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We proudly present Volume 74, Issue 4 of the Arkansas Law Review *for the benefit of all who learn and advance the law, whether judge, advocate, professor, or student. We have carefully developed these materials to elicit informed discussions and provide intellectual and practical assistance to members of the legal community.*

Arkansas Law Review Editorial Board
2021-2022

WHY ARKANSAS ACT 710 WAS UPHELD, AND WILL BE AGAIN

Mark Goldfeder*

I. INTRODUCTION

A lie can travel halfway around the world while the truth is putting on its shoes.
— ironically, not Mark Twain

The recent Eighth Circuit ruling in *Arkansas Times LP v. Waldrip*[1], the lawsuit revolving around an Arkansas anti-discrimination bill, has led to a lot of (at best) confusion or (at worst) purposeful obfuscation by people unwilling or unable to differentiate between procedural issues and the constitutional merits of a case.[2] In other words, reports of the bill's death have been very much exaggerated.[3]

Despite the fact that the court's narrow ruling did not even strike down the bill in Arkansas, let alone set a precedent for other similar bills, there are those who are concerned that the *Arkansas Times* decision somehow calls into question legislative action in

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1. 988 F.3d 453 (8th Cir. 2021), *reh'g en banc granted, opinion vacated* (8th Cir. June 10, 2021) (No. 19-01378).

2. *See e.g.*, Elliot Setzer, *Eighth Circuit Strikes Down Arkansas's Anti-BDS Law*, LAWFARE (Mar. 1, 2021), [https://perma.cc/36TX-HAAU] (falsely claiming that the Eighth Circuit struck down the bill, when in fact all it did was remand the case for further proceedings).

3. *See* Sean Savage, *Advocates See Federal Court Decision on Arkansas Anti-BDS Law 'Disappointment,' Not Setback*, JEWISH NEWS SYNDICATE (Feb. 16, 2021), [https://perma.cc/C8BW-CSWP].

other states across the country.[4] In order to separate fact from fiction and clarify the constitutional concerns that are still very relevant in a case that is still very much alive, this Article will recap what has already actually happened and why, explain what is still being decided, and then forecast what is likely to happen in the future of this case.

II. BACKGROUND

"In 2017, Arkansas enacted Arkansas Act 710, titled 'An Act to Prohibit Public Entities from Contracting with and Investing in Companies That Boycott Israel; and for Other Purposes.'"[5] Under this law, state entities are prohibited from contracting on ordinary terms with companies that boycott the State of Israel.[6]

The majority of states in the United States of America (thirty as of the date of this writing) have adopted similar bills, and the motivation behind them was the rise of the antisemitic Boycott, Divestment, and Sanctions ("BDS") Movement, which "operates as a coordinated, sophisticated effort to disrupt the economic and financial stability of the state of Israel,"[7] persons conducting business in and with Israel,[8] and individuals that the movement deems to be too closely affiliated with Israel in some way.[9]

It is the longstanding policy of the United States to oppose discriminatory boycotts against Israel; ever since President Carter

4. *See e.g.*, Aaron Terr, *Eighth Circuit: Arkansas Anti-BDS Law Violates First Amendment*, FIRE: NEWSDESK (Feb. 18, 2021), [https://perma.cc/AW27-6UWM].

5. *Ark. Times LP*, 988 F.3d at 458; *see also* ARK. CODE ANN. § 25-1-503 (2017).

6. § 25-1-503(a).

7. *See* OMAR BARGHOUTI, BDS: BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS 223 (2011); *see also* Bob Unruh, *Hate-Israel Movement Flames Out as Investments Rise*, WORLD NOT DAILY (June 4, 2016), [https://perma.cc/4N26-TXQX].

8. GHADA AGEEL, APARTHEID IN PALESTINE: HARD LAWS AND HARDER EXPERIENCES 100 (Joanne Muzak ed., 2016).

9. As long as those people do not also make useful things that the boycotters want, like Covid-19 vaccines. Marcy Oster, *BDS Founder: Israel-Invented Virus Vaccine Would Be OK for Boycotters to Use*, TIMES ISR. (Apr. 7, 2020), [https://perma.cc/3U9V-PPBN]; *see also* Karl Vick, *This Is Why It's Hard to Boycott Israel*, TIME (June 5, 2015), [https://perma.cc/D94K-KJAR] (discussing how the Israel-boycott-movement began with a targeted boycott of items produced on the West Bank, but the BDS movement has expanded to a boycott of all things produced in Israel); *Boycott Israel Products*, BOYCOTT ISR. TODAY (Sept. 8, 2014), [https://perma.cc/39N3-R7WD] (advocating for a boycott of Israeli and Jewish products that support Israel directly or indirectly no matter where produced).

signed the anti-boycott amendments to the Export Administration Act in 1977,[10] every single Congress and administration has affirmed it.[11] All that Arkansas Act 710 and the rest of the so-called anti-BDS bills really do is implement that federal policy by saying that if you want a particular state to do business with you, you need to abide by that state's policies (reflective of federal policies) related to sound and fair business practices. This includes a requirement to abide by the state's anti-discrimination rules.

In theory this should not be controversial. "The Supreme Court has consistently found that state and federal anti-discrimination laws that relate to race, religion, color, and national origin do not violate the highest level of First Amendment protections."[12] States "all have a compelling interest in preventing invidious discrimination," and they are free to implement "that compelling interest by imposing conduct-based

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10. *Statement by President Carter upon the Signing of Anti-Boycott Legislation*, ISR. MINISTRY OF FOREIGN AFFS., [https://perma.cc/2PDQ-DD2X] (last visited Oct. 21, 2017) [hereinafter *President Carter Anti-Boycott Signing Statement*].

11. *See* Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 47–48 (2017) ("Though the EAA Anti-Boycott Law has statutorily lapsed by its own terms pursuant to its sunset provision, as the Congressional Research Service Report states, 'its provisions are continued under the authorization granted to the President in the National Emergencies Act and the International Economic Emergency Powers Act, most recently under Executive Order 13222 signed August 17, 2001.'") (quoting MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 6 n.18 (2017)). President Carter's signing statement itself was quite telling:

> For many months I have spoken strongly on the need for legislation to outlaw secondary and tertiary boycotts and discrimination against American businessmen on religious or national grounds . . . . My concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries. But the issue also goes to the very heart of free trade among all nations . . . . The bill seeks instead to end the divisive effects on American life of foreign boycott [sic] aimed at Jewish members of our society. If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.

President Carter Anti-Boycott Signing Statement, *supra* note 10.

12. Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 61 & n.135 (2018) (first citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); then citing Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2015); and then citing Christian Legal Soc'y v. Martinez, 561 U.S. 661, 697-98 (2010)).

regulations on government contractors."[13] In fact, liberal organizations like the American Civil Liberties Union ("ACLU") have been publicly supportive of this idea on a regular basis and in a variety of contexts.[14] The only difference here appears to be the relative popularity of the targets of the discriminatory action that the government is seeking to protect against. In this case (as applied), more often than not the people being discriminated against are Jewish people and those who support the Jewish state.[15] "Act 710's text makes clear the Arkansas General Assembly's antidiscrimination goals. As [the legislature] found, boycotts of Israel, which are 'discriminatory decisions,' are rooted in animus towards 'the Jewish people.'"[16]

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13. Brief of States of Arizona & Florida et al. as Amici Curiae Supporting Petitioner, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2526871, at *1.

14. *See e.g.*, Heather L. Weaver & Daniel Mach, *A New String of State Bills Could Give Religious Organizations Blanket Immunity from Any Wrongdoing*, ACLU: NEWS & COMMENT. (Mar. 20, 2021), [https://perma.cc/2J63-563P] (arguing that states should be free to decide whom they contract with, otherwise the law could "make the government an accomplice to discrimination. For example, the bills could prohibit the State from denying State contracts, licenses, and certifications, as well as tax exemptions based on religious organizations' exercise of their faiths. Under these provisions, the State could be required to give government contracts to groups like the KKK, which claim to be religiously based, or organizations that claim a religious right to discriminate against certain social-services beneficiaries.").

15. *See* David Bernstein, *The ACLU's Shameful Role in Promoting Antisemitism*, REASON (Mar. 11, 2019), [https://perma.cc/6P26-79TX] (noting how, when it comes to the BDS movement, the ACLU is surprisingly willing to engage in some light antisemitism, including the use of classic antisemitic tropes, like calling the anti-discrimination provisions "loyalty oath[s]" to the State of Israel). In his words:

> This is complete nonsense. Contractors certifying that their businesses don't boycott Israel-related entities is no more a "loyalty oath" to Israel than certifying that they don't refuse to deal with black or gay or women-owned business, or or [sic] that they will deal only with unionized businesses, is a "loyalty oath" to blacks, gays, women, or unions. Contractors who sign anti-boycott certifications are free to boycott Israel and related entities in their personal lives, and they and their businesses are free to donate to anti-Israel candidates and causes, and even to publicly advocate for BDS.

Id.

16. Brief of Defendants-Appellees, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2407954, at *2; *see also* ARK. CODE ANN. § 25-1-501(2)-(3) (2017) (noting that discriminatory boycotts of Israel predated even its official declaration of independence). Other states have been even more explicit on the subject. *See, e.g.*, Greendorfer, *supra* note 12, at 46 (citing Act of Sept. 24, 2016, §§ 1(f), (j), 2016 Cal. Stat. 4023, 4025 (West 2016) (codified at CAL. PUB. CONT. CODE § 2010 historical and statutory notes)).

To be clear, while it is not the case that all BDS supporters are antisemitic, the movement itself is demonstrably so, and that is the relevant fact for a constitutional analysis.[17] The BDS campaign "is predicated on the claim that Israel is nothing more than a colonial and racist initiative undertaken by Jews and explicitly states that the State of Israel is a racist, illegitimate entity that should not exist."[18] Its leaders openly and repeatedly deny the Jewish people's right to self-determination and call for the destruction of their homeland.[19] Per the internationally recognized International Holocaust Remembrance Alliance ("IHRA") definition of antisemitism, that alone is unacceptable antisemitism,[20] but it is *also* true that the nonprofit umbrella group for U.S.-based BDS organizations funnels money to terrorist organizations that specialize in killing Jews and that call for Jewish genocide;[21] that more than thirty[22] of the BDS National Committee's leaders are *actual* violent terrorists;[23] and that the

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17. Greendorfer, *supra* note 12, at 33.

18. Marc A. Greendorfer, *Discrimination as a Business Policy: The Misuse and Abuse of Corporate Social Responsibility Programs*, 8 AM. U. BUS. L. REV. 307, 358 (2020) (citing GRASSROOTS PALESTINIAN ANTI-APARTHEID WALL CAMPAIGN, TOWARDS A GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY'S ANTI-APARTHEID ACTIVISM, (2007), [https://perma.cc/TCT5-LQNV] [hereinafter TOWARDS A GLOBAL MOVEMENT]). In relation to the colonialist claim, Greendorfer also notes the fact that this is a complete inversion of history: Jews are the indigenous people of the land and are simply reclaiming their historic homeland and asserting their inherent right to self-determination. Greendorfer, *supra* note 11, at 5, 85.

19. *See, e.g.*, Ali Abunimah, *Finkelstein, BDS and the Destruction of Israel*, AL JAZEERA (Feb. 28, 2012), [https://perma.cc/TX4R-8AA4] (quoting an interview with Norman Finkelstein); Rachel Avraham, *Goal of the BDS Movement: Delegitimize Israel*, UNITED WITH ISR. (July 10, 2013), [https://perma.cc/M4HY-L4UP]; HAROLD BRACKMAN, SIMON WIESENTHAL CTR., BOYCOTT DIVESTMENT SANCTIONS (BDS) AGAINST ISRAEL: AN ANTI-SEMITIC, ANTI-PEACE POISON PILL 1-3 (2013).

20. *See* Ahmed Shaheed, *Elimination of All Forms of Religious Intolerance*, ¶¶ 18, 50, U.N. Doc. A/74/358 (Sept. 20, 2019) (noting with concern the claim "that the objectives, activities and effects of the Boycott, Divestment and Sanctions movement are fundamentally antisemitic" under the IHRA's internationally accepted standard definition of antisemitism).

21. Armin Rosen & Liel Leibovitz, *BDS Umbrella Group Linked to Palestinian Terrorist Organizations*, TABLET (June 1, 2018), [https://perma.cc/P3WK-8H52].

22. *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations*, STATE OF ISR. (Feb. 2019), [https://perma.cc/Z4U7-D6PW] (detailing exposed information of more than thirty individuals who are BDS leaders and have personal involvement in actual terrorism).

23. Emily Jones, *'Terrorists in Suits': Senior Leaders of Anti-Israel BDS Groups Tied to Palestinian Terror*, CBN NEWS (Feb. 4, 2019), [https://perma.cc/9QNN-TMA6].

antisemitism some BDS activists spout[24] often breaks through the "non-violent" veil,[25] leading to people, including innocent Jewish (not Israeli) American citizens getting hurt.[26] Our government is, of course, aware of these connections; in 2016 for example, Congress heard testimony from former United States Department of the Treasury counterterrorism analyst Dr. Jonathan Schanzer that: "[i]n the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign."[27]

This is also not in any way a partisan issue: both the Republican and Democratic parties have consistently denounced BDS in their platforms.[28] Nor is it only a federal issue; in 2017, the governors of *all fifty* states signed onto a statement affirming

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24. Jeremy Bauer-Wolf, *After Threat of Violence, Calls to Fire RA*, INSIDE HIGHER ED (Aug. 1, 2018), [https://perma.cc/6L42-F2VG] (stating that a college student who was associated with a student organization which supports BDS sought to physically fight Zionists on campus).

25. Rachel Frommer, *British Jewish Leaders Outraged by London University Anti-Israel Protest Which Required Police Intervention*, ALGEMEINER (Oct. 28, 2016, 4:37 PM), [https://perma.cc/JNH2-T3UD].

26. DAN DIKER & JAMIE BERK, JERUSALEM CTR. FOR PUB. AFFS., STUDENTS FOR JUSTICE IN PALESTINE UNMASKED: TERROR LINKS, VIOLENCE, BIGOTRY, AND INTIMIDATION ON US CAMPUSES 5, 28 (2018), [https://perma.cc/6NYS-TSLK].

27. *Israel Imperiled: Threats to the Jewish State: Joint Hearing Before the Subcomm. on Terrorism, Nonproliferation, & Trade & the Subcomm. on the Middle E. & N. Afr. of the H. Comm. on Foreign Affs.*, 114th Cong. 23 (2016) (statement of Dr. Jonathan Schanzer, Vice President of Rsch., Found. for Def. of Democracies); *see also Israel, the Palestinians, & the United Nations: Challenges for the New Admin.: Joint Hearing Before the Subcomm. on the Middle E. & N. Afr. and the Subcomm. on Afr., Glob. Health, Glob. Hum. Rts., & Int'l Orgs. of the H. Comm. on Foreign Affs.*, 115th Cong. 42-43 (2017) (statement of Dr. Johnathon Schanzer, Vice President of Rsch., Found. For Def. of Democracies):

> [The Palestinian National Fund] reportedly pays the salaries of the [Palestine Liberation Organization's ("PLO")] members, as well as students, who received tens of millions of dollars in support of BDS activities each year . . . . PLO operatives in Washington, DC are reportedly involved in coordinating the activities of Palestinian students in the U.S. who receive funds from the PLO to engage in BDS activism. This, of course, suggests that the BDS movement is not a grassroots activist movement, but rather one that is heavily influenced by PLO-sponsored persons.

28. *See, e.g.*, *Republican Platform 2016*, GOP (2016), [https://perma.cc/U9AE-DNKA]; *2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT (2016), [https://perma.cc/S6Z8-Q6YE]; *2020 Democratic Party Platform*, DEMOCRATIC NAT'L CONVENTION (August 18, 2020), [https://perma.cc/S7VL-MB9S].

their opposition to BDS, noting that "[t]he goals of the BDS movement are antithetical to our values and the values of our respective states[,]" and reiterating that BDS's "single-minded focus on the Jewish State raises serious questions about its motivations and intentions."[29]

And so, it is not surprising that, in response to the BDS movement, a majority of states have enacted their own "anti-BDS bills,"[30] which mirror the federal anti-boycott provisions and seek to prevent American citizens and businesses from being forced to take sides in a foreign conflict, and to take part in actions (such as national origin discrimination) which are repugnant to American values and traditions.[31]

Just so that there is no confusion: none of the state "anti-BDS" laws ban or punish speech that is critical of Israel; none of the state laws target advocacy for Palestinian rights; and none of the state laws stop anyone or any business from boycotting Israel. The laws simply say that if you *do* choose to boycott Israel in a discriminatory manner, the State can choose not to do business with you.

Again, there should be nothing controversial with a state simply choosing how to spend its dollars.[32] Government

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29. *Governors United Against BDS*, AM. JEWISH COMM., [https://perma.cc/M9MX-98QY] (last visited Oct. 1, 2021).

30. Some of which are modeled in spirit after the 1977 amendments to the Export Administration Act. *See, e.g.*, Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 [hereinafter EAA of 1977]; *Impact of the Boycott, Divestment, & Sanctions Movement: Hearing Before the Subcomm. On Nat'l Sec. of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2015) (statement of Eugene Kontorovich); Ribicoff Amendment to the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at 26 U.S.C. § 999); *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., [https://perma.cc/H9HJ-NWNS] (last visited Nov. 25, 2021).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a(a)).

32. This is usually not a disputed point, and it applies in a variety of areas. For example, there is a market participant exception to the Commerce Clause that allows a state to make commercial purchasing decisions to comport with the interests of the state, even if that decision may otherwise appear to be partisan in some way. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 437-39 (1980). While Act 710 is not a Commerce Clause case, the market participant exception certainly reinforces the idea that states are not always prohibited from acting in their own interests when it comes to commercial relations. If this were not the case, then states like California would not be allowed to do what they do when acting as a market participant for state-sponsored travel by state employees, i.e., prohibiting travel to states or localities that have policies or laws that California's legislators find to be discriminatory, such as states that refuse to fully support LGBTQ activism. *See* Rebecca Beitsch, *Supposedly*

spending (especially with accompanying legislative findings) in this context is government speech, and "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."[33] In fact, the Supreme Court has continually refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals."[34] In the case of Arkansas Act 710 and all similar statutes, the government does not even seek to fund a controversial program, it merely seeks *not* to fund a program that discriminates.[35] While people remain free to engage in hateful actions, that does not make them less hateful, nor does it mean that the State must agree to subsidize those actions.[36] "To argue otherwise would be to suggest that [a] state is constitutionally obligated to support the BDS [M]ovement, which is not only irrational but also has no basis in law."[37]

In addition to protecting citizens from coercion and protecting the government from involving itself in discriminatory

Symbolic, State Travel Bans Have Real Bite, PEW (Aug. 15, 2017), [https://perma.cc/C34V-8GE6] (detailing the negative economic impact imposed on some states by six other states, including California, by utilizing the market participant exception to further their interests). Of course, in that case the ACLU (which filed against Act 710 here) openly *supported* the choice that California made not to engage with those whom they consider to be acting in a discriminatory fashion. *See* Carma Hassan, *California Adds 4 States to Travel Ban for Laws It Says Discriminate against LGBTQ Community*, CABLE NEWS NETWORK (June 23, 2017, 5:50 PM), [https://perma.cc/KZL5-E6FH].

33. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015); *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (holding that a city's decision to reject, or accept, certain monuments is a form of government speech).

34. *Walker*, 576 U.S. at 208 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

35. *See* Mark Goldfeder, S*top Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 219 (2018).

36. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) ("[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but *it has never been accorded affirmative constitutional protections*.") (emphasis added) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)); N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 13 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Ark. Times LP v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021).

37. Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), [https://perma.cc/727P-CW9X].

practices, anti-BDS bills also protect the economic interests of the United States, which could be detrimentally impacted by efforts to disrupt the economic stability of a close ally,[38] as well the interests of each of the individual states themselves. Arkansas, for example, does almost $43,000,000 a year worth of trade with Israel,[39] and has longstanding binational foundation grants that it shares with Israel in the areas of Agricultural Research and Development; Science and Technology; and Industrial Research and Development.[40] And so aside from the fact that supporting BDS is morally wrong, supporting those who would boycott Israel is also a bad *business* decision for the United States of America, and leading politicians of both major political parties have consistently affirmed this.[41]

As it relates to this point, on February 24, 2016, President Barack Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 into law.[42] The Act promotes United States–Israel relations by discouraging cooperation with entities that participate in boycott, divestment, and sanctions movements against Israel, and requires regular reporting on such entities.[43] As the President explained, in no uncertain terms, "I have directed my administration to strongly oppose boycotts, divestment campaigns, and sanctions targeting the State of Israel."[44] Several provisions in the Act bear repeating—for example, the "[s]tatements of policy," say that Congress:

> (1) supports the strengthening of economic cooperation between the United States and Israel and *recognizes the tremendous strategic, economic, and technological value of cooperation with Israel*;
>
> . . . .

38. Michael Eisenstadt & David Pollock, *Friends with Benefits: Why the U.S.-Israeli Alliance Is Good for America*, WASH. INST. (Nov. 7, 2012), [https://perma.cc/7NV4-JKB5].

39. *State-to-State Cooperation: Arkansas and Israel*, JEWISH VIRTUAL LIBR., [https://perma.cc/DJT9-6CSE] (last visited Mar. 20, 2021).

40. *Id.*

41. *See* Goldfeder, *supra* note 35, at 210–12.

42. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 127 (codified as amended at 19 U.S.C. §§ 4301-4456 (2016)).

43. 19 U.S.C. § 4452(a)-(b), (d).

44. Statement on Signing the Trade Facilitation and Trade Enforcement Act of 2015, 2016 DAILY COMP. PRES. DOC. 98 (Feb. 24, 2016).

> (4) opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel[.][45]

Based on these and other similar (and consistent) Congressional findings over the decades,[46] the Arkansas legislature found in the passing of Act 710 that:

> (4) It is the public policy of the United States, as enshrined in several federal acts, to oppose boycotts against Israel, and . . . *Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness*;
>
> (5) Israel in particular is known for its dynamic and innovative approach in many business sectors, and *therefore a company's decision to discriminate against Israel, Israeli entities, or entities that do business with or in Israel, is an unsound business practice, making the company an unduly risky contracting partner or vehicle for investment*; and
>
> (6) Arkansas seeks to act to implement Congress's announced policy of "examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel."[47]

For the purposes of the statute, the term "boycott of Israel" means:

> [E]ngaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, *in a discriminatory manner*.[48]

45. 19 U.S.C. § 4452(b)(1), (b)(4) (emphasis added).

46. *See e.g.*, EAA of 1977, *supra* note 30; *President Carter Anti-Boycott Signing Statement*, *supra* note 10.

47. ARK. CODE ANN. § 25-1-501 (2017) (emphasis added).

48. § 25-1-502(1)(A)(i) (emphasis added). Note that a decision not to engage in business with Israel for non-discriminatory reasons is perfectly fine.

Operationally, the Act requires entities who wish to do business with the State of Arkansas to sign a certification stating that they are not currently boycotting Israel as defined by the Act, and do not intend to boycott Israel for the duration of the contract.[49] It is worth reiterating that the law only applies to discriminatory boycotts, and non-discriminatory boycotts are not subject to the certification requirement.[50] If a party was, for example, boycotting all Middle East countries, or all companies that work with militaries, or all companies that provide tech for security forces, without regard to the country of origin, that would not be a discriminatory boycott under the Act. A party could sign the certification and if ever asked, simply show that the boycott was not discriminatory. Regardless, even if a company is not willing to sign such a statement, it can *still* do business with the State if its price comes in at 20% less than the lowest certifying business,[51] an amount the legislature has deemed enough to make up for the greater inherent risk involved in doing business with a company that makes *political* rather than economically *sound* business decisions.

III. THE LAWSUIT

The Arkansas Times is a free weekly newspaper that has never actually boycotted Israel. Nevertheless, in October 2018, the paper decided to file a test case against Act 710, challenging it on the grounds that it conditioned State contracts "on the unconstitutional suppression . . . of protected speech[,]"[52] and seeking injunctive and declaratory relief, based on alleged violations of the First and Fourteenth Amendments. It argued "that the law impermissibly compels speech regarding contractors' political beliefs, association, and expression[,]" and that it imposes an unconstitutional condition on funding by impermissibly restricting "state contractors from engaging in protected First Amendment activities, including boycott

49. § 25-1-503(a)(1).
50. § 25-1-502(1)(A)(i).
51. § 25-1-503(b)(1).
52. Brief for Petitioner-Appellant at 5, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378).

participation and boycott-related speech, without a legitimate justification."[53]

It was especially surprising and disheartening that liberal groups like the ACLU, which filed on behalf of the Arkansas Times, came out in support of the plaintiffs and argued *against* the general rule that commercial decisions to buy or not to buy are *not* protected by the First Amendment.[54] It is surprising because, as noted above, they are arguing against *literally* the very same rule that they have championed publicly and consistently in other contexts when it better suited their ideological leanings.[55] For example, upon rereading certain passages in the brief that the ACLU filed in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[56] it is hard to find a better word to describe its position here in the Arkansas case than hypocritical:

> The Bakery is not the first business to claim a First Amendment right to violate an antidiscrimination law . . . . This Court has never accepted that premise, and has, instead, affirmed repeatedly the government's ability to prohibit discriminatory conduct over the freedom of expression, association, and religion objections of entities ranging from law firms[;] . . . to private schools, and universities; to membership organizations open to the public; to restaurants, *and newspapers*. . . . "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[57]

53. Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617, 621 (E.D. Ark. 2019) *rev'd and remanded*, 988 F.3d 453 (8th Cir. 2021).

54. *Arkansas Times LP v. Waldrip*, ACLU, [https://perma.cc/5LF3-D68B] (May 9, 2019).

55. This is not entirely surprising. *See* Wendy Kaminer, *The ACLU Retreats From Free Expression*, WALL ST. J. (June 20, 2018), [https://perma.cc/N2EM-6FCH] (noting the ACLU's 2018 guidelines assertion that case selection should involve an assessment of whether it will advance the goals of those "whose views are contrary to our values . . . [i]n selecting speech cases to defend, the ACLU will . . . balance the 'impact of the proposed speech and the impact of its suppression'").

56. Brief for Respondents Charlie Craig and David Mullins at 14-15, Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

57. *Id*. (internal citations omitted) (emphasis added). *But see* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945); Runyon v. McCrary, 427 U.S. 160, 176 (1976), Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987);

The ACLU was also clear that this was in fact the *general* rule for all commercial activity and all kinds of discrimination, and was not somehow case specific:

> While the particular facts of this case involve a bakery refusing to sell a cake for the wedding reception of a same-sex couple, the implications of the . . . arguments are not limited to sexual orientation discrimination or weddings . . . [a]nd, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. . . . To recognize either of the Bakery's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people, regardless of status, should be able to receive equal service in American commercial life.
>
> . . . .
>
> The State's prohibition against discrimination in the sale of goods and services to the public is a regulation of commercial conduct that affects expression only incidentally . . . [b]usinesses, the court has held, have "no constitutional right . . . to discriminate."[58]

As several prominent amicus curiae in this case have already pointed out, this idea is in fact "the foundation of the wide range of antidiscrimination laws, public accommodation laws, and common carrier laws throughout the nation."[59]

It is unclear why the ACLU would change its position in this case. Charitably, perhaps it is because it is not aware that the BDS movement is *actually* antisemitic, and so it thinks that states do not have a compelling interest in combatting it with anti-discrimination laws. Unfortunately, as evidenced by the statements of the movement's leaders, and its founding

Newman v. Piggie Park Enters., 390 U.S. 400, 402-03 n.5 (1968) (per curiam); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 389 (1973).

58. Brief for Respondents, *supra* note 56, at 2-15.

59. Brief of Profs. Michael C. Dorf et. al. as Amici Curiae in Support of Defendants-Appellees at 1, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2488957.

documents, that line of thinking is both wrong on its face and wrong as applied.

BDS leaders often use classic antisemitic tropes to make their arguments "including, but not limited to, false accusations of Jewish conspiracies; blood libels; portraying Jews (. . . not just *Israelis* but caricatures of religious *Jews*) as Satanic, demonic, and evil (at times even using actual Nazi propaganda), accusing Jews of dual loyalty, and engaging in Holocaust denial and Holocaust inversion."[60] In terms of its practical effect, the BDS movement discriminates against Jewish people in an absurdly clear and disproportionate manner: 95% of American Jews support the State of Israel[61] which is the definition of Zionism that BDS targets. A movement that discriminates against 95% of a group based on its members' shared ethnic beliefs is discriminatory toward that group, and a state has the right not to subsidize or further that movement's discriminatory goals.

But even if the BDS movement *was not* generally antisemitic, that would *also* be irrelevant for the purposes of this statute and for the proper disposition of this case. The statutes in question, including the Arkansas statute, do not target BDS supporters, or even the BDS movement as a whole;[62] by definition the law in question (and BDS laws and anti-discrimination laws generally) only affect *discriminatory conduct* in commercial activity, i.e., when the action taken is based on race, color, religion, gender, or national origin.[63] In this case, the Act does not affect decisions not to deal with Israel that are based on economic reasons, or the specific conduct of a person or firm. The only way we could *possibly* know that a company's buying decisions were based on discriminatory reasons and not economic

60. *See* Mark Goldfeder, *The Danger of Defining Your Own Terms: Responding to the Harvard Law Review on Antidiscrimination Law and the Movement for Palestinian Rights*, 3.2 J. CONTEMP. ANTISEMITISM 141, 143 (2020). It should also be obvious that saying Jews are not a people while calling for the destruction of the world's lone Jewish state, along with the ethnic cleansing and/or the genocidal extermination of its millions of Jewish inhabitants, is *also* antisemitic.

61. Frank Newport, *American Jews, Politics and Israel*, GALLUP (Aug. 27, 2019), [https://perma.cc/74VQ-2AWZ].

62. It is also worth highlighting that while *the BDS movement* is antisemitic, that is not a criticism of general Palestinian rights work and advocacy. *See* Goldfeder, *supra* note 60, at 141, 143.

63. *See* ARK. CODE ANN. § 25-1-501(3) (2017).

ones would be if it told us, in *accompanying* speech, that it was taking this action *in order to discriminate*. Certainly, we should all be able to agree that *when* BDS, by admission, involves non-expressive discriminatory conduct, it can and should be regulated by anti-discrimination law.[64]

Now to be fair, the truth is that a casual observer (not the lawyers at the ACLU) *might* be excused for some confusion in this case because of the use of the term "boycott" in the statute. The term "boycott" could, in some contexts, refer to the kinds of boycott activities that *are* protected by the First Amendment. The fact is though that *none* of the state laws in question, including Arkansas Act 710, regulate that kind of expressive boycott activity, and indeed they could not legally do so.

As the Supreme Court ruled in *NAACP v. Claiborne Hardware Co.*,[65] a case about a primary boycott of white-owned businesses to protest racial discrimination in Mississippi,[66] "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[67] No one involved in the Arkansas case (or with any of the state anti-BDS bills for that matter) in any way disagrees with that principle.

The boycott in *Claiborne* involved a range of First Amendment protected activities, including speeches, picketing, the sending of telegrams and the publication of lists, etc.[68] "Crucially, *Claiborne* did not 'address purchasing decisions or

64. The argument that an individual's refusal to deal, or his purchasing decisions, when taken in connection with a larger social movement, do become inherently expressive is also unpersuasive. "Such an argument is foreclosed by *FAIR*, as individual law schools were effectively boycotting military recruiters as part of a larger protest against the Don't Ask, Don't Tell policy." Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019); *see* Rumsfeld v. F. for Acad. & Inst. Rights, Inc. (''FAIR''), 547 U.S. 47, 66 (2006).

65. 458 U.S. 886 (1982).

66. *Id.* at 889. A boycott by those whose constitutional rights were being infringed upon and against those who were infringing upon those rights, as opposed to a secondary political boycott directed towards foreign governments against longstanding U.S. policy. *See* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 218-19 (1982).

67. *Claiborne Hardware Co.*, 458 U.S. at 914.

68. *See id*. at 889, 902, 907.

other non-expressive conduct.'"[69] As former Solicitor General Paul Clement has explained, what *Claiborne* did was affirm that those elements of a boycott that *do* involve protected First Amendment activity do not *lose* that protection simply because they are accompanied by elements that are *not* expressive.[70] But "[a]t no point did the Court suggest that the mere act of refusing to deal—accompanied by no protected conduct like speech or picketing—constitutes 'inherently expressive' conduct" entitled to First Amendment protection.[71]

The Court in *Claiborne* also did not address whether the First Amendment would protect a refusal to deal with someone that is forbidden under state anti-discrimination law because at the time there *were* no laws in Mississippi that prohibited racial discrimination. "Nor was the boycott banned by general prohibitions on 'concerted refusal to deal,' 'secondary boycotts,' or 'restraint[s] of trade[]' . . . . Indeed, *Claiborne Hardware* expressly reserved the question whether a boycott 'designed to secure aims that are themselves prohibited by a valid state law' is constitutionally protected."[72]

That question was left open by *Claiborne* but conclusively resolved by the Supreme Court in *Rumsfeld v. FAIR*: to the extent that such a boycott involves *non-expressive activity*, that activity is *not* protected.[73]

69. *Ark. Times LP*, 362 F. Supp. 3d at 625 (quoting Jordahl v. Brnovich, Case No. 18-16896, Dkt. No. 26 slip op. at 5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting)).

70. Brief for Amicus Curiae Christians United for Israel in Support of Defendant-Appellees' Petition for Rehearing En Banc at 7, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2021 WL 1603995.

71. *Id.*

72. Brief in Support of Defendants-Appellees, *supra* note 59, at 7 (quoting *Claiborne Hardware Co.*, 458 U.S. at 891 n.7, 894, 915). "The holding of *Claiborne* is thus consistent with the principle set forth just six years before in *Runyon v. McCrary*: Though people and institutions have a right to advocate for discrimination . . . 'it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.'" *Id.* at 7-8 (quoting Runyon v. McCrary, 427 U.S. 160, 176 (1976)).

73. 547 U.S. 47, 65-66 (2006). *Rumsfeld* involved law schools engaged in a boycott of military recruiters to protest the military's then-extant "Don't Ask Don't Tell" policy. *See id.* at 52. The Court held that such conduct was "not inherently expressive" because the actions "were expressive *only* because the law schools accompanied their conduct with speech explaining it." *Id.* at 66; *Ark. Times LP*, 362 F. Supp. 3d at 623. Otherwise, no one would know for sure why the recruiters were not there. *Rumsfeld*, 547 U.S. at 66.

In addition, the BDS movement is fairly open[74] about the fact that, as opposed to the primary boycott activity in *Claiborne*, for the most part, BDS activities take the form of secondary and tertiary boycotts.[75] A primary boycott is generally one in which the boycotter is acting against the entity that it has a grievance with; a secondary boycott is one in which the party boycotting an entity has a goal of affecting a third party, rather than the boycotted entity. A tertiary boycott is one in which the goal is to affect a fourth party, who supports the third party supporting the boycotted entity.[76] BDS activists say that their issue is with the State of Israel, but the bulk of their targets are not the government of Israel, but rather companies doing business in or with Israel (a secondary boycott) and the people that support them (a tertiary boycott). Unlike in *Claiborne*, "[t]he BDS supporters are not trying to protect their own constitutional rights[]" from those who are oppressing them; "they are trying to use commerce to inflict harm on a foreign nation[.]"[77] "In both *Claiborne* and *International Longshoremen's Association*,[78] the Supreme Court explicitly stated that secondary boycotts are not accorded the same types of protections under the First Amendment as primary boycotts."[79] In fact, the Court in *Longshoremen* actually upheld a law regulating boycott activity directed at a matter covered by U.S. foreign policy, "conclud[ing] that boycotts that impede United States commerce and are political protests intended to punish foreign nations for their offshore conduct *may* [in fact] be limited by the government."[80]

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74. *See, e.g.*, TOWARDS A GLOBAL MOVEMENT, *supra* note 18.

75. *See* Goldfeder, *supra* note 35, at 223-31.

76. *See generally* Presentation by the Office of Antiboycott Compliance in the Bureau of Industry and Security in the U.S Department of Commerce, [https://perma.cc/EA7Y-Q6CK].

77. Goldfeder, *supra* note 35, at 224.

78. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917 (1982); Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 216-17 (1982).

79. *See* Greendorfer, *supra* note 12, at 58 (first citing *Claiborne*, 458 U.S. at 912 ("Secondary boycotts and picketing by labor unions may be prohibited . . . ."); then citing *Longshoremen*, 456 U.S. at 226-27 n.123 ("holding that a law prohibiting secondary boycotts did not violate the First Amendment and stating, '[i]t would seem even clearer that conduct designed not to communicate, but to coerce, merits still less consideration under the First Amendment.'")).

80. Goldfeder, *supra* note 35, at 229 (emphasis added) (citing *Longshoremen*, 456 U.S. at 221).

Of course, BDS activists like to conflate protected and unprotected activities,[81] which is exactly why the state had to clarify that the mere use of the term boycott "to refer to one's commercial choices does not create a First Amendment right to contract, or not to contract."[82] The clear distinction between expressive and non-expressive "boycott" activity is *precisely* why the legislature in Arkansas defined the term "boycott" in the statute to *only* refer to a company's non-expressive commercial choices.[83] Contractors with the State remain absolutely free to engage in any and all *expressive* boycott activity against Israel. The Arkansas Times may, for example, "send representatives to meetings, speeches, and picketing events in opposition to Israel's

81. Indeed, the ACLU relied extensively on a cherrypicked recitation of *Claiborne* in briefing this case. *See generally* Appellant's Opening Brief, Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019) (No. 19-1378), 2019 WL 1756930; Appellant's Reply Brief, Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019) (No. 19-1378), 2019 WL 3208596.

82. Brief in Support of Defendants-Appellees, *supra* note 59, at 5, 7. For instance, "[a] limousine driver cannot refuse to serve a same-sex wedding party, even if he describes this as a boycott of same-sex weddings (or part of a nationwide boycott of such weddings by like-minded citizens)." *Id.* at 2. By that very same token, it should be obvious that:

> A cab driver who is required to serve all passengers cannot refuse to take people who are visibly carrying Israeli merchandise. Of course all these people would have every right to speak out against same-sex weddings . . . and Israel. That would be speech, which is indeed protected by the First Amendment. But as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment. And though people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or creating speech they disapprove of—that is a basis for a narrow as-applied challenge, not a facial one.

Id. at 2-3.

83. To the extent that anyone really does believe that such a boycott is expressive, then the reverse should also be true, and the State of Arkansas's decision not to do business with those who engage in discrimination should be considered government speech, not a regulation of private speech. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009). "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." ERWIN CHEMERINSKY, THE FIRST AMENDMENT 49 (Wolters Kluwer 2019). The Supreme Court has continually refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals[.]" *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

policies . . . call upon others to boycott Israel, write in support of such boycotts, and engage in picketing and pamphleteering to that effect[]" and the State can say nothing about it.[84] This does not mean, however, that the newspaper's *non*-expressive commercial decisions are *also* protected by the First Amendment.[85]

And so, it was not surprising when the district court—based on the well-established rule that particular commercial purchasing decisions do *not* themselves communicate ideas[86]—rejected the Plaintiff's shallow surface comparison of the "boycott" activities proscribed in Act 710 to the activities in *Claiborne* and denied the Plaintiff's motion for a preliminary injunction, while granting the Defendants' motion to dismiss.[87]

The court correctly concluded that a boycott of Israel, *as defined by the Act*,[88] commercial actions undertaken in a discriminatory way, is "neither speech nor inherently expressive conduct[]" and is thus not entitled to First Amendment protection.[89] Such actions are only expressive when the conduct is accompanied by speech that explains it.[90] As the court noted:

> Very few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the *absence* of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel. Instead, an observer would simply believe that the types of products located at the contractor's office reflect its commercial, as opposed to its political, preferences. In most, if not all cases, a contractor would have to explain to an observer that it is engaging in a boycott for the observer to have any idea that a boycott is taking place. And under *FAIR*, the fact that such conduct *may* be subsequently explained by speech does not mean that this

84. *Ark. Times LP*, 362 F. Supp. 3d at 625.

85. *Id.*

86. *See id.* at 624.

87. See Ark. Times LP v. Waldrip, 988 F.3d 453, 458 (8th Cir. 2021).

88. I.e., a refusal to deal or a company's purchasing decisions. *Ark. Times LP*, 362 F. Supp. 3d at 623.

89. *Id.*; *see* Pickup v. Brown, 740 F.3d 1208, 1225 (9th Cir. 2014) (quoting Rumsfeld v. F. for Acad. & Inst. Rights, Inc. ("*FAIR II*"), 547 U.S. 47, 66 (2006)) ("The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'").

90. *See FAIR II*, 547 U.S. at 66.

> conduct is, or can be, transformed into inherently expressive conduct. ("The fact that . . . explanatory speech is necessary is strong evidence that . . . conduct . . . is not so inherently expressive that it warrants protection.").[91]

Arkansas Times appealed, and in February 2021, the Eighth Circuit issued an opinion reversing the decision and remanding the case back to the district court for further findings.[92]

IV. A NARROW (AND VERY STRANGE) APPELLATE DECISION

This is where the purposeful misreporting comes in, with BDS activists falsely claiming that the anti-BDS law in Arkansas had been struck down as unconstitutional.[93] Here is what actually happened in the Eight Circuit's extremely narrow opinion reversing the district court's decision to *immediately* dismiss the case.

First and foremost, the court *accepted* the fairly obvious principle that commercial buying decisions are not inherently expressive.[94] Far from being an adverse ruling, that understanding alone *confirms* the constitutionality of anti-BDS laws across the country.

Perhaps because the Arkansas Times is not actually boycotting Israel, and the court felt the need to find an interpretation of the Act that could even possibly apply to it such that it would have a potential claim, the majority opinion chose to focus on one phrase in the definition of boycott that (according to the court) could reasonably be misconstrued as applying to actually expressive conduct. Again, the Act defines "boycott of Israel" to mean:

(1) "engaging in refusals to deal";

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91. *Ark. Times LP*, 362 F. Supp. 3d at 624. The Court also noted in *Longshoremen* that "[i]t would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982).

92. *Ark. Times LP*, 988 F.3d at 458, 467.

93. *Federal Court Rules Arkansas Anti-Boycott Law Violates First Amendment*, PALESTINE LEGAL (Feb. 18, 2021), [https://perma.cc/XH7N-PD5A].

94. *Ark. Times LP*, 988 F.3d at 460.

(2) "terminating business activities"; or

(3) "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner."[95]

The State has consistently insisted that, like the activities described in subsections (1) and (2), the phrase "other actions" in subsection (3) is clearly also limited to similar non-expressive commercial conduct and indeed has reiterated many times that any and all contractors are in fact free to express their feelings about Israel *in any way that they want*, including but not limited to criticizing Israel, lobbying against Act 710 itself, and even advocating for boycotts.[96] In fact, in this very case, the Arkansas Times itself had done those things, and the State had no problem with it.[97] The court, however, felt that because that phrase "is open to more than one plausible construction," it was still too ambiguous.[98]

The court did note that the district court had used the appropriate canon of *ejusdem generis* to understand the meaning of the phrase "other actions" in the statute.[99] *Ejusdem generis* is the principle of statutory construction which says that "when general words follow specific words in a statutory enumeration the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[100] Applied to the Act, the term "other actions" should obviously be read to include only conduct similar in kind to the terms that precede it: "refusals to deal" and "terminating business activities," i.e. non-expressive commercial activity. But then, in a truly mystifying manner, the court decided *not* to follow the correct canon of construction and instead to "look to the statute as a whole to interpret it according to the legislative intent[]."[101]

95. ARK. CODE ANN. § 25-1-502(1)(A)(i) (2017).
96. Defendants-Appellees' Brief at 4, *Ark. Times LP*, 988 F.3d 453 (No. 19-1378).
97. *Id.* at 8.
98. *Ark. Times LP*, 988 F.3d at 464.
99. *Id.*
100. Hanley v. Ark. State Claims Comm'n, 333 Ark. 159, 167, 970 S.W.2d 198, 201 (1998).
101. *Ark. Times LP*, 988 F.3d at 464-65 (citing Simpson v. Cavalry SPV I, LLC, 2014 Ark. 363, at 3, 440 S.W.3d 335, 338).

Incredibly, this reference to legislative intent was offered as a reason for the court to disagree with the district court's reading, *despite* the fact that the legislative intent in passing the bill, confirmed repeatedly by the legislature's own representatives, was *clearly* (and *demonstrably*, based on their relationship with the Plaintiff-Appellees *in this very case*) for that section to be read exclusively in the way that the district court did, i.e., as applying only to non-expressive commercial conduct.

The only justification that the court seemed to give for the decision to ignore both the text and the readily apparent legislative intent was to note that "the State has not provided any example of the type of conduct that, under their interpretation of the Act, would fall in the 'other actions' category[,]"[102] as if to say that the concern about other discriminatory non-expressive commercial conduct could not really be the reason for subsection (3) and to imply that the State's position was just apologetics. This is a logically flawed and lazy argument.

First, the legislature does not have to specify every single behavior that could be referenced, so long as it sufficiently delineates the type of behavior being prohibited. In this instance, the type of behavior being referred to is clearly, contextually, discriminatory non-expressive commercial conduct.

Second, there are *numerous* behaviors that fit into that category, i.e., cases where a party is discriminating in commercial decision making against Israel or Israelis while not *technically* refusing to deal or terminating business relations, and it was these actions that the Arkansas Legislature clearly meant to cover.

Some easy examples of the kind of constitutionally unprotected activity that the "other actions" clause covers could include, but are not limited to, a refusal to give equal commercial access/opportunities to an Israeli person or group (like the access that was denied in the *FAIR* case that the court discusses at length).[103] That action is broader than a simple refusal to deal but, if done for discriminatory reasons, would also fall under subsection (3). Likewise, another type of behavior in that category of "other actions" that are discriminatory non-expressive

102. *Id.* at 464.
103. *See generally* Rumsfeld v. F. for Acad. & Inst. Rts., 547 U.S. 47 (2006).

commercial decisions would be the classic BDS tactic of a *conditional* refusal to deal, i.e., a scenario in which a company discriminatorily says that it *will* do business with Israelis but only if the Israeli group or individual (as opposed to every other group or individual it is willing to do business with) first meets a set of conditions.[104] Or, as the dissent points out, "consider the following: a company begins charging overly-inflated shipping prices for products shipped to Israel to reduce commercial relationships with the country. While this is not a refusal to deal or a termination of business activities, it is another 'action . . . intended to limit commercial relations with Israel.'"[105]

Finally, and seeing as the court was ostensibly looking for legislative intent this whole time, perhaps most convincingly, the Arkansas General Assembly's very purposeful choice of language actually points directly to the type of behavior it intended to cover with the statute. Anti-boycott laws[106] and anti-discrimination laws[107] are "not the only federal law[s] implicated by the BDS Movement[.]"[108] As the 1976 House Boycott Report and the accompanying Department of Justice analysis[109] concluded, anti-Israel boycotts that affect U.S. businesses also violate anti-trust laws.[110] In fact, the phrase that the Arkansas

104. *See, e.g.*, Todd Gitlin & Nissim Calderon, *A Counterproductive Call to Boycott Israel's Universities*, NEW REPUBLIC (Oct. 10, 2010), [https://perma.cc/5QPZ-TEHP]. A prime and well publicized example of this process, which also belied the movement's underlying antisemitism, was the BDS movement's 2015 attempted boycotting of Jewish-American (non-Israeli) reggae star Matthew Paul Miller. The singer, also known as "Matisyahu," was scheduled to perform at the Spanish Rototom Sunsplash Festival in August 2015, but when the BDS movement got wind of his performance, its members pressured the festival to demand that Matisyahu, the only Jewish artist invited, issue a statement in support of Palestinian statehood as a condition for the opportunity to perform. That condition was not placed on any other artist at the festival. *See* Donna Rachel Edmunds, *Jewish Rapper Matisyahu Banned by Israel Boycotters . . . Except He's Not Israeli*, BREITBART (Aug. 17, 2015), [https://perma.cc/8PFJ-7RV4].

105. *Ark. Times LP*, 988 F.3d at 468 (Kobes, J., dissenting).

106. *See, e.g.*, EAA of 1977, *supra* note 30.

107. *See, e.g.*, Title VI, 42 U.S.C. § 2000d (1964).

108. Greendorfer, *supra* note 11, at 97.

109. Written by the late Justice Antonin Scalia, at the time an Assistant Attorney General at the Department of Justice. *See Arab Boycott: Hearings on H.R. 5246, H.R. 12383 and H.R. 11488 Before the Subcomm. on Monopolies & Com. L. of the Comm. on the Judiciary*, 94th Cong. 68-74 (1975) (statement of Antonin Scalia, Assistant Attorney General, Department of Justice).

110. Greendorfer, *supra* note 11, at 97.

Legislature used in subsection (1) of Act 710, a "refusal to deal," comes *directly* from the anti-trust caselaw.[111] In passing the Sherman Antitrust Act:[112]

> What the government was most concerned with was a scenario where, due to pressure from the Arab League, one United States entity would refuse to deal with another entity that was being targeted by the Arab League for having relations with Israel. Such a refusal to deal would not only have damaging effects on United States commerce and competition, it would, in essence, be a private usurpation of the federal government's exclusive authority to regulate commerce. In the House Legal Analysis, [later-to-be] Justice Scalia cited to *Fashion Originators Guild of America v. F.T.C* [] in support of his argument that such boycotts are *prima facie* illegal. . . . In the same way, the BDS Movement's activities put the regulation of commerce into private, indeed hostile, foreign hands.[113]

That concern over a secondary/tertiary refusal to deal that is at the heart of the Sherman Antitrust Act is a perfect description of yet another type of "other actions" that are discriminatory but non-expressive commercial activity. Seen in this light, the most obvious reading of the statute is that the Arkansas General Assembly *intended* and indeed *incorporated* all of the regular and contextually appropriate anti-trust meanings of "refusal to deal," including other related non-expressive coercive business actions undertaken with the same discriminatory intent. Again, the legislative findings state that:

> (4) It is the public policy of the United States, as enshrined in *several federal acts*, to oppose boycotts against Israel, and . . . Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness.[114]

111. *See e.g.*, Kathryn A. Kusske, *Refusal to Deal as a Per Se Violation of the Sherman Act: Russell Stover Attacks the Colgate Doctrine*, 33 AM. U. L. REV. 463, 463-64 (1984); *see also* Kenneth Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1, 1-2 (2002) for an overview of Sherman Act principles, especially as they relate to group boycotts.

112. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7.

113. Greendorfer, *supra* note 11, at 99-100.

114. ARK. CODE ANN. § 25-1-501(4) (2017) (emphasis added).

In the definition section, subsection (1), the legislature referenced a classic refusal to deal as an example of the kind of behavior that would obviously fall under the statute.[115] Then it clarified in subsection (3), for those who may not be familiar with this area of law, that, consistent with the legal and historical usage of the term "refusal to deal" *in this very context*, if a party were to take "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel"—for example, if they were to make business decisions designed to force or coerce *another* party to refuse to deal with the target of a boycott (i.e. a secondary or tertiary boycott), even while never engaging in the actual boycott themselves, that too would be the kind of discriminatory commercial action that (aside from the federal concerns) would be (a) problematic under Act 710, and (b) not entitled to First Amendment protection.[116] Outsourcing discrimination does not make it better,[117] and the Arkansas Legislature had every right to include that concern, decades old in the context of anti-Israel boycotts, in its deliberate considerations.

Regardless, the divided Eighth Circuit panel felt that the legislature had not been clear *enough* about its intent to limit the statute to non-expressive activity.[118] While it is not uncommon for courts to find a statute void for vagueness, in this instance it really looks like the court set out to find the statute vague for voidness.[119] Then, incredibly, instead of being content with merely casting the language as ambiguous, the court offered as "proof" of the legislatures' real intent the fact that the statute:

> [P]ermits the State to consider specified "type[s] of evidence" to determine whether "a company is participating

115. § 25-1-502(1)(A)(i).

116. *See generally* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984).

117. *See generally* Greendorfer, *supra* note 11; *see* Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 113 (2016).

118. Ark. Times LP v. Waldrip, 988 F.3d 453, 464-65 (8th Cir. 2021).

119. *See generally* Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); *see id.* at 667 n.178 ("A keen analysis of the partisan use of the void-for-vagueness doctrine may be found in Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L REV. 67, 75-85, 98-115 (1960).").

> in a boycott of Israel." This evidence includes the company's own "statement that it is participating in boycotts of Israel." Additionally, evidence that a government contractor "has taken the boycott action" in association with others . . . can be considered to enforce the Act. At a minimum, therefore, a company's speech and association with others may be considered to determine whether the company is participating in a "boycott of Israel," and the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott. In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity.[120]

The only problem with that reading, as the dissent forcefully points out, is that this very line of reasoning was *firmly* rejected by a unanimous Supreme Court:

> The First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent.[121]
>
> . . . .
>
> Here, a company only engages in a boycott of Israel if its "other actions are *intended* to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories." The better (and constitutionally permissible) understanding of the permitted use of speech here is that it may establish the element of intent. The prohibited *conduct* is still commercial.[122]

The majority's fierce determination to find *some* reading of the statute that *could* be problematic, while ignoring clear language and precedent, is truly bizarre. The text, history, and application of the law make it clear that the legislature only ever intended to do exactly what the statute says, i.e., regulate discriminatory non-expressive commercial activity. Even in this very case, the Arkansas Times itself *actually* did publish multiple articles critical of the Act, and the State was *still* more than willing to do business with it so long as the paper would certify that its

120. *Ark. Times LP*, 988 F.3d at 465.
121. Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).
122. *Ark. Times LP*, 988 F.3d at 468 (Kobes, J., dissenting) (quoting ARK. CODE ANN. § 25-1-502(1)(A)(I) (2017)).

non-expressive commercial activity was in fact non-discriminatory.[123] The court's refusal to acknowledge even the *possibility* that the legislature intended to legislate within constitutional bounds, hidden away in footnote 12 of the opinion, is nothing short of remarkable:

> The district court relied upon the doctrine of constitutional avoidance to conclude that "other actions" referred to purely commercial conduct. Constitutional avoidance is the "bedrock principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court] is to adopt the latter" out of respect for the legislature, assumed to legislate "in the light of constitutional limitations." But "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." When considering the whole Act, as Arkansas law requires, there is *but one permissible interpretation*—that the Act restricts speech in addition to economic refusals to deal with Israel.[124]

That line, which is at the crux of this *entire* decision, is astounding. Not only *is* there clearly, demonstrably, explicitly, another permissible interpretation—all of the evidence actually suggests that this other interpretation is the correct one! Again, as the dissent explains in no uncertain terms:

> In Arkansas, "[t]he first and most important rule of statutory interpretation is that a statute is presumed constitutional and all doubts are resolved in favor of constitutionality." To honor this principle, "[i]f it is possible to construe a statute as constitutional, we must do so." ("All statutes are presumed constitutional, and if it is possible to construe a statute so as to pass constitutional muster, this court will do so."). That is plainly possible here, and I would "construe

123. *Id.* at 460, 470.

124. *Id.* at 466 n.12 (emphasis added) (first quoting Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec., 738 F.3d 885, 892-93 (8th Cir. 2013); and then quoting Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 959 (8th Cir. 2018)).

[the] statute with a limiting interpretation to preserve [its] constitutionality."[125]

Still not done, in yet another effort to find a problem with the statute's application, the majority continued its dubious reading of the facts by claiming that "the certification makes no effort to provide the Act's definition of 'boycott of Israel,' leaving it to the contractor to determine what activity is prohibited."[126] As an aside, it is hard to even know what to respond to that patently false statement, because the certification form itself is literally *attached to the opinion* as an appendix, and it very plainly *begins* with the words: "Pursuant to Arkansas Code Annotated § 25-1-503[.]"[127]

Regardless, having observed that a contractor could perhaps *misread* the statute as applying to protected speech, the court next considered whether the Act imposed a restriction outside of the program itself, because even if it did implicate speech, the State would be justified in regulating speech that fell within the contours of the contractual relationship.[128] Of course, looking at and reading it objectively, Act 710 is clearly designed to "define the limits of the State's spending program," by making sure that the State only does business with people making sound business decisions.[129] But having concluded that the law could be misread as applying to protected speech as well, the court circularly found that the condition therefore "seek[s] to 'leverage funding to regulate speech outside the contours of the program itself.'"[130]

In a final twist of omission, even supposing arguendo that the wording in that subsection of the Act did impose on protected First Amendment activity, the court declined to consider the traditional balancing test used in unconstitutional conditions cases. That test, first established in *Pickering v. Board of*

125. *Id.* at 469 (Kobes, J., dissenting) (first quoting Booker v. State, 335 Ark. 316, 325, 984 S.W.2d 16, 21 (1998); then quoting Reinert v. State, 348 Ark. 1, 4, 71 S.W.3d 52, 52 (2002); and then quoting Ark. Hearing Instrument Dispenser Bd. v. Vance, 359 Ark. 325, 331, 197 S.W.3d 495, 499 (2004)).

