



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

## PROFESSIONAL ARTICLES

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*Laura R. Ford*

THE PEDAGOGY OF LEGAL SYNTHESIS

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*Cambrie Short*



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# The Sociological Dilemma in U.S. Law: Private Attorneys General and the “Societal Importance” of Litigation

Laura R. Ford\*

We have been so taught to respect the beliefs of our neighbors that few will respect the beliefs of a neighbor when they depart from forms which have become associated with aspiration for a decent neighborly life. This is the illiberalism which is deep-rooted in our liberalism.

-John Dewey, *The New Republic*, 1922<sup>1</sup>

[W]e have assumed, often without extended discussion, that the vindication of a constitutional right likely confers a benefit on individuals other than the plaintiff and that such a benefit—since, after all, it is constitutional—may well qualify as “substantial.”

-Oregon Supreme Court, en banc, 2021<sup>2</sup>

## ABSTRACT

*This Article draws on the law of remedies, Weberian social theory, and moral philosophy to identify and critically discuss a “sociological dilemma” in U.S. law. The dilemma can be summarized as a derivative of Plato’s Euthyphro problem: a social command-based theory of law, which renders legal duties and powers arbitrary and*

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\* Associate Professor of Law, Faulkner University, Jones School of Law. I wish to thank Michael Malloy for including an earlier version of this Article in a panel at the 2025 Association of American Law Schools Annual Meeting (“New Voices in Socio-Economics and Law”) and June Carbone for her thoughtful and incisive comments on the paper. I also wish to thank colleagues here at Jones for their thoughtful comments on earlier versions of the paper, particularly John Browning, Mike DeBoer, Jeff Hammond, Taurus Myhand, Andy Olree, and Melvin Otey. Thank you also to Jessica Holton and Aaron Palmer, who provided state-by-state research on adoption of the private attorney general doctrine. See *infra* notes 15, 316–318 and accompanying text. Thank you finally to Simon Jaronski, Lindsay Henry, and Abigail Palotas for outstandingly careful and thoughtful editorial work on this Article.

1. John Dewey, *The American Intellectual Frontier*, 30 NEW REPUBLIC 303, 305 (1922); N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 129 (1997).

2. *De Young v. Brown*, 486 P.3d 740, 745 (Or. 2021) (en banc).

*vacuous. Judges are posited as moral agents, translating what they perceive to be developing social mores into legal obligations, acting with a kind of moral "expertise" that is closely analogous to social science. Such a conception of the judicial role was explicated by the architects (such as Roscoe Pound and Benjamin Cardozo) of the early twentieth century's turn to sociological jurisprudence. And it is hardly an exaggeration to say that their conception of the judicial role is largely presumed today, often celebrated, within contemporary understandings of the common law tradition. This Article explores the sociological dilemma in U.S. law by focusing on a specific doctrine within the law of remedies: the private attorney general doctrine, an equitable doctrine that gives judges discretion to grant attorney fees to a victorious plaintiff who has vindicated a "societally important" right (or policy). The requisite judgment of "societal importance" makes the private attorney general doctrine particularly well suited to revealing the broader sociological dilemma in U.S. law. Following a substantive introduction, the Article proceeds in four main parts to (1) explore the private attorney general doctrine in a recent Arizona case; (2) place the private attorney general doctrine in its doctrinal context as an exception to the "American Rule" that parties pay their own attorneys; (3) trace the historical development of the private attorney general doctrine, emphasizing its dependence on a broader "triumph" of equity in the common law tradition, and upon restitutionary rationales; and (4) elaborate the sociological dilemma in U.S. law by illustrating its foundations in the sociological turn of twentieth century U.S. jurisprudence.*

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I.        INTRODUCTION

In 1942, the Swedish political economist Gunnar Myrdal coined a phrase —“The American Dilemma”—to describe a crisis of moral legitimacy in American race relations.<sup>3</sup> Avowing his sympathy with American political and moral culture, Myrdal nonetheless emphasized the economic, social, political, and (ultimately) moral factors that were contributing to a failure to live up to the ideals of that culture.<sup>4</sup> This yawning moral gap between spiritual ideals and

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3. 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY, at lxxix (Transaction Publishers 1996) (1944) (“Though our study includes economic, social, and political race relations, at bottom our problem is the moral dilemma of the American – the conflict between his moral valuations on various levels of consciousness and generality. The ‘American Dilemma,’ referred to in the title of this book, is the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the ‘American Creed,’ where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.”); *see also* Sissela Bok, *Introduction* to 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY, at lxxix (Transaction Publishers 1996) (1944). For recent assessment of Myrdal as a social theorist, focusing on his relationship to Max Weber’s “anti-sociology,” *see generally* Sven Eliaeson, *Gunnar Myrdal: A Theorist of Modernity*, 43 ACTA SOCIOLOGICA 331 (2000); Sven Eliaeson, *Modalities of Value Incommensurability: Associated Reflections*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK ON MAX WEBER 129 (Alan Sica ed., 2022) [hereinafter Eliaeson, *Modalities of Value Incommensurability*]. For a recent evocation of Myrdal’s work in the analysis of racial inequalities in the criminal justice system, *see generally* STEVEN E. BARKAN, RACE, CRIME, AND JUSTICE: THE CONTINUING AMERICAN DILEMMA (2019). Myrdal’s *An American Dilemma* was, of course, accorded a preeminent place among the modern social science authorities establishing the inherent inequality of “separate but equal” education. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 n.11 (1954).

4. 1 MYRDAL, *supra* note 3, at lxxix.

social realities presented a haunting and pressing “dilemma” for Americans and their society, which Myrdal presented as, ultimately, a battle in the heart of each American.<sup>5</sup> Praising Americans for their generosity in inviting a “foreigner” to critique their society, Myrdal sought to persuasively summon what he portrayed as “ideal-typical” American propensities to moralism, faith, optimism, and rationalism, in order to lance the poison of racial inequality and the legacies of slavery in American society.<sup>6</sup>

Strikingly, Myrdal’s diagnosis recognized conflicting attitudes toward law as resting near the heart of the American dilemma.<sup>7</sup> These conflicting attitudes can be described as a combination of (1) confidence in a “higher law” deriving from the Enlightenment natural law tradition, intertwined with Christian faith, (2) defiance toward laws deemed inconsistent with that “higher law,” which readily tended toward cynicism and flagrant disrespect for law, and (3) a legalistic approach to social conflicts, which Myrdal characterized as “a desire to regulate human behavior tyrannically by means of formal law.”<sup>8</sup> This paradoxical attitude toward law was manifested not only in popular culture, Northern and Southern alike, but also in American social science, particularly in sociology.<sup>9</sup> In the American sociology of Myrdal’s time he saw, simultaneously, a theoretical

5. *Id.*

6. *Id.* at lxxviii (“America, relative to all the other branches of Western civilization, is moralistic and ‘moral-conscious.’ The ordinary American is the opposite of a cynic. He is on the average more of a believer and a defender of the faith in humanity than the rest of the Occidentals. It is a relatively important matter to him to be true to his own ideals and carry them out in actual life. We recognize the American, wherever we meet him, as a practical idealist. Compared with members of other nations of Western civilization, the ordinary American is a rationalistic being, and there are close relations between his moralism and his rationalism.”). The “ideal type” is much more closely associated with Max Weber’s sociology than Gunnar Myrdal’s. *See, e.g.,* Hans Henrik Bruun & Sam Whimster, *Introduction to MAX WEBER: COLLECTED METHODOLOGICAL WRITINGS*, at xi, xxiv–xxv (Hans Henrik Bruun & Sam Whimster eds., Hans Henrik Bruun trans., 2012); HANS HENRIK BRUUN, *SCIENCE, VALUES AND POLITICS IN MAX WEBER’S METHODOLOGY* 41–47 (2d ed. 2007); RICHARD SWEDBERG & OLA AGEVALL, *THE MAX WEBER DICTIONARY* 156–58 (2d ed. 2016). However, Myrdal did use the phrase in his discussion of the lingering effects from slavery on black families in America. 2 MYRDAL, *supra* note 3, at 691–92.

7. *See* 1 MYRDAL, *supra* note 3, at 12–21.

8. *Id.* at 16. “So we find that this American, who is so proud to announce that he will not obey laws other than those which are ‘good’ and ‘just,’ as soon as the discussion turns to something which in his opinion is bad and unjust, will emphatically pronounce that ‘there ought to be a law against . . .’ To demand and legislate all sorts of laws against this or that is just as much part of American freedom as to disobey the laws when they are enacted. America has become a country where exceedingly much is permitted in practice but at the same time exceedingly much is forbidden in law.” *Id.* at 17 (alteration in original). In his 1978 Harvard Address, Aleksandr Solzhenitsyn made an analogous argument about the impacts of legalistic culture in America and the broader Western world. ALEKSANDR SOLZHENITSYN, *Harvard Address, in THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS, 1947–2005*, at 561, 561–75 (Edward E. Ericson, Jr. & Daniel J. Mahoney eds., 2006).

9. *See* 1 MYRDAL, *supra* note 3, at 19–20.

presumption that law is ineffectual in changing customary “folkways” and an enthusiastic theory of “social engineering,” an instrumentalist attitude toward law as an agent in scientific “social control.”<sup>10</sup>

This Article does not focus on Myrdal’s primary “American Dilemma” of racial inequality, although that dilemma is never far from the surface because, as Myrdal himself argued, it is a leitmotif in the broader story of “American civilization” and culture.<sup>11</sup> Rather, the Article draws by analogy on Myrdal’s diagnosis to identify a “sociological dilemma” in U.S. law, focusing on a narrow set of doctrines in remedies law: the “private attorney general doctrine,” together with closely related doctrines that go under varying names like the “public benefit” or “substantial benefit” doctrine.<sup>12</sup> These doctrines give judges equitable discretion to award attorney fees to victorious plaintiffs in cases where the judge perceives “societal importance” or “public benefit” in the outcome of the plaintiff’s suit.<sup>13</sup>

Despite rejection by the U.S. Supreme Court for federal litigation,<sup>14</sup> the private attorney general doctrine (together with its relatives) is alive and well in state courts, even in states that initially rejected it.<sup>15</sup> By holding out the hope that attorney fees might be compensated, particularly for litigation that touches on state constitutional law, the doctrine incentivizes and rewards litigation over highly conflictual areas of politics, morality, and social policy.<sup>16</sup>

10. See *id.* at 20; 2 MYRDAL, *supra* note 3, at 23, 158 n.c., 528, 848–50, 872–91. An understanding of sociology as the scientific study of social control mechanisms is closely associated with the work of E.A. Ross, Roscoe Pound’s tutor in the emerging discipline of American sociology. See EDWARD ALSWORTH ROSS, *SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER*, at viii (1901); A. Javier Treviño, *Introduction* to ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW*, at vii, xx–xxii (Transaction Publishers 1997) (1942).

11. See 1 MYRDAL, *supra* note 3, at lxxxv.

12. See *infra* Parts II–IV.

13. See *infra* Parts II–IV.

14. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 270 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

15. See, e.g., *Brown v. State*, 565 So. 2d 585, 592 (Ala. 1990) (embracing public/common benefit doctrine to justify award of attorney fees); *Shelby Cnty. Comm’n v. Smith*, 372 So. 2d 1092, 1096–97 (Ala. 1979) (rejecting private attorney general doctrine). While this Article does not offer a comprehensive survey of each U.S. jurisdiction’s position regarding the private attorney general doctrine and its relatives, it does reflect a state-by-state examination. I gratefully acknowledge the ALR report by Ann K. Wooster, which provided the foundation for this partial survey, together with research assistance by Jessica Holton and Aaron Palmer. See Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R.5th 523 § 5 (2003). For a partial survey, see *infra* notes 316–318 and accompanying text.

16. See *infra* Parts II–IV. By social policy I mean, following Daniel Bell, a normative subset of public policy, developing since the 1960s and pursuing goals oriented toward the development of a more robust welfare state that redresses environmental harms and

At the same time, its application requires a discretionary, equitable, and, ultimately, moral judgment about the social (“societal”) benefits of litigation that has few principled guides in legal doctrine.<sup>17</sup>

This Article treats the private attorney general doctrine as a reflection of a much broader, sociological dilemma in U.S. law, a dilemma now rooted deeply in the common law tradition, as that tradition has been reconstructed over the course of the twentieth century.<sup>18</sup> The turn toward social science, and toward sociology specifically, with the claim to provide a new anchor for the common law tradition in “social needs,” is a striking theme of twentieth century U.S. legal history.<sup>19</sup> At the beginning of the twentieth century, Roscoe Pound trumpeted the dawn of a new “sociological jurisprudence” for U.S. law,<sup>20</sup> a charge taken up eagerly and charismatically by Benjamin Cardozo,<sup>21</sup> whose decisions provide foundations for today’s first-year curriculum and for the American Law Institute’s ongoing project in “restating” U.S. law.<sup>22</sup> Even as Pound’s

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eliminates social inequalities. See DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 225–26 (2d ed. 1996).

17. See *infra* Part V.

18. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 37–99 (2d ed. 2014).

19. See *id.* at 11, 67–81; Philip Bobbitt, *The Age of Consent* in GILMORE, *supra* note 18, at 100, 140–42; see also BYLAWS, AM. L. INST. § 1.01(A) (2016) (“The particular business and objects of the . . . [American Law Institute] are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs . . .”).

20. For early statements of Pound’s new “creed,” see generally Roscoe Pound, *A New School of Jurists*, 4 U. STUD. 249 (1904); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

21. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 3–15, 21–24, 37–90, 103–15 (Quid Pro L. Books 2010) (1921). For an extraordinary report of Cardozo’s charismatic impact in the delivery of these lectures at Yale Law School, see Arthur Corbin’s gushing account. Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 197–98 (1961) (“The hall was jammed, with many more pushing to get in; and we transferred the lecture to the near-by Lampson Lyceum, with some 500 seats. For the remaining lectures that hall was filled to capacity; and each day at 6 P.M. the ritual of the first day was exactly repeated—the rising of the audience, the continuous applause, the smile of pleasure, the appreciative bow, and the leaving with the faculty while all others stood and cheered. Both what he had said and his manner of saying it had held us spell-bound on four successive days. He had inspired our ambition in the law and had warmed the cockles of our hearts. Never again have I had a like experience.”).

22. Foundations for the first-year torts curriculum: *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920) (negligence per se); *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934) (reliance on juries in assessing reasonableness under the circumstances); *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929) (assumption of the risk); *Wagner v. Int’l Ry.*, 133 N.E. 437 (N.Y. 1921) (proximate/legal cause, “danger invites rescue”); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (duty to foreseeable plaintiff); *Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928) (duty based on undertaking); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (products liability). Foundations for the first-year contracts curriculum: *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (consideration, implied promise); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921) (constructive conditions, substantial

sociological jurisprudence has faded in appeal and memory, a loosely sociological understanding of the judiciary's moral role has become entrenched, to the extent that it is virtually assumed to-day.<sup>23</sup>

The “sociological turn” of twentieth century jurisprudence means that, in one way or another, an ill-defined, vaguely understood, perhaps even illusory collective entity (“society”) has become the criterion for goodness, right, and justice in our legal order.<sup>24</sup> Judges are expected to act as normative analogues to social scientists, ascertaining moral developments within society, recognizing that they are good for society, and transforming them into binding legal principles as they define rights and duties between individuals in

performance, damages). Foundations for the American Law Institute's ongoing restatement project: Corbin, *supra* note 21, at 195, 198; Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 190 (1968) (“I knew that germinal opinions like those of Judge Cardozo in the *Palsgraf* case; *MacPherson v. Buick Motor Co.*; or *Ultra-mares Corp. v. Touche, Niven & Co.*, had been embraced in the drafts of the first Restatement long before they had much following in other courts, in the view that they were right and should be followed . . . .” (footnotes omitted)).

23. See Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORN. L. REV. 861, 873 (1981); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 274–78 (1982) [hereinafter SUMMERS, INSTRUMENTALISM]; ROBERT S. SUMMERS, LON L. FULLER 54–61 (1984); MARSHALL S. SHAPO, TORT LAW AND CULTURE (2003); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 101 (2006) [hereinafter TAMANAHA, LAW AS A MEANS TO AN END]; Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 L. & SOC. INQUIRY 493, 512 (2020) (“Once the view that law is a social institution with social ends and consequences became taken for granted, a jurisprudential school dedicated to this view no longer seemed necessary.”).

24. *Dwy v. Connecticut Co.*, 92 A. 883, 891 (Conn. 1915) (Wheeler, J., concurring in the judgment) (“That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society . . . .” (emphasis added)), *superseded by statute*, CONN. GEN. STAT. ANN. § 52-572e (West, Westlaw through all enactments of the 2025 Reg. Sess. and the 2025 November Special Sess.), *as recognized in*, *Sims v. Honda Motor Co.*, 623 A.2d 995, 998–99 (Conn. 1993). Cardozo cited *Dwy* with approval. CARDOZO, *supra* note 21, at 97. The concept of “society” presumes a unitary and holistic social entity, often an implicitly national entity. For a recent critique of this presumptive starting point for social theory, see 1 MICHAEL MANN, THE SOURCES OF SOCIAL POWER: A HISTORY OF POWER FROM THE BEGINNING TO AD 1760, at xi–xii, 1–2 (2d ed. 2012). For a critical discussion of the social theory implied by contemporary legal theory, see ROGER COTTERRELL, SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY 160–62 (2018). A recent and influential line of moral philosophy proceeds from the premise that moral obligation has a “social character,” exemplified by tort law, with normativity ultimately anchored in divine command. See JOHN E. HARE, GOD’S COMMAND 110–11 (2015) [hereinafter HARE, GOD’S COMMAND]; ROBERT MERRIHEW ADAMS, FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS (1999); JOHN E. HARE, GOD AND MORALITY: A PHILOSOPHICAL HISTORY (2009) [hereinafter HARE, GOD AND MORALITY]. Nontheistic adaptations of this basic approach to moral obligation anchor the normativity of moral obligation in social command. See SUSAN WOLF, THE VARIETY OF VALUES: ESSAYS ON MORALITY, MEANING, & LOVE 233–54 (2015).

litigation.<sup>25</sup> Quite naturally, then, the conceptions that judges have about the nature of society (i.e. judicial social theories) become enormously significant for legal interpretation.<sup>26</sup> And such conceptions are not simply given—whether implicitly or explicitly, they must be formed through a process of moral reasoning, which entails a choice among intensely contested values.<sup>27</sup>

As Max Weber provocatively argued, just over a century ago, knowledge-claims about the social world depend on judgments of social or cultural importance that necessarily entail a choice between warring gods.<sup>28</sup> Even for a social scientist committed to truth-seeking over politics, these initial judgments of importance can never be value-neutral.<sup>29</sup> Ultimately, the choices entail existential decisions about ultimate value commitments, which are either arbitrary (and nihilistic) or referenced to a transcendent (or immanent) source of normative authority.<sup>30</sup> Either way, the model of

25. See SHAPO, *supra* note 23, at 30–31, 45, 50–51, 53–175, 269–300. Roger Cotterrell, drawing heavily on Emile Durkheim’s sociological theory, advocates a normative version of Shapo’s descriptive account, in which judges (with other types of legal experts (jurists)) seek to promote social cohesion through sociologically-conscious, creative, regulatory legal interpretation. See COTTERRELL, *supra* note 24, at 165–226. The orienting value-commitment for jurists, arrived at through Durkheimian analysis, is “moral individualism.” See *id.* at 175. Moral individualism, like liberalism, places the individual at the center of the moral universe; however, unlike liberalism, moral individualism gives society a primacy over the individual. See *id.* “It is *society* (its need for solidarity in circumstances of modern complexity and diversity) that invests each individual with absolute moral value (irrespective of personal conditions or character). . . . *The autonomy and dignity of the individual are what society decrees (and needs) them to be.*” *Id.* (second emphasis added).

26. See COTTERRELL, *supra* note 24, at 58–72, 160–70, 218–29.

27. See MAX WEBER, *The “Objectivity” of Knowledge in Social Science and Social Policy*, in MAX WEBER: COLLECTED METHODOLOGICAL WRITINGS, *supra* note 6, at 100, 100–38 [hereinafter WEBER, *Objectivity*]; MAX WEBER, *The Meaning of “Value Freedom” in the Sociological and Economic Sciences*, in MAX WEBER: COLLECTED METHODOLOGICAL WRITINGS, *supra* note 6, at 304, 304–34 [hereinafter WEBER, *Value Freedom*]; BRUUN, *supra* note 6, at 11–41; cf. COTTERRELL, *supra* note 24, at 222–26.

28. MAX WEBER, *Science as a Profession and Vocation*, in MAX WEBER: COLLECTED METHODOLOGICAL WRITINGS, *supra* note 6, at 335, 347–53 [hereinafter WEBER, *Science as a Profession and Vocation*]; MAX WEBER, MAX WEBER’S ‘SCIENCE AS A VOCATION’ 22–31 (Peter Lassman & Irving Velody with Herminio Martins eds., 2015) (1922) [hereinafter WEBER, *SCIENCE AS A VOCATION*]. Robert Adams addresses this basic problem, in dialog with Susan Wolf, as the “fragmentation of value.” ADAMS, *supra* note 24, at 179–82. “The deeply disturbing feature of the proposed or threatened fragmentation is the suggestion that some such conflicts are between types of value so fundamental and so incommensurable that there is no well-defined point of view from which one can do justice to all the competing values.” *Id.* at 182.

29. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 345–53; WEBER, *Objectivity*, *supra* note 27, at 100–38.

30. See SVEN ELIAESON, MAX WEBER’S METHODOLOGIES 10–15, 101–02, 110–22 (2002). Eliaeson sees a logical extension of Weber’s legacy in the nihilistic position of Axel Hägerström, a foundational figure in Scandinavian legal realism and an influential figure for Gunnar Myrdal. See *id.*; Eliaeson, *Modalities of Value Incommensurability*, *supra* note 3, at 133–37. As Hägerström formulated it, the nihilistic position is that there is no truth-value in moral statements. See Eliaeson, *Modalities of Value Incommensurability*, *supra* note 3, at



sociological jurisprudence is one in which judges are forming their conception of the social good by selecting among intensely contested values.<sup>31</sup> Judge-made law becomes a kind of mediated social command, with one section of an intensely divided society imposing values on another.<sup>32</sup>

Ironically, then, the sociological turn has resulted in a dilemma for U.S. law that is closely analogous to the moral dilemma of a divine command-based theory of law.<sup>33</sup> This may be no accident if, as Emile Durkheim classically argued, “society” serves as the secular counterpart for God in providing the ultimate “sanction” for normative obligation.<sup>34</sup> When the gods of society are at war with one

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137. It is close to the “emotivist” theory of ethics propounded by Charles Stevenson, according to which normative language and judgments serve as instruments of social persuasion, expressing attitudes and feelings, and inviting others to share those attitudes and feelings. *See id.* at 135; HARE, GOD AND MORALITY, *supra* note 24, at 197. Weber has himself been accused of moral nihilism. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS 141–56, 194–215 (25th anniversary ed. 2012). However, in my reading of him, Weber was more ambivalent about the possibility of transcendent moral commitments than Bloom’s interpretation allows. *See also* Eliaeson, *Modalities of Value Incommensurability*, *supra* note 3, at 131–33, 136. For a thoughtful historical account of the effort to anchor morality in social science, which has effectively ended up in moral nihilism by equating moral goodness with social success, see JAMES DAVISON HUNTER & PAUL NEDELISKY, SCIENCE AND THE GOOD: THE TRAGIC QUEST FOR THE FOUNDATIONS OF MORALITY 20–21 (2018). For a summary of the philosophical arguments, made since the mid-twentieth century, that notions of moral obligation (“normativity”) only make sense “against the background” of a transcendent lawgiver, which secularism has discarded, see HARE, GOD AND MORALITY, *supra* note 24, at 260–63.

31. *See* COTTERRELL, *supra* note 24, at 11, 17–19, 29–31, 41–43, 58–72, 87–88, 154–55, 160–87, 206–14, 218–29; SUMMERS, INSTRUMENTALISM, *supra* note 23, at 41–59.

32. *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note 23, at 156–71. For discussion of a “social command” theory of moral obligation, *see* WOLF, *supra* note 24, at 233–54.

33. Robert Merrihew Adams sets forth his divine command theory of moral obligation by proposing a “social requirements” paradigm, according to which the nature of obligation (“normativity”) consists in being (rightly) required by another (rightly valued) person or group of persons to do something. *See* ADAMS, *supra* note 24, at 241–48. Adams surveys the reasons for concluding that “actual human societies are simply not good enough to constitute the basis of moral obligation.” *Id.* at 248. For a theist, the solution to this problem is to recognize that, in a divine command theory of moral obligation, the nature of moral obligation consists in being (rightly) required by God to do something. *See id.* at 249. This is an idealized form of the social requirements theory, which is possible because of the understanding that our relationship with God is interpersonal and social. *See id.* Interpreting Adams’s divine command theory from a Kantian perspective, John Hare summarizes Adams’s solution of the Euthyphro dilemma “that a divine command theory allows God to command anything at all” and requires obedience to this command. HARE, GOD AND MORALITY, *supra* note 24, at 263.

34. *See* EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 418–48 (Karen E. Fields trans., The Free Press 1995) (1912). Durkheim, of course, would put the point very differently: with secularization, we recognize that “the divinity is only the symbolic form of the society.” EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 195 (Cornelia Brookfield trans., 2d ed. 1992). For further discussion, *see*, for example, ROGER COTTERRELL, EMILE DURKHEIM: LAW IN A MORAL DOMAIN 49–64 (1999); Laura R. Ford, *Legacies of the Sacred in Private Law: Roman Civic Religion, Property, and Contract*, in THE SACRED AND THE LAW: THE DURKHEIMIAN LEGACY 157, 157–200 (Werner Gephart & Daniel Witte eds., 2017); STEVEN LUKES, EMILE DURKHEIM: HIS LIFE AND WORK 61–63, 110–19, 237–44, 255–

another, Euthyphro's dilemma is only rendered more acute—is an action right because society commands it or does society command it because it is right?<sup>35</sup> The dilemma highlights the futility in seeking the ultimate criteria for moral and legal obligation in a social order that is morally conflicted and corrupt.<sup>36</sup>

The private attorney general doctrine in remedies law is well-suited to revealing the sociological dilemma in U.S. law, due to the emphasis it places on judgments of “societal importance.”<sup>37</sup> Judgments of “societal importance” (and “social needs”) are, unavoidably, value-judgments that must be anchored in prior moral perceptions and commitments.<sup>38</sup> In the context of today's “culture wars,” such judgments will tend to reflect the same moral divides that underpin our ever-intensifying partisanship in politics, judicial nominations, and, ironically, social science.<sup>39</sup> Exploration of the private

76, 410–84, 500–20 (1985); W.S.F. PICKERING, DURKHEIM'S SOCIOLOGY OF RELIGION: THEMES AND THEORIES 244–45, 300–11 (1984).

35. See PLATO, EUTHYPHRO 2a–16a (G.M.A. Grube trans.) [hereinafter EUTHYPHRO]; JOHN E. HARE, PLATO'S *EUTHYPHRO* (1985). This Article follows J.B. Schneewind's formulation of the dilemma, as discussed by John Hare. See JOHN E. HARE, GOD'S CALL: MORAL REALISM, GOD'S COMMANDS, AND HUMAN AUTONOMY 99–100 (2001) [hereinafter HARE, GOD'S CALL]; J.B. Schneewind, *The Divine Corporation and the History of Ethics*, in PHILOSOPHY IN HISTORY 173, 176 (Richard Rorty, J.B. Schneewind & Quentin Skinner eds., 1984); Chris Heathwood, *Desire-Fulfillment Theory*, in THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING 135, 145 (Guy Fletcher ed., 2016). For Ronald Dworkin's brief discussion of the Euthyphro dilemma, which is consistent with the formulation here, see RONALD DWORIN, RELIGION WITHOUT GOD 153–55 (2013).

36. See ADAMS, *supra* note 24, at 241–48; HARE, GOD AND MORALITY, *supra* note 24, at 263.

37. *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977) (en bane) (holding that three basic factors are considered in awarding attorney fees under private attorney general doctrine: (1) strength or societal importance of the public policy vindicated by litigation, (2) necessity for private enforcement and magnitude of burden on plaintiff, and (3) number of people who will benefit from the decision).

38. See *supra* notes 24–32 and accompanying text.

39. For influential and recent accounts of the culture wars, see generally JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) [hereinafter HUNTER, CULTURE WARS]; JAMES DAVISON HUNTER, DEMOCRACY AND SOLIDARITY: ON THE CULTURAL ROOTS OF AMERICA'S POLITICAL CRISIS (2024) [hereinafter HUNTER, DEMOCRACY AND SOLIDARITY]; JOHN ICELAND, ERIC SILVER & ILANA REDSTONE, WHY WE DISAGREE ABOUT INEQUALITY: SOCIAL JUSTICE VS. SOCIAL ORDER (2023). For an insightful analysis of tort law as a “series of culture wars,” reflecting Americans' “deep divisions about the role of law and morality in our social life,” see SHAPO, *supra* note 23, *passim*. For recent descriptions of the culture wars, see, for example, Zack Stanton, *How the ‘Culture War’ Could Break Democracy*, POLITICO (May 20, 2021, at 17:30 ET), <https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900> (on file with the Duquesne Law Review); Andrew Anthony, *Everything You Wanted to Know About the Culture Wars—but Were Afraid to Ask*, THE GUARDIAN (June 13, 2021, at 15:00 ET), <https://www.theguardian.com/world/2021/jun/13/everything-you-wanted-to-know-about-the-culture-wars-but-were-afraid-to-ask> (on file with the Duquesne Law Review) (UK focus); *Culture War*, EUROPEAN CTR. FOR POPULISM STUD., <https://www.populismstudies.org/Vocabulary/culture-war/> (on file with the Duquesne Law Review) (last visited Dec. 22, 2025) (defining populism with a European focus).

attorney general doctrine, both in its current application and in its historical development, can serve as a synecdoche (a part that reveals the whole) to highlight a basic challenge to legal and political legitimacy, posed by the twentieth century's turn to judicially-mediated social mores as the standard for legal normativity.<sup>40</sup>

The argument proceeds in four parts followed by a conclusion. Part II of the Article unpacks the implications of the private attorney general doctrine by exploring a recent Arizona case applying the doctrine, *Arizona School Boards Ass'n v. State*.<sup>41</sup> This intensely partisan, "culture war" case illustrates the political and evaluative stakes of state constitutional litigation in which attorney fees are readily available under the private attorney general doctrine.<sup>42</sup> Part III describes the historical and doctrinal background of the private attorney general doctrine, contrasting the American and English "rules" for attorney fees and elaborating the policy arguments for these alternative default rules.<sup>43</sup> The American "rule" is that each side should pay their own attorneys.<sup>44</sup> The private attorney general doctrine is a judicially-created exception to this rule, benefiting plaintiffs who are judged to be litigating in the "societal" or public interest.<sup>45</sup>

Part IV of the Article elaborates the restitutionary rationale that contributed to the emergence of the private attorney general

40. See TAMANAHA, LAW AS A MEANS TO AN END, *supra* note 23, at 215–45. Max Weber's sociology is well-known for its focus on the problem of legal legitimacy. From a historical perspective, he recognized heightened risks to legal legitimacy in the decline of natural law and the rise of legal realism. See MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 303–21 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Simon & Schuster 1954) (1922) [hereinafter WEBER, LAW IN ECONOMY AND SOCIETY]. These concerns were hauntingly echoed in the post-WWII context by Lord Radcliffe in his 1960 Rosenthal Lectures at Northwestern Law School: LORD RADCLIFFE, THE LAW AND ITS COMPASS (1960).

41. 501 P.3d 731, 738–40 (Ariz. 2022).

42. For the prevailing interpretations of the case with reference to current culture war conflicts, see Tess Bissell, Note, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 215 n.46 (2023) (describing the Arizona Supreme Court as striking down an "anti-CRT law" on "procedural grounds"); Kelly J. Deere, *Democratizing Emergencies: The Local Predicament*, 101 N.C. L. REV. F. 1, 19 (2022) (describing Arizona Supreme Court as affirming strike-down of "mask mandate ban"); see also Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1844 n.190 (2022) (describing Arizona Supreme Court as upholding lower court ruling striking down ban on mask mandates).

43. See *infra* Part III.

44. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 279 (3d ed. 2018) ("The general American rule is that the losing party in litigation is not liable to pay the winner's attorney fees. Attorneys look to their own clients for payment of their fees."). The private attorney general exception to the American Rule allows recovery of fees by plaintiffs under the theory that the fees are necessary to sufficiently compensate and encourage socially beneficial litigation. See *id.* at 285–87.

45. See *id.* at 285.

doctrine and its relatives.<sup>46</sup> The basic intuition is that the litigant has provided a benefit to others within an identifiable social group, who should be compelled to pay for this benefit, lest they otherwise be “unjustly enriched.”<sup>47</sup> The exception developed in equity and its expansion can be seen as part of a broader procedural transformation that scholars have described as a “triumph” (or “conquest”) of equity in U.S. law.<sup>48</sup> Part V elaborates the “sociological dilemma” in U.S. law posed by the combination of heightened judicial discretion and vaguely sociological moral judgment that underpins the private attorney general doctrine.<sup>49</sup>

The Article concludes with a brief reiteration of the sociological dilemma, together with a plea for recommitment to the American Rule, subject to modification through democratic processes and legislation.<sup>50</sup> The Delaware Supreme Court’s recent reaffirmation of the American Rule provides good reasons to hope that this may indeed be the direction of future developments in the very large majority of states that remain ambivalent about the private attorney general doctrine.<sup>51</sup>

## II. PICKING SIDES IN THE CULTURE WARS: *ARIZONA SCHOOL BOARDS ASSOCIATION V. STATE*

In a 2022 decision, *Arizona School Boards Ass’n v. State*,<sup>52</sup> the Arizona Supreme Court reiterated a blackletter summary of the private attorney general doctrine: this is “an equitable rule that allows a court to award fees to ‘a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance.’”<sup>53</sup> Including fees at both the trial court and the appellate level, together with small amounts for costs, the victorious plaintiffs were awarded \$172,631.01 to compensate them for substantial legal expenses.<sup>54</sup> Because the plaintiffs won their case against the state, the attorney fees were ultimately charged to Arizona taxpayers.

The focus in the *Arizona School Boards Ass’n* litigation was not on attorney fees, but rather on Arizona’s constitutional

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46. See *infra* Part IV.

47. See *infra* Part IV.

48. See *infra* Part IV.

49. See *infra* Part V.

50. See *infra* Part VI.

51. See *In re Del. Pub. Schs. Litig.*, 312 A.3d 703, 707 (Del. 2024).

52. 501 P.3d 731 (Ariz. 2022).

53. *Id.* at 741 (quoting *Ansley v. Banner Health Network*, 459 P.3d 55, 65 (Ariz. 2020)).

54. Stipulated Amended Judgment Awarding Att’y’s Fees & Costs, *Ariz. Sch. Bds. Ass’n v. State*, No. CV2021012741, 2021 WL 4487632 (Ariz. Super. Ct. Sep. 27, 2021).

requirements for valid legislation.<sup>55</sup> The plaintiffs challenged four Arizona statutes—state budget-related bills, called “budget reconciliation bills” (BRBs), which made substantive legal changes necessary to implement budgetary allocations for K–12 education, among many other things, and which included Republican-sponsored measures restricting the teaching of “critical race theory,” along with mask and vaccine mandates—successfully arguing that specific provisions in these statutes (and one in its entirety) violated the Arizona Constitution.<sup>56</sup> The constitutional provision in question, titled “subject and title of bills,” requires that every legislative act embrace only a single subject (the single subject rule) and that the subject be stated in the bill’s title (the title requirement).<sup>57</sup> Because selected sections of the challenged legislative acts (and one in its entirety) were determined to violate these provisions, they were held unconstitutional and void.<sup>58</sup>

#### A. *Guardians of the Guardians: Private Attorneys General as Public Representatives*

*Arizona School Boards Ass’n* did not break new ground in the articulation of the private attorney general doctrine by Arizona courts.<sup>59</sup> Indeed, the Arizona Supreme Court applied the doctrine quite superficially, offering very little explanation for its conclusion.<sup>60</sup> The court did not identify the right that had been vindicated in the case or explain how it met the three criteria of (1) benefiting

55. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 738–40; ARIZ. CONST. art. IV, pt. 2, § 13. Arizona’s Constitution, adopted in 1912, is a premier exemplar of early-twentieth century legal Progressivism, including its hostility to legislative “logrolling.” See TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 10, 25–34 (2d ed. 2010).

56. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 738–39. I have placed “critical race theory” in quotes as an acknowledgement of the debate about whether the kinds of critical social theories intended to be targeted by “anti-CRT” legislation are actually related to Critical Race Theory, as this was originally developed within legal academia. See Bissell, *supra* note 42, at 221–24; *Randall Kennedy on Why Critical Race Theory Is Important*, CURRENT AFFAIRS (Mar. 2, 2022), <https://www.currentaffairs.org/2022/03/randall-kennedy-on-why-critical-race-theory-is-important> (on file with the Duquesne Law Review); Greg Lukianoff et al., *13 Important Points in the Campus & K-12 ‘Critical Race Theory’ Debate*, FIRE (June 28, 2021), <https://www.thefire.org/news/blogs/eternally-radical-idea/13-important-points-campus-k-12-critical-race-theory-debate> (on file with the Duquesne Law Review).

57. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 738. These requirements are part of Arizona’s original Constitution. See ARIZ. CONST. of 1912, art. IV, pt. 2, § 13 (1910).

58. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 738–40.

59. The attorney general, Mark Brnovich, did not dispute that the plaintiffs had satisfied the requirements of the private attorney general doctrine, contesting only the reasonableness of, and documentary support for, the initial fee request at the trial court level. State’s Response in Opposition to Plaintiffs’ Application for Att’y’s Fees, *Ariz. Sch. Bds. Ass’n v. State*, No. CV2021012741, 2021 WL 4487632 (Ariz. Super. Ct. Sep. 27, 2021).

60. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 741.

a large number of people, (2) requiring private enforcement, and (3) societal importance.<sup>61</sup> The court simply cited two Arizona appellate cases, indicating by its parenthetical summaries of these cases that attorneys' fees had previously been granted to plaintiffs challenging the constitutionality of Arizona legislation.<sup>62</sup> The court's conclusory treatment of the private attorney general doctrine might indicate that its application to this case was noncontroversial, and the attorney general perhaps accepted that premise.<sup>63</sup>

But there is nonetheless something both striking and troubling about Arizona's application of the private attorney general doctrine, which brings into focus broader and long-standing ambivalences in U.S. law about the role of private party litigation, and of courts, in adjudicating matters of social policy.<sup>64</sup> By implication, the "rights" being vindicated in the *Arizona School Boards Ass'n* case were "public" rights because they concerned the proper interpretation of the Arizona Constitution, as it pertains to legislation.<sup>65</sup> Indeed, in the two appellate court cases cited by the Arizona Supreme Court to ground its application of the private attorney general doctrine, the "rights" at issue were identified as rights belonging to the state: in the more recent case, *Meyer v. State*, it was the state's "right to regulate wages and benefits" that was vindicated,<sup>66</sup> and in the older case, *Arizona Center for Law in the Public Interest v. Hassell*, the right involved state ownership of riverbeds.<sup>67</sup> In both cases, legislation was declared unconstitutional and the private attorney general doctrine was applied in granting attorney fees against the state in defending that legislation. In *Meyer*, the parties successfully challenging the legislation included legislators who had voted against

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61. *See id.*

62. *Id.* ("Plaintiffs' challenge to the constitutionality of four bills satisfies the criteria for an attorney fee award under the private attorney general doctrine. *See Meyer v. State*, 246 Ariz. 188, 195–96 ¶¶ 25–31, 436 P.3d 511, 518–19 (App. 2019) (awarding fees to legislators successfully challenging the constitutionality of a law); *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371, 837 P.2d 158, 173 (App. 1991) (awarding fees to private litigants successfully contesting the constitutionality of legislation). We therefore exercise our discretion to award reasonable attorney fees to Plaintiffs.").

63. *See supra* note 59 and accompanying text.

64. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 481–91 (2021) (arguing that "regulatory" conceptions of private party litigation in tort law as "pure public law," relied upon to address matters of social policy, confuse important distinctions between public and private law, with worrisome implications for properly adjudicating novel extensions of the private attorney general theory, as in Texas's antiabortion law, Senate Bill 8).

65. As discussed further below, the plaintiffs argued that they were vindicating a constitutional right against log-rolling. *See infra* notes 165–168 and accompanying text.

66. *Meyer v. State*, 436 P.3d 511, 519 (Ariz. Ct. App. 2019).

67. *Ariz. Ctr. for L. in the Pub. Int. v. Hassell*, 837 P.2d 158, 161 (Ariz. Ct. App. 1991).

the legislation.<sup>68</sup> What does it mean, then, to conclude with the Arizona Supreme Court that a “private attorney general” is “necessary” in order for the “socially important”—and public—rights at stake in these cases to be properly enforced?

An answer to this question was given in 1972, in a formative case that helped to forge the private attorney general doctrine in the lower federal courts, *La Raza Unida v. Volpe*.<sup>69</sup> Applying a predecessor to the three-part test applied by the Arizona Supreme Court in the *Arizona School Boards Ass’n* case, the U.S. District Court for the Northern District of California explained that private party enforcement is necessary in order to “guard the guardians.”<sup>70</sup> Due to “limited resources and potentially conflicting interests within and among governmental entities,” effectuation of public policies prioritized by congressional legislation frequently depends on “private vigilance and enforcement.”<sup>71</sup> Citing a liberalizing trend in Article III standing requirements as support for its argument, the court went on to infer that the necessary “private vigilance” required that “[r]esponsible representatives of the public should be *encouraged to sue*, particularly where governmental entities are involved as defendants.”<sup>72</sup> To make this economically feasible, courts should exercise their equitable powers to shift the financial burden of the litigation onto the governmental defendants, which in this case were California state entities and, ultimately, the “state treasury.”<sup>73</sup>

The conceptual basis for the private attorney general doctrine applied in *La Raza Unida* had been articulated in the context of litigation pursuant to the Civil Rights Act of 1964.<sup>74</sup> In a 1968 per

68. *Meyer*, 436 P.3d at 514.

69. *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *abrogated by*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025). This language and rationale have resonated in state supreme courts that have carefully considered whether to adopt the private attorney general doctrine. *Compare* *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999) (adopting private attorney general doctrine and rationale), *with* *State Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657, 661 (Ind. 2001) (rejecting private attorney general doctrine and rationale).

70. *La Raza Unida*, 57 F.R.D. at 101. The phrase “guard the guardians” is attributed to an amicus brief filed by the Barristers Club of San Francisco. *Id.* at 95, 101.

71. *Id.* at 100.

72. *Id.* at 100–01 (emphasis added).

73. *Id.* at 101–02.

74. *Id.* at 96, 99 n.7; *see also* Peter Nussbaum, *Attorney’s Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 317–31 (1973) (tracing development in the federal courts toward awarding fees to plaintiffs who help to effectuate important social policies by securing benefits to a class or group). The concept of the “private attorney general” is older, first articulated in the context of standing-related doctrine by Jerome Frank. *See infra* note 290 and accompanying text; William B. Rubenstein, *On What a Private Attorney General Is—and Why It Matters*, 57 VAND. L. REV. 2127, 2133–34 (2004).

curiam opinion, *Newman v. Piggie Park Enterprises, Inc.*,<sup>75</sup> the U.S. Supreme Court described a plaintiff bringing an action under Title II of the Civil Rights Act as doing so, "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."<sup>76</sup> The Court held that a plaintiff who successfully obtained an injunction under Title II "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."<sup>77</sup> In effect, the equitable power to grant attorney fees under Title II was translated into a presumptive norm that the fees should be granted.<sup>78</sup>

As was noted in an influential article written shortly after *La Raza Unida* was decided, that case represented the leading edge of a trend involving the extension of the *Piggie Park* rationale beyond the immediate context of civil rights legislation and racial discrimination.<sup>79</sup> That trend was halted only a few years later, however, when the U.S. Supreme Court rejected the private attorney general doctrine for federal courts in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>80</sup> Overturning the D.C. Circuit's embrace of the private attorney general doctrine in the context of environmental litigation, the Court reaffirmed the American Rule, concluding that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."<sup>81</sup>

Prompted by compelling concerns that attorney fees would no longer be consistently available to support civil rights litigation at the federal level, Congress acted quickly to pass the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988.<sup>82</sup>

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75. 390 U.S. 400 (1968) (per curiam).

76. *Id.* at 402.

77. *Id.*

78. See Nussbaum, *supra* note 74, at 319–20 ("*Piggie Park* broadened the permissible scope of fee granting by interpreting a discretionary provision for attorney's fees as a virtual command always to award fees to a successful plaintiff, and thereby signaled a change in the Court's position toward a more liberal approach.").

79. *Id.* at 329–31.

80. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975), *superseded by statute*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

81. *Id.* at 262.

82. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988). For a concise description of background and purpose, see generally S. REP. NO. 94-1011 (1976). The purpose, as described in the Senate Report, was to amend the Civil Rights Act of 1866, to give federal courts the discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts that Congress has passed since 1866. *Id.* at 1. More specifically, the purpose was "to remedy



At the same time, however, a case was pending in the California courts, *Serrano v. Priest*,<sup>83</sup> which would resurrect the expanding private attorney general doctrine for state courts.<sup>84</sup> And, with this shift from federal to state courts, the private attorney general doctrine would be transformed from a relatively constrained doctrine, justified as adding equitable support to effectuate legislatively-articulated public policies, into a potentially much more far-reaching doctrine, encouraging constitutional challenges to state legislation and governance, in order to enforce policies or rights that private litigants (and/or their attorneys) believe should be judicially designated as “societally important” and, ultimately, morally good.<sup>85</sup>

As matters stand today, only a minority of states have firmly embraced the revamped private attorney general doctrine, following the lead of California.<sup>86</sup> States like Arizona that have followed this path have decided, at the level of the state’s highest court, to declare their adherence to the doctrine, a declaration that typically leaves trial courts with limited discretion in applying the doctrine.<sup>87</sup> For courts that have followed California’s lead, like the Arizona Supreme Court, the grant of attorney fees pursuant to the private

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anomalous gaps in our civil rights laws created by the United States Supreme Court’s recent decision in [*Alyeska*], and to achieve consistency in our civil rights laws.” *Id.*

83. 569 P.2d 1303 (Cal. 1977) (en banc). The *Serrano* decision is discussed further below. See *infra* notes 308–313 and accompanying text.

84. See *Hellar v. Cenarrusa*, 682 P.2d 524, 530 (Idaho 1984) (affirming trial court’s reliance on the *Serrano* test for granting attorney fees under the private attorney general doctrine); cf. *Arnold v. Ariz. Dep’t of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989) (en banc) (referencing *Serrano* in applying the private attorney general doctrine for the first time), *overruled in part by*, *Ansley v. Banner Health Network*, 459 P.3d 55, 64 n.4 (Ariz. 2020) (clarifying the distinction between the private attorney general doctrine and the “substantial benefits doctrine”).

85. As seen by comparing the three-factor “test” in *La Raza Unida* with the analogous test in *Arizona School Boards Ass’n*, two of the factors remain fairly consistent across the varying formulations of the test used in both federal and state courts: the policy or right in question must (1) benefit a large number of people, and (2) a private attorney general must be “necessary” in order to enforce the right or policy. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972); *Ariz. Sch. Bds. Ass’n v. State*, 501 P.3d 731, 741 (Ariz. 2022). What changes in the move from federal to state courts is the characterization of the public policy or right in question; in *La Raza Unida* it was a “strong congressional policy,” inferred from enacted legislation, while in *Serrano* and its progeny, the right or policy was “societally important,” as determined by the court. *La Raza Unida*, 57 F.R.D. at 96; *Serrano*, 569 P.2d at 1313–14; *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 741.

86. See *infra* notes 316–318 and accompanying text.

87. *Arnold*, 775 P.2d at 537. In Arizona, a trial court’s determination about whether the private attorney general doctrine applies is reviewed de novo, although the application of the doctrine is reviewed under the more deferential (and more typical) “abuse of discretion” standard. See *Ansley*, 459 P.3d at 64; see also *Hockenberg Equip. Co. v. Hockenberg’s Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 158 (Iowa 1993).

attorney general doctrine ensures necessary financial support for litigation in the public interest.<sup>88</sup>

Another side of the argument, however, is that judgments of public benefit and “societal importance” are value-judgments or moral perceptions anchored in prior normative commitments that are inevitably controverted in our pluralistic moral culture; they are, in other words, dependent on the underlying worldview of the person making the moral judgment.<sup>89</sup> Among the state supreme courts that have rejected the private attorney general doctrine, Indiana and New Mexico have been particularly explicit on this point, emphasizing the “subjectivity” of the value-judgment,<sup>90</sup> which shades over into a concern that the determinations of public benefit and societal importance involved in the application of the private attorney general doctrine will further politicize judicial rulings on already-politically-momentous constitutional conflicts, with the grant of attorney fees registering a sign of judicial favor for the policy preferences of the winning side, adding “insult to injury” for the losing side.<sup>91</sup>

Despite the constitutional formalism of its holding, these concerns are well illustrated by the Arizona Supreme Court’s award of

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88. *Arnold*, 775 P.2d at 537 (“Given the eroded status of the ‘American Rule’ and the benefit to Arizona citizens from public interest litigation, we adopt and apply the private attorney general doctrine here.”); *see also* M. David Gelfand, *Guest Editor’s Introduction: Court-Awarded Attorney’s Fees as a Crucial Mechanism for the Enforcement of Civil Rights*, 37 URB. LAW. 647, 652 (2005) (“In the United States, most attorneys work in the private sector for profit, and few government-employed or government-financed lawyers are available to bring suits to vindicate the constitutional and other civil rights claims of ordinary citizens. Though some statutory claims may have become fairly routine, the more nuanced forms of discrimination (and some other unconstitutional conduct) encountered today often require the analytical skills of highly sophisticated advocates. Thus, ‘private attorneys general’ are just as necessary today as in the early civil rights days.”).

89. *See supra* notes 26–32 and accompanying text; *cf.* *State Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657, 662 (Ind. 2001) (“[S]ocietal importance is in the eye of the beholder. The subjectivity involved in ranking various public interests could make it difficult for prospective litigants to know in advance whether fee reimbursement would accompany a victory. Given this uncertainty, it is far from clear that the doctrine would serve as a significant incentive to those seeking to vindicate the public interest.”); *see also* Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L. REV. 1929, 1935 (1985) (“[T]he determination of importance is essentially a subjective one, perhaps inherently incapable of principled judicial resolution.”).

90. *State Bd. of Tax Comm’rs*, 751 N.E.2d at 662; *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 459 (N.M. 1999).

91. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025); *N.M. Right to Choose*, 986 P.2d at 458; *see also* *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1040 (D.C. Cir. 1974) (MacKinnon, J., dissenting) (arguing that the grant of attorney fees under the private attorney general doctrine adds “insult to injury”), *rev’d sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

attorney fees to the successful plaintiffs in *Arizona School Boards Ass'n v. State*.<sup>92</sup>

### B. *Arguments in Arizona School Boards Association v. State*

The Arizona budget reconciliation bills (BRBs), portions of which were ultimately struck down as unconstitutional in *Arizona School Boards Ass'n v. State*, were enacted as part of Arizona's 2021 budget-implementation process.<sup>93</sup> Controversial sections of the bills attempting to prevent the teaching of "critical race theory" in K–12 schooling and to restrict local government powers to impose COVID-19-related mandates were added as amendments (i.e. "riders") during the legislative session, and were included in the consolidated bills signed into law by the Republican Governor, Doug Ducey, in June 2021.<sup>94</sup> In August 2021, a curated group of plaintiffs led by the Arizona School Boards Association (ASBA) filed their complaint, seeking preliminary injunctive relief against implementation of the legislation and a declarative judgment that the bills were unconstitutional.<sup>95</sup> In an expedited ruling, the trial court issued an order granting the declaratory judgment on September 27, 2021.<sup>96</sup> That judgment was upheld by the Arizona Supreme Court in 2021, with an opinion issued in 2022.<sup>97</sup>

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92. *Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731 (Ariz. 2022).

93. *Id.* at 734–35, 741–42; H.B. 2898, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

94. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 734–35; H.B. 2898. For the sake of simplicity, and because the politically-divisive education-related measures were included in this bill, this Article's analysis focuses on House Bill 2898. Portions of two other budget reconciliation bills, Senate Bill 1824 and Senate Bill 1825, were also struck down, together with the entirety of a third bill, Senate Bill 1819. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 741–42.

95. Complaint for Declaratory and Injunctive Relief at 16–19, *Ariz. Sch. Bds. Ass'n v. State*, No. CV2021012741, 2021 WL 4487632 (Ariz. Super. Ct. Sep. 27, 2021), 2021 WL 3599542. The lead plaintiff, the Arizona School Boards Association (ASBA), is a private, non-profit advocacy organization, which pursues policy-based goals on behalf of Arizona's public schools. See, e.g., DENNIS HOFFMANN & TOM R. REX, ARIZ. STATE UNIV., IMPROVING THE FISCAL SYSTEM OF ARIZONA STATE GOVERNMENT: PREPARED FOR THE ARIZONA SCHOOL BOARDS ASSOCIATION (2010), <https://ccpr.wpcarey.asu.edu/sites/default/files/asba.pdf> (on file with the Duquesne Law Review). In its complaint, the ASBA was described as a provider of "training, leadership, and essential services" to its members, which included "nearly all of the school districts in the state represented through their governing boards and individual members of school district governing boards." Complaint for Declaratory and Injunctive Relief, *supra*, at 2. The ASBA was joined by other nonprofit advocacy organizations, a union, and eleven individuals occupying a range of positions within Arizona's education-related institutional landscape. See *id.* at 1.

96. *Ariz. Sch. Bds. Ass'n*, 2021 WL 4487632, at \*1.

97. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 741–42.

*i. Constitutional Arguments*

The trial court ruled that all four challenged BRBs violated the title requirements of the Arizona Constitution,<sup>98</sup> and the Arizona Supreme Court agreed: the title of the legislation did not provide adequate notice of the bill's content.<sup>99</sup> The trial court explained that this failure to signal a bill's content in the title inhibits democratic processes because it means that the public is not provided with adequate notice as to the subject-matter being addressed by the proposed legislation.<sup>100</sup> We can call this the problem of *democratic inscrutability*.<sup>101</sup>

The fourth challenged BRB violated both the title requirement and the single subject requirement, adding the problem of "logrolling" (and "riders") to the problem of democratic inscrutability.<sup>102</sup> The problem with logrolling and riders is basically that legislators are pressured into voting for measures they would prefer not to see enacted into law.<sup>103</sup> They vote for measures they do not like in order to secure passage of other measures they approve.<sup>104</sup> We can call this the problem of *coerced compromise*.<sup>105</sup> The prescribed remedy to this problem is to ensure that each bill proposes only one single measure so that legislators will be free to vote for or against each measure in its entirety.<sup>106</sup>

The problem, however, is that the adjudication of whether legislation covers only one single subject, and whether the title adequately provides notice as to the content of the legislation, is a slippery enterprise.<sup>107</sup> Modern legislation is complicated, and this is

98. *Ariz. Sch. Bds. Ass'n*, 2021 WL 4487632, at \*6–8.

99. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 738–39.

100. *Ariz. Sch. Bds. Ass'n*, 2021 WL 4487632, at \*1.

101. See Michael D. Gilbert, *Single Subject Rules and the Democratic Process*, 67 U. PITT. L. REV. 803, 816–17 (2006); cf. Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 391–92 (1958) (explaining that the purpose of title requirements working in tandem with the single subject rule is to prevent stealth legislation).

102. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 739–40.

103. See *id.* at 739; Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1634–35 (2019).

104. Briffault, *supra* note 103, at 1634–35; see also Gilbert, *supra* note 101, at 813–16 (describing legislative processes involving "logrolling" with attention to the coercive effects on legislators).

105. See Briffault, *supra* note 103, at 1651.

106. See *State v. Cassidy*, 22 Minn. 312, 322 (1875) ("The well-known object of this section of the constitution . . . was to secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits . . ."); Ruud, *supra* note 101, at 390–91.

107. See Briffault, *supra* note 103, at 1636–50 (elaborating the difficulties inherent in defining the subject of a bill for purposes of the single subject rule); Stephanie Hoffer & Travis McDade, *Of Disunity and Logrolling: Ohio's One-Subject Rule and the Very Evils It Was Designed to Prevent*, 51 CLEV. ST. L. REV. 557, 561 (2004); Gilbert, *supra* note 101, at 823–28.

particularly true for budget-related legislation.<sup>108</sup> As commentators have emphasized, judgments about whether the legislation relates to a unified subject-matter, and whether that subject-matter is indicated in the title, will depend very much on the level of abstraction that is allowed in describing the subject-matter.<sup>109</sup> It will also depend on the purposes and value-judgments (including judgments of importance) involved in the conceptual classification, as well as the context (including, unavoidably, the political context).<sup>110</sup>

To illustrate, the BRB addressing K–12 education (House Bill 2898) contained 120 sections, amending or repealing a page-long list of statutes.<sup>111</sup> The Westlaw document containing the text of House Bill 2898 is nearly 200 pages in length.<sup>112</sup> In terms of subject matter, the provisions all relate to K–12 education, but they nonetheless range very widely.<sup>113</sup> Some provisions are closely connected to the financing of K–12 education, and the link to the budget is intuitive, but others are about substantive policies connected in varying degrees of closeness to K–12 education.<sup>114</sup> Authorizations for school district governing boards address disciplinary procedures and the content of the curriculum.<sup>115</sup> Other sections grant discretion to require school uniforms.<sup>116</sup> Still other sections address immoral and unprofessional activity on the part of service providers and enable the creation of fingerprint databases to monitor criminal backgrounds.<sup>117</sup> Overall, the legislation authorizes and empowers a wide range of education-related bodies and activities, while establishing rules about how those bodies should carry out their authorized activities.<sup>118</sup>

The plaintiffs challenged only three of House Bill 2898's 120 sections, arguing that these specific sections violated the title requirement (while, by implication, the other 117 sections did not).<sup>119</sup> The trial court accepted the plaintiffs' argument and the Arizona

108. See *infra* notes 148–151 and accompanying text.

109. See Briffault, *supra* note 103, at 1636–50; Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 940 (1983).

110. See Lowenstein, *supra* note 109, at 940–41; Gilbert, *supra* note 101, at 825; see also *supra* notes 26–32 and accompanying text.

111. H.B. 2898, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.* § 10.

116. See *id.* § 11.

117. See *id.* §§ 13, 19–20.

118. See *id.*

119. See *Ariz. Sch. Bds. Ass'n v. State*, No. CV2021012741, 2021 WL 4487632, at \*6–7 (Ariz. Super. Ct. Sep. 27, 2021).

Supreme Court upheld this decision.<sup>120</sup> Neither opinion, however, attempts to explain why the challenged sections were more constitutionally problematic than the other 117 sections that the plaintiffs did not challenge.<sup>121</sup>

After reciting high-level principles applicable to the title requirement (the title must be worded so that it puts people on notice as to the contents of the bill), the trial court simply asserted that the bill's title "does not provide notice that the bill would: (1) ban public schools from implementing mask mandates; (2) ban and penalize teaching certain curriculum; or (3) authorize lawsuits against state employees for vaguely-defined conduct related to public schools."<sup>122</sup> The Arizona Supreme Court focused on the use of the phrase "appropriating monies" in a BRB's title, concluding that the challenged sections lacked the "fiscal significance" that would be indicative of appropriations.<sup>123</sup>

What made the remaining sections "compliant" with the title requirement?<sup>124</sup> Many of them also had no obvious fiscal import and contained no direct reference to appropriations.<sup>125</sup> Perhaps the fiscal import of an authorization to issue bonds is relatively intuitive, but what about a requirement to incorporate the teaching of Native American history or the permission to require school uniforms?<sup>126</sup> What makes those substantive policy provisions pass constitutional muster, while the plaintiffs' selected sections do not? In future years, when legislators are developing budget-related bills, how should they title the legislation so as to provide adequate notice about 200 pages worth of budgetary policy-related content? The courts made no attempt to say.<sup>127</sup>

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120. See *id.*; *Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 738–39 (Ariz. 2022).

121. See *Ariz. Sch. Bds. Ass'n*, 2021 WL 4487632, at \*6–7; *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 738–39.

122. *Ariz. Sch. Bds. Ass'n*, 2021 WL 4487632, at \*6.

123. See *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 738–39.

124. See *id.* at 739 ("A violation of the title requirement voids the portion of the act not expressed in the title, but the compliant part of the act survives." (citing ARIZ. CONST. art. IV, pt. 2, § 13)).

125. See *supra* notes 115–117 and accompanying text.

126. See H.B. 2898, 55th Leg., 1st Reg. Sess. §§ 10–11, 71–96 (Ariz. 2021).

127. The Arizona Supreme Court did specifically affirm the constitutionality of the "California Format" for legislative titles, which allows the "title" to consist of a lengthy string of statutory citations. See *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 739. While this method of titling does enable a researcher to identify the statutory sections that are being amended by the legislation, the title becomes virtually meaningless at the level of ordinary human language.

## ii. Policy Arguments

Upon appeal, a number of parties filed amicus briefs supporting the ASBA-affiliated plaintiffs/appellees, or the state as defendant/appellant. The amicus briefs filed on behalf of the plaintiffs/appellees were relatively issue-specific, focusing primarily on preserving local government powers to issue public health (mask and vaccine) mandates.<sup>128</sup> Among the more policy-focused of these briefs were those of the Arizona Medical Association, joined by a hospital association, the American Academy of Pediatrics, and the National School Boards Association (NSBA).<sup>129</sup>

Shortly before filing its amicus brief on October 14, 2021, the NSBA earned national notoriety for its September 29, 2021 letter to President Biden requesting that the administration utilize executive powers against domestic terrorism to investigate parental activities at school board meetings.<sup>130</sup> The NSBA is a national umbrella organization for state school board associations, like the ASBA, which in turn serve as umbrella organizations for local school boards.<sup>131</sup> In recent years, both the NSBA and the ASBA have been accused of carrying out politically divisive agendas, while claiming to act on behalf of their members as nonpartisan organizations.<sup>132</sup>

A report commissioned by the NSBA to investigate the September 2021 letter pointed to support from high-level Biden Administration officials in the drafting of the letter and concluded that the

128. See, e.g., Amicus Brief of Phx. Union High Sch. Dist. Filed with Written Consent of the Parties, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013900; Amicus Curiae City of Tucson's Brief in Support of Plaintiffs/Appellees, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013899.

129. See Brief of Amici Curiae Ariz. Hosp. & Healthcare Ass'n & Ariz. Med. Ass'n Filed with Written Consent of the Parties, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013898; Amicus Brief of Ariz. Chapter of Am. Acad. of Pediatrics & Am. Acad. of Pediatrics in Support of Plaintiffs/Appellees, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013901; Brief of Amicus Curiae Nat'l Sch. Bds. Ass'n Filed in Support of Plaintiffs (Submitted with the Consent of Defendant-Appellant & Plaintiff-Appellees), *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013897.

130. See JAMES W. CARROLL, NICHOLAS J. BOERKE & PHILIP G. KIKO, FINAL REPORT ON THE EVENTS SURROUNDING THE NATIONAL SCHOOL BOARDS ASSOCIATION'S SEPTEMBER 29, 2021 LETTER TO THE PRESIDENT 2, 22 (2022), <https://nsjonline.com/wp-content/uploads/2025/07/2022-NSBA-Final-Report.pdf> (on file with the Duquesne Law Review).

131. See *About NSBA*, NSBA, <https://www.nsba.org/who-we-are/about-nsba> (on file with the Duquesne Law Review) (last visited Dec. 23, 2025).

132. See, e.g., *Arizona Conservatives Launch Alternative to Education Group*, 12NEWS (Oct. 24, 2021, at 14:57 PT), <https://www.12news.com/article/news/education/arizona-conservatives-launch-alternative-to-education-group/75-1d943e2f-15cf-4e0c-8087-9ec98413b360> (on file with the Duquesne Law Review); Matt Beienburg, *Under Local Control: Arizona School Boards Are Being Forced to Fund Critical Race Theory at Taxpayer Expense*, GOLDWATER INST. (Oct. 19, 2021), <https://www.goldwaterinstitute.org/policy-report/local-control/> (on file with the Duquesne Law Review).

sending of the letter resulted from a breakdown in NSBA communications and oversight.<sup>133</sup> While responses from the Biden Administration to the letter were very positive, the responses from state and local school board associations, as well as many NSBA staff members, were more negative.<sup>134</sup> As of June 15, 2022, when the Wisconsin Association of School Boards withdrew, over half of state school board associations had withdrawn from the NSBA, including the ASBA.<sup>135</sup> As of December 2025, twenty-five state school board associations have joined an alternative organization, the Consortium of State School Boards Associations (COSSBA), which formed in late 2021.<sup>136</sup>

With the ASBA (at this time still a member of the NSBA) as lead plaintiff, the *Arizona School Boards Ass'n* case played out in a context involving a high level of public, political focus, framed in terms of education-related culture war issues.<sup>137</sup> This was, to put the point simply, a culture war case, and it has been interpreted that way by scholars who have discussed the case subsequently, mostly writing from perspectives that are sympathetic to the plaintiffs.<sup>138</sup> This was likewise a highly partisan and politicized case, as evidenced by the fact that House and Senate majority and minority leaders, together with the Governor, all filed amicus briefs.<sup>139</sup>

The amicus brief filed on behalf of the Legislative Democrats—as represented by House Minority Leader Reginald Bolding and Senate Minority Leader Rebecca Rios—argued that the BRBs resulted from an unprecedented legislative session involving egregious behavior on the part of Republicans.<sup>140</sup> The sensitive nature of the efforts to prohibit the teaching of “critical race theory” in K–12 schools and to limit local government powers to issue mask

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133. CARROLL, BOERKE & KIKO, *supra* note 130, at 2–6, 15, 18, 26–28.

134. *See id.* at 5–6.

135. *See* Terrence Falk, *The National School Board Association Is Falling Apart*, WIS. EXAM'R (June 15, 2022, at 06:24 ET), <https://wisconsinexaminer.com/2022/06/15/the-national-school-board-association-is-falling-apart/> (on file with the Duquesne Law Review); Letter from Dr. Sheila Harrison-Williams, Exec. Dir., Ariz. Sch. Bds. Ass'n, to Dr. John Heim, Exec. Dir., Nat'l Sch. Bds. Ass'n (Feb. 16, 2022), <https://arizonadailyindependent.com/wp-content/uploads/2022/02/asba.pdf> (on file with the Duquesne Law Review).

136. *Members*, COSSBA, <https://www.cossba.org/members> (on file with the Duquesne Law Review) (last visited Dec. 23, 2025). ASBA has not joined the Consortium of State School Boards Associations. *See id.*

137. *See, e.g., Arizona Conservatives Launch Alternative to Education Group, supra* note 132 (referencing the ASBA's lawsuit as an example of perceived politicization of the organization).

138. *See supra* note 42 and accompanying text.

139. *See infra* notes 140–153 and accompanying text.

140. Legislative Democrats' Amicus Brief in Support of Appellees' Ariz. Sch. Bds. Ass'n, Et AL., Ariz. Sch. Bds. Ass'n v. State, 501 P.3d 731 (Ariz. 2022) (No. CV-21-0234-T/AP), 2021 WL 8013896.



mandates were mentioned in the brief, with emphasis on a Democratic Senator's frustration with the fact that she received the text of amendments—incorporating substantive policy proposals that had failed earlier in the legislative session—only ninety minutes before the third reading of the bill, when it was due to pass out of the legislative chambers and move to the Governor's office.<sup>141</sup> In terms of process, the Republicans had behaved in an unprecedented and irregular way by flooding the BRBs with controversial amendments at the very last minute. The result (and inferable intention) was to prevent adequate public debate of the amendments being proposed; and, substantively, the policy measures included in the BRBs involved “drastic” changes, “unrelated to any specific spending provisions.”<sup>142</sup>

From the other political side, amicus briefs supporting the state's position were filed by senior Republican Senators, House leaders, and the Governor.<sup>143</sup> The amici argued that the Arizona trial court ruling for the plaintiffs had embraced an unprecedentedly broad reading of the constitutional provisions at issue, particularly the single subject rule.<sup>144</sup> The amici warned about the consequences of the ruling, which would open the floodgates for litigation over legislation necessary to enact the budget, inviting extensive judicial interference with future budget-related processes.<sup>145</sup> Principles of judicial deference to the legislature in interpreting the constitution's single subject and title requirements had been overturned based on judicial disapproval of a few, “cherry-picked” provisions in the extensive BRBs necessary to fund state activities.<sup>146</sup> The logical conclusion of the trial court's ruling would be that a separate BRB would be required for every single topic addressed in the budget, a radical interpretation that had never been given to the “single

141. *Id.* at 3.

142. *Id.* at 4; see also Rachel Leingang & Hank Stephenson, *Republicans Threw Too Much Stuff into the State Budget This Year. It Could Change the Legislature Forever.*, ARIZ. AGENDA (Sep. 30, 2021), <https://arizonaagenda.substack.com/p/republicans-threw-too-much-stuff> (on file with the Duquesne Law Review).

143. Amici Curiae Brief of Senator Vince Leach, Senator David Gowan, & Representative Regina Cobb in Support of Petitioners, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013902; Brief of Amici Curiae Speaker of the Ariz. House of Representatives Russell Bowers, Arizona Senate President Karen Fann, & Governor Douglas A. Ducey, *Ariz. Sch. Bds. Ass'n*, 501 P.3d 731 (No. CV-21-0234-T/AP), 2021 WL 8013903.

144. Amici Curiae Brief of Senator Vince Leach, Senator David Gowan, & Representative Regina Cobb in Support of Petitioners, *supra* note 143, at 1–5.

145. *Id.* at 1–2, 5.

146. *Id.* at 1–5; see *Hoffmann v. Reagan*, 429 P.3d 70, 73–74 (Ariz. 2018); *Litchfield Elementary Sch. Dist. v. Babbitt*, 608 P.2d 792, 800–03 (Ariz. Ct. App. 1980); see also *Korte v. Bayless*, 16 P.3d 200, 203–05 (Ariz. 2001) (en banc) (applying single subject requirement to ballot proposition amending the Arizona Constitution).

subject rule,” which had previously been understood to allow separate BRBs for each broadly-recognized area of the budget (e.g. funding K–12 education).<sup>147</sup>

The amicus brief of Governor Ducey and the Speakers of the House and Senate offered an historical overview of the developments leading to the legislature’s current budgeting process, which had been revamped in 2004 to address concerns that omnibus bills addressing substantive policy changes connected with budgetary appropriations constituted violations of the “single subject” requirement of the Arizona Constitution.<sup>148</sup> To address this concern, expressed in Arizona Supreme Court dicta, the 2004 legislative process had established a paradigm according to which substantive policy legislation to accompany budgetary allocations would be parceled into BRBs organized by subject area.<sup>149</sup> The position of the Governor and Speakers of the House and Senate was that the BRBs enacted in 2021 had fully conformed to this paradigm.<sup>150</sup> Similarly, regarding the constitutional title requirements, the 2021 legislation had fully conformed to protocols established in 1990, the so-called “California Format,” according to which bills were titled by enumerating the individual statutes added or amended by the bill, together with a generalized heading encapsulating the subject matter.<sup>151</sup>

Far from the unprecedented legislative session described by the Democratic amici, the Republican amici described a legislative session that fully comported with constitutional requirements, historically-developed practice, and the practical realities of the legislative budgeting process.<sup>152</sup> At the very least, then, they argued, the court’s constitutional ruling should only be given prospective effect, given the changes to legislative processes that would be necessary to comply with it, and the disruption to governance that would result from striking down budgetary legislation after the legislative session ended.<sup>153</sup>

Both the Arizona Supreme Court and the trial court gave short shrift to arguments that justiciability boundaries, particularly the

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147. Amici Curiae Brief of Senator Vince Leach, Senator David Gowan, & Representative Regina Cobb in Support of Petitioners, *supra* note 143, at 5.

148. Brief of Amici Curiae Speaker of the Ariz. House of Representatives Russell Bowers, Arizona Senate President Karen Fann, & Governor Douglas A. Ducey, *supra* note 143, at 2. The concern had been raised in dicta by the Arizona Supreme Court in *Bennett v. Napolitano*, 81 P.3d 311, 319–20 (Ariz. 2003).

149. Brief of Amici Curiae Speaker of the Ariz. House of Representatives Russell Bowers, Arizona Senate President Karen Fann, & Governor Douglas A. Ducey, *supra* note 143, at 2.

150. *Id.* at 2–3.

151. *Id.* at 3.

152. *Id.* at 2–8.

153. *Id.* at 7–8.

political question doctrine, should have counseled a refusal to decide the case altogether.<sup>154</sup> Extending the concerns of a commentator noting the Arizona Supreme Court's increasing propensity to wade into highly partisan, policy-related budget disputes,<sup>155</sup> we could, for the sake of argument, grant the necessity of judicial intervention to protect Arizona's constitutional commitments while questioning the legal wisdom of an attorney fee award in such an overtly partisan, social-policy-focused case.

### C. *Constitutional Litigation and the Culture Wars*

*Arizona School Boards Ass'n* endorsed a strong interpretation of judicial review, affirming the Arizona Supreme Court as the ultimate guardian of constitutional propriety in legislative activity.<sup>156</sup> The court invoked the great case of *Marbury v. Madison*.<sup>157</sup> In affirming the judiciary's power to ultimately say what Arizona's Constitution means, the court also firmly upheld Arizona's Progressive-era commitment to preventing the corrosive "evils" of inscrutable titles and "logrolling" from undermining the integrity of the legislative process.<sup>158</sup> Commentators focusing on these constitutional dimensions of the trial court's decision, including prominent Republicans legislators, viewed the decision positively, as reinforcing necessary constitutional boundaries against legislative impropriety.<sup>159</sup>

There is no question that a state supreme court decision establishing boundaries on improper legislative activity is *constitutionally* important.<sup>160</sup> But constitutional importance is not necessarily equivalent to "societal" importance, as state supreme courts applying the private attorney general doctrine have consistently held, and as commentators have further argued.<sup>161</sup> Limiting the category of "societally important rights" to constitutional rights is surely too narrow, for one thing.<sup>162</sup> Rights deriving from statutory and

154. *Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 737–38 (Ariz. 2022); *Ariz. Sch. Bds. Ass'n v. State*, No. CV2021012741, 2021 WL 4487632, at \*3–4 (Ariz. Super. Ct. Sep. 27, 2021).

155. See Christopher L. Hering, *Playing a Leading Role: How Recent Cases Are Thrusting the Arizona Courts into the State's Budget Drama*, 52 ARIZ. L. REV. 173, 195–97 (2010).

156. *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 741–42.

157. *Id.* at 737 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

158. See McCLODY, *supra* note 55, at 10, 25–34, 57–58.

159. See Leingang & Stephenson, *supra* note 142 (citing Republican state senators Paul Boyer and J.D. Mesnard to illustrate Republican acknowledgment that the 2021 budget "went too far" in packing policy measures into the budget, while disagreeing about whether the courts should have deferred to the legislature).

160. See McCLODY, *supra* note 55, at 10, 25–34, 57–58.

161. See Woodland Hills Residents Ass'n v. City Council of L.A., 593 P.2d 200, 209–10 (Cal. 1979); Cheng, *supra* note 89, at 1936–42.

162. See, e.g., Cheng, *supra* note 89, at 1936–42.

common law can also be readily identified as socially important.<sup>163</sup> And, on the other hand, many state constitutions contain highly particularistic provisions whose broader social importance is not obvious.<sup>164</sup> It bears mentioning, moreover, that “society” is not coextensive with state boundaries, even assuming that importance to the people of a particular state is incontrovertible.

The fee application for the plaintiffs in *Arizona School Boards Ass’n* asserted that the societally important right defended was “a right to a legislative process that avoids the log-rolling that has come to plague that process.”<sup>165</sup> The plaintiffs offered essentially the same argument for the proposition that the litigation vindicated a right that benefited a large number of people.<sup>166</sup> “All Arizonans” would benefit from compliance with the constitutional protections against logrolling.<sup>167</sup> The final prong of the test, necessity for private litigation in order to vindicate the right in question, was satisfied because the Arizona Attorney General, far from litigating on behalf of the plaintiffs, was defending the constitutionality of the legislature’s actions in enacting the BRBs.<sup>168</sup>

The formulation of a “right to be free from logrolling” is awkward, an example of “rights talk”: the pervasive tendency to translate legal principles and rules into entitlements.<sup>169</sup> It is perhaps telling that neither the trial court nor the Arizona Supreme Court embraced this language.<sup>170</sup> Nonetheless, because Arizona’s rights-based adaptation of *Serrano v. Priest* provides the doctrinal test for application of the private attorney general doctrine, the plaintiffs did need to find a way to characterize their objective in the form of a right.<sup>171</sup> This is awkward when the constitutional principle

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163. See, e.g., *Woodland Hills*, 593 P.2d at 203, 209–10; *Friends of the Trails v. Blasius*, 93 Cal. Rptr. 2d 193, 208 (Cal. Ct. App. 2000); *Cal. Common Cause v. Duffy*, 246 Cal. Rptr. 285, 291–92 (Cal. Ct. App. 1987).

164. See, e.g., ALA. CONST. art. 1, § 51-7.00 (allowing operation of bingo games for prize money in Montgomery County, so long as purposes are charitable, educational, or otherwise lawful); Cheng, *supra* note 89, at 1936–37.

165. Plaintiffs’ Application for Att’y’s Fees at 3, *Ariz. Sch. Bds. Ass’n v. State*, No. CV2021012741, 2021 WL 4487632 (Ariz. Super. Ct. Sep. 27, 2021).

166. See *id.* at 2.

167. See *id.*

168. See *id.*

169. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 137 (1991).

170. *Ariz. Sch. Bds. Ass’n v. State*, 501 P.3d 731, 741 (Ariz. 2022); *Stipulated Amended Judgment Awarding Att’y’s Fees & Costs*, *supra* note 54.

171. *Ariz. Sch. Bds. Ass’n*, 501 P.3d at 741; see also *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977) (en banc) (three basic factors to be considered in awarding attorney fees under the private attorney general doctrine are: (1) strength or societal importance of the public policy vindicated by litigation, (2) necessity for private enforcement and magnitude of burden

vindicated does not create a right, but rather establishes a kind of negative boundary for propriety in legislative activity.<sup>172</sup> That the Arizona Supreme Court was not troubled by this seems to indicate that application of the *Serrano*-derived doctrinal test has become relatively superficial: any constitutional victory, secured by a plaintiff, will do.<sup>173</sup>

Courts have struggled to provide legal criteria for identifying “societal importance.”<sup>174</sup> Recent Arizona cases, both at the supreme court level and at the appellate level, simply assert that a right vindicated is societally important, neglecting to recite legal criteria and sometimes neglecting to provide more than the most cursory of policy-based explanations.<sup>175</sup>

The most extensive efforts to articulate legal criteria for identifying “societally important rights” have come from California courts.<sup>176</sup> And, ironically, the pathbreaking case that is still frequently cited, *Woodland Hills Residents Ass’n v. City Council of Los Angeles*, rather elaborates the opacity than resolves it.<sup>177</sup> Judges applying California’s codification of the *Serrano* test are instructed to “realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right.”<sup>178</sup> That the right vindicated must be “important” indicates that there is to be some selectivity—not all rights derived from constitutional, statutory, or common law will qualify.<sup>179</sup> Where the right is derived from statutory law, “fundamental legislative goals” should provide the criteria.<sup>180</sup> Where a statutory “right” is deemed to “constitute” a merely “technical requirement,” it may not qualify.<sup>181</sup> However, even where the case is resolved on an acknowledged technicality, the plaintiff should still qualify for an attorney fee award so long as the case can be understood as ultimately vindicating a “theoretically more ‘important’ right.”<sup>182</sup>

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on plaintiff, and (3) the number of people who will benefit from decision). See *supra* note 83 and accompanying text; see also *infra* notes 308–313 and accompanying text.

172. ARIZ. CONST. art. 4, pt. 2, § 13.

173. See also *infra* note 344 and accompanying text.

174. See Cheng, *supra* note 89, at 1936–42.

175. See *Ansley v. Banner Health Network*, 459 P.3d 55, 65 (Ariz. 2020); *Meyer v. State*, 436 P.3d 511, 518–19 (Ariz. Ct. App. 2019).

176. See *Wooster*, *supra* note 15, § 5.

177. *Woodland Hills Residents Ass’n v. City Council of L.A.*, 593 P.2d 200, 209–11 (Cal. 1979); Cheng, *supra* note 89, at 1936–42.

178. *Woodland Hills*, 593 P.2d at 211.

179. See *id.* at 209–10.

180. See *id.* at 210.

181. See *id.* at 210, 220–21.

182. See *id.* at 211.

Ultimately, we are left with a test that emphasizes social, rather than legal, importance.<sup>183</sup> The question, then, is how judges should decide about social importance.<sup>184</sup> What the courts often seem to do is equate social importance with social (or public) benefit.<sup>185</sup> The outcome the plaintiff has achieved is Good for Society (or the Public).<sup>186</sup> This is, self-evidently, a moral judgment.

The private attorney general doctrine, in other words, adds an overtly moral judgment of “societal” (or public) benefit on top of the substantive legal judgment in a case. This point is well illustrated in the *Arizona School Boards Ass’n* case.<sup>187</sup>

Whether we focus on the constitutional or social policy implications of *Arizona School Boards Ass’n*, the moral dimensions of the dispute are clear.<sup>188</sup> This was a struggle over the power to define and legally defend the social and political good.<sup>189</sup> More particularly, this was a struggle over the power to define the prevailing social reality and the appropriate governmental response.<sup>190</sup> At a constitutional level, this was a struggle to legally define the boundaries of legislative propriety.<sup>191</sup> At a social policy level, this was a struggle over educational content (“critical race theory”) and the imposition of public health mandates.<sup>192</sup>

183. See *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977) (en banc); Cheng, *supra* note 89, at 1929.

184. See, e.g., *Woodland Hills*, 593 P.2d at 209–10.

185. See, e.g., *Robles v. Emp. Dev. Dep’t*, 250 Cal. Rptr. 3d 611, 617 (Cal. Ct. App. 2019); *City of Oakland v. Oakland Police & Fire Ret. Sys.*, 240 Cal. Rptr. 3d 571, 577–78 (Cal. Ct. App. 2018). California’s statutory codification of the private attorney general doctrine makes this equation quite natural because it qualifies the importance of a right affecting the public interest as one that has conferred a benefit on the public or a large class of persons. CAL. CIV. PROC. CODE § 1021.5 (West, Westlaw through Ch. 2 of 2026 Reg. Sess.).

186. See, e.g., *N. Bay Reg’l Ctr. v. Maldonado (In re Conservatorship of Person & Estate of Whitley)*, 241 P.3d 840, 853 (Cal. 2010) (California’s codification of the private attorney general doctrine intended to solve the “problem of the nonaffordability of litigation that will benefit the public but cannot pay its own way”); see also *Robles*, 250 Cal. Rptr. 3d at 617, 621–23.

187. *Ariz. Sch. Bds. Ass’n v. State*, 501 P.3d 731 (Ariz. 2022); see *supra* notes 92–159 and accompanying text.

188. See *supra* notes 92–159 and accompanying text.

189. See, e.g., *Complaint for Declaratory and Injunctive Relief*, *supra* note 95, at 13–15 (describing the COVID-19-related “public health crisis” and condemning Republicans for their statements that school district mask mandates border on anarchy and threaten to destabilize “the very foundation of our society”).

190. See *Brief of Amici Curiae Ariz. Hosp. and Healthcare Ass’n & Ariz. Med. Ass’n Filed with Written Consent of the Parties*, *supra* note 129; *Amicus Brief of Ariz. Chapter of Am. Acad. of Pediatrics & Am. Acad. of Pediatrics in Support of Plaintiffs/Appellees*, *supra* note 129.

191. See, e.g., *Amicus Curiae City of Tucson’s Brief in Support of Plaintiffs/Appellees*, *supra* note 128.

192. See *Complaint for Declaratory and Injunctive Relief*, *supra* note 95.

The case was, quite straightforwardly, a “culture war” case.<sup>193</sup> The “culture wars,” as they have been thoroughly and repeatedly analyzed by James Davison Hunter since 1991, are essentially struggles between competing views about the nature of social reality and the moral principles that should govern public (and social) life.<sup>194</sup> They are struggles, in other words, between competing moral paradigms that involve different conceptions of the social good.<sup>195</sup> Hunter names these competing paradigms the “orthodox” and the “progressive,” and shows how they have played out in five important areas of social life: (1) the family, (2) education, (3) media and the arts, (4) law, and (5) electoral politics.<sup>196</sup> At stake in the culture wars, Hunter argues, are competing philosophies of American public life, which emerge from competing understandings of the “sacred” (or ultimate) and authoritative sources of social solidarity.<sup>197</sup> In a recent book, Hunter briefly extends the analysis to recent conflicts over the teaching of “critical race theory” and COVID-related public health mandates.<sup>198</sup>

The culture wars pertain to basic understandings of social reality, legitimacy, and authority that underpin the application of legal doctrine.<sup>199</sup> They are manifest in the partisan dynamics of judicial nominations, but they are also doctrinally significant because they drive the social policy disputes that are resolved through litigation.<sup>200</sup> The competing “interests” at stake in social policy disputes, in other words, are anchored in our broader, culture war conflicts.<sup>201</sup> And the judicial decisions that resolve these conflicts articulate doctrinal resolutions that constitute a victory for one side or the other.<sup>202</sup> The private attorney general doctrine then “adds insult to injury,” because it requires the judge to go one step further in

193. See *supra* notes 39–42 and accompanying text.

194. HUNTER, *CULTURE WARS*, *supra* note 39, at 42–51, 58–59, 107–32, 158. The conflict emerges out of a “fundamental disagreement over the sources of moral truth.” See *id.* at 77.

195. See *id.* at 31–32, 42–51, 58–59, 308–17.

196. See *id.* at 50–51, 107–32, 173–287.

197. *Id.* at 131, 153, 184, 224, 237–39, 247–49, 255–56, 322–25. “What is ultimately at issue are deeply rooted and fundamentally different understandings of being and purpose.” *Id.* at 131. Hunter explicates this point drawing on the sociological theory of Emile Durkheim. See *id.*

198. HUNTER, *DEMOCRACY AND SOLIDARITY*, *supra* note 39, at 275–77, 368–70; see also ICELAND, SILVER & REDSTONE, *supra* note 39, at 23–26.

199. HUNTER, *CULTURE WARS*, *supra* note 39, at 54–55, 107–32, 135–36.

200. See *id.* at 54–55, 131, 135–36, 176–287.

201. See *id.* at 56–57, 135–36, 176–287.

202. See SHAPO, *supra* note 23, at 8, 30–31, 50–51, 53–175, 269–300; see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 15 (5th ed. 1984) (“Perhaps more than any other branch of the law, the law of torts is a battleground of social theory . . .”). This sentence appears already in the first edition of Prosser’s treatise. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 15 (1941).

determining that the victorious plaintiff has vindicated a “societally important” right or policy.<sup>203</sup> The plaintiff is judged to have been legally and morally Right.

The grant of attorney fees pursuant to the private attorney general doctrine only increases the likelihood that losing parties, together with members of the broader public who might happen to be paying attention, will see the court as picking a political side.<sup>204</sup> While that risk is always present in politically-conflictual constitutional judgments, it becomes virtually inevitable when the decision is based on a conclusion that one party has provided an “important” social benefit.<sup>205</sup> For one political side, of course, the benefit provided is vitally important. For the other political side, no benefit has been provided; indeed, harm has been done in preventing democratic processes from functioning, however imperfectly, to resolve social policy-related disputes.<sup>206</sup>

Where society is divided about the Right and the Good, juridical standards anchored in social mores will lack coherent authority.<sup>207</sup> If the gods are at war, the goods they love are also at war, and individuals (judges and litigants alike) must choose at their peril. So Euthyphro discovered, in dialog with Socrates.<sup>208</sup>

A more robust judicial conception of the social good, such as the Durkheimian standard of social cohesion, can solve this problem, but only if a radically nontraditional model of judicial expertise is accepted, one in which judges act, ultimately, as moral experts, with charismatic authority.<sup>209</sup> According to this model, litigation serves a revelatory function for the development of new rights, duties, and institutional structures that serve the social good.<sup>210</sup> Something close to this way of thinking about litigation did indeed develop over the course of the twentieth century, as we can see in exploring the background to the private attorney general doctrine: the American Rule.

203. See *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1040 (D.C. Cir. 1974) (MacKinnon, J., dissenting), *rev’d sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

204. See Cheng, *supra* note 89, at 1929–30, 1935–36.

205. See *id.*

206. See *id.*

207. See *supra* notes 26–32, 89; *infra* note 461 and accompanying text.

208. See *infra* notes 487–496 and accompanying text.

209. See COTTERRELL, *supra* note 24, at 11, 17–19, 29–31, 41–43, 58–72, 87–88, 154–55, 160–87, 206–14, 218–29.

210. See *id.*



### III. THE AMERICAN AND ENGLISH RULES

What we call today the “American Rule” with respect to attorney fees is a default rule regarding the payment of attorneys by each side in civil litigation, one that developed over the course of the nineteenth century and that was first articulated explicitly in the early twentieth century.<sup>211</sup> The American Rule receives its name by way of contrast to the so-called English Rule, according to which the attorney fees of the winning party in litigation are paid by the loser.<sup>212</sup> This is sometimes summarized as a “loser pays” rule.<sup>213</sup> When attorney fees are granted as a remedy, courts and commentators often refer to this as “fee shifting.”<sup>214</sup>

Viewed from a comparative perspective, the English Rule may be seen as a variation of a default European Rule, which was historically rooted in Roman and Canon law.<sup>215</sup> The Roman and Canon law background for English law was significant, even if it was subtle, and it was particularly strong in equity, given the development of

211. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 12 (1984); W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” in How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 375–77 (1999).

212. See, e.g., *Sage Sys., Inc. v. Liss*, 198 N.E.3d 768, 770 n.4 (N.Y. 2022); see also TOM BINGHAM, *THE RULE OF LAW* 53 (2010) (“The awarding of costs in a civil action in the UK is always said to be in the discretion of the judge. But again it is not a free-ranging discretion. The ordinary rule is that the loser of the action is ordered to pay the reasonable costs incurred by the winner in winning it. Thus an unsuccessful claimant usually pays the defendant’s costs: he should not have brought the action. An unsuccessful defendant usually pays the claimant’s costs: he should have paid what was due and not defended the action. Not infrequently, the honours of war are shared, and neither side is the clear winner. Then the judge must apportion the costs so as to reflect the parties’ respective degrees of success and failure, and may conclude that no order should be made. Exceptionally, a winning party may be denied his costs and, much more often, a losing party without means may escape an order to pay them. But the broad principles to be applied are clear. There is very little room for arbitrariness.”).

213. See, e.g., *Native Vill. of Nunapitchuk v. State*, No. 1JU-03-700 CI, 2004 WL 5190042, at \*9–10 (Alaska Super. Ct. Apr. 6, 2004); SUSANNE DI PIETRO, TERESA W. CARNS & PAMELA KELLEY, ALASKA JUD. COUNCIL, *ALASKA’S ENGLISH RULE: ATTORNEY’S FEE SHIFTING IN CIVIL CASES* 9 (1995); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1570 (1993).

214. See, e.g., DI PIETRO, CARNS & KELLEY, *supra* note 213, *passim*.

215. See 2 THE CODEX OF JUSTINIAN 7.51.5, 1935–37 (Bruce W. Frier ed., Fred H. Blume trans., Cambridge Univ. Press 2016) (534) (“The constitution orders that every judge shall in his verdict order the loser to pay all expenses of litigation.”). But note the exception in clause three where the judge finds that the suit was over a “contentious matter.” *Id.*; see also 1 THE CODEX OF JUSTINIAN 3.1.13.6, 610–11 (Bruce W. Frier ed., Fred H. Blume trans., Cambridge Univ. Press 2016) (534) (“[T]he losing party must be condemned to pay costs . . .”) (“[V]ictim victori esse condemnandum . . .”); Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 L. & CONTEMP. PROBS. 37, 40–43, 43 n.29 (1984); LEOPOLD WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 330–34 (Otis Harrison Fisk trans., 1940).

equitable principles by English Chancellors, who were servants of the Church until the eve of the Reformation in England.<sup>216</sup>

The American Rule, seen in comparative perspective, is exceptional, and this might be partly explainable as a product of the American Revolution and its aftermath. Prior to the Revolution, American courts were part of a loosely-governed British imperial court system, with a legacy of parliamentary legislation and prerogative-based equitable powers establishing a paradigm for “taxing” fees according to defined schedules.<sup>217</sup> Revolutionary lawyers like John Adams expressed considerable hostility to English legal traditions associated with feudalism and Canon law, and, in colonies like New York, Pennsylvania, and Massachusetts, the eighteenth century was a period of sporadic political controversy surrounding courts of equity.<sup>218</sup> In New York, particularly, the effort to create courts of equity generated considerable pushback, with an early articulation of the idea that legislative assemblies should approve any equity-based powers exercised by colonial courts, alongside fears of the threat posed by courts of equity to juries.<sup>219</sup>

At a more pragmatic level, perhaps, the Revolution marked a break with previous customs and practices: a new “republican”

216. Pfennigstorf, *supra* note 215, at 43; *see also* F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 2–10 (A.H. Chaytor & W.J. Whittaker eds., 1910); R.H. HELMHOLZ, 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 311, 348 (John Baker ed., 2004).

217. *See* Leubsdorf, *supra* note 211, at 12; CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 234–36 (1935). This descriptive statement compresses three centuries of complex historical developments into a brief summary. On the imperial “convergence” of America’s colonial common law traditions, *see generally* 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660 (2008) and 3 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1660-1750 (2016).

218. JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 19, 22 (2000) (originally published in 1765); *see also* JOHN ADAMS, *Novanglus; or, a History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra*, at 149, 242–43; Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY, 257, 257–84 (Donald Fleming & Bernard Bailyn eds., 1971). On American Revolutionary fears of Anglican establishment operating through courts, *see* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA 200–09 (1986).

219. Katz, *supra* note 218, at 273–76, 282–84. It is worth noting that attorney fees, while not the most significant political issue, were part of the controversy in New York. *See id.* at 274–75. The Governor who was “vigorously” exerting his chancery powers, William Burnet, had “proclaimed a Chancery Fee Ordinance designed to regularize practice in the court and to avoid the excessively high fees charged by lawyers for equity litigation.” *Id.*

beginning, with implications for legal doctrine and practice.<sup>220</sup> In the decades following the American Revolution, state legislatures did not act systematically to reestablish rules with respect to the allocation of attorney fees, and colonial legislation setting caps on fees was not updated.<sup>221</sup> During the first half of the nineteenth century, American lawyers became accustomed to recovering fees from their own clients, and thus the “American Rule” is probably best seen as a product of nineteenth-century practice, later sanctioned by judicial opinion.<sup>222</sup> It is worth emphasizing again, however, that the American Rule was not recognized explicitly, by name, until the early twentieth century.<sup>223</sup>

An early and cryptic judicial recognition of something *like* the American Rule may, nonetheless, be seen in a 1796 Supreme Court decision *Arcambel v. Wiseman*,<sup>224</sup> which invalidated the component of a damages award that charged the losing party for attorney’s fees.<sup>225</sup> The Court stated that the “general practice of the United States” is in opposition to awards of this kind, declining to explain further.<sup>226</sup> The Court went on to note that, if the principle behind the practice was incorrect, Congress could change it.<sup>227</sup>

The *Arcambel* decision may be seen as standing for the proposition that the policy-making power to address default rules with respect to attorney’s fees rests with the legislature, and this can also be seen as a point of common ground with the English Rule.<sup>228</sup> What the English and American Rules have in common, in other words,

220. See generally R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985) (emphasizing the republican context of Story’s life and legal scholarship).

221. Leubsdorf, *supra* note 211, at 13–14; MCCORMICK, *supra* note 217, at 235–36.

222. See Leubsdorf, *supra* note 211, at 13–24. To say that the custom arose from practice is not, of course, to explain why the practice and custom emerged. While he does not say so directly, Leubsdorf seems to embrace a material interest/ideology explanation, according to which lawyers with interests in higher fees influenced the course of events, namely the judicial acceptance of higher fees and the legislative failure to constrain them through updated legislation providing for taxation of costs by courts. See *id.* at 13–17, 23 n.99.

223. *Id.* at 27–28, 28 n.130 (citing Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 856 (1929) (“It is common understanding in America that the difference between the American and English rules as to costs lies in the fact that under the English system the successful party may recover the charges he has to pay his own lawyer.”)).

224. 3 U.S. (3 Dall.) 306, 306 (1796).

225. *Id.* But see *Boston Mfg. Co. v. Fiske*, 3 F. Cas. 957, 957–58 (C.C.D. Mass. 1820) (No. 1,681) (allowing attorney fees to a plaintiff in a patent case and declaring the authority of *Arcambel* “shaken” insofar as it contained a “general doctrine” prohibiting inclusion of attorney fees in actual damages); Leubsdorf, *supra* note 211, at 15.

226. *Arcambel*, 3 U.S. at 306.

227. *Id.*

228. See Vargo, *supra* note 213, at 1571–72, 1575–76; Leubsdorf, *supra* note 211, at 15.; cf. *Boston Mfg. Co.*, 3 F. Cas. at 957 (summarizing the statement in *Arcambel* that the practice to refuse attorney fees should be “respected until changed by statute”).

is a conception of the award of attorney's fees as a matter of public policy most appropriately decided by legislative bodies.

In England, a legislative tradition stretching back into the thirteenth century, later developed in court rules, has been in favor of a "loser pays" policy, subject to exceptions and judicial discretion.<sup>229</sup> In the United States, Congress primarily controls the award of attorney's fees for federal litigation, and the result has been a default rule by which each side pays its own fees, subject to an increasing number of fee-shifting exceptions.<sup>230</sup> With the important exception of Alaska, most states have declared their adherence to the American Rule, while recognizing fee shifting exceptions, which are rooted in the equitable powers of courts, in contractual provisions, or in statutes proliferating especially since the 1960s.<sup>231</sup>

In 2022, for example, the New York Court of Appeals affirmed the American Rule, discussing its rationale in relation to the English Rule.<sup>232</sup> The New York case, *Sage Systems, Inc. v. Liss*, addressed contractual exceptions to the American Rule, summarizing the court's view of the policy considerations behind the contrasting English and American rules.<sup>233</sup> The English Rule, according to New York's high court, rewards prevailing parties by covering the financial burden of their legal fees.<sup>234</sup> The intention is to encourage settlements and discourage wasteful litigation.<sup>235</sup> The American Rule, by contrast, is intended to facilitate access to courts and to prevent the discouragement of litigation that would come from fears that losing in court might mean having to pay the other side's legal fees.<sup>236</sup> The New York Court of Appeals also took notice of the historical development of the American Rule, asserting that the litigation-friendly policy behind the rule had been determined by federal legislation since the mid-nineteenth century.<sup>237</sup>

A fuller description of the nineteenth century historical developments behind the American Rule was provided in the 1975 U.S.

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229. See MCCORMICK, *supra* note 217, at 234–35; Vargo, *supra* note 213, at 1570–72. For historical descriptions of English rules governing the taxing of costs to losing parties, see *Garnett v. Bradley* [1878] LT 261 (HL) 265 (Lord Blackburn) and W. BLAKE ODGERS, PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE 348–64 (7th ed. 1912).

230. See Leubsdorf, *supra* note 211, at 25, 30; Vargo, *supra* note 213, at 1588–89.

231. See generally Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 L. & CONT. PROBS. 321 (1984) (surveying state attorney fee shifting statutes).

232. *Sage Sys., Inc. v. Liss*, 198 N.E.3d 768 (N.Y. 2022).

233. See *id.* at 770.

234. See *id.* at 770 n.4.

235. See *id.*

236. See *id.* at 770.

237. See *id.*

Supreme Court case that rejected the private attorney general doctrine for federal courts, *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>238</sup> Writing for the majority, Justice White concluded that recognition of this fee shifting exception to the American Rule in federal courts would represent an unwarranted extension of the equitable powers of federal courts into a territory of policy-making that was best left to Congress.<sup>239</sup> The case thus drew a significant boundary around the equitable powers of federal courts in the area of attorney's fees.

The U.S. Court of Appeals for the D.C. Circuit in the case below had emphasized courts' "broad equitable powers" in surveying with approval the judicial and scholarly arguments for embracing the private attorney general doctrine, as it was expanding beyond the civil rights context, and in adopting the doctrine.<sup>240</sup> The D.C. Circuit noted that it is a "paramount principle of equity that the court will go much farther both to grant and to withhold relief in furtherance of the public interest than when only private interests are involved."<sup>241</sup> Justifying its application of the private attorney general doctrine as consistent with the "chief rationale" of the American Rule, namely that parties not be "unjustly discouraged from instituting or defending actions to vindicate their rights,"<sup>242</sup> the D.C. Circuit explained that the constitutional benefits of the litigation—enforcing the "duty of the Executive Branch to observe the restrictions imposed by the Legislative"—had been won at significant cost by the plaintiffs, and that the amount of attorney fees, "though conceivably large in [the] absolute sense," was too small relative to the overall financial significance of the litigation to discourage the defendant, *Alyeska*, and others similarly situated.<sup>243</sup>

In two vigorously-written opinions, the dissenting judges pointed to an alternative understanding of the policy positions sanctioned by the D.C. Circuit majority. Far from acting in the "public interest," the plaintiffs had endangered the public by blocking access to "much needed oil at a critical time in our history," thereby raising prices.<sup>244</sup> If the plaintiffs had actually succeeded on their main

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238. 421 U.S. 240, 247–62 (1975), *superseded by statute*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

239. *See id.* at 262–71.

240. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974), *rev'd sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

241. *Id.* at 1030.

242. *Id.* at 1031.

243. *Id.* at 1031–33.

244. *Id.* at 1042 (Wilkey, J., dissenting) (responding to the majority's argument that the litigation provided "substantial benefits to private individuals" and noting that: "Aside from

environmental claim, the effect would have been to “subject a vital part of our energy supplies to the future veto of a foreign government.”<sup>245</sup> As it was, the plaintiffs had achieved only a modest, statutory victory, which the majority was glorifying as a constitutional triumph for the separation of powers.<sup>246</sup>

Avoiding explicit engagement with the policy conflicts at stake in the litigation, Justice White, writing for the majority of the U.S. Supreme Court, nonetheless made an oblique reference, stating that “courts are not free to fashion drastic new rules with respect to the allowance of attorneys’ fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts’ assessment of the importance of the public policies involved in particular cases.”<sup>247</sup> Congress had shown itself to be perfectly capable of carving out exceptions to the American Rule, which was “deeply rooted in our history and in congressional policy.”<sup>248</sup> Thus, the power to create exceptions to the American Rule should be left with Congress, rather than being arrogated by the courts.

The rationale for the American Rule informing the judicial opinions in *Alyeska* had been earlier reprised in a trademark-related Supreme Court decision authored by Chief Justice Warren, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, which briefly surveyed the policy considerations behind the American Rule.<sup>249</sup> As summarized by Chief Justice Warren, the policy considerations behind the American Rule are egalitarian and utilitarian.<sup>250</sup> The American Rule avoids discouraging the poor from bringing a meritorious lawsuit, and it avoids the penal effect of imposing costs on a party who

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the numerous lawyers involved, we are at a loss to know who those ‘particular individuals’ enjoying ‘substantial benefits’ might be. It is hard to visualize the average American in this winter of 1973-74, turning down his thermostat and with a careful eye on his auto fuel gauge, feeling that warm glow of gratitude to those public-spirited plaintiffs in the Alaska Pipeline case. While no one questions the sincere motives of these ‘public interest’ plaintiffs, it is not enough for a plaintiff to have a sincere feeling of self-righteous correctness in bringing litigation. There is the matter of good judgment in assaying just where the public interest lies. Did the plaintiffs exercise good judgment here in bringing suit to block the Alaska Pipeline? In retrospect, we submit they did not.”).

245. *Id.* at 1040 (MacKinnon, J., dissenting).

246. *Id.* at 1043 (Wilkey, J., dissenting).

247. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975), *superseded by statute*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

248. *Id.* at 271.

249. 386 U.S. 714, 717 (1967).

250. *See id.* at 717–19.

has merely sought her day in court.<sup>251</sup> From a utilitarian perspective, the American Rule seeks to avoid imposing a significant burden on courts, which would otherwise be tasked with complex exercises in computing fees.<sup>252</sup>

*Fleischmann Distilling* was decided in 1967, and the Warren Court's interpretation of egalitarian, policy-based goals served by the American Rule reflects a broader, social policy-based attitude toward litigation that developed over the course of the twentieth century.<sup>253</sup> According to this view, litigation provides an important social good, aiding in the enforcement of rights that might otherwise go unprotected.<sup>254</sup> Litigation is therefore something that might be strategically encouraged, for policy-based reasons, but it is in any event something that should never be discouraged, especially for economically or socially disadvantaged plaintiffs.<sup>255</sup>

The egalitarian rationale articulated by Chief Justice Warren extended, however, to embrace both plaintiffs and defendants, with a sympathetic evaluation of the uncertainties involved in litigation for both sides.<sup>256</sup> "Since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit . . . ."<sup>257</sup> This recognition that the costs, stresses, and unpredictability of litigation are significant for plaintiff and defendant alike, regardless of wealth or social station, and that the American Rule wisely avoids adding "insult to injury" by refusing to impose what is effectively a penalty upon the loser, represents an additional, explicitly pluralistic dimension of Chief Justice Warren's egalitarian rationale for the American Rule. In 2001, Indiana's Chief Justice Shepard interpreted this as an effective response to the argument that the English Rule is fairer than the American Rule.<sup>258</sup>

Nonetheless, the social policy-based attitude toward litigation, i.e. a willingness to strategically encourage litigation in order to ensure that politically favored rights are fully enforced, can be seen in the statutory fee shifting exceptions to the American Rule that have been created, proliferating since the 1960s. At the federal level, statutes had already started to create exceptions to the American Rule, long before legal scholars had named the American

251. See *id.* at 717–18.

252. See *id.*

253. See Leubsdorf, *supra* note 211, at 26–30.

254. See *id.*

255. See *id.*

256. See *Fleischmann Distilling*, 386 U.S. at 718.

257. *Id.*

258. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657, 658, 663–64 (Ind. 2001).

Rule: early statutes granting attorneys' fees to successful plaintiffs were the patent and copyright acts, civil rights acts from the 1870s and 1880s, the Interstate Commerce Act of 1887, and the Sherman Antitrust Act of 1890.<sup>259</sup> Progressive-era federal statutes mirrored developments at the state level, with statutes arising out of the populist Granger movement providing for recovery against railroads to pay attorneys' fees when the railroads were found to have charged farmers unlawfully high rates.<sup>260</sup>

In the early twentieth century, as sociological theories began to appeal to legal scholars, arguments were made about the benefits of litigation to serve "social engineering" purposes. These types of arguments became influential in legislation around the time of the New Deal, and by the 1960s and 1970s they had turned into what the legal scholar John Leubsdorf has called a "deluge."<sup>261</sup> The major civil rights legislation and environmental legislation of the 1960s and 1970s often included fee provisions to incentivize litigation on something like the private attorney general theory.<sup>262</sup> Because this is the theory, legislative fee-shifting of this type is often one-way: the obligation to pay the attorney's fee is shifted to a losing defendant against whom a successful plaintiff brings a claim.<sup>263</sup>

While courts do not always say this explicitly, the logic of the private attorney general doctrine supports a one-way fee shift that is intended to systematically benefit (and incentivize) plaintiffs.<sup>264</sup> As the Alaska Supreme Court has discussed, with reference to its closely-related (and now legislatively overruled) public interest exception, this is, itself, a substantive, policy choice.<sup>265</sup>

Courts today have vastly expanded discretionary powers to impose substantive, policy choices through the judicial granting of attorney fees because of the expansion in their equitable powers, and this is an important point to emphasize in relation to the private attorney general doctrine. The very notion of fee shifting, of the type considered in relation to the private attorney general doctrine, only makes sense where courts have the discretionary, equitable power

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259. Leubsdorf, *supra* note 211, at 25–26; see An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, § 12, 4 Stat. 436, 438–49 (1831); An Act to Promote the Progress of Useful Arts, and to Repeal All Acts and Parts of Acts Heretofore Made for That Purpose, ch. 357, §§ 14–15, 5 Stat. 117, 123 (1836).

260. Leubsdorf, *supra* note 211, at 25.

261. *See id.* at 30.

262. *See id.*

263. *See id.*

264. *See* State v. Native Vill. of Nunapitchuk, 156 P.3d 389, 395 (Alaska 2007); Gordon Sommers, Note, *The End of the Public Interest Exception: Preventing the Deterrence of Future Litigants with Rule 82(b)(3)(D)*, 31 ALASKA L. REV. 131, 136 (2014).

265. *Native Vill.*, 156 P.3d at 402–04.



to order payment of fees.<sup>266</sup> The development of the private attorney general doctrine, then, together with the whole question of discretionary, court-ordered fee-shifting, is a reflection of the broader “triumph of equity,” which has transformed the rules of civil procedure, and the culture of civil litigation, at both the federal and the state levels, since the mid-nineteenth century.<sup>267</sup>

#### IV. THE TRIUMPH OF EQUITY AND RESTITUTIONARY LOGIC IN THE PRIVATE ATTORNEY GENERAL DOCTRINE (AND CLOSELY RELATED DOCTRINES)

In an influential series of articles from the 1970s addressing the expansion of equitable exceptions to the American Rule, John Dawson emphasized the seductive power of the restitutionary logic relied upon to justify these exceptions.<sup>268</sup> The judicial powers that enabled courts to forge these expanding exceptions to the American Rule, supported by the logic of “unjust enrichment,” were the equitable powers created through the merger of law and equity, which was largely complete by the 1970s.<sup>269</sup> This Part provides a brief sketch of the historical line of cases developing a restitution-based foundation for the private attorney general doctrine. This history,

266. See *Stallo v. Wagner*, 245 F. 636, 637–38 (2d Cir. 1917), discussed in N.M. Right to Choose/NARAL v. Johnson, 986 P.2d 450, 457 (N.M. 1999).

267. See generally Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53 (1993) (showing that equity is both ordinary and pervasive in remedies, in substantive law, and in civil procedure); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (tracing the implications of the historical shift from a federal civil procedure dominated by a “common law mentality” to procedural rules dominated by equity and discretion).

268. See John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 854, 929–30 (1975) [hereinafter Dawson, *Public Interest Litigation*]; John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1597–98, 1601, 1607–08 (1974) [hereinafter Dawson, *Attorney Fees from Funds*]; John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1409, 1457–58 (1974) [hereinafter Dawson, *Self-Serving Intermeddler*]; see also JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 8 (1951) (“From the record it appears that a general principle prohibiting enrichment through another’s loss appears first as a convenient explanation of specific results; it is an instrument for quite practical and intelligible purposes. Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock.”); *id.* at 117.

269. See ROBERT WYNNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE, at ix, 52–75 (1952). Holdouts against merger at the time of Millar’s book (1952) were Alabama, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia. See *id.* at 57. Several of these holdouts capitulated in the 1970s, including Alabama. See ALA. R. CIV. PRO. 2, committee comments on 1973 adoption; TILLEY’S ALABAMA EQUITY § 1:1 (Dylan Reeves ed., 6th ed. 2025), Westlaw (database updated Nov. 2025). Today, the states retaining a separation between law and equity are Delaware, Iowa, Mississippi, and Tennessee. See SAMUEL L. BRAY & EMILY SHERWIN, AMES, CHAFEE, AND RE ON REMEDIES, CASES AND MATERIALS 441 (4th ed. 2024).

as John Dawson and others have explicated it, begins with judicial recognition of the common fund exception in the late nineteenth century.<sup>270</sup>

A. *The Development of the Restitutionary Rationale*

The common fund exception was first recognized in an 1881 U.S. Supreme Court decision, *Trustees v. Greenough*.<sup>271</sup> The case involved a lawsuit by a bondholder, one Francis Vose, who took it upon himself to sue the trustees who were supposed to be overseeing a large fund of land that was meant to serve as the guarantee for repayment of bonds issued by a Florida railroad company.<sup>272</sup> Mr. Vose successfully claimed, on behalf of himself and the other bondholders, that the funds were being wasted because the land comprising the fund was being sold at nominal prices and the funds generated from the sales were not being properly allocated to the payment of principal or interest on the bonds.<sup>273</sup> The suit was in equity, and Mr. Vose was successful in persuading the court to take the fund into receivership and to appoint agents to oversee the sales of the land and allocation of proceeds to the bondholders.<sup>274</sup> Mr. Vose generated huge legal fees in the process, and he successfully persuaded a court-appointed special master that he should be compensated for these fees from the proceeds of the fund.<sup>275</sup> The Supreme Court, over one dissent, affirmed the lower court ruling that Mr. Vose should be allowed to recover his counsel fees from the common fund.<sup>276</sup>

The Court in *Greenough* recognized that it was crafting an equitable exception to a rule for attorney's fees, but this was not the American Rule per se.<sup>277</sup> Rather, it was an exception to the congressional legislation that, since 1853, had capped recovery of attorney's fees at nominal levels, as part of a broader provision for taxing court

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270. It is important to note, however, that the common fund exception is not primarily a fee-shifting exception, but rather a fee-sharing exception. See DOBBS & ROBERTS, *supra* note 44, at 282. The common fund exception allows plaintiffs' attorneys to recover payment for their fees from a fund generated by the litigation, which is shared by others. See *id.* If the exception did not exist, the beneficiaries of the fund would be able to freely benefit from the victory secured by the plaintiffs' attorneys, perhaps at great legal expense. See *id.* at 283. Those beneficiaries would therefore be unjustly enriched. See *id.* The common fund exception compels them to contribute to the legal expenses that secured the common fund from which they benefit.

271. 105 U.S. 527, 537 (1881).

272. *Id.* at 528-29.

273. *Id.*

274. *Id.* at 528-30.

275. *Id.* at 529-31.

276. *Id.* at 530-38.

277. See *id.* at 531-37.

costs to the parties in litigation in federal courts.<sup>278</sup> The Court referred to this legislation as the “fee-bill,” and reasoned that this bill only regulated fees and costs chargeable between the opposing parties in litigation.<sup>279</sup> It did not limit the power of a court of equity to make allowance to a party out of a common fund, as justice and equity required, to reimburse that party for costs he incurred on behalf of the other beneficiaries of the fund.<sup>280</sup>

As John Dawson has argued, the restitutionary logic of the common fund exception is difficult to constrain—it can easily be expanded by analogy to other situations where litigation appears to have conferred some type of public benefit.<sup>281</sup> That expansion occurred in *Sprague v. Ticonic National Bank*,<sup>282</sup> a case arising out of the Great Depression and ultimately decided in 1939. The case involved a suit in equity brought by the client of a bank, Lottie Sprague, who lost her money when the bank to which she originally delivered funds in trust was acquired by another bank; the acquiring bank subsequently went into receivership.<sup>283</sup> Sprague’s equitable claim for a lien against bonds held by the failed bank was successful.<sup>284</sup> She then argued that her success in discharging a lien against the proceeds of the bonds held by the failed bank created a common fund that benefitted fourteen other trusts similarly situated to her own.<sup>285</sup> On this ground, she claimed that her reasonable counsel fees and litigation expenses should be paid out of the proceeds.<sup>286</sup>

Justice Frankfurter wrote a sweeping opinion that dealt broadly with the equitable powers of federal courts to grant attorney’s fees, recognizing the extension of the common fund exception beyond situations where a common fund is actually created.<sup>287</sup> This language is dicta because a common fund had been created in the *Sprague* case, but the language has provided strong ammunition ever since for arguments that there is an equitable exception to the American

278. See *id.* at 535–36.

279. *Id.*

280. *Id.* The legislation that the Court referred to as the “fee-bill” has been reenacted across the years and, currently, empowers courts to tax parties for attorney’s fees at nominal sums ranging from twenty dollars to one hundred dollars. 28 U.S.C. § 1923.

281. See *supra* note 268 and accompanying text; DOBBS & ROBERTS, *supra* note 44, at 284–85.

282. 307 U.S. 161 (1939).

283. *Id.* at 162–63.

284. *Id.* at 163.

285. *Id.*

286. *Id.*

287. See *id.* at 164–67; see also Dawson, *Attorney Fees from Funds*, *supra* note 268, at 1609–10.

Rule where litigation has secured some type of public benefit.<sup>288</sup> Here is Justice Frankfurter:

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.<sup>289</sup>

The restitutionary logic of justice to recapture unjustly received gains still operates between concrete parties here, and there is nominal reference to creation of a "fund" to benefit others, but, in many important respects, we have here the foundation for expanding the common fund doctrine into today's close cousins: the "common benefit" exception and the private attorney general exception.<sup>290</sup>

In the early 1970s, a pair of Supreme Court cases took the next step, extending the "public benefit" rationale, already an extension of the common fund exception, to situations where a common benefit was provided without the generation of anything like a common fund with cash proceeds.<sup>291</sup> The first case, *Mills v. Electric Auto-Lite Co.*, was a shareholder action to set aside a corporate merger, arguing that a misleading proxy statement induced the stockholders to vote for the merger.<sup>292</sup> The Court held that all the corporate shareholders benefited from the litigation, and that this justified a fee award charged against the corporate assets.<sup>293</sup> In effect, in shareholder derivative suits premised on claims like this, the corporate assets become a type of common fund against which attorneys' fees can be charged.<sup>294</sup> In the second case, *Hall v. Cole*, a union member brought an action against his union, arguing that the union retaliated against him for exercising his free speech rights in criticizing

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288. Dawson, *Attorney Fees from Funds*, *supra* note 268, at 1609–10 (discussing Justice Frankfurter's expansive reading of *Sprague*).

289. *Sprague*, 307 U.S. at 167.

290. Within only a few years, the phrase "private attorney general" had been introduced by Judge Jerome Frank in the United States Court of Appeals for the Second Circuit, in an argument for Article III standing, soon to be reiterated by Justice Douglas in a dissenting U.S. Supreme Court opinion. *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707; *FCC v. NBC*, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting); *see also* Rubenstein, *supra* note 74, at 2133–37.

291. For further discussion of these two decisions, *see* DOBBS & ROBERTS, *supra* note 44, at 284–85, 287.

292. 396 U.S. 375, 377–78 (1970).

293. *Id.* at 394–97.

294. *See* DOBBS & ROBERTS, *supra* note 44, at 284–85, 287.

the union.<sup>295</sup> The Supreme Court held that attorneys' fees could be charged to the whole union, because all of its members benefited through the vindication of their free speech rights.<sup>296</sup> The underlying justification in both these cases was basically the restitutionary logic that the beneficiaries of the attorneys' labors would be unjustly enriched if they did not contribute to the expenses incurred in producing the benefits.<sup>297</sup>

Running through this line of cases, stretching across roughly a century from the 1880s to the 1970s, is a connecting thread involving the expansion of equitable powers in U.S. courts, at both the federal and state level.<sup>298</sup> In the 1990s, leading scholars of remedies and civil procedure encapsulated this development under the rubric of equity's "triumph" (or "conquest").<sup>299</sup> A prime illustration of this equitable triumph may be seen in the Federal Rules of Civil Procedure (1938), which synthesized equitable and common law rules governing civil litigation in ways that heavily favored equity-based judicial powers.<sup>300</sup> By 1952, states that had not already done so were rapidly conforming themselves to the new procedural order.<sup>301</sup>

Seen in the light of this seismic shift in the rules governing civil litigation, the expansion of equity-based fee-shifting, justified by the "public benefit" rationale, is simply one manifestation of expanded equitable powers exercised by U.S. courts. In recent years, scholarship has drawn attention to similar issues under the rubric of "inherent judicial powers."<sup>302</sup> Running through all these lines of scholarly commentary is a recognition of enhanced judicial discretion and power, connected to the merger of law and equity in U.S. courts.<sup>303</sup>

Stephen Subrin described this "conquest of equity" in terms of a characteristic mentality associated with civil litigation, contrasting

295. 412 U.S. 1, 2–3 (1973).

296. *Id.* at 8–10.

297. See DOBBS & ROBERTS, *supra* note 44, at 284–85, 287.

298. See Subrin, *supra* note 267, *passim*.

299. See *id.*; Laycock, *supra* note 267, at 53–54, 71. For a recent argument that judicial invocation of inherent powers, rooted in equity, has not received the attention it deserves in scholarly commentary, see Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 415 (2020); cf. Charles Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035, 1037–38 (2022) (defending ambiguities in judicial invocations of "inherent authority" against scholarly efforts to clarify and legitimize).

300. Subrin, *supra* note 267, at 910–13, 922–26, 973–91.

301. See MILLAR, *supra* note 269, at ix, 52–75.

302. See, e.g., Dobbins, *supra* note 299, at 417 ("At its heart, the exercise of inherent power is an almost pure expression of a court's exercise of discretion.").

303. See, e.g., Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 446–57 (2017).

it with the common law "mentality" that it displaced.<sup>304</sup> Rather than "mentality," we could conceive of this contrast in terms of ideal-typical "cultures" of civil litigation.<sup>305</sup> Associated with the growth of equitable exceptions to the American Rule for attorney fees, then, is a broader development in which a particular culture of civil litigation triumphs at the expense of its older rival.<sup>306</sup> In the area of attorney fees, the basic pattern is one in which courts gain considerable discretion to grant symbolic and financial blessing to social policy-based values promoted through private litigation.<sup>307</sup>

The seminal case in forging the private attorney general doctrine at the state level, of course, was *Serrano v. Priest*.<sup>308</sup> Acknowledging the U.S. Supreme Court's warning that embracing the private attorney general exception to the American Rule would represent an unwise intrusion of the judicial branch into the legislative policy-making domain, the California Supreme Court nonetheless accepted the arguments of plaintiffs and amici that:

In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative.<sup>309</sup>

Explicating the challenges of funding such private action, the court arrived at the "solution . . . within the equitable powers of the judiciary to provide," namely the "award of substantial attorneys fees to those public-interest litigants and their attorneys."<sup>310</sup> The court went on to distill the "three basic factors to be considered in awarding fees on this theory," based on its review of the previous

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304. Subrin, *supra* note 267, at 920, 922–25.

305. The concept of culture is less psychological and more sociological, enabling focus on institutions and rules, alongside the meaningful concepts and goals that inform individual intentions. See Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 264–74 (1997).

306. See Subrin, *supra* note 267, at 922–25.

307. See, e.g., *supra* notes 189–192 and accompanying text.

308. 569 P.2d 1303 (1977) (en banc).

309. *Id.* at 1313.

310. *Id.*

cases that had accepted the argument for granting fees on the private attorney general theory.<sup>311</sup> “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision.”<sup>312</sup> A trial court awarding fees on this theory should therefore determine “that the litigation has resulted in the vindication of a strong or societally important public policy, that the necessary costs of securing this result transcend the individual plaintiff’s pecuniary interest to an extent requiring subsidization, and that a substantial number of persons stand to benefit from the decision.”<sup>313</sup> This is the three-part test that has been adopted, albeit with variations, by the state supreme courts that have embraced the private attorney general doctrine.<sup>314</sup>

In California, the private attorney general doctrine has been legislatively codified,<sup>315</sup> but in most of the other states that embrace the doctrine it is the state’s highest court that has recognized and elaborated it.<sup>316</sup> Many states have explicitly rejected the private

311. *Id.* at 1314.

312. *Id.*

313. *Id.*

314. See, e.g., *Ariz. Sch. Bds. Ass’n v. State*, 501 P.3d 731, 741 (Ariz. 2022).

315. CAL. CIV. PROC. CODE § 1021.5 (West, Westlaw through Ch. 790 of 2025 Reg. Sess.); *Vasquez v. State*, 195 P.3d 1049, 1053 (Cal. 2008).

