[i]f you go into a museum, no one says, 'People don't stop at this painting for very long anymore—let's throw it in the trash.' Or if you did, we would all have to assume, 'Well, that painting is worthless.'"[58] Furthermore, she does not own a physical copy of the show.[59]

The artists who work on these shows, and select fans who enjoy them, have made their opinions known that the removal of this content raises major concerns about media preservation and protection.[60] These concerns are not new; artists and art advocates have consistently criticized decisions to limit access to art, and some have sought legal recourse.[61] Below are two examples:

First, consider *Monty Python and the Holy Grail*.[62] In *Gilliam v. American Broadcasting Cos., Inc.*,[63] Monty Python, the group of writers and performers, and Terry Gilliam, the director of the film,

---

53. *Id.*

54. Ryan Gajewski, *Disney Creators Vent over Disappearing Film and TV Shows on Streaming*, HOLLYWOOD REP. (June 6, 2023, 9:57 AM), https://www.hollywoodreporter.com/business/digital/disney-creators-hulu-shows-disappear-remove-1235508084/ [https://perma.cc/9DFN-JP7X].

55. *Id.* More titles were removed along with *Earth to Ned* across platforms: *Everything's Trash*, *Y: The Last Man*, *Dollface*, *The Mysterious Benedict Society*, *Artemis Fowl*, *Willow*, *The Mighty Ducks: Game Changers*, *Turner & Hooch* (2021), *Cheaper by the Dozen* (2022), *Diary of a Future President*, and *Darby and the Dead*. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Kat Bailey, *Willow Ended Less Than Six Months Ago, and Now It's Leaving Disney Plus*, IGN (May 19, 2023, 12:46 PM), https://www.ign.com/articles/willow-ended-less-than-six-months-ago-and-now-its-leaving-disney-plus [https://perma.cc/WGE3-S5K8]. The fan response to disappearing content has been to upload lost episodes of their favorite shows onto Archive.org and other websites, but those efforts are "piecemeal." *Id.* Archive.org houses the Internet Archive, a 501(c)(3) non-profit, which "is building a digital library of Internet sites and other cultural artifacts in digital form." *About the Internet Archive*, INTERNET ARCHIVE, https://archive.org/about [https://perma.cc/2BNS-K62S] (last visited Aug. 13, 2024). The goal of the website is to provide universal digital access through archiving. *Id.*

61. *See, e.g.*, Daniel Grant, *Has a US Law Created to Safeguard Artists' Work Backfired?*, THE ART NEWSPAPER (Sept. 23, 2024), https://www.theartnewspaper.com/2024/09/23/has-a-us-law-created-to-safeguard-artists-work-backfired [https://perma.cc/P6DA-RLKR].

62. MONTY PYTHON AND THE HOLY GRAIL (Cinema 5 Distributing 1975).

63. 538 F.2d 14 (2d Cir. 1976).

were furious upon learning that American Broadcasting Company (ABC) edited Gilliam's cut of the film for television, removing twenty-four minutes of the ninety minute film to make time for commercials and to delete "offensive or obscene matter."[64] The United States Court of Appeals for the Second Circuit determined that ABC was not allowed to heavily edit the film for television.[65] Although this case occurred in the pre-Carlin era,[66] the court found ABC's cuts of Monty Python's work to be "actionable mutilation," reasoning that "[u]nauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright."[67]

Second, in 1999, Warner Bros. and the Motion Picture Association (MPA) censored certain shots in a sixty-five second orgy sequence in Stanley Kubrick's *Eyes Wide Shut*.[68] Critics were appalled when the film was released on DVD and video in the United States with the digital alterations.[69] Back in 1999, the Los Angeles Film Critics Association issued a statement condemning Warner Bros.' and the MPA's digital alterations of the film, decrying the MPA for being "out of control," "trampling the freedom of American filmmakers," and "creat[ing] its own zone of knee-jerk Puritanism."[70] The censorship fundamentally altered audience and critics'

64. *Id.* at 18.

65. *Id.* at 25.

66. In 1978, the Supreme Court determined that the FCC could subject a radio broadcasting company to administrative sanctions and censorship for broadcasting comedian George Carlin's "Filthy Words" monologue at 2:30 pm. FCC v. Pacifica Found., 438 U.S. 726, 729–31 (1978); *cf.* Home Box Off., Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977) (explaining First Amendment obscenity rules for cable television). In Monty Python's case, the court determined that, by 1976 standards, the removal of "hell" and "damn" from a film broadcast during ABC's 11:30 pm to 1:00 am time slot seemed inexplicable. *Gilliam*, 538 F.2d at 23 & n.8. Nevertheless, had ABC honestly concluded the film was obscene, it could have chosen to either (1) refuse to broadcast the special at all, or (2) rectify the problem with Monty Python first. *Id.*; *cf.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection.").

67. *Gilliam*, 538 F.2d at 21, 23–24.

68. EYES WIDE SHUT (Warner Bros. 1999); James Kendrick, *What Is the Criterion? The Criterion Collection as an Archive of Film as Culture*, 53 J. FILM & VIDEO, no. 2/3, 2001, at 124, 125.

69. Kendrick, *supra* note 68, at 125.

70. Bernard Weinraub, *Critics Assail Ratings Board Over 'Eyes Wide Shut,'* N.Y. TIMES, July 28, 1999, at E3.

opinion of the film.[71] To this day, Kubrick's unaltered version remains difficult to find.[72]

Both historical examples involve a party changing the artistic integrity of the film itself. But the total removal of the artistic product requires a different legal analysis. Total removal requires an examination of the laws of preservation.[73] Society has seen VHS, Laserdisc, and 8-track all come and go. Why should it care that DVD (and physical media in general) becomes obsolete? Ty Burr of the Washington Post suggests that the misconception underlying this question is:

> the belief that video on demand really does offer everything—every movie ever shot, every TV show ever produced—when the vast majority of films and series are not and have never been available at the touch of a remote and a $2.99 streaming rental. By contrast, a much larger percentage of entertainment history has made its way to various forms of physical media over the decades since VHS beat out Betamax and DVD subsequently subsumed videotape.[74]

The step into purely digital forms of media consumption is troubling because it speaks to larger socio-cultural issues about who decides what is important to art and culture. Digital media is about who sits at the steering wheel and dictates what the general viewing public gets to see.[75] Presently, it is not the general populace. The onset of digital media has, essentially, consolidated the power

---

71. New York critics stated that, because Kubrick died soon after its release, the release of EYES WIDE SHUT was "shrouded in vagueness and misinformation." *Id.*

72. There is no source suggesting that an uncensored version was ever released or discovered by viewers. Several internet message boards users have tried to find a copy to no avail. *See, e.g.*, @haineshisway, HOME THEATER F. (Dec. 5, 2020), https://www.hometheaterforum.com/community/threads/is-it-possible-to-reproduce-the-original-look-of-eyes-wide-shut-on-blu.370122/.

73. *See, e.g.*, Carl Feiss, *Our Lost Inheritance*, *in* NAT'L TR. FOR HISTORIC PRES., WITH HERITAGE SO RICH 114 (3d ed. 1999) ("[When] we discuss the losses and the jeopardies and the gains on a national basis . . . [t]here are no fixed criteria of judgment . . . . [O]ur judgment must be subjective based on the interests and affections of [all] people.").

74. Ty Burr, *Opinion, For Movie Lovers, There's a Darker Side to Netflix Ending DVD Rentals*, WASH. POST (Apr. 21, 2023, 8:21 AM), https://www.washingtonpost.com/opinions/2023/04/21/netflix-dvd-rentals-movies-forgotten-streaming/ [https://perma.cc/SVY8-J9HR]. Contrast the marketing tactics of film and television streaming services like Netflix with music streaming services like Spotify. On the one hand, Netflix acquires content and sells it via subscriptions. Ndubuisi Ekekwe, *Between Netflix and Spotify, Which One Is Better?*, TEKEDIA (July 25, 2023), https://www.tekedia.com/between-netflix-and-spotify-which-one-is-better/ [https://perma.cc/GA3P-SJSD]. On the other hand, Spotify licenses music and pays perpetual royalties to copyright owners. *Id.*

75. *See* Burr, *supra* note 74 ("[Media conglomerates] own the movies that are this country's cultural gift to the world, and they are happy to make you pay for them over and over. Or vanish them entirely.").

to control public consumption to the point where its manipulation is all but inevitable.[76] Film history is tethered to cultural history by preservation rhetoric: when a film disappears or ceases to exist, so too does the society it reflects.[77] When access restricts, entertainment choices constrict to what large corporations determine is profitable.

B. Why Only a Few People Care

Longstanding opinions about what constitutes "art," and what *deserves* to be preserved are an obstacle to preservation. At the outset, mass-produced film and television titles battle the "high art" versus "low art" distinction.[78] This controversial concept is rooted in 18th century thought regarding fine art and attempts to draw a line between art that is purely aesthetic in nature (high art) and work that is functional or for the consumption of the masses (low art).[79] Philosophers in the 18th century such as Charles Batteux thought that painting, sculpture, music, architecture, and poetry belonged in the high art distinction.[80] Low art was conceptually more difficult to group, but stemmed from the Platonian (and later, Utilitarian) notion of higher and lower pleasures.[81] The lower pleasures were categorized with physical pleasures.[82] Art created to satisfy the lower pleasures had three aims: (1) to provide function, (2) to entertain, and (3) to cause basic bodily responses.[83] As an example, humor and jokes were generally considered low art because they cause laughing and smiling—i.e., physical responses that bypass conscious reasoning.[84] Opinions of art have changed over the years, but this idea is still persistent in the art world zeitgeist.[85] The distinction exists between fine art and film, and on a more granular level, between film and television.[86]

---

76. *See id.* ("[H]ow can consumers be expected to demand movies they don't know exist?").
77. *Id.*
78. *See* Matt Plescher, *High and Low Art*, RAPIDIAN (Oct. 3, 2013, 1:10 PM), https://www.therapidian.org/high-and-low-art [https://perma.cc/45YV-4YZM].
79. *Id.*
80. *Id.*; *see also* John Fisher, *High Art Versus Low Art*, *in* ROUTLEDGE COMPANION TO AESTHETICS 473, 474 (Berys Gaut & Dominic Lopes eds., 2013).
81. Fisher, *supra* note 80, at 482.
82. *Id.*
83. *Id.* at 477.
84. *Id.* at 478.
85. *See id.* at 473.
86. *See id.* Even Fisher uses film and television as an example: "Popular [film] genres such as horror, westerns and musicals can produce examples of high art. On the low end of the scale, TV soap operas with their cliché-ridden emotions tend to be constrained to producing low art[.]" *Id.* at 478.

Consider archival film and television holdings: because budget constraints require preservationists to be selective with their choices, they find themselves ranking which art form deserves preservation and which deserves de facto destruction.[87] Even though the preservation of both is operatively the same, the archival film holdings get chosen more often because "film's longer institutional history (including its place in museums, archives and the academy) [and] its aesthetic status [contribute to its] high preservation profile [over television]."[88] The logic follows that mass produced versions of film (DVDs and Blu-rays) are derivative and hold a much lower preservation status than the film itself. The criteria for selection have been heavily tailored, and mutually reinforced, by film students who have become film scholars.[89] These film scholars, who were molded by their college teachings, defend the "film as art," but reject the "television as art" theory.[90] This rejection is due to their closeness with museum-sponsored screenings of experimental works, the art house circuit, and concepts like auteur theory, which all reinforce an elitist art perspective.[91] These film scholars (turned preservationists) unintentionally fall victim to "Historical Filtration," a process that limits access to the past because dominant social formations (e.g., dominant trends in filmmaking and film scholarship) govern archival criteria and, in doing so, marginalize other social formations judged undeserving of preservation.[92] These sentiments persist today in archiving policy, legislation, industry response, and public sentiment.[93]

C. The Present Law Is Not Assisting

Two federal laws exemplify how current legislation limits the disappearing media discourse: The United States Internal Revenue Code[94] (the Tax Code) and the Visual Artists Rights Act of 1990 (VARA).

---

87. William Uricchio, *Archives and Absences*, 7 FILM HIST. 256, 256, 259 (1995).

88. *Id.*

89. *See id.* ("Many of the people responsible for archival preservation policy . . . were intellectually shaped during the formative years of cinema studies as a university discipline.").

90. *Id.*

91. *Id.* Auteur theory, coined by film critic Andrew Sarris, is an assumption drawn by film critics that the director is the author of a film; the author is the one who "gives [a film] any distinctive quality." Andrew Sarris, *Notes on the Auteur Theory in 1962*, *in* FILM THEORY & CRITICISM 451 (Leo Braudy & Marshall Cohen eds., 2004).

92. Uricchio, *supra* note 87, at 260; *see also* Kendrick, *supra* note 68, at 134.

93. Uricchio, *supra* note 87, at 262.

94. Located at Title 26 of the United States Code, the commonly used citation abbreviation for the Internal Revenue Code (Tax Code) is I.R.C. THE BLUEBOOK: A UNIFORM SYSTEM

1. The United States Tax Code

Traditionally, Congress, the Department of Treasury, and the Internal Revenue Service (I.R.S.) have failed to carve out exceptions for special needs of the arts, creating a blind spot in the Tax Code for the visual artist.[95] Many believe that the Tax Code is in need of an audit to simplify its nearly ten thousand sections.[96] Although the Tax Code is revised incrementally, it has nonetheless "created legal and legitimate tax avoidance crevices."[97]

The current version of the Tax Code allows streaming companies like Disney to purge art from its catalog to save money via tax write-offs. Because of how Department of the Treasury Regulation Sections 1.197-2 and 1.168(k) (the amortization of intangible asset and bonus depreciation provisions) operate in conjunction with the Tax Code, companies like Disney incur billions of dollars in losses by purging streaming content.[98] The bigger the loss asserted by Disney, the larger the tax write-off it can claim.[99] When Disney or Netflix produces a film, the company creates an asset that maintains value over its "useful life."[100] The company must spread the cost of the asset through its entire useful life through a process called "amortization."[101] Typically, this process occurs over a ten-year period using the "income forecast method."[102] Now take *Crater* or *Willow*, both pulled from the streaming service within a few months of their respective debuts.[103] Disney artificially devalued both titles, making them economically worthless and reducing the value of their useful life.[104] Disney then reported an "impairment charge" to the I.R.S. when filing its taxes to reflect the write-off in each titles' value.[105] This process is enabled by the Tax Cuts and Jobs Act,[106]

OF CITATION R. 12.9.1, at 130 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). This article will use I.R.C. when citing to specific provisions of the Tax Code.

95. Fishman, *supra* note 7, at 495.

96. Sheldon H. Jacobson, *Tax Code Audit Is Long Overdue*, THE HILL (Sept. 8, 2022, 11:30 AM), https://thehill.com/opinion/finance/3633981-tax-code-audit-is-long-overdue/ [https://perma.cc/DH3S-285Q].

97. *Id.*

98. Julia Rock, *The Magical Math Behind Disney's Content Purge*, LEVER (July 25, 2023), https://www.levernews.com/the-magical-math-behind-disneys-content-purge/ [https://perma.cc/5YFB-6HGS].

99. *Id.*

100. *Id.*

101. *Id.*

102. I.R.C. § 167(g).

103. *See* De Leon, *supra* note 51.

104. Rock, *supra* note 98.

105. *Id.*

106. Budget Fiscal Year, 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The Tax Cuts and Jobs Act was a congressional revenue act designed to simplify tax filing and reform provisions of the Tax Code. *See generally id.*

(TCJA) which allows a producing company to depreciate the value of an asset up front rather than requiring amortization over time.[107] In particular, the final regulations issued by the I.R.S. to support the pro-growth reform goals of the TCJA implemented a 100% additional first-year bonus depreciation deduction that "allows businesses to write off the cost of most depreciable business assets in the year they are placed in service by the business . . . [so long as the] depreciable business assets [have] a recovery period of 20 years or less[.]"[108] The TCJA made specific amendments to the Internal Revenue Code of 1986 and included film, television, and theatrical productions as property eligible for first-year bonus depreciation.[109]

The bonus depreciable business asset provision makes sense for small businesses like restaurants that need to use cooking appliances and furniture, or farmers that need to use machinery.[110] But when applied to films produced by large production companies, the provision is manifestly abused.[111] The abuse leads to the loss of access to media by consumers, and the loss of payment in the form of residuals to artists.[112]

Section 168 of the Tax Code provides for a sunset provision to the 100% bonus depreciation for products placed in service after September 27, 2017, and onward.[113] This sunset provision will help to stymie the motives of production companies to remove content, but artists and consumers can still suffer from the law in two potential ways.

First, the provision applies to qualified property "placed in service" which, for film and television production, means "at the time of initial release or broadcast[.]"[114] Any film or television production placed in service after September 27, 2017, and before January 1, 2023, is still subject to the 100% bonus depreciation.[115] Any film or television production placed in service after December 31, 2022, and before January 1, 2024, is subject to 80% bonus depreciation.[116] The percentage continually drops until after December 31, 2025, and

107. Rock, *supra* note 98.

108. Treas. Reg. § 1.168(k)-2 (2024); *see also* Additional First Year Depreciation Deduction, 85 Fed. Reg. 71734, 71734 (Nov. 10, 2020) (codified at Treas. Reg. pt. 1).

109. Additional First Year Depreciation Deduction, 85 Fed. Reg. at 71734.

110. *What Small Business Owners Should Know About the Depreciation of Property Deduction*, IRS (Nov. 23, 2021), https://www.irs.gov/newsroom/what-small-business-owners-should-know-about-the-depreciation-of-property-deduction [https://perma.cc/5ANC-GTER].

111. *See* Rock, *supra* note 98.

112. *See id.*

113. I.R.C. § 168(k)(6).

114. *Id.* § 168(k)(2)(H).

115. *Id.* § 168(k)(6)(A)(i).

116. *Id.* § 168(k)(6)(A)(ii).

before January 1, 2027, when the depreciation is only 20%.[117] Thus, although there is a limiting provision, large production companies like Disney can still take advantage of this bonus depreciation provision for years to come.

Second, Congress can extend this legislation if it chooses. Indeed, in January of 2024, the House approved the Tax Relief for American Families and Workers Act of 2024, by a vote of 357–70, a rare bipartisan tax agreement.[118] If passed in the Senate, signed by the President, and made law, the 100% depreciation would remain in place for most qualified business property placed into service before January 1, 2026.[119] Though the extension of the TCJA's provisions has less support in the Senate, there are supporters.[120]

2. The Visual Artists Rights Act

The VARA, which protects an artist's right to the creative integrity of their visual art works, does not provide filmmakers any form of statutory relief.[121] Subsection (c)3 limits the scope of the law to "work[s] of visual art," defined in Section 101 of the Copyright Act as

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[122]

When the VARA was enacted, its drafters also amended Section 101 of the Copyright Act by adding the definition of "work of visual

---

117. *Id.* § 168(k)(6)(A)(v).

118. Kerry Lynch, *House Approves Bonus Depreciation Extension*, AIN (Feb. 1, 2024), https://www.ainonline.com/aviation-news/business-aviation/2024-02-01/house-approves-bonus-depreciation-extension [https://perma.cc/DK37-TXC3].

119. *Id.*

120. Spencer Heywood, *Lately on the Hill*, FORVIS MAZARS (May 14, 2024), https://www.forvismazars.us/forsights (search "From the Hill" in the query box; then scroll down and click "View More FORsights"; then select "From the Hill: May 14, 2024") [https://perma.cc/7MVW-FKCW].

121. 17 U.S.C. § 106A.

122. 17 U.S.C. § 101. The VARA cross-references the Copyright Act, 17 U.S.C. §§ 101–1511.

art."[123] According to the amended Section 101, "work of visual art does not include . . . motion picture[s] or other audiovisual work[s,]" nor "any merchandising item or advertising, promotional, descriptive, covering or packaging material or container[.]"[124] The scope of the legislation was purposefully narrow.[125] In 1990, before the bill was presented to the House of Representatives for approval, "the Subcommittee on Courts, Intellectual Property[,] and the Administration of Justice" added Subsection c(3) to exclude motion pictures so as to not "impede the ability of [the motion picture] industr[y] to produce and disseminate U.S. created works, or undercut America's pre-eminent copyright status both here and abroad."[126] But this Article suggests that the current media access crisis calls for a reexamination of the VARA and what it can protect.

The distortion, mutilation, modification, or destruction of a "work of visual art" is defined as a violation of an artist's right in the VARA.[127] If filmmakers were included under the VARA, they would have the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and . . . prevent any destruction of a work of recognized stature."[128] The inclusion of motion pictures and television as works of visual art would provide added protection for filmmakers against unilateral efforts by production companies to remove, alter, or devalue film and television streaming titles. Unquestionably, these laws need revision to adapt to contemporary legal issues. This Article provides a two-phase solution to assist in the revision.

III. POSSIBLE SOLUTIONS IN TWO PHASES

A. Bringing About Mindset Change Through Borrowed Rhetoric

The first step in the two-step solution proposed by this Article requires Congress and agency heads to rethink the philosophy behind the Tax Code and the VARA. To do so, this Article provides four philosophical movements from which a new philosophical framework can be built upon to better protect access for consumers

123. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 602, 104 Stat. 5128, 5128.
124. 17 U.S.C. § 101(2)(A)(i). It is clear federal legislators meant to exclude mass produced film works with the second clause. *See id.*
125. *See* 136 CONG. REC. E3716-03 (daily ed. Nov. 2, 1990) (statement of Hon. Carlos J. Moorhead).
126. *Id.* at E3717.
127. 17 U.S.C. § 106A(a)(3).
128. *Id.*

and creative rights for filmmakers. To the extent possible, these four movements are presented in chronological order.

1. Building Preservation

> Ladies, the home of Washington is in your charge; see to it that you keep it the home of Washington. Let no irreverent hand change it; no vandal hands desecrate it with the finger of progress. Those who go to the home in which he lived and died, wish to see in what he lived and died. Let one spot in this grand country of ours be saved from change. Upon you rests this duty.
>
> - Ann Pamela Cunningham, early preservation activist and founder of The Mount Vernon Ladies' Association of the Union.[129]

The preservationists interested in archiving film adapted the efforts of early architectural conservators and historic building policymakers to their cause.[130] French architect Eugene-Emmanuel Viollet-le-Duc, the architect responsible for Notre Dame's restoration, viewed restoration and preservation as a process of "reestablish[ing a structure] in a finished state . . . [putting] oneself in the place of the original architect and [trying] to imagine what he would do if he returned to Earth . . . [and proceed] as the original Master did."[131] He viewed the process as holy and although Viollet-le-Duc himself was not a Christian, he was nonetheless a believer "in the genius of the French nation."[132] His philosophy on preservation and restoration was linked with the notion that the buildings in a nation represent the nation itself, and should be protected for their cultural value.[133]

The first real attempt at historic preservation in America—George Washington's Mount Vernon—was similarly rooted in the belief that certain places are sacred and that there is patriotic value in protecting them.[134] In 1853, Louise Bird Cunningham, a family friend of the Washingtons, called Mount Vernon's disrepair "a blot

---

129. THOMAS NELSON PAGE, HISTORY AND PRESERVATION OF MOUNT VERNON, at x (Knickerbocker Press 1910).

130. FRICK, *supra* note 10, at 9.

131. *Id.* at 10.

132. Meagan Flynn, *The Story Behind the Towering Notre Dame Spire and the 30-year-old Architect Commissioned to Rebuild It*, WASH. POST (Apr. 16, 2019, 10:28 AM), https://www.washingtonpost.com/nation/2019/04/16/story-behind-towering-notre-dame-spire-year-old-architect-commissioned-build-it/ [https://perma.cc/4UEX-4F38].

133. *See id.*

134. Erika J. Pribanic-Smith, *Two Magazines and the Fight to Save Mount Vernon, 1855-1860*, 26 AM. PERIODICALS, no. 1, 2016, at 92.

on our country" and suggested the building be preserved.[135] After taking full control of the estate in 1860, the Mount Vernon Ladies' Association of the Union (MVLA) began restoring Washington's home, and to this day operates the location as a tourist attraction.[136] But the MVLA's efforts have further significance: the "[MVLA] served as a prototype for large-scale historic preservation at a time when preservation was a grassroots, amateur activity without set procedures or access to national funds."[137] Essentially, the MVLA and its efforts set the foundation for American preservation policy.

Congressional interest in historic building preservation began in 1906 with the Antiquities Act,[138] which authorized President Theodore Roosevelt to set aside national monuments on United States controlled lands.[139] Congress then passed The Historic Sites, Buildings, and Antiquities Act of 1935.[140] The Act's purpose statement provided this ideological basis: "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[141] The Historic Sites Act also created the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments.[142]

This "national policy for preservation" concept continued to be prevalent after World War II. In 1949, Congress created the National Trust for Historic Preservation in the United States (National Trust), a nonprofit corporation designed "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest[.]"[143] Following the success of previous laws, Congress created the Housing and Urban Development Act of 1965,[144] amending a prior act and authorizing the Secretary

135. *Id.* at 94.
136. *Id.*
137. *Id.*
138. Act of June 8, 1906, ch. 3060, § 2, 34 Stat. 225 (previously codified at 16 U.S.C. §§ 431–433, recodified at 54 U.S.C. §§ 320301–320303 pursuant to Pub. L. No. 113-287, 128 Stat. 3272 (2014)).
139. WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris, 603 F.2d 310, 320 (2d Cir. 1979) (finding that plaintiffs can seek attorney's fees arising from historic building preservation litigation under the National Historic Preservation Act).
140. Act of Aug. 21, 1935, ch. 593, § 1, 49 Stat. 666 (previously codified at 16 U.S.C. § 461–467, recodified and incorporated at 54 U.S.C. §§ 320101–320106 pursuant to Pub. L. No. 113-287, 128 Stat. 3272 (2014)).
141. *WATCH*, 603 F.2d at 320 (quoting 16 U.S.C. § 461).
142. *Id.*
143. *Id.* at 321. The chartering of the National Trust was reorganized into Title 54 (National Park Service and Related Programs) and is now found at 54 U.S.C. §§ 312101–312106. Public participation refers to the National Trust's power to receive donations of culturally significant sites, buildings, and objects, as well as to "accept, hold, and administer gifts of money, securities, or other property" to carry out its preservation mission. § 312102(b).
144. Pub. L. No. 89-117, § 101, 79 Stat. 451.

of Housing and Urban Development to distribute funds to any housing project to relocate "within the project area a structure which the local public agency determines to be of historic value."[145] A public body or a private nonprofit organization would then assume the project for historic renovation and maintenance.[146]

It was not until President Lyndon B. Johnson signed into law the National Historic Preservation Act of 1966 (NHPA) that the connection between cultural heritage and preservation was firmly established.[147] In 1966, the Special Committee on Historic Preservation of the United States Conference of Mayors outlined an imminent need for a national preservation program.[148] While further developing its own "national policy," Congress looked to the Special Committee's Report titled, "With Heritage So Rich," (the Report) which advocated for recognizing the value of historic preservation as an ethical duty of the country.[149] In its plea, the Special Committee stated: "[i]f the preservation movement is to be successful, it must go beyond saving bricks and mortar . . . . It must attempt to give a sense of orientation to our society using structures and objects of

145. *Id.* § 309, 79 Stat. at 477. Essentially, the provision existed to financially benefit any housing project that protected structures of historic value within the project area itself.

146. *Id.* The Housing and Urban Development Act of 1965, which amended Title I of the Housing Act of 1949 (42 U.S.C. § 1460), is now omitted from the U.S. Code because the powers and duties of the Secretary of Housing and Urban Development to make loans or grants were terminated. *See* 42 U.S.C. § 5316.

147. 54 U.S.C. §§ 100101–100102 are the current sections of the NHPA. The NHPA was amended and expanded several times. *National Historic Preservation Act*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act [https://perma.cc/M9X4-XSYR] (last visited Aug. 13, 2024). In 2014, Public Law 13-287 moved the NHPA's provisions from Title 16 to Title 54 "with minimal and non-substantive changes to the text of the [NHPA] and a re-ordering of some of its provisions." *Id.* The policy and purpose findings are still current law. But "rather than citing to the U.S. Code, when referring to the findings one may cite to: 'Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665[, 80 Stat. 915], as amended by Pub. L. No. 96-515[, 94 Stat. 2987].'" *Id.*

148. *See Historic Preservation and Community Development: Why Cities and Towns Should Look to the Past as a Key to Their Future: Hearing Before the Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform*, 109th Cong. 16 (2006) (statement by Janet Snyder Matthews, Associate Director for Cultural Resources, National Park Serv., Department of the Interior). For context, the U.S. Conference of Mayors is a non-profit organization composed of cities in the United States represented by the mayor of each city. *About the Conference*, U.S. CONF. OF MAYORS, https://www.usmayors.org/the-conference/about/ [https://perma.cc/2CE9-5SVQ] (last visited Aug. 13, 2024). In 1932, Frank Murphy, the Mayor of Detroit, invited twenty-nine mayors to Detroit to address problems caused by the Great Depression, and to call on Congress for relief. *Id.* When both the legislative and executive branches ignored the call, those mayors formalized their conference in 1933. *Id.*

149. WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris, 603 F.2d 310, 321 (2d Cir. 1979). *See generally* NAT'L TR. FOR HIST. PRES., WITH HERITAGE SO RICH (Preservation Books ed. 1999) (1966).

the past to establish values of time and place."[150] In the Report's foreword, former president of the National Trust, Richard Moe, argued that preservation is for more than just buildings; it is forming a world that "support[s], educate[s,] and enrich[es] American lives."[151]

The Special Committee was concerned with what it defined as a "memory problem," going so far as to call America a victim of amnesia.[152] According to the Special Committee, a nation "can say it is only getting rid of 'junk' in order to make room for the modern. What it often does instead, once it has lost the graphic source of its memories, is to break the perpetual partnership that makes for orderly growth in the life of a society."[153]

This nonchalant attitude, then and now, leads to Americans lacking a basic comprehension of the nation's past.[154] In the Special Committee's view, the true problem was that the solution to these memory problems required a population to be actively interested in protecting and preserving history as a form of identity.[155] With simple complacency, society creates its own holes in memory via inactivity when the "physical signs of our previous national life are removed from our midst."[156]

Richard Moe provided a modern preservation issue as an example of this memory problem: sprawl.[157] According to Moe, sprawl "devours open space, drains people and economic life out of traditional neighborhoods and business districts, and forces communities into a wasteful and fiscally irresponsible duplication of services and infrastructure in outlying areas while older neighborhoods are allowed to deteriorate."[158] This sprawl discussed by Moe, based on growing evidence, appeared to erode a sense of community in cities

150. Albert Rains et al., *Findings and Recommendations*, *in* WITH HERITAGE SO RICH 189, 193.

151. Richard Moe, *Message from the President*, *in* WITH HERITAGE SO RICH 6, 7.

152. Sidney Hyman, *Empire for Liberty*, *in* WITH HERITAGE SO RICH 23, 23. The problem could also be analogized to senility, where indifference to the loss of memory breeds further memory loss, and the cycle repeats until the brain becomes dull. In actively preserving heritage (buildings, monuments, and landmarks), humans preserve the memory of culture.

153. *Id.* Sidney Hyman, the author of this particular section of the Report, was drawing on history (President Thomas Jefferson's election) and philosophy (Plato, Montesquieu, and Smith) to describe America's nation building and how it framed its republic. *Id.* at 24.

154. Albert Rains & Laurance G. Henderson, *Preface* to WITH HERITAGE SO RICH 19, 19.

155. *Id.*

156. *Id.*

157. *See* Moe, *supra* note 151, at 8.

158. *Id.* The metaphysical similarities between the concept of sprawl and the proliferation of streaming are jarring: both are caused by unrestricted growth without concern for the consequences, both are fiscally irresponsible, and both are ultimately unsustainable.

where it occurred—the sense of community that tied America's united heritage together.[159]

The ethos of the Report undergirds the policy and purpose section that Congress fed into the NHPA:

> (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development *in order to give a sense of orientation to the American people*;
> (3) historic properties significant to the *Nation's heritage are being lost or substantially altered*, often inadvertently, with increasing frequency;
> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans [. . .].[160]

The NHPA enforced these policies via Section 106, which requires federal agencies to review the projects they carry out, approve, or fund on historic properties.[161] Specifically, federal agencies must provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on projects prior to an agency action that affects a site included or eligible for inclusion in the National Register.[162] "Agency action" occurs when the agency engages in an "undertaking."[163]

Despite the NHPA failing to define the term, the Advisory Council on Historic Preservation's regulations define "undertaking" and further set out the statutory responsibilities of agencies under the Act.[164] According to the Advisory Council on Historic Preservation, "undertaking" means "any [agency] project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of

159. *Id.*
160. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966), as amended by Pub. L. No. 96-515, 94 Stat. 2987 (1980) (emphasis added). *See* sources cited *supra* note 147.
161. JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW 4 (Preservation Books 2004) (1997).
162. *Id.*
163. *Id.* at 4, 44.
164. *See generally* 36 C.F.R. §§ 800.1–800.16 (2024).

potential effects."[165] The federal agency's project must be under its jurisdiction, direct or indirect, or else licensed by a federal agency.[166] The definition includes both new and continuing projects.[167] The ultimate goal of these review procedures is to protect cultural heritage by identifying potentially affected historic properties, assessing the effects of any undertakings, and mitigating any adverse effects on the identified historic properties.[168]

The key takeaway from Congress' early dabbling with building preservation is its willingness to accept that objects and places are worthy of preservation regardless of their status or level of hierarchical importance. Furthermore, Congress gave the Advisory Council prefatory review and comment on projects that affect those objects or places worthy of preservation. Reasonable opportunity for comment by a trusted expert is mirrored in early film preservation practice, as seen below in the Library of Congress' adoption of curator expertise, and Congress' adoption of filmmaker testimony in bill drafting.

2. Early Film Preservation and Colorization

> Since the cobbler's children are always the worst shod, it is natural enough that Hollywood should be almost the last place in the world where the films of the past are esteemed seriously.
>
> - Iris Barry, first curator of the Film Library of the Museum of Modern Art.[169]

Early attempts at film preservation directly utilized the rhetoric found in both American and European historic preservation policy. The influence came from initial failed legal attempts to create an American equivalent to England's Public Record Office.[170] The idea

---

165. McMillan Park Comm. v. Nat'l Capital Plan. Comm'n, 968 F.2d 1283, 1285 (D.C. Cir. 1992) (quoting 36 C.F.R. § 800.16(y)).

166. *Id.*

167. *Id.*

168. *See id.*; *see also* § 800.1(a).