126. *Id.* at 466.

127. *Ark. Times LP*, 988 F.3d at 470.

128. *Id.* at 467.

129. *Id.* (alterations in original) (quotation omitted).

130. *Id.* (quotation omitted).

Education,[131] and later clarified in *Connick v. Myers*,[132] balances the public employee or contractor's speech rights to comment on matters of public concern against the government's interest in operational efficiency.[133] As the Supreme Court has noted:

> In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."[134]

As applied to Arkansas Act 710, the test would clearly favor upholding an anti-discrimination bill that also has strong business efficiency considerations (because it targets a friendly trade partner and those who support it in a way that the State considers risky)[135] against the secondary and tertiary boycotting of a foreign nation, which is not even necessarily related to a "matter of public concern,"[136] and the conducting of which the Arkansas public

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131. 391 U.S. 563, 568 (1968).

132. 461 U.S. 138, 154 (1983). While *Pickering* dealt with public employees, for our purposes *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service, Inc.* expanded *Pickering* to the private sector. *See Pickering*, 391 U.S. at 569; Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 700 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 721 (1996).

133. *See generally* Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008).

134. *Umbehr*, 518 U.S. at 676 (quoting Waters v. Churchill, 511 U.S. 661, 673, 675 (1994)); Greendorfer, *supra* note 12, at 65–66.

135. For example, a contractor might use a less efficient or more costly means of fulfilling its contractual duties to the government because it wished to avoid using an Israeli firm or product. *Umbehr*, 518 U.S. at 674.

136. *See* D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258-59 (1990). *See also* Greendorfer, *supra* note 12, at 66-67 ("The typical *Pickering* case involves individuals who are speaking on a matter of local (or, at least, domestic) concern, such as the functioning of school districts, public hospitals, or local law enforcement. Certainly, such speech is valuable and important to the functioning of a robust and healthy democracy. Economic attacks upon companies that do business in a foreign nation to protest that foreign nation's policies, however, have remote and nebulous connections to the interests of a state and its citizens.").

itself finds deeply offensive.[137] The Eighth Circuit, however, did not apply the test.[138]

And so, in conclusion, all that the Eighth Circuit really *did* do was two things:

First, and most importantly, the court restated the obvious; limiting discriminatory non-expressive commercial activity does not violate the First Amendment.

Second, having forced an ambiguous reading onto a subsection of the Act, such that it could potentially be *misapplied* to limit discriminatory *expressive* activity, the court remanded the decision back to the district court for further proceedings consistent with that ruling.[139] It did not strike down the law as unconstitutional. It reversed the granting of the State's motion to dismiss and asked the district court to reconsider whether the Arkansas Times's request for a preliminary injunction, *at least as applied to subsection (3)*, might in fact be appropriate.[140]

V. WHAT HAPPENS NEXT

Despite being remanded to the district court, this was an obvious win for the State of Arkansas, which never *intended* to limit anything but non-expressive commercial activity in the first place. It is important to understand that nothing about the Eighth Circuit's opinion in any way damages the core tenet of anti-BDS

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137. *See* Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112, 121 (2000) (quoting *Connick*, 461 U.S. at 152) (factoring community relations into a *Pickering-Connick* analysis).

138. The test did briefly come up in the 8th Circuit's en banc rehearing of this matter after one judge asked why the government's ability to act as proprietor and choose whom to do business with was not dispositive. The ACLU's rather weak attempt to respond focused on analogizing this case to the *Pickering*, 391 U.S. 563 and *United States v. Treasury Emps.*, 513 U.S. 454 (1995) cases, arguing that when the government is imposing an ex ante restriction on expressive activity (which again it is not doing here, but for argument's sake), it should have to articulate a compelling interest and show how the proposal would help eliminate a real harm. *See generally* Oral Arguments During en banc Rehearing, Ark. Times LP v. Waldrip, No. 19-1378 (8th Cir. argued Sept. 21, 2021), [https://perma.cc/64YN-XLD4] [hereinafter Oral Arguments During en banc Rehearing]. That answer was weak, of course, because even on the ACLU's own terms and understanding, the government of Arkansas has done just that, explaining clearly its desire to eliminate this particular form of discrimination.

139. *Ark. Times LP*, 988 F.3d at 467.

140. *Id.*

legislation, or even the statute at the heart of this case. Indeed, the principle upon which Arkansas Act 710 and similar laws rest has actually been upheld and will be upheld once again: discriminatory commercial purchasing decisions are not protected under the First Amendment.[141] As it relates to this bill, under Arkansas law the provisions of a statute are severable, and so even if subsection (3) *were* to be found invalid, *the rest of the statute is still fully constitutional and fine*.[142]

* * *

After this Article was accepted for publication, Arkansas filed a petition appealing to have this case reheard by the entire Eighth Circuit sitting en banc, which was granted,[143] and the case was reheard shortly before this Article went to print.[144] At the hearing[145] the judges focused on the dueling interpretations of *Claiborne* and *FAIR*, but perhaps the most telling moment came in a short discussion related to the technicalities of the certification form itself.

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141. *See* Aaron Bandler, *Federal Appeals Court Sends Arkansas Anti-BDS Law to Lower Court*, JEWISH J. (Feb. 16, 2021), [https://perma.cc/WKW4-WQ4M] ("[S]tate anti-BDS laws have always been about refusals to deal, not pro-BDS speech, so the decision upheld much more than it rejected. Thus 8th Circuit ruling leaves intact not just the principal part of Arkansas's anti-BDS law, but also provides a strong precedent for the constitutionality of such laws across the country, which quite clearly target pure business conduct, not merely 'supporting' boycotts. Ironically, the plaintiff was not engaged in any kind of Israel boycott—neither a refusal to deal, or even verbal support for it. They just brought it as a test case, obscuring the fact that no one but the 2 8th circuit judges had read 'any actions' that way. While BDS champions will try to spin this as a win, the decision will in fact keep anti-BDS laws on the books across the country.") (quoting Eugene Kontorovich (@EVKontorovich) TWITTER (Feb. 13, 2021, 4:13 PM), [https://perma.cc/9P5W-TBFW]).

142. *See* Eugene Volokh, *The Eighth Circuit's Narrow Decision About the Arkansas BDS Statute*, REASON (Feb. 14, 2021, 1:05 PM), [https://perma.cc/5RWU-LU6] ("Except as otherwise specifically provided in this Code, in the event any title, subtitle, chapter, subchapter, section, subsection, subdivision, paragraph, subparagraph, item, sentence, clause, phrase, or word of this Code is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this Code.") (quoting ARK. CODE ANN. § 1-2-117 (2016)).

143. *See generally* Order Granting Petition for en banc Rehearing, Ark. Times LP v. Waldrip, (8th Cir. June 10, 2021) (No. 19-1378), [https://perma.cc/2DE8-JSYN].

144. U.S. CT. APPEALS EIGHT CIR., SEPTEMBER 20-21, 2021 ORAL ARGUMENTS VIA TELECONFERENCE OR VIDEOCONFERENCE 4 (2021), [https://perma.cc/6NHS-2CP7] (case reheard on September 21, 2021).

145. *See generally* Oral Arguments During en banc Rehearing, *supra* note 138.

Judge Kelly, who had written the majority opinion in February, asked Arkansas Solicitor General Nicholas J. Bronni if perhaps by using the term "boycott" (instead of, for example, the term "refusing to purchase"), the State of Arkansas had made the whole matter more complicated, because while the certification does admittedly refer back to the statute and its clear definition, it does not specifically refer to the definition *section* of the statute, and so some lay person might not read the definition and might, therefore, misunderstand what the State actually meant to regulate.[146] Bronni answered that the statute and the form were fairly self-explanatory and conformed to the vernacular understanding of boycott.[147] More importantly, as he explained, Arkansas did not "redefine" the word boycott as Judge Kelly had suggested—*Claiborne* itself made clear that there are protected and non-protected aspects contained within the term boycott, which is why Arkansas used the correct legal term and even took the additional step of clarifying exactly what aspect it was referring to.[148]

While the en banc decision is still forthcoming, for all of the reasons listed above—including the clear rules of statutory construction; the canon of constitutional avoidance; the list of discriminatory, non-expressive "other actions" that subsection (3) does cover, and the clear intent of the legislature not to target expressive actions *as demonstrated in its interactions with this very plaintiff in this very case*—it is more than likely that a majority of judges faithfully applying the law would reverse the Eighth Circuit panel and reinstate the district court's reading and accompanying decision to dismiss.

And even if we were to ignore all of the above, i.e., even if First Amendment protections were to somehow apply to that "ambiguous" clause, or even to anti-BDS laws generally, the

146. *Id.* at 17:20.

147. *Id.* at 17:34.

148. *Id.* at 18:26. In his rebuttal, Brian Hauss, the attorney for the ACLU, picked up on this argument to try and make the claim that even if the people signing it knew what the term boycott meant, the fact that someone else reading their certification might also misunderstand and miss the definition, should be enough to turn the certification form itself, a mere statement of fact, into a compelled ideological expression. *Id.* at 38:48. That argument has no limiting principle and, thankfully, did not appear to gain any traction at all, even from the judges sympathetic to his cause.

court should still uphold the law as constitutional. Under the standard free speech balancing test appropriate in this context, a state is certainly at liberty to decide not to fund a discriminatory movement that is antithetical to American foreign policy and to the state's own interest in the efficient conduct of its business, especially if that discriminatory movement is not clearly directed at public concerns and has the potential to undermine the government's relationship with the community.

At *worst*, based on Judge Kelly's questions, the State will have to go back to the district court for further proceedings pursuant to the Eighth Circuit's original decision and may have to amend subsection (3) of its definition section to further clarify that the words "other actions," like the two subsections before it, are only dealing with non-expressive commercial activity.[149] There is no loss there, however, because that is all Arkansas ever wanted to do all along!

And that is why legislatures in all the other states that have passed anti-BDS bills do not have to be concerned that their laws will be called into question by the Eighth Circuit's ruling in this case. Because despite what they may have heard, Arkansas Act 710 was actually substantially upheld and will be once again.

149. The legislature may even decide to amend the certification form itself, if we take the hypothetical misinformed, lay person argument seriously.

SLAVERY AND THE HISTORY OF CONGRESS'S ENUMERATED POWERS

Jeffrey Schmitt*

INTRODUCTION

In his first inaugural address, President Abraham Lincoln declared, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[1] Like virtually all Americans before the Civil War, Lincoln believed in what historians call the "national consensus" on slavery.[2] According to this consensus, Congress's enumerated powers were not broad enough to justify any regulation of slavery within the states.[3] Legal scholars who support the modern reach of federal powers have thus conventionally argued that the Constitution is a living document that changes over time outside the formal amendment process. Bruce Ackerman, for example, contends that the constitutional moment of the New Deal effectively amended the Constitution by expanding the reach of implied powers.[4]

A growing number of revisionist scholars, however, argue that the modern reach of federal powers can be justified without

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1. Abraham Lincoln, *First Inaugural Address* (March 4, 1861), [https://perma.cc/LBV7-NTSZ].

2. *See* Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 49 AM. J. LEGAL HIST. 180, 184-86; *Id.* at 190-91 (explaining that it was unclear whether Lincoln could end slavery in the states and that Lincoln had no intention of changing the "current constitutional structure").

3. *See, e.g.*, SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 162 (2018); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 16 (Ward M. McAfee ed. 2002).

4. *See generally* 1 BRUCE ACKERMAN: WE THE PEOPLE: FOUNDATIONS 41 (1991).

resorting to a living Constitution. Scholars like Richard Primus and David Schwartz look to the history of the founding, early congressional debates, and Marshall Court decisions to argue that no subject is off-limits from federal regulation.[5] Moreover, progressive originalists like Jack Balkin contend that the historical purpose underlying Congress's enumerated powers is to empower the federal government to regulate any subject that the states cannot.[6] Many of the most influential scholars in the field thus contend that constitutional history supports virtually unlimited federal power.

This Article argues that the revisionist account of federal powers is inconsistent with the constitutional history of slavery. In sum, the national consensus—the idea that Congress had no power to regulate slavery within the states—was a litmus test for constitutional meaning prior to the Civil War. The Founders, early Congress, and federal courts all rejected any interpretation of federal powers that could have justified the regulation of slavery within the states.[7] In particular, the Commerce Clause, which is the basis for most federal regulation today, did not empower Congress to regulate intrastate economic activity.[8] This was not because, as is sometimes argued,[9] the economy was less interconnected in the early republic. Instead, Congress and the courts rejected the modern approach to the commerce power precisely because southern plantations produced cash crops for

5. *See generally* DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND 1-4 (2019) [hereinafter SCHWARTZ, THE SPIRIT OF THE CONSTITUTION]; David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 930 (2018) [hereinafter Schwartz, *An Error and an Evil*]; Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 417 (2018) [hereinafter Primus, *The Essential Characteristic*]; Richard Primus, *The* Gibbons *Fallacy*, 19 U. PA. J. CONST. L. 567, 568-69 (2017); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 3-4 (2016); Richard Primus, *The Limits of Enumeration*, 124 YALE L. J. 576, 578-79 (2014); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2003-04 (2021).

6. *See* JACK BALKIN, LIVING ORIGINALISM 140, 155 (2011); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010).

7. *See infra* text accompanying notes 78-89.

8. *See infra* Part III. The National Consensus in the Courts.

9. *See* United States v. Lopez, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (asserting that the New Deal approach to the Commerce Clause merely "appl[ied] preexisting law to changing economic circumstances").

interstate and internal trade.[10] In fact, constitutional objections to federal power blocked federal initiatives that would be at the core of the commerce power today, such as the construction of interstate roads and canals.[11] In the constitutional debates over these projects, slavery always lurked in the background.

Although legal scholars often distinguish historical practices from constitutional meaning,[12] no such legal sleight of hand can save the revisionist accounts of federal powers. The revisionist scholars present their theories as being consistent with the principles of the original Constitution, early congressional practice, or landmark Marshall Court decisions. In doing so, they ignore or minimize slavery's pervasive influence on the original Constitution. Especially at this time of racial reckoning, legal scholarship should present an accurate account of how slavery shaped constitutional history.

In fact, slavery's ubiquitous influence on the Constitution of 1787 demonstrates why history should not be dispositive in matters of constitutional interpretation.[13] However, as Justice Amy Coney Barrett's confirmation hearings vividly demonstrate, the revisionist account threatens to provide moral cover for those who pretend that originalism is a neutral and bipartisan theory.[14] Legal scholars thus should stop advancing implausible historical arguments in a vain attempt to convince conservative justices to abandon federalism. Instead, any convincing defense of federal power requires scholarship that justifies a living Constitution and convinces the legal community (and public at large) to reverse the rising influence of originalism. By arguing that slavery was

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10. *See infra* Part II. The National Consensus in Antebellum Politics.

11. *See infra* text accompanying notes 114-16.

12. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 811 (2019) (arguing that constitutional scholars "properly ignor[e] certain facts" about history when constructing legal doctrine).

13. This Article is not a comprehensive attack on originalism. The many flaws of originalism have been detailed elsewhere. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH (2018). In fact, originalism may be a defensible approach to the Reconstruction Amendments, which were created with the purpose of eliminating slavery.

14. *Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript*, REV (Oct. 13, 2020), [https://perma.cc/6V5R-ZKL9]. Justice Barrett defended her commitment to originalism by saying that it "is not necessarily a conservative idea." In fact, she explained, "there is a school of . . . progressive originalism" that has gained increasing influence in the academy.

central to the structure of the Constitution of 1787, this Article attempts to accomplish the latter.

This Article is divided into five Parts. Part I examines how the national consensus on slavery shaped federal powers at the Founding. Part II explores how slavery influenced Congress's understanding of its powers prior to the Civil War. Part III argues that the national consensus profoundly shaped the Marshall and Taney Courts' jurisprudence on federal powers. Part IV summarizes the revisionist history of federal powers and argues that it is inconsistent with the constitutional history of slavery. Part V discusses why this debate is important and explores how the constitutional history of slavery should shape constitutional interpretation today.

I. THE NATIONAL CONSENSUS AT THE FOUNDING

At the Constitutional Convention, James Madison recognized that "the great division of interests in the United States . . . did not lie between the large & small States: it lay between the Northern & Southern."[15] Although slavery was a national institution at the time of the Founding, the Revolutionary War put it on the path to gradual extinction in the North.[16] Many Americans recognized the hypocrisy of fighting a war for liberty while denying it to those held in bondage.[17] Pennsylvania, Connecticut, and Rhode Island therefore all passed gradual abolition legislation during the 1780s, and Massachusetts abolished slavery by judicial decree in 1783.[18]

In the South, however, slavery was too deeply rooted to be dislodged by abstract principles of liberty.[19] While enslaved

15. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., Yale Univ. Press 1911).

16. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 261 (2016).

17. *Id.* at 259-60.

18. *Id.* at 260; RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 311 (2009). Pennsylvania's law, for example, only freed people who were born after its enactment when they reached the age of twenty-eight. Slaves were therefore expected to pay for their own freedom through decades of forced labor.

19. Virginia, Maryland, and Delaware each debated gradual emancipation proposals and passed legislation that authorized masters to manumit their slaves without legislative approval. Virginia even freed slaves who had served in the war for their masters, declaring

people were less than three percent of the population of the North, they represented approximately forty percent of the population and one-third of the wealth of the southern states.[20] Not only was the southern economy dependent on slave labor, but southerners also could not imagine an interracial society without the institution.[21] Thomas Jefferson expressed a common sentiment when he said that, if the races lived together without slavery, "[d]eep rooted prejudices" would cause "the extermination of the one or the other . . . ."[22]

The delegates to the Convention therefore understood that the national government would have no power to interfere with slavery in the states.[23] Several delegates from the Deep South emphatically declared that their states would never join a union that threatened the future of slavery. For example, when the Committee of Detail wrote the first draft of the Constitution, Charles Cotesworth Pickney of South Carolina warned that, if the committee failed "to insert some security to the Southern States agst. an emancipation of slaves" he would "be bound by his duty to his State" to oppose it.[24] Northern delegates were unwilling to see if the South was bluffing. Oliver Ellsworth of Connecticut asserted that the "morality or wisdom of slavery" was a matter only for "the States themselves,"[25] and Elbridge Gerry of Massachusetts told the Convention that it "had nothing to do with the conduct of the States as to Slaves . . . ."[26] From the very

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that men who "contributed towards the establishment of American liberty and independence should enjoy the blessings of freedom as a reward for their toils and labours . . . ." KLARMAN, *supra* note 16, at 261(quoting BEEMAN, *supra* note 18, at x).

20. KLARMAN, *supra* note 16, at 266-67.

21. *See* FEHRENBACHER, *supra* note 3, at 15.

22. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 147 (Philadelphia, Prichard & Hall, 1787). Patrick Henry likewise said: "As much as I deplore slavery, I see that prudence forbids its abolition" because it was not "practicable, by any human means, to liberate them without producing the most dreadful and ruinous consequences[.]" 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 590-91 (Philadelphia, Jonathan Elliot ed., J.B. Lippincott Co., 1891).

23. WILENTZ, *supra* note 3, at 2; KLARMAN, *supra* note 16, at 294.

24. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (Max Farrand ed., Yale Univ. Press 1911). Thomas Lynch declared that "[i]f it is debated, whether their slaves are their property, there is an end of the confederation." 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1080 (Worthington Chauncey Ford ed., 1906).

25. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 364.

26. *Id.* at 372.

beginning, the Framers understood that the state governments would have complete independence on matters relating to slavery within the states.[27]

Although the Framers shared a basic assumption that the new federal government would have no power over slavery, the Convention was nearly undone over conflicts regarding the international slave trade and the manner in which slaves would be counted for representation in Congress.[28] As Madison would later tell Jefferson, South Carolina and Georgia "were inflexible on the point of the slaves."[29] The Deep South was especially committed to preserving the international slave trade. John Rutledge of South Carolina declared: "If the convention thinks that [North Carolina, South Carolina, and] Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest."[30] Because the delegates from these states believed that their way of life depended on continued access to slave labor, they threatened to abandon the Union if the Convention did not meet their demands.[31]

Bowing to Southern pressure, Northern representatives struck a deal. They agreed to prohibit Congress from interfering with the international slave trade for twenty years.[32] In exchange, the South agreed to grant Congress the power to regulate commerce—a power they feared Congress could use to protect manufacturing and East Coast shipping interests at the expense of southern cash crops.[33] Although many delegates found the slave trade immoral, most seem to have agreed with Oliver Ellsworth of Connecticut,[34] who feared that, without compromise, the states might "fly into a variety of shapes & directions, and most

27. WILENTZ, *supra* note 3, at 31.

28. KLARMAN, *supra* note 16, at 257-64, 283-86 (discussion of the southern states asserting that they would not ratify a constitution without protections for slavery).

29. Madison to Jefferson, Oct. 24, 1787, *in* 5 THE WRITINGS OF JAMES MADISON 32 (Gaillard Hunt ed., N.Y.: Putnam, 1904).

30. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 373.

31. BEEMAN, *supra* note 18, at 315.

32. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 415.

33. KLARMAN, *supra* note 16, at 287-89.

34. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 369-75.

probably into several confederations[,] and not without bloodshed."[35] When pushed on slavery, most delegates compromised and voted in their self-interest rather than in the interests of liberty.[36]

The Framers also sought to protect slavery within the states with at least two fundamental features.[37] The first was the infamous Three-Fifths Clause, which allocated representation in the federal government by counting enslaved people as three-fifths of a person.[38] If slaves had been counted equally, the North and South would have had roughly the same population at the time of the Founding.[39] The Three-Fifths Compromise ensured that, although the North would initially have a majority in the House, the South would not be a helpless minority.[40] In fact, when Gouverneur Morris attacked the Three-Fifths Clause because it would empower the South to control federal policy, Pierce Butler responded that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."[41] Southerners fought for the Three-Fifths Clause in large part because it gave them the power to protect slavery from federal overreach.[42]

The second major structural protection for slavery was the enumeration of Congress's powers. Enumeration ensured that the federal government had no power to interfere with slavery in the

35. *Id.* at 375.

36. For more detail on these constitutional compromises on slavery, see KLARMAN, *supra* note 16, at 270-76, 287, 304; BEEMAN, *supra* note 18, at 207-18, 316, 326-33; FEHRENBACHER, *supra* note 3, at 24-28, 32-35, 41; PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 12-18, 25-35 (2d. ed. M.E. Sharpe Inc., 2001); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA 64-73 (Cornell Univ. Press, 1977).

37. Many other provisions protected slavery. Examples include the Fugitive Slave Clause, the Slave Trade Clause, and the duty to suppress insurrections. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 13-18 (Harv. Univ. Press 2018); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 6-9 (Hill & Wang 2009).

38. U.S. CONST. art. 1, § 2, cl. 3.

39. KLARMAN, *supra* note 16, at 266.

40. WILENTZ, *supra* note 3, at 68-69.

41. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 603-05.

42. Of course, the Three-Fifths Clause also gave the South a larger vote in the Electoral College. KLARMAN, *supra* note 16, at 301.

states. When the Virginia delegation first introduced Resolution VI of the Virginia Plan, Pierce Butler (of South Carolina) feared that "we were running into an extreme in taking away the powers of the States," and he asked Edmund Randolph to explain "the extent of his meaning."[43] Edmund Randolph, who had introduced the resolution, "disclaimed any intention to give indefinite powers to the national Legislature," and insisted that "he was entirely opposed to such an inroad on the State jurisdictions . . . ."[44] Moreover, Luther Martin of Maryland (a small slaveholding state) invoked slavery to explain why the national government could not be trusted with such a power.[45] Historian Michael Klarman captures the scholarly consensus when he says that, "[i]t is likely that every delegate in Philadelphia believed that regulating a domestic institution such as slavery would exceed the delegated powers of Congress."[46]

The debates over Ratification confirm that the Founders thought Congress lacked the power to regulate slavery within the states. Federalist James Iredell, who would later serve as a Supreme Court Justice, rhetorically asked the North Carolina ratifying convention: "Is there any thing in this Constitution which says that Congress shall have it in their power to abolish the slavery of those slaves who are now in the country?"[47] In South Carolina, Charles Cotesworth Pinckney declared that the South had "a security that the general government can never emancipate them, for no such authority is granted, and it is admitted on all hands, that the general government has no powers but what are expressly granted by the constitution."[48] Madison told the Virginia Ratifying Convention that "[n]o power is given to the General Government to interpose with respect to the

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43. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 53.

44. *Id.*

45. WALDSTREICHER, *supra* note 37, at 79.

46. KLARMAN, *supra* note 16, at 294; *see also* FINKELMAN, *supra* note 37, at 19 ("Virtually everyone in 1787—and thereafter until the Civil War—fully understood that Congress could not interfere with the 'domestic institutions' of the states . . . .").

47. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 102 (Philadelphia, Jonathan Elliot ed., J.B. Lippincott Co., 1891).

48. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 124 (1788) (John Kaminski ed., 2021) [hereinafter THE DOCUMENTARY HISTORY].

property in slaves now held by the States."[49] In fact, Anti-Federalist Luther Martin of Maryland, an antislavery southerner, condemned the Constitution on the grounds that the federal government lacked the power "to make such regulations as should be thought most advantageous for the *gradual abolition of slavery*, and the *emancipation* of the *slaves* which are already in the States."[50]

Southern Anti-Federalists generally responded by arguing that Congress could indirectly undermine or weaken slavery rather than by saying that the Constitution empowered the federal government to emancipate directly. At the Virginia Ratifying Convention, for example, George Mason and Patrick Henry criticized the Constitution for failing to include any explicit protection for slavery.[51] Mason warned the Virginia ratifying convention that, without such a protection, Congress could find a way to undermine slavery, such as a tax on slaves so high "as it will amount to manumission."[52] Patrick Henry similarly worried that Congress could use its powers to weaken slavery and thus slowly eradicate it.[53] No prominent politician at the time of the founding, however, seriously suggested that the Constitution granted Congress the power to abolish slavery within the states.[54] Given the Deep South's intense commitment to the institution, Anti-Federalists certainly would have so argued if they could make even a plausible case for a federal power of emancipation.[55]

When Anti-Federalists complained that the Constitution made them complicit in slavery, Federalists generally responded by saying that slavery was an issue wholly reserved to the states.[56] For example, Pennsylvania Federalist Tench Coxe stressed that,

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49. *Id.* at 1339. Madison later said that the Congress could not emancipate slaves within the states because "[t]here is no power to warrant it, in that paper. If there be, I know it not." *Id.* at 1503.

50. WILENTZ, *supra* note 3, at 142 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 196).

51. *Id.* at 143.

52. *Id.* at 144 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1338).

53. *Id.* at 149.

54. *Id.* at 158 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1483).

55. *See* KLARMAN, *supra* note 16, at 302-03; DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR (2006).

56. WILENTZ, *supra* note 3, at 121.

because state laws regarding slavery "can *in no wise* be controuled or restrained by the fœderal legislature," each state had the power not only to preserve slavery, but also to abolish it.[57]

In fact, Federalists who touted the antislavery potential of the Constitution did not suggest any federal power to regulate slavery. Instead, they argued that the Constitution put slavery on the path to extinction by abolishing the international slave trade and empowering Congress to halt slavery's expansion into the federal territories.[58] They largely agreed with Oliver Ellsworth of Connecticut, who justified the Constitution's accommodation of slavery by arguing that, "as population increases; poor laborers will be so plenty as to render slaves useless[,]" so that "[s]lavery in time will not be a speck in our country."[59]

Although the founding generation agreed that Congress had no power to regulate slavery within the states, the Constitution does not explicitly protect slavery. In fact, the Constitution does not use the term "slave" at all. Even the Fugitive Slave Clause euphemistically refers to "Person[s] held to Service or Labour," and the Three-Fifths Clause counts "free Persons" and "three fifths of all other Persons."[60] Historians have conventionally said that the northern delegates wished to hide their complicity with such an obviously unjust institution.[61] In a compelling new book, however, historian Sean Wilentz argues that there was a much deeper meaning.[62] He convincingly argues that, "the convention took care to ensure that while the Constitution would accept slavery where it already existed, it would not validate slavery in national law[.]"[63] Wilentz concludes that the Constitution thus gave the states complete sovereignty over slavery—the federal

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57. *Id.* at 130 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 836). New England Federalist William Heath similarly responded to antislavery criticism by stating that "[e]ach State is sovereign and independent to a certain degree, and they have a right, and will regulate their own internal affairs." *Id.* at 121 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1371).

58. *Id.* at 132-33 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 463).

59. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 371.

60. U.S. CONST. art. IV, § 2, cl. 3; U.S. CONST. art. I, § 2, cl. 3.

61. WILENTZ, *supra* note 3, at 7-9.

62. *Id.* at vii.

63. *Id.* at xiii.

government had no power to require it in the North or abolish it in the South.[64]

In sum, the history of the Founding demonstrates that the national consensus on slavery was a critical feature of the Constitution. The records of the Convention make it painfully obvious that South Carolina and Georgia insisted on some assurance that the federal government could never abolish slavery within the states.[65] Northerners, however, were unwilling to protect slavery explicitly, because they hoped that abolition of the international slave trade, the power to ban slavery in the territories, and continued white immigration would soon spell the end of the institution.[66] The Convention's tacit compromise was thus to empower Congress to ban the slave trade (in 1808) and control the territories but give Congress no power to regulate the domestic institutions of existing states. The Framers wrote this compromise into the text through the enumeration of Congress's powers.

II. THE NATIONAL CONSENSUS IN ANTEBELLUM POLITICS

The national consensus on slavery exerted a powerful influence on antebellum politics. Because approximately one-third of the southern population was held in bondage, economic prosperity was heavily dependent on slave labor.[67] Moreover, because whites were paranoid about the possibility of slave insurrections, they viewed any threat to slavery as a threat to their personal safety.[68] White southerners thus thought their economy,

64. *Id.* at 6. Wilentz thus emphasizes the antislavery potential of the Constitution. Although the Constitution did not empower Congress to abolish it directly within the existing states, Congress had the power to ban it in the territories and prohibit the international slave trade. He thus argues that the Constitution did not use the word "slave" because many Founders hoped slavery would quickly wither away.

65. *Id.* at 69.

66. WILENTZ, *supra* note 3, at xiii.

67. *Id.* at 12.

68. *Id.* at 13-15. Even though most white southerners did not own slaves, the potential to become a slave owner was also an important part of white southern cultural identity. *See* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY 1789-1861: A STUDY IN POLITICAL THOUGHT 12-13 (1963).

personal safety, and very way of life depended on the continuation of the institution.

White southerners, however, did not trust the federal government to protect slavery. In fact, southern distrust of the federal government increased over time as the population in the North progressively exceeded that of the South.[69] At the time of the Founding, the southern population was roughly equal to that of the North, and, although the Three-Fifths Clause decreased southern representation, the South had 46% of the seats in the House.[70] Southern power in the federal government, however, consistently decreased over time. By 1860, when Lincoln was elected president, the southern states held only 35% of the seats in the House.[71] Although it sounds ironic today, white southerners saw themselves as a minority group that was under constant threat from a northern majority.[72]

Southern leaders thus looked to the Constitution for protection. John C. Calhoun, the architect of nullification and a leading voice in southern constitutionalism, warned that legislation like the Missouri Compromise could never protect southern interests.[73] By contrast, he declared, "the Constitution . . . is a firm and stable ground, on which we can better stand in opposition to fanaticism, than on the shifting sands of compromise. Let us be done with compromises. Let us go back and stand upon the Constitution!"[74] When sectional tensions reached new heights in 1850 over the status of slavery in the federal territories, then Representative Robert Toombs of Georgia declared that the North had "brought us to the point where we are to test the sufficiency of written constitutions to protect the rights of a minority against a majority of the people."[75] Toombs warned that the South would "stand by the Constitution and laws" for protection, and he implicitly threatened secession if federal power

69. CARPENTER, *supra* note 68, at 12-13.

70. *Id.* at 22.

71. *Id.*

72. Another key factor was rising antislavery sentiment in the North, especially in the 1830s. *Id.*

73. *See* CONG. GLOBE, 29th Cong., 2d Sess. 453-54 (1847).

74. *Id.* (statement of Sen. John C. Calhoun).

75. CONG. GLOBE, app. 31st Cong., 1st Sess. 198 (1850) (statement of Rep. Robert Toombs).

restricted slavery.[76] In the words of Jefferson Davis, who would later become the president of the Confederacy: "Our safety consists in a rigid adherence to the terms and principles of the federal compact. If . . . we depart from it, we, the minority, will have abandoned our only reliable means of safety."[77] In sum, the national consensus was a central principle of antebellum politics, and political elites knew that any deviation from it would threaten the stability of the Union.

The national consensus on slavery, moreover, was not an isolated exception to otherwise broad federal power. Instead, all federal powers were interpreted narrowly to preserve state sovereignty over local economic and social issues, the most important of which was slavery.[78] In fact, southerners saw threats to slavery from federal legislation that had nothing to do with the institution, including the bank of the United States, internal improvements, and tariffs.[79] Rather than insist on expansive federal power, advocates of this federal legislation tried to reassure southerners that federal power could never threaten slavery or state sovereignty more generally.[80]

Congress explicitly disclaimed any power to regulate slavery within the states as early as 1790.[81] The issue first arose when a group of Quakers petitioned Congress to tax the international slave trade, prohibit slaves from entering the federal territories, and otherwise attack slavery "to the full extent of [its] power . . . ."[82] Southern representatives generally agreed with South Carolina Representative William Loughton Smith, who responded by asserting that the southern states "never would have adopted" the Constitution if they thought it empowered the

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76. *Id.* at 201 (statement of Rep. Robert Toombs).

77. *Id.* at 1614 (statement of Sen. Jefferson Davis); *see also* CARPENTER, *supra* note 68, at 141-44, 146 (arguing that most southerners relied on the Constitution to protect southern rights in this era).

78. *See, e.g.*, Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L. J. 405, 421, 429-30 (2012) (concluding that the South "insisted on limitations on the national government precisely because . . . . [n]o other institution was so vulnerable to hostile legislation at the national level").

79. *See id.* at 425.

80. *See, e.g.*, *id.* at 421, 423.

81. CARPENTER, *supra* note 68, at 142.

82. *See e.g.*, 1 ANNALS OF CONG. 1224-26 (1790) (Joseph Gales ed., 1834); LIGHTNER, *supra* note 55, at 38.

federal government to interfere with slavery.[83] Representative Thomas Tudor Tucker went so far as to declare that the petition's "unconstitutional request" to interfere with slavery "would never be submitted to by the Southern States without a civil war."[84] Although some spoke out in defense of the right to petition and to end the slave trade in 1808, no one in Congress advocated for a federal power to regulate slavery.[85] The House ultimately voted to refer the matter to a committee, which issued a report stating: "Congress ha[s] no authority to interfere in the internal regulations of particular States" regarding slavery.[86]

The leading politicians of the North readily admitted that federal power was too limited to pose a threat to slavery within the states. Daniel Webster, New England's leading champion of federal power, said that "Congress has no authority to interfere in the emancipation of slaves. This was so resolved by the House in 1790 . . . and I do not know of a different opinion since."[87] Moreover, in his first inaugural address, President Lincoln likewise declared:

> The maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions [i.e., slavery] according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend.[88]

In fact, no mainstream politician prior to the Civil War publicly argued that Congress had the power to regulate or abolish slavery within the states.[89]

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83. 1 ANNALS OF CONG. *supra* note 82, at 1243-44.

84. *Id.* at 1240. Many other southern representatives made similar statements. *See, e.g.*, Richard S. Newman, *Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Federal Congress*, 16 J. EARLY REPUBLIC 571, 582-86 (1996).

85. *See* Newman, *supra* note 84, at 588-90. For more on slavery's influence on the rights of speech and petition, see MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 121-22 (Duke Univ. Press ed., 2000).

86. 2 ANNALS OF CONG. 1465 (1790). Similar resolutions were passed in the House in 1836 and the Senate in 1838. *See* CARPENTER, *supra* note 68, at 142-43.

87. Newman, *supra* note 84, at 573 (quoting Webster).

88. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: Abraham Lincoln*, PROJECT GUTENBERG (May 28, 2004), [https://perma.cc/C8UQ-KZ68].

89. *See, e.g.*, SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 36.

Although historians recognize that the country's intense commitment to federalism was largely driven by a perceived need to protect slavery, congressmen often avoided making the connection explicitly.[90] This is because northern and southern statesmen alike understood that public debate over slavery was extraordinarily divisive. After the first major debate over slavery's expansion in 1820, for example, Thomas Jefferson wrote, "this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union."[91] When debates over slavery's expansion again threatened to tear the country apart in 1850, Stephen Douglas, the leader of the Democratic Party in the North, pushed through the Compromise of 1850 and "resolved never to make another speech upon the slavery question in the halls of Congress."[92] Although politicians often avoided the subject of slavery, historian David Currie explains that "the slavery question often lurked behind Southern insistence on strict interpretation of federal powers . . . ."[93]

Slavery impacted every major debate over the reach of federal power, including the First Congress's debate over Congress's power to incorporate a national bank. Because the text of the Constitution does not explicitly empower Congress to incorporate a bank, the debate focused on the scope of implied powers.[94] Madison emerged as the leading opponent of the bank.[95] In sum, he contended that the bank was unconstitutional because Congress's implied powers included only those necessary to effectuate the powers enumerated in Article I.[96] He warned that "[i]f implications, thus remote and thus multiplied,

90. *See also id.* at 35.

91. Letter from Thomas Jefferson to John Holmes, LIBR. CONG. (April 22, 1820), [https://perma.cc/W8E6-S7TK]. Jefferson lamented that agitation over slavery would destroy the Union and make the Revolution a "useless sacrifice." *Id.* His "only consolidation" was that he would "not . . . weep over it." *Id.*

92. CONG. GLOBE, app. 32d Cong., 1st Sess., app., 65 (Dec. 23, 1850) (statement of Sen. Stephen Douglas).

93. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, at xii (2005); *see also* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 35.

94. *See id.* at 202.

95. *Id.* at 203.

96. *See id.* at 208-09.

can be linked together, a chain may be formed that will reach every object of legislation . . . ."[97] Although he did not say so explicitly, antebellum readers would have understood this as a warning that the bank bill would set a precedent for federal power that could threaten slavery.[98] In fact, in an obvious reference to slavery, one representative noticed that "the opinions respecting the constitution seem to be divided by a geographical line."[99]

As some revisionist scholars have stressed,[100] many representatives responded to Madison by arguing that Congress was not limited to its enumerated powers or that Congress could legislate for the "general welfare."[101] These men, however, did not argue that Congress had unlimited regulatory power. Instead, according to historian Jonathan Gienapp, American elites often did not view the Constitution "strictly, or even primarily, as a text" until approximately 1796.[102] Many elites thus saw the Constitution as an abstract set of principles, much like the unwritten British constitution.[103] Under this approach, the text was merely illustrative of a system that balanced competing powers and interests rather than strictly enforceable like a statute.[104] Congress thus could legislate according to the spirit, as opposed to the letter, of the powers enumerated in Article I.[105]

The debates show that representatives on both sides of the debate agreed that the spirit of the Constitution limited federal power so as to preserve state sovereignty over domestic institutions like slavery.[106] William Loughton Smith, a proponent of the bank, asserted that no one would ever accept the idea that

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97. 2 ANNALS OF CONG. *supra* note 86, at 1899.

98. *See* JOHNATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 207 (2018).

99. *Id.* at 212.

100. *See* Primus, *The Essential Characteristic*, *supra* note 5, at 460-61. Primus's arguments are addressed below. *See* discussion *infra* Part V.

101. *See* GIENAPP, *supra* note 98, at 203, 218.

102. *See id.* at 10.

103. *See id.* at 23. Other scholars agree with Gienapp's assessment. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 11-12 (2004); *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 3-4 (1990).

104. *See* GIENAPP, *supra* note 98, at 62-63.

105. *Id.* at 92.

106. *See id.* at 203, 217, 222.

"whatever the legislature thought expedient was therefore constitutional."[107] Fisher Ames similarly said that he "did not contend for an arbitrary and unlimited discretion in the government to do every thing" and that implied powers must be "guided and limited."[108] Even Hamilton, the foremost champion of the bank, acknowledged that some subjects were beyond the power of Congress and reserved to the states.[109] Although the bank's supporters had a difficult time articulating the line between legitimate and illegitimate implied powers,[110] it would be a mistake to assume that there was no such line. The larger historical context suggests that the bank's supporters were attempting to assure men like Madison that the bank bill was no threat to the national consensus on slavery.

Although the bank's supporters won the battle over the bank, they lost the debate over the meaning of the Constitution. In fact, Gienapp concludes that, as early as 1796, Madison's textualist approach to enumerated powers dominated elite thinking.[111] Elites thus embraced the idea that Congress was limited to its enumerated powers (as supplemented by implied powers), which could be best understood by excavating original meaning.[112] Because the national consensus on slavery pervaded the original meaning of federal powers, this approach to constitutional meaning dictated that federal powers were narrow in scope.

The debates over internal improvements further reveal slavery's ubiquitous influence on federal powers. Today, no one doubts that Congress can build and regulate interstate transportation under the Spending and Commerce Clauses.[113] In fact, the modern Court identifies interstate transportation as a core Commerce Clause concern.[114] Before the Civil War, however, the states and private companies built most roads and canals

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107. *Id.* at 222.
108. *Id.* at 203, 217.
109. GIENAPP, *supra* note 98, at 202, 244.
110. *Id.* at 222.
111. *See id.* at 10, 203.
112. *Id.* at 330, 332.
113. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 558 (1995).
114. *Id.*

because many political actors thought Congress lacked the constitutional authority to build internal improvements.[115]

Using veiled references to slavery, presidents from Jefferson to Polk cited constitutional concerns when vetoing internal improvement bills. In 1824, for example, Thomas Jefferson said that he "most dreaded" a federal power over internal improvements, because it would imply that Congress could "make the text say whatever will relieve them from the bridle of the States."[116] Moreover, in his last act as President, Madison vetoed a bill to fund improvements (the Bonus Bill of 1817) and warned that "the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments . . . ."[117] As late as 1846, President James K. Polk warned that "[a] construction of the Constitution so broad as that by which the power in question [over internal improvements] is defended tends imperceptibly to a consolidation of power in a Government intended by its framers to be thus limited in its authority."[118] For southerners like Jefferson, Madison, and Polk, consolidation was dangerous not only because it threatened the republic, but also because it threatened state sovereignty over slavery.[119]

In telling moments, frustrated southern representatives occasionally tied the constitutional debates over internal improvements to slavery explicitly.[120] Representative John Randolph of Virginia, for example, warned that, if Congress had

115. *See* JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 49, 79 (2001).

116. Letter from Thomas Jefferson to Richard Rush (Oct. 13, 1824), *in* 12 THE WORKS OF THOMAS JEFFERSON 380-81 (Paul Leicester Ford ed., 1905).

117. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: James Madison*, PROJECT GUTENBURG (Jan. 31, 2004), [https://perma.cc/M278-7WSL].

118. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: James Knox Polk*, PROJECT GUTENBURG (May 28, 2004), [https://perma.cc/W2WB-6XLG]. Polk argued that, while longstanding practice allowed the federal government to build lighthouses and piers near the ocean to facilitate navigation, Congress could not "advance a step beyond this point . . . to make improvements in the interior" of the country. *Id.*

119. Many congressional representatives made the same arguments in debates over internal improvements. *See* LARSON, *supra* note 115, at 67.

120. *See* LIGHTNER, *supra* note 55, at 57; *see also* 41 ANNALS OF CONG. 1299 (1824).

the implied power to build roads and canals, it could also "emancipate every slave in the United States."[121] Nathaniel Macon, a representative from North Carolina and former Speaker of the House, similarly said, "if Congress can make banks, roads and canals under the constitution; they can free any slave in the United States . . . ."[122] He thus warned that a broad interpretation of federal power over internal improvements threatened to "destroy our beloved mother N[orth] Carolina and all the South country."[123]

Other examples of slavery's influence on constitutional politics abound. During the nullification crisis of 1832, John C. Calhoun argued that Congress lacked the power to impose a tariff that had a disproportionate effect on the slave states' cash crop economy.[124] Although President Jackson rejected the theory of nullification, he devoted his second inaugural address to reassuring the country that he defended state sovereignty over local matters. Jackson stated that "the destruction of our State governments or the annihilation of their control over the local concerns of the people [i.e., slavery] would lead directly to revolution and anarchy, and finally to despotism and military domination."[125] In one of the most famous speeches in the history of the Senate, Webster similarly argued that southern fear of federal encroachment on slavery was "wholly unfounded and unjust" because such an encroachment would "evade the constitutional compact and [] extend the power of the government over the internal laws and domestic condition of the states."[126]

Southern paranoia around federal power occasionally even pushed Congress to limit federal protections for slavery. For example, after Shadrach Minkins escaped from federal custody as

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121. 41 ANNALS OF CONG., *supra* note 120, at 1308.

122. EDWIN MOOD WILSON, THE CONGRESSIONAL CAREER OF NATHANIEL MACON 71-72 (1900).

123. *Id.* at 46-47.

124. *See* 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY: 1776-1854, at 255, 257 (1990); *The Tariff of Abominations: The Effects*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, [https://perma.cc/MMX5-P3LA] (last visited Oct. 13, 2021).

125. STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 108 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

126. SPEECHES OF HAYNE AND WEBSTER IN THE UNITED STATES SENATE, ON THE RESOLUTION OF MR. FOOT, JANUARY, 1830, at 44 (Redding & Co., 1852).

a fugitive slave in 1851, President Millard Fillmore sought authorization to call on the federal military and state militia to enforce the Fugitive Slave Act.[127] A strange combination of votes from northern Whigs and southern Democrats, however, led Congress to deny the President's request.[128] According to Jefferson Davis:

> [W]hen any State in this Union shall choose to set aside the law, it is within her sovereignty, and beyond our power. . . . [I]t would be a total subversion of the principles of our Government if the strong arm of the United States is to be brought to crush the known will of the people of any State in this Union.[129]

The *Charleston Mercury* similarly warned, "the Boston riot is to be used, as all Northern outrages are, as the occasion and pretext for arming the General Government and especially the Executive, with increased means of assailing the South."[130] In fact, Senator Robert Rhett of South Carolina even went so far as to declare that the proslavery Fugitive Slave Law of 1850 was an unconstitutional consolidation of power in the federal government.[131]

Although some scholars argue that the Slave Trade Clause implies a broad Commerce Power, or at least some power to regulate slavery,[132] such arguments rely on a modern reading of the text rather than constitutional history. The Slave Trade Clause of the Constitution prohibited Congress from banning the international slave trade prior to 1808.[133] When northern representatives introduced the first bill to end the trade in January

127. *Presidential Speeches: Millard Fillmore Presidency, February 19, 1851: Message Regarding Disturbance in Boston*, MILLER CTR., [https://perma.cc/J6EK-KJXS] (last visited Oct. 15, 2021); *See* Brendan Wolfe, *Minkins, Shadrach (d. 1875)*, ENCYCLOPEDIA VA., [https://perma.cc/K492-SR2E] (Feb. 12, 2021).

128. *See* CONG. GLOBE, 31st Cong., 2d Sess. 828 (1851); CONG. GLOBE, 31st Cong., 2d Sess. app. 292.326 (1851).

129. CONG. GLOBE, 31st Cong., 2d Sess. 599 (1851).

130. *The President's Message*, CHARLESTON MERCURY, Feb. 25, 1851. *Cf. The Picayune and Consolidation*, NEW ORLEANS DELTA, *quoted in* DAILY PICAYUNE, Feb. 27, 1851 (arguing that supporters of the president's proclamation "intended to prepare the public mind for the idea of an absolute consolidated National Government, built upon the ruins of State Governments").

131. CONG. GLOBE, 31st Cong., 2d Sess. app. 317–18 (1851).

132. *See* Schwartz, *An Error and an Evil*, *supra* note 5, at 955.

133. U.S. CONST. art. I, § 9, cl. 1.

of 1807, they "altogether denied" that the Commerce Clause could apply to slavery.[134] Instead, they relied on Congress's power to "define and punish offenses against the law of nations."[135] Using the Commerce power, they asserted, would be "at war with our fundamental institutions" presumably because it would imply that Congress could regulate the interstate slave trade and perhaps even slavery within the states.[136]

The Slave Trade and Commerce Clauses arose again during the Missouri Crisis. James Tallmadge, Jr., of New York, provoked the crisis in 1819 by proposing that Missouri's admission to the Union be made conditional on its abolition of slavery.[137] The proposal's supporters primarily argued that Congress's power to regulate the territories and admit new states authorized Congress to impose conditions on Missouri's admission.[138] Some northerners, however, also relied on the Slave Trade and Commerce Clauses.[139] Because the Slave Trade Clause was merely a prohibition on ending the trade for a period of years, they argued, some other provision of the Constitution must have granted Congress the power to enact a ban.[140] The most natural source of such power was the Commerce Clause, which confers power over both international and interstate commerce.[141]

Southerners like Madison, however, replied that the Slave Trade Clause implied only that Congress could ban the international slave trade.[142] If the Framers or Ratifiers had thought that Congress had a similar power over the domestic slave trade, Madison contended, the South surely would have objected.[143] Southerners further demanded that Congress allow

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134. 16 ANNALS OF CONG. 271 (1807).

135. *Id.*

136. LIGHTNER, *supra* note 55, at 45-46. They further stated that it was "abhorrent to humanity" to call people articles of commerce. *Id.*

137. *See* JOHN R. VAN ATTA, WOLF BY THE EARS: THE MISSOURI CRISIS: 1819-1821, at 1 (2015).

138. *See* LIGHTNER, *supra* note 55, at 49.

139. *See id.* at 49-52.

140. *See id.* at 51.

141. *See id.* at 51-52.

142. *See From James Madison to Robert Walsh Jr., 27 November 1819, Founders Online*, NAT'L ARCHIVES, [https://perma.cc/8YHJ-4WLR] (last visited Oct. 15, 2021).

143. *Id.*

slavery to expand on terms equal to those of free labor.[144] The Missouri Compromise, which allowed slavery in Missouri but banned it north of the new state's southern border, did not resolve the constitutional debate.[145] The nation thus could not even agree on whether Congress could ban slavery in the territories or regulate the interstate sale of slaves. In this context, it was a basic assumption that Congress had no power to regulate slavery directly within the southern states.

Although not as common or well known, some northerners also sought to limit federal power to preserve a state's right to abolish slavery. In his famous senatorial campaign against Stephen Douglas in 1858 and his successful run for the presidency in 1860, Lincoln repeatedly warned that a southern-dominated federal government could force slavery into the North.[146] Most dramatically, after the Wisconsin Supreme Court declared the federal Fugitive Slave Act unconstitutional in 1854, it declared that state sovereignty trumped the power of the United States Supreme Court to exercise appellate jurisdiction.[147] In a concurring opinion, Judge Smith of the Wisconsin Supreme Court explained that state sovereignty was paramount and warned that, if the state lacked the power to reject the federal Fugitive Slave Act, "[t]he slave code of every state in the union [would be] engrafted upon the laws of every free state . . . ."[148] The Wisconsin legislature adopted the same states' rights stance, Ohio nearly followed suit, and northern militia came close to confronting federal marshals over a state's right to exclude slavery.[149]

In sum, slavery's influence on antebellum federal powers is difficult to overstate. On issues ranging from mundane details like funding for the Cumberland Road to high-profile legislation

144. *See* VAN ATTA, *supra* note 137, at 14, 75.

145. *See* LIGHTNER, *supra* note 55, at 57.

146. *See* DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 333 (1976); FEHRENBACHER, *supra* note 3, at 451.

147. *See In re* Booth, 3 Wis. 1, 9 (1854).

148. *Id.* at 122.

149. For more on the Wisconsin decision and its context, see Jeffrey M. Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007).

like the Fugitive Slave Act of 1850,[150] slavery pushed the country towards a narrow understanding of federal powers. It is no accident that, aside from *Marbury v. Madison*,[151] the Supreme Court did not strike down a single federal statute until the *Dred Scott* decision.[152]

III. THE NATIONAL CONSENSUS IN THE COURTS

Slavery also deeply influenced the Court's jurisprudence on federal powers. Although the Court, like Congress, often did not mention slavery explicitly, its influence is unmistakable. The national consensus on slavery pushed the Court to adopt both a narrow interpretation of federal authority and a broad understanding of the states' police powers.

Although legal scholars have conventionally read Chief Justice Marshall's opinion in *McCulloch v. Maryland* as an endorsement of expansive federal powers,[153] his opinion actually reinforces the national consensus on slavery. In *McCulloch*, Justice Marshall provided the definitive interpretation of the Necessary and Proper Clause while upholding the constitutionality of the bank of the United States.[154] Although the power to create a bank is not enumerated in Article I, the Court held that it was implied from the powers to tax, spend, regulate commerce, and support the armies and navies.[155] In an oft-quoted passage, Justice Marshall said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution,

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150. In the debates over the Fugitive Slave Act, Maryland Senator Thomas G. Pratt moved to have the federal government indemnify slaveholders when the government failed to return fugitives. In response, Jefferson Davis, the future president of the Confederacy, asked: "If we admit that the Federal Government has power to assume control over slave property . . . where shall we find an end to the action which anti-slavery feeling will suggest?" *See* Jeffrey M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of* Prigg v. Pennsylvania, 123 PENN STATE L. REV. 103, 129-130 (2018).

151. 5 U.S. (1 Cranch) 137, 147-48 (1803).

152. Scott v. Sanford, 60 U.S. (1 How.) 414, 416 (1857).

153. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 16-23 (collecting sources).

154. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 324 (1819).

155. *Id.* at 407.

are constitutional."[156] He further explained that legislation is "necessary" when it is "convenient, or useful" in the pursuit of enumerated powers.[157]

Chief Justice Marshall, however, was careful to stress that implied powers were limited in scope. He asserted that the federal "government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."[158] For Justice Marshall, this meant "that the powers of the [federal] government are limited, and that its limits are not to be transcended."[159] He further stated that, "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."[160] In other words, Justice Marshall said that there are topics reserved to the states and thus prohibited from the federal government. Although Justice Marshall does not spell out the precise limits on federal power, he clearly contemplates that federal legislation could be related to an enumerated power and yet still be inconsistent with "the letter and spirit of the constitution . . . ."[161] As David Schwartz concludes in his recent book on *McCulloch*, the language of the decision is "deeply ambiguous" because it uses vague and indeterminate language when describing both the scope and limitations of implied powers.[162]

Looking beyond the language of the opinion, however, the historical context strongly implies that the Court in *McCulloch* did not have an expansive view of federal powers. The outcome of the decision was never in question, as Congress had already extensively debated the issue and the bank had become central to

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156. *Id.* at 421.
157. *Id.* at 413.
158. *Id.* at 405.
159. *McCulloch*, 17 U.S. at 421.
160. *Id.* at 410.
161. *Id.* at 421.
162. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5.

the nation's economic well-being.[163] Yet, the Court decided the case as the Missouri Crisis raged in Congress, and it had obvious implications for slavery.[164] For a Chief Justice who is famous for his political acumen when ruling in cases like *Marbury*,[165] it would have been an especially inopportune moment to declare that Congress had virtually unlimited federal powers.

In fact, Justice Marshall himself did not view *McCulloch* as a precedent for expansive federal powers.[166] Soon after the Court announced its decision, the *Richmond Enquirer* published a series of essays arguing that *McCulloch*'s reasoning threatened to consolidate power in the federal government.[167] In a remarkable turn of events, Justice Marshall anonymously published a series of responses in the *Philadelphia Union*[168] and *Alexandria Gazette*.[169] In the words of legal historian Gerald Gunther:

> [T]he thrust of Marshall's response was to deny that charge of consolidation, to insist, with more emphasis than in *McCulloch* itself, that those principles did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement.[170]

For example, in his *Friend of the Constitution* essay of July 5, Marshall says, "[i]n no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution."[171]

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163. *See* GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 5 (1969) ("To conclude that the Bank was constitutional was to beat a moribund horse.").

164. *Id.* at 8.

165. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 53.

166. *McCulloch*, 17 U.S. at 353.

167. *See* GUNTHER, *supra* note 163, at 55 ("If the Congress of the United States should think proper to legislate to the full extent, upon the principles now adjudicated by the supreme court, it is difficult to say how small would be the remnant of power left in the hands of the state authorities."). Although the authors used pseudonyms, the essays were probably written by William Brockenbrough and Spencer Roane, both of whom were prominent judges on the Virginia Court of Appeals and well-known for their Jeffersonian principles. *Id.* at 1.

