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NO TRESPASSING: HOW STATE CONSTITUTIONS CAN PREVENT WARRANTLESS SEARCHES OF PRIVATE PROPERTY*

Bob Cunha[1]

"Private land marked in a fashion sufficient to render entry thereon a criminal trespass . . . is protected by the [constitutional] proscription of unreasonable searches and seizures."[2]

I. Introduction

Most Americans–at least those who learned constitutional doctrine on *Law & Order* and *Cops*–know that police generally need a warrant to search their homes.[3] But what about the rest of their property? Can

*Gratitude is extended to Editor in Chief Tamsin Woolley and the Law Review editors from the 2022-2023 term for their exceptional guidance and editorial support in refining this article for publication in Volume 48.1 of our esteemed Law Review.

[1] Adjunct Professor of Law, Suffolk University Law School.

[2] Oliver v. United States, 466 U.S. 170, 195 (1984) (Marshall, J., dissenting).

[3] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "); *see* Anderson v. Creighton, 483 U.S. 635, 664 n.21 (1987) (Stevens, J., dissenting). When a homeowner "asked if [police] had a search warrant, one of the officers told him, 'We don't have a search warrant [and] don't need [one]; you watch too much TV.'" *Id.* Yet the TV-watching homeowner was correct; the police needed a warrant. *Id.* at 636.

police, without a warrant, search a vehicle in the driveway?[4] A shed?[5] An unfenced backyard?[6] Can officers, on a mere hunch, investigate private property behind barbed wire, locked gates, and "No Trespassing" signs?[7]

Justice Thurgood Marshall said no.[8] In his dissent to *Oliver v. United States*, Justice Marshall suggested a "clear, easily administrable rule": police may not trespass and search private property without a warrant.[9]

Yet the Court majority rejected Marshall's straightforward proposal.[10] Instead, the *Oliver* Court established the shambolic "open fields doctrine," which has confounded a generation of property owners, police officers, and judges.[11]

Under the open fields doctrine, police generally need a warrant to search "curtilage," which is defined as "the land immediately surrounding and associated with the home."[12] Conversely, all land outside the curtilage is considered open fields.[13] Open fields might (or might not) include driveways, sheds, backyards, and wooded areas

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[4] *Compare* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (warrantless search of vehicle in driveway unconstitutional), *with* Commonwealth v. Greineder, 936 N.E.2d 372, 407 (Mass. 2010) (warrantless search of vehicle in driveway *not* unconstitutional).

[5] *Compare* United States v. Cardoza-Hinojosa, 140 F.3d 610, 611 (5th Cir. 1998) (warrantless search of shed did not violate Fourth Amendment), *with* Commonwealth v. Archer, No. 04227, 2005 WL 1812449, at *4 (Mass. Super. Ct. May 13, 2005) (warrantless search of shed violated Fourth Amendment), *rev'd on other grounds*, 854 N.E.2d 144.

[6] *Compare* United States v. Knapp, 1 F.3d 1026, 1029 (10th Cir. 1993) ("drug enforcement agents committed no violation of the Fourth Amendment by" searching unfenced backyard), *with* State v. Morsman, 394 So. 2d 408, 410 (Fla. 1981) (police violated Fourth Amendment when they searched unfenced backyard).

[7] *See Oliver*, 466 U.S. at 180 (warrantless search of remote field held constitutional); United States v. Dunn, 480 U.S. 294, 301 (1987) (fencing configurations are important factors in defining curtilage of home protected by Fourth Amendment).

[8] *See Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

[9] *See id.* Of course, a warrant requirement would have exceptions for consent and certain exigencies. *See infra* notes 51-54 and accompanying text.

[10] *See id.* at 184.

[11] *See* Amy Dillard, *Big Brother Is Watching: The Reality Show You Didn't Audition for*, 63 OKLA. L. REV. 461, 466-76 (2011); *Oliver*, 466 at 196 (Marshall, J., dissenting) (correctly predicting police confusion and "spate of litigation").

[12] *Oliver*, 466 U.S. at 180.

[13] *Id.*

behind a home.[14] Police do not need a warrant to trespass and search so-called open fields with constitutional impunity.[15]

There are two main problems with the *Oliver* open fields doctrine. First, the invisible boundary between curtilage and open fields is impossible to identify with any accuracy.[16] Homeowners[17] and police must guess whether a warrant is required, and judges are left to sort it out afterward.[18] Second, the notion that police may freely trespass is anathema to ordinary property owners because it represents a violation of their reasonable expectation of privacy.[19]

The United States Supreme Court is exceedingly unlikely to abandon the open fields doctrine.[20] Nonetheless, state constitutions can provide a bulwark against warrantless searches of private property. State supreme courts should adopt the dependable, intuitive rule advocated by Justice Marshall in his *Oliver* dissent: police may not trespass on private property without consent, a warrant, or a constitutionally recognized exception to the warrant requirement.[21] This article focuses on why–and how–Massachusetts should adopt such a rule. While the history and text of the Massachusetts Constitution are

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[14] *See* cases cited *supra* notes 4-6; State v. Pelletier, 673 A.2d 1327, 1329 (Me. 1996).
[15] *Pelletier*, 673 A.2d at 1329.
[16] *Collins*, 138 S. Ct. at 1681 (Alito, J., dissenting) ("Ascertaining the boundaries of the curtilage thus determines whether a search is governed by the Fourth Amendment."); *see supra* notes 4-7 and accompanying text; *see also infra* Part III, Exhibit A for examples of unreliable results.
[17] For brevity's sake, this article will often refer to "homeowners" as a generic term for all individuals–including renters–with a property interest in their abode. The law makes no categorical distinctions among types of possessors or dwellings. *See* Commonwealth v. Leslie, 76 N.E.3d 978, 984 (Mass. 2017) (requiring same curtilage analysis to multiunit homes as to single-family homes).
[18] *See Dunn*, 480 U.S. at 301 (outlining factors to analyze individual cases); *see also* Commonwealth v. Fernandez, 934 N.E.2d 810, 816 (Mass. 2010) (mandating curtilage issues be assessed on case-by-case basis); Florida v. Jardines 569 U.S. 1, 7 (2013) (abandoning *Dunn* factors and stating that curtilage is 'easily understood from our daily experience.'); *Collins*, 138 S. Ct. at 1671 (stating that curtilage is "easily understood from our daily experience.").
[19] Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harland, J., concurring) (establishing "constitutionally protected reasonable expectation of privacy."); *Oliver*, 466 U.S. at 191 (Marshall, J., dissenting) ("criminal liability" of trespass establishes "expectations of privacy . . . that society is prepared to recognize as reasonable.").
[20] *See Collins*, 138 S. Ct. at 1667, 1681 (all nine justices recognized constitutional distinction between curtilage and open fields).
[21] *Oliver*, 466 U.S. at 195–97 (Marshall, J., dissenting).

unique, this analytical blueprint may be replicated in other states.

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The Massachusetts Supreme Judicial Court (SJC) has long held that Article 14 of Massachusetts's Declaration of Rights, which predates the United States Constitution's Fourth Amendment, guarantees much broader protections of individual liberties.[22] In particular, the SJC has increasingly relied on Article 14 to provide greater safeguards from police searches—and clearer rules for police to follow—than those established by the United States Supreme Court.[23] In this case, the SJC would stand on firm ground:[24]

- **Textual analysis.** The text of Article 14 is more expansive than the Fourth Amendment.

While the Fourth Amendment protects "persons, houses, papers, and effects," Article 14 guarantees "a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and *all his possessions*."[25] Based on rigorous analysis of Framing-era sources—including dictionaries, political writings, and early Massachusetts court cases—the word "possessions" includes real property.[26] Article 14 protects it "all."[27]

- **Massachusetts history and precedent.** The Framers of

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[22] *See, e.g.*, Joseph A. Grasso, Jr., *"John Adams Made Me Do It": Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts' Declaration of Rights*, 77 MISS. L.J. 315, 327–29 (2007); Herbert P. Wilkins, *The Massachusetts Constitution–the Last Thirty Years*, 44 SUFFOLK U. L. REV. 331, 337 (2011).

[23] *See, e.g.*, Wilkins, *supra* note 22, at 333, 337.

[24] *See id.*; Grasso, *supra* note 22, at 342; Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 409 (2004).

[25] U.S. CONST. amend. IV; MASS. CONST. pt. 1, art. XIV (emphasis added).

[26] *See* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 180 (1988); *see also* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH 328 (1828) (defining "possession" as "the thing possessed; land, estate or goods owned.").

[27] MASS. CONST. pt. 1, art. XIV.

the Massachusetts Constitution abhorred free-ranging searches.[28] Article 14 was inspired by opposition to British writs of assistance, which had authorized broad authority for British customs agents to search wherever they desired.[29] Accordingly, John Adams, James Otis, Samuel Adams, and their brethren would have recoiled from the open fields doctrine, which maintains that police may freely roam and search *anywhere* on private land, except for the curtilage.[30]

Massachusetts homeowners continue to have a reasonable expectation of privacy on their own land.[31] Their expectations have been shaped over centuries by trespass law.[32] As the SJC has long

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[28] *See* Commonwealth v. Cundriff, 415 N.E.2d 172, 176 (Mass. 1980) (Article 14 was drafted in response to the blanket search powers granted to the British by "writs of assistance . . . which allowed officers of the crown to search, at their will, wherever they suspected untaxed goods to be, and granted the officials the right of forcible entry.").

[29] *See* Grasso, *supra* note 23, at 319.

[30] *See Oliver*, 466 U.S. at 182-83. *See generally* WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4(a) (6th ed. 2022) (an open field is "totally lacking any constitutional protection against government intrusion."); Chad Flanders, *Collins and the Invention of "Curtilage*," 22 U. PA. J. CONST. L. 755, 776 (2020) ("curtilage always gets protected under the Fourth Amendment, but open fields never do.").

[31] Massachusetts follows *Katz*, 389 U.S. at 360-61 (Harland, J., concurring), which holds that the Fourth Amendment and Article 14 protect any location where a person has a subjective expectation of privacy and the expectation is one that society is willing to accept as reasonable. *See* Commonwealth v. McCarthy, 142 N.E.3d 1090, 1097 (Mass. 2020) ("(i) an individual has manifested a subjective expectation of privacy in the object of the search, and (ii) society is willing to recognize that expectation as reasonable.").

[32] *See* Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring) ("[P]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable."); New England Box Co. v. C & R Const. Co., 49 N.E.2d 121, 128 (Mass. 1943) ("It is the general rule that any actual possession of real estate is sufficient to enable the parties in possession to maintain an action against a stranger for interfering with that possession and that everyone must be deemed a stranger who can show no title and no older possession."); *see also*, *e.g.*, State v. Mooney, 588 A.2d 145, 153 (Conn. 1991) (citing *Rakas*, 439 U.S. at 144 n. 12) ("Legitimate expectations of privacy derive from 'concepts of real or personal property law or [from] understandings that are recognized and permitted by society.'"). These expectations predate the American constitutional experience. *See* United States v. Jones, 565 U.S. 400, 405 (citing Entick v. Carrington (1765) 95 Eng. Rep. 807, 817-18 (KB)) (proclaiming

noted, Massachusetts residents expect police to follow the same guidelines as their neighbors.[33] Good neighbors do not trespass.

- **Comparisons to sister states.** New York,[34] Vermont,[35] and at least five other states[36] have recognized an expectation of privacy in open fields and thereby adopted the rule proposed in this Article. State supreme courts have relied on their own constitutions, rather than the Fourth Amendment, to identify the fundamental rights of landowners to be protected from warrantless searches of their property.[37]
- **Policy considerations.** Massachusetts has a legitimate interest in ensuring that police officers are not forced into unworkable case-by-case assessments, where officers "have to guess before every search" whether they need a warrant.[38] The "No Trespassing" rule proposed in this Article, however, is intuitive and familiar.[39] Police are well-versed

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that agents of the government may not enter private property unless authorized by law).

[33] *See, e.g.*, Commonwealth v. Mora, 150 N.E.3d 297, 312 (Mass. 2020) (pole camera surveillance unconstitutional because such conduct exceeds what "a neighbor could observe"); Commonwealth v. Pietrass, 467 N.E.2d 1368, 1373 (Mass. 1984) ("If the porch were one that a visitor would naturally expect to pass through to gain access to the front door," then police may also do so); *see also Jardines*, 569 U.S. at 21 (Alito, J., dissenting) (police may "do no more than any private citizen might do"). *See generally* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 110 (2008) ("[S]trangers play a crucial role in determining reasonable expectations of privacy, which in turn determine what policemen may and may not do.").

[34] *See* People v. Scott, 593 N.E.2d 1328, 1335 (N. Y. 1992) ("We believe that under the law of [New York] the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all—without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs—is one that we cannot accept as adequately preserving fundamental rights of New York citizens.").

[35] *See* State v. Kirchoff, 587 A.2d 988, 994 (Vt. 1991); *see also* State v. Dupuis, 197 A.3d 343, 354 (Vt. 2018) ("If police officers, including game wardens, want to enter private [Vermont] property to investigate hunting violations, they can ask a lawful possessor's permission or get a warrant based on probable cause.").

[36] *See* Falkner v. State, 98 So. 691, 693 (Miss. 1924); State v. Bullock, 901 P.2d 61, 75-76 (Mont. 1995); State v. Dixson, 766 P.2d 1015, 1023-24 (Or. 1988); State v. Lakin, 588 S.W.2d 544, 549 (Tenn. 1979); State v. Myrick, 688 P.2d 151, 154 (Wash. 1984).

[37] *See Scott*, 593 N.E.2d at 1335.

[38] *See* Oliver, 466 U.S. at 181 ("Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.").

[39] *Id.* at 196 (Marshall, J., dissenting).

in the rule—after all, they are responsible "for enforcing it against the public."[40]

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This Article is intended to provide an analytical foundation for the SJC–and other state supreme courts–to modernize and protect privacy rights. Part II of this Article will provide a brief outline of how courts have interpreted the federal and state constitutions to protect curtilage from warrantless searches, while allowing police free rein in open fields. Part III will examine why the open fields doctrine is unreliable and problematic. Part IV will propose a commonsense rule prohibiting warrantless searches of private property. The Conclusion will outline various practical considerations for police and homeowners.

One point is worth emphasizing at the outset: this proposal will not paralyze police work. If police officers have probable cause to search property, they can (and should) obtain a valid warrant. Moreover, familiar exceptions to the warrant requirement would still apply, including consent, plain view, and exigencies such as hot pursuit and the imminent destruction of evidence.[41] Finally, warrantless searches would be permitted on remote property that is unfenced and unposted because such property is presumptively open to the public under state trespassing laws.[42]

Otherwise, homeowners have a reasonable expectation of privacy on their own land.[43] As Justice Marshall declared, "Men and women, in civilized society, are entitled 'to be let alone' by their governments."[44]

II. The Three Zones of Private Property

Under both federal and Massachusetts law, privately owned land is divided into three distinct zones: the home, the curtilage, and open fields.[45] Fourth Amendment and Article 14 rights depend on which

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[40] *Id.*
[41] *See* Kentucky v. King, 563 U.S. 452, 460-63 (2011).
[42] MASS. GEN. LAWS ANN. ch. 266, § 120 (protecting "improved or enclosed land" if entry is "forbidden . . . directly or by notice posted thereon").
[43] *See Oliver*, 466 U.S. at 192-93 (Marshall, J., dissenting).
[44] *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
[45] *See id.* at 192-93 (Marshall, J., dissenting).

zone the police encroach.

A. Home

In search and seizure jurisprudence, "the home is first among equals."[46] Physical entry of the home is the primary evil against which Article 14 and the Fourth Amendment were directed.[47] The Framers sought to protect "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[48]

This zone is also the easiest to define because it is "bounded by the unambiguous physical dimensions of an individual's home."[49] Article 14 and "the Fourth Amendment [drew] a firm line at the entrance to the house," and police generally may not cross that threshold without a warrant.[50]

There are several established exceptions to the warrant requirement. Among them are consent[51] and various exigencies—hot pursuit,[52] emergency aid,[53] and imminent destruction of evidence.[54] Absent these circumstances, however, police must obtain a warrant that is based on probable cause a crime has been committed and that explains with particularity the area to be searched and the items to be seized.[55]

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[46] See *Jardines*, 569 U.S. at 6; *See* Commonwealth v. Straw, 665 N.E.2d 80, 83 (Mass. 1996) (home is where "a person's expectation of privacy is at its highest").
[47] United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972); *See* Commonwealth v. Panetti, 547 N.E.2d 46, 48 (Mass. 1989).
[48] Silverman v. United States, 365 U.S. 505, 511-12 (1961); *see Mora*, 150 N.E.3d at 309.
[49] Payton v. New York, 445 U.S. 573, 589–590 (1980); *see* Commonwealth v. Sheppard, 441 N.E.2d 725, 743 (Mass. 1982) (Liacos, J. concurring), *rev'd on other grounds sub nom.* Massachusetts v. Sheppard, 468 U.S. 981 (1984).
[50] *Payton*, 445 U.S. at 590.
[51] Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Commonwealth v. Rogers, 827 N.E.2d 669, 672 (Mass. 2005).
[52] United States v. Santana, 427 U.S. 38, 42–43 (1976); Commonwealth v. Di Santo, 397 N.E.2d 672, 701-702 (Mass. App. Ct. 1979).
[53] Brigham City v. Stuart, 547 U.S. 398, 406 (2006); Commonwealth v. Snell, 705 N.E.2d 236, 244 n. 7 (Mass. 1999).
[54] Kentucky v. King, 563 U.S. 452, 460 (2011); Commonwealth v. Washington, 869 N.E.2d 605, 612 (Mass. 2007).
[55] U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

B. Curtilage

Under *Oliver*, the area "immediately surrounding and associated with the home"—i.e., the curtilage—is considered part of the home under Article 14 and the Fourth Amendment.[56] Curtilage is the "penumbra" of the home.[57] A citizen enjoys precisely the same expectation of privacy in the curtilage as in the home itself.[58]

Courts typically cite Blackstone's *Commentaries* as the original source of curtilage doctrine.[59] In defining the terms "mansion or dwelling house," Blackstone noted that only the "parcel of the mansion-house, and within the same common fence"—which he called the "curtilage or homestall"—should be given the same legal protections and privileges as the home itself.[60]

Front porches, side gardens, and areas just outside front windows

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searched, and the persons or things to be seized."); Groh v. Ramirez, 540 U.S. 551 (2004) (holding reasonable officers must understand particularity requirement of search warrants); Commonwealth v. Walsh, 468 N.E.2d 1136, 1138 (Mass. 1991).

[56] *Oliver*, 466 U.S. at 180; Commonwealth. v. McCarthy, 705 N.E.2d 1110, 1112 (Mass. 1999).

[57] Flanders, *supra* note 30, at 784 (crediting René Reyes for coining this phrase).

[58] *See, e.g.,* California v. Ciraolo, 476 U.S. 207, 212–213 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."); *see McCarthy*, 705 N.E.2d at 1112.

[59] *See* Flanders, *supra* note 30, at 763. Blackstone has been quoted by the Supreme Court in nearly every major case defining curtilage. *See e.g.*, *Ciraolo*, 476 U.S. at 212–13; *Dunn*, 480 U.S. at 300; *Jardines*, 569 U.S. at 6–7; *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring). Despite the Court's continued reliance on Blackstone, some scholars believe that his definition of curtilage has been misapplied. *See generally* Flanders, *supra* note 30, at 764-69. Blackstone was not addressing search and seizure doctrine; rather, this section of *Commentaries* was focused on defining *burglary*, and whether theft from buildings such as barns, stables, and warehouses should be considered within the scope of the crime. 4 WILLIAM BLACKSTONE, COMMENTARIES 225 (London, John Murray Albemarle Street 1876) (1765). Moreover, Blackstone's literal definition of curtilage has been ignored by the very courts that have cited him. *Commentaries* defines curtilage as the area "within the same common fence" as the home. *Dunn*, 480 U.S. at 299 n. 3 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *225). But in *Dunn*, the Supreme Court held that a barn was outside the curtilage, despite being located within a common perimeter fence as the main house. 480 U.S. at 306 (198-acre ranch encircled by perimeter fence).

[60] 4 WILLIAM BLACKSTONE, COMMENTARIES 230.

are paradigmatic examples of curtilage.[61] The right to retreat into one's home would be meaningless if police could search these areas with impunity, or "stand[] on the porch and use[] binoculars to peer through your windows."[62]

Consequently, when a police officer invades the curtilage to gather evidence, a search in the constitutional sense has occurred.[63] Such conduct is presumptively unreasonable without a warrant unless there is a recognized exception or consent.[64] In addition, police have implied consent to walk through curtilage to knock on the front door.[65] Otherwise, curtilage is as sacred as the home.[66]

C. Open Fields

Everything that is not the home or curtilage is considered an open field.[67] This term is misleading. An open field need not be "open" nor a "field," but includes all land outside of the curtilage.[68] A driveway,[69] shed,[70] unfenced backyard,[71] wooded area behind a home,[72] vacant lot,[73] or private beach[74] could all be considered open fields, depending on the configuration of the property.[75] Fences and "No Trespassing" signs have no dispositive legal effect on whether property is open to the prying eyes of police.[76]

In open fields, police officers may search with impunity because

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[61] *See Collins*, 138 S. Ct. at 1671.
[62] *See Jardines,* 569 U.S. at 12 (Kagan, J., concurring); Commonwealth v. Leslie, 76 N.E.3d 978, 986 (Mass. 2017).
[63] *See Collins*, 138 S. Ct. at 1670; *McCarthy*, 705 N.E.2d at 1112.
[64] *See King*, 563 U.S. at 462-63; *McCarthy*, 705 N.E.2d at 1112.
[65] *See King*, 563 U.S. at 469; *Leslie*, 76 N.E.3d at 986.
[66] *See Collins*, 138 S. Ct. at 1672 ; *Dunn*, 480 U.S. at 300; *Straw*, 665 N.E.2d at 83.
[67] *Oliver*, 466 U.S. at 180 n. 11.
[68] *Id.*
[69] Commonwealth v. Dobson, No. 15-P-1024, 2016 Mass. App. Unpub. LEXIS 1128, at *1 (Mass. App. Ct. Nov. 25, 2016).
[70] United States v. Cardoza-Hinojosa, 140 F.3d 610, 611 (5th Cir. 1998).
[71] *Knapp*, 1 F.3d at 1029.
[72] *Pelletier*, 673 A.2d at 1329.
[73] State v. Stavricos, 506 S.W.2d 51, 57-58 (Mo. Ct. App. 1974).
[74] State v. Glenner, 513 A.2d 1361, 1364 (Me. 1986).
[75] *See generally* LaFave, *supra* note 30.
[76] *Oliver*, 466 U.S. at 179.

they have not conducted a "search" in the constitutional sense.[77] Article 14 and the Fourth Amendment therefore offer no protection whatsoever.[78] In fact, there is no constitutional difference between police searching a public square and the open fields of private property.[79]

Courts have generally provided two rationales for allowing police to search open fields without a warrant. First, neither the Fourth Amendment nor Article 14 mentions the specific words "open fields" or "property," so no constitutional protection applies.[80] Justice Holmes relied on this strict textualism in *Hester v. United States*, the progenitor of *Oliver*.[81] In *Hester*, police trespassed onto Mr. Hester's land, where they found a jug of moonshine.[82] Justice Holmes decided that a warrantless search in these circumstances did not violate the constitution because "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."[83] The Supreme Court affirmed Holmes's textualist approach in *Oliver*.[84]

The *Oliver* Court also introduced the second rationalization for the open fields doctrine, basing its decision on a narrow reading of the "expectation of privacy" doctrine established in *Katz v. United States*. In *Katz*, the Court broadened the Fourth Amendment protection to any location where an individual has an expectation of privacy that "society is prepared to recognize as 'reasonable.'"[85] Interpreting *Katz*, the *Oliver* Court made a curious categorical assertion: individuals *never*

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[77] *Id.* at 183.
[78] *Id.*; *Leslie*, 76 N.E.3d at 984; Commonwealth v. Simmons, 466 N.E.2d 85, 90 (Mass. 1984).
[79] *Dunn*, 480 U.S. at 304.
[80] *See Oliver*, 466 U.S. at 184.
[81] *See* Hester v. United States, 265 U.S. 57, 59 (1924). Modern cases continue to cite *Hester* as the basis for curtilage and open fields doctrine. *See*, *e.g.*, *Jardines*, 569 U.S. at 6. Yet Holmes's opinion did not actually use the word "curtilage," nor explain anything about the concept; rather, his focus is on the distinction between the home and "open fields." *See* Flanders, *supra* note 30, at 769-72.
[82] *Hester*, 265 U.S. at 58.
[83] *Id.* at 59.
[84] *See, e.g.*, *Oliver*, 466 U.S. at 180.
[85] *Katz*, 389 U.S. at 360-61 (Harland, J., concurring).

have a legitimate expectation of privacy on land outside the curtilage.[86] The Court simply declared that the owner's expectation of privacy in open fields is illegitimate.[87] Massachusetts courts have repeatedly adopted *Oliver* as consistent with the rights established by Article 14.[88]

III. The Problems with *Oliver*

Oliver was wrongly decided, for at least two reasons. First, *Oliver* assumes that the boundary between curtilage and open fields is clearly demarcated.[89] Hundreds of state and federal cases belie this assumption; the invisible boundary has long vexed homeowners, police, and judges. Second, the *Oliver* Court's declaration that individuals never have a legitimate expectation of privacy in their open fields is untethered to any empirical evidence or societal norms.

A. The Fluid Border Between Curtilage and Open Fields

1. *How Are Police Supposed to Locate the Boundary?*

The Court attempted to define the frontier between open fields and curtilage in *United States v. Dunn*.[90] In *Dunn*, federal agents and local police suspected that a drug lab was operating in a barn located on a 200-acre ranch.[91] Rather than procuring a warrant, they decided to investigate.[92] Police officers crossed a perimeter fence, scaled an interior fence, then climbed three more fences.[93] When they finally reached the barn, they discovered an illegal phenylacetone laboratory.[94]

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[86] *See Oliver*, 466 U.S. at 182-83; *Kirchoff*, 587 A.2d at 993-94 ("Certainly, it was a bold and unsupported pronouncement in *Oliver* that society is not prepared under any circumstances to recognize as reasonable an expectation of privacy in all lands outside the curtilage.").
[87] *See Oliver*, 466 U.S. at 182-83.
[88] *See*, *e.g.*, *Leslie*, 76 N.E.3d at 984.
[89] *See Oliver*, 466 U.S. at 182 n. 12.
[90] *Dunn*, 480 U.S. at 296.
[91] *Id.* at 297-98.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 298.

The police search was perfectly legal, according to the Supreme Court.[95] The barn, which was located roughly sixty yards from the ranch house, was not part of the curtilage, so police could trespass with impunity.[96] To explain this decision, the Court established the *Dunn* factors. Under *Dunn*, whether an area is curtilage depends on four factors:

(1) proximity of the area to the home;

(2) "whether the area is included within an enclosure surrounding the home";

(3) "nature of the uses to which the area is put"; and

(4) "steps residents have taken to protect the area from observation by" passersby.[97]

The Court conceded, "We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions."[98] Rather, the ultimate question is whether the area in question "is so intimately tied to the home itself" that it deserves the protection of the Fourth Amendment.[99]

The *Dunn* analysis was quickly adopted by federal and state courts.[100] Ironically, the United States Supreme Court quietly abandoned *Dunn*, and has never applied *Dunn* factors to an open fields case in more than thirty-five years since.[101]

Instead, when faced with open fields cases, the Court has adopted a much less rigorous analytical approach. In 2013, the Court was faced with a curtilage conundrum: could police use drug-sniffing dogs to

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[95] *Id.* at 305.
[96] *Id.* at 301.
[97] *Id.*
[98] *Dunn*, 480 U.S. at 301.
[99] *Id.*
[100] *See, e.g.*, State v. Krech, 403 N.W.2d 634, 636–37 (Minn. 1987) (rigorously applying *Dunn* factors only five weeks after Supreme Court decision); *McCarthy*, 705 N.E.2d at 1112-13 (first application of *Dunn* factors in Massachusetts appellate court).
[101] The Supreme Court has cited *Dunn* in a majority opinion only once–fleetingly. The *Dunn* factors were not mentioned. *See Jones*, 565 U.S. at 411.

search a person's front porch without a warrant?[102] In *Florida v. Jardines*, a divided court determined that the front porch was part of the home's curtilage and therefore required a warrant.[103] Rather than rigorously analyzing the four *Dunn* factors, the Court took a shortcut to a summary conclusion: "[T]he conception defining the curtilage is at any rate familiar enough that it is easily understood from our daily experience. Here there is no doubt that the officers entered it."[104]

In other words, "I know it when I see it."[105] In 2018, the Court continued this casual analytical style in *Collins v. Virginia*.[106] The Supreme Court held that a vehicle parked at the end of a suspect's driveway was within the curtilage of his home and could not be searched without a warrant.[107] The majority decision did not cite *Dunn*, nor did it apply the *Dunn* factors.[108] Rather, an 8-1 court "easily understood" that the driveway was curtilage and left it at that.[109]

In fact, the driveway in *Collins* almost certainly would have failed a rigorous *Dunn* analysis.[110] While the driveway was close to the house, it was not within an enclosure surrounding the home and was easily observable from the street.[111] The homeowner had taken no steps to conceal the driveway or any vehicles from passersby.[112] Justice Alito cited *Dunn* in his dissent, but the majority ignored his analysis.[113]

2. *Unreliable Results*

In the years since *Oliver* was decided, the Massachusetts SJC and Appeals Court have faced the issue of curtilage boundaries on dozens

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[102] *Jardines*, 569 U.S. at 3–4.
[103] *Id.* at 5-6.
[104] *Id.* at 7 (2013) (quoting *Oliver*, 466 U.S., at 182 n. 12) (internal quotation marks omitted).
[105] *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (defining "hard-core pornography").
See Flanders, *supra* note 30, at 761 ('you'll know it when you see it').
[106] *See Collins*, 138 S. Ct. at 1671.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *See* case cited *supra* note 97 and accompanying text.
[111] Collins, 138 S. Ct. at 1670-71.
[112] *Id.*
[113] *Id.* at 1681 (Alito, J., dissenting).

of occasions.[114] An analysis of these cases reveals some clear patterns. Massachusetts appellate courts have deduced that fenced yards,[115] porches and patios,[116] basements, [117] and sheds[118] are within the curtilage. That is no surprise: these areas are typically adjacent (or very close) to the home, concealed from public view, and "intimately tied to the home itself."[119] Conversely, while Massachusetts courts ostensibly apply the same four-factor *Dunn* analysis to multiunit homes as to single-family homes,[120] courts have typically held that common areas

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[114]See, e.g., *Fernandez*, 934 N.E.2d at 816-17 (Dunn analysis determined driveway was within home's curtilage); Commonwealth v. Russ, 94 N.E.3d 880 (2017) (driveway within curtilage); Commonwealth v. Campbell, No. 20-P-1158, 2021 Mass. App. Unpub. LEXIS 660, at *10 (Mass. App. Ct. Oct. 25, 2021) (holding driveway was not within curtilage); Commonwealth v. Watson, No. 19-P-492, 2020 Mass. App. Unpub. LEXIS 311, at *5 (Mass. App. Ct. April 24, 2020) (driveway not within curtilage); Commonwealth v. Dobson, No. 15-P-1024, 2018 Mass. App. Unpub. LEXIS 162, at *14 (Mass. App. Ct. Feb. 20, 2018) (driveway not within curtilage); McCarthy, 705 N.E.2d at 1113 (parking lot not within curtilage); Commonwealth v. Escalera, 970 N.E.2d 319, 329-30 (2012) (basement within curtilage); Commonwealth v. Pierre, 71 Mass. App. Ct. 58, 62–63 (2008) (basement within curtilage); Commonwealth v. Sanchez, 89 Mass. App. Ct. 249, 251, 47 N.E.3d 443, 445 (2016) (shed within curtilage); Commonwealth v. Leslie, 76 N.E.3d 978, 984-987 (2017) (porch and side yard within curtilage); Commonwealth v. Jubrey, 91 Mass. App. Ct. 1119 (2017) (side yard within curtilage); Commonwealth v. Straw, 38 Mass. App. Ct. 738, 741 (1995), rev'd on other grounds, 422 Mass. 756 (1996) (dicta indicating backyard within curtilage); Commonwealth v. Sorenson, 98 Mass. App. Ct. 789, 792-95 (2020), review denied, 486 Mass. 1112, and cert. denied sub nom. Sorenson v. Massachusetts, 42 S. Ct. 107 (2021) (common hallway of apartment not within curtilage); Commonwealth v. Fredericq, 482 Mass. 70, 88 n. 2 (2019) (dicta indicating crawl space of apartment building not within curtilage of tenant's apartment); Commonwealth v. Reyes, 94 Mass. App. Ct. 1121 (2019) (carpet outside multifamily apartment building not within tenant's curtilage).

[115] *See Straw*, 665 N.E.2d at 162 (*dicta* indicating backyard within curtilage); Commonwealth v. Jubrey, No. 16-P-468, 2017 Mass. App. Unpub. LEXIS 446, at *4 (Mass. App. Ct. May 1, 2017) (side yard within curtilage); *Leslie*, 76 N.E.3d at 985-86.

[116] *See Leslie*, 76 N.E.3d at 984-987 (porch within curtilage); *see also* Commonwealth v. Archer, No. 04227, 2005 WL 1812449, at *2 (Mass. Super. May 13, 2005), *rev'd on other grounds*, 854 N.E.2d 144 (2006) (patio within curtilage).

[117] *See Escalera*, 970 N.E.2d at 329-30 (basement within curtilage); Commonwealth v. Pierre, 879 N.E.2d 131, 135 (Mass. App. Ct. 2008) (basement within curtilage).

[118] *See* Commonwealth v. Sanchez, 47 N.E.3d 443, 445 (Mass. App. Ct. 2016) (shed within curtilage); *see also Archer*, 2005 WL 1812449, at *2 (shed within curtilage).

[119] *Dunn*, 480 U.S. at 301.

[120] *See Leslie*, 76 N.E.3d at 984.

of apartment buildings are not within an individual tenant's curtilage.[121]

Driveways have been the most frequently litigated issue in Massachusetts curtilage cases.[122]

When police conduct a warrantless search in a driveway, defendants may seek to exclude any evidence collected claiming the driveway is within the curtilage.[123] Massachusetts courts have issued five written decisions for such "defendant-initiated" curtilage claims.[124] In these cases, courts have only once excluded evidence collected in the driveway.[125] In the other four cases, courts determined that driveways were open fields, thereby allowing the police to conduct warrantless searches.[126] In other words, the police usually win.[127]

A different picture emerges for "police-initiated" curtilage claims. These occur when police have a valid warrant for a home—but not for the driveway—and prosecutors seek to *include* the driveway within the curtilage so that their warrant will cover the search of a vehicle.[128] Massachusetts courts have issued eight written decisions for police-initiated driveway curtilage claims.[129] In five of those cases, courts

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[121] *See* Commonwealth v. Sorenson, 159 N.E.3d 750, 755-56 (Mass. App. Ct. 2020) (common hallway of apartment not within curtilage); Commonwealth v. Fredericq, 121 N.E.3d 166, 182 n. 2 (Mass. 2019) (Lowy, J., concurring) (*dicta* indicating crawl space of apartment building not within curtilage of tenant's apartment); Commonwealth v. Reyes, No. 17-P-1052, 2019 Mass. App. Unpub. LEXIS 110, at *9 (Mass. App. Ct. Feb. 8, 2019) (carpet outside multifamily apartment building not within tenant's curtilage); *Escalera*, 970 N.E.2d at 329 ("The concept of curtilage is applied narrowly to multiunit apartment buildings.").

[122] Massachusetts courts have issued at least thirteen written decisions addressing whether driveways are within a home's curtilage. *See* Exhibit A.

[123] *See*, *e.g.*, *Simmons*, 466 N.E.2d at 86.

[124] *Simmons*, 466 N.E.2d at 86; Commonwealth v. A Juvenile (No. 2), 580 N.E.2d 1014, 1019 (Mass. 1991); Commonwealth v.
Butterfield, 691 N.E.2d 975 (Mass. App. Ct. 1998); Commonwealth v. Alicea, No. 17-P-1742, 2008 Mass. App. Unpub. LEXIS 911, at *13 (Mass. App. Ct. Nov. 28, 2008); *Dobson*, No. 15-P-1024, 2018 Mass. App. Unpub. LEXIS 162, at *14 (Mass. App. Ct. Feb. 20, 2018).

[125] *Alicea*, No. 17-P-1742, 2008 Mass. App. Unpub. LEXIS 911, at *12 (Mass. App. Ct. Nov. 28, 2008).

[126] *See* Exhibit A.

[127] *Id.*

[128] *See, e.g.*, *Fernandez*, 934 N.E.2d at 815.

[129] Commonwealth v. Zapata, No. CRIM. A. 2007-01013, 2008 WL 2922130, at ∗ 1 (Mass. Super. Ct. June 23, 2008);

have ruled that police may freely search vehicles because the driveway is *within* the curtilage.[130] Again, the police usually win.[131]

Based on photos of the driveways in question, these outcomes are hardly intuitive.[132] For example, in *Commonwealth v. Dobson*, a driveway adjacent to a single-family home was ruled an open field when the defendant sought to exclude evidence collected in a warrantless search.[133] The driveway configuration in *Commonwealth v. Fernandez* is nearly identical, but when police sought to *include* the driveway within the curtilage, the court agreed they could search it with impunity.[134] It is difficult to avoid the conclusion that prosecutorial outcomes, not legal analyses, drove these decisions.

Exhibit A: Driveway Curtilage Claims in Massachusetts

***Defendant-initiated*: Defendant Sought to *Exclude* Evidence from Warrantless Search of Driveway**

Case	Location of Driveway	Curtilage or Open Field?	Evidence	Prevailing Party

Commonwealth v. Fernandez, 934 N.E.2d 810 (Mass. 2010); Commonwealth v. Burgos, No. 10-1024,, 2011 WL 5138725,
(Mass. Super. Sept. 9, 2011); Commonwealth v. Greineder, 936 N.E.2d 372 (Mass. 2010), *cert. granted, judgment vacated on other grounds sub nom.* Greineder v. Massachusetts, 567 U.S. 948 (2012); Commonwealth v. Vick, No. 14-P-195, 2015 Mass. App. Unpub. LEXIS 587, at *3 (Mass. App. Ct. June 8, 2015); Commonwealth v. Russ, No. 16-P-1628, 2017 Mass. App. Unpub. LEXIS 1020, at *7 (Mass. App. Ct. Nov. 20, 2017); *Watson*, No. 19-P-492, 2020 Mass. App. Unpub. LEXIS 311, at *5 (Mass. App. Ct. 2020); *Campbell*, No. 20-P-1158, 2021 Mass. App. Unpub. LEXIS 660, at *10 (Mass. App. Ct. Oct. 25, 2021).

[130] *See* Exhibit A.

[131] *Id.*

[132] *See* Exhibit B.

[133] *Dobson*, No. 15-P-1024, 2018 Mass. App. Unpub. LEXIS 162, at *14 (Mass. App. Ct. Feb. 20, 2018).

[134] *Fernandez*, 934 N.E.2d 817; *see* Exhibit B.

Commonwealth v. Simmons, 466 N.E.2d 85 (Mass. 1984)	Beside single-family home	Open Field	Allowed	Government
Commonwealth v. A Juvenile (No. 2), 580 N.E.2d 1014 (Mass. 1991)	Beside single-family home	Open Field	Allowed	Government
Commonwealth v. Butterfield, 691 N.E.2d 975 (Mass. App. Ct. 1998)	Beside single-family home	Open Field	Allowed	Government
Commonwealth v. Alicea, No. 17-P-1742, 2008 Mass. App. Unpub. LEXIS 911, at *13 (Mass. App. Ct. Nov. 28, 2008)	Beside single-family home	Curtilage	Excluded	Defendant
Commonwealth v. Dobson, No. 15-P-1024, 2018 Mass. App. Unpub. LEXIS 162, at *14 (Mass. App. Ct. Feb. 20, 2018)	Beside single-family home	Open Field	Allowed	Government

***Police-initiated*: Police with Warrant to Search Home Sought to Include Evidence from Search of Driveway**

Case	Location of Driveway	Curtilage or Open Field?	Evidence	Prevailing Party
Commonwealth v. Zapata, No. CRIM. A. 2007-01013, 2008 WL 2922130 (Mass. Super. June 23, 2008)	Behind multifamily apartment building	Curtilage	Allowed	Government
Commonwealth v. Fernandez, 934 N.E.2d 810, 816 (Mass. 2010)	Beside multifamily apartment building	Curtilage	Allowed	Government
Commonwealth v. Burgos, No. 10-1024,, 2011 WL 5138725 (Mass. Super. Sept. 9, 2011)	Beside two-family apartment building	Curtilage	Allowed	Government
Commonwealth v. Greineder, 936 N.E.2d 372 (Mass. 2010), *cert. granted, judgment vacated on other grounds sub nom. Greineder v. Massachusetts*, 567 U.S. 948 (2012)	Beside single-family home	Open Field	Excluded	Defendant

Commonwealth v. Vick, No. 14-P-195, 2015 Mass. App. Unpub. LEXIS 587, at *3 (Mass. App. Ct. June 8, 2015)	Beside multifamily duplex; located on opposite side from suspect's entrance	Curtilage	Allowed	Government
Commonwealth v. Russ, No. 16-P-1628, 2017 Mass. App. Unpub. LEXIS 1020, at *7 (Mass. App. Ct. Nov. 20, 2017)	Beside single-family home	Curtilage	Allowed	Government
Commonwealth v. Watson, No. 19-P-492, 2020 Mass. App. Unpub. LEXIS 311, at *5 (Mass. App. Ct. April 24, 2020)	Beside single-family home	Open Field	Excluded	Defendant
Commonwealth v. Campbell, No. 20-P-1158, 2021 Mass. App. Unpub. LEXIS 660, at *10 (Mass. App. Ct. Oct. 25, 2021)	Beside single-family home	Open Field	Excluded	Defendant

Exhibit B: Driveway Photos

Curtilage

40 Sampson Ave., Braintree, MA
Commonwealth v. Burgos, No. 10-1024, 2011 WL 5138725 (Mass. Super. Sept. 9, 2011)

Open Fields

17 Zoar St., Pittsfield, MA
Commonwealth v. Butterfield, 691 N.E.2d 975 (Mass. App. Ct. 1998)

19 General Patton Drive, Hyannis, MA
Commonwealth v. Russ, No. 16-P-1628, 2017 Mass. App. Unpub. LEXIS 1020, at *7 (Mass. App. Ct. Nov. 20, 2017)

14 Terry Court, Hyannis, MA
Commonwealth v. Campbell, No. 20-P-1158, 2021 Mass. App. Unpub. LEXIS 660, at *10 (Mass. App. Ct. Oct. 25, 2021)

Curtilage

8 Berkeley St., Watertown, MA
Commonwealth v. Fernandez, 934 N.E.2d 810, 816 (Mass. 2010)
163 Main St. Sheffield, MA

Open Fields

163 Main St. Sheffield, MA
Commonwealth v. Dobson, 102 N.E.3d 1032 (Mass. App. Ct. 2018)

2304 Dellmead Lane, Charlottesville, VA Collins v. Virginia, 138 S. Ct. 1663 (2018) Photo: Google Street View

56 Cleveland Rd., Wellesley, MA
Commonwealth v. Greineder, 936 N.E.2d 372 (Mass. 2010), *cert. granted, judgment vacated on other grounds sub nom. Greineder v. Massachusetts*, 567 U.S. 948 (2012)
Photo: Coldwell Banker
Note: Home was razed in 2016.

B. Privacy Expectations

Beyond its practical limitations, the fundamental problem with *Oliver* is its flimsy premise—that individuals never have a legitimate expectation of privacy in open fields, regardless of any steps homeowners take to shield their property from trespass or observation.[135]

The basis of this conclusion is untethered from any factual or logical foundation.[136] Why do homeowners *never* have a reasonable expectation of privacy outside the curtilage? The Court suggested that

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[135] *See* Dillard, *supra* note 11, at 507 ("The Court engaged in a pure policy choice to leave all government intrusion into posted, private open fields wholly unregulated, resulting in an open fields doctrine untethered from precedent and tied only to the socio-political context of 1984.").

[136] *Oliver*, 466 U.S. at 179; *see Kirchoff*, 587 A.2d at 993 ("[T]here is no empirical evidence on whether society is willing to recognize an expectation of privacy in 'open fields' as reasonable or unreasonable."); Dillard, *supra* note 11, at 464 (*Oliver* "lacked any substantive analysis by the Court").

the kind of activity that occurs in open fields, "such as the cultivation of crops," simply does not deserve privacy.[137] That explanation is irrelevant to the vast majority of citizens who are not farmers, but whose driveways, backyards, and toolsheds this doctrine controls.[138] Or, maybe it is because "open" fields are open to public view?[139] But that cannot be right—the Court holds that even property concealed by locked gates and high fences, far from public view, may be considered open fields.[140]

Instead, the Supreme Court has simply asserted, without offering any empirical support, that society is not "prepared" to recognize an expectation of privacy outside the curtilage.[141] But is that true? Is society not "prepared" to recognize that reasonable people expect to be left alone

on their own land?[142] Is society not "prepared" to prevent police officers from scaling fences marked "No Trespassing" based on nothing but a hunch?[143] One suspects that a national referendum of "reasonable" American homeowners would reach a different result than the Court has.

IV. Establishing a Commonsense Rule in Massachusetts

Massachusetts courts need not follow *Oliver* and its progeny down this murky path. Instead, Massachusetts should look to Article 14 of its own Constitution to abolish the open fields doctrine and establish a dependable rule: *Warrantless searches of private property are*

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[137] *Oliver*, 466 U.S. at 179.

[138] There are more than 3 million housing units in Massachusetts, but fewer than 7,500 farms. *Quick Facts: Massachusetts, United States*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/MA; *Agricultural Resources Facts and Statistics: Statistics on Agriculture in Massachusetts*, MASS. DEP'T AGRIC. RES., https://www.mass.gov/info-details/agricultural-resources-facts-and-statistics (last visited Apr. 13, 2023)

[139] *Oliver*, 466 U.S. at 179 *("*Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be.").

[140] *Id*. at 173.

[141] *Id*. at 177.

[142] *Kirchoff*, 587 A.2d at 993; *Oliver*, 466 U.S. at 190-91 (Marshall, J., dissenting); LaFave, *supra* note 30.

[143] *See Oliver*, 466 U.S. at 173.

presumptively unreasonable.

A. Article 14 Offers Broader Protection than the Fourth Amendment

States may interpret their own constitutions to establish greater protections than the federal Constitution.[144] The Massachusetts Constitution preceded and is independent of the federal Constitution.[145] Massachusetts is therefore not "compelled to act in lockstep" with United States Supreme Court interpretations of the Fourth Amendment.[146] As Chief Justice Wilkins explained, the Supreme Court merely provides "a common base from which we can go up."[147] The SJC is constitutionally *required* to develop an independent determination of whether the Massachusetts Constitution guarantees a defendant's rights *prior* to analyzing the United States Constitution.[148]

The SJC has repeatedly interpreted Article 14 of the Massachusetts Declaration of Rights to provide broader rights than the Fourth Amendment in protecting individuals from unreasonable searches and seizures. For example:

- The Fourth Amendment, as interpreted by the United States Supreme Court, allows police to order individuals out of any vehicle that has been lawfully stopped for a traffic violation.[149] The SJC refused to adopt this rule, instead holding that under Article 14 police officers may not issue an exit order without

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[144] *See* Commonwealth v. Upton, 476 N.E.2d 548, 555 (Mass. 1985); *see generally* Ireland, *supra* note 24.

[145] *Upton*, 476 N.E.2d at 555 (establishing that Article 14 provides more substantive protection to criminal defendants than does the Fourth Amendment); *see also* Wilkins, *supra* note 22, at 337.

[146] Commonwealth v. Gonsalves, 711 N.E.2d 108, 115 (Mass. 1999).

[147] Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997).

[148] *Id.*; *see also* D. Christopher Dearborn, *"You Have the Right to an Attorney," but Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 395 (2011); Commonwealth v. Rodriguez, 722 N.E.2d 429, 434 (Mass. 2000).

[149] Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977).

"reasonable suspicion of danger."[150]

- Under the Fourth Amendment, magistrates may consider the totality of the circumstances when assessing whether an informant's tip provides probable cause for a warrant.[151] The SJC requires a higher standard under Article 14: police must show that an informant has adequate basis of knowledge and credible information (the "*Aguilar- Spinelli* test").[152]
- The Fourth Amendment allows police, without a warrant, to record conversations with suspects.[153] Article 14 does not.[154]
- Under the Fourth Amendment, the pursuit of a fleeing suspect is not considered a seizure.[155] Under Article 14, it is.[156]
- The Fourth Amendment allows for random, mandatory drug testing of police officers.[157] Article 14 does not.[158]
- The Fourth Amendment does not provide suspects accused of possession crimes automatic standing to challenge searches of third-party premises.[159] Article 14 does.[160]
- Under the Fourth Amendment, a police officer may conduct a warrantless search under the plain view exception, even where he intends to find specific items.[161] Under Article 14, the plain view exception only applies if discovery is inadvertent.[162]

Thus, the SJC has a bold history of interpreting Article 14 as providing greater protection to criminal suspects, and this trend has accelerated in recent decades.[163] Establishing a constitutional shield

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[150] *Gonsalves*, 711 N.E.2d at 111.
[151] Illinois v. Gates, 462 U.S. 213, 234–35 (1983).
[152] Upton, 476 N.E.2d at 556-57.
[153] United States v. White, 401 U.S. 745, 752 (1971).
[154] Commonwealth v. Blood, 507 N.E.2d 1029, 1034 (Mass. 1987).
[155] California v. Hodari D.*,* 499 U.S. 621, 629 (1991).
[156] Commonwealth v. Stoute, 665 N.E.2d 93, 97 (Mass. 1996).
[157] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989).
[158] Guiney v. Police Com'r of Bos., 582 N.E.2d 523, 527 (Mass. 1991).
[159] *See Rakas*, 439 U.S. at 134-135; United States v. Salvucci, 448 U.S. 83, 95 (1980).
[160] Commonwealth v. Amendola, 550 N.E.2d 121, 126 (Mass. 1990).
[161] Horton v. California, 496 U.S. 128, 138-42 (1990).
[162] Commonwealth v. Balicki, 762 N.E.2d 290, 298 (Mass. 2002).
[163] *See* Dearborn, *supra* note 148, at 394–95; Ireland, *supra* note 24, at 406; Wilkins, *supra* note 22, at 331.

against warrantless searches of private property would align with this approach.

B. Article 14 Prohibits Warrantless Searches of Private Property

To justify Article 14 deviations from the Fourth Amendment, the SJC has cited a range of rationales, of which four are especially relevant here:[164] textual analysis,[165] Massachusetts's unique history and precedent,[166] comparisons to sister states,[167] and policy considerations, including workable guidelines for police.[168] Each of these factors points toward prohibition of warrantless police searches on private property under the Massachusetts Constitution.[169]

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[164] While the SJC tends to pick and choose the most relevant rationales for each case, the Supreme Court of Pennsylvania has adopted a standard four-part analysis for deviating from the federal Constitution: (1) the text of the provision of the state constitution; (2) the "history of the provision, including [state] caselaw"; (3) relevant caselaw from other jurisdictions; and (4) policy considerations. *See* Commonwealth v. Edmunds, 526 Pa. 374, 391 (1991). This article roughly follows Pennsylvania's template.

[165] *See Upton*, 476 N.E.2d at 555; Ireland, *supra* note 24, at 409.

[166] *See Gonsalves*, 711 N.E.2d at 115; Ireland, *supra* note 24, at 409.

[167] *See Amendola*, 550 N.E.2d at 126; Ireland, *supra* note 24, at 409.

[168] *See, e.g., Gonsalves*, 711 N.E.2d at 112-13; Wilkins, *supra* note 22, at 338.

[169] In addition, there is another, albeit weaker, justification for this proposed rule: equal protection under the Fourteenth Amendment. In *Collins v. Virginia*, Justice Sotomayor suggested this justification almost as an afterthought, in which she stated, "[A] parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage," and treating these situations differently "would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources." *See Collins*, 138 S. Ct. at 1675; *see also* United States v. Ross, 456 U.S. 798, 822 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion"). Likewise, the SJC has noted that "affording different levels of protection to different kinds of residences 'is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity.'" *See Mora*, 150 N.E.3d at 306 (quoting *Leslie*, 76 N.E.3d at 54). While this emphasis on economic discrimination may be compelling on public policy grounds, one doubts that courts applying rational basis review for economic discrimination would identify a constitutional violation.

1. *Textual Analysis*

Analyzing the open fields doctrine solely through a textualist lens is dubious business.[170] First, the textualist approach to search and seizure doctrine has been discredited and supplanted by the *Katz* "expectation of privacy" approach.[171] Second, even on its own merits, textualism fails. For example, *Oliver* protects curtilage, even though the word curtilage never appears in the Fourth Amendment.[172] Third, and most critically, the Bill of Rights is stingy with words, while liberties are vast.[173] Neither state nor federal courts requires every constitutional right to be explicitly enumerated.[174] Massachusetts courts seek to honor the purpose, rather than simply the words, of

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[170] *See Hester,* 265 U.S. at 59 (relying on strict literal reading of Fourth Amendment to deny constitutional protection in the open fields); *Oliver*, 466 U.S. at 184 (relying on strict literal reading of Fourth Amendment to deny constitutional protection in the open fields).

[171] *See Oliver*, 466 U.S. 170, 188-89 (1984) (Marshall, J. dissenting).

[172] *See id.* at 186. Likewise, the constitutional text makes no mention of phone booths, unattached garages, barns, or commercial office buildings, all of which may fall under the Fourth Amendment's protection. *See Katz*, 389 U.S. 347 (1967) (phone booth); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 596 (6th Cir. 1998) (unattached garage); United States v. Wright, 991 F.2d 1182, 1186 (4th Cir. 1993) (barn); *Oliver*, 466 U.S. at 178 n. 8 (office building). *See generally* Flanders, *supra* note 30, at 784 (arguing Court does not take Fourth Amendment textualism seriously).

[173] *See Oliver*, 466 U.S. at 185–87 (Marshall, J. dissenting). Justice Marshall's argument is worth quoting at length:

> The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with precision permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.

Id. (internal citations and quotation marks omitted).

[174] *See* Ireland, *supra* note 24, at 415.

constitutional guarantees.[175]

Nonetheless, text matters.[176] That is especially true when the text of the Massachusetts Constitution deviates from—and is broader than—the language in the United States Constitution.[177] Under Article 14, "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and *all his possessions*."[178] That last phrase does not appear in the federal Constitution.[179]

Land is a "possession,"[180] and Article 14 protects it "all."[181] While John Adams did not expound on the precise meaning of the phrase during the drafting and debate of the Massachusetts Constitution,[182]

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[175] *See id*.

[176] *See* Dearborn, *supra* note 148, at 401 ("The SJC has specifically analyzed the semantic differences between the state and federal constitutions and explained that those differences are meaningful in that they provide greater protections in Massachusetts.").

[177] *Compare* Commonwealth v. Amirault, 677 N.E.2d 652, 661-63 (Mass. 1997) (analyzing language of confrontation clause in Massachusetts Constitution), *and* Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 (Mass. 1988) (noting Massachusetts first to use face-to-face language), *with* Maryland v. Craig, 497 U.S. 836, 846 (1990) (announcing actual face-to-face encounter not absolute requirement); *see also* Attorney General v. Colleton, 387 Mass. 790, 795 (1982) ("The phraseology of the Massachusetts Constitution, however, is different from that of the Fifth Amendment. The Fifth Amendment states, 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .' Article 12 sets forth, "No subject shall be . . . compelled to accuse, or furnish evidence against himself.'"); Batchelder v. Allied Stores International, Inc., 445 N.E.2d 590, 593 (Mass. 1983) (SJC compared First Amendment ("Congress shall make no law . . .") and Fourteenth Amendment ("nor shall any State deprive any person . . . "), with Article 9 ("All elections ought to be free . . ."), which is not limited to state action). *See generally* Ireland, *supra* note 24.

[178] MASS. CONST. Pt. 1, art. XIV (emphasis added).

[179] U.S. CONST. amend. IV (substituting "effects" for "all his possessions").

[180] *See generally* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 180 (1988).