316. The states that have explicitly embraced the doctrine, drawing on a variation of the *Serrano* formulation, listed by chronological order of adoption are: Idaho (*Hellar v. Cenarrusa*, 682 P.2d 524 (Idaho 1984)); Arizona (*Arnold v. Ariz. Dep’t of Health Servs.*, 775 P.2d 521 (Ariz. 1989) (en banc), *overruled in part by*, *Ansley v. Banner Health Network*, 459 P.3d 55 (Ariz. 2020)); Montana (*Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800); and Hawaii (*Sierra Club v. Dep’t of Transp.*, 202 P.3d 1226 (Haw. 2009)). The Utah Supreme Court embraced the private attorney general doctrine in 1994, but this was legislatively overturned in 2009. UTAH CODE ANN. § 78B-5-825.5 (West, Westlaw through laws of the 2025 Gen. Sess.). *But see* *Laws v. Grayeyes*, 2021 UT 59, ¶¶ 48–63, 498 P.3d 410, 419–22 (assuming, for the sake of argument, that the legislature’s effort to overturn the private attorney general doctrine was an unconstitutional interference with the judiciary’s power to govern the practice of law, but concluding that the plaintiff would not qualify for fees under the private attorney general doctrine). Minnesota adopted a consumer fraud-focused version of the private attorney general doctrine by statute in 1973. See MINN. STAT. ANN. §8.31 subd. 3(a) (West, Westlaw through legislation from the 2025 Reg. and First Special Sessions); *Ly v. Nystrom*, 615 N.W.2d 302, 310–14 (Minn. 2000). Alaska stands in a class all its own, as a state that has embraced a version of the English Rule for attorney’s fees, and that previously recognized a variation on the private attorney general doctrine as a “public interest” exception; in 2003 that doctrine was legislatively overruled, with preservation of a “limited constitutional claimant public interest litigant exception.” *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 395 (Alaska 2007); ALASKA STAT. ANN. § 09.60.010 (West, Westlaw through ch. 25 of the 2025 First. Reg. Sess. and Ch. 1 of the First Special Sess. of the 34th Legislature). In 2013, the Commonwealth of the Northern Mariana Islands embraced the private attorney general doctrine. *Deleon Guerrero v. Commonwealth Dep’t of Pub. Safety*, 2013 MP 17, 9 N. Mar. I. 230.

attorney general doctrine.<sup>317</sup> However, a significant number of states keep the door slightly open to a version of the private attorney general doctrine, often by recognizing equitable or common law exceptions to the American Rule—going under various names like common benefit, public benefit, or substantial benefit—that accomplish the same thing.<sup>318</sup>

### B. “Inherent Equitable Powers” & Public/Substantial Benefit Doctrines

A recent application of the substantial benefit doctrine by the Oregon Supreme Court nicely illustrates the ways in which a restitutionary logic supported by “inherent” equitable powers is invoked to accomplish the same objectives as the private attorney general doctrine, under a different name. The en banc decision, *De Young v. Brown*,<sup>319</sup> stated the “central principle” behind Oregon’s “substantial benefit doctrine,” which is the generalized restitutionary principle emerging out of the common fund exception: that the costs of legal advocacy should be shared by its beneficiaries, whether these are “shareholders of a corporation, voters of a particular city, or the residents of the state as a whole.”<sup>320</sup>

The case concerned efforts by the City of Damascus—a suburban municipality incorporated in 2004 to secure greater independence

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317. States that have explicitly rejected the private attorney general doctrine, at the level of the state’s highest court, listed in chronological order, include: Illinois (*Hamer v. Kirk*, 356 N.E.2d 524 (Ill. 1976)); Rhode Island (*Providence J. Co. v. Mason*, 359 A.2d 682 (R.I. 1976)); Alabama (*Shelby Cnty. Comm’n v. Smith*, 372 So. 2d 1092 (Ala. 1979)); South Dakota (*Van Emmerik v. Montana Dakota Utils. Co.*, 332 N.W.2d 279 (S.D. 1983)); Pennsylvania (*Jones v. Muir*, 515 A.2d 855 (Pa. 1986)); Washington (*Blue Sky Advocs. v. State*, 727 P.2d 644 (Wash. 1986) (en banc)); Connecticut (*Doe v. Heintz*, 526 A.2d 1318 (Conn. 1987)); Massachusetts (*Pearson v. Bd. of Health of Chicopee*, 525 N.E.2d 400 (Mass. 1988)); Michigan (*Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641 (1998)); New Mexico (*N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450 (N.M. 1999)); and Indiana (*State Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001)).

318. See, e.g., *Dover Hist. Soc’y, Inc. v. City of Dover Planning Comm’n*, 902 A.2d 1084, 1089–91 (Del. 2006) (narrowly overruling trial court’s grant of attorney fees on a “substantial benefit” theory recognized as a variant of the private attorney general doctrine); *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394–95 (N.H. 1999) (approving award of attorney fees on substantial benefits theory); *Robes v. Town of Hartford*, 636 A.2d 342, 349–50 (Vt. 1993) (recognizing the “substantial benefits” doctrine but declining to adopt it on the facts of the case); see also *Baldwin v. City of Estherville*, 929 N.W.2d 691, 716–17 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (leaving door open for trial court to apply private attorney general doctrine as a common law exception to the American Rule). Indiana’s rejection of the private attorney general doctrine should probably be read as extending to the public/common/substantial benefit doctrines. See *State Bd. of Tax Comm’rs*, 751 N.E.2d at 658 n.3, 661–64. Pennsylvania has left a very slight opening for the common benefit doctrine but is probably best understood as rejecting it. See *Jones*, 515 A.2d at 860 n.11; *Petow v. Warehime*, 996 A.2d 1083, 1088–89 (Pa. Super. Ct. 2010).

319. 486 P.3d 740 (Or. 2021) (en banc).

320. *Id.* at 746.



vis-à-vis the Portland metropole—to disincorporate itself.<sup>321</sup> Within less than a decade of their incorporation, a number of residents decided that they would be better off disincorporating and organized a campaign to achieve this goal.<sup>322</sup> Proceeding by way of voter-approved initiative, their 2013 attempt failed because, even though a majority of *actual* voters approved the disincorporation, they did not secure the statutorily required majority of *eligible* voters.<sup>323</sup> By 2015, however, they obtained legislation providing for a disincorporation process allowing a lower threshold (simple majority rather than “absolute majority”) for voter approval.<sup>324</sup> A majority of voters approved the disincorporation, and, pursuant to the legislation, the municipality was thereby disincorporated.<sup>325</sup> The municipality proceeded to wind up its affairs, terminating its employees and transferring its property.<sup>326</sup>

However, a councilman and resident of the City of Damascus named James De Young, disagreeing with the wisdom of disincorporation, challenged its legal and constitutional validity.<sup>327</sup> The trial court rejected his arguments, but, in 2019, the court of appeals reversed, finding validity in several of Mr. De Young’s statutory arguments that the attempted disincorporation had been legally ineffectual.<sup>328</sup> The court remanded for further proceedings, premised on the notion that the City of Damascus had never been legally disincorporated and was therefore still in existence as a legal entity, despite the manifest reality that it had stopped functioning as a municipal entity.<sup>329</sup>

Ultimately, legislation was drafted to retroactively solve the temporal technicality that Mr. De Young’s litigation exposed, and the legal disarray created by the court of appeals was resolved.<sup>330</sup> The City of Damascus remained disincorporated.<sup>331</sup> But Mr. De Young did not give up easily, petitioning the retroactive legislative fix to the Oregon Supreme Court, which upheld it.<sup>332</sup> The Oregon Supreme Court also upheld the court of appeals’ award of attorney fees

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321. *City of Damascus v. State ex rel. Brown*, 472 P.3d 741, 744 (Or. 2020) (en banc).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 745.

326. *De Young v. Brown*, 486 P.3d 740, 742 (Or. 2021) (en banc).

327. *Id.* at 741–42.

328. *De Young v. Brown*, 443 P.3d 642, 651 (Or. Ct. App. 2019).

329. *City of Damascus*, 472 P.3d at 745.

330. *Id.*

331. *See id.*

332. *See id.* at 746, 760.

to Mr. De Young, clarifying the application of Oregon's substantial benefit doctrine in the process.<sup>333</sup>

On the basis of the "central" restitutionary principle underlying the substantial benefit doctrine, the Oregon Supreme Court clarified that it is incumbent upon judges to articulate the benefit that has been provided, in order that it might be determined whether the benefit is sufficiently "substantial" to justify the award of fees.<sup>334</sup> The state agreed that the litigation resulted in a clarification of Oregon law, but it was a highly technical clarification, elucidating how legislation should be drafted to enable voting processes that are exceptions to normal statutory requirements.<sup>335</sup> The state argued that the public interest in such legal clarifications was too abstract and diffuse to justify an equitable fee award, but the Oregon Supreme Court disagreed.<sup>336</sup> So long as the benefit, in itself, could be characterized as substantial, the court held, there was no requirement that each individual benefited receive a substantial benefit.<sup>337</sup> Moreover, the size of the group benefited does not matter.<sup>338</sup> Even where litigation confers benefits that are "individually small," the substantial benefit doctrine may justify a fee award, so long as the benefits can be characterized as "important" and "widely shared."<sup>339</sup>

Because Mr. De Young's challenge had not been decided on constitutional grounds, there was a question about whether he was entitled to attorney fees under the line of Oregon Supreme Court cases, beginning in 1963, that had forged the substantial benefit doctrine.<sup>340</sup> That question was also resolved in *De Young*. From now on, it is clear that constitutional grounds for a decision striking down legislative action are not required in order to successfully invoke the substantial benefit doctrine for awarding attorney fees in Oregon.<sup>341</sup>

In arriving at this conclusion, the Oregon Supreme Court acknowledged the extent to which constitutional litigation had been valorized in the opinions awarding attorney fees pursuant to the courts' "inherent equitable power."<sup>342</sup> While attorney fees had not

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333. *De Young v. Brown*, 486 P.3d 740, 741 (Or. 2021) (en banc).

334. *Id.* at 746.

335. *See id.* at 747.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *See id.* at 742–46.

341. *See id.* at 745.

342. *Id.*

always been awarded to plaintiffs who successfully “vindicated an important constitutional right that applies to all Oregonians,” they had “often” been.<sup>343</sup> Evidently seeking to account for this empirical pattern, the court offered this hesitant explanation:

In part, this is because we have assumed, often without extended discussion, that the vindication of a constitutional right likely confers a benefit on individuals other than the plaintiff and that such a benefit—since, after all, it is constitutional—may well qualify as “substantial.”<sup>344</sup>

The court elaborated by comparing the preservation of individual liberties, accomplished through constitutional litigation, with the securing of fair voting in union elections, which had been the “substantial benefit” identified in the first case to establish the exception.<sup>345</sup> The public interest in the former far outweighs the public interest in the latter, and if attorney fees are merited in litigation against a union then *a fortiori* they are merited in constitutional litigation.<sup>346</sup> While some statutory rights might also be of similar importance to constitutional rights, the general public interest in their vindication is less obvious, and must therefore be more carefully explicated by the courts.<sup>347</sup>

The Oregon Supreme Court affirmed the decision of the Oregon appellate court.<sup>348</sup> Mr. De Young had “acted in a representative capacity to the benefit of others” and provided a “substantial benefit” in securing a clarification in the law about how the Oregon legislature should “refer” measures to voters.<sup>349</sup> While this did not vindicate a constitutional right, it was sufficiently important and beneficial to the public to merit an award of attorney fees.<sup>350</sup>

It is highly likely, of course, that a significant portion of Mr. De Young’s fellow Oregonians were intensely ungrateful for the

343. *Id.*

344. *Id.*

345. *Id.* at 742 (citing *Gilbert v. Hoisting & Portable Eng’rs, Loc. Union No. 701*, 384 P.2d 136 (Or. 1963) (en banc) as the first case to recognize the doctrine); *id.* at 745 (“[T]he interest of the public in preservation of the individual liberties guaranteed against governmental infringement of the constitution is even stronger’ than the interest in fair voting in union elections . . .” (quoting *Deras v. Myers*, 535 P.2d 541, 550 (Or. 1975) (en banc))).

346. *Id.* at 745.

347. *See id.*

348. *Id.* at 747–48.

349. *Id.*

350. *See id.*

“substantial benefit” that he had afforded them.<sup>351</sup> And here is the great irony, pointed out by John Dawson, in the way in which the restitutionary logic underlying the common fund exception and its progeny has developed.<sup>352</sup> In restitution law itself, subject to a few narrow exceptions, the “officious intermeddler” is without remedy.<sup>353</sup> Having taken it upon herself to foist her beneficence upon others, she must bear the costs of it herself.<sup>354</sup>

However, when litigious beneficence involves attorney expenses incurred to challenge democratically-approved legislation or government action, the “officious intermeddler” is valorized as a “private attorney general,” or as the “representative” provider of “substantial benefits” to his fellow citizens, a person whose efforts should be encouraged and whose fees should be recompensed.<sup>355</sup> In rewarding this officious intermeddler, courts are called upon to pick sides in socially-significant constitutional struggles, doing so either pragmatically or ideologically, but inevitably politically, and, ultimately, morally.<sup>356</sup>

#### V. THE SOCIOLOGICAL DILEMMA: THE JUDGE AS INTERPRETIVE SOCIAL SCIENTIST (AND MORAL EXPERT)

Among the commentators whose work has informed the foregoing summary of the historical development of the private attorney general doctrine, several have noted the doctrine’s close associations with confidence in social engineering.<sup>357</sup> And among the most self-conscious proponents of that confidence was Roscoe Pound, who organized a new legal and moral philosophy around it.<sup>358</sup> Pound was

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351. See *id.* at 743 (summarizing appellate argument of Oregon governor and State of Oregon, which contested “benefit” conferred on residents of the state, as a whole, and expressed doubt about benefit to those who had supported disincorporation of the city).

352. See Dawson, *Public Interest Litigation*, *supra* note 268, at 854; Dawson, *Attorney Fees from Funds*, *supra* note 268, at 1601; Dawson, *Self-Serving Intermeddler*, *supra* note 268, at 1410–12, 1457–58.

353. See 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* §§ 10.1, 10.8 (1978).

354. See Dawson, *Public Interest Litigation*, *supra* note 268, at 854; Dawson, *Attorney Fees from Funds*, *supra* note 268, at 1601; Dawson, *Self-Serving Intermeddler*, *supra* note 268, at 1410–12, 1457–58.

355. See Dawson, *Public Interest Litigation*, *supra* note 268, at 854; Dawson, *Attorney Fees from Funds*, *supra* note 268, at 1601; Dawson, *Self-Serving Intermeddler*, *supra* note 268, at 1410–12, 1457–58.

356. See *supra* notes 183–186, 204–206 and accompanying text.

357. See, e.g., Leubsdorf, *supra* note 211, at 9, 28.

358. See 1 ROSCOE POUND, *JURISPRUDENCE* 346–47 (1958) [hereinafter POUND, *JURISPRUDENCE*]; Roscoe Pound, *A Theory of Social Interests*, in XV PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY, PAPERS AND PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN SOCIOLOGICAL SOCIETY 16, 44 (1921) [hereinafter Pound, *Theory of Social Interests*]; Roscoe Pound, *A Survey of Social Interests*, in STUDYING LAW 439, 439–89 (Arther T. Vanderbilt ed., 1945) [hereinafter Pound, *Survey of Social Interests*].

also a foundational expounder of the American-style “jurisprudence of interests,” which was influential in the early American Law Institute Restatements, and which informed the California Supreme Court’s analysis in *Serrano*.<sup>359</sup> As Stephen Subrin has pointed out, Pound was likewise an important proponent and architect of the “triumph of equity.”<sup>360</sup>

The contribution of Roscoe Pound’s philosophy of equity to his broader, Progressive jurisprudence has been highlighted by N.E.H. Hull in her account of American legal realism.<sup>361</sup> For Pound, equity provided, in an American context, under the rubric of “police power,” what the prerogative power of the king had provided in the English context: a residuary authority, capable of transforming law (and society) at a constitutional level.<sup>362</sup> Indeed, as Pound well knew, this was no accident, because the equity that developed out of the Chancellor’s court was an expression of the prerogative powers of the king, deployed in order to provide a corrective justice (*epieikeia*) in particular cases, complementary to the common law’s limited, writ-based forms of action (which the Chancellor had also helped to shape).<sup>363</sup>

Deployed intentionally and actively, equity could contribute constructively to the “progressive liberalizing of our constitutional law,” which Pound saw happening in 1905, but this would only be possible if the discretion of judges to freely exercise their equitable powers was enhanced.<sup>364</sup> Otherwise, a “decadence of equity” would

359. See T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943, 958–62 (1987). Francis Bohlen, Reporter of the First Restatement of Torts, acknowledged Pound’s influence in conceptualizing and “sloganizing” the “balancing of interests” as a mode of analysis that “has been universally accepted in the law school world and has been followed in practice, though not always in words, by many courts.” Francis H. Bohlen, *Fifty Years of Torts* (pt. 2), 50 HARV. L. REV. 1225, 1226 (1937); see also Francis H. Bohlen, STUDIES IN THE LAW OF TORTS, at vi (1926) (“Terms such as ‘right,’ ‘duty’ and ‘wrong’ were, at the time these articles were written, regarded as sufficiently accurate. Today they are recognized as being, to say the least, vague and indefinite and an attempt is made to find new and, it is to be hoped, more exact terms. Thus, what in the earlier articles is termed a ‘right,’ is in the latter articles called a ‘legally protected interest.’”). For a recent article tracing Bohlen’s substitution of “interests” for “rights” in the First Restatement of Torts, see generally Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293 (2021).

360. Subrin, *supra* note 267, at 944–48.

361. Hull, *supra* note 1, at 59, 67, 71–72, 85, 87, 94.

362. Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 342, 350 (1905) [hereinafter Pound, *Philosophy of Law*]; Hull, *supra* note 1, at 59.

363. Roscoe Pound, *Recent Developments in the Law of Equity of Interest to Practicing Lawyers*, in LECTURES BEFORE THE INSTITUTE OF THE CLEVELAND BAR ASSOCIATION 3, 27–29 (1933) [hereinafter Pound, *Recent Developments*]; see also MAITLAND, *supra* note 216, at 2–10; Alan Cromartie, *Epieikeia and Conscience*, in THE OXFORD HANDBOOK OF LAW AND LITERATURE, 1500–1700, at 320, 329–31 (Lorna Hutson ed., 2017).

364. Pound, *Philosophy of Law*, *supra* note 362, at 351.

set in, as it had at times in England, wherein rigid rules replace discretionary judgment.<sup>365</sup>

However, Pound was ambivalent about the solution of heightening discretion, as became evident only a year later in 1906, in his controversial speech to the American Bar Association.<sup>366</sup> In diagnosing the travails of America's judicial system, Pound presented a dialectical theory of legal history, a constant movement between the opposite poles of discretion, on the one hand, and "the mechanical operation of legal rules," on the other.<sup>367</sup> Judicial discretion to pursue the "end of law," namely justice, enabled vital flexibility in periods of rapid social transformation.<sup>368</sup> At the same time, however, Pound gave a critical edge to the "ethics of the community" that equitable discretion empowered: the view of justice and morality this ethical framework legalized would inevitably be that of the class from whence its expounders came.<sup>369</sup>

Echoing Oliver Wendell Holmes, Pound presented law as a kind of crystallized public morality, even while asserting that intensifying social complexity was leading to greater moral and ethical divisions between groups.<sup>370</sup> Indeed, Pound saw this opening decade of the twentieth century as a time in which moral bonds were weakening across all groups, leading to strains upon a legal system that was expected to do "double duty," supplying a "regulating agency" that had previously come from theological beliefs, conscience, and individual responsibility.<sup>371</sup> The theory of interest-based "social engineering" that Pound developed as the core of his "sociological jurisprudence" offered, among many other things, a prescriptive understanding of the appropriate judicial response to such a situation.<sup>372</sup>

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365. See Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 24 (1905); Cromartie, *supra* note 363, at 320–36.

366. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 446 (1906) [hereinafter Pound, *Causes of Popular Dissatisfaction*]; HULL, *supra* note 1, at 63–65.

367. Pound, *Causes of Popular Dissatisfaction*, *supra* note 366, at 445; see also POUND, JURISPRUDENCE, *supra* note 358, at 418–22.

368. Pound, *Causes of Popular Dissatisfaction*, *supra* note 366, at 446.

369. *Id.*

370. *Id.*

371. See *id.* at 450.

372. See generally Harold Gill Reuschlein, *Roscoe Pound – The Judge*, 90 U. PA. L. REV. 292 (1942) (examining judicial opinions written by Pound when acting as a member of the Nebraska Supreme Court Commission and treating them as reflections of Pound's judicial philosophy).

### A. *The Sociological Turn in U.S. Law*

Pound explicated his “social engineering” theory of interest balancing to the American Sociological Society (the predecessor of today’s American Sociological Association) in 1920.<sup>373</sup> Tutored in a positivist vision for progressive sociology by Edward Alsworth Ross, Pound was optimistic about the possibilities for refashioning law on the foundations of social science.<sup>374</sup> Consistent with Auguste Comte’s grand narrative of human knowledge, “The Law of Progress,” this entailed a resolute abandonment of theology (the “fictitious”) and metaphysics (the “abstract”) in ascertaining the social ends to be served by law.<sup>375</sup>

And so, as in the past men thought of social control and of the legal order in terms of theology . . . or in terms of metaphysics . . . instead of these I venture an engineering interpretation. I venture to think of problems of eliminating friction and precluding waste in human enjoyment of the goods of existence and of the legal order as a system of social engineering whereby those ends are achieved.<sup>376</sup>

For his sociological audience, Pound emphasized the methodology by which to empirically ascertain and classify the social interests served and harmonized by a social engineering approach to law.<sup>377</sup> For legal audiences, on the other hand, Pound would, over the succeeding decades, primarily focus on elaborating the relationship of his social engineering theory with moral philosophy and the historical trajectory of jurisprudence.<sup>378</sup>

Pound’s theory of social interests was explicitly intended to “clarify” the analysis of public policy considerations and to thereby

373. Pound, *Theory of Social Interests*, *supra* note 358, at 16–45.

374. Michael R. Hill, *Roscoe Pound*, in 7 BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 3585, 3586 (George Ritzer ed., 2007); *see also* MICHAEL R. HILL, ROSCOE POUND AND AMERICAN SOCIOLOGY: A STUDY IN ARCHIVAL FRAME ANALYSIS, SOCIOBIOGRAPHY AND SOCIOLOGICAL JURISPRUDENCE (May 1989) (Ph.D. dissertation, University of Nebraska-Lincoln) (UNL Digital Commons); Bruce Keith, *The Foundations of an American Discipline: Edward A. Ross at the University of Nebraska, 1901-1906*, 13 MID-AM. REV. SOCIO. 43, 53 (1988).

375. *See* AUGUSTE COMTE, THE POSITIVIST PHILOSOPHY OF AUGUSTE COMTE FREELY TRANSLATED 1–4 (Harriet Martineau trans., 1896); LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 7–9 (2d ed. 2003). For a discussion of Edward Ross as a developer and proponent of Auguste Comte’s positivism, *see* GILLIS J. HARP, POSITIVIST REPUBLIC: AUGUSTE COMTE AND THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865-1920, at 173–81 (1995).

376. Pound, *Theory of Social Interests*, *supra* note 358, at 44.

377. *See id.* at 29–44.

378. *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 193–216 (Transaction Publishers 1999) (1921) [hereinafter POUND, THE SPIRIT OF THE COMMON LAW].

relativize the kinds of absolutist claims to individual rights that were hampering efforts to ameliorate harmful social conditions.<sup>379</sup> Briefly surveying examples in which public policy considerations had been drawn upon to establish limits on property rights and absolutist claims to contractual freedom, Pound ascertained inchoate conceptions of social interests in long-established common law doctrines.<sup>380</sup> The older conceptions of natural law-based rights had mistakenly formed their premises on the basis of individual liberty and individual rights, but a more correct understanding of the common law's development would recognize the ultimate foundation for legal principles and doctrines in social needs, the most fundamental of which was "the need of the social group to be secure against those forms of action and courses of conduct which threaten its existence."<sup>381</sup> Pound labeled this the social interest in general security, and elaborated a handful of forms by which it manifested itself in legal doctrines.<sup>382</sup>

Pound defined "interests" as wants, demands or claims, made by individuals or groups, and he distinguished individual, public, and social interests.<sup>383</sup> Public interests are interests "of the political organization of a society as such, conceived as a person," whereas social interests are those of "the whole social group as such."<sup>384</sup> In addition to the social interest in general security, Pound elaborated six other types of social interests that the law recognizes and protects: (1) security of social institutions (the family, religion, and political institutions); (2) general morals ("the claim or want or demand of society to be secured against acts or courses of conduct offensive to the moral sentiments of the general body of individuals therein for the time being"); (3) the social interest in the conservation of resources, which included the interest in protection and training of dependents and persons unable, for a variety of reasons, to care for themselves; (4) the social interest in "general progress" (the development of human powers and increasing satisfaction of human wants in the realms of economy, politics, and culture); (5) the social interest in aesthetic surroundings; and (6) the social interest in the individual life, the "demand of society that each individual be able to live a human life according to the standards of the society."<sup>385</sup>

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379. See Pound, *Theory of Social Interests*, *supra* note 358, at 16–22.

380. See *id.* at 22–23.

381. See *id.* at 24.

382. See *id.* at 33–34.

383. See *id.* at 29–30.

384. See *id.* at 30.

385. *Id.* at 35–41.



The social engineering approach to law that Pound elaborated was avowedly functionalist, i.e. instrumentalist: law is an activity or task, the purpose of which is to balance, harmonize, and reconcile the various interests at stake in a particular conflict.<sup>386</sup>

Looked at functionally, the law is an attempt to reconcile, to harmonize, to compromise these overlapping or conflicting interests, either through securing them directly and immediately, or through securing certain individual interests or delimitations or compromises of individual interests, so as to give effect *to the greatest number of interests or to the interests that weigh most in our civilization*, with the least sacrifice of other interests.<sup>387</sup>

Interestingly, Pound recognized that people might have some reservations about the language of “social engineering.”<sup>388</sup> The “engineering” conception was intended to reassure people who might worry about the menace of “socialism.”<sup>389</sup> Rather than imposing a controversial ideology, the judicial social engineer would act as a moral expert, ascertaining the morally best outcome through a scientifically rational decision-making process.

A particularly insightful assessment of Pound’s conception of social engineering, in relation to his broader “juristic creed,” was offered in 1942 by Georgetown Law Professor Harold Gill Reuschlein.<sup>390</sup> Seeking to pinpoint early manifestations of Pound’s sociological jurisprudence in the judicial opinions Pound had offered during his brief period of service as a judicial commissioner in Nebraska, Reuschlein noted that the conception of law as social engineering depended on a broader, “social ordering” perspective on the role of courts, as agents for ameliorating inevitable clashes of social and moral ends.<sup>391</sup> “If law is viewed as social engineering, its end is conceived to be the satisfaction of all demands and the securing of all interests with a minimum of conflict so that the means of satisfaction may have the widest possible distribution.”<sup>392</sup>

In the mature form of Pound’s sociological jurisprudence, this entailed a broad distinction between two types of disputes, with a corresponding distinction in judicial approach.<sup>393</sup> For disputes

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386. *See id.* at 44.

387. *Id.* (emphasis added).

388. POUND, *THE SPIRIT OF THE COMMON LAW*, *supra* note 378, at 195–96.

389. *Id.*

390. *See* Reuschlein, *supra* note 372, at 294.

391. *See id.* at 297.

392. *Id.*

393. *See id.* at 306.

pertaining to property and commercial transactions, the judicial approach should be highly rule-bound and predictable.<sup>394</sup> But for disputes connected to the “more intimate problems of human conduct,” the judicial approach should be more flexible, individualized, and particularistic.<sup>395</sup> In the latter type of case, judicial discretion should be at its maximum, in order to enable this particularized, sociologically-informed adjudication.<sup>396</sup> The law as a whole, in other words, should have both “zones of certainty” and “zones of discretion.”<sup>397</sup> For the former, the strictness and rigidity of the common law tradition provided the clarity and predictability that were necessary, while for the latter, equity afforded a principled, rather than rule-governed, approach.<sup>398</sup>

But in order to maintain these zones of discretion and certainty, courts needed broad equitable powers, so that they might shift between the zones, as appropriate to balance the interests at stake in any given dispute.<sup>399</sup> Or, as Reuschlein puts the point, Pound’s conception of differentiated “zones” of legal certainty and discretion is closely related to his fundamental conception of adjudication as “interest balancing.”<sup>400</sup> As Reuschlein describes the interest balancing approach to justice, it necessarily entails “evaluating” the social interests at stake in a case “in terms of the greatest social good.”<sup>401</sup> The judge, in other words, is, first and foremost, an adjudicator of social values, even where this is disguised by legal technique.<sup>402</sup>

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394. *See id.*

395. *Id.*

396. *See id.*

397. *See id.* at 306–10.

398. *See id.* at 321; *see also* Pound, *Recent Developments*, *supra* note 363, at 29–35.

399. *See* Reuschlein, *supra* note 372, at 321.

400. *See id.* at 310–13.

401. *See id.* at 311.

402. *See* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936) (“It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt, and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial lawmaking. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply.”). This straightforward admission that judges are in the business of adjudicating social values appeared in an address delivered to a conference on the future of the common law held at Harvard Law School in 1936. *See id.* at 4. Stone went on to advocate an instrumentalist approach to law, as a means to the end of controlling and protecting “social and economic” interests: because the judge has this “liberty of choice of the rule which he applies,” and because that choice depends, in turn, on the relative weight to be given to social and economic values, the judge “performs essentially the function of the legislator, and in a real sense makes law.” *Id.* at 10, 11, 20. T. Alexander Aleinikoff draws attention to these passages in tracing the origins of the interest balancing analysis that has become so pervasive throughout the U.S. common law, and particularly in constitutional law. *See* Aleinikoff,

Consistent with sociological positivism, of the type advocated by Auguste Comte and later systematized by Emile Durkheim, Pound regarded “interests” as social facts, which could be objectively identified and weighed by judges, and which could be empirically surveyed by scholars.<sup>403</sup> Legal realism, in turn, doubled down on the quest for social facts in law, and on a conception of law as “social science.”<sup>404</sup> Over the course of the twentieth century, this sociological turn provided the backdrop for remaking and “restating” the principles of common law and for the prevailing instrumentalist approach to law.<sup>405</sup>

### *B. The Moral Philosophy of the Sociological Turn*

The moral foundations of Pound’s approach were positivist and pragmatist, consistent with the early forms of American sociology that he carried forward.<sup>406</sup> Like the early founders of U.S. sociology, particularly E.A. Ross, he viewed law as a preeminent form of social control, and he conceived of society as being basically unitary, even while he readily recognized and theorized conflicts within society.<sup>407</sup> True, perhaps, to his botanist training, Pound conceived the foundation of interests as resting ultimately in social psychology, in

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*supra* note 359, at 959–60; see also FRANCIS BOHLEN, *Mixed Questions of Law and Fact*, in BOHLEN, *STUDIES IN THE LAW OF TORTS*, *supra* note 359, at 601, 609–13.

403. See Pound, *Survey of Social Interests*, *supra* note 358, at 459–60. On Durkheim’s positivist prescription to study “social facts” as “things,” see COSER, *supra* note 375, at 129–43.

404. See GILMORE, *supra* note 18, at 79 (“At the hands of the Realists, the slogan ‘law is a science’ became ‘law is a social science.’ Where Langdell had talked of chemistry, physics, zoology, and botany as disciplines allied to the law, the Realists talked of economics and sociology not merely as allied disciplines but as disciplines which were in some sense part and parcel of the law. Economists, sociologists, and even psychiatrists were invited to join the faculties of the major law schools and did so in considerable numbers. . . . Few lawyers ever bothered to study any of the social sciences (any more than the social scientists, even those who joined the law faculties, ever bothered to study law). But from the 1930s on, it became an article of faith for a great many lawyers and law professors that the social sciences had come much closer to the ‘truth’ than traditional legal scholarship had ever done. The social scientists agreed with this flattering estimate of their work.” (footnote omitted)).

405. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 24–26, 35–47 (1997).

406. ROSCOE POUND, LAW AND MORALS 4–6, 25–26, 37–39, 48, 114–15 (2d ed. 1926) [hereinafter POUND, LAW AND MORALS]. Endowed by the Reverend John Calvin McNair, these lectures were to “show the mutual bearing of science and theology upon each other, and to prove the existence of attributes (as far as may be) of God from nature”; they were also supposed to be “prepared by a member of some one of the evangelic denominations of Christians.” *Id.* (dedication page). The university was evidently prepared to be quite flexible in interpreting this bequest.

407. See *id.* at viii, 25; see also POUND, JURISPRUDENCE, *supra* note 358, at 15–16 (explaining how the various ideas of law coalesce under the “idea of social control,” which Pound defines “in the wider sense in which the term was first given currency by Professor Ross, whom it was my good fortune to have for a colleague at Nebraska, and to whom I owe my real start in the science of society”).

"instincts or fundamental tendencies or predispositions," but he eventually lost confidence in the capacity of the social sciences to ascertain the naturalistic foundations for such drives.<sup>408</sup> Better to keep the empirical analysis at the level of legal decisions, rather than attempting to ground that empirical analysis in social-psychological mechanisms.<sup>409</sup>

The relationship between law and morals, in this new "social philosophical" school of jurisprudence, involved a division of labor.<sup>410</sup> The task of moral philosophy and ethics is to evaluate such interests, and the task of law, which follows this evaluation, is to "choose which we shall recognize," to "fix the limits within which we shall recognize them," and "weigh or evaluate conflicting or overlapping interests in order to secure as much as we may with the least sacrifice."<sup>411</sup> In order to "attain justice through law," according to this view of jurisprudence as "applied ethics," legal elites ("we") are called upon to "formulate the ideals of the epoch."<sup>412</sup>

But Pound tempered this sweeping ethical vision with realism about the common law tradition. The complex mass of "precepts," rules, and institutions making up the body of Anglo-American law had been largely borrowed from diverse traditions: English common law and equity, of course, but also Roman law, Greek philosophical speculation, Canon law, the Bible, Germanic customary law, feudal relations, and "customs of popular action, as in American mining law."<sup>413</sup> The existing body of law built up from this disparate legacy was, not so much an authoritative body of ethical custom, but more the product of a "juristic or judicial search for a rule that will follow logically from the traditional legal materials," the "technical workings over of the traditional precepts, or technical adaptations of authoritative extra-legal propositions," and, ultimately, "the technical, scientific custom of the courts and lawyers."<sup>414</sup> For the tasks of applied ethics, which were to work upon this aggregate of traditional materials, all the social sciences should be coworkers with juridical practice.<sup>415</sup>

An enormously persuasive articulation and implementation of this basic understanding of the judicial role was given by Benjamin Cardozo, whose vision of the judicial task was avowedly sociological,

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408. Pound, *Theory of Social Interests*, *supra* note 358, at 30–31.

409. *See id.* at 32–43.

410. POUND, *LAW AND MORALS*, *supra* note 406, at 105.

411. *Id.*

412. *Id.* at 105–06.

413. *Id.* at 111–12.

414. *Id.* at 114.

415. *See id.* at 115.

in Pound's sense.<sup>416</sup> Cardozo's articulation of the interest-balancing calculus was simpler and more pragmatic, but this enabled him to be clearer about the ultimate source of normative authority behind common law tradition: social mores.<sup>417</sup>

For Cardozo, the judge's moral task is, so to speak, to read the social signs of the times, ascertaining the important social interests that should guide his interpretation of the logical implications from judicial precedents, legislative intentions, and applications of public policy.<sup>418</sup> This most emphatically did not mean that the judge should simply impose her own policy preferences.<sup>419</sup> Rather, her task is to ascertain the developing morality that is immanent in society, drawing upon that immanent social morality to adjust the legal tradition, as necessary, to achieve the social good.<sup>420</sup>

Judgments of societal importance are central to the judicial task.<sup>421</sup> Thus the private attorney general doctrine is particularly revealing of a broader juridical development. It is emblematic, in fact, of a basic conception of the judicial task that has come to hold sway over the course of the twentieth century.<sup>422</sup> The task of the judge is to ascertain the important social values at stake in litigation, and to draw upon these as guides in interpreting the legal tradition. In the language of Roscoe Pound and Gunnar Myrdal, the judge is a social engineer.<sup>423</sup> As a judicial social theorist, the judge is called upon to creatively adjudicate rights and duties in a way that grants legal authority to the values that are most appropriate for ensuring social cohesion.<sup>424</sup>

In a society riven by the culture wars, however, the judge cannot rely on social consensus in selecting values to promote social cohesion.<sup>425</sup> How, then, should the judge decide? The answer offered by sociological jurisprudence is social science.<sup>426</sup>

416. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 71 (Andrew Kaufman ed., 2010) (1921).

417. See *id.* at 15, 18, 37, 43, 65, 68, 70–71, 86–87, 97.

418. See *id.* at 22–23, 37–45, 54–55, 58, 66–73, 75–77, 97, 111–15.

419. See *id.* at 16–17, 41, 54–55, 68.

420. See *id.* at 10, 37–45, 66–73, 75–77, 84–87, 97, 111–15.

421. See *id.* at 70–71.

422. After a lifetime spent studying judicial decision-making, especially in the area of tort law, Marshall Shapo was convinced that this conception of the judicial role was implicitly guiding the way judges made decisions. See SHAPO, *supra* note 23, at 9, 51, 53–175, 231–300.

423. See KEETON ET AL., *supra* note 202, at 15.

424. See COTTERRELL, *supra* note 24, at xiii, 17–24, 30–31, 41–42, 172–203, 220–26.

425. See *supra* notes 194–207 and accompanying text.

426. See COTTERRELL, *supra* note 24, at xiii, 3, 11, 59–62, 68–72. In the Durkheimian tradition, social science is ultimately moral science. See *id.* at 172–229.

C. *From Social Science to Politics: Max Weber's Critical Methodology*

Recognizing that the ultimate bulwark for sociological jurisprudence is social science, it is worth revisiting Max Weber's insights into the place of values in social science and the limited conditions under which it is possible for claims to social knowledge to be objectively true (i.e. true in a sense that does not depend on the observer's perspective or subjective experience).<sup>427</sup> Weber explored these themes throughout his academic career, and several of his statements related directly to the relevance of social science for legislation and public policy.<sup>428</sup> His relatively well-known essay on "objectivity," for example, outlined the approach to be taken by a journal for which he was joining the helm as editor, a journal that was intended to inform legal and policy debates.<sup>429</sup> His less well-known essay on value freedom touched on some of these same themes toward the end of the First World War.<sup>430</sup> And his essays on the "vocation" of politics and science reprised similar themes near the end of his life in 1920.<sup>431</sup>

For Weber, claims to knowledge about the social world are always, to some degree, value-relative, due to the fact that the concepts used to empirically grasp and describe an infinitely-complex social world are intrinsically value-laden.<sup>432</sup> Values drive social science by channeling scholars' interests in the social world, the topics they focus upon, and the conceptual categories they use to frame

427. See WEBER, *Objectivity*, *supra* note 27, at 100–38. Among Weber's American interpreters within the legal academy, Anthony Kronman is an influential proponent of the view, adopted in this Article, that Weber's methodological writings provide the key for interpreting his legal sociology. See ANTHONY T. KRONMAN, MAX WEBER 4, 6–36 (1983); see also MICHEL COUTU, MAX WEBER'S INTERPRETIVE SOCIOLOGY OF LAW 13–29 (2018). For a helpful definition of objectivity in value-judgments that I view as consistent with Weber's position, see John E. Hare, *Prescriptive Realism*, 71 PHILOSOPHIA REFORMATICA 14, 20–22 (2006) [hereinafter Hare, *Prescriptive Realism*].

428. See, e.g., WEBER, *Objectivity*, *supra* note 27, at 100–38.

429. *Id.*

430. WEBER, *Value Freedom*, *supra* note 27, at 304–34.

431. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 335–53; MAX WEBER, *The Profession and Vocation of Politics*, in WEBER: POLITICAL WRITINGS 309, 309–69 (Peter Lassman & Ronald Speirs eds., Ronald Speirs trans., 1994) [hereinafter WEBER, *The Profession and Vocation of Politics*]. The essays, published in 1919, are revised versions of lectures given in 1917 and 1919 to a Bavarian student organization. See Wolfgang Schluchter, *Value Neutrality and the Ethic of Responsibility*, in MAX WEBER'S VISION OF HISTORY: ETHICS & METHODS 65, 115–16 (1979).

432. WEBER, *Value Freedom*, *supra* note 27, at 317; see also WEBER, *Objectivity*, *supra* note 27, at 103–38; WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 344–53. I make no attempt here to summarize Weber's complex views about social science methodology and refer the reader to Hans Henrik Bruun as the best guide to follow. See BRUUN, *supra* note 6, at 12–17, 20–41, 46–55.

their research.<sup>433</sup> Nonetheless, where social scientists are vocationally driven by a desire to discover truth about the social world, they can transcend the value-relativity of their perceptions if they are committed to coherence (both logical and ethical) and to an empirically realistic appraisal of correlational and causal relationships implicated in policy-based interventions.<sup>434</sup>

Even though he believed that it is possible, under specific ethical and social conditions, and with recognition of strict limitations, for knowledge claims about the social world to be objectively true, Weber was severely critical of the fledgling social sciences of his own day for conflating value-judgments and factual claims.<sup>435</sup> He abandoned the new German sociological association that he helped found when he became convinced that his commitment to “value freedom” would not hold there.<sup>436</sup> The ethical vision that he laid out for the “vocation” of social science was rigorous and would certainly not be met by many of the politically-committed research programs prevailing in sociology today.<sup>437</sup> For the university professors of his own day who used their position of authority in the classroom to propagandize their students, and doubtless for the social scientists today who view their research in overtly moralized and politicized terms, Weber warned that academic “prophecy” of this kind could only produce a vicious sectarianism, never a genuine political community, let alone scientific truth.<sup>438</sup>

433. WEBER, *Objectivity*, *supra* note 27, at 108–38.

434. *Id.* at 100–38; WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 344–53.

435. See CHRISTOPHER ADAIR-TOTTEFF, *SOCIOLOGICAL BEGINNINGS: THE FIRST CONFERENCE OF THE GERMAN SOCIETY FOR SOCIOLOGY* 30–31, 35, 74–75 (2005).

436. See *id.* at 30–32, 35; Keith Tribe, *Introduction* to MAX WEBER, *ECONOMY AND SOCIETY: A NEW TRANSLATION* 1, 62 (Keith Tribe ed. & trans., Harvard Univ. Press 2019) (1922); Wilhelm Hennis, *The Media as a Cultural Problem: Max Weber's Sociology of the Press*, 11 HIST. HUM. SCI. 107, 107–08 (1998).

437. For discussions of the problems with politicization in contemporary American sociology, see generally Musa al-Gharbi, *Why Should We Care About Ideological Diversity in the Academy?*, HETERODOX ACAD. (May 23, 2018), <https://heterodoxacademy.org/blog/why-should-we-care-about-ideological-diversity-in-the-academy-the-definitive-response/> (on file with the Duquesne Law Review); Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237 (2005); Seymour Martin Lipset, *The State of American Sociology*, 9 SOCIO. F. 199 (1994); Mark S. Mizruchi, *The Current Crisis of American Sociology*, 31 MICH. SOC. REV. 1 (2017); Jukka Savolainen, *Florida's Shunning of Sociology Should Be a Wake-Up Call*, WALL ST. J.: OP. (Dec. 7, 2023, at 13:16 ET), <https://www.wsj.com/opinion/floridas-shunning-of-sociology-should-be-a-wake-up-call-curriculum-higher-education-politics> (on file with the Duquesne Law Review); Jonathan H. Turner, *The More American Sociology Seeks to Become a Politically-Relevant Discipline, the More Irrelevant it Becomes to Solving Societal Problems*, 50 AM. SOCIOLOGIST 456 (2019); Stephen Turner, *Public Sociology and Democratic Theory*, 41 SOCIO. 785 (2007); Jeremiah B. Wills, Zachary W. Brewster & Gerald Roman Nowak III, *Students' Religiosity and Perceptions of Professor Bias*, 50 AM. SOCIOLOGIST 136 (2019).

438. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 352.

If social scientists are largely doomed to fail in their efforts at objectivity in social policy judgments, and today are loudly proclaiming their abandonment of this goal, it is hard to know why we would expect judges to succeed.<sup>439</sup> In his own time, Weber was troubled by the turn to judicial policy-making associated with Germany's "free law" variant of legal realism, which he viewed as a tragic consequence of natural law's decline and the turn to "substantive rationality" (i.e. value-based rationality where the values are supplied by extralegal bodies of knowledge, such as economics or varieties of moral philosophy).<sup>440</sup> As is well-known, Weber considered the common law tradition's heavy reliance on jury "common sense" as an abdication of legal rationality.<sup>441</sup> He admired the syllogistic logical clarity of civilian legal science, even while he worried that it would lend itself to an excessively mechanistic approach to law.<sup>442</sup> And, while he might admire the political leadership of judges called upon to opine on the "social importance" of legal changes accomplished by successful litigants, his writings would compel us to consider such "leadership," to the extent it can be analyzed in rational terms, as depending on extralegal political or moral values, rather than the "rule of law."<sup>443</sup>

Indeed, Weber spoke quite explicitly about the value-relativity of precisely this type of judgment in his public lectures on politics (*Politik*, which can also be translated as policy) and science as "vocations" ("callings" or "professions," *Berufen*).<sup>444</sup> Given in the revolutionary postwar context of Germany, these lectures articulate the moral and political implications of Weber's "diagnosis of modernity" to a greater degree than Weber allowed in his more narrowly social scientific writings.<sup>445</sup>

439. See Michael Burawoy, *Sociology Faces the Question of Palestine*, 50 CRITICAL SOCIO. 1011, 1012 (2024); Michael Burawoy, *2004 American Sociological Association Presidential Address: For Public Sociology*, 56 BRIT. J. SOCIO. 259 (2005); Michael Burawoy, *Papers on Public Sociology*, MICHAEL BURAWOY, <http://burawoy.berkeley.edu/PS.Webpage/ps.papers.htm> (on file with the Duquesne Law Review) (last visited Dec. 23, 2025).

440. See WEBER, LAW IN ECONOMY AND SOCIETY, *supra* note 40, at 309–21; see also Laura R. Ford, *Law and the Development of Capitalism*, in THE OXFORD HANDBOOK OF MAX WEBER 88, 98–104 (Edith Hanke, Lawrence A. Scaff & Sam Whimster eds., 2019).

441. See WEBER, LAW IN ECONOMY AND SOCIETY, *supra* note 440, at 78–80, 318.

442. See *id.* at 62, 309; see also MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 3, 10 (Richard Swedberg ed., Talcott Parsons trans., W.W. Norton & Co. 2009) (1930); ANDREAS ANTER, MAX WEBER'S THEORY OF THE MODERN STATE: ORIGINS, STRUCTURE AND SIGNIFICANCE 195–202 (Keith Tribe trans., 2014).

443. See WEBER, LAW IN ECONOMY AND SOCIETY, *supra* note 440, at 63–64, 293–321; cf. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 349 (cautioning students against looking to their professors for "leadership" in the political or moral realm).

444. See WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 335–53; WEBER, *The Profession and Vocation of Politics*, *supra* note 431, at 309–69.

445. See Schluchter, *supra* note 431, at 68.



When it comes to normative disciplines like law and politics, and even for the ethics of social science, Weber believed there is an ultimate decision that every person (whether judge, politician, academic, attorney, or litigant) must make.<sup>446</sup> This is an ultimate choice between conflicting value-orientations, or, as he put it more vividly at times, a choice about which gods we will serve.<sup>447</sup> The social scientist, no less than the judge or politician, must choose between warring gods.<sup>448</sup> If the social scientist is truly committed to science, the god he serves will be scientific (empirical) truth, but he must recognize the harsh implications of this choice, together with the stark conflicts posed to other, competing values.<sup>449</sup>

If a researcher decides that the scientific quest for truth will be her vocation, Weber argued, she must abandon a host of popular illusions that are held about what this vocation entails, including the belief that it will contribute to greater happiness, whether for herself or for her society.<sup>450</sup> More fundamentally, however, she must abandon the myth that science itself offers any answers about which values (or gods) she should serve.<sup>451</sup> Science presupposes values, but cannot establish them.<sup>452</sup> And the question of scientific importance, which the researcher must decide in order to select topics and concepts that will direct her scientific work, is a preeminent question of values.<sup>453</sup> Here is how Weber put the point:

In any scientific work the validity of the rules of logic and method, those general foundations of our orientation in the world, are presupposed. . . . But science further presupposes that what is produced by scientific work should be important in the sense of 'being worth knowing.' And it is obvious that all our problems lie here, for this presupposition cannot be proved by scientific means. It can only be interpreted with reference to its ultimate meaning, which one must accept or reject according to one's ultimate attitudes towards life.<sup>454</sup>

All science can tell us if we are facing a question, for example, about whether a person's life should be prolonged, is about the

446. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 348–53; WEBER, *The Profession and Vocation of Politics*, *supra* note 431, at 355–68.

447. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 348, 350.

448. *See id.*

449. *See id.* at 344–53.

450. *See id.* at 344.

451. *See id.* at 344–49.

452. *See id.*

453. *See id.* at 344–45.

454. WEBER, *SCIENCE AS A VOCATION*, *supra* note 28, at 18.

technical means that would be most effective in achieving the goal of prolonging life.<sup>455</sup> It cannot tell us whether a particular person's life should be prolonged, or whether a commitment to prolonging life should be absolute in medicine.<sup>456</sup> Answers to these broader questions depend on values and world-views, upon the "ultimate attitude to life" that scientists take, and the gods (or demons) they serve.<sup>457</sup>

And Weber viewed legal science (jurisprudence) from the same perspective:

Or take jurisprudence. [That discipline] determines what is valid [law] according to the rules of legal thought, which is based partly on logically binding [conclusions], partly on conventionally established constructions; in other words: [it determines what is legally valid] *provided that* certain legal rules and certain methods of interpreting [those rules] are accepted as binding. But it does not tell us *whether* law should exist [at all] and *whether* these particular legal rules should be established. It can only indicate that, if one wants a certain result, then this [or that] particular legal rule is, according to the norms of our legal thinking, the appropriate means of achieving it.<sup>458</sup>

The ultimate values informing jurisprudential "conventions," together with judgments about the social importance of efforts to change or defend them, are, according to this understanding, extra-legal.<sup>459</sup> Their sources might be ultimately political, religious, or moral, and they might become embedded in legal thought through a long historical process that partly disguises their ultimate sources.<sup>460</sup> But, particularly in a pluralistic society, honest assessment must involve clear-eyed recognition that they can never be anything other than contested value-judgments, of the type that political leaders, and indeed all genuinely free persons, are called to make.<sup>461</sup>

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455. See WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 345.

456. See *id.*

457. See *id.* at 345, 344–53.

458. *Id.* at 345 (alterations in original).

459. See *id.*; WEBER, *LAW IN ECONOMY AND SOCIETY*, *supra* note 440, at 61–97, 224–55, 303–21.

460. WEBER, *LAW IN ECONOMY AND SOCIETY*, *supra* note 440, at 61–97, 224–55, 303–21.

461. WEBER, *Science as a Profession and Vocation*, *supra* note 28, at 348–53; see also WEBER, *Value Freedom*, *supra* note 27, at 315.

Politicians and policy-makers, together with judges, are wielders of violent coercion.<sup>462</sup> The vocation of *Politik* (politics or policy), Weber argued, requires a clear-eyed recognition of what is entailed in this distinctive “calling,” which directs the exercise of state power.<sup>463</sup> Here the ultimate choice to be made, Weber argued, is between an ethics of “conviction,” in which the “right” goal is pursued no matter what the consequences might be, and an ethics of “responsibility,” in which the ruler accepts that despicable means must be deployed in order to serve desired policy goals.<sup>464</sup> These goals are determined by worldviews and values, which inevitably conflict.<sup>465</sup> The politician must choose which god she will serve, and, above all else, she must be honest with herself and others about the choices she is making.<sup>466</sup>

The early Christians [like Persian dualists] too knew very well that the world was governed by demons, that anyone who gets involved with politics, which is to say with the means of power and violence, is making a pact with diabolical powers, and that it does *not* hold true of his actions that only good can come of good and only evil from evil, but rather that the opposite is often the case. Anyone who fails to see this is indeed a child in political matters.<sup>467</sup>

The compromises necessary to achieve political goals almost inevitably undermine the purity of those goals, whether these are socialist revolution or Christian self-denial and pacifism:

Anyone wishing to practise politics of any kind, and especially anyone who wishes to make a profession of politics, has to be conscious of these ethical paradoxes and of his responsibility for what may become of *himself* under pressure from them. He is becoming involved, I repeat, with the diabolical powers that lurk in all violence.<sup>468</sup>

What is ultimately required of the political actor is good judgment, and the capacity to discern when to act on the basis of an

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462. See WEBER, *The Profession and Vocation of Politics*, *supra* note 431, at 310, 313.

463. See *id.* at 330–31. Weber sharply distinguishes the vocation of the politician from the vocation of the official, a category that for him would include judges. See *id.*

464. See *id.* at 352–69.

465. See *id.* at 355–69.

466. See *id.* at 365–66.

467. *Id.* at 362.

468. *Id.* at 365.

ethic of conviction or an ethic of responsibility.<sup>469</sup> For there are indeed times when the politician must act from conviction, and proclaim with Luther “[h]ere I stand, I can do no other.”<sup>470</sup> The capacity to move between these ethical positions, indeed, marks the “true human being” who has a genuine vocation for politics and policy-making.<sup>471</sup>

Judicial determinations of “social benefit” and “social importance” are, from this Weberian perspective, political value-judgments, which, at their best, will reflect this capacity to act from an ethic of conviction or responsibility. They place judges in the position of political actors, wielding the “demonic” forces of state violence and coercion in order to support social policy goals that plaintiffs and their attorneys have chosen to pursue through litigation. Once we concede that judges are acting as arbiters of social values, however, and that such judgments cannot be made in value-neutral ways, we undermine the core functionalist argument for courts as modulators of social conflicts through impartial dispute-resolution processes.

Here is the sociological dilemma in U.S. law to which a century of sociological jurisprudence has led: a yawning gap that has opened between the social ideals of the judicial system—an impartial method for resolving disputes and adjudicating according to what is legally Right—and the realities of social engineering that are an inevitable result of heightened judicial discretion, mobilized by litigant activism, in pursuit of intensely contested social policy goals.<sup>472</sup>

The sociological dilemma is, fundamentally, a dilemma of value-choices, a dilemma of value-pluralism and value-relativity. In order to ascertain the social mores at stake in litigation, judges must first choose (explicitly or implicitly) which values (or gods) they will serve. In seeking to further the social good, they must first select which value-system defines the social good.

Judges must enter the lists of the culture wars in order to resolve them.<sup>473</sup>

In doing so, judges may act as charismatic moral experts, selecting the moral values that will serve social cohesion.<sup>474</sup> But, like

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469. *See id.* at 366–69.

470. *See id.* at 367.

471. *See id.* at 368.

472. *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note 23, at 156–71.

473. *See* HUNTER, CULTURE WARS, *supra* note 39, at 54–55, 107–32, 135–36, 250–71.

474. COTTERRELL, *supra* note 24, at 11, 17–19, 29–31, 41–43, 58–72, 87–88, 154–55, 160–87, 206–14, 218–29.

Euthyphro, they cannot escape the dilemma posed by a theory of legal authority that is closely analogous to divine command.

## VI. CONCLUSION: EUTHYPHRO'S DILEMMA REVISITED

Opening an ancient collection of Plato's works, *Euthyphro* is one of the "aporetic" dialogues, in which Socrates's questioning exposes a lack of knowledge on the part of his interlocutor.<sup>475</sup> Summoned to the public square to answer charges of impiety, Socrates encounters Euthyphro, who claims to know all about piety, having just finished (quite self-righteously) indicting his own father on a charge of murder.<sup>476</sup> Professing his eagerness for better understanding, Socrates questions Euthyphro closely, exposing the emptiness of Euthyphro's claims to knowledge, together with the arbitrariness (and illegitimacy) of the charges that led finally to Socrates's death.<sup>477</sup>

The aporetic dialogues present Socrates as a cheerful but relentless seeker, hunting the definitions that will provide reliable criteria for moral concepts.<sup>478</sup> These are the "Forms" or "Ideas."<sup>479</sup> In the *Laches*, for example, Socrates seeks the form of courage,<sup>480</sup> while in the *Euthyphro* he is seeking the form of holiness/piety, which Euthyphro and Socrates agree must be closely related to justice.<sup>481</sup> The penultimate definition they explore, before Euthyphro finally runs away, considers holiness/piety to be a part of justice, namely that part of justice that relates to the gods.<sup>482</sup> Socrates's relentless questioning undermines Euthyphro's specific formulation of the definition, but Socrates seems to agree with the proposition that

475. See John M. Cooper, *Introduction to PLATO: COMPLETE WORKS*, at vii, xv–xxv (John M. Cooper & D.S. Hutchinson eds., 1997); see also THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, *PLATO'S SOCRATES* 3–29 (1994).

476. See EUTHYPHRO, *supra* note 35, at 3e–6a, 15d–e; PLATO, *Euthyphro*, *PLATO: COMPLETE WORKS*, *supra* note 475, at 1, 1–4, 15 [hereinafter *Euthyphro*, *COMPLETE WORKS*]. There is some ambiguity about whether Euthyphro has already initiated the indictment or whether he encounters Socrates prior to doing so. See BRICKHOUSE & SMITH, *supra* note 475, at 26 n.46.

477. See EUTHYPHRO, *supra* note 35, at 2a–15e; *Euthyphro*, *COMPLETE WORKS*, *supra* note 476, at 1–15.

478. See BRICKHOUSE & SMITH, *supra* note 475, at 3–29; see also Terry Penner, *Socrates and the Early Dialogues*, in *THE CAMBRIDGE COMPANION TO PLATO* 121, 124–25 (Richard Kraut ed., 1992).

479. See EUTHYPHRO, *supra* note 35, at 6d; *Euthyphro*, *COMPLETE WORKS*, *supra* note 476, at 6; JOHN M. RIST, *PLATO'S MORAL REALISM: THE DISCOVERY OF THE PRESUPPOSITIONS OF ETHICS* 35–46 (2012).

480. See PLATO, *LACHES* 178a–201c (Rosamond Kent Sprague trans.).

481. EUTHYPHRO, *supra* note 35, at 6d, 12e–13a; *Euthyphro*, *COMPLETE WORKS*, *supra* note 476, at 6, 12–13.

482. EUTHYPHRO, *supra* note 35, at 12e; *Euthyphro*, *COMPLETE WORKS*, *supra* note 476, at 12.

holiness/piety is a part of justice, namely that part of justice that concerns the relationship between humans and the gods.<sup>483</sup>

In *The Laws*, Plato's Athenian Stranger presents holiness/piety as a moral foundation for the normativity of law.<sup>484</sup> A right relationship to the gods, to parents, and to others with whom one is related by social ties, involves a willingness to perform the duties that are owed in those social relationships.<sup>485</sup> The content of those duties is supplied by the laws themselves (including custom and divine precept), but the normativity—the obligation or sanctioning force—derives from the objective Rightness of the prescriptive command and the subjective willingness to obey, which is holiness/piety, strictly speaking.<sup>486</sup>

In the *Euthyphro*, Socrates says that he is seeking a definition of holiness/piety that will help him in his self-defense.<sup>487</sup> Once he is able to clearly and universally define this virtue, he will be able to show that the conversations he has been having with the young men of Athens are not corrupting the moral fiber of the *polis*, that he is not introducing destructive novelties in matters of religion, and that his critical discursive methodology, far from undermining piety, seeks to sustain it more robustly.<sup>488</sup> Unfortunately, Euthyphro is unable to provide a definition, and Socrates does not find the moral expertise he is seeking (and critiquing).<sup>489</sup> Nonetheless, in the *Apology*, Socrates demonstrates his commitment to something like

483. EUTHYPHRO, *supra* note 35, at 12e; *Euthyphro*, COMPLETE WORKS, *supra* note 476, at 12; see also RIST, *supra* note 479, at 43–48 (summarizing the implications of the dialog for Plato's developing theory of the forms); CATHERINE H. ZUCKERT, PLATO'S PHILOSOPHERS: THE COHERENCE OF THE DIALOGUES 639–50 (2009) (interpreting *Euthyphro* with reference to the dramatic sequence of Plato's dialogues and discerning both a Socratic lesson about the limits of human knowledge and a Platonic lesson about characteristic forms of Greek impiety).

484. PLATO, LAWS 704a–747e (Tom Griffith trans.) [hereinafter LAWS]; GLENN R. MORROW, PLATO'S CRETAN CITY: A HISTORICAL INTERPRETATION OF THE LAWS 74–86 (2d ed. 1993).

485. LAWS, *supra* note 484, at 716–18.

486. See *id.*; cf. JULIA ANNAS, VIRTUE & LAW IN PLATO & BEYOND 72–119, 193–94 (2017) (describing the educational program in Plato's *Laws*, which aims to cultivate both rational capacities and motivational desires in individual citizens, and instill piety, which is a “rational appreciation” for the ordered structure of the cosmos, mirrored in the laws of the city, together with a subjective desire to voluntarily conform themselves to this ordered structure); Laura R. Ford, *From Plato to WIPO: Old and New in Legal Harmonization*, in HARMONIZING INTELLECTUAL PROPERTY LAW FOR A TRANS-ATLANTIC KNOWLEDGE ECONOMY 45, 53–54 (Péter Mezei, Hannibal Travis & Anett Pogácsás eds., 2024) (summarizing Annas's description in the context of a narrative tracing the ideal of legal harmony from Plato to the World Intellectual Property Organization in the twentieth century).

487. EUTHYPHRO, *supra* note 35, at 5a–6e, 16; *Euthyphro*, COMPLETE WORKS, *supra* note 476, at 4–6, 16.

488. EUTHYPHRO, *supra* note 35, at 2c–3c; *Euthyphro*, COMPLETE WORKS, *supra* note 476, at 2–3; see also PLATO, APOLOGY 17a–42a (G.M.A. Grube trans.).

489. EUTHYPHRO, *supra* note 35, at 15c–16a; *Euthyphro*, COMPLETE WORKS, *supra* note 476, at 15–16.

holiness/piety, stating his conviction about what he must do because “doing injustice and being disobedient to the better person, either god or human being, is bad and shameful.”<sup>490</sup>

The Euthyphro dilemma that has passed into philosophical tradition is primarily conceived as a dilemma for theistic, divine command theories of moral obligation.<sup>491</sup> It is derived from the second and third definitions offered by Euthyphro, which identify holiness/piety with what is pleasing to the gods (what the gods love).<sup>492</sup> Recognizing that the gods do not agree in their loves, Euthyphro is persuaded by Socrates to restrict holiness to that which is pleasing to (or loved by) *all* the gods.<sup>493</sup> But then the question is whether the holy is beloved by the gods because of something else that makes it lovable, or whether it is holy simply in virtue of being loved by them (and for no other reason).<sup>494</sup> If the latter, holiness/piety is arbitrary.<sup>495</sup> If the former, we have not answered the question (our answer is vacuous), because we still want to know what property constitutes (or explains) the holiness/piety that is beloved by the gods.<sup>496</sup> We find, in other words, that we do not know what holiness/piety is. And, by implication, any action we have thus far claimed as an instance of holiness/piety cannot be so defended.

The dilemma can be generalized, however, into a dilemma for *any* theory of law and/or morality that is anchored in authoritative behavioral prescriptions.<sup>497</sup> It is a dilemma, in other words, for normative authority, i.e. for legal legitimacy.<sup>498</sup> In a culture that has placed the ultimate authority in society and social science, it becomes a dilemma for a “science of society” and for prescriptions derived from social authority (social commands).<sup>499</sup> It can be extended,

490. TERENCE IRWIN, *PLATO'S ETHICS* 28–29 (1995).

491. See PHILIP L. QUINN, *DIVINE COMMANDS AND MORAL REQUIREMENTS* 46–52 (1978).

492. See *id.*

493. EUTHYPHRO, *supra* note 35, at 7a–9e; *Euthyphro*, COMPLETE WORKS, *supra* note 476, at 6–9.

494. For a compelling defense of a divine command theory of ethics by a contemporary moral philosopher, see generally HARE, *GOD AND MORALITY*, *supra* note 24; Hare, *Prescriptive Realism*, *supra* note 427; HARE, *GOD'S CALL*, *supra* note 35.

495. See *supra* note 35 and accompanying text.

496. See *supra* note 35 and accompanying text.

497. See Susan Wolf, *Moral Obligations and Social Commands*, in *METAPHYSICS AND THE GOOD: THEMES FROM THE PHILOSOPHY OF ROBERT MERRIHEW ADAMS* 343, 344–48, 357–67 (Samuel Newlands & Larry M. Jorgensen eds., 2009) (noting parallels between divine command and social command theories of normative obligation, both in the difficulties encountered by such theories and in the advantages such theories offer in accounting for moral (and legal) obligations).

498. See COUTU, *supra* note 427, at 157–88; KRONMAN, *supra* note 427, at 37–71; STEPHEN P. TURNER, *EXPLAINING THE NORMATIVE* 66–92 (2010).

499. For an argument that social science should be treated as legally authoritative, as “social authority,” see John Monahan & Laurens Walker, *Social Authority: Obtaining,*

in other words, into a dilemma for sociologically-grounded legal legitimacy.

In this Article, I have presented the sociological dilemma in U.S. law as a derivative of Euthyphro's dilemma, one that has resulted from the twentieth century's "sociological turn" in jurisprudence.<sup>500</sup> I have argued from the factual premise that, despite its apparent fall from favor, the sociological approach to the common law tradition has actually become entrenched, at least in the way that tradition is presented to first-year law students.<sup>501</sup> I have treated the private attorney general doctrine in remedies law as a synecdoche (a part that reveals the whole) in order to try to show why the sociological turn has been harmful to legal legitimacy.<sup>502</sup>

Application of the private attorney general doctrine requires a judgment about the societal importance of a litigant's cause.<sup>503</sup> Drawing on Max Weber's critical sociology, I have sought to show that any decision about societal importance necessarily depends on prior moral commitments and perceptions that are deeply contested in our pluralistic moral culture.<sup>504</sup> The decision depends upon a choice of values and is therefore value-relative, in the same way, and to the same extent, as social science.<sup>505</sup> The judge must choose, in Weber's metaphorical language, between warring gods, a choice that will ultimately be arbitrary or will depend on reference to contested metaphysical, transcendent, and/or immanent beliefs and principles that cannot be defended as scientific knowledge.<sup>506</sup> Such choices are a matter of faith, not knowledge, strictly speaking.<sup>507</sup>

At the opening of the twentieth century, sociological jurisprudence shifted the normative authority of law to judicially-mediated social commands and judicially-theorized "social needs," rather than the "empty formalisms" of the inherited legal tradition.<sup>508</sup> Judges were valorized as social theorists and scientists, praised for deriving moral principles from perceived societal norms and values.<sup>509</sup> Judges were tasked with transforming their understanding

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*Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986); see also TURNER, *supra* note 498, at 5–6, 66–92; *supra* note 30 and accompanying text.

500. See *supra* notes 19–27 and accompanying text; White, *supra* note 405, at 24–26, 35–47.

501. See *supra* notes 18–23 and accompanying text.

502. See *supra* notes 18, 37–40 and accompanying text.

503. See *supra* notes 37–40 and accompanying text.

504. See *supra* notes 432–461 and accompanying text.

505. See *supra* notes 432–461 and accompanying text.

506. See *supra* notes 432–461 and accompanying text.

507. See WEBER, *Objectivity*, *supra* note 27, at 103–04.

508. See *supra* notes 19, 373–387 and accompanying text.

509. See *supra* notes 410–422 and accompanying text.



of society, and of society's good, into the guide for legal duties.<sup>510</sup> As a result, what is often a vanishingly thin veneer of social presumptions and unexplained moral intuitions provides the sociological understanding that is meant to provide a moral compass to the law.

In Weberian terms, the sociological turn was a shift from formal rationality to substantive rationality in law, a shift from a legal order premised on rational principles derived from within the legal tradition to a legal order justified by criteria derived from external ideals of social justice, social science, and moral philosophy.<sup>511</sup> Judicial decisions become decisions of social policy, implicitly resting upon a value-based determination about the social Good.<sup>512</sup> This can, at least to some extent, also be seen as a shift to the charismatic authority of judicial moral expertise.<sup>513</sup> Judges become prophets, diviners of the social Good, with lawyers serving as priests to interpret their revelatory oracles.

Euthyphro's old dilemma is simply reprised in social terms. Is a social policy Good because the gods of society love it, or do the gods of society love it because it is Good? Like Euthyphro, we recognize that some authority beyond these warring gods must provide the criterion of Goodness and Right, or else there is no criterion, but to say that requires us to commit an impiety: to say that the gods of society are not God.

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Nearly fifty years ago, the U.S. Supreme Court rejected the private attorney general doctrine for federal courts.<sup>514</sup> Viewed in hindsight, in the light of today's intensifying culture wars, this seems like a wise decision, with lessons worth relearning in states (red and blue alike) that are adapting versions of the doctrine to "weaponize" attorneys' fees in the pursuit of intensely contested social policies.<sup>515</sup>

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510. See *supra* notes 410–422 and accompanying text.

511. See WEBER, LAW IN ECONOMY AND SOCIETY, *supra* note 440, at 301–21.

512. See *id.*

513. See *id.*

514. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), *superseded by statute*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988), *as recognized in*, *Lackey v. Stinnie*, 604 U.S. 192 (2025).

515. Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 YALE L.J. 2048, 2057 (2023).

# The Pedagogy of Legal Synthesis

Stephen E. Mortellaro\*

## ABSTRACT

*The ability to synthesize implicit legal principles from many ambiguous cases is a mark of a skilled attorney. But legal synthesis is notoriously challenging to teach, and law students typically receive little explicit guidance on how to synthesize. The literature likewise offers law professors little direction on how to impart the skill successfully.*

*This Article serves as a guide for professors to effectively train law students to synthesize implicit legal principles. Drawing upon cognitive science, the study of logic, and educational research, this Article explains the challenges of learning legal synthesis and equips professors with pedagogical methods and curricular resources to meet those challenges. It walks professors through how to design synthesis-friendly legal writing assignments as a primary vehicle to teach students the skill. It also explains how to lecture clearly about each aspect of synthesis, including how to use inductive reasoning, abstract implicit legal principles from ambiguous cases, and draft clear analyses. Finally, it shows how to drill the skill in class through practice exercises. The Article is written with first-year legal writing professors in mind, and the tools it offers can easily be adapted for use in other courses. Armed with proven teaching techniques, law professors can empower students to master the skill of legal synthesis.*

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## INTRODUCTION

“Synthesis.” Few words elicit more anxiety or confusion from a law student or new attorney. A mark of a skilled legal writer is the ability to synthesize legal principles from multiple ambiguous cases. Yet legal synthesis is a skill that is often relegated “into the hidden curriculum of law schools, one that professors expect students to either know inherently or figure out on their own ‘by osmosis,’ if at all.<sup>1</sup> “[E]xcept for perhaps a half a class in legal writing, synthesizing rules is not usually taught in law schools.”<sup>2</sup> To help demystify the concept, many legal writing textbooks have incorporated some light instruction on how to synthesize a legal principle from multiple cases.<sup>3</sup> Legal scholars have likewise offered guidance in the literature.<sup>4</sup> But it remains one of the most challenging skills for law students to learn. Empirical research shows that law students consistently struggle to synthesize legal principles that cross multiple cases—especially ambiguous or poorly written cases whose reasoning is left unstated.<sup>5</sup> If law students are to overcome this struggle, law professors must offer clear and thorough synthesis instruction.

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1. Jennifer M. Cooper, *The Science of Legal Synthesis*, 95 ST. JOHN'S L. REV. 285, 285 (2021) (quoting FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING*, at xi (2009)).

2. Scott Fruehwald, *Synthesizing Rules*, LEGAL SKILLS PROF BLOG (Aug. 26, 2014), [https://lawprofessors.typepad.com/legal\\_skills/2014/08/synthesizing-rules.html](https://lawprofessors.typepad.com/legal_skills/2014/08/synthesizing-rules.html) [[https://web.archive.org/web/20230202083040/https://lawprofessors.typepad.com/legal\\_skills/2021/09/one-of-the-most-important-skills-that-law-students-need-to-learn-in-is-how-to-synthesize-rules-from-cases-yet-studies-have.html](https://web.archive.org/web/20230202083040/https://lawprofessors.typepad.com/legal_skills/2021/09/one-of-the-most-important-skills-that-law-students-need-to-learn-in-is-how-to-synthesize-rules-from-cases-yet-studies-have.html)].

3. See, e.g., ELIZABETH FAJANS ET AL., *WRITING AND ANALYSIS IN THE LAW* 69–76, 130–42 (8th ed. 2024); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL WRITING AND ANALYSIS* 71–156 (3d ed. 2021) [hereinafter MURRAY & DESANCTIS, *LEGAL WRITING*]; ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 39, 43–47 (2d ed. 2020); CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES* 104–10 (3d ed. 2018).

4. See generally Cooper, *supra* note 1 (discussing cognitive science research relevant to legal synthesis and offering evidence-based recommendations for improving synthesized analyses); Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365 (1998) (distinguishing the inductive reasoning of synthesis from other types of reasoning and discussing the prevalence of inductive arguments in law); Paul T. Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1983) (offering law professors methods for teaching students legal reasoning skills, including legal synthesis); Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH L. REV. 1 (2007) (offering methodologies to perform legal synthesis).

5. DOROTHY H. EVENSEN ET AL., LAW SCH. ADMISSION COUNCIL, *DEVELOPING AN ASSESSMENT OF FIRST YEAR LAW STUDENTS' CRITICAL CASE READING AND REASONING ABILITY: PHASE 2*, at 7 (2008), <https://thegirlsguidetolawschool.com/wp-content/uploads/2011/12/Assessment-of-what-skills-1Ls-learn.pdf.pdf> [<https://perma.cc/N7LG-QAQF>].

Yet little has been written on how professors can effectively teach students to synthesize.<sup>6</sup> This dearth of pedagogical scholarship may reflect various ideas that arise time and again in the legal academy. One is the notion that students learn best when the professor hides the ball and forces students to learn without explicit guidance.<sup>7</sup> Another view is that legal synthesis is too advanced for students to learn in law school and that students should wait until law practice to figure it out.<sup>8</sup> But perhaps the most common and legitimate complaint is that legal synthesis is simply difficult to teach.<sup>9</sup>

This Article seeks to fill a void in the literature and help law professors teach students to excel at synthesizing the law. Rather than relegating legal synthesis into the hidden curriculum, law professors—and especially legal writing professors—should explicitly teach law students how to synthesize legal principles and drill the skill starting early in students' legal education. Legal synthesis is critical to success in law practice, and explicitly teaching students to synthesize increases the odds that they will master the skill.

Legal synthesis may be difficult to teach and difficult to learn, but both are achievable when professors are equipped with the right pedagogical tools. Crucially, professors cannot rely solely on textbooks or traditional law school podium techniques to teach legal synthesis effectively. Synthesis is a *skill*, and like any skill, it must be practiced. And as with any skill, practice is easier under the tutelage of a well-equipped teacher.

This Article aims to turn professors into effective synthesis teachers. It offers a comprehensive legal synthesis curriculum that guides professors on how to teach legal synthesis to novices. The curriculum is most helpful for professors who teach legal writing or lawyering skills courses to first-year law students, which is where the skill can be taught most directly to new students. But elements of it can be easily adapted for doctrinal courses and other skills courses.

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6. But see, e.g., Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. LEGAL EDUC. 245, 246 (2011).

7. Cf. Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 56 (2010) ("How do students view the pedagogical approach of law professors? They sum it up in a refrain: 'Professors hide the ball.'").

8. I am unaware of any scholarly articles that advance this view, but I have heard it expressed by some professors.

9. See Lara Freed & Joel Atlas, *A Structural Approach to Case Synthesis, Fact Application, and Persuasive Framing of the Law*, 26 PERSPS. 50, 50 (2018) ("Among the thorniest of these [analysis-related] skills are synthesizing cases, applying facts, and persuasively framing the law. Professors struggle to teach these skills, and students consistently struggle to understand and implement them."); see also Wangerin, *supra* note 4, at 443 ("For some reason, the creation of synthesis seems to be surprisingly difficult for most students, and, for that matter, for most lawyers.").

To establish a foundation for this curriculum, Part I of this Article explains the concept of legal synthesis, its roots in inductive reasoning, its relationship to other types of reasoning, and its advantages over its traditional competitor—unsynthesized, case-by-case analysis. Part II discusses the challenges of synthesizing legal principles. Part III provides the curriculum itself and guides professors to effectively design synthesis-friendly legal writing assignments, lecture on synthesis, and implement exercises that allow students to practice synthesizing the law.

## I. REASONING THROUGH LEGAL SYNTHESIS

Legal synthesis differs from the case-by-case analysis that pervades legal thinking. Law schools traditionally train students to analyze the law by briefing and analyzing individual cases in isolation, which can encourage students to adopt a case-by-case approach to legal reasoning. As Paul T. Wangerin has observed, when “formulat[ing] a legal argument based, for example, on four or five related cases, most students will simply talk about the cases one after another. They will first argue that the first case supports their position; then . . . that the second case also helps them, and so on.”<sup>10</sup>

Dissecting individual cases is necessary to comprehend and apply the law; individual cases must be understood before the greater whole can be understood. But focusing too much on individual cases in isolation can cause an attorney to “miss the forest for the trees.” Attorneys should, in addition to studying cases individually, labor to discover how those cases work together to support an argument. Many principles of law can be properly discerned only after multiple cases have been analyzed in tandem. The inductive process of discovering cross-case legal principles is, in a nutshell, legal synthesis.<sup>11</sup>

The case-by-case approach to legal analysis uses deductive and analogical reasoning to construct arguments. The synthesis approach uses these forms of reasoning as well, but it adds the powerful reasoning of inductive generalization. This Part describes these three forms of reasoning, how they are used and not used in the synthesized and unsynthesized case-by-case approaches, compares legal synthesis to the case-by-case approach, and outlines the advantages of synthesis.

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10. Wangerin, *supra* note 4, at 443.

11. MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 126 (“[S]ynthesis relies on inductive reasoning drawing from multiple authorities . . . to create knowledge about the meaning and effect of the precedents . . .”).

### A. *The Logic of Legal Reasoning*

Legal synthesis is a form of logical reasoning known as “inductive reasoning by generalization,” or simply “inductive generalization” or “inductive reasoning.”<sup>12</sup> It coincides with and complements two other forms of logical reasoning used in legal analysis, deductive reasoning and analogical reasoning.<sup>13</sup> Inductive reasoning is used to synthesize general legal principles that span multiple cases; deductive reasoning is used to apply legal principles to new facts; and analogical reasoning is used to apply a prior case’s holding to a new case’s legal issue by comparing the two cases’ legally-relevant facts.<sup>14</sup>

Legal writers typically should synthesize the law *before* using it in deductive and analogical arguments. But to synthesize effectively, they must begin with the end in mind. To understand how legal synthesis fits into legal argumentation and why it is challenging, legal writers must also understand how lawyers use deductive and analogical reasoning.

#### 1. *Deductive Reasoning*

Deductive reasoning—also called rule-based reasoning—provides the scaffolding for legal analysis. Deductive arguments are typically structured using at least one “syllogism”<sup>15</sup> that consists of two premises and a conclusion.<sup>16</sup> Usually, the reasoning in a syllogism flows from general to specific.<sup>17</sup> The first premise, called the *major premise*, is a general principle; the second premise, called the *minor premise*, is a specific proposition; and the conclusion combines information in the two premises.<sup>18</sup> Most importantly, in a

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12. MICHAEL R. SMITH, ADVANCED LEGAL WRITING 71 (3d ed. 2013) (“Some legal writers use the term *synthesizing* to describe the process of inducing a general rule from a group of related cases.”); see also Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1, 12 (2007) (“Inductive generalization is a form of logic in which big, general principles are divined from observing the outcomes of many small events.”).

13. Analogical reasoning and inductive generalization are both types of inductive reasoning. Cooper, *supra* note 1, at 289. Except where specified otherwise, this Article follows the common practice in which the term “inductive reasoning” is shorthand for inductive generalization in particular rather than all types of induction.

14. See Aldisert, Clowney & Peterson, *supra* note 12, at 2–3.

15. See Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students’ Critical Thinking Skills*, 22 LEGAL WRITING 109, 129 (2018); Aldisert, Clowney & Peterson, *supra* note 12, at 3.

16. Kalinowski, *supra* note 15, at 128–29.

17. Aldisert, Clowney & Peterson, *supra* note 12, at 10.

18. Diane B. Kraft, *CREAC in the Real World*, 63 CLEV. ST. L. REV. 567, 568–69 (2015); Aldisert, Clowney & Peterson, *supra* note 12, at 4.

valid deductive argument, truthful premises *guarantee* the truth of the conclusion.<sup>19</sup> A classic example of a syllogism is:

|                                |                            |
|--------------------------------|----------------------------|
| All men are mortal.            | (major premise)            |
| <u>Socrates is a man.</u>      | (minor premise)            |
| Therefore, Socrates is mortal. | (conclusion) <sup>20</sup> |

The major premise “all men are mortal” is a general principle. The minor premise “Socrates is a man” is a specific proposition. The conclusion “Socrates is mortal” is valid; it deductively combines information from the major and minor premises.<sup>21</sup>

Syllogisms underlie legal analysis.<sup>22</sup> In a typical legal argument, the major premise is the law, the minor premise is a fact or set of facts, and the conclusion interweaves the law and facts together.<sup>23</sup> For example:

|                                                 |                            |
|-------------------------------------------------|----------------------------|
| Any person who votes twice commits voter fraud. | (major premise)            |
| <u>Johnny voted twice.</u>                      | (minor premise)            |
| Therefore, Johnny committed voter fraud.        | (conclusion) <sup>24</sup> |

Sophisticated legal arguments typically include multiple syllogisms that stack together to form a complete analysis.<sup>25</sup> The conclusion of one syllogism often becomes a premise of another.<sup>26</sup> A legal rule may have multiple elements, and each element may itself be

19. Aldisert, Clowney & Peterson, *supra* note 12, at 3 (“Defined broadly, deduction is reasoning in which a conclusion is *compelled* by known facts.”); *see also* Kraft, *supra* note 18, at 569 (“Reasoning by syllogism is widely regarded as a highly effective way to win an argument because if the judge agrees with the major premise and the minor premise, the conclusion is inevitable.”).

20. Aldisert, Clowney & Peterson, *supra* note 12, at 3; Kraft, *supra* note 18, at 569.

21. Aldisert, Clowney & Peterson, *supra* note 12, at 4.

22. *See id.* (“It is no exaggeration to say that the syllogism lies at the heart of legal writing.”).

23. *Id.* at 5–6.

24. This argument uses a “categorical syllogism,” which can be reduced to the following form: “A is in C. B is in A. Therefore, B is in C.” Kalinowski, *supra* note 15, at 128 n.109. Judge Aldisert used the categorical syllogism as the basis for his “Prosecutor’s model” of deductive reasoning: “Doing X violates the law. The defendant did X. Therefore, the defendant violated the law.” *See* Aldisert, Clowney & Peterson, *supra* note 12, at 6. Other syllogistic models are also suited for the law, such as the “conditional syllogism,” which structures the major premise with an if-then statement: “If P, then Q. Q. Therefore, P.” Kalinowski, *supra* note 15, at 130. Rewritten as a conditional syllogism, the example here would read “if a person votes twice in an election, then the person violates the law. Johnny voted twice in an election. Therefore, Johnny violated the law.” Although expressed differently, both categorical and conditional syllogisms follow the same deductive structure.

25. Aldisert, Clowney & Peterson, *supra* note 12, at 8–9 (explaining that legal writers often use a series of syllogisms, or a “polysyllogism,” in which “the conclusion of one syllogism supplies a premise of the next syllogism”).

26. *Id.*



defined by several narrower legal principles that the writer synthesizes. To complete the legal analysis, the legal writer would structure separate syllogisms to individually apply each element or principle to the relevant facts. After assembling these syllogisms, the legal writer would then use their conclusions as the premises in additional syllogisms to reach a broader conclusion on whether the overall rule is satisfied.

For example, the rule of intentional infliction of emotional distress has four elements: (1) intent, (2) outrageous conduct, (3) causation, and (4) severe emotional distress.<sup>27</sup> An attorney arguing for a plaintiff would first create a syllogism applying the “intent” element to the case facts. The attorney would repeat this process for the other three elements. The conclusions of each element’s syllogism would then become premises of an overarching syllogism concluding that the full rule is satisfied.

The syllogistic form may not always be obvious when reading legal arguments in cases, briefs, and legal memos. Syllogisms may be “obscured in verbiage, buried under mounds of facts, and drowned out by the complex law they seek to order.”<sup>28</sup> At times, a legal writer may also fail to explicitly state parts of the syllogism, leaving some premises or conclusions assumed.<sup>29</sup> Nonetheless, even if it is buried or provided only partially, the legal syllogism lies at the heart of virtually every legal argument.<sup>30</sup>

Law students learn a refined version of the syllogism to structure their written work. This “legal syllogism” incorporates elements not included in a traditional syllogism that are expected from and helpful to a legal audience. The legal syllogism comes in a few common variants, each with its own acronym, such as IRAC (Issue, Rule, Application, Conclusion), CREAC (Conclusion, Rule, Explanation, Application, Conclusion), and TREAT (Thesis, Rule, Explanation, Application, Conclusion),<sup>31</sup> to name a few.

Because legal writing is not mystery novel writing, a legal syllogism typically *begins* with the conclusion (as with CREAC or TREAT), or at least a statement of the legal issue that the syllogism’s conclusion answers (as with IRAC). Additionally, some variants of the legal syllogism, such as CREAC and TREAT, break the

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27. *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

28. SONYA G. BONNEAU & SUSAN A. MCMAHON, *LEGAL WRITING IN CONTEXT* 66 (1st ed. 2017).

29. A syllogism with an unstated premise or conclusion is called an “enthymeme.” *Id.*; Cooper, *supra* note 1, at 289.

30. Aldisert, Clowney & Peterson, *supra* note 12, at 4.

31. Kraft, *supra* note 18, at 567 n.1, 568–69; MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 22–23.

major premise into two subparts: (1) a “rule” statement, followed by (2) an “explanation” of the rule that uses case summaries to illustrate how courts previously applied the rule.<sup>32</sup> The minor premise (facts) appear in the “application” section of the legal syllogism, where the facts are interwoven with the law to support the conclusion.<sup>33</sup> Despite any differences from the traditional syllogism, the legal syllogism is fundamentally the same argument structure: a major premise that provides a legal rule or principle, a minor premise that provides legally-significant facts, and a conclusion that flows from the combination of the two premises.

Deductive arguments are compelling because they offer certainty; if the major and minor premises are both true, then the conclusion *must* be true.<sup>34</sup> However, if a premise is *false*, then the conclusion is not guaranteed.<sup>35</sup> A legal writer must work to ensure the premises are true. To prove the minor premise (facts), this means working to discover and use as much helpful evidence as possible. To prove the major premise (law), this means effectively researching and leveraging cases that show the correctness of any doctrine used—and synthesizing the law effectively to create accurate legal principles that are applicable to future cases.

## 2. *Analogical Reasoning*

Legal writers often supplement deductive reasoning with analogical reasoning. In an argument from analogy, the similarity of some characteristics between two items is used to infer that they should also share an additional characteristic that only one of them is known to have.<sup>36</sup> A nonlegal example of an argument from analogy is “my son enjoys chocolate, and therefore, my daughter will enjoy chocolate.” The (unstated) similarity is that your son and your daughter are both your biological children, and because of that similarity, you can infer that a known characteristic about your son (that he enjoys chocolate) also applies to your daughter.

The analogical argument structure is used in law when a prior case’s facts are compared to a client’s facts to infer a legal conclusion. In an argument from analogy, if the relevant facts are similar,

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32. Kraft, *supra* note 18, at 568–69; MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 22–23.

33. Kraft, *supra* note 18, at 568–69; MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 22–23.

34. See sources cited *supra* note 19.

35. See sources cited *supra* note 19.

36. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 1006 (1996).

and the similarities outweigh the differences, then the prior case's holding should control the outcome of the client's case.<sup>37</sup> A related type of analogical reasoning is the argument from disanalogy, or "distinguishing." It works in reverse: if the facts are dissimilar, and the differences outweigh the similarities, then the prior case's holding should not control the outcome of the client's case.<sup>38</sup>

Unlike deductive reasoning, which usually flows from "general to specific," analogical reasoning is "specific to specific": an old case's holding is applied to a new case's facts through fact-to-fact comparisons. Despite an analogy's focus on specific facts, a "general" legal rule or principle still animates analogical reasoning because the comparable facts must be "relevant" to the governing law.<sup>39</sup> In a dispute over whether a client accepted a contract by email, the attorney could compare the wording of his client's email to similar wording in an email used by a party to accept an offer in a past case. The specific facts from both cases are relevant to the governing legal rule of contract acceptance. However, the fact that the attorney's client wrote his email using Arial font should not be compared to the fact that the plaintiff in the prior case also wrote his email using Arial font. Such facts are similar (even identical), but they are irrelevant to the governing legal rule of contract formation.<sup>40</sup> Thus, an attorney must carefully choose the cases and facts used for analogical arguments.

Analogical arguments do not provide certainty in their conclusions like deductive arguments do; they provide *probable* conclusions.<sup>41</sup> As should be obvious, your son's love of chocolate does not guarantee that your daughter will enjoy chocolate. The strength of an analogical argument depends on the strength of the relevant similarities. In law, rarely (if ever) will a legal writer find a prior

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37. See *id.*

38. See *id.*

39. See Jacob M. Carpenter, *Persuading with Precedent: Understanding and Improving Analogies in Legal Argument*, 44 CAP. U. L. REV. 461, 467 (2016) ("For example, an analogy may be strong—even if the facts do not seem similar—if both sets of facts could cause similar harm to the public, or if both sets of facts would further the same purpose underlying the applicable statute.").

40. In the legal literature on analogies, "irrelevant" factual similarities are often referred to as "surface" similarities, and "relevant" factual similarities are often referred to as "relational" or "structural" similarities. See, e.g., *id.* at 466–67; Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy*, 3 PERSPS. ON PSYCH. SCI. 454, 457 (2008); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195, 214–15 (1993).

41. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) ("[A]nalogical reasoning does not guarantee good outcomes or truth. For analogical reasoning to operate properly, we have to . . . [justify] that A and B are 'relevantly' similar, and that there are not 'relevant' differences between them.").

case that is incontrovertibly analogous to a client's case "on all fours." As Cass Sunstein has recognized, "[a]n argument from analogy depends on the fact that there are both plausibly relevant differences and plausibly relevant similarities between the precedent and the case at hand."<sup>42</sup> The uncertainty inherent to analogical arguments makes them more difficult to win than deductive arguments. Nonetheless, well-crafted analogical arguments are especially persuasive in law because of *stare decisis* and the prevailing principle that judges should "treat like cases alike."<sup>43</sup>

Attorneys use deductive and analogical reasoning together to apply the law to the facts. In deductive reasoning, a general legal rule or principle is directly interwoven with the client's specific facts. In analogical reasoning, the specific holding from one case is applied to the client's case by comparing legally-relevant facts. If the premises are true in the deductive argument, and the cases chosen for analogies show strong relevant factual similarities (or dissimilarities for disanalogies), then the attorney's conclusion rests on solid foundations.<sup>44</sup>

Some legal writers stop there. Deductive and analogical reasoning are the traditional tricks of the trade, and lawyers use them to win cases all the time. They are all that are needed to deploy the case-by-case approach. And inductive reasoning is, by and large, more difficult to understand and use than deductive and analogical reasoning.

But the legal writer's arsenal is incomplete without inductive generalization. Even if an attorney *can* win without it, she is more likely to win with it. By using inductive reasoning to synthesize general legal principles, a legal writer will strengthen the major premises of their legal syllogisms and the governing law that animates their analogies. The next Subsection introduces the mechanics of inductive reasoning and how legal writers use it to synthesize general principles of law.

### 3. *Inductive Generalization*

The word "synthesis" is an often-overlooked source of confusion, and its usage sometimes obscures its inductive roots. Merriam Webster's dictionary defines the term as most laypeople likely understand it: "the composition or combination of parts or elements so as

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42. *Id.* at 745 n.19.

43. See Schauer, *supra* note 40, at 456.

44. Sunstein, *supra* note 41, at 745.

to form a whole.”<sup>45</sup> To synthesize, then, is “to combine.” Sometimes, this simple definition is adequate in the legal field. If a legal rule has multiple elements that are explicitly described across various cases, then an attorney may combine them into a single cohesive rule statement. This version of synthesis is relatively easy for an attorney to accomplish because it fuses together and harmonizes explicit statements without inferring new information about the rule.<sup>46</sup> Because it creates nothing original, but simply articulates or rearticulates rule information explicitly contained in the cases, this type of synthesis can be called “unoriginal synthesis.”

But often, attorneys are required to abstract *implicit* legal principles by inferring meaning from multiple indeterminate, ambiguous case opinions. When doing so, synthesis surpasses simply “combining” information—it involves inducing and creating *new* information that is not explicitly provided in the sources. This is “original synthesis.” Except where otherwise noted, this Article uses the word “synthesis” as a shorthand to refer specifically to the original synthesis of implicit legal principles.

Original synthesis requires sophisticated inductive reasoning. Inductive reasoning moves in the opposite direction of deductive reasoning; it flows from specific observations to general conclusions. As Dan Hunter has explained,

Induction is, generally, the process of taking a number of specific cases or instances, classifying them into categories according to relevant attributes and outcomes, and deriving a broadly applicable rule from them. That is, we take a number of isolated experiences and attempt to explain them by a general rule that covers all the instances examined.<sup>47</sup>

Inductive reasoning involves two overlapping mental tasks: categorization and abstraction. Categorizing involves pattern recognition and sorting “specific cases or instances”<sup>48</sup> into a category based on relevant similarities—matching “like with like.” Abstracting involves creating a general principle that describes all category members.<sup>49</sup>

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45. *Synthesis*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/synthesis> [<https://perma.cc/WJE2-G6MX>] (last visited Dec. 19, 2025).

46. Gionfriddo, *supra* note 4, at 10.

47. Hunter, *supra* note 4, at 369.

48. *Id.*

49. See Cooper, *supra* note 1, at 301 (explaining that “we abstract individual objects to develop generalized rules”).

Inductive reasoning is pervasive in everyday life, albeit for easier and more intuitive tasks than synthesizing legal principles. For example, if you adopt a dog and, on the first day at your home, the dog barks when the postal carrier approaches your front door, you might conclude that your dog barks when any person approaches your front door. This is the simplest form of inductive generalization: inferring from a single specific instance (your dog barking when the postal carrier approaches your door one time) to a general principle (your dog barks when any person approaches your door).

Because your generalization is based on only one specific instance (a category with a single member), its support is weak. Unlike deductive conclusions, an inductive conclusion is never guaranteed to be correct—a single counterexample can disprove it.<sup>50</sup> But its likelihood of being correct can be strengthened by increasing the *number* and *variety* of specific instances that support it.<sup>51</sup> For example, as the days go on, you may observe that your dog barks at the approaching postal carrier two days in a row, then three, then four, and so on. With each additional specific instance of barking, your general principle becomes stronger.<sup>52</sup>

But then you consider an alternative: what if your dog is barking not merely when *anyone* is approaching the door, but only when the postal carrier in particular approaches the door? Increasing the variety of specific instances can eliminate this alternative explanation: you notice that your dog also barks when your next-door neighbor approaches the door, when your best friend approaches the door, and so on.<sup>53</sup> Negative instances—that is, instances in which the dog does *not* bark—can further increase the principle's variative support and constrain its scope to barking at "persons": you notice your dog does *not* bark when a squirrel or bird approaches the door. The greater the number of supportive specific instances, and the more diverse those specific instances are, the stronger your general principle becomes.

Similarly, legal writers use inductive reasoning to synthesize implicit legal principles from multiple cases. When working to resolve

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50. Mary Massaron Ross, *A Basis for Legal Reasoning: Logic on Appeal*, 3 J. ASS'N LEGAL WRITING DIRS. 177, 182 (2006).

51. See Cooper, *supra* note 1, at 301 ("[T]he number and diversity of individual examples within a category predict the inductive strength of synthesis within a category . . .").

52. This method of inductive reasoning, where the general principle becomes stronger as the *number* of its supportive specific instances increases, is known as *enumerative induction*. Hunter, *supra* note 4, at 370.

53. This method of inductive reasoning, where the general principle becomes stronger as the *variety* of its supportive specific instances increases, is known as *variative induction* or *eliminative induction*. *Id.* at 370–71, 370 n.17.

a client's legal issue, an attorney may read multiple specific cases, discern that a general type or category of fact is present across them, and determine that this general type of fact is correlated with a particular case outcome. The attorney can then write a sentence that describes this relationship. The relationship can be reduced to the form "if  $x$  type of fact is present, then  $y$  is (or is more likely to be) the outcome."

Synthesis is vital for attorneys to master because courts do not always announce their reasoning explicitly, leaving attorneys with the task of abstracting legal principles themselves. This is especially true in areas of law with flexible legal standards (as opposed to bright-line rules) that are indeterminate or not easily defined.<sup>54</sup> After synthesizing a legal principle, the attorney can use it as the major premise of a legal syllogism and deductively apply it to new facts. Alternatively, an attorney can write an unsynthesized analysis that explores a legal standard's meaning case-by-case. But this simply offloads the work of categorizing and abstracting legal principles to the readers themselves—diminishing the clarity, persuasiveness, and usefulness of the attorney's work product.

### *B. Comparison of Legal Synthesis and Case-by-Case Analysis*

To illustrate the difference between the synthesis and case-by-case approaches, consider how an attorney may explain the rule of intentional infliction of emotional distress (IIED). To succeed on an IIED claim, a plaintiff must prove, among other things, that the defendant's conduct was "outrageous."<sup>55</sup> This "outrageous conduct" element is not a bright-line rule that is easy to apply to new facts. It is a flexible standard: "outrageous conduct" has a loose meaning, and courts may apply the element without explicitly elaborating on their reasoning. Faced with an opaque body of cases, an attorney could argue for their client through a case-by-case approach, simply comparing their client's facts to the facts of a selected handful of past cases. But a more sophisticated attorney will use inductive reasoning to identify patterns among the cases and synthesize legal principles to use in their arguments.

Consider how these differing approaches could be used by a plaintiff's attorney probing the meaning of "outrageous conduct" in Kentucky case law. The attorney's research would quickly yield three

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54. SMITH, *supra* note 12, at 72.

55. *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

key cases: *Craft v. Rice*,<sup>56</sup> *Brewer v. Hillard*,<sup>57</sup> and *Humana of Kentucky, Inc. v. Seitz*.<sup>58</sup> None of these cases contains much explicit reasoning that explains their outcomes.

In constructing an “outrageous conduct” analysis using an unsynthesized, case-by-case approach, the attorney would first summarize *Craft*, *Brewer*, and *Humana*—without any clearly-stated legal principles to guide the reader. An example of a case-by-case explanation of “outrageous conduct” is given below.

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### Case-by-Case Explanation

The Kentucky Supreme Court first recognized the tort of intentional infliction of emotional distress and began to define its “outrageous conduct” requirement in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). In this case, a married couple was harassed by a former sheriff. *Id.* at 248. For three months, he kept them under surveillance at home and work, and would contact the wife over CB radio to threaten to imprison her husband. *Id.* The court held that a reasonable juror could find that the former sheriff’s treatment of the married couple was outrageous. *Id.* at 251.

The Kentucky Court of Appeals further defined outrageous conduct in *Brewer v. Hillard*, 15 S.W.3d 1 (Ky. Ct. App. 1999). The plaintiff in *Brewer* had been sexually harassed by his work supervisor, who frequently called him sexually explicit names and requested sexual acts. *Id.* at 4. The plaintiff alleged that he had complained to the company’s leadership about the harassment in December 1992; the harassment finally stopped in August 1993 after another complaint. *Id.* at 5–6. The court held that a reasonable juror could find that the supervisor’s conduct was outrageous. *Id.* at 8.

Finally, the Kentucky Supreme Court narrowed the meaning of outrageous in *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990). In this case, a hospital patient gave birth to a stillborn infant. *Id.* at 1. While she was delivering, a nurse shouted at her to “shut up.” *Id.* at 2. Shortly after the stillborn infant was delivered, a nurse took the infant’s body from the mother and said she would “dispose of” it. *Id.* The court held that the nurses’ conduct was not outrageous. *Id.* at 4. The court reasoned that telling the patient to “shut

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56. 671 S.W.2d 247 (Ky. 1984).

57. 15 S.W.3d 1 (Ky. Ct. App. 1999).

58. 796 S.W.2d 1 (Ky. 1990).



up” was necessary to calm her and limit noise in the hospital; moreover, informing her that the hospital would “dispose of” the stillborn infant’s body was merely insensitive. *See id.* at 4–5. Neither statement was so offensive that it reached the level of “outrageous.” *Id.*

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After writing this case-by-case explanation, the attorney would then individually analogize or disanalogize these three cases to the client’s facts. The analogies and disanalogies would serve as the bulk of the “application” of the outrageous conduct element. Because the attorney is representing a plaintiff, the goal would be to show that the client’s facts are similar to *Craft* and *Brewer*, where previous plaintiffs won, and dissimilar to *Humana*, where a previous plaintiff lost. If successful, the attorney should win the argument on outrageous conduct.<sup>59</sup>

But the attorney could increase their odds of success by synthesizing one or more applicable legal principles from the three cases rather than analyzing each case individually. To do so, the attorney would mine the facts of the cases and look for similarities and differences that could explain their outcomes.<sup>60</sup> The attorney may notice that in *Craft* and *Brewer*, the court came down in favor of the plaintiff when the defendant’s conduct was repetitive over a lengthy duration—three months and at least eight months, respectively—while the court favored the defendant when the conduct was short and fleeting, as in *Humana*. Therefore, the attorney could induce a general principle based on the duration of the defendant’s demeaning conduct: the longer or more repetitive a person’s offensive conduct is, the more likely it reaches the threshold of outrageous conduct.

To explain the rule in a legal brief, the attorney could use this “long duration” principle to form the basis of a paragraph’s topic sentence. Supporting this principle-based topic sentence would be citations to, and case illustrations of, *Craft*, *Brewer*, and *Humana*. This paragraph would serve as part of the attorney’s “explanation” of what “outrageous conduct” means. Unlike the legal explanation in a case-by-case approach, which is organized around case

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59. Although deductive reasoning may appear absent from the case-by-case approach, it remains critical to the approach’s success, even though it does take a backseat to analogical reasoning. The (often unstated) syllogism that facilitates the case-by-case approach is “if my client’s facts resemble past cases where a similarly-situated party won on rule X, then my client wins. My client’s facts resemble past cases where a similarly-situated party won. Therefore, my client wins.” The success of this deductive argument depends entirely on the strength of the underlying analogical arguments.

60. *See* sources cited *infra* note 83.

summaries that directly illustrate the broad element of outrageous conduct, the synthesized approach organizes the explanation around narrower legal principles, such as the “long duration” principle, that themselves elaborate upon the meaning of outrageous conduct. Case illustrations are still used, but their focus is narrowed to illustrating the legal principle of long duration rather than illustrating the entire element of outrageous conduct. To complete the explanation, this structure is repeated for other legal principles (in addition to the long duration principle) that the attorney synthesizes to further explain the meaning of outrageous conduct.

Recall that a principle’s strength depends on the numerosity and variety of cases that support it.<sup>61</sup> Numerically, the “long duration” principle is supported by three cases. Variatively, it is supported by distinct fact patterns: a former sheriff’s harassment over three months, sexual harassment over at least eight months, and offensive comments made to a mother of a stillborn infant in a single event. The first two cases provide “positive” support for the principle. *Humana* provides a “negative” example with facts that are somewhat similar to the facts of *Craft* and *Brewer*—all three cases’ facts belong to a superordinate category of “duration”—but not similar enough to fall under the principle’s category of “long duration.” *Humana* supports the principle by serving as an example of its absence: when a person’s conduct occurs for a *short* time and is *not* repetitive, the conduct is less likely to be outrageous.

Together, these three cases provide a convincing level of support for the principle. If the attorney could find even more case examples (positive or negative) that speak to long duration, she could further increase the principle’s numeric and variative support.<sup>62</sup> However, the constraints of space limit how many cases the attorney can include in her brief. Using a representative handful of cases is usually sufficient to support synthesized principles.<sup>63</sup>

The attorney should also summarize the cited cases—not in their entirety, but the portions of the cases that illustrate the courts’ applications of the synthesized principle. Case illustrations serve two functions. First, they show that the principle is supported by the cited cases, confirming the inductive strength of the argument

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61. See Cooper, *supra* note 1, at 301.

62. See MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVANCED LEGAL WRITING AND ORAL ADVOCACY 159 (3d ed. 2022) [hereinafter MURRAY & DESANCTIS, ADVANCED LEGAL WRITING] (“A large part of the effectiveness, reliability, and persuasiveness of an instance of explanatory synthesis comes from the use of significant numbers of precedent cases in the synthesis.”).

63. *Id.* (encouraging legal writers to support synthesized legal principles with at least three or four citations).

without forcing the reader to read the cases directly. Second, they provide the reader examples of how courts have applied the principle in the past, which can aid the reader's comprehension of the principle itself.

The attorney has a few options for how to write these partial case summaries: textual case illustrations, parenthetical case illustrations, or both. To the extent feasible, the attorney can save space—and allow room for more cases to be included in the synthesis—by writing tailored case illustrations in succinct parentheticals.<sup>64</sup> Some legal writers recoil at the idea of using parentheticals due to aesthetic preferences<sup>65</sup> or out of fear that readers may skip them as unimportant.<sup>66</sup> But parentheticals are increasingly recognized as stylish when written well,<sup>67</sup> and they are efficient tools for readers precisely because they *can* be easily skipped if a reader understands and accepts the synthesized principle without needing it illustrated.<sup>68</sup> Empirical research also shows that judges favor

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64. See SMITH, *supra* note 12, at 52 (advising legal writers to use parenthetical illustrations when feasible because they “can provide the reader with an illustrative narrative without adding significant length”); Eric P. Voigt, *Explanatory Parentheticals Can Pack a Persuasive Punch*, 45 MCGEORGE L. REV. 269, 295 (2014) (“[P]arentheticals are usually necessary to prove [a] synthesized rule.”); MURRAY & DESANCTIS, *ADVANCED LEGAL WRITING*, *supra* note 62, at 143 (“There is an additional advantage to explanatory synthesis: the succinct and elegant form of multiple citations each with an explanatory parenthetical allows the author to present and discuss a large number of authorities in a small amount of space.”).

65. E.g., Bryan A. Garner, *Parenthetical Habits: On the Use and Overuse of Parentheses and Brackets*, ABA J. (Nov. 1, 2016, at 02:10 CT), [https://www.abajournal.com/magazine/article/garner\\_parenthetical\\_habits](https://www.abajournal.com/magazine/article/garner_parenthetical_habits) [<https://perma.cc/N9YC-8YM6>] (calling string citations with parentheticals “visually repulsive” and implying they are fake “paragraphs”). But see Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 837 n.73 (2019). Chew refutes Garner’s view, arguing that a paragraph is nothing more than a topic sentence supported by reasons—and those reasons can be stated through a string citation with parentheticals rather than prose. *Id.* Chew further notes that a paragraph composed of a topic sentence and a string citation “is an efficient means of conveying a rule synthesized from multiple authorities.” *Id.*

66. See BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 207 (3d ed. 2014) (“[T]he phrase ‘important parenthetical’ is surely an oxymoron.”).

67. Chew, *supra* note 65, at 865–67 (providing guidance on how legal writers can stylishly write and use parentheticals). Chew also notes that “Professor Michael D. Murray, in one of several articles about parentheticals, has described them as ‘especially lovely,’ ‘elegant,’ and ‘efficient’—just about the nicest things anyone has said about an element of legal citation.” *Id.* at 865 n.253 (quoting Michael D. Murray, *For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning*, U. DAYTON L. REV. 175, 193 (2012)).

68. Michael D. Murray, *Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT*, 8 LEGAL COMM. & RHETORIC 217, 232 (2011) (reasoning that skipping parentheticals is not a “fatal disability” of synthesis because the induced principle is paramount, and the reader can refer to the parentheticals if the principle is “troubling, surprising, or counterintuitive” while saving time by skipping parentheticals that illustrate principles that the reader finds “acceptable and familiar”); see also Chew, *supra* note 65, at 859 (“[I]f the proposition is a rule inferred from a pattern observed across multiple cases—the proposition should explicitly say what that pattern is. The reader should only have to

parentheticals.<sup>69</sup> Parentheticals hit several birds with one stone—illustrating the synthesized principle, demonstrating the principle’s numerical and variative support, and efficiently saving space and the reader’s time. Nonetheless, a concise textual illustration is appropriate if a partial case summary is too complex to fit within the confines of a parenthetical.

Along with writing case illustrations, the attorney should “test” the principle. To ensure the principle is valid, the attorney must read a wide variety of relevant IIED cases that discuss “outrageous conduct” and ensure their holdings do not contradict the “long duration” principle, whether explicitly or implicitly. If a contradiction is found, then the principle must be amended to capture additional nuance—or discarded altogether if it cannot be squared with the case law.<sup>70</sup> If the long duration principle does not contradict any cases, the attorney can safely add it to her brief and support it with citations to, and illustrations of, *Craft*, *Brewer*, and *Humana*.

Below is an example of how an attorney may present in her brief the synthesized “long duration” principle with supporting parenthetical case illustrations. Compare it to the unsynthesized, case-by-case example above. Rather than the cases directly serving as the attorney’s explanation of “outrageous conduct,” they serve as support for the narrower “long duration” principle that the attorney abstracted for the reader’s benefit.

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### Synthesized Explanation

The longer or more repetitive a person’s offensive conduct is, the more likely it is outrageous. *Compare Craft*, 671 S.W.2d at 248, 251 (holding reasonable jury could find former sheriff’s conduct was outrageous when he harassed married couple for nearly three months by keeping them under surveillance and threatening them with imprisonment over CB radio), *and Brewer*, 15 S.W.3d at 4–6 (concluding sufficient evidence showed that supervisor’s conduct was

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read the explanatory parentheticals closely if she desires more information, not to figure out the pattern.”).

69. Ross Guberman, *Judges Speak Out Behind Closed Doors: How Your Briefs Might Bug Them, and How You Can Make Them Smile Instead*, LEGAL WRITING PRO (June 26, 2017), <https://www.legalwritingpro.com/blog/judges-speak-out/> [https://web.archive.org/web/20240226213231/https://www.legalwritingpro.com/blog/judges-speak-out/].

70. Gionfriddo, *supra* note 4, at 14–15 (“While [a synthesized] explanation does not need to have been articulated by any one court within the group, it must make logical sense in relationship to the facts and results of each individual case and its explicitly articulated doctrine and reasoning . . .”).

outrageous when he sexually harassed an employee for at least eight months), *with Humana*, 796 S.W.2d at 2–4 (determining nurses did not act outrageously when they told a patient delivering a stillborn infant to “shut up”—and then took the infant body from the patient and said they would “dispose of” it—but did not continue any offensive conduct afterward).

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Note the differences between this and the synthesized example. Rather than the cases directly serving as the attorney’s explanation of “outrageous conduct,” they serve as support for the narrower “long duration” principle that the attorney abstracted for the reader’s benefit. The factual information in the parenthetical illustrations is tailored to illustrate the principle, allowing for extraneous details to be excluded and for the explanation to remain succinct, focused, and elegant.

After incorporating the long duration principle into her brief, the attorney can complete the explanation of “outrageous conduct” by synthesizing additional relevant principles, stating them as the topic sentences of their own paragraphs, and illustrating them with their own tailored, succinct case illustrations. In this way, synthesized principles provide another layer of analysis and understanding and offer a list of criteria courts use to apply the element of “outrageous” to different factual scenarios.

Following this synthesized explanation of the law, the attorney can apply the outrageous conduct element to the client’s facts using deductive and analogical reasoning. Starting with the long duration principle, the attorney interweaves the principle with the client’s facts. Using a syllogism, the attorney textually links the language of the principle to the specific facts from her client’s case that show the defendant’s conduct was long or repetitive enough to be outrageous. To support this deductive argument, the attorney can also succinctly analogize his client’s facts to *Craft* or *Brewer* or disanalogize them from *Humana*. But unlike the case-by-case approach, where analogies and disanalogies are the central focus of the argument, the synthesized approach uses them to supplement deeper deductive reasoning. Rather than using analogies and disanalogies to apply the outrageous conduct element as a whole, they are used to support narrower principle-based arguments. As such, each analogy and disanalogy compares only principle-relevant facts, rather than comparing facts relevant to the entire element of outrageous conduct.

After applying the long duration principle, the attorney can repeat this process to apply the other principles of outrageous conduct that the attorney synthesized. If the attorney convincingly applies the principles to the client's facts, the attorney should win the argument on outrageous conduct.

### C. *Advantages of Legal Synthesis*

The advantages of synthesizing general legal principles over using an unsynthesized case-by-case approach are numerous. Synthesis produces a more organized and efficient analysis.<sup>71</sup> In the case-by-case approach, readers must analyze a series of case summaries and pick out the important points themselves. In the synthesized approach, the attorney completes this cognitive task for the reader and provides important legal principles upfront in topic sentences. A legal reader will not need to "wonder about the categories of situations that satisfy" a legal rule or element of a legal rule.<sup>72</sup>

Relatedly, synthesis leads to more sophisticated deductive reasoning. In the case-by-case approach, deductive reasoning is used only in broad strokes and takes a backseat to analogical reasoning. A legal writer may attempt to deductively argue the facts in terms of the general legal standard of outrageous conduct. But such an argument is challenging because the standard is flexible and loosely defined. The legal writer will naturally gravitate toward using analogies and disanalogies, as they provide more guidance on how courts applied the law in the past. But because they are not anchored to concrete legal principles that narrow the definition of outrageous conduct, analogies and disanalogies must be stated broadly to encompass the legal standard in general terms.<sup>73</sup> This may lead to large, unwieldy paragraphs that attempt to compare many facts at once with little discernible structure.<sup>74</sup>

In a synthesized approach, a general legal standard is divided into narrower principles that offer "guidance as to what categories

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71. See MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 141–42.

72. See *id.* at 151.

73. In a few circumstances, arguing in terms of the general legal standard may be preferable—such as when most or all of the relevant principles that could be synthesized weigh against the client. See SMITH, *supra* note 12, at 83–84 ("From a persuasive strategy standpoint, an advocate should only offer a new [synthesized] factor test if the advocate knows his or her client will fare well under the new test."). That said, if most or all of the synthesized principles weigh against a client, the attorney may better serve the client by recognizing the strength of the opposing party's hand and pursuing settlement.

74. See MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 141–42.

of facts the court actually considers”<sup>75</sup> when applying that standard. Each principle becomes the major premise of its own syllogism, infusing granular instances of deductive reasoning throughout the analysis. As the example in the previous Section shows, rather than applying the indeterminate “outrageous conduct” element of IIED directly to a client’s facts, the legal writer applies the “long duration” principle and other synthesized principles that elucidate the standard. The outrageous conduct argument is split into multiple clearer and more digestible mini-arguments.

Analogies and disanalogies are still powerful tools to support these mini-arguments.<sup>76</sup> But in a synthesized analysis, analogies and disanalogies can be shorter and more tightly focused on comparing subsets of facts relevant to individual synthesized principles, rather than broadly focused on comparing all facts relevant to the standard of outrageous conduct. These smaller, principle-based arguments also enable a greater number of cases to be used to support the overarching outrageousness argument; because individual case illustrations and analogies can be shorter, more space is allowed for additional authorities to be incorporated, further strengthening the analysis through numerosity and variety.<sup>77</sup>

Relatedly, synthesis promotes “cognitive economy.” Cognitive research has discovered that “individual examples fade more quickly in memory than rules developed from category members, proving we are more likely to remember a rule than the individual examples used to develop the rule.”<sup>78</sup> A legal reader is more likely to notice, remember, and use a legal principle that is induced from multiple cases than he is to notice, remember, and use the cases themselves. By placing the reader’s attention on the legal principles rather than the cases, synthesis minimizes the reader’s cognitive load and promotes comprehension.<sup>79</sup>

Finally, synthesis appeals to a reader’s desire for clarity. By abstracting implicit legal principles from indeterminate cases and stating them explicitly, the writer brings clarity to ambiguous areas

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75. DANIELLE M. SHELTON, KAREN L. WALLACE & MELISSA H. WERESH, *LEGAL ANALYSIS AND WRITING* 113 (2020) (referring to the narrower legal principles that define a broader rule as “guiding factors”).

76. See Wangerin, *supra* note 4, at 448 (“In fact, individual cases often provide lawyers with their most potent weapons. But the weapons are those of ‘analogy,’ not synthesis.”).

77. See MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 155 (“Explanatory synthesis is very economical—both in its use of words to state a principle as well as in its use of parentheticals to provide illustrative detail. As a result, you can increase the number of cases from which you derive your principles of interpretation and application.”).

78. Cooper, *supra* note 1, at 300.

79. For further discussion of cognitive load, see *infra* notes 192–97 and accompanying text.

of law.<sup>80</sup> Not only does such elegance make the writing easier to understand than a case-by-case analysis, it is compelling because “it taps into the [reader’s] basic human need for certainty, order, and coherence.”<sup>81</sup> Bringing such clarity can please the reader and boost the writer’s credibility as an intelligent, deliberate, and trustworthy source.<sup>82</sup>

## II. CHALLENGES OF LEGAL SYNTHESIS

For all its benefits, synthesis is deceptively challenging. Legal writing texts may simplify the process by instructing legal writers to identify similarities among cases and combine their content into general categories or principles while offering relatively light instruction on how to accomplish these steps.<sup>83</sup> Even in the outrageous conduct example just given, the discussion skimmed on explaining how an attorney actually conducts the process of synthesis by simply saying the attorney “mines the cases for similarities and differences” and then, voilà, discovers an implicit “long duration” principle. Some legal writers are naturally talented and can intuitively induce legal principles with such minimal guidance.<sup>84</sup> But most would benefit from greater direction.

This Part discusses why legal writers find legal synthesis so challenging to intuit and why deeper instruction is necessary for student success. Legal synthesis presents at least four overlapping challenges for all legal writers, and especially novices: (1) cross-case analysis, (2) implicit reasoning, (3) ambiguity aversion, and (4) the limits of inductive generalization. These challenges are exacerbated by (5) insufficient synthesis instruction in law school.

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80. SMITH, *supra* note 12, at 86–88 (discussing the benefits of synthesizing implicit legal factors from ambiguous cases).

81. *Id.* at 86.

82. *Id.* at 86–87.

83. See, e.g., FAJANS ET AL., *supra* note 3, at 73 (“Read the precedents you found, and identify the types of facts that courts consider significant in proving or disproving the cause of action. Then articulate a general category for each type of fact.”); MURRAY & DESANCTIS, LEGAL WRITING, *supra* note 3, at 132–33 (“Read cases and look for common facts and common outcomes. Review the groups to find the factors or public policies that make the difference in the outcome. Write principles of interpretation that explain your findings.”); CHEW & PRYAL, *supra* note 3, at 48 (describing legal synthesis as the “process of combining multiple legal authorities into a unified rule”); COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 104–07 (instructing legal writers to “combin[e] principles stated in a series of authorities to form one rule” by mining those authorities for “common denominator[s]” and “reasoned distinction[s]”).

84. See Gionfriddo, *supra* note 4, at 3 (“[N]ot all lawyers are able to synthesize well enough for sophisticated law practice. Some lawyers understand and use this skill intuitively but do not consciously think about the steps they actually take.”).



### A. *Cross-Case Analysis*

By definition, legal synthesis is a cross-case analysis. Reading an individual case in isolation to decipher its holding and reasoning can be a challenging task unto itself, especially for a novice. Multiplying the number of cases multiplies the challenge. The additional task of discovering cross-case legal principles exponentiates it.

The difficulty of conducting a synthesized, cross-case analysis was confirmed by a comprehensive empirical study of law students' critical reading and reasoning abilities conducted by Dorothy H. Evensen, James F. Stratman, Laurel C. Oates, and Sarah Zappe (the Law Student Reasoning Study).<sup>85</sup> The researchers administered two tests to students from five law schools in two phases.<sup>86</sup> Each test required students to read three cases—two intermediate appellate court decisions and one trial court decision—that shared closely related legal issues within one jurisdiction.<sup>87</sup> Students were told that the losing party in the trial court case wished to appeal, and they were instructed to assume the role of an attorney preparing an appeal for the losing party.<sup>88</sup>

Bearing that role in mind, each student was asked to answer fourteen questions about the cases.<sup>89</sup> Each question reflected one of two “comprehension difficulty categories”: (1) single-case questions and (2) cross-case questions.<sup>90</sup> Single-case questions evaluated students' abilities to recognize and understand the legal issue and reasoning of one case; cross-case questions evaluated students' abilities to recognize legal issues that are common to multiple cases, identify similarities and differences among multiple cases' fact patterns, and recognize similarities and differences among multiple cases' lines of legal reasoning.<sup>91</sup>

In both phases of the study, students performed significantly worse on cross-case questions than on single-case questions.<sup>92</sup> Given the increased task complexity when moving from a single-case to a cross-case analysis, this result is unsurprising.

The researchers noted that the difference between a single-case analysis and cross-case analysis is “not simply quantitative”; a cross-case analysis is fundamentally different than aggregating

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85. EVENSEN ET AL., *supra* note 5, at 1.

86. *Id.*

87. *Id.* at 4–5, 10.

88. *Id.*

89. *Id.* at 1.

90. *Id.*

91. *See id.* at 30.

92. *Id.* at 7, 18.

several single-case analyses.<sup>93</sup> “Attempting to read ‘across’ multiple cases by simply replicating what one does when reading a single case is a ‘method’ that is likely, more often than not, to break down.”<sup>94</sup>

To conduct cross-case analyses, legal writers must not only understand the issues and reasoning of each case individually; they must distill relationships among the cases. Identifying such relationships is especially challenging for law students, who, as novices, are more likely to focus their attention on irrelevant surface details of individual cases.<sup>95</sup> A successful cross-case analysis requires looking beyond the surface and abstracting cases to a “gist” level, identifying underlying similarities and patterns among them.<sup>96</sup> This task becomes even more challenging when the cases include ambiguities that require a legal writer to engage in implicit reasoning.

### B. *Implicit Reasoning*

The difficulties of conducting a cross-case analysis are exacerbated by the challenges of stating explicitly that which judges have left implicit. Legal writers, and especially novices, typically prefer the certainty offered by explicit language in cases and the “unthinking mimicking of another’s reasoning.”<sup>97</sup> But cases are often indeterminate or ambiguous, leaving important reasoning unstated. Synthesis requires legal writers to abstract legal principles by “reading between the lines” of cases to find facts that implicitly support holdings.<sup>98</sup> This task requires original thinking on the legal writer’s part because the legal writer cannot rely solely on the explicit text of cases; rather, the legal writer must analyze cases’ contexts and subtexts to articulate a new legal principle.<sup>99</sup> Not only is this task daunting, it is mentally taxing. Synthesizing implicit principles is at the highest order of cognitive tasks.<sup>100</sup> Reading a

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93. *Id.* at 4.

94. *Id.*

95. Cooper, *supra* note 1, at 314–16.

96. *Id.*

97. Nick James & Kelley Burton, *Measuring the Critical Thinking Skills of Law Students Using a Whole-of-Curriculum Approach*, 27 LEGAL EDUC. REV. 1, 9 (2017).

98. COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 108 (“New lawyers feel safer putting in their arguments only the language that they have seen in cases. But remember this: An attorney adds value by making explicit those themes that would otherwise remain obscured in a morass of case law.”).

99. See James & Burton, *supra* note 97, at 9.

100. See E. SCOTT FRUEHWALD, HOW TO GROW A LAWYER: A GUIDE FOR LAW SCHOOLS, LAW PROFESSORS, AND LAW STUDENTS 9–10 (2018) (describing Bloom’s Taxonomy, a seminal description of the six stages of cognitive thinking from lowest order thinking to highest order thinking—(1) remembering, (2) understanding, (3) applying, (4) analyzing, (5) evaluating, and (6) creating—and placing legal synthesis in the highest order stage of “creating”); Cooper,

synthesized analysis may promote the *reader's* cognitive economy, but for the legal writer, it is far more demanding than simply restating explicit case language or using an unsynthesized case-by-case analysis.

Effectively “reading between the lines” requires legal writers to discover legally-relevant patterns that emerge across cases. Not every hidden meaning is legally relevant; synthesis requires legal writers to sort the wheat from the chaff. Novices in particular can struggle to identify relevant structural similarities among cases, especially when the cases’ facts are complex or could lead to nuanced, multifaceted principles.<sup>101</sup> For example, even if five winning plaintiffs all wrote emails using Arial font to accept contract offers, the legal writer should not use the superficial, irrelevant factual similarity of font to synthesize a legal principle on contract acceptance. In her seminal piece, *The Science of Legal Synthesis*, Jennifer M. Cooper explained that when synthesizing principles,

Novices rely heavily on surface features of category items, rather than abstracting structural features, and prefer the development of unidimensional categories based on single features, such as green things, than those based on multiple features, such as green and square, or green or two-sided . . . . The preference for simple, unidimensional categories and surface features is consistent with law students’ preference for parroting of judicial text and creation of simplified rules lacking nuance exemplified by overuse of quotations instead of more complex paraphrasing and synthesis.<sup>102</sup>

The taxing mental work involved in reasoning implicitly from numerous and diverse cases discourages novices from synthesizing implicit legal principles. Cognitive load is inversely correlated with inductive strength. The more numerous and diverse the supporting cases, the stronger the legal principle—but also the more cognitively onerous the task.<sup>103</sup> The allure of simplicity can be the

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*supra* note 1, at 297 (“When Bloom’s Taxonomy was revised, synthesis was renamed and incorporated into the higher-order thinking “Create” category—described as ‘putting elements together to form a coherent or functional whole,’ remaining at the highest order of thinking and cognitive processes.” (quoting A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM’S TAXONOMY OF EDUCATIONAL OBJECTIVES 84 (Lorin W. Anderson et al. eds., Addison Wesley Longman, Inc. 2001) (1956))); *see also* James & Burton, *supra* note 97, at 6–9 (describing four stages of critical thinking: (1) interpretation, (2) analysis, (3) evaluation, and (4) synthesis).

101. Cooper, *supra* note 1, at 308.

102. *Id.*

103. *Id.* (“Numerosity and diversity lead to greater inductive strength, but they also increase task complexity, cognitive load, and difficulty in induction and categorization.”)

downfall of a legal writer's attempted synthesis. Focusing on irrelevant facts results in irrelevant principles, and principles that are unidimensional or supported by few, nondiverse cases may be incomplete or inaccurate.

The Law Student Reasoning Study sheds further light on how difficult implicit reasoning can be. Just as the researchers assessed students' ability to read and understand cases by asking them two categories of "comprehension" questions—single-case questions and cross-case questions—researchers also assessed students' ability to read and analyze cases by asking them two categories of "semantic" questions—"determinate-meaning questions" and "indeterminate-meaning questions." The researchers defined "indeterminate" as "all the rhetorical ways that statements offered by courts may be open to interpretation, such that there may be no way to tell precisely what a court means or precisely how it is reaching its conclusion."<sup>104</sup> The researchers included in this definition cases that are ripe for "reading between the lines," namely cases in which "the facts as described may seem to be confounded or selectively focused; and a court's explanation of the legal principles, rules, or precedents it is applying may seem logically inconsistent, arbitrarily chosen, truncated, or simply absent."<sup>105</sup> In other words, indeterminate-meaning questions required students to engage in implicit reasoning and abstract implied legal principles.