168. *See* Gerald Gunther, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of* McCulloch v. Maryland, 21 STAN. L. REV. 449, 449-50 (1969).

169. *Id.*

170. *See* Gunther, *supra* note 168, at 19.

171. *Id.* at 186-87. He further writes that "not a syllable uttered by the court[] applies to an enlargement of the powers of congress. The reasoning of the judges is opposed to that

Moreover, the Marshall Court adopted a narrow reading of Congress's implied powers in subsequent cases, rarely cited *McCulloch*, and never cited its discussion of implied powers when deciding other federalism issues.[172] If the conventional view of *McCulloch* as a precedent for expansive federal powers is correct, the Court and Justice Marshall seem to have been completely unaware.

Slavery's influence on federal powers is perhaps most evident in the Court's Commerce Clause jurisprudence. The institution of slavery was deeply embedded within interstate and international commerce. Slaves primarily produced cash crops like tobacco, rice, and cotton that were bound for interstate and international markets.[173] Enslaved people were also important articles of interstate commerce themselves, because masters in the Upper South sold millions of slaves to fuel development in the Deep South, where brutal conditions produced high mortality rates.[174] The interstate slave trade was thus key to slavery's expansion and an important feature of the southern economy.[175] Revisionists who support the modern reach of the Commerce Clause thus cannot simply rely on changing economic circumstances.[176] Because slave labor was local economic activity that substantially effected interstate (and international) commerce, modern doctrine would unquestionably empower Congress to regulate or abolish slavery.

The antebellum Supreme Court, however, never suggested that Congress could use the Commerce Clause to regulate any aspect of slavery. Because Congress did not attempt to regulate the interstate slave trade, the Court never had occasion to rule on that issue. However, this lack of federal regulation was no accident. In *Slavery and the Commerce Power*, historian David Lightner concludes, "during both the drawing up of the Constitution and the battle over ratification, it never entered the

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restricted construction which would embarrass congress . . . but makes no allusion to a construction enlarging the grant beyond the meaning of its ends." *Id.* at 182.

172. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 59.

173. LIGHTNER, *supra* note 55, at 32.

174. *Id.*

175. *Id.* at 5.

176. *See* Balkin, *Commerce*, *supra* note 6, at 21.

minds of most southerners that the Constitution gave Congress the authority to outlaw the interstate slave trade."[177] Lightner continues to explain that, although a faction of the abolitionist movement thought Congress could regulate the interstate slave trade, this position lacked any serious support in national politics or the judiciary.[178]

Although the Court never staked out a position on the interstate slave trade, it broadly interpreted state power over slavery and clearly stated (albeit in dicta) that the commerce power could not reach slavery within the states.[179] Before examining the Court's decisions, however, it is important to understand the context in which they arose. Each of the cases discussed below implicate the State's power to regulate the interstate movement of people—passengers, immigrants, and slaves. The Court, however, never ruled on the most contentious such state law.

South Carolina's Negro Seaman's Act required all black sailors who left their ships in a South Carolina port to be jailed until the vessel left harbor.[180] After Denmark Vesey's attempted slave insurrection in 1822, South Carolinians became paranoid that outsiders, and especially free blacks, would incite revolt by spreading dangerous ideas of freedom and equality.[181] Many other states followed suit with similar legislation targeting free blacks and antislavery speech.[182] White southerners believed such legislation was essential to slavery's survival and thus the preservation of southern society.[183]

In *Elkison v. Deliesseline*, Justice William Johnson challenged southern control over slavery by ruling that the Negro Seaman's Act was unconstitutional.[184] While riding circuit, Justice Johnson held that the law was unconstitutional because Congress's power to regulate interstate commerce was exclusive

177. LIGHTNER, *supra* note 55, at 33.

178. *See id.* at 59.

179. *See id.* at 65, 68-69.

180. *See id.* at 66.

181. *See* MICHAEL A. SCHOEPPNER, MORAL CONTAGION: BLACK ATLANTIC SAILORS, CITIZENSHIP, AND DIPLOMACY IN ANTEBELLUM AMERICA 3 (2019).

182. *Id.* at 4.

183. *Id.*

184. 8 F. Cas. 493, 498 (C.C.D. S.C. 1823) (No. 4,366).

in nature.[185] Southerners, however, rejected the decision as an attack on slavery, and South Carolina brazenly continued to enforce the law.[186] In a private letter, Chief Justice John Marshall criticized Johnson's decision and worried that Southerners would "break" the Constitution before they would "submit" to Johnson's ruling,[187] and the Supreme Court never intervened.

Justice Marshall issued his landmark decision in *Gibbons v. Ogden* just one year after Johnson's controversial decision in *Elkison*.[188] *Gibbons* arose from a challenge to an exclusive New York license to navigate certain waters that connected the state to New Jersey.[189] In his argument for Gibbons, Daniel Webster argued that the New York licensing law was invalid because, as Justice Johnson had held while riding circuit, the Commerce Clause granted Congress an exclusive power over interstate commerce.[190] However, despite Webster's deserved reputation as a nationalist, he interpreted the scope of the commerce power quite narrowly. He acknowledged that a broad view of the commerce power was possible by saying "[a]lmost all of the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulations*."[191] However, he rejected the argument that Congress could regulate local matters merely because they were "connected" to interstate commerce. Instead, he argued, the Commerce Clause should be interpreted in light of its underlying purpose. This purpose, he said, was simply the elimination of "embarrassing and destructive" trade barriers between the states that had existed under the Articles of Confederation.[192] Interpreting commerce in light of this purpose, he argued, meant that federal power was limited to the regulation of trade and navigation.[193]

185. *Id.* at 495.
186. SCHOEPPNER, *supra* note 181, at 47.
187. LIGHTNER, *supra* note 55, at 66-67.
188. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186 (1824).
189. *Id.* at 1-2.
190. *Id.* at 186.
191. *Id.* at 9-10.
192. *Id.* at 11.
193. In his article, *The* Gibbons *Fallacy*, Richard Primus contends that Webster urged the Court to hold that Congress had the exclusive power to regulate all "domestic commerce as one integrated system . . . ." Primus, *The* Gibbons *Fallacy, supra* note 5, at 583-84. When combined with federal exclusivity, Primus says, such a broad reading of the commerce power

Webster warned that a more expansive interpretation of commerce would be dangerous to federalism and state sovereignty. He argued that a broad view of commerce as extending to all economic activity would:

> [A]cknowledge[] the right of Congress, over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequence would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; *a consequence, which no one would admit for a moment*. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term.[194]

In this quote, Webster is saying that the mere possibility of federal regulation over local activities was "a consequence which no one would admit for a moment" because the Supremacy Clause would allow Congress to overrule the states.[195] Of course, federal supremacy over local conditions would also violate the national consensus on slavery—something that Webster clearly invoked when he warned that, if Congress and the states had a concurrent power over commerce, federal law could overrule state commercial legislation, including New York's ban on slavery.[196] He thus urged the Court to view commercial legislation narrowly, so that the federal government had no power

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would have invalidated most state economic legislation. *Id.* at 584. Webster, however, said nothing of the sort. The "God-like Daniel" and "Expounder of the Constitution" would never have made such an impractical argument, and its strains credulity to suggest otherwise. *See* ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 9, 162, 613 (1997) (using Webster's nicknames). Instead, as explained above, Webster understood that federal exclusivity would require a narrow reading of the Commerce Clause. *See Gibbons*, 22 U.S. (9 Wheat) at 14 ("[T]he words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires.").

194. *Gibbons*, 22 U.S. (9 Wheat) at 19 (emphasis added).

195. *Id.* at 19.

196. *Id.* at 20-21.

to interfere with state legislation enacted under the police power.[197]

In *Gibbons*, Justice Marshall found a way to adopt the basic thrust of Webster's argument while still preserving the national consensus on slavery.[198] With Justice Johnson's recent decision on the Negro Seaman's Act likely on his mind,[199] Marshall did not adopt Webster's argument that the federal commerce power was exclusive. Instead, he held that New York's exclusive license was invalid because it conflicted with a federal steamboat license.[200] The federal license was valid, Justice Marshall held, because the Commerce Clause empowered Congress to "prescrib[e] rules for carrying on" the "commercial intercourse between nations, and parts of nations . . . ."[201]

Although Justice Marshall held that commerce included navigation, he followed Webster by saying that the Commerce Clause did not extend to that "which is completely internal" to a state.[202] This was true, he said, because "[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."[203] In other words, because the Commerce Clause grants Congress power only over commerce "among" the states, the text implies that Congress has no power over intrastate commerce.[204] But Marshall did not leave this point up to implication. He further says that the:

> [G]enius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the

197. *Id.* at 19-20.

198. *Id.* at 239-40.

199. *See* SCHOEPPNER, *supra* note 181, at 6-7 (asserting that *Gibbons* and other Commerce Clause cases "were adjudicated with an eye towards the effects on the Seamen Acts").

200. *Gibbons*, 22 U.S. (9 Wheat.) at 24, 27.

201. *Id.* at 189-90.

202. *Id.* at 193-95.

203. *Id.* at 195.

204. *Id.* Presumably, Justice Marshall must have thought that using the Necessary and Property Clause to reach internal commerce would similarly violate the text of the Commerce Clause. *See Gibbons*, 22 U.S. (9 Wheat.) at 195.

> States generally; *but not to those which are completely within a particular State* . . . .[205]

Marshall continues to say that "[s]uch a power [over intrastate conduct] would be inconvenient, and is certainly unnecessary."[206] Because Marshall elsewhere uses the word "convenient" when interpreting the Necessary and Proper Clause,[207] his statement strongly implies that Congress cannot use that Clause to expand the commerce power to reach intrastate commerce. If any doubt remained, he further stated: "completely internal commerce of a State, then, may be considered as reserved for the State itself."[208] As Webster forcefully argued, state power is not "reserved" when the federal government can overrule state legislation.[209] *Gibbons* is thus best understood as holding that Congress's commerce power, even when supplemented by the Necessary and Proper Clause, did not apply to intrastate commerce.[210]

Justice Marshall's cautious approach to federal powers should come as no surprise. Marshall was a wealthy Virginian

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205. *Gibbons*, 22 U.S. (9 Wheat.) at 195 (emphasis added).

206. *Id.* at 194.

207. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409 (1819).

208. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

209. *See id.* at 31, 34-35.

210. In *The* Gibbons *Fallacy*, Primus asserts that Marshall's opinion is relatively consistent with modern doctrine on the scope of federal power. *See* Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 591. According to Primus, although the Commerce Clause does not directly extend to intrastate commerce, *Gibbons* holds that the Necessary and Proper Clause allows Congress to reach local commerce as an implied power. *Id.* at 574-75. According to Primus, this distinction was important to Marshall because he believed that the Commerce Clause made federal power over interstate commerce exclusive, whereas the Necessary and Proper Clause was not. As a result, the states had concurrent power over local commerce but no power to interfere with interstate trade. *Id.* at 591. Although Primus presents a creative argument, it is not historically accurate. Marshall did not invent an ingenious argument for federal exclusivity over trade and concurrent authority over local economic activities, as Primus contends. *See id.* at 590-92. Instead, Marshall found a way to adopt the basic thrust of Webster's argument while still preserving the national consensus on slavery. See *id.* at 584-85, 613. As explained above, Justice Johnson had declared that South Carolina's Negro Seaman Act was unconstitutional because Congress had the exclusive power to regulate interstate and international commerce. *See supra* notes 185-88 and accompanying text. Marshall thought Johnson's decision was unwise because he knew that the South would never tolerate any interference with state authority over slavery, and many Southerners thought restrictions on free blacks were necessary to maintain control over the enslaved. *See supra* notes 185-88 and accompanying text. Although Marshall said that Webster's argument for exclusivity had "great force" he was probably unwilling to adopt it because of the national consensus on slavery. *See Gibbons*, 22 U.S. (9 Wheat.) at 209.

who bought and sold hundreds of enslaved people throughout his lifetime.[211] According to historian Paul Finkelman, "in slavery cases, Marshall's opinions were cautious, narrow, legalistic, and hostile to freedom."[212] Moreover, in his biography of Justice Marshall, Kent Newmyer similarly states that Marshall's approach to "federalism deferred to the states on the question of slavery."[213] Justice Marshall probably had no inclination to challenge state sovereignty over slavery through an expansive interpretation of implied federal powers. When Marshall said that federal legislation must be consistent with the "spirit of the constitution,"[214] he may very well have had state sovereignty over slavery on his mind.

The Taney Court's Commerce Clause jurisprudence similarly supported the national consensus on slavery. In *Mayor of New York v. Miln*, the Court broadly interpreted the state's police power to include the power to regulate the entry of immigrants because doing so was necessary to guard against the introduction of "moral pestilence" as well as physical disease.[215] The reference to "moral pestilence" was not lost on the southern states, which had used similar language to justify racial "quarantine" laws like the Negro Seamen Acts and prohibitions on abolitionist literature.[216] In fact, New York warned the Court that any ruling against its immigration law would call into question "a class of laws peculiar to the southern states, prohibiting traffic with slaves, and prohibiting masters of vessels from bringing people of colour in their vessels."[217] Slavery thus pushed the Court in *Miln* to interpret state police powers broadly and to reject federal exclusivity over the entry of immigrants.[218]

The Taney Court returned to the issue of slavery and the Commerce Clause in *Groves v. Slaughter*.[219] The case arose

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211. FINKELMAN, *supra* note 37, at 31.
212. *See id.* at 28.
213. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 434 (La. St. Univ. Press 2001).
214. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819).
215. 36 U.S. 102, 142-43 (1837).
216. *See* SCHOEPPNER, *supra* note 181, at 106-07.
217. *Miln*, 36 U.S. at 109.
218. *See id.* at 111-12.
219. 40 U.S. 449, 464 (1841).

when Moses Groves purchased slaves from Robert Slaughter and used a promissory note as partial payment.[220] Groves, however, claimed that the note was invalid because Mississippi's constitution stated, "[t]he introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."[221] Despite the plain meaning of the text, the Court held that the Mississippi Constitution was not self-executing and thus, required legislation to go into effect.[222] The Court thus bent over backwards to avoid ruling on slavery.[223]

Justice John McLean of Ohio, however, wrote separately to address the parties' argument that federal power over interstate commerce was exclusive.[224] McLean was easily the most antislavery justice on the Court, and he would later dissent in the Court's two most consequential proslavery opinions: *Prigg v. Pennsylvania*[225] and *Dred Scott v. Sanford*.[226] Justice McLean declared that "[t]he power over slavery belongs to the states respectively. It is local in its character, and in its effects[.]"[227] A state therefore could ban the sale of slaves into its territory because "the transfer or sale of slaves cannot be separated from this power" over slavery.[228] Although a state could not ban the importation of cotton or fabrics from other states, McLean said, the sale of slaves was different because "the Constitution acts upon slaves as persons, and not as property."[229] Moving beyond doctrine, he went so far as to declare that a state's power to ban

220. *Id.* at 455.
221. *Id.* at 451-52.
222. *Id.* at 500-01.
223. *Id.*
224. *Groves*, 40 U.S. at 503-04.
225. 41 U.S. 539, 658 (1842) (McLean, J., dissenting).
226. 60 U.S. 393, 545 (1857) (McLean, J., dissenting). Antislavery leader Salmon P. Chase said Justice McLean was "a good man and an honest man, [whose] sympathies [were] with the enslaved." Salmon P. Chase, Letter to Charles Sumner (April 24, 1847), *in* 2 THE SALMON CHASE PAPERS 149 (John Niven, ed. 1994). Chase would later serve as the Governor of Ohio, U.S. Senator, Secretary of the Treasury under Lincoln, and Chief Justice of the Supreme Court. For more on McLean, see generally FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT (1937).
227. *Groves*, 40 U.S. at 508.
228. *Id.*
229. *Id.* at 507.

slavery was "higher and deeper than the Constitution."[230] McLean's opinion shows why the federal consensus was nearly universally accepted—it not only protected slavery in the South, but it also preserved freedom in the North.

Chief Justice Roger B. Taney felt compelled to respond.[231] Like Justice McLean, he said that the power to regulate slavery "is exclusively with the several states[.]"[232] Taney elaborated that the states had the exclusive power "to determine their condition and treatment within their respective territories: and the action of the several states upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the Constitution of the United States."[233] Taney did not justify his conclusion by saying that there was a slavery exception to the Commerce Clause. Instead, he said that Congress's commerce power was so narrow that "the regulations of Congress, already made, appear to cover the whole, or very nearly the whole ground[.]"[234]

This Article's discussion of slavery's impact on the Court's Commerce Clause jurisprudence is one, admittedly incomplete, example of slavery's influence on the Constitution. However, this example shows that the Court was unwilling to interpret federal power in a way that could challenge the national consensus on slavery.

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230. *Id.* at 508.

231. *See id.*

232. *Grover*, 40 U.S. at 508.

233. *Id.*

234. *Id.* at 509. Justice Baldwin also wrote separately, though he concluded that, if the Mississippi ban on importing slaves were self-enforcing, it would violate the dormant Commerce Clause. *See id.* at 515-17. He narrowly defined "'[c]ommerce among the states,' as . . . 'trade,' 'traffic,' 'intercourse,' and dealing in articles of commerce between states, by its citizens or others, and carried on in more than one state." *Id.* at 511. He distinguished this from the police power of the states, which, he said, "relates only to the internal concerns of one state, and commerce, within it . . . ." *Grover*, 40 U.S. at 511. He further explained that slavery within the states was "a matter of internal police, over which the states have reserved the entire control; they, and they alone, can declare what is property capable of ownership . . . ." *Id.* at 515. Justice Baldwin thus concluded that, although the Commerce Clause extended to the interstate traffic in slaves, it could not reach intrastate economic activity. *See id.* at 515-17.

IV. THE REVISIONIST HISTORY OF FEDERAL POWERS

The revisionist history of federal powers is a story of constitutional redemption. According to this story, the Framers created a national government that was capable of solving every problem that required a national solution. The Marshall Court then broadly interpreted federal power in canonical cases like *McCulloch* and *Gibbons*. The proslavery Taney Court, however, retreated from the true meaning of the Constitution by artificially limiting federal power to protect state sovereignty over slavery. The Court later continued to limit federal power to facilitate the retreat from Reconstruction and establishment of Jim Crow. When the Court dramatically expanded federal power in the New Deal era, it was returning to the principles of the original Constitution and the logical implications of the Marshall Court's great decisions. Although the revisionists tell a nice story, it is a work of historical fiction.

A. The Enumeration Principle

A growing number of revisionist scholars argue that the enumeration of Congress's powers in Article I should not be seen as a limitation on the scope of federal authority.[235] These revisionists acknowledge that Article I and the Tenth Amendment limit Congress to its enumerated powers.[236] They argue, however, that Congress's enumerated powers are broad enough to leave nothing beyond the reach of the federal government.[237]

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235. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5-6; Schwartz, *An Error and an Evil*, *supra* note 5, at 932; Primus, *The Essential Characteristic*, *supra* note 5, at 415-16; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 567; Primus, *Why Enumeration Matters*, *supra* note 5, at 1-4; Primus, *The Limits of Enumeration*, *supra* note 5, at 576; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2003-05.

236. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 26, 29; Schwartz, *An Error and an Evil*, *supra* note 5, at 938; Primus, *The Essential Characteristic*, *supra* note 5, at 496; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 571; Primus, *Why Enumeration Matters*, *supra* note 5, at 6-7, 24; Primus, *The Limits of Enumeration*, *supra* note 5, at 581-82, 629-30; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2007, 2010.

237. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5-6; Schwartz, *An Error and an Evil*, *supra* note 5, at 932; Primus, *The Essential Characteristic*, *supra* note 5, at 415-16; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 567;

In doing so, they challenge the conventional wisdom and reasoning of several modern Supreme Court decisions that limit the scope of the federal Commerce Power.[238] In *NFIB v. Sebelius*, for example, Chief Justice Roberts contends that "[t]he enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'"[239] I will refer to this idea as the "enumeration principle." Legal scholars have advanced at least three different lines of reasoning to argue that history does not support the enumeration principle. None of these arguments, however, withstands scrutiny.

1. The Unimportance of Enumeration

Richard Primus, who has written several articles on the enumeration principle,[240] contends that we can be faithful to the Founders' design while still rejecting the enumeration principle because the Founders cared far more about process limits—such as elections and separation of powers—than doctrinal limitations on federal power like enumeration.[241] He further asserts that the public rejected enumeration as an adequate safeguard for individual rights when it demanded a bill of rights that would impose external constraints on federal power.[242] Because the Founders' real concern was in limiting federal power and preserving individual rights, he argues, we can abandon the enumeration principle in favor of more important process limits and external constraints.[243]

As demonstrated above, however, white southerners saw enumeration as a critical component of the Constitution's

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Primus, *Why Enumeration Matters*, *supra* note 5, at 2-4; Primus, *The Limits of Enumeration*, *supra* note 5, at 576; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2004-05.

238. *See* United States v. Lopez, 514 U.S. 549, 566 (1995); *see also* NFIB v. Sebelius, 567 U.S. 519, 532-37 (2012).

239. *NFIB*, 567 U.S. at 534 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

240. *See e.g.*, Primus, *The Essential Characteristic*, *supra* note 5; Primus, *The* Gibbons *Fallacy*, *supra* note 5; Primus, *Why Enumeration Matters*, *supra* note 5; Primus, *The Limits of Enumeration*, *supra* note 5; Primus, *Reframing Article I, Section 8*, *supra* note 5.

241. Primus, *The Limits of Enumeration*, *supra* note 5, at 615-17. Primus calls this the "*internal-limits canon*."

242. *See id.* at 617-18.

243. *See id.* at 623-25.

protections for slavery, and complete state sovereignty over slavery—i.e., the national consensus—was perhaps the most fundamental principle of the antebellum constitutional order.[244] It may be true that some delegates to the Constitutional Convention thought that the Three-Fifths Clause and Slave Trade Clause were more significant,[245] but the historical record shows that most Founders were adamant about limiting the scope of federal power.[246]

Moreover, public concern over the adequacy of enumeration does not suggest that it was rejected or that it was so unimportant that it can be ignored. Instead, history shows only that the Framers sought overlapping devices to protect liberty, including the separation of powers, enumeration, and the Bill of Rights. The fact that the people did not trust any single method to protect liberty does not mean that we can ignore any of them today.[247]

2. Rejection of Textualism

Scholars also object to the enumeration principle by pointing out that some Founders and members of the early Congress did not see the text as an enforceable document.[248] Early uncertainty about the nature of the Constitution, however, provides little reason to reject the enumeration principle today. Although the contested nature of constitutional meaning in the eighteenth century is fascinating from the standpoint of history, the fact

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244. *See supra* notes 74-86 and accompanying text.

245. In *Reframing Article I, Section 8*, Primus specifically addresses slavery's impact on the constitutional convention. Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2021-24. Following his earlier work, Primus argues that enumeration was not important to southern delegates because they counted on structural provisions like the Three-Fifths Clause to protect slavery. *See id.* However, Primus's argument does not seriously engage with the national consensus on slavery after the Founding.

246. *See supra* note 106 and accompanying text.

247. A hypothetical may help to illustrate the point. Suppose that the Constitution had originally granted a police power to Congress along with a bill of rights. Suppose further that the people ratified the Constitution only on the understanding that subsequent amendments would limit Congress to a list of enumerated powers. Under this hypothetical, would it make sense to say that the courts could ignore the bill of rights in the original constitution? Although such an argument would be highly problematic, it is like Primus's argument in every way that matters.

248. *See* Primus, *The Essential Characteristic*, *supra* note 5, at 462-69; SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 25.

remains that the textualist approach to constitutional interpretation, i.e., reading the text like an enforceable statute, won out in Congress and the Courts by the turn of the nineteenth century.[249] More fundamentally, as explained above, even the representatives who viewed the Constitution as an abstract framework did not think that it was infinitely malleable.[250] Although many representatives in the 1790s believed that the Constitution merely created a framework for government, complete state sovereignty over local economic activities was a central component of that framework. There is simply no historical evidence that any prominent public figure thought the federal government had the power—enumerated or not—to regulate slavery within the states.[251] In other words, although some representatives briefly rejected the enumeration principle in the 1790s, none seem to have rejected the national consensus on slavery or the fact that federal power was inherently limited.[252]

3. Slavery as an Exception to Inherently Broad Federal Powers

In *The Spirit of the Constitution*, David Schwartz attempts to reconcile the conventional reading of *McCulloch* with the constitutional history of slavery.[253] According to Schwartz, the Marshall Court "retreated from the more expansive ideas of implied powers expressed in *McCulloch*" to keep the Court out of

249. GIENAPP, *supra* note 98, at 203.

250. *See supra* text accompanying notes 73-84. For example, Fisher Ames, a proponent of the Bank and unenumerated powers, said that "he 'did not contend for an arbitrary and unlimited discretion in the government to do everything. . . .'" *See* GIENAPP, *supra* note 98, at 203.

251. Although some representatives argued that Congress had the power to "legislate in the general interest" during the bank debate. *Id.* at 210. The national consensus on slavery implies that this "general interest" was distinct from local activities. In fact, many of the bank's defenders argued that Congress's implied powers should be limited to national objects that the states could not regulate. *Id.* at 218. Moreover, it is probably no coincidence that southerners generally favored a narrower and textualist approach to federal powers during the debate. *Id.* at 212.

252. *See id.* at 222 (Ames), 227-28 (Madison), 244 (Hamilton).

253. Although Schwartz acknowledges that McCulloch is "deeply ambiguous," he somehow concludes that "the logic of implied powers spelled out in *McCulloch* could, when applied to the Commerce Clause, justify all present-day federal regulation of the economy." SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 4-5, 23.

the growing controversy over slavery.[254] The Taney Court, he further asserts, then sought to "protect the constitutional position of slavery" by "in essence, not overruling but actually reversing the direction of *McCulloch*."[255] The Court's doctrine of "reserved state powers," he further contends, emerged to accommodate state control over slavery and Jim Crow.[256] Schwartz thus argues that the enumeration principle—the idea that there must be something Congress cannot regulate—is an artificial constraint that should be rejected as a relic of constitutional evil.[257] In other words, he concludes that, because slavery was an external constraint on otherwise broad federal power, the Thirteenth Amendment requires us to reject slavery's influence on the Constitution and return to a broad understanding of federal powers.[258]

Schwartz, however, gets it exactly backwards. Slavery did not operate as an external constraint on otherwise broad federal power. Instead, slavery was a powerful motivation for the antebellum consensus that all federal powers were inherently limited in scope. The abolition of slavery thus did not open the way to a *return* to strong federal powers, because federal powers were never understood to be expansive in the first place.[259] Although abolition should have reduced the motivation to limit federal powers in the future, it did not change the historical fact that federal powers had always been limited in scope. Any expansion of federal power thus must arise from the new powers granted in the Reconstruction Amendments or an evolving (i.e., non-originalist) understanding of federal powers under the

254. *Id.* at 5, 87-88.

255. *Id.* at 87-88.

256. Schwartz, *An Error and an Evil*, *supra* note 5, at 933.

257. *Id.* at 934. Schwartz derisively calls the enumeration principle the "'mustbesomething' rule." *Id.* at 939.

258. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 98 ("[S]ome of the justices seemed to view slavery as legally unique—as though there were a slavery exception to the Commerce Clause . . . .").

259. In fact, Schwartz acknowledges that Marshall's decision in *McCulloch* was ambiguous and could be read to endorse a more limited approach to federal powers. *Id.* at 5. After discussing the case, however, the remainder of the book appears to assume that the nationalist reading of the decision is correct. If the narrower reading of the case is correct, as this Article argues, then the Court did not "retreat" from anything. Instead, subsequent Marshall and Taney Court decisions were perfectly consistent with both the founding and *McCulloch*.

original Constitution. Pretending otherwise is an attempt to write the history of slavery out of the Constitution.

B. Living Originalism: Text and Principle

Focusing on the history of the Founding, progressive originalists like Jack Balkin similarly argue that constitutional history supports a virtually unbounded approach to federal powers.[260] In his book, *Living Originalism*, and a series of related articles, Balkin advances a method of constitutional interpretation he calls "*text and principle.*"[261] As he explains, "[t]he basic idea is that interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie the text."[262] In referring to the "original meaning of the constitutional text," Balkin means the semantic or linguistic meaning of the words in context.[263] After finding this original linguistic meaning, he argues, courts should construct doctrine that advances the text's underlying principles.[264] These principles, he asserts, should be defined broadly to create a framework that can change and adapt over time.[265] Under his approach, therefore, the Framers' expectations of how the text would apply to concrete issues are not binding today.[266]

Balkin contends that the principle underlying Congress's enumerated powers, including the Commerce Clause, is "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action."[267] He draws this principle from Resolution VI of the Virginia Plan,

260. *See* BALKIN, LIVING ORIGINALISM, *supra* note 6, at 138-40, 143, 146, 298; *see* Balkin, *Commerce*, *supra* note 6, at 3, 6, 12, 16-18; *see* Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551, 567-75 (2009); *see* Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292, 297-98 (2007).

261. BALKIN, LIVING ORIGINALISM, *supra* note 6, at 3.

262. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 260, at 551-52.

263. *Id.* at 551-52.

264. *Id.* at 553-54.

265. *Id.* at 553-59.

266. *See* Balkin, *Commerce*, supra note 6, at 4-5.

267. BALKIN, LIVING ORIGINALISM, *supra* note 6, at 140; Balkin, *Commerce*, *supra* note 6, at 6.

which Edmund Randolph introduced at the Constitutional Convention.[268] According to Balkin, the Committee of Detail drafted Congress's enumerated powers to effectuate this principle, and Federalists like James Wilson used it to explain the nature of federal power during the Ratification debates.[269]

The Founders, however, rejected Resolution VI precisely because it violated state sovereignty and the national consensus on slavery.[270] As delegates like Pierce Butler of South Carolina immediately recognized, Congress could have used Resolution VI to justify the abolition of slavery by asserting that abolition was in the national interest.[271] In fact, it was commonly argued that the threat of slave insurrections posed a threat to national security, especially during times of war with foreign powers.[272] As historians recognize, the Convention did not accept the substance of Resolution VI; instead, the delegates voted to approve it only as a placeholder so that the Convention could move forward.[273] The Framers did not even mention Resolution VI when debating the scope of the powers drafted by the Committee of Detail, and there is no record of its mention during the debates over Ratification.[274] The enumerated powers were not meant to reflect Resolution VI because the Framers understood that, to preserve state sovereignty (over slavery), Congress's powers must be limited in scope.

Although it may be difficult to admit, the national consensus on slavery was part of the principle underlying Congress's enumerated powers. As detailed above, the Founders agreed that

268. Balkin, *Commerce*, *supra* note 6, at 8-9.

269. *Id.* at 8-10.

270. Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2134-35, 2137-39 (2012).

271. As explained above, when Resolution VI was first introduced, Pierce Butler (of South Carolina) feared that "we were running into an extreme in taking away the powers of the States . . . ." I RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 53. Later in the debates, Butler explained that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do." *Id.* at 605.

272. Schwartz, *An Error and An Evil*, *supra* note 5, at 995-96.

273. Lash, *supra* note 270, at 2134; JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 177-78 (1996).

274. Lash, *supra* note 270, at 2138-39.

Congress had no power to interfere with slavery in the states. This was true in the North as well in the South, during the Convention and Ratification, and even among the most antislavery of the Founders.[275] The principle underlying federal powers thus could better be stated as follows:

> Congress has the power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action (i.e., Resolution VI); provided, however, that the states have complete and exclusive autonomy over intrastate activities, regardless of their effects on interstate commerce (i.e., the national consensus on slavery).

Of course, this principle is a relatively accurate statement of the Court's Commerce Clause jurisprudence prior to the New Deal. It is also similar to the principle that Daniel Webster—the nationalist "Expounder of the Constitution"—identified as a lawyer in *Gibbons*.[276] Although post-ratification history is certainly not dispositive, this consistency is no coincidence. As Balkin himself admits, post-ratification history is circumstantial evidence of both text and principle.[277] His failure to engage seriously with the history of slavery in his work on living originalism is thus particularly striking.

Balkin might object that the "principle" underlying the Commerce Clause should be defined at a higher level of generality than the national consensus on slavery. His theory "views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. The goal is to get politics started and keep it going (and stable) so that it can solve future problems of governance."[278] The national consensus on slavery, however, is just this type of framework principle. Rather than straitjacket constitutional meaning for all issues, it would simply

275. As explained above, opponents of slavery hoped that ending the international slave trade and empowering Congress to ban slavery's expansion into the territories would destroy the institution.

276. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 11 (1824). For more on Webster, *see* REMINI, *supra* note 193, at 28-29, 162.

277. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 260, at 551-52.

278. *Id.* at 550.

dictate the division of authority between the state and federal governments. The Framers also saw it as a necessary condition of ratification and peace within the Union.

Although the division of power dictated by the national consensus may not fit Balkin's policy preferences, produce normatively desirable results, or match modern doctrine, it is hard to explain why it is wrong under his theory of constitutional interpretation. Balkin's text and principle method purports to look for the actual historical principles that guided the Founders.[279] Of course, the Founders also wanted to produce an effective and just government. If these are seen as the underlying principles, however, his method would better be called "text and free-floating concepts of justice." However, this would eliminate any recognizable form of originalism from his theory of *Living Originalism*.

Balkin takes other theories of originalism to task for their inability to explain constitutional progress on issues like segregation, women's rights, and federal power.[280] He also argues that Bruce Ackerman's theory of constitutional change is unnecessary because the New Deal's expansion of federal power is perfectly consistent with the "Constitution's original meaning, its text, or its underlying principles."[281] His theory, however, explains the reality of expansive federal power only by ignoring the most obvious candidate for the actual principle underlying the Commerce Clause and by fabricating an expansive alternative that has little basis in history. Of course, using the national consensus on slavery as a fundamental principle to interpret the Constitution today would strike most people as illegitimate. It is slavery's very illegitimacy, however, that demonstrates why constitutional doctrine should not be bound by the principles (or intent) of the people who wrote and ratified the Constitution of 1787.

279. *Id.* at 551-53.
280. *See* Balkin, *Commerce*, *supra* note 6, at 2.
281. *Id.* at 4.

V. SLAVERY, ORIGINALISM, AND THE LIVING CONSTITUTION

The scope of federal powers is one of the most significant issues in constitutional law. In *NFIB*, the Supreme Court came within one vote of striking down the Affordable Care Act ("ACA"), perhaps the most significant federal legislation of the twenty-first century.[282] In fact, by making Medicaid expansion voluntary with each state, the Court invalidated a central provision of the ACA and effectively prevented millions of Americans from getting health insurance.[283] The Justices who voted against the ACA did so to protect "the independent power of the States" in our federal system.[284] The Obama Administration's expansive view of federal power, Chief Justice Roberts warned, "would . . . permit[] Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'"[285] The Roberts Court could use the same reasoning to strike down any new legislation that expands the role of the federal government or its oversight of state programs. Just as the Hughes Court gutted the New Deal before 1936,[286] the Roberts Court could impede urgently needed federal action on issues ranging from climate change to pandemic relief.

The revisionist attempt to forestall this result is understandable. History is influential to the Roberts Court, and this is particularly true with respect to its federalism jurisprudence.[287] However, it is extremely unlikely that the revisionist history of scholars like Balkin, Primus, or Schwartz will convince the Justices to change course. Groundbreaking work on the history of the Second Amendment, affirmative action, and state action doctrine, to name just a few examples,

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282. NFIB v. Sebelius, 567 U.S. 519, 524 (2012).

283. *Id.* at 588, 599.

284. *Id.* at 536.

285. *Id.* at 554 (quoting THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961)).

286. Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201-02 (1994).

287. *See, e.g.*, *NFIB*, 567 U.S. at 533-34; Bond v. United States, 572 U.S. 844, 854 (2014).

have had little influence on the Court, notwithstanding the fact that it is painstakingly researched and historically accurate.[288] There is little reason to think that a highly contested revisionist history of federal powers will fare any better. In fact, even the Court's self-identified originalist justices often ignore history when it does not favor their preferred results.[289]

Moreover, at this moment of racial reckoning, with widespread protests against systemic racism and a national debate over teaching critical race theory, legal scholarship should not ignore the constitutional history of slavery. The revisionist history sees slavery as a temporary aberration that can be easily excised from the Constitution, leaving a coherent and workable framework for modern life. However, the hard truth is that it is impossible to understand the Constitution of 1787 without appreciating the pervasive influence of slavery. Because of the South's insistence on complete state autonomy over slavery—the foundation of its social and economic system—federal powers were extraordinarily narrow in scope. Pretending otherwise threatens to obscure the country's history of racial injustice and treat it as a phenomenon of the past. The struggle for racial justice, however, requires a clear-eyed view of the past of white supremacy and its continuing effects.[290] Without such an honest assessment, the continuing structures of systemic racism can never be eliminated.[291]

Recognizing slavery's influence on the Constitution is not only necessary to address the legacy of racial injustice, but it also presents a powerful argument against any theory of constitutional interpretation that makes historical purpose, principles, beliefs, or practices dispositive of constitutional meaning.[292] Any such

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288. *See, e.g.*, Chris Schmitt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. ONLINE 33, 51-52 (2018); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 798 (1985).

289. *See* SEGALL, *supra* note 13, at 3, 6-7, 169.

290. *See, e.g.*, Charles W. McKinney, Jr., *Beyond Dreams and Mountains: Martin King's Challenge to the Arc of History*, 49 U. MEMPHIS L. REV. 263, 282-83 (2018).

291. Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 31 (2004) ("The historic serves as a guide to understanding the present.").

292. This does not describe all originalist methods of interpretation. An originalist who believes in the distinction between interpretation and construction may not view historic

theory must view modern constitutional doctrine, which allows Congress to regulate local economic matters because they effect interstate commerce, as illegitimate. Countless federal laws that enjoy overwhelming public support, ranging from civil rights protections to criminal laws against child pornography, are thus unconstitutional from the standpoint of originalism. Admittedly, most originalists argue that the courts should uphold non-originalist precedent under certain circumstances.[293] The fact remains, however, that most federal legislation would be constitutionally suspect, and the Court may strike down any new legislation that would expand federal power. An originalist Court thus could strike down new legislation on critical issues requiring a national solution, such as medical care or climate change, to preserve a system that the Founders designed to protect state autonomy over slavery. Stated simply, understanding the constitutional history of slavery demonstrates why no one should accept a strong version of originalism today.

Once originalism is rejected, it is far easier to articulate a principled justification for a broad view of federal powers. As a matter of text and logic, Primus's critique of the enumeration principle is correct. Rejection of the enumeration principle, however, requires a dynamic approach to constitutional meaning. While Primus's theory may be faithful to the values of liberty and limited government, it is not faithful to the historical understanding of the Constitution. He undermines his larger argument by saying otherwise.

Similarly, there is much to recommend in Balkin's work on text and principle. It works well for individual rights protections that are stated at a high level of generality and that reflect fundamental shared values, especially those in the Reconstruction Amendments. As Balkin explains, our conception of how these fundamental values apply to concrete issues changes over time. For example, although the framers of the Fourteenth Amendment

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purpose or practices as dispositive. *See, e.g.*, LAWRENCE SOLUM & ROBERT BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 3 (2011). Of course, this critique also would not apply to an originalist approach to the Reconstruction Amendments.

293. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007). However, the fact remains all such federal legislation would be constitutionally illegitimate from an originalist standpoint.

thought that segregation was consistent with equal treatment,[294] this original expected application is not binding today. As the Court held in *Brown v. Board of Education*, we now know that segregation is incompatible with the principle of equality.[295]

However, Balkin is wrong to extend the text and principle approach to the federal powers contained in the Constitution of 1787. This is because, rather than reflecting a fundamental shared value like equality, the structure of federal powers reflected a compromise that gave the states complete sovereignty to abolish or protect slavery. In other words, the Founders sought to preserve a state's power to structure its social and political institutions to enforce white supremacy. A dynamic, "living" approach to constitutional interpretation thus is the only legitimate approach to federal powers.

CONCLUSION

Abolitionist William Lloyd Garrison famously condemned the Constitution as a "covenant with death" and an "agreement with Hell."[296] As Garrison recognized more than 150 years ago, slavery exerted a profound influence on the structure of the Constitution and its subsequent interpretation. In fact, from the founding period until the Civil War, there was a national consensus that the federal government had no power to interfere with slavery in the states. Because slavery was a central component of the country's economic and social order, the national consensus dictated that Congress's powers were far more limited in the past than they are today. In particular, American elites agreed that Congress had no power to regulate local activities merely because they had an effect on interstate commerce. If Congress could regulate working conditions, wages, or production, it could abolish slavery as well. Any theory of constitutional interpretation that looks to original intent, underlying principles, or early constitutional history therefore must account for the national consensus on slavery.

294. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-6 (2006).

295. 347 U.S. 483, 495 (1954).

296. *See* FINKELMAN, *supra* note 37, at 11.

There is an obvious injustice to using the national consensus on slavery to interpret the Constitution. After all, slavery was profoundly unjust, and the country fought its bloodiest war to see it formally eliminated in the Thirteenth Amendment.[297] Whitewashing constitutional history, however, is not the answer. Instead, legal scholars should plainly acknowledge that the Constitution's basic meaning has changed over time. The living Constitution should be celebrated and defended, not obscured by a revisionist history that minimizes the Constitution's complicity with slavery.

297. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, [https://perma.cc/LXD6-MWFB] (last visited Oct. 13, 2021).

NONLAWYERS IN THE LEGAL PROFESSION: LESSONS FROM THE SUNSETTING OF WASHINGTON'S LLLT PROGRAM

Lacy Ashworth*

INTRODUCTION

Today, the number of attorneys in the world fails to serve the number of people in need of legal assistance.[1] Approximately sixty percent of law firm partners are baby boomers, meaning those in their mid-fifties to early seventies, and twenty-five percent of all lawyers are sixty-five or older.[2] These individuals will predictably retire. Meanwhile, law school costs more than ever. The average law student graduates $160,000 in debt only to enter into the legal profession with an average starting salary of $56,900 in the public sector and $91,200 in the private sector.[3] It is no surprise law schools have recently experienced lower enrollment numbers.[4] Again, we do not have enough lawyers *today* to meet the legal needs of our citizens. With a significant

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1. *See* discussion *infra* Part I.

2. Ida O. Abbott, *Your Boomer Retirement Problem Won't Just Fade Away*, ATT'Y AT WORK, [https://perma.cc/P2SM-KUBN] (July 7, 2020).

3. Melanie Hanson, *Average Law School Debt*, EDUCATIONDATA.ORG, [https://perma.cc/R2E9-8Q6R] (July 10, 2021).

4. *Id.* I want to give credit to Interviewee 2 and Interviewee 5 for calling my attention to the issue of retiring baby boomers. *See* Zoom Interview 2 with Ltd. License Legal Technician Bd. Member/Active Ltd. License Legal Technician 4 (Nov. 23, 2020); Telephone Interview 5 with Ltd. License Legal Technician Bd. Member 1 (Dec. 28, 2020).

percentage of our current lawyers reaching the age of retirement and less individuals choosing to become lawyers, the amount of unmet need will only continue to grow.

Recognizing the legal profession—in its traditional sense—has proven unable to fulfill its duty of providing access to justice to all, in 2012, Washington state effected the first-ever nonlawyer license to practice law.[5] An individual who attains the license through education and training is called a Limited License Legal Technician or "Triple-LT" ("LLLT").[6] In developing the license, proponents hoped the LLLT would become the nurse practitioner of the legal field.[7] Because this license is the first of its kind, it attracted the interest of several states and even areas beyond the United States.[8] Now, Utah and Arizona have implemented their own nonlawyer paraprofessional programs,[9] and other states are considering doing the same.[10]

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5. *See* Order in the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, at 1 (June 15, 2012) [hereinafter 2012 Order for APR 28], [https://perma.cc/V72Q-GCBX]; *see also* Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, A.B.A. J. (June 8, 2020, 3:35 PM) [hereinafter Moran, *Article on LLLT Sunsetting*], [https://perma.cc/X7VX-X95R].

6. Ralph Schaefer, *Triple LT Rules 'Onerous'*, TULSA WORLD (Sept. 9, 2015), [https://perma.cc/7HH3-5PLE]; Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 1, 2015, 5:50 AM), [https://perma.cc/R6B5-MBS8].

7. *See* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 613-14 (2014); Chief Justice Barbara Madsen & Stephen Crossland, *The Limited License Legal Technician: Making Justice More Accessible*, NWLAWYER, Apr.-May 2013, at 23.

8. Limited License Legal Technician (LLLT) Board Public Meeting with State Supreme Court, TVW 01:16:03-01:16:17 (May 12, 2020, 12:00 PM), [https://perma.cc/SFL8-RSJP] [hereinafter May 12, 2020 Meeting]. Such states include California, Colorado, Connecticut, Washington D.C., Florida, Illinois, Maryland, Minnesota, Montana, New York, and Vermont. *Id.* The outside areas include the Canadian provinces of Alberta, British Columbia, Manitoba, and Saskatchewan, as well as Singapore. *Id.* at 01:16:18-01:16:25.

9. *See Licensed Paralegal Practitioner*, UTAH CTS., [https://perma.cc/Q5WX-5A5Y] (Feb. 16, 2021) (referring to Utah's paraprofessionals as "Licensed Paralegal Practitioner[s]"); Lyle Moran, *Arizona Approves Nonlawyer Ownership, Nonlawyer Licensees in Access-to-Justice Reforms*, A.B.A. J. (Aug. 28, 2020, 2:20 PM) [hereinafter Moran, *Article on Arizona Nonlawyer Licensees*], [https://perma.cc/LM7U-FA4R] (referring to Arizona's nonlawyer licensees as "Legal Paraprofessionals").

10. *See* Jason Tashea, *Oregon Bar Considering Paraprofessional Licensing and Bar-Takers Without JDs*, A.B.A. J. (Oct. 7, 2019, 10:49 AM), [https://perma.cc/73YH-M4T9]; *see also* Letter from Stephen R. Crossland, Chair, Ltd. License Legal Technician Bd., to

Despite such interest, on June 4, 2020, eight years into the program, the Washington State Supreme Court decided to end the program by a seven-two majority vote.[11] The majority determined that while "[t]he program was an innovative attempt to increase access to legal services . . . the overall costs of sustaining the program and the small number of interested individuals" deemed it an ineffective way to meet such needs.[12] At that time, the cost of the program totaled $1.4 million and there existed only thirty-eight active LLLTs.[13] In "sunset[ting]" the program, the Court allowed existing LLLTs to maintain their licenses but disallowed the licensing of any new LLLTs after July 31, 2022,[14] leaving "at least" 275 people in the process of obtaining the necessary requirements either racing toward the finish line or dropping out altogether—losing all invested funds.[15] Ironically, only months before the sunsetting, the American Bar

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Justices of the Washington State Sup. Ct. 2 (June 19, 2020) [hereinafter Letter in Response to LLLT Sunsetting] (on file with the Author) (discussing California, New Mexico, Colorado, Minnesota, Connecticut, Massachusetts, and Ontario).

11. *See* Letter from C.J. Debra L. Stephens, Washington State Sup. Ct., to Stephen Crossland, Chair, Ltd. License Legal Technician Bd., Rajeev Majumdar, President, Washington State Bar Ass'n Bd. of Governors, and Terra Nevitt, Interim Exec. Dir., Washington State Bar Ass'n 1 (June 5, 2020) [hereinafter Letter Notification of Sunsetting] (writing on behalf of the Washington State Supreme Court, relaying that the majority voted on June 4, 2020 to sunset the LLLT program); Moran, *Article on LLLT Sunsetting*, *supra* note 5. Throughout this Comment, I also refer to the Washington State Supreme Court as "the Court."

12. Letter Notification of Sunsetting, *supra* note 11, at 1.

13. Daniel D. Clark, Treasurer, Wash. State Bar Ass'n Bd. of Governors, WSBA Treasurer's Response to the LLLT Program Business Plan, PowerPoint slides 7, 19 (May 12, 2020) [hereinafter Clark PowerPoint] (on file with the Author) (this PowerPoint was presented at the May 12, 2020 meeting between the LLLT Board, the Washington State Supreme Court, and other members of the WSBA). Note that there were forty-four licenses total, but only thirty-eight were active, with four inactive and one suspended. *Id.* at 7.

14. *See* Letter Notification of Sunsetting, *supra* note 11, at 1-2 (imposing the initial deadline of July 31, 2021). Shortly after the sunsetting, the LLLT Board asked the Court to reconsider its decision to sunset the program, or alternatively, to extend the deadline to August 1, 2023 to allow those in the pipeline to complete the requirements and to allow the National Center for State Courts ("NCSC") to complete its planned study of the LLLT program. Letter in Response to LLLT Sunsetting, *supra* note 10, at 6. *See infra* notes 385-88 and accompanying text for more information on the planned NCSC study. Inevitably, the Court met the LLLT Board in the middle, extending the deadline to July 31, 2022. *Decision to Sunset the LLLT Program*, WASH. STATE BAR ASS'N, [https://perma.cc/VU89-6Z4Y] (Oct. 8, 2021).

15. Letter in Response to LLLT Sunsetting, *supra* note 10, at 2, 4 (people in the pipeline "can ill-afford to absorb the loss of money and time spent pursuing the LLLT license"); Zoom Interview 2, *supra* note 4, at 7.

Association encouraged all jurisdictions "to consider innovative approaches to the access to justice crisis in order to help the more than eighty percent of people below the poverty line and the many middle-income Americans who lack meaningful access to effective civil legal services."[16]

As the push for state-level innovation to meet unmet legal needs is more prevalent than ever, it is critical for states to look at Washington's LLLT program, as it produced the first and longest-standing nurse practitioner-type professional to have entered the legal profession.[17] Because the Court deemed Washington's program ineffective,[18] states must determine whether, with what changes, and in what ways a nonlawyer paraprofessional program might better achieve viability to carry out the intended purpose of providing affordable legal services. Further, as nontraditional solutions continue to be considered, future and existing attorneys must prepare for change and look inward to see how they may better support and assist in achieving the larger goal that is providing affordable access to legal services to all. To aid in these future considerations, this Comment serves as an analysis of the LLLT program, discussing the lessons that may only be gleaned from being the first and with the benefit of hindsight.[19]

To better understand the sunsetting of Washington's LLLT program, I conducted interviews with sixteen individuals with

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16. DON BIVENS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 1 (Feb. 2020); *see also* AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 115 (Feb. 17, 2020) [hereinafter RESOLUTION 115] (adopting Bivens' submitted report); *New ABA Policies Endorse Expanding Access to Justice, Voting*, A.B.A. (Feb. 24, 2020), [https://perma.cc/8YTK-YRL3].

17. *See* Madsen & Crossland, *supra* note 7; Letter Notification of Sunsetting, *supra* note 11, at 1.

18. *See* Letter Notification of Sunsetting, *supra* note 11, at 1.

19. At the time of the writing of this Comment, the June 2020 decision to sunset the LLLT program is somewhat recent. In fact, the decision has only been voiced by the Washington State Supreme Court via a letter to the relevant parties. *See* Letter Notification of Sunsetting, *supra* note 11. The Court has yet to provide a formal order officially documenting the fate of the program, though that order is anticipated. So while those involved have assuredly considered what went wrong with the program and how they might have done better to sustain it, because the current priority is supporting those in the pipeline working toward becoming LLLTs by the Court-imposed deadline, Washington has not yet had the opportunity to conduct its own formal postmortem. Zoom Interview 13 with Wash. State Bar Ass'n Exec. Leadership Team Member 4 (Jan. 8, 2021).

key roles and unique involvement in the program.[20] Such individuals include active LLLTs, members of the LLLT Board tasked with overseeing the program, previous members of the Practice of Law Board that initially proposed the program, current and former members of the Board of Governors ("BOG") of the Washington State Bar Association ("WSBA"), members of the Executive Leadership Team of the WSBA, a family law practitioner involved with the Family Law Section of the WSBA, and family law professors that were involved in the development and teaching of the LLLT curriculum.[21] Some individuals wore multiple hats; for instance, some were on the initial Practice of Law Board that proposed the program, and later became members of the LLLT Board.[22] Some LLLT Board members were also active LLLTs.[23] These individuals were able to provide perspectives from each of their respective roles.

Admittedly, the LLLT program and the concept of a nonlawyer serving clients in the legal profession became a political and controversial topic for Washington, as it was the first state to follow through with it.[24] The program had its supporters and opponents from its inception.[25] It too had people that were once opposed and later became supportive of the program, and

20. Interviews were meant to be thorough, not copious. While most of the interviews were one-on-one, two interviews involved more than one participant. The questions were meant to elicit qualitative, not quantitative information, so while some questions were posed to each interviewee, others differed depending on the person's role in the program. Interviews were conducted via Zoom and telephone. While five interviews were recorded, the content of the majority of the interviews were documented using detailed notes.

21. When discussing a controversial topic such as this one, it is important to maintain focus on the program being examined and to consider the message more so than the specific messenger. Therefore, throughout this Comment, I omitted the names of the interviewees and provided only their roles to give context to their perspectives.

22. *See* Zoom Interview 1 with Ltd. License Legal Technician Bd. Member 1 (Nov. 23, 2020); Telephone Interview 5, *supra* note 4.

23. *See* Zoom Interview 2, *supra* note 4; Zoom Interview 3 with Ltd. License Legal Technician Bd. Member/Active Ltd. License Legal Technician (Dec. 18, 2020); Zoom Interview 4 with Ltd. License Legal Technician Bd. Member/Active Ltd. License Legal Technician (Dec. 18, 2020).

24. *See* Zoom Interview 9 with Fam. L. Professor/Ltd. License Legal Technician Instructor 2 (Nov. 30, 2020) (believing the program fell apart for three political reasons); Zoom Interview 12 with Wash. State Bar Ass'n Bd. of Governors Member 7 (Dec. 28, 2020); Telephone Interview 16 with Wash. State Bar Ass'n Bd. of Governors Member 5 (Dec. 17, 2020).

25. *See infra* Section II.A and Part III.

vice versa.[26] Consequently, while the insightful thoughts of sixteen individuals cannot be considered indicative of the feelings of all of those involved in the program, the goal was to interview people with different roles in and views on the program to counteract a skewed narrative.[27]

This Comment will be one of the first in-depth inquiries into the sunsetting of the LLLT program from the perspective of an outsider and with the insight of some of the key players. It will add to what surely will be a significant amount of scholarship, as Washington and other states consider what happened with the LLLT program and where to go from here. As the program has been in the making for more than twenty years and has undergone several changes in that time,[28] this Comment does not purport to take on *all* of the intricacies that impacted the program or led to the sunsetting, but it voices the afterthoughts of those involved, offers additional analysis and commentary on the reasons provided by the Court in sunsetting the program, and works to provide versatile and key lessons from the LLLT program that may be used by other states in developing their own innovative programs.

This Comment is divided into six parts. Part I discusses the current breadth of the access to justice phenomenon that has led to innovative programs being implemented nationwide, such as Washington's LLLT program. Part II provides the history of the LLLT license, its requirements, and the LLLT's scope of practice. Part III surveys the legal profession's reaction to the license. Part IV discusses both the anticipated success of the program at its inception and the success actually attained. Part V considers the reasons behind the demise of the program, including shortcomings of those tasked with supporting and administering

26. *See infra* Section III.B.

27. Note also that while interviewees will be able to provide essential information and insight on the program through their roles, none can truly speak to the mindset of the voting members of the Washington State Supreme Court that ultimately decided to sunset the program, and no voice is indicative of all. Interviewee 12 noted that the Washington State Supreme Court is very available for discussion, and that it is not uncommon for an individual Justice to have a phone call with someone about court business and policies, so there are likely conversations regarding the program of which we will never know the content. *See* Zoom Interview 12, *supra* note 24, at 15.

28. *See infra* note 44 and accompanying text; Ambrogi, *supra* note 6.

the program and the structure and concept of the program itself. Finally, Part VI offers some lessons from the LLLT program that may be utilized by other states considering implementing similar nonlawyer programs to be used as potential stones in gradually bridging the access to justice gap.

