WESTERN MICHIGAN UNIVERSITY COOLEY LAW REVIEW

Volume 37 **Fall 2022** **Issue 2**

Articles

Distinguished Briefs

A Publication of Western Michigan University
Thomas M. Cooley Law School

Cite this volume as: 37(2) W. MICH. U. T.M. COOLEY L. REV. (2022).

The *Western Michigan University Thomas M. Cooley Law Review* is published three times annually by the students of the Western Michigan University Thomas M. Cooley Law School, 300 South Capitol Avenue, P.O. Box 13038, Lansing, Michigan 48901.

Subscriptions: Special Patrons, $50 per year; Law Firm Benefactors, $100 per year; regular subscriptions, $30 per year. Inquiries and changes of address may be directed to the Law Review, care of the Western Michigan University Thomas M. Cooley Law School, phone number 1 (517) 371-5140, ext. 4501.

The *Western Michigan University Thomas M. Cooley Law Review* welcomes submission of articles. Manuscripts should be typed, double-spaced, with footnotes. Citations in manuscripts should follow the form prescribed in *The Bluebook: A Uniform System of Citation* (19th or 20th Ed.). We regret that unsolicited manuscripts cannot be returned. E-mail to LawReview@cooley.edu in Microsoft Word format.

Editorial Policy: The views expressed in papers published herein are to be attributed to their authors and not to the *Western Michigan University Thomas M. Cooley Law Review*, its editors, or the Western Michigan University Thomas M. Cooley Law School.

The *Western Michigan University Thomas M. Cooley Law Review* is a member of the National Conference of Law Reviews. Printed by The Sheridan Press, 450 Fame Ave., Hanover, Pennsylvania 17331. Nonprofit postage prepaid at Lansing, Michigan, and at additional offices.

Back issues and volumes, as well as complete sets, are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209, phone number 1 (800) 828-7571.

Printed on recycled paper.

WESTERN MICHIGAN UNIVERSITY
THOMAS M. COOLEY LAW SCHOOL

James McGrath, President & Dean

BOARD OF DIRECTORS

Hon. Louise Alderson, Chairman
Aaron V. Burrell
Thomas W. Cranmer
Hon. Michael P. Hatty
Kenneth V. Miller
Hon. Bart Stupak
Mitchell S. Zajac
Mustafa Ameen
Christina Corl
John M. Dunn
Hon. Jane Markey
Lawrence P. Nolan
Jordan V. Sutton

PROFESSOR, FOUNDER, AND PAST PRESIDENT

The Honorable Thomas E. Brennan (deceased)

DEANS EMERITI

Michael P. Cox, Dean and Distinguished Professor Emeritus
Keith J. Hey, Dean and Distinguished Professor Emeritus
Robert E. Krinock, Dean and Professor Emeritus (deceased)
Don LeDuc, Dean Emeriti

DISTINGUISHED PROFESSORS EMERITI

Gary Bauer
Ronald Bretz
Paul Carrier
Dennis Cichon
David Cotter
Cynthia Faulkner
Anthony Flores
Lisa Halushka
Emily Horvath
Eileen Kavanagh
R. Joseph Kimble
Dena Marks
Dan McNeal
Ann Miller Wood
Maurice Munroe
Nora Pasman-Green
Philip Prygoski (deceased)
Devin Schindler
Curt Benson
Kathleen Butler
Terrence Cavanaugh
Julie Clement
Mary D'Isa
Norman Fell
Judith Frank
Christopher Hastings
Peter Jason (deceased)
Peter Kempel (deceased)
Dorean Koenig (deceased)
John Marks
Helen Mickens
Marla Mitchell-Cichon
Kimberly O'Leary
James Peden
John Rooney
John Scott
David Berry
Evelyn Calogero
Karen Chadwick
Pat Corbett
Mark Dotson
Gerald Fisher
Elliot Glicksman (deceased)
James Hicks
John Kane
Mara Kent
Gerald MacDonald
Jeffrey L. Martlew
Nelson Miller
Lawrence Morgan
Charles Palmer
Ernest Phillips
Marjorie Russell
Charles Senger

Chris Shafer
Brent Simmons
John Taylor
Gerald Tschura
Cynthia Ward
Nancy Wonch

Dan Sheaffer
Paul Sorenson
Gina Torielli
Victoria Vuletich
William Weiner

Jane Siegel
Norman Stockmeyer
Ronald Trosty
William Wagner
F. Georgeann Wing

PROFESSORS EMERITI

Sherry Batzer
Heather Garretson
Paul Marineau
Florise Neville-Ewell
Dan Ray
Ronald Sutton
Karen Truszkowski

James Carey
Lewis Langham
Donna McKneelen
Norman Plate
Kevin Scott
David Tarrien

Lisa DeMoss
Ashley Lowe
Monica Navarro
Toree Randall
Dan Sheaffer
Lorna Thorpe-Mock

DEANS

Erika Breitfeld
Assistant Dean of the Lansing Campus and Associate Professor

Tracey Brame
Associate Dean of Experiential Learning and Practice Preparation & Director of the Innocence Project & Professor

Katherine Gustafson
Assistant Dean of the Tampa Bay Campus & Associate Professor

Amy Timmer
Associate Dean of Academic and Student Affairs & Professor

Paul J. Zelenski
Senior Vice President and Associate Dean of Enrollment & Student Services

Duane A. Strojny
Associate Dean for Library and Instructional Support & Professor

PROFESSORS

Tammy Asher
Jeanette Buttrey
Mark Dotson
David Finnegan
Marjorie Gell
Richard C. Henke
Barbara Kalinowski
Mable Martin-Scott
Michael K. Molitor
Monica Nuckolls
Jeffrey Swartz
Christine Zellar-Church

Amy Bandow
Bradley Charles
Renalia DuBose
Amanda Fisher
Katherine Gustafson
James Hicks
Linda Kisabeth
Daniel Matthews
Martha Moore
Lauren Rousseau
Patrick Tolan

Brendan Beery
Mark Cooney
Heather Dunbar
Dustin Foster
Joseline Hardrick
Emily Horvath
Tonya Krause-Phelan
Michael McDaniel
Florise Neville-Ewell
Matthew Marin
Joan Vestrand

ADJUNCT PROFESSORS

Mustafa Ameenuddin
Hon. Rosemarie Aquilina
Andrew Arena
Byron Babbish
Amy Bandow
Laura Bare
Brendon Basiga
Gary Bauer
David Berry
Kristina Bilowus
David Bilson
Scott Brinkmeyer
Chard Brown
Charles Bullock
Joseph Burgess
William Burleson
Evelyn Calogero
Lindsay Canan
James Carey
Terrence Cavanaugh
Joseph Celello
Karen Chadwick
Theresa Jean-Pierre Coy
Debbie Crockett
Mary D'Isa
Marshall Deason
Elizabeth Devolder
Rich Digiacomo
Stacey Dinser
Michelle Donovan
Steve Dulan
Peter Durand
Lisa Fadler
Joshua Fahlsing
William Fleener
Hon. Richard Garcia
Laura Genovich
Jack Gilbreath
Nathan Goetting
Phillip Green
Jonathan Grossman
Katherine Gustafson
Christi Henke
Michael Hughes
Nancy Hillary
Daniel Houlf
Timothy Innes
Hon. Curtis Ivy
Julie Janeway
Any Jonker
Shannon King
Lewis Langham
Michael Leffler
Caroline Johnson
Justin Lighty
Matthew Lucas
Peggy MacDougall
Colin Maguire
Daryl Manning
Matthew Marin
Paul Marineau
John Mashni
Ellen Mason
Michael McClory
Catherine McCollum
Hon. Catherine McEwen
Scott Mertens
Thomas Moga
Julie Mullens
Andrea Muroto-Bilabaye
Mikhail Murshak
Thomas Myers
Nicholas Nazaretian
John Nicolucci
Sarah Ostahowski
Steven Owen
Donna Perry
Kevin Peterson
Christine Piatkowski
Karen Poole
Kerry Przybylo
Rebecca Pugliesi
Teri Quimby
Alissa Raasch
Antoinette Raheem
Daniel Ray
Dale Rietberg
Robert Rothman
Christopher Sabella
Salvatore Lamendola
Kelsey San Antonio
Ronald Sangster
Traci Schenkel
Joseph Shada
Michael Shea
Sheila Lake
Ben Shotten
Samantha Sliney
Eric Skinner
Daria Solomon
Sonya Beverly
Robert Stocker
Timothy Stoepker
Cari Sullivan
John Taylor
David Tirella
Gregory Ulrich
Miriam Velez
Victor Veschio
James Vlasic
Graham Ward
Geoffrey Weed
Samantha Welton

WESTERN MICHIGAN UNIVERSITY
COOLEY LAW REVIEW
TRINITY 2022

BOARD OF EDITORS

ASSOCIATE EDITORS

WESTERN MICHIGAN UNIVERSITY
COOLEY LAW REVIEW
TRINITY 2022

DAWN C. BEACHNAU AWARD

This award is presented to the member of the Western Michigan University Cooley Law Review Voting Board of Editors who made the most significant contributions to the Law Review through leadership and dedication.

Trinity 2022 Recipients:

Samira Montlouis
Anna King

JOHN D. VOELKER AWARD

This award is presented to the Senior Associate Editor of the Western Michigan University Cooley Law Review who made the most significant contributions to the publication of the Law Review.

Trinity 2022 Recipient:

Ronja Lugo Akergren

EUGENE KRASICKY AWARD

This award is presented to the Assistant Editor of the Western Michigan University Cooley Law Review who made the most significant contributions to the publication of the Law Review.

Hilary 2022 Recipient:

Alexandra Calzaretta

WESTERN MICHIGAN UNIVERSITY COOLEY LAW REVIEW

Volume 37 **Fall 2022** **Issue 2**

CONTENTS

LETTER FROM THE EDITOR

Dear Reader,

I am proud to present to you Volume 37, Issue 2 of the WMU Cooley Law Review. The Law Review members have devoted themselves to compiling and editing the articles presented in this edition. It has been an honor and a privilege to have had the opportunity to work with them. I would also like to thank the authors for giving us an opportunity to share their work with our readers.

This edition features six articles that focus on modern legal challenges involving technology, dated legal procedures, and the environment. This issue begins with a focus on digital currency and big tech censorship. The first article examines the contitutional implications of a central bank for digital currency. The second article discusses applying First Amendment protections to tech companies in a manner that would encourage a free marketplace, limit government oversight, and maintain free speech. The next three articles examine procedural matters involving arbitration, peremptory challenges, and guardianship. The third article examines employment arbitration and how the rules and processes that protect litigants in the court system are lacking for those resolving issues through arbitration. The fourth article analyzes peremptory challenges and their role in a criminal case being tried six times. The fifth article hones in on the rights forfeited through guardianship and how a more modern approach would be more beneficial to those most affected by having a guardian oversee their lives. The final article shifts to an examination of wetland legislation and its inability to preserve wetlands.

In addition, we are especially honored to include an award-winning brief from the 2021 Distinguished Brief Awards hosted by the WMU Cooley Law Review. The brief was written by Mark M. Bendure, a recipient of this award on three previous occasions.

With every advancement in technology, long standing legal rules and procedures are challenged. Sometimes, these innovations place our rights at risk. Othertimes, new rights are developed. For this reason, an ongoing dialogue is crucial and we hope we have positively contributed to this discourse. I am hope you enjoy this issue and wish you the very best.

Sincerely,

Nancy Zieah

CENTRAL BANK DIGITAL CURRENCIES: UNCONSTITUTIONAL AND IMMORAL

JAYSON THOMAS[1]

1. Candidate for JD. Special thanks to my wife, Kelsey, whose unwavering support and encouragement kept me going during the long hours of researching and writing this article. I would also like to express my gratitude to my colleagues, whose insightful comments and suggestions greatly improved the quality of this work. I am also indebted to the editors of the Thomas M. Cooley Law Review for their meticulous editing and invaluable feedback. Finally, I want to thank my professors for inspiring me to pursue legal scholarship and for their guidance and mentorship throughout my academic journey.

Should governments have warrantless access to every transaction? Can any government be trusted with the power to disable currency with the flip of a switch? This is what is proposed, so it is time to decide.

DEVELOPING A CBDC

As of September 2022, the majority of nations are officially considering implementing Central Bank Digital Currencies (CBDC).[2] Three nations, including China, have already launched CBDCs.[3] The Federal Reserve published a proposal to develop a U.S. version in January of 2022.[4] Two months later, President Biden revealed his desire for a CBDC with the Executive Order for "Ensuring Responsible Development of Digital Assets."[5] This Order emphasizes that the Biden Administration places "the highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC."[6]

Implementation of CBDC in the United States would have far-reaching effects. Many of which are alarming, to say the least. Chief among these concerns are monetary manipulation, privacy forfeiture, and intolerable risks to our national security.

---

2. Lesa Moné, *Which Governments are Researching CBDCs Right Now?A Comprehensive List of CBDC Experiments Planned, in Progress, or Paused Globally*, CONSENSYS (Apr. 6, 2021), https://consensys.net/blog/enterprise-blockchain/which-governments-are-using-blockchain-right-now/.

3. Turner Wright, *The Bahamas Launches World's First CBDC, the 'Sand Dollar,'* COINTELEGRAPH (Oct. 21, 2020), https://cointelegraph.com/news/the-bahamas-launches-world-s-first-cbdc-the-sand-dollar;
See also Eustance Huang, *China's Digital Yuan Could Challenge the Dollar in International Trade This Decade, Fintech Expert Predicts*, CNBC (Mar. 15, 2022, 2:22 AM), https://www.cnbc.com/2022/03/15/can-chinas-digital-yuan-reduce-the-dollars-use-in-international-trade.html; *See also* Osita Nwanisobi, *CBN Selects Technical Partner For Digital Currency Project*, CENTRAL BANK OF NIGERIA (Aug. 30, 2021), https://www.cbn.gov.ng/Out/2021/CCD/CBN%20Press%20Release%20(CBDC)%2030082021.pdf.

4. *Money and Payments: The U.S. Dollar in the Age of Digital Transformation*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. 11 (Jan. 2022), https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf. [hereinafter *Money and Payments*].

5. Ensuring Responsible Development of Digital Assets, Exec. Order No. 14067, 87 C.F.R 14143 (2022).

6. *Id.*

Basics and Background

A CBDC is a type of cryptocurrency. But this version of digital money is worlds apart from current versions of internet banking; or even other types of cryptocurrencies.

The original cryptocurrency, Bitcoin, was meant to be a "peer-to-peer version of electronic cash that would allow online payments to be sent directly from one party to another without going through a financial institution."[7] Put simply, banking without banks. By design, it could not be controlled by a single entity, including governments and their central banks. Decentralized finance is beneficial in many ways. For one, it is an invaluable safeguard against domestic despots and foreign assailants, providing financial access even when governments and traditional banks have failed.[8]

Traditional banking does not automatically provide the government with a complete list of financial transactions. Accessing the private "papers" of citizens and businesses requires warrants (or subpoenas, at the very least).[9] A CBCD, on the otherhand, grants our federal government access to each and every users' transactions.[10]

Even more alarming is the "programmability" of the currency: with a click, the government can limit or even disable transactions completely.[11] Such a dynamic shift demands thoughtful consideration.

Even if such immense power could be trusted in the hands of the government, it creates unacceptable security risks. Recent years have seen many memorable cyberattacks. A remote attack on a gasoline

---

7. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (Oct. 31, 2008), https://bitcoin.org/bitcoin.pdf.

8. Ian Austin & Dan Bilefsky, *Trudeau Declares Rare Public Emergency to Quell Protests*, N.Y. TIMES (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/world/americas/justin-trudeau-emergencies-act-canada.html; *See also* Global News, *Trucker protests: Cryptocurrency Complicates Efforts to Stop Blockade Funds*, YOUTUBE (Feb 16, 2022), https://www.youtube.com/watch?v=EjtcMfpqjY0; *See also* Caitlin Ostroff, *Ukraine Central Bank Halts Currency Market, Limits Cash Withdrawals*, WALL ST. J. (Feb. 24, 2022, 3:51 AM), https://www.wsj.com/livecoverage/russia-ukraine-latest-news/card/ukraine-central-bank-halts-currency-market-limits-cashwithdrawals0FHSuPNxXCqIn8zfYptK?mod=article_inline; *See also* Paul Vigna, *How Bitcoin and a Crypto Exchange Became Part of Ukraine's War Effort*, WALL ST. J. (Mar. 3, 2022 10:18 AM ET), https://www.wsj.com/articles/how-bitcoin-and-a-crypto-exchange-became-part-of-ukraines-war-effort-1164632069.

9. U.S. CONST. amend. IV; Andresen v. Maryland, 427 U.S. 463 (1976).

10. Money and Payments, *supra* note 4, at 17.

11. *Id.* at 17-18.

pipeline brought the east coast to a grinding halt.[12] Hospitals, police departments, and even entire cities have been held hostage.[13] The federal level has also been hit hard: the Pentagon, intelligence agencies, nuclear labs, the U.S. Treasury, and the Commerce departments have had data stolen and their systems compromised.[14]

The more data is centralized, the more profitable an individual attack becomes. Said differently, data decentralizaiton makes attacks less profitable. It is troubling to think that all citizen's personal data and biometrics would be kept in a single, managed centrally by a small group. If a foreign adversary hijacks and disables the country's monetary system, chaos would inevitably follow.

But the point of this paper is not whether it is a good policy to implement a CBDC. (It's not.) Rather, the focus is whether it *can* be implemented, constitutionally. Aside from being morally dubious, it is also constitutionally deficient in several regards. First, there is no authority for the state or federal government to emit bills of credit. Second, this proposal lacks a compelling rationale for the contraventions of our most fundamental liberty interests. Third, even if, for the sake of argument, the action was not already violative, legislative authority is reserved for congress; any regulatory action causing such titanic shifts in society necessitates an explicit delegation of authority.

---

12. David E. Sanger, Clifford Krauss & Nicole Perlroth. *Cyberattack Forces a Shutdown of a Top U.S. Pipeline*, N. Y. TIMES (May 8, 2021), https://www.nytimes.com/2021/05/08/us/politics/cyberattack-colonial-pipeline.html.

13. Jessica Davis, *Healthcare Accounts for 79% of All Reported Breaches, Attacks Rise 45%*, HEALTH IT SEC. (Jan. 5, 2021), https://healthitsecurity.com/news/healthcare-accounts-for-79-of-all-reported-breaches-attacks-rise-45;
See also Nicole Perloth & Julian E Barnes, *D.C. Police Department Data Is Leaked in a Cyberattack*, N.Y. TIMES (April 27, 2021), https://www.nytimes.com/2021/04/27/us/dc-police-hack.html;
See also Niraj Chokshi, *Hackers Are Holding Baltimore Hostage: How They Struck and What's Next***,** N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/baltimore-ransomware.html.

14. Dustin Volz, *U.S. Agencies Hacked in Foreign Cyber Espionage Campaign Linked to Russia,* WALL ST. J. (last updated Dec. 13, 2020), https://www.wsj.com/articles/agencies-hacked-in-foreign-cyber-espionage-campaign-11607897866;
See also David E. Sanger, Nicole Perlroth, & Eric Schmitt, *Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit*, N.Y. TIMES, (last updated Sept. 9, 2021), https://www.nytimes.com/2020/12/14/us/politics/russia-hack-nsa-homeland-security-pentagon.html; *See also* Brendan I. Koerner, *Inside the Cyberattack That Shocked the US Government*, WIRED (Oct. 23, 2016), https://www.wired.com/2016/10/inside-cyberattack-shocked-us-government/.

THE ORIGINAL AMERICAN PAPER MONEY CRISES

The American colonies experienced hyperinflatary periods twice in the 1700s. The first derived from the copious paper money printing that funded the raids in Quebec.[15] This rapid currency expansion led to economic turmoil and the enactment of legal tender laws.[16] The colonial economies had become so chaotic that the British parliament banned paper currency printing.[17] This mandate for hard money—minted gold coins—returned economic stability and was followed by an era of booming growth.[18] But old habits returned with the revolution.

At the beginning of 1775, the total currency supply of the federated colonies was roughly 12 million Continentals.[19] The Continental Congress began authorizing increasingly more paper currency. [20] Most of the colonies also began issuing their own versions of paper money.[21] So too, did the Continental Army when congressional funding was insufficient to purchase war supplies.[22] The currency supply jumped by 650 million in just five years, a 5000% increase.[23] George Washington famously wrote, "A wagon-load of money will scarcely purchase a wagon-load of provisions."[24] (He meant currency).

Like all other instances of currency debasement, this period was mired by the need for constant price adjustments and economic friction.[25] Congress enacted tender laws and price controls when the American people returned to hard money.[26] Anyone refusing to accept the increasingly worthless currency was declared an enemy of the

15. Murray N. Rothbard, *A History of Money and Banking in the United States: The Colonial Era to World War II* 51-53 (2002); G. Edward Griffin, *The Creature From Jekyll Island: A Second Look at the Federal Reserve* 310 (5th ed. 2010).

16. Griffin, s*upra* note 15, at 311.

17. The Colonial Williamsburg Found., *The Currency Act of 1764*, The Am. Revolution, https://www.ouramericanrevolution.org/index.cfm/page/view/m0175

18. Griffin, s*upra* note 15, at 311.

19. *Id.*

20. *Id.* at 311-12 (1776: 19 million, 1777: 13 million, 1778: 64 million, and 1779: 125 million).

21. *Id.* at 312.

22. *Id.*

23. *Id.*

24. Thomas E. Woods, Jr., *The Revolutionary War, and the Destruction of the Continental*, MISES INST. (Nov. 10, 2006), https://mises.org/library/revolutionary-war-and-destruction-continental.

25. Griffin, s*upra* note 16, at 313.

26. *Id.*

country and punished for treason.[27] This monetary despotism spurred riots across the new nation.[28] Even as the Constitutional Convention convened in Philadelphia in the summer of 1787, angry mobs crowded the streets, threatening the legislators.[29]

Delegates across the political and geographic spectrum vowed to abolish paper money printing for good. [30] Notably, even Alexander Hamilton, the poster boy of the central-bank movement, agreed that if a government bank were to be created, it should not be allowed to issue paper currency: "[T]o emit an unfunded paper as the sign of value. . . ought not to continue a formal part of the [C]onstitution, nor ever hereafter to be employed, being in its nature pregnant with abuses and liable to be made the engine of imposition and fraud."[31]

The Articles of Confederation was the starting point for the first draft of the new Constitution.[32] These Articles originally contained a clause authorizing the federal legislature to "borrow money or emit bills on the credit of the United States."[33] The latter power was omitted in the Constitution.

The August 16 journal ledger from the Constitutional Convention documents that it was moved and seconded to strike out the words "and emit bills of credit."[34] The motion passed by a margin of more than four to one.[35] Later, one of the Delegates wrote that "the convention was so smitten with the paper money dread, that they insisted the prohibition should be absolute."[36]

The prohibition on federal credit bills was uncontested until the American Civil War. Paper currency bills, then known as

---

27. *Id.*

28. Britannica, *Constitutional Convention* (last updated Nov. 11, 2022), https://www.britannica.com/event/Constitutional-Convention; *see also* Griffin, s*upra* note 16, at 313.

29. Griffin, s*upra* note 16, at 314.

30. *Id.*

31. *Continental Congress Unsubmitted Resolution Calling for a Convention to Amend the Articles of Confederation*, FOUNDERS ONLINE NATIONAL ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-03-02-0272.

32. Griffin, s*upra* note 16, at 316.

33. Art. of Confederation, sec. 1231.10, https://www.govinfo.gov/content/pkg/SMAN-107/pdf/SMAN-107-pg935.pdf

34. *The Writings of James Madison*, 219 (Gaillard Hunt ed., 1903), https://oll-resources.s3.us-east2.amazonaws.com/oll3/store/titles/1936/1356.04_Bk.pdf.

35. *Id.* at 221.

36. Luther Martin, *Genuine Information*, MD. GAZETTE AND BALTIMORE ADV., Dec. 28 1787, at § 60.

"greenbacks," were printed to expedite war funding. This authority was never officially granted to the federal government. Worse still, the power was never relinquished at the war's end. In his 1880 Constitutional Law textbook, Judge Thomas M. Cooley summarized the legal standing:

> It is not agreed from what clause or portion of the Constitution this power is derived; and as the legal tender act was passed during the existence of a civil war which put the existence of the Union in peril, some jurists have been inclined to justify the exercise of the power as they would any other act made imperative by the extreme exigencies of war. In the law it is declared that "United States treasury notes shall be lawful money"; as though the making them with the legal tender quality was the coining of money; but there is nothing in the debates attending the making and adoption of the Constitution, or in contemporary history, which. . . would lead to the belief that the phrase ''to coin money" was understood in a broader sense than [stamping pieces of metal for use as a medium of exchange in commerce, according to fixed standards of value]. But a power whose justification rests upon necessity can never be restricted to any one period or exigency; and from the nature of the justification it must rest in the discretion of Congress, to be exercised whenever in its opinion the need is sufficiently urgent.[37]

The Reason to Ban Paper Money

Governments have been manipulating monetary systems for thousands of years.[38] Government leaders are incentivized to spend money to gain or keep the support of the people they lead.[39] Historically, government debt derives from military expeditions,

37. Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 79-80 (1880), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1048&context=books.

38. Michael Maloney, *Guide to Investing in Gold & Silver: Protect Your Financial Future*, 6 (2015).

39. *Id.* at 44.

public works projects, or social welfare programs.[40] To service the debt, politicians only have four options: (1) spending less, (2) debt defaults and restructuring, (3) raising taxes, and (4) currency devaluation through money printing.[41] Compared to the other options, currency devaluation is the most expedient.[42] And politicians prefer expedience.

The Constitution mandates a hard money monetary system to avoid the temptation of money printing.[43] The reason for this is simple. Hard money—gold and silver—cannot be manipulated, these coins can only be minted if the supply of metal increases.[44]

Contemporary Economies

Precious metals are far from antiquated. The most powerful nations are hoarding gold and silver at increasing rates. Although bank notes are no longer redeemable for gold, global economies operate under a shadow gold standard.[45] The top holders of gold are the United States, Germany, the International Monetary Fund (IMF), Italy, France, Russia, and China.[46] But there is reason to believe that gold reserves are significantly higher than official reports.[47]

The United States dollar has been the world reserve currency since the Bretton Woods Conference.[48] It was chosen because the United States had the most gold and the bank notes were redeemable for gold. U.S dollars were decidedly "good as gold."[49] In the decades since, America has recklessly spent beyond its means, with national debt

40. *Id.*

41. Ray Dalio, *Principles for Dealing with the Changing World Order: Why Nations Succeed and Fail*, 125 (2021).

42. *Id.* at 125.

43. U.S. CONST. art. I, § 10.

44. *Id.* at 129.

45. James Rickards, *The New Case for Gold*, 52-54 (2016).

46. World Off. Gold Holdings, *International Financial Statistics*, WORLD GOLD COUNCIL (March 2022), https://www.gold.org/download/file/7739/world_official_gold_holdings_as_of_march2022_ifs.xlsx.

47. Dominic Frisby, *China Almost Certainly Owns More Gold than the US*, MONEYWEEK (Mar. 3, 2022), https://moneyweek.com/investments/commodities/gold/603131/how-much-gold-does-china-own.

48. Maloney, s*upra* note 38, at 44.

49. Maloney, s*upra* note 38, at 44.

ballooning.[50] Instead of generating tax revenue, it was more expedient to fund wars and social welfare programs through money printing.

Currency holders lose purchasing value when new units are created. It is irrelevant if the holder is an American citizen or a foreign nation holding dollars in their reserves: the value of existing dollars decreases with each additional round of printing.[51] Not wanting to have their wealth stolen to fund American projects, foreign nations holding US dollars in reserves redeemed the notes for gold held in American vaults.[52] But America had created dramatically more currency than the gold it held.[53] To avoid admitting the country was insolvent, America reneged on its fiduciary responsibility as the arbiter of the world's gold standard. In 1971, Nixon announced that US dollars could no longer be redeemed for gold.[54] Since then, the world's currencies have become unanchored, floating fiat systems.[55]

The Great Recession exposed the weaknesses of the American economy. Because the global economy is built on the U.S. dollar, the reverberations of an American crash were felt worldwide and have become a warning sign for many nations. Since then, the other world superpowers have been increasing their gold reserves.[56] From June 2015 through early 2020, the official Chinese gold reserves increased by 20%.[57] Again, this invites an important question: why? It is because gold and silver were chemically destined to be used as money.[58] The founders understood that paper money manipulation could only last so long; eventually, equilibrium returns.

---

50. *Federal Debt Held by Federal Reserve Banks,* FED. RES. BANK, https://fred.stlouisfed.org/series/FDHBFRBN (last updated Aug. 22, 2022).

51. Maloney, s*upra* note 38, at 47.

52. *Id.* at 45-47.

53. St. Louis Federal Reserve, *Total Gold Reserves of Federal Reserve Banks for United States*, https://fred.stlouisfed.org/series/M14062USM027NNBR.

54. Maloney, s*upra* note 38, at 47.

55. Rickards, s*upra* note 44, at 46.

56. *Id.* at 52-55.

57. Trading Economics, *China Gold Reserves*, https://tradingeconomics.com/china/gold-reserves.

58. Frank Holmes, *The Chemical Reason Gold Makes a Perfect Currency*, INSIDER (Aug. 20, 2017), https://www.businessinsider.com/gold-price-chemistry-science-currency-destiny-2017-8.

Paper Money Steals Purchasing Power

To understand how currency manipulation steals purchasing power, it may be helpful to think of paper money as shares of company stock. Indeed, foreign currency exchanges trade on the open market in the same ways as company shares.[59]

Imagine if a private company, WidgetCorp, issues 100 shares of stock in its initial public offering, and Investor buys 10 shares that cost $50 each. At this point, WidgetCorp has a market capitalization of $5000 (100*$50), and Investor's stake in the company is worth $500 (10*$50) or 10% (10/100).

If WidgetCorp later conducts a two-to-one stock split, the total outstanding shares double (200), and the stock price gets cut in half ($25). Importantly, stock splits do not fundamentally change the company's value.[60] This is because current shareholders must be compensated proportionately. In this case, Investor's shares must also double (20) to maintain a 10% holding. Like the company's total market capitalization, the value of Investor's stake is unchanged; the shares are still worth $500 (20*$25). Nominally, there are more shares, but the real value of the company and the investment are unchanged.

But if WidgetCorp does not issue the new shares proportionate to the split, the company appropriates value from the current holders. For example, perhaps WidgetCorp only issues an investor two additional shares instead of ten. Nominally, the investor has more shares (12), but the real value of the holdings has actually decreased from 10% to 6% (12/200).

The same happens when governments print paper money: purchasing power is extracted from currency holders. Accumulating additional dollar bills is different from an increase in purchasing power. Even if nominal holdings increase, such as with so-called "stimulus checks," real purchasing power decreases when the amount received is proportionately less than total holdings.

When a private company manipulates stock, it is uncontroversially fraudulent. But the government does the same thing with currency,

59. DailyFX, *Forex Rates*, FX PUBL'G, https://www.dailyfx.com/forex-rates (last visited Apr. 7, 2022).

60. *Stock Splits*, FIN. REGUL. AUTH., https://www.finra.org/investors/investing/investment-products/stocks/stocksplits#:~:text=FINRA%20does%20not%20approve%20reverse%20splits%2C%20but%20it,to%20the%20record%2Feffective%20date%20of%20the%20corporate%20action. (last visited Sep. 7, 2022).

accountability is inexplicably evaded. Whether done by the private or public sector, the trick is fraudulent theft.

U.S. Governments are Prohibited From Creating Paper Money

"The powers delegated to the federal government are 'few and defined.'"[61] Article One gives Congress the power to "coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;"[62] Article One also places monetary restrictions on State governments, "No State shall. . . coin Money; *emit Bills of Credit*; make any Thing but gold and silver Coin a Tender in Payment of Debts"[63]

Importantly, *coining* is different from printing paper money. The definition of *coining* has remained unchanged since the nation's founding.[64] It has always meant stamping metal coins for use as a commercial exchange medium.[65]

The Federal government is limited to the enumerated powers. The authority to emit bills of credit was purposefully and unambiguously omitted from this list. Likewise, states are explicitly forbidden to emit credit bills. As such, both levels of government are restricted from discharging credit bills. But, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people."[66] Therefore, only private citizens and organizations have the authority to emit bills of credit.

Bills of Credit means anything "issued by a [sovereign], on the faith of the [sovereign], . . . designed to circulate as money."[67] Under this definition, our current monetary system is already problematic.

"More than 99 percent of all U.S. currency in circulation is in the form of Federal Reserve notes; the remainder includes United States notes, national bank notes, and silver certificates, all of which remain legal tender."[68] Federal Reserve notes are "legal tender for all debts,

61. The Federalist No. 45 (James Madison).

62. U.S. CONST. art. I, § 8, cl. 5.

63. U.S. CONST. art. I § 10, cl. 1 (emphasis added).

64. *Coining*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/coining (last updated Nov. 10, 2022).

65. Cooley, s*upra* note 36, at 79.

66. U.S. CONST. amend. X.

67. Briscoe v. Bank of Cmmw. of Kentucky, 36 U.S. 257, 318 (1837).

68. *Currency and Coin Services*, BD. GOV'R FED. RSR. SYS., https://www.federalreserve.gov/paymentsystems/coin_about.htm (last accessed on Sep. 7, 2022).

public charges, taxes, and dues."[69] "Federal Reserve notes are backed by the full faith and credit of the United States government."[70]

It makes no difference that the proposed system uses "digital" currency instead of physical paper. Society has long agreed that digitization is legally indistinctive. For instance, electronically stored information (ESI) is discoverable, digital signatures are enforceable, and property rights apply to computer files. And so, this attempted distinction is unconvincing.

By its own admission, the Federal Reserve, an agency of the Federal Government, unconstitutionally emits Bills of Credit. Hence, the current U.S. monetary system is unconstitutional. Because the current system is unconstitutional, so too is the proposed CBDC.