The researchers found that students performed far worse on indeterminate questions than on determinate questions.<sup>106</sup> In considering both comprehension and semantic categories together, students scored even worse on cross-case indeterminate questions than on single-case indeterminate questions.<sup>107</sup> The study's results confirm what law professors have long suspected: reading between the lines to abstract implicit principles from multiple ambiguous cases is far more difficult than conducting an unsynthesized case-by-case analysis.

### C. *Ambiguity Aversion*

Synthesis is challenging not only because of the task complexity of identifying implicit principles that span multiple indeterminate cases, but because of psychological hurdles the legal writer must overcome when facing uncertainty. Legal writers often prefer the

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104. EVENSEN ET AL., *supra* note 5, at 3.

105. *Id.*

106. *Id.* at 7.

107. *Id.*

comfort of arguing using the explicit text of case opinions.<sup>108</sup> But the most comfortable argument is frequently not the best argument or the argument most likely to persuade.

When legal texts are indeterminate or ambiguous, a legal writer may feel “ambiguity aversion.” Ambiguity aversion is a psychological bias that is best defined as a person’s tendency to favor the “devil you know.” It manifests when people must make decisions “under ignorance or ambiguity, where the probabilities of potential outcomes are neither specified in advance nor readily assessed on the basis of the available evidence.”<sup>109</sup> Researchers have found that people are generally averse to choosing “uncertain” options with vague probabilities and prefer options that, even if risky, have a clearly defined probability.<sup>110</sup>

For example, consider you are a student signing up for a required course, and you have two options for who teaches it: a professor with mediocre teaching evaluations or a professor with no teaching evaluations. A person experiencing ambiguity aversion would choose the professor with mediocre teaching evaluations because of the uncertain probability that the professor with no evaluations could be worse.<sup>111</sup> Ambiguity aversion arises in numerous legal contexts, ranging from a criminal defendant’s decision to choose a bench or jury trial<sup>112</sup> to an environmental regulator’s choice of how strongly to restrict the use of chemicals that pose vaguely probable health hazards.<sup>113</sup>

Ambiguity can be unsettling, and ambiguity aversion may prompt the legal writer to find ways around it rather than confronting it. The temptation, especially for novices, is to avoid ambiguity in the law by arguing based only on what is certain—the explicit text of case opinions.<sup>114</sup> The case-by-case method of legal analysis can enable overreliance on explicit text because it allows the legal writer to simply summarize and analogize cases without exploring

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108. See James & Burton, *supra* note 97, at 9; Cooper, *supra* note 1, at 308.

109. Craig R. Fox & Amos Tversky, *Ambiguity Aversion and Comparative Ignorance*, 110 Q.J. ECON. 585, 585 (1995).

110. Larry G. Epstein, *A Definition of Uncertainty Aversion*, 66 REV. ECON. STUD. 579, 579 (1999).

111. Dan Pilat & Sekoul Krastev, *Why Do We Prefer Options We Know?*, THE DECISION LAB, <https://thedecisionlab.com/biases/ambiguity-effect> [<https://perma.cc/Q8QC-6V63>] (last visited Dec. 19, 2025).

112. Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1501, 1524, 1549 (2006) (calling for reforms to allow criminal defendants to “opt for a bench trial unilaterally” because choosing a bench trial “disambiguat[es] . . . [the] probability of conviction” compared to the greater uncertainty of a jury trial).

113. David Weisbach, *Introduction: Legal Decision Making Under Deep Uncertainty*, 44 J. LEGAL STUD. 319, 319 (2015).

114. See James & Burton, *supra* note 97, at 9; Cooper, *supra* note 1, at 308.

implicit reasoning within a case or latent patterns among cases.<sup>115</sup> However, avoiding ambiguity does not resolve it. If explicit case text does not provide a satisfactory answer to a legal issue, or if better answers can be abstracted by confronting the ambiguity using implicit reasoning, then relying solely on case text will lead to an inadequate legal analysis.

Synthesis allows an attorney to crystallize implicit legal principles and make them explicit, which can ultimately decrease ambiguity in the law.<sup>116</sup> Doing so requires the legal writer to mine ambiguous case opinions for patterns and themes that can form those implicit legal principles. That, in turn, requires the legal writer to overcome unsettling feelings of ambiguity aversion.

#### *D. Limits of Inductive Generalization*

Synthesis is also constrained by the limits of inductive generalization as a form of reasoning. When constructing a synthesized analysis, the legal writer risks that the synthesis will be logically fallacious. Even if a synthesis is logically strong, inductive generalization still involves an element of subjectivity, and the legal writer risks that the audience will reject the synthesis for subjective reasons.

The risk of fallacious reasoning is inherent to all inductive generalizations. Synthesis does not produce certain results; unlike deduction, synthesis leads to *probable* conclusions.<sup>117</sup> If a legal principle is supported by “too few” cases, the legal writer risks committing the “hasty generalization” fallacy, which “occurs when you construct a general rule from an inadequate number of particulars.”<sup>118</sup> Other types of faulty generalizations arise when a reader bases a synthesis on bad law or misinterpreted cases.<sup>119</sup>

Likewise, a legal writer must take care not to mistakenly “cherry-pick” cases that support the principles they synthesize. If some cases support a principle but others contradict it, then the principle cannot stand (unless the contradictory cases can be convincingly attacked as such poor law that the court should disregard or overturn

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115. The case-by-case method does not inherently prompt ambiguity avoidance; a legal writer can choose to include a court's implicit reasoning in a case summary. But because the case-by-case method does not require legal writers to search for patterns and themes that cross multiple cases, the case-by-case method gives legal writers an easy route to avoid implicit reasoning and ambiguity.

116. SMITH, *supra* note 12, at 85–86.

117. Ross, *supra* note 50, at 182.

118. *Id.* at 185; Aldisert, Clowney & Peterson, *supra* note 12, at 14.

119. Ross, *supra* note 50, at 185.

them).<sup>120</sup> The risks of committing these fallacies can be mitigated by conducting thorough legal research, testing potential legal principles, and supporting synthesized legal principles with numerous and diverse cases that eliminate alternate interpretations of the law.<sup>121</sup>

Synthesis also requires making subjective choices about how ambiguities in the law should be interpreted.<sup>122</sup> Which case facts that legal writers choose to categorize, the labels that legal writers assign to those categories, and the principles they choose to ultimately include in their writing are subjective choices.<sup>123</sup> Confronted with the same indeterminate case opinions, two legal writers may derive different legal principles.<sup>124</sup> Cooper has succinctly summarized this reality: if a “rule suits your argument but not mine, we are under no obligation to agree that it is the law.”<sup>125</sup> Of course, indeterminacy allows the law to remain malleable enough to give opposing attorneys ammunition to argue in favor of their clients. But the subjectivity involved in crafting legal principles is especially distressing to novices who are prone to look for “one right answer” to a legal issue.<sup>126</sup>

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120. For further discussion of how to “test” legal principles to ensure they are consistent with the case law, and how to handle legal principles that contradict the case law, see *infra* note 228 and accompanying text.

121. See *supra* Section I.A.3.

122. Cooper, *supra* note 1, at 309 (describing legal synthesis as a “subjective” and “context-dependent” process).

123. See Hunter, *supra* note 4, at 379 (“[T]hough all lawyers are using induction to derive generalizations about the law, the fact[s] they use to generate the principles will differ. The choice of fact[s] is an entirely personal one, and one that the inductive process cannot control. We need not expect identical rules in each domain, since each person will induce different rules.”); Cooper, *supra* note 1, at 309; see also Itzhak Gilboa & Larry Samuelson, *Subjectivity in Inductive Inference*, 7 THEORETICAL ECON. 183, 183–84 (2012) (“Admittedly, perfectly objective [inductive] inference is impossible: even the purest of classical statisticians must exercise judgement when deciding which variables to include in a model, which significance level to choose, and so forth.”).

124. Cooper, *supra* note 1, at 310 (“Opposing lawyers working on the same dataset of precedent will persuasively synthesize precedent to advocate for opposing conclusions.”).

125. *Id.* at 310 n.164 (citing Michael B. W. Sinclair, *What Is the “R” In “IRAC”?*, 46 N.Y. L. SCH. L. REV. 457, 470 (2003) (“If we’re lucky there will be [a] suitably rule-like abstraction in the opinion, nicely expressed in a sentence or two. But if it suits your position and not mine, I won’t concede it’s the rule . . .”)).

126. Jennifer M. Cooper, *Cognitive Science in Law Learning*, 44 CAP. U. L. REV. 551, 553 (2016) (noting that before law school, many students’ prior schooling “trained [them] that there is a ‘right answer’ through more emphasis on standardized testing and less emphasis on rigorous reading and writing tasks”); William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399, 417 (“Whereas students, anxious to learn the ‘meaning’ of words and phrases, strive mightily to find *the* answer that can be valid in all contexts, the teacher must show that meaning shifts continuously with changing contexts, that words have shifting components of meanings . . .”). The Socratic method has been criticized as inadvertently reinforcing the idea that students should pursue “one right answer” when problem solving. Laura A. Webb, *Speaking the Truth: Supporting Authentic*

Novices especially fear that when they synthesize implicit principles, they will “make up” law that is not found in the cases.<sup>127</sup> But so long as the risk of fallacies is minimized, “making up” law is, in a sense, the *point* of synthesis. Unlike deductive reasoning, which merely reassembles existing information to offer conclusions that may *seem* new, inductive reasoning creates truly new information.<sup>128</sup> Inductive generalizations go beyond their premises (holdings of past cases) to provide new conclusions (synthesized legal principles) that can be applied to new cases. Induced legal principles decrease ambiguity and are a legal writer’s “added value” to the law.<sup>129</sup>

Novices may also fear that the legal principles they synthesize will be rejected by the reader for subjective reasons. A particular audience’s subjective predilections are often largely unknown to a legal writer, especially when the audience is a new or unfamiliar supervisor, professor, or judge. Even if a legal writer provides substantial numerical and variative support for a synthesized legal principle, the audience may remain unconvinced for other reasons, such as bias or policy preference. Or perhaps opposing counsel simply put forward a contrasting synthesis that was even more compelling. And even if a legal writer does successfully convince a judge that a synthesized legal principle is strongly supported by existing case law, the judge may overturn precedent and modify or abandon the principle.

These risks of “losing” are not unique to synthesis, and legal writers are not powerless to overcome them. A well-written legal synthesis supported by numerous and diverse cases can convince an audience to change their predilections in favor of the legal writer’s view. This possibility is especially likely when the audience is a

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*Advocacy with Professional Identity Formation*, 20 NEV. L.J. 1079, 1107 (“The professors [who practice the Socratic method] are fully aware that there is not an absolute law handed down from on high to find; this concept, all too clear to them, feels unnecessary to explicitly divulge to the students.”).

127. See COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 108 (“New lawyers often get nervous about explaining implicit rules. New lawyers feel safer putting in their arguments only the language that they have seen in cases.”).

128. See Timothy Shanahan, *Deductive and Inductive Arguments*, THE INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/deductive-inductive-arguments/> [<https://perma.cc/7CNR-YHL5>] (last visited Dec. 19, 2025) (noting that in logic texts, a “popular approach . . . is to say that ‘the conclusion of a deductively valid argument is already “contained” in the premises,’ whereas inductive arguments have conclusions that ‘go beyond what is contained in their premises’” (quoting ALAN HAUSMAN, FRANK BOARDMAN & KAHANE HOWARD, *LOGIC AND PHILOSOPHY: A MODERN INTRODUCTION* (13th ed. 2021)))).

129. See MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 148 (describing synthesis of implicit principles as a writer’s “value-added analysis”); COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 108 (“An attorney adds value by making explicit those themes that would otherwise remain obscured in a morass of case law.”).



judge who is comparing two briefs—one with a clear, synthesized analysis and one with an unclear, unsynthesized analysis.<sup>130</sup> As discussed in Section I.C, the benefits of synthesis usually outweigh the costs.

Nonetheless, the challenges of legal synthesis are undeniable—and they are especially heightened for inexperienced novices. Moreover, the challenges of legal synthesis are compounded by traditional law school education, which provides minimal explicit instruction in synthesizing implicit legal principles.

### *E. Insufficient Law School Instruction*

Using a longitudinal design, the Law Student Reasoning Study researchers administered tests to students in their first year of law school and assessed them again with a different version of the test in their third year of law school.<sup>131</sup> The research results did not change; third-year students scored nearly identically to first-year students.<sup>132</sup> In other words, students performed just as poorly on cross-case indeterminate questions regardless of their year in law school.

Not only does this research confirm the difficulty of analyzing multiple ambiguous cases in tandem, but it also hints that law schools should better help students rise to the challenge. The failure of law students to improve over time implies that law schools offer inadequate instruction on how to synthesize. Both doctrinal courses and legal writing courses must be falling short in giving students what they need.

#### *1. Doctrinal Courses*

At first blush, doctrinal courses may appear to offer the perfect setting for students to learn to synthesize. Traditionally, students learn a subject area's legal doctrines using the "case method," reading numerous cases to learn the meaning of the law.<sup>133</sup> In the classroom, professors pair the case method with the Socratic method, asking students to dissect and analyze the cases they have read. Over the course of law school, students will read and analyze

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130. See SMITH, *supra* note 12, at 88 ("[B]ecause the [synthesized] test created by the advocate is a new one that only appears in the advocate's brief, a judge is likely to rely heavily on that brief.").

131. EVENSEN ET AL., *supra* note 5, at 15–16.

132. *Id.* at 1, 16.

133. Johnson, *supra* note 7, at 43; see Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 S.D. L. REV. 347, 351 n.9 (2001).

hundreds of cases using these methods. One would think that students would have ample opportunities to master the craft of synthesizing cross-case legal principles. Yet students continue to fall short. Why?

These traditional methods of teaching doctrinal classes may inadvertently undermine students' ability to learn synthesis by focusing too heavily on single-case analyses. As noted, the difference between a single-case analysis and a synthesized analysis is "not simply quantitative";<sup>134</sup> it is fundamentally different, requiring legal writers to abstract multiple cases to a "gist" level and identify structural relationships between them.<sup>135</sup> Even if the case method and Socratic method do teach students to analyze *many* cases, they do not necessarily teach students how to effectively synthesize *across* those cases.

In a nutshell, the case method and Socratic method require students to read, brief, and answer a professor's questions about individual cases.<sup>136</sup> Students spend great effort scrutinizing the anatomy of an opinion and summarizing its procedural history, legal issues, legally-significant facts, holdings, and reasoning. Students then move on to the next assigned opinion and repeat.

During this process, little may compel students to identify underlying structural features that cut across multiple cases. Students will (or fear they will) be quizzed in class about the particulars of an individual case, and their instinct is to prepare to answer those case-specific questions in detail.<sup>137</sup> The attention paid to surface details of individual cases, such as background facts or procedural history, inhibits deeper cross-case understandings and facilitates case-by-case thinking.<sup>138</sup> As Christine M. Venter has put it, "[s]tudents tend to memorize portions of the cases so that they can respond when called upon [in class]. They do not necessarily see the relationship between parts of the law, or how the elements or rules of a given case interrelate with the law as a whole."<sup>139</sup>

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134. EVENSEN ET AL., *supra* note 5, at 4.

135. *See supra* notes 93–96 and accompanying text.

136. Johnson, *supra* note 7, at 43.

137. *See* Schwartz, *supra* note 133, at 352 ("In fact, law professors devote considerable classroom time to critiquing students' case reading and case evaluation skills even though, ironically (or, perhaps, perversely), law professors seldom test case reading skills explicitly.").

138. *See* Cooper, *supra* note 1, at 314 ("Focusing solely on the detail level—specific surface factual details [in judicial opinions]—obstructs abstraction and transfer. This presents immediate problems for the case method and Socratic method of questioning, as well as current case briefing instruction methods, where the focus is on details of individual cases." (citing ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 4–5 (2007))).

139. Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 *MERCER L. REV.* 621, 630 (2006).

The focus on individual case briefing and quizzing in law school risks training students to default to an unsynthesized case-by-case approach to legal reasoning. A century ago, Karl N. Llewellyn recognized this risk. He described case briefing as “essential”—yet also “the saddest trap that ever awaited a law student” because of the temptation “to brief cases *one by one*, and therefore blindly . . . [A] case read by itself is meaningless, is nil, is blank, is blah.”<sup>140</sup> His advice?

Briefing should begin *at the earliest* with the second case of an assignment. Only *after* you have read the second case have you any idea what to do with the first. Briefing . . . is a problem of putting down what in the one case bears upon the problem stated by the other cases. . . . What does . . . [each] case *add, what difference does it make*, to what I already know? This is the keynote of the brief. For this same reason . . . you must distrust your briefs, and distrust most the earliest ones you made. The earlier in the research the brief was made, the less you knew when you made it; hence, the more worthless it is. Read through the first found case again, and see! The chances are the first half of the briefs made in any one job of research belong on the ash-heap. The cases blossom under further study, under new reading. They yield more wisdom as your wisdom grows.<sup>141</sup>

Given the results of the Law Student Reasoning Study and the difficulties students have conducting cross-case analyses, Llewellyn’s guidance remains worthwhile advice for law students.

To the extent that doctrinal course instructors wish for students to identify cross-case patterns, they often expect students to intuit those patterns themselves. “Pattern recognition instruction . . . seldom occurs in legal instruction. Law professors almost never explicitly identify for students or require students to identify common factual patterns relevant to spotting issues or to common patterns of legal argumentation.”<sup>142</sup> The instructor may give little attention to teaching cross-case pattern recognition due to a belief that students should learn the skill on their own or because of competing priorities that limit the professor’s use of class time, such as teaching the complexities of the substantive law itself or teaching other legal reasoning skills.

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140. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 54 (1930).

141. *Id.*

142. Schwartz, *supra* note 133, at 413.

Yet even when doctrinal course instructors do explicitly endeavor to guide students to link cases together, they do so in a context that is far different from practicing attorneys who synthesize the law to resolve client-centered legal issues. In a doctrinal course, the goal is for students to read cases from multiple jurisdictions to discern the “national law” or majority rules of the subject matter.<sup>143</sup> “Working with thematic ideas from cases across jurisdictional lines results in syntheses that necessarily capture the broad strokes of doctrine and policy underpinnings of the particular legal subject area, which is a process that is obviously valuable for teaching law students how to think about the law.”<sup>144</sup> However, the goal of such courses is to learn the subject matter broadly, not to synthesize a single jurisdiction’s case law to resolve a client’s legal issue.<sup>145</sup>

This “purely doctrinal” synthesis is different from the type of synthesis attorneys use in practice. When writing briefs, attorneys are limited to a single jurisdiction and particular client legal issues. They “synthesiz[e] cases to determine the particular law of a particular jurisdiction at a specific point in time,” with the goal of using the synthesized law to resolve a client’s legal issue.<sup>146</sup> This “practice realistic” type of synthesis is what is taught in legal writing courses, it was the type of synthesis investigated by the Law Student Reasoning Study,<sup>147</sup> and it is the form of synthesis of most interest to this Article.

Law schools offer especially minimal instruction in practice-realistic synthesis. Outside of the mandatory first-year legal writing course, students may have few, if any, systematic opportunities before graduation to learn how to synthesize legal principles in a practice-realistic, single-jurisdiction, client-centered context.<sup>148</sup> Some of the cross-case analysis skills learned in a doctrinal course may transfer to practice-realistic settings, but given the Law Student Reasoning Study’s findings that students’ ability to conduct a cross-

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143. *See id.*

144. *Id.*

145. Gionfriddo, *supra* note 4, at 3 n.1. Of course, students’ ability to resolve legal issues using doctrine is tested by law school exams, but these exams typically require students to apply general concepts that were previously learned—not synthesize new legal principles from new cases in a single jurisdiction. *Cf.* Schwartz, *supra* note 133, at 352 (“Of course, many law professors do require or encourage students to apply and distinguish cases in their examination answers, but requiring and encouraging the use of cases already studied and discussed in class does not test whether students have developed the skills of reading and analyzing new court opinions.”).

146. Gionfriddo, *supra* note 4, at 3 n.1.

147. *See* EVENSEN ET AL., *supra* note 5, at 4–5, 10.

148. *See infra* note 158 and accompanying text.

case analysis remains static between the first and third years of law school, the transferability appears limited.<sup>149</sup>

Doctrinal courses could place a greater emphasis on legal synthesis. Professors could more explicitly teach and model for students how to conduct a cross-case analysis, and the doctrinal courses could incorporate more practice-realistic, single-jurisdiction synthesis exercises. However, a full analysis of how doctrinal courses could be reformed to facilitate greater synthesis instruction is beyond the scope of this Article. Moreover, given how little doctrinal course instruction has changed since Christopher Landgell's instructional methods were popularized in the 1870s,<sup>150</sup> reforms that do more than tweak around the edges will likely be difficult to achieve. This is not to say that reform efforts are unimportant, but doctrinal courses are not the only type of law school course where students can learn synthesis. For now, legal writing courses offer more fertile ground to work with. Yet they, too, often fall short.

## 2. Legal Writing Courses

If structured appropriately, the first-year legal writing course can provide excellent opportunities for students to learn how to synthesize as attorneys do in practice. Because legal writing courses are designed foremost to teach students legal reasoning and drafting abilities, professors may teach synthesis free from the constraints of doctrinal instruction. Rather than using the case method and Socratic method, legal writing professors can use simulated legal memorandum and brief drafting assignments to explicitly teach students how to synthesize legal principles in the context of practice-realistic, single-jurisdiction client issues.

But the potential of legal writing courses does not appear to be met. If students are graduating law school without meaningfully

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149. Moreover, some doctrinal course instructors do not emphasize the skill of synthesis at all and instead focus on teaching students how to deductively apply rules that have been “pre-synthesized” by other sources. “[T]hese teachers believe that [contemporary] judges, lawyers and law students . . . function in a world in which statutes, cases, restatements, hornbooks, treatises and commercial outlines already provide explicit formulations of the specific rules of law applicable in factual situations.” Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 526 (1988). This “deductive” approach to doctrinal instruction may work well and even be the most effective instructional approach in a doctrinal classroom, where students are learning general principles of law across multiple jurisdictions. But it does not demand students synthesize the law on their own. This is not necessarily a critique of the deductive approach; rather, it is a call for law schools to incorporate more opportunities for students to learn synthesis as well—and for law schools to teach it more effectively. For a detailed discussion of the divide between the “inductive” and “deductive” approaches to doctrinal instruction, see *id.* at 523–27.

150. Schwartz, *supra* note 133, at 349–50.

advancing their ability to conduct cross-case analyses since early in their first year of law school, as the Law Student Reasoning Study shows, then legal writing courses—like doctrinal courses—are not giving students what they need. As Scott Fruehwald has summarized,

[W]hile second- and third-year law students are generally proficient at applying a single case to a set of facts, they are poor at synthesizing rules and applying several cases to a set of facts. This deficiency has developed because, except for perhaps a half a class in legal writing, synthesizing rules is not usually taught in law schools.<sup>151</sup>

If synthesis is critical to a practicing attorney's success, why do so many legal writing courses—whose goal is to make students practice-ready—provide only “half a class” to teach the skill? The answers are many. One is that legal writing courses, like doctrinal courses, have much more content to cover than just synthesis—and time is limited. Rather than covering doctrinal content, legal writing courses must also teach the two other types of legal reasoning—deductive rule-based reasoning and analogical reasoning. They also typically teach legal research, the conventions of disparate legal documents, legal writing style, citation style, oral argumentation, and possibly other practical skills such as negotiation, client counseling and interviewing, interacting with supervisors, soft skills, and professional identity formation. Given these competing priorities, legal writing professors may be tempted to (mistakenly) give legal synthesis little instructional focus.

Some legal writing professors may also have misguided ideas about the propriety of teaching legal synthesis. One notion is that professors should “hide the ball” and force students to learn synthesis on their own. This “self-teaching” model of instruction is common throughout traditional legal education.<sup>152</sup> Using this model, “law professors fail to state explicitly what students need to know, or to explain how to spot legal issues or to perform legal analysis.”<sup>153</sup> The lack of explicit explanation is by design, reflecting a belief that the best students will differentiate themselves by figuring out on their own how to reason.<sup>154</sup> The law professors who teach using this

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151. Fruehwald, *supra* note 2.

152. Schwartz, *supra* note 133, at 352 (“[L]aw school instruction . . . [is] self-teaching because, for the most part, law professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class.”).

153. *Id.*

154. *See id.* at 353–54.

model likely were once among the best students in their own graduating class and successfully self-taught in law school.

The self-teaching model has come under fire for leaving most students behind.<sup>155</sup> In the context of legal synthesis instruction, the self-teaching model is especially pernicious because the skill is not intuitive for most students, and few students enter law school with formal training in inductive reasoning.

Another misguided view is that, despite the benefits of synthesis, the skill is unnecessary for students to learn and that instruction in case-by-case reasoning is preferable. This is a minority view among modern legal writing professors; most contemporary legal writing textbooks do instruct students to synthesize the law,<sup>156</sup> even if the instruction may be lacking. But it is still a view held, consciously or unconsciously, by many. This view may reflect a professor's own instruction in law school; if a professor received subpar instruction or no instruction on how to conduct legal synthesis, then the professor may not see the benefit of teaching it to their own students. Alternatively, this view may reflect a belief that legal synthesis is too advanced for law students to learn and that students should wait until law practice to figure it out.

But one of the most common reasons that professors do not give sufficient attention to legal synthesis is that the skill is simply difficult to teach.<sup>157</sup> Unsurprisingly, helping students overcome the many challenges of legal synthesis poses a challenge for a professor. To teach students synthesis, the professor must explicitly walk them through how to use inductive reasoning, engage in a cross-case analysis, reason implicitly, and overcome ambiguity aversion—all while remaining patient as students struggle to learn and the professor likely struggles to teach. The next Part offers guidance on how legal writing professors can effectively teach legal synthesis.

### III.      TEACHING LEGAL SYNTHESIS IN THE FIRST-YEAR LEGAL WRITING COURSE

“To help students develop this skill [of synthesis], first-year professors need to *drill* this skill, just like they do case analysis.”<sup>158</sup> Legal writing professors can drill first-year students by incorporating a comprehensive legal synthesis curriculum into their teaching

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155. *See id.*

156. *See* sources cited *supra* note 3.

157. *See* sources cited *supra* note 9.

158. Fruehwald, *supra* note 2.

that is thorough and clear. This Part outlines the contours of such a curriculum. It offers guidance for professors to effectively design synthesis-friendly legal writing problems and to implement a legal synthesis module that provides students with a robust lecture and practice exercises.

### A. *Designing Synthesis-Friendly Legal Writing Problems*

“Legal writing problems” are the bread and butter of legal writing courses. Such problems call for students to write, usually over the span of several weeks, a memorandum or brief to resolve one or more simulated client legal issues within a single jurisdiction. Legal writing problems serve as secondary texts for a legal writing course.<sup>159</sup> They are the primary vehicles professors use to teach and assess a variety of skills—issue spotting, rule identification, analogical reasoning, rule-based reasoning, legal research, and writing style and clarity, just to name a few.<sup>160</sup> Problem design is one of the most important and challenging aspects of a legal writing professor’s work.

Much has been written about how legal writing professors can design effective legal writing problems generally.<sup>161</sup> But little has been written about how to create legal writing problems that effectively teach and assess legal synthesis. Without straying too far into the many other aspects of successful problem design, this Section offers guidance on how to create a legal writing problem that is synthesis-friendly.

#### 1. *Identify a Flexible Standard*

The literature abounds with different ideas on what to prioritize when designing a legal writing problem. Suggestions include starting by considering the types of sources that students will need to engage with (cases, statutes, encyclopedias, etc.);<sup>162</sup> the research methods students will need to practice;<sup>163</sup> the strength of the fact pattern and whether it is interesting and realistic;<sup>164</sup> and the

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159. Lorraine Bannai et al., *Sailing Through Designing Memo Assignments*, 5 LEGAL WRITING 193, 200 (1999).

160. Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 LEGAL WRITING 163, 164 (1997).

161. See *infra* notes 162–65 and accompanying text.

162. Bannai et al., *supra* note 159, at 208.

163. Tonner & Pratt, *supra* note 160, at 163–64.

164. See Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 PERSPS. 58, 59 (1995); Bannai et al., *supra* note 159, at 205–06.



structure of the legal rule that students will apply.<sup>165</sup> All of these suggestions are sensible. But when crafting a legal writing assignment that teaches synthesis, a primary consideration is the *plasticity* of the legal rule—that is, whether the legal rule is a “bright-line rule” or a “flexible standard.”<sup>166</sup>

Not all legal rules are plastic enough to provide a meaningful opportunity for original legal synthesis. Bright-line rules have definite meanings that typically offer few, if any, opportunities to synthesize legal principles. For example, a bright-line rule that “no individual under the age of eighteen may vote in a public election” offers no ground for interpretation; a legal writer can simply apply it directly to the facts of a case without elaboration. The analysis is straightforward: if a person under eighteen voted, they violated the rule; if a person over eighteen voted, they did not violate the rule.

At most, a rigid bright-line rule could be synthesized by fusing it with another related rule into a multipart test. For example, if another line of authority says, “no individual who has been convicted of a felony may vote in a public election,” then the two rules could be synthesized into “no individual under the age of eighteen or who has been convicted of a felony may vote in a public election.” But this unoriginal synthesis, where explicit rule statements from disparate sources are fused together, does not pose the challenges that students need to overcome to learn sophisticated inductive reasoning demanded by many legal issues.<sup>167</sup> It does require a cross-case analysis, but it involves little to no original thinking, reading between the lines, or wrestling with ambiguity.

In contrast to bright-line rules, “flexible standards” are ripe for synthesis. Flexible standards have indeterminate meanings that require a decision-maker to make an evaluative judgment on how to apply the standard to a given set of facts.<sup>168</sup> The “outrageous conduct” element of intentional infliction of emotional distress is an example of a flexible standard; so is its sister requirement that the plaintiff suffer “severe emotional distress.” The most famous flexible standard is built into countless broader legal rules: the

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165. Elizabeth E. Berenguer, *Designing Problems to Enhance Student Learning*, 28 LEGAL WRITING 71, 80 (2024). Berenguer identifies six rule structures: “simple declarative, conjunctive (sometimes called elements), factors (sometimes called totality of the circumstances), balancing, disjunctive (sometimes called either/or), and defeasible (sometimes called rule with exception).” *Id.* Each of these rule structures can present opportunities for synthesis.

166. For a detailed discussion of the differences between “bright-line rules” and “flexible standards” (the names of which are often truncated to simply “rules” and “standards”), see generally Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

167. See discussion of original and unoriginal synthesis *supra* Section I.A.3.

168. See discussion of bright-line rules and flexible standards *supra* Section I.A.3.

“reasonable person” standard, which rears its head when a legal rule uses the word “reasonable” or “objective.”<sup>169</sup> The words “outrageous,” “severe,” and “reasonable” do not have definite, universal meanings; they are open-ended, indeterminate, and malleable. Their plasticity gives legal writers ample opportunities to read between the lines of cases and synthesize legal principles that define these indeterminate words—and make the law a little less ambiguous in the process.

When designing a legal writing problem, start by identifying a legal rule that is a flexible standard (or has flexible standards built into its elements). This bucks conventional wisdom for legal writing professors to start with an interesting area of law, novel legal issue, exciting fact pattern, or digestible rule structure.<sup>170</sup> While these are worthwhile goals in problem design, they must be subordinate to a level of rule plasticity that supports synthesis. A professor can easily design a legal problem around a bright-line rule that can be resolved in a case-by-case analysis or using pure rule-based reasoning. But only plastic legal problems can facilitate the teaching of original synthesis. Beginning problem design by identifying a flexible standard is the first step to ensuring that the legal writing problem will successfully teach and assess the skill of legal synthesis.

## 2. *Ensure Numerous and Diverse Cases Apply the Standard*

After identifying a flexible standard, the next step is to ensure that it has been interpreted by numerous and diverse cases within a given jurisdiction. This step will require the professor to conduct extensive legal research, and it is likely the most time-consuming part of problem design. Yet this work is vital. Just as numerosity and variety are important to support a synthesized legal principle, so too are they important to problem design.

As a consequence, a popular version of the legal writing problem—a one-case memorandum, in which students solve a legal issue using only a single assigned case—is not conducive to teaching legal synthesis. Although a legal principle *can* be generalized from

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169. Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 S.D. L. REV. 651, 654 (2013) (“The reasonable person ‘inhabit[s] every nook and cranny of the common law’; he is a character who has found a place in tort law’s negligence, affirmative defenses in criminal law, *Miranda* jurisprudence, the Establishment Clause, and even habeas proceedings, along with a host of others.” (alteration in original) (footnotes omitted) (quoting John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 273 (2001))).

170. See *supra* notes 162–65.

a single case, this is the simplest form of inductive reasoning and the most likely to lead to a hasty generalization.<sup>171</sup> A cross-case synthesis is more challenging and practice realistic. Moreover, cognitive science shows that learning synthesis can be undermined by requiring students to work on cases individually.<sup>172</sup> Overemphasis on a single case can encourage students to “get lost” in superficial case details and miss important legal principles that may become apparent only when they emerge as patterns that cross multiple cases. Drawing upon cognitive research, Cooper advises legal writers to “compare and abstract from two or more cases at once, instead of relying on individual cases, since comparing two cases can lead to a better understanding as a whole even when neither case is well-understood individually.”<sup>173</sup> A one-case memorandum may be well-suited to teach simple deductive and analogical reasoning, but it cannot effectively teach legal synthesis.

Fortunately, students can learn to synthesize with as few as two or three cases. Recall that the “long duration” principle that helps define the “outrageous conduct” standard of IIED was synthesized from only three cases.<sup>174</sup> Designing a legal writing problem that involves a small number of cases may be advantageous early in the academic year so as not to overwhelm students.<sup>175</sup> If using a small number of cases, those cases should be varied enough in their fact patterns and outcomes to give students sufficient inductive support to synthesize principles. A professor can choose to limit the number of cases by creating a closed research legal writing problem that uses only a few cases or by designing an open research legal writing problem around an underdeveloped area of law.

However, even early in the academic year, there are several pedagogical advantages to using a synthesis-friendly legal writing problem that involves more than merely two or three cases:

- (1) The more cases available to students, the more opportunities students have to recognize a pattern or theme that can form

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171. See Aldisert, Clowney & Peterson, *supra* note 12, at 14 (“Most importantly, you must be careful to assemble a sufficient number of examples before shaping a far-reaching rule, or you will be guilty of the fallacy of ‘hasty generalization.’”); see also SMITH, *supra* note 12, at 70 (“Induction in its simplest form occurs when one induces a general proposition from a single instance. . . . Induction from a single event, however, is frequently unreliable.”).

172. See Cooper, *supra* note 1, at 315.

173. *Id.*

174. See Synthesized Explanation *supra* Section I.B.

175. Cf. Berenguer, *supra* note 165, at 85 (encouraging professors to “scaffold” legal writing problems based on rule structure by first introducing students to legal writing problems that use simple rules before advancing students to legal writing problems that use complex rules). For further discussion of scaffolding, see *infra* Section III.B.1.b.

the basis of a legal principle. Some students may abstract a principle, such as the “long duration” principle of outrageous conduct, after reading only two cases that imply its existence. Other students may not abstract it until reading three, four, or more cases.

- (2) Oftentimes, a greater number of cases will allow for a greater total number of opportunities to synthesize. Two or three cases can imply only so many principles. “Long duration” is one implicit criterion courts may consider when determining whether conduct is outrageous, but others exist as well. Increasing the variety of fact patterns increases the variety of principles students can synthesize. This variety can be important not only to satisfactory resolution of the legal issue, but to students’ skill development. If a student fails to abstract one legal principle, they can still practice synthesis by abstracting others.
- (3) Providing numerous and diverse cases allows students more opportunities to provide inductive support for their synthesized principles. In practice, attorneys who support their work with few or nondiverse cases risk committing the hasty generalization fallacy and losing their arguments. Students can learn how to mitigate this risk by citing and illustrating numerous and diverse cases.
- (4) Diverse cases also allow students to synthesize principles to support arguments on both sides of a legal issue. Building “tension” into a legal problem that allows students to argue both sides is a laudable pedagogical goal.<sup>176</sup> The more cases with diverse outcomes are available, the more balanced the legal writing problem will be, and the more opportunities students will have to synthesize principles favoring different outcomes.

Science does not dictate an ideal number of cases to use when building a synthesis-friendly legal writing problem. Anecdotal evidence suggests that roughly six cases, half of which support one party and half the other, are appropriate for the students’ *first* assigned legal writing problem. Having personally used many such problems and worked with colleagues who have done the same, I can attest that the four advantages discussed above are achievable by legal writing problems that involve roughly six cases.

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176. Bannai et al., *supra* note 159, at 202.

Whatever number of cases is chosen for the first assignment, subsequent legal writing problems should increase the number and variety of cases students use. After students get their feet wet, they should be progressively challenged with more sophisticated opportunities for legal synthesis. “Writing experiences must be scaffolded so that problems assigned early in the semester are designed around simpler skills and later evolve to incorporate more complex ones.”<sup>177</sup>

### 3. *Find Synthesizable Legal Principles and Create Principle-Relevant Facts*

After settling on a flexible standard that courts have applied across a mix of numerous and diverse cases, the professor must do what they will ask the students to do: synthesize. This is the most important step in creating a synthesis-friendly legal writing problem. If a professor struggles to find patterns or implicit themes that cut across cases, then students will struggle even harder. The only way for the professor to verify that the legal writing problem will effectively teach the skill of synthesis is for the professor to first synthesize principles personally.<sup>178</sup>

Synthesizing principles before students do is beneficial for several reasons. First, it allows the professor to verify that the chosen flexible standard is, in fact, flexible. If a legal rule uses an open-ended term like “reasonable,” it is *usually* flexible. But if the cases have explicitly defined the legal rule using bright-line subrules such that its meaning has become fixed and clear, then the legal rule is not a good candidate for a synthesis-driven legal writing problem. Similarly, if courts have so explicitly refined the legal rule that its criteria are unambiguous, then students will not be able to engage in original thinking and implicit reasoning. By surveying the cases and searching for implicit themes and hidden meanings, the professor can ensure the legal rule is sufficiently flexible and indeterminate for students to refine through synthesis.

Second, the professor can verify that the flexible standard is not *too* ambiguous. If the standard has been applied to too few cases, or no cases at all, then courts may not have confronted enough fact patterns to meaningfully elaborate on its meaning. Although students will certainly get value out of addressing an issue of first

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177. Berenguer, *supra* note 165, at 90. For further discussion of scaffolding, see *infra* Section III.B.1.b.

178. This guidance parallels advice given by other authors to professors to write or outline their own answers to legal writing problems before assigning them to students. See Bannai et al., *supra* note 159, at 203–04.

impression, interpreting a virgin statute, or resolving a circuit split, legal synthesis is typically not a skill that is tested by these types of legal issues.

Third, identifying legal principles empowers the professor to craft a fact pattern for the legal writing problem that contains principle-relevant facts. Synthesis is meaningless in a vacuum. To teach and assess the skill of legal synthesis, a legal writing problem must involve issue-driven facts that students can apply the principles to. The fact pattern need not speak to every conceivable principle; the professor can tailor the facts to those principles that the professor feels are most important, workable, or fit with other goals that the professor has for the fact pattern, such as telling an interesting and realistic story.

The professor should keep in mind that because legal synthesis involves originality and subjectivity, students' synthesis may differ in acceptable ways from the professor's own synthesis. Students may phrase principles differently, and they may even discover relevant principles that the professor missed. Nonetheless, having a baseline understanding of what students are likely to synthesize will help the professor anticipate questions, guide the students toward abstracting relevant principles, and prepare for grading students' final papers.

A related suggestion is for the professor to recruit a student teaching assistant or research assistant to wrestle with a draft legal writing problem and synthesize principles. The same caveats apply: upper-level students may phrase principles differently or synthesize altogether different principles. But having an upper-level student take on this challenge can give the professor another perspective on how other students are likely to react to the legal writing problem and the principles they will likely synthesize.

Finally, a professor may run the cases through a generative artificial intelligence program, such as Lexis AI+ Protégé, to see what principles it can identify. This can be potentially helpful in the same ways as a teaching assistant. If the professor allows students to use generative AI on the assignment, it can also prepare the professor for the types of results students are likely to receive. However, the impact of generative AI on the legal profession is a burgeoning area of research, and the effects of generative AI on legal synthesis have yet to be meaningfully studied.

Evidence suggests that at present, generative AI chatbots struggle with ambiguity, especially when that ambiguity extends across multiple cases. It can summarize cases and suggest arguments based on the explicit text of cases, but like humans, it finds the

process of synthesizing implicit principles challenging.<sup>179</sup> Even explicitly instructing an AI program to synthesize implicit principles usually leads to it summarizing judicial opinions' explicit text in a case-by-case fashion.<sup>180</sup> Therefore, the professor will need to primarily rely on their own synthesis skills, and perhaps the skills of a trusted teaching or research assistant, to identify possible implicit principles in the legal writing problems they develop. This is also a cautionary tale for students that generative AI does not offer any easy shortcuts; synthesis is a skill they must learn on their own.

### *B. Legal Synthesis Module*

With a synthesis-friendly legal writing problem in hand, the professor can prepare to teach the skill of synthesis to students in the classroom. This Section offers a module on legal synthesis that professors may implement shortly after assigning the course's first synthesis-friendly legal writing problem. The module assumes that students have several weeks before the legal writing problem's memo or brief is due, during which time they can learn about the skill of synthesis through this module. After the module is complete, students can demonstrate what they learned when they complete a final draft of the memo or brief; the professor can then assess their work and provide feedback.

This module *introduces* students to legal synthesis, and the professor must keep realistic expectations. Outside of a few rare students who can easily intuit the skill, students will not master legal synthesis after completing this module. Synthesis is a skill that students will continue to develop and refine with further practice, ideally with additional synthesis-friendly legal writing problems assigned after this module's completion. The goal of this module is for students to start to overcome the challenges of legal synthesis and learn the fundamentals of how to effectively induce general principles of law from multiple cases.

The scope of this module is limited to legal synthesis. It does not teach students how to use deductive reasoning to interweave a synthesized legal principle with a new set of facts. It also does not teach students how to construct case analogies. These "law application" skills are important enough to deserve separate modules in a legal writing course. Nonetheless, all of these concepts are connected and recursive. When a student later learns how to construct and support

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179. See *infra* note 277 and accompanying text.

180. However, AI has some ability to synthesize implicit legal principles. See discussion *infra* Section III.B.4.c.

a principle-based argument using deductive and analogical reasoning, the student will refine their thinking and likely return to the skill of synthesis to add, amend, or abandon the legal principles they synthesized earlier in the writing process. This, in turn, will lead to more sophisticated deductive and analogical arguments. Teaching legal synthesis establishes a firm foundation on which deductive and analogical skills can be developed and refined. Likewise, instruction in deduction and analogy will reinforce the lessons learned from this synthesis module.

This Section begins by describing the cognitive principles that guided the design of this module and should animate its implementation. It then describes the timing of when to deploy the module and the prerequisite knowledge and skills students need before learning synthesis. Finally, it describes the content of the module itself: a legal synthesis lecture delivered by the professor, followed by exercises that allow students to practice the skill.

### *1. Guiding Pedagogical Principles*

To successfully teach legal synthesis, the legal writing professor must “meet students where they are.” First-year law students may have an intuitive understanding of simple inductive reasoning, but few have had any formal training in the skill or have synthesized a legal principle before law school. Students will require a fair amount of handholding and clear instructions to develop legal synthesis skills, especially at first. The legal synthesis module this Article proposes is guided by two foundational pedagogical principles, both of which are informed by cognitive science: metacognition and scaffolding.

#### *a. Metacognition*

Metacognitive strategies help novices learn new skills.<sup>181</sup> Metacognition, or “thinking about one’s own thinking,”<sup>182</sup> refers to the *knowledge* a person has about their thinking and the ability to *regulate* their thinking.<sup>183</sup> Unlike cognition, which involves the mental work of performing a task, metacognition involves understanding

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181. Schwartz, *supra* note 133, at 376.

182. *Id.*

183. Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 43 (2006).



*how* to perform (and learn) the task.<sup>184</sup> Metacognition allows learners to recognize weaknesses in their performance and create new cognitive skills to ameliorate them.<sup>185</sup> “The theory behind metacognition is that those learners who apply appropriate metacognitive strategies are better self-regulated and effective learners.”<sup>186</sup> Metacognition empowers students to adopt appropriate learning strategies that encode new cognitive skills in long-term memory<sup>187</sup> and transfer cognitive skills to new contexts and problems.<sup>188</sup>

The legal synthesis module facilitates the development of metacognitive skills. In the legal profession, metacognition involves developing “knowledge of the cognitive skills required of a lawyer so the student can match skills, or the lack thereof, to the particular tasks” expected in the legal profession.<sup>189</sup> Inductive reasoning is a foundational cognitive skill that lawyers must learn and refine. This module teaches that skill explicitly and transparently—in a step-by-step fashion. Inductive reasoning is not a skill that can be taught well by “hiding the ball,” or by simply telling students to “synthesize!” and expecting them to figure out how on their own. Although some students can synthesize intuitively, most law students learn best by explicit instruction that allows them to consciously follow the process of inductive reasoning. By transparently teaching students how to reason inductively, professors allow students to metacognitively regulate their learning. Once students understand the challenge of the task, they can plan goals to deepen their understanding, monitor their comprehension and skill development, self-evaluate their performance, and identify steps to improve.<sup>190</sup> The legal synthesis module’s lecture and exercises are designed and sequenced to help students use these metacognitive strategies.

But more than teaching students the steps of *how* to synthesize, the legal synthesis module teaches students *why* and *when* attorneys synthesize. Without the “why” and “when,” students may learn to go through the motions of synthesis to complete classwork without fundamentally understanding its role in resolving legal issues. By teaching students to consider the circumstances where synthesis

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184. *Id.* at 42–43 (“For example, the ability to use a digest or Westlaw/LexisNexis to find relevant case law is a cognitive skill, whereas knowing when to use a digest or Westlaw/LexisNexis involves metacognition or a metaskill.”).

185. *Id.* at 44.

186. *Id.* at 42.

187. Schwartz, *supra* note 133, at 376.

188. Niedwiecki, *supra* note 183, at 45, 61.

189. *Id.* at 57–58.

190. *See id.* at 61–62.

is appropriate and why attorneys use it, students will more easily transfer the skill to new legal issues outside of the context of the legal writing course.<sup>191</sup>

*b. Scaffolding*

The legal synthesis module is scaffolded to facilitate student learning by maintaining a manageable cognitive load. Legal synthesis is a cognitively onerous task—especially for novices who are new to the skill.<sup>192</sup> “Cognitive load” refers to “the mental burden that managing working memory imposes on a person.”<sup>193</sup> A person can only store a few pieces of information in working memory simultaneously, and information in working memory is stored only for a short period before it is forgotten.<sup>194</sup> Thus, working memory is a limited resource that can be quickly exhausted when a person is exposed to complex information. To truly *learn* new information, the information must be transferred from working memory to long-term memory.<sup>195</sup> To accomplish this transfer, a person must mentally organize the information into a cognitive “chunk” or *schema*. A schema is a structure of long-term memory that stores knowledge and skills for retrieval in the distant future with negligible cognitive load.<sup>196</sup> Seasoned attorneys have developed numerous schemata that allow them to almost automatically perform their day-to-day work. For instance, “understanding of how to perform legal reasoning, how to develop case holdings from court opinions, how to draw inferences from facts, and how to apply and distinguish cases all are stored in schemata.”<sup>197</sup> Law students are in the early stages of developing schemata for legal knowledge and skills, including the complex skill of legal synthesis. As such, the cognitive load imposed on students who are first learning to perform legal synthesis is great.

The legal writing professor must manage students’ cognitive load to foster their ability to learn legal synthesis and transfer the skill-set to long-term memory. To this end, the professor should scaffold the opportunities students have to learn about synthesis through lecture and exercises. “Scaffolding” refers to the process of teaching

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191. *See id.* at 60–61.

192. *See* Cooper, *supra* note 1, at 308.

193. Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space to Allow First-Year Legal Writing Students to Focus on Analytical and Writing Processes*, 20 LEGAL WRITING 109, 110 (2015).

194. *Id.* at 111; Schwartz, *supra* note 133, at 372.

195. Enns & Smith, *supra* note 193, at 110.

196. *See id.* at 111–12, 119.

197. Schwartz, *supra* note 133, at 374.

students by building from existing knowledge and simple tasks to new knowledge and more complex tasks.<sup>198</sup> When scaffolding, the professor gradually diminishes the amount of assistance the student receives until eventually the student can complete the task without aid.<sup>199</sup> The professor paces students through the learning process so that they do not become overwhelmed by too much new, complex information. When the cognitive load is excessive, the learning process shuts down.<sup>200</sup> Scaffolding prevents such cognitive overload.

In the context of legal synthesis pedagogy, scaffolding means introducing students to the basics of inductive reasoning and relating it to their prior experiences, adding new information about inductive reasoning in a legal context, having students complete increasingly challenging legal synthesis exercises, and gradually decreasing the amount of feedback provided to students on their attempts to synthesize. The legal synthesis module is rooted in these scaffolding techniques.

## 2. *Timing and Prerequisites*

The first scaffolding consideration is the timing of when to deploy the legal synthesis module within the course curriculum. The module is designed for students to learn in tandem with a memo or brief assignment that responds to a synthesis-friendly legal writing problem. If the professor assigns a synthesis-friendly legal writing problem at the beginning of the academic year, then this module should be implemented in the first few weeks of the course. Alternatively, the professor can delay assigning the course's first synthesis-friendly legal writing problem until later in the academic year, in which event this module should be implemented then. For example, the professor may ask students to first draft an unsynthesized, case-by-case analysis of the legal writing problem using only one or two cases at first, and then transform that analysis into a synthesized version with additional cases. Or, a professor may wait to deploy their synthesis-friendly legal writing problem until after the first semester of a year-long legal writing course, after students have completed other legal writing problems that do not require synthesis.

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198. Karen J. Sneddon, *Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom*, 48 MITCHELL HAMLINE L. REV. 1095, 1106 (2022).

199. Enns & Smith, *supra* note 193, at 114.

200. Sneddon, *supra* note 198, at 1106.

The advantage of teaching legal synthesis earlier, rather than later, is that students will not need to break the habits of case-by-case analysis they formed first—habits that may accustom students to hyperfocus on the superficial details of individual cases and therefore inhibit learning cross-case analysis.<sup>201</sup> Professors should not be afraid to teach legal synthesis early in the academic year.

Regardless of when the professor chooses to implement this module, it requires students to have some prerequisite knowledge. Before learning to synthesize, students must first learn basic legal concepts and case analysis skills. Before synthesizing a principle that crosses multiple cases, a student must understand the basic components of a judicial opinion, what a legal rule is, and how to identify a legal rule in a single case. Students also should be able to recognize that courts break most legal rules into constituent “sub-rules” (elements or factors) and apply the sub-rules to a case’s facts to resolve a legal issue. To head off concerns that students will focus on the superficial details of a case, professors should help students distinguish between relevant legally-significant facts and irrelevant background facts.<sup>202</sup> Professors should introduce students to the various rule structures<sup>203</sup> and to the concept of rule plasticity (flexible standards versus bright-line rules).<sup>204</sup>

Students should also understand the legal syllogism before learning legal synthesis and receive a light introduction to deductive reasoning. Students do not need to fully master these concepts to synthesize, and a full module on deductive reasoning can follow the module on legal synthesis. But students should begin with the end in mind. A basic introduction to the legal syllogism serves this function. By understanding that a synthesized legal principle will eventually be applied deductively to a set of facts, students will understand the goal that legal synthesis serves and *why* they need to learn the skill. Most variants of the legal syllogism represent the major premise with a “rule” or “rule explanation” section, and students should know that this is where they will demonstrate their skill of legal synthesis.<sup>205</sup>

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201. See *supra* note 102 and accompanying text.

202. See Cooper, *supra* note 1, at 314 (advising legal writers to learn and perform synthesis by first “abstract[ing] single cases to a higher level of abstraction to the gist or abstract level to move beyond surface details and observe structural features, such as the underlying dispute, material facts, holding, and rationale”).

203. See *supra* note 165 and accompanying text.

204. See *supra* Section III.A.1.

205. See *supra* note 31 and accompanying text. The variation of the legal syllogism that the professor chooses to use—be it IRAC, CREAC, TREAT, or something else—is not of major consequence. Professors have leeway to choose whichever variant they wish; all of them can accommodate a synthesized analysis.

### 3. *Lecturing on Legal Synthesis*

After students have the prerequisite knowledge, the professor can formally begin the legal synthesis module with an in-class lecture. This Subsection offers guidance on what substance to include in the lecture and how to structure it.

To prepare for the lecture, students should read about rule explanations and the process of synthesis beforehand. Many legal writing textbooks include at least a cursory introduction to legal synthesis that the professor can assign.<sup>206</sup> However, reading a legal writing textbook is insufficient by itself to teach legal synthesis. The professor should plan to spend significant time in class expanding upon synthesis concepts during the lecture. The professor may wish to use a PowerPoint or distribute handouts to visually reinforce important information and convey examples given during the course of the lecture.

#### a. *Case-by-Case Method*

To scaffold the lecture, students should build from existing knowledge and simple tasks to new knowledge and more complex tasks.<sup>207</sup> Therefore, a natural—if counterintuitive—starting point for the lecture is to begin by teaching students about the inverse of synthesis: a case-by-case method of explaining the law. Students “should immediately recognize . . . case-to-case analogical reasoning because casebooks are rife with it.”<sup>208</sup> Thus, teaching students about the case-by-case method draws upon students’ existing knowledge. The case-by-case method also involves simpler tasks than synthesis: summarizing and parroting the explicit points made in past cases. It does not involve the more challenging tasks of cross-case implicit reasoning and inductive generalization.<sup>209</sup>

Because students will be familiar with the case-by-case method and its relative simplicity, the lecture need not have a large focus on it. But students should, at a minimum, be shown some examples of cases or other legal documents that use the case-by-case method to explain the law. These examples could be assigned as part of the reading before class, or students could be given the examples to read during a pause in the lecture itself. Either way, the lecture should highlight the drawbacks of the case-by-case method, including the amount of space taken up by lengthy case summaries, which

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206. See sources cited *supra* note 83.

207. See *supra* Section III.B.1.b.

208. MURRAY & DESANTIS, *LEGAL WRITING*, *supra* note 3, at 138.

209. See *supra* Part II.

may exhaust the reader and limit the number and variety of cases the author can draw upon to support their arguments.<sup>210</sup>

*b. Inductive Reasoning*

With this foundation established, students should be presented with the alternative approach of legal synthesis. This presentation should begin with a short introduction to inductive generalization. Most first-year law students have, at best, a cursory understanding of the concept, and legal writing textbooks generally do not discuss it in any detail.

The lecture should define what inductive reasoning is: using specific instances to infer a general conclusion. Emphasize that the reasoning moves from specific to general. Students should understand that inductive reasoning offers only probable, not certain, results, and that the way to increase the probability of success is by increasing the number and variety of particular instances that support the generalized conclusion.<sup>211</sup> Finally, students should be given a non-legal example of inductive reasoning. For instance, students could be told a version of the example used in the discussion of inductive reasoning above in Section I.A.3:

You adopt a dog and observe its behavior each day.

- Day #1: Your dog barks when the postal carrier approaches your door.
- Day #2: Your dog barks when your neighbor approaches your door.
- Day #3: Your dog barks when your relative approaches your door.
- Therefore, your dog barks whenever someone approaches your door.

Having introduced the concept of inductive reasoning, students are prepared to learn how inductive reasoning serves a legal analysis: by using individual cases to infer, or synthesize, a general legal principle that explains a legal rule or subrule.

*c. Structure of Legal Synthesis*

The concept of legal synthesis can be difficult to understand in the abstract, and students will benefit from seeing how attorneys

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210. See *supra* Section I.C.

211. See Cooper, *supra* note 1, at 301.

construct, support, and use legal synthesis when writing legal documents. To facilitate this instruction, students can be given a simple structure for writing a synthesized analysis: **Legal Principle—Citations—Case Illustrations**.<sup>212</sup> This structure “chunks” synthesis into three components, decreasing cognitive load and making the concept easier to understand and retain.<sup>213</sup> It also reflects how attorneys can effectively organize a synthesized analysis when writing a legal document.<sup>214</sup> To scaffold the teaching of each chunk, the lecture should briefly define each of the three components before providing more complex information about them:

- **Legal Principle:** A synthesized statement explaining how courts apply a rule or subrule when a particular “type” or category of fact is present in a case. This statement may span one or more sentences.
- **Citations:** Attribution is necessary to show that the case law supports the legal principle. Because the legal principle is synthesized from multiple cases, multiple citations should be included to support it.
- **Case Illustrations:** Partial case summaries show how the courts applied the legal principle to the relevant facts in the cited cases.

The next phase of the lecture should delve into further details on each structural chunk—starting with the “legal principle” and the process of synthesizing legal principles.

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212. This structure is inspired by the explanatory synthesis paradigm, Proposition—String Cite—Parentheticals, articulated by Michael D. Murray and Christy H. DeSanctis in MURRAY & DESANCTIS, *LEGAL WRITING*, *supra* note 3, at 127. However, the structure this Article proposes is more flexible in two ways. First, it allows legal principle statements to exceed a single sentence in length. *Contra id.* at 127 (“Each proposition for the syntheses you write in the course of an Explanation Section must be a single sentence.”). For a multi-sentence principle statement, the citations (and parentheticals) that support the legal principle can be placed at the end of the paragraph. See CAROLYN V. WILLIAMS, ASS’N OF LEGAL WRITING DIRS., *ALWD GUIDE TO LEGAL CITATION* 368 (7th ed. 2021) [hereinafter *ALWD GUIDE*] (rule 34.2). Second, this structure is agnostic on whether case illustrations take the form of parentheticals, textual case illustrations, or both. Although parentheticals are often preferred because they are concise and offer many advantages over textual case illustrations, *see supra* notes 64–69 and accompanying text, either form of case illustration can be effectively used to illustrate a synthesized legal principle. Different circumstances and preferences may dictate when the author should support a synthesized analysis with parentheticals, textual case illustrations, or both.

213. See Laura A. Webb, *Why Legal Writers Should Think Like Teachers*, 67 J. LEGAL EDUC. 315, 326–28 (2017) (describing how chunking information into “smaller, manageable pieces” can reduce cognitive load and maximize the transfer of information from working memory to long-term memory).

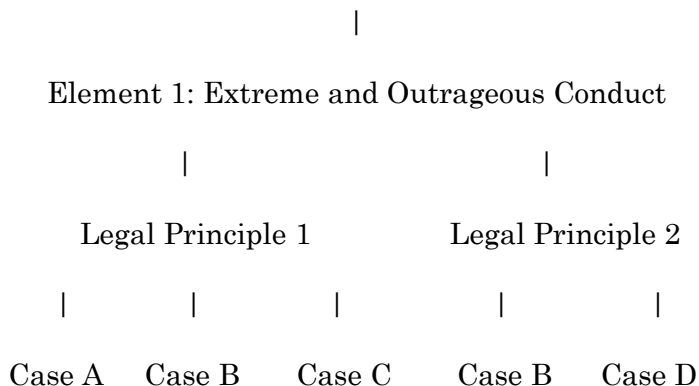
214. See Synthesized Explanation *supra* Section I.B.

*d. Process of Legal Synthesis*

A legal principle is the end result of a synthesis of cases, and students should understand its dual purpose: first, to explain the meaning of the element of a legal rule, and second, to be deductively applied to a client's facts. Synthesis is an outcome-driven process, and legal principles belong in a document only if they are relevant to the client's fact pattern.

The lecture should also make explicit the level of generality at which synthesized legal principles operate. Because it explains a legal rule's element, a legal principle is narrower than the element itself. Because it is typically inferred from multiple cases, it is also broader than any one case holding. Students will benefit from seeing a visual diagram of the relationship between an overall legal rule, element, principle, and case holdings:

Overall Rule: Intentional Infliction of Emotional Distress



Having established a basic picture of what a legal principle is, students are prepared to absorb more complex information about synthesizing the two types of legal principles: explicit and implicit.

As the name suggests, explicit legal principles are explicitly stated in cases. Conceptually, they require little explanation to students because they can be lifted directly out of case opinions and placed into their own writing. However, students should be cautioned that they may still need to engage in some simple acts of unoriginal synthesis before placing explicit principles into their own writing.<sup>215</sup> First, cases can use different language to refer to the same principle; when this occurs, the student's task will be to

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215. See discussion of unoriginal synthesis *supra* Section I.A.3.



harmonize that language.<sup>216</sup> Second, some cases may articulate one part of a principle, and other cases may articulate a different part of a principle.<sup>217</sup> Students will need to fuse these different parts into one complete principle statement in their own writing.<sup>218</sup> Finally, even explicit principles that do not require harmonizing language or fusing parts can still benefit from synthesized citation support. Numerosity and variety are less necessary to “prove” legal principles that courts have previously announced explicitly, but including numerous and diverse citations still bolsters an explicit principle’s strength by demonstrating the firmness of its case law support.

To help make the concept of a legal principle more concrete, students can be provided an example of an explicit principle, either orally or preferably through a PowerPoint or written handout. The case law is littered with examples that the professor could choose from; one such example is given below, along with its relationship to a broader legal rule.

**Overall Rule:** Battery is intentionally causing offensive or harmful contact with another person.

**Element:** Offensive contact

**Principle:** Contact can be offensive when an object closely connected to a person’s body is touched by the defendant.<sup>219</sup>

After completing discussion of explicit legal principles, the lecture can shift to the more challenging topic: synthesizing implicit legal principles. Students should understand that implicit legal principles, like their explicit counterparts, typically arise out of multiple cases and serve the same function: explaining broader rules or elements and constructing the major premise of a deductive argument. What differs is that generating implicit legal principles requires a contextual or subtextual analysis in which students “read between the lines” of case opinions to capture reasoning that is left unstated.

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216. Gionfriddo, *supra* note 4, at 11.

217. *Id.* at 12.

218. *Id.* at 13.

219. *E.g.*, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (holding that grabbing defendant’s dinner plate out of his hand constituted offensive contact); *Stokes v. State*, 115 N.E.2d 442, 443 (Ind. 1953) (holding defendant offensively contacted plaintiff when he fired a gun and the bullet blew a hole in plaintiff’s necktie and did not directly strike plaintiff’s body).

Students may feel anxiety and ambiguity aversion at this stage, preferring to stick to the explicit text of case opinions. They may fear that they will “make up” legal principles that are not supported by the cases. The lecture must emphasize that confronting indeterminate case opinions is a necessary part of an attorney’s role. Reassure students that so long as the cases support an implicit principle, and so long as students *show their work* by including supportive citations and accurate case illustrations in their writing, they should not fear implicit principles. Rather, students must find the courage to synthesize them.<sup>220</sup>

The lecture should also tell students that different attorneys may find different implicit principles. Synthesis does not produce black and white results; it involves subjective decisions and leads to a “reasonable zone of right answers.”<sup>221</sup> To further help students overcome ambiguity aversion,<sup>222</sup> remind students that ambiguity is a blessing for our profession: arguing over different interpretations of the law keeps attorneys employed.

After offering these reassurances, the lecture should explicitly lay out the process of synthesizing an implicit legal principle. Explicit instruction will allow students to more easily conduct synthesis and more easily transfer the skillset to “new and novel situations, instead of the exact situation that the students are studying at any particular moment.”<sup>223</sup>

Before proceeding, students should be reminded that synthesized legal principles are generally used to elaborate upon a type of fact that a court considers important in applying an element or subrule of an overall rule. Students should synthesize legal principles for each element separately.

The process of synthesizing implicit legal principles can be condensed into five steps for students:<sup>224</sup>

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220. COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 108 (instructing students to “[d]are to explicitly state an implicit rule”).

221. See discussion *supra* Section II.D.

222. See discussion *supra* Section II.C.

223. Niedwiecki, *supra* note 183, at 60–61.

224. These steps are similar to those described in Cooper, *supra* note 1, at 296–97 (describing five steps of synthesis), with some variation. Rather than instructing students to read each case individually, extract an individual rule from each case, and then combine those individual rules, *id.*, I prefer to instruct students to identify “a pattern of similar facts.” Students may not notice an implicit legal rule in an individual case until they have read multiple cases and seen patterns of similar facts. Students who focus on pinpointing the rule of each individual case first and then attempt to merge individual case rules may miss the forest for the trees.

**(1) Read and brief cases relevant to a legal issue.** Students must first have some understanding of the overall rule, elements, and case law that governs the legal issue they are working to resolve.

**(2) Sort cases by element outcome.** Cases in which the facts satisfied an element of the legal rule go into one group; cases in which the facts did not satisfy that element go into another group.

**(3) Identify a pattern of similar facts within each group.** Within each group, look for subgroups of cases that have similar facts. Take note of those similar facts and consider whether those similarities can explain (at least partially) the cases' common outcomes.

**(4) Describe the pattern of similar facts as a legal principle.** For each relevant category of similar facts identified, create a general term that describes and encompasses those facts. Link that term to the associated outcome. The resulting principle should be describable in the basic form "if *x* category of fact is present, then *y* is (or is more likely to be) the outcome."

**(5) Test the principle.** Apply the principle to the facts of each case within both groups to ensure it is consistent with the body of case law.<sup>225</sup> Testing can also reveal additional cases that support the principle, including positive support from cases whose similar facts satisfy the principle and negative support from cases whose superficially-similar facts fail to satisfy the principle.<sup>226</sup> The greater the number and variety of cases that support a principle, the stronger it is inductively.<sup>227</sup> But if the principle is found to conflict with any case's holding, then refine the principle to broaden or narrow its scope to avoid the conflict if possible. If the conflict is unavoidable, discard the principle.<sup>228</sup>

To facilitate teaching this process, the professor may wish to show students a synthesis case chart. A synthesis case chart allows students to easily follow the above steps. Synthesis case charting is discussed more below in Section III.B.5.

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225. Gionfriddo, *supra* note 4, at 14–15.

226. See discussion of positive and negative case law support for synthesized principles *supra* Section I.B.

227. See Cooper, *supra* note 1, at 301.

228. Gionfriddo, *supra* note 4, at 14–15. That is, unless the legal writer can plausibly argue that the contradictory case is an aberration that should be (or already has been) ignored, that courts have abandoned that case's approach, or that the case should be overturned. Generally speaking, rare scenarios where courts have created two competing lines of authority can be highly challenging; discussion of these scenarios is best saved for after students have learned how to synthesize rules in an area of law that offers more consistency.

*e. Citations*

Having concluded the discussion of legal principles, the lecture can briefly turn to the second component of the Legal Principle—Citations—Case Illustrations paradigm. Students should understand that citations support a legal principle much like they support any other proposition given in legal writing. Students must also understand that because a synthesized principle is constructed from multiple cases, the principle must be supported by multiple citations. These citations should appear in students' writing in a string citation placed immediately after the principle statement.<sup>229</sup> This differs from the case-by-case method, where cases are explained and cited one at a time.<sup>230</sup>

The professor would be wise to give little detail on most aspects of citation formatting as part of this lecture. Although citations provide essential support for a synthesized principle, *The Bluebook* is a byzantine collection of complex citation rules, the details of which can distract students from learning the process of legal synthesis. Some basic citation principles may be necessary to mention in this lecture if students have not yet received any instruction on the topic. But students would benefit most from receiving separate instruction on the intricacies of legal citation outside of the legal synthesis module.

However, the professor may make space to briefly discuss or review three citation topics that are especially relevant to legal synthesis: string citations, introductory signals, and parentheticals. String citations are necessary to support synthesized legal principles because the principles are derived from multiple cases. Moreover, string citations allow students to demonstrate the numerical and variative support of the synthesized principles. The citation rule for string citations is straightforward: within a citation sentence or clause, separate citations with semicolons.<sup>231</sup>

Different introductory signals are called for depending on whether a principle is explicit or implicit. Because explicit principles are directly supported by the text of cases, no signal is usually required when citing supporting cases.<sup>232</sup> In contrast, implicit

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229. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION B1.1, at 3–4 (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025) (“[C]itations generally appear within the text of the document immediately following the propositions they support.”). For a multi-sentence legal principle, the citations can be placed at the end of the paragraph so long as there are no intervening citations. ALWD GUIDE, *supra* note 212, at 368 (rule 34.2).

230. See *supra* Sections I.B, I.C.

231. See THE BLUEBOOK, *supra* note 229, at R. 1.1, at 66–68.

232. See *id.*

principles are abstracted from ambiguous cases. As such, a “see” signal is appropriate to include because the cases indirectly support the principle.<sup>233</sup> Alternatively, the “*Compare...with...*” signal can facilitate variative support.<sup>234</sup> Oftentimes, a principle will be supported by a mix of cases with different outcomes: one group of positive cases where the relevant facts satisfied the principle, and another group of negative cases where the relevant facts did not satisfy the principle. In these instances, the citations can be efficiently structured by using a “*Compare... with...*” signal: place one group of cases before the “*with*” and the other group after the “*with*.”<sup>235</sup> The citation signal can be used both for explicit and implicit principles in lieu of no signal or “*see*.”<sup>236</sup> If this signal is used, it should be used in tandem with parentheticals that explain each cited case attached to the signal. The professor may wish to include a visual of how a “*Compare...with...*” signal is used in a legal document, similar to the Synthesized Explanation example given in Section I.B.<sup>237</sup>

The lecture may also briefly discuss parenthetical formatting, especially if the professor chooses to emphasize the use of parenthetical case illustrations.<sup>238</sup> Students are unlikely to be familiar with parenthetical formatting from their academic studies before law school. The basic rules are that parentheticals should be no longer than one sentence fragment, start with a present participle (or “-ing verb”) that refers to an action of the court (such as holding, determining, affirming, denying, etc.), begin with a lowercase letter, and exclude ending punctuation.<sup>239</sup> An exception applies when a full sentence is quoted in the parenthetical, in which event the quoted language should be surrounded by double quotation marks, the first letter capitalized, and a period included at the end.<sup>240</sup> Although *The*

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233. See *id.*; see also Rosa Kim, *Introducing Implicit Reasoning Through Use of the See Signal*, 24 SECOND DRAFT 1, 13 (2009).

234. See THE BLUEBOOK, *supra* note 229, at R. 1.2, at 66–68 (explaining that the “*Compare...with...*” signal is used when “[c]omparison of the authorities cited will offer support for or illustrate the proposition”). Students should not confuse the “*Compare...with...*” signal with the “*but see*” and “*contra*” signals, which are used only when an authority contradicts a legal principle implicitly (“*but see*”) or explicitly (“*contra*”). See *id.* For discussion of how to treat a case that contradicts a synthesized legal principle, see *supra* note 228 and accompanying text.

235. See THE BLUEBOOK, *supra* note 229, at R. 1.2, at 66–68. For an example of “*Compare...with...*” being used to support a synthesized principle, see *supra* Section I.B.

236. See THE BLUEBOOK, *supra* note 229, at R. 1.2, at 66–68 (defining the appropriate uses of “[no signal]” and the “*see*” signal).

237. Also note that unlike in other instances, cases in a “*Compare...with...*” signal are separated by commas rather than by semicolons. See *id.*

238. Considerations of whether to emphasize parenthetical case illustrations or textual case illustrations are discussed *infra* in the next Subsection.

239. THE BLUEBOOK, *supra* note 229, at R. 1.5, at 69–71.

240. *Id.*

*Bluebook* does not mandate a limit on length, parentheticals should be short, taking up no more than three or perhaps four lines of text at most. To facilitate conciseness, unnecessary words, such as “the,” can be excluded.<sup>241</sup> The professor may briefly list these rules and show students examples of well-written parentheticals through PowerPoint slides or a handout.

*f. Case Illustrations*

The lecture should also explain that bare citations are usually not enough; a synthesized principle is usually further explained through concise case illustrations. The lecture should define case illustrations, describe their functions, and show the different ways they can be drafted.

A case illustration is a partial case summary that shows how the principle was applied to the facts of a cited case. It should include (1) the case’s principle-relevant facts, and (2) the case’s holding, or part of the holding, that shows how the court applied the principle to those facts.<sup>242</sup> Case illustrations serve at least three functions: “[1] [t]hey can clarify [principles]; [2] they can prove that you described [principles] accurately; and they [3] can foreshadow the analytical framework you will use when applying the [principles] to your client’s case.”<sup>243</sup>

When considering how to illustrate principles, present students with the three options:

- (1) Parenthetical case illustrations
- (2) Textual case illustrations
- (3) No case illustrations

The lecture should emphasize that the third option is generally disfavored. Bare citations are more appropriate for broader rules and elements, not synthesized principles that provide nuanced explanations of those rules and elements. Case illustrations are generally necessary to illustrate a principle unless the principle is simple, explicit, universally accepted, and easy to understand. Even then, providing case illustrations can still decrease the reader’s cognitive load and promote comprehension because “humans understand concepts expressed in the form of stories or narratives better

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241. *Id.*

242. See COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 115–16.

243. *Id.* at 114.

than they understand concepts explained as abstract principles.”<sup>244</sup> Moreover, case illustrations prime readers for case analogies that may later appear in the students’ writing when the law is applied to the facts.<sup>245</sup> Legal readers expect that a case will be explained before it is applied, so if a case will be used in an analogical argument, it should first be illustrated.<sup>246</sup>

The professor has some discretion over how much to steer students toward the first option or the second option, or how much to steer them toward using a mix of both. Both have advantages—though often, students should prefer parentheticals because they achieve multiple goals. Parentheticals force the writer to be concise and focus only on the principle-relevant facts. They are efficient because they are not grammatically complete sentences; they are embedded in citations and exclude extraneous words.<sup>247</sup> Because a parenthetical allows the writer to illustrate a principle using the fewest words possible, more parentheticals can be included than textual illustrations, enhancing the numerical and variative support for the principle.<sup>248</sup> However, students should be cautioned to balance numerosity with the constraints of space.<sup>249</sup> Approximately three or four parentheticals are often sufficient to support and illustrate a principle.<sup>250</sup>

Textual case illustrations offer some advantages over parentheticals. Some legal writers and readers find parentheticals aesthetically displeasing.<sup>251</sup> Complex case facts can be difficult to fit into

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244. SMITH, *supra* note 12, at 38.

245. *Id.*; see also COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 115 (noting that case illustrations foreshadow a legal writer’s application of law to facts).

246. COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 154 (instructing students who are writing analogies to “[i]ntroduce no new information about the prior case” in the analogy itself because “[a]ttorneys expect the *explanation* of the law to set forth all of the law relevant to analyzing an element or factor. So, in your explanation of the law, you should include all the information about a prior case that you will need to analyze an element or factor. If you do not include all the necessary information in your explanation of the law and your application includes new information, you will surprise and likely confuse your reader.” (emphasis added)).

247. See THE BLUEBOOK, *supra* note 229, at R. 1.5, at 69–71.

248. See *supra* note 64 and accompanying text.

249. SMITH, *supra* note 12, at 52 (“On the one hand, a premium is placed on brevity; on the other, communication principles derived from cognitive psychology suggest that merely stating rules may not be enough. A legal writer must balance these competing considerations when drafting a brief. In many cases, the compromise will be to use parenthetical illustrations . . .”).

250. MURRAY & DESANTIS, ADVANCED LEGAL WRITING, *supra* note 62, at 159 (“A synthesis of three or four cases is a good bet as a minimum number of precedent cases to use. If available, a synthesis of five or six cases may be worthwhile, and, depending on the topic of the synthesis, larger numbers certainly may be used. The limitation on the number of cases used may be more closely tied to the amount of information that must be stated in the parentheticals; an individual synthesis probably should not run on for several pages of text.”).

251. See *supra* notes 65–68 and accompanying text.

parentheticals at times.<sup>252</sup> Some readers skip parentheticals and can miss important context (although if a reader accepts and understands the principle without needing to refer to case illustrations, then making case illustrations easy to skip by placing them in parentheticals can benefit the reader).<sup>253</sup> These realities counsel in favor of using textual illustrations in some instances. However, textual case illustrations tend to be longer than parentheticals.<sup>254</sup> Due to space constraints, a paper may be able to include fewer textual case illustrations than parentheticals.

Regardless of how much the professor chooses to emphasize the use of parenthetical illustrations or textual illustrations, the strengths of both should be presented to students. Additionally, the lecture should emphasize that case illustrations should not merely restate the synthesized legal principle. Rather, they should explicitly provide specific case facts that *illustrate* the principle, and they should explicitly state whether the court held that those facts satisfied the principle.<sup>255</sup>

Students often struggle to include appropriate factual specificity when crafting case illustrations, preferring conciseness over clarity. Tell students to leave nothing to the reader's imagination; a case illustration should be specific and detailed enough that the reader does not need to read the case itself to understand the principle and how the court applied it. Conversely, the case illustration is a *partial* case summary and should include only *principle-relevant* facts; do not waste the reader's time with extraneous information. If a single case is used to illustrate more than one principle, then it should be treated to multiple case illustrations. Each illustration should be tailored to the principle it illustrates, rather than trying to summarize the entire case at once.

### *g. Exceptions*

Finally, the lecture can end with a discussion of when synthesis is *not* necessary or preferable. When a case's facts are so similar to the client's facts that it is dispositive "on all fours," then that case should be described in full detail. Furthermore, when a legal issue is in an emerging area of law, there may not be enough cases

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252. SMITH, *supra* note 12, at 52 ("[I]f an illustration cannot be explained in a single, relatively short and understandable sentence, then it must be explained in the text.").

253. See *supra* note 68 and accompanying text.

254. See MURRAY & DESANCTIS, LEGAL WRITING, *supra* note 3, at 141–42 (stating that a case-by-case explanation can require detailed case summaries spanning one or more paragraphs per case).

255. SMITH, *supra* note 12, at 61.



available to meaningfully synthesize legal principles. In these instances, a case-by-case explanatory method—or pure deductive reasoning—may be necessary instead of synthesis.

#### 4. *Synthesis Exercises*

With the lecture concluded, students are prepared to continue to learn through practice. Students may express confidence that they understand legal synthesis conceptually after the lecture. But “[t]aking notes in a lecture does not always facilitate internalization of the material.”<sup>256</sup> The true test of knowledge is implementation. The practice exercises discussed in this Subsection will reinforce the lecture and further help students learn legal synthesis.

Exercises allow students to test their ability to implement a new skill. An exercise is a type of “active learning.”<sup>257</sup> Active learning strategies require a student “to manipulate and process information in his or her own way in order to fully understand it.”<sup>258</sup> Active learning empowers students to metacognitively monitor their development of a new skill.<sup>259</sup> Requiring students to retrieve and apply new information through exercises helps to encode that information into long-term memory.<sup>260</sup> The exercises discussed in this Subsection come in a variety of forms, including simulations, memo critiques, and generative AI prompt engineering and content critique exercises.

##### a. *Simulations*

As the old adage goes, “practice makes perfect.” Simulation exercises empower students to directly practice the skills they are learning. In a synthesis simulation exercise, students must read a handful of cases or case summaries, categorize them by factual similarity, and abstract general principles. Such exercises allow students to refine their skills outside of the context of a full memorandum or brief assignment. This Subsection discusses how to create and use

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256. Christine N. Coughlin, Lisa T. McElroy & Sandy C. Patrick, *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 383 (2010).

257. See Jennifer A. Gundlach & Jessica R. Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. LEGAL EDUC. 156, 173 (2019) (offering examples of practical exercises that are active learning strategies, including “writing responses to hypothetical fact patterns and answering multiple-choice questions”).

258. Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U. S.F. L. REV. 839, 855 (1997).

259. See Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 72–73 (2010).

260. See Schwartz, *supra* note 133, at 421.

an effective synthesis simulation exercise. Students should be tasked with completing at least one synthesis simulation exercise after the lecture.

A synthesis simulation exercise is a truncated version of a legal synthesis writing problem. The most important aspects of a synthesis simulation exercise are the exercise's law and its cases, real or fictional, that students must use to synthesize legal principles. Unlike a full memorandum or brief assignment, the professor does not necessarily need to create a novel client fact pattern for students to apply legal principles to; law application is a related but separate skillset from synthesis. To keep the exercise manageable and easy to fit within the span of a typical class session, the professor can use a synthesis simulation exercise that focuses entirely on the act of synthesis itself. Students can later complete separate law application simulation exercises after the legal synthesis module is complete. Alternatively, the professor can combine both synthesis and application into a single simulation exercise. Combined exercises are beyond the scope of this Subsection, but the professor can simply add a client fact pattern to a synthesis simulation exercise to create a combined exercise.

Many of the same guidelines for designing a synthesis-friendly legal writing problem apply to creating a synthesis simulation exercise.<sup>261</sup> The exercise should incorporate a flexible standard and a small variety of cases that apply the standard. Those cases should present meaningful opportunities for students to synthesize legal principles—both explicit principles and implicit principles. Students should be provided with the legal standard itself and a handful of cases that apply the standard to different fact patterns. The professor should task the students with using these materials to synthesize legal principles that explain the standard.

To create the exercise, the professor can either research and identify a suitable standard and cases that apply it, or the professor can create their own fictional standard and cases. The advantage of using an actual standard and cases is that it increases the exercise's realism. However, when using actual cases, the professor has less control over the principles that are available for students to synthesize. The advantage of using a fictitious standard and cases is the greater power the professor has to design the exercise.

Because a simulation exercise is intended to be completed in the course of a class session, lengthy cases are not suitable for it. If designing a synthesis simulation exercise that uses actual cases, the

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261. See *supra* Section III.A.

professor can either find short cases to include in the exercise, edit cases to include only short excerpts, or provide students with case summaries. If the professor is using fictitious cases, the professor has greater control and can craft cases of any length—or simply write and provide students with case summaries. Whatever form the case materials take, they should include all facts that are relevant to the principles that students are meant to abstract from the cases.

An example of a synthesis simulation exercise is provided below.<sup>262</sup> It uses a fictitious legal standard and three fictitious case summaries.

### Sample Legal Synthesis Simulation Exercise

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#### Incitement in Greensburg

**Rule:** An individual is guilty of incitement if the individual (1) provoked others (2) to cause (3) immediate harm to a person's property or body.

**Instructions:** From the cases below, synthesize at least three legal principles, at least one of which should be an *implicit* principle, that explain the first element, "provocation." Write these principles in your own words and indicate which case(s) support the principle.

#### *Greensburg v. Birch:*

A sixteen-year-old boy, Birch, is well-known in the community as a vandal and graffiti artist. One day, while walking home from school, Birch's classmate Jake approached him and asked if he could join Birch's graffiti activities. Birch refused and called Jake "too much of a wuss" to join his posse. Jake took a can of spray paint out of his backpack and covered the neighbor's van in red paint. Birch was charged with incitement.

We hold Birch is not liable for incitement. Birch did not provoke Jake; although Birch insulted Jake for not having the "bravery" to commit an illegal act, belittling comments are not reasonably likely to provoke people into illegal action.

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262. Another excellent synthesis simulation exercise is offered in Figley, *supra* note 6, at 251–61.

*Greensburg v. Sally:*

Sally and Mike, who did not know each other at the time, were customers at a grocery store who happened to be shopping in the same aisle. Sally, who had smoked cannabis a half hour earlier, noticed two boxes of pancake mix next to each other on the shelf—one was labeled “gluten-free,” and the other was not. Turning to Mike, she said, “gluten-free is so stupid. Wouldn’t it be hilarious if someone mixed these up?” and turned away. Mike laughed, opened both boxes, and switched the bags of pancake mix. Later, an unsuspecting customer with celiac disease purchased the mix labeled “gluten free” and consumed the non-gluten-free mix that Mike placed in it, causing her to be hospitalized. Sally was charged with incitement.

We hold that Sally is not liable for incitement because there was no provocation. An offhand speculative remark made to a stranger suggesting a harmful act, even one made in poor taste, does not indicate that Sally knew, or should have known, that Mike would commit that act.

*Greensburg v. Finn:*

A dozen people angrily marched around the outside of a doctor’s office. They were protesting the doctor’s support for “right to die” legislation that would allow terminally ill patients who are in extreme pain to request medical assistance to end their lives. The protest was led by Pat, who had taken cocaine beforehand and had a record of nonviolent crimes. When the doctor tried to leave the building out of the back door, Pat noticed him and screamed, “there he is! Bash his head in!” Several protestors then attacked the doctor, who barely escaped with his life and made it to his car. Pat later said it was just a joke and never meant for anyone to get hurt. Pat was charged with incitement.

We hold that Pat is liable for incitement. Even if Pat was insincere, directing angry protestors to attack the target of the protest was reasonably likely to prompt them to do so.

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Because synthesis involves subjectivity, students may find multiple “correct” answers to this exercise. A nonexclusive list of synthesizable principles from this exercise includes:

- Provocation exists only when the defendant commits an act that is reasonably likely to prompt another person to commit an illegal act. *Birch, Finn.*
- To provoke, a defendant must have actual or constructive knowledge that their act will likely prompt the illegal act. *Sally, Finn.*
- The sincerity of the defendant is immaterial. *Sally, Finn.*
- Drug intoxication is not a defense to provocation. *Sally, Finn.*

At the conclusion of a simulation exercise, the professor should allow students to share their answers with the class, and the professor should respond with global oral feedback.<sup>263</sup> If these exercises are assigned as homework rather than deployed in-class, the professor should still review the results of the exercises inside the classroom. The feedback will help students refine their use of synthesis before they apply the skill outside of the classroom when writing a legal memo or brief.

#### *b. Sample Critiques*

“[I]t is legitimate and reasonable for students to want to see examples of the kinds of documents they are being asked to prepare, especially because the document is probably unlike anything that most first-year law students have previously seen or written.”<sup>264</sup>

Many scholars extoll the value of showing students samples of attorney work product.<sup>265</sup> Learning through studying samples is an active learning technique that can increase the “strength and number of schemas acquired.”<sup>266</sup> Studying written samples offers students two benefits. “First, using samples helps students engage in the material on a deeper analytical level. Second, viewing a sample provides context for the students, allowing them to understand the breadth of an assignment and how the individual pieces they are

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263. Jennifer A. Gundlach & Jessica R. Santangelo, *Understanding the Metacognitive “Space” and Its Implications for Law Students’ Learning*, 50 HOFSTRA L. REV. 769, 808 (2022) (summarizing empirical study that showed professor feedback enhanced students’ metacognitive regulation of their learning).

264. Judith B. Tracy, “*I See and I Remember; I Do and Understand*” *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 TOURO L. REV. 297, 308–09 (2005).

265. See, e.g., *id.*; Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 583 (1997); Coughlin, McElroy & Patrick, *supra* note 256, at 381.

266. See Coughlin, McElroy & Patrick, *supra* note 256, at 385–86 (quoting John Sweller & Graham A. Cooper, *The Use of Worked Examples as a Substitute for Problem Solving in Learning Algebra*, 2 COGNITION AND INSTRUCTION 59, 77 (1985)).

learning fit together as a whole.”<sup>267</sup> This Subsection discusses how to design and use a synthesis sample critique exercise that students can complete in class.

A sample critique *exercise* is more useful than merely distributing a sample to students and allowing them to read it (or not) at their leisure. By requiring students to read, critique, and discuss samples in class, students more actively engage with the sample’s content. Moreover, the professor can provide helpful context by explicitly explaining the goals of the exercise in class, showing what makes the sample an effective or ineffective piece of writing.<sup>268</sup> Finally, the professor can answer questions about the sample in front of the classroom to the benefit of every student.

A synthesis sample critique exercise should achieve a few pedagogical goals. First, the exercise should allow students to visualize the written structure of synthesis used in legal memoranda and briefs: Legal Principle—Citations—Case Illustrations. Students should be able to identify each component of this structure in the samples (and each instance in which a component is missing). Second, the exercise should allow students to see the contextual structure of how a synthesized legal principle explains a broader rule or subrule. Third, students should see the importance of effective writing style, conciseness, clarity, and specificity in communicating a synthesized analysis.

To achieve these goals, the exercise’s samples should be short and focused on synthesized explanations of at least one element of a legal rule. The samples do not need to be full legal memoranda or briefs; a few paragraphs of “rule explanation” content are sufficient. Other content, such as a Question Presented, Statement of Facts, or even content that shows how the law is applied to a client’s facts, can lengthen the exercise and distract students from its pedagogical goals. However, if critical sections of the document are missing, the professor should provide a written or oral summary of the sample’s legal issues to ensure students have the necessary context.

Moreover, the exercise should require students to critique and compare at least two samples. Critiquing a single sample may lead students to mistakenly believe that it represents the one correct

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267. *Id.* at 381.

268. *See id.* at 387 (“For a sample to be an effective learning tool, the professor must know what pedagogical goals the sample will address, explicitly explain how the sample illustrates those goals, consider how the student will respond to the sample, and require the student actively to engage the sample on some level.”).

“model” to emulate. Including varied samples discourages students from developing tunnel vision.<sup>269</sup>

Topically, the samples should address legal issues that the students are unfamiliar with so that they can experience reading them as any other unfamiliar reader would. However, the samples should also be intelligible to a first-year law student who is still learning the basics of the law. To achieve this goal, the samples could be based on the writing of past students in the course who wrote a memo or brief as part of a synthesis-friendly legal writing problem. Alternatively, the professor could adapt student-friendly briefs written by practicing attorneys or write their own samples.<sup>270</sup>

To achieve the best results, the exercise should include one sample whose legal synthesis is especially strong and another sample whose legal synthesis is weak. Students can learn how to communicate synthesis effectively by contrasting these samples’ differing qualities. A strong sample will explicitly articulate the legal rule, clearly state legal principles that explain at least one element of the legal rule, support each legal principle with multiple citations, and use case illustrations to show how courts in the cited cases have explicitly applied each principle to facts. A poor sample may include a variety of errors: not clearly stating the legal rule or element; not following the structure of Legal Principle—Citations—Case Illustrations, or missing components of it; including too few or too many citations or case illustrations to support legal principles; having unclear or confusingly written principles or case illustrations; or using the case-by-case method.

The professor should not disclose beforehand which sample is strong or weak. Instead, give students the opportunity to discern the strengths and weaknesses of each sample themselves.

To guide their critique of each sample, students should be provided with a written list of questions that they should read and be mindful of while reading the samples. These questions should prompt students to look for the qualities that make for an effective legal synthesis. Instructions and questions for a sample critique exercise are given below.

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269. *Id.* at 388 (“Using several samples can also dissuade students from believing that one ‘perfect’ or ‘correct’ mode or expression of legal analysis actually exists.”); Parker, *supra* note 265, at 583 (“Providing models of effective legal writing to law students does carry some risk, especially if students are given only a single model of a particular kind of document. Students may seek to use it as a template from which to create all documents of that type or, not yet having sufficient experience in the genre to recognize what is good about the model document, may emulate its less desirable attributes.”).

270. See Tracy, *supra* note 264, at 323.

### Synthesized Rule Explanations: Sample Critique Exercise

**Instructions:** Below are two samples of rule explanation sections. When reading them, consider the following questions, making notes as necessary:

1. What is the element of the legal rule that is being explained in this sample? Is it clear? Make a note of which sentence(s) state the element.
2. What legal principles are used to explain the element? Are they clear? Make a note of any principle that is unclear or confusing.
3. Is the rule explanation organized around legal principles, or is it organized around cases? Relatedly, does the explanation follow the framework of legal synthesis, Legal Principle—Citations—Case Illustrations? Or does it try to explain the law through summarizing a “laundry list” of cases? Make a note of any unsynthesized case discussion that you notice.
4. Do the facts in the case illustrations (if present) go into enough explicit detail for you to understand how the principle was applied to the facts of the case? Are you left with questions or wanting more? Make a note of any case illustration that is not detailed enough or confusing.
5. Which sample do you think is stronger? Why?

When you finish, discuss your reactions with your group.

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After students finish reading these questions, they should read the samples themselves. Then, to learn from each other, students should discuss in small groups their impressions of each sample and how to answer the exercise’s questions. Finally, after the small group discussions, the professor should call on the groups to provide their answers to each question. The professor can respond to the students’ answers with feedback, highlight points that the students missed, and emphasize the attributes that make each sample strong or weak.

Although not part of this legal synthesis module, the professor may wish to follow this exercise with a second sample critique exercise on law application. In the follow-up exercise, the professor can redistribute the same rule explanation samples used for the synthesis sample critique exercise and add rule application content



to each sample. The additional content can show students how an effectively synthesized rule explanation can set up a strong rule application—and how a poorly synthesized rule explanation can lead to a poor rule application.

*c. Generative AI Prompt Engineering and Content Critique*

Another version of a sample critique exercise incorporates the use of generative artificial intelligence (GAI). Students can ask a GAI program, such as Lexis AI+ Protégé, Westlaw CoCounsel, ChatGPT, Google Gemini, Claude, or Microsoft CoPilot to synthesize legal principles from multiple cases. Students can then evaluate and critique the effectiveness of the AI chatbot's output.

GAI is imperfect and is not a substitute for an attorney. In law school, overreliance on GAI can disrupt students' learning.<sup>271</sup> Like humans, GAI can struggle to synthesize legal principles—especially implicit ones.<sup>272</sup> Used judiciously, however, GAI has the potential to enhance student learning.

Unlike a traditional sample critique exercise in which the professor supplies human-written samples, students must know how to “talk” to GAI so they can make it produce a sample. Talking to generative GAI is known as “prompt engineering.”<sup>273</sup> Often, such conversations involve a back-and-forth between the user and the machine: the user prompts GAI to provide an initial output, which the user then prompts GAI to revise.<sup>274</sup>

Through prompt engineering, GAI can help students synthesize implicit legal principles. However, the professor must make clear that GAI is prone to errors and omissions. According to Carolyn V. Williams, “[t]he three weaknesses most relevant to assessment of legal writing in law school are 1) [GAI's] tendency to hallucinate case law and legal sources; 2) its failure to recognize the truth; and

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271. John Bliss, *Teaching Law in the Age of Generative AI*, 64 JURIMETRICS J. 111, 130 (2024) (“[I]t is vital that ‘students learn the hard way,’ and that they master basic legal skills before they begin to use AI as a ‘supplement.’ Otherwise, students might use AI as a ‘shortcut’ or a ‘crutch.’”).

272. See discussion of generative AI *supra* Section III.A.3.

273. Kirsten K. Davis, *Prompt Engineering for ChatGPT Can Improve Your Legal Writing—Even if You Never Use ChatGPT*, APP. ADVOC. BLOG (Apr. 6, 2023), [https://lawprofessors.typepad.com/appellate\\_advocacy/2023/04/prompt-engineering-for-chatgpt-can-improve-your-legal-writing-even-if-you-never-use-chatgpt.html](https://lawprofessors.typepad.com/appellate_advocacy/2023/04/prompt-engineering-for-chatgpt-can-improve-your-legal-writing-even-if-you-never-use-chatgpt.html) (on file with the Duquesne Law Review) (“Prompt engineering is the process of using specific words and phrases along with choices about the structure and organization of those words and phrases to write instructions that improve generative AI's ability to provide a response that is useful to a human prompter.”).

274. *Id.*

3) some analysis issues that apply to legal writing [including misunderstanding legal terms].”<sup>275</sup> “Hallucinations” are especially concerning; GAI may fabricate convincing case citations, and more insidiously, it may misreport the facts and reasoning of existing cases and inaccurately describe legal rules and principles.<sup>276</sup> The weaknesses of GAI present problems even for experienced attorneys, and law students are especially susceptible to GAI’s misrepresentations because they are still developing the legal reasoning skills necessary to meaningfully evaluate GAI outputs.

Moreover, GAI’s ability to synthesize implicit legal principles is limited. One study has determined that two GAI models—GPT 4 and Llama 3.1—had only weak to moderate success in synthesizing factors from cases in the absence of an explicit, predefined list of factors.<sup>277</sup> Compared to humans, the GAI models were more likely to synthesize factors that were too specific, too broad, or legally irrelevant—including inaccurate factors that were “contrary to basic legal knowledge.”<sup>278</sup> Given that law students are novices who are only beginning to learn “basic legal knowledge,” their use of GAI will likely produce even worse results than the authors of the study, who were university-employed experts in law and computer science.<sup>279</sup> The professor must emphasize that students are ultimately responsible for their own work product and that they must use their own judgment—and their own ability to synthesize—to evaluate, modify, and build upon any sample writing offered by a GAI chatbot.

Nonetheless, so long as it is properly supervised and not overused, GAI may potentially assist students in synthesizing legal principles. This legal synthesis module includes a prompt engineering exercise that teaches students how to supervise GAI when synthesizing legal principles. Specifically, the exercise shows students (1) how to prompt engineer and “converse” with GAI, and (2) how to evaluate, modify, and supplement any attempt at synthesis offered by a GAI chatbot.

To create the exercise, the professor should follow a truncated version of the process used to create a synthesis-friendly legal

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275. Carolyn V. Williams, *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the Nextgen Bar Exam*, 28 LEGAL WRITING 1, 23 (2024).

276. See *Generative AI and Legal Research*, WIDENER UNIV. DEL. L. SCH. (Mar. 14, 2025, at 13:36 ET), <https://libguides.law.widener.edu/generative-ai-legal-research> [https://perma.cc/8QSY-FEPP].

277. Morgan A. Gray et al., *Using LLMs to Discover Legal Factors*, 395 LEGAL KNOWLEDGE & INFO. SYS. 60, 61–62 (2024).

278. *Id.* at 69.

279. See *id.* at 60.

writing problem: identify a flexible standard, ensure that at least a small variety of cases within a jurisdiction apply the standard, and find at least one synthesizable legal principle supported by those cases. The professor should then prompt a GAI model to use the chosen cases to synthesize an implicit legal principle. This process involves experimentation; GAI may need to receive multiple prompts before it generates an implicit legal principle, and it may not succeed even after numerous attempts. The professor may need to try multiple flexible standards, cases, GAI models, and prompts before receiving a GAI-generated implicit legal principle. Once the professor finds a workable combination, they can confidently implement the exercise in class.

The exercise proceeds in two phases: a “demonstration” phase in which the professor models how to prompt engineer, and a “critique” phase in which students assess the GAI’s output. To begin the demonstration phase, provide students with the flexible standard that the professor successfully experimented with when creating the exercise and the cases the professor used. Then replicate the steps used to generate the implicit legal principle, showing students the prompts necessary to achieve the result. Alternatively, rather than a live demonstration in class, the professor could save their earlier “conversation” with GAI when creating the exercise and share a copy of it with the class. Either way, the points students should take away is how involved the human is in the process and the variety of prompts needed to produce a synthesized principle. The professor should also inform students that the synthesis is facilitated by instructing GAI to synthesize using only a small, pre-defined list of cases. Results could differ if other cases were used—or GAI could simply fail to synthesize altogether.

After students see the process of prompting GAI to synthesize, the exercise can shift to the “critique” phase in which students evaluate the GAI output using the instructions and questions for the synthesis sample critique exercise. During the “critique” phase, the professor may also wish to distribute a human-written sample synthesis for students to compare the GAI output against.

The rest of this Subsection will walk through an example of how a synthesis GAI prompt engineering exercise may proceed using the “outrageous conduct” element of IIED in Kentucky. An initial prompt that the professor could input into a GAI chatbot during the exercise’s “demonstration” phase is as follows:

*You are my legal assistant helping me write a legal memorandum on Kentucky’s law of intentional infliction of emotional distress. Please draft an explanation of what the “extreme and outrageous*

*conduct” element means. Please synthesize the law, organize paragraphs around legal principles, and support those legal principles with citations to case law and partial case summaries that illustrate the principles.*

Students will likely get slightly different answers to this prompt. GAI does not consistently respond to each prompt it receives—even when the prompts are worded identically.<sup>280</sup> However, as an example, I entered the above prompt into Lexis AI+ Protégé on February 2, 2025, and received the following response (errors in original):

### **Outrageous and Intolerable Conduct**

The conduct must be so outrageous and intolerable that it offends generally accepted standards of decency and morality *Combs v. Spicer*, 686 S.W.3d 151. This standard is high and requires conduct that goes beyond all possible bounds of decency., For example, in *Craft v. Rice*, the Kentucky Supreme Court adopted the Restatement (Second) of Torts 46, which defines outrageous conduct as that which is so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Bednarek v. United Food & Commercial Workers International Union, Local Union 227*, 780 S.W.2d 630 *Highlands Hosp. Corp. v. Preece*, 323 S.W.3d 357.

This GAI-generated explanation is lacking. It identifies a few cases, but it does not meaningfully synthesize them to explain what “outrageous conduct” means. No category of fact, such as “duration of the conduct,” is given that could form the basis of a synthesized legal principle. Rather, the explanation parrots the Restatement’s general definition. It is also not fully responsive to the prompt; no meaningful case summaries are included. These deficiencies effectively show students the limits of GAI, especially for its initial responses.

Students should be instructed to continue prompting GAI to revise its output, and the professor should show them how. To make the task easier for GAI, the professor may show students how to prompt GAI to synthesize legal principles from a specific group of cases they have found. For instance, if GAI is told to focus on the

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280. Stephen Mortellaro, Lexis AI+ Protégé, “You are my legal assistant helping me write a legal memorandum on Kentucky’s law of infliction of emotional distress. Please draft an explanation of what the ‘extreme and outrageous conduct’ element means. Please synthesize the law, organize paragraphs around legal principles, and support those legal principles with citations to case law and partial case summaries that illustrate the principles.” (Feb. 2, 2025).

three IIED cases used in the synthesized example given in Section I.B—*Craft v. Rice*,<sup>281</sup> *Brewer v. Hillard*,<sup>282</sup> and *Humana of Kentucky, Inc. v. Seitz*<sup>283</sup>—then a second prompt may read as follows:

*Use Humana of Kentucky, Inc. v. Seitz, Craft v. Rice, and Brewer v. Hillard to synthesize at least one shared factor that courts consider when they assess whether a defendant's conduct is "extreme and outrageous."*

Lexis AI+ Protégé returned this response:

### **Outrageous and Intolerable Conduct**

One shared factor that courts in Kentucky consider when assessing whether a defendant's conduct is "extreme and outrageous" is whether the conduct goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community. This standard is high and requires conduct that is more than just petty insults, unkind words, or minor indignities.

### **Case Summaries**

#### **1. Craft v. Rice**

- In this case, the Kentucky Supreme Court recognized the tort of IIED and adopted the Restatement (Second) of Torts Section 46. The court held that the alleged harassment, including keeping the plaintiff under surveillance, threatening to put her husband in jail, and forcing her vehicle off the road, was enough to satisfy the threshold requirements for the tort of outrageous conduct. This conduct was considered extreme and outrageous because it went beyond all possible bounds of decency and was utterly intolerable in a civilized community.

#### **2. Humana of Kentucky, Inc. v. Seitz**

- The court in this case set out the elements necessary to sustain a cause of action for outrageous conduct. The conduct must be so outrageous and intolerable that it offends generally accepted standards of decency and morality. The court emphasized that the action for IIED will not lie for petty insults, unkind words, and minor indignities. The conduct must be truly outrageous and intolerable.

#### **3. Brewer v. Hillard**

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281. 671 S.W.2d 247 (Ky. 1984).

282. 15 S.W.3d 1 (Ky. Ct. App. 1999).

283. 796 S.W.2d 1 (Ky. 1990).

- In this case, the court reiterated the elements required to establish a claim for IIED, emphasizing that the conduct must be so outrageous and intolerable as to offend generally accepted standards of decency and morality. The court highlighted that there must be a direct causal connection between the conduct and the emotional distress suffered, and the resulting emotional distress must be severe.<sup>284</sup>

This revised analysis is better than the first in a few ways. Although not written in standard paragraph format, it includes case illustrations. It also attempts to follow a rough version of the Legal Principle—Citations—Case Illustrations structure of synthesis. However, it does not include a synthesized legal principle; its opening paragraph again regurgitates the general definition of the rule given in the Restatement (and this time, without any direct citations for support). Moreover, the case illustrations are deficient; they do not state any specific facts at all and instead speak in generalities. A potential legal principle is actually embedded in the case summary of *Humana*—“[t]he court emphasized that the action for IIED will not lie for petty insults, unkind words, and minor indignities”—but the GAI did not recognize it as such or provide any facts that illustrate it. Ultimately, the GAI response is an unsynthesized case-by-case explanation of “outrageous conduct”—and a poor one at that.

Students can again be shown how to prompt GAI to revise its response. The next prompt should be even narrower and more explicit. For example:

*Revise the draft. Using Humana of Kentucky, Inc. v. Seitz, Craft v. Rice, and Brewer v. Hillard, synthesize an implicit factor that courts use to determine whether conduct is outrageous. The factor must be implicit; it cannot be stated explicitly in any of these cases.*

The answer received when inputting this tertiary prompt into Lexis AI+ Protégé is similar to the previous, but the GAI is getting closer:

### **Outrageous and Intolerable Conduct**

One implicit factor that courts in Kentucky consider when assessing whether a defendant’s conduct is “extreme and outrageous” is the context and relationship between the parties

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284. Stephen Mortellaro, Lexis AI+ Protégé, “Use *Humana of Kentucky, Inc. v. Seitz, Craft v. Rice*, and *Brewer v. Hillard* to synthesize at least one shared factor that courts consider when they assess whether a defendant’s conduct is ‘extreme and outrageous.’” (Feb. 2, 2025).

involved. This factor is not explicitly stated in the cases but can be inferred from the court's reasoning and outcomes.

### **Case Summaries**

#### **1. *Craft v. Rice***

- In this case, the Kentucky Supreme Court recognized the tort of IIED and adopted the Restatement (Second) of Torts Section 46. The court held that the alleged harassment, including keeping the plaintiff under surveillance, threatening to put her husband in jail, and forcing her vehicle off the road, was enough to satisfy the threshold requirements for the tort of outrageous conduct. The context of the ongoing harassment and the power dynamics between the parties played a crucial role in determining the outrageousness of the conduct.

#### **2. *Humana of Kentucky, Inc. v. Seitz***

- The court in this case set out the elements necessary to sustain a cause of action for outrageous conduct. The conduct must be so outrageous and intolerable that it offends generally accepted standards of decency and morality. The court emphasized that the action for IIED will not lie for petty insults, unkind words, and minor indignities. The relationship between the healthcare provider and the patient, and the expectations of care and trust inherent in that relationship, were implicit factors in assessing the outrageousness of the conduct.

#### **3. *Brewer v. Hillard***

- In this case, the court reiterated the elements required to establish a claim for IIED, emphasizing that the conduct must be so outrageous and intolerable as to offend generally accepted standards of decency and morality. The court highlighted that there must be a direct causal connection between the conduct and the emotional distress suffered, and the resulting emotional distress must be severe. The context of the relationship between the parties, including any abuse of power or trust, was an implicit factor in the court's assessment of the conduct.<sup>285</sup>

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285. Stephen Mortellaro, Lexis AI+ Protégé, "Revise the draft. Using *Humana of Kentucky, Inc. v. Seitz*, *Craft v. Rice*, and *Brewer v. Hillard*, synthesize an implicit factor that courts use to determine whether conduct is outrageous. The factor must be implicit; it cannot be stated explicitly in any of these cases." (Feb. 2, 2025).

At first glance, GAI appears to synthesize an implicit legal principle in the opening paragraph: “the context and relationship between the parties involved.” However, this point is actually explicitly mentioned in *Humana*; the court refers to the possibility that a healthcare provider and a patient may have a “special relationship,” but it explicitly declines to determine whether a special relationship between parties is a factor relevant to an IIED analysis.<sup>286</sup> Thus, GAI failed to identify an implicit legal principle; it apparently identified a point explicitly made in one case, misunderstood it, and attempted to say it encompassed other cases. Moreover, the case summaries remain deficient. A GAI output like this one offers more valuable lessons to students on the limits of using GAI as a tool for synthesis.

However, with continuous prompting, GAI can improve. Telling GAI to “try again” can eventually lead to results. I entered the prompt “*Revise the memorandum. Find a different implicit factor shared among the three cases.*” The response mirrored the previous result except for some slight wording changes; the “relationship between the parties involved” was reworded to “the vulnerability of the plaintiff.”<sup>287</sup> I reentered this prompt again, and the answer was once again largely the same; “vulnerability of the plaintiff” was reworded to “the degree of power or control the defendant has over the plaintiff.”<sup>288</sup>

Finally, after repeating this prompt a third time, GAI responded with an accurate implicit legal principle: “duration and persistence of the conduct.” The full revised answer is given below.

### **Outrageous and Intolerable Conduct**

One implicit factor that courts in Kentucky consider when assessing whether a defendant’s conduct is “extreme and outrageous” is the duration and persistence of the conduct. This factor is not explicitly stated in the cases but can be inferred from the court’s reasoning and outcomes.

### **Case Summaries**

#### **1. Craft v. Rice**

- In this case, the Kentucky Supreme Court recognized the tort of IIED and adopted the Restatement (Second) of Torts

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286. *Id.*

287. Stephen Mortellaro, Lexis AI+ Protégé, “Revise the memorandum. Find a different implicit factor shared among the three cases.” (Feb. 2, 2025).

288. Stephen Mortellaro, Lexis AI+ Protégé, “Revise the memorandum. Find a different implicit factor shared among the three cases.” (Feb. 2, 2025).



Section 46. The court held that the alleged harassment, including keeping the plaintiff under surveillance, threatening to put her husband in jail, and forcing her vehicle off the road, was enough to satisfy the threshold requirements for the tort of outrageous conduct. The duration and persistence of the harassment were crucial in determining the outrageousness of the conduct.

2. **Humana of Kentucky, Inc. v. Seitz**

- The court in this case set out the elements necessary to sustain a cause of action for outrageous conduct. The conduct must be so outrageous and intolerable that it offends generally accepted standards of decency and morality. The court emphasized that the action for IIED will not lie for petty insults, unkind words, and minor indignities. The ongoing nature of the healthcare provider's conduct towards the patient, who relied on them for care and trust, was an implicit factor in assessing the outrageousness of the conduct.

3. **Brewer v. Hillard**

- In this case, the court reiterated the elements required to establish a claim for IIED, emphasizing that the conduct must be so outrageous and intolerable as to offend generally accepted standards of decency and morality. The court highlighted that there must be a direct causal connection between the conduct and the emotional distress suffered, and the resulting emotional distress must be severe. The prolonged and persistent nature of the defendant's conduct towards the plaintiff was an implicit factor in the court's assessment of the conduct.<sup>289</sup>

This response is still far from perfect; its case summaries have inadequate factual detail, and it does not make clear how *Humana* supports the principle at all. A legal writer will have much work to do themselves to reverse engineer the specific facts from each case that support the “duration and persistence of conduct” principle.

But after significant handholding, this prompting does achieve the synthesis of a legal principle, making it an effective point to end the “demonstration” phase of the exercise and to begin the sample “critique” phase. Students can be given the instructions and questions used for the sample critique exercise and asked to critique the GAI output; the rest of the exercise can proceed much like the

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289. Stephen Mortellaro, Lexis AI+ Protégé, “Revise the memorandum. Find a different implicit factor shared among the three cases.” (Feb. 2, 2025).

sample critique exercise. For comparison, an effective human-written sample synthesis can be included for students to critique as well.

Students should immediately recognize the need to substantially rewrite the latest GAI response to make it worthy of inclusion in a legal memo or brief. Nonetheless, a GAI prompt engineering exercise of this sort imparts powerful lessons. It shows students how to iteratively prompt GAI to assist with synthesis, demonstrates the strengths and limitations of GAI, and highlights the critical role legal writers need to play in evaluating and rewriting GAI output. Although GAI may eventually synthesize a legal principle, it may provide many incomplete, inaccurate, or insufficient responses along the way—and nothing is guaranteed. Moreover, the amount of handholding GAI requires to synthesize an implicit principle may be greater than the effort required for a human to synthesize directly.

The professor should conclude the exercise by emphasizing the importance of the human element and the need for students to independently develop their own judgment and “lawyer intelligence.” The only way for students to do that is to learn how to synthesize the law themselves. GAI is a tool that legal writers may use, but only to supplement—not replace—their own skills.

### 5. *Synthesis Case Charting*

In tandem with or after the lecture and exercises, the professor can introduce a common tool legal writers use to assist with legal synthesis: a case chart. A case chart provides a visual summation of the legal writer’s research and case briefs. Traditionally, a case chart consists of columns or rows for case names and dates (and possibly other citation information), legally-significant facts, and the courts’ holdings and reasoning. By viewing key information from multiple cases in one chart, the legal writer can more easily identify patterns and relationships among cases and use those to synthesize legal principles.

This approach is sound. Nonetheless, even when equipped with a case chart, students often still struggle to use the chart to synthesize effectively. Traditional case charts have many uses besides synthesis, such as organizing research, observing how case law has evolved over time, and constructing analogies and disanalogies.<sup>290</sup> These purposes are valid, but because traditional case charts are

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290. See COUGHLIN, ROCKLIN & PATRICK, *supra* note 3, at 74.

typically designed to facilitate multiple uses, their effectiveness as tools for synthesis can be diminished. If used haphazardly, case charts can counterproductively lead the legal writer to produce an unsynthesized, case-by-case analysis.<sup>291</sup>

A traditional case chart may take this form:

Traditional Case Chart

| Case Name | Facts | Holding and Reasoning | Analogies/ Distinctions |
|-----------|-------|-----------------------|-------------------------|
| Case A    |       |                       |                         |
| Case B    |       |                       |                         |
| Case C    |       |                       |                         |

This form of case chart may undermine synthesis because it encourages students to organize their case summaries in a case-by-case manner. As explained by Deborah Shore,

The typical student, after completing a traditional case chart . . . will often immediately begin a discussion of the law in a memo by first mentioning Case A, then discussing the facts of Case A, the relevant factors addressed by the court in Case A, and then the outcome of Case A. This will then likely be repeated for Case B, and so forth, with little, if any, attempt to synthesize those cases.

Additionally, although case charts can be an effective tool to construct analogies and disanalogies, placing students’ focus on formulating individual case analogies too early can undermine the pattern recognition necessary to find cross-case legal principles.

To maximize its utility as an aid for synthesis, a case chart should have a few attributes:

- (1) **The case chart should first be organized by element outcome.** Legal principles are synthesized to give meaning to the elements of a legal rule. Rather than organizing case-by-case, organize by each element of the legal rule. Space should be provided to record the element’s relevant facts and

291. Deborah Shore, *A Revised Concept Chart: Helping Students Move Away from a Case-by-Case Analysis*, 11 PERSPS. 123, 123 (2003) (“By requiring the students to list the relevant cases in the first column and then asking them to fill in the facts and relevant factors considered by each court in the subsequent columns, the traditional case chart still focuses the students’ attention first on the individual cases, rather than on legal concepts flowing from those cases.”).

the outcome and reasoning for why the element was satisfied or not.

- (2) **The case chart should exclude mention of a client’s case.** Constructing analogies and disanalogies should come later—after the synthesis of legal principles is completed.
- (3) **The case chart should explicitly prompt students to synthesize.** Completing the case chart itself allows students to complete the first two steps of synthesis:<sup>292</sup> (1) reading and briefing relevant cases, and (2) sorting the cases by element outcome. The case chart should include instructions that tell students to then complete step (3): look through the case summaries in the chart to identify patterns of factual similarities within each group of cases. The case chart should also provide students with space to (4) describe each pattern as a legal principle. Finally, the case chart should instruct students to (5) test the principle against remaining cases. The summaries provided in the chart itself can assist with these tests.

A template “synthesis case chart” that includes these attributes is given below. Additional charts can be developed for each element of a legal rule.

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Synthesis Case Chart

Group A: Cases where [element 1] is satisfied.

| Case Name | Element-Relevant Facts | Holding and Reasoning |
|-----------|------------------------|-----------------------|
|           |                        |                       |
|           |                        |                       |

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292. See *supra* Section III.B.3.d.

|  |  |  |
|--|--|--|
|  |  |  |
|--|--|--|

**Group B: Cases where [element 1] is *not* satisfied.**

| Case Name | Element-Relevant Facts | Holding and Reasoning |
|-----------|------------------------|-----------------------|
|           |                        |                       |
|           |                        |                       |
|           |                        |                       |

Look for factual similarities *within* each group. Use those patterns to identify general types of facts that courts consider important and can serve as the basis of principles. Also, look for *superficial* factual differences *between* each group, and determine the *underlying differences* that explain why the case outcomes differ despite their factual similarities. Use these differences to further help you identify principles. Record your principles below.

|                                                                                                                                                                                                                                                                                                                                                                                        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Synthesized Legal Principles:</b></p> <ul style="list-style-type: none"><li>• Principle 1: <i>[Case 1]</i> had [fact]. Similarly, <i>[Case 2]</i> had [similar fact]. Therefore, a shared principle could be that when [type of fact] is present, [element 1] is (or is more likely to be) satisfied (or not satisfied).</li><li>• Principle 2:</li><li>• Principle 3:</li></ul> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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The professor has a few options for how to integrate a synthesis case chart into their teaching. The professor may create an exercise that allows students to practice case charting. After students have read the cases for their synthesis-friendly legal writing problem assignment, the professor can distribute blank case charts to the class and ask them to work alone or in groups to fill in the case chart for one element and then synthesize one principle on their own. A variant of this exercise is for the professor to project or recreate the case chart on the board in the front of the room and for the class to fill it out together. Alternatively, the professor could attach this same exercise to a synthesis simulation exercise<sup>293</sup> and have students use case charting to help them synthesize principles for that exercise.

Finally, if class time is limited, the professor may simply introduce the case chart briefly in class and encourage students to use it as a resource. If taking this route, the professor should still take some time in class—either as an add-on to the legal synthesis lecture, or in a follow-up class afterward—to briefly show students the case chart and explain its utility.

#### 6. *After the Module*

The end of the legal synthesis module should not be the end of students' instruction in legal synthesis. Equipped with knowledge, tools, and practice, students are prepared to put their skill to the test by drafting answers to synthesis-friendly legal writing problems. These more challenging assignments are more practice-realistic and challenging than the module's introductory exercises. They require students to continuously refine their skills. Ideally, students will have opportunities to contend with *multiple* synthesis-friendly legal writing problems before the course ends—scaffolded so that later problems require more sophisticated synthesis than earlier problems. With the aid of draft feedback from their professor (and perhaps from others as well, such as peers and upper-level student mentors), students will continue to grow their expertise as a legal synthesizer.

### CONCLUSION

Synthesis is difficult to teach and difficult to learn, but equipped with a robust legal synthesis curriculum, both become easier. The

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293. See *supra* Section III.B.4.a.

challenges of legal synthesis—including the difficulties of cross-case analysis, implicit reasoning, ambiguity aversion, and inductive generalization—can be overcome. The curriculum this Article sets forth provides law professors a pedagogical framework to thoughtfully create and deploy synthesis-friendly legal writing problems, lecture transparently on how to synthesize, and offer several meaningful opportunities for practice that will empower students.

The word “synthesis” may always strike fear into the hearts of students and attorneys alike. But with this legal synthesis curriculum, professors can effectively manage those fears and help students master the skill.

# Regaining Childcare Liberties for Natural Parents

Jeffrey A. Parness<sup>1</sup>

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## I. INTRODUCTION

Until recently, it was easy to identify at birth those beyond gestating mothers with legally protected parental liberties involving the “care, custody, and control” of newborns.<sup>2</sup> There was little or no prebirth legal parentage. At-birth parentage beyond birth mothers was mostly established by heterosexual marriage to the birthgiver. Natural ties between husbands and children were usually presumed, though spousal parentage was sometimes rebuttable. Post-birth legal parentage was governed by state adoption laws.

With increases in nonmarital births, paternity suits became more widely used to establish parentage. Genetically tied unwed men could, however, inadvertently lose childcare liberty opportunities by not pursuing paternity judgments. From the mid-1990s, voluntary paternity acknowledgments (VPAs) became available to unwed genetic fathers to establish nonjudicial judgments on childcare parentage in nonmarital, as well as in some marital, birth settings. VPAs were usually executed around the time of birth, required the assent of the birthgiver and the birthgiver’s spouse, could be done without genetic testing, and had the same force and effect of judicial judgments.<sup>3</sup>

More recently, new avenues to at-birth parenthood have emerged. These avenues were prompted by both social and scientific changes, including: same-sex marriages; assisted reproduction births, including in both nonsurrogacy and surrogacy settings; and voluntary *parentage* acknowledgments, instead of and in addition to mere paternity acknowledgments. Some of these new avenues, as with certain at-birth parentage laws involving assisted reproduction births and certain voluntary parentage acknowledgments, require parental-like acts taken prebirth.

These new avenues to childcare parentage at-birth embody expanded chances for intended parentage for those with no genetic

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2. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing parents’ interests in the “care, custody, and management” of their children). Protections arise from the federal constitutional liberty interests benefitting (often state-recognized) childcare parents. On childcare liberties, *see infra* notes 7–28 and accompanying text. On dependence on state laws defining federal constitutional childcare parents, *see generally*, for example, Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN’S L. REV. 965 (2016) [hereinafter *Federal Constitutional Childcare Parents*] (criticizing Supreme Court deference).

3. The history behind state VPA laws is reviewed in Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 179–84 (2017).

ties. Contractual parenthood and contractual nonparenthood at birth are often recognized in assisted reproduction birth settings. Exemplary are prebirth enforceable genetic and gestational surrogacy pacts that establish childcare interests for some and waive such interests for others. As well, new forms of parentage (not just paternity) acknowledgments at-birth prompt intended parentage.

Further, there are both somewhat old and some very new avenues to childcare parentage based on actions solely taken after birth. These avenues differ markedly from those guiding formal adoptions. Exemplary of postbirth acts prompting postbirth parenthood are certain types of marriages, residency/hold out parenting, and de facto parenting. Only some of these avenues allow postbirth acts to prompt parentage retroactive to the time of birth.

The old and new avenues for postbirth, nonadoptive parentage prompt many chances for natural parents<sup>4</sup> to lose childcare liberties without forfeiture due to fault or waiver.<sup>5</sup> Such losses are sanctioned, for example, in current marital parentage, residency/hold out parentage, and de facto parentage laws.<sup>6</sup>

4. Herein, natural parents include both those genetically tied to children and those who gave birth to children through fertilized egg implants (i.e., biological—but not genetic—ties). This Article does not address regained childcare liberties for those who are presumed “natural” parents, but who have no genetic or other biological ties, as with some parents married to birthgivers and some parents who hold out children as their own together with another natural parent or a parent via an adoption. *See, e.g., Chatterjee v. King*, 2012-NMSC-019, ¶¶ 1–5, 280 P.3d 283, 284–86 (residency/hold out parentage involves presumed “natural” parenthood); CAL. PROB. CODE § 6453 (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (defining “natural parent” to include a “presumed” parent under the state Uniform Parentage Act which includes some who have no genetic ties and who did not give birth). This Article speaks to natural parents of varying forms (including sperm or egg providers who do not give birth and gestational and genetic surrogates). Some (gestational surrogates) have no genetic ties, though they are biologically-tied. The differing forms of natural parenthood have not been explored to date by the U.S. Supreme Court. Terms are often confused, as in 750 ILL. COMP. STAT. ANN. 50/1 (T-5) (West, Westlaw through P.A. 104-130 of the 2025 Reg. Sess.) (explaining that “biological parent,” “birth parent,” and “natural parent” are “interchangeable terms that mean a person who is biologically or genetically related to that child as parent”).

5. Waiver herein involves “an intentional relinquishment or abandonment of a known right or privilege,” contrasted to forfeiture which is defined herein as “the failure to make the timely assertion of a right.” *People v. Brown*, 2020 IL 125203, ¶ 25, 181 N.E.3d 823, 829. Forfeiture failures seemingly can arise from fault (e.g., failure via neglect with no intent to surrender a known right) or without fault (e.g., failure to assert in a timely way a known right or privilege which was unbeknownst and could not have been reasonably known). Thus, the Article demonstrates childcare liberty losses can arise without intentional relinquishment or abandonment of a known right and without a failure to make a timely assertion of a right. Other terms could have been employed. *See, e.g., State v. Roller*, 2024 ND 180, ¶ 13, 11 N.W.3d 864, 868 (explaining that “intentional conduct is a subset of willful conduct” along with knowing conduct and reckless conduct).

6. This is not to say that natural parents may not also lose, without significant, or any, fault or waiver, childcare liberties in formal adoption proceedings. *See, e.g., Jeffrey A. Parness, Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good Faith Cooperation*, 36 CUMB. L. REV. 63, 64 (2005) [hereinafter *Adoption Notices*]; Laura Oren, *Thwarted*

When lost, however, the childcare liberties of natural parents might be regained. This Article advocates for greater opportunities for regained natural parent childcare liberties under law. Reforms are particularly appropriate when earlier losses occurred under new nonadoptive parentage laws with no fault or waiver by natural parents. This Article further argues that some opportunities for regaining lost childcare liberties are constitutionally compelled.<sup>7</sup> Regaining the lost childcare liberties of natural parents could entail either the reestablishment of childcare parenthood that was earlier secured but then ended, or the opportunity to establish a new child-parent relationship.

Upon reviewing the federal constitutional childcare liberties of natural parents, the current laws on losing natural parent childcare liberties, and the current laws on regaining natural parent childcare liberties, this Article urges the creation of new laws on regaining natural parent childcare. New laws would not only better follow current constitutional precedents than do current laws, but also better promote important nonconstitutional public policies, including advancing the best interests of children.

This Article chiefly focuses on regained natural parent childcare long after birth on behalf of living natural parents who seek to reestablish or to establish anew parent-child relationships under law. It recognizes that healthy natural parent-child relations can effectively arise without designating legal parentage for natural parents, as when nonparent natural family members secure childcare orders (via adoption, visitation, guardianship or otherwise) based on their natural ties.<sup>8</sup>

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*Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAMILY L.Q. 153, 173 (2006).