I. THE ACCESS TO JUSTICE GAP

To understand the LLLT program as a proposed solution, it is important to first grasp the gravity of the problem. Access to justice is defined as the "ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances."[29] The access to justice gap is the difference between the population's legal needs and "the resources available to meet those needs."[30] Considering indigent criminal defendants are afforded the right to free legal representation, it is those in need of civil legal aid that largely suffer the effects of the access to justice gap.[31]

A 2017 study conducted by the Legal Services Corporation found 71% of low-income households experienced at least one civil legal problem within the year and received little or no legal aid in handling 86% of those problems.[32] The impact is most felt by low-income households, as there are more than sixty million Americans with family incomes below the 125% Federal Poverty Line, bringing home $30,750 or less for a family of four.[33] However, middle-income households are certainly not immune, considering 40-60% of their legal needs also go unmet.[34] These legal needs are most prevalently related to family, health, estate, consumer and finance, and housing law.[35] The gap is especially prevalent in family law, where 80-90% of cases involve at least

29. Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, A.B.A. (Dec. 3, 2017), [https://perma.cc/69ZL-5QAP] (internal quotations omitted).

30. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017).

31. *Id.*

32. *Id.* at 6.

33. *Id.* at 16.

34. Jennifer S. Bard & Larry Cunningham, *The Legal Profession is Failing Low-Income and Middle-Class People. Let's Fix That*, WASH. POST (June 5, 2017), [https://perma.cc/X6DE-B4E2]; *see also* Wills, *supra* note 29.

35. LEGAL SERVS. CORP., *supra* note 30, at 7.

one self-represented party, and in many cases, both parties find themselves without legal assistance.[36]

So, what is the cause of the justice gap? Many fingers point to cost—the cost of obtaining legal aid generally, and the complexities of necessary civil litigation that can yield delays and additional costs.[37] For instance, considering 75% of all monetary civil judgements award less than $5,200, for most civil cases, it would cost more for a litigant to obtain a lawyer than the potential financial judgement rendered in the case.[38] Even if the litigant could afford to obtain an attorney for the matter, many attorneys would choose not to take the case due to the low pay-out.[39] Further, lawyers are encouraged, not compelled, to provide pro bono (free) services under the Model Rules of Professional Conduct.[40] Most states do not require lawyers to report pro bono hours.[41] Therefore, considering many lawyers enter the profession with significant debt and a comparatively low salary,[42] working pro bono is likely either unfeasible or not made a priority.

Regardless of the cause of the access to justice gap, with citizens in every state suffering from an inability to obtain access to justice for their important legal needs,[43] it is fair to assume every state can agree that the problem is serious enough to warrant looking outside the box of which the public's legal needs have certainly outgrown.

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36. NATALIE ANNE KNOWLTON, ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 1 (2016).

37. *See* NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iii, v (2015) ("[I]n most jurisdictions state courts hold a monopoly on procedures to enforce judgements."); 2012 Order for APR 28, *supra* note 5, at 4.

38. NAT'L CTR. FOR STATE CTS., *supra* note 37, at iv, vi.

39. *See id.*

40. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR. ASS'N 2021).

41. Only nine states require their attorneys to report pro bono hours and Washington is not one of them. *Pro Bono Reporting*, A.B.A., [https://perma.cc/9W29-FTFA] (Mar. 19, 2020).

42. *See* Andrea Fuller, et al., *Law School Loses Luster as Debts Mount and Salaries Stagnate*, WALL ST. J., (Aug. 3, 2021, 8:01 AM), [https://perma.cc/NRY6-FZ3M].

43. LEGAL SERVS. CORP., *supra* note 30, at 7.

II. DEVELOPING THE LLLT PROGRAM

A. The Practice of Law Board

Washington's innovative thinking surfaced the first nonlawyer license to practice law. The history of the LLLT dates back to 2001, when the Washington State Supreme Court developed the Practice of Law Board to respond to two major concerns plaguing the state: unmet civil legal needs and the unauthorized practice of law ("UPL").[44] The Practice of Law Board consisted of thirteen court-appointed members who were responsible for reviewing and reporting cases of UPL and considering and recommending "new avenues for persons not currently authorized to practice law to provide legal and law-related services that might otherwise constitute the practice of law as defined in [Washington]."[45] Any recommendations were to first be forwarded to the WSBA BOG for "consideration and comment at least 90 days before" being recommended to the Court.[46] The recommended program was to be created to increase access to affordable legal services in a way that protects the public and could be financially self-supporting "within a reasonable period of time."[47] Note that the Court's failure, unwillingness, or inability to define what constitutes a reasonable period of time would result in one of the program's greatest points of contention.[48]

In fulfilling its duty regarding UPL, the Practice of Law Board heard terrible cases of people getting taken advantage of

44. WASH. GEN. R. 25; Ambrogi, *supra* note 6; Zoom Interview 1, *supra* note 22, at 1-2; Zoom Interview 8 with Fam. L. Professor/Ltd. License Legal Technician Instructor 1 (Dec. 15, 2020). However, keep in mind that those intimately involved discuss the history as going back even further, to the WSBA committees formed in the late 1980s and early 1990s to address UPL and "the growing number of people unable to afford professional legal help[,]" which "was dramatically true in family law cases where courts in the 1970s began reporting large increases in family law cases involving at least one party not represented by an attorney." Crossland & Littlewood, *supra* note 7, at 612-13.

45. WASH. GEN. R. 25(a), (b)(2)-(3). To address UPL, Washington first felt a more specific definition of the practice of law was necessary. A WSBA committee proposed a definition, which is captured in Washington's General Court Rule 24. Crossland & Littlewood, *supra* note 7, at 613; WASH. GEN. R. 24.

46. WASH. GEN. R. 25(b)(2).

47. *Id.* at 25(b)(2)(A), (E).

48. *See infra* Section V.A.1; *see also infra* note 389 and accompanying text.

when seeking aid from those unauthorized to practice law, who were sometimes charging more than attorneys.[49] While committing UPL is a crime, the Practice of Law Board was unsuccessful in getting prosecutors to bring charges against these perpetrators, as some prosecutors felt that it was not a big deal that someone was getting some help by a nonlawyer, and moreover, the idea that someone should be punished for taking money and business away from a lawyer would be hard to sell to a jury.[50] With nothing other than cease and desist letters and no real way to ratify or deter the harm caused, the Practice of Law Board existed as "a weapon without any ammunition."[51]

Then, in 2003, Washington conducted its own civil access to justice study.[52] The Civil Legal Needs Study found that "[a]pproximately 87[%] of low-income households experienced at least one . . . civil legal need" in the past year, and low-income households with civil legal problems averaged as many as 3.3 problems per year.[53] Low-income individuals faced more than 85% of these problems without professional legal assistance.[54] Most prevalently, these issues were related to housing, family, employment, consumer, and public and municipal services.[55] While low-income individuals were more likely to enlist an attorney for matters relating to family law, they still only did so 30% of the time.[56] Further, the study found women and children have more legal problems than the general population, which was especially true in family law.[57] These results further solidified the

49. Zoom Interview 1, *supra* note 22, at 1-2 (discussing how immigrant farm workers had some of the worst cases); Zoom Interview 8, *supra* note 44, at 1.

50. Zoom Interview 1, *supra* note 22, at 1 (noting there were also anticompetitive and antitrust problems disallowing the Bar from going after those committing UPL); Zoom Interview 8, *supra* note 44, at 1-2; Zoom Interview 10 with Fam. L. Prac. 1 (Dec. 23, 2020).

51. Zoom Interview 10, *supra* note 50, at 1.

52. TASK FORCE ON CIV. EQUAL JUST. FUNDING, WASH. STATE SUP. CT., THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 5 (2003) [hereinafter CIVIL LEGAL NEEDS STUDY].

53. *Id.* at 23. In this study, low-income households are defined as those with incomes at or below the 125% federal poverty line. *Id.* at 19.

54. *Id.* at 25.

55. *Id.* at 33-35.

56. CIVIL LEGAL NEEDS STUDY, *supra* note 52, at 8.

57. *Id.*

need for the Practice of Law Board to fulfill its duty to explore ways to increase access to legal services.

With a twofold desire to protect consumers from UPL and provide more people with access to justice, in 2005, the Practice of Law Board "crafted a rule to create and regulate a new legal professional."[58] As required by the Court, the Practice of Law Board twice sent the proposed rule to the BOG for its consideration and comment, but it voted to oppose the rule each time.[59] After undergoing revisions, in 2008, the rule was sent to the Court, though it did not specify in which practice area these licensed individuals would serve.[60] With an eye toward the areas with prevalent UPL and those determined to have high unmet need by the 2003 Civil Legal Needs Study, the Practice of Law Board considered and consulted with expert practitioners in four practice areas: family, immigration, landlord-tenant, and elder law.[61] So when the Court requested the Practice of Law Board actually apply the proposed rule to a practice area in order to get a better idea of its general application, it is no surprise that the Practice of Law Board chose family law, evidenced by the 2003 Civil Legal Needs Study to be an area with immense need.[62]

The final proposal was sent back, and the Court sat silently on the proposal for two years, placing it on its agenda for a vote in 2010 and 2011, but tabling it each time.[63] The Practice of Law Board submitted further revisions in an attempt to address some of the lingering concerns presented by the BOG.[64] Then, on June 15, 2012, a six-three majority of the Court decided it was time to adopt the LLLT Limited Practice Rule ("Admission to Practice Rule 28" or "APR 28") "to provide limited legal assistance under carefully regulated circumstances in ways that expand the

58. Crossland & Littlewood, *supra* note 7, at 613.

59. *Id.*; Ambrogi, *supra* note 6.

60. Ambrogi, *supra* note 6; Zoom Interview 1, *supra* note 22, at 2 (stating the Practice of Law Board did not initially specify the practice area because they did not want to alienate any of the WSBA sections).

61. Telephone Interview 5, *supra* note 4, at 5; Zoom Interview 8, *supra* note 44, at 4.

62. E-mail from Stephen Crossland, Chair, Ltd. License Legal Technician Bd., to Lacy Ashworth, Ark. L. Rev. (Mar. 31, 2021) (on file with the Author).

63. Ambrogi, *supra* note 6; Zoom Interview 1, *supra* note 22, at 2 (noting that the Court did not want to meet with the Practice of Law Board during this time).

64. Ambrogi, *supra* note 6.

affordability of quality legal assistance which protects the public interest."[65] The rule went into effect September 1, 2012,[66] and in March 2013, family law became the first official practice area.[67]

B. LLLT Requirements

Upon the creation of the LLLT program, the baton was passed from the Practice of Law Board to a newly created LLLT Board, tasked with maintaining the LLLT curriculum, creating rules of professional conduct, determining the scope and authorizations of the LLLT, and proposing new practice areas and amendments to APR 28 to the Court for final approval.[68] Financially, the program was to be subsidized by the WSBA through bar dues until the program was self-supporting.[69] In developing the curriculum, the LLLT Board first had to consider what would be the scope of the LLLT.[70] The Board asked expert family law practitioners which aspects of family law were complicated and where it would be really significant to make a mistake.[71] These were the areas that would be left to attorneys.[72]

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65. WASH. ADMISSION TO PRAC. R. 28(A); 2012 Order for APR 28, *supra* note 5, at 6. It is no secret among those involved in the LLLT program that Justice Barbara Madsen of the Washington State Supreme Court was the program's biggest advocate on the Court. It seems to be more than coincidence that she sat as Chief Justice when, after two years, the Court finally voted in favor of implementing the program in 2012. *See generally* Letter from J. Barbara Madsen, Washington State Sup. Ct., to Stephen Crossland, Chair, Ltd. License Legal Technician Bd., Rajeev Majumdar, President, Washington State Bar Ass'n Bd. of Governors, and Terra Nevitt, Interim Exec. Dir., Washington State Bar Ass'n 1 (June 5, 2020) (on file with the Author) (this letter serves as her strong dissent to the Court's decision to sunset the LLLT program); Wash. State Bar Ass'n, *Become a Legal Technician*, YOUTUBE (Apr. 8, 2019), [https://perma.cc/4XXG-BPY6]; Madsen & Crossland, *supra* note 7, at 23; Zoom Interview 10, *supra* note 50, at 4.

66. 2012 Order for APR 28, *supra* note 5, at 12; WASH. ADMISSION TO PRAC. R. 28.

67. Crossland & Littlewood, *supra* note 7, at 616.

68. WASH. ADMISSION TO PRAC. R. 28(C)(2) (listing additional responsibilities).

69. *See* 2012 Order for APR 28, *supra* note 5, at 1-2 (Owens, J., dissenting); Telephone Interview 16, *supra* note 24, at 4.

70. Crossland & Littlewood, *supra* note 7, at 616 ("Subject to some limitations, the scope of practice generally includes the following areas: child support modification actions, dissolution and legal separation actions, domestic violence actions, committed intimate relationship actions, parenting and support actions, major parenting plan modifications, paternity actions, and relocation actions.").

71. Telephone Interview 5, *supra* note 4, at 3.

72. *Id.*

It then engaged family law professors from Washington's three law schools to aid in creating the curriculum.[73]

A LLLT is defined as "a person qualified by education, training, and work experience who is authorized to engage in the limited practice of law in approved practice areas of law . . . ."[74] Therefore, to ensure quality legal assistance, LLLTs must prove competence through "education, examination, and experience."[75] LLLTs must have an associate degree or higher.[76] They must complete forty-five credits of legal coursework at an ABA-approved law school or an ABA-approved or LLLT Board-approved paralegal program, and it is envisioned that they use these credits to attain the requisite associate degree.[77] However, paralegals with ten or more years of experience working under the supervision of an attorney can waive the associate degree requirement and the forty-five credits of legal coursework through the program's waiver process.[78] Every candidate must complete fifteen credits in a specific practice area, and because family law is the only area in which the LLLT may serve, the fifteen credits consist of Family Law I, II, and III.[79] For a student attending full-time, this core education may be obtained in two years.[80] These courses are taught online to make the program

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73. Crossland & Littlewood, *supra* note 7, at 617; Telephone Interview 5, *supra* note 4, at 4; Zoom Interview 8, *supra* note 44, at 1; Zoom Interview 9, *supra* note 24, at 1.

74. WASH. ADMISSION TO PRAC. R. 28(B)(4).

75. *Become A Legal Technician*, WASH. STATE BAR ASS'N, [https://perma.cc/BHJ4-Y3QV] (Oct. 8, 2021).

76. Crossland & Littlewood, *supra* note 7, at 617.

77. *Id.* The legal curriculum must include eight credits of Civil Procedure, three credits of Contracts, three credits of Interviewing and Investigation Techniques, three credits of Introduction to Law and Legal Process, three credits of Law Office Procedures and Technology, eight credits of Legal Research, Writing, and Analysis, and three credits of Professional Responsibility. *Become A Legal Technician*, *supra* note 75.

78. *Limited-Time Waiver*, WASH. STATE BAR ASS'N, [https://perma.cc/9PBW-6MVK] (Oct. 8, 2021).

79. WASH. STATE BAR ASS'N, REPORT OF THE LIMITED LICENSE LEGAL TECHNICIAN BOARD TO THE WASHINGTON SUPREME COURT: THE FIRST THREE YEARS 16 (2016) [hereinafter REPORT: THE FIRST THREE YEARS]; *See also* Crossland & Littlewood, *supra* note 7, at 617 ("five credits in basic family law and ten credits in advanced and Washington law-specific topics.").

80. Letter in Response to LLLT Sunsetting, *supra* note 10, at 2 (making this estimation under the assumption that the candidate does not enter the program through the waiver process and is able to attend full-time, and that the community college offers the required classes in the necessary order).

more accessible and with the hope that individuals in rural communities may obtain the license and remain to aid those in need in their rural areas where attorneys are less prevalent.[81]

To be qualified by examination, candidates must pass a general paralegal exam, a LLLT practice area exam, and the LLLT professional responsibility exam.[82] Finally, to be qualified by experience, the candidate was required to complete 3,000 hours of substantive legal work signed off by a supervising attorney.[83] However, upon sunsetting the program, the Court agreed to amend the required experience hours from 3,000 to 1,500 to make it easier for candidates in the pipeline to obtain the license by the cut-off date.[84] While decreasing the required hours by half seems drastic, the LLLT Board had already determined that 3,000 hours was unduly burdensome and that the same benefit of thorough training could be experienced with 1,500 hours.[85] Attaining the license costs approximately $15,000.[86] With less debt than the average lawyer, the idea was that LLLTs could provide a limited range of quality services at a more affordable rate than attorneys, whose prices presumably reflect a need to pay off law school debt.[87]

Upon obtaining the license, like attorneys, LLLTs become members of the bar, they are required to pay bar fees, are subject to discipline, are held to ethical standards outlined by rules of professional conduct, are required to engage in continuing

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81. *See* Crossland & Littlewood, *supra* note 7, at 617-18; Telephone Interview 5, *supra* note 4, at 1, 4; Zoom Interview 9, *supra* note 24, at 1; Zoom Interview 8, *supra* note 44, at 2.

82. *Become A Legal Technician*, *supra* note 75.

83. REPORT: THE FIRST THREE YEARS, *supra* note 79, at 15.

84. Zoom Interview 2, *supra* note 4, at 7; Lyle Moran, *How the Washington Supreme Court's LLLT Program Met its Demise,* A.B.A. J. (July 9, 2020, 1:46 PM), [hereinafter Moran, *How the Washington Supreme Court's LLLT Program Met its Demise*], [https://perma.cc/VY2W-9VFR].

85. STEPHEN CROSSLAND, LTD. LICENSE LEGAL TECHNICIAN BD., REPORT OF THE LIMITED LICENSE LEGAL TECHNICIAN BOARD TO THE WASHINGTON SUPREME COURT: THE CHALLENGES OF BEING FIRST IN THE NATION Bookmark 5, at 6 (2020) [hereinafter MARCH 2020 REPORT OF THE LLLT PROGRAM]; Zoom Interview 1, *supra* note 22, at 8; Telephone Interview 5, *supra* note 4, at 4; Telephone Interview 16, *supra* note 24, at 3.

86. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 8; REPORT: THE FIRST THREE YEARS, *supra* note 79, at 26.

87. Zoom Interview 1, *supra* note 22, at 3.

education, and are highly encouraged to deliver pro bono services.[88] The LLLT Rules of Professional Conduct state LLLTs should aspire to complete at least thirty hours of pro bono service and LLLTs showing fifty hours or more receive commendation.[89] However, unlike most attorneys, LLLTs are also required to have professional liability insurance.[90] These requirements were enacted to ensure consumer protection.[91] After developing the scope, curriculum, rules, requirements, and exams for LLLTs, the first LLLT entered the legal profession through the waiver process in mid-2015.[92]

C. LLLT Authorizations

When the Court first passed APR 28, LLLTs were authorized to assist pro se (self-represented) litigants with "simple legal matters[,] such as selecting and completing court forms, informing clients of procedures and timelines, explaining pleadings, and identifying additional documents that may be needed in a court proceeding."[93] LLLTs may work in law firms, have their own solo practices, or work with non-profit organizations.[94] The promise, at that time, was that LLLTs "would not be able to represent clients in court or contact and negotiate with opposing parties on a client's behalf."[95]

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88. Crossland & Littlewood, *supra* note 7, at 612; WASH. ADMISSION TO PRAC. R. 28(I)(3), (K)(2); LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 6.1 (2015).

89. LTD. LICENSE LEGAL TECHNICIAN RULES of PRO. CONDUCT r. 6.1 (2015).

90. WASH. ADMISSION TO PRAC. R. 28(I)(2); Zoom Interview 8, *supra* note 44 at 3. Only Oregon and Idaho have malpractice insurance requirements for their attorneys. Susan Humiston, *Practicing Law Without Liability Insurance*, MINN. STATE BAR ASS'N, [https://perma.cc/2726-P2PB] (last visited Oct.13, 2021).

91. Crossland & Littlewood, *supra* note 7, at 612.

92. Moran, *How the Washington Supreme Court's LLLT Program Met its Demise*, *supra* note 84; Zoom Interview 9, *supra* note 24, at 2; Zoom Interview 2, *supra* note 4, at 3.

93. Madsen & Crossland, *supra* note 7, at 23; *see also* WASH. ADMISSION TO PRAC. R. 28(F) (listing LLLT authorizations).

94. *See* 2012 Order for APR 28, *supra* note 5, at 8-9; *see also* Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U.L. REV. 1, 2, 43 (2018) (finding, after interviewing a majority of the first two cohorts of LLLTs and LLLT candidates, that LLLTs primarily planned to work in law firms or maintain solo practices).

95. 2012 Order for APR 28, *supra* note 5, at 8.

However, because LLLTs were unable to accompany their clients in court, clients found themselves at a loss when the judge asked questions about their LLLT-prepared documents.[96] One LLLT found herself preparing scripts for her anxious clients to assist them in the courtroom.[97] After having LLLTs practice in the legal profession for four years, it became clear to LLLTs, LLLT Board members, and others that submitted comments to the Court that LLLTs would be better able to serve clients if they could accompany them in court.[98] On May 1, 2019, a close five-four majority of the Court agreed and expanded the scope of the LLLT under APR 28.[99] Following this decision, LLLTs could negotiate with opposing counsel on behalf of their clients and accompany and assist them in depositions and certain court hearings, where they could respond to direct questions from the judge regarding factual and procedural issues.[100] With this new ability, LLLTs noticed their clients' anxiety levels decrease, and one asserted that with her present, her clients were no longer badgered by opposing counsel.[101]

Yet, as suggested by the close majority decision, not everyone was for the idea of allowing LLLTs into the courtroom. While many were against the program from the start, others turned against the program upon this expansion.[102] The dissent

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96. Zoom Interview 9, *supra* note 24, at 3; *see also* Telephone Interview 5, *supra* note 4, at 2.

97. Zoom Interview 6 with Active Ltd. License Legal Technician 2 (Nov. 23, 2020).

98. Telephone Interview 5, *supra* note 4, at 2; *see also* Zoom Interview 6, *supra* note 97, at 2; Zoom Interview 9, *supra* note 24, at 3.

99. Order in the Matter of Proposed Amendments to APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1258, at 2 (May 1, 2019) [hereinafter Order to Expand APR 28].

100. WASH. ADMISSION TO PRAC. R 28 app. at regul. 2(B)(2)(h); Order to Expand APR 28, *supra* note 99, at 2 (González, J., dissenting); *see also* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 9 (aiding judges by listing the LLLT's permitted courtroom activities).

101. Zoom Interview 4, *supra* note 23, at 2.

102. *See* Zoom Interview 9, *supra* note 24, at 3 (noting the amendments seemed to push the Court "just a movement too far."); *see also* Dan Bridges, *Treasurer's Note: The Cost of LLLTs*, NWLAWYER, Sept. 2019, at 48-49; Telephone Interview 11 with Wash. State Bar Ass'n Bd. of Governors Member 1 (Dec. 21, 2020); Zoom Interview 12, *supra* note 24, at 2. Note that Justice González was in the majority when the Court adopted APR 28 in 2012, but he authored the dissent to the Order expanding the program in 2019. Order to Expand APR 28, *supra* note 99, at 1-2 (González, J., dissenting).

believed the program had not proven itself to be a sustainable business plan to meet unmet legal needs, and that expansion should not be considered until evidence could be provided to show otherwise.[103] Moreover, the dissent felt the majority's decision "fundamentally change[d]" the program by allowing LLLTs to do that which they were "never meant to."[104] This sentiment was shared by lawyers and members of the BOG that felt the LLLT Board, in getting the program approved and later proposing to amend it, had essentially effectuated a bait and switch.[105] The majority of the Court, in approving the expansion, had too backed out of their initial promise.[106]

III. REACTIONS FROM THE LEGAL COMMUNITY

Even today, doctors and nurse practitioners struggle to coexist. Doctors question whether nurse practitioners are qualified to aid patients in certain ways and the permissible scope of nurse practitioners remains a topic of debate.[107] It is no surprise then, that lawyers would have similar concerns about what was presented as the nurse practitioner of the legal profession.[108]

A. WSBA Family Law Section

In 2009, when the Washington State Supreme Court was considering the Practice of Law Board's program proposal, the Family Law Section—existing as one of the largest and most

103. Order to Expand APR 28, *supra* note 99, at 2 (González, J., dissenting).

104. *Id.* at 1-2 ("LLLTs were never meant to legally advocate on behalf of a client.").

105. *See* Bridges, *supra* note 102, at 50 ("[T]he program's proponents made representations, many of which were so quickly abandoned it is reasonable to ask if they were ever intended to be kept."); *see also* Zoom Interview 10, *supra* note 50, at 1 ("The program was pitching smoke and mirrors."); Telephone Interview 11, *supra* note 102, at 1-2.

106. *See supra* notes 93-95 and accompanying text.

107. *See Where Can Nurse Practitioners Work Without Physician Supervision?*, SIMMONS UNIV., [https://perma.cc/Y2CM-X8PQ] (last visited Oct. 13, 2021); Heather Stringer, *Nurse Practitioners Gain Ground on Full Practice Authority*, NURSE.COM (July 24, 2019), [https://perma.cc/4WJK-S8F4] (noting twenty-two states allow nurse practitioners to practice independently of doctors, suggesting the remaining twenty-eight states disagree that they should be able to); Zoom Interview 3, *supra* note 23, at 2.

108. *See supra* note 7 and accompanying text.

active sections of the WSBA[109]—discovered that the program may enter the family law arena and wrote a letter requesting the Court "resoundingly reject [it], in the strongest possible terms."[110] The Family Law Section felt that instead of helping with access to justice, the program would "dilute resources" already available that would benefit from "greater support from the Court, the Bar, and the Legislature."[111]

The Family Law Section did not believe LLLT services would actually cost less than attorneys, noting that while the education and training costs significantly less than law school, LLLTs would still have to pay presumably the same office rent and expenses as attorneys.[112] Further, it disliked that there were no controls on the rates that could be charged by LLLTs and that the Practice of Law Board did not provide economic data requested by the WSBA BOG regarding the cost of the program itself and the prices LLLTs would likely need to charge to maintain an office.[113] The Family Law Section believed this information was key to determining the economic viability of the program.[114]

Further, it did not feel there was or would be enough interest in this type of program to bring in the numbers necessary to make it self-supporting.[115] Believing candidates were to be experienced paralegals, it did not believe long-time paralegals would want to move to rural areas where services are most needed.[116] Additionally, the LLLT was likened to Washington's then-existing Limited Practice Officer ("LPO"), which had hundreds of candidates in previous years, but only fifteen applicants in its most recent year, so the Family Law Section did not think the

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109. Telephone Interview 16, *supra* note 24, at 2; *see also* Zoom Interview 10, *supra* note 50, at 1; *Family Law Section*, WASH. STATE BAR ASS'N, [https://perma.cc/XQ8A-FUVN] (Oct. 1, 2021) (providing further information on the Family Law Section).

110. Letter from Jean Cotton, Outgoing Chair, Fam. L. Section Exec. Comm., Washington State Bar Ass'n, to C.J. Charles Johnson, Washington State Sup. Ct. 1 (Apr. 28, 2009) (on file with the Author).

111. *Id.* at 4.

112. *Id.*

113. *Id.*

114. *Id.*

115. Letter from Jean Cotton, *supra* note 110, at 4-5.

116. *Id.* at 4.

LLLT program would conjure sufficient candidates.[117] As the Court inevitably cited a lack of interest as one of the two reasons for sunsetting the program in 2020, this 2009 prediction was not far off.[118]

The Family Law Section also noted that family law is one of the most challenging practice areas and has incredibly high stakes.[119] It listed several potentially problematic scenarios that may be caused by the proposed legal technician in providing "inaccurate or inadequate" services.[120] Instead of placing resources into what it felt would be an unsuccessful and harmful program, the Family Law Section asked that the Court support and fund other projects it believed would better provide quality services to low-income individuals.[121] For instance, it suggested increased support for Washington's then-existing Courthouse Facilitator program, which serves to help pro se litigants in obtaining and completing the correct forms.[122] It further suggested supporting existing civil legal service programs that allow attorneys to provide low and pro bono work, continuing to work to simplify mandatory forms, and educating lawyers and the public about the benefit of unbundled services.[123]

The Family Law Section was not alone in its feelings against LLLTs serving in its practice area. As early as 2007, the Elder Law Section of the WSBA and the National Academy of Elder Law Attorneys expressed similar concerns about the quality of services nonlawyers would provide and also suggested the funds and efforts instead be used to expand and improve existing

117. *Id.*

118. *See* Letter Notification of Sunsetting, *supra* note 11, at 1.

119. Letter from Jean Cotton, *supra* note 110, at 5.

120. *Id.* (listing: (1) "loss of custody or contact with one's children[;]" (2) "erroneous child support obligation calculations[;]" (3) "inequitable or inaccurate allocation property and liabilities in dissolutions[;]" (4) "misidentification of fathers[;]" (5) "waiver of parentage challenges[;]" and (6) "lack of or inappropriate issuance of restraining or protective orders").

121. *Id.* at 2-4.

122. *Id.* at 2-3. *See generally Courthouse Facilitators: How Courthouse Facilitators Can Help*, WASH. CTS., [https://perma.cc/9R8T-D5TF] (last visited Oct. 13, 2021) (providing more information on the Courthouse Facilitator program).

123. Letter from Jean Cotton, *supra* note 110, at 3-4. Unbundled services allow clients to pay lawyers only for limited services rather than for the entirety of the representation. *Unbundled Legal Services*, A.B.A., [https://perma.cc/2URR-X93W] (last visited Oct. 13, 2021).

programs.[124] However, despite such concerns, the Court decided to adopt APR 28 and allow LLLTs to practice family law.[125] Then, when the WSBA's BOG voted to allow LLLTs, who were now members of the WSBA, to join WSBA sections, several members of the Family Law Section left to create their own group called the Domestic Relations Attorneys of Washington ("DRAW"), in which LLLTs were not allowed.[126]

The Family Law Section's opposition toward the program was believed by some to be none other than turf protection—a desire to maintain its monopoly on providing family law services in Washington.[127] However, a family law practitioner stated that the only time the Family Law Section discussed that LLLTs would be taking away work from its members was when discussing the risk LLLTs posed to young lawyers with little experience and considerable debt that must charge the minimum.[128] Perhaps some members of the Family Law Section came around, as one LLLT was elected to its executive board.[129] Still, for many family law practitioners, the sentiment toward the

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124. *See* Letter from Karl L. Flaccus, Chair, Elder L. Section, Washington State Bar Ass'n, to Stephen Crossland, Chair, Prac. of L. Bd. 1-2, 4, 6-7, 11 (Oct. 5, 2007) (on file with the Author); Letter from Erv DeSmet, President, Nat'l Acad. of Elder L. Att'ys, to Stephen Crossland, Chair, Prac. of L. Bd. 2-4, 7 (Oct. 12, 2007) (on file with the Author).

125. *See* 2012 Order for APR 28, *supra* note 5. One interviewee believed that a major problem with the program was that it was first initiated in family law. Telephone Interview 16, *supra* note 24, at 2-3. While he recognized that family law is an area of immense need and that LLLTs should have entered that arena eventually, he did not think they should have initially done so, because the Family Law Section, as one of the biggest and most involved sections of the WSBA, had the ability to present strong opposition. *Id.* He noted lawyers in family law are merely getting by, rather than earning an overflow of cash, so they were largely offended and worried about the financial threat. *Id.* Seemingly responding to the Family Law Section's suggestion regarding Courthouse Facilitators, in the Court's Order, it discussed Courthouse Facilitators, saying that they serve the courts and not pro se litigants, so there is a "gap" in the types of services available to pro se litigants. 2012 Order for APR 28, *supra* note 5, at 5. The Court also acknowledged the Family Law Section's efforts in providing public and pro bono services and working to provide more affordable rates, but stated that because of the scope of the LLLT, LLLTs are unlikely to have "any appreciable impact on attorney practice[,]" and noted, moreover, that "[p]rotecting the monopoly status of attorneys in any practice area is not a legitimate objective." *Id.* at 7-8.

126. Zoom Interview 10, *supra* note 50, at 3; Zoom Interview 9, *supra* note 24, at 3; Zoom Interview 1, *supra* note 22, at 6.

127. *See* Telephone Interview 5, *supra* note 4, at 3; Zoom Interview 4, *supra* note 23, at 2; Zoom Interview 9, *supra* note 24, at 3.

128. Zoom Interview 10, *supra* note 50, at 4.

129. Telephone Interview 5, *supra* note 4, at 3.

LLLT program remained unchanged.[130] Upon the sunsetting of the program, several family law practitioners held a huge party by Zoom, phone, and text to celebrate that they could finally protect their clients.[131]

B. Lawyers

While those involved in the WSBA's Family Law Section knew about the program, a member of the BOG estimated eighty percent of the lawyers in Washington never heard of the LLLT, and another admitted he was among the eighty percent until joining the BOG.[132] This estimation would make sense considering there were only thirty-eight active LLLTs in the legal profession at the time of sunsetting and they were only permitted to work in family law,[133] so lawyers in other practice areas who were not actively involved in the WSBA or working with LLLTs in family law would not have occasion to take notice of the program.

Regarding the reactions of the estimated remaining twenty percent, while some lawyers were in favor of the program, others were emphatically opposed. Lawyers would show up to forums meant to educate the public on the role of the LLLT only to assert statements against the program that were not true, such as the complaint that LLLTs do not need malpractice insurance, suggesting future impacted clients would not have recourse for mistakes made by LLLTs.[134] One previous Practice of Law Board member noted that involved proponents made efforts to educate attorneys on the role of the LLLT to show how they would not step on toes, and even a justice on the Washington State Supreme Court authored a newsletter to that effect, but all attempts to educate seemed to fall on deaf ears.[135]

Lawyers against the program affected LLLT candidates in fulfilling their requirements. Recall that LLLTs needed 3,000

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130. *See* Zoom Interview 10, *supra* note 50, at 3.

131. *Id.*

132. Telephone Interview 11, *supra* note 102, at 9; Zoom Interview 12, *supra* note 24, at 1.

133. *See* Clark PowerPoint, *supra* note 13, at slide 7.

134. Zoom Interview 8, *supra* note 44, at 4.

135. *Id.*

hours of legal work signed off by an attorney.[136] Some attorneys refused to certify that the LLLT had completed their hours.[137] Upon entering the legal profession, some LLLTs faced demeaning comments, suggestions that they did not know what they were doing, and refusals to communicate that disadvantaged their clients.[138] Further, like the Family Law Section, some county bar associations fought having LLLTs become members.[139]

Luckily, not all LLLT-attorney interactions have been bad, as many improved as LLLTs worked in the profession.[140] One LLLT stated she now gets referrals from family law attorneys.[141] One stated that while some lawyers are demeaning and infuriated that LLLTs exist, some are glad "to have a nurse practitioner on the team if they need to go into surgery."[142] A member of the LLLT Board stated that some family law practitioners that were initially against the program now admit they find LLLTs help the process for everybody, a sentiment also expressed by some judges that have had the opportunity to run cases more efficiently and cost-effectively with pro se litigants receiving assistance from LLLTs.[143] Further, as a number of LLLTs work in law firms,[144] there would appear to be several collaborative, if not amicable, relationships between LLLTs and their affiliating attorneys.[145]

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136. REPORT: THE FIRST THREE YEARS, *supra* note 79, at 15.

137. Zoom Interview 1, *supra* note 22, at 6; Zoom Interview 4, *supra* note 23, at 2 (because attorneys were not signing off on LLLT work, she created a contract binding her supervising attorneys to sign off on her completed hours).

138. Zoom Interview 3, *supra* note 23, at 2 (noting the less kind interactions were a result of attorneys not knowing the role of the LLLT); Zoom Interview 4, *supra* note 23, at 2; Zoom Interview 6, *supra* note 97, at 1; Zoom Interview 7 with Active Ltd. License Legal Technician 1 (Nov. 28, 2020).

139. Zoom Interview 2, *supra* note 4, at 4; Telephone Interview 16, *supra* note 24, at 1.

140. Zoom Interview 1, *supra* note 22, at 6.

141. Zoom Interview 3, *supra* note 23, at 2.

142. Zoom Interview 6, *supra* note 97, at 1.

143. Telephone Interview 5, *supra* note 4, at 2-3.

144. *See* Letter from Dan Bridges, Treasurer, Washington State Bar Ass'n Bd. of Governors, to C.J. Mary Fairhurst, Washington State Sup. Ct. 2 (July 9, 2019) (on file with the Author); Donaldson, *supra* note 94, at 43; Zoom Interview 2, *supra* note 4, at 1 (works in a firm); Zoom Interview 6, *supra* note 97, at 2 (worked in a firm, but is now solo).

145. *See* Telephone Interview 16, *supra* note 24, at 1 (noting mutually beneficial relationships between attorneys and LLLTs); Sart Rowe, Comment to Washington State Bar

C. WSBA Board of Governors

Many members of the BOG also opposed the implementation of the LLLT program. One LLLT Board member asserted that the time in which it took the program to get approved is indicative in and of itself of the resistance to the concept.[146] Recall that in 2001, when the Washington State Supreme Court created the Practice of Law Board to consider ways to provide more individuals with access to legal services, it required the Board first submit any recommendation to the BOG for "consideration and comment" before submitting to the Court.[147] If the Court instead required the Practice of Law Board to receive the BOG's approval before submitting the proposal to the Court, the LLLT program would not have been implemented, and surely would not have been expanded.[148]

As required by the Court, in 2006, the Practice of Law Board submitted the first drafted legal technician rule to the BOG.[149] The BOG unanimously voted against it, but left open the possibility of revision and resubmission.[150] In January 2008, the Practice of Law Board submitted a refined version to the Court and the BOG asked the Court to refrain from acting to allow it time to "solicit feedback from members and formulate a position."[151] In late 2008, the BOG again unanimously voted against the rule.[152] Even when the Court finally approved the program in 2012, the BOG remained, for the most part,[153] opposed.

Association, FACEBOOK (May 12, 2020), [https://perma.cc/6385-49RH] (stating he is a family law attorney that has had good experiences with the quality of work from LLLTs and has partnered with them on cases).

146. Zoom Interview 1, *supra* note 22, at 2.

147. *See supra* text accompanying note 46.

148. Telephone Interview 11, *supra* note 102, at 4.

149. Ambrogi, *supra* note 6.

150. *Id.*

151. *Id.*

152. *Id.*

153. At one point in time, the WSBA and the BOG seemed in support of the program, as evidenced by their voting to allow LLLTs to become members of WSBA sections, i.e., the Family Law Section. *See* Telephone Interview 5, *supra* note 4, at 3; Zoom Interview 10, *supra* note 50, at 3. However, one interviewee believed this vote took place when the Chair of the LLLT Board was President of the BOG, and a major advocate of the program was serving as Executive Director of the WSBA. Zoom Interview 10, *supra* note 50, at 3. Also,

Before the program's implementation, the BOG expressed several client-centered concerns about nonlawyers practicing law, "even in a 'limited' manner."[154] It worried that the limited licensed individuals might represent clients in court and did not believe they could be trusted to "identify nuances and risks lawyers occasionally miss."[155] As the Court inevitably approved APR 28 over the BOG's objection and required the WSBA to subsidize the program, members of the BOG likely took whatever comfort they could in the initial assurances that LLLTs would not represent clients in the courtroom and that LLLT fees would make the program financially self-supporting in a reasonable period of time.[156] With these assurances, some BOG members supported the program.[157]

However, the BOG reiterated opposition when the Court voted to allow LLLTs into the courtroom in 2019, and when the program was not producing the number of LLLTs necessary to achieve financial independence from the WSBA in what the BOG considered to be a reasonable amount of time.[158] A deeper discussion of the BOG's financial concerns ensues in Section V.A.[159]

In addition to these concerns related to LLLT scope of practice, cost of the program, and time to attain self-sufficiency, the BOG also voiced its concern that the LLLT program might become a "pink collar" profession.[160] Members of the BOG noted

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it is important to recognize that there were some advocates on the BOG, one being their liaison. Zoom Interview 2, *supra* note 4, at 3; Telephone Interview 16, *supra* note 24, at 1; *see also* Zoom Interview 12, *supra* note 24, at 10 (mentioning a BOG member who was a big supporter).

154. Bridges, *supra* note 102, at 48.

155. *Id.*

156. 2012 Order for APR 28, *supra* note 5, at 8; WASH. GEN. R. 25(b)(2)(E).

157. *See* Telephone Interview 11, *supra* note 102, at 1 (advocating for insurance companies to cover LLLTs and for their acceptance into local bar associations); Bridges, *supra* note 102, at 50 (noting "I am not against LLLTs as originally conceived.") (emphasis omitted); Letter from Dan Bridges, *supra* note 144, at 5 (noting the same).

158. *See* Clark PowerPoint, *supra* note 13, at slide 2; Letter from Dan Bridges, *supra* note 144, at 2; Telephone Interview 11, *supra* note 102, at 1; Zoom Interview 12, *supra* note 24, at 1.

159. *See infra* Section V.A.

160. Letter from Christina A. Meserve, Washington St. Bar Ass'n Bd. of Governors, to Sup. Ct. JJ., Washington State Sup. Ct. 1 (July 1, 2019) (on file with the Author); Bridges, *supra* note 102, at 50.

that a majority of LLLTs and LLLT Board members are women and worried that this new limited profession was averting capable women from going to law school.[161]

IV. SUCCESS OF THE LLLT PROGRAM: ANTICIPATED AND ATTAINED

A. Anticipated

To determine the LLLT program's success, it is important to first define how it was meant to be measured. Yet, a debilitating issue underlying the LLLT program was that there were differing views on the role that LLLTs were intended to play and the intended targets for their services. When there are different expectations and definitions of success, of course there will be conflicting opinions about whether those expectations have been met. However, the only expectations that truly matter are those voiced by the majority of the Washington State Supreme Court when it decided to adopt the program in 2012.[162]

In the 2012 Order, then Chief Justice Barbara Madsen addressed the hopes expressed by supporters of the program who believed the LLLT program "should be a primary strategy to close the [j]ustice [g]ap for low and moderate income people with family related legal problems."[163] In response, Justice Madsen emphasized the need to "be careful not to create expectations that adoption of this rule is not intended to achieve."[164] She provided, "depending upon how it is implemented . . . [the program] holds promise to help reduce the level of unmet need for *low and moderate income* people who have relatively uncomplicated family related legal problems and for whom some level of individualized advice, support and guidance would facilitate a timely and effective outcome."[165] Justice Madsen referred to the

161. Letter from Christina A. Meserve, *supra* note 160, at 1; Letter from Dan Bridges, *supra* note 144, at 6; *see also* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 2, at 3 (discussing this concern and noting that many LLLTs are paralegals and most paralegals in Washington are female).

162. 2012 Order for APR 28, *supra* note 5, at 1-2.

163. *Id.* at 6.

164. *Id.*

165. *Id.* (emphasis added).

program as a "baby step" in meeting the legal needs of indigent Washingtonians but admitted in the Court Order that "[n]o one has a crystal ball[,]" signifying that even the Court could not say for sure what the program would become.[166]

Some thought LLLTs were meant to work as solo practitioners rather than in law firms, that they were meant to provide services in rural communities where attorneys are less prevalent, or that they would work for nonprofit organizations or legal aid programs.[167] Assuredly, there were various discussions regarding the program before and during its implementation, so such beliefs may rightfully stem from when and how the program was initially or varyingly pitched.[168] However, as impartial reviewers without the benefit of being in the room when the parties voiced their intentions, like a contract, we must look to the four corners of the Court's Order adopting APR 28 and APR 28 itself to determine the essential components of the LLLT program.[169]

As the Court did not limit the LLLT's job prospects—by order or by rule—to rural areas or solo offices, it is assumed that it did not intend to limit the LLLT in these ways.[170] In fact, the rule differentiates between that which a stand-alone LLLT can do and that which a LLLT may do with attorney supervision, demonstrating it was not out of the question that LLLTs would work with attorneys.[171] The prospect of LLLTs working in rural communities has been discussed by the LLLT Board,[172] but was

166. Schaefer, *supra* note 6; 2012 Order for APR 28, *supra* note 5, at 8.

167. *See* Letter from Dan Bridges, *supra* note 144, at 2; Telephone Interview 11, *supra* note 102, at 5; Zoom Interview 12, *supra* note 24, at 6, 9.

168. *See* Bridges, *supra* note 102, at 48.

169. *See* Zoom Interview 13, *supra* note 19, at 2-3 (noting that when a group makes a decision, it is difficult to determine intent—perhaps some believed the program would only be for low-income people, while others thought it would also serve moderate-income people and that LLLTs would be able to work wherever they wanted—the most important thing is what the rule says and the rule did not limit who they could serve or where).

170. *See id.*

171. *See* 2012 Order for APR 28, *supra* note 5, at 8-9.

172. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 2, at 2-3; Telephone Interview 5, *supra* note 4, at 1; Zoom Interview 1, *supra* note 22, at 4.

not fully addressed in the Court's Order,[173] and the prospect of LLLTs working for nonprofit or legal aid organizations was contemplated as a possibility in the Court's Order, though not listed as a requirement.[174] Therefore, in summary, the LLLT program was adopted with the hope that it would be implemented in such a way that it would serve as a baby step in reducing the unmet legal needs of low- and moderate-income individuals in Washington.[175]

B. Attained

1. Quality Legal Services

Using the 2012 Court Order's anticipations of the LLLT program as a measuring stick, we now turn to whether and to what extent the program can be considered to have succeeded in providing quality services to low- and moderate-income individuals. Quality concerns raised against the LLLT program included that nonlawyers would not be able to provide quality legal services to clients, that clients would be getting second-tier services, and that clients would not be protected upon LLLT malpractice.[176] To combat quality concerns, APR 28 imposed safeguards, such as stringent educational and supervised experiential requirements, a professional responsibility exam, and proof of malpractice insurance.[177] Further, to dispel concerns that LLLTs would go beyond their scope of practice and harm clients, candidates were taught not only what they could do, but also how to recognize that which went beyond their scope of practice.[178]

While some LLLTs felt the 3,000 hours of legal experience should specifically be in family law rather than in any practice

173. *See* 2012 Order for APR 28, *supra* note 5, at 9 (mentioning rural areas only to say that attorneys in these areas are "barely able to scrape by[,]" so "[d]oing reduced fee work through the Moderate Means program . . . will not be a high priority.").

174. *See* 2012 Order for APR 28, *supra* note 5, at 9.

175. *See id.* at 1-2, 4.

176. *See supra* notes 119-21, 134, 154-55 and accompanying text; Zoom Interview 8, *supra* note 44, at 2, 4; Telephone Interview 11, *supra* note 102, at 8; Zoom Interview 12, *supra* note 24, at 3.

177. *See supra* notes 75-83, 90 and accompanying text.

178. Crossland & Littlewood, *supra* note 7, at 617; Zoom Interview 8, *supra* note 44, at 2; Telephone Interview 5, *supra* note 4, at 4.

area, they generally felt the curriculum and requirements well-equipped them to serve their clients in family law.[179] Some believed they were even better equipped than new family law attorneys they interacted with and one noted having to educate some newer attorneys about how things work in family law.[180] Supporting their belief, family law professors who created and taught the curriculum echoed that the fifteen family law credits better equipped LLLTs in family law than most law school graduates who only take three credits.[181] A March 2020 report of the LLLT program found "[o]ver 50% of all LLLTs have at least [ten] years of substantive law related experience."[182] Interviewed family law professors noted such long-time paralegals were even better qualified.[183] The report also indicated that, to that date, not a single LLLT had been disciplined.[184]

2. Serving the Intended Target

While some, including a member of the Washington State Supreme Court, have asserted the belief that LLLTs would only serve low-income individuals,[185] those involved in the initial

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179. Zoom Interview 3, *supra* note 23, at 1; Zoom Interview 4, *supra* note 23, at 2.

180. Zoom Interview 3, *supra* note 23, at 1; Zoom Interview 4, *supra* note 23, at 2.

181. *See* Zoom Interview 8, *supra* note 44, at 2; Zoom Interview 9, *supra* note 24, at 1; Telephone Interview 5, *supra* note 4, at 3-4.

182. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 3, at 4.

183. Zoom Interview 9, *supra* note 24, at 2; Zoom Interview 8, *supra* note 44, at 2.

184. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 3, at 4.

185. Again, note that Justice González was a part of the majority decision to adopt APR 28 in 2012, but authored the dissent to expansion in 2019. *See* Order to Expand APR 28, *supra* note 99, at 1-2 (González, J., dissenting). Interviewees discussed Justice González's public statement regarding the belief that the LLLT would only serve low-income individuals. *See* Zoom Interview 9, *supra* note 24, at 3 (noting one of the schisms on the Court was whether LLLTs were only meant to serve low-income people); Telephone Interview 5, *supra* note 4, at 7. In his dissent, Justice González stated, "The LLLT program was conceived as an effort to address the unmet civil legal needs of *low-income* Washingtonians" and "[i]t did not take long to realize that the business model adopted by the LLLT program was incompatible with meeting the needs of *low-income* individuals . . . ." Order to Expand APR 28, *supra* note 99, at 1-2 (González, J., dissenting) (emphasis added). However, the majority decision in 2012 discussed LLLTs serving moderate-income individuals as well. 2012 Order for APR 28, *supra* note 5, at 1, 4, 6. This suggests even the majority was unclear in 2012 about who the program would serve. Obviously, this important

creation and proposal of the program insist it was always the intent for the LLLT to serve low- and moderate-income individuals.[186] Again, supporting the latter is the 2012 Order in which Chief Justice Madsen cites both low- and moderate-income individuals as the intended targets.[187]

In 2020, the LLLT Board conducted a survey of twenty responding LLLTs, who reported serving a total of 1,527 paid clients mostly within 0-300% of the federal poverty level.[188] Eighty-five percent of the respondents reported serving clients within 0-200% of the federal poverty level.[189] Twenty-nine percent signed up for a WSBA program in which they agreed to reduce their fees by half when serving clients within 200-250% of the federal poverty level.[190] The report found many LLLTs offer free initial consults, sliding scale fees, and unbundled services, and thirty-four percent of the twenty respondents reported serving as many as 929 pro bono hours—more than attorneys were on average reporting.[191] LLLTs provide anecdotes of their clients praising them for providing services at affordable rates, and they report serving low- and moderate-income individuals that, for the most part, cannot afford an attorney.[192]

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discrepancy among the Court in particular would alter the view of whether the LLLT was succeeding.

186. Telephone Interview 5, *supra* note 4, at 7; Zoom Interview 1, *supra* note 22, at 2-3; *see also* Zoom Interview 9, *supra* note 24, at 3-4. Interviewee 9 discussed how, from the beginning, he talked to LLLTs about a business plan, and it was clear LLLTs would need to serve middle-income as well as low-income individuals in order to earn a salary and pay rent. *Id.* at 3. He noted it was ridiculous to think that LLLTs can only serve low-income individuals and that they should be expected to do more pro bono work than lawyers. *Id.* at 4. He also noted that LLLTs did in fact report doing more pro bono work than lawyers and emphasized the need to balance access to justice with the fact that LLLTs need to be able to make a living wage. *Id.* at 4, 6.

187. *See* 2012 Order for APR 28, *supra* note 5, at 1, 4.

188. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 3, at 3.

189. *Id.* at Bookmark 3, at 4.

190. *Id.*

191. *Id.*; Zoom Interview 2, *supra* note 4, at 1; Zoom Interview 9, *supra* note 24, at 2; *see also* Zoom Interview 8, *supra* note 44, at 3 (discussing how there was only one LLLT in her area, but she noticed the LLLT was very involved in the free advice clinic, as every time she went, she saw the LLLT there); Michelle White, Comment to Washington State Bar Association, FACEBOOK (May 12, 2020), [https://perma.cc/6385-49RH] (most LLLTs she knows do a lot of flat fee, reduced rates, and pro bono work).

192. *See* Zoom Interview 2, *supra* note 4, at 1-2; Zoom Interview 3, *supra* note 23, at 1; Zoom Interview 4, *supra* note 23, at 2; Zoom Interview 7, *supra* note 138, at 2; *see also*

LLLTs report being busy and that the LLLTs they know are busy.[193] Some are working with technology and different business models to find the most efficient way to serve their clients.[194]

While these reports and testimonials provide some reassurance that there are people being helped by LLLTs, it has been suggested that anecdotal stories do not provide a sufficient metric of success to determine the new profession's overall impact.[195] While LLLTs and LLLT Board members express confidentiality concerns in collecting client data,[196] others assert LLLTs could collect data without providing specifics in order to more concretely gauge the program's success.[197] However, notably, nowhere was it mandated that LLLTs be required to report their prices or information regarding their clientele.[198]

A 2018 law review article suggested the original LLLT model could work to serve moderate-income individuals at a rate more affordable than attorneys but would come up short in providing services at a rate low-income individuals can afford.[199] The assertion was based on interviews and a study of thirty-six respondents from the first two cohorts of LLLTs and LLLT candidates.[200] The article claimed that while LLLTs "[m]ost frequently . . . reported that they planned to work with both low- and moderate-income clients[,]" a number of elements would inhibit their ability to charge prices low-income individuals can

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Donaldson, *supra* note 94, at 31-32 (providing a LLLT's positive experience with a client). I say "for the most part" because one LLLT stated that a good half of her clients fire their lawyers and hire her due to the preference of using her services. Zoom Interview 6, *supra* note 97, at 3.

193. Zoom Interview 3, *supra* note 23, at 1, 4.

194. Zoom Interview 4, *supra* note 23, at 5; Zoom Interview 6, *supra* note 97, at 2.

195. *See* Bridges, *supra* note 102, at 50; Telephone Interview 11, *supra* note 102, at 5; Zoom Interview 12, *supra* note 24, at 8-9.

196. Zoom Interview 4, *supra* note 23, at 4 (noting that she told her clients that if they wanted to, they could fill out a form providing information that would be used for LLLT data, but she did not and could not force them to due to confidentiality concerns); Telephone Interview 5, *supra* note 4, at 8.

197. Zoom Interview 12, *supra* note 24, at 8-9; Telephone Interview 11, *supra* note 102, at 5.

198. *See* 2012 Order for APR 28, *supra* note 5; WASH. ADMISSION TO PRAC. R. 28.

199. Donaldson, *supra* note 94, at 61, 65.

200. *Id.* at 17.

afford: solo practitioners will incur office overhead no different than lawyers, those working in law firms will have to sustain their salaries while making their employment worthwhile to law firms, and many in the first cohorts were previously paralegals that aspired to bring in higher salaries as LLLTs.[201] While these potential inhibitors to serving low-income individuals are worthy of consideration, it is important to note that the article surveyed LLLTs and candidates that either had not yet entered the profession or had not been in it for very long.[202] The thirty-six respondents' uncertainty was exemplified in their doubt regarding how to price their services.[203]

Nonetheless, considering many respondents reported a desire "to expand access to justice in family law," the article remained optimistic that LLLTs could serve more low-income individuals with some changes to the LLLT model.[204] One of which was allowing LLLTs to appear in court and negotiate with opposing counsel so they may provide their clients "a more comprehensive, seamless, and affordable experience . . . ."[205] Recall that this change was implemented in 2019.[206] Another suggestion was that LLLTs could serve moderate- and high-income individuals to subsidize their taking on more low-income clients.[207] Still, the article noted, "[i]f the model can increase access for moderate-income legal consumers who could not previously afford civil legal services to meet their needs, the model would do its part to close the justice gap."[208]

201. *Id.* at 38, 41, 49-50, 62. The article also noted that while most of the interviewees cited a desire to "expand access to justice in family law [as one of their reasons for becoming a LLLT], they still predominantly intend to target clients who can afford to pay their rates—rates lower than attorneys' fees but not low enough for low-income populations to afford." *See id.* at 65; *see also supra* notes 110-13 and accompanying text (the Family Law Section expressing similar concerns with LLLT office overhead).

202. Donaldson, *supra* note 94, at 17 (stating the invitations to participate in her study were sent in fall 2015). Recall that the first LLLT did not enter the legal profession until mid-2015. *See supra* note 92 and accompanying text.

203. Donaldson, *supra* note 94, at 20, 40.

204. *Id.* at 59-60, 65, 67, 71; *see also* Zoom Interview 2, *supra* note 4, at 1-2 (stating LLLTs are passionate not only about providing services at a lower rate, but also about volunteering a lot of their time).

205. Donaldson, *supra* note 94, at 67-68.

206. *See supra* notes 96-100 and accompanying text.

207. Donaldson, *supra* note 94, at 68.

208. *Id.* at 72.

Importantly, in considering whether the LLLT program has succeeded in serving its intended target, we must reflect on what we have: anecdotal stories, pro bono and clientele reports, studies, and survey and interview responses. And we must still acknowledge that which is lacking, as LLLTs were never made to report on their services and the program never specifically defined how it would gauge its success.[209]

V. THE DEMISE OF THE LLLT PROGRAM

In the Washington State Supreme Court's letter informing the Chair of the LLLT Board (and others) of the Court's majority decision to sunset the program, the Court cited two main reasons: (1) the cost of the program and (2) the lack of interest in the program.[210] While those involved, and outsiders alike, may speculate about other potential reasons for the program's sunsetting, such as a desire to maintain a monopoly on legal services, avoid change, or prevent diversion from law school, it is important to first consider the two reasons afforded by the Court that chose to implement this program in the first place. This section works to provide that analysis.

