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LETTER FROM THE EDITOR-IN-CHIEF

With change, anything is possible. Justice Ketanji Brown Jackson in her speech following her Supreme Court confirmation stated, "Our children are telling me that they see now, more than ever, that here in America, anything is possible." Her words give inspiration to the future leaders of America. Our ancestors were forced to pioneer change with little to no blueprint. Now more than ever, the next generation of leaders have a paragon of virtue. In Issue 2 of Volume 66, each article takes us back in time and teaches a lesson through policy, law, and reform. Our hope is that these articles will serve as a foundation of change both nationally and internationally.

In our first article, Tenielle R. Brown, focuses on Federal Rule of Evidence 404(a) that states, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Although inadmissible, attorneys can often trust that jurors will draw the very character inference that is forbidden by a suite of complex rules. Additionally, an attorney only needs to follow two rules to get this type of evidence admitted at trial. First, is to frame the evidence as anything other than character evidence. Second, is to label the conduct in a way that makes it less likely to be seen as voluntary and blameworthy. Brown argues that when it comes to testimony about someone's behavior, the traditional evidence categories are beginning to fall apart. Because of the lack of boundaries, judges have flexibility in how they classify the evidence. This has unfortunately created "a backdoor to proving character." She states this is directly attributable to the evidence rules losing their traditional moorings in morality. In her article, she explores the admissibility of evidence of addiction to argue that the removal of moral valence from the character evidence rules has destroyed the descriptive validity of character evidence. She concludes with an ask for the evidence rules to acknowledge the powerful role of morality in judge and juror decision-making.

Next, Gregory M. Dickinson, analyzes Martha Minow's book Saving the News. Dickinson extends Minow's analysis by considering the human and technological roots of the social-media phenomenon. He addresses Minow's warning that the shift to online news is a revolutionary departure that could prove catastrophic for the democratic engagement. Dickinson acknowledges Minow's concerns but argues that she doesn't consider the other side of the phenomenon. He argues that Americans repeatedly choose

to read such material and their historical content preferences have trained the algorithms that now fill their social-media feeds. Simply put, online content may be misleading and even blatantly false; but it is what Americans choose to read.

The *Howard Law Journal* is pleased to publish an article by one of our editors. Managing Editor Austin Lewis Hollimon's note, "Hiding in Plain Sight: The Fourteenth Amendment's Privileges or Immunities Clause Uproots Qualified Immunity and Secures a Constitutional Remedy Against State Violence," discusses the true purpose for the Privileges or Immunities Clause. Hollimon argues that the obvious purpose was to protect Black Americans from private and state violence through federal power. He gives a nod to Justice Clarence Thomas for being the only Justice in the Supreme Court's history to wrestle deeply with the Privileges or Immunities Clause's impact on Black Americans. Mr. Hollimon opens his note with a story that shook the world in 2020. He details the tragic death of George Floyd at the hands of the Minneapolis Police Department. Also, he details the death of Ryan Stokes who was killed by the Kansas City Police. In this case, the officer who shot Mr. Stokes wasn't charged with a crime. Due to qualified immunity, this officer was shielded and not held accountable for his actions. Mr. Hollimon ultimately argues that jurists should embrace the original meaning of the Clause by limiting qualified immunity.

"The Duty to Vote in an American City," by Nate Ela argues that voting should be a duty instead of a right. The article excavates the history of compulsory voting in America. Ela examines Kansas City in 1889. In 1889, voters in Kansas City, Missouri approved a poll tax that applied only to eligible voters who failed to cast a ballot in local elections. This duty to vote remained in force during four local election cycles, from 1890 to 1896, when the Missouri Supreme Court struck it down in Kansas City v. Whipple. The article tells the story of what happened in Kansas and argues that making voting a duty could be a game-changer for American democracy.