The founders forbade the federal and state governments from creating paper money systems because they knew the temptation to manipulate the currency was too great. Nothing since has changed.

BEYOND THE FOUNDERS' FEARS

The proposed CBDC goes well beyond framers' fears of monetary manipulation. It would also infringe on several fundamental liberty interests.

Privacy has long been defined as "the right to be let alone."[71] Although the word "privacy" is not explicitly mentioned in the constitution, its essence is apparent. The Court has repeatedly made clear that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."[72] The right to privacy is one that is "deeply rooted in this nation's history and traditions." Of particular importance to this discussion are the rights of the First and Fourth Amendments.

Right of Association

69. 31 U.S.C.A. § 5103.

70. *Federal Reserve System Audits*, BD. GOV'R FED. RSR. SYS., Apr. 2005, at 321, https://www.federalreserve.gov/boarddocs/rptcongress/annual04/audits04.pdf.

71. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (quoting Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, 2d ed., 29. [p. 195 Note 4 in original.]).

72. Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

Financial records provide an immense amount of information. Each additional transaction builds a mosaic, containing the most intimate details of a person's life. Such broad intrusions intolerably chill the free exercise of association rights.

"The 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."[73] Although the right of association is not explicitly listed in the First Amendment "its existence is necessary in making the express guarantees fully meaningful."[74]

Knowledge of government monitoring limits expression. Common sense and empirical data confirm as much. This is particularly the case when opinions conflict with that of the majority.[75]

In *NAACP v. Alabama*, the State of Alabama attempted to force a civil rights organization to disclose its member list. The State intended to weaponize mandatory publication as means to disincentive membership, weakening the group's support.

The Court held that requiring the NAACP to produce records of its members' names and addresses created an undue restraint upon members' exercise of their right to freedom of association.[76] It emphasized, many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosing their personal contacts.[77] Even without such association concerns, government monitoring could easily "reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life."[78]

Right Against Unreasonable Search and Seizure

People have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[79] But Fourth Amendment protections have struggled to traverse the technological

---

73. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

74. *Id.*

75. Heidi Boghosian, *I Have Nothing to Hide: And 20 Other Myths About Surveillance and Privacy*, 144 (Kindle ed. 2021).

76. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

77. Smith v. Maryland, 442 U.S. 735, 751 (1979) (Marshall & Brennan, JJ., dissenting).

78. *Id.* at 748 (Stewart & Brennan, JJ., dissenting).

79. U.S. CONST. amend. IV.

advances of the past century. Pertinent to this analysis is the third-party doctrine: a lingering dogma devoid of modern realities. The implicit contradictions of the third-party doctrine are well illustrated in *Smith* and *Miller*.

Smith-Miller

In *Miller*, a Customer's bank records were subpoenaed and used to convict him of operating a distillery without paying whiskey taxes. The Court held that a bank customer has no legitimate expectation of privacy in financial information that he "voluntarily" conveys to bank employees in the ordinary course of business.[80]

This ruling created two major contradictions. First, the *Miller* Court developed an illogical standard where the courts must "examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy concerning their contents.'"[81] In other words, records must be revealed to know if they should have been protected. This moots the point: the papers will already have been examined when it is determined they should not have been.

Later in that same term, the same Court indicated that business records and professional correspondence have the same Fourth Amendment protection as personal records.[82] But a business cannot transact and correspond with itself. Transactions and correspondence necessitate the involvement of another party.

Second, the Court failed to apply the correct standard. The Court relied on the outdated standard of physical trespass in "a constitutionally protected area."[83] Yet, "the Fourth Amendment protects people, not places."[84] The *Miller* Court dismissed *Katz* because "[w]hat a person knowingly exposes to the public. . . is not a subject of Fourth Amendment protection."[85] But does any customer reasonably expect their bank statements will be published for the world to see? Certainly not.

In his *Miller* dissent, Brennen points out that "it is impossible to participate in the economic life of contemporary society without

80. U.S. v. Miller, 425 U.S. 435, 437 (1976).
81. *Miller*, 425 U.S. at 442.
82. Andresen v. Maryland, 427 U.S. 463, 480 (1976).
83. *Miller*, 425 U.S. at 440 (1976).
84. Katz v. United States, 389 U.S. 347, 35 (1967).
85. *Miller*, 425 U.S. at 442 (citing *Katz*).

maintaining a bank account."[86] Not only is banking crucial to modern life, but it is also mandatory for many professions. Lawyers, for example, are legally and ethically, required to use bank accounts.[87] Additionally, under the Bank Secrecy Act, banks are legally mandated to keep records of their customer's checks.[88] A professional needs a bank to conduct business, banks are legally required to track their customer's transactions, and those records must be forfeited when mere subpoenas—not warrants—are issued. Which part of this is voluntary?

In *Smith*, at the request of law enforcement, a telephone company installed a pen register at its central offices to record the numbers dialed from the telephone in Mr. Smith's home.[89] The police did not get a warrant or court order before requesting the pen register installation.[90] The device revealed that Mr. Smith had made a call to the target of the investigated robbery.[91] This information was used in obtaining a search warrant.[92]

The Court held that there is no reasonable expectation of privacy in the dialed numbers.[93] Again, the Court leaned on the third-party doctrine. It reasoned that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and telephone users "know that they must convey numerical information to the phone company," and, thus, "[Mr. Smith] assumed the risk that the information would be divulged to police."[94]

Like banking, people must use phones to participate in a modern society. "It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative."[95] Nonetheless, practicality was again defeated.

In *Katz*, the Court held that one using a public phone may "assume that the words he utters into the mouthpiece will not be broadcast to the world."[96] But the *Smith* Court did not afford the same protection to Mr. Smith's calls in his own home. The majority gave little importance

86. *Id.* at 451 (Brennan J. dissenting).
87. MODEL CODE OF PROF. RESP. § 1.15(c).
88. 12 U.S.C. § 1829b(d)(1)(2022).
89. Smith v. Maryland, 442 U.S. 735, 737 (1979).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 745.
94. *Id.* at 743,745.
95. *Id.* at 750 (Marshall & Brennan, JJ., dissenting).
96. *Katz*, 389 U.S. at 352.

to the location of the phone call. Instead, it reasoned that because the "content" of the communication was not revealed, no search occurred. The Court emphasized that the "limited capabilities" of the device do not capture the "content" of communications.[97]

The Court believed that metadata was not revealing. But this could not have been well considered. For instance, imagine if this method was employed by the State in *NAACP v. Alabama*. If the state government places a pen register at the headquarters and homes of the organizers, they have the list of members they want. For practical purposes, the state does not need to request the member list; it could just take it. Apparently, the Court is saying that asking for the information is unconstitutional, but secretly taking it is not.

Former NSA general counsel Stewart Baker confirms, "Metadata absolutely tells you everything about somebody's life. If you have enough metadata, you don't really need content."[98] The same has been established by Stanford University researchers using the leaked NSA files from Edward Snowden. The metadata of call logs revealed the phone numbers of call participants, the serial numbers of the phones involved, the time and duration of the calls, and the location of each person during the call, which allowed investigators to identify specific individuals.[99]

Even more alarming is the amount of "intimate personal details" that can be marshaled from metadata. Researchers Deepak Jagdish and Daniel Smilkov created a tool to contextualize email metadata. Using only the sent timestamps and the From, To, and CC fields, researchers could make amazing discoveries about their senders' social interactions, relationships, sleep cycles, and even the most productive moments of their day.[100] Indeed, "unregulated governmental monitoring" has proven to be "disturbing even to those with nothing illicit to hide."[101]

The "limited capabilities" rationale for metadata is outlandish. Justice Frankfurter urged the Court to tread carefully when considering new technology, and to ensure that the Court "do[es] not embarrass the future."[102] In this regard, it has failed.

---

97. *Katz*, 389 U.S. at 741-42.
98. Boghosian, *supra* note 73, at 98-99.
99. *Id.* at 98.
100. *Id.*
101. *Smith*, 442 U.S. at 751 (Marshall & Brennan, JJ., dissenting).
102. Carpenter v. U.S., 138 S. Ct. 2206, 2220 (2018).

Riley-Carpenter

Yet, hope is not lost as the Court seems to be stirring from its stupor. Two major cases of the last decade seem to be righting the Fourth Amendment ship nearing capsize. Both cases involved the massive amount of information that can be taken from cell phones and the realization that Eighteenth-century doctrines do not always conform with modern technological advancements.

In *Riley*, two consolidated cases posed the issue of whether the contents of a cell phone could be searched without a warrant incident to an arrest.[103] The Court emphatically answered no.[104] A unanimous Court held that law enforcement may not conduct warrantless searches for digital information on a cell phone seized from an individual who has been arrested.[105]

In *Carpenter,* Defendant was convicted on multiple counts based on cell-site location information (CSLI).[106] Law enforcement used this data to track the location of robbery suspects on the day of the crime.[107] The Court held that accessing the vast amounts of data obtained by law enforcement invaded the defendant's reasonable expectations of privacy and was therefore an unlawful search.[108]

This represented the Court's first departure from the third-party doctrine. However, the Court was not willing to part with the doctrine completely. It is only "rare cases" that require a warrant when there is a "legitimate privacy interest in records held by a third party."[109] It is not clear whether this rarity will be an exception to the general rule or yet another example of the Chief Justice's preference for incrementalism.

Riley and *Carpenter* raise questions about the validity of the *Smith-Miller* third-party doctrines. In *Jones*, Justice Sotomayor hinted, "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[110] Likewise, the *Carpenter* Court was similarly skeptical of what it meant to share

103. Riley v. California, 573 U.S. 373, 401-02 (2014).
104. *Id.* at 403.
105. *Id.* at 401-02.
106. *Carpenter*, 138 S. Ct. at 2221.
107. *Id.*
108. *Id.* at 2221.
109. *Id.* at 2222.
110. U.S. v. Jones, 565 U.S. 400, 418 (2012) (Sotomayor, J., concurring).

information voluntarily "Cell phone location information is not truly 'shared' as one normally understands the term. In the first place, cell phones and the services they provide are 'such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society."[111] The majority seems to be embracing the dissenting opinions from *Smith* and *Miller*.

CBDCs are an Intolerable Liberty Infringement

The Bill of Rights applies directly to the federal government, executive agencies included. Because a CBDC infringes fundamental liberty interests of the First and Fourth Amendments, the regulation would need to withstand strict scrutiny. Under this highest level of judicial review, the government has the burden to demonstrate the infringement "necessary" to achieve an "overriding government purpose."[112]

In its proposal, the Federal Reserve advances several theories as to why a CBDC might be potentially beneficial: (1) safely meeting future needs and demands for payment services, (2) improved method for cross-border payments, (3) supporting the dollar's international role, (4) financial inclusion, and (5) extending public access to "safe" central bank money.[113]

Vagueness and uncertainty aside, these aims are far from compelling. This category is reserved for issues relating to "substantial public concern such as health, safety, the welfare of children, or some other similar consideration."[114] However, even if the bar were lowered to include these lesser goals, the government would still fail the second prong of the analysis because it could not show that it is the least restrictive means.

For one, there is no explanation for why payments should be nationalized. The government's traditional role is in facilitation, not total control. Other cryptocurrencies, as well as traditional methods of banking, have already accomplished these goals. Further, the Federal

111. *Carpenter*, 138 S. Ct. at 2220.

112. Rolald D. Rotunda & John E. Nowak, § 18.3(a)(iii) Strict Scrutiny—The Compelling Interest Test, 3 TREATISE ON CONST. L. (2022).

113. Money and Payments, *supra* note 3, at 14-16.

114. Brendan T. Beery & Daniel R. Ray, *Five Different Species of Legal Tests - and What They All Have in Common*, 37 QUINNIPIAC L. REV. 501, 516 (2019).

Reserve already has a service, *FedNow*, that accomplishes the above-listed goals.[115]

Proponents claim that reducing money laundering and monitoring for terrorist funding is sufficient rationale. But it would be outrageous for every house to be searched simply because a search of one revealed contraband. Liberties relinquished to expediency portend tyranny.

Marginal "improvements" are by no means compelling. But because less restrictive means exist, the proposal is necessarily not narrowly tailored. Even assuming, arguendo, that the CBDC proposal was not already an unconstitutional emission of credit bills, it would also fail to withstand strict-scrutiny analysis.

MAJOR QUESTIONS REQUIRE EXPLICIT DELEGATIONS

To satisfy the separation-of-powers principle of the U.S. Constitution, delegations of authority to administrative agencies must be based on an "intelligible principle."[116] Title 12, Chapter 3 of the federal U.S. code is verbose and convoluted, to say the least. But, in short, the Federal Reserve has been granted all powers "necessary" or "incidental" to promote its three main goals: maximum employment, stable prices, and moderate long-term interest rates.[117]

But "incidental to banking" includes almost anything. Few, if not all, policy choices are at least "incidentally" related to the supervision, regulation, stabilization, or servicing of banks. Practically speaking, congress has given the central bank unlimited authority.

It is far from bold to say that a grant of unlimited power is anything but intelligible. Yet, the Court has only rejected a handful of delegation challenges since the New Deal era. Following the challenge in *Whitman*, the Court has virtually renounced judicial review regarding the sufficiency of Congress's intelligible principle.[118] As such, a delegation challenge is unlikely to succeed.

Yet, this is not the only check against the administrative state. In *West Virginia v. EPA*, the Environmental Protection Agency attempted

115. The Fed. Rsrv., *About FedNow Service*, https://www.frbservices.org/financial-services/fednow/about.html.

116. J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 409 (1928).

117. 12 U.S.C.A. § 225a (2000).

118. Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 472 (2001). *See also* Jack M. Beerman, Administrative Law 46, ASPEN PUBL'G (2020).

to promulgate and enforce "cap-and-trade for carbon" rules that "Congress considered and rejected multiple times."[119]

The Court held that in extraordinary cases, Congress must be explicit in its grant of authority.[120] It found that the "'history and the breadth of the authority that the agency has asserted', and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[121] It also emphasized, "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'"[122]

The major question at issue in *EPA* was setting the reasonable standard for limiting carbon emissions in new and modified power plants.[123] This concern pales in comparison to the proposed CBDC. And the Federal Reserve admits this.

First, a CBDC could have devastating effects on the security of the nation. Second, it "could fundamentally change the structure of the U.S. financial system, altering the roles and responsibilities of the private sector and the central bank."[124] Third, it "could make runs on financial firms more likely or more severe."[125] Fourth, and perhaps worst of all, it would completely eliminate consumer privacy by granting the government access to a log of everyone's location and purchases: "A general-purpose CBDC would generate data about users' financial transactions." And if this were not Orwellian enough, a designed "programmability" allows the government to "limit the amount of CBDC an end user could hold."[126] It is not just the amounts that could be limited, but also the types of purchases that could be made. It takes little imagination to see the devastation that could be inflicted if the nation's enemies hijacked it. Or how it could be politically weaponized against minorities and scapegoats. The American people have conducted countless witch hunts, both figurative and literal. The next time witches are hunted, we must not

119. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (internal quotation marks omitted).
120. *Id.* at 2595.
121. *Id.*
122. *Id.* at 2609.
123. *Id.* at 2601.
124. Money and Payments, *supra* note 3, at 17.
125. *Id.*
126. *Id.* at 18-19.

allow them to be burned into financial ruin before reason has a chance to prevail.

Even if this proposal were not already unconstitutional for the two crucial reasons presented above, the Federal Reserve would still be unable to implement its proposed CBDC unilaterally.

CONCLUSION

The current paper-currency printing of the central bank is unconstitutional. The Federal Reserve's proposal to create a CBDC would likewise be an unconstitutional emission of Bills of Credit. Even if this were not the case, the enormous infringements on several of our most fundamental liberty interests are patently far from withstanding strict scrutiny. Still, even if these impediments could be overcome, the evokes major questions, implicating monumental economic and political shifts. In short, the proposal is immoral and constitutionally inept.

‘PRIVATIZING’ THE CONSTITUTION: CAN THE FIRST AMENDMENT PROTECT THE FREE MARKETPLACE AGAINST BIG TECH CENSORSHIP?

ELIZABETH BADOVINAC

INTRODUCTION

Almost four hundred years ago, Englishman John Milton's pamphlet *Areopagitica* proposed that bad ideas will surrender to truth in a fair and open fight.[1] Writing against state censorship of books during the English Civil War, Milton envisioned an unregulated public sphere of ideas governed only by fair competition.[2] In Milton's world, ideas would enter the ring and live or die by the hand of God-given reason rather than the preemptive strike of the government.[3] And, unbeknownst to him, this notion would underscore First Amendment protections of free speech in America.[4]

Justice Oliver Wendell Holmes brought Milton's concept to First Amendment jurisprudence in the 1919 case of *Abrams v. United States*.[5] In Holmes' dissent against the conviction of two defendants for distributing anti-war leaflets, Holmes spearheaded a new age of free speech by encouraging a "free trade of ideas" unfettered by government suppression or regulation.[6] Holmes maintained that the

---

1. JOHN MILTON, *Areopagitica*, 58 (Richard C. Jebb ed., Cambridge Univ. Press 1918).

2. According to Milton, "And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter." John Milton, *Areopagitica*, SAYLOR ACADEMY 1-2, https://resources.saylor.org/wwwresources/archived/site/wp-content/uploads/2012/08/ENGL402-Milton-Aeropagitica.pdf (last visited July 30, 2021).

3. Vincent Blasi explains that Milton's concept of truth was linked to both religious and civil concerns, but he emphasizes that Milton's concept of free reading was inexorably linked with theology: "Free reading, even of false and dangerous ideas, indeed especially of false and dangerous ideas, is integral to the experience of purification by means of resisting the pervasive temptations of a fallen world." Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica, *The Foundational Essay of the First Amendment Tradition*, 1 SUP. CT. REV., U. CHI. 55 (2017).

4. *Id.*

5. In the aftermath of a U.S. military operation in Russia, the Supreme Court convicted two defendants for distributing leaflets from a New York City window. The leaflets called for a strike in U.S. ammunition plants. Abrams v. United States, 250 U.S. 616, 616-17 (1919).

6. Justice Holmes explained, "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon

Constitution supported this free marketplace of ideas, where the best test of truth lay with market competition and society's rational decision-making.[7] Absent an emergency or "clear and present danger," Holmes added, the marketplace would be protected by the First Amendment and the Court.[8]

While the application of the free marketplace of ideas is fraught with many assumptions and criticisms, most scholars agree that the concept of the free marketplace substantially evolved with the dawn of social media.[9] Social media companies and their distributors play a significant role in facilitating the marketplace of ideas, including disseminating news and allowing public discourse. However, social media's increasing content censorship surrounding politics, bodily integrity, elections, health crises, and other vital areas threatens the spirit of the marketplace of ideas. This censorship essentially replaces government control with that of a powerful few—Big Tech companies and their leaders. But even as social media's actions raise questions about the free marketplace and its protections, United States courts continue to reject any notion of enforcing the First Amendment against such entities. Thus, the question remains: Can the First Amendment preserve the spirit of the free marketplace against Big Tech censorship?

This article argues that federal courts can and should extend First Amendment protections against Big Tech in certain, limited cases. However, it proposes that this approach should be modest to encourage a free marketplace, limit government oversight, and maintain free

---

which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Id.* at 630.

7. *Id.*

8. Schenck v. United States, 249 U.S. 47, 52 (1919).

9. Critics outline the rigidity of the marketplace of ideas, which resists evolution and application in a world that Milton and Holmes did not consider: "Absent a reformulation, the marketplace of ideas analogy
serves to celebrate failures of legal imagination." Paul Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 969 (1997). Claudio Lombardi calls the marketplace an illusion tainted with the assumption that "the public has access to the whole information output and that there is a rational and informed process for selecting the truth," a characteristic which does not survive due to press and government censorship. Claudio Lombardi, *The Illusion of a "Marketplace of Ideas" and the Right to Truth*, 3 AMERICAN AFFAIRS 198, 202 (2019). Likewise, Stanley Ingber outlines the "implausible" assumption that all humans make rational decisions. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 DUKE L.J. 1, 31 (1984).

speech channels. Part I examines the conceptual framework of the free marketplace of ideas, documenting the Court's adoption of the concept to a relevant extent. Part II.A examines the free marketplace's evolution with the dawn of social media. Part II.B explores the challenges social media poses toward the free marketplace, exploring regulatory failures of social media giants like Facebook and Twitter and their growing efforts to stifle speech. Part III explores past constitutional challenges against these social media companies, with Part III.A examining the relative unsuccess of First Amendment application to them and Part III.B briefly emphasizing policy concerns that could arise from such application. Finally, Part IV outlines some additional considerations that could allow courts to enforce the First Amendment against social media, adapting First Amendment jurisprudence to the modern marketplace of ideas and opening the door to more nuanced policy and legislative reform.

THE CONCEPTUAL FRAMEWORK OF THE FREE MARKETPLACE AND THE FIRST AMENDMENT

In order to understand the birth and evolution of the free marketplace in the United States, one must first look at Milton's *Areopagitica*. Milton created the pamphlet in response to an ordinance enacted in 1643, which regulated the licensing and printing of books.[10] As a governmental decree, the order gave parliamentary committees and their relations the power to "search and seize" all books and pamphlets not licensed by parliamentary committees and the like.[11] Couched as a mere regulation, the ordinance bestowed powerful censorship abilities to the government "in an effort to head off fractious political controversy along religious lines."[12]

---

10. C H Firth and R S Rait, *June 1643: An Ordinance for the Regulating of Printing. Acts and Ordinances of the Interregnum 1642-1660.* , BRITISH HISTORY ONLINE, https://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp184-186 (last visited Nov. 1, 2022).

11. *Id*.

12. Blasi, *supra* note 3, at 56. During the war in 1641, the Crown's relationship with the London Stationers Company fell through, an occurrence that made strides toward a free press—one untethered by control of the state. Fueled by new politics in the evolving atmosphere, the press was more "at risk" from being influenced by public opinion and mass petitions, which left the government and Stationers scrambling to retain control. Michael Mendle, *De Facto Freedom, De Facto Authority: Press and Parliament, 1640-43*, 38 HIST. J. 307, 308, 312 (1995).

In his profound and poignant review of such censorship efforts on London society, Milton introduced the concept of a collective marketplace in which an energetic society pursues, debates, and uncovers ultimate truths.[13] Through ingenuity and scholarship, human reason finds truth among the lies. Attempts to censor the vast array of content only slow and impede this process.[14] Milton wrote:

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing.[15]

Milton's approach is categorically hands-off, discouraging censorship, especially by the government. Left to its own devices, Milton explained that the free marketplace would ultimately unify human ideas despite the differences between them.[16] Unification could occur only with the freedom of thought and ideas rather than forced ideologies cultivated by government censorship.[17] "Good" ideas—such as those the government favored—and "bad" ideas—such as those the government feared—could counterbalance each other and lessen the dichotomy between order and chaos.[18] Such balance would also allow objective truth, inspired by humanity's divine higher faculties, to rise to the surface.[19]

Inspired by Milton and his own contemporaries, Justice Holmes explored the marketplace theory centuries later.[20] The concept perhaps culminated in his infamous dissent in *Abrams*, where he wrote:

---

13. Milton writes, "Lords and Commons of England, consider what Nation it is whereof ye are, and whereof ye are the governours: a Nation not slow and dull, but of a quick, ingenious, and piercing spirit, acute to invent, suttle and sinewy to discours, not beneath the reach of any point the highest that human capacity can soar to." Milton, *supra* note 2, at 1.

14. *Id.*

15. *Id.*

16. *Id.* at 2.

17. *Id.*

18. Englishman John Stuart Mill would refine this concept in the nineteenth century: "If [a person's] opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." JOHN STUART MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 79 (J.M. Dent & Sons 1922) (1861).

19. Milton, *supra* note 2, at 2.

20. Holmes was influenced by the work of Milton as well as John Stuart Mill, having reread Mill's *On Liberty* in early 1919. Letter from Oliver Wendell Holmes

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . .That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[21]

Like Milton, Holmes believed that a free and fair marketplace would effectively allow powerful ideas to rise to the surface. He added to Milton's concept of divinely inspired truth winning out over falsities, leaving more room for false statements to win out in the marketplace competition. Holmes's answer to "bad" or untrue speech was not a divine battle between truth and falsehood in which truth would ultimately prevail. Instead, Holmes's free marketplace entailed a logic-based competition between "bad" or untrue speech and "good" or true speech.[22] Further, remedying harmful or false ideas did not require censorship; it required the use of counterspeech to balance the scales.[23] Holmes's contemporary, Justice Louis D. Brandeis, examined

---

to Harold J. Laski (Feb. 28, 1919), HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 187 (Mark DeWolfe Howe ed., Harvard Univ. Press 1953). Holmes's contemporaries included Judge Learned Hand as well as Harold Laski. *See* Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1524 (2019) (brief overview of Holmes's contemporary influences); Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses* 22 YALE J.L. & HUMANS. 35, 38 (2010) (explores correspondence between Holmes and Laski, as well as Holmes's responses to Learned Hand).

21. Abrams v. United States, 250 U.S. 616, 616 (1919).

22. Holmes was purportedly skeptical about an epistemic truth existing without the benefit of political discourse or a logic-based "deliberative process." Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1166 (2015).

23. Nunziato outlines the Court's adoption of this counterspeech approach: "The remedy for harmful ideas in this marketplace is not censorship but counterspeech,

this in *Whitney v. California*, effectively coining the counterspeech doctrine: "If there be time to expose through discussion, the falsehoods, and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[24]

Holmes and Brandeis also argued that government censorship based on a mere belief of danger or disagreement improperly shackled the free marketplace. Just months after *Abrams*, Holmes refined this statement in *Schenck v. U.S.*, writing the majority opinion that stated, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the *substantive evils* that Congress has a right to prevent" (emphasis added).[25] As such, Holmes raised the bar on which sort of speech could be censored in the context of the free marketplace: speech presenting clear dangers.

SOCIAL MEDIA GIANTS: THE EVOLUTION OF THE ONLINE FREE MARKET

According to the *Merriam-Webster Dictionary*, social media includes "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)."[26].[27] Social media distributors, stores, or "marketplaces," are defined as platforms used to sell or provide social media websites and applications to users on a desktop, phone, or other media device. This article focuses on social media platforms and its CEOs rather than distribution marketplaces.

Social Media and the Evolving Marketplace

While the government seems to recognize the interplay between social media and the free marketplace, it has only begun to appreciate the fundamental challenges social media presents to Holmes's original

---

which works by allowing those who are exposed to bad speech to be exposed to good speech as a counterweight." Nunziato, *supra* note 20, at 1526.

24. Whitney v. California, 274 U.S. 357, 377 (1927).

25. Schenck v. United States, 249 U.S. 47, 52 (1919). Holmes likens such dangerous words to a "man in falsely shouting fire in a theatre and causing a panic," which "the most stringent protection of free speech would not protect." *Id* at 376.

26. *Social Media,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/social%20media (last visited Nov. 1, 2022.

27. I also use the term "Big Tech" to refer to social media platforms and leaders.

"free trade of ideas." After all, the modern social media marketplace is a far cry from the slow information spread during the 1919 World War or the new information age.[28] Today, information can change with the click of a button. Armies of foreign "trolls" can influence politics and a nation's thought patterns.[29] Statements can be "fact-checked" and flagged as misinformation before they even reach the masses.[30] The voices of powerful political figures across the world can be silenced.[31]

Moreover, the power of censorship is largely controlled—at least on the surface—by a handful of giant private entities. Nearly 100 percent of Americans use the internet, and among them, 7 in 10 Americans use social media.[32] Facebook and Google-owned YouTube are the most frequented platforms online, with 69 percent and 81 percent of the population using them, respectively.[33] Other social media sites like Instagram and Twitter trail with a 40 percent and 23 percent respective user population.[34] To obtain these social media apps, 500 million people with smartphones use the Apple Store, while

---

28. *See* Jared Schroeder, *Toward a Discursive Marketplace of Ideas: Reimaging the Marketplace Metaphor in the Era of Social Media, Fake News, and Artificial Intelligence*, 52 FIRST AMEND. STUD., 38, 40-60 (2018).

29. *See* Tim Wu, *Is the First Amendment Obsolete?* 117 MICH. L. REV. 547, 560-61 (2018).

30. Michael Hameleers & Toni G. L. A. van der Meer, *Misinformation and Polarization in a High-Choice Media Environment: How Effective Are Political Fact-Checkers?* 47 COMMC'N RSCH. 227, 227-28 (2019).

31. *See* Twitter Inc., *Permanent suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension (Twitter bans American President Donald J. Trump for Tweeting that he would not be going to his successor's Inauguration and his supporters would not be disrespected); Adam Taylor, *Facebook's battle with errant world leaders has only just begun*, WASH. POST. (May 6, 2020), https://www.washingtonpost.com/world/2021/05/06/facebook-world-leaders/ (Facebook bans Venezuelan President in March after accusing him of coronavirus "misinformation"; Myanmar's military was also blocked).

32. *See* Pew Research Center, *Social Media Fact Sheet*, PEW RESEARCH CENTER (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/; Pew Research Center, *7% of Americans don't use the internet. Who are they?*, PEW RESEARCH CENTER (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/.

33. *Id.*

34. *Id.*

more than 1 billion people use Google Play.[35] Amazon AppStore alone offers more than 460,000 Android apps to its smaller user base.[36] Through such staggering amounts of users and resulting ad revenue, Big Tech—colloquially known as Alphabet (the parent company of Google), Apple, Facebook, Amazon, and Microsoft—was born and continues to reign today.[37]

These social media giants simultaneously facilitate the modern marketplace while placing it in dire straits through censorship practices and regulatory failure. It is clear here that Holmes's hands-off approach has, as critics have suggested, given way to the assumption that the marketplace is inherently fair and ideas are given an equal chance when the government steps away.[38] This notion is no longer the case, given the censorship and suppression power of social media. [39] As such, the modern free marketplace poses a number of challenges that cannot be solved without reexamining the regulatory role of the government and broadening the application of the First Amendment.

The Challenges of Social Media 'Policy Making' and Censorship

It is no secret that social media and Big Tech companies censor content. Facebook's terms of service dictate that users "will not post content" ranging from hate speech to violence and porn.[40] Other social media companies, including Twitter, Google-owned YouTube, and

35. Apple, *App Store Ecosystem by 24 percent to $643Billion in 2020*, APPLE NEWSROOM (June 2, 2021), https://www.apple.com/newsroom/2021/06/apple-developers-grow-app-store-ecosystem-billings-and-sales-by-24-percent-in-2020/; Google Play, *Developers*, DEVELOPER PAGE (2021), https://developer.android.com/distribute.

36. Statista, *Number of Apps Available in Leading App Stores 2021*, MOBILE INTERNET AND APPS (July 6, 2021), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/#:~:text=The%20Amazon%20Appstore%20offers%20approximately,%2C%20education%2C%20and%20utilities%20apps.

37. Jasper Jolly, *Is big tech now just too big to stomach?*, THE GUARDIAN (Feb. 6, 2021), https://www.theguardian.com/business/2021/feb/06/is-big-tech-now-just-too-big-to-stomach.

38. For more analysis, see Nunziato, *supra* note 20, at 1526-40.

39. *See* Peter Maggiore, *Viewer Discretion is Advised: Disconnects between the Marketplace of Ideas and Social Media Used to Communicate Information during Emergencies and Public Health Crises*, 18 MICH. TEHC. L. REV., 626, 638 (2012); Brietzke, *supra* note 9, at 966-68.

40. Facebook, *Objectionable Content*, COMMUNITY STANDARDS (2021), https://www.facebook.com/communitystandards/objectionable_content.

Facebook-owned Instagram, have similar terms of service.[41] While such terms sound clear enough, users and scholars alike have discovered that they are anything but.[42] In fact, the way in which social media companies and their distributors decide which content to censor—and, indeed, how they implement their censorship practices—remains somewhat ambiguous.

Social Media Companies Regulating Themselves

Until relatively recently, social media policy making has served as one of the very few regulations surrounding social media platforms' content.[43] Acting under the legal protections for private entities, social media has never had to face the scrutiny of the First Amendment for its content policies and moderation. Questioning app marketplaces on their decisions to censor content is even less scrutinized, with lawsuits focusing on anti-competitive practices, Section 230 of the Communications Decency Act, or other approaches.[44] Currently, social media is content-curator trusted, but not obligated, to regulate itself with "transparent" policies and objective decision-making.[45]

Generally, social media leaders have publicly committed to content moderation policies that best serve their users. In a Senate Judiciary Committee hearing before the 2020 United States election, CEO Jack Dorsey stated that Twitter's policies seek to make "people

41. *See* Instagram, *Community Guidelines FAQs*, COMMUNITY GUIDELINES (2018), https://about.instagram.com/blog/announcements/instagram-community-guidelines-faqs; TikTok, *Introduction*, COMMUNITY GUIDELINES (2020), https://www.tiktok.com/community-guidelines?lang=en ("we are committed to maintaining a supportive environment for our community").

42. Kirsten Grind, *Inside 'Facebook Jail': The Secret Rules That Put Users in the Doghouse*, WALL ST. J. (May 4, 2021), https://www.wsj.com/articles/inside-facebook-jail-trump-the-secret-rules-that-put-users-in-the-doghouse-11620138445.

43. *See* ARNE HINTZ, *Social Media Censorship, Privatized Regulation and New Restrictions to Protest and Dissent*, *in Critical Perspectives on Social Media and Protest: Between Control and Emancipation*, 109, 109-15 (Oliver Leistert ed., Rowman & Littlefield 2015).

44. Laurence Tribe, *First Amendment Fantasies in the Social Media Debate*, THE HILL (May 11, 2021), https://thehill.com/opinion/technology/552735-laurence-tribe-first-amendment-fantasies-in-the-social-media-debate.