169. Iris Barry, *Why Wait for Posterity?*, HOLLYWOOD Q., Jan. 1946, at 131.

170. Donald R. McCoy, *The Struggle to Establish a National Archives in the United States*, *in* GUARDIAN OF HERITAGE: ESSAYS ON THE HISTORY OF THE NATIONAL ARCHIVES 1, 6 (Timothy Walch ed., Nat'l Archives & Recs. Admin. 1985). The English Public Record Office is now called The National Archives. Public Records were originally records kept by the monarch's administrative servants. Vanessa Carr, *A History of the Public Record Office*, NAT'L ARCHIVES (Oct. 8, 2010), https://media.nationalarchives.gov.uk/index.php/a-history-of-the-public-records-office/ [https://perma.cc/R6WN-C4X9]. Because the monarch was itinerant, the documents were carried around with his personal belongings and jewels in chests. *Id.* As government in England developed, record-making administration was divided: the Exchequer dealt with finance; the Chancery dealt with general administration; and the Courts of

was first broached by neither an academic nor an official in politics, as might be expected.[171] Instead, it was a printer and genealogist from Massachusetts named Lothrop Withington.[172] Withington drafted a bill to create an American Public Record Office and persuaded Senator Henry Cabot Lodge (R-MA) to introduce the bill in the Senate in 1906.[173] The bill never reached the floor, but if it had, it would have created a Board of Record Commissioners that would have had legal custody of old federal records and oversight of the records in an appropriately designed national archive building.[174] From 1907 through the 1930s, Congress continued debating iterations of the bill, each one making explicit mention of European archive models.[175] Thus, the film preservation movement owes its genesis to both American and European policy. As debates continued over the creation of a National Archives, the motion picture gained massive popularity.[176] With the popularization of the motion picture, both politicians and producers exploited the technology as a means of creating a federal agency to facilitate records collection.[177]

The first attempt[178] at incorporating film protection into federal preservation policy came on February 24, 1921 when Senator James D. Phelan (D-CA) presented a bill to Congress for "the creation of an American film collection that aspired to preserve noteworthy motion-picture films . . . if . . . a motion-picture film so registered records a historical or otherwise noteworthy event."[179] The bill was referred to the Committee on Education and Labor and

---

Common Law dealt with legal administration. *Id.* By 1782, when the country's "State Paper Office" was divided into a Home and Foreign Office, these three medieval recording systems disappeared in favor of the modern departmental government system. *Id.*

171. McCoy, *supra* note 170, at 6.

172. *Id.*

173. *Id.*

174. *Id.*

175. FRICK, *supra* note 10, at 33.

176. *Id.*

177. *Id.*

178. The only mention of film prior to 1921 was the 1912 Townsend Amendment to the Copyright Act of 1909, which created "Class L" for motion picture copyright protection of works and "Class M" for newsreels and other material. Wendi A. Maloney, *1912 Amendment Adds Movies to Copyright Law*, COPYRIGHT (Mar. 2012), https://www.copyright.gov/history/lore/pdfs/201203%20CLore_March2012.pdf [https://perma.cc/TF6U-U5S4]. A House of Representatives Report from two months before the amendment took effect stated that motion picture production had become so vast, the money invested so great, and the property rights so valuable that copyright law required amendment to give motion pictures distinct and definite recognition and protection. *See id.*; *see also* H.R. REP. NO. 62-756, at 1 (1912). The critical difference between federal film protection policy and copyright protection is that the rhetoric used by the copyright proponents was inherently economic. It was likely easier for Congress to justify motion picture's acceptance into copyright than into preservation law because the United States would not profit economically from preservation policy. *See id.*

179. FRICK, *supra* note 10, at 29 (internal quotation omitted).

killed with minimal discussion.[180] In the same year, film industry leaders overhauled their original trade association, renaming it the Motion Picture Producers and Distributors of America (MPPDA), and installed Postmaster General Will Hays as the association's president.[181] Hays' approach during the early tenure of his presidency allowed MPPDA members to pursue profits and market "salacious content," leading to calls from religious institutions for reprimand.[182] This approach put the film industry in the ironic crosshairs of Congress, where debates occurred over federal regulation of contemporary films as well as the merits of a federal preservation plan for historical films and the potential creation of a national archive.[183] President Roosevelt signed the National Archive Act into law in 1934, which established a National Archives of the United States Government.[184] Indeed, after Representative Sol Bloom (D-NY) introduced H.R. 8910 in 1934, which would have restricted a film's entry into the National Archives to films "illustrative of the United States Government[,]" Hays and the MPPDA successfully lobbied a new version that ensured any films "illustrative of historical activities of the United States" were to be accepted into the National Archive.[185]

The Library of Congress, an agency of the legislative branch, is tasked with preserving and providing access to millions of books, films and video, audio recordings, photographs, newspapers, maps and manuscripts; maintaining the United States Copyright Office;

180. *Id.*

181. *Id.* at 30.

182. *Id.* In reality, the content was not salacious. Rather, social reformers claiming that Hollywood lived in an "era of scandal" began questioning Hollywood's morals. Chris Yogerst, *100 Years Ago: How Hollywood's Early Self-Censorship Battles Shaped the MPA*, HOLLYWOOD REP. (Sept. 2, 2022, 9:15 AM), https://www.hollywoodreporter.com/business/business-news/100-years-ago-how-hollywoods-early-self-censorship-battles-shaped-the-mpa-1235210771/ [https://perma.cc/N5ZU-SW9F]. Three major scandals occurred. First, in 1920, "America's Sweetheart" Mary Pickford obtained a divorce from her husband and the gossip mills reported that Douglas Fairbanks was "waiting in the wings" for her. *Id.* She was subsequently accused of breaking up Fairbanks's marriage. *Id.* Second, silent comedian Roscoe "Fatty" Arbuckle was charged with manslaughter related to the death of 25-year-old actress Virginia Rappe. *Id.*; *see also* Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN MAG. (Nov. 8, 2011), https://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/ [https://perma.cc/92EJ-BECD]. Third, Wallace Reid, who later died from influenza exacerbated by opiate withdrawal, had a debilitating addiction which was the subject of newspaper scandal. Jon Ponder, *An All-American Tragedy*, W. HOLLYWOOD HIST. (Dec. 17, 2020), https://www.westhollywoodhistory.org/an-all-american-tragedy/ [https://perma.cc/SBR6-V9WQ]. The scandals, as well as others, caused Hays to self-regulate and enforce a "Production Code" on the industry. Yogerst, *supra*.

183. FRICK, *supra* note 10, at 30.

184. Act of June 19, 1934, ch. 668, Pub. L. No. 73-432, 48 Stat. 1122. The statutory authority for the National Archives and Records Administration is now found at 44 U.S.C. §§ 2101–2120.

185. FRICK, *supra* note 10, at 34.

and acting as the main research arm of the United States Congress.[186] Although the National Archives incorporated film in the 1930s, it took another eight years before the Library of Congress began formally changing its preservation criteria practices to include films.[187] In 1942, Archibald MacLeish, the ninth Librarian of Congress,[188] "recognizing the importance of motion pictures and the need to preserve them as a historical record," began to collect film copyrights, gift donations, and missing records from 1912 to 1942.[189] MacLeish introduced a Library policy under which the Museum of Modern Art Film Department would counsel the Library on which films it should retain.[190] The Motion Picture, Broadcasting & Recorded Sound Division of the Library of Congress still maintains some of these practices today.[191]

A real preservation framework began to form for film when, in the 1980s and 1990s, filmmakers and production companies locked horns over the merits of colorizing black and white films.[192] The film industry itself was constantly in pursuit of emerging technologies and potential profits.[193] Thus, the industry's mindset toward preservation was narrow. Iris Barry, the first curator of the film department of the Museum of Modern Art in New York City, gave three reasons for the industry's mindset:

> First, [preservation] could not possibly be profitable. Second, the problem of selection [of films to be preserved] might be an

---

186. *About the Library*, LIBR. OF CONG., https://www.loc.gov/about/ [https://perma.cc/VUS8-L5WA] (last visited Aug. 13, 2024).

187. *Motion Pictures in the Library of Congress*, LIBR. OF CONG. (Sept. 12, 2022), https://www.loc.gov/rr/mopic/mpcoll.html [https://perma.cc/GYR8-ZCZR] [hereinafter *Motion Pictures*].

188. *Archibald MacLeish (1892-1982)*, LIBR. OF CONG., https://www.loc.gov/item/n80015459/archibald-macleish-1892-1982-2/ [https://perma.cc/8QJT-G3ZS] (last visited Aug. 13, 2024). MacLeish was chosen and nominated by President Roosevelt in 1939 after hearing from Supreme Court Justice Felix Frankfurter that he was a good choice: "only a scholarly man of letters can make a great national library a general place of habitation for scholars." *Id.*

189. *See Motion Pictures*, *supra* note 187.

190. *Television Preservation in the Library of Congress*, LIBR. OF CONG., https://www.loc.gov/static/programs/national-film-preservation-board/documents/tvlc.pdf [https://perma.cc/M5LT-524J] (last visited Aug. 13, 2024).

191. *See Motion Pictures*, *supra* note 187.

192. Penny Pagano, *Colorization Gets a Senate Hearing*, L.A. TIMES (May 13, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-05-13-ca-4198-story.html [https://perma.cc/57RP-Y9YH].

193. *See* Leslie Bennetts, *'Colorizing' Film Classics: A Boon or a Bane?*, N.Y. TIMES, Aug. 5, 1986, at A1, C14. Indeed, Earl Glick, the then-chairman of Hal Roach Studios, a Los Angeles company that possessed black-and-white feature films, stated that "[p]eople who buy the movies for distribution and sale—television stations, networks, cable television and so on—always classify the black-and-white movie as a lesser picture, and therefore don't pay as much as they would pay for a color picture[.]" *Id.*

> embarrassing one. [Third] . . . an undertaking would run counter to the main impulse of the film community. The men who finance and produce motion pictures, as well as the men and women who make them, are inevitably and primarily concerned, not with history or the films of the past, but with the films they are planning for tomorrow or making today.[194]

At the time, colorization was the popular emerging technology.[195] On the one hand, supporters argued that colorization provided a renewed interest in older films among the viewing public.[196] On the other hand, filmmakers argued that the colorization process "mutilate[d]" the artistic quality of the film.[197] Filmmakers, like Martin Scorsese, developed the Film Foundation in response and in opposition to colorization, in order to draw popular attention to preservation and to assert moral and creative rights to corporate product.[198] Moral and creative rights, according to Director Elliot Silverstein, are a list of recorded acknowledgements that filmmakers are artists.[199] As such, filmmakers have rights, not privileges, to be involved in an essential way with all aspects of filmmaking and to express a devotion to the filmmaking work.[200] Film guilds further contended that colorization was "an aesthetic affront to—and outright violation of—the integrity and moral rights of motion picture artisans."[201]

Taking it a step beyond moral and creative rights, Silverstein, in his Senate hearing speech, stated that colorization "represents the mutilation of history . . . not merely as it relates to film, but as it affects society's perception of itself."[202] Silverstein called

---

194. Barry, *supra* note 169, at 131.

195. *See* Bennetts, *supra* note 193, at A1, C14.

196. Dan Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM. & ENT. L.J. 391, 391 (1989).

197. *Id.* Director Frank Capra, in a 1984 letter to the Library of Congress, had this to say: "I beseech you with all my heart and mind not to tamper with a classic in any form of the arts. Leave them alone. They are classics because they are superior. Do not help the quick-money makers who have delusions about taking possession of classics by smearing them with paint." *See* Bennetts, *supra* note 193, at A1, C14.

198. FRICK, *supra* note 10, at 4.

199. *Legal Issues that Arise when Color is Added to Films Originally Produced, Sold, and Distributed in Black and White: Hearing Before the Subcomm. on Tech. and the L. of the S. Comm. on the Judiciary*, 100th Cong. 3 (1987) [hereinafter *Colorization Hearing*] (statement of Elliot Silverstein) (located in video form at https://www.c-span.org/video/?56772-1/colorization-black-white-movies beginning at 12:30).

200. *Id.*

201. FRICK, *supra* note 10, at 4.

202. *Colorization Hearing*, *supra* note 199, at 4. Silverstein continued: "Our artists have been formed and informed by our culture which, in most cases, gave them birth, and in all cases gave them an opportunity for the kind of free expression that led finally to the production of their work . . . ." *Id.*

colorization a re-writing of history, thereby linking the colorization issue to cultural heritage.[203] Film theorist and professor, Rob Edelman, suggested that it also harmed the viewing public, who would only see a "bastardized, vulgarized, colorized" version of film due to the inaccessibility of museums and repertory houses to the mass of filmgoers, and their dependency on television and videocassette.[204]

The rhetoric used by film preservationists during this period was directly inspired by early building and film preservation as it was steeped in conceptions of "authenticity, canonicity, and cultural heritage."[205] Indeed, the goal of Scorsese's Film Foundation was to protect and preserve the nation's cinematic heritage.[206] Media Historian Caroline Frick pointed to a particular example to show how pervasive the rhetoric had become: in 1990, when a security guard tossed a cigarette into a trash bin on the Universal Studios lot, igniting a massive fire and causing $25 million in property damage, a tourist named Maryann Zawacki wondered how someone "could take [our American heritage] so lightly."[207] The tourist viewed the property loss at Universal Studios—practically synonymous with film—as direct damage to the nation's heritage and history, similar to the demolition of a building.[208] Some moral and creative rights supporters likened colorization to building preservation by drawing the comparison that old buildings, and even entire neighborhoods, are given landmark status and safeguarded from physical alteration.[209] Thus, old films, like old buildings, do not need to be modernized because it takes away from their truth value.[210]

In the context of the colorization debates, Congress focused on two goals: (1) the law must keep pace with emerging technologies, and (2) the law must protect cultural heritage.[211] As a result of the

---

203. *Id.*

204. Rob Edelman, *Homevideo*, 15 CINÉASTE, no. 2, 1986, at 57. Edelman, who passed in 2019, was a professor at the University of Albany. Ian Pickus, *WAMC Remembers Longtime Film Commentator Rob Edelman*, WAMC (May 23, 2019, 7:46 PM), https://www.wamc.org/wamc-news/2019-05-23/wamc-remembers-longtime-film-commentator-rob-edelman [https://perma.cc/L7LS-EYY8].

205. FRICK, *supra* note 10, at 4.

206. *Id.*

207. *Id.* at 3.

208. *See id.*

209. Edelman, *supra* note 204, at 57.

210. *Id.*

211. *See Colorization Hearing*, *supra* note 199, at 1–2 ("The technology used in colorizing black-and-white films points out the need for Congress to stay ahead of the curve and begin to look at our laws with imagination equal to that of the inventors of technological innovation.") (opening statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on Tech. and the L.). Senator Leahy further stated that the subcommittee planned to explore how colorization affected the law, as well as the "artistic integrity and the preservation of a major part of our national cultural heritage." *Id.* at 2.

public debates and testimony provided during congressional hearings, Congress enacted the National Film Preservation Act of 1988, the organic statute that established both the National Film Preservation Board (NFPB) and the National Film Registry.[212] Some saw the advisory board's creation as a success, though others viewed it as a futile victory because the advisory board and the substantive provisions of the law did not function to limit colorization.[213]

3. Art Law / Cultural Property

This section explores film preservation through a different lens: art law, a legal field with early roots, and cultural property law, an area that began expanding after the second World War.[214]

Art law is multi-disciplinary and developed out of early civil disputes implicating commercial, contract, and tort law.[215] But judicial reluctance to define art has led to the existence of very few art law cases, and even fewer appeals to high courts. Those accepted for review by the United States Supreme Court are primarily chosen to sort out the administrative functions surrounding art: i.e., "how historic artifacts are managed, how art is created and funded, and to what extent art can be censored."[216] Many of the early case examples relate to the statutory interpretation of customs duties. In *Tutton v. Viti*, the Supreme Court found that, under Revised Statute section 2504, Schedule M, reproductions of marble sculptures imported into the United States were considered high art with the

212. Renberg, *supra* note 196, at 392. Designed as an advisory body of the Library of Congress, the NFPB works with members of the Motion Picture, Broadcasting and Recorded Sound Division as well as the National and International Outreach Service to recommend films to the Librarian for inclusion in the National Film Registry, and to advise the Librarian on current developments and research in the film preservation world for potential implementation in the National Film Preservation Plan. Susan Oxtoby, *A Decentralized Model: The United States of America (Politics and the Road to Preserving a National Heritage)*, J. FILM PRES., April 2017, at 11–12; *About This Program*, LIBR. OF CONG., https://www.loc.gov/programs/national-film-preservation-board/about-this-program/ (last visited Aug. 13, 2024) (discussing the National Film Preservation Board program). The National Film Registry is "a list of films deemed 'culturally, historically or aesthetically significant' that are recommended for preservation by . . . motion picture studios, the Library of Congress and other archives, or filmmakers." *Frequently Asked Questions*, LIBR. OF CONG., https://www.loc.gov/programs/national-film-preservation-board/film-registry/frequently-asked-questions/ [https://perma.cc/76BD-4LG2] (last visited Aug. 13, 2024). Every December, the Librarian announces twenty-five new films for inclusion into the Registry. *Id.*

213. Renberg, *supra* note 196, at 392.

214. *See* Fishman, *supra* note 7, at 483–84.

215. Christine Steiner & Bee-Seon Keum, *Art Law: Looking Back, Looking Forward*, 20 CHAPMAN L. REV. 119, 120 (2017).

216. Talia Berniker & Sabrina Soffer, *Art Law in the Supreme Court*, CTR. FOR ART L. (Dec. 29, 2020), https://itsartlaw.org/2020/12/29/art-law-in-the-supreme-court/ [https://perma.cc/F959-GVVD]. The Supreme Court has classified works of art only to the extent that the legal classification affected a work's taxation, copyright, or protection status. *Id.*

same regard as originals for tax purposes because the artistic skill it takes to create both was the same.[217] Finding no difference in skill, the Supreme Court thus established a precedent that examines craftsmanship rather than artistic rendering to measure whether a manufacture is, in fact, a statue subject to lower customs taxing.[218]

The United States Customs Court[219] took further steps to define art within the meaning of statutory law when it recognized that the statutory definition of art in the Tariff Act of 1922 required reinterpretation to keep up with the ever-changing art world.[220] In *Brancusi v. United States*,[221] the Customs Court recognized that "standards relating to works of art must include special criteria which reflect the unique nature of the subject matter."[222] The term "art" was defined strictly by the Tariff Act, covering original paintings, sketches, etchings, and sculptures.[223] Under the 1916 Customs Court decision in *United States v. Olivotti*, sculpture, as defined by the Tariff Act, had to be representational to be art.[224] Thus, under existing statutory interpretation precedent, sculptures needed to be made by professionals, and resemble the human or animal figure.[225] Brancusi's "Bird in Space" was invoiced as a bronze bird entitled to entry free of duty as a work of art, yet it had no head, feet, or feathers to identify the work as resembling a bird.[226] The Collector of Customs instead assessed the piece a 40% tax, calling it a "manufacture of metal."[227] In resolving *Brancusi*, the Customs Court rejected the *Olivetti* interpretation and instead considered the contemporary new school of art, modernism, concluding:

---

217. 108 U.S. 312, 313–14 (1883). The Supreme Court also provided a new definition for artists of these reproductions: "statues were made by men not really professional sculptors, though calling themselves such[.]" *Id.* at 314. "Rev. St. § 2504, Schedule M" refers to Section 2504, Schedule M of the Revised Statutes of the United States, which was a section of the "first codification of federal statutes approved by Congress [the predecessor to the U.S. Code]." Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBR. OF CONG. BLOGS (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/4AHE-S9SA].

218. Berniker & Soffer, *supra* note 216.

219. The United States Customs Court, established in 1926, was an independent Article I court that resolved international trade disputes and importations. *About the Court*, U.S. CT. INT'L TRADE, https://www.cit.uscourts.gov/about-court [https://perma.cc/ZU99-7VHT] (last visited Aug. 13, 2024).

220. Fishman, *supra* note 7, at 484.

221. T.D. 43063, 54 Treas. Dec. 428, 1928 Cust. Ct. LEXIS 3 (1928).

222. Fishman, *supra* note 7, at 485.

223. *Brancusi*, 1928 Cust. Ct. LEXIS 3, at *2.

224. T.D. 36309, 30 Treas. Dec. 586, 7 Ct. Cust. App. 46, 49 (1916).

225. *Brancusi*, 1928 Cust. Ct. LEXIS 3, at *7.

226. *Id.* at *4.

227. *Id.* at *1.

> [Bird in Space] is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental, and as we hold under the evidence . . . it is the original production of a professional sculptor and is in fact a piece of sculpture and a work of art . . .[228]

The Custom Court's recognition that definitions of art need to keep pace with the art world aligns with the previous example of Congress' recognition that the law needs to keep pace with ever-changing ideas.[229] Congress was spurred by colorization while the Customs Court was spurred by new schools of artistic thought.

The development of art law expanded again post-World War II. After the war, many art and auction markets moved from Europe to the United States, causing an economic value shift.[230] Abstract expressionism, pop art, and other visual arts movements arose simultaneously, and New York's image as the center of the art world inspired greater interest in the arts as well as increased art coverage in publication and television.[231] Corporate interest in modern art and architecture cemented this value shift into the American mainstream via the construction of museums and galleries in the two decades following World War II.[232]

This expansion period connects to physical media preservation policy in that, concomitant with growth in governmental and corporate interest, art collection became possible for the masses, thus growing consumer interest.[233] The middle class "was encouraged [to collect] by the creation of new collecting art forms such as prints, posters, and photographs."[234] American artists grew in popularity for producing consumer art goods, not just art to be hung in a museum.[235] Human psychology and sociology best explain this

228. *Id.* at *8. On a conceptual level, Modernism is "a willingness to double down on the category of art itself, to question it, to interrogate it . . . . Modernism is a willingness to experiment, to take things to extremes, to push the boundaries, to break existing rules and protocols." Jane Carroll, *Defining Modern Art*, OMNIA, Fall/Winter 2021, at 12.

229. Fishman, *supra* note 7, at 485.

230. *Id.* at 482.

231. *Id.*

232. *Id.* For example, the Museum of Contemporary Art Chicago was established in 1967 and hosts one of the largest catalogs of contemporary art in the world. *About*, MCA CHI., https://mcachicago.org/about [https://perma.cc/M7WW-SEP9] (last visited Aug. 13, 2024). Other museums grew. For instance, the Los Angeles Museum of History, Science, and Art, established in 1910, split into two campuses in 1961, and the Los Angeles County Museum of Art "became a separate, art-focused institution." *About LACMA*, LACMA, https://www.lacma.org/about [https://perma.cc/TZ4B-G4PN] (last visited Aug. 13, 2024).

233. Fishman, *supra* note 7, at 482.

234. *Id.*

235. *Id.* at 484.

phenomenon. As an earlier example, the industrial revolution, a massive economic shift, "led to the emergence of a consumer class that sought goods previously unavailable to them," pointing to a natural human disposition to collect after important influencing forces.[236] Andrew Dillon, a professor who specializes in psychology and human behavior in information science, argues that collecting is fundamental to human existence.[237] Collections function as both learning repositories and wellsprings for emotional comfort, but regardless of collection type, formality, or purpose, the collecting process offers "both material and emotional value" to individuals and communities.[238]

Statutes and regulations post-World War II did not protect the artist or the collecting public in the same ways that companies or the government itself were protected.[239] In the 1970s, the spread of mass reproduction techniques made it easier for the collecting public and young artists to be defrauded.[240] Accordingly, several states altered property laws related to the reproduction of works of fine art.[241] These statutes "aim[ed] to increase the information given to and understood by purchasers of fine arts[]" to provide better protection for the collector or artist.[242] For example, as interest grew in art collection, New York legislators met to reinterpret the state's deficient consignment law.[243] The New York legislature replaced the state's use of the Uniform Commercial Code with N.Y. Gen. Bus. Law art. 12-C to provide protections to sales on consignment between an artist and a dealer.[244]

"Cultural property," as opposed to art law, is more difficult to define.[245] Art law pioneer John Henry Merryman claims that the term refers to objects that have "artistic, ethnographic, archaeological, or historical value."[246] The 1954 Hague Convention defines the term broadly, but from more of a cultural heritage perspective: "For the

236. *See, e.g.*, Andrew Dillon, *Why Do People Collect? The Psychologist's View*, ART BASEL (Jan. 3, 2024), https://www.artbasel.com/stories/survey-global-collectors-art-basel-professor-andrew-dillon-university-of-texas?lang=en [https://perma.cc/A3MM-5TQG].
237. *Id.*
238. *Id.*
239. Fishman, *supra* note 7, at 486.
240. *Id.*
241. *Id.*
242. *Id.*
243. Leslie Kaufman Akst, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 939–40 (1978).
244. *Id.* at 940.
245. Carol A. Roehrenbeck, *Repatriation of Cultural Property–Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L J. LEGAL INFO. 185, 187 (2010).
246. *Id.*

purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: [. . .] movable or immovable property of great importance to the cultural heritage of every people."[247] The Hague Convention's definition of "cultural property" aligns with Cultural Internationalism, which is the philosophy that not just nations but all people have an interest in the preservation of cultural property.[248]

This philosophy runs contrary to Cultural Nationalism, which "is the idea that cultural property should remain in its historical context in the location where the property holds the most cultural significance."[249] The Cultural Nationalism philosophy originated in countries that are victims of war, genocide, and plunder.[250] In recent years, the consensus on cultural property has shifted away from Cultural Internationalism to Cultural Nationalism, which, at its heart, advocates for the protection and repatriation of cultural property.[251] Repatriation occurs when artifacts, objects, and even people are "return[ed] again to one's native country," while restitution (repatriation on the individual level) refers to the "action of restoring or giving back something to its proper owner[.]"[252] This Article borrows the repatriation and restitution dynamic for those artists and consumers who have lost access to their works and products.

---

247. *Id.* This Convention definition is underscored by prior codes and conventions. First, the Lieber Code of 1863 (military law governing the conduct of the Union Army in the Civil War) attempted to protect cultural heritage during armed conflict. *Id.* at 194. The Lieber Code provided additional protection for art and libraries from military damage. *Id.* Second, the Hague Convention of 1907 specified obligations to protect property belonging to "institutions of religious, charitable, educational, historic and artistic character from intentional damage[.]" *Id.* Both codes recognized that some places needed additional protection that would otherwise not be provided. *Id.* These predecessor codes influenced the 1954 Hague Convention. *Id.*

248. *Id.* at 190.

249. Maya Lucyshyn, Comment, *Western Art Museums and the Legacy of Imperialism: The Successes, Shortcomings, and Future of the Art Repatriation Movement*, 36 TEMP. INT'L & COMP. L.J. 119, 139 (2021).

250. *Id.* Traditionally, plunder and theft were prioritized ways for countries to culturally enrich themselves. *Id.* On the other side of the theft, subjugated people were losing access to their valued cultural property. *Id.* This plunder mindset has existed for most of human history. For the Romans, art ranked first among spoils of war leading to their systematic plunder of works of art belonging to subjugated peoples. Roehrenbeck, *supra* note 245, at 191. In the Renaissance period, "[p]lunder for cultural enrichment became a primary purpose, and there was a renewed taste for artistic and literary treasures." *Id.* at 192.

251. *Id.* at 186.

252. *Id.* at 186–87.

4. Consumer Rights

A preservation framework that considers consumer rights along with artist rights is a necessary piece of borrowed rhetoric in the needed mindset shift this Article proposes. In a speech to the Congress, President Kennedy was the first person to explicitly define a "Consumer Bill of Rights."[253] Echoing preservation rhetoric from the colorization debates discussed above, President Kennedy recognized that, to protect the consuming public from corporate overreach, new legislation to safeguard consumer choice in the areas of food, medicine, and equipment must walk in lockstep with new technology.[254] According to President Kennedy, the four rights vital for every customer were:

> [1] The right to safety: to be protected against the marketing of goods that are hazardous to health or life. [2] The right to be informed: to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, and other practices, and to be given the facts needed to make informed choices. [3] *The right to choose*: to be assured, wherever possible, of access to a variety of products or services at competitive prices. In those industries where government regulation is substituted for competition, there should be assurance of satisfactory quality and services at fair prices. [4] *The right to be heard*: to be assured that consumer interests will receive consideration in the formulation of government policy and fair treatment in its administrative tribunals.[255]

In this speech, President Kennedy called specifically for the expansion of channel options on television receivers.[256] At the time, consumers were limited to twelve channels on their receivers, and stations that wanted to operate more channels had no "incentive to make the substantial initial investment and continuing expenditures that effective broadcasting requires."[257] Consumers were being restricted unknowingly such that their rights to choose and be heard under President Kennedy's Bill of Rights were being violated.

---

253. John F. Kennedy, 35th President of the U.S.: 1961–63, Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962) (transcript available at https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest [https://perma.cc/TGC5-U5YR]).

254. *Id.*

255. *Id.* (emphasis added).

256. *Id.*

257. *Id.*

Though never enacted as law, President Kennedy's four basic rights serve as the basis for the modern consumer rights movement.[258] Likewise, the right to choose and the right to be heard are implicated in the current streaming dilemma. The removal of physical media and the increasing restrictions on streaming act to limit a consumer's right to choose and, as an extension of that right, a consumer's access to a variety of content.[259] If left unchecked, streaming company conduct leads to a "catch and kill" practice,[260] where only the most profitable content is allowed to survive. Further, without access to content in its physical form, the content will be left out of the hands of consumers completely. The right to archive provides that access.

B. The Right to Archive Patchwork

> [T]he culture of books in the old-fashioned sense is still and will continue to be dominantly important. But in the educational influence of our democracy two new media are already competing for primacy with the printed page – the radio and the movie.
>
> - Justice Felix Frankfurter in a letter to President Franklin D. Roosevelt.[261]

The historic building preservation, film preservation, art and cultural property law, and consumer rights movements have something in common: the rhetoric used in each promotes forms of *culture*, not just forms of *art*. The rhetoric of these four movements culminates in the theoretical backbone of this Article: the right to archive. The right to archive suggests an expanded theory of

---

258. *See* Scott Cheney et al., *Consumer Awareness: Curating Information About Higher Education*, HIGHER LEARNING COMM'N (July 2023), https://download.hlcommission.org/ConsumerAwareness_2023_INF.pdf [https://perma.cc/Q375-M9W6] ("[The four basic] rights eventually became known as the Consumer Bill of Rights and have endured for more than [fifty] years.").

259. *See* Letter from Reps. Joaquin Castro, Elizabeth Warren, David N. Cicilline & Pramila Jayapal to Merrick B. Garland, Att'y Gen. & Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just. (Apr. 7, 2023), https://castro.house.gov/imo/media/doc/2023.04.07%20Letter%20to%20DOJ%20.pdf [https://perma.cc/U87A-AKXZ] (contending that the WarnerMedia/Discovery merger which caused the cancellation of $90 million Batgirl "enabled Warner Bros. Discovery (WBD) to adopt potentially anticompetitive practices that reduce consumer choice and harm workers in affected labor markets").

260. *Id.*

261. Letter from Felix Frankfurter to Franklin Delano Roosevelt, President of the U.S. (May 11, 1939) (on file with Libr. of Cong. and available at https://www.loc.gov/item/mff000014/ [https://perma.cc/BUA9-LUJY]).

preservation to include "at risk" cultural heritage: purely digital forms of media like streaming content.

A very early example of an archive, in the sense being invoked here, is the Aerarium. During the ancient Roman era, officers employed the Aerarium, located in the Temple of Saturn near the Capitoline Hill, as a physical record-keeping location.[262] Inside its walls, the Aerarium contained more than resolutions and administrative papers; administrators also stored metals, reserve funds, and insignia.[263] To the Romans, putting something into the Aerarium transmuted the quality of those physical objects into *monumenta publica*, "public records" in English.[264] The Aerarium became a potent image in the human imagination of state authority over knowledge.[265]

Media theorist Carol Steedman referred to philosopher Jacques Derrida when claiming that the institution of archives is an expression of state power.[266] Derrida further "urge[d] a distinction between actual archives (official *places* for the reception of records, with systems of storage, organization, cataloguing) and what we all too frequently reduce them to: memory, the desire for origins[.]"[267] The content that is procured and preserved in an archive is preserved for its intrinsic artistic value, which is thought to resonate for all humans.[268] The tradition of the archive was largely for authoritative utility purposes like storage, organization, and catalog.[269] However, defining the archive as a cultural touchstone supposes the system itself as an art form. It thus "functions" in two ways: a protection mechanism for art, and an artistic and cultural medium in and of itself.

Additionally, the archive as a cultural touchstone has roots in the ethical concerns of legal thought. This interpretation of the archive reflects what Professor Richard Weisberg called the "poetic method"

---

262. JUSSI PARIKKA, WHAT IS MEDIA ARCHEOLOGY? 114 (2012); *see also Aerarium Populi Romani*, UNIV. CHI., https://penelope.uchicago.edu/~grout/encyclopaedia_romana/romanforum/aerarium.html [https://perma.cc/Y32D-8MAE] (last visited Aug. 13, 2024).

263. PARIKKA, *supra* note 262, at 114.

264. *Id.*

265. *Id.* The Aerarium was also used as the primary public treasury. *See Aerarium Populi Romani*, *supra* note 262. Plutarch once asked in his Roman Questions (XLII):

> 'Why do they use the temple of Saturn as the public treasury and also as a place of storage for records of contracts?' Was it because, in the golden age of Saturn, 'there was no greed or injustice among men, but good faith and justice,' or that the god was 'the discoverer of crops and the pioneer in husbandry' and an abundant harvest allowed buying and selling and so initiated a monetary system?

Id.

266. CAROLYN STEEDMAN, DUST: THE ARCHIVE AND CULTURAL HISTORY 8 (2001).

267. *Id.* (emphasis added).

268. *See id.* at 44 (maintaining a legal archive for its intrinsic legal and procedural value).

269. *See* PARIKKA, *supra* note 262, at 113–14.

of law: the notion that form and substance are one in law.[270] Weisberg was echoing Justice Cardozo's sentiment that "[t]he strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance."[271] In this sense, well-crafted legal writing, opinions, and statutes unite form and substance. Though the law itself is often defined as an instrument for the arbitration of conflicts, it relies on a repository of administrative forms that assume a concrete shape in files and archives.[272] The law's substance and its form must harmonize. The result is an undeniable connection between law and archive; they "mutually determine each other."[273]

Applying the "poetic method" of law to the media access dilemma, the artistic value of physical media collecting becomes closely tethered to perception and the senses. Physical media collecting becomes valuable when the media fulfills its purpose as art, cultural heritage, and entertainment, and when the archive fulfills its purpose as a protective, safe repository.[274] Streaming has a digital form but lacks a physical one—a reality that speaks to its substance and also to the harms presented by its removal. Consider the early Roman judges who relied on their legal archive to remind them of past precedent.[275] People's rights hung in the balance of a proper judicial determination.[276] Without a physical archive, a judge could not properly consider law with *stare decisis* principles in mind.[277] This thought reveals societal fears about the "memory problem" caused by the loss of heritage discussed in *With Heritage So Rich*.[278] The law loses all "sense of orientation" of its own space in society,[279] thus

---

270. RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW & LITERATURE 4 (1992). Compare Marshall McLuhan's pivotal essay, "The Medium is the Message": "[t]he content of writing is speech, just as the written word is the content of print, and print is the content of the telegraph." MARSHALL MCLUHAN, *The Medium is the Message*, *in* THE EXTENSIONS OF MAN 1 (1964). Weisberg is a Professor Emeritus of Constitutional Law at Cardozo Law who helped litigate successfully on behalf of Holocaust survivors and their heirs in American federal courts. *Richard H. Weisberg*, CARDOZO L., https://cardozo.yu.edu/directory/richard-h-weisberg [https://perma.cc/C22A-PZL9] (last visited Aug. 13, 2024). He was also appointed to the Commission on the Preservation of America's Heritage Abroad by President Obama. *Id.*

271. WEISBERG, *supra* note 270, at 4 (citing then-Judge BENJAMIN N. CARDOZO, *Law and Literature*, *in* SELECTED WRITINGS 340 (1931)).

272. CORNELIA VISMANN, FILES: LAW AND MEDIA TECHNOLOGY, at xiii (Geoffrey Winthrop-Young trans., Stanford University Press 2008) (2000).

273. *Id.*

274. *See id.*; *see also* Kendrick, *supra* note 68, at 126.

275. STEEDMAN, *supra* note 266, at 44.

276. *See id.*

277. *See id.* (explaining that judges filed away their notes to "remind themselves of what they had done, as well as what the law said they couldn't do").

278. *See* Hyman, *supra* note 152, at 23; Rains et al., *supra* note 150, at 193.

279. Rains et al., *supra* note 150, at 193.

removing its form; and when the form is removed, the law's function is reduced to nothing.

Similarly, without a physical archive, a viewer could not properly enjoy the film and video art form if the art could disappear without warning. Viewers experience a disorienting fear when streaming titles that have no physical version disappear from their location on the streaming service.[280] The archive is meant to curb the eventual memory problem caused by this disappearance.[281] The logical step is to preserve streaming titles in the form of physical media. An archive in the form of physical media (DVDs, Blu-rays, etc.) is a piece of cultural property deserving of legal protection the same way an archive of film stock is a piece of cultural property deserving of legal protection. But these forms of physical media are not similarly protected.[282]

An example of non-protection is found in the Copyright Amendments Act of 1992.[283] The Copyright Amendment Act amended several sections of the United States Code, including 17 U.S.C. §§ 101, 108, 304, 408, and 409.[284] Notably, the Act amended the term "film" to mean a "'motion picture' as defined in [Section 101], except that such term does not include any work not originally fixed on film stock, such as a work fixed on videotape or laser disks[.]"[285] Notably, the definition excludes any physical form of film not on actual film stock, and it does not include other forms of media, like television or videogames.[286] The thought that a television program (or a videogame) "is 'precious,' has a 'heritage,' and is anything more than innocuous is still dealt with through barely disguised irony. However . . . television, in fact, is our cultural heritage."[287] The definition

280. *See* Doherty, *supra* note 50 (co-opting the term "memory hole," originally found in George Orwell's *1984*, for this sense of disorientation); *cf.* Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 19, 2009), https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0 [https://perma.cc/3R54-CAN7] ("In a move that angered customers and generated waves of online pique, Amazon remotely deleted some digital editions of [*1984* and *Animal Farm*] from the Kindle devices of readers who had bought them.").

281. *See* VISMANN, supra note 272, at 58 (reasoning that the archive "creat[es] a body of texts that can be addressed as a *monument* of the past").

282. *See, e.g.*, Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264.

283. *Id.*

284. *See id.*

285. *Id.* § 211, 106 Stat. at 271 (amending 2 U.S.C. § 179i, which was repealed and reauthorized pursuant to the National Film Preservation Act of 1996, Pub. L. No. 104-285, § 111, 110 Stat. 3377, 3382 and recodified at 2 U.S.C. § 179u).