The next article by Rory Bahadur & Dr. Kevin Ruth titled, "Bad Math, Bad Sauce and the ABA as a Shill for the NCBE," argues that bar examination does not validly test lawyer competency. They critique two recently published articles and demonstrate that law reviews do not conduct the stringent checks on empirical mathematical research necessary to validate the research before publishing it. Bahadur and Ruth develop and explain two novel, mathematics-based recommendations for developing valid measures of bar performance. Throughout the article, they question why legal scholars continue to rely on an examination that ineffectively measures lawyer competency and very effectively excludes people of color from the practice of law.

Our final article, "Pioneers of an Interesting and Exciting Destiny: The Live's and Legacies of Howard's First Law Graduates," examines the legacies of the first ten students to graduate from Howard University School of

Law. The article discusses their historical significance as legal trailblazers, and as mentors and role models for successive generations. "For every milestone like the confirmation of Justice Jackson, there are sobering reminders of the inequities that persist and the challenges that still remain in bringing diversity and inclusiveness to the legal profession." This article is a powerful end to Volume 66, Issue 2 and celebrates the lives of our heroes that fought prejudice within the profession even as they struggled to protect civil rights.

On behalf of the members of Volume 66 of the Howard Law Journal, I would like to thank you for your support and readership. It is our hope that through these submissions, we might allow history to serve as our teacher to ensure that every day we are striving to a better America.

Alexandria Mangum
Editor-in-Chief
Volume 66

Bad Habits: Character Evidence by Another Name

TENEILLE R. BROWN[1]*

Abstract

The way we describe behavior has changed dramatically in the last three hundred years. Conduct that was once considered blameworthy—like having social anxiety or postpartum depression—is now better understood as resulting in part from powers outside of our control. Yesterday's moral failing is today's mental illness. This evolving understanding of the complex causes of behavior has been fueled by advances in psychology, sociology, neuroscience, and genetics—fields that did not even exist when the common law first developed.

Unfortunately, the evidence rules have not kept pace with this change. They continue to treat behavior as either voluntary or reflexive, either physical or mental. These dichotomies are false, but they justify treating character, habit, physical traits, and psychological traits as completely different things with completely different rules. The categories made sense when character implied conduct that was voluntary and immoral, with habit, physical and psychological traits being reflexive or amoral. But now that character has expanded to cover amoral traits, the boundaries between these types of evidence are fading away. This article uses addiction to expose how behavior may be treated as either impermissible or permissible, depending not on its use but on the discretion of the judge. This flexibility allows judges to instrumentally admit or exclude evidence of someone's "bad habits," triggering the very prejudice the character ban was created to prevent. If we do not think addiction is

1. *Teneille R. Brown is the James I. Farr Professor of Law and director of the Center for Law and the Biomedical Sciences at the S.J. Quinney College of Law at the University of Utah. She is also an adjunct in Internal Medicine and a member of the Center for Health Ethics, Arts and Humanities at the University of Utah. This project has been brewing for several years. She thanks the faculty in attendance at the Stanford Law Biolawlawpalooza conference in 2019 and the AALS Evidence section panel on evidence and the opioid crisis for their helpful comments.

appropriate habit evidence, it is not because it fails to meet the technical requirements under the rules. It is because it forces us to say the quiet part out loud—which is that the rules of evidence are fundamentally about steering folk judgments about morality. Given this, I conclude with a revived call for character to be retethered to morality—not because our moral intuitions are correct, but because they are inescapable.

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Introduction

A. Setting Things Up: the Big Lie Embedded in the Rules of Evidence

Whether evidence will be admitted at trial depends entirely on how it is being used. However, use is not foreordained. It is flexible. Evidence might be easily admitted for one purpose but completely forbidden for another. If attorneys are skilled, they will describe the evidence in such a way that maximizes admissibility—concealing multiple layers of descriptive discretion.