A. Cost of the Program

1. Cost Neutral in "A Reasonable Period of Time"

From the inception of the LLLT program, there was controversy about who should fund the program and for how long they should be required to do so. When the Washington State Supreme Court ordered the adoption of the program, it ordered the WSBA to subsidize it.[211] Washington requires its attorneys to be members of the Bar, thus, every lawyer in Washington was made to pay for a program that some believed would serve as their

209. *See infra* Section VI.D. for a deeper discussion on the importance of gauging success.
210. Letter Notification of Sunsetting, *supra* note 11, at 1.
211. *See* 2012 Order for APR 28, *supra* note 5, at 1-2 (Owens, J., dissenting).

competition.[212] In fact, in Justice Owen's dissent to the Court's 2012 Order, she stated that making the WSBA pay for the program was not fair, that the Court was imposing a tax on lawyers, and that doing so would reduce the amount the WSBA could budget for other programs.[213]

However, the program was not supposed to be a burden on the Bar forever; rather, from its inception, the program was intended to be "financially self-supporting within a reasonable period of time."[214] This was to be done through LLLT licensing fees.[215] In its 2012 Order, the Court asserted its "confiden[ce] that the WSBA and the Practice of Law Board, in consultation with this Court, will be able to develop a fee-based system that ensures that the licensing and ongoing regulation of [LLLT]s will be cost-neutral to the WSBA and its membership[,]" though it did not specify at what time.[216] Justice Owens felt the program's ability to be self-sustaining would depend, in large part, on the number of licenses attained, and suggested that even the Practice of Law Board was unsure LLLT fees alone would suffice to attain cost-neutrality, since it also mentioned a reliance on "commitments from the WSBA."[217]

At the time of sunsetting, the WSBA had provided the program nearly $1.4 million and the program was years away from attaining cost neutrality.[218] Just before the sunsetting, the LLLT Board estimated that with an additional $986,588.65 and eight more years, the program would produce enough licenses to be self-sustaining.[219] To some, the $1.4 million already expended likely represented funding taken away from other assistance

212. Zoom Interview 3, *supra* note 23, at 2; Zoom Interview 6, *supra* note 97, at 3 (believing it to be a design flaw to force attorneys to subsidize something they did not accept and believed would serve as competition); Zoom Interview 8, *supra* note 44, at 4 (stating the problem is attorneys and their unrealistic fear that LLLTs would take work away from them); Zoom Interview 9, *supra* note 24, at 3 (noting concerns from family lawyers that LLLTs would take their livelihood); Telephone Interview 16, *supra* note 24, at 3 (noting the LLLT appeared as a financial threat to family lawyers).

213. 2012 Order for APR 28, *supra* note 5, at 1-2 (Owens, J., dissenting).

214. WASH. GEN. R. 25(b)(2)(E).

215. 2012 Order for APR 28, *supra* note 5, at 11.

216. *Id.*

217. *Id.* at 2-3 (Owens, J., dissenting).

218. *See* Clark PowerPoint, *supra* note 13, at slides 2, 5, 13.

219. *See id.* at slide 8.

programs better able to provide access to justice than the mere thirty-eight active LLLTs at that time.[220] To others, the $1.4 million amounted to one percent of the WSBA's total budget and was not that much considering Washington had to form the program from scratch.[221] Justice Madsen, a major supporter of the program,[222] also noted that several years ago, the WSBA informed the Court that it takes approximately $1.4 million to investigate and prosecute ten cases of UPL, which was a driving force in "opening the practice of law" and "expand[ing] the number of people who can be trained . . . ."[223] While opponents felt eight years was plenty of time for the program to achieve self-sustainability and that asking for a total of sixteen years was violating the initial rule requiring it to achieve such status,[224] proponents pointed to the fact that LLLTs had only been in the profession for five years, which was not nearly enough time for the program to build the momentum necessary to be cost neutral, considering how other professions have developed over time.[225]

A member of the LLLT Board admitted it was a fair criticism from the WSBA that the program was taking lawyer license fees but stated that no one knew how much money the program would take and that a disclaimer was provided to the Court prior to the adoption of the program of such lingering uncertainty inherent

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220. *See generally supra* Section III.A. Recall that the Family and Elder Law Sections of the WSBA suggested to the Court that resources could be better spent on other programs and efforts rather than the LLLT program. *See supra* Section V.A. Justice Owens expressed similar concerns about reducing the budget for other programs. *See* 2012 Order for APR 28, *supra* note 5, at 1-2 (Owens, J., dissenting).

221. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 15, slide 4; Zoom Interview 2, *supra* note 4, at 4; Telephone Interview 5, *supra* note 4, at 6.

222. *See generally* Letter from J. Barbara Madsen, *supra* note 65.

223. May 12, 2020 Meeting, *supra* note 8, at 00:42:32-00:43:31. However, Justice Madsen admitted she did not know how many UPL cases were related to work LLLTs were already doing or work the LLLT Board was proposing LLLTs be allowed to do. *Id.* at 00:43:31-00:43:53. LLLT Board member Nancy Ivarinen responded suggesting there was at least some overlap. *See id.* at 00:43:53-00:44:30.

224. *See* Clark PowerPoint, *supra* note 13, at slide 13; *see also* Letter from Daniel D. Clark, Treasurer & Dist. 4 Governor, Washington State Bar Ass'n Bd. of Governors, to CJ. Stephens, Washington State Sup. Ct. 4 (May 12, 2020) (on file with the Author).

225. May 12, 2020 Meeting, *supra* note 8, at 02:02:42-02:03:34 (discussing nurse practitioners); *see also* Zoom Interview 2, *supra* note 4, at 3-4.

with any new program.[226] Perhaps this is why the Court never set a specific date for the program to be cost neutral.

2. Poor Guardian of Mandatory Fees

A member of the BOG felt the LLLT Board was a poor guardian of mandatory fees, and that it spent money with no sense of accountability.[227] It costs the WSBA "just shy of $10,000" to hold the LLLT bar exam regardless of whether there is one or one thousand test-takers, and it administers the exam twice a year.[228] A member of the BOG believed that with the dwindling number of test-takers, the LLLT Board might consider only having one exam per year.[229] Further, the LLLT Board researched the possibility of expanding LLLTs into practice areas such as bankruptcy and immigration law, which were areas of high need but governed by the federal courts, resulting in unfeasibility and the inevitable waste of time and money.[230] There were inquiries as to why the LLLT Board needed to meet monthly and take retreats that required travel and lodging expenses when it was only tasked with overseeing one program, as opposed to several, like the BOG.[231] To bring in more money from LLLTs themselves, the BOG wanted LLLTs to pay the same bar dues as lawyers, but the idea was rejected in favor of the argument that LLLTs are more limited than lawyers, so their dues should reflect such limitations.[232]

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226. Telephone Interview 5, *supra* note 4, at 9.

227. *See* Bridges, *supra* note 102, at 50; *see also* Zoom Interview 12, *supra* note 24, at 3, 4.

228. Bridges, *supra* note 102, at 48; Letter from Dan Bridges, *supra* note 144, at 4-5.

229. Zoom Interview 12, *supra* note 24, at 3.

230. *See id.* at 7; Letter from Dan Bridges, *supra* note 144, at 5; Telephone Interview 11, *supra* note 102, at 2; Zoom Interview 9, *supra* note 24, at 4 (discussing the immense need in immigration law, but how there would need to be a federal change to allow LLLTs to serve as advocates in that arena).

231. *See* Clark PowerPoint, *supra* note 13, at slide 14; *see also* Letter from Dan Bridges, *supra* note 144, at 4; Telephone Interview 11, *supra* note 102, at 3; Zoom Interview 12, *supra* note 24, at 6.

232. Telephone Interview 11, *supra* note 102, at 4 (believing LLLTs should pay the same dues as lawyers because they are not yet self-sufficient and their dues should reflect that goal); Zoom Interview 12, *supra* note 24, at 6 (believing LLLTs should pay the same dues as lawyers, because even though they are more limited, they still have access to the same resources that lawyers do). *See generally License Fees*, WASH. STATE BAR ASS'N,

On the other hand, the LLLT Board felt that it was the BOG that was in charge of overseeing the funding for the program and that it merely lived within its means.[233] The LLLT Board needed to meet more often because it was developing a new program which required a lot more work and time.[234] Notably, several months before the program's sunsetting, the LLLT Board did attempt to mitigate the program's financial burden on the WSBA.[235] The Board asked the BOG to allow the LLLT education to be run through WSBA technology, which it believed would be a cost benefit to the Bar.[236] In theory, this change would allow the cost of tuition to go directly to the program, rather than to the law school or community colleges acting as middle-men curriculum providers.[237] This revenue could supplement LLLT license fees, which had not yet allowed the program to attain self-sufficiency.[238] Yet, in January 2020, the BOG voted twelve-one against the proposal, listing antitrust reasons and the belief that it would present a financial loss to the WSBA, rather than a gain.[239]

Regardless, the true issue did not seem to be money per se, but rather, whether the program was producing the results necessary to justify the money already expended and continued expenditure. One member of the BOG stated that he did not necessarily care that the program ever achieved cost neutrality, as the goal is to serve the public.[240] So, if the program costs $50,000

[https://perma.cc/NXL8-Q8Q5] (Oct. 8, 2021) (listing the fees for attorneys, LLLTs, and other paraprofessionals in Washington).

233. Telephone Interview 5, *supra* note 4, at 6.

234. May 12, 2020 Meeting, *supra* note 8, at 01:56:45-01:57:20; Zoom Interview 1, *supra* note 22, at 2 (discussing the hard work that occurred during retreats); Telephone Interview 5, *supra* note 4, at 6 (discussing the time that went into creating the foundation of the program).

235. *See* May 12, 2020 Meeting, *supra* note 8, at 01:17:42-01:18:01.

236. *See id.* at 01:17:05-01:18:37, 01:54:30-01:54:54.

237. *Id.* at 01:17:53-01:18:36.

238. *See supra* Section V.A.1.

239. May 12, 2020 Meeting, *supra* note 8, at 01:18:00-01:18:15; *see also id.* at 1:22:53-01:23:41 (BOG Treasurer also noting a lack of financial information); *id.* at 01:21:10-01:21:23 (BOG President also noting "that the private market should be able to sustain [the education] and in fact the private market has been able to sustain [it]"); Zoom Interview 12, *supra* note 24, at 11 (noting also that the WSBA is in the business of licensing—not training—lawyers and LLLTs, so it was not within its mission or scope to do so).

240. Zoom Interview 12, *supra* note 24, at 13.

or $75,000 per year, that would be a great use of Bar dues, so long as the public is actually being served.[241] The question was whether the LLLT program was making or could make the difference the money intended it to even with an additional one million dollars and eight years.[242] Inevitably, a majority of the Court felt the program did not warrant the additional expenditure.[243]

B. Small Number of Licenses

1. Efforts to Promote the Program

One reason cited for the lacking number of LLLTs was that the program was not properly promoted. Several interviewees and others have suggested that increasing public awareness of the program and better marketing it as a potential career and resource would have aided in its success.[244] However, LLLT Board members were caught up in creating the foundation of the program, and more pertinently, they worried about promoting the LLLT as a potential resource to those in need of legal services when they did not have enough LLLTs to provide such services.[245] They wanted to get more LLLTs in the pipeline before increasing marketing.[246]

Of course, there were efforts to promote the program as a potential career. The Chair of the LLLT Board spoke on a paralegal podcast, at events, and at almost all of the Washington

241. *Id.*

242. *See generally* Clark PowerPoint, *supra* note 13 (expressing doubt that the additional expenditure and time would generate the interest necessary to allow the program to be self-sustaining and emphasizing the low numbers achieved up until this point).

243. *See* 2012 Order for APR 28, *supra* note 5, at 11.

244. Zoom Interview 2, *supra* note 4, at 5; Zoom Interview 3, *supra* note 23, at 2; Telephone Interview 5, *supra* note 4, at 6; Zoom Interview 6, *supra* note 97, at 3; Zoom Interview 7, *supra* note 138, at 2-3; Zoom Interview 9, *supra* note 24, at 2-3; Telephone Interview 11, *supra* note 102, at 2; Rowe, *supra* note 145 (noting that the public has "little idea" of what the LLLT is and "[p]ublic outreach is key"); Synth Surber, Comment to Washington State Bar Association, FACEBOOK (May 12, 2020), [https://perma.cc/6385-49RH] ("LLLT needs to be promoted more.").

245. Zoom Interview 2, *supra* note 4, at 5; Zoom Interview 3, *supra* note 23, at 2 (stating they were worried that because there were so few LLLTs, they would "bait and switch" those in need of legal services); Telephone Interview 5, *supra* note 4, at 6.

246. Zoom Interview 2, *supra* note 4, at 5; Telephone Interview 5, *supra* note 4, at 6.

community colleges with paralegal programs to tell paralegal candidates that if they did one more year of schooling for an additional $3,000 they could broaden their business horizons by becoming LLLTs.[247] The LLLT Board sent a representative to a statewide high school counselor meeting to let the counselors know about the LLLT as a potential career option to promote to students.[248] Further, discussed in the LLLT Board's March 2020 report to the Court were LLLT "rack cards," existing as "the first print materials created specifically for the public to raise awareness of LLLT services."[249] At that time, 500 cards had been distributed to locations such as libraries and courthouses.[250] Although there were approximately 275 people working toward the license at the time of sunsetting, there were still only thirty-eight active LLLTs,[251] so perhaps such educational efforts earlier on and to a greater extent would have resulted in more LLLTs providing services in Washington by the time of sunsetting.

2. LLLT Curriculum and Requirements

While the LLLT requirements were created to diminish quality concerns, some may have been so stringent that they deterred potential candidates.[252] First, to complete the 3,000 hours of substantive legal experience, it would take the candidate a minimum of eighteen months of working forty-hour weeks, and that is assuming all eight hours of every working day are approved

247. Telephone Interview 5, *supra* note 4, at 7-8; Zoom Interview 3, *supra* note 23, at 1 (stating that she discovered the LLLT program at an event where the Chair spoke, which solidified her decision to become a LLLT).

248. Telephone Interview 5, *supra* note 4, at 7.

249. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 4, at 5.

250. *Id.*

251. *See supra* notes 13-15 and accompanying text.

252. *See* Donaldson, *supra* note 94, at 33-34 (discussing how some interviewed non-paralegal LLLT candidates expressed "doubts and frustration about the ability to achieve [the LLLT] prerequisites before taking the exam[]" and noting that if these doubts were presented by people that inevitably opted to pursue the license, they could have deterred those otherwise interested in the license that opted not to pursue it).

by the supervising attorney as constituting "substantive" work.[253] Meaning, if the candidate showed up to work nine hours, but only five and a half were considered by the supervising attorney to be substantive, the timeline for reaching the 3,000-hour threshold would only be prolonged.[254] While attaining thorough experience is necessary to protect the public, this daunting time commitment, initially set by the LLLT Board in exercising "an abundance of caution[,]" actually served as an unnecessary deterrent to people interested in pursuing the license.[255] The LLLT Board believed the same benefit of thorough training could be experienced with 1,500 hours, and proposed this change in its March 2020 report to the Court.[256]

Significantly, when Arizona's task force proposed the Legal Paraprofessional ("LP") to the Arizona Supreme Court, it stated that it "deliberately did not pattern" its program on the LLLT, "in part because of [the] program's high experiential learning requirement."[257] Utah only requires its Licensed Paralegal Practitioner ("LPP") to complete 1,500 substantive hours,[258] and Oregon is considering the same for its Licensed Paraprofessional.[259] Arizona and Utah require some of the hours to be in the specific practice area in which the licensee plans to work,[260] while Washington made no such distinction.[261] Lessening the hours to 1,500 earlier on would have made the

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253. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 3, at 4; Zoom Interview 2, *supra* note 4, at 5 (defining "substantive hours" as work otherwise performed by an attorney).

254. This example was provided by Interviewee 2. Zoom Interview 2, *supra* note 4, at 5.

255. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 13.

256. *Id.*; Zoom Interview 1, *supra* note 22, at 8; Telephone Interview 5, *supra* note 4, at 4.

257. Moran, *Article on Arizona Nonlawyer Licensees*, *supra* note 9.

258. *Licensed Paralegal Practitioner*, *supra* note 9; MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 13.

259. Tashea, *supra* note 10.

260. ARIZ. CODE OF JUD. ADMIN. § 7-210(E)(3)(b)(9)(a)(iv) (2021) (requiring applicants entering with the education combination under (9)(a) to obtain one year of substantive experience under the supervision of an attorney in the area of practice sought); *Licensed Paralegal Practitioner*, *supra* note 9 (requiring 500 of the 1,500 hours be in family law when that is the area sought, or 100 of the hours be in debt collection or forcible entry and detainer if those are the areas sought).

261. *See* WASH. ADMISSION TO PRAC. R. 28(B)(7), app. at regul. 9; REPORT: THE FIRST THREE YEARS, *supra* note 79, at 15.

LLLT license more attainable, attracting more candidates. Further, having a number of those hours in family law, as suggested by existing LLLTs,[262] would have aligned with the quality initiative and even better prepared LLLTs for practice.

Second, while earning the LLLT license costs much less than the average student pays to go to law school, financial aid was not made available to LLLT candidates for the fifteen credits of family law, which has been estimated to cost approximately $3,750.[263] The LLLT Board hoped to be able to obtain financial aid for candidates throughout their LLLT education, but because it existed as a new program and because of the way it was offered, doing so was beyond the Board's control.[264] This deficiency certainly impacted the program's numbers, as it limited the license to those financially able to pay for the family law credits on the front end.[265]

Third, the program's waiver process only allowed paralegals to waive the required associate degree and forty-five core credits if they had ten or more years of experience.[266] Many of the first cohorts and a significant portion of existing LLLTs were paralegals that entered the program through the waiver process.[267] In its March 2020 report to the Court, the LLLT Board requested that the Court consider lessening the ten-year waiver requirement, noting Utah set its waiver requirement at seven years.[268] The Board hoped this change would bring in more paralegals

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262. *See supra* note 179 and accompanying text.

263. REPORT: THE FIRST THREE YEARS, *supra* note 79, at 25-26. *But see* Zoom Interview 2, *supra* note 4, at 6 (estimating the LLLT education to cost closer to $5,000).

264. REPORT: THE FIRST THREE YEARS, *supra* note 79, at 25; Zoom Interview 2, *supra* note 4, at 6.

265. Donaldson, *supra* note 94, at 34; THOMAS M. CLARKE, NAT'L CTR. FOR STATE CTS. & REBECCA L. SANDEFUR, AM. BAR FOUND., PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 8 (2017) [hereinafter PRELIMINARY EVALUATION OF THE LLLT PROGRAM] (citing a lack of financial aid as a potential deterrent).

266. *Limited-Time Waiver*, *supra* note 78.

267. *See* Donaldson, *supra* note 94, at 57 (noting twenty-nine of the thirty-six interviewed LLLTs and LLLT candidates previously or currently worked as paralegals); MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 3, at 4 (noting over fifty percent of existing LLLTs have ten or more years of substantive legal experience); Zoom Interview 9, *supra* note 24, at 2; Zoom Interview 8, *supra* note 44, at 2.

268. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 14.

interested in the program and aid in numbers.[269] Without the change, paralegals with less than ten years of experience would have to take on more of the required curriculum, a commitment that surely would not be as appealing to those with seven, eight, or nine years of experience.[270]

Fourth, it is important to consider that LLLT candidates must be willing to take a risk in pursuing a profession that is the first of its kind, as they lack guidance on whether it will be fruitful for them. The financial and time commitments only increase the risk candidates must be willing to take.[271] One LLLT stated that some people did not become LLLTs because they were waiting for changes to be made to the program, for its tweaks to be worked out, and to see how LLLTs fared in the workforce[272] (i.e., for the risk to subside). This wait-and-see approach was surely another culprit leading to less LLLTs than intended in the five years in which the program was producing licenses before the sunsetting.

3. Limited to Only One Practice Area

The LLLT Practice Rule, APR 28, never mentions family law.[273] It merely states what LLLTs are permitted to do in "approved practice areas."[274] Listed as the first responsibility of the LLLT Board is "[r]ecommending practice areas of law for LLLTs, subject to approval by the [] Court[.]"[275] From this language, there is no doubt that when the Court implemented the

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269. *See id.* at Bookmark 5, at 6; Zoom Interview 14 with Wash. State Bar Ass'n Exec. Leadership Team Member 1-2 (Jan. 8, 2021).

270. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 5, at 6 (describing the ten years as a barrier keeping experienced paralegals from entering through the waiver process).

271. Donaldson, *supra* note 94, at 33; Zoom Interview 4, *supra* note 23, at 3.

272. Zoom Interview 4, *supra* note 23, at 3; *see also* Zoom Interview 6, *supra* note 97, at 1 (stating that she became a LLLT after seeing the results of Washington's Civil Legal Needs Study but discussing how if she had read APR 28 more finely, she might have waited for them to make the program more robust before doing it).

273. Family law and "domestic relations" are mentioned in the Appendix of APR 28, which was adopted August 20, 2013, and amended several times. *See* WASH. ADMISSION TO PRAC. R. 28 app. at regul. 2(B). But family law is not mentioned in APR 28, as appended to the 2012 Court Order adopting it, nor is it in the current version of APR 28. *See generally* 2012 Order for APR 28, *supra* note 5, at app. 1-8; WASH. ADMISSION TO PRAC. R. 28.

274. WASH. ADMISSION TO PRAC. R. 28(A), (B)(4), (C)(2)(b)-(c).

275. WASH. ADMISSION TO PRAC. R. 28(C)(2)(a).

program, it anticipated that LLLTs might serve in areas beyond family law. Proposers asserted it was always the mission of the LLLT program to expand into other practice areas, and for existing LLLTs to be able to return and complete a few courses to get certified in another area if they wished.[276]

Accordingly, pursuant to APR 28, the LLLT Board made proposals to the Court to expand into areas such as consumer, money, and debt, low-level estates (which they called "family documents"), elder, unemployment, residential tenant and debt assistance, administrative law, and eviction and debt assistance.[277] The Board also discussed LLLTs helping with matters such as stepparent adoptions and adult guardianships for parents of adults with special needs.[278] Immigration and bankruptcy were also discussed with the Court, though they were unfeasible due to issues with federal preemption.[279] When deciding which practice areas to propose the LLLT Board asked: (1) Is there a need? (2) Can we properly educate, prepare, and regulate LLLTs in this area? (3) Can LLLTs make a living with this practice area (i.e., is it a good adjunct to a LLLT practice)?[280]

In considering need, the LLLT Board looked to the results of Washington's 2003 Civil Legal Needs Study, and later, a 2015 study regarding specifically low-income individuals.[281] It worked closely with subject area experts, volunteer lawyer programs, legal clinics, and legal aid groups to see who was

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276. Zoom Interview 1, *supra* note 22, at 4-5.

277. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmarks 11, 12 (proposing administrative law, residential tenant and debt defense assistance, and eviction and debt assistance); Zoom Interview 1, *supra* note 22, at 4 (discussing "family documents" and administrative law); Zoom Interview 2, *supra* note 4, at 2 (discussing consumer, money, and debt and unemployment law); Zoom Interview 9, *supra* note 24, at 4 (discussing elder law).

278. E-mail from Nancy Ivarinen, Ltd. License Legal Technician Bd. Member, to Lacy Ashworth, Ark. L. Rev. (Apr. 18, 2021, 1:42 CT) (on file with the Author) (Ivarinen's specialty on the LLLT Board was proposing new practice areas).

279. *Id.*; *see also* Zoom Interview 9, *supra* note 24, at 4 (discussing the immense need in immigration law and the federal roadblock); Telephone Interview 11, *supra* note 102, at 2 (discussing immigration and bankruptcy law); Zoom Interview 12, *supra* note 24, at 7 (discussing bankruptcy law).

280. Zoom Interview 1, *supra* note 22, at 4-5.

281. Telephone Interview 5, *supra* note 4, at 5; Zoom Interview 1, *supra* note 22, at 4. *See generally* CIVIL LEGAL NEEDS STUDY UPDATE COMM., WASH. STATE SUP. CT., 2015 WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE (2015).

coming through their doors.[282] For the most part, the Board had the support of these groups.[283] The Board was also approached by legal professionals that felt LLLTs would be able to aid in their area.[284] For instance, the Chief Administrative Law Judge asked the Board for LLLTs to aid in administrative law.[285] Despite proposals being made every year, the Court inevitably rejected expansion into new practice areas.[286]

Perhaps some of these practice areas were ill-conceived because they required the program to break the barrier of federal law.[287] Perhaps some were rejected because they involved non-forms-based practice areas, contrary to the structure of family law.[288] While administrative law seemed like a good fit and they had the head judge's support to back it up, this area was not pitched very long before the sunsetting.[289] Perhaps, in this instance, it was merely too late to sway the Court, considering it decided to sunset the program a few months later.[290]

Regardless of the reason for the rejected proposals, the program's existing only in family law surely impacted the number of licenses. Just as some would-be candidates were waiting for kinks to be worked out and to see whether LLLTs fared well in the legal profession, many were waiting to become LLLTs with the hope that the program would expand into other practice areas.[291] First, not everyone is interested in family law, and moreover, it would be difficult for a LLLT to run a solo practice in a rural area providing services in family law alone.[292]

282. Zoom Interview 2, *supra* note 4, at 2; Telephone Interview 5, *supra* note 4, at 5.

283. Zoom Interview 2, *supra* note 4, at 2.

284. Zoom Interview 1, *supra* note 22, at 4; Telephone Interview 5, *supra* note 4, at 5.

285. Zoom Interview 1, *supra* note 22, at 4; Telephone Interview 5, *supra* note 4, at 5; MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 5, at 5.

286. *See* Zoom Interview 1, *supra* note 22, at 3-4.

287. *See* Zoom Interview 12, *supra* note 24, at 7; Zoom Interview 9, *supra* note 24, at 4; Telephone Interview 11, *supra* note 102, at 2.

288. *See* Zoom Interview 9, *supra* note 24, at 4; Zoom Interview 12, *supra* note 24, at 2, 14; *see also* Zoom Interview 7, *supra* note 138, at 3 (believing the LLLT Board proposed practice areas too soon and too broadly).

289. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 11; Zoom Interview 1, *supra* note 22, at 7; Telephone Interview 16, *supra* note 24, at 3-4.

290. *See* Telephone Interview 16, *supra* note 24, at 4-5.

291. Zoom Interview 4, *supra* note 23, at 3.

292. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 5, at 5; Zoom Interview 2, *supra* note 4, at 2; Zoom Interview 4, *supra* note 23, at 3.

Therefore, to carry out the hope expressed by LLLT proposers to have LLLTs provide services in rural areas, they would arguably need to be multi-certified.[293] Consequently, limiting the program to family law had the ability to hinder the program not only in attaining licenses, but also in reaching its full intended potential in providing widespread access, including in rural communities.

For these reasons, some interviewees regretted that the program did not start with more than one practice area and commended Utah for starting its LPP program with three practice areas: family law, forcible entry and detainer, and debt collection.[294] In effecting its program on January 1, 2021, Arizona went even further, allowing its LPs "to practice in administrative law, family law, debt collection and landlord-tenant disputes, with limited jurisdiction in civil and criminal matters."[295] Oregon plans to start its Licensed Paraprofessional program with family and landlord-tenant law.[296] Other states should consider the impact expansion into multiple practice areas may have on a limited license program by looking to these other states as more data becomes available.

4. Low Exam Passage Rate

A month before the June 2020 sunsetting, the passage rate for the LLLT bar exam was calculated at 35.7%.[297] For context, Washington's J.D. bar exam passage rate was 57.3% in 2020 and 68.5% in July 2019.[298] Of course, if approximately two-thirds of

293. Telephone Interview 5, *supra* note 4, at 1; MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 2, at 2-3, Bookmark 5, at 5.

294. Zoom Interview 2, *supra* note 4, at 5-6; Zoom Interview 9, *supra* note 24, at 4; *Licensed Paralegal Practitioner*, *supra* note 9.

295. Moran, *Article on Arizona Nonlawyer Licensees*, *supra* note 9.

296. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 13.

297. Clark PowerPoint, *supra* note 13, at slide 7; *see also LLLT Exam Results*, WASH. STATE BAR ASS'N, [https://perma.cc/6CRM-K2RR] (Oct. 8, 2021) (providing the LLLT bar exam results for the last five exams).

298. *See Persons Taking and Passing the 2020 Bar Examination*, BAR EXAM'R, [https://perma.cc/44A2-ZJQQ] (last visited Oct. 14, 2021) (providing the February 2020 exam passage rate of 48%, the July 2020 exam passage rate of 86%, and the September 2020 exam passage rate of 38%—all percentages being inclusive of all test-takers, not just first-timers); *July 2019 Washington Bar Exam Pass Rates*, JD ADVISING, [https://perma.cc/G3T9-9DJF] (last visited Oct. 14, 2021).

LLLT candidates fail to pass the requisite examination, there are far less LLLTs then there would be if all those obtaining the educational requirements actually entered into the workforce. Therefore, the low exam passage rate certainly played a role in the limited number of licensed LLLTs.

The low exam passage rate raised questions for the LLLT Board and law professors teaching the curriculum. The LLLT Board wondered whether the exam was done appropriately, whether the curriculum was being presented well, and whether it should be prescreening candidates in some way to better assure their ultimate success.[299] Professors and LLLT candidates were provided a study guide to aid in preparing for both the professional responsibility and LLLT bar exams.[300] One professor stated that she ensured students learned the contents of the study guide and beyond, so to her, that so many LLLTs were not passing raised questions as to whether the information on the study guide aligned with what was actually being tested on the exam.[301] The professor did not know who was grading the bar exams, let alone whether they were being graded fairly.[302]

Initially, the LLLT Board received training on exam-writing to assist it in creating the LLLT bar exam.[303] Later, it had assistance from an organization called Ergometrics that worked in conjunction with the LLLT Board's exam committees, which were made up of LLLT Board members and other volunteer legal professionals.[304] The WSBA administers the exam and the grading is done by the exam committee.[305] The LLLT bar exam is long and supposedly created to be just as difficult as the J.D. bar exam, though only in the area of family law.[306] The exam

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299. Telephone Interview 5, *supra* note 4, at 6.

300. Zoom Interview 8, *supra* note 44, at 2-3; *LLLT Examination*, WASH. STATE BAR ASS'N, [https://perma.cc/EM4U-PQG7] (Oct. 8, 2021).

301. Zoom Interview 8, *supra* note 44, at 2-3

302. *Id.* at 3.

303. E-mail from Bobby Henry, Reg. Servs. Dep't, Washington State Bar Ass'n, to Lacy Ashworth, Ark. L. Rev. (Apr. 8, 2021, 12:33 CT) [hereinafter E-mail from Bobby Henry 2] (on file with the Author).

304. *Id.*; Zoom Interview 14, *supra* note 269, at 2.

305. E-mail from Bobby Henry 2, *supra* note 303; Zoom Interview 14, *supra* note 269, at 2.

306. *See* Zoom Interview 2, *supra* note 4, at 7; Telephone Interview 11, *supra* note 102, at 7; Zoom Interview 12, *supra* note 24, at 10.

consists of a 135-minute essay session, a 120-minute performance session, and a 90-minute multiple choice session.[307] One professor found it was more difficult for those with only an associate degree that lacked experience as a paralegal in family law to attain the license and pass the exams, as he believed their writing was not sufficient to do so.[308] He felt this shortcoming knocked out "a good third" of the possible candidates.[309]

In contrast, as noted by members of the BOG, upon taking the bar exam, law students typically have seven years of schooling to develop writing and thinking skills.[310] One BOG member questioned that if these tests are meant to gauge competence and two-thirds of candidates cannot pass after fulfilling their LLLT education, what does that say about the program?[311] While the low passage rate fairly breeds such skepticism, considering that LLLTs are taught more than the average law student in the field of family law,[312] it may be that a lack of competence is not the true culprit.

Unlike J.D. candidates who have their pick of numerous bar preparation materials and courses before taking the bar exam, LLLTs are afforded only a study guide listing general topics that are supposed to align with the contents of the exam.[313] While not discussed among interviewees, it should be noted that law professors teaching law students have studied for, taken, and passed the J.D. bar exam.[314] They are able to speak to law students regarding the process and tailor their course exams and

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307. *LLLT Examination*, *supra* note 300.

308. Zoom Interview 9, *supra* note 24, at 2, 5.

309. *Id.* at 5.

310. Telephone Interview 11, *supra* note 102, at 7; Zoom Interview 12, *supra* note 24, at 10.

311. Zoom Interview 12, *supra* note 24, at 10.

312. *See supra* text accompanying notes 179-81.

313. E-mail from Bobby Henry, Reg. Servs. Dep't, Washington State Bar Ass'n, to Lacy Ashworth, Ark. L. Rev. (Apr. 8, 2021, 10:52 CT) [hereinafter E-mail from Bobby Henry 1] (on file with the Author). One LLLT who passed the LLLT bar exam her first time stated she made her own bar preparatory materials, and she gave those materials to another LLLT. Zoom Interview 6, *supra* note 97, at 4. As she understands it, there are nine bootleg copies of her materials floating around, and she was happy to have been able to do that for others. *Id.*

314. *How Do I Become a Law School Professor?*, FINDLAW, [https://perma.cc/38UG-QZY6] (June 20, 2016).

teaching styles to better prepare students to take the bar.[315] Meanwhile, law professor teaching LLLTs lack familiarity with the LLLT bar exam grading process.[316] The only resource provided to professors to assist them in preparing LLLTs is the same study guide that is supposed to align with their exam—which the professor has neither taken nor seen.[317] Consequently, to better enable professors to prepare LLLTs for their bar exam, they should be made privy to its contents.

Further, while it may be unfeasible for the entity writing and grading the bar exam to provide LLLTs with more substantive bar preparation materials,[318] with so few candidates able to pass the exam, it is imperative to find an ethical way to do so.[319] And, as one professor felt subpar writing skills played a role in the low exam passage rate,[320] perhaps the LLLT program could have better incorporated opportunities for writing development. For this reason, paraprofessional bar preparatory materials should also include practice essays.

Lastly, if the LLLT bar exam is really as substantively difficult as the J.D. bar exam in the area of family law, perhaps such difficulty should be reconsidered. While it is important, in the interest of client protection, that LLLTs be competent and that their competency be tested, LLLTs are neither law school graduates nor are they permitted to do that which an attorney can do in family law after passing the bar.[321] Regardless of difficulty and these other factors, it may be necessary to take a second look to assure the actual LLLT bar exam aligns with both the curriculum being taught and the duties of LLLTs upon passing. If these elements do not align, LLLTs are handicapped, and their

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315. *See* Emmeline Paulette Reeves, *Teaching to the Test: The Incorporation of Elements of Bar Exam Preparation in Legal Education*, 64 J. LEGAL EDUC. 645, 646 (2015).

316. Zoom Interview 8, *supra* note 44, at 2-3.

317. *See id.*

318. E-mail from Bobby Henry 1, *supra* note 313 (noting "as the licensing agency and administrators and writers of the exam, it would not be appropriate for the LLLT Board or the WSBA to develop an exam prep program[]" and "bar exam prep is provided by the law schools or private companies for the same reason").

319. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 15, slide 9 (discussing the low exam passage rates and noting that a "licensing exam prep course[]" could increase exam passage rates).

320. Zoom Interview 9, *supra* note 24, at 5.

321. *See generally supra* Sections II.B., II.C.

bar exam passage rate is doomed from the start. If they do, considerations must be made for how to better assure LLLTs can prove competence in the examination room.

5. Lack of Support from the Legal Community

Another reason that may have led to the program's inability to attract LLLT candidates is that it was not supported by the legal community.[322] As previously discussed, from its inception, the LLLT program had its opponents.[323] At forums to educate the public on LLLTs, some lawyers would express their disapproval of the program, and some lawyers would not sign off on LLLT work and disrespected LLLTs once they entered the profession.[324] There was opposition to the program even before its implementation and expansion of scope.[325] Recall that after the WSBA voted to allow LLLTs to become members of the Family Law Section, some family law practitioners left to create their own group in which LLLTs were not allowed.[326] Exclusion and criticism further carried over onto forums such as listservs and Facebook.[327]

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322. *See* Zoom Interview 8, *supra* note 44, at 2 (in speculating why there were so few LLLTs, she discussed the tremendous push back from attorneys about the program, while noting that on the other end of the spectrum, some LLLTs were being hired by attorneys to work in their firms); Zoom Interview 9, *supra* note 24, at 3 (finding the constant resistance from the Family Law Section to be one of three political reasons leading to the program's downfall); Zoom Interview 6, *supra* note 97, at 3 (discussing how the adversarial dynamic with the WSBA was deeply threatening to people); Zoom Interview 7, *supra* note 138, at 2 (discussing how there were not enough people speaking positively about the program); Telephone Interview 5, *supra* note 4, at 5 (noting hostile audiences made up of lawyers against the program); *see also supra* Part III.

323. *See supra* note 25 and accompanying text. *See generally supra* Part III.

324. *See supra* notes 134-39 and accompanying text.

325. *See supra* note 124 and accompanying text. *See generally supra* Part III.

326. *See supra* note 126 and accompanying text.

327. Zoom Interview 9, *supra* note 24, at 3; Zoom Interview 4, *supra* note 23, at 2 (listservs made LLLTs out to be secretaries dabbling); Alisa Bagirova, Comment to Washington State Bar Association, FACEBOOK (May 12, 2020), [https://perma.cc/6385-49RH] (stating she is a family lawyer and her experience with LLLTs is that they charge as much as she does and "lots of times" they fill out forms incorrectly); *see also* White, *supra* note 191 (responding that she apologizes and does not know a single LLLT charging attorney rates, and most she knows do flat fee, reduced rates, and pro bono work, and also noting "[w]e all want to do our best for our clients and learn from any mistakes we make.").

When there are already so many inherent risks and reasons to be skeptical about investing time and money into a new profession, the fact that it was not well-received likely did not help attract candidates, especially those practicing the wait-and-see approach.[328] In the May 12, 2020 meeting between the LLLT Board and the Court, a member of the Board expressed her hope that "over time[,] once we have the support and once we have the vocal welcoming into the bar community . . . we're going to see more people wanting to take a chance and . . . join us."[329] Of course, this did not happen, as the program was sunsetted less than a month later.[330] Hopefully, other states can learn from the impact a lack of support from the legal community can have on the number of people willing to take on a new legal profession. Perhaps they will reap the benefits only hoped of in Washington.

VI. LESSONS LEARNED

It is easier and faster to edit than to create.[331]

Aside from providing background information on the access to justice gap and on the LLLT program itself, up until this point, this Comment has discussed the shortcomings of the program and those tasked with supporting and administering it, it has presented the concerns of the BOG, other members of the legal community, the Washington State Supreme Court, the LLLT Board, and others involved, and it has analyzed the overarching reasons provided by the Court for sunsetting the LLLT program. This section works to summarize some of the lessons alluded to above, and to provide and expound on some of the other suggestions offered by interviewees when asked what would help the next

328. *See supra* text accompanying note 272.

329. May 12, 2020 Meeting, *supra* note 8, at 01:53:50-01:54:09.

330. *See* Letter Notification of Sunsetting, *supra* note 11, at 1.

331. I give credit specifically to interviewees 13 and 14, who similarly stated this concept, and to many other interviewees who alluded to the same, which gave me the idea to start this section in this way. *See* Zoom Interview 14, *supra* note 269, at 2 (noting it is faster to edit than to draft and now other states can look at Washington's rule and edit rather than draft it); Zoom Interview 13, *supra* note 19, at 2-3; *see also* Kirsten Jordan, *Bag of Tricks: It's Easier to Edit Than Create*, PEOPLERESULTS (Oct. 12, 2012), [https://perma.cc/6RRL-6PXC].

state better succeed in developing a sustainable nonlawyer program.

A. Ensure Oversight and Objectivity

As previously discussed, the LLLT program became a political and controversial issue in Washington, as most firsts do.[332] Although the purpose of the LLLT was to take a "baby step" in the direction of providing better access to civil justice,[333] the program grew to mean more than that for Washington. Being in favor of the program seemed to translate into being in favor of other concepts, such as access to justice, or racial equality—an association that deterred some people from questioning the program.[334] Still, there were questions about the objectivity of the LLLT Board and its need for oversight.

Regarding objectivity, there was the concern that because a few members of the LLLT Board were being paid to teach LLLT courses, they had a financial interest in the program that could impact their decisions in overseeing the program.[335] Also, because Washington was the first, and much thought, work, and advocacy went into the initial proposal and development of the program, there existed the belief that such passionate advocacy, without outside oversight, impacted the LLLT Board's ability to be the "objective shepherd the program need[ed]."[336]

Further, there was uncertainty about whether the LLLT program was meant to have oversight beyond that of the Court and the LLLT Board. In the Court's 2012 Order adopting APR 28, it stated the LLLT Board would have the authority "to oversee the activities of and discipline certified [LLLT]s in the same way the [WSBA] does with respect to attorneys."[337] APR 28 stated the Bar was to "provide reasonably necessary administrative

332. *See supra* text accompanying note 24.
333. *See supra* text accompanying notes 166, 175.
334. Zoom Interview 12, *supra* note 24, at 12-13.
335. *Id.* at 12.
336. Letter from Dan Bridges, *supra* note 144, at 6.
337. 2012 Order for APR 28, *supra* note 5, at 3.

support for the LLLT Board[]"[338] but what that support should entail beyond funding the program seemed unclear. Because the program was adopted by Court Order, it was considered the Court's program.[339] While the Court did not mandate the WSBA not to question the program, the BOG was told by a ranking WSBA member that it was not to question it, and moreover, the BOG did not feel doing so would be fruitful.[340] It was not until several years into the program that the Court expressed to the BOG that it was not only allowed, but it was expected to conduct oversight of the LLLT program, because if the BOG was not overseeing the program, who was?[341] It was following this stamp of approval that the BOG began looking into what the provided money was able to procure in terms of licenses.[342]

Consequently, when the WSBA brought financial concerns and questions to the doorstep of the LLLT Board in 2019, they were viewed as a symbol of lost support.[343] The LLLT Board began looking for funding elsewhere and crafting a more concrete business plan to show how and when the program could achieve self-sufficiency and what, theoretically, would need to occur to

338. WASH. ADMISSION TO PRAC. R. 28(C)(4).

339. Telephone Interview 11, *supra* note 102, at 4; Zoom Interview 12, *supra* note 24, at 5.

340. Telephone Interview 11, *supra* note 102, at 4; Zoom Interview 12, *supra* note 24, at 5.

341. Zoom Interview 12, *supra* note 24, at 5 (believing the conversation had taken place two or three years ago [from this December 2020 interview] at the BOG's annual meeting with the Court in April, but not knowing for sure).

342. *Id.* at 6.

343. *See* Zoom Interview 2, *supra* note 4, at 3 (discussing how budget concerns were not brought to the LLLT Board until October 2019); Zoom Interview 1, *supra* note 22, at 5-6, 8 (also discussing how budget concerns were not brought to the LLLT Board until October, and noting that if the financial concerns were brought to the Board earlier, it would have looked for other funding earlier, and because it operates on a fiscal year, the Board believed it would have at least a year to address the budgetary concerns); *see also* Telephone Interview 16, *supra* note 24, at 2 (noting he encouraged the LLLT Board to create a plan for financial self-sufficiency because the WSBA had budgetary concerns and a group was against the program). *See generally* Letter from Daniel D. Clark, Treasurer, Washington State Bar Ass'n Bd. of Governors, to Steve Crossland, Chair, Ltd. License Legal Technician Bd. (Nov. 15, 2019) (on file with the Author) (discussing that the program was intended to be "cost revenue neutral to the WSBA budget[]" and that the program had not met this goal, and inviting Crossland to attend the BOG's Budget and Audit Committee meeting to discuss collaborative ways to solve the financial issue—noting the letter was "not meant to be considered an adversarial communication . . . .").

do so more quickly.[344] For instance, if the Court approved expansion into other practice areas, lessened the hours of experience from 3,000 to 1,500, and lessened the years required for paralegals to enter through the waiver process—all of which are changes to the program for which this Comment advocates.[345]

These proposals and the developing business plan were submitted to the Court in the LLLT Board's March 2020 report, in which it also noted how "[t]he recent difficulties in determining points of authority between the BOG and LLLT Board hinder our ability to work efficiently."[346] While many of the changes proposed by the LLLT Board would have helped in increasing numbers, attaining self-sufficiency was still nine years and nearly one million dollars away, and even this 2029 projection was assuming the Court approved the Board's proposals and that the Board's assumptions were correct.[347] And, because the Board's plan to fundraise in order to attain more substantial outside funding was so new, the WSBA's obligation to subsidize the program appeared indefinite.[348] The proposal and plan, though thorough and outwardly promising, seemed to come too late for Washington, as the Court decided to sunset the program only months after being presented with the detailed plan.[349] Similarly,

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344. *See* MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 6, at 8 (stating "[t]he LLLT Board is exploring fundraising as a way to help offset WSBA's costs for administering the program . . . ."); Zoom Interview 14, *supra* note 269, at 1; *see also* Letter from Steve Crossland, Chair, Ltd. License Legal Technician Bd., to Washington State Bar Found. Bd. of Trs. 1 (Mar. 13, 2020) (on file with the Author) (requesting that the Foundation "create a LLLT fund to enable the LLLT Board to seek contributions from potential donors and grantors and securely manage funds obtained.").

345. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 6, at 8; Zoom Interview 14, *supra* note 269, at 1-2; *see also infra* notes 355-61 and accompanying text.

346. MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 5, at 7.

347. Clark PowerPoint, *supra* note 13, at slide 8; *see also* May 12, 2020 Meeting, *supra* note 8, at 00:55:40-00:56:42 (noting that the LLLT Board provided data backing its assumptions to show their likelihood).

348. *See generally* Letter from Kristina Larry, President, Washington St. Bar Found., to Steve Crossland, Chair, Ltd. License Legal Technician Bd. (Apr. 10, 2020) (on file with the Author) (responding to and denying the LLLT Board's request to create a LLLT fund).

349. *See* Letter from Stephen R. Crossland, Chair, Ltd. License Legal Technician Bd., to JJ. of the Washington Sup. Ct. 2 (April 22, 2020) (on file with the Author); MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85, at Bookmark 15; Letter Notification of Sunsetting, *supra* note 11, at 1.

while budget concerns and calls for collaboration were brought to the LLLT Board in late 2019,[350] they too seemed to come too late to be truly fruitful for the program, as there was uncertainty about oversight and an underlying opposition between the program's key entities that had been building up since it was initially proposed.[351]

When administering any new program, it is important to have passion, but equally important is the ability to have free-flowing questions and ideas, objectivity, and oversight. Such principles elicit trust in the decisions and decisionmakers and assure the program is reaching its full potential for the purpose for which it was designed. Plausibly, if the LLLT Board, the WSBA, and the BOG recognized or had been better appraised of the BOG's intended role in conducting oversight of the program from its initial implementation, the administrative minds of the BOG and the passionate minds of the LLLT Board could have collaborated sooner, more effectively, more objectively, and potentially with less hostility, to foster better reactions toward the program and potentially its financial sustainability, in order to carry out the intended purpose of providing more people with access to justice.

Perhaps then, the Court's confidence, as expressed in its 2012 Order, "that the WSBA and the Practice of Law Board, in consultation with this Court, w[ould] be able to develop a fee-based system that ensure[d] that the licensing and ongoing regulation of [LLLT]s w[ould] be cost-neutral to the WSBA" would not have been so ill-founded.[352] Of course, for this collaboration to be fruitful, the BOG would have had to better support the program at its inception, because as previously mentioned, if the decision to approve the program was in the hands of the BOG in 2012, it would not have been implemented.[353] Therefore, it remains paramount for the Court to have the power of final approval.

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350. *See supra* note 343 and accompanying text; *see also* Letter from Daniel D. Clark, *supra* note 224, at 2 (discussing his "attempt[] to work in good faith collaboration with the LLLT Board.").

351. *See generally supra* notes 146-150 accompanying text.

352. *See* 2012 Order for APR 28, *supra* note 5, at 11.

353. *See supra* note 148 and accompanying text.

B. Change the Program

There were many aspects of the program itself that hindered it from reaching its full potential in numbers. Having lesser numbers surely impacted the perception of the cost of the program, and in conjunction, the amount of support coming from the WSBA.[354] To better assure a nonlawyer program achieves greater numbers, support, and sustainability—all of which are greatly intertwined—other states should consider the following program changes. Note first, while many of these changes were considered or proposed by the LLLT Board or other observers throughout the life of the program, in learning from Washington, these changes should be employed upon initial implementation:

(1) Promote the program vigorously and immediately—as a career and as a resource to potential clients;[355]

(2) Set the experiential hours at a number that fosters sufficient training and competency, while still ensuring feasibility. To allow for this balance, take a page out of Utah and Arizona's prequel and require at least some of the hours to be in the area the nonlawyer will work upon entering the legal profession.[356] As the nurse practitioner and doctor relationship has shown, quality concerns will always be a point of contention between professional and paraprofessional.[357] This change can be further used as a sword in fighting against quality concerns;

(3) Again, in learning from changes made by Washington's successors, start the program with multiple practice areas to attract candidates interested or experienced in different areas of law, and to better allow solo practitioners to stay financially afloat while charging reasonable prices, recognizing overhead may be similar to attorneys.[358] This is especially true in attempting to fulfill the goal of offering limited services in rural areas, where the ability to provide legal services in multiple areas may be the only way for a rural nonlawyer to maintain a solo practice;[359]

354. *See generally supra* Section V.A.
355. *See supra* Section V.B.1.
356. *See supra* note 260 and accompanying text.
357. *See supra* notes 107-08 and accompanying text.
358. *See supra* notes 292-96 and accompanying text.
359. *See supra* notes 392-93 and accompanying text.

(4) Find a way to provide candidates with resources to assist them in passing their competency exams, including essay-writing resources (as are provided to law students).[360] Also, assure the classroom curriculum aligns both with the exam and the actual duties of the nonlawyer upon entering the legal profession.

(5) Get rid of as much risk as possible. Recognizing starting a new profession is risky in and of itself, find a way to ensure financial aid is available through the curriculum provider.[361]

The LLLT Board cannot be considered negligent for not incorporating these addendums when crafting the rule in 2005, or when the Court adopted it in 2012, just as it could not have foreseen that such alterations would be helpful when creating the program from scratch. Importantly, upon realizing that the program could be aided by certain changes, the LLLT Board made various proposals, many of which were rejected.[362] This reality brings me to the next point.

C. Work to Stick to the Original Idea, but Forewarn Change

The legal community either turned against or became even less in favor of the LLLT program when the LLLT Board, through proposals for expansion of scope and expansion into other practice areas, worked to develop the program into something it initially was not—succeeding in the former expansion only by a five-four majority vote.[363] Note this shift in support. The BOG swallowed the idea of the program upon its implementation only after being promised that LLLTs would not enter the courtroom.[364] It retracted such support once the LLLT became something more.[365] Seven of nine members of the Court approved the program when the scope of the LLLT was more limited, but when the Court was voting to allow LLLTs to provide aid to clients during negotiations, depositions, and in the

360. *See supra* notes 313-20 and accompanying text.

361. *See* Donaldson, *supra* note 94, at 67 (similarly discussing how developing more scholarship opportunities could attract more candidates, especially those from "lower income backgrounds").

362. *See generally supra* Section V.B.3.

363. *See supra* notes 99, 102-06, 156 and accompanying text.

364. *See supra* notes 156-57 and accompanying text.

365. *See supra* notes 100-06 and accompanying text.

courtroom, that vote changed, only earning the support of five members.[366]

While radical change is certainly the only way to fully close the access to justice gap, states must consider what is feasible, because as many interviewees noted, the legal profession is resistant to change.[367] Changing the program from its original form surely played a role in its lack of support, and its lack of support surely played a role in its inevitable sunsetting.[368] While Washington is unique because it was the first to permit nonlawyers to practice law, other states have the benefit of already having the concept of nontraditional programs lingering in the legal profession, as other states have adopted or considered similar programs and the ABA has publicly called for innovation.[369] Still, as the legal profession remains self-regulating,[370] other states must consider the potential impact that the lack of support from attorneys, who are tasked with approving, implementing, administering, and funding these programs, can have. On the other hand, states must balance the need to be able to change an implemented program when it is not working or producing the intended results, as the LLLT Board and the majority of the Court did, at least in finding LLLTs could be more useful to clients with an expansion in scope.[371]

Therefore, while Washington understandably could not and arguably should not have had to stick to its program's original idea, or guarantee that it would remain static when creating it from scratch, other states can learn from the shift in support that

366. *See supra* notes 99-102 and accompanying text.

367. Zoom Interview 8, *supra* note 44, at 3-4 (noting that due to the nature of the job, attorneys are always looking for something to oppose); Zoom Interview 9, *supra* note 24, at 6 (stating it all comes down to the facts that courts develop slowly, the law develops slowly, and lawyers do not like large-scale change, they like incremental change, so future states considering similar programs have to look at it as "incremental change"); Zoom Interview 4, *supra* note 23, at 2-3 (believing the Court's sunsetting the program sent the message that it will "do anything to maintain the status quo"); Zoom Interview 3, *supra* note 23, at 3 (stating that for a program like this to succeed, the legal profession would need to adapt as the medical profession has and to look at issues in a new way).

368. *See generally supra* Sections II.C., III.C., V.B.5.

369. *See supra* notes 5, 16 and accompanying text.

370. Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1081 (2005).

371. *See supra* notes 96-101 and accompanying text.

occurred in Washington upon changes to the program and try to better determine from the outset what their nonlawyer paraprofessional will do. Then, they can promote the program in a uniform way and in a way that assures everyone knows what the program is and that it *is* subject to change for the purpose of meeting the overarching goal of providing more people with access to legal services.[372] The legal profession must also take responsibility in understanding that programs need to be changed to better achieve their intended purpose. However, this transparency and forewarning may at least allow the legal profession to prepare for such changes, whether or not they agree with them.

D. Monitor Through Data Collection

Another apparent point of disconnect between the LLLT Board and the BOG was whether and how LLLTs could collect data about their services. As discussed in Part IV, the BOG did not believe LLLT and client testimonials alone sufficed to show that LLLTs were actually increasing access to justice.[373] While LLLTs and LLLT Board members expressed confidentiality concerns,[374] a member of the BOG believed there to be several non-privileged statistics that could have been provided to justify the program: number of divorces, success rates, case counts, outcomes, prices, and other information if LLLTs asked their clients to waive confidentiality.[375] A member of the LLLT Board stated there were antitrust problems with its asking LLLTs for certain information, including how much they make.[376] The only information that it has is the limited information some LLLTs have voluntarily provided.[377] An interviewee felt that because there was information that LLLTs could have provided without

372. Doing this would hopefully dispel the "bait and switch" and "smoke and mirrors" concerns. *See supra* note 105 and accompanying text.

373. *See supra* notes 195-97 and accompanying text.

374. *See supra* note 196 and accompanying text.

375. Zoom Interview 12, *supra* note 24, at 8-9.

376. Zoom Interview 1, *supra* note 22, at 8-9.

377. *Id.* at 9.

issues of confidentiality, that LLLTs were not providing such data leads one to consider why.[378]

Relevantly, in the 2020 ABA resolution encouraging innovative thinking to aid in the access to justice crisis, the ABA called for "the collection and assessment of data regarding regulatory innovations, both before and after the[ir] adoption . . . to ensure that changes are data driven and in the interests of clients and the public."[379] The ABA resolution further stated:

> The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public's growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, best provide continuing and necessary protections for those in need of legal services, and best serve the interest of clients and the public.[380]

As expressed by the ABA, the ability to use data to measure the success of a program in providing access in a way that protects the public is imperative.[381] Of course, it cannot go understated that Washington was the first, and that it created its program long before the ABA encouraged innovation and data collection.[382] Still, while BOG and LLLT Board members disagree about what information is feasible to attain when neither the 2012 Court Order nor APR 28 require LLLTs to report such data, they both seem to agree that future states should come up with some kind of system at the outset of the program that outlines how administrators plan to gauge their program's success.[383] To better appease both sides of the equation, this should be done in a way

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378. Zoom Interview 12, *supra* note 24, at 8.

379. RESOLUTION 115, *supra* note 16, at 3.

380. *Id.*

381. *Id.*

382. *See* 2012 Order for APR 28, *supra* note 5, at 12 (drafted in 2012); RESOLUTION 115, *supra* note 16, at 4 (drafted in 2020).