7. This Article only explores revivals of natural parent childcare liberties for children who have not reached the age of majority. There can be revivals, meaning new parent-child relationships, for adult children. On allowing adult children “to resolve” the dilemma of “the intractable conflict between different definitions of parentage—functional, intentional, legal, and genetic,” see Sean Hannon Williams, *DNA Dilemmas*, 40 YALE L. & POL’Y REV. 536, 536 (2022). This Article also does not address special norms on regaining childcare interests involving an Indian child. *See, e.g.*, 25 U.S.C. § 1912.

8. Nonparent natural family members sometimes seek to secure legal parentage orders on behalf of natural parents (including those living and those dead) for purposes beyond childcare, including monetary recoveries by newly named children and nonparent child visitation orders for natural family members. *See, e.g.*, *Garza ex rel. Garza v. Maverick Mkt., Inc.*, 768 S.W.2d 273, 274 (Tex. 1989) (holding that an illegitimate posthumous child can recover for wrongful death of natural parent); 755 ILL. COMP. STAT. ANN. 5/2-3(a)–(b) (West, Westlaw through P.A. 104-130 of the 2025 Reg. Sess.) (establishing that posthumous child shares in probate distribution of natural parent’s estate).

## II. NATURAL PARENT CHILDCARE

### A. Federal Constitutional Childcare Liberties

The U.S. Supreme Court has recognized two distinct federal constitutional Due Process liberty mandates involving natural parent childcare.<sup>9</sup> One is the right to the “care, custody, and management” of a person’s “natural” child.<sup>10</sup> This childcare right is clearly held at birth by those who give birth as a result of sex.<sup>11</sup> The Court has not, however, expressly ruled that this same right is held by those who give birth via assisted reproduction involving injected sperm (i.e., use of the birthgiver’s own gametes) or by those who give birth via assisted reproduction wholly utilizing the gametes of others.<sup>12</sup>

The Court also has not ruled on whether a birthgiver may waive her childcare interests before birth. The 2017 Uniform Parentage Act (UPA) rejects irreversible prebirth waivers where there is a genetic surrogacy pact naming another or others as parents; the Act does authorize a postbirth waiver by a genetic surrogate within seventy-two hours of birth.<sup>13</sup> By contrast, the Act does recognize

9. Natural parent childcare interests have been described as carrying “substantial costs.” Jennifer S. Hendricks, *Genetic Essentialism in Family Law*, 26 HEALTH MATRIX, 109, 110, 122 (2016) (“[Genetic essentialism] is the modern face of a male supremacist ideology . . .”).

10. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality) (establishing parental right to the “care, custody, and control” of a child).

11. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). Outside the U.S. Supreme Court, mothers who raped are sometimes accorded childcare parent status. Consider the case of Mary Kay Letourneau, who raped a thirteen-year-old student (and later married him in 2005 after serving a seven-year prison sentence), resulting in the birth of a child she later helped to raise with her former student. Daniel Victor, *Mary Kay Letourneau, Teacher Who Raped Student and Then Married Him, Dies at 58*, N.Y. TIMES (July 7, 2020), [www.nytimes.com/2020/07/07/obituaries/mary-kay-letourneau-dead.html](http://www.nytimes.com/2020/07/07/obituaries/mary-kay-letourneau-dead.html) (on file with the Duquesne Law Review).

12. Lower court rulings include *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66, ¶ 69, 349 Wis. 2d 84, 121–22, 833 N.W.2d 634, 652 (holding that a provision in a parentage agreement involving a genetic surrogate that requires the surrogate to agree to terminate any parental childcare rights cannot be enforced as it conflicts with a Wisconsin statute, which requires an in-person judicial hearing to ensure that consent to a parental rights termination was “informed and voluntary”); *see also* WIS. STAT. ANN. § 48.41 (West, Westlaw through 2025 Act 15, published July 3, 2025); *P.M. v. T.B.*, 907 N.W.2d 522, 542–44 (Iowa 2018) (holding that a provision in a parentage agreement involving a gestational surrogate that requires the surrogate to agree to terminate any parental childcare rights can be enforced).

13. Under the 2017 UPA, for example, a gestational surrogate (i.e., egg donor utilized) can waive rights prebirth while a genetic surrogate (i.e., no egg donor) can only waive rights postbirth. UNIF. PARENTAGE ACT § 809(b) (UNIF. L. COMM’N 2017) (providing that neither gestational surrogate nor her spouse “is a parent” at birth); *id.* § 814(a)(2) (providing that a genetic surrogate may withdraw consent to waiver “any time before 72 hours after the birth”). These UPA provisions now operate in some locales. *See, e.g.,* WASH. REV. CODE ANN. § 26.26A.715 (West, Westlaw through all legislation of the 2025 Reg. Sess.).

irreversible prebirth parent childcare waivers by birthgivers through gestational surrogacy pacts.<sup>14</sup>

As for “natural” fathers, the Supreme Court has sustained, but not mandated, state laws on parent childcare liberties for men who are married to birthgivers, including laws that recognize, whether via a rebuttable or an irrebuttable presumption, “natural” parenthood.<sup>15</sup> State spousal parent laws are widespread, but do vary.<sup>16</sup> Further, some spousal parent laws explicitly recognize non-contractual female spousal parentage for children born of sex to their mates, often presuming parentage in any spouse of one giving birth, though they clearly are not actual “natural” parents.<sup>17</sup>

For men, the U.S. Supreme Court has also sustained childcare liberty interests in natural parents under state paternity laws.<sup>18</sup> And it has sustained such interests in men who sign voluntary paternity acknowledgments (VPAs) involving children born of sex to unmarried birthgivers.<sup>19</sup> VPA parenthood can be lost, however,

14. UNIF. PARENTAGE ACT § 808(a) (UNIF. L. COMM’N 2017) (“A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer . . .”); *id.* § 809(a)–(b) (explaining that upon the birth of a child under a gestational surrogacy agreement, each intended parent is a legal parent of the child and the surrogate is not); *see, e.g.*, WASH. REV. CODE ANN. § 26.26A.715 (West, Westlaw through all legislation of the 2025 Reg. Sess.) (gestational surrogacy pact); 15 R.I. GEN. LAWS ANN. § 15-8.1-801 (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature) (gestational carrier pact).

15. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality) (discussing a California statute that (once) presumed “a child born to a married woman living with her husband . . . to be a child of the marriage,” thus establishing a conclusive presumption only subject to challenge by a spouse). Current California law appears at CAL. FAM. CODE § 7611(a) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (explaining that a “person” is presumed to be a “natural parent” if married to a mother who gives birth during the marriage or shortly after the marriage is terminated); *id.* § 7612(a) (stating that § 7611’s presumption is “rebuttable . . . in an appropriate action”); *see also* L.A. Cnty. Dep’t of Child. & Fam. Servs. v. Heriberto C. (*In re Jesusa V.*), 85 P.3d 2, 13 (Cal. 2004) (holding that biological ties do not always rebut the presumption of parenthood).

16. *See, e.g.*, Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 255–57 (2019); June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 665–67 (2016).

17. *See, e.g.*, UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017) (presuming parentage for “individual” married to birthgiver, at the time of birth, who is not a surrogate), *followed by* CONN. GEN. STAT. ANN. § 46b–488(a)(1) (West, Westlaw through all enactments of the 2025 Reg. Sess.) (“person” is presumed parent); WASH. REV. CODE ANN. § 26.26A.115(1)(a)(i) (West, Westlaw through all legislation of the 2025 Reg. Sess.) (“individual” is presumed parent). Spousal parentage is also recognized through judicial precedents on equality for some women married to birthgivers who have no genetic ties to their children. *See, e.g.*, Jeffrey A. Parness, *Marriage Equality, Parentage (In) Equality*, 32 WIS. J.L. GENDER & SOC’Y 179, 187–88 (2017).

18. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 251 n.5 (1983) (holding that an adjudication of fatherhood prompts, for that parent, a right to receive notice of an adoption proceeding involving his child).

19. *Id.* at 251 n.5 (explaining that a VPA can prompt notice rights in adoption proceedings). It remains somewhat uncertain whether a natural parent of a child born of assisted

through rescission or challenge norms that are governed, in some part, by the federal Social Security Act.<sup>20</sup> Not all VPA fathers are actual “natural” parents in the genetic sense, nor are all spousal parents. Further, some states allow parentage acknowledgments for women who are not actual “natural” parents, as with children born to their mates without fertilized egg implants.<sup>21</sup>

The other federal constitutional Due Process liberty mandate on natural parent childcare expressly recognized by the U.S. Supreme Court encompasses the “opportunity” interest of a “natural father” in establishing parental childcare for a child born of consensual sex to a woman to whom he is not married.<sup>22</sup> Successful seizures of this interest, according to U.S. Supreme Court precedent, can occur for some men via paternity suits, VPAs, putative father registrations, and actual childcare support provided for (expected or born) children.<sup>23</sup> This opportunity interest has been expanded by some lower courts to “natural” mothers and fathers who provided gametes for assisted reproduction births.<sup>24</sup>

Recognized federal constitutional Due Process liberty interests in natural parent childcare can be lost. They can be lost through waiver or forfeiture.<sup>25</sup> But the “care, custody, and control” (childcare) rights are not easily lost. The U.S. Supreme Court said at one point that a state needs to demonstrate permanent neglect (or other

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reproduction may utilize a VPA (or, for a woman, a voluntary acknowledgment of parentage) to establish childcare parentage. *But see, e.g.*, UNIF. PARENTAGE ACT §§ 703–704 (UNIF. L. COMM’N 2017) (establishing that a natural parent who consents to assisted reproduction by a woman with the intent to be a parent of a child is a parent of the child, with consent coming “in a record” made “before, on, or after birth,” with consent to parenthood coming in “an express agreement entered into before conception,” or with satisfaction of residency/hold out parentage norms). And consider equality concerns involving sperm providers in sexual conduct settings and sperm and egg providers in assisted reproduction settings where intended parenthood by the providers and the prospective gestating parent is more likely contemplated.

20. *See, e.g.*, Parness & Saxe, *supra* note 3, at 178.

21. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b–476 (West, Westlaw through all enactments of the 2025 Reg. Sess.) (stating that a presumed spousal parent (a “person”) can sign acknowledgment of parentage). Such an acknowledgment is recognized in the 2017 UPA, but not in the 1973 or the 2000 UPAs.

22. *Lehr*, 463 U.S. at 251 (recognizing the constitutional legitimacy of a New York statute regulating when natural fathers of children born of consensual sex to unwed mothers must be given notice of ongoing formal adoption proceeding). Where the mother is married to someone other than the natural father, the Court has allowed states to deny “opportunity” interests to the natural father. *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurality).

23. *Lehr*, 463 U.S. at 251.

24. *See, e.g.*, *In re Parentage of S.D.S.*, 539 P.3d 722, 732, 746 (Or. 2023) (trial court found egg provider was a parent under *Lehr* because affirmative steps were taken to accept responsibilities of parenthood in the form of the contractual rights of the provider); *L.F. v. Breit*, 736 S.E.2d 711, 721–22 (Va. 2013) (sperm provider).

25. *See supra* note 5.

bad acts) by “clear and convincing evidence” before it can involuntarily terminate the childcare liberties of a “natural parent.”<sup>26</sup>

Not all “natural” parents have opportunities for childcare. Some U.S. Supreme Court justices authorized the involuntary end of fundamental natural parent childcare liberties without neglect. In 1989, four justices found that it is “a question of legislative policy and not constitutional law” whether a state “will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted” by a natural parent who seeks childcare.<sup>27</sup> These justices said so even though the Court earlier determined that the “significance of the biological connection” between a “natural father” and a child born of consensual sex “is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.”<sup>28</sup>

Furthermore, even without neglect, a “natural parent” may, for now, otherwise effectively have childcare interests involuntarily ended. Under some new state parentage laws, childcare liberties of natural parents are ended or diminished with the naming of new nonadoptive, nongenetic, and otherwise nonbiological childcare parents.<sup>29</sup> Such new parenthood now emerges through residency/hold out, de facto, voluntary acknowledgment, assisted reproduction, and spousal parent laws.<sup>30</sup> These laws frequently originate through state enactments of provisions in the different UPAs (1973, 2000 as amended in 2002, and 2017).<sup>31</sup> To date, the U.S. Supreme Court has not addressed the validity of such laws.

26. *Santosky v. Kramer*, 455 U.S. 745 769–70 (1982) (recognizing the determination of the precise burden is “a matter of state law properly left to state legislatures and state courts”). The Court further observed that the childcare right “does not evaporate” simply because one has not been a “model” parent or has “lost temporary custody of the child to the State.” *Id.* at 753.

27. *Michael H.*, 491 U.S. at 129–30. Compare *id.* at 133 (Stevens, J., concurring in the judgment) (discussing why there is no foreclosure of possible “constitutionally protected” childcare interest in natural father), with *id.* at 156 (Brennan, J., dissenting) (finding that the state must provide natural father with a hearing).

28. *Lehr*, 463 U.S. at 262 (six–three decision).

29. Nonbiological parents herein include those with no natural ties, that is no genetic ties (i.e., no sperm or egg connection), and those with no other biological ties (i.e., no gestational surrogate).

30. See, e.g., Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 190–219 (2020) (surveying model laws and current state laws on nonadoptive and nonbiological childcare parents).

31. In 2002, the 2000 UPA was revised. On residency/hold out parents, compare UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973) (allowing presumed parentage for a man who receives a minor child into his home and “openly holds out the child as his natural child”), with UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (allowing presumed parentage for an “individual” who “resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual’s child”). On de facto parents, see UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017) (adjudicating a de

Finally, it is worth noting that even with a finding of neglect (or other bad acts), a “natural parent” may not lose childcare liberties. Numerous state adoption statutes, for example, mandate a finding that a child’s best interests will be served before an involuntary parental rights termination.<sup>32</sup>

### B. State and Other Federal Childcare Parent Laws

After its ruling in *Dobbs v. Jackson Women’s Health Organization*<sup>33</sup> negating the federal constitutional right to an abortion, further U.S. Supreme Court extensions of federal constitutional natural (or other) parent childcare liberties seem unlikely.<sup>34</sup> Long before *Dobbs*, state lawmakers were generally left by the Court to determine who holds such liberties, either automatically or upon effective seizure of a parental opportunity interest.<sup>35</sup>

State lawmakers and federal legislators have recognized natural parent childcare interests extending beyond the federal constitutional childcare liberties recognized for natural parents. Such interests sometimes speak to natural ties though actual ties may not be present. There are extensions through state judicial precedents utilizing U.S. Supreme Court constitutional analyses, as with equality demands for men and women in spousal parent laws founded on presumed natural ties.<sup>36</sup> There are judicial extensions arising from

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facto parent claim). On voluntary acknowledgment parents, compare UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM’N 1973) (presumed “paternity” for a man who acknowledges the paternity of a child in writing), with UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017) (acknowledgers, together with birthgivers, need not be men as they can be intended parents of children born of nonsurrogacy assisted reproduction or they can be presumed spousal parents). On assisted reproduction parents, see UNIF. PARENTAGE ACT §§ 701–708 (UNIF. L. COMM’N 2017) (assisted reproduction nonsurrogacy parentage); *id.* §§ 801–818 (assisted reproduction gestational and genetic surrogacy parentage).

32. See, e.g., IND. CODE ANN. § 31-19-11-1(a)(1) (West, Westlaw through all legislation of the 2025 First Reg. Sess. of the 124th General Assembly effective through July 1, 2025).

33. 597 U.S. 215, 231–32 (2022).

34. These recognized liberties, however, will likely not be eliminated, as was the abortion right in the *Dobbs* case. See, e.g., Jeffrey A. Parness, *Dobbs and Unenumerated Parental Custody Rights and Interests*, 14 CONLAWNOW 117, 130 (2023). For a different view on the post-*Dobbs* status of federal constitutional childcare liberties, see Michael Farris, *Rethinking Parental Rights: It’s Time to Move to Procedural Due Process*, 18 LIBERTY U. L. REV. 911, 912 (2024) (proposing that parental rights cases should be decided under the framework of procedural due process, without reliance on substantive due process).

35. See, e.g., *Federal Constitutional Childcare Parents*, *supra* note 2, at 971–75.

36. See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner is a parent under earlier California statutory law on presumed natural fathers who hold out children as their own); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 180 Vt. 441, 465, 912 A.2d 951, 970 (upon dissolution of civil union of lesbian couple, both women are parents as statute making husband the presumed “natural parent” of a child born to his wife was applicable via a second statute saying that civil unions and married couples shall have the “same” rights); VT. STAT. ANN. tit. 15, § 1204(f) (West, Westlaw through Chs.



precedents on “independent” state constitutional liberties going beyond U.S. Supreme Court constitutional liberty precedents.<sup>37</sup> State constitutional provisions nowhere found in the federal constitution, like the explicit right to privacy, can prompt natural parent childcare interests.<sup>38</sup>

State courts as well as state and federal legislators have recognized nonconstitutional parental childcare interests in some who are natural parents or who are presumptively deemed natural parents though there may be no genetic or other biological ties.<sup>39</sup> Exemplary are state laws recognizing childcare interests in presumptive natural parents of those giving birth.<sup>40</sup> Illustrative as well are childcare parent laws presuming natural ties in those establishing parentage via voluntary acknowledgments with those giving birth.<sup>41</sup>

Nonconstitutional parent childcare interests have been extended in state laws chiefly via the two most recent UPAs, adopted in 2000

73 (end) and M-5 (end) of the 2025 Reg. Sess.); *see also* Henderson v. Box, 947 F.3d 482, 484 (7th Cir. 2020); McLaughlin v. Jones *ex rel.* Cnty. of Pima, 401 P.3d 492, 494 (Ariz. 2017).

37. *Compare* Callender v. Skiles, 591 N.W.3d 182, 191 (Iowa 1999) (holding that genetic father of child born to married woman has a “liberty interest in challenging paternity” under Iowa Constitution though the husband, a presumed spousal parent, opposed the father’s paternity suit), *with* Michael H. v. Gerald D., 491 U.S. 110, 118–29 (1989) (plurality) (holding that putative genetic father had no federal constitutional interest in establishing parentage in a child born into an intact and continuing marriage). On independent state constitutional interpretation, *see generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

38. Available state constitutional privacy provisions include ALASKA CONST. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed.”); CAL. CONST. art. I, § 1 (listing “inalienable rights” of “[a]ll people” to include “privacy”); D.C. CONST. art. I, § 4 (“privacy” includes “whether to procreate or to bear a child,” an “inviolable” right); MONT. CONST. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).

39. A review of the state court precedents on common law presumptions of natural parentage in the spouses of those giving birth appears in Feinberg, *supra* note 16, at 248–54 (providing a brief history of common law development). Similar statutory presumptions include a Maine statute presuming parentage in the spouse of one who gives birth and a Washington statute which considers an “individual” married to one who gives birth to be a presumed parent. ME. REV. STAT. ANN. tit. 19-a, § 1881 (Westlaw through 2025 First Reg. and First Special Sessions of the 132nd Legislature); WASH. REV. CODE ANN. § 26.26A.115(1) (West, Westlaw through all legislation of the 2025 Reg. Sess.).

40. Spousal parent laws are reviewed in Jeffrey A. Parness, *In-Hospital Assertions of Childcare Parentage*, 39 WIS. J.L. GENDER & SOC’Y 155, 179–83 (2024) [hereinafter *In-Hospital Assertions*].

41. State laws may be founded on UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM’N 1973) or UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2000). Under the 2017 UPA, acknowledgments are available to nonbirthgivers with no professed genetic ties. UNIF. PARENTAGE ACT §§ 204(a)(1), 204(a)(2), 301, 703 (UNIF. L. COMM’N 2017).

(as revised in 2002) and in 2017.<sup>42</sup> Unlike their 1973 predecessor, these Acts recognize quite broad childcare parentage involving children born from both consensual sex and assisted reproduction. All three Acts authorize some parental childcare interests for those with no actual natural ties to their children, though at times deeming them “natural” parents.<sup>43</sup> Some authorizations encompass parentage for those clearly without actual “natural” ties based on conduct occurring long after birth.<sup>44</sup> Relevant UPA provisions and their state law enactments are reviewed in greater detail.<sup>45</sup>

Finally, Congress has recognized nonconstitutional natural parent childcare interests in limited settings.<sup>46</sup> For example, natural parents who are Native American Indians have received special protections,<sup>47</sup> like the special adoption processes that operate for children born to tribal members.<sup>48</sup>

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42. For an account of state laws employing the 2017 UPA, see generally Rebecca Byrd et al., *A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*, 37 J. AM. ACAD. MATRIM. LAWS. 1 (2024).

43. See, e.g., UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM’N 1973) (man is presumed “natural” father if married to birthgiver); UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM’N 2000) (man is “presumed to be the father” if married to birthgiver); UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017) (“individual” is presumed to be a parent if married to birthgiver).

44. See, e.g., UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (resided with child while holding out child as one’s own). The latter two acts, but not the 1973 UPA, require residency to begin at birth and continue for at least two years. Residency/hold out parentage laws are reviewed in *In-Hospital Assertions*, *supra* note 40, at 168–71.

45. For state law responses to the varying UPAs, see generally Byrd et al., *supra* note 42.

46. Congress may have authority to recognize constitutional natural parent childcare interests, though such power, if available, has never been exercised. U.S. CONST. amend. XIV, § 5 (stating that “Congress shall have power to enforce” Due Process liberties “by appropriate legislation”).

47. Indian Child Welfare Act of 1978 §§ 101–403, 25 U.S.C. §§ 1912–1915, *found valid in* *Haaland v. Brackeen*, 599 U.S. 255 (2023).

48. An exemplary federal provision says there shall be “no termination of parental rights . . . in the absence of a determination . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(f). The Indian Child Welfare Act is codified and tightened in some state statutes. See, e.g., New Mexico Indian Family Protection Act, N. M. STAT. ANN. § 32A-28-1 to -42 (West, Westlaw through chs. effective July 1, 2025 of the 2025 First Reg. Sess. of the 57th Legislature (2025)).

### III. SOME LAWS AUTHORIZING LOST CHILDCARE FOR NATURAL PARENTS

#### A. Introduction

Natural parents can lose the federal constitutional “care, custody, and management” mandate,<sup>49</sup> as well as the parental opportunity interest mandate.<sup>50</sup> They can be lost voluntarily, as via a waiver in an adoption proceeding.<sup>51</sup> They can be lost involuntarily for cause, as in a parental rights termination proceeding involving unfitness, which may also anticipate an adoption by a new parent with no genetic or biological ties.<sup>52</sup> In some states, though, nonparental but familial natural ties are deemed important enough that adult “blood” relatives of a child removed from parental custody for cause must be found and noticed regarding future childcare options.<sup>53</sup>

Federal constitutional parental opportunity interests can also be lost involuntarily without cause. Lost opportunity interests in an existing child can occur when a pregnancy and birth prompted by consensual sex are concealed from a natural father who had no reason to consider or investigate possible genetic ties to a child.<sup>54</sup> Such

49. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality) (“care, custody, and control” mandate).

50. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (a man’s failure to develop a parent-child relationship for a child born of consensual sex with an unwed mother); *see also D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013) (an egg donor can have a parental opportunity interest in a child born of assisted reproduction via fertilized egg implant (FEI)).

51. The requirements for valid waivers vary interstate. *See, e.g.*, TEX. FAM. CODE ANN. § 161.103(a)(1) (West, Westlaw through the end of the 2025 Reg. and Second Called Sessions of the 89th Legislature) (“An affidavit for voluntary relinquishment of parental rights must be . . . signed after the birth of the child, but not before 48 hours after the birth . . .”); KY. REV. STAT. ANN. § 625.040(3) (West, Westlaw through 2025 Reg. Legis. Sess. and the Nov. 5, 2024 election) (no petition until three days after birth); S.D. CODIFIED LAWS §§ 25-5A-3, 25-5A-4 (Westlaw through the 2025 First Special Sess. and Supreme Court Rule 25-16) (no petition until more than five days after birth).

52. *See, e.g.*, N.C. GEN. STAT. ANN. § 48-2-206 (West, Westlaw through S.L. 2025-44) (determination of a natural parent’s right to consent to an adoption where the child is not yet born, but where the expectant mother indicates an intent to place the child for adoption); *id.* § 48-2-603(a)(4) (individual need not consent to adoption if there has been a relinquishment of parental rights to an agency).

53. *See, e.g.*, CAL. WELF. & INST. CODE § 309(e) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025), *reviewed in* Solano Cnty. Health & Soc. Servs. Dep’t v. D.B. (*In re K.B.*), 315 Cal. Rptr. 3d 537 (Cal. Ct. App. 2023).

54. *See, e.g.*, IND. CODE ANN. § 31-35-1-4.5(1) (West, Westlaw through all legislation of the 2025 First Reg. Sess. of the 124th General Assembly effective through July 1, 2025) (“The putative father’s consent to the termination of parental rights is irrevocably implied . . . if [he] . . . fails to file a paternity action . . . [within] thirty (30) days after receiving actual notice . . . of the mother’s intent to proceed with an adoptive placement of the child.”). Failure to file may not constitute actual consent to termination, as when a natural father, desirous of childrearing, filed his intentions through a paternity case with a court rather than through putative father registration. *See, e.g.*, *Heidbreder v. Carton*, 645 N.W.2d 355, 370 (Minn. 2002). Failures to seize childcare parent opportunity liberties are sometimes assessed differently

a forfeiture forecloses the need to give notice to the natural father in a formal adoption proceeding.<sup>55</sup> Thus, involuntary losses can befall some natural parents even though they had no reason to know of a pregnancy, birth and adoption petition,<sup>56</sup> though they did not act badly, and they did much, or all they could, to undertake actual childcare or to grasp parenthood.<sup>57</sup> These losses do not necessarily end the child support obligations of those naturally tied to children.<sup>58</sup>

Laws also authorize involuntary losses of childcare liberties for natural parents who earlier undertook childcare, successfully securing “care, custody, and management” rights, but who later became distanced from their children through choices of new childcare parents arising from postbirth acts of other natural (or adoptive) parents.<sup>59</sup> For example, a natural parent of a child born to a spouse during a marriage can effectively lose childcare liberties involving custody/visitation to a person who is judicially determined to be a

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under statute based on the age of the child. *See, e.g.*, IDAHO CODE ANN. § 16-1504(3)(a) (West, Westlaw through the First Reg. Sess. of the Sixty-Eighth Idaho Legis.) (child placed with adoptive parents more than six months after birth); *id.* § 16-1504(3)(b) (child under six months placed with adoptive parents). On “thwarted” fathers, see generally Oren, *supra* note 6.

55. *See, e.g., Lehr*, 463 U.S. at 266 (stating that “only certain putative fathers” have “the right to veto an adoption and the right to prior notice of any adoption proceeding”).

56. *Compare* UTAH CODE ANN. § 81-13-202(7)(a)–(c) (West, Westlaw through the 2025 General Sess. and Chs. 1 and 2 of the 2025 First Special Sess.) (“The Legislature finds that an unmarried mother has . . . a right of privacy with regard to . . . [her] pregnancy and adoption plan . . . [and therefore has] no legal obligation to disclose the identity of an unmarried biological father before or during an adoption proceeding . . . and . . . no obligation to volunteer information to the court with respect to the father.”), *and* IDAHO CODE ANN. § 16-1501A(4) (West, Westlaw through the First Reg. Sess. of the Sixty-Eighth Idaho Legis.) (similar), *with* *Tomas v. Rubin*, 926 F.2d 906, 911 (9th Cir. 1991) (reviewing and sustaining administrative agency regulations requiring federal welfare benefit applicant to cooperate in identifying the father of her child born of consensual sex so that state could pursue reimbursements of welfare payments).

57. *See, e.g., Jones v. Maple (In re Paternity of Baby Doe)*, 734 N.E.2d 281, 285–87 (Ind. Ct. App. 2000) (reviewing other states’ cases); *In re Adoption of A.A.T.*, 196 P.3d 1180, 1188 (Kan. 2008) (although birth mother “lied to” natural father and “took extraordinary measures to prevent him from knowing about the birth of his child,” and “falsified her affidavit and gave false information to the court regarding the identity of the putative father,” natural father failed to grasp his parental opportunity interest as he suspected the mother lied and “took no action to protect his parental rights”); *Frank R. v. Mother Goose Adoptions*, 402 P.3d 996, 998 (Ariz. 2017); *Heidbreder*, 645 N.W.2d at 360.

58. *See, e.g., In re H.S.*, 805 N.W.2d 737, 745 n.4 (Iowa 2011) (reviewing cases); *see also* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.02(1)(b) (A.L.I. 2002) (defining a child support parent to include a person “required by state law to support a child despite termination of the person’s parental rights”).

59. Natural parents can lose once-held child custody/visitation interests though parental status is not terminated permanently and though child support duties are not ended.

nonbiological, nonadoptive childcare parent where that person's childcare conduct was invited by the birthgiver.<sup>60</sup>

The following Sections describe in greater detail laws authorizing involuntary losses of the parental opportunity liberties and of the “care, custody, and management” liberties of natural parents protected under federal constitutional precedents. Residency/hold out and de facto parentage laws operate after birth to prompt involuntary childcare liberty losses for natural parents. Voluntary parent acknowledgment laws often operate prebirth or at birth to prompt involuntary losses of parental opportunity liberties for natural parents.

### *B. Residency/Hold Out Parentage*

Residency/hold out parentage determinations can prompt childcare parent status<sup>61</sup> for some with no natural ties, while simultaneously prompting natural parent childcare losses, including losses that are involuntary and that arise from postbirth acts (including postbirth conduct by the other natural parent). Residency/hold out childcare parentage is effective only after birth and is facilitated by custodial, most often natural, parents.<sup>62</sup> There are two basic forms of this parentage in contemporary American state laws. One type, usually arising from the 1973 UPA, involves a “man” (or a person per judicial interpretation)<sup>63</sup> who receives a child into his (or the person's) home and “openly holds out the child as his [or the person's] natural child.”<sup>64</sup> The other type, when arising from the 2000 UPA, as amended in 2002,<sup>65</sup> embodies a “man” (or any person per

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60. The lower court precedents are split on the constitutionality of allowing such one-parent invitations. *Infra* note 198.

61. Similar determinations of parental-like relationships for those with no natural ties can also trigger parental-like status in other settings (outside of childcare), like the circumstances calling for state support services to parental-like figures when children are deemed in need of state services. *See, e.g.,* B.U. v. Ind. Dep't of Child Servs. (*In re* L.A.M.), 243 N.E.3d 347, 351 (Ind. Ct. App. 2024) (custodian must sign release, with custodian defined as one who resided with the child and provided care under Indiana Code provision).

62. Such second parent choices can only sometimes be made long after birth. Some residency/hold out parents must be chosen right after birth. *Compare* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) (choice involves “the first two years of the life of the child”), *with* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973) (choice made “while the child is under the age of majority” by receiving the child into the home and holding out the child as one's “natural child”).

63. *See, e.g.,* Elisa B. v. Superior Ct., 117 P.3d 660, 670 (Cal. 2005) (former lesbian partner of a gestating parent is a hold out parent required to pay child support though there were no biological ties); McLaughlin v. Jones, 401 P.3d 492, 500 (Ariz. 2017); Henderson v. Box, 947 F.3d 482, 487 (7th Cir. 2020).

64. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973).

65. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000) (“man”).

judicial interpretation),<sup>66</sup> or, when arising from the 2017 UPA,<sup>67</sup> embodies an “individual,” who resides in the same household with the child and “openly holds out the child as [their] . . . own for the first two years of the child’s life.”<sup>68</sup>

Involuntary losses of natural parent childcare can occur when a court chooses the residency/hold out parent with no genetic ties over a “natural” parent, often the former spouse of a birthgiver, with the custodial gestating parent remaining as a childcare parent. The judicial choice is often based on an assessment of “the weightier considerations of policy and logic”<sup>69</sup> or “the best interests of the child.”<sup>70</sup> The losses are involuntary where, for example, the losing natural parent did not agree to the common residence, and perhaps did not even learn of it until it was too late to intervene to challenge a later residency/hold out parentage assertion.

### C. *De Facto Parentage*

As with residency/hold out parentage, *de facto* parentage determinations can prompt natural parent childcare losses arising from postbirth acts. Again, these losses can be involuntary. The 2017 UPA expressly recognizes, unlike its UPA predecessors, “*de facto*” parenthood, determined by one parent, as a form of childcare parentage for those without genetic, other biological, or formal adoption ties.<sup>71</sup> Such parenthood is dependent upon a nonparent meeting far more requirements than those applicable to residency/hold

66. See, e.g., *In re Guardianship of Madelyn B.*, 98 A.3d 494, 501 (N.H. 2014).

67. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (“individual”).

68. Note that unlike the 1973 UPA, the 2000 and 2017 UPAs do not say the hold out is for one’s “natural” child. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 4 cmt. (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017).

69. UNIF. PARENTAGE ACT §§ 4(a)(1), 4(a)(4), 4(b) (UNIF. L. COMM’N 1973) (presumed spousal parent and presumed residency/hold out parents clash).

70. UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM’N 2017) (adjudicating competing claims to parentage). By comparison, the 2000 UPA makes it more difficult for an alleged residency/hold out parent to override a spousal presumption for a husband as there is a need to show that the male spousal parent “neither cohabitated nor engaged” in sex with his wife “during the probable time of conception” and that he “never openly held out the child as his own.” UNIF. PARENTAGE ACT §§ 204(a), 607(b) (UNIF. L. COMM’N 2000).

71. It further recognizes that such parenthood may be determined by one of two (or three) childcare parents. UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. COMM’N 2017). The term “*de facto*” parent did not originate in the 2017 UPA. The Comment to the Act indicates its *de facto* parentage standard was modeled on Maine and Delaware statutes. *Id.* § 609 cmt. The term was also employed in the 2002 ALI Principles. See PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (A.L.I. 2002); see also RESTATEMENT OF CHILDREN AND THE LAW §1.62(a) (A.L.I. Tentative Draft No. 6, 2024) (*de facto* parentage is one of the “black letter” sections approved by membership).

out parentage.<sup>72</sup> Under the 2017 UPA on de facto parentage, an existing legal parent must have “fostered or supported” a “bonded and dependent relationship” between the child and the nonparent which is “parental in nature”;<sup>73</sup> the nonparent must have held out the child as the nonparent’s own child and undertaken “full and permanent” parental responsibilities;<sup>74</sup> and the nonparent must have “resided with the child as a regular member of the child’s household for a significant period of time.”<sup>75</sup>

The 2002 American Law Institute’s (ALI) *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002 ALI Principles),<sup>76</sup> as well as a 2024 ALI draft of the *Restatement of the Law: Children and the Law* (2024 ALI Restatement Draft),<sup>77</sup> also recognize forms of “de facto” parentage for those without genetic, other biological, or formal adoption ties. Each form requires both common residence and consent by one existing legal “parent.”<sup>78</sup>

Before and since 2017, American state statutes and common law precedents recognized nonmarital, nonbiological, and nonadoptive childcare parentage on terms similar to the suggested UPA and ALI de facto parent norms. For example, before the 2017 UPA there

72. Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., “a bonded and dependent relationship with the child.” UNIF. PARENTAGE ACT §609(d)(5) (UNIF. L. COMM’N 2017). Thus, there is not recognized a possible “bonded and dependent relationship” with a fetus, a fertilized egg, or some child of sex yet unconceived.

73. UNIF. PARENTAGE ACT § 609(d)(5), (6) (UNIF. L. COMM’N 2017).

74. *Id.* §609(d)(4), (3).

75. *Id.* § 609(d)(1). A curious requisite for de facto parentage is the express limit on who can commence a parentage proceeding. Commencement may only be undertaken by an “individual” who is “alive” and who “claims to be a de facto parent of the child.” *Id.* § 609(a). Thus, an existing legal parent, like a birth mother, may not be able to pursue de facto parenthood, as for child support, even where the requirements are met. This requirement is criticized in Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. AM. ACAD. MATRIM. LAWS. 157, 160–62 (2018).

76. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(c), 3.02(1)(c) (A.L.I. 2002) (requirements include residence with the child, as well as “the agreement of a legal parent to form a parent-child relationship” unless the legal parent completely fails, or is unable, to perform caretaking functions).

77. RESTATEMENT OF CHILDREN AND THE LAW §1.62(a) (A.L.I. Tentative Draft No. 6, 2024) (requirements of this section, approved by ALI members, include residence with the child, as well as establishing that “a parent consented to and fostered the formation of the parent-child relationship”).

78. But only the 2002 ALI Principles further recognize a “parent by estoppel.” PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (A.L.I. 2002). Under the 2002 ALI Principles, a legal parent, a parent by estoppel, and a de facto parent each has standing to pursue or participate in an action involving judicial allocation of custodial and decision-making responsibility for a child. *Id.* § 2.04(1). A “legal parent” is “an individual who is defined as a parent under other state law.” *Id.* § 2.03(1)(a).

were comparable Maine and Delaware statutes<sup>79</sup> as well as a Wisconsin Supreme Court precedent.<sup>80</sup> These laws were, in fact, utilized by the drafters of the 2017 UPA.<sup>81</sup> Since 2017, some states have statutorily recognized 2017 UPA de facto parenthood.<sup>82</sup>

On occasion, statutes within a single state recognize both residency/hold out and de facto parents who are neither biologically tied to, nor formal adopters of, children. Thus, the Maine Parentage Act provides for presumed parents who resided since birth with a child for at least two years, held the child out as their own, and “assumed personal, financial, or custodial responsibilities.”<sup>83</sup> It also provides for de facto parents who, inter alia, “resided with the child for a significant period of time,” established with the child “a bonded and dependent relationship,” and “accepted full and permanent responsibilities as a parent . . . without expectation of financial

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79. ME. REV. STAT. ANN. tit. 19-a, § 1891 (Westlaw through 2025 First Reg. and First Special Sessions of the 132nd Legislature of Maine); DEL. CODE ANN. tit. 13, § 8-201(c) (West, Westlaw through ch. 229 of the 153rd General Assembly (2025-2026)).

80. *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421, 435–36 (Wis. 1995) (finding that a “parent-like” relationship with a child can prompt visitation rights when in child’s best interests). In 2008, the South Carolina Supreme Court, adopting the Wisconsin Supreme Court’s analysis in *H.S.H.-K.*, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. *Marquez v. Caudill*, 656 S.E.2d 737, 743–45 (S.C. 2008) (applying *H.S.H.-K.*’s four-prong test for nonparent child visitation orders); see also *Conover v. Conover*, 146 A.3d 433, 446–47 (Md. App. Ct. 2016) (using *H.S.H.-K.* in recognizing de facto parent doctrine and clarifying the doctrine’s consistency with Supreme Court precedent on the care, custody, and control right of parents). In 2009, the United States Court of Appeals for the Fifth Circuit observed that Mississippi law recognized that a person standing “in loco parentis,” i.e., “one who has assumed the status and obligations of a parent without a formal adoption,” has the same “rights, duties and liabilities” as a natural parent. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 183 (5th Cir. 2009) (quoting *Farve v. Medders*, 128 So. 2d 877, 879 (Miss. 1961)). By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. See, e.g., Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 495–504 (2017). For a forceful argument on the need for continuing the common law “equitable parenthood doctrine” even where there are statutes, see Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 109 (2017).

81. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017).

82. See, e.g., WASH. REV. CODE ANN. § 26.26A.440(1)(b) (West, Westlaw through all legislation of the 2025 Reg. Sess.); VT. STAT. ANN. tit. 15C, § 501 (West, Westlaw through Chs. 73 (end) and M-5 (end) of the 2025 Reg. Sess.).

83. ME. REV. STAT. ANN. tit. 19-A, § 1881(3) (Westlaw through 2025 First Reg. and First Special Sessions of the 132nd Legislature of Maine).



compensation.”<sup>84</sup> Similarly, Delaware,<sup>85</sup> Washington,<sup>86</sup> and Vermont recognize both residency/hold out parents and de facto parents.<sup>87</sup>

Should one seek de facto parent status where there are two natural parents (a birth mother and her current or former spouse, a presumed parent),<sup>88</sup> the presumed parent can be displaced, assuming no three-parent option,<sup>89</sup> even where there are genetic ties between the presumed spousal parent and the child. Displacement is based on “the best interest of the child” under the 2017 UPA.<sup>90</sup> Comparably, a nongestating natural parent of a nonmarital child can be displaced by a court-recognized de facto parent.<sup>91</sup>

#### D. *Voluntary Acknowledgment Parentage*

Voluntary parentage acknowledgments can also prompt natural parent childcare losses arising from postbirth acts, including involuntary losses. While federal welfare law “child support” mandates prompted states to initiate voluntary paternity acknowledgment procedures in IV-D child-support settings,<sup>92</sup> these and similar procedures (e.g., voluntary parentage acknowledgment procedures) are now used by states beyond IV-D in child support settings,<sup>93</sup> as well

84. *Id.* § 1891(3)(A)–(C) (effective July 1, 2016).

85. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West, Westlaw through ch. 229 of the 153rd General Assembly (2025-2026)) (presumed residency/hold out parent); *id.* § 8-201(c) (de facto parent).

86. WASH. REV. CODE ANN. § 26.26A.115(1)(b) (West, Westlaw through all legislation of the 2025 Reg. Sess.) (presumed residency/hold out parent who “resided in the same household with the child for the first four years of the life of the child”); *id.* § 26.26A.440 (de facto parent).

87. VT. STAT. ANN. tit. 15C, § 401(a)(4) (West, Westlaw through Chs. 73 (end) and M-5 (end) of the 2025 Reg. Sess.) (presumed residency/hold out parent status where “person resided in the same household with the child for the first two years of the life of the child”); *id.* § 501(a) (de facto parent).

88. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM’N 2017).

89. The Act does offer state lawmakers a three-parent option. *Id.* § 613(c) (Alternative B).

90. *Id.* § 613(a) (best interest factors); *id.* § 613(b) (additional factors when parentage challenge is based on the results of genetic testing).

91. *Id.* §§ 609(e), 613 (where a person claims de facto parentage and there is more than one other individual who is a parent or has a claim to parentage, parentage is adjudicated under best interest factors).

92. The federal laws on IV-D funding of state welfare programs are reviewed in Jeffrey A. Parness, *Reforming Illinois Paternity/Maternity/Parentage Acknowledgment Laws*, 48 S. ILL. U. L.J. 417, 417–19 (2024). Voluntary parentage acknowledgment schemes predated the 1995 federal laws in some states. *See, e.g.*, UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM’N 1973) (presuming that a man is a natural father of a child when he “acknowledges his paternity . . . in a writing” filed with government); NEB. REV. STAT. ANN. § 43-1409 (West, Westlaw through end of the 1st Reg. Sess. of the 109th Legis. (2025)) (same).

93. *See, e.g.*, CAL. FAM. CODE § 7570(a)(1) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (“Establishing parentage is the first

as in nonsupport parentage settings, like custody,<sup>94</sup> visitation,<sup>95</sup> and tort.<sup>96</sup> Further, parent acknowledgment procedures are increasingly employed in settings beyond gametes providers, that is, in cases where acknowledged parentage is not founded on actual, presumed, or alleged genetic or other biological ties.<sup>97</sup> State parentage acknowledgment laws today are guided by not only the federal IV-D directives,<sup>98</sup> but also by the various UPAs.

All three UPAs recognize childcare parentage in those who have signed a voluntary paternity or parentage acknowledgment. These acknowledgments reflect actual consent to parentage by those who are at that time either expecting or existing gestational parents and by those who are at that time nonparents. It is possible that these nonparent signors have no actual genetic or other biological ties to their acknowledged children. Increasingly, acknowledgment signors need not even believe these ties exist.<sup>99</sup>

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step toward a child support award . . . .”); *id.* § 7570(a)(2) (finding that a system for establishing voluntary parentage will allow for “greater access to child support and other benefits,” including, per section 7570(a)(1), “social security, health insurance, survivors’ benefits, military benefits, and inheritance rights”).

94. *See, e.g.*, UNIF. PARENTAGE ACT § 305(a) (UNIF. L. COMM’N 2017) (stating that acknowledgments are “equivalent” to parentage adjudications and confer “all rights and duties of a parent”); *id.* § 203 (parent-child relationship established under the Act “applies for all purposes”).

95. *See, e.g.*, CAL. FAM. CODE § 7573(d) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025).

96. *See, e.g.*, *Hussey v. Woods*, No. W2014–01235–COA–R3–CV, 2015 WL 5601777, at \*1 (Tenn. Ct. App. Sep. 23, 2015) (birth mother, on behalf of child, seeks to employ in Tennessee a voluntary acknowledgment executed in Mississippi in a wrongful death lawsuit first pursued by the deceased male signor’s mother), *rev’d*, 538 S.W.3d 476 (Tenn. 2017).

97. *See, e.g.*, *Scott v. Benson*, 2023 UT 4, ¶¶ 1–5, 529 P.3d 319, 321–22 (Utah 2023) (gestating mother could not undo voluntary acknowledgment though male signor had no genetic ties); *J.M. v. C.G.*, 212 N.E.3d 776, 782 (Mass. 2023) (parentage can be established via voluntary acknowledgment though there are no biological ties).

98. Federal law directives cannot constitutionally mandate state pursuits of all genetic parents, regardless of IV-D application, as there is no congressional authority under the Taxing and Spending Clause. *See, e.g.*, *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585–86 (2012) (articulating limits on use of the Taxing and Spending clause by Congress). A provision in the draft leading to the 1973 UPA recognized that if no second legal parent was pursued or recognized within a year of the birth of a nonmarital child born of consensual sex, “an action shall be brought promptly on behalf of the child by the appropriate state agency.” Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 1, 11–12 (1974) (reporter-draftsman to the drafting committee deemed the striking of this provision before UPA passage regrettable).

99. In contrast to VPAs, where presumed spousal parents can deny parentage due to lack of genetic ties so that genetic parents may undertake VPAs, at times presumed spousal parents can deny parentage without any accompanying new VPA undertaking. *See, e.g.*, UNIF. PARENTAGE ACT § 201(2) (UNIF. L. COMM’N 2017) (presumed spousal parentage can be overcome “in a judicial proceeding”); WASH. REV. CODE ANN. §26.26A.435(1)–(2) (West, Westlaw through all legislation of the 2025 Reg. Sess. of the Washington Legislature) (setting limits on challenges to presumption). *But see* *Mackley v. Openshaw*, 2019 UT 74, ¶ 3, 456 P.3d 742, 744 (husband could not rescind his earlier denial of paternity in order to secure an order of

The 1973 UPA recognizes that “a man is presumed to be the natural father of a child”—thus prompting childcare parentage—if “he acknowledges his paternity in a writing” filed with the state, and that writing is not disputed by the birth mother “within a reasonable time after being informed.”<sup>100</sup> Beliefs about “natural” bonds are quite important, even if mistaken. Where “another man” is a presumed parent, whether by actual or attempted marriage<sup>101</sup> or by residency/hold out parentage,<sup>102</sup> “acknowledgment may be effected only with the written consent of the presumed father or after the presumption is rebutted.”<sup>103</sup> But rebuttal of spousal parentage in the “natural father” may only be sought by the child, the natural mother, or a man who is a presumed spousal parent.<sup>104</sup> An “interested party,” on the other hand, can seek to rebut a presumed residency/hold out or an as-acknowledged “natural father.”<sup>105</sup>

The 2000 UPA, however, does not recognize a childcare parentage presumption attending a paternity acknowledgment signature,<sup>106</sup> although it does recognize that a birth mother and “a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”<sup>107</sup> Again, genetic bonds seem quite important, even if beliefs are mistaken.<sup>108</sup>

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legal fatherhood because any mistake in making the denial involved legal, not factual, matters).

100. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM’N 1973). This provision governed in Colorado until August 2022, *People in Interest of C.S.*, No. 23CA0738, 2024 WL 4182231, at \*3 (Colo. App. Sep. 12, 2024), and thus may still operate there for acknowledgments undertaken before the new law took effect. Rebuttal of such a presumption occurs only with “clear and convincing evidence of no biological ties,” together with “a court decree establishing paternity of the child by another man.” UNIF. PARENTAGE ACT § 4(b) (UNIF. L. COMM’N 1973). For another discussion of the approaches taken by the three UPAs to voluntary acknowledgment parentage, see Jeffrey A. Parness, *Evaporating Natural Parent Childcare Liberties Under New Parentage Laws*, 77 ARK. L. REV. 643, 669–77 (2025) [hereinafter *Evaporating Liberties*].

101. UNIF. PARENTAGE ACT § 4(a)(1)–(3) (UNIF. L. COMM’N 1973).

102. *Id.* § 4(a)(4).

103. *Id.* § 4(a)(5).

104. *Id.* § 6(a).

105. *Id.* § 6(b).

106. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2000).

107. *Id.* § 301. The Comment to this section indicates that the requirement of “a sworn assertion of genetic parentage of the child” by a man acknowledging parentage was intended to correct an “omission” in the federal welfare subsidy statutes that often prompt state VPA laws. *Id.* cmt. The Comment also clarifies that the 2000 UPA “takes into account” assisted reproduction settings, as where a male sperm donor undertakes a VPA with his “partner,” the birth mother. *Id.* The 2000 UPA allows for a “signatory” to rescind a VPA within sixty days of its effective date. *Id.* § 307. After that, a signatory is limited to “challeng[ing]” the VPA in court on “the basis of fraud, duress, or material mistake of fact” within two years of the VPA filing. *Id.* § 308(a).

108. The U.S. Department of Health and Human Services, in 2003, did opine that the federal Social Security Act did not allow IV-D states to “require genetic testing” before accepting a VPA. Sherri Z. Heller, *Paternity Disestablishment*, ADMIN. FOR CHILD. & FAMS.

Where a man is presumed to be the child's father, though not a presumed "natural father,"<sup>109</sup> a gestating parent cannot acknowledge parenthood in another person under the 2000 UPA unless there is filed with the state "a denial of paternity . . . by the presumed father."<sup>110</sup> Should an alleged individual who is not a signatory (other than the child) wish to challenge an acknowledgment and seek paternity adjudication, the individual, like the mother,<sup>111</sup> has two years to challenge.<sup>112</sup>

The 2017 UPA also recognizes that a parentage acknowledgment can prompt parental childcare status without a presumption.<sup>113</sup> It also allows for parentage acknowledgments to be undertaken by a more diverse group of signatories, including not only those who claim to be "an alleged genetic father" of a child born of sex,<sup>114</sup> but also those who do not allege genetic ties, including a presumed parent (man or woman) due to an alleged or actual marriage;<sup>115</sup> a presumed parent due to a holding out of the child as one's own while residing in the same household with the child "for the first two years of the life of the child;"<sup>116</sup> and, an intended parent (man or woman) in a nonsurrogacy, assisted reproduction birth setting.<sup>117</sup> The 2017 UPA also recognizes that acknowledgments may be undertaken "before or after the birth of the child."<sup>118</sup> While beliefs about genetic ties need not always exist in undertaking parentage acknowledgments, the lack of genetic ties cannot always undo such parentage.<sup>119</sup>

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(Nov. 26, 2021), <https://acf.gov/css/policy-guidance/paternity-disestablishment> [https://perma.cc/2826-8HUS].

109. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2000).

110. UNIF. PARENTAGE ACT § 302(b)(1) (UNIF. L. COMM'N 2000); *see also* UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973). Both provide that an acknowledgment is void if it "falsely denies the existence of a presumed, acknowledged, or adjudicated father." UNIF. PARENTAGE ACT § 302(b)(3) (UNIF. L. COMM'N 2000); *see also* UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973).

111. UNIF. PARENTAGE ACT § 308(a)(2) (UNIF. L. COMM'N 2000).

112. *Id.* § 609(b). A child is bound by a parentage determination via an acknowledgment if "the acknowledgment is consistent with the results of genetic testing." *Id.* § 637(b)(1).

113. UNIF. PARENTAGE ACT § 201(5) (UNIF. L. COMM'N 2017). Some marital parentage presumptions, including marriages occurring after birth, can be prompted by parentage assertions in records filed with the state. *Id.* § 204(a)(1)(C)(i).

114. *Id.* § 301.

115. *Id.* §§ 301, 204(a)(1)(A)–(C).

116. *Id.* §§ 301, 204(a)(2).

117. *Id.* §§ 301, 703.

118. *Id.* § 304(c).

119. As with the 2000 UPA, signatories may rescind within sixty days. *Id.* § 308(a)(1) (allowing for rescission within two months of the effective date of an acknowledgment or denial of parentage). Challenges after that can only be brought "not later than two years after the effective date" and "only on the basis of fraud, duress, or material mistake of fact." *Id.* § 309(a). While nonsignatory challenges may be pursued within "two years after the effective date of the acknowledgment," such challenges usually will only be sustained when a judge

In recognizing parentage acknowledgments by those with no genetic ties to acknowledged children, the 2017 UPA allows for the circumvention of formal adoption laws and the safeguards they provide for children, including necessary adult background checks and child best-interest findings. The concerns in the Comments to the 2000 UPA lamenting that the federal statutes guiding state paternity acknowledgment laws did not expressly “require that a man acknowledging paternity . . . assert genetic paternity”—along with the assertion in the Comments that the Act was “designed to prevent circumvention of adoption laws by requiring a sworn assertion of genetic parentage of the child”—are no longer present.<sup>120</sup>

As with earlier UPAs, the 2017 UPA recognizes that acknowledgments are subject to sixty-day signatory rescissions<sup>121</sup> and to later signatory challenges based on fraud, duress, or material mistake of fact;<sup>122</sup> these are the requirements demanded of IV-D states receiving federal welfare subsidies.<sup>123</sup> Post sixty-day challenges by signatories based on fraud, duress, or material mistake of fact may be undertaken “not later than two years after the effective date” of the acknowledgment.<sup>124</sup> Post sixty-day challenges by nonsignatories as to parentage affirmances or parentage denials, other than by the child,<sup>125</sup> also must be undertaken “not later than two years after the effective date of the acknowledgment.”<sup>126</sup> Here, a court may permit the challenge proceeding only upon finding that it would serve “the best interest of the child.”<sup>127</sup> Nonsignatory challenges beyond the child can include an individual who is a parent, an individual whose parentage is to be adjudicated, a child support agency, an adoption agency, or a representative acting on behalf of an individual who has standing to challenge, but who was unable to challenge because of death, incapacitation, or minority.<sup>128</sup>

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finds the child’s “best interest” is served. *Id.* §§ 309(b), 610(b)(1)–(2). Nonsignatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; “an individual whose parentage of the child is to be adjudicated”; an adoption agency; and a child support, or other authorized, governmental agency. *Id.* §§ 610(b), 602. Thus, the parents or siblings of an alleged sperm provider of a child born of consensual sex are seemingly unable to challenge.

120. UNIF. PARENTAGE ACT art. 3 cmt. (UNIF. L. COMM’N 2000).

121. UNIF. PARENTAGE ACT § 308 (UNIF. L. COMM’N 2017) (“A signatory may rescind . . .”); 42 U.S.C. § 666(a)(5)(D)(ii)(I).

122. UNIF. PARENTAGE ACT § 309 (UNIF. L. COMM’N 2017) (signatory who acknowledged parentage or who denied parentage).

123. See 42 U.S.C. § 666(a)(5)(D)(ii)(I), (iii).

124. UNIF. PARENTAGE ACT § 309(a) (UNIF. L. COMM’N 2017).

125. *Id.* § 610(b).

126. *Id.* § 610(b)(1).

127. *Id.* § 610(b)(2).

128. *Id.* §§ 610(b), 602.

There are significant differences in current state acknowledgment challenge laws. In fact, Congress invited state law differences by leaving the terms “fraud, duress, or material mistake of fact” undefined.<sup>129</sup> These terms are implemented differently in the states.<sup>130</sup>

Congress also did not address standing to pursue nonsignatory rescissions and challenges.<sup>131</sup> State laws vary on post sixty-day acknowledgment challenges by nonsignatories,<sup>132</sup> with recognized challengers including, at times, alleged genetic fathers, governmental offices and/or officers, and the children and certain family members of acknowledgment signatories.<sup>133</sup> The state law standards for successful acknowledgment challenges sometimes vary between nonsignatory challengers.<sup>134</sup>

State law time limits on post sixty-day parent acknowledgment challenges also vary. Challenges must be commenced under written laws within a year in Massachusetts,<sup>135</sup> within two years in Delaware,<sup>136</sup> and within any time in Texas provided that the basis for the challenge is “fraud, duress, or material mistake of fact.”<sup>137</sup> In Utah, a statutory challenge may be made “at any time” on the ground of fraud or duress, but only within four years for a material

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129. 42 U.S.C. § 666(a)(5)(D)(iii) (providing no definition of who can be a challenger).

130. See, e.g., Parness & Saxe, *supra* note 3, at 183–203.

131. 42 U.S.C. § 666(a)(5)(D)(ii), (iii).

132. Parness & Saxe, *supra* note 3, at 186–94.

133. *Id.*

134. See, e.g., D.E. v. State (*In re State in Interest of J.E.*), 2023 UT App 3, ¶ 30, 524 P.3d 1009, 1017–18 (child can challenge VPA based simply on genetic testing, with no need to show fraud, mistake, or duress as required of other challengers); UTAH CODE ANN. § 81-5-623(2) (West, Westlaw through 2025 General Sess. and Chs. 1 and 2 of the 2025 First Special Sess.) (child’s challenge); *id.* § 81-5-307(1) (support enforcement agency’s challenge).

135. MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West, Westlaw through Ch. 65 of the 2025 1st Annual Sess.); see also State *ex rel.* Sec’y of Dep’t for Child. & Fams. v. Smith, 392 P.3d 68, 74, 77 (Kan. 2017) (applying one-year (after birth) limit on signatory challenges though there were found technical violations (e.g., no proper notarizations) of the statute); J.M. v. C.G., 212 N.E.3d 776, 781–83 (Mass. 2023) (applying one-year limit for genetic father to challenge another man’s VPA notwithstanding genetic father’s allegation of fraud, though he could pursue common law parentage if he proved substantial parent-child relationship existed).

136. DEL. CODE ANN. tit. 13, § 8-308(a)(2) (West, Westlaw through ch. 229 of the 153rd General Assembly (2025-2026)); see also VT. STAT. ANN. tit. 15C, § 308(a)(2) (West, Westlaw through Chs. 73 (end) and M-5 (end) of the 2025 Reg. Sess.); Paul v. Williamson, 2014 OK CIV APP 31, ¶ 8, 322 P.3d 1070, 1072–73 (employing Oklahoma two-year limit against alleged biological father per Oklahoma statute). Compare OKL. STAT. ANN. tit. 10, § 7700-609(B) (West, Westlaw through legislation of the First Reg. Sess. of the 60th Legislature (2025)), with LA. STAT. ANN. § 9:406 revision cmts. 2016 (Westlaw through the 2025 Reg. and First Extraordinary Sessions) (describing how two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgment was repealed in 2016).

137. TEX. FAM. CODE ANN. § 160.308(a) (West, Westlaw through the end of the 2025 Reg. and Second Called Sessions of the 89th Legislature).

mistake of fact.<sup>138</sup> In Michigan, an alleged genetic father can seek to revoke an acknowledgment of parentage “within 3 years after the child’s birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later.”<sup>139</sup> Where there are no written time limits, broad trial court discretion can reign.<sup>140</sup>

Failure to meet the ordinary time limits in acknowledgment challenge laws may not foreclose a parentage action by a genetic father of a child born of consensual sex under some state laws. In Massachusetts, a father has a “common law claim pursuant to the court’s equity jurisdiction” to “establish paternity” by demonstrating “a substantial parent-child relationship by clear and convincing evidence.”<sup>141</sup> In Rhode Island, an individual who seeks an adjudication of their own parentage<sup>142</sup> can extend the two-year limit on acknowledgment challenges by showing a lack of knowledge of “potential parentage due to a material misrepresentation or concealment,” though the court must also find that a challenge proceeding is “in the best interests of the child.”<sup>143</sup>

#### IV. SOME LAWS ON REGAINING NATURAL PARENT LIBERTIES

##### A. *Introduction*

Of course, the laws authorizing lost childcare liberties for natural parents can be altered so as to reduce losses, involuntary or otherwise.<sup>144</sup> Loss reductions occur, for example, when laws allow

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138. UTAH CODE ANN. § 81-5-307 (West, Westlaw through 2025 General Sess. and Chs. 1 and 2 of the 2025 First Special Sess.).

139. MICH. COMP. LAWS ANN. § 722.1437(1) (West, Westlaw through P.A.2025, No. 13, of the 2025 Reg. Sess., 103rd Legislature), *applied in* Taylor v. Brown, No. 366736, 2024 WL 207022, at \*7–8 (Mich. Ct. App. Jan. 18, 2024) (per curiam) (dismissing revocation petition due to no showing of mistake of fact or newly discovered evidence).

140. See, e.g., *In re Neal*, 184 A.3d 90, 92, 96–97 (N.H. 2018) (affirming exercise of trial court discretion to allow rescission of VPA where a 2009 VPA was challenged by male signatory in November 2015 after a 2012 paternity test revealed that he was not the biological father, and child contact was cut off in March 2014); Kelley v. Kelley, 55,358, p. 1–2, 6–7 (La. App. 2 Cir. 12/20/2023), 376 So. 3d 320, 321, 324 (La. Ct. App. 2023) (2012 and 2014 acknowledgments by the mother’s then-husband were challenged in 2022, and found to be “absolute nullities” as there were no genetic ties).

141. J.M. v. C.G., 212 N.E.3d 776, 783 (Mass. 2023).

142. 15 R.I. GEN. LAWS ANN. § 15-8.1-105(a)(3) (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature).

143. *Id.* § 15-8.1-308(b).

144. For example, a New York statutory title on Care and Protection of Children generally limits a finding that a child is “severely abused” to instances where a state “agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate” an abusive parent, as long as “such efforts will not be detrimental to the best interests of the child.” N.Y. SOC. SERV. LAW § 384-b(8)(a)(iv) (McKinney, Westlaw through L.2025 chs. 1 to 713). The policy is based on the view that it is generally desirable for the child to remain with or be returned to the birth parent. *Id.* § 384-b(1)(a).

parental liberty retentions even though the facts support waiver or forfeiture of childcare liberties. But laws can also allow natural parents to regain earlier lost childcare liberties, whether “care, custody, and control” interests<sup>145</sup> or parental “opportunity” interests.<sup>146</sup>

New laws on regaining natural parent liberties earlier lost might borrow from, or expand upon, current laws on retaining or regaining childcare liberties. The existing laws favoring natural parent childcare will first be reviewed before possible new laws on regaining lost natural parent childcare liberties are explored.

A review of current laws reveals that at times there can be adequate factual bases for permanently ending childcare liberties, particularly “care, custody, and control” interests, but that these liberties may nevertheless be retained, though perhaps not then able to be exercised, as when a child’s best interests will not be served by severing parent-child ties.<sup>147</sup> The review also reveals how laws can effectively allow natural parents whose childcare liberties have been permanently ended (as through a formal adoption or permanent guardianship) to develop or to continue parental-like relationships with their offspring through child placements in the homes of natural family members, like grandparents, aunts, and uncles.<sup>148</sup> Similarly, laws invite parental-like relationships between natural parents and their offspring to continue though all parental childcare liberties have been ended for the natural parents, as when laws recognize third-party visitations by nonparental natural family members, including not only grandparents, aunts, uncles, and siblings, but also genetic/biological parents.<sup>149</sup>

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145. See *supra* note 2.

146. See *supra* note 22.

147. See, e.g., N.J. STAT. ANN. § 30:4C-15.1(a)(4) (West, Westlaw through L.2025, c. 146 and J.R. No. 10) (“Termination of parental rights . . . [must] not do more harm than good.”), applied in N.J. Div. of Child Prot. & Permanency v. D.C.A. (*In re Guardianship of I.A.C.C.*), 304 A.3d 660 (N.J. 2023).

148. State law schemes on kinship caregiver-headed families are reviewed and critiqued in Cynthia Godsoe, *Kinship Care and Adoption Myopia*, 76 RUTGERS U. L. REV. 689, 698 (2024) (urging “more resources for kinship families” and “more flexible permanency solutions such as guardianship and open/partial adoption”).

149. See, e.g., OHIO REV. CODE ANN. § 3109.12(a) (West, Westlaw through File 25 of the 136th General Assembly (2025-2026) and 2025 Statewide Issue 2 (May election) (2024 H.J.R. No. 8)) (while unwed natural father may not be granted “reasonable parenting time rights,” the “parents of the father and any relative of the father” may seek an order “granting them reasonable companionship or visitation rights with the father”); LA. CHILD. CODE ANN. art. 1264 (Westlaw through 2025 Reg. Sess.) (stating that the parents of one who forfeited the right to object to the adoption of his/her child “may have limited visitation rights to the adopted child”). But see *Troxel v. Granville*, 530 U.S. 57, 73–74 (2000) (plurality); *id.* at 77 (Souter, J., concurring) (recognizing significant federal constitutional limits on a state’s ability to allow nonparent child visitations over parental objections).



Current laws on regaining natural parent liberties include statutes on parental reunification; parents of children born of extra-marital sex; voluntary parentage acknowledgments; and undoing parental rights terminations. Some of these laws are described below.

*B. Reunification, Not Termination, Upon Finding Parental Unfitness*

The ALI supports state laws that preserve natural childcare parentage. In its 2024 ALI Restatement Draft, the ALI declared that before a child is removed to state custody, the “state must make reasonable efforts to preserve the integrity of the family and prevent the removal by helping the parent . . . address the conduct and circumstances that led to state intervention.”<sup>150</sup> It further said that “the child’s health and safety are the state’s paramount concern.”<sup>151</sup> If a child is removed from the care of a parent, with jurisdiction in the removing court retained, according to the ALI “the court will also order the state to make reasonable efforts to reunify the child and parent.”<sup>152</sup> In states that allow both state-initiated and private petitions for parental rights terminations, there are often fewer opportunities for parental rehabilitation/reunification in private petition settings.<sup>153</sup> Presumptive parent placement opportunities should, of course, not occur upon certain showings, as with proof there is no chance of correction of neglectful conditions.<sup>154</sup>

In line with these ALI norms, a natural parent who forfeited or waived childcare liberties may nevertheless not permanently lose childcare liberties under some state laws, as where the maintenance of the parent-child relationship serves a child’s best interests.<sup>155</sup> In California, there will be no final parental rights

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150. RESTATEMENT OF CHILDREN AND THE LAW § 2.30(a) (A.L.I. Tentative Draft No. 6, 2024).

151. *Id.* § 2.30(b).

152. *Id.* § 2.50(a). The ALI reunification policy is reflected in federal law guidelines for states participating in a federal child welfare assistance program. 42 U.S.C. § 671(a)(15)(B) (stating generally that “reasonable efforts shall be made to preserve and reunify families”). Criticism of state family preservation programs appears at Steven M. Cytryn, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81, 85–88 (2010).

153. See, e.g., Deidre M. Smith, *Termination of Parental Rights as a Private Remedy: Rationales, Realities and Alternatives*, 72 SYRACUSE L. REV. 1174, 1210–22 (2022).

154. W. VA. CODE ANN. § 49-4-604(c)(6) (West, Westlaw through legislation of the 2025 Reg. Sess.) (“[N]o reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future . . .”).

155. For suggested guidelines (involving a “holistic process of reviewing multiple factors” rather than allowing a “single factor” to “overrule all other factors”), see John J. Choi, *A Blow to Reunification: How the Supreme Court of North Carolina’s Ruling in In re J.M. Eviscerates*

termination if there is a “compelling reason” for finding that termination would be detrimental to the child.<sup>156</sup> In Wisconsin, a factor in determining whether to terminate parental rights is whether the child will suffer harm if “substantial relationships” with family members are ended.<sup>157</sup> An unfit natural parent who permanently loses childcare liberties,<sup>158</sup> however, may be continued as a child support parent.<sup>159</sup>

In California, the ALI preference for parental reunification is further recognized in a law, with some exceptions,<sup>160</sup> stating that “the juvenile court shall order the social worker to provide child welfare services to the child and the child’s mother and statutorily presumed father whenever a child is temporarily removed from a parent’s custody.”<sup>161</sup> For nonpresumed fathers whose paternity has been recognized due to genetic ties, the court “may order services for the child and biological father, if the court determines that services will benefit the child.”<sup>162</sup>

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*the Hopes of Parents in Reunifying with Their Children*, 102 N.C. L. REV. 1755, 1773 (2024). Guidelines that apply to analyses of the best interests of children when involuntary terminations of parental rights are considered are found in RESTATEMENT OF CHILDREN AND THE LAW § 2.80(b) (A.L.I. Tentative Draft No. 6, 2024).

156. See, e.g., CAL. WELF. & INST. CODE § 366.26(c)(1)(B) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (preventing termination of parental rights where there is a “compelling reason for determining that termination would be detrimental to the child”). A compelling reason can be benefits from continuing the parent’s regular visitation and contact with the child or the objection of a child twelve years of age or older. *Id.* § 366.26(c)(1)(B)(i), (ii), *applied in* S.F. Hum. Servs. Agency v. Christine C. (*In re Caden C.*), 486 P.3d 1096 (Cal. 2021); see also ME. REV. STAT. ANN. tit. 18-C, § 9-204(3)(B)(1) (Westlaw through 2025 First Reg. and First Special Sessions of the 132nd Legislature) (allowing a court to order termination of parental rights upon “clear and convincing evidence” that “[t]ermination is in the best interest of the child”). For a review of the varying U.S. state law approaches to assessing the “best interests of the child” in custody cases, see Stephanie L. Tang, *Best Interests of the Child and the Expanding Family*, 14 U.C. IRVINE L. REV. 263, 264 (2024) (stating that application of the best interests norm is “inconsistent, particularly in cases where a parent resides with extended family members or regularly seeks childcare assistance from extended family members”).

157. WIS. STAT. ANN. § 48.426(3)(c) (West, Westlaw through 2025 Act 15, published July 3, 2025).

158. Where reunification efforts fail, Professor Chris Gottlieb suggests that the unfit natural parent would just have parental rights transferred to another, with that parent having the right to continue to visit the child as long as the child’s best interests would be served. Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL’Y REV. 43, 43 (2024).

159. Where a child’s best interests are not served by “reunification with a parent” for childcare purposes, that parent may still be a parent for child support purposes. See, e.g., N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004); *In re Stephen Tyler R.*, 584 S.E.2d 581, 585 (W. Va. 2003); Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 792–93 (2018).

160. CAL. WELF. & INST. CODE § 361.5(a), (b) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025).

161. *Id.* § 361.5(a).

162. *Id.*; see also MINN. STAT. ANN. § 260C.301(8) (West, Westlaw through legislation from the 2025 Reg. and First Special Sessions) (requiring the juvenile court to make specific

Resuscitation of natural parent childcare liberties, once lost, is promoted in Nevada where children “have not been adopted.”<sup>163</sup> There, “a petition for the restoration of parental rights” for a child can be granted where the “child is not likely to be adopted” and “the best interests of the child” are served.<sup>164</sup> In Oregon, “reinstatement of parental rights” is available for natural parents of children who have not been adopted or who were previously adopted but who no longer have legal parents.<sup>165</sup>

Reunification with natural parents can also be promoted indirectly, as when opportunities for custody/visitation are recognized for nonparental genetic family members. Natural parents benefit in Kentucky where parental status is temporarily lost. There, when determining temporary child custody placement, state officials must give preference “to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision . . . .”<sup>166</sup> Placement with certain relatives surely increases the chances that natural parents can later avoid or overturn childcare liberty losses and begin or resume child “care, custody, and control.”

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findings “that reasonable efforts to finalize the permanency plan to reunify the child and the parent were made” before terminating parental rights).

163. NEV. REV. STAT. ANN. § 128.170(1) (West, Westlaw through legislation of the 83rd Reg. Sess. (2025) end).

164. *Id.* § 128.190(2) (for a child “14 years of age or older,” there must also be the consent of the child).

165. OR. REV. STAT. ANN. § 419B.532(2) (West, Westlaw through 2025 Reg. Sess. of the 83rd Legis. Assembly) (requiring, among other things, eighteen months since termination judgment or six months since appellate court affirmation of termination, whichever is later, before motion to reinstate may be brought by Department of Human Services or a ward). Conditions for reinstatement include both present parental fitness and the child’s best interests. *Id.* § 419B.532(6)(b). Other state laws include UTAH CODE ANN. § 80-4-402 (West, Westlaw through 2025 General Sess. and Chs. 1 and 2 of the 2025 First Special Sess. 2025); VA. CODE ANN. § 16.1-283.2 (West, Westlaw through 2025 Reg. and Reconvened Sessions); WASH. REV. CODE ANN. § 13.34.215 (West, Westlaw through all legislation of the 2025 Reg. Sess.); N.Y. FAM. CT. ACT § 636 (McKinney, Westlaw through L.2025 chs. 1 to 491); N.C. GEN. STAT. ANN. 7B-1114 (West, Westlaw through S.L. 2025-58 of the 2025 Reg. Sess. of the General Assembly); OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West, Westlaw through legislation of the First Reg. Sess. of the 60th Legis. (2025)); 705 ILL. COMP. STAT. ANN. 405/2-34 (West, Westlaw through P.A. 104-130 of the 2025 Reg. Sess.); HAW. REV. STAT. ANN. § 587A-34 (West, Westlaw through 2025 Reg. Sess.); COLO. REV. STAT. ANN. § 19-3-612 (West, Westlaw through First Reg. and Extraordinary Sessions, 75th General Assembly (2025)); DEL. CODE ANN. tit. 13, § 1116 (West, Westlaw through ch. 229 of the 153rd General Assembly (2025-2026)); ME. REV. STAT. ANN. tit. 22, § 4059 (Westlaw through 2025 First Reg. and First Special Sessions of the 132nd Legislature of Maine) (state laws differ on, e.g., age of child and time since a parental rights termination).

166. KY. REV. STAT. ANN. § 620.090(2) (West, Westlaw through 2025 Reg. Legislative Sess. and the Nov. 5, 2024 election). A similar New Jersey policy was implemented in *M.M. v. Department of Children & Families (In re Guardianship of D.H.)*, 323 A.3d 530, 533, 535–36 (N.J. Super. Ct. App. Div. 2024). See N.J. STAT. ANN. § 30:4C-15.1(a)(2) (West, Westlaw through L.2025, c. 146 and J.R. No. 10).

Besides temporary child custody placement preferences for non-parent genetic family members, similar preferences in permanent child custody settings can indirectly benefit natural parents seeking new or renewed relationships with their children. Thus, in Arkansas, “[i]n all custodial placements . . . in . . . adoption, the court shall give preferential consideration to an adult relative over a non-related caregiver . . . .”<sup>167</sup> And in Georgia, when parental rights in a child are terminated or voluntarily surrendered, a placement of the child “in accordance with such child’s court approved permanency plan” requires “findings of fact” regarding, inter alia, the “placement that offers the greatest degree of legal permanence and security,” the “child’s sense of attachment and need for continuity of relationships,” and, the “value of biological and familial connections.”<sup>168</sup>

### C. *Extramarital Sex, Marital Birth*

Currently, some genetically tied parents of children born of adulterous sex may lose childcare liberty interests; if lost, these interests sometimes can be regained. Here, female birthgivers are distinguished from male sperm providers. Women who bear children born of sex outside of their marriage maintain their childcare interests because they gave birth.<sup>169</sup> Men who pursue natural parent childcare for children born of adulterous sex can sometimes secure childcare interests if they are permitted under law, and affirmatively seek, to override the marital parent presumption initially favoring the birthgiver’s spouse.<sup>170</sup> Where the spousal parent

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167. ARK. CODE ANN. § 9-9-102(a) (West, Westlaw through acts passed during the 2025 Reg. Sess. of the 95th Arkansas Gen. Assemb.).

168. GA. CODE ANN. § 15-11-321(a)(1), (3), (4) (West, Westlaw through legislation passed at the 2025 Reg. Sess. of the Georgia Gen. Assemb.); see, e.g., *In re J.J.*, 682 S.E.2d 349, 355 (Ga. Ct. App. 2009) (stating that there is “no conclusive preference given to relatives”); *In re D.L.T.*, 747 S.E.2d 880, 882 (Ga. Ct. App. 2013) (similar).

169. See, e.g., UNIF. PARENTAGE ACT § 201(1) (UNIF. L. COMM’N 2017) (a parent-child relationship is established between an individual who gave birth and the child, excepting certain surrogacy births).

170. *Id.* § 607 (adjudicating claim of alleged genetic parent); *id.* § 608 (adjudicating parentage where there is presumed spousal parent); *id.* § 613 (adjudicating competing claims of parentage). State laws vary on whether adulterous natural parents can pursue childcare. Compare *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (holding that male adulterer, under Iowa Constitution, has “a liberty interest in challenging paternity” of husband of woman who gave birth), with *Kinnett v. Kinnett*, 2023-00060, p. 5, 24 (La. 6/27/23), 366 So. 3d 25, 28, 40 (holding that a statute allowing a putative biological father to seek paternity within a year of birth of a child born to a woman married to another is not unconstitutional). But see *Strauser v. Stahr*, 726 A.2d 1052, 1052–53 (Pa. 1999) (holding that a male adulterer cannot challenge spousal parentage in husband where the marriage is intact and the married couple favors maintaining the spousal parent presumption), *abrogated by*, *Sitler v. Jones*,

presumption is not subject to override by a nongestating natural parent, state law limits on rebuttals effectively prompt losses of natural parent opportunity interests in childcare, losses which the U.S. Supreme Court has sanctioned notwithstanding the natural parent opportunity interests recognized in *Lehr v. Robertson*.<sup>171</sup>

Where rebuttal overrides of male spousal parentage by adulterous male natural parents are not initially allowed,<sup>172</sup> genetically tied men may nevertheless be able to secure childcare. Consider paternity suits after the (presumed) marital parentage on behalf of the birthgiver's spouse has been rebutted, whether by the birthgiver or by the spouse.<sup>173</sup> As well, a natural father, the birth mother, and her spouse usually can sign a voluntary paternity/parent acknowledgment declaring the natural father, but not the spouse, a childcare parent under law.<sup>174</sup>

Further, without a spousal parent override, a genetically tied man may also secure the protected childcare liberty through post-birth childcare acts that prompt parenthood, as are recognized within laws on formal adoptive, residency/hold out, and de facto parenthood.<sup>175</sup> These laws normally will depend on the cooperative efforts of the gestating parent.<sup>176</sup>

#### *D. Voluntary Parentage Acknowledgment Challenges*

Natural parents, both men and women, can lose childcare liberties when birthgivers sign voluntary parentage acknowledgments with those having no genetic ties. Losses can be overcome by the nongestating natural parents where the acknowledgments are successfully challenged, with those natural parents thereafter able to establish childcare parentage, as through paternity/maternity suits. However, there are significant barriers to acknowledgment challenges by nonsignatories. There are typically both time

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334 A.3d 861 (Pa. 2025) (holding that marital spouse presumption can only be rebutted if it served the child's best interests).

171. *Michael H. v. Gerald D.*, 491 U.S. 110, 113, 128–30 (1989) (plurality).

172. In states where a marital/spousal parent presumption arises for a female spouse, here too there may be rebuttal barriers for a natural parent whose semen prompted birth. Barriers may also initially block parentage actions by egg donors who are not married to the birthgiver. Where a married woman gives birth to a child via assisted reproduction utilizing the eggs of another, the one-time egg donor (i.e., no parentage, as via waiver or forfeiture), as a natural parent, may later be granted standing to seek a parentage declaration in the event of a spousal parentage rebuttal.

173. See, e.g., UNIF. PARENTAGE ACT § 608(c)(3) (UNIF. L. COMM'N 2017).

174. *Id.* § 301.

175. *Id.* § 204(a)(2) (residency/hold out); *id.* § 609 (de facto). For de facto parentage, there are no bars to use by natural parents yet unrecognized as childcare parents under law. *Id.*

176. It is possible, for example, that the natural father acted in parental ways with the widow/widower of the gestating parent.

constraints and requirements on demonstrating fraud, duress, or material mistake of fact. State laws vary on the challenge requisites allowing nonbirthgiving natural parents to later secure or regain childcare liberties.

When a child is born of consensual sex, childcare liberties only sometimes can be regained by a natural father who lost any existing or possible childcare through a voluntary paternity or parentage acknowledgment signed by the birthgiver and another person. State laws vary on how acknowledgments can be challenged by such natural fathers.<sup>177</sup> A natural father who had a *Lehr* opportunity interest in raising a child, which was lost by an acknowledgment, can regain that interest in order to secure childcare parent status via an acknowledgment challenge.<sup>178</sup> A natural father who had a care, custody, and control interest in a child by marriage to the birthgiver can regain childcare parentage via an acknowledgment challenge.<sup>179</sup> Such a father, due to marital/spousal parentage status, would have needed to be, but was not, a signatory to the acknowledgment.<sup>180</sup> By contrast, a natural father who had a federal statutory parental opportunity interest under the Indian Child Welfare Act may seek to regain or assert paternity under less stringent standards than a natural father with no such statutory interest.<sup>181</sup>

When a child is born via a form of assisted reproduction, a non-birthgiving gametes provider may have parental liberties under *Lehr*, a broader liberty interest under state law, or a broader federal statutory interest, as under the Indian Child Welfare Act.<sup>182</sup> Such

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177. Natural fathers and mothers who have theretofore not been childcare parents under law can seek to secure legal parentage through an acknowledgment challenge coupled with a paternity/maternity lawsuit. Natural fathers, as with spouses of birthgivers, who waived childcare liberties by signing acknowledgments of nonparentage allowing nonbirthgivers with birthgivers to acknowledge parentage in the nonbirthgivers can seek to regain childcare liberties by challenging their own acknowledgments. There are currently few, if any, state acknowledgment forms allowing a female egg donor who earlier waived parental childcare liberties to challenge a parentage acknowledgment recognizing parentage in another together with the birthgiver. *But see* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017) (allowing a presumed female spousal parent, together with the birthgiver, to sign an acknowledgment; such a spouse may also be a natural parent if pregnancy was prompted by a fertilized egg implant).

178. UNIF. PARENTAGE ACT §§ 602(4), 610(b) (UNIF. L. COMM'N 2017).

179. *Id.* § 602(3) (UNIF. L. COMM'N 2017) (a presumed parent); *id.* § 610(b).

180. *See, e.g., id.* § 302(b)(1); *see also* UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973) (if a man is a presumed parent via marriage to the birth mother, he must consent before another man files a voluntary paternity acknowledgment with the birth mother).

181. *See, e.g.,* 25 U.S.C. § 1912(d) (when one is seeking to end parental rights of an Indian to an Indian child, under state law state officials must undertake “active efforts” to “prevent the breakup of an Indian Family”).

182. Federal parental liberty interests are reviewed in *Evaporating Liberties*, *supra* note 100, at 648–54. Exemplary of broader state liberty interests is *Callender v. Skiles*, 591

liberty interests can be employed, for example, by such a gametes provider to undo a voluntary paternity or a parentage acknowledgment, as with the 2017 UPA, which expressly authorizes an acknowledgment by an intended parent in a nonsurrogacy, assisted reproduction birth setting.<sup>183</sup> While the 1973 and 2000 UPAs seemingly exclude acknowledgment processes involving assisted reproduction births,<sup>184</sup> hospital and state officials seemingly would usually have no way of knowing that a male and female acknowledgment signor did not engage in sex prompting the birth.

So, what particular barriers make acknowledgment challenges by nonsignatory natural parents difficult? Laws on standing to challenge present no such barriers as generally challengers include individuals whose parentage is to be adjudicated.<sup>185</sup> But time barriers vary amongst the states and are as short as one year from signing.<sup>186</sup> The challenge times can be extended, as in Rhode Island, which extends the two-year period where there is a lack of knowledge of “potential parentage due to a material misrepresentation or concealment.”<sup>187</sup> Further, sometimes a challenge, even when timely, cannot proceed if it would not serve “the best interest of the child.”<sup>188</sup> Legitimate policies support certain difficulties facing nonsignatory natural parents when their children are subject to parentage acknowledgments by others. State laws can value the stability found in two-parent family relationships once established, including the availability of two parents for child support purposes.<sup>189</sup> When those policies are no longer being served, as when

N.W.2d 182, 192 (Iowa 1999), with the ruling employed in *Callender v. Skiles*, 623 N.W.2d 852 (Iowa 2001).

183. UNIF. PARENTAGE ACT §§ 301, 703 (UNIF. L. COMM’N 2017).

184. UNIF. PARENTAGE ACT § 5, cmt. (UNIF. L. COMM’N 1973) (stating that “[t]his Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination,” though it does speak to the practice when employed by a licensed physician, husband, and wife); UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM’N 2000) (stating that the article on children born of assisted reproduction “does not apply to the birth of a child conceived by means of sexual intercourse”).

185. UNIF. PARENTAGE ACT §§ 610(b), 602 (UNIF. L. COMM’N 2017).

186. MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West, Westlaw through Ch. 65 of the 2025 1st Annual Sess.).

187. 15 R.I. GEN. LAWS ANN. § 15-8.1-308(b) (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature); *see also id.* § 15-8.1-105(a)(3) (“[A] proceeding to adjudicate parentage may be maintained by . . . [a]n individual whose parentage is to be adjudicated[.]”).

188. UNIF. PARENTAGE ACT § 610(b)(2) (UNIF. L. COMM’N 2017); *see* CONN. GEN. STAT. ANN. § 46b-483(e) (West, Westlaw through all enactments of the 2025 Reg. Sess.) (following the 2017 UPA).

189. *See, e.g.,* CAL. FAM. CODE § 3020(b) (West, Westlaw through Ch. 790 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (“The Legislature finds and declares that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents . . .”).

an acknowledgment has been successfully challenged by the signing gestating parent as to the signing nongestating parent,<sup>190</sup> natural parent recoveries of childcare liberties make greater sense. Natural parent childcare recoveries make sense as well when the aforesaid legitimate policies underlying voluntary parentage acknowledgments are no longer fully served, as when one signor dies or has parental rights terminated.

### *E. Undoing Formal Parental Rights Terminations*

Where parental childcare liberties have been ended in parental rights termination proceedings,<sup>191</sup> laws can make these liberties subject to revival. Formal terminations might be undone through paternity suits, formal adoptions, or residency/hold out or de facto parentage decrees. Such laws can distinguish birthgivers from other genetically tied parents, with revivals more easily undertaken by gestating parents. As well, these laws can distinguish between those who are and those who are not genetically tied or biologically tied to the children for whom they seek regained parental childcare. Finally, these laws can favor those with genetic ties, as by distinguishing between sperm/egg providers and gestational carriers.

For men prompting births via consensual sex, laws can allow childcare liberty opportunity interest revivals when earlier losses arose due to untimely paternity pursuits, especially where the time failures were caused by others, perhaps involving fraud or misrepresentation.<sup>192</sup> For example, consider a revival opportunity after parental rights termination in contemplation of a future adoption where the adoption later fails or is abandoned. Further, consider a revival opportunity for a natural parent after a voluntary paternity acknowledgment has been rescinded or successfully challenged.

For childcare liberty losses to sperm providers and nonbirthgiving egg providers in assisted reproduction settings, even assuming no *Lehr* or *Lehr*-type interests, laws can allow revivals. Revival

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190. Challenge opportunities for nonsignatories who are not natural parents are often unavailable, as with natural family members like paternal grandparents. Parness & Saxe, *supra* note 3, at 186–94.

191. Currently, some states differentiate between, e.g., grounds for termination of parental rights for genetic parents and for adoptive parents. See, e.g., Kira Kilstein, Note, *The Forever Family's Legal Loophole: A 50-State Survey on Adoption Dissolution*, 46 CARDOZO L. REV. 183, 183, 198, 199 (2024) (urging that a single statutory scheme in each state is needed).

192. Such a policy is reflected in a Rhode Island statute extending the time for a natural father to challenge a voluntary parentage acknowledgment by the birth mother and another where the natural father lacked knowledge of his potential parentage due to a “material misrepresentation or concealment.” 15 R.I. GEN. LAWS ANN. § 15-8.1-308(b) (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature).



opportunities are particularly appropriate when the losses arose solely due to earlier failures to prevail on intended parentage contract enforcement claims, especially where there were significant parental intentions and actions for both the provider and the gestating parent.<sup>193</sup>

## V. NEW LAWS ON REGAINING NATURAL PARENT LIBERTIES

### A. Introduction

State and federal laws on the losses of natural parent childcare liberties have been widely debated, and often criticized.<sup>194</sup> Unfortunately, there has been scant review by legislators, judges, commentators, or others on when and how such lost childcare liberties might be regained. As noted, there are some laws on natural parent childcare revival mechanisms, including parental rights termination provisions within formal adoption laws and challenge provisions in presumed spousal parent and voluntary parentage acknowledgment laws.

Importantly, opportunities for natural parents to regain lost parental childcare generally are not addressed in state laws on the forms of nonadoptive, nonbiological, or nongenetic<sup>195</sup> childcare parenthood based on actions after birth, sometimes referred to as

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193. See, e.g., *Gatsby v. Gatsby*, 495 P.3d 996, 999 (Idaho 2021) (holding that failure to follow requirements of the state's Artificial Insemination Act by a nongenetic intended parent meant she had no parental childcare interests), criticized in Jeffrey A. Parness, *DIY Artificial Insemination: The Not-So-Great Gatsby*, 55 CREIGHTON L. REV. 465 (2022). Similarly, when an egg donor fails to follow contract requirements on fertilized egg implants, losses can occur. Here, federal constitutional issues might negate strict compliance requirements in assisted reproduction birth statutes. But see, e.g., *In re Parentage of S.D.S.*, 539 P.3d 722, 742 (Or. 2023) (finding that genetic, but not gestating, female has no federal constitutional childcare opportunity, per *Lehr v. Robertson*, if not recognized as "a parent in the first place" by state law). On the lack of a federal constitutional parental opportunity interest for a sperm donor in a child born of assisted reproduction due to the lack of a written agreement, see *In re K.M.H.*, 169 P.3d 1025, 1040–42 (Kan. 2007).

194. For example, some commentators opine that birthmothers ought to control regardless of whether there is a recognition of any childcare liberties by natural fathers in children born of consensual sex. See Jeffrey A. Parness, *New Mothers Know Best? Second Parent Choices at Birth*, 48 S. ILL. U. L.J. 1, 1–2 (2023) (reviewing and criticizing four commentators). Elsewhere, others bemoan the failures to adequately protect the childcare liberties of natural fathers of children born of consensual sex in adoption (and other) settings. Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?*, 36 CAP. U. L. REV. 207, 220 n.69 (2007).

195. Nongenetic, but biological ties prompt childcare parentage in, for example, birthgiving gestational carriers (i.e., no genetic ties). See, e.g., UNIF. PARENTAGE ACT § 808(a) (UNIF. L. COMM'N 2017) (establishing that a party to a gestational surrogacy pact may end the agreement only before an embryo transfer); *id.* § 814(a)(2) (establishing that a genetic surrogate, notwithstanding intended parentage in a genetic surrogacy agreement, may pursue childcare parentage within seventy-two hours of birth).

informal adoption laws.<sup>196</sup> These include the previously described residency/hold out and de facto parentage laws.<sup>197</sup> State recognitions of such childcare parenthood sometimes cannot be stopped by actual natural parents, including some who secured and never lost their childcare liberties.<sup>198</sup>

Regardless of the fairness of initial losses of childcare parenthood by those with natural ties,<sup>199</sup> new laws should recognize special opportunities for regaining natural parent childcare liberties. New laws are especially warranted where liberties were lost by natural parents who did all they could to establish or maintain parentage.

New laws should be formulated only after considering suggested norms by distinguished groups, like the ALI, and by commentators. Any new laws should take account of existing state laws on regaining childcare liberties in order to ensure consistent public policies.

New laws on regaining natural parent childcare liberties must take account of the two childcare liberty forms recognized by the U.S. Supreme Court.<sup>200</sup> Yet new laws should vary interstate to accommodate the differing rationales underlying state laws on parentage.<sup>201</sup>

Childcare parent revival laws should be founded on concerns about the fairness of earlier childcare liberty losses, particularly

196. Herein, formal adoptions include those adoptions, whether deemed public or private, requiring court recognitions before taking effect wherein statutory requisites typically include investigations, notice, terminations of existing parental rights, and child best-interest findings. Informal adoptions involve court recognitions of parentage, as with residency/hold out and de facto parentage, where formal adoption procedures are not required. *See* Jeffrey A. Parness, *Formalities for Informal Adoptions*, 43 CAP. U. L. REV. 373, 382–90 (2015); Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 950–51, 964 (2019) (describing court recognitions of parentage in informal adoptions).

197. *See supra* Sections III.B–C.

198. While the precedents are split on establishing de facto parenthood, there is some judicial support for the proposition that only one of two existing legal childcare parents needs to consent to any establishment. Major cases include *E.N. v. T.R.*, 255 A.3d 1, 6 (Md. 2021) (holding that to establish de facto parentage a nonconsenting legal parent must be unfit or “exceptional circumstances [must] exist”); *Martin v. MacMahan*, 2021 ME 62, ¶ 29 & n.16, 264 A.3d 1224, 1234–35, 1235 n.16 (Me. 2022) (citing *E.N.* with approval); *see also* Douglas NeJaime, *Parents In Fact*, 91 U. CHI. L. REV. 513, 547–50 (2024) (reviewing other cases).

199. *See, e.g., Evaporating Liberties, supra* note 100, at 655–88 (reviewing initial losses of natural parent childcare liberties under residency/hold out, de facto, voluntary acknowledgment, and assisted reproduction laws).

200. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality) (finding parents’ liberty interest in the care, custody, and control of their children is more than seventy-five years old); *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (recognizing the “opportunity” of biological parent “to develop a relationship” with offspring).

201. The U.S. Supreme Court has recognized that federally protected childcare parentage is defined by state lawmakers, as with issues on when, if at all, a spousal parentage presumption should be subject to rebuttal by a natural father and on whether to recognize residency/hold out parentage, de facto parentage, or similar forms of nonadoptive parentage. *See, e.g., Federal Constitutional Childcare Parents, supra* note 2, at 971–76 (describing how the U.S. Supreme Court has authorized state nonadoptive childcare parent laws).

where childcare liberties were lost to a faultless natural parent.<sup>202</sup> New laws should also surely be grounded on serving a child's best interests in establishing or having established the child-natural parent relationship.<sup>203</sup> Laws on reviving parental status should encompass settings where the natural parent is deceased; here, a revival can promote the development or continuation of healthy natural family relationships between children and their siblings, grandparents, or other family members, as well as prompt monetary recoveries by children in tort and/or probate.<sup>204</sup>

New laws on revivals of lost childcare liberties of natural parents could authorize: formal adoptions or kinship legal guardianships<sup>205</sup> by nonparent natural family members that would facilitate new, or would reignite earlier, natural parent-child relationships; the undoing of judicial terminations of parental childcare liberties; the foster placements of now-parentless children with nonparent natural family members; or, kinship legal guardianships with those having "a biological or legal relationship with the child."<sup>206</sup> New laws could benefit natural parents directly, as by reviving their once-lost childcare liberties, or indirectly, as by creating new opportunities for familial relationships between children and their natural parents through locating children within the homes of extended natural family members.

Before examining possible new natural parent revival laws, an illustrative case is presented. Its story will be used to demonstrate

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202. See, e.g., 15 R.I. GEN. LAWS ANN. § 15-8.1-308(b) (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature) (allowing a genetic father to challenge a voluntary paternity acknowledgment by another man after the general limitations period has expired but subject to child's best interests, where the father did not know of "potential parentage due to a material misrepresentation or concealment").

203. A child's interest may include having a second childcare parent and learning about one's genetic background for healthcare purposes, child support, and gaining a better understanding of how one came to be. Of course, a child's best interests cannot alone serve as a basis for excluding a natural parent from childcare. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

204. See, e.g., *Fernandez v. Motorola Sols., Inc.*, 2024 IL App (1st) 220884, ¶ 1, 238 N.E.3d 555, 559 (children sue parents' employer for their congenital conditions caused by their parents' exposure to toxic chemicals at work); *supra* note 8.

205. See, e.g., N.J. STAT. ANN. §§ 3B:12A-1 to 12A-7 (West, Westlaw through L.2025, c. 146, and J.R. No. 10) (permanent kinship guardianship).

206. See, e.g., *id.* § 3B:12A-2 (defining "kinship relationship" under statutes on "kinship legal guardianship"). The statute's 2021 amendments were described in *M.M. v. Department of Children & Families (In re Guardianship of D.H.)*, 323 A.3d 530, 542 (N.J. Super. Ct. App. Div. 2024), as having these goals:

The objective of the statutory amendments was to ensure a focus on preserving the birth parent-child relationship given the "benefits to placing children with relatives or other kinship caregivers, such as increased stability and safety as well as the ability to maintain family connections and cultural traditions."

how new natural parent childcare revival laws of varying types are needed in the ever-changing landscape of legal parenthood. The case involves a natural childcare parent who was also recognized as a residency/hold out childcare parent and who was never deemed unfit, but who nevertheless lost childcare liberties. The case prompts thoughts about possible new laws, including laws on residency/hold out parents, child-parent (re)unification, spousal parentage, voluntary acknowledgment parentage, and parental rights terminations.

### *B. An Illustrative Case*

The California Supreme Court's decision in *In re Jesusa V.* illustrates how there can be two nongestating childcare parents, under law, together with the gestating parent, after birth due to their (and the mother's) postbirth acts for a child born of consensual sex.<sup>207</sup> It further shows how two such parents sometimes need to face each other in a showdown over who secures legal parenthood though each has satisfied statutory criteria,<sup>208</sup> where a showdown may leave a natural and fit parent without childcare status.<sup>209</sup> Jesusa V. was born in 1999 to Jesusa, who was married to Paul at the time; Jesusa had five other children by Paul.<sup>210</sup> The couple had separated before the birth<sup>211</sup> of Jesusa V., who was born of consensual sex with Heriberto.<sup>212</sup> "An unusual living arrangement" ensued after birth; Jesusa V. and her mother "lived with Heriberto during the week and with Paul and . . . [Jesusa's] other children on weekends."<sup>213</sup>

Jesusa and Heriberto had a "tempestuous relationship"; prior to Jesusa V.'s second birthday, Heriberto was arrested for raping Jesusa,<sup>214</sup> and Jesusa V. was taken into protective custody in April of 2001, with the Los Angeles County Department of Children and Family Services petitioning the juvenile court to declare Jesusa V. a dependent of the court.<sup>215</sup> The court appointed counsel to represent Heriberto, who denied the rape allegations.<sup>216</sup> Heriberto also

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207. L.A. Cnty. Dep't of Child. & Fam. Servs. v. Heriberto C. (*In re Jesusa V.*), 85 P.3d 2, 7 (Cal. 2004). The *Jesusa V.* decision is reviewed in *Evaporating Liberties*, *supra* note 100, at 696–700.

208. A similar showdown between two men occurred in *People in Interest of C.S.*, No. 23CA0738, 2024 WL 4182231, at \*1 (Col. App. Sep. 12, 2024).

209. *Jesusa V.*, 85 P.3d at 7.

210. *Id.* at 13.

211. *Id.* at 27 (Kennard, J., dissenting).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 6 (majority opinion).

216. *Id.* at 7.

asserted that he, not Paul, was Jesusa V.'s legal father.<sup>217</sup> Heriberto later pled no contest to rape and was sentenced to three years in prison.<sup>218</sup>

Before and at the dependency hearings, it was at least assumed that Paul was an Air Force sergeant in San Diego.<sup>219</sup> Paul and Jesusa had been married for nearly eighteen years, though they often lived apart for the last three years of their marriage.<sup>220</sup> However, Jesusa did live with Paul "when her mother came to San Diego to visit her other children," with the most recent visit in March of 2001.<sup>221</sup>

As to parenting, Heriberto, assumed to be Jesusa V.'s genetic father, was found to have held himself out as Jesusa V.'s father and to have received her into his home.<sup>222</sup> Paul was also found to have held himself out as Jesusa V.'s father, received her into his home, and treated her as his own.<sup>223</sup> Paul lived with Jesusa V. "for a significant period of time in her young life."<sup>224</sup>

At a hearing in July of 2001, the court ruled that both Heriberto and Paul were presumed residency/hold out parents; it then, however, labeled Heriberto as a "mere biological father."<sup>225</sup> Because the attorneys representing Paul and Jesusa did not challenge the allegations of Heriberto's genetic ties, the court deemed them true, despite the lack of supporting blood tests.<sup>226</sup> The juvenile court ordered Jesusa V. placed with Paul, allowed Jesusa unmonitored visits, and forbade Heriberto from having any contact with Jesusa V.<sup>227</sup>

Heriberto appealed, with the California Court of Appeals affirming the order declaring Paul the father of Jesusa V.<sup>228</sup> In a four-three ruling, the California Supreme Court affirmed the custody order favoring Paul, but with new reasoning.<sup>229</sup> All seven justices

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217. *Id.*

218. *Id.* Heriberto was also subjected to "an immigration hold"; over Heriberto's objection, the hearing was conducted in his absence. *Id.* at 8 (paternity and jurisdictional findings).

219. *Id.* at 7.

220. *Id.*

221. *Id.* (one month before April 2001 hearing).

222. *Id.* (representations by Heriberto's counsel).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 29 (Kennard, J., dissenting) (observing that blood tests "were unnecessary, as the parties agreed that Heriberto, not Paul, was Jesusa's biological father").

227. *Id.* at 8 (majority opinion) (forbidding contact between the natural father and his child while never deeming that father to be unfit).

228. *Id.* It reversed the order, however, finding no juvenile court authority to proceed in Heriberto's physical absence. *Id.*

229. *Id.* at 27 (reversing the ruling of the appellate court that Jesusa V. was a "dependent child of the court," while affirming "[i]n all other respects" its judgment, which affirmed, in part, the trial court order). The court found no prejudice in conducting the hearing without

agreed that both Paul and Heriberto were “presumed” natural fathers.<sup>230</sup> Paul qualified because Jesusa V. was born to his wife.<sup>231</sup> Both Paul and Heriberto qualified because each had received Jesusa V. into his home and openly held her out as his natural child.<sup>232</sup> But because there could be “only one presumed father,”<sup>233</sup> the court resorted to another Code provision, which directed that the choice between two competing presumed fathers be resolved on the basis of “the weightier considerations of policy and logic.”<sup>234</sup> The application of these norms split the court. Four justices chose Paul,<sup>235</sup> while three chose Heriberto,<sup>236</sup> though at least two of these three recognized that “[t]he juvenile court may well have been right that Paul rather than Heriberto was likely to be a better parent to Jesusa.”<sup>237</sup>

How did three justices find that “policy and logic” favored Heriberto, a rapist who had also been jailed for three months in Colorado in 2000 for assaulting Jesusa, but who had never been found to be an unfit parent? These justices found other California statutory provisions compelling, though not applicable to the case at hand. Another Family Code section allowed a genetic father like Heriberto to override the “presumed” father status of a man like Paul within two years of the child’s birth with blood tests.<sup>238</sup> Here, Jesusa V. was taken into protective custody before she was two.<sup>239</sup>

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Heriberto’s presence. *Id.* at 25; *see also* L.A. Cnty. Dep’t of Child. & Fam. Servs. v. Heriberto C. (*In re Jesusa V.*), 118 Cal. Rptr. 2d 683, 691 (Cal. Ct. App. 2002) (finding “no error in awarding presumed father status to Paul B. . . . over Heriberto”), *aff’d in part, rev’d in part*, 85 P.3d 2 (Cal. 2004).

230. *Jesusa V.*, 85 P.3d at 6, 24, 27 (employing CAL. FAM. CODE § 7611 (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025)); *id.* at 31 (Kennard, J., dissenting); *id.* at 33 (Chin, J., dissenting).

231. *Id.* at 6 (majority opinion).

232. *Id.* at 11.

233. *Id.*

234. *Id.* (quoting CAL. FAM. CODE § 7612(b) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025)). Since the high court ruling, the California legislature has opened the door to three possible parents by indicating that in a showdown between two presumed parents where there is also a birth mother, no choice between the two presumed parents need be made where “recognizing only two parents would be detrimental to the child.” CAL. FAM. CODE § 7612(c) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025). On why lawmakers should sometimes recognize more than two parents at any one time, *see generally* Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007).

235. *Jesusa V.*, 85 P.3d at 27 (affirming appellate court except as to its finding “Jesusa V. to be a dependent child of the court”).

236. *Id.* at 27 (Kennard, J., dissenting); *id.* at 52 (Chin, J., dissenting).

237. *Id.* at 29 (Kennard, J., dissenting).

238. CAL. FAM. CODE § 7541(a) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025).

239. *Jesusa V.*, 85 P.3d at 6; *id.* at 29 (Kennard, J., dissenting) (“[S]ections 7541 and 7554 show that as to children under the age of two years, the Legislature views biology as the ‘weightier consideration.’ Thus, because Heriberto, one of the presumed fathers, was

A second Family Code section declared that the question of paternity “shall be resolved” by uncontroverted blood tests.<sup>240</sup> While here there were no blood tests, the juvenile court assumed genetic ties between Jesusa V. and Heriberto based on the representations of counsel.<sup>241</sup>

The other four justices refused to give categorical preference to Heriberto, notwithstanding that he had proven genetic ties without blood tests; they agreed with the juvenile court judge that the prevailing policy involved the preservation and protection of the “family unit” and of “parent/child relationships which give young children social and emotional strength and stability.”<sup>242</sup> These four justices found that the man who provided the stability and permanence—Paul—was more important to the child than the man who had mere genetic ties—Heriberto—especially since Heriberto did not take any “legal steps to formalize his relationship” to Jesusa V. until after the rape and the filing of the dependency petition.<sup>243</sup>

Ultimately, the failure of Heriberto to formalize his relationship to Jesusa V. earlier in her life was important to these justices. Perhaps Heriberto could have taken the route offered in another Family Code section, which declares that “a completed voluntary declaration of parentage . . . that has been filed with the Department of Child Support Services is equivalent to a judgment of parentage of the child and confers on the declarant all rights and duties of a parent.”<sup>244</sup> Heriberto may have won unanimously if there had been blood tests within two years or if he had signed a voluntary

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undisputedly Jesusa’s biological father, the juvenile court should have adjudicated paternity in his favor.”).

240. *Id.* at 28 (Kennard, J., dissenting) (citing CAL. FAM. CODE § 7554 (West, Westlaw through Ch. 790 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025)).

241. *Id.* at 7 (majority opinion).

242. *Id.* at 15.

243. *Id.* at 16. *But see* S.M. v. E.C., F065817, 2014 WL 2921905, at \*13 (Cal. Ct. App. June 27, 2014) (Poochigian, J., concurring and dissenting) (suggesting federal constitutional superior parental rights might demand male biological parents always prevail over presumed parents when the biological parents have established “sufficiently profound” actual relationships with their biological offspring born of sex).

244. CAL. FAM. CODE § 7573(d) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025).

parentage declaration, even without a blood test as he could have done,<sup>245</sup> regardless of Jesusa V.'s best interests.<sup>246</sup>

The *Jesusa V.* ruling is problematic because there was no proof of male genetic ties.<sup>247</sup> The *Jesusa V.* court also failed to include a third man, the possible genetic father, as by publication notice, if nothing else.<sup>248</sup> This failure could have opened the door to the genetic father's later attempt to undo both Paul and Heriberto as childcare parents. Recall, for example, that in Rhode Island, a genetic father can extend the two-year limit on parentage acknowledgment challenges by showing a lack of knowledge of "potential parentage due to a material misrepresentation or concealment."<sup>249</sup>

Additionally, in considering "policy and logic,"<sup>250</sup> the California courts failed to consider the effects of the custodial determination on nonparental family members, including Jesusa's mother and Jesusa V.'s siblings. Further, there was no consideration of the U.S. Supreme Court ruling that a state needs to demonstrate neglect or the like before it can involuntarily terminate the childcare rights of

245. The acknowledgment statute says that "[a]n unmarried woman who gave birth" and "another person who is a genetic parent" can sign. *Id.* § 7573(a)(1). And the forms are to be made available to be signed at "hospitals, clinics and other places of birth." *Id.* § 7572(d). Yet no blood tests seemingly are required to demonstrate "genetic" parentage. *See also, e.g.*, CAL. DEPT OF CHILD SUPPORT SERVS., CAL. HEALTH & HUM. SERVS. AGENCY, DECLARATION OF PATERNITY (2008) (allowing for a declaration of biological fatherhood under penalty of perjury with no blood tests accompanying signed acknowledgment).

246. Comparable showdowns between a husband and a person other than the birth mother involving marital children occur elsewhere. *See, e.g.*, Greer *ex rel.* Farbo v. Greer, 324 P.3d 310, 321 (Kan. Ct. App. 2014) (biological father and husband); People in Interest of K.L.W., 2021 COA 56, ¶ 1, 492 P.3d 392, 394–95 (Colo. App. 2021) (biological father and mom's former domestic partner); N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000) (en banc) (holding that a child's best interests should guide paternity showdown between hold out husband and biological father); *In re* Parentage of R.R., 518 P.3d 826 (Kan. Ct. App. 2022) (per curiam) (unpublished table decision). There are no showdowns when one of the two men seeking parentage under law took formal action, not only via a voluntary declaration, but also via a secured court judgment as to parentage. *See, e.g.*, Child Prot. Servs. v. Kyle H. (*In re* Mia G.), 2d Juv. No. B251942, 2014 WL 3510747, at \*3 (Cal. Ct. App. July 16, 2014).

247. Without genetic testing, it remained possible for a third man to step forward to claim paternity, though time delays may have constituted a bar to the claim where the third man was faultlessly unaware of Jesusa's pregnancy and Jesusa V.'s birth until shortly before stepping up to seize his parental opportunity interest under *Lehr*, with the spousal parent presumption being rebuttable. *See Lehr v. Robertson*, 463 U.S. 248, 260–61 (1983).

248. The problems with newspaper publication notice, particularly those not preceded by state agency/judicial efforts to locate the actual genetic father, have long been recognized. *See, e.g.*, *Adoption Notices*, *supra* note 6, at 76–77.

249. 15 R.I. GEN. LAWS ANN. § 15-8.1-308(b) (West, Westlaw through Ch. 473 of the 2025 Reg. Sess. of the Rhode Island Legislature) (allowing a proceeding only if it is in "the best interests of the child"); *see also* VT. STAT. ANN. tit. 15C, § 308(b) (West, Westlaw through Chs. 73 (end) and M-5 (end) of the 2025 Reg. Sess.) (extending the two-year challenge period for a nonsignatory and nonchild person who "did not know and could not reasonably have known of the person's potential parentage due to a material misrepresentation or concealment").

250. *Supra* note 234.



a “natural” parent.<sup>251</sup> In that ruling, the U.S. Supreme Court observed that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>252</sup> While perhaps not an ideal childcare parent, Heriberto’s liberty interest evaporated as Paul was deemed a better parent.<sup>253</sup> State overrides of natural parent interests, even if a child’s interests are advanced, are at least somewhat problematic.

The *Jesusa V.* case demonstrates how natural parent childcare liberties might be easily lost (as with *Jesusa V.*’s actual genetic father or with a loss by a person like Paul to an acknowledging, but rapist, genetic father). It highlights the need for new parent revival laws.

### C. *Residency/Hold Out Parents*

A different parentage showdown occurred in November 2001 in California.<sup>254</sup> Here, there were two unmarried men. The case involved a September 2000 dependency proceeding for thirteen-year-old Kiana A. that arose because her birth mother had been arrested.<sup>255</sup> Both Mario A. and Kevin W. sought presumptive father status arising from their holding out of Kiana as their own.<sup>256</sup>

Mario declared that he and the mother cohabited during her pregnancy; that, with his consent, he was named as Kiana’s father on her birth certificate; and, that he married Kiana’s mother on May 9, 1990, about two years after Kiana’s birth (thus disallowing any marital presumption of paternity, as there was no marriage during pregnancy or shortly thereafter).<sup>257</sup> Kiana’s mother and Mario divorced on December 26, 1997.<sup>258</sup> At about the time of Kiana’s birth, Mario was arrested, incarcerated, and scheduled for release on parole in October 2001.<sup>259</sup> Mario said that he wanted to do what he could for Kiana, including by accepting responsibility as

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251. *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982) (deeming the “determination of the precise burden” a matter of state law properly left to state legislatures and state courts).

252. *Id.* at 753. On other troublesome evaporations, see *Evaporating Liberties*, *supra* note 100, at 708–16.

253. L.A. Cnty. Dep’t of Child. & Fam. Servs. v. Heriberto C. (*In re Jesusa V.*), 85 P.3d 2, 16 (Cal. 2004).

254. L.A. Cnty. Dep’t of Child. & Fam. Servs. v. Mario A. (*In re Kiana A.*), 113 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001).

255. *Id.* at 673.

256. *Id.* at 673–74.

257. *Id.* at 674.

258. *Id.*

259. *Id.*

her father and indicating that he had maintained contact with Kiana by writing and telephoning her while incarcerated.<sup>260</sup>

In seeking presumptive father status, Kevin declared that he and Kiana's mother lived together when she became pregnant, around August 1987 and for the next five months, and that she told him that he was the expecting genetic father.<sup>261</sup> When Kiana's mother separated from Kevin during her pregnancy, she began to live with Mario.<sup>262</sup> Kiana's mother denied Kevin was Kiana's father at various times, making conflicting statements about genetic ties over the years.<sup>263</sup> Kevin indicated that he "has always been a part of Kiana's life."<sup>264</sup>

A state agency reported that Kiana did not acknowledge Mario as her father and did not recall ever seeing him.<sup>265</sup> The report also said that Kevin treated Kiana as his child and had indicated that he would always treat Kiana as his child, regardless of the results of any genetic test.<sup>266</sup>

In resolving the dispute, the juvenile court heard counsel for Kiana ask that Kiana be released to Kevin.<sup>267</sup> Kiana stated: "Kevin is my real dad. He has always been there for me."<sup>268</sup> Kevin testified that he had cohabited "off and on" with Kiana's mother after Kiana was about four.<sup>269</sup> He also said that Kiana had stayed at his home for two or three months at a time, having a bed in a room shared by his girlfriend's two daughters. When Kiana's mother was arrested, Kiana telephoned Kevin and said: "Daddy, come get me."<sup>270</sup> Kevin thereafter enrolled Kiana and her sister in school and transported Kiana to and from school.<sup>271</sup>

The juvenile court denied a request for genetic testing.<sup>272</sup> On December 12, 2000, the juvenile court found that both Mario and Kevin were presumed residency/hold out fathers and that Kevin's presumption prevailed.<sup>273</sup> The appeals court affirmed, concluding that given "the strong public policy in favor of preserving the parental relationship" between Kevin and Kiana, the juvenile court

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260. *Id.*

261. *Id.* at 673.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 674.

269. *Id.* at 673.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 674.

“properly could have weighed the competing presumptions without regard for biological paternity,” though observing that if competing residency/hold out presumptions are in “near equipoise,” then genetic ties might be determinative.<sup>274</sup>

The decision demonstrates that childcare parentage under law can be influenced by events long after birth that do not even consider genetic ties. Genetic ties become less important over time. The ruling is unclear on whether certain postbirth events, such as the common residence of Kiana, Kiana’s mom, and a third man, might have been important in considering Kiana’s custody/visitation, especially had Kiana called the third man rather than Kevin after her mother was arrested.<sup>275</sup> The courts did not consider whether there could be a third (or fourth) “holding out” parent at the time of Kiana’s mother’s arrest; California statutes now recognize there can be more than two parents to avoid detriment to the child.<sup>276</sup> Today, a second hold out parent could be deemed, with the birth mother, a childcare parent.<sup>277</sup>

There was also no consideration in Kiana’s case of whether the third man should have been an indispensable party in the parentage dispute; thus, there was no consideration of whether Kiana or the man had significant (or protected) interests in a parent-child relationship. There was also no opportunity to assess any familial relationships with that man’s family and what the loss of any such relationships would mean to Kiana or the man.

Unlike in *Jesusa V.*, in *Kiana A.* there was no assumption of male genetic ties to Kiana, a child seemingly born of consensual sex. No inquiry was made into male genetic ties to Kiana, though such an inquiry is and was required in California if either Kevin or Mario, or someone else, had sought formal adoption.<sup>278</sup>

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274. *Id.* at 679–80.

275. The arrest and the subsequent dependency proceeding occurred about a dozen years after Kiana’s birth. *Id.* at 679. Kiana was thirteen years old when the dependency proceeding was held. *Id.*

276. California Family Code § 7612(c) was added in 2017 (and became operative in 2020), wherein a three-parent option became possible. CAL. FAM. CODE § 7612(c) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025).

277. While in California a paternity showdown is guided by a statute demanding an analysis of “the weightier considerations of policy and logic,” *id.* § 7612(b), a paternity showdown in New York involving a nonmarital child is determined under common law (e.g., equitable estoppel), not statutory, guidelines, *see, e.g.*, *Fidel A. v. Sharon N.*, 894 N.Y.S.2d 753, 754 (N.Y. App. Div. 2010) (finding it detrimental to the child to consider a paternity petition).

278. Either Kevin or Mario could have been the natural father under the facts. *See, e.g.*, CAL. FAM. CODE § 7666(a) (West, Westlaw through Ch. 764 of 2025 Reg. Sess., and Governor’s Reorganization Plan No. 1 of 2025) (providing for notice to every possible biological father); *In re Kiana A.*, 113 Cal. Rptr. 2d at 674 (Kiana’s mother made conflicting statements about male genetic ties to Kiana).

Genetic ties could support a revival of natural parent childcare liberties in settings like those in *Jesusa V.* and *Kiana A.* Borrowing from state laws on reinstating/resurrecting childcare liberties upon the failures of anticipated adoptions<sup>279</sup> or private guardianships,<sup>280</sup> or laws on the deaths of childcare parents, state lawmakers could allow the likes of Heriberto and Mario, assuming genetic ties, to pursue again some form of parental (or perhaps nonparental, as with visitation) childcare.

#### *D. (Re)Unification with Natural Parents*

(Re)unification of children with natural parents who earlier lost parental liberties can occur directly or indirectly. Direct unification or reunification of a child with a natural parent can occur in several different ways. One direct way to unify occurs when a natural parent formally adopts the child, having earlier lost the *Lehr* parental opportunity interest. Other direct ways include unification by being recognized as a residency/hold out parent or as a de facto parent after losing the *Lehr* parental opportunity liberty interest.

Adoptive, residency/hold out, or de facto parent status might also directly secure reunification of a natural parent with a child though the parent earlier had parental “care, custody, and control” liberty, but lost it. Greater barriers are appropriate for such reunifications if there were earlier parental childcare failures than for unifications with natural parents who earlier lost only *Lehr* opportunities, particularly in unification settings where there were no unfitness findings (as with losses due only to time barriers in seeking parental childcare status, or losses due to intact marriages).

Whether natural parents lost earlier secured “care, custody, and control” parental liberties or parental “opportunity” interests, laws can provide chances for reinstatements of lost parental rights. Such laws are particularly appropriate, as in Illinois, where children have remained wards of the court and are not “currently in placement likely to achieve permanency.”<sup>281</sup> Yet some of the related Illinois conditions for reinstatements pose problems for fit natural parents (and their family members) who desire reinstatement, as well as for the best interests of children. One such condition only allows reinstatement motions by the state or a “minor” child.<sup>282</sup> Another

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279. 705 ILL. COMP. STAT. ANN. 405/2-34(1)(b)(i) (West, Westlaw through P.A. 104-130 of the 2025 Reg. Sess.).

280. *Id.* 405/2-34(1)(b)(ii).

281. *Id.* 405/2-34(1)(b)(i), (c).

282. *Id.* 405/2-34(1).

requires three years to have passed since “consent or surrender” before reinstatement can be pursued.<sup>283</sup>

(Re)unification of children with natural parents can occur indirectly, as when natural parents (re)connect without attaining the parental liberty interest in “care, custody, and control.” For example, in New Jersey, the Kinship Legal Guardianship statute<sup>284</sup> has been interpreted as focused on “preserving the birth parent-child relationship given the ‘benefits to placing children with relatives or other kinship caregivers, such as increased stability and safety as well as the ability to maintain family connections and cultural traditions.’”<sup>285</sup> In Illinois, it is easier for a natural relative to adopt a child than it is for a prospective adopter with no genetic ties. Under the Illinois Adoption Act, the six-month residency requirement for a prospective adopter is waived if the adopter seeks to adopt a “related child.”<sup>286</sup>

Of course, the potential for the loss of parental childcare liberties can be diminished when parental rights terminations are only permitted upon serious considerations of existing relationships between the children and nonparental family members. In Wisconsin, for example, termination proceedings must include judicial consideration of “[w]hether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.”<sup>287</sup>

### *E. Spousal Parents*

As noted, spousal parent laws recognize childcare parentage in some spouses of birthgivers though authorizing judicial overrides of such parenthood. Challengers are, however, limited in some states.<sup>288</sup> Where natural parents are initially foreclosed from

283. *Id.* 405/2-34(1)(f).

284. N.J. STAT. ANN. § 3B:12A-1 to 12A-7 (West, Westlaw through L.2025, c. 146 and J.R. No. 10).

285. *M.M. v. Dep’t of Child. & Fams. (In re Guardianship of D.H.)*, 323 A.3d 530, 533, 542 (N.J. Super. Ct. App. Div. 2024) (granting permanent custody to paternal great aunt over objections by foster caregivers).

286. 750 ILL. COMP. STAT. ANN. 50/2(A), 1(B) (West, Westlaw through P.A. 104-130 of the 2025 Reg. Sess.) (defining related children to include those with relationships “by blood, marriage, adoption, or civil union,” encompassing a “parent, grand-parent, great-grandparent, brother, sister, step-parent, step-grandparent, step-brother, step-sister, uncle, aunt, great-uncle, great-aunt, first cousin, or second cousin”); *see also* *Fak v. Shelton (In re Adoption of V.C.)*, 2024 IL App (2d) 230275, ¶¶ 23–29, 243 N.E.3d 283, 289–90 (holding that first cousins once removed are included in statutory scheme).

287. WIS. STAT. ANN. § 48.426(3)(c) (West, Westlaw through 2025 Act 15, published July 3, 2025) (one of several “factors” employed in considering “the best interests of the child”).

288. *Kinnett v. Kinnett*, 2023-00060, p. 1 (La. 6/27/23), 366 So. 3d 25, 26 (putative biological father had no fundamental constitutional right to pursue paternity of a child born to a

childcare due to challenge limits, they can be allowed childcare liberties through laws on regaining lost liberties (whether “care, custody, and management” or parental opportunity). It seems especially appropriate to allow for natural parent childcare revivals for those who always desired to provide childcare and who initially lost childcare liberties involuntarily.

Quite deserving of revival opportunities, for example, are natural fathers of children born of consensual sex to women who were married to others at the relevant times so as to preclude the natural fathers from pursuing rebuttals of spousal parentage due to intact marriages, as where the spouses to the marriages for some time did not desire to override the marital parentage. Where marriages are later no longer intact, or where one or neither of the spouses are serving as a childcare parent any longer, some revival opportunities for natural parents should be available notwithstanding any limitations periods operative in different settings. Consider, for example, natural parents who have developed familial-type relationships with their children upon marital breakups. Regained childcare or parental opportunity liberties should only be available, however, where the best interests of the children are served.

Those deserving revival opportunities include some genetic parents whose gametes were employed in surrogacy birth settings where the intended parents cared for the child for a while but were later deemed unfit. Again, availability should depend on the best interests of the child. Revival may be deemed especially warranted for gametes providers in gestational surrogacy settings where childcare desires were expressed much earlier, as when prebirth waivers or forfeitures were unsuccessfully sought to be undone.

#### *F. Voluntary Acknowledgment Parents*

As noted, increasingly voluntary parentage acknowledgment laws allow childcare parentage for those without genetic ties who secure the written support of gestating childcare parents sometimes before, and always after, the births of children. Rescissions of such acknowledgments by nonsigning genetic parents within sixty days of signing usually are not expressly allowed. Challenges to such acknowledgments by nonsignatories, including genetic parents (both

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woman married to another, though avowal statute gave him one year to sue in paternity). *But see* K.E.M. v. P.C.S., 38 A.3d 798, 810 (Pa. 2012) (natural father can be pursued for child support if best interests of a child are served by not finding mother is barred by paternity by estoppel arising from marriage); *Sitler v. Jones*, 334 A.3d 861, 877 (Pa. 2025) (male spousal parentage presumption is rebuttable upon DNA testing and a determination that rebuttal would serve the child’s best interests).

men and women) sometimes can be pursued over the objections of a signatory or the signatories. But time limits, standing requirements, and other barriers often doom such pursuits, even where the pursuits were initiated very soon after the pursuers learned of the acknowledgments and even where the pursuers acted quite promptly upon learning of their genetic ties to the acknowledged children. In Vermont, an alleged genetic parent can challenge a spousal parent presumption beyond the general two-year limit where the challenger did not know, and could not reasonably have known, of “potential genetic parentage” due to “material misrepresentation or concealment.”<sup>289</sup>

As with spousal parent rebuttals, here too public policies should differentiate between challengers who earlier waived childcare liberties or were to blame for childcare liberty forfeitures, and challengers whose childcare liberty forfeitures were faultless. The latter should be able to more easily establish childcare liberties (both opportunity interests<sup>290</sup> and “care, custody, and control” interests<sup>291</sup>).

Establishment can be facilitated by laws expressly allowing single gestating childcare parents to sign<sup>292</sup> acknowledgments with those having genetic ties, including sperm or egg providers in assisted reproduction settings (including perhaps those who were at one time donors with no childcare liberties). These laws would promote state policies favoring two childcare parents and avoid the costs and delays in undertaking formal adoptions, assuming the promotion of the best interests of the children.