286. *Id.*

287. FRICK, *supra* note 10, at 13. Consider film critic Armond White's comments from 2014: "As much as I love pop culture, I tend to be a purist about this debate. Nothing beats the big screen. Simply put: Film is a visual art form and television is merely a visual medium." Armond White, Opinion, *Film Is Art, Television Is a Medium*, N.Y. TIMES (Apr. 3, 2014), https://www.nytimes.com/roomfordebate/2014/04/03/television-tests-tinseltown/film-

inside the Copyright Amendment Act needs to be expanded to protect all emergent forms of cultural heritage against the endless march of human advancement. Dispensing with the high art versus low art distinction and related mindset allows for protections typically restricted to high art to be open to all forms of cultural heritage.[288]

For purposes of physical media preservation, the media-as-art discourse must be dispensed with in favor of a different discourse: media-as-culture.[289] Indeed, analyzing all forms of media (not just film on nitrate) as cultural heritage side-steps the high versus low, popular versus elite debates, and strengthens the "moral claims" of the would-be custodians of this media.[290] Archival policy must become sensitive to this paradigm by taking a wider view of what qualifies for preservation rather than a narrow view of what types of aesthetic norms deserve preservation.[291]

Film professor James Kendrick provided an example of a private company that can serve as a model for proper physical archive preservation: The Criterion Collection (Criterion).[292] For background, home video collectors lack effective organization to protect their rights.[293] This is primarily because collection on a personal level is completely decentralized, and a collector can tailor her collection as she sees fit. Criterion is a private company aimed at publishing classic and contemporary films in DVD and Blu-ray format from around the world in the highest technical quality.[294] Criterion attempts to include all types of film, whether it be "an auteur

---

is-art-television-is-a-medium [https://perma.cc/2FW7-Y8RB]. He divorces television from film and considers it aesthetically inferior. *See supra* notes 78–86 and accompanying text. White goes on to say:

> [Y]ounger generations should spend more time watching the classics in old-school movie houses -- checking their smart phones at the door -- where they can both focus on sweeping, fantastic vistas ('*Intolerance*,' '*Lawrence of Arabia*,' '*Last Year at Marienbad*,' '*2001: A Space Odyssey*,' '*Nashville*') and dramatic close-ups ('*The Passion of Joan of Arc*,' '*Vivre sa vie*,' '*L'Avventura*') without getting distracted by the latest text or viral video.

White *supra*.

288. *See* discussion *supra* notes 78–93.

289. Uricchio, *supra* note 87, at 259.

290. FRICK, *supra* note 10, at 15.

291. Uricchio, *supra* note 87, at 260.

292. *See* Kendrick, *supra* note 68, at 124. Kendrick is a professor at Baylor University, focusing on "film theory/aesthetics, the history of motion pictures, film genres, and media and society." James Kendrick, *About*, BAYLOR BLOGS, https://blogs.baylor.edu/james_kendrick/ [https://perma.cc/MX5L-KC5C] (last visited Aug. 13, 2024). He is also the director of undergraduate studies in the Department of Film and Digital Media. *Id.*

293. *See* Kendrick, *supra* note 68, at 124.

294. *Our Mission*, CRITERION COLLECTION, https://www.criterion.com/about [https://perma.cc/VCU2-QCDW] (last visited Aug. 13, 2024).

classic, a Hollywood blockbuster, [or] an independent B horror film."[295] From Criterion President Peter Becker's perspective, these are all cultural documents that represent concerns and trends in film history.[296] In this sense, Criterion has itself dispensed with the media-as-art concept and opted for media-as-culture as its philosophical backbone.[297]

Although Criterion makes a profit from its DVD and Blu-ray sales, its audience nonetheless believes in its mission to protect physical media heritage.[298] While corporate streaming companies "chase audiences by producing endless sequels and spinoffs, trying to wring fresh content from old ideas, Criterion has built a brand that audiences trust to lead them—even to the most obscure corners of the film universe."[299] Criterion's original vision, after all, was to provide people "access to . . . great films."[300] The company's pursuit of a surviving print of the lost original negative for *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* is a compelling example of the company's desire to provide access.[301] There was only one print struck from the film's original negative, and Criterion editor, Maria Palazzola, discovered it located in Japan.[302] To get to the United States, the print would have had to survive Japanese customs.[303] Due to strict anti-pornography laws, Japanese Customs officials would have been required to screen test the film that "would almost certainly have degraded or destroyed Kubrick's sole personal print of the film."[304] After a long battle, Criterion eventually convinced Japanese authorities to send the print undisturbed.[305] Thus, neither its status as a private company nor its roots in the decentralized world of home viewing and personal collection should detract from Criterion's model as an "ideal film archive."[306]

---

295. *FAQ*, CRITERION COLLECTION, https://www.criterion.com/faq [https://perma.cc/S3HA-RRV9] (last visited Aug. 13, 2024).

296. Kendrick, *supra* note 68, at 135. Kendrick compares the argument to sociologist I.C. Jarvie's statement that "[Film] is a major vehicle for the dissemination of [a country's] national culture." *Id.* at 136.

297. *Id.* at 126.

298. Joshua Hunt, *Sure, It Won an Oscar. But Is It Criterion?*, N.Y. TIMES, https://www.nytimes.com/2024/02/29/magazine/criterion-collection.html [https://perma.cc/WS7C-UUWN] (Mar. 18, 2024).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Kendrick, *supra* note 68, at 127. Consider James Billington's 1993 report on behalf of the Library of Congress again:

C. Prompting Action to Protect Artists and Consumers

The time has come to recognize that the filmmaker who creates content for streaming services is the artist caught in the flux of an emerging technology. The physical media collector is the modern-day version of the art-collecting public of the 1970s. Both groups should be protected in similar ways by the executive and legislative branches. The law has not walked in lockstep with the technological change. The proliferation of streaming has caused several unforeseen side effects that have limited the rights of consumers: it caused consumers to monitor the market like hawks, and it took away their ability to access previously accessible content.[307] The law must not feed into the "memory problem."[308] Thus, to protect the right to archive, this Article urges (1) the Librarian of Congress; (2) Congress; and (3) the Department of Treasury to exercise their various powers in the ways described below.

1. Librarian of Congress—Promote and Archive

The United States government holds a recognizable archival right to protect its filmic cultural heritage.[309] A primary reason for the success of previous preservation movements was the appeal to film's public functions as art, history, and cultural heritage.[310] But a similar, more decentralized consumer right to a physical archive solves the issue of the ever-expanding digital frontier. Because the Librarian of Congress is a presidentially-appointed head of an agency,[311] she can exercise her legal authority to govern the Library of Congress, and protect consumer access to streaming, in two ways of value here: (1) she can promote the archival philosophy to change the hearts and minds of lawmakers and the general public, and coordinate a cultural heritage archival plan that includes physical

> [T]o the extent that preservation is a commitment made to the future, it has further complexities. The issue has often been put this way: Can a film be considered 'preserved' if it is physically protected but held only under *private* ownership? That question has surfaced in a number of widely publicized contexts, including the 'colorization' controversy of the late 1980s [] and the concerns in 1989 and 1990 over foreign purchases of American studio film libraries.

Billington, *supra* note 6.

307. Mark A. Lemley, *Disappearing Content*, 101 B.U. L. REV. 1255, 1262 (2021).

308. *See supra* notes 152–159 and accompanying text.

309. *See, e.g.*, National Film Preservation Act of 1992, Pub. L. No. 102-307, § 202, 106 Stat. 267, 267 (stating that the policy purpose of the law is to maintain[] and preserv[e] films that are culturally, historically, or aesthetically significant").

310. FRICK, *supra* note 10, at 5.

311. *Governance*, LIBR. OF CONG., https://www.loc.gov/programs/support-the-library-of-congress/about-this-program/governance/ [https://perma.cc/9N9X-EG4P] (last visited Aug. 13, 2024).

media beyond film stock; and (2) she can select a film or television program that has been removed from a streaming service to be included in the National Film Registry.[312]

First, the National Film Preservation Act of 1992 establishes that the Librarian of Congress can generate public awareness of and support for the efforts of archivists.[313] This duty is limited in comparison to other agency heads, but the Librarian can still develop a research plan to assist archivists and to generate public awareness for physical media preservation.[314] James Billington, in establishing his second comprehensive national preservation plan for film and television, called for "comment and information from individuals and organizations about the current state of American television and video preservation, including . . . suggestions on how the Library of Congress might best assist in coordinating a cooperative preservation program."[315] Using the results of this 1996 request, Librarian Billington drafted a 1997 report on the state of American film and television preservation.[316] This report helped to design a preservation program to improve practices and coordinate participation with studios and other archives.[317] The preservation plan also called on the Library of Congress to address television and video preservation and to build a similar plan.[318] In conjunction with his powers under the National Film Preservation Act,

312. See *supra* note 212 for a discussion of the National Film Registry's function.

313. National Film Preservation Act of 1992, Pub. L. No. 102-307, §§ 201–214, 106 Stat. 267, 267–72 (repealed and reauthorized by the National Film Preservation Act of 1996, Pub. L. No. 104-285, §§ 101–114, 110 Stat. 3377, 3377–82; which was repealed and reauthorized by the National Film Preservation Act of 2005, Pub. L. No. 109-9, §§ 301–302, 119 Stat. 224, 224–26; which was repealed and reauthorized by the Library of Congress Sound Recording and Film Preservation Programs Reauthorization Act of 2008, Pub. L. No. 110-336, 122 Stat. 3727, 3727–28; which was repealed and reauthorized until 2026 by the Library of Congress Sound Recording and Film Preservation Programs Reauthorization Act of 2016, Pub. L. No. 114-217, 130 Stat. 840, 840–41).

314. *See id.* § 203, 106 Stat. at 267. Compare the Librarian of Congress's power with that of the Director of the Federal Bureau of Investigation, who can, for instance, "carry firearms, serve warrants and subpoenas issued under the authority of the United States[,] and make arrests without warrant for any offense against the United States committed in [his] presence[.]" 18 U.S.C. § 3052.

315. Request for Information and Notice of Hearing: Study of the Current State of American Television and Video Preservation, 61 Fed. Reg. 171, 172 (Jan. 3, 1996). Billington's first preservation study only considered film. *See generally* Billington, *supra* note 6.

316. James H. Billington, *A Report on the Current State of American Television and Video Preservation: Volume 1*, LIBR. OF CONG., https://www.loc.gov/static/programs/national-film-preservation-board/documents/tvstudy.pdf [https://perma.cc/5NXB-FRTB] ("This is a PDF version of the report, [originally published in October 1997,] converted from an ASCII text version. It lacks footnote text and some of the tables. For more information, please contact Steve Leggett via email at 'sleg@loc.gov'").

317. *Id.* Examples include the UCLA Film and Television Archive, Peabody Award Archive, and the American Film Institute, among others. *Id.*

318. *Id.*

Librarian Billington also used consultation powers to visit and gather information from studios and archives.[319]

The current Librarian should similarly seek comment from interested parties via the Federal Register, draft a contemporary report, and establish a new preservation plan for film and television now being provided on streaming services. The new plan should look to "media as culture" as its philosophical backbone. The last time the Library inspected the longevity of CD-R and DVD-R RW, the year was 2004.[320] The main issue it identified was the physical media's reliance on a playing machine, making its future access dependent on the availability of matching hardware and software.[321] Building upon this previous research could show the public that the Library of Congress has renewed interest in alternative forms of media preservation.

More specifically, the current Librarian should take public comment in Librarian Billington's four areas of recommendation: (1) preservation; (2) access; (3) funding; and (4) increasing public awareness.[322] Preservation and access require the Librarian to convene with professionals in the preservation industry.[323] Funding requires the Librarian to provide a report on the viability of sales tax and the gift donation process.[324] Increasing public awareness requires the Librarian to urge for an expanded Registry and to promote the creation of a documentary about the new efforts.[325] Then, the Librarian should commission a new study that also incorporates issues involving streaming.

Second, the Librarian can spur debate by selecting a film or television program that has been removed by a streaming service for inclusion into the National Film Registry. One of the twenty-five films selected could be, for instance, *Earth to Ned*. It would present a new problem for the National Film Registry in terms of preservation because *Earth to Ned* was removed from its streaming service, and even the head writer, who has called media attention to this very fact, does not have a physical version of the program.[326] The National Film Registry "seeks to ensure that a selected title either

319. *Id.*

320. *CD-R and DVD-R RW Longevity Research*, LIBR. OF CONG., https://www.loc.gov/preservation/scientists/projects/cd-r_dvd-r_rw_longevity.html [https://perma.cc/A83W-BW92] (last visited Aug. 13, 2024).

321. *Id.*

322. Billington, *supra* note 316.

323. *See infra* Appendix A (containing James Billington's overarching television study framework, modified for the current streaming media access issue).

324. *See infra* Appendix A.

325. *See infra* Appendix A.

326. *See* Gajewski, *supra* note 54.

has already been preserved or will be in the future," but ensuring the preservation of a piece of media that has been removed from viewing access likely requires working together with Disney.[327] When the annual list of twenty-five films selected for their "historical, cultural and aesthetic" value is released, it usually receives media coverage. For example, after the December 2023 release that included films like *Apollo 13*, *Home Alone*, and *Lady and the Tramp*, Turner Classic Movies hosted a television special on December 14 to screen a selection of the chosen films.[328] What happens if *Earth to Ned* is selected? The Librarian has never taken an action like this before. Perhaps the moment to do so is now.[329]

2. Congress—Amend the Tax Code

Revising the Tax Code to decrease the ability of large companies like Netflix and Disney to artificially devalue the media in their catalog provides protection for both artists and consumers. There are two options. First, Congress could eliminate the ability of production companies to receive a bonus deduction and return the deduction process to its pre-TCJA framework. Second, Congress could amend the definition of "qualified film and television productions" to exclude productions made purely for streaming so that streaming titles may not qualify for bonus depreciation, even if Congress also chooses to extend the TCJA provisions. Each of the options is further explored below.

First, Congress could repeal the bonus depreciation provisions of the TCJA, forcing production companies to resort to pre-TCJA deduction methods. As it stands, production companies can still take advantage of the bonus depreciation provisions formed by the TCJA. Prior to the passage of the TCJA, qualified film and television productions already had a way to deduct production costs via Section 181 of the Internal Revenue Code.[330] Under the "Section 181 Election," production companies could, at their choosing, elect to

327. *See Frequently Asked Questions*, *supra* note 212.

328. *25 Films Selected for Preservation in National Film Registry*, LIBR. OF CONG. (Dec. 13, 2023), https://newsroom.loc.gov/news/25-films-selected-for-preservation-in-national-film-registry/s/aa4bef48-95f6-486f-882d-110613633b1e [https://perma.cc/RMS7-ST89].

329. Of course, a major roadblock is that no film is eligible for inclusion in the National Film Registry until ten years after its first publication. 2 U.S.C. § 179m(a)(1)(B). Nevertheless, the Librarian could select a film that fits within this eligibility requirement that has similarly been removed from a streaming service.

330. *See* I.R.C. § 181.

expense the first $15 million of production costs.[331] Companies could also expense $20 million for productions in low-income communities or distressed areas.[332] These were called Production Cost Expense Limits.[333] Companies were permitted to recognize the expense as costs paid rather than recover those costs using the income forecast method.[334] The Section 181 Election expired and the TCJA's bonus depreciation rules replaced the process until its termination date was extended to December 31, 2025.[335] Congress could remove the bonus deduction provisions from the TCJA so that production companies have to rely on the Section 181 Election. In this framework, production companies could only limit their tax deductions for productions to $15 million. If production companies could limit their deduction to only $15 million, use of the artificial amortization process would decrease because it would no longer provide the same value for companies.

Second, Congress could amend the definition for "qualified film and television production."[336] Qualified film and television productions are considered qualified property "for which a deduction would have been allowable under [S]ection 181" defined by Section 181(d) and placed in service before January 1, 2027.[337] Qualified film or television production, as defined by Section 181(d), is any production (1) if the production is property described in Section 168(f)(3); (2) if 75% of the total compensation of the production is compensation performed in the United States by actors, production personnel, directors, and producers; and (3) if the production is not sexually exploitative under 18 U.S.C. § 2257.[338] For its property definition of "films and video tape," this provision cross-references Section 168.[339] Specifically, it refers to the "property to which [Section 168] does not apply."[340] The definition is broad: "*Any* motion picture film or video tape."[341] Section 181(d)'s definition also includes a

331. Shane Nix, *Entertaining Taxes Production Companies Must Carefully Navigate How Funding Is Structured and Apply Alternative Strategies to Align Production Income with Production Expense*, 42 L.A. LAW. 38, 42 (2019).
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*; *see* I.R.C. § 181(g); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 116, 134 Stat. 3051 (2020).
336. *See* I.R.C. § 181(d)(1).
337. I.R.C. § 168(k)(2)(A)(i)(IV).
338. I.R.C. § 181(d).
339. I.R.C. § 168(f)(3).
340. *Id.* § 168(f).
341. *Id.* (emphasis added).

provision indicating special rules for a television series.[342] Congress could amend Section 181(d) of the Tax Code to insert a "[s]pecial rules for streaming productions" provision. The language of this provision would (1) limit productions made purely for streaming services; (2) reduce the ability for companies to use the Tax Code to receive up-front depreciation for streaming content; and if companies wanted to use bonus depreciation, it would (3) require them to produce a permanent physical output of the content to archive.

3. Department of Treasury and I.R.S.—Provide New Guidance

Alternatively, the United States Department of Treasury and the I.R.S. could issue new interpretive guidance. Using their power to review and administer the Tax Code, the Department of Treasury and the I.R.S. could provide interpretive guidance on the definition of "qualified film and television production" to exclude purely streaming content.[343] In terms of Section 181, the Department of Treasury defines production as "any motion picture film or video tape (including digital video) production the production costs of which are subject to capitalization under section 263A, or that would be subject to capitalization if section 263A applied to the owner of the production."[344] Property under Section 263A simply refers to any real or tangible personal property produced by the taxpayer, which includes a "film, sound recording, video tape, book, or similar property."[345] Department of Treasury regulations interpreting Section 263A provide even more information on tangible personal property of film and "similar property."[346] Notably, other "similar property" is considered intellectual or creative tangible property "for which, as costs are incurred in producing the property, it is intended (or is reasonably likely) that any tangible medium in which the property is embodied will be mass distributed by the creator or any one or more third parties *in a form that is not*

342. I.R.C. § 181(d)(2)(B) ("In the case of a television series—(i) each episode of such series shall be treated as a separate production, and (ii) only the first 44 episodes of such series shall be taken into account.").

343. Milan N. Ball, *Reliance on Treasury Department and IRS Tax Guidance*, CONG. RSCH. SERV. (June 12, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11604 [https://perma.cc/FYT4-GHG7]. Indeed, the Treasury Department and the I.R.S. use a variety of forms of guidance to help taxpayers understand the Tax Code. *Id.* The guidance is split into three categories: "(i) treasury regulations, (ii) sub-regulatory guidance published in the Internal Revenue Bulletin (IRB), and (iii) unpublished sub-regulatory guidance (i.e., sub-regulatory guidance not published in the Federal Register or the IRB)." *Id.*

344. Treas. Reg. § 1.181-3(b)(1) (2024).

345. I.R.C. § 263A(b).

346. Treas. Reg. § 1.263A-2(2)(ii) (2024).

substantially altered."[347] Of course, in this sea of definitions, there is no definition of "substantial alteration." But what if the Department of Treasury decided that artificially removing streaming titles constituted substantial alteration to the property? If so, streaming companies could not use bonus depreciation or the Section 181 Election as tax avoidance crevices.

4. Congress—Amend the VARA

Congress should amend the VARA, which already serves to protect moral and creative rights for artists of works of visual art, to include filmmakers into the definition of visual artist, thereby protecting royalty collection and restitution of the physical version of digitally made content. Or at the very least, to allow filmmakers to seek relief under the VARA in the way visual artists can seek relief. Presently, relief provided by the VARA to visual artists comes in the form of actual and statutory damages.[348] Allowing filmmakers to seek relief under the Act would carry out the moral rights rhetoric of film preservationists during the colorization debates.

At present, plaintiffs in an action under the VARA must demonstrate that their work has achieved "recognized stature."[349] According to the United States Court of Appeals for the Second Circuit, "a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community."[350] The analysis requires the same "high" versus "low" art diagnosis that occurs in the art world because the relevant expert community consists of art historians, critics, curators, and various other experts.[351] Using expert testimony, as the court suggests, to decide recognized stature might cause unforeseen issues when existing laws do not protect media other than that on film stock.[352]

347. *Id.* (emphasis added).
348. Castillo v. G&M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020).
349. *Id.*
350. *Id.*
351. *Id.* It also assumes that a work must exist for a period of time so that its recognized stature can incubate. However, a film or television series that exists for the artistic community and the consuming public for six to eight weeks cannot properly incubate in quite this way. Establishing that piece of art as having "recognized stature" demonstrates the legal bifurcation of art taste. The Court of Appeals for the Second Circuit read VARA in *Castillo* so as not to exclude temporary works of art. *Id.* at 167. Even though the court was analyzing physical art (graffiti), it still developed a "minimal duration requirement" of several minutes, which protects temporary or ephemeral art. *Id.* at 168. This interpretation of VARA would benefit filmmakers who have their film or series removed, but if the decision is ever overruled, time duration would need to be written into the statutory law.
352. *Id.* at 170. To avoid these interpretive issues, this article suggests that more protective state law (specifically, Massachusetts) should be the framework to analyze VARA provisions including, but not limited to, "recognized stature." *Id.*

Congress could model an amendment to the VARA recognizing a filmmaker's creative right using existing state law. Likening this back to Eliza Skinner's situation with *Earth to Ned*, there ought to be a way for artists to stipulate both a creative right and an archival right to their work.[353] Skinner's situation is likely contractually complicated with the studio, but for all intents and purposes, her work was stolen.[354] The contractual conditions should dissolve when the producers artificially devalue this content to zero. Using repatriation rhetoric, artists and consumers should be able to bring a claim for the return of stolen property.[355] This amendment can draw from Massachusetts state law to develop its enforcement mechanism. Presently, Massachusetts is the only state with a VARA-type cause of action that includes videotapes and films.[356] The Massachusetts law prohibits any person (other than the artist) to deface, mutilate, alter, or destroy a work of fine art created by the artist.[357] Importantly, "fine art" is "any original work of visual or graphic art of any media which shall include, but not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or *video tape, film*, hologram, *or any combination thereof*, of recognized quality."[358] Though content removal could debatably fall under "alteration" or "destruction" of fine art, federal legislators could take this protection one step further and include the word "removal" to the list of prohibitions in the VARA. This inclusion would protect both the filmmaker who creates art for streaming, and the consumer who watches the work on streaming services. Borrowing Massachusetts' existing language to feed into a VARA amendment would provide statutory relief for filmmakers by including their work with other visual artist mediums.

5. Congress—Consider a Public-Private Partnership

As a final option, Congress could draft new legislation to develop a private corporation with delegated power to develop a curated archive on behalf of the United States. Congress could model the corporation's skeletal framework after Criterion. This type of legislation is not new for Congress. For example, the Rail Passenger Service Act of 1970 created the National Railroad Passenger

353. *See supra* Section II.A.
354. *See supra* Section II.A.
355. *See* Roehrenbeck, *supra* note 245, at 185–90.
356. MASS. GEN. LAWS ch. 231, § 85S (2024).
357. *Id.* § 85S(c).
358. *Id.* § 85S(b) (emphasis added).

Corporation (Amtrak).[359] In the Act itself, Amtrak was created so as not to "be an agency or establishment of the United States Government."[360] Creating a for-profit archiving company allows for a company to exist that mirrors the actions of Criterion: protecting and curating an archive while also allowing members of the consuming public to enjoy the archive if they choose to pursue it. Archiving and preserving are not highly profitable industries.[361] Like Amtrak, this for-profit archiving company could receive state and federal subsidies.[362] However, allowing a for-profit private company with a pre-set mission to re-master works and distribute the works physically while simultaneously working to preserve them could provide the fiscal stop-gap necessary to support this important work.

IV. CONCLUSION

Although streaming and other forms of digital content have permitted consumers to view film and television titles *en masse*, the irony is that they restrict just as much as they expand. Streaming media should not suffer the decaying effects of vinegar syndrome like early acetate film did. If the studios refuse to provide access to a published work, artists and consumers should be permitted to access it some other way.

Thus, preservation laws should provide the route to access content. Undoubtedly, legislators and agencies must find happy mediums, balancing the rights of sellers with those of buyers. But a basic archival and access right, one that recognizes the inherent value in physical media and the consequences of its erasure and obsolescence, is consistent with the history of American preservation law. It now becomes the charge of (1) the Librarian of Congress; (2) the Department of Treasury and the I.R.S.; and (3) Congress itself to protect the right to archive for artists and consumers. In doing so, these entities will fulfill the goals of the preservationists that came

359. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (codified as amended at 49 U.S.C. §§ 24301–24323).

360. *Id.* § 301, 84 Stat. at 1330.

361. *See, e.g.*, Kathleen D. Roe, *Why Archives?*, 79 AM. ARCHIVIST 6, 8 (2016) ("[B]ased on facts and figures, how can we make the case to a resource allocator, or a taxpayer, or, in particular, to certain members of Congress for the costs needed to keep thousands of boxes of records for decades[?]"). According to Roe, society does not put a high monetary value on archiving because the work is misunderstood and thus undervalued and unsupported. *Id.* at 7.

362. Jakob Eckstein, *How Amtrak Makes Money*, INVESTOPEDIA (Dec. 29, 2022), https://www.investopedia.com/articles/investing/072115/how-amtrak-works-makes-money.asp [https://perma.cc/TZ7R-MD28].

before them. The memory problem might never be solved, but it is the duty of these entities to mitigate the problem and stop the United States from, yet again, becoming a victim of amnesia.

APPENDIX A: BILLINGTON'S FOUR AREAS OF RECOMMENDATION UPDATED

When Librarian Billington drafted his preservation plan for television titles, he provided four recommendations/solutions. The next four paragraphs attempt to take Billington's solutions verbatim, updated with substitutions made in brackets for the present streaming dilemma. This appendix operates as a new starting point for legislators and executive agencies to frame their actions with an eye toward (1) preservation; (2) access; (3) funding; and (4) raising public awareness.

Preservation

[The program] promotes the concept of a shared responsibility for the American [media] heritage, and calls for public and corporate archives to rationalize and coordinate their preservation programs to avoid unnecessary duplication and ensure that no significant portion of this heritage (held in collections throughout the nation) is endangered. [The program] provides a working definition of video preservation as part of a total management system and proposes appropriate considerations and strategies with respect to technological obsolescence of video formats, restoration, and storage [including DVD and Blu-ray formats]. [The program] reiterates the importance of the 1993 motion picture study [and hypothetical new study] as guidance for safeguarding and preserving film and addresses specific technical issues relating to television film [and streaming media]. [The program] defines the role of film and videotape in preservation copying. [The program] recommends the establishment of a Video Preservation Study Center to collect bibliographic materials, manufacturers literature, and obsolete equipment[; and, if need be, create these materials for titles that have no physical version).

Access

[The program] encourages public and corporate archives to seek the advice and guidance of scholars and educators to establish appraisal standards and determine appropriate selection guidelines. [The program] urges the identification of important television programs and coverage of events each year to encourage prompt availability in a public archives. [The program] urges [streaming companies] to work closely with advisory boards and archives to halt further [removal of content]. [The program] recognizes the importance

of video art and independent video production and calls for increased efforts to stimulate their collection. [The program] urges the support of public policies that encourage the widespread dissemination of information through the Internet and other sources, and asks for a national union listing, a network of publicly shared databases, and a comprehensive catalog of American television programs by decade. [The program] suggests ways for increasing the physical availability of television materials, minimizing regional or economic barriers. [The program] urges the Library of Congress to use its current authority under the Copyright Act of 1976 for off-air taping to the fullest extent possible, and encourages other libraries and archives to establish off-air recording projects [to the extent] authorized by the Copyright Act. [The program] identifies steps to make it easier for scholars and educators to use television and video materials in their research, writing, and teaching, and calls for interested parties to intensify discussions (through conferences, informal channels and other means), regarding copyright and educational access to television, [video, and streaming] archives. Only through such dialogue can these difficult issues be fully addressed and perhaps solved.

Funding

[The program] recommends the establishment of an independent nonprofit organization in the private sector to raise funds for television [, video, and streaming] preservation, to recognize through an awards program individuals and organizations in this endeavor, and to keep television[, video, and streaming] preservation at the forefront of the national archival agenda. [The program] urges public archives to build a consensus around the principles of television [, video, and streaming] preservation and make them understandable to funding organizations, which should then be more responsive to the needs of television[, video, and streaming] archives. [The program] asks federal agencies to improve coordination of their much valued funding efforts. [Specifically, the program calls on the Office of Management and Budget (OMB), and the Office of Information and Regulatory Affairs (OIRA) to provide assistance in the coordination of funding efforts.] [The program] proposes discussions (among all affected parties) be held regarding possibility of [a new] avenue of funding: a dedicated sales tax. [The program] asks the [National Film Preservation Foundation to solicit] preservation grants [from private contributions] pursuant to the [The National Film Preservation Act of 1996]. [The program] recommends direct

public appeals for donations through appropriate archival programming. [The program] proposes the Library of Congress use off-air recordings as a possible substitute for copyright deposit copies, if such an operation could be funded by the industry. [The program also proposes the Library of Congress request, if possible, physical copies of digital content from production companies.]

Increasing Public Awareness

[The program] recommends the creation of a National Registry of television [, video, and streaming] treasures at the Library of Congress. [The program] encourages professional and industry organizations to advance the cause of preservation through awards and grants. [The program] identifies the need for a documentary about the problems of television [, video, and streaming] preservation aimed at general audiences and potential funders. [The program] urges the inclusion of video art[, independent video, streaming content, and other forms of digital media] in all public awareness campaigns.

Toxic Trains: Reviewing Federal Preemption of Tort Claims Against Railroads in Light of the East Palestine Train Derailment

*Mark W. Grasinger**

I. INTRODUCTION

At 8:55 p.m. on February 3, 2023, the small Ohio town of East Palestine, located just west of the Pennsylvania border, was irrevocably changed when a Norfolk Southern freight train derailed on the east side of the community.[1] The train included a number of

* J.D. Candidate, Thomas R. Kline School of Law of Duquesne University, 2025. Mark is an alumnus of Grove City College where he graduated *summa cum laude* with a B.A. in Political Science. He would like to thank Professor Jan M. Levine and the Executive Board of the *Duquesne Law Review* for helping to develop this Article. Mark would also like to extend thanks to his cousins, Gregory J. Grasinger and Abigail S. Groner, and his parents for their support and encouragement.

1. *East Palestine, Ohio Train Derailment Background*, U.S. ENV'T PROT. AGENCY (Apr. 13, 2023), https://www.epa.gov/east-palestine-oh-train-derailment/ background.

tanker cars that contained hazardous chemicals.[2] The derailment and subsequent fire that broke out among the derailed cars resulted in extraordinary volumes of toxic chemicals being released into the surrounding community, including over one million gallons of vinyl chloride and numerous other dangerous chemicals.[3] This environmental and public health catastrophe captivated the nation as residents fled their homes in the shadow of an ominous black plume of smoke, which rose from an intentional burn-off of chemicals designed to prevent the derailed cars from exploding.[4] In the wake of the disaster, residents of the area affected by the derailment have reported numerous health symptoms.[5] Further, toxic chemicals have been detected in the community by both university researchers and the Environmental Protection Agency (EPA).[6] While the full ramifications of the derailment and subsequent toxic contamination will likely not be fully realized and understood for years, or even decades, calls for justice against Norfolk Southern naturally have arisen among local residents and others who were affected by the derailment.[7]

In the months following the derailment, residents of East Palestine filed several lawsuits against Norfolk Southern.[8] The United States District Court for the Northern District of Ohio consolidated many of these lawsuits into a single class action lawsuit under the

---

2. *See id.*

3. *Id.*; *see also* Meghan Schiller, *Judge Appoints 4 Attorneys to Consolidate East Palestine Train Derailment Lawsuits*, CBS NEWS (Apr. 7, 2023, 7:33 PM), https://www.cbsnews.com/pittsburgh/news/attorneys-consolidate-east-palestine-ohio-train-derailment-lawsuits/.

4. Jesse Kirsch et al., *Decision to Burn Chemicals After Ohio Derailment Under Scrutiny at Hearing*, NBC NEWS (June 23, 2023, 8:10 AM), https://www.nbcnews.com/news/us-news/decision-burn-chemicals-ohio-derailment-scrutiny-hearing-rcna90728. A subsequent investigation by the NTSB has called into question the necessity of the burn-off. Chris Isidore, *Deliberate Toxic Burn Following Norfolk Southern Derailment was not Necessary, Safety Regulator Testifies*, CNN (Mar. 6, 2024, 9:00 PM), https://www.cnn.com/2024/03/06/business/norfolk-southern-derailment-controlled-burn-unecessary-ntsb/index.html.

5. Aria Bendix, *High Levels of a Hazardous Chemical Polluted the Air Weeks After the Ohio Train Derailment, an Analysis Shows*, NBC NEWS (July 12, 2023, 8:48 AM), https://www.nbcnews.com/health/health-news/ohio-train-derailment-hazardous-chemical-polluted-air-rcna93640.

6. *Id.*

7. Kelly Kennedy, *East Palestine Residents Furious Following NTSB's Report Saying Norfolk Southern Botched Train Derailment Response*, CLEVELAND 19 NEWS (June 25, 2024, 10:28 PM), https://www.cleveland19.com/2024/06/26/east-palestine-residents-furious-following-ntsbs-report-saying-norfolk-southern-botched-train-derailment-response/.

8. *See* Zack Budryk, *East Palestine Residents File Class-Action Against Norfolk Southern*, THE HILL (Feb. 24, 2023, 1:42 PM), https://thehill.com/policy/energy-environment/3872818-east-palestine-residents-file-class-action-against-norfolk-southern/; Schiller, *supra* note 3.

title, *In re East Palestine Train Derailment*.[9] The plaintiff class, composed of East Palestine residents and others who reside within the vicinity of the derailment (Plaintiffs), alleged two general bases for their claims against Norfolk Southern.[10] First, they argued that Norfolk Southern was negligent in its operation and inspection of its rail cars prior to the derailment, and that such conduct proximately caused the derailment.[11] Specifically, the Plaintiffs contended that Norfolk Southern's policy of reducing its workforce, while at the same time increasing the size of each train, negligently increased the risk of derailments.[12] The Plaintiffs further contended that the East Palestine derailment was caused by an overheated wheel bearing on a train car with known safety issues, and that, although the overheating wheel bearing was detected by three wayside detectors, the engineer of the train did not receive a warning until it was too late to prevent the derailment.[13]

Second, the Plaintiffs argued that after the derailment occurred, the decision by Norfolk Southern and public officials to burn off the chemicals to prevent an explosion was unnecessary and negligent, and that this decision ultimately resulted in the needless release of a dangerous volume of toxic chemicals into the surrounding community and environment.[14] While both issues are of great importance and involve novel and far-reaching issues of law, this Article will focus solely on the first issue and ask to what degree negligent conduct in the ordinary operation of a railroad that causes a derailment is preempted by federal law.

On June 6, 2023, Norfolk Southern filed a motion to dismiss, arguing that the Plaintiffs' claims were preempted by the Federal Railroad Safety Act (FRSA), the Interstate Commerce Commission Termination Act (ICCTA), and the Hazardous Materials Transportation Act (HMTA).[15] Arguing that "the ICCTA 'preempts all state laws that may reasonably be said to have the effect of managing or

9. Order Appointing Plaintiffs' Counsel and Consolidating Cases, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023) ECF No. 28. *See also* Schiller, *supra* note 3; Clark Mindock, *Norfolk Southern Says East Palestine Residents' Suit Barred by US Law*, REUTERS (June 5, 2023, 5:07 PM), https://www.reuters.com/legal/norfolk-southern-says-east-palestine-residents-suit-barred-by-us-law-2023-06-05/.

10. Complaint at 34–36, 44–48, 57–63, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023), ECF No. 138.

11. *Id.* at 57–63.

12. *Id.* at 19–21. The Plaintiffs alleged that Norfolk Southern reduced the number of operators on each train and the number of safety inspectors of both the trains themselves and the wayside monitors which are used to monitor overheating wheel bearings. *Id.*

13. *Id.* at 26–28.

14. *Id.* at 34–36.