[181] The word "'all'" before "'unreasonable searches'" and "'possessions'" is significant" and suggests comprehensive
protection of property. *See* David A. Macdonald, Jr., Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course, 63 TEMP. L. REV. 559, 579 (1990); State v. Settle, 122 N.H. 214, 218 (1982).

[182] *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1028 (2011)*; see generally* Robert J. Taylor,

scholars have discovered the following ample evidence that, during the Founding Era, "possessions" included real property:[183]

- According to the Oxford English Dictionary, by the eighteenth century the word "possessions" had been used to denote land for centuries.[184]
- Noah Webster's early American dictionary defined "possession" as "land, estate or goods owned."[185]
- The King James Bible, which profoundly influenced the Framers, nearly always used the word "possessions" to mean land.[186] For example: "[A]nd the land shall be subdued before you; then ye shall give them the land of Gilead for a possession*:* But if they will not pass over with you armed, they shall have possessions among you in the land of Canaan."[187]
- John Locke, who famously inspired John Adams and the other Framers, conspicuously used "possessions" to include land.[188] For example: "[T]his part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other . . . a few acres would serve for both their possessions . . . their possessions enlarged."[189]
- James Madison repeatedly used the word "possessions" to include land during the federal Constitutional Convention.[190] For example: "Landed possessions were no certain evidence of

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Construction of the Massachusetts Constitution, PROC. AM. ANTIQUARIAN SOC'Y Vol. 90, Iss. 2, 317, 344 (Jan 1, 1981).

[183] *See* McCabe, *supra* note 180, at 218-19.

[184] *See id.* at 195. The Oxford English Dictionary lists examples of the word "possession(s)" being employed in apparent references to real property or to all of a person's property in the years 1340, 1388, 1420-1450, 1538, and 1610. 7 THE OXFORD ENGLISH DICTIONARY 1156-57 (1978).

[185] WEBSTER, *supra* note 26, at 321 (defining "possession" as "the thing possessed; land, estate or goods owned").

[186] *See* McCabe, *supra* note 180, at 201-02.

[187] *Numbers* 32:29-30 (King James).

[188] *See* Taylor, *supra* note 182, at 327; McCabe, *supra* note 180, at 198-201.

[189] J. Locke, *Concerning the True Original Extent and End of Civil Government*, in 35 GREAT BOOKS OF THE WESTERN WORLD para. 38, at 33 (R. Hutchins ed. 1952).

[190] *See* McCabe, *supra* note 180, at 206 (quoting 2 & 3 DOCUMENTARY HISTORY OF THE CONSTITUTION (1894) (Madison's notes).

real wealth."[191]

- The *Federalist Papers* used "possessions" to include land.[192] For example, in referring to a legislator losing his land, the *Federalist Papers* noted he could find himself "degraded from his sovereign rights and his possessions forfeited."[193]
- Early Massachusetts courts understood the word "possessions" to refer to real property.[194] For example, in 1835 the SJC sought to define the word by appealing to Samuel Johnson's dictionary: "Dr. Johnson defines movables, as 'goods; furniture: distinguished from real or immovable possessions, as lands or houses.'"[195]

While Article 14 pointedly used the phrase "all his possessions," the Fourth Amendment, ratified nine years later, omitted the phrase and replaced it with "effects."[196] "Effects" is generally understood to refer

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[191] *Id.* at 207.
[192] *See id.* at 207-08.
[193] THE FEDERALIST NO. 19 (J. Madison).
[194] *See, e.g.,* Sims' Lessee v. Irvine, 3 U.S. 425, 440 (1799) (referring to "lands, tenements, or hereditaments" as "possessions"); Patton's Lessee v. Easton, 14 U.S. 476, 479 (1816); Somerville v. Hamilton, 17 U.S. 230, 233 n.2 (1819).
[195] Penniman v. French, 34 Mass. 404, 405 (1835); *see also, e.g.*, Harlow v. French, 9 Mass. 192, 197 (1812) ("The committee of eastern lands have decided between them, and have ascertained the boundaries of their respective claims. Their possessions, as rightful, are to be restricted to the boundaries assigned them in the gift of confirmation, accorded to them respectively by the committee."); Swett v. Poor, 11 Mass. 549, 554 (1814) ("For if successfully practiced, its tendency is to disturb the quiet of neighborhoods, and produce distress to people who, but for such intermeddlers, would be left in the quiet enjoyment of their possessions."); Williams v. Ingell, 38 Mass. 288, 289 (1838) ("locating and confirming the grant, and recorded in the book of locations, or possessions, makes a good title"); City of Boston v. Richardson, 95 Mass. 146, 146 (Mass. 1866) ("A record in the original Book of Possessions of the town of Boston, which book appears to have been made between 1639 and 1645, of a possession of a house and lot "bounded with the street," shows title in the possessor to the center of the street, even if the possession was granted by the general court or the town after the street had been laid out.").
[196] U.S. CONST. amend. IV. Madison's first draft of the Fourth Amendment used the word "property"; Madison never explained this change. *See* David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1076-77 (2004). The Convention later changed the word to "effects," again with no recorded explanation. *See* Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 632–33 (2018).

solely to moveable personal property.[197] No historical documentation explains why the Constitution Convention made this revision.[198]

In sum, there is ample textual justification to distinguish Article 14 from the Fourth Amendment.[199] While the Supreme Court may cling to a textualist rationale for the open fields doctrine,[200] the Massachusetts Constitution explicitly prohibits warrantless searches of "all . . . possessions," including real property.

2. *Massachusetts History and Precedent: Expectations of Privacy*

Under *Katz*, property may not be searched if its owners have an expectation of privacy that society is prepared to accept as

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[197] *See Oliver*, 466 U.S. at 177 n. 7 ("The Framers would have understood the term 'effects' to be limited to personal, rather than real, property."); *see also* Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 262–66 (2019) ("In the Framing era, the term "effects" was invoked in will contests and proceedings to divide up the contents of lawfully seized ships. In both contexts, the term broadly extended to all tangible items, but not real property (or the ships themselves)."). Noah Webster defined "effects" as "goods; movables; personal estate." WEBSTER, *supra* note 26. *But see Kirchoff*, 587 A.2d at 991 ("The word 'effects' is now construed narrowly by the United States Supreme Court, but that does not obscure the fact that it was often given a broader meaning in the late eighteenth century. F. STROUD, STROUD'S JUDICIAL DICTIONARY 603–05 (2d ed. 1903).").

[198] *See* Tokson, *supra* note 196, at 632-33; Steinberg, *supra* note 196, at 1076-77; Bellin, *supra* at 262-66.

[199] Several scholars and courts dispute this conclusion, though none has fully grappled with the evidence analyzed by McCabe, *supra* note 182, and summarized here. *See*, *e.g,* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 708 n. 460 (1999) (arguing that McCabe's analysis does not show that "possessions" was ever used in the context of complaints about searches and seizures of land); Steinberg, *supra* note 196, at 1079 ("[N]o historical evidence indicates that the state constitutional provisions were intended to regulate anything other than physical searches of residences.."); Commonwealth v. Russo, 934 A.2d 1199, 1205-1206 (Pa. 2007) (concluding that "possessions" in the Pennsylvania Constitution does not include real property under the doctrine of *ejusdem generis*). Nonetheless, Davies concedes that the term "persons, papers, or possessions," which was used by Samuel Adams during the Massachusetts ratification convention in 1788, likely included all privately owned property. *See* Davies, *supra* at 597.

[200] *See*, *e.g.*, *Jardines*, 569 U.S. at 6.

reasonable.[201] The *Oliver* Court flatly declared that society is not prepared to accept an expectation of privacy in open fields.[202] Nonetheless, the SJC has the authority to reach different conclusions about the privacy expectations of its citizens.[203] The history, precedent, and customs of the Commonwealth point toward a legitimate privacy interest on the entirety of one's property.

First, the history of Article 14 provides a guidepost. The text was inspired by Massachusetts patriot James Otis's opposition to writs of assistance, a form of general warrants that authorized customs officers to search anywhere for smuggled goods.[204] Otis considered writs of assistance the "worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law book" because it "placed the liberty of every man in the hands of every petty officer."[205] It is difficult to imagine that John Adams or James Otis would have tolerated a British customs house official snooping through their driveways or gardens.

Second, the evolving history of Massachusetts has influenced homeowners' expectations.

When society changes, so too must application of *Katz* standards.[206] The *Oliver* Court—and Justice Holmes before it—rested their decisions on agricultural norms.[207] It may be true that a farmer does not expect privacy over his crops, nor a rancher over his unfenced

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[201] *Katz*, 389 U.S. at 360-61 (Harland, J., concurring).

[202] *Oliver*, 466 U.S. at 182-83.

[203] Commonwealth v. Porter P., 923 N.E.2d 36, 44 (Mass. 2010) ("In examining the expectation of privacy question under art. 14, we do not necessarily reach the same result as under Fourth Amendment analysis.") (quoting Commonwealth v. Montanez*,* 571 N.E.2d 1372, 1381 (Mass. 1991)).

[204] *See Blood*, 507 N.E.2d at 1035 ("Opposition to the search policies centered upon the use by British customs house officers of the writs of assistance, general warrants which allowed officers of the crown to search, *at their will,* wherever they suspected untaxed goods to be . . .") (quoting Commonwealth v. Cundriff*,* 415 N.E.2d 172, 176 (Mass. 1980), *cert. denied*, 451 U.S. 973 (1981)); *see also* Grasso, *supra* note 23, at 319.

[205] *See, e.g.*, *Blood*, 507 N.E.2d at 1034 (quoting *Olmstead,* 277 U.S. at 478) (Brandeis, J., dissenting) ("the right most valued by civilized men").

[206] *Jones*, 565 U.S. at 427 (Alito, J., concurring) ("[T]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations."); *see also id.* at 415 (Sotomayor, J., concurring).

[207] *See Oliver*, 466 U.S. at 179; *Hester,* 265 U.S. at 59.

holdings.[208] But those expectation are irrelevant to the experience of most modern homeowners.[209]

While the Commonwealth was once largely agricultural, it is now primarily urban and suburban.[210] The privacy expectations of modern homeowners are shaped primarily by the law of trespass.[211] Property rights reflect society's recognition of a person's authority, "and therefore should be considered in determining whether an individual's expectations of privacy are reasonable."[212] Possessors of land have the right to exclude trespassers.[213] *Oliver* simply dismisses trespass law as irrelevant,[214] but "the fact that society may adjudge one who trespasses on such lands a criminal belies the claim."[215]

Indeed, the Supreme Court has continually reinforced the proposition that police should follow the same guidelines as private citizens.[216] Reasonable neighbors do not break the law, and nor should

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[208] *See Dixson*, 766 P.2d at 1023.

[209] *See* Horton v. United States, 541 A.2d 604, 608–09 (D.C. 1988) (privacy interests "must be evaluated with reference to the obvious attributes of an urban environment"); State v. Webb, 943 P.2d 52, 57 (Idaho 1997) ("For instance, the curtilage of a home located within the city limits of Boise may not be the same as the curtilage of a ranch located in one of Idaho's rural counties. The trial court must therefore take into consideration the differences in custom and terrain within different areas of the state when contemplating particular expectations of privacy.").

[210] *See supra* note 129 and accompanying text.

[211] *See Rakas*, 439 U.S. at 143 n. 12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude"); State v. Mooney, 588 A.2d 145, 153 (Conn. 1991) ("Legitimate expectations of privacy derive from 'concepts of real or personal property law or [from] understandings that are recognized and permitted by society.'") (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES, ch. 1).

[212] *Rakas* 439 U.S. at 153 (Powell, J., concurring).

[213] *See* Entick v. Carrington (1765) 95 Eng. Rep. 807, 817-18 (KB) (proclaiming that agents of the government may not enter private property unless authorized by law); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 246 ("The owner is allowed to exclude all, and is accountable to no one.").

[214] *See Oliver*, 466 U.S. at 183-84.

[215] *Kirchoff*, 587 A.2d at 994; *see also Oliver*, 466 U.S. at 190-91 (Marshall, J., dissenting); LaFave, *supra* note 30.

[216] *See* Jardines, 569 U.S. at 8 (police may "do no more than any private citizen might do"); King, 563 U.S. at 462-63; *see also* Rubenfeld, *supra* note 33, at 110 ("[S]trangers play a crucial role in determining reasonable expectations of privacy, which in turn determine what policemen may and may not do.").

police. For this reason, New York's high court refused to adopt *Oliver*:

[W]e do not dismiss so lightly the fact that the police were violating defendant's property rights and committing criminal and civil trespass by entering the land. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law."[217]

3. *Comparison to Sister States*

At least seven states, including New York[218] and Vermont,[219] have squarely rejected the

open fields doctrine based on state constitutional guidelines.[220] These states have instead adopted the rule proposed by Justice Marshall in his *Oliver* dissent.

In some cases, these decisions were based primarily on textual considerations, particularly in states that, like Massachusetts, used John Adams's language and specified that "possessions"—rather than "effects"—were protected from unreasonable searches.[221] For example, the Mississippi Supreme Court held:

If the section meant only to protect the persons and houses the words "and possessions" would be superfluous and meaningless . . . The language of our Constitution is somewhat broader than the words "papers of effects," and, applying the principle of liberal construction which governs in cases affecting the liberty and property of the citizen, we think the term embraces all of the property of the citizen.[222]

Most of the states that have rejected the open fields doctrine, however, have done so based on the *Katz* principle of reasonable

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[217] *Scott*, 593 N.E.2d at 1336 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).
[218] *Id.*
[219] *Kirchoff*, 587 A.2d at 994.
[220] *See Falkner*, 98 So. at 693; *Bullock*, 901 P.2d at 75; *Dixson*, 766 P.2d at 1016; Lakin, 588 S.W.2d at 544; *Myrick*, 688 P.2d at 155. In addition, Idaho has substantially enlarged the concept of curtilage under its state constitution, without rejecting *Oliver* in full. *See Webb*, 943 P.2d at 57.
[221] *See Falkner*, 98 So. at 692; *Lakin*, 588 S.W.2d at 548; *Myrick*, 688 P.2d. at 155.
[222] *See Falkner*, 98 So. at 692-93.

expectations of privacy. State supreme courts have decided that, regardless of the text, their state constitutions guarantee a right to privacy on private property outside the curtilage.[223] Under the Oregon Constitution, "Allowing the police to intrude into private land, regardless of the steps taken by its occupant to keep it private, would be a significant limitation on the occupant's freedom from governmental scrutiny."[224] Likewise, in Montana, "a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable."[225]

Conversely, at least eight states have affirmed the open fields doctrine as consistent with their state constitutions.[226] Notably, New Hampshire, Maine, and Pennsylvania have explicitly adopted *Oliver* as consistent with their state constitutions, despite the presence of the word "possessions" in the text of their search and seizure provisions.[227]

Exhibit C summarizes states that have directly considered the question of whether the open fields doctrine violates their state constitutions.[228] As in most issues of federalism, the results are not uniform. Nonetheless, Massachusetts would hardly be alone—much less a leader—in protecting its citizens' rights by providing constitutional protection beyond the curtilage.

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[223] People v. Scott, 593 N.E.2d 1328, 1336 (N.Y. 1992); *Kirchoff*, 587 A.2d at 992; *Bullock*, 901 P.2d at 75; *Dixson*, 766 P.2d at 1024.

[224] *Dixson*, 766 P.2d at 1024.

[225] *Bullock*, 901 P.2d at 75-76.

[226] *Ex parte* Maddox, 502 So. 2d 786, 788 (Ala. 1986); People v. Pitman, 813 N.E.2d 93, 101 (Ill. 2004); State v. Showalter, 427 N.W.2d 166, 168 (Iowa 1988); Brent v. Commonwealth, 240 S.W.2d 45, 49 (Ky. 1922); State v. Cayer, 617 A.2d 208, 210 (Me. 1992); State v. Cody, 539 N.W.2d 18, 27 (Neb. 1995); State v. Pinder, 514 A.2d 1241, 1246 (N.H. 1986); *Russo*, 934 A.2d at 1213.

[227] *See Pinder*, 514 A.2d at 1246; *Cayer*, 617 A.2d at 210; *Russo*, 934 A.2d at 1213.

[228] Exhibit C does not include states that have applied the open fields doctrine to their citizens based on the Fourth Amendment, without squarely considering whether the doctrine is consistent with their state constitution. *See, e.g.*, Wellford v. Commonwealth, 315 S.E.2d 235, 237 (Va. 1984).

Exhibit C: Overview of State Supreme Court Decisions Regarding Open Fields Doctrine Under State Constitutions

*Open Fields Doctrine **Rejected***

State	State Constitutional Provision (emphasis added)	Case Law
MS	MISS. CONST., § 23 "The people shall be secure in their persons, houses, and **possessions**, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."	*Falkner v. State*, 98 So. 691, 693 (Miss. 1924) "The language of our Constitution is somewhat broader than the words 'papers of effects,' and, applying the principle of liberal construction which governs in cases affecting the liberty and property of the citizen, we think the term embraces all of the property of the citizen."

MT	MONT. CONST. ART. II, § 11 "The people shall be secure in their persons, papers, . . . homes and **effects** from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing . . . shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing."	*State v. Bullock*, 901 P.2d 61, 75-76 (Mont. 1995) "We conclude that in Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable . . ."
NY	N.Y. CONST. art. I, § 12 "The right of the people to be secure in their persons, houses, papers and **effects**, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."	*People v. Scott*, 593 N.E.2d 1328, 927 (N.Y. 1992) "We believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all—without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs—is one that we cannot accept as adequately preserving fundamental rights of New York citizens."

OR	OR. CONST. art. I, § 9 "No law shall violate the right of the people to be secure in their persons, houses, papers, and **effects**, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."	*State v. Dixson*, 766 P.2d 1015, 1024 (Or. 1988) "Allowing the police to intrude into private land, regardless of the steps taken by its occupant to keep it private, would be a significant limitation on the occupant's freedom from governmental scrutiny. Article I, section 9, does not permit such freewheeling official conduct."
TN	TENN. CONST. art. I, § 7 "That the people shall be secure in their persons, houses, papers and **possessions**, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."	*State v. Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979) "Ordinarily officers searching occupied, fenced, private property must first obtain consent or a warrant; otherwise they proceed at the risk that evidence obtained may be suppressed."

VT	VT. CONST. ch. I, art. XI "That the people have a right to hold themselves, their houses, papers, and **possessions**, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted."	*State v. Kirchoff*, 587 A.2d 988, 994 (Vt. 1991) "*Oliver's* per se rule, that a person may never legitimately demand privacy under the Fourth Amendment in his or her land beyond the borders of the curtilage, fails to guarantee that right. We now hold that a lawful possessor may claim privacy in 'open fields' under Article 11 of the Vermont Constitution where indicia would lead a reasonable person to conclude that the area is private."
WA	WASH. CONST. art. I, § 7 "No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law."	*State v. Myrick*, 688 P.2d 151, 153 (Wash. 1984) "[W]e have recognized that the unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally. While we may turn to the Supreme Court's interpretation of the United States Constitution for guidance in establishing a hierarchy of values and principles under the Washington Constitution, we rely, in the final analysis, upon our own legal foundations in determining its scope and effect."

Open Fields Doctrine <u>Adopted</u>

State	State Constitutional Provision (emphasis added)	Case Law
AL	ALA. CONST. art. I, § 5 "That the people shall be secure in their persons, houses, papers, and **possessions** from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."	*Ex parte Maddox*, 502 So. 2d 786, 788 (Ala. 1986) "The Fourth Amendment to the United States Constitution and Article I, § 5, of the Alabama Constitution protect people from unreasonable searches and seizures of their persons, houses, papers, and possessions. This protection applies to the area immediately surrounding one's home, often referred to as the curtilage. Officer Windsor could legitimately search the open fields surrounding the petitioners' property without violating any Fourth Amendment rights." (internal citations omitted)

IL	ILL. CONST. art. I, § 6 "The people shall have the right to be secure in their persons, houses, papers and **other possessions** against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."	*People v. Pitman*, 211 Ill. 2d 502, 513 (2004) "This court has interpreted the search and seizure provision found in section 6 in a manner that is consistent with the fourth amendment jurisprudence of the United States Supreme Court."
IA	IOWA CONST. art. I, § 8 "The right of the people to be secure in their persons, houses, papers and **effects**, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."	*State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988) "When there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo style review. Although defendants assert constitutional violations under both the state and federal search and seizure clauses, the language of those clauses is substantially identical and we have consistently interpreted the scope and purpose of article I, section 8, of the Iowa Constitution to track with federal interpretations of the Fourth Amendment." (internal citations omitted)

KY	KY. CONST., § 10 "The people shall be secure in their persons, houses, papers and **possessions**, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."	*Brent v. Commonwealth*, 240 S.W. 45, 48-49 (Ky. 1922) "Looking to that origin and to the history of such provisions [in other constitutions], and considering the word 'possessions' in its relationship to the other words with which it is to be construed, we cannot regard . . . our Constitution as intended to apply to a state of facts such as is presented in this record . . . . We have been able to find no decision in which [the state] Constitution has been construed as prohibiting the searching of woodland, somewhat remotely situated from the residence of the owner."
ME	ME. CONST. art. I, § 5 "The people shall be secure in their persons, houses, papers and **possessions** from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause-- supported by oath or affirmation."	*State v. Cayer*, 617 A.2d 208, 210 (Me. 1992) "Cayer cannot claim a 'constitutionally protected reasonable expectation of privacy' in the area searched. '[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.'" (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)) (intrernal citations omitted)

NE	NEB. CONST. art. I, § 7 "The right of the people to be secure in their persons, houses, papers, and **effects** against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."	*State v. Cody*, 539 N.W.2d 18, 26 (Neb. 1995) "The facts upon which Cody relies do not establish that he had a legitimate expectation of privacy in the marijuana patch. The marijuana patch is subject to the open fields doctrine that was first articulated in *Hester v. United States* . . . We have concluded that the Nebraska Constitution provides no greater protection in this regard than does the U.S. Constitution."
NH	N.H. CONST. Pt. 1, art. 19 "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and **all his possessions**. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be	*State v. Pinder*, 514 A.2d 1241, 1246 (N.H. 1986) "We are convinced that part I, article 19 of the New Hampshire Constitution, which protects 'possessions,' like provisions of other American constitutions which protect either 'possessions' or 'effects,' was not designed to protect 'open fields,' which are unoccupied and undeveloped lands somewhat removed from dwellings and other protected structures, from warrantless searches. Accordingly, for the purposes of applying part I, article 19, although we interpret 'possessions' broadly, we do not interpret that word so broadly as to include 'open fields.'"

	issued; but in cases*, and with the formalities, prescribed by law."	
PA	PA. CONST. art. I, § 8 "The people shall be secure in their persons, houses, papers and **possessions** from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."	*Commonwealth v. Russo*, 934 A.2d 1199, 1213 (2007) "[W]e hold that the guarantees of Article I, Section 8 of the Pennsylvania Constitution do not extend to open fields; federal and state law, in this area, are coextensive."

4. *Public Policy: Clarity for Police*

The Supreme Court favors a search and seizure doctrine in which police do not "have to guess before every search" whether they are in curtilage or open fields.[229] Likewise, the SJC has observed that the search and seizure doctrine should avoid "many factored tests and complex balancing of factors," because such complexity is "inappropriate in an area of law which is to be administered by police officers in the field, often in dangerous and confused circumstances."[230] As a policy matter, courts want to avoid "unadministrable" rules for police.[231]

By this standard, courts have failed. Application of the *Dunn* four-

[229] *See Oliver,* 466 U.S. at 181 ("Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment."); *see also* LaFave, *supra* note 30. Although the Supreme Court insists (against all evidence) that current case law seeks to avoid "case-by-case" analyses, the SJC interpretation is that "it is the policy of the United States Supreme Court and of this court to approach curtilage questions on a case-by-case basis." *Fernandez*, 934 N.E.2d at 816.

[230] *Gonsalves*, 711 N.E.2d at 120 (Fried, J., dissenting).

[231] *Collins*, 138 S. Ct. at 1675.

factor test (or the alternative "I Know It When I See It" approach of *Jardines* and *Collins*) has resulted in judicial rulings that are unpredictable and inconsistent.[232] Police, unlike judges, do not have the luxury of reviewing appellate briefs and arguments prior to every search.[233] The stakes are high: an officer's misdiagnosis could violate a person's constitutional rights, or let a guilty person go free.[234] Justices Marshall and Brennan correctly predicted that police officers would have great difficulty making "on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone."[235]

Massachusetts should abolish four-factor tests and "I Know It When I See It" decisions about whether an area is curtilage or an open field. It should eliminate after-the-fact, case-by-case analyses for judges to determine whether police encroached on ill-defined curtilage. Instead, Massachusetts should follow a straightforward approach: do not trespass to conduct a search without a warrant, consent, or constitutionally recognized exception to the warrant requirement.

V. Conclusion: Practical Considerations for Police and Homeowners

This Article has argued for a straightforward rule: warrantless searches of private property are presumptively unreasonable. This rule, proposed by Justice Marshall in his *Oliver* dissent,[236] is supported by Article 14 of the Massachusetts Constitution. The rule is consistent with the literal text; reflects the unique history and precedent of Massachusetts; aligns with sister states such as New York and Vermont; and provides clear guidelines for homeowners, police, and courts.

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[232] *See, e.g.*, *supra* notes 4-7 and accompanying text; *see also* Exhibit A for examples of unreliable results.

[233] *See* Dunn, 480 U.S. at 312 n. 3 (Brennan, J., dissenting) ("police officers making warrantless entries upon private land will be obliged 'to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone'") (quoting *Oliver,* 466 U.S. at 196 n. 20 (1984) (Marshall, J., dissenting)); *see also Collins*, 138 S. Ct. at 1671.

[234] *See Collins*, 138 S. Ct. at 1671.

[235] *Dunn*, 480 U.S. at 312 (1987) (Brennan, J., dissenting) (citing *Oliver*, 466 U.S. at 196 n. 20 (Marshall, J., dissenting)) (internal quotations and citations omitted).

[236] *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

This proposal would not unduly burden legitimate police work. As a practical matter, police may still conduct reasonable searches, and homeowners would likewise have clear expectations. Guidelines would be straightforward:

- Police may not enter any private property that is reasonably demarcated to indicate property lines. In urban and suburban areas, police should respect property lines just as a neighbor would—by reasonably judging the configuration of buildings, fences, and landscaping.[237] Property owners should not be required to construct elaborate fences, gates, or physical barriers to keep police out.[238] However, homeowners in rural areas may need to fence or post their land, consistent with state trespass law, in order to alert the public that the land is privately owned and that trespass is prohibited.[239]
- Police may enter private property with the owner's informed consent.[240]
- Police may assume implied license to approach and knock on the front door, unless the area is clearly marked in such a way as to prevent strangers from approaching.[241] Nonetheless,

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[237] *See id*. ("Certain spaces are so presumptively private that signals of this sort are unnecessary.").

[238] *See Mora*, 150 N.E.2d at 306 ("[R]equiring defendants to erect physical barriers around their residences before invoking the protections of the Fourth Amendment and art. 14 would make those protections too dependent on the defendants' resources."); *Collins*, 138 S. Ct. at 1675 (rejecting "constitutional rights [only for] those persons with the financial means to afford residences with garages . . . but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify" for constitutional protection).

[239] *See*, *e.g.*, MASS. GEN. LAWS ANN. ch. 266, § 120 (protecting "improved or enclosed land" if entry is "forbidden . . . directly or by notice posted thereon").; *Kirchoff*, 587 A.2d at 995 ("[s]igns or placards so designed and situated as to give reasonable notice" that rural land is private); *see also* Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 495–96 (2015).

[240] *Schneckloth*, 412 U.S. at 222.

[241] *See*, *e.g.*, *Leslie* 76 N.E.3d at 986 ("[A] police officer, like any other citizen, has an implied license to walk up the path to the front door of a home and knock on the front door. That license, however, is limited in scope, purpose, and duration."; State v. Falls, 853 S.E.2d 227, 234 (N.C. App. 2020) ("First, law enforcement may not

approaching the front door to knock does not imply consent to search the path to the front door.[242]

- Police may enter private property to chase a fleeing suspect, to prevent the destruction of evidence, or to render emergency aid.[243]
- Under the plain view doctrine, police would be permitted to position themselves in a public area to observe property, and their observations may be used as evidence of probable cause to justify a warrant.[244] Nonetheless, police without a warrant may not use intrusive technology such as thermal imaging[245] or long-term video surveillance.[246] Moreover, police must not enter the property until they obtain a warrant (absent consent or a recognized exception to the warrant requirement). [247]

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approach a home in a manner that "would not have been reasonable for solicitors, hawkers[,] or peddlers."). *But see* State v. Christensen, 517 S.W.3d 60, 78 (Tenn. 2017) ("Defendant argues that his "No Trespassing" signs established that he had a reasonable expectation of privacy that precluded any entry onto his curtilage by Investigators Green and Chunn. We disagree. For the same reasons supporting our holding under the ***Jardines*** test, we hold that the Defendant has failed to satisfy the second prong of the reasonable expectations test.").

[242] *See Jardines*, 569 U.S. at 9.

[243] *See King*, 563 U.S. at 462-63; *McCarthy*, 705 N.E.2d at 1112.

[244] *See* California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."); *Mora*, 150 N.E.2d at 304 ("limited surveillance falls within the general rule that a person has no reasonable expectation of privacy in what he or she knowingly exposes to the public.").

[245] *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (providing Fourth Amendment protection when "the technology in question is not in general public use.").

[246] *Mora*, 150 N.E.2d at 310.

[247] *See Jardines*, 569 U.S. at 7 ("While law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas.") (quoting *Ciraolo*, 476 U.S. at 213) (internal quotation marks and citations omitted). As Justice Sotomayor analogized in *Collins*, 138 S. Ct. at 1671:

> Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine

- If police wish to search a driveway, yard, or accessory building, they should get a warrant for those areas. Police should not assume that a warrant to search the home extends beyond the home.[248]
- Finally, police could continue to conduct limited searches incident to arrest.[249]

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In drafting the Massachusetts Constitution, John Adams composed explicit language against unreasonable searches of "all [] possessions."[250] Land is a possession,[251] and homeowners have a reasonable expectation of privacy from unwarranted trespass.[252] Police, who are charged with enforcing criminal trespass law, should not have constitutional impunity to trespass.[253]

Nonetheless, Massachusetts, like most other states, ignores this "clear, easily administrable rule"[254] and instead follows the faulty logic of *Oliver*.[255] To protect the rights of their citizens, state supreme courts should adopt a "No Trespassing" rule that aligns with their state constitutions and follows the enduring wisdom of Justice Marshall.[256]

> further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

[248] *Contra, e.g.*, Fernandez, 458 Mass. at 141-42.

[249] *See* Chimel v. California, 395 U.S. 752, 763 (1969); Commonwealth v. Phifer, 979 N.E.2d 210, 213-14 (Mass. 2012).

[250] MASS. CONST. Pt. 1, art. XIV

[251] *See* McCabe, *supra* note 180r, at 218-19.

[252] *See Rakas*, 439 U.S. at 143 n. 12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude"); *Kirchoff*, 587 A.2d at 994; *see also Oliver*, 466 U.S. at 190-91 (Marshall, J., dissenting); LaFave, *supra* note 30, at 776.

[253] *Scott*, 593 N.E.2d at 1335; *Kirchoff*, 587 A.2d at 998; *see also Oliver*, 466 U.S. at 190-91 (Marshall, J., dissenting); LaFave, *supra* note 30, at 776.

[254] *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

[255] *McCarthy*, 705 N.E.2d at 1112.

[256] *See Oliver*, 466 U.S. at 190-91 (Marshall, J., dissenting).

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FROM THE LIBRARY OF ALEXANDRIA TO THE LOCAL SCHOOL BOARD: THE MODERN AMERICAN PERPETUATION OF THE LEGACY OF BANNED BOOKS

Nathalie Conklin *

I. INTRODUCTION

Ray Bradbury's 1953 seminal novel, *Fahrenheit 451*, opens with the line: "It was a pleasure to burn."[1] The mention of "banned books" often invokes images of oppressive government regimes ripping volumes from shelves or setting pages on fire. These images, while powerful, often overshadow the true culprit of contemporary book banning: local school boards. [2] Every year, schools ban thousands of books, a trend that is only increasing.[3] "The large majority of book bans . . . today are not spontaneous, organic expressions of citizen concern."[4] These bans are not the result of individualized instances of parental disquiet, or schools exercising

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[1] RAY BRADBURY, FAHRENHEIT 451 (1953).

[2] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (5-4 decision) (plurality opinion). This Comment will use "ban" and "removal" interchangeably to describe such situations. This Comment takes the position that book removals are effectively bans, though a thorough exploration of such an argument is outside of the scope of this Comment.

[3] *See generally* Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools.

[4] *Id.*

curriculum discretion, but instead, they are the result of organized efforts by advocacy groups to censor ideas.[5]

The Supreme Court of the United States has directly addressed this issue once. *Board of Education, Island Trees Union Free School District No. 26 v. Pico* ("*Pico*") was a 1982 decision on the issue of whether the removal of certain books from libraries in a New York school district violated the First Amendment.[6] In a 5–4 decision, the Court ruled in favor of the challengers, but the majority could not agree on the reason, nor could they agree on a clear, enforceable standard that would ensure adequate First Amendment protections across the board.[7] Removing books from school libraries poses an intricate and unique First Amendment challenge because of the conflicting interests of deference to the local control of schools and the First Amendment rights of students.[8] The Eleventh Circuit's 2009 decision in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board* ("*ACLU*") shows just how fraught this issue remains in the wake of *Pico*. The harsh and critical language in the *ACLU* decision undermined the already weak protections of *Pico*.[9]

The United States needs a new, universal rule that is true to the intention of *Pico*'s original plurality—that the First Amendment affords speech protections to school library book removal decisions—while remedying its flawed and vague standard. Part II of this Comment explores the motivations behind banning books and the history of the practice, both globally and within the United States. Part III examines the relevant First Amendment decisions, focusing on *Pico* and *ACLU*. Part IV explains why a new standard is necessary. Part V suggests some solutions to the issue and concludes that *Pico* must be modified to insulate students' First Amendment rights from local and legislative whims in order to ensure that there is a clear and enforceable standard for when, exactly, book removals are appropriate. Part VI contains a brief conclusion.

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[5] *See id.*

[6] *Pico*, 457 U.S. at 856–57.

[7] Lindsay M. Saxe, *Politics Versus Precision: Did the Miami-Dade School Board Violate the First Amendment When it Voted to Remove ¡Vamos A Cuba from its District Libraries?, ACLU v. Miami-Dade County School Board 11th Cir.*, 61 FLA. L. REV. 921, 923–24 (2009).

[8] *Pico*, 457 U.S. at 866.

[9] Saxe, *supra* note 7, at 928–30.

II. AN ABBREVIATED HISTORY OF BOOK BANS IN AND OUT OF SCHOOL LIBRARIES

Part A will discuss censorship and the evolution of book bans, a legacy which spans over two dozen centuries. Part B will discuss the modern tradition of banning books in the United States.

A. Why Are Books Banned?

One of the first recorded instances of book banning happened in the third century B.C.E., when Chinese Emperor Shih Huang Ti allegedly buried over four hundred scholars alive in order to control the recorded narrative of history.[10] He burned all of the books in his empire in the hope that "history could be said to begin with him."[11] Ever since, governments have banned books for reasons such as politics, religion, and conquest.[12] Plato discussed the need to "supervise . . . storytellers" in *The Republic*, which was written in the fourth century B.C.E.[13] The Library of Alexandria was destroyed in 48 B.C.E., when Julius Caesar invaded Egypt, and again in 640 C.E., when Caliph Omar invaded.[14] The Roman Empire outlawed and banned books to "prevent disorder and the spread of foreign customs."[15]

With the invention of the printing press in the fifteenth century, books—and the ideas they contained—became commodified.[16] They

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[10] *Banning and Burnings in History*, FREEDOM TO READ 1, 8 [hereinafter FREEDOM TO READ], https://www.freedomtoread.ca/wp-content/uploads/Bannings-and-Burnings-in-History-2021.pdf.

[11] *Id.*

[12] *See* Lorraine Boissoneault, *A Brief History of Book Burning, from the Printing Press to Internet Archives*, SMITHSONIAN MAG. (Aug. 31, 2017), https://www.smithsonianmag.com/history/brief-history-book-burning-printing-press-internet-archives-180964697.

[13] PLATO, THE REPUBLIC 61 (G. R. F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000); Thomas Brickhouse & Nicholas D. Smith, *Plato (427-347 B.C.E.)*, INTERNET ENCYC. PHIL., https://iep.utm.edu/plato (last visited Oct. 22, 2023).

[14] Boissoneault, *supra* note 12.

[15] Orrin Grey, *The History of Book Burning "He Who Destroys a Good Book, Kills Reason Itself."*, EARLY BIRD BOOKS (July 18, 2022), https://earlybirdbooks.com/book-burning-history#.

[16] Boissoneault, *supra* note 12.

were thus more accessible, and the spread of those ideas became much more difficult to control.[17] In the sixteenth century, France banned books "containing ideas subversive to the authority of kings."[18] In seventeenth century Germany, Papal authority ordered the burning of Martin Luther's translation of the Bible.[19] In the eighteenth century, the Catholic Church maintained an Index of Prohibited Books.[20] In 1792, Thomas Paine was charged with treason in England for defending the French Revolution in his work, *The Rights of Man*; several of his publishers were prosecuted for printing his writing, which argued against Christianity.[21] Government officials in nineteenth century Massachusetts threatened Walt Whitman with criminal prosecution due to the use of explicit language in his works.[22] The United States Postal Service seized books throughout the early twentieth century.[23]

Across the Atlantic Ocean, twentieth century European dictators in Italy, Yugoslavia, and Nazi Germany censored books.[24] 25,000 books written by Jewish authors were burned at the University of Berlin on May 10, 1933.[25] South Africa's apartheid regime also participated in book banning in the twentieth century, as did the Soviet Union, which removed both the Bible and the Qur'an from libraries and banned them from being imported.[26] The motivations behind these book bans vary. But, according to one scholar:

> The unifying factor between all types of purposeful book-burners in the 20th century . . . is that the perpetrators feel like victims, even if they're the ones in power. Perhaps the most infamous book burnings

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[17] See *id.*

[18] *Banned Books Online*, ONLINE BOOKS PAGE (John Mark Ockerbloom ed.) [hereinafter ONLINE BOOKS PAGE], https://onlinebooks.library.upenn.edu/banned-books.html (last visited Jan. 15, 2023).

[19] ANNE LYON HAIGHT, BANNED BOOKS: INFORMAL NOTES ON SOME BOOKS BANNED FOR VARIOUS REASONS AT VARIOUS TIMES AND IN VARIOUS PLACES 30 (2d ed. 1955)

[20] This Index was not abolished until 1966. ONLINE BOOKS PAGE, *supra* note 18.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] HAIGHT, *supra* note 19, at 121.

[26] ONLINE BOOKS PAGE, *supra* note 18.

> were those staged by Adolf Hitler and the Nazis, who regularly employed language framing themselves as the victims of Jews.[27]

When Mao Zedong took power in China, books that did not comply with Chinese Communist Party propaganda were destroyed as part of the Cultural Revolution.[28] As recently as 2003, Cuba jailed seventy-five people for distributing books outside of the country's state-funded library system.[29]

The United States is no stranger to censorship, including that which is politically motivated.[30] Books deemed "subversive" have been censored, and their distribution has been disrupted.[31] The United States military has directed libraries to remove pacifist books.[32] The federal government halted distributors of anti-draft materials during World War I.[33] In 2020, United States Senator Tom Cotton introduced a bill that would reduce federal funding to schools that taught *The 1619 Project*, which has been awarded a Pulitzer Prize.[34]

Today, because it is extremely difficult, if not impossible, for American legislatures to pass laws explicitly limiting access to books, the suppression of speech happens on a much more individualized scale. Speech is suppressed when a school declines to shelve a book in its library, or when a library is required to remove a book from its collection.[35] In 2022, Sotheby's auctioned off a fireproof copy of *The Handmaid's Tale* by Margaret Atwood.[36] Atwood's novel has become

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[27] Boissoneault, *supra* note 12.
[28] *Id.*
[29] ONLINE BOOKS PAGE, *supra* note 18.
[30] *Id.*
[31] *See id.*
[32] *See id.*
[33] *Id.*
[34] *Id.*
[35] *See How Do Books Get Banned?*, FIRST AMEND. MUSEUM, https://firstamendmentmuseum.org/how-do-books-get-banned (last visited Nov. 1, 2022).
[36] Eliane Velie, *Margaret Atwood Protests Book Banning with Fireproof Copy of* The Handmaid's Tale, HYPERALLERGIC (May 25, 2022), https://hyperallergic.com/735674/margaret-atwood-protests-book-banning-with-fireproof-copy-of-the-handmaids-tale.

one of the most banned books in the United States.[37] The fireproof copy was "intended to serve as a powerful symbol against censorship and a reminder of the necessity of protecting vital stories."[38] To Atwood's knowledge, her book has never been burned;[39] it has, however, been subject to bans in schools.[40] This Comment will focus exclusively on the removal of books from school libraries, which is distinguishable from the general concept of book banning.

B. The History of Book Removals from the United States' School Libraries

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[37] *See id.* Interestingly, Atwood's book explores the concept of the censorship of ideas through book bans. In the book's fictional nation of Gilead, women lack the freedom to read. As one analyst explains, "The relationship between political autocracy and intellectual censorship has always been obvious. The more someone seeks to know, the more dangerous that person appears to those in authority because knowledge is power, often in more ways than one." *Why Are Books So Dangerous? Reading 'The Handmaid's Tale' and 'Brave New World'*, HYPERBOLIT SCH., https://hyperbolit.com/2020/05/30/why-are-books-so-dangerous-reading-the-handmaids-tale-and-brave-new-world (last visited Feb. 19, 2023).

[38] *Margaret Atwood & PRH Fight Censorship With an "Unburnable" Edition of The Handmaid's Tale*, PENGUIN RANDOM HOUSE (May 25, 2022), https://global.penguinrandomhouse.com/announcements/margaret-atwood-prh-fight-censorship-with-an-unburnable-edition-of-the-handmaids-tale/#:~:text=More%20than%20a%20unique%20collector%E2%80%99s%20item%2C%20the%20fireproof,reminder%20of%20the%20necessity%20of%20protecting%20vital%20stories.

[39] *Id.* Ray Bradbury's *Fahrenheit 451* was in fact burned. In 1973, it was set on fire in a high school in North Dakota. In response, Vonnegut wrote a letter to the school board's chairman, stating: "Wars have been fought against nations which hate books and burn them." *Nazi Book Burnings: Recurring Symbol*, Article in *Holocaust Encyclopedia*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/nazi-book-burnings-recurring-symbol (last visited May 12, 2023). A book-burning in the United States was conducted recently. When, in February 2022, Greg Locke, a pastor at Global Vision Bible Church, invited his parishioners to join him in burning "demonic" materials such as *Harry Potter* and other "evil garbage" such as young-adult fantasy novels. The event, which took place in Mount Juliet, Tennessee, resulted in a "massive bonfire." Morgan Sung, *Pastor Holds Bonfire to Burn to 'Witchcraft' Books Like 'Twilight'*, NBC NEWS (Feb. 4, 2022, 6:34 PM), https://www.nbcnews.com/news/us-news/pastor-holds-bonfire-burn-witchcraft-books-twilight-rcna14931.

[40] Hillel Italie, *Burn-Proof Edition of 'The Handmaid's Tale' Up for Auction*, AP NEWS (May 24, 2022, 12:04 AM), https://apnews.com/article/politics-entertainment-margaret-atwood-1690fb90e5f26f63bf4ea14dde7d8d36.

In the 1960s, schools in California removed Ernest Hemingway's *The Sun Also Rises* and many of his other works from their libraries.[41] A group known as "Texans for America" opposed textbooks that referred students to his books.[42] In 1977, an Illinois school removed a picture book, *In the Night Kitchen*, from its library.[43] In 1972, an Ohio school removed *Cat's Cradle* by Kurt Vonnegut from its library.[44] Schools in New York and Oklahoma, in 1975, removed *One Flew Over the Cuckoo's Nest* by Ken Kesey from their libraries.[45] In 1980, 1982, and 1992, schools in Ohio, Alabama, and Florida, respectively, removed *The Catcher in the Rye* by J.D. Salinger from their libraries.[46] High schools in Alabama in 1982 also removed *The Grapes of Wrath* by John Steinbeck and *A Clockwork Orange* by Anthony Burgess from their libraries.[47] Schools in Wisconsin restricted *Slaughterhouse Five* by Kurt Vonnegut in their libraries in 1986.[48] A Florida high school removed *Of Mice and Men* by John Steinbeck from its library in 1991.[49] In 1994, schools removed *Song of Solomon* by Toni Morrison from their libraries in Georgia.[50] In 1995, in a high school in Louisiana, *To Kill a Mockingbird* by Harper Lee was removed from the library.[51] A school in West Virginia in 1997 removed *The Color Purple* by Alice Walker, and sixteen other titles from its library.[52] A Virginia school removed Walker's novel from a library in 1999, and it was challenged again, along with seventeen other books, for removal from another Virginia school library in 2002.[53] A high school in California removed *Sophie's*

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[41] FREEDOM TO READ, *supra* note 10, at 5.
[42] *Id.*
[43] *Id.* at 3.
[44] *Banned & Challenged Classics*, ALA OFF. FOR INTELL. FREEDOM, https://www.ala.org-advocacy-bbooks-frequentlychallengedbooks-classics (last visited Sept. 11, 2022).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Banned & Challenged Classics*, *supra* note 44.
[53] *Id.*

Choice by William Styron from its library in 2002.[54] In 2000, an Alabama high school removed *Brave New World* by Aldous Huxley from its library "because a parent complained that its characters showed contempt for religion, marriage, and family."[55] This list is non-exhaustive.

The aforementioned bans are not of a bygone era.[56] In Pennsylvania, the diversity education committee of Central York School District created a list of over 300 resources that they considered "helpful in educating themselves and in supporting [the] diverse student population."[57] In September 2021, the school district banned all the resources on the list.[58] Included in the ban were books such as *I Promise* by Lebron James; *I Am Human: A Book of Empathy* by Susan Verde; *Hidden Figures: The True Story of Four Black Women and the Space Race* by Margot Lee Shetterly; *Hank's Big Day: The Story of a Bug* by Evan Kuhlman; *Elizabeth Blackwell: First Woman Doctor* by Francene Sabin and JoAnn Early Macken; *The Story of Ruby Bridges* by Robert Coles; *Malala: My Story of Standing Up for*

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[54] *Id.*

[55] *Id.*

[56] There were 458 book challenges in 2003, 547 in 2004, 405 in 2005, 546 in 2006, 420 in 2007, 513 in 2008, 460 in 2009, 348 in 2010, 326 in 2011, 464 in 2012, 307 in 2013, 311 in 2014, 275 in 2015, 323 in 2016, 354 in 2017, 347 in 2018, 377 in 2019, 159 in 2020, and 729 in 2021. *Top 10 Most Challenged Books Lists*, AM. LIBRARY ASS'N, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10/archive (last visited May 13, 2023). There were 1,269 challenges in 2022, "the highest number of attempted book bans since [the American Library Association] began compiling data about censorship in libraries more than 20 years ago. The unparalleled number of reported book challenges in 2022 nearly doubles the 729 book challenges reported in 2021." *Top 13 Most Challenged Books of 2022*, AM. LIBRARY ASS'N, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited May 13, 2023). In 2023's first eight months, there have been challenges to 1,915 individual titles. Ayana Archie, *There Have Been Attempts to Censor More Than 1,900 Library Book Titles So Far in 2023*, NPR (Sept. 20, 2023, 5:11 PM), https://www.npr.org/2023/09/20/1200647985/book-bans-libraries-schools#:~:text=There%20were%20nearly%20700%20attempts,in%202022%2C%20the%20organization%20said.

[57] Tina Locurto, *'Afraid to Teach': School's Book Ban Targeted Black, Latino Authors*, YORK DISPATCH (Sept. 1, 2021, 8:29 AM), https://www.yorkdispatch.com/story/news/education/2021/09/01/afraid-teach-schools-book-ban-targeted-black-latino-authors/5601980001.

[58] *Id.*

Girls' Rights by Malala Yousafzai; and *Cece Loves Science* by Kimberly Derting and Shelli R. Johannes.[59] In February 2022, two parents in McKinney, Texas, challenged 282 individual books[60] in the district's school libraries.[61] In October 2022, over one hundred school library books were "restricted" in Escambia County, Florida, prior to an official review.[62] The Republican Party of Texas, in 2022, included in its platform the intention to pass legislation that would "filter" school libraries.[63] In January 2023, the school board in Madison County, Virginia, removed twenty-one books from its high school's library shelves.[64] Each of the books had been on a list of

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[59] *Central York Banned Book List*, CENT. YORK BANNED BOOK CLUB, https://static1.squarespace.com/static/6147e65f6d67f64f407da640/t/6166f48fff2cc27cf4896e2d/1634137231681/YC+Banned+List+Infographic_REVISED.pdf (last visited May 13, 2023).

[60] This included books written by authors such as Ruby Bridges, Margaret Atwood, Ta-Nehisi Coates, and John Green. *Spreadsheet of Challenged Books in McKinney, Texas*, TEX. SCORECARD, https://texasscorecard.com/wp-content/uploads/2022/02/mckinney-isd-282-challenged-books.xlsx (last visited Feb. 19, 2023).

[61] Erin Anderson, *McKinney Parents Challenge 282 Sexually Explicit Books in School Libraries*, TEX. SCORECARD (Feb. 16, 2022) [hereinafter *McKinney Challenge*], https://texasscorecard.com/local/mckinney-parents-challenge-282-sexually-explicit-books-in-school-libraries.

[62] In the meantime, students require a form signed by their parents in order to access the books. Brittany Misencik, *100+ 'Questionable' Books Placed in Restricted Section While Escambia Schools Review Them*, PENSACOLA NEWS J. (Oct. 4, 2022, 6:00 AM), https://www.pnj.com/story/news/local/escambia-county/2022/10/04/escambia-county-banned-books-over-100-books-reviewed-ban/8166391001.

[63] REPUBLICAN PARTY OF TEX., PLATFORM AND RESOLUTIONS AS AMENDED AND ADOPTED BY THE 2022 STATE CONVENTION OF THE REPUBLICAN PARTY OF TEXAS 15 (LINDA NUTTALL ET AL. EDS., 2022), https://texasgop.org/wp-content/uploads/2022/07/2022-RPT-Platform.pdf.

[64] The books removed were: (1) *The Handmaid's Tale* by Margaret Atwood, (2) *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie, (3) *The Perks of Being a Wallflower* by Stephen Chbosky, (4) *Defy Me* by Tahereh Mafi, (5) *Ignite Me* by Tahereh Mafi, (6) *Restore Me* by Tahereh Mafi, (7) *Shatter Me* by Tahereh Mafi, (8) *Imagine Me* by Tahereh Mafi, (9) *Unravel Me* by Tahereh Mafi, (10) *Tar Baby* by Toni Morrison, (11) *The Bluest Eye* by Toni Morrison, (12) *Sula* by Toni Morrison, (13) *Love* by Toni Morrison, (14) *The Tale of the Body Thief* by Anne Rice, (15) *Interview with the Vampire* by Anne Rice, (16) *Snow Falling on Cedars* by David Guterson, (17) *Empire of Storms* by Sarah Maas, (18) *Bag of Bones* by Stephen King, (19) *11/22/63: A Novel* by Stephen King, (20) *It* by Stephen King, and

"unacceptable" books circulated by "*Focus on the Family*, an ultra-conservative family-values organization."[65] In January 2023, the school board in Pinellas County, Florida announced the removal of *The Bluest Eye* by Toni Morrison from its high school libraries.[66] This list is, again, non-exhaustive.

III. EXAMINING *PICO* AND *ACLU*

The Supreme Court of the United States addressed the issue of school library removals in the 1982 case *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.[67] *Pico*, a case which resulted in the issuance of numerous plurality opinions, provided little clarity on the issue.[68] The Eleventh Circuit's 2009 opinion in *ACLU* discusses *Pico* as if its plurality has very little authority,[69] further weakening *Pico*'s already feeble protections to school library books. Below, Part A will discuss an overview of *Pico*, while Part B will analyze its numerous opinions. Part C will discuss an overview of *ACLU*, while Part D will analyze its opinion and the effect it had on *Pico*'s efficacy.

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(21) *Furyborn* by Claire Legrand. Becky Thompson, *Madison County School Board Bans 21 Books From High School Library*, THE MADRAPP RECORDER (Jan. 14, 2023), https://madrapp.com/madison-county-school-board-bans-books-from-high-school-library-p4501-221.htm.

[65] *Id.*

[66] Dozens of parents, teachers, and students opposed the ban, which was initiated by a single parent. Jeffrey S. Solochek, *Pinellas Students, Parents Urge School Board to Reconsider Book Ban*, TAMPA BAY TIMES (Feb. 14, 2023), https://www.tampabay.com/news/education/2023/02/14/toni-morrison-bluest-eye-pinellas-school-board-parents-students-ban.

[67] *See generally* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

[68] *See generally id.*

[69] Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1199 (11th Cir. 2009).

A. An Overview of *Pico*

1. Relevant Facts & Procedural History in *Pico*

The situation that led to *Pico* was as follows: a school board ordered the removal of certain books[70] from their junior high school and high school libraries because the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[71] The books were reviewed by a "Book Review Committee[]" appointed by the school board to determine whether the books were educationally suitable, relevant, of good taste, and age-appropriate.[72] The Committee recommended that five of the books be retained.[73] The school board ignored the recommendations of the committee and issued its own decision regarding the books, removing almost all of them from library shelves.[74] Respondents[75] initiated an action against the board, alleging that the removal decision was due to political, and not educational, reasons.[76] The Federal District Court of the Eastern District of New York granted summary judgment in the school board's favor.[77] The Eastern District concluded that the removal was clearly due to the content of the books but did not find that it was in violation of the First Amendment.[78] The United States Court of Appeals for the Second

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[70] The books were: (1) *Slaughterhouse Five* by Kurt Vonnegut, Jr., (2) *The Naked Ape* by Desmond Morris, (3) *Down These Mean Streets* by Piri Thomas, (4) *Best Short Stories by Negro Writers* edited by Langston Hughes, (5) *Go Ask Alice* by Anonymous, (6) *Laughing Boy* by Oliver LaFarge, (7) *Black Boy* by Richard Wright, (8) *A Hero Aint Nothing But A Sandwich* by Alice Childress, and (9) *Soul On Ice* by Eldridge Cleaver. Pico v. Bd. Of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 389 n.2 (E.D.N.Y. 1979).

[71] *Pico*, 457 U.S. at 853.

[72] *Id.* at 857.

[73] *Id.* at 857–58.

[74] *Id.*

[75] Respondents were Steven Pico, who initiated the lawsuit against his school district at seventeen years old, along with other students. Nicole Chavez, *He Took His School to the Supreme Court in the 1980s for Pulling 'Objectionable Books. Here's His Message to Young People*, CNN (June 25, 2022, 4:00 AM), https://www.cnn.com/2022/06/25/us/book-bans-island-trees-union-free-school-district-v-pico/index.html.

[76] *Pico*, 457 U.S. at 858–59.

[77] *Id.* at 853.

[78] *Id.* at 859–60.

Circuit reversed the Eastern District's decision.[79] The Second Circuit found that the board was not entitled to summary judgment, and that they were "obliged to demonstrate a reasonable basis for interfering with respondents' First Amendment rights."[80] In the Second Circuit's opinion, Judge Sifton noted that the case involved "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters."[81] The opinion concluded that "respondents 'should have . . . been offered an opportunity to persuade a finder of fact that the ostensible justifications for [petitioners'] actions . . . were simply pretexts for the suppression of free speech.'"[82] Concurring in the result, Judge Newman "viewed the case as turning on the contested factual issue of whether petitioners' removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas."[83] The Supreme Court affirmed the Second Circuit's judgment.[84]

Not one of *Pico*'s several opinions are binding. "Plurality decisions are unique because of a conceptual gap between the legal rule and the outcome. . . . [I]n plurality decisions . . . at least two coalitions of concurring Justices articulate different legal rules in an attempt to justify the same outcome."[85] Because *Pico* has no simple majority, its precedential authority is determined by subsequent courts' interpretations.[86] "Any legal rule articulated in a plurality . . . has been implicitly or explicitly rejected by a majority of the [C]ourt."[87] A court faced with a book removal challenge may look to any of *Pico*'s opinions for authority; thus, this Comment analyzes each opinion in turn.