In anticipation of later eligibility for voluntary parent acknowledgments, nongestating genetic parents should be afforded chances under law to declare their childcare parent intentions, as through in-hospital written and filed assertions of those intentions when accompanied by assent from gestating parents.<sup>293</sup> Such assertions

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289. VT. STAT. ANN. tit. 15C, §§ 401(a)(2), 402(b)(2) (West, Westlaw through Chs. 73 (end) and M-5 (end) of the 2025 Reg. Sess.). On challenges to voluntary parentage acknowledgments by similarly situated unknowing genetic parents, Vermont law again recognizes that the time period (two years) can be extended for two years after the discovery by the alleged genetic parent of “potential parentage” due to “a material misrepresentation or concealment.” *Id.* § 308(b).

290. *Supra* note 22. Here, the pursuers should include certain egg providers although not yet recognized by the U.S. Supreme Court as possessing federal constitutional liberty interests. *Supra* note 24.

291. *Supra* note 2.

292. These laws are particularly appropriate in settings where there may be two (or more) child support parents, but there is then only one childcare parent.

293. *In-Hospital Assertions*, *supra* note 40, at 157; see also Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87, 104–05 (2017) (supporting vehicles for “clear indications of childcare intentions” expressed by existing legal parents and those looking forward to (further) preserving a parental role).

would then be used in later acknowledgment efforts once, for example, spousal parentage has been rebutted.

Related to such genetic parent assertions could be nonparent genetic family member assertions, with accompanying gestating parent consent. Family members would be allowed to stand in for non-gestating natural parents who have, at least, parental opportunity interests such as those in *Lehr*. Family member access to children with whom there are genetic ties for their own custody/visitation purposes would also be promoted.<sup>294</sup> One can even imagine a child asserting parentage on behalf of a nongestating natural parent, with a gestating parent confirming male genetic ties,<sup>295</sup> in settings where the nongestating natural parent earlier lost or had no chance to pursue (e.g., due to death) protected childcare opportunity interests.

### G. *Undoing or Avoiding Parental Rights Terminations*

As noted, terminations of the parental rights of natural parents can result from either waiver (as with intentional relinquishment or abandonment) or forfeiture (as with failure to timely assert a right, which can be recognized even where the lost right was unknown, and could not have been known, to the loser, including due to certain fraudulent acts by others).<sup>296</sup> Termination may or may not be in contemplation of an imminent child adoption, may or may

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294. There are some precedents, outside the U.S. Supreme Court, that recognize constitutional protections of natural family relationships between children and nonparents like grandparents and siblings. On possible liberty interests in maintaining a familial relationship involving a genetically tied grandparent and a grandchild, where there is no parental objection per *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality) (normally no questioning of parents' decisions on childrearing), see, for example, *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (holding that genetic ties alone did not support liberty interest where no familial relationship had been established between grandmother, who wished to adopt, and grandchild). On the need for laws safeguarding and promoting “familial ties” between children and their siblings, see generally Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012); Willa Sweeney, Note, *Family Matters: Examining Sibling Rights Under Guardianship Law*, 76 RUTGERS U. L. REV. 729 (2024).

295. See, e.g., *L.F. v. Breit*, 736 S.E.2d 711, 723 (Va. 2013) (recognizing that “children also have a liberty interest in establishing relationships with their parents”); *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) (“[T]his constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents.”), *overruled by*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

296. See, e.g., *S.R. v. T.D. (In re Adoption of M.J.H.)*, 237 N.E.3d 668, 673–74 (Ind. Ct. App. 2024) (holding that, in adoption proceedings, putative biological father’s consent to adoption was irrevocably implied when father failed to file with Putative Father Registry before an adoption proceeding began, even though he was named as the father in the adoption petition).



not be dependent upon a criminal conviction, and may or may not be grounded on a finding of knowing and voluntary waiver.

Natural parent childcare liberties are sometimes not lost even though there is a waiver or forfeiture. Here, an analysis of the best interests of the child can prompt a court to choose not to terminate parental liberties (including either earlier established “care, custody, and control” interests or parental opportunity interests). Such analyses can be employed when the child is not likely to be, or will not be, placed for adoption.<sup>297</sup> Laws authorizing courts to forego parental rights terminations are laudable, as are state efforts to reunify a child with a one-time natural childcare parent or state efforts to assist a natural parent in securing childcare parent status by seizing a parental opportunity interest.

Natural parent childcare revivals should sometimes be available when parental rights terminations are undone. Revivals should be available to some natural parents in cases where planned adoptions fall through, or where the adopter later loses childcare interests through a termination proceeding. In settings where recognitions of natural parent childcare liberties would serve the child’s best interests<sup>298</sup> and the underlying basis for termination has vanished, as where a pertinent criminal conviction is overturned on appeal or where later discovered evidence demonstrates that an earlier finding of childcare waiver or forfeiture was erroneous, revivals may be appropriate. Revival mechanisms here are especially needed where a parental rights termination case cannot be reopened under judgment modification standards.

Relatedly, revival mechanisms are needed where there were, practically speaking, effective parental rights terminations. Consider a genetic father of a child born of sex with one who was then underage, but who initially allowed, as an adult mother, paternal childcare, and who later revoked her consent to such care. Here, the father may be denied future childcare without current maternal consent, regardless of maternal fitness to parent and of the child’s best interest. As one court held, a man who fathers a child as a result of statutory rape (i.e., with a woman too young at the time of sex) cannot rely on the mother’s earlier consent to his childcare because she was “incapable of giving consent to an act of sexual

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297. See, e.g., *State v. H.C.*, 2025 WI 20, ¶ 20, 416 Wis. 2d 233, 246, 21 N.W.3d 330, 336.

298. Consider, for example, a putative father who lost his *Lehr* opportunity simply because he failed to register with the putative father registry before the adoption petition was filed. See, e.g., *In re Adoption of M.J.H.*, 237 N.E.3d at 674 (employing IND. CODE ANN. §§ 31-19-5-12(a), 31-19-5-18 (West, Westlaw through all legislation of the 2025 First Reg. Sess. of the 124th General Assembly effective through July 1, 2025)).

penetration,” which was a crime.<sup>299</sup> Yet, should not the mother’s consent, as an adult parent, to coparent with the genetic father, then allow the father to seek some form of childcare where the child’s best interest would be served?

Finally, revival mechanisms are needed for some gametes providers whose parental childcare interests were earlier lost in an assisted reproduction birth setting, as where a recognized sperm or egg donor aided two women in becoming intended parents to a child born to one of them, but where one of the intended parents never parented or is no longer parenting.<sup>300</sup> Such mechanisms, of course, do not require that all gametes donors with lost (or never obtained) parental opportunities necessarily later be deemed “care, custody, and control” parents.<sup>301</sup>

## VI. CONCLUSION

It was once easy to identify at birth those with legally protected parental liberties involving the “care, custody, and control” of newborns. There was little or no prebirth legal parentage. At-birth legal parentage beyond birth mothers was mostly established by heterosexual marriage to the birthgiver. While natural ties between husbands and children were presumed, spousal parentage was sometimes rebuttable. Yet actual rebuttals were uncommon since most families remained intact and genetic testing was unavailable or costly.

With increases in nonmarital births, paternity suits became more widely used to establish parental liberties. Genetically tied unwed men could, however, inadvertently lose childcare liberties by not pursuing paternity judgments, with losses often occurring during adoption proceedings. Beginning in the mid-1990s, voluntary paternity acknowledgments became increasingly available to unwed genetic fathers seeking to establish childcare parentage in nonmarital, and in some marital, birth settings. Acknowledgments were

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299. *Colton S. v. Aura C.-K. (In re Parentage of D.S.)*, 2021 IL App (1st) 192257, ¶¶ 16, 30–31, 197 N.E.3d 92, 98, 101 (relying on 750 ILL. COMP. STAT. ANN. 46/622 (West, Westlaw through P.A. 104-442 of the 2025 Reg. Sess.) to require current maternal consent); *see also* *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996) (recognizing no constitutional parental childcare opportunity in a later-born child for a male statutory rapist, in a case where he was forty and the mother was twelve at the time of “consensual” sex).

300. Consider the issues raised in Florida regarding gametes providers in assisted reproduction birth settings where the relevant statutes speak only to those who “commission[]” births employing “assisted reproductive technology.” *Brito v. Salas*, No. SC2024-1184, 2025 WL 3765686, at \*1 (Fla. Dec. 30, 2025); *see also supra* note 193.

301. The child’s best interests must always be served, as should a state’s interests in having only two parents for any child.

typically executed shortly after birth, required no genetic testing, and had the same force and effect of judicial judgments.

More recently, new avenues to at-birth and postbirth childcare parenthood have emerged, prompted by both social and scientific changes, including same-sex marriages, assisted reproduction births, more widely available genetic testing, and voluntary parentage (beyond paternity) acknowledgments. A few new avenues depend on parental-like acts taken prebirth which prompt parenthood at birth. Some new avenues to at-birth parenthood depend on parental-like acts taken around the time of birth. Further, there are new avenues to parenthood dependent upon postbirth acts, where parentage may or may not retroactively apply to the time of birth.

New avenues to childcare parentage based on actions taken after birth differ markedly from avenues to parentage under the laws on formal adoptions. Exemplary of acts prompting postbirth parenthood founded on postbirth acts are some marriages, residency/hold out parenting, and de facto parenting.

The new avenues for postbirth, nonadoptive parentage prompt greater chances for natural parents to lose childcare liberties without forfeiture due to fault or waiver. Such losses are sanctioned, for example, in residency/hold out parentage and de facto parentage laws. When lost, however, the childcare liberties of natural parents might be regained. This Article urges greater opportunities for regained natural parent childcare liberties under law. Reforms are particularly appropriate when earlier losses occurred under new nonadoptive parentage laws with no fault or waiver.<sup>302</sup> This Article argues that some opportunities for regaining lost childcare liberties are constitutionally compelled. Regaining the lost childcare liberties of natural parents could entail either the reestablishment of parental childcare that was earlier secured but ended, or the opportunity to establish a new child-parent relationship.

Upon reviewing the federal constitutional childcare liberties of natural parents, the current laws on losing natural parent childcare liberties, and the current laws on regaining natural parent

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302. Consider, e.g., earlier losses by nongestating natural parents, including paternity fraud involving men whose parentage was prompted by consensual sex, as well as paternity/maternity fraud involving gametes providers in assisted reproduction births who intended to childcare with the consent of future gestating parents, but who were later denied parental childcare status (as via a failed or faulty parentage agreement or a coerced parenthood waiver). On current problems with legal norms on paternity fraud, see generally Albertina Antognini, *Fraudulent Families*, 15 U.C. IRVINE L. REV. 128 (2024). On a loss due to a failed assisted reproduction contract eliminating one who had earlier childcared, where the child's best interests may have been served by continuing the parental-like relationship, see *supra* note 193.

childcare liberties, this Article posits possible new laws on regaining natural parent childcare. New laws would not only better align with current constitutional precedents, but also better promote important nonconstitutional public policies, particularly the promotion of the best interests of children, the preference for two parents, and the importance to children and relatives of genetic family relationships.

# The Sophistication Trap: When Investor Protection Becomes the Problem

William Baglio\*

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## I. INTRODUCTION

### A. *“Sincerely, CalPERS”*

On April 25, 2022, the California Public Employees’ Retirement System (CalPERS) sent the Securities and Exchange Commission (SEC) a comment letter that captured some of the key difficulties with regulating the private fund industry.<sup>1</sup> The nation’s largest

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1. Cal. Pub. Emps.’ Ret. Sys., Comment Letter on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Apr. 25, 2022) [hereinafter CalPERS Letter], <https://www.sec.gov/comments/s7-03-22/s70322-20127881-289394.pdf>

public pension fund, managing \$470 billion (enough to rank thirty-fourth among world economies and ahead of the combined GDP of Greece, Hungary, and Croatia),<sup>2</sup> endorsed, in part, new regulations that would force private fund managers to deal with a host of new compliance burdens,<sup>3</sup> costing the industry “\$5.4 billion and millions of hours of employee time.”<sup>4</sup> But buried in paragraph six came a crucial caveat: “The SEC rule should not erode what has become market practice . . . .”<sup>5</sup> In practice, however, this statement meant that there was support for universal rules, as long as special deals remained untouched.

Was their position hypocrisy or sincerity? CalPERS may have genuinely believed that regulatory standardization and their negotiated advantages could coexist, that rules could somehow raise the floor while preserving their penthouse.<sup>6</sup> They acknowledged that smaller investors had “disproportionately limit[ed] . . . access” to information because “[i]nvestor access to basic transparency is . . . the product of market dynamics.”<sup>7</sup> Then they immediately pivoted to protecting the limited partner (LP)-level reporting they had negotiated through side letters, requesting that “the Commission consider improving the final rule by requiring private fund advisers to provide fee and expense reporting at the *pro rata* investor level, upon request by an investor.”<sup>8</sup> They wanted the SEC to mandate quarterly disclosures at the fund level while preserving their right to demand more granular, investor-specific data, arguing these new rules should establish a floor, not a ceiling.<sup>9</sup>

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[<https://perma.cc/XW3F-ZD8Q>]. CalPERS managed \$470 billion at the time they sent their comment letter in 2022. *Id.* at 1. The current figure is over half a trillion dollars. See *Investments*, CALPERS, <https://www.calpers.ca.gov/investments> [<https://perma.cc/XD4H-U3YY>] (last visited Aug. 13, 2025).

2. *Gross Domestic Product 2022*, WORLD BANK (July 1, 2023), [https://databank-files.worldbank.org/public/ddpext\\_download/GDP.pdf](https://databank-files.worldbank.org/public/ddpext_download/GDP.pdf) [<https://perma.cc/33CQ-XMPS>] (reflecting 2022 GDP figures).

3. CalPERS Letter, *supra* note 1.

4. John M. Faust, Brittany A. Puckett & Kiki M. Scarff, *Fifth Circuit Strikes Down SEC’s Private Fund Advisers Rule*, AKERMAN (June 17, 2024), <https://www.akerman.com/en/perspectives/fifth-circuit-strikes-down-secs-private-fund-advisers-rule.html> [<https://perma.cc/F4H9-BNBH>].

5. CalPERS Letter, *supra* note 1, at 2.

6. *Id.*

7. *Id.*

8. *Id.* at 2–3.

9. *Id.* at 2 (opposing “a maximum compliance threshold . . . [in favor of] a minimum standard”).

Meanwhile, Tech Council Ventures, a much smaller venture capital firm managing \$175 million across multiple funds,<sup>10</sup> wrote desperately that these same rules were “likely to make it very difficult for a firm like ours to conduct business.”<sup>11</sup> Their fees “just cover the modest salaries of a few investment professionals,” and they lack “the resources to engage enough support or spend time on substantial administrative requirements.”<sup>12</sup> The total assets under management (AUM) of Tech Council Ventures amount to a rounding error in CalPERS’s portfolio, yet both would face identical compliance burdens.<sup>13</sup> While CalPERS (an investor) and Tech Council Ventures (a manager) occupy different sides of the market, their contrasting responses show how standardized regulations affect market participants differently.<sup>14</sup> CalPERS would not directly bear compliance costs, though they would ultimately pay through higher fees and reduced returns while preserving negotiated advantages. Tech Council Ventures and other emerging managers might simply exit the market, ultimately reducing the investment options available to all LPs, including CalPERS itself.<sup>15</sup>

The giant Californian LP exposed the sophistication paradox in private fund regulation. The investors who least need protection are often its loudest champions.<sup>16</sup>

### *B. Twin Judicial Earthquakes*

This paradox might have remained an interesting footnote in financial history, but for two judicial earthquakes that struck within weeks of each other in 2024. First, on June 5th, the United States Court of Appeals for the Fifth Circuit vacated the SEC’s new private fund adviser rules, finding that the Commission exceeded its statutory authority by attempting to rewrite the bargain between sophisticated parties who deliberately chose to operate outside public market constraints.<sup>17</sup> CalPERS’s letter revealed what the court

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10. *About Tech Council Ventures*, TECH COUNCIL VENTURES, <https://techcouncilventures.com/about-tech-council-ventures/> [https://perma.cc/53HC-A9A4] (last visited Aug. 13, 2025).

11. Tech Council Ventures, Comment Letter on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews 1 (June 14, 2022) [hereinafter Tech Council Ventures Letter], <https://www.sec.gov/comments/s7-03-22/s70322-20131460-301675.pdf> [https://perma.cc/LV8T-59NZ].

12. *Id.*

13. CalPERS Letter, *supra* note 1; Tech Council Ventures Letter, *supra* note 11.

14. CalPERS Letter, *supra* note 1; Tech Council Ventures Letter, *supra* note 11.

15. See discussion *infra* Section III.B.

16. See discussion *infra* Section III.B.

17. See Nat’l Ass’n of Priv. Fund Managers v. SEC, 103 F.4th 1097, 1110, 1114 (5th Cir. 2024).

ultimately recognized, specifically, that these were powerful institutions with armies of lawyers who negotiated precisely the arrangements they wanted.<sup>18</sup> Then, on June 28th, the Supreme Court delivered the death blow to regulatory overreach by overturning the doctrine of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, thereby stripping agencies of their forty-year presumption of interpretive authority.<sup>19</sup> The timing seemed to be consequential, and these decisions exposed the false belief that standardized rules could improve upon the bespoke governance structures that sophisticated parties spent decades refining.<sup>20</sup> The private fund industry, which expects to manage \$30 trillion globally by 2030 and drives innovation from Silicon Valley garages to Fortune 500 boardrooms, suddenly found itself at a crossroads.<sup>21</sup> Would Congress eventually explicitly authorize the kind of sweeping intervention the SEC attempted?<sup>22</sup> Or would courts continue to recognize that markets populated exclusively by institutional investors, some with eleven-figure portfolios, view regulatory paternalism as not just unnecessary but counterproductive?<sup>23</sup>

### C. *Liberation, Not Crisis*

This Article argues these decisions prevented,<sup>24</sup> rather than caused, a regulatory crisis.<sup>25</sup> Through an analysis of comment letters, market practices, and regulatory economics, this Article demonstrates that the SEC's attempted standardization of private fund governance represented a solution in search of a problem.<sup>26</sup> The rules would have destroyed the very information asymmetries that make private markets valuable, imposed crushing compliance costs that would have driven out emerging managers, and replaced functional market solutions with regulatory theater.<sup>27</sup> Drawing on Friedrich Hayek's knowledge problem, this Article shows why central regulators cannot price the complexity of private fund

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18. See *id.* at 1113–14.

19. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

20. See discussion *infra* Section III.C.

21. SOCIÉTÉ GÉNÉRALE SEC. SERVS., PRIV. MARKETS EMBRACING A NEW DIMENSION 3 (2025), [https://www.securities-services.societegenerale.com/fileadmin/user\\_upload/sgss/2025/Magazines/Magazine\\_PrivateMarkets2025\\_Accessible.pdf](https://www.securities-services.societegenerale.com/fileadmin/user_upload/sgss/2025/Magazines/Magazine_PrivateMarkets2025_Accessible.pdf) [https://perma.cc/RAC6-LD6N] (noting that global private markets' AUM were approximately \$15 trillion in 2024 and projected to grow significantly).

22. See discussion *infra* Section III.C.

23. See discussion *infra* Sections III.B–C.

24. See discussion *infra* Part III.

25. See discussion *infra* Part III.

26. See discussion *infra* Part III.

27. See discussion *infra* Section III.A.



management, which is an art that resists standardization.<sup>28</sup> The sophisticated investors these rules purported to protect already developed superior governance mechanisms through private ordering, from Institutional Limited Partners Association (ILPA) standards to side letter negotiations.<sup>29</sup> The Supreme Court and Fifth Circuit thus reliberated an industry that was never broken, preserving the competitive dynamics and innovation that enable private funds to transform companies, launch technologies, and generate returns that public markets cannot match.<sup>30</sup> In the post-*Chevron* landscape, this case study illuminates a broader truth, which is that sophisticated markets and their investors regulate themselves better than Washington ever could.<sup>31</sup>

## II. BACKGROUND

### A. *Private Funds: Charting a \$30 Trillion Horizon*

The world of private funds encompasses three major categories: private equity (PE), venture capital (VC), and hedge funds.<sup>32</sup> Each plays a distinct role in the investment landscape, managing trillions of dollars collectively.<sup>33</sup> These funds primarily serve institutional investors and high-net-worth individuals, offering access to alternative strategies that differ significantly from those of, say, traditional mutual funds.<sup>34</sup> While often discussed as discrete categories, private funds (especially private equity) are best understood as “a broad spectrum of investment approaches, each with its own risk-return profile, time horizon, and implementation considerations.”<sup>35</sup> Despite their diversity, they are united by their exemption from the registration requirements of the Investment Company Act of 1940 (ICA) under sections 3(c)(1) and 3(c)(7).<sup>36</sup> Understanding

28. See discussion *infra* Section III.A.

29. See discussion *infra* Section III.B.

30. See discussion *infra* Part III.

31. See discussion *infra* Part III.

32. Lisa Lilliot Rydin, *Private Equity, Venture Capital, and Hedge Funds*, HARV. L. SCH. LIBR. (Sep. 18, 2025, at 15:35 ET), [https://guides.library.harvard.edu/law/private\\_equity](https://guides.library.harvard.edu/law/private_equity) [<https://perma.cc/U3SZ-VKQM>].

33. See SOCIÉTÉ GÉNÉRALE SEC. SERVS., *supra* note 21, at 3 (noting a \$30 trillion prediction by 2030); see also Sophie Baker, *Global Alternatives AUM to Grow to \$29.2 Trillion by Year-End 2029 — Preqin*, PENSIONS & INVS. (Sep. 19, 2024, at 12:58 ET), <https://www.pionline.com/alternatives/global-alternatives-aum-grow-292-trillion-year-end-2029-preqin> [<https://perma.cc/A7LA-K5Q4>].

34. Rydin, *supra* note 32.

35. *Beyond Buyout: Exploring the Spectrum of Private Equity Diversification*, CAIS (Sep. 4, 2025), <https://www.caigroup.com/articles/beyond-buyout-exploring-the-spectrum-of-private-equity-diversification> [<https://perma.cc/KHA4-EG7X>].

36. See Investment Company Act of 1940 § 3(c)(1), (7), 15 U.S.C. § 80a–3(c)(1), (7).

how these classifications interact with statutory exclusions is key to navigating the legal framework governing private fund activity in the United States.<sup>37</sup>

### B. *The 3(c) Escape Hatch*

Unlike public market investments, which are accessible to retail investors through regulated exchanges with transparent pricing and detailed financial disclosures, private funds are typically reserved for accredited investors and institutions.<sup>38</sup> Private funds are distinct from registered investment companies (RICs) under the ICA.<sup>39</sup> Unlike RICs, which are subject to extensive regulation and oversight designed to protect individual investors, private funds are exempt from many of the ICA's requirements under section 3(c) of the ICA.<sup>40</sup> Specifically, private funds rely on ICA exemptions such as section 3(c)(1) and section 3(c)(7).<sup>41</sup> Section 3(c)(1) provides an exemption for funds that have no more than 100 beneficial owners and do not publicly offer their securities, allowing them to avoid registration with the SEC while limiting the number of investors in the fund.<sup>42</sup> On the other hand, section 3(c)(7) offers an exemption for funds that are only available to qualified purchasers, which typically include institutions and wealthy individuals who meet certain asset thresholds.<sup>43</sup> Unlike section 3(c)(1), there is no limit on the number of investors a private fund may have under section

37. For detailed descriptions of PE, growth equity, and VC strategies, see generally CLAUDIA ZEISBERGER, MICHAEL PRAHL & BOWEN WHITE, *MASTERING PRIVATE EQUITY: TRANSFORMATION VIA VENTURE CAPITAL, MINORITY INVESTMENTS & BUYOUTS* (1st ed. 2017).

38. *Id.* at 7 (“Investors active in PE include private and public pension funds, endowments, insurance companies, banks, corporations, family offices, and fund of funds.”); see Rydin, *supra* note 32 (“Private equity funds are typically based on individual (private) contractual arrangements and therefore are exempt from the disclosure and other requirements applicable to publicly traded companies or investments . . .”).

39. Investment Company Act of 1940 § 3(a)(1)(A) (defining an “investment company” as “any issuer which . . . is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities”).

40. *Id.* § 3(c).

41. *Id.* § 3(c)(1), (7). Section 3(c) contains additional, specialized exemptions for a variety of entities and activities. *Id.* § 3(c). An exhaustive review of those provisions lies beyond the scope of this Article.

42. *Id.* § 3(c)(1). For venture capital funds, the number of permitted beneficial owners increases to no more than 250. *Id.* Section 3(c)(1) is “the most common method for . . . securing . . . [an] exemption from the Act’s requirements.” Alexander J. Davie, *3(c)(1) Funds vs. 3(c)(7) Funds*, STRICTLY BUS. (Sep. 21, 2017), <https://www.strictlybusinesslawblog.com/2017/09/21/3c1-funds-vs-3c7-funds/> [<https://perma.cc/RL9Y-ZX5D>].

43. Investment Company Act of 1940 § 3(c)(7). The ICA defines a “[q]ualified purchaser” as, among others, any natural person owning not less than \$5 million in investments and any person owning and investing on a discretionary basis not less than \$25 million in investments. *Id.* § 2(a)(51)(A)(i), (iv).

3(c)(7).<sup>44</sup> Both of these exemptions allow private funds more flexibility in terms of who they can accept as investors, and provide the fund managers with the ability to manage investments with fewer regulatory constraints.<sup>45</sup> By operating under these exemptions, private funds can avoid the burdens of registration, public reporting, and other investor protections that are required of registered investment companies, such as mutual funds, which are designed to be accessible to the general public.<sup>46</sup>

### C. *Private Fund Adviser Rules*

On August 23, 2023, the SEC narrowly approved a set of new rules and amendments under the Investment Advisers Act of 1940, known as the Final Rules, with a three–two vote.<sup>47</sup> These changes imposed broader compliance requirements on private fund advisers, covering both registered and unregistered entities, exempt reporting advisers, state-regulated advisers, foreign private advisers, and others.<sup>48</sup> The rules imposed five major requirements: quarterly standardized statements, mandatory annual audits, fairness opinions for adviser-led secondaries, new compliance documentation, and restrictions on preferential treatment.<sup>49</sup> Collectively, these would have cost the industry an estimated \$5.4 billion annually by

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44. *Id.* § 3(c)(7). Another limitation on the exemption is that the issuer must “not mak[e] and does not at that time propose to make a public offering of such securities.” *Id.* § 3(c)(7)(A). “The advantage of a 3(c)(7) fund is that the number of investors is not limited under the Act so a fund could take up to 1,999 investors before it is required to register with the SEC under the Securities and Exchange Act of 1934.” Davie, *supra* note 42.

45. James Chen, *Private Investment Fund: Non-Public Investments Like Hedge Funds*, INVESTOPEDIA (Aug. 17, 2024), <https://www.investopedia.com/terms/p/privateinvestmentfund.asp> [<https://perma.cc/9CF7-MW5Q>] (explaining that “the regulations around private investment funds are much looser than for public funds”).

46. *Id.* (“Private funds typically seek to beat market returns, and some of them manage to do so. However, they also have access to riskier investments that would not be feasible for a public mutual fund.”).

47. See SKADDEN, THE NEW SEC PRIVATE FUND ADVISER RULES 1 (2023), [https://www.skadden.com/-/media/files/publications/2023/09/a-practical-guide-to-interpreting-the-new-sec-private-fund-adviser-rules/a\\_practical\\_guide\\_to\\_interpreting\\_the\\_new\\_sec\\_private\\_fund\\_adviser\\_rules.pdf?rev=6dd93ee8c2714c2c8b02328f3d186a72&hash=A0EF449785BB33898188587EC70B4D39](https://www.skadden.com/-/media/files/publications/2023/09/a-practical-guide-to-interpreting-the-new-sec-private-fund-adviser-rules/a_practical_guide_to_interpreting_the_new_sec_private_fund_adviser_rules.pdf?rev=6dd93ee8c2714c2c8b02328f3d186a72&hash=A0EF449785BB33898188587EC70B4D39) [<https://perma.cc/Y8B7-SBYG>].

48. *Id.* Private fund advisers manage the operations and investment strategies of private funds, often acting as fiduciaries with duties of loyalty and care to their clients. SEC v. Rashid, 96 F.4th 233, 242 (2d Cir. 2024) (“A fiduciary’s duties under the Investment Advisers Act are demanding, but they are not boundless.”). Although private funds are exempt from the ICA, their advisers remain subject to regulatory oversight under the Investment Advisers Act of 1940. Nat’l Ass’n of Priv. Fund Managers v. SEC, 103 F.4th 1097, 1102 (5th Cir. 2024). Registered advisers must comply with SEC obligations, including disclosure, recordkeeping, and compliance requirements. *Id.* at 1103.

49. SKADDEN, *supra* note 47, at 5, 8, 10, 17, 21 (summarizing the SEC’s private fund adviser rules, used here as a substitute for vacated C.F.R. provisions).

altering private fund operations.<sup>50</sup> As per the SEC, the rules were designed to “protect private fund investors by increasing transparency, competition, and efficiency in the private funds market” and were “advance[d] . . . on behalf of all investors—big or small, institutional or retail, sophisticated or not.”<sup>51</sup>

#### *D. The Fifth Circuit Votes for Vacatur*

In *National Ass’n of Private Fund Managers v. SEC*, the Fifth Circuit heard a challenge to the SEC’s new private fund rules.<sup>52</sup> Petitioners (collectively, Private Fund Managers) filed suit under the Administrative Procedure Act (APA), arguing that the regulations exceeded the SEC’s authority under the Investment Advisers Act.<sup>53</sup> The Private Fund Managers asserted that the “new rules would fundamentally change the way private funds are regulated in America.”<sup>54</sup> In support of this argument, they claimed:

(1) the Commission exceeded its statutory authority, (2) the Final Rule . . . [was] not a logical outgrowth of the Proposed Rule, (3) the Final Rule . . . [was] arbitrary and capricious under the APA, and (4) the Commission failed to adequately consider the Final Rule’s impact on efficiency, competition, and capital formation.<sup>55</sup>

As discussed previously, “private funds are excluded from the definition of ‘investment company’” under the ICA, but private fund advisers are still subject to the Advisers Act in “specific, limited respects.”<sup>56</sup> The Advisers Act defines an investment adviser as “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.”<sup>57</sup> Additionally, section 206(4) of the Advisers Act provides that investment advisers are prohibited from “engag[ing] in any act, practice, or course of business which is

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50. *Nat’l Ass’n of Priv. Fund Managers*, 103 F.4th at 1108.

51. *SEC Enhances the Regulation of Private Fund Advisers*, U.S. SEC & EXCH. COMM’N (Aug. 23, 2023), <https://www.sec.gov/newsroom/press-releases/2023-155> [<https://perma.cc/3J22-U933>].

52. *Nat’l Ass’n of Priv. Fund Managers*, 103 F.4th at 1108.

53. *Id.*

54. *Id.* (quoting Petition for Rev. at 1, *Nat’l Ass’n of Priv. Fund Managers*, 103 F.4th 1097 (5th Cir. 2024) (No. 23-60471)).

55. *Id.*

56. *Id.* at 1102.

57. *Id.* at 1103 (quoting Investment Advisers Act of 1940 § 202(a)(11), 15 U.S.C. § 80b-2(a)(11)).

fraudulent, deceptive, or manipulative.”<sup>58</sup> The same section grants the SEC the authority to prevent such conduct through rules and regulations, stating: “The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”<sup>59</sup> Section 211(a) of the Advisers Act “authorizes the Commission ‘to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this . . . [title].’”<sup>60</sup> Section 211(h) tasks the SEC with ensuring clear disclosures are made to investors about investors’ relationships with brokers, dealers, and investment advisers, including material conflicts of interest.<sup>61</sup> Additionally, the SEC must examine and, if necessary, establish rules to prohibit or restrict sales practices, conflicts of interest, and compensation schemes deemed “contrary to the public interest and the protection of investors.”<sup>62</sup>

The issues in *National Ass’n of Private Fund Managers* were “whether the Dodd-Frank Act expanded the Commission’s rulemaking authority to cover private fund advisers and investors under section 211(h) of the Advisers Act . . . and whether section 206(4) authorizes the Commission to adopt the Final Rule.”<sup>63</sup> The court held that “neither section grant[ed] the . . . [SEC] such authority.”<sup>64</sup>

Regarding the section 211(h) issue, the court found that the statutory context did not show that the provision’s reference to investors encompassed private fund participants, despite the SEC’s arguments to the contrary.<sup>65</sup> The Advisers Act and ICA, enacted as sister statutes, created a deliberate distinction, with the ICA

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58. *Id.* at 1104 (quoting Investment Advisers Act of 1940 § 206(4)).

59. *Id.* (quoting Investment Advisers Act of 1940 § 206(4)).

60. *Id.* (quoting Investment Advisers Act of 1940 § 211(a)).

61. *Id.* at 1105.

62. *Id.* (quoting Investment Advisers Act of 1940 § 211(h)(2)).

63. *Id.* at 1110.

64. *Id.* Industry participants raised these precise statutory concerns during the comment period. *See, e.g.,* Federated Hermes, Inc., Comment Letter on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (May 10, 2022), <https://www.sec.gov/comments/s7-03-22/s70322-20128469-292007.pdf> [<https://perma.cc/R2LY-KXEN>] (“Federated Hermes requests that the . . . [SEC] provide analysis on its authority to enact the Proposal as we do not believe that Sections 206(4) or 211(h) of the Advisers Act provide the Commission with requisite authority.”). Soon after the Fifth Circuit’s vacatur of the SEC’s private fund adviser rules, the SEC set out to adopt technical amendments to these regulations to comply with the court’s decision. *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, U.S. SEC. & EXCH. COMM’N (May 20, 2025), <https://www.sec.gov/rules-regulations/2024/11/s7-03-22> [<https://perma.cc/ZT4Y-5T59>].

65. *Nat’l Ass’n of Priv. Fund Managers*, 103 F.4th at 1112.

extensively regulating public investment companies while explicitly exempting private funds under sections 3(c)(1)–(7).<sup>66</sup> Moreover, section 913 of the Dodd-Frank Act, which the SEC cited as support, repeatedly references “retail customers” and sits in Title IX (retail investor protections), not Title IV (private fund advisers); thus, the court concluded that section 211(h) was intended to protect retail investors, not sophisticated private fund participants.<sup>67</sup>

With respect to section 206(4), the court held the SEC’s antifraud rationale was “pretextual.”<sup>68</sup> The SEC failed to define what fraudulent conduct the rules would prevent, instead relying on vague assertions of misconduct affecting only 0.05% of advisers.<sup>69</sup> The court emphasized that when Congress intends to mandate disclosure, “it . . . [does] so explicitly,” as in other Advisers Act provisions, rather than through antifraud authority.<sup>70</sup> Moreover, because the ICA exempts private funds from governance regulations, using section 206(4) to impose such requirements contradicted congressional intent.<sup>71</sup> The court concluded that absent an obligation to disclose, nondisclosure cannot constitute deception.<sup>72</sup>

### *E. Chevron Dies Three Weeks Later*

On June 28, 2024, the Supreme Court overturned one of the most significant and frequently cited decisions in administrative law, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in *Loper Bright Enterprises v. Raimondo*.<sup>73</sup> In a six–two ruling, the *Loper Bright* Court held that *Chevron* deference is no longer applicable.<sup>74</sup> The Court clarified that the APA requires courts to independently evaluate whether an agency has acted within its legal authority, without automatically deferring to the agency’s reasonable interpretation of an ambiguous law.<sup>75</sup>

*Chevron* deference, established in the 1984 Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, created a critical two-step framework for courts reviewing agency

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66. *Id.* at 1111.

67. *Id.* at 1112.

68. *Id.* at 1113.

69. *Id.*

70. *Id.* (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

71. *Id.* at 1113–14.

72. *Id.* at 1114.

73. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024). In *Loper Bright*, the dispute arose when federal regulators required Atlantic herring fishermen to pay for onboard monitors, despite their notable absence from the Magnuson-Stevens Fishery Conservation and Management Act’s categories of fee-paying vessels. *Id.* at 380–83.

74. *Id.* at 412–13.

75. *Id.*

interpretations of statutes.<sup>76</sup> At step one, courts were required to determine “whether Congress ha[d] directly spoken to the precise question at issue.”<sup>77</sup> If Congress’s intent was clear, that ended the inquiry.<sup>78</sup> However, if the statute was silent or ambiguous on the specific issue, courts proceeded to step two, where they were required to defer to the agency’s interpretation so long as it represented a permissible construction of the statute.<sup>79</sup> As a precondition, the interpretation had to come from the agency charged with administering the statute, as other agencies’ interpretations received no deference.<sup>80</sup>

The *Loper Bright* Court held that, because the APA requires courts to “decide all relevant questions of law” arising on review of agency action, *Chevron* deference could no longer apply because it did not allow the courts to independently examine each statute to determine its meaning.<sup>81</sup> Additionally, the Court dismissed the Government’s argument that agencies’ subject-matter expertise positions them as the best interpreters of statutes.<sup>82</sup> While an agency’s perspective may inform judicial decision-making, it does not override the judiciary’s interpretive role.<sup>83</sup> The Court emphasized that although agencies may possess greater technical knowledge, the judiciary holds superior expertise in statutory interpretation.<sup>84</sup> The Court rejected the notion that promoting uniformity in federal law justified deference to agency interpretations, highlighting the inherent inconsistencies in the application of *Chevron* and the potential for agency interpretations to shift with changing administrations.<sup>85</sup>

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76. 467 U.S. 837, 842–43 (1984), *overruled by*, *Loper Bright*, 603 U.S. at 412–13.

77. *Id.* at 842.

78. *Id.* at 842–43.

79. *Id.* at 843.

80. *Id.* Nor did deference “extend to an agency’s self-determination of its own jurisdiction under the statute.” *Id.* “[C]ourts must defer to an executive agency’s reasonable interpretation of an ambiguous provision of a statute the agency administers.” Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938–39 (2018) (emphasis added).

81. *Loper Bright*, 603 U.S. at 411 (quoting 5 U.S.C. § 706). For a useful and concise case overview by Steven Baicker-McKee, see *Administrative Law—Deference to Agency Interpretations—Chevron Deference*, FED. LITIGATOR, Aug. 2024.

82. See *Loper Bright*, 603 U.S. at 412.

83. *Id.* at 402–403.

84. *Id.*

85. *Id.* at 403.

## III. ANALYSIS

A. *Why Central Planners Can't Price Complexity*

The SEC's private fund rules reflected a central planning fallacy, which was the belief that regulators in Washington could design new regulations applicable to everything from a \$10 million micro-VC fund backing prerevenue startups to a \$25+ billion buyout fund delisting Fortune 500 companies off the New York Stock Exchange.<sup>86</sup> While the SEC is not a central planner in the sense of allocating resources or setting prices, its approach reflects the same underlying knowledge problem Friedrich Hayek described, which is that decision-makers in Washington inevitably lack the dispersed, tacit knowledge that market participants rely on in real time.<sup>87</sup> The SEC's only apparent nod to market diversity was procedural, with staggered compliance dates for some of the new rules based on a \$1.5 billion AUM threshold, while the substantive requirements remained uniformly applicable across widely varying fund strategies and structures.<sup>88</sup>

This knowledge problem becomes quite sensitive in private markets, where information asymmetry is embedded in the industry.<sup>89</sup> For example, a venture capitalist's decision to invest often depends on intangible factors such as the founder's grit or the team's chemistry.<sup>90</sup> Likewise, a private equity firm's operational improvements rely on proprietary insights gained from decades of pattern recognition across portfolio companies.<sup>91</sup> Sophisticated investors deeply value and rely on this information, and the SEC's new private fund rules would have destroyed this knowledge by forcing all funds to report identical data points and eliminating the competitive

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86. See SKADDEN, *supra* note 47, at 5, 8, 10, 17, 21 (summarizing the SEC's private fund adviser rules, used here as a substitute for vacated C.F.R. provisions).

87. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

88. See SKADDEN, SEC PRIVATE FUND RULES – APPLICABILITY AND COMPLIANCE DEADLINES 1 (Aug. 29, 2023), [https://www.skadden.com/-/media/files/publications/2023/08/sec\\_private\\_fund\\_rulesapplicability\\_and\\_compliance\\_deadlines.pdf](https://www.skadden.com/-/media/files/publications/2023/08/sec_private_fund_rulesapplicability_and_compliance_deadlines.pdf) [https://perma.cc/QX76-GBX3].

89. See Suzanne Brenner & Justin Reed, *Investing in Private Markets*, BROWN BROS. HARRIMAN (May 16, 2025), <https://www.bbh.com/us/en/insights/capital-partners-insights/investing-in-private-markets.html> [https://perma.cc/722S-8WRR] (“[T]he information asymmetry in private markets makes . . . undiscovered [acquisition] opportunities . . . possible.”).

90. Matt Muldavin, *How VC Funds Evaluate and Identify Strong Startup Leaders and Teams*, MAGMA: MAGMA BLOG (Sep. 10, 2024), <https://magmapartners.com/post/how-vc-funds-evaluate-and-identify-strong-startup-leaders-and-teams> [https://perma.cc/K8HM-A2NT].

91. Mike Hinckley, *Private Equity Operations: The Complete Guide*, GROWTH EQUITY INTERVIEW GUIDE (May 1, 2025), <https://growthequityinterviewguide.com/private-equity/private-equity-operations> [https://perma.cc/E387-37K4].



advantage that comes from asking better questions and gathering differentiated insights.<sup>92</sup>

In his 1945 essay *The Use of Knowledge in Society*, Hayek revealed the information problem facing all regulators.<sup>93</sup> He distinguished between two types of knowledge: scientific (theoretical) knowledge and the “knowledge of the particular circumstances of time and place.”<sup>94</sup> While economists can model supply and demand curves, only the corner grocer knows that Mrs. Smith buys extra milk on Tuesdays when her grandchildren visit.<sup>95</sup> This second type of knowledge, which is temporal and contextual, cannot be relayed to central authorities through forms or reports because it exists only in specific moments and loses meaning outside its original context.<sup>96</sup> For Hayek, this meant that centralized economic planning would always fail due to the impossibility of gathering information needed to make optimal decisions.<sup>97</sup>

Private fund managers operate in a similar fashion and thrive on this type of untransmittable knowledge.<sup>98</sup> For example, a private equity partner considering a manufacturing buyout understands, from decades of operational improvements, that a target’s warehouse layout creates invisible bottlenecks that financial statements miss entirely.<sup>99</sup> The partner recognizes that the retiring founder’s daily factory walks maintain worker morale in ways that will not survive the transition, which is key knowledge gained through informal conversations that no due diligence checklist includes.<sup>100</sup>

The SEC’s Quarterly Statement Rule, for example, gives a great illustration as to how standardization destroys this essential

92. See SKADDEN, *supra* note 47, at 5, 8, 10, 17, 21 (summarizing the SEC’s private fund adviser rules, used here as a substitute for vacated C.F.R. provisions).

93. Hayek, *supra* note 87, at 521.

94. *Id.*

95. The “corner grocer” example is whimsical but illustrates, in the abstract, the types of information private funds can uncover and act upon.

96. *Id.* at 522 (discussing examples of how people of different professions might become advantaged “based on special knowledge of circumstances of the *fleeting* moment not known to others” (emphasis added)).

97. *Id.* at 527 (explaining that “approaching the problem with the assumption of more or less perfect knowledge on the part of almost everyone has made us somewhat blind to the true function of the price mechanism”).

98. See Brenner & Reed, *supra* note 89 (“[Deal] sourcing expertise can add value if a manager is able to engage a company’s management team on a potential acquisition before other buyers are even aware that the business is for sale.”).

99. See *How Private Equity Firms Use Operational Due Diligence to Evaluate Agribusiness Investments*, FARRELLY MITCHELL (July 12, 2024) [hereinafter FARRELLY MITCHELL], <https://farrellymitchell.com/due-diligence-consulting/operational-due-diligence/> [https://perma.cc/4N85-W5H4] (discussing operational due diligence via facility tours and inspections as a method of “assess[ing] the efficiency and effectiveness of the target’s operations”).

100. See *id.* (“Interviews with management can provide insights into their operational knowledge, experience, and leadership capabilities.”).

knowledge.<sup>101</sup> The Quarterly Statement Rule required all funds, whether investing in prerevenue startups or buying a massive company, to report identical metrics every quarter.<sup>102</sup> For some VC funds, this hypothetically would have meant calculating “returns” on prerevenue companies.<sup>103</sup> How do you accurately measure returns of a startup whose tech prototype is still in beta testing?<sup>104</sup> Their early investors care more about intangible metrics rather than hard numbers at that point in time.<sup>105</sup> For a large buyout fund, the rule’s requirement to itemize every tiny expense without grouping them would bury the important information (did operational improvements work?) under hundreds of trivial line items (was lunch \$47 or \$52?).<sup>106</sup>

The CalPERS comment letter reveals how standardized disclosure can affect competitive dynamics among investors.<sup>107</sup> While CalPERS supported the SEC’s goal of increased transparency, it cautioned that limiting disclosure to fund-level data risks rolling back the investor-level reporting many large institutions have negotiated.<sup>108</sup> These detailed reports are essential for meeting their complex reporting and oversight needs.<sup>109</sup> CalPERS urged the SEC to require investor-level disclosures upon request to preserve these advantages.<sup>110</sup> Although not implying deliberate strategy, the effect of a fund-level-only baseline could unintentionally place smaller investors at a disadvantage by reducing their access to detailed information.<sup>111</sup> Thus, it is difficult to design rules that apply broadly

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101. See SKADDEN, *supra* note 47, at 3 (summarizing the SEC’s private fund adviser rules, used here as a substitute for vacated C.F.R. provisions).

102. *Id.*

103. See Kirsty MacSween, Anthony Rose & Jonny Seaman, *How to Value a Pre-Revenue Company and What Metrics to Show Investors*, SEEDLEGALS (June 14, 2024), <https://seed-legals.com/resources/how-to-value-pre-revenue-company/> [<https://perma.cc/66R9-T99W>] (“[W]hen your company is early stage — and especially when you’re pre-revenue — it’s especially tricky to come up with a number to put in front of prospective investors during funding round negotiations.”).

104. See *id.*

105. See *id.*

106. See SKADDEN, *supra* note 47, at 3. For example, SEC commentary derived from Adopting Releases explained that “[t]hese line-item tallies do not allow for (i) the exclusion of de minimis expenses.” *Id.*

107. CalPERS Letter, *supra* note 1, at 2.

108. *Id.*

109. *Id.*

110. *Id.* at 2–3.

111. See Christopher Carrigan & Cary Coglianese, George J. Stigler, “The Theory of Economic Regulation,” in THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 287, 288–89 (Steven J. Balla, Martin Lodge & Edward C. Page eds., 2015) (noting that firms “prefer regulations that operate as barriers to entry by potential competitors” and that “any time a regulation contains a grandfather clause exempting incumbent firms from new requirements, regulation increases the relative costs to new entrants”). When large institutional investors advocate for disclosure requirements they can meet but smaller

while accounting for the diverse informational needs of sophisticated market participants, echoing Hayek's insight that centralized regulations often miss the nuanced knowledge held by individual actors.<sup>112</sup> Fortunately, as the next Section demonstrates, markets have evolved elegant solutions that preserve rather than destroy this delicate art.<sup>113</sup> Although some investors may require protection, the real question is whether bureaucratic rules can improve upon the organic evolution of market practice. In practice, the answer is a resounding no.

### *B. Market Solutions vs. Regulatory Theater*

While the SEC spent years crafting these rules, private markets continued to build upon sophisticated governance systems that already function effectively.<sup>114</sup> For example, the ILPA now represents over 600 member institutions with \$3 trillion in private equity assets.<sup>115</sup> Without any regulatory mandate, the ILPA developed standardized reporting templates, best practices for fund governance, and model limited partnership agreements that funds voluntarily adopt.<sup>116</sup> This organic revolution succeeded because it preserves flexibility, and funds can adapt ILPA templates to their specific strategies rather than forcing all strategies into one template.<sup>117</sup> The story of the ILPA and similar market innovations reveals that sophisticated markets can generate better solutions than bureaucrats through competition and cooperation.<sup>118</sup>

Side letters, which represent private ordering at its finest, are customized, "confidential agreements between the sponsor and individual investors that give the latter special rights, beyond those that apply to other investors," solving specific investor needs without imposing one-size-fits-all mandates.<sup>119</sup> Sophisticated institutional investors often negotiate for preferential redemption rights,

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funds cannot, the competitive effects mirror these classic concerns about regulatory barriers to entry.

112. See *supra* notes 96–97 and accompanying text.

113. See discussion *infra* Section III.B.

114. See, e.g., *About the Institutional Limited Partners Association*, INSTITUTIONAL LTD. PARTNERS ASS'N, <https://ilpa.org/about-ilpa/> [<https://perma.cc/LY27-VV3Y>] (last visited Aug. 10, 2025).

115. *Id.*

116. See *ILPA's Private Equity Templates, Standards & Model Documents*, INSTITUTIONAL LTD. PARTNERS ASS'N, <https://ilpa.org/industry-guidance/templates-standards-model-documents/> [<https://perma.cc/XZ2C-TKKH>] (last visited Aug. 10, 2025).

117. *Id.*

118. See discussion *infra* Section III.B.

119. Elisabeth de Fontenay & Yaron Nili, *Side Letter Governance*, 100 WASH. U. L. REV. 907, 907 (2023).

such as shorter lock-up periods, priority withdrawal rights, or special redemption windows that align with their specific liquidity needs.<sup>120</sup> Under the SEC's preferential treatment rule, these redemption provisions would have been prohibited if they materially negatively affected other investors unless offered to all investors without qualification, meaning funds could not condition these rights on commitment size.<sup>121</sup> This misunderstands how private fund capital formation works. Large anchor investors command preferential redemption terms precisely because their substantial capital commitments make the fund viable in the first place, as well as representing a vote of confidence for other investors.<sup>122</sup> A \$500 million commitment from a sovereign wealth fund creates the very investment opportunity that allows smaller LPs to access top-tier managers and strategies.<sup>123</sup> Without the ability to offer tailored redemption rights to secure this cornerstone capital, funds would either not launch or would exclude smaller investors entirely.<sup>124</sup> The market had already developed elegant solutions like "most favored nation" (MFN) clauses that let smaller investors selectively opt into provisions that make sense for them, creating voluntary term adoption rather than mandatory equality.<sup>125</sup>

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120. *Private Fund Side Letters: Common Terms, Themes and Practical Considerations*, DECHERT (Nov. 5, 2024), <https://www.dechert.com/knowledge/onpoint/2024/11/private-fund-side-letters--common-terms--themes-and-practical-co.html> [<https://perma.cc/7B7K-34DN>].

121. See SKADDEN, *supra* note 47, at 17 (summarizing the SEC's private fund adviser rules, used here as a substitute for vacated C.F.R. provisions).

122. See *Private Equity: Limited Partners: The Essential Guide for Limited Partners in Private Equity*, FASTERCAPITAL (Apr. 7, 2025), <https://www.fastercapital.com/content/Private-equity--Limited-Partners--The-Essential-Guide-for-Limited-Partners-in-Private-Equity.html> [<https://perma.cc/PU5K-TRFM>] ("The reputation and support of prominent LPs can significantly impact a PE firm's ability to raise new funds. A commitment from a well-respected LP can serve as a seal of approval for other potential investors.").

123. See Shawn Cole et al., *Anchors Aweigh: Analysis of Anchor Limited Partner Investors in Impact Investment Funds* 5 (May 2020) (unpublished manuscript) (on file with the Harvard Business School), <https://hbswk.hbs.edu/Shared%20Documents/pdf/Final-Anchors-Aweigh.pdf> [<https://perma.cc/8F44-UUJB>] ("Anchors provide early investments in funds that are, on average, larger than those of non-anchor investors."); see also *id.* ("The interviews with anchor investors also suggest a halo effect for the funds receiving their investment which results from an early endorsement by a respected investor.").

124. Jessica S. Jeffers & Anne M. Tucker, *Shadow Contracts*, 1 U. CHI. BUS. L. REV. 259, 268 (2022) ("Side letters are also flexible, reflecting last minute and after-the-fund-is-formed deal adaptations necessary to attract capital. This is particularly true with large investors, those able and willing to invest cornerstone capital necessary to make a fund. Large investors hold negotiation power because of their influence over whether the fund raises the minimum capital amount to form." (footnotes omitted)) (showing that managers routinely use bespoke side-letter terms to secure cornerstone/seed capital and that such bespoke rights are instrumental to forming funds).

125. *Private Fund Side Letters: Common Terms, Themes and Practical Considerations*, *supra* note 120 ("[MFN rights] have historically been a key term negotiated in side letters, particularly for more significant investors.").

This preference for flexibility for private funds and their managers also extends beyond fund terms by shaping where funds choose to domicile in the global setting. Singapore illustrates the appeal to a light-touch regulatory framework, which, anchored by the Variable Capital Company (VCC) structure, enables managers to establish funds more quickly, tailor terms to sophisticated investors, and operate under a comparatively lighter compliance regime.<sup>126</sup> Since the VCC's introduction in 2020, "a total of 969 VCCs (representing 1,995 sub-funds) have been incorporated or re-domiciled in Singapore," shedding light on investment fund managers' preferences for higher operational flexibility.<sup>127</sup> This trend, driven by economic substance requirements and the appeal of combining regulatory efficiency with favorable tax treatment in a single jurisdiction, reflects a broader shift away from traditional offshore jurisdictions (like the Cayman Islands) toward domiciles where fund managers are located.<sup>128</sup>

Conversely, Europe's Alternative Investment Fund Managers Directive (AIFMD) has been met with criticism by industry participants since its implementation in 2011.<sup>129</sup> For hedge fund managers, "AIFMD and SEC registration were widely seen as the most onerous regimes with which to comply."<sup>130</sup> In KPMG's 2013 study, managers ranked AIFMD highest in terms of "cost, time and need for external support,"<sup>131</sup> and "suggest[ed] that the more complex the regulation, the more they believe they will spend."<sup>132</sup> Under the AIFMD, fund managers who market funds to European investors must comply with this complex framework, regardless of where the

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126. Tim Cooper, *The Evolving Regulation of Private Equity in Singapore*, QASHQADE (Jan. 3, 2024), <https://www.qashqade.com/insights/the-evolving-regulation-of-private-equity-in-singapore> [<https://perma.cc/ZYL9-VT3T>] ("In contrast to the US, which is expanding private equity regulation, Singapore emphasizes transparency rather than rules and aims to retain a relatively simplified regime, especially for venture capital (VC) managers.").

127. Jon Nair et al., *Private Equity Laws and Regulations Singapore 2025*, ICLG (Aug. 22, 2025), <https://iclg.com/practice-areas/private-equity-laws-and-regulations/singapore> [<https://perma.cc/A933-ZW7Z>].

128. Jerry Koh & Jonathan Lee, *The Increasing Popularity of Private Funds*, INT'L BAR ASS'N, <https://www.ibanet.org/article/6B07A0C3-D6BE-414A-BBDC-76FF0235326D> [<https://perma.cc/TNAE-Q998>] (last visited Oct. 9, 2025).

129. See, e.g., *IMA Responds to Adoption of AIFMD Regulation: "A Disappointing Outcome from a Flawed Process,"* THE INV. ASS'N (Dec. 19, 2012), <https://www.theia.org/news/press-releases/ima-responds-adoption-aifmd-regulation-disappointing-outcome-flawed-process> [<https://perma.cc/LQF7-K986>] ("[S]ome of the detailed provisions in this Regulation are out-of-sync or even conflict with other regulations that managers are required to follow and will impose additional costs for investors without conferring clear benefits.").

130. See KPMG, ALT. INV. MGMT. ASS'N & MANAGED FUNDS ASS'N, *THE COST OF COMPLIANCE* 27 (2013), <https://assets.kpmg.com/content/dam/kpmg/pdf/2013/10/the-cost-of-compliance-v2.pdf> [<https://perma.cc/3B57-MTBT>].

131. *Id.* at 5.

132. *Id.* at 4.

fund is domiciled, creating more hurdles and fewer investment opportunities for European LPs.<sup>133</sup>

### C. *Ossification's New Reality Post-Chevron*

In administrative law, “ossification” is a commonly used term to describe “the common notion that because of . . . procedural requirements, it takes agencies a long time to promulgate new regulations.”<sup>134</sup> This Section does not wade into abstract debates about whether ossification is good or bad.<sup>135</sup> Rather, it highlights how the private fund industry presents an acute version of this problem because innovation occurs at breakneck speed while regulation crawls forward.<sup>136</sup> This is not to suggest, however, that private funds should be completely free of any oversight whatsoever or that the SEC cannot issue new rules.<sup>137</sup> The point is that the structural lag inherent in ossified rulemaking makes timely regulation uniquely challenging in such a rapidly evolving industry.<sup>138</sup>

A core issue is that financial markets are capable of reinventing themselves in the time it takes for Congress to pass meaningful legislation.<sup>139</sup> As financial innovation accelerates and lawmakers trail behind, legislative and regulatory processes will struggle to keep pace with the evolving industry. Before *Chevron* fell, interestingly, ossification in the private fund industry seemed less apparent because agencies had room to maneuver.<sup>140</sup> For example, they could stretch existing statutes through reasonable interpretation, adapting old rules to new products, and courts would defer to the SEC's interpretation of ambiguous statutes.<sup>141</sup> But that previous flexibility is gone, and breakthrough financial innovations now potentially require their own acts of Congress.<sup>142</sup>

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133. *Id.* at 19.

134. Aaron L. Nielson, *Optimal Ossification*, 89 GEO. WASH. L. REV. 1209, 1210 (2018).

135. See discussion *infra* Section III.C.

136. See discussion *infra* Section III.C.

137. See discussion *infra* Section III.C.

138. See discussion *infra* Section III.C.

139. The historical track record shows this problem, as Dodd-Frank took two years to emerge after the 2008 crisis, the JOBS Act required three years from initial concept to final enactment, and, going further back, the Investment Company Act needed eleven years after the 1929 crash to address investment company abuses. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (1940).

140. See discussion *supra* Section II.E.

141. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), *overruled by*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

142. See *Loper Bright*, 603 U.S. at 412–13. Cryptocurrency serves as an interesting example of potential problems that arise with ossification. The Bitcoin network launched officially

*Chevron*'s demise throws another wrench into the government's approach because it will force agencies to act only with clear congressional mandates.<sup>143</sup> Just as existing statutory frameworks were able to be stretched to include some crypto assets,<sup>144</sup> Congress will now have to change or create new statutes to accomplish the same purported goals as the SEC's private fund adviser rules in order to further regulate private funds.<sup>145</sup> The SEC tried the band-aid approach of passing more regulation under the Adviser's Act, but this resulted in vacatur by the Fifth Circuit.<sup>146</sup> That said, major economic policies shouldn't emerge from creative statutory interpretation; Congress never voted to standardize private fund disclosures or restrict preferential treatment.<sup>147</sup>

#### IV. CONCLUSION

The Fifth Circuit's vacatur of the private fund rules and the Supreme Court's rejection of *Chevron* deference mark a watershed moment in financial regulation.<sup>148</sup> While the SEC's rules were ostensibly designed to address transparency and conflicts of interest within an industry managing tens of trillions of dollars, their fate

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in 2009, but to this day, nearly two decades later, there has been no comprehensive federal framework specifically regulating cryptocurrency. David Schepp, *Cryptocurrency Regulation: U.S. Laws and Global Developments*, BRITANNICA: BRITANNICA MONEY, <https://www.britannica.com/money/cryptocurrency-regulation> [<https://perma.cc/8M48-J95A>] (last visited Oct. 12, 2025) (summarizing the lack of comprehensive federal regulation and noting the GENIUS Act as a limited federal response for stablecoins). Instead, certain agencies have applied existing laws to cryptocurrency case-by-case, depending on the "nature and use" of each asset. *Id.* This approach acts more as a band-aid than a complete solution for regulation of fast-moving innovation. *See id.* The problem is that, while agencies realize it would take forever to establish a comprehensive framework for regulating cryptocurrency, this quick-fix approach comes at a cost. *See id.* The longer it takes for cryptocurrency to become fully regulated (assuming this is the government's goal), the more innovative and variable the asset class will become. *See* Julie Pinkerton, *The History of Bitcoin*, U.S. NEWS & WORLD REP. (Sep. 2, 2025, at 15:54 ET), <https://money.usnews.com/investing/articles/the-history-of-bitcoin> (on file with the Duquesne Law Review) (noting early cryptocurrency innovations, including David Chaum's 1983 proposal of eCash).

143. *See Loper Bright*, 603 U.S. at 412–13.

144. *See* Timothy G. Massad, *It's Time to Strengthen the Regulation of Crypto-Assets*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/articles/its-time-to-strengthen-the-regulation-of-crypto-assets/> [<https://perma.cc/MZ5V-VTDG>] ("The SEC has jurisdiction over crypto-assets deemed securities, but many crypto assets . . . are not securities.").

145. *Loper Bright*, 603 U.S. at 412–13.

146. *See* discussion *supra* Section II.D.

147. Nat'l Ass'n of Priv. Fund Managers v. SEC, 103 F.4th 1097, 1111 (5th Cir. 2024) ("The ICA 'places significant restrictions on the types of transactions registered investment companies may undertake,' and it imposes additional measures designed to protect investors. Yet Congress clearly chose *not* to impose the same prescriptive framework on private funds." (citation omitted) (quoting Goldstein v. SEC, 451 F.3d 873, 875 (D.C. Cir. 2006))).

148. *See* discussion *supra* Sections I.B, II.E.

reveals a greater truth about sophisticated markets.<sup>149</sup> The sophistication paradox exposed in CalPERS's comment letter, where the world's thirty-fourth largest "economy" demanded protection while preserving its negotiated advantages, demonstrates that regulatory "protection" often serves to entrench existing hierarchies rather than level playing fields.<sup>150</sup>

The knowledge problem that doomed these rules runs deeper than technical compliance issues.<sup>151</sup> Private fund management is an art that resists standardization.<sup>152</sup> When regulators attempt to reduce the nuanced judgment of venture capitalists evaluating founder potential or private equity partners recognizing operational patterns into quarterly reporting templates, they destroy the very information that makes these markets valuable.<sup>153</sup> The SEC's rules would have transformed this sophisticated craft into compliance theater, replacing customized solutions with standardized metrics that serve no one, not even the sophisticated investors who claimed to want them.<sup>154</sup>

Markets have already demonstrated their superiority in addressing genuine investor needs.<sup>155</sup> The ILPA's organic evolution, the sophisticated ecosystem of side letters, and the stark contrast between Singapore's thriving private fund sector and Europe's struggling post-AIFMD landscape all point to the same conclusion.<sup>156</sup> Sophisticated investors and fund managers, operating through repeated interactions and reputational constraints, generate better governance solutions than bureaucrats can design.<sup>157</sup> The political economy of the proposed rules would have accelerated industry concentration, with compliance costs serving as moats that protect incumbent giants while crushing emerging managers who bring diversity and innovation to the industry.<sup>158</sup>

Looking ahead, the post-*Chevron* landscape presents both challenges and opportunities.<sup>159</sup> The ossification problem is real, as financial innovation moves at Silicon Valley speed while Congress operates at Founding Fathers' pace.<sup>160</sup> Yet this friction between

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149. See discussion *supra* Section I.A.

150. See discussion *supra* Section I.A.

151. See discussion *supra* Section III.A.

152. See Brenner & Reed, *supra* note 89; FARRELLY MITCHELL, *supra* note 99.

153. See discussion *supra* Section III.A; see, e.g., FARRELLY MITCHELL, *supra* note 99.

154. See discussion *supra* Section III.A; CalPERS Letter, *supra* note 1.

155. See discussion *supra* Section III.B.

156. See discussion *supra* Section III.B.

157. See discussion *supra* Section III.B.

158. See discussion *supra* Section I.B; Tech Council Ventures Letter, *supra* note 11.

159. See discussion *supra* Section I.B.

160. See discussion *supra* Section III.C.



innovation and legislation may prove beneficial if it forces a rethinking of how we govern sophisticated markets.<sup>161</sup> Rather than lamenting the death of agency deference, we should embrace the return to first principles.<sup>162</sup> If private funds require regulation beyond existing antifraud provisions, Congress must say so explicitly, with full democratic accountability.<sup>163</sup>

The current regulatory uncertainty is not a crisis but a laboratory.<sup>164</sup> Without prescriptive rules forcing standardization, private funds can experiment with new structures, embrace technological solutions, and compete on their ability to serve investor needs rather than their capacity to navigate compliance mazes.<sup>165</sup> The Fifth Circuit and Supreme Court did not create a dangerous “wild west”; they prevented the codification of a system that would have benefited the CalPERS of the world at the expense of the Tech Council Ventures.<sup>166</sup>

Ultimately, these judicial decisions represent a victory for constitutional governance and market dynamism.<sup>167</sup> By requiring clear congressional authorization for major regulatory initiatives, the courts have restored the proper balance between democratic accountability and bureaucratic expertise.<sup>168</sup> While this framework may sacrifice some administrative efficiency, these temporary frictions pale in comparison to the long-term benefits of preserving innovation, competition, and the artistry that makes private fund management valuable.<sup>169</sup> The current state of private fund regulation, constrained by judicial skepticism but energized by market possibilities, offers the best hope for an industry that thrives on turning uncertainty into opportunity.<sup>170</sup>

The market has already moved on. The question is whether regulators will chase it or learn from it.

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161. See discussion *supra* Section III.B.

162. See discussion *supra* Section III.B.

163. See discussion *supra* Section III.C.

164. See discussion *supra* Section III.B.

165. See discussion *supra* Section III.B.

166. See discussion *supra* Section III.B.

167. See discussion *supra* Section III.B.

168. See discussion *supra* Section III.C.

169. See discussion *supra* Section III.C.

170. See discussion *supra* Section III.C.

# Farmworker Autonomy and Digital Management

Lindsay Henry\*

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## I. INTRODUCTION

This Article will examine the use of data-driven technologies that manage agricultural workers, including productivity-tracking, wage-tracking, and algorithmic management tools. While these tools have been the subject of legal and media controversy in retail warehouses and delivery driving, they have received little attention in the context of agricultural workers.<sup>1</sup> This Article will focus on

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1. See Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for ‘Productivity,’* THE VERGE (Apr. 25, 2019, at 12:06 ET), <https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations> [<https://perma.cc/EP5B-8J9Q>]; see also Ifeoma Ajunwa, *Algorithms at Work:*

those sectors of the agricultural industry that are more likely to adopt workplace surveillance technologies because they are labor-intensive: fruit orchards, berry farms, and vegetable farms.<sup>2</sup> First, this Article will discuss both the history and current state of agricultural technology as it relates to employee management,<sup>3</sup> followed by a discussion of the body of labor law that governs agricultural workers,<sup>4</sup> who have historically been excluded from the labor protections afforded to most workers under the National Labor Relations Act<sup>5</sup> and the Fair Labor Standards Act.<sup>6</sup> Second, this Article will examine existing labor law and proposed legislation as it applies to digital labor management technology while highlighting the unique legal status of farmworkers under those laws.<sup>7</sup> In conclusion, this Article will recommend regulatory action for digital labor management technology that encompasses the needs of farmworkers, reconsideration of existing labor law as it applies to agriculture, and areas for further research.<sup>8</sup>

## II. AGRICULTURAL TECHNOLOGY AND WORKPLACE MANAGEMENT

Contemporary technological developments have created new methods of monitoring and managing workers.<sup>9</sup> Location- and

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*Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21, 37 (2018).

2. Beyond the labor required for growing these crops, most fruits and vegetables require significant labor inputs postproduction in the way of packing, sorting, grading, and transporting. See BASEL MUSHARBASH, FARM ACTION, “KINGS OVER THE NECESSARIES OF LIFE”: MONOPOLIZATION AND THE ELIMINATION OF COMPETITION IN AMERICA’S AGRICULTURE SYSTEM 127 (2024), [https://farmaction.us/wp-content/uploads/2024/09/Kings-Over-the-Necessaries-of-Life-Monopolization-and-the-Elimination-of-Competition-in-Americas-Agriculture-System\\_Farm-Action.pdf](https://farmaction.us/wp-content/uploads/2024/09/Kings-Over-the-Necessaries-of-Life-Monopolization-and-the-Elimination-of-Competition-in-Americas-Agriculture-System_Farm-Action.pdf) [<https://perma.cc/S4FZ-RGVF>]. This sector of the industry operates within a highly consolidated structure under large corporations known as “grower-shipper-packers” (GSPs). *Id.* at 128. GSPs dominate processing, shipping, and distributing produce at a high overhead cost to the growers with whom they contract. *Id.* Today, 80–90% of produce is marketed through GSPs, who exercise significant control over farmers’ growing practices. *Id.* at 129. Crops like berries, carrots, and lettuce are under the control of a handful of GSPs and their parent private equity firms, with individual operations becoming increasingly concentrated to accommodate the high costs of contracting with GSPs. *Id.* at 131–35.

3. See *infra* Part II.

4. See *infra* Part III.

5. See 29 U.S.C. §§ 141–197 (granting collective bargaining rights to specified workers).

6. See 29 U.S.C. §§ 201–219 (granting minimum wage, maximum hour, and child labor protections).

7. See *infra* Part IV.

8. See *infra* Part V.

9. See generally Pauline T. Kim, *Artificial Intelligence, Big Data, Algorithmic Management, and Labour Law*, in THE OXFORD HANDBOOK OF THE LAW OF WORK 819 (Guy Davidov, Brian Langille & Gillian Lester eds., 2024) (discussing the relationship between emergent digital tools designed to manage workers and existing workplace laws); Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV.

productivity-tracking technologies collect data that evaluate how, when, with whom, and where employees work (and take breaks).<sup>10</sup> The existing legal framework surrounding employment in the United States grants employers wide discretion in controlling workplaces without negotiating with employees.<sup>11</sup> Consequently, technological innovation in the workplace tends to achieve productivity enhancement primarily in the interest of employers, often serving to enhance employer power and control over the workplace.<sup>12</sup> Although some federal guidance and bills have acknowledged the risks to workers' rights that digital productivity-monitoring and management tools pose, there are no comprehensive regulations governing how those tools are deployed in workplaces.<sup>13</sup>

Farmworkers occupy a unique position in employment law and a critical position in the economy.<sup>14</sup> The issue of workplace technological change as applied to farmworkers highlights the need for clear regulations of digital management tools and underscores longstanding issues with farmworkers rights.<sup>15</sup> Agricultural employees face enhanced vulnerability in areas of wage theft, unlawful working conditions, and health and safety risks; as such, the effects of technological intensification on their working conditions demand the attention of lawmakers and researchers.<sup>16</sup>

Proponents of data-driven technology in agriculture promise heightened productivity, lower environmental impact, and reduced costs from lower inputs.<sup>17</sup> Labor accounts for one of the costliest inputs on farms where machinery has been unable to replicate the skill required to perform certain work—many fruit and vegetable

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531 (2020) (discussing historical trends in workplace management and technology and the effect of modern digital and algorithmic management tools on laws governing the workplace); Ajunwa, *supra* note 1 (discussing digital workplace productivity monitoring technologies and implicated laws).

10. See Ajunwa, *supra* note 1, at 24 (surveying physical tracking practices across occupations); see also Maria Macaluso & Ariana R. Levinson, *Collective Action, Legislation, and Creative Litigation at the Intersection of Geospatial Data and Workers' Rights*, 36 A.B.A. J. LAB. & EMP. L. 299, 300 (2022) (providing examples of how employers use GPS).

11. See Rogers, *supra* note 9, at 544.

12. See *id.*

13. See Macaluso & Levinson, *supra* note 10, at 313; see also discussion *infra* notes 128–40.

14. Unless otherwise noted, “farmers” includes farm owners and managers. “Farmworkers” includes all farm wage workers. “Employers” includes both farm owners and farm labor contractors.

15. See discussion *infra* Part V.

16. See discussion *infra* Part III.

17. See Louisa Prause, *Digital Agriculture and Labor: A Few Challenges for Social Sustainability*, SUSTAINABILITY, June (I) 2021, at 1, 6, <https://www.mdpi.com/2071-1050/13/11/5980> [<https://doi.org/10.3390/su13115980>] (discussing digital agriculture in Germany).

crops are considered “labor intensive” for this reason.<sup>18</sup> In general, the agricultural labor supply has posed a chronic issue for food and commodity production in the United States because the production and profit goals of farmers are often compromised by the cost and availability of farmworkers.<sup>19</sup> Significant resources are devoted to research and development of robotic harvesters, seeders, pickers, and sorters in labor-intensive agriculture, although the rolling-out of this technology is still in an experimental phase.<sup>20</sup> While heightened technological capabilities are giving new life to old desires for increased mechanization and, further, automation, many tasks remain resistant to mechanization, and new equipment is often cost prohibitive.<sup>21</sup> Thus, human labor remains vital in many areas of agricultural production.<sup>22</sup>

The technological options available to companies looking to monitor worker performance are vast. Some examples include: software applications downloaded to phones; wearable devices like wristbands or microchips that use radio-frequency identification (RFID); global positioning system (GPS); and infrared and microphone sensor technologies to track the physical location of persons for purposes of monitoring productivity, location, employee relationships, verbal communications, and calculating wages.<sup>23</sup> Such data can, in turn, be organized by algorithmic management software to direct workflow and make employment-based decisions like recommendations for termination.<sup>24</sup> In some cases, termination based on algorithmic management has been automatic, bypassing human oversight entirely.<sup>25</sup> Microchipping technology can function the same way without requiring another device that hosts software.<sup>26</sup>

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18. See LINDA CALVIN, PHILIP MARTIN & SKYLER SIMNITT, U.S. DEP’T OF AGRIC., ADJUSTING TO HIGHER LABOR COSTS IN SELECTED U.S. FRESH FRUIT AND VEGETABLE INDUSTRIES 1, 9 (2022) [hereinafter ADJUSTING TO HIGHER LABOR COSTS], [https://ers.usda.gov/sites/default/files/\\_laserfiche/publications/104218/EIB-235.pdf](https://ers.usda.gov/sites/default/files/_laserfiche/publications/104218/EIB-235.pdf) [perma.cc/CX86-TPTB].

19. See *id.* at 1. An additional, more modern challenge for the farmer growing labor-intensive crops is the increasing competition with cheaper imports. See *id.* at 6–8.

20. See *id.* at 9. Current technology supports mechanization of some crops more readily than others, as opposed to fully automating processes with robotics. *Id.* Mechanization, replacing human labor with machine power, is distinguished from automation, which relies on computerized judgment. See *id.*

21. See *id.* at 9.

22. See *id.* at 1 (highlighting the importance of labor).

23. See Ajunwa, *supra* note 1, at 23–24, 39–40 (describing productivity monitoring through app-based location tracking, wearable RFID technology, and wearable sensors); see also Macaluso & Levinson, *supra* note 10, at 304–06 (describing GPS- and RFID-based monitoring).

24. See Rogers, *supra* note 9, at 569.

25. See Lecher, *supra* note 1.

26. See Macaluso & Levinson, *supra* note 10, at 306–07.

Microchips are designed to be implanted directly into the body or are embedded into wearable devices.<sup>27</sup> Several states have banned the practice of requiring employees to implant microchips into their bodies, but many have not, and a few states have rejected proposals to implement such a ban.<sup>28</sup>

Algorithmic management tools can make suggestions or decisions based on data collected from workers' performances.<sup>29</sup> The cost-cutting goals of algorithmic management are most readily realized in types of work that have long embraced methods of "scientific management."<sup>30</sup> "Taylorism," the name given to the scientific management system developed by Frederick Winslow Taylor, divides work processes "into discrete, rationalized, low-skill tasks' that c[an] be performed by workers with little specialized training."<sup>31</sup> The division of work into delegable tasks still requires the process knowledge of the worker; however, "scientific management" proceeds from a position "directly antagonistic to the old idea that each workman can best regulate his own way of doing the work."<sup>32</sup>

The scientific management method was not developed with agriculture in mind, but farmers have implemented it over time as the availability of labor fluctuated and technological advancements supported the mechanization of tasks.<sup>33</sup> One example of these circumstances coming together to transform the agricultural workplace was the end of the *Bracero* (guestworker)<sup>34</sup> Program in 1964.<sup>35</sup> Congress terminated the program with the intent of improving

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27. See *id.*

28. See *id.* at 313–14. As of 2024, thirteen states have passed laws banning the mandatory microchipping of employees: Alabama, Arkansas, California, Indiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Utah, and Wisconsin. See Zhanna L. Malekos Smith, *The Rise of Preemptive Bans on Human Microchip Implants*, CARNEGIE COUNCIL FOR ETHICS IN INT'L AFFS. (Jul. 9, 2024), <https://www.carnegiecouncil.org/media/article/preemptive-bans-human-microchip-implants> [<https://perma.cc/ZC36-87QY>].

29. See Rogers, *supra* note 9, at 562.

30. See *id.* at 541.

31. See *id.* (quoting Karen Levy, *The Contexts of Control: Information, Power, and Truck-Driver Work*, 31 INFO. SOC'Y 160, 161 (2015)).

32. See *id.* at 541, 541 n.46 (quoting FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 37 (1911)).

33. See Don Mitchell, *Taylorism Comes to the Fields: Labor Control, Labor Supply, Labor Process, and the Twilight of Fordism in California Agribusiness*, 99 ECON. GEOGRAPHY 341, 345–46 (2023) (discussing the staggered adoption of mechanization and rationalization among different crops depending on labor supply).

34. *Id.* at 341.

35. See Gilbert G. Gonzalez, *Bracero Program*, OXFORD BIBLIOGRAPHIES (Mar. 19, 2013), <https://www.oxfordbibliographies.com/view/document/obo-9780199913701/obo-9780199913701-0028.xml> [<https://perma.cc/HZ32-EH9B>]. The U.S. federal government operated the *Bracero* Program from 1942 to 1964, which brought more than four million men from Mexico to the United States as guestworkers, mainly in agriculture. *Id.*

domestic employment opportunities by eliminating foreign labor.<sup>36</sup> Amid the guestworker labor shock and the concurrent surge in unionization in the workforce that remained, researchers at the University of California partnered with the state's agribusiness to develop innovations in the labor process that might compensate for farmers' fluctuating control over the workforce.<sup>37</sup>

The University of California worked with the states' farm owners before on similar projects.<sup>38</sup> In the 1940s, major strikes disrupted the lemon orchards around Ventura, leading the orchardists to ask researchers to develop an "incentive pay system."<sup>39</sup> The resulting pay-rate method came about as follows:

[The researchers studied] the rate of picking and its relationship to the height of the trees, yield of the orchards and other variables, and then . . . [devised] a piece-rate schedule which varied with the daily variation in such factors. Overall, however, the schedule was designed to yield, in any one year, a certain average hourly wage to an "efficient" worker.<sup>40</sup>

Within a year, workers in Ventura's "rationalized" lemon orchards proved the effectiveness of the method, where the rate of pick increased by 40% and the work required 29% fewer pickers.<sup>41</sup>

When farmers again came to the University of California hoping for a scientific innovation that could bridge the gap between their budgets and the competing labor interests of domestic workers, researchers devoted their resources to mechanization technology for crops like broccoli, cauliflower, oranges, raisin grapes, brussels sprouts, tree nuts, and tree fruit, including the development of new cultivars suited to mechanization.<sup>42</sup> The new machines were designed to perform part of the work by, for example, carrying workers and eliminating the need for workers to walk, or to aid efficiency by alleviating the energy required for the most strenuous bodily motions, measured as the "time-motion expenditures" of workers.<sup>43</sup>

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36. Michael A. Clemens, Ethan G. Lewis & Hannah M. Postel, *Immigration Restrictions as Active Labor Market Policy: Evidence from the Mexican Bracero Exclusion*, 108 AM. ECON. REV. 1468, 1469 (2018).

37. See Mitchell, *supra* note 33, at 341.

38. *Id.* at 348.

39. *Id.*

40. *Id.* (second and third alterations in original) (quoting DAVID RUNSTEN & PHILLIP LEVEEN, MECHANIZATION AND MEXICAN LABOR IN CALIFORNIA AGRICULTURE 80–81 (1981)).

41. *Id.* at 349.

42. *Id.* at 349–53.

43. *Id.* at 349–51.

Beyond those farmers connected to the University of California's research program, others adopted existing technology that had only become cost-effective with the end of the *Bracero* Program.<sup>44</sup> The tomato harvester, used primarily for harvesting ketchup and sauce tomatoes, was available beginning in the 1950s, but did not gain widespread use until tomato growers who had employed *bracero* labor sought an alternative with the end of the program.<sup>45</sup> Ultimately, increased mechanization and technological development in production likely obstructed Congress's purpose of improving the position of domestic workers by ending the *Bracero* Program.<sup>46</sup>

As the needs of employers have driven technological developments in the past, they continue to influence research and development in cutting costs, streamlining efficiencies, and exercising control over the workplace.<sup>47</sup> The growing use of digital management tools has drawn comparisons to Taylorist models with what has been termed "digital Taylorism."<sup>48</sup> Like its analog counterpart, digital Taylorism adapts to farming through software packages and devices that include productivity-tracking and GPS-monitoring tools.<sup>49</sup> As with other types of work where data-driven, digital management tools are used, these new tools pose threats to the rights and safety of farmworkers.<sup>50</sup>

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44. See *id.* at 354 (showing that the share of canning tomatoes harvested by machine increased nearly 100% from 1961 to 1970); see also Clemens, Lewis & Postel, *supra* note 36, at 1482 (showing how use of tomato harvest machines increased dramatically following the end of the *Bracero* Program).

45. See Clemens, Lewis & Postel, *supra* note 36, at 1482.

46. See *id.* at 1485.

47. See Rogers, *supra* note 9, at 542 (identifying three main purposes of technology for modern employers: enhancing efficiency, deskilling work, and monitoring productivity for the purpose of quota-based disciplining); see also *id.* at 541 (arguing that the design of and choice over workplace technology is an exercise of power that has historically been directed at workers).

48. See PHILLIP BROWN, HUGH LAUDER & DAVID ASHTON, *THE GLOBAL AUCTION: THE BROKEN PROMISES OF EDUCATION, JOBS AND INCOMES* 72 (2011) (using the phrase "digital Taylorism" to describe the use of digital tools for capturing data that software employs to execute intellectual tasks like managing workers).

49. See Prause, *supra* note 17, at 7.

50. See IRENE TUNG, NICOLE MARQUEZ & PAUL SONN, NAT'L EMP. L. PROJECT, *AMAZON'S OUTSIZED ROLE: THE INJURY CRISIS IN U.S. WAREHOUSES AND A POLICY ROADMAP TO PROTECT WORKERS* 10 (2024), <https://www.nelp.org/app/uploads/2024/05/Amazons-Outsized-Role-5-1-24.pdf> [<https://perma.cc/24M5-3BMK>] (noting that the Occupational Safety and Health Administration attributes high rates of injury at Amazon warehouses directly to its digital management practices); Emilia F. Vignola et al., *Workers' Health Under Algorithmic Management: Emerging Findings and Urgent Research Questions*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Jan. (II) 2023, at 1, 8–9, <https://www.mdpi.com/1660-4601/20/2/1239> [<https://doi.org/10.3390/su13115980>] (discussing worker health in context of app-based delivery services).



One example of how farmers use this technology is employee-entered data accompanied by wearable RFID tags.<sup>51</sup> The worker enters data into production terminals that are scattered across a workplace as they complete discrete tasks, like harvesting one row of plants.<sup>52</sup> They then tap their RFID tags onto the terminal or otherwise enter an identifying marker.<sup>53</sup> Data can be displayed in real time for managers.<sup>54</sup> Employers can make staffing or disciplinary decisions based on performance data gathered in this way.<sup>55</sup>

Another example is GPS-enabled devices that determine if an employee is in an area designated as a work area.<sup>56</sup> If workers are outside of the “geofenced” area, they do not accrue compensable time worked or cannot clock in to work.<sup>57</sup> Fields can thus be broken down into areas associated with either compensable or noncompensable time.<sup>58</sup> These tools can also monitor workers’ movements while they are clocked in regardless of whether they are within a geo-fenced area or not.<sup>59</sup>

Contemporary discussions around technology in agriculture focus on robotics, automation, and “precision agriculture” systems that use varying combinations of data-collecting drones and AI-generated decisions to direct equipment like sprayers, cultivators, and harvesters in the field.<sup>60</sup> Widespread enthusiasm from investors searching for a stake in the future of food systems drives the discussion, but the industry remains skeptical or unable to make meaningful use of the new technology.<sup>61</sup> As an example, Gro

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51. See Olivia Doggett, Matt Ratto & Priyank Chandra, *Migrant Farmworkers’ Experiences of Agricultural Technologies: Implications for Worker Sociality and Desired Change*, in CHI ‘24: PROCEEDINGS OF THE 2024 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 7–8 (2024) (discussing terminal networks used in Canadian greenhouse production).

52. See *id.* at 7.

53. See *id.*

54. See *id.* at 8.

55. See *id.*

56. See Andjelka Prvulovic, *Navigating the Fields: Best GPS Tracking Apps for Employees in Agriculture*, TIMEERO (Apr. 18, 2024, at 01:50 ET), <https://timeero.com/post/gps-tracking-employees-agriculture> [<https://perma.cc/JUU3-ZBSQ>].

57. See *id.*

58. See *id.*

59. See *id.*

60. See *Agriculture*, CARNEGIE MELLON UNIV.: NAT’L ROBOTICS ENG’G CTR., <https://www.nrec.ri.cmu.edu/solutions/agriculture> [<https://perma.cc/2RSX-BDZN>] (last visited Sep. 22, 2025); see also *Specialty Crop Automation*, CARNEGIE MELLON UNIV.: NAT’L ROBOTICS ENG’G CTR., <https://www.nrec.ri.cmu.edu/solutions/agriculture/specialty-crop-automation/> [<https://perma.cc/ZF6H-F482>] (last visited Nov. 2, 2025); *Strawberry Plant Sorter*, CARNEGIE MELLON UNIV.: NAT’L ROBOTICS ENG’G CTR., <http://nrec.ri.cmu.edu/solutions/agriculture/strawberry-plant-sorter/> [<https://perma.cc/K38X-SF2P>] (last visited Nov. 2, 2025).

61. See David Fiocco et al., *Agtech: Breaking Down the Farmer Adoption Dilemma*, MCKINSEY & CO., <https://www.mckinsey.com/industries/agriculture/our-insights/agtech->

Intelligence, a digital, data-driven farm management platform, attracted eighty-five million dollars in venture capital investment and received an acknowledgment from TIME magazine as one of the hundred most influential companies in 2021, but in 2024, it shuttered its doors after failing to secure a market.<sup>62</sup>

While development in automation and precision agriculture dominate the discussion around agricultural technology, existing digital tools that monitor and manage workers have found a natural habitat on the farm, where employee management has embraced workplace surveillance technologies to enhance productivity.<sup>63</sup> Agricultural workers under pressure to perform or be replaced report added negative pressure working under digital productivity tracking.<sup>64</sup>

Most farmworkers in the United States are noncitizens that are either employed through the H-2A visa program or are undocumented aliens.<sup>65</sup> Thus, understanding the regulatory scheme that controls implementing digital employee management technology on farms and assessing its efficacy requires a discussion of several unique aspects in agricultural labor regulation.

### III. THE LEGAL STATUS OF AGRICULTURAL WORKERS

#### A. *The Legal Status of Agricultural Workers in General*

Most workers in the United States are guaranteed rights and labor protections through a series of New Deal enactments providing wage guarantees, work hour limitations, child labor regulations,

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breaking-down-the-farmer-adoption-dilemma [https://perma.cc/5Q5W-9HDQ] (last visited Nov. 1, 2025).

62. See AGFUNDER, AGFUNDER AGRIFOODTECH INVESTMENT REPORT 22 (2022), <https://research.agfunder.com/2022-agfunder-agrifoodtech-investment-report.pdf> (on file with the Duquesne Law Review); see also Elaine Watson, *Breaking: Ag Insights Platform Gro Intelligence Is Closing Down*, AGFUNDER NEWS (May 31, 2024), <https://agfunder-news.com/breaking-ag-insights-platform-gro-intelligence-is-closing-down> [https://perma.cc/9VCF-37FE].

63. See Doggett, Ratto & Chandra, *supra* note 51, at 7 (discussing digital agriculture in Canada); see also Prause, *supra* note 17, at 11 (discussing digital agriculture in Germany); Chris Ramsaroop, *Reality Check 101: Rethinking the Impact of Automation and Surveillance on Farm Workers*, MIGRANTWORKERSRIGHTS (Sep. 6, 2019), <https://www.migrantworkersrights.net/en/resources/reality-check-101-rethinking-the-impact-of-automati> (on file with the Duquesne Law Review) (discussing digital agriculture in Canada).

64. See *Automation in Agriculture Offers Solutions for Farmers, but Workers Fear for Their Jobs*, CBS NEWS: MONEYWATCH (Oct. 28, 2024, at 12:50 ET), <https://www.cbsnews.com/news/farming-automation-ford-migrant-workers/> [https://perma.cc/4BT5-K396].

65. See *Farm Labor*, U.S. DEPT OF AGRIC.: ECON. RSCH. SERV. (Sep. 12, 2025), <https://www.ers.usda.gov/topics/farm-economy/farm-labor> [https://perma.cc/L5GT-JJRR].

and collective bargaining rights.<sup>66</sup> When Congress enacted these laws, it excluded agricultural workers from them, with most of those exclusions remaining in place today.<sup>67</sup> Both the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) excluded farmworkers from the definition of “employee,” thereby excluding them from all protections granted by each Act.<sup>68</sup> Without coverage under the NLRA, farmworkers are not guaranteed a right to collectively bargain without retaliation from their employer.<sup>69</sup> The legislative history of the NLRA does not indicate a clear reason for this exclusion, but some scholars have theorized that agricultural growers yielded considerable influence in Congress to block the NLRA and other New Deal legislation if it included farmworkers.<sup>70</sup> The animus behind the exclusion, which disproportionately affected African American workers, is the subject of ongoing debate; some argue that lobbyists and lawmakers were racially motivated in seeking the farmworker exclusion as a means of denying collective bargaining rights to a significant share of African American workers, the majority of whom worked in agriculture.<sup>71</sup>

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66. See 29 U.S.C. §§ 141–197 (granting collective bargaining rights to specified workers); see also 29 U.S.C. §§ 201–219 (granting minimum wage, maximum hour, and child labor protections).

67. See *History of Changes to the Minimum Wage Law*, U.S. DEPT OF LABOR: WAGE AND HOUR DIV., <https://www.dol.gov/agencies/whd/minimum-wage/history> [<https://perma.cc/AB7W-93KK>] (last visited Sep. 22, 2025) (describing amendments to the FLSA in 1977 that mandated minimum wages for employees of large agricultural employers); 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer. . . .”).

68. 29 U.S.C. § 203(3); 29 U.S.C. § 152(3).

69. See *id.* §§ 157–158 (granting a right to collective bargaining for covered employees under the Act and defining unfair labor practices by an employer to include interfering with that right or discriminating against employees for exercising it).

70. See Paul D. Lall, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUM. RTS. L. REV. 597, 601 (2000) (citing ROBERT GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE Bargaining 29 (1st Ed. 1976)); see also 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. REV. 104, 111–16 (2024) (discussing the exclusion of both agricultural workers and African Americans from multiple New Deal programs).

71. See Lall, *supra* note 70, at 602. But see Larry Dewitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 63–64 (2010) (arguing against a racial animus behind the agricultural worker exclusion from the Social Security Act). There is also reason to suggest that farmworkers were not as eager to unionize as their industrial counterparts in that efforts of the Industrial Workers of the World (IWW) to unionize farmworkers were counterproductive—the strategy of organizing strikes during peak harvest times left a bad impression on the farm labor community. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 n.12 (1987). Worth noting, however, is that the IWW had focused their organization efforts on white farmworkers in California. See *id.* (citing CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870–1941, at 81–83 (1981); MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 292–300 (Quadrangle Books 1969)).

Today, fourteen states guarantee collective bargaining rights to agricultural workers, with varying degrees of protection for union activity.<sup>72</sup>

In 1977, some protections under the FLSA were extended to farmworkers.<sup>73</sup> The FLSA guarantees overtime pay and minimum wage to workers; however, special rules affect how these protections are guaranteed for farmworkers, with farms using less than five hundred man-days of labor in a calendar year exempt from paying their employees a minimum wage.<sup>74</sup> Further, agricultural workers remain excluded from overtime pay requirements under the FLSA.<sup>75</sup> However, some states mandate overtime pay for farmworkers.<sup>76</sup>

The primary vehicle of labor protections for farmworkers is the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA).<sup>77</sup> The AWPA defines both seasonal and migrant workers as those whose employment in agriculture is seasonal or temporary in nature.<sup>78</sup> Migrant workers are required to be absent overnight from their permanent residence, while seasonal workers are not so required.<sup>79</sup> Under the AWPA, farmworkers have a private right of action for lost wages and other labor violations.<sup>80</sup> The Act includes an antiretaliation provision, which allows a worker to issue a complaint to the Secretary of Labor if they believe their employer has discriminated against them in retaliation for filing a complaint under the AWPA.<sup>81</sup> The Secretary can then choose to investigate the claim, and, upon determination of a violation, bring an action in district court against the employer.<sup>82</sup>

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72. Those states are Arizona, California, Colorado, Hawaii, Kansas, Kentucky, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Oregon, Washington, and Wisconsin. Samantha Mikolajczyk, *Collective Bargaining Rights for Farm Workers*, THE NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/> [https://perma.cc/B6FE-E8R3] (last visited Feb. 14, 2025).

73. See *History of Changes to the Minimum Wage Law*, *supra* note 67.

74. 29 U.S.C. § 213(a)(6). A "man-day" is "any day during which an employee performs any agricultural labor for not less than one hour." *Id.* § 203(u).

75. *Id.* § 213(b)(12) (exempting agricultural workers from maximum hour and overtime requirements).

76. Those states are California, Colorado, Hawaii, Minnesota, New York, and Washington. Samantha Mikolajczyk, *Overtime for Agricultural Workers*, THE NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/changes-to-state-overtime-minimum-wages-for-the-agriculture-industry/> [https://perma.cc/56UV-SPFW] (last visited Feb. 14, 2025).

77. 29 U.S.C. §§ 1801–1872.

78. *Id.* § 1802(8), (10).

79. *Id.*

80. *Id.* § 1854(a).

81. *Id.* § 1855.

82. *Id.*

The AWPAs also requires Farm Labor Contractors (FLCs) to register with the Secretary of Labor, specify the labor contracting activities they are authorized to perform, register the vehicles they use in farm contracting operations, and identify the housing facilities that they use.<sup>83</sup> FLCs recruit, solicit, hire, employ, or transport workers and occupy a significant role in the hiring and managing of farm labor.<sup>84</sup> They may also be responsible for providing housing to guestworkers.<sup>85</sup> The amount of FLC activity varies by state; for example, in California, it is estimated that FLCs supply 50–75% of farmworkers.<sup>86</sup>

Where FLCs engage or otherwise manage labor on behalf of a farm owner, liability for labor violations may be allocated jointly between the contractor and owner, or liability may be assigned solely to the contractor if the contractor is not deemed an employee of the farmer.<sup>87</sup> The AWPAs adopted the concept of “joint employment” from the FLSA.<sup>88</sup> Farm labor contractors are often migrant workers themselves who pose logistical challenges for obtaining judgments and tend to lack financial resources for satisfying judgments.<sup>89</sup> Growers can seek protection from civil and criminal liability under the structure of contracted labor that FLCs provide.<sup>90</sup>

## B. *The Legal Status of Guestworkers*

As of 2022, around 10% of all farmworkers and 17% of crop farmworkers were noncitizens who entered the United States to work through the H-2A visa program.<sup>91</sup> Under the program, agricultural employers may hire noncitizens to perform temporary work if they can demonstrate that they made efforts to hire domestic workers but were unable to do so.<sup>92</sup> Importantly, to qualify for the program,

83. *Id.* §§ 1811–1812.

84. See Lall, *supra* note 70, at 610; see also *Fact Sheet #49: The Migrant and Agricultural Worker Protection Act*, U.S. DEP’T OF LAB.: WAGE AND HOUR DIV. (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/49-mspa> [<https://perma.cc/XTH9-4TCJ>].

85. See *Fact Sheet #49: The Migrant and Agricultural Worker Protection Act*, *supra* note 84.

86. See Mary Hoopes, *Regulating Marginalized Labor*, 73 HASTINGS L.J. 1041, 1060 (2020).

87. See 29 C.F.R. § 500.20(h)(4), (5) (2025); see also Lall, *supra* note 70, at 611–14.

88. See 29 C.F.R. § 500.20(h)(5).

89. See Lall, *supra* note 70, at 610–11.

90. See Hoopes, *supra* note 86, at 1060.

91. See Daniel Costa, *How Many Farmworkers Are Employed in the United States?*, WORK ECON. BLOG (Oct. 3, 2023, at 14:53 ET), <https://www.epi.org/blog/how-many-farmworkers-are-employed-in-the-united-states/> [<https://perma.cc/LQ85-R37U>] (analyzing Department of Labor statistics).

92. 20 C.F.R. § 655.100(a)(1)(i) (2025); see also, e.g., *id.* § 655.103(a) (“In order to bring nonimmigrant workers to the United States to perform agricultural work, an employer must

the Secretary must determine that “[t]he employment of H-2A worker(s) will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>93</sup> The primary mechanism for enforcing labor regulations under the program is oversight from the Department of Labor, which delegates authority to the Wage and Hour Division to investigate compliance with contractual obligations and terms of employment.<sup>94</sup>

H-2A workers are explicitly excluded from the AWP and are instead granted labor protections through the requirements of the visa program itself,<sup>95</sup> although the program also provides that employers may be subject to the FLSA under the law’s independent requirements.<sup>96</sup> Under the visa program, employers are required to provide three-fourths of the workdays in the employment contract, or, if they fail to do so, pay the employee wages for three-fourths of the workdays in the employment contract.<sup>97</sup> The provision includes a variation of the guarantee as applied to piece-rate workers that averages a worker’s hourly piece-rate earnings to calculate the amount due under the guarantee.<sup>98</sup> The Department of Labor’s Wage and Hour Division has the authority to investigate wage, hour, housing, or retaliation complaints, and the Office of Special Counsel for Immigration-Related Unfair Employment Practices of the Department of Justice has the authority to investigate charges of discrimination based on immigrant status or citizenship.<sup>99</sup>

The legal status of a farmworker employed under the H-2A visa program depends on their continued employment under the original job offer that solicited their visa application.<sup>100</sup> An employer may not terminate an H-2A worker’s employment at will; rather, a worker can be terminated only for cause when the worker fails “to comply with employer policies or rules or to satisfactorily perform

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first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment . . .”).

93. *Id.* § 655.100(a)(1)(ii).

94. *Id.* § 655.101(b).

95. 29 U.S.C. § 1802(8)(B)(ii).

96. 20 C.F.R. § 655.135(e) (“The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.”); *see also id.* § 655.122(g) (if an employer deducts from wages the cost of providing meals to workers and the charge brings the wage below the minimum wage set by the FLSA, it must meet requirements of reasonableness set out under the FLSA).

97. *Id.* § 655.122(i).

98. *Id.* § 655.122(i)(2). Piece-rate work systems compensate workers based on quantity produced or processed as an alternative to hourly wages. *Id.* § 655.103(b).

99. 29 C.F.R. § 501.1(c) (2025); 28 C.F.R. § 44 (2025).

100. *See* 20 C.F.R. § 655.135(i)(1) (“The employer must inform H-2A workers of the requirement that they leave the United States at the end of the period certified by the Department or separation from the employer . . .”).

job duties in accordance with reasonable expectations based on criteria listed in the job offer.”<sup>101</sup>

In April of 2024, the Department of Labor issued a final rule that adopted provisions aimed at protecting workers from employer retaliation when they self-organize to bargain over working conditions.<sup>102</sup> The Department of Labor explained that the agency is unable to investigate every farm where H-2A workers are employed, but, of the farms it investigated within five years of the final rule, 88% were committing labor violations under the program.<sup>103</sup> By contrast, the Department found that less than 1% of farms employing H-2A workers faced investigation within any given year.<sup>104</sup> With widespread abuse evading agency oversight, the H-2A program fails to satisfy its core mission to provide needed labor without adversely affecting wages and working conditions of domestic workers.<sup>105</sup> Without greater workforce protections, employers are incentivized to seek a labor supply that is cheaper and less accountable to enforcement rather than pay higher wages and invest in better working conditions.<sup>106</sup>

The provision in the final rule protecting H-2A workers who organize motivated three notable lawsuits claiming that the discrepancy between it and the NLRA’s exclusion of farmworkers was an unconstitutional overreach by the Department of Labor.<sup>107</sup> In August 2024, a federal district court in the Southern District of Georgia issued a preliminary injunction blocking implementation of the provision in seventeen states.<sup>108</sup> The court found that the rule did not exceed the Department of Labor’s rulemaking authority conferred by Congress under the program—issuing regulations “to ensure that any certifications it issues for H-2A visas do not ‘adversely

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101. *Id.* § 655.122(n)(2).

102. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33901 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, 29 C.F.R. pt. 501).

103. *Id.* at 33988.

104. *Id.*

105. *Id.* at 33900.

106. *Id.*

107. *See* *Kansas v. U.S. Dep’t of Lab.*, 749 F. Supp. 3d 1363, 1369 (S.D. Ga. 2024); *see also* *Int’l Fresh Produce Ass’n v. U.S. Dep’t of Lab.*, 758 F. Supp. 3d 575, 580 (S.D. Miss. 2024); *Barton v. U.S. Dep’t of Lab.*, 757 F. Supp. 3d 766, 774 (E.D. Ky. 2024).

108. *Kansas*, 749 F. Supp. 3d at 1383. The seventeen states in which the rule cannot be enforced are Georgia, Kansas, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia. *Id.* The District Court for the Eastern District of Kentucky issued a preliminary injunction blocking enforcement of certain provisions of the final rule against the activities of named plaintiffs, including the enhanced retaliation measures, in Alabama, Kentucky, Ohio, and West Virginia. *Barton*, 757 F. Supp. 3d at 794.

affect' American agricultural workers.”<sup>109</sup> However, because the rule conflicted with the NLRA's farmworker exclusion, the court held that the Department of Labor exceeded its constitutional authority by creating a federal right where Congress has expressly denied one.<sup>110</sup> On July 2, 2025, the Department of Labor submitted for notice and comment a rule rescinding requirements to the H-2A program added by the 2024 rule, including the expansion of retaliation protections to workers who self-organize.<sup>111</sup>

### C. *The Legal Status of Undocumented Farmworkers*

During the fiscal years 2021–22, over 40% of workers surveyed as part of the Department of Labor's National Agricultural Workers Survey (NAWS) were not authorized to work in the United States.<sup>112</sup> Across all industries, undocumented workers employed in the United States face a heightened vulnerability to wage theft, health and safety violations, and risks in cases of employer retaliation if they advocate for themselves.<sup>113</sup> However, they are not entirely without protections under the law; the Supreme Court has held that undocumented workers are “employees” for the purposes of the NLRA.<sup>114</sup> Similarly, courts consistently include undocumented workers within the protections of the FLSA, reasoning that ensuring wage protections for undocumented workers both protects job availability for domestic workers and deters illegal immigration by reducing incentives to hire unregulated labor.<sup>115</sup> It follows that

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109. *Kansas*, 749 F. Supp. 3d at 1374–75.

110. *Id.* at 1376, 1378.

111. Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States, 90 Fed. Reg. 28919, 28919 (July 2, 2025) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, 29 C.F.R. pt. 501).

112. See JBS INT'L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2021-2022: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES CROP WORKERS 11 (2024), <https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf> [<https://perma.cc/TN2P-R6C8>]. The 2021–2022 NAWS was prepared for the Department of Labor by a contractor. *Id.*

113. Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1621 (2018).

114. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 904 (1984) (finding that undocumented workers are included within the protections of the NLRA but precluded from receiving the NLRA's “more effective remedies” under immigration laws); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (finding that, while covered under the NLRA, undocumented workers are not entitled to backpay that they would have earned if not for unfair labor practices).

115. See *Patel v. Quality Inn S.*, 846 F.2d 700, 704–05 (11th Cir. 1988) (finding enforcement of the FLSA in wage actions brought by undocumented workers consistent with the Immigration Reform and Control Act (IRCA) of 1986); see also *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 243 (2d Cir. 2006) (finding that *Hoffman Plastic* does not preclude complying with FLSA requirements because such compliance in context of labor already performed does not presume a continued violation of the IRCA).



an undocumented farmworker is subject to the same exclusions and limitations that apply to documented farmworkers; they have no right to collectively bargain without retaliation or federal overtime wage rate, and they have limited minimum wage guarantees.<sup>116</sup> While undocumented farmworkers do have legally cognizable rights, like foreign authorized workers, they face barriers to legal remedies, including poor access to representation and irreversible consequences in cases of employer retaliation.<sup>117</sup>

#### IV. LAW AND POLICY AFFECTING WORKPLACE TECHNOLOGY

Current law affecting labor management practices is predicated on human decisions directing management.<sup>118</sup> Human managers are limited in their capacity to gather and interpret data; in contrast, advanced computing technology can collect vast amounts of data and process it at a granular level to produce statistical models or make predictions about individual workers.<sup>119</sup>

Issues regarding surveillance and tracking of employees implicate potential violations of workplace privacy laws.<sup>120</sup> Yet, private sector employees have limited rights to prevent their employer from collecting data about their conduct while they are working and fewer rights with respect to how their employer monitors their work.<sup>121</sup> Courts across the country uphold the claim that public sector employees do not enjoy a reasonable expectation of privacy while they are working in “open areas.”<sup>122</sup> However, tracking software presents a special concern for privacy when the software collects data beyond working hours.<sup>123</sup>

Digital management technologies raise health and safety concerns because the pressure to perform under constant surveillance causes workers to experience significant stress, leading to an increased risk of accident, injury, and illness.<sup>124</sup> One example of digital management technologies are RFID micro-chipped wristbands developed by Amazon that track employee hand movements and

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116. See discussion *supra* notes 67–76.

117. See Lee, *supra* note 113, at 1625.

118. See Kim, *supra* note 9, at 832–33.

119. See *id.*

120. See Rogers, *supra* note 9, at 550.

121. See *id.*

122. See *id.* The employer’s right to monitor work is taken for granted today but was an area of conflict in the past where workers refused to work while being monitored by supervisors. See *id.* at 551.

123. See Ajunwa, *supra* note 1, at 25.

124. See Vignola et al., *supra* note 50, at 8–9.

vibrate if they are reaching for the wrong bin.<sup>125</sup> Amazon received a patent for the wristbands in 2018 but has shown no signs of implementing them.<sup>126</sup> Nonetheless, current management practices in Amazon distribution warehouses based in productivity-tracking technology have consistently resulted in higher rates of injury for workers.<sup>127</sup> In agriculture, pressure from intensified productivity tracking discourages workers from taking the breaks necessary to maintain basic physical health when working outdoors.<sup>128</sup> Reported deaths and injuries of farmworkers due to heat exposure have increased in recent years, as have reports of heat-related illness like acute and chronic kidney disease.<sup>129</sup> Despite the obvious health risks associated with working outdoors, Florida, which hosts one of the largest H-2A workforces in the country, recently banned municipalities from requiring water breaks for outdoor workers.<sup>130</sup>

#### A. *Proposed and Active Legislation Addressing Workplace Technology*

Laws among the states that address collecting and using employee data vary considerably.<sup>131</sup> At least twenty-six states have addressed GPS surveillance of individuals without their consent.<sup>132</sup> Eleven of those states include within their stalking laws a prohibition on location tracking, nine specifically prohibit tracking a motor vehicle without the consent of the vehicle owner by installing a tracking device, and seven more broadly prohibit location tracking

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125. Macaluso & Levinson, *supra* note 10, at 306–07.

126. Olivia Solon, *Amazon Patents Wristband That Tracks Warehouse Workers' Movements*, THE GUARDIAN (Jan. 31, 2018, at 19:30 ET), <https://www.theguardian.com/technology/2018/jan/31/amazon-warehouse-wristband-tracking> [<https://perma.cc/7DGR-YJDY>].

127. See TUNG, MARQUEZ & SONN, *supra* note 50, at 10.

128. See SARAH GOLDMAN ET AL., JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, ESSENTIAL AND IN CRISIS: A REVIEW OF THE PUBLIC HEALTH THREATS FACING FARMWORKERS IN THE US 26–28 (2021), [https://clf.jhsph.edu/sites/default/files/2021-05/essential-and-in\\_crisis-a-review-of-the-public-health-threats-facing-farmworkers-in-the-us.pdf](https://clf.jhsph.edu/sites/default/files/2021-05/essential-and-in_crisis-a-review-of-the-public-health-threats-facing-farmworkers-in-the-us.pdf) [<https://perma.cc/38MN-HEPZ>] (connecting working long hours without breaks to a risk of developing chronic or acute kidney disease and heat stress); see also Prause, *supra* note 17, at 7–8 (providing examples of farmworkers monitored through workplace management software skipping breaks to avoid pay deductions or discipline); Prvulovic, *supra* note 56 (marketing that demonstrates how an employee can waive statutorily required meal breaks).

129. See GOLDMAN ET AL., *supra* note 128, at 30–31.

130. Devin Martin, *Farmworker Advocates React to Florida Law Banning Local Heat Protections*, SPECTRUM NEWS 13 (July 1, 2024, at 22:30 ET), <https://mynews13.com/fl/orlando/news/2024/07/02/farmworker-advocates-react-to-hb-433-prohibits-cities-and-counties-from-adopting-individual-heat-requirements> [<https://perma.cc/ZFH9-S6NM>].

131. Macaluso & Levinson, *supra* note 10, at 313.

132. See *Private Use of Location Tracking Devices: State Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Sep. 13, 2022), <https://www.ncsl.org/technology-and-communication/private-use-of-location-tracking-devices-state-statutes> (on file with the Duquesne Law Review).

of a person in any context.<sup>133</sup> Some states carve out exceptions for tracking devices on an employer's vehicle.<sup>134</sup> Among the states, California offers the greatest degree of legal protection in the interest of privacy, especially regarding employees.<sup>135</sup> The California penal code specifically restricts how GPS tracking can be used by criminalizing electronically tracking a person's location or movement.<sup>136</sup>

Federal legislation proposed in 2023 by Senator Bob Casey (PA) would limit surveillance technologies and restrict algorithmic management disciplinary actions based solely on data gathered and processed by such technology.<sup>137</sup> The laws would apply to any employer "engaged in commerce."<sup>138</sup> Under the No Robot Bosses Act, the lawfulness of employment decisions based in part on automated decisions would be contingent on the system's compliance with employment discrimination laws, and those systems would have to be regularly tested for efficacy and legal compliance.<sup>139</sup> Additionally, employment decisions integrating automatically collected and processed data would need to be corroborated through "meaningful oversight by a human."<sup>140</sup> Such a decision would be followed up with "full, accessible, and meaningful documentation in plain language" to the employee.<sup>141</sup> Employers would need to disclose the implementation of data-collection and automated-decision systems and their intention to use them as a basis for decision-making.<sup>142</sup> Individuals operating those systems would be subject to training requirements.<sup>143</sup> The Stop Spying Bosses Act includes provisions for disclosure of permissible workplace surveillance and bans other types of workplace surveillance.<sup>144</sup> Finally, the No Robot Bosses Act would establish a Technology and Worker Protection Division within the Department of Labor.<sup>145</sup> Both bills were introduced to the Senate in

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133. *Id.* The eleven states prohibiting tracking in the context of stalking are Alaska, Arizona, Connecticut, Illinois, Maryland, New York, North Carolina, North Dakota, Oklahoma, Washington, and Wyoming. *Id.* The nine states that prohibit tracking motor vehicles are Delaware, Illinois, Michigan, Oregon, Rhode Island, Tennessee, Texas, Utah, and Wisconsin. *Id.* The seven states with broad prohibitions on location tracking are California, Florida, Hawaii, Louisiana, Minnesota, New Hampshire, and Virginia. *Id.*

134. *Id.* Those states are Illinois, Rhode Island, and Virginia. *Id.*

135. *See* Ajunwa, *supra* note 1, at 27.

136. *See id.*

137. *See* No Robot Bosses Act, S. 2419, 118th Cong. (2023); Stop Spying Bosses Act, S. 262, 118th Cong. (2023).

138. S. 2419 § 2(6)(A)(ii); S. 262 § 2(10)(A)(ii).

139. S. 2419 § 3(a)(1)(B).

140. *Id.* § 3(a)(1)(B)(v).

141. *Id.* § 3(a)(1)(B)(vi).

142. *Id.* § 3(a)(2)(A)(i).

143. *Id.* § 3(a)(3).

144. S. 262, 118th Cong. §§ 3–4 (2023).

145. S. 2419 § 4.

2023 and were referred to the Committee on Health, Education, Labor and Pensions with no further action since then.<sup>146</sup> When introducing the bills, Senator Casey emphasized that the issue is most appropriately addressed by cohesive federal legislation, but he encouraged states to make their own efforts to get ahead of the emerging workplace technological issues while Congress remains inactive.<sup>147</sup>

### *B. Executive Policy*

In 2022, the White House issued a “Blueprint for an AI Bill of Rights,” the purpose of which was to set forth “five principles and associated practices to help guide the design, use, and deployment of automated systems to protect the rights of the American public in the age of artificial intelligence.”<sup>148</sup> One principle advanced by the AI Bill of Rights is data privacy; the report cites the concern that employers have used surveillance technology to disrupt collective bargaining efforts in the workplace.<sup>149</sup> Complementing the AI Bill of Rights is the “Good Jobs Initiative” released jointly in 2022 by the Departments of Labor and Commerce, which includes among its principles defining a “good quality job” that “the use of electronic monitoring, data, and algorithms” is “transparent, equitable, and carefully deployed with input from workers.”<sup>150</sup> Yet, in early 2025, the Department of Labor abandoned the initiative.<sup>151</sup>

146. S. 2419; S. 262.

147. Justin Sweitzer, *Bob Casey Talks ‘Robot Bosses’ and the Need to Regulate AI*, CITY & STATE PA. (Oct. 23, 2023), <https://www.cityandstatepa.com/personality/2023/10/bob-casey-talks-robot-bosses-and-need-regulate-ai/391386/> [<https://perma.cc/YWQ5-YGER>].

148. OFF. OF SCI. AND TECH. POL., EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE 4 (2022) [hereinafter BLUEPRINT FOR AN AI BILL OF RIGHTS], <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> [<https://perma.cc/5K6T-VR38>].

149. *Id.* at 32.

150. U.S. DEP’T OF COM. & U.S. DEP’T OF LAB., GOOD JOBS PRINCIPLES, <https://web.archive.org/web/20250101164214/https://www.dol.gov/sites/dolgov/files/goodjobs/Good-Jobs-Summit-Principles-Factsheet.pdf> (on file with the Duquesne Law Review) (last visited Dec. 31, 2025); see also *US Departments of Labor, Commerce Announce Coordinated Effort to Create Good Jobs, Promote Equity Throughout the Workforce*, U.S. DEP’T OF LAB. (June 21, 2022) [hereinafter *Good Jobs News Release*], <https://www.dol.gov/newsroom/releases/osec/osec20220621> [<https://perma.cc/4W4W-SMLU>].

151. See *Good Jobs News Release*, *supra* note 150 (noting that, as of 1/20/2025, information contained in news releases may not reflect current policy and providing broken links to the “Good Jobs Principles” and “Good Jobs Initiative”).

## V. RECOMMENDATIONS FOR THE FUTURE OF DIGITAL FARMWORKER MANAGEMENT

Workers have protested the use of digital management tools for complicating their work by creating more of it, violating their privacy, or formulating an improper or opaque basis for discipline.<sup>152</sup> Available research in the area suggests that farmworkers have similar concerns.<sup>153</sup> The issue is suited to regulatory action, but, because most farmworkers in the United States are either working on H-2A visas or are undocumented, new rules are likely not capable of enforcement.<sup>154</sup> The Department of Labor admits that it can only scratch the surface in conducting oversight of employers engaging workers through the program, with around 1% likely to face inspection per year.<sup>155</sup> Further complicating regulatory efforts, the nature of employment for undocumented workers is such that workers and employers seek to evade oversight.<sup>156</sup> Farmworkers themselves have limited options for redress in cases of workplace violations, and many of those options depend on the ability of regulating agencies to investigate their claims.<sup>157</sup> The challenges inherent in regulating the agricultural labor force highlight the need for collective bargaining protections for farmworkers to exercise leverage in workplace decisions.<sup>158</sup> However, regulators could make use of evolving workplace technologies to serve existing regulatory needs, which would also allow for greater oversight of the new tools themselves.<sup>159</sup>

While the working conditions in warehouses have brought attention to health and safety risks for workers subject to productivity monitoring and algorithmic management, the bills proposing both the No Robot Bosses Act and Stop Spying Bosses Act indicate that

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152. See Rogers, *supra* note 9, at 576–77 (discussing cases of workers protesting workplace technology in the last ten years).

153. See Doggett, Ratto & Chandra, *supra* note 51, at 9–11; see also Prause, *supra* note 17, at 8.

154. See discussion *supra* Section III.B.

155. See Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33988 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, 29 C.F.R. pt. 501).

156. See discussion *supra* Section III.C.

157. See discussion *supra* Part III.

158. See Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 34004 (supporting advocate claims that retaliation by employers against workers who take action to enforce their rights reduces the ability of authorities to enforce labor laws); see also Macaluso & Levinson, *supra* note 10, at 309–13 (discussing how union contracts allow workers to enforce protections from misuse of technology in the workplace).

159. See Rogers, *supra* note 9, at 578–79 (providing an example of how workplace data could be shared with and used by regulators).

lawmakers understand risks inherent in digital management across all industries.<sup>160</sup> Similarly, executive policy under the Biden Administration expressly valued restraint in deploying surveillance technology at work.<sup>161</sup> Research suggests that productivity monitoring and algorithmic management degrades workplace quality across all industries through heightened tensions between management and workers and intensified pressure to work at an unsustainable pace.<sup>162</sup> Here, too, executive policy has previously encouraged high-quality jobs with the understanding that human dignity is a national asset, and that an unguarded technological intensification of work threatens the dignity of workers.<sup>163</sup> Nonetheless, there is no comprehensive guiding legal framework that regulates surveillance and management technology in the workplace.<sup>164</sup>

#### A. *New Example Supporting Collective Bargaining Rights for Farmworkers*

In the agricultural labor context, broad regulation of digital management and surveillance technologies faces barriers due to the H-2A guestworker program's existing resistance to regulation enforcement and the prevalence of undocumented workers.<sup>165</sup> Moreover, entrenched worker disempowerment in the industry through farmworkers' exclusion from the NLRA denies workers the opportunity to negotiate modifications to their workplaces that are in their interest.<sup>166</sup>

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160. See No Robot Bosses Act, S. 2419, 118th Cong. § 2(6)(B)(i) (2023) (including "any person engaged in commerce or in any industry or activity affecting commerce who employs . . . 11 or more covered individuals" within the definition of the term "covered employer"); see also Stop Spying Bosses Act, S. 262, 118th Cong. § 2(10)(B)(i) (2023) (using the same definition of "covered employer").

161. See BLUEPRINT FOR AN AI BILL OF RIGHTS, *supra* note 148, at 34.

162. See Vignola et al., *supra* note 50, at 8 (discussing algorithmic management in the context of app-based food delivery).

163. See Memorandum from Pamela S. Williams, Assistant Adm'r (Acting), Grant Programs, Fed. Emergency Mgmt. Agency, to All St. Admin. Agency Heads et al. on Good Jobs and Safe Workplaces Best Practices for DHS/FEMA Disaster and Non-Disaster Grant Programs (Oct. 17, 2024) (on file with the Duquesne Law Review) (providing Good Jobs Principles defined by Department of Labor).

164. See BLUEPRINT FOR AN AI BILL OF RIGHTS, *supra* note 148, at 31; see also Macaluso & Levinson, *supra* note 10, at 313; Rogers, *supra* note 9, at 551 (surveying various approaches to worker privacy under state and federal law).

165. See Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33988–90 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, 29 C.F.R. pt. 501) (explaining that the Department's enforcement capabilities are not adequate to ensure compliance with employment laws governing the H-2A program).

166. See 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer. . . .").

Introducing new workplace technology with workers' input and consent is an effective means of mitigating the risk of abuse.<sup>167</sup> While the American legal apparatus allows companies to determine workplace technology without negotiating with workers, alternative institutional models in similarly advanced economies demonstrate how worker influence can shape industries without sacrificing productivity or profitability.<sup>168</sup> The broad legal rights over the workplace granted to American employers support the tendency for American companies to rapidly innovate production techniques that enhance productivity by lowering labor costs and deskilling jobs.<sup>169</sup> Technological innovation in the agricultural industry has reflected and continues to reflect that tendency, where production management breaks down processes into discrete tasks that are either suited for mechanization or for quantifying workers' performance through data.<sup>170</sup> The ending of the *Bracero* Program is an example of how, when faced with labor supply constraints, farm employers tend to seek technological modifications that allow them to keep labor costs low.<sup>171</sup> On the other hand, farmworkers have their own ideas about transforming production techniques, which focus on automating the most labor-intensive tasks and ergonomically designing tools that mitigate injury to workers' bodies.<sup>172</sup> Such examples enhance efficiency without maximizing extracted labor or augmenting employers' control over workers.<sup>173</sup>

*Semillero de Ideas* (Nursery of Ideas), a nonprofit based in Washington, recognizes the difference between technology sought out solely by employers and that which employees want to implement.<sup>174</sup> Understanding that those performing the work have valuable insight into improving it, the organization hosts an annual

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167. See Rogers, *supra* note 9, at 580 (discussing advantages to a “democratization strategy” wherein workers who understand the benefits and costs to new workplace technologies can respond to them on an individual basis as opposed to uniform regulations).

168. See *id.* at 573–75 (discussing the influence of workers' unions, councils, and supervisory board positions in German industrial organization, labor relations in German call centers defined by “high-involvement employment systems with broad skills and worker discretion,” and the role of Swedish social democracy in workplace technological change).

169. See *id.* at 575–76.

170. See discussion *supra* notes 51–59.

171. See discussion *supra* notes 33–46.

172. See Doggett, Ratto & Chandra, *supra* note 51, at 12 (interviewing greenhouse workers in Canada as part of a study on productivity tracking technology who identified protective gear and automated crate stacking to avoid heavy lifting as areas where they desired technological innovation in their workplaces).

173. See Rogers, *supra* note 9, at 543 (contrasting the “productivity-enhancing” and “power-augmenting” purposes for implementing technological change in the workplace).

174. See Ross Courtney, *Nonprofit Center Cultivating Innovation with Ag Workforce*, GOOD FRUIT GROWER (May 1, 2024), <https://www.goodfruit.com/nonprofit-center-cultivating-innovation-with-ag-workforce/> [https://perma.cc/5QD6-GW3W].

competition for farmworkers designing new workplace tools, and the winner is awarded financial and legal aid to launch a product with their design.<sup>175</sup> The winner of 2024's competition designed a padded bucket harness for cherry picking, and other entries included padded ladder rungs to prevent bruising, a forked pole for thinning fruit trees, and retractable gloves that balance physical safety and food safety needs.<sup>176</sup> The project is an example of what worker-determined innovation looks like: tools that enhance productivity by directly minimizing physical strain on workers.<sup>177</sup> However, current norms do not give workers significant influence over workplace technological decisions unless workers leverage influence through collective bargaining.<sup>178</sup>

Still, unionized workers' ability to control technological change is limited. The Supreme Court has held that employers are not required to bargain over new technologies that would lead to job loss "if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."<sup>179</sup> Similarly, the National Labor Relations Board does not recognize a right for workers to "work on their own terms" when doing so would "constitute[] [the workers' refusal] . . . to accept the terms of employment set by their employer."<sup>180</sup> The result is that workers are not granted a right to bargain over "all conditions and regulations affecting their employment."<sup>181</sup>

Union contracts can contain provisions that establish workers' rights to participate in selecting and managing new technology. Examples include binding employers to pursuing technologies that will secure jobs by enhancing the firm's competitiveness or requiring employers to negotiate with the union over new technologies.<sup>182</sup> Another strategy that guarantees union participation in workplace technology implementation is the establishment of a joint labor-management committee that can work with employers to develop plans for implementing new technology, identifying problems, or

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175. *Id.*

176. *Id.*

177. *Id.* Worth noting is the winner of the 2024 competition's explanation for the end-goal of the design: helping workers be more productive because higher productivity translates to higher wages. *See id.*

178. *See Rogers, supra* note 9, at 546–47 (contrasting circumstances for workers exercising control over technological change in unionized and nonunion workplaces).

179. *See id.* at 547 (quoting *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981)).

180. *Id.* at 548 (quoting *Elk Lumber Co.*, 91 NLRB 333, 337 (1950)).

181. *Id.* (quoting *Elk Lumber*, 91 NLRB at 337).

182. *See Lisa Kresge, Union Collective Bargaining Agreement Strategies in Response to Technology 2* (Dec. 3, 2020) (unpublished manuscript) (on file with the UC Berkeley Center for Labor Research and Education).



training employees.<sup>183</sup> Beyond the planning and implementing stages, union contracts can offer workers wide latitude to protect job security and quality.<sup>184</sup> Regarding management technologies specifically, contracts can contain provisions requiring certain health and safety standards be met, consistent training for those who deploy monitoring technologies, and limitations for use in employee evaluation or disciplinary actions.<sup>185</sup>

As previously discussed, agricultural workers are not guaranteed a right to collective bargaining under federal law.<sup>186</sup> Thus, most farmworkers are susceptible to retaliation for taking issue with workplace technologies.<sup>187</sup> Despite the Department of Labor's recent attempt to promote collective bargaining for H-2A workers and prevent retaliatory action by their employers, judicial determinations of the agency's lack of authority to do so and changes in executive policy seem likely to hamper those efforts.<sup>188</sup> A possible move forward could be a meaningful reconsideration of the NLRA farmworker exclusion rather than acceptance of its effect of preventing stronger labor protections for guestworkers despite such high levels of demonstrated exploitation in the guestworker program. Unionization is an effective means of safeguarding worker protections that should not be more difficult for farmworkers to achieve.

