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RESTORING PERMISSIVE INTERVENTION

Rachel Koehn Breland*

ABSTRACT

This Article addresses a textual mismatch: Federal Rule of Civil Procedure 24(b) governing permissive intervention requires a “claim or defense that shares with the main action a common question of law or fact,” but federal courts routinely allow intervention by nonparties who do not meet these requirements. These nonparties—which this Article calls “records-access intervenors”—seek to join the proceeding only for the purpose of obtaining relief related to sealed court records. The public’s right of access to court records is undoubtedly important, but when used to vindicate that right, Rule 24(b) doesn’t quite fit. This Article explores how permissive intervention came to be used for records access and highlights the myriad ways in which this use departs from Rule 24’s text and purpose. It then proposes solutions aimed at two goals: implementing a better procedural mechanism to facilitate the public right of access to court records, and restoring permissive intervention to its proper use.

I. INTRODUCTION

Among the joinder devices at the complex litigation cocktail party, intervention is the uninvited guest. The procedure permits an outsider not named by any existing litigant to enter the lawsuit as a party based on some asserted interest in the outcome.¹ In civil litigation in federal courts in the United States, intervention is governed by Federal Rule of Civil Procedure 24,² which subdivides the mechanism into intervention of right under Rule 24(a)³ and permissive

* Assistant Professor, South Texas College of Law Houston. Thanks to John T. Sullivan of Winston & Strawn LLP for starting the conversation that inspired this piece. I am also grateful to the participants in the 2024 SEALS New Scholars Workshop for their insightful comments on this project, as well as to the editors of the *UMKC Law Review* for their efforts.

¹ See 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1901 (3d ed.), Westlaw (database last updated June 2024) (defining intervention as “a procedure by which an outsider with an interest in a lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants”) [hereinafter 7C WRIGHT & MILLER]; *Intervention*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining intervention as “the entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome” and “the legal procedure by which such a third party is allowed to become a party to the litigation”); see also James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 565 (1936) (“Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented.”).

² FED. R. CIV. P. 24. Some specialty federal courts have their own version of Federal Rule of Civil Procedure 24 or other rules governing intervention. See, e.g., U.S. CT. INT’L TRADE R. 24; FED. R. BANKR. P. 2018.

³ FED. R. CIV. P. 24(a) states:

- (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
 - (1) is given an unconditional right to intervene by a federal statute; or

intervention under Rule 24(b).⁴ Section (b)(1)(B) of the Rule describes the circumstances under which permissive intervention is permitted absent statutory authorization: “On timely motion, the court may permit anyone to intervene who [. . .] has a claim or defense that shares with the main action a common question of law or fact.”⁵ Rule 24(c) then directs nonparties regarding how to request to intervene: “A motion to intervene must be served on the parties [. . .] and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”⁶

While the use-cases for permissive intervention may seem clear—it is for nonparties with “a claim or defense that shares with the main action a common question of law or fact”—many federal courts have applied the mechanism in a circumstance that is not immediately obvious from the language of the rule: allowing nonparties to join a case only for the purpose of obtaining relief related to sealed court records.⁷ In fact, every circuit court of appeals to consider the question has concluded that nonparties may utilize Rule 24(b) to intervene for the purpose of challenging confidentiality orders or seeking other document-related relief.⁸ These “records-access intervenors” are often media outlets, researchers, or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

⁴ FED. R. CIV. P. 24(b) states:

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party’s claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

⁵ FED. R. CIV. P. 24(b)(1)(B).

⁶ FED. R. CIV. P. 24(c).

⁷ Compare FED. R. CIV. P. 24(b)(1)(B), with, e.g., *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023); *League of Women Voters of the U.S. v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020); *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1354 (9th Cir. 2013).

⁸ See *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783–84 (1st Cir. 1988); *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Team Fin., L.L.C.*, 80 F.4th at 578; *Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Bond v. Utreras*, 585 F.3d 1061, 1068 (7th Cir. 2009); *Flynt*, 782 F.3d at 966; *Blum*, 712 F.3d at 1353; *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Comm’r, Ala. Dep’t of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1173 n.12 (11th Cir. 2019); *EEOC v. Nat’l Child.’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). See also *League of Women Voters*, 963 F.3d at 135 (“[E]very circuit court that has considered the question—including this one—has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.” (internal quotation marks and citation omitted)).

nonprofit organizations⁹ who are seeking to intervene post-judgment or in long-closed cases.¹⁰ And because they make only administrative, document-related requests, these intervenors may not include a pleading with their motion despite Rule 24(c)'s directive to do so.¹¹ At the cocktail party, then, records-access intervenors are more akin to party-crashers: not only are they uninvited, but they have come solely for the hors d'oeuvres.

Federal courts that have granted records-access intervention motions have explained that they liberally construe Rule 24(b)'s requirement for a "claim or defense with common questions of law or fact" to apply to these requests.¹² In these cases, the "claim or defense" is often said to be the public's right of access to judicial records at common law via *Nixon v. Warner Communications*¹³ or under Federal Rule of Civil Procedure 26.¹⁴ Some courts explicitly note the absence of any other procedural mechanism to vindicate this right to justify allowing permissive intervention.¹⁵ Once the nonparty has joined the case via intervention, the court goes on to separately decide whether to grant the records-related relief.

Although these document-related interventions have become increasingly common, they pose several problems for federal court litigation. First, despite federal courts of appeals permitting these interventions for several decades, lower courts have continued to deny records-requesters' motions to intervene based on the textual mismatch between Rule 24 and this records-related use.¹⁶ In addition, because the requirements for and purpose of permissive intervention do not fit in the unsealing context, courts have difficulty applying them and sometimes

⁹ *E.g.*, *Team Fin., L.L.C.*, 80 F.4th at 575 (economist and researcher); *League of Women Voters*, 963 F.3d at 134 (nonprofit organization); *Flynt*, 782 F.3d at 966 (publisher and advocate against death penalty).

¹⁰ *See, e.g.*, *Blum*, 712 F.3d at 1353 (years after underlying litigation had concluded); *Bond*, 585 F.3d at 1065 (after settlement but before court entered order of dismissal); *Nat'l Child.'s Ctr., Inc.*, 146 F.3d at 1047 (two years after settlement).

¹¹ *E.g.*, *Team Fin., L.L.C.*, 80 F.4th at 576 (motion to intervene accompanied by proposed motion to unseal); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (no pleading accompanying motion to intervene).

¹² *E.g.*, *Team Fin., L.L.C.*, 80 F.4th at 577 (Rule 24(b) "construed liberally"); *Bond*, 585 F.3d at 1070 (Rule 24(b) "broad enough to encompass a third-party challenge to a protective order even though it is not a neat fit"); *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) ("flexible reading").

¹³ *See Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

¹⁴ *E.g.*, *Team Fin., L.L.C.*, 80 F.4th at 577 (common law); *Bond*, 585 F.3d at 1073 (common law and Rule 26); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 245 F.R.D. 632, 636 (D. Minn. 2007) (common law and Rule 26); *League of Women Voters*, 963 F.3d at 132 (common law).

¹⁵ *E.g.*, *Flynt*, 782 F.3d at 967 ("Despite appellees' suggestions that Flynt should seek other avenues to challenge the sealing of these judicial records, other courts have found they 'are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion.'"); *Nat'l Child.'s Ctr., Inc.*, 146 F.3d at 1045 ("Although a strict reading of the rule might suggest a contrary result, courts have been willing to adopt generous interpretations of Rule 24(b) because of the need for an effective mechanism for third-party claims of access to information generated through judicial proceedings." (citation and internal quotation marks omitted)).

¹⁶ *See infra* Part III.B.

disregard them entirely.¹⁷ The textual mismatch also creates a barrier for members of the public, to whom it is not evident from reading the rule that it encompasses access to court records.¹⁸ Finally, as written, Rule 24(b) does not allow consideration of factors relevant to access to records, like the importance of the information to the public compared with the parties' legitimate interest in confidentiality.¹⁹

These issues warrant a closer look at records-access permissive intervention—an endeavor this Article undertakes. Part II explores the history of intervention, with a focus on developments impacting permissive intervention, as well as the modern use of permissive intervention in federal court and the policies underlying the procedural mechanism. Part III then examines how records-access permissive intervention emerged against this backdrop—an inquiry that legal scholarship to date has not undertaken. Part III also surveys federal courts' current approaches to permissive intervention requests to unseal court records, considering the issues the practice creates in further depth. Informed by this context, Part IV asserts that permissive intervention is not a proper procedural device to administer requests related to accessing court records—this application of permissive intervention is both inconsistent with the text of Rule 24 and the policy goals that Rule aims to serve. Part V concludes the piece by proposing potential solutions to better facilitate the public's right of access to court records and restore permissive intervention to its proper use.

II. INTERVENTION IN HISTORICAL AND MODERN USE

Intervention in United States civil litigation likely evolved from procedures used in admiralty and equity proceedings.²⁰ Federal Rule of Civil Procedure 24, adopted in 1937, attempted to capture existing federal intervention practice at the time by providing mechanisms for both intervention of right and permissive intervention.²¹ Supreme Court decisions and amendments to the Rule reshaped both types of intervention in the following decades, with broadening applications of intervention of right impacting the parallel development of permissive intervention.²² Modern permissive intervention practice emphasizes the court's discretion and weighs the potential for undue delay and prejudice to the original parties.²³ Indeed, throughout its development, past and present iterations of the intervention rule have aimed to balance the often-competing interests of the parties, the intervenor, the court, and the public.²⁴

¹⁷ See *infra* Part IV.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *infra* Part II.A.

²¹ *Id.*

²² See *infra* Parts II.A.1–3.

²³ See *infra* Part II.B.

²⁴ See *infra* Part II.C.

A. The Evolution of Intervention in Federal Court

The original source of the intervention mechanism has yet to be precisely determined.²⁵ Scholars trace its beginnings to multiple contexts, the most widely accepted among them admiralty and equity.²⁶ Intervention in admiralty cases dates back to at least the 19th century.²⁷ The *in rem* nature of these proceedings—which made the court’s judgment “binding on all the world”—warranted the availability of intervention for third parties to protect their interests.²⁸ By the early 20th century, the Admiralty Rules had formalized the intervention procedure.²⁹ Admiralty Rule 34 permitted a third party to intervene in an *in rem* action “for his own interest,” and Admiralty Rule 42 allowed intervention by “[a]ny person having an interest in any proceeds in the registry of the court.”³⁰

Courts of equity permitted nonparties with a sufficient interest to join ongoing cases as early as the mid-18th century.³¹ Intervention existed in two primary forms: as an extension of interpleader,³² and through examination *pro interesse suo*, which permitted a nonparty to petition the court to question them about the extent of their interest in property that was the subject of a pending proceeding.³³ Some limited intervention practice occurred in courts of law as well, including through the state procedural rules that were applied at the time in actions at law in federal courts.³⁴ On the equity side, the use of intervention culminated in

²⁵ Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 241 (2000) (“The exact origin of intervention practice in the federal courts is somewhat unclear.”).

²⁶ See, e.g., Moore & Levi, *supra* note 1, at 568–69; David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 721 (1968); Jeffrey L. Rensberger, *Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals*, 58 IND. L.J. 111, 114 (1982); Appel, *supra* note 25, at 240; Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 300–09 (2020). Scholars have also included Roman law and English ecclesiastical courts on this list. See, e.g., Moore & Levi, *supra* note 1, at 568. However, more recent work has cast doubt on the prevalence of intervention in these contexts. See generally Peter A. Appel, *Intervention in Roman Law: A Case Study in the Hazards of Legal Scholarship*, 31 GA. J. INT’L & COMP. L. 33, 35–36 (2002).

²⁷ Moore & Levi, *supra* note 1, at 569 & n.24; see also *Stratton v. Jarvis*, 33 U.S. (8 Pet.) 4, 8–9 (1834) (noting that pursuant to the “familiar” practice in *in rem* admiralty proceedings, the owners of certain goods on a vessel should have interposed claims by “each intervening, in his own name, for his proprietary interest”).

²⁸ Moore & Levi, *supra* note 1, at 570 (quoting *The Mary Anne*, 16 F. Cas. 953, 954 (D. Me. 1826) (No. 9195)); Appel, *supra* note 25, at 244 (“The nature of admiralty cases in rem required intervention by necessity if courts were to protect the rights of third parties.”).

²⁹ Moore & Levi, *supra* note 1, at 570 & nn. 27–28.

³⁰ ADMIRALTY R. 34, 254 U.S. 693–94 (1920); ADMIRALTY R. 42, 254 U.S. 697 (1920); Moore & Levi, *supra* note 1, at 570 (noting that “[t]he historic admiralty practice is now stated in federal admiralty rules” and citing Admiralty Rules 34 and 42).

³¹ Appel, *supra* note 25, at 243–44 (citing Geoffrey Gilbert, *The History and Practice of the High Court of Chancery* 47–48 (Samuel Tyler, ed., 1st Am. ed., Washington, D.C., W.H. & O.H. Morrison 1874) (first published 1758)).

³² See generally *Interpleader*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining interpleader as “[a] suit to determine a right to property held by a [usually] disinterested third party (called a stakeholder) who is in doubt about ownership[.]”); see also FED. R. CIV. P. 22; 28 U.S.C. § 1335.

³³ Appel, *supra* note 25, at 243–44; see Moore & Levi, *supra* note 1, at 570–71.

³⁴ Moore & Levi, *supra* note 1, at 570, 572, 577–78; Nelson, *supra* note 26, at 308.

Equity Rule 37, which provided in relevant part: “Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.”³⁵

Notably, each of the Admiralty Rules and the Equity Rule required the intervenor to have an “interest” in the litigation.³⁶ As Professor Caleb Nelson has observed, both the admiralty and equity contexts envisioned intervention by nonparties with a recognized legal interest in the case rather than “a practical interest in the outcome of the case or the precedent that it set.”³⁷ Thus, taken together with the circumstances in which intervention was permitted in each type of proceeding, these early forms of intervention contemplated situations in which a nonparty with a cognizable legal claim or interest desired to participate in the proceeding to protect that interest.

The original version of Federal Rule of Civil Procedure 24 governing intervention drew from Equity Rule 37 in its effort to “[amplify] and restate[] the present federal practice at law and in equity.”³⁸ In a departure from Equity Rule 37’s permissive language, however, the Rule provided a right to intervene in three situations, including “when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action” and “when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.”³⁹ In contrast, the Rule retained the discretionary posture of the Equity Rule in its provision on permissive intervention:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.⁴⁰

The Rule also required any nonparty seeking intervention—whether of right or permissive—to serve a motion to intervene on affected parties, “accompanied by a pleading setting forth the claim or defense for which intervention is sought.”⁴¹

The Advisory Committee notes on the Rule’s 1937 adoption attributed the distinction between the absolute and discretionary rights to intervene to English practice.⁴² Scholars have also credited this distinction to Professors James William

³⁵ EQUITY R. 37, 226 U.S. 659 (1912); Moore & Levi, *supra* note 1; Nelson, *supra* note 26, at 308.

³⁶ ADMIRALTY R. 34, 254 U.S. 693–94 (1920); ADMIRALTY R. 42, 254 U.S. 697 (1920); EQUITY R. 37, 226 U.S. 659 (1912).

³⁷ Nelson, *supra* note 26, at 304, 307–08.

³⁸ FED. R. CIV. P. 24 advisory committee’s note to 1937 adoption.

³⁹ FED. R. CIV. P. 24(a), 308 U.S. 690–91 (1937). The Rule also permitted intervention of right when a statute provided the unconditional right to intervene. *Id.*

⁴⁰ FED. R. CIV. P. 24(b), 308 U.S. 691 (1939).

⁴¹ FED. R. CIV. P. 24(c), 308 U.S. 691 (1939).

⁴² FED. R. CIV. P. 24 advisory committee’s note to 1937 adoption.

Moore and Edward H. Levi,⁴³ who divided federal intervention practice predating the Rule into these two categories and lauded such a division as “justifiable” for “procedural purposes.”⁴⁴ According to their 1936 account, “[t]he discretionary right to intervene exist[ed] when the petitioner ha[d] an interest in a question of law and fact common to the pending litigation.”⁴⁵ The language of Rule 24 that took effect in 1938 closely resembled this assessment of when permissive intervention was appropriate.⁴⁶

1. Developments in Permissive Intervention

The Supreme Court had an early opportunity to interpret and apply the language of Rule 24 in 1940 in *Securities and Exchange Commission v. United States Realty & Improvement Co.*⁴⁷ The appeal turned on two related questions: whether U.S. Realty had improperly filed for bankruptcy under Chapter 11 rather than Chapter 10, which permitted the SEC’s participation in bankruptcy proceedings of large, public corporations; and if so, whether the SEC could intervene to require the dismissal of the Chapter 11 petition.⁴⁸ After concluding that the district court should have dismissed the Chapter 11 case because allowing it to proceed would thwart the public’s interest in SEC oversight of the bankruptcy proceedings, the Court turned to the question of intervention.⁴⁹ The Court first declared the issue not one of intervention of right, but a question of whether the district court properly exercised its discretion to permit permissive intervention under Rule 24(b).⁵⁰ According to the Court, the language of Rule 24(b) “plainly dispense[d] with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.”⁵¹ Without exploring the kind of interest that Rule 24(b) *did* require, the Court then briskly concluded that “the Commission ha[d] a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny[,] from

⁴³ Appel, *supra* note 25, at 246 (“Moreover, the structure of the rule followed Moore and Levi’s division of intervention into two types.”); Gene R. Shreve, *Questioning Intervention of Right – Toward a New Methodology of Decision Making*, 74 NW. U. L. REV. 894, 903 n.33 (1980) (“Whatever uncertainty of labels or lack of methodological self-consciousness was evident from the American cases they collected, the research of Professors Moore and Levi establishes the existence of the distinction in American jurisprudence prior to the adoption of rule 24.”). See also Nelson, *supra* note 26, at 314 (“Moore and Levi’s research provided the template for what became Federal Rule of Civil Procedure 24.”).

⁴⁴ Moore & Levi, *supra* note 1, at 581 & nn. 79–83.

⁴⁵ *Id.*

⁴⁶ See FED. R. CIV. P. 24(b), 308 U.S. 691 (1939); Nelson, *supra* note 26, at 315 (“This rule closely tracked Moore and Levi’s description of existing practice, both with respect to the circumstances in which intervention ‘shall’ be permitted and with respect to the additional circumstances in which intervention ‘may’ be permitted.”); *id.* at 312 (noting that the Federal Rules of Civil Procedure were completed in 1937 but took effect in 1938).

⁴⁷ SEC v. U.S. Realty & Improvement Co., 310 U.S. 434 (1940).

⁴⁸ *Id.* at 441, 444–47.

⁴⁹ *Id.* at 456–57, 458, 459–60.

⁵⁰ *Id.* at 458.

⁵¹ *Id.* at 459.

proceeding without it.”⁵² In light of this “public interest,” the Court explained, “[t]he ‘claim or defense’ of the Commission founded upon this interest ha[d] a question of law in common with the main proceeding” as required by the permissive intervention rule.⁵³

Justice Owen Roberts, joined by Chief Justice Charles Hughes and Justice James McReynolds, dissented from *U.S. Realty*’s holding, including its conclusions regarding the SEC’s ability to intervene.⁵⁴ In Justice Roberts’ view, “a mere reading” of Rule 24 revealed that permissive intervention was not available to the SEC “because no statute confers a conditional right to intervene and because it has no claim or defense which will be affected by any decision of law or fact by the court.”⁵⁵ Scholars have since echoed this critique of *U.S. Realty*, highlighting the apparent lack of any claim or defense to support permissive intervention.⁵⁶

As the Supreme Court’s first Rule 24(b) decision, *U.S. Realty* impacted the evolution of permissive intervention in at least two material ways. First, and most significantly, it modeled an expansive reading of Rule 24(b)’s “claim or defense” language, one that included the “public interest” among the kinds of interests sufficient to satisfy this requirement.⁵⁷ Second, and relatedly, the *U.S. Realty* Court tethered its conclusion that permissive intervention was appropriate to the SEC’s duties conferred by statute, suggesting that government intervenors should be treated differently than private parties under the intervention rules.⁵⁸ Both principles would shape the development and use of permissive intervention for decades to follow.

The Supreme Court next grappled with the requirements of Rule 24(b) in *Allen Calculators v. National Cash Register Co.*, decided in 1944.⁵⁹ The United States had filed antitrust claims against National Cash Register Company to

⁵² *Id.* at 460.

⁵³ *U.S. Realty*, 310 U.S. at 459–60.

⁵⁴ *Id.* at 468–69 (Roberts, J., dissenting).

⁵⁵ *Id.*

⁵⁶ See Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 924 (1989) (explaining that the *U.S. Realty* Court allowed the SEC to permissively intervene “even though the SEC had no claim or defense it could have pursued in an independent action”); Shapiro, *supra* note 26, at 736 (“In the leading case of [*U.S. Realty*], the Court in upholding a grant of permissive intervention to the SEC refused to be deterred by the ‘claim or defense’ language of Rule 24”); Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319, 324 (1951) (“The *United States Realty* decision apparently expanded the meaning of ‘claim or defense,’ which elsewhere in the Federal Rules seems to have the meaning of ‘cause of action’ or defense to a particular claim already asserted in the action.”).

⁵⁷ See *U.S. Realty*, 310 U.S. at 459–60.

⁵⁸ See *id.* at 460; Nelson, *supra* note 26, at 325 (“In any event, even if one thinks that the Supreme Court’s opinion in *U.S. Realty* relaxed the requirements for permissive intervention, it arguably did so only in favor of governmental entities like the SEC.”); Shapiro, *supra* note 26, at 735–36 (citing *U.S. Realty* in a discussion of the “expansion of government intervention”). See also Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65, 79 (1940) (“It can also be argued the Supreme Court adopted this Rule and is presumably free to declare its own ‘legislative’ intention—that, for purposes of intervention by the Government, the word ‘claim,’ in consonance with prior intervention practice, was intended to embrace interests which because of circumstances peculiar to the case do not amount to a cause of action.” (emphasis added)).

⁵⁹ *Allen Calculators v. Nat’l Cash Reg. Co.*, 322 U.S. 137 (1944).

prevent it from acquiring a competitor, and Allen Calculators, another competitor, moved to intervene.⁶⁰ The district court denied intervention.⁶¹ On expedited appeal to the Supreme Court, the Court concluded that Allen Calculators could not meet the criteria for intervention of right, but that it had “standing to invoke the discretion of the district judge” to allow permissive intervention.⁶² The Court then held that the lower court did not abuse its discretion in *denying* permissive intervention, observing that “where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense,” but “[t]o permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court.”⁶³ Thus, in contrast to *U.S. Realty*, the *Allen* Court signaled a wariness to allow intervention to protect the public interest when the intervenor is a private party.⁶⁴ Of course, this also reinforced the distinction *U.S. Realty* seemed to draw between government intervenors and others.⁶⁵

Two years after *Allen*, Rule 24 was amended for the first time.⁶⁶ The amendment expanded third parties’ ability to intervene of right in property-related cases⁶⁷ and added the following sentence to the section on permissive intervention:

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.⁶⁸

The change was significant: While the *U.S. Realty* Court had to stretch the “claim or defense” requirement in Rule 24(b) to allow a government actor to intervene to fulfill its duties to the public, this addition, ostensibly made in response to *U.S. Realty*, explicitly permitted governmental nonparties to intervene in a case without a claim or defense of their own.⁶⁹ Thus, in theory, the *U.S. Realty* Court’s expansive reading of the “claim or defense” language was no longer

⁶⁰ *Id.* at 138–39.

⁶¹ *Id.* at 139. The Court did so following an inquiry in which it learned that Allen would participate indirectly in the proceeding via its president, who was set to testify as a witness for the United States.

⁶² *Id.* at 140–41.

⁶³ *Id.* at 141–42.

⁶⁴ *See id.*

⁶⁵ *See supra* note 58 and accompanying text.

⁶⁶ FED. R. CIV. P. 24(b), 329 U.S. 853–54 (1946).

⁶⁷ Rather than being limited to situations when the property was in the custody of the court, intervention of right was now permitted “when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.” *Compare* FED. R. CIV. P. 24(a), 308 U.S. 690–91 (1939), with FED. R. CIV. P. 24(a)(3), 329 U.S. 853 (1946).

⁶⁸ FED. R. CIV. P. 24(b), 329 U.S. 853–54 (1946).

⁶⁹ *See* FED. R. CIV. P. 24 advisory committee’s note to 1946 amendment (citing *U.S. Realty*); 7C WRIGHT & MILLER, *supra* note 1, § 1912 (explaining that the 1946 amendment to Rule 24(b), which became effective in 1948, “codified” the *U.S. Realty* decision).

necessary, and the line between government and private intervenors was formalized.⁷⁰

In the decades following the 1946 amendment to Rule 24(b), however, courts continued to rely on *U.S. Realty*'s broad construction of the "claim or defense" requirement to allow permissive intervention by government actors and private parties alike.⁷¹ The D.C. Circuit seemed to lead the charge to interpret Rule 24 expansively. For example, in 1955, the D.C. Circuit approved permissive intervention by a labor union and a private employer who would economically benefit from the minimum-wage increase that was the subject of the litigation, emphasizing that Rule 24's "provisions require[d] other than literal application in atypical cases."⁷² In response to the appellees' argument that these third parties had only a "general interest" in the litigation, the D.C. Circuit explained that "intervention [had] been allowed in situations where 'the existence of any nominate "claim" or "defense" [was] difficult to find'"⁷³ and was, under *U.S. Realty*, "not dependent upon a showing of 'direct pecuniary interest' in the litigation," although the intervenors had such an interest.⁷⁴

Relatedly, in the 1967 case *Nuesse v. Camp*, the D.C. Circuit reversed the denial of the Wisconsin Commissioner of Banks' request to permissively intervene.⁷⁵ Although the court ultimately determined that the Commissioner's request fit within the newly-added Rule 24(b) language for government intervenors, it discussed the "claim or defense" language as well, noting that it "[was] not interpreted strictly so as to preclude permissive intervention."⁷⁶ The court advocated for "a broad reading" of Rule 24 because "equity jurisdiction persists as to situations not specifically covered by the Rule."⁷⁷ Scholarship at the time echoed this call for a flexible reading of Rule 24(b), criticizing the scope of permissive intervention as "potentially too restrictive."⁷⁸

⁷⁰ See Nelson, *supra* note 26, at 393 n.246 ("[T]he fact that Congress had recently highlighted the need for special rules about intervention by public authorities dovetails with the Supreme Court's emphasis in *U.S. Realty* on the SEC's 'statutory authority and . . . public duties.' A few years later, indeed, the Court amended Rule 24(b) so that it explicitly made governmental officers or agencies eligible to intervene in cases involving the statutes they administered.").

⁷¹ See, e.g., *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955); *Mitchell v. Singstad*, 23 F.R.D. 62, 64 (D. Md. 1959); *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967); *United States v. Loc. 638, Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Mach., Air Conditioning & Gen. Pipefitters*, 347 F. Supp. 164, 166 (S.D.N.Y. 1972); *In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975). See also *infra* Part III.A.2.-3.

⁷² *Textile Workers Union of Am.*, 226 F.2d at 767.

⁷³ *Id.* at 769 (quoting 4 Moore, *Federal Practice* 60 (2d ed. 1950)).

⁷⁴ *Id.* (quoting *U.S. Realty*, 310 U.S. at 458-60).

⁷⁵ *Nuesse*, 385 F.2d at 698, 706.

⁷⁶ *Id.* at 704.

⁷⁷ *Id.* at 706.

⁷⁸ Shapiro, *supra* note 26, at 759 (arguing that intervention may be appropriate even when a government agency "does not come within the second sentence of the rule and has no 'claim or defense'" or when a private party "can assert no claim for relief against the defendant," and noting that "[o]ne alternative in such cases is to stretch the language of the rule, and to give the words a meaning quite different from that given them in other contexts.").

2. Related Developments in Intervention of Right

While the Supreme Court's broad interpretation of Rule 24(b) ushered in the 1946 amendment to the permissive intervention rule, much the opposite occurred with respect to intervention of right. As originally drafted, Rule 24(a) permitted intervention of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."⁷⁹ One important context in which this provision was thought to apply was the class action lawsuit—"specifically, Rule 24(a)(2) was thought to let individual members of the class intervene if the party purporting to represent them could not be counted on to protect their interests."⁸⁰ However, as the Supreme Court pointed out in *Sam Fox Publishing Company v. United States* in 1961, the text of the Rule was at odds with this intended purpose: "the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation, [. . .] yet intervention as of right presupposes that an intervenor's interests are or may not be so represented."⁸¹ Thus, an individual class member attempting to intervene of right in an ongoing class action found her hands tied: In order to intervene, she would have to demonstrate that the named class members would inadequately represent her interests, but making such a showing would prevent her from satisfying the second requirement of establishing that she would be bound by the judgment.⁸² The Court in *Sam Fox* applied the language of Rule 24(a) in precisely this strict textual fashion to preclude intervention of right,⁸³ and the decision thus became "something of an impediment to intervention."⁸⁴ As a result, *Sam Fox* prompted the next (and most recent) major amendment to Rule 24.⁸⁵

In 1966, Rule 24(a) was amended to permit intervention of right in the following circumstances:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair

⁷⁹ FED. R. CIV. P. 24(a), 308 U.S. 690–91 (1937).

⁸⁰ Nelson, *supra* note 26, at 330; *see also* FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

⁸¹ *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 691 (1961).

⁸² *See id.*; Nelson, *supra* note 26, at 331.

⁸³ *Sam Fox Pub. Co.*, 366 U.S. at 691.

⁸⁴ Appel, *supra* note 25, at 253.

⁸⁵ Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 429 (1991) (explaining that *Sam Fox* "was the major reason for the amendment of Rule 24 in 1966"); *see* 7C WRIGHT & MILLER, *supra* note 1, § 1903 ("Rule 24 has been amended eight times since it was originally adopted, but only the 1966 amendment is of major significance."). Minor amendments to the Rule were made in 1948 and 1963. *See* FED. R. CIV. P. 24 advisory committee's notes to 1948 and 1963 amendments.

or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.⁸⁶

The new rule eliminated two of the previous bases for intervention of right—that the applicant “is or may be bound by a judgement” and that the applicant will be “adversely affected by a distribution” of property in the court’s control—in favor of this more flexible standard requiring some “interest” which the applicant’s ability to protect would be “as a practical matter impair[ed] or impede[d].”⁸⁷ According to the Advisory Committee, this change was a response to the too-confining text of the two previous provisions: Rule 24(a)(3) regarding property was “unduly restricted,” leading some courts to “virtually disregard [its] language”; Rule 24(a)(2), similarly, “could defeat intervention in some meritorious cases” if “the language was read literally.”⁸⁸ The Committee explicitly cited *Sam Fox* in support of the latter proposition.⁸⁹ The amendment also tied intervention more closely to Rule 19 governing necessary parties.⁹⁰ Overall, the Committee espoused a new focus on the practical impact of pending cases on the would-be intervenor, signaling its view of intervention as a tool to resolve all issues arising from a single transaction in a single case.⁹¹

The Supreme Court’s response to the reformulated Rule 24 came quickly in the 1967 case *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*⁹² The litigation involved a court-ordered divestiture of a natural gas pipeline company that sold primarily in California pursuant to antitrust laws.⁹³ Several parties sought to intervene, including Cascade, a distributor of natural gas in the Pacific Northwest whose supplier would be a new entity created under the divestiture.⁹⁴ Cascade claimed that the deal disadvantaged the new entity and, in turn, Cascade, which justified its intervention of right.⁹⁵ With little explanation, the Court held that the new Rule 24(a) “was broad enough to include Cascade,” despite the fact that Cascade’s “interest” almost certainly would not have qualified for intervention of right under the old Rule.⁹⁶ Thus, this decision evidenced a clear about-face in the Court’s view of the right to intervene—where *Sam Fox* advocated narrow availability of intervention, *Cascade* suggested that the new Rule 24 had

⁸⁶ FED. R. CIV. P. 24(a), 383 U.S. 1051 (1966).

⁸⁷ Compare FED. R. CIV. P. 24(a)(3), 329 U.S. 853 (1946), with FED. R. CIV. P. 24(a), 383 U.S. 1051 (1966).

⁸⁸ FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment.

⁸⁹ See *id.*

⁹⁰ *Id.* Rule 24(a)’s “impair or impede” language also appears in Rule 19. FED. R. CIV. P. 19(a)(1)(B)(i).

⁹¹ See FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment; Appel, *supra* note 25, at 254 (“These amendments highlighted the Advisory Committee’s new approach, a focus on using litigation to settle all issues arising from a single transaction or series of transactions, which the Advisory Committee saw as a more practical and pragmatic approach.”).

⁹² *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129 (1967).

⁹³ *Id.* at 129, 131–32.

⁹⁴ *Id.* at 129, 132–33.

⁹⁵ *Id.* at 129, 133.

⁹⁶ See *Cascade Nat. Gas Corp.*, 386 U.S. at 136; see also Appel, *supra* note 25, at 258.

broadened the right to intervene far beyond its previous reach.⁹⁷ This change was in line with the Advisory Committee's apparent desire for application of Rule 24 to anyone with a "practical" interest in the proceedings.

The policy goals for intervention of right emphasized in the 1966 Advisory Committee notes and amplified in *Cascade* dovetailed well with the flexible readings of the permissive intervention rule following *U.S. Realty*.⁹⁸ These developments in intervention jurisprudence opened the doctrine to a broader, "interest representation" view of litigation that coalesced in the following decades.⁹⁹

3. A Narrowing of "Claim or Defense"

Even as the 1966 amendment and *Cascade* continued to broaden views of the role of intervention, discussion of Rule 24(b)'s "claim or defense" language in the Supreme Court signaled a potential retreat from its interpretation in *U.S. Realty*. The 1986 case *Diamond v. Charles* involved a challenge to an Illinois law regulating abortion by a group of obstetricians.¹⁰⁰ Eugene F. Diamond sought to intervene in the case based on his "conscientious objection to abortions" and "his status as a pediatrician and as a parent."¹⁰¹ While the majority opinion decided the case based on Diamond's lack of standing to intervene, Justice Sandra Day O'Connor's concurring opinion focused instead on whether Diamond was a procedurally proper intervenor under Rule 24.¹⁰² After concluding that Diamond had not asserted the kind of "significantly protectable interest" required for intervention of right, Justice O'Connor found Diamond's request to join the proceeding equally unsupported by the requirements for permissive intervention.¹⁰³ Discussing the requirement that the intervenor's "claim or defense and the main action have a question of law or fact in common," Justice O'Connor explained:

The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Thus, although permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *SEC v. United States Realty & Improvement Co. . . .*, it plainly does require an interest sufficient to support a legal claim or

⁹⁷ See Appel, *supra* note 25, at 258.

⁹⁸ See *supra* Part III.A.1.

⁹⁹ See Nelson, *supra* note 26, at 351–56.

¹⁰⁰ *Diamond v. Charles*, 476 U.S. 54, 56–57 (1986).

¹⁰¹ *Id.* at 54, 57–58.

¹⁰² *Id.* at 54, 71.

¹⁰³ *Id.* at 54, 76–77.

defense which is “founded upon [that] interest” and which satisfies the Rule’s commonality requirement.¹⁰⁴

Because Diamond lacked any “actual, present interest that would permit him to sue or be sued” by the plaintiff physicians, he did not have the “claim or defense” he needed to permissively intervene.¹⁰⁵

A decade later, the majority approved of Justice O’Connor’s reading of “claim or defense” by relying on it to inform the Court’s interpretation of similar language in Federal Rule of Civil Procedure 23.¹⁰⁶ Some lower courts have followed suit, requiring would-be intervenors to assert some “interest sufficient to support a legal claim or defense” to satisfy the requirements for permissive intervention.¹⁰⁷ Others, however, have continued to rely on *U.S. Realty* and its progeny to afford a flexible reading to Rule 24(b)’s “claim or defense” requirement.¹⁰⁸

B. Permissive Intervention in the Modern Era

After the 1966 amendment to the intervention of right provision—which left the permissive intervention provision from 1946 alone—only a few other minor amendments were made to Rule 24 to reach its current form.¹⁰⁹ These included eliminating the Rule’s masculine pronouns, conforming subsection (c) requiring a motion and pleading to relevant statutes, and restyling its text.¹¹⁰ The current version of Rule 24 was adopted in 2007,¹¹¹ with Rule 24(b) continuing to govern permissive intervention:

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or
(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party’s claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 54, 77.

¹⁰⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997).

¹⁰⁷ *See, e.g., Laube v. Campbell*, 215 F.R.D. 655, 659 (M.D. Ala. 2003); *United States v. Patej*, 197 F.R.D. 593, 597 (E.D. Mich. 2000); *Travelers Prop. Cas. Co. of Am. v. Lamar Co., LLC.*, No. CV 07-0704-KD-C, 2008 WL 11395509, at *3 (S.D. Ala. June 26, 2008).

¹⁰⁸ *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108, 1110–11 (9th Cir. 2002), *abrogated on other grounds* by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *In re First Databank Antitrust Litig.*, 205 F.R.D. 408, 414 (D.D.C. 2002); *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 179 F.R.D. 505, 507–09 (W.D.N.C. 1998).

¹⁰⁹ *See* FED. R. CIV. P. 24 advisory committee’s notes to 1987, 1991, 2006, and 2007 amendments.

¹¹⁰ *Id.*; Appel, *supra* note 25, at 311 n. 220.

¹¹¹ FED. R. CIV. P. 24.

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.¹¹²

Subsection (1)(B) contains the iteration of permissive intervention with which this work is concerned: intervention by a nonparty who “has a claim or defense that shares with the main action a common question of law or fact.”¹¹³ The language of this provision still resembles Moore and Levi’s formulation from nearly a century ago, which described a discretionary intervention right when “the petitioner has an interest in a question of law and fact common to the pending litigation.”¹¹⁴ The Rule also retains the separate provision permitting a government officer or agency to intervene based on an existing party’s claim or defense.¹¹⁵

Under either subsection of Rule 24(b), a nonparty seeking intervention must demonstrate that their application is timely.¹¹⁶ The court must also consider any undue delay or prejudice to the existing parties in exercising its discretion to permit intervention.¹¹⁷ However, given the discretionary nature of the inquiry, a court may deny an intervention request even if all of the requirements in the Rule are satisfied.¹¹⁸ In addition, Rule 24(c) continues to dictate the procedure for intervention: “A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”¹¹⁹

Beyond those set out explicitly in the text of Rule 24, federal courts have discussed additional considerations impacting whether they will grant a nonparty’s motion for permissive intervention. For example, some courts have set out factors that guide their determination of whether the motion to intervene is timely, such as the length of time between when the movant knew or should have known of the case and when they moved to intervene, the prejudice to the movant if intervention is denied, and the extent to which the litigation has progressed at the time when the motion is filed.¹²⁰ Some federal courts have also emphasized that, in addition to satisfying the requirements of Rule 24, a permissive intervenor must show an independent ground for federal subject matter jurisdiction because “the typical movant asks the district court to adjudicate an additional claim on the merits.”¹²¹

¹¹² FED. R. CIV. P. 24(b).

¹¹³ FED. R. CIV. P. 24(b)(1)(B).

¹¹⁴ Compare FED. R. CIV. P. 24(b)(1)(B), with Moore & Levi, *supra* note 1, at 581.

¹¹⁵ FED. R. CIV. P. 24(b)(2).

¹¹⁶ FED. R. CIV. P. 24(b).

¹¹⁷ FED. R. CIV. P. 24(b)(3).

¹¹⁸ 7C WRIGHT & MILLER, *supra* note 1, § 1913.

¹¹⁹ FED. R. CIV. P. 24(c).

¹²⁰ See, e.g., *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023); *Comm’r, Ala. Dep’t of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019); *ACLU Minn. v. Tarek Ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011).

¹²¹ See, e.g., *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011); see also Edward H. Levi & James Wm. Moore,

Permissive intervenors have likewise been required to demonstrate their constitutional standing separate from their establishment of the Rule 24(b) requirements if they seek relief distinct from that sought by the existing parties.¹²²

In granting a motion to intervene under Rule 24(b), a court may limit the status of the intervenor.¹²³ While historically an intervenor became a full party to the litigation with all the attendant rights,¹²⁴ language in the Advisory Committee notes to the 1966 amendment to Rule 24 suggested that affording an intervenor this status was not required in every case.¹²⁵ As a result, courts have admitted intervenors on a limited basis by, for example, preventing them from presenting witnesses or participating fully in discovery.¹²⁶ An order denying intervention is subject to interlocutory appeal, although the denial of permissive intervention will only be reversed if the lower court abused its discretion.¹²⁷ Intervenors also typically have the right to appeal an adverse final judgment despite not being original parties to the litigation.¹²⁸

Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements, 47 YALE L.J. 898, 927 (1938) (“Intervention in an *in personam* action under a discretionary right must be supported by independent grounds of jurisdiction.”). For a detailed discussion of jurisdictional issues pertaining to intervention, see 7C WRIGHT & MILLER, *supra* note 1, § 1917.

¹²² See *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009) (“In this typical case, the permissive intervenor may not need to show standing for the same reason that not every plaintiff in a lawsuit is required to show standing: As long as there is at least one individual plaintiff who has demonstrated standing to assert these rights as his own, a court need not consider whether the other . . . plaintiffs have standing to maintain the suit.” (internal quotation marks and citation omitted)); 7C WRIGHT & MILLER, *supra* note 1, § 1917 (“The Supreme Court has held that if the intervenor is not seeking relief different from that requested by the existing parties, the intervenor does not need to have Article III standing.”) (citing *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020)).

¹²³ 7C WRIGHT & MILLER, *supra* note 1, §§ 1917, 1922; e.g., *Dep’t of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (“The district court’s discretion . . . under Rule 24(b), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues.”).

¹²⁴ See, e.g., *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (“When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.”); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1982) (intervenors “enter the suit with the status of original parties”); *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978) (“[A]n intervenor is treated as if he were an original party and has equal standing with the original parties.”).

¹²⁵ See FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment (discussing conditions on intervention of right).

¹²⁶ See *Appel*, *supra* note 25, at 278; e.g., *United States v. Idaho*, 342 F.R.D. 144, 146 (D. Idaho 2022) (“[T]he Court will grant permissive intervention on a limited basis to allow the Legislature to present argument and evidence (including witnesses) in opposition to the United States’ pending Motion for Preliminary Injunction.”).

¹²⁷ 7C WRIGHT & MILLER, *supra* note 1, § 1923 (“The traditional view has been that the appellate court can reverse if the trial court has erroneously denied intervention of right or if it has abused its discretion in denying permissive intervention, but that its order is not appealable, and the appeal must be dismissed, if the trial court properly denied the application for intervention.”).

¹²⁸ 7C WRIGHT & MILLER, *supra* note 1, § 1923 (“One who has been allowed to intervene in an action may appeal from subsequent orders in the action. Indeed, there are cases in which intervention is granted solely so that the intervenor can prosecute an appeal.”).

C. The Purpose of Intervention

In civil litigation, intervention aims to balance several competing interests. First, there are the interests of the existing parties to the case—the plaintiff’s in controlling his own lawsuit, and all parties’ in an efficient resolution of the controversy without interference from outsiders.¹²⁹ There is also the court’s and the public’s interests in conserving judicial resources and achieving a final disposition of the controversy at the heart of the case.¹³⁰ Finally, there is the interest of the intervenor in protecting their due process right in whatever claim or interest they assert to have in the proceeding.¹³¹ It is a concern for this final interest that is said to justify the existence of intervention in the first place—“[i]ts utility lies in offering protection to non-parties, who obviously comprise a large and undefined group with varied interests, oftentimes of tremendous financial and legal importance.”¹³² Protecting the legal interests of nonparties thus lies at the heart of the public policy goals that intervention aims to serve.

As for the two categories of intervention, scholars have suggested that their purposes differ to some degree. Intervention of right prevents the impairment of the intervenor’s interest through litigation in which he is not included.¹³³ In contrast, because it requires only a “common question of law or fact,”¹³⁴ permissive intervention focuses more on trial convenience and the avoidance of repetitive proceedings.¹³⁵ Permissive intervention’s encompassing of a broader scope of potential participants in a proceeding is perhaps what gave rise to its use for the administrative purpose of unsealing court records. The next Part explores that proposition.

III. RULE 24 AND RECORDS-RELATED RELIEF

As permissive intervention emerged in federal court, it brought with it an anomaly: the use of Rule 24(b) as the procedural mechanism to facilitate nonparty access to court records.¹³⁶ Court orders sealing judicial records have existed since

¹²⁹ 7C WRIGHT & MILLER, *supra* note 1, § 1901; Vern R. Walker, *Timeliness Threat to Intervention of Right*, 89 YALE L.J. 586, 586 (1980).

¹³⁰ 7C WRIGHT & MILLER, *supra* note 1, § 1901; Rensberger, *supra* note 26, at 120–21; Walker, *supra* note 129, at 588.

¹³¹ 7C WRIGHT & MILLER, *supra* note 1, § 1901; Rensberger, *supra* note 26, at 120–21; John E. Kennedy, *Let’s All Join In: Intervention Under Federal Rule 24*, 57 KY. L. J. 329, 329–30 (1969).

¹³² Moore & Levi, *supra* note 1, at 565. *See also* United States v. S. Fla. Water Mgmt. Dist., 922 F.2d 704, 707 n.3 (11th Cir. 1991) (“Denial of intervention cannot impair a nonparty’s ability to protect its interests if that nonparty would have no legal protection for those interests in any event.”).

¹³³ Walker, *supra* note 129, at 587–588; Moore & Levi, *supra* note 1, at 581 (“The absolute right is given as a protection to the petitioner.”).

¹³⁴ FED. R. CIV. P. 24(b)(1)(B).

¹³⁵ Moore & Levi, *supra* note 1, at 581, 607; Walker, *supra* note 129, at 587–88; Kennedy, *supra* note 131, at 335.

¹³⁶ *See, e.g.*, United States *ex rel.* Hernandez v. Team Fin., L.L.C., 80 F.4th 571, 578 (5th Cir. 2023); League of Women Voters of the U.S. v. Newby, 963 F.3d 130, 136 (D.C. Cir. 2020); Flynt v. Lombardi, 782 F.3d 963, 967 (8th Cir. 2015); Blum v. Merrill Lynch Pierce Fenner & Smith Inc., 712 F.3d 1349, 1354 (9th Cir. 2013); *see also infra* Part III.A.

at least 1915, but early decisions involving access to records did not discuss the appropriate procedural mechanism.¹³⁷ In 1979, the Fifth and Second Circuits nearly simultaneously identified intervention as the proper procedure for a governmental nonparty to obtain access to sealed court records, and records-access permissive intervention was soon extended to private intervenors as well.¹³⁸ Today, the practice has become routine, although some lower federal courts have continued to deny intervention based on the plain language of Rule 24(b).¹³⁹ Federal circuit courts responding to these denials reaffirm permissive intervention as the tool to facilitate access to court records, likely because federal court procedure currently lacks any mechanism specifically addressed to nonparty unsealing requests.¹⁴⁰

A. How Rule 24(b) Became a Records-Access Mechanism

No scholar to date has undertaken the task of determining how permissive intervention under Rule 24(b) came to be used for nonparty unsealing requests. This work will attempt to chronicle the major developments along that path. The general history of federal intervention practice detailed in the previous Part provides a helpful backdrop for this exercise.

1. Early Connections Between Intervention and Records-Related Relief

Prior to the adoption of the Federal Rules of Civil Procedure and Moore & Levi's illustrious work on intervention, the Supreme Court addressed nonparty access to court records, including in conjunction with intervention. The first Supreme Court decision to mention the sealing of court records was the early-20th century case *Ex parte Uppercu*.¹⁴¹ The case involved a suit by the government against a manufacturer for penalties under immigration law.¹⁴² After the case settled, Uppercu, who had rendered services in the suit, was sued by two others based on claims of entitlement to a portion of the fees paid to Uppercu.¹⁴³ In a petition for writ of mandamus—not a motion to intervene—Uppercu sought access to sealed depositions and exhibits filed in the government's case that he alleged would demonstrate that neither claimant had a right to the funds.¹⁴⁴ The Supreme

¹³⁷ See *infra* Part III.A.1.

¹³⁸ See *infra* Parts III.A.2.–3.

¹³⁹ See *infra* Part III.B.

¹⁴⁰ *Id.*

¹⁴¹ *Ex parte Uppercu*, 239 U.S. 435, 438 (1915); see also Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 198 (2009) (“The first Supreme Court mention of an order sealing judicial records from public access is *Ex parte Uppercu*, a 1915 opinion by then Supreme Court Justice Holmes.”).

¹⁴² *Ex parte Uppercu*, 239 U.S. at 438.

¹⁴³ *Id.* at 438–39.

¹⁴⁴ *Id.* The Second Circuit later concluded that mandamus was not the proper procedure for nonparty requests to modify protective orders. *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (“Although a petition by a non-party for review of a district court order might be entertained

Court granted him the requested writ, holding that “[s]o long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown[.]”¹⁴⁵ In the Court’s view, this right derived from “[t]he necessities of litigation and the requirements of justice” and was not based on “having an interest in the original cause.”¹⁴⁶ In addition, writing in a pre-Federal Rules era, the Court emphasized that the assertion of this right “require[d] no particular formality.”¹⁴⁷ *Uppercu*, then, set the stage for nonparty access to court records, at least as necessitated by litigation involving the nonparty.

Three years later, in the 1918 case *Perlman v. United States*, the Supreme Court suggested that intervention could be used to facilitate records-related requests by nonparties.¹⁴⁸ There, following two patent infringement suits in which the inventor, Louis H. Perlman, had produced various documents related to the creation of the patented invention, a United States attorney sought—by unidentified motion—to obtain the documents for use in a criminal investigation of Perlman.¹⁴⁹ The U.S. attorney had requested the documents from the trial court in the second patent infringement case, which had placed the documents under seal “to be opened only by order of [the] court on notice to each of the parties.”¹⁵⁰ Perlman, though not himself a party to the second patent infringement case, filed an (again unspecified) petition in that court to attempt to prevent disclosure of the documents to the U.S. attorney.¹⁵¹ The district court denied the petition, and Perlman appealed to the Supreme Court.¹⁵² In response to the government’s objection that Perlman was not a party to the patent infringement case and thus had no right to seek relief in that proceeding, the Supreme Court held that Perlman “could *intervene* to oppose” the disclosure of the documents to the government because the investigatory powers the government sought to exercise in obtaining the documents “would affect Perlman.”¹⁵³ Thus, the *Perlman* Court gestured toward intervention as a procedural mechanism for a nonparty to obtain records-related relief, but it tied that conclusion to Perlman’s legal interest as the subject of a criminal prosecution in which the records were sought.¹⁵⁴ This pre-Federal Rules case remains the closest the Supreme Court has come to sanctioning the use of intervention to facilitate nonparty access to court records.¹⁵⁵

as an application for a writ of mandamus against the district court, . . . this extraordinary writ would hardly be available here where the only purpose was to obtain modification of a pretrial order for investigative purposes.”).

¹⁴⁵ *Ex parte Uppercu*, 239 U.S. at 440.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 441.

¹⁴⁸ See *Perlman v. United States*, 247 U.S. 7 (1918).

¹⁴⁹ See *Perlman*, 247 U.S. at 7, 8–10.

¹⁵⁰ *Id.* at 8–9, 9 n.1.

¹⁵¹ *Id.* at 10.

¹⁵² See *id.* at 8, 11.

¹⁵³ *Id.* at 12 (emphasis added). The Court went on to conclude that because Perlman had produced the documents in litigation, the government was authorized to use them. *Id.* at 15 (citing *Ex parte Uppercu*, 239 U.S. 435 (1915)).

¹⁵⁴ *Id.* at 12 (emphasis added).

¹⁵⁵ *Perlman* also gave rise to the *Perlman* doctrine, which allows a privilege claimant to file an

Moore and Levi's 1936 work makes no mention of intervention to obtain access to court records,¹⁵⁶ and the original Federal Rule of Civil Procedure 24 adopted a year later did not by its plain language provide for such nonparty administrative relief.¹⁵⁷ Soon after the Rule's adoption, however, came *U.S. Realty's* liberal construction of the "claim or defense" required for permissive intervention.¹⁵⁸ As discussed in *supra* Part II.A.1., this gave rise to a set of cases that took a broad view of when permissive intervention was permitted.¹⁵⁹ However, none of these cases had yet involved intervention to gain access to sealed court records.¹⁶⁰

One of the earliest post-Federal Rules requests to intervene to unseal court records occurred in the 1964 case *Olympic Refining Co. v. Carter*.¹⁶¹ Plaintiff Olympic Refining Co. had asserted antitrust claims against Standard Oil Co. and another defendant in the Northern District of California.¹⁶² During discovery in that case, Olympic Refining requested issuance of a document subpoena to an antitrust official in the United States Department of Justice seeking production of some of the government's discovery and pretrial filings in a pending antitrust case the government had filed against Standard Oil in the Southern District of California.¹⁶³ Because the documents were subject to a series of protective orders in the Southern District case, the government filed a motion to vacate the protective orders in that court, and Olympic Refining intervened in support of the motion.¹⁶⁴ Standard Oil did not oppose the intervention.¹⁶⁵ The Southern District of California denied the motion to vacate, and Olympic Refining initiated a mandamus proceeding before the Ninth Circuit in which the appellate court without discussion permitted all parties in both the Northern and Southern District cases to intervene.¹⁶⁶ The Ninth Circuit's resulting opinion, which cited *Upperco*, ordered the district court to modify the protective orders to allow Olympic Refining access to the documents it had requested, although it permitted the court to maintain any "reasonable restriction as may be necessary [. . .] to prevent unnecessary disclosure" to the public of competitively sensitive information such as trade

interlocutory appeal of a discovery order directed to a disinterested third party. See Bryan Lammon, *Perlman Appeals After Mohawk*, 84 U. CIN. L. REV. 1, 8 (2016). Courts evaluating *Perlman* appeals in civil cases have not questioned the use of Rule 24(b) as the mechanism for the third party's intervention. See, e.g., *Doe No. 1 v. United States*, 749 F.3d 999, 1003–04 (11th Cir. 2014).

¹⁵⁶ See Moore & Levi, *supra* note 1.

¹⁵⁷ See *supra* note 40.

¹⁵⁸ See *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459–60 (1940).

¹⁵⁹ See *supra* notes 71–78 and accompanying text.

¹⁶⁰ See *supra* notes 71–78 and accompanying text.

¹⁶¹ *Olympic Ref. Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964). A 1960 Ninth Circuit case dealt with intervention to protect documents from disclosure, but the documents at issue were the subject of a proprietary interest based on their trade secret status. See *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52, 53–54 (9th Cir. 1960). The case was decided under intervention of right and did not deal with a disinterested nonparty seeking records-related relief. See *id.* at 56–57.

¹⁶² *Olympic Ref.*, 332 F.2d at 261.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 263.

secrets.¹⁶⁷ The decision nowhere addressed whether intervention was the proper mechanism to obtain such relief.¹⁶⁸ And notably, the original request to unseal in the case came from a party to the proceeding—the government.¹⁶⁹

2. The Emergence of Records-Access Intervention for Government Intervenors

One year after *Olympic Refining*, the Southern District of New York explicitly addressed whether permissive intervention could be used as a mechanism for document-related relief.¹⁷⁰ There, the United States requested to intervene to prevent disclosure of documents to the plaintiffs in a wrongful death case against Boeing.¹⁷¹ The plaintiffs had requested the documents—accident reports involving Air Force planes made by Boeing—from Boeing, who did not object to their production “except to the extent that the [United States] Air Force may object . . . on grounds of privilege or otherwise.”¹⁷² The Air Force intervened to assert an executive privilege over the documents, and the district court first turned to the threshold “technical question whether this should be done through intervention under [Rule 24] or otherwise, for example, as an *amicus curiae*.”¹⁷³ Relying on the Supreme Court’s liberal construction of Rule 24(b)’s “claim or defense” language in *U.S. Realty*, the court concluded that “the ‘claim or defense’ of the United States ha[d] ‘a question of law or fact in common’ with ‘the main action’ in the sense that a ‘party’ (such as Boeing) to the ‘main action’ could oppose this motion of plaintiffs.”¹⁷⁴ The “claim or defense” the court recognized, however, appeared to be more akin to the government’s ability to intervene under the new language added to Rule 24(b) in 1946, which permitted intervention based on the statutory claim or defense of an *existing party* to the case¹⁷⁵—although, of course, the question remains whether opposition to a request for documents qualifies as a “claim or defense” at all.

Thus, despite the 1946 amendment to Rule 24(b), the echoes of the Supreme Court’s broad reading of “claim or defense” in *U.S. Realty* persisted and began to be applied in the unsealing context. The 1966 amendment to Rule 24, although it focused on intervention of right, fueled that fire. Coupled with the Supreme Court’s 1967 decision in *Cascade*, Rule 24(a)’s new focus on those with a practical interest in the litigation widened the door for potential intervenors in both categories.¹⁷⁶

In 1979, the Fifth Circuit became the first federal appellate court to directly address whether intervention was an appropriate mechanism for nonparty

¹⁶⁷ *Id.* at 263–64, 266.

¹⁶⁸ See *Olympic Ref. Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964).

¹⁶⁹ *Id.* at 262.

¹⁷⁰ See *O’Keefe v. Boeing Co.*, 38 F.R.D. 329, 330 (S.D.N.Y. 1965).

¹⁷¹ *Id.* at 329–30.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 330 (citing *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459–60 (1940)).

¹⁷⁵ Compare *id.*, with FED. R. CIV. P. 24(b).

¹⁷⁶ See FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment; see also *supra* Part II.A.2.

challenges to protective orders.¹⁷⁷ *In re Beef Industry Antitrust Litigation* was a private antitrust lawsuit in which the district court had entered a protective order prohibiting the disclosure of documents or deposition testimony designated confidential to anyone other than the producing party or certain “qualified persons,” except with the producing party’s consent or by order of the court.¹⁷⁸ Upon learning of the suit, two House of Representatives subcommittees that were investigating the domestic beef industry subpoenaed representatives of one of the plaintiffs for documents obtained in discovery.¹⁷⁹ The subpoenaed plaintiff requested permission from the court to produce the documents, which were subject to the protective order, and the district court declined without prejudice to the right of the subcommittees to request relief themselves.¹⁸⁰ The subcommittees then sought leave to file a motion to grant the plaintiff’s request, and the district court granted leave but ultimately denied the subcommittees access to the subpoenaed documents.¹⁸¹

On the subcommittees’ appeal to the Fifth Circuit, the court first considered, *sua sponte*, the legislators’ failure to comply with Rule 24(c)’s procedures for intervention because, in the Fifth Circuit’s view, “the procedurally correct course for the chairmen [of the subcommittees] would have been first to obtain status in the suits as intervenors.”¹⁸² In support of this proposition, the Fifth Circuit cited *Securities & Exchange Commission v. Lincoln Thrift Association*, a 1978 Ninth Circuit case in which various creditors of a company in receivership who were not parties to the case appealed the district court’s order denying their motion to transfer the proceedings to the bankruptcy court.¹⁸³ Discussing the issue in the context of whether it had jurisdiction over an appeal by a nonparty, the Ninth Circuit concluded it did because, although the nonparty creditors “might have moved to intervene and then appealed,”¹⁸⁴ they were “not appealing the order as disinterested persons but as persons with a legitimate interest in whether the case was transferred.”¹⁸⁵ Thus, the *Lincoln Thrift* court’s nod to intervention contemplated use of the procedure by third parties with a direct, financial stake in the proceedings—one which would likely permit intervention of right—not third parties seeking only the disclosure of documents produced in the case for separate

¹⁷⁷ See *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979) (concluding that House of Representatives subcommittees that were not parties to the litigation but sought access to sealed documents should have filed “a formal motion for intervention” under Rule 24).

¹⁷⁸ *Id.* at 787–88.

¹⁷⁹ *Id.* at 788.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 788–89.

¹⁸³ *Id.* at 788; see *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 601 (9th Cir. 1978).

¹⁸⁴ The creditors had in fact sought to intervene in the district court as an alternative to transfer to bankruptcy court, but their motion was denied. See *Lincoln Thrift*, 577 F.2d at 604.

¹⁸⁵ See *id.*

use.¹⁸⁶ Indeed, the *Lincoln Thrift* nonparties did not seek document-related relief at all.¹⁸⁷

Also significant is that the *Lincoln Thrift* court was focused on the necessity of intervention in the court below to the ability to *appeal*, not the procedural propriety of intervention to seek the transfer they requested (although, for the reasons discussed in the previous paragraph, the nonparty creditors were likely proper intervenors in that case).¹⁸⁸ The Fifth Circuit's statement in *In re Beef Industry* that intervention was the "procedurally correct course" for the House subcommittees to seek access to confidential documents was also made in the context of whether the nonparty subcommittees' *appeal* should be entertained.¹⁸⁹ The Fifth Circuit highlighted three prior cases in which it "ha[d] been lenient in hearing the appeals of nonparties,"¹⁹⁰ none of which contains any mention of intervention despite the fact that each involved nonparties seeking relief related to documents produced in the case.¹⁹¹ As a result, the Fifth Circuit's reasoning avoided explanation of *why* intervention was the appropriate mechanism for the subcommittees to obtain the requested documents in the lower court.

A third aspect of *In re Beef Industry* worth noting is that the case, like *O'Keefe* in the Southern District of New York, involved government actors as the would-be intervenors.¹⁹² At the time, the Supreme Court's permissive intervention decisions in *U.S. Realty* and *Allen Calculators* seemed to support different treatment of requests to intervene by the government versus private parties.¹⁹³ The 1946 amendment's provision for government "piggybacking" on the parties' claims and defenses likewise supported a broader right of intervention for government actors, although it attempted to eliminate the need to liberally construe Rule 24(b)'s requirement for a "claim or defense" to provide it.¹⁹⁴ Against this backdrop, the approval of records-access intervention in *In re Beef Industry*—and in the Southern District of New York's *O'Keefe* before it—could be seen as part and parcel to an expanded right of the government to join proceedings that did not extend to the private sector.

¹⁸⁶ See *id.* at 601, 603. The Court also included a curiously broad description of Rule 24: "Under Rule 24 of the Federal Rules of Civil Procedure, *anyone who wishes to be a party to the action* may bring a motion to intervene." *Id.* at 602 n.1 (emphasis added).

¹⁸⁷ See *id.* at 601.

¹⁸⁸ See *id.* at 602–03.

¹⁸⁹ See *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 788–89 (discussing the propriety of intervention by the chairmen of two House of Representatives subcommittees).

¹⁹⁰ See *id.*

¹⁹¹ See generally *Overby v. U.S. Fid. & Guar. Co.*, 224 F.2d 158 (5th Cir. 1955); *Caswell v. Manhattan Fire & Marine Ins. Co.*, 399 F.2d 417 (5th Cir. 1968); *United States v. United Fruit Co.*, 410 F.2d 553, 554 (5th Cir. 1969).

¹⁹² *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 788–89; see *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 329–30 (S.D.N.Y. 1965). The cited case, *Lincoln Thrift*, involved private-party intervenors, but as discussed, those parties had a direct financial interest in the case, and they were not seeking records-related relief. See *Lincoln Thrift*, 577 F.2d at 603.

¹⁹³ See *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459–60 (1940); *Allen Calculators v. Nat'l Cash Reg. Co.*, 322 U.S. 137, 141–42 (1944); see also *supra* Part II.A.1.

¹⁹⁴ See FED. R. CIV. P. 24 advisory committee's note to 1946 amendment; see also *supra* Part II.A.1.

Twelve days after the Fifth Circuit's *In re Beef Industry* decision, the Second Circuit took the same view of records-access intervention in *Martindell v. International Telephone and Telegraph Corp.*¹⁹⁵ That case involved circumstances similar to those in *Olympic Refining*.¹⁹⁶ There, the government sought access to various pretrial depositions taken in a shareholder derivative suit against International Telephone & Telegraph Corporation.¹⁹⁷ The depositions had been taken pursuant to a protective order preventing their disclosure to anyone other than the parties and their attorneys.¹⁹⁸ The government informally asked the court for the deposition transcripts for use in a criminal perjury and obstruction investigation, explaining that it feared it would be unable to obtain statements from the witnesses because they would assert their Fifth Amendment privileges against self-incrimination.¹⁹⁹ The district court denied the request on the ground that the witnesses had relied on the protective order in giving the depositions, and the government appealed to the Second Circuit.²⁰⁰ In its opinion on appeal, the Second Circuit first addressed the question of whether the government had any right to appeal given that it was not a party to the action in the lower court and had only made an informal request via letter to the court for the documents.²⁰¹ In the Second Circuit's view, the "proper procedure" was either to subpoena the documents in the grand jury investigation "or to seek permissive intervention in the private action pursuant to Rule 24(b) [. . .] for the purpose of obtaining vacation or modification of the protective order."²⁰² Overlooking this defect based on an assumption that the lower court would "undoubtedly" grant intervention on remand, the Second Circuit ultimately left the protective order in place.²⁰³

In support of the proposition that permissive intervention was an appropriate procedural mechanism to seek access to the documents, the *Martindell* court cited four decisions: *Nuesse v. Camp*, *All American Airways v. Village of Cedarhurst*, *O'Keefe v. Boeing Co.*, and *Mitchell v. Singstad*.²⁰⁴ *Nuesse*, discussed above, seems to be cited for its observation—derived at least in part from *U.S. Realty*—that the phrase "claim or defense" in Rule 24(b) "is not interpreted strictly so as to preclude permissive intervention," given that the case involved a government official's intervention for reasons unrelated to access to court records.²⁰⁵ *All American Airways* and *Mitchell* likewise involved government agencies intervening for reasons other than obtaining access to confidential court filings.²⁰⁶ The only case cited that did involve a request for access to records, the

¹⁹⁵ *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

¹⁹⁶ Compare *id.* at 292, with *O'Keefe*, 38 F.R.D. at 329–30.

¹⁹⁷ *Martindell*, 594 F.2d at 292.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 293.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 293–94.

²⁰² *Id.* at 294.

²⁰³ *Martindell*, 594 F.2d. at 295, 297.

²⁰⁴ *Id.* at 294.

²⁰⁵ See *Nuesse v. Camp*, 385 F.2d 694, 698, 704–06 (D.C. Cir. 1967).

²⁰⁶ See *All Am. Airways, Inc. v. Vill. of Cedarhurst*, 201 F.2d 273, 274 (2d Cir. 1953); *Mitchell v. Singstad*, 23 F.R.D. 62, 63 (D. Md. 1959).

Southern District of New York's *O'Keefe* decision discussed above, likewise relied on *U.S. Realty's* conclusory language regarding the SEC's supposed "claim or defense" to allow intervention by the U.S. government.²⁰⁷ As a result, *Martindell's* conclusion regarding the proper procedure to obtain access to records appears to be both founded on *U.S. Realty's* broad view of permissive intervention and yet again confined to governmental requests.

The 1970s thus concluded with *In re Beef Industry* and *Martindell* emerging as twin pillars sanctioning permissive intervention as the procedural mechanism with which to obtain access to confidential judicial records—at least for government intervenors—although neither engaged with how the language of Rule 24(b) justified this use.²⁰⁸ The flexible interpretation of the permissive intervention rule that this required fit well within post-1966 jurisprudence and scholarship championing a broad right to intervene after the expansion of intervention of right.²⁰⁹ In fact, the expanded scope of intervention of right in the 1966 amendment prompted at least one federal court to conclude that document-related relief constituted a sufficient interest to warrant a *private party's* intervention *of right*.²¹⁰ The Supreme Court's broad construction of the "claim or defense" requirement for permissive intervention in *U.S. Realty* remained one of the engines at the core of this opening of the door to records-access intervention.²¹¹

3. The Expansion of Records-Access Intervention to Private Intervenors

Permissive intervention to access court records was explicitly extended to private-party intervenors in short order. In the 1981 case *In re Franklin National Bank Securities Litigation*, a nonprofit consumer protection research group sought to intervene in a closed bank receivership proceeding to set aside the district court's confidentiality order protecting the parties' settlement agreement and its supporting documents.²¹² Although the Eastern District of New York ultimately denied access to the settlement papers, it held that the nonprofit was entitled to request that relief via permissive intervention.²¹³ According to the court, "the intervenors' position as representatives of the public present[ed] a claim founded upon an important interest," and the "common question of law or fact" shared by the nonprofit intervenor and the existing parties was "the validity of a secret element in the settlement agreement."²¹⁴ The court acknowledged that this conclusion "stretch[ed] the concept of mutuality somewhat," but nonetheless found permissive intervention to be a "desirable" procedural mechanism to "afford

²⁰⁷ *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 330 (S.D.N.Y. 1965).

²⁰⁸ The Seventh Circuit also approved of the State of New York's intervention to obtain sealed documents in 1980, but it did not address whether intervention was the appropriate procedural mechanism to do so. *See Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1298 (7th Cir. 1980).

²⁰⁹ *See supra* Part II.A.2.

²¹⁰ *See United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980).

²¹¹ *See, e.g., Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (citing *Nuesse v. Camp*, 385 F.3d 694, 704 (1967)); *Am. Tel. & Tel. Co.*, 642 F.2d at 1291 (D.C. Cir. 1980).

²¹² *In re Franklin Nat. Bank Sec. Litig.*, 92 F.R.D. 468, 470 (E.D.N.Y. 1981).

²¹³ *Id.* at 471–72.

²¹⁴ *Id.* at 471.

intervenor a forum, otherwise unavailable” to vindicate the public’s right of access to government agency information under the Freedom of Information Act.²¹⁵ On appeal, the Second Circuit affirmed the Eastern District of New York’s decision without comment on the procedural propriety of intervention.²¹⁶ The case not only extended records-access permissive intervention to a private intervenor, but it was also perhaps the first to specifically identify Rule 24(b) as the appropriate procedural mechanism to facilitate a generalized public right of access to court records, as opposed to an access right belonging to the government or a party to other related litigation.

A year after the appeal from *Franklin National Bank*, the Second Circuit affirmed another district court decision allowing access to sealed court records, this time involving a private intervenor—a deponent in the underlying bankruptcy case from which the records were sought—opposing the production.²¹⁷ The appellate court again declined to comment on the propriety of intervention to obtain this relief, although it referenced *Martindell*’s granting of permissive intervenor status to the government to modify the protective order there.²¹⁸ In 1986, the Fifth Circuit dismissed an appeal from the district court’s denial of private intervenors’ request to permissively intervene in a case involving the breach of a natural gas contract, but it did not do so based on any procedural misuse of intervention.²¹⁹ Instead, the court concluded that the district court had not abused its discretion in determining that an existing party would be prejudiced if the intervenors were given access to the documents they requested.²²⁰ The implicit approval of the procedural use of permissive intervention in both decisions suggested that extending records-access intervention to private party intervenors was uncontroversial in light of *In re Beef Industry* and *Martindell*’s previous sanctioning of the practice. Some controversy was perhaps warranted, however, given that the nonparties’ status as government actors seemed to support the availability of intervention in both *In re Beef Industry* and *Martindell*.

The use of permissive intervention as an unsealing mechanism by both government and private intervenors continued undaunted by Justice O’Connor’s stricter textual reading of Rule 24(b) in her *Diamond v. Charles* concurrence.²²¹ Indeed, one year after *Diamond*, the Sixth Circuit declared that, since the Second Circuit’s *Martindell* had been decided in 1979, permissive intervention under Rule 24(b) had also been “held to be a proper method to challenge a protective order . . . in the Sixth Circuit,” citing (curiously) *In re Upjohn Co. Antibiotic Cleocin*

²¹⁵ *Id.*

²¹⁶ See *FDIC v. Ernst & Ernst*, 677 F.2d 230, 231–32 (2d Cir. 1982).

²¹⁷ See generally *United States v. Davis*, 702 F.2d 418, 420–21 (2d Cir. 1983).

²¹⁸ *Id.* at 421.

²¹⁹ See *Stack v. Gamill*, 796 F.2d 65, 67 (5th Cir. 1986). The court dismissed the appeal because a denial of permissive intervention is only appealable if the district court abused its discretion. See *id.* Because the lower court had not abused its discretion, the Fifth Circuit lacked jurisdiction over the appeal. *Id.*

²²⁰ *Id.* at 67–68.

²²¹ *Diamond v. Charles*, 476 U.S. 54, 76 (1986) (O’Connor, J., concurring) (“The words ‘claim or defense’ manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit[.]”).

Products Liability Litigation.²²² *In re Upjohn Co.* was decided in 1981 and contains no mention of *Martindell* or intervention—indeed, the access to records issue there was raised informally by counsel for an *existing* party in one of a number of cases in a multidistrict litigation, so no intervention was necessary.²²³ Like the Second and Fifth Circuits before it, the Sixth Circuit in *Meyer Goldberg* devoted no discussion to whether *Martindell*'s declaration of the proper procedure for government intervenors extended to the private department store company that intervened in the case before it.²²⁴

Relying on *In re Beef Industry*, *Martindell*, and *Meyer Goldberg*, federal courts soon began to routinely allow the use of Rule 24(b) permissive intervention to facilitate nonparty requests related to accessing court records.²²⁵ By the end of the 1990s, eight circuit courts of appeals had explicitly recognized that intervention was the proper procedure for these records-access requests.²²⁶ Another two circuit courts had impliedly condoned this procedural practice.²²⁷

²²² *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987) (citing *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114, 115 (6th Cir. 1981)).

²²³ See *In re Upjohn Co.*, 664 F.2d at 116.

²²⁴ See *Meyer Goldberg, Inc.*, 823 F.2d at 162.

²²⁵ See, e.g., *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) (“Relying on the language of Rule 24, the Fifth Circuit has previously held that intervention is ‘the procedurally correct course’ for third-party challenges to protective orders. . . . We agree.”) (citing *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979)); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (“[T]here is ample support for intervenor’s argument that courts also recognize Rule 24(b) intervention as a proper method to modify a protective order.”) (citing *Meyer Goldberg, Inc.*, 823 F.2d at 162; *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979)); *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789)); *N. States Power Co. v. Westinghouse Elec. Corp.*, 156 F.R.D. 168, 170 (D. Minn. 1994) (concluding that permissive “intervention is the proper procedure” for non-parties to challenge protective orders) (citing *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789).

²²⁶ See *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789; *Martindell*, 594 F.2d at 294; see *Meyer Goldberg, Inc.*, 823 F.2d at 162; see *Pub. Citizen*, 858 F.2d at 783; *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Beckman Indus., Inc.*, 966 F.2d at 472; *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993); *EEOC v. Nat’l Child.’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); see also *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994) (determining that “intervention” was the appropriate mechanism without specifying which type). The Seventh Circuit clarified that unsealing should be done under Rule 24(b) permissive intervention in 2000. *Jessup v. Luther*, 227 F.3d 993, 997–99 (7th Cir. 2000).

²²⁷ See *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (permitting newspaper to intervene to challenge sealing order); *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) (vacating district court’s protective order following nonparty’s permissive intervention to obtain records); see also *Haworth, Inc. v. Steelcase, Inc.*, 12 F.3d 1090, 1092 (Fed. Cir. 1993) (affirming district court’s denial of motion to intervene under Rule 24(b) without addressing whether permissive intervention was the proper procedural mechanism for nonparty’s records-access request).

B. Records-Access Intervention in Modern Practice

Today, eleven of the thirteen circuit courts of appeals allow nonparties to request access to sealed court records via permissive intervention.²²⁸ The Fourth Circuit has still only impliedly permitted the procedure,²²⁹ and the Federal Circuit has not had occasion to decide the issue.²³⁰

Records-access interventions sometimes occur after judgment has been entered or even months or years after the case is closed.²³¹ The nonparty intervenors are often media organizations, nonprofit groups, researchers, academics, or other third parties that do not have any direct legal interest in the case.²³² The intervention request typically unfolds as follows: The nonparty first files a motion to intervene, which may not be accompanied by the pleading required under Rule 24(c).²³³ The federal court then typically allows intervention, noting that it is broadly construing Rule 24(b)'s requirement for a "claim or defense with common questions of law or fact"²³⁴ or relying on *In re Beef Industry*,

²²⁸ See *Pub. Citizen*, 858 F.2d at 783–84; *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005); see *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023); *Meyer Goldberg, Inc.*, 823 F.2d at 162; *Bond v. Utreras*, 585 F.3d 1061, 1068 (7th Cir. 2009); *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013); *United Nuclear Corp.*, 905 F.2d at 1427; *Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1173 n.12 (11th Cir. 2019); *Nat'l Child. 's Ctr., Inc.*, 146 F.3d at 1046.

²²⁹ See *Stone*, 855 F.2d at 180 (permitting newspaper to intervene to challenge sealing order); see also *Doe v. Pub. Citizen*, 749 F.3d 246, 253, 275 (4th Cir. 2014) (suggesting intervention to challenge sealing order is allowed but holding that the district court lacked jurisdiction to decide the motion to intervene).

²³⁰ See *Ericsson Inc. v. InterDigital Commc'ns Corp.*, 418 F.3d 1217, 1220–21 (Fed. Cir. 2005) (explaining that the denial of a motion to intervene is a "matter[] not unique to patent law," so it is "governed by the law of the appropriate regional circuit").

²³¹ E.g., *Blum*, 712 F.3d at 1351–53 (intervention sought six years after underlying litigation had concluded); *Bond*, 585 F.3d at 1065 (after settlement but before court entered order of dismissal); *Nat'l Child. 's Ctr., Inc.*, 146 F.3d at 1047 (two years after settlement); *Doe v. Marsalis*, 202 F.R.D. 233, 236 (N.D. Ill. 2001) (nine months after settlement); *Dorsett v. Cnty. of Nassau*, 289 F.R.D. 54, 72 (E.D.N.Y. 2012) (seven months after settlement); *In re Alterra Healthcare Corp.*, 353 B.R. 66, 71 (Bankr. D. Del. 2006) (over a year after challenged seal order was entered); *Marshall v. Planz*, 347 F. Supp. 2d 1198, 1205 (M.D. Ala. 2004) (three years after termination of case); *Sunbelt Veterinary Supply, Inc. v. Int'l Bus. Sys. United States, Inc.*, 200 F.R.D. 463, 466 (M.D. Ala. 2001) (almost two years after case settled). See also *Pansy*, 23 F.3d at 779 ("Discussion in a recent decision by this court reflects the growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated.").

²³² E.g., *Team Fin., L.L.C.*, 80 F.4th at 575 (economist and researcher); *League of Women Voters of the U.S. v. Newby*, 963 F.3d 130, 134 (D.C. Cir. 2020) (nonprofit organization); *Flynt*, 782 F.3d at 966 (publisher and advocate against death penalty); *Bond*, 585 F.3d at 1065 (journalist); *Pansy*, 23 F.3d at 775 (newspapers); *Pub. Citizen*, 858 F.2d at 776 (newspaper and group of public health organizations); *Est. of Nunez v. Cnty. of San Diego*, 386 F. Supp. 3d 1334, 1338 (S.D. Cal. 2019) (ACLU); *Parson v. Farley*, 352 F. Supp. 3d 1141, 1150 (N.D. Okla. 2018) (law professor).

²³³ E.g., *Team Fin., L.L.C.*, 80 F.4th at 576 (motion to intervene accompanied by proposed motion to unseal); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (no pleading accompanying motion to intervene).

²³⁴ E.g., *Team Fin., L.L.C.*, 80 F.4th at 577 (Rule 24(b) "construed liberally"); *Bond*, 585 F.3d at

Martindell, Meyer Goldberg, or their progeny.²³⁵ Some of these decisions explain that the “claim or defense” involved is the public’s right of access to judicial records derived from common law via *Nixon v. Warner Communications*,²³⁶ Federal Rule of Civil Procedure 26, or some combination of the two.²³⁷ The court may expressly note the absence of any other procedural mechanism to vindicate this right to justify its application of permissive intervention.²³⁸ After the motion to intervene is granted, the court proceeds to evaluate whether to grant the requested records-related relief.

The proposition that Rule 24(b) can be used to challenge protective orders has been acknowledged by scholars as well.²³⁹ Indeed, Wright and Miller observe that courts have allowed permissive intervention to be invoked by nonparties who wish to join a proceeding “for the sole purpose of challenging confidentiality orders.”²⁴⁰ While some note that this application requires a “flexible interpretation”

1070 (Rule 24(b) “broad enough to encompass a third-party challenge to a protective order even though it is not a neat fit”); *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (“flexible reading”); *Newby v. Enron Corp.*, 443 F.3d 416, 422–23 (5th Cir. 2006) (“construed liberally”); *New York v. Microsoft Corp.*, 206 F.R.D. 19, 21 (D.D.C. 2002) (“generous interpretation[]”); *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 661 (7th Cir. 2001) (“sufficiently broad-gauged”); *Sunbelt Veterinary Supply, Inc.*, 200 F.R.D. at 465 (“read . . . flexibly”). See also 7C WRIGHT & MILLER, *supra* note 1, § 1911 (“[C]ourts generally have interpreted their discretion under [Rule 24(b)] broadly and have held that it can be invoked by nonparties who seek to intervene for the sole purpose of challenging confidentiality orders.”).

²³⁵ *E.g.*, *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) (citing *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 293–94 (2d Cir. 1979)); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 534 (S.D. Fla. 2010) (citing *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979) and the Third Circuit’s *Pansy v. Borough of Stroudsburg*, which relies on all three).

²³⁶ See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”).

²³⁷ *E.g.*, *Team Fin., L.L.C.*, 80 F.4th at 577 (common law); *Bond*, 585 F.3d at 1073–74 (common law and Rule 26); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 245 F.R.D. 632, 636 (D. Minn. 2007) (common law and Rule 26); *League of Women Voters*, 963 F.3d at 132 (common law); *Vanda Pharms., Inc.*, 539 F. Supp. at 51–52 (common law); see also *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2013 WL 3958232, at *2–3 (N.D. Cal. July 29, 2013) (analyzing intervenor’s sealing request under *Nixon* and FRCP 26, but noting that the intervenor did “not seek to intervene for the purpose of litigating any claims on the merits”).

²³⁸ *E.g.*, *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (“Despite appellees’ suggestions that Flynt should seek other avenues to challenge the sealing of these judicial records, other courts have found they ‘are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion.’”); *EEOC v. Nat’l Child.’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (“Although a strict reading of the rule might suggest a contrary result, courts have been willing to adopt generous interpretations of Rule 24(b) because of the need for an effective mechanism for third-party claims of access to information generated through judicial proceedings.” (citation omitted)).

²³⁹ See, e.g., Zachary N. Ferguson, *Rule 24 Notwithstanding: Why Article III Should Not Limit Intervention of Right*, 67 DUKE L.J. 189, 206 n.111 (2017); Jordana Cooper, *Beyond Judicial Discretion: Toward A Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 782–83 (2005); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 341 (1999); Alia Lyerly Smith, *Civil Procedure*, 67 GEO. WASH. L. REV. 852, 853 (1999).

²⁴⁰ 7C WRIGHT & MILLER, *supra* note 1, § 1911.

of the Rule,²⁴¹ scholarship to date has not questioned whether Rule 24(b) is well-suited for this purpose.

Despite federal courts' and scholars' acceptance of permissive intervention as the procedural device for nonparty unsealing requests, lower courts still, on occasion, decline these intervention requests due to the textual mismatch between Rule 24 and its use for records access.²⁴² In two modern cases involving a lower court's denial of records-access intervention based on the plain language of Rule 24(b), the courts of appeals reaffirmed permissive intervention as the appropriate procedural device for nonparty records requests in federal court.

In 2015, the Eighth Circuit's approval for the first time of permissive intervention as the procedural vehicle for nonparty access to records came in response to a district court denying such an intervention request apparently based on the text of Rule 24(b).²⁴³ There, the Western District of Missouri had denied a publisher's motion for permissive intervention because "[a] generalized interest in a subject of litigation [did] not justify intervention" under Rule 24(b).²⁴⁴ On appeal, the Eighth Circuit concluded that the district court had "applied the incorrect legal standard."²⁴⁵ Whereas a permissive intervenor "[n]ormally" has to satisfy the textual requirements of Rule 24(b) (as well as establishing an independent ground for jurisdiction and timeliness), the court highlighted that in a nonparty unsealing case, "most circuits have found that 'there is no reason to require such a strong nexus of fact or law.'"²⁴⁶ Instead, "the public's interest in the confidentiality of the records" constitutes the question of law in common required under Rule 24(b).²⁴⁷ Thus, Rule 24(b) was the appropriate procedural route for nonparty unsealing requests.²⁴⁸ The court went on to remark that permissive intervention often better serves the purpose of judicial efficiency than any potential alternative.²⁴⁹

A similar situation arose in the Fifth Circuit as recently as September 2022, although as the previous sections illustrate, that court was not considering the use

²⁴¹ Smith, *supra* note 239, at 852; 7C WRIGHT & MILLER, *supra* note 1, § 1911 (acknowledging that allowing records-access intervention resulted from courts "interpret[ing] their discretion under the rule broadly").

²⁴² See, e.g., United States *ex rel.* Hernandez v. Team Fin., L.L.C., No. 2:16-CV-00432-JRG, 2022 WL 16550318, at *5 (E.D. Tex. Sept. 28, 2022), *rev'd in part*, 80 F.4th 571 (5th Cir. 2023) [hereinafter *Team Fin.* 2]; Sunbelt Veterinary Supply, Inc. v. Int'l Bus. Sys. United States, Inc., 200 F.R.D. 463, 465 (M.D. Ala. 2001) (explaining that Magistrate Judge's Order denying intervention based on access to documents was "premised on the plain language of Rule 24(b)"); see also *Chrimar Sys., Inc. v. Alcatel-Lucent Enter. USA Inc.*, No. 6:15-CV-00163-JDL, 2017 WL 6211008, at *2 (E.D. Tex. Apr. 11, 2017) (allowing nonparty access to the requested transcript but noting that seeking it was "not a proper basis for intervention").

²⁴³ *Flynt*, 782 F.3d at 966.

²⁴⁴ *Id.* See also Order Denying *Flynt's* Motion to Intervene, *Ringo v. Lombardi*, No. 2:09-cv-04095 (W.D. Mo. Dec. 27, 2013), Dkt. No. 276; Order Denying *Flynt's* Motion for Reconsideration, *Zink v. Lombardi*, No. 2:12-cv-04209 (W.D. Mo. Dec. 26, 2013), Dkt. No. 236.

²⁴⁵ *Flynt*, 782 F.3d at 966.

²⁴⁶ *Id.* at 966–67.

²⁴⁷ *Id.* at 967.

²⁴⁸ See *id.*

²⁴⁹ See *id.*

of intervention for nonparty records requests for the first time.²⁵⁰ In *United States ex rel. Hernandez v. Team Finance*, a nonparty economist sought to permissively intervene in a False Claims Act case after settlement and dismissal because he “believe[d] that the information in th[e] case would be highly informative to his work” on healthcare economics and policy.²⁵¹ The district court denied his motion to intervene, concluding that “[t]he desire to intervene to pursue the vacating of the protective order and/or the unsealing of the record is not a justiciable controversy or claim” under Rule 24(b)(1)(B) and the economist “had alleged no other ‘claim or defense’ that provide[d] a basis for permissive intervention.”²⁵² On appeal, the Fifth Circuit reversed, emphasizing that the “claim or defense” language in Rule 24(b) should be “construed liberally” and that it had “permitted intervention by nonparties who seek only to challenge record-related restrictions,” citing *In re Beef Industry* from 1979.²⁵³

In a move the Fifth Circuit had not previously made in a records-access intervention case, the Court then attempted to read records access into the plain language of Rule 24(b).²⁵⁴ According to the court, the economist’s request fell within the Black’s Law Dictionary definition of “claim”—an “interest or remedy recognized at law”—because he sought to vindicate the public’s common law right to inspect judicial records.²⁵⁵ This issue related to the public’s right of access also constituted “a common question of law with the district court’s decisions related to sealing records.”²⁵⁶ In so holding, the Fifth Circuit noted that deciding otherwise “would categorically bar all nonparty record-related challenges in federal court made with public access in mind” because “intervention is ‘the procedurally correct course’ for the public to challenge such restrictions.”²⁵⁷

Perhaps the reason for this continued use of records-related intervention is as the Fifth Circuit said: Federal court procedure currently lacks any other mechanism for nonparty unsealing requests.²⁵⁸ Or perhaps this is a case of “valu[ing] precedent not because it is desirable but merely because it exists.”²⁵⁹ Either way, the need for *some* procedure to vindicate the public’s right of access

²⁵⁰ See *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023); see also *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979).