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[79] *Id.* at 860.
[80] *Id.* (citing Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26, 638 F.2d 404, 414–15 (1980)).
[81] *Id.*
[82] *Id.* (quoting *Pico*, 638 F.2d at 417).
[83] *Id.* at 860–61 (quoting *Pico*, 638 F.2d at 432–37).
[84] *Pico*, 457 U.S. at 853.
[85] Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1595 (1992).
[86] *See id.* at 1596.
[87] *Id.* at 1596–97.

2. An Overview of Justice Brennan's Opinion

Justice Brennan wrote the Court's plurality opinion, joined by Justice Marshall and Justice Stevens in full and Justice Blackmun in part.[88] Brennan noted that the question in this case was limited in nature: precedent established that school boards may have a fair amount of discretion on matters of curriculum, so the case at hand only involved the discretion afforded to schools in determining which library books to offer.[89] Even still, the question was further limited to only the removal of library books, excluding their acquisition from the analysis.[90] Essentially, the question before the Court was: Does the First Amendment impose limitations on local decisions regarding the removal of books from school libraries?[91] It is important to note, as Justice Brennan did, the distinction between schools' discretion when it comes to matters of curriculum and matters of library book acquisition.[92] Though not the matter before the Court, the Court in the past recognized constitutional limits imposed on schools' discretion regarding curriculum.[93] Brennan further distinguished the issue by noting that *Pico*'s decision does not apply to textbooks or any other compulsory reading part of the curriculum.[94] According to Justice Brennan, "the only action challenged in this case is the *removal* from

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[88] *Pico*, 457 U.S. at 855.
[89] *Id.* at 861–62.
[90] *Id.* at 862.
[91] *Id.* at 855–56.
[92] *Id.* at 861–62.
[93] According to Justice Brennan:

> Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. For example, *Meyer v. Nebraska* struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson v. Arkansas* declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school. But the current action does not require us to re-enter this difficult terrain . . . For as this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read.

Id. (citations omitted).
[94] *Id.* at 862.

school libraries of books originally placed there by the school authorities, or without objection from them."[95]

Brennan noted two questions at hand: (1) Are there First Amendment limitations on the discretion of local school authorities to remove library books?; and (2) Did the school board in *Pico* violate those limitations?[96] Brennan then tackled each question individually.

Brennan answered the first question by outlining the purpose of public schools, emphasizing the autonomy of local boards and authorities in managing school affairs, and "inculcating fundamental values necessary to the maintenance of a democratic political system."[97] Nonetheless, Justice Brennan then noted previous decisions where the Court has recognized that the First Amendment limits school board discretion "in matters of education."[98] This means, essentially, that schools' discretion must exist within First Amendment guardrails.[99]

Justice Brennan proceeded to outline several precedential decisions related to the intersection between the First Amendment and school autonomy. The first was *West Virginia Board of Education v. Barnette*, which held that a school's compulsion of students to salute the flag or pledge allegiance in furtherance of patriotism impedes on the liberty of students and violates the First Amendment.[100] The second was *Tinker v. Des Moines School District* ("*Tinker*"), which held that students' personal expressions can only be regulated if the expression materially disrupts the classroom or invades the rights of other students.[101] In *Tinker*, the Court wrote:

> [F]ree speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent

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[95] *Id.* This Comment adopts the same scope as Justice Brennan outlined.
[96] *Pico*, 457 U.S. at 863.
[97] *Id.* at 864 (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).
[98] *Id.*
[99] *See id.*; *see generally* Helen M. Quenemoen, Case Comment, Board of Education v. Pico*: The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103, 1121 (1984) ("*Pico*, however, does not undermine local school board authority but simply assures students that a school board, in making a book removal decision, must consider student rights.").
[100] *Pico*, 457 U.S. at 865.
[101] *Id.* at 866.

> government has provided as a safe haven for crackpots. . . . [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.[102]

After discussing the relevant precedent, Brennan concluded "that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[103] He reasoned that precedent clearly indicates the importance of First Amendment protections in allowing public debate and access to ideas.[104] Further, it is not the role of the state to narrow the knowledge publicly available.[105] Therefore, "the Constitution protects the right to receive information and ideas."[106]

Brennan then noted that the right to receive ideas is supported by the right to send them, as protected by the First Amendment: "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[107] Brennan further elaborated that the right to receive ideas is an important and necessary aspect of a recipient's First Amendment rights.[108] Precedent is clear that this principle applies to students.[109] "'[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom."[110] The use of school libraries is voluntary, as is the selection of books within said libraries.[111] They

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[102] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
[103] *Pico*, 457 U.S. at 866.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 866–67 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
[107] *Id.* at 867 (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)).
[108] *Id.*
[109] "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Id.* at 868 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
[110] *Id.* at 868–69 (quoting Keyishian v. Bd. Regents, 385 U.S. 589, 603 (1967)).
[111] *Pico*, 457 U.S. at 869.

serve a special role because they afford students "an opportunity at self-education and individual enrichment that is wholly optional."[112]

While a school board has discretion regarding the curriculum it imposes upon students, that discretion is misplaced when attempts to impose it go "beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."[113] School boards have "significant discretion to determine the content of their school libraries[,] [b]ut that discretion may not be exercised in a narrowly partisan or political manner."[114] Whether a school board violated the First Amendment "depends upon the motivation" of the school board in removing the books.[115]

Brennan found that if the books at issue were removed because they were found to be "pervasively vulgar," that would be okay.[116] Brennan noted that "if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible.'"[117]

Once Brennan established that a First Amendment right, though narrow, existed under the present facts, he proceeded to answer the second issue that he had laid out: whether the facts at hand led to the conclusion that the First Amendment was violated.[118] Brennan looked to the record to determine the motivation behind the removal of the nine books at issue.[119] He found that on their face, the criteria considered in making the removal were "permissible."[120] Such criteria were: "'educational suitability,' 'good taste,' 'relevance,' and 'appropriateness to age and grade level.'"[121] Brennan then found that because the school board did not employ "facially unbiased procedures

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 870.
[115] The Court defined such unconstitutional motivation: "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Id.* at 871.
[116] *Id.* at 871.
[117] *Id.* at 872.
[118] *Id.* at 863.
[119] *See Pico*, 457 U.S. at 871.
[120] *Id.* at 873.
[121] *Id.*

for the review of controversial materials,"[122] the record demonstrated the potentiality for biased motivations in violation of the Constitution.[123] Brennan did not conclude whether the motivations of the school board were unbiased or political.[124] He instead found that the "decision to remove the books rested decisively upon disagreement with constitutionally protected ideas."[125]

Thus, Brennan's standard, limited only to the removal of library books (and not textbooks or any other compulsory reading part of a curriculum)[126] is as follows: the removal of said books may directly implicate students' First Amendment rights.[127] These books exist in a special role, because their use by students is voluntary.[128] This is distinguishable from a school board's discretion regarding imposed curriculum.[129] While significant discretion still remains for school boards to determine the content of said libraries, school boards may not act "in a narrowly partisan or political manner."[130] Further, the motivation behind the removal determines whether the First Amendment has been violated.[131] A book being "pervasively vulgar"[132] or lacking "educational suitability"[133] are acceptable motivations.[134] Other criteria a school board may consider are "'good taste,' 'relevance,' and 'appropriateness to age and grade level.'"[135] A court may consider whether a school board reviewed allegedly controversial materials through "facially unbiased procedures" to determine the school board's motivation.[136] Finally, if a removal is motivated upon disagreement with constitutionally protected ideas, the First Amendment has been violated.[137]

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[122] *Id.* at 874.
[123] *See id.*
[124] *Id.* at 875.
[125] *Id.*
[126] *Id.* at 861–62.
[127] *Pico*, 457 U.S. at 861–62.
[128] *Id.* at 869.
[129] *Id.*
[130] *Id.* at 870.
[131] *Id.* at 871.
[132] *Id.* at 871.
[133] *Id.* at 872.
[134] *Id.* at 871–72.
[135] *Pico*, 457 U.S. at 873.
[136] *See id.*
[137] *Id.*

3. An Overview of Justice Blackmun's Concurring Opinion

Justice Blackmun's opinion concurred in part and concurred in the judgment.[138] Blackmun viewed the case as presenting a clash between two competing constitutional principles: (1) the responsibility of public schools to prepare the American citizenry with the necessary knowledge to participate in our Constitutional democracy; and (2) the operation of schools within the confines of the First Amendment in order to protect children from the prescription of ideals and politics.[139] Blackmun, quoting *Tinker*, concluded that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[140] Blackmun further concluded: "the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons."[141]

Blackmun disagreed with Brennan that what is at issue in *Pico* is the right to receive speech or information.[142] He instead concluded that states do not have an "affirmative obligation" to provide students with speech.[143] He found that the issue in *Pico* was not unique to the school library.[144] He stated "if schools may be used to inculcate ideas, surely libraries may play a role in that process."[145] Blackmun postulated that the school environment is unique as to insulate it from most First Amendment restrictions.[146] He concluded that the issue at hand was that "we must reconcile the schools' 'inculcative' function with the First Amendment's bar on 'prescriptions of orthodoxy.'"[147]

Justice Blackmun then recommended a standard which affords weaker First Amendment protections than Justice Brennan's standard:

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[138] *Id.* at 875 (Blackmun, J., concurring).
[139] *Id.* at 876.
[140] *Id.* at 877 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
[141] *Id.*
[142] *Id.* at 878.
[143] *Pico*, 457 U.S. at 878.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 879.
[147] *Id.*

so long as a school board demonstrates that its book removal was caused by something more than an attempt to avoid an unpopular viewpoint, it will have acted in compliance with the First Amendment.[148] "School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present."[149] Per Blackmun's opinion, these considerations were not barred by the First Amendment.[150]

Blackmun mentioned two precedential considerations.[151] First, *Federal Communications Commission v. Pacifica Foundation* ("*FCC v. Pacifica*"), which led Blackmun to conclude that a book can be removed because it contains offensive language without violating the First Amendment.[152] *FCC v. Pacifica*, a 1978 Supreme Court decision, held that the First Amendment would not be violated if sanctions were imposed upon a broadcast containing offensive language without a finding that the broadcast was obscene.[153] An important consideration to the Court's finding was that the broadcast would be accessible to children.[154] Second, *Pierce v. Society of Sisters*[155] ("*Pierce*"), which led Blackmun to conclude that a book can be removed because it is "psychologically or intellectually inappropriate for the age group" without violating the First Amendment.[156] Blackmun wrote:

> [T]ying the First Amendment right to the purposeful suppression of ideas makes the concept more manageable . . . Most people would recognize that

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[148] *Id.* at 880.
[149] *Id.*
[150] *Id.*
[151] *Pico*, 457 U.S. at 880.
[152] *Id.*
[153] FCC v. Pacifica Found., 438 U.S. 726, 745–50 (1978).
[154] *Id.* at 749.
[155] *Pierce* is a 1925 Supreme Court decision striking down Oregon's Compulsory Education Act, which "require[d] every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides." Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 530 (1925).
[156] *Pico*, 457 U.S. at 880.

> refusing to allow discussion of current events in Latin class is a policy designed to "inculcate" Latin, not to suppress ideas. Similarly, removing a learned treatise criticizing American foreign policy from an elementary school library because the students would not understand it is an action unrelated to the purpose of suppressing ideas. In my view, however, removing the same treatise because it is "anti-American" raises a far more difficult issue.[157]

He concluded that "[t]he First Amendment has application to all the State's activities."[158] This includes school operations.[159] "[D]ifficult constitutional problems would arise if a State chose to exclude 'anti-American' books from its public libraries—even if those books remained available at local bookstores."[160]

Blackmun's standard, which is not limited in scope to the school library,[161] is as follows: the State may suppress exposure to ideas so long as there are "sufficiently compelling reasons,"[162] and it does not have an "affirmative obligation" to provide students with speech.[163] Thus, a removal does not violate the Constitution so long as the school board demonstrates that its motivation is something beyond an attempt to avoid an unpopular viewpoint.[164] Examples of acceptable motivations are that a book contains offensive language or is "psychologically or intellectually inappropriate for the age group."[165]

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[157] *Id.* at 881.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 878.
[162] *Id.* at 877 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
[163] *Id.* at 878.
[164] *Pico*, 457 U.S. at at 880.
[165] *Id.*

4. An Overview of Justice White's Opinion

Justice White concurred in the judgment but declined to issue findings or an opinion on the First Amendment implications of the facts.[166] His concurrence, however, provided the fifth vote for the judgment.

5. An Overview of Justice Burger's Dissenting Opinion

Justice Burger issued a dissenting opinion, joined by Justice Powell, Justice Rehnquist, and Justice O'Connor.[167] The dissent took issue with the plurality's supposed expansion of First Amendment protections beyond any prior precedent in "an attempt to deal with a problem in an area traditionally left to the states."[168] The dissent claimed that if the plurality's standard was to come to pass, the Supreme Court would become a "super censor" of decisions made by school boards in regard to their libraries.[169]

The dissent criticized the scope of the issue established in Brennan's plurality opinion. Justice Burger argued that the issue in *Pico* was twofold.[170] First, whether it should be up to school boards and elected officials,[171] or teenagers and judges, to decide the administration of local schools.[172] Second, whether or not "the values of morality, good taste, and relevance to education" were sufficient reasons to remove books.[173] The dissent misconstrued the plurality and claimed that it established a First Amendment right for students to have access to certain books in their school's library.[174]

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[166] *Id.* at 883 (White, J., concurring).
[167] *Id.* at 885 (Burger, J., dissenting).
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *But cf.* Quenemoen, *supra* note 99, at 1123 ("In *Pico* the Board made the book removals a major issue at a subsequent school board election. When the incumbent members were reelected, they considered it a plebiscite approving the censorship. The Board obviously had the approval of the majority of the voters, but what of the minority of the community who disapproved of the book removals? . . . Students have constitutionally protected rights, including the right to hold a minority view.").
[172] *Pico*, 457 U.S. at 885 (Burger, J., dissenting).
[173] *Id.*
[174] *See id.* at 886.

B. An Analysis of *Pico*

Pico's plurality attempted to answer a complicated constitutional question and grappled with several competing values.[175] Brennan and Blackmun's "coalitions" disagreed on the applicable scope of *Pico*, as well as where to draw the line of permissible State discretion.[176] The Justices both contributed valuable ideas, but at the same time, offered standards which were lacking. Brennan established a standard far too focused on insubstantially defined motivation, which fails to be enforceable due to its subjectivity.[177] Blackmun's opinion, in direct contrast to Brennan's, was far too generous in scope —by refusing to carve out, as Brennan did, a special non-curricular space for library book removals. Blackmun's opinion would ultimately have the effect of allowing school boards the same amount of discretion that they have in curricular decisions. While he introduced a useful analysis of the constitutional question, his analysis was too interwoven with considerations outside of Brennan's established scope—which this Comment adopts—to be applicable without carefully parsing through.[178] This Comment will explore the relevant analysis in *Pico*'s opinions related to issues of (1) scope, (2) competing constitutional questions, and (3) an applicable standard.

1. An Issue of Scope

The *Pico* decision loses much of its precedential value due to one of the main differences in Brennan and Blackmun's opinions: To what extent does the decision apply?[179] This Comment is of the opinion that Brennan's scope, limited only to the removal of library books (and not textbooks or any other compulsory reading part of a curriculum),[180] is correct. On the other hand, Blackmun viewed the facts in *Pico* as raising a question of competing Constitutional values

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[175] *See id.* at 853 (plurality opinion).
[176] *See id.*
[177] *See generally* Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).
[178] *See Pico*, 457 U.S. at 853 (plurality opinion).
[179] *See id.*
[180] *Id.* at 861–62.

not limited to the removal of school library books.[181] Blackmun's disagreement that *Pico*'s issue was as particularized as the school library[182] is one of the reasons the plurality loses precedential value—the Justices could not even decide what the issue in the case was and, therefore, what the *Pico* standard should apply to.[183] Blackmun's concurrence raised a particularly interesting point when he concluded that the issue at hand was the reconciliation between schools' educational authority and the protections afforded by the First Amendment.[184] But this Comment disagrees that this was the only issue in *Pico*.

The dissent's definition of the issue in *Pico* misconstrued the plurality,[185] which, while flawed, did not seek to take autonomy away from local school boards.[186] Brennan carved out a *very* niche area in which his opinion should apply and took extensive care to repeatedly affirm, to the detriment of his opinion's own strength, the absolute discretion local school boards have in content-based decision-making outside of this defined niche.[187]

2. No Clear Line Between Competing Constitutional Concerns

The facts in *Pico* are difficult to grapple with due to schools' unique role in constitutional jurisprudence. It is hard to draw the line between where state sovereignty ends and students' First Amendment rights begin. The Justices disagreed with each other on where that line should be drawn and even contradicted themselves.[188] For instance, Brennan, in his opinion, took care to emphasize the autonomy that schools have to impose certain political values on their students in a situation outside the scope of the decision.[189] He then concluded that

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[181] *Id.* at 876 (Blackmun, J., concurring).
[182] *Id.* at 878.
[183] *Id.* at 853 (plurality opinion).
[184] *Id.* at 879 (Blackmun, J., concurring).
[185] *Compare id.* at 885 (Burger, J., dissenting), *with id.* at 861–62 (plurality opinion).
[186] *Pico*, 457 U.S. at 864.
[187] *Id.*
[188] *See generally id.* at 853.
[189] *Id.* at 864.

school board decisions regarding book removals should be apolitical.[190]

Brennan's opinion focused on First Amendment precedent related to the school setting, having just previously addressed the long leash granted to local schools when making educational decisions.[191] This contrast in focus emphasizes the crux of the issue that makes the question in *Pico*, and that this Comment attempts to tackle, so difficult to solve with finality. There is no doubt that schools have a special role: preparing the American citizenry with the necessary knowledge to participate in our constitutional democracy.[192] But because of the compulsion aspect of the American public school system, this Comment is of the position that the First Amendment, which has a place in schools,[193] should absolutely apply without exception to the books that local school boards have already opted to supply to the public, i.e., their students.[194] An ideal standard would not bar school librarians—or even school administrations—from being able to change their mind about the books they stock their shelves with.[195] The concern is not the innocuous decisions related to shelf space, or even—for example—preferring one book on a certain topic over

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[190] *Id.* While this distinction is necessary to place Brennan's scope within permissible precedential standards, it emphasizes the contradictons and nuance Brennan was required to navigate to afford school library book removals any modicum of First Amendment protection.

[191] *Id.* at 864–66.

[192] *E.g.*, *id.* at 864.

[193] *Id.* at 865–66.

[194] These are not authors in the abstract, but living people whose words and ideas are being condemned, often en masse in contemporary practice. *See generally* Alexandra Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html. Whether or not local government authorities deciding that books they had previously deemed, for whatever reason, sufficient to stock in their libraries are no longer suitable for student access infringes on the First Amendment rights of the authors is an interesting constitutional question, but is nonetheless outside of the scope of this Comment.

[195] "School libraries are sufficiently non-curricular such that they should be governed . . . with the recognition that books may also need to be removed for practical reasons, such as space limitations." Ryan L. Schroeder, Note, *How To Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 366 (2021).

another, but instead removal decisions motivated by disagreement with the ideas conveyed in books.

Blackmun took a different approach to the competing constitutional issues.[196] Blackmun's concurrence focused on the school library as a "check" on local authority to prescribe ideas and politics to impressionable children.[197] This concept lends credence to the idea that the library, a unique vehicle in schools because it grants students access to ideas outside of their curriculum without those ideas being prescribed, is an ideal avenue to ensure schools do not indoctrinate children.[198] If school boards maintain autonomy over curriculum and what has essentially amounted to unchecked autonomy in practice when it comes to access to ideas outside the classroom, i.e., the school library, how can we otherwise check their power and ensure schools do not prescribe orthodoxy? Blackmun's conclusion that the school environment may be insulated from First Amendment protections[199] is a dangerous idea without checks on school board authority and was worded flippantly as to disregard previous and less controversial precedent such as *Tinker*.[200] The *Tinker* ideal Blackmun quoted[201] should necessitate that states would need to meet a high threshold to remove a book from the library circulation—very few circumstances make it actually necessary to remove a book, typically space concerns or outdated material. This Comment acknowledges those circumstances and takes no issue with them. Instead it is concerned with the circumstances where a local authority chooses, without necessity, to remove a book. Blackmun's comment that the motivation to suppress exposure to ideas cannot stand without "sufficiently compelling reasons,"[202] is the essence of the kind of ideal standard this Comment recommends. The "sufficiently compelling

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[196] *Compare Pico*, 457 U.S. at 866–67 (plurality opinion), *with id.* at 879 (Blackmun, J., concurring).
[197] *Id.* at 874–76.
[198] *See id.*
[199] *Id.* at 879.
[200] *See id.*
[201] "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Id.* at 877 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
[202] *Id.*

reasons"[203] must be defined with specificity, but this is a good skeleton ideal on which an improved standard can be based.

The dissent claimed that *Pico* established a First Amendment right for students to have access to certain books in their school's library,[204] further misconstruing Brennan's plurality opinion. The opinion in no way expressly or implicitly authorized such a right.[205] Its finding was much narrower—once a school has already provided access to a book, there are certain First Amendment implications that must be considered when the school seeks to revoke that access.[206]

3. No Definitive Standard

Pico's precedential value is harmed by the plurality's failure to clearly define a workable standard that future courts could use to analyze book removals.[207] Brennan's focus on the special role of the school library as an optional opportunity for self-education,[208] followed by his emphasis on the necessity to discern the local authority's motivation in deciding the Constitutionality of the removal decision,[209] came close to getting things right. But focusing on motivation—without clear criteria—does not work in application.[210] As this Comment will later demonstrate, politically-motivated removals still pass muster in contemporary applications of the *Pico* standard, as exemplified by *ACLU*'s finding that political motivation is valid, so long as it is not the only reason for a book removal.[211] Thus, a book can be removed for political reasons so long as there is some

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[203] *Pico*, 457 U.S. at 877.
[204] *Id.* at 886 (Burger, J., dissenting).
[205] *See id.* at 870 (plurality opinion).
[206] *Id.* at 866.
[207] "The main problem with the *Pico* test is that courts do not use it consistently, which causes confusion and arbitrary modifications. This is understandable given Pico's lack of precedential value. Nonetheless, even if courts were to begin strictly applying the motivations test, it would remain an unworkable standard, because Pico and its progeny provide a 'road map' for school boards to improperly remove books." Schroeder, *supra* note 196, at 382.
[208] *Pico*, 457 U.S. at 869.
[209] *Id.* at 871.
[210] *See generally* Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009). *See also* Schroeder, *supra* note 196, at 382.
[211] "[T]he school board in Miami-Dade was almost certainly politically motivated, yet the Eleventh Circuit ruled against the students." Schroeder, *supra* note 196, at 382; *see also ACLU*, 557 F.3d at 1202.

additional reason found for the removal that the school board can point to. This is why a new standard applied with objectivity and using strict criteria is preferable.

This Comment takes no issue with Brennan's finding that a removal due to the vulgarity of a book would be permissible.[212] In fact, this was a "predictable application of precedent."[213] In one of the suggested standard modifications laid out in Part V, this Comment will expand upon this finding to ensure guardrails that define "vulgarity" narrowly, in line with other previous Supreme Court First Amendment decisions. This will ensure that such exceptions do not get applied with broad discretion, such as in the facts of *Pico*, where the removed books were described as "plain filthy."[214] Without more specificity in such a standard, who defines what is vulgar?[215] For instance, to Evangelical conservatives, a young-adult novel about the love story of two queer teenagers could be considered vulgar. What about a sexual education nonfiction book that is pragmatic about teenage sexuality and advocates for safe sex instead of chastity? Could that be vulgar?[216]

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[212] *Pico*, 457 U.S. at 871.

[213] Amy Anderson, *A Pleasure to Burn: How First Amendment Jurisprudence on Book Banning Bolsters White Supremacy*, 49 MITCHELL HAMLINE L. REV. 1, 16 (2023) [hereinafter Anderson, *A Pleasure to Burn*].

[214] *Pico*, 457 U.S. at 853.

[215] Anderson, *supra* note 214, at 16–17. One scholar suggests that there may be racial undertones in how the "vulgarity" standard is applied. For instance:

> The determination of whether certain material is considered vulgar is left to school administrators acting in consideration of "community values." The imposition of ambiguous "community values" . . . permits dominant groups to impose restrictions on those without power. In particular, the use of white cultural values as the norm when considering vulgarity inevitably leads to the silencing of BIPOC voices and the erasure of representation. The use of an allegedly "color-blind" standard, such as "community values," ultimately "represses and renders irrelevant the ways in which race shapes social relationships" and ignores the cultural context around "vulgarity" that can affect its meaning in different circumstances.

Anderson, *supra* note 214, at 17.

[216] One such book, *Safe Sex 101: An Overview for Teens* by Margaret Hyde, was included in the 282 books challenged in McKinney, Texas. The book, in a spreadsheet submitted by the challenging parents, was described as follows:

> Offers guidance to teens on how to decide whether they are ready for sex, explores the abstinence option, and provides information

Even so, in the opinion of this Comment, *Pico*'s fatal flaw is Brennan's finding that a removal due to the "educational suitability" of a book would be "perfectly permissible."[217] It is a loophole that has allowed for politically-motivated bans to be considered constitutional.[218]

In answering *Pico*'s second question, whether the school board violated the First Amendment, the Court made a mistake in validating the discretion of the school board in determining the removal criteria it considers instead of defining the limits of permissible criteria.[219] Part V of this Comment will suggest and define criteria that could be used in a new standard.

This Comment does not disagree with Blackmun's recommended standard but instead acknowledges that it is flawed and requires more specificity to ensure First Amendment protections. As it stands, it allows for virtually unchecked removal discretion.[220] His statement that schools must be able to choose preferred books without outside influence—when one is better, more relevant, or any other neutral reason[221]—is again not directly applicable to the issue this Comment addresses, because it has to do with book selection and curriculum, not book removal, but it is an interesting consideration.

This Comment seeks to adopt into its recommended standard Blackmun's mention of two precedential considerations.[222] First, *FCC v. Pacifica*'s finding on offensive language[223] may be ideal for defining the scope of the permissible issue of removal due to

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> on safe sex practices for young people who choose to become sexually active, discussing how the sex organs work, contraception, and the prevention of pregnancy and sexually transmitted diseases.

Spreadsheet of Challenged Books in McKinney, Texas, TEX. SCORECARD, https://texasscorecard.com/wp-content/uploads/2022/02/mckinney-isd-282-challenged-books.xlsx (last visited Feb. 19, 2023). The book was only on offer in the district's high school libraries and was challenged for being "too sexually explicit" and having "no educational merit." *Id.*; *McKinney Challenge*, *supra* note 61.

[217] *Pico*, 457 U.S. at 871.

[218] *See generally* Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009); *see also* Schroeder, *supra* note 196, at 382.

[219] *Pico*, 457 U.S. at 873.

[220] *See* discussion *infra* Part V.

[221] *Pico*, 457 U.S. at 880 (Blackmun, J., concurring).

[222] *Id.*

[223] FCC v. Pacifica Found., 438 U.S. 726, 745–47 (1978).

"vulgarity" that the plurality opinion considers.[224] In *FCC v. Pacifica*, Justice Stevens found:

> Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the . . . characterization of [language] as offensive could be traced to its political content . . . First Amendment protection might be required. . . . [W]ords [that] offend for the same reasons that obscenity offends . . . [have a] place in the hierarchy of First Amendment values [which] was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. . . . Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.[225]

Vulgarity, or offensive language, is an important consideration for this Comment's standard because the books it seeks to protect will be accessible to children. Second, *Pierce*'s finding on age-appropriate

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[224] *Pico*, 457 U.S. at 880, 883 (Blackmun, J., concurring).
[225] *Pacifica,* 438 U.S. at 745–47 (internal citations omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

psychological and intellectual content[226] is an important consideration for this Comment's recommended standard. It would perhaps require more nuance, but should be included.

Blackmun's theorizing on tying the First Amendment and book decisions to the suppression of ideas[227] is an interesting point and ideologically sound. But as *ACLU* will demonstrate, relying on ill-defined "motivation" to determine whether a book removal is in violation of First Amendment protections is a wholly unenforceable standard.[228] It is significant that Blackmun noted that "[t]he First Amendment has application to all the State's activities[,]"[229] because if this is the case, one can look to a breadth of First Amendment decisions to tailor a standard. Brennan's plurality has already established that book removals are distinct from the special and circumstantial isolation of curriculum discretion. Thus, when a book is removed from a school library, the state is essentially saying it finds the book, a form of speech, unsuitable for public consumption. Absent defined considerations, due to access being afforded to children, the state should not be able to do this. The Court should consider school libraries to be just as public as a local municipality's library—if not more—due to the compulsion aspect of the public school system in the United States.[230] Thus, the burden should absolutely be on the state to prove there are *solely* unbiased motivations behind a book's removal, in accordance with a strict standard or criteria, and subject to close judicial review if challenged.

Justice Burger's concern that the *Pico* standard would lead to the courts becoming "super censors"[231] of local library decisions is a valid concern, yet hindsight demonstrates that it was without grounds. It has been forty years since *Pico* was decided, and its standard has led to the opposite of overt censorship by courts.[232] More books are being

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[226] *Pico*, 457 U.S. at 880 (Blackmun, J., concurring).
[227] *Id.* at 881.
[228] *See* Am. Civ. Liberties Union of Fla. Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009); *see also* Schroeder, *supra* note 196, at 382.
[229] *Pico*, 457 U.S. at 881 (Blackmun, J., concurring).
[230] *See infra* Part IV.B.
[231] *Pico*, 457 U.S. at 885 (Burger, J., dissenting).
[232] *Contra* Quenemoen, *supra* note 99, at 1120 ("One clear legacy of *Pico* will be more litigation over school library book removals.").

removed from school libraries than ever before.[233] But, this Comment recommends a standard which seeks to avoid the necessity of any ad hoc court review. Instead, this Comment emphasizes the necessity for a standard that is enforceable and clearly defined, by which school boards would know exactly when they may run afoul of the First Amendment.

C. An Overview of *ACLU*

ACLU, a 2009 decision by the Eleventh Circuit, began as follows: an aggrieved father found that a nonfiction book,[234] written for readers aged four to eight in his daughter's school library, did not reflect what he believed to be an accurate depiction of life in Cuba, having previously been a political prisoner in the country.[235] So, he petitioned for it to be removed.[236]

The board decided to set aside decisions to keep the book.[237] This was done even after extensive review and voting by two rounds of committees on particular and careful criteria.[238] This was to the chagrin of some board members.[239] Board member Evelyn Langley Greer was quoted saying:

> Once a book is in a system, and has enjoyed the consent of the administration of being in the system, it can only be legitimately removed in this country based on

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[233] *See generally Top 13 Most Challenged Books of 2022*, AM. LIBR. ASS'N, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited Sept. 4, 2023).

[234] It is important to note that this book was categorized as nonfiction. *ACLU*'s prominence in the jurisprudence on this issue, coupled with its findings only applying to nonfiction books, leaves fiction books in a sort of standardless limbo that this Comment seeks to alleviate. *See* Jensen Rehn, *Battlegrounds For Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1426 (2023).

[235] Am. Civ. Liberties Union of Fla. Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1182–83 (11th Cir. 2009).

[236] *Id.* at 1182.

[237] *Id.* at 1184–86.

[238] *Id.*

[239] *Id.* at 1187 ("[T]he 'beauty' of the administrative procedure for requesting that a book be removed from the library was that 'it takes the emotion and the politics out' of the decision-making process 'and substitutes professional judgement.'").

> serious, material, irrevocable and clear inaccuracies and biases. The 22 professional educators who reviewed this book have affirmatively determined that that is not the case, therefore, we are here today in essentially a political process[.] We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board, which I completely understand, and with which I sympathize, but one of the things we did when we took an oath of office today is to uphold The Constitution of The United States as it has been set down and interpreted by The United States Supreme Court.[240]

Another board member described his decision regarding the book removal as follows: "[I]f I say, no, . . . I'm pro-communist; . . . if I say, yes, I'm anti . . . ."[241]

The Eleventh Circuit described *Pico* as "a badly fractured decision."[242] The opinion in *ACLU* then detailed the *Pico* standard—i.e., that school boards' removals of books cannot be solely motivated by a dislike of the ideas presented by the books—and highlighted that *Pico*'s plurality noted that the removal of a book for "educational suitability" would be permissible.[243] The opinion then went on to quote Justice White's concurrence in *Pico* in criticism of the decision.[244] The court highlighted the heart of the issue: there is no majority decision on *Pico*'s First Amendment issue.[245] The Eleventh Circuit stated: "With five different opinions and no part of any of them gathering five votes from among the nine justices—only one of whom is still on the Court—Pico is a non-decision so far as precedent is concerned. It establishes no standard."[246] The Court also suggested

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[240] *Id.*
[241] *Id.*
[242] *Id.* at 1199.
[243] *ACLU*, 557 F.3d at 1199.
[244] *Id.* at 1200 (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982)) ("*Pico* is of no precedential value as to the application of the First Amendment to these issues.").
[245] *Id.*
[246] *Id.*

that school libraries are "nonpublic fora" and therefore the books they staff should be treated as government speech.[247]

Thus, *ACLU* shined light on *Pico*'s fatal flaw: it is persuasive at best. Courts need not follow any single opinion, and may instead pull its numerous opinions to provide support for their own desired result. While *Pico* indeed held that a school library book removal violated the First Amendment,[248] that holding is essentially relegated to its particular facts, and courts are at liberty to distinguish the circumstances before them as necessary. There is no standard that courts must follow, and students' First Amendment protections related to the continued access of certain books, if they exist at all, must be parsed from other binding First Amendment decisions with unrelated fact patterns.[249]

D. An Analysis of *ACLU*

The book at issue in *ACLU* was categorized as nonfiction.[250] In diminishing the *Pico* standard and failing to address the issue of fiction books, *ACLU* leaves a dangerous gap in First Amendment protections of the issue at hand.

With the two aforementioned quotes from the school board members,[251] a reasonable mind may conclude that the decision to remove the book, even if not solely motivated by politics, was in *large* part politically motivated.[252] The Court in *ACLU* determined that there was not enough political motivation to find that the removal condemned speech as to violate the First Amendment.[253] Such a conclusion under the facts demonstrates how impractical the *Pico* standard is in application, especially now that any school board seeking to ban a book can cite to *ACLU* to add credence to the removal, even if the hypothetical removal is in large part politically

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[247] *Id.* at 1201.
[248] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 853 (1982) (plurality opinion).
[249] *See ACLU*, 557 F.3d at 1200.
[250] *Id.* at 1182.
[251] "[W]e are here today in essentially a political process . . . We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board. *Id.* at 1187.
[252] *See id.*
[253] *Id.* at 1207.

motivated.[254] One scholar criticizes *ACLU*'s decision and its impact upon *Pico*'s precedential value, stating:

> The [*ACLU*] decision demonstrates how the *Pico* motivation test can be easily manipulated due to its vagueness. Given courts' halfhearted efforts in investigating school boards' motivations, as long as some evidence exists that the school board had concerns about the educational suitability of the book (manufactured or otherwise), the court will give great weight to that evidence. Additionally, because *Pico* provides little clarity for distinguishing between content-motivated removals and viewpoint-motivated removals, courts will be able to continue to sneak in more justifications into the content-motivated category.[255]

ACLU itself rejects *Pico*'s authority, claiming that *Pico* contains no valuable precedential standard.[256] This claim by the Eleventh Circuit

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[254] Recently, the American Civil Liberties Union filed a class-action lawsuit on behalf of two minor students in Wentzville, Missouri, challenging the district's removal of *The Bluest Eye* by Toni Morrison from its school libraries. Tony Rothert, ACLU of Missouri's director of advocacy, described the removal as the district having "targeted and removed books that are from the perspective and viewpoint of racial or sexual minorities." *2 Students Sue Missouri School District Over Banned Books*, ASSOCIATED PRESS NEWS (Feb. 17, 2022, 12:24 PM), https://apnews.com/article/entertainment-education-lawsuits-st-louis-missouri-3b182505a62b2a7f340c80b5d04df35a. The United States District Court for the Eastern District of Missouri denied the ACLU's motion for preliminary injunction in this suit, rejecting the ACLU's argument that the removal of *The Bluest Eye*, along with seven other books, under the policy by which the books were removed, constituted a book ban:

> [T]his case does not involve banning books . . . . The District's policy does *not* ban the District's students from reading the books at issue here. Nor does it ban students from acquiring the books or lending the books to others. Students may borrow the books from the public library or from a friend or neighbor. They likewise are free to purchase the books . . . . So, the "overwrought rhetoric about book banning has no place" in this case.

C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F.Supp.3d 906, 909 (E.D. Mo. 2022) (quoting *ACLU*, 557 F.3d at 1218).

[255] Schroeder, *supra* note 196, at 382–83.

[256] *ACLU*, 557 F.3d at 1200.

diminishes the already weak *Pico* authority, rendering it a non-decision.[257] In sum, the Eleventh Circuit's opinion in *ACLU* considerably undermines *Pico*'s authority.

IV. THE NEED FOR A NEW STANDARD

Pico, as it currently stands, is insufficient to prevent school boards from removing library books in violation of the First Amendment.[258] Part A will take a closer look at how book bans have increased, and have even become blatantly biased, since *Pico* was decided. Part B will discuss the role of compulsory attendance laws in public schools and whether they indicate the necessity for heightened protections to library books.

A. "Book Bans" Post-*Pico*

It is important to note that "[m]any school libraries already have mechanisms in place to stop individual students from checking out books of which their parents disapprove."[259] Yet, "[p]arents, activists, school board officials and lawmakers around the country are challenging books at a pace not seen in decades."[260] Traditionally, when schools regulated the content of their libraries, that regulation was aimed at ensuring students only had access to age-appropriate material.[261] But:

> [B]ook banning has been "expanding rapidly" in the U.S. Between July [2021] and . . . March [2022], . . . 1,145 books . . . were banned across 86

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[257] The authority of circuit courts to disregard Supreme Court jurisprudence due to the deciding justices no longer being on the bench is concerning, but nonetheless outside the scope of this Comment.

[258] Anderson, *A Pleasure to Burn*, *supra* note 214, at 10–11 (citing Schroeder, *supra* note 196, at 379–82) ("The lack of definition put forward by the plurality in *Pico* has already allowed for challenges to materials in school libraries based on ideology to flourish under the guise of a concern for academic suitability, vulgarity, and excessive controversy.").

[259] Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Feb. 8, 2022), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html.

[260] *Id.*

[261] STEPHEN S. GOTTLIEB, EDUC. RES. INFO. CTR., THE RIGHT TO READ: CENSORSHIP IN THE SCHOOL LIBRARY 2–3 (1990), https://files.eric.ed.gov/fulltext/ED319067.pdf.

> school districts in 26 states, affecting more than 2 million students. Many of the banned works are about racism, gender, and sexual orientation, often by authors of colour and LGBTQ+ writers, being used to teach students about social inequality, history, and sexuality.[262]

This past year (2022) has had an unprecedented amount of book challenges and bans.[263] These challenges may be the result of "a strong belief in the power of books to introduce [students] to new ideas and . . . change their minds."[264] In twentieth century Sweden, the youth demographic grew in power both commercially and politically.[265] Due to this, the Swedish Association for Moral Culture, a pro-censorship organization, had a "strong focus on young people" in order to "guide and control their behavior."[266] Today, young American voters favor left-leaning political causes by a wide margin.[267] Generation Z, many of whom are still in school, "are [mainly] progressive and pro-government, . . . see the country's growing racial and ethnic diversity as a good thing, and [are] less likely than older generations to see the United States as superior to other nations."[268] Political groups have recognized this, as evidenced by the

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[262] David Brown, *Why Rethink Gave Margaret Atwood a Flamethrower to Fight Book Bans*, MESSAGE (May 26, 2022), https://the-message.ca/2022/05/26/why-rethink-gave-margaret-atwood-a-flamethrower-to-fight-book-bans.

[263] Heather Hollingsworth & Hillel Italie, *Activism Grows Nationwide in Response to School Book Bans*, ASSOCIATED PRESS (Mar. 1, 2022), https://apnews.com/article/entertainment-arts-and-entertainment-lifestyle-education-florida-62616d5f02b1045e734234c583c3f203.

[264] Emily J.M. Knox, *Books, Censorship, and Anti-Intellectualism in Schools*, 101 THE PHI DELTA KAPPAN 28, 29 (2020).

[265] Kristin Johansson, *Poison, Literary Vermin, and Misguided Yourths: Descriptions of Immoral Reading in Early Twentieth-Century Sweden*, *in* FORBIDDEN LITERATURE: CASE STUDIES ON CENSORSHIP 169, 181 (Erik Erlanson et al. eds., 2020).

[266] *See id.* at 171, 173, 181.

[267] Sarah McCammon, *Young Voters Tend to Lean Democrat. Conservatives are Trying to Win them Over*, NAT'L PUB. RADIO (Aug. 27, 2023, 8:08 AM), https://www.npr.org/2023/08/27/1196219597/young-voters-tend-to-lean-democrat-conservatives-are-trying-to-win-them-over.

[268] Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*, PEW RSCH. CTR. (May 14, 2020),

interrelation between efforts to gerrymander and efforts to control education: many of the over twenty states that have passed voter suppression laws have also passed laws to ban books.[269]

It is common today for school boards to review books for removal based on the request of parents[270]:

> Many parents have seen Google docs or spreadsheets of contentious titles posted on Facebook by local chapters of organizations such as Moms for Liberty. From there, librarians say, parents ask their schools if those books are available to their children. . . . Some groups . . . have essentially weaponized book lists meant to promote more diverse reading material, taking those lists and then pushing for all the included titles to be banned.[271]

Not all parents are in favor of these removals.[272] Today, there is often a "stated reason" for censorship, but in actuality, "[b]ooks that do not

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https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2.

[269] Kimberlé Williams Crenshaw, *Why Book Bans and Voter Suppression Go Hand in Hand*, L.A. TIMES (Nov. 8, 2022, 5:38 PM), https://www.latimes.com/opinion/story/2022-11-08/book-ban-voter-supression-midterms-insurrection-racism-white-supremacy.

[270] Ana Goñi-Lessan, *It's Easier to Ban Books Under New Florida Law. One Activist Wants to Ban the Bible*, USA TODAY (Apr. 28, 2022, 4:56 PM), https://www.usatoday.com/story/news/nation/2022/04/28/florida-book-ban-bible-in-schools/9575017002; *see also* Anya Kamenetz, *School Is for Everyone*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/opinion/us-school-history.html?smid=url-share ("This country has seemingly never had a harder time embracing a shared reality or believing in common values. The parents who are showing up at school boards yelling about 'critical race theory' and pronouns are trying to get public schools to bend history, reality and values to their liking . . . It would be far worse if these parents went home and created their own schools. Because their children would then grow up with one set of unchallenged beliefs, while my children and the children of like-minded people would grow up with another—emerging as adults who have no hope of understanding one another, much less living together peacefully. If we lose public education, flawed as it is, the foundations of our democracy will slip.").

[271] Harris & Alter, *supra* note 260.

[272] Hollingsworth & Italie, *supra* note 264 ("[I]f you don't want your child to have access to a book, then opt them out. That's fine. You just don't want to just take that opportunity away from my kids.").

fulfill their role as a vessel for acceptable ideas are dubbed *trash* or *filth*."[273] There are numerous reasons why parents and school officials are challenging books at an unprecedented rate.[274] One possible conclusion is that books, in the Western Christian Protestant tradition, have a sort of recognized primacy and power.[275] This tradition furthers an absolutist mindset, in direct contradiction to "intellectualism," which is considered "subversive" since "there is nothing [intellect] will not reconsider, analyze, throw into question."[276] Thus, "censors, public and private, assume that they should determine what is good and what is bad for their fellow citizens."[277]

State governments, such as Florida, have taken this one step further. Florida House Bill 1467, which allows parents to "review learning materials and contest them if they're considered inappropriate[,]" has codified this practice.[278] Senator Rob Standridge of the Oklahoma Senate filed a bill in late 2021 which addressed the issue of "the indoctrination of . . . children in school classrooms" by dealing with "sexually-graphic books in public schools, public charter schools, and school libraries . . . ."[279] Senator Standrich has stated that schools are not where "moral lessons" should be taught and has expressed concern over students being "indoctrinated."[280] Senator Standrich's bill, Senate Bill 1142, would impose significant consequences on school officials who fail to remove a book due to a written parental request within thirty days.[281] "If not removed during that time, the employee tasked with the book's removal would be dismissed or not reemployed, subject to due process provisions, and he or she could not be employed by a public school district or public charter school for two years."[282] Senate Bill 1142 also proposes to create a cause of action that would allow parents to seek monetary

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[273] Knox, *supra* note 265, at 30.
[274] *See id.*
[275] *See id.*
[276] *Id.*
[277] Guenter Jansen, *The Value of Books*, 3 AM. LIBRS. 468, 469 (1972).
[278] Goñi-Lessan, *supra* note 271.
[279] *Standridge Files Bills to Address Indoctrination in Oklahoma Schools*, OKLA. SENATE (Dec. 16, 2021, 4:30 PM), https://oksenate.gov/press-releases/standridge-files-bills-address-indoctrination-oklahoma-schools?back=/senator-press-releases/rob-standridge.
[280] *Id.*
[281] *Id.*
[282] *Id.*

damages against a school district for violating the law's provisions.[283] A prosecutor's office in Wyoming "considered charges against library employees for stocking books like 'Sex Is a Funny Word' and 'This Book Is Gay.'"[284] Librarians in Texas fear they may become the targets of criminal complaints based on statements made by Governor Greg Abbott about book availability in public schools.[285] "[L]ibrarians say that just the threat of having to defend against charges is enough to get many educators to censor themselves by not stocking the books to begin with. . . . [A]ll of a sudden you might be charged with the crime of pandering obscenity."[286]

New research suggests that censorship does not begin and end with removals: the threat of library challenges has created a "chilling effect" resulting in school districts opting not to acquire books that deal with topics such as racism, abortion, and "particularly books about LGBTQ characters and issues."[287] A study conducted by a postdoctoral fellow at Boston University's Wheelock Educational Policy Center found that "[s]chools in districts that were subject to a book challenge in the 2021–22 school year were 55 percent less likely to have acquired one of the 65 books about LGBTQ characters published between June and August 2022."[288] Further, "[e]ach new book challenged in a district reduced the probability that the district would buy a new book about LGBTQ characters by four percent."[289] This is of concern, since these decisions inhibit the ideas that students have access to in an otherwise closed-circuit learning environment in

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[283] *Id.*
[284] Harris & Alter, *supra* note 260.
[285] *Id.*
[286] *Id. But cf.* Nicole Solas, *Banned Books Week Looks More Like Porn For Kids Week*, FOX NEWS (Sept. 22, 2022, 12:00 PM), https://www.foxnews.com/opinion/banned-books-week-looks-more-like-porn-for-kids-week ("Let's get one thing straight about Banned Books Week: there are no banned books in America. . . . [I]nstead, pornographic books for kids are meticulously collected for displays in school libraries and promoted by the American Library Association's 'Banned Books Week.'").
[287] Eesha Pendharkar, *What Book Bans Are Doing to School Library Purchases*, EDUC. WEEK (Jan. 6, 2023), https://www.edweek.org/teaching-learning/what-book-bans-are-doing-to-school-library-purchases/2023/01.
[288] *Id.*
[289] *Id.*

which they are compelled to attend, and in which decisions regarding curriculum are afforded abundant local discretion.[290]

Research indicates that many people read to find acceptance and understanding within a book's pages.[291] "Books provide confirmation that others have gone through similar experiences and survived."[292] It is difficult not to notice the pattern that arises between the most challenged books of late, and it takes no vast leap in logic to understand just which students are under threat of the books they identify with being removed from their school's library shelves.[293] The most frequently challenged book in 2021 was *Gender Queer* by Maia Kobabe, a nonbinary author, followed by *Lawn Boy* by Jonathan Evison, which "follows a young Mexican American man who . . . is coming to terms with his sexual identity."[294] The third most challenged book in 2021 was *All Boys Aren't Blue* by George M. Johnson, which explored "the challenges and joys of growing up Black and queer."[295] Next was *Out of Darkness* by Ashley Hope Pérez, which "centers on a romance between a Mexican American teenage girl and a Black teenage boy."[296] The fifth most challenged book in 2021 was *The Hate U Give* by Angie Thomas, which "centers on a

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[290] *See id.*; Mary K. Novello, *A Case Against Compulsion*, WASH. POL'Y CTR. (Mar. 1, 1998), https://www.washingtonpolicy.org/publications/detail/a-case-against-compulsion; Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 861–62 (1982) (plurality opinion).

[291] Molly Strothmann & Connie Van Fleet, *Books That Inspire, Books That Offend*, 49 REFERENCE & USER SERVS. Q. 163, 164 (2009).

[292] *Id.*

[293] *E.g.*, Mike Hixenbaugh, *Banned: Books on Race and Sexuality are Disappearing from Texas Schools in Record Numbers*, NBC News (Feb. 2, 2022, 10:56 AM), https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rcna13886 (detailing a phone conversation between reporter and a teenage queer student—whose parents believe homosexuality to be a sin and do not know about her sexuality—discussing how books that the teenager identifies with are disappearing from shelves of her "safe haven," the school library); *see also* Anderson, *A Pleasure to Burn*, *supra* note 214, at 12–13 (discussing that many book bans are the result of "political movements opposed to teaching Critical Race Theory in public schools").

[294] Harris & Alter, *supra* note 260.

[295] In a county in Florida, a complaint against this book was filed with the local sheriff's department by a school board member. Johnson, in response, said "I didn't know that was something you could do, file a criminal complaint against a book." *Id.*

[296] *Id.*

Black teenage girl whose friend is shot by a police officer during a traffic stop."[297] *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie, the 2007 winner of the National Book Award, was the sixth most challenged book in 2021.[298] The novel is semi-autobiographical, exploring the experience of a boy who lives on an Indian reservation and "attends an all-white school where the only other Native American is the school mascot."[299]

Activist groups working against censorship try to navigate the school board climate under the *Pico* standard. They acknowledge that, in practice, the standard does not provide adequate protection:[300]

> [L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books.[301] The tricky area . . . is that school officials are allowed to ban books for reasons other than not approving of the viewpoints the books express. Officials might determine, for instance, that the book is too profane or vulgar. The problem is just that often our definitions, for example, of vulgarity or age appropriateness, are for lack of a better word, mushy, and they can also hide or be used as pretext for viewpoint-based decisions by the government[.][302]

In January 2022, a Tennessee school board banned the Pulitzer Prize-winning graphic novel *Maus* by Art Spiegelman.[303] Spiegelman's novel tells the story of his parents, who survived Auschwitz, and depicts Nazis as cats and Jewish people as mice.[304] The banning decision was due to the novel's inclusion of curse words and because it depicted a naked character.[305] In response, Spiegelman said in an

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[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] Goñi-Lessan, *supra* note 271.
[301] *Id.* (referring to Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion)).
[302] *Id.*
[303] Jenny Gross, *School Board in Tennessee Bans Teaching of Holocaust Novel 'Maus'*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/us/maus-banned-holocaust-tennessee.html.
[304] *Id.*
[305] *Id.*

interview, "This is disturbing imagery . . . But you know what? It's disturbing history."[306] "After reading the minutes of the meeting, Mr. Spiegelman said he got the impression that the board members were asking, 'Why can't they teach a nicer Holocaust?'"[307]

A school board in McKinney, Texas, amended their book review policy in January of 2023.[308] Now, instead of being required to read the entirety of a challenged book, reviewers may only read the passages at issue.[309] The irony of this sort of review is perhaps best highlighted by Azar Nafisi's memoir, *Reading Lolita in Tehran*. In her memoir, Nafisi writes:

> The chief film censor in Iran, up until 1994, was blind. Well, nearly blind. Before that, he was the censor for theater. . . . An assistant who sat by him would explain the action onstage, and he would dictate the parts that needed to be cut. After 1994, this censor became the head of the new television channel. There, he . . . demanded that the scriptwriters give him their scripts on audiotape; they were forbidden to make them attractive or dramatize them in any way. He then made his judgments about the scripts based on the tapes. More interesting, however, is the fact that his successor, who was not blind—not physically, that is—nonetheless followed the same system. Our world under the mullahs' rule was shaped by the colorless lenses of the blind censor.[310]

Deborah Caldwell-Stone, the American Library Association's Director of the Office for Intellectual Freedom, cautioned against the aggressive policing of books for reasons such as inappropriate content.[311] She noted that these efforts "could limit students' exposure

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[306] *Id.*
[307] *Id.*
[308] Susan McFarland, *Following Banned Books Controversy, McKinney ISD Changes Library Review Process*, DALL. MORNING NEWS (Jan. 25, 2023, 5:43 AM), https://www.dallasnews.com/news/2023/01/25/mckinney-isd-eases-library-book-review-process.
[309] *Id.*
[310] AZAR NAFISI, READING LOLITA IN TEHRAN 24–25 (2003).
[311] Harris & Alter, *supra* note 260.

to great literature."[312] "If you focus on five passages, you've got obscenity . . . If you broaden your view and read the work as a whole, you've got Toni Morrison's 'Beloved.'"[313]

B. Should Compulsory Attendance Lead to Heightened Protection?

The First Amendment of the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech."[314] The American public school system has a compulsion aspect. State laws require parents to educate their children themselves, send them to school from approximately ages four to eighteen, or face fines and/or jail time.[315] Even when parents dedicate their time or resources to tailoring their children's education, through either homeschooling or private schooling, they may run afoul of state laws, which enforce a base-level standard for the education of its citizenry.[316] The United States Supreme Court has held that states have the power to impose regulations on the duration of education required of their citizenry.[317] Reasonable state regulations, which the Supreme Court has held include statutes compelling school attendance, have only narrow exceptions.[318] Those exceptions must be more than a "matter of personal preference."[319]

Equally crucial to ensuring an educated citizenry, American public schools are involved in the inculcation of American children to value certain ideals:

> [P]ublic schools are also for making Americans. Thus, public education requires lessons about history—the American spirit and its civics—and also contact with and context about other Americans: who we are and what has made us. . . . When partisan politicians ban the

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[312] *Id.*
[313] *Id.*
[314] U.S. CONST. amend. I.
[315] Novello, *supra* note 291.
[316] *See id.* ("[E]nforcement efforts appear to be directed at families who place their children in unapproved education settings[.]").
[317] Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).
[318] *Id.* at 215.
[319] *Id.*

> teaching of our country's full history, children are purposely made ignorant of how American society works. And the costs of this ignorance to American democracy will be borne by us all.[320]

For better or worse, American education is not isolated from politics. "[E]ducation is inherently political, because it enables students to understand, question and change their world."[321] Students learn about and are taught to question the world around them.[322] In fact, "freedom comes from having the tools to comprehend a range of good and bad experiences and weigh the options for charting [the] future."[323] However, the inherent politicization and local, disjointed control of education in the United States implicates concerns over questions such as: What values are children being taught? Who decides how sensitive or controversial subject matter is handled? At what point are we prescribing ideals instead of allowing students to reach their own conclusions? Does choosing one book over another to be taken off a library shelf say something about what values or voices are prioritized?

Compulsory school attendance places states in a unique role. "Public school students provide the sole example of a captive audience forced to hear state-approved viewpoint-based information."[324] But free speech rights may only be limited "in order to accomplish legitimate pedagogical goals."[325] Education does not happen in a

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[320] Heather C. McGhee & Victor Ray, *School Is For Making Citizens*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/opinion/us-school-citizenship.html.

[321] *Id.*

[322] Helen M. Quenemoen argues that:

> Students need to be taught to cope with diversity rather than be protected from it. Television and newspapers regularly present a broad view of reality. Many students will soon go beyond their local communities and be confronted with a variety of values and ideas, some of which might not be acceptable in the community in which they were educated. Limiting the information available to a high school student who will soon be considered an adult and asked to act the part of a responsible citizen is not a realistic or responsible role for the public schools.

Quenemoen, *supra* note 99, at 1121.

[323] McGhee & Ray, *supra* note 321.

[324] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 997 (2009).