A farm labor force empowered to bargain over workplace technology would likely enforce transparent use of digital tracking and management tools on their own behalf.<sup>189</sup> Productivity-tracking and algorithmic-management tools have been shown to drive workplace injuries, but workers with control over their use have a personal interest in preventing those tools from pressuring workers to the point of injury.<sup>190</sup> Because productivity is also a concern for workers, especially those earning a piece-rate wage, workplaces would more likely adopt changes that enhance both productivity and

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183. *See id.* at 3.

184. *See id.* at 9–10.

185. *See id.* at 15–21.

186. *See* 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer. . .”).

187. *See* Rogers, *supra* note 9, at 545–56 (explaining that employment at will implies the employer's right to terminate workers who complain about employer actions that are not unlawful, such as implementing new workplace technologies).

188. *See* discussion *supra* notes 107–11.

189. *See* Kresge, *supra* note 182, at 15–21 (outlining several methods that collective bargaining agreements can use to negotiate the use of workplace surveillance technology).

190. *See* TUNG, MARQUEZ & SONN, *supra* note 50, at 10 (attributing high rates of injury at Amazon warehouses to algorithmic management and productivity monitoring).

workplace quality if technological choices involved farmworkers.<sup>191</sup> Further, workers generally have a nuanced understanding of how to improve operations from the perspective of performing them and can help employers determine how to choose and best implement new technologies.<sup>192</sup> Control over workplace conditions is one of many reasons workers choose to unionize, but greater collective bargaining protections for farmworkers would also direct workplace technological development toward enhancing rather than degrading the quality of farming jobs.

Even so, unionization rates are low among agricultural workers in states where they have a right to collectively bargain, and, thus, union protections are not an efficient guarantee of advancing their interests under prevailing norms.<sup>193</sup> As such, centralized rulemaking that governs data-driven management and workplace surveillance at both the state and federal levels could offer the most comprehensive coverage.<sup>194</sup> Farmworkers in particular would benefit from regulatory oversight that ensures timekeeping functions of digital management tools are accurate, productivity tracking tools are not increasing rates of injury and illness, and location tracking functions are turned off outside of working hours.<sup>195</sup> Employers should also disclose to employees how digital management tools collect data from their performance, and collected data should be available to employees.

Timekeeping software often enables users to adjust hours or even automatically round hours down.<sup>196</sup> Commonplace timekeeping programs present wage and hour compliance risks where human

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191. See Kresge, *supra* note 182, at 2 (detailing the wide variety of strategies unions employ to preserve workplace quality, including targeting technologies that boost firm performance for the purpose of job security).

192. See discussion *supra* notes 172–77.

193. See UNION MEMBERS — 2024, BUREAU OF LAB. STAT., U.S. DEPT OF LAB. 2 (Jan. 28, 2025, at 10:00 ET), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/M9UN-3UHX>] (showing union membership among farmworkers around 1.5%).

194. See BLUEPRINT FOR AN AI BILL OF RIGHTS, *supra* note 148, at 30–32 (suggesting that the American public is entitled to comprehensive protections regarding data collection, with reference to the practice of workplace surveillance conducted for the purpose of interfering with unionizing efforts).

195. See Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33988 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, 29 C.F.R. pt. 501) (describing a high rate of wage theft by employers in the H-2A program); see also *id.* (referring to California state agency observations that agricultural labor is one of the most dangerous types of work); *id.* at 34017 (referring to employer use of isolation and monitoring to control H-2A workers outside of the workplace).

196. See Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 17–18 (2017) (discussing common editing features in timekeeping software).

managers are capable of editing wage data.<sup>197</sup> They can also present impractical rigidity when systems are automated, preventing workers from recording actual time spent on breaks by automatically recording unpaid break periods that require overriding action.<sup>198</sup> When combined with GPS or RFID technology, compensable tasks that devices are unable to detect will not figure in wage calculations, and any work that must be conducted outside of “geo-fenced” areas would automatically be excluded.<sup>199</sup> As previously discussed, wage theft is chronic among H-2A workers and their options for collecting unpaid wages are limited.<sup>200</sup> The ability to suppress guest-worker wages negatively affects the wages of domestic workers, defeating a significant purpose of H-2A program regulations to protect the working conditions and wages of domestic workers.<sup>201</sup> Nonetheless, the Department of Labor has expressed concern that the program creates downward pressure on wages and working conditions because H-2A workers are highly exploitable.<sup>202</sup> Thus, timekeeping software used to track guestworkers’ compensable time and work must be accurate and its calculations transparent and capable of straightforward review by authorities.

Employers who rely on H-2A workers can set productivity quotas beyond what domestic workers would be comfortable meeting, despite the practice being prohibited by the program.<sup>203</sup> Setting productivity standards abnormally high can serve as an improper screening mechanism for local workers, ensuring eligibility for the program because the local workforce will not apply or stay with the job.<sup>204</sup> Additionally, enforcing quotas can result in termination, a result that is effectively a deportation for guestworkers and thus

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197. *See id.* at 36.

198. *See id.*

199. *See* Prvulovic, *supra* note 56.

200. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33988.

201. *See* 20 C.F.R. § 655.100(a)(1)(ii) (2025); *see also* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33987.

202. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33987.

203. *See* 20 C.F.R. § 655.122(b) (requiring job offers to contain bona fide standards that are consistent with “normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops”); *see also* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33965 (referring to commenters who suspect “that uncapped productivity standards would have the effect of dissuading U.S. workers”).

204. *See* 20 C.F.R. § 655.100(a)(1)(i) (setting forth that the employer must show that “[t]here are not sufficient able, willing, and qualified United States (U.S.) workers available to perform the agricultural labor”).

avoided by workers even at the expense of their health.<sup>205</sup> Tracking productivity at a granular level through digital technologies enhances employer control over guestworkers to the workers' detriment, and it similarly enhances an employer's ability to exclude domestic workers.<sup>206</sup>

Agricultural workers face some of the highest rates of death, injury, and work-related illness in the workforce.<sup>207</sup> Intensive, sustained work over long periods of time contributes to rates of injury, and enhanced productivity quotas exacerbate the health and safety risks of agricultural work.<sup>208</sup> Thus, as advocates have noted, productivity tracking implicates a need for oversight from the Occupational Safety and Health Administration (OSHA).<sup>209</sup>

Both guestworkers and domestic farmworkers often depend on their employer for housing, which, under both the AWPA and the H-2A program, employers are required to provide; however, access to and privacy within housing has historically been an issue.<sup>210</sup> Privacy concerns surrounding employee tracking technology are exacerbated by the delicate arrangement of receiving housing from an employer. Surveillance technologies in the workplace are often tied to union suppression, and the ease with which surveillance can extend to more private areas when an employer controls housing exposes workers to a high risk of overreach.<sup>211</sup> Requiring employers to

205. See *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. at 33988 (quoting a California State labor agency's observation that an H-2A employee's dependency on his or her employer for legal residency results in pronounced vulnerability); see also *id.* at 33965 (sharing commenter's observations that productivity standards expose workers to increased risk of workplace accidents).

206. See *id.* at 33965.

207. See *Agriculture Worker Safety and Health*, CDC: NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (May 16, 2024) <https://www.cdc.gov/niosh/agriculture/about/index.html> [<https://perma.cc/L8BL-46LQ>]; see also *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. at 33988–89.

208. See *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. at 33965; see also TUNG, MARQUEZ & SONN, *supra* note 50, at 10 (attributing workplace injuries in Amazon warehouses in part to algorithmically generated quotas).

209. See REED SHAW, ANNA RODRIGUEZ & MATT SCHERER, *GOVERNING FOR IMPACT & CTR. FOR DEMOCRACY & TECH., ELECTRONIC SURVEILLANCE AND ALGORITHMIC MANAGEMENT* 04-2 (2023), <https://cdt.org/wp-content/uploads/2023/04/Complete-Electronic-Workplace-Surveillance-OSHA-NIOSH-memo-package.pdf> [<https://perma.cc/V6TL-QJGT>]; see also Occupational Safety and Health Act of 1970 § 2(b)(1), (9), 29 U.S.C. § 651(b)(1), (9) (stating that the purpose of the Act is to ensure safe working conditions "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and . . . by providing for the development and promulgation of occupational safety and health standards").

210. See *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. at 34017.

211. See BLUEPRINT FOR AN AI BILL OF RIGHTS, *supra* note 148, at 32; Jo Constantz, *'They Were Spying on Us': Amazon, Walmart, Use Surveillance Technology to Bust Unions,*

disclose when location tracking tools are engaged and to share collected location data with employees would discourage employers from continuing to track locations of employees beyond working hours.

Job loss is a leading concern today with new workplace technologies based in robotic and AI-assisted automation, but that concern is counterbalanced by the chronic labor shortage in agriculture.<sup>212</sup> Industry stakeholders expect that data-driven and machine-assisted systems will expand job opportunities in agriculture due to resulting higher yields and tech management needs.<sup>213</sup> One study conducted with H-2A workers in Washington state's apple orchards found that the perceived pressure on farm owners to automate processes can lead H-2A workers to disfavor the implementation of policies intended to financially benefit them, such as overtime pay.<sup>214</sup> These workers were concerned that increased regulation on their employment would disincentivize employers from hiring them, leaving automated systems as the natural alternative.<sup>215</sup> The study acknowledged that its data-set was limited—a result of companies' resistance to having their workers surveyed—but it still echoes the industry-wide anxiety surrounding automation and job replacement.<sup>216</sup> And despite the study's limited scope, it suggests that those imposing regulation should consider the precarity of the farmworkers' position if the regulation's purpose is to promote higher quality working conditions.<sup>217</sup> These workers' concerns echo historical trends that show employers turn to technological replacements when they would otherwise be compelled to improve working conditions.<sup>218</sup>

Although the H-2A visa program is evidently difficult to regulate, providing regulators with access to data collected for the purpose of

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NEWSWEEK (Dec. 13, 2021, at 06:00 ET), <https://www.newsweek.com/they-were-spying-us-amazon-walmart-use-surveillance-technology-bust-unions-1658603> [<https://perma.cc/L2BL-NAWV>]. Interfering with unionization of farmworkers violates labor laws in fourteen states. See discussion *supra* note 72.

212. See ADJUSTING TO HIGHER LABOR COSTS, *supra* note 18, at 1.

213. Jennifer Martson, *What's Driving Ag Robotics Innovation? 'Labor, Labor, Labor,' Say FIRA USA 2024 Attendees*, AGFUNDER NEWS (Oct. 30, 2024), <https://agfunder-news.com/whats-driving-ag-robotics-innovation-labor-labor-labor-say-fira-usa-2024-at-attendees> [<https://perma.cc/6B5N-6S4M>].

214. Sam Jones, *Robots on the Farm*, NC STATE UNIV.: CALS NEWS (Aug. 22, 2024) (citing Karina Gallardo et al., *H-2A Workers' Preferences for Job Attributes: Evidence from an Experiment*, 2024 J. AGRIC. & APPLIED ECON. ASS'N 633), <https://cals.ncsu.edu/news/automating-farm-production/> [<https://perma.cc/UZQ4-RXTA>].

215. See *id.*

216. See Gallardo et al., *supra* note 214, at 636.

217. See *id.* at 652.

218. See discussion *supra* notes 33–46.

tracking and managing employees could ensure responsible implementation of the technology while also assisting regulators with enforcing the existing requirements of the program.<sup>219</sup> Data-sharing with workers would resolve uncertainties workers experience when they are unaware what information their employers are collecting, and it could also support workers in private complaints of labor violations.<sup>220</sup> Indeed, some tracking tools are designed for the record keeping needs of employers engaged in the H-2A guestworker program.<sup>221</sup> Provided that regulators can organize data that they receive, data-sharing by employers could offer a low-cost option to mitigate existing regulatory problems and manage new requirements.

New workplace technologies present problems that do not exist in a vacuum; contingent factors like the power of agribusiness and the yet-unseen environmental limitations of data collection and storage are beyond the scope of this Article, but they bear considerable influence on the future of data-driven digital management tools in the industry.<sup>222</sup> For example, whether regulators can harness employer-collected data to support enforcement of labor laws depends on the feasibility of storing and processing vast data quantities. Additionally, farm owners and employers strive to keep labor costs low as growing financialization in the agriculture industry, inflationary pressures, and consolidation of major suppliers and distributors raise the overhead costs of doing business.<sup>223</sup> Thus, the efforts of lawmakers and agencies to protect farmworkers and job quality as technology transforms the workplace will depend on a variety of factors.

In the future, farms may require minimal human labor if technological innovators deliver on their promises. But today, many commonly enjoyed crops, from apples to cilantro, need human hands to bring them to dinner tables. The laborers responsible for producing

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219. See Rogers, *supra* note 9, at 578–79.

220. See *id.* at 579.

221. See H2 ORGANIZER, h2-organizer.com [<https://perma.cc/GTQ2-4PHR>] (last visited Feb. 16, 2025); see also *H2-A Program*, GANAZ, [ganaz.com/h2a-program](https://ganaz.com/h2a-program) [<https://perma.cc/LD6S-7TKS>] (last visited Jan. 7, 2025).

222. See MUSHARBASH, *supra* note 2, at 47. See generally Steven Gonzalez Monserrate, *The Staggering Ecological Impacts of Computation and the Cloud*, THE MIT PRESS READER (Feb. 14, 2022) <https://thereader.mitpress.mit.edu/the-staggering-ecological-impacts-of-computation-and-the-cloud/> [<https://perma.cc/NV4W-TM3R>] (discussing the degree to which data storage and cloud computing require electricity and water).

223. See MUSHARBASH, *supra* note 2, at 134–35. See generally Manogna R. L. & Nishil Kulkarni, *Does the Financialization of Agricultural Commodities Impact Food Security? An Empirical Investigation*, 24 BORSA ISTANBUL REV. 280 (2024) (arguing that financialization of agriculture has negatively affected food security worldwide and proposing a solution in monetary policy).

this food deserve workplaces that respect their dignity, consistent with the laws and regulations that generally apply to workers in the United States. Where new data-driven, digital tools managing workers are concerned, rules stipulating how employers can deploy these tools are needed for workers in all industries and such regulations should consider farmworkers' needs. Perhaps more effective than rulemaking, though, would be workplace relations based on negotiation between employers and employees. Allowing workers to enforce technological standards in their workplaces on their own behalf and with greater sensitivity to the needs of individual operations would promote developing technologies less likely to harm workers' interests. Accordingly, the issue of workplace technological change underscores a need to reconsider farmworkers' exclusion from the NLRA and shift towards encouraging farmworker unionization. Given the enormous and often unmet task of effectively enforcing regulations in the agricultural labor force, unions offer an opportunity for workplace self-regulation. Where workers can advocate for their interests without the threat of retaliation, workplace quality improves, and quality farm jobs support a stronger agricultural industry.

# Statute-Rule Hybrid Deadlines in the Age of the Clear Statement: Clarifying the Nonjurisdictional Character of Federal Rule of Bankruptcy Procedure 8002(a)(1)

*Simon Jaronski\**

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## I. INTRODUCTION

Since the millennium, few topics addressed by the Supreme Court have been *less* controversial than jurisdiction. From 2004 onward,<sup>1</sup> the Court resolved to clarify the long-confused distinction between those litigation requirements<sup>2</sup> which are jurisdictional and

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1. See *infra* Section II.B.

2. In the course of litigation, parties must comply with a myriad of both time- and content-based requirements and rules, including statutes of limitations, administrative exhaustion requirements, statutory coverage prerequisites, pleading timelines, appeal deadlines, and too many others to count. See, e.g., Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 5 (1994).



those which are merely mandatory, claim-processing rules.<sup>3</sup> The difference between these two concepts can be illustrated simply enough by an example. Consider the quintessential appeal deadline: if a party fails to appeal a final judgment within the prescribed timeframe, does that failure act as a barrier to the appellate court's jurisdiction, or does it merely require dismissal of the action subject to certain equitable exceptions?

Stated another way, jurisdictional requirements go to the heart of a tribunal's power to adjudicate the case before it.<sup>4</sup> As such, the jurisdictional label can have drastic consequences for litigants.<sup>5</sup> If a court finds that it lacks jurisdiction over a case due to a party's failure to abide by a certain litigation requirement, then the action must be dismissed.<sup>6</sup> Dismissal is warranted even if the issue of noncompliance is raised for the first time on appeal.<sup>7</sup> Claim-processing rules, however, merely "promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,"<sup>8</sup> and the harsh effects of noncompliance can potentially be mitigated by certain equitable exceptions; although still mandatory, noncompliance is not necessarily fatal to an unfortunate litigant.<sup>9</sup>

The Court uses a bright line rule in making this determination: a litigation requirement is essentially presumed to be nonjurisdictional unless Congress "clearly states" its intent for noncompliance with that requirement to deprive a court of jurisdiction.<sup>10</sup> A typical clear-statement analysis, the application of which has always resulted in a nonjurisdictional outcome,<sup>11</sup> proceeds roughly along the following lines. First, the Court will look to the plain text of the provision at issue, followed by context (i.e., whether the provision is separate from the portion of the statutory scheme which contains

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3. See *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (discussing the distinction between both categories of rules).

4. *Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154, 160 (2010) (citing *Kontrick*, 540 U.S. at 455).

5. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

6. See *id.* at 434–35.

7. *Id.*

8. *Id.* at 435.

9. See *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 297–98 (2023).

10. See, e.g., *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 203 (2022).

11. The Court has never applied the clear-statement test and concluded that a provision is jurisdictional. See *Ziv Schwartz, Fixing a Failed Jurisdictional Revolution*, 90 MISS. L.J. 729, 754 n.128 (2021). However, there is an additional historical component to the Court's jurisdiction framework, which can arguably be conceptualized as an extension of the clear-statement test. See *infra* note 13 and accompanying text.

the grant of jurisdiction), and occasionally policy considerations.<sup>12</sup> In addition to this standard clear-statement rule, the Court has also shown its willingness to treat a provision as jurisdictional where Congress has not objected.<sup>13</sup> Despite the apparent simplicity of this rule, along with the Court's relative unanimity on the issue of jurisdiction,<sup>14</sup> numerous unresolved questions still exist.<sup>15</sup>

Some of these ambiguities arise from the source of the litigation requirement at issue. Litigation requirements fall into roughly one of three categories, based on where they originate.<sup>16</sup> In the first scenario, the requirement is embodied exclusively in a statute.<sup>17</sup> In the second scenario, the requirement is embodied exclusively in a procedural rule (e.g., the Federal Rules of Civil Procedure).<sup>18</sup> The Court has stated that procedural rules are incapable of conferring or withdrawing jurisdiction.<sup>19</sup> The third category, where a litigation requirement is embodied in both a statute and a rule of procedure, is the most problematic and has only been addressed by the Court on two occasions.<sup>20</sup> Ultimately, whether this sort of hybrid deadline is properly characterized as jurisdictional depends on whether the statute—or Congress—essentially prescribes the deadline, or whether the deadline is instead prescribed by the rulemaker.<sup>21</sup>

One instance of this confusion is the circuit split concerning Federal Rule of Bankruptcy Procedure 8002(a)(1) (Rule 8002(a)(1)),

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12. See *infra* Section II.B.

13. See *Bowles v. Russell*, 551 U.S. 205, 210 (2007). Arguably, this historical component of the Court's jurisdiction framework can be conceptualized as an extension of the clear-statement rule, since congressional silence in the face of longstanding judicial characterization of a provision as jurisdictional effectively constitutes a statement—although hardly a clear one—that Congress finds that result acceptable. See Schwartz, *supra* note 11, at 756–57.

14. *Bowles*, decided five–four, is arguably the most significant outlier in the Court's modern jurisdiction cases. For a thorough discussion of *Bowles* and its critics, see *infra* Section II.B.

15. See Schwartz, *supra* note 11, at 749–53 (discussing the confusion among the lower courts and the Court itself occasioned by inconsistencies in the clear-statement framework).

16. The Court has never formally identified its approach to jurisdiction as involving three categories of litigation requirements based on origin, but the case law can logically be sorted into these categories for convenience.

17. See, e.g., *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 292 (2023).

18. See, e.g., *Kontrick v. Ryan*, 540 U.S. 443, 447 (2004).

19. *Id.* at 453. Congress possesses the exclusive authority to determine the jurisdiction of the lower federal courts, see U.S. CONST. art. III, § 1, and rules of procedure are promulgated by the Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2071. For a competing perspective that the Court (in its rulemaking capacity) actually does have such a power, see Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LIT. 353, 360–64 (2020) (critiquing the idea that congressional authority over jurisdiction is exclusive).

20. *Bowles v. Russell*, 551 U.S. 205 (2007); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17 (2017).

21. See *Hamer*, 583 U.S. at 19, 24.

which, in conjunction with 28 U.S.C. § 158(c)(2),<sup>22</sup> establishes a fourteen-day appeal deadline for final orders of a bankruptcy court.<sup>23</sup> Section 158(c)(2) directs that bankruptcy appeals be taken “in the time provided by Rule 8002 of the bankruptcy rules,”<sup>24</sup> and Rule 8002(a)(1) requires in turn that “a notice of appeal [be] filed with the bankruptcy clerk within 14 days after the judgment . . . is entered.”<sup>25</sup> Thus, the Rule 8002(a)(1) deadline falls into the troublesome hybrid category. If this deadline is understood to be jurisdictional, as most circuits have held, then a missed deadline permanently destroys the ability of the district court (or Bankruptcy Appellate Panel) to hear an appeal.<sup>26</sup> However, if the deadline is understood to be a nonjurisdictional, claim-processing rule, as the United States Courts of Appeals for the Sixth and Eighth Circuits have held,<sup>27</sup> then a litigant may be able to pursue its appeal due to equitable exceptions.<sup>28</sup> It is the goal of this Article to further explore that problematic third category in relation to Rule 8002(a)(1) and the Court’s precedents generally.

In an appropriate future case, the Court should hold that the fourteen-day appeal deadline found in Rule 8002(a)(1) is a nonjurisdictional, claim-processing rule, due to the lack of a clear statement from Congress and in light of special considerations arising out of the Court’s past precedents concerning hybrid statute-rule litigation requirements.<sup>29</sup> In evaluating Rule 8002(a)(1) specifically, and other claim-processing rules in the future, the Court should take care to clarify the extent to which equitable exceptions like tolling can be applied by lower courts to excuse noncompliance by certain types of litigants.<sup>30</sup>

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22. 28 U.S.C. § 158(c)(2). This statute establishes the basic process for appeals in the bankruptcy context. *See infra* Section II.C. For simplicity, I will refer to this deadline throughout the Article as the Rule 8002(a)(1) deadline. However, it is the language in § 158(c)(2) that really matters for whether that deadline is jurisdictional or not. *See infra* Section II.B.

23. FED. R. BANKR. P. 8002(a)(1).

24. 28 U.S.C. § 158(c)(2).

25. FED. R. BANKR. P. 8002(a)(1).

26. *See, e.g., Emann v. Latture (In re Latture)*, 605 F.3d 830, 836–37 (10th Cir. 2010). This is the necessary effect of noncompliance with a jurisdictional rule. *See, e.g., Hamer*, 583 U.S. at 20.

27. *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1022, 1025 (6th Cir. 2020); *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880, 883 (8th Cir. 2021).

28. This follows naturally from any one of the Court’s jurisdiction precedents, since jurisdictional rules and claim-processing rules are effectively treated as opposites. *See, e.g., Hamer*, 583 U.S. at 19–20 (“A time limit not prescribed by Congress ranks as a mandatory claim-processing rule . . . [and] may be waived or forfeited.”).

29. *See infra* Section III.A.

30. *See infra* Section III.B.

First, this Article will situate the problem presented by the Rule 8002(a)(1) deadline by elaborating on the nature of the jurisdictional vs. claim-processing distinction more broadly,<sup>31</sup> before discussing the historical evolution of the Court's jurisdiction jurisprudence.<sup>32</sup>

Second, this Article will discuss the current circuit split that exists surrounding whether Rule 8002(a)(1) is jurisdictional or claim-processing.<sup>33</sup> The analysis of the Sixth Circuit, which found Rule 8002(a)(1)'s deadline to be nonjurisdictional, will be discussed in detail.<sup>34</sup>

Third, this Article will offer a prescription for the approach that the Court might—and should—take toward Rule 8002(a)(1): namely, that the deadline is nonjurisdictional based on the clear-statement rule and the Court's past precedents of *Bowles v. Russell*<sup>35</sup> and *Hamer v. Neighborhood Housing Services of Chicago*.<sup>36</sup> This approach will rely to some extent on the Sixth Circuit's reasoning, while also addressing some issues that the court did not address.<sup>37</sup>

Fourth and finally, this Article will address some latent flaws in the Court's approach to jurisdiction and suggest a more comprehensive framework through which the Court can provide lower courts with much-needed guidance on enforcing or otherwise excepting compliance with claim-processing rules.<sup>38</sup> Using Rule 8002(a)(1) as an example, this Article will apply the three-part, context-based framework developed by Ziv Schwartz in his study of the Court's jurisdiction jurisprudence.<sup>39</sup> This framework would require the Court, in formulating guidance to the lower courts on how equity might or might not apply to mitigate the effects of noncompliance with a claim-processing rule, to consider (1) the prototypical non-compliant litigant, (2) the prototypical form of noncompliance, and (3) case chances.<sup>40</sup> By adopting such a context-based approach, the Court could eliminate some unnecessary confusion surrounding its approach to jurisdiction, and further achieve its goals of rationality and fairness in this area of the law.

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31. See *infra* Section II.A.

32. See *infra* Section II.B.

33. See *infra* Section II.C.

34. See *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1022, 1025 (6th Cir. 2020).

35. 551 U.S. 205 (2007).

36. 583 U.S. 17 (2017).

37. See *infra* Section III.A.

38. See *infra* Section III.B.

39. Schwartz, *supra* note 11, at 731–32.

40. *Id.* at 785.

## II. BACKGROUND

### A. *The Jurisdictional vs. Claim-Processing Distinction*

“Jurisdiction . . . is a word of many, too many, meanings.”<sup>41</sup> This pithy observation has become a sort of touchstone, frequently revisited by the Court as part of its continuing efforts to clarify the centuries’ worth of confusion surrounding the use of the jurisdictional label.<sup>42</sup> Before that history can properly be addressed, it will be necessary to briefly define the concepts at work in this area of the law.

At the most general level, jurisdiction refers to a court’s “adjudicatory authority,”<sup>43</sup> i.e., its very power to hear and decide a case.<sup>44</sup> Subject-matter jurisdiction specifically concerns a court’s power to hear and decide the specific *type* or *class* of case before it.<sup>45</sup> As courts of limited jurisdiction,<sup>46</sup> the lower federal courts rely on Congress for a grant of subject-matter jurisdiction; Congress, in turn, can grant subject-matter jurisdiction less than or coextensive with the outer limits established by Article III.<sup>47</sup>

41. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

42. See, e.g., *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023).

43. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

44. The concept of jurisdiction *qua* power, although seemingly enshrined as black letter law by the Supreme Court, has been complicated in recent years by some scholars: Scott Dodson, a professor at UC College of the Law, San Francisco, has challenged the Court’s positivistic approach to jurisdiction, opting instead for a notion of jurisdiction with inherent identity. See, e.g., Scott Dodson, *Jurisdiction and its Effects*, 105 GEO. L.J. 619, 619, 622 (2017). According to Dodson, jurisdiction serves to “determine[] forum in a multiforum legal system.” *Id.* at 621. Thus, doctrines that have traditionally been considered nonjurisdictional, like venue and forum non conveniens, would become jurisdictional insofar as they direct litigation from one forum to another; conversely, doctrines like standing and mootness would become nonjurisdictional. *Id.* at 622.

45. *Kontrick*, 540 U.S. at 455. Subject-matter jurisdiction is not to be confused with personal jurisdiction, which concerns a tribunal’s power to exercise authority over a particular defendant consistent with the limits of due process. See *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 128–32 (2023) (tracing the evolution of personal jurisdiction doctrine).

46. Congress has plenary authority over the lower federal courts and could conceivably abolish them entirely. See U.S. CONST. art. III, § 2, cl.1. For one of the classic discussions of the possible constitutional limitations on Congress’s ability to manipulate the lower Article III courts, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240–41 (1985). Congress’s ability to interfere with the Supreme Court’s appellate jurisdiction is much more limited, however, being confined to the making of “exceptions” and “regulations.” U.S. CONST. art. III, § 2, cl. 2.

47. See *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 25 (1st Cir. 2001). Every first-year law student should be able to articulate with ease the three major constitutional bases (and their corresponding statutory counterparts) that allow a federal court to exercise subject-matter jurisdiction over an action. These are federal question jurisdiction, 28 U.S.C. § 1331, diversity jurisdiction, 28 U.S.C. § 1332, and supplemental jurisdiction, 28 U.S.C. § 1367. Congress has not conferred on the lower federal courts the full extent of subject-matter jurisdiction permitted under Article III. See, e.g., *Strawbridge v. Curtiss*, 7 U.S.

Because of its importance to the values of federalism and the separation of powers, federal courts have an independent duty to police subject-matter jurisdiction.<sup>48</sup> Thus, if it becomes clear in the course of an action that the court was without subject-matter jurisdiction, *sua sponte* dismissal becomes necessary, and any judgments rendered are a nullity.<sup>49</sup> This can unnaturally interrupt the normal workings of the adversary process and cause hardship to unsuspecting litigants.<sup>50</sup> Additionally, parties cannot waive, forfeit, or consent to subject-matter jurisdiction.<sup>51</sup>

The presence of jurisdiction is not solely linked to such sweeping categories, however.<sup>52</sup> In the course of litigation, courts can be deprived of jurisdiction through a party's failure to comply with a "jurisdictional" requirement or rule—even a requirement with no relation to the underlying merits.<sup>53</sup> Whether a requirement is properly characterized as jurisdictional rests upon what the Court has come to describe as a "clear-statement" rule: Congress must clearly state its intention for a rule to have jurisdictional

(3 Cranch) 267, 267 (1806) (reading a requirement of complete diversity into Congress's statutory grant of authority to the courts to adjudicate suits between citizens from different states).

48. See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). The link between jurisdiction and the separation of powers is well illustrated by one of Justice Ginsburg's footnotes in *Arbaugh*, which recounts a list of statutes which limit jurisdiction to certain types of plaintiffs (e.g., Amtrak) or claims (e.g., claims related to the United States Postal Service). See 546 U.S. at 515 n.11. These limitations essentially reflect Congress's policy judgment that, for one reason or another, certain people under certain circumstances should not have their destinies determined by the federal courts.

49. Some of the all-time classic civil procedure cases concern this situation exactly. See, e.g., *Louisville & Nash. R.R. v. Mottley*, 211 U.S. 149 (1908); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

50. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) ("Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants.").

51. See *Arbaugh*, 546 U.S. at 514 (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)). This has not stopped some scholars from advocating for waivability or consentability of jurisdiction. See Jessica Berch, *Waiving Jurisdiction*, 36 PACE L. REV. 853, 877–78 (2016).

52. Although a comprehensive discussion of the concept of jurisdiction is beyond the scope of this Article, there are several other aspects that bear mentioning. The constitutional requirement of standing, i.e., the limitation of the judicial power to "cases" and "controversies," U.S. CONST. art. III, § 2, cl. 1, is understood by the Court to be a limitation on jurisdiction, see *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992).

53. *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. Put another way, the notion of "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," but it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." (alteration in original) (citations omitted)).

consequences.<sup>54</sup> Although Congress need not “incant magic words,” traditional tools of statutory construction must show the intent of Congress to make a rule jurisdictional.<sup>55</sup>

The alternative<sup>56</sup> to a jurisdictional requirement is a *mandatory, claim-processing* requirement.<sup>57</sup> There are several crucial differences between these two concepts. Courts are not required to (or inclined to) independently police compliance with claim-processing rules when the parties do not press the issue, although this does occasionally occur.<sup>58</sup> Furthermore, while jurisdictional requirements implicate concerns of federalism and the separation of powers (and essentially represent a congressional policy judgment that a type of claim is unworthy of adjudication in the event of noncompliance),<sup>59</sup> claim-processing requirements merely “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”<sup>60</sup> If a party fails to comply with a claim-processing requirement, then that party will likely still be out of luck: this is why claim-processing rules are still considered *mandatory*.<sup>61</sup> However, depending on the circumstances, courts can use certain equitable exceptions to mitigate the otherwise harsh effects of noncompliance.<sup>62</sup>

Courts have several equitable tools at their disposal if circumstances are appropriate. A party can waive its objection to another

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54. *E.g.*, *United States v. Wong*, 575 U.S. 402, 409 (2015); *Wilkins v. United States*, 598 U.S. 152, 157 (2023).

55. *Wong*, 575 U.S. at 409–10 (quoting *Sebelius*, 568 U.S. at 153).

56. For the most part, these two concepts can helpfully be thought of as opposites. However, the Court (and lower courts) have not always been clear on whether all claim-processing rules are the opposite of jurisdictional rules, or whether there are other preconditions for relief that fall outside of either category. *See* Schwartz, *supra* note 11, at 754–55, 754–55 nn.129–32 (discussing the extent to which courts can *sua sponte* raise noncompliance with claim-processing rules otherwise forfeited or waived by a party). If this was so, presumably all claim-processing rules would be subject to equitable exceptions like tolling, and this is most certainly not the case. *See, e.g.*, *Boechler, P.C. v. Comm’r*, 596 U.S. 199, 208–11 (2022) (discussing the availability of equitable tolling as a rebuttable presumption).

57. *See Wilkins*, 598 U.S. at 157.

58. *See* Schwartz, *supra* note 11, at 754–55, 755 n.130.

59. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”).

60. *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 548–49 (2019) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

61. *Id.* at 549.

62. *See, e.g.*, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 297–98 (2023). The role of equity in mitigating noncompliance with claim-processing rules is anything but certain, however. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 171 (2010) (declining to address whether nonjurisdictional statutory copyright registration provision should be enforced *sua sponte*); *Kontrick v. Ryan*, 540 U.S. 443, 457–58 (2004) (declining to address equitable exceptions to Federal Rule of Bankruptcy Procedure 4004).

party's noncompliance with a claim-processing rule by "intentional[ly] relinquish[ing] or abandon[ing] . . . a known right,"<sup>63</sup> or forfeit the same through "the failure to make the timely assertion of [that] right."<sup>64</sup> Similarly, a party can also be judicially estopped—in the interest of fairness—from taking a position in litigation that is inconsistent with a prior position.<sup>65</sup>

The doctrine of equitable tolling also provides courts with flexibility to extend (or essentially stop the clock on) a deadline when justice so requires.<sup>66</sup> The Court has described tolling as a "traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods."<sup>67</sup> Although the Court is sometimes willing to explicitly recognize the availability of tolling in the context of a particular statute (as a sort of parting thought to its jurisdictional vs. claim-processing analysis),<sup>68</sup> it has proven rather reticent on the question in other circumstances.<sup>69</sup> Finally, the doctrine of unique circumstances historically provided courts with the ability to correct the inadvertent misrepresentation of deadlines by the judiciary.<sup>70</sup>

### B. *A Brief History of the Court's Approach to Jurisdiction*

In the American legal system, drastic departures from the past are certainly not the norm: the nature of the common law and the venerable principle of stare decisis demand, to varying degrees, that even difficult-to-rationalize precedents be accommodated in a coherent framework.<sup>71</sup> However, the history of the Court's

63. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The "right" might be the ability to assert untimeliness as an affirmative defense. Waiver and forfeiture are often incorrectly used as synonyms. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017).

64. *Olano*, 507 U.S. at 733.

65. *See Nicole C. Frazer, Note, Reassessing the Doctrine of Judicial Estoppel: The Implications of the Judicial Integrity Rationale*, 101 VA. L. REV. 1501, 1502 (2015).

66. *See United States v. Brockamp*, 519 U.S. 347, 348–49 (1997); *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990).

67. *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 208–09 (2022) (citing *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–11 (2014)).

68. *See, e.g., id.* at 209–11 (interpreting a statute to allow equitable tolling when it was contained in a section of the Tax Code that is "unusually protective" of the taxpayer).

69. *See Schwartz, supra* note 11, at 754–55; *see also infra* Section III.B (advocating for the Court to weigh in on the availability of tolling as part of its approach to claim-processing rules).

70. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962), *overruled by*, *Bowles v. Russell*, 551 U.S. 205 (2007); *see also Philip A. Pucillo, Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 TUL. L. REV. 693, 694–96 (2007) (explaining the doctrine and recommending that Congress codify it as part of 28 U.S.C. § 2107).

71. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263–64 (2022).



jurisdiction jurisprudence is marked by just such a departure.<sup>72</sup> Indeed, the Court has explicitly framed its efforts as a long overdue corrective for past judicial profligacy in applying the jurisdictional label to rules and litigation requirements.<sup>73</sup>

Prior to 2004, the Supreme Court routinely characterized litigation requirements as jurisdictional without any substantive reasoning and with little regard for what consequences the label actually entailed.<sup>74</sup> Often, if a party failed to satisfy some precondition for relief, or meet the elements of a cause of action, the Court would say the defect was jurisdictional.<sup>75</sup>

During the period from 2004–2006, the Court changed its tune.<sup>76</sup> The proper application of the jurisdictional label suddenly came to be of the utmost importance.<sup>77</sup> The quartet of jurisdiction cases<sup>78</sup> decided within that two-year period marks the first of three major stages in the evolution of the Court’s jurisprudence and stands for a few things. For one, the Court fully accepted responsibility for its past imprecision in applying the jurisdictional label.<sup>79</sup> Second, the Court articulated a “functional” approach to jurisdiction,<sup>80</sup> where only those “prescriptions [i.e., rules or requirements] delineating the classes of cases (subject-matter jurisdiction) . . . falling within a court’s adjudicatory authority” would be considered jurisdictional.<sup>81</sup> And, third, the Court presaged that the intent of Congress would

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72. See *infra* Section II.B.

73. See, e.g., *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013).

74. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

75. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248–49, 251 (1991) (repeatedly referring to Title VII’s various definitional provisions as jurisdictional); *Hishon v. King & Spalding*, 467 U.S. 69, 73 n.2 (1984) (declining to clarify whether the district court’s dismissal for lack of subject-matter jurisdiction, as opposed to failure to state a claim, was proper); *United States v. Robinson*, 361 U.S. 220, 229 (1960).

76. Several scholars seem to identify 2004–2006 as a distinct period in the evolution of the Court’s jurisdiction jurisprudence, and I have chosen to do so as well. See, e.g., Schwartz, *supra* note 11, at 745–49 (“Between 2004 and 2006, the Court issued four opinions that offered a bright-line rule to determine whether a requirement is jurisdictional or not.”).

77. Outside of the jurisdictional vs. claim-processing arena, jurisdiction generally has always been important and has featured prominently in some of the Court’s more politically charged disagreements: standing is a prime example. See, e.g., *United States v. Windsor*, 570 U.S. 744, 778–79 (2013) (Scalia, J., dissenting) (“The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle [i.e., standing], a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives.”).

78. See *supra* note 76 and accompanying text.

79. See *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (“Although we find [the lower court’s] disposition to have been in error, we fully appreciate that it is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases.”).

80. Schwartz, *supra* note 11, at 739.

81. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

later become the primary benchmark, although the clear-statement rule in use today was not yet fully articulated.<sup>82</sup>

In *Kontrick v. Ryan*, the first case in the quartet, the Court held that Federal Rule of Bankruptcy Procedure 4004's sixty-day deadline for objecting to a chapter seven debtor's discharge was not jurisdictional,<sup>83</sup> and it articulated a functional approach to the jurisdictional vs. claim-processing distinction.<sup>84</sup> Ryan, a creditor and former business associate of the debtor, Kontrick, filed a complaint objecting to Kontrick's discharge on the basis of fraudulent transfers.<sup>85</sup> Although Ryan filed the complaint outside the window allowed by Federal Rule of Bankruptcy Procedure 4004, Kontrick only objected to the timeliness of the complaint after the court had ruled against him on the merits.<sup>86</sup> The bankruptcy court found the filing deadline to be nonjurisdictional and held that Kontrick waived his right to object to the untimely complaint by waiting until after a decision on the merits.<sup>87</sup> The United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit both affirmed the bankruptcy court's holding that the timeliness condition was nonjurisdictional.<sup>88</sup>

The Supreme Court agreed,<sup>89</sup> reasoning that because Congress has the exclusive power to determine the subject-matter jurisdiction of lower federal courts, rules of procedure "prescribed by this Court for 'the practice and procedure in cases under title 11'"<sup>90</sup> cannot by themselves "create or withdraw federal jurisdiction."<sup>91</sup> The Court drew a distinction between time constraints contained in jurisdictional statutes (e.g., those statutes cataloging core proceedings over which bankruptcy courts have jurisdiction) and time

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82. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006).

83. 540 U.S. at 447. The Court really addressed a related cluster of claim-processing rules, including Federal Rule of Bankruptcy Procedure 4004(b), which governs extensions of time under Federal Rule of Bankruptcy Procedure 4004(a), and Federal Rule of Bankruptcy Procedure 9006(b)(3), which limits the ability of bankruptcy courts to extend time under Federal Rule of Bankruptcy Procedure 4004(b) to the conditions stated in Federal Rule of Bankruptcy Procedure 4004. *Id.* at 448.

84. *Id.* at 455.

85. *Id.* at 448–49.

86. *Id.* at 451.

87. *Id.*

88. *Id.*

89. *Id.* at 447. Kontrick actually abandoned his contention that the provision was jurisdictional before the Court, and argued instead that the rule was simply mandatory and inflexible (thus producing the same outcome). *Id.* at 455. The Court still addressed the jurisdictional argument, however, since Kontrick's new argument that even claim-processing rules could not be waived or forfeited was incorrect. *Id.* at 456.

90. *Id.* at 453 (quoting 28 U.S.C. § 2075). The analogous provision in the Rules Enabling Act for the federal district and appellate courts can be found in 28 U.S.C. § 2072.

91. *Id.* (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)).

constraints contained only in procedural rules, and concluded that Rule 4004 fell into the latter category.<sup>92</sup> The Court then articulated the following general rule: “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the *classes of cases* (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>93</sup> Thus, the Court in *Kontrick* relied mainly on a “functional” understanding of jurisdiction,<sup>94</sup> while also implicitly recognizing Congress’s unique power to attach the jurisdictional label to litigation requirements.<sup>95</sup>

Two years later, the Court found a statutory litigation requirement to be nonjurisdictional, while placing even greater emphasis on the intent of Congress.<sup>96</sup> In *Arbaugh v. Y & H Corp.*, the Court considered whether Title VII’s employee-numerosity requirement<sup>97</sup> was merely an element of a plaintiff’s claim for relief, or an indispensable part of federal court subject-matter jurisdiction over Title VII claims.<sup>98</sup> Jennifer Arbaugh brought a sex-discrimination suit against her employer, Y & H Corp., which owned and operated the café where she was employed.<sup>99</sup> After a trial on the merits where Arbaugh prevailed, Y & H raised for the first time that it had fewer than the fifteen employees required to bring a claim under Title VII.<sup>100</sup> Although disappointed with the result, the United States District Court for the Eastern District of Louisiana dismissed Arbaugh’s case for lack of jurisdiction.<sup>101</sup>

Writing for a unanimous Court,<sup>102</sup> Justice Ginsburg took prior generations to task for their “drive-by” jurisdictional rulings.<sup>103</sup> Elaborating on the functional analysis of jurisdiction that featured

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92. *Id.* Specifically, the Court noted that 28 U.S.C. § 157(b)(1), which gives bankruptcy courts jurisdiction over core proceedings, and § 157(b)(2)(J), which enumerates “objections to discharges” as one category of core proceeding, contained no timeliness condition. *Id.* Query whether the result would be different if Congress had instead used the phrase “objections to discharges filed in the time provided by Rule 4004 of the Bankruptcy Rules.” See *infra* Section III.A (analyzing what constitutes a congressional prescription of a timeliness condition for hybrid deadlines).

93. *Kontrick*, 540 U.S. at 455 (emphasis added).

94. See Schwartz, *supra* note 11, at 762.

95. See *Kontrick*, 540 U.S. at 452 (discussing Congress’s plenary authority to determine the subject-matter jurisdiction of the lower federal courts).

96. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006).

97. Title VII requires that an employer have fifteen or more employees. 42 U.S.C. § 2000e(b).

98. 546 U.S. at 503.

99. *Id.* at 503–04.

100. *Id.* at 504.

101. *Id.*

102. Justice Alito took no part in the consideration of this case.

103. *Id.* at 511 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998)).

so prominently in *Kontrick*, she emphasized that: “[i]f the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.”<sup>104</sup> Accordingly, because the fifteen-employee threshold requirement did not “speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,”<sup>105</sup> and appeared in a provision separate from Title VII’s jurisdictional provision, the Court held that it was a non-jurisdictional limitation on the coverage of Title VII, required to be proved as part of a plaintiff’s claim for relief.<sup>106</sup> Thus, *Kontrick* and *Arbaugh* represent the opening salvo in the Court’s struggle to control the use of jurisdiction in the federal courts.<sup>107</sup>

Despite the apparent shift to a “bright line,”<sup>108</sup> textual approach, the Court soon retreated to past precedent by reading the hybrid appeal deadline in 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) to be jurisdictional.<sup>109</sup> In *Bowles v. Russell*, Keith Bowles was convicted of murder by an Ohio jury and sentenced to a maximum of fifteen years in prison.<sup>110</sup> After his direct appeal failed, Bowles sought federal habeas relief, which was denied.<sup>111</sup> Bowles then missed the thirty-day deadline for filing a notice of appeal (established in 28 U.S.C. § 2107(a) and mirrored by Federal Rule of Appellate Procedure 4(a)(1)(A)).<sup>112</sup> He was allowed to reopen the appeal deadline for an additional fourteen days, pursuant to Federal Rule of Appellate Procedure 4(a)(6).<sup>113</sup> However,

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104. *Id.* at 515–16 (footnote omitted).

105. *Id.* at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

106. *Id.* at 516. As part of its analysis, the Court also noted the unfairness and waste of judicial resources that would result from reading the threshold to be jurisdictional. *Id.* at 515. However, it is probably best to think of this consideration, both in *Kontrick* and elsewhere, as a general animating reason for the Court’s concern with jurisdiction in the first place, rather than as a substantive component of the analysis.

107. Two other cases from the 2004–2006 period similarly dealt with the question of jurisdiction. *Eberhart v. United States* concerned a deadline in the Federal Rules of Criminal Procedure. 546 U.S. 12, 13 (2005). *Scarborough v. Principi* concerned the deadline for an application for attorneys’ fees brought under the Equal Access to Justice Act. 541 U.S. 401, 406 (2004). Both litigation requirements were held to be nonjurisdictional. *Eberhart*, 546 U.S. at 13; *Scarborough*, 541 U.S. at 406.

108. *Arbaugh*, 546 U.S. at 516.

109. *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007). Federal Rule of Appellate Procedure 4 is rather complex and contains two different provisions governing extensions of the time to appeal from an order of the district court. Federal Rule of Appellate Procedure 4(a)(6), the provision at issue in *Bowles*, provides for a fourteen-day reopening of the thirty-day appeal deadline set out in Federal Rule of Appellate Procedure 4(a)(1)(A), but only if, among other things, the moving party did not receive notice of the judgment or order within twenty-one days of its entry. FED. R. APP. P. 4(a)(6).

110. *Bowles*, 551 U.S. at 207.

111. *Id.*

112. *Id.*

113. *Id.*

the United States District Court for the Northern District of Ohio inexplicably granted Bowles seventeen days to file the notice of appeal.<sup>114</sup> Bowles filed his appeal within the seventeen-day window, but after the fourteen-day window set by the rule itself.<sup>115</sup> The warden raised the issue of timeliness on appeal, and the Sixth Circuit dismissed for a lack of jurisdiction.<sup>116</sup>

The Court held, in a five–four decision, that the fourteen-day deadline in § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) was jurisdictional, thus depriving Bowles of his right to an appeal.<sup>117</sup> Acknowledging the Court’s recent efforts to clarify the significance of jurisdiction, Justice Thomas looked to past precedent treating *statutory* appeal deadlines as jurisdictional.<sup>118</sup> Because the text of § 2107(c) (not Federal Rule of Appellate Procedure 4(a)(6) standing alone) limited the amount of time by which a court could reopen the appeal period to fourteen days, the Court held that the intended jurisdictional effect of Congress was clear.<sup>119</sup> Based on this historical treatment of statutory appeal deadlines, the Court apparently found it unnecessary to scrutinize the text of the relevant provision for a clear statement: the mere fact that Congress created the deadline was enough.<sup>120</sup> *Bowles* is also significant insofar as it overturned the doctrine of unique circumstances.<sup>121</sup>

*Bowles*, which proved to be a rather controversial decision,<sup>122</sup> added an important caveat to the Court’s developing jurisdiction framework: if the Court’s historical precedents universally support a jurisdictional understanding of a litigation requirement, and Congress has expressed no intent to the contrary, then that understanding will be conclusive.<sup>123</sup> Because prior cases recognized

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 215.

118. *Id.* at 210.

119. *Id.* at 213.

120. *Id.*

121. *Id.* at 213–14. That doctrine allows courts to remedy judicial errors by tolling a deadline. See *supra* Section II.A.

122. *Bowles*, 551 U.S. at 215 (Souter, J., dissenting) (“It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.”); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 69 (2007); Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. 631, 632 (2008); Vincent Paylish, Note, *Bowles v. Russell: They Got Me on a Technicality*, 70 MONT. L. REV. 147, 160 (2009). But see E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of Deadline – Except for All Others*, 102 NW. L. REV. COLLOQUY 151, 152 (2008).

123. *Bowles*, 551 U.S. at 209–10.

statutory appeal deadlines as jurisdictional, the Court declined to change its approach in *Bowles*.<sup>124</sup>

The Court fully articulated its current approach to jurisdiction in *Henderson ex rel. Henderson v. Shinseki*.<sup>125</sup> There, the Court held that the 120-day deadline to appeal the U.S. Department of Veterans Affairs' denial of federal benefits to the U.S. Court of Appeals for Veterans Claims (Veterans Court) was nonjurisdictional.<sup>126</sup> David Henderson, a veteran of the Korean War and a diagnosed paranoid schizophrenic, had his claim for supplemental benefits denied through the VA's internal benefits process.<sup>127</sup> Unfortunately, Henderson missed the Veterans Court appeal deadline by fifteen days.<sup>128</sup> The Veterans Court, ostensibly relying on *Bowles*'s recognition of the jurisdictional character of statutory appeal deadlines, dismissed the appeal.<sup>129</sup> The United States Court of Appeals for the Federal Circuit upheld the dismissal, and Henderson appealed to the Supreme Court.<sup>130</sup>

Justice Alito, writing for the majority, held that the 120-day appeal deadline in 38 U.S.C. § 7266(a) was nonjurisdictional.<sup>131</sup> The Court framed the issue of jurisdiction as one of congressional intent: "[u]nder *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'"<sup>132</sup> Thus, rather than relying chiefly on the "functional,"<sup>133</sup> or "classes of cases" approach first articulated in *Kontrick* and reiterated in *Arbaugh*, the Court effectively reinterpreted those cases as standing all along for a clear-statement test.<sup>134</sup> However, the Court added a crucial caveat to this clear-statement rule, by stating that Congress "need not use magic words."<sup>135</sup> Thus, where Congress has "left undisturbed"<sup>136</sup> a long line of precedents, the Court can assume that a particular

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124. *Id.* at 213.

125. 562 U.S. 428 (2011).

126. *Id.* at 431.

127. *Id.* at 433. If a VA regional office denies benefits, the veteran can seek review with the Board of Veterans' Appeals. *Id.* at 431. The determination of the Board represents the VA's final say; if the veteran wishes to appeal further, they must file an appeal with the Veterans Court. *Id.* at 432.

128. *Id.* at 433.

129. *Id.* at 433–34.

130. *Id.* at 434.

131. *Id.* at 431.

132. *Id.* at 435–36.

133. See Schwartz, *supra* note 11, at 739.

134. See *Henderson*, 562 U.S. at 435–36; Schwartz, *supra* note 11, at 748.

135. *Henderson*, 562 U.S. at 436.

136. *Id.* (quoting *Union Pac. R.R. v. Bhd. of Locom. Eng'rs Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009)).

requirement is jurisdictional.<sup>137</sup> Applying the clear-statement analysis to the provision at issue, the Court concluded based on text, the structure of the Veterans' Judicial Review Act as a whole, and the general "solicitude of Congress" for veterans that the filing deadline was nonjurisdictional.<sup>138</sup>

The jurisdiction framework that was enshrined in *Henderson* thus has two components, a result of the Court synthesizing the 2004–2006 quartet of cases with *Bowles*. First, Congress must clearly state its intent for a litigation requirement to be treated as jurisdictional.<sup>139</sup> What exactly constitutes a clear statement by Congress, and the manner in which that formulation applies beyond a simple statute, have been further elaborated by the Court.<sup>140</sup> Second, congressional failure to act in the face of longstanding judicial recognition of a rule as jurisdictional might suffice as a clear statement.<sup>141</sup>

The Court's normal clear-statement analysis now proceeds in the following way.<sup>142</sup> First, the Court will "[s]tart with the text,"<sup>143</sup> or the "text or structure"<sup>144</sup> of the provision at issue. Then, the Court will turn to the provision's context in the broader statutory scheme.<sup>145</sup> So far, the Court has always used context to reinforce its previous conclusion that the plain text of the provision did not reveal a clear statement.<sup>146</sup> Sometimes, the Court will use "other factors" or some case-specific rationale to further support its conclusion that a provision is nonjurisdictional.<sup>147</sup> Finally, the Court will often address counterarguments raised by the party seeking to have the requirement deemed jurisdictional.<sup>148</sup> On rare occasions, the

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137. *Id.* Although this precedent-based aspect of the Court's approach to jurisdiction can helpfully be thought of as separate from the clear-statement analysis, they are really one and the same; essentially, and rather strangely, Congress has clearly stated its intent that a requirement be treated as jurisdictional by leaving the Court's precedents undisturbed. *See supra* note 13 and accompanying text.

138. *Henderson*, 562 U.S. at 438–41.

139. *Id.* at 435–36.

140. *See infra* Section II.B.

141. *Henderson*, 562 U.S. at 436.

142. Arguably, the Court had already used this process as early as *Arbaugh v. Y & H Corp.* 546 U.S. 500, 515 (2006). This is rather unsurprising, since it is essentially a specialized form of statutory analysis.

143. *See, e.g., MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 299 (2023).

144. *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 205 (2022).

145. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164–65 (2010); *Wilkins v. United States*, 598 U.S. 152, 159 (2023); *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 550–51 (2019) (inverting the order of analysis).

146. *See, e.g., MOAC*, 598 U.S. at 300.

147. *Reed Elsevier*, 559 U.S. at 165.

148. *See, e.g., Fort Bend*, 587 U.S. at 552.

Court will go beyond the context of a provision (i.e., the placement of the provision at issue relative to the jurisdiction-conferring provisions of the statutory scheme) by looking to policy considerations.<sup>149</sup>

The cases leading up to and including *Henderson* also reveal that litigation requirements can be embodied in roughly three ways, all of which are treated differently by the Court.<sup>150</sup> First, the requirement might be exclusively embodied in the text of a statute.<sup>151</sup> Second, the requirement might find expression in a rule of procedure (e.g., the Federal Rules of Bankruptcy Procedure).<sup>152</sup> This type of litigation requirement will never have jurisdictional consequences, for the rather obvious reason that Congress had no involvement in the drafting and promulgation of the rule.<sup>153</sup> Third, the requirement may be expressed in both a statute and a rule of procedure: in this case, a statute might establish the existence of a requirement or deadline, and then leave some degree of discretion to the rulemaker to implement it.<sup>154</sup>

The Court's approach to these hybrid deadlines is a product of two cases: *Bowles*<sup>155</sup> and *Hamer v. Neighborhood Housing Services of Chicago*.<sup>156</sup> Whereas *Bowles* dealt with Federal Rule of Appellate Procedure 4(a)(6) and 28 U.S.C. § 2107(c), which govern the manner in which a federal district court can *reopen* the thirty-day appeal window specified in Federal Rule of Appellate Procedure 4(a)(1)(A),<sup>157</sup> *Hamer* dealt with the relationship between Federal Rule of Appellate Procedure 4(a)(5) and 28 U.S.C. § 2107(c), which instead concern the *extension* of the appeal deadline.<sup>158</sup> In *Hamer*, the plaintiff received an adverse judgment on her claims for age-

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149. In *Henderson ex rel. Henderson v. Shinseki*, the Court considered an appeal deadline in the Veterans' Judicial Review Act. 562 U.S. 428, 431 (2011). The Court found that the deadline, which governed appeals of benefit denials from an internal Department of Veterans Affairs' body to the Article I Veterans Court, was nonjurisdictional partially in light of the historic "solicitude of Congress for veterans." *Id.* at 440–41.

150. The Court does not explicitly employ such a three-part framework. However, this Article uses it as a heuristic. This heuristic is not to be confused with another "tripartite" framework found in the literature. See Dodson, *supra* note 19, at 357–58. This Article discusses the three rules identified by Dodson as aspects of the general clear-statement rule as developed by case law.

151. See, e.g., *MOAC*, 598 U.S. at 292.

152. See, e.g., *Kontrick v. Ryan*, 540 U.S. 443, 447–48 (2004).

153. See *id.* at 453.

154. See, e.g., *Bowles v. Russell*, 551 U.S. 205, 208 (2007).

155. 551 U.S. 205.

156. 583 U.S. 17 (2017).

157. 551 U.S. at 208.

158. 583 U.S. at 24. Reopening a judgment under Federal Rule of Appellate Procedure 4(a)(6) is only applicable where, among other things, a party failed to receive notice of the judgment being appealed. See FED. R. APP. P. 4(a)(6).



based employment discrimination and then sought and received a two-month extension to appeal.<sup>159</sup> However, the Seventh Circuit realized on appeal that Rule 4(a)(5) limited extensions of the appeal window to thirty days and dismissed the appeal for lack of jurisdiction.<sup>160</sup>

The *Hamer* Court picked up where *Bowles* left off: statutory appeal deadlines are jurisdictional (based on Congress's failure to say otherwise in response to past precedent), whereas appeal deadlines (and time limits generally) contained in court-made rules are not.<sup>161</sup> However, the Court found the relationship between Rule 4(a)(5) and § 2107(c)—at issue in *Hamer*—distinguishable from the relationship between Rule 4(a)(6) and § 2107(c), which was at issue in *Bowles*.<sup>162</sup> Because § 2107(c) *did* specify a maximum amount of time for “reopening” the appeal period but *did not* specify any comparable ceiling for “extending” the appeal period, the Rule 4(a)(5) deadline in *Hamer* was not prescribed by statute, and thus it could not be jurisdictional.<sup>163</sup> The Court admonished the Seventh Circuit and other appellate courts for misunderstanding *Bowles* to mean that all appellate deadlines are “mandatory and jurisdictional.”<sup>164</sup> Instead, only the particular appellate deadline at issue in *Bowles* was jurisdictional, and only then because it was prescribed by statute.<sup>165</sup>

C. *The Circuit Split on Whether Federal Rule of Bankruptcy Procedure 8002(a)(1) is Jurisdictional*

The Court has addressed the jurisdictional vs. claim-processing distinction with great zeal and relative unanimity in the past two decades.<sup>166</sup> The simplifying clear-statement rule that has resulted from these efforts no doubt represents a marked improvement from the past. However, the rule still proves difficult to apply in certain

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159. 583 U.S. at 21.

160. *Id.* at 22. The district court thus made a mistake, which the defendants did not notice until the Seventh Circuit ordered briefing on the issue. *Id.*

161. *Id.* at 18–19.

162. *See id.* at 26.

163. *See id.* at 26–27.

164. *Id.*

165. *Id.* at 27. And, of course, the reason that the mere fact of prescription by statute was enough to make it jurisdictional, and not some more rigorous clear statement as would normally be required, stemmed from the *Bowles* Court's unique approach to precedent about appeal deadlines. 551 U.S. 205, 210 (2007). However, this does not necessarily mean that the clear-statement analysis is inapplicable to hybrid appeal deadlines.

166. *Bowles v. Russell*, a five–four split, is the main exception here. 551 U.S. 205 (2007); *see also supra* Section II.B.

contexts,<sup>167</sup> leaving things muddled.<sup>168</sup> Recently, a circuit split has materialized concerning the appeal deadline contained in Rule 8002(a)(1). This began with the Sixth Circuit's 2020 decision in *Tennial v. REI Nation, LLC* (*In re Tennial*), which broke new ground by reading the deadline as nonjurisdictional.<sup>169</sup>

Rule 8002(a)(1) provides that "a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree to be appealed is entered."<sup>170</sup> However, Rule 8002(a)(1) does not operate in isolation. Otherwise, the deadline would clearly be nonjurisdictional under the Court's precedents concerning rules of procedure.<sup>171</sup> 28 U.S.C. § 158(c)(2), which establishes a framework for bankruptcy appeals, provides that such appeals "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules."<sup>172</sup> Thus, Rule 8002(a)(1) falls into the third category of litigation requirements: the statute-rule hybrid.<sup>173</sup> In this case, the statute acknowledges the existence of a deadline, but directs the rulemaker to set it.<sup>174</sup>

Prior to the Sixth Circuit's pathbreaking decision in 2020, every other circuit that considered the issue understood Rule 8002(a)(1) to be jurisdictional. However, the reasoning has varied.<sup>175</sup>

167. See Schwartz, *supra* note 11, at 762–67.

168. *Id.* Because the clear-statement test does not require that Congress actually use the word "jurisdiction" (or any "magic words" for that matter), perhaps differences of opinion among lower courts are predictable. See Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

169. 978 F.3d 1022, 1028 (6th Cir. 2020). Interestingly, a District Court did previously read the Rule 8002(a)(1) deadline as nonjurisdictional. See *Felix v. Felix*, Civil Action No. 09–6262, 2009 WL 3711483, at \*1–2 (E.D. La. Nov. 3, 2009). The court relied on Federal Rule of Bankruptcy Procedure 9030's instruction that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein," *id.* at \*2 (quoting FED. R. BANKR. P. 9030), and did not mention the possibility that § 158(c)(2) might have some bearing on the analysis. *Id.*

170. FED. R. BANKR. P. 8002(a)(1). The deadline for bankruptcy appeals is significantly shorter than the thirty-day deadline for civil appeals found in Federal Rule of Appellate Procedure 4(a)(1)(A). Compare FED. R. BANKR. P. 8002(a)(1), with FED. R. APP. P. 4(a)(1)(A).

171. See, e.g., Kontrick v. Ryan, 540 U.S. 443, 452–53 (2004).

172. 28 U.S.C. § 158(c)(2).

173. See *supra* Section II.B.

174. 28 U.S.C. § 158(c)(2).

175. Some decisions paid little or no attention to the possibility that Rule 8002(a)(1) might serve a claim-processing function and provided little reasoning generally. See *Ozenne v. Chase Manhattan Bank* (*In re Ozenne*), 841 F.3d 810, 814 (9th Cir. 2016); *Gowdy v. Mitchell* (*In re Ocean Warrior, Inc.*), 835 F.3d 1310, 1318 (11th Cir. 2016) (citing *Williams v. EMC Mortg. Corp.*, 216 F.3d 1295, 1298 (11th Cir. 2000)); *Hamid v. Deutsche Bank Nat'l Tr. Co.* (*In re Hamid*), 577 F. App'x 208, 208 (4th Cir. 2014) (per curiam) (relying on *Bowles* for the proposition that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement" (quoting *Bowles v. Russell*, 551 U.S. 205, 214 (2007))).

*Emann v. Latture* (*In re Latture*), handed down by the United States Court of Appeals for the Tenth Circuit in 2010, perhaps represents the most sustained pre-*Tennial* discussion of Rule 8002(a)(1).<sup>176</sup> Some of the other circuits to have considered Rule 8002(a)(1) post-*Latture* explicitly engaged with and adopted its reasoning, making it representative of the jurisdictional approach to Rule 8002(a)(1).<sup>177</sup> And, although it was not the first case to have approached Rule 8002(a)(1) in light of the Court's post-2004 approach to jurisdiction,<sup>178</sup> its citation by and prevalence in the decisions of other courts make it useful.<sup>179</sup> In *Latture*, the court advanced roughly three reasons for why the Rule 8002(a)(1) deadline is jurisdictional. First, the court stated that exact symmetry between a statute and a rule does not seem to be necessary, and cited *Kontrick* for support.<sup>180</sup> Second, the court pointed out that § 158(c)(2) is part of the same provision that grants the district courts and bankruptcy appellate panels jurisdiction to hear appeals from the bankruptcy courts.<sup>181</sup> Third, the court found that *Bowles*'s guidance on the historical treatment of appeal deadlines applied by analogy to the Rule 8002(a)(1) bankruptcy deadline.<sup>182</sup> Finally, the court addressed the counterargument that rules of procedure alone are incapable of withdrawing jurisdiction: because § 158(c)(2) actually directs the rulemaker to establish a deadline, the court found that sufficient to confer jurisdiction.<sup>183</sup>

In 2020, the Sixth Circuit became the first appellate court to interpret Rule 8002(a)(1) as nonjurisdictional.<sup>184</sup> In that case, chapter thirteen debtor *Tennial* sought to appeal a bankruptcy court order granting relief from the automatic stay to a third party who purchased her home from the mortgage company.<sup>185</sup> Unfortunately, *Tennial* filed her notice of appeal after Rule 8002(a)(1)'s fourteen-

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176. 605 F.3d 830 (10th Cir. 2010).

177. See *In re Caterbone*, 640 F.3d 108, 113 n.5 (3d Cir. 2011); *Smith v. Gartley* (*In re Berman-Smith*), 737 F.3d 997, 1001–03 (5th Cir. 2013) (per curiam); *In re Sobczak-Slomczewski*, 826 F.3d 429, 431–32 (7th Cir. 2016) (per curiam).

178. See *Taylor v. Taylor* (*In re Taylor*), 343 F. App'x. 753, 755 n.1 (3d Cir. 2009); *Hatch Jacobs, LLC v. Kingsley Cap., Inc.* (*In re Kingsley Cap., Inc.*), 423 B.R. 344, 348–51 (B.A.P. 10th Cir. 2010).

179. See cases cited *supra* note 175.

180. *In re Latture*, 605 F.3d at 836–37 (citing *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004)).

181. *Id.* at 837. This is essentially “step two” of the clear-statement analysis. See *supra* Section II.B.

182. *In re Latture*, 605 F.3d at 837. The *Latture* court drew attention to the Advisory Committee Notes to Rule 8002, which state that Rule 8002 was adapted from Federal Rule of Appellate Procedure 4(a) (the provision at issue in *Bowles*). *Id.* (citing *In re Taylor*, 343 F. App'x at 755 n.1).

183. *Id.*

184. *Tennial v. REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1028 (6th Cir. 2020).

185. *Id.* at 1024.

day deadline had passed, allegedly because she did not receive a copy of the order.<sup>186</sup> The bankruptcy court, upon motion by the third-party purchaser, dismissed the untimely appeal due to a lack of jurisdiction.<sup>187</sup>

On appeal, the Sixth Circuit declined to read Rule 8002(a)(1) as jurisdictional, disregarding its own past precedent to the contrary.<sup>188</sup> First, the *Tennial* court hearkened back to the Court's efforts to clarify the use of the jurisdictional label through the clear-statement rule.<sup>189</sup> Looking to § 158(c)(2), the court concluded that Congress did not clearly state that Rule 8002(a)(1)'s deadline would be a "jurisdictional prerequisite" to an appeal.<sup>190</sup> Rather, Congress merely referenced an appeal deadline to be established by the rules.<sup>191</sup> Second, the court looked to all four of the Court's past cases dealing with rule-based deadlines,<sup>192</sup> and synthesized an underlying rule: unless Congress sets the appeal deadline exactly—literally, by number of days—by statute (as was the case in *Bowles*), then the deadline is nonjurisdictional.<sup>193</sup>

The court also referenced the strange effects that a jurisdictional reading of Rule 8002(a)(1) (and other statute-rule hybrid litigation requirements like it) would produce.<sup>194</sup> A jurisdictional reading of Rule 8002(a)(1) would imply that the rules committee could control subject-matter jurisdiction, which is forbidden by the Constitution.<sup>195</sup> Furthermore, because the rules committee did previously change the Rule 8002(a)(1) deadline from ten days to fourteen days, Congress would somehow have "specified" a deadline on which it had no input.<sup>196</sup>

The *Tennial* court also engaged with the other circuits explicitly and rejected some of the common arguments for a jurisdictional understanding of Rule 8002(a)(1). First, the court rejected the argument that because Rule 8002(a)(1) was modeled after Federal Rule of Appellate Procedure 4(a) (the provision which, along with § 2107(a), was found to be jurisdictional in *Bowles*), it must be

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186. *Id.*

187. *Id.*

188. *Id.* at 1025.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1025–26. These are *Kontrick*, *Eberhart*, *Bowles*, and *Hamer*. See *supra* Section II.B.

193. *In re Tennial*, 978 F.3d at 1026.

194. *Id.*

195. *Id.*

196. *Id.*

jurisdictional as well.<sup>197</sup> Obviously, the deadline in *Hamer* was also contained in Federal Rule of Appellate Procedure 4(a), and the Court held that it was nonjurisdictional because it did not implement a time limit set by Congress.<sup>198</sup> Second, the court addressed the counterargument that Rule 8002(a)(1) really did implement a statutory deadline created by Congress, notwithstanding the fact § 158(c)(2) failed to specify an *exact* deadline.<sup>199</sup> In other words, the difference between the statutory *creation* of a deadline (e.g., the thirty-day deadline at issue in *Bowles* which was specified by § 2107(a)) and the statutory *implementation* of a deadline (e.g., § 158(c)(2)'s reference to "the time provided by Rule 8002") is really of no substance.<sup>200</sup> Predictably, the *Tennial* court rejected this argument because the creation vs. implementation distinction actually accounts for the outcome in all four of the Court's cases involving rule-based deadlines.<sup>201</sup> Of course, the Court has not yet considered a hybrid deadline like that found in Rule 8002(a)(1) and § 158(c)(2), which makes this argument speculative.<sup>202</sup>

Finally, the *Tennial* court refused to adopt a jurisdictional reading of Rule 8002(a)(1) on stare decisis grounds.<sup>203</sup> Although *Bowles* added a stare decisis component to the clear-statement analysis, the *Tennial* court found that the Supreme Court's entire approach to jurisdiction since *Arbaugh* indicated a general willingness to reconsider past precedent in this area of the law.<sup>204</sup>

### III. DISCUSSION

#### A. *Federal Rule of Bankruptcy Procedure 8002(a)(1) is a Claim-Processing Rule*

This section will apply the clear-statement framework to the question of Rule 8002(a)(1),<sup>205</sup> and then it will address a unique argument—compelled by a close reading of *Bowles* and *Hamer* and not addressed by the *Tennial* court—as to why that deadline is

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197. *Id.* at 1027.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* Thus, in *Bowles*, the fact that Congress did specify the exact deadline is the only difference between it and the other cases. *Id.*

202. This gap in the *Tennial* court's reasoning will be addressed explicitly. See *infra* Section III.A.

203. *In re Tennial*, 978 F.3d at 1028.

204. *Id.*; see also *supra* Section II.B.

205. Again, that framework involves an analysis of the text itself (which can include statutory context and policy considerations) and a historical component which looks to longstanding treatment of a provision as jurisdictional. See *supra* Section II.B.

nonjurisdictional. The *Tennial* court covered some of this territory already,<sup>206</sup> but that court's arguments are worth restating here for their persuasiveness.

Scholars and practitioners alike would benefit from a future grant of certiorari to resolve the circuit split surrounding Rule 8002(a)(1). For one, the rule is a commonplace in the world of bankruptcy practice: because the scope of finality in bankruptcy proceedings is construed much more liberally than in civil cases, appeals are occurring all the time.<sup>207</sup> Furthermore, a grant of certiorari to address Rule 8002(a)(1) would bring a further, and perhaps decisive, degree of clarity to the elusive third category of litigation requirement: the statute-rule hybrid.<sup>208</sup>

Before turning to the question of whether Rule 8002(a)(1) is jurisdictional or claim-processing, the nature of the appeal deadline at issue should be clarified once more. The fourteen-day deadline for filing a notice of appeal is contained in a procedural rule, promulgated by the Court pursuant to the Rules Enabling Act<sup>209</sup> for "the practice and procedure in cases under title 11";<sup>210</sup> however, the existence of the deadline is rooted in 28 U.S.C. § 158(c)(2), which articulates a general framework for bankruptcy appeals by specifying that they shall be taken "in the time provided by Rule 8002."<sup>211</sup> This places Rule 8002(a)(1), along with Federal Rules of Appellate Procedure 4(a)(5) and 4(a)(6)—the provisions at issue in *Hamer* and *Bowles*, respectively—squarely in the hybrid, third category of litigation requirements.<sup>212</sup>

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206. See *supra* Section II.C. In a recent and insightful article, one commentator, arguing for a jurisdictional understanding of the Rule 8002(a)(1) deadline, has criticized the *Tennial* court's reasoning as inconsistent with the Court's past precedents. See Matthew Kent Stiles, *White Rabbit Bankruptcy Appeals: The (Unconstitutional) Jurisdictional Significance of Being Late*, 41 GA. ST. U. L. REV. 321, 352–61 (2025). Specifically, Stiles contends that the *Tennial* court, in lumping the Rule 8002(a)(1) deadline together with the rest of the exclusively rule-based deadlines dealt with by the Court over the years, gave short shrift to the important fact that Congress still expressed its intent in § 158(c)(2) that there be "some deadline." *Id.* at 353. Stiles also argues that because the deadline is jurisdictional, it runs afoul of the Court's nondelegation doctrine insofar as Congress delegated deadline-setting authority to the rulemaker without establishing an intelligible principle for why the judiciary was suited to set the deadline. *Id.* at 372. Although this Article expresses no opinions on that latter proposition, its response to the jurisdiction argument is found below. See *infra* Section III.A and note 238.

207. See *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501–02 (2015).

208. See *supra* Section II.B.

209. 28 U.S.C. § 2071.

210. *Id.* § 2075.

211. *Id.* § 158(c)(2).

212. See *supra* Section II.B.

“Start with the text.”<sup>213</sup> As the *Tennial* court observed, nothing about a statute that merely refers to an as-yet-to-be-created deadline could possibly be considered clear.<sup>214</sup> Considering that the Court has only found two requirements to be nonjurisdictional since 2004, it would be rather surprising to change course on a statute that fails to even set a specific deadline.<sup>215</sup> The *Tennial* court did not specifically address context or policy, but those factors do not affect the outcome. As for statutory context, § 158(c)(2) is contained in the same provision that confers jurisdiction on the district courts to hear bankruptcy appeals.<sup>216</sup> However, the Court has never rested its conclusion that a provision is jurisdictional on context.<sup>217</sup> This step only ever serves to reinforce the Court’s conclusion that the plain text of a provision does not indicate a clear statement.<sup>218</sup> Any policy considerations would likely be inconclusive as well given the multifarious goals embodied in the Bankruptcy Code.<sup>219</sup>

The *Tennial* court’s analysis is instructive in other respects besides the standard clear-statement framework.<sup>220</sup> For example, that court pointed out that a jurisdictional reading of Rule 8002(a)(1) and § 158(c)(2) would implicitly contravene the Court’s longstanding prohibition against procedural rules creating jurisdiction.<sup>221</sup> In fact, because the rulemaker previously changed the Rule 8002(a)(1) deadline from ten days to fourteen days in 2009, a jurisdictional reading would produce the absurd result that Congress prescribed a deadline on which it had no input whatsoever.<sup>222</sup>

Although the Court’s typical clear-statement analysis, along with the other arguments that the *Tennial* court raised, seem to weigh in favor of a nonjurisdictional understanding of Rule 8002(a)(1), the ambiguity inherent in the hybrid category requires something more. After all, under *Bowles*, certain provisions (or categories of provisions, like statutory appeal deadlines) can be jurisdictional

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213. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 299 (2023).

214. *Tennial v. REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1025 (6th Cir. 2020).

215. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008); *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007).

216. See 28 U.S.C. § 158(a)(1)–(3). The *Latture* court also referenced this as a reason in favor of a jurisdictional reading. See *Emann v. Latture* (*In re Latture*), 605 F.3d 830, 837 (10th Cir. 2010).

217. See Schwartz, *supra* note 11, at 754 n.128.

218. *Id.* The Court has never found a provision to be nonjurisdictional using the clear-statement analysis, let alone using the context inquiry specifically. *Id.*

219. See, e.g., *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011) (analyzing policy in the context of the Veterans’ Judicial Review Act).

220. See *supra* Section II.C.

221. *Tennial v. REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1026 (6th Cir. 2020).

222. *Id.*

based merely on past treatment.<sup>223</sup> The Court's jurisdiction precedents involving statute-rule hybrid deadlines—*Bowles* and *Hamer*—provide an answer to the puzzle presented by Rule 8002(a)(1). And, although the *Tennial* court did synthesize a congressional prescription/specification rule from these cases,<sup>224</sup> it nonetheless missed another crucial principle. Although neither *Bowles* nor *Hamer* addressed the jurisdictional significance of statutes like § 158(c)(2) (which explicitly direct the rulemaker to set a deadline while leaving the actual number of days within the rulemaker's discretion),<sup>225</sup> a close reading reveals only one logical possibility for Rule 8002(a)(1), consistent with precedent and the nature of hybrid deadlines generally: if a statute falls anywhere short of specifying an exact deadline or time limit to be implemented by the rulemaker, then the time limit actually set by the rulemaker will be nonjurisdictional.

An initial reading of the Court's logic in *Hamer* might seem to support a jurisdictional understanding of hybrid deadlines like the one found in Rule 8002(a)(1): “[i]n *Bowles v. Russell*, this Court clarified that an appeal filing deadline *prescribed by statute* will be regarded as ‘jurisdictional,’ meaning that late filing of the appeal notice necessitates dismissal of the appeal.”<sup>226</sup> In some sense, § 158(c)(2) does prescribe an appeal filing deadline by specifying that bankruptcy appeals shall be taken “in the time provided by Rule 8002.”<sup>227</sup> But does a statute really prescribe—and thus clearly state—an appeal deadline when, like here, it merely provides for the existence of *some* deadline and then delegates authority to the rulemaker to set that deadline? Or does prescription of a deadline require something more, like an exact specification of days? A comparison of *Bowles* and *Hamer* reveals the answer.

In *Bowles*, the Court was concerned with the hybrid deadline found in both § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6), namely, the fourteen-day maximum period by which courts

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223. *Bowles v. Russell*, 551 U.S. 205, 210 (2007). The *Tennial* court did briefly address the possibility of upsetting reliance interests and the historical argument, but it concluded that the Court's post-2004 cases weighed in favor of revisiting problematic jurisdiction precedents. 978 F.3d at 1028 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)). The Court also remarked that the congressional specification requirement inherent in the four cases dealing with rule-based deadlines effectively trumped the historical approach in *Bowles*. *Id.*

224. 978 F.3d at 1026.

225. To summarize again, the deadline in *Bowles* (thirty-days) was explicitly set by Congress, and then mirrored exactly by Federal Rule of Appellate Procedure 4(a)(6). 551 U.S. at 208–09. The deadline in *Hamer v. Neighborhood Housing Services of Chicago*, by contrast, was not mentioned by Congress, and was set by Federal Rule of Appellate Procedure 4(a)(5) (thirty or fourteen days depending on the circumstances). 583 U.S. 17, 24 (2017).

226. *Hamer*, 583 U.S. at 18–19 (emphasis added) (citation omitted).

227. 28 U.S.C. § 158(c)(2).



can *reopen* the thirty-day appeal window found in Federal Rule of Appellate Procedure 4(a)(1)(A).<sup>228</sup> Congress established this deadline first in the statute, down to the exact day; then, the rulemaker (who obviously had no choice) matched the fourteen-day deadline exactly in Rule 4(a)(6).<sup>229</sup>

The Court in *Hamer* was instead concerned with the time limit found in Federal Rule of Appellate Procedure 4(a)(5)(C), which provides for a maximum deadline *extension* of thirty days in normal circumstances.<sup>230</sup> Unlike in *Bowles*, however, § 2107(c) does not specify a number of days (i.e., a period of maximum extension) like it does for Rule 4(a)(6).<sup>231</sup> In fact, it fails to mention any time limitation upon a court's ability to extend.<sup>232</sup> It merely states that "the district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause."<sup>233</sup> Since there is clearly no "prescri[ption] by statute"<sup>234</sup> of the maximum amount of time by which a court can extend, the Rule 4(a)(5)(C) deadline is exclusively rule-based, and thus nonjurisdictional in light of the Court's past precedents.<sup>235</sup>

If the *Hamer* court understood the Rule 4(a)(5)(C) deadline to be nonjurisdictional due to the lack of a clear-statement or prescription in § 2107(c),<sup>236</sup> then it follows that the fourteen-day Rule 8002(a)(1) appeal deadline—established but not set by § 158(c)(2)—is nonjurisdictional on the same grounds. In order to grasp the essential similarity between the two statutory provisions, one must not lose sight of the work that § 2107(c) is actually doing: in establishing the court's authority to extend a deadline for good cause or excusable neglect, Congress is implicitly delegating the authority to create a corresponding deadline (i.e., an upper limit of days by which a court can extend the deadline). Therefore, both § 2107(c) *and* § 158(c)(2) delegate deadline- or extension-setting authority to the rulemaker, although the former does so implicitly and the latter explicitly by directing the rulemaker to provide for a time.<sup>237</sup>

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228. *Bowles*, 551 U.S. at 208–09.

229. *Id.*

230. *Hamer*, 583 U.S. at 24.

231. *Id.*

232. *Id.*

233. 28 U.S.C. § 2107(c).

234. *Bowles*, 551 U.S. at 205 (citation omitted).

235. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 452–53 (2004).

236. *Hamer*, 583 U.S. at 27.

237. It seems implausible that a statute like § 2107(c), which fails to mention any sort of time limit for extending the deadline, leaves the rulemaker without the authority to set a deadline. Obviously, the rulemaker did set a deadline in Federal Rule of Appellate Procedure 4(a)(5)(C), notwithstanding the lack of a statutory command to do so. *See* FED. R. APP. P. 4(a)(5)(C). As a general matter, there is good reason to think that rulemakers have broad

Because both statutes are functionally identical insofar as they leave the rulemaker with the authority to set deadlines, there is no principled basis to distinguish between § 2107(c) as nonprescriptive (and thus lacking the characteristics of a congressional clear statement) and § 158(c)(2) as prescriptive (and thus constitutive of a clear statement).

To distinguish between the two statutes by reading the language in § 158(c)(2) as a clear statement would be to countenance an absurd interpretive result. In order to clearly state its intent to attach jurisdictional consequences to a deadline, Congress would be forced to make explicit what is already entirely obvious: that a rulemaker must set time limits where none exist in a statute. The clear-statement rule would thus be inverted: rather than requiring Congress to clearly state its intent for the jurisdictional exception to trump the claim-processing norm, Congress would perversely be required to cloak the exception in the language of the norm.

Stated differently, predicated the existence of a clear statement on Congress directly stating what would otherwise be a fundamental assumption (i.e., the assumption that the rulemaker can set time limits within which courts can take certain actions explicitly provided for by Congress, like extending a deadline) would undermine the very purpose of a clear-statement rule.<sup>238</sup> Instead, the logical solution would simply be to require Congress to clearly state that the jurisdictional exception applies, rather than making it indicate its intention indirectly by restating something obvious.

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authority to set time limits, unless that authority is constrained by some other legal principle, whether constitutional or statutory in nature. *See* 28 U.S.C. § 2072(a)–(b) (granting the Supreme Court the “power to prescribe general rules of practice and procedure” while at the same time forbidding such rules from “abridg[ing], enlarg[ing] or modify[ing] any substantive right”); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (stating that the federal rules must comport with the “terms of the [Rules] Enabling Act” and any “constitutional restrictions”); *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005) (limiting a federal habeas petitioner’s right to seek relief from judgment under Federal Rule of Civil Procedure 60(b) where such a motion would effectively constitute a successive petition for habeas relief of the sort restricted by the Antiterrorism and Effective Death Penalty Act of 1996).

238. Thus, Stiles’s argument that Congress intended for the creation of at least “some deadline” (which in turn supports his comparison between the Rule 8002(a)(1) deadline and the deadline for ordinary civil appeals found to be jurisdictional in *Bowles*), *see* Stiles, *supra* note 206, at 353, 353–61, appears less significant when the language in § 158(c)(2) is understood as an acknowledgment by Congress that the task of fixing the bankruptcy appeal deadline is ill-suited for statute, rather than as an explicit—and entirely unnecessary—grant of deadline-setting authority to the rulemaker which it is obviously entitled to exercise absent some other limiting principle. *See* statute and cases cited *supra* note 237. As the *Tennial* court rightly recognized in light of the Court’s clear-statement rule, § 158(c)(2)’s “mere[] refer[ence]” to the deadline ultimately set by the rulemaker is much too thin a reed upon which to rest the “attach[ment] [of] subject matter jurisdiction consequences.” *See Tennial v. REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1025 (6th Cir. 2020).

To attach jurisdictional significance to a statute like § 158(c)(2), where Congress made explicit what is normally entirely obvious (i.e., that the rulemaker can establish deadlines for procedural mechanisms—like appeal window extensions—if it sees fit) would thus be to discriminate on the basis of statutory language which bears no real relation to the question of jurisdiction. The plausible explanation for why Congress chose to explicitly grant the rulemaker discretion in the case of § 158(c)(2), and not in § 2107(c), is simply variance in language and emphasis, rather than any sign of intent that the deadline be jurisdictional.<sup>239</sup>

In interpreting Rule 8002(a)(1), and all statute-rule hybrid deadlines, the Court should stick to the understanding that an exact specification of days by Congress is a necessary, but not necessarily sufficient, condition to make a hybrid deadline jurisdictional. Any hybrid deadline that falls anywhere short of an exact match between statute and rule should be understood as nonjurisdictional.

*B. The Court Should Clarify Its Approach to Jurisdiction by Applying a Context-Based Analysis to Claim-Processing Rules*

If Rule 8002(a)(1) is a nonjurisdictional, claim-processing rule, and a party fails to comply by missing the deadline, what are the effects? Is a court permitted to consider equitable exceptions, and if so, under which circumstances and in what form? The *Tennial* court, despite having broken new ground on the question of jurisdiction, declined to answer the question of equity, simply stating that the deadline was mandatory.<sup>240</sup> Whether or not the *Tennial* court thought the “mandatory” nature of the deadline totally precluded any consideration of equity, or whether the debtor’s circumstances merely failed to warrant equitable consideration, is unclear.

More broadly, the Court’s zeal in policing jurisdiction basically stops at the proper application of the label itself: the Court has proven unwilling to venture any further by elaborating on if and

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239. In addition to the clear-statement context, the Court has proven increasingly unwilling to treat ambiguities or contingencies in the legislative process as signs of congressional intent. *See, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399–404 (2024) (refusing to recognize the presence of statutory ambiguity as a grant of law-making authority to agencies in light of, among other things, the fact that many statutory ambiguities are unintentional results of a complex legislative process).

240. *In re Tennial*, 978 F.3d at 1028. Interestingly, the court may have gestured toward the role of equity when it stated that “[b]ecause the appeal deadline is mandatory, because *Tennial* missed it, and because *REI* raised the issue in its motion to dismiss, the appeal must be dismissed as dilatory.” *Id.* (emphasis added).

how certain provisions are subject to equitable considerations.<sup>241</sup> Then again, perhaps this unwillingness is not so shocking given the essentially flexible nature of equity.<sup>242</sup> Either way, there is at least some contradiction between the Court's corrective project, which is grounded in a concern for the waste of judicial resources and general inequity caused by its past imprecise jurisdiction precedents,<sup>243</sup> and the Court's unwillingness to set guidelines to assist lower courts in applying equitable exceptions when justice requires. By providing such context for the future claim-processing rules it decides to address, the Court will facilitate its goals of preventing wasted judicial resources, eliminating unfairness to certain categories of litigants, and generally creating a more rationally coherent framework for jurisdiction.

One scholar has discussed this flaw in the Court's jurisprudence in detail: Ziv Schwartz, in his article *Fixing a Failed Jurisdictional Revolution*, offers several prescriptions for the Court's approach to jurisdiction.<sup>244</sup> First, Schwartz suggests an even more rigorous formulation of the clear-statement rule.<sup>245</sup> In his view, the Court should find a clear statement from Congress *only* where Congress uses the word "jurisdiction" or where the provision at issue is contained in the jurisdictional section of a statutory scheme.<sup>246</sup> This would necessarily involve abandoning the part of the framework that originated with *Bowles v. Russell*, namely, that congressional acquiescence in the face of longstanding judicial treatment of a provision as jurisdictional effectively operates as a clear statement.<sup>247</sup> Second, Schwartz offers a three-part framework (or factor test) for the Court to use in formulating guidance to help lower courts in their exercise of equitable discretion.<sup>248</sup>

The first factor involves an inquiry into the prototypical noncompliant litigant and a comparison of the specific noncompliant litigant before the court with that prototypical noncompliant

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241. See, e.g., *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 442 n.4 (2011). *But see* *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 161 (2013) (clarifying that equitable tolling does not apply to a nonjurisdictional administrative appeal deadline).

242. *But see*, e.g., *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 208–11 (2022) (analyzing a provision in the Tax Code to determine the applicability of equitable tolling).

243. See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006).

244. Schwartz, *supra* note 11, at 779–80.

245. *Id.* at 780.

246. *Id.* Under this approach, the Rule 8002(a)(1) deadline would likely still be nonjurisdictional, notwithstanding the fact that it originates in a jurisdiction-conferring provision. See 28 U.S.C. § 158(c)(2).

247. See Schwartz, *supra* note 11, at 781. Although, the Court has only relied on this approach in *Bowles* itself. *Id.*

248. *Id.* at 785.

litigant.<sup>249</sup> According to Schwartz, if the situation of the prototypical noncompliant litigant—relative to the area of law or provision at issue—involves an imbalance of power (e.g., in a criminal case or postconviction relief matter), courts should be able to broaden the effects of equity.<sup>250</sup>

The second factor would look to the nature of the prototypical noncompliance relative to a given provision and then compare the specific instance of noncompliance before the court with that prototype.<sup>251</sup> For example, the prototypical instance of noncompliance with a time-based litigation requirement would, rather obviously, be a failure to file something or take a particular action within a mandated time. However, this inquiry would go further by looking to the root causes of the prototypical noncompliance and the best possible way to remedy it.<sup>252</sup> Thus, if the cause of a litigant's noncompliance with a time-based litigation requirement is the unusual complexity of the requirement, or is attributable to a mistake by an attorney or the court, the litigant might not be in a blameworthy position.<sup>253</sup> Accordingly, the court—through the use of equity—is in the best possible position to remedy it.<sup>254</sup>

Third and finally, Schwartz suggests using case chances as a tie-breaker.<sup>255</sup> Although this sort of merits-based determination might seem strange in the context of a procedural ruling (i.e., whether an instance of noncompliance with a litigation requirement should be excused), it could assist in resolving dilemmas about whether a court should intervene (perhaps by equitably tolling a deadline, or, on the other hand, intervening *sua sponte* to raise noncompliance when the parties have not).<sup>256</sup>

Applying this approach to Rule 8002(a)(1) would likely lead to the conclusion that the circumstances justifying equity are extremely narrow. Because the prototypical noncompliant litigant—likely a chapter seven or chapter thirteen debtor, perhaps facing a stay relief motion or an unfavorable outcome in an adversary proceeding relating to the dischargeability of a debt—is not in a unique position of vulnerability or disadvantage, and because the prototypical form of noncompliance is a result of the litigant's own error, the

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249. *Id.* at 786.

250. *Id.* at 786–87.

251. *Id.* at 788–89.

252. *Id.* at 788.

253. This assumes that the litigant is deserving of equity in the first place based on a power imbalance. *See id.* at 789.

254. *Id.*

255. *Id.* at 789–90.

256. *Id.*

application of tolling should be limited to instances of judicial error or timing complexity resulting from some unique aspect of the bankruptcy process. Furthermore, *sua sponte* raising of noncompliance (assuming another party might otherwise waive or forfeit their right to object to the noncompliance) should not be precluded in the interest of efficiency and promoting the prompt administration of bankruptcy estates.

First, the prototypical noncompliant litigant in the case of Rule 8002(a)(1) would likely be an individual chapter seven or chapter thirteen debtor (or a pair of debtor spouses filing jointly), having filed bankruptcy primarily for consumer or nonbusiness reasons. Filing data,<sup>257</sup> along with a glance back at the facts of the cases on both sides of the Rule 8002(a)(1) circuit split,<sup>258</sup> should make this theory at least plausible. Furthermore, common sense dictates that more sophisticated entities involved in the chapter eleven process are less likely to miss appeal deadlines.<sup>259</sup>

Of course, other provisions in the Bankruptcy Code—unlike a generally applicable appeal deadline—are targeted at certain types of parties and their specific concerns. Take 11 U.S.C. § 363(m), a statutory mootness provision that cloaks good-faith purchasers or lessees of bankruptcy estate assets from having the sale or lease overturned on appeal (as long as the appellant did not receive a stay), which the Court recently held to be a claim-processing rule.<sup>260</sup> In *MOAC*, the noncompliant litigant was a sophisticated entity that leased space to retail tenants at the Minnesota Mall of America.<sup>261</sup> Because § 363 usually implicates sophisticated creditors and commercial entities, often bidding against one another for estate assets,

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257. See *Bankruptcy Filings Rise 11.5 Percent Over Previous Year*, U.S. CTS. (July 31, 2025), <https://www.uscourts.gov/data-news/judiciary-news/2025/07/31/bankruptcy-filings-rise-115-percent-over-previous-year> [<https://perma.cc/CTE9-7NJT>]. Out of the 542,529 bankruptcies filed during the one-year period ending on June 31, 2025, the number of “non-business” bankruptcies, at 519,486, dwarfed the number of “business” bankruptcies, at 23,043. *Id.* Similarly, of the 46,401 individual bankruptcies filed in September of 2025 (which was itself nearly 95% of the total bankruptcies filed that month), nearly 95% were chapter seven or chapter thirteen cases. See *Year-to-Date Individual Chapter 7 Filings Increased 15 Percent Compared to Same Period Last Year*, AM. BANKR. INST. (Oct. 3, 2025), <https://www.abi.org/node/1000879> [<https://perma.cc/EU8G-7DV8>].

258. See cases cited *supra* notes 175–84 (listing cases on both sides of the Rule 8002 circuit split).

259. At the same time, the complexity in chapter eleven cases likely involves the entry of more appealable orders and more interested parties, thus increasing the chances of a missed deadline.

260. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 291–92 (2023).

261. *Id.* at 293. The factual and procedural history is too tortuous to be recounted here.

this provision does not obviously implicate any sort of power imbalance, and the effects of noncompliance should be strict.<sup>262</sup>

However, even if the prototypical noncompliant litigants who fail to comply with the fourteen-day deadline in Rule 8002(a)(1) are comparatively unsophisticated relative to their business-type debtor counterparts, they are still likely not in the sort of disadvantaged position that would warrant a broader scope for equity. Generally, the Bankruptcy Code is neither pro-debtor nor pro-creditor, so there are no disadvantages to the debtor built into the system.<sup>263</sup> Unlike a vulnerable criminal defendant attempting to stave off the state's attempt to deprive him of life or liberty,<sup>264</sup> a tort claimant suing the government, or an employee suing his employer, a debtor has affirmatively chosen to avail himself of the benefits of the Bankruptcy Code.

Second, the prototypical noncompliance in the case of Rule 8002(a)(1) appears to be mere inattentiveness to the deadline.<sup>265</sup> Naturally, and under Schwartz's approach, the specific instance of noncompliance before a court is relevant as well.<sup>266</sup> Thus, if a debtor's situation varies from the typical laxity or minor confusion that causes a missed deadline, perhaps as a result of judicial error, equity may play a role. The nature of the bankruptcy process could potentially produce some interesting scenarios where equity could play a role. For example, consider the usual rule that only final judgments are appealable.<sup>267</sup> In bankruptcy cases, however, the definition of finality is relaxed considerably, such that parties can appeal many "final" orders in the context of a bankruptcy case that do

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262. Notwithstanding the narrow role that equity should otherwise play in the context of § 363(m), the facts in *MOAC* could very well warrant the application of waiver or forfeiture to that provision's mootness protection by the lower court on remand. Transform, the party that argued for a jurisdictional reading of § 363(m), may have deliberately misrepresented its litigation strategy. *Id.* at 293–94.

263. See, e.g., CHARLES JORDAN TABB, *LAW OF BANKRUPTCY* 2–3 (4th ed. 2016) ("Bankruptcy laws in the United States have evolved considerably since the first federal bankruptcy law was passed in 1800. The term 'bankruptcy' at that time had a very specific technical meaning. A bankruptcy law was one intended principally for the relief of creditors . . . . An 'insolvency' law, by contrast, was conceived as a debtor relief law . . . . Today in the United States the distinction between the two terms has largely evaporated. The term 'bankruptcy' has come to encompass both the notions of a remedy for creditors and of debtor relief. The current Bankruptcy Code encompasses a wide spectrum of possible measures."). Some areas of the Bankruptcy Code are even concerned with third parties. See, e.g., 11 U.S.C. §§ 363(m), 364(e).

264. See Schwartz, *supra* note 11, at 791 (discussing how the context-based approach would apply hypothetically to *Bowles*).

265. See cases cited *supra* notes 175–84.

266. Schwartz, *supra* note 11, at 789.

267. See 28 U.S.C. § 1291.

not actually resolve the case itself.<sup>268</sup> When this rule interacts with the truncated appeal deadline, confusion could potentially result, thus broadening the scope of equitable effects.

In conclusion, noncompliance with the Rule 8002(a)(1) appeal deadline should only be excused by equitable tolling in very narrow circumstances, pertaining to judicial error or possibly time-related complexity unique to the bankruptcy process. Otherwise, courts should strictly enforce the deadline as mandatory and raise non-compliance *sua sponte* when a party otherwise waives or forfeits their right to object to an untimely appeal. There is no one stereotypical noncompliant litigant in the bankruptcy context, and the Bankruptcy Code's emphasis on finality and predictability weigh in favor of a mandatory appeal deadline.

#### IV. CONCLUSION

First, the Court should address the circuit split on Rule 8002, and hold that the rule is nonjurisdictional in light of (a) a standard clear-statement analysis of § 158(c)(2), the statute that lays out the bankruptcy appeal process and delegates deadline-setting authority to the rulemaker, and (b) an analogy between Rule 8002(a)(1) and the statute-rule hybrid deadlines at issue in *Bowles* and *Hamer*.

Second, the Court should further clarify its approach to jurisdiction by applying a context-sensitive analysis to Rule 8002(a)(1) and the other claim-processing rules it considers in the future. This analysis would serve to instruct the lower courts on the scope of any equitable effects that might apply to excuse noncompliance with a particular litigation requirement, and further the Court's goal of making the law of jurisdiction more rational and fair.

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268. See 28 U.S.C. § 158(a)(1), (3) (conferring jurisdiction on the district courts to hear appeals from "final judgments, orders, and decrees . . . entered in cases and proceedings" (emphasis added)); *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015) ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." (quoting *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006))).



# When a Navy SEAL and a Law Student Talk About War Dogs

Cassandra Novakis\*

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## I. INTRODUCTION

Sergeant Stubby was a stray little brindle mutt<sup>1</sup> with a stubby tail that wandered into the company of Private J. Robert Conroy while Conroy was training for combat.<sup>2</sup> Stubby and Private Conroy became best friends, and Stubby would become the mascot of the 102nd Infantry, Twenty-Sixth Yankee Division as he learned “the bugle calls, the drills, and even a modified dog salute as he put his right paw on his right eyebrow when a salute was executed by his fellow soldiers.”<sup>3</sup> Stubby was smuggled across the sea by Private Conroy when he was deployed to France.<sup>4</sup> The two became inseparable, and the Yankee Division commanding officer allowed Stubby to stay as he was impressed with Stubby’s salutes and positive impact on the morale of the soldiers.<sup>5</sup>

Stubby would go on to serve in seventeen battles, acquiring the special skill of locating and alerting his human heroes to wounded soldiers who needed help.<sup>6</sup> Stubby sustained numerous injuries during his service and was treated at a field hospital, much like the human warriors he fought beside.<sup>7</sup> His bravery and perseverance

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1. A brindle mutt is a multi-colored mixed breed dog. See Ashley Flaws & Maddie Topliff, *15 Brindle Dog Breeds Bringing Stripes Back in Style*, DAILY PAWS (Oct. 5, 2025), <https://www.dailypaws.com/living-with-pets/pet-compatibility/brindle-dog-breeds> (on file with the Duquesne Law Review).

2. BRONWEN DICKEY, PIT BULL: THE BATTLE OVER THE AMERICAN ICON 80–82 (2016); *Stubby*, SMITHSONIAN, [https://www.si.edu/object/nmah\\_439710](https://www.si.edu/object/nmah_439710) (on file with the Duquesne Law Review) (last visited Nov. 1, 2025).

3. *Stubby*, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*; Katie Lange, *War Dogs: How WWI Led to the Military Working Dog Program*, U.S. DEPT OF WAR: DOD NEWS (Sep. 5, 2024), <https://www.war.gov/News/Feature-Stories/Story/Article/3895789/war-dogs-how-wwi-led-to-the-military-working-dog-program/> [https://perma.cc/5WS7-A557]. As of this writing, the official designation by Congress of this Department is the Department of Defense. 44 U.S.C. § 3005. This Article retains the designation of the Department of Defense to ensure consistency and clarity across referenced

made him a war hero, and he received his own gas mask, uniform, and awards for his incredible role in protecting the Yankee Division soldiers on the front lines.<sup>8</sup> Sergeant Stubby returned to the United States, where he met three presidents, participated in patriotic parades, and was revered by all for his exceptional bravery alongside the Yankee Division.<sup>9</sup>

Military working dogs (MWDs) have historically served a vital role in national defense, and Sergeant Stubby is but one example of many war dog heroes that have bravely sacrificed their time, skills, and lives for this nation.<sup>10</sup> MWDs, however, have not always been able to return home, and even when they do, there are hurdles to their adoption or continued care due to insufficient legislation protecting MWDs after service.<sup>11</sup> This Article begins by discussing the relevance and urgency of addressing the status and neglect of MWDs.<sup>12</sup> The Article then provides an abbreviated history of MWDs in service,<sup>13</sup> followed by a legislative analysis of statutes and

materials, despite the Trump Administration's change to the name of the Department. Sara Cook, Ed O'Keefe & Joe Walsh, *Trump Signs Executive Order Renaming Department of Defense to Department of War*, CBS NEWS (Sep. 5, 2025, at 17:28 ET), <https://www.cbsnews.com/news/trump-department-of-war-defense/> [<https://perma.cc/S2SG-Q6VV>]; Bernd Debusmann Jr., *Trump Rebrands Department of Defense as Department of War*, BBC (Sep. 5, 2025), <https://www.bbc.com/news/articles/cgr9r4qr0ppo> [<https://perma.cc/WJ92-8SCF>].

8. DICKEY, *supra* note 2, at 80–82. Stubby received a special medal from General John Pershing for his bravery, and Private Conroy affixed many of his own medals on Stubby's uniform. *Id.*

9. *Id.* at 82.

10. See discussion *infra* Section II.A. The author asked Mike Ritland, a retired U.S. Navy SEAL and the founder of Warrior Dog Foundation, how many lives MWDs have saved post-9/11. Telephone Interview with Mike Ritland, U.S. Navy SEAL and Founder of Warrior Dog Foundation (Nov. 12, 2024); see also *infra* text accompanying notes 291–92. Ritland guessed, on the low end, “thousands, but probably tens of thousands. It becomes impossible to quantify if the dog captures and neutralizes a high-value target . . . .” Telephone Interview with Mike Ritland, *supra*. Ritland refers to, for example, a dog that takes out a top bomb maker, or IED facilitator: “When you’re dismantling those networks, we don’t know the ripple effect. Multiply that times thousands of dogs over a twenty-year period—who knows.” *Id.* Ritland noted that it is “remarkable” how many lives MWDs have saved, and it speaks to how important they are. *Id.* An “IED” is an improvised explosive device. THE NAT’L ACADS. & U.S. DEP’T OF HOMELAND SEC., IED ATTACK: IMPROVISED EXPLOSIVE DEVICES 1 (2015), [https://www.dhs.gov/sites/default/files/publications/prep\\_ied\\_fact\\_sheet.pdf](https://www.dhs.gov/sites/default/files/publications/prep_ied_fact_sheet.pdf) [<https://perma.cc/UHU3-PULF>]. The Department of Homeland Security specifically states that IEDs are hard to detect and that “[e]xplosives-detection dogs, trained to detect and locate chemical explosives, are used in many security scenarios.” *Id.* at 2.

11. See Mackenzie Landa, *From War Dogs to Service Dogs: The Retirement and Adoption of Military Working Dogs*, 24 ANIMAL L. 39, 46–49 (2018); Sarah D. Cruse, *Military Working Dogs: Classification and Treatment in the U.S. Armed Forces*, 21 ANIMAL L. 249, 283–84 (2015); Michael J. Kranzler, Student Note, *Don’t Let Slip the Dogs of War: An Argument for Reclassifying Military Working Dogs as “Canine Members of the Armed Forces,”* 4 U. MIA. NAT’L SEC. & ARMED CONFLICT L. REV. 268, 291–94 (2013).

12. See discussion *infra* Section I.A.

13. See discussion *infra* Section II.A.

proposed legislation that implicate MWD status.<sup>14</sup> Next, the Article surveys current efforts to address the status and neglect of MWDs,<sup>15</sup> followed by a three-part proposal<sup>16</sup> that seeks to reclassify MWDs,<sup>17</sup> create a federally funded retirement program,<sup>18</sup> and encourage the federal government to act on this issue<sup>19</sup> to promote MWDs' protection, honor, and dignity after service.<sup>20</sup>

#### A. *Relevance: In The News*

Reports of postservice neglect of MWDs are both recent and disturbing. In May 2024, the Pennsylvania Society for the Prevention of Cruelty to Animals (PSPCA) rescued twenty-eight dogs from an animal rescue organization that claimed to nurture and provide for retired working dogs, including MWDs.<sup>21</sup> Unfortunately, the dogs were found covered in their own feces and blood, housed in kennels in unclean and dangerous conditions.<sup>22</sup> The owner of this supposed rescue organization pled guilty to animal cruelty charges and lost her kennel license.<sup>23</sup> This neglect could have been avoided had there been greater precaution and care exercised by the federal government in welcoming home these four-legged heroes.<sup>24</sup>

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14. See discussion *infra* Section II.B.

15. See discussion *infra* Section III.B.

16. See discussion *infra* Part IV.

17. See discussion *infra* Section IV.C.

18. See discussion *infra* Section IV.D.

19. See discussion *infra* Section IV.B.

20. This Article acknowledges the tangentially related and equally important issues that arise with treating animals as property and compelling their service by exploiting them to work without their consent. However, this Article's scope is far narrower and explores one issue of many in the pursuit of advocacy for animal welfare. For more information on this topic, see generally David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010) (proposing a new legal classification for animals as living property). See also Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS L. REV. 721, 723 (1994).

21. Pennsylvania SPCA, FACEBOOK (May 24, 2024), <https://www.facebook.com/share/p/xm9oEWyufbdGdJ6B/> (on file with the Duquesne Law Review).

22. Hayden Mitman, *PSPCA Seeks Homes for Neglected Military or Government Working Dogs*, NBC PHILA. (May 28, 2024, at 17:55 ET), <https://www.nbcphiladelphia.com/clear-the-shelters/pspc-seeks-homes-for-neglected-military-or-government-working-dogs/3869845/> (on file with the Duquesne Law Review).

23. *Id.*

24. See discussion *infra* Part IV.

## II. HISTORY OF MILITARY WORKING DOGS

A. *A Brief History*

During the Civil War, MWDs boosted morale, as evidenced by mascots Jack of the 102nd Pennsylvania Volunteers, Old Harvey of the 104th Ohio Volunteer Infantry, and Sallie of the Eleventh Pennsylvania at Gettysburg.<sup>25</sup> In foreign affairs, MWDs served the United States unofficially for decades—including in World War I—until official recognition in 1942 with the creation of the Dogs for Defense.<sup>26</sup> Dogs for Defense was unofficially called the “K-9 Corps” and was created by a private organization that sought the recruitment of the public’s pet dogs to join the Corps as an expression of patriotism.<sup>27</sup> “Donating” one’s dog got that individual a patriotic certificate, and the dog was sent to training to assess his capabilities.<sup>28</sup> Breeders caught on to the kind of breed, demeanor, behavior, and size that the military sought in the hopes of breeding dogs for the military.<sup>29</sup> Despite the military beginning to train its own dogs, Dogs for Defense contributed the majority of the dogs that served in World War II.<sup>30</sup> MWDs would go on to serve in the Korean War and again in Vietnam.<sup>31</sup>

In Vietnam, around 4,000 MWDs served; however, because the Department of Defense (DoD) had classified MWDs as “equipment,” the dogs “were left behind—transferred to the army of South Vietnam, systematically euthanized, or simply abandoned.”<sup>32</sup> Of those 4,000 MWDs that served, it is estimated that only 200 MWDs returned home.<sup>33</sup>

MWDs were also deployed to serve in Iraq and Afghanistan, working “to detect explosives . . . find illegal drugs . . . search for

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25. DICKEY, *supra* note 2, at 43–45, 79.

26. Ranny Green, *Military Working Dogs Through History*, AM. KENNEL CLUB: EXPERT ADVICE (May 26, 2022), <https://www.akc.org/expert-advice/news/war-dogs-military-history/> [<https://perma.cc/TQT2-W7FQ>].

27. *Id.*; Lange, *supra* note 7.

28. Green, *supra* note 26.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Dogs of the Vietnam War*, VIETNAM VETERANS MEM’L FUND, <https://www.vvmf.org/topics/Dogs-of-the-Vietnam-War/> [<https://perma.cc/RPK4-SFWJ>] (last visited Nov. 1, 2025) (“When the war ended, many handlers wanted to bring their dogs home to America. In a decision that remains controversial to this day, the Department of Defense classified the dogs as equipment, and most were left behind . . .”).

33. *Id.*

missing comrades, or target enemy combatants.”<sup>34</sup> Despite many reports to the contrary, the DoD and the Pentagon have confirmed that those MWDs were returned home when the military pulled out of Afghanistan in 2021.<sup>35</sup>

### B. *A Legislative History*

Until 2000, MWDs were considered “excess equipment” under federal law,<sup>36</sup> which meant that the federal government did not have an obligation to pay for the return, transportation, continued veterinary care, adoption, or rehabilitation of MWDs.<sup>37</sup> MWDs were the equivalent of guns, ammunition, and other supplies the military used overseas.<sup>38</sup>

After the Vietnam War, canine handlers were outraged by the lack of effort made by the DoD to bring MWDs home.<sup>39</sup> Former handlers even offered to pay for the costs and expenses of having their dogs returned to the States, but those requests were refused by the DoD.<sup>40</sup> One veteran, Mark Smoot, vividly recalls the moment he had to say goodbye to his canine, “Crazy Jake”:

34. Alan Taylor, *Afghanistan: Dogs of War*, THE ATLANTIC (June 3, 2014), <https://www.theatlantic.com/photo/2014/06/afghanistan-dogs-of-war/100750/> [https://perma.cc/F4P9-3ANN].

35. Virginia Chamlee, *Military Dogs Weren't Left Behind in Afghanistan, Pentagon Says*, PEOPLE (Aug. 31, 2021, at 12:53 ET), <https://people.com/politics/pentagon-says-military-dogs-not-left-behind-in-afghanistan/> [https://perma.cc/NW46-CR98]. Eric Pahon, a Defense spokesman, stated that photos of dogs in cages near airplanes “were animals under the care of the Kabul Small Animal Rescue, not dogs under the care of the U.S. military.” *Id.* But see Angelo Fichera, *What We Know About the Claims of Military Dogs Left in Kabul*, FACTCHECK.ORG (Sep. 1, 2021) <https://www.factcheck.org/2021/09/what-we-know-about-the-claims-of-military-dogs-left-in-kabul/> [https://perma.cc/AM35-WNJX] (stating that some *contract* working dogs’ fates were unknown, as they are not in the care of the U.S. military); Donald Trump Jr. (@DonaldJTrumpJr), X (Aug. 31, 2021, at 12:42 ET), <https://twitter.com/DonaldJTrumpJr/status/1432745544393367552> (on file with the Duquesne Law Review) (alleging the Biden Administration left service dogs in Afghanistan).

36. 10 U.S.C. § 153. But see *infra* text accompanying note 227.

37. Cruse, *supra* note 11, at 251–52; see also COMMANDANT OF THE MARINE CORPS, DEP’T OF DEF., MARINE CORPS ORDER 5585.5A, MARINE CORPS MILITARY WORKING DOG (MWD) MANUAL 4-1 (2020), <https://www.marines.mil/Portals/1/Publications/MCO%205585.5A.pdf?ver=2020-04-07-105814-547> (on file with the Duquesne Law Review) (“Like other highly specialized *equipment*, MWDs complement and enhance the command capabilities and enable commanders to perform their mission more effectively with significant savings of manpower, time, and money.” (emphasis added)).

38. Cruse, *supra* note 11, at 251.

39. *Dogs of the Vietnam War*, *supra* note 32; *In Conversation with... Vietnam Dog Handler, Mark Smoot*, THE U.S. WAR DOGS ASS’N [hereinafter *Conversation with Mark Smoot*], <https://www.uswardogs.org/in-conversation-with-vietnam-dog-handler-mark-smoot> [https://perma.cc/4FD2-D87T] (last visited Nov. 1, 2025).

40. Green, *supra* note 26; see *Conversation with Mark Smoot*, *supra* note 39.

As a nineteen-year-old going to war, I saw some terrible things, but when I think back, seeing him sitting there in his kennel waiting for me as I went to see him for the last time, absolutely kills me. I have a picture of that exact moment and I can't look at it, even today, without my eyes filling with tears. It breaks my heart to think that my government wouldn't let Jake come home with me, even though it was near the end of the war.<sup>41</sup>

In response to the extraordinary failure of the federal government to honor these dogs after service, House Bill 5314 (Robby's Law) was passed by Congress, and President Clinton signed it into law in November of 2000.<sup>42</sup> The purpose of Robby's Law was "to facilitate the adoption of retired military working dogs by law enforcement agencies, former handlers of these dogs, and other persons capable of caring for these dogs."<sup>43</sup> Robby's Law has decreased euthanasia rates of MWDs after service, and subsequent amendments promote reunification between former handlers and their canines.<sup>44</sup> Although Robby's Law as it currently stands does not have language that changes MWDs from "equipment" to a higher status,<sup>45</sup> it was nonetheless fervently opposed by the DoD for fear the law would increase the DoD's liability or be too burdensome to implement.<sup>46</sup>

Since 2000, Robby's Law has been strengthened by several amendments.<sup>47</sup> In 2006, section 599 of the National Defense Authorization Act for Fiscal Year 2006 amended Robby's Law and enumerated three circumstances under which a dog may be available for adoption.<sup>48</sup> The statute provided for adoption:

- (1) At the end of the dog's useful working life.
- (2) Before the end of the dog's useful working life, if such Secretary, in such Secretary's discretion, determines that unusual or extraordinary circumstances justify making the dog available for adoption before that time.

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41. *Conversation with Mark Smoot, supra* note 39.

42. Robby's Law, Pub. L. No. 106-446, 114 Stat. 1932 (2000) (codified as amended at 10 U.S.C. § 2583).

43. 114 Stat. at 1932.

44. Kranzler, *supra* note 11, at 285; Cruse, *supra* note 11, at 263.

45. *See* 10 U.S.C. § 2583(a)–(i).

46. Cruse, *supra* note 11, at 260–61.

47. Landa, *supra* note 11, at 45.

48. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 599(b)(1)–(3), 119 Stat. 3136, 3284 (codified as amended at 10 U.S.C. § 2583(a)(1)–(3)).

(3) When the dog is otherwise excess to the needs of such military department.<sup>49</sup>

This amendment sought to keep handlers and their MWDs together after service.<sup>50</sup> For example, it was not uncommon for a handler to sustain an injury and have to return home from service; however, that handler may have seen her request to adopt her MWD denied because the MWD was not at the end of his useful life.<sup>51</sup>

Robby's Law was amended again in 2011 through section 351 of the National Defense Authorization Act for Fiscal Year 2012.<sup>52</sup> This amendment sought to define what "unusual or extraordinary circumstances" meant, as drafted in the 2006 amendment.<sup>53</sup> Section 351 is titled "Adoption of Military Working Dog by Family of Deceased or Seriously Wounded Member of the Armed Forces Who Was the Dog's Handler."<sup>54</sup> The amendment allowed for the adoption of the MWD by "a parent, child, spouse, or sibling of the deceased handler" instead of limiting adoption availability to the handler only.<sup>55</sup> Such language was necessary after families struggled to adopt MWDs that their wounded or deceased family members worked with due to the narrow adoption provisions of the 2006 amendment.<sup>56</sup>

49. *Id.*

50. Cruse, *supra* note 11, at 261–62.

51. See *id.* Another example of a handler having to wait to adopt her MWD is that of Marine Corps Sgt. Jenna L. Cauble. Caitlin Brink, *Face of Defense: Marine Adopts, Reunites with Military Working Dog*, U.S. DEPT OF WAR (Apr. 1, 2021), <https://www.war.gov/News/Feature-Stories/Story/Article/2557396/face-of-defense-marine-adopts-reunites-with-military-working-dog/> [https://perma.cc/6CTP-DJAJ]. When Cauble heard her MWD, Bbutler, was being retired, she was excited. *Id.* "When I left Okinawa, I left my adoption papers for when the time came for him to retire." *Id.* She recalled the difficulties of bringing him home because of his declining health but credits a nonprofit with helping to reunite her with Bbutler. *Id.* "They got Bbutler back to the states and drove him personally across the country to my house here in Havelock, N.C." *Id.* She said that she never realized how close their bond was: "I always thought about him and kept him close to my heart since I left Japan in 2017. I hoped I would see him again and be able to give him a good life." *Id.*

52. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 351, 125 Stat. 1298, 1375–76 (2011) (codified as amended at 10 U.S.C. § 2583(a)(2), (c)).

53. *Id.* § 351(1), 125 Stat. at 1375; see § 599(b)(2), 119 Stat. at 3284 (requiring "unusual or extraordinary circumstances" as justification for adopting a MWD).

54. § 351, 125 Stat. at 1375.

55. *Id.* § 351(2), 125 Stat. at 1375–76.

56. See Cruse, *supra* note 11, at 262. Such was the case for the heroic MWD Lex, that stayed by his handler Dustin's side as he died in combat. *Id.* Dustin's family fought to adopt Lex as they mourned their son, and they even sought the help of John Burnam, a Veteran Dog Scout Handler, to petition the government to permit this adoption. Paula Pedene, *In Honor of Jim Frost, a Profile on Lex the Military Working Dog from the 2008 Phoenix Veterans Day Parade*, HONORING AM.'S VETERANS (May 12, 2022), <https://honoringamericasveterans.org/in-honor-of-jim-frost-a-profile-on-lex-the-military-working-dog-from-the-2008-phoenix-veterans-day-parade/> [https://perma.cc/G45B-EQQD]. Lex was the first MWD to be



In 2013, Robby's Law was further amended to add provisions on MWD retirement.<sup>57</sup> This amendment provided that the secretary of the concerned military department had the discretion to transfer a MWD to either "the 341st Training Squadron; or . . . to another location for adoption under this section."<sup>58</sup> A MWD could only be transferred for retirement if the secretary determined that he should retire, and "no suitable adoption . . . [was] available at the military facility where the dog . . . [was] located."<sup>59</sup> Additionally, the amendment created a new subsection under Robby's Law titled "Military working dogs: veterinary care for retired military working dogs."<sup>60</sup> This new subsection gave the Secretary of Defense the authority to "establish and maintain a system to provide for the veterinary care of retired" MWDs; however, the subsection stated that "[n]o funds may be provided by the Federal Government for this purpose."<sup>61</sup> The Secretary of Defense was also given the authority to set the standard of care that the MWDs' caretakers were required to meet.<sup>62</sup>

Robby's Law was again amended in 2015 to further address the transfer and adoption of MWDs.<sup>63</sup> The amendment recommended a priority of adoptions by giving first priority to "former handlers of the animal," secondary priority to "other persons capable of humanely caring for the animal," and tertiary priority to "law enforcement agencies."<sup>64</sup> The amendment is also significant as it allowed a wounded handler to immediately adopt his MWD.<sup>65</sup> If the handler is killed or dies from wounds sustained in action, then the MWD is made available for adoption only to that handler's family.<sup>66</sup>

retired before the end of his working life, and he was also the first MWD to be adopted by a family of a fallen soldier. *Id.*

57. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 371, 126 Stat. 1632, 1706 (codified as amended at 10 U.S.C. §§ 2583(f), 994).

58. *Id.* sec. 371(a)(2), § 2583(f)(1)–(2), 126 Stat. at 1706. The 341st Training Squadron is the United States Air Force's 37th Training Wing based in San Antonio, Texas, that houses and trains MWDs for military service. See *341st Training Squadron*, 37TH TRAINING WING, <https://www.37trw.af.mil/Units/37th-Training-Group/341st-Training-Squadron/> (on file with the Duquesne Law Review) (last visited Nov. 1, 2025).

59. Sec. 371(a)(2), § 2583(f)(1)–(2), 126 Stat. at 1706.

60. *Id.* sec. 371(b)(1), § 994, 126 Stat. at 1706.

61. *Id.* sec. 371(b)(1), § 994(a), 126 Stat. at 1706.

62. *Id.* sec. 371(b)(1), § 994(c), 126 Stat. at 1706.

63. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 342, 129 Stat. 726, 793–94 (2015) (codified as amended at 10 U.S.C. § 2583(a)–(i)).

64. *Id.* sec. 342(b), § 2583(c)(1)(A)–(C), 129 Stat. at 793.

65. *Id.* sec. 342(b), § 2583(c)(2), 129 Stat. at 793.

66. *Id.*; see Michelle Reif, *Bringing Part of Josh Home: MWD of Fallen Handler Adopted by Family*, MARINES (Feb. 29, 2016), <https://www.marines.mil/News/News-Display/Article/682135/bringing-part-of-josh-home-mwd-of-fallen-handler-adopted-by-family> (on file with the Duquesne Law Review) ("For the family of fallen Marine Sgt. Joshua Ashley, adopting MWD Sirius into their family was like reuniting with a part of their son.").

Additionally, the amendment made it an obligation for the secretary of the concerned military department to transport a retiring MWD to the Veterinary Facility at Lackland Air Force Base in Texas.<sup>67</sup> Prior to this amendment, it was merely a consideration.<sup>68</sup> The amendment noted that this provision will not apply where the dog is adopted by a U.S. citizen or service member who is living abroad, or if the dog is within the U.S. and there is appropriate adoption available where the dog is located.<sup>69</sup> In an effort to address the problem of multiple handlers, the amendment gave the secretary of the concerned military department discretion to decide which handler gets priority over another to adopt a MWD, basing the decision on what is in the dog's best interest after consultation with the kennel master where the dog was last staying.<sup>70</sup>

Critically, in 2018, Robby's Law was amended to require that the secretary of the concerned military department transport a MWD back to the United States at the expense of the government.<sup>71</sup> This meant that the adopter no longer bore the costs of transporting a MWD back home; instead, these costs fell upon the DoD.<sup>72</sup>

Starting in 2020, Robby's Law began to account for the ongoing veterinary care of MWDs after service at Lackland Air Force Base in Texas.<sup>73</sup> The amendment required that both MWDs and contract working dogs (CWDs) receive a "full veterinary screening . . . and necessary veterinary care" after their "service" lives have ended.<sup>74</sup>

In the midst of amending and strengthening Robby's Law for MWDs, there have been minimal changes in the law to reflect the

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67. § 342(c), 129 Stat. at 793; *see* 10 U.S.C. § 2583(f)(1)(A).

68. § 342(c), 129 Stat. at 793.

69. *Id.* sec. 342(d)(4), § 2583(f)(2)(A)–(B), 129 Stat. at 793–94.

70. *Id.* sec. 342(e)(2), § 2583(g)(1)–(2), 129 Stat. at 794.

71. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, sec. 352, § 2583(f)(3)(A), 132 Stat. 1635, 1731 (2018) (codified as amended at 10 U.S.C. § 2583(f)).

72. *Id.*

73. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, sec. 372(b)(2), § 2583(f)(2)(A)–(B), 133 Stat. 1198, 1330–31 (2019) (codified as amended at 10 U.S.C. § 2583(g)–(i)).