383. *See* Zoom Interview 4, *supra* note 23, at 4; Telephone Interview 11, *supra* note 102, at 6; Zoom Interview 12, *supra* note 24, at 8-9.

that avoids confidentiality and antitrust concerns, but results in more than voluntary information from willing LLLTs.[384]

Notably, while the LLLT program lacked a specific system for measuring success, there have been some studies of the LLLT program by outside entities and within the program itself.[385] In fact, the National Center for State Courts ("NCSC") is currently conducting a study of the LLLT program.[386] While the study was planned prior to the program's sunsetting, the NCSC still plans to follow through with it, and LLLT Board members hope the results, coming from an outside entity with the goal of improving the court system, will help establish the program as viable, though they wish the Court would have waited for such impartial results prior to sunsetting.[387] While there are limitations to the information the NCSC may obtain due to the state system and the need to obtain the consent of LLLTs and their clients, the NCSC is getting input from judges, lawyers, LLLTs, and clients to determine the impact and viability of the program.[388] Other states should consider the results upon completion.

E. Develop Clear and Mutual Expectations

384. The ABA resolution cited Utah's Unlocking Legal Regulation project as one example of an effort to collect and analyze data: "Among other initiatives, the project will '[a]ssess and support pilot projects for risk-based regulation in Utah and other states, including identifying metrics and conducting empirical research to evaluate outcomes.'" RESOLUTION 115, *supra* note 16, at 3 (citing *Unlocking Legal Regulation*, UNIV. DENVER INST. FOR ADVANCEMENT AM. LEGAL SYS., [https://perma.cc/YMM5-7U59] (last visited Oct. 14, 2021)). While providing data may seem intrusive and yet another burden that the paraprofessional must take on in addition to all those that come with being a part of a new profession, at least until the program proves itself, such data collection is essential to assure the program is working as intended. If the data results are positive, then this requirement would help prove the program as viable sooner and may increase support from those tasked with funding the program, even if the program is not self-sustaining as quickly as anticipated.

385. *See generally* PRELIMINARY EVALUATION OF THE LLLT PROGRAM, *supra* note 265; REPORT: THE FIRST THREE YEARS, *supra* note 79; MARCH 2020 REPORT OF THE LLLT PROGRAM, *supra* note 85; Donaldson, *supra* note 94.

386. Telephone Interview 5, *supra* note 4, at 8; Zoom Interview 1, *supra* note 22, at 8; Zoom Interview 2, *supra* note 4, at 7.

387. *See* Letter in Response to LLLT Sunsetting, *supra* note 10, at 1; Telephone Interview 5, *supra* note 4, at 8; Zoom Interview 1, *supra* note 22, at 8; Zoom Interview 2, *supra* note 4, at 7.

388. Zoom Interview 1, *supra* note 22, at 8-9; Telephone Interview 5, *supra* note 4, at 8.

Though it comes last, this section presents, in my opinion, the true crux of the problem with Washington's LLLT program. Perhaps the program's greatest issue was that no one seemed to be on the same page—about who, where, how, in what practice area, for what purpose, and under what oversight the LLLT would serve. The program was required to be self-supporting in a reasonable period of time, but proponents, opponents, and even members of the Court seemed to be on different pages as to what constituted reasonable.[389] Until attaining such status, the program was to be subsidized by the WSBA, but there was disconnect as to how much money the program should be expending in the meantime.[390] A member of the LLLT Board believed that if people could grasp just how much it would cost to implement this type of program, that would be one less criticism, because finances would not come as a shock.[391] Now, administrators can look at Washington and see that it cost them $1.4 million to develop and administer the program from scratch in an eight-year period and they can use these figures in determining projected funds and time allocations for future programs *from their beginning*.[392]

There were also different notions about how long the program was actually producing licenses and able to generate funds. The BOG pointed to the fact that there were only thirty-eight active LLLTs produced in an eight-year period,[393] while the LLLT Board and proponents stressed the considerable amount of preparation that went into the first three years of the program and

389. *See supra* Section V.A.I.; *see also supra* notes 47-48, 158 and accompanying text; May 12, 2020 Meeting, *supra* note 8, at 01:56:03-01:56:23 (discussing why the LLLT Board believed their time estimations for achieving cost neutrality to be reasonable).

390. *See* discussion *supra* Section V.A.

391. Telephone Interview 5, *supra* note 4, at 9.

392. *Id.*; *see also* Zoom Interview 13, *supra* note 19, at 3 (noting that different states spend differently, so other states should look at the details of the costs within Washington, rather than just the number, but finding that the money and time spent in Washington can give other states a sense of the scope).

393. *See* Clark PowerPoint, *supra* note 13, at slides 7, 9, 13; *see also* Letter from Dan Bridges, *supra* note 144, at 1 (this letter was written almost a year earlier, so the numbers are different, but it illustrates the same point, mentioning "[f]or $2 million dollars [sic] spent over 7 years, there are only 35 actively licensed LLLTs . . . .").

that the first LLLT did not enter the profession until mid-2015.[394] Further, recall that the first cohort and many of the first LLLTs were long-time paralegals that entered the program through the waiver process, rather than by undergoing the usual, longer course of completion.[395] As the program continued, more and more candidates were non-paralegals who had to complete the entirety of the program's requirements, which is estimated to take a minimum of three and half years, but can take much longer for a candidate unable to attend full-time.[396] Members of the LLLT Board believed the Court and opponents misunderstood the program's timeline for moving candidates through the pipeline.[397] Significantly, saying thirty-eight active LLLTs in eight years[398] versus thirty-eight active LLLTs and 275 people in the pipeline in five years[399] surely has a different ring to it.

Importantly, for any future nonlawyer program to survive, all key entities must support the program. One of the reasons support was lacking in Washington was because there were so many differing views on what the program would and should be. In summary, as one insightful interviewee stated, we all believe in access to justice, we just have different ideas about how to get there, so if people can go into this type of program with shared and realistic expectations, they are more likely to be successful.[400]

CONCLUSION

394. May 12, 2020 Meeting, *supra* note 8, at 01:52:54-01:53:17; Zoom Interview 2, *supra* note 4, at 3-4; Telephone Interview 5, *supra* note 4, at 6; Zoom Interview 13, *supra* note 19, at 2.

395. *See supra* notes 266-67 and accompanying text; May 12, 2020 Meeting, *supra* note 8, at 01:52:24.

396. Letter in Response to LLLT Sunsetting, *supra* note 10, at 2 (noting that it can take much longer for a candidate with family or financial demands, or if he or she struggles in finding work experience); *see also* Zoom Interview 4, *supra* note 23, at 2-3 (noting it takes many candidates a while to become a LLLT because they are older, on their second profession, and with kids and other responsibilities).

397. *See* Letter in Response to LLLT Sunsetting, *supra* note 10, at 3, 5; May 12, 2020 Meeting, *supra* note 8, at 01:52:24; Zoom Interview 4, *supra* note 23, at 2; Zoom Interview 1, *supra* note 22, at 6; Zoom Interview 2, *supra* note 4, at 3-4.

398. *See* Clark PowerPoint, *supra* note 13, at slides 5-7.

399. *See* Letter in Response to LLLT Sunsetting, *supra* note 10 at 4, 5; *see also supra* notes 92, 251 and accompanying text.

400. Zoom Interview 13, *supra* note 19, at 3-4.

Contrary to society's goal, the access to justice gap is widening. Low-income individuals face a vast majority of their civil legal needs alone, and the number of unmet civil legal needs for moderate-income individuals continues to grow.[401] As voiced by Justice Sonia Sotomayor, "[w]e educated, privileged lawyers have a professional and moral duty to represent the underrepresented in our society, to ensure that justice exists for all, both legal and economic justice."[402] Yet, despite its best intentions, the legal profession, in its traditional sense, is failing to fulfil this important duty.[403] When the alternative to being unable to afford an attorney is no representation at all, we must consider ways to meet those in need in the middle.[404] It is time for the legal profession to focus on the bigger picture; to open our minds to change; to continue to consider innovative solutions; to give proposed solutions the patience, time, and support they deserve; and to take whatever lessons we can from those inevitably deemed to come up short.

With the help of individuals uniquely involved, this Comment analyzed the successes and shortcomings of Washington's innovative LLLT program from its conception to its ultimate sunsetting.[405] In doing so, it further emphasized some key lessons other states should consider moving forward in establishing and developing similar nonlawyer paraprofessional programs.[406] Many interviewees hope, in one way or another, other states will take whatever lessons and work product they can from Washington and continue to innovate.[407] Perhaps then, the program can return to Washington improved by its successors—

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401. *See supra* notes 32-34 and accompanying text.

402. Randy James, *Sonia Sotomayor: Obama's Supreme Court Nominee*, TIME (May 27, 2009), [https://perma.cc/VHL7-F9KU] (quote stated in 2002).

403. *See supra* notes 1-4 and accompanying text. *See generally supra* Part I.

404. *See supra* Part I.

405. *See supra* Parts IV, V.

406. *See supra* Part VI.

407. *See* Zoom Interview 3, *supra* note 23, at 3; Zoom Interview 4, *supra* note 23, at 4; Telephone Interview 5, *supra* note 4, at 10; Zoom Interview 13, *supra* note 19, at 2-3; Zoom Interview 14, *supra* note 269, at 2; Zoom Interview 15 with Wash. State Bar Ass'n Bd. of Governors Member 1 (Jan. 8, 2021) (stating he is sure a program like this can work, believing fresh perspectives and new outlooks will help and noting that Utah seems to be doing well).

to better achieve the intended purpose of providing more people with access to justice.[408]

408. *See* Zoom Interview 3, *supra* note 23, at 3; Zoom Interview 13, *supra* note 19, at 2-3; Telephone Interview 16, *supra* note 24, at 5 (still believing the LLLT will return to Washington in the next decade).

REASSOCIATING STUDENT RIGHTS: GIVING IT THE OLE COLLEGE TRY

Tyler Mlakar*

I. INTRODUCTION

At the beginning of 2020, the World Health Organization ("WHO") declared Coronavirus disease 2019 ("COVID-19") a "public health emergency of international concern."[1] Governments around the world began instituting citywide and even nationwide "lockdowns."[2] In the United States, the approach was far more splintered. While there was no nationwide lockdown, states across the country instituted varying measures ranging from "shelter-in-place" and "stay at home" orders, to school closures, limits on the size of public gatherings, "mask mandates," and even some states allowing restaurants and bars to

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1. *WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), [https://perma.cc/A2WW-MCQZ].

2. *See, e.g.*, *Coronavirus: India Enters 'Total Lockdown' After Spike in Cases*, BBC NEWS (Mar. 25, 2020), [https://perma.cc/QDS6-MTDN]; Michael Levenson, *Scale of China's Wuhan Shutdown Is Believed to Be Without Precedent*, N.Y. TIMES (Jan. 22, 2020), [https://perma.cc/42W6-R32W]; *Emmanuel Macron annonce l'interdiction des déplacements non essentiels dès mardi midi*, MAG. MARIANNE (Mar. 17, 2020, 8:10 AM), [https://perma.cc/PM2V-X3XU]; Eric Sylvers & Giovanni Legorano, *As Virus Spreads, Italy Locks Down Country*, WALL ST. J., [https://perma.cc/HA3T-FWD2] (Mar. 9, 2020, 6:42 PM); Ndanki Kahiurika, *Countdown to Lockdown*, NAMIBIAN (Mar. 27, 2020), [https://perma.cc/S2EJ-NRL4]; Calla Wahlquist, *Australia's Coronavirus Lockdown—The First 50 Days*, GUARDIAN (May 1, 2020, 4:00 PM), [https://perma.cc/PGK9-255K].

remain open.[3] Across the United States, these measures have resulted in the most pervasive governmental regulation of American citizens' private affairs since World War II.[4]

During the early stages of COVID-19, universities nationwide frantically closed their doors to students and scrambled to adopt online teaching curricula.[5] As COVID-19 restrictions began to relax across the country over the summer months, many universities decided to reopen their campuses for the fall 2020 semester.[6] To the seeming astonishment of university administrators, upon returning to campus, young, impressionable students who had not seen their friends in months decided they did not want to sit in their dorm rooms all day every day.[7] As COVID-19 cases surged on campus, universities adopted policies—often incorporated into their disciplinary codes—designed to curb the spread of the virus, including, among other things: mask mandates, required completion of "daily

3. James G. Hodge, Jr., *COVID-19 Emergency Legal Preparedness Primer*, NETWORK FOR PUB. HEALTH L. (Mar. 24, 2020), [https://perma.cc/LF5X-EWBE]; Lawrence Gostin & Sarah Wetter, *Why There's No National Lockdown*, ATLANTIC (Mar. 31, 2020), [https://perma.cc/AZ6U-GVM3]; *Gov. Northam Announces Statewide Mask Mandate to Begin Friday*, NBC12 NEWSROOM, [https://perma.cc/FB72-D9AP] (May 27, 2020, 6:37 AM); Josh Shannon, *Face Mask Mandate Takes Effect in Delaware*, NEWARK POST (Apr. 29, 2020), [https://perma.cc/6KJN-3N6K].

4. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (upholding the authority of the executive to force American citizens of Japanese descent to evacuate their homes and relocate to government internment camps).

5. Mike Baker et al., *First U.S. Colleges Close Classrooms as Virus Spreads. More Could Follow*, N.Y. TIMES, [https://perma.cc/9DMN-D45W] (Mar. 11, 2020); Abigail Johnson Hess, *How Coronavirus Dramatically Changed College for Over 14 Million Students*, CNBC (Mar. 26, 2020, 2:07 PM), [https://perma.cc/S58Y-5JMR] (stating that as of March 26, 2020, more than 1,100 colleges and universities had closed their doors to students as a result of COVID-19).

6. *See, e.g.*, Anemona Hartocollis, *Fever Checks and Quarantine Dorms: The Fall College Experience?*, N.Y. TIMES, [https://perma.cc/JZ4V-F8P8] (Aug. 18, 2020); Elinor Aspegren & Samuel Zwickel, *In Person, Online Classes or a Mix: Colleges' Fall 2020 Coronavirus Reopening Plans, Detailed*, USA TODAY (June 22, 2020, 5:36 PM), [https://perma.cc/7N27-7ZC8]; Jacquelyn Elias et al., *Here's Our List of Colleges' Reopening Models*, CHRON. HIGHER EDUC., [https://perma.cc/9WBA-SJKL] (Oct. 1, 2020, 2:04 PM) (providing the fall 2020 reopening plans of nearly 3,000 colleges and universities).

7. *See, e.g.*, Scottie Andrew, *The Psychology Behind Why Some College Students Break Covid-19 Rules*, CNN, [https://perma.cc/SSB4-5KTY] (Sept. 9, 2020, 12:37 PM); *More Suspensions Possible as NYU Investigates Massive Party in Washington Square Park*, NBC N.Y., [https://perma.cc/AFX2-34WC] (Sept. 7, 2020, 12:43 PM); Natasha Singer, *College Quarantine Breakdowns Leave Some at Risk,* N.Y. TIMES, [https://perma.cc/RC3H-NNDD] (Sept. 16, 2020) (detailing how many students refused to remain in quarantine).

health checks," prohibitions of in-person registered student organization ("RSO") meetings, limits on the size of student gatherings on and off campus, reporting measures for student violations, virus tracking apps, etc.[8]

Unfortunately, for many students, it did not take long for them to discover that these policies were not idle threats; disciplinary action was swift and relentless, often making national headlines.[9] The obvious question for many students and their

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8. *See, e.g.*, E-mail from Charles F. Robinson, Interim Provost, Univ. of Ark., to Univ. of Ark. Cmty. (Sept. 4, 2020, 12:50 PM CST) [hereinafter Appendix A] (appended below); UNIV. OF NOTRE DAME, COVID-19 POLICY (2021), [https://perma.cc/S39U-V6GP]; *COVID-19: Essential Information*, MIDDLEBURY COLL., [https://perma.cc/C92L-FJVS] (last visited Oct. 19, 2021); *UC Berkeley Keep Berkeley Healthy Pledge*, UC BERKELEY, [https://perma.cc/WV7B-LBP8] (last visited Oct. 19, 2021); Rebecca Blank, *Chancellor Directs 14-Day Student Restrictions for Health, Safety*, UNIV. OF WIS.-MADISON (Sept. 7, 2020), [https://perma.cc/W5A4-5Z7Y]; *Policy on Health Requirements Related to COVID-19 Pandemic*, NYU (Aug. 27, 2021), [https://perma.cc/6KLD-3BEZ]; *Protect Texas Together*, UNIV. OF TEX., [https://perma.cc/M28K-W8DQ] (last visited Oct. 19, 2021); *Healthy Together Community Commitment Violations*, WM. & MARY, [https://perma.cc/49KQ-V62L] (last visited Oct. 19, 2021). Indeed, the interim dean of students of Northwestern University requested that even non-university-affiliated residents of the communities surrounding Northwestern report student violations of COVID-19 policies off campus to university administrators. Elyssa Cherney, *'There's Been an Awful Lot of Partying': Northwestern University Asks Evanston Residents to Report Students Who Ignore COVID-19 Precautions in Off-Campus Gatherings*, CHI. TRIB. (Aug. 26, 2020), [https://perma.cc/EY4G-E9HK].

9. *See, e.g.*, Bobby Maldonado & Marianne Thomson, *Additional Information About Last Night's Quad Gathering*, SYRACUSE UNIV. (Aug. 20, 2020), [https://perma.cc/77QC-CS8E] (suspending twenty-three students for gathering with scores of others in the university quad); Ian Thomsen, *Northeastern Dismisses 11 Students for Gathering in Violation of COVID-19 Policies*, NEWS@NE (Sept. 4, 2020), [https://perma.cc/243M-H9MT] (dismissing eleven students from Northeastern for congregating in a hotel room in violation of Northeastern's COVID-19 conduct policies); Riddhi Andurkar, *UPDATE: Two MU Students Expelled, Three Suspended for COVID-19 Safety Violations*, COLUM. MISSOURIAN (Sept. 15, 2020), [https://perma.cc/895P-87KH] (discussing how the University of Missouri expelled two students, suspended three others, and began an investigation of eleven student organizations as a result of reported violations of the university's COVID-19 policies); Annie Grayer, *36 Purdue Students Suspended After Breaking Social Distancing Rules*, CNN (Aug. 21, 2020, 3:32 PM), [https://perma.cc/7P4B-J6GS] (reporting on Purdue University administrators' decision to suspend thirty-six students for attending a party off campus and not following the university's COVID-19 policies); Rachel Treisman, *More Than 200 Ohio State University Students Suspended for Violating Pandemic Rules*, NPR (Aug. 25, 2020, 9:17 PM), [https://perma.cc/UA4H-H37A] (reporting on Ohio State University administrators' decision to temporarily suspend 228 students before classes even began as a result of the students' violations of the University's COVID-19 safety protocols); *Pi Kappa Alpha Chapter and Its Leaders Receive Summary Suspensions*, PENNSTATE, [https://perma.cc/7ZCK-V6LV] (Sept. 22, 2020) (suspending a fraternity and members of its executive board for hosting a gathering with approximately seventy people in attendance); Elissa Nadworny, *Despite Mass Testing, University of Illinois Sees Coronavirus Cases Rise*,

parents thus became, can public[10] universities do this in light of the United States Constitution's guarantee of the First Amendment right to freely associate?[11] Not much controversy surrounded administrators' decisions to discipline students for on-campus violations of COVID-19 policies, but the discipline of students for their off-campus behavior left many enraged and none with answers. This is largely because the Supreme Court has never addressed the extent to which public universities may regulate the off-campus associational activities of their students. Indeed, the Court has barely touched the First Amendment right to association in the university context at all, even on campus.[12]

The jurisprudence of university students' associational rights, like that of its speech counterpart, may aptly be described as "a mixture of muddled reasoning and inconsistent decisions,"[13] so muddled, in fact, "that even 'lawyers, law professors, and judges' are unclear what standards apply."[14] As the law currently stands, there is no one clear approach that courts may uniformly apply to review the constitutionality of university regulations of students' associational rights. Although there is a robust body of scholarship regarding the impacts of university restrictions on First Amendment rights, particularly speech, to date, no scholar has attempted to unravel the extraordinarily murky patchwork of case law to identify a clear approach to the student associational

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NPR (Sept. 3, 2020, 10:39 AM), [https://perma.cc/BA9Y-SJXG] (stating that as of September 3, 2020, about 100 students and organizations were facing disciplinary action—including suspension—for violating the University of Illinois at Urbana-Champaign's COVID-19 policies).

10. Because the Constitution requires state action before its provisions are applicable, I will not address private universities throughout the rest of this Comment. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883). However, it is likely that even most private universities today are subject to the directives of the Constitution given their continuous reception of massive amounts of federal funding. *See* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018, 8:00 AM), [https://perma.cc/UV8X-YVGC]. I will leave this question for another day.

11. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor.").

12. *See infra* Section II.B.2.b.

13. Frank D. LoMonte, *"The Key Word is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 341 (2013).

14. Meggen Lindsay, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1500 (2012) (quoting Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011)).

rights analysis. In light of the critical gap in the Court's associational rights jurisprudence, this Comment proposes a three-tiered, sliding scale of judicial scrutiny analytical framework for reviewing the constitutionality of university regulation of students' associational rights.

In the first tier, the university is at the height of its authority to regulate students' associational rights. When the targeted activity is on campus and school sponsored,[15] the courts should review a university's regulations of its students' associational activities under the rational basis test. In the second tier, the university retains a significant amount of authority to regulate associational activities that are either off campus and school sponsored or on campus and not school sponsored. The courts should review university regulations of students' associational activities that fall into this second tier under the intermediate scrutiny test. Finally, in the last tier, the university's authority to regulate is at its trough where the regulation impacts off-campus, non-school-sponsored associational activities. University attempts to regulate associational activities that fall into this third tier should be reviewed under the strict scrutiny test.

Importantly, the three tiers are not rigid, unforgiving concepts, but rather, they are meant to be guideposts for the Court along a sliding scale of judicial scrutiny. Indeed, I realize, as often happens in the law, there exist gray areas in which student conduct does not neatly fit into any one of the three tiers. A flexible approach such as this one would allow the Court to consider the idiosyncrasies of each case while also providing clear guidance to university administrators and lower courts.

This Comment will proceed as follows. In Part II, I will discuss the various (and often inconsistent) frameworks that courts currently apply to university students' associational rights. Part III subsequently re-introduces the proposed three-tiered

15. For the purposes of this Comment, I use the definition of "school-sponsored" expounded by the Court in *Hazelwood School District v. Kuhlmeier*. 484 U.S. 260, 271 (1988) (explaining that "school-sponsored" means those "activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."). Importantly, the Court has emphasized that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65 (2006).

framework and justifies its adoption as the test the Court should employ moving forward. Following this section, in Part IV, I will use the proposed framework to review the constitutionality of the University of Arkansas's COVID-19 policy. Finally, in Part V, I will call upon the Court to remedy the incoherent and unworkable state of university student associational rights jurisprudence and urge it to adopt a clear framework moving forward.

II. BACKGROUND

The Court's university student associational rights jurisprudence is nearly incomprehensible. To fully appreciate the lack of a coherent approach, it is necessary to understand how the Court got to where it is today. University student associational rights principles draw from the right to association and primary and secondary speech precedent. In this section, I will analyze each of these predecessors in turn and explain the current state of university student associational rights.

A. The Right to Association

The right to association is not express in either the Constitution or the Bill of Rights.[16] Nonetheless, since the founding era, it has long been recognized as vital to both the effective functioning of the United States government and the preservation of individual liberties.[17] Despite the founders'

16. U.S. CONST. amend I; Mark D. Bauer, *Freedom of Association for College Fraternities After* Christian Legal Society *and* Citizens United, 39 J. COLL. & U. L. 247, 248 (2013).

17. Bauer, *supra* note 16, at 272 (discussing James Madison's proposal that "[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances, for redress of their grievances," as well as *The Federalist*'s assertion that the freedom of association is necessary to the proper functioning of a republic) (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 217 (Neil H. Cogan ed., 1997)); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (asserting that "[t]hose who won our independence believed that . . . without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine[,]" and "they amended the Constitution so that free speech and assembly should be guaranteed."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First

insistence on the fundamentality of the right to association, the Supreme Court did not recognize the right as protected by the First Amendment to the United States Constitution until 1958.[18] In the landmark case of *NAACP v. Alabama ex rel. Patterson*, the Court highlighted the "close nexus" between the freedoms of speech and association, emphasizing that one cannot exist without the other.[19] Furthermore, the Court unequivocally asserted that the right to association is entitled to the most onerous of constitutional protections in holding that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . state action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*."[20] The right to association remained a bulwark against government regulation for decades as the Court continually reaffirmed its importance and occasionally even expanded it.[21]

However, the right began to deteriorate in response to the civil rights era and the general push for equality in the United States throughout the 1960s-80s, as private groups throughout this period continually tried to keep racial minorities and women out of their organizations by asserting right to association claims, only to have the courts consistently invalidate them.[22] This

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Amendment of the Bill of Rights."). The freedom of association is deeply rooted in human history. However, for the purposes of this Comment, I will only discuss the United States constitutional beginnings of the right to association. For a more in-depth historical analysis of the right, see generally CHARLES E. RICE, FREEDOM OF ASSOCIATION (1962).

18. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); Scott Patrick McBride, *Freedom of Association in the Public University Setting: How Broad Is the Right to Freely Participate in Greek Life?*, 23 U. DAYTON L. REV. 133, 136 (1997).

19. *Patterson*, 357 U.S. at 460.

20. *Id.* at 460-61 (emphasis added).

21. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (asserting that "[t]he right of 'association,' like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means[,]" and that "[a]ssociation in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624 (1980) (stating that "[b]efore *Griswold* was decided, the notion of constitutional protection of the freedom of association was a First Amendment doctrine and little more."); *see also* Eisenstadt v. Baird, 405 U.S. 438, 447, 453 (1972) (extending *Griswold*).

22. *See, e.g.*, Sigma Chi Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515, 524-27 (D. Colo. 1966).

culminated in the Supreme Court's overhauling of the right to association in *Roberts v. United States Jaycees*.[23] In *Roberts*, the United States Jaycees ("Jaycees"), a non-profit membership corporation dedicated to the growth and fostering of young men's civic organizations, brought an action against the Minnesota Department of Human Rights ("MDHR"), claiming that the MDHR's demand that it admit women as regular members to its organization violated its constitutional right to association.[24] The Court began its analysis of the Jaycees' right to association claim by breaking the right down into two sub-rights: the right to intimate association and the right to expressive association.[25]

First, the Court discussed the right to intimate association.[26] This right is protected "as a fundamental element of personal liberty."[27] Indeed, the right "reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[28] The Court went on to explain that this right is designed to protect the formation of only certain kinds of highly personal relationships and provided some guidance on how to interpret this limitation.[29]

The "highly personal relationships" limitation requires that the relationship in question contain those "personal bonds [which] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and

23. 468 U.S. 609, 618 (1984).

24. *Id.* at 612-13, 615.

25. *Id.* at 617-18 (stating that "[o]ur decisions have referred to constitutionally protected 'freedom of association' in two distinct senses."). However, the Court made sure to clarify that these two rights are not always mutually exclusive, rather, in most instances "freedom of association in both of its forms may be implicated." *Id.* at 618. *But see*, John D. Inazu, *The Unsettling "Well Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 155-56 (2010) (arguing that the *Roberts* opinion "suggest[s] four possible categories of associations: (1) intimate expressive associations, (2) intimate nonexpressive associations, (3) nonintimate expressive associations, and (4) nonintimate nonexpressive associations.").

26. *Roberts*, 468 U.S. at 617-18.

27. *Id.* at 618.

28. *Id.* at 619.

29. *Id.* at 618-20.

beliefs[.]"[30] In other words, it must be along the lines of a familial relationship.[31] The Court ultimately established a spectrum framework, where the State's authority to regulate is contingent upon how intimate the association is.[32] The more intimate the association, the more significant the State's interest must be for it to regulate that association.[33] In providing further guidance on gauging the placement of a given association along this spectrum, the Court suggested several factors be taken into consideration: size, selectivity, purpose, and seclusion.[34] Using these factors, the Court ultimately decided that the Jaycees were not entitled to protection under the right to intimate association because the chapters were not small or selective, and many women and other non-members regularly attended meetings and participated in social functions.[35]

Second, the Court discussed the right to expressive association.[36] The right to expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[37] Expressive association is thus a correlative right of sorts. In establishing this right as distinct from the right to intimate association, the Court reasoned that "[a]ccording protection to collective effort on

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30. *Id.* at 618-19.

31. *Roberts*, 468 U.S. at 619 (asserting that "[t]he personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family").

32. *Id.* at 620; McBride, *supra* note 18, at 146 ("The continuum of groups for intimate association analysis has at one end the family, possessing the most highly protected intimate relationships, and at the other end a large, profit-motivated corporation, having no chance of claiming intimate associational rights.").

33. *See Roberts*, 468 U.S. at 620 ("Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").

34. *Id.*

35. *Id.* at 621.

36. *Id.* at 621-22.

37. *Id.* at 618. The establishment of the right to expressive association is a recognition of the fact that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[38] While recognizing that the right to expressive association is indeed entitled to the most onerous of constitutional protections, the Court held that it is not absolute, and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[39] In other words, government regulation of expressive association must generally meet the arduous demands of the strict scrutiny test in order to comport with the Constitution.

While the MDHR's demand that the Jaycees admit women to the organization infringed upon the group's right to expressive association,[40] the State of Minnesota nonetheless prevailed.[41] The Court reasoned that because (1) Minnesota had a compelling interest in eradicating gender discrimination, (2) the regulation was the least restrictive means of assuring Minnesota's citizens "equal access to publicly available goods and services," and (3) the regulation imposed only a limited burden on the associational freedoms of the Jaycees, the Jaycees' right to expressive association claim failed.[42]

1. Intimate Association

Although the Supreme Court's most in-depth treatment of the right to intimate association occurred in *Roberts*,[43] the right was first articulated in Kenneth Karst's law review article, *The*

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38. *Id.* at 622; *see also* Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 68 (2006) (asserting that the right to expressive association developed because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others[,]" and "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.").

39. *Roberts*, 468 U.S. at 623.

40. *Id.*

41. *Id.*

42. *See id.* at 623-26.

43. *See supra* notes 26-35 and accompanying text.

Freedom of Intimate Association, a mere four years prior to the right's constitutional debut.[44] Karst's article and the *Roberts* opinion are astoundingly similar.[45] Justice Brennan noticeably omitted any citation to Karst's article in his *Roberts* opinion.[46] However, several commentators have suggested that the Supreme Court adopted much of Karst's intimate association framework,[47] one even suggesting that the Supreme Court "lifted the right to intimate association from Karst's article."[48]

Thus, while Karst's article did not determine the parameters of the right to intimate association, it is highly instructive, as it was almost certainly the Supreme Court's inspiration of the right.[49] Karst defined an intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. An intimate association, like any group, is more than the sum of its members; it is a new being, a collective individuality with a life of its own."[50] Karst argued that the right to intimate association is an expansive, broad right, protected not only under the First Amendment, but also under substantive due process and equal protection principles of the Fifth and Fourteenth Amendments.[51] Importantly, he also argued that the right to

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44. Karst, *supra* note 21, at 624; Gwynne L. Skinner, *Intimate Association and the First Amendment*, 3 L. & SEXUALITY 1, 3 (1993).

45. For a comprehensive analysis of the similarities between Karst's article and the Supreme Court's *Roberts* opinion, see Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 278-79 (2006).

46. Inazu, *supra* note 25, at 165; *Roberts*, 468 U.S. 609. Justice Brennan is lucky he did not have a faculty advisor reviewing his opinion. Although, I suppose Professor Karst is not too upset, his idea has become enduring constitutional law after all.

47. *See, e.g.*, Marcus, *supra* note 45, at 276; Inazu, *supra* note 25, 158-68 ("Brennan's *Roberts* opinion never cites Karst's article, but the intellectual debt is apparent."); Joshua P. Roling, *Functional Intimate Association Analysis: A Doctrinal Shift to Save the* Roberts *Framework*, 61 DUKE L.J. 903, 909 (2012) ("[M]any of Professor Karst's values were reflected in the Court's rationales for protecting intimate associations."); Skinner, *supra* note 44, at 3-8; *see generally* Collin O. Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 233-39 (1998).

48. Udell, *supra* note 47, at 232.

49. *See supra* notes 43-48.

50. Karst, *supra* note 21, at 629.

51. *Id.* at 652-67.

intimate association was not limited to traditional relationships,[52] a point where he and Justice Brennan diverged.[53]

In the thirty-six years since the Supreme Court initially recognized the right to intimate association in *Roberts*, it has not once taken up another case in which it has devoted extensive attention to clarifying the right.[54] There was an initial attempt by Justice Blackmun to invoke the right in defense of LGBT rights in *Bowers v. Hardwick*,[55] a mere two years after *Roberts* was decided, but to no avail, as the majority opinion in that case did not even acknowledge the right to intimate association in formulating its holding.[56]

Nonetheless, the Supreme Court has provided a limited amount of guidance on "what [an intimate association] is not[.]"[57] A few years after *Roberts* was decided, another very similar case came before the Supreme Court: *Board of Directors of Rotary International v. Rotary Club of Duarte*.[58] Much like in *Roberts*, here, Rotary International, an umbrella organization controlling 19,788 local rotary clubs, had a policy limiting official membership to men.[59] The Rotary Club of Duarte, California ("Duarte Chapter") decided to start admitting women, to which Rotary International responded by revoking the club's charter.[60] The Duarte Chapter then sued Rotary International, asserting that its policy limiting membership to men violated California's Unruh Civil Rights Act ("UCRA").[61] Rotary International then claimed that the UCRA violated its right to association.[62]

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52. *Id.* at 629, 662, 671, 686-87 (claiming that even "close friendship" may be included in the right to intimate association).

53. Udell, *supra* note 47, at 238-39 (suggesting that Justice Brennan was "hesitant to do more than vaguely suggest that the right might move beyond traditional relationships").

54. *See generally id.* at 239; Marcus, *supra* note 45, at 283-84.

55. 478 U.S. 186, 202-03 (1986) (Blackmun, J., dissenting) ("I believe that Hardwick has stated a cognizable claim that [the Georgia sodomy statute] interferes with constitutionally protected interests in privacy and freedom of intimate association.").

56. *See generally id.* at 186 (majority opinion).

57. Marcus, *supra* note 45, at 283.

58. 481 U.S. 537, 537 (1987).

59. *Id.* at 539-41.

60. *Id.* at 541.

61. *Id.* at 541-42.

62. *See id.* at 537.

In applying the *Roberts* framework to analyze Rotary International's intimate association claim,[63] the Court acknowledged that "[w]e have not attempted to mark the precise boundaries of this type of constitutional protection."[64] It then went on to cite a plethora of substantive due process cases in order to exemplify the kinds of relationships deserving constitutional protection under the right to intimate association.[65] However, ultimately, in employing the *Roberts* intimate association factors to Rotary International, the Court held that neither Rotary International nor its individual Rotary Clubs were entitled to *any* degree of intimate association protection.[66] In reaching this conclusion, the Court highlighted several facts: membership ranged from fewer than twenty to more than nine hundred, about ten percent of the membership moved away or dropped out every year, the clubs' policies stated that they were inclusive, guests attended meetings, and members from other Rotary Clubs were required to be admitted to any Rotary Club meeting.[67]

Surprisingly, the very next year, the Court decided an almost identical case: *New York State Club Ass'n v. City of New York*.[68] Yet again, private clubs sought to enjoin the enforcement of a human rights law prohibiting discrimination, asserting their right to association as a defense.[69] In analyzing the New York State Club Association's claims, the Court failed to even mention the right to intimate association by name,[70] instead choosing to refer to the vague notion of "private association."[71] Nonetheless, the Court still employed the *Roberts* framework and denied the New York State Club Association's intimate association claim based on the facts that most of the clubs were more than four hundred

63. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545-46.
64. *Id.* at 545.
65. *Id.* (first citing Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); then citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (decision to have children); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (child-rearing and education); and then citing Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (cohabitation with relatives)).
66. *Id.* at 546-47.
67. *Id.*
68. 487 U.S. 1, 1 (1988).
69. *Id.* at 7.
70. Marcus, *supra* note 45, at 284; *N.Y. State Club Ass'n*, 487 U.S. 1.
71. *N.Y. State Club Ass'n*, 487 U.S. at 6, 12.

members strong, and they all regularly provided service to and received payments from nonmembers.[72] The Court also emphasized, albeit implicitly, that the regular presence of strangers at club meetings strongly counsels against the finding of an intimate association.[73]

Following *New York State Club Ass'n*, it seems that large private clubs learned their lesson (at least for a time), as there was not another large private club intimate association case to reach the Supreme Court for another decade.[74] However, this did not stop the Court from invalidating intimate association claims elsewhere. The year after *New York State Club Ass'n*, the Court denied another intimate association claim in *City of Dallas v. Stanglin*.[75] In *Stanglin*, the owner of a skating rink brought a challenge to a city ordinance that prohibited teenagers from entering the skating rink at certain hours and socializing with those outside their age group.[76] He alleged that the ordinance interfered with his patrons' right to associate with persons outside their age bracket.[77] The Court found that the Constitution does not recognize "a generalized right of 'social association' that includes chance encounters in dance halls."[78] Indeed, Justice Rehnquist, writing for the majority, emphatically held that "[i]t is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*."[79] However, he barely explained his reasoning in holding that "coming together to engage in recreational dancing" does not qualify as a form of intimate association.[80]

Continuing the trend of hearing one association focused case a year, in 1990, the Court reviewed *FW/PBS, Inc. v. City of Dallas*.[81] Like in *Stanglin*, here, owners of Dallas businesses

72. *Id.*
73. *Id.*
74. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
75. 490 U.S. 19, 20-21 (1989).
76. *Id.* at 21-22.
77. *Id.* at 22.
78. *Id.* at 25.
79. *Id.* at 24.
80. *Stanglin*, 490 U.S. at 25.
81. 493 U.S. 215 (1990).

brought intimate association claims on behalf of their patrons against a city licensing scheme that, among other things, required motel owners to obtain a license if they were to rent rooms for fewer than ten hours.[82] Justice O'Connor, perhaps a bit sarcastically, held that "we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*[,]" and that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'"[83] Thus, again, the Court refused to take advantage of an opportunity to clarify the parameters of the right to intimate association. Since the Court's decision in *FW/PBS, Inc.*, there have been no Supreme Court intimate association cases defining the doctrine to any appreciable extent.[84]

In the absence of any clear guideposts, the Circuit Courts of Appeals have largely been left to their own devices when it comes to the right to intimate association.[85] This has created wide and varying gaps in the application of the right.[86] The central thesis of one of the most comprehensive legal commentaries on the right to intimate association to date was that "[w]ith *Lawrence* [*v. Texas*] shining new light on intimate association rights, the Court could soon decide[] . . . that the time has finally come to clarify the parameters and protections that define the freedom of intimate association."[87] Indeed, the Court had a golden opportunity to do

82. *Id.* at 220-21.

83. *Id.* at 237 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984)).

84. *See* Marcus, *supra* note 45, at 286-87 (first citing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); then citing Troxel v. Granville, 530 U.S. 57 (2000); and then citing Overton v. Bazzetta, 539 U.S. 126 (2003), and discussing how, in each case, the Court did not take advantage of the opportunity to clarify or define the right to intimate association).

85. *Id.* at 287.

86. *Id.* at 288-98 (identifying upwards of ten different tests the Circuit Courts of Appeals have applied to the right of intimate association since *Roberts* and describing the variance as "mind-boggling") (citing Udell, *supra* note 47, at 233-39). Professor Marcus also discusses the "[c]lear cries for clarity" coming from the Circuit Courts of Appeals, providing as an example a somewhat comical reference to the Second Circuit's citation of a Bible verse "to describe its lack of knowledge of the unfixed boundaries of intimate association." *Id.* at 297.

87. *Id.* at 299.

exactly that in the recent landmark decision of *Obergefell v. Hodges*.[88] *Obergefell* was a major step forward in terms of the right to intimate association, as it finally broke away from the age old traditional relationships approach in its holding that "[s]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association," echoing a more Karstian view of the right.[89] However, aside from a couple of quick references to the right to intimate association, the Court yet again refused to clarify its parameters or provide any meaningful analysis of it.[90] Thus, in line with the rest of its post-*Roberts* intimate association decisions, the Court has allowed the gates of the doctrine of intimate association to remain wide open, refusing to shut them for almost forty years.[91]

2. Expressive Association

The Supreme Court's most in-depth analysis of the right to expressive association was also laid out in *Roberts*.[92] The *Roberts* definition of an expressive association "requires both an organization (the association itself) and a purpose (a First Amendment activity)."[93] The right to expressive association essentially allows an organization to be considered an individual for purposes of the First Amendment and grants it all the First Amendment rights and corresponding limitations of such rights that are bestowed upon the individual.[94] Just like the intimate association jurisprudence, the Supreme Court has provided little

88. 576 U.S. 644 (2015).

89. *Id.* at 646.

90. *See id.* at 646, 667.

91. My sympathies go out to Professor Marcus. I have only just begun researching the right to intimate association and I am quite frustrated with the Court's lack of guidance, while I know she has watched the Court refuse to define the right for at least fourteen years now.

92. *See supra* notes 36-42 and accompanying text.

93. Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 24-25 (2012).

94. *Id.* For example: viewpoint and content restrictions; prior restraints; public forum doctrine; time, place, and manner restrictions; etc. *See id.* That being said, the right still protects the individuals that participate in these associations, so in a sense, it is also an individual right. Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

guidance on what exactly qualifies an organization as an expressive association.[95]

The first expressive association case to come to the Supreme Court after *Roberts* was *Board of Directors of Rotary International*.[96] Although the UCRA's interference with Rotary International's right to expressive association seemed to warrant the application of strict scrutiny,[97] the Court gave short shrift to Rotary International's claim, asserting that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[98] The Court indicated that Rotary International was not an expressive association at all, seemingly because the Rotary Clubs did not take positions on political issues.[99] Moreover, the Court went on to say that even if the UCRA interfered with Rotary International's right to expressive association, the UCRA was "unrelated to the suppression of ideas" and "serv[ed] the State's compelling interest in eliminating discrimination against women."[100]

A nearly identical result occurred in the next expressive association case to reach the Court, *New York State Club Ass'n*.[101] In this case, however, the New York State Club Association sought to bring the expressive association claim on behalf of individual club members, as opposed to on behalf of each organization as a whole.[102] The Court affirmed that the right is also held by individuals, but unfortunately for the New York State Club Association, it held that the public accommodations law did "not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints."[103] The Court went on to justify its decision and lay

95. Bezanson et al., *supra* note 93, at 25-27.

96. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); *see supra* notes 58-62 and accompanying text (providing the pertinent facts).

97. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

98. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548.

99. *Id.*

100. *Id.* at 549.

101. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); *see supra* notes 68-72 and accompanying text (providing the pertinent facts).

102. *N.Y. State Club Ass'n*, 487 U.S. at 1, 13.

103. *Id.* at 13 (citing *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548).

the groundwork for future expressive association litigants in explaining that:

> It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.[104]

Following *New York State Club Ass'n*, the Court briefly analyzed the right to expressive association in *Stanglin*.[105] Again, the Court limited the right. Here, the Court held that social gatherings of strangers do not "involve the sort of expressive association that the First Amendment has been held to protect."[106] Because the "hundreds of teenagers who congregate each night at this particular dance hall [were] not members of any organized association[,]" they were not entitled to the protections of the right to expressive association.[107] The Court noted that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[108]

After a decade of consistently striking down expressive association claims, the Court finally upheld an organization's right to expressive association in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*.[109] In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") sought to march in the 1993 Boston St. Patrick's Day parade as a way for its members to express their pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate the existence of such individuals, and to express solidarity with individuals like themselves who were at the time seeking to march in the very similar New York St. Patrick's Day

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104. *Id.*

105. City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989); *see supra* notes 75-78 and accompanying text (providing the pertinent facts).

106. *Stanglin*, 490 U.S. at 24.

107. *Id.*

108. *Id.* at 25.

109. 515 U.S. 557, 557 (1995).

parade.[110] However, the organizer of the parade, the South Boston Allied War Veterans Council ("SBVC"), refused to allow them to march as a group behind their own banner in the parade.[111] GLIB filed suit under the Federal Constitution, Massachusetts Constitution, and Massachusetts public accommodations laws.[112] SBVC asserted its right to expressive association in justifying its exclusion of GLIB.[113]

The Court began its analysis of SBVC's expressive association claim by acknowledging that parades are indeed a form of expressive action.[114] For once, the Court seemed to broaden the right, in finding that "a narrow, succinctly articulable message is not a condition of constitutional protection."[115] Additionally, the Court found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[116] In combining these principles, the Court found that, although there were a multitude of different groups with different ideas in the parade, because SBVC "decided to exclude a message it did not like from the communication it chose to make, . . . that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[117] Thus, although Massachusetts had a compelling interest in eliminating discrimination based on sexual orientation, it could not defeat SBVC's right to expressive association.[118]

The Court again expanded the right to expressive association in the case of *Boy Scouts of America v. Dale*.[119] Here, the Boy Scouts of America ("BSA") sought to exclude an assistant

110. *Id.* at 561.

111. *Id.* at 560, 572. Importantly, SBVC was a private organization, however, the parade still involved state action in that the City of Boston authorized the SBVC to organize it. *Id.* at 560. It is also important to note that the parade had been a state-sponsored event from as early as 1737 to as late as 1947. *Id.* at 560.

112. *Hurley*, 515 U.S. at 561.

113. *Id.* at 563.

114. *Id.* at 568.

115. *Id.* at 569 (citing Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

116. *Id.* at 569-70.

117. *Hurley*, 515 U.S. at 569, 574.

118. *Id.* at 572, 575.

119. 530 U.S. 640, 661 (2000).

scoutmaster (Dale), who had been a longtime member of the BSA, upon discovering that he was openly gay.[120] Dale then filed suit under New Jersey's public accommodations law.[121] The Court established several universal rules for the right to expressive association. First, "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[122] Relatedly, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[123] Furthermore, instilling a system of values constitutes expression within the meaning of the right.[124] Finally, courts must give deference to an "association's assertions regarding the nature of its expression, [and its] view of what would impair its expression."[125]

Ultimately, the Court concluded that the New Jersey public accommodations law violated the BSA's right to expressive association.[126] However, it is unclear which test the Court applied to the law in striking it down. Although, in citing to the previous association cases, the Court made vague references to "compelling state interest[s]" and "serious burden[s]," it did not expressly state whether it was applying strict scrutiny, intermediate scrutiny, or something entirely different in analyzing the validity of the New Jersey public accommodations law.[127] Rather, the Court said that "[i]n *Hurley*, we applied traditional First Amendment analysis" and "the analysis we applied there is similar to the analysis we apply here."[128]

120. *Id.* at 643-45.
121. *Id.* at 645.
122. *Id.* at 648.
123. *Id.* at 655.
124. *Dale*, 530 U.S. at 650.
125. *Id.* at 653.
126. *Id.* at 659.
127. *Id.* at 657-59 (referencing *Roberts*, *Bd. of Dirs. Int'l*, *N.Y. State Club Ass'n*, and *Hurley*).
128. *Id.* at 659.

Thus, the right to expressive association jurisprudence has, like the right to intimate association jurisprudence, left the lower courts in flux. Although the right has always been considered a correlative right of sorts,[129] it has become less of a freestanding right of its own over the years and increasingly more of a branch of free speech doctrine. Since the Court's decision in *Dale*, the Court has not yet decided another expressive association case outside of the education context, which I turn to next.[130]

B. First Amendment Education Jurisprudence

While the Supreme Court has rarely forayed into the realm of the First Amendment rights of students, *especially* university students, there are a few seminal cases that guide lower courts.[131] This section proceeds as follows: first, I will discuss the education quartet; second, I will review off-campus speech jurisprudence generally; and finally, I will examine the Court's treatment of university students' First Amendment associational rights specifically. This context is crucial to understanding how the Court's approach to university student associational rights developed and the many problems surrounding its practical application.

1. The Education Quartet

Because of the Supreme Court's lack of guidance in the education realm, there are not many cases governing the First Amendment rights of students, especially in the university setting. Indeed, the Court has provided so little guidance that the lower courts have consistently relied on the education quartet, a string of four First Amendment student rights cases that were decided in the primary and secondary education context.[132] The education

129. *See supra* note 38 and accompanying text.

130. *See infra* Section II.B.2.b. Unfortunately, the expressive association jurisprudence only gets more complex.

131. *See infra* notes 132-210 and accompanying text.

132. This reliance has engendered much scholarly commentary. Most commentators are staunchly opposed to the imposition of these primary and secondary education cases in the context of the public university setting. *See infra* note 167 and accompanying text.

quartet consists of: *Tinker v. Des Moines Independent Community School District*,[133] *Bethel School District No. 403 v. Fraser*,[134] *Hazelwood School District v. Kuhlmeier*,[135] and *Morse v. Frederick*.[136]

a. Tinker

The renowned line from Justice Fortas's opinion in *Tinker* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[137] has been quoted so often that it has almost become a cliché.[138] In *Tinker*, elementary, junior high, and high school students planned to wear black armbands to class in protest of the Vietnam War.[139] Upon hearing about this plan, school administrators adopted a policy "that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[140] The students indeed wore the armbands to school and, not surprisingly, were suspended pursuant to the policy.[141] They then brought First Amendment claims against the school and its officials under 42 U.S.C. § 1983.[142]

The Court began by emphasizing "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,"[143] seemingly

133. 393 U.S. 503 (1969).

134. 478 U.S. 675 (1986).

135. 484 U.S. 260 (1988).

136. 551 U.S. 393 (2007).

137. *Tinker*, 393 U.S. at 506.

138. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972); Lindsay, *supra* note 14, at 1489; Andrew R. Kloster, *Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students' Rights*, 81 UMKC L. REV. 617, 617 (2013); Marcia E. Powers, *Unraveling* Tinker*: The Seventh Circuit Leaves Student Speech Hanging by a Thread*, 4 SEVENTH CIR. REV. 215, 219 (2008). That of course is not going to stop me from quoting it anyways, as you may have noticed.

139. *Tinker*, 393 U.S. at 504; *id.* at 516 (Black, J., dissenting).

140. *Id.* at 504 (majority opinion).

141. *Id.*

142. *Id.*

143. *Tinker*, 393 U.S. at 507.

signaling defeat of the students' claims. However, it went on to find that:

> In our system, *state-operated schools may not be enclaves of totalitarianism*. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[144]

Thus, the Court found that the First Amendment remains a bulwark against governmental authority even in the classroom setting. However, in acknowledging that First Amendment rights must be "applied in light of the special characteristics of the school environment,"[145] the Court did establish a limitation to its protections: school administrators may discipline students for conduct that "materially and substantially interfer[es]" with the operation of the school.[146]

b. Fraser

Following *Tinker*, the Court decided *Fraser*. In *Fraser*, a high school student gave a sexually explicit, "indecent, lewd, and offensive" speech at a school assembly, in front of 600 other students, many of whom were fourteen-years-old.[147] School

144. *Id.* at 511 (emphasis added).

145. *Id.* at 506.

146. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). However, the school may not seek to discipline the student on the basis of her viewpoint alone. *Id.* at 509, 511 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

147. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).

officials then suspended the student for three days.[148] The student subsequently brought an action under 42 U.S.C. § 1983 based on the violation of his First Amendment rights.[149] In holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech,"[150] the Court reasoned that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[151] Furthermore, the Court established an additional rule for future First Amendment education cases: the First Amendment does not prohibit schools from regulating speech that "would undermine the school's basic educational mission."[152]

c. Hazelwood

Following *Fraser*, the Court gave even more power to schools and their officials to regulate the First Amendment rights of their students. In *Hazelwood*, high school journalism students sought to publish certain articles about teen pregnancy and divorce in their student-run newspaper.[153] However, because the articles contained identifying information about students and references to sexual activity and birth control, the principal prohibited their publication.[154] The students then sued the school and its officials, seeking a declaration that their First Amendment rights had been violated.[155] The Court unequivocally denied the students' request for relief in holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

148. *Id.* at 678.
149. *Id.* at 679.
150. *Id.* at 685.
151. *Id.* at 682.
152. *Fraser*, 478 U.S. at 685.
153. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988). Importantly, the newspaper was part of the school's journalism curriculum. *Id.* at 262.
154. *Id.* at 263-64.
155. *Id.* at 264.

to legitimate pedagogical concerns."[156] Importantly, however, the Court limited this holding to the primary and secondary context in stating that "[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the *college and university level*."[157]

d. Morse

Finally, in *Morse*, a high school principal suspended a student for ten days after the student waived a banner that said "BONG HiTS 4 JESUS" at an off-campus, school-approved event.[158] After exhausting his administrative appeals, the student brought a 42 U.S.C. § 1983 action alleging that the principal and the school board violated his First Amendment rights.[159] *Morse* was a much different case than the other three of the education quartet in that the student's speech in this case occurred off campus.[160] However, the Court reasoned this extremely pertinent fact away in finding, among other things, that:

> The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct[.]" Teachers and administrators were interspersed among the students and charged with supervising them.[161]

Because of these factual findings, the Court ultimately decided that the school had authority over the student's speech and that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[162] Although

156. *Id.* at 273. One is left wondering what school administrators could not identify as a "legitimate pedagogical concern."

157. *Hazelwood Sch. Dist.*, 484 U.S. at 273 n.7 (emphasis added).

158. Morse v. Frederick, 551 U.S. 393, 397-98 (2007). Technically it was "off campus," although it was right across the street from the school. *Id.* at 397.

159. *Id.* at 398-99.

160. *Id.* at 397.

161. *Id.* at 400-01 (internal citations omitted).

162. *Morse*, 551 U.S. at 401, 403.

the Court ultimately decided that the school had the authority to discipline the student here, it was cautious in issuing this opinion, noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . but not on these facts," clearly indicating that the school's authority to regulate students' off-campus First Amendment rights is not synonymous with on-campus authority.[163] Indeed, the Court confirmed this when it referenced its earlier decision in *Fraser*, stating that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[164]

Given this important on-campus/off-campus dichotomy the Court explicitly created in the *Morse* opinion, one would think that the Court would have taken up an off-campus speech case in the thirteen years since the decision. Despite numerous opportunities to do so, the Court has refused to provide any guidance. Indeed, since its decision in *Morse*, the Supreme Court has remained silent on the authority of school administrators to regulate the off-campus speech rights of their students both in the primary/secondary and university settings.[165] Thus, the Court has again left the lower courts to their own devices, resulting in a myriad of different approaches.[166]

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163. *Id.* at 401.

164. *Id.* at 405.

165. Benjamin A. Holden, Tinker *Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 233, 285 (2018); Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 427 (2012); Darryn Cathryn Beckstrom, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261, 290 (2008) ("[T]he Court has remained silent on several issues related to college speech. These issues include, among others, whether college administrators can discipline college students for off-campus speech, what constitutes off-campus speech, and whether student publications receiving financial support from the college or university can be afforded First Amendment protection."); Kloster, *supra* note 138, at 618; Emily Deyring, *"Professional Standards" in Public University Programs: Must the Court Defer to the University on First Amendment Concerns?*, 50 SETON HALL L. REV. 237, 241 (2019) ("[T]he Supreme Court has not yet addressed the specific issue of university student speech off-campus."); Lindsay, *supra* note 14, at 1483 ("[T]he Supreme Court has never upheld a student-speech restriction at the university level.").

166. For an absolutely fantastic description of the current Circuit Courts of Appeals' approaches to the question of the authority of primary and secondary public schools to regulate the off-campus speech of their students, see Holden, *supra* note 165, at 257-79.

2. The University

I am sure at this point you are wondering what a bunch of free-speech primary and secondary education cases have to do with the university and associational rights. You are not alone; many legal commentators have questioned, even challenged, the imposition of *Tinker* and its progeny in the university context.[167] However, the federal circuits have not been so hesitant; indeed, many of them have applied *Tinker* and its progeny to the university context, at least in speech cases, both on and off campus.[168] Although it did not expressly so hold, the Supreme

167. *Id.* at 250 n.85 ("[T]he applicability of *Tinker*'s holding to public colleges remains open."); Beckstrom, *supra* note 165, at 307 ("*Tinker* is a K-12 student speech standard, and therefore, this standard should not be applied to college student speech."); Deyring, *supra* note 165, at 253 ("Courts must not look to the standards set forth in *Tinker* and *Hazelwood* but must treat students in professional university programs as mature adults who are not in need of the same paternalistic stance."); Lindsay, *supra* note 14, at 1480, 1483 (arguing that college students are entitled to the same First Amendment protections as other adults and stating that "[t]he Supreme Court has not yet held explicitly that *Tinker* or its progeny do not apply to college speech, but the Court also has never applied *Tinker* in a post-secondary-speech case."); LoMonte, *supra* note 13, at 306, 342-43 (arguing that none of the purposes animating *Hazelwood* apply in the university setting and stating that "[i]t is incongruous with the law's otherwise consistent treatment of adult-aged college students—who are eligible to vote, join the military, purchase firearms, sign contracts, incur civil and criminal liability in adult court and otherwise bear the legal indicia of adulthood—to regard them as 'constitutional children' whose speech is of no greater legal dignity than that of an eighth-grader."). However, LoMonte concedes that *Tinker* applies in the university setting. *Id.* at 311.

168. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1289-90 (10th Cir. 2004) (applying *Hazelwood* to a university student's First Amendment claims); Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (same); Esfeller v. O'Keefe, 391 F. App'x 337, 341 (5th Cir. 2010) (same); DeJohn v. Temple Univ., 537 F.3d 301, 304, 317 n.17 (3d Cir. 2008) (citing *Tinker*, *Fraser*, and *Hazelwood* in analyzing a graduate student's First Amendment claims); Keeton v. Anderson-Wiley, 664 F.3d 865, 865, 875-76 (11th Cir. 2011) (applying *Hazelwood* to a graduate student's First Amendment claims); Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) (noting that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); Keefe v. Adams, 840 F.3d 523, 531-32 (8th Cir. 2016) (holding that college administrators could discipline a nursing student for his off-campus speech so long as their actions were "reasonably related to legitimate pedagogical concerns.") (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)). *But see, e.g.*, Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) ("*Hazelwood* . . . is not applicable to college newspapers."); Amidon v. Student Ass'n of State Univ. of N.Y. at Albany, 508 F.3d 94, 105 (2d Cir. 2007) ("[C]ases like *Hazelwood* explicitly reserved the question of whether the 'substantial deference' shown to high school administrators was 'appropriate with respect to school-sponsored expressive activities at the college or university level."); Oyama v. Univ. of Haw., 813 F.3d 850, 863 (9th Cir. 2015) (declining to

Court's decision in *Papish v. Board of Curators*[169] indicated that the First Amendment rights of university students are far more expansive than those of primary and secondary education students.[170]

a. Papish

In *Papish*, a graduate student at the University of Missouri School of Journalism was expelled for distributing a non-school-sponsored newspaper on campus because it depicted policemen raping the Statue of Liberty and the Goddess of Justice and contained an article with the headline "Motherfucker Acquitted."[171] The Court, "while recognizing a state university's undoubted prerogative to enforce reasonable rules governing student conduct," reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[172] Indeed, although the Court cited to *Tinker*, there was no mention of its "material and substantial interference" test here.[173] Arguably, the Court did not apply *Tinker*'s test because the University of Missouri was discriminating on the basis of Papish's viewpoint,[174] and thus, the Court did not dispel *Tinker*'s application to the university setting. Nonetheless, the Court certainly would not require primary and secondary school administrators to permit their students to bring something to school depicting a rape, accompanied by a word like

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extend the education quartet to the university setting because they "fail[] to account for the vital importance of academic freedom at public colleges and universities.").

169. 410 U.S. 667 (1973).

170. *See infra* notes 171-75 and accompanying text.

171. *Papish*, 410 U.S. at 667.

172. *Id.* at 669-70 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

173. *Id.* at 670; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

174. The Court stated that while it has "repeatedly approved [the University's] regulatory authority" to "enforce reasonable regulations as to the time, place, and manner of speech and its dissemination[,]" the only reason Papish was expelled was "because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution." *Papish*, 410 U.S. at 670 (emphasis added). This is indeed in line with those circumstances in which the Court has held that even in the primary and secondary education context, *Tinker*'s test would not apply. *See supra* note 146 and accompanying text.

"Motherfucker."[175] Thus, *Papish* stands for the proposition that the First Amendment rights of university students are not coextensive with those of primary and secondary students, even if *Tinker* and its progeny apply.

b. University Association

Support for the proposition that *Tinker* applies in the university setting, even to college students' associational rights, rests in *Healy v. James*.[176] In *Healy*, the President of Central Connecticut State College ("CCSC") denied official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society ("SDS") because the organization would constitute a "disruptive influence" on campus, and perhaps a little ironically, because the group "openly repudiate[d]" CCSC's dedication to academic freedom.[177] After exhausting their administrative remedies, the students brought a First Amendment right to association claim seeking to force CCSC and its administrators to officially recognize SDS.[178] The Court began by proclaiming that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[179]

Immediately after, it confirmed that *Tinker* applies to the university setting.[180] Indeed, the Court quoted *Tinker* to emphasize the need for deference to school administrators.[181] Despite this confirmation, the Court nonetheless found that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections

175. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (upholding suspension of student for making sexual innuendos during his speech at a school assembly in which fourteen-year-olds were in the audience).

176. 408 U.S. 169, 180-81 (1972).

177. *Id.* at 170-72, 174-76, 179.

178. *Id.* at 177.

179. *Id.* at 180.

180. *Id.* (quoting *Tinker* extensively and applying it to the university setting).

181. *Healy*, 408 U.S. at 180 ("And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*.'") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)) (emphasis added).

should apply with less force on college campuses than in the community at large."[182]

Thus, the Court's opinion began quite paradoxically. On the one hand, a primary and secondary education case controls the First Amendment rights of full-grown adult college students and university administrators must receive "comprehensive" judicial deference,[183] but on the other hand, the First Amendment applies with the same amount of force on college campuses as it does everywhere else.[184] The confusion did not end there. Throughout the opinion, the Court announced at least two different tests that could be applicable in the university association context. First, the Court noted that "[w]hile a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such a restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[185] This test in itself could be construed as rational basis review, rational basis plus, or even one of the multitudinous versions of intermediate scrutiny.

Second, although the first test proposed by the Court indicated that university students have powerful associational rights on campus, the Court went on to say that "[a]lso prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.'"[186] If you are thinking this is not a high threshold to meet, you would be right, as "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[187] Importantly, the Court does not define the bounds of what constitutes a "reasonable campus rule[]," even in its holding that "[a] college administration may impose a

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 184.

186. *Healy*, 408 U.S. at 189 (quoting *Tinker*, 393 U.S. at 513).

187. *Id.* Although, in line with *Tinker*, university administrators cannot restrict these associational activities based on an "undifferentiated fear or apprehension of disturbance." *Id.* at 191 (quoting *Tinker*, 393 U.S. at 508). Rather, there must be "substantial evidence" that there will be a *Tinker* violation. *Id.* at 190-91.

requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law."[188]

Despite the highly deferential sounding language of the second test, in a footnote, the court tacked onto the end of it that:

> It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights—as nonrecognition does—the State must demonstrate that the action taken is reasonably related to protection of the State's interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[189]

The Court ultimately reversed the lower courts and remanded the case in light of all the new standards.[190] Thus, although the standards coming out of the *Healy* opinion appear to be quite confusing, the principle that may be derived from the case is that, while college students have strong First Amendment associational rights generally, on campus, these rights are subject to reasonable campus rules, and the Court will defer to university administrators as to what counts as a reasonable campus rule.[191] Seemingly, as long as the university does not discriminate on the basis of the organization's viewpoint, the Court will likely side with the decisions of its school officials.[192]

The Court has repeatedly reaffirmed *Healy* in similar cases.[193] It has also continued the trend of deferring to university administrators' on-campus regulations, provided that they do not discriminate on the basis of a student's viewpoint.[194] The Court has afforded so much deference, in fact, that legal commentators have said that "the Supreme Court's deference to educational

188. *Id.* at 189, 193.

189. *Healy*, 408 U.S. at 189 n.20 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

190. *Id.* at 194.

191. *Id.* at 180, 189.

192. *See id.* at 189-93.

193. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264-65, 276-77 (1981); *see generally* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

194. *Widmar*, 454 U.S. at 267 n.5, 668 (asserting in the association context that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.").

judgment involving college students is an honor."[195] This is hard to square with the equally repetitive maxim that the Court employs in university cases, that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[196]

The proverbial nail in the coffin of university students' on-campus associational rights occurred in the Court's most recent university association case, *Christian Legal Society v. Martinez*.[197] In *Christian Legal Society*, Hastings College of Law ("Hastings") refused to grant official recognition to a religious student organization, the Christian Legal Society ("CLS"), because the CLS refused to change its by-laws to accord with Hastings' "all-comers" policy.[198] CLS then sued Hastings, claiming that Hastings violated the CLS's First Amendment rights to free speech and expressive association.[199] In an unprecedented opinion,[200] the Court held that CLS's "expressive-association and free-speech arguments merge[,]" and that it "makes little sense to treat CLS's speech and association claims as discrete."[201] It reasoned that Hastings' registered student organization ("RSO") program was a limited public forum and that three observations provide the basis for why the association claim should also be analyzed under the limited public forum doctrine.[202] First, "speech and expressive-association rights are closely linked," and "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[203]

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195. J. Wes Kiplinger, *Defining Off-Campus Misconduct that "Impacts the Mission": A New Approach*, 4 U. ST. THOMAS L.J. 87, 112 (2006).

196. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

197. 561 U.S. 661 (2010).

198. *Id.* at 669, 672-73. The CLS's by-laws required its members and officers to sign a "Statement of Faith," affirming certain beliefs and promising to live their lives in accordance with the Statement. *Id.* at 672. The by-laws excluded from affiliation members of different faiths and those of the LGBTQ community. *Id.*

199. *Id.* at 668. I told you we would get back to it eventually.

200. Pun intended.

201. *Christian Legal Soc'y*, 561 U.S. at 680.

202. *Id.* at 680-82.

203. *Id.* at 680-81.

Second, applying the strict scrutiny that the Court typically affords expressive association claims in this context would destroy "a defining characteristic of limited public forums—the State may 'reserv[e] [them] for certain groups.'"[204] Third, the Court found that "this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition."[205]

Following its justification for employing the limited public forum doctrine here, the Court went on to hold that Hastings' policy was both "reasonable and viewpoint neutral."[206] In the analysis of the reasonableness of Hastings' policy, Justice Ginsburg cited to the (hopefully) now familiar precedents of *Hazelwood* and *Tinker*.[207] In line with the increasingly substantial amount of deference the Court has provided to university administrators in their regulation of students' constitutional rights, Justice Ginsburg discussed how "[s]chools, we have emphasized, enjoy 'a significant measure of authority over the type of officially recognized activities in which their students participate.' We therefore 'approach our task with special caution,' mindful that Hastings' decisions about the character of its student-group program are due decent respect."[208]

Thus, the unifying principle derivable from the university association precedents is that university administrators may regulate the associational rights of their students on campus so long as their regulations are reasonable, and the Court will defer to the university in determining what is reasonable. Indeed, the Court has even indicated that this general principle applies to

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204. *Id.* at 681 (quoting Rosenberger v. Rector, 515 U.S. 819, 829 (1995)).

205. *Id.* at 682. This final reason is quite surprising given Justice Powell's description of the myriad detriments that the SDS would have suffered, and did suffer, as a result of CCSC's denial of official recognition in *Healy*. *See* Healy v. James, 408 U.S. 169, 181-84 (1972).

206. *Christian Legal Soc'y*, 561 U.S. at 697.

207. *Id.* at 686.

208. *Id.* at 686-87 (first quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990); and then quoting *Healy*, 408 U.S. at 171) (internal citations omitted).

RSOs off campus,[209] and potentially even off-campus, non-RSO, school-sponsored associational activities.[210] Yet, the Supreme Court has never expressly so held. Thus, important questions remain unanswered: may public universities regulate their students' on-campus associational activities that are not school sponsored? What about associational activities that are off campus but school sponsored? Associational activities that are off campus but that have nothing to do with the school? What framework should the Court apply? These questions are what I turn to next.

III. PROPOSED THREE-TIERED FRAMEWORK

The inevitable conclusion one must draw from analyzing these numerous and often conflicting bodies of law is that there is not a clear test for courts to apply when reviewing the constitutionality of university regulations impacting their students' associational rights. The Court has simply not adequately developed the law in this area. Thus, in this section, I propose that the Court adopt a three-tiered framework for reviewing the constitutionality of these regulations. Importantly, the three tiers are not rigid, unforgiving concepts, but rather, they are meant to be guideposts for the Court along a sliding scale of judicial scrutiny.[211] Indeed, I realize, as often happens in the law, that there exist gray areas in which student conduct does not neatly fit into any one of the three tiers. A flexible approach such as this one allows the Court to take into account the idiosyncrasies of each case while also providing clear guidance to university administrators and lower courts. My approach is consistent with

209. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234 (2000) ("We make no distinction between campus activities and the off-campus expressive activities of objectionable RSO's.").

210. *See Christian Legal Soc'y*, 561 U.S. at 686-87 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.").

211. The concept of a sliding scale of judicial scrutiny is not new to First Amendment analysis, as the Court has explicitly recognized that "not every interference with speech triggers the same degree of scrutiny under the First Amendment." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).

the values and realities acknowledged by the Court in its prior jurisprudence and represents principles extracted from existing law.

In the first tier, the university is at the height of its authority to regulate when the associational activity is on campus and school sponsored. The courts are to review university regulations of students' associational activities which fall into this tier under the rational basis test. In the second tier, the university retains a significant amount of authority to regulate. Situations that fall into the second tier are those in which the associational activities are either off campus and school sponsored, or on campus and not school sponsored. The courts are to review university regulations of students' associational activities which fall into this second tier under the intermediate scrutiny test. Finally, in the last tier is off-campus, non-school-sponsored associational activities, where the university's authority to regulate is at its trough. University attempts to regulate associational activities which fall into this third tier must be reviewed under the strict scrutiny test.

A. Tier 1: Rational Basis

Under the first tier of the proposed framework, university regulation of on-campus, school-sponsored associational activity must be reviewed under the rational basis test. The rational basis test requires that university regulations "be rationally related to legitimate government interests."[212] Although it is the lowest standard of judicial review, and almost any regulation will pass constitutional muster under this test,[213] it makes sense to employ it in the context of on-campus, school-sponsored associational activity for several reasons.

First, the Court already provides an enormous degree of deference to the decisions of university administrators when it comes to on-campus regulations, even in the associational

212. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

213. *See* Christen Sproule, *The Pursuit of Happiness and the Right to Sexual Privacy: A Proposal for a Modified Rational Basis Review for Due Process Rights*, 5 GEO. J. GENDER & L. 791, 809 (2004).

context.[214] Second, on campus, the Court has consistently recognized that all that is required of university administrators is that their regulations of students' First Amendment rights be "reasonable."[215] Third, simply by definition, the right to intimate association will almost certainly never be implicated in the context of an on-campus, school-sponsored association, and therefore, the balancing test prescribed by the *Roberts* Court will not apply in this first tier.[216] Fourth, in citing to *Hazelwood* in her *Christian Legal Society* opinion,[217] Justice Ginsburg implied that,

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214. Healy v. James, 408 U.S. 169, 180 (1972) ("And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the *comprehensive* authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*.'") (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (asserting in the association context that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission *upon the use of its campus and facilities*.") (emphasis added); *Southworth*, 529 U.S. at 232 ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."); *Christian Legal Soc'y*, 561 U.S. at 686-87 ("Schools, we have emphasized, enjoy 'a significant measure of authority over the type of *officially recognized* activities in which their students participate.'") (emphasis added) (quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990)); Kiplinger, *supra* note 195, at 112 (stating that "the Supreme Court's deference to educational judgment involving college students is an honor."); Beckstrom, *supra* note 165, at 278; Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 548 (2011) ("[W]hen the association is a student group meeting on a public university campus, the university receives more deference from the court than would the state regulator if the association met off campus."); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1815 (2017) ("[W]hile the Court has not directly held that universities are entitled to a measure of deference when they restrict student speech on campus, in recent years the Court has expressly embraced deference in the affirmative action and freedom of association contexts.").

215. *Widmar*, 454 U.S. at 267 n.5 ("A university's mission is education, and decisions of this Court have never denied a university's authority to impose *reasonable* regulations compatible with that mission upon the use of its campus and facilities.") (emphasis added); Papish v. Bd. of Curators, 410 U.S. 667, 669-70 (1973) (recognizing a public university's "undoubted prerogative to enforce *reasonable* rules governing student conduct.") (emphasis added); *Healy*, 408 U.S. at 189 ("Associational activities need not be tolerated where they infringe *reasonable* campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.") (emphasis added); *Christian Legal Soc'y*, 561 U.S. at 697.

216. Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984); *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2-3, 7-9 (1974) (holding that even a group of six college students who shared a home together off campus were not entitled to any substantive due process protection).

217. *Christian Legal Soc'y*, 561 U.S. at 686.

at least for on-campus, school-sponsored associations, university "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[218]

Fifth, the Court established in *Christian Legal Society* that when an on-campus, school-sponsored student organization brings an expressive association claim, this claim cannot be disaggregated from speech because "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[219] Therefore, the Court in that case implicitly concluded that any on-campus, school-sponsored expressive association claim must not be reviewed under anything more than rational basis review, as this analysis would invalidate the requisite limited public forum analysis of the speech claim.[220] Finally, even the rational basis test would prohibit the university from blatantly discriminating against a particular association based on its viewpoint.[221]

B. Tier 2: Intermediate Scrutiny

Under the second tier of the proposed framework, university regulation of (1) off-campus, school-sponsored or (2) on-campus, non-school-sponsored associational activity must be reviewed under the intermediate scrutiny test. The intermediate scrutiny test requires that the university's regulations further an important state interest and do so by means that are substantially related to

218. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

219. *Christian Legal Soc'y*, 561 U.S. at 680-81.

220. *See id.* at 679-81.

221. *See generally* Healy v. James, 408 U.S. 169, 187-88 (1972) ("[T]he State[] may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); Papish v. Bd. of Curators, 410 U.S. 667, 669-70 (1973); *Christian Legal Soc'y*, 561 U.S. at 667-68, 683-84; Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 233 (2000). *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); Rosenberger v. Rector, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

that interest.[222] Although intermediate scrutiny is largely associated with the Equal Protection context,[223] it has found a home in several tenets of First Amendment doctrine as well.[224] Thus, its application to the associational rights of university students, a First Amendment right, is not unprecedented.[225]

1. Off-Campus, School-Sponsored

Many of the reasons justifying the use of rational basis review in the context of on-campus, school-sponsored associational activities also apply in this context. For example, because these associational activities are still school sponsored, Justice Ginsburg's indication that *Hazelwood* applies in the university setting suggests that even off campus, "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[226] However, in the off-campus context, this justification would only apply in limited circumstances. For example, the university would have substantially more authority to regulate a school-sponsored organization's activities at a regional competition, where the organization is officially representing the school, than it would if the school-sponsored organization was simply meeting off campus to socialize.[227] Yet, because the organization in this

222. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

223. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985) (associating intermediate scrutiny with equal protection claims related to race, alienage, national origin, gender, and illegitimacy).

224. *See, e.g.*, *Turner Broad. Sys., Inc.*, 512 U.S. at 636-37, 661-62 (applying intermediate scrutiny to "must-carry provisions" intruding on "cable speech" by requiring cable operators to carry the signals of a specified number of local broadcast television stations); Ward v. Rock Against Racism, 491 U.S. 781, 796-803 (1989) (applying a heightened version of intermediate scrutiny to a city's volume control regulation); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to a law imposing criminal penalties for destroying selective service cards); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-66 (1980) (applying a version of intermediate scrutiny to commercial speech).

225. This is especially true given Justice Powell's quoting of *O'Brien* in his *Healy* opinion. *Healy*, 408 U.S. at 189 n.20 (quoting *O'Brien*, 391 U.S. at 377).

226. *Christian Legal Soc'y*, 561 U.S. at 686; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

227. Naturally, the university's interest in regulating would be much stronger in the former as opposed to the latter.

context is still school sponsored, the university retains entitlement to significant judicial deference in regulating its activities.[228] Further, as before, by definition, a school-sponsored association is almost certainly never going to qualify as intimate, even if it is off campus.[229]

The main difference between the first tier, and this first category of the second tier is, of course, that the associational activities are occurring off campus. This distinction is enormously important. Even in the context of primary and secondary education, the Court has noted in dicta that First Amendment activity off campus is entitled to far greater protection than it would have on campus.[230] Many legal commentators agree.[231] However, the Court has also noted that there is "no distinction between [on-]campus activities and the off-campus expressive activities of objectionable RSO's," and that the university "is free to enact viewpoint neutral rules restricting off-campus travel or other expenditure by RSO's, for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected."[232]

Given this holding, the associational rights of university students in this context clearly could not be subjected to strict scrutiny. Thus, on the one hand, associational activities in this context are entitled to more protection than rational basis review

228. *See supra* notes 208-10, 214 and accompanying text.

229. *See supra* note 216 and accompanying text.

230. *See supra* notes 163-64 and accompanying text. *But see* Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 234 (2000) (noting that "[u]niversities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse.").

231. *See, e.g.*, Lindsay, *supra* note 14, at 1488-89 ("The very premise of *Tinker*—that students do not shed their First Amendment right to free speech at the 'schoolhouse gate'—indicates that the restrictions at stake occur at school.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); Beckstrom, *supra* note 165, at 299-300 ("[F]ederal courts should . . . adopt an unequivocal standard that . . . universities cannot discipline college students for off-campus speech unless such speech constitutes a true threat or a crime under existing law."); Cimino, *supra* note 214, at 550-51 ("[G]iven the Court's expressive association cases, it seems that associational freedom is more likely to prevail off campus rather than on campus . . . ."); Hauer, *supra* note 165, at 433 ("[T]he Supreme Court has not fully addressed whether a school has the power to restrict off-campus speech, but the decision in *Morse* suggests that such restrictions will face high scrutiny and may be found to fall outside the realm of school regulation.").

232. *Southworth*, 529 U.S. at 234.

by virtue of their being off campus. However, on the other hand, they are not entitled to strict scrutiny review because of the school-sponsored nature of the organizations. Therefore, intermediate scrutiny is the best test to apply to student associational activity falling into this category because it adequately balances both the off-campus nature of the associational activities and the university's interests, while not providing too much weight to either. Again, the university would never be permitted to discriminate against an association based on its viewpoint alone.[233]

2. On-Campus, Non-School-Sponsored

The primary reason justifying the maintenance of heightened deference to the university in this context is the fact that the associational activity is occurring on campus. One of the most oft-quoted lines from *Tinker* and the Court's education jurisprudence is that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'"[234] Associational activities are often loud, rambunctious, or at the very least involve many people. "[I]n light of the special characteristics of the [university] environment," then, universities must have substantial authority to regulate these activities in order to prevent disruption on campus.[235] Indeed, the Court in *Healy* held that, "[w]hile a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a '*heavy burden*' rests on the college to demonstrate the appropriateness of that action."[236] The Court went on to further define the contours of this holding in stating that:

233. *See supra* note 221 and accompanying text.

234. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (quoting *Tinker*, 393 U.S. at 506); Christian Legal Soc'y v. Martinez, 561 U.S. 661, 685-86 (2010) (same); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (same); Healy v. James, 408 U.S. 169, 180 (1972) (same).

235. *Tinker*, 393 U.S. at 506, 513.

236. *Healy*, 408 U.S. at 184 (emphasis added).

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." . . . . Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.[237]

However, the university is not at the height of its authority to regulate in this context, as it was in the first tier, because the association is not school sponsored. The associational activities do not implicate a "legitimate pedagogical concern[]" beyond the disruption of classes because the organizations are not supported by the school.[238] Additionally, unlike in the first tier, here, because the organizations are not school sponsored, they have several arguments potentially implicating the right to intimate association. Furthermore, the expressive association claims of these organizations are not necessarily confined to the limited public forum analysis of their school-sponsored counterparts.[239] Indeed, many spaces on college campuses could be considered truly public forums, where no such limitations can exist.[240] Thus, the intermediate scrutiny test is again the best test to apply in these circumstances because it adequately balances the "special characteristics of the school environment" and the university's interests in preventing disruption with the student's more extensive associational rights.[241]

237. *Id.* at 188-89 (first quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); and then quoting *Tinker*, 393 U.S. at 513) (internal citations omitted).

238. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

239. *See supra* notes 197-208, 219-21, 232-33 and accompanying text.

240. Widmar v. Vincent, 454 U.S. 263, 267 n. 5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *id.* at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.").

241. *Tinker*, 393 U.S. at 506.

C. Tier 3: Strict Scrutiny

Lastly, under the third and final tier of the proposed framework, university regulation of off-campus, non-school-sponsored associational activities should be subject to the most rigorous standard of judicial review: strict scrutiny. The strict scrutiny test requires the university to affirmatively demonstrate that the regulation "furthers a compelling [state] interest and is narrowly tailored to achieve that interest," meaning that the regulation employs the least restrictive means possible.[242] In proposing the adoption of the strict scrutiny test, I do mean *strict* scrutiny. I emphatically do not mean a test that is merely "strict in theory but feeble in fact."[243]

One of the primary justifications driving the adoption of the strict scrutiny test in this context is the fact that the students' associational activities are occurring off campus, where the university's authority to regulate is already diminished, even for school-sponsored associational activities.[244] Additionally, because these associational activities are not school sponsored, in theory, there is no risk that the community at large will impute the activities of the organizations to the university.[245] There is also the common sense justification that it does not make any sense to grant universities broad authority to regulate their students' off-campus, non-school-sponsored associational activities, because they have absolutely nothing to do with school. Judicial deference to university authority in this context is unwarranted and simply "becomes a matter of deference for deference's sake."[246]

242. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)); McCullen v. Coakley, 573 U.S. 464, 478 (2014). The strict scrutiny standard has an extensive history in First Amendment jurisprudence. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800-01 (2006).

243. Fisher v. Univ. of Tex., 570 U.S. 297, 314 (2013).

244. *See supra* Section II.B.1.

245. Indeed, even on campus, the Court has acknowledged that "an open forum in a public university does not confer any imprimatur of state approval on [First Amendment activities]." *Widmar*, 454 U.S. at 274.

246. LoMonte, *supra* note 13, at 341.

Furthermore, although the right to intimate association typically requires a balancing test,[247] strict scrutiny is warranted in this context because the university has no business whatsoever regulating an off-campus, non-school-sponsored intimate association. It would be nonsensical to assert that a university has any say over how one of its students raises her children,[248] who she decides to marry,[249] who she chooses to have sex with,[250] or any other of the kinds of relationships which have been recognized as protected by the right to intimate association.[251] Indeed, even if the more expansive Karstian definition of the right is invoked, no one would seriously argue that a university has the authority to regulate a student's choice of who she decides to become close friends with outside of school.[252]

Regarding the right to expressive association, strict scrutiny is the test that is applied to the community at large.[253] Therefore, there is no reason why university students should have less expressive associational rights off campus, while in the community at large, when their associational activities are not school sponsored. Ultimately, because the university should only be permitted to regulate the off-campus, non-school-sponsored associational activities of their students in the gravest of circumstances, strict scrutiny is the best test for this final tier.

IV. COVID-19 AND THE THREE-TIERED FRAMEWORK

Having now described and justified the three-tiered, sliding scale of judicial scrutiny approach to university associational

247. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

248. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 (1925) ("[T]he child of man is his parent's child and not the State's.").

249. *See generally* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

250. *See generally* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter [into sexual] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons.").

251. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

252. Karst, *supra* note 21, at 629 (claiming that even "close friendship" may be included in the right to intimate association).

253. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

rights, I will apply it to the University of Arkansas's COVID-19 disciplinary policy.[254] The policy provides that, first, "on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis."[255] Second,

> if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.[256]

Third, it provides that "if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation."[257]

A. Tier 1: Rational Basis

The first part of the University policy, stating that "on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis,"[258] implicates the first tier of the three-tiered approach. Under the first tier of the proposed framework, university regulation of on-campus, school-sponsored associational activity must be reviewed under the rational basis test. The rational basis test

254. To view a copy of the actual policy, see Appendix A provided below. I apply my approach to the University of Arkansas's policy only because I attend law school there, not because of any animus toward the school. Furthermore, the University of Arkansas's policy is a representative sample of many public universities' COVID-19 policies nationwide. *See supra* notes 8-9 and accompanying text. Thus, the application of my approach to the University of Arkansas's COVID-19 policy is applicable across the country. Do note that the University's policy has since changed.

255. Appendix A, *supra* note 8.

256. *Id.*

257. *Id.*

258. *Id.*

requires that the university regulations be rationally related to a legitimate government interest.[259] Rational basis is the lowest standard of judicial review, and almost any regulation will pass constitutional muster under this test.[260] Indeed, the Court has held that under rational basis review, it is "entirely irrelevant" what end the government is actually seeking and regulations can be based on "rational speculation unsupported by evidence or empirical data."[261]

One of the primary functions of government is to protect the safety and well-being of its citizens.[262] In furtherance of this paramount objective, the Court has held that the states have an interest in regulating the spread of infectious and contagious diseases.[263] Indeed, from the very beginning, the Court has adhered to the principle that states have legitimate interests in promulgating "quarantine laws [and] health laws of every description . . . ."[264] In *Jacobson v. Massachusetts*, the Court stated that, "of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[265] Recently, the Court confirmed that preventing the spread of COVID-19 is not only a legitimate state interest, but also a compelling one.[266] Thus, here, one cannot seriously argue that the University does not have a legitimate interest in preventing the spread of COVID-19.

In terms of the second prong of the rational basis test, the University's policy of restricting on-campus, school-sponsored

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259. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

260. *See* Sproule, *supra* note 213, at 809.

261. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

262. United States v. Salerno, 481 U.S. 739, 755 (1987); *see also* Cruzan *ex rel.* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

263. *See generally* Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 387-88 (1902); Jacobson v. Massachusetts, 197 U.S. 11, 12-13, 39 (1905) (holding that Massachusetts had the authority to require its citizens to receive smallpox vaccinations to prevent the spread of the disease).

264. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824).

265. 197 U.S. at 27.

266. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kagan, J., in chambers) (Kavanaugh, J., dissenting) (stating that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.").

events to only those which have been officially sanctioned is almost certainly rationally related to preventing the spread of COVID-19. First, empirical evidence is not even necessary, as the University "has the right to pass [regulations] which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases."[267] Indeed, it is common sense that preventing large groups of people from congregating in close spaces helps prevent the spread of communicable diseases. Beyond the common sense justification, the Centers for Disease Control and Prevention ("CDC") COVID-19 guidelines emphasize that large gatherings result in the rapid transmission of COVID-19.[268] Thus, the restriction of on-campus, school-sponsored events to only those which the University has officially sanctioned is unquestionably a "reasonable campus rule[]"[269] that meets the rational basis test in light of the University's interest in preventing the spread of COVID-19. Further, the policy applies to all on-campus, school-sponsored events,[270] meaning that it is content neutral and cannot be struck down on the basis of viewpoint discrimination.

B. Tier 2: Intermediate Scrutiny

The second part of the University policy states:

> if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.[271]

267. *Jacobson*, 197 U.S. at 35.

268. *Guidance for Organizing Large Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/QYE4-VBE3] (Mar. 8, 2021).

269. Healy v. James, 408 U.S. 169, 189 (1972).

270. Appendix A, *supra* note 8.

271. *Id.*

This implicates both prongs of the second tier. Under the second tier of the proposed framework, university regulation of (1) off-campus, school-sponsored or (2) on-campus, non-school-sponsored associational activity must be reviewed under the intermediate scrutiny test. The intermediate scrutiny test requires that the university's regulation furthers an important state interest, and does so by means that are substantially related to that interest.[272] There is no single definition of what constitutes an important state interest, though the Court has provided a multitude of examples.[273] A substantial relation requires only that the regulation be an effective way to achieve the stated objective, not necessarily the optimal way, and that it ultimately "avoid unnecessary abridgment" of First Amendment rights.[274]

1. Off-Campus, School-Sponsored

The University policy targets "large parties and similar social gatherings involving 10 or more student guests," regardless of whether they occur on or off campus.[275] In the university environment, off-campus social gatherings and large parties involving ten or more students often occur at fraternity houses. Universities consider fraternities as RSOs, requiring them to go through various official recognition processes, and universities retain the authority to regulate the organizations' conduct, revoke official recognition, and even ban the organizations from

272. Craig v. Boren, 429 U.S. 190, 197 (1976).

273. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984) (upholding a ban on sleeping in public parks against a First Amendment challenge because the government had a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition"); United States v. O'Brien, 391 U.S. 367, 380 (1968) (upholding criminal sanction for destruction of Selective Service cards against a First Amendment challenge because the government had an important interest in "preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662-63 (1994) (finding that "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming" are all important governmental interests); Davis v. FEC, 554 U.S. 724, 737 (2008) (identifying "preventing corruption and the appearance of corruption" as an important governmental interest).

274. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

275. Appendix A, *supra* note 8.

returning to campus.[276] Thus, fraternities are school sponsored. However, in addition to fraternities, the University of Arkansas's policy implicates any off-campus RSO meeting at which more than ten people are in attendance, regardless of the purpose of the meeting.[277]

Given the analysis of the State's interest in preventing the spread of communicable diseases above,[278] the University's policy regulating off-campus, school-sponsored gatherings certainly serves an important interest. Moreover, the policy is likely substantially related to the State's interest in preventing the spread of COVID-19. The policy does not outright restrict associational conduct, but rather, it simply requires students organizing in groups of more than ten to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[279] Thus, the University policy serves the important state interest in preventing the spread of COVID-19 while also "avoid[ing] unnecessary abridgment" of students' First Amendment rights in participating in off-campus, school-sponsored activities.[280]

2. On-Campus, Non-School-Sponsored

As stated in the previous section, the University's policy targets "large parties and similar social gatherings involving 10 or more student guests," regardless of whether they occur on or off campus.[281] Given the analysis of the State's interest in

276. *See generally, e.g.*, INTERFRATERNITY COUNCIL, COLL. OF WM. & MARY, THE CONSTITUTION OF THE INTERFRATERNITY COUNCIL AT WILLIAM & MARY (2020), [https://perma.cc/7AM6-Z29B]; UNIV. OF ARK. INTERFRATERNITY COUNCIL, UNIVERSITY OF ARKANSAS INTERFRATERNITY COUNCIL CONSTITUTION (2019), [https://perma.cc/P65H-W4SS]; *Chapter Conduct Status*, STOCKTON UNIV., [https://perma.cc/8WNW-6QEZ] (last visited Nov. 12, 2021); UNIV. OF CAL. AT BERKELEY, THE ALL-GREEK SOCIAL CODE (2009), [https://perma.cc/9H94-VRAZ]; *Policies and Resources for Members*, NYU, [https://perma.cc/6AEG-RQ6H] (last visited Nov. 12, 2021).

277. Appendix A, *supra* note 8.

278. *See supra* notes 262-66 and accompanying text.

279. Appendix A, *supra* note 8; *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/K5J9-LCMQ] (Mar. 8, 2021) (advocating social distancing, mask wearing, avoiding large gatherings, among other things).

280. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

281. Appendix A, *supra* note 8.

preventing the spread of communicable diseases above,[282] the University's policy regulating on-campus, non-school-sponsored gatherings surely serves an important interest. This is especially true in the on-campus context because university campuses are "at risk to develop an extreme incidence of COVID-19 and become superspreaders for neighboring communities."[283]

Moreover, it is almost certain that the policy is substantially related to the achievement of the State's interest in preventing the spread of COVID-19. First, the CDC emphasized that, "measures are needed to reduce transmission at institutes of higher education and could include reducing on-campus housing density, ensuring adherence to masking and other mitigation strategies, increasing testing for SARS-CoV-2, and discouraging student gatherings."[284] The policy seeks to implement many of these recommendations as it encourages students to avoid large gatherings, wear masks, and practice social distancing techniques.[285] Empirical data suggests that these kinds of actions on the part of university administrators are effectual in stemming the spread of COVID-19.[286] Furthermore, the policy says nothing about gatherings of less than ten people, essentially respecting students' intimate association rights. Finally, as discussed in the prior section, the policy does not outright ban large gatherings, but rather, it simply requires students organizing in groups of more than ten to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[287] Thus, the University policy serves the important state interest of preventing the spread of COVID-19 while also "avoid[ing] unnecessary

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282. *See supra* notes 262-66 and accompanying text.

283. Hannah Lu et al., *Are College Campuses Superspreaders? A Data-Driven Modeling Study*, 24 COMPUT. METHODS IN BIOMECHANICS & BIOMEDICAL ENG'G 1136, 1136 (2021), [https://perma.cc/U3MZ-5TGS]; *see also* Erica Wilson et al., *Multiple COVID-19 Clusters on a University Campus—North Carolina, August 2020, in* 69 MORBIDITY & MORTALITY WKLY. REP., CTRS. FOR DISEASE CONTROL & PREVENTION 1416, 1416 (2020), [https://perma.cc/92TF-UBBN]; Danielle Ivory et al., *Young People Have Less COVID-19 Risk, but in College Towns, Deaths Rose Fast*, N.Y. TIMES, [https://perma.cc/7FZH-CVFR] (Mar. 2, 2021) (finding that "deaths in communities that are home to colleges have risen faster than the rest of the nation").

284. Wilson et al., *supra* note 283, at 1418.

285. Appendix A, *supra* note 8.

286. *See, e.g.*, Wilson et al., *supra* note 283, at 1413; Lu et al., *supra* note 283, at 1144.

287. *See supra* note 279 and accompanying text.

abridgment" of its students' First Amendment rights while on campus participating in non-school-sponsored activities.[288]

C. Tier 3: Strict Scrutiny

Finally, the last part of the University policy provides that "if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation."[289] This aspect of the policy implicates the third tier of the three-tiered approach, as it restricts off-campus, non-school-sponsored associational activities. Under this final tier, university regulation of off-campus, non-school-sponsored associational activities is subject to the most rigorous standard of judicial review: strict scrutiny. The strict scrutiny test requires the university to affirmatively demonstrate that the regulation "furthers a compelling interest and is narrowly tailored to achieve that interest," meaning that the regulation employs the least restrictive means possible.[290]

Although there is no single definition of what constitutes a compelling state interest, the Court has provided a multitude of examples.[291] Indeed, beyond that, it has explicitly held that "[s]temming the spread of COVID-19 is *unquestionably* a

288. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

289. Appendix A, *supra* note 8.

290. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)); McCullen v. Coakley, 573 U.S. 464, 478 (2014).

291. *Compare* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (finding that states have a compelling interest "in preserving public confidence in the integrity of the judiciary"); Roberts v. U.S. Jaycees, 468 U.S. 609, 623-24 (1984) (holding that states have a compelling interest in eradicating gender discrimination); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (same); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007) (finding that "remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test"); Fisher v. Univ. of Tex., 570 U.S. 297, 308 (2013) (reiterating that student body diversity is a compelling state interest); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) (discussing the state's interest in eliminating discrimination on the basis of sexual orientation), *with* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (suggesting that neither preserving a town's aesthetic appeal nor traffic safety were compelling state interests).

compelling interest . . . ."[292] Thus, the compelling state interest prong of the strict scrutiny test is certainly met here.

The narrowly tailored prong is a closer question. On the one hand, the "Constitution principally entrusts" state officials with broad latitude to guard and protect health and safety when there are medical and scientific uncertainties and "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by [the courts] which lack[] the background, competence, and expertise to assess public health and [are] not accountable to the people."[293] However, on the other hand, "even in a pandemic, the Constitution cannot be put away and forgotten."[294] Thus, although the University has implemented the policy in the face of an unprecedented crisis, caution is still warranted. As aptly stated by Judge Stickman of the Western District of Pennsylvania in discussing COVID-19 regulations:

> [G]ood intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake. The Court is guided in this balancing by principles of established constitutional jurisprudence.[295]

The Court held in *Frisby v. Schultz* that "[a] [regulation] is narrowly tailored if it targets and eliminates no more than the

292. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (emphasis added); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kagan, J., in chambers) (Kavanaugh, J., dissenting) (stating that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.").

293. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 (Kagan, J., in chambers) (Roberts, C.J., concurring).

294. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

295. Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 890 (W.D. Pa. 2020).

exact source of the 'evil' it seeks to remedy."[296] Here, on the one hand, the University policy does not define what constitutes a "large group[]" and it applies broadly to cover any student gathering, whether it be on public or private property, and without regard to its proximity to the University.[297] However, on the other hand, it only covers "socializ[ing]," indicating that many protected associational activities, such as protesting, are not even implicated.[298] Importantly, as discussed in the prior section, the policy does not outright ban large gatherings, but rather, it simply requires students to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[299] Thus, the University policy serves the compelling state interest in stemming the spread of COVID-19 while also "eliminat[ing] no more than the exact source of the 'evil' it seeks to remedy."[300] Ultimately, then, the University policy is likely constitutional even under the strict scrutiny test.

V. CONCLUSION

The COVID-19 pandemic has presented the United States with unprecedented challenges. Uncertainty abounds, and in the face of that uncertainty, federal, state, and local government actors have done the best they can to keep American citizens safe. Desperate times often call for desperate measures. Importantly, however, desperate times do not condone draconian measures. Indeed, "even in a pandemic, the Constitution cannot be put away and forgotten."[301] As government officials have taken unprecedented actions in attempting to stem the spread of COVID-19, many have raised novel constitutional questions, or highlighted areas of constitutional law that are severely

296. 487 U.S. 474, 485 (1988) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)).

297. Appendix A, *supra* note 8.

298. *Id.* Indeed, as Judge Van Tatenhove of the Eastern District of Kentucky recently opined, "it is the right to protest . . . that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction." Ramsek v. Beshear, 468 F. Supp. 3d 904, 919 (E.D. Ky. 2020). However, the right to intimate association is still implicated.

299. *See supra* note 279 and accompanying text.

300. *Frisby*, 487 U.S. at 485 (quoting *Taxpayers for Vincent*, 466 U.S. at 808).

301. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020).

underdeveloped and in desperate need of a new approach. The university student associational rights jurisprudence is paradigmatic.

COVID-19 has presented the Court with the perfect opportunity to remedy the incoherent and unworkable state of university student associational rights jurisprudence. My three-tiered, sliding scale of judicial scrutiny approach provides the Court with a sound, precedent-based test that adequately weighs both student associational rights and the prerogatives of university administrators "in light of the special characteristics of the school environment,"[302] both on and off campus. It utilizes familiar standards and is easy to apply. Perhaps it is time an addition was made to Justice Fortas's oft-quoted line in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech [or association] at the schoolhouse gate," *or beyond it*.[303]

302. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
303. *Id.*; *see supra* notes 137-38 and accompanying text.

APPENDIX A

9/7/2020 Mail - Outlook

Message from the Provost

University of Arkansas <feedback@uark.edu>

Fri 9/4/2020 12:50 PM

To:

September 4, 2020

View in browser

Dear U of A Community:

The current number of COVID cases in the University community is too high. We need to work hard on reducing the number to maintain a campus environment that is as safe as possible and have a successful semester. Here are two measures we are taking at this time:

First, starting Saturday, Sept. 5 and continuing through Sept. 18, on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis. To be clear, this suspension does **not** affect in-person classes, labs, or other instructional activities and does **not** relate to practices or related activities for intercollegiate athletics. Whether this might need to be extended will be evaluated over the next two weeks.

Second, we believe that one of the largest sources of transmission among students may be off-campus social gatherings where social distancing is not observed. We understand that students enjoy getting together to socialize, but at this time events where social distancing and mask-wearing do not occur run the risk of further spreading the disease and putting others at risk. Therefore, we want to make the following clear:

Until further notice, if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.

In addition, if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation.

Students must hold each other accountable for safe behavior and lead the way in modifying conduct to prevent COVID Spread.

Please enjoy a safe and relaxing weekend.

Sincerely,

Charles F. Robinson
Interim Provost and Vice Chancellor for Student and Academic Affairs
Professor of History

University Relations - Davis Hall - Fayetteville, AR 72701
Unsubscribe

https://outlook.office.com/mail/search/id/AAQkAGIyM2ZmZjI2LWU2OWQtNDc0NI1lMmUxLTNhOWY1ZjRmOGIyNQAQAHHcC4hxfRdFqbNyt0JWqb4...

THE PROBLEM OF QUALIFIED IMMUNITY IN K-12 SCHOOLS

Sarah Smith*

I. INTRODUCTION

When thirteen-year-old Savana Redding arrived at school one autumn day in 2003, she was not expecting to be pulled out of her math class and strip searched.[1] But, that is exactly what happened after the assistant principal suspected her of possessing and distributing "prescription-strength ibuprofen" and "over-the-counter . . . naproxen" after receiving information from another student.[2] After Savana consented to a search of her backpack and other belongings—a search which turned up no evidence of drug possession—the assistant principal asked the school nurse and administrative assistant to search Savana's clothes.[3] To do this, the school officials asked Savana "to remove her jacket, socks, and shoes," followed by her pants and shirt.[4] As if this was not enough, they then told Savana "to pull her bra out to the side and shake it, and to pull out the elastic of her underpants, thus exposing her breasts and pelvic area . . . ."[5] Ultimately, the school

* J.D. Candidate, University of Arkansas School of Law, 2022. Articles Editor for the *Arkansas Law Review*, 2021-2022. The author sincerely thanks Professor Danielle Weatherby for her help, advice, and support throughout the writing process. The author also thanks Gray Norton for her invaluable encouragement and advice and the entire *Arkansas Law Review* staff, especially Caleb Epperson, for the countless hours they spent cite checking and editing. Finally, the author also gives a special thank you to her mother, father, and brothers for their encouragement and support throughout the writing process and her entire law school career.

1. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).
2. *Id.* That student, Marissa, was also subjected to a strip search before the school officials' search of Savana, during which the school did not find any pills. *Id.* at 373.
3. *Id.* at 368-69.
4. *Id.* at 369.
5. *Redding*, 557 U.S. at 369.

officials did not find any pills after the "embarrassing, frightening, and humiliating" strip search.[6]

In response to the strip search, Savana's mother filed suit against the school, the assistant principal, the administrative assistant, and the school nurse for violating Savana's Fourth Amendment rights.[7] The case made it to the Supreme Court, which found that although the strip search violated Savana's Fourth Amendment rights, qualified immunity protected the school officials from liability because the law surrounding school strip searches was not "sufficiently clear."[8] This is the most recent Supreme Court case that addresses qualified immunity's application to public school officials.

However, numerous lower courts have also held that qualified immunity protected school officials in cases with other forms of egregious conduct against students.[9] Lower courts' applications of qualified immunity as a shield for school personnel have created a problem for students and their parents who attempt to sue school officials for wrongful conduct but are barred because of the doctrine's broad application.[10] This Comment argues that the Supreme Court should abolish qualified immunity in Section 1983 cases, which enables private individuals to sue government actors for civil rights violations,[11] against public school officials.

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6. *Id.* at 369, 374-75.

7. *Id.* at 369.

8. *Id.* at 378-79.

9. *See, e.g.*, Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951-52 (11th Cir. 2003) (teacher entitled to qualified immunity after performing strip searches of fifth grade students after twenty-six dollars disappeared from the teacher's desk); Harris v. Robinson, 273 F.3d 927, 929, 931 (10th Cir. 2001) (teacher entitled to qualified immunity after making student clean out a toilet with his bare hands); Heidemann v. Rother, 84 F.3d 1021, 1025-26, 1033 (8th Cir. 1996) (school district and physical therapist entitled to qualified immunity after using a blanket wrapping technique to restrain a mentally and physically disabled student for over one hour, allowing flies to enter the student's nose and mouth); Hagan v. Hous. Indep. Sch. Dist., 51 F.3d 48, 50, 53-54 (5th Cir. 1995) (school principal entitled to qualified immunity after failing to sufficiently respond to complaints of sexual molestation by a coach even though he failed to follow the steps for handling sexual abuse complaints in the school handbook).

10. *See* Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. 319, 345 (2018).

11. *See* 42 U.S.C. § 1983.

The modern-day application of the doctrine, particularly how courts view and apply the "clearly established" prong, allows school officials to escape liability for egregious acts against students. Indeed, courts applying the "clearly established" prong require the facts in a particular case to be strikingly similar, substantially similar, or nearly identical to a previous case that "a reasonable official would understand that what he is doing violates" the constitutional right at issue.[12] If the Supreme Court rejected qualified immunity for public school officials, students would have a greater chance of winning their Section 1983 claims.

In the absence of qualified immunity as an affirmative defense for school officials, courts should evaluate claims against these officials based on the nature of the claimed injury, applying existing standards. *First*, courts should continue to evaluate claims for Fourth Amendment violations through the *New Jersey v. T.L.O.* standard for school searches[13] and the *Ingraham v. Wright* standard for corporal punishment.[14] *Second*, regarding Fourteenth Amendment violations, courts should continue to use the already burdensome "shocks-the-conscience" test for substantive Due Process violations.[15] *Third*, concerning First Amendment violations, courts should continue to apply heightened scrutiny, based on the quartet of Supreme Court cases that govern issues implicating student speech rights.[16]

To be clear, practically, these standards already govern a student's Section 1983 claim after it survives the defendant's dispositive motion grounded in qualified immunity. However, this Comment argues that the Supreme Court should reject qualified immunity in these cases because it has been an additional barrier for vindications of students' constitutional rights. Relying on these standards alone, without the interference

12. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

13. 469 U.S. 325, 341-42 (1985).

14. 430 U.S. 651, 674 (1977).

15. *See* Lewis M. Wasserman, *Students' Freedom From Excessive Force by Public School Officials: A Fourth or Fourteenth Amendment Right?*, 21 KAN. J.L. & PUB. POL'Y 35, 51-61 (2011).

16. *See* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

of the qualified immunity defense, will more effectively balance vindication of student rights with school officials' discretion to control the learning environment.[17] The existing standards also provide adequate notice to school officials about what behaviors are and are not permissible when performing their job duties because they are sufficiently clear to define the contours of the implicated constitutional rights.[18]

This Comment includes four parts. Part II explains the doctrine of qualified immunity and its policy justifications and summarizes other protections for school officials to defend against Section 1983 claims. It then argues that the modern application of qualified immunity is inappropriate in the K-12 public school context because it fails to support the Supreme Court's policy justifications for the doctrine. Part III analyzes the existing legal standards and structures that should continue to inform courts' evaluations of students' claims for constitutional violations against school officials. This Part lays out the *T.L.O.* standard for Fourth Amendment claims for unreasonable searches, describes the burdensome "shocks-the-conscience" test for Fourteenth Amendment excessive punishment claims, and explains how First Amendment claims for violations of student speech are analyzed under heightened scrutiny. Part IV considers the implications of abolishing qualified immunity for public school officials and relying on the existing legal standards alone to evaluate students' Section 1983 claims.

In conclusion, this Comment suggests that abolishing qualified immunity as a defense for K-12 public school officials will respect the policy justifications of qualified immunity while providing an avenue for more successful student claims asserted against school officials under Section 1983. Allowing traditional legal standards alone to guide students' Section 1983 claims will effectively balance public and private interests by securing greater protections for students' constitutional rights, shielding school officials from financial liability where appropriate, providing adequate notice of the types of conduct that violate

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17. *See infra* Part III.
18. *See infra* Parts III-IV.

constitutional protections, and respecting school officials' discretion to perform their duties as educators.[19]

II. QUALIFIED IMMUNITY AND OTHER PROTECTIONS

To fully understand why the modern application of the doctrine of qualified immunity has failed in the K-12 public school context, it is instructive to look at how the doctrine began and how it has evolved in the Supreme Court. This Part traces the Supreme Court's introduction of the doctrine in the public school context, its subsequent transformation to its modern iteration, and scholars' support of the doctrine. It then discusses other protections that are available to public school officials and districts when students bring Section 1983 claims for violations of their constitutional rights. This Part concludes with a discussion of why courts' modern applications of qualified immunity are inappropriate in the K-12 context.

A. Qualified Immunity

The main statutory mechanism for students to vindicate their constitutional rights in claims against teachers is 42 U.S.C. § 1983, which provides that anyone who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," deprives another "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[20] Although written broadly, Section 1983 has its limits, including several immunities for government officials.[21] Courts have traditionally

19. Courts' applications of qualified immunity are problematic in all areas, not just K-12 public schools. However, it is important to focus on qualified immunity in the school context because schools are charged with the important task of "educating the young for citizenship[, which] is reason for scrupulous protection of Constitutional freedoms of the individual." *Tinker*, 393 U.S. at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). Thus, this Comment is limited to qualified immunity in the K-12 public school context.

20. 42 U.S.C. § 1983.

21. David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 DICK. L. REV. 1, 19-20 (1994).

allowed school officials to raise qualified immunity as an affirmative defense against claims of civil rights violations.[22] Qualified immunity is a "judicial construct"[23] created because the Supreme Court determined "that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs."[24]

The Supreme Court first addressed qualified immunity's application to school officials in *Wood v. Strickland*.[25] In that case, Arkansas high school students brought a Section 1983 action against two school administrators, claiming that the administrators violated their Due Process rights when they expelled the students for possessing and consuming alcohol at an extracurricular meeting in violation of a school regulation.[26] The Court held:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[27]

The *Wood* Court based this holding on the principle that "the school disciplinary process . . . necessarily involves the exercise of discretion . . ." and reasoned that denying immunity to school officials "would contribute not to principled and fearless decision-making but to intimidation."[28]

The Court modified its *Wood* holding in *Harlow v. Fitzgerald*, which introduced the modern qualified immunity

22. *Id.* at 20; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

23. Blickenstaff, *supra* note 21, at 21. *But see* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018) (arguing that qualified immunity is "an unquestioned principle of American statutory law").

24. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989).

25. 420 U.S. 308, 318-22 (1975).

26. *Id.* at 309-11.

27. *Id.* at 322.

28. *Id.* at 319 (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

doctrine.[29] Although *Harlow* involved presidential aides rather than school officials, it introduced the current qualified immunity defense school officials raise in response to claims of constitutional violations.[30] Justice Powell noted that the *Wood* holding involved both an objective component and a subjective component but found the subjective component created "substantial costs" in the litigation of whether the government officials acted in good faith in carrying out their duties.[31] In response, the Court articulated a new test for the application of the qualified immunity doctrine: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[32] The new test wholly eliminated the subjective component articulated in *Wood* and reworked the objective component to include the "clearly established" language on which courts rely so heavily today.[33]

Anderson v. Creighton further expanded the protection granted to government officials under the qualified immunity doctrine.[34] In that case, an F.B.I. agent conducted a warrantless search of a family while pursuing the suspect of a bank robbery.[35] Justice Scalia explained that "if the test of 'clearly established law' were to be applied" too generally, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."[36] Thus, he clarified that "[t]he contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[37] Under this rule, it is substantially easier for government officials, including public school officials, to avoid liability.[38]

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29. 457 U.S. 800, 818 (1982).
30. *Id.* at 802.
31. *Id.* at 815-16.
32. *Id.* at 818.
33. Blickenstaff, *supra* note 21, at 22; *Harlow*, 457 U.S. at 818.
34. 483 U.S. 635, 639-40 (1987).
35. *Id.* at 637.
36. *Id.* at 639.
37. *Id.* at 640.
38. Blickenstaff, *supra* note 21, at 23.

Pearson v. Callahan is another important qualified immunity decision.[39] In that case, "state law enforcement officers . . . conducted a warrantless search of [the respondent's] house incident to his arrest for the sale of methamphetamine to an undercover informant . . . ."[40] The Court overturned its previous ruling in *Saucier v. Katz* which required courts first to determine "whether 'the facts alleged show the officer's conduct violated a constitutional right'" and then to decide "whether the right was clearly established."[41] The Court in *Pearson* held that "[t]he judges of the district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which [one] of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[42] Following this decision, many courts have failed to reach the first prong (i.e., "whether the conduct violated a constitutional right") and have focused solely on the "clearly established" prong of qualified immunity.[43]

As discussed in Part I, the most recent Supreme Court case applying qualified immunity to school officials is *Safford Unified School District No. 1 v. Redding*.[44] The Court held that a school principal was entitled to qualified immunity after he strip searched a thirteen-year-old girl because he suspected her of bringing prescription-strength ibuprofen and over-the-counter naproxen to school.[45] While the Court did not spend much of its opinion discussing qualified immunity, it found that even though the principal's search of the student's bra and underwear was unreasonable, the law surrounding school strip searches was unclear.[46] Therefore, the principal was not expected to know that his conduct would violate the student's Fourth Amendment right to be free from unreasonable searches.[47] This decision renewed

39. 555 U.S. 223, 227 (2009).
40. *Id.*
41. *Id.* at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).
42. *Id.* at 236.
43. Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1041 (2012).
44. 557 U.S. 364, 368 (2009).
45. *Id.*
46. *Id.*
47. *Id.* at 378-79.

the debate over the legality of strip searches in schools and whether qualified immunity should protect public school administrators and teachers in these situations.[48]

The Supreme Court has articulated several policy justifications for its creation of and reliance on the qualified immunity doctrine.[49] In *Pearson*, the Court stated that qualified immunity was necessary to balance "the need to hold public officials accountable when they exercise power irresponsibly and need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[50] The Supreme Court in *Harlow* also pointed to the doctrine's protection against (1) "the expenses of litigation," (2) "the diversion of official energy from pressing public issues," (3) "the deterrence of able citizens from acceptance of public office," and (4) "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" as important policy justifications for the doctrine.[51] In *United States v. Lanier*, the Court explained that "qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,'" meaning that public officials need to have "fair warning" that their conduct would violate an individual's constitutional rights to be held liable for their actions.[52] A more recent justification for the doctrine is to reduce the "burdens

48. *See* Ryan E. Thomas, Comment, Safford Unified School District No. 1 v. Redding*: Qualified Immunity Shields School Officials Who Ordered Strip-Search of Thirteen-Year-Old Girl*, 45 NEW ENG. L. REV. 267, 275 (2010); Eric W. Clarke, Note, Safford Unified School District #1 v. Redding*: Why Qualified Immunity is a Poor Fit in Fourth Amendment School Search Cases*, 24 B.Y.U. J. PUB. L. 313, 324-26 (2010); Thomas R. Hooks, Comment, *A Rock, a Hard Place, and a Reasonable Suspicion: How the United States Supreme Court Stripped School Officials of the Authority to Keep Students Safe*, 71 LA. L. REV. 269, 269-70 (2010).