[325] *Id.* at 998 n.388.

vacuum, and like most everything else, is subject to flaws. This Comment does not condemn the American public school system, but argues that its compulsion aspect must be acknowledged, so that policies can be put in place to correct for its indoctrination potential. One of the most important "checks" to the fairly generous authority local school boards enjoy is the availability of outside research in the form of the school library. Access to library books is beneficial to students.[326]

V. SUGGESTING A NEW STANDARD

A well-educated citizenry is a commendable goal for any nation. But how can a citizenry be considered "well-educated" when it can only access certain ideas? President John F. Kennedy once said:

> If this nation is to be wise as well as strong, if we are to achieve our destiny, then we need more new ideas from more wise men reading more good books in more public libraries. These libraries should be open to all—except the censor. We must know all the facts and hear all the alternatives and listen to all the criticisms. Let us welcome controversial books and controversial authors. For the Bill of Rights is the guardian of our security as well as our liberty.[327]

The Supreme Court should modify *Pico* to establish a new, stricter standard that encourages courts to evaluate book bans with a well-

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[326] Access to books provides students with a variety of perspectives, which is critical for the development of their critical thinking skills. *The Importance of Books in Education: An Undeniable Source*, EDUEDIFY (Sept. 1, 2022), https://eduedify.com/importance-of-books-in-education; *e.g.*, Denice Adkins, *U.S. Students, Poverty, and School Libraries: What Results of the 2009 Programme for International Student Assessment Tell Us*, SCH. LIBR. RSCH., Sept. 11, 2014, at 2 (explaining that studies demonstrate that access to "adequate collections of materials" led to students scoring higher on exams).

[327] John F. Kennedy, *Quotable Quote*, GOODREADS, https://www.goodreads.com/quotes/48906-if-this-nation-is-to-be-wise-as-well-as (last visited Sept. 11, 2022).

defined, consistent test rather than by ad hoc review.[328] In fact, "[t]he malleability of the standard proposed in *Pico* leaves a wide field for interpretation and permits politically motivated and performative challenges with suspect justifications for removing texts from library shelves. . . . Ultimately, Pico's own ambiguity has undermined the First Amendment protections the plurality intended to reinforce."[329] *Pico* is too flawed, with too many loopholes, to be allowed to stand as the guiding authority on the matter, particularly after the Eleventh Circuit dismissed its authority in *ACLU*. *Pico*'s plurality allows for too much discretion. This modification, or correction, to *Pico* should be made without delay. The United States has an urgent need to adopt a new standard, as this Comment earlier demonstrated that thousands of books are being removed from school libraries each year,[330] a trend that is only increasing and is a blatant violation of First Amendment protections, even under the most limited reading of *Pico*.

A. A New "*Pico* Test"

This new standard must: (1) guarantee First Amendment protection to school library books, as was done in *Pico*; (2) be in line with "educational suitability," but with more specificity; (3) be enforceable; and (4) maintain reasonable exceptions.

1. Guaranteeing First Amendment Protection to School Library Books

There is much that *Pico* does get right regarding the balance between First Amendment rights and school autonomy. Justice Brennan was clear "that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[331] *Pico* is correct that it is not the role of the state to narrow the knowledge publicly available[332] and that "the

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[328] Quenemoen, *supra* note 99, at 1120 ("Since plaintiffs now have a cause of action, and since the Supreme Court majority failed to agree upon definitive standards for review, each case will have to be tried individually.").
[329] Anderson, *A Pleasure to Burn*, *supra* note 214, at 10–11.
[330] *See* discussion *infra* Parts II & IV.
[331] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion).
[332] *Id.*

Constitution protects the right to receive information and ideas."[333] "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[334] A new, ideal *Pico* standard would include a re-emphasis of these statements and would have a majority of Justices signing on.

2. Educational Suitability, with Teeth

An ideal standard would be in line with "educational suitability," but with more specificity (i.e., books can be removed because they advocate for violence, are obscene[335] or inappropriate for the age group of the school, or are obtusely factually inaccurate as confirmed by a neutral third party). Several authoritative First Amendment cases address criteria for when speech can be limited that the Supreme Court may reference to tailor this standard.[336] *Pico* itself mentioned several cases that have these criteria. Justice Blackmun highlighted two precedential considerations.[337] In his concurrence, he called attention to *FCC v. Pacifica*, which led him to conclude that a book can be removed because it contains offensive language without violating the First Amendment.[338] Justice Blackmun also turned to *Pierce*, which led him to conclude that a book can be removed because it is "psychologically or intellectually inappropriate for the age group" without violating the First Amendment.[339] Justice Brennan's plurality found that it is acceptable for the books to be removed because they were found to be "pervasively vulgar."[340] Brennan also found such criteria as "'educational suitability,' 'good taste,' 'relevance,' and

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[333] *Id.* at 866–67 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
[334] *Id.* (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)).
[335] For an in-depth discussion of the permissibility of children's access to obscene materials, see Todd E. Pettys, *Serious Value, Prurient Appeal, and "Obscene" Books in the Hands of Children*, 31 WM. & MARY BILL RTS. J. 1003 (2023).
[336] One scholar recommends combining *Pico* with *West Virginia State Board of Education v. Barnette* and *Brown v. Entertainment Merchants Ass'n*. Rehn, *supra* note 235, at 1409.
[337] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring).
[338] *Id.*
[339] *Id.*
[340] *Id.* at 871 (plurality opinion).

'appropriateness to age and grade level'" to be "permissible."[341] This Comment recommends that a modified *Pico* should define and standardize such criteria so local school boards may consistently make removal decisions while keeping in line with the principles of the First Amendment.[342]

The findings of Brennan's and Blackmun's opinions may be combined into a singular standard. Brennan's standard, which is limited only to the removal of library books (and not textbooks or any other compulsory reading part of a curriculum),[343] could be the basis. His opinion found that removing library books may directly implicate "the First Amendment rights of students."[344] The standard may consider motivation, though it should note that motivation (especially "educational suitability") is too subjective to be the only factor determining a First Amendment violation. Though, if a removal is motivated by disagreement with constitutionally protected ideas, the First Amendment has been violated.[345] *Pico*'s plurality, at least on its face, makes viewpoint-based removals unconstitutional, yet school boards have been left "with a set of easily manipulatable legal standards."[346] A new, combined standard could also include considerations from Blackmun's opinion, such as his findings of acceptable motivations (a book is removed because it contains offensive language or is "psychologically or intellectually inappropriate for the age group").[347] Blackmun's statement that "[s]chool officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present,"[348] may also be included.

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[341] *Id.* at 873.
[342] As one scholar notes: "Whether a book runs afoul of . . . vague prohibitions . . . becomes a subjective matter of opinion, often that of a complaining parent or a deferential school board. This is exactly the kind of arbitrary and unmoored standard that courts have held is impermissible in other contexts . . . ." Andrew Perry, Pico*, LGBTQ+ Book Bans, and the Battle for Students' First Amendment Rights*, 32 TUL. J.L. & SEXUALITY 197, 216–17 (2023).
[343] *Pico*, 457 U.S. at 861–62.
[344] *Id.*
[345] *Id.*
[346] Schroeder, *supra* note 196, at 365.
[347] *Pico*, 457 U.S. at 861–62.
[348] *Id.*

In sum, the Court is not without guidance and authority that it could turn to in order to create a workable standard. A new, ideal *Pico* standard would include an analysis and application of these criteria to the nuanced question and facts that *Pico* tackles and would have a majority of Justices signing on.

3. An Enforceable Standard

There is a glaring necessity for a new standard that puts school boards on clear notice of when they may be violating the First Amendment to lessen the number of instances that require individual citizens to challenge removals. Currently, challenged book removals lead to judicial review of the record to determine if the removals were politically motivated.[349] This is inferior to a hypothetical clear standard with rules that can be easily adhered to, and that would—ideally—not require quite as many activist groups, parents, and students to dedicate resources to litigation to check local book removal discretion. A new, ideal standard would shift the emphasis from the balancing seemingly favored in *Pico* to a more straightforward and universal test.[350] The ruling in *ACLU* also emphasizes ad hoc judicial review by distinguishing the challenged book from the books in *Pico* for several reasons, including but not limited to the challenged book being nonfiction.[351] This disparity leaves a significant gap in jurisprudence in this area, as three-quarters of the books that are banned throughout the United States are fiction.[352] Ad hoc balancing "is 'ambiguous and unpredictable in application,' . . . fails 'to establish a constitutional standard for adjudicating claims in a principled fashion,' and . . . tends 'to legitimate restrictions on speech . . . because

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[349] Schroeder, *supra* note 196, at 378–380.

[350] Schroeder emphasizes the necessity for an objective standard:

> [F]or a school board's challenged book removal to be proper, the board should have to prove that inclusion of the book would "materially and substantially disrupt the work and discipline of the school" or that the book needs to be removed for practical reasons, such as shelf space limitations, damage, or obsolescence.

Id. at 387.

[351] Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1182 (11th Cir. 2009).

[352] Friedman & Farid Johnson, *supra* note 3.

First Amendment claims [are] construed as simply private interests to be juxtaposed with public interests.'"[353]

4. Other Solutions

Another way that First Amendment protections may be accomplished is through procedural regulations. The Court in *Pico* addressed this when it found that because the books were not removed through "facially unbiased procedures for the review of controversial materials,"[354] there was the potential for biased motivations.[355] School boards may "develop policy statements on book procurement" and removal, such as a prescription of administrative procedures tailored for age groups and grade levels, the accommodation of local communites' objections to books before being added to the library, or adding a "neutral review committee which would examine, discuss, and make recommendations regarding library selections[,]" which school boards would be required to honor.[356] The American Library Association and National Council of Teachers of English, two groups that work to resist book banning efforts, recommend that steps to protect books should be taken before attempts to challenge books even begin.[357] In both *Pico* and *ACLU*, books were removed *despite* the professional judgement of educators advising to the contrary.[358] At the very least, school boards should have a standard process for both

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[353] John R. Vile, *Ad Hoc Balancing*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/888/ad-hoc-balancing (last visited Nov. 1, 2022).

[354] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 874 (1982) (plurality opinion).

[355] *See id. But see* Schroeder, *supra* note 196, at 381 ("It is unclear, given the abundance of evidence that the board disagreed with the views espoused by the books, why the court would need to resort to evidence of suspect procedures. . . . [This] was consistent with the . . . general reluctance to critically examine boards' motivations despite [the] courts purportedly relying on *Pico*.").

[356] GOTTLIEB, *supra* note 262, at 3.

[357] *Id.*

[358] *Pico*, 457 U.S. at 857–58; Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1184–86 (11th Cir. 2009).

their book selection and removal decisions.[359] This could mitigate the potential for bias to interfere with educational decisions.[360]

VI. CONCLUSION

Public education is compulsory, state-controlled, and political. If the First Amendment does not govern it, what can it govern? Books have been banned throughout recorded history. Censorship is not a new problem; seemingly, so long as there are ideas, there are people who find them dangerous. While significant progress against censorship has been made in the United States, more books are being removed from school libraries than ever before. Many of these books have Black or queer characters and authors.

The recent uptick in book removals across the United States has demonstrated the need for a new and improved "*Pico* Test": one that (1) guarantees First Amendment protections to school library books; (2) is in line with "educational suitability," but with more specificity; (3) is enforceable; and (4) maintains reasonable exceptions. This new test would ideally insulate students' First Amendment rights from local legislative whims and ensure a clear and enforceable standard for when, exactly, book removals are appropriate.

While this country is no stranger to censorship, it can also learn from and improve upon its past. In light of *ACLU* and the recent uptick in book challenges throughout the United States, it is time for the Supreme Court to revisit their decision in *Pico* to definitively rule on where the First Amendment stands in the balance between students' and local authorities' rights.

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[359] GOTTLIEB, *supra* note 262, at 3.

[360] It is important to note that this section does not suggest that any recommended procedural solutions should be Constitutionally required. Rather, school boards may implement them in order to avoid book removal challenges at the outset.

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HEADS UP: THE NFL & COGNITIVE INJURIES

Zacarias Gonzalez *

I. INTRODUCTION

Over time, the NFL's insufficient research and apparent indifference towards findings concerning cognitive and concussive injuries experienced by their athletes has exposed countless players to undue risks during their careers and beyond.[1] Most recently, Miami Dolphins Quarterback Tua Tagovailoa sustained massive head and neck injuries in back to back games.[2] In a game against the Buffalo Bills, Linebacker Matt Milano pushed Tagovailoa to the ground, causing his head to smash against the hard turf.[3] Tagovailoa was helped up by his teammates, but could not hold the weight of his body and was having serious difficulties staying balanced.[4] He left the game and was temporarily listed as questionable to return with a possible head injury.[5] Having passed the test according to the NFL's return-to-play safety protocol and with the approval of the team doctor, the

[1] Jeremy Paul Gove, Note, *Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem*, 14 VAND. J. OF ENT. & TECH. L. 649, 649 (2012).

[2] *See generally* Zac Al-Khateeb, *Tua Tagovailoa concussion history: Revisiting Week 3 controversy vs. Bills, later head injuries to Dolphins QB*, THE SPORTING NEWS (Jan. 15, 2023), https://www.sportingnews.com/us/nfl/news/tua-tagovailoa-concussion-week-3-dolphins-bills/in0yyd86o2oymmv01mdxqhwm.; *see also* Marcel Louis Jacques, *Miami Dolphins' Tua Tagovailoa released from hospital after suffering head and neck injuries*, ESPN (last visited Oct. 28, 2023), https://www.espn.com/nfl/story/_/id/34692842/miami-dolphins-quarterback-tua-tagovailoa-taken-hospital-head-neck-injuries.

[3] *Id.*

[4] *Id.*

[5] *Id.*

quarterback came back into the game to begin the third quarter and missed just five offensive snaps.[6] The very next week, Tagovailoa was rammed into the ground by Cincinnati Bengals defensive lineman Josh Topu.[7] After sustaining the hit, Tagovailoa stayed motionless for minutes as television cameras captured horrifying images of his fingers being stuck in an unnatural position before he was carted off the field and immediately taken to the hospital.[8]

Instances of misdiagnoses and the subsequent suffering of major concussive injuries are common in professional football players. The NFL's general disregard for injuries has led to increased skepticism of how the NFL handles the safety of its players after they have sustained a concussive injury. Section II will begin by discussing the classifications of the NFL as an entity, the teams, and the players. Section III will detail a brief history of concussions in NFL football and studies regarding these injuries. Section III will examine how cognitive injuries pose severe threats to players' health. Sections IV through VI will consider cases filed and the league or teams' potential liability for causing players to suffer from said injuries. Lastly, section VII will examine current solutions implemented by the NFL to reduce head injuries, as well as their investment in improving the health and safety of players in the future.

II. CLASSIFYING THE NFL, ITS THIRTY-TWO MEMBER ORGANIZATIONS, AND THE PLAYERS

The NFL was founded in the 1920s, providing a sporting spectacle Americans had never witnessed on a grand stage.[9] The NFL quickly became one of the world's most successful, popular, and lucrative sports leagues, grossing billions of dollars in revenue each

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[6] *See generally* The Athletic Staff, *Dolphins' Tua Tagovailoa details night of his concussion: 'I don't remember being carted off*, THE ATHLETIC (Oct. 19, 2022), https://theathletic.com/3709768/2022/10/19/tua-tagovailoa-concussion-dolphins/.

[7] *Id.*

[8] Mike Fisher, *Tua Tagovailoa Concussion Again Vs. Bengals After Buffalo Bills Controversy*, SPORTS ILLUSTRATED (Sept. 29, 2022, 10:59 PM), https://www.si.com/nfl/bills/news/tua-tagovailoa-concussion-again-vs-bengals-after-buffalo-bills-controversy.

[9] TRAVIS R. BELL ET AL, CTE, MEDIA, AND THE NFL: FRAMING A PUBLIC HEALTH CRISIS AS A FOOTBALL EPIDEMIC 1 (2019).

year.[10] The NFL consists of two structured conferences containing thirty-two member teams in total.[11] With thirty-two member teams and billions on the line, the NFL is, and has always been, avid about avoiding any negative publicity regarding their entity.[12] Due to this, "the NFL regulates just about everything pertaining to their teams' operations, including league policies, player appearance, marketing, and safety, among other items."[13]

The NFL is an unincorporated association. The league regularly operates throughout the United States but maintains its headquarters in New York.[14] An unincorporated association is not a separate legal entity, rather it is a form of organization consisting of two or more individuals who are considered members of the association.[15] The NFL consists of thirty-two member teams. One of the most important features of the unincorporated association is the members' agreement to co-operate in furthering a common purpose.[16] Therefore, members of the association have duties and liabilities that stem from the rules of the association.[17] Moreover, members of the association may incur personal liability for the debts and obligations of the association.[18] The proper scope of liability of a member extends beyond their individual actions and includes acts in which they

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[10] Plaintiff's Original Complaint at 1, *Alexander v. Nat'l Football League*, No. 12-cv-00794 (S.D. Tex. Mar. 14, 2012), http://nflconcussionlitigation.com/wp-content/uploads/2012/01/Alexander-v.-NFL.pdf.

[11] First Amended Complaint for Damages at 7, *Pear v. Nat'l Football League*, No. CV-11-08395 R (C.D. Cal. Dec. 9, 2011), http://nflconcussionlitigation.com/wp-content/uploads/2012/02/download-66.pdf.

[12] Plaintiff's Original Complaint at 1, *Myers v. Nat'l Football League*, No. 12-cv-00582 (S.D. Tex. Feb. 24, 2012), http://nflconcussionlitigation.com/wp-content/uploads/2012/02/Myers-v.-NFL.pdf.

[13] Plaintiff's Original Complaint, *supra* note 10, at 1.

[14] First Amended Complaint for Damages, *supra* note 11, at 5.

[15]Wesley A. Sturges, *Unincorporated Associations As Parties to Actions*, 33 YALE L.J. 383, 397 (1924).

[16] *Id.*

[17] *Unincorporated Nonprofit Associations: Opportunities and Risks*, LAWYERS ALLIANCE FOR NEW YORK (Apr. 16, 2020), https://lawyersalliance.org/userFiles/uploads/legal_alerts/Unincorporated_Nonprofit_Associations_FAQs_COVID_April_2020.pdf.

[18] *Id.*

participate, authorize, consent to, or ratify.[19] As such, "[t]he liability of a member of an unincorporated . . . association is based upon his direct, active negligence, whether it takes the form of an act or a failure to act."[20] The liability for a member of an unincorporated association, like the NFL, is based on a closeness test. The court will look at (1) the negligent individual's relationship to the unincorporated association, (2) the scope of the negligent individual's duties, (3) whether the individual's actions actually amounted to negligence, and (4) whether the negligence of the individual directly caused or contributed to the injuries suffered.[21] Accordingly, players who incur injuries stemming from the negligence of the league's members and are able to establish the necessary elements have the potential to recover damages.

NFL Properties, LLC is a limited liability company that is engaged in, among other things, approving, licensing, and promoting equipment used by each one of the thirty-two member teams.[22] An LLC is a non-incorporated form of business organization that allows flexibility among the individuals involved and their needs.[23] The makeup of an LLC can include "[m]embers that each own and control equal parts of the business, or an LLC can be managed by some members with different control and profit allocations among all the members."[24] Additionally, an LLC allows the individuals to enjoy limited personal liability in the business, which generally means an investor or other individual in a legal capacity cannot be held responsible for liabilities or damages of the business.[25] However, a court is entitled to pierce the corporate veil to hold individual members of the LLC personally liable for the company's actions.[26] The court examines various factors including the presence of fraud, misconduct,

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[19] Guyton v. Howard, 525 So. 2d 948, 954 (Fla. Dist. Ct. App. 1988).
[20] *Id.* at 956.
[21] Patrick Spicer & Una Donovan, *Liability in Unincorporated Associations*, MATHESON: INSIGHTS (Mar. 25, 2019), https://www.matheson.com/insights/detail/liability-in-unincorporated-associations.
[22] First Amended Complaint for Damages, *supra* note 11, at 7.
[23] *Limited Liability Company*, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/limited_liability_company_(llc).
[24] *Id.*
[25] JEROLD A. FRIEDLAND, UNDERSTANDING PARTNERSHIP AND LLC TAXATION 6 (3rd ed. 2012).
[26] *Id.*

or injustice as the primary indicators in deciding to pierce the veil.[27] For example, when players sustain a head injury and the member teams, in conjunction with the NFL and its safety protocols, decide to have a player return to action prematurely, the entity and its members are availing themselves to liability for any secondary or subconcussive injuries due to their misconduct.[28] Therefore, NFL Properties, LLC may be held liable as an entity for injuries suffered by individual players if the proper elements have been established.

In *American Needle v. NFL*, Justice Stevens stated, "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[29] The United States Supreme Court held that each one of the thirty-two member teams in the NFL is a legally distinct and separate entity from the other member organizations, as well as the NFL itself.[30] Therefore, the member teams are not considered to be unincorporated associations. The thirty-two teams are organized under different classifications including limited liability companies, limited partnerships, corporations, and basic partnerships.[31] Furthermore, the NFL is not the employer of the individual athletes that make up the team.[32] Rather, the players are the professional employees of the independent teams organized within the NFL, making the ability to pursue claims involving the league and its thirty-two member organizations much more difficult.[33]

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[27] Jimerson Birr, *The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts,* JIMERSON BIRR: BLOG (Mar. 2, 2016), https://www.jimersonfirm.com/blog/2016/03/the-five-most-common-ways-to-pierce-the-corporate-veil-and-impose-personal-liability-for-corporate-debts/.
[28] *See generally* Richard Weinmeyer, *Concussion-Related Litigation against the National Football League*, AMA J. of Ethics (July 2014) https://journalofethics.ama-assn.org/sites/default/files/2018-05/hlaw1-1407.pdf.
[29] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 185 (2010).
[30] Complaint at 19, *Hairston v. Nat'l Football League*, No. 2:12-cv-00989-AB (E.D. Pa. Feb. 24, 2012), http://nflconcussionlitigation.com/wp-content/uploads/2012/02/Hairston-v.-NFL.pdf.
[31] *Id.* at 19-20.
[32] *Id.*
[33] *Id.*

III. A HISTORY OF CONCUSSIONS AND THE NFL

More than 50 years ago, a group of medical organizations and professionals from across the globe defined concussions as complex brain injuries caused by forceful impacts to the head or body.[34] Concussions often lead to temporary problems with brain function, but typically the injuries will get better on their own.[35] Although concussions can cause structural changes in the brain, the symptoms medical professionals are able to observe are mostly due to how the brain functions.[36] Concussions may also have different levels of severity, with or without loss of consciousness. The aforementioned definition and common features of concussion were established to provide recommendations for the improvement of safety and health of athletes who suffer traumatic brain injuries when participating in their respective sports.[37] Despite a common understanding in the scientific and medical communities of what constitutes a concussion, brain scans will typically appear normal in an individual with a concussion, thus causing difficulty for healthcare providers to completely comprehend such injuries.[38]

The brain health of American football players is a heavily debated and widely researched issue. In 2015, a medical study related to the neuropathology of traumatic brain injury stated, "traumatic brain injury occurs when a force transmitted to the head or body results in neuropathological damage and dysfunction."[39] Professional football players often experience long term, repetitive, mild traumatic brain injuries (MTBIs) due to the violent physical nature of the sport.[40]

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[34] *See* Gove, *supra* note 1, at 654; Mark Aubry et al., *Summary and agreement statement of the first International Conference on Concussion in Sport, Vienna 2001*, 36 BRIT. J. SPORTS MED. 6 (2001).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Ann C. McKee et al., *The Neuropathology of Traumatic Brain Injury,* 127 HANDBOOK OF CLINICAL NEUROLOGY 45 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4694720/.
[40] Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 131 (2005), https://pubmed.ncbi.nlm.nih.gov/15987548/.

Despite the vast improvement of sports technology, helmets have done little to combat these repetitive brain injuries.[41] According to Dr. Bennet Omalu, a forensic pathologist who studied the brains of deceased retired NFL players, the helmets worn by football players are great for protection of the skull, but neglect the brain, which upon impact, collides with the walls of the skull.[42] Omalu stated: "I've seen so many cases of people like motorcyclists wearing helmets. On the surface is nothing, but you open the skull and the brain is mush."[43]

In the early days of football, the heads of the athletes were not involved in the game because their helmets were only a light leather shell constructed to protect the ears of players.[44] However, the technological improvements of helmets (leather to plastic; open-faced to face bars and masks) have allowed them to be used in the field of play.[45] Helmets have become more of a weapon and less of a shield which has, in turn, amounted to massive increases in long term, repetitive MTBIs and concussions suffered by professional football players.[46]

Over the years, the NFL has gradually implemented modest alterations to the rules as an attempt to make the game safer. However, the application of new rules has not caused substantial changes to truly shield the players from repetitive brain injuries.[47] In the 1960s and 1970s, the league enacted some of the first rules regarding head safety.[48] The rules included forbidding the grabbing of another player's facemask and a prohibition against slapping an opposing

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[41] Gove, *supra* note 1, at 655.
[42] Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ MAGAZINE (Sept. 14, 2009), https://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions.
[43] *Id.*
[44] Gove, *supra* note 1, at 656.
[45] *Id.*
[46] *Id.;* Complaint at 17, Easterling v. Nat'l Football League, Inc., No. 11-cv-05209-AB (E.D. Pa. Aug. 17, 2011), https://docs.justia.com/cases/federal/district-courts/pennsylvania/paedce/2:2011cv05209/435351/4 ; *see also* Taylor Simpson-Wood & Robert H. Wood, *When Popular Culture and the NFL Collide: Fan Responsibility in Ending the Concussion Crisis*, 29 MARQ. SPORTS L. REV. 13, 15 (2018).
[47] Gove, *supra* note 1, at 656; First Amended Complaint for Damages at 13-15, Maxwell v. Nat'l Football League, No. CV-11-08394 R, (C.D. Cal. July 19, 2011).
[48] Gove, *supra* note 1, at 656.

player's head when attempting to get past them.[49] Despite these new rules, the NFL failed to implement any in-game punishments for violating the rules until the mid-1970s.[50]

As the NFL began to take notice of players suffering from head injuries, the league decided to take a deeper look into concussions. [51] In the mid-1990s, the NFL assembled an MTBI committee of medical personnel and outside professionals in an attempt to promote a more complete understanding of the causes, diagnoses, treatment, and prevention of concussions.[52] Despite the league's apparent desire to fully understand the athletes' head injuries, the NFL selected a rheumatologist, Dr. Elliot Pellman, as the leader of the new committee.[53] A rheumatologist is an individual specializing in the treatment of rheumatic illnesses, including "arthritis, anemia, weakness, weight loss, fatigue, joint or muscle pain, autoimmune disease, and anorexia."[54] Although the new head of the committee had valuable experience working in the NFL, he lacked expertise regarding concussions and brain injuries.[55] For example, during a game in which Pellman was working as the Jets' team physician, one of the team's wide receivers suffered a concussion that knocked him unconscious.[56] However, after being evaluated by Pellman, he was allowed to re-enter the game just plays later.[57] Although he was appointed as the head of the committee, instances such as the one above illustrate that Pellman did not truly understand concussions, their severity, or their effects on athletes.[58]

Despite the lack of expertise, the MTBI committee found that "[r]eported concussions occurred at a rate of 0.41 concussions per

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[49] *Id.*
[50] *Id.*
[51] Gove, *supra* note 1, at 658; Paul Tagliabue, *Tackling Concussions in Sports*, 53 NEUROSURGERY 796, 796 (2003).
[52] Gove, *supra* note 1, at 659.
[53] Gove, *supra* note 1, at 659.
[54] *Id.*; MARGARET SCHELL FRAZIER & JEANETTE DRZYMKOWSKI, ESSENTIALS OF HUMAN DISEASES AND CONDITIONS 161 (6th ed. 2015).
[55] Gove, *supra* note 1, at 659; First Amended Complaint for Damages, *supra* note 47, at 13.
[56] Gove, *supra* note 1, at 659-660.
[57] *Id*. at 660.
[58] *Id.*

game between the 1996 and 2001 seasons."[59] Additionally, more than half of the individuals who incurred a reported concussion, continued playing or alternatively continued to participate in the same game after a very brief stint on the bench.[60] These actions put the players at grave risk of second impact syndrome[61] and potentially life-long brain damage.[62] However, the committee found that "NFL players recover fully from concussions within one hour, while post-concussion signs and symptoms resolve more quickly in NFL players than they do in non-athletes."[63] The committee came to the conclusion that injuries which had gone unreported were mild and could be recovered from quickly.[64] This is because professional football players were not only very well-conditioned and extremely physically fit, but also ordinarily dealt with pain throughout the games and wanted to get back on the field as soon as possible.[65] The committee assumed that due to the physical attributes of the athletes, they were automatically less likely to suffer from concussions and post-concussion symptoms.[66]

Further, the MTBI committee essentially dismissed the idea that professional football players in the NFL could suffer from chronic traumatic encephalopathy, known as CTE.[67] CTE is a progressive degenerative brain condition that is caused by repeated blows to the head and repeated instances of concussion.[68] CTE involves symptoms

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[59] *Id.* at 661.
[60] *Id.; see* Daniel J. Kain, *"It's Just a Concussion:" The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697, 704 (2009).
[61] Todd May, et. Al. *Second Impact Syndrome*, NAT'L LIBR. OF MED. (July 3, 2023), https://www.ncbi.nlm.nih.gov/books/NBK448119/#:~:text=Introduction,initial%20head%20injury%5B1%5D (occurs when a person sustains a second head injury prior to a complete recovery of the first head injury).
[62] Kain, *supra* note 60, at 703; Gove, *supra* note 1, at 661-662.
[63] Gove, *supra* note 1, at 662.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id*. at 663.
[68] Joshua Piercey, *Stop Playing Through It: Why Indiana Needs to Reassess Its Stance Towards Brain Injuries and Its Current Concussion Protocol in High School Sports*, 17 IND. HEALTH L. REV. 313, 314 (2020); Alzheimer's Association,

such as "memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and eventually progressive dementia."[69] For years, CTE was most commonly reported in professional and Olympic boxers.[70] However, studies conducted by the MTBI committee revealed that collisions by professional football players gave rise to brain bashing against the skull at a higher velocity and with significantly greater force than pro boxers' punches.[71]

A pivotal shift in NFL regulations concerning the brain and head health of professional football players occurred when the league universally prohibited the utilization of helmets to initiate contact such as butting, spearing, or ramming against opponents as a measure to address the concussion crisis.[72] While the mentioned rule played a vital role in advancing safety, football players in the 1970s, 1980s, and 1990s were coached and motivated to employ all aspects of their helmets for blocking, tackling, butting, spearing, ramming, or causing harm to opposing players.[73] Despite safety concerns, it is probable that players were not familiar with alternative approaches to playing the game.[74] Hence, even if the NFL had made it mandatory for teams to allocate portions of practice time to refine their tackling techniques, it is unlikely players would be capable of modifying their tackling approach adequately to adhere to the rule.[75] Additionally, the rule prohibiting the use of helmets to butt, spear, or ram opponents was not enforced in games until well after the findings of the MTBI were

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Chronic Traumatic Encephalopathy (CTE), (last visited Oct. 18, 2023), https://www.alz.org/alzheimers-dementia/what-is-dementia/related_conditions/chronic-traumatic-encephalopathy#:~:text=Chronic%20traumatic%20encephalopathy%20(CTE)%20is,with%20the%20development%20of%20dementia.

[69] *Chronic Traumatic Encephalopathy FAQs*, BOS. UNIV. ALZHEIMER'S DISEASE RSCH. CTR. https://www.bu.edu/alzresearch/ctecenter/chronic-traumatic-encephalopathy-faqs/#CTE.

[70] Gove, *supra* note 1, at 663.

[71] *Id.*

[72] *Id.* at 657; Class Action First Amended Complaint at 7, *Easterling*, No. 11-cv-05209-AB, https://docs.justia.com/cases/federal/district-courts/pennsylvania/paedce/2:2011cv05209/435351/4.

[73] Gove, *supra* note 1, at 657; Class Action First Amended Complaint, *supra* note 72, at 7.

[74] Wood, *supra* note 46, at 17.

[75] *Id*. at 18.

published.[76] A game penalty would normally have accompanied the rule change, however it took decades for helmet to helmet contact to become a personal foul.[77]

At first glance, the NFL's rule regarding spearing appeared to be a step forward in the league's endeavor to prevent players from sustaining brain injuries, but the NFL has been the subject of many criticisms, particularly by its own athletes.[78] Some of the league's current and former players, including the former Vice President of the NFL Players Association (NFLPA), believe the league's response to the concussion crisis places players on the field in difficult situations. These situations result in different injuries and fail to make the game of professional football any safer.[79] Former Super Bowl winning cornerback Richard Sherman stated, "[i]t's ridiculous. . . [l]ike telling a driver if you touch the lane lines, you're getting a ticket. (It's) gonna lead to lower-extremity injuries."[80] According to members of the NFLPA, there is a need for the NFL to take a more imaginative and strategic approach to the concussion problem, rather than implementing new measures that are merely perceived as favorable in terms of player safety.[81]

Eliminating the use of the helmeted head as the initial contact area for blocking and tackling should have been an important way to keep the head out of football. [82] However, efforts to dissuade players from employing their heads to create forceful impacts while carrying the ball, blocking, or tackling have been downplayed by the individuals most crucial to proper implementation of the rule—the league, coaches, and referees. [83] The players were not originally taught that the helmet should only have been used for protection, rather than as a weapon against an opponent.[84] The league's disregard for the

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[76] Gove, *supra* note 1, at 657.
[77] *Id.*
[78] Wood, *supra* note 46, at 17 (spearing is an illegal tackling technique in which a player makes initial contact with the crown of their helmet by launching their body head-first).
[79] *Id.*
[80] *Id.* at 17-18.
[81] *Id.* at 17.
[82] Gove, *supra* note 1, at 657.
[83] *Id.*
[84] *Id.*

findings of their own studies and the continued negligence in properly implementing the spearing rule caused significant head injuries to numerous athletes in the NFL leading to much greater risks of potentially permanent effects.[85]

IV. CASES SHOWING COGNITIVE INJURIES POSE SEVERE THREATS TO PLAYERS' HEALTH

Over the last twenty years, the NFL has been party to a major uptick in litigation regarding concussions, the handling of such injuries, and the long-term detrimental effects of concussions on its players, including hundreds who have filed both class action and individual lawsuits.[86] Players, families, and the estates of deceased former players allege the NFL knew about the long-term health risks associated with concussions and deliberately ignored, as well as actively concealed, this information in order to protect the economic value of the game. [87]

One of the earliest cases concerning concussions was brought by the estate of Michael Webster against former NFL Commissioner Pete Rozelle, Bert Bell, and the NFL Retirement Plan.[88] Webster, also known as "Iron Mike," was a center on the offensive line for the Pittsburgh Steelers, playing fifteen seasons, during which he won four Super Bowls, and participating in about 250 games—the most ever played by a center in the history of the NFL.[89] A center has the responsibility of holding the football on the ground until the quarterback decides to snap the ball, making it the most exposed and

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[85] Class Action First Amended Complaint, *supra* note 72, at 4.
[86] *See* Press Release, NFL, NFL, ex-players agree to $765M settlement in concussions suit (Aug. 29, 2013), https://www.nfl.com/news/nfl-ex-players-agree-to-765m-settlement-in-concussions-suit-0ap1000000235494; *see also* Associated Press, Ten retired NFL players sue league's benefits plan (Feb. 9, 2023), https://www.espn.com/nfl/story/_/id/35623612/ten-retired-nfl-players-sue-league-benefits-plan.
[87] *See* Plaintiff's Original Complaint, *supra* note 10, at 2; *see also* First Amended Complaint for Damages, *supra* note 11, at 11-12.
[88] Jani v. Bell, 209 F. App'x 305, 305 (4th Cir. 2006).
[89] *Id.* at 307; *see* Gove, *supra* note 1, at 664.

unprotected position in all of football and subjecting the player to repeated blows from opposing defensive linemen.[90] Although the slapping of an opposing player's head was outlawed only two seasons into Iron Mike's career, defensive linemen and other defensive players continued to use the head slap and other violent strategies to disorient others for the entirety of his career.[91] A treating doctor once asked Webster if he had been involved in an automobile collision to which he responded: "[o]h, probably about 25,000 times or so."[92]

Once retired, Webster filed a disability claim against the NFL and became subject to physical, psychiatric, and psychological examinations and evaluations that revealed he had suffered numerous concussions.[93] The exact number of concussions was unknown because the league did not keep any records of concussions or head injuries.[94] In his initial disability claim to the NFL, Webster submitted medical records and affidavits suggesting that his disabilities began while he was still playing professional football.[95] Webster contended that by the time of his retirement from the NFL in 1990, he was completely disabled and should have been entitled to active player benefits from the Retirement Board of the NFL.[96] Notwithstanding Webster's contention, the Board claimed he had not become completely disabled until six years after he left the game of football.[97] A postmortem autopsy revealed that he had been suffering from CTE due to numerous episodes of mild traumatic or concussive brain injury.[98]

Since Webster's unfortunate death, thousands of professional football players have brought their own stories to light in an attempt to

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[90] *Bell*, 209 F. App'x at 307.
[91] *Id.*
[92] STEVE FAINARU & MARK FAINARU-WADA, LEAGUE OF DENIAL: THE NFL, CONCUSSIONS, AND THE BATTLE FOR TRUTH 57 (2013).
[93] *Id.*
[94] *Id.*
[95] Brett Edwin LoVellette, *"Mortal [K]ombat in cleats": An Examination of the Effectiveness of the National Football League's Disability Plan and its Impact on Retired Players*, 36 PEPP. L. REV. 1101, 1129 (2009).
[96] *Id.*
[97] *Id.* at 1130.
[98] Gove, *supra* note 1, at 664; *see also* BENNET OMALU, PLAY HARD, DIE YOUNG: FOOTBALL, DEMENTIA, DEPRESSION, AND DEATH 89 (2008).

hold the league legally liable for their total disregard of player safety regarding head injuries. For example, Charles Fred Alexander, Jr., Greg Louis LaFleur, and Lamar Lavantha Lathon filed a joint complaint against the NFL.[99] Charles Fred Alexander, Jr., was drafted by the Cincinnati Bengals in 1979 and played for seven seasons.[100] Greg Louis LaFleur was drafted by the Philadelphia Eagles in 1981 and played for six seasons.[101] Lamar Lavantha Lathon was drafted by the Houston Oilers in 1990 and played for ten seasons.[102] Each of these three men suffered numerous concussions throughout the course of their careers.[103] However, the team physicians never warned these players about the risks of returning to the field prematurely, nor were they informed about any possibility of suffering long-term effects due to these injuries.[104] Since retirement, each of these men has suffered from various health afflictions, including but not limited to severe migraines, trouble sleeping, dizziness, loss of memory, depression, blurred vision, and hearing loss.[105] The lack of concern for the players' health and total failure to warn players of the adverse effects of head injuries are the most substantial factors contributing to the past and present injuries of these men.[106]

Though players and the families of deceased former players were already confronting the NFL on a scale that had not previously been seen, the tragic death of a modern football superstar and one of the greatest players to ever play the game struck a nerve. Very few men have impacted the game of football like Junior Seau did throughout his two-decade career.[107] Seau was one of the most ferocious hitters the league has seen and displayed immense speed

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[99] Plaintiff's Original Complaint, *supra* note 10, at 1.
[100] *Id.* at 19.
[101] *Id*.
[102] *Id.* at 20.
[103] *Id.* at 19-20.
[104] *Id.*
[105] *Id.*
[106] *Id*. at 23.
[107] *Junior Seau*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/junior-seau/ (last visited Dec. 28, 2022).

when tracking the ball.[108] Over the course of his career, Seau was a pro bowler, an All-Pro, NFL's Defensive Player of the Year, and he helped lead his hometown San Diego Chargers to their first and only Super Bowl appearance.[109] Seau soon became a household name and one of the league's most popular players.[110]

During his time in the League, Seau played linebacker, one of the most difficult positions to play, requiring incredible amounts of toughness. [111] Despite all the accolades and popularity he amassed, his greatness could not shield him from enduring decades of abuse as a linebacker in the NFL.[112] Seau decided to step away from the game in 2009 as a future first-ballot Hall of Fame player.[113] However, after only three years in retirement, at the age of 43, Seau was found dead by his girlfriend due to a self-inflicted gunshot wound to the chest.[114] Junior Seau's tragic suicide captured the attention of the league, the media, current and former NFL pros, the medical and scientific communities, and individuals around the globe.[115] People were stunned and immediately began to question why Seau would take his life after only being retired for a few years, but studies would show that CTE caused by repetitive blows to the head played a role.[116]

In 2013, Dr. Russell Lonser, the former chief of surgical neurology at the National Institute of Health (NIH), helped put together a study of Junior Seau's brain that was "blinded" to ensure its independence.[117] The study involved three neuropathologists, (each being independent of the NIH) all of whom "were given unidentified

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[108] Stephen Sheehan, *Junior Seau's Tragic Death Exposed the Lethal Impact of CTE*, SPORTSCASTING (June 21, 2020) https://www.sportscasting.com/the-tragic-death-of-junior-seau-exposed-the-lethal-impact-of-cte/.
[109] *Junior Seau*, *supra* note 107.
[110] Sheehan, *supra* note 108.
[111] *Id.*; *Junior Seau*, *supra* note 107.
[112] Sheehan, *supra* note 108.
[113] *Id.*
[114] *Junior Seau Found Dead in Apparent Suicide,* CBS NEWS (May 3, 2012, 9:16 AM), https://www.cbsnews.com/news/junior-seau-found-dead-in-apparent-suicide/.
[115] Sheehan, *supra* note 108.
[116] *Id.*
[117] Mark Fainaru-Wada and Steve Fainaru, *Doctors: Junior Seau's brain had CTE*, ESPN (Jan. 9, 2013), https://www.espn.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players.

tissue from three different brains; one belonged to Seau, another to a person who had suffered from Alzheimer's disease, and a third to a person with no history of traumatic brain injury or neurodegenerative disease."[118] The three neuropathologists each arrived at the same conclusion: Seau's brain showed definitive and significant signs of CTE.[119] The results of the NIH's research came as a shock because Seau had never been diagnosed with a concussion or other head injury while playing in the NFL.[120] However, it is safe to say he endured dozens of head injuries that went undocumented.[121] Junior Seau's death exposed the lethal impact of undiagnosed CTE on professional football players.

Unfortunately, Junior Seau is not the only player who was discovered to have suffered from CTE after tragically passing away.[122] Dave Dureson, a star safety of the Chicago Bears and a Super Bowl Champion, retired from football at the age of thirty-two and became a successful businessman.[123] After his retirement and a few years of operating his business, Dureson began to struggle with mental health, pain, confusion, and persistent headaches.[124] In 2011, Dureson committed suicide by shooting himself in the chest.[125] Before Dureson took his own life, he messaged his family asking that his brain be used for research regarding CTE.[126] After his death, neurologists at Boston University established that Dureson had in fact suffered from CTE.[127] Dureson was later portrayed in the 2015 film *Concussion*, which drew public attention to diagnoses of CTE in professional football players.[128]

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[118] *Id.*
[119] *Id.*
[120] Sheehan, *supra* note 108.
[121] *Id*.
[122] Kirk Fox, *A Tribute to the NFL Players Who Suffered CTE Brain Injury*, LEGACY (Feb. 7, 2020), https://www.legacy.com/news/culture-and-history/a-tribute-to-the-nfl-players-who-suffered-cte-brain-injury/.
[123] John Moriello, *The Tragic Death of Chicago Bears Star Dave Dureson*, SPORTSCASTING (June 13, 2020), https://www.sportscasting.com/the-tragic-death-of-chicago-bears-star-dave-duerson/.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

Tragedies such as those mentioned above have become more prominent in recent years due to the growing controversy surrounding the wide range of symptoms that make diagnosis, treatment, and return-to-play standards difficult.[129] Less than half of American football players self-report concussive symptoms due to an injury incurred in the field of play,[130] either because of their desire to continue playing or an absence of understanding regarding concussion symptoms.[131] Even when a team doctor finds that a player may have a concussion, over fifty percent of these individuals are allowed to reenter the game.[132] This leads to recurring concussions and a likelihood of negative long-term consequences, such as CTE.[133]

V. CONCUSSION LITIGATION IN THE NFL

Until the United States Congress stepped in, the NFL was reluctant to acknowledging the large accumulation of evidence linking football-related concussions and the long-term effects of such injuries.[134] In the Fall of 2009, doctors, players, executives, and members of the United States Congress came together "to debate over revelations that former NFL players may suffer from memory-related disorders at a much higher rate than the population at large."[135] Representatives at the House Judiciary Committee hearing "compared the NFL's stance on concussions to tobacco companies' denial that

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[129] William P. Meehan III & Richard G. Bachur, *Sport-Related Concussion*, 123 PEDIATRICS 114, 116-17 (2009).
[130] *Id.* at 115.
[131] *Id.*
[132] Arash Markazi, *Dangerous Games: Doctors Show Link Between Concussions and Dementia*, SPORTS ILLUSTRATED (Apr. 23, 2007), https://www.si.com/more-sports/2007/04/24/concussion-summit.
[133] *Id.*
[134] Catherine K. Dunn, *Football is Taxing on Players' Brains—So Why Not Tax The NFL? A Simple Solution To The Headache of Concussion Litigation*, CHARLESTON L. REV. 1, 6 (2012).
[135] Alexander C. Hart, *NFL Head Injuries a Hot Topic in Congress*, L.A. TIMES (Oct. 29, 2009, 12:00 AM) http://articles.latimes.com/2009/oct/29/sports/sp-football-congress29; *see generally Legal Issues Relating to Football Head Injuries (Part I & II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2009), https://www.govinfo.gov/content/pkg/CHRG-111hhrg53092/html/CHRG-111hhrg53092.htm;

smoking causes lung cancer,"[136] and requested the league to release its data on concussions for independent review.[137] Independent research requested by the House Judiciary Committee revealed that continuous concussive blows to the heads of athletes were associated with CTE.[138]

Since this hearing, the league began to openly recognize that the MTBIs and concussions suffered by professional football players may have long-term adverse ramifications.[139] The NFL began making efforts to better protect their players, such as a partnership with General Electric "to begin 'the development of imaging technology that [will] detect concussions and encourage the creation of materials to better protect the brain.'"[140] The NFL also began hiring independent neurological consultants to be present on the sidelines in an attempt to aid in detecting head injuries.[141] Additionally, the NFL decided to strictly enforce the aforementioned spearing rule to outlaw the use of the crown of the helmet in striking opponents.[142] However, the NFL's efforts were too little too late and seemingly occurred only as a response to the surmounting litigation the league was beginning to encounter.[143]

In February of 2013, there were over 200 separate concussion-related lawsuits filed, with more than 4,000 player plaintiffs and nearly

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[136] *Legal Issues Relating to Football Head Injuries (Part I & II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 469 (2009) (testimony of Bernie Parrish, retired NFL player), https://www.govinfo.gov/content/pkg/CHRG-111hhrg53092/html/CHRG-111hhrg53092.htm; Dunn, *supra* note 134, at 6.

[137] *Legal Issues Relating to Football Head Injuries (Part I & II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Honorable John Conyers, Jr., Chairman of the Committee), https://www.govinfo.gov/content/pkg/CHRG-111hhrg53092/html/CHRG-111hhrg53092.htm; Dunn, *supra* note 134, at 6-7.

[138] *Legal Issues Relating to Football Head Injuries (Part I & II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 66 (2009) (testimony of Robert C. Cantu, M.D., Chief of Neurosurgery Serv., and Dir., Sports Med., Emerson Hosp., Concord, Mass.), https://www.govinfo.gov/content/pkg/CHRG-111hhrg53092/html/CHRG-111hhrg53092.htm; Dunn, *supra* note 134, at 6-7.

[139] Dunn, *supra* note 134, at 7.

[140] *Id*.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 7-8.

6,000 total plaintiffs.[144] In *In re National Football League Players Concussion Injury Litigation*, retired professional football players brought suit against the NFL. [145] The plaintiffs asserted claims including, but not limited to, negligence, fraudulent concealment, fraud, negligent misrepresentation, wrongful death and survival, civil conspiracy, and loss of consortium.[146] The plaintiffs alleged: (1) the NFL perpetually repudiated any causal link between concussions and MTBIs suffered by players in the course of play and the issues stemming from such injuries; (2) the NFL zealously hid any findings of studies conducted by medical professionals that demonstrated a causal connection between on-field concussions, MTBIs, and post-career damage; (3) the NFL's decision to conceal the risks of concussions and repeated MTBIs exposed players to unnecessary dangers; and (4) the NFL caused, contributed, and increased the risk of sustaining concussions by concealing the true risks of such injuries.[147]

In these lawsuits, the biggest obstacle plaintiffs faced was being able to prove the NFL, as an entity, proximately caused the injuries incurred by the plaintiffs.[148] In order for the plaintiffs to prove proximate causation, "[t]he actions of the person (or entity) who owes you a duty must be sufficiently related to [the] injuries such that the law considers the person to have caused your injuries in a legal sense."[149] Moreover, the individuals or families who brought suit against the NFL were required to establish that MTBIs and concussive injuries were caused by a failure on behalf of the league to enact proper rules and regulations, thereby proximately causing the long-term neurological deficits incurred by the athletes.[150]

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[144] Dunn, *supra* note 134, at 8. (The other plaintiffs include the spouses of the players.)
[145] *In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d 410 (3d Cir. 2016).
[146] *Id*. at 422.
[147] *Id.*
[148] Dunn, *supra* note 134, at 11.
[149] *Proximate Cause*, N.Y.C. BAR LEGAL REFERRAL SERV., https://www.nycbar.org/get-legal-help/article/personal-injury-and-accidents/proximate-cause (last visited Dec. 29, 2022).
[150] Dunn, *supra* note 134, at 11.

Prior to the late 1990s, the research conducted by medical-science experts was not completely transparent regarding what long-term risks athletes may be exposed to after having suffered from an MTBI or concussion.[151] As a result, causation became difficult to establish and troublesome for NFL athletes suffering from long-term neurological deficits to prove which impacts contributed to their cognitive decline.[152] The difficulty in proving causation arose from the fact that many of the men who have played football in the NFL and suffered from such injuries have participated in football from the time they were young boys.[153] Therefore, it is simple for the NFL to attribute the long-term injuries incurred by the plaintiffs to other collisions and injuries suffered outside of their time on the NFL gridiron.[154] Dr. Joseph Maroon, a trainer in the NFL and member of the NFL Committee, argued "that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players."[155] Likewise, when evidence of CTE was found in yet another late NFL player's brain tissue, the Commissioner of the NFL stated: "[He] may have had a concussion swimming. . . . [a] concussion happens in a variety of different activities."[156]

The NFL believed the players had an inability to establish which collisions gave rise to concussions and, eventually, long term neurological deficits. However, the plaintiffs contended the league's failure to warn players regarding the risks associated with MTBIs and concussions was only one of several contributing factors to their injuries.[157] Since the plaintiffs maintained that multiple causes exist, application of the "but-for" standard was proper.[158] The "but-for" test determines whether an action may be considered the cause of an injury

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[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*.; *see also* Alan Schwarz, *12 Athletes Leaving Brains to Concussion Study*, N.Y. TIMES (Sept. 24, 2008), https://www.nytimes.com/2008/09/24/sports/football/24concussions.
[156] *Id.*
[157] Dunn, *supra* note 134, at 11; *see also* Peterson v. Gray, 628 A.2d 244, 246 (N.M. 1993) (holding a defendant's tortious conduct must be a cause of the harm not "the cause").
[158] Dunn, *supra* note 134, at 12.

if, but for the action, the injury would not have occurred.[159] Accordingly, plaintiffs were permitted to acknowledge they may have sustained MTBIs and experienced concussive collisions off the football field, and more specifically outside of the context of professional football in the NFL.[160] Therefore, if the plaintiffs were able to establish that their neurological injuries became aggravated by the league's failure to warn of the long-term effects of concussive injuries, the incorporation of the "but-for" standard would be appropriate. [161]

Although the plaintiffs could prove the NFL proximately caused the injuries incurred or that their neurological injuries were aggravated by the league's failure to warn of the long-term effects of concussive injuries, such claims are preempted. Preemption is applicable when a higher authority of law and a lower authority conflict and the lower authority is thereby displaced by the higher authority.[162] In *Allis Chalmers Corp. v. Lueck*, the Supreme Court of the United States held that "when resolution of a state law claim is substantially dependent on analysis of the terms of a collective bargaining agreement (CBA), that claim must either be treated as a Section 301 [of the Labor Management Relations Act] claim or dismissed as preempted by federal labor contract law."[163] Applying Section 301 of the Labor Management Relations Act, courts utilize a two-step approach to determine if the claim is adequately independent to persist through preemption.[164] Under this two-step approach, the CBA provision at issue must detail the right upon which the claim is based and the claim must require interpretation of a provision of the

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[159] Hillel David et al., *Proving Causation Where The But For Test is Unworkable*, THE ADVOCATE'S QUARTERLY Vol. 30 (Jul. 22, 2005), https://mccagueborlack.com/uploads/articles/43/hd-pm-py_proving-causation.pdf.
[160] Dunn, *supra* note 134, at 12.
[161] *Id.*
[162] *Preemption,* CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Dec. 29, 2022).
[163] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 202 (1985).
[164] Labor Management Relations Act, § 301, 29 U.S.C.A. § 185; *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 422.; Williams v. Nat'l Football League, 582 F.3d 863, 874 (8th Cir. 2009); Dunn, *supra* note 134, at 14.

CBA.[165]

The NFL continued to treat these cases as simple labor controversies over health and safety in the workplace.[166] Due to the rigid character of federal labor law, an arbitrator is preferred to interpret the CBA. If the claim requires interpretation of numerous provisions, it will be entirely preempted.[167] Accordingly, as applied to the NFL, "if [a judge] has to examine all of the past and current CBAs, to determine what duties, if any, were owed to the players, . . .the claims must be dismissed."[168] However, plaintiffs contended their claims were not preempted because the league's obligation to ensure player safety by executing rules and equipment regulations, as well as failing to perform the duty owed, was not definitively stated in the language of the NFL's CBA.[169] Rather, the duty arose from the NFL's position as the overseer of professional football and keeper of vital information regarding health and safety, including the risks of concussions.[170] The player-plaintiffs maintained their argument that the NFL breached its duty "when it concealed this information, failed to warn its players, spread misinformation, and set up a 'sham' Mild Traumatic Brain Injury Committee in [the mid 90s]."[171]

In turn, the NFL asserted that without an interpretation and clarification of the CBA, it would be unfeasible and impracticable to ascertain the extent of the league's obligation.[172] The NFL filed a motion to dismiss which noted a number of provisions contained in the CBA essential to resolving the player's claims, including: "player

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[165] Labor Management Relations Act, § 301, 29 U.S.C.A. § 185; *Williams*, 582 F.3d at 874; Dunn, *supra* note 134, at 14.
[166] *Id.*; *Williams,* 582 F.3d at 874.
[167] Dunn, *supra* note 134, at 14.
[168] *Id.*
[169] *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 421; Dunn, *supra* note 134, at 14.
[170] *In re Nat'l Football League Players Concussion Injury Litig.,* 821 F.3d at 421*;* Dunn*, supra* note 134, at 14.
[171] Dunn, *supra* note 134, at 14; *see In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 439.
[172] *See In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d at 422.

medical care, health and safety, and rulemaking."[173] The league argued the claims brought against it are preempted by federal labor law because rectification of the plaintiff's claims hung considerably on an examination of the terms contained within the CBA.[174] According to the NFL, the responsibility for player health and safety is allocated to the individual member clubs through the CBA, and players could not bypass the issues of preemption by reaching over the member teams to sue the league.[175]

In order for the plaintiffs to have demonstrated the NFL's negligence, they must have established the NFL had a duty, and been able to define the scope of the duty and the standard of care that was required in observing proper of protocols for the health and safety of the players.[176] The NFL contended that resolution of the plaintiffs' claims, whether they are based in negligence or fraud, would turn on an analysis of the terms of the CBA.[177] If the court found the aforementioned questions indistinguishably linked with the CBA, the court would presumably dismiss the claims by way of preemption.[178]

According to the league, any claims based on fraud should be subject to preemption due to the need to analyze the CBA.[179] In order to prove fraud, the plaintiff-players must have demonstrated "justifiable reliance on the misrepresentation."[180] The NFL claimed it

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[173] Master Motion to Dismiss Brief, In re National Football League Players' Concussion
Litigation, No. 2:12-md-02323-AB at 14 (E.D. Pa. Aug. 30, 2012); Dunn, *supra* note 134, at 15.
[174] Master Motion to Dismiss Brief, In re National Football League Players' Concussion
Litigation, No. 2:12-md-02323-AB at 15 (E.D. Pa. Aug. 30, 2012) [hereinafter Motion to Dismiss]; Dunn, *supra* note 134, at 15.
[175] Smith v. Nat'l Football League Players Ass'n, 2014 WL 6776306, at *7 (E.D. Mo. Dec. 2, 2014).
[176] Clark Belote, *Football and Torts: Two American Traditions and the NFL Concussion Litigation,* U. RICH. L. REV. 1, 32 (2012).
[177] *In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d at 422; Dunn, *supra* note 134, at 14.
[178] *In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d at 439; Dunn, *supra* note 134, at 16.
[179] *In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d at 422; Belote, *supra* note 176, at 32.
[180] Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); Belote, *supra* note 178, at 33.

is not possible for the court to ascertain if the plaintiffs reasonably and justifiably relied on information provided by the NFL without interpreting the CBA's health and safety provisions.[181] The plaintiffs' allegations stated the misrepresentation and failure to inform players of the dangers related to concussions and sub-concussive injuries caused reasonable and justifiable reliance upon said information.[182] Conversely, the NFL argued multiple provisions contained within the CBA must be examined in order to determine whether or not the plaintiff's reliance was justifiable.[183] Moreover, the league contended the plaintiffs' claims for "post-retirement fraudulent concealment" are also subject to the doctrine of preemption because "the plaintiffs' fraudulent concealment and negligent misrepresentation claims hinge on a duty to disclose, the assessment of any such duty on the part of the NFL requires an interpretation of the CBA's numerous post-retirement benefits provisions."[184] Furthermore, the league looked to the plaintiffs' claims stating the NFL fell short when attempting to carry out rule changes with the goal of minimizing head injuries and failed to impose regulations taking aim at player health and safety.[185] The NFL's presumed duty of implementation and enforcement of regulations pertaining to professional football, as well as health and safety protocols, were established by the CBA.[186] Consequently, the plaintiffs' claims would be preempted by federal law, because the league does not maintain a duty to each person in society to make

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[181] Motion to Dismiss, *supra* note 174, at 10; Belote, *supra* note 178, at 33.