This choreography is made possible by the "big lie" of evidence. The big lie rests on the always-dubious assumption that jurors can follow limiting instructions issued by the judge.[2] This unproven hypothesis is foundational to the rules of evidence and trial.[3] It is what keeps many admissions from leading to mistrials, as judges pretend that jurors will not use information for a forbidden purpose if they are explicitly told not to do so. The big lie facilitates a great deal of unfair prejudice. When it comes to damning evidence related to someone's moral character, it likely matters very little how the evidence is technically admitted, so long as the jury gets to hear it. Attorneys can often trust that jurors will draw the very character inference that is forbidden by a suite of complex rules.

Consider that an attorney wants to discredit an opposing witness, who has a history of heroin addiction. The attorney only needs to follow two rules to get this admitted at trial. The first is to frame the evidence as anything *other* than character evidence. That is, the witness's past acts cannot technically be used to prove that this is the "type of person" who uses heroin and was likely using at another time.

2. "Jurors are presumed to follow the court's limiting instructions." *See* State v. Hecht, 319 P.3d 836, 843 (Wash. App. 2014); State v. Ali, 855 N.W.2d 235, 249 (Minn. 2014); People v. Flinner, 476 P.3d 240, 279 (Cal. 2020).

3. Roselle L. Wissler, Patricia F. Kuehn & Michael J. Saks, *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCH. PUB. POL'Y & L. 712 (2000); Lora M. Levett, Erin M. Danielsen, Margaret Bull Kovera & Brian L. Cutler, *The Psychology of Jury and Juror Decision Making*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 365, 365–406 (N. Brewer & K. D. Williams eds., The Guilford Press, 2005).

This specific inference is completely banned under Federal Rule of Evidence 404(a) and its state counterparts.

Rule 404(a) states simply that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[4] This is referred to as using character for propensity purposes, and it is with just a few exceptions prohibited. However, any other purpose of the heroin addiction may be allowed, and there are a plethora of other ways it may be introduced.

For example, the attorney could argue the heroin addiction is being used to prove the witness had a particular state of mind[5] or motive,[6] to impeach his credibility in general or perception of a salient event,[7] to reduce damages,[8] as evidence of incapacity to execute a will,[9] as background "fact evidence"[10] to "complete the tapestry" of an overly rosy portrayal by the opposition,[11] or to prove the witness had a habit and acted in conformity with it. Any of these alternative routes are permitted, even if they incidentally place the defendant's character at issue.[12] It is assumed that a judge's limiting instruction

4. FED. R. EVID. 404.

5. *See* State v. Feliciano, 778 A.2d 812, 827 (Conn. 2001) ("[E]vidence of defendant's having drug habit and stealing to finance drug habit . . . was relevant to show defendant had motive and intent to commit robbery.").

6. *See* Dimmett v. State, 942 N.E.2d 925 (Ind. Ct. App. 2011). *But see* Michael Davis, *Addiction, Criminalization, and Character Evidence*, 96 TEX. L. REV. 619, 622–23 (2018).

7. States vary on this point, but evidence that a witness was addicted to a drug is often admissible to challenge competence or credibility. United States v. Harris, 542 F.2d 1283, 1302–03 (7th Cir. 1976); s*ee* United States v. Cameron*,* 814 F.2d 403 (7th Cir. 1987). *See* People v. Crump, 125 N.E.2d 615, 620–21 (Ill. 1955); *see contra*, Edwards v. State, 548 So. 2d 656, 658 (Fla. 1989); People v. Owens, No. 288074, 2010 WL 4320396, at *6 (Mich. Ct. App. Nov. 2, 2010); People v. Williams, 6 N.Y.2d 18, 24–25, 159 N.E.2d 549, 553 (1959) (canvassing many state's case law in this area and concluding that drug addiction inadmissible to impeach a witness's credibility).

8. Bridges v. Wilson, No. 15-CV-00126-GKF-JFJ, 2019 WL 11585345, at *3 (N.D. Okla. July 2, 2019); Ortiz v. City of New York, No. 15cv2206 (DLC), 2017 WL 5613735, at *5 (S.D.N.Y. Nov. 21, 2017).