45. Hintz, *supra*, at 20.

feel safe. . .and free to express themselves."[46] Facebook's community guidelines echo that "To ensure that everyone's voice is valued, we take great care to craft policies that are inclusive of different views and beliefs."[47] YouTube states in its Community Guidelines that its policies are designed to ensure our community stays protected.[48] The list goes on.[49]

Veiled under ambiguous terms such as "nudity," "violence," "graphic content," or "objectionable content," however, the type of content that social media companies and distributors suppress under their policies remains inconsistent and unclear.[50] Pictures of scantily-clad beach bodies pervade Instagram's feeds, yet "female nipples" or pubic hair get banned nearly instantaneously as pornographic material.[51] Violent riots in streets around the world are broadcast and go viral on YouTube, while videos talking about experiences with "abuse" or "pedophiles" are marked as dangerous or triggering content.[52] World leaders get banned on Facebook and Twitter for everything from "misinformation" to "potential for violence," while

---

46. *Mark Zuckerberg & Jack Dorsey Testimony Transcript Senate Tech Hearing Nov. 17*, REV (Nov. 17, 2020), https://www.rev.com/blog/transcripts/mark-zuckerberg-jack-dorsey-testimony-transcript-senate-tech-hearing -november-17.

47. Facebook, *Introduction*, COMMUNITY STANDARDS (2021), https://www.facebook.com/communitystandards/.

48. YouTube, *Countering Disinformation*, COMMUNITY GUIDELINES (2021), https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#developing-policies.

49. *See* Instagram, *supra* note 41 ("We want Instagram to continue to be a safe place for inspiration and expression. Our Community Guidelines set out our policies for what we do and don't allow on Instagram in order to achieve this); TikTok, *supra* note 41 ("we are committed to maintaining a supportive environment for our community").

50. Facebook, *supra* note 47.

51. *See* text accompanying note 38. *See* also Gretchen Faust, *Hair, Blood and the Nipple*, DIGIT. ENVIRONMENTS, 159, 160-61 (2017).

52. *See* Rachel Sandler, *YouTube, Maza and Crowder: Amid Censorship Battle, Some Caught in the Middle*, FORBES (June 6, 2019), https://www.forbes.com/sites/rachelsandler/2019/06/06/in-searching-for-middle-ground-youtube -angers-everyone/?sh=3940ed2024b5; Lindsay Dodgso, *YouTubers have identified a long list of words that immediately get videos demonetized, and they include 'gay' and 'lesbian' but not 'straight' or 'heterosexual'*, INSIDER (Oct. 1, 2019), https://www.insider.com/youtubers-identify-title-words-that-get-videos-demonetized -experiment-2019-10.

others seem to have immunity.[53] Although Facebook and Twitter have denied such contradictions in the past, both CEOs, Mark Zuckerberg and Jack Dorsey, have since admitted that their censorship practices—both preemptive algorithms and after-the-fact employee review—can have errors or bias.[54] Such inconsistencies pose a threat to the free marketplace in a multitude of critical areas. This article focuses on a select three: bodily and artistic expression, public health, and politics.

Critical Areas of Social Media Censorship

One marked area of censorship surrounds self-expression and nudity, the bans of which seem to affect female users disproportionately.[55] Facebook and its company, Instagram, both take a similar view of nudity, applying a blanket approach and refusing to distinguish between artistic expression and pornography.[56] Instagram, in particular, has come under scrutiny for banning pictures of female nipples but not male nipples, causing a global "Free the Nipple" protest both online and offline.[57] There is also evidence of both platforms "shadowbanning" certain users who post sexually suggestive posts, such as those featuring "revealing clothing" or "sexually suggestive positions." However, the platforms have not publicly defined either of those phrases.[58] While social media platforms allow some leeway on acts of protest or photos of post-mastectomy scarring, concerns have

53. CEO of YouTube Wojcicki stated, "When you have a political officer that is making information this is *really important* for their constituents to see, or for other global leaders to see, that is content that we would leave up because *we think it's important* for other people to see" (emphasis added). Julia Alexander, *YouTube will remove politicians' content if it breaks rules, but there are some exceptions*, THE VERGE (Sep. 25, 2019), https://www.theverge.com/2019/9/25/20884283/youtube-ban-politicians-rule-breaking-community-guidelines
-facebook-twitter.

54. Mark Zuckerberg & Jack Dorsey Testimony Transcript Senate Tech Hearing Nov. 17, *supra* note 46.

55. Gabriella Mas, *#NoFilter: The Censorship of Artistic Nudity on Social Media*, 65 WASH. U. J. OF LAW & POLICY 307, 309-12 (2021).

56. *Id*. at 309.

57. Carolina Are, *The Shadowban Cycle: An Autoethnography of Pole Dancing, Nudity and Censorship on Instagram*, 1 FEMINIST MEDIA STUD. 1, 3 (2021) https://www.tandfonline.com/doi/full/10.1080/14680777.2021.1928259.

58. Shadowbanning is a way in which social media platforms limit the visibility of posts and content from certain users without notifying them, resulting in less traffic to that user's profile or page. *See* Mark Zuckerberg & Jack Dorsey Testimony Transcript Senate Tech Hearing Nov. 17, *supra* note 46.

continued to rise with the constant banning and suppression of bodily integrity and self-expression.[59]

Social media also has policies regulating information distribution in the public health sector. During the COVID-19 pandemic and over the span of April through June 2020, Facebook reported that it had taken down more than 7 million posts of "COVID misinformation."[60] It further stated 98 million COVID-related posts had been flagged as "misleading" during that same period.[61] In February of 2021, Facebook reported that it had removed claims about the efficacy of vaccines as well as claims that COVID-19 was "man-made" or manufactured, yet two months later stated that it would no longer remove the latter claims.[62] In May 2021, two Facebook employees leaked internal memos to reveal that Facebook was testing a beta version of its algorithm to track down "vaccine-hesitant" users, identify them, and "reduc[e] the visibility of the[ir] comments. . .to remove barriers to vaccination."[63] Twitter has reported similar efforts, targeting COVID vaccine "misinformation" by labeling it as such and using a strike system that increases enforcement after a first offense.[64]

Both platforms, as well as others, have elicited concerns about their handling of COVID. Critics have questioned the dangers of preemptively determining which pieces of information are "misinformation" and which are true without the benefit of public discourse and alternative expert opinions.[65] Other concerns have

---

59. Facebook, *supra* note 40.

60. Rachel Lerman, *Facebook Says It Has Taken Down 7 Million Posts for Spreading Coronavirus Misinformation*, WASH. POST. (Aug. 2020), https://www.washingtonpost.com/technology/2020/08/11/facebook-covid-misinformation
-takedowns/.

61. *Id*.

62. Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, FACEBOOK BLOG (Apr. 16, 2020), https://about.fb.com/news/2020/04/covid-19-misinfo-update/.

63. Will Feuer, *Facebook Trying to Censor Posts from COVID-19 VaccineSkeptics: Report*, N.Y. POST (May 25, 2021), https://nypost.com/2021/05/25/facebook-trying-to-censor-covid-19-vaccine-skeptics-report/.

64. Kari Paul, *Twitter Targets Covid Vaccine misinformation with Labels and 'Strike' System*, THE GUARDIAN (Mar. 1, 2021), https://www.theguardian.com/technology/2021/mar/01/twitter-coronavirus-vaccine-misinformation-labels.

65. *See* statements from representatives in *Mark Zuckerberg & Jack Dorsey Testimony Transcript Senate Tech Hearing*, U.S. GOV'T PUBL'G OFFICE (Nov. 17,

included conflicts of interest in moderating content about the efficacy of vaccines and lockdowns. In February 2019, Congressman Adam Schiff (D-CA) threatened to introduce legislation to remove Facebook's and Google's immunity under Section 230 of the Communications Decency Act unless Facebook implemented algorithms to suppress "vaccine misinformation" and advertising.[66] The *New York Times* reported in June of 2021 that both Alphabet's and Microsoft's profits soared from increased Internet usage during the COVID pandemic lockdowns globally, reporting a third straight quarter of record profit for Alphabet ($55.31 billion in revenue, up 34 percent from a year earlier) and the strongest quarterly growth in years for Microsoft ($41.7 billion in revenue for the fiscal third quarter, up 19 percent from a year earlier).[67] With both regulatory freedom and money on the line, Big Tech shows very little willingness to dip out of the public health conversation, especially as it pertains to COVID-19.

A third prominent area of censorship surrounds United States politics. Perhaps, as one of the longest-standing areas of censorship, it is again no secret that social media suppresses certain political viewpoints with which its leadership disagree.[68] A research study by Harvard University Professor Benjamin Edelman in 2010 showed that Google's search results were not, as the company claimed, objective and politically neutral.[69] During the Obama-era, Google representatives were seen in White House meetings roughly once a week for the first seven years of Barack Obama's presidency.[70] In

---

2018), https://www.govinfo.gov/content/pkg/CHRG-115hhrg32930/html/CHRG-115hhrg32930.htm.

66. Children's Health Def. v. Facebook Inc., 546 F. Supp. 3d 909, 918 (N.D. Cal. 2021).

67. Sarah Kessler, *Google's and Microsoft's Profits Soar as Pandemic Benefits Big Tech*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/live/2021/04/27/business/stock-market-today.

68. *See* Brad Parscale, *Trump is Right: More than Facebook & Twitter, Google Threatens Democracy, Online Freedom*, USA Today (Sep. 10, 2018), https://www.usatoday.com/story/opinion/2018/09/10/trump-google-youtube-search-results-biased-against-republicans-conservatives-column/1248099002/ (explains timeline and gradual political suppression in social media).

69. Benjamin Edelman, *Hard-Coding Bias in Google "Algorithmic" Search Results,* BEN EDELMAN BLOG (Nov. 15, 2010), https://www.benedelman.org/hardcoding/.

70. Mario Trujillo, *Report Finds Hundreds of Meetings between White House and Google*, THE HILL (Apr. 22, 2016), https://thehill.com/policy/technology/277251-report-highlights-hundreds-of-meetings-between-white-house-and

2018, Prager University sued Google-owned YouTube for demonetizing 40 of its videos, which cover primarily conservative content.[71] A study in June 2021 showed that groups of political channels such as "far-right & politics" are the most frequently deleted on YouTube among more than 11,000 banned channels.[72] After the 2020 elections, YouTube banned President Donald Trump's YouTube channel with its more than 3 million followers, blocking new uploads for ambiguously "violating [YouTube's] policies and inciting violence" after protesters broke into the Capitol building on January 6, 2021.[73] It has yet to be reinstated.

YouTube's popular social counterparts, Facebook and Twitter, have demonstrated a similar bias. After the Capitol riot, Twitter banned more than 70,000 "Qanon" accounts, which allegedly related to a far-right group that posted about deep-state conspiracies.[74] The platform then silenced conservative figures such as Michael Flynn and Sidney Powell for speaking about election fraud.[75] Despite Facebook's Mark Zuckerberg vowing in 2016 that he would not censor President Trump's posts even as complaints from left-leaning employees called for him to label the President's posts as "hate speech," Facebook promptly banned the sitting president from his platform shortly after the 2020 elections as well.[76] Facebook has also been reported as

---

-google.

71. Jonathan Stempel, *Google Defeats Conservative Nonprofit's YouTube Censorship Appeal*, REUTERS (Feb. 26, 2020), https://www.reuters.com/article/us-google-lawsuit-censorship/google-defeats-conservative-nonprofits-youtube-censorship-appeal-idUSKCN20K33L.

72. Adrian Rauchfleisch & Jonas Kaiser, *Deplatforming the Far-right: An Analysis of YouTube and BitChute,* SSRN (June 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3867818.

73. Ina Fried & Ashley Gold, *YouTube Takes Down Trump Video, Bans New Uploads for a Week*, AXIOS (Jan. 13, 2021), https://www.axios.com/youtube-takes-down-trump-video-bans-new-uploads-for-a-week-f8f6caca-801f-4d2a-917d-fafb6401d9cd.html.

74. Kate Conger, *Twitter, in Widening Crackdown, Removes Over 70,000 QAnon Accounts*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/11/technology/twitter-removes-70000-qanon-accounts.html.

75. Salvador Rodriguez, *Twitter bans Michael Flynn, Sidney Powell and other QAnon accounts*, CNBC (Jan. 8, 2021), https://www.cnbc.com/2021/01/08/twitter-bans-michael-flynn-sidney-powell-and-other-qanon-accounts.html.

76. Deepa Seetharaman, *Facebook Employees Pushed to Remove Trump's Posts as Hate Speech*, FOX BUS. (Oct. 21, 2016),

banning political activist groups that they deem "extreme," including groups from both the Democrat and Republican parties.[77]

A recent study suggests that the bias runs even deeper than human oversight from employees and tech leaders themselves.[78] Algorithms that rank the results people see when typing in political-based inquiries hold both input bias and other forms of bias that "significantly" affect what people see in their search results.[79] Right now, algorithm patterns and adoption remain unclear, and they lack any sort of function that would allow consumers to turn them off.[80]

APPLYING THE 1ST AMENDMENT AGAINST SOCIAL MEDIA CENSORSHIP

Social media has changed the landscape of the free marketplace of ideas, both with its ability to censor content as well as suppress critical information and expression. But the legislative and judicial branches seem unable to reconcile this new marketplace with their own history of giving the marketplace space to thrive. Perhaps this is most evident in Section 230 of the Communications Decency Act, which gives social media companies immunity against suits for content published on their platforms. Section 230 ironically protects social media companies to foster the marketplace, as the law itself states that its purpose is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[81] The law seems unable to adapt to the new marketplace of ideas, where social media is far from facilitating a "competitive free market" and instead taking the place of government censorship in an unprecedented manner.

---

https://www.foxbusiness.com/features/facebook-employees-pushed-to-remove-trump-posts-as-hate
-speechWSJ.

77. Dan Tyman, *Facebook Accused of Censorship After Hundreds of US Political Pages Purged*, THE GUARDIAN (Oct. 16, 2018), https://www.theguardian.com/technology/2018/oct/16/facebook-political-activism-pages-inauthentic
-behavior-censorship.

78. Juhi Kulshrestha & Muhammad Bilal Zafar, *Quantifying Search Bias: Investigating Sources of Bias*
for Political Searches in Social Media, 1 (2017).

79. *Id*.

80. Nunziato, *supra* note 20, at 1551, 1553-54.

81. 47 U.S.C. § 230 (1934).

Even more concerning is the Court's similar inability—or, perhaps, unwillingness—to update and refine Holmes's marketplace of ideas in the context of social media. In fact, social media presently occupies uncharted legal territory due to the Court's unwillingness to expound upon the marketplace idea. While the application of the First Amendment to private social media entities is certainly treading new waters, both the Court and social media leaders themselves have not hesitated to associate social media companies with the free marketplace of ideas. In the 1997 *Reno v. Aclu* case, the Supreme Court asserted that social media offers "relatively unlimited, low-cost capacity for communication of all kinds."[82] The U.S. Court of Appeals echoed in a 2019 lawsuit, "Using private property as a forum for public discourse is nothing new. Long before the Internet, people posted announcements on neighborhood bulletin boards, debated weighty issues in coffee houses, and shouted each other down in community theaters."[83]

Certainly, then, the Court has seemed to acknowledge that social media has taken over the free marketplace, at the very least interacting with it and facilitating some of its content. But if that is the case, why have First Amendment claims been so unsuccessful against social media companies so far?

First Amendment Rejections from Modern Courts

The Supreme Court has not been altogether resistant to applying—and in some ways, refining—the spirit of the free marketplace in First Amendment cases. Time after time, the Court has applied the First Amendment to government or "state" actors.[84] But the Court's application of the First Amendment to private entities has been far more modest. In *Marsh v. Alabama*, the Court decided in a rare case that a privately-owned company town could be considered a state actor because the town functioned like a public town, where the corporation acted as a municipality government.[85] However, this approach has received scrutiny in many other cases, especially when private technological entities are involved. In *Manhattan Cmty. Access Corp. v. Halleck*, for example, the Court held that private operators of public

82. Reno v. Aclu, 521 U.S. 844 (1997).

83. Prager Univ. v. Google LLC, 951 F.3d 991, 995 (2020).

84. See Freedom of Speech: General, BILL OF RIGHTS INSTITUTE (2021), https://billofrightsinstitute.org/resources/freedom-of-speech-general.

85. Marsh v. Alabama, 326 U.S. 501, 507-10 (1946).

access television channels are not state actors subject to the First Amendment.[86]

Similarly, success with modern courts has been virtually nonexistent. While plenty of First Amendment suits have emerged against the social media oligarchy, very few have made it past the lower courts. In 2018, a California court dismissed a suit by blogger and activist Charles C. Johnson against Twitter for violating his free speech rights by banning him in 2015.[87] Prager University likewise was unsuccessful in its suit against Google and YouTube in 2018.[88] In 2019, Democratic politician Tulsi Gabbard's suit against Google for briefly suspending her political ad account was dismissed.[89] Shortly thereafter, a West Virginia court dismissed another First Amendment case against Twitter, stating that it was a private forum and did not fall under the purview of the First Amendment.[90]

The list continues.[91] Generally, courts have rejected First Amendment claims against social media platforms based on the fact that they are, by definition, private actors.[92] And, understandably, the Court's unwillingness to apply the First Amendment against social media may lie with the policy concerns that hearken back to Holmes's original marketplace.

Policy Concerns of Applying the First Amendment to Social Media

Critics of enforcing the First Amendment against private actors rightly express concerns about government regulation in the free marketplace.[93] After all, the very premise of the free marketplace of

86. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1935 (1921).

87. Johnson v. Twitter, Inc., 2018 Cal. Super. LEXIS 8199.

88. *Prager Univ.*, 951 F.3d at 995.

89. Tulsi Now, Inc. v. Google, LLC, No. 2:19-cv-06444-SVW-RAO, 2020 U.S. Dist. LEXIS 41673 (C.D. Cal. Mar. 3, 2020).

90. Wilson v. Twitter, No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800 (S.D. W. Va. May 1, 2020).

91. *See* Adi Robertson, *Social Media Bias LawsuitsKeepFailing in Court*, THE VERGE (May 27, 2020), https://www.theverge.com/2020/5/27/21272066/social-media-bias-laura-loomer-larry-klayman-twitter-google
-facebook-loss (detailing some conservative cases that have been dismissed).

92. *See* Nyabwa v. Facebook, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at *13985 (S.D. Tex. Jan. 26, 2018). as an example (case dismissed because Facebook was not a state actor).

93. Clyde Wade Crews, *The Case against Social Media Content Regulation*, COMPETITIVE ENTERPRISE INSTITUTE (May 1, 2020), https://cei.org/studies/the-case-against-social-media-content-regulation/.

ideas is to keep it free from government oversight and censorship.[94] Moreover, there does seem to be a risk that turning the First Amendment against private entities like social media platforms will place administrative tasks into the legislators' hands, unnecessarily burdening them with regulatory decisions and giving them an unconstrained opportunity to manipulate the marketplace.[95] As Clyde Wade Crews wrote:

Blocking or compelling speech in reaction to governmental pressure would not only violate the Constitution's First Amendment—it would require immense expansion of constitutionally dubious administrative agencies. These agencies would either enforce government-affirmed social media and service provider deplatforming—the denial to certain speakers of the means to communicate their ideas to the public—or coerce platforms into carrying any message by actively policing that practice. When it comes to protecting free speech, the brouhaha over social media power and bias boils down to one thing: The Internet— and any future communications platforms—needs protection from both the bans on speech sought by the left and the forced conservative ride-along speech sought by the right.[96]

The concept of state action or actors has also been greatly limited to the definition Justice Holmes and his contemporaries gave it rather than evolving with the times.[97] Expanding state action to social media has the potential to usher in a new age of government censorship. It could replace private entities' freedom to censor what free market champions like Milton and the framers of the Constitution feared most—tyrannical government oversight and suppression.[98]

Certainly, applying the "public function" exception outlined in *Marsh* to as far-reaching a service as social media would risk giving

---

94. *Id.*

95. Crews explains, "American values strongly favor a marketplace of ideas where debate and civil controversy can thrive. Therefore, the creation of new regulatory oversight bodies and filing requirements to exile politically disfavored opinions on the one hand, and efforts to force the inclusion of conservative content on the other, should both be rejected." *Id.*

96. *Id.*

97. Tim Wu explains, "The paradigm established in the 1920s and fleshed out in the 1960s and 70s was so convincing that it is simply hard to admit that it has grown obsolete for some of the major political speech challenges of the twenty-first century." Tim Wu, *supra* note 29, at 553.

98. For more analysis, see *Id*. at 570.

the government excessive regulatory power in the private sphere.[99] And, perhaps, broadening the definition of a "state actor" to encompass private entities would be too invasive to avoid threatening a power shift.[100] However, appropriately applying the First Amendment to reflect social media's deep and fundamental changes to the free marketplace is a step that the Court could take. In fact, the Court's recharacterization of Holmes's marketplace of ideas, a recharacterization that considers social media's vast regulatory and censorship power, could open the door to applying the First Amendment against these entities.

ADDITIONAL CONSIDERATIONS FOR FIRST AMENDMENT PROTECTIONS AGAINST SOCIAL MEDIA

What, then, would this recharacterization entail? The first step the Court could take is to explore social media's role not as a participant in or facilitator of the marketplace, but as a regulator that functions much like the government itself. As seen in the language of Section 230, the Internet was once seen as a champion or facilitator of the free market that deserved the same protections as citizens participating in it. But, clearly, this definition no longer fits. Social media has grown exponentially and often functions as a regulator in the free marketplace. It is an entity that affects users' engagement in all manners of public communications as users "simultaneously invoke three of the interests protected by the First Amendment: freedom of speech, freedom of the press, and freedom of association."[101]

However, social media does not always perform the actions of a regulator. In many ways, it does still remain a participant in the marketplace itself. As such, policy considerations and overbreadth would likely prevent the Court from considering social media a state actor or government regulator in many cases. Still, there are several specific situations in which the Court could redefine "state actors" to

---

99. Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Amendment to Social Media Platforms via the Public Function Exception*, WASHINGTON J. OF L. 1, 52-53 (2019).

100. *Id.* at 66-67.

101. David L. Hudson, Jr., In the Age of Social Media, Expand the Reach of the First Amendment, 43 A.B.A. HUMAN RIGHTS MAGAZINE (2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to
-define-free-speech/in-the-age-of-socia-media-first-amendment/.

encompass social media's manipulation or restriction of information. Particularly, the Court could consider social media a state actor when it acts at the behest of, or in collaboration with, actual government officials.

The Constitution does indeed leave room for applying the "state actor" definition in such cases. Fourteenth Amendment cases have applied a broadened state actor definition against private entities. For example, the Court in *Blum v. Yaretsky* applied Constitutional protections against private actions influenced by a state actor's "coercive power or. . .such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[102] The court in *Andrews v. Federal Home Loan Bank of America* expounded on this definition, stating that a private actor is acting for the state when "[the state] has coerced the private actor" or it "has sought to evade a clear constitutional duty through delegation to a private actor."[103]

The Court also has a string of First Amendment cases that have scratched the surface of "state actor" in a similar manner. The Sixth Circuit held that because a state official complained to a citizen's employer and sought to have her terminated, the employer engaged in state action under the First Amendment when they fired her.[104] In *Lloyd Corp. v. Tanner*, the Court suggested that a private entity that stands "in the shoes of the State," such as the company town in *Marsh*, can be held accountable under the First Amendment as a state actor.[105]

It is true that a social media platform does not perform all the functions of a state, nor does it act under state coercion in most cases. On the other hand, as the *Children's Health Defense* and *Tulsi* cases demonstrate, social media does often work with, or at the behest of, government officials.[106] Actions like these could fall into the realm of retaliation claims, such as *Lloyd Corp.* or state coercion cases like *Blum*. In fact, these modern cases demonstrate two areas that could

---

102. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

103. Andrews v. Fed. Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993).

104. Wells ex rel. Bankr. Estate of Arnone-Doran v. City of Grosse Pointe Farms, 581 F. App'x 469, 469-73 (6th Cir. 2014). *See* Andrews, *supra* note 103 at 217 for defining a private party as a state actor.

105. Lloyd Corp. *v.* Tanner, 407 U.S. 551, 569 (1972).

106. Tulsi Now, Inc. v. Google, LLC, No. 2:19-cv-06444-SVW-RAO, 2020 U.S. Dist. LEXIS 41673 (C.D. Cal. Mar. 3, 2020); Children's Health Def. v. Facebook Inc., 546 F. Supp. 3d 909, 916-918 (N.D. Cal. 2021).

clearly warrant this expanded definition of "state actor": public health and political policies.

In light of the COVID-19 "misinformation" crackdowns and vaccine push, for example, it has become increasingly clear that the United States government works extensively with social media to "privatize" the First Amendment and to avoid First Amendment violations. Over the past two years alone, Congress members like Adam Schiff (D-CA) have "threatened to introduce legislation" to remove social media immunity unless they suppress "vaccine misinformation and advertising."[107] The CDC and World Health Organization similarly collaborated with social media companies during the COVID crisis to launch a Health Alert platform that pushes their information "via Facebook's global reach" and combats "COVID misinformation."[108] Such actions deeply parallel the standard set out in *Lloyd Corp*. and especially *German v. Fox*, as actual state actors work to coerce or actively work through social media platforms, skewing the free marketplace by suppressing alternative viewpoints of laypeople and medical experts.[109] In such cases, holding social platforms accountable as state actors under the First Amendment would be appropriate to preserve the free marketplace, particularly by removing improper government oversight and regulation that has emerged with the privatization of the First Amendment.

Social media's censorship of political speech, likewise, may also constitute state action. While certainly a murkier area, social media's suppression of world leaders—particularly political figures in America—gives the media platforms a far reach in influencing the free marketplace of ideas and election results.[110] In many cases, such as

---

107. Pl. Compl. ¶¶ 10-18, Aug. 17, 2020, No. 3:20-cv-05787.

108. World Health Org., *WHO Launches a Chatbot on Facebook Messenger to Combat COVID-19 Misinformation*, WHO NEWSROOM (Apr. 15, 2020), https://www.who.int/news-room/feature-stories/detail/who-launches-a-chatbot-powered-facebook-messenger-to-combat-covid-19-misinformation.

109. Lloyd Corp. v. Tanner, 407 U.S. 551, 569-570 (1972).; German v. Fox, 267 F. App'x. 231, 235 (4th Cir. 2008) at 234.

110. For more about social media's impact on election results *see Social Media's Impact on the 2020 Presidential Election: The Good, the Bad, and the Ugly*, UNIVERSITY OF MARYLAND RESEARCH DIVISION (2020), https://research.umd.edu/news/news_story.php?id=13541; Benjamin Peters, *Election 2020: The Impact of Social Media,* UNIVERSITY OF TULSA RESEARCH DIVISION (2020), https://artsandsciences.utulsa.edu/election-2020-social-media-peters/; Thomas Fujiwara, Karsten Muller, & Carlo Schwarz, *The Effect of Social Media on Elections: Evidence from the United States*, PRINCETON ECONOMICS

when a social media platform censors citizen's protests or shadowbans their pages, social media essentially steps in to "stand in the State's shoes" and to protect certain government figures or political ideas.[111] Treating a social media platform that suppresses or otherwise labels political speech as a state actor could reinvigorate the free marketplace by balancing polarizing rhetoric with alternative viewpoints. Implementation of this would require the Court's novel and unified approach—one that, again, considers the new role of social media not as participants in the free marketplace but as regulators.

CONCLUSION

Today's free marketplace of ideas is much different than what Holmes and his contemporaries could have imagined. While the Court has generally honored Holmes's theories , it has left one of the marketplace's greatest influencers, social media, unchecked and unfettered by the First Amendment. By reevaluating the marketplace of ideas and limiting social media platforms reach over it, courts can remedy polarization and encourage their long-held value of counterspeech rather than complete censorship and suppression. Although the First Amendment far from holds the only remedy to fostering this new marketplace of ideas, it can be applied in some cases where social media platforms are acting with, for, or as state actors. In doing so, the Constitution can afford protection against social media censorship and make strides in updating the marketplace of ideas to reflect society's current state. Such an effort can at least serve as a first step to more nuanced regulatory and policy reform.

(2020), https://economics.princeton.edu/working-papers/the-effect-of-social-media-on-elections-evidence-from-the-united
-states/.

111. *See* Hudson, *supra* note 101.

LEVELING THE ARBITRATION PLAYING FIELD: A LOOK AT THE PLAYERS INVOLVED IN THE GAME

TYLER SMITH, LL.M., J.D. & TANYA M. MARCUM, J. D.

INTRODUCTION

"The best law is a quiet agreement, made either by themselves, betwixt whom the suit is, or by an umpire. If this do not proceed (succeed) they come into court."[1]

Though the exact origins of arbitration are lost in obscurity, in Aristotle's Rhetoric, he described the benefit of settling a dispute by negotiating rather than mandate.[2] Aristotle posited, the reason for the invention of arbitration was "with the express purpose of securing full power for equity."[3] The Roman Empire used arbitration as a common method for ending litigation.[4] Quite unlike the development of systems of law, the development of arbitration is not an account of principles and doctrines used and developed throughout time that have validity and force. Arbitration, as a term referring to an extra-judicial process of resolving disputes, has not developed substantive principles. Rather, each case is viewed as a matter of practical expediency in light of ethical or economic norms.[5]

In the past century, arbitration has become a large part of resolving disputes in the United States legal system.[6] It is said that arbitration runs alongside the courts but is not a perfect method of substitution for the rules and processes that protect litigants in the court system.[7] Some of the procedures available in litigation are not available in arbitration or are limited in scope, such as discovery procedures, rules of

---

1. Amos Comenius, Educator A.D. 1592-1670. Characterized as Comemus' plea for voluntary arbitration before an umpire. 1 Arbitration in Action, Nos. 7-8, p. 1 (1943).

2. Aristotle, Rhetoric, 1.13. *See also* David Mirhady, Aristotle and the Law Courts, POLIS. Vol. 23. No. 2, 2006.

3. ROBERT M. SMITH, ADR FOR FINANCIAL INSTITUTIONS, (W. Grp. 2d ed., 1998).

4. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, U. PA. L. REV. 132 (Dec. 1934). In addition, Professor Nussbaum traces arbitration even further back, mentioning the possibility that an arbitration clause was contained in the treaty concluded between two city states of Mesopotamia (Lagash and Umma) in the fourth millennium B.C. (approximately 3100 B.C.) which, he says, "would make arbitration one of the most venerable institutions of mankind. . .." ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS, at 2 (1954).

5. Wolaver, *supra*, at 132.

6. Andrew McWhorter, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration*, 52 COLUM. J. L. & SOC. PROBS. 521, 522 (2019).

7. *Id.*

evidence, and the appellate process.[8] Pre-dispute arbitration clauses and agreements have been litigated in the courts and debated by scholars in various fields.[9]

This article will focus on labor or employment arbitration, though the authors recognize that arbitration impacts other types of situations, including commercial and consumer disputes. Part II of this paper will discuss the categories of arbitration. Part III will introduce the players involved in establishing the legal frameworks for arbitration at the federal and state level. Part IV will discuss the role of congressional legislation in creating the frameworks for current labor arbitration. Part V will discuss the role of government agencies in implementing legal frameworks in labor disputes. Part VI will discuss how federal and state courts have interpreted federal and state arbitration statutes in light of private arbitration agreements. Part VII will discuss the role of private organizations in labor arbitration. Part VIII will describe issues arising from the use of mandatory arbitration clauses, potential bias in arbitrator selection, gender and race issues, and statutory issues.

CATEGORIES OF ARBITRATION

Arbitration is not a perfect substitute for litigation.[10] Arbitration, as an alternative method for dispute resolution, has limited discovery, limited evidentiary processes, and it is binding with limited availability for appeal.[11] Contractually mandatory arbitration between parties virtually blocks access to the courts by forcing the disputes to be resolved in arbitration.

Union and Nonunion Arbitration

As will be discussed below, mandatory arbitration in nonunion employment settings differ significantly from labor arbitration. Participants in the union labor arbitration "process - employers, employees, union officials, attorneys, and the arbitrators" all have a stake in an effective and fair process.[12] When the system is abused or distorted beyond its intentions, the outcomes can be disappointing and

---

8. *Id. See also Labor Arbitration Rules*, AM. ARB. ASS'N, 6 (July 1, 2013), https://www.adr.org/sites/default/files/Labor%20Rules.pdf.

9. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001) (discussing mandatory arbitration clauses and common criticisms).

10. *Id.*

11. McWhorter, *supra* note 6, at 522.

12. AM. ARB. ASS'N, *supra* note 7.

fundamentally unfair. More than 60 million Americans[13] are contractually bound by binding arbitration procedures written in the same contract that dictates their pay, healthcare benefits, promotion, and other items negotiated on their behalf. Many contract ratifiers may not realize the rights given up with respect to the arbitration procedures until they realize they have a problem. By ratifying the contract, the employees may be gaining increases in pay, bonuses, and the ability to become a permanent employee faster. However, employees may not realize that they are giving up a right to take an employer to court in exchange for those benefits.[14] "Under such agreements, workers whose rights are violated–for example, through employment discrimination or sexual harassment–can't pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers."[15]

Labor Arbitration

Each year, thousands of collective bargaining agreements are made between union representatives and management.[16] Nearly all of these agreements contain provisions that provide for arbitration of unresolved grievances.[17] These provisions usually include language to indicate that management and employees can request arbitration as the final step to settle matters not otherwise settled through the grievance procedure as outlined in the contract itself.[18] For example, the 2019

13. Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers,* VOX (May 21, 2018), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court.

14. Karla Gilbride, *'Forced' is never fair: What labor arbitration teaches us about arbitration done right-and wrong*, ECONOMIC POLICY INSTITUTE (May 30, 2019), https://www.epi.org/blog/forced-is-never-fair-what-labor-arbitration-teaches-us-about-ARBITRATION-done-right-and-wrong/.

15. John Bickerman, *Increase in Workers Subject to Arbitration Coincides with Supreme Court Ruling*s, ABA PRACTICE POINTS (Jan. 16, 2020), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/increase-in-workers-subject-to-arbitration-coincides-with-supreme-court-rulings/ (last visited Apr. 29, 2020).