[182]Motion to Dismiss, *supra* note 174, at 26 (citing Cavallaro v. UMass Mem'l Healthcare, Inc.,
678 F.3d 1, 6 (1st Cir. 2012) (finding fraud and negligent misrepresentation claims preempted
because "plaintiffs, who say they were misled into thinking certain time was uncompensated,
could not have reasonably relied on such statements without taking into account CBA provisions
like those guaranteeing payment for work performed during meals, and the practices such
provisions embody."); Belote, *supra* note 178, at 33.

[183] Motion to Dismiss, *supra* note 174, at 26; Belote, *supra* note 178, at 33; *see* Tran v. Metro. Life Ins. Co., 408 F.3d 130, 135 (3d Cir. 2005).

[184] Motion to Dismiss, *supra* note 174, at 29; Belote, *supra* note 178, at 34.

[185] Motion to Dismiss, *supra* note 174, at 32-33; Belote, *supra* note 178, at 35.

[186] Motion to Dismiss, *supra* note 174, at 11, 32 ; Belote, *supra* note 178, at 36.

widely known the rules concerning football safety and the claims brought were not independent of the CBA.[187]

VI. THE LEAGUE'S LIABILITY FOR COGNITIVE INJURIES SUFFERED BY ITS PLAYERS

The league violated the athletes' right to receive all information available regarding concussions and cognitive injuries pertaining to professional football. Merrill Hoge stands as the sole retired player to achieve victory in a concussion lawsuit against the NFL, securing damages exceeding one million dollars, including $100,000 designated for pain and suffering.[188] However, the awarded amount, though deemed a success, would fall short for present-day players due to the substantial rise in the NFL's average salary.[189]

The negligent and fraudulent conduct of the NFL pertaining to the health and safety of its players should subject the league to liability for their injuries.[190] The athletes should be awarded compensatory damages for the injuries incurred due to the league's inadequate concussion policy regarding return to play and diagnosis standards.[191] In addition to compensatory damages, the NFL should incur punitive damages for misleading players, and failing to fully inform them of the adverse effects and risks of MTBIs and concussions through the league's committee.[192]

While disseminating misinformation throughout the league and among the players by way of the MTBI committee, the NFL has become the highest-grossing sports league in the United States.[193] The cost of having to pay damages to its players pales in comparison to the financial benefit the league has seen over the years.[194] The league must compensate players through court-ordered damages and make

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[187] *Williams*, 582 F.3d at 881; Belote, *supra* note 178, at 36.
[188] Gove, *supra* note 1, at 687.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id*.

significant efforts to the game's safety to protect the health of its most valuable asset—the players.

VII. CURRENT SOLUTIONS AND A LOOK AT THE FUTURE OF NFL FOOTBALL

In recent years, the NFL has begun taking steps to address concussions and dangerous plays with increased seriousness by implementing new relevant polices as experts have continued to reveal the enduring consequences of sustaining concussive as well as subconcussive injuries. The NFL has begun to harness player data in an effort to enhance both player safety and the evolution of the game.[195] The league has implemented policy changes, such as kickoff modifications and the "Use of Helmet" rule, aimed at eliminating potentially risky behavior that could lead to injuries.[196] With the "Use of the Helmet" rule, the NFL has started to impose hefty fines and the possibility of suspension for players who lower their head to initiate and make contact with their helmet against an opponent.[197] As for the kickoff modifications, the NFL now has teams kick off from the 35-yard line, as opposed to the 30-yard line.[198] The League has also banned players on the kickoff team from getting a running head start—thereby increasing the amount of touchbacks and reducing concussive injuries during one of the most dangerous plays in football.[199]

Additionally, the NFL has continued to work with leading experts to evaluate and improve both the quality and effectiveness of helmets used by the players. Biomechanical engineers designated by

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[195] NFL Football Operations, *Player Health & Safety*, https://operations.nfl.com/inside-football-ops/players-legends/player-health-safety, (last visited May 18, 2023).
[196] *Id.*
[197] NFL Football Operations, *supra* note 195; David Chaise, *"Knockout: Concussed Players Sending the NFL Down For the Count"* (2012), Law School Student Scholarship, 93, https://scholarship.shu.edu/student_scholarship/93.
[198] Bob Cunningham, *Is New NFL Kickoff Rule Really Better for Player Safety?,* BLEACHER REPORT (Sept. 22, 2012), https://bleacherreport.com/articles/1343646-is-new-nfl-kickoff-rule-really-better-for-player-safety (reducing the distance is "intended to create more touchbacks and in turn help drastically decrease the amount of kickoff returns").
[199] *Id.*

the NFL in conjunction with the NFL Players' Association conduct annual laboratory tests on every different model of helmet worn by players throughout the league to assess the effectiveness in reducing the severity of impacts to the head.[200] The results of these helmet tests provide major assistance to medical, equipment, and training personnel so they may make informed choices to move players into better performing helmets as a step towards a reduction in head injuries suffered by players.[201]

Furthermore, the NFL has large teams of medical personnel to assist in providing players with the care they need during games, practices, and in the off-season.[202] During game days, there is an average of thirty healthcare providers at stadiums to provide immediate medical care to the athletes.[203] In addition to the large number of healthcare providers at the stadium, the league also employs unaffiliated medical personnel to aid in the evaluation of injuries, with a particular emphasis on properly diagnosing concussions.[204]

When identifying, diagnosing, and treating player concussions, NFL medical professionals adhere to the new Comprehensive NFL Concussion Protocol, following a systematic step-by-step approach.[205] When a player sustains an impact to the head, the Concussion Protocol may be triggered if the player begins to exhibit signs of concussion, or if the team trainer, physician, booth spotter, or unaffiliated neurotrauma consultant initiates the protocol.[206] Once the protocol is triggered, the player will be forced to exit the game and will be further evaluated in the sideline medical tent or the locker room.[207] After a player is diagnosed with a concussion, he must adhere to a five-step process prior to being eligible to make a return to practice and

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[200] NFL Football Operations, *supra* note 195.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] NFL Player Health & Safety, *Concussion Protocol & Return-to-Participation Protocol: Overview* (Jun. 22, 2018), https://www.nfl.com/playerhealthandsafety/health-and-wellness/player-care/concussion-protocol-return-to-participation-protocol.
[207] *Id.*

games.[208] The five-step process consists of: 1) symptom-limited activity and rest, advancing to light aerobic exercises and supervised balance training; 2) supervised aerobic exercises, dynamic stretching, and neurocognitive testing for a baseline; 3) controlled football-specific exercise for up to 30 minutes; 4) non-contact drills, strength training, team exercises, and tests to reach baseline results; 5) full clearance for football activity after approval from the Club physician and Independent Neurological Consultant post-concussion resolution.[209] Following the completion of the five-step process, the player must not only be cleared for full participation by the team physician, but also by an NFL- and NFLPA-approved independent neurological consultant.[210]

Additionally, in an effort to ensure consistent adherence to the Concussion Protocol, the NFL and NFLPA have collaboratively established an enforcement policy.[211] This policy encompasses a comprehensive investigation procedure aimed at addressing instances where clubs deviate from the protocol and institutes disciplinary measures, including fines and the possibility of forfeiting draft picks.[212] In the field of medicine, it is well understood that the standardization of protocols leads to improved outcomes for the patient population by reducing variability and eliminating a significant amount of uncertainty.[213]

As for the future of NFL football, the key to continually reducing injuries and improving player safety is to make significant efforts in educating football players at all levels. It is often overlooked that "football injuries affect considerably more non-professional players, such as high-school athletes, than NFL players."[214] In an effort to advance player safety across all levels, the NFL and its thirty-two member organizations have teamed up with USA Football to create a

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[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] NFL Football Operations, *supra* note 195.
[212] *Id.*
[213] NFL Player Health & Safety, *supra* note 212.
[214] Chaise, *supra* note 202, at 34.

comprehensive educational program, Heads Up Football.[215] The program implements health and safety protocols that encompass coaching certification and the organization of safety clinics for coaches, parents, and players.[216] Specifically, the Heads Up Football program provides a step-by-step protocol to instruct players on the core principles of tackling by utilizing a series of drills to educate the players on proper tackling mechanics and maintaining correct body position when making a tackle, with the focus remaining on the reduction of helmet-to-helmet contact.[217] Additionally, Heads Up Football provides instruction to coaches and parents on how to properly fit equipment, including helmets and shoulder pads, which can place players at greater risks of injury when improperly fitted.[218] By promoting safe and proper techniques among coaches, parents, and players, the NFL contributes to the overall well-being of football players at all levels. With the American public's attention remaining focused on the long-term health effects of playing football, and as litigation continues to increase in the district courts, the NFL must continue to promote the health and safety of players not only in the NFL, but at all levels, to establish a culture of responsible play and help ensure the sustainability of the sport.[219]

VIII. CONCLUSION

Since the early days of the NFL, the game of football has changed immensely. Now the pro game has bigger, stronger, and faster players,[220] instant replay, next generation statistics, tech- infused player analytics, 360-degree camera angles, as well as the latest

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[215] Youth Sports Foundation, *Heads Up Football*, https://youthsportsfoundation.org/heads-up-concussion/ (last visited May 18, 2023).
[216] *Id.*
[217] *Id.*
[218] USA Football, *Equipment Fitting*, https://youthsportsfoundation.org/heads-up-concussion/ (last visited Sep 18, 2023).
[219] Chaise, *supra* note 202, at 36.
[220] Gove, *supra* note 1, at 649.

advancements in sports medicine and protective equipment.[221] Despite these vast advancements in both the athletic ability and technology, NFL players have suffered from major increases in concussive injuries sustained over the years.[222] For decades, the NFL vehemently refuted legitimate scientific studies which concluded that repetitive concussions and MTBIs are linked to the cognitive deterioration of former NFL athletes.[223]

While the league slowly started to adopt health and safety protocols to mitigate concussions and other injuries, following the revelation of the connection between concussions and CTE, the NFL must take responsibility for its questionable treatment of both present and past players.[224] However, the fact that developments in science and studies of the game's impact on professional players' health have helped concoct plausible theories for the causation of the injuries suffered does not necessarily guarantee players any legal remedies.[225]

Accordingly, the NFLPA should continue to push for rule changes and the implementation of new policies with the hope of reducing injuries and removing reckless play from the league. Moreover, the NFL and the Players' Association must continue to invest in youth participation and implement community initiatives, such as Heads Up Football, at all levels to contribute to the overall well-being of the sport by promoting proper techniques and safety, thus ensuring the sustainability of the NFL. Therefore, in addition to seeking legal remedies for which they are entitled, current and former players should work in conjunction with the NFL to find a balance between the safety and competitiveness of football.[226]

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[221] NFL Player Health & Safety, *NFL Explained: Innovation in Player Health and Safety*, NFL (Jan. 24, 2022), https://www.nfl.com/playerhealthandsafety/equipment-and-innovation/aws-partnership/nflexplainedinnovation; NFL Football Operations, *Technology and the Game*, (last visited Oct. 18, 2023), https://operations.nfl.com-gameday-technology-technology-and-the-game-#:~:text=At%20the%20start%20of%20the,game%20and%20during%20replay%20reviews.

[222] *Id.*

[223] Chaise, *supra* note 202, at 3.

[224] Gove, *supra* note 1, at 690.

[225] Belote, *supra* note 176, at 42.

[226] Gove, *supra* note 1, at 690.

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BRUEN'S EFFECT ON 18 USC § 922(G)(8) AND (9): A MAJOR THREAT TO THE SAFETY OF DOMESTIC VIOLENCE VICTIMS

Raven Peña

I. Introduction

Federal statutes face new threats which place domestic violence victims in deadly danger. This danger arises when domestic violence abusers have access to firearms despite court recognition of the intimate partner violence. This danger is not unheard of; Congress provides two major protections for individuals against firearm-aided domestic violence perpetrators: 18 U.S.C. § 922(g)(8) and (9). Section (8) prohibits firearm possession by individuals subject to protective or restraining orders. Section (9) prohibits individuals convicted of a misdemeanor for domestic violence from possessing firearms. Both provisions are relatively new in the United States, having been enacted in the 1990's. For almost thirty years, these statutes retained their constitutionality under the Second Amendment.

But in 2022, the Supreme Court's ruling in *Bruen* resulted in a challenge to the statutes' constitutionality under the Second Amendment. *Bruen* questions the presumptively lawful status of these statutes, which most courts found under *Heller*'s "long standing prohibitions" language. This comment will assess *Bruen's* effect on § 922(g)(8) and (9) in the months after its holding.

Part II covers a historical analysis of legal protections against domestic violence in two parts. First, the comment dives into 18 U.S.C. § 922(g)(8) and (9) to establish a foundation for understanding the importance of prohibiting the possession of firearms by domestic violence perpetrators. It also describes the relatively

recent ascension of women to full political community members who have individual rights in and outside the home.

The second portion of Part II covers Second Amendment challenge tests post-*United States v. Heller* up to *Bruen*. Second Amendment challenge tests have changed over time. Before 2008, the courts considered the Second Amendment right a group right, which enabled the government to proscribe individual Second Amendment rights. In 2008, *Heller* established the Second Amendment to be an individual right. From *Heller*, the courts largely established a presumption that longstanding firearm prohibitions are constitutional, and the courts created a new Second Amendment balancing test. Although it varied among the circuits, most courts adopted some two-pronged, means-end test that weighed government provisions permitting prohibitions on an individual's Second Amendment rights against the government's interest in the regulation. In 2022, the Second Amendment challenge test changed again to the Nation's Historical Tradition Test. This test focuses primarily on comparing historical Second Amendment prohibitions to present-day challenged regulations that prohibit the possession of firearms.

Part III analyzes several recent cases deciding the constitutionality of § 922(g)(8) and (9). This comment highlights the strengths and weaknesses of the government's legal arguments made. It also analyzes the courts' determinations of law. By doing so, it will give a full account of the state of firearm regulations on domestic violence and intimate partner offenders throughout the United States federal courts. Part III reviews lower court cases to forecast whether section (8) or (9) will retain their constitutionality and why.

Part IV proposes solutions to the problems arising with the constitutionality of either provision under a broadened historical view and offers an argument that may overcome the claims of those stricter court holdings. This section advises on what legislative steps the federal government and states can do to meet the *Bruen* test in order to constitutionally prevent domestic violence perpetrators from carrying firearms. It also provides practical arguments to support the constitutionality of the provisions on appeal.

II. Origins of Domestic Violence in the United States and the Constitutionality of Firearm Prohibitions that Decrease Firearm-based Violence in Domestic Partnerships

A. Creation of § 922(g)(8) and (9)

"Domestic violence" is a relatively new notion in United States legal system.[1] Statistical studies of the demographics of domestic abuse victims is also relatively new to social analyses.[2] However, it is no surprise that domestic violence victims are largely women.[3] Women's subjugation as property began with the founding of our Nation, whether the women were slaves, indentured servants, or wives.[4] It was not until the Fourteenth Amendment that all people born

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[1] *Compare* THE DECLARATION OF INDEPENDENCE (U.S. 1776) *with* DOMESTIC VIOLENCE, Black's Law Dictionary (11th ed. 2019) (establishing the legal term in 1891); *see Background*, THE EDUC. FUND TO STOP GUN VIOLENCE, *Domestic Violence and Firearms*, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/ ("Domestic violence is physical, sexual, or psychological violence perpetrated against current or former spouses and/or partners, or family. Domestic violence typically includes violence perpetrated against individuals beyond current or former intimate partners that may cohabitate or be related to the intimate partner. Legal definitions of domestic violence vary by state."); *see also* Abigail Adams, *Abigail Adams to John Adams* (1776), *reprinted in* The Feminist Papers: From Adams to Beauvoir 10–11 (Alice S. Rossi, ed., 1973) (requesting John Adams "put it out of the power of the vicious and the Lawless [(men)]to use us [(women)] with cruelty and impunity").

[2] *See generally* Catherine Jacquet, *Domestic Violence in the 1970s*, NATIONAL LIBRARY OF MEDICINE, (Oct. 15, 2015), https://circulatingnow.nlm.nih.gov/2015/10/15/domestic-violence-in-the-1970s/ ("During the early 1970s, domestic violence remained largely unrecognized and virtually ignored in the legal, medical, and social spheres.").

[3] *Id.*

[4] *See* Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 EARLY AMERICAN STUDIES 223, 241–42 (2007). After the revolution, the caliber of violence required for legal action at court was death threats or permanent injury. *Id.* Even then, the resulting penalty was a peace bond at the local level or divorce, separation, assault or battery at the state level. *Id.* However, the matter of domestic abuse during this time was largely seen as a private matter. *Id.* If the abuse was less than threatening life or permanent injury, the courts offered no recourse. *Id.*; *see Indentured Servants*, ENCYCLOPEDIA OF THE NEW AMERICAN

in the United States received the status of a citizen.[5] Until 1919, women did not have the right to participate in the political process by voting.[6] Even more recently, women have been uncoupled from long-held machismo ideas of the wife as property of the husband.[7] For example, some states offer a marital rape defense to rape.[8] As our country entered the final decade of the 20th Century, establishing protections against severe domestic abuse gained traction in Congress.[9]

Section § 922(g)(8) was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.[10] Through this Act, Senator Paul Wellstone of Minnesota and Representative Robert Torricelli of New Jersey worked to get firearms out of the hands of domestic abusers.[11] This initiative was in response to trends in the early 1990's when firearm homicides peaked.[12] While gun violence subsided in the 2000's, killings from intimate partner violence made

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NATION (May 21, 2018), https://www.encyclopedia.com/history/united-states-and-canada/us-history/indentured-servants#1G23401802009 ("Likened to slaves in that masters had almost complete control over them, including the right to control their labor and the ability to severely punish them.").

[5] U.S. CONST. amend. XIV, § 1.

[6] *Id.* (establishing women's right to vote in 1919).

[7] *Id.*

[8] *See* S.C. CODE ANN. § 16-3-658 (1977) ("A person cannot be guilty of criminal sexual conduct under Sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree as defined by Sections 16-3-652 and 16-3-653."); *see also* Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1833 (2011) (explaining how some states "allow for prosecution of marital rape only in certain circumstances, or impose extra requirements on victims of marital rape that are not required of victims of nonmarital rape).

[9] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[10] *Id.*; 18 U.S.C.A. § 922(g)(8).

[11] United States v. Perez-Gallan, 640 F. Supp. 3d 697, 702 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023) (citing N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 2125 (2022)).

[12] *See* D'Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RSCH. CTR. (May 7, 2013), https://www.pewresearch.org/social-trends/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware/.

up approximately half of all murders of women.[13] Senator Wellstone and Representative Torricelli greatly reduced the chances of women dying from spousal homicide by preventing the possession of guns by people subject to domestic violence protective orders.[14]

Around 1996, Congress became aware of how § 922(g)(8) alone did not fully protect spouses from domestic abuse and homicide.[15] At the time, over half of women killed in the United States were murdered by their partners.[16] Sixty-five percent of those murders involved a firearm.[17] However, Congress realized that domestic violence abusers could be charged with a crime but still have access to firearms because domestic violence often resulted in misdemeanor charges or the abuser not being charged at all.[18] At that time, federal prohibitions only limited perpetrators who committed felony-level domestic violence from possessing firearms. So, by categorizing the abusers as misdemeanants, the law allowed those violent perpetrators, who posed a great and immediate danger to their spouses, to possess firearms.[19] Senator Frank Lautenberg of New Jersey was troubled by the amount of people engaging in violent domestic abuse who still had access to firearms.[20] In 1997, he championed an amendment of § 922(g), adding subsection 9, which prohibits convicted domestic

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[13] Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners,* THE ATLANTIC (July 20, 2017), https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/ ("The CDC analyzed the murders of women in 18 states from 2003 to 2014, finding a total of 10,018 deaths. Of those, 55 percent were intimate partner violence-related, meaning they occurred at the hands of a former or current partner or the partner's family or friends. In 93 percent of those cases, the culprit was a current or former romantic partner.").

[14] *Id.*

[15] Treasury, Postal Service, and General Appropriations Act, 1997, S. RES. 104TH CONGRESS, 597 U.S. CONG REC 10377, 10377 (1996) (revealing that Senator Lautenberg hoped to "establish a policy of zero tolerance when it comes to guns and domestic violence").

[16] *Id.* 10378.

[17] *Id.*

[18] *Id.*

[19] 18 U.S.C. § 922(n).

[20] 597 U.S. CONG REC 10377 (Senator Lautenberg expressing his concerns over the way court systems dealt with intimate partner violence against women).

violence misdemeanants from possessing a firearm.[21] Being new provisions, § 922(g), (8) and (9) faced challenges.

However, early Second Amendment constitutional challenges to § 922(g)(8) and (9) failed.[22] Courts found the Second Amendment "guarantees a collective right rather than an individual right."[23] The Fourth, Sixth, Eight, Ninth, Tenth, and Eleventh Circuit courts relied on the limiting language of "a well-regulated militia" and a showing of some reasonable relationship to the preservation or efficiency of "a well-regulated militia," to reach this conclusion.[24] The First, Fifth, and Seventh Circuits denied defendants' Second Amendment challenges to § 922(g) because, even if the Second Amendment conferred an individual right, "the procedural requirements to be followed before imposing § 922(g)(8)'s restrictions adequately safeguard the right to possess firearms."[25] This Circuit split on the type of right, collective or individual, however, would result in the Supreme Court delivering guidance that would unravel Second Amendment jurisprudence.[26]

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[21] *Id.*

[22] *See* United States v. Bayles, 310 F.3d 1302, 1307-08 (10th Cir. 2002) (explaining Commerce Clause challenges arose but categorically failed (citing United States v. Bostic, 168 F.3d 718, 723 (4th Cir. 1999)); United States v. Jones, 231 F.3d 508, 514-15 (9th Cir. 2000); United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998)).

[23] United States v. Napier, 233 F.3d 394, 402-04 (6th Cir. 2000).

[24] *Id.* at 403 ("It is well-established that the Second Amendment does not create an individual right. Since *Miller,* 'the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.'" (quoting Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995)). The Ninth Circuit stated in Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996), that it was following its sister circuits in holding that "the Second Amendment is a right held by the states and does not protect the possession of a weapon by a private citizen." The Eleventh Circuit held in United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997), *vacated in part on other grounds,* 133 F.3d 1412 (11th Cir. 1998), that the Second Amendment protects 'only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states.'"); *see also* United States v. Bayles, 310 F.3d 1302, 1307 (10th Cir. 2002); United States v. Lippman, 369 F.3d 1039, 1043–44 (8th Cir. 2004).

[25] United States v. Coccia, 446 F.3d 233, 242-43 (1st Cir. 2006) (citing United States v. Emerson, 270 F.3d 203, 261–65 (5th Cir. 2001)).

[26] *Id.*

B. Recent Second Amendment Means-Ends Tests

In 2008 and 2010, the most influential Second Amendment cases came from *District of Columbia v. Heller* and *McDonald v. City of Chicago*, respectively.[27] These cases increased Second Amendment protections.[28] In *Heller*, the Court answered whether restrictions on firearm possession in one's home is a violation of the Second Amendment.[29] From this one question, the Court unexpectedly answered broadly, expanding guns rights.[30] It reaffirmed the Constitution's designation of the home as a sacred, private, and protected area.[31] The home became an area righteously and constitutionally protected by firearms.[32] Additionally, what was once only considered a collective right, reserved in its preamble to "a well-regulated militia," became an individual self-defense right belonging to the people.[33] *Heller's* answer applied only to the Federal Government, but in *McDonald*, the Court extended *Heller's* ruling to states, incorporating the Second Amendment through the Fourteenth Amendment.[34] States often receive deference due to their police power and power to ensure public safety.[35] With *McDonald*, laws prohibiting firearm possession that are predicated on these purposes would be open to higher scrutiny by the federal judicial branch.[36]

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[27] District of Columbia v. Heller, 554 U.S. 570, 580-81 (2008); McDonald v. City of Chicago, 561 U.S. 742, 749-50 (2010).

[28] *See Heller,* 554 U.S. at 580-8; *McDonald*, 561 U.S. at 749-50.

[29] *See Heller*, 554 U.S. at 637.

[30] *See id.* at 584-85.

[31] *See also id.* at 635 (explaining the right of an individual to protect their hearth and home is an elevated component of the Second Amendment, other protections outside the home are ancillary to this core principle).

[32] *Id.*

[33] *Id.* at 595-97; *see generally* AKHIL REED AMAR, THE WORDS THAT MADE US, 319 (Basic Books New York 2021) ("The Second Amendment celebrated the right of 'the people' to participate in civic militias representative of the citizenry.")

[34] *McDonald*, 561 U.S. at 749.

[35] Berman v. Parker, 348 U.S. 26, 32 (1954) (recognizing "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power").

[36] Matthew Sacrola, *Analysis: State Gun Regulations and McDonald*, SCOTUSBLOG (June 28, 2010, 10:24 pm), https://www.scotusblog.com/2010/06/analysis-state-gun-regulations-and-mcdonald/ (last visited 10/22/2021).

The declaration of an individual right to armed self-defense put into question all laws formed on the basis of the Second Amendment conferring only a collective right.[37] In 1968, Congress enacted expansive firearm regulations by way of the Commerce Clause, under § 922.[38] The judiciary held these laws constitutional by reading the Second Amendment as a collective right, not as an individual right to self-defense.[39] But after *Heller* and *McDonald*, a question of legitimacy tainted both sections 8 and 9, and other subsequent amendments to § 922.[40] For this reason, lower courts received an onslaught of § 922 challenges.[41] Two questions immediately arose: (1) what state and federal prohibitions on firearms are now unconstitutional under the Second Amendment?; and (2) what test applies to Second Amendment constitutional challenges?[42]

Federal circuit and district courts struggled to apply the new case law. Each circuit wrestled with forming a test for Second Amendment challenges.[43] After all, *Heller* gave little guidance on how

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[37] *See* District of Columbia v. Heller, 554 U.S. 570, 680 (2008) (Stevens, J., dissenting) (noting his fear that changing the Second Amendment right from a group right to an individual will lead to further challenges that will change the interpretation of the Second Amendment right); *see also* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L. J. 1433, 1455 (2018) (showing the number of post-Heller Second Amendment challenge opinions to be just under one thousand).

[38] *See generally* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §902, 82 Stat. 197 (codified as amended at 18 U.S.C. § 922).

[39] Jon Shwarz, *Right-Wing Supreme Court Continues Its "Great Fraud" About the Second Amendment*, THE INTERCEPT (June 24, 2022, 12:01 p.m.), https://theintercept.com/2022/06/24/supreme-court-gun-second-amendment-bruen/.

[40] *E.g., Heller,* 554 U.S. at 580-81; McDonald v. City of Chicago, 561 U.S. 742, 749-50 (2010).

[41] *See* Elizabeth Coppolecchia et al., United States v. White: *Disarming Domestic Violence Misdemeanants Post*-Heller, 64 U. MIA. L. REV. 1505, 1508-09 (2010).

[42] Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. 90 P.L. 351, 82 Stat. 197.

[43] *Compare* Tyler v. Hillsdale Cty. Sheriff's Dept., 775 F.3d 308, 322-30 (6th Cir. 2014) [hereinafter Tyler I], *vacated*, 837 F.3d 678 (6th Cir. 2016) (listing out the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth and D.C. Circuit courts' use of intermediate scrutiny Second Amendment challenges), *with* Mance v. Sessions, 896 F.3d 699, 705 (5th Cir. 2018) (applying strict scrutiny to Second Amendment question, "the curtailment of [the constitutional right] must be actually necessary to the solution.").

to decide if a regulation infringed on Second Amendment rights.[44] *Heller* completely rejected a means-end balancing test while at the same time stating that a test would need to be more rigorous than a rational basis balancing test in order to determine if legislation is within or outside Second Amendment prohibitions.[45] Simply put, there was no express test given for Second Amendment constitutional challenges.[46]

A majority of circuits applied similar intermediate scrutiny tests: (1) whether there is a substantial government objective, and if there is (2) whether the statute is a reasonable fit between the government's objective and the regulated conduct.[47] A few circuits elected to assess Second Amendment challenges under similar strict scrutiny test frameworks: (1) whether there is a compelling government interest for the statute, and (2) whether the law is narrowly tailored to serve the compelling government interest.[48]

Throughout each court's analysis, despite the variance in tests, an overwhelming majority of court decisions weighed in favor of sections 8 and 9.[49] Court determinations, with respect to § 922, weighed *Heller's* and *McDonald's* caveat heavily in their determinations, which is that either opinion should not:

> cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[50]

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[44] *See* Coppolecchia, *supra* note 41, at 1508.

[45] *Cf.* Heller, 554 U.S. at 628-34 n.27.

[46] *See* Betty J. Caipo*, Judicial Toleration for Negative Externalities of Bearing Arms in Public: Addressing the Second Amendment Circuit Split*, 14 SETON HALL CIR. REV. 209, 223-26 (2018).

[47] *Tyler I,* 775 F.3d at 324-26.

[48] *See* SARAH S. HERMAN, CONG. RSCH. SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE, 15, 20–21 (2019).

[49] *Id.* at 15–16.

[50] *Heller*, 554 U.S. at 626–27; s*ee generally* McDonald v. City of Chicago, 561 U.S. 742, 787 (2010) (reassuring *Heller's* stance on longstanding prohibitions).

The courts read § 922 as within the category of longstanding prohibitions.

This caveat stabilized the federal firearm regulatory framework because the courts could consider federal and state law means of firearm prohibition to overcome constitutional issues.[51] The stanza essentially formed a rebuttable presumption of constitutionality that attached to § 922.[52] Whether the courts chose to apply strict or intermediate scrutiny, the courts held these longstanding prohibitions were permissible regulations under the Second Amendment.[53] Section 922 remained safe and the means-end balancing test circuit split continued until 2022, when the Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* which completely turned the means-end balancing test on its head.[54]

III. *Analysis of Bruen*

In *Bruen*, the New York State Rifle & Pistol Association petitioned the Court on behalf of two if its members who sought to obtain an unrestricted license to have and carry a concealed pistol or revolver in New York under New York Penal Law § 400.00(2)(f).[55] The issue before the Court was whether state laws requiring an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" to carry a gun, were unconstitutional prohibitions on Second Amendment rights.[56]

The New York regulation required applicants to show proper cause existed to issue the unrestricted license.[57] Proper cause required a "demonstration of special need for self-protection," distinguishable from the general community's need for self-protection.[58] Proving this need generally required evidence of "particular threats, attacks, or

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[51] 18 U.S.C. § 922. Federal firearm regulations, first established in the Omnibus Crime Control and Safe Streets Act of 1968, are now an ever-engulfing list of prohibitions on firearm and ammunition possession. *See id.*

[52] *See Tyler I,* 775 F.3d at 324.

[53] HERMAN, s*upra* note 48, at 21–22.

[54] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022).

[55] *Id.* at 17.

[56] *Id.* at 8.

[57] *Id.* at 12.

[58] *Id.*

other extraordinary danger to personal safety."[59] Importantly, officials reviewing the applicant could ("*may*") deny the application even if the applicant met the statutory thresholds.[60] Then, on appeal of the official's decision, the applicant must show the denial of the license was "arbitrary and capricious."[61]

In *Bruen,* officials denied both applicants the total unrestricted license.[62] Subsequently, the petitioner filed a motion for declaratory injunction which was denied by the district court and affirmed on appeal.[63] The appellate court, applying *Heller* and *McDonald*, determined that New York's statute passed the circuit's means-end balancing test, affirming that the petitioner's denial for unrestricted carry was a constitutional prohibition.[64] However, in *Bruen*, the Court ruled that the New York (and other states') "may deny" licensing regulation violated the Constitution. The Court established a new holding that the Second Amendment protects the right of the ordinary, law-abiding citizen to possess a handgun in *and outside* the home for self-protection.[65] The Court declined to adopt the two-part approach that combined the Nation's history with a means-end scrutiny approach, which the Courts of Appeal coalesced around. Justice Thomas, writing for the majority, deemed the means-end test, "one step too many," including the means-end balancing test the New York

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[59] *Id.* at 13-15 (showing in the United States there are six "may issue" carry licenses. Forty-three states have "shall issue" carry licenses).

[60] *Id.*

[61] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 12 (2022).

[62] *Id.* at 15-16.

[63] *Bruen*, 597 U.S. at 16; *see also Bruen*, 597 U.S. at 15 n. 2 (overturning D.C. CODE §§ 7-2509.11(1), 22-4506(a); CAL. PENAL CODE § 26150; HAW. REV. STAT. § 134-2; MD. CODE ANN., PUBLIC SAFETY § 5-306(a)(6)(ii); MASS. GEN. LAWS ANN. ch. 140, § 131(d); N.J. STAT. ANN. § 2C:58-4(c); N.Y. Penal Law § 400.00(2)(f)). *Bruen*, 597 U.S. at 8) (Justice Thomas wrote the opinion of the Court).

[64] United States v. Rahimi, 61 F.4th 451 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023) (No. 22-915); *see also United States v. Rahimi*, Oyez, https://www.oyez.org/cases/2023/22-915 (last visited Oct 28, 2023) ("Does 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violate the Second Amendment?").

[65] *Bruen*, 597 U.S. at 8; *see also Bruen*, 597 U.S. at 15 n.2 (overturning D.C. CODE §§ 7-2509.11(1), 22-4506(a); CAL. PENAL CODE § 26150; HAW. REV. STAT. § 134-2; MD. CODE ANN., PUBLIC SAFETY § 5-306(a)(6)(ii); MASS. GEN. LAWS ANN. ch. 140, § 131(d); N.J. STAT. ANN. § 2C:58-4(c); N.Y. PENAL LAW § 400.00(2)(f)).

Appellate Court applied in the earlier decision.[66] The Court reached back to *Heller*'s exhaustive historical analysis as an exemplar of the proper test for a constitutional challenge.[67] Through this analysis, Justice Thomas developed the Nation's Historical Tradition Test.[68]

Under the new test, the government must demonstrate, through constitutional text and history, that the modern regulation in question is consistent with this Nation's historical tradition of firearm regulation.[69] The first step in this process is determining whether the conduct is protected by the Second Amendment.[70] Conduct is presumptively protected when the Second Amendment's plain text covers an individual's conduct.[71] If it is protected conduct, then the Government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[72]

The Nation's Historical Tradition Test further expands into two queries: is the firearm prohibition (1) a straightforward application or (2) an analogous comparison.[73] When there are no clear, straightforward, identical historical regulations, the government must use analogical reasoning to show historical regulations are relevantly similar to the current regulation.[74] Important metrics to consider in the analysis are *how* and *why* the modern and historical regulations are similar.[75] The "how" being "whether modern and historical regulations impose a comparable burden" on Second Amendment rights.[76] The "why" being "whether the burden is comparatively justified."[77] Justice Thomas noted that this process is not a

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[66] *Bruen*, 597 U.S. at 15-20.
[67] *Id.* at 19.
[68] *Id.* at 24.
[69] *Id.* at 24.
[70] *Id.* at 24-25.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 26-27.
[74] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26-27 (2022).
[75] *Id.* at 29.
[76] *Id.*
[77] *Id.* at 29; c*ompare* Caipo, *supra* note 46, at 228-30 (2018) (showing how New York, New Jersey, and Maryland regulated concealed weapons with "proper cause" laws, which placed a burden on law abiding-citizens to prove a special need to carry a concealed firearm in public spaces. In other words, the person seeking a concealed carry license had to show "why.").

"straightjacket" on present regulations, nor does it require regulations to be "twins."[78] "Analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin."[79]

A. The *Bruen* Nation's Historical Tradition Test

While Justice Thomas's decision had the support of six justices, three of those justices expressed some disagreement.[80] Justice Alito and Justice Kavanaugh, joined by Chief Justice Roberts, both published concurrences narrowing *Bruen*.[81] This is significant because the justices chose to write separately rather than join the Thomas opinion.[82] It signifies that the Court may be concerned about the potentially broad interpretation of *Bruen* left to the lower courts.[83]

That concern is not unwarranted. The new Nation's Historical Tradition Test brings into question at least three things: (1) who is encompassed by "the people" under the Second Amendment's basic language — in the past and present, and whether that matters; (2) what conduct is protected; and (3) what history the court should use to determine a historical analogue.[84]

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[78] *Bruen*, 597 U.S. at 30.

[79] *Id.*

[80] *Id.* at 83-133. Justice Breyer wrote a dissent with whom Justices Sotomayor and Kagan joined. Id. at 83. Justices Alito and Barrett contributed their own separate concurrence. Id. at 71. Justice Kavanaugh, joined by Chief Justice Roberts, published a concurrence. Id. at 79.

[81] *Id.* at 79 (J. Kavanaugh, concurring) ("I join the Court's opinion, and I write separately to underscore two important points about the limitations of the Court's decision."); *id.* at 71 (J. Alito, concurring) (stating the holding does not answer who may "possess a firearm or the requirements that must be met to buy a gun.").

[82] *See* Andrew Willinger, Bruen's *Concurrences: The Questionable Durability of the* Bruen *Majority, and the Ruminations on Originalism and the Limits of Historical Inquiry,* DUKE CTR. FOR FIREARMS L. (July 6, 2022), https://firearmslaw.duke.edu/2022/07/bruens-concurrences-the-questionable-durability-of-the-bruen-majority-and-ruminations-on-originalism-and-the-limits-of-historical-inquiry/.

[83] *Id.*

[84] *See Bruen*, 597 U.S. at 17, 31, 107.

1. Dissecting "the people" and its meaning

To answer the first question, it is clear in *Bruen* that there is no wavering on the definition of "the people" within the Second Amendment. *Bruen,* stated that "the people" within the Second Amendment surely includes ordinary, law-abiding, adult citizens.[85] This follows the earlier cases of *McDonald*, *Heller*, and *United States v. Verdugo-Urquidez*; and follows the rhetorical analysis as well.[86]

The Court uses the rhetorical tactics of primacy and recency to direct the reader to the opinion's ultimate and important conclusion that the Second Amendment protects *law-abiding citizens*' right to self-defense within and outside of the home.[87] Primacy and recency are communication tactics often applied in oral arguments before appellate courts or in opening statements before a jury.[88] "Primacy" refers to the fact that information presented first is more effectively remembered.[89] "Recency" is the idea that the last thing presented is more easily recalled.[90] The first sentence, second sentence, and second-to-last sentence of Justice Thomas's opinion, state very clearly that the Second Amendment protects law-abiding citizens.[91] It is as if the Court is speaking to the reader with a megaphone, hoping the readers do not get lost in the lengthy opinion.

Legal scholars and lower courts are likely to call into question whether the "law-abiding" adjective applies to citizens as a holding, rather than dicta.[92] Justice Alito's and Justice Kavanaugh's

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[85] *Bruen*, 597 U.S. at 31.

[86] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 259–61 (1990) ("'the people' refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."); District of Columbia v. Heller, 554 U.S. 570, 580 (2008) ("[The Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home" and "[w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."); McDonald v. City of Chicago, 561 U.S. 742, 767-78 (2010).

[87] *Bruen*, 597 U.S. at 8.

[88] *See* H. Mitchell Caldwell et al., *Primacy, Regency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 434 (2001).

[89] *Id.* at 465.

[90] *See id.* at 437.

[91] *Bruen*, 597 U.S. at 8, 69.

[92] *Id.*

concurrences shudder this interpretation of "the people" under the Second Amendment.[93] Justice Alito refers back to *Heller* and reaffirms only that "the people" entails more than just members of the militia and includes "many people" including law-abiding citizens.[94] He limits the holding by removing the determination of "who may lawfully possess a firearm" from the majority opinion.[95] Justice Kavanaugh's concurrence did not consider who is included within "the people" because the concurrence is limited, focusing on the unconstitutional methods of New York's law that prohibit ordinary law-abiding citizens from exercising the right to carry a handgun for self-defense.[96]

In the year following *Bruen*, lower courts wrestled with this determination of the scope of "the people."[97] Some courts completely sidestepped the issue, noting that *Bruen* does not contemplate the individual, but rather the conduct.[98] Other courts considered the element narrowly, finding that the plain text of the Second Amendment excluded citizens who are not law-abiding or responsible.[99] Others considered and construed "the people" broadly.[100]

In *United States v. Rahimi*, the Fifth Circuit followed *Heller* and *Bruen* by concluding that the protections of the Second Amendment extended beyond responsible, law-abiding citizens, to

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[93] *Compare* Willinger, *supra* note 82 *with* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines,* 61 ST. LOUIS UNIV. L. J. 193, 229 (differing court judgment as the importance of "law-abiding" or "citizen" in assessing gun rights).

[94] *Bruen*, 597 U.S. at 71.

[95] *Id.*

[96] *Id.* at 80.

[97] United States v. Rahimi, 61 F.4th 443 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023); United States v. Combs, No. 5:22-136-DCR, 2023 WL 1466614, *1 (E.D. Ky 2023) (mem. op.).

[98] United States v. Banuelos, 640 F. Supp. 3d 716, 725 (W.D. Tex. 2022); United States v. Anderson, No. 2:21CR00013, 2022 WL 10208253 *1 (W.D. Va. Oct. 17, 2022) (assuming the Second Amendment protects the conduct charged in the indictment); United States v. Jackson, 622 F. Supp. 3d 1063, 1068 (W.D. Okla. 2022) (determining the statute at issue covered *conduct* facially covered under the Second Amendment (emphasis added)).

[99] *See* United States v. Perez-Garcia, 628 F. Supp. 3d 1046, 1053 (S.D. Cal. 2022), review denied, No. 22-CR-1581-GPC, 2022 WL 17477918 (S.D. Cal. Dec. 6, 2022), *aff'd sub nom*., United States v. Garcia, No. 22-50314, 2023 WL 2596689 (9th Cir. Jan. 26, 2023); United States v. Ingram, 623 F. Supp. 3d 660, 664 (D.S.C. 2022).

[100] *Combs,* 2023 WL 1466614, at *2.

include everyone.[101] The court defined "the people" within the bounds of *Verdugo-Urquidez* as "persons who are a part of a national community."[102] The appellant was not a model citizen, but the Court concluded Rahimi was "part of the political community entitled to the Second Amendment's guarantees."[103]

In *United States v. Rowson*, the Southern District of New York addressed whether felony indictees, who are American citizens, fall outside "the people," making them "*ex officio*, lacking Second Amendment rights."[104] The court reflected on the circuit court's extensive pre-*Bruen* findings to demonstrate how conditioned individuals are not categorically excluded from Second Amendment rights.[105] It held that, for the purposes of construing 18 U.S.C. § 922(n), "a defendant under indictment but as-yet convicted remained a law-abiding citizen."[106]

The Eastern District of Kentucky in *United States v. Combs* applied *Bruen* to determine whether 18 U.S.C. § 922(g)(8) was

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[101] *Rahimi*, 61 F.4th at 451.

[102] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[103] *Rahimi*, 61 F.4th at 451.

[104] United States v. Rowson, No. 22 CR. 310 (PAE), 2023 WL 431037, at *15 (S.D.N.Y. Jan. 26, 2023).

[105] *Id.* at *16 (S.D.N.Y. Jan. 26, 2023) ("With limited exceptions, most declined to hold that the groups at issue were categorically without Second Amendment rights. These included convicted felons, *see, e.g.,* United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014) (rejecting as-applied challenge to 18 U.S.C. § 922(g)(1)"); Kanter v. Barr, 919 F.3d 437, 445–47 (7th Cir. 2019) (assuming arguendo that felons are within "the people" under the Amendment), *abrogated by Bruen,* 597 U.S. 1; *see also* Kanter, 919 F.3d at 453 (Barrett, J., dissenting) ("Neither felons nor the mentally ill are categorically excluded from our national community."); United States v. Meza-Rodriguez, 798 F.3d 664, 669–72 (7th Cir. 2015) (illegal aliens are within "the people"); United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming, without deciding, that illegal immigrants are within "the people"); United States v. Torres, 911 F.3d 1253, 1257, 1261 (9th Cir. 2019) (same); United States v. Perez, 6 F.4th 448, 453 (2d Cir. 2021) (same); United States v. Jimenez, 895 F.3d 228, 233–34 (2d Cir. 2018) (assuming arguendo that defendant could claim Second Amendment protections despite dishonorable discharge); United States v. Witcher, No. 20 Cr. 116 (KMW), 2021 WL 5868172, at *4 (S.D.N.Y. Dec. 10, 2021) (considering § 922(g)(8)); United States v. Chester, 628 F.3d 673, 680–82 (4th Cir. 2010) (noting that Government had not argued and historical evidence did not support excluding persons convicted of domestic violence crimes from "the people").

[106] *Rowson*, 2023 WL 431037, at *16.

constitutional under the Second Amendment.[107] The court assumed the defendant fell under the Second Amendment's protection of individual rights afforded to all Americans, and as a citizen, he would belong "to a class of persons who are part of a national community."[108]

While the question of who is within the "the people" could affect the Nation's Historical Tradition Test, one thing we now know is that when it is apparent that the person exercising the Second Amendment right to self-defense is a law-abiding citizen, that person is included in "the people."[109]

2. Prohibited Conduct Protected by the Second Amendment

The Second Amendment's operative clause, "the right of the people to keep and bear Arms," protects conduct outside and inside the home, because it is necessary for individuals to defend themselves in both places.[110] *Bruen* interprets the right to possess and carry weapons in case of confrontation as a right guaranteed to an individual.[111] That right "[to] bear naturally encompasses public carry."[112] Weapons include firearms and handguns "in common use today for self-defense."[113]

However, asking what conduct is protected presents numerous additional questions of unanswered application.[114] First, the Court did not place a burden of proof on either party to prove the conduct fell within the Second Amendment.[115] Instead, the Court compared the regulation at issue against the conduct within the Second

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[107] United States v. Combs, No. 5:22-136-DCR, 2023 WL 1466614, *1 (E.D. Ky 2023) (mem. op.).
[108] *Id.* (citing *Verdugo-Urquidez,* 494 U.S. at 265).
[109] *See* United States v. Rahimi, 61 F.4th 451 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023).
[110] *Bruen*, 597 U.S. at 31-2.
[111] *Id.* at 31-2 (explaining that "bear arms" means to carry on the person for the purpose of being armed for self-defense, because one doesn't usually wear a firearm in the home for moments of confrontation).
[112] United States v. Quiroz, 629 F. Supp. 3d 511, 515 (W.D. Tex. 2022) (interpreting the conduct of "carry" to include to have, possess, and receive weapons); United States v. Banuelos, 640 F. Supp. 3d 716, 725 (W.D. Tex. 2022).
[113] *Bruen*, 597 U.S. at 22, 31.
[114] *See* Willinger, *supra* note 82.
[115] *Id.*

Amendment.[116] In the lower courts' application of the *Bruen* test, neither the defendant nor the applicant appear to bear the burden of proving conduct.[117] Some courts simply moved forward in their assessment of the case by assuming, rather than deciding, that the conduct fell within Second Amendment protections.[118] While the circuits are split, it seems most compelling to place the burden of proof regarding the first question on the plaintiff. Therefore, there should be a bar on cases in which a plaintiff cannot establish a violation of their right to Second Amendment conduct.[119]

Second, *Bruen* is not clear on whether conduct prohibited by "longstanding prohibitions" is presumed to be outside the Second Amendment's protected conduct.[120] In *Heller* and *McDonald* (and Justice Kavanaugh's *Bruen* concurrence), the Court reiterated, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[121] Yet, Justice Thomas's majority opinion only clearly extended

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[116] *Id.*

[117] United States v. Nutter, 624 F. Supp. 3d 636, 639 (S.D.W. Va. 2022); United States v. Jackson, 622 F. Supp. 3d 1063, 1066 (W.D. Okla. 2022).

[118] *Nutter*, 624 F. Supp. 3d at 639. For instruction, it may be helpful to look lower courts past application of the previous Circuit Court two-pronged means-end balancing test, which asked whether the law imposes a burden on conduct falling under the Second Amendment. *See* Alexandra T. Cline, Note, *Who Has the Right? Analysis of Second Amendment Challenges to 18 U.S.C. § 922(g)(4),* 96 NOTRE DAME L. REV. 1623, 1634 (2021).

[119] *Compare* Binderup v. Attorney General, 836 F.3d 336, 340 (3d Cir. 2016) (en banc)) ("[P]laintiff must (1) identify the traditional justifications for excluding from the Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.") *with Tyler*, 837 F.3d at 688 ("The government bears the burden at step one to conclusively demonstrate that the challenged statute burdens persons historically understood to be unprotected).

[120] *See* Willinger, *supra* note 82.

[121] *Bruen,* 597 U.S. at 81.

presumptively lawful status to firearm prohibitions in "sensitive places."[122]

Legal analysts prognosticate that *Bruen* signals a movement that strays from presumptively protecting longstanding firearm prohibitions on particular conduct because only two of the justices backing the majority opinion deliberately includes such language in their concurrences.[123] Perhaps, the conduct within those longstanding prohibitions is presumptively regulatable, not *per se* conduct outside the Second Amendment's protection.[124]

Whether by courts' nondecision or a finding that the conduct is protected, the Court will have addressed *Bruen's* first prong whether the conduct is protected by the Second Amendment.[125] The Court must then move to the inquiry's second prong: whether the regulation of conduct falls within the Nation's historical tradition.[126]

3. Historical Analysis Under *Bruen*

Bruen resolved the constitutional question surrounding "may issue" public carry laws on the foundation of the new Second Amendment challenge test.[127] "May issue" was the clause in New York's law that permitted the denial of public carry licenses, even if the person seeking the permit satisfied all other criteria of the permit application.[128] Three justices joining the majority in *Bruen*, Roberts, Kavanaugh, and Alito, state in their concurrences that the opinion only addressed "may issue" laws in the ruling. Their concurrences did not extend the majority's holding to pre-existing bans on legal gun ownership, restrictions on firearm purchases, or limitations on firearm categories.[129] These concurrences do not challenge *Bruen's* new test.

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[122] *Bruen*, 597 U.S. at 30 (2022) ("[C]ourts can use analogies to 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings' to determine whether modern regulations are constitutionally permissible").

[123] *See* Willinger, *supra* note 82.

[124] *Id.*

[125] *E.g.* United States v. Nutter, 624 F. Supp. 3d 636, 639 (S.D.W. Va. 2022).

[126] *Bruen,* 597 U.S. at 32-33.

[127] *See Nutter*, 624 F. Supp. 3d at 639, n.2 (stating that the court will assume the conduct falls under the Second Amendment protections and thereafter moving on to the next step in their analysis).

[128] *See Bruen*, 597 U.S. at 14-15.

[129] *Id.* at 71-82.

[130] However, they appear to invite Second Amendment appeals to the Court for challenges based on the *Bruen* test.[131]

To save a regulation from failing a Second Amendment *Bruen* challenge, the government carries the burden to show that the "right codified in the Second Amendment . . . does not protect" the proposed regulated conduct by establishing some relevant historical tradition of regulation.[132] While some regulations are historical, most are not so obvious.[133] In cases where the historical backing is not straightforward, the government must present a historical analog.[134] The courts are not responsible for "sifting through historical materials for evidence to sustain" the government's contention.[135] The lack of evidence may be a reason to reduce the historical proposed regulations' relevance.[136] While meeting this burden can be a hefty task for the state "[c]ourts are entitled to decide a case based on the historical record compiled by the parties." [137]

The court divides historical evidence into five brackets: (1) "medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and

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[130] *See also id.* at 81-82. (Barrett, J., concurring) (maintaining the validity of the test but parsing through the questions asked within the second prong).

[131] *See* United States v. Rahimi, 61 F.4th 451 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023) (No. 22-915) ("Question presented: Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.").

[132] *Bruen*, 597 U.S. at 32-33.

[133] *Id.* at 26-27. The Court explained:

> For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id.

[134] *Id*. at 30.

[135] *Id*. at 2150.

[136] *Id*. at 26-27.

[137] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 2130 n.6 (2022) (citing United States v. Sineneng-Smith,140 S.Ct. 1575, 1579 (2020)).

(5) the late-19th and early 20th centuries."[138] Outright, the Court minimized comparisons to regulations created in the 20th century because of their distance from 1787.[139] New York also offered older statutory laws, common law, and surety laws as evidence of the regulations, similar to historical laws. The text details various public-carry limitations during the colonial period, such as complete prohibitions and regulations in American territories, along with statutes regarding surety.[140] Yet, despite producing a bundle of historical regulations to support its own law, the Court ruled New York failed to meet its burden in *Bruen*.[141]

Justice Thomas stated, "Analogical reasoning requires only that the government identify a well-established and representative historical *analog*, not a historical *twin*."[142] A textual understanding of this dicta would lead one to believe one good analog would suffice to affirm the constitutionality of a questioned regulation.[143] After all, "a" is singular, "analog" is singular, and "twin" is singular.[144] However, one good analog is not enough, neither are three, or even six.[145] As the Court elucidated its reasoning for denial, it developed a clear trend of "treating laws in isolation and then remarking that the court cannot rely on isolated laws to justify [its regulation]."[146]

For instance, Justice Thomas gave an example that "if some jurisdictions . . . attempted to enact analogous regulations during this timeframe, but [rejected those proposals] on constitutional grounds, that rejection surely would provide some probative evidence of

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[138] *Id*. at 32-34

[139] *Id*. at 34-35.

[140] *Id*. at 47.

[141] *Id*. at 69.

[142] *Id*. at 30.

[143] *Cf. id.* at 65 ("we will not give disproportionate weight to a single state statute and a pair of state-court decisions.").

[144] *Twin,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/twin (last visited 10/22/2023 ("one of two persons or things closely related to or resembling each other"); *A,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/a (last visited 10/22/2023) ("used as a function word before singular nouns when the referent is unspecified"); *compare Analogue* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/analogue (last visited 10/22/2023) (offering the examples: "historical analogues to the current situation" or "an aspirin analogue").

[145] *Bruen*, 597 U.S. at 69.

[146] *See* Willinger, *supra* note 82.

unconstitutionality."[147] Seeking to satisfy this example, New York offered Texas' reconstruction law, which in 1871 "forbade anyone from 'carrying on or about his person . . . any pistol . . . unless he has reasonable grounds for fearing an unlawful attack on his person.'"[148] The Texas law prohibited carrying firearms in public, and there were cases challenging its constitutionality, but those challenges were not successful: The Texas law was constitutional.[149] In addition to the Texas law, New York offered West Virginia law that similarly required proof of reasonable grounds.[150] Justice Thomas remarked, "[w]e acknowledge that the Texas cases support New York's proper-cause requirement, which one can analogize to Texas' 'reasonable grounds' standard. But the Texas statute, and the rationales set forth in [the cases challenging the Texas statute], are outliers." [151]

Cherry-picking history in this manner presents a grave danger to the stability of congressionally passed statutes and to the lower courts' judicial economy. [152] Judges, who are not absent their own political beliefs, are faced with political petitioners who are represented by political organizations. These political organizations may taint the traditionally apolitical positions of the court when they seek to establish new limitations or expansions on the law.[153] When such judges and political organizations meet, it threatens to break the dam, releasing a flood of decisions that drown polity. The rush of new

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147 *Bruen,* 597 U.S. at 27.