15. Defendants' Motion to Dismiss at 8, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023), ECF No. 76.

governing rail transportation,'"[16] Norfolk Southern contended that the ICCTA preempted any aspect of the Plaintiffs' claims relating to train length, organization, or route.[17] Norfolk Southern further noted that under the FRSA, a claim is preempted unless the activity it relates to violates a federal regulation or the railroad's internal standards, or the activity is not "covered" by federal regulation.[18]

Norfolk Southern argued that the Plaintiffs failed to state with specificity any federal regulations that its conduct violated and failed to allege that it violated any internal standards whose adoption was mandated by federal law, which it contended are the only form of internal standards that may be considered for preemption purposes.[19] Norfolk Southern further argued that the Plaintiffs' allegations involving its failure to inspect its trains and wayside detectors, its failure to properly train its employees, and its negligent transportation of hazardous chemicals were all "covered" by regulations promulgated under the FRSA, and thus preempted.[20] Norfolk Southern concluded by asserting that the HMTA, which was passed to regulate the transportation of hazardous materials, preempted the Plaintiffs' claims that arose from their allegations relating to Norfolk Southern's routing and handling of hazardous materials, the release of such materials, and the inspection and maintenance of the container used to transport such materials.[21]

On June 30, 2023, the Plaintiffs filed a brief in opposition to Norfolk Southern's motion to dismiss, wherein they argued that the federal laws cited by Norfolk Southern did not preempt their claims because the conduct at issue fell under recognized exceptions to preemption.[22] The Plaintiffs contended that all of their claims and allegations pertained to railroad safety, and that courts analyze potential preemption of railroad safety matters under the FRSA framework only, rather than the ICCTA or the HMTA.[23] And because the ICCTA and HMTA have different preemption standards than the FRSA, their application to this case would result in

16. *Id.* at 9 (quoting Adrian & Blissfield R.R. Co. v. Vill. of Blissfield, 550 F.3d 533, 539–40 (6th Cir. 2008)).

17. *Id.* at 9–10.

18. *Id.* at 11–12.

19. *Id.* at 12–13 (citing Tipton v. CSX Transp., Inc., 2017 WL 10398182, at *21 (E.D. Tenn. Oct. 25, 2017)).

20. *Id.* at 14–18.

21. *Id.* at 20.

22. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 1–2, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023), ECF No. 103.

23. *Id.* at 16, 19 (citing CSX Transp., Inc. v. Pub. Utils. Comm. of Ohio, 901 F.2d 497 (6th Cir. 1990); Tyrrell v. Norfolk S. Ry. Co., 248 F.3d 517 (6th Cir. 2001); Island Park, LLC v. CSX Transp., Inc., 559 F.3d 96 (2d Cir. 2009)).

multiple preemption analyses for each of the Plaintiffs' claims that could reasonably be said to relate to multiple statutes.[24] This would greatly diminish the likelihood that the Plaintiffs' claims would succeed because, to avoid the dismissal of their claims, every claim would have to survive each relevant statute's preemption analysis.[25] Therefore, an important argument asserted by the Plaintiffs was that when a claim or regulation primarily relates to railroad safety, only the FRSA analysis is applicable, even if the claim also tangentially touches upon matters regulated under the ICCTA or the HMTA.[26]

The Plaintiffs further argued that their allegations were not "covered" by federal regulation because the Federal Railroad Administration (FRA) specifically acknowledged that no regulations existed involving wayside detectors, and that no regulations existed governing the detection and response to an overheating wheel bearing.[27] Thus, these aspects of the Plaintiffs' claims were not preempted under the FRSA.[28] Additionally, the Plaintiffs pointed to a number of instances in the complaint where they alleged that Norfolk Southern violated federal regulations, such as failing to properly inspect its equipment and train its employees.[29] The Plaintiffs further asserted that precise specificity regarding these allegations was not necessary to survive a motion to dismiss.[30] The Plaintiffs concluded by noting that because all of their allegations fell under an exception to the FRSA on the grounds that they were either not "covered" by a regulation or involved in a violation of a regulation, their claims were not preempted.[31]

On July 14, 2023, Norfolk Southern filed a memorandum in response to the Plaintiffs' brief opposing Norfolk Southern's motion to dismiss, and argued that the ICCTA and the HMTA did apply to the conduct at issue and thus preempted claims arising from them, and that the conduct at issue did not fall into an exception to the

24. For instance, the circuit court in both Tyrrell v. Norfolk S. Ry. Co., 248 F.3d 517 (6th Cir. 2001) and Island Park, LLC v. CXS Transp., Inc., 559 F.3d 96 (2d Cir. 2000) held that the state laws at issue were not preempted by the FRSA, and thus upheld the laws because the ICCTA was not applicable. Had the courts also analyzed the laws under the more stringent preemption standards of the ICCTA, then the laws might have been struck down, despite their compliance with FRCA preemption.

25. *See supra* note 24.

26. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 16, 19.

27. *Id.* at 9–10.

28. *Id.* at 9–11.

29. *Id.* at 10–12.

30. *Id.* at 13–15.

31. *Id.* at 1.

FRSA preemption.[32] Norfolk Southern argued that when a case invokes issues of *both* railroad operation, which is governed by the ICCTA, and railroad safety, which is governed by the FRSA, both the ICCTA and the FRSA can preempt the claim, not solely the FRSA.[33] Norfolk Southern also contended that when a claim involves both railroad safety and the transportation of hazardous materials, both the FRSA's and HMTA's preemption apply—not just the FRSA.[34] Norfolk Southern further argued that under the FRSA, the Plaintiffs' claims were "covered" by federal regulations.[35] Specifically, Norfolk Southern reasoned that wayside detectors, while themselves not specifically regulated, are a form of inspection of railcars, which is covered by federal regulations.[36] Norfolk Southern concluded by reasserting that the Plaintiffs failed to identify the regulations that it violated with sufficient specificity to survive a motion to dismiss.[37]

On March 13, 2024, the district court issued an order granting in part and denying in part Norfolk Southern's motion to dismiss.[38] In all parts relevant to the discussion in this Article, the court dismissed Norfolk Southern's arguments and held that the Plaintiffs' claims were not preempted by federal law.[39] The court found that in disputes involving railroad safety during the transportation of hazardous materials, the preemption analysis of the FRSA, not the HMTA, governed the analysis.[40] Additionally, the court found that in matters involving railroad safety, the preemption analysis of the FRSA, not the ICCTA, was to be used.[41] The court thus applied only FRSA preemption to the Plaintiffs' claims.[42] The court concluded that FRSA preemption was inapplicable to the Plaintiffs' claims because the claims, including those claims relating to the use of wayside detectors, were not "covered" by federal regulation.[43] The court also found that FRSA preemption did not apply because the Plaintiffs sufficiently pleaded that Norfolk Southern violated federal

32. Reply Memorandum in Support of Defendants' Motion to Dismiss at 1, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023), ECF No. 112.
33. *Id.* at 4.
34. *Id.* at 10.
35. *Id.* at 5–6.
36. *Id.*
37. *Id.* at 8–9.
38. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *In re* E. Palestine Train Derail., No. 23-cv-00242 (N.D. Ohio filed Feb. 7, 2023) ECF No. 428.
39. *Id.* at 16.
40. *Id.* at 13–15.
41. *Id.* at 15.
42. *Id.* at 10, 13.
43. *Id.* at 10.

regulations.[44] Shortly after the court rejected Norfolk Southern's motion to dismiss, the parties settled the lawsuit for approximately $600 million.[45]

From the foregoing filings and order, the primary issues were: (1) whether the FRSA's preemption framework is the exclusive preemption analysis in cases involving railroad safety, thus excluding preemption under the ICCTA and the HMTA in such cases; and, if so, (2) whether the conduct from which the East Palestine Plaintiffs' claims arise fit into an exception to the FRSA so that their state-law claims can survive preemption.[46] This Article investigates whether the district court ruled correctly on these two issues and explores the public policy implications of the current preemption doctrine when applied to train derailments.

This Article's examination of the issues that arose from the East Palestine litigation is not intended to be a comprehensive resolution of all the issues raised by the parties. Instead, the aim of this Article is to use the arguments and issues raised by the East Palestine litigants as a case study to demonstrate the flawed and unjust nature of the current preemption regime when applied in the context of train derailments. Even though federal preemption did not bar the Plaintiffs from recovery in this case, preemption still unjustly prevents many derailment victims from obtaining compensation for their injuries,[47] and thus reform is needed.

II. BACKGROUND

A. Tort Preemption Generally

To determine whether the district court was correct in ruling that the claims against Norfolk Southern were not preempted by federal law,[48] an understanding of the nature of preemption is necessary.

---

44. *Id.* at 12.

45. Josh Funk, *Judge Signs Off on $600 Million Ohio Train Derailment Settlement but Residents Still Have Questions*, AP NEWS (May 22, 2024, 5:46 PM), https://apnews.com/article/east-palestine-ohio-train-derailment-settlement-464c131 2b19dc075ea159ae0e7ee0b0a.

46. *See* Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 7–8, 10–16.

47. *See, e.g.*, Mehl v. Canadian Pac. Ry. Ltd., 417 F. Supp. 2d 1104, 1121 (D.N.D. 2006) (holding that the claims of victims of a train derailment were preempted by FRSA, thereby barring relief); *In re* Derail. Cases, 416 F.3d 787, 794 (8th Cir. 2005) (holding that derailment victims' negligent inspection claims were preempted by the FRSA); Norfolk So. Ry. Co. v. Shanklin, 529 U.S. 344, 360 (2000) (Ginsburg, J., dissenting) (noting that FRSA preemption's displacement of state negligence law "with no substantive federal standard of conduct to fill the void" creates an outcome that "defies common sense and sound policy").

48. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 16.

Some disagreement exists regarding the origin of the preemption power.[49] The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land," and the prevailing view is that this language itself creates Congress' power of preemption.[50] However, some have argued that the Supremacy Clause acts only as a choice of law provision that ensures the supremacy of federal law when it conflicts with state law, and the power of preemption instead arises from Congress' enumerated powers.[51] Regardless of the constitutional justification employed, "Congress certainly has the power to preempt both state common law and state statutory law through federal legislation."[52] Congress may use its preemption power to "prohibit the states from regulating in certain areas and, where the states are allowed to regulate, to assert primacy in a conflict between state and federal regulatory schemes."[53]

Courts have long recognized that not only are state statutes and regulations subject to federal preemption, but causes of action arising from state common law may also be preempted by federal law.[54] This is because a damages award resulting from a state law claim, if severe or cumulative, can have such an extreme economic impact on the defendant that the defendant is, in effect, regulated by the standard of care set forth in the state law claim.[55] This state standard of care may be higher than the federal regulatory standard of care.[56] In addition to monetary damages, state regulation also

---

49. Justin Hymes, Comment, *Railroads Running Roughshod: The Preemptive Power of the Interstate Commerce Commission Termination Act on Tort Claims*, 123 PENN ST. L. REV. 535, 540–41 (2019).

50. U.S. CONST. art. VI, cl. 2. The clause reads in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. See also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) (noting that preemption "has its roots in the Supremacy Clause").

51. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (arguing that "the Supremacy Clause itself does not authorize Congress to preempt state laws").

52. Hymes, *supra* note 49, at 541.

53. *Id.* (quoting Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913, 917 n.44 (2003)).

54. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) ("[T]he phrase 'state law' . . . include[s] common law as well as statutes and regulations.").

55. *See, e.g.*, Pace v. CSX Transp., Inc., 613 F.3d 1066, 1070 (11th Cir. 2010).

56. *See* Jack Heurter, Comment, *Exploding Trains in the Wake of the Crude-by-Rail Boom: The Distribution of Liability in Crude Train Derailments*, 2016 WIS. L. REV. 1033, 1041 n.46 (2016).

occurs in cases where injunctive relief is sought against a defendant.[57] Regardless of the remedy sought, if the activity subject to regulation arises from a state law claim that is already regulated by federal law in a manner that preempts the state law regulation, then the state law claim fails.[58]

Through the application of the preemption doctrine, courts have recognized two types of preemptive power: complete preemption and ordinary preemption.[59] Complete preemption is a doctrine that provides that "in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim."[60] Complete preemption tends to be applied only in limited circumstances,[61] and for complete preemption to be found, two requirements must be met.[62] First, the claim's subject matter must be exclusively regulated by federal law.[63] A congressional intent to completely occupy the field at issue with federal regulation will usually satisfy this requirement.[64] Second, a federal claim must exist that allows the state claim to be replaced by a substitute federal cause of action.[65] If both of these requirements are met, the court will find that the state claim has been preempted and that the plaintiff must remove his claim to federal court and use the available federal claim.[66]

In contrast, ordinary preemption generally applies when a state claim conflicts with a federal statute.[67] Unlike complete preemption that allows for removal to federal court, ordinary preemption is a complete defense to a state claim.[68] Ordinary preemption can occur in three ways.[69] First, Congress may preempt state claims through statute by expressly declaring an intent to displace state law.[70] Second, state law is preempted when Congress intends to occupy an entire field with such a comprehensive regulatory scheme that a

57. *See, e.g.*, Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 838, 842–43 (E.D. Ky. 2004) (noting that in a case where plaintiffs sought injunctive relief against a railroad, that the granting of such relief would operate as a state regulation of the railroad).
58. *Id.* at 842–43.
59. *See, e.g.*, Fayard v. Ne. Vehicle Servs., 533 F.3d 42, 45 (1st Cir. 2008).
60. *Id.*
61. *Id.*
62. *Id.* at 46.
63. *Id.*
64. Hymes, *supra* note 49, at 541.
65. *Fayard*, 533 F.3d at 46.
66. Hymes, *supra* note 49, at 542.
67. *Id.*
68. *See Fayard*, 533 F.3d at 45.
69. *See* Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007) (noting that in addition to express preemption, "[t]here are two types of implied preemption: conflict preemption and field preemption").
70. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).

reasonable person can infer that Congress "left no room" for state supplementary regulation.[71] This form of preemption is often referred to as field preemption.[72] Field preemption can also occur when the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[73] Third, when neither express nor field preemption has occurred, a state claim is preempted to the extent that it "actually conflicts" with a federal statute or regulation.[74] The United States Supreme Court explained that "[s]uch a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[75] Accordingly, this form of preemption is generally known as conflict preemption.[76]

Two principles guide courts as they consider preemption issues.[77] First, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[78] Second, courts assume "that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[79] Courts often refer to this second principle as a "presumption against preemption,"[80] which is applicable even where an express preemption provision is at issue.[81] However, the presumption against preemption is overcome if the preemptive scope of the statute is clear.[82]

Norfolk Southern argued that the claims against it were preempted by ordinary preemption.[83] Based upon the foregoing

---

71. *Id.*

72. *See* English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (referring to this form of preemption as "field pre-emption").

73. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

74. Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985).

75. *Id.* (citations omitted) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

76. *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 873 (2000) (referring to this form of preemption as "conflict pre-emption").

77. Roth v. Norfalco LLC, 651 F.3d 367, 375 (3d Cir. 2011).

78. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

79. *Id.*

80. Deweese v. Nat'l R.R. Passenger Corp., 590 F.3d 239, 246 (3d Cir. 2009) (citing Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992)).

81. *Roth*, 651 F.3d at 375.

82. *Id.*; *see also* Bruesewitz v. Wyeth Inc., 561 F.3d 233, 240 (3d Cir. 2009) ("[I]n the face of clear evidence, the presumption against preemption can be overcome.").

83. Norfolk Southern argued that the Plaintiffs' claims were preempted by the express preemption provisions of the ICCTA, the FRSA, and the HMTA. Defendants' Motion to Dismiss, *supra* note 15, at 8, 11, 19. Express preemption is a form of ordinary preemption. Hymes, *supra* note 49, at 542.

rules, had the District Court agreed with Norfolk Southern's arguments, then preemption would have served as a major bar to the ability of the East Palestine Plaintiffs to recover under state tort law.[84] However, the foregoing rules also make clear that any preemption analysis is highly dependent on the nature of the particular federal law at issue.[85] Thus, to determine whether the East Palestine Plaintiffs' claims are preempted, each federal statute that Norfolk Southern cited in its motion to dismiss must be individually examined for its preemptive effect.[86]

B. FRSA Preemption

One of the federal statutes cited by Norfolk Southern was the FRSA.[87] The FRSA was enacted by Congress in 1970 with the goal of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents."[88] The FRSA regulates railroads by directing the Secretary of Transportation (Secretary) to "prescribe regulations and issue orders for every area of railroad safety."[89] Thus, the FRSA grants the Secretary broad regulatory authority over the conduct of railroads, and imposes requirements on, among other things, railroad track standards, inspection requirements, train speeds, braking requirements, routing and operating requirements, and equipment standards.[90] The Secretary has delegated this power to the Federal Railroad Administration (FRA).[91]

The FRSA contains a preemption provision that expressly invalidates state and local laws regulating railroad safety.[92] Relying

84. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) (noting that federal law may preempt claims arising from state common law, which necessarily includes tort law).

85. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (noting that "the purpose of Congress is the ultimate touchstone in every pre-emption case" and that "Congress' intent . . . primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it").

86. Norfolk Southern argued that the Plaintiffs' claims were preempted by the FRSA, the ICCTA, and the HMTA. Defendants' Motion to Dismiss, *supra* note 15, at 8, 11, 19. The purpose of Congress is the "ultimate touchstone" in determining whether these statutes preempt the Plaintiffs' claims. *Medtronic*, 518 U.S. at 485. To discern the intent of Congress, the language and "statutory framework" of each statute must be separately analyzed. *Id.* at 485–86.

87. Defendants' Motion to Dismiss, *supra* note 15, at 8.

88. Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101).

89. 49 U.S.C. § 20103(a).

90. *See* § 20142 (relating to track standards); § 20162 (relating to inspections); § 20169 (relating to train speeds); § 20141 (relating to braking); § 20157 (relating to routing and operations); § 20133 (relating to equipment standards).

91. *See* Mich. S. R.R. Co. v. City of Kendallville, 251 F.3d 1152, 1154 (7th Cir. 2001).

92. *See* § 20106.

upon this provision, courts have regularly dismissed claims against railroads on preemption grounds.[93] However, this preemption is not absolute.[94] The FRSA provides:

> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.[95]

Courts have interpreted this provision to mean that the FRSA does not preempt all tort claims involving railroad safety because "the preemptive effect of the [FRSA] reaches only state laws 'covered' by" those regulations.[96] "Because the term 'cover' is a 'restrictive term,' preemption will not apply if the FRSA regulation in question merely 'touches upon or relates to' the subject matter of state law."[97]

---

93. *See, e.g.*, Tipton v. CSX Transp., Inc., 2017 WL 10398182, at *17 (E.D. Tenn. Oct. 15, 2017) (holding that some parts of the plaintiffs' claims against a railroad, including those relating to the railroad's failure to inspect its cars and failure to use wayside detectors, were preempted by the FRSA, but nonetheless finding that "plaintiffs' claims could proceed to the extent they did not 'attempt to impose additional duties on defendants . . . beyond those contained in the FRSA or in defendants' operating rules.'"); *In re* Derail. Cases, 416 F.3d 787, 794 (8th Cir. 2005) (holding that the plaintiffs' negligent inspection claims were preempted by the FRSA because the inspection of rail cars is covered by FRA regulations); Bradford v. Union Pac. R.R. Co., 491 F. Supp. 2d 831, 838–39 (W.D. Ark. 2007) (holding that the plaintiffs' negligent inspection claims were preempted by the FRSA, but the plaintiffs' negligent operation claims survived preemption).

94. *See, e.g.*, CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626, 628 (6th Cir. 1996) ("FRSA preempt[s] all railroad safety legislation except [1] state law governing an area in which the Secretary of Transportation has not issued a regulation or order and [2] state law more strict than federal regulations when necessary to address local problems."); 49 U.S.C. § 20106(b) (FRSA preemption does not apply to defendant's conduct which violates regulations).

95. § 20106(a)(2).

96. MD Mall Assocs., LLC v. CSX Transp., Inc., 715 F.3d 479, 489–90 (3d Cir. 2013) (quoting § 20106(a)(2)).

97. *Id.* (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

Instead, "pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law."[98] "Normal State negligence standards [thus] apply where there is no federal [regulation] covering the subject matter."[99] Therefore, if a defendant railroad's specific act of negligence is not something "covered" under FRSA, as the East Palestine Plaintiffs contended was true in their case,[100] then that claim is not preempted and may proceed. Further, the Supreme Court has held that "[e]ven after federal standards have been promulgated, the States may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards are 'not incompatible with' federal laws or regulations and not an undue burden on interstate commerce."[101]

Historically, courts applied the FRSA to preempt claims despite the defendant railroads' alleged violations of federal regulations.[102] But in 2007, Congress amended the FRSA so that it does not preempt claims that arise from a defendant's violation of regulations.[103] As amended, the FRSA states:

> Nothing in [the FRSA] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--
>
> (A) *has failed to comply with the Federal standard of care established by a regulation or order* issued by the Secretary of Transportation (with respect to railroad safety matters) . . . [or];

---

98. *Id.* (quoting *Easterwood*, 507 U.S. at 664) (emphasis added). However, "a regulatory framework need not impose bureaucratic micromanagement in order to substantially subsume a particular subject matter." *In re Derail. Cases*, 416 F.3d at 794.

99. 49 C.F.R. § 217.2 (2024).

100. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9.

101. *Easterwood*, 507 U.S. at 662 (quoting §§ 20106(a)(2)(A)–(C)).

102. *See, e.g.*, Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 357–58 (2000) (finding complete preemption of negligent inspection claims, despite plaintiffs' claim that the railroad failed to comply with FRA regulations); Lundeen v. Canadian Pac. Ry. Co., 507 F. Supp. 2d 1006, 1012–13 (D. Minn. Feb. 2, 2007) (holding that the plaintiff's negligence claims were preempted even though they alleged that the defendant railroad violated FRA regulations, as a railroad is not required "to prove FRA compliance before allowing state law preemption"); Mehl v. Canadian Pac. Ry. Ltd., 417 F. Supp. 2d 1104, 1106 (D.N.D. 2006) (holding that plaintiffs' negligence claims involving violation of federal rail safety standards were preempted by the FRSA, as "[t]he determination of whether state law is preempted by federal law does not concern an examination of the compliance with . . . the federal regulation").

103. § 20106(b); *see also* Frank J. Mastro, *Preemption is Not Dead: The Continued Vitality of Preemption Under the Federal Railroad Safety Act Following the 2007 Amendment to 49 U.S.C. § 20106*, 37 TRANSP. L.J., no. 1, 2010, at 1, 14.

> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries[.][104]

Therefore, if a railroad's conduct violates a regulation under the FRSA, as the East Palestine Plaintiffs argued in their case,[105] a claim arising from such conduct is not preempted by the FRSA.[106] However, the Supreme Court has found that if the defendant railroad was complying with a regulation under the FRSA, then a claim that arises from that compliant activity is preempted.[107]

Thus, to analyze whether a claim against a railroad is preempted under the FRSA, courts follow a "two-step process."[108] Under this process, courts first determine whether the conduct from which the claims arose violated either a federal regulation or an internal rule that was created pursuant to federal regulation.[109] If there is such a violation, there is no preemption.[110] But if there is no violation, the court then moves to the second step and asks whether such conduct is "covered" by a federal regulation.[111] If the conduct is not "covered," the claim is not preempted.[112] But if it is "covered," the claim is preempted unless the proposed standard of care satisfies the requirements under sections 20106(a)(2)(A)–(C) of the FRSA.[113]

C. ICCTA Preemption

The second statute cited by Norfolk Southern in its motion to dismiss was the ICCTA.[114] Congress passed the ICCTA in 1995.[115] In passing the ICCTA, Congress hoped to both reduce regulation on surface transportation and to establish uniform federal rules regulating such transportation.[116] This statute dissolved the Interstate

---

104. § 20106(b)(1)(A)–(B) (emphasis added).
105. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 14.
106. *See* Smith v. CSX Transp., Inc., No. 13 CV 2649, 2014 WL 3732622, at *3 (N.D. Ohio July 25, 2014) (holding that the plaintiff's claim that the railroad failed to comply with FRA regulations relating to the inspection of railroad tracks is not preempted under the FRSA).
107. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 673–74 (1993).
108. Zimmerman v. Norfolk S. Corp., 706 F.3d 170, 178 (3d Cir. 2013).
109. *Id.*
110. *Id.*
111. *Id.*
112. *See Easterwood*, 507 U.S. at 662.
113. *See id.*
114. Defendants' Motion to Dismiss, *supra* note 15, at 8.
115. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804.
116. 49 U.S.C. § 10101; *see also* Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1185 (2012).

Commerce Commission (ICC),[117] a nearly one-hundred-year-old agency that extensively, though not exclusively, regulated various sectors of surface transportation, including railroads.[118] In the ICC's stead, Congress established the Surface Transportation Board (STB).[119] Congress vested the STB with exclusive jurisdiction and control over economic matters involving railroads.[120] Congress expressed the extent of STB's regulatory authority over railroads as follows:

> The jurisdiction of the Board over--
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation *are exclusive and preempt the remedies provided under Federal or State law*.[121]

The foregoing language is broad and encompasses almost all railroad activities.[122] Moreover, the language includes an express preemption clause.[123] But because each case is fact specific, courts have differed as to the extent to which the ICCTA preempts state tort claims.[124] Preemption based on the ICCTA is usually ordinary preemption because there is no federal claim for the plaintiff to rely upon if their state claim is barred by the ICCTA.[125] Without a viable

---

117. ICC Termination Act §§ 101, 109.
118. *See* Hymes, *supra* note 49, at 539.
119. 49 U.S.C. § 1301.
120. *See* Hymes, *supra* note 49, at 539; *see also* 49 U.S.C. §§ 10101(2), 10501(b).
121. § 10501(b) (emphasis added).
122. *Id.*
123. § 10501(b)(2).
124. *See, e.g.*, Tipton v. CSX Transp., Inc., 2017 WL 10398182, at *16 (E.D. Tenn. Oct. 25, 2017) (holding that an assertion that a railroad "breached its duty to 'design, operate, inspect, maintain, and repair its trains and railroad tracks . . . so as to prevent derailments,' was preempted" by the ICCTA, but other aspects of plaintiff's claims survived preemption); Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004) (held that a nuisance claim involving "the construction and/or maintenance of the tracks and crossings themselves" is preempted by the ICCTA).
125. *See* Fayard v. Ne. Vehicle Servs., 533 F.3d 42, 49 (1st Cir. 2008).

federal claim, complete preemption is inapplicable.[126] Thus, the key issue is to determine whether a state law has a regulatory effect on the rail industry.[127] The ICCTA preempts a state law only if the state law has a regulatory effect.[128] Incidental effects on railroads do not rise to such a level of regulation.[129] Interpreting the ICCTA's express preemption clause,[130] several circuit courts have held that

> Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation.[131]

Further, state tort claims are not preempted under implied ICCTA preemption when they only have an incidental impact on railroads and do not unreasonably interfere with railroad activity.[132] On the other hand, when a state tort claim against a railroad directly interferes with railroad activity or when the damages potentially arising from the tort claim could have a regulatory impact on railroads, courts have generally found that the state claim is preempted by the ICCTA.[133]

---

126. *See id.*
127. *See* Guild v. Kan. City S. Ry., 541 F. App'x 362, 368 (5th Cir. 2013).
128. *Id.*
129. *Id.*
130. 49 U.S.C. § 10501(b)(2).
131. Franks Inv. Co. v. Union Pac. R.R. Co., 593 F.3d 404, 410 (5th Cir. 2010) (quoting Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001)).
132. *See, e.g.*, *id.* at 414 ("[S]tate law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation."); *Guild*, 541 F. App'x at 368; N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 254 (3d Cir. 2007) ("[A] state law that affects rail carriage survives preemption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage."); Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1133 (10th Cir. 2007) ("[T]o decide whether a state regulation is preempted requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation."); New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 332 (5th Cir. 2008) ("For state or local actions that are not facially preempted, the [ICCTA] preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.").
133. *See, e.g.*, Island Park, LLC v. CSX Transp., Inc., 559 F.3d 96, 105 (2d Cir. 2009) ("[S]everal courts and the STB have declined to find pre-emption where the state or local regulation does not interfere with rail operations."); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1069 (11th Cir. 2010) (holding that a nuisance action for monetary damages directly related to the operation and use of the side track, and thus was preempted by the ICCTA); Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1146 (8th Cir. 2015) (holding that state-law nuisance and trespass claims would unreasonably burden or interfere with rail transportation, and thus they were preempted by the ICCTA, because "they are based on alleged harms

However, some courts have recognized additional situations where the ICCTA does not preempt state tort claims against railroads.[134] First, a tort claim is not preempted when it "challenges a railroad's activities other than the maintenance and operation of its rail lines."[135] Second, a tort claim is not preempted when it relates to rail safety.[136] In such cases, a separate, narrower preemption provision in the FRSA applies.[137] The East Palestine Plaintiffs relied upon the second exception to argue that the ICCTA does not preempt their claims.[138]

In *Tyrrell v. Norfolk Southern Railway Co.*, the United States Court of Appeals for the Sixth Circuit held that while the ICCTA may preempt state laws or claims that affect other railroad-related topics, the FRSA governs claims dealing with railroad safety.[139] The court explained:

> [w]hile the STB must adhere to federal policies encouraging 'safe and suitable working conditions in the railroad industry,' the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority

---

stemming directly from the actions of a rail carrier . . . that clearly are part of 'transportation by rail carriers.'").

134. *See* cases cited *infra* notes 135–37.

135. Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273, 277 (Iowa 2018) (citing *Guild*, 541 F. App'x at 368 ("declining to find that a state-law tort claim that the defendant damaged the plaintiff's private spur track by temporarily parking train cars of excessive weight on that private track was preempted"); *Emerson*, 503 F.3d at 1130 ("finding that § 10501(b) does not preempt a claim relating to a railroad 'discarding old railroad ties into a wastewater drainage ditch adjacent to the tracks and otherwise failing to maintain that ditch'"); Rushing v. Kan. City S. Ry., 194 F. Supp. 2d 493, 499–501 (S.D. Miss. 2001) ("finding that § 10501(b) preempted tort claims relating to the railroad's operation of its switch yard but not relating to its erection of an earthen berm outside the switch yard"); Jones v. Union Pac. R.R., 94 Cal. Rptr. 2d 661, 666–67 (2000) ("finding no preemption where there was a triable issue whether the railroad ran its engines and sound 'solely to harass plaintiffs' rather than for safety reasons or 'in furtherance of [defendant's] railroad operations'")).

136. *Id.* at 278 (citing 49 U.S.C. § 20106; Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523–25 (6th Cir. 2001) ("finding that the FRSA rather than the ICCTA governed a trainman's personal injury claim and the claim was not preempted"); Waneck v. CSX Corp., No. 17cv106, 2018 WL 1546373, at *4–6 (S.D. Miss. Mar. 29, 2018) ("finding in a personal injury case that tort claims relating to the design and maintenance of the crossing and related rail structures were governed by the ICCTA and therefore preempted, whereas claims relating to the railroad's failure to slow the train related to rail safety, were therefore governed by the FRSA, and were not preempted")).

137. *Id.*; *see also* Smith v. CSX Transp., Inc., No. 13 CV 2649, 2014 WL 3732622, at *2 (N.D. Ohio July 25, 2014) ("Plaintiffs' claims of negligence and qualified nuisance are based solely upon allegations that CSX failed to comply with FRA safety regulations regarding the inspection of defective rails. Because those claims relate to rail safety, and do not amount to the economic regulation of railroads, the ICCTA does not preempt Plaintiffs' claims.").

138. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 19.

139. *Tyrrell*, 248 F.3d at 523 (emphasis added).

> over rail safety. Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia.* For example, while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 *et seq.,* while the STB handled economic regulation and environmental impact assessment.[140]

The court noted that if the ICCTA is applied to preempt state tort claims that relate to railroad safety, it would exclude claims that are permitted under the exceptions to the FRSA and create a conflict between the statutes.[141] The court concluded that "Congress vested the FRA with primary authority over national rail safety policy and assigned the STB the duty to encourage 'safe and suitable working conditions' for railway *employees* through its assessment of individual railway proposals subject to its authority."[142] Thus, a state regulation "related to rail safety . . . require[s] preemption analysis under [the] FRSA."[143]

Several other circuits have followed the Sixth Circuit's lead and have recognized that claims involving railroad safety are to be analyzed under the FRSA's preemption analysis, not the ICCTA's.[144]

D. HMTA Preemption

The final statute cited by Norfolk Southern in its motion to dismiss was the HMTA.[145] Congress enacted the HMTA in 1975 with the goal of "protect[ing] against the risks to life, property, and the environment that are inherent in the transportation of hazardous material."[146] The HMTA's regulatory reach is not limited to railroads and also includes any transportation of materials in

140. *Id.*
141. *Id.* at 522–23.
142. *Id.* at 523 (quoting 49 U.S.C. § 10101(11)) (emphasis added).
143. *Id.*
144. *See, e.g.*, Island Park, LLC v. CSX Transp., Inc., 559 F.3d 96, 107 (2d Cir. 2009) ("Several circuits that have examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the [FRA], not the STB. We agree. Thus, FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law."); Boston & Me. Corp. v. Surface Transp. Bd., 364 F.3d 318, 321 (D.C. Cir. 2004) ("[P]rimary jurisdiction over railroad safety belongs to the FRA, not the STB."); Iowa, Chi. & E. R.R. Corp. v. Wash. Cnty., 384 F.3d 557, 561 (8th Cir. 2004) (holding that the ICCTA does not preempt a state administrative proceeding involving rail and highway *safety*).
145. Defendants' Motion to Dismiss, *supra* note 15, at 8.
146. 49 U.S.C. § 5101.

commerce that the Secretary determines to be "hazardous."[147] Like the FRSA and the ICCTA, the HMTA contains an express preemption clause[148] that reflects Congress' intent to establish "a uniform, national scheme of regulation regarding the transportation of hazardous materials."[149] The preemption clause states:

> unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted.[150]

The above-referenced "following subjects" to which the HMTA's preemptive power applies are:

> (A) the designation, description, and classification of hazardous material.
>
> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
>
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
>
> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
>
> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.[151]

Relying upon this language, courts have held that the HMTA preempts state requirements that (1) "relate to, or are 'about,' the

147. *See* 49 U.S.C § 5103.
148. 49 U.S.C § 5125.
149. CSX Transp., Inc. v. Williams, 406 F.3d 667, 674 (D.C. Cir. 2005) (Henderson, J., concurring) (citing Chlorine Inst., Inc. v. Cal. Highway Patrol, 29 F.3d 495, 496–97 (9th Cir. 1994)).
150. § 5125(b)(1).
151. § 5125(b)(1)(A)–(E).

five subject areas set forth" above,[152] and (2) are not "substantively the same as" federal regulations "related to" such subjects.[153] In other words, "the HMTA preempts state common law claims that, if successful, would impose design requirements upon a package or container qualified for use in transporting hazardous materials in commerce."[154] Thus, the HMTA has frequently been used by courts to bar tort claims brought against transporters of hazardous materials.[155]

But, like the ICCTA, some courts have found that the preemption of claims involving railroad *safety* is best analyzed under the FRSA, not the HMTA.[156] In *CSX Transportation, Inc., v. Public Utilities Commission of Ohio*,[157] the Sixth Circuit, quoting the Committee report to the HMTA, noted:

> The intent of the Committee in these provisions [the HMTA] is to consolidate in the Department of Transportation the [sic] certain basic functions with respect to regulated hazardous materials, while the enforcement of the regulations pertaining to the shippers and carriers of hazardous materials remains delegated to the particular Administration within DOT having jurisdiction over the mode by which such materials move.
>
> . . . We find it clear from this language, and the legislative history behind it, that the purpose of the HMTA was to consolidate regulation of hazardous material transportation at the Secretarial level, and not to remove such regulation of hazardous material transportation by rail from the preemption provision of the FRSA.[158]

Therefore, a train carrying a load of hazardous waste is considered a railroad that happens to be carrying hazardous waste (thus

152. Roth v. Norfalco LLC, 651 F.3d 367, 375 (3d Cir. 2011) (quoting § 5125(b)(1)).
153. § 5125(b)(2).
154. *Roth*, 651 F.3d at 379.
155. *See, e.g.*, *id.* at 370 (holding that state law tort claims arising from exposure to sulfuric acid while unloading a railway tank car are preempted by the HMTA); Parrish v. JCI Jones Chems., Inc., No. 17-00518, 2019 WL 1410880, at *5 (D. Haw. Mar. 28, 2019) (holding that negligence claims arising from exposure to chlorine gas at the plaintiff's place of work, a facility which stores hazardous materials, are preempted by the HMTA); Mawa Inc. v. Univar USA Inc., No. 15-6025, 2016 WL 2910084, at *1, *6 (E.D. Pa. May 19, 2016) (holding that claims arising from a chemical distributor's failure to properly remove chemicals from decommissioned containers, resulting in the release of hydrochloric acid, are preempted by the HMTA).
156. *See* cases cited *infra* notes 157, 163.
157. 901 F.2d 497 (6th Cir. 1990).
158. *Id.* at 501 (citation omitted).

suggesting application of the FRSA preemption provision), not hazardous waste that happens to be carried by rail (which would suggest application of the HMTA preemption provision).[159] Further, "FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary* [of Transportation]."[160] The court ultimately found "that the language of the FRSA, [stating] 'any law . . . relating to railroad safety,' applies to the HMTA as it relates to the transportation of hazardous material by rail."[161] Thus, the court rejected the use of the preemption provisions under the HMTA in favor of those under the FRSA in matters relating to railroad safety.[162]

Relying upon *Public Utilities Commission*, other courts have similarly found that only the FRSA preemption analysis applies to derailment claims that involve both rail safety and the transportation of hazardous materials.[163] Likewise, the East Palestine Plaintiffs relied on the *Public Utilities Commission* holding to argue that their claims were not preempted by the HMTA.[164]

III. ANALYSIS

A. The ICCTA Should Not Preempt Railroad Safety Tort Claims

In addition to raising issues of railroad safety,[165] many of the East Palestine Plaintiffs' claims also invoked matters related to the routing, length, and organization of railroads.[166] Thus, both the ICCTA and the FRSA are potentially capable of preempting those claims.[167]

---

159. *Id.*

160. *Id.*

161. *Id.* (citation omitted).