²⁵¹ *Team Fin.* 2, 2022 WL 16550318, at *1 (E.D. Tex. Sept. 28, 2022), *rev’d*, 80 F.4th 571 (5th Cir. 2023). The author participated in this case as an attorney for the defendants prior to settlement and dismissal in the district court, but has had no involvement after that time, including in the proceedings on the motion to intervene.

²⁵² *Id.* at *5 (quoting *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994)).

²⁵³ *Team Fin., L.L.C.*, 80 F.4th at 578.

²⁵⁴ See *id.* at 577.

²⁵⁵ See *id.* at 576.

²⁵⁶ *Id.* at 578.

²⁵⁷ *Id.* at 577. On remand, the lower court again denied intervention, but this time on timeliness grounds only. See *United States ex rel. Hernandez v. Team Fin., L.L.C.*, No. 2:16-CV-00432-JRG, 2024 WL 1149191, at *10 (E.D. Tex. Mar. 15, 2024) [hereinafter *Team Fin.* 3].

²⁵⁸ See *Team Fin., L.L.C.*, 80 F.4th at 577.

²⁵⁹ See Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 63 (2009).

to court records is clear, as that right is critical to maintaining the legitimacy of the judiciary.²⁶⁰ Rule 24(b) permissive intervention, however, is not the right one.

IV. RECORDS-ACCESS INTERVENTION IS AN IMPROPER USE OF RULE 24

As the previous Part detailed, federal courts uniformly accept permissive intervention under Rule 24(b)(1)(B) as the appropriate mechanism for a nonparty to obtain access to court records. However, as the evolution of that practice demonstrates, the fit between the means and the end is less than perfect. Indeed, using permissive intervention to facilitate access to court records is inconsistent with the requirements, history, and purpose of intervention.

A. Records-Access Intervention is Inconsistent with the Requirements of Permissive Intervention

Rule 24(b)(1)(B) authorizes permissive intervention by a nonparty “who [. . .] has a claim or defense that shares with the main action a common question of law or fact.”²⁶¹ In addition, Rule 24(c) requires a would-be intervenor to serve a motion to intervene on the existing parties, “accompanied by a pleading that sets out the claim or defense for which intervention is sought.”²⁶² A permissive intervenor’s motion must be “timely,”²⁶³ and the intervenor must demonstrate an independent ground for jurisdiction and, in some cases, constitutional standing.²⁶⁴

However, a nonparty intervening to challenge a federal court’s sealing order often cannot—and need not—satisfy these requirements.²⁶⁵ Indeed, courts allowing records-access permissive intervention have observed that doing so requires a less-than-literal application of Rule 24(b).²⁶⁶ As the D.C. Circuit put it,

²⁶⁰ See *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (“Article III courts are independent, and it is ‘particularly because they are independent’ that the access presumption is so vital—it gives the federal judiciary ‘a measure of accountability,’ in turn giving the public ‘confidence in the administration of justice.’” (citations omitted)); *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 12 (1st Cir. 2009) (“Placing court records out of public sight is a serious step, which should be undertaken only rarely and for good cause.”); *In re Application for Access to Video Exhibits*, 575 F. Supp. 3d 101, 106 (D.D.C. 2021) (“The common-law right of public access to judicial records ‘is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch.’” (citation omitted)).

²⁶¹ FED. R. CIV. P. 24(b)(1)(B).

²⁶² FED. R. CIV. P. 24(c).

²⁶³ FED. R. CIV. P. 24(b)(1).

²⁶⁴ See *supra* notes 120–21 and accompanying text.

²⁶⁵ See *supra* Part III.A.1.

²⁶⁶ *E.g.*, *Dorsett v. Cnty. of Nassau*, 289 F.R.D. 54, 72 (E.D.N.Y. 2012) (“[M]any courts have observed that ‘ordinary principles applicable to intervention do not necessarily apply to intervention for the limited purpose of modifying a protective order to gain access to documents.’”); *EEOC v. Nat’l Child’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (“Despite the lack of a clear fit with the literal terms of Rule 24(b), every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.”); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 315

“[o]n its face, Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order.”²⁶⁷

1. “Claim or Defense”

The Supreme Court last discussed Rule 24(b)’s “claim or defense” language in 1997, echoing Justice O’Connor’s reading of the phrase in *Diamond v. Charles*: “The words ‘claims or defenses’ in [the Rule 23(a)(3)] context—just as in the context of Rule 24(b)(2) governing permissive intervention—‘manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.’”²⁶⁸ As Professor Nelson has explained:

The Federal Rules of Civil Procedure consistently use the word “claim” to mean a “claim for relief.” Likewise, a “defense” is a particular type of legal argument that the targets of a claim assert to explain why the court should not grant relief against them. If these words mean the same thing in Rule 24(b)(1) that they mean elsewhere in the Federal Rules of Civil Procedure, then (in the absence of special statutory authorization) an outsider cannot use Rule 24(b) to become a party to a case simply because the outsider has a practical stake in the outcome. Instead, the outsider needs to be a proper party to a claim for relief.²⁶⁹

The United States Court of International Trade recently took a similar view of the “claim or defense” requirement in Rule 24(b), emphasizing that it “must be read in tandem” with the use of those terms in Rule 8 of the Rules of the United States Court of International Trade,²⁷⁰ whose language closely parallels that of Federal Rule of Civil Procedure 8.²⁷¹ FRCP 8(a)(2), in turn, requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁷² And Rule 8(b)(1)(A) requires a party responding to a pleading to “state in short and plain

(D. Conn. 2009) (“Courts have interpreted these requirements [for permissive intervention] with even greater flexibility when the third-party seeks to intervene only for the purpose of gaining access to discovery materials.”); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (“The interest [in access to public proceedings] . . . does not fit neatly within the literal language of either section[of Rule 24].”); *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (“Where intervention is sought only for a collateral purpose like unsealing documents, the ordinary requirements for permissive intervention are relaxed.”).

²⁶⁷ *Nat’l Child. ’s Ctr., Inc.*, 146 F.3d at 1045. See also *Cooper*, *supra* note 239, at 783 (“The intervention rules do not, on their face, appear to accommodate intervention for the sole purpose of obtaining discovery for use in another case or otherwise outside the context of the pending case.”).

²⁶⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997); see also Carl Tobias, *Intervention After Webster*, 38 U. KAN. L. REV. 731, 744-45 (1990) (“Correspondingly, some courts state that the common question of law or fact criterion requires an interest that would substantiate a legal claim or defense.”).

²⁶⁹ Nelson, *supra* note 26, at 274–75.

²⁷⁰ *N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313, 1334 (Ct. Int’l Trade 2021), *aff’d sub nom. California Steel Indus., Inc. v. United States*, 48 F.4th 1336 (Fed. Cir. 2022); *accord Deotte v. Azar*, 332 F.R.D. 173, 186 (N.D. Tex. 2019).

²⁷¹ *Compare* U.S.C.S. CT. INT’L TR. R. 8, with FED. R. CIV. P. 8.

²⁷² FED. R. CIV. P. 8(a)(2).

terms its defenses to each claim asserted against it.”²⁷³ Thus, in plain meaning—and contrary to the Fifth Circuit’s reasoning in *Hernandez*—“claim or defense” in Rule 24(b) refers to a true claim for relief or defense to an asserted claim that could be raised in a lawsuit via a pleading.²⁷⁴

The public’s right of access to court records does not fit this definition. As recognized by the Supreme Court in *Nixon v. Warner Communications, Inc.*, this is a right to inspect and copy judicial records that is explicitly *not* conditioned on “a proprietary interest in the document.”²⁷⁵ Indeed, the Supreme Court’s first mention of sealed court records in *Ex parte Uppercu* acknowledged that the nonparty’s right of access was not based on “having an interest in the original cause.”²⁷⁶ As for the interventions grounded in Rule 26, federal courts have recognized that the Federal Rules of Civil Procedure do not create any independent, legally-enforceable rights.²⁷⁷ Likely for these reasons, even as records-access intervention was developing in federal court, some circuits concluded that nonparty media seeking access to court proceedings lacked the kind of interest that would justify intervention.²⁷⁸

Despite this mismatch, as detailed in the previous Part, *U.S. Realty* fostered the liberal construction of the “claim or defense” language in Rule 24(b) that led to its application in unsealing cases.²⁷⁹ The fact that this use of the Rule is a textual stretch has not been lost on federal courts or scholars. The Ninth Circuit has recognized that intervenors seeking to modify protective orders “do not seek to litigate a claim on the merits.”²⁸⁰ Similarly, the Seventh Circuit has noted that records-access intervention “is not a neat fit” within the language of Rule 24(b) because “[t]he ‘interest’ being asserted by such an intervenor is not really a ‘claim’

²⁷³ FED. R. CIV. P. 8(b)(1)(A).

²⁷⁴ See *EEOC v. Nat’l Child.’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (Rule 24(b) “appears to limit permissive intervention to circumstances in which the putative intervenor seeks to become involved in an action in order to litigate a legal claim or defense on the merits.”); Note, *supra* note 56, at 324 (explaining that “claim or defense” as used in the Federal Rules of Civil Procedure “seems to have the meaning of ‘cause of action’ or defense to a particular claim already asserted in the action”).

²⁷⁵ *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978).

²⁷⁶ See *Ex parte Uppercu*, 239 U.S. 435, 440 (1915).

²⁷⁷ See *Xu v. Neubauer*, 166 F. Supp. 3d 203, 207 (D. Conn. 2015) (addressing alleged violation of Rule 26, among other Federal Rules of Civil Procedure); *State Police for Automatic Ret. Ass’n v. DiFava*, 164 F. Supp. 2d 141, 156 (D. Mass. 2001); *McKeithan v. Angel Oak Prime Bridge, L.L.C.*, No. 1:20-CV-04580-ELR-RDC, 2020 WL 9600585, at *2 (N.D. Ga. Dec. 3, 2020), *report and recommendation adopted*, No. 1:20-CV-04580-ELR, 2020 WL 9600555 (N.D. Ga. Dec. 29, 2020).

²⁷⁸ See, e.g., *Cent. S.C. Chapter, Soc’y of Pro. Journalists, Sigma Delta Chi v. U.S. Dist. Court*, 551 F.2d 559, 563 (4th Cir. 1977) (“It is clear that the Society [of Professional Journalists] should not participate in a case to which it is not a party. Even in civil cases, intervention requires an interest in the transaction or property before the court. But the Society has no interest in the determination of the defendant’s guilt or innocence to justify its intervention.” (citation omitted)).

²⁷⁹ See *supra* Parts II.A.1.–A.2.

²⁸⁰ *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); see also *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (noting that “it is undisputed” that the intervenor “does not seek to bring any counterclaims or cross-claims”).

or ‘defense.’”²⁸¹ Many other courts have made similar observations.²⁸² Likewise, Wright and Miller have observed:

[T]he language of Rule 24(b) appears directed toward intervenors who seek to become involved in the main action by its requirement that there be a common question of law or fact between the intervenor’s claim or defense and the main action. Nonetheless, courts generally have interpreted their discretion under the rule broadly and have held that it can be invoked by nonparties who seek to intervene for the sole purpose of challenging confidentiality orders.²⁸³

2. “Common Question of Law or Fact”

The common question of law or fact requirement is not unique to Rule 24(b)—it also appears in Rules 20, 23, and 42.²⁸⁴ Rule 20 permits the joinder of plaintiffs or defendants if the claims by or against them arise out of the same transaction, occurrence, or series of transactions or occurrences and “any question of law or fact common to all plaintiffs will arise in the action.”²⁸⁵ Similarly, one of the requirements for a class action under Rule 23 is that “there are questions of law or fact common to the class.”²⁸⁶ In addition, under Rule 42, a federal court may consolidate actions that “involve a common question of law or fact.”²⁸⁷

This similar language calls for the same analysis in all four contexts, and as Wright and Miller have explained, it “has not been a difficult concept to apply.”²⁸⁸ Perhaps for this reason, few courts have spent time defining this language. Still, the available precedent on this issue is instructive. Under Rule 20, the commonality requirement does not require that all of the legal or factual issues

²⁸¹ *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009).

²⁸² *E.g.*, *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (explaining that a third party seeking records-access intervention “does not ask the court to rule on the merits of a claim or defense”); *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (observing that a party seeking to intervene to modify a protective order does not aim “to litigate a claim on the merits”); *Newby v. Enron Corp.*, 443 F.3d 416, 420 (5th Cir. 2006) (“The Board is not seeking to litigate any claim . . . Whether the Board should have access to . . . confidential deposition transcripts and exhibits has no bearing on the merits of the underlying securities fraud action.”); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2013 WL 3958232, at *2 (N.D. Cal. July 29, 2013) (“Rovi does not seek to intervene for the purpose of litigating any claims on the merits, simply to ensure that a license agreement between Rovi and Apple is maintained under seal.”); *see also City of Herriman v. Bell*, 590 F.3d 1176, 1184 (10th Cir. 2010) (“It is also true the words ‘claim or defense,’ as they appear in Rule 24(b), should not be strictly interpreted so as to preclude permissive intervention.”).

²⁸³ 7C WRIGHT & MILLER, *supra* note 1, § 1911.

²⁸⁴ FED. R. CIV. P. 20(a)(1)(B), 23(a)(2), 42(a).

²⁸⁵ FED. R. CIV. P. 20(a)(1).

²⁸⁶ FED. R. CIV. P. 23(a)(2).

²⁸⁷ FED. R. CIV. P. 42(a).

²⁸⁸ 7C WRIGHT & MILLER, *supra* note 1, § 1911; *see also Walls v. Sterling Jewelers, Inc.*, No. 2:19-CV-2844-JPM-TMP, 2020 WL 2842843, at *4 (W.D. Tenn. June 1, 2020) (“The same analysis governing whether a case presents a common question of law or fact in the context of Rule 20(a), 23(a)(2), and Rule 42(a) motions also governs whether Gordon-Fortune’s proposed intervenor complaint presents a common question of law or fact.”).

in the case are common across all parties.²⁸⁹ Rule 42 also does not require a total identity of issues as long as some commonality between claims or defenses exists.²⁹⁰ In class actions under Rule 23, courts have specified that claims or defenses arising under “the same general law” do not satisfy the commonality language; they must also be subject to proof through a common body of evidence.²⁹¹ Courts applying Rule 42 have likewise required claims or defenses that rely on similar evidence or allege the same misconduct.²⁹² One court has noted that the “plain meaning” of the commonality requirement in Rule 42 indicates that “a common question is one that must be answered identically in each case in which it is presented.”²⁹³

Though difficult to define, the “common question of law or fact” condition in Rule 24(b) is also at odds with use of the Rule to modify or vacate confidentiality orders. To use the Rule for this purpose, federal courts have had to sidestep this requirement, finding that the would-be intervenor is not required to show “a strong nexus of law or fact” between their request and the underlying action.²⁹⁴ Instead, courts allow “the public’s interest in the confidentiality of the records” to satisfy

²⁸⁹ See *Martinez v. Dep’t of Just.*, 324 F.R.D. 33, 37 (D.D.C. 2018); 7C WRIGHT & MILLER, *supra* note 1, § 1653.

²⁹⁰ See Michele M. Hughes et al., § 77:41. *Requirement of Common Question of Law or Fact for Consolidation*, 33 FED. PROC., L. ED. (2024).

²⁹¹ *Visendi v. Bank of Am., N.A.*, No. 2:11-CV-02413-MCE, 2012 WL 6651426, at *4 (E.D. Cal. Dec. 20, 2012), *rev’d in part on other grounds*, 733 F.3d 863 (9th Cir. 2013); see also *DZ Rsrv. v. Meta Platforms, Inc.*, 96 F.4th 1223, 1233 (9th Cir. 2024).

²⁹² *E.g.*, *Waiters v. Sci. Applications Int’l*, No. CV 2:17-3227-BHH-BM, 2020 WL 12765188, at *1 (D.S.C. July 17, 2020).

²⁹³ *Evans v. Mahoney*, No. 17-C-1435, 2018 WL 2389713, at *2 (E.D. Wis. May 24, 2018); see also *Mutual Life v. Hillmon*, 145 U.S. 285, 292 (1892) (stating, pre-Federal Rules, that consolidating cases “of like nature and relative to the same question” is within trial court’s discretion).

²⁹⁴ *In re Baycol Prods. Litig.*, 214 F.R.D. 542, 543 (D. Minn. 2003) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994)); see also *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 536–37 (S.D. Fla. 2010) (“The commonality requirement has been read loosely by the circuit courts [in records-access cases.]”); *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (stating parties “seeking to intervene in a case for the limited purpose of unsealing judicial records” need not show a “strong nexus of fact or law” to the issues in the original case); *Sunbelt Veterinary Supply, Inc. v. Int’l Bus. Sys. United States, Inc.*, 200 F.R.D. 463, 466 (M.D. Ala. 2001) (“The second requirement for permissive intervention under Rule 24(b)(2) is commonality. . . . In cases such as this one, this requirement has been read loosely by the circuit courts.”); *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (“And finally, unlike in an ordinary motion for permissive intervention, ‘no particularly strong nexus of fact or law need exist between’ the underlying litigation and the case for which the intervenor is seeking to access the sealed documents.”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“When a collateral litigant seeks permissive intervention solely to gain access to discovery subject to a protective order, no particularly strong nexus of fact or law need exist between the two suits.”); see also 7C WRIGHT & MILLER, *supra* note 1, § 1911 (“A third party seeking permissive intervention in order to unseal court record ‘does not need to demonstrate . . . a common question of law or fact.’”).

the commonality requirement,²⁹⁵ sometimes tying it in with the parties' own battles over record-sealing.²⁹⁶

In one unpublished opinion, the Ninth Circuit has gone a step further, explicitly stating that “[a] third party seeking permissive intervention purely to unseal a court record does not need to demonstrate [. . .] a common question of law or fact” at all.²⁹⁷ The court in *Cosgrove* thus viewed the public right of access to records as a near-automatic justification for permissive intervention, instructing lower courts to deny intervention only if “the countervailing interests opposing public disclosure can overcome the presumption in favor of it.”²⁹⁸ In a precedential opinion, the Seventh Circuit has likewise disregarded the “common question of law or fact” requirement in favor of a test specific to records-access permissive intervention: It considers “(1) whether the party opposing intervention has any substantial right at stake, and (2) whether the proposed modification [of the protective order] would ‘tangibly prejudice’ that right” to ensure consideration of the impact of unsealing on the existing parties to the case.²⁹⁹ These alternative approaches reinforce that Rule 24(b), as written, is not geared toward facilitating the public right of access to court records.

3. “On Timely Motion”

Unlike some of the other requirements for permissive intervention, federal courts have engaged in detailed discussions of the directive that the court may permit intervention “on timely motion.”³⁰⁰ Several federal circuit courts of appeals

²⁹⁵ *E.g.*, *Boca Raton Cmty. Hosp., Inc.*, 271 F.R.D. at 536–37 (“[T]he Third Circuit has held that the commonality prong is satisfied merely by the fact the proposed purpose of the intervention is to modify a protective order.” (citing *Pansy*, 23 F.3d at 778)); *Flynt*, 782 F.3d at 967 (“[I]t is the public’s interest in the confidentiality of the judicial records that—in the language of Rule 24(b)(2)—[is] a question of law . . . in common between the Parties [to the original suit] and the [would-be intervenor].”); *Jessup v. Luther*, 227 F.3d 993, 998–99 (7th Cir. 2000) (“Although the Parties take a very different view of the matter of confidentiality, nevertheless, that confidentiality is—in the language of Rule 24(b)(2)—a ‘question of law . . . in common’ between the Parties and the Newspaper.”); *Young v. Glanz*, No. 13-CV-00315-JED-JFJ, 2018 WL 1588026, at *6 (N.D. Okla. Mar. 31, 2018) (“*United Nuclear*’s flexible approach to the ‘common question of fact or law’ prong extends to non-parties seeking to modify protective orders for purposes of gaining public access to protected or sealed materials.” (citing *United Nuclear Corp.*, 905 F.2d at 1427)). *See* 7C WRIGHT & MILLER, *supra* note 1 § 1911 (“In cases in which a party seeks to intervene for the limited purpose of unsealing judicial records, it is the public’s interest in the confidentiality of the judicial records that, in the language of the permissive intervention rule, is a question of law in common between the parties to the original suit and the would-be intervenor.”).

²⁹⁶ *E.g.*, *Coleman v. Cnty. of Suffolk*, 174 F. Supp. 3d 747, 754 (E.D.N.Y. 2016), *aff’d*, 685 F. App’x 69 (2d Cir. 2017) (“[T]he press intervenors’ argument for public access to the documents in question is closely related to the dispute in the main action over whether to seal the documents”); *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023) (“We also conclude that Adler’s claim shares a common question of law with the district court’s decisions related to sealing records: Whether there are compelling reasons for sealing that outweigh the public’s right of access.”).

²⁹⁷ *Cosgrove v. Nat’l Fire & Marine Ins. Co.*, 770 F. App’x 793, 795 (9th Cir. 2019).

²⁹⁸ *Id.*

²⁹⁹ *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 662 (7th Cir. 2001).

³⁰⁰ FED. R. CIV. P. 24(b)(1).

have created multi-factor tests to determine whether a would-be intervenor has made a timely request. For example, the Fifth Circuit considers “(1) the length of time the movant waited to file, (2) the prejudice to the existing parties from any delay, (3) the prejudice to the movant if the intervention is denied, and (4) any unusual circumstances.”³⁰¹ The Eleventh Circuit uses a similar test, although it specifies that the first factor considers “the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before petitioning for leave to intervene.”³⁰² The Eighth Circuit’s set of considerations is somewhat different, with the court evaluating “(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor’s knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties.”³⁰³ Under these timeliness tests, federal courts have generally disfavored requests to intervene post-judgment or after the case has settled.³⁰⁴

When it comes to records-access interventions, however, many federal courts have been quick to step back from the detailed analysis these factor-driven tests would require. Instead, courts addressing motions for permissive intervention to access documents have noted that the timeliness requirement is “broad”³⁰⁵ or “less implicated”³⁰⁶ under those circumstances because a request for records has little impact on the existing parties’ substantive rights.³⁰⁷ Some federal courts have even suggested that the timeliness requirement may not apply to records-access intervention at all.³⁰⁸ In addition, federal courts have specifically recognized that a

³⁰¹ *Team Fin., L.L.C.*, 80 F.4th at 578 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–66 (5th Cir. 1977)).

³⁰² *Comm’r, Ala. Dep’t of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019).

³⁰³ *ACLU Minn. v. Tarek Ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011).

³⁰⁴ 7C WRIGHT & MILLER, *supra* note 1, § 1916 (“[T]here is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment[.]”). See, e.g., *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds* by *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009); *Payne v. Tri-State Careflight, LLC*, 322 F.R.D. 647, 665–66 (D.N.M. 2017).

³⁰⁵ *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 535 (S.D. Fla. 2010) (quoting *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 315 (D. Conn. 2009)).

³⁰⁶ *Marshall v. Planz*, 347 F. Supp. 2d 1198, 1205 (M.D. Ala. 2004); see also *Sunbelt Veterinary Supply, Inc. v. Int’l Bus. Sys. United States, Inc.*, 200 F.R.D. 463, 466 (M.D. Ala. 2001) (“Strict adherence to the timeliness requirement is not a concern when the underlying lawsuit has been settled ‘and the intervention is for the purpose of modifying a protective order.’”).

³⁰⁷ E.g., *Comm’r, Ala. Dep’t of Corr.*, 918 F.3d at 1171 n.9 (“Moreover, other circuits have recognized that timeliness concerns may be less significant when intervention is ‘not on the merits, but for the sole purpose of challenging a protective order.’” (collecting cases)); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 786 (1st Cir. 1988) (“Because Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case.”); *In re Ethylene Propylene*, 255 F.R.D. at 315 (“Where a party seeks intervention to modify a protective order and not to participate on the merits, courts have permitted intervention even where the parties to the underlying litigation have settled their dispute.”).

³⁰⁸ E.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“Rule 24(b)’s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is

nonparty may intervene “long after a case has been terminated” if the intervention is for the purpose of challenging a confidentiality order.³⁰⁹ This need to abandon the timeliness requirement for permissive intervention further emphasizes the mismatch between the text of Rule 24 and its use for access to records.

4. “Accompanied by a Pleading”

Under Rule 7, permissible pleadings in federal civil cases include complaints, answers, third-party complaints, and replies.³¹⁰ Rule 8 outlines the function of these pleadings: they should allege grounds for a claim for relief, respond to allegations, or assert defenses.³¹¹ A document adhering to this substantive claim-defense or allegation-response structure is undoubtedly what Rule 24(c) contemplates in its instruction that a motion to intervene be “accompanied by a pleading.”³¹²

Given that a nonparty seeking to intervene to access records does not have a true “claim or defense” to assert, however, courts have found it difficult to apply Rule 24(c)’s pleading requirement—instead, federal courts have permitted intervention in unsealing cases without requiring a pleading at all, gesturing toward their eschewing a hyper-technical application of Rule 24(c).³¹³ This demonstrates

for a collateral purpose.”); *Boca Raton Cmty. Hosp., Inc.*, 271 F.R.D. at 535; *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (“Moreover, ‘Rule 24(b)’s timeliness requirement,’ the purpose of which ‘is to prevent prejudice in the adjudication of the rights of the existing parties,’ need not apply ‘when the existing parties have settled their dispute and intervention is for a collateral purpose.’”).

³⁰⁹ *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013); *see also Flynt*, 782 F.3d at 967 n.2 (“[A] district court may properly consider a motion to intervene permissively for the limited purpose of modifying a protective order even after the underlying dispute between the parties has long been settled.” (citation omitted)); *Anoke v. Twitter, Inc.*, No. 23-CV-02217-SI, 2024 WL 3908108, at *3 (N.D. Cal. Aug. 20, 2024) (“As the Ninth Circuit has observed, delays measured in years have been tolerated where an intervenor is pressing the public’s right of access to judicial records.” (internal quotation marks and citation omitted)). *But see Team Fin. 3*, 2024 WL 1149191, at *10 (E.D. Tex. Mar. 15, 2024) (denying post-judgment intervention on timeliness grounds after Fifth Circuit’s remand); *Entropic Commc’ns, LLC v. Charter Commc’ns, Inc.*, No. 2:22-CV-00125-JRG, 2024 WL 1932413, at *2 (E.D. Tex. May 2, 2024) (motion to intervene not timely in records-access case).

³¹⁰ FED. R. CIV. P. 7(a).

³¹¹ *See* FED. R. CIV. P. 8.

³¹² *See* *Nelson*, *supra* note 26, at 292 (“As if to confirm that the word ‘interest’ in Rule 24(a) refers to legal relations, Rule 24(c) requires all would-be intervenors (including those who assert a right to intervene under Rule 24(a) as well as those seeking permission to intervene under Rule 24(b)) to submit ‘a pleading that sets out the claim or defense for which intervention is sought.’”).

³¹³ *See, e.g., Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Spring Constr. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980) (“[A]lthough some cases have held that intervention should be denied when the moving party fails to comply strictly with the requirements of Rule 24(c), the proper approach is to disregard non-prejudicial technical defects.”); *Providence Baptist Church v. Hillendale Comm., Ltd.*, 425 F.3d 309, 313–15 (6th Cir. 2005) (noting weight of authority taking a “permissive” view of Rule 24(c) and holding that a district court abused its discretion in rejecting a motion to intervene based on its failure to attach a pleading when “neither party has ever claimed that any prejudice would result from granting the motion to intervene” and

yet another obstacle in the Rule's text to applying permissive intervention in the unsealing context.

5. Jurisdiction and Standing

As discussed in *supra* Part II.B., federal courts have discussed additional requirements that permissive intervenors must satisfy beyond those specifically set out in the text of Rule 24(b). Like the text-based requirements, these are difficult to contend with when Rule 24(b) is used to obtain access to judicial records.

First, federal courts have emphasized that permissive intervenors must establish an independent ground for jurisdiction.³¹⁴ In unsealing intervention cases, however, federal courts have generally not required an independent jurisdictional basis.³¹⁵ Courts have justified this departure on the ground that these records-access intervenors “do not seek to litigate a claim on the merits”³¹⁶ or by explaining that records-access intervention asks “the court only to exercise that power which it already has to protect the public’s access to judicial records.”³¹⁷

In addition, while some federal courts require a permissive intervenor to make a separate showing of standing in some circumstances,³¹⁸ some have relaxed the standing requirement when addressing nonparty records-access requests.³¹⁹ These courts have proffered similar rationales to those provided regarding the jurisdictional showing or have simply “overlooked” the standing question.³²⁰ Federal courts’ acknowledgment that neither independent grounds for jurisdiction

“the parties are clearly on notice as to [intervenor’s] position and arguments”); *Hill v. Kansas Gas Serv. Co.*, 203 F.R.D. 631, 634 (D. Kan. 2001) (holding that Rule 24(c) requires a pleading or “other equivalent information”).

³¹⁴ See *Levi & Moore*, *supra* note 121, and accompanying text.

³¹⁵ *E.g.*, *Flynt*, 782 F.3d at 967; *Cosgrove v. Nat’l Fire & Marine Ins. Co.*, 770 F. App’x 793, 795 (9th Cir. 2019); *Doe v. Marsalis*, 202 F.R.D. 233, 236 (N.D. Ill. 2001); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 316 (D. Conn. 2009).

³¹⁶ *Beckman Indus., Inc.*, 966 F.2d at 473; see also, *e.g.*, *Flynt*, 782 F.3d at 967 (“Furthermore, when a party is seeking to intervene only to modify a protective order or unseal documents, and not to litigate a claim on the merits, an independent basis of jurisdiction is not required.”); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (“Rodgers does not seek to bring any counterclaims or cross-claims. Accordingly, Rodgers is not required to make any further showing that his intervention is supported by independent jurisdictional grounds.”); *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 50 (D.D.C. 2021) (“[A]n independent jurisdictional basis is . . . unnecessary when the movant seeks to intervene only for the limited purpose of obtaining access to documents covered by seal, . . . because the third party does not ask the court to rule on the merits of a claim or defense.” (alterations in original)).

³¹⁷ *Est. of Nunez v. Cnty. of San Diego*, 386 F. Supp. 3d 1334, 1338–39 (S.D. Cal. 2019); see also *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 229 F.R.D. 126, 130 (S.D. Tex. 2005).

³¹⁸ See *supra* note 122 and accompanying text.

³¹⁹ *E.g.*, *In re Baycol Prods. Litig.*, 214 F.R.D. 542, 544 (D. Minn. 2003); *Young v. Glanz*, No. 13-CV-00315-JED-JFJ, 2018 WL 1588026, at *6 (N.D. Okla. Mar. 31, 2018). *But see* *Bond v. Utreras*, 585 F.3d 1061, 1072 (7th Cir. 2009) (“[W]e hold that when a third party seeks intervention under Rule 24(b) for the purpose of challenging a protective order *in a case or controversy that is no longer live*—as when the case has been dismissed and none of the original parties has sought this relief postjudgment—the intervenor must meet the standing requirements of Article III[.]” (emphasis added)).

³²⁰ *Id.*

nor standing are necessary to demonstrate in records-access cases further underscores the ill fit between permissive intervention as intended and its use for document-related relief. Honoring the public's interest in court proceedings is undeniably important, but using Rule 24(b) as the procedural mechanism to do so requires the near-evisceration of its requirements.

B. Records-Access Intervention is Inconsistent with the History and Purpose of Intervention

The use of Rule 24(b) to permit nonparty access to court records is also inconsistent with the historical underpinnings of intervention and its stated policy goals and purposes. As detailed in Part II.A.1., intervention originated in the admiralty and equity contexts and was permitted in cases where a third party had some identifiable legal interest in the outcome of the proceedings.³²¹ As a result, Moore and Levi's study of federal intervention practice led them to define intervention this way: "the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented."³²² In his work around the same time, Raoul Berger explained that the "fundamental purpose" of intervention is "the prevention of injury which may result from a proceeding unless the party who is attempting to intervene is heard."³²³ Thus, traditionally, intervention envisions a third party who desires to join as a party in ongoing litigation because of its potential impact on their existing legal rights.³²⁴

Rule 24 developed from this context.³²⁵ And despite the amendments to some portions of the Rule to broaden its applicability, modern definitions of intervention are similar to Moore and Levi's. As Wright and Miller put it, intervention is "a procedure by which an outsider with an interest in a lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants."³²⁶ Black's Law Dictionary similarly characterizes intervention as "the entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome" and "the legal procedure by which such a third party is allowed to become a party to the litigation."³²⁷ Thus, at base,

³²¹ See *supra* notes 26–37 and accompanying text; see also Berger, *supra* note 58, at 69 ("Traditionally, third party intervention in litigation is predicated upon an 'interest in the case.'").

³²² Moore & Levi, *supra* note 1, at 565.

³²³ Berger, *supra* note 58, at 65.

³²⁴ See *Intervention of Private Parties Under Federal Rule 24*, 52 COLUM. L. REV. 922, 922 (1952) ("Very often the outcome of a legal proceeding may have serious effects on one who is not a party and is thus unable to defend his interests. Even more often, one may desire to press a claim which will necessitate the trial of issues which are currently being litigated in another action. In both instances the outsider may desire to enter the current litigation: in the first for protection, and in the second to save expense. Intervention is the entry into that litigation.").

³²⁵ See FED. R. CIV. P. 24 advisory committee's note to 1937 adoption. ("This rule amplifies and restates the present federal practice at law and in equity.").

³²⁶ 7C WRIGHT & MILLER, *supra* note 1, § 1901.

³²⁷ *Intervention*, BLACK'S LAW DICTIONARY (11th ed. 2019).

intervention remains a mechanism for a third party to *participate* in an existing case to protect their legal interest in its subject matter.

Nonparties seeking to intervene to obtain court records do not look like the traditional intervenor, nor do they fit within courts' and scholars' historic or modern views of what intervention is. Unlike a true intervenor who will be adversely (or perhaps favorably) impacted by the outcome of the case, a records-access intervenor desires only administrative relief—to inspect and copy court records—that is untethered from the court's overall resolution of the proceeding.³²⁸ In addition, rather than seeking to participate in the proceeding to protect their interests, records-access intervenors in reality do not aim to become parties at all—only to obtain the requested documents.³²⁹ It is only because intervention is the procedural mechanism for obtaining those documents that these nonparties request entry into the proceeding.

Nonparty intervention in unsealing cases also departs from the goals that distinguish permissive intervention from intervention of right: trial convenience and avoidance of repetitive proceedings.³³⁰ As Professor Nelson has noted, Rule 24(b) is “a mechanism for consolidating in a single action claims or defenses that might otherwise be litigated separately.”³³¹ In addition, in his work on intervention of right in the environmental law context, Professor Peter Appel detailed four judicial-efficiency-related benefits of intervention espoused by proponents of a broad right to intervene:

First, intervenors make new arguments and bring to light evidence that would otherwise not be before the court. Second, intervenors might simply bring better lawyering to represent their concerns. Third, if nothing else, a broad right to intervene allows the intervenor to be heard, thus increasing the legitimacy of the proceeding. Finally, formal intervention of right helps in the remedial phase of a given case. Intervention provides the intervenor with a seat at the table during settlement negotiations and provides the intervenor with a formal opportunity to contest a remedy that the intervenor finds unduly harsh.³³²

³²⁸ See *Bond v. Utreras*, 585 F.3d 1061, 1070–71 (7th Cir. 2009) (“Where, as in many cases and in this case, the protective order is entered by stipulation of the parties, ‘the extra litigant . . . is not simply along for the ride’ but rather shifts the progress of the lawsuit in a new direction to obtain relief that neither the plaintiff nor the defendant may want.”); *United Servs. Auto. Ass’n v. PNC Bank N.A.*, No. 2:20-CV-00319-JRG, 2021 WL 3545089, at *2 (E.D. Tex. July 27, 2021) (“The vehicle of intervention is simply at odds with the relief that Wells Fargo seeks. Intervention is more appropriate where the applicant seeks to litigate the merits of the case, either joining with one party in opposition to the other or opposing the claims of both parties.”).

³²⁹ See *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (“Intervenors do not ask the district [court] to rule on additional claims or seek to become parties to the action.”); Ferguson, *supra* note 239, at 206 n.111 (indicating that records-access intervenors’ requests “entail virtually no participation in the litigation”).

³³⁰ See Moore & Levi, *supra* note 1, at 581, 607; Kennedy, *supra* note 131, at 335; Walker, *supra* note 129, at 587–88.

³³¹ Nelson, *supra* note 26, at 386.

³³² Appel, *supra* note 25, at 295.

An intervenor seeking only access to judicial records provides none of these benefits. In these cases, the nonparty desires to obtain existing evidence and other court records, which often introduces questions of document confidentiality that the court would not otherwise have had to address or reopens issues the parties already litigated. Thus, even if the intervenor provides better lawyering, any judicial efficiency gained is outweighed by the need for the court to address the unsealing request.³³³ In addition, because the intervenor's request for access to records is typically for a purpose distinct from resolving the claims and defenses in the case, allowing the intervenor to be heard is unconnected with the legitimacy of the proceeding itself. For similar reasons, as noted above, there is often no benefit to involving a nonparty records-requester in determining the remedy in the case—the only remedy they seek is disclosure of the requested materials. Perhaps this is why, as originally envisioned by Moore and Levi, intervention was not available solely to attack administrative orders already entered by the court, like protective orders.³³⁴ Indeed, courts have recognized that the use of permissive intervention for document-related relief departs from the procedure's purpose.³³⁵

* * *

Federal courts have justified their deviations from the text and purpose of permissive intervention in records-access cases by appealing to the importance of public access to court records and the absence of any procedural alternative—but these justifications do not erase the fundamental mismatch between Rule 24(b)'s design and its current use. Allowing permissive intervention to be used in this manner may instead function as an impediment to court-records transparency, as the plain language of the Rule does not make clear to potential records-access intervenors that it is the mechanism to facilitate that access. In addition, Rule 24(b)'s requirements are not addressed to the interests implicated by a request for access to sealed court records, such as the public's need for the information and the existing parties' privacy and confidentiality concerns. An appropriate procedural mechanism should invite consideration of these interests.

³³³ See *Allen Calculators v. Nat'l Cash Reg. Co.*, 322 U.S. 137, 141–42 (1944) (observing that “where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense,” but “[t]o permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court”).

³³⁴ Levi & Moore, *supra* note 121, at 916.

³³⁵ See, e.g., *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) (noting that “Rule 24 was undoubtedly crafted principally for other situations occurring more frequently in federal litigation” than records-access intervention); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2013 WL 3958232, at *2 (N.D. Cal. July 29, 2013) (explaining that although “the primary focus of Rule 24(b) is intervention for the purpose of litigating a claim on the merits,” nonparties had been permitted to intervene to modify protective orders).

V. POTENTIAL SOLUTIONS TO THE RECORDS-ACCESS INTERVENTION PROBLEM

If, as the previous Part argues, allowing permissive intervention for the purpose of unsealing court records is an improper use of Rule 24(b), the solution is not to cease allowing these nonparty requests altogether. As the Supreme Court has acknowledged, courts across the nation have recognized the public's general (although not unlimited) right to inspect judicial records and have even applied a presumption in favor of allowing access to these materials.³³⁶ The question, then, is not whether to permit nonparty requests for court records, but what procedural mechanism would better enable this access. This Part proposes various options.

A. Adopt a New Access-to-Records Federal Rule of Civil Procedure

Perhaps the most effective means of facilitating public access to court records is to create a new Federal Rule of Civil Procedure designed specifically for that purpose. Many state court systems have procedural rules for nonparty access to court records, including Arkansas, Florida, Indiana, Maine, Texas, and Vermont.³³⁷ In Indiana and Arkansas, the mechanism to request access to sealed court records is a verified written request demonstrating that access is appropriate considering the public interest and any potential harm in disclosure.³³⁸ In Vermont and Maine, the procedure is for the nonparty to simply file a specific motion for access to the records explaining why access should be allowed.³³⁹ Maine courts consider whether "the need for public access now substantially outweighs a party's reasonable expectation of privacy" and provides the nonparty a right to appeal if the motion is denied.³⁴⁰

The new Federal Rule of Civil Procedure could likewise require a verified written request or "motion for access to records" in which the nonparty specifies the reasons justifying their disclosure. Rather than addressing the ill-fitting textual requirements of Rule 24(b), the nonparty could be required to discuss considerations more relevant to the court's decision as to whether to grant access, such as the specific public interest at issue, any potential harm to the existing litigants, the parties' expectations of privacy, concerns regarding delay and consumption of judicial resources, and the like. In some jurisdictions, the rule would do little more than formalize federal courts' existing analyses on permissive intervention requests by record-access intervenors. In others, it would eliminate the preliminary step of determining whether to allow intervention under the Rule

³³⁶ See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (collecting cases).

³³⁷ *E.g.*, IN. ST. ACCESS R. 9; ARK. SUP. CT. R. ADMIN. ORDER 19; VT. R. PUB. ACCESS CT. REC. R. 9; ME. R. ELEC. CT. SYST. R. 11; FLA. ST. GEN. PRAC. & J. ADMIN. R. 2.420; TEX. R. CIV. P. 76a. The Texas rule still uses the label "intervention" for the procedure nonparties may use to seal or unseal court records, although it designates a special form of intervention for the limited purpose of seeking records-related relief. See TEX. R. CIV. P. 76a (3), (4), (5), (7), (8).

³³⁸ IN. ST. ACCESS R. 9; ARK. SUP. CT. R. ADMIN. ORDER 19.

³³⁹ VT. R. PUB. ACCESS CT. REC. R. 9; ME. R. ELEC. CT. SYST. R. 11.

³⁴⁰ ME. R. ELEC. CT. SYST. R. 11.

24(b) requirements before turning anyway to the question of whether granting access to the requested records is appropriate. Either way, this solution is preferable to current federal court practice because it moves nonparty records requests out from under the umbrella of intervention.

B. Amend Rule 24(b) to Specifically Encompass Access to Records

An obvious solution to the mismatch between Rule 24(b)'s text and its use in unsealing cases is to amend the Rule to explicitly allow its use under these circumstances.³⁴¹ Indeed, the Advisory Committee has seen fit to amend Rule 24 in the past when courts were “virtually disregard[ing its] language.”³⁴² Just as the Rule was amended in 1946 to allow the government to intervene without a “claim or defense” of its own,³⁴³ a similar provision could be added to permit nonparties to intervene to access judicial records without the need to satisfy (or sidestep) Rule 24(b)(1)(B)'s textual requirements. Rule 24(c) could be amended in parallel to eliminate the need to attach a pleading when a nonparty permissively intervenes only for the purpose of challenging a protective order. While this solution would certainly alleviate the counter-textual nature of nonparty intervention to unseal records, it does not address all of the concerns outlined above. In particular, it keeps the nonparty records requesters as intervenors in the case, which is not consistent with the historic use of that label or the purposes and policies behind intervention.

C. Allow Courts to Handle Records-Access Requests Informally via Local Rules

Another potential approach for nonparty sealing requests is to allow federal courts to dictate the procedure for these requests on a court-by-court basis via local rules. District courts already handle requests to file amicus briefs—which some have compared to records-related permissive intervention³⁴⁴—in this manner, as the Federal Rules of Civil Procedure do not address amicus requests (the Federal Rules of Appellate Procedure do).³⁴⁵ For example, the local rules for the United States District Court for the Northern District of Texas instruct amicus filers to seek leave from the presiding judge and set forth their interest in the

³⁴¹ See *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) (“The language of [Rule 24] certainly could be fashioned more precisely to accommodate situations such as the one before us.”).

³⁴² See FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment.

³⁴³ See *supra* notes 68–69 and accompanying text.

³⁴⁴ *E.g.*, *O’Keefe v. Boeing Co.*, 38 F.R.D. 329, 330 (S.D.N.Y. 1965) (“The United States moves to intervene to assert a privilege. . . . It is a technical question whether this should be done through intervention under Fed. R. Civ. P. 24 or otherwise, for example, as an amicus curiae.”); 7C WRIGHT & MILLER, *supra* note 1, § 1911 (“Early cases had thought intervention not appropriate when the applicant merely wished to avoid the creation of a precedent that might someday come back to haunt him, and had suggested that the applicant could be protected sufficiently by appearing as amicus curiae.”).

³⁴⁵ See FED. R. APP. P. 29.

litigation in their brief.³⁴⁶ The United States District Court for the District of Columbia addresses amicus procedure in more detail in its local rule, specifying the considerations that must be addressed in the motion for leave to file an amicus brief and requiring timely filing “such that it does not unduly delay the Court’s ability to rule on any pending matter.”³⁴⁷ The rule also provides a time limit for parties to file an opposition to the motion and prohibits any further briefing on the issue.³⁴⁸

Federal courts at all levels could add similar provisions to their local rules permitting nonparties to make administrative requests to the court to modify protective orders or to inspect and copy particular judicial records that have been sealed from public view. As with amicus briefs, the provision could require the requester to attach a brief stating their justification for obtaining the records and provide the parties with an opportunity to consent to or oppose the unsealing request.³⁴⁹ Each district or circuit can likewise impose its own preferences regarding the contents of the requests and the timeline for resolving them so as to minimize any delay or disruption to the ongoing proceeding. This approach is certainly less formal than permissive intervention under Rule 24(b), but because it permits the court to tailor the local rules to its own preferences and practices and to the specific purpose of unsealing court records, it promises to alleviate many of the textual and policy-related difficulties associated with deciding these requests under Rule 24(b).

VI. CONCLUSION

“Placing court records out of public sight is a serious step, which should be undertaken only rarely and for good cause.”³⁵⁰ But the current federal-court procedural mechanism to bring those sealed court records back into public view is not the right one. The widespread use of permissive intervention as a mechanism for nonparty access to sealed court records represents a significant departure from Rule 24(b)’s text, history, and intended function. Courts have justified this improper use of permissive intervention largely out of necessity, given the lack of an alternative procedural avenue for third parties seeking to unseal records. However, this pragmatic approach comes at the cost of doctrinal coherence in the law of intervention, and it unnecessarily conceals the procedure to facilitate access to court records behind a textually incompatible tool. To restore permissive intervention to its proper scope while preserving the public’s right of access to judicial records, alternative procedural solutions should be pursued. By realigning intervention practice with Rule 24’s text and purpose, federal courts can ensure both procedural integrity and meaningful transparency in judicial proceedings.

³⁴⁶ N.D. Tex. L.R. 7.2(b).

³⁴⁷ D.D.C. L. Civ. R. 7(o).

³⁴⁸ *Id.*

³⁴⁹ See FED. R. APP. P. 29(a)(2), (3).

³⁵⁰ R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 12 (1st Cir. 2009).

BROKENNESS: NAVIGATING PRECARIETY IN THE LEGAL ACADEMY

Tiffany Jeffers*

I. INTRODUCTION

There are some folks for whom openness is not about the luxury of “will I choose to share this or tell that,” but rather, “will I survive—will I make it through—will I stay alive.” And openness is about how to be well and telling the truth is about how to put the broken bits and pieces of the heart back together again. ~ bell hooks¹

Law schools are charged with preparing future lawyers in the core areas of legal doctrine, theory, and skills.² Yet, in tension with their pursuit of teaching critical thinking and the rule of law, these institutions remain deeply embedded within systemic structures of inequity.³ These inequities, far from being incidental, are upheld by the American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools and most notably, ABA Standard 405.⁴ The ABA Standards govern the accreditation and operation of law schools that offer Juris Doctor degrees.⁵ Section 405 of the Standards provides structure for law faculty. These rules and standards are primarily governed by the types of courses that law professors teach with some roles receiving greater job protections and others getting less.⁶ This dynamic becomes evident when examining how tenure-track

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¹ BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 2 (2d ed., Routledge 2014) (1989) (italics added).

² See AM. BAR ASS’N, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024-2025 19-20* (2024), (setting out standards for the program of legal education in law schools) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf.

³ See Meera Deo, *The Ugly Truth about Legal Academia*, 80 *BROOK. L. REV.* 943, 947, 956, 962 (2015) (exploring discrimination and bias in legal academia); Angela Onwuachi-Willig, *Moving Beyond Statements and Good Intentions in U.S. Law Schools*, 75 *ALA. L. REV.* 691, 700 (2024) (on the movement towards encouraging antiracist approaches to law practice and education).

⁴ See AM. BAR ASS’N, *supra* note 2, at 33 (setting out standards for law school faculty professional environment, including security of position); J. Lyn Entrikin et al., *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(C) and Eliminating 405(D)*, 98 *OR. L. REV.* 1 (2020).

⁵ See *id.*

⁶ See AM. BAR ASS’N, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024-2025* (2024), https://www.americanbar.org/content/dam/aba/administrative/legal_education

doctrinal positions and clinical roles, which receive tenure-like security under the ABA Standards, contrast with legal writing appointments, which the Standards require to have only the minimum protections needed to hire and retain “instructors,” and how these very different roles are distributed across demographic groups.⁷ The privileging and security of particular positions and statuses, and thus even certain identities, contributes to disparities that undermine legal education’s stated commitment to justice and equity.⁸

Pursuant to the U.S. Department of Education,⁹ the American Bar Association (ABA) is endowed with the authority to accredit U.S. law schools that award Juris Doctor degrees.¹⁰ The American Bar Association Standards and Rules for Law School Approval provide the procedural standards by which law schools are required to operate.¹¹ These procedures include the requirements for the qualifications, role, size, responsibilities, and professional environment of law faculties.¹² Explicit within these rules is a hierarchical structure that creates status disparity between tenured or tenure-track,¹³ clinical,¹⁴ and legal writing¹⁵ faculty. By codifying a hierarchical system of faculty employment, the ABA provides a baseline that enables law schools to preserve inequitable distinctions among faculty positions.¹⁶

and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf.

⁷ See Amanda L. Stephens & Sean M. Viña, *On Women Professors Who Teach Legal Writing: Addressing Stigma and Women’s Health*, 48 VT. L. REV. 237, 238–41 (2024) (noting that nearly 80% of legal writing faculty are women and mostly white and that these positions are “non-tenure track, low status . . . less pay and job security”); Meera E. Deo, *Intersectional Barriers to Tenure*, 51 U.C. DAVIS L. REV. 1155, 1178–80 (2018) (finding that white men remain over-represented among tenured/tenure-track law faculty).

⁸ *See id.*

⁹ 34 C.F.R. § 602 (2023).

¹⁰ *See id.*

¹¹ AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017_2018_aba_standards_rules_approval_law_schools_final.pdf.

¹² *Id.* at 27-30.

¹³ *See id.* at 29.

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* AM. BAR ASS’N, *supra* note 6 (requiring law schools to maintain adequate conditions for faculty recruitment and retention; to establish a policy on academic freedom and tenure (405(b)); to grant clinical faculty security of position reasonably similar to tenure (405(c)); and to provide legal writing faculty the protections needed to attract qualified teachers and ensure academic freedom (405(d)): By Using Distinct Terms for Faculty Status, “Tenure” for Doctrinal Faculty, “Security of Position” for Clinicians, and “Only the Protections Necessary for *Legal Writing Teachers* (emphasis added), the ABA Standards Codify Hierarchical Employment Structures).

Legal academics, a privileged group collectively,¹⁷ experience different levels of personal impact as a result of their professional status and identity.¹⁸ To the extent that law schools function as a microcosm of society,¹⁹ they can reflect the nested hierarchies that mirror socially constructed identities such as race, class, and gender.²⁰ These hierarchies confer privilege upon some while marginalizing and oppressing others.²¹ Many legal scholars teach, research, and write because they aim to make the law function more justly; further, legal scholarship can be a conduit aimed at addressing wrongs and reimagining law.²² However, this labor will occur within a hierarchical and inequitable profession, if socially constructed identities are reinforced by status disparities.²³ There remains space to further theorize how productivity and output levels intersect with professional status and identity to the detriment of law professors in the most vulnerable employment positions of the legal academy.

This article critically examines how contractual faculty positions in law schools contribute to professional marginalization and heightened employment precarity. To do so, the article uses three concepts: “precarity,” “weaponized gratitude,” and “toxic productivity.” First, precarity creates chronic instability in one’s professional standing given conditions marked by limited security of position, unclear pathways for advancement, and heightened vulnerability to institutional decision making.²⁴

Within this stratified context, precarity interacts with elitism to give rise to the second concept, which I call “*weaponized gratitude*.” *Weaponized gratitude* describes the subtle expectation that those in contract-based faculty roles should feel grateful for opportunities that come with fewer protections and greater

¹⁷ See Milan Marković, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813 (2020) (observing that most law professors “come from privileged backgrounds” and noting the structurally advantaged position of faculty within academia writ large); Ann Juliano, *Privileging Scholarship and Law School Compensation Decisions: It’s Time to Shine Some Light*, 61(2) LOUISVILLE L. REV. 291 (2023) (demonstrating that the compensation and reward systems in legal academia place law professors in a comparatively privileged position within higher education); cf. U.S. Bureau of Lab. Stat., *Occupational Employment and Wage Statistics: Law Teachers, Postsecondary* (May 2023), <https://www.bls.gov/oes/2023/may/oes251112.htm> (reporting a median annual wage of \$127,360 for postsecondary law teachers, reflecting their comparatively high compensation), with U.S. Bureau of Lab. Stat., *Occupation Finder: Occupational Outlook Handbook* (May 2024), <https://www.bls.gov/ooh/occupation-finder.htm> (noting that the median annual wage for all U.S. workers was \$49,500, illustrating law professors’ substantially higher earnings relative to the national workforce).

¹⁸ See MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

¹⁹ See Karolina Kocemba, *Space and Socialization in Legal Education: A Symbolic Interactionism Approach*, 2021 L. & METHOD 1, 2-4 (2021).

²⁰ See Cynthia G. Bowman, *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 27 (2006).

²¹ See ELIZABETH BERENGUER ET AL., *CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY* (2023).

²² See Eric Martinez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEO. L. J. 111, 118 (2023).

²³ See DEO, *supra* note 18.

²⁴ Many different types of workers faced precarious employment conditions during the COVID pandemic. This essay’s narrow focus on legal writing faculty should not diminish that lived reality of workers in the other various fields.

instability.²⁵ What seems like appreciation for academic flexibility can enable gratitude to be used as a tool of control, especially for those in contractual roles whose status affords them fewer protections, pushing them to accept inequity and suppress critique to remain included.²⁶ Under these circumstances, the flexibility sometimes described as “work-life balance” is repurposed not to ease burdens, but to encourage faculty in precarious roles to take on more work while appearing grateful for the chance to do so.²⁷ Although work-life balance is intended to offer flexibility, weaponized gratitude can turn it into an expectation to do even more, undermining any real balance.

This dynamic often manifests as the third concept, “toxic productivity,” a harmful pressure to maintain high levels of professional output, even at the expense of health or well-being, because professional survival feels contingent on visible performance.²⁸ *Toxic productivity* generates a pattern of excessive and unsustainable work driven by insecurity, obligation, or the perceived need to demonstrate value within exclusionary professional environments. In legal academia, toxic productivity can impact faculty whose roles lack status or stability, producing cycles of overwork that reinforce marginalization and amplify the harms

²⁵ See Kent Dunnington, Mona Siddiqui & Nathanael Vette, eds., *A Theology of Gratitude: Christian and Muslim Perspectives*, 40 FAITH & PHIL. 286, 288 (2023); see also Nicola Andrews, *It's Not Imposter Syndrome: Resisting Self-Doubt as Normal for Library Workers*, LIBR. WITH LEAD PIPE (June 10, 2020), <https://www.inthelibrarywiththeleadpipe.org/2020/its-not-imposter-syndrome/>.

²⁶ See Entrikin et al., *supra* note 4 (arguing that Standard 405 entrenches a hierarchy that devalues skills-focused faculty and leaves them with diminished security and voice); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 480–81 (2005) (documenting the gendered status hierarchy and substantial pay and power disparities between doctrinal and skills faculty); Melissa H. Weresh, *Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) Tenure-Like Security of Position*, 34 L. & INEQ. 137 (2016) (explaining how differing security of position under Standard 405(c) and (d) produces unequal and discriminatory conditions for skills-focused faculty); Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575, 576–83 (2017) (linking contingent status of legal writing professors of color to marginalization, vulnerability, and chilled academic freedom); Emily Grant, *Belongingness*, 54 CONN. L. REV. ONLINE 1 (2022).

²⁷ Deo, *supra* note 7, at 1178-80 (discussing how faculty in precarious positions feel pressure to overperform and accept their status); Harmony Decosimo, *Professor Mom: The Pandemic's Disruption of the Personal-Professional Divide in Legal Academia*, 25 LEGAL WRITING: J. LEGAL WRITING INST. 67 (2021) (addressing how the rhetoric of flexibility during COVID masked increased workload and expectations for teaching faculty).

²⁸ See Renee Nicole Allen, *Get Out: Structural Racism and Academic Terror*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 599 (2023); Ayatakshee Sarkar et al., *Can Gratitude Counter Workplace Toxicity? Exploring the Mediating Role of Psychological Capital (PsyCap)*, 12 BUS. PERSP. & RES. 261 (2024) (arguing that institutionalized gratitude-based organizational culture can combat workplace toxicity); see also Maureen Salamon, *Beyond the Grind: Toxic Productivity and How It Sabotages Your Well-Being*, HARVARD WOMEN'S HEALTH WATCH (2024) (connecting internalized productivity norms to mental and emotional strain in support of the psychological dimension of toxic productivity); see also Francesca Bellini & Vera Lomazzi, *Changing Work Values: Beyond Hustle Culture*, 56 SOCIOLOGIA – SLOVAK SOCIOLOGICAL REVIEW 555 (2024) (arguing that “hustle-culture” defined as workplace culture that puts work at the center of life, impacts the well-being and mental health of workers).

of precarity.²⁹ This article interweaves the concepts of precarity, weaponized gratitude, and toxic productivity in the setting of legal academia during the COVID pandemic.

Part II of this article explores how the COVID crisis³⁰ exacerbated issues related to precarious employment positions³¹ such as professional status, identity, and productivity. The article relies on normative research methods such as analyzing scholarship to assess and critique how mindset and belief systems intersect with hierarchical systems and impact outcomes. Additionally, Part II uses autoethnography³² as a methodological framework to enhance the analysis of the theoretical interplay between inequitable institutions, hierarchical systems, and lived experience. I recount the internal and external signals that, compounded by the explicit hierarchy existing within legal academia, contributed to my decision to teach while hospitalized during the COVID pandemic. Drawing from my own trajectory in legal academia, I examine how weaponized gratitude and toxic productivity shaped the decision, and how the decision starkly exposed the pressures embedded in hierarchical faculty structures.

By situating personal experience alongside broader sociological and psychological understandings of precarity, hierarchy, and institutional culture, this article connects individual choices to the structural conditions that incentivize them. In doing so, it demonstrates how the interplay of precarity, weaponized gratitude, and toxic productivity can perpetuate the marginalization of faculty in contract-based roles and reveals deeper inequities within legal education. Part III provides a broader analysis of the structural inequity within legal academia, focusing on elitism, hierarchy, and the impact of the COVID crisis on non-tenure-track law professors. It ties the autoethnographic narrative to broader institutional hierarchies, showing how law school structures contribute to inequity and

²⁹ See JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 62–64 (2000) (describing the “ideal worker norm” that equates worth with constant productivity); see also MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 5–6 (2003) (defining the “work devotion schema” as an expectation of singular dedication to professional success).

³⁰ See Henk Ten Have & Bert Gordijn, *Vulnerability in Light of the COVID-19 Crisis*, 24 *MED., HEALTH CARE & PHIL.* 153, 153 (2021).

³¹ See generally Shiham Solomon & Marieta Du Plessis, *Experiences of Precarious Work Within Higher Education Institutions: A Qualitative Evidence Synthesis*, 8 *FRONTIERS IN EDUC.* 960649 (2023), <https://www.frontiersin.org/journals/education/articles/10.3389/feduc.2023.960649/full> [<https://doi.org/10.3389/feduc.2023.960649>] (finding that current university structures and their reliance on temporary contracts for many faculty exacerbate insecurity, exploit academic staff, diminish research capacity, strain student support, and disproportionately burden women or otherwise marginalized academics).

³² See Maybell Romero, *Ruined*, 111 *GEO. L.J.* 237 (2022); see also Carolyn Ellis et al., *Autoethnography: An Overview*, 36 *HIST. SOC. RSCH.* 273, 275 (2011) (“As a method, autoethnography combines characteristics of autobiography and ethnography. When writing an autobiography, an author retroactively and selectively writes about past experiences. Usually, the author does not live through these experiences solely to make them part of a published document; rather, these experiences are assembled using hindsight.”); Stephanie Hannam-Swain & Chris Bailey, *Considering COVID-19: Autoethnographic Reflections on Working Practices in a Time of Crisis by Two Disabled UK Academics*, 4 *SOC. SCI. & HUMANS. OPEN* 1 (2020).

precarity, including those reflected in ABA Standard 405.³³ This section concludes with a focused discussion on how the pandemic impacted marginalized faculty within the legal academy, particularly faculty with precarious employment contracts.³⁴

Part IV uses weaponized gratitude³⁵ as a framework for understanding how the inequitable systems that sustain precarity in legal academia entrench the phenomenon of toxic productivity, harming marginalized law professors. This section explores how gratitude is manipulated and weaponized within legal academia to maintain inequitable power dynamics. This inequity undergirds the exploitative nature of short-term employment contracts permissible for non-tenure-track faculty under the ABA standards for law faculty.³⁶ Further, this section engages in a discussion of toxic productivity that arises from lack of belonging,³⁷ and its impacts in legal academia. Specifically, this article analyzes how the pressure to maintain productivity during the pandemic exacerbated the challenges faced by vulnerable law professors. Through a critical analysis of how ABA Standard 405(d) allows law schools to maintain the precarity of certain law professors, this section reveals how these issues are not isolated and instead are part of a broader pattern of systemic inequity within legal academia.

Part V recognizes ABA Standard 405 not as a minimal compliance threshold for law schools and instead recommends a framework for safeguarding equitable, stable, and professionally sustainable faculty careers. This section calls for acknowledgement of the educational and professional harm that these inequitable hierarchies create for law students, lawyers, and legal academics. By reimagining gratitude as a tool for developing sustainable alternatives to the traditional work-life balance, the legal academy can begin to address the deep-seated inequities the pandemic has laid bare. Finally, the article provides practical steps for creating a more equitable work environment for all legal academics, particularly those in the most precarious roles, and encourages institutions to align their employment practices with the values they teach.

The conclusion offers a hopeful vision for a more equitable legal academy that supports marginalized law professors.

³³ See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf.

³⁴ See Mary B. Beazley, *Shouting into the Wind: How the ABA Standards Promote Inequality in Legal Education, and What Law Students and Faculty Should Do About It*, 65 VILL. L. REV. 1037, 1040 (2020).

³⁵ See Claudia Card, *Gratitude and Obligation*, 25 AM. PHIL. Q. 115 (1988).

³⁶ See AM. BAR ASS'N, *supra* note 6.

³⁷ See Grant, *supra* note 26.

II. THE BURDEN OF OPENNESS: ADVERSITY, CHOICE, AND REGRET

“When I liberate myself, I liberate others. If you don’t speak out ain’t nobody going to speak out for you.” ~ Fannie Lou Hamer³⁸

The COVID pandemic illuminated and intensified long-standing inequities in the legal academy, especially for non-tenure-track faculty navigating precarious employment contracts.³⁹ At its core, this precarity reflects entrenched hierarchies codified by the ABA Standards.⁴⁰ This section examines how the pandemic exacerbated systemic inequities and underscores the urgent need to critically evaluate these governing frameworks pursuant to the procedural requirements of ABA Standard 405(d). While these inequitable and systemic frameworks were exacerbated by the pandemic, they existed prior to that moment in time and remain persistent today. As memory of the COVID pandemic ebbs, the propensity to resolve these issues diminishes and the harms of the inequity become veiled.

The pandemic posed unique challenges for legal educators, requiring swift adaptation to remote teaching while managing personal and societal upheavals.⁴¹ However, the burdens were not borne equally. During the COVID crisis, both tenure-track and non-tenure-track faculty experienced increased teaching loads, administrative responsibilities, and significant emotional labor in supporting students. The distinction, however, lay in the context of *how* institutions responded disparately to faculty experiences of these burdens. Without the job security and institutional support afforded to tenure-track colleagues, non-tenure-track faculty members also faced heightened vulnerabilities.⁴²

This section uses autoethnography⁴³ to recount a personal experience of teaching while hospitalized during the COVID pandemic, a decision influenced largely by internalized expectations shaped by external realities and pressures. These pressures are not incidental but are the product of deeply embedded systemic inequities that valorize productivity over well-being. By critically analyzing this

³⁸ MAEGAN PARKER BROOKS & DAVIS W. HOUCK, *THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS* 121-30 (2011) (italics added).

³⁹ See Merin Oleschuk, *Gender Equity Considerations for Tenure and Promotion During Covid-19*, CAN. REV. OF SOC. (2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7436417/>.

⁴⁰ See Weresh, *supra* note 26.

⁴¹ See Katie Rose Guest Pryal, *Front-Line Faculty and Systemic Burnout: Why More Faculty Should Attend to Law Students’ Mental Health and the Inequities Caused by Faculty Who Opt Out*, 27 LEGAL WRITING 199 (2023).

⁴² See Meera E. Deo, *Pandemic Pressures on Faculty*, 170 U. PA. L. REV. ONLINE 127 (2022).

⁴³ See Ellis et al., *supra* note 32, at 275 (“As a method, autoethnography combines characteristics of autobiography and ethnography. When writing an autobiography, an author retroactively and selectively writes about past experiences. Usually, the author does not live through these experiences solely to make them part of a published document; rather, these experiences are assembled using hindsight.”).

experience, the section contextualizes how institutional hierarchies perpetuate harm under the guise of professionalism and commitment.

Ultimately, this autoethnographic narrative situates the COVID pandemic's impact within the broader structural inequities of legal academia. It highlights how the intersection of precarious employment, identity, and professional expectations demands a reimagining of the policies and practices governing legal education. Autoethnography allows for the examination of personal experiences within their broader social and institutional context.⁴⁴ My decision to teach while hospitalized during the pandemic reflects the intersection of individual agency and structural inequity.

This section recounts that experience in detail, highlighting the cascading factors that led to such an untenable situation. These include the use of productivity as a substitute for belonging and equity, the lack of job security, and the implicit demands weaponized gratitude requires of law professors in precarious contract positions. By situating this narrative within the broader context of legal academia, this section demonstrates how systemic inequities compel marginalized faculty to prioritize professional obligations over personal well-being.

A. Adversity

I am a two-time stage IV cancer survivor. I also live with chronic illness stemming from overlapping autoimmune diseases. I present as an able-bodied person, which gives me the privilege of concealing my chronic pain, restricted mobility, and limited physical functionality. This personal narrative centers my experience as a disabled law professor with a one-year contract teaching position during the lockdown period of the COVID pandemic.

During the COVID pandemic lockdown,⁴⁵ my children were four and five years old. In the fall of 2020, they would be entering kindergarten and first grade. When the world shut down, my very first thought was, "How will my kids learn to read?" I was consumed with the reality that not only would I be working from home full-time, but I would also be responsible, along with my husband who also worked full-time, for the care and instruction of our two kids. I was hyper-focused on my obligation and responsibility to not only protect and care for my kids' physical bodies, but also to craft and lead their educational experiences and teach them during these crucial foundational years. This was anxiety-inducing because my children were at the age where they were building the fundamental skills that would contribute to their intellectual growth and development throughout their years in education and their adult lives. They were learning to sound out words and read short sentences. They were beginning to understand the basic mechanics of numbering sequences, and how those sequences contribute to addition and subtraction. In my mind, grasping these foundational concepts was critical to their

⁴⁴ See Romero, *supra* note 32, at 256.

⁴⁵ E.g., *158 Million Americans Told to Stay Home, but Trump Pledges to Keep It Short*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/03/23/world/coronavirus-updates-usa-world.html>.

primary and secondary educational experience, and ultimately their overall life trajectory.

Similar to many other parents around the world, I ordered workbooks, carved out space in our home for the kids to learn, and created daily schedules. When the learning became overwhelming for the family collective, the kids played outside in the yard for hours while I continued to worry, stress, and use these brief uninterrupted periods of time to get my work done. This was a familiar routine for many families. This cyclical experience of working nonstop among the various obligatory components of life was normalized as the most effective way to manage competing priorities simultaneously and as safely as possible. I believed that my ability to seamlessly transition between work and life was a blessing—the work-life balance part of the American Dream.⁴⁶

I had spent my first three years in academia as a full-time legal writing professor at a state university, where I was employed via one-year contracts renewable only by the dean. In 2020, I transitioned to a different law school as a full-time legal practice professor, again on a one-year contract renewed at the dean's discretion. While I received the offer at the end of 2019, the position began in July 2020, the point in the COVID pandemic where we still did not know much about the virus. Universities had not yet made decisions as to whether instruction would be virtual or in-person,⁴⁷ more people were being diagnosed with and dying from COVID daily,⁴⁸ and although I had a new job in a new city, my family was still living almost 150 miles from my new job. Once it was confirmed at my new institution that all classes would be taught via remote instruction for the fall semester, my family decided not to uproot in the midst of so much uncertainty. I was nervous about starting at a new school and doing so remotely, but I also had an inner confidence in the work I had done to prepare to be successful and effective in the Zoom classroom, and to ensure that my students retained the skills they needed to acquire in a first-year legal writing course. I had attended panels, presentations, and trainings on remote instruction and synchronous learning. I researched best pedagogical practices for virtual teaching and worked thoroughly to integrate active teaching concepts into my syllabi and curriculum materials. I was also hopeful that my preparation and hard work would be enough to support my application for a contract renewal at the end of the academic year.

As the semester approached for both my young children and me, my anxiety spiked. I was incredibly grateful for my flexible work schedule which provided the time and space for me to navigate my children's schooling. However, I was nervous about my own transition to a new institution that was categorized as

⁴⁶ See Clare Kelliher et al., *All of Work? All of Life? Reconceptualising Work-Life Balance for the 21st Century*, 29 HUMAN RESOURCES MANAGEMENT JOURNAL 97 (2018).

⁴⁷ E.g., Nick Anderson, *100 Public Universities to Watch for Coronavirus*, WASHINGTON POST (Aug. 26, 2020), <https://www.washingtonpost.com/education/2020/08/26/100-public-universities-to-watch-coronavirus/>.

⁴⁸ E.g., Noah Higgins-Dunn, *Covid Is Killing More than 2,000 People a Day in the U.S. as Infections and Hospitalizations Hit Records*, CNBC (Dec. 5, 2020, 3:59 PM), <https://www.cnbc.com/2020/12/05/covid-is-killing-more-than-2000-people-a-day-in-the-us-as-infections-and-hospitalizations-hit-records.html>.

“elite.” Questions about my capabilities and my short-term employment status swirled in my mind.

On the first day of class, I set up my office with my laptop and second monitor. I printed out my notes, placed them next to my workstation and left the room to get dressed. As I was dressing, I noticed that I was unable to lift my arms above my waist. I was trying to zip my dress and brush my hair, but the tasks were physically impossible. I had about an hour left before my class started, so I called my husband upstairs and told him about my inability to use my arms. I was very nonchalant and told him that I was just really nervous about my first day and that *other than being completely immobilized in my arm span*, I was fine! He zipped my dress, put my hair in a ponytail, and I went on to teach the class.

Once I began class that morning, I felt my adrenaline kick in, and while my mobility was severely limited, I found that I was still able to use the keyboard. I opened my computer and logged into my Zoom classroom. The students filtered in, and as my screen populated with new faces, I greeted them one by one. I gave my introductory remarks and paused to take a sip of water. As I tried to swallow the water, it felt like my throat was closing. It was so hard to swallow I almost choked. The combination of air and water filtering down my throat was too much for my body to handle. It took a maximum amount of effort to maintain my composure on the screen while being unable to swallow water in that moment. Despite my physical limitations and discomfort, I made it through the class and considered it a great success, especially in light of the circumstances. I closed the tabs on my screen and tried to stand up and stretch. As I attempted to rise from my chair, I felt incredibly weak, like my legs would collapse under the weight of my body. Over the years, I’d experienced varying autoimmune symptoms, but the weakness felt different this time.

As a person living with chronic pain and an invisible illness for years, I had primed myself to not complain about every little ailment. Although these symptoms were alarming, I attributed them to my nerves, anxiety, and exhaustion finally catching up with me. It never occurred to me that my body was shutting down—that the inability to move my arms, the difficulty swallowing, and the muscle weakness in my legs—were warning signs of something more serious. I had become so consumed by my responsibilities and obligations to care for others as a mom, kindergarten teacher, first-grade teacher, and law professor, that I’d forgotten about my obligations to myself.

Because I was not completely oblivious to the oddity of all these symptoms happening simultaneously, I decided to reach out to my long-time rheumatologist.⁴⁹ I am, after all, a risk-averse lawyer. Additionally, since logistically I could not really stand up from my desk, and typing with my arms strategically placed at my sides was one of the few physical movements I could manage, I decided to send my doctor an email through the patient portal. I logged into my account and typed a very cavalier message to my physician explaining the

⁴⁹ *Rheumatologist*, CLEVELAND CLINIC (Jan. 30, 2022), <https://my.clevelandclinic.org/health/Essays/22335-rheumatologist?view=print> [<https://perma.cc/BVV2-Q6ZW>].

symptoms. I ended the message by saying that this was probably “just an anxiety attack,” because I was very nervous about my new job. I hit send.

I managed to get myself to my bedroom despite the almost debilitating weakness in my legs. My steps were wobbly at best, and I used the walls for support. Once I’d made it to my bedroom, I laid down on the bed and fell asleep for three hours. When I awoke, my husband asked how I was feeling, and I told him much better. I reiterated that I must have been nervous and tired, and the nap was probably what I needed. I checked my phone and noticed a missed call and voicemail from my rheumatologist’s office. I listened to the voicemail and the urgency in my doctor’s voice caused me to immediately regret sending her the email. My intent was not to scare her but rather to keep her informed. She had left her personal cell phone number on the voicemail and told me not to call the office, but to call her directly and soon.

Before returning the call, I asked my husband to come in the room with me so I would not have to repeat the conversation. I called her back and she answered on the first ring. I will never forget how she answered the phone: “Hello, Ms. Jeffers, you need to go to the emergency room immediately.” I knew I had heard concern in her voice in the voice message, but I was still surprised at the seriousness of her tone. My response to my doctor’s prompting was, “Okay, I’ll go in two days after I teach my other two classes this week.” Although, she and my husband were both aghast, I found my response to be completely reasonable. I was a professional, I did not feel *that bad*, and it would not be fair to my students if I canceled their second class of law school when they were already struggling with so many other uncertainties. The silent subconscious conversation I was having internally was fear-based and focused on how weak and unprofessional I would appear to my new colleagues if I cancelled classes because I was not feeling well. And buried more deeply were thoughts about whether I’d even have a job to return to.

My doctor and my husband spent significant time negotiating with me, trying to persuade me that I was being completely ridiculous, and that I needed to take my health seriously. I was working a counter-effort to persuade them that I did not want to make waves at my new job, that my students were relying on me, and that I did not want to be seen as being unable to meet the challenge. Looking back on this conversation I am now filled with deep sorrow and regret.

Finally, after considerable back-and-forth, they convinced me to go to the emergency room at the nearest teaching hospital, which was a forty-five-minute drive from my house. My husband packed my bag because we knew, based on the conversation with my doctor, that I would be admitted. My husband, kids, and I piled into the car and drove to the hospital. This was during the height of the pandemic and emergency room waiting times were long.⁵⁰ Visitors and family

⁵⁰ E.g., David Wenner, *ERs Packed, Patients Waiting as COVID Fills Pa. Hospitals*, PENNLIVE (Dec. 6, 2021, 5:48 PM), <https://www.pennlive.com/news/2021/12/ers-packed-patients-waiting-as-COVID-fills-pa-hospitals.html>.

were not permitted,⁵¹ and so I sat masked and alone in the emergency room lobby for twelve hours. The ER was crowded, and although my doctor had called the hospital staff to give notice of my symptoms and arrival, there was nothing that could be done about the wait time.

After my name was finally called, and the battery of tests were run, as anticipated, I was admitted to the hospital. An attending physician and a resident explained to me that my condition was on the cusp of being life-threatening, but they were hopeful that their proposed inpatient treatment combined with rigid outpatient care would be successful. I was then administered a complex inpatient regimen of intravenous medications and steroid treatments.

B. Choice

Ever the optimist, I realized this was the first time in six months that I had been alone, and decided this would be a wonderful opportunity to catch up on work. I still had classes to teach, after all. I had spent the previous summer learning about different synchronous and asynchronous remote teaching options. I decided that despite being hospitalized, bedridden, immobilized, and connected to multiple IVs, I could still record a lecture off-camera and post it to my Canvas page.

I buzzed my nurses and kindly asked if they could ensure that I was not interrupted because I was going to be recording a lecture. They were so calm and generous, and they obliged, but I am sure in that moment they felt sorry for me. I recorded the lecture off-camera and navigated my corresponding slides as I spoke. I posted the recording to my course management page and felt proud of myself. I was feeling so accomplished that I also proceeded to teach my small six-student upper-level seminar synchronously off-camera. I did not share with the students that I was hospitalized but told them I was a bit “under the weather” so I would teach with my camera off. My goal was not to be a martyr, but to be perceived as competent and capable.

After recording a lecture and teaching a live off-camera seminar, I still had a bit of energy left. I decided that I needed to inform a few departmental colleagues and the dean of my status. I sent an overly apologetic and hyper-informative email about my hospitalization and treatment plan. I downplayed the diagnosis and my corresponding symptoms. I emphasized that this hospitalization would in no way detract from my ability to do my job. I was very intentional about maintaining a sense of positivity and reiterating my gratitude about having a position that allowed me to work while hospitalized. I wanted to reassure my colleagues that this was simply me keeping them in the loop and was not a request for assistance.

My colleagues and the dean all immediately wrote me back inquiring how they could support me. They asked whether I needed or wanted to take a leave of absence. They told me that my health and well-being was the top priority. They reassured me that they would support me however they could. They were genuine.

⁵¹ E.g., Katie Hafner, ‘*A Heart Wrenching Thing*’: *Hospitals Ban on Visitors Devastates Families*, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/health/coronavirus-hospital-visit-ban.html>.

They were worried about me. They were scared. My obsession with being perceived as capable, reliable, dependable, and dedicated to the work was so powerful, that I had tailored a story of well-being curated to assuage any indication of my dire health situation.

Deep in my subconscious mind was the looming fear that I was not enough, and any sign of weakness would expose my deficiencies. I was too scared to put in writing or say out loud that my one-year employment contract was the driving force behind these decisions and my behavior. I was terrified that my health crisis would in some way jeopardize the possibility of my contract renewal. I was hospitalized for seven days.

The recovery time from my autoimmune crisis was lengthy and intense. I struggled to walk upstairs by myself. I needed help sitting and standing. I went to physical therapy multiple times a week for months. I used mobility aids to assist with simple personal hygiene tasks. I was prescribed high dosages of steroid treatments in addition to my regular medication regimen. Through it all, I continued to teach my classes as if everything was normal.

C. Regret

It was not until several months into recovery that I was able to look back, honestly assess the experience, and understand how unwell I was at that moment. The inappropriateness and instability of my decision to teach while hospitalized and experiencing a devastating medical crisis was a clear indication of brokenness. After having the time and space to process this experience, I wanted to walk back through what led me to make the choice to teach while hospitalized. Doing this would require me to identify and assess not only the steps in my decision-making process, but the internal and external factors I believed in and relied upon in that process.

My assessment began with my pre-COVID personal narrative entering academia. Although I had a robust career practicing law, I became increasingly insecure about my educational background when I realized that most of my colleagues had “elite” educational pedigrees. My liberal arts undergraduate education and state school law degree became inferior in my mind—but it was not only in my mind. I had been told more than once by different legal academics that it would be nearly impossible to obtain a tenure-track position, or any kind of meaningful job security as a law professor with my educational background. As I sat in meetings focused on the desirability of law faculty candidates based on their credentials, my own insecurities about whether I actually belonged in legal academia were inflamed. I also started recognizing the disparity between myself as a legal practice faculty member and my colleagues on the tenure track. When I began to challenge these inequities, I was silenced. I was told that I had already overcome such improbability by breaking into academia, that it was best to simply appreciate my positionality. The implicit message was that I should be grateful for the unmerited space I was taking up where I did not actually belong.

Another contributing factor to my personal narrative was entering legal academia as a lower-status legal practice professor. I was repeatedly told that my

legal writing class was “the most important class” in the first-year curriculum.⁵² That affirmation made me feel valued and seen, but then I became aware of the gaping salary disparity between myself and similarly situated tenure-track colleagues. During the hiring process, I learned through an inadvertently forwarded email that I was being paid only half the salary of a tenure-track colleague. We had started on the same day and had similar backgrounds with clerkships and government work history. The glaring difference between us was not our publication record, nor was it our teaching experience, as we were both transitioning directly from practice with no full-time teaching experience. The singular difference between us was the track we were hired on and what the ABA Standards allowed administrators to do based upon those varying faculty tracks. Status as a badge was not vital to my happiness, but feeling secure and valued in my work, contribution, and position was important to me. Having the veil lifted to reveal the devaluing of legal practice instruction in the greater legal academy combined with the reality of the status and significant pay disparity, discolored my self-perception.

In contrast to the disparity, I felt a general sense of privilege to be part of the legal academic community. When I first joined legal academia, I attended the AALS New Law Teachers Conference.⁵³ It was a great opportunity to learn more about the profession and begin cultivating relationships. Becoming an effective teacher and impactful scholar was important to me. I found this conference to be incredibly helpful, especially considering I had spent a decade as a lawyer and had no previous experience as an academic. The undertone of the New Law Teachers Conference was that being a law professor was a privilege.⁵⁴ Law professors train new lawyers for the legal profession and impact law and society with prolific scholarship.⁵⁵

I actually believe both of these propositions, in part. I love my job. I love the work that we, as law professors, get to do. I love teaching law students to develop analytical skills they need to become effective practitioners. Additionally, it is a privilege to write scholarship that critiques systems, calls out hierarchies, and proposes changes to make the law more just. Law professors have an opportunity to improve legal systems and the legal profession with our teaching, scholarship, and service.

Further, I do recognize the improbability of my transition to legal academia. Law teaching jobs are hard to come by.⁵⁶ Even the most decorated and qualified candidates are sometimes rejected.⁵⁷ There are only so many classrooms, subjects, and students. When I examine my position as a law professor, I am filled

⁵² See Mark K. Osbeck, *What Is “Good Legal Writing” And Why Does It Matter*, 4 DREXEL L. REV. 417, 419, 467 (2012).

⁵³ *Workshop for New Law School Teachers*, ASS’N OF AM. L. SCHS., <https://nlt.aals.org> [<https://perma.cc/A455-N2JD>] (last visited Apr. 12, 2023).

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *Choosing an Academic Career*, N.Y.U. L., <https://www.law.nyu.edu/acp/choosing-academic-career#:~:text=The> [<https://perma.cc/SW6S-LHVD>] (last visited Oct. 12, 2023).

⁵⁷ *Id.*

with gratitude and joy. However, there is deep tension that exists between the overlapping realities of the privilege of teaching the law, gratitude for this privilege, and the marginalization of my current position in academia. The dissonance between these co-existing and seemingly contradictory realities is at times hard to balance.

As I worked to unravel the factors and beliefs that led to my harmful choice, it was important that I understood how my personal narrative, lived experience, and external signals each contributed to my ultimate decision to minimize my physical health and emotional well-being and teach while hospitalized. Mistakes, if acknowledged, can be learning opportunities. That choice was a mistake, but rather than punish myself for the terrible decision I made in the moment, I have decided to release the burden of regret. I now make the choice to be vulnerable and open in the discomfort of my truth. This vulnerability may serve as a mechanism that will guide my healing. I further hope to bring attention to these conceptual frameworks and support other marginalized academics who have faced similar experiences or will face similarly difficult choices at some point in their professional careers.

III. BROKEN BY DESIGN: THE STRUCTURAL FAILURES OF LEGAL ACADEMIA

“People get used to anything. The less you think about your oppression, the more your tolerance for it grows. After a while, people just think oppression is the normal state of things.”
~ Assata Shakur⁵⁸

For more than three decades, scholars across the legal academy have charted how the doctrine/skills divide entrenches a stratified faculty system that systematically marginalizes legal writing professors, roles which are disproportionately held by women.⁵⁹ The literature documents how this hierarchy is operationalized through titles, compensation, governance, and most consequentially, security of position under the American Bar Association’s Standards, particularly Standard 405(c)–(d).⁶⁰ Alongside diagnosis, this analysis offers concrete reforms: unifying titles, integrating faculty status, extending tenure or tenure-similar protections to all skills faculty, and restructuring faculties into departments that ensure parity while respecting disciplinary differences.⁶¹

Legal academia plays a pivotal role in shaping the future of the legal profession and driving societal change through research, scholarship, and

⁵⁸ ASSATA SHAKUR, ASSATA: AN AUTOBIOGRAPHY 331 (Lawrence Hill ed. 2001) (1987) (italics added).

⁵⁹ Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).

⁶⁰ Entrikin et al., *supra* note 4.

⁶¹ Larry Cunningham, *Dividing Law School Faculties into Academic Departments: A Potential Solution to the Gendered Doctrinal/Skills Hierarchy in Legal Education*, 67 VILL. L. REV. 679 (2022).

education.⁶² The procedural standards mandated by the ABA are the same for every law school. However, law schools have significant institutional latitude regarding the implementation of the standards. Chapter Four of the ABA Standards governs full-time faculty, including faculty qualifications, faculty size, instructional roles, responsibilities, and the professional environment.⁶³ ABA Standard 405, which governs the professional environment of full-time faculty, creates an inequitable positionality between tenure-track faculty, clinicians, and legal writing faculty.⁶⁴ The inequity exists based on the differing levels of security established by the Standards.

Although I had received the support of the administration and my faculty colleagues to focus on my health, ABA Standard 405(d), which places legal writing faculty in precarious employment positions, was a significant factor in my decision to teach while hospitalized. This section argues that the nested hierarchy within legal academia is supported by the ABA standards and rules governing faculty. And while not the driving force of the inequities, the ABA standards serve as a foundational component allowing law schools to perpetuate inequity among faculty. Individual institutions are capable of remedying these inequities by developing equitable statuses among differing faculty categories rather than complying with the requisite baseline set in the ABA Standards.

The hierarchical structures within legal academia reflect broader patterns of privilege and marginalization. Central to this hierarchy is ABA Standard 405, which codifies disparities among faculty by stratifying their roles, responsibilities, and protections. This section delves into the structural inequities embedded in legal academia, analyzing their historical roots and contemporary manifestations. The classification of faculty in legal education mirrors broader systems of exclusion in legal academia. Tenured and tenure-track faculty, who typically enjoy greater autonomy, compensation, and recognition, represent a privileged minority. In contrast, non-tenure-track faculty, including clinical and legal writing professors, often face lower salaries, heavier teaching loads, and limited opportunities for professional advancement. These disparities are institutionally driven, functioning as institutional choices providing no consistency across the academy. The codification of the minimal standards through the ABA accreditation standards, which reinforces a multi-tiered system of faculty status, allows institutions to make these institutional decisions.