9. Buxton v. Emery, 102 N.W. 948, 949 (Mich. 1905).

10. The appellate court "reject[ed] the state's idea that the 'addict trait' is a recognized character trait" and instead found that testimony of defendant's addiction to pain meds was mere "fact testimony." State v. Green, 921 N.E.2d 276, 281 (Ohio 2009).

11. Defense testified "to his occupation as a professional photographer, as to his physical dress on the day in question, . . . as to his working in his garden at home and as to the planned attendance at a family barbecue on the day of the alleged crime. The state was entitled to complete the tapestry with his admitted drug addiction." State v. Renneberg, 522 P.2d 835, 836 (Wash. 1974).

12. Evidence that the defendant had a possible addiction is allowed to show motive even though "it incidentally places the defendant's character in issue." Brock v. State, 347 S.E.2d 230, 231 (Ga. 1986). Evidence of defendant's drug addiction is allowed to impeach, but not for propensity purposes. *See* State v. Daniels*,* 332 N.W.2d 172, 180 (Minn. 1983).

can keep jurors from drawing impermissible character propensity inferences.

However, jurors cannot erect a mental wall between information about a witness's mental state, such as intent to distribute illegal drugs, and inferences about their past actions that imply moral character. We automatically infer mental states from behavior, and predict behavior from inferred mental states. There is a tight, bi-directional relationship between the two.[13] This is why attorneys care more about the jury *hearing* about these traits, and less about precisely how they are classified, used, or labeled as evidence. Three decades of psychology research supports the claim that the specific purpose for which moral character evidence is introduced will matter less than the fact that it was heard. Later in the article I will explain what I mean by this in great detail.

The brilliance of technically forbidden, implicit inferences is that they may be stronger than inferences we are told to make. Imagine eating a peach and being instructed to focus only on its beautiful color, and to ignore how it tastes. Of course, you will automatically assess its flavor, and perhaps decide it is delicious. Now imagine someone saying, "This peach is delicious! Isn't it delicious?" The judgment you come to on your own may be more powerful because it is based on your own senses, which you are more likely to trust. We like to think that we arrived at our insights because we are so observant and wise, and not due to someone's coaching.

Notwithstanding this, our rules of evidence assume that jurors only draw character inferences when they are explicitly granted permission to do so—a convenient and obvious fiction. This fiction allows attorneys to get damning evidence before the jury that would not be admitted if introduced for a direct and explicit character inference.[14] For example, attorneys may ask whether a witness *knew* about a defendant's past bad acts, thus putting this squarely before the jury despite the same question being inadmissible to prove the *occurrence* of such acts.[15] Of course, the distinction between knowledge of a fact and

13. *See* Jennifer L. Ray, Peter Mende-Siedlecki, Ana P. Gantman & Jay J. Van Bavel, *The Role of Morality in Social Cognition*, THE NEURAL BASES OF MENTALIZING 555, 555 (2021). *See* Andrew Heberlein & Rebecca Saxe, *Dissociation Between Emotion and Personality Judgments: Convergent Evidence from Functional Neuroimaging*, 28 NEUROIMAGE 770 (2005) (describing the use of dispositions to infer mental states and predict behavior).

14. *See* People v. Warren, 2019 WL 4072005 (Cal. Ct. App. Aug. 29, 2019).

15. Collins v. Jones, 3 So. 591, 592–93 (Ala. 1888), overruled on other grounds by Sims v. Struthers, 100 So. 2d 23 (Ala. 1957).

the truth of the fact itself is a subtle one for most of us. Consider this hypothetical exchange.

> **Prosecution:** Mr. Young, were you aware that when the defendant uses meth, he gets violent and sometimes beats his wife?
>
> **Defense counsel:** Objection, impermissible character evidence.
>
> **Prosecution:** Your honor, this isn't character evidence. I only wanted to ask about how well Mr. Young *knows* the defendant to vouch for his character.
>
> **Judge:** Ok, I will allow it. The jury is instructed only to use the answer to assess the witness's *awareness* of the defendant's character, not to suggest the defendant has actually done these things or was likely violent on a particular occasion.