162. *Id.* at 502.

163. *See, e.g.*, *In re* Miamisburg Train Derail. Litig., 626 N.E.2d 85, 89 (Ohio 1994) ("[W]e conclude that . . . the FRSA is the applicable preemption provision in analyzing whether the Secretary's regulations at issue in this [derailment] case preempt appellants' claims."); Bradford v. Union Pac. R.R. Co., 491 F. Supp. 2d 831, 839 (W.D. Ark. 2007) ("[B]ecause FRSA preemption refers to acts 'by the Secretary,' a regulation affecting railroad safety promulgated pursuant to the HMTA takes FRSA's preemptive effect.").

164. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 16.

165. Complaint, *supra* note 10, at 58–61 (alleging that Norfolk Southern failed to properly inspect and maintain the train, lacked adequate safety procedures, and failed to properly utilize "wayside defect detectors" which could detect an overheating wheel bearing prior to a derailment).

166. *Id.* at 58–59, 61–62 (alleging that Norfolk Southern failed to route the train to avoid populated areas, loaded the train with "too many railcars," and improperly organized the railcars).

167. Matters of railroad routing, length, and organization are generally regulated by the ICCTA, while matters of railroad safety are governed by the FRSA. *See* 49 U.S.C. §§ 10501(b), 20103(a).

The result of the interplay between the preemptive effect of these two statutes can be determined by examining the meaning of *Tyrrell v. Norfolk Southern Railway Co*.[168] The East Palestine Plaintiffs interpreted *Tyrrell* broadly and contended that whenever a claim invokes issues of both railroad operation and railroad safety, the ICCTA is set aside and only the FRSA preemption analysis applies.[169] Conversely, Norfolk Southern interpreted *Tyrrell* narrowly and asserted that the court only held that ICCTA preemption was inapplicable to a state rail safety statute, not that ICCTA preemption was inapplicable whenever rail safety was at issue in litigation; therefore, both FRSA and ICCTA preemption are applicable in this case.[170] On this issue, the East Palestine district court cited *Tyrrell* when it ruled in favor of the Plaintiffs and explained that "while the ICCTA may preempt state laws or claims bearing on other railroad-related topics, claims dealing with rail safety [were] governed by the FRSA."[171] For the following reasons, the court correctly ruled in favor of the Plaintiffs on this issue.[172]

Although Norfolk Southern was correct that the regulation at issue in *Tyrrell* arose from a state statute and not from a common law negligence claim, the court did not limit its holding to cases only involving state statutes.[173] The regulation at issue in *Tyrrell*, which required a certain amount of clearance between tracks, related both to rail safety and rail construction.[174] But despite the applicability of both the ICCTA and the FRSA,[175] the *Tyrrell* court applied *only* the FRSA preemption analysis.[176] This is contrary to Norfolk Southern's position in the East Palestine case that *both* statutes' preemption analyses must be applied.[177] Instead, the court, upon analyzing the regulation, classified it as fundamentally relating to railroad safety, not construction.[178] In conducting this classification, the court stated that

---

168. 248 F.3d 517 (6th Cir. 2001).
169. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 19.
170. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 3–4.
171. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 15–16 (citing *Tyrrell*, 248 F.3d at 522–23).
172. *See* discussion *infra* pp. 33–38; *see also* discussion *supra* Section II.C.
173. *Tyrrell*, 248 F.3d at 520–21, 525.
174. *Id.* at 520–21.
175. 49 U.S.C. § 10501(b)(2) (railroad construction is governed by the ICCTA); 49 U.S.C. § 20103(a) (railroad safety is governed by the FRSA).
176. *Tyrrell*, 248 F.3d at 524–25.
177. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 4.
178. *Tyrrell*, 248 F.3d at 523–24.

> [al]though a state regulation may have an alternative purpose and does not reference railroad safety, it may be "'related to' railroad safety because it has a 'connection with' railroad safety." To determine whether a regulation has a "connection with" rail safety, we "must necessarily look at [its] terms (". . .") and what the ordinance requires in terms of compliance." Thus, a state regulation may relate to railroad safety based on the potential safety aspects that arise from complying with the regulation.[179]

Applying this analysis, the court found that even though the state regulation only referred to construction, not safety, its purpose and effects primarily related to rail safety and therefore it was to be analyzed under the FRSA, not the ICCTA.[180] The primary takeaway from this holding is that when a state regulates an area that invokes preemption under both the ICCTA and the FRSA, the court will not apply both, but rather will classify the regulation as either fundamentally relating to rail safety or rail operations.[181] If the regulation fundamentally relates to rail safety, then courts apply the FRSA analysis alone.[182] Conversely, if the regulation fundamentally relates to railroad operations, then courts apply the ICCTA analysis alone.[183] This analysis is done on a "per regulation" basis, not a "per case" basis.[184] Thus, in a case where multiple regulations are at issue, some may be classified under the ICCTA's analysis, while others are classified under the FRSA's analysis.[185] Yet, the

---

179. *Id.* at 523 (alteration in original) (citations omitted) (quoting and citing CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626, 629 (6th Cir. 1996)).

180. *Id.* at 523–24.

181. *See id.*; *see also* Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273, 289 (Iowa 2018) ("When the state statute addresses rail safety, then courts analyze preemption under FRSA. When the state statute addresses construction or economic concerns, then courts analyze preemption under ICCTA.").

182. *See Tyrrell*, 248 F.3d at 523–24; *see also* Smith v. CSX Transp., Inc., No. 13 CV 2649, 2014 WL 3732622, at *2 (N.D. Ohio July 25, 2014) ("Plaintiffs' claims of negligence and qualified nuisance are based solely upon allegations that CSX failed to comply with FRA safety regulations regarding the inspection of defective rails. Because those claims relate to rail safety, and do not amount to the economic regulation of railroads, the ICCTA does not preempt Plaintiffs' claims.").

183. *See Tyrrell*, 248 F.3d at 523–24; *see also* Pace v. CSX Transp., Inc., 613 F.3d 1066, 1069 (11th Cir. 2010) (holding that a nuisance action for monetary damages directly related to the operation and use of the side track, and thus was preempted by the ICCTA).

184. *See Tyrrell*, 248 F.3d at 523–24; *see also* Waneck v. CSX Corp., No. 17cv106, 2018 WL 1546373, at *6 (S.D. Miss. Mar. 29, 2018) (holding that tort claims relating to the design and maintenance of a rail crossing were governed by the ICCTA and therefore preempted, whereas claims relating to the railroad's failure to slow the train related to rail safety, were therefore governed by the FRSA, and were not preempted).

185. *See Tyrrell*, 248 F.3d at 523–24; *see also Waneck*, 2018 WL 1546373, at 6.

key is that for each individual regulation, courts will apply *only one* statute's preemption analysis.[186]

Norfolk Southern warned against this interpretation and argued that "[v]irtually any aspect of railroad operations can 'involve safety' at a broad level," which would effectively nullify the ICCTA.[187] But this argument is also true in reverse. Virtually any aspect of railroad safety can also involve railroad operations, which if applied in the manner that Norfolk Southern suggests, would nullify the FRSA—the outcome *Tyrrell* specifically sought to avoid.[188] More fundamentally, the *Tyrrell* court did not state that any regulation that has a tangential impact on safety is governed by the FRSA.[189] Instead, the court employed a wholistic analysis to determine the fundamental purpose of the regulation, and thereby determine which statute's preemption analysis is applicable.[190] This understanding of *Tyrrell* is consistent with the principle that "repeals by implication are disfavored"[191] because the preemption analyses of both the ICCTA and the FRSA are given full effect when a regulation relates to what that particular statute regulates.[192] The ICCTA and the FRSA do not risk disrupting each other when a regulation relates to something covered by both statutes because, ultimately, only one statute can apply.[193]

While *Tyrrell*'s analysis focused on a statutory regulation, nothing suggests that the same analysis is inapplicable to a negligence standard of care.[194] The application of preemption to negligence standards of care has long been justified by their similarity to

186. *See Tyrrell*, 248 F.3d at 523–24.

187. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 3 (quoting Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 19).

188. *Tyrrell*, 248 F.3d at 522–23 ("[T]he district court's decision erroneously preempts state rail safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA. As a result, this interpretation of the ICCTA implicitly repeals FRSA's first saving clause.").

189. *Id.* at 524.

190. *Id.* ("As the Ohio regulation has a connection with rail safety based on its terms, the safety benefits of compliance, and its legally recognized purpose, FRSA provides the applicable standard for assessing federal preemption.").

191. *Id.* at 523.

192. *See id.*

193. *See id.*

194. The plaintiff in *Tyrrell* brought a negligence per se action against the railroad, arguing that the railroad's violation of an Ohio statutory regulation caused him injury. *Id.* at 520–21. In a negligence per se claim, the standard of care placed upon the defendant is set forth in a statute, rather than the common law. *See* Rains v. Bend of the River, 124 S.W. 3d 580, 589 (Tenn. Ct. App. 2003). Thus, to determine whether the plaintiff's tort claim was preempted, the *Tyrrell* court asked whether the standard of care placed on the defendant—here set forth in a statute—was preempted. *See Tyrrell*, 248 F.3d at 521.

statutory regulations.[195] These similarities likewise justify the equal application of *Tyrrell* to both forms of law.[196] Thus, a court facing the questions raised in the East Palestine case ought to examine each proposed standard of care and determine whether it fundamentally relates to railroad safety or railroad operations, and then use this determination to apply either the FRSA or the ICCTA. The East Palestine Plaintiffs listed thirty-eight standards of care that they alleged Norfolk Southern had breached.[197] Some of these alleged standards of care, such as the assertion that Norfolk Southern had a duty to route the train away from populated areas and that Norfolk Southern had a duty to organize the train in a certain manner,[198] invoked strong elements of both railroad safety and railroad operation.[199] Thus, a court could reasonably classify these under either the ICCTA or the FRSA.[200] But once this classification occurs, only that statute's preemption analysis is applied.[201] However, some of the Plaintiffs' asserted standards of care, including the duty to have adequate safety features and the duty to properly utilize "wayside defect detectors" to monitor overheating wheel bearings,[202] are fundamentally related to railroad safety such that a court should have little difficulty solely applying the FRSA preemption analysis.[203] Ultimately, the great majority, if not all, of

195. *See, e.g.*, Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) ("[A] state regulation can be as effectively exerted through an award of damages as through some form of preventive relief.") (quoting Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001).

196. A number of courts, following the reasoning of *Tyrrell*, have found that common law negligence claims relating to railroad safety are governed by FRSA preemption, while such claims relating to railroad operations are governed by ICCTA preemption. *See, e.g.*, Waneck v. CSX Corp., No. 17cv106, 2018 WL 1546373, at *4–6 (S.D. Miss. Mar. 29, 2018) (holding that in a case involving claims of common law negligence, that claims relating to the design and maintenance of a railroad crossing were governed by the ICCTA and therefore preempted, whereas claims relating to rail safety were governed by the FRSA, and were not preempted); Smith v. CSX Transp., Inc., No. 13 CV 2649, 2014 WL 3732622, at *2 (N.D. Ohio July 25, 2014) (holding that because claims of negligence and qualified nuisance related to rail safety, and did not amount to the economic regulation of railroads, the ICCTA did not preempt the claims).

197. Complaint, *supra* note 10, at 58–63.

198. *Id.* at 58–59, 61–62.

199. These claims, in essence, asserted that the manner in which Norfolk Southern conducted railroad operations decreased railroad safety. Some claims are difficult to classify under either the FRSA or the ICCTA because the claims involve elements of both railroad safety and operations. *See* Ezell v. Kan. City S. Ry. Co., 866 F.3d 294, 300 n.6 (5th Cir. 2017) ("In some cases, it may be difficult to discern whether a particular state law or claim is better characterized as an economic or safety regulation.").

200. The East Palestine district court ultimately analyzed all of the Plaintiffs' claims, including these ones, under the FRSA. *See* Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 10–13, 15–16.

201. *See supra* notes 181–86 and accompanying text.

202. Complaint, *supra* note 10, at 58–61.

203. *See supra* note 200.

the Plaintiffs' claims were related to railroad safety to a sufficient degree to warrant the application of the FRSA preemption analysis alone.[204] Therefore, the ICCTA does not preempt the East Palestine Plaintiffs' claims, and the East Palestine district court properly ruled in favor of the Plaintiffs on this issue.[205]

B. The HMTA Should Not Preempt Railroad Safety Tort Claims

Similarly to the dispute regarding ICCTA preemption, the East Palestine Plaintiffs and Norfolk Southern clashed regarding the applicability of HMTA preemption when an alleged act of negligence invoked issues regulated by both the HMTA and the FRSA.[206] Relying upon *CSX Transportation., Inc. v. Public Utilities Commission of Ohio*,[207] the Plaintiffs argued that "[w]hen a claim involves matters of railroad safety, courts analyze preemption under the FRSA framework, rather than the HMTA, regardless of whether the applicable regulations were issued under the FRSA or the HMTA."[208] Many elements of the Plaintiffs' claims against Norfolk Southern related to both rail safety and the transportation of hazardous materials.[209] Examples include Norfolk Southern's alleged failure to train employees on the safe transportation of dangerous materials, failure to implement proper procedures to prevent the exposing of toxic chemicals to the environment, and failure to transport and handle hazardous materials in a manner that would not cause harm to those in the vicinity of the derailment.[210] According to the Plaintiffs, these claims should have been analyzed solely under the FRSA

204. *See* Complaint, *supra* note 10, at 60–63. For instance, the Plaintiffs alleged that Norfolk Southern breached its duty to them by failing to properly inspect its trains, failing to maintain a vigilant lookout during the operation of its trains, and failing to properly calibrate, maintain, test, and operate train brake systems. *Id.* at 60–61. While these claims tangentially touch upon rail operations, the claims fundamentally relate to rail safety, as the Plaintiffs are arguing that Norfolk Southern's violation of these alleged duties increased the risk of harm by reducing rail safety. Thus, the court ought to apply only the FRSA preemption analysis. This analysis can be applied to most of the claims brought by the Plaintiffs with a similar result.

205. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 15–16.

206. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 16; Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 10.

207. 901 F.2d 497 (6th Cir. 1990).

208. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 16.

209. 49 U.S.C. § 20103(a) (railroad safety is governed by the FRSA); 49 U.S.C. § 5101 (the transportation of hazardous materials is governed by the HMTA).

210. Complaint, *supra* note 10, at 59, 62.

preemption analysis.[211] Conversely, Norfolk Southern argued that the Plaintiffs misinterpreted *Public Utilities Commission* and that when the conduct at issue invokes FRSA and HMTA regulations, then the preemption analyses of both statutes must be applied.[212] On this issue, the East Palestine district court, citing *Public Utilities Commission*, ruled in favor of the Plaintiffs, and held that "the FRSA's preemption provisions, and not those of the HMTA, govern matters of railroad safety."[213] For the following reasons, the court correctly ruled in favor of the Plaintiffs on this issue.[214]

Much like in *Tyrrell*, the dispute in *Public Utilities Commission* arose from a state statute that regulated railroad conduct, including the transportation of hazardous materials.[215] In *Public Utilities Commission,* both the HMTA's and the FRSA's preemption analyses had the potential to apply to the state statute at issue.[216] However, neither party argued that *both* statutes should apply; instead, the parties contested whether the HMTA's *or* the FRSA's preemption analysis should apply to the statute.[217] The court framed the issue as:

> should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting application of the FRSA preemption provision) *or* hazardous waste which happens to be carried by rail (thus suggesting application of the HMTA preemption provision).[218]

The framing of this issue implies an analysis where the court must choose one of two options, as the court ultimately asked whether the regulation at issue ought to be classified under the FRSA *or* the HMTA.[219] The court concluded that "the language of the FRSA, 'any law . . . relating to railroad safety,' applies to the HMTA as it relates to the transportation of hazardous material by rail."[220] The court

211. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 16.

212. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 10.

213. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 13–15.

214. *See* discussion *infra* pp. 40–43. *See also* discussion *supra* Section II.D.

215. CSX Transp., Inc. v. Pub. Utils. Comm'n of Ohio, 901 F.2d 497, 498 (6th Cir. 1990).

216. Both HMTA and FRSA preemption were potentially applicable because the state statute related both to transportation of hazardous materials and rail safety. *Id.* at 501. Specifically, the statute sought to regulate the transportation of hazardous material by rail. *Id.* at 498–99.

217. *Id.* at 501.

218. *Id.* (emphasis added).

219. *Id.*

220. *Id.* (quoting 45 U.S.C. § 434).

ultimately found that the statute was preempted under the FRSA.[221] Therefore, *Public Utilities Commission* indicated that when a regulation invokes both HMTA and FRSA preemption, the regulation is to be analyzed solely under the FRSA's preemption analysis.[222]

In its motion to dismiss in the East Palestine district court, Norfolk Southern rejected this interpretation of *Public Utilities Commission*.[223] Norfolk Southern argued that the East Palestine Plaintiffs' interpretation ignored the *Public Utilities Commission* court's admonition that "the proper approach [to preemption] is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted."[224] However, contrary to Norfolk Southern's argument, the *Public Utilities Commission* court noted that applying FRSA preemption instead of HMTA preemption did not "oust" the HMTA.[225] The court explained that

> [a] failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected.[226]

Therefore, much like the *Tyrrell* court, the *Public Utilities Commission* court found that when two statutes potentially preempt the same conduct, the way to reconcile the problem is not to apply both statutes' preemption provisions, but rather to apply only the preemption analysis of the most relevant statute.[227]

While *Public Utilities Commission* pertained to a state regulatory statute,[228] nothing suggests that the holding is not also applicable in negligence claims where it is alleged that the defendant breached duties relating to both railroad safety and the transportation of

---

221. *Id.* at 499, 503.
222. *Id.* at 502–03.
223. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 10 (quoting *Pub. Utils. Comm'n*, 901 F.2d at 502).
224. *Id.*
225. *Pub. Utils. Comm'n*, 901 F.2d at 503.
226. *Id.*
227. *Id.*
228. *Id.* at 498.

hazardous materials,[229] such as the East Palestine case.[230] Applying the reasoning of *Public Utilities Commission* to the Plaintiffs' claims that invoke regulation under both the FRSA and the HMTA, each of the Plaintiffs' claims involve the transportation of hazardous materials only insofar as such transportation lessens railroad safety by increasing the risk of harm in the event of a derailment.[231] Thus, the essence of the Plaintiffs' claims involved railroad safety, not hazardous materials.[232] Therefore, only the FRSA preemption analysis is applicable,[233] and the East Palestine court properly ruled in favor of the Plaintiffs on this issue.[234]

C. The East Palestine Plaintiffs' Claims Are Not Preempted by the FRSA

Regardless of the applicability of the ICCTA and the HMTA, the fate of the East Palestine Plaintiffs' claims relies on whether such claims can survive FRSA preemption.[235] If the ICCTA and the HMTA do not apply, then all of the Plaintiffs' claims are subject to the FRSA analysis.[236] However, even if the ICCTA and the HMTA do apply, any of the Plaintiffs' claims that do not credibly invoke

229. A number of courts, following the reasoning of *Public Utilities Commission*, have found that common law negligence claims relating to the transportation of hazardous materials by rail are governed by FRSA preemption, not HMTA preemption. *See, e.g.*, *In re* Miamisburg Train Derail. Litig., 626 N.E.2d 85, 89 (Ohio 1994) (holding that common law negligence claims relating to the transportation of hazardous material by rail are to be analyzed under the FRSA preemption analysis, not the HMTA); Bradford v. Union Pac. R.R. Co., 491 F. Supp. 2d 831, 839 (W.D. Ark. 2007) (holding that negligence claims alleging violations of the HMTA relating to the transportation of hazardous material by rail are governed by the preemption analysis of the FRSA, not the HMTA).

230. Complaint, *supra* note 10, at 60–63 (alleging that Norfolk Southern was negligent by "[a]ccepting and transporting shipments of hazardous material that had pressure relief devices made of materials that were incompatible with the lading," "[f]ailing to operate, maintain, inspect and/or repair the railway and railcars in such a way to ensure their safe and proper operation, particularly when transporting hazardous materials," "[f]ailing to route railcars carrying hazardous materials in such a way as to avoid populated areas," "[f]ailing to adequately warn those in danger of exposure to hazardous chemicals," and failing to respond to the derailment and release of hazardous materials).

231. *See id.*

232. *See Bradford*, 491 F. Supp. at 839 (holding that claims alleging that a railroad was negligent in the manner in which it stored, handled and transported hazardous materials involved railroad safety).

233. *See id.* (noting that a regulation affecting railroad safety promulgated pursuant to the HMTA takes FRSA's preemptive effect).

234. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 13–15.

235. This is because all of the Plaintiffs' claims relate to rail safety to some extent, and thus both the Plaintiffs and Norfolk Southern agree that the FRSA analysis applies to Plaintiffs' claims. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9–20; Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 5.

236. *See supra* note 235.

issues of railroad operation or transportation of hazardous materials will still be solely analyzed under the FRSA analysis.[237] While this article will not examine each of the Plaintiffs' claims to determine whether they survive FRSA preemption, some of the claims are given outsized attention in the parties' respective pleadings and deserve further investigation.[238]

The East Palestine Plaintiffs argued that their claims were not preempted by the FRSA because such claims either (1) involve conduct that is not "covered" by regulations promulgated under the FRSA or (2) involve conduct that constitutes a violation of federal regulations or internal operating rules.[239] For instance, the East Palestine Plaintiffs argued that the use of wayside detectors—trackside devices that detect train temperature and other defects prior to a derailment[240]—to warn train operators of overheating wheel bearings was not "covered" by FRSA regulation.[241] The Plaintiffs supported this assertion with a safety advisory by the FRA that stated that "there are no Federal regulations requiring the use of [wayside detectors] for freight trains, or any regulations related to the inspection, calibration, and maintenance of this equipment."[242] The Plaintiffs acknowledged *Tipton v. CSX Transportation, Inc.*, in which the court found that the FRSA preempted a claim that arose from a failure to use wayside detectors.[243] However, the Plaintiffs distinguished the East Palestine case from *Tipton* by contending that in East Palestine, the negligence was not failure to install wayside detectors, but rather the negligence arose from the improper use of wayside detectors *after* their installation.[244]

---

237. This is because the ICCTA only preempts claims relating to railroad operations, *see* 49 U.S.C. § 10501, while the HMTA only preempts claims relating to the transportation of hazardous materials, *see* 49 U.S.C. § 5125.

238. Particularly, a major focus of the Plaintiffs' complaint was on the allegation that Norfolk Southern failed to adequately use wayside detectors to prevent the derailment. *See* Complaint, *supra* note 10, at 61 (alleging the Norfolk Southern was negligent by "[f]ailing to utilize appropriate and available technology such as 'wayside defect detectors' or 'hot bearing detectors'; failing to appropriately place such detectors to ensure timely alerting of any potential problems; failing to implement appropriate policies for the use of such detectors including, but not limited to, setting appropriate alarm thresholds and criteria for determining when a potentially dangerous condition exists; and failing to ensure that such detectors are timely and properly inspected and maintained").

239. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9, 12.

240. FRA Safety Advisory 2023-01, 88 Fed. Reg. 13494 (Mar. 3, 2023).

241. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9–10.

242. FRA Safety Advisory 2023-01, 88 Fed. Reg. at 13496.

243. Tipton v. CSX Transp., Inc., No. 15-cv-311, 2017 WL 10398182, at *17 (E.D. Tenn. Oct. 25, 2017).

244. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 10.

The Plaintiffs also asserted that the failure of Norfolk Southern employees to timely detect the fire—the cause of the derailment—was not covered by the FRSA because there were no federal regulations that "substantially subsume[d]" such conduct that occurred during transit.[245] Additionally, the Plaintiffs argued that their FRSA covered claims, such as the allegation that Norfolk Southern failed to properly inspect its trains and railcars, nonetheless survived preemption because such conduct violated federal regulations.[246] The Plaintiffs concluded by contending that they alleged such regulatory violations with sufficient specificity to survive a motion to dismiss and stated their expectation that more details regarding such alleged violations would arise during the course of discovery.[247]

Conversely, Norfolk Southern argued that all of the Plaintiffs' claims were "covered" by FRSA regulation and were preempted.[248] Norfolk Southern contended that particular conduct need not be specifically mentioned by a regulation to be "substantially subsumed" by federal regulation.[249] Specifically, Norfolk Southern argued that even though wayside detectors were not specifically mentioned by federal regulations, their use was still substantially subsumed by regulations that pertained to the inspection of railcars, as such detectors are a form of inspection.[250] Norfolk Southern argued that *Tipton* supported its position that claims regarding wayside detectors were preempted by the FRSA, and asserted that the Plaintiffs' attempt to distinguish *Tipton* from the East Palestine facts failed.[251] Norfolk Southern also asserted that the alleged employee conduct that failed to timely detect the fire was "covered" by a number of federal regulations and thus preempted.[252] Norfolk Southern concluded by arguing that the Plaintiffs failed to allege any facts that indicated that it violated any regulation or internal rules and thus, such claims should fail as they do not meet the low bar necessary to survive a motion to dismiss.[253]

---

245. *Id.* at 11.
246. *Id.* at 13–14.
247. *Id.* at 13–15.
248. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 5.
249. *Id.*
250. *Id.* at 5–6.
251. *Id.* at 6.
252. *Id.* at 7–8.
253. *Id.* at 8–9.

The East Palestine district court held that the Plaintiffs' claims were not preempted by the FRSA.[254] The court, relying upon the FRA safety advisory, held that the claims involving wayside detectors were not preempted because Norfolk Southern failed to identify any regulations covering the use of such detectors.[255] The court further held that the Plaintiffs' claims involving deficient lookout and failure to detect and address the fire in a timely manner were not preempted as "[c]ourts generally have found that allegations like failure to keep a proper lookout are not preempted."[256] Finally, the court found that the Plaintiffs' allegations of Norfolk Southern's violation of federal regulations were sufficient to survive a motion to dismiss, and that disputes regarding the factual support of such allegations must be reserved for a motion for summary judgment.[257] For the following reasons, the district court was correct to rule in favor of the Plaintiffs on this issue.[258]

The primary dispute between the litigants here was over how closely related a regulation must be to certain conduct for that conduct to be "substantially subsumed" by that regulation.[259] It is a relatively high bar for an act to be "substantially subsumed," as "preemption will not apply if the FRSA regulation in question merely touches upon or relates to the subject matter of state law."[260] Nonetheless, "a regulatory framework need not impose bureaucratic micromanagement in order to substantially subsume a particular subject matter."[261] The application of these principles can be better understood by analyzing one of the particular claims that Norfolk Southern argued is "substantially subsumed"—the use of wayside detectors.[262]

One of the most relevant cases addressing the question of whether wayside detectors are substantially subsumed by federal regulations is *Tipton v. CSX Transportation, Inc.*[263] At face value, *Tipton* appears to be a difficult hurdle for the Plaintiffs to overcome.

---

254. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 15.

255. *Id.* at 10.

256. *Id.* at 10–11.

257. *Id.* at 12.

258. *See* discussion *infra* pp. 47–50; *see also* discussion *supra* Section II.B.

259. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9; Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 5.

260. MD Mall Assocs., LLC v. CSX Transp., Inc., 715 F.3d 479, 489–90 (3d Cir. 2013) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993)).

261. *In re* Derail. Cases, 416 F.3d 787, 794 (8th Cir. 2005).

262. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 6–7.

263. No. 15-cv-311, 2017 WL 10398182, at *17 (E.D. Tenn. Oct. 25, 2017).

In a factual circumstance strikingly similar to the East Palestine derailment, the *Tipton* court held that claims involving failure to use wayside detectors were substantially subsumed by regulations promulgated by the FRA.[264] However, *Tipton* is distinguishable from the East Palestine case and the *Tipton* reasoning is flawed in light of subsequent developments.[265]

The *Tipton* court said that "[its] ruling . . . did not completely dispose of plaintiffs' claims. Instead, plaintiffs' claims could proceed to the extent they did not attempt to impose additional duties on defendants . . . beyond those contained in the FRSA or in defendants' operating rules."[266] Thus, in *Tipton*, the plaintiffs' claims failed because they attempted to impose an additional duty on railroads that did not already exist—the use of wayside detectors.[267] But in the East Palestine case, Norfolk Southern already was using wayside detectors, thus the Plaintiffs were not attempting to impose an additional duty onto Norfolk Southern; rather, they were attempting to hold Norfolk Southern liable for breaching a duty it undertook voluntarily.[268] Therefore, because the Plaintiffs were not seeking to impose an additional duty onto Norfolk Southern, the reasoning in *Tipton* is distinguishable from the issues of the East Palestine case and the East Palestine district court was correct in not relying upon *Tipton* in its decision.[269]

Further, the reasoning in *Tipton* finding that wayside detectors were "covered" by federal regulations was flawed, and this reasoning has weakened further due to the release of the FRA safety advisory after *Tipton*'s resolution.[270] As the Plaintiffs noted, the FRA stated that there were no federal regulations that required the use of wayside detectors or regulated their use and maintenance.[271] Norfolk Southern's argument that wayside detectors were covered

264. *Id.*
265. *See infra* pp. 49–51.
266. *Tipton*, 2017 WL 10398182, at *17 (internal quotation omitted).
267. *Id.*
268. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 10.
269. *See* Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 10 (finding, contrary to *Tipton*, that there were no federal regulations requiring or regulating the use of wayside detectors, and thus the Plaintiffs' claims relating to such detectors were not preempted by the FRSA).
270. The *Tipton* court dismissed the plaintiffs' claims relating to wayside detectors in 2016, *see Tipton,* 2017 WL 10398182, at *16–17*,* while the FRA safety advisory was released on March 3, 2023, *See* FRA Safety Advisory 2023-01, 88 Fed. Reg. 13495 (Mar. 3, 2023).
271. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 10 (citing FRA Safety Advisory 2023-01, 88 Fed. Reg. at 13495).

by regulations as a form of inspection was quite tenuous.[272] Regulations relating to railcar inspection appear to "merely touch upon or relate to" the use of wayside detectors,[273] and likely do not "substantially subsume" the use of wayside detectors.[274] It is difficult to say that the use of wayside detectors is substantially subsumed by federal regulation when the FRA specifically stated that such detectors were not covered by any federal regulations.[275] Ultimately, the East Palestine Plaintiffs had a strong argument that the *Tipton* court erred in finding that the use of wayside detectors was substantially subsumed by FRA regulation.[276] Having knowledge of the FRA's statement that wayside detectors were not covered by federal regulation—knowledge that the *Tipton* court lacked[277]—the East Palestine court correctly disregarded *Tipton* to find that the Plaintiffs' claims relating to the use of wayside detectors was not covered by federal regulation and that such claims were not preempted by the FRSA.[278]

While many additional claims were disputed between the parties, which the court ultimately resolved in favor of the Plaintiffs,[279] the same FRSA preemption analysis used in the above analysis of the wayside detector claim is applicable to those claims as well.[280] The foregoing discussion of wayside detectors sufficiently illustrates the nature of FRSA preemption as applied to train derailment tort claims, such that an in-depth preemption analysis of each claim at issue in the East Palestine litigation is unnecessary.[281]

D. The FRSA Still Unjustly Bars Many Railroad Safety Tort Claims, and Thus Reforms Should be Considered

As noted in the Introduction, the issues raised in the East Palestine filings illustrate the fundamentally flawed nature of the

272. Reply Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 32, at 5–6.

273. MD Mall Assocs., LLC v. CSX Transp., Inc., 715 F.3d 479, 490 (3d Cir. 2013) ("[P]reemption will not apply if the FRSA regulation in question merely "touch[es] upon or relate[s] to" the subject matter of state law.") (second and third alterations in original) (citing and quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

274. *Id.* ("[P]re-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.") (quoting *Easterwood*, 507 U.S. at 664)).

275. FRA Safety Advisory 2023-01, 88 Fed. Reg. at 13496.

276. Tipton v. CSX Transp., Inc., No. 15-cv-311, 2017 WL 10398182, at *17 (E.D. Tenn. Oct. 25, 2017).

277. *See supra* note 270.

278. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 10.

279. *Id.* at 10–16.

280. *See supra* note 235 and accompanying text.

281. *See* discussion *supra* Sections II.B, III.C.

modern preemption regime as applied to railroad tort litigation.[282] Even though the court held that the East Palestine Plaintiffs' claims were not preempted,[283] the injustice that arises from railroad tort preemption will persist. The East Palestine Plaintiffs' claims survived preemption largely because these Plaintiffs were "lucky" insofar that their case presented the opportunity to argue that the conduct upon which they based their claims was neither covered by FRSA regulation nor involved a violation of such regulations.[284] Many victims of train derailments are not so fortunate. If the railroad's negligent conduct was covered by and compliant with federal regulations, victims would be faced with an absolute bar to recovery, regardless of the egregiousness of the railroad's negligence or the severity of the harm inflicted.[285] There is much evidence to suggest that the American rail industry is severely underregulated and that the current regulatory scheme imposed by the FRA is woefully inadequate to ensure that railroads maintain reasonable safety standards.[286] In light of this dearth of regulation, granting railroads blanket immunity from tort suit so long as they are in compliance with such inadequate standards is unconscionable. This immunity encourages railroads to engage in reckless conduct, knowing that they are shielded by preemption so long as they accomplished the bare minimum to comply with regulations.[287] Most importantly, this immunity provides Americans—who are forced from their homes and exposed to toxic chemicals by derailments—no relief in law for their injury, and such victims are thus reliant on the hope that the railroad who caused them harm might voluntarily offer some form of relief.[288] Due to the grave defects in current

282. *See supra* pp. 11–12 and note 47.

283. Order Granting in Part and Denying in Part Norfolk Southern's Motion to Dismiss, *supra* note 38, at 16.

284. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 22, at 9–16.

285. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 673–74 (1993).

286. *See, e.g.*, Peter Eavis, Mark Walker & Niraj Chokshi, *Rail Heat Sensors, Under Scrutiny in Ohio Crash, Face Few Regulations*, N.Y. TIMES (Mar. 7, 2023), https://www.nytimes.com/2023/03/07/business/norfolk-southern-derailment-east-palestine-regulation.html; Kendra Pierre-Louis, *How Decades of Lax Rules Enable Train Disasters*, THE ATLANTIC (Mar. 23, 2023), https://www.theatlantic.com/ science/archive/2023/03/how-deregulation-enabled-train-disasters-like-east-palestine/673502/.

287. Under the two-part FRSA preemption analysis, a state claim relating to an activity "covered" by a federal regulation and compliant with that regulation is preempted. *See supra* pp. 21–22 and notes 108–13. This is true even if the federal regulation is utterly deficient and the activity falls below any reasonable tort standard of care. *See supra* pp. 21–22 and notes 108–13; *see also supra* note 285 and accompanying text.

288. Norfolk Southern has committed over $103 million in aid to the areas affected by the East Palestine derailment. *Norfolk Southern to End Relocation Aid Right After One-Year Anniversary of its Fiery Ohio Derailment*, CBS NEWS (Dec. 10, 2023, 7:38 AM),

preemption jurisprudence as applied to train derailments,[289] the courts and Congress ought to consider reforms to lessen the harshness of preemption and to protect injured parties.

First, courts ought to interpret and apply the FRSA, the ICCTA, and the HMTA in a manner to lessen these statutes' preemptive effect. Courts ought to universally adopt the interpretation of these statutes that has arisen from *Tyrrell* and *Public Utilities Commission* as discussed above and hold that when multiple rail statutes are implicated by a railroad's conduct, only one statute's preemption analysis should apply.[290] Applying one preemption analysis instead of multiple will increase the likelihood of a particular claim surviving preemption and will ensure that each statute's preemption analysis is not in conflict with the others'.[291] Further, what is "covered" by these statutes should be interpreted narrowly, leaving greater room for state regulation and litigation. The presumption against preemption should be given full effect,[292] and a subject of regulation should be presumed to *not* be covered by federal regulation unless there is clear and convincing evidence that the subject has been substantially subsumed by regulation. This approach is consistent with the constitutional duty of courts to ensure the supremacy of federal law,[293] yet it also gives injured plaintiffs greater opportunity to recover from negligent railroads.