This section situates these inequities within the context of Critical Legal Theory, exploring how race and gender intersect with faculty status to perpetuate marginalization.⁶⁵ By framing these issues as part of a broader pattern of structural inequity, the section underscores the urgent need for reform. It argues that the hierarchical structures of legal academia undermine the mission of legal education

⁶² See Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517 (2009).

⁶³ *Id.*

⁶⁴ See Entrikin et al., *supra* note 4.

⁶⁵ See Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41 (2009).

to promote justice and equity, calling for a re-examination of the policies and practices that sustain these disparities.

A. Reimagining Excellence: Power, Privilege and Hierarchy in Legal Education

This section explores how these hierarchies mirror broader societal inequities, particularly those tied to race, gender, and class.⁶⁶ It critiques the valorization of traditional scholarship and argues for a more inclusive understanding of academic excellence that recognizes diverse contributions. Legal academia is a historically elite and White space.⁶⁷ The elitism of legal academia dates back to the shift from the apprenticeship model of training new lawyers in the skillset of law practice to the current Langdellian framework of theoretical legal education.⁶⁸ As law schools were created around the country, graduates of only a handful of “elite” institutions began to fill the role of law teachers.⁶⁹

The pathway to legal academia became a rigid model of elite undergraduate and legal education, followed by prestigious federal clerkships, leading to exclusive fellowship programs designed to prepare candidates for academia. These individual steps built upon each other and the elimination of one step increased the likelihood of exclusion from the next step. Racial segregation, sexism, and financial viability in the college and law school admissions process further contributed to the exclusion of people of color, women, and first-generation law graduates from making the transition to legal academia in meaningful and significant numbers. This exclusion was and arguably remains foundational to the overwhelming Whiteness and maleness of legal academia.

Gender sits at the center of this stratification. Foundational work identified legal writing as feminized labor with heavy teaching and service loads, lower pay, and reduced advancement pathways.⁷⁰ Often framed as academic “office housework,” such indispensable but invisible labor is expected of (predominantly) women, and is undervalued.⁷¹ At the micro-level, studies of hierarchical microaggressions catalogue daily practices such as exclusion from committees, title-based disparagement, and presumptions of lesser expertise.⁷² These

⁶⁶ See Rosa Kim & Katrina Lee, *Asian American Inclusion in Legal Academia*, MICH. ST. L. REV.: MSLR FORUM (2022), <https://www.michiganstatelawreview.org/forum-1/2022/3/28/asian-american-inclusion-in-legal-academia>.

⁶⁷ See Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 294 (2016); see also Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER, L. & JUST. 352, 367 (2014).

⁶⁸ See Sheila I. Velez Martinez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585, 592 (2015).

⁶⁹ See Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 J. LEGAL EDUC. 614, 622 (2019).

⁷⁰ See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 118-28 (1997).

⁷¹ See Mary Bowman, *Legal Writing as Office Housework?*, 69 J. LEGAL EDUC. 22 (2019).

⁷² See Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN'S L.J. 3 (2020).

microaggressions normalize second-class status by reifying diminished value on tasks unrelated to scholarly productivity.⁷³

Race intensifies these harms. Narratives from women of color in legal writing reveal layered exclusion, stereotype threat, and disproportionate service expectations, some report being steered away from skills roles because of their stigmatized status.⁷⁴ The literature on designation underscores how titles both reflect and reproduce racialized and gendered hierarchies, with modified titles and non-tenure appointments signaling lesser legitimacy that can translate into lower pay and a curtailed voice in law school governance.⁷⁵

Scholars have readily studied the pragmatic impact of this phenomenon. Early accounts traced the marginalization of skills instruction to the Langdellian ascendance, which elevated appellate case analysis over practice-oriented competencies and valorized scholarship over pedagogy.⁷⁶ As law schools professionalized legal writing programs in the late twentieth century, they commonly did so through contingent, lower-paid, and governance-limited positions—a structure that produced what came to be called the “pink ghetto.”⁷⁷ Survey evidence from the Association of Legal Writing Directors (ALWD), the Legal Writing Institute (LWI), and the Center for the Study of Applied Legal Education (CSALE) through the 1990s–2010s corroborates persistent status gaps, pay disparities, and unequal voting rights for skills faculty even as schools expanded experiential requirements.⁷⁸

Scholars have long theorized that the Langdellian model of legal education marked a deliberate effort to recast law schools from institutions devoted primarily to vocational training into academic enterprises modeled after the broader university system.⁷⁹ This shift elevated theoretical inquiry and doctrinal analysis as the dominant modes of legal study.⁸⁰ Although this orientation continues to influence the legal academy, the ABA has mandated a broader approach that now includes experiential learning as a foundational component of legal education.⁸¹ Within this context, the profile of law faculty has expanded. While faculty have traditionally possessed elite educational backgrounds, the prevailing credentials

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Rachel López, *Unentitled: The Power of Designation in the Legal Academy*, 73 RUTGERS U. L. REV. 923 (2021).

⁷⁶ See Lucille Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111 (2015).

⁷⁷ Arrigo, *supra* note 70, at 118-28.

⁷⁸ Robert R. Kuehn et al., *The 2016-17 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. (CSALE) (2017); see also Robert R. Kuehn et al., *The 2019-20 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. (CSALE) (2020).

⁷⁹ See generally CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi–vii (1871) (describing the scientific method applied to the study of law).

⁸⁰ See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, 82 MICH. L. REV. 961, 971 (1983) (critiquing the elevation of doctrinal analysis over training in practice).

⁸¹ AM. BAR ASS'N, *supra* note 6, at r. 303(a)(3) (requiring experiential courses as part of the J.D. curriculum).

for most professors consisted of the bachelor's degree and the Juris Doctor.⁸² More recently, however, hiring committees have increasingly appointed faculty who, in addition to their legal training, hold doctoral degrees in other disciplines.⁸³ This development has considerable value, as such faculty bring methodological sophistication and interdisciplinary expertise that deepen scholarly inquiry and enrich legal education.⁸⁴

The value of doctoral training is not limited to the production of scholarship. Its greatest significance lies in the ability of such training to enrich pedagogy and to prepare students for practice in an increasingly interdisciplinary society.⁸⁵ Faculty who hold doctoral degrees are well positioned to translate complex theoretical constructs into teaching that renders doctrine accessible and contextually meaningful.⁸⁶ Their training allows them to frame law not merely as a body of rules but as a social institution embedded in political, economic, and cultural systems.⁸⁷ This pedagogical contribution is indispensable to modern legal education and warrants the active encouragement of doctoral candidates to pursue academic careers in law.⁸⁸

At the same time, the growing preference for doctoral credentials risks obscuring the importance of another vital form of expertise: substantial professional law practice. The privileging of doctoral training has the potential to create implicit hierarchies that elevate the scholar over the practitioner.⁸⁹ This tendency marginalizes faculty whose expertise is rooted in practice, even though these individuals provide essential instruction in the professional competencies that legal employers and clients demand.⁹⁰ Clinicians, trial advocates, and transactional specialists supply critical forms of knowledge that cannot be replicated by scholarly training alone.⁹¹ Yet these forms of expertise are often undervalued within the structures of faculty governance, hiring, and promotion.⁹²

A more comprehensive conception of legal education would recognize that doctoral training and law practice experience represent complementary forms of

⁸² ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 104–10 (1983).

⁸³ See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS*, 61–65 (2012) (describing increased hiring of faculty with Ph.D.s and the structural consequences for legal education).

⁸⁴ See Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 *J. LEGAL EDUC.* 65 (2013).

⁸⁵ See Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Nonpartisanship in Lawyering*, 72 *TEMP. L. REV.* 785, 793–95 (1999).

⁸⁶ See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515, 526–29 (2007).

⁸⁷ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 29–32 (2007).

⁸⁸ See Deborah Merritt, *Bias, Credentials, and the Legal Academy*, 82 *N.C. L. REV.* 1419, 1447–49 (2004).

⁸⁹ See Paul Campos, *The Crisis of American Law Schools*, 46 *U. MICH. J.L. REFORM* 177, 188–89 (2012).

⁹⁰ See Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355, 360–62 (2008).

⁹¹ See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 12–15 (2000).

⁹² Anthony Alfieri, *Against Practice*, 107 *MICH. L. REV.* 1073, 1080–82 (2009).

expertise. Each makes a distinct contribution to the three pillars of legal academia: teaching, scholarship, and service. Doctoral training introduces interdisciplinary methods and intellectual breadth.⁹³ Professional practice experience imparts judgment, practical skills, and the lived realities of lawyering. Both are indispensable, and neither should be regarded as secondary to the other. A legal academy that accords equal value to these backgrounds would ensure that law students graduate not only as competent practitioners, but also as reflective scholars, capable of situating their work within a broader intellectual and societal framework.⁹⁴

Teaching is the foundation of any institution of higher education.⁹⁵ Yet, within the legal academy, teaching has historically been positioned as less significant than scholarship in assessing faculty contributions.⁹⁶ This hierarchy reflects not only the longstanding elitism of legal academia but also the embedded structural divisions that impose disproportionate burdens on non-tenure-track faculty.⁹⁷

Scholars have documented the “pink ghetto” of legal education, a term used to describe the marginalization of legal writing faculty, who are predominantly women and occupy positions marked by lower status, reduced pay, and fewer opportunities for advancement.⁹⁸ Clinicians likewise experience inequities, as their scholarship, often grounded in practice and oriented toward lawyering skills, receives less recognition than traditional doctrinal work.⁹⁹ Although some institutions provide a form of clinical tenure, such arrangements may still be considered subordinate to standard tenure and perpetuate an unnecessary hierarchy based on role rather than contribution.¹⁰⁰

Multiple strands converge on the power of titles. Scholarship demonstrates that the unmodified title “Professor of Law” functions as cultural capital within faculties and with students, while designations such as “Professor of Legal Writing,” “Teaching Professor,” or “Professor of Practice” mark caste boundaries, regardless of actual qualifications or contributions.¹⁰¹ Empirical and doctrinal analyses connect title differentiation to concrete consequences: lower salaries,

⁹³ LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS*, 78–80 (2005).

⁹⁴ *Id.*

⁹⁵ See generally SULLIVAN ET AL., *supra* note 87, at 21–24 (emphasizing teaching as a central dimension of professional education).

⁹⁶ Juliano, *supra* note 17.

⁹⁷ See generally Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42–44 (1992) (criticizing the legal academy’s prioritization of scholarship over teaching).

⁹⁸ Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000).

⁹⁹ Barry, Dubin & Joy, *supra* note 91, at 15–17.

¹⁰⁰ See generally Alfieri, *supra* note 92, at 1078–80; Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1988–89 (2003) (discussing lower status of clinical tenure and its structural implications).

¹⁰¹ See Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 J. LEGAL WRITING 3 (2006).

weaker presumption of scholarly legitimacy, and diminished voting rights.¹⁰² Reformers therefore urge unification of titles as a low-cost, high-signal intervention that complements meaningful structural change.¹⁰³

Many non-tenure-track positions formally carry no scholarly requirement. Yet, faculty in these roles produce rigorous scholarship, both to contribute to the academy and to strengthen their claims to professional security. When non-tenure-track faculty publish, they assume labor beyond their official teaching-focused mandate. This additional work arises because teaching, though central to their appointments, is undervalued within the hierarchy of legal academia.¹⁰⁴ As a result, these faculty often pursue scholarship out of commitment to the field and in hopes of institutional recognition, but their efforts rarely yield tangible rewards in the form of job security, promotion, or pay equity. Contrary to stereotypes, legal writing professors produce substantial scholarship including doctrinal, empirical, and pedagogical works.¹⁰⁵ This scholarship advances both theory and practice.¹⁰⁶ Yet promotion criteria and informal norms often discount this work as “teaching-adjacent,” perpetuating the very hierarchy the literature critiques. Bibliographic and empirical studies document the breadth of publication by skills faculty, and normative accounts argue for unified standards that value teaching, service, and scholarship regardless of subject area.¹⁰⁷

The robust scholarly productivity of non-tenure-track law faculty has led to a rich body of legal scholarship that became the foundation for many virtual teaching methods widely adopted by law faculty during the COVID pandemic. Even still, there remains an ongoing debate within the legal writing community about whether the path to eliminating the precarity of these short-term contract faculty positions is unitary tenure, clinical tenure, or something that resembles neither.¹⁰⁸ What is clear, however, is that the hierarchy that exists amongst faculty statuses is nuanced and layered. Scholarly productivity is an important component of any academic community. Teaching and sound pedagogical practice is equally important. And service binds the community together. The legal academy should embrace the notion that the three pillars can co-exist in an equitable manner without devaluing any components of legal education.

¹⁰² See Ann McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585 (2017).

¹⁰³ See Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47 (2015).

¹⁰⁴ Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 50 (1996).

¹⁰⁵ Pollman & Edwards, *supra* note 101.

¹⁰⁶ *Id.*

¹⁰⁷ See Mary Beth Beazley, *Riddikulus!: Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 J. LEGAL WRITING 79 (1998–2000).

¹⁰⁸ See Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School's Experience*, 31 COLUM. J. GENDER & L. 65 (2015) (discussing competing models for integrating legal writing faculty into the tenure system and describing institutional debate over traditional tenure versus alternative frameworks); Entrikin et. al., *supra* note 4 (examining unitary tenure, clinical tenure, and long-term contract models as pathways to security of position for skills-focused faculty).

B. Precarity as Policy: The Role of ABA Standard 405(d)

Since 1952, the Council of the ABA Section of Legal Education and Admissions to the Bar has been the U.S. Department of Education's recognized national accrediting agency for JD programs.¹⁰⁹ Under this authority, the ABA promulgated standards and rules for all aspects of legal education.¹¹⁰ Standard 405 governs law faculty qualifications, size, instructional role, responsibilities and professional environment.¹¹¹ This Standard creates three categories of law faculty including tenured/tenure-track faculty, clinical faculty, and legal writing *teachers*.¹¹² Even in the language used in the standard, the ABA creates a clear status distinction among the three categories by using different terminology to identify the set of law faculty based on teaching criteria. ABA Standard 405(d) sets forth guidelines for legal writing positions within law schools, yet it fails to provide legal writing professors the same level of security of position afforded to tenured/tenure-track and clinical faculty.¹¹³ These codified distinctions of faculty status enhances precarity based on the inequity and lack of security for certain faculty built into the governing system.¹¹⁴

Legal writing faculty experience precarity due to the lack of protection required under the ABA Standards. The minimal security the ABA demands for legal writing faculty has led some law schools to hire legal writing professors on short-term contracts. Some clinicians might also experience precarity based on contractual employment status; however, ABA Standard 405(c) requires that clinicians have statuses "reasonably similar" to tenure.¹¹⁵ When law schools only adhere to the minimum requirements outlined in ABA Standard 405, they choose to maintain inequity among faculty not only in status, but in salary disparity and governance roles.¹¹⁶

While 405(b) protects tenure and academic freedom broadly, 405(c) affords clinicians only "reasonably similar" security, leaving 405(d) to minimally require "such security of position . . . as may be necessary," to hire and maintain legal writing teachers.¹¹⁷ This language in practice, permits short-term, contingent appointments without governance, pay, or security parity to colleagues of differing faculty statuses.¹¹⁸ The inequities fostered by 405(d) disproportionately burden women and faculty of color, undermining experiential education.¹¹⁹ Case studies of schools that placed legal writing on the tenure track demonstrate improved

¹⁰⁹ 34 C.F.R. § 602 (2023).

¹¹⁰ See AM. BAR ASS'N, *supra* note 6.

¹¹¹ See Entrikin et al., *supra* note 4.

¹¹² See *id.*

¹¹³ See AM. BAR ASS'N, *supra* note 33.

¹¹⁴ See Tiffany Jeffers, *The Choice to Stay in the Pink Ghetto*, 23 LEGAL WRITING. 41, 41-43 (2019).

¹¹⁵ See AM. BAR ASS'N, *supra* note 6.

¹¹⁶ Beazley, *supra* note 67, at 284.

¹¹⁷ See *id.* at 287.

¹¹⁸ See AM. BAR ASS'N, *supra* note 6.

¹¹⁹ Christopher, *supra* note 108.

equity and institutional benefits, while also revealing cultural resistance rooted more in status anxiety than in reasoned objections.¹²⁰

One of the main issues with Standard 405(d) is that it does not require institutions to provide specific protections for legal writing faculty, such as tenure or long-term contracts. Instead, it merely states that institutions “shall afford legal writing *teachers* such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.”¹²¹ Facially, the Standard outlines what appears to be specific guidelines for the hiring and retention of legal writing faculty. However, the Standards leave the unspoken specificities of the implementation of this Standard up to the individual law school administrations.¹²² While it is important that the rules identify the need to protect the academic freedom of legal writing faculty, without the protection and security of longevity and stability in their hiring mechanism, legal writing faculty experience precarity. The specific distinctions between Standards 405(b), (c), and (d) leave an opening of ambiguity which fosters the precarity associated with legal writing employment contracts.

Non-tenure-track faculty are employed in a myriad of varying contract statuses, including from one-year reviewable contracts to presumptively renewable long-term contracts and everything in between.¹²³ Tenured and tenure-track law faculty positions are not only a symbol of higher status within the legal academy, but their existence also offers tangible benefits from which contract-based law faculty are often excluded, such as higher salaries, research stipends, institutional voting rights, and security of position.¹²⁴

This vague language allows institutions to exploit loopholes and offer minimal protections that do not adequately safeguard legal writing faculty from arbitrary dismissal or non-renewal of contracts. Furthermore, creating separate faculty tracks based on teaching type enables institutions to justify and maintain pay disparity between those tracks. The lack of concrete protections under Standard 405(d) can have detrimental effects on the quality of legal education, both for student learning experiences and for faculty professional development.¹²⁵ Moreover, the precarious employment conditions faced by legal writing faculty can have a detrimental impact on the quality of legal education. Faculty who are constantly worried about their job security may feel they have limited agency in making choices about their teaching, scholarship, or even their own physical well-being.

¹²⁰ *Id.*

¹²¹ AM. BAR ASS’N, *supra* note 33.

¹²² *See id.*

¹²³ Beazley, *supra* note 67, at 284.

¹²⁴ Beazley, *supra* note 67, at 283-84 (noting also that the voting rights for clinical faculty is also institution specific and potentially excludes working members of the full-time faculty).

¹²⁵ *See* KerryAnn O’Meara et al., *Earning Professional Legitimacy: Challenges Faced by Women, Underrepresented Minority, and Non-Tenure-Track Faculty*, 120 TCHR. COLL. REC. 1, 18 (2018).

C. Crisis Upon Crisis: How the Pandemic Exposed Existing Inequity

Legal writing faculty, categorized as “skills” professors, and particularly those in short-term contracts experienced burdening precarity during the COVID pandemic. However, contract faculty were not the only group to face heightened precarity. Untenured tenure-track faculty also encountered uncertainty as they approached critical stages of the tenure process.¹²⁶ The experiences of both groups reveal the structural hierarchies of legal academia. What distinguished the experience of legal writing faculty was not precarity itself, but the form that precarity assumed.¹²⁷

The transition to remote learning highlighted these differences. Legal writing faculty had long relied on iterative assessments, individualized feedback, and conferencing.¹²⁸ These pedagogical methods were immediately transferable to the digital classroom and became central to sustaining student-centered learning.¹²⁹ This shift underscored the pedagogical value of the time-intensive practices that have long characterized legal writing pedagogy, individual assessment, direct and timely feedback on interim assignments, and sustained, engaged learning beyond the Socratic dialogue.¹³⁰ The moment drew on the particular expertise of legal writing professors and naturally broadened the scope of their teaching responsibilities in partnership with doctrinal colleagues, making visible how essential skills faculty are to the core functioning of legal education, even as the structures of the academy continued to place them at its margins.¹³¹

Gendered expectations intensified the demands on legal writing faculty.¹³² Legal writing professors are disproportionately women and often cast as

¹²⁶ See Deo, *supra* note 42 (presenting empirical data showing that untenured faculty, including pre-tenure tenure-track professors, were uniquely vulnerable during the pandemic because they lacked the protections of tenure while facing significant disruptions to research productivity, heightened caregiving burdens, and increased institutional expectations).

¹²⁷ See Brenda D. Gibson, *Teaching in the Midst of Trauma*, 27 J. LEGAL WRITING INST. 251 (2023).

¹²⁸ See Sherri Lee Keene, *Are We There Yet?: Aligning the Expectations and Realities of Gaining Competency in Legal Writing*, 53 DUQ. L. REV. 99 (2015) (discussing the role of assessments and individualized feedback in building students' legal writing competence and arguing that these tools are essential to developing legal writing proficiency).

¹²⁹ Nina Kohn, *Teaching Law Online: A Guide for Faculty*, 70 J. LEGAL EDUC. 230, 237–39 (2021).

¹³⁰ See Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227 (2015) (arguing that legal writing pedagogy must center frequent, formative assessment and individualized feedback loops in order to move beyond the passive Socratic lecture format and engage students in active, sustained learning through iterative drafts, peer review, self-assessment and instructor guidance).

¹³¹ See Jessica Lynn Wherry & Frances C. DeLaurentis, *A Pathos-Infused Approach to Teaching Legal Research and Writing: A Lesson to Carry Forward from the Pandemic*, 29 PERSPS. TEACH. LEGAL RES. & WRITING 58 (Spring 2022) (arguing that the shift to remote legal writing instruction during COVID-19 revealed the deep value of labor-intensive, individualized feedback loops, interim assessments, and sustained engagement beyond the Socratic method).

¹³² See Cunningham, *supra* note 61 (examining how the longstanding separation between doctrinal and skills faculty rooted in gendered hierarchies marginalizes legal writing and other skills professors despite their central role in delivering core pedagogical functions, and proposing structural reforms to recognize and elevate their contributions).

“caretakers” of student development.¹³³ During the pandemic, students and administrators increasingly sought them out for mentorship, reassurance, and emotional support.¹³⁴ Requests for individual meetings and guidance multiplied. This additional labor was invisible within formal structures of recognition. At the same time, untenured tenure-track faculty carried substantial burdens of their own. They were expected to maintain scholarly productivity while adjusting their teaching, managing family responsibilities, and navigating uncertainty about tenure.¹³⁵ Yet the tenure-track, at least in theory, offers eventual security and promotion. Non-tenure-track legal writing faculty labored under conditions where loss of employment was an immediate risk and where prospects for advancement were minimal.¹³⁶

The paradox is evident. At the moment when their pedagogical expertise was indispensable, legal writing faculty occupied the most vulnerable of institutional faculty positions. They designed innovative teaching materials, facilitated student access to remote learning, and sustained engagement in the digital environment. These contributions came at a great personal cost. Scholarly productivity declined. Caregiving responsibilities intensified. Insecurity about contract renewal deepened.¹³⁷ For tenure-track faculty, precarity was situational, linked to the timing of promotion and tenure decisions.¹³⁸ For non-tenure-track faculty, precarity was systemic, embedded in the governance of law schools themselves.¹³⁹ The pandemic underscored the fragility of existing hierarchies. It revealed the degree to which legal education relies upon the undervalued labor of skills faculty. It also exposed the insufficiency of current institutional structures for supporting both tenure-track and non-tenure-track professors.¹⁴⁰

Some administrators contend that extending tenure or equivalent protections to skills faculty would divert scarce resources from the core research mission and create inflexibility in staffing during enrollment shocks. They argue

¹³³ Cassandra Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RES. HIGHER EDUC. 672, 681–82 (2017).

¹³⁴ See Pryal, *supra* note 41 (observing that during the COVID-19 pandemic, legal writing and other skills faculty became “front-line faculty,” providing expanded mentorship, emotional support, and student-wellness assistance, and shouldering disproportionate relational and institutional labor as students and administrators increasingly relied on them).

¹³⁵ See Deo, *supra* note 42.

¹³⁶ AM. ASS’N OF UNIV. PROFESSORS, *CONTINGENT FACULTY AND THE GLOBAL PANDEMIC* (2020), <https://www.aaup.org/news/contingent-faculty-and-global-pandemic>.

¹³⁷ Jessi L. Smith, L. Lynn Vidler & Michele S. Moses, *The “Gift” of Time: Documenting Faculty Decisions to Stop the Tenure Clock During a Pandemic*, 47 INNOVATIVE HIGHER EDUC. 875, 879 (2022).

¹³⁸ See Maria A. Holland et al., *Extended Time, Elevated Expectations: The Unappreciated Downsides of Pausing the Tenure Clock*, 121 PROC. NAT’L ACAD. SCIENCE 34 (2024).

¹³⁹ AM. ASS’N OF UNIV. PROFESSORS, *ANNUAL REPORT ON THE ECONOMIC STATUS OF THE PROFESSION 2024-25* (2025), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/annual-report-economic-status-profession-24-25>.

¹⁴⁰ Ryan Quinn, *Tenure Extensions Were Popular Amid the Pandemic. That May Not Be Good.*, INSIDE HIGHER ED (Feb. 1, 2024), <https://www.insidehighered.com/news/faculty-issues/tenure/2024/02/01/tenure-clock-delays-debatable-fix-popular-amid-pandemic>.

that contingent appointments enable rapid pedagogical pivots and protect the scholarly enterprise when budgets tighten.¹⁴¹

The literature suggests that while the benefits afforded to faculty across statuses, the precarity experienced by contract legal writing faculty imposes real costs on teaching quality, academic freedom, and equity.¹⁴² However, institutions still rely on the expertise of legal writing faculty to meet pedagogical mandates and the bar's practice-readiness goals, despite the associated burdens placed on contract faculty.¹⁴³ Schools that placed legal writing faculty on tenure lines report benefits for recruitment, retention, and curricular innovation without the parade of negative outcomes predicted by opponents.¹⁴⁴

Lasting reform requires more than temporary recognition of teaching excellence. It requires structural redesign. Law schools must create systems that value teaching and scholarship alike. They must provide meaningful security, resources, and opportunities for advancement to all faculty members. Without such measures, the inequities made visible by the pandemic will remain entrenched, and the brokenness of the legal academy will persist.

IV. THE COST OF SURVIVAL: CHALLENGES FOR MARGINALIZED LAW FACULTY

“And when we speak, we are afraid our words will not be heard or welcomed. But when we are silent, we are still afraid. So, it is better to speak remembering we were never meant to survive.” ~ Audre Lorde¹⁴⁵

The theory of *weaponized gratitude* illustrates how the combination of my educational pedigree, professional experience, and role as a non-tenure-track professor weakened my ability to advocate for myself while seeking the status and pay equity I deserved. The institutions and systems that I was working to change categorized me as already having exceeded my potential and trajectory. They signaled that I should remain in a place of perpetual gratitude. The benefits of gratitude and a positive mindset were weaponized and used as silencing tools to my personal detriment.¹⁴⁶ In addition to my silence, the weaponization of gratitude led to my subconscious belief that if I simply worked harder and produced more, my acceptance into this space would be warranted. Working to gain acceptance in

¹⁴¹ McGinley, *supra* note 102, at 586–88.

¹⁴² See Christopher, *supra* note 108.

¹⁴³ See Arrigo, *supra* note 70, at 118–28.

¹⁴⁴ See Beazley, *supra* note 107.

¹⁴⁵ AUDRE LORDE, *THE BLACK UNICORN: POEMS* 31 (W.W. Norton & Company 1995) (1978) (italics added).

¹⁴⁶ See SARA AHMED, *ON BEING INCLUDED: RACISM AND DIVERSITY IN INSTITUTIONAL LIFE* 60–65 (2012) (explaining how institutions demand gratitude and positivity from marginalized individuals as a condition of belonging, thereby suppressing complaint and critique); see also Arlie R. Hochschild, *Emotion Work, Feeling Rules, and Social Structure*, 85 AM. J. SOC. 551, 558–59 (1979) (introducing the concept of “feeling rules,” which are institutionalized expectations that individuals display socially sanctioned emotions).

certain spaces as a way to prove belonging, at the expense of your physical, mental, or emotional well-being, is *toxic productivity*.¹⁴⁷

The phenomena of weaponized gratitude and toxic productivity operate as dual mechanisms of control within the legal academy, perpetuating inequity and exploitation.¹⁴⁸ This section critically examines these concepts, arguing that they are not merely individual experiences, but systemic issues deeply embedded in the culture and governance of legal academia. Weaponized gratitude manipulates the emotion of gratitude because of hierarchical frameworks to garner compliance and acceptance of inequitable conditions.¹⁴⁹ In legal academia, this often manifests as expectations for non-tenure-track faculty to express gratitude for positions that, while offering professional opportunities, are fundamentally exploitative.¹⁵⁰ This dynamic is particularly harmful for marginalized faculty, who may feel compelled to internalize gratitude as a survival mechanism within an exclusionary system.¹⁵¹

Toxic productivity, on the other hand, reflects the pervasive expectation to maintain high levels of professional output, even at significant personal cost.¹⁵² This culture of overwork is deeply entrenched in legal academia, where prestige is often tied to relentless productivity.¹⁵³ For non-tenure-track faculty, the pressure to demonstrate value through excessive output is compounded by fears of job insecurity and professional marginalization.¹⁵⁴ The COVID pandemic magnified these dynamics, as faculty were expected to balance extraordinary personal challenges with uninterrupted professional performance.¹⁵⁵

This section engages with interdisciplinary scholarship from sociology, psychology, and organizational studies to analyze the structural and cultural forces

¹⁴⁷ See WILLIAMS, *supra* note 29; see also BLAIR-LOY, *supra* note 29.

¹⁴⁸ Marcia L. Bellas, *Emotional Labor in Academia: The Case of Professors*, 61 ANNALS AM. ACAD. POL. & SOC. SCI. 96, 97–99 (1999) (discussing how affective regulation and unpaid emotional work reinforce inequity in academic hierarchies); see also SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 93–94 (2004) (arguing that institutional norms around gratitude and happiness sustain systems of domination).

¹⁴⁹ SARA AHMED, *COMPLAINT!* 142–43 (2021) (explaining how gratitude and positivity are institutional affective norms used to neutralize dissent within universities).

¹⁵⁰ See generally Beazley, *supra* note 34, at 1037–41 (arguing that ABA Standard 405 institutionalizes inequitable hierarchies among law faculty).

¹⁵¹ See Weresh, *supra* note 26 at 152–54.

¹⁵² See BLAIR-LOY, *supra* note 29, at 5–7; see also WILLIAMS, *supra* note 29, at 71 (identifying the “ideal worker norm” that links professional legitimacy to overwork and emphasizing the propensity for lawyers to engage in overwork).

¹⁵³ See Jenna Mittelmeier, *The Glorification of Overwork in Academia and Its Impacts on Our Collective Wellbeing*, VOICES OF ACADEMIA (Mar. 31, 2023), <https://voicesofacademia.com/2023/03/31/the-glorification-of-overwork-in-academia-and-its-impacts-on-our-collective-wellbeing-by-jenna-mittelmeier/>.

¹⁵⁴ See generally Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the Ideal Worker*, HARV. BUS. REV. (2020) (explaining how COVID-19 intensified expectations of uninterrupted productivity despite personal and caregiving burdens); see also AM. ASS’N OF UNIV. PROFESSORS, *THE STATUS OF NON-TENURE-TRACK FACULTY* (2019), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/status-non-tenure-track-faculty>.

¹⁵⁵ See generally Deo, *supra* note 42, at 131–32; see also Williams, *supra* note 154 (explaining how COVID-19 intensified expectations of uninterrupted productivity despite personal and caregiving burdens).

that sustain weaponized gratitude and toxic productivity.¹⁵⁶ It argues that these phenomena are not isolated occurrences but systemic features of an inequitable academic environment. By exploring their impact on faculty well-being and professional trajectories, this section highlights the need for systemic change to disrupt these harmful patterns.¹⁵⁷

A. Weaponized Gratitude: The Demand for Compliance and Silence

Gratitude as a practice and mindset is not simply a beneficial exercise, but an important state of being. However, there is potential for both the conceptual and practical aspects of gratitude to be used against those who seek equity in their professional capacity. When gratitude is wielded against the most vulnerable members of a particular community, it becomes an instrument of harm weaponized to maintain the inequitable status quo. Weaponized gratitude is the tendency to use the gratitude of specific populations or individuals as a tool to excuse oppressive and harmful workplace wrongs, including pay and status disparity, unfair workload distribution, and micro-aggressions, against marginalized members of the community.

Conceptually, the psychology and philosophy literatures distinguish between targeted gratitude (directed toward an identified benefactor) and generalized or propositional gratitude (a diffuse attitude of appreciation).¹⁵⁸ Overexpansive moralizing of gratitude risks collapsing it into obligation, indebtedness, or deference, especially in contexts of injustice.¹⁵⁹ Empirical and theoretical work further differentiates gratitude from indebtedness and shows that prescriptive gratitude can morph into compliance norms that undermine justice claims.¹⁶⁰

Empirically, social-power studies demonstrate that gratitude expressions by disadvantaged groups after aid from high-power groups can reduce willingness to protest injustices and pursue structural remedies, while interventions that pivot gratitude toward solidarity (rather than deference) mitigate those effects.¹⁶¹ Related

¹⁵⁶ See Sarkar et al., *supra* note 28; see also Salamon, *supra* note 28; see also Bellini & Lomazzi, *supra* note 28.

¹⁵⁷ Beazley, *supra* note 34, at 1043–45.

¹⁵⁸ See Nick Hebbink, Anders Schinkel & Doret de Ruyter, *Does Dyadic Gratitude Make Sense? The Lived Experience and Conceptual Delineation of Gratitude in Absence of a Benefactor*, 57 J. VALUE INQUIRY 423 (2023) (describing the distinction between “targeted” or “personal” gratitude (gratitude to a benefactor for an act) and “generalized” or “propositional” gratitude (gratitude that some beneficial state of affairs p holds) and tracing the literature in psychology and philosophy).

¹⁵⁹ See Liz Jackson, *Why Should I Be Grateful? The Morality of Gratitude in Contexts Marked by Injustice*, 45 J. MORAL EDUC. 276, 277–85 (2016).

¹⁶⁰ See Philip Watkins et al., *The Debt of Gratitude: Dissociating Gratitude and Indebtedness*, 20 COGNITION & EMOTION 2, 217–241 (2006).

¹⁶¹ Inna Ksenofontov & Julia C. Becker, *The Harmful Side of Thanks: Thankful Responses to High-Power Group Help Undermine Low-Power Groups’ Protest Intentions*, 46 PERS. & SOC. PSYCHOL. BULL. 794 (2020) (finding across multiple experiments that when members of disadvantaged groups expressed gratitude for aid provided by a high-power group, their willingness to protest injustices and pursue collective action decreased).

studies warn of a “gratitude trap,” where beneficiaries internalize obligations that suppress complaint and mobilization.¹⁶²

Historically and culturally, gratitude has been racialized. Across Victorian and imperial archives and in contemporary cultural critique, there are repeated demands that racialized and colonized people perform gratitude for even minimal protection or conditional inclusion.¹⁶³ Philosophers of moral education argue that teaching gratitude without attention to injustice can reproduce subordination, especially where thanks are demanded for mere non-maleficence or for benefits that entrench dependency.¹⁶⁴

In higher education, scholarship on precarious and dualized labor shows how gratitude norms differentially burden those in contingent roles, naturalizing overwork, invisible service, and suppressed voice.¹⁶⁵ Comparative labor analyses frame dualization as a power/interest equilibrium that perpetuates secondary tracks, with gratitude expectations operating as soft controls.¹⁶⁶ Studies of early-career academics link insecurity to structural conditions and identify what individual-level antecedents (e.g., mobility, time for research, networks) can and cannot buffer.¹⁶⁷

The hierarchical structure of legal academia is one of the haves and the have-nots.¹⁶⁸ The most powerful members in academia are those who have elite law degrees and prestigious practice experience.¹⁶⁹ When people outside of these two categories successfully penetrate the legal academic market and obtain jobs in legal academia, it is sensible that they would experience robust gratitude because all signs indicate the unlikelihood of their success in breaking into legal academia. However, when the lived experiences of these members of the legal academic community begin to feel indicative of unfair work practices, lower pay, and precarious status, gratitude becomes a burden.

In legal academia, mixed-methods empirical work documents intersectional bias faced by women and faculty of color, including heavier service loads, presumption of incompetence, and classroom confrontation, dynamics that

¹⁶² See Sean Chung, *The Gratitude Trap* (2023) (M.A. Thesis, Univ. at Albany, State Univ. of N.Y.), <https://scholarsarchive.library.albany.edu/legacy-etd/3100/> [<https://doi.org/10.54014/42MK-4P91>]; see also Daniel Lyons, *The Odd Debt of Gratitude*, 29 ANALYSIS 3 (1969).

¹⁶³ See Robert Burroughs, *The Racialization of Gratitude in Victorian Culture*, 25 J. VICTORIAN CULTURE 477, 478–86 (2020).

¹⁶⁴ See Blaire Morgan, Liz Gulliford & David Carr, *Educating Gratitude: Some Conceptual and Moral Misgivings*, 44 J. MORAL EDUC. 97 (2015) (arguing that educational approaches to gratitude that ignore injustice or power imbalances risk promoting dependence and subordination rather than genuine moral agency).

¹⁶⁵ See Blake A. Allan, Kelsey L. Autin & Kerrie G. Wilkins-Yel, *Precarious Work in the 21st Century: A Psychological Perspective*, 126 J. VOCATIONAL BEHAV. 103491 (2021).

¹⁶⁶ See Arthur Corazza, *Power, Interest, and Insecurity: A Comparative Analysis for Workplace Dualization in Europe*, THE LOND. SERIES OF ECON. & POL. SCI.: LSE EUROPE IN QUESTION DISCUSSION PAPER SERIES (2020).

¹⁶⁷ See Renate Ortlieb & Silvana Weiss, *What Makes Academic Careers Less Insecure? The Role of Individual-Level Antecedents*, 76 HIGHER EDUC. 571, 575–83 (2018).

¹⁶⁸ See Ann Schiavone, *A Tale of Two Disciplines: Legal Writing – A World of Haves and Have Nots*, 6 STETSON L. REV. FORUM 1 (2023).

¹⁶⁹ See DEO, *supra* note 18.

interact with gratitude scripts (“be grateful to be here”) to chill advocacy for parity.¹⁷⁰ Legal writing scholars have demonstrated through both narrative and doctrinal work that gratitude is not merely personal sentiment, but a tool within a wider status system that influences faculty compensation, titles, participation in governance, and long-term job security.¹⁷¹ Trauma-informed teaching accounts from legal writing faculty underscore how crisis contexts intensify invisible care labor and amplify gratitude expectations on those already in precarious roles.¹⁷²

Together, these ideas show how gratitude can be weaponized in hierarchical settings. It turns into obligation, suppresses protest, and is demanded more from low-power and racialized groups. For law schools, the implication is not to reject gratitude wholesale, but to redesign policies so that gratitude points upward toward institutional accountability and solidarity, rather than downward toward deference to power.

Speaking up and speaking out against these inequities creates a “rocking the boat” phenomenon,¹⁷³ where the individuals experiencing the harmful impact place themselves in peril by working to create a safer and more equitable existence for themselves and others similarly situated. When marginalized communities in legal academia begin to point out systemic and structural inequities, they are silenced with polite, and sometimes not so polite reminders that they should remain grateful to simply just be here, as their pedigree is insufficient for the space they take up.¹⁷⁴ The consistent use of gratitude as an oppressive weapon can damage the psyche of marginalized persons in academic spaces.¹⁷⁵ Even when the weaponization is non-verbal, the signaling used within legal academia is sufficient to indicate to these communities that they should simply “be grateful.”¹⁷⁶

Recognizing how these subtle signals operate makes clear that addressing the problem requires structural change rather than merely urging individuals to resist the gratitude script. Implications for policy include: (a) eliminating status signals that trigger gratitude scripts, for example, title modifiers that encode caste; (b) replacing contingent appointments with tenure/long-term renewable security that protects voice; (c) rebalancing service and care workloads with formal

¹⁷⁰ See Deo, *supra* note 3, at 943.

¹⁷¹ See Durako, *supra* note 59 (documenting how structural inequities in pay, titles, governance participation, and job security for legal writing faculty are sustained through cultural expectations that skills faculty express gratitude for limited institutional inclusion); Jack L. Sammons, *Legal Writing Scholarship, Making Strange, and the Aesthetics of the Law*, 61 MERCER L. REV. 925 (2010) (exploring how legal writing scholarship articulates the distinct role of writing faculty in shaping legal education, and how their scholarly voice frequently acknowledges relational and normative expectations).

¹⁷² Gibson, *supra* note 127.

¹⁷³ *To Rock the Boat*, COLLINS DICTIONARY (2025) (a phrase that means someone is upsetting a calm situation and causing trouble); see also *Boat-rocker*, MERRIAM-WEBSTER (2025) (someone who challenges the status quo).

¹⁷⁴ See Allen, *supra* note 28, at 599.

¹⁷⁵ See generally AHMED, *supra* note 149, at 140–44 (arguing that institutional gratitude demands suppress resistance and harm the psychological wellbeing of marginalized individuals).

¹⁷⁶ BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 35–37 (1994) (observing that will to include those considered “marginal” without a willingness to accord their work the same respect and consideration given other work).

recognition; and (d) reframing student-facing “professionalism” to separate civility from compelled thankfulness.¹⁷⁷ To the extent that professional identity instruction encourages students to adopt gratitude as a professional norm, it should be accompanied by justice-literacy that clarifies when gratitude is ethically inappropriate in environments marked by structural inequity.¹⁷⁸

Together, these insights show that entrenched norms sustain this dynamic and that weaponized gratitude intensifies precarity by limiting professional autonomy.¹⁷⁹ It has also considered the psychological toll of weaponized gratitude, showing how it reinforces precarity and undermines professional autonomy.

B. Toxic Productivity: The Exploitation of Invisible Labor

Toxic productivity is the persistent pursuit and completion of professional obligations despite significant physical, emotional, situational, or psychological impairment. It reflects a maladaptive orientation toward work in which individual worth, contribution, and value are measured primarily by professional efficacy and task completion, often at the expense of personal health and well-being.¹⁸⁰ Within this framework, overwork functions as a compensatory mechanism: when individuals perceive themselves as unqualified, unwelcome, or undervalued, they may equate relentless productivity with legitimacy and belonging.¹⁸¹ Such dynamics may be rooted in perceived deficits of pedigree, status, or institutional capital.¹⁸²

This subsection examines how these patterns are embedded within the culture of legal academia, particularly among faculty in non-tenure-track or otherwise precarious appointments.¹⁸³ The analysis further explores the structural and cultural conditions that sustain toxic productivity and considers its disproportionate impact on marginalized faculty members, whose intersecting identities intensify pressures related to credibility, performance, and inclusion.¹⁸⁴

¹⁷⁷ See Beazley, *supra* note 34, at 1037–45.

¹⁷⁸ See Sturm & Guinier, *supra* note 86.

¹⁷⁹ See generally Bellas, *supra* note 148, at 97–99 (documenting how emotional expectations and institutional cultures sustain inequities in higher education); JOAN C. TRONTO, *CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE* 146–49 (2013) (describing how systemic undervaluation of care and emotional labor undermines autonomy and reproduces structural subordination).

¹⁸⁰ CHRISTINA MASLACH & MICHAEL P. LEITER, *THE TRUTH ABOUT BURNOUT: HOW ORGANIZATIONS CAUSE PERSONAL STRESS AND WHAT TO DO ABOUT IT* 17–19 (1997) (describing how chronic overwork degrades health and morale).

¹⁸¹ See BLAIR-LOY, *supra* note 29, at 5–8 (articulating the “work devotion schema” as a moralized equation between worth and output).

¹⁸² See generally WILLIAMS, *supra* note 29, at 61–64 (arguing that perceived status deficits drive individuals to compensate through overwork to signal legitimacy).

¹⁸³ See generally Beazley, *supra* note 34, at 1037–64 (discussing how institutional design embeds inequities that heighten pressure for contingent faculty to overperform).

¹⁸⁴ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244–46 (1991) (explaining how intersecting identities intensify vulnerability and marginalization in institutional settings).

The COVID pandemic brought a profound recalibration of priorities within higher education.¹⁸⁵ During the lockdown period, institutions focused intensely on the care and support that students required at the time to navigate unprecedented challenges. Universities and law schools emphasized student well-being and continuity of learning, asking faculty to extend their availability, adapt rapidly to virtual platforms, and sustain levels of engagement on video conferencing platforms that approximated the in-person classroom experience.¹⁸⁶ Administrators were likewise committed to ensuring that students received an educational experience that retained academic rigor and human connection despite the constraints of remote instruction.

This abrupt shift to online learning brought pedagogy to the forefront of institutional consciousness. In legal education, it highlighted the centrality of teaching as a scholarly and professional craft.¹⁸⁷ For many faculty members, particularly those in legal practice, writing, and skills-based positions, the pandemic created new opportunities to contribute their expertise in curriculum design, instructional innovation, and student engagement. Legal writing faculty, long recognized for their pedagogical strength, became essential in guiding schools through this transformation.¹⁸⁸ While rhetoric and skills scholarship have, at times, been undervalued in comparison to doctrinal or theoretical research, its pedagogical grounding positioned these faculty as leaders in a moment when effective teaching became an institutional imperative.

For law faculty across statuses, this heightened attention to pedagogy offered both opportunity and complexity.¹⁸⁹ On one hand, it validated the enduring importance of teaching and affirmed the value of those whose work centers on the development of practice-ready graduates. On the other, it intensified existing inequities in academic recognition and reward structures, particularly where pedagogical excellence is celebrated rhetorically but remains less institutionally compensated.¹⁹⁰ Many faculty members, myself included, perceived this as a moment to demonstrate our worth to our students, our institutions, and the broader legal academy, by producing more, performing better, and proving indispensable.¹⁹¹ This impulse, though understandable, sometimes manifested as

¹⁸⁵ Philip G. Altbach & Hans de Wit, *COVID-19: The International Impact on Higher Education*, 27 INT'L HIGHER EDUC. 3, 3–5 (2020) (noting that the pandemic restructured institutional priorities toward continuity and student support); see also Karin Mika, *The Pandemic and Resisting the Lure of the 24/7 Legal Writing Professional*, 34 No. 2 LWI: THE SECOND DRAFT 1 (2021).

¹⁸⁶ See generally Williams, *supra* note 154 (explaining how COVID-19 entrenched unrealistic productivity expectations).

¹⁸⁷ See generally Melissa H. Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. LEGAL EDUC. 538 (2017) (recognizing teaching as a core intellectual contribution deserving structural protection).

¹⁸⁸ See Emily A. Kline, *Teaching Social Justice in the Legal Writing Classroom Through Personal Narrative*, 25 J. LEGAL WRITING 29 (2021).

¹⁸⁹ See generally TRONTO, *supra* note 179, at 145–49 (emphasizing that care-focused labor, such as teaching and mentoring, is often undervalued in hierarchical organizations).

¹⁹⁰ Entrikin et al., *supra* note 4, at 1–51.

¹⁹¹ ARLIE R. HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–8 (1983) (linking emotional labor to institutional reward systems that reinforce overperformance and self-sacrifice).

toxic productivity: the internalized belief that relentless output could secure belonging or mitigate the precarity of one's professional status.¹⁹²

Toxic productivity reflects a deeply ingrained expectation to sustain extraordinary levels of performance, often at the expense of personal well-being.¹⁹³ Yet, true equity and inclusion in academia cannot emerge solely through the individual labor of those most marginalized within it.¹⁹⁴ Without corresponding structural reforms by institutional leadership, the efforts of vulnerable faculty to “outwork” inequity can inadvertently reinforce the very hierarchies they seek to transcend.¹⁹⁵ The pandemic's intense focus on pedagogy offered both a cautionary tale and an aspirational model: it illuminated the centrality of teaching across all faculty roles, while also revealing the need to equitably value the distinct forms of pedagogical labor, including the especially time-intensive work of skills and writing faculty, alongside the contributions of doctrinal and research-oriented colleagues. Recognizing pedagogical expertise as an intellectual and scholarly pursuit is not a critique of doctrinal faculty, but an affirmation of the diverse forms of excellence that sustain legal education.¹⁹⁶

During the COVID pandemic, law schools rapidly mobilized to safeguard student learning and well-being. Administrators funded virtual engagement opportunities, expanded access to wellness resources, and reassured students that faculty would remain supportive and responsive throughout the transition to remote learning.¹⁹⁷ The shift to virtual teaching allowed professors to meet with students more flexibly and to respond quickly to questions and concerns, removing barriers such as commuting time and office-hour limitations.¹⁹⁸ While these initiatives were rooted in a genuine commitment to student care, they also expanded expectations for faculty accessibility and blurred traditional boundaries between professional and personal time.¹⁹⁹ Many educators experienced this period as a paradox, deeply meaningful in terms of service and pedagogy, yet also physically and emotionally taxing.

¹⁹² See generally AHMED, *supra* note 149, at 140–43 (arguing that internalized institutional gratitude perpetuates self-silencing and overwork among marginalized academics).

¹⁹³ See generally MASLACH & LEITER, *supra* note 180, at 16–19 (defining burnout as an organizational pathology rooted in chronic overwork).

¹⁹⁴ See generally TRONTO, *supra* note 179, at 146–49 (arguing that true equity requires institutional, not individual, restructuring).

¹⁹⁵ See generally AHMED, *supra* note 149, at 140–44 (observing that individuals' attempts to navigate inequity through overcompliance or overperformance can entrench existing hierarchies).

¹⁹⁶ See generally Kristen K. Tiscione, *The Next Great Challenge: Making Legal Writing Scholarship Count as Legal Scholarship*, 22 J. LEGAL WRITING 50-55 (2018) (affirming that pedagogical scholarship constitutes intellectual labor equivalent to doctrinal research).

¹⁹⁷ See generally Altbach & de Wit, *supra* note 185, at 4 (discussing institutional focus on student care and engagement during the pandemic).

¹⁹⁸ See generally Williams, *supra* note 154 (explaining how remote work redefined expectations for constant availability).

¹⁹⁹ See Mary Blair-Loy & Erin A. Cech, *Perceiving Glass Ceilings? Meritocratic Versus Structural Explanations of Gender Inequality Among Women in Science and Technology Industries*, 57 SOC. PROBS. 371 (2010); Mary Blair-Loy & Erin A. Cech, *Demands and Devotion: Cultural Meanings of Work and Overload among Women Researchers and Professionals in Science and Technology Industries*, 32 SOCIAL FORUM 5 (2017) (noting that flexibility initiatives often expand, rather than relieve, workload expectations).

To support faculty facing these new demands, many universities introduced tenure-clock tolling policies that allowed tenure-track professors to extend their probationary periods.²⁰⁰ These measures represented a thoughtful and responsive intervention. They recognized the uneven impact of the pandemic on scholarly productivity, particularly for those with caregiving responsibilities, increased teaching burdens, or limited access to research resources, and sought to preserve fairness within promotion and tenure processes.²⁰¹ For many tenure-track scholars, tolling the clock provided necessary flexibility and relief.²⁰²

However, such mechanisms did not address the precarious position of non-tenure-track or contract faculty, for whom tenure was not an available pathway.²⁰³ For these educators, the pandemic magnified structural vulnerabilities already embedded in the academic employment hierarchy.²⁰⁴ Legal writing, clinical, and skills faculty, who bore substantial responsibility for maintaining student engagement and experiential learning, often did so without the job security, research support, or compensation afforded to their tenure-track counterparts.²⁰⁵ Extending the tenure clock could not remedy the absence of institutional stability or recognition for this group.²⁰⁶

Law school administrators might have considered complementary measures to mitigate this inequity. For example, multi-year renewable contracts could have offered greater security and predictability during a time of global uncertainty.²⁰⁷ Expanding eligibility for professional development funding and research stipends could have affirmed the scholarly and pedagogical contributions

²⁰⁰ See generally Angela Onwuachi-Willig, *The Intersectional Race and Gender Effects of the Pandemic in Legal Academia*, 72 HASTINGS L.J. 1703 (2021) (arguing that even the actions taken by law schools to provide relief to faculty, such as tolling the tenure clock, still had widespread disparity of the positive and negative consequences across differing faculty identities).

²⁰¹ See generally Colleen Flaherty, *COVID-19 and Beyond: Solutions for Academic Mothers*, INSIDE HIGHER ED (Mar. 10, 2021), <https://www.insidehighered.com/news/2021/03/11/covid-19-and-beyond-solutions-academic-mothers> (reporting on the unequal caregiving impact and rationale for tolling).

²⁰² Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2473 (2021).

²⁰³ *Id.* (“The study was limited to pre-tenure and tenured faculty teaching ‘podium’ courses. The challenges revealed there and anticipated in this future work are likely even more pronounced for clinical, legal writing, library, academic support, and other faculty who teach students but without the security of position and other benefits generally afforded tenure-stream professors.”) (citing Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 527 (2019)).

²⁰⁴ See Allen et al., *supra* note 203, at 527 (“Law schools have bolstered their overall faculty diversity by hiring women for non-tenure track clinical and legal writing faculty positions. Yet, these women suffer ‘occupational segregation’ characterized by lower pay, lack of job security, and limits on the subject areas that they are permitted to teach. . . . These women are second-class citizens who are often excluded from faculty governance or the full protection of academic freedom.” (footnotes omitted)).

²⁰⁵ See Gibson, *supra* note 127.

²⁰⁶ See Onwuachi-Willig, *supra* note 200.

²⁰⁷ See Weresh, *supra* note 187 (advocating for multi-year renewable contracts as a structural reform promoting equity); see also AM. ASS’N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE § 13 (2022), <https://www.aaup.org/reports-publications/aaup-policies-reports/investigation-and-inquiries/special-report-covid-19-and>.

of skills faculty, enhancing both morale and equity.²⁰⁸ Similarly, institutions could have implemented transparent promotion pathways that recognized excellence in teaching, curricular innovation, and service areas in which non-tenure-track faculty made essential contributions throughout the pandemic.²⁰⁹

Recognizing the distinct circumstances of contract faculty does not diminish the importance of supporting tenure-track scholars; rather, it underscores that equitable academic policy requires differentiated yet parallel mechanisms of support.²¹⁰ The pandemic highlighted that excellence in legal education depends upon the collective expertise of doctrinal, clinical, and skills faculty alike.²¹¹ Sustaining that excellence in future crises will require institutional frameworks that value all forms of academic labor, not only those aligned with traditional tenure structures.²¹²

V. TOWARDS WHOLENESS: REIMAGINING LEGAL ACADEMIA

“To bring about change, you must not be afraid to take the first step. We will fail when we fail to try.” ~ Rosa Parks²¹³

ABA Standard 405 has often been cited as evidence of hierarchy within legal academia, distinguishing between tenured, clinical, and legal writing faculty.²¹⁴ Yet rather than viewing the standard as a source of inequity, it can be understood as a tool through which institutions might actively work to recalibrate those hierarchies.²¹⁵ By reimagining Standard 405 as a framework for equity rather than a mechanism of exclusion, the legal academy can transform an administrative rule into an engine for structural reform.²¹⁶

At its core, Standard 405 establishes the baseline for the professional environment of law faculty.²¹⁷ While its language presently allows institutional discretion, that very flexibility offers opportunity.²¹⁸ The standard could be revised

²⁰⁸ See generally Beazley, *supra* note 34, at 1037–64 (noting that expanding research and development resources to all faculty affirms scholarly equality); see also Merritt, *supra* note 88, at 1447–49 (arguing that equitable access to institutional support mitigates systemic hierarchy).

²⁰⁹ Melissa H. Weresh, *Institutionalizing Inequity: How ABA Standard 405(d) Subverts Faculty Inclusion*, 34 HASTINGS WOMEN’S L.J. 75, 79–82 (2023) (advocating transparent promotion systems valuing pedagogical excellence).

²¹⁰ Beazley, *supra* note 107, at 81.

²¹¹ Beazley, *supra* note 67.

²¹² See generally TRONTO, *supra* note 179, at 145–49 (arguing that sustainable institutional excellence depends on valuing all forms of care and labor).

²¹³ ROSA PARKS & GREGORY J. REED, DEAR MRS. PARKS: A DIALOGUE WITH TODAY’S YOUTH 87 (1996) (italics added).

²¹⁴ See generally Beazley, *supra* note 34, at 1037–64 (describing 405(d) as codifying faculty status hierarchies).

²¹⁵ See generally Weresh, *supra* note 209, at 78–81 (advocating reinterpretation of 405(d) to advance equity).

²¹⁶ See generally AHMED, *supra* note 146, at 60–63 (explaining that reframing institutional rules can turn compliance into reform).

²¹⁷ See AM. BAR ASS’N, *supra* note 6.

²¹⁸ This article does not attempt a full revision of ABA Standard 405. The disparities identified here reinforce the need for the profession to reconsider Standard 405 and to explore a unified framework

to require law schools to create more equitable systems of employment, compensation, and participation across faculty tracks.²¹⁹ Properly implemented, Standard 405 could serve as a structural blueprint for what might be termed the “de-hierarchization” of legal academia: a model that values pedagogical, clinical, and scholarly excellence as complementary rather than stratified pursuits.

Reimagining Standard 405 in this way would align accreditation policy with the realities of modern legal education. Law schools rely on the expertise of legal writing faculty, and clinicians to teach lawyering, communication, and ethical judgment, competencies that define professional readiness. A revised Standard 405 could explicitly recognize these contributions by incentivizing institutions to provide presumptively renewable multi-year contracts, proportional compensation, and meaningful participation in faculty governance across faculty tracks.²²⁰ Such measures would not only mitigate precarity but would enhance institutional quality by stabilizing the teaching cadre that sustain the core of legal education.²²¹

Moreover, a rearticulated Standard 405 could signal a broader cultural shift within the profession.²²² The hierarchies of the legal academy mirror those of the legal field itself, where prestige often tracks proximity to theory, scholarship, or elite credentials. Embedding equity principles into accreditation standards would invite law schools to model the justice and inclusion they expect their graduates to champion.²²³ By using Standard 405 as a normative mirror, institutions could confront the structural asymmetries that have long defined faculty status and, in turn, the culture of legal education.²²⁴

In this sense, reform does not require dismantling Standard 405 but rather re-imagining its potential.²²⁵ Accreditation can move beyond mere compliance to become a catalyst for transformation, encouraging law schools to cultivate environments in which every category of faculty is afforded dignity, stability, and a voice in shaping the future of the profession.²²⁶ The project of rebalancing the

that offers doctrinal, clinical, and legal writing faculty meaningful and appropriately calibrated security of position. This is not a new undertaking. Legal writing scholars and other faculty advocates have pressed for comprehensive reform of Standard 405 for decades. A full redesign remains outside the scope of this article, but continued work in this area is both necessary and overdue.

²¹⁹ See generally Weresh, *supra* note 187 (identifying contract security and promotion systems as mechanisms for parity).

²²⁰ See *id.* (identifying contract security and promotion systems as mechanisms for parity).

²²¹ See Weresh, *supra* note 26, at 152–54.

²²² See generally TRONTO, *supra* note 179, at 146–49 (arguing that structural reform must embed care and equity as organizational norms).

²²³ See generally HOOKS, *supra* note 176, at 35–38 (urging educators to embody justice and inclusion as pedagogical practice).

²²⁴ See generally AHMED, *supra* note 149, at 140–44 (contending that institutions must confront structural asymmetries to achieve equity).

²²⁵ AM. ASS'N OF UNIV. PROFESSORS, CONTINGENT APPOINTMENTS AND THE ACADEMIC PROFESSION (2024), https://www.aaup.org/sites/default/files/2025-07/Contingent_Appointments_and_the_Academic_Profession.pdf.

²²⁶ See generally Weresh, *supra* note 26 (proposing governance participation for all faculty ranks).

legal academy is not about erasing distinctions of role or expertise; it is about ensuring that those distinctions no longer determine worth.²²⁷

A. Revising 405(d): The Potential for Structural Reform

The long trajectory of this work is reflected in the Legal Writing Institute's decades-long, prolific advocacy for equitable faculty status, which demonstrates that the movement for structural reform in legal education is neither new nor nascent, but a sustained scholarly and professional endeavor.²²⁸

Reforming ABA Standard 405 is essential to addressing the structural inequities codified within legal academia.²²⁹ This includes eliminating the three-tiered system of faculty status by providing equitable job security, compensation, and governance rights to all faculty members, regardless of their track or teaching discipline.²³⁰ Such reforms would not only promote fairness but also enhance the overall quality of legal education by recognizing and valuing the contributions of all legal educators. Specific revisions providing non-tenure-track faculty with greater job security, equitable compensation, and meaningful participation in administrative governance could change the narrative and landscape of legal education.²³¹

Although this Article does not attempt to draft a full model Standard, the analysis offered here points toward an essential and attainable direction for revising the Standard. A reimagined Standard 405 must protect all full-time law faculty who perform core pedagogical labor, regardless of track. The Standard should no longer embed a hierarchy of security but should adopt a unified baseline that guarantees meaningful and appropriately calibrated protections for doctrinal, clinical, and legal writing faculty. A revised 405(d) at minimum should provide legal writing faculty with no less than the protections afforded to clinical faculty under 405(c), and it should extend comparable forms of long-term security to doctrinal faculty not eligible for tenure.²³² Contemporary legal education requires that institutions value the entire instructional continuum, from legal writing to clinical practice to doctrinal analysis, and accreditation should reflect that reality.

A comprehensive revision could follow this general structure:

A law school shall provide all full-time faculty whose teaching, supervision, or assessment is essential to the school's core educational

²²⁷ See generally TRONTO, *supra* note 179, at 149 (arguing that dignity and inclusion must replace hierarchical valuations of labor).

²²⁸ ASSN. OF LEGAL WRITING DIRS., LEGAL WRITING INST. & LEGAL WRITING, REASONING & RESEARCH SEC., ASSOCIATION OF AM. LAW SCHOOLS, JOINT COMMENT TO COUNCIL REGARDING STANDARD 405 (2024), <https://www.lwionline.org/joint-comment-council-regarding-standard-405>.

²²⁹ See Beazley, *supra* note 34, at 1063-64.

²³⁰ Weresh, *supra* note 26, at 137.

²³¹ Weresh, *supra* note 187.

²³² See generally Peter A. Joy, *ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education*, 66 J. LEGAL EDUC. 606 (2017) (Noting ABA Standard 405(c) reflects the ABA's long-running but contested effort to require law schools to give clinical faculty tenure-like security and governance rights to protect academic freedom).

program, including doctrinal, clinical, and legal writing faculty, with security of position reasonably comparable to that required under Standard 405(c). Such security shall include renewable long-term contracts, clinical tenure, or tenure protections for academic freedom in teaching and scholarship, written and equitable standards for appointment and promotion, and meaningful participation in faculty governance. A law school shall maintain policies that ensure these protections apply equitably across faculty roles essential to the curriculum.

This formulation offers a harmonized framework while recognizing that security need not be identical in form to be comparable in substance. It establishes a floor of professional protections that acknowledges the collective contribution of all law faculty to the mission of legal education.

Concerns will inevitably arise. Some will argue that a unified security structure undermines the tradition of tenure or collapses distinctions among faculty roles. Others may claim that extending 405(c)-level protections across faculty tracks is too costly, administratively burdensome, or disruptive to long-standing institutional practices.²³³ Still others may fear that a single baseline rule will reduce flexibility or constrain innovation. These concerns merit acknowledgment but not deference. A revised Standard 405 need not eliminate tenure; it can retain tenure as one form of long-term security within a broader framework that ensures comparable protections for faculty who perform core instructional work. Further, institutions would still be able to differentiate responsibilities, expectations, and evaluation criteria. The question is not whether doctrinal, clinical, and legal writing roles are identical. They are not. The question is whether distinctions in responsibility justify distinctions in institutional protection. They do not. The essential functions of each role (teaching, mentoring, assessment, and cultivating legal reasoning and professional identity) are central to the educational program and warrant comparable stability.

Neither cost or administrative difficulty present compelling objections to revision. Many schools already employ long-term contract systems for clinical or legal writing faculty, demonstrating that meaningful protection is both feasible and sustainable. Moreover, institutional flexibility is not lost; it simply becomes structured. A revised Standard 405 would still permit variation in contract length, governance models, and promotion criteria, so long as the protections provided are equitable in substance. In this sense, the argument for unified security is not merely normative but practical.²³⁴ Stability enhances educational continuity, improves

²³³ See *id.* at 631-633 (noting viewpoints from those opposed to extending 405(c)-level protections across all faculty).

²³⁴ By describing the case for unified security as “not merely normative but practical,” the text highlights that the rationale extends beyond abstract principles of fairness or equality among faculty. A normative argument would justify a unified system on the grounds that similarly situated educators ought to receive similar protections as a matter of professional equity. The practical argument, by contrast, emphasizes the concrete institutional benefits of a single security structure, such as simplified governance, reduced administrative burden, clearer evaluation standards, and improved

faculty recruitment and retention, and aligns accreditation standards with the pedagogical realities of professional formation. The core competencies of legal education, legal writing, clinical experience, and doctrinal analysis are interdependent. Accreditation should therefore protect the faculty who teach them with equal seriousness.

A reimagined Standard 405 is not a radical break but an overdue correction.²³⁵ Legal writing scholars and many others have called for such reform for decades, and the persistence of inequity in faculty status renders the existing system indefensible.²³⁶ By affirmatively requiring schools to provide comparable security to all faculty whose work is central to the curriculum, a revised Standard 405 would move accreditation away from hierarchy and toward integrity. It would model the values of fairness, respect, and professional dignity that legal education seeks to instill in its students.²³⁷ The profession has long accepted inequity as a structural inevitability. A reimagined Standard 405 would instead treat equity as an accreditation imperative, demonstrating that meaningful reform is not only possible, but necessary.

B. Rejecting Scarcity: Cultivating a Culture of Collective Empowerment

The structural reforms described above cannot succeed without corresponding cultural transformation. Even the most equitable revisions to Standard 405 will falter if institutions continue to operate from a mindset of scarcity. Thus, while accreditation reform is necessary, it is not sufficient. Structural equity must be accompanied by a cultural shift that dismantles the conditions in which hierarchy thrives.

The culture of scarcity, which frames opportunities and resources as limited commodities to be competed for, fuels hierarchies and exclusion within legal academia.²³⁸ Shifting to a culture of abundance and collaboration requires rethinking institutional priorities and practices.²³⁹ This includes equitable resource allocation, transparent decision-making, and fostering an environment where faculty can thrive without fear of marginalization or competition. The advocacy for shifting toward a culture of abundance and collaboration should emphasize equitable resource allocation and transparent decision-making.²⁴⁰ By fostering a more supportive and inclusive environment, legal academia can begin to address the systemic barriers that marginalize vulnerable faculty.²⁴¹

The structural inequities embedded in faculty status are sustained not only through accreditation rules, but also through the pervasive culture of scarcity that

faculty retention. In this sense, support for unified security rests not only on what should be done as a matter of principle, but also on what works effectively in day-to-day law school operations.

²³⁵ See Enrikin et al., *supra* note 4, at 34–44.

²³⁶ *See id.*

²³⁷ *See id.* at 40–43.

²³⁸ TRONTO, *supra* note 179, at 145–49.

²³⁹ AHMED, *supra* note 149, at 138–42.

²⁴⁰ BELL HOOKS, *TEACHING COMMUNITY: A PEDAGOGY OF HOPE* 45–49 (2003).

²⁴¹ Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reform*, 40 J. LEGAL PROF. 65, 72–75 (2016).

characterizes much of legal academia. Scarcity manifests in many forms: scarce tenure lines, scarce raises, scarce governance seats, scarce recognition, and scarce institutional trust. These conditions create a zero-sum environment in which faculty implicitly compete for legitimacy, resources, and survival rather than working collectively to strengthen the institution as a whole. Scarcity is not merely a budgeting constraint; it is a cultural logic that reinforces hierarchy.²⁴² It frames professional worth as a rationed commodity and leads faculty in more secure positions to guard their status rather than interrogate why it is unequally distributed in the first place.²⁴³

Rejecting a scarcity mindset requires reimagining how resources and opportunities are conceptualized within the legal academy. A culture of abundance does not presume unlimited budgets or infinite faculty lines. Rather, it recognizes that abundance can be cultivated through transparency, shared governance, equitable workload distribution, and the intentional valuing of all forms of faculty labor.²⁴⁴ When faculty understand the criteria by which decisions are made, feel included in those decisions, and see their work valued and compensated fairly, abundance becomes an institutional reality rather than an aspirational metaphor.

Cultivating abundance also requires confronting how scarcity fosters unnecessary conflict and competition among faculty tracks. Faculty experiencing precarity may hesitate to advocate for themselves or others, while secure faculty may fear that expanding protections will diminish their own standing. These dynamics obscure the shared interests that bind faculty across roles. Every faculty member regardless of title, benefits from a healthier, more transparent, and more equitable institutional environment.²⁴⁵ Moving beyond scarcity therefore means redistributing not just material resources, but epistemic resources: access to information, shared decision-making power, and inclusion in conversations that shape the curriculum and the culture of the school.

A culture of collective empowerment reframes faculty success away from individual advancement toward institutional flourishing. It requires aligning our practices with the collaborative nature of legal education itself. Clinical, legal writing, and doctrinal faculty do not compete to prepare students; they collaborate, sequencing competencies, reinforcing skills, and building professional identity together.²⁴⁶ This pedagogical interdependence provides a roadmap for cultural interdependence. By modeling collaboration and abundance internally, law schools can create environments in which faculty are no longer positioned as

²⁴² See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

²⁴³ See Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 245–47 (2008).

²⁴⁴ GARY RHOADES, *MANAGED PROFESSIONALS: UNIONIZED FACULTY AND RESTRUCTURING ACADEMIC LABOR* 3-7 (1998).

²⁴⁵ *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES* (MICHAEL N. BASTEDO, PHILIP G. ALTBACH & PATRICIA J. GUMPORT eds., (2023)).

²⁴⁶ See Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 329–33 (1995) (demonstrating the pedagogical interdependence of doctrinal, clinical, and skills instruction).

occupants of competing tiers but as co-equal contributors to a shared mission. Structural reform enables this shift; cultural transformation sustains it.

C. Reclaiming Gratitude: From Obligation to Authentic Recognition

Just as a scarcity mindset reinforces hierarchical structures, so too do cultural norms that position gratitude as obligation rather than mutual recognition. If the work of reforming Standard 405 requires structural clarity and a rejection of scarcity, it also requires reimagining the emotional and relational practices that shape academic life.

Reclaiming gratitude as a positive and empowering force is critical to creating a more inclusive and supportive academic culture.²⁴⁷ This involves redefining “gratitude” as a mutual expression of respect and recognition, rather than a tool of manipulation.²⁴⁸ Institutions must actively work to value and support all faculty members, providing the resources and opportunities needed to succeed both professionally and personally. By implementing these strategies, the legal academy can begin to dismantle the inequities that have long defined it.²⁴⁹ These reforms are not only necessary for creating a more just and equitable professional environment, but are also essential to fulfilling the broader mission of legal education to advance justice and equity in society.²⁵⁰ Developing practical strategies for fostering an environment where all faculty members feel valued and supported, emphasizing the importance of collective well-being over hierarchical structures is the foundation for lasting structural transformation.

If scarcity cultivates hierarchy, misdirected gratitude enforces it. Within legal academia, gratitude has too often functioned as a mechanism of compliance rather than a practice of mutual recognition. Precarious faculty are frequently encouraged, either implicitly or explicitly, to express gratitude for conditions that should be baseline professional norms: contract renewal, modest raises, limited governance roles, or even the opportunity to teach. This form of gratitude is hierarchical in nature and it reinforces existing power structures by recasting inequity as benevolence and positioning faculty with limited security as beneficiaries rather than colleagues.²⁵¹

Reclaiming gratitude requires disentangling it from obligation and realigning it with justice. Genuine gratitude emerges from environments in which all faculty have the security, respect, and support necessary to flourish. It is not gratitude *for* precarity, but gratitude *within* a community that protects its members.²⁵² When gratitude becomes a relational exchange of mutual recognition,

²⁴⁷ See JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 212–14 (1993) (developing a framework that *supports* the idea of valuing, rather than explicit “gratitude” and thereby implicitly accepts being grateful for care as a kind of gratitude-practice).

²⁴⁸ ROBIN D. G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 110–12 (2002).

²⁴⁹ TRONTO, *supra* note 179, at 145–49.

²⁵⁰ BELL HOOKS, *ALL ABOUT LOVE: NEW VISIONS* 87–91 (2000).

²⁵¹ See generally Ksenofontov & Becker, *supra* note 161.

²⁵² See generally PARKER J. PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER’S LIFE* (2007) 88–95 (1998) (describing authentic professional community and mutual recognition as foundations for flourishing).

rather than a one-way expression of indebtedness, it strengthens institutional cohesion and reduces the power asymmetries that have long shaped faculty life.

Authentic gratitude also requires that institutions actively recognize the labor that has historically been undervalued. Legal writing faculty mentor struggling students, teach foundational competencies, model professional communication, and provide detailed feedback hours beyond the classroom; yet their work is often rendered invisible by status hierarchies.²⁵³ Clinical faculty supervise emotionally complex client work, carry professional responsibility obligations, and teach ethical reasoning in real-world contexts; yet their roles are often treated as ancillary to doctrinal scholarship.²⁵⁴ Reclaiming gratitude means naming and valuing these contributions not as exceptions or extras, but as essential to the very identity of legal education.

Furthermore, gratitude must operate horizontally, not vertically. A culture that encourages gratitude upward, from precarious faculty toward secure faculty, is a culture that reinforces hierarchy. A culture that encourages gratitude across the faculty body fosters belonging, reduces divisions, and recognizes the diverse expertise that each faculty role brings to the educational mission. In this sense, gratitude becomes a tool for solidarity rather than subordination.

Finally, cultivating authentic gratitude requires institutional practices that support it: equitable compensation systems, transparent promotion structures, access to professional development, and meaningful participation in governance. When faculty feel seen, supported, and secure, gratitude emerges naturally, not as a survival strategy, but as a reflection of shared purpose. In this way, gratitude becomes not a mask for inequity, but a catalyst for connection, well-being, and lasting structural transformation.

CONCLUSION

The inequities within legal academia are neither new nor obscure; they are structural, longstanding, and well documented. The pandemic did not create these hierarchies but instead provided a clarifying lens through which their effects became undeniable. What emerged was not simply a crisis of logistics or pedagogy, but a crisis of equity: a revelation of how faculty status, institutional culture, and professional identity intersect to shape the lived experience of legal educators.

While no single individual can amend accreditation standards or redefine the profession's value system, collective recognition of these realities is the first step toward meaningful reform. ABA Standard 405, long viewed as a source of division, can instead serve as an instrument for progress. Properly drafted and applied, it provides a framework through which institutions can reimagine equity, ensuring that all faculty are valued as integral to the mission of legal education.

²⁵³ See Ederlina Co, *Weahtering Invisible Labor*, 51 SW. L. REV. 258 (2022).

²⁵⁴ See Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008) (detailing the long-standing structural barriers that have relegated clinical faculty to second-class status and limited their professional recognition).

Ultimately, the work ahead is neither punitive nor revolutionary. It is restorative. By using existing structures, like Standard 405, as tools for responsiveness, and by fostering cultures of equity and mutual recognition, the legal academy can move closer to alignment with its own ideals, educating not only advocates for justice, but also embodying justice within its own walls.

WE CANNOT AFFORD STRONG LAWMACRO

Jeremy Kidd*

I. INTRODUCTION

“None of us is as dumb as all of us.”¹

Individuals make mistakes, but those mistakes are often magnified when aggregated. Often, this magnification of mistakes occurs because the nature of the mistakes is obscured in the very process of aggregation. This quote was offered as a commentary on team dynamics, suggesting that aggregating multiple people into a single decision-making process leads to suboptimal outcomes. The same is true for aggregate decision-making by a single individual; when even a single individual makes decisions for others, the outcomes tend to be suboptimal. There are many possible explanations for this, but the most clearly identified in economics literature are the knowledge problem² and various public choice obstacles.³

The explanations are relevant to a trend in law and economics—the rise of law and macroeconomics,⁴ which emphasizes the use of macroeconomic variables in identifying, diagnosing, and remediating societal problems. This is a shift from traditional law and economics, which has a largely microeconomic foundation. Microeconomics focuses on the incentives facing individual economic actors—individuals, businesses, government officials—and the choices those actors take in response. Macroeconomics focuses on aggregate measures of economic activity, like total production in society, unemployment rates, and so on. Proponents of law and macroeconomics, or LawMacro,⁵ argue that standard law and economics, or LawMicro,⁶ has neglected profoundly important societal problems out of a refusal to consider aggregate macroeconomic trends.⁷

This article takes the LawMacro critique seriously,⁸ but also presents potential justifications for absence of macroeconomic variables from law and economics literature. It does so in the context of the tradeoffs⁹ inherent in our

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¹ Zac Keeney, *None of Us is as Dumb as All of Us*, A KEEN MIND (Feb. 11, 2015) (quoting Mark Kelly), <https://zackeeney.com/none-of-us-is-as-dumb-as-all-of-us/>.

² See, e.g., F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

³ See, e.g., James M. Buchanan, *Politics Without Romance*, 19 PUBLIC CHOICE 13 (2003).

⁴ See, e.g., Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REG. 791 (2017).

⁵ Anna Gelpern & Adam J. Levitin, *Considering Law and Macroeconomics*, 83 LAW & CONTEMP. PROBS. i, i (2020).

⁶ *Id.* at ii.

⁷ *Id.* at v-vi.

⁸ See generally Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215 (1993) (that critique was first offered in 1993, but only as a critique without proposed solutions); Yair Listokin, *A Note on Tax Expenditures and Business Cycle Fluctuations*, 102 PROC. ANN. CONF. ON TAXATION 195 (2009); Yair Listokin, *Equity, Efficiency, and Stability: The Importance of Macroeconomics for Evaluating Income Tax Policy*, 29 YALE J. ON REG. 45 (2012).

⁹ After all, “[t]here are no solutions. There are only tradeoffs.” THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* 113 (1995).

choosing to collectivize solutions to problems in society. Specifically, aggregate decisions, like those advocated by LawMacro, are subject to confounding factors that are not present when individuals are making choices on their own behalf and for their own benefit.

Returning to the initial quote, aggregate decisions, whether made by a group or a single individual, are always going to be “dumber” than individual decisions, because the knowledge necessary to make “smart” decisions is never fully available to regulators.¹⁰ Even if full and perfect information were readily available to the regulators, however, they would have strong incentives to ignore some or all of that information when doing so would help them obtain personal goals or benefits.¹¹ LawMacro scholars set these obstacles aside because, according to them, there are problems that (1) need to be solved, and (2) cannot be solved if we focus too heavily on individual choice.¹²

The problem with macroeconomic policy is that it is made *by* a small number of regulators—sometimes controlled by the head executive,¹³ sometimes operating within ostensibly independent agencies¹⁴—but imposed *on* hundreds of millions of individuals, and it is the responses of those individuals that determine whether the policy will be successful. The regulator has goals in mind, and a desired optimal response from the affected individuals, but individuals tend to respond based on their individual preferences and circumstances¹⁵ rather than the assumptions of the regulator. Importantly to the LawMacro analysis, the regulator has access to macroeconomic data and tools that will not play a role in the decision-making processes of most individuals.¹⁶ As a result, the regulator—or anyone else

¹⁰ See Hayek, *supra* note 2, at 521. When this research refers to “regulators,” it means all those who work at administrative agencies and are responsible for promulgating the regulations that govern the actions of all those subject to the U.S. government.

¹¹ Jeremy Kidd, *No Perfect Solutions for Market Imperfections*, 26 U. PA. J. BUS. L. 443, 470 (2024). For example, a regulator in charge of setting airline safety standards might fully understand that stricter rules would improve passenger safety but choose to downplay or ignore the information because stricter standards would anger powerful airline companies that promise lucrative post-regulatory jobs.

¹² See, e.g., Jason Furman, *How Lawyers Can Help Macroeconomists in the Wake of Three Major Challenges*, 24 YALE J. ON REG. 709, 734-40 (2017) (describing the need for a macro approach to handling antitrust disputes).

¹³ One need not adopt the unitary executive theory, in which the U.S. President exercises sole control over the entire executive apparatus, to accept that the President will often determine agency outcomes. See, e.g., David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 3 (2020).

¹⁴ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 276 (2020) (Kagan, J., concurring in part and dissenting in part) (“Independent agencies are everywhere”) (Some independent agencies—the Federal Trade Commission, for example—are commonly known, but there are many more that the public may not readily recognize).

¹⁵ See Hayek, *supra*, note 2, at 521 (“[T]he knowledge of the particular circumstances of time and place.”).

¹⁶ For example, most people do not concern themselves with the level of M1, the total amount of physical currency and coin, demand deposits, and other highly liquid assets in the economy. Many regulators, however, will need to know this and other variables relevant to the money supply, inflation, etc. See Investopedia Team, *M1 Money Supply: How It Works and How to Calculate It*, INVESTOPEEDIA (Oct. 2, 2024), <https://web.archive.org/web/20250116103311/https://www.investopedia.com/terms/m/m1.asp>.

who pays attention to those macro-data and macro-tools—may “see” societal problems that are not visible to the average citizen. The problems may be real but invisible, or they may be invisible because they are illusory.

The LawMacro approach assumes the former and ignores the latter, but that approach exhibits a lack of epistemic humility that renders LawMacro of questionable validity. Without epistemic humility, the LawMacro approach will overstate the ability of regulators to craft ideal policy and understate the difficulties in getting the regulated individuals and businesses to behave as desired. Regulators, operating even with the best of intentions and available data/tools, are certain to make horrible decisions that no single individual would make, given the separation between the point of decision and feedback from the system onto which the regulation is to be imposed.

The article will begin by fleshing out the LawMacro critique in Part II, followed by critiques from both Austrian economics and public choice literature in Part III. Assessing the benefits and costs of using aggregate data in solving problems, this article, in Part IV, will propose how to internalize the LawMacro critique without adopting all of the costs that accompany a strong adoption of the methodology.

II. THE LAWMACRO CRITIQUE

Law and Macroeconomics, as a movement, arose as a counter to the microeconomics-centered law and economics movement.¹⁷ Understanding LawMacro, therefore, requires understanding its critique of LawMicro. This section will summarize that critique, which largely surrounds two primary pillars: First, that monetary policy matters but is largely absent from standard law and economics analysis, and second, that aggregate measures—economic development, inequality, environmental quality, and more—matter.

A. Money Matters

Law and economics is primarily concerned with how individuals react to legal rules,¹⁸ and that is a good thing because law applies to individuals, and living life within a legal regime means tailoring behavior to the rules imposed by that regime. But money is the mode through which many of the things that contribute to human flourishing are obtained, and many standard law and economics analyses stop short of addressing the effects of legal change on the money supply.¹⁹ At one

¹⁷ See Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. & SOC. SCI. 377, 378 (2019) (describing law and macroeconomics as a response to the lack of consideration on macroeconomic variables, like the money supply, by law and economics scholars, who focus on microeconomic foundations).

¹⁸ See, e.g., Paul H. Rubin, *Law and Economics*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/LawandEconomics.html>.

¹⁹ See, e.g., Leonidas Zelmanovitz & Bruno Meyerhof Salama, *LawMacro and the Schism in Law and Economics*, L. & LIBERTY (Oct. 29, 2020), <https://lawliberty.org/how-money-could-revive-law-and-economics/> (describing the tendency of law and economics to treat banks “merely as financial intermediaries,” ignoring their impact on money creation through fractional reserve banking).

level, this may make sense, since the primary source of monetary policy is the Federal Reserve, who can increase or decrease the amount of money in circulation or change certain foundational interest rates.²⁰ Doing so changes the prices that individuals face for the various goods and services that they wish to purchase,²¹ but if the legal change in question does not originate with or flow through the Federal Reserve, the money supply may seem largely irrelevant to the analysis.²²

This is a significant oversight for a microeconomist, who should recognize that individuals can react to a legal change in a variety of ways, some of which will impact their willingness to borrow or spend.²³ Similarly, the borrowing and spending preferences of individuals can dampen, amplify, or otherwise distort the reactions they would otherwise have had.²⁴ A full analysis of how legal change will ripple through society, then, can be improved by including monetary measures in the analysis.

B. Aggregate Measures Matter

There are far more facets to macroeconomics than just monetary theory, of course, and LawMacro is interested in all of them, to the extent that they are responsive to legal changes, and vice versa.²⁵ Most LawMacro falls within the standard aggregate measures that a macroeconomist would recognize, such as aggregate demand²⁶ and market stability,²⁷ but others are a little further afield, such as inequality²⁸ and climate change.²⁹

Among the standard-fare macroeconomic measures, LawMacro scholars catalog the various ways that governments have intervened in the past, in order to address perceived problems in the market. The most obvious case is the slate of New Deal programs that were designed to react to the devastation caused by the Great Depression.³⁰ In the wake of the financial crisis of 2007-08, the government

²⁰ See Anna J. Schwartz, *Money Supply*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/MoneySupply.html> (“Federal Reserve policy is the most important determinant of the money supply.”).

²¹ See *id.*

²² See Zelmanovitz & Salama, *supra* note 19.

²³ E.g., Itay Ravid & Jonathan Zandberg, *The Business of Abortion: Access to Capital Post Dobbs*, 75 U.C. L. J. 977, 983 (2024) (arguing that changes in constitutional jurisprudence regarding abortion will have an impact on the willingness of individuals to borrow to establish business locations that provide abortion services).

²⁴ *Id.*

²⁵ See, e.g., Yair Listokin, *Law and Macro: What Took So Long?*, 83 L. & CONTEMP. PROBS. 141, 145 (2020).

²⁶ See, e.g., *id.* at 144.

²⁷ See, e.g., Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 L. & CONTEMP. PROBS. 219, 221-26 (2020).

²⁸ See, e.g., *id.* at 228-31.

²⁹ See, e.g., Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301, 1301 (2021); Steven A. Ramirez, *Social Justice and Capitalism: An Assessment of the Teachings of Pope Francis from a Law and Macroeconomics Perspective*, 40 SEATTLE U. L. REV. 1229, 1251 (2017).

³⁰ See, e.g., Matthew P. Allen, *A Lesson from History, Roosevelt to Obama—the Evolution of Broker-*

again grew concerned with stagnant growth and waning aggregate demand, and implemented changes to the legal regime designed to stimulate growth and prevent future market collapses.³¹

Some of these efforts were focused on micro-level actions and reactions, such as curbing individual actions that could destabilize financial markets—insider trading, market manipulation.³² These efforts are not ignored by LawMacro, to the extent that they have macroeconomic effects. For example, market manipulation, if successful, can destroy investor confidence in financial markets.³³ Then again, there is reason to believe that these types of schemes will occur with sufficient regularity to affect markets, broadly.³⁴

Some efforts in the wake of the Great Recession that appeal to LawMacro scholars are those focused on aggregate measures, such as monetary stability and systemic risk.³⁵ One prominent example was empowering the government to declare certain market actors as “systemically important”³⁶ and to regulate “systemically significant prices and indices.”³⁷ These efforts are an attempt to find and ameliorate “systemic vulnerabilities,”³⁸ which are portrayed as different from systemic risk, but inevitably are tied to systemic risk.³⁹

Moving beyond business cycle theory, other standard macroeconomic concerns also enter the debate. Our microeconomic assumptions about unemployment—that labor markets clear in most cases—for example, might be

Dealer Regulation: From Self-Regulation, Arbitration, and Suitability to Federal Regulation, Litigation, and Fiduciary Duty, 5 ENTREPRENEURIAL BUS. L.J. 1, 19 (2010).

³¹ See Gina-Gail S. Fletcher, *Macroeconomic Consequences of Market Manipulation*, 83 L. & CONTEMP. PROBS. 123, 123 (2020).

³² See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.) (explaining that the act addressed market manipulation, including Titles VII and IX; in Title VII, Section 753, the Commodities Futures Trading Commission was authorized to prosecute market manipulation and lowered the burden of proof for manipulation cases).