74. *Id.* sec. 372(b)(2), § 2583(f)(1)(B), (2)(A)–(B), 133 Stat. at 1330–31. This amendment uses more humane language, as well, by using the words "service life" as opposed to "useful life" to describe the end of the dog's working career. *Id.*; *see* 10 U.S.C. § 2583(a)(1). Any ongoing medical treatment and care, however, falls upon the adopter. *See infra* Section IV.D. CWDs differ from MWDs as CWDs are not usually paired with a handler, and they are not owned by the government. *Operation Support Our Troops*, GUARDIANS OF RESCUE, <https://guardiansofrescue.org/operation-support-troops/> [<https://perma.cc/AY9A-BWSR>] (last visited Nov. 1, 2024). Pursuant to 10 U.S.C. § 2387, a contract working dog is a dog that "(1) performs a service for the Department of Defense pursuant to a contract; and (2) . . . is trained and kenneled by an entity that provides such a dog pursuant to such a contract." 10 U.S.C. § 2387(c)(1)–(2).

status and service of CWDs.<sup>75</sup> However, in December 2016, Congress passed a law that provided for the return of CWDs to the 341st Training Squadron after their “service li[ves],”<sup>76</sup> and, most importantly, reclassified CWDs as military animals available for adoption in conformance with Robby’s Law.<sup>77</sup>

The most recent amendment to Robby’s Law occurred in 2021, with the passing of a provision that aimed to both improve and clarify certain MWD legislation from prior years.<sup>78</sup> Specifically, Congress added a provision that explicitly prohibited mandatory costs for bringing MWDs back to the States<sup>79</sup> and amended the National Defense Authorization Act for Fiscal Year 2017 to require research concerned with the leading causes of morbidity and mortality for MWDs in combat.<sup>80</sup>

### III. MWDs TODAY

#### A. DoD MWD Program

The DoD MWD Program is run pursuant to DoD Directive 5200.31E.<sup>81</sup> The Directive details the purposes of the program, as well as ways in which MWDs should not be used (such as for interrogation purposes).<sup>82</sup> Regarding the DoD’s budget, a review of the 155-page Fiscal Year 2025 Budget Request revealed that the words “MWDs,” “dog,” “handler,” “animal,” and “canine” do not appear.<sup>83</sup>

75. Fichera, *supra* note 35.

76. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, sec. 342(a)(1), § 2410r(a), 130 Stat. 2000, 2082 (2016) (codified as amended at 10 U.S.C. § 2387); see *341st Training Squadron*, *supra* note 58.

77. § 342(b), 130 Stat. at 2082 (codified as amended at 10 U.S.C. § 2583(i)(1)).

78. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 373, 135 Stat. 1541, 1667 (2021) (codified as amended at 10 U.S.C. § 2583(d)).

79. *Id.* § 373(a), 135 Stat. at 1667.

80. *Id.* § 373(b)(2), 135 Stat. at 1667.

81. U.S. DEP’T OF DEF., DIRECTIVE NO. 5200.31E, DoD MILITARY WORKING DOG (MWD) PROGRAM 1 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/520031e.pdf> (on file with the Duquesne Law Review). The Directive designated the Secretary of the Air Force as the DoD Executive Agent for MWD Program matters. *Id.*; *DoW Military Working Dog (MWD) Program*, DEP’T OF DEF.: EXEC. AGENTS (Oct. 10, 2025, at 08:03 ET), <https://dod-executiveagent.osd.mil/Agents/ViewAgent.aspx?agentId=71> (on file with the Duquesne Law Review).

82. U.S. DEP’T OF DEF., *supra* note 81, at 2.

83. See OFF. OF THE UNDER SEC’Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFFICER, U.S. DEP’T OF DEF., DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2025 BUDGET REQUEST (2024) [hereinafter DEFENSE BUDGET OVERVIEW], [https://comptroller.war.gov/Portals/45/Documents/defbudget/FY2025/FY2025\\_Budget\\_Request\\_Overview\\_Book.pdf](https://comptroller.war.gov/Portals/45/Documents/defbudget/FY2025/FY2025_Budget_Request_Overview_Book.pdf) [https://perma.cc/49NA-XG58]. This is likely the result of MWDs being classified as equipment. See 10 U.S.C. § 2583.

As such, it is difficult to ascertain the amount of funding the DoD MWD Canine Program receives annually to operate.<sup>84</sup>

*B. The Current Efforts to Mitigate Postservice Neglect of MWDs*

*1. The U.S. Government Accountability Office Investigation*

The U.S. Government Accountability Office (GAO) identified eighteen issues that are of paramount importance to the health, safety, and wellbeing of working dogs.<sup>85</sup> The study, conducted in 2022, resulted in a recommendation to several federal agencies, including the DoD, to implement the GAO's policy revision suggestions.<sup>86</sup> Two of the recognized issues included "medical needs after retirement" and retirement generally.<sup>87</sup> In November of 2024, the DoD updated the GAO, informing the agency that it would be revising Directive 5200.31E to reflect the recommendations by July of 2025.<sup>88</sup> President Biden signed into law the Working Dog Health and Welfare Act of 2023, which requires "agencies with working dog programs to implement the recommendations of the GAO relating to the health and welfare of working dogs, and for other purposes."<sup>89</sup> The House proposed a related bill, but it has not become law.<sup>90</sup>

Although the DoD concurred with the GAO's findings, it initially lacked a timeline for implementation because the DoD did not find that there were any "clear budget implication[s]" and so was "not required to provide a timeline for full implementation."<sup>91</sup> However, in April of 2025, the Department of the Air Force, as the DoD

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84. See DEFENSE BUDGET OVERVIEW, *supra* note 83.

85. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-104489, WORKING DOGS: FEDERAL AGENCIES NEED TO BETTER ADDRESS HEALTH AND WELFARE 3–4 (2022), <https://www.gao.gov/assets/gao-23-104489.pdf> (on file with the Duquesne Law Review).

86. *Id.* at ii, 38–39, 75.

87. *Id.* at ii, 16–17. The GAO does not mandate the creation of a federally funded retirement program for MWDs. See *id.* at 32. The GAO often illustrates the issues surrounding working dog retirement in the frame of CWDs as well, providing a less than clear depiction of what would be acceptable for MWD retirement and postservice veterinary care. See *id.* Additionally, under Robby's Law, MWDs have an adoption priority established. 10 U.S.C. § 2583(c).

88. *Working Dogs: Federal Agencies Need to Better Address Health and Welfare*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 19, 2022), <https://www.gao.gov/products/gao-23-104489> [<https://perma.cc/Y7L3-2NF6>].

89. Working Dog Health and Welfare Act of 2023, Pub. L. No. 118-195, 138 Stat. 2669, 2669 (2024). Though exciting that this extension of enforcement of the GAO findings has become law, it does not guarantee a federally funded MWD Retirement Program. See *id.* § 2(e), 138 Stat. at 2670; *infra* Section IV.D.

90. Working Dog Health and Welfare Act of 2024, H.R. 6950, 118th Cong. (2024). The bill was referred to the Committee on Oversight and Accountability, as well as to the Committee on Foreign Affairs. H.R. 6950.

91. See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE RESPONSE TO THE GOOD ACCOUNT OBLIGATION IN GOVERNMENT ACT (GAO-IG ACT) GAO RECOMMENDATIONS 1, 184, 251 (2024).

Executive Agent for the MWD Program, issued guidance memorandum changes that specifically address health and welfare issues concerning MWDs.<sup>92</sup> Yet, even with CWD provisions and kennel standards added, none of the changes support MWD retirement, and the “Disposition of Trained, Failure to Qualify and Medically Eliminated MWDs” provisions remain the same with euthanasia as the “last resort” when all else fails.<sup>93</sup>

## 2. *The Efforts for Recognition Through Legislation*

Congress introduced legislation to create mechanisms for the celebration and recognition of canine heroes. A House Resolution was introduced in 2010 that aimed to recognize the “significant contributions of the Military Working Dog Program” to the Armed Forces, as well as to express support for the adoption and continued care of MWDs once service is complete.<sup>94</sup> The House agreed to the resolution in 2010, but no further action has been taken.<sup>95</sup>

A House Resolution introduced in 2012 expressed “support for the designation of March 13 as ‘K-9 Veterans Day’, in order to recognize the service and improve the treatment of military working dogs.”<sup>96</sup> The resolution lists the many remarkable ways that MWDs have promoted the welfare of the United States, naming Sergeant Stubby and Chips<sup>97</sup> specifically, while acknowledging that “K-9 veterans

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92. DEP’T OF THE AIR FORCE, DEPARTMENT OF THE AIR FORCE GUIDANCE MEMORANDUM TO DAFI 31-126, *DoD MILITARY WORKING DOG (MWD) PROGRAM* 1 (2025). The guidance memorandum added numerous sections addressing CWDs. *Id.* at 2–4. It also added “Attachment 3,” named “MWD Health and Welfare,” which incorporates the eighteen GAO recommendations. *Id.* at 4–6. Lastly, it created “Attachment 4,” which specifically addresses MWD welfare regarding mental and physical enrichment, welfare indicators, and kennel standards. *Id.* at 6–20. The GAO’s website now reflects the DoD as having implemented the recommended changes based upon the issuance of the April memorandum. *Working Dogs: Federal Agencies Need to Better Address Health and Welfare*, U.S. GOV’T ACCOUNTABILITY OFF. (Oct. 19, 2022), <https://www.gao.gov/products/gao-23-104489> [<https://perma.cc/P87J-4RE4>].

93. DEP’T OF THE AIR FORCE, DAFI 31-126, *DoD MILITARY WORKING DOG (MWD) PROGRAM* 16–18 (2019). The “disposition” checklist first considers the legally prescribed adoption priority order, followed by transfer considerations, and concludes by authorizing euthanasia. *Id.* Furthermore, section 2.12.6 of DAFI 31-126 continues to use language that treats MWDs as equipment, such as describing the process for MWDs when “declared excess” to the DoD as how “MWDs should be disposed of.” *Id.* at 17; see *infra* Section IV.E.

94. H.R. Res. 812, 111th Cong. (2010).

95. *H.Res.812 - Recognizing the Significant Contributions of the Military Working Dog Program to the United States Armed Forces*, CONGRESS.GOV, <https://www.congress.gov/bills/111th-congress/house-resolution/812?s=1&r=3317> (on file with the Duquesne Law Review) (last visited Nov. 1, 2025).

96. H.R. Res. 740, 112th Cong. (2012).

97. *Id.* Chips is another famous canine hero that served during World War II. Seth Paltzer, *The Dogs of War: The U.S. Army’s Use of Canines in WWII*, THE ARMY HIST. FOUND., <https://armyhistory.org/the-dogs-of-war-the-u-s-armys-use-of-canines-in-wwii> [<https://perma.cc/DG2A-ZCRE>] (last visited Nov. 1, 2025). Chips was awarded a Silver Star, Purple Heart, and Distinguished Service Cross, but saw those awards and honors revoked due to

have saved countless lives at home and abroad in service to United States military and law enforcement agencies.”<sup>98</sup> The resolution was referred to the Subcommittee on Military Personnel in addition to the House Committee on Armed Services, but no further action has been taken.<sup>99</sup>

Another House Resolution introduced in 2013 contained precisely the same language as House Resolution 740, seeking to establish March 13 as “K-9 Veterans Day.”<sup>100</sup> Like its predecessor, this resolution resulted in a referral to the Subcommittee on Military Personnel, but no further action was taken.<sup>101</sup>

The Senate issued a resolution in 2017 in honor of the seventy-fifth anniversary of the MWD Program in the United States.<sup>102</sup> The resolution enumerated the many heroic efforts of war dogs, assured the Armed Forces that “war dogs will continue to be treated with the deference commensurate with their service and rank,” and honored those war dog heroes that have bravely provided to the United States Armed Forces.<sup>103</sup> The Committee on Armed Services considered and agreed to the resolution.<sup>104</sup>

In December of 2018, the House and the Senate both presented resolutions with the goal of recognizing MWDs “and solidier handlers in the tactical explosive detection dog program of the Army and encouraging the Army and other government agencies . . . with former tactical explosive detection dogs to prioritize adoption of the dogs to former tactical explosive detection dog handlers.”<sup>105</sup> These concurrent resolutions sought to honor the heroism and bravery of these war dogs and their soldier handlers, as well as acknowledge the abhorrent mismanagement of reuniting tactical explosive detection dogs with their former handlers after the end of the nontraditional MWD program specifically created for Operation Enduring Freedom.<sup>106</sup> When the program was dismantled, tactical explosive

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“army policy,” as noted in this resolution. *Id.*; H.R. Res. 740. This policy was guided by the belief that giving medals to war dogs may not be appropriate. Paltzer, *supra*.

98. H.R. Res. 740.

99. *Id.*

100. H.R. Res. 116, 113th Cong. (2013).

101. *Id.*

102. S. Res. 160, 115th Cong. (2017).

103. *Id.*

104. *Id.*

105. H.R. Con. Res. 145, 115th Cong. (2018); S. Con. Res. 58, 115th Cong. (2018). The House and Senate introduced identical resolutions with the same language on this topic.

106. H.R. Con. Res. 145; S. Con. Res. 58. Operation Enduring Freedom refers to the War on Terror efforts to remove the Taliban and al-Qaeda from power after the terrorist attacks on September 11, 2001. *Operation Enduring Freedom (OEF)*, DEF. CASUALTY ANALYSIS SYS., <https://dcas.dmdc.osd.mil/dcas/app/conflictCasualties/oef> (on file with the Duquesne Law Review) (last visited Nov. 1, 2025).

detection working dog handlers were not given priority in adopting their war dog companions; rather, according to the resolution, “proper procedures outlined in Department of Defense policy were ignored, and, as a result, the former soldier handlers were not provided the opportunity to adopt their tactical explosive detection dogs.”<sup>107</sup> The resolutions failed to provide these soldier handlers with a remedy, nor did they provide any clear guidance to the DoD or other government agencies on how to implement appropriate policies to mitigate such a disastrous outcome in the future.<sup>108</sup>

In 2019, the House introduced a concurrent resolution that replicated the House and Senate resolutions proposed in December of 2018.<sup>109</sup> This resolution also acknowledged the hard work of a specific member of Congress, Congressman Walter B. Jones, who worked diligently to ensure that the Air Force Manual on MWDs clearly articulated that dogs are not equipment.<sup>110</sup> The resolution was referred to the Committee on Armed Services, which then referred the resolution to the Subcommittee on Readiness.<sup>111</sup> No further action was taken.<sup>112</sup>

Another House Resolution introduced in 2019 sought to praise the “performance of the Special Operations Forces and a military working dog in the eradication of the terrorist leader of the Islamic State of Iraq and Syria,” also known as ISIS.<sup>113</sup> This resolution sought specifically to honor the MWD that chased down the leader of ISIS, “one of the most depraved terrorist enemies of the United States.”<sup>114</sup> This resolution, as presented in the House, was referred to the Committee on Armed Services, and no further action was taken.<sup>115</sup>

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107. H.R. Con. Res. 145; S. Con. Res. 58.

108. H.R. Con. Res. 145; S. Con. Res. 58.

109. H.R. Con. Res. 43, 116th Cong. (2019).

110. *Id.*

111. *H.Con.Res.43 - Recognizing the Honorable Service of Military Working Dogs and Soldier Handlers in the Tactical Explosive Detection Dog Program of the Army and Encouraging the Army and Other Government Agencies, Including Law Enforcement Agencies, with Former Tactical Explosive Detection Dogs to Prioritize Adoption of the Dogs to Former Tactical Explosive Detection Dog Handlers*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/43> (on file with the Duquesne Law Review) (last visited Oct. 14, 2025).

112. *Id.*

113. H.R. Res. 678, 116th Cong. (2019).

114. *Id.* However, this resilient MWD, named Conan, would later be invited to the White House and receive a medal from the President to honor his heroism and exceptional bravery. Deb Riechmann, *Conan the Dog Gets Hero's Welcome at White House After Raid*, AP (Nov. 25, 2019, at 16:44 ET), <https://apnews.com/article/f8d792206b364099af2fbd4cc1b3637f> (on file with the Duquesne Law Review).

115. H.R. Res. 678.

There appears to be a common theme among each of these proposed bills and resolutions: ownership of the shortcomings of the MWD program and its gaps, followed by little to no tangible, legal change to address those gaps.<sup>116</sup> The resolutions and bills artfully describe the incredible heroism of MWDs in American history yet fully fail to create a process for recognizing and decorating MWDs.<sup>117</sup> These proposed resolutions and bills read like apologies, promising nothing but still demanding everything from war dogs.<sup>118</sup>

In both February 2022 and March 2024, resolutions were introduced in the House which sought to acknowledge “the importance of creating a process for honoring” MWDs’ service and bravery in the Armed Forces.<sup>119</sup> These resolutions appear to be the closest attempt of any to creating a federal program that honors and decorates MWDs.<sup>120</sup> The resolutions recognize that “there are currently over 3,000 military working dogs in the United States today, and there is an increasing demand for these military working dogs in the United States as a result of the proven worth and success in their various service and working capacities.”<sup>121</sup> The resolutions praise the Animals in War and Peace (AWP), a nonprofit organization that honors working animals with AWP Medals of Bravery and AWP Distinguished Service Medals.<sup>122</sup> Acknowledging the importance of AWP’s work, the House “supports the creation of an annual process to nominate animals for the Medal of Bravery and Distinguished Service Medal.”<sup>123</sup> However, it does not fall on the government to create these honors; AWP’s website, as a nonprofit, indicates that it relies on public donations to support working animals’ recognition.<sup>124</sup> The language of the resolution indicates that the House is willing to articulate expressions of support for the

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116. See, e.g., H.R. Con. Res. 145, 115th Cong. (2018); S. Con. Res. 58, 115th Cong. (2018).

117. Many of the bills and resolutions detail a set of findings regarding the MWD program. See S. Res. 160, 115th Cong. (2017) (“[W]ar dogs are credited with saving countless lives, while alerting servicemembers to danger on patrol, detecting improvised explosive devices, identifying weapons caches, performing search and rescue, and providing other specialized mission functions . . .”).

118. See discussion *supra* Part III.

119. H.R. Res. 1054, 118th Cong. (2024); H.R. Res. 935, 117th Cong. (2022).

120. See discussion *infra* Part III.

121. H.R. Res. 1054; H.R. Res. 935.

122. H.R. Res. 1054; H.R. Res. 935.

123. H.R. Res. 1054; H.R. Res. 935.

124. *Fundraising Opportunities*, ANIMALS IN WAR & PEACE, <https://animalsin-warandpeace.org/fundraising> [<https://perma.cc/ACC8-LKT5>] (last visited Nov. 1, 2025). The website proudly bolsters the house resolutions that acknowledge the work this remarkable nonprofit does. *House Resolution 1054*, ANIMALS IN WAR & PEACE, <https://animalsin-warandpeace.org/house-resolution> [<https://perma.cc/6B32-N3GM>] (last visited Nov. 1, 2025).



work of AWP, but will not encumber the DoD with honoring its war dogs at the federal level.<sup>125</sup>

### 3. *Legislative Elevation: From Equipment to Canine Members of the Armed Forces*<sup>126</sup>

In recent years, members of Congress have attempted to pass legislation to elevate MWDs from equipment to canine heroes. Specifically, members of Congress have proposed outright reclassification,<sup>127</sup> enhanced veterinary care,<sup>128</sup> and developing the study of MWDs in order to understand how best to care for them after service.<sup>129</sup>

In 2020, two bills were introduced, in both the Senate and House, called the “Support Our Military Working Dogs Act,” which aimed “[t]o amend title 10, United States Code, to require that military working dogs be retired in the United States, and for other purposes.”<sup>130</sup> The 2020 bills largely tried to modify veterinary care provisions in Title 10 by stating that the DoD may accept donations “for the purpose of providing long-term care for any” MWDs, as well as by modifying language to prohibit adoption fees for MWDs.<sup>131</sup> The bills were reintroduced in 2021 with some modifications, such as by amending the Defense National Authorization Act of 2017 to introduce and clarify the role of the Joint Trauma Education and

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125. H.R. Res. 1054; H.R. Res. 935.

126. Another model for legislative drafting that protects MWDs presents itself by looking abroad at how other countries, particularly in Europe, retire their MWDs. For example, the British Army’s website explicitly states, “[w]hen it comes to the time to retire our MWDs we look for the most suitable home for them. We assess each dog’s needs on a case-by-case basis to find the best home for them to have a happy retirement.” *1st Military Working Dog Regiment*, ARMY, <https://www.army.mod.uk/learn-and-explore/about-the-army/corps-regiments-and-units/royal-army-veterinary-corps/1st-military-working-dog-regiment> (on file with the Duquesne Law Review) (last visited Oct. 31, 2025). As part of the effort to “prepare military working dogs and veterinary capabilities,” the United Kingdom plans for postservice care by rehoming MWDs on a case-by-case basis. *Id.* Within the solution as framed through a federal retirement program, the U.S. government could implement a policy that creates similar “rehoming criteria” for each specific MWD and his needs to ensure postservice retirement placement is successful. *Id.* To be clear, until adoption, the U.S. government should continue to provide housing and funding for MWDs. *See* discussion *infra* Part IV.

127. H.R. 4081, 118th Cong. (2023).

128. H.R. 6188, 116th Cong. (2020); S. 4092, 116th Cong. (2020). The House and Senate introduced identical bills with the same language on this topic, although the stated goals of the bills are phrased differently. *See* H.R. 6188; S. 4092.

129. Support Our Military Working Dogs Act, H.R. 1739, 117th Cong. (2021); Support Our Military Working Dogs Act, S. 3083, 117th Cong. (2021).

130. H.R. 6188; *see also* S. 4092 (phrasing the goal of the bill as to “amend title 10, United States Code, to improve veterinary care for retired military working dogs and to prohibit charge for adoption of military animals, and for other purposes”). These two bills have the same names as H.R. 1739 and S. 3083 but state slightly different goals. H.R. 1739; S. 3083; H.R. 6188; S. 4092.

131. H.R. 6188; S. 4092.

Training Directorate.<sup>132</sup> The reintroduced bills had the express purpose of providing “veterinary care for retired military working dogs, and for other purposes.”<sup>133</sup> The bills would have added new sections to veterinary care provisions, such as by authorizing the DoD “to accept donations . . . for the purpose of providing long-term care for retired” MWDs that have been adopted.<sup>134</sup> Further, the bills would have allowed for the DoD to enter “into a multi-year agreement with a veterans service organization or nonprofit entity to solicit, accept, and transfer funds to provide” long-term care to MWDs.<sup>135</sup> The bills would have prohibited MWD adoption fees.<sup>136</sup> Importantly, the bills would have required the Joint Trauma Education and Training Directorate “to develop a comprehensive trauma care registry with respect to military working dogs. . . . [and] inform and advise the conduct of research on the leading causes of morbidity and mortality of military working dogs in combat.”<sup>137</sup> These amendments would have remarkably improved the quality of veterinary care MWDs receive postservice, as well as the DoD’s ability to provide necessary care. Unfortunately, after being “[r]ead twice and referred to the Committee on Armed Services,” no further action was taken in the Senate.<sup>138</sup> In the House, the bill was referred to the House Committee on Armed Services, but no further action was taken.<sup>139</sup>

The Canine Members of the Armed Forces Act was proposed to the House Committee on Armed Services on June 13, 2023,<sup>140</sup> by Representative Elissa Slotkin.<sup>141</sup> The bill seeks to amend Robby’s

132. H.R. 1739 § 4; S. 3083 § 4. The current mission of the Joint Trauma Education and Training Directorate is “[t]o ensure Armed Forces combat casualty care personnel maintain readiness and are able to be deployed rapidly for future armed conflicts.” *Joint Trauma Education and Training (JTET) Branch*, JOINT TRAUMA SYS. (May 27, 2025), [https://jts.health.mil/index.cfm/education/jtet\\_branch](https://jts.health.mil/index.cfm/education/jtet_branch) (on file with the Duquesne Law Review).

133. H.R. 1739; S. 3083.

134. *S.3083 - Support Our Military Working Dogs Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/3083> (on file with the Duquesne Law Review) (last visited Nov. 1, 2025); *H.R.1739 - Support Our Military Working Dogs Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1739> (on file with the Duquesne Law Review) (last visited Jan. 5, 2025).

135. *S.3083 - Support Our Military Working Dogs Act*, *supra* note 134; *H.R.1739 - Support Our Military Working Dogs Act*, *supra* note 134.

136. H.R. 1739 § 3; S. 3083 § 3.

137. *S.3083 - Support Our Military Working Dogs Act*, *supra* note 134.

138. *Id.*

139. *H.R.1739 - Support Our Military Working Dogs Act*, *supra* note 134.

140. Canine Members of the Armed Forces Act, H.R. 4081, 118th Cong. (2023).

141. Elissa Slotkin is now a Senator after being elected in the November 2024 election. *Elissa Slotkin, U.S. Senator for Michigan*, SENATE, <https://www.slotkin.senate.gov/> [<https://perma.cc/9FHF-9HJ4>] (last visited Jan. 10, 2025). The author reached out to Senator Slotkin to inquire as to how much the proposed bill would cost to implement; however, as of the time of writing this Article, no answer has been provided.

Law and to provide “for certain requirements relating to the retirement, adoption, and recognition of military working dogs, and for other purposes.”<sup>142</sup> This bill is potentially powerful: if signed into law, it would reclassify MWDs as “canine members of the Armed Forces,” as it expressly states that MWDs will “not be classified as equipment.”<sup>143</sup> It would also amend section 1125 of Title 10 by creating a “Recognition of Service of Military Working Dogs” section, stating that the “Secretary of Defense shall create a decoration or other appropriate recognition to recognize military working dogs under the jurisdiction of the Secretary that are killed in action or perform an exceptionally meritorious or courageous act in service to the United States.”<sup>144</sup> This critical bill has been referred to the House Committee on Armed Services but is still pending.<sup>145</sup>

In May of 2024, Representative John James presented a bill called the “Protecting America’s Working Dogs Act,” with the goal of requiring “the Attorney General to establish a grant program to assist with the medical expenses of qualified working dogs, and for other purposes.”<sup>146</sup> This bill seeks to create a federal grant program to assist eligible nonprofits in providing for the medical costs of qualified working dogs, such as by detailing how the nonprofit may apply for and qualify for funding.<sup>147</sup> The bill also explains the role of the Attorney General to report to Congress on the effectiveness of the grants.<sup>148</sup> Included in the definition of “qualified working dog[s]” are retired MWDs.<sup>149</sup> The most recent movement on this bill was on July 23, 2024, when the bill was referred to the Subcommittee on Health by the Committee on Veterans’ Affairs.<sup>150</sup>

Another bill currently pending is the “Honoring Our K9 Heroes Act,” introduced in June of 2024 by Representative Brian Fitzpatrick.<sup>151</sup> This bill would amend the Homeland Security Act of 2002

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142. H.R. 4081.

143. *Id.* § 3(f).

144. *Id.* § 4(b).

145. *H.R.4081 - Canine Members of the Armed Forces Act*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/4081> (on file with the Duquesne Law Review) (last visited Jan. 18, 2026).

146. Protecting America’s Working Dogs Act of 2024, H.R. 8571, 118th Cong. (2024).

147. *Id.* § 3. Under this Act, a qualifying nonprofit organization could receive up to \$575,000 to assist in providing care to qualified working dogs. *Id.*

148. *Id.* The Attorney General’s report should detail the “number of qualified working dogs assisted” through this Act, as well as the “average medical expenses for each qualified working dog assisted pursuant to a grant” through this Act. *Id.*

149. *Id.* § 3(f).

150. *H.R.8571 - Protecting America’s Working Dogs Act of 2024*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/8571> (on file with the Duquesne Law Review) (last visited Jan. 18, 2026).

151. Honoring Our K9 Heroes Act, H.R. 8887, 118th Cong. (2024).

by adding a new section under Subtitle A which would permit “grants for increased access to medical care for retired federal working dogs.”<sup>152</sup> The bill would allow qualified nonprofits to apply for and receive such funding.<sup>153</sup> This bill defines a retired federal working dog as a dog that “(1) has been issued a retirement letter from the Federal department or agency that employed such dog; and (2) is in the care of its handler.”<sup>154</sup> This bill is narrower in effect, permitting medical cost assistance only for dogs that fit this specific description.<sup>155</sup>

#### 4. *The Working Dog Commemorative Coin Act*

The Working Dog Commemorative Coin Act<sup>156</sup> is the only law that Congress has passed, despite the importance of proposed bills like the Canine Members of the Armed Forces Act<sup>157</sup> and the Support Our Military Working Dogs Act.<sup>158</sup> This law requires the Secretary of the Treasury to “mint and issue . . . [certain] coins in commemoration of the invaluable service that working dogs provide to society.”<sup>159</sup> This is a form of honoring and recognizing MWDs and other working dogs; however, a coin does not elevate MWDs from equipment to Canine Armed Forces veterans.<sup>160</sup> A coin does not provide for their ongoing medical care after service.<sup>161</sup> A coin most certainly does not assist nonprofits that do the government’s job of caring for these heroes once they retire.<sup>162</sup> The bills and resolutions that would achieve such outcomes are either pending or moot, with a commemorative coin representing the only tangible congressional effort to provide for these heroes.<sup>163</sup>

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152. *Id.* § 2. The Homeland Security Act of 2002 is the act that created the Department of Homeland Security. *Homeland Security Act of 2002*, U.S. DEP’T OF HOMELAND SEC. (April 24, 2025), <https://www.dhs.gov/homeland-security-act-2002> [<https://perma.cc/A2E9-X98S>].

153. H.R. 8887 § 2 (“[A]n eligible entity shall submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary may require.”).

154. *Id.*

155. *Id.*

156. Working Dog Commemorative Coin Act, Pub. L. No. 118-109, 138 Stat. 1597 (2024).

157. Canine Members of the Armed Forces Act, H.R. 4081, 118th Cong. (2023) (using language that would elevate MWDs from equipment to “canine members of the Armed Forces”).

158. Support Our Military Working Dogs Act, H.R. 1739, 117th Cong. (2021); Support Our Military Working Dogs Act, S. 3083, 117th Cong. (2021). These bills use language that would expressly provide continued veterinary care to retired MWDs. H.R. 1739; S. 3083.

159. § 3(a), 138 Stat. at 1598.

160. *See* discussion *supra* Section III.B.3.

161. *See* discussion *supra* Section III.B.3.

162. *See* discussion *supra* Section III.B.3.

163. *See* § 1, 138 Stat. at 1597.

### C. *Advocacy Through Literature and Cinema*

Advocacy for MWDs is not confined to legislative action. Some of the most persuasive and compelling mediums to demonstrate the heroism of MWDs are the stories of their bravery as told by the most critical link between MWDs and service: human heroes. One such story, titled *No Ordinary Dog*, describes the unbreakable bond between U.S. Navy SEAL Will Chesney and his canine partner, Cairo.<sup>164</sup> Chesney experienced a traumatic injury during service that debilitated his physicality and his indomitable spirit.<sup>165</sup> Chesney recounts how nothing made him feel better; no amount of doctor visits or medication helped him heal from “multiple deployments, injuries, brain trauma, migraines, PTSD, [and] depression . . .”<sup>166</sup> Yet, adopting Cairo once he finally retired gave Chesney hope;<sup>167</sup> he said, “[t]here was no way I would ever get my old job back, but I wanted my life back. I wanted my personality back. Cairo was a part of that deal.”<sup>168</sup> Upon bringing Cairo home, Chesney quickly found that he was not the only soldier in his house “suffering from PTSD. The signs were subtle, at first, like the way Cairo preferred not to be left alone. . . . Then . . . [Chesney] started to notice that if . . . [he] walked from the kitchen to the living room, Cairo would get up and follow.”<sup>169</sup> Chesney gave Cairo the retirement he earned for his years of sacrifice, for the countless lives he saved, and for his work as one of the most famous MWDs in military history.<sup>170</sup> Cairo was “[c]ontent. He was leading a life of leisure, just as he deserved.”<sup>171</sup>

Chesney’s story also reveals how Cairo was perceived as a fellow “brother,” not another piece of equipment.<sup>172</sup> This was true not only in the eyes of the members of the squadron, but also based on the

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164. WILL CHESNEY WITH JOE LAYDEN, *NO ORDINARY DOG: MY PARTNER FROM THE SEAL TEAMS TO THE BIN LADEN RAID*, at x (2020).

165. *Id.* at 264, 270.

166. *Id.*

167. Chesney recounts that waiting for Cairo to be adopted was a painful experience. *Id.* at 267. “I sat around and waited. As the weeks and months went by, I became frustrated. I was still dealing with chronic pain and migraines. I was unhappy with work and missed my friends. I felt like Cairo would ease some of that pain.” *Id.* He noted how everything moved at a “glacial pace,” which was expected for “life in the military.” *Id.* at 269.

168. *Id.* at 270.

169. *Id.* at 274.

170. *Id.* at 270–71.

171. *Id.* at 279.

172. *Id.* at 197. Chesney states, “Cairo was one of the boys. He lived with us, ate with us, slept with us, played with us, trained with us, fought with us. Sometimes he even pranked with us.” *Id.* at 159.

medical protocol,<sup>173</sup> and how Cairo was cared for by the physicians when he was shot during one of his deployments.<sup>174</sup> Chesney expressed disappointment after Operation Neptune Spear,<sup>175</sup> when “everyone on the mission was awarded the Silver Star . . . [i]t was a disappointment to me that Cairo did not receive a Silver Star; he was every bit as important a part of the mission as anyone else. He risked just as much.”<sup>176</sup> When Cairo’s health began to decline during his retirement, Chesney was told that he had to find somewhere else to take Cairo for veterinary care because Cairo was no longer a working dog; “he had been retired, which meant he was ineligible for unlimited free care by navy docs. That might seem unfair . . . but that’s the way it was.”<sup>177</sup>

Chesney’s story highlights Cairo’s hard work, the countless lives he saved, his retirement and adoption by Chesney after experiencing shared trauma, and how adopting Cairo was critical to Chesney’s ability to heal.<sup>178</sup>

Even cinema seeks to show the importance of brave MWDs.<sup>179</sup> One movie tells the tale of Sergeant Stubby,<sup>180</sup> while another follows a veteran on his quest to get a MWD named Lulu to her canine handler’s funeral service.<sup>181</sup> Of special note is a movie that details a former marine’s struggle to retire and adopt her MWD.<sup>182</sup>

There is also some legal scholarship on the topic of MWD reclassification.<sup>183</sup> In 2013, Michael Kranzler argued for the reclassification of MWDs from equipment to “canine members of the armed

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173. *Id.* at 173–74 (“When it comes to recovering from surgery or life-threatening injuries, the protocol for dogs is similar to humans in a few significant ways. In both cases, ambulation is important. . . . Second, you want to know that the plumbing is working properly.”).

174. *Id.* at 168. Chesney details how Cairo was treated not by veterinarians, but by the physicians who treated wounded human soldiers. *Id.* He said, “they didn’t treat Cairo like a dog but simply as a wounded member of the U.S. armed forces.” *Id.*

175. Operation Neptune Spear is the name for the Special Operations mission that resulted in the death of the terrorist leader and mastermind behind 9/11, Osama bin Laden. *Id.* at 211–14.

176. *Id.* at 236. However, Cairo did get to meet President Obama and Vice President Joe Biden at the 160th Airborne Base. *Id.* at 236–37.

177. *Id.* at 296.

178. *Id.* at 274, 304–05.

179. This Article does not contain a complete list of every MWD movie but rather seeks to illustrate that cinema is yet another avenue for advocating for the welfare and recognition of MWDs. For a list of several of the most popular MWD movies, see Alyssa Sparacino, *10 Dog War Movies About Military Canines*, CHEWY (Apr. 30, 2025), <https://be.chewy.com/9-dog-movies-honoring-military-canines/> [https://perma.cc/BQ8D-6JEA].

180. SGT. STUBBY: AN AMERICAN HERO, Amazon Prime (Fun Academy Studios 2018).

181. DOG, Apple TV (Free Association 2022).

182. MEGAN LEAVEY, HBO Max (LD Entertainment 2017).

183. Landa, *supra* note 11, at 39; Cruse, *supra* note 11, at 249; Kranzler, *supra* note 11, at 268.

forces.”<sup>184</sup> In 2015, Sarah Cruse embarked on a thorough and insightful analysis that emphasized the ways MWDs are deprived of dignity and honor by their classification as equipment.<sup>185</sup> Her article outlines the parallels between canine heroes and human heroes, separating “MWDs from the equipment category and plac[ing] the canines far closer along the spectrum towards ‘members’ of the armed forces.”<sup>186</sup> She, too, proposes reclassifying MWDs and advocates for an increase in federal funding to provide for MWDs’ continued medical care after service.<sup>187</sup>

In 2018, Mackenzie Landa discussed how reuniting former canine handlers and their MWDs often fails.<sup>188</sup> Landa points to the shortcomings of retirement for MWDs, such as lack of funding for transportation costs,<sup>189</sup> the issue of multiple handlers and priority of adoption,<sup>190</sup> and the classification of MWDs as equipment.<sup>191</sup> She proposes reclassification, funding, and policy changes to address these gaps.<sup>192</sup>

#### *D. When War Heroes Take Their Own Initiative: Mike Ritland’s Warrior Dog Foundation*

Sometimes, war heroes return home after serving their country heroically and commit their lives to the mission of advocating for MWDs. Such is the case for U.S. Navy SEAL Mike Ritland.<sup>193</sup> From a young age, Ritland knew he wanted to become a Navy SEAL.<sup>194</sup> A combination of lived experiences and a family of war heroes pointed Ritland to serve his country.<sup>195</sup> Ritland would go on to serve almost thirteen years in the U.S. Navy, “eleven of which . . . [were] spent as a SEAL Team member . . . .”<sup>196</sup> He also knew early on that he

184. Kranzler, *supra* note 11, at 269.

185. Cruse, *supra* note 11, at 249.

186. *Id.* at 268.

187. *Id.* at 284.

188. Landa, *supra* note 11, at 39.

189. *Id.* at 47.

190. *Id.* at 46.

191. *Id.* at 49.

192. *Id.* at 49–52.

193. The author extends her heartfelt gratitude and the utmost praise to Mr. Ritland for taking the time to be interviewed for the benefit of this Article and to enhance the quality of the author’s proposed solutions. Mr. Ritland’s service to his country and MWDs is remarkable, inspiring, and selfless.

194. MIKE RITLAND WITH GARY BROZEK, TRIDENT K9 WARRIORS 37 (2013). Ritland stated, “[i]n my case, both my grandfathers served in World War II, one in the army and one in the navy. . . . They didn’t talk much about their war experiences, but I was eager to hear anything about them . . . .” *Id.* He also described different Navy SEAL literature that effectively worked to “recruit” him to SEAL training. *Id.*

195. *Id.* at 37–39.

196. *Id.* at 13.

liked dogs, and combining both interests into a meaningful career is something he is grateful for.<sup>197</sup> Ritland experienced firsthand how one MWD could save an entire team from fatality,<sup>198</sup> and after serving, he founded a nonprofit organization “to make certain that retired military working dogs are able to live out the remainder of their lives in positive and beneficial environments.”<sup>199</sup>

This nonprofit is called Warrior Dog Foundation,<sup>200</sup> and one of its primary goals is to ensure that retired MWDs that cannot be adopted by their former handlers or that have bit the wrong person too many times are rehabilitated rather than euthanized.<sup>201</sup> Warrior Dog Foundation expressly exists

to provide the highest level of retirement care to working dogs who have dedicated their lives to serving our country and communities! We provide mental and physical rehabilitation to these four-legged veterans so they can be adopted into a forever home; if this is not possible, they are cared for by us for the rest of their lives. . . . These heroes have endured intense situations, saved lives, and protected our service personnel and our freedoms. Yet like many human veterans, they return home with physical and mental injuries. Because these special dogs may have a bite history, aggression, and other traits that render them unadoptable, they are often euthanized. They deserve better! We take these K9s in and help them heal so they can transition to civilian life and live out the rest of their retirement in peace.<sup>202</sup>

Running a nonprofit with such a mission presents many challenges. Some are expected, such as how the facility has to be built;

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197. *Id.* at 20.

198. *Id.* at 11. Ritland told the story of Duco and his handler, Seth, on a mission, where Seth states, “I’d hate to think what would have happened if he wasn’t with us . . . . Instead, here we are.” *Id.*

199. *Id.* at 13. In 2009, Ritland also began “training and providing working dogs for the military, various government agencies, and private individuals.” *Id.*

200. *About The Warrior Dog Foundation*, WARRIOR DOG FOUND., <https://warriordogfoundation.org/about-us/> [<https://perma.cc/355A-UGLA>] (last visited Jan. 11, 2025).

201. Telephone Interview with Mike Ritland, *supra* note 10. Ritland explained that once an entity has determined that the dog is a liability, euthanasia is preferred over adopting the dog. *Id.* Instead of euthanasia, Ritland steps in and acts as a sanctuary, then rehabilitates and often rehomes the dog. *Id.* The dogs that do not get rehabilitated get to stay at Warrior Dog Foundation to live out their retirements in peace. *Id.* Ritland also stated that something he and the organization are very proud of is when a young dog is sent to Warrior Dog Foundation, and the dog is able to be rehabilitated and “repurposed.” *Id.* It is an accomplishment when he is able to put the dog back to work, “doing good things for our country.” *Id.*

202. *About The Warrior Dog Foundation*, *supra* note 200.



after all, Ritland is not dealing with “ordinary” dogs.<sup>203</sup> The facility itself has to “be built kind of like a super max prison . . . [with] epoxy-coated . . . concrete cinder blocks, guillotine doors on tubular stainless-steel tracks . . . [and] real heavy duty kennel panels . . . .”<sup>204</sup> Even the dogs’ water buckets need to be of everlasting durability; Ritland joked, “[i]f any company wants to test their product, send it to us . . . if there’s a weak link in . . . your product, they will find it.”<sup>205</sup>

Another challenge presents itself in the form of staffing.<sup>206</sup> Ritland cannot—for the dogs’ safety, civilian safety, and staff safety—permit unqualified individuals to walk into Warrior Dog Foundation and begin working with the dogs.<sup>207</sup> To work with Warrior Dog Foundation’s war dog residents, one must have specialized knowledge about working dogs, proper training, an understanding of dog psychology and canine behavioral training, and a familiarity with the unique challenges of rehabilitating and working with former working dogs.<sup>208</sup>

Furthermore, Warrior Dog Foundation’s facility can house about thirty dogs, which means that Ritland can only have thirty dogs in his care at a time.<sup>209</sup> This has resulted in a waitlist forming for dogs to get into Warrior Dog Foundation to be cared for and rehabilitated.<sup>210</sup> Warrior Dog Foundation has “thirty [kennel] runs and they’re full all the time, and we have . . . at least ten dogs or more on a waiting list at all times.”<sup>211</sup> To resolve this, Ritland would love to build another facility, but that would require more money.<sup>212</sup>

Hence, at the core of all of these issues is one central hurdle that takes time away from Ritland’s execution of the mission of Warrior Dog Foundation: the problem of funding.<sup>213</sup> Lack of funding impacts

203. Telephone Interview with Mike Ritland, *supra* note 10; CHESNEY WITH LAYDEN, *supra* note 164, at xv (“I want to focus on . . . what he meant to his fellow fighters, and to me personally; and why I went to such enormous lengths to cut through the bureaucracy that nearly kept us apart in his waning years. . . . Cairo gave me more than I ever imagined, probably more than I deserved. This is for you, buddy.”).

204. Telephone Interview with Mike Ritland, *supra* note 10.

205. *Id.* (describing how the dogs will destroy anything, as is their nature as former working dogs).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* Ritland said that the number of dogs he can take in varies year to year, but on average, the organization takes in about twelve to fifteen dogs. *Id.* He noted that close to half of the dogs are “turning over every year,” meaning there are adoptions, or the dogs are “re-purpose[d]” and go back to work. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

the entire foundation, which results in less space to house more working dogs, a lack of staff, and an inability to focus on the central mission of the nonprofit.<sup>214</sup> Ritland and the organization have to “shake all the trees and fundraise throughout the year.”<sup>215</sup> Ritland said that, at a minimum, “if the U.S. Government says they don’t have the ability to man up or stand up and house” the dogs the way Ritland believes they need and deserve, the government should at least set up a grant or federal funding program to fund organizations like his to “focus on the mission, not spend[] half the time raising money every year.”<sup>216</sup>

#### IV. PROPOSED SOLUTIONS

##### A. *A Federal MWD Retirement Program: When a Navy SEAL and a Law Student Talk About War Dogs*<sup>217</sup>

After discussing his nonprofit, reclassification, the canine program generally, and his book, the author asked Ritland for ideas as to solutions to this problem.<sup>218</sup> A three-part solution presented itself and is outlined below.<sup>219</sup>

##### B. *Step One: “When the Squeaky Wheel Gets the Grease”*<sup>220</sup>

“[T]he bigger emphasis you can put on . . . your average everyday citizen that contacts their congressman or senator or, you know, any . . . channels they have in the federal government and enough people complain,” demanding it gets fixed—“it will get fixed.”<sup>221</sup> Ritland asserted that change will occur when people begin to care about this mission and take individual action by putting pressure

214. *Id.*

215. *Id.* Ritland reflected on all of the time that he would save if he did not have to fundraise, and on how he could use that time to “handle the mission” of the organization. *Id.* Being a nonprofit in the military space also means Ritland is, essentially, competing with other honorable military nonprofits for funding and charity. *Id.* Ritland said frankly, “[i]t’s embarrassing that there is a single military charity . . . our government should be taking care of all of those things.” *Id.*

216. *Id.*

217. *Id.* Ritland talked generally about working dogs, but this Article applies the proposed solution to MWDs, specifically.

218. *Id.*

219. *Id.* This “three-part plan” summarizes the solutions Ritland proposed in combination with the author’s goal of drafting a new federal statute to address the reclassification prong of the solution. See discussion *infra* Sections IV.B, IV.C, IV.D.

220. Telephone Interview with Mike Ritland, *supra* note 10.

221. *Id.* Ritland says pressure on Congress and individuals involved in the political process is what is going to get things moving. *Id.* He emphasized putting pressure on the federal government to get line items into the federal budget to build facilities and provide these dogs the care they need. *Id.*

on Congress and the federal government to make the changes necessary for the welfare of working dogs.<sup>222</sup> Ritland also encouraged citizens to donate to organizations that focus on postservice care and rehabilitation of the dogs, whether it be by purchasing a t-shirt or donating on a Facebook fundraiser.<sup>223</sup>

### C. *Step Two: Reclassification*

It is inhumane to classify MWDs as equipment.<sup>224</sup> This categorization dilutes their valor and hard work, prevents them from proper recognition,<sup>225</sup> and allows the federal government to absolve itself of continuing the dogs' care after service.<sup>226</sup> Reclassification is critical to the "proper retirement of working canines."<sup>227</sup>

To accomplish reclassification, Congress should remove Robby's Law from the text of 10 U.S.C. § 153 and give it its own chapter. This, in effect, would place working animals—specifically, MWDs—outside of the "equipment" categorization. The language of the statute should also be amended to use humane language instead of phrases that minimize or negate the sentience of MWDs, such as "useful working life,"<sup>228</sup> or stating that an animal may be adopted "when the animal is otherwise excess to the needs of such military department."<sup>229</sup>

Robby's Law, much like the proposed changes in the Canine Members of the Armed Forces Act,<sup>230</sup> must include provisions that require the DoD to create a federally funded MWD retirement program that operates in a fashion described in this Article. While some may find offense in viewing MWDs as soldiers or, after

222. *Id.*

223. *Id.*

224. See Landa, *supra* note 11, at 52; Cruse, *supra* note 11, at 283–84; Kranzler, *supra* note 11, at 294.

225. CHESNEY WITH LAYDEN, *supra* note 164, at 236; Cruse, *supra* note 11, at 280; Kranzler, *supra* note 11, at 291.

226. Canine Members of the Armed Forces Act, H.R. 4081, 118th Cong. (2023); Kranzler, *supra* note 11, at 294.

227. Telephone Interview with Mike Ritland, *supra* note 10. Ritland said it should come as no surprise that he does not agree with working dogs being classified as equipment. *Id.* He said that the dogs are technically still equipment, even though they are "not treated as such." *Id.* They are not "discarded" anymore, "but we still have a long way to go in terms of how they are actually taken care of." *Id.* Reclassification, according to Ritland, does not even get us halfway in terms of solving the postservice care of MWDs, however. *Id.* He views reclassification as "step one." *Id.*

228. 10 U.S.C. § 2583(a)(1).

229. *Id.* § 2583(a)(3).

230. H.R. 4081.

service, as veterans, human warrior testimony,<sup>231</sup> public policy,<sup>232</sup> and common sense<sup>233</sup> are on the side of reclassifying MWDs to grant them sentience in the eyes of the law.

### 1. *Common Sense*

Cruse's article artfully draws parallels between human soldiers and canine soldiers,<sup>234</sup> pointing out that recruitment procedures and standards require both humans and canines to be in good health and of sound mind.<sup>235</sup> The rigors of training for humans are best explained by a Navy SEAL such as Chesney, who recounted the training he endured to become a SEAL.<sup>236</sup> The same is true of canines; not just any dog can become a MWD.<sup>237</sup> The training humans and canines endure is grueling and challenging, but it ensures readiness for deployment.<sup>238</sup> It also indicates that MWDs are not like the other equipment used in the Armed Forces.<sup>239</sup> Each MWD is unique, with his own personality, while each piece of diving equipment, for example, is the same.<sup>240</sup>

Cruse also notes the parallels between medical services provided to MWDs and human soldiers, such as by describing the Daniel F. Holland Hospital at the Lackland Air Force Base, which is home to the MWD veterinary hospital.<sup>241</sup> Other examples of these

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231. CHESNEY WITH LAYDEN, *supra* note 164, at 304–05; RITLAND WITH BROZEK, *supra* note 194, at 14 (“By the time you finish reading this book, I hope you’ll come to understand that there’s not an ounce of disrespect intended when I make the comparison between what military working dogs in the SEAL Teams have contributed and what their human counterparts have done.”).

232. Michelle Megna, *Pet Ownership Statistics 2025*, FORBES (Jan. 2, 2025, at 03:19 ET), <https://www.forbes.com/advisor/pet-insurance/pet-ownership-statistics/> (on file with the Duquesne Law Review); *Dogs of the Vietnam War*, *supra* note 32.

233. Cruse, *supra* note 11, at 284.

234. *Id.* at 268–82.

235. *Id.* at 269.

236. CHESNEY WITH LAYDEN, *supra* note 164, at 15–33 (detailing BUD/S Training and its phases, from indoctrination, to “hell week,” to the graphic telling of jock itch, to the years of training it took to become a SEAL).

237. See *id.* at 103. “Cairo’s resume indicated a higher-than-usual score on his certification test . . .” *Id.* Chesney also wrote that, “[i]n addition to being strong in all the basic skills like odor detection and bite work, Cairo impressed the trainers by being a dog of uncommon demeanor.” *Id.* at 106.

238. *Id.* at 141. After training together, Chesney said Cairo was “physically, temperamentally, [and] tactically” ready for deployment, and that he “couldn’t wait to see him in action.” *Id.*

239. Cruse, *supra* note 11, at 273 (“[E]quipment . . . is unlike either human or canine members of the Armed Forces, who—not being precision-manufactured to have identical characteristics meant to serve a particular end—must be instead selected and trained.”).

240. *Id.*; Telephone Interview with Mike Ritland, *supra* note 10.

241. Cruse, *supra* note 11, at 274; see Karla Gonzalez, *Military Working Dog Care Even Better with Opening of Rehab Facility and Recovery Kennels*, JOINT BASE SAN ANTONIO (July

similarities can be found by reviewing how Sergeant Stubby<sup>242</sup> and Cairo<sup>243</sup> were cared for when they faced their injuries. The contrast between an injured MWD and a weapon that breaks is almost laughable and seems awkward; however, it underscores the need to reclassify MWDs.

Cruse relates MWDs to human soldiers—and differentiates them from pieces of equipment—in other ways as well, including by noting the existence of posttraumatic stress disorder (PTSD) and canine posttraumatic stress disorder (CPTSD),<sup>244</sup> and by drawing attention to the fact that both humans and canines receive housing and meals,<sup>245</sup> air transportation,<sup>246</sup> and their own gear.<sup>247</sup> Cruse also brings awareness to MWD burial<sup>248</sup> and MWD recognition.<sup>249</sup> These comparisons further demonstrate the sentience of MWDs as service members and veterans, not equipment.<sup>250</sup>

## 2. *Human Warrior Testimony*

Regarding the maintenance of the canine program, Ritland discussed what makes canines different from other “skills” and programs.<sup>251</sup> Ritland described the advantage of canine warriors as a perishable skill, “because it is not a weapons system. . . . If you introduce a new platform of sniper rifles . . . anything that we already kind of use, there is already a baseline there. . . . With a canine program, you’ll have to excuse the cheesy pun, but it really is a

2, 2018), <https://www.jbsa.mil/News/News/Article/1565433/military-working-dog-care-even-better-with-opening-of-rehab-facility-and-recover/> (on file with the Duquesne Law Review).

242. Lange, *supra* note 7.

243. CHESNEY WITH LAYDEN, *supra* note 164, at 168.

244. Cruse, *supra* note 11, at 275–77; CHESNEY WITH LAYDEN, *supra* note 164, at 274.

245. Cruse, *supra* note 11, at 277–78; CHESNEY WITH LAYDEN, *supra* note 164, at 144.

246. Cruse, *supra* note 11, at 278–79. Cruse notes that DoD transportation is managed by the Air Force for MWDs; she notes that the “classification of MWDs as ‘equipment’ and the treatment of retired MWDs as ‘excess equipment’” reveals the continually troubling nature of the existing amendments to Robby’s Law. *Id.* at 279.

247. *Id.* at 279; CHESNEY WITH LAYDEN, *supra* note 164, at 145.

248. Cruse, *supra* note 11, at 281. There are several war dog memorials, such as The Pledge in Arlington National Cemetery. *War Dog Memorial*, THE U.S. WAR DOGS ASS’N, <https://www.uswardogs.org/war-dog-memoriale18b5e37> [<https://perma.cc/M8T2-ZYA8>] (last visited Jan. 10, 2025) (listing several war dog memorials across the country). Yet, MWDs are not listed as being eligible for burial in national cemeteries. Cruse, *supra* note 11, at 281 (citing 38 U.S.C. § 2402).

249. Cruse, *supra* note 11, at 280; *see also* H.R. Res. 1054, 118th Cong. (2024); H.R. Res. 935, 117th Cong. (2022). Both of these bills supported the creation of a process for honoring MWDs with service medals through the AWP. H.R. Res. 1054; H.R. Res. 935. As noted previously, recognition of MWDs does not come from the federal government; rather, it happens through nonprofits like AWP. *Fundraising Opportunities*, *supra* note 124.

250. Cruse, *supra* note 11, at 280–81.

251. Telephone Interview with Mike Ritland, *supra* note 10.

totally different animal.”<sup>252</sup> This is because each dog is different and unique, with his own special skills and his own personality.<sup>253</sup> “You don’t have to think about those things with a brand-new sniper rifle, or explosives, or diving equipment . . . they aren’t living breathing entities that make decisions or have bad days . . . .”<sup>254</sup>

Additionally, much can be gleaned from Will Chesney’s story of Cairo.<sup>255</sup> Cairo received his own gear,<sup>256</sup> was injured and then cared for in the same way as his human counterparts,<sup>257</sup> experienced PTSD<sup>258</sup> and separation anxiety,<sup>259</sup> and was considered “one of the boys.”<sup>260</sup> He slept in Chesney’s quarters,<sup>261</sup> and he was as capable of catching “bad guys” as he was capable of loving Chesney until the day he died.<sup>262</sup> The scope of Cairo’s emotional bandwidth and his daily habits are indicative of his sentience.<sup>263</sup>

It also is very common for canine handlers to refer to themselves as “dad.”<sup>264</sup> Ritland equated being a canine handler to parenting a toddler, as the handler gets a quirky, “extra set of responsibilities,” especially on deployment: “You take on this fatherly, protective role of them.”<sup>265</sup>

### 3. *Public Policy*

America is a nation that has exemplified the domestication of animals—especially of pet dogs—and its laws and treatment of animals in every capacity should reflect societal adoration for canine companions.<sup>266</sup> Americans spent \$136.8 billion on their pets in

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252. *Id.*

253. *Id.*

254. *Id.*

255. CHESNEY WITH LAYDEN, *supra* note 164, at xv.

256. *Id.* at 145. Chesney wrote, “[t]hen I’d check all of Cairo’s gear. I always carried a small, collapsible bowl to give Cairo water on patrol, and a medical kit designed to treat canine injuries.” *Id.*

257. *Id.* at 168, 173.

258. *Id.* at 274–76.

259. *Id.* at 279.

260. *Id.* at 159.

261. *Id.* at 144.

262. *Id.* at 117, 122 (calling Cairo an “aggressive snuggler and blanket hog”).

263. *Id.* at 304–05.

264. *Id.* at 114 (“Working dogs need to work, and they want nothing more than to please their handlers . . . their *dads*, as we became known.”).

265. Telephone Interview with Mike Ritland, *supra* note 10. Ritland said for many, it is like bringing a sense of humanity and a slice of home on deployment, as many have grown up with dogs in their households. *Id.*

266. For example, pet owners can buy their dogs pajamas and onesies from Petco. *Dog Onesies & Dog Pajamas*, PETCO, <https://www.petco.com/shop/en/petcostore/category/dog/dog-apparel/dog-onesies-and-dog-pajamas> (on file with the Duquesne Law Review) (last visited Oct. 13, 2025).

2022,<sup>267</sup> and dogs are the most popular pets to have in American households.<sup>268</sup> What Americans are willing to do for their pets<sup>269</sup>—with many choosing to adopt pets rather than have human children<sup>270</sup>—evidences the societal value placed on dogs in this nation. 97% of pet owners view their pets as family members.<sup>271</sup> This closely held societal value can direct a public response to elevate MWDs from equipment to servicemembers and, after service, to canine veterans. Public outcry has moved MWD legislation forward in the past,<sup>272</sup> and it is surely capable of directing change in the future.<sup>273</sup>

#### *D. Step Three: A Federally Funded Program*

“To me, nothing would make me happier than to be able to shut it [Warrior Dog Foundation] down—not because of lack of funding but because the U.S. government stands up” and houses the working dogs itself.<sup>274</sup> To Ritland, “the real grand slam would be things are so good federally” that Warrior Dog Foundation would be able to close or at least shift to become a rescue organization or a resource in another capacity.<sup>275</sup>

It seems sensible, and perhaps even simple: the federal government buys, trains, and deploys MWDs;<sup>276</sup> therefore, it should be responsible for them when it deems their “useful lives”<sup>277</sup> to be over.<sup>278</sup> Ritland explained what that could look like, whether local or federal, and he suggested several ideas, such as starting with “four regional, big facilities . . . start with the DoD, but then get in law

267. Megna, *supra* note 232.

268. *Id.*

269. *Id.* (noting a Forbes Advisor survey that found that “36% of dog owners reported that they would spend \$4,000 or more out-of-pocket on life-saving medical care for their dogs” (citing Michelle Megna, *States with the Most Devoted Dog Owners, Ranked*, FORBES (Feb. 9, 2023, at 08:35 ET), <https://www.forbes.com/advisor/pet-insurance/states-with-most-devoted-dog-owners/> [https://perma.cc/S4B5-TDLZ] (last visited Oct. 13, 2025))).

270. Mark Travers, *A Psychologist Explains the Appeal of ‘Pet-Parenting’ for Child-Free Couples*, FORBES (Mar. 16, 2024, at 08:45 ET), <https://www.forbes.com/sites/travers-mark/2024/03/16/a-psychologist-explains-the-appeal-of-pet-parenting-for-child-free-couples/> (on file with the Duquesne Law Review).

271. Anna Brown, *About Half of U.S. Pet Owners Say Their Pets Are as Much a Part of Their Family As a Human Member*, PEW RSCH. CTR. (July 7, 2023), <https://www.pewresearch.org/short-reads/2023/07/07/about-half-us-of-pet-owners-say-their-pets-are-as-much-a-part-of-their-family-as-a-human-member/> [https://perma.cc/2QYH-NZPF].

272. *Dogs of the Vietnam War*, *supra* note 32.

273. Telephone Interview with Mike Ritland, *supra* note 10.

274. *Id.* (discussing Warrior Dog Foundation’s role in the future).

275. *Id.*

276. *Id.* Ritland said that there are at least tens of thousands of dollars invested in each dog. *Id.*

277. 10 U.S.C. § 2583(a)(1).

278. Telephone Interview with Mike Ritland, *supra* note 10.

enforcement, customs and border patrol, federal protection services, secret service . . . [and] other canine entities.”<sup>279</sup> He proposed that there could be a location in the North, South, East, and West to start the federal program.<sup>280</sup>

For the long term, Ritland said there must be federal facilities that are manned by government contractors, with the government building the facilities to its own specifications and hiring the people that run them.<sup>281</sup> The facilities should “get a piece” of the federal budget every year the same way that the U.S. Department of Veterans Affairs (VA) does.<sup>282</sup> Ritland believes that this would ensure consistency and is better from a “quality control standpoint.”<sup>283</sup> The oversight component of the facilities could be akin to the U.S. Department of Agriculture inspecting a chicken plant, said Ritland.<sup>284</sup> If the program were to start locally, it could have an administrative office, with individuals like Ritland inspecting and evaluating the facilities to ensure that they “check all the boxes.”<sup>285</sup>

Building such facilities would provide housing and care for those MWDs that cannot be reunited with former handlers, although “in the high ninety-percentiles . . . those handlers adopt those dogs or they’ll go to somebody else in the unit or that the dog has been around and the human is comfortable with.”<sup>286</sup> But, that person becomes responsible for

the whole ball of wax and so it’s like taking on, you know, an active working dog in terms of the upkeep. . . . To me, in a perfect world, anybody who adopts a dog . . . should get . . . an insurance card . . . and that person can now take that dog to any vet and can bill . . . the entity they retired the dog from.<sup>287</sup>

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279. *Id.* This Article focuses on MWDs; however, the goal in Ritland’s eyes is four regional housing facilities for all working dogs, regardless of their department of origin. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* Ritland said that this would be to ensure that the dogs are getting the best care possible, and individuals like himself are most prepared to assess whether the dogs’ needs are being met. *Id.* Some of the specifics that could be considered during an inspection include whether there is adequate space, the durability of the kennel, and staff management. *Id.* Ritland views this as a “happy medium” or a “compromise that . . . would allow . . . local organizations or . . . civilian-run groups like mine to stand up and take care of the need.” *Id.*

286. *Id.* The government does not pay for the dogs’ continued care. *Id.* There are organizations that raise money for such a cause, but the government does not do anything. *Id.* Ritland said, “[i]t is a shame those organizations—our organizations—even need to exist . . .” *Id.*

287. *Id.* Ritland believes this is how the VA should be run, as well. *Id.* He reflected on how the VA is mismanaged, so it is unsurprising that the “canine version is nonexistent.” *Id.* If



*E. Does the DoD Have the Budget for a Federally Funded MWD Retirement Program?*

It is hard to estimate how much a MWD retirement program would cost the federal government.<sup>288</sup> There are too many variables to determine a number.<sup>289</sup> A calculation would need to consider, as a starting point, how the program would even operate. For example, if the program is going to be another “line item” on the federal budget, it will yield a different total cost than if the program were to operate as an administrative office that helps to fund nonprofits like Warrior Dog Foundation.<sup>290</sup>

Regardless of the total cost, however, is the admitted fact that MWDs save countless lives every single year.<sup>291</sup> MWDs are effective at combatting improvised explosive devices (IEDs),<sup>292</sup> and yet they cost nearly a fraction of what an advanced weapons system would cost to execute the same task.<sup>293</sup> If the DoD or federal government

we cannot take care of human soldiers, “it shouldn’t come as a surprise, but it is not more acceptable” that the government provides no canine postservice care at all. *Id.* The VA is outside of this Article’s scope, and its issues are not explored herein.

288. See *H.R. 4081 - Canine Members of the Armed Forces Act*, *supra* note 145 (stating that “[a]s of 10/19/2025, a CBO Cost Estimate for this measure has not been received”).

289. E-mail from Kendell Jones, Producer of Mike Ritland’s Mike Drop Podcast, to author (Jan. 10, 2025, at 03:30 ET) (on file with author) (“I talked to Mike and we can’t really come up with an answer. Th[ere] [are] too many variables that would go into it, so unfortunately, we can’t really put a number on it.”).

290. See *supra* Section III.D.

291. CHESNEY WITH LAYDEN, *supra* note 164, at x (“I remember walking into a training room once, early in my tenure, and hearing the following directive: ‘Raise your hand if your life has ever been saved by a dog.’ Without hesitation, roughly 90 percent of the men in the room lifted their arms. They did not laugh. They did not smile. This was serious, earnest business.”).

292. Telephone Interview with Mike Ritland, *supra* note 10; RITLAND WITH BROZEK, *supra* note 194, at 199–200 (citing ANTHONY H. CORDESMAN, CHARLES LOI & VIVEK KOCHARLAKOTA, CTR. FOR STRATEGIC & INT’L STUD., IED METRICS FOR IRAQ: JUNE 2003 – SEPT. 2010 (2010), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/101110\\_ied\\_metrics\\_combined.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/101110_ied_metrics_combined.pdf) [<https://perma.cc/W3KM-U9JZ>]). Ritland noted that

there are a number of factors that contributed to the dramatic decline in the number of casualties related to IEDs . . . . How much canine detection contributed to this is not something that has been quantified . . . . All we have to go on, then, is the anecdotal evidence. Ask any fighting man who worked with a canine team how important explosive detection was to his life either being saved or not terribly altered by an IED, and he’ll tell you that contribution was huge.

Telephone Interview with Mike Ritland, *supra* note 10

293. Telephone Interview with Mike Ritland, *supra* note 10. A MWD may cost \$65,000 to \$85,000, including training, but a fully trained bomb detection canine could be worth over \$150,000. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 85, at 6; Ranny Green, *What Do Military Working Dogs Do?*, AM. KENNEL CLUB (Sep. 1, 2021), <https://www.akc.org/expert-advice/news/what-are-military-working-dogs/> [<https://perma.cc/9LMC-BKEY>]; see also Jon Michael Connor, *Dogs Noses Key to Security Regarding Detection of Explosives in Afghanistan*, U.S. ARMY (Oct. 8, 2019), [https://www.army.mil/article/212166/dogs\\_noses\\_key\\_to\\_security\\_regarding\\_detection\\_of\\_explosives\\_in\\_afghanistan](https://www.army.mil/article/212166/dogs_noses_key_to_security_regarding_detection_of_explosives_in_afghanistan) (on file with the Duquesne Law

needed a starting number, they could begin by subtracting the cost of an expensive weapons system from the cost to breed, train, and deploy a MWD.<sup>294</sup> The amount of money saved could be contributed to the MWD Retirement program. For each MWD, that amount will likely be significant, but this is one way in which the DoD and the federal government could finance the program.<sup>295</sup>

Hence, DAFI 31-126 section 2.12.6.3 needs to be changed to remove euthanasia as a “last resort” and, rather, direct those MWDs to a federally funded retirement facility when they are not medically suffering and cannot be retired to a former handler or law enforcement agency.<sup>296</sup>

### F. A Note on Barriers to Adoption

Ritland noted that there are plenty of people that want to adopt retired MWDs; however, the “biggest thing is the potential adoptee being qualified to actually take the dog . . . 99.99% of them aren’t equipped” mentally or environmentally to take on a retired working dog.<sup>297</sup> A potential adoptee should not have other pets, should not have children around, should own the home he lives in, have a “six-foot privacy fence,” and must meet other nuanced requirements to mitigate the adoptee’s risk and civilian risk of getting bit.<sup>298</sup>

Additionally, a dog may have had multiple handlers.<sup>299</sup> The general understanding, according to Ritland, is “whoever the last

Review); Spencer Ackerman, *\$19 Billion Later, Pentagon’s Best Bomb-Detector Is a Dog*, WIRE (Oct. 21, 2010, at 15:46 ET), <https://www.wired.com/2010/10/19-billion-later-pentagon-best-bomb-detector-is-a-dog> [<https://perma.cc/AXK7-FUYV>].

294. This is money the DoD and federal government would have to spend but for the hard work and valor of MWDs. Telephone Interview with Mike Ritland, *supra* note 10. It seems both appropriate and logical that the money MWDs save the DoD and the federal government be used to preserve their dignity and health postservice.

295. Telephone Interview with Mike Ritland, *supra* note 10.

296. See DEPT OF THE AIR FORCE, *supra* note 93, at 16–18.

297. Telephone Interview with Mike Ritland, *supra* note 10.

298. *Id.* However, Ritland did note that for some retired dogs, having children around and integrating with other dogs is not a problem. *Id.* Such was the case for Samson, adopted by his former handler, Dave. *Id.*; RITLAND WITH BROZEK, *supra* note 194, at 191–92. Samson had a “seamless retirement,” adapting well to Dave’s two teenagers and male golden retriever. Telephone Interview with Mike Ritland, *supra* note 10. Samson was “hanging out on the couch for years,” and he was a lovely house dog. *Id.* In relation to Ritland’s book, the author asked if Samson was reunited with his favorite toy—an Elmo toy—which he found while deployed in Kandahar. Telephone Interview with Mike Ritland, *supra* note 10; RITLAND WITH BROZEK, *supra* note 194, at 200, 207–08. Samson did, indeed, remember the toy. Telephone Interview with Mike Ritland, *supra* note 10.

299. Such was the case for Nico, a dog that Ritland trained to prepare him for service. *Id.* Nico had three different handlers and was retired back to Ritland once he was done serving. *Id.* His last handler, Taylor Canfield, got to adopt him. See Taylor Canfield (@taylor1canfield), INSTAGRAM (Aug. 26, 2018), <https://www.instagram.com/p/Bm9eOo5nYGA/>

person was to have the dog” gets the “first crack” at the adoption.<sup>300</sup> “The tough part for a lot of handlers is that they are not always in an ideal scenario to adopt a dog.”<sup>301</sup> Where a former handler cannot adopt the dog, Ritland often steps in to provide the dog with rehabilitation and a home for his retirement.<sup>302</sup>

## V. CONCLUSION

From Chesney and Cairo<sup>303</sup> to Canfield and Nico,<sup>304</sup> retiring a MWD with dignity to live the remainder of his life in a loving home is possible and powerful for both adoptee and canine. Where a former handler may not be able to adopt his canine, the MWD still deserves a safe and comfortable home. The survey of proposed legislation,<sup>305</sup> current efforts to resolve this issue,<sup>306</sup> and the insight from a U.S. Navy SEAL<sup>307</sup> indicate that the DoD and the federal government<sup>308</sup> should step up and provide homes unconditionally to the four-legged heroes that served them so valiantly.<sup>309</sup> The lasting and significant gaps in legislation<sup>310</sup> continue to result in retired MWDs being euthanized like excess equipment,<sup>311</sup> which is especially frustrating given the immeasurable number of lives MWDs save.<sup>312</sup> These are the reasons why, when a Navy SEAL and a law student talk about war dogs, they discuss a shared dream that, one

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?utm\_source=ig\_web\_copy\_link (on file with the Duquesne Law Review). Taylor captioned a collage post of Nico:

#nationaldogday... He's a hero with fur and teeth, a comedian, and most of all, a best friend. I wouldn't be lost without this guy, but I sure as hell wouldn't be where I am today without him. Love ya little buddy! Seal K9 Nico. As always, thank you to @warriordogfoundation and @mritland for taking great care of this guy during his retirement/transition into the retired life!

*Id.* In another post, Nico was given a medal of bravery on behalf of Cairo and Will Chesney at the Capitol during the AWP ceremony. Taylor Canfield (@taylor1canfield), INSTAGRAM, (Mar. 13, 2022) <https://www.instagram.com/p/CbDMbCvLMA6/> (on file with the Duquesne Law Review).

300. Telephone Interview with Mike Ritland, *supra* note 10. Ritland said the general order for adoption is whoever had the dog last, then first, then anyone in between. *Id.*

301. *Id.*

302. *Id.*

303. CHESNEY WITH LAYDEN, *supra* note 164, at 304.

304. Taylor Canfield (@taylor1canfield), INSTAGRAM (Aug. 26, 2018), [https://www.instagram.com/p/Bm9eOo5nYGA/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/Bm9eOo5nYGA/?utm_source=ig_web_copy_link) (on file with the Duquesne Law Review); Taylor Canfield (@taylor1canfield), INSTAGRAM (Mar. 13, 2022) <https://www.instagram.com/p/CbDMbCvLMA6/> (on file with the Duquesne Law Review).

305. See discussion *supra* Section III.B.3.

306. See discussion *supra* Section III.B.

307. See discussion *supra* Section IV.A.

308. Telephone Interview with Mike Ritland, *supra* note 10.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

day, all retired MWDs will have unconditional and free access to ongoing veterinary care, rehabilitation, and rehoming options simply because they deserve it.

# Bad Beats: The History, Harms, and Regulatory Failure of Sports Gambling Advertisements and Inducements in Post-*Murphy* America

Lewis F. Richardson\*

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## I. INTRODUCTION

Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.<sup>1</sup>

“The legalization of sports gambling is a controversial subject.”<sup>2</sup> This line, which appears on the final page of Justice Samuel Alito’s landmark majority opinion in *Murphy v. NCAA*, summarizes over a century of passionate debate about legalized sports gambling in America.<sup>3</sup> Despite Justice Alito’s charitable characterization, the story of the nation’s “complicated on-again, off-again relationship with gambling” mirrors that of a rocky romantic relationship.<sup>4</sup> While state-sponsored wagering played a critical part in financing the nation’s founding, for over two decades from 1992 until 2018 sports betting was forbidden across the United States short of very limited circumstances.<sup>5</sup> For better or for worse, after *Murphy* was decided in 2018, states were quick to tie the knot with legal sports gambling.<sup>6</sup> As of October 2025, thirty-eight states and the District

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1. COMM’N ON THE REV. OF THE NAT’L POL’Y TOWARD GAMBLING, GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 1 (1976), <https://ia804603.us.archive.org/27/items/gamblinginameric00unit/gamblinginameric00unit.pdf> (on file with the Duquesne Law Review).

2. *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

3. *Id.*

4. Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 25 (2016).

5. *Id.* at 25, 31–32; see Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–3704), *invalidated by*, *Murphy v. NCAA*, 584 U.S. 453 (2018); John T. Holden, Marc Edelman & Keith Miller, *Legalized Sports Wagering in America*, 44 CARDOZO L. REV. 1383, 1390 (2023).

6. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 932 (2020).

of Columbia have approved of a legal sports gambling regime,<sup>7</sup> with more jurisdictions likely to follow suit.<sup>8</sup>

In the post-*Murphy* race to hop on the sports gambling bandwagon, states acted quickly to capitalize on potential increases in tax revenue tied to the activity.<sup>9</sup> As a result of this frantic, modern-day gold rush, state-based statutory legalization frameworks and regulatory schemes for the sports gambling industry contain drastic differences.<sup>10</sup> Consumers are confronted with variations in minimum age requirements for betting, wildly different state-tax rates on successful wagers, and inconsistent restrictions on the types of bets they can place (i.e., proposition bets, moneyline bets, live bets).<sup>11</sup> Supporters of this piecemealed, state-specific sponsorship and regulation of sports gambling argue that legislative freedom has allowed different locales to adopt policies in line with their unique histories, attitudes, and financial expectations associated with the vice.<sup>12</sup> On the other hand, critics have argued that this

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7. John Gramlich, *Americans Increasingly See Legal Sports Betting as a Bad Thing for Society and Sports*, PEW RSCH. CTR. (Oct. 2, 2025), <https://www.pewresearch.org/short-reads/2025/10/02/americans-increasingly-see-legal-sports-betting-as-a-bad-thing-for-society-and-sports/> [https://perma.cc/NU9R-H6CA]; see also Erin El Issa & Elizabeth Renter, *2025 Sports Betting and Gambling Survey*, NERDWALLET (Jan. 28, 2025, at 06:00 PT), <https://www.nerdwallet.com/article/investing/2025-sports-betting-and-gambling-survey> [https://perma.cc/9L4E-26RT] (stating that sports gambling is legal in thirty-nine states and the District of Columbia).

8. *State of Play*, AM. GAMING ASS'N [hereinafter *State of Play Map*], <https://www.americangaming.org/research/state-gaming-map/> (on file with the Duquesne Law Review) (last visited Aug. 14, 2025). At the time of this Article's writing in August 2025, thirty-eight states and the District of Columbia have operational gambling regimes in place. *Id.* Missouri voters authorized the activity in November 2024, and the state must have operations up and running by December 31, 2025. *Id.* Between February and August of 2025, four states, Hawaii, Oklahoma, Texas, and South Carolina, saw a piece of sports gambling legislation or a legalization ballot initiative fail. *Id.* This effectively closed the door on short-term efforts to introduce the vice to those four jurisdictions. *Id.*

9. Holden & Edelman, *supra* note 6, at 941.

10. *Id.* at 939–40.

11. *State of Play Map*, *supra* note 8 (providing a dataset of each state's applicable gambling laws and regulations); Kevin Hardy, *Wagers on Touchdowns, Strikeouts and Even Penalties: States Eye Limits on Prop Bets*, STATELINE (Sep. 9, 2025, at 05:00 ET), <https://stateline.org/2025/09/09/wagers-on-touchdowns-strikeouts-and-even-penalties-states-eye-limits-on-prop-bets/> [https://perma.cc/6Y22-PD8B] (describing existing and ongoing state efforts to limit proposition betting on sports). A moneyline bet is a wager on the ultimate outcome of an event (i.e., whether a team will win or lose). *Id.* In contrast, a prop bet, short for "proposition bet," is a type of wager that is separate from the outcome of a game's result. See Dan Santaromita, *What Are Prop Bets?*, N.Y. TIMES (Jun. 25, 2025), <https://www.nytimes.com/athletic/2537514/2022/01/25/prop-bets-how-to-bet-a-prop-best-prop-bets/> [https://perma.cc/KBA5-LCUE]. Generally speaking, there are four different kinds of prop bets available to consumers: player props (bets on a specific player's performance during a contest), team props (bets related to an outcome for one of the teams in a contest), game props (bets on things that will occur in a contest), and nongame props (bets on aspects of a contest not related to the sport itself). *Id.*

12. See, e.g., Bill Miller, *The CFTC Must Respect State and Tribal Authority in Regulating Sports Betting*, SPORTS BUS. J. (Feb. 27, 2025), <https://www.sportsbusinessjournal.com/>

widespread regulatory unpredictability—paired with sports gambling’s meteoric rise in popularity and unprecedented accessibility—has only exacerbated the well-documented social ills associated with problem gambling.<sup>13</sup>

The most noteworthy difference in sports gambling laws appears from how states allow bets to be placed.<sup>14</sup> Among the forty jurisdictions that have legalized sports gambling, thirty-two have authorized mobile sports gambling through application-based sportsbooks.<sup>15</sup> This differs from the familiar kiosk or teller-based sports betting that occurs in brick-and-mortar locations like casinos, bars, or restaurants.<sup>16</sup> Mobile sportsbooks allow bettors to wager on sporting events from almost anywhere in a permitted jurisdiction where they have phone or internet service.<sup>17</sup>

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Articles/2025/02/27/the-cftc-must-respect-state-and-tribal-authority-in-regulating-sports-betting/ [https://perma.cc/Q2N6-SKTU] (describing how sports betting laws “reflect the unique priorities and concerns of . . . [state] residents”); see also *Murphy v. NCAA*, 584 U.S. 453, 486 (2018) (summarizing key positions of legal sports gambling’s supporters and critics).

13. See *Murphy*, 584 U.S. at 486. At the conclusion of the Court’s majority opinion, Justice Alito wrote: “Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.” *Id.*

14. Wayne Taylor, *To Legalize Online Gambling or Not? It’s Complicated*, SMU: COX SCH. OF BUS. (Sep. 26, 2024), <https://www.smu.edu/cox/coxtoday-magazine/2024-09-26-complicated-legalize-gambling> [https://perma.cc/FJ3W-MXY7].

15. *State of Play Map*, *supra* note 8.

16. Matthew Dziok, *Sports Law—Sports Gambling in a Post-Murphy World: Ensuring Emerging Sports Gambling Laws Adequately Protect the Integrity of College Sports*, 44 W. NEW ENG. L. REV. 149, 163 (2022); see also *State of Play Map*, *supra* note 8 (listing the ways a bet can be legally placed in each state); AM. GAMING ASS’N, *STATE OF THE STATES 2025: THE AGA ANALYSIS OF THE COMMERCIAL CASINO INDUSTRY 12–13* (2025) [hereinafter *STATE OF THE STATES 2025*], <https://www.americangaming.org/wp-content/uploads/2025/05/AGA-State-of-the-States-2025.pdf> [https://perma.cc/BH4U-9EZU]. Brick-and-mortar betting has often been termed “retail” sports betting, and is available, as of December 2024, in thirty-seven out of forty legal jurisdictions. *STATE OF THE STATES 2025*, *supra*, at 12–13. One state, Missouri, has legalized both retail and online sports gambling via a November 2024 ballot initiative for a constitutional amendment that was later approved by the state’s voters. *Id.* at 77–79. Both online and retail sports betting are slated to begin in Missouri on December 1, 2025. See Steve Bittenbender, *Missouri Sports Betting: Sign Up for MO Sportsbooks Today*, BET MO. (Nov. 28, 2025, at 09:06 ET), <https://www.betmissouri.com/> [https://perma.cc/2UCC-J5W3]. Tennessee and Vermont are the only two states that allow sports betting to occur solely online. *STATE OF THE STATES 2025*, *supra*, at 12–13. In contrast, eight states—Mississippi, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Washington, and Wisconsin—only allow sports betting to occur in brick-and-mortar establishments, though bettors in Mississippi may place mobile sports bets only when geographically situated at an authorized casino property. *Id.* at 12–13; Nick Beare, *Mississippi Sports Betting: Legal MS Sportsbooks & Legislation Updates*, LEGAL SPORTS REP. (Nov. 27, 2024), <https://www.legalreport.com/sports-betting-states/mississippi/> [https://perma.cc/9ALQ-6CDJ].

17. See Jacob Davis, *Pocket Sportsbooks: Mobile Sports Gambling in the Modern Era*, 51 FORDHAM URB. L.J. 843, 860 (2024).



More tellingly, in 2024 Americans legally wagered a record-breaking \$147.9 billion on sports (a 23.6% increase from 2023),<sup>18</sup> which generated \$13.78 billion in revenue (a 24.8% increase from 2023).<sup>19</sup> With more than one in five Americans betting on sports in 2024,<sup>20</sup> sportsbooks have seen a roughly 2,140.9% increase in total annual sports gambling handle since *Murphy v. NCAA* was decided in May 2018.<sup>21</sup> Although mobile sports betting is only available in approximately three-quarters of legal U.S. jurisdictions,<sup>22</sup> over 95% of sports bets placed nationwide in 2024 were placed on mobile devices.<sup>23</sup> This number should come as no shock: 98% of American adults own a cell phone, and 91% of the population owns a smartphone (i.e., a device capable of placing bets via a mobile application).<sup>24</sup> By 2030, industry commentators predict that the continued rise of mobile sports gambling will push annual sports gambling revenue north of \$20 billion.<sup>25</sup> In states that have legalized

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18. Eric Fisher, *Americans Bet \$148 Billion on Sports in 2024, Up 23.6%*, FRONT OFF. SPORTS (Feb. 20, 2025, at 16:27 ET), <https://frontofficesports.com/americans-bet-148-billion-on-sports-in-2024-up-23-6/> [<https://perma.cc/55VB-FWJ3>]; Michael McClymont, *U.S. Sports Betting Revenue & Handle: October 2025 Betting Market Handle*, COVERS (Dec. 2, 2025, at 16:26 ET), <https://www.covers.com/betting/betting-revenue-tracker> [<https://perma.cc/3FL2-JCPC>] (noting that Americans wagered a total of \$149.7 billion in 2024). This number tracks the total amount of money wagered by all bettors and is commonly referred to as the sports betting “handle.” See Chase Kiddy, *What Does Handle Mean in Sports Betting?*, BETMG (Apr. 28, 2025, at 08:50 ET), <https://sports.betmgm.com/en/blog/what-does-handle-mean-sports-betting-bm06/> [<https://perma.cc/N2Q4-PNMM>].

19. STATE OF THE STATES 2025, *supra* note 16, at 10. “Notably, the sports betting total does not include revenue earned by sportsbooks in tribal casinos or from mobile sports betting in Florida, which is also conducted as a form of tribal gaming.” *Id.*

20. *American Attitudes Toward Gaming 2025*, AM. GAMING ASS’N (Oct. 30, 2025), <https://www.americangaming.org/resources/american-attitudes-towards-gaming-2024/> [<https://perma.cc/VUL6-DCYB>].

21. See 584 U.S. 453 (2018); cf. McClymont, *supra* note 18 (describing total handle, gross revenue, and hold percentage for sports betting in all legal states captured year-by-year and month-by-month). From May 2018 until the end of that calendar year, the total sports gambling handle in the U.S. was approximately \$6.6 billion. *Id.* In 2019, sports gambling’s first full year of nationwide legalization efforts enabled Americans to legally wager approximately \$13.1 billion. *Id.*

22. STATE OF THE STATES 2025, *supra* note 16, at 12–13.

23. Fisher, *supra* note 18; see also Mark Conrad, *Betting on Addiction Money: Can Sports Betting Advertising Be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?*, 15 HARV. J. SPORTS & ENT. L. 127, 130 (2024) (noting that 90% of sports bets were placed on a mobile device as of 2022).

24. *Mobile Fact Sheet*, PEW RSCH. CTR. (Nov. 20, 2025), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/X9EM-C5AE>]. Even more tellingly, 97.5% of adult Americans aged 18–49 own a smartphone. *Id.* Juxtaposed with the most recently available statistics which indicate that 67.7% of sports bets in the U.S. are placed by those aged 18–44, the appearance of a public health crisis becomes even more likely. *Id.*; see Patrick Cwiklinski, *American Sports Bettors Pray for the Best - Who Bets on Sports in the US?*, SPORTS BETTING DIME (July 3, 2025, at 13:33 ET), <https://www.sportsbettingdime.com/guides-research/survey-who-bets-on-sports/> [<https://perma.cc/GS2P-DMJY>].

25. Andrew Bimson, *Sports Betting’s Next Five Years Promise a Tech-Driven Boom*, SPORTICO (May 11, 2023, at 05:55 ET), <https://www.sportico.com/business/sports->

mobile sports betting, the only things limiting a bettor from wagering huge sums of money from the comfort of their home is their desire to gamble and availability of capital.<sup>26</sup> This is all the more concerning amidst studies demonstrating the drastic economic,<sup>27</sup> psychological,<sup>28</sup> and familial harms linked to online sports gambling.<sup>29</sup>

In just seven short years, mobile sportsbooks have fundamentally altered the way Americans watch and bet on sports by placing a “casino in your pocket.”<sup>30</sup> As digital wagering has supplanted casino-based sports betting as the default gambling booth, Americans have been confronted with two novel interconnected outgrowths of this switch: advertisements for mobile sportsbooks<sup>31</sup> and gambling inducements.<sup>32</sup> A recent study from the Siena College Research Institute (SCRI) and St. Bonaventure University’s Jandoli School of Communication reported that at least 75% of adults residing in the

betting/2023/sports-betting-next-five-years-tech-boom-1234721976/ [https://perma.cc/2E UW-LRYG]. This is even more notable considering that two of the nation’s largest, most populous, and most economically productive states, California and Texas, have not legalized sports gambling in any form as of August 2025. *Id.*; *State of Play Map*, *supra* note 8. Should California legalize the activity, the first year of operation should bring at least \$30 billion annually in handle, which would alone account for approximately 20% of what was legally wagered nationwide in 2024. *See* Bimson, *supra*; Fisher, *supra* note 18 (noting that approximately \$147.9 billion was wagered in 2024).

26. *See* Davis, *supra* note 17, at 860, 864.

27. Scott R. Baker et al., *Gambling Away Stability: Sports Betting’s Impact on Vulnerable Households* (Nat’l Bureau of Econ. Rsch., Working Paper No. 33108, 2024), <https://www.nber.org/papers/w33108> (finding that sports betting leads to “increase[d] credit card balances, reduce[d] available credit, increase[d] lottery play, and decrease[d] net investments,” especially in “financially constrained households”); Heather Wardle et al., *The Association Between Gambling Marketing and Unplanned Gambling Spend: Synthesised Findings from Two Online Cross-Sectional Surveys*, ADDICTIVE BEHAVS., Dec. 2022, at 3–4 (describing how gambling marketing has been linked to unplanned increases in spending, thereby affecting an individual’s financial planning ability).

28. Marianne Balem et al., *Impact of Wagering Inducements on the Gambling Behaviors of On-Line Gamblers: A Longitudinal Study Based on Gambling Tracking Data*, 117 ADDICTION 1020, 1031 (2021) (concluding that gambling inducements have a disproportionately large impact on individuals already predisposed to problem gambling by offering delayed discounting (which leads to “chasing” losses) and by favoring the development of gambling-related cognitive distortions).

29. Kyutaro Matsuzawa & Emily Arnesen, *Sports Betting Legalization Amplifies Emotional Cues & Intimate Partner Violence* 15 (Oct. 30, 2024) (unpublished manuscript) (on file with the Duquesne Law Review), <https://papers.ssrn.com/abstract=4938642> (finding that when sports gambling is legalized, the effect of NFL home team upset losses on rates of intimate partner violence increases by around ten percentage points and increases at an even greater rate in states where mobile sports betting is legal).

30. Davis, *supra* note 17, at 859 (quoting Dave Davies, *The Story Behind the Sports Betting Boom*, NPR (Apr. 6, 2023, at 14:00 ET), <https://www.npr.org/2023/04/06/1168349259/the-story-behind-the-sports-betting-boom> [https://perma.cc/6TWF-DFJM]).

31. *2024 Sports Betting Advertising Trends*, AM. GAMING ASS’N (Apr. 21, 2025), <https://www.americangaming.org/resources/2024-sports-betting-advertising-trends/> [https://perma.cc/K7GX-B56S].

32. Nerilee Hing et al., *Does the Uptake of Wagering Inducements Predict Impulse Betting on Sport?*, 7 J. BEHAV. ADDICTIONS 146, 146 (2018) [hereinafter Hing et al., *Uptake*].

United States have seen an advertisement for an online sportsbook.<sup>33</sup> Concerningly, early investigations on the effectiveness of gambling advertisements—and the wagering inducements they rely upon—have demonstrated that they are extremely successful at inducing both casual and problematic gamblers to wager more than they can reasonably afford.<sup>34</sup> When coupled with the reality that only five states—Maine, Ohio, New York, New Jersey, and Massachusetts—have enacted meaningful advertising restrictions on sportsbooks, the sheer prevalence of betting advertisements takes on a far more troubling significance.<sup>35</sup>

All this is to say: the current moment presents a critical juncture for regulating sports gambling advertising and inducements before widespread, systemic harm becomes entrenched. While the challenges facing regulators may be of a relatively recent vintage, it would be wrong to suggest that Americans have not been down this road before when it comes to regulating sports gambling.<sup>36</sup> It would be equally unwise to overlook the lessons that past failures in regulating this resilient industry offer for future efforts to mitigate harm.<sup>37</sup> As a result, this Article will explain the haphazard legal history of sanctioned sports gambling in America, which curiously led to the state-specific legalizations of sports gambling that the nation is confronted with today.

33. See SIENA COLL. RSCH. INST. IN PARTNERSHIP WITH ST. BONAVENTURE UNIV.'S JANDOLI SCH. OF COMM'N, AMERICAN SPORT FANSHIP SURVEY 1 (2024), <https://www.sbu.edu/docs/default-source/academics-documents/academics-jandoli-school/asfs24-crosstabs---release-2-online-sports-betting.pdf> [<https://perma.cc/PX3E-RXAE>]; *St. Bonaventure/Siena Research Survey Reveals Almost 1 in 5 Americans Have an Online Sports Betting Account*, ST. BONAVENTURE UNIV. (Feb. 5, 2024), <https://www.sbu.edu/news/news-items/2024/02/05/st.-bonaventure-siena-research-survey-reveals-almost-1-in-5-americans-have-an-online-sports-betting-account> [<https://perma.cc/J3B7-3VYQ>].

34. See KARL E. SCHNEIDER, CONG. RSCH. SERV., SPORTS GAMBLING AND CONSUMER FINANCE 1 (2024), [https://www.congress.gov/crs\\_external\\_products/IF/PDF/IF12761/IF12761.3.pdf](https://www.congress.gov/crs_external_products/IF/PDF/IF12761/IF12761.3.pdf) [<https://perma.cc/7RXQ-FAE2>]; see also Ian Thomsen, *Ads for Sports Betting Have Been More Effective than the Original Cigarette Campaigns, Northeastern Expert Says*, NE. GLOB. NEWS (May 19, 2023), <https://news.northeastern.edu/2023/05/19/sports-betting-ad-campaigns/> [<https://perma.cc/39Q6-LK9T>] (finding that the gambling industry's goal is to get bettors to “play to extinction” by betting as much as they can until they “run[] out of all their money”).

35. See Heidi McNeil Staudenmaier & Megan Carrasco, *Wagers and Warnings: The State of Sports Betting Advertisements*, A.B.A. (Nov. 11, 2024), <https://www.americanbar.org/groups/judicial/resources/judges-journal/2024-fall/wagers-warnings-state-sports-betting-advertisements/> [<https://perma.cc/AW82-GK98>]. For a deeper analysis of ongoing federal efforts at restricting gambling advertisements, see discussion *infra* Section IV.B.

36. See Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571–77 (2013) (discussing the history of sports gambling regulatory efforts in America).

37. See *id.*

Part II of this Article provides a historical synthesis broadly grouped into four distinct eras.<sup>38</sup> The first era, which ranges from 1612 to 1931, describes the back-and-forth relationship that Americans had with illegal sports wagering—and state-sponsored gambling more generally—for much of the country’s history.<sup>39</sup> The second era, which ranges from 1931 to 1992, is bookended by state and federal attempts at regulating sports gambling.<sup>40</sup> The third era, which ranges from 1992 to 2018, includes the effective dates of the Professional and Amateur Sports Protection Act (PASPA), Congress’s temporary success at instituting a national freeze on sports wagering.<sup>41</sup> The fourth era considers the U.S. Supreme Court’s 2018 decision in *Murphy v. NCAA* and its immediate aftermath.<sup>42</sup>

Part III examines contemporary scientific studies identifying recognized harms associated with legal sports gambling advertising and inducements in the post-*Murphy* era.<sup>43</sup> Because of the novelty of, and growing concern surrounding, sports gambling advertisements and inducements in the post-*Murphy* era, this analysis focuses on this issue in particular. The discussion proceeds in three parts: first, it considers experimental evidence demonstrating how inducements increase betting volume and cause decision errors; second, it examines the psychological mechanisms through which inducements manipulate decision-making; and third, it surveys real-world exposure data documenting the omnipresence of gambling marketing.<sup>44</sup>

Part IV concludes by diagnosing the current regulatory landscape of legalized American sports gambling in 2025.<sup>45</sup> This Part proceeds in three parts: first, it examines the collapse of industry self-regulation efforts; second, it analyzes federal legislative proposals, including the SAFE Bet Act; and third, it draws lessons from America’s historical relationship with gambling regulation to inform future policy directions.<sup>46</sup>

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38. See discussion *infra* Sections II.A–D.

39. See discussion *infra* Section II.A.

40. See discussion *infra* Section II.B.

41. See discussion *infra* Section II.C.

42. See discussion *infra* Section II.D.

43. See discussion *infra* Part III.

44. See discussion *infra* Sections III.A–C.

45. See discussion *infra* Part IV.

46. See discussion *infra* Sections IV.A–C.

## II. A BRIEF HISTORY OF LEGAL SPORTS GAMBLING IN AMERICA

Gambling in the United States did not emerge fully formed as a contested legal issue; rather, it developed unevenly, shifting between periods of wide acceptance and moral condemnation.<sup>47</sup> Accordingly, the story of sports gambling in America is best understood as a shifting narrative.<sup>48</sup> In the earliest period, from 1612 to 1931, gambling was not only tolerated but often celebrated: colonial lotteries funded settlements, universities, and even the Revolutionary War, while horseracing and baseball drew wagers despite growing moral backlash.<sup>49</sup> However, by 1931 public perception had hardened, and Nevada's decision to legalize casino gambling marked the beginning of a second era (1931–1992), defined by limited legalization in select jurisdictions alongside persistent struggles against organized crime and illegal bookmakers.<sup>50</sup> The third era (1992–2018) was dominated by federal prohibition under the Professional and Amateur Sports Protection Act (PASPA), which largely froze legal sports wagering in place outside Nevada, even as underground and offshore markets flourished.<sup>51</sup> The Supreme Court's 2018 decision in *Murphy v. NCAA* opened the door to the modern era by allowing states to chart their own course.<sup>52</sup> To understand how the nation arrived at this moment, however, it is necessary to return to the beginning—when early lotteries and wagers first took root in America—and trace the gradual shifts in public perception that shaped every stage of gambling's complex legal history.

### A. 1612–1931: An Era of Changing Perceptions on Sports Gambling

#### i. State-Sponsored Lotteries: America's First Foray into Legal Gambling

America's rocky relationship with state-sponsored gambling can trace its origins to well-before the nation's founding and the

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47. Holden, Edelman & Miller, *supra* note 5, at 1389.

48. *Id.*

49. Holden & Edelman, *supra* note 6, at 910–15.

50. *Id.* at 914–16; George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 UNIV. NEV. L.V. GAMING RSCH. & REV. J. 65, 70 (1996), <https://digitalscholarship.unlv.edu/cgi/view-content.cgi?article=1223&context=grrj> [<https://perma.cc/JF3N-MSBG>].

51. Holden & Edelman, *supra* note 6, at 919–21, 931–33; Fielkow, Werly & Sensi, *supra* note 4, at 29–34.

52. See Alexander Hall, *Place Your Bets*, 55 TENN. BAR J. 14, 15 (2019).

development of sports betting as we know it today.<sup>53</sup> The earliest state-sponsored form of gambling in the United States is the lottery.<sup>54</sup> In 1612, King James I chartered the Virginia Company of London and tasked it to raise money through lotteries conducted across England for the first successful English colony on the mainland of North America, the Jamestown Settlement.<sup>55</sup> This directive proved critical to the sustainability of the settlement, as it lacked a central government and power to tax.<sup>56</sup>

Between 1624 and the Civil War, both public and private lotteries provided needed revenue for countless early-American activities and civic projects.<sup>57</sup> While the Virginia Company's sponsorship was short-lived, the success of using the lottery to generate revenue sprouted the first domestic lotteries in 1624.<sup>58</sup> Some of these newly created lotteries funded the establishment of colleges such as Harvard (1636), William and Mary (1693), Yale (1701), and Princeton (1746).<sup>59</sup> In 1776, the First Continental Congress created a public lottery in all thirteen colonies to finance the costly Revolutionary War.<sup>60</sup> As Ronald J. Rychlak described, lotteries contributed to and financed "the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches."<sup>61</sup> To colonists and enterprising early Americans, playing the lottery was such a lauded and effective form of public fundraising that this limited form of gambling was thought to be something of a civic responsibility.<sup>62</sup>

Public perception surrounding state-sponsored gambling through lotteries soon soured.<sup>63</sup> As concern surrounding the moral and social

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53. See CORNELL INST. ON ORGANIZED CRIME, DEVELOPMENT OF THE LAW OF GAMBLING 1776-1976, at 52-53 (1976), <https://www.ojp.gov/pdffiles1/Digitization/37369NCJRS.pdf> [<https://perma.cc/CPK4-2HE6>].

54. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 (1992).

55. *Id.*

56. *Id.*

57. *Id.* at 24-25 (noting that 1624 marked the revocation of the Virginia Company's lottery charter, thereby catalyzing the development of domestic-run lotteries in the U.S.).

58. *Id.* at 24.

59. *Id.* at 25; Becky Little, *Lottery Tickets Helped Fund America's 13 Colonies*, HIST. (Oct. 19, 2018), <https://www.history.com/news/13-colonies-funding-lottery> [<https://perma.cc/4QHD-T23E>]. While lotteries contributed to the fundraising efforts for each of these colleges' construction projects, "[t]he free labor of enslaved Black people significantly drove down the price of construction and maintenance." *Id.*

60. Little, *supra* note 59.

61. Rychlak, *supra* note 54, at 25.

62. Little, *supra* note 59; Woo, *supra* note 36, at 571-72.

63. See Woo, *supra* note 36, at 572.

evils associated with betting rose, so too did state-specific regulatory schemes attempting to curtail some of the externalities associated with gambling.<sup>64</sup> As Rychlak noted, “[s]erious lottery opposition began to mount in the early to mid-1800s as part of general social reform that included movements for temperance, peace, women’s rights, educational reform, prison reform and abolition of slavery.”<sup>65</sup> This disdain came to a head almost three decades after the Civil War through a congressional effort to limit the nationwide reach of the country’s largest lottery—the Louisiana Lottery—which, despite state approval, had origins in a New York crime syndicate.<sup>66</sup> Plagued by scandals, corruption, and a rediscovered sense of public morality,<sup>67</sup> Congress banned all lottery materials from being transmitted via mail in 1890,<sup>68</sup> and banned all lottery materials from interstate commerce in 1895.<sup>69</sup> In 1903, the Supreme Court upheld Congress’s ban on lottery ticket trafficking and reaffirmed the power of states to use their police powers to regulate gambling.<sup>70</sup> From 1903 until 1964, there was little legalized gambling and no state-sponsored lotteries in the United States.<sup>71</sup>

ii. *The Origins of American Sports Betting: Horseracing & Baseball*

Unlike lotteries, nearly all sports betting in the United States prior to 2018 was illegal.<sup>72</sup> Despite this shroud of illegitimacy, modern American sports wagering traces its roots to horseracing, with the continent’s first racetrack built in New York in 1665.<sup>73</sup> Unlike today, “[h]orseracing was still primarily a sport at that time, and most bets of the participants and spectators were a reflection of the

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64. See *id.*; Rychlak, *supra* note 54, at 27 (noting that many of this era’s regulatory efforts were aimed at private lotteries specifically).

65. Rychlak, *supra* note 54, at 32.

66. *Id.* at 41–43.

67. *Id.* at 42–43; I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 369 (2010) (exploring the connection between lottery scandals and waves of “newfound morality” that have historically affected the legal status of lotteries).

68. Act of Sep. 19, 1890, ch. 908, 26 Stat. 465.

69. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963; see also Rychlak, *supra* note 54, at 13. “From the late-1800s until 1964, lotteries were prohibited throughout America. These prohibitions were based on a perception that lotteries greatly contributed to personal downfall and societal decay, as well as concerns about fraud in operation.” *Id.*

70. *Champion v. Ames*, 188 U.S. 321, 363–64 (1903). This decision dealt a death knell to the Louisiana Lottery—and, more broadly, state-sponsored gambling in the United States—that lasted until the mid-1960s. See Rychlak, *supra* note 54, at 43–44.

71. Holden & Edelman, *supra* note 6, at 912.

72. Holden, Edelman & Miller, *supra* note 5, at 1390.

73. Holden & Edelman, *supra* note 6, at 911.

bettor's loyalties to a particular horse or rider."<sup>74</sup> As a result of this, betting on horseracing throughout most of early American history "represented gambling of an essentially private character," and continued in this regard until professional bookmaking emerged in the 1870s.<sup>75</sup>

Perhaps given the perceived recreational and private nature of betting on horseraces, the activity continued uninterrupted despite state-specific efforts at regulating gambling throughout the eighteenth and nineteenth centuries.<sup>76</sup> Some of the earliest efforts at regulating horseracing were aimed at improving public safety surrounding the activity, not preventing the occurrence of the sport itself.<sup>77</sup> As the new nation developed, state governments like New Jersey and Rhode Island attempted to curtail horseracing in an effort to prevent wasteful and immoral wagering and to ensure that all available horses were being used to support the Revolutionary War effort.<sup>78</sup>

Even amid sporadic attempts to do away with horseracing and the betting that accompanied it, the sport has "seemingly managed to evade widespread bans throughout U.S. history" and has been effectively "immune to the cyclical illegalization of other forms of gambling."<sup>79</sup> As a testament to its resilience, in 1908, horseracing was banned in nearly every state, though twenty-five racetracks remained in operation despite such laws.<sup>80</sup> Perhaps most important

74. CORNELL INST. ON ORGANIZED CRIME, *supra* note 53, at 55.

75. *Id.*

76. See Holden & Edelman, *supra* note 6, at 911–12 (describing that "[t]he exception to the cyclical treatment of gambling appears to be horseracing . . . [which] seemingly managed to evade widespread bans throughout U.S. history" despite state-specific efforts at regulating and banning other forms of gambling).

77. See, e.g., THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 171 (William Brigham ed., 1836), <http://archive.org/details/compactwithchart00newp> [<https://perma.cc/Q8SJ-ZQ7T>] (describing a 1674 law in the Plymouth Colony which prohibited racing horses on public roadways); CORNELL INST. ON ORGANIZED CRIME, *supra* note 53, at 55–56 (describing similar public safety laws enacted around 1674 to control horseracing in the Massachusetts Bay Colony).

78. CORNELL INST. ON ORGANIZED CRIME, *supra* note 53, at 56–57. This history provides something of a full-circle moment: the first state to outlaw sports wagering on horseracing was New Jersey in 1761, which ironically was the very same state that led the charge to strike down PASPA in 2018. *Id.* at 56; Murphy v. NCAA, 584 U.S. 453, 462–63 (2018).

79. Holden & Edelman, *supra* note 6, at 911–12.

80. Fenich, *supra* note 50, at 69. Even as states attempted to universally crack down on horseracing at the turn of the twentieth century, by 1910 both Maryland and Kentucky still maintained a legal horseracing industry. *Id.* These states are home to two of the three famed "Triple Crown" races in American thoroughbred horseracing: the Preakness Stakes, which was first run in Maryland in 1873, and the Kentucky Derby, which was first run in 1875. See Marvin Drager, *Triple Crown*, BRITANNICA (Nov. 5, 2025), <https://www.britannica.com/sports/Triple-Crown-American-thoroughbred-horse-racing> [<https://perma.cc/LH46-3C4U>]; Marvin Drager, *Preakness Stakes*, BRITANNICA (Oct. 29, 2025) <https://www.britannica.com/sports/Preakness-Stakes> [<https://perma.cc/Z8C6-GKWV>]; Jamie Nicholson,



to the rise of the modern gambling industry, in-person betting on horseraces laid the foundation for interstate sports wagering and odds-making, which entered the American consciousness towards the end of the nineteenth century with the advent of the telephone and totalizator machines.<sup>81</sup>

On a larger scale, sports gambling in America rapidly grew in popularity as professional baseball rose to prominence in the second half of the 1800s.<sup>82</sup> Baseball and gambling are inextricably linked American pastimes, as Bill Lamb described: “The long-standing, often toxic relationship between baseball and gambling dates from the sport’s infancy, with game-fixing having been exposed as early as 1865. . . . The first modern World Series of 1903 was jeopardized by gambler attempts to bribe Boston Americans catcher Lou Criger into throwing games.”<sup>83</sup> Despite its questionable legality, by 1860 team owners began building betting booths into their baseball parks.<sup>84</sup> In doing so, baseball team owners provided Americans with expanded accessibility to a seemingly legitimate sports gambling outlet.<sup>85</sup> While the general public’s enthusiasm for legal (or at least legitimate) sports gambling outlets grew rapidly alongside the ascent of baseball, state and federal legislatures were not convinced of the value of such widespread acceptance.<sup>86</sup> This hesitation was for good reason: sports gambling was almost uniformly illegal in the United States at this time, and, as a result, most wagers were placed with bookies tied to organized crime syndicates.<sup>87</sup>

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*Kentucky Derby*, BRITANNICA (Oct. 29, 2025) <https://www.britannica.com/sports/Kentucky-Derby> [https://perma.cc/R3EY-UJTR].

81. Holden & Edelman, *supra* note 6, at 911; Rose, *supra* note 67, at 371; *see also Pari-Mutuel*, BRITANNICA (Nov. 26, 2010), <https://www.britannica.com/topic/pari-mutuel#ref145213> [https://perma.cc/5BVJ-ZFXC]. Pari-mutuel betting is one of the oldest methods of wagering on horse races, though it relied on technological developments to truly take on a prominent role at racetracks. *Id.* Concerning the totalizator machine, Britannica noted the following: “An important innovation in pari-mutuel betting came in the 1920s with the development of the totalizator, a mechanical device for issuing and recording betting tickets. Modern totalizators, usually computers, calculate betting pools and current odds on each horse and flash these figures to the public at regular intervals. They may also display race results, payoff amounts, running times, and other information.” *Id.*

82. Woo, *supra* note 36, at 572.

83. Bill Lamb, *The Black Sox Scandal*, SOC’Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/the-black-sox-scandal/> [https://perma.cc/AJG6-Z9UR] (last visited Aug. 21, 2025).

84. Fenich, *supra* note 50, at 68.

85. *Id.*

86. *See* Holden & Edelman, *supra* note 6, at 914; Fenich, *supra* note 50, at 68. In 1861, Nevada’s state government banned all forms of gambling and classified it as a felony, punishable by imprisonment of up to two years and fines of \$5,000 for offenders. *Id.* By 1862, all states except Kentucky and Missouri followed suit by banning their state lotteries. *Id.* Despite this, by 1869 the Nevada legislature made gambling legal again in the state by repealing their 1861 ban. *Id.*

87. Woo, *supra* note 36, at 572.

Despite baseball's early days being filled with a newfound acceptance for sports gambling, American anxiety and contempt for illegal sports gambling was at its peak in 1919.<sup>88</sup> Commonly known as the "Black Sox" scandal, public outcry arose when eight Chicago White Sox players were alleged to have thrown the 1919 World Series after being bribed by organized-crime leader Arnold Rothstein.<sup>89</sup> Professional baseball team owners promptly took concerted steps to purge the sport of its ties to illegal gambling operations by appointing Judge Kenesaw Mountain Landis as the first commissioner of baseball shortly after the Black Sox scandal.<sup>90</sup> While the eight involved players were acquitted of criminal charges by a jury, Judge Landis permanently banned the players from professional baseball on August 3, 1921.<sup>91</sup> Judge Landis's imposition of the lifetime ban was accompanied by a warning when he remarked:

Regardless of the verdict of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever again play professional baseball.<sup>92</sup>

In addition to resurrecting the legitimacy and public image of professional baseball, Landis's statement and stern treatment of athlete-gamblers set the precedent for professional sports leagues' treatment of gambling for the next century.<sup>93</sup>

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88. Holden & Edelman, *supra* note 6, at 912–13.

89. *Id.*; Lamb, *supra* note 83. Lamb's telling of the infamous Chicago White Sox 1919 World Series game-fixing scandal provides essential historical context for any exploration of American sports gambling. *Id.* Lamb's characterization of the legacy of the cheating scandal is particularly on point: "[O]ne central and indisputable truth endures: Talented members of that White Sox club conspired with professional gamblers to rig the outcome of the 1919 World Series. Another certainty attends the punishment imposed in the matter. The permanent banishment from the game of those players implicated in the conspiracy, while perhaps an excessive sanction in certain cases, achieved an overarching objective. Game-fixing virtually disappeared from the major-league landscape after that penalty was imposed on the Black Sox." *Id.*

90. Holden & Edelman, *supra* note 6, at 913; Woo, *supra* note 36, at 573.

91. Matt Bonesteel, *Sports Betting Timeline: From Las Vegas to the Supreme Court*, WASHINGTON POST (Aug. 29, 2022), <https://www.washingtonpost.com/sports/2022/08/29/history-of-sports-gambling/> (on file with the Duquesne Law Review).

92. Kenesaw Landis, NAT'L BASEBALL HALL OF FAME <https://baseballhall.org/hall-of-famers/landis-kenesaw> [https://perma.cc/8MD5-SJGZ] (last visited Oct. 5, 2025).

93. *Id.*; see also Edward Sutelán, *Pete Rose's Gambling Scandal, Explained: Why MLB's Hits King Was Banned for Betting on Baseball*, SPORTING NEWS (Oct. 23, 2025, at 11:53 ET), <https://www.sportingnews.com/us/mlb/news/pete-rose-gambling-scandal-mlb-hits-record-banned-betting/bef86ec38adflcb165801853> [https://perma.cc/M2ET-3MD9] (describing how baseball's all-time hits leader, Pete Rose, was deemed "permanently ineligible" from the sport in 1986 for violating the league's gambling policy established in 1919). Despite his statistical

As professional and collegiate sports leagues professed their aversion to sports gambling, substantial increases in fan viewership and attendance at sporting events during the 1920s led to the further expansion of criminally run sportsbooks.<sup>94</sup> These illegal sportsbooks largely operated by using an interstate racing wire service, which transmitted horseracing results and sports scores via telegraph and telephone nearly instantaneously.<sup>95</sup> This service was extremely successful.<sup>96</sup> By this point, federal legislators knew that they had to act in order to control organized crime.<sup>97</sup>

### *B. 1931–1992: Early Gambling Legalization & Continued Attempts at Curtailing Illegal Gambling Operations*

At the tail end of the Roaring Twenties, many state economies across the union were decimated by the onset of the Great Depression in October 1929.<sup>98</sup> This, combined with widespread unemployment, failures in agricultural production caused by the “Dust Bowl” throughout the 1930s, and a largely insolvent banking system, caused many states to resort to drastic measures in an effort to stay afloat.<sup>99</sup> Sensing this urgency, Nevada legalized most forms of

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greatness, Rose has never been inducted into the Baseball Hall of Fame in Cooperstown, New York, further solidifying the sport’s historical disdain for athlete gamblers. *Id.* Perhaps as evidence of professional baseball’s changing opinions on gambling, on May 13, 2025, MLB Commissioner Robert D. Manfred, Jr., in a letter to the Rose family attorney, issued what has been interpreted as a policy statement on the league’s rules concerning “permanent ineligibility” status (from further professional baseball activities and Hall of Fame eligibility). Letter from Robert D. Manfred, Jr., Comm’r of Baseball, Major League Baseball, to Jeffrey M. Lenkov (May 13, 2025) (on file with the Duquesne Law Review), <https://img.mlbstatic.com/mlb-images/image/upload/mlb/nygssehtiivswdtymqso.pdf>. In this letter, Commissioner Manfred determined that due to Rose’s recent passing, he is now eligible for consideration for admission to the Professional Baseball Hall of Fame. *Id.* Notably, Manfred did not substantively change the league’s antigambling policy established by Judge Landis. *Id.* Instead, Manfred merely determined that because “a person no longer with us cannot represent a threat to the integrity of the game,” “permanent ineligibility ends upon the passing of the disciplined individual,” and, subsequently, “Mr. Rose will be removed from the permanently ineligible list.” *Id.*

94. Woo, *supra* note 36, at 573. The decade following the 1919 Black Sox scandal has been termed the “Golden Age of Sports.” *Id.*

95. Charles B. Hagan, *Wire Communications Utilities and Bookmaking*, 35 MINN. L. REV. 262, 262–63 (1951).

96. DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 47 (2005) (exploring how the emergence of the wire service coincided with an increased American appetite for sports gambling). By 1950, a Gallup survey considering illegal gambling habits showed that 58% of Americans had wagered at least once in the past year. *Id.*

97. *Id.* at 45–46 (describing how gambling and other crime, though once viewed as a geographically localized problem, became increasingly national in nature from the late 1940s into the early 1960s).

98. *Great Depression History*, HIST. (Dec. 1, 2025), <https://www.history.com/articles/great-depression-history> [https://perma.cc/ZY86-SG7M].

99. *Id.*

gambling (excluding sports betting) in 1931.<sup>100</sup> The legalization of gambling in Nevada aimed to stimulate revenue, create jobs, and attract tourists.<sup>101</sup> Initially, casino-style gambling, rather than sports betting, took center stage, but the framework laid by Nevada's legislature became the foundation for future discussions about regulated sports gambling.<sup>102</sup>

Sports betting remained largely illegal nationwide, short of pari-mutuel sports betting,<sup>103</sup> up until Nevada legalized the activity in 1949.<sup>104</sup> Because the first major casino in Las Vegas was built in 1940,<sup>105</sup> sports betting in Nevada started modestly, primarily through small-scale betting shops that operated independently from the larger casinos.<sup>106</sup> These establishments catered to a growing demand for legal wagering on horseracing and, later, other sports.<sup>107</sup> However, the regulatory structure was rudimentary at best, and the resulting tax burdens imposed on bookmakers, rather than the costs of enforcement itself, prompted many to abandon the legal market and return to underground operations.<sup>108</sup> Nevada responded by establishing the state's Gaming Control Board in 1955 to address these issues, signaling the first meaningful state-led attempt to regulate sports betting within a legal framework.<sup>109</sup>

Nevada's efforts to internally control rampant sports gambling proved to be too little, too late.<sup>110</sup> Throughout the early 1950s, the size of the sports betting market is estimated to have reached between \$2 to \$8 billion,<sup>111</sup> with the total value of the illegal gambling

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100. Brett McGinness, *March 19, 1931: Nevada Re-Legalizes Gambling*, RENO GAZETTE J. (Mar. 17, 2025, at 05:02 PT), <https://www.rgj.com/story/news/2025/03/17/march-19-1931-nevada-re-legalizes-gambling/82440517007/> [<https://perma.cc/P7AP-RH9R>].

101. Fielkow, Werly & Sensi, *supra* note 4, at 26–27.

102. Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE (Nov. 13, 2017), <https://sportshandle.com/gambling-laws-legislation-united-states-history/> [<https://perma.cc/2KGR-RL4S>].

103. Rose, *supra* note 67, at 374. This form of sports betting, which is nearly exclusive to horseracing, was ubiquitous throughout the 1930s, with twenty-one states opening race-tracks and offering this form of legal wagering throughout this decade. *Id.*

104. See *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (describing the legislative history of legal sports gambling in America).

105. Fenich, *supra* note 50, at 70.

106. *Nevada Sports Betting*, CASINO CITY, <https://www.casinocity.com/nevada/sports-betting/> [<https://perma.cc/YB7D-36YU>] (last visited Aug. 22, 2025).

107. See Holden & Edelman, *supra* note 6, at 915. These quasi-legal establishments were known as “turf clubs” and served as the precursors to today's sportsbooks. *Id.*

108. Holden, Edelman & Miller, *supra* note 5, at 1390–91.

109. *About Us*, NEVADA GAMING COMM'N & THE NEVADA GAMING CONTROL BD. (Aug. 27, 2025), <https://gaming.nv.gov/about/home/> [<https://perma.cc/E27Z-75K4>].

110. See John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part One*, LEGAL SPORTS REP. (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/> [<https://perma.cc/8D2L-R9NR>].

111. *Id.*

market estimated to have generated somewhere near \$12 billion annually.<sup>112</sup> Most of these sports bets were placed with crime syndicates and underground operators, which used telegraphs and telephones to receive bets across state lines, placing the activity squarely within Congress's power to regulate interstate commerce.<sup>113</sup> Additionally, organized crime's involvement in sports betting not only generated immense profits but also created opportunities for match-fixing and corruption within professional and collegiate sports.<sup>114</sup> Though many sportsbooks were operating legally in Nevada, the success of the illegal sports betting market prompted a significant, punitive response from the federal government: in 1951, Congress passed a law imposing a 10% excise tax on all handle received by legal and illegal sportsbooks.<sup>115</sup> As contemporary authors have rightly pointed out, "[t]he tax was purportedly not passed in the interest of generating revenue for the federal government, but instead as a means of allowing the federal government to sanction intrastate gambling activity."<sup>116</sup> This tax on the total amount bet made it financially impossible for legally operating sportsbooks to make a profit, and as a result forced even more sports gambling underground for the next decade.<sup>117</sup>

Even before this, the U.S. Senate authorized the creation of a five-member "Special Committee to Investigate Organized Crime in Interstate Commerce," commonly known as the Kefauver Committee, on May 3, 1950, to formally explore this lucrative market rife with organized crime.<sup>118</sup> The Committee travelled to fourteen cities over the course of fifteen months and hosted televised hearings and interviews of over 600 suspects and witnesses involved in illegal organized crime operations across the country.<sup>119</sup> The Committee produced its final report on August 31, 1951, which recommended with respect to illicit wagering that "[t]he transmission of gambling information across State lines by telegraph, telephone, radio,

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112. SCHWARTZ, *supra* note 96, at 48.

113. Woo, *supra* note 36, at 573–74.

114. For a detailed study and analysis of match-fixing and "points shaving" controversies throughout the 1950s, see Holden & Edelman, *supra* note 6, at 915–16; Bonesteel, *supra* note 91.

115. Smiley, *supra* note 102; Holden & Edelman, *supra* note 6, at 915. It is somewhat comical that Congress's 1951 law attempted to collect a tax from illegal sportsbooks, though it likely included this language to avoid a constitutional challenge to its legislative authority. *Id.*

116. Holden & Edelman, *supra* note 6, at 915.

117. Holden, Edelman & Miller, *supra* note 5, at 1390–91.

118. Holden, *supra* note 110.

119. SCHWARTZ, *supra* note 96, at 70–71. Americans paid quite a bit of attention to these broadcasts—at the peak of its investigation in New York City in 1951, between twenty to thirty million Americans tuned into these hearings daily *Id.* at 71.

television, or other means of communication or communication facility should be regulated so as to outlaw any service devoted to a substantial extent to providing information used in illegal gambling.”<sup>120</sup> This recommendation, along with ample case studies of illegal gambling rings across American cities throughout the report, served as the catalyst for the next two decades of federal gaming legislation.<sup>121</sup>

Recognizing the corrosive impact of illegal gambling, federal authorities began taking action to curtail its influence.<sup>122</sup> The first major legislative step came with the enactment of the Johnson Act in 1951, which targeted the “possession, operation, transportation, or repair of gambling devices unless [an] individual State passed a law that made them or their transportation legal.”<sup>123</sup> While the act did not directly address sports betting, it signaled a growing federal interest in regulating gambling activities.<sup>124</sup>

Under the Kennedy Administration and Attorney General Robert F. Kennedy, the federal government started a full-court regulatory press in 1961 to curtail the illegal sports gambling industry and “tackle the leviathan of the mafia.”<sup>125</sup> From 1961 to 1970, Congress passed a slew of legislation that sought to dismantle organized crime’s stranglehold on sports wagering.<sup>126</sup> The most effective and most well-known of these laws, the Federal Wire Act, was passed in 1961<sup>127</sup> and was a direct legislative response to the recommendations of the Kefauver Committee from a decade prior.<sup>128</sup> The Federal Wire Act explicitly targeted interstate sports betting and pronounced:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the

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120. S. REP. NO. 82-725, at 12 (1951), <https://stoppredatorygambling.org/wp-content/uploads/2012/12/Kefauver-Committee-Final-report.pdf> [<https://perma.cc/9CYG-73TC>]. Adding to the Committee’s conclusions on the interconnectedness of organized crime and illegal gambling, they noted: “Many a hoodlum has stated with pride that he had never stooped to the sale of drugs, but he said that only because gambling was a sufficiently profitable source of income.” *Id.* at 25.

121. Holden, *supra* note 110.

122. Davis, *supra* note 17, at 852.

123. Fenich, *supra* note 50, at 71; CORNELL INST. ON ORGANIZED CRIME, *supra* note 53, at 444. Nevada promptly passed a law exempting itself from this act and enabling its legal casino market to continue operating. *Id.*

124. CORNELL INST. ON ORGANIZED CRIME, *supra* note 53, at 444–45.

125. Davis, *supra* note 17, at 852 (quoting Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling*, 29 CTR. FOR GAMING RSCH. 1, 2 (2014)).

126. Smiley, *supra* note 102.

127. 18 U.S.C. § 1084.

128. Holden & Edelman, *supra* note 6, at 916–17.

transmission in interstate or foreign commerce of bets or wagers or information assisting in the *placing of bets or wagers on any sporting event or contest* . . . shall be fined under this title or imprisoned not more than two years, or both.<sup>129</sup>

While the Federal Wire Act became a cornerstone of federal antigambling enforcement and enabled authorities to crack down on bookmakers, the law was accompanied by similarly aggressive legislative actions.<sup>130</sup>

Congress also passed the following laws over the next decade: (1) the Travel Act of 1961, which forbade the use of mail or a facility in interstate commerce to distribute proceeds of crime;<sup>131</sup> (2) the Interstate Transportation of Wagering Paraphernalia Act of 1961, which regulated the physical tools and materials associated with illicit gambling;<sup>132</sup> (3) the Sports Bribery Act of 1964, which, as the name suggests, criminalized match-fixing and bribery associated with sporting events;<sup>133</sup> and (4) the Illegal Gambling and Business Act, which was enacted alongside the Racketeer Influenced and Corrupt Organizations (RICO) Act in 1970.<sup>134</sup>

Despite Congress's best efforts to compose a comprehensive regulatory scheme, these federal efforts largely failed: illegal bookmaking continued and even grew in its scope and proliferation throughout the 1970s and 1980s.<sup>135</sup> The U.S. Department of Justice's decision to deprioritize criminal enforcement of illicit sports betting towards the end of the 1970s, likely informed by the impracticality of limiting sports betting through criminal laws, did not help the situation.<sup>136</sup> By 1976, a report issued to President Gerald Ford was conducted to assess the effectiveness of Congress's legislative effort, though it spoke with no uncertainty when it described that "effective gambling law enforcement [is] an impossible task under present conditions."<sup>137</sup>

While federal authorities focused on combating illegal gambling, some states began experimenting with limited forms of sports

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129. 18 U.S.C. § 1084(a) (emphasis added).

130. Smiley, *supra* note 102.

131. 18 U.S.C. § 1952.

132. 18 U.S.C. § 1953.

133. 18 U.S.C. § 224.

134. 18 U.S.C. § 1955; *see also* Fielkow, Werly & Sensi, *supra* note 4, at 27 n.38.

135. Smiley, *supra* note 102.

136. Fielkow, Werly & Sensi, *supra* note 4, at 28. As a result of this lack of DOJ enforcement of the federal antigambling regime, the value of the U.S.'s illegal gambling market is estimated to have ballooned from \$8 billion in 1983 to approximately \$50 billion in 1989. *Id.* at 28–29.