Second, Congress ought to implement legislation to lessen the preemptive effect of the FRSA, the ICCTA, and the HMTA. For instance, Congress can codify the holdings of *Tyrrell* and *Public Utilities Commission* so that only one preemption analysis is applied when multiple statutes are invoked in a railroad tort claim. A codification of these holdings is preferable to their piecemeal adoption by various courts because codification would establish a uniform national standard rather than allowing the circuit courts to adopt potentially conflicting rules. Congress also could amend the FRSA so that its preemptive power only applies when action is *clearly* covered by regulation, and that close calls should be resolved in favor of non-preemption. Similarly, Congress could amend the FRSA to allow state regulations that are more stringent than FRA

---

https://www.cbsnews.com/pittsburgh/news/norfolk-southern-to-end-relocation-aid-right-after-one-year-anniversary-of-its-fiery-ohio-derailment/. While this aid is laudable, victims of derailments should not be reliant solely on the goodwill of railroad companies to provide adequate compensation following derailments.

289. *See* discussion *supra* pp. 51–52 and note 47.

290. *See* discussion *supra* Sections III.A, B.

291. *See supra* note 24 and accompanying text.

292. *See supra* p. 16 and notes 79–80.

293. U.S. CONST. art. VI, cl. 2; *see also supra* note 50 and accompanying text.

regulation to coexist with FRA regulations, thus preempting only state regulations that are less stringent than FRA regulations. In such a case, the FRA regulations exist as a national "bare minimum," and it would thus be possible for a railroad to comply with both the national standard and a higher state standard by meeting the state standard. However, this approach would lessen the uniformity of railroad regulations across the country, so Congress must weigh the burden of such diversity of regulation with the benefits to safety and the necessity of derailment victims having access to compensation.

Finally, if Congress determines that weakening the preemptive power of the FRSA would cause an unbearable burden on railroads due to varying and potentially conflicting forms of state regulation, Congress ought to establish a fund from which derailment victims can receive compensation when their lawsuit is barred by preemption. Such a program could resemble the National Vaccine Injury Program (NVIP).[294] This program was established by the National Childhood Vaccine Injury Act of 1986 in response to fears that traditional tort suits against vaccine manufacturers and healthcare providers would cause vaccine shortages and reduce vaccination rates.[295] The Act restricted tort suits arising from injuries caused by vaccines, but created the Vaccine Injury Trust Fund, which is funded by a tax on vaccines, from which funds are used to compensate persons who are found to have been harmed by vaccines, regardless of fault.[296] This program, administered by the Department of Health and Human Services,[297] has served as a reasonable compromise between the need to promote vaccine production and innovation and the need to compensate those harmed by vaccines, even though in recent years the program has suffered from understaffing and a lack of resources.[298]

A program similar to the NVIP, perhaps under the supervision of the Secretary of Transportation and funded by taxes on railroads, could be a reasonable option to compensate persons injured by derailments while not excessively burdening railroad operations. Train derailments are an extremely common phenomenon, with an

294. *About the National Vaccine Injury Compensation Program*, U.S. HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/vaccine-compensation/about (Sept. 2024).
295. *Id.*
296. *Id.*
297. *Id.*
298. Lauren Gardner, *Vaccine Injury Compensation Programs Overwhelmed as Congressional Reform Languishes*, POLITICO (June 1, 2022, 5:00 AM), https://www.politico.com/news/2022/06/01/vaccine-injury-compensation-programs-overwhelmed-as-congressional-reform-languishes-00033064.

average of 1,475 derailments occurring each year from 2005 to 2021,[299] so the need for widespread compensation certainly exists. The establishment of a derailment compensation program would allow the current restrictions related to tort suits against railroads to remain in place, protecting railroads from being regulated through litigation, while allowing victims of derailments to obtain some form of relief. While such a program would do little to incentivize railroads to operate in a safer manner, it would be preferable to the current legal regime because no victim of a derailment would be barred from compensation, even if their claim would otherwise be preempted.

IV. CONCLUSION

While most derailments are not as disastrous as the East Palestine derailment, it is nonetheless the case that numerous people are injured and sometimes killed by derailments each year.[300] While the long-term environmental and health impacts of the release of toxic chemicals from derailments are difficult to measure, such impacts undoubtedly are relevant in any analysis of the harm caused by derailments due to the high frequency at which such dangerous chemicals are released.[301] With an aging railroad infrastructure system and a lax safety culture existing within many railroad companies,[302] potentially disastrous derailments will continue to be an issue for the foreseeable future. Thus, victims of these derailments must have access to some form of compensation for the harm inflicted upon them and their communities by negligent railroad companies.

However, the goal of compensating victims of derailments must be balanced with the need for railroads to operate free of unreasonable burdens. The railroad industry plays a crucial role in the

299. Sanya Mansoor, *As Norfolk Southern Faces NTSB Investigation, Train Derailments Are More Common Than You Might Think*, TIME (Mar. 8, 2023, 12:56 PM), https://time.com/6260906/train-derailmentments-how-common/ (citing *Train Fatalities, Injuries, and Accidents by Type of Accident*, U.S. BUREAU OF TRANSP. STAT., https://www.bts.gov/content/train-fatalities-injuries-and-accidents-type-accidenta (last visited Jan. 3, 2024)).

300. *Id.*

301. *See* Carey Gillam, *US Faces Almost Daily Hazardous Chemical Accidents, Research Suggests*, THE GUARDIAN (Nov. 9, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/nov/09/how-many-chemical-accidents-spills-explosion#top.

302. *See, e.g.*, *Rail Infrastructure Crumbling Throughout US*, CBS NEWS BALT. (May 27, 2016, 6:14 PM), https://www.cbsnews.com/baltimore/news/rail-infrastructure-crumbling-throughout-us/; Topher Sanders et al., *"Do Your Job." How the Railroad Industry Intimidates Employees into Putting Speed Before Safety*, PROPUBLICA (Nov. 15, 2023, 6:00 AM), https://www.propublica.org/article/railroad-safety-union-pacific-csx-bnsf-trains-freight.

modern American economy.[303] Operating across the country, this $80 billion industry employs over 167,000 Americans and accounts for approximately 28% of all domestic freight movement.[304] Due to the importance of this industry, placing unreasonable and unduly high burdens upon its operations would almost certainly have negative economic consequences, as indicated by the history of rail regulation in the twentieth century.[305]

Nonetheless, no industry, regardless of its importance, ought to be able to harm Americans while hiding behind an almost invulnerable shield of tort immunity. Railroads cannot "have their cake and eat it too" insofar that they benefit from a lax regulatory environment yet remain immune from all tort suits under preemption so long as they show bare minimum compliance with such lax regulations. Either the regulatory environment must become more rigorous, or railroads must be subject to tort liability for the harms caused by their negligence, regardless of their compliance with regulations. At the bare minimum, Americans harmed by train derailments must have access to some form of compensation to help them recover after the loss of their homes, communities, health, or loved ones. Reforms can be implemented that further the goals of rail safety and compensation of victims while simultaneously not unreasonably burdening rail operations. Without a reform in the law, railroad companies will face no true incentive to improve their reckless safety culture and victims of derailments will remain uncompensated. It is only a matter of time before a disaster on the scale of East Palestine occurs again, and the victims of the next derailment may not have the same opportunities for compensation as the residents of East Palestine did.

303. *Freight Rail Overview*, FED. R.R. ADMIN., https://railroads.dot.gov/rail-network-development/freight-rail-overview (June 20, 2024).

304. *Id.*

305. *See, e.g.*, Joel Palley, *Impact of the Staggers Rail Act of 1980*, FED. R.R. ADMIN. (Mar. 2011), https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1645/ STAGGER_%20RAIL_ACT_OF_1980_updated_31811.pdf; Ass'n of Am. R.Rs., *How Deregulation Saved the Freight Rail Industry*, WASH. POST, https://www.washingtonpost.com/sf/brand-connect/wp/enterprise/how-deregulation-saved-the-freight-rail-industry/ (last visited Jan. 3, 2023); Steve Pociask, *Rail Deregulation 40 Years Ago: Staggering Success for Consumers Today*, THE HILL (Oct. 7, 2020, 3:30 PM), https://thehill.com/blogs/congress-blog/politics/519890-rail-deregulation-40-years-ago-staggering-success-for-consumers/.

Demystifying *Martin*: Analyzing a Controversial and Confusing Precedent in the Context of Pennsylvania Homelessness Practices

Brooke McCaffrey

I. INTRODUCTION

"We will never solve homelessness," said Jennifer Liptak, chief of staff for then-County Executive Rich Fitzgerald in Pittsburgh, Pennsylvania.[1] Boos erupted in the Allegheny County court room, where the gavel-hammering and jeer-ridden county council hearing over the then-impending closure of the Smithfield United Church of Christ shelter, one of the city's few shelter options, was underway.[2] The mounting frustration arising from the issue of providing access to shelter for the unhoused is not unique to Pittsburgh.[3] Homelessness, and the rights of those suffering from it, raises polarizing and complex debates across the country.[4]

---

1. Lucas Dufalla & Eric Jankiewicz, *Advocates for Pittsburgh's Unhoused and Business Leaders Met and Agreed on One Thing: Bathrooms*, PUBLICSOURCE (June 17, 2023), https://www.publicsource.org/smithfield-shelter-allegheny-county-council-policy-meeting-downtown-pittsburgh-bathrooms. Allegheny County's Department of Human Services made the decision to close the Smithfield United Church of Christ shelter. *Id.* The county, which receives over $100 million a year to address homelessness, controls the allocation of resources for shelters. *See* Andy Sheehan, *Allegheny County Controller to Audit Department of Human Services Over Homelessness Services*, CBS NEWS (Jan. 9, 2024, 6:18 PM), https://www.cbsnews.com/pittsburgh/news/allegheny-county-controller-to-audit-department-of-human-services-over/. The City of Pittsburgh, meanwhile, is responsible for carrying out policies and programming to address homelessness, like when to clear or "decommission" an encampment. *See* Eric Jankiewicz, *Pittsburgh Creates New Policy Addressing Tent Encampments*, PUBLICSOURCE (Aug. 31, 2023) [hereinafter *New Pittsburgh Tent Policy*], https://www.publicsource.org/pittsburgh-homelessness-housing-tent-encampments-aclu-gainey/ (reporting Pittsburgh City Solicitor Krysia Kubiak as explaining that the City's part in providing shelter is limited because it is the county that receives funding for homeless services and shelters). This bifurcated structure, combined with internal discord within both the county and the City, has contributed to the controversy and backlash surrounding Pittsburgh's homelessness crisis. *See, e.g.*, Julia Felton, *Pittsburgh Council Gripes About Gainey but Passes His Housing Plan*, TRIBLIVE (Mar. 12, 2024, 5:54 PM), https://triblive.com/local/pittsburgh-council-gripes-about-gainey-but-passes-his-housing-plan/ (describing how "exasperated" city council members have plead for better communication from the mayor's office arising from concern that the two were operating on "two separate tracks").

2. Dufalla & Jankiewicz, *supra* note 1; *see also* Kris Maher & Dan Frosch, *Why Are Cities Closing Shelters if Homelessness Is Rising?*, WALL ST. J. (Dec. 13, 2023, 9:00 AM), https://www.wsj.com/us-news/why-are-cities-closing-shelters-if-homelessness-is-rising-c73cdbcd (quoting an unhoused individual as stating "I don't know where people are going to go" in reaction to the closure of Pittsburgh's cold weather shelter).

3. *See* Maher & Frosch, *supra* note 2.

4. *See* Zachary B. Wolf, *A Hard Look at New York's Controversial New Approach to the Homeless*, CNN POL. (Dec. 3, 2022, 10:26 AM), https://www.cnn.com/2022/12/03/politics/nyc-

Many states and cities have resorted to criminalizing homelessness, penalizing unhoused individuals for engaging in "prohibited" behaviors in public, to address the crisis.[5] While laws prohibiting those behaviors have been challenged and shaped by constitutional law for over fifty years,[6] questions have lingered about when a municipality can punish persons for their actions arising from being homeless. For municipalities within the Ninth Circuit's jurisdiction, those questions were asked and answered in the 2019 landmark decision, *Martin v. Boise*.[7] In that decision, the Ninth Circuit held that the City of Boise, Idaho's ordinance, which criminally sanctioned a homeless person for sleeping outside without access to alterative shelter, violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[8] While *Martin* was championed by advocates against criminalizing homelessness,[9] not everyone believed that the Ninth Circuit's decision was the correct solution.[10] The ruling and its residual effects ignited outcry from critics who contended that the decision hindered initiatives geared toward addressing homelessness.[11] Since the Supreme Court of the United

---

hospitalize-mentally-ill-what-matters/index.html; Steve Pomeroy, *Why Are People Homeless? Is it By Choice or Circumstance?*, MEDIUM (July 23, 2019), https://stevepomeroy-85262.medium.com/why-are-people-homeless-is-it-by-choice-or-circumstance-3b94829d0068.

5. Scholars contend that colonial vagrancy laws—prohibitions against wandering without an apparent lawful purpose—have evolved into today's anti-homeless laws that make it a crime to be poor. *See, e.g.*, *U.S. Vagrancy Laws*, UNIV. OF VA. SCH. OF L., https://www.law.virginia.edu/scholarship/publication/risa-goluboff/640716#:~:text=Vagrancy%20laws%20took%20myriad%20forms,some%20jurisdictions%20criminalized%20loitering%20separately (last visited Mar. 7, 2024). Modern examples include issuing penalties for individuals sleeping or asking for charity in public. *See* Press Release, Nat'l Homelessness L. Ctr., First Nat'l Study of State L. Criminalizing Homelessness Released: Widespread Criminalization of Sheltering, Camping, and Other Means of Survival (Dec. 1, 2021) (finding fifteen states that have laws restricting camping in public places, forty-eight states that have laws restricting conduct of homeless individuals, and 187 cities across the country that criminalize homelessness).

6. *See, e.g.*, Robinson v. California, 370 U.S. 660, 660–61 (1962) (deciding that a California statute making it a criminal offense for a person "to be addicted to the use of narcotics" was unconstitutional).

7. *See* Martin v. City of Boise, 920 F.3d 584, 615–18 (9th Cir. 2019) (interpreting *Robinson* to mean that the Eighth Amendment's prohibition against the state from punishing one's status of being addicted to narcotics also applied in instances where the state's action punished the status of being homeless).

8. *See id.*

9. *See* Press Release, Nat'l Homelessness L. Ctr., Sup. Ct. Lets Martin v. Boise Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives (Dec. 16, 2019) (quoting advocates describing the ruling as "a win for everyone" and that "[h]ousing, not handcuffs, is what ends homelessness").

10. *See Martin*, 920 F.3d at 590 (Smith, J., dissenting) (opining that *Martin* "shackles the hands of public officials trying to redress the serious societal concern of homelessness").

11. *See* Press Release, City of Boise, City of Boise Formally Asks U.S. Sup. Ct. to Hear *Martin* Case (Aug. 22, 2019) ("It takes away an important tool cities have to stop the proliferation of permanent encampments, which undermine cities' efforts to provide shelter and

States denied certiorari to reconsider the matter in 2019,[12] other circuits have been left to grapple with the Ninth Circuit's decision.[13] Consequently, *Martin* has influenced policies and practices beyond the boundaries of Boise, and into Pennsylvania cities and courtrooms.[14] While Pennsylvania cities like Pottstown and Pittsburgh started to grapple with *Martin*,[15] officials across the Ninth Circuit, who believed that the decision "impermissibly intrude[d]" on cities' policing duties and frustrated efforts to curb homelessness, sought to prevent the decision's application from spreading further.[16] Many officials advocated for and petitioned the Supreme Court to hear a similar case that expanded *Martin*: *City of Grants Pass, Oregon v. Johnson*.[17]

Once the Supreme Court granted certiorari to review *Grants Pass*,[18] debates over *Martin* reemerged under the spotlight.[19] Although the decision was imperfect, *Martin* signified a recognition by courts that criminalization of unavoidable behaviors, like sleeping outside when there is no alternative shelter, is not a meaningful solution to homelessness.[20]

---

services to the most vulnerable."); *see also* Petition for Writ of Certiorari, City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024) (No. 23-175).

12. *See* City of Boise v. Martin, 140 S. Ct. 674 (mem.) (2019).

13. *See* Better Days Ahead Outreach Inc. v. Borough of Pottstown, No. 23-CV-04234, 2023 WL 8237255 (E.D. Pa. Nov. 28, 2023) (deciding, in a matter of first impression, that *Martin* applied and required that the Borough of Pottstown be enjoined from enforcing a homeless encampment closure through criminal penalties).

14. *Id. See* discussion *infra* Part IV.C.

15. *See Better Days Ahead Outreach Inc.*, 2023 WL 8237255 at *1, *4–5; *see also New Pittsburgh Tent Policy*, *supra* note 1.

16. *See* Rachel M. Cohen, *Cities Are Asking the Supreme Court for More Power to Clear Homeless Encampments*, VOX (Oct. 10, 2023, 6:00 AM), https://www.vox.com/2023/10/10/23905951/homeless-tent-encampments-grants-pass-martin-boise-unsheltered-housing (explaining that although leaders recognize that they cannot ban camping everywhere given the court rulings, "[i]f *Martin* was overturned by the Supreme Court, however, officials would likely feel much more empowered to resume city-wide anti-camping bans and prosecute those who violate them").

17. *See* Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023) (extending *Martin* to hold that a city's anti-camping ordinance prohibiting a homeless person from sleeping outside with bedding was unconstitutional).

18. Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023), *cert. granted*, 144 S. Ct. 679 (2024).

19. *See, e.g.*, Ian Millhiser, *The Supreme Court Case that Could Turn Homelessness into a Crime, Explained*, VOX (Apr. 17, 2024, 7:00 AM), https://www.vox.com/scotus/24121344/supreme-court-homeless-grants-pass-martin-crime-grants-pass-johnson (observing that modern day disagreements over how to address homelessness is synonymous with fights about the *Martin* decision).

20. Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address (explaining that "[i]t can cost three times more to enforce anti-homeless laws than to find housing for people who don't have it" and that such laws don't decrease the number of those experiencing homelessness).

This Article will discuss the growing confusion surrounding how cities deal with homelessness. Part II opens with a brief background on issues and controversies related to twenty-first century homelessness practices in Pennsylvania.[21] Part III explains the origins and the rise of Eighth Amendment challenges to anti-homelessness laws that set the stage for the *Martin* decision.[22] Part IV addresses post-*Martin* perspectives for and against *Martin*, giving insight into how and why the decision has caused division.[23] Part IV then discusses the decision's reversal and subsequent aftermath and looks to how courts and policymakers have responded to *Martin* to provide clarity to the decision's reach and significance.[24] Part V proposes that *Martin,* despite the ambiguity arising from it*,* can be considered a catalyst for change that inspired municipalities to reimagine laws and policies in favor of transformative and compassionate approaches to homelessness.[25]

II. THE STATE OF HOMELESSNESS IN PENNSYLVANIA

On a given night, 12,691 Pennsylvanians do not have a place to call home.[26] The number of homeless individuals is nearly double the amount of available shelter beds in Pennsylvania.[27] Yet, thirty-seven municipalities across the state ban sleeping in public places.[28] In Jenkintown, Pennsylvania, it is unlawful for a person to erect structures, like a tent, or to sleep outdoors on the borough's property.[29] While an ordinance of this kind is not novel, Jenkintown and other cities across the state criminalize this behavior even when adequate alternative shelter is not available.[30] An individual guilty of violating those provisions of the Jenkintown ordinance may be

---

21. *See* discussion *infra* Part II.
22. *See* discussion *infra* Part III.
23. *See* discussion *infra* Part IV.A.
24. *See* discussion *infra* Part IV.B–C.
25. *See* discussion *infra* Part V. Morgan Chandegra, Comment, *And It's Beginning to Snow*, 56 CAL. W. L. REV. 425, 453 (2020).
26. *SOH: State and CoC Dashboards*, *State of Homelessness*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-dashboards/?State=Pennsylvania (last visited Oct. 21, 2023).
27. *Id.*
28. Emily Previti, *Homelessness: Some Pa. Cities' Laws Against Sleeping Outside May Be Unconstitutional*, WHYY (Aug. 24, 2015), https://whyy.org/articles/homelessness-some-pa-cities-laws-against-sleeping-outside-may-be-unconstitutional (noting Doylestown in southeastern Pennsylvania, Palmerton in northeastern Pennsylvania, and Johnstown in southwestern Pennsylvania, as cities with a history of anti-sleeping laws).
29. JENKINTOWN, PA., CODE § 114–7(A)–(B) (2012).
30. *See* Previti, *supra* note 28 (noting that officials in the over fifty Pennsylvania municipalities with similar ordinances should be on notice after the Department of Justice (DOJ) denounced the practice as unconstitutional).

subject to a minimum fine of $300, and failure to pay this fine may result in imprisonment and additional offenses.[31] Norristown, Pennsylvania has also made headlines for its homelessness policies.[32] In 2022, the Norristown Borough Council instituted a "sunrise [to] sunset" ordinance that made it illegal for individuals to stay overnight in parks.[33] The decision was criticized because the ordinance's proposal came on the heels of the closure of Norristown's only twenty-four seven emergency housing shelter.[34] Meanwhile, Norristown's hospitality center claimed that it was receiving constant calls from families fearing eviction, and that homelessness had increased 118% from the previous year in the county at large.[35]

While the City of Pittsburgh does not have an active anti-camping or anti-sleeping ordinance, the City has taken other measures that local attorneys believe penalize and infringe on the constitutional rights of those experiencing homelessness.[36] For example, the City's custom of "sweeping" has faced scrutiny and has been subject to litigation over the years.[37]

In 2003, the American Civil Liberties Union (ACLU) of Pennsylvania sued the City of Pittsburgh on behalf of homeless individuals living on public property.[38] The ACLU of Pennsylvania brought the class action, *Sager v. City of Pittsburgh*, on the grounds that the City's policy of seizing, destroying, and taking homeless individuals' property without adequate procedural due process protections and

---

31. JENKINTOWN, PA., CODE § 114–7(C) (2012).

32. *See* Emily Rizzo, *Advocates Say There's 'No Place' for Unhoused People in Norristown, Where it May Soon Be Illegal to Stay in Parks Past Dusk*, WHYY, https://whyy.org/articles/norristown-pa-unhoused-people-dawn-to-dusk-park-ordinance (Aug. 9, 2022, 11:19 AM).

33. NORRISTOWN, PA., CODE § 225–2(A) (2022).

34. Emily Rizzo, *As Norristown Closes Parks from Dusk to Dawn, Unhoused People Fear Arrest*, WHYY (Aug. 20, 2022), https://whyy.org/articles/pa-norristown-closes-parks-from-dusk-to-dawn-unhoused-people-fear-arrest/.

35. *See* Rizzo, *supra* note 32.

36. *See* Amelia Winger et al., *Tent Camp Closure Marks Shift in Pittsburgh, Allegheny County Homelessness Policies*, PUBLICSOURCE (Jan. 20, 2023), https://www.publicsource.org/homelessness-pittsburgh-allegheny-county-stockton-encampment-camp-aclu-community-justice/.

37. *See id.*

> A "sweep" is . . . the forced disbanding of homeless encampments on public property and the removal of both homeless individuals and their property from that area. This could be through an explicit or implied threat of enforcement of criminal ordinances, or use of public health, sanitation, parking enforcement, park or other public space regulations.

Impact of Encampment Sweeps on People Experiencing Homelessness, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (Dec. 2022), https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf.

38. *See* Winger et al., *supra* note 36.

without just compensation violated those individuals' Fourth, Fifth, and Fourteenth Amendment rights.[39]

The ACLU of Pennsylvania alleged that there were insufficient beds to house individuals in need of shelter, that the City failed to give notice to those living in the encampment about the deprivation of property or information as to how the property could be reclaimed, and that the property seized, like clothing, blankets, medications, and identification, were valuable to individuals' health, safety, and personhood.[40]

The parties reached a settlement in which the City agreed to provide notice seven days in advance of a sweep.[41] The agreement stipulated the kinds of information that the notices were to provide, such as the dates and times of a sweep, the location and address of where individuals could reclaim their property, and a telephone number to call for further details or questions.[42] For nearly twenty years, the City honored the settlement agreement.[43]

But in 2022, history repeated itself.[44] That December, legal advocacy groups decried the City closure of a homeless encampment on Stockton Avenue during which work crews using front-loaders inadvertently scooped a woman in a tent before she was then dropped to the ground.[45] The legal advocacy groups condemned the City's decommissioning process for its departure from the *Sager* guidelines in failing to provide the residents with sufficient notice of the closure, alternative housing options, or storage for the items they left behind, and questioned how the residents' property could be "properly preserved after the 'haphazard manner' in which they were collected."[46] City officials claimed that the camp's decommission was necessary to address public health and safety concerns as the site had become an open-air drug market.[47] While the City stated its intention to house those individuals who had previously

39. Verified Class Action Complaint at 1, Sager v. City of Pittsburgh, No. 03-0635 (W.D. Pa. May 3, 2003).

40. *Id.* at 1, 6, 8–9.

41. Settlement Agreement at 2, Sager v. City of Pittsburgh, No. 03-0635 (W.D. Pa. May 9, 2003).

42. *Id.* at 3–4.

43. *See* Winger et al., *supra* note 36 (reporting that Vic Walczak, an attorney who litigated the *Sager* agreement in 2003, believed that subsequent mayoral administrations had largely respected the "tenets" of the agreement by providing notice and storage despite its expiration in 2006).

44. *Id.*

45. *Id.*

46. *Id.* (quoting attorneys from Community Justice Project (CJP) and ACLU of Pennsylvania, firms representing the residents of the Stockton Avenue encampment).

47. *Id.*

been in the encampments,[48] reports indicated that the then-newly built low-barrier shelter, Second Avenue Commons, had already reached capacity within days of opening.[49]

After the Stockton Avenue incident, and months of planning and consulting with legal organizations and outreach groups, the City published its new decommissioning policy in late summer of 2023 that outlined factors the City would consider when deciding whether to clear an encampment.[50] The policy included guidelines for giving notice to residents and for retrieving their property, but similar to *Sager*, attorneys from CJP and ACLU of Pennsylvania representing the encampment residents expressed concern that there was a lack of information for alternative shelter.[51] This time, however, the attorneys hinted at challenging the city and county governments on different constitutional grounds: the Eighth Amendment.[52]

III. HISTORICAL BACKGROUND TO EIGHTH AMENDMENT CHALLENGES TO ANTI-HOMELESS LAWS

The Eighth Amendment of the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[53] The Cruel and Unusual Punishments Clause has been enforced by three mechanisms: "First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly dis-proportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[54] The third mechanism, the substantive limitation, has been analyzed for decades to determine the legality of ordinances that punish a person's actions related to status, conditions, and voluntariness.[55]

---

48. *Id.*

49. *Id.*; *see also* Julia Felton, *Crews Shut Down Homeless Encampment on Pittsburgh's North Side*, TRIBLIVE (Dec. 15, 2022, 12:01 PM), https://triblive.com/local/crews-shut-down-homeless-encampment-on-pittsburghs-north-side/.

50. *See New Pittsburgh Tent Policy*, *supra* note 1 (noting health and safety concerns, evidence of drug sales, and proximity to streets, sidewalks, or a right-of- way, as determining factors for decommissioning an encampment).

51. *Id.*

52. *Id.*

53. U.S. CONST. amend. VIII.

54. Brief In Opposition at 13, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) (citing Ingraham v. Wright, 430 U.S. 651, 667 (1977)).

55. *See* Chandegra, *supra* note 25, at 433.

A. Using the Cruel and Unusual Punishment Clause's Substantive Limitation to Invalidate "Status" Crimes

In 1962, the United States Supreme Court determined, in *Robinson v. California*, that a California statute that made it a criminal offense for a person to be addicted to narcotics was unconstitutional.[56] The majority likened addiction to illness and found that it was a violation of the Eighth Amendment to punish a person for something of an involuntary nature that arises from his or her "status."[57]

A few years later, the Supreme Court considered whether *Robinson* extended to a California statute prohibiting public intoxication.[58] Unlike in *Robinson*, the *Powell* court determined that because the plaintiff failed to show an irresistible compulsion to drinking in public, the statute's punishment of public intoxication did not arise from the person's status, and therefore neither implicated *Robinson* nor violated the Eighth Amendment.[59] Justice White concurred, but opined that it was unavoidable that certain behaviors for homeless individuals be performed in public.[60] Justice White contended that public drunkenness for individuals experiencing homelessness could not be punishable because there is "no place else to be when they are drinking"[61]—four dissenting justices echoed the same.[62]

B. The Robinson-Powell-*Concurrence-Dissent Doctrine Applied*

Courts have since relied on the "no place else to be" phrasing from the *Powell* concurrence and dissent, together with the *Robinson* prohibition on criminalizing "status" crimes,[63] in deciding similar matters:

---

56. *See* Robinson v. California, 370 U.S. 660 (1962).

57. *Id.* at 666.

58. *See* Powell v. Texas, 392 U.S. 514 (1968).

59. *Id.* at 532 (explaining that a criminal sanction for public intoxication on a particular occasion was a "far cry" from being an addict or chronic alcoholic).

60. *Id.* at 551–54 (White, J., concurring) (explaining that because record evidence indicated that the plaintiff had a home, and that he failed to show why he was unable to stay out of public during the night in question, his subsequent conviction was constitutional).

61. *Id.* at 551.

62. *See id.* at 556–58 (Fortas, J., dissenting). While the four dissenting justices in *Powell* opined that the facts here did implicate *Robinson*, they agreed with Justice White's observation that imposing criminal penalties for performing certain actions in public, when that person lacked a private space and was therefore powerless to avoid being in public such that he could not help but violate the ordinance, did invoke Eighth Amendment concerns. *Id.*

63. This Article refers to these decisions as the "*Robinson-Powell*-Concurrence-Dissent Doctrine."

> Five Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. Although this principle did not determine the outcome in *Powell*, it garnered the considered support of a majority of the Court. Because the conclusion that certain involuntary acts could not be criminalized was not dicta, we adopt this interpretation of *Robinson* and the Cruel and Unusual Punishment Clause as persuasive authority.[64]

1. Jones v. City of Los Angeles

In 2003, six homeless individuals living in Los Angeles, California, challenged the enforcement of an ordinance that criminalized sitting, lying, and sleeping in the City of Los Angeles no matter the time of day.[65] In *Jones v. City of Los Angeles*, the Ninth Circuit applied the *Robinson-Powell*-concurrence-dissent doctrine and explained that a proper reading of *Robinson* and *Powell* instructed "that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment."[66] And here, because the plaintiffs were in a chronic state of homelessness without access to private spaces, the court established that sitting, sleeping, and lying outside was merely incidental conduct and the unavoidable consequence of their homelessness.[67] Applying the *Robinson-*

---

64. Jones v. City of Los Angeles, 444 F.3d 1118, 1135–36 (9th Cir. 2006) (internal citations omitted) (explaining that the lack of agreement on the meaning of *Robinson* and Eighth Amendment by the *Powell* plurality commands that the rationale shared by Justice White's concurrences and the four dissenting justices control in the analysis) (citing Marks v. United States, 430 U.S. 188, 193 (1977)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]"), *vacated*, 505 F.3d 1006 (9th Cir. 2007). *See* Carli Ross, Note, *Constitutional Law-Penalizing the "Unsightly": An Argument for the Abolishment of Laws Criminalizing Life-Sustaining Behaviors Among the Homeless*, 43 W. NEW. ENG. L. REV. 219, 242 (2022); Ryan P. Isola, Note, *The Status of the Status Doctrine*, 54 U.C. DAVIS L. REV. 1725, 1736 (2021).

65. *Jones*, 444 F.3d at 1118, 1136.

66. *Id.* at 1132.

67. *Id.* at 1136.

> We are not confronted here with a facial challenge to a statute, nor a statute that criminalizes public drunkenness or camping, or sitting, lying, or sleeping only at certain times or in certain places within the city. And we are not called upon to decide the constitutionality of punishment when there are beds available for the homeless in shelters.

Powell-concurrence-dissent doctrine, the court in *Jones* held that the ordinance that criminalized this incidental conduct, no matter the time or location, across the city, violated the Cruel and Unusual Punishments Clause of the Eighth Amendment:

> We hold only that, just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home, the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.[68]

The court cautioned, however, that the decision did not prevent ordinances that criminalized panhandling or other actions considered "avoidable" consequences of being homeless.[69] Although *Jones* was later vacated,[70] the court's rationale has inspired subsequent landmark Ninth Circuit decisions.

2. Martin v. Boise

Three years later in Boise, Idaho, the issue of enforcing similar ordinances when homeless individuals outnumbered the available shelter beds arose again.[71] In *Martin v. City of Boise*, homeless plaintiffs alleged that their citations and convictions for violating the City's Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.[72] During the time of litigation, the City of

---

Id. at 1138 (internal citations omitted).

68. *Id.* at 1138 (internal citations omitted).

69. *Id.* at 1137–38. (adding that "[w]e do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless . . . and do not desire to encroach on the legislative and executive functions reserved to the City Council and the Mayor of Los Angeles") (internal citations omitted).

70. Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007).

71. *See* Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019). Similar to the challenged ordinance in *Jones* that prohibited sleeping in public across the city in a twenty-four seven manner when shelter was unavailable, the City of Boise's two challenged ordinances in *Martin* employed sweeping language to prohibit sleeping and camping in "any" public location like streets, sidewalks, or parks "at any time" when Boise had limited and restrictive shelter options. *See supra* notes 65–69 and accompanying text; *see also infra* notes 72–81 and accompanying text.

72. *Martin*, 920 F.3d at 606. The Camping Ordinance, Boise City Code § 7-3A-2(A) formerly § 9-10-02 (2009), made it a misdemeanor to use "*any* streets, sidewalks, parks, or public places, as a camping place *at any time*." *See* Ross, *supra* note 64, at 221 n.3 (emphasis added). The Camping Ordinance defined camping to mean the "use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation *at*

Boise operated three homeless shelters with emergency services,[73] two of which required individuals to join religious programming to access services.[74] During trial, plaintiff Robert Anderson testified to the execution of this policy, as he slept outside for several weeks after declining the River of Life's Discipleship Program and was consequently cited for violating the Camping Ordinance and fined $25.[75] Plaintiff Robert Martin was similarly cited under the Camping Ordinance for sleeping outside in 2009, and again in 2012.[76] While the City later amended the ordinance in 2014 to prevent enforcement when shelter space was unavailable,[77] the *Martin* court determined that because there was a genuine issue of material fact regarding whether plaintiffs faced a credible risk of prosecution, the plaintiffs had standing.[78]

Relying on the *Robinson-Powell*-concurrence-dissent doctrine and the vacated *Jones* opinion, the court determined that, because sleeping was an involuntary and life-sustaining activity inseparable from a person's status, issuing criminal sanctions for sleeping outside when plaintiffs lacked access to alternative shelter violated the Eighth Amendment.[79] Like *Jones*, the court in *Martin* explained that the decision was intentionally narrow so as not to infringe on the City of Boise's lawmaking authority or policing powers.[80] Rather, the court emphasized that "[w]e hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'"[81]

---

anytime between sunset and sunrise, or as a sojourn." *Id.* at 235 n.131 (emphasis added). The Disorderly Conduct Ordinance, Boise City Code § 5-2-3(A), formerly § 6-01-05 (2009), prohibited "[o]ccupying, lodging, or sleeping in *any* building, structure, or public place, whether private or public without the permission of the owner or person entitled to possession or in control thereof." *Id.* at 221 n.5 (emphasis added).

73. *Martin*, 920 F.3d at 605.
74. *Id.* at 609–10.
75. *Id.* at 606.
76. *Id.*
77. *Id.* at 608.
78. *Id.* at 610.
79. *Id.* at 616–17 (reiterating that because five of the Justices in *Powell* understood *Robinson* to mean that criminal penalties could not be inflicted against a person for "being in a condition he is powerless to change," and the *Jones* court's determination that sleeping outdoors when no alternative shelter was available was an unavoidable result of the condition of homelessness, that the City of Boise's ordinances in *Martin* criminalizing this ran afoul of the Eighth Amendment) (citing Powell v. Texas, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)). *See* discussion *supra* Part III.B.
80. *Id.* at 617.
81. *Id.* (quoting Jones v. City of Los Angeles, 505 F.3d 1006, 1138 (9th Cir. 2007)).