148 *Id*. at 65.

149 *Id*.

150 *Id*.

151 *See id*. at 2144 ("Regardless, even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*.").

152 *See* Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen's Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/.

153 *Forum-Shopping,* Black's Law Dictionary (11th ed. 2019) ("The practice of choosing the most favorable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum-shopping, for example, by filing suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge."); *Judge-Shopping,* Black's Law Dictionary (11th ed. 2019) ("The practice of filing several lawsuits asserting the same claims — in a court or a district with multiple judges — with the hope of having one of the lawsuits assigned to a favorable judge and of nonsuiting or voluntarily dismissing the others.").

litigation first hits district courts, then appellate courts.[154] Being that *Bruen's* ruling is so recent, it is unlikely the Supreme Court will touch the subject in the next couple of years.[155] While the New York law addressed ordinary law-abiding citizens' right to public-carry, the rush to the lower courts will most certainly challenge "longstanding prohibitions on firearms," particularly 18 U.S.C. § 922(g)(8) and (9).[156]

B. "Longstanding Prohibitions" at Lower Courts.

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . .[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions . . . [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]"[157]

State and federal governments currently control firearms through regulations.[158] The federal government's longstanding

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[154] *See* 28 U.S.C.S. § 1331; FED. R. CIV. P. 5.1.

[155] *See* Cornell, *supra* note 152.

[156] *Id.*

[157] *Bruen*, 597 U.S. at 80 (Breyer, J., dissenting) (citing McDonald, 561 U.S. at 786 (2010)).

[158] *Compare State Laws and Published Ordinances – Firearms*, ATF BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (34th Edition), https://www.atf.gov/firearms/state-laws-and-published-ordinances-firearms-34th-edition (last updated Sept. 16, 2021) (offering a database of state and territory laws) *with* U.S. DEPT. OF JUST., ATF P 5300.5, STATE LAWS AND PUBLISHED ORDINANCES – FIREARMS (2001 – 23RD EDITION) (exhibiting an extensive list of U.S. state and territory firearm laws, the number of which span over 410 pages). *Cf.* U.S. DEPT. OF

prohibitions on firearms under the Second Amendment are codified in 18 U.S.C. § 922 (Unlawful Acts) and 18 U.S.C. § 924 (Penalties).[159] The statutes include prohibitions on possessing firearms for the mentally ill (§ 922(g)(4)), convicts (§ 922(g)(1)), and fugitives (§ 922(g)(2)).[160] At common law, these laws have historical constitutional footing.[161]

However, firearms prohibitions that aim at predominantly protecting women may not have such firm historical footing.[162] Women only became full-fledged and undeniable members of the political community in 1919 with the passage of the Nineteenth Amendment.[163] After all, the American Colonies continued the English common law of coverture.[164] Up until the 1970's, American society and its courts saw domestic violence and abuse as a private family matter.[165] However, today, most Americans consider domestic abuse to be a public safety concern.[166]

Under § 922(g)(8), it is unlawful for a person who is subject to a civil court order that restrains the person from engaging in or threatening to engage in stalking, harassing, violence to a child, or

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JUST., 5300.4, ATF FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, 3-5 (2014) (showing the expansive index of federal firearm regulations).

[159] 18 U.S.C. §§ 922, 924.

[160] *Id*. § 922.

[161] *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008); *Bruen*, 597 U.S. at 80 (Breyer, J., dissenting) (citing McDonald, 561 U.S. at 786 (2010)).

[162] *See* Elizabeth Tobin-Tyler, Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises, 51 J. L. MED. ETHICS 64, 65 (2023) ("It was not until the 1970s that state laws were enacted to protect IPV victims and hold abusers accountable. A link between IPV and firearms began in 1968 when the federal Gun Control Act barred firearm possession by individuals convicted of felony domestic violence.")

[163] *See* U.S. Const. XIX Amend.

[164] 2 WILLIAM BLACKSTONE, COMMENTARIES *432 (describing coverture); *see* ELEANOR FLEXNOR, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES, 14–15 (9th ed. 1973) (establishing that married women during the founding of the United States were essentially robbed of freedom by law and lacked political posture in the view of men and society).

[165] *See generally* United States v. Perez-Gallan, 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023); Catherine Jacquet, *Domestic Violence in the 1970s*, NAT'L INST. HEALTH (2015), https://circulatingnow.nlm.nih.gov/2015/10/15/domestic-violence-in-the-1970s/ (last visited 10/28/2021).

[166] *Bruen,* 597 U.S. at 87-88 (Breyer, J., dissenting) (citing McDonald, 561 U.S. at 786 (2010)).

intimate partner violence to ship, transport, possess, or receive a firearm.[167] Under § 922(g)(9), it is unlawful for a person convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive a firearm.[168] Violating either statute results in a criminal action, where the defendant must forfeit their firearms and ammunition upon a finding of guilt and may be fined and imprisoned for up to 15 years.[169]

Section 922(g)(8) resulted in a Second Amendment prohibition on guns being in the hands of those with restraining and protective orders.[170] Protective orders and restraining orders are two different forms of civil action.[171] States vary, but generally, a restraining order is a civil injunction with a civil penalty, whereas a protective order is a civil injunction with a criminal liability.[172] In Texas, a court may issue a protective order if the applicant shows by a preponderance of evidence that the respondent is stalking, harassing, threatening intimate partner violence, or engaging in family abuse.[173] This standard of proof is much lower than beyond a reasonable doubt, which a criminal finding requires.[174] Additionally, because it is a civil

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[167] 18 U.S.C. § 922(g)(8).

[168] *Id.* § 922(g)(9).

[169] *Id.* §§ 922(d), (a)(1).

[170] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2015.

[171] 18 U.S.C. § 922.

[172] *Cf.* AM. BAR ASSOC.: COMM'N ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) (June 2020) (compiling all U.S. State's laws regarding Civil Protection Orders).

[173] Tex. Fam. Code Ann. § 82.001; Tex. Code Civ. Proc. Art. 7B.001; *see* AM. BAR ASSOC.: COMM'N ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) (June 2020) (compiling all U.S. State's laws regarding Civil Protection Orders); In re Cummings, 13 S.W.3d 472, 476 (Tex. App.—Corpus Christi 2000, no pet.) (finding a preponderance of evidence in support of a protective order).

[174] United States v. Rahimi, 61 F.4th 443, 455 n.7 (5th Cir.) ("The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections. . . It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.") (citing U.S. CONST. amends. IV, V, VI, VIII).

hearing, the respondent to a protective order is not guaranteed the right to counsel or trial by peers.[175]

The case is different under § 922(g)(9). Section 922(g)(9) requires a criminal misdemeanor conviction to activate it.[176] The Fifth and Sixth Amendments apply to criminal charges.[177] A defendant has a right to a defense lawyer.[178] Prosecutors also bear a higher burden of proof; the evidence must prove beyond a reasonable doubt that the defendant committed the crime they are charged with.[179] These safeguards are comparable to the protections provided to felons, who are included in the category of those presumptively prohibited from Second Amendment carry due to their place in the longstanding prohibition on the right to bear arms.[180]

The three issues presented above ("the people," conduct, and history) remain relevant to determining constitutionality for both sections under the Second Amendment. In challenges to § 922(g)(8) and (9), the *Bruen* test generally finds § 922(g)(8) unconstitutional, while challenges to § 922(g)(9) have failed, upholding its constitutionality.

1. 18 U.S.C. 922(g)(9) Is Likely to Remain Constitutional

Bruen's opinion came out on June 23, 2022, and one of the first cases applying *Bruen* was *United States v. Jackson*, decided by the Western District Court of Oklahoma only a few months later.[181] In *Jackson*, the "defendant [stood] charged in a one-count indictment of knowingly possessing two firearms after having been convicted of a misdemeanor crime of domestic violence, in violation of § 922(g)(9)."[182] The defendant "[motioned] seek[ing] a determination that § 922(g)(9) is facially unconstitutional[.]"[183] The question at issue was "whether the Second Amendment's plain text covers Defendant's

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[175] *See* U.S. CONST. amends. IV, V, VI, VIII.
[176] 18 U.S.C. §§ 922(g)(8)–(9).
[177] U.S. CONST. amends. V, VI.
[178] Baldwin v. New York, 399 U.S. 66, 68 (1970) ("the long-established view that so-called 'petty offenses' may be tried without a jury."); Gideon v. Wainwright, 372 U.S. 335, 340 (1963).
[179] TEX. PENAL CODE § 2.01; In re Winship, 397 U.S. 358, 361 (1970).
[180] *See Rahimi*, 61 F.4th at 455-56.
[181] United States v. Jackson, 622 F. Supp. 3d 1063 (W.D. Okla. 2022).
[182] *Id*. at 1064-65.
[183] *Id*. at 1065.

conduct and, if so, whether the government ha[d] demonstrated that § 922(g)(9) is consistent with the United States' historical tradition of firearm regulation."[184]

The government pointed to *Heller*'s "law-abiding citizen" dicta to argue that Second Amendment rights do not apply to criminally convicted individuals.[185] However, the Court did not find this persuasive.[186] The Court did not address whom the Second Amendment covers. Instead, it quickly moved past "the people" question to conduct.[187] The Court presumed § 922(g)(9) prohibits "conduct which is facially covered by the plain text of the Second Amendment."[188] The Court then relied on the district court case *Daniels* to determine that the Second Amendment protects an individual's right to possess a firearm for self-defense in and out of the home.[189] The Court moved next to the second prong, the Nation's Historical Tradition Test.[190]

The government provided insufficient evidence of historical laws correlated to domestic abuse.[191] Its strongest argument, which the Court accepted, was a broad argument demonstrating historical prohibitions on felons in possession of firearms.[192] The argument goes as follows:

1. Heller states there is a "longstanding" historical prohibition on the possession of firearms by felons.[193]
2. There are many non-violent felonies that carry a prohibition on firearm possession.[194]

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184 *Id*. at 1066.
185 *Id*.
186 *Id*. at 1065 (showing that the government did not have an extensive historical analysis).
187 *Id*.
188 *Id*. at 1066 n.2
189 United States v. Jackson, 622 F. Supp. 3d 1063, 1066 (W.D. Okla. 2022).
190 *See id*. at 1067 (providing an analogue that must be relevantly similar, which is identified by two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense.").
191 *Id*.
192 *Id*.
193 *Id*.
194 *Id*.

3. Misdemeanors for domestic violence requires a finding of violence.[195]
4. Therefore, they "should be logically viewed as 'relevantly similar to felons' who should be 'denied weapons for the same reasons.'[196]

Further, the Court supported its logical analysis with *Voisine v. United States*, where the Supreme Court recently held that § 922(g)(9) applies to a reckless misdemeanor assault which requires a lesser *mens rea*.[197] This rationale is persuasive, as evidenced by another court focusing on the misdemeanor's violent element.[198] Published ten days after *Jackson*, the Southern District Court of West Virginia delivered *United States v. Nutter*.[199] There, the Court presumed the Second Amendment's plain text covered Defendant's conduct. Based on this presumption, the Court found the government demonstrated that § 922(g)(9) is consistent with the United States' historical tradition of firearm regulation.[200]

Nutter distinguished its issue of the constitutionality of 922(g)(9) from *Bruen*'s "may issue."[201] The Court proceeded to narrow *Bruen,* stating, "the opinion focuses on regulations impacting law-abiding citizens, as opposed to the class of regulations prohibiting certain people from carrying firearms based on their conduct or characteristics."[202] Rather than comparing surety laws to the current regulation, the Court analogized the "why" behind the current and past laws, finding "domestic violence was a concern in the founding era" and is still a concern today.[203] Due to the legal landscape surrounding

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[195] *Id.*

[196] *Id.* (citations and quotations omitted).

[197] United States v. Jackson, 622 F. Supp. 3d 1063, 1066 (W.D. Okla. 2022); Voisine v. United States, 579 U.S. 686, 692 (2016).

[198] United States v. Nutter, 624 F. Supp. 3d 636, 644 (S.D.W. Va. 2022).

[199] *See generally Nutter,* 624 F. Supp. 3d at 636.

[200] *Id.* at 638 (showing that a female minor wrote a statement detailing minors drinking alcohol while Defendant possessed and used firearms. That same day, law enforcement obtained and acted on a search warrant on Defendant's home. There, officers located five firearms and assorted ammunition. Upon further investigation, officers found Defendant had three prior misdemeanor convictions involving domestic violence, either against his spouse or child.).

[201] *Id.* at 644.

[202] *Id.* at 641.

[203] *Id.* at 641.

crime and punishment being vastly different, "the absence of an equivalent prohibition on firearm possession by people convicted of domestic violence offenses is not dispositive."[204] Instead, "[t]he absence of stronger laws [during the founding era] may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue."[205] Under this foundation, the government successfully argued historical laws similarly restricted the rights of domestic abusers.[206]

Nutter also added a novel argument. It asserted that the preamble to the Second Amendment, "a well-regulated militia," should be deciphered to mean the Second Amendment tolerates regulations, because no other Amendment includes such contemplations for public safety.[207] The Court cites historical laws in the founding era that prohibited firearm possession based on race, ethnicity, and religion merely to proactively prevent fear and terror.[208] The comparisons strengthen the notion that prohibitions on firearms as a means to prevent fear and terror (like preventing domestic violence and abuse) are constitutional.

Under its broader version of the Nation's Historical Tradition Test's analogue prong, the Court found, "[t]he prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence fits easily within this framework of regulation consistent with the history and purposes of the Second Amendment and designed to keep firearms away from dangerous people."[209]

In December of 2022, the Northern District Court of Iowa ruled on *United States v. Bernard*.[210] The Court had prior rulings to reflect on, and the government proffered substantial historical analysis to win

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[204] *Id.* at 642. Felonies in the time of the founders were capital punishments; today, felonies death sentences are rare. *Id.*

[205] *Id.* at 641.

[206] *Id.* at 645.

[207] United States v. Nutter, 624 F. Supp. 3d 636, 642 (S.D.W. Va. 2022).

[208] *Id.* at 642–43.

[209] *Id.* at 643.

[210] United States v. Bernard, No. 22-CR-03 CJW-MAR, 2022 WL 17416681, at *1 (N.D. Iowa Dec. 5, 2022) (hearing on a case where defendant is a domestic abuse misdemeanant. After receiving an indictment for violating 18 U.S.C. § 922(g)(9), defendant pleaded guilty. The defendant filed a motion to withdraw his guilty plea arguing § 922(g)(9) is unconstitutional and filed a motion to dismiss if the court found so true.).

the challenge.[211] The Court found that while the conduct regulated in § 922(g)(9) falls under the protections of the Second Amendment, the government demonstrated § 922(g)(9) is consistent with the United States' historical tradition of firearm regulation.[212]

The district court applied *Bruen*, recognizing its two-part test. It first determined that the Second Amendment textually covers "people," including the defendant.[213] The court also found that § 922(g)(9) does regulate the conduct covered by the Second Amendment's plain text.[214] The court found, however, that Congress has the ability under the Second Amendment to regulate a person's possession of firearms conditioned on their non-law-abiding status.[215]

Section 922(g)(9) "is consistent with the Nation's historical tradition of firearm regulation . . . because at the time of the adoption of the Second Amendment the Nation kept arms from citizens who posed a danger to society."[216] Despite the relative newness of § 922(g)(9), "[p]rohibiting violent criminals from possessing firearms, such as those who have been convicted of a misdemeanor crime of domestic violence, is consistent with and analogous to prohibiting felons from possessing firearms."[217] The court points to *Kanter v. Barr* to support its proposition.[218] There, then-Seventh Circuit Justice Amy Coney-Barrett dissented, stating historical evidence supports the proposition,

> "[T]hat the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have

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[211] *Id.*
[212] *Id.* at *7.
[213] *Id.* at *7 (citing Perez-Gallan, 2022 WL 16858516, at *8–9 (holding the Second Amendment is not limited to law-abiding citizens but applies to individuals in the political community)).
[214] *Bernard*, 2022 WL 17416681, at *7.
[215] *Id.*
[216] *Id.*
[217] *Id.*; *see* Kanter v. Barr, 919 F.3d 437, 454, 456–58 (7th Cir. 2019) (Barrett, J., dissenting).
[218] *Bernard,* 2022 WL 17416681, at *7; *see Kanter*, 919 F.3d at 454, 456–58 (7th Cir. 2019) (Barrett, J., dissenting).

> not been convicted of felonies but not felons lacking indicia of dangerousness."[219]

Domestic abusers are likewise legislatively disarmed, because they have shown a proclivity for violence against their victim.[220] In fact, both § 922(g)(8) or § 922(g)(9) requires a proof of indicia of dangerousness for the civil court order or for the misdemeanor charge of domestic violence.[221]

The most recent case resolving a § 922(g)(9) Second Amendment constitutional challenge is *United States v. Porter*.[222] There, in the Western District Court of Louisiana, the government argued "prohibiting persons convicted of misdemeanor domestic abuse battery from possessing firearms is consistent with this Nation's historical tradition of firearm regulation."[223] The Court agreed and observed § 922(g)(9) requires a finding of violent criminality, which the Defendant had.[224]

> On or about September 14, 2022, in the Western District of Louisiana, the defendant, Tydarrien T. Thomas, knowing he had been convicted of a misdemeanor crime of domestic abuse battery, knowingly possessed a firearm to wit: a Glock pistol, model: 20 Gen 4; Caliber: .45 auto; and the firearm . . .[225]

This criminal finding gave the defendant adequate protections and due process before removing their Second Amendment rights.[226] Further, the Second Amendment prohibition comported with historical "going

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[219] *Bruen*, 597 U.S. at 82 (Barrett, J. concurring) (advising on what questions to consider when going through the historical analysis).
[220] *Bernard,* at *8 (citing Kanter, 919 F.3d at 454, 456–58 (Barrett, J., dissenting)).
[221] *Id.*
[222] United States v. Porter, No. CR 22-00277, 2023 WL 2527878, at *1 (W.D. La. Mar. 14, 2023) (mem. op.).
[223] *Id.*
[224] *Id.*
[225] *Compare Porter*, 2023 WL 2527878, at *1 *with* 18 U.S.C. 922(g)(9).
[226] *Porter,* 2023 WL 2527878, at *2.

armed" laws of Massachusetts, North Carolina, and Virginia, which also required a violent crime finding.[227]

The government supported its position that § 922(g)(9) is constitutional by providing analogous policy reasons for prohibiting violent offenders from possessing firearms.[228] *Bruen* explicitly averts this use, mandating an originalist textual reading of the Second Amendment.[229] *Porter* found the inclusion of policy as a piece of the whole analysis. While "comparing public policy goals is foreclosed by the *Bruen* decision, the Court [found] the Government engaged in *more* than a simple comparison of policy."[230]

Further, the Court mentions, "[s]uch justifications are grounded in social and scientific studies, evincing the positive effect of preventing domestic abusers from possessing firearms" while citing past case law.[231] This is significant because it reverts to the means-end balancing test which asks what are the government's interests, i.e., policy reasons.[232]

Porter finds no reason to completely turn on past findings.[233] Other district courts also uphold the constitutionality of § 922(g)(9).[234] The district courts, almost unanimously, find longstanding Second Amendment prohibitions on felony firearm possession analogous to misdemeanor domestic abuse.[235] That is because misdemeanors require due process similar to a felony and because misdemeanor domestic violence requires a violent act.[236] If the government provides at least this argument, the Court will likely uphold § 922(g)(9).

2. 18 U.S.C. 922(g)(8) Likely Now Unconstitutional

While § 922(g)(9) will likely remain constitutional, its partner, § 922(g)(8), will likely not survive a Second Amendment

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[227] *Id.* at *3.
[228] *Id.*
[229] *Id.* at *4.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] United States v. Porter, No. CR 22-00277, 2023 WL 2527878, at *3–4 (W.D. La. Mar. 14, 2023) (mem. op.).
[235] *See e.g., id.* at *3.
[236] *Id.*

constitutional challenge.[237] Three courts have ruled against § 922(g)(8)'s constitutionality, and only one found the regulation constitutional.[238]

Two months after *Bruen*, The United States District Court for the Western District of Oklahoma ruled on a § 922(g)(8) Second Amendment challenge in *United States v. Kays*.[239] Reaching back to *Jackson* and pre-*Bruen* holdings, the Court reasoned that, like § 922(g)(9), § 922(g)(8) is a longstanding prohibition on Second Amendment rights.[240] Those individuals subject to a domestic violence protective order should logically be denied weapons for the same reasons that domestic violence misdemeanants. Both prohibit the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence.[241]

At the beginning of the opinion, the Court states, "Under [both *Heller* and *McDonald*] decisions, the Tenth Circuit has consistently upheld the constitutionality of § 922(g) generally and subsection (8) specifically."[242] While this statement is purely dicta, it foreshadows the ultimate conclusion, § 922(g)(8) must be constitutional.[243] *Kays* swiftly relinquishes individuals' Second Amendment rights by leap-frogging from legitimate constitutional firearm prohibitions on felons, to permissible firearm prohibitions on domestic violence misdemeanants, to technically law-abiding citizens, those individuals who have been so violent that they have a civil order prohibiting their

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[237] *See* United States v. Combs, No. 5:22-136-DCR, 2023 WL 1466614 at *1 (E.D. Ky 2023) (mem. op.); *see also* United States v. Perez-Gallan, 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023); United States v. Rahimi, 61 F.4th 443; *but cf.* United States v. Kays, 624 F. Supp. 3d 1262 (W.D. Okla. 2022).

[238] *See Combs,* 2023 WL 1466614 *1; *Perez-Gallan*, 640 F. Supp. 3d 697; *Rahimi*, 61 F.4th 443; *but cf. Kays*, 624 F. Supp. 3d 1262.

[239] *Kays,* 624 F. Supp. 3d at 1262 (stating defendant stood indicted in part for being a prohibited person in possession of a firearm, in violation of 18 U.S.C. § 922(g)(8). Defendant sought a determination that § 922(g)(8) is facially unconstitutional because "it infringes on an individual's fundamental right under the Second Amendment to possess and carry firearms, and if successful, he seeks a dismissal of the charges against him under an unconstitutional statute.").

[240] *Id.* at 1267 (The government argues the law is broadly similar to surety laws and other historical prohibitions on felons and the mentally ill).

[241] *See id.* at 1266–67.

[242] *Id.* at 1264–65.

[243] *See id.*

interaction with their victim.[244] *Kays* failed to support this analogy by providing persuasive or comprehensive review of history or the law.[245] It is no wonder, then, that subsequent holdings on § 922(g)(8) Second Amendment challenges find the law unconstitutional.

In November of 2022, the Western District Court of Texas applied the Nation's Historical Tradition Test and delivered a shocking finding: § 922(g)(8) is unconstitutional.[246] *United States v. Perez-Gallan* is the first case post-*Bruen*, finding a longstanding prohibition on the firearm possession to be outside of the Second Amendment.[247] This finding was shocking because it seemed permit gun violence by raising the Second Amendment rights of a violent domestic partner above the right of the victim spouse's liberty, life, and freedom of oppression.[248]

In *Perez-Gallan,* the defendant drove his 18-wheeler into a border patrol checkpoint along the US-Mexico border.[249] Agents directed him to a secondary search area, where they asked if he had any weapons.[250] The defendant stated he had a gun and then he consented to a search of the vehicle.[251] Agents found the defendant's pistol in his backpack, and the defendant's wallet, which contained a Kentucky restraining order concerning a May 2022 assault.[252] The government subsequently indicted the defendant under 18 U.S.C. § 922(g)(8) for possession of a firearm while under court order.[253] The

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244 *Id.*

245 *Id.*

246 United States v. Perez-Gallan*,* 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023) (Judge David Count's opinion in Perez-Gallan could be called the catalyst that led the other courts of the nation to find § 922(g)(8) and other "Longstanding prohibitions" unlawful.).

247 *Id.*

248 *See also id.* at 714–15; *see also* Elizabeth Tobin-Tyler, *Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises*, 51 J. L. MED. ETHICS 64, 65 (2023) ("Access to firearms plays a large role in IPV injury and death. A victim or survivor of IPV is five times more likely to die when an abusive partner has access to a gun. The rate of IPV-related firearm homicides in the U.S. is significantly higher than comparable industrialized countries.").

249 United States v. Perez-Gallan*,* 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023)

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.*

defendant then moved to dismiss the indictment, claiming § 922(g)(8) was unconstitutional.[254]

The Court first assessed whether the elements of § 922(g)(8) were met.[255] Section 922(g)(8) requires: (1) the underlying state court order be issued after the defendant receives notice of an opportunity to participate in a hearing; (2) that the order restrain the defendant from harassing, stalking, or threatening or engaging in conduct threatening bodily harm to the recipient of the order; and (3) the order, by its terms, explicitly prohibits threats, attempts, or actual use of physical force against the recipient of the order.[256] Although the defendant's order did not detail a prohibition on threats, or use or attempted use of force against the recipient of the order, it did prohibit abuse.[257] The court found the order sufficient to apply § 922(g)(8), as "a court order need not perfectly match § 922(g)(8)'s language."[258]

The Court then moved to the Second Amendment challenge, assessing the case under the Nation's Historical Tradition Test derived from *Bruen*.[259] *Perez-Gallan* applied the first prong of the test: whether the regulated conduct falls within Second Amendment protections.[260] The Court found, "[T]he Second Amendment's language 'keep and bear arms' language plainly encompasses possession," therefore § 922(g)(8) would prohibit the subject of the order from their Second Amendment right to possess firearms.[261] Second Amendment protection of firearm possession makes the conduct prohibited by § 922(g)(8) protected under the Second Amendment, moving the analysis to the second prong of the Nation's Historical Tradition Test.[262]

The second prong of the test asks whether the current regulation falls within the nation's historical tradition on Second

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254 *Id.*
255 *Id.*
256 *Id.*
257 United States v. Perez-Gallan, 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. August 2, 2023)
258 *Id.* at 700
259 *Id.* at 701; *see also* Bruen, 597 U.S. at 23-24. (Under that test, the court must first determine if the Second Amendment's plain text covers the regulated conduct. Second, the government must justify its regulation by ensuring its consistency with "the nations historical tradition of firearm regulation.").
260 *Perez-Gallan*, at 701–702.
261 *Compare id. with* United States v. Nutter, 624 F. Supp. 3d 636 (S.D.W. Va. 2022).
262 *Perez-Gallan*, at 701–702.

Amendment prohibitions, either in a (1) straightforward manner or (2) by historical analogy.[263] The Court found no straightforward historical regulation for two reasons.[264] First, these prohibitions came into effect late in the nation's history (the federal government enacted § 922(g)(8) less than thirty years ago).[265] Second, circuit courts found little evidence of historical domestic violence regulations that prohibited firearm possession.[266] From this determination, the analysis shifted to assessing if an analogous historical regulation existed.[267]

The Court discarded numerous historical regulations in the same fashion as *Bruen*, by isolation and elimination.[268] This follows because § 922(g)(8) is similar to New York's show of cause public carry law at issue in *Bruen.*[269] Both regulations' prohibitions apply to the general population who have no violent criminal history.[270] However, § 922(g)(8) is more severe because it completely bans access to firearms.[271] Due to its severity, there is no way to show cause that would overcome the automatic prohibition.[272]

Like *Bruen,* the government in *Perez-Gallan* compared § 922(g)(8) to historical surety laws.[273] The Western District Court

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[263] *Id.* at 702 (explaining that if the conduct regulated is a historical regulation of conduct "that has persisted since the 18th century" then the analysis is "straightforward." However, if the regulated conduct falls outside that bucket, there is a more nuanced approach where the government must show a historical analogue that is relatively similar to the modern regulation.).

[264] *Id.* at 702–03.

[265] *Id.* at 703.

[266] *Id.* at 702–03 (protective orders and restraining orders are a recent convention, as well, coming about in the last fifty years. In 1970, states implemented firearm prohibitions to subjects of protective orders. Further, the court identified other cases questioning the constitutionality of § 922 regulations.).

[267] *Id.* at 703.

[268] *Id.* at 701–2 (the historical analogue test does not require the historical regulation and current regulation be twins. court should look to (1) whether the problematic conduct regulated is conduct that persisted since the 18th century, and (2) whether earlier generations through materially similar means. If both are met, then it is evidence that the current regulation is constitutional.).

[269] *Id.* at 713 ("In short, the historical record does not contain evidence sufficient to support the federal government's disarmament of domestic abusers.").

[270] U.S. v. Perez-Gallan 640 F. Supp.3d 697, 710 (W.D. Tex. 2022).

[271] *Id.*

[272] *Id.* at 710.

[273] *Id.* at 709.

did not find that analogy persuasive.[274] It contended domestic violence is not new, and that while surety laws sought to control public threats of violence, "private vices (like spousal disputes)" were outside the domain of surety laws.[275] Surety laws operated differently than § 922(g)(8) as well.[276] They required a "money payment or pledge" of future good conduct that required a violation of the surety for disarmament.[277] Yet, § 922(g)(8) immediately prohibits possession of firearms because there is no promise by the subject of the order to not act violent, nor condition subsequent on the promise that acting violent would prohibit their possession of firearms.[278] Therefore, the conduct regulated by surety laws were not sufficiently analogous to § 922(g)(8).[279]

The government offered three other arguments that the Court quickly ruled out: (1) the historical tradition of disarming dangerous people, (2) disarming the politically disloyal, (3) prohibiting felons from possessing weapons and restricting the right to peacefully assemble.[280] The court ultimately held § 922(g)(8) unconstitutional.[281]

It is important to note that before signing off on the ruling, the Court took note of the danger of a strict *Bruen* analysis.[282] The Supreme Court "could easily imagine a scenario" where courts come to "different conclusions on a law's constitutionality, but where both courts would be right" due to the difficulty of historical analysis.[283] These statements demonstrate that the Court recognized its ruling as controversial.

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[274] *Id.*

[275] *Id.*

[276] *Id.* at 709-710.

[277] *Id.* at 714.

[278] U.S. v. Perez-Gallan 640 F. Supp.3d 697, 710 (W.D. Tex. 2022).; *see also*18 U.S.C. § 922(g)(8).

[279] *Perez-Gallan* 640 F. Supp.3d at 710.

[280] *Id.* at 710-12 (the court found these arguments unpersuasive. With respect to the constitutional provisions, the court highlighted that felons have a conviction through constitutional process whereas respondents to protective orders do not. First Amendment restrictions require an "exploit[ation of] their First Amendment rights [in favor of] violence," whereas § 922(g)(8) does not require such exploitation.).

[281] *Id.* at 713.

[282] *Id.* (The court poked at the present interpretation of the Second Amendment being an Independent Right as so new that it is younger than Facebook.)

[283] *Id.*

Several months later, the Kentucky District Court applied *Bruen* to § 922(g)(8), and found the provision unconstitutional under the Second Amendment.[284] In its application of *Bruen*, the Court assumed the defendant fell under the protections of the Second Amendment because Second Amendment protections are individual rights that belong to all Americans, and the defendant, as a citizen, would belong "to a class of persons who are part of a national community."[285] Having met the first portion of the *Bruen* analysis, the Court dug into its historical inquiry.[286]

Here, the government also claimed historical surety laws as analogues to § 922(g)(8).[287] It showed how the current regulation and historical regulations have similar purposes, or *whys*.[288] The purpose of historical surety laws was "prevention, without any crime actually being committed by the party but arising only from probable suspicion, that some crime [was] intended or likely to happen."[289] Likewise, § 922(g)(8)'s purpose is to prevent threats against a child or domestic partner that have been proven under a preponderance of the evidence.[290] The Court agreed the laws have "an arguably similar social purpose for burdening an individual's right to bear arms."[291] But the final inquiry remained, whether the method, or *how* these two laws burden Second Amendment protections, is similar.[292]

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[284] U.S. v. Combs, No. 5:22-136-DCR, 2023 WL 1466614, at *9 (E.D. KY. February 2, 2023) (On June 15, 2022, the county court issued a domestic violence order against defendant. Four days later, he purchased a gun without disclosing to the gun dealer his status as a domestic violence order holder. The magistrate court's report and recommendation indicted defendant on two counts, the first being a violation of § 922(g)(8), which prohibits possessing firearms after receiving an order prohibiting "harassing, stalking, or threatening intimate partner violence . . ."; and the second being a violation of § 922(a)(6), which prohibits making false statements to intended or likely to deceive arms dealers. Defendant appealed to the Federal District Court for review.).

[285] *Id*. at *3.

[286] *Id*. at *4.

[287] *Id.*

[288] United States v. Combs, No. 5:22-136-DCR, 2023 WL 1466614 *1, *4 (E.D. KY 2023) (mem. op.).

[289] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 249 (1769).

[290] *Combs*, 2023 WL 1466614 at *4.

[291] *Id.* at *5.

[292] *Id.*

The Court found the means of historical surety laws and § 922(g)(8) "markedly different."[293] Similar to *Perez-Gallan*, the Court reasoned historical surety laws did not immediately disarm individuals who are subject to them.[294] "Sureties, in their most potent form, were only a 'possible disarmament,'" whereas, § 922(g)(8) is a total prohibition.[295] This material difference in *how* the law burdens Second Amendment protections deems historical surety laws and the current regulation dissimilar, placing § 922(g)(8) outside the confines of constitutionality under the Second Amendment.[296]

In March of 2023, the Fifth Circuit ruled in *United States v. Rahimi* that the appellant fell within the protections of the Second Amendment because he is within "the people," which is defined under *Verdugo* as a person who is "part of the political community."[297] In regards to, the constitutionality of § 922(g)(8), the government failed to meet the appropriate burden that a historical firearm regulation existed with comparable burdens.[298] To restrict the appellant's Second Amendment protections, the government must prove its regulation is consistent with the nation's historical tradition of firearm regulation.[299] Thus, the Court rendered § 922(g)(8) unconstitutional, finding the government provided no common law, "going armed" law, or surety law comparable to sustain § 922(g)(8).[300]

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[293] *Id.*

[294] *Id.*

[295] United States v. Perez-Gallan, No. 22CR-00427, 2022 WL 16858516, *1, *10 (W.D. Tex. No. 10, 2022) (citation omitted).

[296] *Id*.

[297] *Rahimi*, 61 F.4th at 448–49 (5th Cir. 2023) (Between December 2020 and January 2021, Appellant used his gun on several instances. On the first instance, Appellant sold narcotics to someone, then shot into their home. The next day, Appellant had a car accident. When he exited his car he fired at the other driver, then fled the scene. Next, Appellant shot at a constable's vehicle. The final event occurred at a Whataburger, where Appellant shot in the air five times after his friend's card was declined. The Arlington Police obtained a search warrant for Appellant's home. There they found a rifle and pistol. Appellant confessed to possessing weapons despite being subject to an agreed civil protective order entered February 5, 2020. The order expressly prohibited his possession of firearms resulting from his alleged assault of his ex-girlfriend).

[298] *Id.* at 448.

[299] *Id.* at 450.

[300] *Id.* at 448.

C. Fifth Circuit's Second Amendment Constitutional Analysis of § 922(g)(8)

The Fifth Circuit looked to *Heller* and *Bruen* in deciding that the protections of the Second Amendment extend beyond responsible, law-abiding citizens to "the people."[301] While determining that the Appellant is not a model citizen, the Court concludes he is still "a part of the political community entitled to the Second Amendment's guarantees."[302]

After addressing the right to Second Amendment protections, the Court faced a subsequent question: whether the appellant's right may be restricted by § 922(g)(8).[303] With respect to prong one of the *Bruen* test, the Court relied on "common use" language to reason the appellant's conduct (being in possession of a rifle and pistol) was presumptively protected under the Second Amendment.[304]

For the second prong of the *Bruen's* test, the Court evaluated the statute.[305] Section 922(g)(8)'s purpose is to protect against domestic violence.[306] The how or means is forfeiture of Second Amendment rights after a civil proceeding for a protective order that results in a finding that the subject of the order is a credible threat to another.[307] The government argued the regulation is analogous to English and American common law, "going armed" laws, and surety laws.[308] None of these arguments propelled the government's position.[309] The court countered common law with their own ammunition, including the Second Amendment arising as a revolutionary defense against the Crown's taking of firearms.[310] This was accomplished by pointing to material differences in similar law,

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[301] *See id*. at 451 (The court defines the people under U.S. v. Verdugo, 494 U.S. 259, 265 (1990) as "persons who are a part of a national community.").
[302] *Id.* at 452.
[303] *Id.* at 453.
[304] *See* United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023) (rather than being highly unusual in society).
[305] *Id.*
[306] *Id.* at 454–55 (5th Cir. 2023) (the how and why of § 922(g)(8))
[307] *See Id.*
[308] *Id.* at 448.
[309] *Id.* at 460.
[310] *Id.* at 448.

and expressing the lack of persuasiveness of failed Second Amendment alternatives.[311]

As for the government's "going armed" laws comparison, the Court, similarly to *Perez-Gallan* and *Bruen*, recognized firearm forfeiture laws existed in some states, but ultimately decided the government's showing of merely a few states' comparable regulations does not show a tradition of public carry regulation.[312] Further, the Court stated regulations de-arming dangerous people disarmed them after an adjudication of threat to *society*, rather than "an individual."[313] However the Court noted surety law analogues to § 922(g)(8).[314] The court stated, "[S]urety was intended merely for prevention, without any crime actually being committed by the party [and] arising only from probable suspicion, that some crime was intended or likely to happen."[315] Only if the party refused, were they forbidden from carrying a weapon.[316] They also required a civil case, not a criminal case.[317] As in *Bruen* and *Perez-Gallan*, the Court found this to be a critical difference.[318] Surety law offered an option: individuals who paid the surety did not have to give up their weapons, whereas § 922(g)(8) is a total forfeiture of the Second Amendment right.[319] Section 922(g)(8) was therefore held to be an incomparable burden on Second Amendment Rights.[320]

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311 *Id.* at 448.

312 *See Rahimi*, 61 F.4th at 457 (citing to Bruen 597 U.S. at 41-44, which gives a 17th Century example of common law going armed laws where "the government charged Sir John Knight, a prominent detractor of James II, with violating the Statute of Northampton because he allegedly 'did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects.'").

313 *Id.* at 458–59.

314 *Id.*

315 *Id.*

316 *Id.* at 459.

317 *Id.*

318 *Id.* at 460.

319 *Id.*

320 United States v. Rahimi, 61 F.4th 443, 460 (5th Cir. 2023).

IV. Keeping Firearms Out of the Hand of Domestic Violence Perpetrators in the Future

Questions as to whether domestic violence based Second Amendment prohibitions are constitutional will persist until the Supreme Court addresses it.[321] When this question arises for § 922(g)(9), the government should argue that the provision prohibits violent misdemeanants in a similar manner to historical prohibitions placed on felons.[322] Because in each prior case where the Court found § 922(g)(9) constitutional, the government successfully compared the violence in domestic abuse to violent felonies.[323] The government should compare what criminal procedures for a misdemeanor and a felony require, in order to take away a defendant's Second Amendment right.[324] Courts find it persuasive that before a defendant's Second Amendment rights are proscribed the defendant is given proper due process, is afforded representation, and they receive a finding of criminality—even if only at the level of a misdemeanor.[325] However, for this exact reason, or lack thereof, its sister regulation, § 922(g)(8), is difficult to support

Section 922(g)(8) only requires a civil order, but a civil order does not necessarily require an affirmative finding of violence.[326] Therefore, comparing § 922(g)(8) to longstanding prohibitions on felonies will not work.[327] What may work, however, are two things: (1) argue broadened historical comparisons, adding focus to the late 19th and early 20th Centuries, and (2) changing the regulations.[328]

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[321] *Cf. Rahimi*, 61 F.4th at 443 (5th Cir. 2023), *petition for cert. filed,* 22-915 (S. Ct. Mar. 7, 2023) (presenting the question "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.").

[322] *See Porter*, 2023 WL 2527878, at *1; *Bernard*, 2022 WL 17416681, at *1; *Nutter*, 624 F. Supp. 3d at 636; *Jackson*, 622 F. Supp. at 1063.

[323] *See Porter,* 2023 WL 2527878, at *1; *Bernard*, 2022 WL 17416681, at *1; *Nutter*, 624 F. Supp. 3d at 636*; Jackson,* 622 F. Supp. at 1063.

[324] *See Porter*, 2023 WL 2527878, at *1; *Bernard*, 2022 WL 17416681, at *1; *Nutter*, 624 F. Supp. 3d at 643; *Jackson*, 622 F. Supp. 3d, at 1066-67.

[325] *Cf. Jackson*, 622 F. Supp. at 1067; *see e.g. Nutter*, 624 F. Supp. 3d at 644.

[326] 18 U.S.C. § 922(g)(8).

[327] *Id.*

[328] *See* United States v. Kays, 624 F. Supp. 3d 1262, 1267 (W.D. Okla. 2022); *see also Porter*, 2023 WL 2527878, at *1; *Nutter*, 624 F. Supp. 3d at 640.

The United States Congress finds importance in protecting people from domestic violence.[329] However, total bans on weapons are highly disfavored under the current Supreme Court's interpretation of the Second Amendment.[330] To maintain support and to ensure the constitutionality of § 922(g)(8), the legislature should make § 922(g)(8)'s prohibition on Second Amendment rights time-bound. This would remove the courts' frustration with the totality of the restriction.[331]

However, there are further issues. Protective orders are state orders originating in state law and varying in duration, limitations, and repercussions for violations.[332] For example, some state's maximum duration of a family violence protective order is two years.[333] After two years, the protective order expires and the individual can possess firearms.[334] Other states' prohibitions may last forever, and thus forever prohibit the subject of the order from exercising their Second Amendment rights.[335] If state governments added a time-bound threshold to the prohibition then it could fall under a "condition" of the Second Amendment right, similar to other longstanding historical laws.[336]

If states required sureties by those seeking possession of a fire arm who are subject to a protective order for less than two years, victims supported by protective orders may be safer if subsection 8 is found unconstitutional.[337] Sureties are promises of peace given by a defendant and supported by a money bond, and if broken, the result is

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[329] United States v. Perez-Gallan, 640 F. Supp. 3d 697, 703 (W.D. Tex. 2022), aff'd, No.22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023).

[330] *Id.* at 713.

[331] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26-28 (2022)

[332] *See* NATIONAL SURVEY OF STATE LAWS 363 (Richard A. Leiter & Wendy Leiter, eds., 9th ed. 2022) (displaying the multitude and diversity of state protective orders).

[333] *Id.* at 363, 369, 371, 377; *see also* TEX. FAM. CODE ANN. § 85.001 (limiting family violence protective orders to a maximum duration of two years).

[334] *E.g.* FAM. §85.001 (relinquishing the protective order after the period of the order, including the after the maximum duration of two years).

[335] *Compare* NATIONAL SURVEY OF STATE LAWS, *supra* note 332, at 366, 377, *with* TEX. CODE CRIM. PROC. ANN. art. 7B.001 (maximizing the length of protective orders for stalking, harassing, assault, sexual assault, and child sexual assault to lifetime).

[336] *Cf. Bruen*, 597 U.S. at 112 (2022) (J. Bryer, dissenting) (commenting on historical conditions on Second Amendment rights).

[337] *Id.* at 55 (recognizing the historical tradition of surety laws).

a relinquishment of their firearms.[338] Despite the government's unsuccessful analogies to historical surety laws in nearly all § 922(g)(8) and (9) Second Amendment challenges, surety laws are promising.[339]

Sureties are promising because both the Supreme Court and lower courts have recognized surety laws as valid historical prohibitions on the Second Amendment.[340] This is instructive on what the Supreme Court would find constitutional if enacted, because the Court is unlikely to overturn a statute that implements a past historical prohibition on firearms.[341] In addition to the state action suggested above, Congress could also amend § 922(g)(8) to require that protective orders include a surety for those subject to time-bound protective orders, which upon a violation would require them to relinquish their firearms.[342]

A. Protecting § 922(g)(8) and (9) by Making Historical Comparisons from Late and Mid 1900's

In 1973, over fifty years after women gained the right to vote and about one hundred years after African Americans gained the right to vote, Barbara Jordan was elected as the first black, southern woman to serve in the U.S. House of Representatives. She recognized her position in context to her Nation's historical tradition:

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338 *Id.*

339 *See Rahimi*, 61 F.4th at 443 (finding surety analogy to § 922(g)(8) unpersuasive), *cert. granted*, 143 S. Ct. 2688 (2023); United States v. Combs, No. CR 5:22-136-DCR, 2023 WL 1466614 *1, (E.D. Ky. Feb. 2, 2023) (mem.op.); United States v. Perez-Gallan, 640 F. Supp. 3d 697, 709 (W.D. Tex. 2022) (making a comparison to the character of surety laws, "the Court questions how 922(g)(8), which completely revokes the constitutionally protected conduct of possession, is less restrictive than a surety statute, which required 'either a money payment or pledge by others "in support of his future good conduct.'"), *aff'd,* No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023).

340 *Perez-Gallan*, 640 F. Supp. 3d at 709 (finding surety laws to be within the historical tradition of the United States, despite not finding it analogous to subsections (8) and (9)).

341 *See Bruen*, 597 U.S. at 55-56.

342 *See Id.* ("the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.'").

> [T]he beginning of the Preamble to the Constitution of the United States. 'We the people.' It is a very eloquent beginning. But, when that document was completed on the seventeenth of September in 1787, I was not included in that 'We, the people.' I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But, through the process of amendment, interpretation, and court decision, I have finally been included in 'We, the people.'[343]

When thinking of the Second Amendment, the founders, Alexander Hamilton, George Washington, John Jay, Patrick Henry and others, were not occupied with the likelihood of men using a firearm to murder their wives.[344] The exception, John Adams, whose wife, Abigail Adams, sent him the most famous documented plea to the founders to just *consider* women in their forming of the Constitution:

> That your [men] are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity? Men of Sense in all Ages abhor those customs which treat us only as the vassals of your Sex. Regard us then as Beings placed by providence under your protection and in imitation of the Supreme Being make use of that power only for our happiness.[345]

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[343] *Debate to Determine Whether to Recommend that the House Adopt Articles of Impeachment Against President Richard Nixon before the H. Comm. On the Judiciary*, 93rd Cong. 1813-2011 (1974) (statement of Rep. Jordan, Member, H. Comm. On the Judiciary).

[344] *Compare* Abigail Adams to John Adams, 31 March 1776, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/04-01-02-0241.

[345] *Id.*

From her letter, it is clear that many women were not treated well, and if they were, they were still under the control of their husbands.[346] At that time, women were not a part of the political community: they could not vote, serve on a jury, nor were many of them landed gentry.[347] This term "political community" is significant because "the people" in the Second Amendment are defined as those within the political community.[348] Political community, as a group right, correlates with political rights granted by the people to those in political positions, both the executive and legislative branches, as opposed to judicial rights granted to the judiciary.[349] Individually, political rights refer to a person's liberty to run for office, belong to a political party, create political parties, vote, keep that enfranchisement, and even utilize one's citizenship.[350]

Those with political rights at the time of the Second Amendment's adoption were a small percentage of the population.[351] After 1920, men *and* women citizens finally had the equal ability to vote.[352] It wasn't until 1932 that a woman was elected to the Senate, and not until 1972 that the House of Representatives would have its

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[346] *Id.*

[347] *Expansion of Rights and Liberties - The Right of Suffrage*, NATIONAL ARCHIVES ONLINE EXHIBIT: THE CHARTERS OF FREEDOM (July 6, 2016); *see also* Judith Apter Klinghoffer & Lois Elkis *'The Petticoat Electors': Women's Suffrage in New Jersey, 1776-1807,* 12 J. OF THE EARLY REPUBLIC 159 (1992) (with the exception of New Jersey).

[348] Dist. of Columbia v. Heller, 554 U.S. 570, 580 (2008).

[349] *Cf. Equity - Jurisdiction - Political Rights; Injunction to Protect*, 30 HARV. L. REV. 397, 397 (1917) (Although now mixed together with civil rights, political rights were common parlance in the 1800's referring to the rights of the political bodies).

[350] Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 YALE L.J. 1131, 1164 (1991) ("[T]he key nineteenth-century distinction between political rights and civil rights. The former were rights of members of the polity—call them Citizens—whereas the latter belonged to all (free) members of the larger society. Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for Citizens. So too, the right to bear arms had long been viewed as a political right, a right of Citizens").

[351] *See* U.S. CONG. SERIAL SET, HISTORY OF THE HOUSE OF REPRESENTATIVES, 1789-1994, 27–28 (1994); *see also Expansion of Rights and Liberties – The Right of Suffrage,* THE CHARTERS OF FREEDOM "A NEW WORLD IS AT HAND," NAT'L ARCHIVES,
[http://www.archives.gov/exhibits/charters/charters_of_freedom_13.html].

[352] U.S. CONST. amend. XIX.

first African American woman, Barbara Jordan, serve in its halls.[353] In 1994, Congress recognized the severity of domestic homicide of women at the hands of their husbands, boyfriends, and other family members.[354] Eschewing early and mid-20th century historical prohibitions on gun violence eliminates from consideration this history of disenfranchisement that likely is the reason for the delay of firearm prohibitions that improve the lives of women.[355] It eliminates from consideration who the newly inclusive "people" of the United States could vote for and how those elected officials could draft and enact laws arising from the political power of women.

This idea goes against Justice Thomas' dicta in *Bruen*, where he dismissed early 20th century law outright.[356] Although dicta may be persuasive, it is not binding.[357] *Bruen* should be read narrowly and within the context of the regulation at issue in that case.[358] The issue was whether all persons, except those who can show reason, may have public carry.[359] It did not consider the character of the person like longstanding prohibitions do.[360] For these reasons, excluding early 20th century historical tradition is unnecessary in cases of long-standing prohibitions on firearms, like those in § 922.[361]

United States v. Nutter is instructive on arguing along 20th century lines for both § 922(g)(8) and (9).[362] *Nutter* addressed the hurdles to overcome in the Nation's Historical Tradition Test: demonstrating a multitude of analogous regulations over a few and the location to begin analysis within the nation's historical timeline.[363]

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353 *See Hattie W. Caraway - First Woman to Be Elected to the United States Senate*, 20 WOMEN LAW. J. 26, 26 (1932).
354 *Cf.* Violence Against Women Act of 1994 Pub. L. No. 103-322 § 40001, 108 Stat 1796, 1902–55, 2014–15 (1994).
355 *Contra* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 8 (2022).
356 *Id.*
357 James Khun, Matthew E.K. Hall & Kristen Macher, *Holding versus Dicta: Divided Control of Opinion Content on the U.S. Supreme Court*, 70(2) POL. RSCH. Q. 257-268 (2017) (stating dicta is not holding, rather it is commentary that is unnecessary and not precedential).
358 *Id.*
359 *See Bruen*, 597 U.S. at 8.
360 *Id.* at 22.
361 Khun et al., *supra* note 357, at 257-68.
362 United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D.W. Va. 2022) (mem. op.).
363 *Compare* Willinger, *supra* note 82, *with* United States v. Nutter, 624 F. Supp. 3d 636 (S.D.W. Va. 2022) (mem. op.).

While the Court admits there is limited evidence of formal legal mechanisms to disarm domestic abusers, it provides context as to why there is limited law.[364]

> Laws surrounding domestic violence have evolved, in part as women's rights and roles in society expanded. The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgement about the importance or seriousness of the issue.[365]

The Court used this context with surety laws to make a strong example of founding-era concern for domestic violence victims.[366] Once this concern is established as the "why," the Court shifted to "how" founding-era legislatures proscribed the Second Amendment.[367]

Instead of shredding the founding-era's fears as clearly irrational and without reason to apply to today's America, *Nutter* utilized their fears, which were written into law.[368] Founding-era legislatures enacted "'complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race' as well as people who 'refused to swear loyalty oaths.'"[369] They also prohibited "'bearing arms in a way that spreads 'fear' or 'terror.'"[370] The court reiterated *Bruen*: "In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to public safety."[371] In *Nutter*'s footnotes, the Court establishes proof that intimate partner violence is a signal for the subject's further violent action in private and public.[372] This threat is presented as running counter to public safety, and if squashed through legislation (i.e., § 922(g)(8) and (9)),

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364 *Nutter*, 624 F. Supp. 3d, at 641.
365 *Id.*
366 *Id.*
367 *Id.* at 643.
368 *Id.*
369 *Id.*
370 *Id.*
371 *Id.*
372 United States v. Nutter, 624 F. Supp. 3d 636, 643 n.9 (S.D.W. Va. 2022) (mem. op.).

is less problematic as opposed to the nation's total prohibitions on firearms based on fears rooted in racism.[373]

Nutter's broadened approach as to how and why, and extension of what law is acceptable to justify such, may prove to be the guiding light in overcoming Second Amendment challenges to § 922(g)(8) and (9).[374] It defies *Bruen, Rahimi,* and *Perez-Gallan* by avoiding their two-step method of narrowing historical laws that restrict the Second Amendment, and then distancing those laws from others.[375] *Nutter* also avoids *Perez-Gallan's* gross exposition on historical non-interference in familial affairs or genuflection to unusual corporal punishment, all to shore-up fear and terror inducing individuals' access to firearms.[376] While the government appears not to have made *Nutter's* arguments in §8 Second Amendment challenges, it is clear they have already succeeded with §9. These arguments might prove successful if the government applies them to future §8 challenges.

V. Conclusion

Domestic violence abusers with access to firearms present a real and lethal threat to their victims, who are largely women: wives, mothers, sisters, and daughters.[377] The federal government protects women from their abusers with 18 U.S.C. 922(g)(8) and (9), which prohibits domestic violence abusers from possessing firearms.[378]

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[373] *Id.* at 643-44.

[374] *Cf. Bruen*, 597 U.S. 1, 27-28; United States v. Perez-Gallan, 640 F. Supp. 3d 697, 707 (W.D. Tex. 2022), aff'd, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023); United States v. Rahimi, 61 F.4th 443, 448 (5th Cir.2023).

[375] *Compare Nutter,* 624 F. Supp. 3d at 644, *with Perez-Gallan*, 640 F. Supp. 3d at 716.

[376] *Compare Nutter,* 624 F. Supp. 3d at 643, *with Perez-Gallan*, 640 F. Supp. 3d at 704.

[377] *Background,* EDUC. FUND TO STOP GUN VIOLENCE, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/ (last updated July 2020) ("Domestic violence is widespread in the United States — nearly one in four (23.2%) women and one in seven (13.9%) men will experience severe physical violence at the hands of their intimate partner in their lifetime. Guns and domestic violence are a lethal combination. Nearly half of all women murdered in the United States are killed by a current or former intimate partner, and more than half of these intimate partner homicides are by firearm. Women are five times more likely to be murdered by an abusive partner when the abuser has access to a gun.").

[378] *See* 18 U.S.C. § 922(g)(8), (9).

These provisions are not safe.[379] The Supreme Court, under *Bruen*, established a new test for Second Amendment challenges.[380] Instead of asking what is the burden to the Second Amendment and what is the government's interest in prohibiting the Second Amendment, *Bruen* asks whether the regulated conduct falls under the Second Amendment and, if so, does that regulation fall within the nation's historical tradition of Second Amendment prohibitions.[381]

Bruen's replacement of the means-end balancing test by the Nation's Historical Tradition Test does not make § 8 and § 9 dead on arrival.[382] Prosecutors have been successful in arguing the constitutionality of both. However, prosecutors have also failed to successfully argue the provisions' constitutionality as well. Methods to improve the government's protection of subsections 8 and 9 can be gleaned from these recent Second Amendment challenges.

When considering subsections 8 and 9, the Nation's Historical Tradition Test should be challenged to consider twentieth century history.[383] These provisions have historically overcome Second Amendment constitutionality tests, and they should continue to remain constitutional today.[384] When answering *Bruen's* second prong, whether the current regulation is relevantly similar to the nation's historical tradition of Second Amendment prohibitions, prosecutors should argue the right to safety of one person should not be secondary to their abuser's Second Amendment rights simply because there are few historical analogues validating such present prohibitions.[385]

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379 *See Bruen*, 597 U.S. 1, 30 (2022).