³³ See Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

³⁴ See Daniel R. Fischel & David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 HARV. L. REV. 503, 518–19 (1991) (explaining that because manipulators face “tremendous risk” that transaction costs outweigh price increase, and there is no guarantee of sale at profit, price pressure schemes are self-deterring).

³⁵ See Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 204 (2008) (explaining that one difficulty with the LawMacro approach is measuring whether it is ever a success; for example, “systemic risk” is defined as “the risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.”).

³⁶ See Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

³⁷ See Robert C. Hockett & Saule T. Omarova, *Systemically Significant Prices*, 2 J. FIN. REG. 1, 9 (2016).

³⁸ See Fletcher, *supra* note 31, at 124.

³⁹ See *id.* at 125 (describing systemic vulnerabilities such as “likelihood of systemic failure” and “weakening the market’s resiliency to risk,” which do not appear to differ in type from the standard definition of systemic risk).

incorrect, creating a space for regulatory policy to reduce unemployment.⁴⁰ Similarly, we may focus too heavily on microeconomic principles for antitrust law, rather than using macroeconomics to identify “structural and institutional factors with potential to affect long-term output, as well as macroeconomic policy transmission channels,” in order to motivate “ex ante regulatory intervention.”⁴¹ Inflation, too, is part of the LawMacro reconsideration, with indexing no longer being used to counter inflation for tax and transfer programs, and instead being used to promote economic growth or stabilization.⁴²

At some point, however, LawMacro escapes the bounds of standard macroeconomic analysis. Some scholars have adopted the LawMacro toolkit for more general, pro-regulation purposes, critiquing LawMicro for not being sufficiently concerned with aggregate measures like “justice, equity, representation, or legal process.”⁴³ To these scholars, the pertinent question is “what regulatory intervention is desirable from a macroeconomic perspective?”⁴⁴

Macroeconomics is a wide field of study, focused on big issues, and relying largely on aggregate measures to gauge the state of the collective economy and, when necessary, plan interventions.⁴⁵ It is therefore understandable that LawMacro, building on those macroeconomic foundations, would adopt a similarly broad range of inquiry. Use of aggregate variables can add marginal value to economic and legal analysis, but that does not mean that every aggregate measure is equally useful, as discussed in Part III, below.

III. WHERE LAWMACRO FALLS SHORT

There are a lot of big problems in the world and big problems cry out for big solutions. LawMacro folks see those big problems, notice that we have big macroeconomic tools—the administrative state—and become frustrated when those tools are not used to fashion big solutions.⁴⁶ The desire to solve big problems, thereby (potentially) alleviating great suffering, is understandable. It may even be part of the natural desire of man “not only to be loved but to be lovely.”⁴⁷ Acting on that desire, however, requires ignoring decades of economic critiques, including the knowledge problem⁴⁸ and public choice descriptions of the distorted incentives that plague administrative agencies.⁴⁹

⁴⁰ See generally Furman, *supra* note 12.

⁴¹ Gelpert & Levitin, *supra* note 5, at 15.

⁴² See generally Daniel Hemel, *Indexing, Unchained*, 83 LAW & CONTEMP. PROBS. 83 (2020).

⁴³ Gelpert & Levitin, *supra* note 5, at 6.

⁴⁴ *Id.*

⁴⁵ See, e.g., Listokin & Murphy, *supra* note 17, at 380.

⁴⁶ See, e.g., Furman, *supra* note 12, at 709.

⁴⁷ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 166 (Prometheus Books 2000).

⁴⁸ See discussion *supra* Section II.A.

⁴⁹ See discussion *supra* Section II.B. Contrary to one commentator’s assertion, these critiques of pro-regulatory policies are not ideological, but grounded in fundamental economic principles, as evidenced by the fact that both schools of thought—Austrian and Public Choice—boast at least one Nobel Laureate. *But see* Listokin, *supra* note 25. Likewise, public choice, at least, counts among its

A. The Knowledge Problem

Associated most closely with F.A. Hayek, Ludwig von Mises,⁵⁰ and others of the Austrian School, the “knowledge problem” refers to the difficulty—or impossibility—of accumulating the information necessary to plan macroeconomic outcomes.⁵¹ Even the process of bringing something simple—say, a pencil⁵²—to market is beyond the capacity of a single planner or group of individuals planning. The reason is that, for every product or service sold, there is a complex web of inputs, and inputs for those inputs, and so on, all of which must be coordinated in order to manufacture a single pencil.⁵³ If a profit-motivated producer cannot know enough to manufacture a pencil without the miracle of market prices, then a regulator tasked with identifying and fixing big, societal problems—without any market signals to give guidance on how to account for the inputs and inputs-of-inputs—faces a truly insurmountable task.⁵⁴

The knowledge problem goes further than that, however, because it is not just that the information needed to adequately identify, diagnose, and remedy societal problems is not readily available. Indeed, the information necessary to accomplish what we ask of regulators often does not exist in any form that can be aggregated for the use of the regulator.⁵⁵ LawMacro therefore proposes to solve big solutions without access to the kind of reliable information that would allow a reasonable observer to have any confidence in the outcome.

Even microeconomic outcomes are unpredictable, as individual responses to stimuli are always subject to the individual tastes and preferences of individuals, the full details of which might not even be fully understood by the individual.⁵⁶ Those obstacles are augmented in macroeconomic analysis by the additional

founders decidedly non-libertarian thinkers, like Mancur Olson and Kenneth Arrow. *See generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).

⁵⁰ Some Austrian economists would argue that Mises would have rejected the knowledge problem, proposing instead that the problem of central planning is a calculation problem. *See* Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51, 65-68 (1991). Others suggest that the distinction between the knowledge problem and the calculation problem is a semantic one, without much substance. *See* Leland B. Yeager, *Mises and Hayek on Calculation and Knowledge*, 7 REV. AUSTRIAN ECON. 93 (1994). This section uses the term “knowledge problem” for the sake of simplicity, but is largely consistent with both conceptualizations of the question.

⁵¹ Hayek, *supra* note 2, at 519.

⁵² *See* LEONARD E. READ, I, PENCIL: MY FAMILY TREE (1958).

⁵³ *Id.*

⁵⁴ *See, e.g.*, Kenta Tsuda, *Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review*, 7 MICH. J. ENV'T & ADMIN. L. 131 (2017) (addressing the difficulties of administrative agencies in interpreting the National Environmental Policy Act of 1969).

⁵⁵ *See* Hayek, *supra* note 2, at 521 (“[T]here is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of several rules: the knowledge of the particular circumstances of time and place.”).

⁵⁶ *See* F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 27 (U. Chi. Press 1960) (“Man is generally ignorant not only of why he uses implements of one shape rather than of another but also of how much is dependent on his actions taking one form rather than another.”).

knowledge hurdles associated with aggregate variables.⁵⁷ The result is twofold. First, it may not be as obvious what the problems actually are. Second, once the problem is identified, a diagnostic process must occur, in order to identify the source of the problem. These two problems can be consolidated into one concept—defining the problem.

Of course, the goal is to *solve* problems, not just identify them, so the next step must be solving the problem, but that raises additional questions. First of all, what is the target at which macroeconomic tools will be aimed? Even after answering that question, administrative agencies must determine how to get from the starting point to the ideal point. This process looks very simple in our theoretical models, but the reality is far more complex. Even A.C. Pigou, in explaining the value of government interventions to cure externalities, explained that it is very difficult to figure out the target.⁵⁸ And, even if we succeeded in correctly identifying the problem, aiming the mechanism of government correctly, and arriving at the efficient point, the dynamic nature of the real world would guarantee that the government “solution” no longer solves the problem.

1. Defining the Problem

It may be more accurate to say that the starting point must always be to determine whether there is a problem to solve.⁵⁹ Individuals have their preferences, and there is a very human tendency to consider all things that run counter to our personal preferences as problems. In reality, there are many things that are bothersome to the individual that are a net gain to others.⁶⁰ When problem solving is left to decentralized processes, those solutions that emerge are likely to be the ones that create the greatest benefit for the greatest number, subject to the constraint that the cost imposed on the losers be minimized.⁶¹ When an individual,

⁵⁷ Aggregation bias has long been understood by both economists and legal scholars to be a significant problem. *See, e.g.*, Kanhya L. Gupta, *Aggregation Bias in Linear Economic Models*, 12 INT’L ECON. REV. 293 (1971) (testing for the presence of aggregation bias in a specific type of model); Peter N. Salib, *Artificially Intelligent Class Actions*, 100 TEX. L. REV. 519, 536 (2022) (“erroneous imputation of population-level effects to individuals in the population is called ‘aggregation bias’”).

⁵⁸ Arthur C. Pigou, *State Action and Laissez-Faire*, in ECONOMICS IN PRACTICE: SIX LECTURES ON CURRENT ISSUES 107 (1935) (“In order to decide whether or not State action is practically desirable, it is not enough to know that a form and degree of it can be conceived, which, if carried through effectively, would benefit the community. We have further to inquire how far, in the particular country in which we are interested, and the particular time that concerns us, the government is qualified to select the right form and degree of State action and to carry it through effectively.”).

⁵⁹ *See* Kidd, *supra* note 11, at 457.

⁶⁰ One example of this phenomenon would be a neighborhood party, to which everyone in the neighborhood is invited, and where music will be played quite loudly. All but one individual—an individual who doesn’t like crowds or loud noises—attends. The noise created by such a party would certainly be a net negative to the individual who did not attend, but the combined gain in happiness to all of those who attend the party and enjoy the music will outweigh the loss to the non-attending individual.

⁶¹ The party, as a net-gain to the combined set of neighbors who attend, will and should occur, but it can be held at a location far enough from the house of the one who will not attend, so as to limit the harm from the music and crowds. Doing so is not only possible, but likely, as long as the neighbors are not motivated by spite, but rather a desire to maximize happiness (in economic terms, utility).

or small group of individuals—e.g., a regulatory body—is tasked with identifying problems, it is far more likely that the “problems” identified will be those that offend the personal sensibilities of the regulators, rather than those that are a net harm to society, at large.⁶²

Setting aside that potential problem, however, and assuming that there has been an efficient selection of a problem to be solved, there remains much work to be done in identifying where the problem is coming from and where to situate policy, to maximize the likelihood of an effective solution. Advocates of government policy interventions, particularly those outside of government or academia, usually assume away all complications regarding this part of the process.⁶³ It is as if the problem were as represented in Figure 1. The field represents the world and the peak represents the problem. In this imaginary world, there is a single, obvious peak, and all that remains for the regulator is to choose a policy based on reducing the height of the peak.

⁶² One reason this might occur is availability bias, in which the individual will view a problem as more serious when they have personal experience with the problem happening. *Cf.* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1127 (1974). It is worth mentioning that certain constitutional doctrines can help mitigate this problem. First and foremost, the separation of powers between three co-equal branches of government—horizontal separation of powers—is intended to limit the ability of any of the three branches from engaging the government’s monopoly on force without the consent of the others. A more diverse group of individuals would therefore be needed to set society on a particular policy path. Similarly, vertical separation of powers—reserving certain powers to the states, rather than to the central government—limits the ability of any level of government to command in too many things. Unfortunately, judicial doctrines meant to shore up a waning dedication to separation of powers—the non-delegation doctrine, the newly fashioned major questions doctrine, and others—have been unsuccessful in gaining dominance in the long run.

⁶³ *E.g.*, Paul F. Campos, *Food Policy and Cognitive Bias*, 5 *WAKE FOREST J.L. & POL’Y* 187, 192 (2015) (“Confirmation, causal, and optimism biases all tend to obscure the complexity of this relationship.”). Even those who understand the complexities of both the problem and the bureaucratic apparatus often oversimplify the process of solving problems, based on the institutional constraints that they face. *See generally* JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

Figure 1

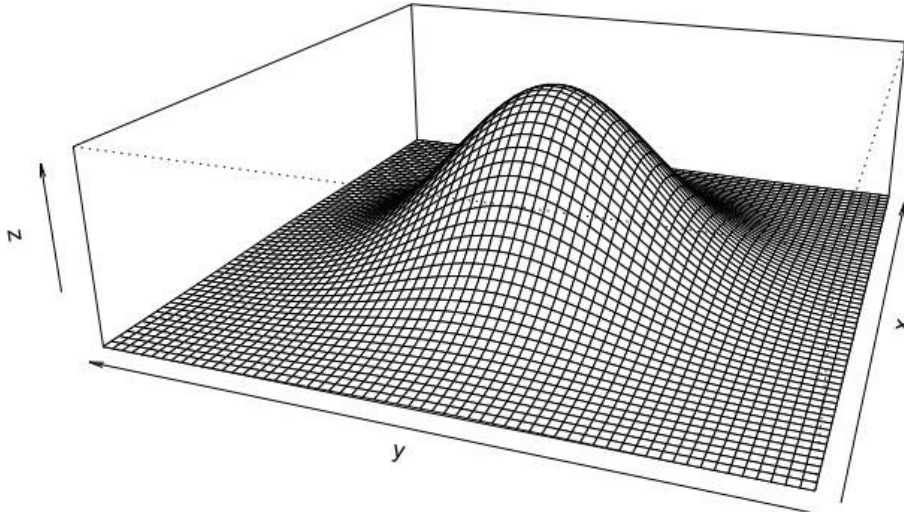
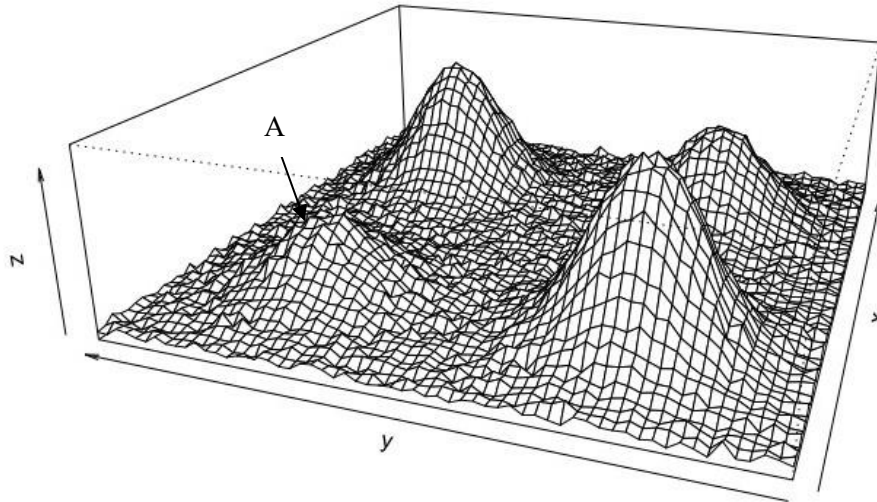


Figure 2



In reality, the world is a complex place, and the problem is far less likely to be readily identifiable. Consider Figure 2, for example, in which there are multiple peaks, potentially of differing heights. Multiple peaks represent the reality

that there are multiple sources of the problem or, at the very least, different manifestations of the problem. The real world, of course, likely has a much greater number of perturbations, high and low, representing a variety of potential sources or manifestations of the problem.⁶⁴ In theory, a regulator who had perfect information would know all of the peaks and valleys of this particular field, their relative heights, and the distance between them—all information relevant to identifying and, later, solving the problem. To the extent that a regulatory proponent acknowledges the complexity of the world, the secondary assumption is often applied: that the regulator will have the information necessary to handle that complexity in identifying the problem.⁶⁵

Unfortunately, the knowledge problem precludes the regulator's having any means of doing so. Instead, the regulator will have only partial information,⁶⁶ which will impact the regulator's view of the field. One possibility is that the regulator sees the entire field, but without any granularity, like viewing it from thirty thousand feet.⁶⁷ In that scenario, the regulator will have trouble distinguishing the relative heights and depths in the field, and that will reduce the accuracy of the regulator in identifying the source of the problem.

The second possibility is that the regulator has a more detailed view, but only of a portion of the field, while remaining largely ignorant of the full spectrum.⁶⁸ This type of scenario might occur when a regulatory body is led by an individual or a group of individuals who have specialized education and training that biases their views towards a particular subset of issues that might contribute to the problem. For example, during the COVID-19 pandemic of 2020-22, much of the policy regime was governed by experts who had education, training, and experience in public health, but no experience in economics, education, or any of the other areas that were impacted by the regulatory response.⁶⁹

Setting aside public choice problems for a moment, a well-intentioned regulator who wants to maximize social welfare will aim to identify the best possible outcome—visually, the global maximum—but the lack of knowledge of the full spectrum might limit the analysis to, for example, the area surrounding

⁶⁴ Recognition of how the world's complexity means that there are usually—if not always—multiple causes of a recognized problem is widespread, including scholars from various disciplines and ideologies. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (discussing how the intersection of racial, gender, and other characteristics independently and jointly contribute to creating disadvantages for individuals and groups); *see also* Hayek, *supra* note 2.

⁶⁵ Most neoclassical economic analysis makes this assumption. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1992).

⁶⁶ *See* Hayek, *supra* note 2.

⁶⁷ *See id.*

⁶⁸ *See* WILSON, *supra* note 63 (identifying this pitfall of bureaucratic specialization as one of the constraints that limit the effectiveness of bureaucratic interventions).

⁶⁹ *E.g.*, Fraser Nelson, *The Lockdown Files: Rishi Sunak on what we weren't told*, THE SPECTATOR (Aug. 27, 2022) (“[Neil Ferguson and his team at Imperial College] stressed it did not consider the wider social and economic costs of suppression, which will be high.”).

peak A.⁷⁰ Even the best analysis available to the regulator will exclude the other peaks and peak A—certainly a local maximum—will be falsely identified as a global maximum. That will result in a policy choice that aims not at the main source of the problem but at an ancillary source. This misdiagnosis will lead to a suboptimal outcome and, depending on the nature of the problem and the proposed policy solution, might make the problem worse.⁷¹

As a relevant side note, if peak A is not particularly tall compared to the remainder of the field, a regulator's failure to understand the full spectrum might lead to similar problems, even if peak A were a global maximum. If the problem is a particularly complex one, there may be so many sources and manifestations of the problem that the entire field has significant height, as represented in Figure 3. A policy solution aimed at peak A will miss most of the problem. As discussed *infra*,⁷² public choice problems will only make these problems worse, as rent-seeking efforts will obscure the regulator's ability—or willingness—to correctly ascertain the lay of the land.

To this point, we have been discussing problems that are inherent to the regulatory process. As a methodology that begins with the premise that big problems need big solutions, LawMacro must acknowledge and address these potential obstacles to its theory. However, the macroeconomic focus on aggregate measures leads to a potential problem that is unique to LawMacro solutions.⁷³ Aggregate measures will usually take the form of averages or something similar, and a dominant focus on the average will obscure any information about peaks and valleys.⁷⁴ The local and global maxima are certain to impact the average, as are local and global minima, but the exact location of those maxima and minima will be lost in the focus on aggregate measures.

An increase in LawMacro's influence will lead to a reduction in the consideration of maxima and minima, and that will increase the likelihood that the policy choice will be aimed not at the global maximum—or even a local maximum—but at some other, less ideal, point. Shifting in this direction has the potential effect of increasing misidentification in the problem, perhaps missing all

⁷⁰ To the regulator that has extensive knowledge of peak A, the field may appear to be as it appears in Figure 1.

⁷¹ A regulator who is focused on achieving peak A might take efforts that move away from peak A, or might shift society away from an even higher peak—a socially-preferred outcome—in achieving the outcome that the regulator incorrectly believes is the best society can achieve.

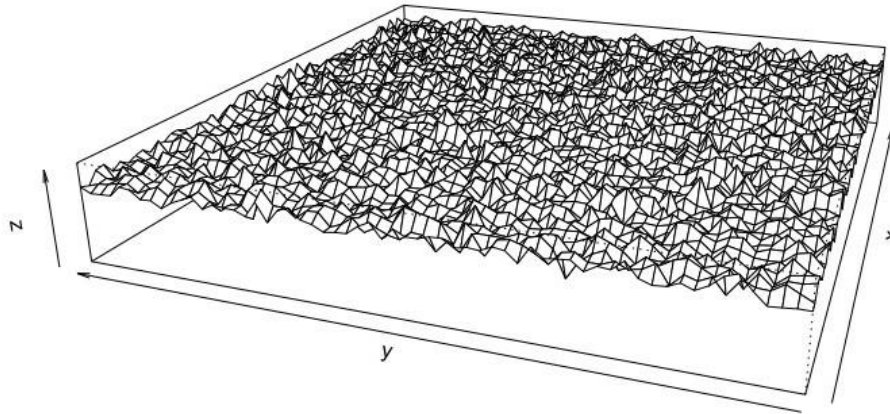
⁷² See discussion *supra* Section II.B.

⁷³ Regulatory bodies are likely to strongly focus on aggregate measures, given that they are typically created to solve big problems, and bigger problems are likely to generate relevant aggregate measures. If LawMacro is successful, however, regulators are likely to increase their emphasis on aggregate measures, making this problem more pronounced.

⁷⁴ Imagine a statistical analysis of Mt. Everest, for example. The peak stands at 29,032 feet above sea level, making it the highest peak in the world. Taking measurements at base camp, which sits at 17,598 feet above sea level, provides a second data point. Both are interesting data points, but the average of the two, 23,315 feet above sea level, is significantly less interesting, as there are over 100 mountains that tall around the world. If the "average height" of Mt. Everest were calculated by using sea level as one of three data points, the number becomes 15,543 feet, which is shorter than almost 400 mountains on earth. Averages can be helpful, but they can also mislead.

local maxima entirely and associating a policy response with a local or global minima, where the remedial policy will be least impactful.

Figure 3



The potential harms of adopting a more LawMacro-centered analysis might be mitigated under two circumstances. The first is the scenario depicted in Figure 3 and described above, when the problem is sufficiently complex that the problem manifests itself in so many different ways that the field has only slight peaks and valleys. In that case, the average will be a fair approximation of the entire field. It may even be that the LawMacro approach will be superior to the standard regulatory approach, at least in terms of diagnosing the problem. The second way that LawMacro distortions might be mitigated is if the regulatory agency chooses micro mechanisms to pursue macro goals,⁷⁵ since that would potentially allow for a broader set of incentives,⁷⁶ to which individuals could respond in ways that would maximize individual and societal welfare.

If the regulator finds some way to overcome these difficulties in identifying and understanding the field in which the problem emerges, there remains a difficult process of diagnosing the actual problem. Specifically, why does the problem manifest itself in a particular way or ways? What is the cause of

⁷⁵ See discussion *supra* Section III (describing the JOBS Act of 2012 as an attempt at macroeconomic stimulus). See also Erik F. Gerding, *Against Regulatory Stimulus*, 83 L. & CONTEMP. PROBS. 64 (2020). However, it achieves its aims through *removing* prior regulations, incentivizing individuals, firms, and financial institutions to change their behavior.

⁷⁶ Rather than focus on attempting to move society through large policy choices, a micro approach to macro problems would attempt to meet individuals where they are, altering their behavior in small ways that, when aggregated, could potentially yield large results. These localized solutions would need to take cultural, socioeconomic, and other differences into account, in order to convince individuals to change their behavior.

the various peaks and valleys, if the problem manifests itself as represented in Figure 2, or the relative lack thereof, if reality comports more with Figure 3? The need for this diagnosis should be obvious, as knowledge of why the problem manifests in certain ways will be vital to understanding how to address the problem. Attempting to implement a solution before understanding the nature of the problem would be little more than an exercise in speculation, and a solution in search of a problem is a recipe for making extant problems worse.⁷⁷

It is possible to imagine some a narrow range of regulatory interventions for which diagnosis would be a purely scientific endeavor, such as those requiring only measurement of the natural world.⁷⁸ Even in such a case, the diagnostic task would be far from easy, due to the inherent complexity of natural systems and the accompanying confounding factors. In most regulatory circumstances, the problem increases in complexity by orders of magnitude, because human beings are involved and humanity is full of individuals who defy standard predictive efforts.⁷⁹ Individuals have tastes and preferences, along with biases, unreasonable fears, and many other character traits that cannot be entirely known by a regulator who endeavors to change the world in which these individuals live, plan, and interact.⁸⁰ Worse—for the regulator—many of the confounding elements in human systems are not even known to the individual until the moment in which the individual is forced to make a choice.⁸¹

A well-intentioned regulator could spend a significant amount of time mastering the scientific knowledge relevant to the problem and still fall short of attaining sufficient information and understanding of the complex human relationships and reactions that would be necessary to identify the full range of its causes, due to the inherent variability and unpredictability of human behavior. Given that regulators' authority, power, and budgets are built on the premise that

⁷⁷ A notable example from history is Prohibition, with the Eighteenth Amendment banning the manufacture, sale, and transportation of alcohol. U.S. CONST. amend. XVIII. One fundamental goal of prohibition was to curb alcohol-related violence. Mark Thornton, *Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure*, CATO INSTITUTE (July 17, 1991), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf>. As is almost universally accepted, the result was the opposite, and largely due to prohibition, itself. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 641-42 & nn. 157-160 (1990) ("The murder rate rose with the start of Prohibition, remained high during Prohibition, then declined for eleven consecutive years when Prohibition ended. The rate of assaults with a firearm rose with Prohibition and declined for ten consecutive years after Prohibition.").

⁷⁸ For example, once society decided that reductions in sulfur dioxide were desirable, and passed the Clean Air Act of 1970, the Environmental Protection Agency has tracked emissions. *E.g.*, *Our Nation's Air: Status and Trends Through 2023*, U.S. ENV'T PROT. AGENCY (2023), <https://gispub.epa.gov/air/trendsreport/2023/>.

⁷⁹ See generally F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 72 (U. of Chi. Press 1980) ("The social complexes, the social wholes which the historian discusses, are never found ready given as are the persistent structures in the organic (animal or vegetable) world.").

⁸⁰ Many of these factors are not even known to the individuals, themselves. See HAYEK, *supra* note 56, at 27. Asking a regulator to know factors that are unknown even to the relevant individuals is to ask the impossible.

⁸¹ See *id.*

regulators are the “experts,”⁸² it is unlikely that a regulator would ever acknowledge the impossibility of the task they have been given, rendering their diagnoses little more than the “pretense of knowledge.”⁸³

Having described the additional problems that can arise when LawMacro is part of the diagnostic process, it is only fair to point out how it could provide some benefits, if applied judiciously. Specifically, the importance of monetary effects is acknowledged by most economists,⁸⁴ yet those effects are absent from most LawMicro analyses.⁸⁵ Economic analysis of law should consider all macro effects that feed back into individual reactions, including interest rates, money supply, systemic risk, and so on. However, application of LawMacro could also make things worse, if macro effects became the focus, rather than a tool. A singular obsession about income inequality, for example,⁸⁶ would focus too much attention on the aggregate measure, such as the United Nations Inequality-Adjusted Human Development Index.⁸⁷ Such a focus obscures the interactions between legal rules and individuals who make the decision to gain levels of human capital that enable them to earn higher incomes.⁸⁸ It also overlooks the role of legal rules that incentivize certain investing and innovation patterns that, in turn, reward different groups of investors differently.⁸⁹

2. Solving the Problem

If the regulator survives the challenges of correctly identifying and diagnosing the problem, there remains the daunting task of crafting and applying a solution that will improve the situation, relative to the status quo. Popular movements in favor of government intervention rarely acknowledge how difficult that task is, and LawMacro proponents are no different. But a realistic solution must go beyond simply providing some additional benefit. More than just improving the status quo, a realistic solution must do so in a cost-effective manner, providing a benefit above and beyond the cost of achieving the goals of the regulatory proponents.⁹⁰

Public debates over proposed regulatory interventions rarely ask the full set of these questions. The regulatory process has certain safeguards in place to encourage cost-benefit analysis of new regulations,⁹¹ but confirmation bias is a

⁸² See, e.g., *Dep't of Health and Hum. Servs. v. Chater*, 163 F.3d 1129 (9th Cir. 1998) (“[W]e must give substantial deference to an agency’s interpretation of its own regulation because its expertise makes it well-suited to interpret the language.”).

⁸³ F. A. Hayek, *The Pretence of Knowledge*, 79 AM. ECON. REV. 3, 7 (1989).

⁸⁴ E.g., Robert E. Lucas Jr., *Expectations and the Neutrality of Money*, 4 J. ECON. THEORY 103 (1972).

⁸⁵ See Zelmanovitz & Salama, *supra* note 19.

⁸⁶ See Ramirez, *supra* note 27, at 228-31.

⁸⁷ See *id.*

⁸⁸ E.g., Gary S. Becker, *Human Capital*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/HumanCapital.html>.

⁸⁹ E.g., Luigi Guiso et al., *Trusting the Stock Market*, 63 J. FIN. 2557 (2008) (describing the role of culture and trust on investment decisions).

⁹⁰ See generally CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018) (describing the importance of cost-benefit analysis and the ways that it informs regulatory decisions).

⁹¹ See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

heady drug,⁹² and proponents of any regulation are unlikely to look very hard at the costs of regulation.⁹³ LawMacro purports to be motivated by a desire to improve humanity by solving big problems, and those big problems and LawMacro's proposed solutions make it difficult—if not impossible—to assess costs, benefits, and relationship to the status quo.

To be fair, it is not just LawMacro that will struggle in these efforts. Any form of regulatory intervention is going to face an uphill battle in crafting a solution that will remedy a perceived wrong. Even if we set the standard for success at something less than perfection—to do so is only fair, as perfection in a complex world is unattainable⁹⁴—regulatory interventions will typically fall short. Take, for example, one of the most acknowledged justifications for government interference in the private activities of its citizens—the negative externality.⁹⁵ Airborne or waterborne pollution is a standard problem in society, with private actions imposing costs on parties not involved in the economic activity.⁹⁶ Standard economic analysis states that, when the social marginal cost is greater than the private marginal cost, the activity will occur at a level that generates more total cost than total benefit.⁹⁷ Efficient legal rules, in this scenario, will find a way to restrict private activity to the point where marginal social cost is equal to marginal social benefit.⁹⁸

The standard answer for achieving this end is to impose a tax equal to the external cost imposed, requiring the individuals engaged in the activity to internalize the costs.⁹⁹ If achieved, this action achieves the efficient outcome, sets marginal benefit equal to marginal cost, and eliminates deadweight loss.¹⁰⁰ Unfortunately, the task of calculating the appropriate tax is incredibly complex. Even Pigou, the originator of this idea, acknowledged the potentially insurmountable task of crafting the efficient tax, in the very work in which the concept was proposed.¹⁰¹

⁹² See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 29-62 (2012) (describing how people use moral intuitions to arrive at conclusions, then use confirmation bias to defend those conclusions).

⁹³ To be fair, opponents of regulatory intervention also fall into the same trap, understating the costs of the status quo and the benefits of regulatory change.

⁹⁴ See generally IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* (1793) (exploring the constraints on human cognition that make perfection impossible).

⁹⁵ See, e.g., WILLIAM D. NORDHAUS, *A QUESTION OF BALANCE: WEIGHING THE OPTIONS ON GLOBAL WARMING* (2007) (justifying regulation of greenhouse gases by the negative externalities imposed by global warming).

⁹⁶ Bryan Caplan, *Externalities*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/Externalities.html>.

⁹⁷ See *id.*

⁹⁸ Gabriel Weil, *The Carbon Price Equivalent: A Metric for Comparing Climate Change Mitigation Efforts Across Jurisdictions*, 125 *DICKINSON L. REV.* 475, 511-512 (2021). *But see* Jeremy Kidd, *Kindergarten Coase*, 17 *GREEN BAG 2D* 141, 147-48 (2014) (describing how bargaining between the parties can lead to a more efficient outcome).

⁹⁹ See generally ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 329-336. There is a separate criticism of the Pigouvian method and, in fact, all standard treatment of externalities. Coase rejected the presumption that an externality was an immoral

The alternative solution is to limit the activity to the efficient level. Efforts at reducing air pollutants often take the form of a cap and trade system, in which the total level of pollution is limited, and polluters are allowed to trade pollution allowances.¹⁰² A power plant that can cheaply switch to low-sulfur coal, for example, might reduce sulfur-dioxide emissions and generate a pollution credit. That credit can then be sold to a manufacturer that is struggling to reduce pollution to mandated levels.¹⁰³ Overall pollution targets are met, and those that can reduce pollution more cheaply can have their abatement expenses defrayed when selling the credits.

The “trade” portion is a microeconomic, market-based method for achieving the reduction in pollution at a lower cost, but the “cap” portion is nothing less than an attempt to identify the efficient level and establish an upper limit.¹⁰⁴ Once again, these regulatory solutions promise an efficient outcome by accounting for the externality and adjusting production to the efficient level. Under either solution—Pigouvian taxes or express caps—the regulator must know not only how the externality arises, and the nature and quantity of harm imposed on all society, but also how people will react to the taxes or limitations.¹⁰⁵

To efficiently regulate production, a regulator would need a very close approximation of the marginal benefit and marginal cost curves for each producer, of which there would be thousands if not millions. Each producer would have an understanding of the contours of the curves—the precise curves are impossible to know with precision—but the regulator would need to obtain this information from the producers, then aggregate it without distortion or bias.¹⁰⁶ Then, the regulator would need to know the marginal spillover cost for each unit of production, which would differ between goods and producers.¹⁰⁷ More importantly, this is information that producers, themselves, may not know, at least not explicitly.

Even those that know *of* the spillover costs may be unaware of the full nature and severity of the costs. In part, this is because the cost is not entirely quantifiable. Some of the costs of pollution, for example, are measurable in terms

imposition of costs and focused on the reciprocal nature of the harms. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960). Coase argued that an efficient solution might even require behavior modification by the “victim,” rather than the polluter. *Id.* at 13. See also Kidd, *supra* note 98, at 149-50. The Coaseian critique is worth considering in most contexts, but will not be here, for it falls outside the confines of the knowledge problem.

¹⁰² Koushik Ghosh & Peter Gray, *Rushing to Copenhagen? Is Cap-and-Trade the Answer?*, 53 CHALLENGE 5, 5 (2010).

¹⁰³ Or, alternatively, to Taylor Swift—or other wealthy individuals—who can then claim a net-zero pollution impact from touring and personal travel.

¹⁰⁴ See, e.g., Weil, *supra* note 98, at 480 (“[I]f policymakers had set an emissions cap at the observed quantity of aggregate GHG emissions and not implemented other emissions policies . . .”).

¹⁰⁵ E.g., Robert E. Lucas, *Econometric Policy Evaluation: A Critique*, 1 CARNEGIE-ROCHESTER CONF. SERIES ON PUB. POL’Y 19 (1976) (showing how individuals would change their behavior as a reaction to the news of regulatory changes).

¹⁰⁶ See ARMEN A. ALCHIAN & WILLIAM R. ALLEN, UNIVERSAL ECONOMICS 240 (Jerry L. Jordan, ed. 2018) (“Each producer has a supply curve representing its rates of supply at various prices. Adding (horizontally) the supply curve of each of the suppliers gives the aggregate (or industry) supply curve.”).

¹⁰⁷ See Kidd, *supra* note 11, at 463-64.

of increased utilization of health care services,¹⁰⁸ but others are psychic, as with a homeowner who loses the aesthetic benefit of a mountain or ocean view, due to increased haze in the air.¹⁰⁹ Many of these psychic costs will not be readily apparent or, if they are, that the individual who suffers them will be able to place a value on them.¹¹⁰ If the individual cannot, we cannot reasonably expect a regulator to assess each individual's psychic costs, aggregate them without bias or confounding effects, and combine them with the monetary spillover costs.¹¹¹

As with identification and diagnosis, the knowledge problem in crafting a solution is made worse by the application of LawMacro principles. It is individuals that interact and create problems, and it is upon individuals that legal rules act, potentially leading to a solution. LawMacro, by focusing on individuals only as part of a collective, misses the opportunity to understand and, therefore, make use of individual preferences. Returning to Figure 2, LawMacro will miss the presence of multiple peaks, to say nothing of the composition of those peaks, and will apply a policy based on a flawed understanding of the problem. As a result, those policies are just as likely to cause peaks to move in opposite directions—one rising while another falls—or both to move in opposition to the regulatory intent.

To be fair, LawMicro policy responses can also get things wrong, because individuals are unpredictable, the world is complex, and our modes of measurement are flawed. However, because LawMicro concerns itself primarily with the individual, there is greater predictive power when we begin with microeconomic foundations and anticipate individual reactions. Some of LawMicro's hypotheses are testable, as we can see *whether* individuals are reacting in the way we thought they might.¹¹² LawMacro, on the other hand, sees results only after aggregation, so we can never know whether any particular individuals acted in the predicted fashion. As a result, we can never know *why* a policy did or didn't work.¹¹³ For example, if the LawMacro policy leads to the desired outcome, it might be the result of half the population acting contrary to the preferred choice of the policymaker, but at a lower intensity than half that acted as

¹⁰⁸ E.g., Stacey E. Alexeeff et al., *Association between traffic-related air pollution exposure and direct health care costs in Northern California*, 287 *ATMOSPHERIC ENV'T* 119271 (2022).

¹⁰⁹ See generally Oscar Holland, *Striking Photos Show a Decade of Environmental Decline Along the Ganges*, CNN (Jun. 12, 2019), <https://www.cnn.com/style/article/ganges-environment-photographs/index.html>.

¹¹⁰ Hedonic models—those that attempt to price psychic amenities—are subject to various limitations. Those limitations do not render hedonic models illegitimate, but they do advise caution. CFI Team, *Hedonic Pricing*, CORPORATE FINANCE INSTITUTE, <https://corporatefinanceinstitute.com/resources/valuation/hedonic-pricing/> (last visited May 22, 2025).

¹¹¹ Even these costs are not simply added up, but must be carefully ascertained through statistical regression, because the world is complex and every increase in costs is likely the result of multiple factors. An efficient solution must begin with accurate assessment.

¹¹² See, e.g., Brian J. Broughman & Kenneth Dau-Schmidt, *Law and Economics: Empirical Dimensions*, 1 *J. LEGAL ANALYSIS* 225 (2015) (describing the way that empirical tests can help refine the models created by law and economics scholars).

¹¹³ If everyone acted uniformly and in the same direction, there would be little difficulty with aggregation. Because everyone won't (they have different preferences and budget constraints), then a particular outcome is not simply everyone's pro-rata choice, summed together.

expected. The regulator might incorrectly assume, therefore, that humanity is acting in accordance with the regulator's assumptions, which would lead to worse outcomes when applied in the future.

3. Need for Dynamism

The job of a regulator is not easy, and it is never done. It is not easy because, as previously discussed, the regulator's inability to obtain and process the relevant information about the problem makes it largely impossible to identify and diagnose the problem. Likewise, even a correctly diagnosed problem must be solved, and the knowledge required to fashion an effective solution is unavailable to the regulator. The regulator's job is also never done because, even if the planets aligned and the regulator succeeded in crafting a solution that would precisely counter the problem, the solution would remain correct for mere moments.

The problem for the regulatory advocate lies in the fact that the world is both deeply complex *and* dynamic.¹¹⁴ Every freshman economics student will learn a host of models designed to convey principles about a complex world, and many of which provide the arguments in favor of regulation.¹¹⁵ Each of these models is founded on the assumption of *ceteris paribus*, or that all other factors will be held constant.¹¹⁶ Regulatory attempts to fix the world cannot use that simplifying assumption, however, because very little in the real world remains constant—the *ceteris* is never *paribus*. In other words, real world problems don't abandon complexity and dynamism because an economist modeling the problem assumes the complexity and dynamism away to make the models more tractable.¹¹⁷

As a result of the world's inherent dynamism, any regulatory target is always a moving target. Regulatory solutions to problems are rarely dynamic since they rely on a regulator to gather information and modify the policy. As a result, there is a strong likelihood that, at any given moment, the regulatory intervention will be falling short—perhaps significantly so—of the stated goals of the policy. As will be discussed in the following section, there are reasons to suspect that poor regulatory performance is intentional but, intentional or not, the mismatch between the dynamism of the problem and the lack of dynamism in regulatory solutions renders regulation ill-suited to most problems.

LawMacro, once again, exacerbates this problem, focusing as it does on large-scale problems, signaled by aggregate measures and purportedly solved by centralized means. First and foremost, big solutions to big problems must comport

¹¹⁴ See Kidd, *supra* note 11, at 456-57.

¹¹⁵ For example, in one popular introductory textbook, Chapter 10 covers externalities and discusses government interventions like Pigouvian taxes, subsidies, and tradeable permits; Chapter 11 covers public goods and common resources; and Chapter 15 covers market power and discusses the potential for government to intervene with antitrust policies. N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* (9th ed. 2020).

¹¹⁶ E.g., Glynn S. Lunney, Jr., *Patents and Growth: Empirical Evidence from the States*, 87 N.C. L. REV. 1467, 1478 (2009) (“[C]eteris paribus (that is, holding all other variables constant).”).

¹¹⁷ This is not a call for economists to abandon models, for we learn many important principles from models that are founded on simplifying assumptions. It is a call for recognizing the limitation of these models and not assuming that the world remains as static as our models.

with the United States Constitution,¹¹⁸ including the process for enacting legal solutions—bicameralism and presentment.¹¹⁹ Any new intervention must gain the approval of a majority of both houses of Congress and the President, or else fall under an existing grant of authority.¹²⁰ Even in this latter case, however, new interventions must be implemented, and that will require compliance with the requirements of the Administrative Procedures Act, or APA, whose procedures work to slow down administrative agencies.¹²¹ As regulatory bodies comply with APA requirements in crafting solutions, the world will change, rendering any solution outdated long before it is implemented. When that fact is discovered, the agency can attempt to update its policy, but obsolescence will persist.¹²²

Finally, the nature of the LawMacro approach requires collection of aggregate measures to guide policy, adding more time to the process. Even if the regulator anticipates the standard dynamism of the world and crafts a solution that can be nimbly applied, LawMacro relies on data that must be collected before it can be applied.¹²³ As a result, even the most nimble solution will be stymied, and every moment of delay moves the world further away from the world that guided the regulator's choices.

B. The Public Choice Problem

If the knowledge problem can be thought of as the reminder—to proponents of regulatory intervention—that no one is smart enough to perfectly achieve the goals of intervention, then the public choice problem can be thought of as the reminder that no one is pure enough, either. The short version is that regulators are just people, subject to standard frailties and biases, including the desire to pursue their own self-interest. Riding under the banner of “politics without romance,”¹²⁴ public choice critiques reject the notion that regulators are angelic automatons, capable of being directed towards utopia and immune to distractions.

What this means is that there is an independent and parallel source of skepticism directed at the claims of regulatory proponents. Even in the unlikely

¹¹⁸ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.”).

¹¹⁹ See U.S. CONST. art. I, § 7, cls. 2–3.

¹²⁰ See *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (“No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.”).

¹²¹ In Prof. Richard J. Pierce, Jr.’s treatise on administrative law, he details, in Chapter 7, the extensive rulemaking procedures which must be followed by an agency that wishes to promulgate new rules. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (5th ed. 2009).

¹²² See Kidd, *supra* note 11, at 468–69.

¹²³ This problem became better understood during the 2020–22 Covid-19 pandemic, as delays in obtaining data was viewed as hindering policy responses by the public health community. See, e.g., Long Ma, et al., *Reporting Delays: A widely neglected impact factor in COVID-19 forecasts*, 3 PNAS NEXUS 204 (2024).

¹²⁴ James M. Buchanan, *Politics Without Romance*, 19 PUBLIC CHOICE 13 (2003).

event that a regulator overcomes the knowledge problem to a sufficient extent that a net gain to society is possible, it does not follow that the gain will be achieved. Anyone who stands to benefit, individually, from the regulatory policy choice will engage in rent-seeking, the effort to divert the public policy choice to where private benefits accrue to the rent-seeker.¹²⁵ That, along with the possibility that regulators will be beholden to special interests—a phenomenon known as regulatory capture¹²⁶—must reduce confidence in the achievability of regulatory goals. This section will discuss the impact of these public choice concerns on regulatory interventions, generally, and on the LawMacro approach, specifically.

1. Rent Seeking

Rent-seeking is an, admittedly, obscure term for the natural inclination of individuals to attempt to get something for nothing. When economists speak of “rents,” they typically mean extra market returns,¹²⁷ or some benefit obtained other than by being productive and providing something consumers want.¹²⁸ These benefits can be positive or negative. Positive, such as barriers to competition that enable the rent-seeker to act like a monopolist.¹²⁹ Negative, in that otherwise harmful regulations are adjusted to limit the costs imposed on the rent-seeker.¹³⁰

To be clear, the problem is not that producers seek profits or seek to avoid losses. Both activities are not only understandable but, in a competitive market, socially beneficial.¹³¹ When competition in an industry is strong, profits are obtained only by providing benefits to consumers, so profit-seeking firms will be striving to discern and then meet consumer preferences.¹³² Those firms will also

¹²⁵ See Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 Chi.-Kent L. Rev. 165, 168-69 (2018).

¹²⁶ See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT SCIENCE 3 (1971) (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).

¹²⁷ See Robert D. Tollison, *The economic theory of rent seeking*, 152 PUB. CHOICE 73, 74-75 (2012).

¹²⁸ “Rent” is also the term economists use for the payments to the owners of land when land is used as an input to production. For centuries, economists—to include Adam Smith, David Ricardo, and Karl Marx—have spoken disparagingly of landowners as receiving compensation without contributing to the productive process. See Alan W. Evans, *On Monopoly Rent*, 67 LAND ECON. 1 (1991).

¹²⁹ A well-known example is the pharmaceutical industry, where patents on newly-discovered treatments provide significant market power to the patent holder, but the phenomenon is far more widespread. See, e.g., Jeffrey Miron & Pedro Aldighieri, *The Biden Executive Order and Market Power*, CATO INSTITUTE (Aug. 24, 2021), <https://www.cato.org/briefing-paper/biden-executive-order-market-power>.

¹³⁰ See, e.g., Randall S. Kroszner & Philip E. Strahan, *What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions*, 114 QUARTERLY J. ECON. 1437 (1999) (describing the gradual deregulation of banking through state-level lobbying).

¹³¹ Throughout his most famous work, Adam Smith shows how individuals, pursuing their self interest, benefit their fellow men and society in various ways. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26-27 (R. H. Campbell & A. S. Skinner, eds., Liberty Fund 1981) (1776) (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self interest.”).

¹³² See Armen A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J. POL. ECON. 211 (1950) (describing how firms, faced with the uncertainty of competitive markets, must be continuously adapting and anticipating change).

seek to limit losses by being efficient in their use of resources, producing less waste—pollution—and leaving valuable resources available to produce other goods that consumers want.¹³³

Rent-seeking is problematic because it occurs outside of competitive markets, typically with the intention of making markets less competitive. The seeking, itself, is wasteful because it expends resources in non-productive activity,¹³⁴ but the greatest harm emerges in the wake of a rent-seeking contest, when barriers to competition have been erected and innovation stymied.¹³⁵

A rent-seeking market is like any other market—it functions only when there are producers and consumers. Those seeking rents can be thought of as the producers, generating a host of products that must appeal to the consumer. Rent-seeking consumers can be anyone with the power to erect barriers to competition; in most cases, that means some government entity.¹³⁶ Regulators, as consumers of rent-seeking expenditures, are themselves seeking to maximize various things—power and influence of their regulatory bodies, administrative budgets, personal enrichment or influence, and advancement of regulatory goals—at a minimum personal cost.¹³⁷

Proponents of regulatory intervention often operate from a strong presumption that the last item—advancement of regulatory goals—is what motivates the regulator.¹³⁸ Similar to the presumption of a single-peaked problem, discussed *supra*,¹³⁹ this assumption may simplify the arguments, but it is as far removed from reality as the simplifying assumptions of economists. And it serves the same purpose to make the models of the pro-regulatory interventionist—in this case, the LawMacro practitioner—more tractable. But is the purpose of the LawMacro models achieving a better understanding of human nature or something else?

Returning to the question at hand: what will LawMacro, if followed, do to the prevalence of rent-seeking? To answer that question, we must recall that the regulator values many things, all of which are potential avenues for the rent-seeker to seek special favors. LawMacro, by itself, does not necessarily affect any of these, but a shift in that direction might make it more difficult to draw connections between rent-seeking pressures and the rewards being sought.

¹³³ Kidd, *supra* note 11, at 484.

¹³⁴ See Gordon Tullock, *The Welfare Costs of Tariff, Monopolies, and Theft*, 5 WESTERN ECON. J. 224, 228-30 (1967).

¹³⁵ See, e.g., Jeremy Kidd, *Who's Afraid of Uber?*, 20 NEV. L.J. 581, 602-06 (2020) (describing the monopoly rents captured by owners of taxi medallions, along with sustained opposition to innovations like ride-sharing).

¹³⁶ See Tullock, *supra* note 134, at 229-30 (describing how private interests will attempt to subvert government power for private ends).

¹³⁷ See Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REGUL. 12, 13 (1983).

¹³⁸ See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976) (contrasting this “public interest” view of regulation with a more general, self-interested model).

¹³⁹ See discussion *supra* Section II.A.

Most rent-seeking is done covertly, under the cover of public statements regarding the need for the barriers to competition.¹⁴⁰ They are necessary, the regulator says, to improve public health and welfare.¹⁴¹ The rent-seeker might even publicly regret the need for regulation—it may even rail against “unnecessary” government meddling—but will privately count the expected increase in profits with great anticipation. This combination of public-virtue and private-vice has been understood by economists ever since Bruce Yandle coined the phrase “Bootleggers and Baptists.”¹⁴² Normally, the Baptist provides a shield of public morality to hide the private vice of the Bootlegger.¹⁴³ LawMacro provides a shield of obscure aggregate data, but the outcome is the same.

There are bound to be numerous allegorical Baptists for the policies advocated by LawMacro. Inequality, for example, is a cause célèbre for many different groups,¹⁴⁴ making the government’s reducing inequality an attractive place for Bootleggers to hide, rent-seeking their way into the regulatory process and tweaking it in ways that yield private benefits. But consider, also, that the aggregate measures that motivate both the origin of the effort and the measurement of “success” will be sufficiently obscure to the vast majority of the electorate that the Bootleggers will be covered by two layers of obscurity, virtually guaranteeing that their rent-seeking will be successful.

LawMacro’s obscuring rent-seeking behavior will reduce the production costs of the rent-seeker, causing the supply curve to shift out and prices to fall.¹⁴⁵ Lower production costs will mean short-term increases in producer surplus, which will turn into long-term profits in a non-competitive marketplace,¹⁴⁶ such as when regulatory capture occurs. But, even in the short-term, the shift in supply will mean an increase in the total amount of rent-seeking, unless there is a shift inward in demand for rent-seeking by the regulator. Unfortunately, that is unlikely to happen.

Recall that the regulator—the consumer of rent-seeking services—will desire to obtain as many as possible of her goals at the lowest possible cost. Those goals are the various quality aspects of rent-seeking, and LawMacro does not decrease the importance of any. LawMacro does affect one of the costs of consuming the rent-seeking—public detection and resulting shame of having used a position of public trust for private gain. To the extent that the demand curve shifts, it will be outwards, as the net benefit to the regulator increases.

At a bare minimum, the demand curve will remain stable, the shift in the supply curve will decrease price and increase quantity, increasing consumer

¹⁴⁰ See Kidd, *supra* note 135, at 606-07.

¹⁴¹ See, e.g., Jonathan H. Adler et al., *Baptists, Bootleggers & Electronic Cigarettes*, 33 YALE J. REG. 313, 342-43 (2016) (describing the emergence of e-cigarettes). See also *id.* at 344-47 (noting e-cigarettes were criticized on public health grounds); *Id.* at 348-51 (explaining that regulation enriched tobacco companies).

¹⁴² Yandle, *supra* note 137.

¹⁴³ See Kidd, *supra* note 135, at 607.

¹⁴⁴ See, e.g., Ramirez, *supra* note 27, at 228-31; Ramirez, *supra* note 29; Gelpert & Levitin, *supra* note 5, at ii-iii; Christina Parajon Skinner, *Central Bank Activism*, 71 DUKE L.J. 247, 281-88 (2021).

¹⁴⁵ See MANKIW, *supra* note 115, at 71.

¹⁴⁶ See Kidd, *supra* note 135, at 598-99.

surplus, to accompany the increase in producer surplus.¹⁴⁷ If the demand curve shifts outward, the overall quantity of rent-seeking will increase even more, and the change in price will be indeterminate.¹⁴⁸

2. Regulatory Capture

Run-of-the-mill rent-seeking is only the beginning, with the short-term effects described in the previous section. In the medium to long-term, however, the nature of the marketplace changes. Repeated dealings between consumer and producer in the rent-seeking market will change the way the participants react to each other. Similar to most markets, a form of brand loyalty will arise, and the regulator will begin to choose the same rent-seeker time after time. Eventually, the relationship will reach a point of full brand loyalty that economists refer to as “regulatory capture,”¹⁴⁹ and that brings with it a reduction in competition in the rent-seeking marketplace.

Profits rise when competition falls,¹⁵⁰ making the successful rent-seeker very happy. A lack of competition means that consumers lose but, in this case, the consumer is a regulator, and the regulator is not paying with her own money. Instead, she is paying with the resources of those in whose name the regulator is supposed to act—the public. The successful rent-seeker, now operating in an industry with lower competition, can extract higher prices from those who will be purchasing goods and services in that industry. In addition to raising revenues, the barriers to competition in the industry will also diminish the need for the successful rent-seeker to satisfy consumer preferences for quality, variety, etc.¹⁵¹

The impact of LawMacro on regulatory capture is not as straightforward as its effect on rent-seeking. Regulatory capture is the consequence of rent-seeking, with rent-seeking a necessary but not sufficient condition. Because LawMacro will tend to increase the amount of rent-seeking, one possible outcome is that application of LawMacro principles will accelerate the capture process. Alternatively, the increased rent-seeking may generate sufficient competition in the rent-seeking market that it will be more difficult to generate brand loyalty,¹⁵² slowing down the speed at which any producer can capture the regulator.

¹⁴⁷ See MANKIW, *supra* note 115, at 137-39.

¹⁴⁸ See *id.* at 78-79.

¹⁴⁹ E.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).

¹⁵⁰ See Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 236 (2021) (“In highly competitive markets, firms make profits, but competition drives their profit level down to the minimum that capital providers insist on for providing the capital.”).

¹⁵¹ See generally Michael Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV., Mar.-Apr. 1990 (providing numerous case studies that show the positive correlation between competition and product quality and innovation).

¹⁵² See generally Tullock, *supra* note 134, at 230 (explaining that this increased competition could help avoid regulatory capture, but rent-seeking imposes its own costs on society, as resources are diverted from productive activity to purely extractive activity).

Before moving on to the next section, where constructive options for using LawMacro will be discussed, one final public choice point is in order. Specifically, how these public choice concerns interact with and affect the knowledge problem, discussed *supra*.¹⁵³ Returning to that discussion, with particular emphasis on Figure 2, recall the difficulty of the task set before the regulator in determining where to apply the remedial policy. Even the most well-intentioned regulator would have had difficulty in identifying the global maximum, but a regulator who has been involved in the rent-seeking market—and especially one that has been captured—may be incapable of applying policy in the efficient location. Much like an intoxicant, rent-seeking will inhibit the regulator’s policy choices by limiting them to a narrower range of options (those preferable to the successful rent-seeker). As a result, the policy might be applied to a local maximum that benefits the rent-seeker or might even be applied to a local or global minimum, if the rent-seeking influence is strong enough.

IV. FUNCTIONAL LAWMACRO

The search for solutions, particularly big solutions to big problems, will always be fraught with peril. The knowledge problem will always loom large over any such efforts, reducing the likelihood of a successful resolution, so the criteria for whether LawMacro should be applied is not whether it will yield perfect solutions—no methodology can make that promise.¹⁵⁴ Instead, the criteria is whether—and in what form—LawMacro can yield a marginal improvement in the diagnostic and remedial accuracy of regulatory interventions.

LawMacro has been underutilized in law and economics scholarship. The literature has suffered for this omission, but the preceding two sections have also shown that avoidance of a strong LawMacro approach has also avoided significant costs. Tradeoffs, it seems, truly are inevitable, even in scholarship and particularly in policy making.

Given the magnitude of the costs imposed by the knowledge problem and public choice pressures, the benefits of adopting an unqualified LawMacro approach would need to be overwhelming. That they are not indicates that those adopting such an approach are likely motivated more by the desired policy choices that LawMacro promotes—largely exercises in central planning. Yet a more modest, “soft” form of LawMacro might provide the net improvement that we seek.

The greatest benefit of adopting LawMacro principles comes in the definition phase.¹⁵⁵ Use of macroeconomic measures can help identify potential

¹⁵³ See discussion *supra* Section III.A.

¹⁵⁴ Economist Harold Demsetz, in what has become known as the “nirvana fallacy,” criticized the tendency to assume that a perfect government solution could resolve imperfections in current institutional arrangements. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 1 (1969); see also THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATIONS AS A BASIS FOR SOCIAL POLICY 113 (1995) (“There are no ‘solutions’ . . . but only tradeoffs.”).

¹⁵⁵ See discussion *supra* Section II.A.1.

inefficiencies that should be addressed. Once used as a high-level diagnostic tool, however, LawMacro should retreat into the background, and allow for more traditional LawMicro analyses to refine the search. The knowledge problem will still be present, but if aggregate variables are only used to provide a first cut at the problem, the additional knowledge costs introduced by LawMacro should be minimized. Likewise, by cabining LawMacro to the broad survey for problems, its ability to mask rent-seeking pressures will be reduced, as well.

During the remedial process,¹⁵⁶ use of aggregate variables will cloud the analysis, so the primary focus should be standard LawMicro. However, certain feedback mechanisms will involve macro-level variables, such as interest rates and the money supply, and these effects cannot be ignored. LawMacro, therefore, can provide an auxiliary role in crafting solutions, but should not be the primary tools being used by regulators. It is in the remedial process that rent-seeking contests truly begin and pressures to distort policies for private gain are at their zenith. By restricting the use of macro variables in the remedial process, rent seeking will be largely unchanged from its normal levels.¹⁵⁷ The benefits of a soft LawMacro might reasonably be expected to outweigh the marginal costs in such a scenario.

The difficulty arises in identifying where to draw the line, and then to hold that line. A savvy rent-seeker will understand that greater LawMacro will yield greater benefits and will encourage greater use of macro variables. Regulators who want to purchase rent-seeking services will cooperate, as increasing LawMacro will open up new consumption opportunities, to say nothing about the increased discretion and power for the regulator. The tendency of the system to drift towards more LawMacro and accompanying costs might lead an observer to conclude that the only winning move is not to play.¹⁵⁸ If the benefits of considering macroeconomic variables are considered to be great enough, however, it might be possible to establish a bright-line, enforceable rule that aggregate measures will not be used in the remedial process.

Perhaps just as importantly, a modicum of care is all that would be necessary to discern which aggregate variables have the potential to impact individual behavior. Individuals consider interest rates, for example, when making decisions about investment, saving, and consumption behaviors.¹⁵⁹ Similarly, the money supply can and does impact individual choices,¹⁶⁰ albeit often without the individuals' recognizing the effect.¹⁶¹ Other aggregate variables, however, have only an attenuated connection, at best. Examples of this kind of variable are things

¹⁵⁶ See discussion *supra* Section II.A.2.

¹⁵⁷ The fact that those levels are as high as they are in our modern society is unfortunate, but that is the result of a variety of factors, very few of which are directly relevant to this discussion.

¹⁵⁸ WAR GAMES (MGM 1983) ("The only winning move is not to play.").

¹⁵⁹ E.g., Chen Lian et. al., *Low Interest Rates and Risk-Taking: Evidence from Individual Investment Decisions*, 32 REV. FIN. STUD. 2107 (2019) (discussing the impact of low interest rates on investor behavior).

¹⁶⁰ E.g., Esra Kilci & Veli Yilanci, *Impact of Monetary Aggregates on Consumer Behavior: A Study on the Policy Response of the Federal Reserve against COVID-19*, 29 APPLIED ECON. J. 100 (2022).

¹⁶¹ See generally Eldar Shafir, Peter Diamond & Amos Tversky, *Money Illusion*, 107 Q.J. ECON. 123 (1997) (providing empirical evidence for the "money illusion" or "price illusion," that individuals are unaware of the impact of inflation on their purchasing power).

like inequality: Wealth and income certainly factor into individuals' budget constraints,¹⁶² but how those levels of wealth and income compare to others is likely to impact individuals only psychologically, if at all. As a result, consideration of interest rates in analyzing and fashioning legal regimes will tend to yield marginal improvements in problem-solving. Conversely, consideration of inequality measures will obscure those variables that matter most, making problem-solving marginally worse and serving only to further the policy preferences of certain brands of politician and scholar.

V. CONCLUSION

Standard law and economics has a strong microeconomic foundation. At one level, that is sensible, as law creates incentives that individuals act on. Those individual reactions to regulatory stimuli are more easily anticipated and accommodated by using tools designed for the study of individual behavior—microeconomics. It is demonstrably *not* true, however, that only individual-level actions matter. There are certain macroeconomic measures that both arise from individual behavior and impact later decisions. Those measures can and should be considered in law and economic analysis, to the extent that they will improve the analysis.

Standard law and economics—with its microeconomic foundations, and particularly its public choice practitioners—has, for almost the entirety of its existence, cautioned advocates of government intervention that things will not work the way they anticipate.¹⁶³ It has offered critiques such as those offered here. Regulators cannot know enough to make the kind of decisions that are expected of them, nor can they avoid the reality that regulators and regulated are self-interest-seeking individuals.¹⁶⁴ Shifting away from microeconomics—individuals—and towards macroeconomics—aggregate measures—exacerbates all of these problems, making it more difficult to effectively solve problems. That shift, in fact, would mask a host of additional rent-seeking, likely rendering the problems much worse, but enriching successful rent-seekers and regulators. In standard economics terms, then, LawMacro exhibits strongly diminishing marginal utility.¹⁶⁵

LawMacro advocates who are operating in good faith will recognize these flaws and accept a soft version, including only a limited range of macroeconomic variables in policy analyses, and never in the remedial stage. Given the nature of LawMacro proposals, however, that appears unlikely, and a hard LawMacro approach looks to be little more than a law and economics gloss given to proposals that have long since been rejected as unsound by standard law and economics. LawMacro has adopted the old adage that, if you can't beat them, join them. Law

¹⁶² See ALCHIAN & ALLEN, *supra* note 106, at 118-20.

¹⁶³ See, e.g., Arrow, *supra* note 49, at 342 (describing his “possibility” theorem, in which he shows that a non-tyrannical path to a social welfare function is impossible).

¹⁶⁴ See discussion *supra* Sections III.A, III.B.

¹⁶⁵ See, e.g., Gabriel A. Weil, *Individual Preferences in Policy Analysis: A Normative Framework*, 50 TEX. ENV'T L.J. 55, 63 (2020) (“[T]he principle of diminishing marginal utility implies that as total consumption increases, the value of a marginal unit of consumption tends to decline.”).

and economics would be well advised to reject that proposal and fashion a more functional hybrid of micro and macro in legal analyses.

DATA PRIVACY AS NATIONAL SECURITY

Shaun B. Spencer*

I. INTRODUCTION

On January 10, 2025, Solicitor General Elizabeth Prelogar stepped to the podium in the United States Supreme Court and opened her oral argument with these words:

The Chinese government’s control of TikTok poses a grave threat to national security. No one disputes that the PRC seeks to undermine U.S. interests by amassing vast quantities of sensitive data about Americans and by engaging in covert influence operations, and no one disputes that the PRC pursues those goals by compelling companies like ByteDance to secretly turn over data and carry out PRC directives.¹

Thus began General Prelogar’s defense of the so-called “TikTok ban,” which the Supreme Court upheld just eight days later in a *per curiam* opinion. The Court relied on the national security interest in preventing the Chinese government from obtaining massive amounts of personal data about ordinary Americans.² The national security concerns that the government espoused, however, were not new.

Since 2012, British and American intelligence analysts have watched Chinese hackers shift from targeting the defense and energy sectors and government agencies to targeting “organizations that housed troves of Americans’ personal information.”³ For example, in 2014, agents affiliated with Chinese intelligence hacked the U.S. Office of Personnel Management and obtained the documentation that Americans provide to obtain security clearances, including “financial data; information about spouses, children and past romantic relationships; and any meetings with foreigners.”⁴ Chinese intelligence uses such information to “root out spies, recruit intelligence agents and build a rich repository of Americans’ personal data for future targeting.”⁵ In 2018, the U.S. government reported that hackers, believed to be working for Chinese intelligence, stole personal data concerning 500 million guests of Marriott, including their credit card

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¹ Transcript of Oral Argument at 115, *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (2025) (No. 24-656) (argument of Solicitor General Prelogar).

² See *TikTok, Inc. v. Garland*, No. 24-656, slip op. at 13-17 (S. Ct. Jan. 18, 2025) (*per curiam*) (upholding the law under intermediate scrutiny based on the government’s national security interest).

³ David E. Sanger et al., *Marriott Data Breach Is Traced to Chinese Hackers as U.S. Readies Crackdown on Beijing*, N.Y. TIMES, (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/trump-china-trade.html> [hereinafter *Marriott Data Breach*]; accord David E. Sanger & Julian E. Barnes, *China’s Hacking Reaches Deep Into U.S. Telecoms*, N.Y. TIMES, (Nov. 21, 2024), <https://www.nytimes.com/2024/11/21/us/politics/china-hacking-telecommunications.html> (noting that U.S. officials have been concerned about Chinese hacking for decades, focusing first on theft of intellectual property and later on gathering information on government officials, “including the theft of security clearance files of more than 22 million Americans”).

⁴ *Marriott Data Breach*, *supra* note 3.

⁵ *Id.*

information and passport data.⁶ And, in 2017, officers of the Chinese military reportedly hacked into the credit reporting agency Equifax and obtained personal information from the credit files of 145 million Americans.⁷

Such massive sets of personal data “can be used for counterintelligence, recruiting new assets, anticorruption campaigns or future targeting of individuals or organizations.”⁸ For example, the Chinese intelligence services could use the data to see which Chinese citizens’ travel plans overlapped with those of Americans identified as potential intelligence agents.⁹

Most recently, Chinese intelligence accessed unclassified documents on employee workstations in the U.S. Treasury Department, obtained a list of phone numbers for which the Justice Department had obtained wiretap orders in criminal and espionage investigations, and exploited a flaw in the aging U.S. telecommunication system to read text messages and listen to telephone conversations.¹⁰ The attacks were sufficiently serious that the FBI, which historically opposed widespread encryption because it could degrade its surveillance capabilities, urged Americans to use encrypted voice and text communications when possible.¹¹

The long overdue recognition that data privacy can enhance national security marks an important shift in the debate over data privacy laws. This Article explores how the dynamics of the debate have evolved over the last 50 years and explains how this recent shift should influence the next critical phase of data privacy legislation.

Part II describes the common framing of security and privacy as polar opposites. This zero-sum game approach informed foundational legislation such as the Foreign Intelligence Surveillance Act in the 1970s, the Electronic Privacy Communications Act in the 1980s, the Clipper Chip debate in the 1990s, and the USA PATRIOT Act debates that began in 2001 and have continued in various legislative reforms to date. In the security-versus-privacy framing that animated these debates, every gain in security required a corresponding sacrifice of privacy, and vice versa, and the legislative goal was simply to strike the right balance.

⁶ *Id.*

⁷ Katie Benner, *U.S. Charges Chinese Military Officers in 2017 Equifax Hacking*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/equifax-hack-china.html>.

⁸ *Marriott Data Breach*, *supra* note 3.

⁹ *See id.*

¹⁰ *See* Ana Swanson & David E. Sanger, *China Hacked Treasury Dept. in ‘Major’ Breach, U.S. Says*, N.Y. TIMES (Dec. 30, 2024), <https://www.nytimes.com/2024/12/30/us/politics/china-hack-treasury.html>; David E. Sanger & Julian E. Barnes, *China’s Hacking Reaches Deep Into U.S. Telecoms*, N.Y. TIMES (Nov. 21, 2024), <https://www.nytimes.com/2024/11/21/us/politics/china-hacking-telecommunications.html>.

¹¹ Bill Chappell, *FBI Warns Americans to Keep Their Text Messages Secure: What to Know*, NPR (Dec. 17, 2024), <https://www.npr.org/2024/12/17/nx-s1-5223490/text-messaging-security-fbi-chinese-hackers-security-encryption>. This Article does not argue that foreign adversaries are violating laws or norms by engaging in these espionage activities. To the contrary, as former Director of National Intelligence James R. Clapper, Jr. observed, “This is what any nation-state intelligence agency would do. No nation-state is going to handcuff themselves and say, ‘You can’t do this,’ because they all engage in similar detection.” *Marriott Data Breach*, *supra* note 3.

Part III explores a different dynamic, one prevalent in the debates over privacy regulation affecting finance, commerce, and a variety of other sectors unrelated to surveillance. In these debates, national security interests are regarded as irrelevant, and the tension exists instead between other interests such as commerce or efficiency on the one hand, and individual privacy on the other. This dynamic informed the early federal privacy laws of the 1970s, such as the Fair Credit Reporting Act and the Privacy Act, but it carried straight through to the financial privacy and sectoral privacy laws that emerged in the 1980s and 1990s. And, if national security ever played a role in those debates, it was portrayed as in tension with individual privacy.

Part IV explores the regulatory response to data globalization that could, at first blush, appear to recognize a connection between data privacy and national security. Originating as a nonbinding commitment under the Organization for Economic Cooperation and Development and eventually codified by the EU, this regulatory approach recognized that nations had an interest in limiting the flow of domestic data to other nations. As Part IV shows, however, these laws were not motivated by any national security interest. Instead, they merely recognized that, in an increasingly interconnected world, countries cannot fully protect the individual privacy rights of their citizens without understanding the risks to individual privacy that arise from cross-border transfers.

Finally, Part V surveys the emerging laws in the U.S. that recognize the alignment between data privacy and national security interests. These laws finally recognize that data privacy laws are essential to deter the intelligence efforts of foreign adversaries in a globalized and digital world. The laws enacted in the past year, however, are only a first step. Having recognized data privacy as a precondition for national security, regulators must use this insight to garner support to enact comprehensive data privacy legislation. To succeed against the business interests that have kept such legislation at bay for a decade or more, legislators will have to frame individual privacy and national security as allied interests that, taken together, outweigh the private commercial interests that resist comprehensive data privacy legislation.

II. SECURITY VERSUS PRIVACY AS A ZERO-SUM GAME

A. The Foreign Intelligence Surveillance Act of 1978

Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA) in the wake of the national controversy over domestic surveillance abuses dating back to the 1950s.¹² Several Congressional committees convened to investigate these abuses, including the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities.¹³ Chaired by Senator Frank

¹² LAURA K. DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* 4-5 (Lee C. Bollinger et al. eds., 2016).

¹³ *Id.* at 5; JENNIFER STISA GRANICK, *AMERICAN SPIES: MODERN SURVEILLANCE, WHY YOU SHOULD CARE, AND WHAT TO DO ABOUT IT* 182 (2017).

Church, the “Church Committee” eventually published a multi-volume report on U.S. government intelligence practices.¹⁴

In response to the domestic surveillance abuses documented by the Church Committee, Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA).¹⁵ The debates over FISA illustrated the zero-sum, security-versus-privacy framing. For example, at a hearing before the House Judiciary Committee, Attorney General Griffin Bell testified that:

While these surveillance techniques are extremely useful in gathering intelligence information, they also intrude upon the privacy of their subjects. Thus, their use raises a difficult problem . . . of finding the proper balance between the vital need of this country to protect its security . . . and the equally important need to protect [Americans’] civil liberties¹⁶

Several members of Congress reinforced precisely this view in their comments on the floor. Representative Morgan Murphy observed that “this legislation is a balancing of this country’s legitimate security needs, national security needs, as opposed to the rights of Americans to be secured from any invasion”¹⁷ Finally, appearing before a House Judiciary Committee subcommittee, Senator Edward Kennedy explained that “this legislation was not fashioned to please either the intelligence community or the civil liberties groups. Rather, this legislation is designed to strike a balance, a careful balance, that will protect the security of the United States without infringing on the civil liberties the rights of the American people.”¹⁸

B. The Electronic Communications Privacy Act of 1986

Congress passed the Electronic Communications Privacy Act of 1986 (ECPA) in order to update the Federal wiretap law enacted in light of “dramatic

¹⁴ GRANICK, *supra* note 13, at 182; CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 172 (2015). The Committee’s primary focus was on domestic surveillance abuses such as “eavesdropp[ing] on domestic political opponents of those in power, including lawmakers, journalists, labor union leaders, antiwar activists, and civil rights advocates.” *Id.* at 182-83.

¹⁵ THE NATIONAL SECURITY LAW PODCAST: Episode 96: *A Deep Dive into...the Foreign Intelligence Surveillance Act* (Apple Podcasts, Oct. 25, 2018).

¹⁶ *Foreign Intelligence Surveillance Act of 1978: Hearing on H.R. 7308 Before the Subcomm. on Cts., C. L., and the Admin. of J. of the H. Comm. on the Judiciary*, 95th Cong. 3, 6 (1978) (“In my view, this bill strikes the proper balance. It sacrifices neither our security nor our civil liberties, and assures that the dedicated and patriotic men and women who service this country in intelligence positions will have the affirmation of Congress that their activities are lawful.”).

¹⁷ *Id.* at 68.

¹⁸ *Id.* at 80; *accord* *United States v. Torres*, 751 F.2d 875, 891 (7th Cir. 1984) (Cudahy, J., concurring) (“the congressional debate [over FISA] was focused on achieving a correct balance, in this instance between privacy interests and national security”) (citing S. Rep. No. 95-604, at 7-9 (1977); S. Rep. No. 95-701, at 16 (1978)).

changes in new computer and telecommunications technologies” since 1968.¹⁹ As the ECPA Senate Report explains, the move to enact ECPA began in 1984 when Senator Patrick Leahy asked the Attorney General whether existing Federal wiretap law covered electronic communications.²⁰ The Justice Department’s Criminal Division responded that Federal law only protected electronic communications that enjoyed a reasonable expectation of privacy and that it was not clear whether a reasonable expectation of privacy existed in the “rapidly developing area of” electronic communications.²¹

ECPA addressed the balance between security and privacy in several areas. Title I of ECPA, known as the Wiretap Act, “address[ed] the interception of wire, oral and electronic communications. It amend[ed] existing chapter 119 of title 18 to bring it in line with technological developments and changes in the structure of the telecommunications industry.”²² The Wiretap Act extended the original wiretap statute’s protections to include electronic communications.²³ The amended Section 2511 prohibits the intentional interception, use, or disclosure of wire, oral, or electronic communications without a warrant.²⁴ The Wiretap Act also provides criminal and civil penalties for violations, including an exclusionary rule to prevent the introduction of illegally intercepted communications as evidence at trial.²⁵

Title II of ECPA, known as the Stored Communications Act (SCA), added “addresses access to stored wire and electronic communications and transactional records.”²⁶ The SCA recognized that technological changes had placed far more of our data than ever in electronic storage in the hands of third parties, where it was “subject to no constitutional privacy protection” and “open to possible wrongful use and public disclosure by law enforcement authorities as well as unauthorized private parties.”²⁷ The SCA prohibited the government from compelling production of communications held in electronic storage for 180 days or less without obtaining a judicial warrant.²⁸ If the contents of such communications were in storage for more than 180 days, the SCA required only a court order finding that the materials sought are “relevant” to an ongoing criminal investigation.²⁹

Title III, known as the Pen Register Act, created a new section regulating the use of pen registers and trap and trace devices.³⁰ Such devices record numbers

¹⁹ S.S. Rep. No. 99-541, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 3555 [hereinafter ECPA Senate Report].

²⁰ *Id.* at 3, reprinted in 1986 U.S.C.C.A.N. at 3557.

²¹ *Id.* at 4, reprinted in 1986 U.S.C.C.A.N. at 3558.

²² *Id.* at 3, reprinted in 1986 U.S.C.C.A.N. at 3557.

²³ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508 § 101(c)(A), 100 Stat. 1848 (amending 18 U.S.C. § 2511 to add “electronic communications” to the statute’s coverage).

²⁴ 18 U.S.C. § 2511(1)(a) (2025).

²⁵ 18 U.S.C. § 2515 (2025).

²⁶ ECPA Senate Report at 3, reprinted in 1986 U.S.C.C.A.N. at 3557.

²⁷ *Id.*

²⁸ Pub. L. No. 99-508 § 201, 100 Stat. 1861-62 (1986) (codified at 18 U.S.C. § 2703(a)).

²⁹ *Id.*, 100 Stat. 1862 (codified at 18 U.S.C. § 2703(d)).

³⁰ *Id.* § 301, 100 Stat. 1868 (codified at 18 U.S.C. §§ 3121).

dialled from a telephone without capturing the content of the conversations.³¹ The Pen Register Act required law enforcement to obtain a court order based upon a showing that “the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.”³²

The legislative history is replete with evidence of the security-versus-privacy framing. For example, the Senate Judiciary Committee’s Report noted that “[t]he Committee believes that [the bill] represents a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies.”³³ Similarly, Assistant Attorney General John Bolton shared with the Committee the Administration’s view that:

While initial versions of this legislation did not in our view adequately safeguard legitimate and vital law enforcement and national security needs for access to communications, as a result of the negotiations that have occurred, the bill has been substantially modified to accommodate our concerns. In our judgment the bill as presently drafted fairly balances the interests of privacy and law enforcement.³⁴

C. The Clipper Chip Debate of the 1990s

The same security-versus-privacy discussion animated the debate over the proposed “Clipper Chip” in the 1990s. The “Clipper Chip” was in fact a technical standard drawing upon a variety of technologies that would have “enable[d] the routine surveillance of all communications in the United States.”³⁵ Had it been implemented, the Clipper Chip would have “undermine[d] the essential characteristics of robust encryption—the assurance of security and confidentiality.”³⁶ The reason for the government’s effort, and the basis of the civil liberties response, again demonstrated the security-versus-privacy framing.

The U.S. government’s Clipper Chip effort was animated by concern that “encryption was upsetting the balance between those who want to speak privately and those who want to listen in.”³⁷ Agencies such as the FBI and NSA were concerned that their longstanding reliance on wiretaps for law enforcement and national security purposes “would be lost in a cloud of encryption.”³⁸ As Peter H. Lewis characterized the debate at the time, “At issue is the balance between the Government’s determination to preserve its ability to conduct lawful wiretaps and the right to privacy cherished by its citizens. The outcome of the debate will, in

³¹ *Id.*, 100 Stat. 1871-72 (codified at 18 U.S.C. § 3126(3)-(4)).

³² *Id.*, 100 Stat. 1868-69 (codified at 18 U.S.C. §§ 3121(a) & 3123(a)).

³³ ECPA Senate Report at 5, reprinted in 1986 U.S.C.C.A.N. at 3559.

³⁴ *Id.* at 50; 1986 U.S.C.C.A.N. at 3604.

³⁵ Marc Rotenberg, *EPIC: The First Twenty Years*, in *PRIVACY IN THE INFORMATION AGE* at 1-2 (Rotenberg et al. eds. 2015); accord Paul Ohm, *Good Enough Privacy*, 2008 U. CHI. LEGAL F. 1, 2 (2008).

³⁶ *Id.*

³⁷ Ohm, *supra* note 35, at 2; accord Peter P. Swire, *The Surprising Virtues of the New Financial Privacy Law*, 86 MINN. L. REV. 1263, 1280 (2002) [hereinafter *Surprising Virtues*].

³⁸ Ohm, *supra* note 35, at 2.

large measure, illuminate the values of a society that is trying to cope with rapid change.”³⁹ The Clipper Chip debate thus offers another illustration of the challenge of “accommodating the rights of free expression and privacy on the one hand, and law enforcement and national security concerns on the other.”⁴⁰ In the face of sustained opposition from multiple civil liberties advocates who coalesced to oppose the Clipper Chip, and the government eventually abandoned its efforts.⁴¹

D. The USA PATRIOT Act of 2001

Congress passed the USA PATRIOT Act⁴² just six weeks after the September 11, 2001 terrorist attacks.⁴³ At a press conference just after 9/11, Attorney General Ashcroft called on Congress to approve the Justice Department’s proposed legislation within one week.⁴⁴ Amid the tremendous political pressure to pass the bill, the House held only one hearing at which the Attorney General was the only witness.⁴⁵ The final bill only became available in print at 3:43 a.m. on the morning of the vote, and the Speaker ruled the one legislator who tried to debate parts of the act out of order.⁴⁶ The Bush Administration made it clear that anyone who did not support what the Administration proposed was essentially pro-terrorist.⁴⁷

³⁹ Peter H. Lewis, *Of Privacy and Security: The Clipper Chip Debate*, N.Y. TIMES, (Apr. 24, 1994), <https://www.nytimes.com/1994/04/24/business/of-privacy-and-security-the-clipper-chip-debate.html>.

⁴⁰ Richard D. Marks, *Security, Privacy, and Free Expression in the New World of Broadband Networks*, 32 Hous. L. REV. 501, 513 (1995); accord ROB REICH, MEHRAN SAHAMI & JEREMY M. WEINSTEIN, SYSTEM ERROR: WHERE BIG TECH WENT WRONG AND HOW WE CAN REBOOT 115-16 (2021) (describing the security-versus-privacy dynamic of the debate over the Clipper Chip); see also Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 VILL. L. REV. 951, 980 (2006).

⁴¹ See Marc Rotenberg, *EPIC: The First Twenty Years*, PRIVACY IN THE INFORMATION AGE at 2 (Rotenberg et al. eds. 2015). Rotenberg explained that this coalition gave rise to the Electronic Privacy Information Center. *Id.* at 2-3; see *Surprising Virtues*, supra note 37, at 1281 (noting that, eventually, “the White House announced a major shift on encryption in the direction of greater exports and privacy protection”).

⁴² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, Oct. 26, 2001.

⁴³ Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1101 (2006).

⁴⁴ Robert O’Harrow, Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 26, 2002; see Jeremy C. Smith, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412, 415–16 (2003) (describing relentless pressure on members of Congress to pass the USA PATRIOT Act).

⁴⁵ See ACLU, *Myths and Realities About the Patriot Act*, ACLU.ORG., (June 22, 2005), <https://www.aclu.org/documents/myths-and-realities-about-patriot-act>.

⁴⁶ See Smith, supra note 44.

⁴⁷ *Id.*; accord John T. Soma et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 RUTGERS COMPUTER & TECH. L.J. 285, 308 (2005) (describing efforts by Congressional leadership and the Administration to minimize attempts “to ameliorate some of the harshest elements of the Act” and noting that the act passed 337 to 79 in the Senate and with just one

The USA PATRIOT Act made several significant changes to the Foreign Intelligence Surveillance Act. First, prior to 2001, if the government wanted to seek a FISA wiretap order, it had to show that foreign intelligence was “the purpose” of the order.⁴⁸ The USA PATRIOT Act relaxed that standard by requiring only that foreign intelligence be “a significant purpose.”⁴⁹

Second, prior to 2001, the government had very limited authority under FISA to seek an order compelling third parties to produce records. The government could compel production of records only from a “common carrier, public accommodation facility, physical storage facility, or vehicle rental facility,” and to obtain the order, the government had to demonstrate “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.”⁵⁰ Congress added this provision in 1998 after Timothy McVeigh used a rented truck to carry out a bombing at the federal building in Oklahoma City, killing 168 people and injuring hundreds more.⁵¹ The USA PATRIOT Act substantially expanded this provision, authorizing the government to seek an order to compel production of “any tangible things (including books, records, papers, documents, and other items)” from anyone at all, so long as they were sought “for an investigation to protect against international terrorism or clandestine intelligence activities.”⁵²

Given the intense political pressure to pass the bill, there are no committee reports describing the bill or its objectives. However, floor debates in the House and Senate captured the security-versus-privacy framing, both among the

may vote in the House); see also Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 ARIZ. L. REV. 607, 614 (2004) (“[In a post-9/11 poll], half the public thinks the Patriot Act strikes a reasonable balance between privacy, liberty, and security. Twenty percent think it does not go far enough and twenty percent think it goes too far.”).

⁴⁸ See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 § 104, 92 Stat. 1783, 1789 (1978) (codified at 50 U.S.C. § 804(a)(7)(b)) (requiring certification that “the purpose of the surveillance is to obtain foreign intelligence information”).

⁴⁹ USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 291, Oct. 26, 2001 (codified as amended at 50 U.S.C. § 1804(a)(6)(B)). The Foreign Intelligence Surveillance Court of Review would eventually hold that this “significant purpose” standard could apply to situations where the investigation’s primary purpose was criminal, “[s]o long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution.” In re Sealed Case No. 02-001, 310 F.3d 717, 735 (Foreign Intel. Surveillance Ct. Rev. 2002); accord Donohue, *supra* note 43, at 1103-07 (discussing the effect of the USA PATRIOT Act).

⁵⁰ Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2410, Oct. 20, 1998 (codified at 50 U.S.C. § 1862).

⁵¹ Donohue, *supra* note 43, at 1106; Jo Thomas, *McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty*, N.Y. TIMES, June 3, 1997, at A1.

⁵² USA PATRIOT Act § 505, 115 Stat. 365 (requiring that an investigation, of a United States person must not be conducted solely on the basis of activities protected by the First Amendment). In the wake of the Snowden disclosures in 2013, however, Congress imposed a sunset on the new business records provision so that it would revert to its pre-USA PATRIOT Act state on December 31, 2009. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 102(b)(1), 120 Stat. 192, 195 (2006). Congress later extended the sunset through March 15, 2020, after which it reverted to the pre-9/11 version. Further Continuing Appropriations Act, 2020, and Further Health Extenders Act of 2019, Pub. L. No. 116-69 § 1703(A), 133 Stat. 1134, 1143 (2019) (codified at 50 U.S.C.A. § 1862).

overwhelming majority who voted in favor of the bill and among the small minority who opposed it. For example, Senator Leahy, who served as the primary Congressional negotiator with the Bush Administration,⁵³ explained that “[i]n negotiations with the Administration, I did my best to strike a reasonable balance between the need to address the threat of terrorism, which we all keenly feel at the present time, and the need to protect our constitutional freedoms.”⁵⁴ Many members of Congress speaking in favor of the bill characterized it as an attempt, however imperfect, to strike a balance between security and privacy.⁵⁵ And those few members speaking against the bill, even if they ultimately voted yes, often used this same security-versus-privacy framing to describe the bill.⁵⁶ Political and

⁵³ O’Harrow, *supra* note 44.

⁵⁴ 147 Cong. Rec. S10990 (Oct. 25, 2001) (statement of Sen. Leahy).

⁵⁵ *See, e.g.*, 147 Cong. Rec. S10574 (Oct. 11, 2001) (“we made the best judgment we could, taking into account the very delicate balance between civil liberties and law enforcement that we had to achieve in bringing a bill of this complexity to the floor”) (Statement of Sen. Daschle); *Id.* at S10586 (“As written, the provision [authorizing the government to compel production of business records in an ongoing terrorism investigation] balances the investigatory needs of the FBI with privacy concerns and provides adequate protection.”) (statement of Sen. Hatch); *id.* at S10594 (“While I am committed to routing out terrorists here and abroad, I am equally committed to making sure the rights of innocent U.S. citizens are not violated. This includes the privacy and property rights our constitution affords and that make this country so great. I believe this bipartisan bill does both.”) (statement of Sen. Enzi); *id.* at S10595 (“[O]ur challenge is to balance our security with our liberties. While it is not perfect, I believe we are doing that in this bill.”) (statement of Senator Wellstone); Cong. Rec. Vol. 147, No. 137, Oct. 12, 2001, at H6766 (“I commend the chairman of the Committee on the Judiciary and others who worked very hard to craft a very necessary and vitally important balance between giving law enforcement those narrowly crafted tools it needs and protecting the civil liberties, including the right to privacy, of American citizens.”) (statement of Rep. Barr); Cong. Rec. Vol. 147, No. 144, Oct. 25, 2001, at S11026 (“Our challenge is to balance our security with our liberties. While it is not perfect, I believe we are doing that in this bill.”) (statement of Senator Wellstone); *id.* at S11033 (“This bill attempts to keep a very careful balance between the personal right to privacy and the Government’s right to know, in an emergency situation, to be able to protect its citizens.”) (statement of Senator Feinstein); Cong. Rec. Vol. 147, No. 137, Oct. 12, 2001, at H6761 (“While not perfect, [the bill] achieves a difficult balance between providing law enforcement with the tools it needs to wage an effective war against terrorism and the protection of American’s civil liberties.”) (statement of Rep. Goodlate); *id.* at H6763 (“The bill strikes an appropriate current balance between civil liberties and providing the Government with the tools needed to protect our Nation to win this war on terrorism.”) (statement of Rep. Cannon); *id.* at H6779 (“This bill strikes the delicate balance between the two vital points of expanding power and protecting civil liberty.”) (statement of Rep. Boyd); *id.* at H6769 (“I call upon my colleagues to join me in approving this important legislation at this time of national crisis which balances the need to expand the laws governing intelligence and law enforcement activities while safeguarding our dearly held constitutional rights and way of life.”) (statement of Rep. Bentsen).