3. Johnson v. City of Grants Pass

In 2023, the Ninth Circuit reexamined *Martin* in a civil context in *Johnson v. City of Grants Pass*.[82] Weeks after the *Martin* decision, homeless individuals residing in Grants Pass, Oregon, sued the City and challenged ordinances with prohibitions against sleeping and camping in public.[83] Unlike the plaintiffs in *Martin*, violators of the ordinances in *Grants Pass* faced civil penalties and could be fined hundreds of dollars.[84] Despite only facing initial civil penalties for violating the ordinances, because individuals that repeatedly violated the ordinances could later be subject to criminal prosecution, the court applied the *Robinson-Powell*-concurrence-dissent doctrine, the vacated *Jones* opinion, and the *Martin* decision.[85] As for the *Robinson-Powell*-concurrence-dissent doctrine, the court in *Grants Pass*, similar to the court in *Jones*, reasoned that the narrowest position articulated by a majority of the court in *Powell*—that if a person's status made his subsequent behavior or action involuntary, then he could not be prosecuted—controlled here.[86] Like the court in *Martin*, the court in *Grants Pass* relied on the logic from the *Jones* opinion, but without an explanation even though *Jones* had been vacated.[87] And as for the *Martin* decision, the court in *Grants Pass* rejected the notion that the two were materially distinguishable, and explained that because the City of Grants Pass merely imposed "a few extra steps before criminalizing the very acts *Martin* explicitly [held] could not be punished"—i.e. a homeless person sleeping outdoors in public when shelter is unavailable—the anti-camping ordinances here were also unconstitutional.[88] While the court in *Grants Pass* extended *Martin* to prohibit civil and criminal penalties that were "closely intertwined," the court went a step further and established that *Martin* also prohibited cities, like the City of Grants Pass, from penalizing homeless individuals for sleeping with blankets or bedding when alternative shelter was unavailable.[89]

---

82. 72 F.4th 868, 875 (9th Cir. 2023).
83. *Id.*
84. *Id.*
85. *Id.* at 889–96.
86. *Id.* at 892–93, 893 n.29. *See supra* note 68 and accompanying text.
87. *Grants Pass*, 72 F.4th at 892. *See supra* note 70.
88. *Grants Pass*, 72 F.4th at 890, 896 (explaining that this made no difference in failing to "cure the anti-camping ordinances Eighth Amendment infirmity").
89. *Id.* at 891 (holding that "the City cannot enforce its anti-camping ordinances to the extent they prohibit 'the most rudimentary precautions' a homeless person might take against the elements").

IV. POST-*MARTIN* DISCUSSION

The decisions in *Martin* and *Grants Pass* sparked fierce reactions from both proponents and critics of the decisions and even united those across the political spectrum.[90] Those in favor of the rulings championed the decisions as progress in the movement to decriminalize homelessness.[91] Despite perceived progress, the celebration was short-lived.[92]

Although the Supreme Court denied the petition for certiorari for *Martin* in 2019, the belief remained that the Supreme Court's potential review of *Grants Pass* could undo both decisions.[93] In August of 2023, the City of Grants Pass filed for a writ of certiorari that opened the floodgates for over fifty governments and organizations to join the charge to overturn the past decisions.[94] Even those who agreed with *Martin* filed briefs.[95] Former Mayor of San Francisco and current Governor of California, Gavin Newsom, claimed that post-*Martin* decisions, like *Grants Pass*, had caused confusion by extending the law beyond the holding in *Martin*.[96] In September 2023, Governor Gavin Newsom publicly stated that he "hope[s] this goes to the Supreme Court[.]"[97] "And that's a hell of a statement

90. *See supra* notes 9–17 and accompanying text; *see also* Shawn Hubler, *In Rare Alliance, Democrats and Republicans Seek Legal Power to Clear Homeless Camps*, N.Y. TIMES (Sept. 27, 2023), https://www.nytimes.com/2023/09/27/us/in-rare-alliance-democrats-and-republicans-seek-legal-power-to-clear-homeless-camps.html (writing that homeless advocates believe that cities hoping for the decisions' reversals want to "blame and penalize and marginalize the victims rather than take the steps they haven't found the political will to take"); Roshana Abraham, *Inspiring: Republicans and Democrats Are Coming Together to Screw Over the Unhoused*, VICE (Oct. 5, 2023, 2:45 PM), https://www.vice.com/en/article/93kzg7/inspiring-republicans-and-democrats-are-coming-together-to-screw-over-the-unhoused/.

91. *See* Press Release, Nat'l Homelessness L. Ctr., *supra* note 9.

92. *See* Abené Clayton, *Supreme Court to Decide Whether US Cities Can Enforce Anti-homeless Laws*, THE GUARDIAN (Jan. 16, 2024, 8:00 AM), https://www.theguardian.com/law/2024/jan/16/supreme-court-anti-homeless-laws-oregon.

93. *See, e.g.*, Cohen, *supra* note 16 (citing Eric Tars of the National Homelessness Law Center as claiming that the government officials filing briefs asking the Supreme Court to review *Grants Pass* are "fooling themselves" for not recognizing that overturning the decision will inevitably result in the Court overturning other rulings that underpin it like *Martin*).

94. Petition for Writ of Certiorari, *supra* note 11, at 36; *see also City of Grants Pass, Oregon v. Johnson*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/city-of-grants-pass-oregon-v-johnson/ (last visited Aug. 4, 2024); Hubler, *supra* note 90.

95. *See, e.g.*, Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner at 4–5, *Grants Pass*, 72 F.4th 868 (No. 23-175) (stating that *Martin* served as a narrow and "modest check on government's use of criminal prohibitions to address the homelessness crisis").

96. *Id.* at 12–13 ("The Ninth Circuit's failure to provide clarity on the governing legal standard—culminating in *Grants Pass*—has effectively removed those tools, leaving only the most rudimentary and fragmented options for effecting change during a growing national crisis.").

97. Associated Press, *Cities Crack Down on Homeless Encampments. Advocates Say That's Not the Answer*, TRIBLIVE (Nov. 29, 2023), https://triblive.com/news/world/cities-crack-down-on-homeless-encampments-advocates-say-thats-not-the-answer/ (citing *Full event:*

coming from a progressive Democrat."[98] In January of 2024, the Supreme Court granted Governor Newsom and others their wish when it granted certiorari to hear *Grants Pass*.[99]

As the fate of *Martin* now depended on the Court's pending decision in *Grants Pass*, proponents and critics of the two decisions sparred over the merits and repercussions of the former through amici briefs and public commentary.[100]

A. The Mystique of Martin

i. Derived From Dicta or Backed by Precedent?

As observed earlier, *Martin*, and by consequence, *Grants Pass*, were derived mostly from three judicial decisions: *Robinson*, *Powell*, and *Jones*.[101] Yet, *Martin* employed principles from only persuasive authorities, i.e. the non-binding opinions of *Powell* and *Jones*, as discussed by the *Robinson-Powell*-concurrence-dissent doctrine and the vacated *Jones* opinion.[102] Critics of the *Martin* decision have taken note of this and have described the *Martin* and *Grants Pass* decisions as lacking judicial basis neither rooted in constitutional text nor tradition.[103]

Others have argued that Justice White's concurrence in *Powell* was articulated on the narrowest grounds and was thus the only authoritative position in that decision.[104] Indeed, four other

---

Gov. Gavin Newsom on Golden State of Politics, POLITICO (Sept. 14, 2023, 11:12 AM), https://www.politico.com/video/2023/09/14/politico-california-golden-state-of-politics-full-program-1052101).

98. *Id.* (citing *Full event: Gov. Gavin Newsom on Golden State of Politics*, *supra* note 97); *see also* Sarah Grace Taylor & Jeremy B. White, *Blue States Look to Conservative Supreme Court for Help on Homelessness*, POLITICO, https://www.politico.com/news/2024/01/12/supreme-court-to-consider-grants-pass-homelessness-rule-00135373 (Jan. 12, 2024, 5:03 PM) (characterizing Governor Newsom's pleas for the Supreme Court to consider the *Grants Pass* decision as part of an unlikely trend as "[l]eaders of blue states and cities now find themselves in the unusual position of hoping the conservative high court will overrule the generally more liberal Ninth U.S. Circuit Court of Appeals and allow them to more aggressively act against homeless encampments").

99. *See Grants Pass*, 72 F.4th 868, *cert. granted*, 144 S. Ct. 679 (2024).

100. *See* discussion *infra* Part IV.A.

101. Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019); *Grants Pass*, 72 F.4th at 892.

102. *See* discussion *supra* Part III.

103. Petition for Writ of Certiorari, *supra* note 11, at 15.

104. Statement of Interest of the United States at 10, Bell v. City of Boise, No. 09-cv-540 (D. Idaho Aug. 6, 2015) (asserting that because no rationale garnered the majority of the *Powell* court, Justice White's concurring opinion specifically contemplating the circumstances of individuals experiencing homelessness controlled) (citing Marks v. United States, 430 U.S. 188, 193 (1977)). *See* Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420–21 (1992) (proposing that a mechanism for determining the "narrowest grounds" involves

dissenting justices agreed with Justice White's position that if a person's status made his subsequent behavior or action involuntary, then he could not be prosecuted.[105] Other courts have agreed and have applied *Robinson* and the *Powell* concurrence and dissent in similar cases to hold that ordinances criminalizing publicly performed, but otherwise innocent, behaviors by unhoused individuals without shelter violated the Eighth Amendment.[106] As for *Jones*, while a vacated decision typically loses its authority, the Department of Justice argued that the vacated decision's logic here remained "instructive and persuasive" because the parties in the matter reached a settlement agreement and the court did not determine that there were flaws on the merits of the issue.[107]

ii. Erroneously Expansive or Truly Narrow?

Critics of the *Grants Pass* decision have claimed that the court's holding in *Martin* has handcuffed cities from enforcing policies to address homelessness because of courts' improper readings of the decision.[108] The confusion in applying the court's decision in *Martin* and its interpretation of the Eighth Amendment is in large part due to the assertion of multiple constitutional claims by those contesting a city's enforcement of anti-homeless laws and policies.[109] In San Francisco, for example, homeless plaintiffs not only raised Eighth

looking at which opinion is "most closely tailored to the specific fact situation before the Court and is thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules" (citing Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980))).

105. Statement of Interest of the United States, *supra* note 104, at 8 (reiterating that because *Powell* did not produce a majority opinion, the plurality's interpretation did not establish a binding test for courts to apply when analyzing similar Eighth Amendment claims).

106. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) (holding that if homeless plaintiffs lacked private spaces, making resisting the need to eat, sleeping, or engaging in life-sustaining activities in public impossible, then punishing them for those otherwise innocent activities, was cruel and unusual punishment) (citing Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring).

107. Statement of Interest of the United States, *supra* note 104, at 10 (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006)) ("It should be uncontroversial that punishing conduct that is a 'universal and unavoidable consequence[] of being human' violates the Eighth Amendment.").

108. *See, e.g.*, Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner, *supra* note 95, at 11–12 (explaining that while *Martin* stood for the "narrow principle that all-places, all-times restrictions on sleeping in public spaces are unconstitutional when no shelter is available[,]" the *Grants Pass* decision has resulted in any governmental action to move unhoused persons or to restrict locations where they can sleep being subjected to litigation).

109. *See, e.g.*, Phillips v. City of Cincinnati, 479 F. Supp. 3d 611, 640, 644–45 (S.D. Ohio 2020) (determining that while homeless plaintiffs pled an Eighth Amendment claim arising from fear of prosecution, they failed on their First and Fourth Amendment claims related to the City's policy of banning encampments or arresting homeless residents).

Amendment claims to prevent criminal penalties arising from the anti-camping or anti-sleeping ordinances, but also claimed that the City's other mechanisms, like sweeping an encampment or destroying property, violated the Fourth Amendment.[110] Like the court in *Martin*, the court in *Coalition on Homelessness v. City and County of San Francisco* enjoined San Francisco from enforcing the ordinances issuing criminal penalties against involuntary homeless individuals for sitting, lying, or sleeping on public property.[111] But the court here went further by enjoining the City from enforcing ordinances penalizing disorderly conduct and public nuisances.[112] Decisions like this, *Grants Pass* critics claimed, have resulted in overly broad injunctions against various municipal actions that neither *Martin* nor other prior decisions envisioned.[113]

Those in favor of affirming the *Grants Pass* decision, however, contested that the *Martin* court expressly defined its limitations, and that cities could take various measures to address homelessness without opening the door to litigation.[114] They noted that courts both before and after *Martin* had been able to discern distinctions for deciding when cities with similar ordinances could survive constitutional muster arising from Eighth Amendment challenges.[115] Proponents of upholding the *Martin* and *Grants Pass* decisions further characterized the purported circuit split that arose from *Martin* as "illusory."[116]

iii. Inhibiting Action or Inspiring Policy?

While the textual meaning of *Martin* was contested, conversations lingered over whether the decision and its descendants like

110. Coal. on Homelessness v. City and Cnty. of S.F., 647 F. Supp. 3d 806, 809 (N.D. Cal. 2022).

111. *Id.* at 842.

112. *Id.*

113. Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner, *supra* note 95, at 5–12 (citing other rulings that have barred cities from issuing citations unless there was "appropriate" shelter available or if shelters met a "list of requirements—from nursing staff, to testing for communicable diseases, to on-site security . . .").

114. *See* Abraham, *supra* note 90 ("There is a universe of difference between what is being said about the opinion and what the opinion says."); Brief In Opposition, *supra* note 54 at 23–24.

115. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (holding that because the City presented irrefutable evidence that a homeless shelter had never reached capacity, that no individual had been turned away and that "camping" was therefore not an involuntary behavior, the ordinance was constitutional).

116. *See* Brief In Opposition, *supra* note 54, at 23–24 (explaining that no court has held that a city "can punish universal biologically necessary 'acts' like sleeping or using a blanket to survive in the cold, and none express any disagreement with the Ninth Circuit's application of *Robinson* to strike down such laws").

the *Grants Pass* decision usurped the powers of states and cities.[117] In a fiery petition for writ of certiorari, the City of Grants Pass, Oregon, claimed that the Ninth Circuit decisions in *Martin* and *Grants Pass* had seized a lawmaking authority meant for the democratic process that in effect had enabled "unelected federal judges" to serve as "homelessness policy czars."[118]

Those in favor of *Martin*, however, claimed that the decision had enabled municipalities to act as laboratories of social experimentation for addressing homelessness.[119] Cities like Austin, Texas, for example, began providing storage lockers, distributing hygiene products, and engaging in outreach work with the unhoused.[120] And in California, Sacramento Mayor Darrell Steinberg credited the *Martin* decision as being the "impetus" for nearby local governments to come together to build an outdoor emergency shelter.[121]

iv. Paining or Protecting the Public?

Not only have *Martin* and *Grants Pass* usurped municipal powers, critics of the decisions alleged, but they have forced officials to "walk a legal tightrope" that prevents cities from addressing health and safety concerns.[122] The City of Grants Pass claimed that this judicial overreach effectively forced cities to permit camping and surrender their sidewalks.[123] Critics further claimed that this perverse outcome was accompanied by devastating consequences for those living both in and near encampments such as "crime, fires, the reemergence of medieval diseases, environmental harm, and record levels of drug overdoses and deaths on public streets."[124]

---

117. *See* Taylor & White, *supra* note 98 (quoting Governor Newsom as stating that "California has invested billions to address homelessness, but rulings from the bench have tied the hands of state and local governments to address this issue").

118. Petition for Writ of Certiorari, *supra* note 11, at 13, 34.

119. Chandegra, *supra* note 25, at 450.

120. *Id.* at 448. *See* Dan Vogel, *Homelessness: A National Problem with a Local Solution,* USA TODAY (Oct. 30, 2019, 7:00 AM), https://www.usatoday.com/story/opinion/2019/10/30/homelessness-california-los-angeles-san-francisco-problem-local-solution-column/2487071001/.

121. Chandegra, *supra* note 25, at 448 n.175 (citing Benjamin Oreskes, *Homeless People Could Lose the Right to Sleep on Sidewalks if Western Cities Have Their Way*, L.A. TIMES (Sept. 25, 2019, 3:23 PM), https://www.latimes.com/california/story/2019-09-25/boise-homeless-encampment-amicus-brief-supreme-court-appeal-cities).

122. *See* Brief of Amici Curiae City of Phoenix & The League of Arizona Cities and Towns Supporting Petitioner at 7, City of Grants Pass v. Johnson, 72 F.4th 868 (9th Cir. 2023) (No. 23-175).

123. Petition for Writ of Certiorari, *supra* note 11, at 13.

124. *Id.* at 5; *see also* Oral Argument at 2:23:12, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175), https://www.oyez.org/cases/2023/23-175 ("When the Ninth Circuit constitutionalized this area, it left cities with really no choice[: E]ither keep building enough

But others recognized that despite *Martin*, cities continued to remove homeless encampments.[125] In Phoenix, Arizona, for example, business owners and residents around "The Zone," an area with a high homeless concentration, sued the City for failing to enforce public health and safety laws.[126] The Arizona state court dispelled the notion that the *Martin* decision established a right to camp that prohibited the City from abating nuisances, enforcing laws, or arresting violent offenders.[127] The court held in favor of the business owners and residents and ordered the City to abate the nuisance.[128]

B. Doing Away with Martin

In the spring of 2024, the Supreme Court of the United States heard oral arguments for the *City of Grants Pass v. Johnson* that contemplated these very questions.[129] Attorneys representing the City of Grants Pass, the Department of Justice (DOJ), and the homeless respondents argued before the Court, specifically addressing the issues of whether the *Martin* and *Grants Pass* decisions were grounded in constitutional law and whether the City of Grants Pass' ordinances were punishing homeless persons for their status in violation of *Robinson*.[130]

Counsel for the City of Grants Pass asked the Court to reverse the decisions in *Martin* and *Grants Pass*, which she characterized as "the Ninth Circuit's failed experiment."[131] Counsel argued that the decisions in *Martin* and *Grants Pass* lacked precedential value and constitutional support and that cities have since struggled to comply with the "unworkable" standard established by the Ninth

---

shelter that may or may not be adequate or suitable to someone's preferences, or be forced to give up all of your public spaces.").

125. *See, e.g.*, Khaleda Rahman*, Gavin Newsom Slammed for Only Cleaning Up San Francisco 'for Xi Jinping'*, NEWSWEEK, https://www.newsweek.com/gavin-newsom-slammed-cleaning-san-francisco-1843412 (Nov. 14, 2023, 5:28 AM) (quoting Governor Newsom when acknowledging San Francisco's homelessness responses ahead of the arrival of President Joseph Biden and the President of the People's Republic of China Xi Jinping as stating, "I know folks say, 'Oh, they're just cleaning up this place because all those fancy leaders are coming into town.' That's true because it's true").

126. Brown v. City of Phoenix, No. CV 2022-010439, 2023 WL 8524163, at *1 (Ariz. Super. Ct. Mar. 27, 2023).

127. *Id.* at *12 ("But the most glaring misinterpretation of the *Martin* and *Grants Pass* opinions is the inference that anyone who has erected a tent or other structure in the public rights of way is intrinsically unable to otherwise obtain shelter.").

128. *Id.* at *12–14.

129. *See* Oral Argument, *supra* note 124.

130. *Id.*; *see infra* notes 131–143 and accompanying text.

131. Oral Argument, *supra* note 124, at 1:59, 22:11, 2:21:11 (emphasizing that "[i]t would be a disaster if *Martin* were to remain on the books in any form").

Circuit decisions.[132] Counsel explained that the Ninth Circuit decisions had "tied cities' hands by constitutionalizing the policy debate over how to address growing encampments," and argued that the anti-camping ordinances did not unconstitutionally target persons for their status of being homeless but were rather "generally applicable laws [that] prohibit[ed] specific *conduct* and [were] essential to public health and safety."[133] But Justices Sotomayor, Kagan, Barrett, and Jackson appeared to push back on this notion, and questioned how the camping laws could be understood as anything other than criminalizing persons for their *status*,[134] which *Robinson*, they noted, prohibited.[135]

An attorney for the DOJ, on behalf of the United States, expanded on Justices Sotomayor, Kagan, Barrett, and Jackson's earlier discussion that the camping laws were criminalizing a person's status in a manner akin to *Robinson*.[136] He explained that those

---

132. *Id.* at 1:21, 4:13 (arguing that "[t]he Ninth Circuit has effectively imposed a municipal code under the . . . *Martin* rule to regulate what [cities like Grants Pass] can do in its public spaces").

133. *Id.* at 0:18, 0:25, 10:14, 2:21:11 (emphasis added) (arguing that homelessness was not a status and therefore *Robinson*'s prohibition against pushing persons for their status was inapplicable here).

134. *Id.* at 5:04.

> Justice Sotomayor: So what you do is say only homeless people who sleep outdoors will be arrested? That's the testimony of your chief of police, two -- and two or three officers, which is, if you read the crime, it's only stopping you from sleeping in public if you -- for the purpose of maintaining a temporary place to live. And the police officers testified that that means that if a stargazer wants to take a blanket or a sleeping bag out at night to watch the stars and falls asleep, you don't arrest them. You don't arrest babies who have blankets over them. You don't arrest people who are sleeping on the beach, as I tend to do if I've been there a while. You only arrest people who don't have a second home. Is that correct?
>
> Ms. Evangelis: Well --
>
> Justice Sotomayor: Who don't have a home?
>
> Ms. Evangelis: So, no. These laws are generally applicable. They apply to everyone.
>
> Justice Sotomayor: Yeah, that's what you want to say. Give me one example, because your police officers couldn't, and they explicitly said, if someone has another home -- has a home, and is out there and happens to fall asleep, they won't be arrested.

Id.

135. *Id.* at 50:03.

> Justice Barrett: The status of homelessness, I mean, it could be, you know, [four] in the afternoon and the person is just standing outside the bus stop. Do you agree that if the law prohibited that, made that a crime, that under *Robinson*, whether *Robinson* was right or wrong, that under *Robinson*, that would be a violation of the Eighth Amendment?
>
> Ms. Evangelis: Well, I -- I -- I think the better framework is due process.
>
> Justice Barrett: I understand that. Under *Robinson*, do you agree that that would be wrong?
>
> Ms. Evangelis: Yes.

Id.

136. *Id.* at 52:20, 54:54 (arguing that because the ordinances here, "as applied to someone who has nowhere else to sleep . . . are the equivalent of making it a crime to be homeless

laws, when applied in a twenty-four seven manner across cities, penalized a person's status because "sleeping outside when you have no other place to go is the definition of homelessness."[137] Counsel asked the Court to respect the core principle of *Robinson*—that because a state cannot criminalize the status of homelessness, the state cannot criminalize the action of sleeping outside if shelter is unavailable—but emphasized that cities could enforce reasonable time, place, and manner restrictions on public sleeping.[138] But questions lingered over the practicality of the Ninth Circuit's formula—that if the number of homeless individuals in a jurisdiction exceeded the number of available beds, the jurisdiction could not prosecute homeless individuals for sleeping outside—and whether the courts were even the proper forum for resolving the dispute.[139]

Next, counsel on behalf of the homeless respondents argued that the ordinances, by intent and effect, "inflict status-based punishment" on those experiencing homelessness in Grants Pass.[140] Counsel assured the Court that the Ninth Circuit decisions still left cities with "an abundance of tools to address homelessness."[141] "The only tool the City want[ed] that it [didn't] have," counsel contended, was the "authority to enforce a [twenty-four seven] sleeping ban that force[d]" its homeless residents to relocate to a different jurisdiction or face unavoidable and "endless punishment" for violating such

---

while living in Grants Pass," the ordinances offend the rule from *Robinson* that the government cannot criminalize status).

137. *Id.* at 1:00:16, 1:00:51, 1:01:19 (adding that that because sleeping is a universal basic human need, by prohibiting it, "the city is basically saying you cannot live in Grants Pass. It's the equivalent of banishment . . .").

138. *Id.* at 1:03:21, 1:23:45 ("[O]ur basic point is that [a] person does not have an Eighth Amendment defense or an Eighth Amendment claim unless he truly does not have some other place to reside.").

139. *Id.* at 1:08:30, 1:44:37.

> [G]iven the line-drawing problems that we've been going through, if a state has a traditional necessity defense, won't that take care of most of the concerns, if not all, and, therefore, avoid the need for having to constitutionalize an area and have a federal judge superintend this rather than the local community, which you've emphasized many times working with the nonprofits and charitable and religious organizations, which is how it works in most places?

Id. at 1:33:00.

140. *Id.* at 1:48:54, 1:51:41, 2:12:00 (distinguishing the twenty-four seven City-wide ban with reasonable time, place, and manner restrictions because the latter "is punishing the conduct of not going to sleep where you're allowed to go. That rationale doesn't work when someone has nowhere to go.").

141. *Id.* at 1:50:11 ("[The City] can ban tents and clear encampments. It can enforce a sleeping ban against homeless people who decline shelter[,] and it can fully enforce its laws prohibiting littering, public urination and defecation, drug use[,] and violent or harassing behavior.").

laws.[142] Counsel also refuted the notion that *Martin*'s Eighth Amendment application was responsible for causing the confusion amongst western cities regarding how they could regulate encampments in tandem with tending to public health and safety issues.[143]

In June of 2024, the Court reversed the Ninth Circuit's decision and remanded the case, holding that the City of Grants Pass' enforcement of generally applicable laws regulating camping on public property did not violate the Eighth Amendment.[144] In writing for the majority, Justice Gorsuch, joined by Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Kavanaugh, and Justice Barrett explained that while the "*Martin* experiment" was well-intended, the Ninth Circuit decisions had complicated the homelessness crisis by wrongly applying constitutional law and usurping power from cities.[145] The Court disagreed with counsel for the DOJ and counsel for the homeless respondents that either the Eighth Amendment or the *Robinson* prohibition against punishing status were implicated.[146] Rather, the matter here, the Court explained, was more akin to that in *Powell*, where the Court determined that the Eighth Amendment could not be construed to bar laws that punished involuntary actions that went beyond "mere status."[147]

In reaching this decision, the Court cited federalism concerns and suggested that the questions posed in the case were not for the judiciary to decide.[148] Rather, this problem of homelessness, the Court explained, is best resolved through localized control and the democratic process at the behest of the "collective wisdom of the American people."[149]

---

142. *Id.* at 1:50:33 ("The state police power is broad[,] but it does not include the power to push the burdens of social problems like poverty on to other communities or the power to satisfy public demand by compromising individual constitutional rights.").

143. *Id.* at 2:19:48.

144. City of Grants Pass v. Johnson, 603 U.S. 520, 560–61 (2024).

145. *Id.* at 551–56 (adding that the *Martin* judges, rather than those on the front lines of this crisis, employed "some back-of-the-envelope arithmetic" to establish abstract rules that have proven nearly impossible to administer).

146. *Id.* at 552 ("If there are answers to those questions, they cannot be found in the Cruel and Unusual Punishments Clause.").

147. *Id.* at 550–51 ("Were the Court to pursue that path in the name of the Eighth Amendment . . . 'it is difficult to see any limiting principle that would serve to prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility . . . .'") (quoting Powell v. Texas, 392 U.S. 514, 533 (1968)).

148. *See id.* at 556 (explaining that rulings from courts have caused confusion and have interfered with the "productive dialogue" and "experimentation" needed for resolving issues traditionally reserved to the people and their elected officials) (citing *Powell*, 392 U.S. at 534–37). *See* Oral Argument, *supra* note 124, at 1:08:20 (quoting Justice Roberts asking "[w]hy would you think [that] these nine people are the best people to judge and weigh those policy judgments?").

149. *Grants Pass*, 603 U.S. at 560 ("Yes, people will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works

Justice Sotomayor, joined by Justice Kagan and Justice Jackson, dissented.[150] Rather than framing the ordinances as policy questions reserved to local governments like the majority, the dissent asserted that it *was* the responsibility of the Court to safeguard the rights of the "rich and poor, housed and unhoused" even when doing so might be unpopular.[151] But the dissent explained that the majority abdicated this duty by focusing on hypotheticals and by failing to acknowledge that even with the *Martin* rule—that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them"[152]—cities had the tools and discretion to deal with homelessness.[153]

The dissent also disagreed with the majority's contention that the ordinances did not criminalize "mere status."[154] Rather than merely permitting a city to enforce generally applicable laws, the dissent remarked that "every shred of evidence" proved that the ordinance's purpose, text, and enforcement targeted and criminalized persons because of their status: "The majority proclaims, with no citation, that 'it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest.' That describes a fantasy."[155] While the dissent detailed the "destabilizing cascade of harm" that is caused by the "revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back[,]" thanks to the ordinances like those in

---

better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right.").

150. *Id.* at 564 (Sotomayor, J., dissenting).

151. *Id.* at 564, 567, 586 (opining that "the only question here is whether the Constitution permits criminalizing sleeping outside when there is nowhere else to go" but that the majority "shift[s] the goalposts [to] focus on policy questions" that go beyond this dispute).

152. *Id.* at 581–82 (quoting Martin v. Boise, 920 F.3d. 584, 604 (9th Cir. 2019)).

153. *Id.* at 563–64, 581–87.

> Just because the majority can list difficult questions that require answers does not absolve federal judges of the responsibility to interpret and enforce the substantive bounds of the Constitution. The majority proclaims that this dissent 'blinks the difficult questions.' The majority should open its eyes to available answers instead of throwing up its hands in defeat.

Id. at 584 (internal citations omitted).

154. *Id.* at 575.

155. *Id.* at 575, 580 (internal citation omitted).

> In reality, the deputy chief of police operations acknowledged that he was not aware of 'any non-homeless person ever getting a ticket for illegal camping in Grants Pass.' Officers testified that 'laying on a blanket enjoying the park' would not violate the ordinances, and that bringing a sleeping bag to 'look at stars' would not be punished. Instead, someone violates the Ordinance only if he or she does not 'have another home to go to.' That is the definition of being homeless.

Id. at 580 (internal citations omitted).

the City of Grants Pass,[156] the Justices ended with a call for optimism and action in addressing homelessness.[157] In doing so, however, the Justices predicted that this may not be the final chapter of the judiciary's role in determining the constitutionality of similar ordinances.[158]

With the Court's reversal of *Grants Pass*, the majority's decision effectively overturned *Martin* as well by its language explaining that it had decided to close the chapter to the "Ninth Circuit's *Martin* experiment."[159] While the majority expressed that permitting the *Martin* and *Grants Pass* decisions to remain good law would deny communities the wide latitude and flexibility needed to resolve homelessness, this Article refutes the narratives blaming *Martin* for worsening the crisis.[160] Rather than being depicted as *the* problem or as *the* solution, *Martin* merely ignited a spark that incentivized municipalities to rethink their policies and practices.[161] This Article contends that *Martin* was a narrow ruling only meant to restrict criminal penalties in specific circumstances, which other courts recognized prior to *Martin*'s reversal.[162] Indeed, post-*Martin* caselaw and municipal responses exemplify the decision's limitations, which even proponents for decriminalizing homelessness have lamented.[163] Finally, this Article proposes that even if *Martin* now lacks the force of law, the decision ought to carry weight in the minds of officials as they hold the power in deciding whether punitive approaches, while neither cruel nor unusual in the eyes of the law, are the right solutions for addressing homelessness.[164]

---

156. *Id.* at 568, 570 (describing how one homeless man's outreach worker made him a t-shirt that read "[p]lease do not arrest me, my outreach worker is working on my housing" after the man was arrested 198 times and charged with over 250 citations).

157. *Id.* at 592 (noting that hope remains that society can come together to address homelessness and to protect those most vulnerable).

158. *Id.* at 591; *see also* Hallie Golden, *Some Cities Facing Homelessness Crisis Applaud Supreme Court Decision, While Others Push Back*, ASSOCIATED PRESS (June 28, 2024, 7:41 PM), https://apnews.com/article/supreme-court-homelessness-cities-reexamine-policies-9f4215ad013f73bf1543bde13d8ffc7d (explaining that other legal theories left untouched by the decision remain available for attorneys to challenge cities that "misread this as a green light for open season on unhoused folks").

159. *Grants Pass*, 603 U.S. at 552 ("And *Martin* exemplifies much of what can go wrong when courts try to resolve matters like those unmoored from any secure guidance in the Constitution.").

160. *Id.* at 559. *See* discussion *infra* Part IV.C.

161. *See* Recent Case, *Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699, 703 (2019).

162. *See* discussion *infra* Part IV.C(i)–(ii).

163. *See* discussion *infra* Part IV.C(i)–(v). *See, e.g.*, Sara Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 612 (2021) (labelling *Martin* as a "missed opportunity").

164. *See* discussion *infra* Part IV.C(iii)–(v).

C. Making the Case for Martin

i. The Plain Language of Martin *was Meant to be Construed Narrowly*

In *Martin*, the Ninth Circuit determined that shelter policies preventing the plaintiffs from accessing shelters constituted a criminal penalty.[165] The decision did not prescribe detailed conditions of what services a shelter had to provide or what other enforcement measures Ninth Circuit cities ought to take to combat homelessness.[166] The *Martin* court did not establish a right to camp or give unhoused communities unfettered control of public spaces.[167] The *Martin* court implied that it did not immunize the unhoused who refuse shelter from criminal prosecution, which even advocates for decriminalizing homelessness have denounced.[168] This critique from those in favor of decriminalizing homelessness acknowledges

---

165. *See* Martin v. City of Boise, 920 F.3d 584, 606 (9th Cir. 2019).

166. *Id.* at 617.

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.

Id. at 617 n.8; *see* Rankin, *supra* note 163, at 612 (2021) ("*Martin* took pains to explain the limits of its holding, emphasizing that cities still retain broad discretion to address homelessness.").

167. *Martin*, 920 F.3d at 617 n.8 (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006) ("Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes.")); *see also* Sam Levin, *'Terrifying and Dystopian': The Dark Realities of The Supreme Court's Homelessness Decision*, Interview with Sara Rankin, THE GUARDIAN, (June 29, 2024), https://www.theguardian.com/society/article/2024/jun/29/law-professor-homeless-rights-supreme-court-ruling (citing to Rankin as explaining that even prior to *Martin* and *Grants Pass* being overturned, cities still had latitude to sweep encampments, enforce anti-camping laws for public health and safety reasons, and regulate tents blocking public rights of way). Sara Rankin is a Professor of Law at the University of Seattle School of Law and has published several articles on legal and policy issues related to homelessness. Biography of Sara Rankin, SEATTLE UNIV. SCH. OF L., https://law.seattleu.edu/faculty/directory/profiles/rankin-sara.html (last visited Nov. 13, 2024). Her scholarship criticizes the criminalization and stigmatization of people experiencing homelessness across the United States. *See id.*

168. *See, e.g.*, Rankin, *supra* note 163, at 612 ("*Martin* appears to be forcing a system redesign that persists in exiling people experiencing homelessness. Even as some cities seek to minimize incarceration, they are actively imagining new and creative techniques to push unsheltered people out of sight and out of mind."). *Id.* Rankin posits that because *Martin* was not implicated if accessible shelter existed, the decision manifested into municipalities exploiting loopholes to relocate unhoused people through increased encampment sweeps and compulsory mass zones with less consideration given to the quality, health, and safety conditions of those alternative spaces. *See id.*

the narrowness of the *Martin* decision.[169] The decision did not usurp police powers by simply telling a city that it had to refrain from fining and arresting homeless individuals in a certain fact-specific context.[170] Rather, the *Martin* decision merely stood for the assertion that if a city does not have a private bed for a person to sleep in, then a city cannot otherwise fine or arrest that person for sleeping outside.[171]

ii. Other Federal Courts Demonstrated the Limitations of Martin

Since *Martin*, courts in Pennsylvania have been able to discern to what extent *Martin* prohibited municipal action.[172] In 2020, the United States District Court for the Eastern District of Pennsylvania, in *Murray v. City of Philadelphia*, considered whether the approximately 230 individuals residing in different encampments across Philadelphia were entitled to injunctive relief to prevent the City from dissolving the sites.[173] Earlier that summer, the City of Philadelphia posted notices informing encampment residents that their conduct was unlawful and that they must vacate the location by the next week.[174] But the residents did not comply with this deadline.[175] After the City sent additional notices to the residents to vacate the site and represented that it did not intend to impose civil or criminal penalties, the residents filed suit seeking to bar the City from disbanding the encampments.[176] However, unlike *Martin*, plaintiffs here raised claims on First, Fourth, and Fourteenth Amendment grounds, alleging that the City's actions constituted a state-created danger.[177] Although the plaintiffs presented credible

169. *See, e.g.*, Ben A. McJunkin, *Response: Ensuring Dignity as Public Safety*, 59 AM. CRIM. L. REV. 1643, 1654 (2022) (arguing that because the crux of the *Martin* rationale was that criminalization of the unhoused was unjustified only when shelter was practically unavailable, once an option did exist, a person's refusal to go to a site that may have also been ripe with dangerous or inhabitable living conditions transformed the behavior of sleeping in public into a matter of individual choice and criminal culpability).

170. Rankin, *supra* note 163, at 612 (calling the decision "hardly radical" for arising from "clear federal precedent prohibiting states from punishing citizens for circumstances they cannot control"); *see* Ross, *supra* note 64, at 232 (explaining that *Martin* "'does no more than prohibit the imposition of criminal penalties against the homeless individuals' who sleep outside when there are no shelters available") (internal citations omitted).