380 *Id.*

381 *Id.*

382 *See* United States v. Jackson, 622 F. Supp. 3d 1063, 1068 (W.D. Okla. 2022) (maintaining §9); United States v. Kays, 624 F. Supp. 3d 1262, 1268 (W.D. Okla. 2022) (maintaining §8).

383 United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D.W. Va. 2022) (mem.op.).

384 *Cf.* United States v. Emerson, 270 F.3d 203, 260–64 (5th Cir. 2001) (holding 18 U.S.C. § 922(g)(8) constitutional under a due process/scrutiny test); United States v. McGinnis, 956 F.3d 747, 758–59 (5th Cir. 2020) (holding 18 U.S.C. § 922(g)(8) facially constitutional under intermediate scrutiny); United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (holding 18 U.S.C. § 922(g)(8) unconstitutional under the Nation's Historical Tradition Test).

385 Universal Declaration on Human Rights, GA 217A, United Nations (December 10, 1948), https://www.un.org/en/universal-declaration-human-rights/index.html (protecting individuals' freedom from being intentionally killed).

Although the historical records are lacking in domestic violence regulations that does not mean the popular perception during the nation's founding was that individual's Second Amendment rights outweighed any specific risk those individuals posed by using firearms against innocent people.[386] Rather, "[t]he absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue."[387] Furthermore, longstanding prohibitions, such as those on the mentally ill, felons, and individuals creating fear and terror are analogous to federal prohibitions on court-recognized domestic violence abusers' firearm possession.[388] This similarly should be highlighted in appellate arguments as part of the second prong of *Bruen's* Nation's Historical Tradition Test.[389]

Arguments should highlight how federal protections against domestic violence may be new, but explain the historical context that abusers once enjoyed greater political power over the political system and over the lives of their spouses than in recent decades.[390] The government must provide the courts with context to understand that women, being so recently incorporated into the "national community" as part of the "political community," have only recently begun to receive substantial protection against their violent co-habitants. Therefore, provisions largely aimed at protecting women from gun violence at the hands of domestic abusers requires historical analysis inclusive of the time in and around the passage of the Nineteenth Amendment.[391]

While arguments made at court can immediately confront threats to subsections 8 and 9, federal and legislatures must shore-up their provisions to ensure domestic violence victims continue to be

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386 *Nutter*, 624 F. Supp. 3d at 643.
387 *Id.* at 641.
388 *Id.* at 643.
389 United States v. Nutter, No. 2:21-cr-00142, 2022 WL 3718518 at *1, *5 (S.D.W.V. Aug. 29, 2022) (mem. op.).
390 U.S. CONST. amend. 19.
391 *See* U.S. CONST. amend. 19; District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

protected from gun-toting domestic violence abusers in the long run.[392] Legislatures should be cognizant of *Bruen* and subsequent lower court holdings.[393] *Bruen, Rahimi, Perez-Gallan,* and *Nutter* recognize the validity of various historical laws and historical limitations on Second Amendment firearm possession.[394] The federal government should consider time-bound limitations to § 922(g)(8) and (9)'s current prohibitions.[395] States should enact surety-like triggers to prohibition for people with protective order durations after the time-bound prohibition is over.[396]

Women, and those subject to domestic abuse, deserve protection from deadly violence by those closest to them: their partners.[397] *Bruen's* new take on the Second Amendment must not erode the carefully woven fabric of protection. The legal community must shine a light on when women became full citizens, when women gained access to political positions to change laws to improve their lives, and how those changes are historically analogous to the how and why of provisions spanning from early America to the 20th century.

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[392] *See Congress Has the Power to Override Supreme Court Rulings. Here's How.*, THE INTERCEPT (Nov. 21, 2020), https://theintercept.com/2020/11/24/congress-override-supreme-court/ ("Congress could overturn [Supreme Court rulings] simply by tweaking the statute to remove whatever ambiguity the court claimed to find in its text.").

[393] *Cf. Congress Has the Power to Override Supreme Court Rulings. Here's How.*, THE INTERCEPT (Nov. 21, 2020), https://theintercept.com/2020/11/24/congress-override-supreme-court/ (advising Congress to amend its current laws to ensure women's reproductive rights are protected).

[394] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022); United States v. Rahimi, 61 F.4th 443, 459 (5th Cir. 2023); United States v. Perez-Gallan, No. 22CR-00427, 2022 WL 16858516, *1, *10 (W.D. Tex. No. 10, 2022) (citation omitted); United States v. Nutter, No. 2:21-cr-00142, 2022 WL 3718518 at *1, *5 (S.D.W.V. Aug. 29, 2022) (mem. op.).

[395] *See* United States v. Perez-Gallan, No. 22CR-00427, 2022 WL 16858516, *1, *10 (W.D. Tex. No. 10, 2022) (citation omitted)

[396] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022).

[397] *See Background*, EDUC. FUND TO STOP GUN VIOLENCE, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/ ("Domestic violence is physical, sexual, or psychological violence perpetrated against current or former spouses and/or partners, or family.13 Domestic violence typically includes violence perpetrated against individuals beyond current or former intimate partners that may cohabitate or be related to the intimate partner. Legal definitions of domestic violence vary by state.").

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REPAIRING THE BROKEN ROAD FOR BLACK AND BROWN EDUCATORS

Hannah Quicksell

I. INTRODUCTION

In 2016, the U.S. Department of Education released a robust report called, "The State of Racial Diversity in the Educator Workforce." This ahistorical report is chalk full of interesting statistics and loud proclamations, such as "[t]he U.S. Department of Education is dedicated to increasing the diversity of our educator workforce, recognizing that . . . [d]iversity is inherently valuable. We are stronger as a nation when people of varied backgrounds, experiences, and perspectives work and learn together."[1] Despite the myriad of present-day feelings and information, the report never mentions *why* we have so few teachers of color.

This is not the only report to radically forget why the United States has so few teachers of color. Numerous reports and studies put forth massive amounts of data and recommendations for how to attract Black and Brown teachers, and similar to "The State of Racial Diversity" report, they fail to acknowledge the history of excluding Black and Brown teachers in the desegregation era following the ruling in *Brown v. Board of Education*.[2] Textbooks, reports, and studies

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[1] U.S. DEP'T OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE 1 (2016), https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.

[2] *E.g.*, Richard M. Ingersoll & Henry May, *Minority Teacher Recruitment, Employment, and Retention: 1987 to 2013*, LEARNING POL'Y INST. (Sept. 15, 2016),

attempt to explain the lack of Back and Brown teachers ahistorically, however an examination of the historical roots of issues such as these can often shape and inform how the problems manifest and can even provide the solutions.

In the wake of *Brown v. Board of Education*, the country adopted race-neutral policies that forced assimilation upon Black and Brown students, erased Black and Brown schools and curriculum, and subsumed schools into white educational structures under the guise of race neutrality.[3] Most importantly, desegregation decimated jobs and opportunities for administrators and teachers of color.[4] The first schools to be closed were Black schools and the last people to be rehired were Black educators.[5] In the South and along border states alone, nearly 40,000 Black teachers lost their jobs between 1954 and 1972.[6] *Brown's* call for equality resulted in a violent white-washing of schools and education.[7] Black and Brown students bore the brunt of

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https://learningpolicyinstitute.org/product/minority-teacher-recruitment-brief; *e.g.*, Lisa McCorkell, *Retaining Teachers of Color to Improve Student Outcomes*, INST. FOR RSCH. ON LAB. & EMP. (Sept. 2019), https://irle.berkeley.edu/files/2019/09/Travis-Bristol-Policy-Brief-Teacher-Representation.pdf; *e.g.,* Linda A. Renzulli, et al., *Racial Mismatch and School Type: Teacher Satisfaction and Retention in Charter and Traditional Public Schools*, 84 AM. SOCIO. ASS'N 23 (2011), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.407.1055&rep=rep1&type=pdf.

[3] *See* Wendy Parker, *Desegregating Teachers*, 86 WASH. UNIV. L. REV. 1, 14 (2008), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1113&context=law_lawreview; *see generally,* Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992); *see generally,* Robin D. Barnes, *Black America and School Choice: Charting a New Course,* 106 YALE L.J. 2375 (1997); *see also* Mallory Lutz, *The Hidden Cost of Brown v. Board: African American Educators' Resistance to Desegregating Schools*, 12 ONLINE J. OF RURAL RSCH. & POL'Y (2017), https://newprairiepress.org/cgi/viewcontent.cgi?article=1085&context=ojrrp.

[4] Days, *supra* note 3, at 55.

[5] Note, *Discrimination in the Hiring and Assignment of Teachers in Public School Systems*, 64 MICH. L. REV. 692, 693 (1966) [hereinafter *Discrimination in Hiring*].

[6] Parker, *supra* note 3, at 15. There are basically no statistics on Latinx or other Brown teachers populations pre and post *Brown*. Often other racial groups become obscured by the American Black/white paradigm, and often even are lumped into white statistics depending on the country's attitude towards that group at the time. *Id.*

[7] *See id.* at 11 ("Desegregating teachers was thus part of erasing a school's racial identity, so that we had not a 'white' school and 'Negro' school, but just schools.").

this violence, as they were divided and forced to assimilate into white schools.[8] Along with the loss of Black teachers, Black and Brown students had white teachers, white curricula, white discipline, and white value systems placed upon them.[9] Although there were some attempts to desegregate faculty, these efforts were stymied by narrow legal definitions of desegregation and failed to make a real effort to employ Black teachers in the immediate aftermath of *Brown*.[10]

Today, schools are still dealing with *Brown's* repercussions of a homogenous, mainly white educator workforce. At least 36 states have implemented programs to try and attract Black and Brown teachers, but they have continually failed to hold onto their teachers because of historically entrenched policies and practices.[11] *Brown* excluded Black and Brown teachers, whereas in contrast, later education reform movements overly burdened teachers, which has kept Black and Brown teachers out. Specifically, the accountability era scapegoated teachers for poor education outcomes, while underfunding schools and paying teachers abysmally small salaries.[12] This has led to low teacher morale and a teacher shortage, especially

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[8] *See id.* at 29; *see* Green v. Cnty. Sch. Bd., 391 U.S. 430, 442 (1968).

[9] *See* Days, *supra* note 3, at 55; *see generally,* Paul Green, *The Paradox of the Promised Unfulfilled:* Brown v. Board of Education *and the Continued Pursuit of Excellence in Education*, 73 J. OF NEGRO EDUC. 268 (2004).

[10] *Race-Based Faculty Hiring and Layoff Remedies in School Desegregation Cases*, 104 HARV. L. REV. 1917, 1920 (1991) [hereinafter *Race-Based Faculty Hiring*]; *see generally,* David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools* in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 219 (Abigail Thernstrom & Stephan Thernstrom eds., 2002), https://www.hoover.org-sites-default-files-uploads-documents-0817998721_219.pdf.

[11] Nicole S. Simon, et al., *The Challenge of Recruiting and Hiring Teachers of Color: Lessons From Six High-Performing, High-Poverty, Urban Schools*, 2-3 (Harv. Graduate Sch. of Educ., Working Paper, 2015), https://projectngt.gse.harvard.edu/sites/projects.iq.harvard.edu/files/gse-projectngt/files/the_challenge_of_recruiting_and_hiring_teachers_of_color_diversity_july_2015.pdf.

[12] Dig. of Educ. Stat., *Estimated Average Annual Salary of Teachers in Public Elementary and Secondary Schools, by State: Selected Years, 1969-70 through 2016-17*, NAT'L CTR. FOR EDUC. STAT. tbl.211.60, https://nces.ed.gov/programs/digest/d17/tables/dt17_211.60.asp (last modified Aug. 2017).

for teachers of color and teachers who work at low-income schools.[13] Although student populations are increasingly more diverse, teacher populations have become less diverse.[14] The lack of teachers of color has a known detrimental impact on students of color.

The idea that we need a diverse teaching force, meaning more Black and Brown teachers is not radical or novel. A diverse teaching force benefits everyone – students, faculty, and the greater school community. More importantly, diverse teachers are needed in K-12 classrooms to serve as role models, to bridge curriculum and culture, and to fill vacant teaching positions, especially for Black and Brown students. There is nothing controversial about the fact that representation matters. However, these Black and Brown teachers should not have to be martyrs on their own individual quest over a road broken by the U.S. government. The government needs to repair the road they broke and make a livable, sustainable career path for teachers of color.[15]

The government needs to repair the pipeline for Black educators to enter and thrive in public schools by investing in teachers and schools and by holding schools accountable to teachers' satisfaction and performance. To do this, policies and practices must be historically conscious. Additionally, the path to educational careers must be attractive because of prestige and respect, rather than implying tokenism or martyrdom. Part II of this article traces of the historical destruction of the Black and Brown workforce. Part III addresses the current state of teacher demographics, desegregation, and integration. Part III also analyzes the impact upon students and communities. Finally, Part IV proposes solutions to recruiting and keeping quality teachers of color.

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[13] Katie Reilly, *'There's No Point in Going if I Have No Teachers.' How the Educator Shortage is Affecting One New Jersey School District*, TIME (Oct. 7, 2022), https://time.com/6220538/teacher-shortage-unequal-schools/.

[14] Ingersoll & May, *supra* note 2, at 5.

[15] Abiola Adeola Farinde, Factors Influencing Black Female Teachers' Job Satisfaction and Intention to Remain in the K-12 Classroom: A Mixed Methods Analysis 4 (2014) (Ph.D. dissertation, University of North Carolina), http://libres.uncg.edu/ir/uncc/f/Farinde_uncc_0694D_10587.pdf.

II. HISTORICAL DESTRUCTION OF BLACK WORKFORCE[16]

Although *Brown* is often lauded as a heroic end of separate but equal schools, the desegregation era brought on a host of new issues. Desegregation forced the assimilation of Black students in white schools, leaving behind Black and Brown neighborhood schools, curricula, and educators. When the federal government abandoned desegregation efforts, the accountability era introduced a wave of race neutral policies which overly burdened educators. The equality and accountability education movements failed to serve America's Black and Brown students and educators.

A. DESEGREGATION'S DARK SIDE

Although desegregation brought the end of a dark era of Jim Crow exclusion, desegregation also created a new system of oppression. In this new version of desegregation oppression, select Black people are included into white systems, but through this desegregation process, existing Black systems are destabilized and destroyed. Before *Brown*, Black neighborhood schools operated not only as educational institutions, but also as community centers. While *Brown* painted a picture of desolate buildings where Black children were getting terrible educations, that is not the way many Black people remember their neighborhood schools.[17] Although Black schools certainly were deprived of equal resources and facilities, Black educators were providing quality education for generations during the Jim Crow era.[18] Prior to desegregation, "Black faculty members who promoted Black culture within the curriculum, and in turn, Black students were able to close various gaps (e.g., the literacy gap, the elementary school attendance gap, and the high school completion gap) between them and their white counterparts."[19] Moreover, many

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[16] *Brown* undeniably had an effect on the Brown educator workforce. However, there is virtually no research on the subject, so for this section, I will focus on the impact on the Black workforce and elaborate its effect by analogy

[17] Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. OF AM. HIST. 43, 43 (2004).

[18] *Id.*; Malcolm Gladwell, *Miss Buchanan's Period of Adjustment*, REVISIONIST HIST. (June 29, 2017), https://www.pushkin.fm/podcasts/revisionist-history/miss-buchanans-period-of-adjustment.

[19] Farinde, *supra* note 15, at 17.

felt that the fierce dedication held by Black educators compensated for the school's material deficits under "separate but equal."[20]

However, *Brown* brought Black neighborhood schools to an end.[21] Relying on social science, the Supreme Court held that,

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal.[22]

School desegregation set off at a turtle's pace. More than ten years later, the Supreme Court, fed up with desegregation's slow process, insisted schools dismantle segregation "root and branch."[23] The Court required that desegregation '[extend] not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities."[24] Finally, desegregation orders were put in place across the country, including a demand to desegregate faculty and staff, although they failed in the long run.[25]

Desegregation meant admitting Black students to white schools with the expectation that Black students assimilate into the

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[20] Fairclough, *supra* note 16 ("'I didn't feel I was getting an inferior education,' recalled the former teacher Louise Metoyer Bouise, who attended public schools in New Orleans during the 1920s and 1930s. 'In fact, I am sure I had very good teachers.' Even in the crude, two-room schoolhouse that she attended in rural North Carolina, insisted Mildred Oakley Page, another retired teacher, 'anyone who wanted to learn could learn. ' As described in teachers' memoirs and oral history interviews, [B]lack schools were places where order prevailed, where teachers commanded respect, and where parents supported the teachers. Teachers, pupils, and parents formed an organic community that treated schooling as a collective responsibility.)

[21] *See generally,* Fairclough, *supra* note 16; *see also Discrimination in Hiring*, *supra* note 5.

[22] Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

[23] *Green*, 391 U.S. at 437-38.

[24] *Id.* at 435.

[25] *Race-Based Faculty Hiring*, *supra* note 10, at 1920; Armor, *supra* note 10, at 221.

white environment.[26] Black students were bused to white schools, but white students were not bused to Black schools.[27] Black and Brown schools were the first to be closed, and through consolidation, Black and Brown teachers lost their jobs and were not rehired.[28] Through the desegregation process, the education system left behind Black teachers,[29] Black curriculum,[30] and subjected Black students to the explicit and implicit biases of white educators.[31] Nearly 40,000 Black teachers lost their jobs in the South.[32] The same was true for principals; after *Brown*, around 90% of Black principals were out of work and the remaining 10% were demoted to assistant principals.[33] On the subject of losing Black community schools and educators, a former, Louisiana principal said, "When they desegregated secondary schools in this parish, they threw the Blacks (sic) back a hundred years."[34] Through the loss of Black educators and Black communities' schools, there was a destabilizing effect that we still experience the repercussions of today.[35]

There were a number of reasons that Black educators lost their positions through desegregation efforts. First, many white parents staunchly resisted Black educators teaching their children in order to maintain the status quo power balance.[36] As much white resistance as there was to Black and Brown students attending white schools, there was more resistance to the thought of Black teachers educating white children, serving as mentors and role models.[37] Additionally, teachers were not the only workers to suffer. School administrators also bore

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[26] *See generally,* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice: *Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993).
[27] Farinde, *supra* note 15, at 16.
[28] *Discrimination in Hiring*, *supra* note 5, at 693.
[29] Gladwell, *supra* note 17.
[30] Green, *supra* note 9, at 268.
[31] *See id.; see also* Sarah E. Redfield & Jason P. Nance, *School-to-Prison Pipeline ABA Preliminary Report*, 61-62 (Feb. 2016), https://www.americanbar.orgcontent/dam/aba/publications/criminaljustice/school_to_prison_pipeline_report.pdf.
[32] Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV.160, 194 (2013).
[33] *Id.*; *See* Parker, *supra* note 3, at 12.
[34] Fairclough, *supra* note 16, at 44.
[35] Days, *supra* note 3, 74; *see* Farinde, *supra* note 15, at 15-16.
[36] Parker, *supra* note 3, at 11-12.
[37] *Id.*

the brunt of communities' biases. Specifically, white districts and communities resisted Black male principals serving as the boss of a faculty composed of predominately white women.[38] Due to the pervasive efforts of white parents' and communities', Black children were permitted to enter schools, while Black educators were excluded from the buildings.

Second, school districts utilized seemingly race neutral hiring policies to ensure that the majority of educators remained white. Specifically, they held racist beliefs about Black educators' capabilities, which fueled the implementation of strict qualifications to be a teacher.[39] As Black neighborhood schools closed, Black educators were laid off and then forced to become "new applicants" in the district.[40] When rehiring came around, nearly all the teachers who remained were white, and few if any were Black or Brown.[41]

In the early years of desegregation, Black educators encountered mass unemployment, and they brought several cases against school districts for discriminatory hiring practices and 14th Amendment claims. In these cases, school districts contended that Black educators "were incompetent to teach white students."[42] In *Cato v. Parhum*, the school district maintained that Black teachers "speech dialect and communication" made it impossible for them to teach white students.[43] In *Smith v. Board of Education*, the Board of Education argued that Black teachers simply do not understand white students, and would be unable to build a rapport with them.[44] The Board of Education went on to argue that Black educators were inferior to white educators, because segregated white schools were better than segregated Black schools.[45] Ironically, the defendants in these cases failed to have the same concerns for Black and Brown students, who were being taught by a white faculty for the first time. Time and again,

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[38] Joyner, *supra* note 32, at 193.
[39] John S. Detweiler, *The Negro Teacher and the Fourteenth Amendment*, 36 J. OF NEGRO EDUC. 403, 406 (1967).
[40] *Id.*
[41] *Id.*; *see* Brooks v. Sch. Dist. of Moberly, 267 F.2d 733 (8th Cir. 1959); *see* also Franklin v. Sch. Bd. of Giles Cnty., 242 F. Supp. 371 (W.D. Va. 1965), *rev'd*, 360 F.2d 325 (4th Cir. 1966).
[42] *See* Parker, *supra* note 3, at 13.
[43] *See* Cato v. Parham, 403 F.2d 12, 14–15 (8th Cir. 1968).
[44] *See* Smith v. Bd. of Educ., 365 F.2d 770, 781 (8th Cir. 1966).
[45] *See id.*

Black educators lost their cases for discrimination, because racism had been subtly embedded in the hiring practices themselves.

In general, school boards have wide discretion in the hiring and firing of school employees.[46] Unless a "clear and arbitrary abuse" of discussion is apparent, courts rarely question the school boards discretion in hiring.[47] When hiring faculty and staff, the school board normally compares candidate qualifications. At the time, standard criteria for judging a teaching applicant included "training, experience, classroom performance, personality, and ability to fulfill the specific requirements of the job."[48]

Although the criteria may appear objective, they were insidiously racist in their application. As a result of past segregation, white resumes often appeared more prestigious at face value,[49] despite the fact that Black teachers overall had more degrees than white teachers.[50] In fact, because teaching was one of the few well-respected careers available to Black people at the time, the Black workforce was saturated with talented and smart educators.[51] However, because segregated Black schools had worse reputations than white segregated schools, Black educators' resumes were deemed less competitive.[52] Subsequently, school boards relied on this factor to not rehire Black educators because, in their opinion, "providing the best available instruction for all students must not be sacrificed for the sake of achieving integrated faculties."[53] In this way, school boards used past racist segregation for students to maintain racist segregation for teachers.

In *Brooks v. Moberly*, seven Black teachers brought a case for discrimination against the Moberly School District when they were not rehired after the schools desegregated their student bodies.[54] Prior to desegregation, there were ninety-eight white teachers and eleven

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[46] *Discrimination in Hiring*, *supra* note 5, at 695.
[47] *Id.*
[48] *Id.* at 696.
[49] *Id.* at 693.
[50] *See* TRUMAN MITCHELL PIERCE ET AL., WHITE AND NEGRO SCHOOLS IN THE SOUTH: AN ANALYSIS OF BIRACIAL EDUCATION 212 (1955); *see also* Lutz, *supra* note 3, at 4.
[51] Lutz, *supra* note 3, at 2.
[52] *Discrimination in Hiring*, *supra* note 5, at 693.
[53] *Id.*
[54] *Brooks,* 267 F.2d at 735.

Black teachers.[55] That year, the District decided to let fifteen teachers go: four white teachers and all eleven Black teachers.[56] The District claimed the Board compared the Black teachers' qualifications to those of the other applicants, and the Black teachers were not as qualified.[57] The court did not think the "board ha[d] exercised its power in an unreasonable, arbitrary, capricious, or unlawful manner."[58] The Black teacher plaintiffs lost their case. In subsequent cases, courts relied on *Moberly* to deny the claims of Black teachers.[59]

Although many districts had teacher desegregation plans, they failed to be effective.[60] In 1968, the Supreme Court decision in *Green* put Southern school districts on notice that rather than simply putting an end to discriminatory practices, the schools must actually achieve desegregated schools.[61] Now known as the *Green* factors, the Supreme Court ordered schools to reach a racial balance in six areas: student assignment, faculty, staff, facilities, transportation, and extracurricular activities.[62] Subsequent cases upheld that a racially balanced faculty is inherent to the desegregation process.[63] In 1969, the Supreme Court ordered an Alabama school board to reassign faculty so that the racial composition of the school's faculty is roughly the same as the racial composition of the entire school system.[64] However, the Court never named a percent of the faculty that must be non-white, so these orders did not sufficiently remedy the displacement of Black and Brown teachers.[65] Black and Brown teachers were not rehired, so across districts, teachers remained mainly white.[66]

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 736.
[58] *Id.* at 739.
[59] Detweiler, *supra* note 40, at 405 ("In *Chambers v. Henderson (N.C.) City Board of Education*, dismissed Negro teachers brought suit against the school board contending that a decrease from 24 to 8 Negro teachers in one year amounted to discrimination. The district judge ruled in favor of the school board, basing his ruling on the long- standing *Brooks* precedent.").
[60] Armor & Rossell, *supra* note 10, at 245.
[61] *See Green*, 391 U.S. at 430.
[62] *Id.* at 435.
[63] *See* U. S. v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225, 232 (1969).
[64] *Race-Based Faculty Hiring*, *supra* note 10, at 1920; *see also Montgomery County Bd. of Educ*., 395 U.S. at 233-36.
[65] *Race-Based Faculty Hiring*, *supra* note 10, at 1920; Armor & Rossell, *supra* note 10, at 220.
[66] *Discrimination in Hiring*, *supra* note 5, at 693.

History keeps repeating itself, and we are still facing these identical problems today. Today, the white anxiety of Black leadership and the use of toxic race neutral language continues. "Today's laws and institutions need not be explicitly racist to ensure that this state of affairs continues - they need only to perpetuate historical conditions."[67] For example, in 1989, a federal judge, who was frustrated by slow desegregation in Louisiana, created a plan to merge historically Black Southern University Law Center with the traditionally white school Louisiana State University (LSU).[68] Southern University resisted the merge.[69] They contended that they would disproportionately bear the burden of desegregation. The merger would displace their Black faculty, and keep Black students from entering law school due to changed admissions standards. In general, the merger would force Southern to assimilate into LSU, leaving behind everything that makes it a school and community.[70]

Fifteen years later, frustrated by decades of poor student performance, the state of Louisiana blamed the educators and drastically changed the makeup of the New Orleans teacher workforce post Hurricane Katrina. After the hurricane, the Orleans Parish School Board (OPSB) failed to rehire approximately 4,300 teachers.[71] These educators were 71% Black and had more than fifteen years of average teaching experience.[72] Only half of these educators returned to education at all, and only a third returned to work in New Orleans schools.[73] Today, only 50.7% of the teacher workforce is Black, which is 20% lower than pre-Katrina.[74] Additionally, many teachers have less

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[67] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994).

[68] Days, *supra* note 3, at 68; L. Tiffany Hawkins, *Recognizing the Nightmare: The Merger of Louisiana State University and Southern University Law Schools*, 50 LA. L. REV. 557, 577 (Jan. 1990).

[69] Days, *supra* note 3, at 68.

[70] *Id.* at 68-69.

[71] Jane A. Lincove et al., *Did the Teachers Dismissed After Hurricane Katrina Return to Public Education?*, EDUC. RSCH. ALL. FOR NEW ORLEANS 1, 1 (May 31, 2017), https://educationresearchalliancenola.org/files/publications/ERA-1705-Policy-Brief-Labor-Market_170804_161710. pdf.

[72] *Id.*

[73] *Id.*

[74] Kate Babineau et al., *The State of Public Education in New Orleans 2018*, THE COWEN INST. 1, 27 (last visited Oct. 30, 2020),

than five years of experience, and only 10% have twenty plus years of experience, compared to pre-Katrina when 40% of teachers had twenty plus years of experience.[75] Furthermore, "the Louisiana Legislature in November 2005 shifted control from a locally-elected, predominantly Black school board to a statewide, mostly white [b]oard."[76] Fifteen years later, student performance has only improved minimally, and Black students in particular have suffered from excessive discipline and disproportionately low performance scores.[77] In a city with a history of chronic under-funding and corruption,[78] maybe the problem with education was not the teachers.

B. ACCOUNTABILITY ERA EVILS

From about 1990 to the present day, desegregation came to a grinding halt and a new era, focusing on accountability, rose.[79] In 1983, when schools were at their most racially and socioeconomically diverse, the education report, *A Nation at Risk*, encouraged standards-based education, in light of the glaring achievement gap centuries of racism had created.[80] The accountability movement focused on the output of student performance through a race-neutral lens and paved the way for standardizing education and assessment through high stakes testing.[81] In 2001, the No Child Left Behind Act (NCLB) passed, which created the race-neutral blanket expectation for all

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http://www.thecoweninstitute.com.php56-17.dfw3-1.websitetestlink.com/uploads/SPENO_2018_Final_-_Double_P age_Spread-1524079581.pdf.

[75] *Id.*

[76] Brian Beabout et al., *New Orleans Public Schools: An Unrealized Democratic Ideal*, THE DATA CTR. 1, 5 (Nov. 2018), https://s3.amazonaws.com/gnocdc/reports/prosperity-brief-brian-beabout-et-al.pdf.

[77] *See id.* at 5-7.

[78] *See id.* at 2.

[79] Robin D Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2397-98 (1997); *see* Sara. F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, J. OF POL'Y ANALYSIS & MGMT. 1, 37 (Dec. 2011), https://cepa.stanford.edu/sites/default/files/reardon%20brown%20fades%20JPAM%20final%20jan%202011.pdf; *see also* Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 AM. EDUC. RSCH. J. 797, 797 (2004).

[80] *See* Lee & Wong, *supra* note 79, at 797.

[81] *Id.*

students to become high achievers in school.[82] In 2010, the controversial Common Core standards (CCSS) came into effect, and the federal government held much needed school funding in exchange for their implementation.[83] In 2015, the Every Student Succeeds Act (ESSA) replaced NCLB and reaffirmed the 1965 Elementary and Secondary Education Act.[84]

ESSA requires states to submit an accountability plan to the federal government, which assesses a range of factors demonstrating student achievement. The federal government requires schools to assess the following indicators: academic achievement in reading and math; another academic indicator of a state's choosing; high school graduation rates; progress toward English language proficiency; and at least one indicator of school quality or student success.[85] These indicators must be the same for all public schools and disaggregated for subgroups for the purpose of comparison.[86] Aside from these indicators, the federal government gives states broad discretion to include any other factors fit to gauge school performance.[87] By intentionally tracking subgroup data, requiring targeted intervention in low performing schools, and discussing "closing the achievement gap" at length, ESSA and accountability reforms masquerade as an effort towards racial justice.[88] However, studies show performance-driven reforms do not lend to closing the achievement gap.[89] Rather, the standardized tests consistently show Black and Brown students trailing

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[82] *Id*. at 797-98.
[83] *Id*.
[84] Every Student Succeeds Act (ESSA), U.S. Dept. of Edu. (last accessed Dec. 13, 2023), https://www.ed.gov/essa?src=rn.
[85] Darryl Bond Denhalter, Holistic Approaches to State School Grading Systems, 20 (Aug. 5, 2020) (Ph.D. dissertation, Brigham Young University) (on file with BYU ScholarsArchive), https://scholarsarchive.byu.edu-cgi/viewcontent.cgi?article=9675&context=etd.
[86] Keisha McIntosh Allen et al., *Every Student Succeeds (Except for Black Males) Act*, 120 TEACHERS COLL. REC. 1, 7 (2018); *Every Student Succeeds Act: Accountability, State Plans, and Data Reporting: Summary of Final Regulations* 1, 2 (last visited Dec. 9, 2020) [hereinafter *Every Student Succeeds Act]*, https://www2.ed.gov/policy/elsec/leg/essa/essafactsheet170103.pdf.
[87] Allen et al., *supra* note 86, at 6; *Every Student Succeeds Act*, *supra* note 86, at 2.
[88] *See* Lee & Wong, *supra* note 79, at 822; *see also Every Student Succeeds Act*, *supra* note 86, at 4.
[89] *See* Lee & Wong, *supra* note 79, at 810; *see also* Allen et al., *supra* note 86, at 6.

behind their white peers with little change in the achievement gap, and states have failed to systemically change that fact.[90]

The accountability era has ushered in a gaslighting model, which places pressure on individuals, not systems to solve education's biggest problems. This poses several big issues. First, a neocolonial education business has emerged because of these narratives. Looking at the achievement gaps in their relative areas, states could have directly addressed racial and socioeconomic disparities in schools, but they have largely failed to change distributions of school expenditures, class size, qualified teachers, and academic achievement.[91] Instead, accountability solutions have mainly included neocolonial efforts, sending unqualified white teachers to "save" Black and Brown children.[92] In 1990, the first Teach for America corps of largely affluent white teachers made missionary trips to change education in poor Black and Brown neighborhoods.[93] Since 1990, zero tolerance charter schools have become far more prevalent. In 2010, Doug Lemov published the cash cow, *Teach Like a Champion*, instilling strict disciplinary tactics so that anyone can teach.[94] His charter school network, Uncommon Schools, which he uses to promote his strategies, also infiltrates poor Black and Brown neighborhoods with inexperienced teachers.[95] These industrial, colonial education narratives are reified by popular media; for example the movie, *Freedom Writers* glorifies white teachers, and objectifies Black and Brown students for the white teacher's savior complex.[96] The accountability era should have attacked systemic issues, because the

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[90] Lee & Wong, *supra* note 79, at 820-21 (finding that states have largely failed to change distributions of school expenditures, class size, qualified teachers, and academic achievement).

[91] *Id.*

[92] *See* Randall Lahann & Emilie Mitescu Reagan, *Teach for America and the Politics of Progressive Neoliberalism*, 38 J. OF TCHR. EDUC. 7, 13 (2011).

[93] Katherine M. Conn et al., *How Teach for America Affects Beliefs About Education*, 20 EDUC. NEXT (2020), https://www.educationnext.org/how-teach-for-america-affects-beliefs-education-classroom-experience-opinions/.

[94] Lauren Gatti & Theresa Gatalano, *The Business of Learning to Teach: A Critical Metaphor Analysis of One Teacher's Journey*, 45 TEACHING & TCHR. EDUC. 149, 151 (2015).

[95] UNCOMMON SCHOOLS (last visited Dec. 12, 2020), https://uncommonschools.org/.

[96] *See* Brittany A. Aronson, *The White Savior Industrial Complex: A Cultural Studies Analysis of a Teacher Educator, Savior Film, and Future Teachers*, 6 J. OF CRITICAL THOUGHT & PRAXIS 36, 37-38 (2017).

three-decade long experiment of sending affluent well-meaning white teachers to "save" the children has failed.

Second, race-neutral, standardization testing blames students in a neo-eugenics fashion. Core curriculum persistently concentrates on eurocentric knowledge, which is coupled with high stakes testing to narrowly define what academic success looks like.[97]

Exams are only able to assess certain educational skills, resulting in the exclusion of a meaningful evaluation of others. Testing and data driven accountability creates a pseudo-science, in which Black and Brown students, especially Black boys, are consistently ranked inferior to their white counterparts.[98] This creates a racial hierarchy which reinforces the idea of white superiority and Black and Brown inferiority.

Finally, accountability narratives put teachers and students at fault for failing students' scores. Teachers have the biggest direct impact on student success and wellbeing, but consistently are the most blamed and the most ignored.[99] Movies like *Waiting for Superman,* blame "bad" teachers for student failure, not decades of under-funding and crowded classrooms. However, accountability has increased teachers' workloads while their salaries, which are influenced by inflation, have been steadily decreasing for decades.[100] Teacher morale is low, and burnout and turnover have become systemic issues.[101]

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[97] Rodney Handelsman, *Being in the Know: Cultural Reproduction & Standardized Knowledge in an Alternative School Setting*, 3 INT'L J. OF CRITICAL PEDAGOGY 89, 90 (2011); Mark Bauerlein, *Common Core as Tactical Advantage*, 26 NAT'L ASS'N OF SCHOLARS (2013), https://www.nas.org/academic-questions/26/4/the_common_core_state_standards_two_views.

[98] Allen et al., *supra* note 86, at 8.

[99] *See generally,* KEVIN K. KUMANSHIRO, BAD TEACHER!: HOW BLAMING TEACHERS DISTORTS THE BIGGER PICTURE (2012).

[100] Jenny Abamu, *The Data Tells All: Teacher Salaries Have Been Declining For Years* (Apr. 5, 2018), https://www.edsurge.com/news/2018-04-05-the-data-tells-all-teacher-salaries-have-been-declining-for-years.

[101] Deborah M. Hill & Marlene Barth, *NCLB and Teacher Retention: Who Will Turn Out the Lights?*, 16 EDUC. & THE LAW 173, 173-181 (2004), https://www.tandfonline.com/doi/abs/10.1080/0953996042000291588?journalCode=cetl20.

Nationally, there is a real teacher shortage now, especially for high poverty, predominantly Black and Brown schools.[102]

III. THE STATE OF EDUCATION TODAY

Although diversity among public school students is rising, there remains little diversity among teachers.[103] In fact, children of color equal nearly half of the public school population,[104] whereas in the public school teacher workforce, 80% of teachers are white and 77% are women.[105] A further breakdown of teacher demographics shows that 9% are Latinx, 7% are Black, 2% are Asian American, and 2% are categorized "other" (two or more races, Native, Alaskan, or Pacific Islander).[106] Further, Black men make up only 2% of the teacher population and are far more likely to have a position in discipline.[107] The problems created by low numbers of Black and Brown teachers are compounded by high teacher turnover. Black and Brown teachers have a turnover rate of 18.9%, while white teachers turnover at a rate of 15%.[108] Simultaneously, white teachers enter the

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[102] Emma García & Elaine Weiss, *The Teacher Shortage Is Real, Large and Growing, and Worse Than We Thought*, ECON. POL'Y INST. (Mar. 26, 2019), https://www.epi.org/publication/the-teacher-shortage-is-real-large-and-growing-and-worse-than-we-thought-the-first-report-in-the-perfect-storm-in-the-teacher-labor-market-series/.

[103] McCorkell, *supra* note 2.

[104] *Racial/Ethnic Enrollment in Public Schools*, NAT'L CTR. FOR EDUC. STAT. 1, 1 (2020), https://nces.ed.gov-programs/coe/pdf/coe_cge.pdf.

[105] *Characteristics of Public School Teachers*, NAT'L CTR. FOR EDUC. STAT. 1, 1-2 (2020), https://nces.ed.gov-programs/coe/indicator/clr/public-school-teachers

[106] A.W. Geiger, *America's Public School Teachers Are Far Less Racially and Ethnically Diverse Than Their Students*, PEW RSCH. CTR. (Dec. 10, 2021), https://www.pewresearch.org-fact-tank/2018/08/27/americas-public-school-teachers-are-far-less-racially-and-ethnica lly-diverse-than-their-students/.

[107] *See* Allen et al., *supra* note 86, at 10; *The State of Racial Diversity in the Educator Workforce*, U.S. DEPT. OF EDUC. 1, 2 (2016) https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.

[108] *See* Allen et al., *supra* note 86, at 10; *The State of Racial Diversity in the Educator Workforce*, U.S. DEPT. OF EDUC. 1, 2 (2016) https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.

market at higher rates than non-white teachers, and non-white teachers (especially Black male teachers) leave at higher rates. [109]

Black and Brown teachers are overwhelmingly employed at high poverty schools with predominantly Black and Brown students, which are notoriously difficult to teach at.[110] The job is difficult not because of the kids, but because of systemically poor working conditions such as a lack of funding and resources, poor administrative relationships, and lower salaries.[111] In fact, for every one in four districts, there is a teacher salary gap of more than $5,000 between high schools with the highest enrollment of children of color and the lowest enrollment.[112] On average, teachers in high schools serving predominantly students of color are paid $1,913 less per year than their colleagues at predominantly white schools.[113] Because we know that Black and Brown teachers tend to teach Black and Brown students, white teachers are likely paid more than their counterparts of color.[114] These poor working conditions render Black and Brown teachers of predominantly Black and Brown students less satisfied than their white counterparts.[115]

The lack of Black and Brown educators detrimentally impacts students in several ways, especially students of color. First, a happy teacher makes a happy classroom where students can succeed.[116] Studies show that the more satisfied a teacher is with their job, the better they perform, and subsequently, students benefit from a more effective teacher.[117] Teacher dissatisfaction is linked to poor school resources, a lack of administrative support, few professional

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[109] Ingersoll & May, *supra* note 2, at 11.
[110] *Id.* at 9-10.
[111] *Id.*at 10.; McCorkell, *supra* note 2, at 2; Renzulli, *supra* note 2, at 40.
[112] *Civil Rights Data Collection Data Snapshot: Teacher Equity*, U.S. DEP'T OF EDUC. OFF. FOR C.R. 1, 1 (Mar. 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-teacher-equity-snapshot.pdf.
[113] *Id.* at 6.
[114] *See* Farinde, *supra* note 15, at 24.
[115] Renzulli, *supra* note 2, at 38.
[116] *See* Iqbal et al., *Relationship between Teachers' Job Satisfaction and Students' Academic Performance*, 65 EURASIAN J. OF EDUC. RSCH. 335, 341 (2016).
[117] *Id.* at 335.

development opportunities, and low salaries.[118] Both job satisfaction and turnover are correlated with negative student outcomes, like lower test scores, poor attendance rates, and higher disciplinary actions.[119]

Second, low job satisfaction directly leads to the turnover crisis in schools today. When a teacher works at an unsustainable job, they burn out and quit, which leads to our turnover crisis.[120] Turnover is notably higher in high poverty schools because of the difficult working conditions.[121] Because of high turnover, Black and Brown students are the less likely to be taught by veteran teachers.[122] Ultimately, the students pay the price of the violent circle of poor working conditions to job satisfaction to turnover. Unfortunately, kids who attend schools in high poverty areas often face the most obstacles and are in need of the most stability.

Third, because white teachers often hold implicit racial biases, Black and Brown students often excel when they have non-white teachers.[123] Implicit bias is the collection of "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases . . . re activated involuntarily and without an individual's awareness or intentional control."[124] Implicit biases manifest in a number of different ways for teachers, like low expectations, low student performance, and a host of periphery school

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[118] *Governor Easley's Teacher Working Conditions Initiative: Summary of Findings*, (last accessed Dec. 9, 2020), https://nepc.info/sites/default/files/EPRU-0504-114-OWI.pdf.

[119] Renzulli, *supra* note 2, at 24.

[120] There is a lot of heroism rhetoric that blames teachers for burning out, but this is gaslighting educators into thinking they can work in unworkable conditions.

[121] *See generally,* Nicole S. Simon & Susan M. Johnson, *Teacher Turnover in High-Poverty Schools: What We Know and Can Do*, 117 TEACHERS COLL. REC. 1 (2015).

[122] Leib Sutcher et al., *A Coming Crisis in Teaching? Teacher Supply, Demand, and Shortages in the U.S.*, LEARNING POL'Y INST. 1, 13 (Sept. 2016), https://learningpolicyinstitute.org/sites/default/files/product-files/A_Coming_Crisis_in_Teaching_REPORT.pdf.

[123] *ABA Task Force on Reversing the School-to-Prison Pipeline Report, Recommendations, and Preliminary Report*, 2018 A.B.A. COAL. ON ETHNIC JUST., CRIM. JUST. SECT. & COUNCIL FOR DIVERSITY EDUC. PIPELINE REP. 16-18, [hereineafter *ABA School-to-Prison Report*] https://www.americanbar.org/content/dam/aba/administrative/corej/final-school-to-prisonpipeline.pdf.

[124] *Understanding Implicit Bias*, THE KIRWAN INST. FOR RACE AND ETHNICITY (2015), http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/.

issues.[125] In general, Black and Brown students are disproportionately disciplined, not recommended for honors programs, and put in special education programs.[126] This sets Black and Brown students up to be pushed out of schools and into the school-to-prison pipeline.[127] Identities are intersectional, so Black and Brown students with disabilities are the most vulnerable to discipline and exclusion.[128]

However, studies show that "compared with their peers, teachers of color are more likely to (1) have higher expectations of students of color (as measured by higher numbers of referrals to gifted programs); (2) confront issues of racism; (3) serve as advocates and cultural brokers; and (4) develop more trusting relationships with students, particularly those with whom they share a cultural background."[129] Indeed, having one Black teacher in elementary school makes a Black child more likely to graduate high school.[130] Moreover, if a Black child has a Black teacher before the third grade, they are 13% more likely to enroll in college, and 32% more likely if they have had two or more Black teachers.[131] As a result of all of these factors, Black and Brown students often excel when they have teachers of color.

Fourth, representation matters for kids. Nearly half of all public school children are students of color, but they rarely see an authority figure within the school who looks like them.[132] Especially Black boys, who rarely see a Black man in education, except in the discipline context.[133] Even in the early years of desegregation, courts recognized

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[125] *ABA School-to-Prison Report*, *supra* note 123, at 16-18.

[126] *See* Redfield & Nance, *supra* note 31, at 25-26; *see also* Cassandra Hart, *An Honors Teacher Like Me: Effects of Access to Same-Race Teachers on Black Students' Advanced-Track Enrollment and Performance*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 165 (2020).

[127] *See generally ABA School-to-Prison Report*, *supra* note 123, at 16-18.

[128] *See* Redfield & Nance, *supra* note 31, at 25;

[129] U.S. DEPT. OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE 2 (2016), https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.

[130] Jill Rosen, *Black Students Who Have One Black Teacher Are More Likely to go to College*, JOHN HOPKINS UNIV. (Nov. 12, 2018), https://hub.jhu.edu/2018/11/12/Black-students-Black-teachers-college-gap/.

[131] *Id.*

[132] *Racial/Ethnic Enrollment in Public Schools*, NAT'L CTR. FOR EDUC. STAT. 1 (2020), https://nces.ed.gov/programs/coe/pdf/coe_cge.pdf; McCorkell, *supra* note 2.

[133] *See* Allen et al., *supra* note 86, at 6.

that students of all races should feel represented by the faculty in their schools.[134] This is not to say a white teacher could never be a role model, but often Black and Brown teachers are uniquely positioned to be role models in students' lives.[135] Often, Black and Brown teachers allow students of color to have more self-worth and decreased senses of alienation in a predominately white environment.[136] Simply put, students are more academically successful when they have teacher-mentors who look like them.

White students also benefit from having diverse authority figures represented in their life. One of the main goals of education is to prepare children to be democratic citizens of a diverse society.[137] There is a reification and indoctrination of racist stereotypes when white children see the majority of authority figures in their schools are white and the only employees of color are the cafeteria and janitorial staff.[138] Further, teachers of color subvert and challenge "negative stereotypes, preparing students to live and work in a multiracial society."[139] Indeed, studies show that students who are educated in an integrated environment are more likely to live in an integrated environment as adults.[140]

Finally, Black and Brown teachers are not just lifeless, embodied representations for children, but often bring different types of knowledge and expertise. Through the loss of Black schools and educators post-*Brown*, class curriculum and culture was white-washed.[141] The terrifying aspect of this is that many Black and Brown

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[134] *See* Dowell v. Sch. Bd., 219 F. Supp. 427, 445 (W.D. Okla. 1963) ("[T]he School Board . . . should make a good faith effort to integrate the faculty, in order that both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of highlevel teaching.").

[135] Simon et al., *supra* note 11, at 22.

[136] Farinde, *supra* note 15, at 31.

[137] *See* U.S. DEPT. OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE (2016), https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf; *see also* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655 (2001).

[138] Farinde, *supra* note 15, at 4.

[139] *Id.* at 31; U.S. DEPT. OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE (2016), https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.

[140] John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 684-85 (2001).

[141] *See generally,* Green, *supra* note 9.

students are being taught by white, middle-class teachers, a demographic that often claims they do not see color and teach a color-blind classroom.[142] Colorblindness has led to the phenomenon of white transparency, where white is the default but its structural impacts become invisible to anyone who is not looking.[143] However, there is no such thing as color-blindness or racial neutrality in this world.

Whereas the white, colorblind teacher cannot see racialized phenomena, a Black or Brown teacher is better positioned to "acknowledge students, their individual cultures, dialects, environments, backgrounds, heritage, and different learning styles."[144] The whiteness of curriculum becomes apparent by looking at the reading lists, grammar lessons, and history classes. The white transparency in school curriculum creates a hierarchy of knowledge that is pervasive in society.[145] This hierarchy values white, eurocentric knowledge and devalues all other colors of knowledge.[146] Moreover, curriculum is often less engaging and communicates to Black and Brown students that they do not belong.[147] When students are exposed to types of knowledge that relates to their roots, they often are more successful in school.[148] However, this threatens white supremacy's claws in education, so educational diversification efforts are often met with resistance.

For example, the Tucson school district developed Mexican-American Studies (MAS) courses that centered the knowledge base on

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[142] Farinde, *supra* note 15, at 2-3.

[143] *See* Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

[144] Farinde, *supra* note 15, at 2-3. Obviously, just because a student and a teacher look similar does not mean that they will automatically have rapport. However, two people with similar backgrounds are more likely to have a certain rapport.

[145] Dawn Zinga and Sandra Styres, *Decolonizing Curriculum: Student Resistances to Anti-Oppressive Pedagogy*, 11 POWER & EDUC. 30, 34 (2018) ("[T]his is also true of educational spaces and the institutions that house those spaces, where embedded assumptions that define and categorize majority and minority groups are also perpetuated and reinforced through everyday interactions that fail to question the enactment of those relations of power.").

[146] *Id.*

[147] *See* Farinde, *supra* note 15, at 18; *see also* Nolan L. Cabrera, et al., *Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson*, 51 AM. EDUC. RSCH. J. 1084, 1086-87 (2014).

[148] *See* Farinde, *supra* note 15, at 18.

the students' Chicanx roots.[149] Students who participated in that program were more likely to graduate from high school and pass standardized tests at higher rates.[150] To ensure a "race neutral"—or transparently white—classroom, the state shut down MAS.[151] However, in a recent decision, a district court judge held that shutting the program down was fueled by racial animus and therefore violated the First and Fourteenth Amendments.[152]

These reasons illustrate the importance of having a diverse teaching staff. Studies repeatedly prove that students, especially Black and Brown students, perform better when they are represented in the classroom. In order to actually remedy the desegregation and accountability era harms, we need to consider who will be directly working with kids to close the achievement gap.

IV. REPAIRING THE EDUCATION CAREER PATHWAY FOR BLACK AND BROWN PEOPLE

To build a sustainable pathway to careers in education for Black and Brown students, the government needs to take an historical, race-conscious approach. There are two main hurdles to creating this education pathway: recruiting and retaining teachers.

A. RECRUITING TEACHERS

There are a number of factors that hinder Black and Brown individuals from entering the teaching job market: barriers to education, workload, and pay. First, a teaching job requires at least a bachelor's degree, which takes time and money.[153] Although outside the scope of this paper, Black and Brown asipiring teachers are coming from impoverished home situations, which create inequitable ability to

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[149] *See generally,* Nolan L. Cabrera et al., *Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson*, 51 AM. EDUC. RSCH. J. 1084 (2014).

[150] *Id*. at 51-52.

[151] Gonzalez v. Douglas, 269 F. Supp. 3d 948, 957-58 (D. Ariz. 2017).

[152] *Id*. at 973.

[153] Simon et al., *supra* note 11, at 3.

get an education.[154] Moreover, even if an individual wants to go to college, the prospect of oppressive student debts hinders many from actually attending college.

Second, workload and pay are two sides of the same coin. Teaching is a full-time job at part-time pay. Every teacher will tell you: the work does not stop when the bell rings. In fact the majority of work -- lesson planning, calling parents, lunch duty, classroom organizing and cleaning, detention, professional development, grading, IEP meetings, etc.—happens outside the classroom. When spread out through the summer, teachers work 42.2-hour weeks.[155] These hours are not the average fourty hours per week, twenty of which are spent scrolling social media and chatting with coworkers at the coffee machine. These are 42.2 hours of actual work. These long hours render teachers at high risk for stress-related diseases and burnout.[156] However, it is important to note that most teachers are ten-month employees without summer pay. A teacher is three times more likely to take on a second job to make ends meet; and not just during the summer.[157] In 2017, the average teacher salary was approximately $58,000.[158] When controlled for inflation, teachers actually make $30 less per week than they did in 2000.[159] In contrast, recent college graduates who work other jobs make about $134 more per week on

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[154] *See Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, THE CONDITION OF EDUC. 2020 (2020), https://nces.ed.gov/programs/coe/pdf/coe_clb.pdf.

[155] Dick Startz, *Do Teachers Work Long Hours?*, BROWN CTR. CHALKBOARD (June 12, 2019), https://www.brookings.edu/articles/do-teachers-work-long-hours/.

[156] Inger Arvidsson et al., *Burnout Among School Teachers: Quantitative and Qualitative Results from a Follow-up Study in Southern Sweden*, BMC PUB. HEALTH (May 29, 2019), https://bmcpublichealth.biomedcentral.com-articles-10.1186-s12889-019-6972-1.

[157] Katherine Schaeffer, *About One-in-Six U.S. Teachers Work Second Jobs – and Not Just in the Summer*, PEW RSCH CTR. (July 1, 2019), https://www.pewresearch.org/fact-tank/2019/07/01/about-one-in-six-u-s-teachers-work-second-jobs-and-not-just-in-the-summer.

[158] *Table 211.60. Estimated Average Annual Salary of Teachers in Public Elementary and Secondary Schools, by State: Selected Years, 1969-70 Through 2016-17*, NAT'L CTR. FOR EDUC. STAT. (last accessed Dec. 9, 2020), https://nces.ed.gov/programs/digest/d17/tables/dt17_211.60.asp.

[159] *Id.*

average since 2000 when controlled for inflation.[160] Intuitively, teachers react to pay, so when teachers are paid below market value, school performance plummets.[161]

Addressing these problems is not rocket science, but it does require an overhaul of this country's lie of meritocracy. Although this article's solutions are idealistic, they are the most reasonable and valid ways to address the teacher shortage. First, the government needs to eliminate barriers to education. The United States needs to fund public education properly because schools are woefully underfunded. Specifically, "[t]he United States is underfunding our public schools by nearly $150 billion annually, robbing millions of children—predominantly minority and low-income children—of the opportunity to succeed."[162] We have terrible education outcomes in comparison to other countries with similar economies.[163] If we improve school funding, teachers will be happier, and students will be more successful. When students are more successful, they are more likely to attend college and receive scholarships.

Next, the United States needs to address its student debt problem. On average, students leave secondary education $30,000 in the hole in a compromised market with exponentially rising inflation.[164] This deters many from attending college and forces the people who do to aim for well-paying jobs.[165] Student debt

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[160] Jenny Abamu, *The Data Tells All: Teacher Salaries Have Been Declining For Years*, EDSURGE (Apr. 5, 2018), https://www.edsurge.com/news/2018-04-05-the-data-tells-all-teacher-salaries-have-been-declining-for-years.

[161] Jack Britton & Carol Propper, *Teacher Pay and School Productivity: Exploiting Wage Regulation*, 133 J. OF PUB. EDUC. 75, 75 (2016).

[162] *Closing America's Education Funding Gap*, THE CENTURY FOUND. (last accessed Dec. 9, 2020), https://tcf.org/content/report/closing-americas-education-funding.

[163] Drew Desilver, *U.S. Students' Academic Achievement Still Lags that of Their Peers in Many Other Countries*, PEW RSCH. CTR. (Feb. 15, 2017), https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/.://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/.

[164] *The Far-Reaching Impact of the Student Debt Crisis*, SCHOLARSHIP AM. (last accessed Dec. 9, 2020), https://scholarshipamerica.org/blog/the-far-reaching-impact-of-the-student-debt-crisis.

[165] *Id.*

disproportionately disadvantages Black and Brown students.[166] Finally, "grow-your-own" programs and alternative certifications make it possible for Black and Brown students to become a teacher later in life. By funding public schools, making college affordable, and providing multiple avenues to be certified, we can break down barriers to education.

Second, the teaching career needs to be reimagined so that teachers work fewer hours and are paid a higher salary because teaching is simply one of the most important jobs someone can hold in society. To be relaxed and effective, teachers need more than one "prep period" per day, which is usually taken up by meetings. Therefore, schools need smaller class sizes and more teachers at each school. More teachers also means less of an emotional burden on Black and Brown teachers, so that they do not become "tokens" doing more work than they are paid to do.

Further, teachers need to be paid more. Whereas teachers in countries with excellent education enjoy competitive salaries, we pay teachers poorly and overwork them.[167] If the job is appealing, people will apply.