⁵⁶ *See, e.g.*, 147 Cong. Rec. S11021 (Oct. 25, 2001) (“I have concluded that this bill still does not strike the right balance between empowering law enforcement and protecting civil liberties.”) (statement of Sen. Feingold); *Id.* at S11029 (“Over many years and with great effort, we have crafted a careful balance in protecting personal privacy. The bottom line is this legislation could circumvent or supersede Federal and State privacy laws that have balanced law enforcement needs and privacy concerns, going well beyond the changes to the law needed for intelligence gathering.”) (statement of Sen. Cantwell); 147 Cong. Rec. S10598 (Oct. 11, 2001) (“I am still troubled by certain provisions in the legislation which fail to strike the proper balance between the need for security and the need for civil liberties”) (statement of Sen. Kerry); Cong. Rec. Vol. 147, No. 137, Oct. 12, 2001, at

scholarly commentary on the law also articulate this security-versus-privacy framing.⁵⁷

III. SECURITY AS IRRELEVANT TO PRIVACY

The debates over regulating data collection and sharing outside of the national security context treated privacy in one of two ways relative to security. In most cases, the debate over data privacy laws was seen as irrelevant to national security. As Rob Reich explains, the traditional arguments against privacy-intrusive commercial surveillance and data collection practices rely on the associated harms to autonomy, dignity, democratic governance, and control over one's own information and democratic governance.⁵⁸ National security interests are notably absent from that list. Then, where national security did play a role, it was portrayed as conflicting with privacy interests.⁵⁹

A. The Fair Credit Reporting Act of 1970

The Fair Credit Reporting Act of 1970 (FCRA) provides consumers with privacy rights and other protections related to “consumer reports” prepared by a “consumer reporting agency.”⁶⁰ The FCRA limits the permissible purposes for which a consumer reporting agency can furnish a consumer report.⁶¹ The FCRA also requires consumer reporting agencies to take steps to ensure the accuracy of

H6762, Statement of Rep. Bryant, “[A]s we redefine this often-delicate balance between our country’s national defense and individual rights, we must be very careful.”; *id.* at H6771 (“[W]e must meet the critical counter-terrorism need of federal law enforcement and intelligence agencies without compromising the civil liberties of our citizens in the process. I have strong concerns about the bill we are considering today because I cannot be guaranteed it strikes this crucial balance.”) (statement of Rep. Langevin); *id.* at H6772 (“Mr. Speaker, in times of war and crisis there is always a very delicate balance between the need to be secure and the need to protect civil liberty. There have been moments in our nation’s history when this balance was not carefully preserved—and with shameful consequences. In the rush to fight the terrorist threat, I want to be absolutely certain that we strike the right balance and avoid looking back on this time with regret about our haste and lack of wisdom.”) (statement of Rep. Udall).

⁵⁷ See, e.g., Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U. L. REV. 375, 379 (2002) (arguing that the law “attacks the balance between the government and the individual by a systematic circumvention of established doctrine and procedures guarding against unreasonable governmental intrusion”); Neil Robinson, *New Laws Seek to Balance Privacy and Surveillance*, JANE’S INTELLIGENCE REV., Jan. 1, 2002 (“The terrorist attacks in New York and Washington on September 11, 2001 have rekindled a passionate debate about protection of civil liberties and national security.”); Soma, *supra* note 47, at 307 (“The PATRIOT Act does include a few specific concessions to the concerns of civil libertarians providing a balance between freedom and national security.”); Lisa M. Kaas, *Liberty v. Safety: Internet Privacy After September 11*, 2002 GEO. J.L. & PUB. POL’Y 175, 188–89 (2002) (arguing that “[w]ith respect to this need for balancing [law enforcement needs against privacy], some provisions of Title II of the Act may need to be reassessed”).

⁵⁸ REICH ET AL., *supra* note 40 at 124–26.

⁵⁹ See *infra* Part III.B.

⁶⁰ Pub. L. No. 91-508 Title VI, § 604, 84 Stat. 1114, 1129, Oct. 26, 1970 (codified at 15 U.S.C. § 1681b).

⁶¹ 15 U.S.C. § 1681b(a).

the reports that they furnish, to disclose to consumers the information that they have collected about those consumers, and to create a procedure for consumers to pursue correction of information in cases where the consumers believe the information to be inaccurate.⁶²

Congress passed the FCRA in response to allegations of abuse by consumer credit reporting agencies and to the rise of computer databases and the resulting “prospect of this detailed personal information flowing into a single database.”⁶³ Congress intended the FCRA to “ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.”⁶⁴ The legislative history of the FCRA “reveals a concern for the consumer’s privacy and the accuracy of information stored at credit bureaus, and demonstrates a sensitivity as to the balance between the free flow of credit information for legitimate business purposes and the right of the consumer to keep their affairs private.”⁶⁵

The legislative findings made no reference to national security concerns.⁶⁶ Instead, the bill was framed as a balance of business and individual privacy interests, with no impact on national security.⁶⁷

⁶² See 15 U.S.C. §§ 1681e(b), 1681g, & 1681i(c). These FCRA obligations implemented the Fair Information Practice Principles, a set of principles originating in the 1970s that have informed nearly every privacy statute to date. Paul M. Schwartz, *Privacy Standing*, 104 B.U. L. REV. 1795, 1805 (2024); see also Daniel J. Solove & Paul M. Schwartz, *Ali Data Privacy: Overview and Black Letter Text*, 68 UCLA L. REV. 1252, 1262–63 (2022).

⁶³ DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 756 (7th ed. 2021). For an analysis placing the Fair Credit Reporting Act of 1970 and the Privacy Act of 1974 in the larger context of evolving privacy legislation, see *Surprising Virtues*, supra note 37, at 1274–75 (“The first major wave of privacy activity took place in the early 1970s, largely in response to the rise of the mainframe computer. The chief worry in that period was the spectre of the enormous, centralized database. The chief areas of concern, as evidenced by the passage of legislation, were credit reporting agencies and the federal government.”).

⁶⁴ *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007); accord 15 U.S.C. § 1681(a) (describing Congress’s findings concerning the importance of accuracy in credit reporting systems, the rise of credit reporting agencies and their impact on consumer credit, and the “need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy”); *Surprising Virtues*, supra note 37, at 1274–75 (“For credit histories, the concern was that the fragmented legacy of local credit agencies was turning into a few nation-spanning databases. . . . The Act establishes a number of fair information practices, including individuals’ right to access their own records and to seek to correct mistakes in those records.”).

⁶⁵ Prescreening, 38 Fed. Reg. 4947 (1973) (codified at 16 C.F.R. § 600.5(e) (1987)).

⁶⁶ See 15 U.S.C. § 1681.

⁶⁷ See Jeffrey I. Langer & Andrew T. Semmelman, *Creditor List Screening Practices: Certain Implications Under the Fair Credit Reporting Act and the Equal Credit Opportunity Act*, 43 BUS. LAW. 1123, 1130 (1988) (describing the basic purpose of the FCRA as “balancing the consumer’s right of privacy and the free flow of credit information for legitimate business purposes”); Ralph C. Anzivino, *What Triggers the Statute of Limitations for Violations of the Fair Credit Reporting Act?*, 2000-01 TERM PREVIEW U.S. SUP. CT. CAS. 17, 19 (2001) (“The FCRA strikes a balance between the interests of consumers in accuracy and privacy on the one hand, and the needs of the credit reporting industry and the credit information users it serves on the other by requiring reporting agencies to adopt reasonable procedures to ensure accuracy, confidentiality, and the proper utilization of the information they collect.”); accord *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045–46 (7th Cir. 2005) (“In an attempt to achieve this balance between consumer privacy and the

B. The Privacy Act of 1974

The Privacy Act of 1974 imposes a set of restrictions on the access, use, and disclosure of personal information by federal agencies.⁶⁸ The Act requires agencies to “balance the utility of the information against threats to privacy by providing notice of the specific purpose and use of individually identifying information.”⁶⁹

The Privacy Act was enacted in response to several related developments. First, public trust in government had eroded substantially in the wake of scandals in the early 1970s, including Watergate and the domestic and foreign intelligence abuses involving the FBI, CIA, and NSA.⁷⁰ Second, government information storage and processing had begun to shift “from paper-based recordkeeping to digital formats, allowing for large quantities of information to be exchanged at speeds and distances not previously possible.”⁷¹ An oft-cited 1973 report prepared for the Secretary of Health, Education and Welfare warned of the risk that “may result from uncontrolled application of computer and telecommunications technology to the collection, storage, and use of data about individual citizens.”⁷²

In its findings, Congress offered a detailed description of its purpose in enacting the Privacy Act. Congress emphasized how federal agency information practices and the increasing use of information technology risk harming individual privacy, as well as the concrete consequences that privacy harms pose to individual employment, insurance, and credit.⁷³ Although the legislative history contains numerous references to national security, they appear exclusively in the context of

needs of a modern, credit-driven economy, [FCRA] ‘limit[s] the furnishing of consumer reports’ to certain statutorily enumerated purposes.”); *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808, 820 (W.D. Ky. 2003) (“[T]he FCRA intended to strike a balance between protecting the needs of commerce and the consumer’s privacy interest.”); *Scharpf v. AIG Mktg., Inc.*, 242 F. Supp. 2d 455, 462 (W.D. Ky. 2003) (“In effect, the FCRA created a fair mechanism through which creditors and insurers could obtain a consumer’s report in order to make an offer and evaluate creditworthiness. Conversely, it also established procedures to ensure accuracy and to protect consumer privacy. The FCRA strikes a balance between these two competing ends.”); *Bonner v. Home123 Corp.*, No. 205-CV-146PS, 2007 WL 778447, at *1 (N.D. Ind. Mar. 9, 2007) (“The FCRA attempts to strike a balance between a consumer’s interest in privacy and his interest in having access to credit products.”).

⁶⁸ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (to be codified at 5 U.S.C. § 552(a)).

⁶⁹ MEGHAN M. STUESSY, CONG. RSCH. SERV., R47863, THE PRIVACY ACT OF 1974: OVERVIEW AND ISSUES FOR CONGRESS 24 [hereinafter PRIVACY ACT OVERVIEW].

⁷⁰ *Id.* at 1.

⁷¹ *Id.*

⁷² *Id.* at 3; *accord Surprising Virtues*, *supra* note 37, at 1275 (“The fear of Big Brother—a unified and government-run database—was an important motivation for the Privacy Act. A crucial feature of the Act generally prohibits transfers from one federal agency to another except with the individual’s consent.”).

⁷³ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552(a)); *accord* General Provisions of Privacy Act of 1974, 5 U.S.C. § 522(a), BUREAU OF JUSTICE ASSISTANCE, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1279> (last visited Apr. 7, 2025) (“Broadly stated, the purpose of the Privacy Act is to balance the government’s need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies’ collection, maintenance, use, and disclosure of personal information about them.”).

exceptions to the individual privacy measures, thus repeating the security-versus-privacy framing from Part II.⁷⁴

C. The Gramm-Leach-Bliley Act

The Financial Services Modernization Act of 1999, commonly known as the Gramm-Leach-Bliley Act, restructured the financial services industry.⁷⁵ The Gramm-Leach-Bliley Act broke down barriers “between banks, insurance, and securities industries” and attempted to “facilitate the efficient sharing of information throughout the financial services industry.”⁷⁶ By creating “one-stop shopping for financial services,” the Act intended to reduce costs and increase efficiency in the banking industry.⁷⁷

Recognizing that these changes would increase the industry’s collection and sharing of consumer information, the Act attempted to “balance[] these efficiencies with customers’ rights to privacy by requiring financial institutions to

⁷⁴ S. 3418 (PUB. L. 93-579) (Sept. 1976), *reprinted in* LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, *printed for the use of* COMM. ON GOV’T OPERATIONS, S., AND THE COMM. ON GOV’T OPERATIONS, H.R. at 295 (1976) (“In summary, the bill: 1. Permits an individual to have access to records containing personal information on him kept by Federal agencies for purposes of inspection, copying, supplementation and correction (with certain exceptions, including law enforcement and national security records.”); *Id.* at 312, 319 (arguing in favor of a proposed exception that would allow the head of the CIA to exempt nearly all of the agency’s system of records from the Privacy Act’s requirements given that “C.I.A. files may include the most delicate information regarding national security”); *id.* at 329 (criticizing exceptions applicable to “records maintained by the C.I.A.” and “information affecting national security”); *id.* at 547 (explaining that “the bill reflects a balancing of the interests involved: The interest of the Government in attracting the best qualified individuals to its service; and its interest in pursuing laudable goals such as protecting the national security, promoting equal employment opportunities, assuring mental health, or conducting successful bond-selling campaigns. There is, however, also the interest of the individual in protection of his rights and liberties as a private citizen.”); *id.* at 881 (“The bill permits an individual to have access to records containing personal information on him kept by Federal agencies for purpose of inspection and correction, with some exceptions, such as national security and law enforcement records.”); *id.* at 939 (“I urge that we strike this general exemption for the CIA since the CIA’s sensitive records and activities are amply protected by other provisions of this bill. To do otherwise would be to deny unnecessarily to one group of individuals the privacy rights protected by this bill.”); *id.* at 940 (“No information which in any way affects the national security or foreign policy of this Nation could, under the specific provisions of section (k) of this act, be made available.”); *id.* at 982 (“Each recommendation of the Task Force seeks to contribute to a broader, more intelligent, viable understanding of the need for a renewed concern for personal privacy. An awareness of personal privacy must be merged with the traditional activities of the free marketplace, the role of government as a public servant, and the need for national security defense, and foreign affairs.”); *id.* at 940 (“the bill provides in section (k)(1)(2) for an exemption of any thing which would in any way affect the national defense or foreign policy of this Nation”); *id.* at 1193 (“As with any law of this breadth, there must be a procedure for the protection of information which is sensitive to the national security, to the operation of law enforcement agencies or for other limited reasons.”).

⁷⁵ Gramm-Leach-Bliley Act, Pub. L. No. 106-102 § 1(a), 113 Stat. 1338 (1999); *see* SOLOVE & SCHWARTZ, *supra* note 63, at 792.

⁷⁶ Steven Robert Roach & William R. Schuerman, Jr., *Privacy Year in Review: Recent Developments in the Gramm-Leach Bliley Act, Fair Credit Reporting Act, and Other Acts Affecting Financial Privacy*, 1 I/S: J.L. & POL’Y FOR INFO. SOC’Y 385, 390 (2005).

⁷⁷ *See id.*

comply with . . . notice and opt-out provisions.”⁷⁸ The report of the House Committee on Banking and Financial Services emphasized the need to protect the financial and medical information of consumers in light of banks’ new ability to affiliate with a wide array of service providers.⁷⁹ The report also warned of the privacy threat “posed by an emerging industry of so-called ‘information brokers,’ who employ fraud and other forms of deception to collect personal financial information from consumers and their financial services providers.”⁸⁰ Similarly, references to privacy during the floor debates discussed only the risks to individual or consumer privacy.⁸¹ Nothing in the legislative history, however, referenced national security justifications or concerns.⁸²

⁷⁸ *Id.*; accord Carl Felsenfeld & Genci Bilali, *Business Divisions from the Perspective of the U.S. Banking System*, 3 HOUS. BUS. & TAX L.J. 66, 135 (2003) (“In passing GLB, Congress tried to establish the right balance between the privacy needs of consumers and the needs of financial institutions to use information to serve customers’ needs.”).

⁷⁹ H.R. Rep. No. 106-74, Part I, at 103 (1999) (“Given that banks will now be able to affiliate with a wide array of financial services providers, the Committee was concerned that the financial and medical information of customers of these new financial holding companies be accorded certain basic privacy protections.”).

⁸⁰ *Id.* at 103.

⁸¹ See, e.g., 145 CONG. REC. S13873 (daily ed. Nov. 4, 1999) (statement of Sen. Safire) (advocating for more protection against “the real potential for abuse and serious invasion of citizens’ privacy”); *id.* at S13875 (statement of Sen. Johnson) (“With the explosive growth of the Internet, we are finding information can be accumulated and acquired with greater ease than previously imaginable. We must address this important consumer protection issue of financial privacy.”); *id.* at S13876 (statement of Sen. Hagel) (arguing that a “topic important to average Americans is financial privacy—how customers control the flow of their private financial information”); *id.* at S13877 (statement of Sen. Allard) (“Privacy is important to many consumers, and the conference report takes important steps to protect the privacy of Americans.”); *id.* at S13878 (statement of Sen. Bunning) (“this bill does give consumers federal privacy protection that they have not previously enjoyed”); *id.* S13879 (statement of Sen. Enzi) (“Some opposed to the bill have said they don’t believe it goes far enough to ensure the privacy of a person’s individual financial information. I have to say this bill will provide the strongest privacy protection ever for Americans.”); *id.* at S13881 (statement of Sen. Schumer) (“[P]rivacy is a large and complicated issue. We don’t know what the balance ought to be between the ability of businesses to share information and the right of the consumer to protect his or her information.”). For similar debates on the House floor, see 145 CONG. REC. H11514 (daily ed. Nov. 4, 1999) (statement of Rep. Sessions) (“Madam Speaker, this legislation also contains the strongest pro-consumer privacy language ever considered by the Congress. Many of my constituents have contacted me with their concerns regarding the dissemination of their private financial information. I am pleased that this legislation provides increased privacy protections for all Americans and imposes civil penalties on those who would violate our financial privacy.”); *id.* at H11514 (statement of Rep. Drier) (“We know that in this legislation we have the toughest privacy component that we have ever seen in any legislation considered here. I think it is important to underscore that once again, because there are a lot of people who have been critical of it, and I believe this clearly is the toughest privacy language that we have ever had. We are, by way of doing this, providing the consumer with a wider range of choices.”); *id.* at H11515 (statement of Rep. Drier) (“We need to look at the fact that the wave of the future there is in electronic banking. I think that, frankly, on the Internet, we are going to see a strengthening of privacy, because that is a priority that is regularly before us for people who spend time on the Internet.”).

⁸² See H.R. REP. NO. 106-74, PT. 1 (1999); 145 CONG. REC. S13871-81 (daily ed. Nov. 4, 1999); 145 CONG. REC. H11513-26 (daily ed. Nov. 4, 1999); see also S. REP. NO. 106-44, at 7 (1999) (discussing the purpose of the legislation but making no reference to privacy because the privacy amendments had not yet been introduced to the bill).

D. Sectoral Privacy Legislation

The debates over a mix of sectoral privacy laws in the 1980s and 1990s similarly contain no reference to national security interests.⁸³ For example, Congress enacted the Video Privacy Protection Act of 1988⁸⁴ in order to “preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials.”⁸⁵ Similarly, Congress passed the Driver’s Privacy Protection Act of 1994⁸⁶ in response to a series of crimes facilitated by criminals obtaining personal information through state departments of motor vehicles, including the stalking and murder of actress Rebecca Schafer at her Los Angeles home.⁸⁷ Congress also enacted the Children’s Online Privacy Protection Act of 1998⁸⁸ in response to concerns over threats to the privacy of children’s personal information on the Internet.⁸⁹ All of these laws focused on the harms to individual privacy, and national security risks were irrelevant to their enactments.

⁸³ See S. REP. NO. 100-599, at 1 (1988), as reprinted in 1988 U.S.C.C.A.N. 4342-1 (“The Video Privacy Protection Act [of 1988] follows a long line of statutes passed by the Congress to extend privacy protection to records that contain information about individuals. In each instance, Congress has expanded and given meaning to the right of privacy.”).

⁸⁴ Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified at 18 U.S.C. § 2710).

⁸⁵ S. REP. NO. 100-599, at 1 (1988) as reprinted in 1988 U.S.C.C.A.N. 4342-1; accord *Statutory Interpretation — the Video Privacy Protection Act — Eleventh Circuit Limits the Scope of “Subscriber” for VPPA Protections — Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015), 129 HARV. L. REV. 2011, 2011 (2016) (“The court’s interpretation excludes a significant segment of consumers from the VPPA’s protections, allowing these protections to be evaded too easily by content providers — consequences directly at odds with the VPPA’s purpose of protecting personal privacy.”).

⁸⁶ Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322, § 300001, 108 Stat. 1796, 2099 (1994) (codified at 18 U.S.C.A. § 2721).

⁸⁷ 139 CONG. REC. 29466 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer); accord Kobi Ankumah, *Think b(4) You Solicit: Maracich v. Spears and the Driver’s Privacy Protection Act’s b(4) Litigation Exception and Its Effect on Attorney Solicitation*, 39 J. LEGAL PROF. 87, 87-88 (2014) (describing the act’s purpose as closing “a loophole in State law that allow[ed] anyone, for any reason, to gain access to personal information . . . and to limit the amount of information that a state could disclose without the express consent from a driver.”). For floor debates detailing the law’s goal of protecting personal privacy and safety, see 139 CONG. REC. 29468 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer) (arguing that the legislation “strikes a critical balance between the legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety”); *id.* at 29469 (statement of Sen. Warner) (describing the legislation as “badly needed to protect individuals in their fight to retain privacy”); *id.* at 29469 (statement of Sen. Robb) (“Easy access to personal information makes every driver in this Nation vulnerable and infringes on their right to privacy.”); *id.* at 29470 (statement of Sen. Biden) (“Americans do not believe they should relinquish their legitimate expectations of privacy simply by obtaining drivers’ licenses or registering their cars. Yet the laws of some States do just that by routinely providing this identifying information to all who request it.”); *id.* at 29470 (statement of Sen. Harkin) (“The Drivers Privacy Protection Act, of which I am an original cosponsor, strikes a fair balance between reasonable interests of the State and the public in this information, and the rights of private citizens to be left alone.”).

⁸⁸ Children’s Online Privacy Protection Act of 1998, Pub. L. No. 105-277 § 1301, 112 Stat 2681, 2681-728 (1998) (codified at 15 U.S.C.A. §§ 6501-06).

⁸⁹ Janine Hiller et al., *Pocket Protection*, 45 AM. BUS. L.J. 417, 428 (2008) (citing 144 CONG. REC.

This focus on purely personal and consumer harms was evident in a 2000 Federal Trade Commission Report to Congress.⁹⁰ The FTC's report called for federal consumer privacy regulation that would implement four essential fair information practice principles: notice, choice, access, and security.⁹¹ However, in its discussion of security, the FTC made no reference to any threat involving foreign actors or national security.⁹² Instead, the focus was on domestic harms to individual consumers.⁹³

IV. FOREIGN NATIONS AS A THREAT TO PRIVACY BUT NOT SECURITY

A. Early Guidelines and Treaty Restrictions on Cross-Border Transfers

Among the earliest efforts at cross-border privacy regulation were the Privacy Guidelines of the Organization for Economic Co-operation and Development (OECD).⁹⁴ The OECD consists of major industrial countries

S12741-04 (1998) (remarks of Sen. Bryan)); Lauren A. Matecki, *Update: COPPA Is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J.L. & Soc. POL'Y 369 (2010) ("The Act responded to the growing number of children online and addressed concerns over the harms that could arise if websites were not held accountable for the manner in which they collected and used children's personal information.") (citing F.T.C. FILE NO. 954,4807, PRIVACY ONLINE: A REPORT TO CONGRESS (1998), <https://www.ftc.gov/reports/privacy-online-report-congress>).

⁹⁰ ROBERT PITOFKY ET AL., PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A FEDERAL TRADE COMMISSION REPORT TO CONGRESS, F.T.C., at 36-37 (2000), <https://ftc.gov/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission>.

⁹¹ *See id.* at ii-iii.

⁹² *Id.* at 18-19, 32-33.

⁹³ *See* FED. TRADE COMM'N, FINAL REPORT OF THE FEDERAL TRADE COMMISSION ADVISORY COMMITTEE ON ONLINE ACCESS AND SECURITY, app. D to PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKET PLACE: A FEDERAL TRADE COMMISSION REPORT TO CONGRESS, (May 15, 2000), <https://govinfo.library.unt.edu/acoas/papers/finalreport.htm> ("If access to personal data is turned into a legislative right, Americans' personal data will be at risk of exposure to con men, private investigators, suspicious spouses – anyone who has the *chutzpah* and the scraps of information needed to plausibly impersonate their target."); *id.* ("The Committee recognizes a second concern about providing a single point of access to all affiliates' information. It may increase the vulnerability of an individual's information to compromise—e.g., if bad actors can determine the password, they can gain access to private information from one convenient location."); *id.* ("Many companies have already implemented information security policies that protect sensitive corporate data (i.e., compensation information) by limiting access to only those employees who need to know. Companies need to implement similar measures that protect customer data from unauthorized access, modification or theft."). The only mention of any foreign nations was one reference to the Safe Harbor agreement that had been negotiated to allow data transfers from the EU to the U.S. *See id.* at Appx. B, Statement of Dr. John Kamp, Advisory Committee Member.

⁹⁴ *See* Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1969-70 (2013); *Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, ORG. FOR ECON. COOP. & DEV. (Nov. 7, 2013), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0188> (hereinafter "OECD Guidelines").

“concerned with economic and democratic development.”⁹⁵ The OECD was the first organization to adopt an international set of privacy principles. As Paul Schwartz explains, the OECD’s “Privacy Guidelines were the first international statement of essential information privacy principles.”⁹⁶ Adopted in 1980, these non-binding guidelines attempted to balance the economic interests in cross-border data flows against the fundamental human rights threatened by the processing of personal data.⁹⁷ As the preamble to the Guidelines explains, the OECD recognized “challenges to the security of personal data in an open, interconnected environment in which personal data is increasingly a valuable asset,” and observed that “[m]ember countries have a common interest in promoting and protecting the fundamental values of privacy, individual liberties, and the global free flow of information.”⁹⁸ Not only were the OECD Guidelines focused on individual rather than national security interests, they adopted the same security-versus-privacy tradeoff as the surveillance measures described in Part II.⁹⁹ The security components of the Guidelines emphasized safeguards against consumer harm resulting from inadequate security, rather than harm to national security interests.¹⁰⁰

The Council of Europe took a similar approach in 1981 when it adopted Convention 108, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹⁰¹ The Convention was the first treaty addressing individuals’ right to “protection of their personal data.”¹⁰² In its Preamble, Convention 108 expressed the need to “reconcile the fundamental values of the respect for privacy and the free flow of information between peoples.”¹⁰³ The only security obligations refer not to national security interests but to the obligation to take “[a]ppropriate security measures” to prevent personal data “against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.”¹⁰⁴ Article 9(2)(a) allowed exceptions for “protecting State security [and] public safety,” again

⁹⁵ Schwartz, *supra* note 94, at 1969-70.

⁹⁶ *Id.* at 1970.

⁹⁷ *Id.* at 1971.

⁹⁸ OECD Guidelines, *supra* note 94, at 5 (pmb1).

⁹⁹ *Id.* at 6 (“Exceptions to these Guidelines, including those relating to national sovereignty, national security and public policy (“ordre public”), should be: (a) as few as possible, and (b) made known to the public.”).

¹⁰⁰ *Id.* at 7 (“Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.”).

¹⁰¹ *Protection of Personal Data and Privacy*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/portal/personal-data-protection-and-privacy> (last visited May 23, 2025).

¹⁰² *Id.*; accord Schwartz, *supra* note 94, at 1970 (“The Council of Europe is an intergovernmental organization, established in 1949, that promotes unity among European nations. Throughout the 1980s, the Council’s Data Protection Convention was the most important Europe-wide agreement regarding the processing of personal information.”). So far, 55 countries have ratified Convention 108 and based their national legislation on the convention’s model. *Protection of Personal Data and Privacy*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/portal/personal-data-protection-and-privacy> (last visited May 23, 2025).

¹⁰³ C.E.T.S. No. 108, *preamble*.

¹⁰⁴ *Id.* at art. 7.

reinforcing the security-versus-privacy framing we have seen before.¹⁰⁵ And, in contrast with limits on transborder data flows we would eventually see in the 1990s and 2010s, Article 12 restricted the ability of “Parties” to Convention 108 (i.e., signatory nations) to prohibit data transfers to other nations on privacy grounds.¹⁰⁶

B. The Data Protection Directive

The increasing role of international data flows in the global economy of the 1990s put pressure on the EU’s approach to protecting personal information. “In the absence of EU-wide standards, data transfers within the EU had the potential to undermine the efforts, dating back to the 1970s, of individual member states to protect the personal information of their citizens.”¹⁰⁷ These concerns led the EU to enact the Data Protection Directive in 1995.¹⁰⁸ The Data Protection Directive built on the national laws of many EU member states and adopted a common data protection framework that all member states were required to enact.¹⁰⁹ The main purposes of the Data Protection Directive were to preserve the free flow of personal data within the EU and to ensure protection for “the fundamental rights and freedoms of natural persons, and in particular their right to privacy.”¹¹⁰ The Directive established a default that personal data should not be processed absent a lawful basis to process the data and afforded data subjects rights such as notice, choice, access, and security.¹¹¹ As with the legislation described in Part III, the Directive focused on personal privacy rights. Any reference to national security interests appeared only in the exceptions carved out of the Data Protection Directive to allow Member States to advance national security, defense, and public safety, again reinforcing the security-versus-privacy framing.¹¹²

¹⁰⁵ *Id.* at art. 9(2)(a).

¹⁰⁶ *Id.* at art. 12(2) (article 12 carved out several exceptions, neither of which bore any relation to national security interests); *see id.* at art. 12(3)(a) (allowing a Party to prohibit transborder data transfers to other Parties where the Party’s “legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection.”); *id.* at art. 12(3)(b) (allowing a Party to prohibit transborder data transfer through an intermediary Party to the territory of a non-Party where the transfer would circumvent the first party’s national legislation).

¹⁰⁷ Schwartz, *supra* note 94, at 1973.

¹⁰⁸ *Id.* at 1972; *see* Council Directive 95/46, Oct. 1995 O.J. (L 281) 31 (EC) (repealed effective May 24, 2018); *see also* Council Regulation 2016/679, 2016 O.J. (L 119), art. 45(2)(a) (repealing Council Directive 95/46/EC).

¹⁰⁹ *See* Schwartz, *supra* note 94, at 1972. Under EU law, a directive instructs member states to enact their own legislation that complies with the standards established in the directive, as opposed to a “regulation” which operates directly on all member states. *Id.* at 1992.

¹¹⁰ *Id.* at 1972 (quoting Council Directive 95/46, art. 1(1), Oct. 1995 O.J. (L 281) 31 (EC)).

¹¹¹ Council Directive 95/46, art. 7, Oct. 1995 O.J. (L 281) 40 (EC) (requirement of a lawful basis for processing); *id.* at arts. 10-11 (notice); *id.* at art. 12 (access); *id.* at art. 14 (choice); *id.* at art. 17 (secure processing).

¹¹² Council Directive 95/46, art. 13(a)(a-c), Oct. 1995 O.J. (L 281) 42 (EC); *accord id.* at art. 3(2) (“This Directive shall not apply to the processing of personal data . . . in the course of an activity which falls outside the scope of Community law, such as . . . processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing

The Data Protection Directive drew worldwide attention because of its new approach to regulating cross-border data transfers. Whereas Convention 108 prohibited nations from preventing cross-border data flows unless the destination nation's privacy laws failed to provide equivalent protection as the nation of origin,¹¹³ the EU's Data Protection Directive took the opposite approach. Under the DPD, member states were prohibited from allowing data transfers outside the EU unless the recipient nation provided an "adequate level of protection" for EU citizens' data.¹¹⁴ Determining whether a foreign nation's laws provided "adequate" protection required considering the nature of the data and proposed process, but also the "rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country."¹¹⁵ However, nothing in this restriction or the statements of policy in the preamble identified national security as a motivating concern. Instead, as Schwartz explains, this restriction "reflects an underlying belief that personal information of EU citizens merits protection throughout the world and not merely within the EU."¹¹⁶

The irrelevance of national security concerns was evident in the "Safe Harbor" agreement negotiated between the United States and the European Commission in order to provide the European Commission with a basis to declare that the U.S. provided "an adequate level of protection" to receive data concerning EU citizens.¹¹⁷ The Safe Harbor agreement required U.S. companies receiving EU data to agree to certain consumer protection practices, but it made no reference to U.S. national security or foreign intelligence data collection.¹¹⁸

C. The General Data Protection Regulation

In 2012, the European Commission proposed an overhaul of the Data Protection Directive that would ultimately become the General Data Protection

operation relates to State security matters) and the activities of the State in areas of criminal law"); *id.* at cl. 13 (activities such as "public safety, defence, State security or the activities of the State in the area of criminal laws . . . [and] the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters"); *id.* at cl. 16 ("[T]he processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law."); *id.* at cl. 43 ("[R]estrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union.").

¹¹³ See C.E.T.S. No. 108, art. 12(2) & 12(3)(a).

¹¹⁴ Council Directive 95/46, art. 25(1), 1995 O.J. (L 281) 31 (EC).

¹¹⁵ *Id.* at art. 25(2).

¹¹⁶ Schwartz, *supra* note 94, at 1973.

¹¹⁷ See Comm'n Decision 520, annex I, 2000 O.J. (L 215) 7-47 (EC) pursuant to Council Directive 95/46/EC, 1995 O.J. (L 281) 31 (basing its adequacy determination solely on materials from the U.S. Department of Commerce and Federal Trade Commission and materials concerning claims for damages for breach of privacy under U.S. law).

¹¹⁸ See Comm'n Decision 520, annex I, 2000 O.J. (L 215) 7-47 (EC); see Schwartz, *supra* note 94, at 1981.

Regulation.¹¹⁹ The overhaul was motivated by the difficulty of protecting personal data in an environment of expanding digital communications and globalization.¹²⁰ In 2013, while GDPR negotiations within the EU were ongoing, NSA contractor Edward Snowden revealed that the U.S. was engaged in widespread collection of the communications of foreign citizens.¹²¹ The revelations led the EU, for the first time, to include consideration of foreign nations' surveillance laws in the adequacy determination for transfers of data outside the EU.

In 2010, the European Commission's discussion of the adequacy determination made no reference to concerns about the surveillance practices of other nations.¹²² Under the Data Protection Directive, the adequacy determination had to consider "the rules of law, both general and sectoral, in force in the third country in question."¹²³ The first draft of GDPR Article 41, in 2012, added illustrations about what rules of law should be considered by specifying "the relevant legislation in force [in the third country], both general and sectoral, including concerning public security, defence, national security and criminal law."¹²⁴ However, in the wake of the Snowden disclosures in 2013 and the vehement public outcry in the EU,¹²⁵ the final version of GDPR Article 45 passed in 2016 with additional references to surveillance and individual privacy rights.¹²⁶ The final text added consideration of "respect for human rights and freedom" in addition to consideration of the "rule of law."¹²⁷ In addition, the final text expanded the examples of national legislation to be considered to include "the access of public authorities to personal data, as well as the implementation of such legislation."¹²⁸ The inclusion of fundamental human rights and the access of public authorities to personal data echoes the 2015 decision of the Court of Justice of the European Union in *Schrems I*, where the CJEU held that the U.S.-EU Safe Harbor did not provide an adequate level of protection under Data Protection Directive

¹¹⁹ *The History of the General Data Protection Regulation*, EUROPEAN DATA PROTECTION SUPERVISOR, https://www.edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en (last visited May 23, 2025); see Schwartz, *supra* note 94, at 1992.

¹²⁰ *Id.* at 1993 (citing *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, at 2, COM (2010) 609 final (Nov. 11, 2010) [hereinafter "European Commission 2010 Statement"]).

¹²¹ GRANICK, *supra* note 13, at 2, 19, 41.

¹²² See European Commission 2010 Statement at 2.4.1 (discussing only the need to clarify and simplify the adequacy determination needed for cross-border data transfers).

¹²³ Council Directive 95/46/EC, art. 25(2), 1995 O.J. (L 281) 31.

¹²⁴ European Parliament, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 011 final (Jan. 25, 2012).

¹²⁵ See Shaun B. Spencer, *The Evolution of International Communications Technology and Foreign Intelligence Surveillance Regulation*, 25 NEV. L.J. 59, 82 (2024) (describing international criticism in the wake of the Snowden disclosures).

¹²⁶ Regul. 679, art. 45(2)(a), 2016 O.J. (L 119) 1.

¹²⁷ *Id.*

¹²⁸ *Id.*

Article 25, in part because the level of protection was not consistent with the fundamental rights and freedoms guaranteed within the EU.¹²⁹

Nevertheless, this focus on the surveillance laws of transferee nations was unrelated to national security. Instead, the heightened adequacy standards in GDPR Article 45 were intended to protect the fundamental rights of EU citizens.¹³⁰ And, as with the Data Protection Directive, GDPR reinforced the security-versus-privacy framing by continuing to exempt national security laws from GDPR's coverage.¹³¹

The focus on individual privacy rights, rather than EU national security, continued with two additional agreements reached between the U.S. and EU in an attempt to provide an adequate level of protection to support data transfers under GDPR. The first was the Privacy Shield, reached in 2016.¹³² The European Commission determined that the Privacy Shield provide an adequate level of protection based on the degree of protection afforded to EU citizens' personal data and the recourse available for abuses concerning that data.¹³³ The CJEU invalidated this adequacy decision in *Schrems II*, holding that the Privacy Shield did not provide adequate protection because U.S. surveillance law (1) lacked sufficient limits on the purpose or scope of signals intelligence collection, which violated the proportionality requirement under Article 52 of the EU Charter on Fundamental Rights, and (2) failed to provide EU data subjects with redress before an independent tribunal, which violated Article 47 of the EU Charter.¹³⁴ The European Commission has since approved another EU-U.S. agreement intended to provide an adequate level of protection to justify data transfers to the U.S., and again focused on concern for the individual privacy rights of EU citizens rather than on EU national security concerns.¹³⁵

¹²⁹ Case C-362/14, *Schrems v. Data Prot. Comm'r* (*Schrems I*), ECLI:EU:C:2015:650, ¶¶ 73, 96 (*"Schrems I"*).

¹³⁰ Regul. 679, art. 104 (adequacy determination should consider how third country "ensure[s] effective independent data protection supervision" and provides data subjects with "effective and enforceable rights and effective administrative and judicial redress").

¹³¹ *Id.*, art. 16 (excluding from GDPR "activities concerning national security" and "the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union"); see *id.*, art. 23(1) (creating exceptions for restrictions necessary to safeguard national security, defense, public security, and law enforcement).

¹³² Privacy Shield Framework, 81 Fed. Reg. 51042, 51042 (Aug. 2, 2016); see Spencer, *supra* note 125, at 82-83 (discussing the CJEU's invalidation of the Safe Harbor agreement in *Schrems I* and the subsequent negotiation of the Privacy Shield agreement).

¹³³ Commission Implementing Decision 2016/1250, pursuant to Directive 95/46 on the adequacy of the protection provided by the EU-US Privacy Shield, 2016 O.J. (L 201) 32 (EU) (finding that Privacy Shield's oversight and recourse mechanisms ensures an adequate level of protection because it "offer[s] legal remedies to the data subject" and that any interference "with the fundamental rights of the persons whose data are transferred" to from the EU to the U.S. "will be limited to what is strictly necessary to achieve the legitimate objective in question").

¹³⁴ Case C-311/18, *Data Prot. Comm'r v. Facebook Ir. Ltd.* (*Schrems II*), ECLI:EU:C:2020:559, ¶¶ 184-186, 192 (July 16, 2020).

¹³⁵ Commission Implementing Decision 2023/1795 pursuant to Regulation 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework, 2023 O.J. (L 231) 166 (EU) ("[T]he Commission considers that any

V. DATA PRIVACY AS NATIONAL SECURITY

Only recently have regulators and legislators in the U.S. begun to recognize the connection between data privacy and national security. Part V details the national security rationale underlying several of these emerging efforts.

The most high-profile legislative effort has come to be known as the “TikTok ban,” though the actual legislation reaches far more broadly than just TikTok. In 2024, Congress passed the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACA).¹³⁶ PAFACA prohibits any entity from assisting with the distribution, maintenance, or updating of a “foreign adversary controlled application” in the United States.¹³⁷ Although public attention and the unsuccessful Supreme Court challenge focused on TikTok, the law applies to any application “controlled by [any] foreign adversary” if the president determines the application to be a national security threat.¹³⁸ The House Report on PAFACA focused primarily on TikTok, but it also found more broadly that “[c]ommunications applications that are owned and operated by companies controlled by foreign adversary countries present a clear and present threat to the national security of the United States,” in part because they “can be used to collect vast amounts of data on Americans.”¹³⁹ The Supreme Court rejected TikTok’s First Amendment challenge to the law based on the government’s national security interest in “preventing China from collecting vast amounts of sensitive data from 170 million U. S. TikTok users.”¹⁴⁰

Both Congress and the Executive Branch have recognized, however, that a foreign adversary need not control an app in the United States to gather U.S. person data. Instead, as the law currently stands, foreign adversaries can simply buy that data from a U.S. data broker. Congress found that data brokers “have collected and stored billions of data elements on nearly every consumer in the United States, including information about children and active members of the

interference . . . with the fundamental rights of the individuals whose personal data are transferred from the Union to the United States under the EU-U.S. Data Privacy Framework, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that effective legal protection against such interference exists. Therefore, in the light of the above findings, it should be decided that the United States ensures an adequate level of protection . . .”).

¹³⁶ Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, Div. H, 138 Stat. 955 (2024).

¹³⁷ *Id.* Div. H, § 2(a)(1).

¹³⁸ *Id.* Div. H, § 2(g)(3)(B).

¹³⁹ H.R. REP. NO. 118-417, at 1 (2024) (describing how foreign adversaries have used access to Americans’ data and communications networks to “disrupt Americans’ daily lives, conduct espionage activities, and push disinformation and propaganda campaigns”).

¹⁴⁰ *TikTok, Inc. v. Garland*, No. 24-656, slip op. at 11 (S. Ct. Jan. 18, 2025) (per curiam); *id.*, slip op. at 14 (referencing the government’s concern that “[a]ccess to such detailed information about U.S. users . . . may enable ‘China to track the location of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage’”); *id.*, slip op. at 14 (“The record reflects that China ‘has engaged in extensive and years-long efforts to accumulate structured datasets, in particular on U. S. persons, to support its intelligence and counterintelligence operations.’”).

military.”¹⁴¹ Absent a comprehensive federal privacy law, “data brokers may be permitted to sell their sensitive information to any entity of the data broker’s choosing, including foreign adversaries.”¹⁴² The House committee report on the legislation cited evidence that “malicious actors could use data from data brokers to undermine America’s national security” and that “China and Russia have used information from data brokers to conduct espionage, blackmail, and cyberattacks.”¹⁴³

The Department of Justice made more extensive findings about this national security threat in its proposed regulations to prevent foreign adversaries from accessing U.S. sensitive personal data and government-related data.¹⁴⁴ The DOJ described in detail the threat from U.S. personal data flowing abroad. “[A]ccess to Americans’ bulk sensitive personal data or United States Government-related data increases the ability of countries of concern to engage in a wide range of malicious activities.”¹⁴⁵ Those countries of concern can use the sensitive personal or government-related data to “engage in malicious cyber-enabled activities and malign foreign influence activities and to track and build profiles on U.S. individuals, including members of the military and other Federal employees and contractors, for illicit purposes such as blackmail and espionage.”¹⁴⁶ Those countries can also use such data to “collect information on activists, academics, journalists, dissidents, political figures, or members of nongovernmental organizations or marginalized communities to intimidate them; curb political opposition; limit freedoms of expression, peaceful assembly, or association; or enable other forms of suppression of civil liberties.”¹⁴⁷ Recent studies show how countries of concern could use this data to “track high-profile military or political targets,” reveal peoples’ visits to sensitive locations “which could be used for profiling, coercions, blackmail, or other purposes,” and reveal the location or activity level at U.S. military locations or undisclosed intelligence sites.¹⁴⁸

Congress took action to prevent such purchases in the same bill that enacted PAFACA, discussed above.¹⁴⁹ The Protecting Americans’ Data from Foreign Adversaries Act of 2024 (PADFAA)¹⁵⁰ prohibits data brokers from selling or disclosing “personally identifiable sensitive data of a United States individual”

¹⁴¹ H.R. REP. NO. 118-418, at 2 (2024).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Provisions Pertaining to Preventing Access to U.S. Sensitive Personal Data and Government-Related Data by Countries of Concern or Covered Persons, 89 Fed. Reg. 86116 (Feb. 28, 2024) (to be codified at 28 C.F.R. pt. 202).

¹⁴⁵ *Id.* at 86118.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 86118-19.

¹⁴⁹ Provisions Pertaining to Preventing Access to U.S. Sensitive Personal Data and Government-Related Data by Countries of Concern or Covered Persons, 89 Fed. Reg. at 86116.

¹⁵⁰ Protecting Americans’ Data from Foreign Adversaries Act of 2024, Pub. L. No. 118-50, Division I, 180 Stat. 955 (2024).

to a “foreign adversary country” or an entity controlled by a foreign adversary.¹⁵¹ In PADFAA, foreign adversary countries are defined by statute to be the Democratic People’s Republic of North Korea, People’s Republic of China, Russian Federation, and Islamic Republic of Iran.¹⁵² And a data broker is any entity that sells or makes available data of U.S. individuals that it did not collect directly from such individuals to another entity that is not acting as a service provider.¹⁵³

The Biden Administration attempted to solve the same problem with Executive Order 14177, which declared that the “continuing effort of certain countries of concern to access Americans’ sensitive personal data and United States Government-related data constitutes an unusual and extraordinary threat.”¹⁵⁴ EO 14177 declared it to be the “policy of the United States to restrict access by countries of concern to [such personal or government-related data] when such access would pose an unacceptable risk to the national security of the United States,” and called for regulations implementing that policy.¹⁵⁵ The Department of Justice published notice of those proposed regulations in October 2024.¹⁵⁶ The proposed regulations prohibit U.S. persons from engaging in “data brokerage” transactions with a country of concern or a covered person (essentially an entity owned by, controlled by, organized in, or acting on behalf of a country of concern).¹⁵⁷ The proposed regulations also prohibit U.S. persons from engaging in data brokerage transactions with any foreign person unless they contractually require the foreign person to refrain from engaging in subsequent data brokerage transactions with countries of concern or covered persons.¹⁵⁸

VI. CONCLUSION

As Part V demonstrates, policymakers have finally recognized that data privacy is essential to national security.¹⁵⁹ The narrow measures we have adopted

¹⁵¹ *Id.* § 2(a).

¹⁵² *Id.* § 2(c)(4).

¹⁵³ *Id.* § 2(c)(3).

¹⁵⁴ Proclamation No. 14177, 89 Fed. Reg. 15421 (Feb. 28, 2024).

¹⁵⁵ *Id.* at 15421.

¹⁵⁶ See Provisions Pertaining to Preventing Access to U.S. Sensitive Personal Data and Government-Related Data by Countries of Concern or Covered Persons, 89 Fed. Reg. 86116 (Oct. 29, 2024).

¹⁵⁷ Proposed 28 C.F.R. § 202.301(a), 89 Fed. Reg. 86213. “Sensitive personal data” under the regulations would exclude personal communications and “information or informational materials” that fall within statutory exceptions to the International Emergency Economic Powers Act (“IEEPA”). See Proposed 28 C.F.R. § 202.249(b)(3) & (4); see also 50 U.S.C. 1702(b)(1) & (3) (exempting “any . . . personal communication and “information or informational materials” from IIEPA). Mirroring the IEEPA exceptions is essential because the proposed regulation relies on IEEPA as a primary source of regulatory authority. See 89 Fed. Reg. 86204 (citing 50 U.S.C. § 1701 et seq. as authority).

¹⁵⁸ See Proposed 28 C.F.R. § 202.302(a)(1), 89 Fed. Reg. 86213-14.

¹⁵⁹ In fact, China is already enacting laws that recognize the national security dimension of data protection. See Amba Kak & Samm Sacks, *Shifting Narratives and Emergent Trends in Data-Governance Policy*, Policy Memo for Yale Law School’s Paul Tsai China Center, at 8-11, 14-17 (2021) (discussing enacted and then-pending digital data-related laws in China that overlap and address national security, economic policy, and privacy goals), https://law.yale.edu/sites/default/files/area/center/china/document/shifting_narratives.pdf.

so far, however, are insufficient.¹⁶⁰ In light of the nature of the risk and the vast amounts of data already collected, regulators are getting an awfully late start and are not addressing enough of the problem. As the 2024 National Counterintelligence Strategy recognizes, foreign intelligence entities “are targeting not only U.S. government entities and private corporations, but also individual U.S. persons and their data.”¹⁶¹ These adversaries see “data as a strategic resource” and are therefore interested in our personally identifiable information to develop economic and research and development benefits and to “use vulnerabilities gleaned from such data to target and blackmail individuals.”¹⁶² Foreign adversaries who wish to acquire U.S. data do so in three different ways. They can steal it from U.S. entities, buy it from U.S. entities, or own it by engaging in lawful business in the U.S.¹⁶³ Protecting against these threats will therefore require at least three significant steps.

First, we must protect the massive amount of data that has already been collected and is currently held in the U.S. To protect this data, we must deter the first two threats from foreign adversaries—stealing it and buying it. Deterring foreign adversaries from stealing the data means enacting legislation requiring substantial improvements to both public and private security measures against data breaches.¹⁶⁴ It may be impossible to stop all targeted attacks by sophisticated state actors, and those attacks require significant resources to combat. Robust data security obligations can at least eliminate the “low hanging fruit” of data that can easily be stolen at scale. The U.S. currently lacks a federal data breach law or a national cyber security obligation.¹⁶⁵ We have instead left it to the states to enact a patchwork of data breach laws, but the states are ill-equipped to protect national security concerns.¹⁶⁶

¹⁶⁰ See Justin Sherman, *Tackling Data Brokerage Threats to American National Security*, LAWFARE, (Nov. 25, 2024), <https://www.lawfaremedia.org/article/tackling-data-brokerage-threats-to-american-national-security> (arguing that regulation of foreign adversary data transfers “while moving in the right direction, does not address myriad other issues and massive gaps in U.S. data security . . .”).

¹⁶¹ OFF. OF THE DIR. OF NAT’L INTEL. AND SEC. CTR., NATIONAL COUNTERINTELLIGENCE STRATEGY 2024 13 (2024), https://www.dni.gov/files/NCSC/documents/features/NCSC_CI_Strategy-pages-20240730.pdf.

¹⁶² *Id.*

¹⁶³ See Joe Duball, *IAPP P.S.R. 2024: The Blueprint to Protecting US Data from Adversarial Regimes*, INTERNATIONAL ASS’N OF PRIVACY PRO. (Sept. 25, 2024), <https://iapp.org/news/a/iapp-psr-2024-the-blueprint-to-protecting-us-data-from-adversarial-regimes> (discussing the fact that the focus has long been on foreign adversaries stealing data by hacking, but increasingly the focus is on “lawful access through commercial activities”).

¹⁶⁴ See Susan Landau, *Understanding Data Breaches as National Security Threats*, LAWFARE (Feb. 26, 2018), <https://www.lawfaremedia.org/article/understanding-data-breaches-national-security-threats> (“Data breaches can constitute not merely a privacy threat but also a national security risk.”).

¹⁶⁵ See Jeff Kosseff, *Hamiltonian Cybersecurity*, 54 WAKE FOREST L. REV. 155, 156-57 (2019) (arguing that Congress has failed to enact broad data security laws, and that the state laws attempting to plug this gap are inadequate); accord Ido Kilovaty, *Availability’s Law*, 88 TENN. L. REV. 69, 86-92 (2020) (describing a patchwork of sectoral federal laws, laws in some states, and attempts by the Federal Trade Commission to impose some measure of cybersecurity obligation on merchants).

¹⁶⁶ See Kosseff, *supra* note 165, at 203 (“States also might have difficulty justifying the local benefits of particularly outdated state cybersecurity laws. For instance, if ransomware and theft of geolocation

Deterring foreign adversaries from simply buying the data requires restricting sales and transfers to foreign adversaries.¹⁶⁷ We have taken an initial step towards this goal, but far more work remains to be done.¹⁶⁸ Congress did enact the PADFAA, but that law applies only to “data brokers,” defined as entities that sell data that they did not collect directly from the data subjects.¹⁶⁹ However, that does not prohibit entities in the U.S. from selling data that they collected themselves to companies controlled by foreign adversaries.¹⁷⁰ The Department of Justice’s proposed regulations attempt to close this loophole by defining “data brokerage” to mean selling data to an entity that did not collect the data directly from the data subject.¹⁷¹ But even those proposed regulations do not fully address the problem because they do not prohibit all such transactions. Instead, they apply only to “bulk” transfers of “sensitive personal data.”¹⁷²

Second, we must adopt comprehensive data privacy legislation that covers every stage of the data lifecycle, starting most critically with collection.¹⁷³ The less information that is collected, the less information will be available for foreign adversaries to steal, buy, or own.¹⁷⁴ The national security interest, therefore, justifies adopting a broad data privacy approach similar to GDPR’s regulation of “processing,” which includes the initial collection of data.¹⁷⁵ The legislation must limit collection to what is necessary in to accomplish the purpose for which it is collected, in order to deter the monetization model of surveillance capitalism that has driven us to a digital world in which entire industries exist merely to extract

data are a greater economic and national security threat than, for instance, identity theft, a state law that focuses on the confidentiality of Social Security numbers and financial account data might not have the same degree of local benefit than it had in the past.”).

¹⁶⁷ See *supra* Part V.

¹⁶⁸ See Sherman, *supra* note 160 (calling for expansion of existing programs “like the bulk data transfer and national security review program”).

¹⁶⁹ Protecting Americans’ Data from Foreign Adversaries Act, H.R.7520, 118th Cong. § 2(c)(3), (2024).

¹⁷⁰ See *id.*

¹⁷¹ Data Brokerage, 89 Fed. Reg. 86207 (to be codified at 28 C.F.R. § 202.214(a)).

¹⁷² See 89 Fed. Reg. 86213 (to be codified at 28 C.F.R. § 202.301) (prohibiting data-brokerage transactions); *id.* at 86127 (to be codified at 28 C.F.R. § 202.205) (defining bulk data); *id.* at 86122 (to be codified at 28 C.F.R. § 202.249); see also Sherman, *supra* note 160 (arguing that the U.S. government “consider how existing mechanisms for national security review, such as the Committee on Foreign Investment in the United States (CFIUS), are also mechanisms to screen for foreign adversaries trying to acquire Americans’ sensitive personal data, including data on military service members, intelligence community personnel, and U.S. government buildings.”).

¹⁷³ See *Promoting U.S. Innovation and Individual Liberty Through a National Standard for Data Privacy: Hearing Before the Subcomm. on Innovation, Data, and Commerce of the Comm. on Energy and Com.*, 118th Cong. 13 (2023) (arguing that “data minimization protects consumer privacy and is critical for cybersecurity and national security”); *id.* at 85 (“the unfettered collection, storage, and sharing of data . . . creates cybersecurity risks . . . [and] national security risks”).

¹⁷⁴ Sherman, *supra* note 160 (arguing that policymakers must “think about how broader comprehensive privacy efforts fit into the picture” because “a comprehensive data privacy and security approach that leaves few gaps for foreign adversaries to exploit”).

¹⁷⁵ See Council Regulation 2016/679, art. 4(2), 2016 O.J. (L 119) (EU) (defining processing to include “collection”).

and sell data about us.¹⁷⁶ This monetization model creates the incentive to over-collect and thereby puts all the collected data at risk of hacking and transfers. Simply put, Congress must order U.S. businesses to stop doing the Chinese Communist Party's work for them.

Finally, to give these regulatory initiatives the best chance of success, we must change the nature of the debate. As described above, privacy laws have long been framed as existing in two different categories—surveillance laws, where security and privacy are irrevocably in tension with one another, and all other laws, in which various efficiencies must be balanced against personal privacy interests. The national security risks that this Article describes must change that dynamic. In the critical legislative efforts needed to enact comprehensive data privacy requirements, we can no longer accept a framing in which Congress must decide how much “inefficiency” is acceptable in order to protect people's personal feelings of privacy. Attempts to extoll the virtues of personal privacy interests have consistently failed to overcome the commercial interests of the world's largest technology companies. Instead, the appropriate framing should pit our own national security against the financial interests of big tech company shareholders. Framed that way, security and privacy advocates become allies in a debate against business interests, which offers a better path to legislative success. We must take the steps necessary to prevent data from being collected in first place and to limit the sharing of what data is collected, to keep it from ending up in the wrong hands. Today, the wrong hands can reach across oceans.

¹⁷⁶ See Sherman, *supra* note 160 (citing recent Congressional debates over comprehensive data privacy proposals).

CELL PHONES G2G: HOW POLICYMAKERS CAN PROMOTE CHILD WELFARE AND ACADEMIC EXCELLENCE THROUGH THE COMPLETE BAN OF CELL PHONES IN PUBLIC SCHOOLS

Brent Boyd*

I. INTRODUCTION

Imagine stepping back in time to a high school cafeteria during lunchtime. Picture a bustling atmosphere where students are engaged in authentic conversations and various activities.¹ Now shift your focus to another high school in a different state, and a striking contrast emerges. There, you would find a group of students seated at a table with their heads bowed down, eyes fixated on their phones, completely disconnected from one another.² Remarkably, the former scenario is not reminiscent of the 1980s—it is a snapshot of a twenty-first-century public high school in Florida.³ This discrepancy in student behavior across different schools nationwide highlights the influence of two critical factors: state legislators and school boards.

In an era dominated by digital connectivity, the school experience has been plagued by rampant cell phone and social media use by students during school hours, threatening students' education, well-being, and physical safety.⁴ These devices and platforms offer unparalleled access to information and connectivity, but also pose significant student risks.⁵ For example, cyberbullying is ever-increasing, and school officials recognize it as a substantial problem.⁶ Phone and social media use is linked to increased rates of depression and elevated risks of suicide among minors.⁷ Studies have shown that smartphone use by students in school is correlated with reduced educational success.⁸ Educators have been increasingly calling for a reevaluation of smartphone usage in schools in response

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¹ See Natasha Singer, *A Florida District Bans Phones. Here's What Happened.*, N.Y. TIMES (Nov. 6, 2023), <https://www.nytimes.com/2023/10/31/technology/florida-school-cellphone-tiktok-ban.html>.

² Jane Adams, *Can We Talk? Schools Try to Wrest Cell Phones from Students' Hands*, EDSOURCE (Oct. 1, 2017), <https://edsource.org/2017/can-we-talk-schools-try-to-wrest-cell-phones-from-students-hands/587748>.

³ Singer, *supra* note 1.

⁴ *Id.*

⁵ See Peter Manza, *The Correlation Between Cyberbullying & Addiction*, BICYCLE HEALTH (Mar. 24, 2023), <https://www.bicyclehealth.com/blog/correlation-between-cyberbullying-addiction>.

⁶ Miranda Dang, *How Schools Should Properly Address Cyberbullying, Taking Accountability*, NJ SPOTLIGHT NEWS (Jan. 15, 2024), <https://www.njspotlightnews.org/2024/01/op-ed-how-schools-should-address-cyberbullying/>.

⁷ Lulu Garcia-Navarro, *The Risk of Teen Depression and Suicide Is Linked to Smartphone Use, Study Says*, LAIST (Dec. 17, 2017, 5:05 AM), <https://laist.com/news/npr-news/the-risk-of-teen-depression-and-suicide-is-linked-to-smartphone-use-study-says>.

⁸ Oluwafemi J. Sunday, Olusola O. Adesope, & Patricia L. Maarhuis, *The effects of smartphone addiction on learning: A meta-analysis*, COMPUTS. IN HUM. BEHAV. REPS., Aug.-Dec. 2021, at 4.

to these mounting concerns.⁹ Banning cell phones on school premises is not merely a pragmatic solution to address issues of distraction and academic underperformance but rather a moral imperative to safeguard the well-being of our children.¹⁰ Teachers nationwide are tasked with the daily challenge of attempting to monitor cell phone usage, and the “only solution that works is to physically remove the cell phone from the student.”¹¹

Recognizing this trend, several states have taken legislative action to address the issue. Last May, Florida enacted a law mandating public school districts to implement regulations prohibiting student cell phone use during instructional hours.¹² Subsequently, Orange County Public Schools, among other districts, escalated these measures by extending the ban to encompass the entire school day.¹³

This Comment delves into the reasoning behind implementing complete cell phone prohibitions in schools. Moreover, it serves as a call to action directed at state legislators and school board members nationwide, urging them to elevate their cell phone usage policies to the next level by instituting a complete ban. In Part II, this Comment will examine the current issues stemming from cell phone usage in public schools, highlighting the consequences of maintaining silence on the matter and leaving educators to grapple with classroom management challenges. In Part III, this Comment will examine the pushback from parents and students that may arise when legislators regulate students’ ability to have their cell phones during school hours, and whether those parents or students have an actionable constitutional claim in response to any ban. In Part IV, this Comment will examine the success of schools nationwide in implementing cell phone bans. Lastly, in Part V, this Comment will explore strategies for school boards and state legislators to effectively implement a ban on cell phone usage in schools and establish enforcement mechanisms, including deterrent measures against bringing phones onto school premises.

⁹ Jocelyn Gecker, *Kids Are Using Phones in Class, Even When It’s Against the Rules. Should Schools Ban Them All Day?*, AP NEWS (Feb. 27, 2024, 8:33 AM), <https://apnews.com/article/school-cell-phone-ban-01fd6293a84a2e4e401708b15cb71d36>.

¹⁰ Alia Wong & Nirvi Shah, *Schools Don’t Want Kids on Cellphones. Is Banning Them the Solution?*, USA TODAY (Jan. 2, 2024, 5:10 AM), <https://www.usatoday.com/story/news/education/2024/01/02/should-schools-ban-cellphones/72012262007/>.

¹¹ Gecker, *supra* note 9.

¹² Singer, *supra* note 1.

¹³ *Id.*

II. THE ISSUES PRESENTED BY HAVING CELL PHONES IN SCHOOLS

“Every classroom we went in the kids weren’t paying attention to the teachers. They were on their phones, they were distracted. Even if they weren’t on their phones, they’re getting notifications.”¹⁴

A. Hear the Cry from Our Teachers Pleading for Change

Teachers nationwide are voicing a common frustration: cell phone use in classrooms has spiraled out of control, and they are tired of being the cell phone police.¹⁵ The prevailing policies in most schools, which permit students to keep their phones in their backpacks, prove ineffective, leaving educators to deal with the fallout.¹⁶ Seventy-two percent of high school teachers said cell phone distraction is “a major problem in the classroom.”¹⁷ Teachers looking for new positions are now raising questions during contract negotiations about whether their prospective schools plan to ban cell phones.¹⁸ As a nation, we cannot afford to lose more teachers, especially while communities across the country grapple with a teacher shortage and are unable to fill nearly 55,000 full-time vacancies.¹⁹ There is hope for teachers, according to a high school principal in Utah, who shared that despite the initial challenges of implementing a cell phone ban, it resulted in more engaged students, fewer distractions for teachers, and improved learning outcomes.²⁰

One significant issue with expecting teachers to police phone use is the power struggles it fosters, damaging teacher-student relationships.²¹ Like our wider society, students are deeply attached to their cell phones, making confiscations especially detrimental to the relationship.²² Furthermore, expecting teachers to continuously monitor students’ smartphone use is unreasonable.²³

¹⁴ Sara Chernikoff, *States Weigh School Cell Phone Bans Atop District Policies*, USA TODAY (June 18, 2024), <https://www.usatoday.com/story/news/education/2024/06/09/cell-phone-school-laws/73975232007/>.

¹⁵ Gecker, *supra* note 9.

¹⁶ *See id.*

¹⁷ Jenn Hatfield, *72% of U.S. High School Teachers Say Cellphone Distraction Is a Major Problem in the Classroom*, PEW RSCH. CTR. (June 12, 2024), <https://www.pewresearch.org/short-reads/2024/06/12/72-percent-of-us-high-school-teachers-say-cellphone-distraction-is-a-major-problem-in-the-classroom/>.

¹⁸ Donna George, *Students Can’t Get off Their Phones. Schools Have Had Enough.*, WASH. POST (May 9, 2023), <https://www.washingtonpost.com/education/2023/05/09/school-cellphone-ban-yondr/>.

¹⁹ Janet Loehrke, *Where Are All the Teachers? Breaking Down America’s Teacher Shortage Crisis in 5 Charts.*, USA TODAY (Mar. 19, 2024), <https://www.usatoday.com/story/graphics/2024/03/19/teacher-shortage-crisis-explained/72958393007/>.

²⁰ Gecker, *supra* note 9.

²¹ Heath Hadom, *Get Smartphones Out of K-12 Classrooms*, ED SOURCE (June 26, 2023), <https://edsources.org/2023/get-smartphones-out-of-k-12-classrooms/692994>.

²² *Id.*

²³ *Id.*

Smartphones and social media platforms are designed to captivate attention, yet schools permit—and sometimes even encourage—students to bring these distractions onto campus daily.²⁴ This acceptance, as well as the significant investments by educators in technology development, implicitly endorses students' phone use in schools.²⁵ Tasking individual teachers to curb this reliance is an impractical and unjustifiable demand.²⁶

B. Health Concerns Attributed to Cell Phone and Social Media Use among Children

“Social networking is engineered to be as habit-forming as crack cocaine.”²⁷ Since the advent of smartphones shortly after 2010, there has been a marked increase in teenage mental health issues.²⁸ Studies show that teenagers who use electronic devices for five or more hours daily are 71% more likely to display at least one suicide risk factor.²⁹ Between 2010 and 2018, the rates of depression and anxiety among college students doubled.³⁰ Emergency room visits for non-fatal self-harm also surged between 2010 and 2020, increasing by 188% for teen girls and 48% for teen boys.³¹ Suicide rates among younger adolescents saw a significant increase, rising by 167% for girls and 91% for boys.³² Additionally, the other health concerns that are correlated with being on your phone could include, but are not limited to, the following: depression, suicide, screen addiction, anxiety, difficulty sleeping, and isolation from social interactions, all of which can lead to decreased performance at school.³³ This underscores the urgent need to prioritize suicide prevention and address the factors that are negatively impacting our children's health.

The average public-school day in America spans around 7.5 hours;³⁴ safeguarding this time from phone use could significantly reduce suicide risk factors associated with excessive screen time. While schools cannot control or influence the time students spend at home or the parenting choices made by families, schools, when given the opportunity, must take proactive steps to mitigate

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Mike Elgan, *Social Media Addiction Is a Bigger Problem than You Think*, COMPUT. WORLD (Dec. 14, 2015), <https://www.computerworld.com/article/1641606/social-media-addiction-is-a-bigger-problem-than-you-think.html>.

²⁸ Jonathan Haidt, *End the Phone-Based Childhood Now*, THE ATLANTIC (Mar. 13, 2024), <https://www.theatlantic.com/technology/archive/2024/03/teen-childhood-smartphone-use-mental-health-effects/677722/>.

²⁹ Garcia-Navarro, *supra* note 7.

³⁰ Haidt, *supra* note 28.

³¹ *Id.*; Jon Haidt, *The Teen Mental Illness Epidemic Began Around 2012*, AFTER BABEL (Feb. 08, 2023), <https://www.afterbabel.com/p/the-teen-mental-illness-epidemic>.

³² Haidt, *supra* note 31.

³³ *See How Do Smartphones Affect Mental Health?*, ENSORA HEALTH (Feb. 10, 2023), <https://ensorahealth.com/blog/how-do-smartphones-affect-mental-health/>.

³⁴ *A Typical Day At School*, CIEE (last visited Sept. 13, 2024), <https://www.ciee.org/in-the-usa/academics/high-school-usa/resources/typical-day-school>.

the risk factors associated with suicide. Parents will naturally have their own individual approaches to raising their children, which can vary widely.³⁵ If schools have the opportunity to reduce factors contributing to adolescent suicide, failing to act would be both remiss and negligent. Ensuring that students spend their school hours free from the harmful effects of excessive phone use could be a significant measure in protecting and saving young lives. By implementing such policies, schools actively fulfill their responsibility to support and safeguard their students' mental health and well-being.

C. Academic Performance is Plummeting in the United States

In recent years, academic performance in America has been on a noticeable decline,³⁶ raising significant concerns among educators, parents, and policymakers. Test scores in schools, often used as a barometer for academic achievement, have shown a downward trend.³⁷ The National Assessment of Educational Progress revealed that reading and math scores have stagnated or declined across many grade levels.³⁸ This decline is particularly alarming because it indicates that students are not meeting the educational benchmarks necessary for future success.

Several factors contribute to this decline in academic performance, but one significant issue is the increasing reliance on technology, which can distract and detract from traditional learning methods.³⁹ Many students spend a considerable amount of time on electronic devices for non-educational purposes, which can detract from their ability to focus on their studies and complete homework assignments.⁴⁰ Additionally, the rise of social media and digital entertainment has contributed to shorter attention spans⁴¹ and reduced face-to-face interactions, both of which are crucial for developing critical thinking and communication skills.⁴²

Addressing the decline in academic performance requires a multifaceted approach, with banning cell phones in public schools as a pivotal step. Schools

³⁵ See Kiley Hurst et. al., *How Today's Parents Say Their Approach to Parenting Does – or Doesn't – Match Their Own Upbringing*, PEW RSCH. CTR. (Jan. 24, 2023), <https://www.pewresearch.org/social-trends/2023/01/24/how-todays-parents-say-their-approach-to-parenting-does-or-doesnt-match-their-own-upbringing/>.

³⁶ Sequoia Carrillo, *U.S. Reading and Math Scores Drop to Lowest Level in Decades*, NPR (June 21, 2023), <https://www.npr.org/2023/06/21/1183445544/u-s-reading-and-math-scores-drop-to-lowest-level-in-decades>.

³⁷ *Id.*

³⁸ *See id.*

³⁹ See Gary Garcia, *Technology's Negative Effect on Test Scores*, QUEST NEWS (Feb. 18, 2020), <https://dalquestnews.org/18037/news/technologys-negative-effect-on-test-scores/>.

⁴⁰ See Sherri Gordon, *How Smartphones Create Distractions in the Classroom*, PARENTS (June 20, 2024), <https://www.parents.com/how-smartphones-create-distractions-in-the-classroom-8658838>.

⁴¹ See Tessa Nussenbaum, *Social Media Causes Attention Spans to Drop*, STANDARD (Dec. 14, 2023), <https://standard.asl.org/27705/uncategorized/social-media-causes-attention-spans-to-drop>.

⁴² See Better Speech, LINKEDIN, <https://www.linkedin.com/pulse/importance-face-to-face-interaction-child-development-better-speech-yyyae/> (last visited Aug. 29, 2024); Jennifer Jolly, *Do Smartphone Bans Work if Parents Push Back?*, USA TODAY (Aug. 28, 2024), <https://www.usatoday.com/story/tech/2024/08/28/do-smartphone-bans-work-if-parents-push-back/74962962007/>.

must prioritize creating environments that minimize distractions and maximize focus on learning.⁴³ Students can engage more effectively with their coursework and participate more actively in classroom discussions as a result of schools prohibiting cell phones.⁴⁴ Such a prohibition can improve academic performance by reducing the temptation to check social media or play games during instructional time.⁴⁵ Additionally, banning cell phones can foster a sense of discipline and academic curiosity, as students rely more on direct interactions with teachers and peers. By taking this comprehensive measure, alongside investing in teacher training, schools can begin to reverse the downward trends in academic performance and ensure that all students have the opportunity to succeed.

III. PUSHBACK FROM PARENTS AND THE CONSTITUTION: THE RIGHT OF SCHOOLS TO REGULATE CELL PHONE USE

As the debate over cell phone use in schools continues, it is essential to consider the legal backdrop regarding the authority of educational institutions to impose such bans. Numerous legal precedents support schools' ability to regulate students' behavior and maintain an environment conducive to learning.⁴⁶ First, however, this Comment will examine parental pushback against banning cell phones. Then, it will analyze the legal implications of school regulation of student cell phones in relation to the First Amendment's Free Speech Clause, the Due Process Clause of the Fourteenth Amendment, and the Fourth Amendment's search and seizure clause.

A. Pushback from Parents

Any change invariably invites resistance, and implementing new policies, such as cell phone bans in schools, is no exception. Many critics argue that students *need* their phones in case of an emergency.⁴⁷ This concern has become especially pronounced in light of school shootings and other potential threats.⁴⁸ However, "no research exists to back up the claim that student's access to cell phones during a school shooting makes them any safer."⁴⁹ Police officers strongly advise against

⁴³ See Ashton Harrison & Kathryn Wojnar, *The Relationship between Classroom Distractions and Off-Task Students* (Dec. 9, 2020) (Honors Theses 403, Coastal Carolina University).

⁴⁴ See Hannah Yechivi, *More Maine Schools Move to Ban Cellphones for the Entire School Day*, NEWS CTR. ME. (Sept. 5, 2023), <https://www.newscentermaine.com/article/news/education/maine-schools-ban-cell-phones-south-portland-westbrook-lewiston/97-5ada2ae5-7716-4b73-adee-36c8561415ff>.

⁴⁵ See *id.*

⁴⁶ See *infra* note 59, 94.

⁴⁷ George, *supra* note 18.

⁴⁸ Elizabeth Heubeck, *When Schools Want to Ban Cellphones—But Parents Stand in the Way*, EDUCATIONWEEK (May 21, 2024), <https://www.edweek.org/technology/when-schools-want-to-ban-cellphones-but-parents-stand-in-the-way/2024/05>.

⁴⁹ *Id.*

students using their phones to contact parents during emergencies.⁵⁰ Instead, they emphasize the importance of students' listening to adults, following directions, and remaining fully present in the moment during such emergencies.⁵¹

Experts argue that the widespread use of cell phones in times of emergency "could potentially decrease, not increase, school safety during a crisis."⁵² Phone systems can become overwhelmed, hindering critical communications between school officials and emergency responders.⁵³ Furthermore, the rapid spread of misinformation, rumors, and panic via student cell phone use can complicate the efforts of first responders and exacerbate the situation.⁵⁴ In larger schools, the collective rush of hundreds or sometimes thousands of students attempting to use their phones can further strain communication networks, creating a chaotic and less secure environment. Additionally, student cell phone use during the crisis may prompt a rush of parents to the school, which could disrupt emergency operations and jeopardize the safety of both parents and students during evacuations or other safety procedures.⁵⁵

B. The First Amendment's Free Speech Clause

Students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁵⁶ The Free Speech Clause of the First Amendment provides that: "Congress shall make no law . . . abridging the freedom of speech."⁵⁷

Although the Supreme Court has never reviewed a student cell phone case,⁵⁸ it has established four tests for determining whether a particular form of student speech is constitutionally protected.⁵⁹ Under the *Tinker* test, schools are permitted to regulate student speech if it causes or is likely to cause substantial disruption to the schools' operations or infringes on the rights of other students.⁶⁰ The *Fraser* test allows schools to restrict speech that is vulgar, lewd, obscene, or

⁵⁰ See Alyson Klein, *School Shootings Are Fueling the Debate Over Cellphones in Class*, EDUCATIONWEEK (June 16, 2022), <https://www.edweek.org/technology/school-shootings-are-fueling-the-debate-over-cellphones-in-class/2022/06>.

⁵¹ *Id.*

⁵² Ken Trump, *Cell Phones and Text Messaging in Schools*, NAT'L SCH. SAFETY & SEC. SERVS. (last visited Sept. 7, 2025), <https://schoolsecurity.org/trends/cell-phones-and-text-messaging-in-schools/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁵⁷ U.S. CONST. amend. I.

⁵⁸ See Joseph O. Oluwole & William Visotsky, *The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 51, 53 (2010).

⁵⁹ See *Tinker*, 393 U.S. at 509; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-85 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Morse v. Frederick*, 551 U.S. 393, 409-10 (2007).

⁶⁰ *Tinker*, 393 U.S. at 509. This case involved students who were suspended for wearing black armbands to protest the Vietnam War, and the court held that their peaceful expression was protected under the Constitution. Further, the court held that schools can only restrict student speech if it causes, or is likely to cause, a substantial disruption to the school environment. *Id.*

clearly offensive, recognizing the school's role "*in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."⁶¹ The *Kuhlmeier* test enables schools to control student speech in school-sponsored activities as long as their actions are reasonably connected to valid educational objectives.⁶² Lastly, the *Morse* test allows schools the ability to restrict speech that promotes illegal drug use.⁶³ If the speech does not fall under any of these more specific tests, the *Tinker* test has typically become the default for analyzing a potential restriction on student speech.⁶⁴

Under the *Fraser* test, a school's ability to regulate student speech extends to vulgar, lewd, or plainly offensive speech.⁶⁵ This test might be applied in the context of banning cell phones in schools if there are concerns about potential bullying⁶⁶ or inappropriate activities, such as sexting via cell phones, during school hours.⁶⁷ Educators must acknowledge that sexting and other inappropriate behaviors can occur during the school day, and these actions could justify a ban under the *Fraser* framework. Schools, however, should be cautious about relying solely on the issue of sexting as their reasoning for banning cell phones. A ban could likely be upheld if there is a documented history of such behavior within the school, as it aligns with its duty to maintain a safe and respectful learning environment. However, without clear evidence or a pattern of such incidents, using sexting as the primary justification might be insufficient under the *Fraser* test, which requires a clear connection between the regulation and the school's educational mission.⁶⁸ Therefore, it is unlikely that the *Fraser* test would be the primary framework applied in a challenge against a cell phone ban on the grounds of free speech.

⁶¹ *Fraser*, 478 U.S. at 683-85. In this case, a school disciplined a student for delivering a speech that was lewd and sexually suggestive at a school assembly. The Court ruled that schools have the authority to regulate vulgar and offensive language to maintain a safe and appropriate learning environment, emphasizing that such speech is inconsistent with the school's educational mission. *Id.*

⁶² *Kuhlmeier*, 484 U.S. at 273. This case arose when a school administrator removed articles on sensitive topics from a student newspaper, and the Court upheld the administrator's decision, reasoning that because the newspaper constituted school-sponsored speech, the school had the constitutional authority to regulate the content based on legitimate educational concerns. *Id.*

⁶³ *Morse*, 551 U.S. at 409-10. This case involved a student who displayed a banner reading "Bong Hits 4 Jesus" at a school event. The Court upheld the school's decision to discipline the student, emphasizing that schools have the responsibility to prevent messages that might be interpreted as encouraging illegal drug activity. *Id.*

⁶⁴ See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001).

⁶⁵ See *Fraser*, 478 U.S. at 685.

⁶⁶ See *id.*; see also Peyton Spellacy, *Online Bullying Concerns Rise as New Mexico Students Return to School*, KOAT ACTION 7 NEWS (Aug. 7, 2024), <https://www.koat.com/article/online-bullying-concerns-new-mexico-schools/61791789>.

⁶⁷ See *Fraser*, 478 U.S. at 685; see also Susan Wind, *What Are the Consequences of Sexting in Schools?*, NET NANNY (Nov. 27, 2017), <https://www.netnanny.com/blog/what-are-the-consequences-of-sexing-in-schools/>; *Sexting*, MERRIAM WEBSTER DICTIONARY (2025) ("Noun: sexting 'sek-stij: the sending of sexually explicit messages or images by cell phone.'").

⁶⁸ *Fraser*, 478 U.S. at 685.

The *Kuhlmeier* test is also unlikely to apply in the context of a cell phone ban, as it primarily deals with regulating school-sponsored speech,⁶⁹ which is not directly related to students' general use of cell phones. The *Morse* test could potentially be relevant if there is a documented history of students using cell phones in connection with illegal drug activities; however, such instances would need to be established and shown for the test to be applicable.⁷⁰ Given these considerations, the most appropriate framework to analyze a cell phone ban would likely be under the *Tinker* test, which focuses on whether the ban is necessary to prevent substantial disruption in the school environment.⁷¹

When applying the *Tinker* test to the issue of banning cell phones in public schools, the key consideration is whether allowing cell phone use would significantly disrupt the educational environment.⁷² Supporters of a ban could argue that cell phones are a frequent source of distractions, such as texting, browsing social media, or even engaging in cyberbullying during classroom instruction time.⁷³ These activities could interfere with the learning process and create an atmosphere that disrupts teaching and other students' ability to focus,⁷⁴ which would satisfy the *Tinker* standard for justifying those restrictions on student behavior. On the other hand, opponents might contend that the mere presence of cell phones does not inherently cause disruption and that a blanket ban is an overreach.⁷⁵ They might argue that specific incidents of disruption should be addressed on a case-by-case basis rather than imposing a broad prohibition, which could be seen as infringing on students' rights without sufficient justification.⁷⁶

While opponents argue that the mere presence of cell phones does not inherently cause disruption and that incidents should be handled individually, this approach overlooks the pervasive and subtle ways in which cell phones can undermine the educational environment.⁷⁷ Moreover, addressing disruptions case-by-case is impractical and reactive rather than practical and proactive. It places an undue burden on educators to monitor and manage these disruptions,⁷⁸ which could be much more easily prevented with a blanket ban. The potential for cyberbullying is another significant concern.⁷⁹ Unlike other forms of disruption,⁸⁰ cyberbullying

⁶⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁷⁰ *See Morse v. Frederick*, 551 U.S. 393, 408 (2007).

⁷¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁷² *Id.*

⁷³ Manza, *supra* note 5; Dang, *supra* note 6; Hadom, *supra* note 21.

⁷⁴ Gordon, *supra* note 40.

⁷⁵ *See* William Thompson, *Be "Yondr" The Schoolhouse Gate: Law And Policy For Student Cell Phone Restriction In Public High Schools*, 29 SUFFOLK J. TRIAL & APP. ADV. 123, 144 (2024) ("The restriction of cell phones in United States public high schools is a multifaceted issue, but evaluation should lead to less restrictive solutions because of the inherent risks to parental and student rights that blunt measures like Yondr pose, and because of the ineffectual public policy they advance. Yondr-esque cell phone restrictions in public high schools ignore the realities of our modern, phone-centric world.").

⁷⁶ *See id.*

⁷⁷ *See* Harrison & Wojnar, *supra* note 43.

⁷⁸ *See* Chernikoff, *supra* note 14.

⁷⁹ *See* Manza, *supra* note 5; *see* Dang, *supra* note 6.

⁸⁰ *See* discussion *supra* section II.

can occur quietly and invisibly, yet its impact on victims and the school environment can be profound.⁸¹ Schools may inadvertently allow harmful behaviors to persist unchecked without a ban.

Ultimately, for a cell phone ban to withstand scrutiny under the *Tinker* test, a school must show that cell phone use has caused, or is reasonably expected to cause, substantial disruption within the school environment.⁸² Given the widespread issues associated with cell phone use, such as distractions,⁸³ cyberbullying,⁸⁴ and decreased academic performance,⁸⁵ it should be easy for a school district to provide sufficient evidence of disruption. Therefore, if a court were to analyze a cell phone ban under the *Tinker* framework, a ban on cell phones in school would likely be upheld.

C. The Substantive Due Process Clause of the Fourteenth Amendment

Banning cell phones in schools raises potential constitutional concerns that implicate the Fourteenth Amendment's Due Process Clause.⁸⁶ The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law"⁸⁷

When evaluating whether such a ban infringes on constitutional rights, it is essential to determine whether any fundamental rights are implicated. Fundamental rights are typically explicit or implicit in the Constitution.⁸⁸ If a fundamental right is found, the act is reviewed under the strict scrutiny standard.⁸⁹ Strict scrutiny is the highest standard of judicial review used by courts to evaluate the constitutionality of a legislative act, requiring the government to prove that the act is narrowly tailored to serve a compelling state interest.⁹⁰ If the right in question is not considered fundamental, courts only need to evaluate the legislative act using the rational basis scrutiny standard of review.⁹¹ It has previously been held that while students have some substantive due process rights in school,⁹² education is not a fundamental right.⁹³

⁸¹ See Rebecca Foss, *Cyberbullying: Five Common Misconceptions*, UNIVERSITY OF MARYLAND GLOBAL CAMPUS (Oct. 4, 2021), <https://www.umgc.edu/news/archives/2021/10/cyberbullying-five-common-misconceptions> ("Cyberbullying occurs out of public view and away from the sightline of mindful parents, teachers, friends and bystanders. Victims of cyberbullying have nowhere to hide.")

⁸² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁸³ See Harrison & Wojnar, *supra* note 43.

⁸⁴ See Manza, *supra* note 5; Dang, *supra* note 6.

⁸⁵ See discussion *supra* section II.C.

⁸⁶ U.S. CONST. amend. XIV, § 1.

⁸⁷ *Id.*

⁸⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

⁸⁹ See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

⁹⁰ See *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.")

⁹¹ *Fed. Comm'n Comm'n v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993).

⁹² See *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

⁹³ See *San Antonio Indep. Schl. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973).

Building on these precedents, schools have argued that banning cell phones is necessary to maintain order and protect students, as in the case of *Price v. New York City Board of Education*.⁹⁴ This legal dispute emerged from the 2006 implementation of a policy prohibiting students from bringing cell phones to New York City's public schools, leading to schools confiscating thousands of devices from students through portable metal detectors.⁹⁵ Parents protested, arguing that cell phones were essential for communicating with their children and ensuring their safety outside of school hours, asserting a violation of their constitutionally protected right to direct their children's care, custody, and control.⁹⁶ Despite the parents' claims, the court ruled in favor of the school's ban, reasoning that it was rationally connected to the legitimate government objective of maintaining order and discipline in schools.⁹⁷ The court dismissed the notion of a fundamental right being violated, asserting that the ban did not significantly impact the children's upbringing.⁹⁸ Even if it were deemed to implicate a fundamental liberty interest, the court reasoned that the ban did not directly hinder parental communication with their children outside of school hours and was therefore constitutional.⁹⁹

D. The Fourth Amendment's Search and Seizure Clause

School officials must be able to confiscate student cell phones to enforce phone ban policies. Without this ability, even the best policies in the world would be considered all bark and no bite. However, the Fourth Amendment provides:

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 Warrants shall not be issued, 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.¹⁰⁰

In *New Jersey v. T.L.O.*, the Supreme Court established that while students have Fourth Amendment rights, these rights are somewhat diminished in the school context.¹⁰¹ The case involved a high school student caught smoking in the bathroom, leading to a search of her purse by the assistant principal, who found evidence of drug dealing.¹⁰² The Court ruled that school officials do not need a warrant or probable cause to search students; instead, they need only reasonable suspicion.¹⁰³ Allowing for searches based on "reasonable suspicion" by school officials suggests a lower threshold for what constitutes a reasonable search and

⁹⁴ See *Price v. New York City Bd. of Educ.*, 51 A.D.3d 277, 279 (N.Y. App. Div. 1st Dept. 2008).

⁹⁵ *Id.* at 280.

⁹⁶ *Id.* at 284.

⁹⁷ *Id.* at 293.

⁹⁸ *Id.* at 291.

⁹⁹ *Id.* at 292.