16. AM. ARB. ASS'N, *supra* note 7.

17. *Id*. *See also* MICHAEL R. CARRELL & CHRISTINA HEAVRIN, LABOR RELATIONS AND COLLECTIVE BARGAINING: PRIVATE AND PUBLIC SECTORS 411 (10th ed. 2013). ("Approximately 98 percent of all collective bargaining agreements provide for binding arbitration as the final step in the handling of grievances").

18. *Id.*

National Agreement between the Internal Revenue Service and the National Treasury Employees Union provides three types of arbitration in which the decision is binding on the parties to the contract.[19] Many of these same agreements include class action arbitration waivers as well.

Nonunion Arbitration

The Economic Policy Institute published a 2018 report discussing mandatory arbitration.[20] First, 53.9% of workers in nonunion private-sector positions have mandatory arbitration agreements, which is approximately 60.1 million workers.[21] Second, where mandatory arbitration is required for employment disputes, 30.1% of these include class action waivers as part of the procedures for their workers.[22] Third, low-wage employees are more apt to have mandatory arbitration procedures than high-wage employees.[23] There is some race and gender discrimination involved "in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers"[24] that include mandatory arbitration procedures.

Commercial Arbitration

In the area of commercial arbitration, "both the structure and the process . . . are determined by the different institutional contexts in which it arises."[25] Commercial arbitration may be used when the parties to a commercial contract agree to use arbitration should a dispute regarding the contract arise in the future. A particular trade association for an industry may set its own arbitration policies for

---

19. *2019 National Agreement*, INTERNAL REVENUE SERV. AND NAT'L TREASURY EMPLOYEES UNION, 143, https://www.treasury.gov/tigta/foia/efoia-imds/chapter400-inv/400-exhibits/NTEU_IRS_Contract.pdf (last visited July 14, 2022).

20. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 848 (1961).

settling disputes for its members.[26] Private organizations and arbitration centers are also available to resolve disputes in the commercial arena. Two examples of these private organizations are the American Arbitration Association with its commercial arbitration rules and the International Chamber of Commerce.[27]

Individual Arbitration

Resting on the laurels that mandated disclosure is effective during a transaction with the average American, many companies have turned to inserting individual arbitration clauses in their employment and consumer contracts.[28] The credit card giant, American Express, states in its Card Member Agreement provisions that customers "may elect, but are not required, to resolve any claim by individual arbitration."[29] American Express "may also request to resolve any claim by individual arbitration, but you are not required to accept our request."[30] While that sounds fairly innocuous, an increasing number of companies have been adding individual arbitration clauses to consumer and employment contracts to circumvent courts and bar people from joining class-action lawsuits.[31] The American Express agreement supports this notion by indicating,

"If the parties agree to resolve a claim by arbitration, that claim will be arbitrated on an individual basis pursuant to that agreement, and the agreement would not allow claims to be arbitrated on a class action basis or on bases involving claims brought in a purported

---

26. *Id*.

27. *Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/arbitration/ (last visited July 14, 2022).

28. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?version=meter+at+0&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=https%3A%2F%2Fwww.google.com%2F&priority=true&action=click&contentCollection=meter-links-click. *See e.g.* CARL SCHNEIDER & OMRI BEN-SHAHAR, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

29. *Card Member Agreement*, AM. EXPRESS (Dec. 19, 2018), https://www.americanexpress.com/content/dam/amex/us/staticassets/pdf/cardmember-agreements/americanexpress-gold-card/American_Express_Gold_Card_12-19-2018.pdf.

30. *Id*.

31. Silver-Greenberg & Gebeloff, *supra* note 27.

representative capacity on behalf of the general public, other Cardmembers, or other persons similarly situated."[32]

Thus, this serves to prohibit customers from joining a class action if they agree to resolve a claim by arbitration.

Class Action Arbitration

An arbitration agreement that creates an ultimatum for consumers is arguably the only realistic way to effectively combat predatory behavior through strength in numbers. An example of this is the American Express Card Member Agreement. In *Lamps Plus, Inc. v. Varela*, the Supreme Court recognized the distinct nature of class action arbitration, noting that "class arbitration fundamentally changes the nature of 'traditional individualized arbitration' envisioned by the FAA."[33] This shift from individual to class action arbitration "sacrifices the principal advantage of arbitration" of its informality while slowing the process and increasing the cost.[34]

IDENTIFICATION OF THE KEY PLAYERS THAT INFLUENCE ARBITRATION POLICY

There are several major players in the labor arbitration arena. These players include the National Labor Relations Board [NLRB], U.S. Congress, federal and state courts, and private organizations. Each have played a significant role in the development of today's mandatory arbitration arena, particularly in employment disputes. This article will discuss each player's role in the development of employment arbitration as it stands today and some of the problems attributed to each party in the process of arbitration.

The U.S. Congress has passed several pieces of legislation regarding mandatory arbitration; the most notable is the Federal Arbitration Act [FAA].[35] In 1925, Congress passed the FAA in an effort to declare the validity of arbitration agreements written

32. AM. EXPRESS, *supra* note 28.

33. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019).

34. *Id.* at 1411.

35. U.S.C. Title 9 - Arbitration § 1-14, was first enacted February 12, 1925 (43 STAT. 883), codified July 30, 1947 (61 STAT. 669), and amended September 3, 1954 (68 STAT. 1233). Chapter 2 was added July 31, 1970 (84 STAT. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (P.L. s669 and 702); Chapter 3 was added on August 15, 1990 (P.L. 101-369); and Section 10 was amended on November 15. 1990.

"relatively short and deceptively cryptic."[36] In addition to the FAA, the courts have spent considerable time defining the breadth and limits of mandatory arbitration.

The NLRB is an independent federal agency that safeguard the rights of employees to bargain collectively and to enforce the 1935 National Labor Relations Act.[37] The NLRB conducts union elections, investigates charges of unfair labor practices, facilitates settlements, makes decisions in cases brought before it, enforces orders, and engages in rulemaking.[38]

State and federal courts have shaped the FAA with numerous decisions regarding mandatory arbitration.[39] The most impactful of these decisions come from the U.S. Supreme Court. As the Supreme Court supports more employers utilizing mandatory arbitration, more labor disputes are likely to be decided in arbitration as opposed to in court.

Several national and international organizations have also impacted the current state of employment arbitration in the United States. Some examples include the American Arbitration Association, CPR [International Institute for Conflict Prevention and Resolution], and JAMS [formerly known as Judicial Arbitration and Mediation Services]. Each of these organizations have played a pivotal role in developing the current arbitration policies in the United States.

CONGRESS AND ITS LEGISLATIVE AUTHORITY IN THE AREA OF ARBITRATION

Prior to the passage of the Federal Arbitration Act in 1925, U.S. courts viewed arbitration with hostility.[40] Arbitration agreements were revocable at any time and actual damages for a breach served as the only remedy available.[41] Courts justified the unfriendly bias against arbitration as contrary to public policy because they "oust[ed] the

36. Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 1 (2016).

37. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified 29 U.S.C. §§ 151-169).

38. NATIONAL LABOR RELATIONS BOARD, www.nlrb.gov (last visited July 14, 2022).

39. David Horton, *Arbitration as Delegation,* 86 N.Y. UNIV. L. REV. 437, 439 (2011).

40. Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 784 (2003).

41. *Id.*

jurisdiction of the courts."[42] The hostility began to ease in the early twentieth century when state legislatures began enacting statutes designed to push courts to enforce arbitration agreements. By 1920, New York passed the first meaningful arbitration statute.[43] Building on the reforms, Congress decided on a new policy on arbitration.[44]

Federal Arbitration Act

In 1925, Congress enacted the United States Arbitration Act, also known as the Federal Arbitration Act (FAA), in "response to a perception that courts were unduly hostile to arbitration."[45] This legislation "intended to provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases."[46] The FAA was also designed to enforce arbitration agreements voluntarily entered into between non-governmental organizations involved in interstate commerce.[47] Originally, the FAA was thought to apply only to disputes between commercial entities with equal bargaining power.[48] Scholars are in overwhelming agreement that the role arbitration plays today has gone well beyond the expectation and intent of Congress in 1925.[49] The U.S. Supreme Court has recognized the FAA as evidencing "a national policy favoring arbitration."[50]

By enacting the FAA, Congress sought to promote the enforcement of arbitration agreements.[51] Section 2 of the FAA provides:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a

---

42. *Id.*

43. *Id.* at 784-785.

44. *Id.* at 785.

45. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018).

46. Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SEATON HALL L. REV. 147 (2010).

47. Tanya M. Marcum & Elizabeth A. Campbell, *Corpses on the Arbitration Battlegrounds: A War But No Winners*, 25 MIDWEST L. J. 1, 2 (2011).

48. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(1) (1st Sess. 2009).

49. Margaret Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400 (1998).

50. Southland Corporation v. Keating, 465 U.S. 1, 10 (1984).

51. *See*, *e.g.*, H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (noting that the FAA was designed to place arbitration agreements "upon the same footing as other contracts").

controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as existing at law or in equity for the revocation of any contract.[52]

Taft-Hartley Act (1947)

The Taft-Hartley Act, commonly known as the Labor Management Relations Act of 1947, "govern[ed] union-management labor arbitration in most segments of interstate commerce in the private sector."[53] Provisions in the Act mandated that courts enforce collective bargaining agreements that contained arbitration clauses.[54] Section 301(a) of the act authorized federal courts to hear "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce."[55] Since there is no explicit indication that federal courts have exclusive jurisdiction over contract disputes between an employer and a labor organization, shortly after its passage questions arose as to "whether or not section 301(a) preempt[ed]the states from asserting" jurisdiction over these disputes.[56]

Railway Labor Act (RLA)

Before the NLRA, Congress passed the Railway Labor Act in 1926, requiring railroad employers to negotiate with the employee's elected representative–a crucial turning point in the labor movement.[57] Congress sought to foster peaceful resolution of labor disputes through

52. 9 U.S.C.§ 2.

53. Martin H. Malin, James Oldham, & Ted St. Antoine, *Brief Overview and Historical Background on Labor and Employment Arbitration*, ARBITRATION INFO (2015), https://law.missouri.edu/arbitrationinfo/2015/07/29/the-various-legal-frameworks-for-arbitration/.

54. 29 U.S.C. § 171, §§ 201(b), 203(c), and 203(d).

55. 29 U.S.C. § 301(a), Malcolm Lassman, *Section 301(a) and Pre-Emption Under Taft-Hartley*, 20 WASH & LEE L. REV. 138 (1963).

56. Lassman, *supra* note 55.

57. *Highlights of the Railway Labor Act ("RLA"), and the U.S. Department of Transportation's ("DOT") Role in RLA Disputes*, OFF. OF RAIL POL'Y AND DEV. FED. R.R. ADMIN., https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1647/Railway%20Labor%20Act%20Overview.pdf (last visited July 17, 2022).

negotiation and mediation.[58] When the airline industry emerged in the 1930's, Congress expanded the RLA to facilitate labor-management relations within the airline and railroad industries. This established the National Mediation Board (NMB), a three-member board that provides mediation and arbitration services.

Dodd-Frank Wall Street Reform and Consumer Protection Act

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau (CFPB).[59] The CFPB was created to study mandatory arbitration clauses in the consumer financial markets and services (such as mortgages, credit cards, and other consumer financial products) and to issue regulations that are in the best interest of the public for the protection of consumers. In 2017, the CFPB issued a regulation which prohibited the use of mandatory arbitration clauses to prevent class actions in most consumer financial situations.[60] Congress later repealed the regulation under the authority of the Congressional Review Act.[61]

Administrative Dispute Resolution Act of 1990

The Administrative Dispute Resolution Act (ADRA) of 1990, and amended in 1996, permits the use of binding arbitration by federal agencies.[62] This act also requires federal agencies to adopt necessary policies for the use of alternative dispute resolution methods.[63] The

58. *Id.*

59. Dodd-Frank Act, 12 U.S.C. § 5518 (2012).

60. *Arbitration Agreements*, 82 FED. REG. 33, 210 (July 19, 2017).

61. Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits,* THE NEW YORK TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html. *See also The Congressional Review Act: Frequently Act Questions*, CONGRESSIONAL RESEARCH SERVICE (Jan.14, 2020), https://fas.org/sgp/crs/misc/R43992.pdf.

62. In September 2019, for the first time in 100 years, the Department of Justice Antitrust Division invoked its authority under the little used Administrative Dispute Resolution Act, by agreeing to binding arbitration to resolve an enforcement action. *See In an Unprecedented Move, DOJ Turns to Binding Arbitration in Merger Challenge*, CROWELL-MORING (Sep. 12, 2019), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/In-Unprecedented-Move-DOJ-Turns-to-Binding-Arbitration-in-Merger-Challenge.

63. Administrative Dispute Resolution Act of 1996, 110 Stat. 3870, Pub.L. 104-320, §3 (1996).

1996 amendment to the ADRA re-authorized alternative dispute resolution methods for federal agencies and the promotion of its use.[64] The amended act made it mandatory for federal agencies to adopt the use of alternative dispute resolution methods (such as the use of formal and informal adjudications) and the designation of a senior official to be a specialist for dispute resolutions.[65]

Restoring Justice for Workers Act: Doomed Proposed Legislation

On May 15, 2019, U.S. Senator Patty Murray, U.S. Representative Jerrold Nadler, and U.S. Representative Robert Scott[66] introduced the Restoring Justice for Workers Act,[67] a legislative attempt to undo the Supreme Court opinion in *Epic Systems*. The proposed law would (1) prohibit predispute workplace arbitration agreements, (2) prohibit retaliation against workers refusing to use arbitration, (3) require protections to make sure these types of arbitration agreements are truly voluntary, and (4) amend the NLRA to prohibit agreements that would force workers to give up their rights to band together in class or collective actions.[68] This is a Democrat-backed bill that will most likely fail in the Senate.

FAIR Act: Doomed Proposed Legislation

In recognition of the problems associated with forced arbitration, the U.S. House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act), mainly along party lines. This far-reaching bill seeks to prevent employers from forcing employees to resolve disputes in private arbitration.[69] Advocates of the bill view it as restoring the right of over 60 million employees to sue their

64. *Id*.

65. *Id.* at §6.

66. *Murray, Nadler, Scott Introduce Bill to End Forced Arbitration in the Workplace, To Allow Workers to Band Together to Enforce Their Legal Rights,* U.S. SENATE ON HEALTH, EDUCATION LABOR & PENSIONS (May 15, 2019), https://www.help.senate.gov/ranking/newsroom/press/murray-nadler-scott-introduce-bill-to-end-forced-arbitration-in-the-workplace-to-allow-workers-to-band-together-to-enforce-their-legal-rights.

67. Restoring Justice for Workers Act, H.R. 2749, 116th Cong. (1st Sess. 2019) (this bill was originally introduced on Oct. 30, 2018, and was not enacted).

68. *Id.* at § 2.

69. Alexia Fernandez Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sep. 20, 2019, 11:30 AM EDT), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.

employers rather than being forced to resolve the dispute in a private arbitration setting via contract.[70] The bill now goes to the Senate, where it is expected to not move forward in the republican-controlled arena.

This is important legislation as it is expected that in five years,approximately 83% of private, non-unionized workers could be subjected to mandatory arbitration.[71] The #MeToo movement has pointed towards the use of arbitration to hush complaints of sexual harassment in the workplace.[72]

Congress can legislate in the area of arbitration and has done so in the past. However, its hands are tied during times when the House and Senate are controlled by different political parties.

FEDERAL GOVERNMENT AGENCIES AND THEIR USE OF ARBITRATION

The federal government's historical role in mediation and arbitration is directly linked to labor-management relations. The Federal Mediation and Conciliation Service [FMCS] is a neutral and independent agency created when Congress passed the Labor-Management Relations Act of 1947 (Taft-Hartley).[73] The National Labor Relations Board, established by the passage of the National Labor Relations Act (Wagner Act) in 1935, is an independent agency of the federal government that is charged with enforcing labor laws with respect to collective bargaining agreements and unfair labor practices.[74]

In 1973, the FMCS Office of Arbitration Services, composed of labor relations experts and arbitrators, was established to advise stakeholders on arbitration policy and procedures.[75] The mission of the FMCS is to prevent or minimize the impact of labor-management disputes on the flow of commerce through mediation, conciliation, and

---

70. *Id.*

71. Andrew Keshner, *Congress Could Rewrite the Rules on Forced Arbitration—3 Reasons Every American Should Care,* MARKETWATCH (Sept. 17, 2019, 2:12 PM ET), https://www.marketwatch.com/story/congress-could-rewrite-the-rules-on-forced-arbitration-here-are-3-ways-it-affects-consumers-and-workers-that-you-might-not-be-aware-of-2019-09-24.

72. *Id.*

73. Labor Management Relations Act, 29 U.S.C. § 186.

74. *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited July 8, 2022).

75. *A Timeline of Events in Modern American Labor Relations*, FMCS, https://www.fmcs.gov/aboutus/our-history/ (last visited July 8, 2022).

voluntary arbitration.[76] The FMCS provides dispute resolution in the areas of mediation for collective bargaining, mediation for grievances, and alternative dispute resolution to government entities.[77] As of March 17, 2020, the FMCS is promoting arbitration through live video conferencing due to the COVID-19 pandemic with approximately 1,000 arbitrators, 150 of whom are ready to arbitrate via video.[78]

As part of its mission, the FMCS has a grant program available "to support the establishment and operation of plant-level, area-wide, industry or sectoral joint labor-management committee confronting specific, definable problems for which they have developed clear, innovative, and measurable long-term solutions."[79] The program is designed to encourage "cooperative efforts among labor, management, and communities to jointly address such issues as health, safety, employee training, and the resolution of workplace disputes."[80] In 2019, FMCS gave Greyhound Lines, Inc. a grant in the amount of $97,636 to provide an improved first-year experience for its new drivers as a cooperative effort between management and the union.[81]

The NLRB is a second federal agency that impacts labor arbitration. The NLRB was created in 1935 to investigate complaints of wrong-doing brought to its attention by workers, unions, or employees.[82] It also conducts union elections and resolves cases brought before it.[83] Section 7 of the NLRA provides information about the NLRB and its activities.[84] Claims to the NLRB must be filed within

---

76. *Our History*, FMCS, https://www.fmcs.gov/aboutus/our-history/ (last visited July 8, 2022).

77. *Services,* FMCS, www.fmcs.gov (last visited July 8, 2022).

78. *FMCS Promotes Use of Video Arbitration,* FMCS, https://www.fmcs.gov/fmcs-promotes-use-of-video-arbitration/ (last visited July 8, 2022).

79. *Labor-Management Grants Program,* FMCS, https://www.fmcs.gov/resources/forms-applications/labor-management-grants-program/ (last visited July 8, 2022).

80. *Id.*

81. *For a Summary of the FY2019 FMCS Labor-Management Grant Recipient,* FMCS, https://www.fmcs.gov/wp-content/uploads/2019/10/2019-Greyhound-web-summary.pdf (last visited July 8, 2022).

82. *See Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited July 8, 2022). *See also*
About NLRB, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do (last visited July 9, 2022).

83. *Id.*

84. Gabrielle (Gay) Semel, *Can Workers Still Use the National Labor Relations Board under Trump?*, LABORNOTES (Jan. 09, 2020),

six months of the alleged violation or they will be dismissed as untimely, with no exceptions.[85]

According to Justice Ginsburg in *Epic Systems Corp. v. Lewis*, the NLRB's purpose was to "place employers and employees on a more equal footing."[86] The NLRB website indicates that the NLRB "is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions."[87] The NLRB protects employees contemplating union organization and also determines whether unfair labor practices have occurred by private employers and unions.[88] The NLRB has been attempting to guarantee the rights of employees to engage in concerted activities since its inception.[89]

The NLRB decisions have caused some uncertainty for both workers and employers in the employment arbitration arena. The decisions have lacked consistency; NLRB precedent is not routinely followed, which leads to unpredictable decision-making. The NLRB is subject to the political arena with board turnover after national presidential elections and it can have significant impacts on arbitration. For example, in December 2019, the NLRB issued a decision in *United Parcel Service, Inc. and Robert C. Atkinson Jr.*[90] that overruled the 2014 NLRB decision of *Babcock & Wilcox Construction Co*. that announced the standard for deferring to arbitral decisions in unfair labor practice cases alleging discharge or discipline in violation of the NLRA.[91] This changes a longstanding standard of procedural and substantive arbitral deferral criteria in *Spielberg*/*Olin* and makes it so arbitral deferral would be appropriate only when the party arguing for deferral demonstrates the following:

1. the arbitral proceedings appear to have been fair and regular,
2. all parties have agreed to be bound,

---

https://www.labornotes.org/2020/01/can-workers-still-use-national-labor-relations-board-under-trump.

85. *Id.*

86. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018).

87. *Introduction to the NLRB*, NLRB, https://www.nlrb.gov/ (last visited July 9, 2022).

88. *What We Do*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do (last visited July 9, 2022).

89. NATIONAL LABOR RELATIONS ACT of 1935, Pub. L. 74-198, 49 Stat 452, *codified as amended* 29 U.S.C. §§ 151-169.

90. 06-CA-143062 (2019).

91. Babcock & Wilcox Construction Co. 361 NLRB 1127 (2014). *See also* United Parcel Services, Inc. and Robert C. Atkinson Jr., Case 06-CA-143062 (2019).

3. the contractual and unfair labor issues are factually parallel,
4. the arbitrator considered the unfair labor practice issue, and
5. the arbitrator's decision is not clearly repugnant to the Act.[92]

The NLRB determined that prior precedent reflected distrust of arbitration regarding statutory rights, interfered with parties' ability to enter into contracts with arbitration clauses, encouraged litigation, and shifted the burden of proof to the party seeking the arbitral deferral.[93] And, the NLRB is back to a preference for arbitration.

According to adr.gov, a few government agencies have issued guidance regarding mandatory arbitration. The Administrative Dispute Resolution Act of 1996 permits the use of arbitration by federal agencies.[94] The Department of Transportation's Federal Aviation Administration and the Department of Navy both have binding arbitration policies in the area of contract law disputes.[95]

THE COURTS SETTING PRECEDENT IN LABOR ARBITRATION

The courts have played a significant role in the interpretation of the FAA and other federal and state arbitration statutes, thus impactfully shaping the area of mandatory arbitration for labor disputes. Initially, the courts were reluctant to enforce arbitration agreements for many reasons, but most importantly due to the want of jurisdiction to hear disputes and the fees associated with those cases.[96]

U.S. Supreme Court

The United States Supreme Court has played a significant and meaningful role in the area of employment arbitration as it has issued many decisions interpreting the FAA, as well as labor arbitration under the Labor Management Relations Act (LMRA). It can be said that the Supreme Court has had and continues to have a significant impact on

---

92. *United Parcel Services, Inc.*, Case 06-CA-143062.

93. John R. Graham, *NLRB Returns to Arbitration-Friendly Standard*, AM. BAR ASS'N (May 7, 2020), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/nlrb-returns-to-arbitration-friendly-standard/.

94. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

95. *Ch. 21 - Arbitration*, ADR.GOV, https://www.adr.gov/adrguide/ch21.html (last visited July 9, 2022).

96. Zachary M. Rupiper, *Enforcement Upon the Unwitting: The Overreaching Ability of Courts to Appoint Substitute Arbitration Forums Under the Federal Arbitration Act,* 100 IOWA L. REV. 411, 414 (2014).

mandatory arbitration agreements.[97] Courts in the U.S. were initially reluctant to approve the labor industry practice of mandatory arbitration,[98] and many scholars critiqued the Supreme Court's arbitration jurisprudence and claimed that Congress's intent was distorted and powerful corporations were the ultimate winners.[99] Regarding mandatory arbitration, this view changed from one decision to the next.[100]

Interestingly, at least one scholar has indicated that there may be three phases of the Supreme Courts' interpretation of the FAA, which are (1) the substitution of forum and effective vindication; (2) proving inability to vindicate; and (3) enforcement according to arbitration agreements terms.[101] We will identify the most significant U.S. Supreme Court cases relative to labor arbitration and briefly explain the relevance of each of the decisions.

The Shift from Hostility to Embracement: 1953-2017

We have seen a significant shift from judicial hostility towards mandatory arbitration to complete judicial embracement of mandatory arbitration. The following cases illustrate this gradual shift by the U.S. Supreme Court.

In 1953, the Supreme Court held in the case of *Wilko v. Swan*,[102] that a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 was unenforceable and could not be waived in an agreement to arbitrate due to an anti-waiver provision in the Securities Act of 1933.[103] This decision was later overturned.[104]

---

97. Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 Am. Bus. L. J. 815, 817 (2019).

98. Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 212 (2004).

99. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011).

100. Tanya M. Marcum & Elizabeth A. Campbell, *The Arbitration Seesaw: Federal Act Preempts General Law Thereby Restricting Judicial Review,* 47 VAL. U. L. REV. 965, 966 (2013).

101. Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L. J. 23, 26-27 (2016).

102. 347 U.S. 427, 438 (1953).

103. *Id.*

104. *Id.*

In the 1957 case of *Textile Workers Union v. Lincoln Mills*,[105] the Supreme Court determined that a section of the LMRA of 1947 enabled federal courts to enforce arbitration agreements between employers and unions to arbitrate grievance disputes rather than litigation.[106] A few years later in the Steelworkers trilogy of cases, the Supreme Court further supported the use of mandatory arbitration clauses in union labor disputes.[107] The Steelworkers Trilogy is a series of cases in which the Supreme Court effectively endorsed arbitration as the preferred means of resolving grievances, rather than through litigation, as arbitration clauses in labor and management agreements could not be ignored.[108] These cases provided further legitimacy to the arbitration process and the decisions also restricted the judicial review process.[109]

In the first of the trilogy of cases, *United Steelworkers v. American Manufacturing Co.,* the union sought arbitration of a contract grievance against the employer, and the employer claimed that the type of dispute was not arbitrable under the collective bargaining agreement.[110] The Supreme Court held that courts had "no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim."[111] Since the agreement in question indicated that grievances would be decided in arbitration, then all claims must be decided in arbitration.[112]

In the second case of the Steelworkers trilogy, *United Steelworkers v. Warrior & Gulf Navigation Co.,* the Court seemed to reflect on the arbitration policy, "promot[ing] industrial stabilization through the

105. 353 U.S. 448 (1957).

106. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449-450 (1957).

107. United Steelworkers v. Enterprise Wheel & Car Corp, 363 U.S. 593, 599 (1960); United Steelworkers v. Warrior & Gulf Navigation Co, 363 U.S. 574 (1960); United Steelworkers v. American Manufacturing Co, 363 U.S. 564 (1960).

108. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 594 (1960); and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); David Gregory, et. al., *The Fiftieth Anniversary of Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions-Will Gold Turn to Dust?*, 60 CATH. U. L. REV. 47, 51 (2010).

109. Tanya M. Marcum & Elizabeth A. Campbell, *Corpses on the Arbitration Battlegrounds: A War But No Winners,* 25 MIDWEST L. J. 1, 5 (2011).

110. United Steelworkers v. American Manufacturing Co., *supra* note 105.

111. *Id.* at 568.

112. *Id*.

collective bargaining agreement."[113] The Court indicated that when disputes arose, the agreement's grievance procedures would apply to the settlement of the dispute.[114] The Supreme Court stated "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[115]

In the final case of the trilogy, *United Steelworkers v. Enterprise Wheel & Car Corp.*, the Supreme Court held that arbitrators did not have to provide reasons for their arbitration award in a particular case.[116] The existence of a "mere ambiguity" in the opinion of the arbitrator did not justify the refusal by a court to enforce the arbitrator's award.[117] Finally, the Court stated, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."[118]

In a 1967 case, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the U.S. Supreme Court examined a contract for consulting services and a covenant not to compete as part of a sale of a business which contained an arbitration clause.[119] There were allegations of fraud in the inducement in entering the contract; one party insisted upon arbitration of this dispute and the other filed suit in federal court.[120] The contract stated that it "embodies the entire understanding of the parties"[121] included a very broad arbitration clause, "[a]ny controversy. . .arising out of this agreement, or the breach thereof, shall be settled by arbitration in the City of New York in accordance with the rules. . .of the American Arbitration Association."[122] The Supreme Court held that unless the arbitration clause itself is challenged, an arbitrator must decide the validity of a contract containing an

113. *United Steelworkers*, 363 U.S. at 578.
114. *Id.* at 583.
115. *Id.* at 582-583.
116. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).
117. *Id*. at 597.
118. *Id.*
119. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397 (1967).
120. *Id.* at 398.
121. *Id.* at 397.
122. *Id.* at 398.

arbitration provision, even in cases where there is an allegation of a fraudulently induced contract.[123] After *Prima Paint*, "the [appellate courts] have since consistently held that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[124] The Supreme Court confirmed the FAA in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* and stated that the FAA "create[s] a body of federal substantive law."[125]

In *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America,* a 1983 case decided by the Supreme Court, the Court recognized that "a court may not enforce a collective-bargaining agreement that is contrary to public policy."[126] The Court further held that "the question of public policy is ultimately one for resolution by the courts."[127] In 1987, the Court was asked to decide the issue of when a federal court could decline enforcement of an arbitration award granted under a collective-bargaining agreement due to public policy reasons.[128] The Court determined when collective-bargaining agreements provide grievance procedures to settle disputes, which include binding arbitration, courts play a "limited role when asked to review the decision of an arbitrator."[129] The Court reasoned that "insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations."[130]

In *Southland Corp. v. Keating*, the Supreme Court held that the FAA created a "national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,"[131] and enforceability is not subject to state law limitations.[132] Thus, the FAA preempted state arbitration laws.

---

123. *Id.* at 406.

124. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

125. *Id.* at 24.

126. W. R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983).

127. *Id.*

128. United Paperworkers Int'l Union, AFL-CIO, et al v. Misco, Inc., 484 U.S. 29, 30 (1987).

129. *Id.* at 36.

130. *Id.* at 37.

131. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

132. *Id.* at 11.

In yet another case, the Supreme Court held that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate."[133] In the case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., the issue before the Court was the arbitrability of a cause of action under the Sherman Act pursuant to an arbitration clause in an international commercial contract.[134] The *Soler Chrysler-Plymouth*'s argument was based on the premise that an arbitration clause must include by specific reference each statute that is to be mandated into arbitration to resolve a dispute.[135] The Supreme Court stated that a court determining whether to compel arbitration must decide if the parties agreed to arbitrate the dispute and must apply "federal substantive law of arbitrability."[136] Thus, the Court disagreed with Soler's argument and held that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[137] The Court further added:

[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deductible from text or legislative history.[138]

The Court ultimately held that the international arbitration clause in the agreement between the parties included those disputes under the Sherman Act.[139] Thus, the dispute must be arbitrated, not litigated.

In 1987, the Supreme Court decided the case of *Shearson/American Express Inc. v. McMahon*, whereby it recognized that the FAA "was intended to reverse centuries of judicial hostility to

133. Dean Witter Reynolds Inc. v. Byrd*,* 470 U. S. 213, 221 (1985).

134. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

135. *Id*.

136. Moses H. Cone Mem'l Hosp., 460 U.S. 1, 24 (1983).

137. *Mitsubishi Motors Corp*., 473 U.S. at 626.

138. *Id.* at 628.

139. *Id.* at 636.

arbitration agreements."[140] The Court then decided that the Exchange Act did not forbid arbitration of claims and stated that *Wilko* must be interpreted to bar arbitration if it is inadequate to protect the rights of the party.[141] However, in 1989, the Supreme Court overruled *Wilko* in a case that involved a dispute by securities investors over a brokerage contract which contained an arbitration clause for any account disputes. It was challenged as violating the Securities Act of 1933 by several investors who had unsuccessful investments.[142] In the *Rodriguez de Quijas v. Shearson/Am. Express Inc*., the Court determined that *Wilko* was decided when the courts did not favor arbitration clauses[143] and pre-dispute agreements to arbitrate claims under the Securities Act of 1933 are enforceable and these claims did not have to be resolved in court.[144]

Critical to the expansion of employment arbitration, the Supreme Court made a pivotal decision in the case of *Gilmer v. Interstate/Johnson Lane* in 1991.[145] The Court upheld the enforceability of mandatory employment arbitration agreements giving employers a powerful tool for use in the workplace to determine the outcome of disputes.[146] Gilmer was required to register with the New York Stock Exchange by his employer; the registration application included an arbitration clause for any "employment or termination of employment" dispute.[147] Gilmer was terminated for what he believed was age discrimination in violation of the Age Discrimination in Employment Act.[148] The employer brought a motion to compel arbitration once Gilmer filed a complaint with the Equal Employment Opportunity Commission.[149] Based on *Alexander v. Gardner-Denver Co.*,[150] the district court denied the motion, and the court of appeals reversed.[151] The Supreme Court ruled, based on

140. Scherk v. Alberto-Culver Co. 417 U.S. 506, 510 (1974).
141. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 229 (1987).
142. Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 479 (1989).
143. *Id.* at 479.
144. *Id*.
145. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
146. *Id.* at 35.
147. *Id.* at 23.
148. *Id.*
149. *Id.*
150. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
151. *Id.*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,[152] that as long as arbitration met certain due process requirements, arbitration was an adequate substitute for litigation even if the case involved statutory employment discrimination claims.[153] After this decision, employers across the nation began using mandatory arbitration agreements forever changing the workplace for American workers.[154]

After *Gilmer,* courts enforced individual arbitration agreements including those for mandatory arbitration of statutory claims, but were "reluctant to do the same with respect to agreements contained in collective bargaining contracts because of the unique dangers such agreements pose to minority rights."[155] There are two unique conflicts in this situation. First, the union employee does not control the arbitration proceedings themselves, the union itself does this.[156] Second, the union owes a duty to the entire membership and this collective interest may not be the same interest that the individual member has in addressing the statutory claim.[157]

In still another arbitration case decided by the Supreme Court, *Allied-Bruce Terminix Cos. v. Dobson*,[158] a firm decision regarding the scope of the FAA arose.[159] The Court decided that Congress intended that the FAA apply to all disputes, including those in state courts and all arbitration clauses and agreements that were covered by the FAA.[160] The case involved a termite prevention contract between a customer and an exterminator company.[161] The house that was subject to the termite treatment was sold and a subsequent terminate infestation was found in the home.[162] The buyer (Dobson) commenced

152. 473 U.S. 614 (1985).

153. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

154. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration,* ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

155. Albert Y. Kim, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations,* 65 U. CHI. L. REV. 225, 226 (1998).

156. *Id.* at 227.

157. *Id.*

158. 513 U.S. 265 (1995).

159. Janet M. Grossnickle, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom,* 36 B.C.L. REV. 769 (1995).

160. *Id.* at 775

161. *Allied-Bruce Terminix Cos.*, 513 U.S. at 268.

162. *Id.*

a state court lawsuit, and the exterminators requested a stay to allow for the issue of liability to be resolved in arbitration, which was denied.[163] The Alabama state court invalidated the arbitration clause because of an Alabama statute that provided that the FAA was only applicable if the parties entering into a contract anticipated substantial interstate activity.[164] The Alabama Supreme Court determined that the parties anticipated only a local transaction between them and not a transaction involving interstate commerce, thus the FAA did not apply.[165] The clause at issue in the FAA was "a contract evidencing a transaction involving commerce."[166] Several state courts and some federal courts were using this interpretation, therefore, the U.S. Supreme Court granted certiorari.[167]

The attorney generals of 20 states also asked the Court to overrule the *Southland v. Keating*[168] case and to allow states to use anti-arbitration statutes based on their interpretation of the FAA.[169] The Court reiterated that the FAA's purpose was to overcome judicial hostility towards arbitration.[170] The Court determined that the FAA does not carve out a niche for individual states to apply anti-arbitration law or policies.[171] The Court held that the words "involving commerce" should be interpreted broadly like "affecting commerce" from other cases.[172] The Court stated, "[t]he parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama."[173] Thus, the state court decision was reversed.

In 2000, the Court in *Green Tree Financial Corp.-Ala. v. Randolph*, made it more difficult for workers and consumers to avoid arbitration on the grounds of cost.[174] Green Tree Financial Corporation

163. *Id.* at 269.
164. *Id.*
165. *Id.*
166. *Id.* at 267.
167. *Id.* at 269-270.
168. 465 U.S. 1 (1984).
169. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995).
170. *Id.*
171. *Id.*at 273.
172. *Id.*at 277.
173. *Id.*at 282
174. Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

financed a mobile home purchased by Larketta Randolph.[175] The mandatory arbitration agreement in question did not address costs and fees.[176] Randolph sued based on a violation of the Truth in Lending Act for the failure to disclose a finance charge.[177] It was undisputed that the parties had agreed to binding arbitration and the Truth in Lending Act did not preclude a waiver of judicial remedies.[178] Randolph's argument was "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against"[179] the lending company. Because the costs were not determined to be unbearable, invalidating the arbitration agreement on that basis alone would undermine the FAA's policy on favoring arbitration.[180]

In 2001, the case of *Circuit City Stores, Inc. v. Adams*,[181] solidified the position that "[e]mployers need no longer worry about the arbitration agreements they include in contracts of employment. . .".[182] This case involved an employment application with an arbitration clause within it.[183] Adams filed a discrimination suit with the California state court two years after his employment commenced. Circuit City filed a motion with the federal district court to compel arbitration.[184] The issue before the U.S. Supreme Court was whether the FAA exempted all employment provisions applied to all contracts of employment.[185] The high Court determined that the FAA's section 1 exemption provision expressly exempted from FAA coverage only seaman, railroad employees or other workers (basically all transportation workers) "actually engaged in the movement of goods in interstate commerce."[186]

---

175. *Id.* at 82.
176. *Id.*
177. *Id.* at 83.
178. *Id.* at 90.
179. *Id.*
180. *Id.* at 91.
181. 532 U.S. 105 (2001).
182. Charity. Robl, *Recent Developments: Circuit City Stores, Inc. v. Adams,* 17 OHIO ST. J. DISP. RESOL. 219 (2001-2002).
183. Circuit City Stores, Inc., 532 U.S. at 109.
184. *Id.* at 110.
185. *Id.* at 109.
186. *Id.* at 112 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997)).

Finally, we must look at the case of *DirectTV, Inc. v. Imburgia*, in which the Supreme Court clarified when the FAA governed arbitration provisions in contracts.[187] The case itself involved a poorly worded arbitration clause in a form consumer contract with DirecTV's customers.[188] The form contract language itself read, "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable.'"[189] The courts in California refused to enforce an arbitration clause in a contract, and the Supreme Court subsequently granted Certiorari to hear the case.[190] Two customers, Imburgia and Greiner, sought damages for early termination fees that they believed violated the law in California.[191] The U.S. Supreme Court stated that the FAA must be followed as well as the precedent of U.S. Supreme Court decisions.[192] The FAA gives great flexibility to the parties to an arbitration contract to choose "what laws governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver."[193] The Court stated six reasons for the ultimate ruling that California law did not put arbitration contracts on "equal footing with all other contracts."[194] Thus, California did not give "due regard. . .to the federal policy favoring arbitration."[195]

Recent U.S. Supreme Court Decisions: 2018-Present

It appears that "[t]he Supreme Court's recent decisions interpreting the Federal Arbitration Act (FAA) in the employment context generally prioritize arbitration over workers' labor law rights."[196] There are four recent U.S. Supreme Court decisions worthy of discussion: *Henry Schein, Inc. v. Archer & White Sales, Inc.,*[197] *Epic*

187. DirecTV, Inc. v. Imburgia, 577 U.S. 47 (2015).
188. *Id.* at 49-50.
189. *Id.* at 50.
190. *Id*. at 53
191. *Id*. at 49-50.
192. *Id.* at 54 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 331 (2011)).
193. *Id*. 53-54.
194. *Id.* (citing Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476 (1989)).
195. *Id.*
196. Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus,* 56(4) AM. BUS. L. J. 815 (2019).
197. 139 S. Ct. 524 (2019).

Systems v. Lewis,[198] *Lamps Plus, Inc. v. Varela,*[199] and *New Prime Inc. v. Dominic Oliveira.*[200]

In the U.S. Supreme Court, *Henry Schein, Inc. v. Archer & White Sales, Inc*.,[201] the Court looked at the "wholly groundless" exception and its consistency with the FAA, as well as who determines threshold arbitrability.[202] "[T]he "wholly groundless" exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration."[203] Justice Kavanaugh, who wrote the opinion for a unanimous Court, explained that when the parties to a contract with an arbitration clause delegate the "threshold arbitrability question to the arbitrator" in a "clear and unmistakable" manner, the arbitrator and not the court, determines whether the dispute itself is arbitrable, even if the arguments in support of arbitration are "wholly groundless" or frivolous.[204] Because the FAA does not contain a "wholly groundless" exception, the courts cannot create their own statutory exceptions.[205]

The case of *Epic Systems v. Lewis*[206] resulted in a 5-4 decision by the U.S. Supreme Court, wherein it held that companies can mandate that workers sign waivers which prevent collective class action lawsuits against their employers. In this case, two federal statutes were interpreted by the Court, the FAA and the National Labor Relations Act (NLRA).[207] Pursuant to the FAA, agreements to arbitrate are both irrevocable and enforceable according to their terms.[208] However, it was argued that the NLRA provides that employees have a right to engage in concerted activities for mutual aid or protection, including class action lawsuits.[209] The Court interpreted the two statutes as working harmoniously[210] rather than conflicting, and determined that an agreement to arbitrate that prevents an employee from joining a

198. 138 S. Ct. 1612 (2018).
199. 139 S. Ct. 1407 (2019).
200. 139 S. Ct. 532 (2019).
201. Henry Schein, Inc., 139 S. Ct. at 524.
202. *Id.* at 528.
203. *Id.* at 529.
204. *Id*. at 530.
205. *Id.*
206. Epic Systems v. Lewis, 138 S. Ct. 1612 (2018), this opinion consolidated the additional cases of Ernst & Young LLP v. Morris (9th Cir.) and National Labor Relations Board v. Murphy Oil USA, Inc. (5th Cir.).
207. *Id.*
208. *Id.* at 1621.
209. *Id.*
210. *Id*. at 1619.

class action lawsuit does not violate the NLRA. Under the NLRA, the right to engage in concerted activities does not include an absolute right to class action lawsuits.[211] In the words of the Court, the "Court is not free to substitute its preferred economic policies for those chosen by the people's representatives."[212] In recent years leading up to this case, the NLRB's position moved from enforcement of arbitration clauses according to their terms, to a position that the NLRA nullified the FAA in cases like those in the *Epic Systems* case.[213] Obviously this position will now change.

In another 5-4 split case, the Supreme Court slammed the door shut on class arbitration unless specifically authorized by the parties in an agreement. The decision in *Lamps Plus, Inc. v. Varela,*[214] reaffirmed the Court's prior precedent that "a court may not compel arbitration on a class wide basis when an agreement is "silent" on the availability of such arbitration."[215] The Court examined whether the FAA barred "an order requiring class arbitration when an agreement is not silent, but rather "ambiguous" about the availability"[216] of class action arbitration. *Lamps Plus* "sought an order from the court compelling individual arbitration"[217] and not class action arbitration. Arbitration is a matter of consent, and that "[s]ilence is not enough" to infer consent to class arbitration.[218]

In *New Prime Inc. v. Dominic Oliveira*, the Supreme Court held that independent contractors may not be forced into mandatory arbitration due to an exemption in the FAA.[219] The case involved an independent contractor who drove trucks for New Prime, an interstate trucking company.[220] The contract between the parties included an arbitration clause, and the scope of the arbitrator's authority included any disputes over the arbitrator's authority.[221] The parties engaged in a wage dispute and a dispute as to whether Oliveira was an independent contractor or an employee.[222] Mr. Oliveira argued that he

211. *Id.*
212. *Id.* at 1632.
213. *Id.* at 4.
214. 139 S. Ct. 1407 (2019).
215. *Id.* at 1412.
216. *Id.*
217. *Id*. at 1414.
218. *Id*. at 1416.
219. *New Prime Inc. v. Olivira, 139 S. Ct. 532 (2019).*
220. *Id*. at 536.
221. *Id*.
222. *Id*.

was really an employee, not an independent contractor, and that he was underpaid.[223] New Prime sought to have arbitration compelled to determine the outcome of the dispute.[224] Mr. Oliveira contended that he was a truck driver engaged in "a 'contract[] of employment of. . . a worker engaged in. . . interstate commerce.'"[225] and thus the court could not mandate arbitration.[226]

The Supreme Court acknowledged that "[w]hile a court's authority under the Arbitration Act to compel arbitration may be considerable, it is not unconditional."[227] Section 1 of the FAA states, "'nothing' in the Act 'shall apply' to 'contracts of employment of sea-men, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'"[228] The Court indicated that a court could determine if a particular arbitration agreement involved the exclusion due to "contracts of employment" because the FAA provides for a court to first determine if the arbitration agreement involves a transaction in interstate commerce pursuant to §1 of the FAA.[229]

For the appeal, Mr. Oliveira agreed that the contract established him as an independent contractor.[230] In the opinion, the Supreme Court spent a considerable amount of time discussing Congress's intent at the time the FAA was enacted and definitions of these words. The Court then determined that "contracts of employment" did not mean just an employer-employee relationship, but could include an independent contractor relationship as well, because this phrase generally referred to "agreements to perform work."[231] Thus, the Court determined that the contract with the employer fell "within the §1's exception" and the lower court "lacked authority under the Act to order arbitration" of the transportation workers exclusion to independent contractors.[232]

This is the first Supreme Court case in quite a while to reject a claim for arbitration, although its impact on employers and employees seems to be limited in scope. The Court did not determine if Mr. Oliveira was an employee or an independent contractor, nor did it

223. *Id.*
224. *Id.*
225. *Id.*
226. *Id*. at 537.
227. *Id*.
228. *Id*.
229. *Id.* at 538.
230. *Id*. at 536.
231. *Id*. at 539.
232. *Id*. at 544.15.

determine that Mr. Oliveira qualified as a "worker engaged in . . . interstate commerce." New Prime also argued that courts have inherent authority to stay litigation and force arbitration agreements, but the Court did not address this argument.

State Court Arbitration Legislation and State Court Decisions

Evidence of arbitration exists in the earliest history of what became the United States.[233] Colonial laws relating to arbitration date to the mid-1600's.[234] Most early laws restricted arbitration to certain causes of action. Massachusetts, Pennsylvania, South Carolina, and Connecticut, for example, had published laws that allowed for arbitration to resolve issues related to a trespass.[235] The townsmen of the settlement of New Amsterdam (now known as New York City) passed in 1647 an ordinance that is the earliest known example of a general law on commercial arbitration.[236]

Following the revolution and the formal creation of the United States as a nation and well into the 20th century, states continued to pass laws regarding arbitration generally and those covering specific disputes.[237] Though commonly practiced prior to the passage of those laws, federal and state courts refused to enforce agreements to arbitrate, even if the agreement concerned arbitration or the dispute arose after the execution of an agreement to arbitration. This meant that if a party agreed to participate in arbitration, but then believed that an arbitrator was going to rule against them, they could revoke the agreement to arbitrate.[238] Thus, in order to prevent the discouragement of arbitration agreements, laws needed to be enacted to enforce arbitration agreements during disputes.[239]

---

233. Margaret Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 425-426 (1998).

234. *Id.* at 425 (1998). See also Sabra A. Jones, Historical Development of Commercial Arbitration in the United States, 12 MINN. L. REV. 240, 246 (1928).

235. Sabra A. Jones*, Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 246 (1928).

236. Charles T. Gehring, *Laws & Writs of Appeal 1647-1663,* at xvii, SYRACUSE UNIVERSITY PRESS 1991, http://www.newnetherlandinstitute.org/files/1814/2777/5092/Laws__Writs_of_Appeal_16471663.pdf.

237. Jones, *supra* note 236 at 247.

238. Harding, *supra* note 234 at 426.

239. William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 194 (1956).

In 1955, "[t]he Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws."[240] Of the 49 jurisdictions that have passed arbitration statutes, 35 "have adopted the UAA and 14 have adopted substantially similar legislation."[241] However, as is consistent with the principles of federal law supremacy, the Federal Arbitration Act is "not easily displaced by state law."[242]

A comprehensive view of every state's legislation and jurisprudence related to arbitration is beyond the scope of this paper. As such, this section will focus on the arbitration statutes and judicial decisions of California, New York, and Washington.

California

The California Arbitration Act coexists with the FAA and is a comprehensive statutory scheme that regulates the practice of private arbitration in the state of California.[243] The 2000 California Supreme Court decision in *Armendariz v. Foundation Health* set the standard for the minimum requirements of enforceability.[244] Under this standard, agreements must "contain provisions for: 1) neutral arbitrators, 2) all remedies allowed under statute, 3) adequate

240. *See* Uniform Arbitration Act, NAT'L CONF. OF COMM'N ON UNIF. STATE L., (July 28, 2000), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af (last visited Nov. 10, 2020). Twenty-two states adopted the 1956 version of the Uniform Arbitration Act: Nebraska (1997), North Dakota (1987), Virginia (1986), Montana (1985), Utah (1985), Kentucky (1984), Iowa (1981), Missouri (1980), Georgia (1978), Oklahoma (1978), South Carolina (1978), District of Columbia (1977), Colorado (1976), Delaware (1976), Idaho (1975), Kansas (1973), North Carolina (1973), South Dakota (1971), Indiana (1970), Nevada (1970), and Maine (1968).
The Uniform Law Commission issued the Revised Uniform Arbitration Act in 2000 to deal with procedural issues not addressed in the original act from 1956. States that have adopted the revised act include: Pennsylvania (2018), Kansas (2018), Connecticut (2018), West Virginia (2015), Florida (2013), Michigan (2013), Arkansas (2011), Arizona (2010), Minnesota (2010), District of Columbia (2008), Washington (2005), Oklahoma (2005), Alaska (2004), Colorado (2004), Oregon (2003), North Dakota (2003), New Jersey (2003), North Carolina (2003), Utah (2002), Hawaii (2001), New Mexico (2001), and Nevada (2001).

241. *Id.*

242. Latif v. Morgan Stanley & Co., LCC, No. 1:18-cv-11528 (S.D.N.Y., June 26, 2019).

243. CAL. CIV. PROC. CODE § 1280 et seq.

244. Armendariz v. Foundation Health, 24 Cal. 4th 83, (2000).

discovery procedures, 4) a written and well-reasoned arbitration decision, and 5) the employer's payment of all costs unique to the arbitration process itself."[245]

In October 2019, California Governor Gavin Newsom signed AB 51 into law.[246] This law effectively bans mandatory arbitration by prohibiting as a condition of employment, the requirement that a person "waive any right, forum, or procedure," including the right to commence a civil action.[247]

On December 29, 2019, a federal court issued a preliminary injunction to stop AB 51 that circumvents both the FAA and the Supreme Court's holding in the *Epic Systems* case. This law prohibits employers in California from requiring employees to enter into arbitration agreements as well as preventing opt out arbitration clauses. The preliminary injunction will prevent enforcement of AB 51 in California. The Ninth Circuit will now determine the fate of this California state statute.

The Ninth Circuit has also determined the fate of mandatory arbitration in consumer class actions in a trio of rulings.[248] In *Blair v. Rent-A-Center*, the Court held that the FAA does not preempt a California Supreme Court ruling in *McGill v. Citibank*, that held that a contractual agreement waiving a party's ability to seek injunctive relief is unenforceable under California law.[249]

New York

According to the New York International Arbitration Center (NYIAC), the state of New York is a leading arbitration center for

245. *Supreme Court's Decision Not to Review California's Arbitration Framework Means We Have A Roadmap For Compliance*, CALIFORNIA EMPLOYER'S BLOG (Oct. 17, 2019), https://www.fisherphillips.com/california-employers-blog/supreme-courts-decision-not-to-review-californias.

246. AB 51: Employment Discrimination: enforcement, CALIFORNIA LEGISLATIVE INFORMATION (Oct. 11, 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51.

247. *Id.* at § 3, 432.6(a)

248. Alison Frankel, *The 9th Circuit Just Blew Up Mandatory Arbitration in Consumer Cases*, REUTERS (July 1, 2019), https://www.reuters.com/article/us-otc-injunction/the-9th-circuit-just-blew-up-mandatory-arbitration-in-consumer-cases-idUSKCN1TW3O0.

249. Blair v. Rent-A-Center, Inc., 928 F.3d 819 (9th Cir. 2019).

international disputes.[250] The NYIAC gives numerous reasons as to why New York is an attractive place for international arbitration. Given the attractiveness of New York for international arbitration, it would stand to reason that state laws with respect to employment and labor arbitration would be equally as attractive. Indeed, the State of New York explicitly prohibits employers from including mandatory arbitration provisions in employment contracts.[251] The New York State Attorney General Arbitration Program provides a dispute resolution process for consumers seeking redress for consumer fraud and protection claims.[252]

Washington

Recently, the Ninth Circuit Court of Appeals decided the case of *Rittmann v. Amazon.com.*[253] The Court determined that Amazon delivery drivers are exempt from mandatory arbitration agreements due to the FAA's transportation worker engaged in interstate commerce exemption under 9 U.S.C. §1.[254] The case involved hourly wage claims at both the federal and state levels and a mandatory arbitration clause for drivers who did not regularly cross state lines.[255] In July of 2020, the First Circuit Court of Appeals similarly decided *Bernard Waithaka v. Amazon.com Inc.*[256] The door has been left open for the U.S. Supreme Court to step in given the different interpretations of the transportation worker exemption and provide clarification.

---

250. *Introduction,* NEW YORK INTERNATIONAL ARBITRATION CENTER, https://nyiac.org/wp-content/uploads/2013/01/Choose-NY-for-IA.pdf (last visited July 15, 2022).

251. New York Consolidated Law § 7515(b)(iii) provides:

(iii) Mandatory arbitration clause null and void. Except where inconsistent with federal law, the provisions of such prohibited clause as defined in paragraph two of subdivision (a) of this section shall be null and void. The inclusion of such clause in a written contract shall not serve to impair the enforceability of any other provision of such contract.

252. Using the NYS Arbitration Process, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, https://ag.ny.gov/consumer-frauds/using-the-nys-arbitration-program (last visited July 17, 2022).

253. 971 F.3d 904 (9th Cir. 2020).

254. *Id.*

255. *Id.* at 907.

256. 966 F.3d 10 (1st Cir. 2020).

International Arbitration Laws

Globalization is defined as "the development of an increasingly integrated global economy marked especially by free trade, free flow of capital, and the tapping of cheaper foreign labor markets."[257] It is no secret that the economies of countries throughout the world have become significantly intertwined in numerous ways throughout history. The World Economic Forum describes the history of globalization as having five eras: Age of Discovery (15th to 18th Century), Globalization 1.0 (19th Century to 1914), Globalization 2.0 (1945 to 1989), Globalization 3.0 (1989 to 2008), and the current era Globalization 4.0 (2009 to present).[258] The digital economy that is omnipresent in the current era shows no signs of slowing down, and that has implications when disputes arise.

To facilitate global trade, in June 1958, a United Nations diplomatic conference adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.[259] Though nations of the world were initially slow to embrace the Convention, today there are 24 signatories and 164 Contracting States.[260] This Convention is aimed at ensuring enforcement of foreign arbitration awards.

PRIVATE AND INTERNATIONAL ORGANIZATIONS

Several private organizations influence the arbitration arena. These organizations are in many ways equally important to the fair and proper function of arbitration as governmental and regulatory arbitration organizations. This is true especially given that arbitration agreements are most often contracts between private parties.

257. Globalization, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/globalization (last visited Dec 27, 2022).

258. Peter Vanham, *A brief history of globalization*, WORLD ECONOMIC FORUM (Jan. 17, 2019), https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/.

259. Lucy Greenwood, *A New York Convention Primer*, AMERICAN BAR ASSOCIATION (September 12, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/.

260. Contracting States-List of Contracting States, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/list+of+contracting+states (last visited July 17, 2022).

Private Dispute Resolution Organizations

There are several private organizations that engage in the dispute resolution process. We will examine a few of these to see how they fit into the arbitration landscape.

American Arbitration Association (AAA)

The AAA is a non-profit organization founded in 1926 that provides a wide range of services designed to help reach resolution in a variety of disputes.[261] As the largest provider of arbitration services in the United States, the AAA is a leader in the field of alternative dispute resolution.[262] The number of arbitration cases has increased over 200% since the 1950's. A report from the Economic Policy Institute and the Center for Popular Democracy anticipates that "by 2024, over 80 percent of private-sector, non unionized workers will be subject to forced arbitration regimes that ban class or collective actions."[263]

American Bar Association (ABA)

The professional organization of American lawyers, the ABA, has several sections and committees concerned with educating lawyers on the developments of arbitration and mediation. The Dispute Resolution section seeks to provide information, practice tips, and skill-building opportunities to its members.

Association for Conflict Resolution (ACR)

The ACR is a professional organization with a vision, "all people know their choices for conflict resolution."[264] Mediators, arbitrators, educators, and practitioners are its members who educate and encourage peaceful conflict resolution methods and the education to the public of these methods.

---

261. *Our Mission*, AM. ARB. ASS'N, https://www.adr.org/mission (last visited July 15, 2022).

262. Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea,* 15 AM. REV. INT'L ARB. 475 (2004).

263. Karla Gilbride, *'Forced' is Never Fair, What Labor Arbitration Teaches us About Arbitration Done Right—and Wrong,* ECONOMIC POLICY INSTITUTE, Working Economic Blog, (May 30, 2019), https://www.epi.org/blog/forced-is-never-fair-what-labor-arbitration-teaches-us-about-arbitration-done-right-and-wrong/.

264. *About Us*, INT'L. INST. FOR CONFLICT PREVENTION & RESOL., https://acrnet.org/page/AboutUS (last visited July 4, 2022).

International Institute for Conflict Prevention & Resolution (CPR)

This nonprofit organization seeks "[t]o prevent and resolve business disputes."[265] This organization brings together in-house corporate attorneys and their firms to reduce the costs of litigation.[266]

International Bodies

Numerous international arbitral bodies provide forums and resources for parties seeking to resolve disputes internationally. Some examples of these international bodies are as follows:

1. International Chamber of Commerce-International Court of Arbitration[267]
2. International Centre for Settlement of Investment Disputes[268]
3. WTO Dispute Settlement Gateway[269]
4. London Court of International Arbitration[270]
5. Arbitration Institute of the Stockholm Chamber of Commerce[271]
6. JAMS International Arbitration[272]

IDENTIFICATION OF ISSUES

Now that the different types of arbitration, the players, and their roles in arbitration have been established, this section will address

---

265. *CPR's Vision, Mission and Values*, INT'L. INST. FOR CONFLICT PREVENTION AND RESOL.,https://www.cpradr.org/about/mission-values-purpose (last visited July 4, 2022).

266. *History*, INT'L. INST. FOR CONFLICT PREVENTION AND RESOL., https://www.cpradr.org/about/history (last visited July 4, 2022).

267. *ICC International Court of Arbitration*, INT'L. CHAMBER OF COM. INT'L. CT. OF ARB. (July 11, 2021), https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/.

268. International Centre for Settlement of Investment Disputes, INT'L. CTR. FOR SETTLEMENT OF INV. DISP., https://icsid.worldbank.org (last visited July 4, 2022).

269. *WTO Dispute Settlement Gateway*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited July 4, 2022).

270. The London Court of International Arbitration, LONDON CT. OF INT'L. ARB., https://www.lcia.org (last visited July 4, 2022).

271. Arbitration Institute of the Stockholm Chamber of Commerce, ARB. INST.OF THE STOCKHOLM CHAMBER OF COM., https://sccinstitute.com (last visited July 4, 2022).

272. *International Arbitrators and Arbitration Services*, JAMS: MED., ARB. AND ADR SERV., https://www.jamsadr.com/arbitration-international (last visited July 4, 2022).

some of the pervasive issues present in the numerous arbitration systems.

Mandatory Arbitration Clauses

The first issue is the circumvention of the courts through forced arbitration clauses buried deeply in agreements. As has been introduced above, companies are increasingly using mandatory arbitration clauses to bind consumers and employees into resolving disputes through arbitration rather than through litigation.[273] Companies certainly would not undertake such efforts if they were not beneficial. Arbitration is traditionally viewed as a fairer, faster, and cheaper than litigation. However, not everyone benefits. For consumer advocates, the use of mandatory arbitration clauses is a cause of major concern.[274]

An Illinois man, Ronald Gorny, woke in his bed only to find bugs crawling on the headboard he had just purchased from Wayfair.com.[275] Gorny found dozens of the bugs engorged with blood when he pulled back the sheets.[276] When Gorny complained to Wayfair, they issued an apology and a 10% off coupon.[277] Gorny's discovery of other complaints against Wayfair regarding bedbugs led him to wanting to file a class action against Wayfair.[278] The putative class action filed against Wayfair alleged violations of Illinois contract and tort law arising from his purchase of the headboard.[279] Wayfair argued irrespective of where the bedbugs came from, the dispute falls within the scope of a binding arbitration agreement that Gorny assented to when he purchased the headboard from Wayfair.com.[280] Unfortunately

273. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration,* ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

274. Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REP. (Nov. 10, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

275. Andrew Keshner, *Consumers won't be allowed to sue over alleged bedbugs in Wayfair headboard*, MARKET. WATCH (June 15, 2019), https://www.marketwatch.com/story/judge-says-consumers-cant-sue-over-alleged-bedbugs-in-wayfair-headboard-2019-06-12.

276. *Id*.

277. *Id*.

278. *Id*.

279. *Id.*

280. *Id.*

for him, the district court ruled that because Gorny had agreed to binding arbitration buried in a 4,500-word agreement when he purchased the headboard, he could not pursue the class action.[281]

Mandatory Arbitration in Discrimination Cases

In 1997, the Equal Employment Opportunity Commission (EEOC) issued a policy statement strongly opposed to employers using mandatory arbitration clauses for employment discrimination claims as a condition for employment.[282] The policy concluded, "'[t]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination.'"[283]

Selection Bias

An extremely important and central reason why arbitration is favored over litigation is the party's ability to select who will resolve their dispute.[284] The benefits are numerous. The parties can opt for a specific type of experience that may be well suited to their dispute.[285] When drafting an arbitration agreement, if the parties cannot decide on the type of experience they want, the parties can agree to a panel consisting of three arbitrators that combined satisfy the qualifications each party wants.[286] While AAA guidelines suggest considering diversity when selecting an arbitrator, it is merely a suggestion.[287]

Unlike judges, arbitrators are not chosen to arbitrate a dispute at random. The parties often choose their arbitrators through a system of ranking and striking certain arbitrators. This is both a benefit and a drawback when choosing to resolve a dispute through arbitration. A benefit is that the arbitrator or tribunal of arbitrators are chosen carefully, the parties can be confident that their dispute will be settled

281. *Id.*

282. Melissa Legault, *EEOC Withdraws Policy Against Mandatory Arbitration of Workplace Discrimination Claims*, EMP. L. WORLDVIEW (Dec. 19, 2019), https://www.employmentlawworldview.com/eeoc-withdraws-policy-against-mandatory-arbitration-of-workplace-discrimination-claims-us/.

283. *Id.*

284. Linda L. Beyea, Selecting the Right Arbitrator for Your Case, AAA-ICDR BLOG (Dec. 10, 2019), https://adr.org/blog/select-the-right-arbitrator-for-your-case.

285. *Id*.

286. *Id.*

287. *Id.*

fairly and perhaps more importantly by a decision maker that has the requisite knowledge to understand the nuances of the dispute. The selection process gives the parties the ability to parse the curriculum vitaes and other qualifications of the arbitrators.

According to a report by the Economic Policy Institute, "employers tend to win cases more often when they appear before the same arbitrator."[288] This seems to indicate that employers have an advantage over employees due to the employer's regular involvement in arbitration.

Gender/Race Discrimination

It is not a secret that in the United States women and racial minorities have had to fight for equality and equity in the application of fundamental rights. Gender and racial discrimination have permeated nearly every aspect of life and the legal system, to include methods of alternative dispute resolution, is no different.

As the late Justice Ruth Bader Ginsburg has noted, "unconscious bias is one of the hardest things to get at."[289] That is because "unconscious biases are prejudices that are automatic, often unintentional, deeply ingrained, and universal."[290] From more explicit

288. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (2015) available at https://www.epi.org/publication/the-arbitration-epidemic/.

289. Linda Gerstel, *RBG and Jay-Z: A 12-Step Recovery Plan for Increasing Diversity in ADR*, 261 N.Y. L. J. 17 (2019), https://cdn1.arbitralwomen.org/wp-content/uploads/2019/02/NYLJ-RBG-JAY-Z-DIVERSITY.pdf.

290. *Id.* Beginning in the 1970's and 1980's, symphony orchestras began using blind auditions that researchers found lead up to a 50% increase in the likelihood of a woman being chosen over a male. Curt Rice, *How Blind Auditions help Orchestras to Eliminate Gender Bias,* THE GUARDIAN (Oct. 14, 2013), https://www.theguardian.com/women-in-leadership/2013/oct/14/blind-auditions-orchestras-gender-bias. The seminal study on unconscious bias in orchestras originally published in 2000, "Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians," by Harvard University's Claudia Goldin and Princeton University's Cecilia Rouse found that blind auditions increased the odds of a women being chosen by 50%. Questions about the findings of that study have recently been raised and some indicate that the original findings were greatly overstated. *See*, Robby Soave, *A Famous Study Found That Blind Auditions Reduced Sexism in Orchestras. Or Did It?*, REASON (Oct. 22, 2019), https://reason.com/2019/10/22/orchestra-study-blind-auditions-gelman/. Despite an overstatement in the study, more women were being hired in orchestras, according to Justice Ruth Bader Ginsburg.

and overt discrimination to unconscious bias, diversity has progressed incrementally.[291]

Gender Discrimination and Bias

Gender discrimination in arbitration has at least two different aspects based upon how it occurs. First, gender discrimination in arbitration proceedings can occur when women are forced to arbitrate their gender discrimination claims rather than litigating those claims in court. An example of this occured when banking giant, Goldman Sachs, forced more than 1,000 women (out of a class of over 3,000) who were suing the bank over gender discrimination claims, into arbitration.[292] The second aspect of gender discrimination in arbitration occurs when the proceedings themselves are subject to gender bias, either explicit or unconscious, that can rise to the level of unlawful discrimination. This can include bias in the outcomes due to different genders of the arbitrators and parties, and also in the selection process for arbitrators, as noted above. Additionally, much like judges, arbitrators are immune from civil liability arising from their actions as the decision-maker.[293]

Race Discrimination

In an attempt to stop arbitration in his company's 2018 licensing dispute with Iconix Brand Group, hip-hop icon Jay-Z (aka Shawn Carter), argued that a failure of diversity in the AAA means he should not be compelled to arbitrate the dispute.[294] In the memorandum of support for a temporary restraining order and preliminary injunction

---

291. Chris Dolmetsch, et. al., *Goldman Forces Women into Arbitration in Gender Bias Case* (2), BLOOMBERG L.AW (Mar. 26, 2020), https://news.bloomberglaw.com/daily-labor-report/goldman-forces-women-into-arbitration-in-gender-bias-case-2.

292. *Id.*

293. While the FAA is silent on the immunity of arbitrators from civil liability, U.S. courts have repeatedly upheld the doctrine of arbitral immunity. *See,* Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987) (noting that the doctrine of arbitral immunity provides that arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings) (quotations omitted), Sacks v. Dietrich, 663 F.3d 1065 (9th Cir. Ct. App. 2011).