B. RETAINING TEACHERS

While recruitment is important, retention is arguably more important.[168] Although recruitment of Black and Brown educators has increased over the last two decades, teacher burnout and turnover keep numbers relatively low.[169] Teachers are the people who make education happen; however, their well-being is often overlooked. States, communities, administrations, and districts need to be accountable to their teachers, just as teachers are accountable to their students. Therefore, part of the ESSA should require accountability to

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[166] *See* Jen Mishory et al., *How Student Debt and the Racial Wealth Gap Reinforce Each Other*, THE CENTURY FOUND. (Sep. 9, 2020), https://tcf.org/content/report/bridging-progressive-policy-debates-student-debt-racial-wealth-gap-reinforce.

[167] Linda Hargreaves, *The Status and Prestige of Teachers and Teaching*, 21 SPRINGER INT'L HANDBOOKS OF EDUC. 217, 217 (2009), https://link.springer.com/chapter/10.1007/978-0-387-73317-3_13.

[168] *See* Ingersoll & May, *supra* note 2, at 25.

[169] Josh Moss, *Where Are All the Teachers of Color?*, HARVARD ED. MAG. (2016), https://www.gse.harvard.edu/news/ed/16/05/where-are-all-teachers-color.

teachers. Policy-wise, federal regulations already require State Education Agencies (SEAs) to support and invest in teachers.[170] Moreover, federal regulations require states' accountability systems to choose indicators that provide a holistic view of student success. As discussed in Part III, teachers' relationships with students are one of the top influencers in student performance, and teachers' ability to relate to students depends on their job satisfaction, experience, and often personal identity. In this way, accountability to teachers is indirect accountability to students.

Schools should be accountable to teachers based on a number of indicators. Indicators could include a mix of quantitative and qualitative data: pay relative to cost of living, teacher-to-student ratio, reported work hours, teacher diversity, administrative diversity, administrative support, teacher turnover, years of staff work experience, and professional development opportunities. These indicators would address a host of issues which would indirectly boost student achievement.

- *Pay relative to cost of living*: Teachers need to be paid more because relative to their amount of work, they are underpaid, and higher pay would make the job more appealing to stay for. On average, teachers' salaries have been decreasing since 2000 when controlled for inflation, while on the other hand, other entry-level jobs have increased their relative salaries.[171] Also, Black and Brown teachers are paid disproportionately less than their white counterparts on average.[172] Naturally, salaries impact teachers' performance, and teachers perform worse when they are paid under market rates.[173]

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[170] Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State Plans, 81 Fed. Reg. 86,076 (Nov. 29, 2016).

[171] Jenny Abamu, *The Data Tells All: Teacher Salaries Have Been Declining For Years*, EDSURGE (Apr. 5, 2018), https://www.edsurge.com/news/2018-04-05-the-data-tells-all-teacher-salaries-have-been-declining-for-years.

[172] *Civil Rights Data Collection Data Snapshot: Teacher Equity*, U.S DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS 1 (Mar. 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-teacher-equity-snapshot.pdf; *see* Farinde, *supra* note 15, at 1.

[173] Jack Britton & Carol Propper, *Teacher Pay and School Productivity: Exploiting Wage Regulation*, 133 J. OF PUB. EDUC. 75, 75 (2016).

- *Teacher-to-student ratio*: Teachers are more satisfied when they have a reasonable class size. Moreover, teachers have better relationships with students and parents with a reduced class size.[174] Obviously, students receive more individualized instruction when there are fewer students in the room and thereby perform better.[175] High-poverty schools are more likely than low-poverty schools to have overcrowded classrooms.[176] Motivating districts to reduce class sizes and increase the number of teachers will result in more satisfied, effective teachers.

- *Reported work hours*: Teachers' work days are not confined to the eight hours for which they are paid. Teachers put in unpaid overtime-hours before and after school and weeks of work during the summer.[177] Overwork causes teachers to be dissatisfied and less effective.[178] Reporting actual work hours will allow districts and states to make adjustments so teachers work less and are more effective.

- *Administrative support*: Administrative support is among the most important factors in teacher retention, and the lack of administrative support is one of the main catalysts for teacher

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[174] William Price & Ernest Terry, Jr., *Can Small Class Sizes Help Retain Teachers to the Profession?*, NAT'L COUNCIL OF PROFESSORS OF EDUC. ADMIN. 4 (July 29, 2008), https://files.eric.ed.gov/fulltext/EJ1067130.pdf.

[175] *Id.*

[176] April Von Burren, *Which Students are More Likely to End Up in a Crowded Classroom? You Can Probably Guess*, STATE OF OPPORTUNITY (Sept. 21, 2016), https://stateofopportunity.michiganradio.org/post/which-students-are-more-likely-end-crowded-classroom-you-can-probably-guess.

[177] *People Underestimate Teachers' Hours and Say They Should Be Paid More*, THE ECONOMIST (Nov. 27, 2018), https://www.economist.com/graphic-detail/2018/11/27/people-underestimate-teachers-hours-and-say-they-should-be-paid-more.

[178] Donna Ault Jacobsen, Causes and Effects of Teacher Burnout, 23 (Dec. 2016) (Ph.D. dissertation, Walden University) (on file with Walden University ScholarWorks), https://scholarworks.waldenu.edu-cgi-viewcontent.cgi-article=3938&context=dissertations.

turnover.[179] In schools with a high minority population, teachers are twice as likely to report severe dissatisfaction with school leaders.[180] By asking teachers to rate their administrators on their supportiveness, administrators will be incentivized to encourage and help staff, communicate a clear vision, and generally run the school well.

- *Professional development (PDs) opportunities*: Relatedly, schools and districts that invest in PDs see a positive impact. PDs are proven to help keep teachers in the classroom because the better trained a teacher is the more likely they are to stay.[181] Whether targeted towards the entire staff or customized to the specific needs of new teachers in the form of a mentoring program, schools would have the freedom to shape their PDs to maximally benefit their unique community.

- *Teacher turnover rates*: The turnover crisis has led to a teacher shortage and a lack of experienced teachers in the classroom, especially in high-poverty schools.[182] My opinion is turnover is a symptom of treating teachers poorly, rather than a root cause. However, tracking this data is important, because it is a clear sign whether teachers are treated well and supported.

- *Years of staff work experience*: Rather than relying on a revolving door of unprepared, young teachers, schools would be motivated to develop their workforce and retain veteran

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[179] *See generally, The Role of Principals in Addressing Teacher Shortages*, LEARNING POL'Y INST. 1, 1 (Feb. 2017), https://learningpolicyinstitute.org/sites/default/files/product-files/Role_Principals_Addressing_Teacher_Shortage-BRIEF.pdf ("Recent data show teacher turnover rates reaching nearly 25% among teachers who strongly disagree that their administrator encourages and acknowledges staff, communicates a clear vision, and generally runs a school well. That is more than double the attrition rate of teachers who feel their administrators are supportive.").

[180] *Id.* at 3.

[181] Nancy I. Latham & W. Paul Vogt, *Do Professional Development Schools Reduce Teacher Attrition?: Evidence from a Longitudinal Study of 1,000 Graduates*, 58 J. OF TEACHER EDUC. 153, 165 (2007).

[182] Sharif Shakrani, *Teacher Turnover: Costly Crisis, Solvable Problem*, MICH. STATE UNIV. 1 (2008), https://files.eric.ed.gov/fulltext/ED502130.pdf.

teachers. Currently, Black and Brown students are the least likely to have a veteran.

- *Teacher diversity*: To rectify Brown's destruction of the Black and Brown teacher workforce and better represent students in the classroom, schools need to be incentivized to hire a diverse teaching staff. School culture and curriculum would become more inclusive. Students of color would personally benefit and likely academically perform better.

- *Administrative diversity*: Districts would be motivated to have Black and Brown people in leadership positions. This would remedy the loss of Black principals as a result of *Brown*. Moreover, children would benefit from seeing authority figures of multiple races, so as to be better citizens later in life.

Overall, hiring teams should first be incentivized to hire a diverse, experienced staff. Second, SEAs and districts should be incentivized to treat teachers well by paying them well, reducing class sizes, increasing the number of teachers, and avoiding teacher burn-out. Third, administrators should be challenged to be supportive, listen to teachers, and not adopt abusive tactics. This approach would give SEAs and districts insight into teachers' specific needs, and the areas in which resources are needed.

Some may argue that schools should be accountable to students, not adults. However, this fails to recognize that teacher accountability directly leads to student accountability. ESSA leaves room for holistic indicators that show student achievement.[183] When teachers are supported and satisfied with their jobs, overall, students directly benefit and perform better.[184] Moreover, this would be a shift in accountability-era tactics, where the only person responsible for a student's success is the teacher, towards a more community-oriented support system strategy. Instead, this would take a step back to realize the school and district as a whole has a responsibility to ensure teachers

[183] Darryl Bond Denhalter, Holistic Approaches to State School Grading Systems, 20 (Aug. 5, 2020) (Ph.D. dissertation, Brigham Young University) (onfile with BYU ScholarsArchive), https://scholarsarchive.byu.edu-cgi/viewcontent.cgi?article=9675&context=etd.

[184] Iqbal et al., *Relationship between Teachers' Job Satisfaction and Students' Academic Performance*, 65 EURASIAN J. OF EDUC. RESEARCH 335, 336 (2016).

are supported in the classroom, in order to ensure students are successful in school.

Further, this teacher accountability portion does not need to be a massive chunk of ESSA accountability, just enough to create an incentive. For example, in Louisiana high schools, schools are measured based on the following indicators: 25% end-of-course standardized test scores, 25% graduation rates, 25% ACT, and Work Keys scores, and 25% strength of diploma. If Louisiana were to add a 10% category for teacher accountability and reduce all other categories proportionally, then the vast majority of scores would be measurements of exclusively student data. However, at 10%, teacher quality, diversity, and satisfaction could make or break a letter grade, which could be the difference between a passing or a failing school. As the teacher accountability score increases, likely the 90% focusing on student performance will increase as well.

Each of the indicators directly reveal the treatment of teachers, especially Black and Brown teachers. In a color conscious way, these indicators take into account who and what was lost in *Brown*'s wake and encourages schools to remedy those wrongs. In turn, attrition of Black and Brown teachers will increase, hopefully because teachers will be more satisfied with their careers. Teachers are the most important adults in the education system, and the time has come for states, districts, and schools to be held accountable to them.

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TEXAS KNOWS HOW TO HOLD 'EM: ANALYSIS OF THE PUSH FOR LEGALIZING GAMBLING UNDER TEXAS' STRICT GAMBLING LAWS

Nicholas Roberts

I. INTRODUCTION

What do gambling, alcoholism, and marijuana all have in common? All these vices are regulated by the states under the Tenth Amendment of the United States Constitution.[1] The Tenth Amendment grants reserved powers to the states that are not delegated to the United States nor prohibited by the United States Constitution.[2] However, some states regulate specific issues differently and have the authority to do so under the Tenth Amendment. A state's authority to regulate gambling is derived from the state's police power, which every state has.[3] Since 1845, Texas has maintained strict gaming laws. Article VII Section 17 of the Texas Constitution of 1845 specifically stated that "no lottery shall be authorized by this state; and the buying or selling of lottery tickets … is prohibited."[4] Even with the enactment of several constitutional amendments,[5] Texas continues to maintain

[1] U.S. CONST. amend. X.
[2] *See Id.*
[3] WALTER T. CHAMPION JR. & I. NELSON ROSE, GAMING LAW IN A NUTSHELL 114 (2nd ed. 2018).
[4] TEX. CONST. of 1845 art. VII, § 17
[5] Article III Section 47 of the Texas Constitution has been amended to authorize subsections (b)(Charitable Bingo), (d)(Charitable Raffles), (d-1)(Addition provisions for Charitable Raffles), and (e)(State Lotteries), which will be further discussed in Section IV of this note.

the essence of Article VII Section 17 of the Texas Constitution of 1845.[6]

The regulation of gambling in Texas can be summed up by the lyrics of Texas native Kenny Rogers' adaptation of "The Gambler," which perfectly expresses Texas's strict gambling laws.[7] Kenny Rogers sings, "[y]ou got to know when to hold 'em, know when to fold 'em, know when to walk away and know when to run," and Texas knows when to hold 'em, fold 'em, and walk away from their stance on gambling legislation.[8] Kenny Rogers further states that "every gambler knows that the secret to survivin[g] is knowing what to throw away and [knowing] what to keep," which could be interpreted as Texas's right to decide whether to enact prohibitory statutes or approve constitutional amendments for voters to decide.[9]

This note has three distinct sections. Section II focuses on Texas's ability to hold its regulatory authority over gambling, specifically analyzing historic federal and state gaming laws, judicial decisions, and Texas's relationship with Tribal gaming laws. Section III explores the process of introducing a constitutional amendment under the Texas Constitution and pertinent historical constitutional amendments, which may be used to predict the outcome of current legislative proposals regarding gambling legislation. In conclusion, Section IV acknowledges the modern push for sports betting and casino resorts and provides a prediction regarding the recent gambling proposals for the current legislative session.

II. TEXAS KNOWS WHEN TO HOLD 'EM –HISTORY OF CONSERVATIVE GAMBLING LAWS IN THE UNITED STATES AND TEXAS

A. MAJOR GAMBLING STATUTES AND JUDICIAL DECISIONS IN THE UNITED STATES

Several federal statutes have been enacted to influence the regulation of gambling and the transmission of bets and wagers through interstate communications and commerce. The following

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[6] TEX. CONST. art. III, § 47(a).
[7] KENNY ROGERS, THE GAMBLER (United Artists Records 1978).
[8] *Id.*
[9] *Id.*

statutes were enacted by Congress to regulate sports and online gambling.

Considering the implications to interstate commerce, Congress enacted the Wire Wager Act (Wire Act) to prohibit the development of illegal interstate gambling activity.[10] The Wire Act prohibits any entity or person "engaged in [the] business of betting or wagering [from] knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sports event or contest."[11] The Wire Act also includes a safe harbor provision that excludes certain types of transmissions, specifically "news reporting for sports events or contests and the transmission of information assisting in the placing of bets on sports events if the location of the sent transmission and received transmission is a State or foreign country where betting is legal."[12] Due to the fact that the Texas Constitution prohibits most lotteries, and the Penal Code prohibits most forms of gambling, any transmission for the purpose of placing a bet sent to or from, or received from Texas would violate the Wire Act.[13]

Similarly, Congress passed the Illegal Gambling Business Act (IGBA) to target the operation of illegal gambling businesses. A gambling business is a business that "(1) violates the law of a State or political subdivision where it is conducted, (2) involves five or more people in the operation of the business, and (3) has been in continuous operation for a period of thirty days or has grossed revenue of $2,000 in a single day."[14] The IGBA was enacted to enable the government to federalize state gambling laws, which would allow the government to regulate interstate commerce and target organized crime.[15] Given the strict nature of Texas's gambling laws, a gambling business, such as Fan Duel or Draft Kings, that meets the second and third elements could be considered in violation of the IGBA.[16]

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[10] 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, 951 (2020).
[11] 18 U.S.C.A. § 1084(a) (West).
[12] 18 U.S.C.A. § 1084(b) (West).
[13] *See* TEX. CONST. art III § 47; *see* TEX. PEN. CODE Ch. 47.
[14] 18 U.S.C.A. § 1955(b)(1)(i)-(iii) (West).
[15] Holden & Edelman, *supra* note 9, at 952.
[16] *Id*. at 953.

Another federal statute that has molded gambling regulation is the Unlawful Internet Gambling Enforcement Act (UIGEA). Under the UIGEA, "no person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another in unlawful internet gambling, (1) credit, (2) electronic fund transfers, or (3) commercial papers."[17] The primary purpose of the UIGEA is "to target offshore operators of illegal gambling internet sites."[18] The UIGEA does not explicitly apply to sports gambling, but the statute does explicitly exempt fantasy sports under certain circumstances.[19] Federal statutes enacted by Congress, such as the Wire Act, the IGBA, and the UIGEA, were passed to target money-making businesses of organized crime entities.[20] Over the years, the purpose of targeting organized crime has become less prominent, and the focus has switched to large licensed companies that operate in various states.[21] With the spread of sports gambling legislation proposals, the federal statutes enacted by Congress to regulate gambling, have a different application to the newly developing gambling industry.

PASPA AND MURPHY V. NCAA

In May of 2018, the U.S. Supreme Court reviewed the constitutionality of the Professional and Amateur Sports Protection Act (PASPA) and its effect on state sovereignty.[22] The Supreme Court granted the State of New Jersey's writ of certiorari and, in a 6-3 decision, found that the provision of the PASPA making sports betting unlawful was unconstitutional.[23] The pivotal decision in Murphy v. NCAA encouraged and expanded the sports betting industry.[24]

Justice Alito, the majority opinion's author, began with the PASPA's provisions at issue.[25] PASPA section 3702, made it unlawful for a State "to sponsor, operate, advertise, promote, license, or

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[17] 31 U.S.C.A. § 5363 (West).
[18] Holden & Edelman, *supra* note 9, at 954.
[19] *Id*.
[20] Holden & Edelman, supra note 4, at 952.
[21] *Id.* at 950.
[22] *Id*. at 931.
[23] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[24] Matthew A. King, *Murphy v. NCAA and Legalization of Sports Betting in States and Indian Country*, JUDGES' J. 16, 20 (2020).
[25] *Murphy,* 138 S. Ct. at 1471.

authorize by law or compact … a lottery, sweepstakes, or [another] betting, gambling, or wagering scheme based on [competitive sports events]."[26] In addition to section 3702 of the PASPA, the opinion also describes the enforcement of the provision, which allows civil action, not criminal, by the Attorney General and professional sports entities.[27] The anti-commandeering doctrine was a vital aspect of Justice Alito's opinion:

> "[T]he anti-commandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States … [T]he Constitution limited but did not abolish the sovereign powers of the States . . ."[28]

Justice Alito emphasized the constitutional right of state sovereignty by focusing on the constitutional right derived from the Tenth Amendment and prior Supreme Court precedents, specifically New York v. United States and Printz v. United States.[29]

In New York, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which was enacted after the initial Low-Level Radioactive Waste Act of 1980.[30] The 1985 act provided three types of incentives: (1) monetary incentives, (2) access incentives, and (3) the take title provision.[31] The take title provision was the main provision at issue because it compelled states to abide by the 1985 Act or receive consequences for all waste generated within the state.[32] The Supreme Court, in an opinion delivered by Justice O'Connor, ultimately held that the take-title provision was unconstitutional because the provision compelled states to adhere to Congress's Low-Level Radioactive Waste Act.[33]

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 1475.
[29] *Id.* at 1477.
[30] New York v. United States, 505 U.S. 144, 151 (1992).
[31] *Id.*
[32] *Id.*
[33] *Id.* at 188.

Similarly, in Printz, the Supreme Court held the anti-commandeering principle of the Tenth Amendment had again been attacked.[34] In 1993, Congress enacted the Brady Handgun Violence Prevention Act.[35] The Act consisted of provisions that guided state law enforcement officers to engage in the administration of a federal regulatory scheme.[36] Specifically, the federally enacted regulatory scheme involved the regulation of handgun applications required by firearms dealers, which would need to be accepted by state law enforcement as directed by the act.[37] In an opinion delivered by Justice Scalia, the Court held that the compelling nature of the Brady Act was incompatible with the constitutional system of dual sovereignty.[38] Justice Scalia stated:

We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officer directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.[39]

The Supreme Court's decisions in New York and Printz help to further explain why the anti-commandeering principle of the Tenth Amendment is significant in the Murphy decision.[40]

Justice Alito not only emphasized the anti-commandeering principles of New York and Printz, he also debunked the empty distinction between affirmative action and a prohibitive action commanded by a congressional act.[41] Regardless of affirmative or prohibitive action by a congressional act commanding the states to follow instructions, the command violates the anti-commandeering doctrine of the Tenth Amendment.[42] Additionally, Justice Alito emphasized a basic principle of constitutional law, that Congress

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[34] *See* Printz v. United States, 521 U.S. 898 (1997).
[35] *Id*. at 902.
[36] *Id.* at 903.
[37] *Id.* at 904.
[38] *Id*. at 935.
[39] *Id.*
[40] *Murphy,* 138 S. Ct. at 1478.
[41] *Id.*
[42] George R. Brand, *Breaking the Ban: Sports Gambling, Anti-Commandeering, and Lots and Lots of Money*, 84 MO. L. REV. 831, 843 (2019).

cannot issue orders to state legislatures.[43] Therefore, the Supreme Court concluded that the PASPA's prohibition of sports gambling and its interference with state sovereignty were unconstitutional.[44]

Justice Alito states that "there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the states," which is fundamentally unconstitutional.[45] The entire PASPA was found unconstitutional because none of the provisions were deemed severable from the operative provision.[46] The Supreme Court's ruling against the PASPA is significant because it gives states, such as Texas, the power to police the issue of gambling, specifically sports gambling, without federal interference.

B. GAMBLING UNDER THE TEXAS CONSTITUTION AND TEXAS LAW

Despite the change of the modern landscape of gambling, Texas's history of gambling continues to fuel its current stance on the issue. Although the fantasized gambling saloons of the Wild West seem to be the essence of gambling in Texas, the ratification of the 1876 Texas Constitution tells a different story.[47] Since the Texas Constitution's ratification in 1876, Texas has maintained strict gambling regulations.[48] Article III, section 47 of the Texas Constitution affirmatively requires the Texas Legislature to pass legislation that prohibits lotteries in Texas.[49] For purposes of passing legislation that prohibits lotteries, a lottery not only includes scratch-off tickets and randomly selected numbered balls, but a wide spectrum of activities that involve, at a minimum: "(1) the payment of consideration, (2) for a chance, (3) to win a prize."[50]

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[43] *Id.*
[44] *Murphy*, 138 S. Ct. at 1485.
[45] *Id.* at 1482.
[46] Matthew A. Melone, *New Jersey Beat the Spread: Murphy v. National Collegiate Athletic Association and the Demise of Paspa Allows for States to Experiment in Regulating the Rapidly Evolving Sports Gambling Industry*, 80 U. PITT. L. REV. 315, 346 (2018).
[47] Marc Dib, *A Game of Skill or Chance? Why Texas Should Legalize Daily Fantasy Sports*, 51 TEX. TECH L. REV. 361, 365 (2019).
[48] *Id.* at 365–66.
[49] City of Fort Worth v. Rylie, 602 S.W.3d 459, 461 (Tex. 2020).
[50] *Id.* at 460–61.

As a result of the language in Article III, section 47 of the Texas Constitution, Texas codified the prohibition of gambling in Chapter 47 of the Texas Penal Code (Penal Code) and various sections of the Occupations Code as well.[51] However, Chapter 47, section 47.01(1) of the Penal Code clearly defines what constitutes a bet, explicitly defining a bet as "an agreement to win or lose something of value solely or partially by chance."[52] Section 47.02 of the Penal Code further prescribes how a person can commit an offense of gambling, which includes:

(1) making a bet on a partial or final result of a game, contest, or the performance of a participant in a game or contest, (2) making a bet on the result of any political nomination, appointment, or election, including the degree of success of any nominee, appointee, or candidate, or (3) playing or betting for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.[53]

Given the explicit language of section 47.02(a)(1)-(3), it is apparent that sports betting and general casino games, which would be a part of the proposed destination resorts, are generally prohibited by the Penal Code's gambling provisions.

POKER ROOMS

As previously discussed, Texas has strict and prohibitive regulations under the Penal Code, but the Penal Code provides various loopholes and exceptions. Poker rooms fall within a loophole in the Penal Code and are considered to function in a so-called 'gray area' of the law.[54] Under the Texas Penal Code, section 47.04(a), a person commits the offense of keeping a gambling place if he knowingly uses a property with the expectation of using the property for the purpose of gambling.[55] However, poker rooms use the affirmative defense of subsection 47.04(b) to operate in the gray area. Under subsection

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[51] *See* TEX. PENAL CODE ANN. § 47.02.
[52] *Id.* § 47.01(1).
[53] *Id.* § 47.02(a)(1)–(3).
[54] Stacy Rickard, *Gambling in Texas: How Poker Rooms Legally Operate Given 'Gray Areas'*, SPECTRUM LOCAL NEWS (Jul. 20, 2021, 9:26 PM), https://spectrumlocalnews.com/tx/dallas-fort-worth/news/2021/07/21/gambling-in-texas--how-poker-rooms-legally-operate-given--gray-areas.
[55] TEX. PENAL CODE ANN. § 47.04(a).

47.04(b), a person may keep a gambling place if (1) the gambling occurs in a private place; (2) no person received any economic benefit other than personal winnings; and (3) the risk of losing and the chances of winning are the same for all participants.[56] Poker rooms may meet elements one and three of subsection 47.04(b) by having a private place and maintaining an equal chance of winning and losing for everyone. However, poker rooms generally operate by assessing membership fees and selling concessions,[57] which could be an issue for satisfying the economic benefit element.[58]

The legality of poker rooms has gained controversial traction after two poker rooms in Dallas, Texas Card House and 214 Shuffle, were granted certificates of occupancy, which allowed the poker rooms to operate as private places or clubs for the purpose of playing poker.[59] After several months of allowing poker rooms to operate within the 'gray area' of the law, the City of Dallas decided to revoke the certificate of occupancy and found the poker rooms' existence illegal.[60] The Board of Adjustments for the City of Dallas heard appeals from the poker rooms and decided that the certificates of occupancy were legally obtained and should not have been revoked.[61] However, in May of 2022, the City of Dallas' Director and Chief Building Official, in his official capacity, filed a petition to have the Board of Adjustment's decision revoked.[62] Civil District Court Judge Eric Moye ruled in favor of the City of Dallas, holding that the city had the authority to revoke the certificate of occupancy, which

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[56] *Id.* § 47.04(b).
[57] Jacob Vaughn, *Court Rules That Dallas Is Allowed to Shut Down Texas Card House*, DALL. OBSERVER (Nov. 4, 2022, 4:00 AM), https://www.dallasobserver.com/news/dallas-allowed-to-revoke-texas-card-house-certificate-of-occupancy-court-rules-15192426.
[58] Zach Despart, *Are Poker Clubs Legal in Texas? The Answer is Unclear*, HOUS. CHRON. (Sep. 13, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Are-poker-clubs-legal-in-Texas-The-answer-is-14435781.php.
[59] Everton Bailey Jr., *Poker House Lawsuits: Dallas OKs Spending at Least $550,000 in Legal Fees*, DALL. NEWS (Jan. 25, 2023, 12:43 PM), https://www.dallasnews.com/news/politics/2023/01/25/poker-house-lawsuits-dallas-oks-spending-at-least-550000-in-legal-fees.
[60] *Id.*
[61] *Id.*
[62] *Id.*

reversed the Board of Adjustments' decision.[63] Texas Card House and 214 Shuffle have filed notices of appeal to the Court of Appeals for the Fifth District.[64] Texas Card House will likely continue appealing until the matter finally reaches the Texas Supreme Court.[65]

The main issue likely to be contested in the Texas Supreme Court, if poker room litigation persists, is the legislature's meaning of "private place" for the purpose of Penal Code Chapter 47.[66] Gene Wu, a State Representative of Houston, filed House Bill 732, which plans to distinguish a private place and a private residence under the Penal Code.[67] The bill would amend various provisions of the Penal Code to change the definition of private place, which allows poker rooms to operate, and to narrow the definition of private residence that would restrict the conduct of poker to a person's dwelling.[68] Although the loophole of 47.04(b) allows poker rooms to operate, poker rooms should push for legislation that either explicitly allows poker rooms to operate legally or a constitutional amendment that would make poker an exception to the prohibition of lotteries under Article III Section 47(a) of the Constitution.

EIGHT-LINERS – FUZZY ANIMAL EXCEPTION

Due to its ambiguous application, the "fuzzy animal" exception has spurred much litigation and debate, specifically regarding eight-liners.[69] The fuzzy animal exception is found in subsection 47.01(4)(B)

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[63] Matt Goodman, *Judge Agrees: Dallas Was Within Its Rights to Shut Down a Poker Room*, D MAGAZINE (Nov. 1, 2022, 2:37 PM), https://www.dmagazine.com/frontburner/2022/11/judge-agrees-dallas-was-within-its-rights-to-shut-down-a-poker-room.

[64] Bailey Jr., *supra* note 98.

[65] Goodman, *supra* note 102.

[66] *See* TEX. PENAL CODE ANN. § 47.01(8) (the meaning of "private place" within the Penal Code presents ambiguity that poker rooms rely on to operate. Unless the Texas legislature fails to enact an amendment clarifying the ambiguity regarding the meaning of "private place," the issue of statutorily interpreting what constitutes a "private place" will instead turn on a judicial ruling).

[67] Everton Bailey Jr., *Judge to Dallas: Leave Poker Business Alone While Appeal Happens*, DALL. NEWS (Dec. 1, 2022, 5:37 AM), https://www.dallasnews.com/news/politics/2022/12/01/judge-to-dallas-leave-poker-business-alone-while-appeal-happens.

[68] *Id.*

[69] Walter T. Champion, *Daily Fantasy Sports and the "Fuzzy Animal" Debate in Texas*, 10 UNLV GAMING L.J. 41 (2020).

of the Penal Code, which creates an exclusion for "electronic, electromechanical, or mechanical contrivances" that are generally considered illegal gambling devices.[70] Subsection 47.01(4)(B) states that the term "gambling devices" does not include:

> Any electronic, "electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prize, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less."[71]

The Texas Supreme Court has attempted to distinguish parameters for determining the definition of a legally operated eight-liner. In *Hardy v. State*, the Supreme Court defined an eight-liner as an electronic device that is operated partially by chance, which would generally constitute it as an illegal gambling device.[72] The Supreme Court analyzed the functions of the eight-liner specifically based on what prize the players could win, and determined that an eight-liner was not excluded from the definition of an illegal gambling device.[73] The Court reasoned that the eight-liners at issue rewarded players with cash or cash equivalents, and no matter the purpose for awarding cash to a player, it does not meet the exclusive noncash merchandise prize, toys, or novelties required in Penal Code Section 47.01(4)(B). [74] Based on *Hardy*, the Supreme Court in *State v. One Super Cherry Master Video 8-Liner Machine,* found that eight-liners that issued redeemable tickets for cash used for additional play and gift certificates for local retailers, did not meet the exclusion established in Section 47.01(4)(B).[75] In 2013, the Supreme Court decided the case of *State v. $1,760.00 In United States Currency*, holding that the award of redeemable non-immediate rights of replay did not meet the statutory exclusion of 47.01(4)(B) because the award was not exclusively for

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[70] *See* TEX. PEN. CODE ANN. § 47.01(4) (2021).
[71] *Id.* § 47.01(4)(B) (2021).
[72] See Hardy v. State, 102 S.W.3d 123, 125 (Tex. 2003).
[73] See *id.* at 131.
[74] See *id.* at 132.
[75] *See* State v. One Super Cherry Master Video 8-Liner Mach., 102 S.W.3d 132, 133 (Tex. 2003).

noncash prizes, toys, or novelties.[76] In Texas, if the prize for an eight-liner is cash or cash equivalent, such as gift certificates, the eight-liner will be considered an illegal gambling device.[77]

Although the ambiguity of Penal Code section 47.01(4)(B) has made it difficult to enforce the legality of eight-liner machine payouts, Texas courts have maintained the prohibitory essence of Article III, Section 47. [78] Even with the fuzzy animal exception, Texas knows when to hold 'em.

DAILY FANTASY SPORTS

With the rise of sports betting, Daily Fantasy Sports (DFS) has garnered more support than its popular counterpart, traditional daily fantasy sports.[79] DFS differs from traditional daily fantasy sports because it allows contestants to pay monetary value to enter contests where the winners are determined "on a daily basis."[80] However, under Texas Penal Code 47.02(a), a person commits an offense of gambling when "making a bet on a partial or final result of a game, contest, or the performance of a participant in a game or contest."[81] Unlike traditional daily fantasy sports, which can meet the three requirements of Penal Code 47.02(b)(1)-(3), DFS does not have a defense against illegal gambling because most DFS companies, like Fan Duel and Draft Kings, take a percentage of the entry fee paid by contestants.[82]

However, in Texas, skill versus chance has sparked much debate.[83] In 2016, Attorney General Ken Paxton opined on the issue of DFS and its legality under the Texas Constitution and Penal Code, in which he asserted that DFS was prohibited under Texas law.[84] Attorney General Paxton analyzed the plain language of Penal Code section 47.02(a)(1) and determined that the section only required a partial chance and did not require the game to be predominantly a

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[76] *See* State v. $1,760.00 in U.S. Currency, 406 S.W.3d 177, 181 (Tex. 2013).
[77] *See* Champion, *supra* note 108, at 57.
[78] *See id.* at 60.
[79] *See* Dib, *supra* note 86, at 364-65.
[80] *See id.* at 364.
[81] TEX. PEN. CODE ANN. § 47.02(a)(1) (2021).
[82] *See* Dib, *supra* note 82, at 367-368 (2019); TEX. PEN. CODE ANN. 47.02(b)(1)-(3) (2021).
[83] *See* Dib, *supra* note 86, at 376.
[84] *See* KEN PAXTON, H.R. Rep. Op. No. 0057, at 9 (Tex. 2016).

game of skill over chance.[85] However, the Attorney General's opinion has been described as an overreach and a mischaracterization of the law.[86] Additionally, the Attorney General's opinion is persuasive, but it is a non-binding authority.[87] In 2017, the debate spurred more attention when House Bill 1457 was introduced by Richard Raymond, a Democratic Representative, which would have classified DFS as a game of skill, not chance.[88] House Bill 1457 would have removed DFS out from the Penal Code's definition of a bet, but unfortunately, the bill, which had bi-partisan support, never made it to the House's floor for a vote.[89]

There is no established line of case law in Texas that clarifies whether DFS is a game of skill or is legal in general. However, the Texas Legislature can pass a law similar to House Bill 1457 that would solidify the status of DFS. It will ultimately come down to the State Legislature, giving Texas more reason to hold its hands tight.[90]

C. GAMBLING UNDER THE INDIAN GAMING REGULATORY ACT AND TEXAS'S AUTHORITY OVER INDIAN GAMING

Under what is known as the "Marshall Trilogy,"[91] tribal sovereignty was established.[92] Nevertheless, tribal sovereignty is not as all-encompassing as it appears. After the Supreme Court combed

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[85] *See id.* at 7.
[86] *See* Champion, *supra* note 108, at 50.
[87] *See* CHRISTY DRAKE ADAMS, *Legal Q&A (Texas Municipal League)*, TEXAS MUNICIPAL LEAGUE, 12 (2020), https://www.tml.org/DocumentCenter/View/2461/Attorney-General-Opinions---2020-12-PDF.
[88] *See* Dib, *supra* note 86, at 373-74.
[89] *See id*. at 374-75.
[90] *See* Champion, *supra* note 108, at 47.
[91] The "Marshall Triology" consists of Supreme Court decisions that Chief Justice John Marshall authored regarding establishing tribal sovereignty. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that the U.S. has superior title over tribal territory within the United States, while the Indian tribes only have a right to occupy such lands.); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (holding Indian tribes were domestic dependent nations, not foreign nations, of the United States, dictated by the Commerce Clause, and did not have standing to bring action before the courts of the United States); Worcester v. Georgia, 31 U.S. 515 (1832) (holding that Indian tribes as domestic dependent nations have the autonomy to regulate within their own territories).
[92] CHAMPION & ROSE, supra note 2, at 178.

through each issue presented by the cases of the Marshall Trilogy, Chief Justice John Marshall concluded that tribes possessed a form of limited sovereignty, making them "domestic dependent nations," subordinate to the plenary power of Congress.[93] Given that tribes are recognized as dependent sovereign nations, tribes are not subject to a state's criminal or civil law but are subject to federal laws.[94] Although tribes are found within a state's border, they are not governed by state authority but by the plenary powers of Congress.

However, in California v. Cabazon, the Supreme Court's decision caused an uproar of concern regarding the status of tribes' inherent powers over state authority.[95] In Cabazon, the Supreme Court reviewed Pub. L. 280, which granted six states, including California, broad criminal jurisdiction over a specified area of Indian country, which included the Cabazon and Morongo Bands of Mission Indians.[96] The Court relied on its interpretation of Pub. L. 280 in Bryan v. Itasca County to determine the issue of the state's authority to prosecute the Cabazon and Morongo Indians for violating a penal code prohibiting bingo games that awarded $250 or more.[97] The Court held that due to the civil regulatory nature of California's bingo regulations, Pub. L. 280 did not authorize California to impose its penal code on the Cabazon and Morongo reservations.[98] The Court further held that the tribal and federal interests outweigh the interest of the state, which California asserted was to prohibit conduct that would attract crime.[99] Cabazon opened the door for tribes to conduct any gaming on their reservation as long as the tribal and federal interests outweigh the state's interests.[100]

In response to Cabazon, Congress passed the Indian Gaming Regulatory Act (IGRA), which was established to provide the statutory authorization of gaming by Indian tribes and that promotes tribal economic development, self-sufficiency, strong tribal governments,

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[93] *Id.* at 179.
[94] *Id.* at 179-80.
[95] Kathryn Almond, *A Fouled Hand: Ysleta Del Sur Pueblo's Struggle to Game in Texas*, 49 TEX. TECH L. REV. 403, 418 (2017).
[96] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).
[97] *Id.* at 208.
[98] *Id.* at 211-12.
[99] CHAMPION & ROSE, *supra* note 2, at 182; *Cabazon Band of Mission Indians*, 480 U.S. at 221-22.
[100] Almond, *supra* note 50.

and overall gaming regulations for Indian tribes.[101] To regulate the gaming of Indian Tribes, Congress created three distinct classes within the IGRA: Class I, Class II, and Class III gaming.[102] Class I gaming is defined as "social games solely for prizes of minimal value or a traditional form of Indian gaming engaged in by individuals as a part of tribal ceremonies or celebrations."[103] Class II gaming consists of what is traditionally referred to as bingo, where a person possesses a card that has numbers on it and must cover each number in a previously designated pattern for a chance to win a prize, including monetary prizes.[104] Class II gaming also includes card games that are "explicitly authorized, or not explicitly prohibited, by the laws of the state" and does not include games such as baccarat or blackjack.[105] Class III gaming includes all forms of gaming that are not expressly defined within the definition of Class I or Class II gaming.[106]

The IGRA further prescribes tribal gaming ordinances, which determines which classes of gaming falls within the exclusive jurisdiction of the Indian Tribes or requires federal regulation.[107] Class I gaming does not have specific requirements because it remains under the exclusive jurisdiction of the tribes.[108] However, Class II and Class III gaming have specific requirements under the IGRA before a tribe can conduct any gaming. Class II and Class III gaming schemes require (1) that the state where the gaming is to be conducted permits the specific gaming and (2) that the tribe adopts an ordinance or resolution approved by the chairman of the National Indian Gaming Commission (NIGC).[109]

In addition to the two requirements for Class II and Class III gaming, Class III gaming requires a Tribal-State Compact in which a tribe must request a state to "enter into negotiations for the purpose of entering a Tribal-State Compact" that governs the conduct of gaming activities.[110] When a state receives a tribe's request, the state must

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[101] *Id.*
[102] *Id.*
[103] 25 U.S.C.A. § 2703(6).
[104] *See* 25 U.S.C.A. § 2703(7)(A)(i)(I).
[105] *See* 25 U.S.C.A. § 2703(7)(A)(ii)(I)-(II); s*ee also* 25 U.S.C.A. § 2703(7)(B)(i).
[106] 25 U.S.C.A. § 2703(8)
[107] *See id.* § 2710.
[108] *Id.* § 2710(a)(1).
[109] *Id.* § 2710(b)(1)(A)-(B).
[110] *Id.* § 2710(d)(3)(A).

negotiate with the tribe in good faith to enter into a compact.[111] There has been controversy regarding the constitutionality of the requirement for states to act in good faith for negotiations. The controversy stems from the Supreme Court's ruling in Seminole Tribe v. Florida, where the Court held that a tribe could not sue a state without its consent for failing to negotiate in good faith regarding a Tribal-State Compact.[112] The Court based its holding on the Eleventh Amendment of the Constitution, which prohibits Congress from making states vulnerable to being sued in federal court.[113] The Supreme Court found the provision of the IGRA that allowed states to be sued unconstitutional, however, under the severability clause of the IGRA,[114] the good faith requirement of tribal compacts stayed intact.[115]

The distinction between the classes of gaming regulated under the IGRA is important to the discussion of state and tribal sovereignty because states have influence over what kind of gaming is allowed within their borders. States can influence the type of gaming authorized under the IGRA because to engage in Class II or Class III gaming, the gaming must, at a minimum, be permitted by the state for any purpose, by any person or entity.[116] For example, since Texas prohibits card games such as Blackjack and Poker, except under certain circumstances, the recognized Texas tribes would not be permitted to conduct Class III gaming under the IGRA. Ultimately, Tribal-State Compacts give states an influential role in negotiating how Class III gaming will be conducted and regulated within the applicable state's tribal territory.[117]

Texas has tried its hardest to maintain strict regulation of gambling within its jurisdiction. However, for decades Texas has also attempted to reach outside of its jurisdiction and regulate gambling in territories such as the Ysleta Del Sur Pueblo Tribe.[118] Texas has three federally recognized Indian Tribes within its borders, the Alabama-Coushatta Tribe, the Kickapoo Traditional Tribe, and the Ysleta del

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[111] *Id.*
[112] CHAMPION & ROSE, *supra* note 2, at 193-94.
[113] Seminole Tribe v. Florida, 517 U.S. 44, 75 (1996).
[114] 25 U.S.C.A. § 2721.
[115] CHAMPION & ROSE, *supra* note 2, at 201.
[116] Almond, *supra* note 50, at 419.
[117] CHAMPION & ROSE, *supra* note 2, at 192.
[118] Almond, *supra* note 50, at 421.

Sur Pueblo Tribe.[119] However, federal recognition has not stopped states like Texas from attempting to exercise its authority over tribal land.

An example of Texas's attempt to exercise authority over tribal lands is evident in the line of cases between the Ysleta Del Sur Pueblo Tribe and Texas. Since the 1990s, the legal battle between the Ysleta Del Sur Pueblo Tribe and Texas was one of Texas's most highly contested disputes regarding Indian gaming.[120] The history between the Ysleta Del Sur Pueblo Tribe and Texas began in 1967 when Texas formally recognized Ysleta Del Sur Pueblo Tribe, as did Congress in 1968.[121] After Texas renounced its trust responsibilities assigned by Congress, the Ysleta Del Sur Pueblo Tribe did not regain its trust status again until the enactment of the Ysleta Del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act (Restoration Act).[122] Section 107 of the Restoration Act was the focal point of the litigation that ensued after its enactment.[123] In 1994, the Fifth Circuit in Ysleta I interpreted the Restoration Act to allow Texas gaming laws and regulations to "operate as surrogate federal law" on the tribe's reservation, which forced the Ysleta Del Sur Pueblo Tribe to stop conducting bingo on its reservation. [124] The Fifth Circuit ruled in favor of Texas.[125]

Texas later filed a permanent injunction against the Ysleta Del Sur Pueblo Tribe for conducting bingo games, which the U.S. District Court for the Western District of Texas granted, and the Fifth Circuit affirmed.[126] The Ysleta Del Sur Pueblo Tribe petitioned for a writ of

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[119] Nataly Keomoungkhoun, *What Happened to Native American Tribes That Once Existed in North Texas? Curious Texas Investigates*, DALL. NEWS (Sep. 9, 2020, 7:00 AM), https://www.dallasnews.com/news/curious-texas/2020/09/09/what-happened-to-native-american-tribes-that-once-existed-in-north-texas-curious-texas-investigates.

[120] Almond, *supra* note 50, at 422.

[121] Ysleta Del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1934 (2022).

[122] *Id.* at 1935.

[123] *Id.* at 1937.

[124] Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325, 1328 (5th Cir. 1994), *abrogated by* Ysleta Del Sur Pueblo v. Texas, 142 S. Ct. 1929 (2022).

[125] *Ysleta Del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act Federal Indian Law Statutory Interpretation* Ysleta Del Sur Pueblo v. Texas, 136 HARV. L. REV. 490, 491 (2022).

[126] *Id.* at 491-92.

certiorari in the United States Supreme Court.[127] The Supreme Court reviewed the Fifth Circuit's decision and determined that the statutory interpretation of the Restoration Act was at issue. The Court understood Section 107 of the Restoration Act to suggest the following interpretation:

> In subsection (a), Congress effectively federalized and applied to tribal lands those state laws that prohibit or absolutely ban a particular gaming activity. In subsection (b), Congress explained that it was not authorizing the application of Texas's gaming regulations on tribal lands. In subsection (c), Congress granted federal courts jurisdiction to entertain claims by Texas that the Tribe has violated in subsection (a).[128]

Based on a statutory interpretation of the Restoration Act, the Court held that the Act sought to prevent the Ysleta Del Sur Pueblo Tribe and Alabama-Coushatta Indian Tribes from conducting gaming that was prohibited in the state, but did not intend to prevent the tribes from conducting gaming that was only regulated by the state.[129] Due to the Supreme Court's holding, the Ysleta Del Sur Pueblo Tribe is authorized to conduct bingo because Article III Section 47(b) authorizes charitable bingo, but federally recognized tribes must be aware of Texas's prohibited gaming activities.[130]

III. TEXAS KNOWS WHEN TO FOLD 'EM – PROCESS OF CHANGING A STRICT CONSTITUTION

A. THE PROCESS FOR LEGALIZING GAMBLING IN TEXAS -- CONSTITUTIONAL AMENDMENTS AND AMENDMENTS REGARDING LOTTERIES

The crusade to legalize gambling in Texas should be anticipated to last a lifetime. Even when all hope is not lost, Texas appears to tighten its grip on gaming laws. However, since the ratification of the Texas Constitution in 1876, its constitutional amendments have provided hope that one day Texas will legalize gambling. These constitutional amendments have been codified in

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[127] *Ysleta Del Sur Pueblo*, 142 S. Ct. at 1937.
[128] *Id.* at 1939–40.
[129] *Id.* at 1941.
[130] *Id.*

Article III Section 47(b), (d), and (e) of the Texas Constitution.[131] The process of passing an effective constitutional amendment requires (1) that an amendment be proposed during any regular session or any special session if the amendment is included within the purpose of the session, and (2) the proposal "be approved by a vote of two-thirds of all the members elected to each House."[132] Although passing and enacting a constitutional amendment is straightforward, obtaining two-thirds approval of all members in each house is difficult.[133]

Nevertheless, in 1979, the 66th regular session of the Texas Legislature approved the proposal of Senate Joint Resolution 18 (SJR 18) for an election.[134] Eligible Texas voters voted in favor of SJR 18, and the constitutional amendment was codified as Article III Section 47(b).[135]Article III, Section 47(b) specifically authorizes the legislature to regulate bingo games conducted by specifically named organizations, the proceeds of which must be donated for charitable purposes.[136] Even though the constitutional amendment appeared to legalize bingo games, it only allowed a limited form of bingo, which the legislature would be able to regulate. Similarly, the Texas Legislature approved House Joint Resolution 32 (HJR 32) in 1989, proposing a constitutional amendment to permit raffles for charitable purposes.[137] Both constitutional amendments only allowed gaming for charitable purposes, which indicates Texas's conservative views regarding gambling. The Penal Code was amended to allow what were initially considered "lotteries," such as bingo and raffles, for charitable purposes.[138]

However, the meaning of "lottery" was blurred when the Texas Constitution was amended to allow the State to operate lotteries. House Joint Resolution 8 (HJR 8) was approved for election during the 72nd first special session of the Texas Legislature, which proposed the constitutional amendment permitting the operation of State lotteries.[139] In the following election, Texas voters favored House Bill 54, which

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[131] *See* TEX. CONST. ART. III, § 47(a) (2021).
[132] *See* TEX. CONST. ART. XVII, § 1(a).
[133] *See* CHAMPION & ROSE, supra note 2, at 101.
[134] *Id.*
[135] Tex. S.J. Res. 18, 66th Leg., R.S. (1979).
[136] *See* TEX. CONST. ART. III, §§ 47(b)–(b)(1).
[137] *See* H.J. Res. 32, 71st Leg. (Tex. 1989).
[138] *Id.*
[139] *See* H.R.J. Res. 8, 72 nd Leg., 1 st C.S. (Tex. 1991).

formalized the constitutional amendment. In 2003, to clarify the definition of "lottery," then Attorney General Greg Abbott considered the issue of the State's authority to operate "video lottery terminals."[140] In the Attorney General's opinion, mention of the term "lottery" was found in two provisions of the Texas Constitution, Article III Section 47(a) and Article III Section 47€.[141] Article III Section 47(a) generally prohibits lotteries, but the language in Section 47(e) allows the State to operate a lottery.[142] To make a distinction between the two provisions, the Attorney General analyzed the ballot proposition that the Texas voters agreed on in 1991.[143] The ballot proposition made it clear that the "State lottery" being proposed was not an extensively broad variety of games involving chance but, a "State lottery" in a narrow sense.[144] Using the broad interpretation of the phrase "State lottery" would thus contradict Texas's restrictive prohibition on lotteries, authorizing the state to operate any game of chance, which was not the voters' or legislature's intention. [145] Based on this distinction by the Attorney General, video lottery terminals were deemed unconstitutional.[146]

While the constitutional amendments of the Texas Constitution regarding gaming does permit some "lotteries," Texas did not intend to allow these exceptions to grant a constitutional right to gamble. Instead, Texas only folded a losing hand.

IV. TEXAS KNOWS WHEN TO WALK AWAY AND KNOWS WHEN TO RUN - MODERN PUSH FOR NEW GAMBLING LAWS IN TEXAS

A. SPORTS BETTING

Texas's history regarding constitutional amendments did not weigh in favor of new gaming legislative proposals submitted in the 2023 legislative term. Although mainly for political reasons, more recent proposals for constitutional amendments for sports betting and

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[140] Tex. Att'y Gen. Op. GA-0103 (2003).
[141] *See id.* at 7.
[142] *See id.*
[143] *See id.*
[144] *See id.*
[145] *See id.* at 5.
[146] *See id.* at 8.

gambling expansion have been denied. [147] Since the initial proposal for sports betting in 2021, the push for sports betting has gained some traction in the Texas Legislature. The Texas Sports Betting Alliance has spearheaded the sports betting campaign with a coalition of teams and betting platforms such as the Dallas Cowboys, Houston Astros, and DraftKings.[148] With support from the Texas Sports Betting Alliance, the push for legalized sports betting has not lost traction. It has even gained support from state representatives and even the Governor of Texas, Greg Abbott.[149] Distant support from Governor Greg Abbott, who has retracted some of his opposition, could be just the beginning of loosening the strict prohibitive character of Article III, Section 47 of the Texas Constitution.[150]

However, like the initial proposals for sports betting during the 2021 legislative push, the 2023 proposal to legalize mobile sports betting was passed by the House of State Affairs Committee, a committee of the Texas House of Representatives.[151] Although the proposal passed, it had to be passed to the Calendars Committee before it made it to the floor of the House.[152] Given the opposition it faced in the Senate by Lieutenant Governor Dan Patrick, the passing of the proposal in the House of State Affair Committee was for nothing.[153]

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[147] Patrick Svitek, *Las Vegas Sands Went All In On Legalizing Casinos In Texas. Here's Why The Multimillion-Dollar Effort Did Not Make It Far This Session*, TEXAS TRIBUNE (Jun. 16, 2021, 5:00 AM), https://www.texastribune.org/2021/06/16/las-vegas-sands-texas-casino-gambling/.

[148] *See id.*

[149] Brooke Taylor, *Houston Lawmaker Says There's Bipartisan Support for Legalized Gambling Heading into 2023 Session*, ABC 13 NEWS (Jan. 2, 2023, 7:00 AM), https://abc13.com/texas-gambling-laws-sports-betting-bill-democratic-senator-carol-alvarado/12642799/#:~:text=HOUSTON%2C%20Texas%20(KTRK)%20%2D%2D,filing%20similar%20legislation%20since%202009.

[150] *See id.*

[151] *See* Aaron Torres, *Mobile Sports Betting, Resort Casino Bills Pass Texas House Committee*, DALL. NEWS (Apr. 4, 2023, 5:00 AM), https://www.dallasnews.com/news/politics/2023/04/04/mobile-sports-betting-resort-casino-bills-pass-texas-house-committee/.

[152] *See id.*

[153] *See* Gromer Jeffers Jr., *Lt. Gov. Dan Patrick Holding the Cards for Texas Casino Gambling, Sports Betting*, DALL. NEWS (Apr. 3, 2023, 5:24 AM), https://www.dallasnews.com/news/politics/2023/04/03/lt-gov-dan-patrick-holding-the-cards-for-texas-casino-gambling-sports-betting/.

B. NEW SUPPORT IN ADVOCACY FOR CASINO RESORTS

To illustrate the strict opposition that the Texas Legislature maintains regarding gambling, the Texas Tribune released an article depicting a multi-million-dollar effort to legalize casinos in the most restrictive gaming law states.[154] In 2021, Las Vegas Sands, the gaming empire, sought to push for legislation to bring casino gambling to Texas's highly populated metropolitan areas.[155] Las Vegas Sands was willing to invest in the campaign by spending nearly 8.5 million dollars on lobbying and state-wide ads. [156] Although quoted as one of the most extensive campaigns to expand gambling in Texas, the efforts by Las Vegas Sands were futile.[157] However, Las Vegas Sands was not discouraged by the fact that the proposed bill did not reach the floor, but was optimistic about the proposed bill's likelihood of reaching the floor in a future session. [158]

In the 88th Regular Session of the Texas Legislature, there were several proposals in the House and Senate for a constitutional amendment legalizing destination resorts, or casinos, in limited destinations. Senate Joint Resolution No. 17 (SJR 17), proposed by Texas Senator Carol Alvarado, aimed to add a section to the Texas Constitution that legalized casinos within destination resorts in limited metropolitan areas such as Houston, Dallas, and San Antonio.[159] SJR 17 authorized the State to impose a tax on the casino gaming revenue by a Texas Gaming Commission.[160] Alvarado's proposal yielded a high percentage of support from Texan voters, with one poll finding that 75 percent of voters would be in favor of Senator Alvarado's proposal.[161] But even with voter and bipartisan support, Lieutenant Governor Dan Patrick, had already taken a position against the

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[154] *See* Svitek, *supra* note 145.
[155] *See id.*
[156] *See id.*
[157] *See id.*
[158] *See id.*
[159] *See* generally S.J. Res. 17, 88th Leg. (Tex. 2023) (A Joint Resolution that will authorize and regulate casino gaming at limited areas and will impose taxes to these casinos in the State of Texas).
[160] *See id.*
[161] *See* Aaron Torres, *Overwhelming Majority of Texas Support Casino Gambling in Dtate, New Poll Shows*, DALL. NEWS (Jan. 26, 2023, 7:00 AM),https://www.dallasnews.com/news/politics/2023/01/26/overwhelming-majority-of-texans-support-casino-gambling-in-state-new-poll-shows/.

expansion of gambling legislation.[162] Lieutenant Governor Dan Patrick's position as the president of the Texas Senate, and his influence on the agenda in the Texas Senate, most likely led to many failed legislative proposals in the 88th Regular Session of the Texas Legislature.[163]

V. CONCLUSION

Texas should legalize gambling in the State for two distinct reasons. First, the State could generate revenue by taxing casino gaming license holders.[164] Second, it would bring economic development to the State of Texas instead of forcing Texans to visit neighboring states.[165] The constitutional amendment process discussed above will likely be the only way for Texans to enjoy sports betting and casino resorts in Texas's metropolitan zones. Texas voters can also influence the fight for gambling in the Texas Legislature by voting to shift the political landscape of the Texas Senate and House of Representatives, which is predominantly Republican.[166] However, the 2023 88th Regular Session of the Texas Legislature will not be the moment of glory for gamblers in Texas because, due to the current version of the Texas Constitution, Texas will always have the upper hand in knowing when to hold 'em, when to fold 'em, and when to walk away. Texas is a true gambler.

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[162] *See* Torres, *supra* note 148.
[163] *See* Jeffers Jr., *supra* note 150.
[164] *See* generally S.J. Res. 17, 88th Leg. (Tex. 2023) (SJR 17 would impose a tax, which would be set by the legislature, on casino license holders).
[165] *See* Steven Dial, *Bills Filed that Would Allow Texans to Vote on Legalizing Casinos, Sports Gambling in November*, FOX 4 NEWS (Feb. 3, 2023) https://www.fox4news.com/news/texas-casinos-sports-betting.
[166] *See generally* Legis. Reference Library, *Party Affiliation on the First Day of the Legislative Session,* https://lrl.texas.gov/legeleaders/members/partyList.cfm (last visited Oct. 12, 2023).