¹⁰⁰ U.S. CONST. amend. IV.

¹⁰¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

¹⁰² *Id.* at 328.

¹⁰³ See *id.* at 346.

seizure of students in schools. Under *New Jersey v. T.L.O.*, the Court articulated a two-pronged analysis:

The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider “whether the . . . action was justified at its inception”; second, one must determine whether the search as actually conducted “was reasonably related in scope to the circumstances which justified the interference in the first place.”¹⁰⁴

Schools implementing cell phone bans should establish clear, reasonable guidelines for confiscation to ensure that their policies are effective and fair. Limiting the duration of confiscation to the remainder of the school day is advisable, with the phone only being returned to a guardian who must come to the school to retrieve it. This approach reinforces the seriousness of the policy by involving parents or guardians in the enforcement process. Additionally, school officials must avoid searching through the contents of a confiscated phone without first consulting with legal counsel or law enforcement, as such actions could lead to significant legal challenges under the Fourth Amendment. Schools can balance upholding their policies and respecting student rights by establishing transparent and fair procedures and clearly communicating them in student handbooks or other relevant materials.

IV. THE SUCCESS SCHOOLS ACROSS THE NATION ARE HAVING FROM IMPLEMENTING CELL PHONE BANS

Comfortable that cell phone bans do not infringe on any constitutionally protected rights of students, school boards and legislators nationwide are beginning to step up to the plate.¹⁰⁵ They recognize the pressing issues caused by cell phone use in schools and have implemented bans that have driven significant positive changes.¹⁰⁶ By taking decisive action to address the pervasive distractions posed by cell phones, these policymakers are paving the way for a renewed focus on academic excellence.¹⁰⁷ The growing trend of cell phone bans in schools reflects a commitment to creating environments where students can thrive both academically and socially.

A. Orange County Public Schools¹⁰⁸

A new Florida law mandated districts to ban phones during instructional time, but Orange County’s policy went further, requiring phones to be stored away

¹⁰⁴ *Id.* at 328 (internal citations omitted).

¹⁰⁵ *See, e.g.*, Postal, *infra* note 109; Sheppard, *infra* note 127; KCCI Des Moines, *infra* note 143.

¹⁰⁶ *See, e.g.*, Postal, *infra* note 109; Sheppard, *infra* note 127; KCCI Des Moines, *infra* note 143.

¹⁰⁷ *See, e.g.*, Postal, *infra* note 109; Sheppard, *infra* note 127; KCCI Des Moines, *infra* note 143.

¹⁰⁸ *Orange County Public Schools*, US NEWS (last visited Sept. 7, 2024),

even during class breaks and lunch.¹⁰⁹ In response, students have become more focused on lessons and more engaged in discussions.¹¹⁰ One teacher even found it amusing when she caught a student passing a handwritten note, a rare sight in today's digital age.¹¹¹ The phone ban in Orange County Public Schools during the school day, including lunch periods, has been a resounding success over the past four months.¹¹² Teachers have noted a remarkable change in classroom learning, with students more engaged because they are not distracted by notifications.¹¹³ These results have led officials to be optimistic that the bans will have a positive impact on test scores in schools that consistently enforce them.¹¹⁴

Despite initial resistance and non-compliance from students, which at first led to numerous confiscations and long lines for phone retrieval after school, students have adapted over time.¹¹⁵ However, some still find the lunch ban excessive.¹¹⁶ Despite some parents' safety concerns, officials assured that students could use phones in emergencies, and exceptions were made for medical needs.¹¹⁷ Educators and school leaders across Central Florida's largest school district report similar benefits, although they have yet to gather concrete data to confirm these observations.¹¹⁸ The Orange County School Board adopted the rule in August 2023, aligning with a growing national trend.¹¹⁹ The Board's objectives were to curb discipline issues exacerbated by social media and cell phones post-pandemic, reduce classroom distractions, promote face-to-face student interactions, and mitigate the adverse effects of excessive screen time on mental health.¹²⁰

While the policy had a rocky start, compliance improved because students grew accustomed to the rules.¹²¹ Although some students have become sneakier with their phone use, the rules have made others more focused and present.¹²² School board members and administrators have reported positive changes, including a decrease in fights and an increase in classroom focus.¹²³ They believe the phone ban benefits students, reflecting an overall sentiment that it has had a

<https://www.usnews.com/education/k12/florida/districts/orange-105568> (for reference, Orange County Public Schools has over 270 schools and over 200,000 students in Florida).

¹⁰⁹ Leslie Postal, *School Cellphone Ban in Orange Brings 'Remarkable Change,' Educators Say. Students Miss Them at Lunch.*, ORLANDO SENTINEL (Dec. 8, 2023), <https://www.orlandosentinel.com/2023/12/08/school-cellphone-ban-in-orange-brings-remarkable-change-educators-say-students-miss-them-at-lunch/>.

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *See id.* See also Peter Busch, *Some Say Cellphone Bans in Florida Classrooms a Success, Call for Expansion*, NBC-2 (May 22, 2024), <https://www.nbc-2.com/article/cellphone-bans-florida-classrooms-expansion/60873660>.

¹¹⁵ *See* Postal, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Postal, *supra* note 109.

¹²² *Id.*

¹²³ *Id.*

positive impact on student behavior and academic engagement.¹²⁴ The principal at East River High School in the Orange County Public School district had this to say when asked what they would tell other schools that are thinking about making their cell phone policies stricter:

I would say, do it. It has been so important, especially for our high schoolers, to just be kids again and to focus on being here, enjoying the school day, having friends, and not being distracted by those outside factors. But be consistent, because if you start off strong and then ease up, it's going to be hard. As I told my students the other day, until the last day of school, we are not using phones here at East River High School.¹²⁵

B. San Mateo High School

In 2019, California's San Mateo High School ("San Mateo"), with approximately 1,600 students,¹²⁶ made a significant change when it became the largest school in the United States to become cell phone-free.¹²⁷ What began as an experiment has evolved into a five-year ongoing success story for San Mateo.¹²⁸ San Mateo implemented a policy against phone use during the school day, enforced with "Yondr" pouches.¹²⁹ Students place their phones in these special locking pouches upon arrival, which can only be reopened at the end of the day.¹³⁰

Since implementing these policies, the results have been astonishing. "Students are actually talking to one another," shares the San Mateo High School principal.¹³¹ "People on our campus have noticed, saying, 'Oh my gosh, you can actually see students' faces and eyes as they walk in the hallways, not looking down at their phones.'"¹³² Before the phone ban, students often sat in circles with friends, texting one another.¹³³ The principal has also noticed that banning phones has helped combat online bullying.¹³⁴ However, there was initial resistance from parents who were worried about school shootings.¹³⁵ The school argued successfully in response that phones could actually be more distracting during

¹²⁴ *Id.*

¹²⁵ Busch, *supra* note 114.

¹²⁶ *San Mateo High School*, US NEWS (last visited Sept. 7, 2024), <https://www.usnews.com/education/best-high-schools/california/districts/san-mateo-union-high/san-mateo-high-school-3346>.

¹²⁷ Elena Sheppard, *This School Banned Cellphones 4 Years Ago. Here's How It's Going—and Why Others Are Now Following Suit.*, YAHOO! LIFE (Dec. 14, 2023), <https://www.yahoo.com/lifestyle/this-school-banned-cellphones-4-years-ago-heres-how-its-going--and-why-others-are-now-following-suit-160052715.html>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Sheppard, *supra* note 127.

¹³⁴ *Id.*

¹³⁵ *Id.*

emergencies because they hinder students from properly following safety procedures.¹³⁶

San Mateo students are accustomed to their phone-free environment and daily Yondr pouch checks, although some have attempted to circumvent the system.¹³⁷ Despite initial pushback, the policy has been widely embraced.¹³⁸ Nearby schools and districts have begun implementing similar cell phone bans, making the transition easier for students.¹³⁹ “I know it can be daunting to take that leap,” says the principal of San Mateo.¹⁴⁰ “I just wish other schools would consider it because the pros definitely outweigh the cons.”¹⁴¹

C. Ottumwa Community School District¹⁴²

Iowa’s Ottumwa Community School District started a new cell phone policy this past August, and the reported results have been tremendous.¹⁴³ One superintendent stated, “What we found is kids could be sitting at a table around their friends, but then they would be texting other people, and you aren’t really, truly there. And then you worry about if you don’t get a text back right away from your other friends.”¹⁴⁴ Not only are students complying with and liking the new cell phone ban, but teachers must also comply.¹⁴⁵ On top of having a profound impact inside the school walls, one student reported finishing their work faster and being able to focus better, and another student reported the ban has changed how they interact with their families at home: “I’ve been hanging out with my family, actually. I’m usually just locked up in my room.”¹⁴⁶ Ottumwa School District has advice for other school districts: “Do it. Do it. It’s not as bad as you think, I think parents are well aware of what cell phones are doing to their kids. They’re seeing it at home. I think parents are behind this.”¹⁴⁷

The success stories from schools nationwide that have implemented cell phone bans demonstrate the widespread benefits of these policies, including increased student focus and more meaningful social interactions. Whether it is Orange County Public Schools in Florida, where a more stringent ban has led to noticeable improvements in classroom engagement,¹⁴⁸ or San Mateo High School

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Sheppard, *supra* note 127.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Ottumwa School District in central Iowa has over 5,000 students. Michael McGrory, *Superintendent’s Welcome*, OTTUMWA CMTY. SCH. DIST., https://www.ottumwaschools.com/19318_2 (last visited Sept. 7, 2025).

¹⁴³ See *Lunchtime Gets Noisy Again in Ottumwa as School District Bans Cellphones*, KCCI DES MOINES (Aug. 31, 2024), <https://www.kcci.com/article/ottumwa-school-district-iowa-bans-cellphones-in-classrooms-lockers/62021960>.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Postal, *supra* note 109.

in California, which has seen a transformation in student behavior and communication since going phone-free,¹⁴⁹ the message is clear: banning cell phones during school hours is yielding positive outcomes. In the Ottumwa Community School District in Iowa, students have embraced the new policy, and the results speak for themselves—greater academic focus, reduced distractions, and improved relationships both at school and at home.¹⁵⁰ The common message from these school districts is a call to action: they encourage other districts to follow their lead, proving that the benefits of a cell phone-free environment far outweigh any initial challenges.

V. HOW TO IMPLEMENT A COMPLETE BAN

The question of whether to implement a statewide ban on cell phones in schools, rather than leaving such a decision to individual districts, is gaining traction.¹⁵¹ A statewide mandate from the legislators offers several compelling advantages, particularly consistency, equality, and administrative efficiency. Local control allows school districts to tailor policies that meet the unique needs of their student populations and local communities. Different schools face different challenges and have varying resources; what works for an urban high school with high student enrollment might not be suitable for a smaller rural district.

A. Framework for a Statewide Ban for State Legislators

To foster a consistent and distraction-free learning environment, state legislators should enact a uniform policy banning cell phone use during school hours across all public schools. This statewide mandate addresses the disruptive nature of cell phones, prioritizing student focus and engagement by eliminating interruptions from digital communication and entertainment. While establishing an explicit prohibition, the policy should allow schools and districts the flexibility to choose the most effective enforcement methods, recognizing the diversity in school resources, size, and administrative capacity. For instance, smaller schools might utilize a check-in system for secure phone storage, while larger institutions could implement innovative solutions like Yondr pouches, which keep phones accessible yet locked. This balanced approach ensures that the policy is practical and adaptable, meeting the unique needs of various educational settings while maintaining a unified and effective standard.

Recent examples of state legislation illustrate how this framework can be effectively applied.¹⁵² In May 2023, Florida's Governor Ron DeSantis signed a bill

¹⁴⁹ See Sheppard, *supra* note 127.

¹⁵⁰ See KCCI Des Moines, *supra* note 143.

¹⁵¹ As of October 2nd, 2025, Alabama, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia have enacted legislation regarding cell phones. Amy Rock, *Which States Have Banned Cell Phones in Schools*, CAMPUS SAFETY MAG. (Oct. 2, 2025), <https://www.campusafetymagazine.com/insights/which-states-have-banned-cell-phones-in-schools/161286/>.

¹⁵² *Id.*

prohibiting cell phone use during class, with exceptions only for educational purposes.¹⁵³ The bill requires schools to designate phone storage areas and allows some flexibility in enforcement.¹⁵⁴ Indiana passed a bill in March 2024 that bans cell phone use during instructional time, with provisions for educational purposes and emergencies, allowing schools discretion in its implementation.¹⁵⁵ Additionally, Louisiana passed a bill effective May 2024, which enforces a comprehensive ban on cell phones throughout the instructional day.¹⁵⁶ Most notably, South Carolina's 2024-2025 state budget included a provision requiring schools to adopt a cell phone ban to receive state funding.¹⁵⁷ This funding tie-in, which mandates policy compliance as a condition for financial support,¹⁵⁸ is a particularly innovative and effective strategy. It ensures broad policy implementation and incentivizes schools to properly adhere to the new standard.

States that have not yet adopted legislation should follow the South Carolina approach of linking policy adoption to funding.¹⁵⁹ This strategy effectively ensures widespread adherence to the cell phone ban while motivating schools to implement and enforce it. By combining a uniform statewide standard with flexibility in enforcement methods and incentivizing compliance through funding, states can enhance educational outcomes and create focused learning environments across diverse school settings.

1. Another Option for a Statewide Ban

When state legislators are slow to act on critical education policies, leadership can emerge from the governor's office. Governor Glenn Youngkin of Virginia issued Executive Order 33 to promote cell phone-free education in schools across the state.¹⁶⁰ Recognizing the urgency of addressing the distractions

¹⁵³ See FLA. STAT. § 1006.07 (2024). See also Ryan Dailey, *Florida Gov. Desantis Signs Bill to Ban Students from Using Phones and TikTok in Schools*, ORLANDO WEEKLY (May 10, 2023), <https://www.orlandoweekly.com/news/florida-gov-desantis-signs-bill-to-ban-students-from-using-phones-and-tiktok-in-schools-34164256>.

¹⁵⁴ See § 1006.07.

¹⁵⁵ Kirsten Adair, *Indiana Lawmakers Ban Cellphones in Class. Now It's Up to Schools to Figure Out How*, NPR (Apr. 3, 2024), <https://www.npr.org/2024/04/03/1240667966/indiana-bans-cell-phones-schools-social-media-distraction>.

¹⁵⁶ Penelope Lopez, *Louisiana Bans Cell Phones in Schools. Parents and School Official Weigh In*, KATC ACADIANA'S NEWSCHANNEL (July 18, 2024) <https://www.katc.com/vermilion-parish/louisiana-bans-cell-phones-in-schools-parents-and-school-official-weigh-in>; Chris Reed, *State Law Impacts Cell Phone Use on Louisiana Public School Campuses*, 99.9 KTDY (July 30, 2024), <https://999ktdy.com/cell-phone-ban-in-louisiana-schools/>.

¹⁵⁷ See Amy Rock, *Which States Have Banned Cell Phones in Schools?*, CAMPUS SAFETY MAG. (Aug. 29, 2024), <https://www.campussafetymagazine.com/insights/which-states-have-banned-cell-phones-in-schools/161286/>; Josie Frost, *State Board of Education Nears Final Approval on Complete Cell Phone Ban in All Public Schools. Here's What You Need to Know*, NEWS19 (Aug. 13, 2024), <https://www.wltx.com/article/news/education/sc-nears-final-approval-of-cell-phone-ban-in-all-public-schools/101-bba92cfb-3835-4cac-a44a-21d856795929>.

¹⁵⁸ See Frost, *supra* note 157.

¹⁵⁹ See *id.*

¹⁶⁰ Nathaniel Cline, *Youngkin Signs Executive Order to Establish 'Cell Phone-free Education' in Va.*

and challenges posed by unrestricted cell phone use in the classroom, Governor Youngkin took decisive action to prioritize student focus and learning.¹⁶¹ Governor Youngkin's executive order is a compelling example of how governors can drive meaningful educational change when legislative bodies fail to take timely steps to address pressing issues.¹⁶²

B. Framework for a Ban for a School District

For a school district, two pivotal questions demand consideration and resolution when contemplating the implementation of cell phone bans: first, the decision to institute a ban on cell phones, which is relatively straightforward to address, and second, the challenging inquiry into the most effective means of enforcing such a ban. Enforcing a school-wide policy on cell phone usage requires two crucial steps. First, consistency is paramount across the school, ensuring all teachers adhere to the same guidelines.¹⁶³ Second, enforcement must be rigorous and consistent, with clear consequences for violating the policy.¹⁶⁴ Behavioral permissiveness undermines the effectiveness of a cell phone ban, necessitating a uniform approach to consequences for offenders.¹⁶⁵ A straightforward result, such as confiscation, lunch detention, and parental phone retrieval, ensures clarity and consistency.¹⁶⁶

1. Containment via Yondr Pouches

A modern approach to managing school cell phone use involves using Yondr pouches, hailed as “an unquestioned success” in various implementations.¹⁶⁷ The Yondr pouch system requires all students to place their phones in a secure pouch upon arriving at school.¹⁶⁸ Students carry their pouches throughout the day but can only access their phones when a teacher unlocks the pouch using a device typically kept with the teacher or placed near school exits.¹⁶⁹ This method minimizes distractions by preventing students from having the ability to access their cell phones during instructional time.¹⁷⁰ However, the cost of Yondr

Public Schools, VA. MERCURY (July 9, 2024), <https://viriniamercury.com/2024/07/09/youngkin-signs-executive-order-to-establish-cell-phone-free-education-in-va-public-schools/>.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See* Daniel Buck, *How to Ban Phones Effectively*, FORDHAM INST. (Jan. 1, 2024), <https://fordhaminstitute.org/national/commentary/how-ban-phones-effectively>.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ Anna North, *Should Schools Lock up Kids' Phones?*, VOX (Mar. 29, 2024, 11:29 AM CT), <https://www.vox.com/24105235/phones-kids-schools-ban-yondr-pouch-smartphones>.

¹⁶⁸ Jennifer Kingon, *The New School Essential: A Yondr Cellphone Pouch*, AXIOS (Mar. 22, 2024), <https://www.axios.com/2024/03/22/yondr-phone-pouch-schools-students>.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

pouches, typically ranging from \$25 to \$30 each, must also be considered when evaluating their suitability for different school districts.¹⁷¹

Despite the innovative nature of Yondr pouches, several challenges are associated with their implementation. One significant concern is that the pouches do not fully address the underlying issues of school cell phone usage. Teachers are still required to manage and enforce the use of these pouches, which can detract from valuable instructional time. Additionally, students may be tempted to keep their phones out of the pouches until they are caught, creating a cycle of non-compliance and undermining the policy's effectiveness. This behavior could lead to repeated attempts to circumvent the system, reducing the overall impact of the ban.

For the Yondr pouch system to be effective, it must be consistently enforced across all classrooms. If enforcement varies between teachers, it can lead to frustration and a lack of uniformity in the policy application. Clear and meaningful consequences for damaging the pouches or failing to place phones inside them must be established. If the only penalty for non-compliance is the requirement to store the phone in the pouch after being caught, students may continue to test the boundaries of the policy. Furthermore, there is a risk of intentional damage to the pouch.¹⁷² To mitigate this, schools may need to implement a system where the cost of any damaged pouches is passed on to parents, reinforcing the policy's seriousness and ensuring better adherence to it.

2. Alternative Approaches

Schools have various options for enforcing a cell phone ban, each with its advantages and challenges. One approach is to implement a complete ban on cell phones by requiring students to either check their phones at the office or have a container system set up to store phones upon arrival. The deterrent is that students caught with their phones face significant consequences, reinforcing compliance. Without fear of consequences, most students will “roll the dice” and simply not turn in their phones. However, this approach can be logistically challenging for larger schools, which must manage and securely store thousands of phones daily. The administrative burden of tracking many devices and the potential for lost or stolen phones may render this solution impractical for schools with larger student populations. Additionally, the system relies heavily on consistent enforcement and administrative capacity, which could vary widely between schools.

Another option is to require students to keep their phones in their backpacks and refrain from using them during school hours.¹⁷³ This approach

¹⁷¹ See Katie Mather, *Schools Have Spent Millions on Yondr Phone Pouches, Designed to Keep Students off Their Devices. Are They Worth It?*, YAHOO! NEWS (Mar. 14, 2024, 7:04 PM CT), <https://www.yahoo.com/news/schools-have-spent-millions-on-yondr-phone-pouches-designed-to-keep-students-off-their-devices-are-they-worth-it-000540657.html>.

¹⁷² See Tyler Stray, *Yondr Pouches: Traversing the Sea of Arguments*, DESIGN TECH HIGH SCH. THE DRAGON (May 26, 2024), <https://www.dtechdragon.com/news/tylerstray-yondr>.

¹⁷³ Elaine S. Povich, *If Schools Won't Ban Kids' Cellphones, Some Lawmakers Say, They Will*, STATELINE (Mar. 13, 2024, 5:00 AM CT), <https://stateline.org/2024/03/13/if-schools-wont-ban-kids-cellphones-some-lawmakers-say-they-will/>.

avoids the logistical complications of collecting and storing phones but still poses significant enforcement challenges. Teachers already tasked with numerous responsibilities may become the “phone police,” spending large amounts of valuable instructional time monitoring students’ compliance with the policy.¹⁷⁴ Additionally, this method relies heavily on students’ honesty and self-discipline, which may be inconsistent. If a phone is visible or in use, the teacher must enforce the ban, which could be potentially disruptive to the class and detract from teaching time.¹⁷⁵ While this method may be less intrusive and easier to implement than other approaches, its effectiveness largely depends on the school culture and the willingness of students and staff to adhere to and enforce the rules consistently.

The primary issue with mandating that students keep their phones in backpacks is that it fails to remove the temptation from the students’ hands and still requires significant enforcement from teachers.¹⁷⁶ The constant availability of phones in backpacks means that students are much more tempted to use them, making it difficult for teachers to maintain a distraction-free environment.¹⁷⁷ This method does not adequately address the root issues of cell phone use in schools, and the burden it places on educators is substantial. A more effective approach would involve using Yondr pouches or implementing a bin system for students to check their phones. Ultimately, however, the success of any cell phone policy hinges on consistent enforcement by teachers and administrators. Even the best-designed policy will fail without the support and commitment of school staff to uphold it. A firm policy, backed by diligent enforcement, is crucial to creating a focused and productive learning environment.

C. Exceptions

When considering a ban on cell phones in public schools, it is essential to account for specific exceptions to ensure the policy is humane and practical. Medical emergencies are a primary concern because students with chronic illnesses or severe allergies may require immediate access to a phone to contact caregivers or manage their conditions through specialized applications.¹⁷⁸ This necessity for emergency contact underscores the importance of allowing exceptions for students with accommodations to ensure a blanket ban on cell phones does not compromise their health and safety. Moreover, non-English speaking students frequently rely on translation apps to aid their understanding of lessons and facilitate their ability to keep pace with the curriculum.¹⁷⁹ Allowing these students to use their phones for translation is also crucial for maintaining an

¹⁷⁴ See Hadom, *supra* note 21; Gecker, *supra* note 9.

¹⁷⁵ See Hadom, *supra* note 21.

¹⁷⁶ See Gecker, *supra* note 9.

¹⁷⁷ See Gecker, *supra* note 9.

¹⁷⁸ Nancy Guan, *A New Hillsborough Schools Policy Restricts Students’ Use of Cellphones*, WUSF (July 25, 2024, 5:00 AM ET), <https://www.wusf.org/education/2024-07-25/hillsborough-schools-new-cell-phone-policy-2024-25-restrict-student-use>.

¹⁷⁹ Monica Faram, *Translation Device Helps Texas School Welcome Cuban Student*, GOV’T TECH. (Mar. 6, 2024), <https://www.govtech.com/education/k-12/translation-device-helps-texas-school-welcome-cuban-student>.

equitable educational environment where all students can access and benefit from the instruction provided.¹⁸⁰

Furthermore, students involved in extracurricular activities, such as school clubs or sports teams, as well as those participating in field trips or school presentations, may require exceptions to the cell phone ban to ensure effective communication and organization. Allowing phone use in these contexts ensures that students can fully participate in and benefit from their extracurricular engagements and special events without major inconvenience. By accommodating these needs, schools can support both the successful execution of these programs and the overall participation of students.

Implementing a ban on cell phones in public schools can minimize distractions and enhance the learning environment,¹⁸¹ but it is crucial to incorporate specific exceptions to address the diverse needs of students. Schools can create a balanced policy that respects individual circumstances while maintaining effectiveness by recognizing and accommodating medical emergencies, language translation needs, and extracurricular and special event participation requirements. Such a nuanced approach ensures that the cell phone ban remains practical and humane, supporting the academic and personal development of all students. By thoughtfully integrating these exceptions, schools can uphold the integrity of their educational goals while fostering an inclusive and supportive environment for every student.

D. Example Cell Phone Policy Statement for Schools

To maintain a focused and productive learning environment, students are not permitted to have their cell phones, smartwatches, tablets, or personal laptops (excluding school-provided laptops) on their person during school hours. This means these devices should not be brought into the school building during school hours. If a student must bring a device to school, they may either leave it in their vehicle (for high school students) or check it in at the school office upon arrival. These measures are implemented due to the growing evidence that personal electronic devices, while valuable tools outside of school, pose significant challenges within the educational setting. These challenges include:

1. **Distractions:** Personal electronic devices are frequent sources of distraction, leading to decreased attention in class, which undermines both teaching and learning.¹⁸²

2. **Academic Integrity:** The potential for cheating through text messaging, internet access, and other applications seriously threatens the integrity of assessments and the overall educational process.¹⁸³

¹⁸⁰ See *id.*

¹⁸¹ Harrison & Wojnar, *supra* note 43.

¹⁸² See Postal, *supra* note 109.

¹⁸³ See Tim Walker, *Technology Makes it Easier, But What Do We Really Know About Why Students*

3. **Cyberbullying:** The use of these devices has been linked to incidents of cyberbullying, creating a hostile and unsafe environment for students.¹⁸⁴

4. **Disruption of School Activities:** Unmonitored use of devices can disrupt school events and activities, detracting from the educational experience of all students.

5. **Security Concerns:** The proliferation of unauthorized recordings and the sharing of inappropriate content can compromise the safety and privacy of students and staff.¹⁸⁵

Recognizing that there are circumstances where access to a device may be necessary, [School Name] allows for the following exceptions:

1. **Medical Exceptions:** Students with documented medical conditions requiring immediate device access will be granted permission. Parents or guardians must provide the school administration with appropriate documentation to secure this exception.

2. **Academic Exceptions:** Students may be allowed to use their devices for academic purposes, such as accessing a translator app or other educational tools.¹⁸⁶ This exception requires prior approval from the teacher and school administration, ensuring that the device's use is strictly limited to educational activities.

Students granted exceptions are expected to use their devices responsibly and only for the approved purposes. Any misuse of this privilege will result in the revocation of the exception and disciplinary action as per the school's code of conduct.

As always, the best way for parents to contact their children during the school day is to call the school office for any messages or changes to their regular bus/pickup routine.¹⁸⁷ We encourage parents to continue this practice and rely on alternative methods, such as messaging their child outside of school hours.¹⁸⁸

Cheat?, NEATODAY (Sept. 15, 2017), <https://www.nea.org/nea-today/all-news-articles/technology-makes-it-easier-what-do-we-really-know-about-why-students-cheat>.

¹⁸⁴ See Manza, *supra* note 5.

¹⁸⁵ See generally Matt Zalaznick, *How Schools Can Get a Handle on Sexting*, DIST. ADMIN. (Mar. 6, 2019), <https://districtadministration.com/how-schools-handle-sexting/>.

¹⁸⁶ Faram, *supra* note 179.

¹⁸⁷ See Stacie Strader, *Some Missouri Schools Start Banning Cell Phones, Smartwatches*, KOAM NEWS NOW.COM (Apr. 6, 2022), https://www.koamnewsnow.com/news/education/some-missouri-schools-start-banning-cell-phones-smartwatches/article_871dbc5e-08e1-5ca1-8261-9ec9057a91e9.html.

¹⁸⁸ *Id.*

Students' devices will be securely locked up and returned upon dismissal, or they may choose not to bring them.¹⁸⁹ Any student who violates this policy will have their device confiscated, and a parent or guardian will be required to pick it up.¹⁹⁰ A second offense will result in the same, with the addition of after-school detention.¹⁹¹

By enforcing this policy, [School Name] aims to foster a learning environment where students can focus on their education, free from the distractions and challenges posed by personal electronic devices.

VI. CONCLUSION

The necessity of implementing a comprehensive cell phone ban in public schools cannot be overstated as part of any effort to promote student welfare and academic success. The increasing prevalence of digital connectivity has given rise to widespread concerns about distractions, compromised academic performance, and students' overall well-being. Courts have upheld the constitutional validity of such bans, recognizing the significant public policy concerns surrounding the pervasive and detrimental effects of cell phone usage in schools.¹⁹² While a few schools have taken proactive steps by enacting comprehensive bans on cell phones, it is essential for all state legislators and school boards to critically evaluate their existing policies and prioritize the needs of both their students and teachers.¹⁹³ The current policies nationwide put an undue burden on teachers, diverting their attention from the primary task of educating students. Schools can effectively address distractions, improve academic performance, and prioritize student well-being by implementing comprehensive bans on cell phone usage. These measures will create conducive learning environments that empower educators to fulfill their fundamental mission, which is effectively educating students.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Price v. New York City Bd. of Educ., 51 A.D.3d 277 (N.Y. App. Div. 1st Dept. 2008).

¹⁹³ See Postal, *supra* note 109; Sheppard, *supra* note 127; KCCI Des Moines, *supra* note 143.

THE PEOPLE’S POWER UNDER SIEGE: MISSOURI’S DECEPTIVE GAMBIT TO DISMANTLE DIRECT DEMOCRACY AND REINSTATE AN ABORTION BAN

Lukas J. Hudson*

I. INTRODUCTION

Majority rule is the cornerstone of democracy.¹ It provides a clear and functional mechanism for collective decision-making, preventing entrenched minorities from leveraging economic, social, or political power to override the will of the majority of voters.² Without this principle, democracy risks devolving into minority rule—the very antithesis of popular sovereignty.³ Majority rule is especially vital in states like Missouri, where, for over a century, Missourians have held the authority to directly shape the laws governing their daily lives through the initiative petition process.⁴

When the United States Supreme Court released its opinion in *Dobbs v. Jackson Women’s Health Organization*,⁵ the Missouri government, in its eager anticipation of the fall of *Roe v. Wade*,⁶ instantly began enforcing its trigger ban on abortion.⁷ Missouri’s statutory ban on abortion is one of the strictest in the country as it prohibits abortion from the moment of conception and provides no exception for rape or incest.⁸ All attempts by Missouri Democratic legislators to add such exceptions have failed along party lines despite overwhelming public

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¹ Thum Ping Tjin, *Principles of Democracy: Majority Rule, Minority Rights*, NEW NARATIF (Sept. 12, 2023), <https://newnaratif.com/majority-rule-minority-rights/>.

² *Id.*

³ *Id.*

⁴ See *History of Initiative & Referendum in Missouri*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Missouri (last visited Oct. 19, 2025) [hereinafter *History of Initiative & Referendum in Missouri*].

⁵ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade* and holding that the United States Constitution does not confer a right to abortion).

⁶ *Roe v. Wade*, 410 U.S. 113 (1973) (holding the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a pregnant woman’s right to an abortion prior to the viability of the fetus).

⁷ See Geoff Mulvihill & Kimberlee Kruesi, *Which States Could Have Abortion on the Ballot in 2024?*, ASSOCIATED PRESS, <https://apnews.com/article/abortion-ballot-amendment-ban-protection-states-2024-052ff9846f8416efb725240af22b92ec> (last updated Apr. 10, 2024, 11:06 AM); Amanda Robert, *What Are Abortion Trigger Laws, and Where Do They Stand?*, ABA J. (June 30, 2022, 2:52 PM), <https://www.abajournal.com/web/article/what-are-abortion-trigger-laws-and-where-do-they-stand> (defining trigger laws as “laws that are enacted by certain circumstances”); MO. REV. STAT. § 188.017 (2022) (“Revisor’s Note: This section became effective upon notification . . . that the United States Supreme Court has overruled, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973).”).

⁸ See MO. REV. STAT. § 188.017.2 (“Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency.”).

opinion in support of the protections, testimony from health care professionals, and pleas from women across the state.⁹ The present Republican (the “GOP”) supermajority in Missouri’s state legislature—the Missouri General Assembly—effectively guarantees that any attempt to pass legislation deregulating abortion is dead-on-arrival.¹⁰ In an attempt to challenge the total abortion ban, a group of clergy members sued Missouri and several state officials, alleging the ban violated the separation of church and state.¹¹ Judge Jason Sengheiser of the 22nd Circuit Court dismissed the lawsuit, ruling the State’s determination that life begins at conception “is not itself necessarily a religious belief.”¹²

Consequently, there remained only one final hope for abortion rights advocates: the initiative petition process.¹³ However, ahead of the 2024 presidential election the Missouri government desperately tried to dash that hope when “Republican lawmakers [. . .] voted to make it harder to change the Missouri Constitution amid a campaign to restore abortion rights through a voter-backed constitutional amendment.”¹⁴ That effort suffered an unexpected defeat, but in truth, it was merely a deferral—one that paved the way for a calculated and cunning maneuver in the 2025 special legislative session, where Republican lawmakers broke with Missouri Senate norms to fast-track their ploy to override

⁹ See Summer Ballentine, *Missouri Senate Votes Against Allowing Abortion in Cases of Rape and Incest*, ASSOCIATED PRESS (Feb. 7, 2024, 8:56 PM), <https://www.pbs.org/newshour/politics/missouri-senate-votes-against-allowing-abortion-in-cases-of-rape-and-incest>.

¹⁰ See Jason Rosenbaum, *Missouri Advocates Gather Signatures for Abortion Legalization, but GOP Hurdle Looms*, NPR (Feb. 28, 2024, 11:55 AM), <https://www.npr.org/2024/02/28/1234278254/missouri-advocates-gather-signatures-for-abortion-legalization-but-gop-hurdle-lo>.

¹¹ Anna Sporre, *Missouri’s Abortion Ban Does Not Violate Separation of Church and State, Judge Rules*, MO. INDEP. (June 17, 2024, 1:11 PM), <https://missouriindependent.com/2024/06/17/missouris-abortion-ban-lawsuit-clergy/>.

¹² *Id.*

¹³ See Rosenbaum, *supra* note 10; see generally *Initiative & Referendum Overview & Resources*, NAT’L CONF. OF STATE LEGISLATORS, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-overview-and-resources> (last updated Jan. 4, 2022) (defining initiative petition process as “a process that enables citizens to bypass their state legislature by placing proposed statutes and, in some states, constitutional amendments on the ballot”).

¹⁴ See Summer Ballentine, *Republicans Vote to Make It Harder to Amend Missouri Constitution*, ASSOCIATED PRESS, https://apnews.com/article/missouri-constitution-amendment-ballot-democracy-3bbb0b585ebcb8a7fc5f8e0ae6d26752?utm_source=copy&utm_medium=share (last updated Feb. 22, 2024, 3:06 PM).

the will of Missouri voters.¹⁵ Thus, even though they failed in 2024, the Missouri GOP's war on direct democracy¹⁶ is far from over.¹⁷

The Missouri government's disapproval of the initiative petition process is readily apparent.¹⁸ Missourians have defied the General Assembly's wishes on medical marijuana,¹⁹ "right-to-work,"²⁰ minimum wage increases,²¹ Medicaid expansion,²² and recreational marijuana legalization.²³ Thus, when Missourians for Constitutional Freedom, a reproductive rights organization, sought to secure approximately 171,000 signatures to place a citizen-led constitutional amendment—titled the "Right to Reproductive Freedom Initiative" (the "RRFI")—on the November 2024 ballot,²⁴ the Missouri GOP's disdain for direct democracy reached its tipping point.

Through a delayed and long-fought campaign, Missourians for Constitutional Freedom collected and submitted more than 380,000 signatures across Missouri's 114 counties to put their amendment on the ballot.²⁵ However, the General Assembly was not going to take any chances on abortion legalization,

¹⁵ See Rudi Keller & Anna Sporre, *Missouri Initiative Petition Bill, a Top GOP Priority, Dies on Final Day of Session*, MO. INDEP. (May 17, 2024, 12:16 PM), <https://missouriindependent.com/2024/05/17/missouri-session-initiative-petition-senate>; Jason Rosenbaum, *Missouri Senate Passes Redistricting and Initiative Petition Plans – Voters May Get Final Say*, STLPR (Sept. 12, 2025, 2:03 PM), <https://www.stlpr.org/government-politics-issues/2025-09-12/missouri-senate-passes-redistricting-and-initiative-petition-plans-voters-may-get-final-say>; Annelise Hanshaw & Anna Sporre, *As Few as 5% of Voters Could Defeat Initiative Petitions Under Missouri GOP Legislation*, MO. INDEP. (Sept. 4, 2025, 8:07 PM), <https://missouriindependent.com/2025/09/04/as-few-as-5-of-voters-could-defeat-initiative-petitions-under-missouri-gop-legislation/>.

¹⁶ Theo Schiller, *Direct Democracy*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/direct-democracy> (last updated Aug. 15, 2025) (defining direct democracy as "direct participation of citizens in democratic decision making . . . by means of referenda and initiatives in which citizens vote on issues").

¹⁷ See Keller & Sporre, *supra* note 15; Rosenbaum, *supra* note 15; Hanshaw & Sporre, *supra* note 15.

¹⁸ Hanshaw & Sporre, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*; see *Right to Work Is ...*, NAT'L RIGHT TO WORK COMM., <https://nrtwc.org/facts/right-work-mean/> (last visited Aug. 25, 2024) ("A Right-to-Work law guarantees that no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to a labor union.").

²¹ Keller & Sporre, *supra* note 15; Mitch Smith, *Missouri Governor Signs Bill Rolling Back Voter-Approved Minimum Wage and Sick Leave*, N.Y. TIMES (July 10, 2025), <https://www.nytimes.com/2025/07/10/us/missouri-minimum-wage-leave.html>.

²² *Id.*; *Medicaid Expansion: Frequently Asked Questions*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/health/medicaid-expansion-frequently-asked-questions-0> (last visited Aug. 25, 2024) (defining Medicaid expansion: a provision in the "Affordable Care Act (ACA) [that] permits states to expand Medicaid coverage to adults with incomes up to 138 percent of the poverty level").

²³ Keller & Sporre, *supra* note 15; Hanshaw & Sporre, *supra* note 15.

²⁴ Rosenbaum, *supra* note 10; *Signature Requirements for Ballot Measures in Missouri*, BALLOTEDIA, https://ballotpedia.org/Signature_requirements_for_ballot_measures_in_Missouri (last visited Nov. 11, 2025) (the required number of valid signatures to place a citizen-led constitutional amendment on the ballot in 2024 was 171,592) [hereinafter *Ballot Signature Requirements*].

²⁵ Anna Sporre, *More than 380,000 Missourians Sign Initiative Petition to Put Abortion on the Ballot*, MO. INDEP. (May 3, 2024, 10:18 AM), <https://missouriindependent.com/2024/05/03/missouri-ans-signatures-abortion-amendment-viability>.

so when signature gathering for the RRFI commenced, the biggest priority of the 2024 legislative session was to significantly raise the threshold to pass a citizen-led constitutional amendment.²⁶

For over a century, Missouri initiative petitions have only required a simple statewide majority (50% + 1) to pass.²⁷ Senate Joint Resolution 74 (SJR 74) attempted to end this century-old precedent ahead of the 2024 election.²⁸ If the General Assembly had passed SJR 74, it would have placed a question on the August 2024 primary ballot.²⁹ That question would have asked voters if they wanted to amend the Missouri Constitution—ironically by a simple majority—to require all future citizen-led constitutional amendments to pass *only if* they secure a simple statewide majority vote *in addition to* securing a majority in five of the eight U.S. congressional districts in Missouri.³⁰ That change would have made it nearly impossible for any amendment to pass because it would have given 23% of Missouri voters the ability to defeat any citizen-led amendment that appears on the ballot.³¹ The intent behind this attack on voter power, or as the General Assembly calls it, “initiative petition reform,” was clear: to ensure that, even if a majority of Missourians support a citizen-led constitutional amendment that the General Assembly opposes, Missouri’s rural voters—who are far more politically aligned with the conservative General Assembly—can defeat the amendment nonetheless.³²

While SJR 74 initially failed to come to fruition and Missourians have since approved the RRFI,³³ the General Assembly has not abandoned its campaign to weaken the initiative petition process and roll back voter-approved ballot measures.³⁴ In the 2025 legislative session, lawmakers advanced a ballot measure

²⁶ Ballentine, *supra* note 9.

²⁷ Rudi Keller, *As Few as 1 in 5 voters Could Defeat Initiative Petitions Under Missouri Senate Proposal*, MO. INDEP. (Feb. 5, 2024), <https://missouriindependent.com/2024/02/05/as-few-as-1-in-5-voters-could-defeat-initiative-petitions-under-missouri-senate-proposal>; MO. CONST. art. III, § 51 (establishing “any measure proposed shall take effect when approved by a majority of the votes cast thereon”).

²⁸ S.J. Res. 74, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024) (proposing any amendment shall take effect if “a majority of votes cast thereon statewide and also a majority of votes cast thereon in each of more than half of the congressional districts in the state is in favor of any amendment”) [hereinafter S.J. Res. 74].

²⁹ *Id.*; see Mo. CONST. art. XII, § 2(b) (“All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments.”).

³⁰ S.J. Res. 74, *supra* note 28.

³¹ Anna Sporre, *GOP Senator Urges Missouri House to Reinstate ‘Ballot Candy’ into Initiative Petition Bill*, MO. INDEP. (Mar. 13, 2024, 6:45 AM), <https://missouriindependent.com/2024/03/13/missouri-initiative-petition-reform-elections/>.

³² Keller & Sporre, *supra* note 15.

³³ *Missouri Amendment 3, Right to Reproductive Freedom Initiative (2024)*, BALLOTEDIA, [https://ballotpedia.org/Missouri_Amendment_3_Right_to_Reproductive_Freedom_Initiative_\(2024\)](https://ballotpedia.org/Missouri_Amendment_3_Right_to_Reproductive_Freedom_Initiative_(2024)) (last visited Oct. 19, 2025) [hereinafter Missouri Amendment 3].

³⁴ Hanshaw & Sporre, *supra* note 15; Anna Sporre, *Judge Approves Ballot Language for*

to restore the ban on elective abortion, and in a highly controversial special session, GOP lawmakers successfully advanced a resolution for the 2026 ballot that seeks to raise the threshold for future citizen-led constitutional amendments to pass.³⁵ If approved by voters in 2026, it would take just 5% of voters to reject any citizen-led constitutional amendment—a threshold significantly more stringent than that proposed in 2024 and one that applies only to citizen-led amendments, not those proposed by the GOP-controlled General Assembly.³⁶ Simply put, if approved by voters in 2026, Missouri's century-old initiative petition process will be reduced to a mere symbolic exercise, appearing to preserve a direct role for voters in policymaking while, in practice, rendering future initiatives nonviable from the outset.

Furthermore, it is vital to recognize that abortion legalization is not the only citizen-led constitutional amendment the General Assembly currently wants to quash. With Justice Thomas's concurrence in *Dobbs* calling for a reexamination of the *Griswold*,³⁷ *Lawrence*,³⁸ and *Obergefell*³⁹ precedents,⁴⁰ civil rights organizations around Missouri will be eager to codify these substantive due process rights into the Missouri Constitution, given the likelihood these issues are left to the mercy of state legislatures.⁴¹ If the General Assembly's plan succeeds, the ability of Missourians to rely on the initiative petition process to protect their fundamental liberties will be stymied. However, at the time of writing, judicial review provides some hope.⁴² And, if the General Assembly's efforts fail in 2026, the initiative petition process has the potential be the very tool that protects its own survival.

This Comment argues that the Missouri General Assembly's attempts to curtail the direct democracy rights of its constituents can—and must—be stopped.

Amendment Reinstating Missouri Abortion Ban, MO. INDEP. (Oct. 7, 2025, 4:10 PM), <https://missouriindependent.com/2025/10/07/missouri-abortion-ban-amendment-ballot-language-2026/>.

³⁵ Rosenbaum, *supra* note 15; Hanshaw & Sporre, *supra* note 15.

³⁶ Hanshaw & Sporre, *supra* note 15.

³⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding the United States Constitution protects the right of marital privacy against state restrictions on contraception).

³⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding criminalization of consensual sexual conduct between individuals of the same sex violates the Due Process Clause of the Fourteenth Amendment).

³⁹ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding the Due Process Clause of the Fourteenth Amendment guarantees the right of marriage to same-sex couples).

⁴⁰ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (“[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous’ . . .”).

⁴¹ See Tessa Weinberg, ‘*Anything's on the Table*’: Missouri Legislature May Revisit Contraceptive Limits Post-Roe, MO. INDEP. (May 20, 2022, 9:00 AM), <https://missouriindependent.com/2022/05/20/anythings-on-the-table-missouri-legislature-may-revisit-contraceptive-limits-post-roe> (Louisiana, Oklahoma, Texas); see also MO. CONST. art. I, § 33 (“a marriage shall exist only between a man and a woman”).

⁴² See, e.g., Jason Hancock, *Lawsuit Challenges ‘Ballot Candy’ in Proposal to Make It Harder to Amend Missouri Constitution*, MO. INDEP. (Oct. 23, 2025, 2:02 PM), <https://missouriindependent.com/briefs/lawsuit-challenges-ballot-candy-in-proposal-to-make-it-harder-to-amend-missouri-constitution/>.

The path forward will not be easy. If the courts fail to uphold these constitutional protections, the responsibility will fall to the people themselves. Through a robust, pro-democracy grassroots campaign to defeat the State's effort to raise the initiative petition threshold, voters can reclaim the process and protect the core principle that Missourians—not just their legislators—have the power to enact policy by a simple majority.⁴³

In Section II, this Comment reviews the history of Missouri's initiative petition process. Section III examines the Missouri government's efforts to undermine the initiative petition process, from earlier attempts to its most recent actions in response to the RRFI. Section IV then highlights legislative efforts in other states to curtail the initiative petition process, particularly in anticipation of abortion legalization. Section V analyzes the State's continued attempts to impede reproductive freedom both before and after the 2024 election. Finally, Section VI proposes ways in which Missouri voters can preserve their right to direct democracy and prevent the General Assembly from encroaching on the initiative petition process.

II. THE HISTORY OF MISSOURI'S INITIATIVE PETITION PROCESS

Until the early twentieth century, Missouri operated as a typical representative democracy in which voters exercised their will by electing state representatives to pass legislation.⁴⁴ In 1907, that model of governance changed after initiative petition proponents conducted a year-long voter education campaign and won approval to enshrine a right of direct democracy in the Missouri Constitution.⁴⁵ In establishing that right, Missouri joined the expanding group of states in the early 1900s that adopted a similar process, including Illinois, Montana, Nevada, Oklahoma, Oregon, South Dakota, and Utah.⁴⁶ The core argument behind the establishment of a citizen-led initiative petition process was to break up the grip that special interest groups had on the General Assembly by giving decision-making power back to the people.⁴⁷

In Missouri, the initiative petition process provides the citizenry the right to propose new statutes, repeal statutes, or adopt constitutional amendments

⁴³ See *Missouri*, UNIV. OF S. CAL., INITIATIVE & REFERENDUM INST., <https://www.initiativeandreferenduminstitute.org/missouri> (last visited Oct. 19, 2025) [hereinafter *Mo. Initiative & Referendum*]; see *Missouri 2026 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Missouri_2026_ballot_measures (last visited Oct. 19, 2025) (outlining the numerous proposed citizen-led amendments to limit the General Assembly's authority to change rules regarding the initiative petition process) [hereinafter *Missouri 2026 Ballot Measures*].

⁴⁴ Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CTR. FOR JUST. (Jan. 16, 2024), <https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives>; *History of Initiative & Referendum in U.S.*, BALLOTPEDIA, https://ballotpedia.org/History_of_initiative_and_referendum_in_the_U.S (last visited Aug. 27, 2024) [hereinafter *History of Initiative & Referendum in the U.S.*].

⁴⁵ *Mo. Initiative & Referendum*, *supra* note 43.

⁴⁶ *History of Initiative & Referendum in the U.S.*, *supra* note 44.

⁴⁷ See *id.*; see *Mo. Initiative & Referendum*, *supra* note 43; see *History of Initiative & Referendum in Missouri*, *supra* note 4.

independent of the General Assembly.⁴⁸ Because constitutional amendments prevent the General Assembly from overriding the will of the voters by subsequently passing a statute that modifies or repeals a citizen-approved statute, such amendments are preferable among petitioners.⁴⁹

Those petitioners, newly charged with democratic vim and zeal, exercised this right routinely in the petition process' early days. The first initiative that appeared on a Missouri ballot was in 1910.⁵⁰ Between 1910 and 2022, ninety-five initiatives have appeared on the ballot and forty-three have passed.⁵¹ In 1920, the first voter-approved initiative mandated that the State enact a new Missouri Constitution.⁵² The next voter-approved initiative came in 1924—a bond that would fund new state highway construction.⁵³ Rounding off nearly two decades of use, in 1928, voters approved a 75 million dollar bond for additional highway construction through this process.⁵⁴

The initiative petition process remained a consistent feature of Missouri governance throughout the twentieth century. During the New Deal era of the 1930s, Missouri voters approved the establishment of the Conservation Commission to manage fish, game, and forest resources.⁵⁵ Missouri's most notable voter-approved initiative petition of that era was the 1940 constitutional amendment establishing nonpartisan judicial selection, a process now famously copied by other states called the "Missouri Plan."⁵⁶ In the spirit of the Reagan Revolution⁵⁷ during the 1980s, Missouri saw the passage of a citizen-led initiative petition which limited state and local taxes,⁵⁸ and in the 1990s, Missouri voters enacted term limits on the General Assembly as well as campaign finance reforms.⁵⁹

While such an amendment would likely fail today,⁶⁰ the Missouri voters of 2004 were in-step with the General Assembly and much of the country at the

⁴⁸ MO. CONST. art. III, § 49 (defining initiative petition power as the "power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also . . . approve or reject by referendum any act of the general assembly").

⁴⁹ See Jason Hancock & Aaron Randle, *Missouri Voters Give Unions a Victory by Strongly Rejecting Right-to-Work Law*, KAN. CITY STAR (Aug. 15, 2018), <https://www.kansascity.com/news/politics-government/election/article215974460.html>.

⁵⁰ NCSL Ballot Measures Database, NAT'L CONF. OF STATE LEGIS., <https://www.ncsl.org/elections-and-campaigns/statewide-ballot-measures-database> (last visited Aug. 27, 2024) [hereinafter NCSL].

⁵¹ History of Initiative & Referendum in Missouri, *supra* note 4.

⁵² Mo. Initiative & Referendum, *supra* note 43.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ Benjamin Lawson, *Introduction to the Reagan Revolution*, LUMEN LEARNING, <https://courses.lumenlearning.com/wm-ushistory2/chapter/introduction-to-the-reagan-revolution/> (last visited Oct. 19, 2025) ("The Reagan Revolution marked the culmination of a long process of political mobilization on the American right.").

⁵⁸ Mo. Initiative & Referendum, *supra* note 43.

⁵⁹ *Id.*

⁶⁰ *Views on LGBTQ Rights in All 50 States: Findings from PRRI's 2023 American Values Atlas*, PRRI, <https://www.prii.org/research/views-on-lgbtq-rights-in-all-50-states/> (last visited Sept. 12, 2024).

time when they approved an amendment to define marriage strictly between a man and a woman.⁶¹ Shortly thereafter, that issue lock-step shared by Missouri's citizenry and the GOP-controlled General Assembly regarding ballot initiatives began to fall out of step.⁶² Incongruent with the views of the General Assembly, Missouri voters approved stem cell research legalization in 2006 and clean energy mandates for utility companies in 2008.⁶³

In 2017, the General Assembly passed legislation that made Missouri a right-to-work state.⁶⁴ Missouri worker unions quickly mobilized and collected more than 300,000 signatures to place a question on the ballot to repeal the right-to-work statute.⁶⁵ Collectively, unions raised 16 million dollars—vastly outspending right-to-work proponents like the Missouri Chamber of Commerce and Industry.⁶⁶ In the August 2018 primary election, 67% of Missourians voted in favor of repealing the General Assembly's right-to-work law—a larger defeat compared to 1978—the last time Missourians rejected the General Assembly's passage of a right-to-work statute.⁶⁷

In addition to passing the later citizen-repealed right-to-work law, the GOP-controlled General Assembly rejected attempts by Missouri Democratic legislators to legalize medical marijuana.⁶⁸ During a debate on a pharmaceutical bill, then-State Senator Bob Onder (R-Lake St. Louis) claimed that the Democrat-led attempts to legalize medical marijuana would lead to the hospitalization of children from marijuana poisoning.⁶⁹ With no help from the General Assembly, Missourians took it upon themselves to get it done when they organized and approved Amendment 2 to legalize medical marijuana with a resounding 65.59% “Yes” vote.⁷⁰

Despite polling that indicated public support, from 2014 to 2018 the General Assembly repeatedly rejected legislation to raise Missouri's minimum wage.⁷¹ In 2017, after some municipalities enacted their own minimum wage increases, the General Assembly banned cities, towns, and counties from setting

⁶¹ NCSL, *supra* note 50.

⁶² See Keller & Spoerre, *supra* note 15.

⁶³ *Id.*

⁶⁴ Hancock & Randle, *supra* note 49; *Right-to-Work Resources*, NAT'L CONF. OF STATE LEGIS., <https://www.ncsl.org/labor-and-employment/right-to-work-resources> (last visited Aug. 25, 2024) (defining Right-to-Work states: “States that . . . allow employees to work in a unionized workplace without financially supporting the union.”).

⁶⁵ Hancock & Randle, *supra* note 49.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ Will Schmitt, *The Missouri Senate (Briefly) Discussed Legalizing Medical Marijuana*, SPRINGFIELD NEWS-LEADER (Feb. 21, 2018), <https://www.news-leader.com/story/news/politics/2018/02/21/missouri-senate-discussed-medical-marijuana-legalization-briefly/360646002/>.

⁶⁹ *Id.* Note: According to the Drug Enforcement Administration, there has never been a fatal marijuana overdose. *Id.*

⁷⁰ NCSL, *supra* note 50.

⁷¹ Alexia Fernández Campbell, *Missouri Voters Just Hiked the Minimum Wage by 53 Percent*, VOX (Nov. 7, 2018), <https://www.vox.com/2018/11/6/18064506/missouri-proposition-b-minimum-wage-results>.

minimum wages higher than the state minimum.⁷² The only option for increasing the minimum wage was for Missourians to take action themselves.⁷³ They did so by gathering over 120,000 signatures across the state.⁷⁴ As a result, in the November 2018 midterm election, Missourians approved a gradual state minimum wage increase from \$7.85 an hour to \$12.00 an hour.⁷⁵

Similarly, the early 2020s saw a use of the citizen-led initiative petition process. In 2020, Missouri voters passed Amendment 2 to expand Medicaid, with 53% of Missourians voting in the affirmative, rebuking the General Assembly and then-Governor Mike Parson (R) (a strong opponent of Medicaid expansion) once again.⁷⁶ In 2022, Missouri saw another reaction by voters when the General Assembly once again disregarded public opinion when it shot down Democratic legislators' attempts to legalize recreational marijuana.⁷⁷ Missouri voters took matters into their own hands once more and sent a sharp rejection to the General Assembly's nonfeasance when they voted 53% to 46% in favor of Amendment 3 which not only legalized recreational marijuana but expunged the criminal records of misdemeanor marijuana offenders.⁷⁸

Between the release of the *Dobbs* decision in 2022 and the 2024 election, the General Assembly ignored public opinion yet again, this time regarding its total prohibition on abortion.⁷⁹ The 2024 election represented a slim window of opportunity for Missourians to directly decide whether they wanted to enshrine abortion rights in the Missouri Constitution.⁸⁰ Missourians for Constitutional Freedom's citizen-led constitutional amendment, the RRFI, asked voters:

Do you want to amend the Missouri Constitution to:

[E]stablish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;

[R]emove Missouri's ban on abortion;

[A]llow regulation of reproductive health care to improve or maintain the health of the patient;

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*; Ballot Signature Requirements, *supra* note 24 (the required number of valid signatures to place a citizen-led statute on the ballot in 2018 was 100,126).

⁷⁵ *See Campbell, supra* note 71.

⁷⁶ NCSL, *supra* note 50.

⁷⁷ Rebecca Rivas, *Missouri Voters Amend State Constitution to Legalize Recreational Marijuana*, MO. INDEP. (Nov. 9, 2022) <https://missouriindependent.com/2022/11/09/missouri-voters-amend-state-constitution-to-legalize-recreational-marijuana/>.

⁷⁸ *Id.*

⁷⁹ Ballentine, *supra* note 9.

⁸⁰ *See 2024 Ballot Measures*, MO. SEC'Y OF STATE, <https://www.sos.mo.gov/elections/petitions/2024-BallotMeasures> (last visited Aug. 27, 2024) [hereinafter 2024 Ballot Measures].

[R]equire the government to not discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and

[A]llow abortion to be restricted or banned after fetal viability except to protect the life or health of the woman?⁸¹

At its core, this amendment sought to codify the right to make decisions about reproductive healthcare, including prenatal care, childbirth, postpartum care, birth control, abortion, and miscarriage care.⁸² To the dismay of the General Assembly, the amendment was successful with 51.60% of Missourians voting in the affirmative.⁸³ The amendment promises that these rights may not be limited unless the government proves it is necessary for a compelling interest related to health, using the least restrictive means.⁸⁴ While the government is permitted to regulate abortion after fetal viability, it cannot impose restrictions if the procedure is deemed necessary by a healthcare professional to protect the health or life of the pregnant woman.⁸⁵ “Fetal viability” is defined in the amendment in accordance with the Supreme Court’s decision in *Roe v. Wade*, i.e., the point when a fetus can likely survive outside the uterus without extraordinary medical intervention, as determined by a healthcare professional.⁸⁶ “Government” is defined as the State of Missouri and its subdivisions.⁸⁷

The amendment also prohibits penalties or adverse actions against individuals based on pregnancy outcomes, or those assisting in reproductive health care, by overriding the State’s Class B felony penalty for individuals who perform or induce abortions.⁸⁸ After the voters approved the RRFI in 2024, it did something no other state had yet to do: That is, Missouri became the first state in the country to repeal a total abortion ban and reinstate the *Roe* standard.⁸⁹

⁸¹ *Id.* (italics added).

⁸² *Amendment*, MISSOURIANS FOR CONST. FREEDOM, <https://moconstitutionalfreedom.org/wp-content/uploads/2024/01/Missourians-for-Constitutional-Freedom-Amendment.pdf> (last visited Aug. 27, 2024) [hereinafter Const. Freedom Amendment].

⁸³ Missouri Amendment 3, *supra* note 33.

⁸⁴ Const. Freedom Amendment, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ Const. Freedom Amendment, *supra* note 82; *Roe v. Wade*, 410 U.S. 113, 160 (1973) (“Physicians and their scientific colleagues . . . have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes ‘viable,’ that is, potentially able to live outside the mother’s womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.”).

⁸⁷ Const. Freedom Amendment, *supra* note 82.

⁸⁸ *Id.*; see also MO. REV. STAT. § 188.017 (2022) (“Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board.”).

⁸⁹ See Daniel Desrochers, Jonathan Shorman & Kacen Bayless, *In Abortion Rights Vote, Missouri Could Do Something no State Has Before*, KAN. CITY STAR (July 10, 2024), <https://www.kansascity.com/news/politics-government/article289577256.html>; Missouri Amendment 3, *supra* note 33.

Hence, when the State refuses to hear their voices, the initiative petition process has allowed and continues to allow Missourians to have a direct voice in public policymaking by enacting law that better reflects the majority view of the citizenry.⁹⁰ This direct voice is one, especially in the *Dobbs* era, that the General Assembly has grown tired of hearing.⁹¹

III. THE STATE'S ATTEMPTS TO UNDERMINE THE INITIATIVE PETITION PROCESS

A. Overriding the Will of the People

While initiative petition campaigns have found success in getting citizen-led statutes and amendments on the ballot, the General Assembly, along with other Missouri officials, have been unafraid to blatantly override the will of the voters.⁹² As referenced earlier, initiative petition organizers heavily favor putting constitutional amendments on the ballot as opposed to measures that merely enact a statute or repeal a statute that was previously passed by the General Assembly.⁹³ This is because the GOP-controlled General Assembly—in no danger of losing its veto-proof supermajority anytime soon—has not flinched to reverse a citizen-approved statute by passing a new statute that overrides it.⁹⁴

Overriding the will of the people has been a hallmark of the General Assembly. For instance, in 1999 Missouri voters rejected a legislatively referred⁹⁵ ballot measure to permit Missourians to carry a concealed weapon.⁹⁶ Unhappy with the decision of the people, four years later the General Assembly overrode the vote by passing a statute permitting concealed carry.⁹⁷ In 2008, voters approved a citizen-led statute mandating clean energy investments for utility companies.⁹⁸ Subsequently, the General Assembly passed legislation to eliminate the requirements for the initiative's implementation.⁹⁹ In 2010, voters approved a citizen-led statute that enacted strong regulations on Missouri's infamous puppy

⁹⁰ Mo. Initiative & Referendum, *supra* note 43.

⁹¹ See Keller & Sporre, *supra* note 15.

⁹² Becky Sullivan, *Missouri Will Not Expand Medicaid Despite Voters' Wishes, Governor Says*, NPR (May 13, 2021), <https://www.npr.org/2021/05/13/996611586/missouri-will-not-expand-medicaid-despite-voters-wishes-governor-says>; Elly Laliberte, *'Decline to Sign' Campaign Discourages Voters from Signing Abortion Amendment Petition*, KOMU, https://www.komu.com/news/state/decline-to-sign-campaign-discourages-voters-from-signing-abortion-amendment-petition/article_1efc53bc-0656-11ef-a03c-7b1c166a69ce.html#:~:text=The%20%22Decline%20to%20Sign%E2%80%9D%20campaign,roughly%20%24185%2C000%20for%20the%20campaign.

⁹³ Hancock & Randle, *supra* note 49.

⁹⁴ See *id.*

⁹⁵ Gunnar Johanson, *Indirect Initiative and Unpopular Referendum in Missouri*, 86 MO. L. REV. (2021) (defining legislatively referred ballot measure: “[I]nitiatives where the state legislature is permitted to place a proposal on the ballot for voter approval”).

⁹⁶ Hancock & Randle, *supra* note 49.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

mill industry.¹⁰⁰ The following year, the General Assembly passed a statute that repealed the voter-approved regulations and replaced them with watered-down versions that amounted to mere recommendations.¹⁰¹

Before Missouri voters repealed the General Assembly's 2017 right-to-work law in August 2018, the General Assembly voted to reschedule the citizen-led right-to-work repeal vote from the originally scheduled November midterm ballot to the August primary ballot.¹⁰² The move was done to curtail the turnout of motivated labor union voters from impacting the U.S. Senate race between then-incumbent Claire McCaskill (D) and now-incumbent Josh Hawley (R).¹⁰³ When rescheduling the vote from November to August failed to weaken turnout enough to prevent a pro-union victory, the General Assembly seriously considered passing another right-to-work statute to outright defy the will of the two-thirds of Missourians that voted to repeal it.¹⁰⁴ Former Missouri Supreme Court Chief Justice, Michael Wolff, contends these instances are what led initiative petition organizers to shift towards putting their ideas in the Missouri Constitution rather than statutes.¹⁰⁵

Only another statewide vote can change the Missouri Constitution.¹⁰⁶ With that in mind, the State had to get creative.

B. Refusing to Implement Voter-Approved Initiatives

In 2020, after petitioners collected over 346,000 signatures across Missouri to place a Medicaid expansion amendment on the ballot, former Governor Parson, as the General Assembly did with the right-to-work repeal vote, strategically rescheduled the Medicaid expansion amendment to appear on the August 2020 primary ballot instead of the November 2020 presidential election ballot to curb turnout.¹⁰⁷ To no avail, the measure was passed by a vote of 53.25% to 46.75%.¹⁰⁸ Because the measure was a constitutional amendment instead of a statute that the General Assembly could easily weaken or repeal, Governor Parson, lacking the authority to veto constitutional amendments, decided to try a new tactic—refusing to implement the voter-approved amendment.¹⁰⁹

The approved Medicaid expansion amendment required the General Assembly to allocate revenue to expand Medicaid coverage to Missouri residents aged 19 to 64 with incomes at or below 138% of the federal poverty level—an expansion that would provide an estimated 275,000 Missourians with health care

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Hancock & Randle, *supra* note 49.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Keller, *supra* note 27.

¹⁰⁶ *Id.*

¹⁰⁷ Cameron Gerber, *Amendment 2, Medicaid Expansion, Explained*, MO. TIMES (Aug. 3, 2020), <https://themissouritimes.com/amendment-2-medicaid-expansion-explained/>.

¹⁰⁸ Keller, *supra* note 27.

¹⁰⁹ Sullivan, *supra* note 92.

coverage.¹¹⁰ Governor Parson, initially pledging to uphold the voter-approved expansion, later recanted this pledge, citing the General Assembly's rejection of necessary funding as the reason it could not proceed.¹¹¹

Medicaid-eligible Missouri residents sued the Department of Social Services (the "DSS"), arguing the State should have maximized the available federal funding to implement the expansion.¹¹² The DSS argued the amendment was unconstitutional because it dictated appropriations.¹¹³ The Circuit Court agreed with the DSS, but the Missouri Supreme Court unanimously reversed, ruling the amendment is constitutional and required the DSS to enroll the eligible residents.¹¹⁴ In other words, the Missouri Supreme Court had to force the General Assembly and Governor Parson to follow their oaths of office and adhere to the will of the people.¹¹⁵ Unfortunately for Missourians, the State's interference in the initiative petition process has not waned.¹¹⁶

C. The Attorney General's Interference in the Abortion Legalization Effort

Tensions over the initiative petition process escalated dramatically in 2023 when Missourians for Constitutional Freedom began the process of submitting the RRFI for the November 2024 election ballot.¹¹⁷ Unhappy about the prospects of abortion legalization, then-Missouri Attorney General Andrew Bailey (R), a staunch pro-life conservative, tried to exaggerate the cost that would be placed on taxpayers if voters approved the amendment.¹¹⁸ Missouri law requires the State Auditor, Scott Fitzpatrick (R), to produce a fiscal note summary detailing a proposed initiative's projected financial impact.¹¹⁹ After his inquiry, Fitzpatrick found that the RRFI would have no financial impact on Missouri.¹²⁰

Bailey, in a deliberate dereliction of his duty, refused to approve Fitzpatrick's estimate and demanded that Fitzpatrick falsify the estimate and increase it by billions of dollars.¹²¹ A legal battle ensued and Cole County Circuit Judge Jon Beetem ruled that "[t]here is an absolute absence of authority to conclude the Attorney General is permitted to send the [A]uditor's fiscal note summary back for revision simply because he disagrees with the [A]uditor's

¹¹⁰ *Doyle v. Tidball*, 625 S.W.3d 459, 461 (Mo. 2021).

¹¹¹ Tami Luhby, *Judge Blocks Medicaid Expansion in Missouri*, CNN (June 23, 2021, 7:16 PM), <https://www.cnn.com/2021/06/23/politics/missouri-medicaid-expansion-blocked/index.html>.

¹¹² *Doyle*, 625 S.W.3d at 461.

¹¹³ *See id.* at 462.

¹¹⁴ *Id.* at 462-67.

¹¹⁵ *See id.*; MO. CONST. art. III, § 51 (establishing "any measure proposed shall take effect when approved by a majority of the votes cast thereon").

¹¹⁶ *See Keller*, *supra* note 27; *Rosenbaum*, *supra* note 15; *Hanshaw & Sporre*, *supra* note 15; *Sporre*, *supra* note 31.

¹¹⁷ *Id.*

¹¹⁸ Jason Hancock, *Missouri Supreme Court Rejects AG's Push to Inflate Cost of Abortion-rights Amendment*, MO. INDEP. (July 20, 2023), <https://missouriindependent.com/2023/07/20/missouri-supreme-court-rejects-ags-push-to-inflate-cost-of-abortion-rights-amendment/>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

estimated cost or savings of a proposed measure.”¹²² Bailey immediately appealed, and, in a quick verdict, the Missouri Supreme Court affirmed, ordering Bailey to approve the Auditor’s fiscal note by the end of the following day.¹²³

Bailey’s refusal to approve the estimate meant that then-Missouri Secretary of State Jay Ashcroft was unable to finalize the RRFI’s ballot summary, which prevented Missourians for Constitutional Freedom from legally starting their signature collection.¹²⁴ The Missouri Supreme Court highlighted that Bailey’s obstruction—rather than compliance with his statutory duty—pushed the start of signature collection back by one hundred days, placing petitioners at a significant disadvantage.¹²⁵

D. The Secretary of State’s Interference in the Abortion Legalization Effort

Following the Missouri Supreme Court order, then-Missouri Secretary of State Ashcroft began the next line of the State’s defense to weaken the efforts of abortion rights petitioners.¹²⁶ In Missouri, it is the duty of the Secretary of State to summarize proposed ballot language fairly and impartially.¹²⁷ In breach of that duty, Secretary Ashcroft summarized the proposed RRFI to ask voters whether they are in favor of allowing “dangerous, unregulated, and unrestricted abortions, from conception to live birth.”¹²⁸ A three-judge panel of the Missouri Court of Appeals found the summaries to be politically partisan and upheld the politically neutral summaries that had to be rewritten by a lower court judge.¹²⁹

That was not the first instance of Secretary Ashcroft using his former office to publish ballot summaries aimed at misleading voters.¹³⁰ In 2020, the General Assembly passed Senate Joint Resolution 38 (SJR 38)—a legislatively referred constitutional amendment that would reverse several provisions of “Clean Missouri”—a 2018 voter-approved citizen-led constitutional amendment that established a nonpartisan demographer to draw legislative maps, alongside other significant ethics reforms.¹³¹ Eight Missouri citizens challenged the Ashcroft-approved ballot summary of SJR 38, arguing the language was misleading, unfair, and insufficient because it downplayed the amendment’s impact on the “Clean

¹²² Rudi Keller, *Judge: Missouri AG Had ‘Absolute Absence of Authority’ to Question Abortion Initiative Cost*, MO. INDEP. (June 20, 2023), <https://missouriindependent.com/2023/06/20/judge-missouri-ag-had-absolute-absence-of-authority-to-question-abortion-initiative-cost/>.

¹²³ Hancock, *supra* note 118.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Jim Salter, *Missouri Supreme Court Deals a Blow to Secretary of State’s Ballot Language on Abortion*, ASSOCIATED PRESS (Nov. 21, 2023), <https://apnews.com/article/missouri-abortion-ballot-measure-wording-0821671b0292823fbabbb30f6cd9824>.

¹²⁷ *Id.*

¹²⁸ *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 200 (Mo. Ct. App. 2023).

¹²⁹ *Id.* at 216-18.

¹³⁰ See, e.g., *Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. Ct. App. 2020) (“[E]ach of the three bullet points in the official summary statement [for SJR 38] was unfair and insufficient; the court accordingly rewrote the summary statement, and certified to the Secretary of State an alternative statement for inclusion on the ballot.”).

¹³¹ *Id.*

Missouri” reforms and instead highlighted minor changes to the law on lobbyist gifts and campaign contributions.¹³² The Cole County Circuit Court agreed with the petitioners, and ordered a new, clearer summary.¹³³ The Missouri Court of Appeals upheld the Circuit Court’s decision and provided a revised summary themselves to ensure fairness in the ballot process.¹³⁴

One would expect the individual responsible for overseeing Missouri’s democratic process would use their position to safeguard free and fair elections. However, when it came to citizen-led constitutional amendments that Secretary Ashcroft personally supported or opposed, he repeatedly leveraged the power of his office to mislead voters in an attempt to secure his preferred outcome.¹³⁵

It is a significant disservice to Missouri voters when they are forced to rely on the judiciary to compel their officials to fulfill their statutory responsibilities to the public.¹³⁶ Alas, even though the judiciary intervened, anti-abortion groups and elected state representatives began escalating their anti-democratic tactics, using unconventional methods to obstruct the efforts of abortion rights petitioners.

E. Voter Intimidation

With the courts putting a stop to the State’s effort to prevent Missourians for Constitutional Freedom from gathering signatures for the RRFI, Missouri officials and other abortion opponents began their next maneuver—voter intimidation.¹³⁷

While Missourians for Constitutional Freedom gathered signatures amid the looming signature deadline, anti-abortion organizations launched a campaign of their own—“Decline to Sign.”¹³⁸ The Decline to Sign campaign was designed by multiple anti-abortion groups including Missouri Stands with Women, Susan B. Anthony Pro-Life America, Missouri Catholic Conference, and Thrive Nation to prevent Missourians for Constitutional Freedom from collecting the minimum required signatures to qualify for the November ballot.¹³⁹ Abortion rights opponents from the Decline to Sign campaign used texts, phone calls, paid Facebook ads, and videos to falsely warn Missourians that by signing the petition they risk subjecting themselves to personal data theft.¹⁴⁰

Contrary to these fraudulent warnings, University of Missouri political science professor Peverill Squire explained that petition groups do not collect

¹³² *Id.*; Under Missouri law, any resident can legally challenge the official ballot language for a legislatively referred constitutional amendment if they believe it is misleading or inadequate. MO. REV. STAT. § 116.190 (2015).

¹³³ *Pippens*, 606 S.W.3d at 693.

¹³⁴ *Id.*

¹³⁵ *Id.*; see also Salter, *supra* note 126; *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 216-18 (Mo. Ct. App. 2023).

¹³⁶ See, e.g., *Pippens*, 606 S.W.3d at 693; see, e.g., *Fitz-James*, 678 S.W.3d at 216-218.

¹³⁷ Laliberte, *supra* note 92.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

information that is not already publicly available.¹⁴¹ Nonetheless, Decline to Sign surrogates sought to falsely cast Missourians for Constitutional Freedom as out-of-state leftist extremists intent on stealing Missourians' personal data.¹⁴² Campaign texts warned that signing the abortion petition would allow these alleged extremists to obtain and sell voters' names, addresses and signatures.¹⁴³ Decline to Sign spokeswoman Stephanie Bell defended the warnings, claiming they were intended to "educate" Missouri voters about what would happen to their data.¹⁴⁴

Not only were these anti-abortion groups intimidating voters, but elected representatives, most notably Republican State Senator Mary Elizabeth Coleman—the lead architect of Missouri's statutory total abortion ban—did not shy away from using voter intimidation to dissuade Missourians from the initiative petition process.¹⁴⁵ Coleman championed the Decline to Sign movement and took her intimidation efforts to the streets by showing up at several petition signing events.¹⁴⁶ At a signing event in her town of Arnold, Missouri, Coleman reportedly shouted at signers, claiming that the petition was more extreme than *Roe* and that it would excuse medical malpractice.¹⁴⁷ Outside the signing event, Coleman flagged down cars in the parking lot and verbally ordered people not to sign the petition.¹⁴⁸

Coleman was not alone in her intimidation.¹⁴⁹ At that same Arnold signing event, one of Coleman's friends reportedly made his way behind the signing booth and shouted at those who approached the booth, demanding them not to sign the petition.¹⁵⁰ Soon thereafter, once she arrived back in Jefferson City, Coleman began drafting a bill to virtually guarantee that any citizen-led attempt to override the General Assembly would never happen again.¹⁵¹

F. The General Assembly's Attempts to Raise the Initiative Petition Passage Threshold

It is sometimes said in the world of business that when you are losing the game, change the rules.¹⁵² The Missouri General Assembly has embodied such sentiment. Members of the General Assembly have sponsored numerous joint

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Laliberte, *supra* note 92.

¹⁴⁴ *Id.*

¹⁴⁵ Jess Piper, *Intimidation Strategies and the Abortion Ballot Measure in Missouri*, SUBSTACK (Apr. 21, 2024), <https://jesspiper.substack.com/p/intimidation-strategies-and-the-abortion>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Piper, *supra* note 145.

¹⁵¹ See Ballentine, *supra* note 9.

¹⁵² Rebecca Dalli Gonzi, *If You're Losing the Game, Change the Rules*, TIMES OF MALTA (Sept. 18, 2013), [https://timesofmalta.com/article/If-you-re-losing-the-game-change-the-rules.486830#:~:text=Stage%201:%20avoiding%20the%20crisis,\(Harvard%20Business%2C%202013\)](https://timesofmalta.com/article/If-you-re-losing-the-game-change-the-rules.486830#:~:text=Stage%201:%20avoiding%20the%20crisis,(Harvard%20Business%2C%202013)).

resolutions to suppress Missouri citizens' right to direct democracy.¹⁵³ Many view these legislative efforts as significant attacks on the people's right to redress grievances.¹⁵⁴ Interestingly, unlike former Secretary Ashcroft, his father, former Governor John Ashcroft (R), defended the initiative petition process.¹⁵⁵ During his tenure as governor in the mid-1980s to early 1990s, former Governor Ashcroft vetoed efforts led by the then-Democrat-controlled General Assembly to restrict the initiative petition process after voters approved an initiative that Democratic legislators opposed.¹⁵⁶ That initiative—the Hancock Amendment—limited the State's ability to raise taxes.¹⁵⁷

Responding to its passage, the Democrats passed a bill in 1991 that would have substantially weakened the initiative petition process.¹⁵⁸ Former Governor Ashcroft, when vetoing the bill, stated the initiative petition process allows “those who have no influence with elective representatives . . . [to] take their cause directly to the people. The General Assembly should be reluctant, therefore, to enact legislation which places any impediments on the initiative power which are inconsistent with the reservation found in the [Missouri] Constitution.”¹⁵⁹

Today, now that the scales have tipped and voters continue to approve progressive ballot measures, Republican enthusiasm towards the initiative petition process has soured.¹⁶⁰ Just as it was in the 1990s under Democratic majorities, efforts to cripple direct democracy are happening again, this time under Republican majorities.¹⁶¹ In response to the legalization of recreational marijuana through a citizen-led constitutional amendment during the November 2022 midterm election, the 2023 General Assembly tried to make it harder for future citizen-led amendments to pass, but the bill died when the legislative session ended.¹⁶²

1. 2024

The top priority for the GOP during the 2024 legislative session was to raise the initiative petition passage threshold.¹⁶³ Yet, the session had a tumultuous start when the GOP Freedom Caucus set the record for the longest filibuster in Missouri history—forty-one hours over a two week period—to stall all Senate

¹⁵³ Carl Bearden, *Opinion: Ashcroft v. Ashcroft: Father Knows Best—Protect the Initiative Petition Process*, MO. TIMES (Apr. 7, 2021), <https://themissouritimes.com/ashcroft-v-ashcroft-father-knows-best-protect-the-initiative-process/>.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Bearden, *supra* note 153.

¹⁶⁰ *See* Ballentine, *supra* note 9.

¹⁶¹ Bearden, *supra* note 153.

¹⁶² Summer Ballentine, *Missouri Lawmakers Fail to Raise the Bar to Amend Constitution, Easing Path for Abortion Rights*, ASSOCIATED PRESS (May 12, 2023), <https://apnews.com/article/ballot-initiative-petition-voter-missouri-republican-8e4d5b8293eb864235cf347410d5d7f5>.

¹⁶³ Rosenbaum, *supra* note 10.

business.¹⁶⁴ The forty-one hour filibuster ended only when Freedom Caucus members were assured by Republican Senate leadership that they would take every means necessary to pass a bill to raise the initiative petition passage threshold.¹⁶⁵

With the leadership's assurance in mind, Senator Coleman spearheaded SJR 74—a legislatively referred constitutional amendment—to the change the initiative petition passage threshold from a simple statewide majority to a new requirement of a simple statewide majority *plus* a majority in five of Missouri's eight U.S. congressional districts.¹⁶⁶ Coleman's core argument was that her proposed change to the initiative petition process would give more voice to rural voters.¹⁶⁷ In reality, Coleman was quite transparent that the plan was to make it nearly impossible for voters to legalize abortion.¹⁶⁸ This chicanery was evidenced when, while debating SJR 74, Coleman and her Republican colleagues frequently cited their disapproval of recent citizen-approved amendments on legislative redistricting, Medicaid expansion, medical and recreational marijuana, and of course the then-pending attempt to legalize abortion, as examples of, in their eyes, the “abuse” of the initiative petition process.¹⁶⁹

Knowing that a straightforward, plain-language ballot measure asking Missourians to give up their right to majority rule would be a tough sell, Coleman attempted to sweeten the deal by attaching what is referred to as “ballot candy”—“pairing a popular idea with a more controversial one in a ballot measure as a way to win over voters”—within SJR 74.¹⁷⁰ The ballot candy Coleman planned to include—and as the first line voters would read—asked voters if they wanted to outlaw non-citizens from voting in Missouri elections, something already explicitly illegal in Missouri.¹⁷¹

Missouri Democratic senators were not going to let SJR 74 pass without a fight.¹⁷² To protect majority rule, they began a series of their own filibusters.¹⁷³ When the Senate brought SJR 74 up for debate in February, Democrats filibustered for twenty-one hours.¹⁷⁴ The filibuster ended only when Coleman agreed to remove the ballot candy from SJR 74.¹⁷⁵ A candy-free version of Coleman's bill subsequently passed the Senate down party lines.¹⁷⁶

¹⁶⁴ Keller & Spoerre, *supra* note 15.

¹⁶⁵ *Id.*

¹⁶⁶ Spoerre, *supra* note 31.

¹⁶⁷ *Id.*

¹⁶⁸ Rosenbaum, *supra* note 10.

¹⁶⁹ Keller & Spoerre, *supra* note 15.

¹⁷⁰ *Id.*; Jason Hancock, ‘Ballot Candy?’ Missouri GOP Adds Citizen-only Voting into Initiative Petition Changes, MO. INDEP. (Feb. 3, 2023), <https://missouriindependent.com/2023/02/03/ballot-candy-missouri-gop-adds-citizen-only-voting-into-initiative-petition-changes/>.

¹⁷¹ *Id.* Only those who are citizens of the United States and residents of Missouri may vote in Missouri elections. See MO. CONST. art. VIII, § 2.

¹⁷² Spoerre, *supra* note 31.

¹⁷³ Keller & Spoerre, *supra* note 15.

¹⁷⁴ *Id.*

¹⁷⁵ Spoerre, *supra* note 31.

¹⁷⁶ *Id.*

The Missouri House, unsatisfied, had every intention of restoring the ballot candy.¹⁷⁷ Coleman even called upon the House to restore the ballot candy in their version of the bill.¹⁷⁸ Later, with just weeks remaining in the 2024 legislative session, the House did just that, and Coleman's bill was taken up once again in the Senate.¹⁷⁹ The Democrats, with what little power they hold in the Missouri Senate,¹⁸⁰ were once again in a fight to save the initiative petition process—the only vehicle in their arsenal through which they have achieved any significant policy victories since Republicans took control of the General Assembly more than two decades ago.¹⁸¹ In a move that gained national attention, Missouri Democrats shattered the Freedom Caucus's forty-one hour filibuster record by filibustering for fifty hours to block SJR 74 from a final vote.¹⁸²

With the Democrat-led filibuster running out the clock, Coleman strongly debated throwing a wild Hail Mary legislative pass by invoking the rarely used and highly controversial “previous question” rule.¹⁸³ Under this rule, if a bill that originated in the Senate is amended by the House before reconsideration by the Senate, the previous question rule can be invoked to force a vote on the legislation, effectively ending any filibuster and shutting down all debate.¹⁸⁴ Then-Democratic Minority Leader, John Rizzo, explained that the previous question rule is rarely used because of the chaos it ignites: “I have been through the movement of a previous question. It is mass chaos. There are hard feelings that happen. People scream and yell at each other to the point where you are worried that people might come to blows.”¹⁸⁵ Yet, unexpectedly, Coleman refrained from raising a previous question motion and instead moved to send SJR 74 back to the House, upon which Senate Democrats ended their filibuster and declared victory.¹⁸⁶

On the last day of the legislative session, the 2024 GOP scheme to eliminate majority rule came to a humiliating end when the Missouri House, while still working on legislation, received notice that the Senate decided to adjourn for the session eight hours before the constitutional deadline.¹⁸⁷ Had SJR 74 passed, been scheduled for the August 2024 ballot, and approved by voters, it would have, as previously mentioned, given 23% of Missourians the ability to not only defeat the RRFI, but also defeat any future citizen-led constitutional amendment.¹⁸⁸

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Anna Spoerre, *Missouri House Sends Initiative Petition Bill Back to Senate with 'Ballot Candy' Reinstated*, MO. INDEP. (Apr. 25, 2024), <https://missouriindependent.com/2024/04/25/missouri-initiative-petition-bill-ballot-candy-reinstated/>.

¹⁸⁰ *Missouri General Assembly*, BALLOTEDIA, https://ballotpedia.org/Missouri_General_Assembly (last visited Oct. 19, 2025) (The Missouri State Senate has 34 seats. Since 2018, Democrats have held 10 seats and Republicans have held 24 seats).

¹⁸¹ Keller & Spoerre, *supra* note 15.

¹⁸² *Id.*

¹⁸³ Spoerre, *supra* note 31.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Keller & Spoerre, *supra* note 15.

¹⁸⁷ *Id.*

¹⁸⁸ Spoerre, *supra* note 31.

2. 2025: Going Nuclear

Shortly after SJR 74's defeat, then-Republican House Majority Leader and now current Speaker of the Missouri House, Jon Patterson, forewarned that, "the issue [wasn't] dead."¹⁸⁹ Patterson accurately predicted the General Assembly's desire to raise the threshold for passing initiative petitions would persist.¹⁹⁰ Patterson further contended that "the House has stood firm that we believe in life, that we believe in [initiative petition] reform."¹⁹¹

Speaker Patterson's belief proved true when the General Assembly in its 2025 special session called by Governor Mike Kehoe (R) finally passed its long-awaited legislatively referred ballot measure that would make it possible, this time for as few as 5% of Missouri voters, to defeat any citizen-led constitutional amendment.¹⁹² During the special session, any semblance of decorum and tradition was off the table: This time around, the General Assembly did not shy away from controversy and was willing to disregard long-standing norms surrounding the previous question rule to force a vote.¹⁹³ The Missouri House passed their "initiative petition reform" measure, along with new gerrymandered congressional districts to convert Kansas City's safe Democratic seat into a likely Republican seat by a vote of 21-11 after abruptly shutting down a Democrat-led filibuster in the Missouri Senate following only four hours of debate.¹⁹⁴ Republican State Senators Lincoln Hough of Springfield and Mike Moon of Ash Grove joined nine Democrats in opposition.¹⁹⁵ "What I've seen at the end of last session, and what I saw this week, is a dismantling of what the Senate is supposed to be," Hough said.¹⁹⁶ A mere twenty minutes after the vote, Hough was informed by Senate Pro Tem Cindy O'Laughlin (R), that because of his dissent he would no longer be chairman of the powerful Senate Appropriations Committee.¹⁹⁷ Hough had been chairman or vice chairman of that committee since being elected to the Missouri Senate.¹⁹⁸

¹⁸⁹ *Id.*; Rudi Keller & Clara Bates, *Jon Patterson Easily Wins Race for Missouri House Speaker over Right-wing Challenger*, MO. INDEP. (Jan. 8, 2025, 1:28 PM), <https://missouriindependent.com/2025/01/08/jon-patterson-easily-wins-race-for-missouri-house-speaker-over-right-wing-challenger/>.

¹⁹⁰ Spoerre, *supra* note 31.