294. Eriq Gardner, *Jay-Z Demands Stop to Arbitration Because of Racial Discrimination*, THE HOLLYWOOD REP. (Nov. 28, 2018), https://www.hollywoodreporter.com/thr-esq/jay-z-demands-stop-arbitration-because-racial-discrimination-1164539.

filed with the New York state intermediate court of appeals, Jay-Z noted:

> The AAA's lack of African-American arbitrators with the expertise necessary to arbitrate "Large and Complex Cases" came as a surprise to Petitioners, in part because of the AAA's advertising touting its diversity. This blatant failure of the AAA to ensure a diverse slate of arbitrators for complex commercial cases is particularly shocking given the prevalence of mandatory arbitration provisions in commercial contracts across nearly all industries, which undoubtedly include minority owned and operated businesses. The AAA's arbitration procedures, and specifically its roster of neutrals for large and complex cases in New York, deprive black litigants like Mr. Carter and his companies of the equal protection of the laws, equal access to public accommodations, and mislead consumers into believing that they will receive a fair and impartial adjudication.[295]

Jay-Z's counsel "reviewed more than 200 potential arbitrators in the New York area," and were "unable to identify a single African-American arbitrator with the necessary expertise."[296] After raising this concern with the AAA, a list of six arbitrators described as "of color," were provided.[297] Of the three candidates who are African American, one of the proposed candidates appeared to be "a partner at the law firm that represents Iconix *in the underlying Arbitration*, creating a blindingly obvious conflict of interest."[298]

The difficulty Jay-Z encountered in finding qualified African-American candidates stands in stark contrast to the AAA's pledges and initiatives to "recruit, retain, and advance a diverse and inclusive Roster of Arbitrators and Mediators."[299] The AAA claims its roster consists of twenty-four percent of women and minorities and has incorporated an algorithm in its case management system to provide parties with a list that comprises at least twenty percent qualified diverse panelists.[300] With the understanding that diversity efforts take time, the AAA clearly has more work to do in fulfilling its pledges.

---

295. Pet'rs' Mem. of Law in Supp. at 2, Shawn C. Carter et al. v. Iconix Brand Group, Inc., No. 655894, (N.Y. Sup. Ct. Nov 28, 2018).

296. *Id.* at 4.

297. *Id.* at 5.

298. *Id.*

299. *Diversity Initiatives: Our Shared Commitment to Diversity and Inclusion*, AMERICAN ARB. ASS'N, https://adr.org/DiversityInitiatives.

300. *Id.*

Lack of Binding NLRB Decisions

Originally requiring three members, NLRB's membership increased to five with the passage of the Taft-Hartley Act.[301] No matter the specific number, the members of the NLRB change with some frequency and negatively impact the productivity of the board, as well as those subject to their decisions.[302]

"Over the last 20 year, the Board has been at its full five-member strength only about *40 percent* of the time."[303] From 2007 to 2010, the Board had only two members due to President George W. Bush's refusal to make nominations and the refusal of the Senate Democrats to confirm those nominations he did make.[304] Despite this, the remaining Board members concluded they had quorum, issuing nearly 400 decisions in 2008 and 2009.[305] In 2010, the Supreme Court ruled in *New Process Steel, L.P. v. NLRB*, that the two-member Board lacked authority to issue decisions.[306] Thus, all of the Board's rulings d were invalidated.

Depending partly on the political orientation of the members, previously established doctrines and the interpretation of rules and processes are completely subject to change when new members join the board.[307] The NLRB is not bound to the concept of *stare decisis*.[308] While this may protect rulings from political motives, the lack of binding precedent makes it extremely difficult for unions and management to predict how the Board might rule on their cases.

---

301. John C. Truesdale*, Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1 (2000).

302. *Id.*

303. *Id.* at 4.

304. Edwin S. Hopson, *NLRB Member Confirmation Battles-January 2001-January 2009,* WYATT FIRM (Feb. 15, 2010), https://wyattfirm.com/nlrb-member-confirmation-battles/.

305. Jay Sumner and C. Scott Williams, *United States: Federal Appellate Court Holdings Strike Down (And Uphold) Decisions By The Two-Member NLRB*, MONDAQ (May 30, 2009), https://www.mondaq.com/unitedstates/employment-litigation-tribunals/79238/federal-appellate-court-holdings-strike-down-and-uphold-decisions-by-the-two-member-nlrb.

306. *See* New Process Steel, L.P. v. N.L.R.B., 560 U.S. 674, 688 (2010).

307. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 708 (2006).

308. Administrative Law Judge Decisions, NLRB, https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions (last visited July 4, 2022).

CONCLUSION

Statutory law and U.S Supreme Court precedent serve as a reminder for all– the parties to a contract should be aware of what they are agreeing to when negotiating contracts, particularly if the contract contains an arbitration clause. The FAA is the law favoring arbitration, and the courts are also favoring arbitration when the parties have agreed to it.

THE INTERSECTION BETWEEN PEREMPTORY CHALLENGES AND THE EQUAL PROTECTION CLAUSE TO CURTIS FLOWERS, A MAN WHO WAS TRIED SIX TIMES FOR THE SAME CRIME.

GEOFREY BILABAYE*

* Assistant Prosecuting Attorney Calhoun County, Michigan

INTRODUCTION

Curtis Flowers was tried six times for a quadruple murder that occurred at a furniture store in Winona, Mississippi, a town of five thousand people, whose population is fifty-three percent black and forty-six percent white.[1] Mr. Flowers's six trials took place in 1997, 1999, 2004, 2007, 2008, and 2010, respectively.[2] In the first two trials, Mr. Flowers was convicted by a jury and sentenced to death; however, the Mississippi Supreme Court reversed the convictions based on prosecutorial misconduct.[3] The prosecutor used peremptory strikes to exclude *all* prospective black jurors.[4]

In the third trial, the prosecutor, again, exercised peremptory challenges to strike *all* fifteen prospective black jurors.[5] The jury convicted Flowers and sentenced him to death; however, again, the Mississippi Supreme Court reversed Flowers's conviction, this time, for violating *Batson v. Kentucky*.[6] Both the fourth and fifth trials ended in mistrials, even though the prosecutor in the fourth trial excluded eleven prospective jurors through peremptory strikes.[7]

In the sixth trial, the prosecutor, again, exercised peremptory challenges to exclude five of six prospective black jurors.[8] The jury, again, convicted Flowers and sentenced him to death.[9] On June 21, 2019, the U.S. Supreme Court reversed Flowers's conviction, from his sixth trial, for a *Batson* violation.[10]

On September 4, 2020, the office of the Attorney General of Mississippi filed a motion to dismiss Flowers's indictment citing

1. Flowers v. Mississippi, 139 S. Ct. 2228, 2236 (2019).
2. All the six trials against Mr. Flowers were tried by the same prosecutor, Doug Evans.
3. *Flowers*, 139 S. Ct. at 2236.
4. In most jurisdiction within the United States, there are typically unlimited number of peremptory challenges, excusing jurors from service for any reason, that both sides, in a trial, is afforded; but there are also a limited number of challenges for cause, excusing jurors from service for a particular reason, that each side gets. In the Flowers's case, the issue was, specifically, about peremptory challenges.
5. *Flowers*, 139 S. Ct. at 2245.
6. Batson v. Kentucky, 476 U.S. 79 (1986).
7. *Flowers*, 139 S. Ct. at 2235.
8. *Id.*
9. *Id.*
10. *Id.* at 2251.

inconsistent testimony by witnesses, lack of key prosecution witnesses to incriminate Flowers, and the totality of circumstances.[11]

THE EARLIEST CASE DISCUSSING THE RACIAL COMPOSITION OF JURY PANELS

The Fourteenth Amendment to the United States Constitution was adopted on July 9, 1868.[12] Specifically, the Fourteenth Amendment provides, in relevant part, as follows: "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[13]

Approximately eleven years after the ratification of the Fourteenth Amendment, the United States Supreme Court decided *Strauder v. West Virginia*, one of the first cases to discuss the racial composition of jury panels in American jurisprudence.[14] In *Strauder*, the Supreme Court, among other issues, decided the question of whether the composition or the selection of jurors by whom a defendant, or plaintiff in this case, "is to be indicted or tried, all persons of his race or color may be excluded by law, solely, because of their race or color, so that by no possibility can any colored man sit upon the jury."[15]

The Supreme Court also decided on the constitutionality of a West Virginia statute that prohibited non-white jurors.[16] The Supreme Court, in *Strauder*, held the statute unconstitutional.[17] Specifically, the Supreme Court reasoned that the Fourteenth Amendment declares that "the law in the States shall be the same for the black as for the white. . .," and "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no

11. Alissa Zhu, *'Finally free': Mississippi AG drops case against Curtis Flowers, tried 6 times for the same crime*, MISSISSIPPI CLARION LEDGER, (Sept. 4, 2020, 4:30 PM CT), https://www.clarionledger.com/story/news/2020/09/04/curtis-flowers-not-face-7th-trial-mississippi-ag-says/5721228002/.

12. U.S. Const. Amend. XIV.

13. *Id.*

14. Strauder v. West Virginia, 100 U.S. 303 (1879).

15. *Id.* at 305.

16. *Id.* at 304.

17. *Id.* at 310.

discrimination shall be made against them by law because of their color . . . ."[18]

In discussing the Equal Protection Clause, the Supreme Court drove this point home by posing the following question: "And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, [solely based on his race] however well qualified in other respects, is not a denial to him of equal legal protection?"[19]

In conclusion, the Supreme Court stated, "the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State."[20]

THE CONCERN *BATSON V. KENTUCKY* SOUGHT TO ADDRESS

In *Batson*, the petitioner, James Kirkland Batson, a black man, was indicted and convicted on charges of second-degree burglary and receiving stolen goods.[21] At trial, the prosecutor exercised his peremptory challenges to strike all four prospective black jurors, and the jury was ultimately composed of only white jurors.[22]

Batson challenged the prosecutor's strikes of black jurors, but the court denied the motion. It held that "the parties were entitled to use their peremptory challenges to 'strike anybody they want to."[23] On appeal, Batson argued, *inter alia*, that the prosecutor improperly exercised peremptory challenges, and that the prosecutor "engaged in a 'pattern' of discriminatory challenges," which violated the Equal Protection Clause.[24] The Supreme Court of Kentucky affirmed.[25]

The U.S. Supreme Court reversed. It held "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black

18. *Id.* at 307.
19. *Id.* at 309.
20. *Id.* at 310.
21. Batson v. Kentucky, 476 U.S. 79, 82-83 (1986).
22. *Id.* at 83.
23. *Id.*
24. *Id.* at 83-84.
25. *Id.* at 84.

defendant."[26] It reasoned, "[r]acial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try." [27] Competence to serve as a juror ultimately depends on an assessment of individual qualifications and the ability to impartially consider evidence presented at a trial.[28] The Batson Court emphasized, "[d]iscrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."[29]

The Batson Court established several procedural rules for these types of challenges. Initially, the defense must establish a prima facie by showing "evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[30] This burden requires proving a two-part test. First, the defense must establish that the defendant "is a member of a cognizable racial group."[31] Second, the defense must show the prosecutor "exercised peremptory challenges to remove from the venire members of the defendant's race."[32]

Then, after a defendant has made a prima facie showing of excluding jurors based on purposeful discrimination, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[33] The State must demonstrate that it used "permissible racially neutral selection criteria and procedures."[34]

Ultimately, the Supreme Court held that Batson made a timely objection to the removal of all prospective black jurors, and because the trial court "*flatly rejected* the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings."[35]

---

26. *Id*. at 89.
27. *Id.* at 87.
28. *Id.* at 87 (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24).
29. Id. at 87-88. (Internal quotation marks and citation omitted; alterations in the original).
30. *Id.* at 96. (Citing Castaneda v. Partida, 430 U.S. 482, 494 (1977); emphasis added.)
31. *Id.*
32. *Id.*
33. *Id.* at 97.
34. *Id.*
35. *Id*. at 100 (emphasis added).

BATSON'S IMPLICATIONS ON THE CURTIS FLOWERS'S CASE

In *Flowers v. Mississippi*, the Supreme Court reversed Flowers's quadruple murder convictions because the prosecutor violated *Batson*.[36]

In the six trials against Flowers, the prosecutor struck forty-one of the forty-two prospective black jurors.[37] In Flowers's sixth trial, the prosecutor exercised peremptory strikes to exclude five of six prospective black jurors.[38] The prosecutor employed pretextual reasons to strike prospective black jurors and "engaged in dramatically disparate questioning of black and white prospective jurors."[39]

Historically, in Winona, Mississippi, jury trials end up composed primarily of white jurors.[40] Black jurors of Mississippi's Fifth Circuit Court have been excluded from jury service at an alarming rate.[41] Data from "more than 6,700 jurors in 225 trials during Doug Evans' tenure as the top prosecutor. . ." shows that from 1992 to 2017, prosecutors excluded Black prospective jurors at almost four and a half times the rate it struck white people.[42] Fifty percent of eligible prospective black jurors were excluded from jury service, in comparison to eleven percent of prospective white jurors.[43]

The Supreme Court noted this issue in its analysis of the Flowers case when it stated that in Flowers's first case, there were thirty-six prospective jurors, five black and thirty-one white.[44] The prosecutor exercised twelve peremptory challenges, five of which were to exclude qualified prospective black jurors.[45] Flowers was convicted, but his conviction was reversed on appeal.[46]

In Flowers's second trial, there were thirty prospective jurors, five black and twenty-five white; again, the prosecutor exercised

---

36. Flowers v. Mississippi*,* 139 S.Ct. 2228 (2019).
37. *Id.* at 2235.
38. *Id.*
39. *Id.*
40. Will Craft, *Mississippi D.A. Dough Evans has long history of striking black people from juries*, APM REPORTS, (June 12, 2018) https://features.apmreports.org/in-the-dark/mississippi-da-doug-evans-striking-black-people-from-juries/.
41. *Id.*
42. *Id.*
43. See *Id.*
44. *Flowers*, 139 S.Ct. 2236.
45. *Id.*
46. *Id*.

peremptory challenges to strike all five black jurors.[47] This time, the trial court stated that the explanation offered by the prosecutor to strike one of the black jurors for being "inattentive and was nodding off during jury selection" was *false*, and the trial court sustained Flowers's *Batson* challenge.[48] As a result, in Flowers's second trial, the jury contained one black juror and eleven white jurors.[49] Flowers was, again, convicted and sentenced to death, but his conviction was reversed on appeal.[50]

"At Flowers's third trial, [forty-five] prospective jurors–[seventeen] black and [twenty-eight] white–were presented to potentially serve on the jury."[51] "One of the black prospective jurors was struck for cause, leaving [sixteen black prospective jurors]." The prosecutor exercised fifteen peremptory challenges to strike all prospective black jurors.[52] Flowers raised a *Batson* challenge, but the trial court denied his motion.[53]

Flowers's third trial consisted of eleven white jurors and one black juror solely because "[t]he lone black juror who served on the jury was seated after the State ran out of peremptory strikes."[54] Flowers was, again, convicted and sentenced to death, but his conviction was reversed on appeal. The Mississippi Supreme Court stated, "[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."[55] The opinion of the Mississippi Supreme Court added that "the 'State engaged in racially discriminatory practices' and that the 'case evinces an effort by the State to exclude African-Americans from jury service.'"[56]

In Flowers's fourth trial, there were thirty-six prospective jurors, sixteen black and twenty white.[57] The prosecutor exercised eleven peremptory challenges, all of which were to strike prospective black jurors.[58] However, because there was a "relatively large number of

47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id.*
52. *Id*.
53. *Id*. 2236-37.
54. *Id*. at 2228, 2237.
55. *Id*. (Citation and internal quotation marks omitted).
56. *Id*. (Citation omitted.)
57. *Id*.
58. *Id*.

prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the prospective black jurors."[59] Therefore, the final jury for Flowers's fourth trial consisted of seven white and five black jurors. This case ended in a mistrial because the jury could not reach a verdict.[60]

In Flowers's fifth trial, the final jury consisted of nine white and three black jurors.[61] This jury, too, could not reach a verdict, and a mistrial was declared.[62]

In Flowers's sixth trial, which was the subject of his appeal to the United States Supreme Court, there were twenty-six prospective jurors, six black and twenty white prospective jurors.[63] The prosecution exercised six peremptory challenges, and it excluded five prospective black jurors.[64] Flowers raised a *Batson* challenge, but the trial court denied his motion.[65] As a result, "[t]he jury at Flowers' sixth [and final] trial consisted of [eleven] white jurors and [one] black juror."[66] Flowers was convicted and sentenced to death.[67] On appeal, the Mississippi Supreme Court affirmed Flowers's conviction.[68] Flowers further appealed to the United States Supreme Court.[69]

The Supreme Court determined that the "review of the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent."[70]

The Supreme Court also stated, "[s]tretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many prospective black jurors as possible. *The State appeared to proceed as if Batson had never been decided*."[71] The Supreme Court added, "[t]he State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers

59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id.*
69. *Id*.
70. *Id*. at 2245.
71. *Id*. at 2246 (emphasis added).

before a jury with as few black jurors as possible, and ideally before an all-white jury."[72]

Furthermore, the Supreme Court determined that the prosecutor's use of peremptory strikes in the sixth trial "followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a *Batson* challenge."[73] The Supreme Court considered its previous decision in *Miller-El v. Dretke*, where a prosecutor may accept one black juror, "in an attempt to obscure the otherwise consistent pattern of opposition to seating black jurors."[74]

The Supreme Court also considered the prosecutor's disparate questioning of prospective black versus prospective white jurors. The Court noted that the prosecutor asked a total of 145 questions to the five prospective black jurors that were excluded, and on the other hand, the prosecutor only asked a total of twelve questions to the white jurors that made it to the final jury.[75] In other words, the five prospective black jurors that were struck from the final jury were asked a total of twenty-nine individual questions each, while the eleven white jurors that made it to the final jury were asked one question each.[76]

The Supreme Court noted that, while "disparate questioning or investigation alone does not constitute a *Batson* violation," "[t]he lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated."[77]

Ultimately, the Supreme Court held that "the State's pattern of striking prospective black jurors persisted from Flowers' first trial through Flowers' sixth trial."[78] The Court stated that all the relevant facts and circumstances, in this case, establish that the trial court was erroneous in Flowers's sixth trial in concluding that the prosecutor's strike of at least one prospective black juror was not motivated by discriminatory intent.[79]

---

72. *Id*.
73. *Id*.
74. *Id*. at 2246 (citing Miller-El v. Dretke, 545 U.S. 231, 250 (2005)).
75. *Id*. at 2246-2247.
76. See *id* at 2247.
77. *Id*.
78. *Id*. at 2250-2251.
79. *Id*.

On August 29, 2019, on the order of the U.S. Supreme Court decision in *Flowers*, the Mississippi Supreme Court reversed and remanded Flowers's conviction and death sentence to the circuit court for a new trial (the seventh trial).[80]

[81] On September 4, 2020, after the same prosecutor who tried Flowers in the previous six trials recused himself, the Mississippi Attorney General's office submitted a motion to dismiss the indictment against Flowers. The motion stated, among other reasons, that no key prosecution witness incriminated Flowers because the available witnesses gave conflicting testimony, and the only witness who offered direct evidence of guilt has recanted his testimony admitting that he lied.

The motion added/asserted/suggested that there were other suspects "with violent criminal histories, as well as possible exculpatory evidence *not previously considered*."[82]The trial court granted Flowers's motion to dismiss the indictment *with prejudice*.[83]

BATSON'S LIMITATIONS IN THE TRIAL PROCESS

One cannot truly know any prosecutor's mental process in excluding jurors during *voir dire*. The law, as shown above in the discussion of *Batson*, only requires a prosecutor to articulate a race-neutral reason for excluding a particular juror, when the opposing side raises a *Batson* challenge.[84]

Moreover, when *Batson* challenges are raised, judges and lawyers may experience difficulties to insinuate that another professional in the courtroom is striking prospective jurors for racially motivated reasons. At least in practice, it does not sound so unusual for the lawyer who is facing a *Batson* challenge to take it personally.

Nonetheless, *Batson* remains the best precedent to use when another side exercises peremptory challenges improperly, especially

---

80. See Andy Kruse, *Supreme Court of Mississippi Reversal*, APM REPORTS, (Aug 29, 2019), https://features.apmreports.org/documents/?document=6361105-Supreme-Court-of-Mississippi-Reversal-8-29-19.

81. See Andy Kruse, *Motion to Dismiss*, APM REPORTS, (Sept. 4, 2020, https://features.apmreports.org/documents/?document=7202734-Curtis-Flowers-Motion-to-Dismiss (emphasis added).

82. *Id.*

83. Andy Kruse, *Order of Dismissal with Prejudice*, APM REPORTS, (Sept. 4, 2020) https://features.apmreports.org/documents/?document=7202735-Curtis-Flowers-Order-of-Dismissal-with-Prejudice (emphasis added).

84. Batson v. Kentucky, 476 U.S. 79 (1986).

because the standard for a prosecutor to survive a *Batson* challenge is low.

In his dissent in *Flowers*, Justice Thomas discusses the issue of who has standing to make a *Batson* challenge during *voir dire*.[85] This question may give an impression of mere intellectual jiu-jitsu; however, at its core, it presents a compelling hole in *Batson*'s plot.

It has long been determined that "[i]ndividual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf."[86] In order to establish standing in a case, the plaintiff must establish, first, that they have suffered an "injury in fact."[87] Second, "there must be a causal connection between the injury and the conduct complained of . . . ."[88] "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision."[89]

In this case, Justice Thomas presents that Flowers was not the excluded juror, and that "although he is a party to an ongoing proceeding, standing is not dispensed in gross; to the contrary, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought."[90]

Therefore, because Flowers does not contend on appeal that the jury that convicted him was not impartial, he should not have standing "to assert the excluded juror's claim."[91] This point is emphasized in the holding, which states, "[d]efendants are not entitled to a jury of any particular composition."[92]

CONCLUSION

The *Flowers* case is the most unique, and it remains the capstone case to test *Batson*'s effectiveness to date. Despite the harrowing fact that Flowers was tried six times, and there was a possibility of a seventh trial, there is a silver lining here: the safeguards to a fair and

85. Flowers v. Mississippi, 139 S.Ct. 2259 (2019).

86. Powers v. Ohio, 499 U.S. 400, 414 (1991).

87. Lujan v Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

88. *Id*. (Citing Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)).

89. *Id*. at 561. (Citation omitted).

90. *Flowers,* 139 S.Ct. at 2270 (Internal quotation marks and citations omitted).

91. *Id*.

92. Holland v. Illinois, 493 U.S. 474, 483 (1990). (Internal quotation marks omitted; alterations in the original.)

impartial jury of his peers, as implemented in *Batson*, still work, and they seem to work effectively.

In 1879, the U.S. Supreme Court, in discussing the composition of a jury, asked a question that echoed for 140 years:"how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?"[93]

The answer has been and always will be the same. Never.

93. Strauder v. West Virginia, 100 U.S. 303, 309 (1879).

RETHINKING GUARDIANSHIP

LEAH ORTIZ*

* Special recognition to Dohn Hoyle, long-time advocate for the rights of people with disabilities, for his wisdom, mentorship, and stern teachings of every person's right to have the dignity of making mistakes. Thank you to the editors of the Thomas M. Cooley Law Review, for the selection of this article, the editing, and time spent making this article a fixture for so many to see. Lastly, with distinct gratitude to my husband, Pepé, who consistently puts a spotlight on my efforts when everything seems so dark, reminding me that light is just so others can see; once you can see, then you can hear and feel what the spotlight focuses on.

INTRODUCTION

So, you want to recommend guardianship for a person with a developmental disability? Do you truly know what you are recommending? Have you thought this through, or are you using the lackadaisical approach of, "well, this is the next step," or "that is how it has always been done?" Using this approach has proven to be a dangerous method of problem solving. The simple act of googling "the way it has always been done," will yield a myriad of articles and commentary about why this method is truly bad business. "[R]esting on your laurels is often subterfuge — a last-ditch effort to remain relevant."[1]

Have you considered that your preconceived notions about developmental disability guardianship could likely be wrong or outdated? Developmental disability guardianship means that someone else can have control over the following: the place you live, the people you associate with, your eating schedule, your clothing, your mode of transportation, your daily activities, the doctor you see, your hobbies, whether you can get married, how much money you can access, and even whether you have a Facebook account. This list pales in comparison to the amount of full control a guardian has over an individual with a developmental disability.

For individuals with developmental disabilities, the list not only continues, but the stigma of having a disability is perpetuated by a piece of paper that no one ever asks for: a guardianship. This piece of paper strips a person of their civil rights.

HISTORY

The Impact of Misguidance and Misinformation

The lack of research and studies about developmental disabilities has paved the path for misinformation, which has led to many dire conditions for individuals facing disabilities. While most professional opinions are generally accepted and trusted, professionals have still contributed to the misconceptions surrounding developmental disabilities and the practical solutions parents can take to help their children throughout life.

---

1. Ben Zimmerman, *The Most Dangerous Phrase in Business: We've Always Done it This* Way, Forbes, (Jan. 24, 2019), https://www.forbes.com/sites/forbeslacouncil/2019/01/28/the-most-dangerous-phrase-in-business-weve- always-done-it-this-way/?sh=385ad88640f7.

Your Baby Will Never Amount to Anything

In the past, if a medical professional determined that a woman may have a baby born with a disability, the medical professional typically suggested that the woman should terminate the pregnancy.[2] If a child were disabled, doctors would commonly tell the parents to put the child in an institution for the rest of their life, because they would never become contributing members of society.[3]

These assumptions controlled the way parents reacted to learning about their child's disability. Unfortunately, many parents instantly followed their doctor's recommendations and either terminated their pregnancy or surrendered their children to institutions.[4]

Until the deplorable conditions of many institutions were publicized, parents believed that they were acting in the child's best interest. Once institutions, like the state of New York's Willowbrook State School, were exposed, people turned their attention to the rights of individuals with disabilities.[5]

At Willowbrook, children and adults with disabilities were left in what was known to many as the "human warehouse."[6] Due to the overcrowded and understaffed institution, Willowbrook residents suffered loss of eyesight, teeth breaking, and frequent bruises and scalp wounds .[7] Some doctors even conducted medical experiments to eradicate hepatitis by deliberately injecting residents with hepatitis.[8] Thousands of residents were described as living in filth, dressed in ragged clothing, and forced to remain in cage-like rooms for hours.[9]

---

2. Teresa Santin, *Is Down Syndrome Doomed? How State Statutes Can Help Expectant Parents Make Informed Decisions about Prenatal Down Syndrome Diagnoses*, 6 PITT. J. ENV'T PUB. HEALTH L. 239, 269 (2012).

3. Benjamin Weiser, *Beatings, Burns and Betrayal: The Willowbrook Scandal's* Legacy, (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/nyregion/willowbrook-state-school-staten-island.html.

4. *Id*.

5. City Lights International, *Unforgotten: Twenty-Five Years After Willow brook- Full Movie*, YOUTUBE.

6. Disability Justice, *The Closing of Willowbrook*, https://disabilityjustice.org/the-closing-of-willowbrook/ (last visited Apr. 4, 2022).

7. New York State Ass'n for Retarded Child., Inc. v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973).

8. Matt Reimann, *Willowbrook, the Institution that Shocked a Nation into Changing its Laws*, TIMELINE (Jun. 15, 2017), https://timeline.com/willowbrook-the-institution-that-shocked-a-nation-into-changing-its-laws-c847acb44e0d.

9. Disability Justice, *supra*.

As a result of the discoveries of abuse in these institutions, the Rehabilitation Act of 1973 was created to prohibit discrimination based on a disability.[10] Patients who lived in these institutions started transitioning into society, and they were provided the proper access to education and treatment.[11] The Rehabilitation Act made way for the United States Department of Education to pass the Individuals with Disabilities Education Act (IDEA) to further promote education for those who were previously left behind.[12]

Teachers Giving Legal Advice – What Could Go Wrong?

In 1976, just three years after the federal Rehabilitation Act was passed, Michigan established the Michigan Administrative Rules for Special Education (MARSE), a program that provides an education through the age of 26.[13] MARSE is unlike any other state's legislation that is meant to aid those with disabilities. Most states follow federal guidelines under the IDEA, which limits a person's access to education to the age of 22.[14] Parents could finally have their children attend school from home. However, once the children reached the age of majority,[15] teachers informed parents that guardianship was the "next step" in the child's learning process.[16]

Most parents are not aware they have options. Lynn Eberhard, a mother of an adult woman with a developmental disability, explained her journey:

I didn't know I had a choice, I looked to the teachers to help me, to help Michelle, as they had done all these years. They taught her since kindergarten. I always did what they suggested. Read to her, I did it. Count with her, I did it. Take her to extracurriculars, I did it. Engage in playgroups, I did it. Apply for guardianship? Okay, done.[17]

10. 29 U.S.C § 794 (1973).

11. 12 C.F.R. § 268.203 (2002).

12. Therese Craparo, Note, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 476 (2003).

13. Mich. Admin. Code r. 340.1700.

14. R 340.1700 et seq.

15. 34 C.F.R § 300.520.

16. Arlene S. Kanter, *Guardianship for Young Adults with Disabilities as a Violation of the Purpose of the Individuals with Disabilities Education Improvement Act*, 8 J. INT'L AGING L. & POL'Y 1, 15 (2015).

17. Interview with Lynn Eberhard, Parent, in Battle Creek, Mich. (Mar. 4, 2022).

Lynn followed the teachers' guidance provided because she "trusted them," and she "thought they knew what they were talking about, but it turns out they didn't."[18]

Parents find comfort in teachers. They look to teachers for guidance on the next steps in the child-rearing process and in the journey of independence. The issue with this misplaced trust is that most K-12 teachers are not lawyers, yet they frequently skirt the line of legal advice, and they make recommendations without considering every aspect of what is best for the student or the family.[19]

It has been said that teachers act from a good place, and they do what they believe is in the student's best interest. This falls in line with the entire concept of guardianship. The idea that guardianship will "protect" a person is the central idea behind the program, but one idea of contention is that it exceeds the necessary level of intrusion.[20]

"Guardianship, at one time seen as a benign way to 'protect' people with disabilities, began to be seen more often as an intrusion into a person's basic civil and human rights and to be avoided if at all possible."[21] Assumptions lead to confusion. This confusion is not limited to parents and teachers – it impacts the legal system as well.

LEGAL PROTECTIONS THAT CREATE VULNERABILITY

In Michigan, there are two separate systems that govern guardianship, the Estate Protected Individuals Code (EPIC) and the Mental Health Code. While they are each meant to address something different, courts frequently misapply them.

The Estate Protected Individuals Code

EPIC is used for the guardianship of adults and minors, commonly referred to as "wards," who cannot manage their own affairs due to their age or physical impairment. [22] Under EPIC, the probate court decides whether a report that substantiates a person's need for a guardian should be submitted to the court, and EPIC does not require a report from a clinician.[23]

---

18. *Id.*
19. Kanter, *supra* note 16, at 48.
20. Kathleen Harris, *Disability Law-Guardianship Reform*, 79 MICH. BAR J. 1658, 1659 (2000).
21. *Id.*
22. Mich. Comp. Laws Serv. § 700.1108.
23. *Id.* § 700.5304.

Guardianships granted under EPIC are generally due to acute mental health conditions, substance abuse disorders, dementia, or aging.[24] These types of guardianships are generally easier to modify or terminate.[25] Once a person is medicated and compliant, they can handle their own affairs, and they would not require the oversight of a guardian. Similarly, a person with substance-abuse issues who receives treatment and no longer needs the assistance of another person would not require a guardian. EPIC is broad, and the process of acquiring a guardianship under this law is not difficult.[26] The word 'disability' is also defined broadly; therefore, the legal system often resorts to EPIC.

The Mental Health Code

Chapter 6 of the Mental Health Code specifically governs Michigan guardianships for individuals with developmental disabilities and has different requirements than the general guardianship guidelines under EPIC. For example, EPIC does not have a clinical requirement, but the Mental Health Code does.[27] Requirements for guardians also vary under the Mental Health Code.[28] Under EPIC, guardians are required to meet their ward within three months of appointment as guardian and at least once every three months thereafter.[29] The guardian, under Chapter 6 of the Mental Health Code, is not required to meet their ward, visit them, or maintain contact over any specified period.[30]

In contrast to the Mental Health Code, EPIC emphasizes that alternatives must be considered prior to the appointment of a full guardian.[31] While EPIC emphasizes alternatives to the most restrictive option of full (plenary) guardianship, Chapter 6 of the Mental Health Code does not consider it.[32]

---

24. John D. Kmetz, *Guardianship and Liberty Interests in Nursing Home Placement: A Loophole Needing Closure*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 119, 122 (1998) (.
25. *Id*. at 125.
26. *Id.*
27. Mich. Comp. Laws Serv. § 330.1631.
28. *Id.*
29. Mich. Comp. Laws Serv. § 700.5106(5).
30. Mich. Comp. Laws Serv. § 330.1631.
31. Mich. Comp. Laws Serv. § 700.5303(2).
32. Mich. Comp. Laws Serv. § 330.1602(1).

The Court's Application

A mother petitioned for guardianship under EPIC of her 46-year-old twin sons who have developmental disabilities. She did so after one of them accepted a position with an employer that does not provide health benefits.[33] One of the sons, Richard, contested the guardianship and filed a motion for summary disposition arguing that because they were *developmentally* disabled, "guardianship proceedings should proceed under Chapter 6 of the Mental Health Code."[34] The court disregarded the Mental Health Code, applied the rules under EPIC, and denied Richard's motion, appointing his mother as his guardian.[35]

Protection or Risk

In Michigan, the National Core Indicators report for 2017-2018 reveals that 81% of people with developmental disabilities are under some form of guardianship, plenary or partial, compared to 43% nationally.[36] Nationally, the core indicators are standard measures used to assess the outcomes of services provided to individuals and families impacted by a disability and address key areas of concern, including guardianship. [37]

While Chapter 6 of the Mental Health Code explicitly states that guardianship "shall be utilized only as is necessary to promote and protect the well-being of the individual, . . ." Michigan's number of developmental disability guardianships is much higher than the national average.[38] If the court determines that some form of guardianship is necessary, partial guardianship is preferred. [39] Interestingly, the State Court Administrative Office (SCAO) does not collect data that differentiate partial from plenary guardianships. The only data collected by the SCAO is the total number of guardianships filed and granted. A state that prefers partial guardianships should collect data to ensure that the application of its laws is adhering to its purpose. Since this is not the case, all that is left is a guess.