137. COMM'N ON THE REV. OF THE NAT'L POL'Y TOWARD GAMBLING, *supra* note 1, at 35.

gambling legalization.<sup>138</sup> While the Federal Wire Act continued to criminalize interstate sports gambling, it left room for states to experiment with legalization regimes of their own.<sup>139</sup> Though Nevada remained the sole destination nationwide with legal sports betting, lotteries, for example, were reintroduced in the 1960s, 1970s, and 1980s as a means of generating revenue for public services.<sup>140</sup> In an attempt to break into Nevada's sports betting monopoly, Delaware, Oregon, and Montana implemented limited sports betting programs tied to their state lotteries.<sup>141</sup>

Following this, in 1976 New Jersey authorized the opening of the first east-coast casino in Atlantic City, which proved to be a massive financial success.<sup>142</sup> Even with this liberalization of gambling laws, efforts to deregulate the commercial gambling industry continued to be constrained by federal laws and opposition from professional sports leagues.<sup>143</sup> At this point, advocates for stricter sports gambling laws had to look elsewhere in an effort to stymie the activity.

### C. 1992–2018: National Prohibition of State-Sponsored Sports Gambling & PASPA

From the late 1980s until 1992, professional and amateur sports leagues emerged as vocal opponents of sports gambling.<sup>144</sup> By the 1990s, Congress had shifted its priorities from targeting illicit bookmakers to targeting the state governments that were tasked with regulating sports gambling within their borders.<sup>145</sup> Amid renewed calls for comprehensive federal regulation, advocates argued that a nationwide, preemptive framework was needed to address inconsistencies in state laws and reduce the influence of organized

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138. Davis, *supra* note 17, at 850–52 (exploring early legalization efforts in Nevada, Delaware, and Oregon).

139. Holden, Edelman & Miller, *supra* note 5, at 1391.

140. Fenich, *supra* note 50, at 71–73.

141. See Holden, Edelman & Miller, *supra* note 5, at 1391–92; *Oregon Lottery*, NASPL, <https://www.naspl.org/naspl-lottery-members/oregon-lottery> [https://perma.cc/XFG9-C6Q3] (last visited Jan. 26, 2025); see also *Montana Lottery*, NASPL, <https://www.naspl.org/naspl-lottery-members/montana-lottery> [https://perma.cc/29AZ-783P] (last visited Jan. 26, 2025); *Delaware State Lottery*, NASPL, <https://www.naspl.org/naspl-lottery-members/delaware-state-lottery> [https://perma.cc/LQ7E-89ZG] (last visited Jan. 26, 2025). In Delaware, this led to significant litigation from the National Football League (NFL), which alleged that the state's sports-lottery system misappropriated the league's property. See *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1376 (D. Del. 1977).

142. Fenich, *supra* note 50, at 72. Even though this opened the door to casino gambling in New Jersey, the state continued to prevent sports gambling. See *id.*

143. Holden & Edelman, *supra* note 6, at 919.

144. Davis, *supra* note 17, at 853–54; Fielkow, Werly & Sensi, *supra* note 4, at 29–30.

145. John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 583 (2020).



crime.<sup>146</sup> The culmination of these efforts came in 1992 with Congress's passage of the Professional and Amateur Sports Protection Act (PASPA).<sup>147</sup>

Sponsored by Senator Bill Bradley, a former professional basketball player, the act aimed to protect the integrity of sports by prohibiting states from licensing or regulating new sports betting operations.<sup>148</sup> As contemporary scholars have surmised, the legislative record and debates surrounding PASPA's enactment expressed two primary apprehensions regarding state-sponsored sports gambling: first, that "children would become unnecessarily exposed to this potential harm, thus making them more susceptible to engage in . . . [sports gambling]," and, second, "that any increase in sports gambling, be it regulated or not, would increase the likelihood of corruption and the possibility of destroying the integrity crucial to professional and amateur sports."<sup>149</sup> While the bill was being debated in Congress, as many as thirteen states were considering legislation or initiatives that would have legalized some form of sports gambling in efforts to alleviate state-budget shortfalls.<sup>150</sup>

In effect, PASPA "froze" state or government entities across the United States from legalizing new regimes for sports wagering in any form.<sup>151</sup> While this represented a seismic shift in federal efforts to regulate sports gambling, PASPA achieved Senator Bradley's stated aim with a relatively simple few lines that made it "unlawful" for a governmental entity or a person to "sponsor, operate, advertise, promote, license, or authorize by law or compact" a "lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate."<sup>152</sup> At the time, this language represented the strongest and most unified opposition to sports gambling

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146. Davis, *supra* note 17, at 854.

147. *Id.*; Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–3704), *invalidated by*, *Murphy v. NCAA*, 584 U.S. 453 (2018).

148. *See Murphy*, 584 U.S. at 461.

149. Woo, *supra* note 36, at 575. The first apprehension is notable in the post-*Murphy* landscape we now live in, as opponents to state-sponsored legal sports gambling and gambling advertisements have developed their position in large part due to the manipulative effect legalization has had on children and young adults. *See* Gianluca Di Censo, Paul Delfabro & Daniel L. King, *Young People's Perceptions of the Effects and Value of Sports Betting Inducements*, 23 INT'L J. MENTAL HEALTH & ADDICTION 1370, 1386 (2023) (concluding that gambling inducements are particularly effective at attracting young bettors).

150. Woo, *supra* note 36, at 574–75.

151. Holden & Edelman, *supra* note 6, at 920; 28 U.S.C. § 3702, *invalidated by*, *Murphy v. NCAA*, 584 U.S. 453 (2018).

152. 28 U.S.C. § 3702.

the nation had ever seen, though it suffered from notable limitations.<sup>153</sup>

To those opposed to PASPA's enactment, the statute represented nothing more than a paper tiger, "toothless" in its ability to effectuate meaningful change or legitimately protect the integrity of sporting events.<sup>154</sup> Notably, PASPA did not subject violators to criminal penalties; instead, it merely allowed the Attorney General or "professional . . . or amateur sports organization[s]" like the MLB or NCAA to commence a civil action enjoining the operation of an illegal gambling operation involving that league's events.<sup>155</sup> Additionally, because PASPA was merely designed to prevent the expansion of state-sponsored sports betting, it largely left undisturbed existing state schemes at the time of its enactment.<sup>156</sup> Accordingly, four states—Nevada, Delaware, Oregon, and Montana—were granted exemptions for their preexisting sports betting activities, though only Nevada offered full-scale sportsbooks at the time.<sup>157</sup> Additionally, because New Jersey had already licensed full-scale casinos in Atlantic City, PASPA allowed the state one full year from the statute's effective date to authorize sports betting, though the state failed to capitalize on the opening.<sup>158</sup> This meant that, in a convoluted way, one place benefitted the most from PASPA: operators of legal sportsbooks in Nevada, which now possessed a lucrative monopoly on sportsbook-style sports wagering.<sup>159</sup>

Furthermore, despite PASPA's restrictions, illegal sports betting continued to thrive.<sup>160</sup> Advances in technology, particularly the rise of the internet, enabled unregulated bookmakers to reach a broader audience.<sup>161</sup> Offshore gambling websites emerged as major players in the industry, offering Americans an accessible alternative to Nevada's sportsbooks.<sup>162</sup> The proliferation of these platforms underscored the limitations of PASPA in curbing illegal gambling and highlighted the persistent demand for sports betting across the country.<sup>163</sup>

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153. Davis, *supra* note 17, at 854.

154. *Id.*; Holden & Edelman, *supra* note 6, at 920.

155. 28 U.S.C. § 3703.

156. 28 U.S.C. § 3704, *invalidated by*, Murphy v. NCAA, 584 U.S. 453 (2018).

157. *Id.*; see also Holden, Edelman & Miller, *supra* note 5, at 1394.

158. Holden, Edelman & Miller, *supra* note 5, at 1384–85, 1394.

159. Holden & Edelman, *supra* note 6, at 920.

160. *Id.* at 921.

161. Holden, Edelman & Miller, *supra* note 5, at 1394–95; Smiley, *supra* note 102.

162. David Purdum, *Sports Betting Legalization: How We Got Here*, ESPN (May 22, 2018, at 12:49 ET), [https://www.espn.com/chalk/story/\\_/id/23561576/chalk-line-how-got-legalized-sports-betting](https://www.espn.com/chalk/story/_/id/23561576/chalk-line-how-got-legalized-sports-betting) [<https://perma.cc/37G6-ZESH>].

163. See *id.*

Over time, PASPA faced increasing criticism from states, policy-makers, and industry stakeholders.<sup>164</sup> Opponents argued that the law infringed on states' rights by imposing a federal prohibition on an activity traditionally regulated at the state level.<sup>165</sup> They further argued that PASPA left a critical regulatory gap with respect to internet-based sports gambling—an issue later addressed unsuccessfully through separate federal efforts—thereby permitting illegal wagering to persist outside the statute's reach.<sup>166</sup> The economic potential of legalized sports betting, especially when facilitated by the internet, became a focal point in the debate.<sup>167</sup> Advocates highlighted the potential for tax revenue and job creation that could be achieved through state-regulated markets.<sup>168</sup> These arguments gained traction as states faced budget deficits and sought new sources of revenue.<sup>169</sup>

The movement to repeal PASPA gained momentum in the 2010s, driven by a coalition of states, gambling industry leaders, and sports enthusiasts.<sup>170</sup> New Jersey emerged as a key player in this effort, enacting legislation in 2012 to legalize sports betting within its borders.<sup>171</sup> This law directly challenged PASPA and set the stage for a legal battle that would ultimately reach the Supreme Court.<sup>172</sup>

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164. Holden, Edelman & Miller, *supra* note 5, at 1399–1402.

165. Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATO SUP. CT. REV. 247, 267 (2018); Woo, *supra* note 36, at 576.

166. Holden, *supra* note 145, at 584.

167. *Id.* (“Following the passage of PASPA, the federal government maintained its staunch opposition to sports betting and online gambling more generally, going so far as to argue before the World Trade Organization (“WTO”) that internet gambling offends the public morals of the country.”). In 1997, Congress took an interest in regulating online gambling, which culminated in the Unlawful Internet Gambling Enforcement Act (UIGEA). *Id.* Despite its name, the UIGEA was not a meaningful deterrent of internet gambling, was riddled with exceptions, and was effectively a banking statute. *Id.* Ironically, the UIGEA's numerous exceptions and loopholes directly catalyzed the development of daily fantasy sports—a precursor to modern day sports betting. *Id.* at 584–86.

168. Brett Hollenbeck, Poet Larsen & Davide Proserpio, *The Financial Consequences of Legalized Sports Gambling* (April 2025) (unpublished manuscript) (on file with the Duquesne Law Review), <https://papers.ssrn.com/abstract=4903302>; Holden, Edelman & Miller, *supra* note 5, at 1399.

169. See Holden, Edelman & Miller, *supra* note 5, at 1399 (describing New Jersey State Senator Ray Lesniak's proposal to revitalize a struggling Atlantic City and bolster small businesses in the state through tax dollars generated by legalizing sports gambling).

170. *Id.* at 1400.

171. *Id.*

172. Fielkow, Werly & Sensi, *supra* note 4, at 1400–01.

D. 2018–Present: *Murphy v. NCAA’s Landmark Decision That Reshaped Sports Gambling in the United States*

After over two decades on the books, New Jersey’s decade-long fight to escape PASPA culminated in *Murphy v. NCAA*, a decision that dismantled the nationwide freeze on state-sponsored sports wagering legalization efforts and redefined the scope of federal commandeering doctrine under the Tenth Amendment.<sup>173</sup> This saga began when New Jersey voters overwhelmingly approved a constitutional amendment in 2011 authorizing sports betting, prompting the state legislature to pass implementing legislation in 2012.<sup>174</sup>

Almost immediately, the NCAA, joined by nearly all of the nation’s professional sports leagues which included the NFL, NBA, NHL, and MLB, filed suit, arguing that the law violated PASPA’s prohibition on state-based licensure of sports gambling schemes.<sup>175</sup> The United States District Court for the District of New Jersey enjoined New Jersey’s proposed law,<sup>176</sup> and the United States Court of Appeals for the Third Circuit affirmed in *NCAA v. Governor of New Jersey (Christie I)*, holding that PASPA constituted a valid exercise of Congress’s Commerce Clause authority and did not commandeer the state legislature.<sup>177</sup> The panel reasoned that PASPA “does not *require* or coerce the states to lift a finger” but merely prevents them from authorizing conduct that federal law forbids, which it characterized as a species of “preemption.”<sup>178</sup> In subsequent commentary, scholars argued that this reading stretched the concept of preemption beyond recognition, because PASPA did not regulate private conduct at all but instead dictated what state legislatures could and could not do.<sup>179</sup>

Undeterred, New Jersey pursued a narrower strategy in 2014, repealing only portions of its sports betting prohibitions that applied to casinos and racetracks rather than enacting an affirmative licensing regime.<sup>180</sup> The state argued that this “partial repeal” avoided PASPA’s restriction, since the statute only barred states

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173. 584 U.S. 453, 486 (2018).

174. *NCAA v. Governor of N.J. (Christie I)*, 730 F.3d 208, 217 (3d Cir. 2013), *abrogated by*, *Murphy v. NCAA*, 584 U.S. 453 (2018).

175. *Id.*

176. *NCAA v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013), *aff’d sub nom.*, *Christie I*, 730 F.3d 208 (3d Cir. 2013).

177. *Christie I*, 730 F.3d at 226, 237.

178. *Id.* at 231, 226.

179. See, e.g., Jonathan O. Ballard Jr., Comment, *Murphy v. NCAA: The Supreme Court’s Latest Advance in Chemerinsky’s “Federalism Revolution,”* 52 LOY. L.A. L. REV. 173, 179–82 (2018) (exploring the political ramifications of the *Murphy* anticommandeering rule).

180. *NCAA v. Governor of N.J. (Christie II)*, 832 F.3d 389, 394 (3d Cir. 2016) (en banc), *rev’d sub nom.*, *Murphy v. NCAA*, 584 U.S. 453 (2018).

from authorizing gambling schemes by law.<sup>181</sup> Once again, the leagues sued, and once again the Third Circuit, this time in an en banc decision, sided with them in *Christie II*, reasoning that even selective repeals had the effect of “authorizing” gambling and therefore fell within PASPA’s prohibition.<sup>182</sup>

When the Supreme Court granted certiorari in 2017, the constitutional question was squarely presented: may Congress prohibit a state from modifying or repealing its own gambling laws?<sup>183</sup> In a seven–two decision, the Court struck down PASPA, explaining that its “anti-authorization” provision was not a conventional preemption clause, which operates by regulating private actors, but a “direct order to the state legislature” forbidding it to act.<sup>184</sup> Such a directive, Justice Alito wrote, acts as a “direct affront to state sovereignty” and violates the “basic principle” that “Congress cannot issue direct orders to state legislatures.”<sup>185</sup> Because PASPA’s core provision, 18 U.S.C. § 3702, violated the anticommandeering doctrine recognized in *New York v. United States* and *Printz v. United States*, the Court invalidated the statute in its entirety, holding that “no provision is severable.”<sup>186</sup>

Justice Thomas concurred, urging reconsideration of the Court’s severability jurisprudence in future cases.<sup>187</sup> Justice Ginsburg, joined by Justice Sotomayor, dissented in part, arguing that the Court should have invalidated only PASPA’s authorization provision rather than striking down the statute wholesale, thereby preserving Congress’s central policy objective.<sup>188</sup> Had Justice Ginsburg’s dissent been adopted as the law, her severability analysis, which would have preserved 18 U.S.C. § 3702 (the provision that “froze” future state sports gambling licensure efforts), may have effectively maintained the nation’s sports gambling status quo while avoiding the regulatory vacuum and accompanying harms that the nation is now facing.

The decision’s doctrinal contribution was to entrench anticommandeering as a cornerstone of modern federalism, clarifying that Congress may regulate sports gambling directly under the

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181. *Id.* at 401.

182. *Id.* at 394, 402.

183. *See Murphy*, 584 U.S. at 465.

184. *Id.* at 480–81.

185. *Id.* at 474–75.

186. *Id.* at 474–75, 486.

187. *Id.* at 491 (Thomas, J., concurring).

188. *Id.* at 493–94 (Ginsburg, J., dissenting). Justice Ginsburg, ever the metaphorical writer, described the majority as “deploy[ing] a wrecking ball” to destroy PASPA in its entirety. *Id.* at 493. She similarly noted that “[t]he Court wields an ax to cut down [18 U.S.C.] § 3702 instead of using a scalpel to trim the statute.” *Id.* at 495.

Commerce Clause but may not dictate the content of state lawmaking choices.<sup>189</sup> The decision's practical consequences, however, were far messier.<sup>190</sup> By striking down PASPA root and branch, the Court left no federal regulatory framework in place, producing an immediate wave of state legalization efforts and a patchwork of divergent approaches to taxation, licensing, and mobile wagering.<sup>191</sup>

Perhaps most strikingly, the leagues that once decried sports betting as an existential threat have now embraced it as a lucrative revenue stream—a reversal that reflects less principle than opportunism.<sup>192</sup> Having long argued that legalized betting would corrode the integrity of the game,<sup>193</sup> the NFL, NBA, MLB, and NHL quickly pivoted after 2018 to embrace partnerships with sportsbooks, monetize proprietary data streams, and integrate betting odds into broadcasts.<sup>194</sup> This reversal highlights the central paradox of *Murphy*: a decision celebrated as a vindication of state sovereignty simultaneously enabled the large-scale commercialization of sports wagering—precisely the outcome PASPA's drafters had sought to forestall.<sup>195</sup>

Seen in this light, *Murphy* is both a triumph and a cautionary tale. On one hand, it vindicated the Tenth Amendment's protection of state autonomy by confirming that Congress cannot conscript states into action or inaction.<sup>196</sup> On the other hand, by erasing PASPA wholesale, the Court facilitated the creation of a fragmented, state-driven marketplace whose unevenness mirrors America's earlier gambling history—with the economic benefits of legalization and the social costs of problem gambling now borne unevenly across the nation.<sup>197</sup>

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189. *Id.* at 486.

190. *See, e.g.*, Staudenmaier & Carrasco, *supra* note 35 (describing the various sports gambling harms facing Americans following *Murphy*).

191. *See* STATE OF THE STATES 2025, *supra* note 16.

192. Edward “Max” Bell, *Betting On Gambling: How Professional Sports Leagues Could Increase Revenues Following Murphy v. NCAA*, 14 J. BUS. ENTREPRENEURSHIP & L. 215, 232–33 (2022) (noting an October 2018 study by the American Gaming Association which found that “the four major U.S. professional sports leagues (NFL, NBA, MLB, and NHL) could earn a combined additional \$4.2 billion annually thanks to *Murphy*”).

193. *See Christie I*, 730 F.3d 208, 221 (3d Cir. 2013) (summarizing American professional sports leagues’ long-held arguments against sports gambling legalization efforts), *abrogated by*, *Murphy v. NCAA*, 584 U.S. 453 (2018).

194. Bell, *supra* note 192, at 232–47.

195. *See* discussion *supra* Section II.C.

196. *Murphy*, 584 U.S. at 486.

197. *See* discussion *infra* Part IV.

### III. GAMBLING ADVERTISEMENTS & INDUCEMENTS IN POST-*MURPHY* AMERICA: THE EXPERIMENTAL AND OBSERVATIONAL EVIDENCE OF HARM

The proliferation of betting promotions and advertisements represents the latest chapter in America's complicated relationship with sports gambling.<sup>198</sup> Since *Murphy v. NCAA* removed PASPA's national pause on state-based sports gambling legalization efforts in 2018, gambling advertisements have become a pervasive feature of American sports culture.<sup>199</sup> This transformation has been swift and comprehensive: sports broadcasts, streaming services, and social media feeds now overflow with promotions for "bonus bets," "deposit matches," "odds boosts," and "no-sweat wagers," each designed to normalize betting and attract new audiences to the vice.<sup>200</sup>

As of 2024, more than three-quarters of U.S. adults have been exposed to gambling advertisements within the past year, with younger adults, especially men aged eighteen to thirty-four, reporting the highest exposure rates.<sup>201</sup> The largely unregulated ubiquity of promotional content echoes patterns from earlier eras of American gambling history.<sup>202</sup> Just as the uncontrolled expansion of lotteries in the nineteenth century eventually produced widespread scandal and corruption, the current advertising deluge has emerged from a regulatory vacuum created by *Murphy*'s invalidation of federal oversight.<sup>203</sup> And much like the federal government's belated response to organized crime's dominance of sports betting in the mid-twentieth century, contemporary regulators now find themselves racing to address harms that have already become

198. See Davis, *supra* note 17, at 889–90.

199. See Samantha Thomas et al., *Protecting Children and Young People from Contemporary Marketing for Gambling*, HEALTH PROMOTION INT'L, Apr. 2023, at 1, 3 (describing the "[o]mnipresent and sophisticated marketing strategies" used by sportsbooks "to normalize gambling as an aspect of everyday leisure activity" and to "promote . . . [their] image as responsible corporate citizen[s]").

200. See *id.* (describing several types of sports betting inducements); Diarmaid Ó Ceallaigh et al., *Effects of Inducements on Sports Gambling and Decision-Errors: An Experimental Study*, 14 J. BEHAV. ADDICTIONS 959, 959–60 (2025) (defining sports gambling inducements and their prevalence in advertising across various forms of media); Hing et al., *Uptake*, *supra* note 32, at 146–47 (same).

201. SIENA COLL. RSCH. INST. IN PARTNERSHIP WITH ST. BONAVENTURE UNIV.'S JANDOLI SCH. OF COMM'N, *supra* note 33, at 1. The fact that men aged eighteen to thirty-four reported seeing sportsbook advertisements most frequently is, undoubtedly, a factor in higher problem gambling rates along these same age lines. See *Gambling & Young Adults*, RGC, <https://responsiblegambling.org/for-the-public/safer-play/gambling-and-young-adults/> [<https://perma.cc/QA42-QZSQ>] (last visited Nov. 29, 2025) (reporting that "[p]eople between the ages of 18–24 are at a high risk of developing gambling problems" and that online gambling is "one of the strongest predictors of gambling problems in young adults").

202. See discussion *supra* Sections II.A–D.

203. See discussion *supra* Sections II.A, II.D.

entrenched.<sup>204</sup> The key difference today is the unprecedented scale and sophistication of the marketing apparatus: where mid-century bookmakers relied on telephone wires and personal contacts, modern, state-licensed sportsbooks deploy behavioral targeting, real-time data analytics, and psychologically optimized inducements delivered directly to consumers' smartphones and televisions.<sup>205</sup>

While proponents of advertising frame it as consumer information and as a means of drawing bettors away from illegal or off-shore gambling marketplaces,<sup>206</sup> a growing body of behavioral research suggests that gambling advertisements, particularly those promoting inducements, can alter risk perception and drive harmful betting behaviors.<sup>207</sup> Broadly speaking, inducements are "[m]arketing strategies used by gambling operators," and are more specifically defined as "gambling incentives provided by a gambling company to a gambler conditional upon certain gambling-related actions and/or distributed in a form that encourages gambling."<sup>208</sup> This Part examines the mounting scientific evidence that wagering inducements function not merely as competitive marketing tools, but as potent behavioral triggers that can undermine consumer autonomy and exacerbate gambling-related harm.

A. *Experimental Evidence: Inducements Increase Betting Volume & Cause Decision Errors*

The most rigorous evidence on the effects of sports gambling inducements comes from randomized controlled experiments (RCEs).<sup>209</sup> In a landmark 2025 study, researchers conducted an RCE to explore whether gambling inducements cause specific changes to betting behavior by "focusing on willingness to gamble" and by "incorporating novel tests of whether inducements lure bettors into decision-making errors."<sup>210</sup> The RCE included a final

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204. See discussion *supra* Section II.B.

205. See Nerilee Hing et al., "Immediate Access . . . Everywhere You Go": A Grounded Theory Study of How Smartphone Betting Can Facilitate Harmful Sports Betting Behaviours Amongst Young Adults, 22 INT'L J. MENTAL HEALTH AND ADDICTION 1413, 1418, 1429 (2024) [hereinafter Hing et al., *Immediate Access*].

206. 2024 Sports Betting Advertising Trends, *supra* note 31.

207. See, e.g., Ó Ceallaigh et al., *supra* note 200, at 969; Hing et al., *Immediate Access*, *supra* note 205, at 1426; Balem et al., *supra* note 28, at 1031–32.

208. Balem et al., *supra* note 28, at 1021.

209. See Ó Ceallaigh et al., *supra* note 200, at 960–61 (describing experimental methodology and design); Eduardo Hariton & Joseph J. Locascio, *Randomised Controlled Trials – the Gold Standard for Effectiveness Research*, 125 BJOG 1716, 1716 (2018) (stating that randomized controlled experiments (or trials) are ideal for "reduc[ing] bias and provid[ing] a rigorous tool to examine cause-effect relationships").

210. Ó Ceallaigh et al., *supra* note 200, at 959.



sample size of 622 male sports bettors under the age of 40.<sup>211</sup> These participants were then randomly selected to either receive inducement offers or to serve as controls to evaluate how the presence or absence of inducements affected betting behaviors amidst varying odds.<sup>212</sup> Finally, participants were given real money to place bets through a custom-built betting application that replicated the interface and odds of commercial sportsbooks.<sup>213</sup>

The results were striking.<sup>214</sup> Exposure to inducements increased total betting expenditure by more than 10% compared to the control group.<sup>215</sup> Further, the presence of inducements made participants 44% less likely to opt out of betting, and increased the amount bet on “offer [inducement] tasks by €0.75, on average, and on post-offer [inducement] tasks by €0.60.”<sup>216</sup> Thus, even after the value of an inducement had been used, it continued to have a meaningful effect on rates of participation and the amount of money wagered by each participant.<sup>217</sup> Most importantly, the presence of inducements tripled the likelihood that participants would select objectively “bad bets”—wagers with the worst available expected value, even after accounting for the promotional benefit of the inducement itself.<sup>218</sup> The researchers concluded that inducements “push gamblers into making decision errors” rather than simply encouraging more aggressive risk-taking among those who would bet anyway.<sup>219</sup>

The vulnerability of problem gamblers to these promotional tactics was especially pronounced.<sup>220</sup> Participants with higher Problem Gambling Severity Index (PGSI) scores—a validated measure of gambling-related harm—were both more responsive to inducements and more likely to commit betting errors.<sup>221</sup> The effect size

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211. *Id.* at 960–61.

212. *Id.* at 962.

213. *Id.* at 961–63.

214. *Id.* at 964–67.

215. *Id.* at 967.

216. *Id.* at 964.

217. *Id.*

218. *Id.* at 967.

219. *Id.* at 969. This study’s takeaway was laid out explicitly: “Inducements to gamble are not merely a marketing tool that operates like equivalent inducements in other consumer markets. The argument that inducements simply help consumers differentiate between operators does not apply; they do more than this. We provide clear evidence for consumer detriment, particularly among vulnerable groups. This supports arguments for stricter regulation of inducements.” *Id.*

220. *Id.* at 965, 967–69.

221. *Id.* at 965–66 (reporting a correlation between PGSI scores and responsiveness to inducements). The PGSI contains nine items with four response options (“[N]ever” = 0, ‘sometimes’ = 1, ‘most of the time’ = 2, and ‘almost always’ = 3.”). Matthew J. Rockloff et al., *Sports Betting Incentives Encourage Gamblers to Select the Long Odds: An Experimental Investigation Using Monetary Rewards*, 8 J. BEHAV. ADDICTIONS 268, 269 (2019). “Total summed

peaked at PGSI scores of eight, showing that inducements amplify existing vulnerabilities rather than merely attracting casual play.<sup>222</sup>

Independent experimental research using different methodologies has replicated the core finding that inducements generally encourage riskier bets.<sup>223</sup> For instance, one 2019 study examined how four particular types of inducements—bonus bets, better odds/winnings, reduced risk, and cash rebate—influenced participants' selection of bets with different win probabilities and odds.<sup>224</sup> Not only did participants perceive “all bets with inducements . . . as more attractive than bets without inducements,” but they also “tended to choose longer odds bets when an inducement was present.”<sup>225</sup> Because sportsbooks tend to incentivize and advertise complex and risky bets with low chances of winning and long odds,<sup>226</sup> bettors' tendencies to place riskier bets in the presence of inducements “necessarily increase[] the proportion of bettors likely to loose . . . bet[s]” and lead to greater financial losses from gambling.<sup>227</sup> Critically, this risk-seeking behavior emerged even in this hypothetical betting scenario where participants had no personal financial stake, suggesting that the psychological risk-taking mechanism associated with inducements is strong across contexts.<sup>228</sup>

Further, robust experimental evidence comes from longitudinal industry data.<sup>229</sup> A 2021 study analyzed twelve months of actual betting records from nearly 15,000 online gambling accounts in France to determine how individual betting behavior changed in response to receiving inducement offers from different gambling

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scores range between 0 and 27, where 0 = non-problem gambling, 1–2 = low risk, 3–7 = moderate risk, and 8–27 = problem gambling.” *Id.*

222. Ó Ceallaigh et al., *supra* note 200, at 965.

223. Rockloff et al., *supra* note 221, at 273–74.

224. *Id.* at 270. For more information on the fifteen generic types of wagering inducements, including those used in this study, see NERILEE HING ET AL., REVIEW AND ANALYSIS OF SPORTS AND RACE BETTING INDUCEMENTS 67–77 (2015).

225. Rockloff et al., *supra* note 221, at 273–74.

226. See Philip W. S. Newall, *How Bookies Make Your Money*, 10 JUDGMENT & DECISION MAKING 225, 228–29 (2015) (finding that, in an effort to increase profits, bookies generally advertise wagers that bettors are unlikely to win).

227. Rockloff et al., *supra* note 221, at 274.

228. *Id.* at 270, 274.

229. Balem et al., *supra* note 28, at 1021, 1031–32. A longitudinal study is a research approach that “involves observing the same subjects over an extended period” ranging from weeks to years. Janine Ungvarsky, *Longitudinal Study*, EBSCO, <https://www.ebsco.com/research-starters/social-sciences-and-humanities/longitudinal-study> [<https://perma.cc/5M59-ZJ2P>] (last visited Dec. 18, 2025). Longitudinal studies beneficially permit researchers to “identify patterns and establish potential cause-and-effect relationships” on large scales and without interfering with subjects' everyday lives. *Id.*

operators.<sup>230</sup> The results revealed that wagering inducements were “associated with an immediate increase in gambling intensity, gambling frequency and at-risk gambling behaviors.”<sup>231</sup> This study concluded that inducements “represent a serious risk factor for developing or exacerbating gambling problems” and that “wagering inducements should be restricted, at least for gamblers who are identified as having gambling problems.”<sup>232</sup>

### *B. The Psychological Mechanisms: How Inducements Hijack Decision-Making*

The experimental findings documented above raise an important question: *why* do inducements have such powerful effects on betting behavior, particularly on vulnerable populations?<sup>233</sup> Psychological research has identified several cognitive mechanisms through which promotional offers distort decision-making and undermine self-control.<sup>234</sup>

First, inducements reduce perceived risk through what researchers call the “zero-price effect.”<sup>235</sup> When consumers perceive

230. Balem et al., *supra* note 28, at 1022–23. This study assessed online gambling behavior associated with sports betting, horse race betting, poker, and lotteries. *Id.* at 1022. Among the 14,988 bettors analyzed in this study, 5,163 engaged in sports betting and 3,524 engaged in horse race betting. *Id.* at 1023. Sports bettors had a median age of thirty-five, and at least 92.9% of those analyzed were male. *Id.* Among horse racing bettors, the median age was fifty-three and at least 87.1% of those analyzed were male. *Id.*

231. *Id.* at 1031. This effect was strongest for at-risk gamblers, which include those with a PGSI score of 5 or higher. *Id.* at 1022. The “at-risk gambling behaviors” described were measured by considering “breadth of involvement,” which tracked the “number of different games for which at least one bet was placed during the week,” and episodes of “chasing,” which tracked “the number of times that money was deposited into the gambling account” under time-limited criteria. *Id.* Chasing losses, or the act of “return[ing] another day to get even” after losing money gambling, is one of the central behavioral characteristics of those diagnosed with gambling disorder (GD). AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 661 (5th ed. text rev. 2022).

232. Balem et al., *supra* note 28, at 1031.

233. See, e.g., Thomas et al., *supra* note 199, at 7–10 (finding that children and young people are both particularly vulnerable to gambling advertisements and support restrictions on all youth-accessible media, sponsorship bans, and celebrity endorsement prohibitions); Di Censo, Delfabbro & King, *supra* note 149, at 1384 (finding that young people with higher problem gambling scores perceived that inducements influenced them to engage in high-risk gambling).

234. See, e.g., Javier García-Castro, Ana Cancela & Miguel-Ángel Martín-Cárdaba, *Effects of Advertising on Problem Gambling: Neural-Cue Reactivity as a Possible Underlying Mechanism*, 31 PROFESIONAL DE LA INFORMACIÓN 1, 4–5 (2022) (establishing neurobiological evidence that gambling advertising exploits addiction-related brain mechanisms); Hibai Lopez-Gonzalez, Ana Estevez & Mark D. Griffiths, *Marketing and Advertising Online Sports Betting: A Problem Gambling Perspective*, 41 J. SPORT & SOC. ISSUES 256, 260–66 (2017) (finding that situational and structural features of online sports betting marketing like inducements, immediacy features (live betting, push notifications), convenience factors (one-click betting, stored payment methods), and skill-framing rhetoric should be regulated).

235. Di Censo, Delfabbro & King, *supra* note 149, at 1384.

something as free or nearly free, they systematically overvalue it relative to its actual benefit and undervalue the associated costs or risks.<sup>236</sup> In the gambling context, a “risk-free” bet creates the illusion that the bettor cannot lose, even though the terms and conditions typically require significant or repeated wagering activity to access any refunded stake.<sup>237</sup> This dynamic is particularly troubling when considered alongside evidence that bettors routinely misunderstand the terms, conditions, and practical effects of wagering inducements, while simultaneously overestimating their value.<sup>238</sup>

Second, inducements exploit “fear of missing out,” commonly referred to as FOMO, through time-limited offers and scarcity messaging.<sup>239</sup> Broadly speaking, psychological research on FOMO demonstrates that time pressure and the threat of losing access to an opportunity trigger anxiety and impulsive decision-making.<sup>240</sup> Gambling operators leverage these mechanisms by advertising inducements with countdown timers, phrases like “limited time only,” or notifications that “this offer expires soon.”<sup>241</sup> For example, in one 2024 qualitative study, participants identified time-limited inducements as creating pressure and an urgency to bet immediately, which often prompted bettors to make impulsive, riskier bets with longer odds.<sup>242</sup>

Third, inducements create what can be described as a “responsible gambling” paradox, especially when paired with advertisements featuring celebrities.<sup>243</sup> A 2025 experimental study examined how

236. *Id.*; Hibai Lopez-Gonzalez et al., *The Perceived Influence of Sports Betting Marketing Techniques on Disordered Gamblers in Treatment*, 20 EUR. SPORT MGMT. Q. 421, 427–28 (2020).

237. Nerilee Hing, Peter Vitartas & Matthew Lamont, *Understanding Persuasive Attributes of Sports Betting Advertisements: A Conjoint Analysis of Selected Elements*, 6 J. BEHAV. ADDICTIONS 658, 665–66 (2017); Nerilee Hing et al., *The Structural Features of Sports and Race Betting Inducements: Issues for Harm Minimisation and Consumer Protection*, 33 J. GAMBLING STUD. 685, 688–90, 695 (2017) [hereinafter Hing et al., *Structural Features*].

238. Ó Ceallaigh et al., *supra* note 200, at 967–68 (finding that most bettors both incorrectly understood the conditions of an inducement and thought that inducements were more valuable than they were).

239. *See generally*

240. *See* Paul Delfabbro, Daniel King & Jonathan Parke, *The Complex Nature of Human Operant Gambling Behaviour Involving Slot Games: Structural Characteristics, Verbal Rules and Motivation*, ADDICTIVE BEHAVS., Feb. 2023, at 1, 6.

241. *See* Di Censo, Delfabbro & King, *supra* note 149, at 1386; *see also* Hing, Vitartas & Lamont, *supra* note 237, at 666 (finding that at-risk gamblers “may be more tempted when an offer is presented as time-limited requiring hasty action”); Hing et al., *Structural Features*, *supra* note 237, at 699 (describing how gambling “happy hours” and inducements more broadly encourage rapid and concentrated impulse betting).

242. Hing et al., *Immediate Access*, *supra* note 205, at 1426.

243. Wenjia Han & Vaidyanathan Viswanathan Saunak, *Bet More – But Only with Me: Role of Celebrity Endorsers in Sports Betting Advertising*, 41 J. GAMBLING STUD. 1657, 1670 (2025) (describing how celebrity appearances in responsible gambling messaging paradoxically diminish the advertisement’s effectiveness when endorser image congruence is high).

celebrity endorsers and responsible gambling messages interact in sports betting advertisements.<sup>244</sup> The researchers found that while image-congruent celebrity endorsers enhanced awareness of responsible gambling messages, this increased awareness did not translate into responsible gambling intentions or behaviors.<sup>245</sup> Most tellingly, the mere presence of supposedly relatable celebrities in a gambling advertisement, even absent a responsible gambling message, appeared to provide consumers with a false sense of security, essentially licensing them to bet more because they believed operators were looking out for their welfare.<sup>246</sup>

### C. *Real-World Exposure: The Omnipresence of Gambling Marketing*

While experimental studies demonstrate that inducements *can* cause harm under controlled conditions, the broader public health implications depend on the extent to which consumers are actually exposed to such marketing in real-world settings.<sup>247</sup> The prevalence of marketing also normalizes gambling as an ordinary component of sports fandom.<sup>248</sup> Multiple lines of evidence document that gambling advertising has become nearly inescapable in contemporary sports media environments.<sup>249</sup>

Content analysis studies have quantified the sheer volume of gambling references embedded in sports broadcasts.<sup>250</sup> In a 2020 study which analyzed the frequency of gambling references in live

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244. *Id.* at 1663–64.

245. *Id.* at 1666–68, 1670. Image congruence is a marketing concept that reduces psychological resistance and consumer inattentiveness by leveraging the tendency of individuals to be more receptive to products or services endorsed by celebrities they perceive as similar to themselves. *Id.* at 1658.

246. *Id.* at 1671.

247. *See, e.g.*, Hing et al., *Immediate Access*, *supra* note 205, at 1429 (noting that “curtailing inducements sent to smartphones would reduce impulsive betting in response to” pervasive gambling marketing); Thomas et al., *supra* note 199, at 3 (“The [gambling] industry’s creative product development has been accompanied by innovative and sophisticated marketing strategies that seek to ensure that its messages are ubiquitous.”); R. I. Purves et al., *Examining the Frequency and Nature of Gambling Marketing in Televised Broadcasts of Professional Sporting Events in the United Kingdom*, 184 PUB. HEALTH 71, 77 (2020) (conducting a frequency analysis tracking appearances of verbal and visual gambling marketing in televised broadcasts across U.K. sporting events).

248. Thomas et al., *supra* note 199, at 3 (“As with other health-damaging products, the gambling industry relies on marketing to stimulate demand for its products, to normalize gambling as an aspect of everyday leisure activity, and to promote its image as a responsible corporate citizen.” (citation omitted)).

249. *See, e.g.*, Purves et al., *supra* note 247, at 74 (reporting that a televised boxing match averaged seven gambling references per broadcast minute and that a football (soccer) match averaged 2.75 gambling references per broadcast minute).

250. *Id.* at 74–75.

sports television broadcasts in the United Kingdom, researchers documented more than 900 gambling-related references per match—including pitch-side advertisements, jersey sponsorships, verbal mentions by commentators, and in-broadcast promotional segments—across two English Premier League football (soccer) matches featuring teams sponsored by gambling brands.<sup>251</sup> In another 2025 study which assessed the appearance of gambling iconography and messaging presented to North American viewers of the NHL's 2025 Stanley Cup Finals, viewers of the most watched game in the series were exposed to an average of 4.7 gambling messages per minute.<sup>252</sup> Notably, children and adolescents are disproportionately exposed to and influenced by this marketing: a systematic review covering multiple countries found that children demonstrate a clear recall of gambling brands and promotions, perceive gambling as a normal part of sports watching, and indicate a willingness to try gambling in the future.<sup>253</sup>

The ubiquity of gambling marketing extends beyond traditional broadcast media into digital and mobile environments where targeting is more sophisticated and exposure more continuous.<sup>254</sup> These messages include push notifications from betting apps, targeted social media ads, text message promotions, and email offers.<sup>255</sup> Notably, direct sports gambling marketing on at least one social media platform was linked to unplanned spending on gambling up to one month after receipt of the advertisement.<sup>256</sup>

Survey evidence corroborates the near-universality of advertising exposure and its consequences.<sup>257</sup> A representative 2024 poll found that 75% of American adults had been exposed to sports gambling advertisements in the prior year, with exposure rates reaching 81% among adults aged eighteen to thirty-four.<sup>258</sup> More pointedly, 71% of respondents that placed a bet within the last year stated that

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251. *Id.* at 75.

252. RAFFAELLO ROSSI ET AL., UNIV. OF BRISTOL, BETTING ON THE FINALS - PREVALENCE OF GAMBLING MARKETING IN THE NBA AND NHL FINALS 12 (2025), [https://www.researchgate.net/publication/394965028\\_Betting\\_on\\_the\\_Finals\\_-\\_Prevalence\\_of\\_Gambling\\_Marketing\\_in\\_the\\_NBA\\_and\\_NHL\\_Finals](https://www.researchgate.net/publication/394965028_Betting_on_the_Finals_-_Prevalence_of_Gambling_Marketing_in_the_NBA_and_NHL_Finals) (on file with the Duquesne Law Review).

253. Thomas et al., *supra* note 199, at 7–8.

254. See Hing et al., *Immediate Access*, *supra* note 205, at 1418; see also André Syvertsen et al., *Relationships Between Exposure to Different Gambling Advertising Types, Advertising Impact and Problem Gambling*, 38 J. GAMBLING STUD. 465, 470–71 (2022) (finding a higher prevalence of direct advertising (via text, email, phone calls, or other electronic means) to those at a higher risk of problem gambling).

255. Hing et al., *Uptake*, *supra* note 32, at 147–48, 154.

256. See Wardle et al., *supra* note 27, at 4.

257. SIENA COLL. RSCH. INST. IN PARTNERSHIP WITH ST. BONAVENTURE UNIV.'S JANDOLI SCH. OF COMM'N, *supra* note 33, at 1.

258. *Id.*

they signed up for a sportsbook or created a betting account “because of a promotion” or because “the money was free.”<sup>259</sup>

#### IV. CONCLUSION: THE PATH TOWARD COHERENT OVERSIGHT OF SPORTS GAMBLING IN THE POST-*MURPHY* ERA

The scientific evidence examined in Part III demonstrates that sports gambling inducements and advertising are powerful behavioral triggers that increase gambling volume, cause decision errors, and disproportionately harm vulnerable populations.<sup>260</sup> As states continue expanding legalized sports betting, policymakers face a narrowing window to establish balanced rules that preserve economic opportunity while preventing predatory practices.<sup>261</sup> The current legal landscape—characterized by industry self-regulation collapse and stalled federal legislation—reflects the same cyclical pattern that has plagued American gambling policy throughout history.<sup>262</sup>

##### A. *The Collapse of Industry Self-Regulation*

The American Gaming Association’s Responsible Marketing Code for Sports Wagering, adopted in 2019 and updated March 28, 2023, represents the industry’s attempt to preempt government oversight through voluntary standards.<sup>263</sup> The Code restricts marketing to audiences where at least 73.6% are “reasonably expected” to be over twenty-one, prohibits misleading “risk free” claims, and bans sportsbook sponsorship deals with college athletes.<sup>264</sup> Further, the Code provides for a complaint and code compliance process that enables “any person or entity, including consumers . . . to flag potential violations of the code by sports betting advertisers and marketers.”<sup>265</sup>

The Code’s viability, however, suffered a devastating blow when two of the nation’s largest sportsbooks, DraftKings and FanDuel, both resigned from AGA membership on November 18, 2025, citing

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259. *Id.* at 4.

260. *See* discussion *supra* Sections III.A–C.

261. *See* Amos Barshad, *The Predatory Gambling Industry Is Misleading Voters*, JACOBIN (Oct. 24, 2024), <https://jacobin.com/2024/10/sports-betting-legalization-gambling-campaign> [<https://perma.cc/MSN6-5NTR>] (describing the legislative balancing act required to capitalize on sports gambling tax revenue while avoiding a “severe human cost”).

262. *See* discussion *supra* Sections II.A–C.

263. *See* AM. GAMING ASS’N, RESPONSIBLE MARKETING CODE FOR SPORTS WAGERING 1 (2023) [hereinafter AGA RESPONSIBLE MARKETING CODE], [https://www.americangaming.org/wp-content/uploads/2025/04/AGA\\_RMCSW\\_2024.pdf](https://www.americangaming.org/wp-content/uploads/2025/04/AGA_RMCSW_2024.pdf) [<https://perma.cc/8ZA4-HRFR>].

264. *Id.* at 2.

265. *Id.* at 4.

irreconcilable differences over prediction markets.<sup>266</sup> Fanatics followed suit in December 2025.<sup>267</sup> Critically, DraftKings and FanDuel alone control approximately 71% of the U.S. sports betting market.<sup>268</sup> Caesars Entertainment, another major player, has not been an AGA member since 2020.<sup>269</sup> As Senator Richard Blumenthal observed in March 2023, “the benefits of this new code are limited given that not all sports betting companies—in fact, many of the largest ones—aren’t members of the AGA and don’t abide by their standards.”<sup>270</sup>

Even before these departures, the Code’s enforcement mechanism was purely voluntary.<sup>271</sup> Violations carry no legal penalties, financial fines, or independent oversight—only a requirement to withdraw the offending advertisement.<sup>272</sup> As one commentator correctly pointed out: “While voluntary regulations may be helpful, their scope and enforcement (or lack thereof) would not be an adequate substitute for legislative or administrative-based regulation.”<sup>273</sup>

### *B. The SAFE Bet Act: Federal Intervention Stalled*

Recognizing the inadequacy of industry self-regulation, Congress introduced the Supporting Affordability and Fairness with Every Bet (SAFE Bet) Act on September 12, 2024.<sup>274</sup> Representative Paul

266. Contessa Brewer, *FanDuel, DraftKings Abandon AGA Trade Group as Rift over Sports Prediction Markets Grows*, CNBC (Nov. 18, 2025, at 14:58 ET), <https://www.cnbc.com/2025/11/18/fanduel-draftkings-abandon-aga-memberships.html> (on file with the Duquesne Law Review).

267. Tom Nightingale, *Fanatics No Longer an American Gaming Association Member*, SBCAMERICAS (Dec. 11, 2025), <https://sbcamericas.com/2025/12/11/fanatics-american-gaming-association/> (on file with the Duquesne Law Review).

268. Matthew Waters, *Predictions Ambitions Lead DraftKings, FanDuel Away from AGA*, LEGAL SPORTS REP. (Nov. 18, 2025), <https://www.legalsportsreport.com/247254/predictions-ambitions-lead-draftkings-fanduel-away-from-aga/> [<https://perma.cc/4QZZ-W5BQ>].

269. Sam McQuillan, *Sports Betting Lobby Responds to Senator’s Call to Leave College*, LEGAL SPORTS REP. (Dec. 13, 2022), <https://www.legalsportsreport.com/93365/sports-betting-lobby-responds-to-blumenthal-call-to-leave-college/> [<https://perma.cc/VL6N-BK7L>].

270. *Blumenthal Statement on Updates to the American Gambling Association’s “Responsible Marketing Code,”* RICHARD BLUMENTHAL U.S. SENATOR FOR CONN. (Mar. 28, 2023), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-statement-on-updates-to-the-american-gambling-associations-responsible-marketing-code> [<https://perma.cc/NZH8-BCXQ>]; Letter from Richard Blumenthal, U.S. Senator, to Academic Administrators (Mar. 27, 2023), [https://www.blumenthal.senate.gov/imo/media/doc/03272023college\\_gambling\\_letter\\_to\\_universitiesletter.pdf](https://www.blumenthal.senate.gov/imo/media/doc/03272023college_gambling_letter_to_universitiesletter.pdf) [<https://perma.cc/88PQ-LBEB>].

271. Conrad, *supra* note 23, at 160–63.

272. AGA RESPONSIBLE MARKETING CODE, *supra* note 263, at 5; Conrad, *supra* note 23, at 161.

273. Conrad, *supra* note 23, at 163.

274. Supporting Affordability and Fairness with Every Bet Act, H.R. 9590, 118th Cong. (2024).



Tonko (D-NY) sponsored H.R. 9590 in the House,<sup>275</sup> while Senator Richard Blumenthal (D-CT) introduced the companion bill, S. 5057.<sup>276</sup> After the 118th Congress ended without action, the legislation was reintroduced in March 2025 as S. 1033.<sup>277</sup>

The Act's advertising provisions directly target the harmful tactics documented in experimental research.<sup>278</sup> The legislation would prohibit broadcast advertising between 8:00 a.m. and 10:00 p.m. local time and ban all advertising during live sporting events.<sup>279</sup> It would prohibit advertisements using terms such as "bonus," "no sweat," "bonus bets," or "odds boosts."<sup>280</sup> The Act would also bar advertisements explaining how to place wagers, establish a national self-exclusion registry, and require affordability checks for wagers exceeding \$1,000 per day.<sup>281</sup>

The Senate Judiciary Committee held a hearing on the legislation on December 17, 2024, titled "America's High-Stakes Bet on Legalized Sports Gambling."<sup>282</sup> NCAA President Charlie Baker, National Council on Problem Gambling Executive Director Keith S. Whyte, and Dr. Harry Levant of the Public Health Advocacy Institute testified in support.<sup>283</sup> The AGA responded sharply, with Senior Vice President of Government Relations Chris Cylke calling the bill "a heavy-handed federal prohibition[]" and a "slap in the face to state legislatures and gaming regulators."<sup>284</sup>

While it is somewhat unlikely that Congress ultimately enacts the SAFE Bet Act, the bill's introduction signals a growing legislative recognition that gambling advertising represents a public health concern requiring federal intervention.<sup>285</sup>

275. *Id.*

276. Supporting Affordability and Fairness with Every Bet Act, S. 5057, 118th Cong. (2024).

277. Supporting Affordability and Fairness with Every Bet Act of 2025, S. 1033, 119th Cong. (2025).

278. See H.R. 9590 § 103; see also PAUL TONKO, SAFE BET ACT (2024), [https://tonko.house.gov/uploadedfiles/safe\\_bet\\_legislative\\_outline\\_3.24.pdf](https://tonko.house.gov/uploadedfiles/safe_bet_legislative_outline_3.24.pdf) (on file with the Duquesne Law Review) (summarizing key provisions of the Act).

279. H.R. 9590 § 103(b)(7)(C)(i)–(ii).

280. *Id.* § 103(b)(7)(D)(i).

281. *Id.* §§ 103(b)(7)(D)(ii), 202, 103(b)(6)(F)(iii).

282. *America's High-Stakes Bet on Legalized Sports Gambling: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2024).

283. *Id.*

284. AGA Statement on Introduction of SAFE Bet Act, AM. GAMING ASS'N (Sep. 12, 2024), <https://www.americangaming.org/aga-statement-on-proposed-safe-bet-act/> [<https://perma.cc/J62K-X8BK>].

285. See John Barr, *Lawmakers Propose New Federal Regulations on Sports Betting*, ESPN (Sep. 12, 2024, at 15:30 ET), [https://www.espn.com/sports-betting/story/\\_/id/41234480/congressmen-propose-new-federal-regulations-sports-betting](https://www.espn.com/sports-betting/story/_/id/41234480/congressmen-propose-new-federal-regulations-sports-betting) [<https://perma.cc/5SLQ-ZYFP>] (noting that "Blumenthal and Tonko have also already met opposition within

*C. The Future: Learning from History*

The current regulatory landscape mirrors historical patterns that have characterized American gambling policy.<sup>286</sup> Just as nineteenth-century lottery scandals eventually prompted federal intervention, and just as mid-twentieth-century organized crime dominance necessitated comprehensive antigambling legislation, today's advertising-driven public health crisis may ultimately compel coordinated national action.<sup>287</sup> The question is whether intervention will come proactively or reactively, after harms have become even more entrenched.

The scientific evidence provides clear guidance for effective regulation.<sup>288</sup> Experimental research, industry data analysis, neurobiological studies, and real-world observations converge on key conclusions: inducements cause measurable increases in gambling volume and decision errors; effects concentrate disproportionately among vulnerable populations; promotional tactics involving "free" or "risk-free" messaging are especially harmful; and industry self-regulation has comprehensively failed.<sup>289</sup>

A sustainable regulatory framework must move beyond voluntary codes and reactive enforcement toward proactive standards grounded in public health research. At minimum, such a framework should include comprehensive restrictions on misleading inducement advertising, limitations on promotional content volume and targeting, robust affordability and self-exclusion mechanisms, enhanced protections for vulnerable populations, and meaningful enforcement with substantial penalties.

Without coordinated federal action, the normalization of gambling through relentless advertising threatens to replicate the public health crises once associated with tobacco and alcohol promotion.<sup>290</sup> For a nation that spent decades battling organized crime's control of illegal gambling, it would be profoundly ironic to permit state-licensed operators to inflict comparable harms through legal but predatory marketing practices.<sup>291</sup>

The path forward requires policymakers to learn from both America's gambling history and the comprehensive scientific evidence

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their own political party" which perhaps signals the unlikelihood that the SAFE Bet Act ultimately passes).

286. See discussion *supra* Part II.

287. See discussion *supra* Sections II.A–B.

288. See discussion *supra* Part III.

289. See discussion *supra* Part III.

290. See Conrad, *supra* note 23, at 147–58 (describing the constitutional dimensions and associated history of "sin product advertising" in the United States).

291. See discussion *supra* Section II.B.

now available.<sup>292</sup> Only through coordinated federal action—whether via the SAFE Bet Act or similar legislation—can the nation hope to preserve the economic benefits of legalized sports wagering while mitigating the public health harms that unfettered advertising threatens to impose.

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292. See discussion *supra* Parts II, III.

# Reclaiming the Classroom: How Pennsylvania Can Reduce Postpandemic K–12 Chronic Absenteeism

Cambrie Short\*

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I. INTRODUCTION

Popularly depicted in the media through characters such as Tom Sawyer and Ferris Bueller, the empty classroom desk is hardly a new phenomenon in the United States.<sup>1</sup> Nonetheless, in 2016, the U.S. Department of Education released data that 16% of K–12 public school students nationwide had been chronically absent during the 2015–2016 school year, creating a “hidden crisis” in education.<sup>2</sup> Students are commonly considered chronically absent when they miss at least 10% of the school year.<sup>3</sup> Chronic absenteeism disrupts student achievement across the nation and likely leads to social, emotional, and behavioral challenges throughout school and after high school graduation.<sup>4</sup>

Then, the COVID-19 pandemic left an unprecedented and dramatic impact on student learning and attendance across the United States.<sup>5</sup> School routines and relationships were altered as students and families experienced the challenges of remote learning, hybrid scheduling, and quarantining.<sup>6</sup> Upon return to in-person learning, student absenteeism nearly doubled from 15% in 2018–2019 to 28% in 2021–2022.<sup>7</sup> As of the 2023–2024 school year, 23.5% of students

1. Brian A. Jacob & Kelly Lovett, *Chronic Absenteeism: An Old Problem in Search of New Answers*, BROOKINGS (July 27, 2017), <https://www.brookings.edu/articles/chronic-absenteeism-an-old-problem-in-search-of-new-answers> [<https://perma.cc/J56K-MXB3>]. Tom Sawyer is an iconic literary character known for his boyhood escapades, including playing “hookey.” MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* 3 (Lerner Publ’g Grp., Inc. 2014) (1876). *Ferris Bueller’s Day Off* is a well-known 1986 film that follows the adventures of a high school senior, Ferris Bueller, who fakes being sick to skip school. *Ferris Bueller’s Day Off*, IMDB, <https://www.imdb.com/title/tt0091042> [<https://perma.cc/G4L4-ZC7S>] (last visited Mar. 5, 2025).

2. *Chronic Absenteeism in the Nation’s Schools*, U.S. DEP’T OF EDUC. (Jan. 2019), <https://web.archive.org/web/20240916024202/https://www.ed.gov/datastory/chronicabsenteeism.html#intro> (on file with the Duquesne Law Review).

3. NAT MALKUS, AM. ENTER. INST., *LONG COVID FOR PUBLIC SCHOOLS: CHRONIC ABSENTEEISM BEFORE AND AFTER THE PANDEMIC 2* (2024), <https://www.aei.org/wp-content/uploads/2024/01/Long-COVID-for-Public-Schools.pdf?x29144> (on file with the Duquesne Law Review).

4. See *id.* at 3.

5. PHYLLIS JORDAN, FUTUREED & ATTENDANCE WORKS, *ATTENDANCE PLAYBOOK: SMART STRATEGIES FOR REDUCING STUDENT ABSENTEEISM POST-PANDEMIC 5* (2023) [hereinafter *ATTENDANCE PLAYBOOK*], <https://www.future-ed.org/wp-content/uploads/2023/05/Attendance-Playbook.5.23.pdf> [<https://perma.cc/89JW-AU9X>].

6. *Id.*

7. Nat Malkus, *The Latest Chronic Absenteeism Numbers*, AM. ENTER. INST. (Sep. 6, 2024), <https://www.aei.org/education/the-latest-chronic-absenteeism-numbers> (on file with the Duquesne Law Review). While Nat Malkus refers to school years by the spring year, this Article refers to school years as encompassing the fall and spring semesters. MALKUS, *supra* note 3, at 4.

remain chronically absent according to current and available state-sourced data.<sup>8</sup>

The aftermath of the pandemic made it clear that, in order to avoid academic, social, behavioral, and emotional fallout, students need to consistently attend school.<sup>9</sup> As a result, state lawmakers began proposing solutions for increasing school attendance by introducing bills and statewide initiatives to “identify, prevent, and address chronic absenteeism.”<sup>10</sup> Unfortunately, Pennsylvania has fallen behind in its efforts.<sup>11</sup>

This Article addresses the need for Pennsylvania’s lawmakers to introduce effective legislation and develop a statewide initiative to reduce postpandemic chronic absenteeism rates in its schools.<sup>12</sup> The Article proceeds in five parts, including the introduction.<sup>13</sup> Part II defines chronic absenteeism and describes its impact on students and schools across the nation before, during, and after COVID-19.<sup>14</sup> Part III discusses different strategies that various state legislatures and leaders are using to deter the alarming rise in chronic absenteeism rates, before shifting focus to Pennsylvania’s efforts thus far.<sup>15</sup> Part IV urges Pennsylvania to analyze and apply influential legislation or initiatives of other states to its own efforts.<sup>16</sup> Finally, Part V concludes that Pennsylvania’s chronic absenteeism rates can be more effectively reduced with: real-time data collection; a reinvention of the truancy courts as “problem-solving court[s]”<sup>17</sup> that work with truant students and their families to reengage them with

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8. Nat Malkus, *Lingering Absence in Public Schools: Tracking Post-Pandemic Chronic Absenteeism into 2024*, AM. ENTER. INST. (June 12, 2025), <https://www.aei.org/research-products/report/lingering-absence-in-public-schools-tracking-post-pandemic-chronic-absenteeism-into-2024> (on file with the Duquesne Law Review). As of June 12, 2025, five states had yet to release chronic absenteeism data from the 2024 school year. *Id.* Data for the 2024–2025 school year is generally not available yet as states continue to receive and collect it. *See id.*

9. MALKUS, *supra* note 3, at 2.

10. Bella DiMarco, *Legislative Tracker: 2024 State Student-Absenteeism Bills*, FUTUREED (May 27, 2024) [hereinafter DiMarco, *2024 Tracker*], <https://www.future-ed.org/legislative-tracker-2024-state-student-absenteeism-bills> [<https://perma.cc/2C87-M3RU>].

11. *See id.* (indicating no legislative efforts to address chronic absenteeism by Pennsylvania as of May 2024); Bella DiMarco, *Legislative Tracker: 2025 Student Chronic Absenteeism Bills in the States*, FUTUREED (July 2, 2025) [hereinafter DiMarco, *2025 Tracker*], <https://www.future-ed.org/legislative-tracker-2025-student-chronic-absenteeism-bills-in-the-states> [<https://perma.cc/X48G-U3X7>] (indicating no legislative efforts to address chronic absenteeism by Pennsylvania as of July 2025).

12. *See* discussion *infra* Part IV.

13. *See supra* Part I; *infra* Parts II–V.

14. *See* discussion *infra* Part II.

15. *See* discussion *infra* Part III.

16. *See* discussion *infra* Part IV.

17. *See* S.B. 865, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

education; and, where appropriate, reward-based programs to remain implemented at the school district level where they can be regularly adjusted.<sup>18</sup>

## II. BACKGROUND

### A. *Defining Chronic Absenteeism*

Chronic absenteeism is commonly defined by the percentage of students who miss at least 10% of the school year, or eighteen days out of the 180-day school year.<sup>19</sup> Students who fall into this category have missed school for any reason, including excused, unexcused, or disciplinary absences.<sup>20</sup> To capture the full picture of lost instructional time and its resulting challenges, this definition expands beyond unexcused absences,<sup>21</sup> also known as truancy.<sup>22</sup> Truancy and chronic absenteeism are terms often used interchangeably by educators, policymakers, and journalists; however, chronic absenteeism focuses on the academic consequence of missing school and the prevention thereof, whereas truancy focuses on compliance with mandatory attendance laws.<sup>23</sup> Truant absences are often referred

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18. See discussion *infra* Part V.

19. MALKUS, *supra* note 3, at 3. Chronic absenteeism does not have a uniform definition. ALYSSA RAFA, EDUC. COMM'N OF THE STATES, CHRONIC ABSENTEEISM: A KEY INDICATOR OF STUDENT SUCCESS 1 (2017), [https://www.ecs.org/wp-content/uploads/Chronic\\_Absenteeism\\_\\_A\\_key\\_indicator\\_of\\_student\\_success.pdf](https://www.ecs.org/wp-content/uploads/Chronic_Absenteeism__A_key_indicator_of_student_success.pdf) [<https://perma.cc/ZE7D-C9M4>]. Chronic absenteeism is federally defined as missing fifteen or more days of school per year. *Id.* Some states measure it based on the number of absences, while other states define it according to the percentage of time missed. *Id.* at 1–2. The Pennsylvania Department of Education defines chronic absenteeism according to the common definition, missing 10% or more of the school year, but limits this definition to only include those who have been enrolled in a public school with twenty or more students for at least ninety days. *Future Ready PA Index*, COMMONWEALTH OF PA., <https://www.pa.gov/en/agencies/education/programs-and-services/schools/every-student-succeeds-act-essa/future-ready-pa-index.html> [<https://perma.cc/9LC4-MV9N>] (last visited Jan. 3, 2024). This ninety-day enrollment requirement is due to there not having been enough time for the school to implement intervention strategies to increase a student's attendance. *Id.*

20. PHYLLIS W. JORDAN & RAEEN MILLER, FUTUREED, WHO'S IN: CHRONIC ABSENTEEISM UNDER THE EVERY STUDENT SUCCEEDS ACT 3 (2017), [https://www.future-ed.org/wp-content/uploads/2017/09/REPORT\\_Chronic\\_Absenteeism\\_final\\_v5.pdf](https://www.future-ed.org/wp-content/uploads/2017/09/REPORT_Chronic_Absenteeism_final_v5.pdf) [<https://perma.cc/NCE9-2PJW>].

21. *Id.*

22. *What's the Difference Between Chronic Absence and Truancy?*, ATTENDANCE WORKS: OUR BLOG (Jan. 11, 2016), <https://www.attendanceworks.org/whats-the-difference-between-chronic-absence-and-truancy> [<https://perma.cc/5PKY-MAH9>]. Under the Pennsylvania Department of Education's definition, a student subject to compulsory school laws is "truant" when the student has accumulated three or more unexcused absences during the school year. *Future Ready PA Index*, *supra* note 19. Furthermore, a student is "habitually truant" if, while subject to compulsory school laws, the student accrues six or more unexcused absences within the school year. *Id.*

23. *What's the Difference Between Chronic Absence and Truancy?*, *supra* note 22.

to school administrators or the legal system to introduce punitive measures set in place by policymakers.<sup>24</sup> Moreover, chronic absenteeism is difficult for schools to monitor as it can manifest itself in different ways.<sup>25</sup> For example, a student missing multiple consecutive days makes it apparent to school leaders that the student is chronically absent, whereas a student who misses three or four days each month, “eventually crossing the chronically absent threshold after several months,” is not as obvious.<sup>26</sup> Chronic absenteeism may also hide beneath average daily attendance at the schoolwide level.<sup>27</sup> For example, while a school’s average daily attendance rate may be 90%, it could still have 40% of students chronically absent since these students are not each missing the same days.<sup>28</sup>

### *B. The Consequences of Lost Instructional Time*

The consequences of lost instructional time are reflected in poor social and academic skills, including negatively impacted test scores and low graduation rates.<sup>29</sup> Chronic absenteeism is linked to growing gaps in social and academic achievement that become more apparent in later grades, with the effect being stronger in math than in reading.<sup>30</sup> Students who become chronically absent in earlier grades will struggle to break this habit in later grades.<sup>31</sup> The impact continues after high school since high school dropouts are more likely to face a loss of earnings, joblessness, and potential incarceration.<sup>32</sup>

Moreover, when chronically absent students return to school, teachers have to spend additional time helping these students make up missed assignments and other lost instructional time.<sup>33</sup> As a result, the academic performance of their nonchronically absent peers may be negatively impacted.<sup>34</sup> Additionally, chronic absenteeism

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24. *Id.*

25. Jill Barshay, *Proof Points: The Chronic Absenteeism Puzzle*, HECHINGER REP. (Feb. 19, 2024), <https://hechingerreport.org/proof-points-the-chronic-absenteeism-puzzle> [https://perma.cc/48J8-T9ZR].

26. *Id.*

27. See *id.*; Madeline H. Meth, Note, *Paying for Attendance: Using Incentives to Combat Chronic Absenteeism*, 24 GEO. J. ON POVERTY L. & POL’Y 243, 245 (2017).

28. MALKUS, *supra* note 3, at 3 (quoting ROBERT Balfanz & VAUGHAN BYRNES, THE IMPORTANCE OF BEING IN SCHOOL: A REPORT ON ABSENTEEISM IN THE NATION’S PUBLIC SCHOOLS 3 (2012), [https://new.every1graduates.org/wp-content/uploads/2012/05/FINAL-ChronicAbsenteeismReport\\_May16.pdf](https://new.every1graduates.org/wp-content/uploads/2012/05/FINAL-ChronicAbsenteeismReport_May16.pdf) [https://perma.cc/QZ55-8FHQ]).

29. Meth, *supra* note 27, at 243.

30. MALKUS, *supra* note 3, at 3.

31. *Id.*

32. Meth, *supra* note 27, at 243.

33. MALKUS, *supra* note 3, at 3.

34. *Id.*



affects every student in every type of community, no matter their economic status or ethnicity.<sup>35</sup> Nevertheless, minority students, students with disabilities, and students from low-income families are more likely to be chronically absent.<sup>36</sup>

### C. *A Hidden Crisis in Education*

In 2016, the U.S. Department of Education released data that over seven million K–12 public school students across the nation, or 16% of students, had been chronically absent during the 2015–2016 school year.<sup>37</sup> As a result, the U.S. Department of Education labeled chronic absenteeism a “hidden educational crisis.”<sup>38</sup> This phenomenon was under-recognized until Congress rewrote federal education law, known as the Every Student Succeeds Act (ESSA) in 2015.<sup>39</sup> ESSA requires states to measure “school quality or school success” by using a fifth indicator, in addition to four indicators driven by academic achievement, to reduce the influence of standardized assessments within the classroom.<sup>40</sup> The fifth indicator must provide “meaningful differentiation” between schools across the state and be a “valid . . . [and] reliable” comparison.<sup>41</sup> States may measure a school’s quality or success by examining “student engagement . . . educator engagement . . . student access to and completion of advanced coursework . . . postsecondary readiness . . . school climate and safety . . . and any other indicator the State chooses that meets the requirements of [20 U.S.C. § 6311(c)(4)(B)(v)(I)(aa)–(cc)].”<sup>42</sup> More than 75% of states use chronic absenteeism as an additional indicator<sup>43</sup> because it meets federal law requirements, displays a

35. ATTENDANCE WORKS, *STEMMING THE SURGE IN CHRONIC ABSENCE: WHAT STATES CAN DO* 3 (2024), <https://www.attendanceworks.org/wp-content/uploads/2019/06/Policy-Brief-2024-062524.pdf> [<https://perma.cc/CRT5-J2Z2>].

36. MALKUS, *supra* note 3, at 3.

37. *Chronic Absenteeism in the Nation’s Schools*, *supra* note 2.

38. *Id.*

39. JORDAN & MILLER, *supra* note 20, at 1. Although many states may have tracked average daily attendance rates under previous federal education law, the No Child Left Behind Act, to secure funding or to comply with mandatory truancy reporting, attendance was not an area of focus for school leaders, let alone chronic absenteeism. *Id.* at 2–3.

40. *Id.* at 1. The four other indicators, as summarized, that the ESSA requires states to report include: proficient academic achievement based on state standardized tests, student academic growth over time based on state standardized tests, graduation rates, and English language proficiency for English learners. See 20 U.S.C. § 6311(c)(4)(B)(i)–(iv).

41. 20 U.S.C. § 6311(c)(4)(B)(v)(I)(aa)–(bb).

42. *Id.* § 6311(c)(4)(B)(v)(II)–(VIII).

43. Letter from Miguel A. Cardona, U.S. Sec’y of Educ., to Chief State School Officers (Mar. 22, 2024), <https://www.ed.gov/laws-and-policy/education-policy/policy-guidance/march-22-2024-letter-from-secretary-cardona-regarding-student-attendance-and-engagement-2> [<https://perma.cc/PL6V-N2TG>]; see also JORDAN & MILLER, *supra* note 20, at 14–17 (displaying each state’s submitted ESSA plan of a fifth indicator in Appendix II).

student's "connectedness" to school, and links to a student's academic performance.<sup>44</sup>

#### *D. Chronic Absenteeism During and Postpandemic*

COVID-19's rapid spread across the United States prompted a national state of emergency declaration on March 13, 2020.<sup>45</sup> By the end of the month, state and local governments pushed their schools into extended closures and remote learning, affecting 50.8 million students in all fifty states.<sup>46</sup> The transition to virtual instruction required constant internet access and a device, which created difficulties for students in attending classes and submitting their assignments, particularly those with low incomes.<sup>47</sup> Additionally, as teachers attempted to "replicate the schoolhouse in the student's house," their best efforts could not compete against the "pre-existing achievement gap" that remote learning only exacerbated.<sup>48</sup> Naturally, the "digital divide" and digital instruction increased truancy rates since students were not "logging into classes, turning in assignments, or making contact with teachers."<sup>49</sup> Based on state standardized tests during the pandemic, the average public school student experienced the equivalent of half a year of learning loss in math and a quarter of a year in reading.<sup>50</sup>

Unfortunately, as students struggled to return to in-person schooling, chronic absenteeism nearly doubled from 15% in 2018–2019 to 28% in 2021–2022.<sup>51</sup> This alarming jump can be attributed to many lingering difficulties students and their families faced after months of isolation, such as unreliable transportation, returning to routines, losing loved ones, and ongoing mental and physical health

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44. JORDAN & MILLER, *supra* note 20, at 2.

45. Megan Helton, Note, *A Tale of Two Crises: Assessing the Impact of Exclusionary School Policies on Students During a State of Emergency*, 50 J.L. & EDUC. 156, 162 (2021).

46. *Id.* at 165.

47. *Id.* at 159–60.

48. *Id.* at 165–66.

49. *Id.* at 176–77. As schools switched to online learning, tracking student attendance became complicated and varied across states. See Phyllis W. Jordan & Hedy N. Chang, *The Challenge of Taking Attendance in Remote Learning*, FUTUREED (Dec. 3, 2020), <https://www.future-ed.org/the-challenge-of-taking-attendance-during-the-pandemic> [<https://perma.cc/3R38-PLMC>]. For example, while schools in Minnesota would mark a student absent for not having direct interaction with a teacher on an instructional day, students in New Jersey were considered present if their assignments were simply turned in on time. *Id.*

50. EDNAVIGATOR, LEARNING HEROES & TNTP, FALSE SIGNALS: HOW PANDEMIC-ERA GRADES MISLEAD FAMILIES AND THREATEN STUDENT LEARNING 1 (2023) [hereinafter FALSE SIGNALS], <https://tntp.org/wp-content/uploads/2023/10/False-Signals.pdf> [<https://perma.cc/FMP2-M8MD>].

51. MALKUS, *supra* note 3, at 2.

issues.<sup>52</sup> Additionally, the school atmosphere greatly differed as staffing shortages surged across the nation's schools, ultimately creating a disconnect between students and families and a lack of curriculum engagement.<sup>53</sup> Simultaneously, the culture surrounding school attendance has dramatically changed as parents have become more willing to let their children miss school.<sup>54</sup> When online grading policies became more flexible, students were able to earn similar grades "with less effort and more absences."<sup>55</sup> Since then, letter grades have become "false signals," suggesting students are academically on track when they are not.<sup>56</sup> Families and students may feel like schoolwork can be completed online,<sup>57</sup> without fear of the student's academic performance falling behind.<sup>58</sup>

While some consider 2022–2023 to be the first postpandemic school year,<sup>59</sup> 25.4% of students remained chronically absent across the nation.<sup>60</sup> Then, that rate dropped to 23.5% in 2023–2024.<sup>61</sup> A comparison cannot be made, however, with the 2024–2025 school year, since states are still continuing to receive and collect that chronic absenteeism data.<sup>62</sup> Nevertheless, although the 2023–2024 data shows that students, teachers, and school districts are slowly

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52. See *Rising Tide of Chronic Absence Challenges Schools*, ATTENDANCE WORKS (Oct. 12, 2023), <https://www.attendanceworks.org/rising-tide-of-chronic-absence-challenges-schools> [https://perma.cc/U3GD-5LQB].

53. *Id.*

54. Frederick M. Hess, *Chronic Absenteeism Has Exploded. What Can Schools Do?*, AM. ENTER. INST. (Feb. 16, 2024), <https://www.aei.org/op-eds/chronic-absenteeism-has-exploded-what-can-schools-do> (on file with the Duquesne Law Review); see also JOINT STATE GOV'T COMM'N, GEN. ASSEMB. OF THE COMMONWEALTH OF PA., THE TRUANCY PROCESS: THE CHALLENGE OF IMPROVING ATTENDANCE IN PENNSYLVANIA SCHOOLS: REPORT OF THE ADVISORY COMMITTEE ON ACT 138 OF 2016, at 2 (2024) [hereinafter JOINT STATE GOV'T COMM'N] (suggesting that Americans' relationship with attending school has become optional); LIZ COHEN, FUTUREED, TEAM SPORT: RHODE ISLAND'S STATEWIDE STRATEGY FOR REDUCING CHRONIC ABSENTEEISM 2 (2024), <https://www.future-ed.org/wp-content/uploads/2024/08/FutureEd-Report-Team-Sport.pdf> [https://perma.cc/276B-4TDT] (reporting that education leaders blame students and parents as believing school attendance to be unimportant).

55. Hess, *supra* note 54.

56. FALSE SIGNALS, *supra* note 50, at 2. EdNavigator, Learning Heroes, and TNTP conducted a study using data collected from two public school districts that "differed in size and achievement relative to national averages." *Id.* at 1–2. The study found that, according to math and ELA achievement scores, the average student is about five months further behind in learning in 2022 than they were in 2019 yet earning the same grades or better in 2022 than in 2019. *Id.* at 3–4.

57. Hess, *supra* note 54.

58. FALSE SIGNALS, *supra* note 50, at 2.

59. See, e.g., MALKUS, *supra* note 3, at 2; Nat Malkus, *The Lasting Effects of COVID on Schooling*, AM. ENTER. INST. (April 1, 2024), <https://www.aei.org/articles/the-lasting-effects-of-covid-on-schooling> (on file with the Duquesne Law Review).

60. Malkus, *supra* note 8.

61. *Id.*

62. See *id.*

recovering from pandemic learning loss, this rate of recovery is not sufficient.<sup>63</sup>

### III. STATE STRATEGIES FOR PROMOTING ATTENDANCE

By 1918, all states had implemented mandatory school attendance laws.<sup>64</sup> Yet, it was not until 2001, after the No Child Left Behind Act (NCLBA) was signed into law, that states became required to report truancy data.<sup>65</sup> The NCLBA emphasized the importance of “anti-truancy laws with court-driven consequences” due to the effects that truancy had on the nation’s low-performing test scores.<sup>66</sup> Now, ever since the ESSA was passed, attention on student attendance has shifted to also include chronic absenteeism.<sup>67</sup> With states no longer being federally required to report student truancy data,<sup>68</sup> and chronic absenteeism rates soaring as a result of the pandemic, state lawmakers are stepping in to propose solutions for increasing school attendance, an issue normally handled by school districts.<sup>69</sup> State legislatures are introducing bills that mobilize community resources to promote statewide initiatives aimed at “identify[ing], prevent[ing], and address[ing] chronic absenteeism.”<sup>70</sup> In fact, FutureEd, a think tank at Georgetown University’s McCourt School of Public Policy, identified at least seventy-one bills targeting student absenteeism, including truancy, that were introduced in twenty-eight state legislatures by both Democrats and Republicans as of May 2024,<sup>71</sup> and fifty-six bills spread across twenty-two states in July 2025.<sup>72</sup> Yet, Pennsylvania was not among these states until August 2025.<sup>73</sup>

#### A. *Tracking Chronic Absenteeism in Real Time*

Even after resuming in-person instruction and making vaccines readily obtainable, Rhode Island faced a 15% rise in chronically

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63. *Id.*

64. LAUREN BURR, MARK ZIEGLER-THAYER & JENNY SCALA, AM. INSTS. FOR RSCH., ATTENDANCE LEGISLATION IN THE UNITED STATES 3 (2023) [hereinafter ATTENDANCE LEGISLATION IN THE UNITED STATES], <https://www.air.org/sites/default/files/2023-04/Attendance-Legislation-in-the-US-Jan-2023.pdf> [<https://perma.cc/WAF4-C92D>].

65. *Id.*

66. *Id.*

67. *Id.* at 6.

68. *Id.* at 4.

69. DiMarco, 2024 *Tracker*, *supra* note 10.

70. *Id.*

71. *Id.*

72. DiMarco, 2025 *Tracker*, *supra* note 11.

73. See DiMarco, 2024 *Tracker*, *supra* note 10; DiMarco, 2025 *Tracker*, *supra* note 11; *infra* Section III.D.

absent students across the state in the 2021–2022 school year.<sup>74</sup> In order to create a statewide sense of urgency regarding this issue, Rhode Island’s governor, Daniel McKee, and the Rhode Island Department of Education (RIDE), launched the first real-time tracking and publication dashboard of student attendance data known as the “Student Attendance Leaderboard” in 2023.<sup>75</sup> By linking each Rhode Island district’s data system with RIDE’s dashboard each night, the Student Attendance Leaderboard can display the current percentage of chronically absent students in every public school.<sup>76</sup> Therefore, although total statewide chronic absenteeism is still calculated at the end of each school year, the Student Attendance Leaderboard can help school leaders gauge the number and percentage of students at risk of being chronically absent within their own schools in real time.<sup>77</sup>

Not only does this initiative offer a public dashboard, but it also allows principals at every school to have their own dashboard to track individual student attendance patterns.<sup>78</sup> Featured in the private dashboard is the ability to “nudge” families through text messages or a printed letter to notify them when attendance can be improved.<sup>79</sup> For \$5 per student per year, and its ability to reduce chronic absenteeism by as much as 15%, nudging is an effortless and inexpensive intervention strategy.<sup>80</sup> Since 2023, 250 out of 271 Rhode Island public schools have used the nudge system incorporated within the dashboard.<sup>81</sup>

As hoped, local leaders who became equipped with this up-to-date data were surprised and alarmed to learn of the serious attendance problems that even top-performing schools were facing.<sup>82</sup> With the ability to address attendance issues on time, and not a school year later, chronic absenteeism rates across Rhode Island schools in the 2023–2024 school year dropped to 24.7%, the lowest it has been since the pandemic began.<sup>83</sup> Specifically, out of the state’s sixty-four school districts, 89% experienced a drop in chronic absenteeism

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74. See COHEN, *supra* note 54, at 1, 3.

75. *Id.* at 1.

76. *Id.* at 3.

77. *Student Attendance Leaderboard*, R.I. DEPT OF EDUC., <https://www3.ride.ri.gov/attendance/public> [<https://perma.cc/F7A4-WZ36>] (last visited Aug. 21, 2025).

78. COHEN, *supra* note 54, at 3.

79. *Id.* Nudging is a method coined by Richard Thaler and Cass Sunstein in 2008, which “suggest[s] a beneficial action without mandating it.” *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1.

rates from the previous year.<sup>84</sup> In addition, the Student Attendance Leaderboard also aided Rhode Island in minimizing the “absenteeism gap” separating low-income students from their more well-off peers.<sup>85</sup> For example, in 2021–2022, a 27% percent attendance gap existed, and by 2023–2024, it shrunk to 18%.<sup>86</sup>

### B. *Punitive Approaches*

As schools attempt to address the issues causing a rise in chronically absent students, many are struggling to handle those students with accumulated unexcused absences.<sup>87</sup> When students have an unexcused absence, they may be penalized through the denial of course credit and opportunities to complete missed assignments, as well as by being excluded from afterschool sports or activities.<sup>88</sup> Where students have multiple unexcused absences, schools may push for the legal system to become involved.<sup>89</sup> With the amount of unexcused absences growing larger postpandemic, more punitive approaches to truancy have been introduced among state legislatures.<sup>90</sup>

Various bills with punitive approaches would change the way schools or public agencies respond to absenteeism, including by making truancy laws stricter.<sup>91</sup> For example, Wisconsin Assembly Bill 1026 ultimately restricts a student from moving on to the next grade if the student missed more than thirty full days of school during the school year.<sup>92</sup> Similarly, under certain circumstances, a student's grade can be based on their attendance in Utah's enacted Senate Bill 177.<sup>93</sup> Additionally, Virginia's Senate Bill 619 expands the definition of an “abused or neglected child” under the state's

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84. *Id.*

85. *Id.*

86. *Id.*

87. ATTENDANCE PLAYBOOK, *supra* note 5, at 69.

88. *Id.*

89. *Id.*

90. *Id.*

91. DiMarco, 2024 *Tracker*, *supra* note 10. Every state has passed their own version of compulsory attendance laws that typically require children of a certain age range to attend school, define absenteeism terms, provide “exceptions and exemptions” to the requirements, and create penalties for parents and children that do not comply with the laws. ATTENDANCE LEGISLATION IN THE UNITED STATES, *supra* note 64, at 2–3.

92. Assemb. B. 1026, 2023–2024 Leg., Reg. Sess. (Wis. 2024). On April 15, 2024, the Assembly Bill failed concurrence pursuant to Senate Joint Resolution 1. *Id.*

93. S.B. 177, 65th Leg., 2024 Gen. Sess. (Utah 2024); DiMarco, 2024 *Tracker*, *supra* note 10.

compulsory education law to include “educational neglect.”<sup>94</sup> This bill would require schools to report parents with chronically absent students, or those who have missed 10% or more of the school year for any reason, to legal authorities.<sup>95</sup>

Nevertheless, other state lawmakers are considering alternatives to court intervention and promoting the use of “diversionary programs” in place of families facing legal action as a consequence for their child’s absences.<sup>96</sup> For example, Maryland’s Senate Bill 865 aims to reform courts handling truancy matters as “problem-solving court[s]” that work with truant students and their families to reengage them with education and reduce unexcused absences.<sup>97</sup> Under its “Truancy Reduction and School Reengagement Program,” the court may order the child to attend summer school, enroll in a credit recovery program, join a virtual learning platform, complete a GED program, participate in personal or family counseling, visit substance abuse treatment, complete community service, or abide by curfew hours.<sup>98</sup> The court may also refer the child or the family to an agency that can assist with understanding behaviors or other factors that may prevent the child from attending school, or take any other action that aligns with the goals of the program.<sup>99</sup>

Similarly, other state legislatures wish to create school programs to “identify, prevent and address” absenteeism overall.<sup>100</sup> For example, Iowa House File 2547 planned to require schools to develop an absenteeism prevention plan for every student missing 15% or more, but less than 18%, of the days or hours in a school calendar by holding an engagement conference with the student and family.<sup>101</sup> A designated school employee will monitor the student’s

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94. S.B. 619, 2024 Gen. Assemb., Reg. Sess. (Va. 2024); DiMarco, *2024 Tracker*, *supra* note 10. As of February 8, 2024, Virginia’s Senate Bill 619 was continued to 2025 in the Senate Education and Health Committee. S.B. 619.

95. S.B. 619; DiMarco, *2024 Tracker*, *supra* note 10.

96. DiMarco, *2024 Tracker*, *supra* note 10.

97. S.B. 865, 2024 Gen. Assemb., Reg. Sess. (Md. 2024); DiMarco, *2024 Tracker*, *supra* note 10. The bill was referred for Senate committee review on February 7, 2024. S.B. 865. Following a subsequent hearing held on February 28, 2024, the bill has remained with the committee where its legislative progress is currently pending. *Id.*

98. S.B. 865.

99. *Id.*

100. DiMarco, *2024 Tracker*, *supra* note 10.

101. H. File 2547, 90th Gen. Assemb., 2d Sess. (Iowa 2024). Iowa defines a student as chronically absent when that student misses more than 10% of the total days or hours in the school calendar year. *Id.* A school engagement meeting may be convened prior to a student missing 15% or more of the school year, in which case an absenteeism prevention plan must be created. *Id.* The subcommittee to the Senate Education Committee recommended amendment and passage of Iowa House File 2547 on March 14, 2024. *Id.*

progress and communicate with the child and family at least once a week.<sup>102</sup>

### C. *Incentives*

Meanwhile, Ohio took an alternative route by introducing legislation to establish pilot programs that provide rewards or incentives for students to attend and graduate from school.<sup>103</sup> Under Ohio House Bill 348, school districts with high chronic absenteeism rates must apply to be considered for the cash incentive program.<sup>104</sup> Next, the program selects control groups of random kindergarten through ninth-grade students from participating schools.<sup>105</sup> Ohio's Department of Education will then test varying monetary incentives for students consistently achieving a 90% attendance rate or higher.<sup>106</sup> The three methods include a \$25 reward made every other week during the school year, a \$150 reward at the end of each quarter, and a one-time \$500 reward at the end of the school year.<sup>107</sup> In addition, Ohio House Bill 348 provides a similar cash incentive program for school districts to apply to in order to increase graduation rates.<sup>108</sup> Selected schools could award \$250 to graduating students, \$500 to graduating students with a 3.0 grade point average (GPA) or higher, and \$750 to graduating students with a 3.5 GPA or higher.<sup>109</sup> Yet, for each reward program, the bill allocates only \$250,000 for fiscal year 2024 and \$500,000 for fiscal year 2025.<sup>110</sup>

### D. *The Evolution of Absenteeism Policy in Pennsylvania*

#### 1. *Prepandemic Efforts*

##### a. *Future Ready PA Index*

In November 2018, the Pennsylvania Department of Education (PDE) launched the "Future Ready PA Index," an interactive

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102. *Id.*

103. H.B. 348, 135th Gen. Assemb., Reg. Sess. (Ohio 2024); DiMarco, *2024 Tracker*, *supra* note 10.

104. H.B. 348. On December 6, 2023, Ohio House Bill 348 died in the House Primary and Secondary Education Committee. *Id.*

105. *Id.* Control groups will consist of half kindergarteners and half ninth graders. *Id.* The Department of Education will also select similar school districts to participate in the program. *Id.* Thereafter, half of the schools will be assigned the cash transfer incentive group and others will have the control group. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*



website for educators, parents, and members of the community to have a better understanding of how their students and schools are performing collectively beyond standardized test scores.<sup>111</sup> The tool features a dashboard to illustrate the school district and its students' success based on "academic performance, student progress, and college and career readiness."<sup>112</sup> To align with Pennsylvania's approved ESSA Consolidated State Plan, the Future Ready PA Index highlights and tracks "regular school attendance" throughout the state.<sup>113</sup> The regular attendance report is compiled from existing absence-related data acquired from Local Education Agencies (LEAs) and school administrators.<sup>114</sup> As a result, the PA Future Ready Index displays the percentage of students who were enrolled for ninety or more school days and present for 90% or more of those enrolled days.<sup>115</sup>

Moreover, chronic absenteeism is grouped within the regular attendance data and is calculated from existing data collections acquired by the PDE.<sup>116</sup> It does not display current compiled data on chronic absenteeism throughout the school years and across the state.<sup>117</sup> Instead, PDE describes the regular attendance report as a "lagging indicator" since the release of its data is a full school year behind due to "reporting schedules and validation procedures."<sup>118</sup> Accordingly, in 2021–2022, the chronic absenteeism rate in Pennsylvania was 26%, and in 2022–2023, it decreased to 22%.<sup>119</sup> Data released on November 14, 2025, revealed that 20.4% of

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111. *Future Ready PA Index*, *supra* note 19.

112. *Id.*

113. *Id.* Regular attendance is calculated at each district's school building level and for any group of twenty or more students in a building. *Id.*

114. *Id.* A student who is considered absent is a part of the absence-related data. *Id.* Students who are not physically participating in instructional time at school or at an "approved off-grounds location" are considered absent. *Id.* Instructional time consists of "[t]ime in the school day devoted to instruction and instructional activities provided as an integral part of the school program under the direction of certified school employees." *Id.* Moreover, a student is considered absent for both excused or unexcused absences, out-of-school suspensions, non-homebound illnesses, bereavement, and noncurriculum or noncourse-expected trips or college visits. *Id.* In contrast, a student is considered present for in-school suspensions, homebound instruction, and school-sponsored trips or college visits. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. SCHOOLSTATUS, NATIONAL K-12 ATTENDANCE DATA INSIGHTS 4 (2021), [https://www.schoolstatus.com/wp-content/uploads/SchoolStatus\\_National-K-12-Attendance-Data-Insights.pdf](https://www.schoolstatus.com/wp-content/uploads/SchoolStatus_National-K-12-Attendance-Data-Insights.pdf) [<https://perma.cc/APS7-PZLP>].

Pennsylvania students were chronically absent during the 2024–2025 school year.<sup>120</sup>

*b. Compulsory Attendance Law*

Additionally, Act 16 of 2019, another amendment to the 1949 Pennsylvania Public School Code,<sup>121</sup> requires that every child in Pennsylvania attend school “no later than age 6 until age 18 or graduation, whichever occurs sooner.”<sup>122</sup> This period of time is known as compulsory school age.<sup>123</sup> If parents or legal guardians are not upholding their legal responsibility for ensuring their child attends school, the school has the option to take the child, or the parent, to court once the child turns fifteen.<sup>124</sup> Magisterial District Judges (MDJs) across the state handle truancy matters under Act 138 of 2016.<sup>125</sup> At truancy proceedings, the school must prove beyond a reasonable doubt that the student, “[w]hile subject to compulsory school attendance . . . was habitually truant . . . [w]ithout justification.”<sup>126</sup> While imposing punishment is not required, MDJs may choose a student’s or a parent’s consequence, subject to a few limitations.<sup>127</sup> Possible truancy punishments include imposing fines, community service, suspending a student’s driver’s license, and assigning an appropriate course designed to improve school

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120. *Pennsylvania Releases 2024–2025 School Assessment Results*, COMMONWEALTH OF PA. (Nov. 14, 2025), <https://www.pa.gov/agencies/education/newsroom/pennsylvania-releases-2024-25-school-assessment-results> [<https://perma.cc/29GD-U3YM>].

121. JOINT STATE GOV’T COMM’N, *supra* note 54, at 9.

122. EDUC. L. CTR., SCHOOL ATTENDANCE AND TRUANCY: UNDERSTANDING THE BASICS 1 (2024) [hereinafter SCHOOL ATTENDANCE AND TRUANCY], <https://www.elc-pa.org/wp-content/uploads/2024/09/School-Attendance-Truancy-The-Basics-2024.pdf> [<https://perma.cc/H46H-HFHM>].

123. *Id.*

124. EDUC. L. CTR., A JUDGE’S GUIDE TO TRUANCY AND ACT 138, at 1 (2017) [hereinafter A JUDGE’S GUIDE TO TRUANCY AND ACT 138], [https://www.aclupa.org/sites/default/files/field\\_documents/truancy\\_and\\_act\\_138\\_2017-12.pdf](https://www.aclupa.org/sites/default/files/field_documents/truancy_and_act_138_2017-12.pdf) [<https://perma.cc/PS4S-CFYZ>]. Schools may refer habitually truant students under the age of fifteen to a school-based or community-based attendance program or to Child and Youth Agencies (CYS) “for services or for possible disposition as dependent children under the Juvenile Act.” *Id.* at 1–2. Schools may also cite the students’ parents or guardians to truancy court. *Id.*

125. SCHOOL ATTENDANCE AND TRUANCY, *supra* note 122, at 4.

126. A JUDGE’S GUIDE TO TRUANCY AND ACT 138, *supra* note 124, at 3. A parent can affirmatively defend a truancy court citation if the parent took reasonable steps to send the child to school, which is ultimately proven by a preponderance of the evidence. *Id.* Moreover, if students with disabilities are cited to truancy court, and their disabilities justify their absences, they may not be adjudicated delinquent. *Id.* Under the Juvenile Act, MDJs must consider evidence of Individual Education Programs, Section 504 Service Agreements, and related documentation of a child’s disability where “relevant to the inquiry into the justification of an absence.” *Id.*

127. SCHOOL ATTENDANCE AND TRUANCY, *supra* note 122, at 5.

attendance.<sup>128</sup> Parents or guardians may also be placed in jail for their child's truancy.<sup>129</sup> Nevertheless, before citing truant students to the court or Child and Youth Agencies (CYS), Act 138 requires that schools hold an attendance improvement conference with written verification.<sup>130</sup> The purpose of this meeting is to develop a plan to improve the child's attendance by addressing any obstacles that may be preventing them from attending school.<sup>131</sup>

## 2. *Postpandemic Efforts*

### a. *School Attendance Toolkit*

In 2021, the PDE designed a toolkit to equip educators and school staff with resources to improve school attendance.<sup>132</sup> The toolkit introduces a "Multi-Tiered System of Support" framework to provide "academic, behavioral, and social-emotional programs and practices" that best fit a student's needs.<sup>133</sup> There are three tiers to addressing a student's attendance problems: universal or foundational support, targeted support, and intensive support.<sup>134</sup>

Tier one focuses on universal practices, or a foundational support system, to encourage attendance for every student.<sup>135</sup> This includes the creation of "equitable, trauma-informed learning environments" that involve positive relationships, a culture of improvement, family engagement, connection to technology, enrichment activities and clubs, and instructional support.<sup>136</sup> Next, tier two identifies students who may require more specialized attendance support through early intervention strategies.<sup>137</sup> The toolkit provides a list of behaviors associated with chronic absenteeism for school staff

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128. A JUDGE'S GUIDE TO TRUANCY AND ACT 138, *supra* note 124, at 4. Yet, a court can impose a fine only when a truant student has the means to pay it. *Id.* Accordingly, the court must first hold a hearing to determine the student's financial capability to pay the fine and the "nature of the burden" in imposing a fine. *Id.* If the student adheres to the court's attendance plan, the court may choose to "remit or waive" the fine. *Id.* at 5.

129. SCHOOL ATTENDANCE AND TRUANCY, *supra* note 122, at 5. A jail sentence may be imposed only if the parent or guardian fails to comply with the lawful court order, has the ability to do so, and willfully refuses to comply. *Id.*

130. A JUDGE'S GUIDE TO TRUANCY AND ACT 138, *supra* note 124, at 2.

131. *Id.*

132. PA. DEP'T OF EDUC., SCHOOL ATTENDANCE TOOLKIT: A TOOLKIT OF INFORMATION TO SUPPORT PROFESSIONALS WORKING WITH STUDENTS AND FAMILIES TO INCREASE STUDENT ATTENDANCE 5 (2021), <https://www.pa.gov/content/dam/copapwp-pagov/en/education/documents/schools/safe-schools/school%20attendance%20toolkit.pdf> [https://perma.cc/NGT3-QT3W].

133. *Id.* at 7.

134. *Id.* at 7–8.

135. *Id.*

136. *Id.* at 8.

137. *Id.* at 7–8.

to look out for, such as low test scores, lack of English proficiency, working students, tiredness, and more.<sup>138</sup> Lastly, tier three provides intensive, assessment-based support to understand the barriers preventing a student from attending school.<sup>139</sup> A "School Attendance Improvement Conference" will allow the student, parent or guardian, school staff, and other service or resource providers to explore all the factors contributing to a student's absenteeism.<sup>140</sup> Accordingly, the toolkit provides a model "School Attendance Improvement Plan" which outlines the use of these holistic team conferences to remedy a student's absenteeism.<sup>141</sup>

In addition, the toolkit emphasizes the use of "cross-agency collaboration and intervention," or "integration," which can be a useful and successful force against chronic absenteeism.<sup>142</sup> For example, organizations such as the Young Men's Christian Association and boys and girls clubs are community-based resources that have an interest in youth education and can assist with truancy prevention programs.<sup>143</sup> Student Assistance Programs, programs that assist students and schools in addressing substance use and mental health issues as barriers to school performance, can also be a helpful tool because absenteeism can affect one's learning.<sup>144</sup> Referral to CYS, Pennsylvania's child welfare system, is also considered an option; however, it is only necessary when all other options to reengage a child with school have been exhausted or when a parent's "actions or inactions" are preventing a child from attending school.<sup>145</sup> From there, the CYS agency will assess a habitually truant child's family and home life.<sup>146</sup> CYS agencies will then determine whether the child would benefit from in-home services or qualify for general protective services.<sup>147</sup> LEAs and MDJs can also work together to address truancy as a "social problem" rather than a "criminal problem."<sup>148</sup>

Overall, the toolkit promotes meaningful partnership and engagement between families, schools, public agencies, courts,

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138. *Id.* at 8–9.

139. *Id.* at 8, 10.

140. *Id.* at 10.

141. *Id.* at 5, 22–24.

142. *Id.* at 12.

143. *Id.*

144. *Id.* at 12–13.

145. *Id.* at 14. CYS agencies exist across sixty-seven counties and operate under federal and Pennsylvania statutes. *Id.* at 13.

146. *Id.* at 14.

147. *Id.* The Child Protective Services Law requires that a CYS agency provide general protective services to "prevent or overcome problems that result in dependency." *Id.* at 13. Dependency can occur when a child is habitually truant. *Id.*

148. *Id.* at 15.

nonprofit organizations, businesses, and the community to provide students with the necessary level of support.<sup>149</sup>

*b. Act 138 of 2016*

Additionally, Pennsylvania conducted research in 2024 on the state's internal efforts to increase student attendance throughout its schools.<sup>150</sup> Beginning in 2014, House Resolution 1032 authorized the Joint State Government Commission to conduct research and examine the issue of student truancy surrounding Pennsylvania schools.<sup>151</sup> As a result, a report with its findings and recommendations was published and spurred the passage of Act 138 of 2016 by the General Assembly.<sup>152</sup> This statute altered procedures that Pennsylvania schools must take to improve school attendance among truant students and their families and directed the Joint State Government Commission to "narrowly" evaluate and revise these procedures after five years.<sup>153</sup> Act 138 was a significant amendment to the Pennsylvania Public School Code of 1949 and was implemented during the 2017–2018 school year.<sup>154</sup>

Since students were unable to attend school in person due to COVID-19, the study could not proceed as planned five years later.<sup>155</sup> Uncertain as to how the study was impacted by the pandemic, the Joint State Government Commission nevertheless decided to proceed with the study and accommodate it to reflect the pandemic's effects.<sup>156</sup> Therefore, in April 2024, a follow-up report to Act 138 of 2016 was published, *The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools* (2024 Report).<sup>157</sup> Unlike the report published a decade earlier that solely focused on truancy issues, the 2024 Report addressed a new concern facing not only Pennsylvania schools but the nation's schools: chronic absenteeism.<sup>158</sup>

The 2024 Report analyzed the state's internal efforts to reduce chronic absenteeism by examining survey feedback and current practices being employed by the state's schools, district courts, and

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149. *Id.* at 5.

150. JOINT STATE GOV'T COMM'N, *supra* note 54, at 2.

151. *Id.* at 1.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2.

158. *Id.*

CYS offices.<sup>159</sup> Based on the evaluation, the Advisory Committee proposed six recommendations to improve student attendance across Pennsylvania school districts.<sup>160</sup> It first recommended a graduated response system to truancy so schools have more time to identify barriers to a student's attendance and exhaust all of their resources before involving the child with welfare systems or the courts.<sup>161</sup> Second, the Advisory Committee called for state financial support in order for schools to create a position with the primary responsibility of tracking student attendance and maintaining communication with families whose children may be experiencing barriers to attending school.<sup>162</sup> Third, it suggested that Pennsylvania's Student Assistance Program be a truancy resource since mental health issues or substance abuse may contribute to chronic absenteeism.<sup>163</sup> Fourth, the Advisory Committee recommended that Intermediate Units be funded to provide school staff with training and consultation on truancy and chronic absenteeism.<sup>164</sup> Fifth, every year, the Advisory Committee recommended training for MDJs to prevent misinterpretation of the Act 138 process.<sup>165</sup> Sixth, the Advisory Committee explained that better communication between families and schools, as well as between schools, CYS, and MDJs, is crucial to improving student attendance.<sup>166</sup>

*c. Reward-Based Attendance Programs*

Across Pennsylvania, school districts have been creating reward-based attendance programs to incentivize student attendance.<sup>167</sup> Glendale School District, located in Cambria County, Pennsylvania, has experienced a decline in student attendance since the pandemic.<sup>168</sup> As a result, it implemented an incentive program to promote student attendance.<sup>169</sup> By targeting students with excessive absences, such as low-income and disabled students, Glendale was

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159. *Id.*

160. *Id.* at 151–54.

161. *Id.* at 151.

162. *Id.* at 152.

163. *Id.*

164. *Id.*

165. *Id.* at 153.

166. *Id.*

167. *CIS of Eastern Pennsylvania Launches Attendance Program at Union Terrace Elementary*, CMTYS. IN SCHS. (Mar. 21, 2023), <https://www.communitiesinschools.org/articles/article/cis-eastern-pennsylvania-launches-attendance-program> [https://perma.cc/EH54-ZXXC].

168. Keegan Raabe, *Incentive Program Raises Attendance at Cambria County School District*, WTAJ (Sep. 16, 2024), <https://www.wtaj.com/news/local-news/incentive-program-raises-attendance-at-cambria-county-school-district> [https://perma.cc/PW72-CZJZ].

169. *Id.*

able to dramatically improve student attendance.<sup>170</sup> For individuals, a point system is used, and points can be spent at the school store.<sup>171</sup> Grade levels and the school as a whole may also earn rewards by meeting attendance goals.<sup>172</sup> Similarly, an elementary school in the Allentown School District began the Attendance Fairy program.<sup>173</sup> The program rewards random classrooms with full attendance daily by dropping off individual treat bags containing small prizes such as stickers and candy.<sup>174</sup> Classrooms also receive a poster to hang in the room.<sup>175</sup> In the roughly five months since the program's implementation, the elementary school saw a 3% increase in school-wide attendance.<sup>176</sup>

### 3. *A Legislative Pivot in 2025*

On May 12, 2025, the Pennsylvania Senate Education Committee held a public hearing on truancy and chronic absenteeism in its schools.<sup>177</sup> Senior Fellow in Education Policy Studies at the American Enterprise Institute, Nat Malkus, testified at the hearing using extensive data and research collected since spring 2020 concerning public schools' responses to the pandemic.<sup>178</sup> Malkus's "Return to Learn Tracker" provides the most comprehensive and up-to-date data on national chronic absenteeism rates and makes cross-state comparisons possible.<sup>179</sup> His testimony urged Pennsylvania's government, school districts, and communities to focus on student absenteeism as the likely way to solve pandemic learning loss.<sup>180</sup>

Additionally, Amy Lena, the Deputy Secretary of Elementary and Secondary Education of the PDE, testified about attendance data collection, the use of the Future Ready PA Index, how LEAs are held accountable under Act 138 of 2016 and Act 16 of 2019, and the valuable information stemming from the 2024 Report.<sup>181</sup> Several

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170. *Id.*

171. *Id.*

172. *Id.*

173. *CIS of Eastern Pennsylvania Launches Attendance Program at Union Terrace Elementary*, *supra* note 167.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Public Hearing on Truancy and Chronic Absenteeism in Pennsylvania Schools: Hearing Before the S. Educ. Comm.*, 2025 Gen. Assemb., Reg. Sess. 0:01 (Pa. 2025) [hereinafter *Hearing*].

178. *Id.* at 2:45.

179. *Id.* at 3:09. Nevertheless, Malkus advised that comparisons between state chronic absenteeism rates should be approached with caution because state chronic absenteeism definitions can vary. *Id.* at 4:53.

180. *Id.* at 8:48.

181. *Id.* at 19:20.

MDJs collectively testified about the need to prioritize truancy early on and with community support, as well as to determine underlying causes.<sup>182</sup> The MDJs also recommended school-based penalties such as community service for both parents and students, rather than fines, and more serious graded offenses for repeated truancy citations.<sup>183</sup> Moreover, there was discussion that students were avoiding truancy citations and court involvement by transferring districts and enrolling in cyber schools.<sup>184</sup>

The final panel consisted of Dr. Sherri Smith, the Executive Director of the Pennsylvania Association of School Administrators (PASA), Dr. Adam Oldham, a high school counselor representing the Pennsylvania School Counselors Association, and Samantha Murphy, a Resource Services Manager for the Allegheny County Department of Human Services.<sup>185</sup> To address persistent issues with absenteeism and cyber school accountability, Dr. Smith, on behalf of PASA, proposed closing enrollment “loopholes” between districts and cyber programs.<sup>186</sup> She recommended limiting midyear transfers that allow truant students to evade consequences, redefining cyber attendance based on work completion instead of logins, and requiring real-time data sharing between cyber charters and districts.<sup>187</sup> Dr. Smith also urged court empowerment to mandate in-person learning for chronically absent students when guardians fail to ensure attendance.<sup>188</sup> Additionally, she emphasized stronger family and student accountability through measures like community service or license restrictions, and expanding early intervention efforts by providing families with free, mandatory training on routines, structure, and engagement.<sup>189</sup>

Dr. Oldham highlighted how the utilization of school counselors and student support services can be a timely intervention tool and a way to engage with students and families before resorting to

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182. *Id.* at 39:16.

183. *Id.* at 46:44.

184. *Id.* at 46:07. It is challenging for the PDE to track cyber charter school absenteeism numbers due to varying attendance policies; however, attendance is usually monitored through “assignment completion, online portal logins, and participation in synchronous sessions.” Special Ct. Judges Ass’n of Pa., *Appearance Before Senate Education Committee*, PA SENATE REPUBLICANS (May 12, 2025), <https://education.pasenategop.com/wp-content/uploads/sites/130/2025/05/MDJs.pdf> [<https://perma.cc/LC65-D59D>].

185. *Hearing, supra* note 177, at 1:14:12.

186. *Id.* at 1:18:35; Sherri Smith, Pa. Ass’n of Sch. Adm’rs, *Testimony to the Senate Education Committee*, PA SENATE REPUBLICANS (May 12, 2025) [hereinafter *PASA Testimony*], <https://education.pasenategop.com/wp-content/uploads/sites/130/2025/05/Dr.-Sherri-Smith.pdf> [<https://perma.cc/U6AF-K26G>].

187. *Hearing, supra* note 177, at 1:18:35; *PASA Testimony, supra* note 186.

188. *Hearing, supra* note 177, at 1:18:35; *PASA Testimony, supra* note 186.

189. *Hearing, supra* note 177, at 1:18:35; *PASA Testimony, supra* note 186.



truancy courts.<sup>190</sup> He also requested more “state-directed coordination” of schools’ social services employees to ensure districts comply with their legal obligation of developing a service program tailored to meet their students’ needs, like improving attendance.<sup>191</sup> Lastly, Ms. Murphy stressed the crucial need to differentiate between truancy and chronic absenteeism in order to understand the contributing factors of absenteeism.<sup>192</sup> She also urged schools to make use of a school-based attendance improvement program to promote a proactive family engagement approach and limit the truancy citation routine.<sup>193</sup> Accordingly, she believed that state recommendations must be shifted from a “compliance-based” lens to a “strengths-based” approach to encourage trust and engagement with families.<sup>194</sup>

Shortly thereafter, on May 30, 2025, Pennsylvania Senator Tracy Pennycuik circulated a memorandum to all Pennsylvania Senate members in hopes that they would join her in cosponsoring future legislation regarding reducing school truancy and chronic absenteeism.<sup>195</sup> Senate Bill 984, referred to the Senate Education Committee on August 27, 2025, proposed comprehensive amendments to the Pennsylvania Public School Code of 1949, with a strong focus on cyber charter schools.<sup>196</sup>

The bill mandates that all charter schools must establish an attendance policy conforming to compulsory attendance law that accurately determines whether a student has an unexcused or excused absence, or is present for instruction.<sup>197</sup> Cyber charter schools must establish detailed attendance policies where presence for synchronous instruction requires students to be visible on camera, and presence for asynchronous instruction requires satisfactory completion of coursework and weekly educational benchmarks.<sup>198</sup> Failing

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190. *Hearing, supra* note 177, at 1:26:03; Adam Oldham, Pa. Sch. Couns. Ass’n, *Pennsylvania Senate – Education Committee Hearing: Chronic Absenteeism*, PA SENATE REPUBLICANS (May 12, 2025) [hereinafter *PSCA Testimony*], <https://education.pasenate-gop.com/wp-content/uploads/sites/130/2025/05/School-Counselors.pdf> [https://perma.cc/96M5-8NZV].

191. *Hearing, supra* note 177, at 1:26:03; *PSCA Testimony, supra* note 190.

192. *Hearing, supra* note 177, at 1:30:15; Samantha Murphy, Allegheny Cnty. Dep’t of Hum. Servs., *Testimony*, PA SENATE REPUBLICANS (May 12, 2025) [hereinafter *Murphy Testimony*], <https://education.pasenategop.com/wp-content/uploads/sites/130/2025/05/Samantha-Murphy.pdf> [https://perma.cc/N8LF-7ZYN].

193. *Hearing, supra* note 177, at 1:30:15; *Murphy Testimony, supra* note 192.

194. *Hearing, supra* note 177, at 1:30:15; *Murphy Testimony, supra* note 192.

195. Tracey Pennycuik, *Reducing School Truancy and Chronic Absenteeism*, PA. STATE SENATE (May 30, 2025, at 11:27 ET), <https://www.palegis.us/senate/co-sponsorship/memo?memoID=46795> [https://perma.cc/RC7B-AHAL].

196. S.B. 984, 2025 Gen. Assemb., Reg. Sess. § 1 (Pa. 2025).

197. *Id.*

198. *Id.*

to meet an asynchronous benchmark would result in an unexcused absence.<sup>199</sup> Furthermore, administrators are prohibited from altering a teacher's attendance record, unless they are correcting a good-faith error.<sup>200</sup> Cyber charter schools must also report unexcused absences and benchmark completion data to the PDE annually through the Pennsylvania Information Management System and provide monthly reports for students found to be truant or habitually truant.<sup>201</sup>

Regarding truancy procedures, on a student's third unexcused absence, the school's written notice to the family must include available state and local resources.<sup>202</sup> It must also warn that a habitually truant child may not transfer to virtual instruction or a cyber charter school during the school year without a judge's approval.<sup>203</sup> Schools must provide habitually truant students with a school attendance improvement plan and continue remedies until the student is no longer truant or of compulsory school age.<sup>204</sup>

The venue for filing a truancy citation against a child in cyber charter school would be based on the child's residence, and the school may participate in the hearing remotely.<sup>205</sup> The bill allows a president judge to adopt a local policy assigning all truancy matters for a school district to a single judge, and permits school employees or the county CYS to attend citation hearings remotely.<sup>206</sup> Upon a child's conviction for violating compulsory school attendance laws, the court must specifically determine the child's ability to transfer to or continue virtual instruction.<sup>207</sup>

The bill also repeals the truancy studies by the Joint State Government Commission.<sup>208</sup> Instead, it adds a new section mandating that the PDE, in coordination with Human Services, develop supports to prevent truancy, and amends reporting requirements by directing all educational entities to report data to the Secretary of Education.<sup>209</sup> Finally, the bill makes knowingly falsifying reports to the PDE a misdemeanor of the third degree.<sup>210</sup>

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* § 2.

203. *Id.*

204. *Id.* § 3.

205. *Id.* § 1.

206. *Id.* § 3.

207. *Id.*

208. *Id.* § 4.

209. *Id.* §§ 5–6.

210. *Id.* § 6.

## IV. ANALYSIS

Although Pennsylvania lawmakers, the PDE, and school districts have taken many steps to address the impact chronic absenteeism has had on schools and student learning, their efforts are not enough.<sup>211</sup> If chronic absenteeism rates are to be reduced, Pennsylvania lawmakers must introduce effective legislation where needed and create a statewide initiative to improve student attendance.<sup>212</sup> To achieve this, Pennsylvania should examine other states' legislative models and initiatives before developing and implementing its own approach, like Senate Bill 984.<sup>213</sup>

A. *Enhance the Future Ready PA Index*

Pennsylvania must display current information regarding chronic absenteeism rates on the Future Ready PA Index.<sup>214</sup> In order to have appropriate, meaningful state action that improves student attendance, it is essential to know whether chronic absenteeism is improving across Pennsylvania schools, districts, grades, and student populations on a timely basis.<sup>215</sup> Real-time data reports would make it easier to identify chronically absent students and what practices work best to reduce chronic absenteeism in schools with better outcomes.<sup>216</sup> It can also help states and school districts establish and monitor short-term and long-term goals for improving student attendance.<sup>217</sup> Nonetheless, Pennsylvania's chronic absenteeism data for the 2024–2025 school year was not released until November 2025, making it outdated.<sup>218</sup> Without displaying numbers in real-time, Pennsylvania schools, families, and communities are not faced with the sense of urgency necessary to bring students back to school.<sup>219</sup> Moreover, it will become more challenging to improve school attendance as “post-pandemic routines will become more entrenched.”<sup>220</sup>

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211. See *supra* Section III.D.

212. See *infra* Parts IV–V.

213. See *supra* Sections III.A–C.

214. See discussion *infra* Section IV.A; *Future Ready PA Index*, *supra* note 19.

215. ATTENDANCE WORKS, *supra* note 35, at 4.

216. *Id.* at 10.

217. *Id.*

218. *Future Ready PA Index*, *supra* note 19; *Pennsylvania Releases 2024–2025 School Assessment Results*, *supra* note 120.

219. See COHEN, *supra* note 54, at 1 (describing how Rhode Island's efforts in tracking and publicizing real-time attendance data has created a sense of urgency among the community).

220. Malkus, *supra* note 7.

School attendance postpandemic is an “enormous challenge [that] demands a response of equal magnitude.”<sup>221</sup> By publicizing current chronic absenteeism data, the postpandemic culture surrounding school attendance can be altered.<sup>222</sup> Therefore, it is vital that the Future Ready PA Index be enhanced to provide up-to-date data collection from Pennsylvania schools, with Rhode Island’s Student Attendance Leaderboard serving as a model.<sup>223</sup>

### *B. Push for Act 138 and Evidence-Based Alternatives*

Punitive responses to truancy have been proven to be ineffective, and court referrals must only be used as a last resort.<sup>224</sup> According to a research study conducted in 2017 by Brandy R. Maynard at St. Louis University, there was a 69% jump in the number of truancy cases being referred to juvenile court in the mid-1990s, eventually contributing to the school-to-prison pipeline.<sup>225</sup> Yet, school truancy rates remained almost the same at 10.8% in 2002 and 11.1% in 2014.<sup>226</sup> As of 2022, 64% of petitioned status offense cases were truancy cases.<sup>227</sup> Moreover, in 2021, a study led by University of Tennessee researcher Clea McNeely found that where absences occur due to issues such as transportation, health care access, or bullying, punitive approaches to reducing the student’s truancy are unlikely to succeed.<sup>228</sup> Overall, any involvement with the legal system for truant students decreases their likelihood of attending school and graduating, as found by the Council of State Governments Justice Center.<sup>229</sup>

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221. See MALKUS, *supra* note 3, at 14.

222. COHEN, *supra* note 54, at 1.

223. See *supra* Sections III.A, IV.A.

224. ATTENDANCE PLAYBOOK, *supra* note 5, at 69.

225. *Id.*; see also ADVANCEMENT PROJECT ET AL., FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 2 (2011), [https://www.elc-pa.org/wp-content/uploads/2013/11/FederalPolicy\\_ESEA\\_and\\_SchoolToPrisonPipeline.03.09.11.pdf](https://www.elc-pa.org/wp-content/uploads/2013/11/FederalPolicy_ESEA_and_SchoolToPrisonPipeline.03.09.11.pdf) [<https://perma.cc/89JD-RZ5B>]. The school-to-prison pipeline begins with the school’s decision to exclude a disruptive student from the classroom by having the juvenile court system intervene. *Id.* Students of color and students with disabilities largely represent students who have been criminalized and incarcerated due to courts being utilized as a punitive consequence in schools. *Id.*

226. ATTENDANCE PLAYBOOK, *supra* note 5, at 69.

227. *Estimated Number of Petitioned Status Offense Cases*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/statistical-briefing-book/court/faqs/qa06601#0-0> [<https://perma.cc/Y888-XDSA>] (last visited Aug. 17, 2025). Status offenses are only considered illegal because the person committing the act is a juvenile. *Id.* Running away from home, curfew violations, ungovernability, and underage drinking are other recurrent petitioned status offense cases. *Id.*

228. ATTENDANCE PLAYBOOK, *supra* note 5, at 69.

229. *Id.*

Despite the research described above indicating otherwise, a group of five Pennsylvania MDJs in the 2024 Report believes that student attendance would improve if parents and students faced stronger consequences and were held more accountable.<sup>230</sup> Some go on to explain that fines or driver's license suspensions do nothing to motivate a student's attendance since a family's failure to pay does not often lead to jail time.<sup>231</sup> Ultimately, these MDJs agree that the truancy court system is without "teeth" due to a large number of students not showing up for their hearings, fines going unpaid, and unexecuted warrants.<sup>232</sup>

Yet, when considering Act 138's overarching purpose statement, the MDJs in Pennsylvania are misinterpreting their roles when handling truancy matters.<sup>233</sup>

The purpose of this subdivision [of Act 138] is to improve school attendance and deter truancy through a comprehensive approach to consistently identify and address attendance issues as early as possible with credible intervention techniques in order to:

- (1) Preserve the unity of the family whenever possible as the underlying issues of truancy are addressed.
- (2) Avoid the loss of housing, the possible entry of a child to foster care and other unintended consequences of disruption of an intact family unit.
- (3) Confine a person in parental relation to a child who is habitually truant only as a last resort and for a minimum amount of time.<sup>234</sup>

Under Act 138, MDJs have the ability to impose fines, punishments, and jail time at their discretion,<sup>235</sup> subject to certain limitations.<sup>236</sup> However, they often act without a full understanding of how these consequences may affect the child or family unit.<sup>237</sup>

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230. See JOINT STATE GOV'T COMM'N, *supra* note 54, at 29–30.

231. *Id.* at 30–31 (suggesting reluctance by judges to impose jail time since it leaves no parent or guardian at home to supervise or encourage regular attendance).

232. *Id.* at 30.

233. See A JUDGE'S GUIDE TO TRUANCY AND ACT 138, *supra* note 124, at 1.

234. 24 PA. STAT. AND CONS. STAT. § 13-1325 (West, Westlaw through Act 60 of the 2025 Reg. Sess.).

235. SCHOOL ATTENDANCE AND TRUANCY, *supra* note 122, at 5.

236. See *supra* notes 128–129 and accompanying text.

237. See A JUDGE'S GUIDE TO TRUANCY AND ACT 138, *supra* note 124, at 1.

Rather than impose stronger legal consequences, Pennsylvania must introduce legislation to reform the way courts handle truancy matters by taking inspiration from Maryland's Senate Bill 865.<sup>238</sup> By pushing emphasis on Act 138's purpose<sup>239</sup> and instilling evidence-based alternatives, such as those found in the *Attendance Toolkit*,<sup>240</sup> truancy courts can be reinvented as "problem-solving court[s]" that work with truant students and their families to reengage them with education.<sup>241</sup> This plan should also require that MDJs receive yearly training on how to deal with parents and children,<sup>242</sup> as suggested by the Advisory Committee in the 2024 Report, since MDJs only receive training on the criminal procedure aspect of truancy law and changes thereof.<sup>243</sup> Therefore, by implementing a collaborative approach between MDJs, families, and schools, barriers preventing a student from attending school can be addressed and remedied.<sup>244</sup>

### C. *Keep Reward-Based Programs at the School Level*

Pennsylvania should maintain the use of attendance incentives administered at the school district level that are designed to meet the needs of its students, rather than implement through legislation a pay-for-attendance program similar to that of Ohio House Bill 348.<sup>245</sup> This recommendation comes amid conflicting research and debate on whether rewards should be used to increase school attendance.<sup>246</sup> For some students, a pay-for-attendance program may be an effective way to motivate attendance due to its ability to reward work for tasks over which the student has control.<sup>247</sup> Additionally, the reward system may work for low-income students because attending school may provide them with "financial and psychological" relief from obstacles faced at home.<sup>248</sup> Rewards may also improve behavior problems, but only in the short term, as chronically absent students tend to misbehave in school.<sup>249</sup>

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238. See discussion *supra* Section III.B; see *infra* Section IV.B.

239. See discussion *infra* Section IV.B.

240. See *supra* pp. 387–89.

241. See S.B. 865, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

242. JOINT STATE GOV'T COMM'N, *supra* note 54, at 32, 153.

243. *Id.* at 32.

244. *Id.* at 153.

245. See discussion *supra* Section III.C; *infra* Section IV.B, Part V.

246. ATTENDANCE PLAYBOOK, *supra* note 5, at 25 (discussing mixed view studies).

247. Meth, *supra* note 27, at 251–52 (suggesting students have control over attending school when it is a "concrete" task, parental support is reliable or less critical, and it is an "educational input" they can directly influence).

248. *Id.* at 257–58.

249. *Id.* at 278.

Even so, such reward programs could create more barriers to student learning, such as through the “effort substitution effect.”<sup>250</sup> The effort substitution effect occurs when chronically absent students put all their effort into attending school, but are left with no motivation to complete school-related tasks while there.<sup>251</sup> It can also lead students to put more effort into incentivized tasks, rather than nonincentivized tasks.<sup>252</sup> In addition, incentivizing students to attend school may lead to behavioral problems in the classroom, resulting in suspensions or involvement with the juvenile court system.<sup>253</sup>

Nevertheless, incentives implemented at the school district level can be a successful way to reduce absenteeism if schools are intentional about the student or grade level that needs to be targeted.<sup>254</sup> For example, Pennsylvania school districts are achieving successful results through varied student incentive programs, including a point system for upper-level students to earn and spend points at the school store and an Attendance Fairy program to reward attendance in the lower-level grades.<sup>255</sup> It is important that school districts consider the specific goals of a pay-for-attendance program, the type of incentive to be implemented, whether the incentive will be awarded individually or per classroom, and the length of time and intervals in which the incentive will be awarded to improve student attendance.<sup>256</sup> Overall, school districts must regularly evaluate whether the incentive program is reducing chronic absenteeism because if not done correctly, it produces further struggles among students and schools.<sup>257</sup>

## V. CONCLUSION

Chronic absenteeism rates are not falling fast enough to reverse dramatic postpandemic effects.<sup>258</sup> As a result, state legislatures are stepping in to propose solutions to combat this educational crisis.<sup>259</sup>

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250. *Id.* at 281.

251. *Id.*

252. *Id.*

253. *Id.* at 283. While these behaviors are troublesome, they are usually nonviolent and minor instances of children acting out such as being disrespectful to school staff, being verbally aggressive with peers, failing to report to detention, and disruptiveness in-class. *Id.*

254. See ATTENDANCE PLAYBOOK, *supra* note 5, at 25.

255. See *CIS of Eastern Pennsylvania Launches Attendance Program at Union Terrace Elementary*, *supra* note 167; Raabe, *supra* note 168.

256. ATTENDANCE PLAYBOOK, *supra* note 5, at 25 (citing a framework established by researchers Rekha Balu and Stacy Ehrlich in a 2018 study).

257. *Id.*

258. ATTENDANCE WORKS, *supra* note 35, at 1.

259. DiMarco, *2024 Tracker*, *supra* note 10.

To improve student attendance, Pennsylvania must enhance its Future Ready PA Index to track chronic absenteeism in real time and provide up-to-date data collection from its schools.<sup>260</sup> In addition, Pennsylvania should introduce legislation that places further emphasis on Act 138's purpose and offers evidence-based alternatives, such as those found in the *Attendance Toolkit*, to reinvent truancy courts as "problem-solving court[s]"<sup>261</sup> that work with truant students and their families to reengage them with education.<sup>262</sup> Lastly, Pennsylvania must not introduce legislation that implements reward-based programs for increasing student attendance.<sup>263</sup> Rather, these programs should remain implemented by school districts where appropriate as they can be adjusted on a regular basis.<sup>264</sup>

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260. See *supra* Section IV.A.

261. See S.B. 865, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

262. See *supra* Section IV.B.

263. See *supra* Section IV.C.

264. ATTENDANCE PLAYBOOK, *supra* note 5, at 25.