49. *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 13-16, 58-76 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236-37 (2006).

50. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

51. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

52. 520 U.S. 259, 270 (1997) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)); *see also* Hope v. Pelzer, 536 U.S. 730, 739, 741 (2002) (explaining that "qualified immunity operates 'to ensure that before they are subject to suit, officers are on notice that their conduct is unlawful'") (quoting Saucier v. Katz, 553 U.S. 194, 206 (2001)).

associated with discovery and trial" for public officials.[53] In the public school setting, the Supreme Court has placed heavy emphasis on qualified immunity's protection of school officials' discretion in disciplining and protecting students.[54]

B. Other Protections

Aside from qualified immunity, public school teachers and districts are afforded other protections against claims for civil rights violations. One of these is the lack of a school's legal duty to protect its students under the Fourteenth Amendment's substantive Due Process right.[55] According to the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[56] Therefore, school officials cannot be liable for private actors' actions against students while attending school under the traditional rule.[57]

However, "courts have recognized two exceptions to this rule: (1) the special relationship theory and (2) the state-created danger doctrine."[58] The special relationship theory states that "a special relationship exists, imposing an affirmative duty to protect, only when a state entity confines a person in its custody against her will, rendering that person unable to care for herself."[59] Notably, the Supreme Court has not recognized that a special relationship exists between students and their schools or teachers, and even though states have "compulsory education laws," several circuit courts have determined that these laws do not create a special relationship between schools and their students that would establish a duty to protect the students.[60] The

53. Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 9.

54. *See* Wood v. Strickland, 420 U.S. 308, 319 (1975).

55. Danielle Weatherby, *Opening the "Snake Pit": Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine*, 48 CONN. L. REV. 119, 130 (2015).

56. 489 U.S. 189, 197 (1989).

57. Weatherby, *supra* note 55, at 130.

58. *Id.*

59. *Id.* at 132.

60. *Id.*

lack of a special relationship between schools and their students means that student plaintiffs may not assert a heightened duty of care when bringing claims against teachers.[61]

Further, the state-created danger doctrine provides a very narrow exception to the no-duty rule if the "harms . . . are brought onto campus by the school itself or its employees."[62] This doctrine only applies in limited circumstances, however, so it alone is insufficient to enable student claims against school officials, especially since qualified immunity poses an additional barrier.[63] Therefore, school officials can avoid liability for certain civil rights violations because of a lack of special relationship between schools and their students or if the school itself did not create the danger.

The Supreme Court has also afforded school boards and districts protection under the extremely stringent standard articulated in *Monell v. Department of Social Services*.[64] Under this standard, "when execution of a government's policy or custom . . . inflicts the injury, . . . the government as an entity is responsible under § 1983."[65] A *Monell* claim involves two elements.[66] First, a state actor (i.e., public school official) must have "violated the plaintiff's constitutional rights."[67] Second, the school must be responsible for the violation because its policy, practice, or custom was the "'moving force' of the deprivation of the plaintiff's federal rights."[68] Further, the plaintiff must show the school, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the plaintiff] constitutional harm."[69] Because the deliberate indifference standard sets such a high bar for plaintiffs, it offers substantial protection to school districts, even when an

61. *See id.* at 133.
62. Weatherby, *supra* note 55, at 135.
63. *Id.* at 135-36 (listing the elements required for a plaintiff to rely on the state-created danger doctrine).
64. 436 U.S. 658, 691, 694 (1978).
65. *Id.* at 694.
66. Weatherby, *supra* note 55, at 160.
67. *Id.*
68. *Id.* at 161 (quoting Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 400 (1997)).
69. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1988).

individual teacher or administrator is liable for a constitutional violation.

C. Why Qualified Immunity is Inappropriate in K-12 Public Schools

In response to the Supreme Court's policy justifications for qualified immunity, several scholars have advanced significant criticisms of the qualified immunity doctrine.[70] Although many of these criticisms arise in the context of the doctrine's application to law enforcement officers, they are still relevant to the doctrine's application to school officials.

Professor Joanna Schwartz has advanced several arguments against the doctrine.[71] She first argues that "qualified immunity has no basis in the common law."[72] In *Pierson v. Ray*, the Supreme Court claimed that the qualified immunity defense should be available to government officials because there was a "good faith and probable cause" defense available for "common-law action[s] for false arrest and imprisonment."[73] Professor Schwartz argues that because there was no "good faith defense to liability" to the Civil Rights Act of 1871 which initially enacted Section 1983, the Supreme Court's claim in *Pierson* is not accurate.[74] Even if the Supreme Court was correct about qualified immunity's basis in the common law, its modern application of the doctrine undermines this claim because the Court "eliminated consideration of officers' subjective intent and instead focused on whether officers' conduct was objectively unreasonable."[75] Consequently, even if "a plaintiff can demonstrate that a defendant was acting in bad faith, that evidence is considered irrelevant to the qualified immunity analysis."[76]

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70. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*]; Bendlin, *supra* note 43, at 1040; Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126 (1985).

71. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1801-32.

72. *Id.* at 1801-02.

73. 386 U.S. 547, 556-57 (1967).

74. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1801.

75. *Id.* at 1802.

76. *Id.*

Professor Schwartz further claims that the doctrine does not actually advance the policy goals articulated in *Harlow*, in part because qualified immunity "does not shield officers from financial burdens."[77] In her six-year study of law enforcement officers, she found that "[i]n the vast majority of jurisdictions, 'officers are more likely to be struck by lightning' than to contribute to a settlement or judgment over the course of their career" because of state laws either requiring or allowing municipalities to indemnify officers in Section 1983 cases.[78] This argument also applies in the K-12 context because school boards or districts often "have a statutory duty to hold . . . teacher[s] harmless from financial loss and expense, including legal fees" for Section 1983 claims or reimburse school officials "for legal expenses incurred with respect to his or her duties."[79] Although one of the main policy justifications for qualified immunity is to protect government officials from "the expenses of litigation," these statutes that authorize teacher indemnification already provide that protection, rendering qualified immunity unnecessary to shield school officials from financial burdens.[80]

Further, Professor Schwartz argues that the doctrine "does not protect against overdeterrence."[81] One of the main policy objectives of qualified immunity articulated in *Harlow* was to prevent "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[82] However, Professor Schwartz notes that "law enforcement officers infrequently think about the threat of being sued when performing their jobs."[83] She also argues that any difficulty in recruiting police officers is due to "high-profile shootings,

77. *Id.* at 1804-08, 1813-14.

78. *Id.* at 1806 (quoting Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 914 (2014)).

79. 78 C.J.S. *Schools and School Districts* § 460 (2021); *see also* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 269-74 (2020).

80. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

81. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1811.

82. *Harlow*, 457 U.S. at 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

83. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1811.

negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."[84] There has also been an increased shortage of teachers in the past several years, largely due to inadequate salaries, "the repeated refrain that US schools are failing and terrible," "loss of professional autonomy," and the sentiment that teaching is so easy that anyone can do it.[85] It is unlikely that the elimination of qualified immunity would deter individuals from working in public schools any more than other factors already do.

Qualified immunity also does not further the policy objective of providing government officials notice that specific kinds of conduct may violate individuals' constitutional rights.[86] This is largely because of "[t]he challenge of identifying clearly established law."[87] Professor Schwartz notes that "the Supreme Court's qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case."[88] The Court has stated that "'clearly established law' should not be defined at a high level of generality."[89] However, by requiring such close factual similarity between cases, "Supreme Court precedent [may be] the only surefire way to clearly establish the law."[90] When the Supreme Court's *Pearson* decision allowed lower courts to evade the constitutional violation issue if they found that no clearly-established right existed in a particular case, it created a "vicious cycle" in which courts grant qualified immunity without ruling on the underlying constitutional claim, thus not "clearly establish[ing]" the law.[91] This resulting "constitutional stagnation" only creates more "confusion about the scope of constitutional rights" and makes it extremely difficult for

84. *Id.* at 1813.

85. Peter Greene, *We Need to Stop Talking About the Teacher Shortage*, FORBES (Sept. 5, 2019, 8:35 PM), [https://perma.cc/A6PB-XTTM].

86. *See* Jacob Heller, *Abominable Acts*, 34 VT. L. REV. 311, 316-17 (2009).

87. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1814-15.

88. *Id.* at 1815.

89. *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)) (internal quotations omitted).

90. *Id.*

91. *Id.* at 1815-16.

plaintiffs to bring successful claims for constitutional violations under Section 1983.[92]

The above criticisms of qualified immunity are concerning in the public school context.[93] Further, there are other protections that courts have afforded to school officials that still allow teachers and administrators to exercise discretion in their job duties.[94] The modern application of qualified immunity in the K-12 context is inappropriate because it protects school officials' egregious conduct. The Supreme Court should abolish the doctrine's use in cases against public school officials and instead should simply rely on existing legal standards for students' claims of constitutional violations. Courts should continue to use the *T.L.O.* standard for school searches[95] and the *Ingraham* standard for corporal punishment to evaluate Section 1983 claims based on the Fourth Amendment.[96] Concerning Fourteenth Amendment claims, courts should continue to rely on the burdensome "shocks-the-conscience" test for substantive Due Process violations.[97] Lastly, courts should continue to evaluate claims for First Amendment violations under heightened scrutiny, based on previous Supreme Court decisions analyzing students' claims for First Amendment violations.[98] These modes of analysis are sufficiently clear as to provide notice to school personnel about what actions may or may not impermissibly violate students' constitutional rights. Relying on these standards without allowing school officials to raise a qualified immunity defense will also further clarify the law, which will allow school officials

92. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 11-12 (2015); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020) [hereinafter Schwartz, *After Qualified Immunity*]; *see also* Bendlin, *supra* note 43, at 1040, 1047-48 (arguing that the modern application of qualified immunity allows courts to skip the constitutional question, thus "leav[ing] an allegedly unclear area of law entirely unsettled, and the state officials remain uncertain whether their actions will violate someone else's constitutional rights").

93. *See supra* text accompanying notes 70-92.

94. *See supra* Section II.B.

95. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

96. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

97. *See* Wasserman, *supra* note 15, at 51-61.

98. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 408 (2007); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).

to have even more adequate notice of what kinds of conduct may or may not be unlawful.

Abolishing qualified immunity will provide more protections for students' constitutional rights while still preserving the policy justifications that qualified immunity was designed to serve. Recognizing that existing legal standards clarify what conduct is permissible and what is impermissible for school officials in performing their job duties will effectively balance the need "to hold [school] officials accountable when they exercise power irresponsibly" with the protection of school personnel from "harassment, distraction, and liability."[99] Further, the existing legal standards that put school officials on notice of what they can and cannot do when performing their duties as educators continue to provide school personnel with discretion in controlling the learning environment.[100] Overall, abolishing qualified immunity in the K-12 public school context will enable more successful student Section 1983 claims while continuing to permit school officials to perform their job duties without fear of financial liability.

III. STUDENTS' CLAIMS

A rejection of the doctrine of qualified immunity would not mean that students' Section 1983 claims against school officials "would imperil individual defendants' pocketbooks and the government fisc . . . [or] discourage people from accepting" positions in K-12 public schools.[101] Current modes of analysis that courts use to evaluate students' constitutional claims are designed to protect teachers' discretion in schools so that school officials can perform their job duties without fear of frivolous lawsuits or financial liability. This Part will explain the standards that courts should continue to use to evaluate students' Section 1983 claims, beginning with claims for bodily injury or violations of bodily integrity under both the Fourth and Fourteenth

99. Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 8 (quoting Pearson v. Callahan, 555 U.S. 233, 231 (2009) (internal quotations omitted)).

100. *See infra* Part III.

101. Schwartz, *After Qualified Immunity*, *supra* note 92, at 315.

Amendments. It will then discuss students' claims for violations of their free speech rights under the First Amendment.

A. Bodily Injury and Violations of Bodily Integrity

Students' claims for bodily injury or violations of bodily integrity commonly arise as claims for violations of the Fourth or Fourteenth Amendments.[102] Fourth Amendment claims usually arise in response to strip searches of students,[103] and Fourteenth Amendment claims commonly result from excessive punishment.[104] This Section will analyze claims under each amendment separately. It will also argue that these standards—which courts already use—provide adequate notice to school officials regarding the lawfulness of their conduct because they are sufficiently clear in defining the scope of permissible conduct for school officials performing their job duties.

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102. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368-69 (2009) (student's mother claimed assistant principal and school nurse violated student's Fourth Amendment right to be free from unreasonable searches after nurse strip-searched the student to look for pills); Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 168 (3d Cir. 2017) (student claimed high school football coach violated student's substantive Due Process rights when student received a traumatic brain injury after coach required the student to participate in practice after student received a violent hit and coach observed concussion symptoms); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951-52 (11th Cir. 2003) (fifth-grade students claimed teacher violated their Fourth Amendment right to be free from unreasonable searches after teacher performed strip searches to find missing money); Heidemann v. Rother, 84 F.3d 1021, 1028-29 (8th Cir. 1996) (disabled student's parents claimed school-employed physical therapist violated the student's substantive Due Process rights under the Fourteenth Amendment after restraining student using a blanket-wrapping technique for over an hour).

103. *See generally* Holly Hudelson, *Spare the Rod, but a Strip Search is Okay? The Effect of Qualified Immunity and Allowing a Strip Search in School*, 39 J.L. & EDUC. 595 (2010) (discussing how the *Redding* Court analyzed the student's Fourth Amendment claim against assistant principal for strip search); Hooks, *supra* note 48, at 270, 278-79; Thomas, *supra* note 48, at 275-77 n.101; Blickenstaff, *supra* note 21, at 2 n.7.

104. *See* Carolyn Peri Weiss, Note, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. U. L.Q. 1251, 1272-73 (1996). However, it is also common for claims of school officials using excessive force against students to arise under the Fourth Amendment. *See, e.g.*, J.W. *ex rel.* Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1253 (11th Cir. 2018); Preschooler II v. Clark Cty. Sch. Bd., 479 F.3d 1175, 1179 (9th Cir. 2007); *see also* Wasserman, *supra* note 15, at 35-38. For the purposes of this Comment, claims for excessive punishment, including corporal punishment, will be dealt with under the Fourteenth Amendment analysis because the majority of courts apply substantive Due Process analyses to these claims. *Id.* at 35.

1. Fourth Amendment Claims: Unreasonable Searches

Scholars have noted qualified immunity's failure to protect students in cases involving Section 1983 claims for violations of the Fourth Amendment, particularly in cases involving strip searches of students by school personnel.[105] One reason for the doctrine's failure is courts' misinterpretations or misapplications of the Supreme Court's articulation of the law regarding strip searches of students in *T.L.O.*[106] In that case, a high school principal searched a student's purse for cigarettes and drugs.[107] Although *T.L.O.* did not involve strip searches, the Supreme Court held that school searches are subject to a two-part inquiry from *Terry v. Ohio* based on the "reasonableness, under all the circumstances, of the search."[108] This two-part inquiry requires courts first to consider "whether the . . . action was justified at its inception" and then determine whether the search as conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[109] The Court then continued and stated how the *Terry* standard should apply in school search cases:

> Under ordinary circumstances, a search of a student by a teacher or other school official[] will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[110]

In *Redding*, the Court determined that the law from *T.L.O.* was unclear because the Circuits interpreted the law differently and that these differences were significant enough for the

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105. *See* Hudelson, *supra* note 103, at 597, 602; Hooks, *supra* note 48, at 285; Thomas, *supra* note 48, at 281; Blickenstaff, *supra* note 21, at 55.

106. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985); *see also* Thomas, *supra* note 48, at 275; Blickenstaff, *supra* note 21, at 42-47.

107. *T.L.O.*, 469 U.S. at 328.

108. *Id.* at 341.

109. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

110. *Id.* at 341-42.

assistant principal to receive qualified immunity.[111] The Court found that these different interpretations of *T.L.O.* did not provide the assistant principal with adequate notice that ordering the strip search of Savana violated the Fourth Amendment.[112] However, the Court's failure to clarify the law from *T.L.O.* has not allowed the law regarding student searches to become sufficiently clear. This kind of "circular reasoning" is a common critique of qualified immunity, even outside cases involving school officials and students.[113]

However, two of the dissenters in *Redding* argued that the *T.L.O.* standard outlining reasonable searches of students under the Fourth Amendment was sufficiently clear to act as a guide for school officials in determining whether a search of a student was reasonable.[114] First, Justice Stevens argued in his dissent that the *T.L.O.* standard was unambiguous, especially regarding strip searches of students.[115] He even stated, "I have long believed that '[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.'"[116] Using the *T.L.O.* standard, he would have determined the strip search of Savana "was both more intrusive and less justified than the search of the student's purse in *T. L. O.*"[117] He also noted that "the clarity of a well-established right should not depend on whether jurists have misread [the Supreme Court's] precedent."[118] Justice Ginsburg also argued in her dissent that *T.L.O.* "'clearly established' the law governing" the facts in *Redding* because "it was not reasonable for [the assistant principal] to believe that the law permitted" his "abusive" treatment of Savana.[119] This demonstrates that, at least in the eyes of two Supreme Court Justices, the *T.L.O.* standard is

111. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378 (2009).

112. *Id.*

113. *See* Bendlin, *supra* note 43, at 1040.

114. *Redding*, 557 U.S. at 379-82 (Stevens, J., concurring in part and dissenting in part).

115. *Id.* at 380.

116. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 382 n.5 (1985)).

117. *Id.*

118. *Id.*

119. *Redding*, 557 U.S. at 381-82 (Ginsburg, J., concurring in part and dissenting in part).

sufficiently clear to put school officials on notice of what conduct is and is not permissible when conducting searches of students.

Further, the *T.L.O.* standard for assessing the reasonableness of school searches of students preserves discretion for school officials in performing their daily duties.[120] Alysa Koloms notes that the Supreme Court's *T.L.O.* standard "heavily favors the disciplinary authority of the school administration."[121] In fact, much of the Court's reasoning for the reasonableness standard was to preserve the school's "freedom to maintain order in the school . . . ."[122] The majority in *T.L.O.* even stated that the goal of the reasonableness standard was to "strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place[.]"[123] Because the *T.L.O.* standard was formulated in part to protect school officials' discretion in disciplining students, qualified immunity for public school personnel is unnecessary to protect their discretion, contrary to the Court's suggestion in *Wood*.[124]

2. Fourteenth Amendment Claims: Excessive Punishment

The majority of claims for excessive punishment arise as claims for violations of a student's substantive Due Process rights under the Fourteenth Amendment.[125] In the seminal corporal punishment case, *Ingraham*, the Supreme Court held "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . . Fourteenth Amendment liberty interests are implicated."[126] However, the Court failed to extend this to the substantive component of the

120. Alysa B. Koloms, Note, *Stripping Down the Reasonableness Standard: The Problems with Using* In Loco Parentis *to Define Students' Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 189 (2010).

121. *Id.* at 191.

122. New Jersey v. T.L.O., 469 U.S. 325, 339-342 (1985).

123. *Id.* at 340.

124. *Id.*; Wood v. Strickland, 420 U.S. 308, 319-20 (1975) (holding that "the school disciplinary process . . . necessarily involves the exercise of discretion . . . .").

125. Wasserman, *supra* note 15, at 35.

126. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

Due Process Clause and expressly rejected the notion that these claims implicated the Eighth Amendment, leaving lower courts unsure as to how to deal with excessive or corporal punishment cases brought under the Fourteenth Amendment.[127]

Circuit courts that deal with claims for excessive punishment as an alleged violation of the student's substantive Due Process rights usually rely on *Johnson v. Glick*, a case from the Second Circuit that first applied the "shocks-the-conscience" test to these claims.[128] Although that case involved incarcerated persons and correctional officers rather than students and school officials, other circuits have extended the Second Circuit's four-factor test to students' claims of excessive force.[129] The *Glick* "shocks-the-conscience" test requires courts to:

> [L]ook to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[130]

In these cases, the stringent analysis courts use to evaluate the "clearly established" prong of qualified immunity imposes an additional barrier to students' claims. For example, in *Heidemann v. Rother*, a student's parents brought a claim alleging a Fourteenth Amendment violation after a school-employed physical therapist used a blanket wrapping technique to physically restrain their mentally and physically disabled nine-year-old daughter for over an hour at a time.[131] The blanket wrapping technique bound the student's body "with a blanket such that she could not use her arms, legs, or hands."[132] When the student's mother found her at the school the first time, the student had "flies crawling in and around her mouth and nose."[133] The second time her mother found her, the physical therapist had

127. *Id.* at 659 n.12; Wasserman, *supra* note 15, at 54.
128. 481 F.2d 1028, 1033 (2d Cir. 1973).
129. *Id.* at 1033-34; Wasserman, *supra* note 15, at 56-58.
130. *Glick*, 481 F.2d at 1033.
131. 84 F.3d 1021, 1025-26 (8th Cir. 1996).
132. *Id.* at 1025.
133. *Id.* at 1026.

wrapped the student so tightly that her mother could not remove the blanket without help.[134] Shockingly, the Eighth Circuit held that the physical therapist was entitled to qualified immunity against the student's Section 1983 claim because the "treatment was . . . within the scope of professionally accepted choices" and was not a "substantial departure from accepted professional judgment, practice, or standards . . . ."[135]

Had qualified immunity not been available in *Heidemann*, the court's use of the "shocks-the-conscience" test from *Glick* would have resulted in the physical therapist's liability under Section 1983.[136] "[T]he need for the application of force" was low, if not nonexistent.[137] In fact, the facts of *Heidemann* provide no evidence that the physical therapist needed to administer the blanket wrapping technique except for the presence of the student's disabilities and the professional judgment of the physical therapist.[138] Therefore, "the relationship between the need and the amount of force that was used" was disproportionate because no force was necessary and the restraint of the student—so tight that her mother could not remove the blanket without assistance—was excessive.[139] Further, "the extent of injury" was substantial, especially considering the presence of flies in and around the student's nose and mouth.[140] Moreover, although there was no evidence that the punishment was inflicted "maliciously and sadistically for the very purpose of causing harm," it was also not "applied in a good faith effort to maintain or restore discipline."[141] Therefore, had qualified immunity not applied, the nine-year-old student and her family would have been able to bring a successful claim for a violation of the student's substantive Due Process rights under Section 1983.

Courts' use of the "shocks-the-conscience" test in evaluating students' right to be free from excessive punishment without the interference of a qualified immunity defense would allow

134. *Id.*
135. *Id.* at 1030-31.
136. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
137. *Id.*
138. *Heidemann*, 84 F.3d at 1025-26.
139. *Glick*, 481 F.2d at 1033; *Heidemann*, 84 F.3d at 1026.
140. *Glick*, 481 F.2d at 1033; *Heidemann*, 84 F.3d at 1026.
141. *Glick*, 481 F.2d at 1033.

students to bring more successful claims for egregious violations of their substantive Due Process rights while still allowing some level of discretion for school personnel. The "shocks-the-conscience" test is a high bar to clear, leaving much room for school officials to implement appropriate disciplinary measures to protect the students and the learning environment. Further, the use of the "shocks-the-conscience" test will continue to protect school officials from the fear of frivolous lawsuits interfering with their ability to perform their jobs. However, for conduct that is completely outrageous, the "shocks-the-conscience" standard will still serve to protect students.

This standard will also allow school officials to have "fair warning" regarding what kinds of conduct are and are not permissible.[142] The "shocks-the-conscience" test is a stringent standard, one that is based on "our common moral intuitions."[143] One does not have to be a constitutional scholar to recognize that some conduct is so egregious that it violates an individual's constitutional rights.[144] The "shocks-the-conscience" standard reflects that sentiment and informs public officials that some conduct is so horrible that it cannot possibly pass constitutional muster, even without the protection of qualified immunity.

B. First Amendment Violations

The qualified immunity defense is also frequently raised in students' claims against school officials for violations of their First Amendment rights.[145] However, it often creates an

142. Heller, *supra* note 86, at 320.

143. *Id.* at 356.

144. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 662 (1998) (arguing that some conduct "contains indicia of its own blameworthiness").

145. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334, 338-39 (2d Cir. 2011) (school administrators entitled to qualified immunity when student brought claim for violation of her First Amendment free speech rights after preventing her from running for student government because of her off-campus speech and prohibiting her from wearing a homemade printed t-shirt at a school assembly); Morgan v. Swanson, 659 F.3d 359, 364-65 (5th Cir. 2011) (principal entitled to qualified immunity when student brought a claim for violation of her First Amendment rights after he restricted her from distributing religious materials outside of school hours to a group of students); C.F. *ex rel.* Farnan v. Capistrano Unified Sch. Dist., 654 F.3d 975, 978 (9th Cir. 2011) (teacher entitled to qualified immunity after student claimed teacher violated the Establishment Clause of the First Amendment

additional obstacle for students who bring claims against school officials under Section 1983 for First Amendment violations.[146] In fact, the Second Circuit noted that "[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case."[147] One First Amendment scholar notes that the *Pearson* Court's decision to allow courts to skip the analysis of whether there was a constitutional violation and directly determine whether the right was clearly established posed serious problems for student speech.[148] In particular, he argued that "[t]he *Pearson* decision gives judges the discretion to avoid tough constitutional questions and decide cases based on the 'clearly established' prong . . . ."[149] Because of this problem, another argument is that "First Amendment values and constitutional values in general would be better served by an approach that obliges courts to decide constitutional questions."[150] Abolishing qualified immunity would allow courts to rule on these constitutional issues without dealing with the stringent "clearly established" standard that requires extreme factual similarity to find that the right was "clearly established" at the time of the school officials' conduct.

The traditional standard for analyzing student speech under the First Amendment comes from *Tinker v. Des Moines Independent Community School District*.[151] In that case, the

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when teacher made statements hostile to religion while discussing creationism in history class); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1259, 1265, 1269 (11th Cir. 2004) (teacher and principal not entitled to qualified immunity when student brought claim for violation of his First Amendment free speech rights after school officials paddled student for raising his fist during a daily flag salute instead of reciting the Pledge of Allegiance).

146. *See* Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of* Tinker *in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 916-17 (2012); David L. Hudson, Jr., Pearson v. Callahan *and Qualified Immunity: Impact on First Amendment Law*, 10 FIRST AMEND. L. REV. 125, 136 (2011) [hereinafter Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*].

147. *Doninger*, 642 F.3d at 353.

148. Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136.

149. *Id.*

150. David L. Hudson, Jr., *4th Amendment Ruling Could Influence First Amendment Law*, FREEDOM F. INST. (Jan. 27, 2009), [https://perma.cc/MXW6-TPXE].

151. 393 U.S. 503, 512-14 (1969).

Supreme Court ruled that a public school district could not prohibit students from wearing black armbands at school in protest of the Vietnam War.[152] The Court also announced that student speech should only be prohibited if it threatens a "substantial disruption of or material interference with school activities . . . ."[153]

After the *Tinker* decision, the Court carved out three exceptions to the *Tinker* doctrine.[154] The first exception applies to "offensively lewd and indecent speech."[155] The Court held that public schools may prohibit this type of speech because it "would undermine the school's basic educational mission."[156] The second exception includes student newspapers and other school-sponsored speech.[157] The Court determined that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner" when "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school."[158]

The last exception is in the Court's second most recent student speech decision, *Morse v. Frederick*, in which the Court took a significant step away from the traditional *Tinker* standard but did not abandon it altogether.[159] In that case, a school principal suspended a student for displaying a banner with the phrase "BONG HiTS 4 JESUS."[160] Chief Justice Robert's majority held that the principal did not violate the student's First Amendment rights because the principal interpreted the banner to advocate for illegal drug use.[161] The Court recognized that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest" and that "[t]he First Amendment does not require schools to tolerate at school events student

152. *Id.* at 510-11.
153. *Id.* at 512-14.
154. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988).
155. *Fraser*, 478 U.S. at 685.
156. *Id.*
157. *Hazelwood*, 484 U.S. at 272-73.
158. *Id.* at 270-71.
159. 551 U.S. 393, 408-10 (2007).
160. *Id.* at 397-98.
161. *Id.* at 402.

expression that contributes to" the dangers of student drug use, thus creating the third exception to the *Tinker* standard.[162]

Justice Breyer's concurrence in part and dissent in part in *Morse* would not have undertaken this analysis under the First Amendment.[163] Instead, Justice Breyer would have held that qualified immunity protected the principal in this case because "she did not clearly violate the law during her confrontation with the student."[164] The majority suggested it did not decide the case based on qualified immunity because the principal asked for declaratory and injunctive relief as well as money damages (and qualified immunity is only available as a defense in cases requesting money damages).[165] However, Justice Breyer's approach of avoiding the constitutional question in favor of finding that the principal was entitled to qualified immunity because there was no "clearly established" right is precisely the problem that the qualified immunity doctrine poses.[166] Without negotiating the highly discretionary qualified immunity analysis, courts could rely solely on *Tinker*, *Fraser*, *Hazelwood*, and *Morse* to evaluate students' Section 1983 claims for violations of their First Amendment rights, and the law in these areas would become clearer.

Although the outcome in *Morse* would likely have been the same with or without a qualified immunity analysis, lower court opinions have demonstrated that qualified immunity is unnecessary in cases involving Section 1983 claims for First Amendment violations.[167] Lower courts tend to rely on *Tinker*'s

162. *Id.* at 407, 408, 410 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

163. *Id.* at 425 (Breyer, J., concurring in part and dissenting in part).

164. *Morse*, 551 U.S. at 429 (Breyer, J., concurring in part and dissenting in part).

165. *Id.* at 400 n.1 (majority opinion).

166. *Id.* at 429 (Breyer, J., concurring in part and dissenting in part); Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136.

167. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334, 338-39 (2d Cir. 2011) (school administrators entitled to qualified immunity when student brought claim for violation of her First Amendment free speech rights after preventing her from running for student government because of her off-campus speech and prohibiting her from wearing a homemade printed t-shirt at a school assembly); Morgan v. Swanson, 659 F.3d 359, 364-65 (5th Cir. 2011) (principal entitled to qualified immunity when student brought a claim for violation of her First Amendment rights after he restricted her from distributing religious materials outside of school hours to a group of students); C.F. *ex rel.* Farnan v. Capistrano

"substantial disruption" standard when analyzing students' claims for violations of their First Amendment free speech rights "unless the speech is lewd, advocates drug use, or bears the school's imprimatur."[168]

For example, in *Doninger v. Niehoff*, the Second Circuit granted qualified immunity to a principal and a superintendent of a school after they prohibited a student from running for class secretary and from wearing a homemade printed shirt stating "Team Avery" to a school assembly based on the student's off-campus speech calling the school administrators "douchebags" and urging other students to take action "to piss [them] off more."[169] Under the *Tinker* analysis, the court held "it was objectively reasonable for school officials to conclude that [the student]'s behavior was potentially disruptive of student government functions . . ." and thus, the student did not have a clearly established right "not to be prohibited from participating in a voluntary, extracurricular activity because of offensive off-campus speech . . . ."[170] Despite the student's reliance on a Supreme Court case in which "public school students were punished for publishing and distributing to their peers a lewd, satirical newspaper" off campus, the court found that this did not create a "clearly established" right despite the substantial factual similarities in the cases.[171] If the school administrators had been unable to raise qualified immunity as an affirmative defense, the student would have had a greater chance to prevail because the Second Circuit would have had more freedom to compare prior

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Unified Sch. Dist., 654 F.3d 975, 978 (9th Cir. 2011) (teacher entitled to qualified immunity after student claimed teacher violated the Establishment Clause of the First Amendment when teacher made statements hostile to religion while discussing creationism in history class). *But see* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) (teacher and principal not entitled to qualified immunity when student brought claim for violation of his First Amendment free speech rights after school officials paddled student for raising his fist during a daily flag salute instead of reciting the Pledge of Allegiance).

168. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 404 (2011).

169. 642 F.3d at 340-41, 351, 356.

170. *Id.* at 346, 351 (quoting Doninger v. Niehoff, 594 F. Supp. 2d 211, 222 (D. Conn. 2009)).

171. *Id.* at 346.

cases with similar facts to the case at issue when applying the *Tinker* standard.

The previous example also demonstrates the discretion the *Tinker* standard affords to school personnel in determining whether to limit particular student speech.[172] The standard "requires courts to defer to educators' reasonable determinations of what speech may cause a substantial disruption . . . ."[173] This is exactly the type of deference that the Supreme Court was trying to protect in *Wood* when they extended qualified immunity to protect school officials.[174] The *Tinker* standard and the three other exceptions to protect student speech are also sufficiently clear to provide officials with "fair warning" about what conduct is unlawful when dealing with student speech issues.[175] Therefore, qualified immunity is unnecessary and may actually present additional challenges to students bringing Section 1983 claims for First Amendment violations.[176]

IV. IMPLICATIONS OF ABOLISHING QUALIFIED IMMUNITY

The biggest challenge to abolishing qualified immunity in K-12 schools and simply relying on existing legal standards to evaluate students' Section 1983 claims is that scholars argue that these standards are unclear and thus do not provide school officials with "fair warning"[177] that their conduct is unlawful.[178] Regarding Fourth Amendment claims for unreasonable searches, David Blickenstaff argues that the *T.L.O.* standard is "too lenient

172. *See* Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008).

173. *Id.*

174. Wood v. Strickland, 420 U.S. 308, 319 (1975).

175. *See* Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 182-88 (2012); Goldman, *supra* note 168, at 405; Hope v. Pelzer, 536 U.S. 730, 739-41 (2002).

176. *See* Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136-39.

177. *Hope*, 536 U.S. at 739-41.

178. *See* Blickenstaff, *supra* note 21, at 41 (arguing that the *T.L.O.* standard to evaluate strip searches of students is unclear); Jett, *supra* note 146, at 897-98, 918-19 (arguing that the *Tinker* standard is unclear as applied to student speech cases).

and too ill-defined" to apply to strip searches of students at school.[179] However, Justices Stevens's and Ginsburg's dissents in *Redding* demonstrate why this view is incorrect.[180] They opined that there is disagreement about the *T.L.O.* standard not because the *T.L.O* test is ambiguous but rather because lower courts misapply the standard.[181] Therefore, if lower courts were to apply the *T.L.O.* test correctly, school officials would have "fair warning" about what is and is not permissible behavior when conducting student searches because the standard is sufficiently clear to provide that notice.[182]

Regarding First Amendment claims, a common critique of the *Tinker* standard is that it is unclear how it applies in student speech cases, particularly regarding online or off-campus student speech.[183] Allison Belnap notes that the *Tinker* standard is ambiguous because it is uncertain whether a school needs to show "*specific and concrete evidence*" that previous similar speech has "resulted in a material and substantial interference with school operations," "*a well-founded belief* that the disruption will occur," or "merely *a foreseeable risk* that the speech would result in a material and substantial disruption . . . ."[184] Another scholar notes that lower courts have applied *Tinker* differently and reached different results in online school speech cases because of "the difficulty in applying traditional school-speech jurisprudence to cyberspeech."[185]

However, these arguments highlight the fact that lower courts are misapplying the Supreme Court's precedent in *Tinker* rather than the standard's ambiguity.[186] Professor Dryden notes that lower courts run into trouble when they only apply one of *Tinker*'s prongs rather than both.[187] If courts applied both prongs

179. Blickenstaff, *supra* note 21, at 47.
180. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 380-82 (2009).
181. *See supra* text accompanying notes 114-19.
182. *Hope*, 536 U.S. at 741.
183. *See generally* Jett, *supra* note 146; Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 509 (2011).
184. Belnap, *supra* note 183, at 523-24.
185. Jett, *supra* note 146, at 897.
186. *See* Dryden, *supra* note 175, at 182-88; Goldman, *supra* note 168, at 405.
187. Dryden, *supra* note 175, at 215-16.

of the *Tinker* standard in analyzing students' claims for First Amendment violations:

> [S]chool officials would not be permitted to proscribe any speech . . . unless they could articulate objective facts which would demonstrate that the expression created, or was likely to create, a substantial disruption of school operations or the expression interfered with the rights of others on more than just a temporary and superficial level.[188]

This hearkens back to Justice Stevens's comment in *Redding* that "the clarity of a well-established right should not depend on whether jurists have misread [the Supreme Court's] precedents."[189] In other words, if applied correctly, the *Tinker* standard is sufficiently clear to put school officials on notice of what kinds of conduct are and are not permissible when dealing with student speech issues.

Relying on *T.L.O.*, the highly deferential "shocks-the-conscience" test, and *Tinker* and its progeny for analyzing students' Section 1983 claims will still provide school officials notice of conduct that is unconstitutional in discharging their duties without the need for qualified immunity. The Supreme Court has stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[190] The standards under which courts analyze students' First, Fourth, and Fourteenth Amendment claims are sufficiently clear to provide school officials with "fair warning" of what conduct is and is not permissible.[191] Further, the argument that qualified immunity is designed to allow public officials, particularly law enforcement officers, to make split-second decisions is not as pressing in the K-12 context.[192] It is much more likely that teachers and school administrators have time to consult attorneys, supervisors, and co-workers about a

188. *Id.* at 215.

189. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 380 (2009) (Stephens, J., concurring in part and dissenting in part).

190. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

191. *Id.*

192. *See* Reichle v. Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy.").

particular method they intend to use to discipline students or prevent distractions in the learning environment.

Even if these standards are not sufficiently clear to provide school officials with notice about the lawfulness of their conduct, it has been noted that public officials "do not pause in the course of conduct to ponder whether their behavior violates the Constitution and can therefore subject them to federal liability . . . ."[193] Therefore, there is an argument that "providing [public officials] with legal or constitutional notice is of little practical use" because state actors do not consider "federal forum[s] or attorney's fees" when deciding how to handle a particular situation.[194] Instead, public officials, "like most people, make decisions based on their conceptions of right and wrong, buttressed perhaps by a rough sense of the law."[195] When viewed in this light, qualified immunity may not be necessary to provide notice to school officials about lawful and unlawful conduct because these officials do not rely on specific articulations of the law when making decisions in the classroom.

Students will also receive more expansive constitutional protections if the Supreme Court abolishes qualified immunity in the K-12 context. According to the *Wood* Court:

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.[196]

Thus, qualified immunity in the school setting serves to protect teachers and other school officials from costly litigation by allowing them to exercise discretion in their day-to-day duties.[197] However, the legal standards previously discussed provide that same level of protection of school officials' discretion.[198]

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193. Heller, *supra* note 86, at 317.
194. *Id.* at 354.
195. *Id.*
196. Wood v. Strickland, 420 U.S. 308, 319-20 (1975).
197. *See id.*
198. *See supra* Part III.

Rejecting qualified immunity for school officials would not affect any other protections the law has already afforded to school personnel, such as the law's refusal to recognize any duty to protect or supervise students.[199] Some cases have applied qualified immunity in cases alleging a failure to protect or supervise students, and these cases usually result in awarding qualified immunity to the school officials.[200] For example, in *Mann v. Palmerton Area School District*, a student brought suit against his football coach under a failure to protect theory of the Fourteenth Amendment after the student suffered a traumatic brain injury when the coach knew the student sustained multiple hard hits in practice and failed to implement the policies required when a student suffered a head injury.[201] The court held that the football coach was entitled to qualified immunity because "it was not so plainly obvious that requiring a student-athlete, fully clothed in protective gear, to continue to participate in practice after sustaining a violent hit and exhibiting concussion symptoms implicated the student athlete's constitutional rights."[202] The Third Circuit repeatedly emphasized the fact that although there were other cases involving student-athletes and coaches brought under Fourteenth Amendment failure to protect claims, none of the facts of those cases was similar enough to create a "clearly established" right.[203] However, without having to undertake a qualified immunity analysis, the court would have been allowed to rely more heavily on the other cases, and thus may have allowed the student to prevail on his claim for a constitutional violation.

Further, abolishing qualified immunity for school officials would not affect the protections that the stringent *Monell* standard

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199. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989).

200. *See, e.g.*, Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 169-70 (3d Cir. 2017) (student claimed high-school football coach violated student's substantive Due Process rights when student received a traumatic brain injury after coach required the student to participate in practice after student received a violent hit and coach observed concussion symptoms); Walton v. Alexander, 44 F.3d 1297, 1300-01 (5th Cir. 1995) (superintendent entitled to qualified immunity after a classmate sexually assaulted the student because the court found no special relationship existed that would create a duty to protect).

201. 872 F.3d at 169-70.

202. *Id.* at 174.

203. *Id.* at 173-74.

provides to school districts and school officials.[204] School districts often indemnify teachers and other school administrators when students bring claims under Section 1983.[205] If a school district or school board indemnifies a school official, another avenue for students to bring Section 1983 claims is against a school district or school board under *Monell*, which requires that (1) a state actor "violated the plaintiff's constitutional rights" and (2) the municipal entity be responsible for the violation because of the entity's policies, practices, or customs.[206] Therefore, even with the availability of qualified immunity, teachers are rarely responsible for the financial burden that comes from Section 1983 liability. Even without qualified immunity, this framework would preserve the doctrine's goal of protecting public officials from financial liability.[207] The strict "deliberate indifference" requirement under *Monell* also serves to protect school districts from financial liability, meaning that eliminating qualified immunity in the K-12 context would not lead to more successful suits against school districts if suits brought against individual school officials fail.[208]

V. CONCLUSION

The Supreme Court should abolish qualified immunity in favor of relying on existing legal standards when analyzing Section 1983 claims against school officials for violating students' constitutional rights. The modern application of the doctrine fails to protect students from constitutional violations because it requires too strict a reliance on cases with substantially similar facts. The *T.L.O.* standard for Fourth Amendment claims,

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204. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 724-25, 729-30 (3d Cir. 1989).

205. 78 C.J.S. *Schools and School Districts* § 460 (2021).

206. Weatherby, *supra* note 55, at 160-61.

207. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that "the expenses of litigation" is one of qualified immunity's protections afforded to public officials).

208. *See Stoneking*, 882 F.2d at 725. This is important because one way that school districts receive the money they could use to pay damages, court costs, and attorneys' fees is from taxes levied against the communities in which they operate. *See Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STATS., [https://perma.cc/J57T-FRKZ] (May 2021). Thus, *Monell*'s strict standard protects school districts, the school officials these districts may indemnify, and the families of students who attend those school districts.

the "shocks-the-conscience" standard for Fourteenth Amendment claims, and the *Tinker* standard for First Amendment claims more effectively balance students' interests and the need for adequate notice about what constitutes unlawful conduct. These tests will also preserve discretion for school officials to perform their job duties effectively. Further, eliminating qualified immunity in cases against school officials would not leave them entirely unprotected from students' Section 1983 claims.

Qualified immunity is not only a problem in K-12 schools.[209] For years, scholars have noted the serious problems the doctrine poses, especially in excessive force claims asserted against law enforcement.[210] After the tragic death of George Floyd in May 2020 while in police custody,[211] many critics renewed the call for a repeal of qualified immunity, especially in the law enforcement context.[212] The U.S. House of Representatives even passed a bill entitled the George Floyd Justice in Policing Act of 2021, which would amend Section 1983 to state that qualified immunity can no longer be a defense for law enforcement officers.[213] However, not everyone is on board with the idea of abolishing qualified immunity.[214] Considering the Supreme Court's reluctance to

209. Courts' applications of qualified immunity are problematic in all areas, not just K-12 public schools. However, it is important to focus on qualified immunity in the school context because schools are charged with the important task of "educating the young for citizenship[, which] is reason for scrupulous protection of Constitutional freedoms of the individual." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

210. *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1798-1800; Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 6-7, 22; John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 67 (2017).

211. *See* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Oct. 29, 2021, 9:48 AM), [https://perma.cc/8BR5-36XX].

212. *See* John Kramer, *George Floyd and Beyond: How "Qualified Immunity" Enables Bad Policing*, INST. FOR JUST. (June 3, 2020), [https://perma.cc/AY7K-MYM3]; Tyler Olsen, *George Floyd Case Revives 'Qualified Immunity' Debate, as Supreme Court Could Soon Take Up Issue*, FOX NEWS (May 29, 2020), [https://perma.cc/N7TX-EJL5].

213. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021). As of April 19, 2021, only the U.S. House of Representative has passed this bill.

214. *See* Schwartz, *After Qualified Immunity*, *supra* note 92, at 315 & nn.18-19 (describing the Supreme Court and other scholars' "strongest defenses of qualified immunity").

address the issue for police officers, it may be a while before there is any further progress in the movement to abolish the doctrine.[215]

The next time the Court addresses the issue, however, it may be more feasible to start in the K-12 public school context than in the law enforcement context. School officials are not often faced with situations in which they must make life or death decisions as law enforcement officers are.[216] Abolishing qualified immunity for K-12 school officials could be a starting point for the Court to see how public officials may react to not having the affirmative defense of qualified immunity in their back pockets when making decisions within the scope of their employment.

Ultimately, regardless of how abolishing qualified immunity in the K-12 context may affect other public actors, the Supreme Court must take a hard look at how the doctrine protects egregious conduct by school officials and prevents students from bringing successful Section 1983 claims. Students do not and should not "shed their constitutional rights . . . at the schoolhouse gate."[217] Courts' modern applications of qualified immunity in K-12 school cases dilute this sentiment and leave students and their families without a legal remedy in the face of more and more violations of their constitutional rights.

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215. *See* Andrew Chung, *U.S. Supreme Court Rejects Case Over 'Qualified Immunity' For Police*, REUTERS (Mar. 8, 2021, 8:48 AM), [https://perma.cc/57U9-CAFM].

216. *See supra* text accompanying notes 190-93; *see also* Justin Driver, *Schooling Qualified Immunity*, EDUC. NEXT, [https://perma.cc/6M3Q-PY4J] (Mar. 23, 2021) ("The teacher's paddle is . . . a far cry from the officer's gun.").

217. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

RECENT DEVELOPMENTS

MORNINGSIDE CHURCH, INC. v. RUTLEDGE[1]

In a case involving a Missouri televangelist, a purported COVID-19 cure, and state officials from Arkansas and California, the Eighth Circuit Court of Appeals affirmed the lower court's dismissal for lack of personal jurisdiction.

Jim Bakker is the lead pastor at Morningside Church in Stone County, Missouri and the host of the Jim Bakker Show—a nationally broadcast television program produced in conjunction with Morningside Church and Morningside Church Productions (collectively, "Morningside"). Bakker is a resident of Stone County, and both Morningside entities are headquartered there.

In February 2020, Bakker began advertising a product named "Silver Solution" on the Jim Bakker Show as a "proven" COVID-19 remedy. This attracted scrutiny from law enforcement officials across the country. Los Angeles, California City Attorney Mike Feuer; Arkansas Attorney General Leslie Rutledge; Merced County, California District Attorney Kimberly Lewis; and San Joaquin County, California District Attorney Tori Verber Salazar opened investigations into Bakker's advertisements for potential violations of California's false advertising law, Arkansas's deceptive trade practices law, and California's Business and Professions Code, respectively.

Bakker and Morningside filed suit against the four officials in the Western District of Missouri, alleging the investigations violated their constitutional rights and that the relevant state statutes were unconstitutional. The district court dismissed for lack of personal jurisdiction. Morningside appealed.

Reviewing the decision de novo, the Eighth Circuit reasoned that due process requires a defendant have minimum contacts with a forum state for that state to exercise specific personal jurisdiction. The court then enumerated the Eighth Circuit's five-

1. Morningside Church, Inc. v. Rutledge, 9 F.4th 615 (8th Cir. 2021).

factor test to assess the sufficiency of a defendant's contacts: "(1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) [the] convenience of the parties."[2]

The court additionally evaluated specific jurisdiction using the 'effects test' set forth in *Calder v. Jones*,[3] which extends specific personal jurisdiction to nonresident defendants who commit intentional torts when their effects are "felt primarily within the forum state."[4] The contacts that Bakker and Morningside alleged were sufficient to establish personal jurisdiction over the defendants in the Western District of Missouri were the letters and telephone calls that the defendants had directed toward them requesting information related to the Silver Solution advertisements.

Using the five-factor test, the court held that the first two factors in this instance "weigh[ed] heavily against personal jurisdiction."[5] It reasoned that the communications at issue occurred in Missouri merely because Bakker lived there and Morningside was headquartered there; therefore, Bakker and Morningside were "the only link between defendant[s] and the forum."[6] The court likewise held that the third factor disfavored personal jurisdiction, as the communications failed to demonstrate contacts with the forum itself. Regarding the fourth and fifth "less important" factors, the court held that "while Missouri has an interest in establishing a forum for its residents, that forum is an inconvenient one for the defendants, who are not from Missouri and have no business in the state."[7]

2. *Id.* at 619 (quoting Federated Mut. Ins. Co. v. FedNat Holding Co., 928 F.3d 718, 720 (8th Cir. 2019)).

3. *See id.* at 620 (citing Calder v. Jones, 465 U.S. 783 (1984)).

4. *Id.* (citation omitted). *Walden v. Fiore* refined the effects test, adding two limitations: (1) the defendant must have created the contacts with the forum state himself; and (2) the contacts must go to the defendant's relationship with the forum itself and not merely to persons who happen to reside there. 571 U.S. 277, 284-85 (2014).

5. *Morningside Church, Inc.*, 9 F.4th at 620-21.

6. *Id.* at 620 (quotation omitted).

7. *Id.* at 621 (quoting Whaley v. Esebag, 946 F.3d 447, 453 (8th Cir. 2020)).

MYERS v. FECHER[8]

According to this December 2021 decision from the Arkansas Supreme Court, the Arkansas Freedom of Information Act ("FOIA") requires that communications between a state employee and another on a cloud-based messenger application that are of a mixed public and private nature must be sorted to determine which messages qualify as "public records" under the Act and are therefore "open to inspection and copying."[9]

In December 2019, the Arkansas Democrat-Gazette renewed a 2017 FOIA request seeking correspondence between former Department of Information Systems ("DIS") Director Mark Myers and any representatives of Cisco Systems since January 2015. The requested records included emails, text messages, and communications saved on Blackberry Messenger, a private, third-party cloud-based application. Myers and Jane Doe, an employee of a technology company that did business with DIS, contested the release of the three thousand-some-odd Blackberry Messenger messages on grounds that they were not entirely public records; rather, they comprised of private, "deeply personal exchanges, musings and information" unrelated to the performance of official functions.[10]

The Democrat-Gazette argued the messages were public records because they were connected to public business and were stored on a server belonging to DIS. The circuit court agreed, stating that "the business and personal matters were so intertwined that all of the messages were 'public records[.]'"[11] The Arkansas Supreme Court granted a stay of the judgment pending appeal.

The Court considered two issues on appeal: (1) whether "the circuit court erred in finding that the [messages] were 'public records' pursuant to FOIA;" and (2) whether "the circuit court erred in finding that the public interest outweighed privacy rights."[12] Addressing the first issue, the Court found that:

8. Myers v. Fecher, 2021 Ark. 230, at 1, 635 S.W.3d 495.
9. *Id.* at 8, 635 S.W.3d at 499 (quoting ARK. CODE ANN. § 25-19-105(a)(1)(A)).
10. *Id.* at 4, 635 S.W.3d at 497.
11. *Id.* at 5, 635 S.W.3d at 498.
12. *Id.* at 6, 635 S.W.3d 498.

> [B]ecause these messages are individual, sent on different days, and sent at different times, the messages are not all interrelated and inextricably intertwined as found by the circuit court. Rather, the messages in this case are capable of being sorted into private-and public-record categories. Therefore, the circuit court clearly erred by not determining whether each individual message met the definition of a "public record."[13]

The Court did not reach Myers and Doe's remaining arguments on appeal, and instead, opined that "once the circuit court has determined which, if any, individual messages are 'public records,' Myers and Doe may raise their right-to-privacy arguments [at which time] the circuit court must conduct the appropriate weighing test for each item before ordering disclosure."[14]

SLUYTER v. WOOD GUYS, LLC[15]

The Arkansas Court of Appeals considered the recently amended mechanics'- and materialmen's-lien statutes in this November 2021 decision involving a dispute between homeowners and a contractor over the refinishing of hardwood flooring in a private residence.

Aaron and Cheryl Sluyter orally contracted with Wood Guys, LLC ("Wood Guys") for the replacement and refinishing of hardwood flooring in their Rogers home. After Wood Guys completed the work in March 2019, a dispute arose regarding the quality of the work performed and the amount owed by the Sluyters. In response to their refusal to pay the demanded amount, Wood Guys filed a mechanics' and materialmen's lien on the property and then filed a complaint to foreclose on the lien, ultimately seeking damages for breach of contract or, alternatively, recovery under the theory of quantum meruit for work done on the Sluyters' property. The Sluyters argued that Wood Guys was barred from bringing any claims because it did not provide the necessary preconstruction lien notice.

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13. *Myers*, 2021 Ark. 230, at 11, 635 S.W.3d at 500-01.
14. *Id.* at 11, 635 S.W.3d at 501.
15. Sluyter v. Wood Guys, LLC, 2021 Ark. App. 442, at 1, ___ S.W.3d ___, ___.

The circuit court found that Wood Guys was exempt from the notice requirement under Arkansas Code Annotated § 18-44-115 (requiring a "residential contractor" to give preconstruction lien notice) because it was a "home improvement contractor," not a "residential contractor."[16] The court reasoned that the term "residential contractor" used in §18-44-115 was synonymous with the term "residential building contractor" defined in Arkansas Code Annotated § 17-25-502(3). Because the former term is not defined in the statute, but the latter term is, Wood Guys did not fall within the definition of a "residential building contractor."

On appeal, the court agreed that Wood Guys was not a residential building contractor but disagreed that the two terms are interchangeable. The court opted for a broader definition of residential contractor, opining that Wood Guys was assuredly a "contractor" as that term is defined in the statute—Wood Guys directly contracted with the Sluyters, who were owners of a single-family residence, for the repair and replacement of wood flooring on the property. "[C]ommon usage of the word 'residence' refers to a place or dwelling in which a person or people live[,]" and the Sluyters' home certainly fit that description.[17] Ergo, the Court held that Wood Guys was a residential contractor subject to the statutory requirement to provide lien notice prior to the commencement of work.

Furthermore, the appellate court agreed with the circuit court's finding that Wood Guys was a "home improvement contractor," but it held that this characterization barred the contractor from being a lien claimant under the direct-sale exception to the notice requirement. This exception provides that the lien notice requirement does not apply if the transaction is a direct sale. A direct sale is a transaction in which: (1) "[t]he property owner orders materials or services from the lien claimant;" and (2) "[t]he lien claimant is *not* a home improvement contractor . . . or a residential building contractor[.]"[18] The appellate court opined that the plain language of the statute

16. *Id.* at 3, ___ S.W.3d at ___.
17. *Id.* at 7, ___ S.W.3d at ___.
18. *Id.*, ___ S.W.3d at ___ (emphasis added) (citing ARK. CODE ANN. § 18-44-115(a)(8)(B)).

stipulates that a contractor that *is* a home improvement contractor *may not* avail itself of the direct-sale exception. Since Wood Guys was a home improvement contractor, the preconstruction-lien-notice requirement was undisturbed.

At bottom, because Wood Guys was a residential contractor and a home improvement contractor, it was required to provide the Sluyters with lien notice prior to commencing the work on the wood floors in their home under Arkansas Code Annotated § 18-44-115(a). Wood Guys did not give notice, so it was barred from bringing an action to enforce its contractual and quantum meruit claims.

The Court concluded by noting that the General Assembly amended the statute in 2021 to remove the bar against equitable claims for residential contractors who fail to provide preconstruction lien notice. "While this legislative amendment comes too late to aid Wood Guys, it now provides a way for residential contractors to seek redress, even when they fail to execute and deliver preconstruction lien notice."[19]

SILAS HEFFLEY

19. *Id.* at 9, ___ S.W.3d at ___.

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