---

33. Neal v. Neal (In re Neal), 230 584 N.W.2d 654, 723 (Mich. App. 1998).

34. *Id.* at 725-726.

35. *Id.* at 725-26.

36. Human Services Research Institute and The National Association of State Directors of Developmental Disabilities Services, NCI, https://www.nationalcoreindicators.org/states/MI/report/2017-18/ (last visited Mar. 20, 2022).

37. *Id.*

38. Mich. Comp. Laws Serv. § 330.1602(1).

39. *Id.*

Unsubstantiated Lifetime Labels

The Diagnostic Statistical Manual-5 (DSM-5) identifies a developmental disability as a limitation in one's intellectual and adaptive functioning throughout the developmental period.[40] Examining one's learning style, reasoning, planning, and abstract thinking ability can identify intellectual functioning deficits.[41] Adaptive functioning deficits are identified by assessing one's social skills, communication, school or work functioning, and personal independence.[42] Some of the most common intellectual and developmental disabilities are down syndrome, autism, cerebral palsy, fragile X syndrome, or attention deficit hyperactivity disorder (ADHD).[43]

The average person has experienced some of these 'deficits' at some point, perhaps even in the developmental phases. Stigmatizing people with these disabilities limits their capacity to thrive, and it is counterproductive in improving their condition. Since many of the issues are experiences that the average person goes through, no one should create a predisposition for their abilities.

Did you learn differently in school? Do you struggle to plan accordingly? Maybe you cannot hold a conversation or get anywhere on time. Maybe you still have not mastered balancing a checkbook or how much change the cashier should have returned to you. Labeling you as suffering from ADHD would not take more than answering "yes" to just a few questions.

Have you gone through a divorce? Have you made more career changes than anyone you know? Perhaps you have moved twice this year? If so, you must lack adaptive functioning. While diagnosing people based on "yes" and "no" answers seems incomplete or haphazard, it is a common practice that places lifetime labels on people.

We are all dependent on others to get by in life. While some have a strong support group, others rely on carpools, public transportation, case management, or even AAA to change a tire. Whatever the reason may be, we are all reliant on someone or something in our lives, and that does equate to having a disability.

---

40. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 33 (5th ed. 2013).

41. *Id.*

42. *Id.*

43. *Id.* at 40.

THE INCOMPATIBILITY OF STRIPPING ONE'S RIGHTS FOR PROTECTION

Chapter 6 of the Michigan Mental Health Code states that guardianship "shall be designed to encourage the development of maximum self-reliance and independence in the individual."[44] Encouraging the development of self-reliance and independence cannot be reached if the ward has no rights or the ability to make decisions. Decision-making is an essential part of learning valuable skills, as well as the 'dignity of risk.'[45] The dignity of risk is the opportunity and the right to make mistakes.[46]

Life is about learning from the mistakes you make. Max Borrows, a self-advocate for a disability rights organization, explains in his YouTube video, "I appreciate, and we appreciate protection from people, but please don't protect us too much or at all from living our lives."[47] He states, "People grow by encountering failures and making mistakes in their life."[48]

Solutions Encouraging Independence

There are alternatives to guardianship that are less restrictive than filing for guardianship.[49] These methods foster independence and create safeguards that can "provide needed support for individuals with disabilities to make choices and decisions and seek a life that meets their needs."[50]

Release of Information

Oftentimes, people are directed to seek guardianship because they are fearful that their loved ones will be excluded from meetings, appointments, or any other informational meeting or gathering. The teacher who tells the parent of an 18-year-old student, "you will need to get guardianship if you want to continue to sit-in on school meetings," is part of the problem, because this is not true. The student

44. Mich. Comp. Laws Serv. § 330.1602(1).

45. Robert Perske, *The Dignity of Risk and the Mentally Retarded*, 24 (1972).

46. *Id.*

47. Univ. Vt. Ctr. Disability & Community Inclusion, *Dignity of Risk*, YOUTUBE (May 23, 2018), https://youtu.be/LUka52lKtdw.

48. *Id.*

49. Claudia Ines Pringles, *Throwing a Life Saver without Going Overboard: Considering Alternatives to Guardianship*, 37 Vt. B.J. 21 (2011).

50. *Id*.

and parent can sign a release of information. This will address all concerns about who can do what.

A signature is a "person's name or mark written by that person or at the person's direction."[51] There is no requirement that a person apply their third-grade cursive lesson, write out their full name, or even spell their name correctly. So long as there is intent to authenticate, a person can use any mark— even an "X"— to validate an agreement.[52]

Person-Centered Planning

Person-Centered Planning is "a process for planning and supporting the individual receiving services that builds upon the individual's capacity to engage in activities that promote community life and that honors the individual's preferences, choices, and abilities."[53] This is a support method that promotes goal-based planning.[54] Plans should detail desired goals, a proposed method for attaining the goals, who can assist, and what resources are necessary.[55] This team-approach is often a more effective alternative to guardianship because the focus is on an individual's preferences, choices, and abilities.[56]

Power of Attorney

Power of attorney is a useful alternative to guardianships. These designations can be used to address a number of concerns, such as those that involve financial, medical, housing, and transportation decisions.[57] Power of attorney designations can be as broad or as narrow as one deems necessary, and it should be drafted with the individual's needs in mind.[58]

51. Signature, Black's law dictionary (11th ed. 2019).
52. *Id.*
53. Mich. Comp. Law Serv. § 330.1700(g).
54. *Id.* § 330.1712.
55. *Id.*
56. Pringles, *supra* note 49, at 22.
57. Pringles, *supra* note 49, at 22.
58. *Id.*

Identify and Address the Root of the Problem

Preserving autonomy should be the primary goal for family planning.[59] For instance, providing the power of attorney to someone because their adult child will not take their medication is not conducive to becoming independent. Finding out why the medication is being rejected could lead to a far better alternative. Does it cause illness? Does it taste bad? Could this be a case of simple defiance? Addressing questions like these will often lead to the root of the problem; guardianship will not make someone take their medication, and it would not be realistic to assume it would.

Another example is the fear of sexual exploitation. Guardianship does not prevent sexual exploitation. Preventative measures that prevent sexual exploitation include teaching someone the difference between good and bad touches and maintaining knowledge of a loved one's encounters that take place outside of the home.

Managing money is another common reason for guardianships.[60] But guardianships, particularly temporary ones, are not meant to address fiscal administration; a financial power of attorney is more suitable for this type of authority delegation.[61] In these types of cases, a guardianship is not required if the adult has a valid power of attorney. Crucially, this allows a reliable agent to manage all financial matters without extreme degradation to civil liberties.

Guardianship is not meant to correct every bump in the road, and the primary objectives of care are preserving autonomy, upholding dignity, and improving quality of life. To do this, families must identify the root issues rather than presuming incapacity.[62]

Supported-Decision Making

Supported-Decision Making (SDM) "starts with acknowledging that people with intellectual and developmental disabilities have the right to make their own decisions."[63] SDM is a tool that can be used to support people to live their lives and to provide a Circle of Support. A

59. Ellen A. Callegary, *Guardianship & Its Alternatives in the 21st Century*, 47 Md. Bar J. 20 (2014).

60. Nicole Shannon, Emily Miller & Emma Holcomb, *Defending Older Clients in Guardianship Proceedings*, 99 Mich. Bar J. 34 (2020).

61. *Id.*

62. *Id.*

63. Mich. Dep't of Health & Hum. Serv., *Supported Decision Making*, https://www.michigan.gov/mdhhs/0,5885,7-339-71550_2941_4868_4897_97701—-,00.html (last visited Apr. 4, 2022).

Circle of Support is a group of people, service agencies, or community members who assist individuals in the decision-making process.[64] While a guardianship means that one individual will control the outcome of another's quality of life, SDM involves several people who support the person in obtaining independence.[65]

Jenny Hatch, a 29-year-old woman with Down Syndrome, lived without a guardian and worked at a thrift store.[66] When Jenny wanted to spend more time with her friends who owned the thrift store, her parents became concerned.[67] Her parents did not think she needed to spend more time with friends, and they were not used to Jenny making decisions that conflicted with their normal routine.[68] In response, Jenny's parents filed for guardianship as a way of controlling her decisions.[69] A year of litigation ensued and by introducing SDM, Jenny won her case and has since been able to make her own choices.[70] She now visits her friends on her own terms and as Jenny said, "Just because people have a disability does not mean the[y] need a guardianship. Many times, they may need just a little help."[71]

In the disability community, people have always known individuals like Jenny—people with intellectual disabilities who live without guardianship by using natural support from their friends or family to manage money, go to doctor appointments, apply for jobs, and make other decisions. Still, it was somewhat revolutionary and exciting to see a court recognize the right of a person to make those decisions when someone decided to pursue guardianship.[72]

Stories like Jenny's should not be revolutionary, they should be common.

---

64. *Id.*

65. Jeremiah J. Underhill, *Supported Decision-Making*, W. Va. Law. 38 (2019).

66. The Jenny Hatch Justice Project, *The Justice for Jenny Trial*, http://www.jennyhatchjusticeproject.org/trial (last visited Apr. 4, 2022).

67. Cathy Free and Jill Smolowe, *Deciding for Herself. A Family for Jenny*, PEOPLE MAGAZINE, (Feb. 17, 2014).

68. *Id.*

69. The Jenny Hatch Justice Project, *The Justice for Jenny Trial*, http://www.jennyhatchjusticeproject.org/trial (last visited Apr. 4, 2022).

70. *Id.*

71. Hatch, *Jenny's Letter – Text Version*, The Jenny Hatch Justice Project http://jennyhatchjusticeproject.org/
jenny_speaks (last visited Oct. 23, 2022).

72. *Id.*

CONCLUSION

After understanding the difference between the two systems that govern guardianship in Michigan, the legal system should also understand that people, regardless of developmental disabilities, are entitled to live a life of their own, without a guardian. Simply being diagnosed with a developmental disability should not automatically trigger the need to implement guardianship.

SDM is the most effective way to achieve care while simultaneously providing a way for the individual to maintain their freedom to make choices and to protect the dignity of risk.

Michigan's rate of developmental disability guardianships is greater than the national average because of the misapplication of guardianship rules. This can be mitigated by approaching developmental disability guardianship with the focus of developing maximum independence with the least restrictive means.

Just because a person may not speak, does not mean they have nothing to say.

BACK TO BASICS: CHOOSING PRESERVATION OVER MITIGATION IN WETLAND PERMITTING

KRYSTEN HERGERT

INTRODUCTION

The word "wetlands" evokes different meanings for different people. While some may think of wetlands fondly, recalling beautiful views and rich diversity of plants and animals, others find them an annoyance — a breeding ground for mosquitoes and flies with the smell of decaying plant matter assaulting the senses. While wetlands are all these things, their most important role is to protect a vast majority of the world's plants, animals, and freshwater. While some protections for wetlands do exist, federal regulations are still allowing wetlands to be destroyed at an alarming rate. This destruction is addressed through mitigation measures, but the success of those measures is still being debated. State and federal regulators should be actively protecting the wetlands we already have until the effectiveness of modern mitigation methods can be proven.

WHAT WETLANDS DO FOR THE ENVIRONMENT

Wetlands play a crucial role in our ecosystem here on Earth and in the health of our water. In fact, the Environmental Protection Agency (EPA) counts wetlands among "the most productive ecosystems in the world, comparable to rain forests and coral reefs."[1] Not only are they rich in plant and animal diversity, but they also support the ecology of watersheds, help to combat climate change through atmospheric maintenance, and protect coastal regions from flooding and shoreline erosion.[2]

Wetlands support a massive number of species in the United States. Varying "microbes, plants, insects, amphibians, reptiles, birds, fish[,] and mammals" all find their home in wetlands.[3] They are home to almost 7,000 plant species and "[a]bout one-third of all plants and animals listed as threatened or endangered species. . . depend on wetlands for survival."[4]

Flooding and erosion are also controlled through wetlands. Wetlands are able to hold large amounts of water that are slowly released into trees, roots, and other vegetation, which helps prevent

---

1. U.S. Env't Prot. Agency, *Why are Wetlands Important?*, EPA, https://www.epa.gov/wetlands/why-are-wetlands-important (last updated Mar. 23, 2022).

2. *Id.*

3. *Id.*

4. Nat'l Park Serv., *Why are Wetlands Important?*, NPS, https://www.nps.gov/subjects/wetlands/why.htm (last updated May 5, 2016).

flash flooding along rivers and other coastal areas.[5] These same roots also help prevent erosion as they hold dirt in place while water runs through them.[6] Many of these wetlands are part of watersheds. Every watershed is built differently and provides different functions for humans.[7] Some watersheds drain into underground aquifers or estuaries, providing clean drinking water for communities.[8]

Knowing all of this, it is shocking to hear that, globally, wetlands are being destroyed three times faster than forests,[9] and there is speculation that up to 87% of them have been destroyed since 1700. In 1990, the U.S. Fish and Wildlife Service found that "221 million acres of wetlands that existed in the lower 48 states in the late 1700s have been destroyed."[10] Even more concerning is the fact that the destruction of wetlands is still ongoing and, in some cases, legally permitted.

WETLAND LEGISLATION

The Clean Water Act

The main piece of legislation dictating the health of the water in the United States is the Clean Water Act (CWA).[11] The Act, as we know it today, "establishes the basic structure for regulating discharges of pollutants into the waters for the United States and regulating quality standards for surface waters."[12] Section 404 of the Act "establishes a program to regulate the discharge of dredged and fill material into waters of the United States" through a permitting process.[13] As written, Section 404 does not directly apply to wetlands

5. Nat'l. Park Serv. *supra*.
6. U.S. Env't Prot. Agency, *supra* note 1.
7. U.S. Env't Prot. Agency, *supra* note 1.
8. Nat'l. Park Serv. *supra*.
9. Ramsar Convention on Wetlands, *The Global Wetland Outlook*, The Ramsar Convention Secretariat, https://www.global-wetland-outlook.ramsar.org/ (last visited July 3, 2021).
10. Nat'l. Park Serv. *supra*.
11. U.S. Env't Prot. Agency, *Clean Water Laws, Regulations, and Executive Orders related to Section 404*, EPA, https://www.epa.gov/cwa-404/clean-water-laws-regulations-and-executive-orders-related-section-404 (last updated Mar. 10, 2022).
12. *Id.*
13. *Id.*

but only to "navigable waters."[14] On a day-to-day basis, the U.S. Army Corps of Engineers (USACE) handles Section 404 permitting decisions; and it, along with the EPA, is responsible for enforcing Section 404 provisions.[15] Since 1975, these organizations have put forth regulatory rules for wetlands and have included a precise definition of wetlands.[16] There is an argument that this expansion is beyond the statutory authority given to these organizations.[17]

The United States Supreme Court, however, has repeatedly upheld the EPA's and USACE's decision to include wetlands in their regulations. In 1985, in *United States v. Riverside Bayview Homes, Inc.*, the Court discussed that the navigable waters definition was not meant to be narrow.[18] Rather, "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands."[19] At that time, the most recent USACE regulations were published in 1977, and defined wetlands as:

those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.[20]

This was because the USACE had found that water exists in systems.[21] When one part of a water system is polluted, it will affect the quality of the water in the entire system.[22] Therefore, "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[23]

---

14. U.S. Env't Prot. Agency, *Overview of Clean Water Act Section 404*, EPA, https://www.epa.gov/cwa-404/
overview-clean-water-act-section-404 (last updated Aug. 10, 2021).

15. U.S. Env't Prot. Agency, *Wetland Regulatory Authority*, EPA, https://www.epa.gov/sites/production/
files/2015-03/documents/404_reg_authority_fact_sheet.pdf (last visited July 31, 2021).

16. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985).

17. *Id.* at 126.

18. *Id.* at 133.

19. *Id.*

20. Definitions, 42 Fed. Reg. 37144 (July 19, 1977).

21. *Riverside Bayview Homes, Inc.*, 474 U.S. at 133-34.

22. *Id.* at 134.

23. *Id.*

In 2006, the Court once again held that the USACE has jurisdiction over wetlands through Section 404 of the CWA and created a precise test that could be used to determine what areas fall under this jurisdiction.[24] The Court reiterated that Congress created the CWA to protect the nation's navigable waters from dredging and filling.[25] It would then follow that wetlands that "perform critical functions related to the integrity of other waters" have a "significant nexus" with navigable waters.[26] Therefore, any wetland that can be proven to have a "significant nexus" with a navigable waterway falls under the jurisdiction of the USACE.[27] Wetlands that are adjacent to navigable waterways will also fall under the USACE's jurisdiction.[28]

Wetland Mitigation

The USACE is responsible for enforcing Section 404 provisions as they relate to wetlands. When an individual or organization wants to take some action that will require the dredging or filling of a wetland, the USACE will attempt to mitigate the impact of that action as much as possible. In 1989, President Bush's administration announced a national goal of "'no net loss'" of wetlands.[29] This goal guides all wetland mitigation permitted by the USACE, placing an emphasis on avoiding discharge as long as there is a practical alternative.[30] As a result, there are three types of mitigation the USACE will apply in order to try and reduce the impact on wetlands.[31]

---

24. Rapanos v. United States, 547 U.S. 715 (2006).
25. *Id.* at 779.
26. *Id.*
27. *Id.*
28. *Id.* at 782.
29. M. Siobhan Fennessy, et al., *Towards a National Evaluation of Compensatory Mitigation Sites: A Proposed Study Methodology*, 2 (2013) (citing U.S. Environmental Prot. Agency, *Memorandum Agreement Regarding Mitigation Under CWA Section 404(b)(1) Guidelines*, EPA, https://www.epa.gov/cwa-404/Memorandum-agreemement-regarding-mitigation-under-cwa-section-404b1-guidelines-text) (last updated June 3, 2022).
30. *Id.*
31. U.S. Env't Prot. Agency, *Types of Mitigation under CWA Section 404: Avoidance, Minimization and Compensatory Mitigation*, EPA, https://www.epa.gov/cwa-404/types-mitigation-under-cwa-section-404-avoidance-minimization-and-compensatory-mitigation (last updated Apr. 20, 2022).

The first is avoidance.[32] Avoidance, as it sounds, means trying to avoid the damaging parts of a project altogether.[33] This can be achieved by considering appropriate and practical alternatives to the project that will produce the least amount of damage.[34]

The second is minimization.[35] If the project could not be avoided through the first step, mitigation will be used to try and limit the severity of the impact on the aquatic resource.[36] This is accomplished through site design that emphasizes avoidance measures.[37]

The third type of mitigation is compensatory mitigation.[38] This type of mitigation is applied to any aquatic resources that incurred damage even after avoidance and minimization measures had been applied.[39]

Compensatory Mitigation

"Compensatory mitigation is the restoration, establishment, enhancement, or preservation of aquatic resources for the purpose of offsetting losses of aquatic resources [wetlands] resulting from activities authorized by Corps of Engineers' permits."[40] In other words, when damage to a wetland is not able to be avoided or minimized, and some part of the wetland will actually be destroyed, this loss must be mitigated in some way. There are currently four acceptable ways to mitigate wetland loss.[41]

The first is restoration.[42] "Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. U.S. Army Corps of Eng'rs, *Compensatory Mitigation Rule*, USACE 2, https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/mitigation/23113_Final_print_brochure.pdf?ver=Cf-v83sd42PQgz6kbIwkTA%3d%3d (Apr. 2008).
41. U.S. Env't Prot. Agency, *What Does Compensatory Mitigation Mean Under CWA Section 404?*, EPA, https://www.epa.gov/cwa-404/what-does-compensatory-mitigation-mean-under-cwa-section-404 (last updated Apr. 20, 2022).
42. *Id.*

aquatic resource."[43] This can be accomplished either through re-establishment or rehabilitation.[44] Re-establishment tries to return the historic functions of a former aquatic resource, resulting in an overall gain in aquatic resources.[45] Rehabilitation tries to return the historic functions of a degraded aquatic resource into a resource that is no bigger, but has improved functionality.[46]

The second is establishment.[47] "Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site."[48] This is essentially building a brand new wetland and will result in a gain in aquatic resources.[49]

The third is enhancement.[50] "Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s)."[51] Although enhancement improves a specific function, it can cause a decline in other functions from that wetland.[52]

The fourth is preservation.[53] "Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources."[54] This method will ensure that an existing resource is maintained through legal or physical means and prevents future loss of the area.[55]

When a wetland, or some portion of it, has been destroyed and requires compensatory mitigation in one of the four forms listed above, the next step is to actually create, enhance, or preserve some area of wetland.[56] This can be accomplished in three ways.[57]

---

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. U.S. Army Corps of Eng'rs, *supra* note 41.
57. *Id.*

The first way is to buy credits from a mitigation bank.[58] A mitigation bank is created when a wetland site is restored, established, or enhanced through a formal agreement with a regulatory agency, like the EPA.[59] When the project is completed, the bank holds a certain number of compensatory-mitigation credits, based on the ecological value of the project.[60] If an individual or organization obtained a permit from the USACE that allowed the destruction of some portion of a wetland, they could then buy a number of compensatory-mitigation credits to make up for the loss.[61] This transfers the obligation to provide compensatory mitigation from the permittee to the mitigation bank.[62]

Alternatively, compensatory mitigation credits can be bought through an in-lieu fee program.[63] These are similar to wetland-mitigation banks but function somewhat differently. For these, an in-lieu fee sponsor collects money from multiple permittees and uses the combined resources to restore, establish, or enhance a wetland site.[64] This exchange transfers the compensatory mitigation obligation from the permittee to the organization running the in-lieu fee program.[65]

The third way is permittee-responsible mitigation.[66] In this case, the individual permittee is responsible for restoring, establishing, or enhancing a wetland area in order to make up for the destruction from their project.[67]

---

58. U.S. Env't Prot. Agency, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404*, EPA, https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404 (last updated Apr. 20, 2022).

59. U.S. Env't Prot. Agency, *Mitigation Banks Under CWA Section 404*, EPA, https://www.epa.gov/cwa-404
/mitigation-banks-under-cwa-section-404 (last updated Mar. 10, 2022).

60. *Id.*

61. U.S. Env't Prot. Agency, *supra* note 59.

62. U.S. Env't Prot. Agency, *supra* note 59.

63. U.S. Env't Prot. Agency, *supra* note 59.

64. Stacey Berahzer, *Fitting Together the Puzzle Pieces: Developing a Sustainable In-Lieu Fee Program for Wetland Mitigation*, Env't Fin. Blog, https://efc.web.unc.edu/2015/09/22/in-lieu-fee-wetlands/ (Sep. 22, 2015).

65. U.S. Env't Prot. Agency, *supra* note 59.

66. U.S. Env't Prot. Agency, *supra* note 59.

67. U.S. Env't Prot. Agency, *supra* note 59.

State Control of 404 Permitting

States that are concerned for their wetlands have the ability to take some control back from the USACE. In general, the USACE handles all permitting relating to dredging and filling any waters of the United States, including wetlands. However, the CWA allows individual states to assume this responsibility.[68] If a state assumes responsibility, it becomes responsible for all Section 404 permitting, outside of tidal waters and a few other specific instances.[69] The "program must be consistent with and no less stringent than" what the CWA requires.[70] To date, Michigan, Florida, and New Jersey are the only three states to have assumed this responsibility.[71]

INEFFECTIVENESS OF CREATED WETLANDS

Even though compensatory mitigation is the least desirable type of mitigation,[72] the USACE, on average, allows 22,000 acres of wetlands to be impacted in a way that requires compensatory mitigation per year.[73] A 2005 study found that only 14% of those were mitigated through preservation.[74] The remaining 85.3% were mitigated through creation, restoration, and enhancement.[75]

The loss of wetlands each year can also be demonstrated by the prevalence of mitigation banks. In 1992, there were only 46 mitigation banks, with 64 pending approval.[76] As of 2005, there were 405 approved mitigation banks in the U.S. and 169 pending approval, showing that in just 13 years, the number of mitigation banks in the U.S. has increased by more than five times.[77]

---

68. U.S. Env't Prot. Agency, *Basic Information About Assumption Under CWA Section 404*, EPA, https://www.epa.gov/cwa404g/basic-information-about-assumption-under-cwa-section-404 (last updated Oct. 27, 2021).

69. *Id.*

70. *Id.*

71. U.S. Env'tl Prot. Agency, *U.S. Interactive Map of State and Tribal Assumption under CWA Section 404*, EPA, https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404 (last updated Mar. 10, 2022).

72. U.S. Env't Prot. Agency, *supra* note 32.

73. U.S. Army Corps of Eng'rs, *supra* note 41.

74. Jessica Wilkinson & Jared Thompson, *2005 Status Report on Compensatory Mitigation in the United States*, ELI 23, https://www.eli.org/sites/default/files/eli-pubs/d16_03.pdf (Apr. 2006).

75. *Id.*

76. *Id.* at 2.

77. *Id.* at 4.

None of these numbers would be alarming if creation, restoration, and enhancement of wetlands were an effective way to replace those lost. Research, however, has found these methods to be far from effective. To determine the success of a wetland mitigation project, there are two factors that must be observed: administrative performance and ecological performance.[78] "Administrative performance refers to the degree to which compensatory mitigation projects meet their permit requirements" and "[e]cological performance refers to meeting ecological standards that ultimately result in a compensatory wetland that replaces lost aquatic functions."[79]

Research from the 2001 Turner and colleagues' seminal review indicates that mitigation projects do not frequently comply with their permit requirements.[80] Nineteen major studies examined whether mitigation projects are meeting their permit requirements.[81] Of those, ten studies concluded that the majority of projects complied with permit conditions, while the nine other studies found only 4-49% complied.[82] The vegetation requirements called for by the permits for those projects are most often achieved, while the monitoring and long-term maintenance requirements are met less often.[83] These numbers do not portray a particularly dire situation but do call into question whether these projects will meet their mitigation goals long-term.

Ecologically, the numbers are much more startling. For instance, the ability to adequately replace wetlands is questionable.[84] Nationally, only 70-76% of the acreage required to be replaced is actually implemented.[85] In individual states, the number drops even lower with only 29% in Michigan and 46% in California.[86] The specific functions of wetlands are also not being replaced, with only 21% of mitigation projects testing as ecologically equivalent to the wetlands they replaced.[87]

---

78. Rebecca L. Kihslinger, *Success of Wetland Mitigation Projects*, 30 Nat'l Wetlands Newsl., (Env't L. Inst. Wash. D.C.), Mar. 2018, at 14.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 15.
85. *Id.*
86. *Id.*
87. *Id.*

Another issue is that the type of wetland being destroyed is not often successfully replaced with the same type of wetland.[88] Forest, meadow, and shrub wetlands are being replaced with open-water wetlands because the success rate for open-water wetland mitigation projects is much greater.[89] This results in the loss of plant and animal species that make their home in forest, meadow, and shrub wetlands.[90] Additionally, most wetland mitigation projects do not include criteria for wildlife.[91] Because of this, very few projects have successfully replaced wildlife habitats, and up to a quarter of them were "extreme failures."[92]

In 2008, the EPA and USACE updated their regulations on compensatory mitigation.[93] The new rules were intended to address some of the existing issues with compensatory mitigation by implementing a compensatory-mitigation hierarchy.[94] This hierarchy states that permittees should first attempt to meet their compensatory-mitigation requirements through mitigation bank credits, then by in-lieu fee program credits, and finally with permittee-responsible mitigation as the least desirable option.[95] This update is based on the assumption that mitigation banks and fee-in-lieu are the most effective compensatory mitigation options.[96] However, studies completed on mitigation banks so far have not found them to be wildly successful and a more complete study of this hierarchy is needed to determine whether this update will improve the effectiveness of compensatory mitigation.[97]

SOLUTIONS

Focus on Preservation

Currently, compensatory mitigation is proven to be ineffective. Preservation is the most desired mitigation strategy, but is rarely used. If the goal of the EPA and USACE is to have "no net loss" of wetlands

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Fennessy, *supra* note 29, at 5.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 5-6.

then compensatory mitigation should be halted or greatly reduced until it is scientifically proven to be a path to "no net loss." Shifting focus to preservation will make it difficult for individuals or organizations to build on existing wetlands, but the side-effects of wetland loss are extreme. Until created wetlands actually replace naturally-created wetland functions at close to a 1:1 rate, the extreme risks that come with the destruction of wetlands cannot be ignored. This shift would not require any new legislature as preservation is already listed as the most desirable mitigation strategy. The USACE just needs to implement that mindset.

States Should Assume Section 404 Permitting

Taking on all Section 404 permitting is a large responsibility, but there are benefits to states taking this process over for themselves. First, individual states have a better understanding of their local aquatic resources than a federal organization.[98] Section 404 permitting specifically does not apply to established farming activities; the maintenance of drainage ditches, dams, dikes, and levees; the construction and maintenance of irrigation ditches; farm or stock ponds; and farm or forest roads, in accordance with best management practices.[99] If states want to impose additional restrictions on these activities to protect their wetlands, they have to take over the permitting process. Second, any local permits can be processed at the same time as the federal ones, saving time and money.[100]

Additionally, states may want to ensure continual protection of their wetlands. The CWA's limits can change based on Supreme Court's decisions.[101] The earlier mentioned *Rapanos* decision, for instance, created a strict rule for deciding which wetlands were protected under the CWA. While this decision likely added protection for some wetlands, the rule removed protections for others.[102] Once federal regulations for a particular wetland have been removed, the

98. U.S. Env't Prot. Agency, *supra* note 69.

99. U.S. Env't Prot. Agency, *Exemptions to Permit Requirements under CWA Section 404*, EPA, https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404 (last visited July 5, 2021).

100. U.S. Env't Prot. Agency, *supra* note 69.

101. Env't L. Inst., *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, ELI, 1, https://www.eli.org/sites/default/files/eli-pubs/
d23-04.pdf (last visited July 31, 2021).

102. *Id.*

state must decide what level of protection it will receive under state law.[103] If the state does not already have established laws in place to protect wetlands when these Supreme Court decisions are issued, some wetlands may be left without any legislative protection.

The CWA is also a national minimum standard, meaning that it states what the minimum acceptable water quality is across the nation.[104] However, individual states are allowed to require more stringent protections for their waters.[105] Increasing protections for wetlands is a smart move for many states. States with a large amount of coast should strive to protect their wetlands to protect against flooding and erosion. States with large bodies of water that they depend on for tourism purposes should protect wetlands to maintain water quality.

Finally, all states should be concerned about the potential loss of plant and animal species. It seems counterintuitive that the loss of one small bird, grass, or bug could lead to catastrophic changes in the ecosystem — but it is not impossible. The loss of any one species could affect the food web that it is a part of. [106] Scientists believe that the loss of only one species can affect soil and water quality, and the effects throughout the food web could even lead to "ecological surprises" such as pandemics and wildfires.[107] There are so many different species in the world that it is impossible to predict what will happen when one is eliminated.[108] The changes caused by the elimination of one species may not be visible until years after the extinction, at which point it is too late to solve the problem.[109]

Hold Created Wetlands to High Ecological Standards

Any type of compensatory mitigation should require the created wetlands to meet the same ecological functions as the ones they are replacing. This should be measured in many different ways, some of which have not been used in the past (for instance, wildlife habitat). This will be more costly for those creating wetlands. However, that

103. *Id.* at 6.
104. *Id.* at 1.
105. *Id.*
106. Sarah Zielinski, *What Happens When Predators Disappear?*, Smithsonian Magazine, July 18, 2011, https://www.smithsonianmag.com/science-nature/what-happens-when-predators-disappear-32079553/.
107. *Id.*
108. *Id.*
109. *Id.*

economic burden will do one of two things: it will either cause individuals and organizations that want to build over wetlands to choose a different location, or it will drive individuals and organizations that really want to build to spend extra money to create quality wetlands. This will not only make those wetlands better, but will drive technology for created wetlands to become more effective and cost-efficient, making ecologically equivalent created wetlands more accessible to all.

Fund Technological Research

The only real issue with compensatory mitigation at this time is that created wetlands are not ecologically equivalent to naturally-occurring wetlands. But what if they were? State and federal legislators should promote funding to research how to create wetlands that serve as a true 1:1 replacement for naturally-occuring wetlands. This research needs to be completed for all wetland types. Once the technology is in place to properly replace every type of existing wetland (from plant and animal diversity to soil composition) compensatory mitigation will be a wildly successful strategy that preserves water resources for humans and maintains species diversity.

CONCLUSION

Currently, there is a strong framework for wetland protection in place but it is under-utilized. States should focus on creating stronger protections under their jurisdiction to protect against fluctuations in federal regulations. Additionally, preservation should become the true focus of regulators until compensatory mitigation actually serves as a 1:1 replacement for destroyed wetlands. With wetlands serving a critical role to so many plant and animal species (including humans) their destruction cannot be ignored. Legislators need to act quickly to protect the wetlands we have left before the loss is too great.

The Distinguished Brief Award is given in recognition of the most scholarly briefs filed before the Michigan Supreme Court, as determined by a panel of imminent jurists. Each year, these winning briefs are printed in the Thomas M. Cooley Law Review. To preserve the author's style, the brief has been reprinted in its entirety, exactly as submitted to the Michigan Supreme Court.

VERNON BOWMAN, as Personal Representative of the Estate of KELLY BOWMAN, and VERNON BOWMAN, individually,

Plaintiffs-Appellees

v.