171. *See* Rankin, *supra* note 163, at 612.

172. *See infra* Part V.C(ii).

173. 481 F. Supp. 3d 461, 467 (E.D. Pa. 2020).

174. *Id.* at 468.

175. *Id.*

176. *Id.*

177. *Id.* at 469–75. While the government does have not an affirmative duty to protect individuals, the state-created danger doctrine is an exception that provides a basis for injured plaintiffs to hold the state responsible for creating or increasing a danger that resulted in

evidence as to the dangerous and subpar conditions of the relevant shelters, the court determined that those conditions were not so pervasive or severe to make the City's decision to dissolve the encampments unlawful.[178] And unlike *Martin* and *Grants Pass*, the City of Philadelphia presented evidence of three hundred available shelter beds to house those displaced by the encampment dissolution.[179] The district court held that the City was therefore permitted to dissolve encampments.[180] While the City of Philadelphia's encampment dissolution survived constitutional muster, by late 2023, district courts in Pennsylvania were confronted with a constitutional claim arising under *Martin* in *Better Days Ahead Outreach Inc. v. Borough of Pottstown*.[181]

In November 2023, homeless individuals and a non-profit organization in Pottstown, Pennsylvania, filed suit to enjoin the Borough of Pottstown from sweeping an encampment.[182] Plaintiffs alleged that the Borough violated their Eighth and Fourteenth Amendment rights.[183] On Eighth Amendment grounds, the plaintiffs alleged that the Borough violated the Cruel and Unusual Punishment Clause when it made a threat to arrest unhoused residents that refused to relocate after the encampment closure.[184] On Fourteenth Amendment grounds, the plaintiffs alleged that the Borough faced liability through the state-created danger doctrine for its removal of individuals from the encampment without access to shelter.[185]

As for the Eighth Amendment claim in particular, the plaintiffs, albeit without an explicit reference to *Robinson*, *Jones*, or *Martin* in their complaint, relied on the rationale from the three decisions and argued that because the encampment residents here had no choice but to sleep outside, the Borough's threat to arrest them for this unavoidable human activity was cruel and unusual punishment.[186]

---

harm. *See* Christopher M. Eisenhauer, Comment, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 DICK. L. REV. 893, 894 (2016).

178. *See Murray*, 481 F. Supp. 3d at 474–75.

179. *Id.* at 474.

180. *Id.* at 466 (explaining that the judiciary "will not seek, nor is it equipped to offer permanent solutions to the problem of homelessness" for such a task "rests squarely on the shoulders of the City's elected officials").

181. *See* Better Days Ahead Outreach Inc. v. Borough of Pottstown, No. 23-CV-04234, 2023 WL 8237255, at *1, *8 (E.D. Pa. Nov. 28, 2023).

182. Complaint at 1, *Better Days Ahead Outreach Inc.*, 2023 WL 8237255 (No. 23-CV-04234).

183. *Id.* at 13–14.

184. *Id.* at 13.

185. *Id.* at 14.

186. *Id.* at 4; *see* Martin v. City of Boise, 920 F.3d 584, 606 (9th Cir. 2019) (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1135–36 (9th Cir. 2006) (explaining that *Robinson* stands for the assertion that the Eighth Amendment prohibits the state from punishing involuntary

Specifically, the complaint noted how the recent closure of a Norristown outreach center caused the remaining shelters in the Borough to turn homeless individuals away after reaching capacity because they lacked overnight beds, which contributed to the inability to obtain shelter and necessitated sleeping outdoors.[187]

The district court determined that the plaintiffs' Eighth Amendment claim succeeded because *Robinson* and *Martin* had prohibited a state from punishing homeless individuals for involuntary conditions that result from the unavoidable consequence of one's status as a homeless individual.[188] The district court articulated its own formula to determine whether the Borough's criminal sanctions were unconstitutional:

> So long as the unhoused residents of the encampment do not have a single place where they can lawfully or practically sleep within the Borough, the imposition of criminal sanctions for living, sleeping, or simply existing on Borough-owned land would effectively punish them for something for which they may not be convicted under the Eighth Amendment—that is, their status of homelessness.[189]

While the district court enjoined the Borough from enforcing criminal penalties against the encampment residents, the court rejected the plaintiffs' state-created danger claim.[190] The court explained that the Borough could clear the encampment and require that the residents leave, with the caveat that those measures not involve criminal penalties.[191]

Together, the factual differences and the courts' analyses in *Murray* and *Better Days Ahead Outreach* demonstrate how a city's

---

actions, such as sleeping, if they are the unavoidable consequence of one's status of being homeless)).

187. Complaint at 3–4, *Better Days Ahead Outreach Inc.*, 2023 WL 8237255 (No. 23-CV-04234).

188. Better Days Ahead Outreach Inc. v. Borough of Pottstown, No. 23-CV-04234, 2023 WL 8237255 at *1, *4, *5 (E.D. Pa. Nov. 28, 2023) ("This Court agrees with the Ninth Circuit's application [in *Jones* and in *Martin*] of the *Robinson* progeny to municipal actions that fundamentally punish the status of homelessness.") (citing Robinson v. California, 370 U.S. 660, 666–67 (1962)) (explaining that because being addicted to narcotics was a status akin to having an illness, that "[e]ven one day in prison would be cruel and unusual punishment for the crime of having a common cold").

189. *Id.* at *5.

190. *Id.*

191. *Id.* at *8 ("[E]ntering a narrow injunction preventing the Borough from using criminal sanctions to close the College Drive Encampment is also in the public interest" as the "public is not harmed by an injunction requiring basic constitutional protections for unsheltered persons who have nowhere to go.").

response to homelessness can invoke constitutional concerns.[192] Unlike *Better Days Ahead Outreach*, *Murray* demonstrated a scenario in which *Martin* could not apply.[193] In *Murray*, the homeless plaintiffs did not raise an Eighth Amendment challenge.[194] And unlike *Martin*, the City of Philadelphia in *Murray* did not criminally fine those in the encampment, and there was evidence that the City *did* have enough shelter beds to house those affected by the dissolution.[195] Based upon this evidence, the *Murray* court determined that the City could constitutionally dissolve the encampment.[196]

But when the United States District Court for the Eastern District of Pennsylvania applied *Martin* in *Better Days Ahead Outreach*, the court noted the factual similarities to *Martin*.[197] Like the City of Boise in *Martin*, Pottstown organizations that provided homeless services could not provide the necessary shelter for homeless individuals and, as a result, those individuals slept in public.[198] Similarly, the court in *Better Days Ahead Outreach* explained that Pottstown's zoning code ban on homeless shelters, and the Borough's plans to impose criminal sanctions in enforcing the evacuation of homeless encampments, called for an application of *Martin*.[199] The court in *Better Days Ahead Outreach* recognized that a city's failure to satisfy the shelter needs of the unhoused, and then to subsequently sanction those that engaged in an involuntary action in public, was a means to criminalize a person's status, which

192. *See infra* notes 193–204 and accompanying text.

193. *See id.*

194. Murray v. City of Phila., 481 F. Supp. 3d 466, 469–75. (E.D. Pa. 2020).

195. *Id.* 474–75.

196. *Id.* at 474.

197. Better Days Ahead Outreach Inc. v. Borough of Pottstown, No. 23-CV-04234, 2023 WL 8237255 at *5 (E.D. Pa. Nov. 28, 2023).

> Indeed, this case is strikingly similar to *Martin*. Boise, like the Borough, '[had] a significant and increasing homeless population' and lacked sufficient shelter space to accommodate a substantial portion of its unsheltered population . . . . As is the case in the Borough, there were only three homeless shelters in Boise, all of which were operated by private, non-profit organizations. By way of further comparison, all three shelters in Boise had policies restricting admission and length of stay, as well as mandatory periods of time between stays. As was the case in *Martin*, the organizations providing services to unhoused people in Pottstown are unable to serve the entire homeless population. Lacking access to shelter, the Borough's homeless community, like the unhoused people in Boise, turned to tents to shelter themselves.

Id. (citing Martin v. City of Boise, 920 F.3d 584, 604 (9th Cir. 2019)).

198. *Better Days Ahead Outreach Inc.*, 2023 WL 8237255, at *5 & n.3, *11 (stating that in Pottstown "[t]here is no evidence that the encampment in the instant matter is organized around a political message—its residents are simply camping in the woods, trying to avoid detection and live with a level of dignity" in contrast with previous litigation deciding whether to clearing encampments in Philadelphia). *See generally* Honkala v. U.S. Dep't of Hous. & Urb. Dev., No. 21-0684, 2022 WL 282912 (E.D. Pa. Jan. 31, 2022); *Murray*, 481 F. Supp. 3d 461.

199. *Better Days Ahead Outreach Inc.*, 2023 WL 8237255, at *4, *5.

the United States Supreme Court had held to violate the Eighth Amendment in *Robinson*.[200] The *Better Days Ahead Outreach* court's denial of the plaintiff's Fourteenth Amendment claim is significant in understanding *Martin* because it permitted the Borough of Pottstown to take measures to deal with the encampment, but without criminal sanctions.[201] In other words, by refusing to grant the injunction, the court held that the Borough could still take measures, like sweeping encampments, that result in the confinement, displacement, exiling, or hiding of the unhoused, but that those actions could be within the constraints of *Martin*.[202] And while the Borough's council quickly voted to appeal the matter, asking the court for instruction on what actions it could take, the decision signified that Pottstown, and perhaps cities similarly situated, must find a mechanism other than criminal sanctions to deal with those who have nowhere else to go.[203]

iii. Martin *has Demanded Empathy and Transparency for Actions Addressing Homelessness*[204]

Since *Martin*, cities across Pennsylvania have focused on holistic approaches to tackling homelessness.[205] While the City of Pittsburgh has not faced litigation for its homelessness practices arising from the Eighth Amendment, the interplay of local policy with

---

200. *Id.* at *5.

201. *Id.* at *8 (finding that while the Borough was permitted to evacuate the encampment after the plaintiffs failed to show that they faced immediate and irreparable harm arising from the dissolution, the Borough was still enjoined from relying on citations, arrests, and prosecutions to enforce the closure).

202. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 564, 583–86 (2024) (Sotomayor, J., dissenting) (explaining that because there was no challenge to Grants Pass' restrictions involving the use of tents or other camping gear, encampment clearances, or to fining or arresting those who declined accessible shelter options, "the majority does not need to answer most of the hypotheticals it poses").

203. Evan Brandt, *Pottstown Council Votes to Appeal Court Ruling on Homeless Sweep*, THE MERCURY (Dec. 7, 2023, 1:13 PM), https://www.pottsmerc.com/2023/12/07/pottstown-council-votes-to-appeal-court-ruling-on-homeless-sweep/ ("All of this leaves the borough in a position of being permitted by the court to undertake the removal of those living along the trail, but without the primary tool they had planned to use to accomplish it."). *Better Days Ahead Outreach Inc.*, 2023 WL 8237255, at *8 ("The Borough's apparent frustration with the 'influx of homeless individuals' and lack of action by other municipalities in addressing homelessness does not release it from its obligation to respect unhoused people's rights and dignities.").

204. *See, e.g.*, Editorial Board, *Editorial: Pittsburgh Still Has No Coherent, or Honest, Response to Homelessness*, PITTSBURGH POST-GAZETTE (Mar. 15, 2024, 5:30 AM), https://www.post-gazette.com/opinion/editorials/2024/03/15/homeless-encampment-clearance-shelter/stories/202403150026 (criticizing Pittsburgh city and county government officials' promise to provide enough shelter beds to house those displaced from an encampment sweep as "flimsy" and "rife with dishonesty").

205. *See* discussion *infra* Part V.C(iii).

Martin has had a palpable effect.[206] In August of 2023, about nine months after the City's closure of the Stockton Avenue encampment, the City issued a new policy formalizing rules and protocol that City officials and personnel authorized to decommission an encampment must follow.[207] The policy outlined what factors officials may consider to deem an encampment closure necessary, such as evidence of a drug sale, health and safety concerns arising from trash being in the open, and tents that come within ten feet of a road.[208] The new policy also outlined the notice and property collection processes, including timelines for when the City must notify encampment occupants prior to a decommissioning, and where owners of personal property removed from the site can retrieve their belongings.[209] The policy came after months of planning and coordinating with community members and groups, including the same legal advocacy organizations that criticized the Stockton Avenue closure and threatened litigation months earlier.[210] But not long after the publication of the new encampment decommissioning policy, locals voiced frustration, and alleged that the City was failing to enforce its regulations, such as prohibiting tents within ten feet of a right of way.[211] Interestingly, the City appeared to take a page out of the *Martin* playbook, with a representative responding that before the City took action, they needed to ensure that "folks ha[d] a *credible offer* of housing."[212]

Despite an appeared attempt to implement the holding from *Martin*, in November of 2023, the City began dismantling the camp in question—the first decommissioning since the new policy was announced.[213] Consistent with the decommissioning policy, city

206. *See generally* Julia Felton, *Pittsburgh Officials Plan to Break Up Homeless Encampment Downtown*, TRIBLIVE (Nov. 3, 2023, 11:26 AM), https://triblive.com/local/pittsburgh-officials-plan-to-break-up-homeless-encampment-downtown/.

207. *See New Pittsburgh Tent Policy*, *supra* note 1.

208. *Id.*

209. *Id.*

210. *Id.*

211. Andy Sheehan, *City Says it Won't Remove Homeless Encampments Violating Rules Until "Credible Offer of Housing" for People*, CBS NEWS (Oct. 12, 2023, 6:24 PM), https://www.cbsnews.com/pittsburgh/news/homeless-encampments-downtown-pittsburgh-city-rules/.

212. *Id.* (emphasis added) (reporting that City Communication Director Maria Montaño stated that the guidelines could not be enforced because those living there had nowhere else to go).

213. Eric Jankiewicz & Stephanie Strasburg, *Updated: County Touts, But Does Not Detail, 'Severe Weather' Plan for Unhoused Amid Camp Clearance*, PUBLICSOURCE (Nov. 9, 2023), https://www.publicsource.org/pittsburgh-winter-emergency-shelter-smithfield-street-downtown-homeless-encampment/. The encampment is in downtown Pittsburgh's First Avenue off Boulevard of the Allies, steps away from both the overflowing Second Avenue Commons shelter and the now closed Smithfield Shelter. *Id.*

workers gave notice to the residents days in advance, with signs warning that it was prohibited to continue camping there after the site's closure.[214] With the closure of the nearby Smithfield Shelter, others expressed doubt and worry about the effectiveness of the decommissioning, likening the move to a "game of musical chairs" that would only shuffle homeless individuals without addressing the root causes of the crisis.[215] But representatives for the City told local journalists that the action was "not a law enforcement activity[.]"[216] Rather, the City took a holistic approach and explained that social workers, outreach teams, and community partners had been engaging with those living there for weeks prior to the decommissioning, and that there were enough shelter beds available for those being forced to leave the site.[217]

While Pittsburgh's efforts to increase shelter availability is commendable, it is not technically required by *Martin*.[218] As articulated in *Better Days Ahead Outreach*, the *Martin* decision provided guidelines for when a municipality could criminally punish a person for sleeping outside, not for when a city could clear an encampment.[219] If legal advocacy groups were to challenge a potential encampment decommissioning on Eighth Amendment grounds, a proper reading of *Martin* only required a showing that those unhoused individuals were being subjected to criminal penalties as a result of having nowhere else to go.[220] Therefore, contrary to advocacy groups

214. *See* Rich Pierce, *City of Pittsburgh Plans to Clear Out Homeless Encampment Downtown*, WPXI NEWS (Nov. 3, 2023, 11:27 PM), https://www.wpxi.com/news/local/city-pittsburgh-plans-clear-out-homeless-encampment-downtown/IQGL5D7CEZHJ3GFLSCARDZCKUA/; Kiley Koscinski, *City of Pittsburgh Set to Clear Downtown Homeless Camp Next Week*, 90.5 WESA (Nov. 2, 2023, 5:30 AM), https://www.wesa.fm/politics-government/2023-11-02/city-of-pittsburgh-set-to-clear-downtown-homeless-camp-next-week.

215. Jankiewicz & Strasburg, *supra* note 213.

216. *Id.*

217. *Id.*; *see also* Koscinski, *supra* note 214.

218. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) ("[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless . . ." (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006))).

219. *See* Martin, 920 F.3d at 617 n.8 (adding that an "ordinance barring the obstruction of public rights of way or the erection of certain structures" may be constitutionally permissible and therefore not barred by *Martin*); Better Days Ahead Outreach Inc. v. Borough of Pottstown, No. 23-CV-04234, 2023 WL 8237255 at *8 (E.D. Pa. Nov. 28, 2023) (explaining that the "Borough may still lawfully evacuate the site in a manner that does not run afoul of homeless people's Eighth Amendment rights[,]" but could not so in a manner that relied on criminal sanctions).

220. Unlike *Martin*, the City of Pittsburgh does not have an active anti-camping or an anti-sleeping ordinance. While Pittsburgh does have an ordinance punishing panhandling, the *Jones* opinion, which *Martin* heavily relied on, explicitly stated that the Eighth Amendment did *not* bar this type of action. *Martin*, therefore, could not apply. *See* PITTSBURGH, PA., MUN. CONDUCT CODE § 602.01–.06 (2001). And while the City of Pittsburgh's notices appear to have indicated an intention to impose penalties for trespass against individuals who return to land part of a previously closed encampment, absent an absolute ban or ordinance

questioning the legality of the City's encampment dissolutions, *Martin* did not require the burden that the City claims it carried—that the City had to provide "credible offers of housing"—as part of its policy response for addressing homelessness.[221] But the principle that cities ought to make a "credible offer" of housing before displacing an already unhoused and vulnerable individual should not be disregarded, either.[222]

Even after *Martin* was overturned, City of Pittsburgh and Allegheny County officials pledged to focus on developing affordable housing and respecting the dignity of those experiencing homelessness rather than relying on criminal charges.[223] Neighboring communities have followed Pittsburgh's lead in shifting their approaches to homelessness.[224] In the City of Washington, for example, Mayor JoJo Burgess condemned the *Grants Pass* decision and has continued to concentrate on providing food, shelter, and medical care for those affected.[225] In Westmoreland County, residents

---

that is enforced city-wide, twenty-four-seven (as was the case in *Jones*), and provided that an alternative space *is* available (unlike in *Better Days Ahead Outreach*), the City's practices technically comply with the low burden that was required by *Martin*. *See* Koscinski, *supra* note 214. Moreover, *Martin* concerned enforcement practices like issuing fines and citations, not whether preliminary encampment clearings themselves violated the Eighth Amendment. *See* Sara Rankin, Article, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L.L. REV. 367, 392, 407 (2021) (suggesting that "the law completely ignores the punishment sweeps impose" as a factor for the lack of successful constitutional challenges to encampment dissolutions).

221. *See generally* Rankin, *supra* note 163, at 573. While *Martin* outlawed a city's enforcement of ordinances that punish a homeless person for sleeping outside when shelter is functionally inaccessible—whether it be because of a lack of beds or barriers to entry—the court did explicitly outline the holding's limitations. *Id.*(citing *Martin*, 920 F.3d at 1048 n.8). For example, the *Martin* court noted that cities may pursue regulations that prohibit sleeping outside during particular times or in particular locations, even when shelter is unavailable. *Id.* (citing *Martin*, 920 F.3d at 1048 n.8). Therefore, while a credible offer of housing reflects the ideal that a plan to relocate unhoused individuals ought not to be premised on empty promises, *Martin* still authorized cities like Pittsburgh to move forward with enforcing encampment dissolutions in particular instances, regardless of available shelter options. *See id.*

222. *See* NAT'L LEAGUE OF CITIES, AN OVERVIEW OF HOMELESS ENCAMPMENTS FOR CITY LEADERS (2022), https://www.nlc.org/wp-content/uploads/2022/01/Overview-of-Homeless-Encampments-Brief.pdf (explaining that sweeping an encampment, without referring individuals to housing services, destabilizes communities).

223. Kiley Koscinski & Julia Zenkevich, *SCOTUS Ruling Against Homeless Encampments Unlikely to Affect Pittsburgh*, 90.5 WESA (June 28, 2024, 4:32 PM), https://www.wesa.fm/politics-government/2024-06-28/scotus-homeless-encampments-pittsburgh; Kate Giammarise, *'500 in 500 days:' Allegheny County Pushes to Move Unhoused Out of Shelters, Into Housing*, 90.5 WESA (June 6, 2024, 1:20 PM), https://www.wesa.fm/politics-government/2024-06-06/500-in-500-days-allegheny-county-pushes-to-move-unhoused-out-of-shelters-into-housing (quoting Allegheny County Executive Sara Innamorato as stating, "[c]aring for our unhoused neighbors is a critical piece to ensuring that we're building an Allegheny County for all").

224. *See* discussion *infra* Part V.C(iii).

225. Jordan Anderson, *How the Supreme Court Ruling Affects Homeless Populations Around the Pittsburgh Area*, PITTSBURGH POST-GAZETTE (July 7, 2024, 5:30 AM),

believe that prioritizing programs that address the root causes and challenges of homelessness has built community trust.[226] In Allentown, the city council passed a resolution symbolizing its commitment to "the equitable use of public spaces" and to "seek compassionate and effective solutions to homelessness."[227]

Pennsylvania lawmakers have also joined the post-*Martin* conversations and plan to introduce legislation to combat homelessness like providing rent protections and establishing a Right to Counsel program in eviction proceedings.[228]

Policies and practices like those discussed above emphasize collaboration and dignity as opposed to punishment and ostracization of those in need, and ought to be the standard—not the outlier.[229] *Martin* has encouraged communities to rethink their responses to better align with this aspirational standard—that municipal actions cannot rely on hiding and punishing unhoused individuals for simply being visible.[230]

iv. Martin *Recognized the Ineffectiveness and Irony of Punitive Approaches*

While *Martin* was narrow in that it did not abolish criminal penalties against a homeless person for sleeping outside altogether, it did force municipalities to consider whether punitive approaches achieved the desired results in protecting public health and

---

https://www.post-gazette.com/news/social-services/2024/07/07/supreme-court-grants-pass-ruling-rural-homeless/stories/202407050069 (quoting Mayor Burgess as asking "[s]ince when is it criminal to be down on your luck?").

226. *Id.* (explaining that "local police will call outreach groups if they find someone in need on the street" or "take the extra step and transport them to a shelter").

227. Jason Addy, *Homeless Have Equal Rights, Allentown Council Says in Passing Resolution*, LEHIGHVALLEYNEWS.COM (July 18, 2024, 8:00 AM), https://www.lehighvalleynews.com/allentown/homeless-have-equal-rights-allentown-council-says-in-passing-resolution.

228. Ben Wasserstein, *Pa. Democrats Rail Against Supreme Court Homeless Decision*, 90.5 WESA (July 5, 2024, 5:31 AM), https://www.wesa.fm/politics-government/2024-07-05/pennsylvania-democrats-supreme-court-homeless-decision.

229. *See* Oral Argument, *supra* note 124, at 1:46:40 (quoting Counsel representing the DOJ as stating, "I think [what] is important to keep in mind in this, is if Grants Pass can do this, so could every other city. So could a state do it state-wide. And, eventually, a homeless person would have no place to be.").

230. *But see* Brief In Opposition, *supra* note 54, at 5–6 (describing how Grants Pass officials were on record for discussing "strategies for pushing homeless residents into neighboring jurisdictions and 'leaving them there'" like buying persons bus tickets out of town or proposing to make it "uncomfortable enough" so that they will want to move down the road) (internal citations omitted).

safety.[231] Courts in other cities have noted the benefits arising from rulings like *Martin*.[232]

Others have noted that the criminalization of sleeping outside contradicts the theories and purposes behind punishment.[233] The deterrence theory, for example, cannot justify punishment because sleeping is an unavoidable activity that a person does not engage in by choice or that a person has the chance to weigh the consequences of before doing.[234] Justifications premised on imprisonment as necessary for protecting the public also fail because sleeping is an innocent activity that only becomes criminal when a person lacks the means to do so in private.[235]

v. Martin *has Encouraged Innovative and Realistic Solutions*

In addition to the new encampment decommissioning policy, government officials in Pittsburgh have also been outspoken about other measures that could be implemented to address homelessness.[236] For instance, in late November 2023, Councilor Deb Gross sponsored a bill that advocated for amending the City's zoning code to legally authorize tent sites.[237] The proposal for city-sanctioned encampments arose from the recognition that winter was approaching, that the number of unhoused individuals exceeded the available shelter, and that many of those individuals wished to stay together.[238] The proposed campsites could have heating, portable

231. Sara Berg, *Homeless People Need More Help, Not Stays in Jail: AMA*, AM. MED. ASS'N (June 12, 2019), https://www.ama-assn.org/delivering-care/population-care/homeless-people-need-more-help-not-stays-jail-ama (stating that while government action is needed for infectious disease outbreaks, it ought to be geared toward mitigating hazards and providing homeless individuals with resources and that "[c]riminal sanctions should be a last resort").

232. Ross, *supra* note 64, at 227 n.64 (noting that Miami's alternative approaches compared to previous criminalization strategies led to a ninety percent decrease in the homeless population) (citing Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1180–81 (S.D. Fla. 2019)).

233. *See id.* at 238–40; *see also* Oral Argument, *supra* note 124, at 2:18:38 ("This Court has recognized that when a punishment scheme has no penological purpose, it inflicts gratuitous suffering, and that is cruel and unusual punishment . . . . [T]he City has not ever identified any penological purpose for punishing homeless people who do not have access to shelter.").

234. *See* Ross, *supra* note 64, at 239.

235. *Id.* ("[T]he actions being punished are not themselves creating hazards or disease."); *see also* Jamie Michael Charles, Note, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 315 (2009) ("Everything . . . has to be done somewhere.").

236. *See* discussion *infra* Part V.C(v).

237. Kiley Koscinski, *Pittsburgh City Council to Weigh Creating City-Sanctioned Homeless Camps*, 90.5 WESA (Nov. 20, 2023, 5:30 AM), https://www.wesa.fm/politics-government/2023-11-20/pittsburgh-city-council-homeless-encampments.

238. *Id.*

restrooms, showers, and medical services, but Gross emphasized that the campsites were meant only to be a temporary solution.[239]

In January 2024, Pittsburgh City Council members unveiled their tiny village pilot proposal as an alternative to the tents in which many of Pittsburgh's unhoused reside.[240] While the proposal has received mixed reactions, activists praised the idea as an improvement for safety and security, and as a measure that could be taken while developing affordable housing.[241]

Five months later, Allegheny County officials unveiled "500 in 500 days," an initiative to create five hundred housing units in five hundred days to transition unsheltered individuals into permanent housing.[242] With government agencies, private landlords, developers, and nonprofits working together to connect those living unhoused with relocation services and professional development resources, the plan signified a moment of collaboration and optimism for local representatives and stakeholders.[243] The plan's announcement proved especially timely as only two days earlier, a fire at the Second Avenue Commons homeless shelter displaced nearly two hundred residents.[244] And with the number of local shelter options dwindling, pressure for achieving this mission has intensified as Pittsburgh's unhoused increasingly have nowhere else to go.[245]

While the mentioned initiatives may have shortcomings that warrant critique, these approaches give homeless individuals a real chance to change their status from unhoused as opposed to a conviction that can affect their future employment and housing outcomes.[246] Cities that adopted approaches like Housing First have

---

239. *Id.* (quoting Gross as stating that the city's goal "is not to have permanent tent communities").

240. Kiley Koscinski, *City Council Members Build 'Tiny Village' Prototype for Pittsburgh's Homeless*, 90.5 WESA (Jan. 25, 2024, 6:50 PM), https://www.wesa.fm/politics-government/2024-01-25/pittsburgh-homeless-tiny-village-prototype.

241. *Id.*

242. Giammarise, *supra* note 223.

243. Eric Jankiewicz, *500 People in Homelessness to be Housed in 500 Days, per New Allegheny County Plan*, PUBLICSOURCE (June 6, 2024), https://www.publicsource.org/allegheny-county-homelessness-unhoused-housing-affordable-500-plan-innamorato/ (explaining how county officials have been working with local philanthropic foundations to secure funding to identify and develop hundreds of housing units across the county).

244. Taylor Sporito, *Nearly 200 People Displaced Due to Fire at Second Avenue Commons*, WPXI NEWS (June 4, 2024, 1:33 PM), https://www.wpxi.com/news/local/heavy-smoke-billows-apartment-building-pittsburghs-bluff-neighborhood/JCH7EBCH5RBCFHZQHNOGWE6SGE/.

245. *See* Kiley Koscinski, *Officials Say Second Avenue Commons Fire Has Created 'An Unprecedented Crisis' in Shelter System*, 90.5 WESA, https://www.wesa.fm/politics-government/2024-06-14/second-avenue-commons-fire-homeless-relocation-crisis (June 17, 2024, 10:03 AM).

246. *See* NAT'L LAW CTR. ON HOMELESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2019), https://homelesslaw.org/wp-

had fewer municipal violations while decreasing the number of individuals experiencing homelessness.[247] Others have also advocated for expansive approaches to the Housing First framework, like unified strategies that provide behavioral health services in tandem with transitional housing, as necessary for making lasting change.[248]

While those in favor of punitive measures may justify criminalization to deter certain behavior, fining or arresting a homeless person without somewhere to go afterwards will neither prevent that person from returning to the public to engage in an unavoidable and biologically-compelled activity, like sleeping, nor will it eliminate homelessness altogether.[249]

---

content/uploads/2019/12/housing-not-handcuffs-2019-final.pdf; *see also* Andy Sheehan, *Pittsburgh Won't Remove Homeless Encampments After U.S. Supreme Court Ruling*, CBS NEWS (July 5, 2024, 6:47 PM), https://www.cbsnews.com/pittsburgh/news/pittsburgh-wont-remove-homeless-encampments-us-supreme-court-ruling/ (quoting Pittsburgh Public Safety director Lee Schmidt for wanting to "come up with solutions that are realistic and don't just move the problem around").

247. *See* HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, *supra* note 246, at 20. ("Housing First is premised on the idea that pairing people with immediate access to their own apartments—without barriers and without mandated compliance with services—is the best way to sustainably end their homelessness."); *see also* Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?*, HOUSING MATTERS (Feb. 27, 2019), https://housingmatters.urban.org/articles/can-housing-interventions-reduce-incarceration-and-recidivism (noting that Milwaukee County, Wisconsin, saw an eighty-two percent decrease in municipal violations and a nearly sixty percent decrease in the number of individuals experiencing homelessness a year after instituting Housing First).

248. Jerrel T. Gilliam, *A Plea for a Compassionate, Transformational Response to Addressing Homelessness in Pittsburgh*, PITTSBURGH POST-GAZETTE (Aug. 4, 2024, 5:30 AM), https://www.post-gazette.com/opinion/insight/2024/08/04/gilliam-homelessness-housing-plus-act-wraparound-services/stories/202408050002 (cautioning that Pittsburgh must "resist reaching for quick answers" because without sufficient resources and funding, approaches like Housing First fail to provide sustainable solutions to homelessness).

249. *See National Alliance to End Homelessness Statement on Landmark Supreme Court Case on Homelessness*, NAT'L ALL. TO END HOMELESSNESS (Jan. 16, 2024), https://endhomelessness.org/media/press-releases/national-alliance-to-end-homelessness-statement-on-landmark-supreme-court-case-on-homelessness/ (claiming that such practices are "harmful to people experiencing homelessness, costly to communities, burdensome on law enforcement, and wholly ineffective at ending homelessness" and that the focus ought to be on evidence-based solutions like low barrier shelter and affordable housing); Clayton, *supra* note 92 ("Homelessness is growing not because cities lack ways to punish people for being poor, but because a growing number of hard-working Americans are struggling to pay rent and make ends meet . . . ."); *see also* Oral Argument, *supra* note 124, at 44:47.

> Justice Kavanaugh: When you get out of jail if you end up – what's going to happen then? Aren't -- you still don't have a bed available. So how does this help?
> Ms. Evangelis: So . . . I do want to make a point about that -- about the criminal aspect. The trespass law here is only triggered after several civil citations.
> Justice Kavanaugh: Right. No.
> Ms. Evangelis: And at that point --
> Justice Kavanaugh: If you run through that cycle --
> Ms. Evangelis: Yes.

V. CONCLUSION

The *Martin* decision, once only binding on cities in the Ninth Circuit's jurisdiction, ignited a national conversation over whether laws that penalize people experiencing homelessness when no reasonable housing alternatives exist ought to remain.[250] By extending beyond Boise, Idaho, into Pennsylvania cities like Pottstown and Pittsburgh, and into the hands of Supreme Court justices, the discourse over the *Martin* and *Grants Pass* decisions symbolize a moment of collective reflection in this country over how to resolve homelessness.[251] To some, the Ninth Circuit's *Martin* and *Grants Pass* rulings were erroneous decisions spurred by judicial overreach and frustration.[252] And given *Martin*'s roots in the *Robinson-Powell*-concurrence-dissent doctrine and the vacated *Jones* opinion, perhaps some of these sentiments were warranted, as *Martin*'s basis made the decision's ultimate demise feel somewhat predictable and inevitable.[253] For others, *Martin* was a legal victory that recognized the cruelty in tactics that have become anything but unusual.[254] Even so, though some believe *Martin* stood for a novel concept, the language of the opinion, and the resulting decisions, demonstrate the narrow instances when it was to apply.[255]

While the merits of *Martin* may be analyzed and debated for years to come, what cannot be disputed is that the decision prompted cities to reassess and reimagine their approaches.[256] And although the Court has determined that this country's history reveals nothing cruel or unusual about criminalizing vulnerable

---

> Justice Kavanaugh: -- and you end up in jail for 30 days, then you get out, I mean, you're not going to be any better off than you were before in finding a bed if there aren't -- going to my earlier question, if there aren't beds available in the jurisdiction, unless you're removed from the jurisdiction or you decide to -- to leave somehow.

Id.

250. *See* Cohen, *supra* note 16.

251. *See* discussion *supra* Part IV.A–C.

252. *See* discussion *supra* Part IV.A(iii). *See generally* Greg A. Alonge, *"Judicial Frustration": A Local Judge's Bold Attempt to Solve the Homeless Crisis From the Bench*, 56 LOY. L.A. L. REV. 267 (2023).

253. *See* discussion *supra* Part III.A–B(ii).

254. *See* Press Release, Nat'l Homelessness L. Ctr., Sup. Ct. Lets Martin v. Boise Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives (Dec. 16, 2019); Press Release, Nat'l Homelessness L. Ctr., First Nat'l Study of State L. Criminalizing Homelessness Released: Widespread Criminalization of Sheltering, Camping, and Other Means of Survival (Dec. 1, 2021).

255. *See* discussion *supra* Part IV.C(i) –(ii).

256. *See* Chandegra, *supra* note 25, at 453 (acknowledging that while the *Martin* decision did not give an easy answer for how municipalities should combat homelessness, the decision did "demand that an answer be sought"); Recent Case, 133 HARV. L. REV. 699, 705, 706 (noting that the *Martin* litigation sparked media coverage on the City's homelessness issues and "facilitated the inclusion of homeless people in the City's political process").

individuals without access to shelter,[257] the American people should not resign themselves to letting this be a tradition that continues to define the future.[258] While the Court's *Grants Pass* decision marked the end of a chapter where discussions over homelessness practices played out in an adversarial forum like the courts, *Martin* supporters must resist throwing their hands up in defeat; rather, now is the time for homelessness advocates, elected officials, and communities to come together to affect change. As evidenced by cities like Pittsburgh, post-*Martin* responses show that cities can take steps to address homelessness by collaborative and comprehensive approaches that prioritize problem-solving over penalties like citations and arrests.[259]

Though the fate of *Martin* appears sealed, the decision's legacy signifies hope that cities can and ought to find alternatives to punishing the unhoused for engaging in life-sustaining activities when they have nowhere else to go.[260]

257. City of Grants Pass v. Johnson, 603 U.S. 520, 560 (2024). *See* Brief for the City of Chico as Amicus Curiae Supporting Petitioner at 37–38, City of Grants Pass v. Johnson, 72 F.4th 868 (9th Cir. 2023) (No. 23-175) ("Sentencing a homeless person for violating anti-camping laws is neither cruel—insofar as the punishment consists of, at most, misdemeanor-level fines and detention—nor unusual—because such punishment has been imposed throughout this country long before *Martin*.").

258. *See* City of Grants Pass, 603 U.S. at 560 ("If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it.").

259. *See* discussion *supra* Part IV.C(i)–(iii).

260. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) ("As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.").

DUQUESNE UNIVERSITY

THOMAS R. KLINE
SCHOOL OF LAW

PITTSBURGH, PENNSYLVANIA | WWW.DUQ.EDU/LAW

Volume 63 Number 2 DUQUESNE LAW REVIEW Pages 315-640 SUMMER 2025