¹⁹¹ *Id.*

¹⁹² Jason Hancock, *Missouri Lawmakers Pass Gerrymandered Congressional Map, Initiative Petition Limits*, MO. INDEP. (Sept. 12, 2025, 1:53 PM), <https://missouriindependent.com/2025/09/12/gerrymandered-congressional-map-initiative-petitions-limits-sent-to-missouri-governor/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Rudi Keller, *Missouri GOP Senator Slams Party Leaders for Forcing Vote on Bills Without Allowing Debate*, MO. INDEP. (Sept. 14, 2025, 8:00 AM), <https://missouriindependent.com/2025/09/14/missouri-gop-senator-slams-party-leaders-for-forcing-vote-on-bills-without-allowing-debate/>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Missouri House Representative Ed Lewis (R) defended the Senate's move, arguing that amending the Missouri Constitution had become "too easy" and that any changes should reflect "broad consensus across the state."¹⁹⁹ In contrast, Democrats denounced the move as a power grab by the GOP supermajority: "This is a cynical maneuver designed to put a thumb on the scale of democracy, to ensure [a] predetermined outcome regardless of the will of the people," said State Senator Barbara Washington (D-Kansas City).²⁰⁰ State Senator Stephen Webber (D-Columbia) also criticized the measure, noting that "[i]f you're a politician in Jefferson City, you become more powerful after this passes."²⁰¹ The proposal will appear on the 2026 ballot and will require only a simple majority for approval.²⁰²

The proposal, certified as Amendment 4, reprises much of the same ballot candy—strategically placed at the top of the amendment—as its ill-fated 2024 predecessor, and will ask voters:

Shall the Missouri Constitution be amended to:

Stop foreign nationals and foreign adversaries of the United States from providing funding to influence ballot measure elections, and allow criminal prosecution of violators;

Punish initiative petition signature fraud as a crime;

Require public hearings be held to get public comment before initiative petitions are placed on the ballot;

Require a majority of voters in each congressional district to approve initiative petitions to amend the constitution; and

*Make available to each voter the full text of initiative petitions with their ballot?*²⁰³

By going nuclear and expediting this anti-democratic amendment—one that, if passed, would only apply to citizen-led amendments and not legislatively referred ones—the General Assembly has made its position unmistakable: *majority rule for me, but not for thee*.

The implications of this amendment's passage would be immediately felt if the United States Supreme Court were to overturn its substantive due process precedents in *Griswold*, *Lawrence*, and *Obergefell*.²⁰⁴ With the GOP's entrenched

¹⁹⁹ Hancock, *supra* note 192.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See *2026 Ballot Measures*, MO. SEC'Y OF STATE, <https://www.sos.mo.gov/petitions/2026BallotMeasures> (last visited Oct. 19, 2025) (italics added) [hereinafter *2026 Ballot Measures*].

²⁰⁴ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*,

supermajority in the General Assembly, the initiative petition process would almost certainly remain the only viable path for Missourians to reclaim those fundamental rights—a path this amendment is designed to block.²⁰⁵

IV. THE EFFORTS IN OTHER STATES TO CURTAIL THE INITIATIVE PETITION PROCESS IN ANTICIPATION OF ABORTION LEGALIZATION

Missouri is not the only state that has attempted to roll back majority rule.²⁰⁶ In 2021, the Ballot Initiative Strategy Center monitored a 500% increase in bills aimed at restricting or abolishing the initiative petition process since 2017.²⁰⁷ In 2025 alone, forty bills in a dozen states have been introduced or enacted to undermine the initiative petition process.²⁰⁸ The *Dobbs* era efforts to legalize abortion at the state level have contributed to the growing urgency of Republican-controlled state legislatures to subvert the initiative petition process.²⁰⁹ One of the most notable examples is the Ohio state legislature's effort to put 175 years of majority rule on the line in August 2023.²¹⁰ Ohio's legislatively referred ballot initiative was developed in an attempt to defeat any chance of a statewide vote that would enshrine abortion rights in its constitution.²¹¹ The question presented in the Ohio measure asked voters if they wanted to raise the passage threshold for a citizen-led amendment from a simple majority to a 60% majority, which would have allowed 41% of voters to defeat amendments that 59% of Ohioans

Lawrence, and Obergefell. Because any substantive due process decision is 'demonstrably erroneous' . . .").

²⁰⁵ See Weinberg, *supra* note 41.

²⁰⁶ Chris Melody Fields Figueredo, *Why Some States are Moving to Restrict Ballot Initiatives*, DEMOCRACY DOCKET (Mar. 30, 2022), <https://www.democracydocket.com/opinion/why-some-states-are-moving-to-restrict-ballot-initiatives/>.

²⁰⁷ *Id.*

²⁰⁸ John Yang, *How Lawmakers Are Restricting Citizen-led Ballot Initiatives*, PBS (May 31, 2025, 5:40 PM), <https://www.pbs.org/newshour/show/how-lawmakers-are-restricting-citizen-led-ballot-initiatives>.

²⁰⁹ Marilou Johaneck, *Save the Date: Ohio's Aug. 8 Election Puts Nearly 175 Years of Majority Voter Authority on the Line*, OHIO CAPITAL J. (May 16, 2023), <https://ohiocapitaljournal.com/2023/05/16/save-the-date-ohios-aug-8-election-puts-nearly-175-years-of-majority-voter-authority-on-the-line/>; Jo Ingles & Karen Kasler, *Ohio Voters Reject Measure that Would Have Made It Harder to Change Constitution*, NPR (Aug. 8, 2023), <https://www.npr.org/2023/08/08/1191679261/ohio-election-results-issue1-abortion-state-constitution-amendment-ballot-voters>; Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, ASSOCIATED PRESS (Nov. 7, 2023), <https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270>; Shawn Griffiths, *Arkansas Voters Reject Attack on Citizen Initiative Process*, INDEP. VOTER NEWS (Nov. 9, 2022), <https://ivn.us/posts/arkansas-voters-reject-attack-citizen-referendum-process>; see Caroline Sullivan, *Florida House Committee Passes Resolution Raising Amendment Threshold to 67%*, DEMOCRACY DOCKET (May 5, 2023), <https://www.democracydocket.com/news-alerts/florida-house-committee-passes-resolution-raising-amendment-threshold-to-67/>; Carter & Clapman, *supra* note 44.

²¹⁰ Johaneck, *supra* note 209.

²¹¹ *Id.*; Ohio S.J. Res. 2, 135th Gen. Assemb., 2023 Sess. (2023).

supported.²¹² After a successful pro-democracy campaign, majority rule survived when the measure was defeated with 57.1% of Ohioans voting “No.”²¹³ Three months later, Ohio voters did exactly what their legislature attempted to prevent—they voted 56.6% to 43.4% to enshrine the right to abortion in the Ohio Constitution.²¹⁴

Similar to Ohio, Arkansas’s 2022 attempt to raise the threshold for citizen-led constitutional amendments from a simple majority to a 60% majority failed with 41% of Arkansans voting “Yes” and 59% voting “No.”²¹⁵ A proposed citizen-led amendment that would enshrine the right to abortion up to 18 weeks of pregnancy with exceptions after that for the life of the mother nearly made it on the November 2024 Arkansas ballot, but was rejected by the Arkansas Secretary of State who cited abortion petitioners’ failure to submit proper documentation.²¹⁶ Abortion petitioners argued that the Secretary merely looked for any rationale to keep the proposed amendment off the ballot because of his personal anti-abortion views.²¹⁷ Woefully, the Arkansas Supreme Court dashed the hopes of pro-choice organizers by siding with the Secretary, a decision which stopped the amendment from making it on the ballot.²¹⁸ Still, Arkansas’s simple majority threshold remains intact²¹⁹ and Arkansans could see another abortion amendment in a future election cycle.

Florida, which already requires initiative petitions to have a 60% majority threshold,²²⁰ attempted to raise its threshold to a 66.67% majority in the 2023 legislative session with House Joint Resolution 129 (HJR 129).²²¹ HJR 129 failed to pass because the Florida legislative session ended.²²² HJR 129 was revived as House Joint Resolution 335 (HJR 335) in the 2024 legislative session when recreational marijuana and abortion rights petitioners were collecting signatures.²²³ Like its 2023 counterpart, HJR 335 failed to come to fruition, this time dying in committee on March 8, 2024.²²⁴ During the 2024 presidential election, and despite

²¹² *Id.*

²¹³ Ingles & Kasler, *supra* note 209.

²¹⁴ Smyth, *supra* note 209.

²¹⁵ Griffiths, *supra* note 209.

²¹⁶ Tess Vrbin, *Arkansas Secretary of State Discriminated Against Proposed Abortion Amendment, Supporters Say*, FAYETTEVILLE FLYER (Aug. 6, 2024), <https://fayettevilleflyer.com/2024/08/06/arkansas-secretary-of-state-discriminated-against-proposed-abortion-amendment-supporters-say/>.

²¹⁷ *Id.*

²¹⁸ Emily Cochrane, *Arkansas Supreme Court Denies Bid to Get Abortion Measure on the Ballot*, N.Y. TIMES (Aug. 22, 2024), <https://www.nytimes.com/2024/08/22/us/politics/arkansas-abortion-amendment.html>.

²¹⁹ *See id.*

²²⁰ A proposed constitutional amendment requires at least 60% approval from voters to pass. FLA. CONST. art. XI, § 5(e).

²²¹ Sullivan, *supra* note 209.

²²² *Id.*

²²³ *See* Tony Lange, *Florida Lawmakers Propose Raising Ballot Initiative Passage Threshold to 67%*, CANNABIS BUS. TIMES (Jan. 31, 2024), <https://www.cannabisbusinesstimes.com/news/florida-cannabis-2024-ballot-measure-majority-vote-pass/>.

²²⁴ HJR 335 died in the Judiciary Committee on March 8, 2024. Fla. H.J. Res. 335, 2024 Leg., Reg. Sess. (2023).

a clear statewide majority, Florida's abortion amendment failed with 57.17% voting in the affirmative—2.83% shy of the 60% threshold.²²⁵ Florida's recreational marijuana amendment failed by 4.1%.²²⁶ Thus, while Florida ultimately failed to raise the threshold to a two-thirds majority, its existing 60% majority still enables a minority of voters to dictate election outcomes and block measures supported by most Floridians.

As evidenced above, Missouri is not the only state seeking to undermine majority rule, and when state legislatures attempt to do so, they often fail—especially when straightforward ballot measures are placed before the people.²²⁷ That is why Missouri GOP lawmakers have been unwavering in their push to include ballot candy in their gambit to silence the voters.²²⁸ Without it, Missourians, like Ohioans and Arkansans, would not be so easily manipulated into voting their own voice away.²²⁹

V. THE STATE'S CONTINUED ENDEAVOR TO IMPEDE REPRODUCTIVE FREEDOM PRE- AND POST-2024 ELECTION

While the 2025 special legislative session has finally allowed the General Assembly to place its ballot-candy-laden proposal designed to trick voters into essentially abolishing the initiative petition process on the ballot, the legislature's failure to advance its similar measure in 2024 did not deter Missouri officials from maneuvering to block Missourians' efforts to legalize abortion.²³⁰ Even after voters approved the RRFI in November 2024, the amendment remains mired in litigation because GOP lawmakers continue to pursue legal challenges aimed at undermining its validity ahead of the 2026 election cycle.²³¹

²²⁵ *Florida Amendment 4, Right to Abortion Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_4_Right_to_Abortion_Initiative_\(2024\)](https://ballotpedia.org/Florida_Amendment_4_Right_to_Abortion_Initiative_(2024)) (last visited Oct. 19, 2025).

²²⁶ *Florida Amendment 3, Marijuana Legalization Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_3_Marijuana_Legalization_Initiative_\(2024\)](https://ballotpedia.org/Florida_Amendment_3_Marijuana_Legalization_Initiative_(2024)) (last visited Oct. 19, 2025).

²²⁷ See Sullivan, *supra* note 209.

²²⁸ See Spoerre, *supra* note 31; Annelise Hanshaw, *Missouri House Advances Bill to Make it Harder for Voters to Amend State Constitution*, MO. INDEP. (Sept. 8, 2025, 4:47 PM), <https://missouriindependent.com/2025/09/08/missouri-house-advances-bill-to-make-it-harder-for-voters-to-amend-state-constitution/>.

²²⁹ See Spoerre, *supra* note 31; see Hanshaw, *supra* note 228.

²³⁰ Summer Ballentine, *Missouri Abortion-rights Amendment Faces Last-minute Legal Challenges*, ASSOCIATED PRESS (Aug. 26, 2024, 5:15 PM), <https://apnews.com/article/abortion-missouri-ballot-constitution-9b2bf89fb7ef2c5cee54988070197995>; Charlie Keegan, *Behind the Scenes During Missouri's Initiative Petition Verification Process*, KSHB 41 (June 26, 2024, 5:33 PM), <https://www.kshb.com/news/local-news/behind-the-scenes-during-missouris-initiate-petition-verification-process>.

²³¹ Rachel Lippmann & Sarah Fentem, *Missouri Supreme Court Puts State Abortion Ban Back into Effect for Now*, STLPR (May 27, 2025, 2:23 PM), <https://www.stlpr.org/health-science-environment/2025-05-27/missouri-supreme-court-overtorn-abortion-amendment-3>; Jacob Richey, *Missouri Appeals Court Affirms Ruling that Allowed Abortions to Resume*, KOMU (Oct. 14, 2025), https://www.komu.com/news/state/missouri-appeals-court-affirms-ruling-that-allowed-abortions-to-resume/article_b5b7d912-7bcb-4bcb-af62-c083cc61384a.html.

To understand how the fight reached this point, it is necessary to look back to 2024 when Missourians for Constitutional Freedom submitted over 380,000 signatures to place the RRFI on the ballot—more than double the minimum requirement.²³² Once submitted, Missouri's counties then began verifying that there were enough valid signatures for the RRFI to qualify for the ballot.²³³ Each county had a July 30, 2024 deadline to complete verifications and the Secretary of State's office had until August 13, 2024 to finalize the count.²³⁴ During that window, anti-abortion groups attempted to use Missouri's Sunshine Law to obtain copies of the petitions,²³⁵ hoping to ensure that names "scratched out" by those who wished to withdraw their signatures were excluded from the total.²³⁶ The anti-abortion groups then encouraged all signers to follow a process to withdraw their signatures from the petition.²³⁷ Unavailing, on August 13, 2024, the Secretary of State's office confirmed the RRFI garnered enough valid signatures and certified it as Amendment 3 for the November 2024 ballot.²³⁸

A. Secretary Ashcroft's Misleading Fair Ballot Language

After winning multiple battles against the State and numerous anti-abortion groups to get the RRFI on the ballot, Missourians for Constitutional Freedom faced a renewed fight for fair ballot access.²³⁹ Former Secretary Ashcroft was once again at the forefront of that fight.²⁴⁰ Section III of this Comment discussed Secretary Ashcroft's proposed ballot summary of the RRFI which stated that the amendment would permit "dangerous, unregulated, and unrestricted abortions, from conception to live birth."²⁴¹ The Missouri Court of Appeals found that language to be politically partisan and ordered the use of impartial language instead.²⁴² Shortly after his August 13th certification of the RRFI, Secretary Ashcroft published a "fair ballot language" summary of the amendment which did not appear on the amendment itself, but did so on his official government

²³² See Spoerre, *supra* note 25.

²³³ Keegan, *supra* note 230.

²³⁴ *Id.*

²³⁵ Laliberte, *supra* note 92.

²³⁶ *Id.*

²³⁷ See Anna Spoerre, *Anti-abortion Groups Say More Aggressive Approach Necessary to Stop Missouri Amendment*, MO. INDEP. (May 2, 2024, 5:55 AM), <https://missouriindependent.com/2024/05/02/missouri-abortion-amendment-march-life/>; see e.g., MO. REV. STAT. § 116.110 (1999) ("Any voter who has signed an initiative or referendum petition may withdraw his or her signature from that petition by submitting to the secretary of state, before the petition is filed with the secretary of state, a sworn statement requesting that his or her signature be withdrawn.").

²³⁸ Anna Spoerre, *Missouri Voters Will Decide Whether to Legalize Abortion in November*, MO. INDEP. (Aug. 13, 2024), <https://missouriindependent.com/2024/08/13/missouri-voters-will-decide-whether-to-legalize-abortion-in-november/>; see e.g., 2024 Ballot Measures, *supra* note 80.

²³⁹ Kacen Bayless, *Missouri Republican Lawmakers Sue to Block Abortion Rights Amendment from Ballot*, KAN. CITY STAR (Aug. 24, 2024), <https://amp.kansascity.com/news/politics-government/article291380665.html>.

²⁴⁰ *Id.*

²⁴¹ *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 200 (Mo. Ct. App. 2023).

²⁴² *Id.* at 216-18.

website.²⁴³ The fair ballot language inaccurately stated that the amendment would guarantee the right to abortion at any time during pregnancy and remove all abortion regulations, including those meant to protect women.²⁴⁴ The language further suggested that the State would be prohibited from imposing penalties for medical malpractice in the event of a mishandled procedure.²⁴⁵ Put plainly, the language was a revival of the inflammatory ballot summary that Secretary Ashcroft attempted to use in 2023 to describe the RRFI.²⁴⁶

The American Civil Liberties Union of Missouri (the “ACLU”) filed a lawsuit that challenged the fairness of the language.²⁴⁷ They argued it mirrored the language previously rejected by the Missouri Court of Appeals, and requested new, impartial fair ballot language.²⁴⁸ Tori Schafer of the ACLU criticized Secretary Ashcroft for continuing to use politically biased language.²⁴⁹ Ballot summary lawsuits are fairly common, but challenges over fair ballot language are rarer.²⁵⁰ Former Missouri Supreme Court Chief Justice, Michael Wolff, warned that Secretary Ashcroft’s language could mislead voters due to its presence on the official Missouri Secretary of State website.²⁵¹ The outcome of that case had the potential to set a precedent on how much flexibility courts will allow future secretaries of state in shaping these descriptions—potentially impacting voter outcomes.²⁵²

Fortunately for Missourians for Constitutional Freedom, Cole County Circuit Judge Cotton Walker threw out Secretary Ashcroft’s fair ballot language, ruling it was “unfair, insufficient, inaccurate, and misleading.”²⁵³ Judge Walker then wrote impartial fair ballot language that accurately explained to voters that the RRFI removes the State’s ban on abortion until fetal viability and unless a patient falls into a medical exception after that point, the State is permitted to restrict abortion.²⁵⁴

B. Senator Coleman’s Attempt to Remove the RRFI from the Ballot

In coordination with Secretary Ashcroft’s misleading fair ballot language scheme, on August 22, 2024, Senator Coleman, joined by State Rep. Hannah Kelly (R-Mountain Grove), and Kathy Forck, an anti-abortion activist, filed a lawsuit in

²⁴³ Jonathan Shorman & Kacen Bayless, *MO Courts Tossed Abortion Ballot Measure Description. Why Is Ashcroft Trying Again?*, KAN. CITY STAR (Aug. 22, 2024), <https://www.kansascity.com/news/politics-government/article291246145.html>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Shorman & Bayless, *supra* note 243.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Kacen Bayless, *MO Judge Strikes Down Ashcroft’s ‘Misleading’ Description of Abortion Rights Amendment*, KAN. CITY STAR (Sept. 5, 2024), <https://www.kansascity.com/news/politics-government/article291999480.html>.

²⁵⁴ *Id.*

Cole County to block the RRFI from the ballot.²⁵⁵ Coleman's lawsuit alleged that the RRFI violated the Missouri Constitution by not detailing the statutes and other constitutional provisions that voters could potentially repeal upon its passage.²⁵⁶ Additionally, the lawsuit asserted that the amendment violated the constitutional requirement that an initiative address only a single subject.²⁵⁷ The subject in question was the amendment's use of the term "reproductive freedom," which Coleman claimed was overly broad and could potentially overturn existing state laws, including bans on specific types of stem cell research.²⁵⁸

Campaign manager for Missourians for Constitutional Freedom, Rachel Sweet, denounced the lawsuit and conveyed it represented another unfounded and desperate effort by politicians to silence Missouri voters.²⁵⁹ Sweet correctly identified that lawsuits of this nature are not rare in Missouri.²⁶⁰ For example, in 2022 after Secretary Ashcroft certified Missouri's recreational marijuana initiative petition, a Jefferson City anti-drug advocate, Joy Sweeny, filed a lawsuit to block it from the November 2022 ballot.²⁶¹ Sweeny's lawsuit used the same claim Coleman raised—that the initiative amended multiple parts of the Missouri Constitution in violation of the single-subject rule.²⁶² Secretary Ashcroft, the named defendant, responded, claiming his office correctly certified the measure in accordance with the Missouri Constitution.²⁶³ Cole County Circuit Judge Cotton Walker dismissed Sweeny's lawsuit for lack of standing.²⁶⁴

While Sweet was positive that the courts would dismiss Coleman's lawsuit, that positivity was a miscalculation.²⁶⁵ At trial, Missourians for Constitutional Freedom argued that the RRFI, because it is an amendment and not a statute, would not immediately repeal existing law, but rather create a new standard under which Missouri's abortion restrictions would be examined.²⁶⁶ The judge did not agree.²⁶⁷ On September 6, 2024, four days before ballots were required to be finalized, Judge Christopher Limbaugh—cousin to the late conservative radio host Rush Limbaugh—ruled that the RRFI was insufficient for

²⁵⁵ Bayless, *supra* note 239.

²⁵⁶ *Id.*

²⁵⁷ *Id.*; *see also* MO. CONST. art. III, § 50 ("Petitions for laws shall contain not more than one subject . . .").

²⁵⁸ Bayless, *supra* note 239.

²⁵⁹ *Id.*

²⁶⁰ *Id.*; *see also* Tessa Weinberg, *Judge Dismisses Lawsuit that Sought to Block Missouri Marijuana Legalization from Ballot*, MO. INDEP. (Sept. 9, 2022), <https://missouriindependent.com/2022/09/09/judge-dismisses-lawsuit-that-sought-to-block-missouri-marijuana-legalization-from-ballot/>.

²⁶¹ Weinberg, *supra* note 260.

²⁶² *Id.*; *see* Bayless, *supra* note 239.

²⁶³ Weinberg, *supra* note 260.

²⁶⁴ *Id.*

²⁶⁵ Bayless, *supra* note 239; Kate Zernike, *Missouri Judge Rules That Abortion Ballot Measure Is Invalid*, N.Y. TIMES (Sept. 7, 2024), <https://www.nytimes.com/2024/09/07/us/missouri-abortion-ballot-measure-invalid.html>.

²⁶⁶ Anna Sporre, *Missouri Supreme Court Rules Amendment Legalizing Abortion Will Remain on Ballot*, MO. INDEP. (Sept. 10, 2024), <https://missouriindependent.com/2024/09/10/missouri-supreme-court-rules-amendment-legalizing-abortion-will-remain-on-ballot/>.

²⁶⁷ *Id.*

ballot certification.²⁶⁸ Judge Limbaugh reasoned that the amendment was unconstitutional because it failed to adequately include all the statutes that would be repealed if voters approved it.²⁶⁹ Notably, the 2024 certified sports betting legalization amendment and the amendment to issue a gambling boat license for a casino adjacent to the Bagnell Dam failed to do the same, yet they were unchallenged by Coleman and her affiliates.²⁷⁰

Missourians for Constitutional Freedom promptly filed an emergency appeal with the Missouri Court of Appeals.²⁷¹ The Court of Appeals immediately transferred the case to the Missouri Supreme Court.²⁷² The Missouri Supreme Court issued a stay of Judge Limbaugh's ruling pending further review and scheduled oral arguments for 8:30 a.m. on Tuesday, September 10, 2024. The day before oral argument, Secretary Ashcroft, who maintained at the September 6th trial that he properly certified the RRFI, reversed his position in his brief to the Missouri Supreme Court, arguing for the RRFI's removal from the ballot.²⁷³ In addition to strategically shifting his position, Ashcroft defied the court's order to keep the amendment on the ballot pending its review when he decertified the amendment and removed it from his official website.²⁷⁴ In response, Missourians for Constitutional Freedom filed a motion to hold Ashcroft in contempt, contending that Ashcroft's unprecedented ballot decertification was an attempt to render the appeal moot just hours before oral arguments.²⁷⁵

With less than three hours before the 5:00 p.m. deadline for ballot finalization, the Missouri Supreme Court issued a reversal.²⁷⁶ Their ruling directed Ashcroft to inform local election authorities that the RRFI must be included on the November 2024 ballot and to take all necessary steps to do so.²⁷⁷ The motion to hold Ashcroft in contempt was denied because his decertification of the amendment was rendered null and void following its initial certification on August 13th.²⁷⁸ Missourians for Constitutional Freedom declared the ruling was not only a victory for abortion rights, but also a triumph—albeit a temporary one—for the integrity of the initiative petition process itself.²⁷⁹

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See Bayless, *supra* note 239.

²⁷¹ *Supreme Court of Missouri to Hear Appeal to Keep Amendment 3 on the November Ballot*, ACLU, <https://www.aclu-mo.org/en/news/supreme-court-missouri-hear-appeal-keep-amendment-3-november-ballot> (last visited Sept. 11, 2024).

²⁷² *Id.*

²⁷³ Spoerre, *supra* note 266.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See Spoerre, *supra* note 266.

C. Courtroom Chess

On November 5, 2024, voters exercised their right to direct democracy and enshrined reproductive freedom in the Missouri Constitution, guaranteeing the right to an abortion up to the point of fetal viability.²⁸⁰ Yet, even after voters spoke decisively, the State, as predicted, continued to resist implementation of the people's will.²⁸¹ Shortly after its passage, health care providers challenged Missouri's total statutory ban on abortion.²⁸² In December 2024, Jackson County Circuit Judge Jerri Zhang issued a ruling that Missouri's abortion ban violated the newly amended Missouri Constitution.²⁸³ Two months later, in February 2025, Judge Zhang further ordered that the special licensing requirements for abortion clinics were discriminatory, effectively allowing abortions to resume in Missouri.²⁸⁴ These rulings, taken together, briefly restored access to abortion for the first time since *Dobbs* was decided in June 2022.²⁸⁵

But the State was not finished. On May 27, 2025, the Missouri Supreme Court unexpectedly vacated Judge Zhang's orders and instructed her to reissue her ruling with different reasoning—a procedural move that halted voter-approved abortion access.²⁸⁶ When Judge Zhang reinstated the temporary injunction on July 3, then-Attorney General Andrew Bailey immediately pledged to appeal.²⁸⁷ After Bailey resigned to take a federal post, Catherine Hanaway (R), Missouri's newly appointed attorney general, continued the State's campaign against the will of the voters.²⁸⁸ In October 2025, the Missouri Court of Appeals unanimously upheld Judge Zhang's injunction, concluding that the lower court had not abused its discretion in temporarily lifting Missouri's restrictive licensing requirements. The ruling finally allowed outpatient abortion providers to resume operating—nearly a year after voters approved the RRFI.²⁸⁹

This anti-democratic saga underscores a recurring theme in Missouri's *Dobbs* era landscape: Even before RRFI's passage—and now after it—the State has persisted in waging legal and procedural battles to roll back rights that the citizenry has plainly approved.²⁹⁰ As the plaintiffs—Comprehensive Health of Planned Parenthood Great Plains, Planned Parenthood Great Rivers, and the ACLU of Missouri—observed, the appellate court's decision “affirmed that Missourians can continue to access abortion care where they live.”²⁹¹ However, the court's ruling may only temporarily halt what has become a relentless campaign

²⁸⁰ Missouri Amendment 3, *supra* note 33.

²⁸¹ Richey, *supra* note 231.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Richey, *supra* note 231.

²⁸⁸ *Id.*

²⁸⁹ Comprehensive Health of Planned Parenthood Great Plains v. State, WD 88244, 2025 WL 2907584 (W.D. Mo. Oct. 14, 2025).

²⁹⁰ Richey, *supra* note 231.

²⁹¹ *Id.*

by Missouri officials to undermine both reproductive freedom and the people's power to govern themselves through the initiative petition process.

D. The General Assembly's Legislatively Referred Amendment to Repeal the RRFI and Reinstatement of an Abortion Ban

Alongside its legal efforts, the General Assembly, rather than accepting the people's will, moved to repeal the RRFI. In May 2025—just six months after Missouri voters approved the RRFI—the General Assembly passed a legislatively referred constitutional amendment that would eliminate the RRFI and reinstate the State's total abortion ban, permitting exceptions only for rape and incest up to twelve weeks' gestation.²⁹² This anti-abortion measure is slated to appear in 2026 alongside the measure to raise the threshold to pass citizen-led constitutional amendments.²⁹³ It too contains ballot candy, most notably banning sex change operations for transgender minors—something already illegal in Missouri²⁹⁴—and deceptively fails to mention that most abortions would be banned.²⁹⁵ The amendment will appear on the ballot as follows:

Shall the Missouri Constitution be amended to:

Guarantee women's medical care for emergencies, ectopic pregnancies, and miscarriages;

Ensure women's safety during abortions;

Ensure parental consent for minors;

Repeal Article I, section 36, approved in 2024; allow abortions for medical emergencies, fetal anomalies, rape, and incest; and

*Prohibit sex-change procedures for children?*²⁹⁶

The General Assembly advanced its disguised abortion ban amendment using nearly identical tactics to those employed during the special session to raise the initiative petition threshold—a sleight of hand relying on a series of rare

²⁹² David A. Lieb, *Missouri Lawmakers Pass Referendum Seeking to Repeal Abortion-rights Amendment Approved by Voters Last Year*, PBS (May 15, 2025, 2:22 PM), <https://www.pbs.org/newshour/politics/missouri-lawmakers-pass-referendum-seeking-to-repeal-abortion-rights-amendment-approved-by-voters-last-year>.

²⁹³ *See id.*; Anna Sporre, *Judge Approves Ballot Language for Amendment Reinstating Missouri Abortion Ban*, MO. INDEP. (Oct. 7, 2025, 4:10 PM), <https://missouriindependent.com/2025/10/07/missouri-abortion-ban-amendment-ballot-language-2026/>.

²⁹⁴ MO. REV. STAT. § 191.1720.3 (2023) (“A health care provider shall not knowingly perform a gender transition surgery on any individual under eighteen years of age.”).

²⁹⁵ *See Sporre, supra* note 293 (despite deliberately not mentioning that upon approval it will ban most abortions, Circuit Judge Daniel Green ruled the amendment's language is fair and sufficient).

²⁹⁶ 2026 Ballot Measures, *supra* note 203 (italics added).

procedural maneuvers to silence debate and push the measure through with a 21–11 vote.²⁹⁷ Protesters in the gallery erupted immediately after the Senate vote, chanting “Stop the ban!” before being abruptly escorted out of the chamber.²⁹⁸ State Senator Brian Williams (D-North St. Louis County) declared that “our rights are under attack,” accusing Republicans of attempting to overturn the will of the voters.²⁹⁹ Democratic leaders vowed to retaliate by slowing Senate operations in next year’s legislative session.³⁰⁰ Only time will tell if slowing down operations will have any impact on a Republican supermajority that is unafraid to disregard decades of norms and procedures to impose its ideological agenda on Missourians.

Taken together, the General Assembly’s strategy is indisputable. By deceiving voters into simultaneously rolling back abortion rights through a new constitutional amendment and raising the initiative petition threshold to near-impossible levels, legislators aim to foreclose any future citizen-led effort to enshrine any substantive due process right in the Missouri Constitution. If successful, the General Assembly will cement its monopoly over policymaking, extending its control from the public sphere into the most private corners of Missourians’ lives.

It is truly regrettable that more than a century after the establishment of the initiative petition process, Missourians face an intense, highly coordinated assault on their voting power from their own representatives. The motto affixed on the Missouri flag, “Salus Populi Suprema lex Esto,” meaning “Let the welfare of the people be the supreme law,” underscores the principle of prioritizing the citizenry’s interest above all else in governance.³⁰¹ The Missouri government, which is supposed to protect and uphold this motto, has neglected its true meaning, choosing to prioritize personal political interests over the interests of the people.³⁰²

Now is the time for Missourians to act. The State has played its hand by demonstrating it is not in the business of protecting the people’s voice.³⁰³ The direct democracy rights Missourians fought vigorously for in 1907 are on the brink of collapse.³⁰⁴ Missouri voters must take the lead to end the State’s ongoing assault on majority rule before it is too late.

VI. PROTECTING MAJORITY RULE

In assessing potential remedies, there is not a single, catch-all solution to preserving majority rule in Missouri. While it is true that Missouri officials use multiple anti-democratic methods to curtail the initiative petition process, the threat most imminent to direct democracy is the General Assembly’s 2026 ballot

²⁹⁷ Lieb, *supra* note 292.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ See *State Seal*, MO. SEC’Y OF STATE, <https://www.sos.mo.gov/symbol/seal> (last visited Sept. 3, 2025).

³⁰² See Keller & Spoerre, *supra* note 15.

³⁰³ Ballentine, *supra* note 9; see Lieb, *supra* note 292; see Spoerre, *supra* note 293.

³⁰⁴ See Hancock, *supra* note 192.

measure to raise the initiative petition passage threshold.³⁰⁵ A passage threshold that would allow 5% of voters to defeat any citizen-led constitutional amendment, in effect, would render the initiative petition process obsolete.³⁰⁶ With a vote to silence the people's voice on the horizon, voter advocacy groups, engaged citizens, and pro-democracy lawmakers must join forces to run a vigorous campaign aimed at educating the public on the consequences of raising the initiative petition passage threshold. If the courts do not put a stop to the General Assembly's anti-democratic scheme to monopolize policymaking,³⁰⁷ today's advocates for majority rule will almost certainly need to employ the same tactic of a voter education campaign that direct democracy advocates successfully executed in 1907.

Tautologically, it may very well require the initiative petition process to save and preserve the initiative petition process. If voters see past this ballot-candy-infused measure to curtail direct democracy, it is of paramount importance that there be a citizen-led constitutional amendment to ban the General Assembly from placing its own questions on the ballot.³⁰⁸ As of 2025, several citizen-led proposals are under way that, if they secure the required number of valid signatures, could place a meaningful opportunity on the ballot to limit the General Assembly's ability to undermine the initiative petition process.³⁰⁹ If any such amendment succeeds, it would send a resounding message that the initiative petition process belongs to the *people* of Missouri, not the General Assembly.³¹⁰

The initiative petition process gives a voice to the voiceless, just as it was intended in 1907, when the process sought to break up the chokehold special interest groups had on the legislature—an idea echoed by former Governor Ashcroft's 1991 veto statement.³¹¹ If the General Assembly desires to enact a law, it can do so through its ordinary legislative channels. It has no place in proposing ballot initiatives, especially when such measures are intended to reverse the will of the voters or take away fundamental rights.

At the very least—if the General Assembly's 2026 attempt to silence Missourians fails—voters can and should organize for an amendment to prevent the inclusion of ballot candy embedded within legislatively referred initiatives. Missourians deserve to know what they are voting for and should have the right to be free from deceptive ballot language that intends to trick the ordinary voter.³¹²

Ultimately, in 2026, both majority rule and the right to reproductive freedom face an imminent threat. The State is attempting to deceive voters into reinstating a total abortion ban—one overturned by a majority of Missourians in

³⁰⁵ See 2026 Ballot Measures, *supra* note 203; see Hancock, *supra* note 192.

³⁰⁶ Hanshaw & Spoerre, *supra* note 15.

³⁰⁷ See generally Hancock, *supra* note 42 (mentioning Missouri court battle over the inclusion ballot candy in the General Assembly's proposal to raise the initiative petition passage threshold).

³⁰⁸ See Johanson, *supra* note 95.

³⁰⁹ See generally Missouri 2026 Ballot Measures, *supra* note 43 (outlining different proposed citizen-led amendments to limit the General Assembly's ability to undermine the initiative petition process).

³¹⁰ See MO. CONST. art. III, § 49.

³¹¹ See *id.*; Barbara Shelly, *Voiceless in Missouri: How an Attack on Initiative Petitions Stifles Democracy*, MO. INDEP. (Apr. 1, 2024), <https://missouriindependent.com/2024/04/01/voiceless-in-missouri-how-an-attack-on-initiative-petitions-stifles-democracy/>; Bearden, *supra* note 153.

³¹² See Spoerre, *supra* note 31.

2024—while simultaneously raising the initiative petition threshold to near-impossible levels. If successful, the State would effectively prevent voters from restoring these rights or pursuing future reforms. If Missourians wish to preserve their political power, they must decisively reject any effort to strip them of their direct democracy rights. The torch Missourians carried in 1907 to protect direct democracy has been passed. Now is the time to launch a robust pro-democracy campaign to ensure that the General Assembly's actions can never threaten the people's voice again.

VII. CONCLUSION

For over a century, Missourians have enjoyed the right to have a direct voice in public policymaking.³¹³ Many of the popular policies Missourians enjoy today are a result of citizen-led constitutional amendments. After each election cycle, it grows more apparent that the divide between the wants of the General Assembly and the wants of Missouri voters is increasing.³¹⁴ Heading into 2026, the stakes have never been higher. The General Assembly has unapologetically orchestrated an effort to mislead voters into functionally abolishing the initiative petition process while simultaneously attempting to roll back the recently approved RRFI.³¹⁵

Even assuming the voters succeed against the General Assembly's 2026 anti-democratic gambit, there is much work to be done to protect majority rule because the war on direct democracy will not stop after 2026. Presuming the courts fail to check the General Assembly's power grab, a large-scale pro-democracy campaign will be needed to educate voters on how the General Assembly is attempting, and will continue to attempt well beyond 2026, an unprecedented consolidation of decision-making authority by undermining the people's century-old right to majority rule. During the 2026 election cycle, voters will have to navigate through deceptive ballot language to decide whether they want to silence their own voices and reverse rights they themselves recently approved. It is imperative that Missourians organize to send the General Assembly a message that cannot be ignored: the land does not vote—the *people* do, and no legislature can ever take that power away.

³¹³ Mo. Initiative & Referendum, *supra* note 43.

³¹⁴ See Keller & Spoerre, *supra* note 15; see Hancock, *supra* note 192.

³¹⁵ Hancock, *supra* note 192; Lieb, *supra* note 292.

SEEING RED AGAIN: BALANCING SAFETY AND PRIVACY TO OVERCOME CHALLENGES TO AUTOMATED TRAFFIC ENFORCEMENT SYSTEMS (ATES)

Jonathan LacKamp*

I. INTRODUCTION

According to the Governors Association for Highway Safety, traffic deaths have surged 30% over the last decade, with over 10,000 more annually in 2023 than in 2013.¹ A study from the Insurance Institute for Highway Safety (IIHS) found that 1,086 people were killed in 2023 in crashes that involved vehicles running red lights.² Half those killed were pedestrians, bicyclists, and occupants of vehicles driven by someone other than the red-light-runner.³ That same year, 136,000 people were injured in similar crashes.⁴ A study conducted in Fairfax, Virginia, prior to the city's use of red light cameras, found that on average a motorist ran a red light every 20 minutes.⁵ In a regional example, the city of Hannibal, Missouri, found more than 20 violations in a 24-hour period at a single traffic light.⁶ Red light running crashes tend to be severe, right-angle ("T-bone") collisions that increase the rate of fatalities and injuries.⁷ This problem directly affects the safety of all motorists, bicyclists, and pedestrians utilizing Missouri's roadways. The large number of crashes also indirectly affects the automotive insurance rates all motorists must pay as well as the allocation of scarce first-responder resources.

The use of Automated Traffic Enforcement Systems (ATES), commonly referred to as "red light cameras," can reduce fatal accidents from running red

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¹ *Automated Enforcement in a New Era*, GOVERNOR'S HIGHWAY SAFETY ASS'N, at 4 (2023), https://www.ghsa.org/sites/default/files/2024-12/AE_newera_12-5-23_0.pdf (last visited Sept. 14, 2025).

² Wen Hu, *Red Light Running*, INS. INST. FOR HIGHWAY SAFETY (July 2025), <https://www.iihs.org/topics/red-light-running>.

³ *Id.*

⁴ *Id.*

⁵ *Id.* (citing Richard A. Retting, et. al., *Evaluation of Red Light Camera Enforcement in Fairfax, Va., USA*, ITE J. (Aug. 1999)).

⁶ *Red Light Cameras*, HANNIBAL POLICE DEPARTMENT, <https://www.hannibalpd.com/citizens/red-light-cameras/> (last visited Sept. 10, 2025) [hereinafter *Red Light Cameras*].

⁷ *Safety Impact of Speed and Red Light Cameras*, CONG. RSCH. SERV., at 6 (Sept. 28, 2020), <https://www.congress.gov/crs-product/R46552> (last visited Sept. 14, 2025, 8:46 PM).

lights by 21% and the rate of all other types of fatal crashes at signaled intersections by 14%, all while conserving police resources for emergencies and violent crime.⁸

Despite these benefits, Missouri courts have held ATES criminal statutes unenforceable in several key decisions: in *Tupper v. City of St. Louis*, because of an unconstitutional shift of the burden of persuasion to the defendant for an alleged crime, unless the operator is identified by more invasive technology;⁹ in *City of St. Peters v. Roeder*, because of a conflict with the statutory requirements of the operator points system;¹⁰ and in *Smith v. City of St. Louis*, for defective notice for fines that violated the procedural due process rights of alleged violators.¹¹

By clearly defining a civil alternative to criminal enforcement, other states¹² have been able to use this effective traffic enforcement method without a successful legal challenge to their governing statutes. If the Missouri General Assembly passed a similar civil penalty statute, it would provide a firm legal footing for municipalities and counties to utilize this technology to increase roadway safety, without those local laws being subject to the fatal constitutional and statutory challenges of prior criminal statutes or requiring law enforcement agencies to use invasive personal surveillance technology to overcome those challenges. For many opponents the potential violations of personal privacy, especially though the use of facial recognition technology or AI (artificial intelligence) assisted cataloging of motorist characteristics, drives their resistance to ATES.

This Comment will describe in section II why an ATES solution should be used to mitigate traffic hazards and how these systems work in practice. Section III is a brief description of the history of ATES statutes in Missouri and the challenges in the three principal cases that largely led to their downfall. Section IV is a point-by-point description of how the proposed legislation overcomes challenges regarding: the amount of fine, non-assessment of operator points, effects on commercial operators, lack of notice, enforcement mechanisms, and unconstitutionally shifting the burden of proof to the accused. Section V is a discussion containing both a comparison of the proposed statute to similar statutes of other states, and an analysis of potential allies and adversaries of the proposed

⁸ Hu, *supra* note 2 (citing Wen Hu and Jessica B. Cicchino, *Effects of turning on and off red light cameras on fatal crashes in large U.S. cities*, J. OF SAFETY RSCH. (June 2017)); GOVERNOR'S HIGHWAY SAFETY ASS'N, *supra* note 1, at 11 (discounting counterargument that rear-end collisions from drivers suddenly stopping creates an equivalent safety hazard to right-angle crashes).

⁹ *Tupper v. City of St. Louis*, 468 S.W.3d 360, 376 (Mo. 2015) (finding ordinance created a rebuttable presumption that improperly shifts the burden of persuasion onto the defendant to prove that defendant was not the operating the vehicle at the time of violation).

¹⁰ *City of St. Peters v. Roeder*, 466 S.W.3d 538, 549 (Mo. 2015) (finding ordinance creating a moving violation under RSMo 302.302.1, but for which operator points cannot be assessed, conflicts with state law mandating points be assessed, and the ordinance is thus void) [hereinafter referred to as "*Roeder*"].

¹¹ *Smith v. City of St. Louis*, 409 S.W.3d 404, 427 (Mo. Ct. App. 2013) (finding lack of an apparent choice for defendant to either pay fine or contest the charge on Notice of Violation intimidated defendant into paying without contest).

¹² See discussion *infra* Section V.A.1-3.

legislation in Missouri. Section VI is a conclusion and call to action. Section VII is an appendix with the full text of the proposed legislation.

II. USE OF ATES AS A TRAFFIC HAZARD SOLUTION

A. Why to Use ATES

The most important reason to utilize red light cameras as part of an ATES system is their effectiveness. Statistics from the City of Chicago show that since the program's adoption in 2005 intersections with red light cameras have experienced a 56% decrease in right-angle crashes, a 52% decrease in all crashes, a 39% decrease in crashes resulting in an injury, and a 49% decrease in crashes involving a pedestrian.¹³ Conversely, in cities where programs were discontinued, the rates of accidents spiked. Houston, Texas, for example, saw a 23% increase in right-angle crashes after red light cameras were discontinued in the city.¹⁴ Use of cameras has also been shown to have a positive spillover effect on overall driver safety. In Oxnard, California, the introduction of red light cameras led to a 29% citywide reduction in injury-causing crashes at intersections (whether equipped with cameras or not), a 32% reduction in T-bone crashes, and a 68% reduction in T-bone crashes involving injury.¹⁵

Other than the raw numbers, other factors argue in favor of ATES. Policing of redlight infractions by automated enforcement can eliminate accusations of biased policing because cameras without facial recognition do not see race, nationality, gender, or other unique characteristics.¹⁶ The chances for a negative police interaction resulting in injury or death to an officer or motorist are likewise reduced. Even without a confrontation, the physical act of a police officer standing outside of a motorist's vehicle on the side of a busy street is inherently dangerous to both parties.¹⁷ Additionally, with a nationwide shortage of qualified law enforcement officers,¹⁸ the use of ATES allows police resources to be allocated to more serious crimes rather than routine traffic enforcement.

¹³ *Red Light Camera Enforcement*, CITY OF CHI., https://www.chicago.gov/city/en/depts/cdot/supp_info/red-light_cameraenforcement.html (last visited Sept. 10, 2025).

¹⁴ Hu, *supra* note 2 (citing Myunghoon Ko, et. al., *Effects of Red Light Running Camera Systems Installation and then Deactivation on Intersection Safety*, J. OF SAFETY RSCH. (Sept. 2017)).

¹⁵ *Id.* (citing Richard A. Retting and Sergey Y. Kyrychenko, *Reductions in Injury Crashes Associated with Red Light Camera Enforcement in Oxnard, California*, AM. J. OF PUB. HEALTH (Nov. 2002)).

¹⁶ GOVERNOR'S HIGHWAY SAFETY ASS'N, *supra* note 1.

¹⁷ *See Law Enforcement Officers Killed and Assaulted (LEOKA)*, FBI CRIME DATA EXPLORER, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/le/leoka> (last visited Sept. 14, 2025, 11:55 PM) (showing that between 2021 and 2025 out of the total accidental deaths per year an average of 25% were officers "stuck as pedestrians" outside of their vehicles).

¹⁸ *The State of Recruitment & Retention: A Continuing Crisis for Policing: 2024 Survey Results*, INT'L ASS'N OF CHIEFS OF POLICE, at 10 (2024), https://www.theiacp.org/sites/default/files/2024-11/IACP_Recruitment_Report_Survey.pdf (last visited Sept. 22, 2025, 11:25 PM) (finding about 65% of respondents reported reducing services or specialized units because of staffing challenges,

ATES is also an enforcement method that can literally pay for itself. Most automated traffic enforcement systems are offered as turn-key systems from a professional vendor who offers all of the equipment and technical support for the system.¹⁹ The compensation method for the vendor may vary from a flat-fee for the leasing of the equipment, a payment-per-citation plan, or a mixed or tiered approach between the personnel and equipment cost.²⁰ The contract specifics will be handled by the relevant municipality or county after legal review. However, it is important for decisionmakers to note that the costs of implementation are typically covered by the programs' own revenues and are not additional drains on the human and financial resources of the state, as is the case with increased conventional traffic enforcement.²¹

B. How ATES Works in Practice

Red light cameras are triggered to photograph vehicles that go through signaled intersections while the red light is displayed indicating the driver has a duty to stop.²² Some systems photograph only the license plates while others attempt to identify the driver as well. This is a critical distinction when determining what type of liability—criminal or civil—can be assessed and what corresponding burden of proof must be met by the state. Many vendors perform an initial review to screen out defective or unusable photos before passing them on to law enforcement.²³ Typically, a sworn police officer then reviews the photos to determine if there is a legal violation or if any exception applies. If a violation is detected, a summons or citation is mailed to the owner and/or operator of the vehicle (depending on the statute), with notice that they can either pay the fine or attempt to contest the finding. It is important to note that automated enforcement

compared to only 25% in IACP's 2019 survey. "We . . . disbanded our Traffic Unit until traffic-related major injury/deaths became a major issue for our community.")

¹⁹ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE HIGHWAY SAFETY OFFICES 217 (13th ed. 2023); "*Cordon-Cross*" *Traffic Enforcement System*, SIMICON, <https://simicon.com/products/speed-and-traffic-enforcement/cordon-cross/> (last visited Sept. 10, 2025); *Red-Light Safety*, VERRAMOBILITY.COM (last visited Sept. 22, 2025, 12:29 PM), <https://www.verramobility.com/government/red-light-safety/>; *License Plate Readers*, FLOCKSAFETY.COM (last visited Sept. 23, 2025 12:22 AM), <https://www.flocksafety.com/products/license-plate-readers>.

²⁰ *Id.* (discussing setup of analogous speed cameras).

²¹ *Id.*

²² *Id.*

²³ *Id.*

is intended to augment, not replace, traditional enforcement by deterring routine, yet potentially tragic, traffic violations.²⁴

III. DOWNFALL OF THE ORIGINAL MISSOURI STATUTES:

A. A Story of Three Cases

The successful challenges by defendants to previous ATES statutes were based on the attempts of cities and counties to mix criminal and civil procedural requirements, which then led to the unconstitutional shifting of the burden of persuasion to defendants—*Tupper*,²⁵ a statutory conflict with state law—*Roeder*,²⁶ and procedural due process violations for defective notice of the rights of accused parties—*Smith*.²⁷ The rulings in these three cases will be explained in detail below. In the wake of the Missouri Supreme Court’s simultaneous rulings in *Tupper* and *Roeder*, many cities abandoned their ATES programs. Until recently, Hannibal was one of the only cities in Missouri that still operated an ATES system.²⁸ It was able to do so because the type of camera used provided an image that could prove *beyond a reasonable doubt* the identity of the *operator* of the vehicle to properly secure a criminal conviction.²⁹ In April 2024, St. Louis City passed new red light camera legislation, but just as in Hannibal, with a requirement for cameras capable of identifying both the vehicle and the operator.³⁰ While the city’s stated objective was traffic safety, the overall rationale for adoption was to give the “Police Department a new tool to curb traffic violence.”³¹ Reducing traffic violence is a laudable goal, but is nevertheless a different goal than safe driving, and in St. Louis, one with a commensurate cost to personal privacy. Similarly, Kansas City, Missouri passed a red light camera statute in September 2024, but again with a

²⁴ *Id.*

²⁵ *Tupper v. City of St. Louis*, 468 S.W.3d 360, 376 (Mo. 2015).

²⁶ *City of St. Peters v. Roeder*, 466 S.W.3d 338, 349-350 (Mo. 2015).

²⁷ *Smith v. City of St. Louis*, 409 S.W.3d 404, 427 (Mo. Ct. App. 2013).

²⁸ *Cf.* HANNIBAL, MO., CODE art. 9, § 17-508 (2013); *Red Light Cameras*, *supra* note 6.

²⁹ *See* HANNIBAL, MO., CODE art. 9, § 17-508 (2013); *Red Light Cameras*, *supra* note 6.

³⁰ ST. LOUIS, MO. CODE, TITLE 17, DIV. I. VEH. AND TRAF., §17.07.060 (2025) (Automated Traffic Enforcement Systems – Implementation, F. Probable Cause.) (“Probable cause for alleged traffic violations detected through the automated camera enforcement system created under this chapter may be deemed to exist if it is in compliance with Rule 37 and if the recorded images or other data show the following: (1) An alleged traffic violation; (2) The date and time . . . ; (3) The vehicle involved . . . ; (4) The letters or numbers on the vehicle’s license plate . . . ; (5) The face of the operator of the vehicle; (6) The traffic control signal while it is emitting a steady red signal, as applicable; and (7) The speed of the vehicle and the speed limit, as applicable. (8) Whether the vehicle came to a complete stop at a stop sign, . . . as applicable. For any alleged traffic violations, probable cause shall not exist unless the identity of the operator of the vehicle . . . is determined.”) (Ord. No. 71821, §7, 4-16-2024) (emphasis added).

³¹ Lauren Brennecke, *St. Louis Brings Back Red-light Cameras in Attempts to Deter Traffic Violence*, ST. LOUIS PUBLIC RADIO (Apr. 29, 2024), <https://www.stlpr.org/law-order/2024-04-29/st-louis-red-light-cameras-return> (last visited Sept. 22, 2025, 7:59 PM) (quoting Mayor Tishaura Jones).

requirement that the vehicle and the face of its operator be identified.³² Again the government's stated rationale was traffic safety, but "[T]he idea of being constantly watched behind the wheel raises concerns for many Kansas Citizens" based upon the type of camera employed.³³ As a local driver was quoted "I think there is always the risk that they [the government] are seeing more and knowing more than is necessary."³⁴

These more advanced cameras come with two important costs: a financial cost to obtain cameras capable of facial recognition, as opposed to merely license plate reading, and the privacy cost arising from cameras tracking the movement of Missouri residents, retaining images of their facial characteristics, and the subsequent storage and security of that data. Although statutory protections exist in the St. Louis and Kansas City ordinances, questions remain as to how this volume of data will be handled by both conventional human and emerging AI policing resources.³⁵ After a summary of the three principal Missouri cases, this Comment will examine how the proposed legislation overcomes the constitutional and statutory challenges posed by those cases while also protecting unsuspecting motorists from unnecessary surveillance.

B. A Preliminary Note on Due Process

At the center of the constitutional challenges to ATEs statutes are claims the statutes violate the right of the accused to due process of law. Discussions of due process are traditionally separated into procedural versus substantive concerns. The court in *Smith* stated that the role of the Missouri Supreme Court regarding procedural due process, as authorized by the state constitution, was to "establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law."³⁶ The purpose of these rules are to "implement a remedy for a violation of a right, promote the orderly administration of justice, provide a pattern of regularity of procedure within the court, and facilitate the effective flow of information."³⁷ In short, procedural due process governs *how* things must be done, and in what order, to guarantee a fair and reliable administrative process. The Missouri Supreme Court's holding in *Smith* rested squarely on the grounds of a procedural due process violation by the city because of the defects in its Notice of Violation.

Substantive due process, on the other hand, deals not with *how* a process is performed, but instead whether there is an intrinsic unfairness or illegitimacy as

³² KANSAS CITY, MO., CODE ART. XII, AUTOMATED CAMERA ENF'T OF TRAF. CONTROL REGL., § 70-961(e) (2025) (Probable Cause) ("(5) The face of the operator of the vehicle") (Ord. No. 240409, § 1, 9-12-24) (emphasis added).

³³ Malik Jackson, *Red Light and Speed Cameras Returning to Kansas City: Here's What You Need to Know*, FOX4KC.COM (Sept. 18, 2025), <https://fox4kc.com/news/red-light-and-speed-cameras-returning-to-kansas-city-heres-what-you-need-to-know/> (last visited Sept. 23, 2025, 7:05 AM).

³⁴ *Id.*

³⁵ See discussion *infra* Section V.B.2.

³⁶ *Smith v. City of St. Louis*, 409 S.W.3d 404, 415 (Mo. Ct. App. 2013) (quoting MO. CONST. art. V, § 5).

³⁷ *Id.* (quoting *Swofford v. State*, 323 S.W.3d 60, 63 (Mo. Ct. App. 2010)).

to *what* is required in the process. Two substantive due process concerns are addressed in *Tupper*: first, whether the statute’s rebuttable presumption that the owner of a vehicle is therefore also its operator is an impermissible shift of the burden of persuasion by the state to a defendant, and thus a violation of a fundamental right; second, whether the fine imposed was a “relatively small fine,” and thus not so punitive that despite its label as a civil penalty it should have been considered a criminal penalty with the resulting higher burden of proof for the state.

C. *Tupper v. City of St. Louis*

The case of *Tupper v. City of St. Louis* is addressed first because its challenge was based upon the basic constitutionality of ATES enforcement. Its holding addressed whether the State *can* permissibly use ATES under any circumstances, whereas the other two principal cases were more focused on *how* such enforcement was implemented. Between March 2012 and September 2013, the two plaintiffs in *Tupper* were served notices stating that there was probable cause to believe that they had violated City of St. Louis Ordinance 66868 for failing to stop at red lights monitored by ATES.³⁸ The cameras recorded only the license plate numbers of the offending vehicles and not the faces of the drivers.³⁹ Each plaintiff also separately received a letter from a law firm employed by the city stating that they owed a \$100 fine.⁴⁰ Ordinance 66868 stated that:

If the City proves: 1) that a motor vehicle was being operated or used; 2) that the operation or use of the motor vehicle was in violation of the Traffic Code Ordinance . . . and 3) that the defendant is the Owner of the motor vehicle in question, then: B. A *rebuttable presumption exists that such Owner of the motor vehicle operated or used in violation of the Traffic Code Ordinance . . . was the operator of the vehicle at the time and place the violation was captured by the Automated Traffic Control System Record.*⁴¹

Plaintiffs subsequently sued to both enjoin enforcement and request declaratory relief based upon five grounds, four of which are relevant to the Comment: (1) conflict with state law by failing to assess points for a moving violation (this is the main issue addressed in *Roeder*, which was simultaneously before the Missouri Supreme Court); (2) use of an inadequate form of notice that violates Missouri Supreme Court Rule 37.33⁴² and plaintiffs’ due process rights (the main issue in *Smith*—the principal “notice” case—which was ruled upon during the initial litigation in *Tupper*); (3) inclusion of a “rat out” provision that

³⁸ *Tupper v. City of St. Louis*, 468 S.W.3d 360, 366 (Mo. 2015).

³⁹ *Id.* at 365.

⁴⁰ *Id.* at 366 (noting in FN 1 that neither ordinance 66868 nor the ordinance prohibiting running a red light provided a penalty or fine, but that by municipal order a judge of the municipal division set a \$100 fine for red light violations issued under the camera enforce system ordinance).

⁴¹ *Id.* at 365 (emphasis added).

⁴² See MO. SUP. CT. R. 37.33.

unconstitutionally shifts the city's burden of proof; and (4) *creation of an unconstitutional presumption that the owner of the motor vehicle was driving the vehicle at the time and place of the violation.*⁴³

Under Ordinance 88686, the criminal defendant effectively bore the burden placed upon him or her to *disprove* an element of the prosecution's case, without the state first having to prove it. The ordinance stated a "[A] rebuttable presumption exists that such Owner of the motor vehicle operated or used in violation of the Traffic Code Ordinance . . . [and] was the operator of the vehicle at the time and place the violation was captured by the Automated Traffic Control System Record."⁴⁴

Although the court addressed multiple issues in its discussion, to include the amount of the fine which will be addressed later, it ultimately held the ordinance to be unconstitutional "because it create[ed] a rebuttable presumption that improperly shift[ed] the burden of persuasion onto the defendant to prove that he or she was not operating the motor vehicle at the time of the violation."⁴⁵ The court cited a U.S. Supreme Court decision from 1979, *Sandstrom v. Montana*, which held unconstitutional those mandatory rebuttable presumptions that have the effect of shifting the burden of persuasion to the defendant on an element of the crime charged, because they violate the accused's due process right to have the prosecution prove *beyond a reasonable doubt* every fact necessary to constitute the crime charged.⁴⁶

However, if instead the burden of proof was a civil *preponderance of the evidence* standard, then a rebuttable presumption would generally be permitted.⁴⁷ This fact is especially relevant for municipal enforcement because municipal violations are civil proceedings containing quasi-criminal aspects.⁴⁸ Rule 37, which governs ordinance violations, mirrors the rules for criminal proceedings and thus requires the city to prove that defendants are guilty *beyond a reasonable doubt* as opposed to the civil *preponderance of the evidence* standard.⁴⁹ To avoid this issue of defaulting to the stricter standard, the burden of persuasion desired by the jurisdiction may be expressly stated.⁵⁰ The court should then "give effect to the intent of the enacting legislative body" as reflected in the plain and ordinary meaning of the ordinance's language absent an explicit definition in the ordinance.⁵¹

Under the supporting case *City of St. Louis v. Cook*, the court held that it was permissible for the state to make the rebuttable presumption that the registered owner of a vehicle is liable for violations for parking tickets incurred by the

⁴³ *Tupper*, 468 S.W.3d at 366.

⁴⁴ *Id.* at 365.

⁴⁵ *Id.* at 376.

⁴⁶ *Id.* at 372-73 (citing *Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979)).

⁴⁷ *Id.* at 371 (citing *Deck v. Teasley*, 322 S.W.3d 536, 541-42 (Mo. 2010)).

⁴⁸ *State ex rel. Kansas City v. Meyers*, 513 S.W.2d 414, 416 (Mo. 1974).

⁴⁹ *Tupper*, 468 S.W.3d at 371-72 (citing *City of Kansas City v. Oxley*, 579 S.W.2d 113, 114 (Mo. 1979); *City of Kansas City v. Tyson*, 169 S.W.3d 927, 928 (Mo. Ct. App. 2005)).

⁵⁰ *See Tupper*, 468 S.W.3d at 371 (quoting *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. 2000)).

⁵¹ *Id.* (quoting *State ex rel. Teefey*, 24 S.W.3d at 684).

vehicle.⁵² In *Cook* the defendant was charged with an illegal parking violation.⁵³ No other direct evidence was introduced to identify the person who had actually parked the vehicle, nor did the defendant introduce any evidence to disprove the allegation.⁵⁴ Subsequently, the defendant sued claiming the ticket was unconstitutional as a matter of substantive due process and therefore void as it deprived the defendant “‘of life, liberty or property without due process of law,’ . . . and in that it compel[led] a person ‘to testify against himself in a criminal cause,’” in violation of both the Missouri and U.S. Constitutions.⁵⁵ The claim asserted the ordinance violated “the fundamental rules that a defendant is presumed to be innocent; that the State must prove him guilty beyond a reasonable doubt; and that he cannot be prejudiced by his failure to testify.”⁵⁶ In short, the plaintiff in *Cook* alleged an abrogation of the fundamental right to be considered innocent until proven guilty.

However, the court in *Cook* held that the inference authorized by the ordinance was a reasonable one.⁵⁷ The court stated “[t]he ordinance does not make any inferred fact conclusive. And the ordinance does not require that a defendant testify; nor does it deny him his right to make out his defense, or to testify.”⁵⁸ The court continued by stating that:

Giving a regard to due process, the power to provide such an evidentiary rule is qualified in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be inferred . . . *the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary.*⁵⁹

The court went on to explain that rules of evidence stating that a fact shown may support an “inference of the ultimate or main fact to be proved are well within the settled power of the legislative body” and therefore “they do not violate provisions of the federal or state constitutions.”⁶⁰

⁵² *Id.* at 372 n.11 (citing *City of St. Louis v. Cook*, 221 S.W.2d 468, 470 (Mo. 1949) (“From a practical standpoint it would be impossible for the police department of the City of St. Louis to keep a watch over all parked vehicles to ascertain who in fact operates them. In such a situation and in view of the purpose of City’s traffic regulations, the City having shown the vehicle to have been parked in violation of the regulatory ordinance and having shown a defendant to be the person in whose name the vehicle is registered, it would seem an owner-registrant, a defendant, could not be said to be put to too great an inconvenience or to an unreasonable hardship in making an explanation if he desires.”)).

⁵³ *Cook*, 221 S.W.2d at 468.

⁵⁴ *Id.* at 469.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 471.

⁵⁸ *Id.*

⁵⁹ *Cook*, 221 S.W.2d at 470 (emphasis added) (citing *State v. Shelby*, 64 S.W.2d 269 (Mo. 1933); *Yee Hem v. United States*, 268 U.S. 178 (1925); *People v. Kayne*, 282 N.W. 248 (Mich. 1938)).

⁶⁰ *Id.* at 469–70.

Therefore, under the holdings in *Deck v. Teasley*, *State ex rel. Teehey*, and *Cook* itself, all of which are cited in *Tupper*,⁶¹ the following rule can be constructed: (1) if the burden of proof is a civil *preponderance of the evidence* standard, then a rebuttable presumption is generally permitted;⁶² (2) the default burden in quasi-criminal hearings at a municipal level of *beyond a reasonable doubt* may be superseded by expressly stating another burden;⁶³ and (3) it is permissible for the state to make the rebuttable presumption that the registered owner of a vehicle is liable for violations incurred by that vehicle without the state having to also prove that the registered owner was the operator at the time of the offense.⁶⁴ By properly constructing the proposed statute, a *substantive due process* challenge based upon a burden of proof arguments can be overcome. How the proposed statute accomplishes this, and how it also addresses the issue of the appropriate amount of fines, are detailed under “Issues Addressed by the Proposed Legislation” in section IV below.

D. *City of St. Peters v. Roeder*

Although several constitutional issues are discussed in *City of St. Peters v. Roeder*, the court decided against the state based upon a clear-cut issue of poor statutory construction. The defendant in *Roeder* was charged with violating city ordinance 4536 by failing to stop at a red light monitored by an automated enforcement system and was issued a \$110 fine.⁶⁵ Unlike the ATES camera in *Tupper*, here there was a photo of not only the vehicle’s license plate, but also the operator’s face.⁶⁶ As such, the law likely could have survived the rebuttable presumption that the owner of the vehicle was also necessarily its driver. This is the presumption that proved fatal to the ordinance at issue in *Tupper*. Despite a similar claim of impermissible burden shifting raised by the defendant, the Court did not reach that conclusion in *Roeder* because the statute had another, more obvious flaw.⁶⁷ It stated that in “no case shall points be assessed against any person . . . for a conviction of a violation of the City Traffic Code detected through the automated red light enforcement system.”⁶⁸ The notice sent to the defendant also stated that no operator points would be assessed against the defendant’s driving record.⁶⁹

Prior to trial, defendant filed a motion to dismiss, asserting that the notice of violation sent by the city: (1) violated her due process rights by not providing statements showing probable cause to believe she was operating the motor vehicle

⁶¹ *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371-72 (Mo. 2015).

⁶² *See id.* at 371 (citing *Deck v. Teasley*, 322 S.W.3d 536, 541-42 (Mo. 2010)).

⁶³ *See id.* at 372 (quoting *City of Kansas City v. Oxley*, 579 S.W.2d 113, 114 (Mo. 1979)).

⁶⁴ *See Cook*, 221 S.W.2d at 468-71.

⁶⁵ *City of St. Peters v. Roeder*, 466 S.W.3d 538, 541-42 (Mo. 2015).

⁶⁶ *Id.* at 541.

⁶⁷ *Id.* at 553 (Draper, J. dissenting, noting he would have held as impermissible the rebuttable presumption that the owner is necessarily the driver, and that the driver must therefore provide evidence that the vehicle was sold or stolen or identify another driver in order to clear his name).

⁶⁸ *Id.* at 541.

⁶⁹ *Id.*

at the time of the violation and creating a rebuttable presumption that the owner of the motor vehicle was the operator at the time the violation occurred (the same allegation as in *Tupper*); (2) that ordinance 4536 conflicted with state law by not assessing points; and (3) that the ordinance was made in violation of proper rulemaking processes.⁷⁰ Running a red light was a “moving violation” under Missouri Revised Statutes § 302.010(13).⁷¹ Once categorized as a “moving violation,” assessment of points to the operator was mandatory under Missouri Revised Statutes § 302.302.1.⁷² Therefore, the defendant argued that because it did not assess points for a moving violation, ordinance 4536 was void.

The defendant’s motion to dismiss was denied, however, and she later was convicted by a jury.⁷³ But after the Missouri Eastern District Court of Appeals’ ruling in *Unverferth v. City of Florissant* that held a similar ordinance conflicting with state law was void, the defendant filed a renewed motion for acquittal.⁷⁴ The trial court sustained the motion to acquit and dismissed the charges.⁷⁵ The court of appeals subsequently upheld the acquittal after an appeal from the city.⁷⁶ Upon further appeal, the Missouri Supreme Court held that the provision was invalid, but was severable from the rest of ordinance, because the city would have likely enacted it without the “No Points” provision.⁷⁷ *Roeder* notes that the “purpose of the points system . . . was to protect the public,” that this purpose indicated the legislative intent to protect the public, and that intent is why the assessment was mandatory.⁷⁸ In his dissent Judge Wilson speculated that the “no-points” element was likely added to make the ordinance more politically palatable and was “essential to the realpolitik of this ordinance, i.e., to striking a balance between the desire to raise revenues and the risk of outraging its citizens.”⁷⁹ While this is quite likely true, the fact remains that by prohibiting what state law permits, the municipal statute was in conflict with state law and thus void.

⁷⁰ *See id.* at 542.

⁷¹ MO. REV. STAT. § 302.010(13) (“‘Moving violation’, that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving . . . without a valid motor vehicle registration license, or violations . . . relating to sizes and weights of vehicles.”).

⁷² MO. REV. STAT. § 302.302.1 (“The director of revenue shall put into effect a point system for the suspension and revocation of licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows: (1) Any moving violation of a state law or county or municipal or federal traffic ordinance or regulation not listed in this section . . . 2 points.”) (emphasis added).

⁷³ *Roeder*, 466 S.W.3d at 542.

⁷⁴ *Id.*; *see also* *Unverferth v. City of Florissant*, 419 S.W.3d 76, 96–97 (Mo. Ct. App. 2013) (“Violations of the Ordinance constitute moving violations under state statute, yet Florissant has classified violations of the Ordinance as non-moving infractions for which no points may be assessed. A municipal ordinance is void if it conflicts with the general laws of the state.”).

⁷⁵ *Roeder*, 466 S.W.3d at 543.

⁷⁶ *Id.* at 550.

⁷⁷ *Id.* at 548.

⁷⁸ *Id.* at 546–47 (citing *Rudd v. David*, 444 S.W.2d 457, 459 (Mo. 1969)).

⁷⁹ *Roeder*, 466 S.W.3d at 558.

E. *Smith v. City of St. Louis*

In 2007 and 2009, the plaintiffs in *Smith v. City of St. Louis* received a Notice of Violation for red light camera tickets issued under the same St. Louis City Ordinance 66868 later at issue in *Tupper*.⁸⁰ The Notice of Violation directed the owner to pay a \$100 fine or fill out the attached affidavit of non-responsibility, and stated that payment of the fine constituted an admission of guilt or liability. The Notice of Violation also stated that if the owner failed to pay the fine by the due date or to appear in court on his or her court date, “further legal action may be taken against you by the City of St. Louis.”⁸¹ If an owner did not pay the fine by the due date indicated on the Notice of Violation, the city would mail a Final Notice to the owner.⁸² The Final Notice informed the owner that it was in his or her “best interest to pay [the fine] immediately,” and that failure to respond to the Final Notice might result in further legal action by the city.⁸³ Upon receiving the Final Notice, one of the plaintiffs paid immediately out of fear that a warrant might be issued for her arrest based upon its language.⁸⁴

In 2010, plaintiffs filed a class action lawsuit alleging, among other things, that Ordinance 66868 violated the due process guarantees of Article I, § 10 of the Missouri Constitution.⁸⁵ Ultimately, the trial court ruled in favor of plaintiffs as to the *procedural due process* complaint, “because *the Notice does not inform the accused of the right to contest the ticket in court.*”⁸⁶ Subsequently, the Court of Appeals reviewed the case *de novo*, and likewise found that the city’s Notice of Violation did not include the “mandatory language” that those who receive a Notice of Violation must respond to the violation notice by *either* paying the fine *or* pleading not guilty and appearing at trial, “and, therefore fail[ed] to provide the recipient with a choice.”⁸⁷ As noted above, under Article V of the Missouri Constitution, the Missouri Supreme Court has the power to establish rules relating to practice, procedure, and pleading for all courts and administrative tribunals and these rules “shall have the force and effect of law.”⁸⁸ Under Rule 37.33(b):

When a violation has been designated by the court to be within the authority of a violation bureau . . . the accused shall also be provided the following information: (1) The specified fine and costs for the violation; and (2) That a person must respond to the violation notice by: (A) Paying the specified fine and court costs; or (B) *Pleading not guilty and appearing at trial.*⁸⁹

⁸⁰ *Smith v. City of St. Louis*, 409 S.W.3d 404, 407–408 (Mo. Ct. App. 2013).

⁸¹ *Id.* at 408.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 409.

⁸⁶ *Smith*, 409 S.W.3d at 409 (emphasis added).

⁸⁷ *Id.* at 417.

⁸⁸ *Id.* at 415.

⁸⁹ *Id.* at 416 (emphasis in the original).

Therefore, the court held:

[When a] violation falls under the authority of a violation bureau—as City assures us and the record indicates is the case here—City is required to inform individuals who receive a[n initial] Notice of Violation that they must respond to the violation notice by *either* paying the fine *or* pleading not guilty and appearing at trial.⁹⁰

This failure by the city to properly inform defendants of this critical choice violated the defendants’ *procedural due process* rights regarding *how* the law was enforced and therefore proved fatal to the statute.⁹¹

This Comment now turns to how the proposed legislation overcomes the constitutional and statutory challenges described in the principal cases in a point-by-point discussion of its clauses.

IV. ISSUES ADDRESSED BY THE PROPOSED LEGISLATION

A. Intent

The intent of the proposed statute is to improve roadway safety by deterring the dangerous operation of motor vehicles, while both conserving police resources and protecting the privacy of Missouri residents operating motor vehicles. This can be accomplished by expressly granting cities and counties the power to utilize Automated Traffic Enforcement Systems. The adoption of a civil enforcement mechanism allows the state to meet the goal of deterring unsafe driving without the negative secondary effects on government budgets and the privacy of citizens.

B. Amount of Fines

The amount of the fine is intended to be a deterrent to unsafe driving, not a punishment for a crime. The proposed statute Section 2, lines 23 to 27, states “Notwithstanding any provision of law to the contrary, any county, city, town, village, or municipality may assess a civil penalty, not to exceed fifty dollars, against the registered owner of a motor vehicle for the violation of a traffic law monitored by an automated traffic enforcement system.”⁹² In the supporting case *City of Kansas City v. Hertz Corp.*, a rental car company was held liable for a \$20 ticket that a renter incurred for illegally parking.⁹³ The defendant company sued, asking whether a parking ordinance which imposes a penalty of a small fine upon the car owner, even though the owner did not personally commit the violation nor authorize it, but merely permitted the driver to operate the owner’s car, was in

⁹⁰ *Id.* at 417 (emphasis in the original).

⁹¹ *See id.* at 415.

⁹² All references to “sections” will be to the proposed statute. *See* lines 23-27 *infra* Section VII: Appendix.

⁹³ *City of Kansas City v. Hertz Corp.*, 499 S.W.2d 449, 450 (Mo. 1973).

violation of the due process clauses of the Missouri and U.S. Constitutions.⁹⁴ If upheld, this would be an example of a substantive due process violation, as it involves the content—the *what*—of the statute, as opposed to the process—the *how*—required by the statute. However, the court held that it was not a violation of due process: “The maximum penalty is a *relatively small fine* and no potential incarceration. There is no public stigma attached to receiving a parking ticket and it has no effect upon one’s driver’s license or insurance cost.”⁹⁵ In *Tupper* however, the court found a \$100 fine for a red light camera violation to be too high to fall under the category of a “relatively small fine.”⁹⁶ *Tupper* surmises that the amount of the fine should be a determinative factor, along with the verbiage of the statute and the effect of the ticket on the driver’s driving record, as to whether a criminal instead of civil burden of proof applies to municipal statutes.⁹⁷ A principal benefit of a civil statute is the ability to use a lower burden of proof to prove a violation and thus remove the necessity of identifying the operator individually *beyond a reasonable doubt*. In 1973, the court held \$20 to be small enough to be considered “relatively small,” while in 2015 \$100 was not. Even discounting the effects of inflation over the past 50 years, it can be argued that the proposed statute’s maximum \$50 fine is still relatively small, and thus permissible in a civil statute, while still having sufficient bite to act as a deterrent.

C. Non-Assessment of Operator Points

Section 2, lines 27 to 31 of the proposed statute states “The penalty imposed shall not be deemed a moving violation and shall not be made part of the operating record of the person upon whom such liability is imposed. In no case shall points be assessed against any person under section 302.302 for a violation of this section.”⁹⁸ This clarifies that the statute does not seek to impose any criminal or administrative penalties against the registered owner as the *operator* of the vehicle as opposed to merely as its *owner*. As described above, the court in *Roeder* found unenforceable a statute where the municipality attempted to “split the baby” by seeking to hold the *operator*, not the *owner*, liable for the violation, while at the same time stating that “[i]n no case shall points be assessed against any person . . . for a conviction of a violation of the City Traffic Code detected through the automated red light enforcement system.”⁹⁹ The proposed statute avoids this entire issue by instead focusing on civil liability for the owner. The violation is not to be used as “*prima facie* evidence” that the registered owner was the operator, as the statute at issue in *Cook* stated regarding parking tickets, but rather to simply hold the registered owner accountable for acts occurring in their vehicle.¹⁰⁰ In sum, the

⁹⁴ *Id.* at 452.

⁹⁵ *Id.* at 453 (emphasis added).

⁹⁶ *Tupper v. City of St. Louis*, 468 S.W.3d 360, 372 (Mo. 2015).

⁹⁷ *See id.* at 371-72.

⁹⁸ *See* lines 27-31 *infra* Section VII: Appendix (referring to MO. REV. STAT. § 302.302).

⁹⁹ *City of St. Peters v. Roeder*, 466 S.W.3d 538, 541 (Mo. 2015); *see* § 302.010(13); § 302.302(1).

¹⁰⁰ *City of St. Louis v. Cook*, 221 S.W.2d 468 (Mo. 1949) (emphasis in the original); *see also* Idris

ability of the owner to limit their own potential liability by controlling who is allowed to operate their vehicle puts the onus on the owner, not the state, to police poor driving in a specific vehicle.

D. Commercial Operators

Section 2, lines 31 to 36, of the proposed statute state, “If the registered owner is the holder of a commercial driver’s license, the registered owner shall be liable for the civil penalty imposed under this subsection, but the violation shall not become part of the person’s CDLIS [Commercial Driver’s License Information System] driver record, as defined under section 302.700.”¹⁰¹ CDLIS reporting can be avoided because for the holder of a Commercial Driver’s License (CDL) no “conviction” or licensing action has occurred as defined by 49 C.F.R. § 384.225 – “CDLIS Driver Record Keeping.”¹⁰² As a civil penalty, the fine will not be construed to fall under the definition of “conviction” in 49 C.F.R. § 383.5 because there will be no attempt to determine the operator of the vehicle.¹⁰³ However, the registered owner is relieved of neither the civil liability for any fine nor of any reporting requirements under 49 C.F.R. Part 383.3 if they are a commercial operator.¹⁰⁴

E. Notice

Section 3, lines 37 to 60 (subsections 1 to 10) of the proposed statute describe the statute’s notice requirements, to include that notice be in writing, be sent within 30 days of the alleged violation, include the specific identifying characteristics of the vehicle charged, and contain warnings that “failure to pay the civil penalty or to contest liability in a timely manner is an admission of liability” and “that resolution may be required before a motor vehicle’s registration may be

v. City of Chi., Ill., 552 F.3d 564, 566 (7th Cir. 2009) (“Legal systems often achieve deterrence by imposing fines or penalties without fault. Consider, for example, a system that subjects to forfeiture any car used in committing a crime, even though the owner may have had nothing to do with the offense. *Bennis v. Michigan*, 516 U.S. 442, . . . (1996), holds that such a system is constitutional, because it increases owners’ vigilance.”).

¹⁰¹ See lines 31-36 *infra* Section VII: Appendix; § 302.700.2(5) (“CDLIS motor vehicle record (CDLIS MVR)’, a report generated from the CDLIS driver record which meets the requirements for access to CDLIS information and is provided by states to users authorized in 49 CFR 384, subject to the provisions of the Driver Privacy Protection Act, 18 U.S.C. Sections 2721 to 2725, et seq.”).

¹⁰² See 49 C.F.R. § 384.225 (2024) (requiring CDL holder to report “[A]ll convictions, disqualifications, and other licensing actions for violations of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed in any type of vehicle”).

¹⁰³ See 49 C.F.R. § 383.5 (2024) (“Conviction means an unvacated adjudication of guilt or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.”).

¹⁰⁴ See 49 C.F.R. § 383.3 (2024).

renewed.”¹⁰⁵ Section 3, lines 61 to 73 (subsection 11) explicitly states that the notice of violation must contain “a statement that the motor vehicle owner may elect to proceed by either paying the civil penalty *or* by challenging the charge in court, by mail, or by administrative hearing.”¹⁰⁶ As explained above, the court in *Smith* found that the “Notice of Violation must inform the ticket recipient of his or her option to plead not guilty and appear at trial.”¹⁰⁷ In *Smith*, initial notice only informed defendants that they had to pay the fine or send in an affidavit of non-responsibility naming who was driving, and thus failed to inform defendants of their due process rights to contest the ticket outright.¹⁰⁸ This was a violation of the *procedural* due process rights of alleged offenders because of *how* it deprived them of their property, in this case the fine amount, without a fair and reliable administrative process. As a remedy to this issue, the proposed statute explicitly states both the content of the notification and the defendant’s right to contest the assessed fine, which precludes due process challenges such as those made in *Smith*.

F. Enforcement Mechanism

Section 2¹⁰⁹ of the proposed statute expressly grants “any county, city, town, village, or municipality” the power to utilize such systems, whether they are constitutional charter cities or not.¹¹⁰ This provision serves to preempt challenges to enforcement based upon the size or type of municipality or arguments that the plenary powers of the state have not been delegated to the local government to make such statutes.¹¹¹

The specific enforcement mechanism in Section 4 states that if the registered owner fails to pay the fine they “shall be prohibited from renewing the registration of the motor vehicle until such penalty is paid.”¹¹² Missouri Revised Statute 301.025.5 allows affected municipal governments to assess a “vehicle related fee or fine” and to prevent the registered owner of a vehicle from renewing its state registration until such time as the penalty is paid to the State or notice provided to the State from the municipality or county whose statute or ordinance was violated.¹¹³ Utilizing the power of vehicle registration regulations allows municipalities and counties to have state-level recourse should a violator fail to pay a local ticket.

¹⁰⁵ See lines 37-60 *infra* Section VII: Appendix.

¹⁰⁶ See lines 61-73 *infra* Section VII: Appendix (emphasis added).

¹⁰⁷ *Smith v. City of St. Louis*, 409 S.W.3d 404, 427 (Mo. Ct. App. 2013); *see id.* at 417.

¹⁰⁸ *See id.* at 413-415.

¹⁰⁹ See lines 23-27 *infra* Section VII: Appendix.

¹¹⁰ *See Smith*, 409 S.W.3d at 426; *see also* *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 210 (Mo. 1986) (finding Missouri courts were compelled to find express grants of authority in the state constitution, statutes, or city charter if the municipality was not a constitutional charter or home-rule city).

¹¹¹ *See id.*

¹¹² *See infra* Section VII: Appendix.

¹¹³ MO. REV. STAT. § 301.025.5 (“‘vehicle-related fees and fines’ includes, but is not limited to, traffic violation fines, parking violation fines . . . and any late payment penalties, other fees, and court costs associated with the adjudication or collection of those fines.”).

G. Burden of Proof

Section 5 of the proposed statute addresses the substantive due process issues regarding constitutionally impermissible shifts of the burden of persuasion that proved fatal to the ATEs statute in *Tupper*.¹¹⁴ However as explained in the discussion of *Tupper*¹¹⁵ above, the following rule can be constructed under the holdings in *Deck v. Teasley*, *State ex rel. Teefey*, and *Cook* to construct a permissible statute: (1) if the burden of proof is a civil *preponderance of the evidence* standard, then a rebuttable presumption is generally permitted;¹¹⁶ (2) the default burden in quasi-criminal hearings at a municipal level of *beyond a reasonable doubt* may be superseded by expressly stating another burden;¹¹⁷ and (3) it is permissible for the state to make the rebuttable presumption that the registered owner of a vehicle is liable for violations incurred by that vehicle, without the state having to also prove that the registered owner was the operator at the time of the offense.¹¹⁸

The proposed statute meets the requirements of this rule as follows. First, in Sections 2, 3(6), 3(9)-(11), and 4, the penalty is referred to exclusively as a “civil penalty,” thus allowing a rebuttable presumption under *Deck v. Teasley* as cited in *Tupper*.¹¹⁹ Second, to avoid any ambiguity as to the burden of proof, the proposed statute expressly states in Section 5, lines 67 to 72:

5. In the prosecution of a red light violation under this section, the county, city, town, village, or municipality shall have the *burden of proving by a preponderance of the evidence* that the motor vehicle described in the notice of violation issued under subsection 3 of this section was operated in violation of this section.¹²⁰

Again, *Tupper* also maintained, according to the holding in *State ex rel. Teefey*, that a statute may expressly state the burden of proof to be used to avoid any ambiguity.¹²¹

Third, Section 5, lines 72-74, states “There shall be a rebuttable presumption that the registered owner of the motor vehicle is liable for the penalties resulting from the motor vehicle violating the statute.”¹²² Under *City of St. Louis v. Cook*, it is still permissible to make the rebuttable presumption that the registered owner is liable for violations that are analogous to a registered owner’s

¹¹⁴ See *infra* Section VII: Appendix; *Tupper v. City of St. Louis*, 468 S.W.3d 360, 373 (Mo. 2015) (citing *Sandstrom v. Montana*, 442 U.S. 510, 517–18 (1979)); *id.* at 376.

¹¹⁵ See *supra* Section III.C.

¹¹⁶ *Tupper*, 468 S.W.3d at 371 (citing *Deck v. Teasley*, 322 S.W.3d 536, 541-42 (Mo. 2010); see *Deck*, 322 S.W.3d at 541-42.

¹¹⁷ See *id.* (citing *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. 2000)); see also *id.* at 372 (citing *City of Kansas City v. Oxley*, 579 S.W.2d 113, 114 (Mo. 1979)).

¹¹⁸ See *City of St. Louis v. Cook*, 221 S.W.2d 468, 468-471 (Mo. 1949).

¹¹⁹ See *infra* Section VII: Appendix; *Tupper*, 468 S.W.3d at 371.

¹²⁰ See lines 67-72 *infra* Section VII: Appendix (emphasis added).

¹²¹ See *Tupper*, 468 S.W.3d at 371.

¹²² See lines 72-74 *infra* Section VII: Appendix.

liability for parking tickets incurred by the vehicle.¹²³ But, in accordance with *Tupper*, Section 5, lines 74 to 76, states “no presumption shall be made that the registered owner was the operator at the time of the violation.”¹²⁴ *Tupper* does point out that that photographs of the driver would relieve the need of a rebuttable presumption under the ordinance, however for the proposed statute avoiding the necessity of invasive photography is one of the two goals, and thus not a solution.¹²⁵ The proposed statute also lists, in Section 5, lines 76 to 92, examples of evidence that may be used to rebut the presumption and prove non-liability of the registered owner.¹²⁶

Ironically, the issue of whether a Missouri city’s red light camera ordinance was civil or criminal in nature, and therefore whether federal criminal due process rights were violated under § 1983, had already been heard in the Federal Court of the Eastern District of Missouri in the 2009 case *Kilper v. City of Arnold*.¹²⁷ However, the federal case is not cited as persuasive authority in any of the principal Missouri cases on the issue. The statute at issue in *Kilper* stated:

[T]he penalty (*fine*) imposed for a finding of guilt for a violation . . . using an Automated Red Light Enforcement System . . . shall be the same as the penalty (*fine*) for a finding of guilt for a violation . . . where an Automated Red Light Enforcement System was not used. *Except that no points will be assigned to the violators drivers [sic] license when guilty of an Automated Red Light Enforcement violation.*¹²⁸

The plaintiffs’ § 1983 lawsuits claimed that the ordinance violated the federal due process clause in that:

[T]he rebuttable presumption in the Ordinance both shifts the burden of proof to the vehicle owner to establish he or she was not driving at the time of the violation and, through the use of an irrational inference to establish a *prima facie* case, allows City to meet its burden of proof without sufficient evidence establishing that the vehicle owner was driving at the time of the violation; and in that the Ordinance permits proof of liability without proof beyond a reasonable doubt.¹²⁹

¹²³ See *Cook*, 221 S.W.2d at 470-71.