ST. JOHN HOSPITAL AND MEDICAL CENTER, ASCENSION MEDICAL GROUP MICHIGAN, d/b/a ROMEO PLANK DIAGNOSTIC CENTER and TUSHAR S. PARIKH, M.D., Jointly and Severally,

Defendants-Appellants

ABSTRACT

In June of 2013, Kelly Bowman noticed a lump in her breast. Dr. Parikh, a radiologist, interpreted the mammogram as showing a cyst that appeared benign. Two years later, in the spring of 2015, a biopsy showed that she had breast cancer. She underwent a mastectomy, but by then the cancer had spread to a lymph node. In 2016, she learned that the cancer had spread further. She consulted a specialist who informed her that she may have had cancer in 2013 and that Dr. Parikh may have misread the mammogram. Within six months after that, she initiated suit against Dr. Parikh, but later passed away.

The applicable statute of limitations requires suit "within 6 months after the plaintiff discovers or should have discovered the

existence of the claim". Defendants contended that suit was time-barred because Ms. Bowman "should have discovered" the claim in 2015, when she was diagnosed with breast cancer and should have concluded that the 2013 radiology interpretation had been wrong. Plaintiff contended that "should have been discovered" did not occur until 2016, when she was first told of the possible malpractice, so the suit was timely.

On appeal, the Supreme Court reversed the summary disposition which had been awarded to Defendants. The Court concluded that where the facts do not compel the patient to infer malpractice, but arise suspicion, courts should consider diligence by the Plaintiff in the statute of limitations analysis. On that basis, the Supreme Court reversed the summary disposition and remanded for further proceedings.

BIOGRAPHICAL STATEMENT

Mark R. Bendure started his legal career at the Michigan Court of Appeals as a pre-hearing research attorney and as a law clerk to the Hon. Michael Kelly. Mr. Bendure went on to practice appellate litigation where he has been lead appellate counsel in hundreds of appeals before the U.S. Supreme Court, U.S. Court of Appeals, Michigan Supreme Court, and Michigan Court of Appeals. As a founding partner of the Bendure and Thomas Law Firm, Mr. Bendure's emphasis on strong writing has earned him the Distinguished Brief Award on three previous occasions and the publication of several articles. Mr. Bendure has also been named a "Michigan Super Lawyer" annually since 2007 and recognized as a top lawyer in Detroit by both "Crain's Detroit Business" and "DBusiness Magazine."

STATE OF MICHIGAN
IN THE SUPREME COURT

VERNON BOWMAN, as Personal Representative of the Estate of KELLY BOWMAN, and VERNON BOWMAN, Individually,

Plaintiffs-Appellants,

v

ST. JOHN HOSPITAL AND MEDICAL CENTER, ASCENSION MEDICAL GROUP MICHIGAN, d/b/a ROMEO PLANK DIAGNOSTIC CENTER and TUSHAR S. PARIKH, M.D., Jointly and Severally,

Defendants-Appellees.

Supreme Court Nos.: 160291-2
Court of Appeals Nos.: 341640, 341663
LC Case No.: 2017-002159-NH
Macomb County Circuit Court
Hon. Richard L. Caretti

BRIAN J. McKEEN (P34123)
ANDREW F. KAY (P73707)
McKEEN & ASSOCIATES, P.C.
Counsel for Plaintiffs
645 Griswold Street, Suite 4200
Detroit, Michigan 48226
(313) 961-4400

MARK R. BENDURE (P23490)
BENDURE & THOMAS, PLC
Appellate Counsel for Plaintiffs
15450 E. Jefferson Ave., Ste. 110
Grosse Pointe Park, Michigan 48230
(313) 961-1525

RENEE J. PRIES (P45355)
MELLON PRIES, P.C.
Counsel for Defendant St. John
2150 Butterfield Dr., Ste. 100
Troy, MI 48084-3427
(248) 649-1330

JOANNE GEHA SWANSON (P33594)
KERR, RUSSELL & WEBER, PLC
Counsel for Defendant Dr. Parikh
500 Woodward Ave., Suite 2500
Detroit, MI 48226-5499
(313) 961-0388

PLAINTIFFS' BRIEF ON APPEAL

* * ***ORAL ARGUMENT REQUESTED*** * *

CERTIFICATE OF SERVICE

STATEMENT REGARDING JURISDICTION

Following decision by the Court of Appeals (13a-29a), this Court granted Plaintiffs' Application for Leave to Appeal by Order of May 22, 2020 (30a), in exercise of its jurisdiction under MCR 7.303(B)(1).

TABLE OF CONTENTS

Page(s)

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

I. **WAS THE DECISION IN SOLOWY v OAKWOOD HOSPITAL, 454 MICH 214; 561 NW2d (1997) INCORRECT INSOFAR AS IT ADOPTS A JUDGE-MADE "POSSIBLE CLAIM" STANDARD, INSTEAD OF THE LANGUAGE OF MCL 600.5838a(2), "THE EXISTENCE OF THE CLAIM", TO DESCRIBE WHAT THE PLAINTIFF, "SHOULD HAVE DISCOVERED" TO START THE RUNNING OF THE SIXTH MONTH PERIOD TO FILE SUIT?**

PLAINTIFFS/APPELLANTS ANSWER "YES".

II. **SHOULD THE STATUTE BE CONSTRUED IN ACCORD WITH THE STATUTORY LANGUAGE?**

PLAINTIFFS/APPELLANTS ANSWER "YES".

III. **DID PLAINTIFF TIMELY SERVE HER NOTICE OF INTENT AND FILE HER COMPLAINT UNDER MCL 600.5838a(2)?**

PLAINTIFFS/APPELLANTS ANSWER "YES".

STATEMENT OF FACTS

Introduction

This appeal calls upon the Court to interpret the statutory medical malpractice discovery rule. The statute on point, MCL 600.5838a(2), states in part:

> "...an action involving a claim based on medical malpractice may be commenced... within 6 months after plaintiff discovers or should have discovered the existence of the claim...".

Citing the common law discovery rule created by this Court in Solowy v Oakwood Hospital Corp, 454 Mich 214; 561 NW2d 843 (1997), the Court of Appeals majority construed the statutory phrase "the existence of the claim" to mean that the time for filing begins to run when "the plaintiff should have known of a possible cause of action" (Opinion, pp. 4-5; 16a-17a). Under this standard, the majority concluded that Plaintiff's suit was time-barred because she "should have discovered" her medical malpractice claim when she was diagnosed with breast cancer in 2015, even before she learned from another doctor that Defendant Parikh misread a 2013 mammogram as benign (Opinion, pp. 7, 9; 19a, 21a).

In dissent, Judge Ronayne Krause relied heavily on Jendrusina v Mishra, 316 Mich App 621; 892 NW2d 423 (2016), lv den, 501 Mich 958; 905 NW2d 231 (2018), a case cited by the circuit court as well (7a-9a). In essence, she accepted the teaching of Jendrusina, that the Legislature's choice of the phrase "should have

discovered" focused on whether a reasonable plaintiff should have concluded that earlier treatment was medical malpractice. In her dissent, Judge Ronayne Krause offered that the 2015 diagnosis of cancer did not, itself, mean that Dr. Parikh committed malpractice, and that Plaintiff "should not have discovered the existence of the claim" until informed by a subsequent treater that the 2013 mammogram had been misread.

With this background, this Court granted leave to appeal. Its Order (30a) provides that:

> " The parties shall address: (1) whether this Court's decision in Solowy v Oakwood Hosp Corp, 454 Mich 214 (1997), adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2); (2) if not, what standard the Court should adopt; and (3) whether the plaintiff in this case timely served her notice of intent and filed her complaint under MCL 600.5838a(2)."

The Medical Malpractice Allegations

The Complaint (39a-46a) alleges that Dr. Parikh, a radiologist, misread a mammogram film of Plaintiff Kelly Bowman[1] in June of 2013 (¶¶ 8-10; 40a). As

[1] The singular term "Plaintiff" refers to Mrs. Bowman who has since passed away from breast cancer. The lawsuit continues through the Personal Representative on behalf of her Estate and family. The claim of her husband, Vernon Bowman, is a derivative action for loss of consortium during her lifetime.

a result, he erroneously assured Mrs. Bowman that a breast lump was benign (¶¶ 9-11; 40a).

In late April of 2015, Plaintiff was diagnosed with breast cancer (Affidavit of Kelly Bowman, ¶¶ 1-2; 47a).[2] As a result, a double mastectomy was performed. Plaintiff had no reason to question Dr. Parikh's representation that the mammogram findings were benign in 2013 until she consulted with Dr. Citrin in August of 2016 (¶¶ 3, 4; 47a). At that time, "Dr. Citrin informed me that the mammogram that I had performed in June 2013 had been misread, and should have been interpreted as being positive or suspicious for cancer" (¶ 4; 47a). Only then did she learn that the June, 2013 mammogram had been misread by Dr. Parikh (¶¶ 3-5; 47a).

After serving the Notice of Intent required by MCL 600.2912b(1), Plaintiff waited the six-month period required by MCL 600.2912b(2). She then filed suit on June 12, 2017.

The Statute of Limitations Issue

MCL 600.5838a(3) provides six months to file suit once a plaintiff "discovers or should have discovered the existence of the claim". It is agreed by the parties and Court of Appeals Judges that this suit was filed within the six-

[2] The Affidavit of Mrs. Bowman was filed in response to Defendants' summary disposition motions. Defendants filed nothing contesting the statements in Plaintiff's Affidavit.

month discovery period[3] if measured from when Plaintiff learned from Dr. Citrin that Dr. Parikh had misread the mammogram. Conversely, it is agreed that the 2015 diagnosis of cancer was more than six months before suit was filed. Consequently, the timeliness of the suit depends on when Plaintiff "discover[ed] or should have discover[ed] the existence of the [malpractice] claim" against Defendants.

Circuit Court Proceedings

Instead of filing Answers, Defendants filed motions for summary disposition seeking dismissal on statute of limitation grounds. Plaintiff filed her Responses and Briefs. In essence, she argued, and verified by Affidavit (47a), that she did not discover the 2013 malpractice until she learned from Dr. Citrin that Dr. Parikh had erroneously read the x-ray as "benign" and misled the patient in the process.

In response to the summary disposition motions, Plaintiff relied on the published Court of Appeals decision in Jendrusina, which interpreted the "discovery rule" codified in MCL 600.5838a. Agreeing with the Jendrusina analysis, Judge Richard Caretti, the assigned Macomb County Circuit Court Judge, concluded that it was a disputed issue of fact whether Plaintiff "should have

[3] The limitation period is tolled for six months while a plaintiff is required to refrain from bringing suit immediately after filing the Notice of Intent, MCL 600.2912b. As a result, a plaintiff has one year to file suit: the six-month mandatory waiting period during which the limitation period is tolled, MCL 600.5856(c), and the six-month discovery period. Plaintiff's June 2017 suit was filed less than one year after she was informed of the malpractice by Dr. Citrin.

discovered", before being told by Dr. Citrin, that Dr. Parikh had been untruthful or inaccurate in reassuring her that she did not have breast cancer in 2013 (2a-12a).

Court of Appeals Proceedings

Defendants Parikh and St. John Hospital filed separate Applications for Leave to Appeal from the denial of their statute of limitations summary disposition motions. The Court of Appeals granted leave. On full appeal, the Court reversed and remanded for entry of summary disposition in favor of Defendants. According to the majority, Judges Letica and Boonstra, once Mrs. Bowman learned that she had breast cancer in 2015, she "should have discovered the existence of the [malpractice] claim" against Dr. Parikh (i.e. that the cancer was present in 2013 and the radiologist violated the standard of care by not identifying the cancer and commencing treatment at that time) (Opinion, 19a, 21a).

Dissenting, Judge Ronayne Krause cited Jendrusina and Hutchinson v Ingham County Health Department, 328 Mich App 108; 935 NW2d 612 (2019). The dissent took the position that (28a-29a):

> "It is... common knowledge that not all breast lumps are cancerous even if they are uncomfortable or painful, that lumps may change over time yet remain benign, and that some initially-benign masses can become cancerous. It is also common knowledge that some cancers can grow significantly faster than other cancers. As the *Hutchinson* Court observed, an adverse diagnosis on a test performed today does not automatically imply malpractice in reporting a

> benign diagnosis on the same test performed several years previously. *Hutchinson*, ___ Mich App at ___ (slip op at pp 14-15, 17-18). Furthermore, patients are entitled to trust medical professionals. *Id.* at ___ (slip op at pp 16-17). We are not oncologists, and neither was Kelly.
>
> * * *
>
> I reject as unacceptable and legally groundless the notion that every cancer patient must assume prior negligence or lose their right to sue, even when no reason exists to suspect an error. The Legislature did not intend such a rule when it used the term "should have discovered." *Solowy, Jendrusina* and *Hutchinson* understood that the term "should have discovered" is not to be applied in a vacuum, but only when a plaintiff has notice of some sort that her condition should have been discovered earlier. There was no such notice or awareness here."

Pursuant to this Court's leave Order (30a), the Argument which follows addresses the three questions posed by the Court. Plaintiff submits that:

1. The Solowy standard is incorrect insofar as it substitutes a judge-made "possible claim" standard for the statutory phrase "should have discovered the existence of the claim".

2. The Court should adopt a standard that is faithful to the statutory language with special emphasis on the component terms "should have discovered", "the existence", and "the claim".

3. In this case, Plaintiff timely served her Notice of Intent and filed her Complaint.

ARGUMENT

I. THE DECISION IN SOLOWY v OAKWOOD HOSPITAL, 454 Mich 214; 561 NW2d (1997) IS INCORRECT INSOFAR AS IT ADOPTS A JUDGE-MADE "POSSIBLE CLAIM" STANDARD, INSTEAD OF THE LANGUAGE OF MCL 600.5838a(2), "THE EXISTENCE OF THE CLAIM", TO DESCRIBE WHAT THE PLAINTIFF "SHOULD HAVE DISCOVERED" TO START THE RUNNING OF THE SIXTH MONTH PERIOD TO FILE SUIT

As will be discussed in Issue II, the operant statutory language includes four distinct terms: "should have discovered", "the existence", "the claim", and "whichever is later". In that section of the Brief, Plaintiff will address each of these to suggest what standards the Court should adopt. Issue II looks at MCL 600.5838a(2) in total, but the Solowy case focused on a single feature: the "possible claim" standard adopted from the common law "discovery rule" created by the Court. Accordingly, this discussion focuses on the "possible claim" approach of Solowy.

In Solowy, the defendant doctor removed a lesion from the patient's left outer ear. Biopsy showed that the lesion was cancerous. After the surgery, the patient was told that the cancer was gone with no chance of recurrence.

More than five years later, Ms. Solowy discovered a similar lesion at approximately the same site. On March 27, 1992, about two months after

discovering the second lesion, her subsequent treater told the plaintiff that there were two possible causes of the lesion: recurrence of the earlier cancer, or a benign tumor. On April 9, 1992, the subsequent treater confirmed that the lesion was cancerous. Suit was filed on October 5, 1992 - - - less than six months after the definitive diagnosis of recurrence but more than six months after the patient was told that recurrence was one of two possible causes. This framed the issue of when the plaintiff "should have discovered the existence of the claim" (i.e., that the first doctor had not removed all of the cancer).

Prior to Solowy, in Moll v Abbott Laboratories, 444 Mich 1; 506 NW2d 816 (1994), a product liability case, this Court created a common law discovery rule, unmoored to any statutory language. Under the judge-created discovery rule of Moll, "discovery" was said to occur when the plaintiff should have discovered a "possible cause of action". In Solowy, the Court imported the common law "possible cause of action" creation of Moll into MCL 600.5838a(2). In this fashion, the statutory phrase, "should have discovered the existence of the claim" was displaced by the judicially created "possible cause of action" to describe what "should have" been discovered to start the six-month discovery period.

With the imported "possible cause of action" standard, the Solowy Court affirmed dismissal of the suit. Citing Moll, the Court summarized its holding (454 Mich at 216):

> "While we caution that there may be circumstances where the six-month period will not begin to run until a more definitive diagnosis is obtained, we conclude in the present case that the period began to run when the plaintiff learned that one of two possible diagnosis for her lesion was potentially actionable because it was at this point that she should have discovered a possible cause of action."

Even with the "possible cause of action" standard, the Solowy Court took pains to dispel the notion that knowledge of a medical condition (cancer) necessarily means the patient "should have discovered" that an earlier treater committed malpractice (454 Mich at 226, 227):

> "While according to Moll, the 'possible cause of action' standard requires less knowledge than a 'likely cause of action standard', it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the 'possible cause of action' standard is not an 'anything is possible' standard.
>
> In the context of a delayed diagnosis, courts should maintain a flexible approach in applying the standard.
>
> * * *
>
> In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of

> possible causes or diagnoses of his condition" (footnote omitted).

The primary flaw in Solowy is that it adopts a common law discovery rule from product liability law, then applies that judge-made standard to a medical malpractice case governed by statute. Perhaps the mistake can be ascribed to the fact that a "textualist" view of statutory construction had not yet taken firm root. Nor had courts fully recognized the separation of powers implications of judicial disrespect for the language of the Legislature. Whatever the source of the mistake, the Solowy Court erred when it adopted the judge-made "possible cause of action" criterion instead of applying the plain language of the statute itself.

In that regard, in matters such as this, the role of the judiciary is to follow and apply the plain language. Judicial thoughts about the wisdom of the words play no role in interpretation or application of a statute. McCormick v Carrier, 487 Mich 180, 191-192; 795 NW2d 517 (2010); MCI Telecom, 460 Mich 396, 411; 596 NW2d 164 (1999); Sun Valley Foods, 460 Mich 230, 236; 596 NW2d 119 (1999).

Nor can the Court read into a statute what the Legislature has seen fit to leave out. Sam v Balardo, 411 Mich 405, 430, fn. 29; 308 NW2d 142 (1981); In re Hurd-Marvin Drain, 331 Mich 504, 509; 50 NW2d 143 (1951).

In short, the term "possible claim" is nowhere to be found in the statute. To answer the Court's inquiry, Solowy was incorrect in creating a judicial "possible

claim" standard. The correct standard is that found in the language used by the Legislature, "the existence of the claim".

II. THE STATUTE SHOULD BE CONSTRUED IN ACCORD WITH THE STATUTORY LANGUAGE

The specific language at issue, with the key words underscored, provides:

> "... [A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."

Parsing the language, one notes that the statute contains both a subjective standard, "discovers", and an objective one, "should have discovered". Upon proof that the plaintiff actually and subjectively "discovered" the claim more than one year before filing suit - - -six month forced NOI delay, and six month limitation period - - - defendant can obtain dismissal by establishing that, objectively, the patient "should have discovered". There is no dispute that Mrs. Bowman actually "discovered" when she learned from Dr. Citrin that Defendant Parikh misread the mammogram in 2013. The issue is whether she "should have discovered the existence of the claim" before that.

In the lower courts, Defendants and their Amici have argued that the intent of the statutes of limitation is to provide a clear time limit, and that MCL 600.5838a(2) should be construed to effectuate that goal. The fallacy of that

approach is that the purpose of a discovery rule is to avoid the injustice of forfeiting a substantively meritorious cause of action just because the plaintiff was unaware of the basis for suit. This is especially so in a malpractice case where the patient's unawareness may stem from misplaced reliance on the doctor who committed the malpractice. Stressing this purpose, one might argue with equal fervor that MCL 600.5838a should be interpreted to advance the deadline-extending objective. As in many cases involving a compromise or middle ground statute, the actual intent is to apply the statute to some, but not all, cases. In this and similar cases, it is enough to recognize the intent to accommodate two conflicting interests, with the exact parameters of the dividing line being set by the language of the Legislature. With that in mind, we turn to the operative language.

A. THE AMBIGUITY OF "WHICHEVER IS LATER"

MCL 600.5838a(2) identifies alternative times in which one may commence a timely suit: "at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later". The meaning of "whichever is later" is the first step to determine the meaning of the statute.

There is ambiguity on the face of the statute regarding the "whichever is later" language. That clause immediately follows "discovers or should have discovered...". The common understanding seems to be that the "whichever is

later" clause refers back to the "section 5805 or sections 5851 to 5856 or within 6 months" language; i.e. that suit is timely if filed either within "section 5805 or sections 5851 to 5856" or if filed within [the time allowed by the discovery rule], "whichever is later". Under that view, both species of "discovery" - - "discovers or should have discovered" - - are collectively compared to sections "5805 or 5851 to 5856".

An alternative interpretation applies "whichever is later" to the two different "discovery" standards in the immediately preceding clause, "discovers or should have discovered". That analysis allows the suit to proceed, based on "whichever is later" of the two: "discovers" or "should have discovered". Here, it is disputed when Plaintiff "should have discovered" but there is no doubt that actual discovery, did not occur until she was informed by Dr. Citrin. If "whichever is later" modifies the "discovers or should have discovered" language, the complaint in this case is timely because it was filed within 6 months of "discovers", "whichever is later" as between "discovers or should have discovered".

The second interpretation is favored by the rule of last antecedent. That "rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation." Stanton v City of Battle Creek, 466 Mich 611, 616; 647 NW2d

508 (2002); Sun Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999); Weems v Chrysler Corp, 448 Mich 679; 533 NW2d 287 (1995).

In this case, the last antecedent before "whichever is later" is "6 months after the plaintiff discovers or should have discovered the existence of the claim". Under the rule articulated by this Court in Stanton, Sun Valley Foods, and Weems, the latter date of when a plaintiff "discovers" or "should have discovered" is the date which commences the 6 month filing deadline. Since Plaintiff "discovered" in August of 2016, regardless of when she "should have discovered", suit is timely when "whichever is later" is construed under the rule of the last antecedent.

For the remainder of this section, it will be assumed that the outcome depends on whether Plaintiff "should have discovered the existence of the claim" when she was diagnosed with cancer or when Dr. Citrin revealed to her that Dr. Parikh misread the 2013 mammogram. With that assumption, we examine the language of the "discovers or should have..." clause.

B. "SHOULD HAVE"

The term "should have" was examined by the Court of Appeals at length in Jendrusina. In that case, the plaintiff, who eventually suffered kidney failure, sued his primary care doctor. He alleged that this doctor failed to refer him to a nephrologist despite blood tests indicating kidney disease. The plaintiff filed suit, arguing that "should have discovered" occurred when a subsequent treater told

him, "The doctor should have sent you. I could have kept you off dialysis" (316 Mich App at 624-625). The Defendant argued that "the existence of the claim" should have been discovered from the injury itself. After reviewing and distinguishing Solowy, the Court rejected the defendants' argument that, when he sustained kidney failure, he "should have known" that his primary care doctor had committed malpractice (316 Mich App at 631). The Jendrusina Court characterized the statutory standard this way:

> "the question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.
>
> Defendants seem to suggest that the diagnosis of any serious illness in and of itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician tested an organ involved in a later diagnosis and reported normal results.
>
> Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an 'objective fact,' but it is a substantial leap to conclude that this fact alone should lead any reasonable person to know of a possible cause of action. We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual could consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier

> diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff 'should have discovered' on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature."

Footnote #9 of Jendrusina explains why a current medical condition does not logically lead to the conclusion that the prior doctor breached the standard of care. It states, "The discovery rule does not incorporate the logical fallacy of *post hoc, ergo propter hoc* (after this, therefore because of this).

As Jendrusina points out, the courts should respect the Legislature's choice of the phrase "should have discovered" and rejection of a more expansive term like "could have discovered". The Court should adopt for itself the Jendrusina analysis of "should have discovered" in determining the level of certainty required before a patient is deemed to "should have discovered".

C. "THE EXISTENCE"

The next step is to determine what "should have been discovered". It is "the existence", not "the possibility", "the possible existence", or even the "probable existence" that is important. It is discovery or "should have discovered" the actual "existence" of the claim that matters.

D. "THE CLAIM"

It is "the claim" whose existence must "should have [been] discovered" before the six month deadline for filing suit begins to run. The significance of the

singular term "the" was addressed by this Court in Robinson v City of Detroit, 462 Mich 439, 461-462; 613 NW2d 307 (2000). The term "the" is a definite article, referring to a single subject in particular, in contrast to the indefinite article "a", which can refer to more than one. Robinson; Jesperson v ACIA, 499 Mich 29, 36; 878 NW2d 799 (2016); People v Huston, 489 Mich 451, 458-459; 794 NW2d 350 (2011).

What a plaintiff "should have discovered" to start the limitations clock is the "existence" of "the claim". The Legislature's use of the definite word "the" creates a requirement that the singular, specific claim ultimately brought was anticipated. If the Legislature had intended otherwise, it would have used the term "a claim", or "any claim" to describe a mere generalized dissatisfaction with the doctor. It is inconsequential whether the plaintiff should have discovered the existence of some different claim. It is only if "the claim" should have been discovered that the time for bringing suit begins to run.

Defendant's argument that Plaintiff "should have discovered" this malpractice claim when the cancer was diagnosed does not stand up to the language of the statute. It is the "claim" - - - the cause of action for medical malpractice - - - whose existence is important. The Legislature's use of the term "the claim" requires that what should have been discovered is not just the medical complication, but that it was caused by malpractice. See Kermizian v Sumcad, 188

Mich App 690; 470 NW2d 500 (1991) (a defendant opposing application of the discovery rule, must show that "the plaintiff... ha[d] reason to believe that the medical treatment was improper or was performed in an improper manner"); Simmons v Apex Drug Stores, Inc, 201 Mich App 250, 254; 506 NW2d 562 (1993). By the plain statutory language, discovery of the "existence of the claim" is essential to Defendants' statute of limitations challenge, and knowledge of an unfavorable medical outcome is not the same.

E. PLAINTIFF'S SUGGESTED INTERPRETATION OF MCL 600.5838a(2)

Return now to the language of the statute. The time for filing suit is "whichever is later" of the times specified in MCL 600.5805 or MCL 600.5851-MCL 5851 to 5856, or six months "after the plaintiff discovers, or should have discovered the existence of the claim". If the date that "the plaintiff discovers...the existence of the claim" is the "latest", then the point of reference is the date of actual discovery. If suit is filed within 6 months of the date of actual discovery, then it is timely.

When the latest time is when the plaintiff "should have discovered the existence of the claim", then that phrase is to be interpreted and applied in accord with the meaning of each of the words that comprise the statutory criteria. Those terms are analyzed above.

Return now to the language of the statute with the critical terms defined in brackets. Suit may permissibly be filed "within six months after the plaintiff should [more probably than not, beyond simply "could"] have discovered [objective standard of reasonable patient, based on the information provided by treaters and the average patient's independent knowledge] the existence [in fact, not merely possible existence] of the claim [cause of action for medical malpractice, not simply injury; i.e. that medical malpractice was a cause of the injury or medical setback]. That is the meaning which flows from the legislative lexicon choices.

As a working summary of the statutory language, Plaintiff suggests the following. In the absence of subjective discovery in fact, a plaintiff "should have discovered the existence of the claim" when, and only when, a hypothetical average reasonable patient, possessing the medical information provided by medical treaters and an average patient's own knowledge, would probably determine that he or she had an actual existing cause of action for medical malpractice which caused the injury or adverse medical condition. Unless that "should have discovered" standard is met, then the 6 month filing period begins to run upon actual discovery.

III. PLAINTIFF TIMELY SERVED HER NOTICE OF INTENT AND FILED HER COMPLAINT UNDER MCL 600.5838a(2)

The "discovery rule" controversy arises by Defendants' motions for summary disposition under MCR 2.116(C)(7) (statute of limitations). The standards of review are accurately recited in the majority Court of Appeals Opinion (16a) and the dissent (25a). The issue is for the court when the facts are undisputed. When the limitations defense depends on the facts, and where reasonable minds can differ, "discovery" is an issue of fact for the jury. Moll v Abbott Laboratories, 444 Mich 1, 26-29; 506 NW2d 816 (1993); Simmons v Apex Drug Stores, Inc., 201 Mich App 250, 254; 506 NW2d 562 (1993); Kermizian v Sumcad, 188 Mich App 690, 691-694; 470 NW2d 500 (1991).

In this case, the undisputed facts show that Plaintiff should not have discovered the existence of a medical malpractice claim against Dr. Parikh before she was informed by Dr. Citrin. Minimally, this is a disputed issue of fact to be decided by a jury, not by summary disposition motion.

It is acknowledged by Defendants that the NOI and Complaint were timely under the subjective "discovers" standard. Mrs. Bowman "discovered" "the existence of the claim" when she learned from Dr. Citrin that the earlier mammogram had been misread by Dr. Parikh. The controversy arises only if the "should have discovered" prong of MCL 600.5838a(2) determines the outcome.

This case follows a familiar pattern found in Solowy, Jendrusina, and Hutchinson. In each, at the time of earlier treatment, the physician told the patient

that a physical condition was fine, benign, cured, or the like. Then, years later, a subsequent examination revealed the existence of an adverse medical condition of the type the original treater had found did not exist at the time of the earlier treatment. After that, the plaintiff learned from a doctor that the original doctor had erred; that the condition really did exist at the time of the first treatment. Each of these "failure to diagnose" cases features the central question: when a condition arises that the patient had been told did not exist previously, should the patient then be deemed to discover, on that basis alone, that the first doctor committed malpractice? Or, is it when the Plaintiff finally learns from another physician that the original treater erred that the patient first "should have discovered the existence of the claim".

Eliminating the "possible" qualification created by the Court in Solowy, and parsing the specific statutory language, Plaintiff suggests the following general rule. When a patient is assured by a doctor that the patient does not have an adverse medical condition at that time, and is diagnosed with that condition at a later time, this does not, by itself, mean that the patient "should have discovered the [malpractice] claim".

This case exemplifies that rule. Like all patients, Mrs. Bowman was expected to believe Dr. Parikh when he told her that the lump was benign in 2013. The fact that she was diagnosed with breast cancer in 2015 would not lead a

reasonable patient to jump to the conclusion that Dr. Parikh lied to her or blundered, and that she had grounds to sue because she had cancer. Judge Krause made the point eloquently in her dissenting opinion (28a-29a):

> "It is, however, equally common knowledge that not all breast lumps are cancerous even if they are uncomfortable or painful, that lumps may change over time yet remain benign, and that some initially-benign masses can become cancerous. It is also common knowledge that some cancers can grow significantly faster than other cancers. As the Hutchinson Court observed, an adverse diagnosis on a test performed today does not automatically imply malpractice in reporting a benign diagnosis on the same test performed several years previously. Hutchinson, ___ Mich App at ___ (slip op at pp 14-15, 17-18). Furthermore, patients are entitled to trust medical professionals. Id. at ___ (slip op at pp 16-17). We are not oncologists, and neither was Kelly.
>
> * * *
>
> The majority's analysis creates a sad consequence apart from the tragedy of Kelly Bowman's death. Patients frequently seek consultation with physicians because they fear that a condition (a breast lump, a swollen gland, a mole) might harbor cancer. Most breast lumps are not cancerous, and nor are most swollen glands, or most moles. The majority nevertheless places on every patient who receives a cancer diagnosis an obligation to immediately go back in time by launching an investigation into the accuracy of all previous diagnostic testing. Those who fail to undertake this mission within six months of diagnosis have no legal recourse if they later learn that a physician's negligence condemned them to death.

* * *

> I reject as unacceptable and legally groundless the notion that every cancer patient must assume prior negligence or lose their right to sue, even when no reason exists to suspect an error. The Legislature did not intend such a rule when it used the term 'should have discovered.' Solowy, Jendrusina and Hutchinson understood that the term 'should have discovered' is not to be applied in a vacuum, but only when a plaintiff has notice of some sort that her condition should have been discovered earlier. There was no such notice or awareness here."

Even under the flawed "possible claim" approach of Solowy, Plaintiff prevails. In Solowy, at the time the lesion was discovered, the patient was specifically told the lesion was either a recurrence of the prior cancer (i.e malpractice) or a benign lesion, a distinction recognized as critical in Jendrusina (316 Mich App at 428). Thus, at the time the condition occurred, the plaintiff in Solowy had actual knowledge that there were two possible causes, one malpractice. Here, in contrast, Mrs. Bowman knew only that she had breast cancer at the time of the diagnosis.

A similar distinction occurred in Hutchinson, another case involving the failure to diagnose breast cancer. As in this case, and in contrast to Solowy, the patient in Hutchinson had no prior history of breast cancer. Noting the factual differences, the Hutchinson Court reversed summary disposition:

> "We reach this conclusion because the record confirms that plaintiff had sought medical treatment and relied on Salisbury's assurance, that the lump in her breast was benign; plaintiff had no reason to know otherwise until the biopsy established that the lump was malignant. Therefore it would be unfair to deem . . . plaintiff aware of a possible cause of action before [she] could reasonably suspect a causal connection to the alleged negligent act or omission. Id. at 226, 561 N.W.2d 843. Plaintiff had no reason to suspect that her medical providers were negligent because she reasonably relied on what she was told—i.e., that her lump was a benign calcification. While plaintiff undoubtedly was aware of the growth of the lump and admitted that it was causing her subjective fear and concern, she notably did not have a history of breast cancer herself or in her family, and she was justifiably relying on her medical provider's explanation of the cause of the lump. Id. at 227, 561 N.W.2d 843; MCL 600.5838a(2).

In sum, Plaintiff's suit is timely under MCR 600.5838a(2). The summary disposition should be reversed.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Appellants pray that this Honorable Court reverse the decision of the Court of Appeals and remand the case to Macomb County Circuit Court for further proceedings, and that the Court allow Plaintiffs to recover the taxable costs and attorney fees of appellate proceedings.

Respectfully Submitted,

BENDURE & THOMAS, PLC

By: */s/ Mark R. Bendure*
MARK R. BENDURE (P23490)
Appellate Counsel for Plaintiffs
15450 E. Jefferson Ave., Suite 110
Grosse Pointe Park, MI 48230
(313) 961-1525
bendurelaw@cs.com

McKEEN & ASSOCIATES, P.C.

BRIAN J. MCKEEN (P34123)
ANDREW F. KAY (P73707)
Attorneys for Plaintiffs
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
akay@mckeenassociates.com

Dated: August 3, 2020

WESTERN MICHIGAN UNIVERSITY
COOLEY LAW REVIEW