¹²⁴ See lines 74-76 *infra* Section VII: Appendix.

¹²⁵ See *Tupper*, 468 S.W.3d at 373 n.12; see also *Brunner v. City of Arnold*, 427 S.W.3d 201, 206 (Mo. Ct. App. 2013). Indeed, other previous statutes in Missouri actually expressly forbade photographing the operator committing the violation out of privacy concerns.

¹²⁶ See lines 76-92 *infra* Section VII: Appendix; *Tupper*, 468 S.W.3d at 371 (citing *Deck v. Teasley*, 322 S.W.3d 536, 549-50 (Mo. 2010) (“The term ‘rebuttable presumption’ is understood at common law to be a mandatory presumption, rather than permissive inference, that requires the other party to produce sufficient evidence to rebut.”)).

¹²⁷ *Kilper v. City of Arnold*, Mo., No. 4:08CV0267 TCM, 2009 WL 2208404, at *1 (E.D. Mo. July 23, 2009).

¹²⁸ *Id.* at *3 (emphasis in the original).

¹²⁹ *Id.* at *12.

In short, the standard for burden of proof appeared to be the higher criminal standard of *beyond a reasonable doubt*, but with the *prima facie* rebuttable presumption that the defendants had to disprove their guilt, rather than the state needing to prove it.

However, the court in *Kilper* held that plaintiffs failed to show that the effects of the ordinance or its penalty negated the intention of the city to create a civil penalty.¹³⁰ Under federal law the “issue of whether a particular punishment or proceeding is criminal or civil is first a matter of statutory construction.”¹³¹ If it is not expressly stated in the statute, “the Court ascertains ‘whether the legislature meant the [legislation] to establish ‘civil’ proceedings.’”¹³² If the evidence indicates a preference for a civil label, the court must still determine if the punishment is so punitive in purpose or effect that the proceeding should be considered criminal.¹³³ This determination requires the balancing of six factors in relation to the legislation:

- (1) Whether the sanction involves an affirmative disability or restraint,
- (2) Whether it has historically been regarded as a punishment, (3) Whether it comes into play only on a finding of scienter, (4) Whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) Whether the behavior to which it applies is already a crime, (6) Whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) Whether it appears excessive in relation to the alternative purpose assigned.¹³⁴

After thorough analysis, the court held that the “ordinance and its remedy are civil in nature” because the plaintiffs did not prove “that the effects of the Ordinance and its penalty negate City’s intention to create a civil Ordinance and remedy.”¹³⁵ Therefore it is “. . . clear . . . that violations under the [Automated Traffic Enforcement] System impose only civil liability in the form of a modest fine, and thus analysis [of a due process challenge to the code’s rebuttable presumption] under the rubrics of criminal law is inappropriate.”¹³⁶

In sum, in an attempt to avoid putting the proposed statute at the mercy of the complicated statutory analysis shown in *Kilper*, Sections 2, 3, and 4 of the proposed statute clearly state that the penalty is to be civil in nature, and Section 5 explicitly states that the burden of persuasion is by a *preponderance of the*

¹³⁰ *Id.* at *19; *see also id.* at *14 (stating evidence of legislature’s intent to create a civil proceeding or penalty may be ascertained either from the express language of the legislation or from other aspects of the legislation) (citing *Allen v. Illinois*, 478 U.S. 364, 368 (1986)).

¹³¹ *Id.* at *13. *See also Allen*, 478 U.S. at 368 on addressing privilege against self-incrimination challenge to civil commitment proceedings for sexually dangerous persons. *See also Hudson v. United States*, 522 U.S. 93, 99 (1997) on addressing double jeopardy challenge to imposition of monetary penalties and occupational debarment.

¹³² *Id.* at *14 (emphasis added) (noting that a preference was shown by the statute’s placement in the city’s code under “Traffic” ordinances instead of “Offenses.” (citing *Allen*, 478 U.S. at 368)).

¹³³ *Kilper*, 2009 WL 2208404, at *15 (citing *Allen*, 478 U.S. at 369; *Hudson*, 522 U.S. at 99)).

¹³⁴ *Id.* (quoting *Hudson*, 522 U.S. at 99–100).

¹³⁵ *Id.* at *19.

¹³⁶ *Id.*

evidence.¹³⁷ These two factors allow the rebuttable presumption to be made that the registered owner is responsible for any fines incurred without violating the owner's *substantive due process* rights by forcing him or her to disprove their guilt regarding a criminal penalty involving actual operation of a vehicle. This comment now turns to a discussion of both how other states have dealt with similar ATES statute challenges, and various allies and adversaries to such statutes in Missouri.

V. DISCUSSION

A. Comparison of Approaches in Other States

1. Illinois

The state of Illinois has well developed caselaw regarding the use of civil penalties for ATES violations and was the original model statute for the proposed Missouri statute presented by this Comment. Of key importance is the burden of proof placed on the state in situations where the operator of the vehicle is not identified. The city of Chicago began enforcement in 2003 and currently enforces 149 intersections with red light cameras.¹³⁸ Under 625 Illinois Compiled Statutes 5/11-208.6 subpart (d)(7), the penalty is expressly listed as “civil penalty imposed.”¹³⁹ Under subpart (j) it is further explained that “A violation for which a civil penalty is imposed under this Section is not a violation of a traffic regulation governing the movement of vehicles and may not be recorded on the driving record of the owner of the vehicle.”¹⁴⁰ This interpretation was upheld when challenged in the 2012 case *Fischetti v. Vill. of Schaumburg*, where the court held that the plaintiff's “contention that she had a constitutional or statutory right to a jury trial [was] based on the faulty premise that she was accused of a criminal act.”¹⁴¹ Section 11–208.6(d) indicates automated red light violations incur civil penalties.¹⁴² The court further explains, “What occurred was not a criminal offense; it was a civil violation and, therefore, not subject to the protections, presumptions, and standard of proof afforded in criminal prosecutions.”¹⁴³ There, the benefit of a clearly defined statewide standard allowed the court to come to a clear determination when

¹³⁷ See *infra* Section VII: Appendix.

¹³⁸ CITY OF CHI., *supra* note 13.

¹³⁹ 625 ILL. COMP. STAT. 5/11-208.6 (2025).

¹⁴⁰ *Id.*

¹⁴¹ *Fischetti v. Vill. of Schaumburg*, 967 N.E.2d 950, 961 (Ill. App. Ct. 2012).

¹⁴² *Id.*

¹⁴³ *Id.*

interpreting a municipal statute. It follows that a comparable Missouri statute would hopefully have the same effect.

Challenges to Illinois law have also been influential in determining whether ATES violates *substantive due process* rights. In the earlier case *Idris v. City of Chicago*, the Seventh Circuit held:

Plaintiffs contend that vicarious liability offends the substantive component of the due process clause, but that argument is a dud. Substantive due process depends on the existence of a fundamental liberty interest, see *Washington v. Glucksberg*, 521 U.S. 702, 719–22 (1997), and no one has a fundamental right to run a red light or avoid being seen by a camera on a public street. The interest at stake is a \$90 fine for a traffic infraction, and the Supreme Court has never held that a property interest so modest is a fundamental right. Plaintiffs insist that, if a law is arbitrary or capricious, then the absence of a fundamental right does not matter. They do not cite any decision of the Supreme Court for that proposition; none is to be found. *Glucksberg* and the Court’s other opinions are adamant: only state action that impinges on fundamental rights is subject to evaluation under substantive due process. If a law is arbitrary, then it might flunk the rational-basis test that applies to all legislation, but this differs (fundamentally) from substantive due process.¹⁴⁴

Additionally, *Idris* provides an economic rationale for the use of photographic evidence from cameras in that it reduces the costs of law enforcement and increases the proportion of traffic offenses that are detected.¹⁴⁵ It also provides that these benefits can be achieved only if the owner is held responsible.¹⁴⁶ The court does point out, however, that “[T]his need not mean that the owner bears the economic loss; an owner can insist that the driver reimburse the outlay if he wants to use the car again (or maintain the friendship).”¹⁴⁷

2. New York

Similar to Illinois, New York has an explicit statewide statute that states “An imposition of liability under a local law or ordinance adopted pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the operating record of the person upon whom such liability is imposed”¹⁴⁸ This clear language was utilized in the 2013 case *Krieger v. City of Rochester* to show that the plaintiff had the burden of providing clear proof that a \$50 fine was of such a punitive nature that it constituted a criminal penalty.¹⁴⁹ The court agreed with the City that the process was entirely civil in nature.¹⁵⁰ Later, it is stated that

¹⁴⁴ *Idris v. City of Chi., Ill.*, 552 F.3d 564, 565–66 (7th Cir. 2009); see *supra* Section IV.C.

¹⁴⁵ *Id.* at 566.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. VEH. & TRAF. LAW § 1111-b(f) (McKinney 2025).

¹⁴⁹ *Krieger v. City of Rochester*, 978 N.Y.S.2d 588, 598 (N.Y. Sup. Ct. 2013).

¹⁵⁰ *Id.*

“the statutory scheme demonstrates an unequivocal intent to create a civil enforcement mechanism, not a criminal one.”¹⁵¹ This is a great illustration of how explicit statutory language avoids the need to speculate as to how a statute should be categorized.

3. Iowa

Conversely, in Iowa, a lack of explicit language in a statewide statute has led to individual court cases arriving at similar conclusions as Illinois and New York, but—similar to Missouri—with more litigation required as individual local statutes are challenged. In the 2018 case *Weizberg v. City of Des Moines*, the Iowa Supreme Court held on a “rebuttable presumption” question similar to that in *Tupper* that ATEs does not violate *substantive* due process when the “stakes only involve a small civil fine.”¹⁵² The court stated that “vicarious liability on a vehicle owner is rational because it encourages owners to ‘take more care when lending their cars, and often they can pass the expense on to the real wrongdoer.’ . . . Other federal and state courts have come to the same result as *Idris* in cases involving civil penalties in the ATE [sic] context.”¹⁵³ The end result is Iowa caselaw allowing the use of ATEs to impose a civil penalty, but only after significant litigation instead of well-crafted legislation. Again, this is the rationale for an explicit, statewide statute, stating both the civil nature of the penalty and the *preponderance of the evidence* burden of persuasion.

B. Potential Allies and Adversaries of the Proposed Legislation in Missouri

1. Allies

The principal ally will be law enforcement agencies across the state of Missouri. The use of ATEs reduces the amount of routine enforcement actions to which law enforcement must divert scarce resources. As described in Section II of this Comment, these routine actions can still have tragic outcomes due to either unplanned hostile encounters with motorists or outright accidents. Recent bills in the Missouri General Assembly attempting to ban license plate reading (LPR) cameras have consistently drawn the opposition of law enforcement departments and organizations.¹⁵⁴ LPR technology is essentially the camera component of many

¹⁵¹ *Id.* at 598–99.

¹⁵² *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 216 (Iowa 2018).

¹⁵³ *Id.* at 216 (quoting *Idris v. City of Chi., Ill.*, 552 F.3d 564, 565–66 (7th Cir. 2009) (citing *Fischetti v. Vill. of Schaumburg*, 967 N.E.2d 950, 959–60 (Ill. App. Ct. 2012); *Krieger*, 978 N.Y.S.2d at 603–04).

¹⁵⁴ Joe Muller, *Missouri Police Seek to Keep License Plate Readers Out of Red-light Camera Ban Bill*, MO.: THE CENTER SQUARE (Apr. 28, 2022), https://www.thecentersquare.com/missouri/article_46eb6b3a-c740-11ec-8452-639339779ce2.html (noting the opposition of police from Jefferson County, St. Louis County, the City of St. Louis, Kansas City, the Missouri Police Chiefs, and the Fraternal Order of Police to the proposed ban under Mo. HB 2705); see also First Alert, ‘Without that Technology It Hinders our Investigations;’

ATESs, so the quick opposition from law enforcement organizations typically indicates their support for other such technological policing solutions.

Another potential ally will be traffic safety organizations like Trailnet (pedestrian and cyclist safety),¹⁵⁵ the Insurance Institute for Highway Safety (IIHS),¹⁵⁶ and the Governor's Highway Safety Association (GHSA). The GHSA specifically researches the intersection of traffic safety with the struggle for racial equity. According to the GHSA, Black drivers in Chicago, for instance, are more than twice as likely to be killed in a traffic crash than White drivers.¹⁵⁷ However, because reports have shown that Black and Hispanic drivers are more than twice as likely to experience the threat of force during police initiated contact, this “tends to collectively undermine public support for traffic enforcement programs.”¹⁵⁸ Support for automated enforcement may be advocated as a way to ensure traffic regulations are enforced consistently without relying on an individual officer's discretion, and possible bias.¹⁵⁹ Other allies are city governments, such as Hannibal, Missouri, who attribute ATES to an increase in traffic safety,¹⁶⁰ as well as neighborhood associations who make similar attributions.¹⁶¹

Police Pushback on Missouri bill Banning License Plate Reading Cameras, FIRSTALERT4.COM (Feb. 19, 2024), <https://www.firstalert4.com/2024/02/20/without-that-technology-it-hinders-our-investigations-police-pushback-missouri-bill-banning-license-plate-reading-cameras/> (last visited Sept. 23, 2025, 8:09 PM) (noting police opposition to Mo. SB 1377; “Without that technology,” said [St. Charles, Mo. Police Lt.] Wilkison. “It hinders our investigations”).

¹⁵⁵ See *Policy & Advocacy Campaigns: Changing Policy and Advocating for Safer Streets for All*, TRAILNET, <https://trailnet.org/our-work/advocacy/policy-advocacy-campaigns/> (noting both the racially neutral and public safety arguments for automated enforcement) (last visited Sept. 17, 2025).

¹⁵⁶ Hu, *supra* note 2 (providing an automated enforcement program checklist and statistical data).

¹⁵⁷ See *An Analysis of Traffic Fatalities by Race and Ethnicity*, at 6, GOVERNOR'S HIGHWAY SAFETY ASSOCIATION (June 2021),

https://web.archive.org/web/20241116085221/https://www.ghsa.org/sites/default/files/2021-06/An%20Analysis%20of%20Traffic%20Fatalities%20by%20Race%20and%20Ethnicity_0.pdf (last visited Sept. 23, 2025).

¹⁵⁸ *Equity in Highway Safety Enforcement and Engagement Programs*, at 3, GOVERNOR'S HIGHWAY SAFETY ASSOCIATION (Aug. 2021), https://www.ghsa.org/sites/default/files/2025-01/equity_2021.pdf (last visited Sept. 23, 2025, 8:30 PM).

¹⁵⁹ See *id.* at 7-8.

¹⁶⁰ See Danny Henley, *State Lawmakers Consider Ban on Red-light Cameras*, HANNIBAL COURIER POST (Apr. 21, 2022), https://www.hannibal.net/news/local/state-lawmakers-consider-ban-on-red-light-cameras/article_6717b9da-c0d4-11ec-b744-1fe647878b8c.html (last visited Sept. 23, 2025, 8:37 PM) (addressing allegations of predatory behavior a city official stated, “Fine proceeds come from someone breaking the law, and the fine is a consequence. The ordinance actually allows for the use of video in the prosecution of traffic offenses, and if the traffic offenses do not occur, the fines don't either.”); *Red Light Cameras*, *supra* note 6 (showing on city's police department website the statistics of, respectively, a 100% and 67% reduction in red light violations at two intersections).

¹⁶¹ See Gregg Palermo, *Red Light Traffic Cameras Likely Coming Back to St. Louis*, SPECTRUM NEWS (Sept. 18, 2023), <https://spectrumlocalnews.com/mo/st-louis/news/2023/09/18/st--louis-red-light-cameras-> (last visited Sept. 23, 2025, 8:46 PM) (noting Neighborhood Traffic Safety Improvement Fund would pay for traffic safety infrastructure on non-arterial roads).

2. Adversaries

Potential adversaries range from those alleging improper collusion by local governments with contractors for monetary profit to small-government and civil liberties advocates. A perennial argument by opponents is that local governments are more interested in utilizing the system for revenue rather than for effective policing.¹⁶² The most effective argument against these allegations is an open and transparent contracting process in compliance with Missouri Sunshine Laws¹⁶³ and a fee structure (as discussed in Section II) that pays a flat or tiered-rate, and therefore does not incentivize over-enforcement.

Opposition by small-government advocates often stems from a libertarian-oriented disapproval of policing through surveillance technology.¹⁶⁴ Privacy concerns were an explicit motivating factor behind recent Missouri House legislative efforts to ban red light cameras.¹⁶⁵ The proposed legislation considers these objections and recognizes their value by intentionally limiting the data collected for enforcement to data on the vehicle itself. The ATES ordinances passed by Kansas City and St. Louis in 2024 contain nearly identical provisions prohibiting the misuse of collected data for purposes outside of automated traffic enforcement, to include its use in AI systems.¹⁶⁶ However, under both ordinances

¹⁶² *Missouri House Bill 2705 – Prohibits the Use of Automated Traffic Enforcement Systems*, NAT'L MOTORISTS ASS'N (Mar. 14, 2022), <https://ww2.motorists.org/alerts/mo-hb2705/> (alleging photo enforcement is more about generating revenue than improving public safety).

¹⁶³ See Sarah Rosenthal, *Police Say Red Light Cameras Set to Stay in Hannibal*, KHQA (Feb. 11, 2020), <https://khqa.com/news/local/red-light-cameras-set-to-stay-in-hannibal> (noting, however, that the Illinois system was under investigation after a state lawmaker pled guilty to accepting a contractor's bribe).

¹⁶⁴ See Joel O. Christensen, *Wrong on Red: The Constitutional Case Against Red-Light Cameras*, 32 WASH. U. J.L. & POL'Y 443, 444–45 (2010) (stating “Advocates claim that any incidental legal implications of automated camera technology are part of life in the new millennium. To red light camera critics, however, the specter of Big Brother looms large. In no other context have traditional, face-to-face enforcement methods been so thoroughly dispensed with in favor of automated technology. As one commentator noted, in municipalities with red light cameras, “[t]he entire traffic enforcement process is almost untouched by human hands.”). This article was used as a reference in J. Draper's dissenting opinion in *Roeder*. See *City of St. Peters v. Roeder*, 466 S.W.3d 553–55 (Mo. 2015) (Draper, J. dissenting).

¹⁶⁵ See H.R. 2705, 101st Gen. Assembly (Mo. 2022) (“The use of automated traffic enforcement systems to record or retain data regarding the location or movements of any specific motor vehicle or its operator or occupant is expressly prohibited unless a warrant has been obtained specifically granting the use of such technology.”).

¹⁶⁶ KANSAS CITY, MO. CODE § 70-961(g) (2025) (Prohibited use of automated traffic enforcement systems) (“(2) In no instance shall anyone provide access to, share, or otherwise make available or accessible the recorded images and other data collected through the city's automated camera enforcement system to or for: a. Any artificial intelligence system, as defined by section 70-961(a), including, but not limited to facial recognition systems; b. Any electronic surveillance program of citizens, as defined in section 70-961(a); c. Any individuals, parties, or entities who are not authorized employees, other than individuals, parties, or entities involved in the prosecution of, defense against, or adjudication of an alleged violation detected through the automated camera enforcement system; or d. Any purpose other than for the implementation and administration of the city's automated camera enforcement system”) (emphasis added); *Accord* ST. LOUIS, MO. CODE §17.07.060.D (2025) (Prohibited use of automated traffic enforcement system).

the average motorist is still left exposed to surveillance without consent, the threat of government malfeasance or abuse, and the risk of sensitive Personally Identifiable Information (PII) being exposed in a data breach solely because they chose to drive on Missouri roads. The proposed legislation, on the other hand, which requires photos of only the vehicle and not of the operator, is the *least* invasive form of automated enforcement that complies with existing precedent but still reaps the benefit of safer streets.

Additionally, some civil rights organizations feel that despite the color-blind nature of the technology, the geographic placement of the cameras in certain areas can still have a disparate impact on communities of color.¹⁶⁷ This objection can hopefully be overcome by a transparent and crash-data-based selection process by which intersections are chosen for traffic enforcement with ATES to rebut any notion they are chosen because of neighborhood demographics.

The final potential opposition group is the “silent majority” of average drivers who are now more likely to get a ticket. Traditionally, to get a ticket most drivers must both be seen by a police officer driving poorly enough to be pulled over and then have the police officer decide to issue a citation. With a camera, on the other hand, there is no similar discretion, and every violator gets a citation.¹⁶⁸ Because of this fact, the perception amongst average motorists is that the police are now “over-enforcing” the traffic laws, which leads to public discontent with ATES programs, when in fact the police are simply more accurately and efficiently enforcing existing law.

Arguments in favor of Automated Traffic Enforcement Systems, like those expressly authorized by the proposed statute, are unfortunately as attractive to most people as arguments in favor of the hall monitor. There are valid claims to be made against ATES enforcement due to concerns of financial collusion and graft, violations of civil liberties, and a potential for disparate impacts to minority communities. However, the proponents of this legislation argue that ATES is a vital cost-saving, facially race-neutral enforcement mechanism, that if enacted with conscious constitutional protections, can dramatically improve the safety of Missouri’s roadways while conserving scarce police resources for emergencies and combatting violent crime. The creation of a coalition of law enforcement, community safety, and civil rights influencers is imperative to the passage of this legislation. Maintaining an emphasis on automated enforcement’s record of effectiveness and safety improvement is the best way to allow any potential bill sponsor to defend their support of the proposed statute.

¹⁶⁷ See Maya Fegan, *Speeding into the Future: The Pitfalls of Automated Traffic Enforcement*, BERKELEY J. OF CRIM. L. BLOG (Apr. 15, 2021), <https://www.bjcl.org/blog/speeding-into-the-future-the-pitfalls-of-automated-traffic-enforcement> (finding that predominantly Black-segregated neighborhoods received 2.82 traffic tickets per capita; twice the city’s average of 1.24 tickets and 17 times the average number of tickets received by drivers in White-segregated neighborhoods).

¹⁶⁸ CONG. RSCH. SERV., R46552, SAFETY IMPACT OF SPEED AND RED LIGHT CAMERAS 11 (2020) (referencing studies of speed cameras, not red light cameras, finding that out of 7.9 million drivers in the U.S. were stopped for speeding in 2015, not all were issued citations; whereas of the 2.2 million speed camera violations detected in Washington, D.C. in 2017 every violation received a citation).

VI. CONCLUSION

The proposed “Civil Penalties for Traffic Violations Monitored by Automated Traffic Enforcement System (ATES) Act” expressly allows Missouri municipalities and counties to assess a civil penalty on the registered owner of a vehicle detected violating traffic laws at an intersection monitored by Automated Traffic Enforcement Systems. By clearly defining a civil alternative to criminal enforcement, other states have been able to utilize effective traffic enforcement methods without successful legal challenges and without violating the privacy of their citizens with invasive surveillance. The General Assembly should pass the “Civil Penalties for Traffic Violations Monitored by Automated Traffic Enforcement System Act” to allow Missouri municipalities and counties the option to utilize this technology to increase roadway safety on a firm legal footing.

VII. APPENDIX: PROPOSED LEGISLATION

ROUGH DRAFT NO. 1

AN ACT

To amend chapter 304, RSMo, by adding thereto one new section relating to automated traffic enforcement systems, with penalty provisions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

Section A. Chapter 304, RSMo, is amended by adding thereto 2 one new section, to be known as section 304.365, to read as 3 follows:

304.365. 1. As used in this section, the following terms 2 mean:

3 (1) “Automated traffic enforcement system”, a system, 4 operated by a governmental entity in a county, city, town, village, 5 or municipality, that:

6 (a) Employs a device with one or more motor vehicle sensors 7 working in conjunction with a red light signal to produce recorded 8 images of a motor vehicle entering an intersection against a red 9 signal indication in violation of any state, county, or local 10 traffic law or ordinance;

11 (b) Is designed to obtain a clear recorded image of the motor 12 vehicle and the motor vehicle's license plate; and

13 (c) Records the time, date, and location of any violation;

14 (2) “Owner”, the owner of a motor vehicle as shown on the 15 motor vehicle registration records of the department of revenue or 16 the equivalent department or agency of another state or country.

17 The term “owner” includes:

18 (a) A lessee of a motor vehicle under a lease of six months or 19 more; or

20 (b) A lessee of a motor vehicle rented or leased from a motor 21 vehicle rental or leasing company, but does not include the motor 22 vehicle rental or leasing company itself.

23 2. Notwithstanding any provision of law to the contrary, any

24 county, city, town, village, or municipality may assess a civil
25 penalty, not to exceed fifty dollars, against the registered owner
26 of a motor vehicle for the violation of a traffic law monitored by
27 an automated traffic enforcement system. The penalty imposed
28 shall not be deemed a moving violation and shall not be made part
29 of the operating record of the person upon whom such liability is
30 imposed. In no case shall points be assessed against any person
31 under section 302.302 for a violation of this section. If the
32 registered owner is the holder of a commercial driver's license,
33 the registered owner shall be liable for the civil penalty imposed
34 under this subsection, but the violation shall not become part of
35 the person's CDLIS driver record, as defined under section
36 302.700.

37 **3.** For each violation recorded by an automated traffic
38 enforcement system, the county, city, town, village, or
39 municipality with jurisdiction shall issue a written notice of the
40 violation to the owner of the motor vehicle. The notice shall be
41 delivered to the motor vehicle owner, by mail, within thirty days
42 of the violation. The notice shall include the following:

- 43 (1) The name and address of the registered owner of the motor
44 vehicle;
- 45 (2) The license plate number of the motor vehicle;
- 46 (3) The violation charged;
- 47 (4) The time, date, and location of the violation;
- 48 (5) A copy of the recorded images and a website address where
49 such images may be viewed;
- 50 (6) The civil penalty imposed and the due date for such civil
51 penalty;
- 52 (7) Whether a traffic education program is required and, if
53 applicable, the date by which the program shall be completed;
- 54 (8) A statement that recorded images are evidence of a red
55 light violation;
- 56 (9) A warning that failure to pay the civil penalty or to
57 contest liability in a timely manner is an admission of liability;
- 58 (10) A warning that payment of the civil penalty, or
59 resolution of the violation by the court, is required before a
60 motor vehicle's registration may be renewed; and
- 61 (11) A statement that the motor vehicle owner may elect to
62 proceed by either paying the civil penalty or by challenging the
63 charge in court, by mail, or by administrative hearing.

64 **4.** If a civil penalty is not paid and liability is not
65 contested, the registered owner shall be prohibited from renewing
66 the registration of the motor vehicle until such penalty is paid.

67 **5.** In the prosecution of a red light violation under this
68 section, the county, city, town, village, or municipality shall
69 have the burden of proving by a preponderance of the evidence that
70 the motor vehicle described in the notice of violation issued under
71 subsection 3 of this section was operated in violation of this
72 section. There shall be a rebuttable presumption that the
73 registered owner of the motor vehicle is liable for the penalties

74 resulting from the motor vehicle violating the statute, but no
75 presumption shall be made that the registered owner was the
76 operator of the motor vehicle at the time of the violation. The
77 court may hear evidence offered by the owner of the motor vehicle
78 that the owner is not liable, which may include, but shall not be
79 limited to, the following claims:

- 80 (1) That the motor vehicle was stolen, or the motor vehicle's
81 license plates were stolen, before the violation occurred and that
82 the motor vehicle was not under the control of or in the possession
83 of the owner at the time of the violation;
- 84 (2) That the motor vehicle was hijacked before the violation
85 occurred and was not under the control of or in possession of the
86 owner at the time of the violation;
- 87 (3) That the driver of the motor vehicle passed through the
88 intersection when the light was red in order to yield the right-of-
89 way to an emergency vehicle or when the motor vehicle was operating
90 as part of a funeral procession; and
- 91 (4) Any other evidence or issues relating to a municipal or
92 county ordinance.

FROM THE APPLE TO THE TREE: REDUCING YOUTH VIOLENCE BY RECONSIDERING PARENTAL LIABILITY FOR THE CRIMINAL ACTS OF CHILDREN IN MISSOURI

Max Techau*

I. INTRODUCTION

In November 2021, tragedy struck Oxford Township, Michigan, when fifteen-year-old sophomore Ethan Crumbley opened fire at Oxford High School, killing four students and wounding seven other individuals, including a teacher.¹ Tragedies of this kind are unfortunately not unique in the United States.² In fact, there were thirty-five school shootings with associated casualties throughout the nation in 2021, resulting in fifteen deaths and over fifty injuries.³ After a more recent school shooting tragedy in August 2024, then-Vice Presidential Candidate JD Vance even called school shootings a “fact of life,” emphasizing how normalized these occurrences have become for American citizens.⁴ What was unique about the Oxford school shooting tragedy, however, was that the local prosecutor ultimately brought criminal charges against James and Jennifer Crumbley, Ethan’s parents.⁵ Oakland County Prosecutor Karen McDonald charged both James and Jennifer with involuntary manslaughter for each of the four deaths their son caused that day and successfully secured convictions for both

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¹ Cassidy Johncox & Derick Hutchinson, *Sunday Read: Everything We Know About Oxford High School Shooting -- Timeline, Charges, Evidence, More*, CLICK ON DETROIT (Dec. 5, 2021, 10:53 AM), <https://www.clickondetroit.com/news/local/2021/12/05/sunday-read-everything-we-know-about-oxford-high-school-shooting-timeline-charges-evidence-more/>.

² See generally *School Shootings in 2021: How Many and Where*, EDUC. WEEK (last updated July 24, 2023), <https://www.edweek.org/leadership/school-shootings-this-year-how-many-and-where/2021/03> (in 2018, journalists began tracking the yearly number of shootings involving K-12 school properties in the United States and noted they were a frequent occurrence and therefore not unusual).

³ *Id.*

⁴ Jonathan J. Cooper, *JD Vance Says He Laments that School Shootings Are a ‘Fact of Life’ and Calls for Better Security*, ASSOCIATED PRESS (last updated Sept. 5, 2024), <https://apnews.com/article/jd-vance-georgia-shooting-7d7727a1aff8491f66914a4d8a14cd8c>.

⁵ See Selina Guevara & Erik Ortiz, *James Crumbley, Father of Ethan Crumbley, Found Guilty of Involuntary Manslaughter in Son’s School Shooting*, NBC NEWS (Mar. 14, 2024, 6:02 PM), <https://www.nbcnews.com/news/us-news/verdict-james-crumbley-involuntary-manslaughter-trial-rcna143174>.

parents in separate jury trials that concluded in February and March 2024, respectively.⁶ Each parent was sentenced to serve ten to fifteen years in prison.⁷

These were landmark cases: for the first time in United States history, parents of a mass school shooter were held criminally responsible for the damage their child caused.⁸ After any landmark case, there is a question of how it will affect or change the legal landscape. Here, the question is how the *Crumbley* cases will affect criminal law, parental responsibility, and gun legislation.⁹ Some argue that the *Crumbleys*' uniquely extreme parental failures—and their clearly negligent omissions and actions surrounding Ethan—make it unlikely that many other cases will arise in which parents are tried for the crimes their children commit.¹⁰ Others contend that prosecutors may use the *Crumbley* cases as blueprints for those situations where a line of causation can be drawn from a parent's actions (or inactions) to the deaths or injuries of others at the hands of their children.¹¹

As for the Missouri landscape, statistics reveal that Missouri has not been spared from endemic youth violence.¹² Missouri Juvenile and Family Division statistics show that there were 54 homicides, 395 weapons offenses, and 4,612 assaults committed by juveniles in 2022 alone.¹³ The trend in homicides committed by Missouri youths is particularly concerning, as the number has been steadily increasing in the years during and since the COVID-19 pandemic.¹⁴ A similar trend is seen in weapons offenses committed by Missouri juveniles.¹⁵ Missouri is also

⁶ *See id.*

⁷ Antoinette Radford & Maureen Chowdhury, *Parents of Michigan School Shooter Sentenced*, CNN U.S. (last updated Apr. 9, 2024), <https://www.cnn.com/us/live-news/james-jennifer-crumbley-sentencing-04-09-24/index.html>.

⁸ *Id.*

⁹ Jacey Fortin, *A Shooter's Parents Were Convicted of Manslaughter. What Happens Next?*, N.Y. TIMES (Mar. 16, 2024, 5:04 AM), <https://www.nytimes.com/2024/03/16/us/crumbley-michigan-oxford-school-shooting.html>.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See generally* MO. JUV. AND FAM. DIV., ANNUAL REPORT 2022, at 20 (Mo. 2022) (Missouri's annual juvenile and family reporting provides that youth across races and age groups participate in criminal activity).

¹³ *See id.*

¹⁴ *See id.*; MO. JUV. AND FAM. DIV., ANNUAL REPORT 2019, at 20 (Mo. 2019); MO. JUV. AND FAM. DIV., ANNUAL REPORT 2020, at 20 (Mo. 2020); MO. JUV. AND FAM. DIV., ANNUAL REPORT 2021, at 18 (Mo. 2021) (noting annual reports published by the Missouri Juvenile & Family Division, presenting general population data about Missouri youth; summary statistics about the status, law, and abuse and neglect referrals processed by Missouri's juvenile divisions; the risk and needs characteristics of the juvenile offender population the division manages; the services and sanctions it provides; recidivism rates; and the case processing time standards and workload formula by which it abides, shows there were twenty-three homicides committed by Missouri juveniles in 2019, rising to twenty-five committed in 2020, thirty-six committed in 2021, and fifty-four committed in 2022, a 134.78% increase from the year prior to the start of the pandemic to the most recent year for which the Missouri Juvenile & Family Division has an available report).

¹⁵ *See id.* (Annual reports published by the Missouri Juvenile & Family Division show there were two hundred and sixty-nine weapons offenses committed by Missouri juveniles in 2019, dropping to one hundred and ninety in 2020, but skyrocketing to two hundred and seventy-five in 2021 and three

one of twenty-four states that have no laws imposing legal liability on adults who fail to keep their guns inaccessible to minors or defining the safe storage of guns and requiring guns to be stored in those ways.¹⁶ Under these circumstances, Missouri prosecutors should consider implementing the prosecutor's approach in *Crumbley* and start holding parents criminally responsible when their parenting failures and parental negligence results in their children causing irreparable harm to others. Such an approach could help successfully deter such negligent parenting behavior,¹⁷ incentivize parents to properly supervise their children's activities, encourage parents to store firearms in the home in safer manners, and, above all else, stop these preventable tragedies caused by poorly supervised children before they get the chance to occur.

In Part II, this Comment focuses on the involuntary manslaughter charges against James and Jennifer and how those cases successfully drew the lines of causation from the duo's parental failures to the four deaths caused by their son. There, this Comment identifies compelling factors that could be utilized when drawing similar lines of causation in future cases. In Part III, this Comment focuses on Missouri law and identifies the types of situations to which this line of causation could be applied, drawing comparisons to other jurisdictions where prosecutors have attempted to draw this line. In Part IV, this Comment focuses on Missouri's lack of safe gun storage legislation, the unlikelihood that legislation of this kind will be passed in Missouri for the foreseeable future, and why this makes the *Crumbley* approach even more necessary for prosecutors in the state.

Overall, the Comment considers, from a public policy perspective, why prosecutors should be more willing to attempt to hold parents responsible and why courts should allow parents to be held accountable when their negligent parenting results in tragedy. This approach would foster a more attentive parenting population and help curb the endemic youth violence plaguing Missouri and the nation.

II. DESIGNING THE MICHIGAN BLUEPRINT: THE APPROACH UTILIZED IN *CRUMBLEY*

The prosecution of James and Jennifer Crumbley was unique because of a key decision made by Oakland County Prosecutor Karen McDonald: choosing to charge the parents of a school shooter with homicide, which no prosecutor in the

hundred and ninety-five in 2022, nearly a fifty percent increase from the year prior to the COVID-19 pandemic to the most recent year for which the Missouri Juvenile & Family Division had an available report as of the writing of this Comment).

¹⁶ See H.B. 307, 103rd Gen. Assemb., Reg. Sess. (Mo. 2025) (Missouri house bill introduced by Democrat Stacy Steinhoff establishing provisions related to the safe storage of firearms killed in session and dead as of May 16, 2025); see also *Child & Consumer Safety: Child Access Prevention & Safe Storage*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/child-access-prevention-and-safe-storage/#:~:text=A%20subset%20of%20CAP%20states,gain%20access%20to%20the%20firearm.>

¹⁷ Fortin, *supra* note 9.

United States had attempted in any previous cases with similar facts.¹⁸ The particular homicide charge she decided to bring individually against both James and Jennifer was involuntary manslaughter.¹⁹ Involuntary manslaughter is a common law offense in Michigan, punishable by up to fifteen years in prison.²⁰ Under Michigan common law, involuntary manslaughter occurs when a death results from negligence that is gross, wanton, willful, or criminal, indicating a culpable indifference to the safety of others.²¹ Three elements are necessary to a finding of willfulness, wantonness, or recklessness.²² Those elements are: (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.²³ Once these elements are met, to sustain a conviction, the conduct of the accused must also have been an immediate and direct cause of the victim's death.²⁴

Involuntary manslaughter in Michigan may also be based on a defendant's failure to perform a legal duty.²⁵ There are several examples of legal duties under

¹⁸ John Woodrow Cox, *Guilty: Inside the High-risk, Historic Prosecution of a School Shooter's Parents*, WASH. POST (July 8, 2024), <https://www.washingtonpost.com/investigations/interactive/2024/michigan-prosecutors-crumbley-parents-oxford-school-shooting/>.

¹⁹ *Id.*

²⁰ MICH. COMP. LAWS § 750.321 (2025).

²¹ *People v. Pittinger*, 307 N.W.2d 715, 740 (Mich. Ct. App. 1981) (quoting *People v. Campbell*, 212 N.W. 97, 99 (Mich. 1927)) (finding that the defendant's conduct of driving intoxicated and swerving, then crashing into a snowbank in front of a service station was grossly negligent, and because it resulted in the death of her passenger, she could be found guilty of involuntary manslaughter).

²² *Id.* (quoting *People v. Orr*, 220 N.W. 777, 779 (Mich. 1928)) (explaining that for the purposes of involuntary manslaughter, before a defendant may be found guilty of willfulness or wantonness and recklessness, three necessary elements must be satisfied as approved by the Supreme Court of Michigan).

²³ *Id.* In this case, the court found the three elements of willfulness or wantonness and recklessness were satisfied by the defendant because: (1) the defendant had knowledge she was intoxicated after consuming several drinks at a wedding, requiring the exercise or ordinary care and diligence of not choosing to in that condition to avert injury to others; (2) she had the ability to avoid the death of a passenger in her vehicle by not choosing to drive in that condition, which would have been the ordinary care and diligence in the use of the means she had at hand; and (3) she omitted using that ordinary care and diligence when she chose to drive intoxicated with the deceased in her passenger seat and to the ordinary mind it was apparent that driving intoxicated with a passenger was likely to prove disastrous to another, and did prove disastrous when she crashed into a snowbank, resulting in her passenger's death.

²⁴ *People v. Scott*, 185 N.W.2d 576, 580 (Mich. Ct. App. 1971) (quoting *People v. Ogg*, 182 N.W.2d 570, 580 (Mich. Ct. App. 1970) (Danhof, J., dissenting)).

²⁵ *See, e.g., People v. Thomas*, 272 N.W.2d 157, 160 (Mich. Ct. App. 1978). In this case defendant was a work coordinator at a religious practical training school who supervised the victim, a nineteen-year-old male catatonic schizophrenic. When the victim was not properly responding to ordinary treatment, defendant obtained permission from the victim's parents to discipline him. The discipline consisted of a beating with a rubber hose that left severe bruises from his waist to his feet. A doctor testified that the victim died from a pulmonary edema and that the trauma to the victim's legs was

Michigan law, including typical legal duties such as those in the context of premises liability,²⁶ as well as more specific legal duties imposed upon parents regarding the care and supervision of their children.²⁷ For an individual to be liable for involuntary manslaughter based on a breach of legal duty, the breach must be the immediate and direct cause of the victim's death.²⁸ Accordingly, causation is a key element of an involuntary manslaughter charge in Michigan.²⁹

Michigan follows the standard common law approach of requiring both factual causation and proximate causation to support the imposition of criminal liability.³⁰ Factual causation requires only that "but for" the defendant's conduct, the result would not have occurred.³¹ In other words, if the result would not have occurred absent the defendant's conduct, then factual causation exists.³² Proximate causation goes further, requiring the victim's resulting injury to be a direct and natural result of the defendant's conduct.³³ To determine if the defendant's conduct is the proximate cause of the harm, it is also necessary to examine whether there was an intervening cause that superseded the defendant's conduct to the point

the underlying cause thereof. Affirming, the Court held that by obtaining the parents' permission to discipline the victim, defendant directly and voluntarily assumed a parental function and stood in a position of *loco parentis* to the victim. Therefore, his beating and failure to provide medical attention violated defendant's legal duty to care for the victim. The Court stated, "Defendant was a supervisor of [religious practical training school], stood in a position of authority over the victim and, by talking with the victim's parents and obtaining their permission to discipline the decedent, he directly and voluntarily assumed a parental function, and stood in a position of *loco parentis* to the decedent. Under such circumstances, defendant's beating of the victim coupled with his failure to provide medical attention, when decedent was unable to obtain same himself, violated defendant's legal duty to care for the victim. The elements of involuntary manslaughter were adequately established."

²⁶ See *Hoffner v. Lanctoe*, 821 N.W.2d 88 (Mich. 2012) (holding that in the context of premises liability, under Michigan law, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. This duty includes fixing dangerous defects in the property that are known or should be known to the property owner, guarding invitees against the defects, or warn invitees of the defects).

²⁷ See *People v. Borom*, No. 313750, 2013 Mich. App. LEXIS 2186 (Mich. Ct. App. Dec. 19, 2013) (recognizing a common law duty of a parent to prevent any harm to their child, regardless of whether the harm is immediate or likely to happen in the future); see also *Price v. Country House Apts., LLC*, No. 355712, 2022 Mich. App. LEXIS 1806 (Mich. Ct. App. Mar. 31, 2022) (reiterating that parents in Michigan have a duty to supervise their children and exercise reasonable care for the safety of their children).

²⁸ See *People v. Albers*, 672 N.W.2d 336 (Mich. Ct. App. 2003) (where a mother was found guilty of involuntary manslaughter based on her breach of her legal parenting duties when her six-year-old son obtained a lighter and started a fire in their apartment complex resulting in the death of a twenty-two-month-old child. The court in this case found that because the mother was previously warned to keep lighters and other incendiary devices and flammable materials away from her son due to his proclivity for starting fires, she breached her duty as a parent when she failed to prevent her son from accessing the lighter and failed to supervise him once he had access to the lighter. Accordingly, the court found that this breach of her legal duty was the direct and immediate cause of the twenty-two-month-old's death that resulted from the fire her son started in the apartment, and therefore there was sufficient evidence to support her involuntary manslaughter conviction).

²⁹ See *People v. Schaefer*, 703 N.W.2d 774, 785 (Mich. 2005).

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

where the causal link between the defendant's conduct and the victim's harm was broken.³⁴ If there were such a superseding, intervening cause, then the defendant's conduct cannot be said to be the proximate cause of the death.³⁵ Michigan uses a specific standard to gauge reasonable foreseeability: If the intervening cause was foreseeable based on an objective standard of reasonableness, then the defendant's conduct will still be considered a proximate cause of the victim's harm.³⁶

Oakland County Prosecutor Karen McDonald convinced two separate juries that James and Jennifer Crumbley's parental actions and omissions regarding their son, Ethan, amounted to criminal negligence that was both the factual and proximate cause of the four deaths.³⁷ Before the Crumbleys stood before their juries, the Michigan Court of Appeals, in an opinion affirming the district court's determination on causation and binding the couple over for trial on

³⁴ *See id.*

³⁵ *See Schaefer*, 703 N.W.2d 774 at 785-86 ("The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. For example, suppose that a defendant stabs a victim and the victim is then taken to a nearby hospital for treatment. If the physician is negligent in providing medical care to the victim and the victim later dies, the defendant is still considered to have proximately caused the victim's death because it is reasonably foreseeable that negligent medical care might be provided.").

³⁶ *See id.* at 786 (holding that under Michigan law, acts of God or the gross negligence or intentional misconduct by a victim or a third party will generally be considered a superseding cause, but ordinary negligence by a victim or third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable); *see also* *People v. Webb*, 415 N.W.2d 9, 10 (Mich. Ct. App. 1987) (finding that although the defendant, a patron of a bar who engaged in a bar fight with decedent, could not exonerate himself from criminal liability merely by arguing that the decedent's negligence of refusing medical care for his injuries resulting from the bar fight was an intervening cause of the death, whether or not refusal of medical treatment was an intervening independent cause and the proximate cause of death were disputed facts for the jury to resolve. Accordingly, a decedent's refusal of medical care could be considered a superseding intervening cause under Michigan law to negate the defendant's conduct as the proximate cause of their death). *But see* *People v. Hudson*, No. 330603, 2017 Mich. App. LEXIS 645 (Mich. Ct. App. Apr. 20, 2017) (where the defendant could not successfully argue that the decedent's actions of lunging towards the defendant and attempting to grab the defendant's gun was a superseding intervening cause of the death to negate defendant's involuntary manslaughter charge because the Court found it highly foreseeable that an individual in decedent's situation, faced with a gun displayed during an altercation, would (1) perceive the danger presented by the gun; (2) fear that defendant might use the gun against him; and (3) react by attempting to disarm defendant by grabbing for the gun, thereby prompting a struggle for control of the gun. Furthermore, the Court also found it was highly foreseeable that such a struggle could result in the discharge of a defendant's loaded gun. Therefore, given the objective foreseeability of the decedent's conduct, his acts of rushing toward defendant and grabbing for the gun could not constitute an intervening, superseding cause sufficient to break the causal chain between defendant's conduct and decedent's death that would eliminate defendant's criminal responsibility for involuntary manslaughter in regard to the death).

³⁷ Teresa Baldas, *James Crumbley Convicted of Involuntary Manslaughter for Son's School Shooting*, DETROIT FREE PRESS (last updated Mar. 15, 2024), <https://www.freep.com/story/news/local/michigan/oakland/2024/03/14/james-crumbley-guilty-of-involuntary-manslaughter-in-oxford-shooting/72968517007/>.

involuntary manslaughter charges, held that the evidence was sufficient for a factual causation finding:

On the basis of the evidence presented at the preliminary exam, a reasonable fact-finder could conclude that [Ethan Crumbley] would not have been able to shoot and kill four students but for [James and Jennifer Crumbley's] decision to purchase their mentally disturbed son a handgun, their failure to properly secure the gun, and most importantly, their refusal to remove [Ethan] from school when he made overt threats to hurt other people. "But for" [James and Jennifer Crumbley's] informed decision to leave [Ethan] at school, these murders would not have occurred that day.³⁸

Unlike the Court of Appeals' finding of factual causation, however, the issue of proximate cause would require a more in-depth analysis. Ethan's guilty plea to first-degree premeditated murder established his actions as intentional, and intentional misconduct of a third party is generally a superseding intervening cause sufficient to sever the causal chain and negate a defendant's conduct as a proximate cause.³⁹ However, the Michigan Court of Appeals held that Ethan's intentional misconduct did not, as a matter of law, supersede his parents' negligence as a proximate cause of the four deaths. Instead, the court held that the intentional actions of Ethan would only supersede his parents' negligence if those actions were *not* reasonably foreseeable under the circumstances.⁴⁰ The Michigan Court of Appeals held that the trial court did not abuse its discretion in concluding that a reasonable juror could find that a reasonably foreseeable outcome of the Crumbleys' gross parental negligence was their son Ethan committing a shooting resulting in harm and death to others, based on several compelling facts established by the record.⁴¹

To consider the applicability of the *Crumbley* case to future cases with similar but non-identical facts, it is essential to review the facts of the Crumbleys' parenting of Ethan that the Michigan Court of Appeals found significant in binding the couple over for trial. These facts were that before Ethan arrived at the school on the day of the shooting, (1) James and Jennifer were aware that Ethan was repeatedly experiencing significant mental health episodes; (2) Ethan was in a distressed mental state due to losing his grandparent and family dog, and because his best friend had moved away; (3) Ethan himself realized he was in a poor mental state and asked James and Jennifer to help him get medical assistance; (4) despite James and Jennifer's knowledge of Ethan's deteriorated mental state, they bought him a handgun, which was readily accessible to him; (5) one day before the shootings, Ethan was researching bullets while in school; and (6) during class on the day of the shootings, Ethan made disturbing drawings depicting shootings and blood, drawing the attention of school officials, who then alerted James and

³⁸ *People v. Crumbley*, 11 N.W.3d 576, 591 (Mich. Ct. App. 2023).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 594-95.

Jennifer.⁴² Upon being alerted, James and Jennifer actually visited the school for a meeting with administrators to discuss Ethan's behavior and disturbing drawing.⁴³

School administrators told James and Jennifer they were concerned about Ethan's mental health, provided them with mental health resources, and recommended they immediately take Ethan to a doctor or therapist that day.⁴⁴ Jennifer objected to that suggestion and stated that getting Ethan care on that day was impossible because she and James had to return to work, and James agreed.⁴⁵ The parental duo then left the school to return to work, and did not look in Ethan's backpack to check for the gun they had given him.⁴⁶ Because there was no disciplinary issue mandating that Ethan leave the school, the decision was made for Ethan to remain there for the day.⁴⁷ Administrators actually believed it was good that Ethan would not be alone, considering his shocking signs of suicidal ideation and contemplation of violence.⁴⁸

Despite their knowledge of all of these circumstances, when given the option by school officials to help Ethan and take him out of school, James and Jennifer did nothing.⁴⁹ The Crumbleys did not, contrary to the recommendations of school officials, take Ethan home and get him immediate medical help.⁵⁰ Moreover, when they decided to leave Ethan at school, they did not tell school officials about Ethan's history of mental health issues nor explain to them that Ethan had easy access to a gun.⁵¹ Neither James nor Jennifer asked Ethan if he had his gun with him, nor did they look in Ethan's backpack, and when they left the school (after coming at the school's request when the drawings were found), they did not go home to make sure Ethan had not taken the gun.⁵² These facts were sufficient for the Michigan Court of Appeals to let juries decide whether James and Jennifer's parental actions and omissions were sufficient factual and proximate causes of the four deaths Ethan caused.⁵³ Thus, the Court of Appeals ultimately determined that a reasonable jury could find Ethan's decision to carry out a school shooting was a foreseeable result of James and Jennifer's parental failures based on an objective standard of reasonableness.⁵⁴ A year later, two separate Michigan juries concluded that James and Jennifer's parental conduct was indeed a factual

⁴² *Id.* at 580-81.

⁴³ *Id.* at 586.

⁴⁴ *Crumbley*, 11 N.W.3d 586.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Crumbley*, 11 N.W.3d at 586.

⁵¹ *See id.* at 586-87 (Court's recitation of the factual sequence indicates the Crumbleys left Ethan at school and did not tell school officials of Ethan's mental health issues or that he could easily access the gun they had purchased him).

⁵² *Id.* at 587.

⁵³ *Id.* at 588.

⁵⁴ *Id.*

and proximate cause of those four deaths when they convicted each parent of four counts of involuntary manslaughter.⁵⁵

From this unfortunate case, prosecutors can extract several compelling factors to consider when attempting to overcome the principle that intentional actions of children are superseding causes that negate parental negligence as a proximate cause of damages to others caused by those children.⁵⁶ When parents know their child is mentally unwell and poses a potential danger to others, yet fail to take reasonable steps to address their child's mental health—so extremely that their inaction evidences a conscious disregard for their child's condition and the safety of others—and their child eventually hurts others as a result, those parents can and should be held responsible.⁵⁷ When parents ignore their child's pleas for help regarding the child's mental health and refuse to help them obtain the necessary medical assistance to improve their mental health, and the child eventually hurts others as a result of their neglected mental health, parents can and should be held responsible.⁵⁸ When parents purchase guns or other dangerous weapons for their child despite the child's known mental health issues, and the child uses those weapons to hurt others, parents can and should be held responsible. When parents fail to secure their guns or other dangerous weapons so that they are readily accessible to the child, and the child then uses them to hurt others, parents can and should be held responsible. And finally, when parents are presented with disturbing warning signs that their child might potentially engage in violent behavior and choose to ignore those signs and take no steps to remove the child from situations where they might endanger the public, and the child does eventually cause harm and endanger the public, parents can and should be held responsible. These factors are a non-exhaustive list and simply illustrate the kinds of questions prosecutors can now examine and eventually put before juries to determine parental liability, similar to what occurred in the *Crumbley* cases.⁵⁹ This comment argues Missouri prosecutors should begin asking these kinds of questions and holding parents responsible in the appropriate circumstances.

III. APPLYING THE BLUEPRINT: EXAMINING MISSOURI LAW AND POTENTIAL APPLICATION OF THE *CRUMBLEY* APPROACH

A. Designing the Blueprint from Missouri Law

In Missouri, a person commits the offense of involuntary manslaughter when they recklessly cause the death of another person.⁶⁰ Under the statutory definition, a person in Missouri acts “recklessly” when they “consciously disregard[] a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the

⁵⁵ See Baldas, *supra* note 37.

⁵⁶ See *Crumbley*, 11 N.W.3d at 592.

⁵⁷ See *id.* at 588.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ MO. REV. STAT. § 565.024(1) (2024).

standard of care which a reasonable person would exercise in the situation.”⁶¹ There is precedent in Missouri case law where defendants were found to have acted recklessly for the purposes of establishing involuntary manslaughter convictions.⁶²

For example, in *State v. Beeler*, a defendant police officer who shot and killed a man during a traffic stop was found guilty of involuntary manslaughter when the court found that he acted recklessly by consciously disregarding the substantial and unjustifiable risk that the victim posed no actual danger requiring such a response.⁶³ This disregard constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation, leading to his conviction.⁶⁴ In *State v. Hayes*, the Missouri Court of Appeals found that the defendant could have been legally considered to have acted recklessly—that is, with a conscious disregard of a substantial and unjustifiable risk of death to the victim—because the force the defendant used in shooting and killing the victim was a gross deviation from the force reasonably necessary for the defendant to protect himself from the victim’s hammer attack.⁶⁵ Therefore, remand and retrial on involuntary manslaughter was the appropriate remedy.⁶⁶ In *State ex rel. Richardson v. Green*, the defendant’s conduct of driving over the legal intoxication limit and driving east in the westbound lane was found to be reckless because when he chose to drive, he consciously disregarded the risk his behavior posed to others.⁶⁷ There, because the court found he consciously disregarded that risk, he was convicted of two counts of involuntary manslaughter when he swerved into another vehicle and killed two of its passengers.⁶⁸

Accordingly, with respect to involuntary manslaughter charges against a parent arising from their child’s actions toward third parties, Missouri law indicates that a parent acts recklessly in relation to their child when they (1) consciously disregard a substantial and unjustifiable risk posed by their child and (2) that risk involves the child’s potential to be violent towards others or to cause others harm.⁶⁹ Furthermore, based on the circumstances, this disregard must constitute a gross deviation from the standard of care that a reasonable parent would exercise in a similar situation.⁷⁰

Based on these standards, Missouri prosecutors could likely secure similar convictions if circumstances like the Crumbley cases were to unfold within Missouri’s borders. A reasonable fact finder could likely determine that James and Jennifer consciously disregarded a substantial and unjustifiable risk that Ethan would injure others when they failed to acknowledge that the circumstances of Ethan’s poor mental health and his accessibility to a gun demonstrated disturbing

⁶¹ MO. REV. STAT. § 562.016.4 (2024).

⁶² See *State v. Beeler*, 12 S.W.3d 294 (Mo. 2000); see also *State v. Hayes*, 23 S.W.3d 783 (Mo. Ct. App. 2000); see also *State ex rel. Richardson v. Green*, 465 S.W.3d 60 (Mo. 2015).

⁶³ See *State v. Beeler*, 12 S.W.3d 294 (Mo. 2000).

⁶⁴ See *id.*

⁶⁵ See *State v. Hayes*, 23 S.W.3d 783 (Mo. Ct. App. 2000).

⁶⁶ See *id.*

⁶⁷ See *State ex rel. Richardson v. Green*, 465 S.W.3d 60 (Mo. 2015).

⁶⁸ See *id.* at 63.

⁶⁹ See *id.*

⁷⁰ See MO. REV. STAT. § 562.016.4 (2025).

warning signs of his potential for violence against others.⁷¹ A jury could also reasonably find that James and Jennifer's disregard for Ethan's mental issues, coupled with their decision to purchase him a gun that was easily accessible to him despite those issues, constituted a gross deviation from the standard of care that a reasonable parent would exercise under similar circumstances.⁷² Accordingly, the same factors established in Part I of this Comment that Prosecutor McDonald used to convince the two juries of James and Jennifer's causation of the Oxford deaths could be used in Missouri to convince juries that certain parental failures can result in criminal liability for parents when those failures result in their children hurting others.⁷³ Given the extent of juvenile violence in Missouri and its prevalence throughout the state,⁷⁴ Missouri prosecutors should be willing to use this approach to foster a safer public and a more attentive and responsible parenting population.

B. Application of the Blueprint to Missouri Situations

The *Crumbley* approach could have been usefully applied in several compelling situations, both past and present, that have unfolded in Missouri.⁷⁵

One such event occurred on February 14, 2024.⁷⁶ It should have been a day of celebration and joy as Kansas City held a parade to celebrate the city's NFL team, the Chiefs, and another championship season after winning Super Bowl LVII.⁷⁷ Instead, it became a day of chaos and infamy as yet another mass shooting event in the United States unfolded after the parade rally concluded outside Union Station near downtown Kansas City.⁷⁸

The shooting began when two people were arguing as the rally dispersed; the situation quickly escalated when both pulled out their guns and began firing.⁷⁹ Unsealed federal court documents revealed that twelve people brandished firearms, and at least six individuals fired their weapons during the chaos at the parade rally that day.⁸⁰ Twenty-three people were shot, and one person died from

⁷¹ *People v. Crumbley*, 11 N.W.3d 576, 591 (Mich. Ct. App. 2023).

⁷² *See id.* at 594.

⁷³ *See supra* Part I.

⁷⁴ *See* MO. JUV. AND FAM. DIV., *supra* note 12, at 20.

⁷⁵ *See, e.g.*, Forton & Draper, *infra* note 78; Swartz & Scammahorn, *infra* note 92.

⁷⁶ Jordan Foote, *KC Chiefs Super Bowl LVIII Parade Details: Date, Time, Route and More*, SPORTS ILLUSTRATED (Feb. 12, 2024), <https://www.si.com/nfl/chiefs/news/kc-chiefs-super-bowl-lviii-parade-details-date-time-route-and-more> (detailing a mass shooting perpetrated in part by juvenile offenders in Kansas City, Missouri, a situation that may indicate parental negligence similar to that found in the *Crumbleys* if the parental actions of the parents of those juveniles are analyzed).

⁷⁷ *See id.*

⁷⁸ Jacey Forton & Kevin Draper, *As Gunshots Rang Out, a Super Bowl Celebration Dissolved into Chaos*, N.Y. TIMES (Feb. 14, 2024), <https://www.nytimes.com/2024/02/14/us/witnesses-kansas-city-shooting-parade.html>.

⁷⁹ *The Kansas City Super Bowl Parade Shooting: What We Know*, N.Y. TIMES (Mar. 21, 2024), <https://www.nytimes.com/article/kansas-city-parade-shooting.html>.

⁸⁰ ASSOCIATED PRESS, *Teen Faces New Charge over Mass Shooting at Chiefs Parade*, ESPN (Mar. 19, 2024), https://www.espn.com/nfl/story/_/id/39767070/teen-faces-new-charge-mass-shooting-chiefs-parade.

their injuries.⁸¹ Additionally, nine children suffered gunshot wounds, and hospitals in the Kansas City area received thirty-eight patients related to the parade shooting.⁸² In the months that followed, several people were charged with crimes related to the incident, including second-degree murder and weapons offenses.⁸³

In addition to the several adults charged, two juveniles, one fifteen-year-old and one sixteen-year-old, were charged in connection with the shooting.⁸⁴ The sixteen-year-old, whose full name was not made public (as Missouri prosecutors elected to allow him to keep his juvenile status by not trying him as an adult), was referred to as “R.G.” in court documents.⁸⁵ R.G. admitted that he committed the charge of unlawful use of a weapon by knowingly discharging or firing a firearm at a person.⁸⁶ R.G. was sentenced to a Missouri State Department of Youth Services facility, where commitments typically last nine to twelve months.⁸⁷

Jackson County Family Court Administrative Judge Jennifer Phillips told the teen, “You made some bad choices, but that doesn’t make you a bad person. It doesn’t make you a bad kid,” and R.G. described himself as a “good kid before he became involved with the wrong crowd,” during a proceeding similar to a sentencing hearing in adult court.⁸⁸ During trial, R.G.’s mother told Judge Phillips, “Our house is not a home without [R.G.],” when requesting that he be released to an intensive supervision program and house arrest in lieu of his sentence.⁸⁹ These statements, while likely accurate, appear to fall short of taking true accountability for R.G.’s role in the tragedies that day.

These statements also raise a series of questions that Missouri prosecutors could ask to examine the potential liability of R.G.’s parents for the damages caused by his conduct at the parade. What kind of home did R.G. come from, where he was able to access a firearm, bring it to a crowded event like a Super Bowl parade, and eventually discharge it into a crowd, causing injuries and devastation? How was R.G. able to become involved with the wrong crowd after initially being a good kid? Were there signs in advance that R.G. was heading down a dangerous path and becoming involved with dangerous people and activities that his mother or other responsible adults should have noticed? Was he brandishing firearms or showing other signs of troubling behavior on social media or at school before heading to the parade that day?

Using the *Crumbley* approach, Missouri prosecutors could—and should—investigate these questions. If the facts revealed that R.G. was neglected by his

⁸¹ N.Y. TIMES, *supra* note 79.

⁸² N.Y. TIMES, *supra* note 79.

⁸³ Jim Salter, *3 Men Charged with Federal Firearms Counts After Kansas City Chiefs Super Bowl Parade Shooting*, AP NEWS (last updated Mar. 13, 2024), <https://apnews.com/article/chiefs-super-bowl-shooting-kansas-city-parade-57662b493b2d987288dabca4bc5fd6f1#>.

⁸⁴ See ASSOCIATED PRESS, *supra* note 80.

⁸⁵ See Chantz Martin, *Judge Sentences Teen for Role in Shooting at Chiefs’ Super Bowl Parade*, FOX NEWS (July 26, 2024, 7:11 PM), <https://www.foxnews.com/sports/judge-sentences-teen-role-shooting-chiefs-super-bowl-parade>.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

parents in a fashion that allowed him to follow a dangerous path and become a danger to the public, prosecutors could hold his parents responsible for the damage they allowed him to inflict on the public. Even if the facts of R.G.'s situation revealed no parental negligence contributing to his shootings, it is worth it for prosecutors to at least investigate, as doing so would put parents on notice that they could be held responsible if their negligent parenting results in their child causing irreparable harm. Overall, if R.G.'s case does not meet the standard outlined in the *Crumbley* cases, it is possible there are other cases more similar to *Crumbley* in which a few or even many (as in *Crumbley*) facts support a parental negligence finding. The availability of this heightened standard for parents could still be helpful in reducing the number of such cases involving juvenile violence in Missouri, despite the novelty of this approach.⁹⁰ This approach appears necessary because, as it stands, there does not appear to be any real incentive for neglectful parents of potentially dangerous children to change their behavior.⁹¹ If parents are not held to a higher degree of responsibility for their dangerous children, tragedies like what unfolded at the Chiefs' parade will likely continue to happen in Missouri.

In a more recent tragic incident, a beloved Kansas City area chef, Shaun Brady, was gunned down outside of his restaurant near the Brookside neighborhood, leaving behind a wife and two young children.⁹² Less than twenty-four hours after the shooting, two juveniles were arrested in connection with Brady's murder.⁹³

Allegedly, Brady was taking out the trash at his restaurant, Brady's KC, when he saw a group of people loitering around cars parked behind the building.⁹⁴ A maintenance worker at the building where Brady's restaurant was located reported that Brady thought those individuals were trying to break into his car, so he decided to confront the group.⁹⁵ This assumption was not an unreasonable one by Brady, as, similar to the trends in youth violence, car thefts in the Kansas City area have increased significantly in the years since the COVID-19 pandemic, rising from 4,351 in 2021 to 7,567 in 2023.⁹⁶ The total number of car thefts in Kansas City through July 2024 surpassed the total for the entirety of 2021, with 4,579 reported through July and 918 reported in July alone.⁹⁷ While there are no current

⁹⁰ See generally MO. JUV. AND FAM. DIV., *supra* note 12, at 22 (noting a number of cases in Missouri involving violence perpetuated by juveniles).

⁹¹ See Martin, *supra* note 85.

⁹² See Gabe Swartz & Julia Scammahorn, 'Our Hearts Are Broken': Brookside Chef Gunned down While Taking Out Trash at Brady & Fox, KCTV5 (Aug. 28, 2024), <https://www.kctv5.com/2024/08/28/kcpd-investigating-shooting-death-rockhill-road/>.

⁹³ Heidi Schmidt, Kansas City Teenager Charged with Murder in Brookside Chef's Homicide, KCTV5 (Aug. 29, 2024), <https://www.kctv5.com/2024/08/29/kansas-city-police-arrest-2-teenagers-brookside-chefs-homicide/>.

⁹⁴ Richard Polina, Beloved Kansas City Chef Fatally Shot by Teens Outside His Restaurant: 'He was Community', N.Y. POST (Aug. 30, 2024), <https://nypost.com/2024/08/30/us-news/beloved-kansas-city-irish-chef-shaun-brady-fatally-shot-by-teens-outside-his-restaurant/>.

⁹⁵ See Andy Alcock & Nick Sloan, Number of Kansas City Car Theft Reports Continue to Surge, KMBC NEWS (Aug. 29, 2024), <https://www.kmbc.com/article/kansas-city-car-theft-reports-continue-to-surge/62012085>.

⁹⁶ *Id.*; see also MO. JUV. AND FAM. DIV., *supra* note 14.

⁹⁷ *Id.*

statistics available to determine the percentage of these thefts committed by juveniles, a glance at area headlines involving car thefts reveals that car thefts by teens or other young offenders are far from uncommon in the Kansas City Metro, often with devastating consequences for the public.⁹⁸ The Brookside neighborhood, where Brady's restaurant was located, has been an area of particular vulnerability to car thefts by juveniles throughout 2024.⁹⁹

Brady's decision to confront the group of teenagers he reasonably thought were attempting to break into or steal his car proved to be a fatal one, as the confrontation quickly escalated to a shooting that left Brady dead and the Kansas City community in mourning.¹⁰⁰

In the aftermath of Brady's shooting, Kansas City Mayor Quinton Lucas addressed the city's ongoing issues with violent and property crimes committed by juveniles, stating:

This is not the first, it's not the second, it's not the third, probably not the last tragedy this year that will be committed at the hands of young assailants . . . [t]he fact that these are teenage juvenile suspects who were picked up for this offense, I think should be concerning to each and every one of us.¹⁰¹

In a social media post, Mayor Lucas acknowledged the importance of attentive parenting to combat this issue, stating, "If you have a son, you need to be in his life. You need to care. You need to steer him right. Forget about what the relationship is with his mom. Your son, our society, all of us need you there."¹⁰²

Lucas further acknowledged that combating these criminal actions by juveniles will require more than just law enforcement, noting that a multifaceted approach is needed to address the root cause of these occurrences and prevent them from happening in the first place.¹⁰³ Lucas stated, "We need to understand how a

⁹⁸ See ASSOCIATED PRESS & KAKE NEWS, *Police Identify 3 Killed in Crash After Stolen Kia Flees Kansas City Traffic Stop*, KAKE NEWS (last updated Aug. 20, 2024), https://www.kake.com/home/3-people-are-dead-6-injured-after-teen-flees-from-kansas-city-traffic-stop-in/article_2151acfe-5b13-11ef-98ac-5b6c438d7e30.html; see also Brian Dulle & Sean McDowell, *Six Minors Arrested in Olathe in Connection to Kia, Hyundai Thefts in Kansas City-area*, FOX4KC (last updated June 6, 2023), <https://fox4kc.com/news/six-minors-arrested-in-olathe-in-connection-to-vehicle-thefts-in-kansas-city-area/>; Lauren Liebhaber, *14-year-old Evading Cops in Stolen Pickup Hits and Kills 85-year-old Driver, Cops Say*, KAN. CITY STAR (June 28, 2024, 3:09 PM), <https://www.kansascity.com/news/nation-world/national/article289616532.html>.

⁹⁹ See Robert A. Cronkleton, *2 Teens Arrested in String of Auto Thefts, Crimes in KC's Brookside, Waldo Area*, KAN. CITY STAR (Aug. 21, 2024, 4:26 PM), <https://www.kansascity.com/news/local/crime/article291259380.html>.

¹⁰⁰ Kathy Quinn & Andrew Lynch, *Irish Community Mourns After Kansas City Chef Is Shot, Killed*, FOX4 KAN. CITY (Aug. 29, 2024), <https://fox4kc.com/news/irish-community-mourns-after-kansas-city-chef-is-shot-killed/>.

¹⁰¹ Robert A. Cronkleton, *After 2 Teens Arrested in KC Chef's Death, Mayor Lucas Calls Out Rising Juvenile Crimes*, KAN. CITY STAR (Aug. 29, 2024, 4:52 PM), <https://www.kansascity.com/news/local/crime/article291667085.html>.

¹⁰² Quinton Lucas (@QuintonLucasKC), X (formerly TWITTER) (Aug. 29, 2024, 4:06 PM), <https://x.com/QuintonLucasKC/status/1829264488429654515>.

¹⁰³ Cronkleton, *supra* note 101.

kid that age starts to engage in this type of behavior, why they were not stopped before, how they got firearms and frankly, what we can do to prevent others from engaging in this sort of behavior in the future.”¹⁰⁴

Reading between the lines of his statements, it appears Mayor Lucas agrees that improper and negligent parenting is a significant contributing factor to the endemic juvenile violence faced by the Kansas City Metro. By Lucas’ logic, one approach to addressing these issues could be a new willingness by area prosecutors to investigate the parental circumstances surrounding juvenile offenders who commit violent crimes and to hold those parents accountable when their parental negligence rises to egregious levels—like that of James and Jennifer Crumbley—and results in death and destruction caused by their children.

In summary, an elevated standard is necessary to hold Missouri parents liable for the manner in which they raise their children, and parents must be put on notice of the legal responsibilities they owe to their children and the public at large. Those who were injured in a mass shooting during what should have been a joyous occasion at the Chiefs’ parade, as well as all others in the state who have felt the tragic effects of the violence committed by juveniles, would likely agree.¹⁰⁵

IV. NO ALTERNATIVE: WHY MISSOURI’S LACK OF GUN SAFETY AND STORAGE LAWS MAKES THE *CRUMBLEY* APPROACH NECESSARY

Twenty-six states and the District of Columbia have statutes that impose criminal liability for failing to secure firearms safely and adequately.¹⁰⁶ These laws vary by jurisdiction, but come in two general forms: (1) Child Access Prevention laws, which impose a penalty on those who fail to secure an unattended firearm and leave it accessible to an unsupervised minor, and (2) safe storage laws, which require unattended firearms to be stored in certain ways.¹⁰⁷ Missouri is one of twenty-four states that has no law of either kind.¹⁰⁸ At the time of the shooting committed by Ethan, Michigan had no law that required firearms stored in the presence of minors to be unloaded and unlocked.¹⁰⁹ Michigan eventually passed legislation to this effect,¹¹⁰ but at the time of Ethan’s murders, prosecutors had to use a different mechanism to hold James and Jennifer accountable.

This mechanism was the involuntary manslaughter charge, drawing a line of causation from James and Jennifer’s parental failures to the murders Ethan

¹⁰⁴ *Id.*

¹⁰⁵ See Martin, *supra* note 85; Swartz & Scammahorn, *supra* note 92; Alcock & Sloan, *supra* note 95.

¹⁰⁶ *Child & Consumer Safety: Child Access Prevention & Safe Storage*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/child-access-prevention-and-safe-storage/> (last visited Sept. 16, 2025).

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ Fortin, *supra* note 9.

¹¹⁰ See Beth LeBlanc, *Michigan House Passes Gun Storage Bills Sought After Deadly Oxford Shooting*, DETROIT NEWS (Mar. 22, 2023, 8:15 PM),

committed.¹¹¹ The laws in Michigan regarding safe gun storage are now comprehensive.¹¹² Severe penalties can now befall adults whose negligent storage allows their firearms to be obtained by minors who then brandish those firearms in public or use those firearms to hurt others.¹¹³ Violation of the new legislation, Mich. Comp. Laws § 28.429, is considered a felony offense and can be punished with up to fifteen years in prison and a maximum fine of \$10,000.¹¹⁴

As of the 2024 legislative session, there is still no safe gun storage legislation in Missouri to this effect.¹¹⁵ On the contrary, it appears Missouri's

<https://www.detroitnews.com/story/news/local/oakland-county/2023/03/22/michigan-house-oks-gun-safe-storage-bills-sought-after-deadly-oxford-high-school-msu-shooting/70038417007/>; see also discussion *infra* Section I.

¹¹¹ See Cox, *supra* note 18.

¹¹² See MICH. COMP. LAWS § 28.429 (2024) (“Firearm; safe storage requirements; penalties if minor obtains firearm; exceptions; literature for firearms dealers; definitions.”).

¹¹³ See *id.* (“(1) An individual who stores or leaves a firearm unattended on premises under the individual’s control, and who knows or reasonably should know that a minor is, or is likely to be, present on the premises, shall do 1 or more of the following: (a) Store the firearm in a locked box or container. (b) Keep the firearm unloaded and lock the firearm with a locking device that is properly engaged to render the firearm inoperable by any individual other than the owner or an authorized user.

(2) An individual who enters onto the premises of another individual, stores or leaves a firearm unattended on those premises, and who knows or reasonably should know that a minor is, or is likely to be, present on the premises, shall do 1 or more of the following: (a) Store the firearm in a locked box or container. (b) Keep the firearm unloaded and lock the firearm with a locking device that is properly engaged to render the firearm inoperable by any individual other than the owner or an authorized user. (c) Before entering onto the premises, do both of the following:

(i) In the individual’s motor vehicle, store the firearm in a locked box or container in that vehicle, or keep the firearm unloaded and lock the firearm with a locking device that is properly engaged to render the firearm inoperable by any individual other than the owner or an authorized user. (ii) Lock the individual’s motor vehicle.

(3) An individual is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both, if the individual violates subsection (1) or (2) by failing to store or leave a firearm in the required manner and as a result of the violation both of the following occur: (a) A minor obtains the firearm. (b) The minor does either of the following: (i) Possesses or exhibits the firearm in a public place. (ii) Possesses or exhibits the firearm in the presence of another person in a careless, reckless, or threatening manner. (4) If an individual violates subsection (1) or (2) by failing to store or leave a firearm in the required manner and, as a result of the violation, a minor obtains the firearm, discharges it and inflicts injury upon the minor or any other individual, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both. (5) If an individual violates subsection (1) or (2) by failing to store or leave a firearm in the required manner and, as a result of the violation, a minor obtains the firearm, discharges it and inflicts serious impairment of a body function upon the minor or any other individual, the individual is guilty of a felony punishable by not more than 10 years or a fine of not more than \$7,500.00, or both. (6) If an individual violates subsection (1) or (2) by failing to store or leave a firearm in the required manner and, as a result of the violation, a minor obtains the firearm, discharges it and inflicts death upon the minor or any other individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.”).

¹¹⁴ *Id.*

¹¹⁵ See GIFFORDS L. CTR., *supra* note 106; see also H.B. 307, 103rd Gen. Assemb., Reg. Sess. (Mo. 2025) (Missouri house bill introduced by Democrat Stacy Steinhoff establishing provisions related to the safe storage of firearms killed in session and dead as of May 16, 2025).

current lawmakers are moving in the opposite direction on gun safety issues.¹¹⁶ In just the first few days of the 2024 Missouri legislative session, lawmakers introduced numerous bills regarding gun ownership, gun possession, and public places where guns are allowed.¹¹⁷ However, these bills were in the direction of liberalizing gun ownership rather than restricting it, and if passed, may have actually served to make guns more ubiquitous in the state.¹¹⁸ This legislation included House Bill 1708, proposing to lower the age for concealed carry of a firearm from nineteen to eighteen and allow concealed carry into churches and other houses of worship, as well as public transportation like buses and trains.¹¹⁹ House Bill 2291 proposed legislation creating exemptions to state sales tax for guns and ammunition to further encourage citizens to purchase guns.¹²⁰ House Bill 1440 ventured into the educational world, proposing to expand the categories of people allowed to carry guns in schools from school resource officers or police officers to all school personnel, including teachers.¹²¹ House Bill 808 proposed to nullify any gun safety legislation passed by Missouri's local or municipal bodies by allowing the state government to take control of municipal law enforcement agencies in a similar fashion to how it currently controls the Kansas City Police Department.¹²²

House Bill 808 illustrates a common theme in the Missouri political landscape: local leaders want to pass increased gun safety legislation for their communities, but the state government of Missouri refuses to allow that to happen.¹²³ This is enabled by a longstanding Missouri law that prevents any county, city, or municipality from passing legislation regulating the sale, purchase, ownership, use, possession, transfer, transportation, licensing, permit, or registration of firearms.¹²⁴ This law is Mo. Rev. Stat. § 21.750, which states:

No county, city, town, village, municipality, or other political subdivision of this state shall adopt any order, ordinance or regulation concerning in any way the sale, purchase, purchase delay, transfer,

¹¹⁶ See *Extremist Lawmakers in Missouri Begin 2024 Legislative Session By Reintroducing Dangerous Gun Laws, Including Legislation to Force Guns Into Places of Worship, Allow More People to Have Guns in Schools, and Legalize Access to Firearms for Children*, EVERYTOWN (Jan. 12, 2024) [hereinafter *Extremist Lawmakers*], <https://www.everytown.org/press/extremist-lawmakers-in-missouri-begin-2024-legislative-session-by-reintroducing-dangerous-gun-laws-including-legislation-to-force-guns-into-places-of-worship-allow-more-people-to-have-guns-in-school/>.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See H.R. 1708, 102d Gen. Assemb., 2d. Reg. Sess., (Mo. 2024).

¹²⁰ See H.R. 2291, 102d Gen. Assemb., 2d. Reg. Sess., (Mo. 2024).

¹²¹ See H.R. 1440, 102d Gen. Assemb., 2d. Reg. Sess., (Mo. 2024).

¹²² See S.B. 808, 102d Gen. Assemb., 2d. Reg. Sess., (Mo. 2024).

¹²³ See *id.*; see also H.B. 307, 103rd Gen. Assemb., Reg. Sess. (Mo. 2025) (Missouri house bill introduced by Democrat Stacy Steinhoff establishing provisions related to the safe storage of firearms killed in session and dead as of May 16, 2025); see also Celisa Calacal & Kavahn Mansouri, *After Parade Shooting, Kansas City Leaders Want to Pass Gun Safety Laws. Missouri Won't Let Them*, KCUR (Feb. 16, 2024), <https://www.kcur.org/politics-elections-and-government/2024-02-16/chiefs-parade-shooting-kansas-city-gun-laws-missouri-local-control>.

¹²⁴ See Calacal & Mansouri, *supra* note 123; MO. REV. STAT. § 21.750.2 (2025).

ownership, use, keeping, possession, bearing, transportation, licensing, permit, registration, taxation other than sales and compensating use taxes or other controls on firearms, components, ammunition, and supplies.¹²⁵

The ability to pass any gun legislation in Missouri, therefore, lies entirely with the Missouri state legislature and governor.¹²⁶

Control of the Missouri state government is currently held solely by the Republican Party.¹²⁷ Republicans control the offices of governor, secretary of state, attorney general, and both chambers of Missouri's state legislature.¹²⁸ Republicans hold a 24-10 supermajority in the Missouri State Senate and a 108-52 supermajority in the Missouri House of Representatives.¹²⁹

This political landscape has left city leaders and lawmakers in a state of hopelessness surrounding gun legislation, and many do not think meaningful change in this area will happen anytime soon.¹³⁰ Even after the high-profile mass shooting at the Chiefs' Super Bowl Parade, Democratic leaders expressed doubt that it would be enough to encourage the majority of Missouri Republican lawmakers to make reforms to gun laws.¹³¹ Soon after the parade shooting, Missouri Democratic State Rep. Ashley Aune summarized the party's consensus on the state of gun legislation, stating:

The only solution to this is electing more Democrats in Missouri, full stop. That's the only way things will change. Republicans have had a supermajority in our state. They have been running everything for 20 years. That is why we are where we're at today with our very lax gun laws.¹³²

Kansas City Council member Andrea Bough, who was present at the parade with her twenty-year-old son when the shooting began, summarized the feelings of local lawmakers who favor tighter gun control in Missouri, stating:

We are limited, and those at the state . . . level, have refused to act. . . . We, here, at the local level who are living with it, are helpless. I mean, I feel helpless as a mother, watching children and hearing the stories of children and hearing the stories of the number of children that were physically harmed [at the parade shooting] yesterday.¹³³

¹²⁵ MO. REV. STAT § 21.750.2 (2025).

¹²⁶ Jonathan Shorman, Kacen Bayless, & Glenn E. Rice, *Kansas City Is 'Awash in Firearms' but Missouri Bans Local Leaders from Regulating Guns*, KAN. CITY STAR (July 10, 2023), <https://www.kansascity.com/news/politics-government/article277094418.html>.

¹²⁷ See *Party Control of Missouri State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Missouri_state_government (last visited Oct. 7, 2025).

¹²⁸ *Id.*

¹²⁹ See *Missouri General Assembly*, BALLOTPEdia, https://ballotpedia.org/Missouri_General_Assembly (last visited Oct. 7, 2025).

¹³⁰ See Calacal & Mansouri, *supra* note 123.

¹³¹ *Id.*

¹³² Calacal & Mansouri, *supra* note 123.

¹³³ *Id.*

As of 2024, Missouri has the fifth-highest gun death rate in the United States.¹³⁴ The gun death rate has increased by 58% from 2007 to 2019.¹³⁵ 2007 was the year “permit-to-purchase” laws were removed, meaning a state permit was no longer required for the purchase of rifles, shotguns, or handguns in Missouri.¹³⁶ Despite this troubling statistical trend and the increasing trend of tragic incidents involving guns like those detailed in this comment,¹³⁷ Missouri politicians with the power to enact legislation that would result in positive change appear unwilling to do so.¹³⁸ After the parade shooting, then-Governor Mike Parson focused the blame on individuals rather than guns, naming “a bunch of criminals, thugs” as the cause of the chaos that day.¹³⁹ Some legislators believe tighter gun laws would not be a sufficient solution to combat the gun violence issues, with Republican House Representative Ben Banker stating, “The fact is . . . no law that we can pass in this body would have prevented the terrible tragedy that happened last week [during the parade].”¹⁴⁰

In summary, despite an undeniable problem with gun violence in Missouri, elected officials with the power to pass legislation restricting guns in any fashion appear unwilling to do so.¹⁴¹ This includes child access prevention laws or safe storage laws like Mich. Comp. Laws § 28.429, passed in Michigan after the Oxford school shooting tragedy.¹⁴² Legislation similar to Mich. Comp. Laws § 28.429 was proposed in January 2024, which would have made it a crime to knowingly fail to secure a firearm in the presence of a child under seventeen years of age.¹⁴³ This proposed bill did not make it out of committee and was declared dead as of May 17, 2024.¹⁴⁴ In such an environment where state leaders refuse to pass legislation to combat gun violence¹⁴⁵ and actively prevent local legislative bodies from passing their own laws to address the issues,¹⁴⁶ prosecutors in Missouri may find the *Crumbley* approach to be a useful tool in combating at least one area in the

¹³⁴ Katie Moore, *Missouri Has the Fifth Highest Gun Death Rate, New Study Says, Where Does Kansas Come In?*, KAN. CITY STAR (May 8, 2024), <https://www.kansascity.com/news/local/article288393115.html>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Forton & Draper, *supra* note 78; Polina, *supra* note 94.

¹³⁸ See Kacen Bayless, Jonathan Shorman, & Katie Bernard, *Amid Fury over KC Shooting, Missouri Republicans Move to Quickly Quash Gun Reform Talk*, KAN. CITY STAR (Feb. 15, 2024), <https://www.kansascity.com/news/politics-government/article285499062.html>.

¹³⁹ Kacen Bayless, *Parson Blames ‘Criminals, Thugs’ for KC Chiefs Rally Shooting, Makes no Mention of Guns*, KAN. CITY STAR (February 15, 2024), <https://www.kansascity.com/news/politics-government/article285515387.html>.

¹⁴⁰ See Kacen Bayless, *Should Kansas City Have More Say over Guns? Democrats Will Push Plan After Mass Shooting*, KAN. CITY STAR (Feb. 19, 2024), <https://www.kansascity.com/news/politics-government/article285665552.html>.

¹⁴¹ See Calacal & Mansouri, *supra* note 123.

¹⁴² See Bayless, *supra* note 140.

¹⁴³ S.B. 996, 102d Gen. Assemb., Reg. Sess., (Mo. 2024).

¹⁴⁴ See *id.*; *MO SB996*, BILLTRACK50, <https://www.billtrack50.com/billdetail/1652085> (last visited Sept. 8, 2024).

¹⁴⁵ See Bayless, *supra* note 139.

¹⁴⁶ See Calacal & Mansouri, *supra* note 123.

broad array of gun issues: gun violence committed by juveniles resulting from negligent supervision by their parents. Just as the Oxford County prosecutor had to find an alternative tool to pursue accountability from James and Jennifer Crumbley before Mich. Comp. Laws § 28.429 was enacted,¹⁴⁷ here in Missouri prosecutors can and should utilize a similar approach in situations that warrant it, with the examples detailed herein being extremely persuasive cases to begin considering such an approach.¹⁴⁸

When the state government provides no alternative, local Missouri prosecutors must be willing to use Karen McDonald's *Crumbley* approach to hold parents accountable when their reckless gun storage results in minors accessing those guns and causing harm to others. Missouri ranks among the top ten states for gun deaths,¹⁴⁹ with more than 130 children and teens killed by guns every year.¹⁵⁰ When the legislature leaves prosecutors with no viable alternatives to seek justice, local leaders must act. Prosecutors should be willing to use the *Crumbley* approach to discourage parental negligence around guns and mitigate the harm caused by unauthorized child access to firearms.¹⁵¹

V. CONCLUSION

As the trend of juvenile violence continues in Missouri, it would be beneficial for Missouri prosecutors to consider using Karen McDonald's approach from the *Crumbley* cases. The cases establish compelling factors regarding the types of parental negligence for which parents could be held criminally responsible. This is especially true when those parenting failures result in their child causing irreparable harm to others. Due to the beneficial deterrent and prevention incentives that this approach can have to make parents properly supervise their children's activities, safely and securely store their firearms, and stop these preventable tragedies before they occur, a good first step in curbing the juvenile violence problems faced here in Missouri would be for prosecutors to begin investigating under this approach, and putting parents on notice that they are doing so.

¹⁴⁷ See Cox, *supra* note 18.

¹⁴⁸ See Martin, *supra* note 85; Quinn & Lynch, *supra* note 100.

¹⁴⁹ See *Extreme Lawmakers*, *supra* note 116.

¹⁵⁰ See *How Does Gun Violence Impact the Communities You Care About: Missouri*, EVERY STAT, <https://everystat.org/#Missouri> (last visited Nov. 11, 2025).

¹⁵¹ See Calacal & Mansouri, *supra* note 123.