Imagine being a jury member in this trial and having to parse out what this instruction means. How could the question speak to the credibility of the character witness if it is based on an event that may never have occurred? While some judges might strike the question as too prejudicial, others would not. Exchanges like this happen frequently, despite being like instructing someone to focus only on what a peach looks like while eating it. Hearing the above exchange will often lead jurors to infer that the defendant is a bad man who uses drugs and beats his wife, and likely did other immoral or violent things. No instruction is going to stop that.

With this "big lie" in mind, we move on to the second rule attorneys must follow to get their behavioral evidence admitted without violating the character evidence ban. This is to label the conduct in a way that makes it less likely to be seen as voluntary and blameworthy. This discretion builds on the fact that behaviors can be styled at multiple levels of abstraction.

Someone who is addicted to heroin can be described alternatively as: a dirty junkie, a dope-fiend, an addict, a person with a substance-use disorder, a psychiatric illness, a physical dependence on opiates, a compulsive behavioral habit, a "hijacked brain," or a particular mutation on the mu-opioid receptor, and so on. These descriptions are not identical and should be treated differently by judges because they encourage distinctive levels of prejudice and probative value. However, the different labels convey similar types of stigmatized propensity information and may trigger related stereotypes. Clever lawyers know

how to select the framing that minimizes prejudice and the likelihood the behavior will be classified as implicating the character ban.

If a party objects to the witness being described as a "mean drunk" because this seems to obviously implicate impermissible character, one might succeed by framing him as someone who "has an impulse control problem when drinking." Is this character? Maybe, maybe not. Historically, addiction was quintessential character evidence. But increasingly, as I will explain, addiction is also viewed as a habit, a physical trait, or a psychological trait. This matters because habit and physical traits are easily admitted, while character evidence is banned. Addiction evidence is a bit like Schrödinger's cat—it could plausibly be and not be character evidence, depending on the whim of the judge.

Therefore, in addition to the "big lie" that jurors can restrict their mental inferences to those that are explicitly permitted, there is yet another, more subtle fiction on which the rules rest. And that is the idea that certain mutually exclusive categories of evidence are, in fact, distinct. To be sure, in many cases they are. Eyewitness testimony is descriptively and operationally unlike stock charts or the blood left behind at a crime scene.

But when it comes to testimony about someone's behavior, the traditional evidence categories are beginning to fall apart. In many contexts, behavioral evidence can now be classified as character, habit, a physical trait, *or* a psychological profile. Granted, each of these presents a distinct type of evidence with completely different admissibility requirements. And yet, because the boundaries between them are vanishing, judges have flexibility in how they classify the evidence. This has unfortunately has created "a backdoor to proving character."[16]

In this article, I argue that this messy classification system is directly attributable to the evidence rules losing their traditional moorings in morality.[17] While the evidence categories may still blur

16. Nobles v. United States, No. 10–cv–1997–BEN (DHB), 2012 WL 1598075, at *2 (S.D. Cal. May 7, 2012); Robert P. Duffield II, *Distorting the Limits of FRE 406: A Tough Habit to Break*, 38 RUTGERS L.J. 897, 913 (2007) ("[McCormick] . . . contrasts habit and character in the broad sense that habit is 'more specific,' while character 'is a generalized description of one's disposition.' While this distinction sets the playing field for admissibility with habit to the more specific side, it does not show us where to draw the dividing line between the two.").

17. Nobles v. United States, No. 10-cv-1997-BEN (DHB), 2012 WL 1598075, at *2 (S.D. Cal. May 7, 2012); Robert P. Duffield II, Distorting the Limits of FRE 406: A Tough Habit to Break, 38 RUTGERS L.J. 897, 913 (2007) ("[McCormick] . . . contrasts habit and character in the broad sense that habit is 'more specific,' while character 'is a generalized description of one's

together in some cases, it would be much easier to disambiguate character from habit (and physical and psychological evidence) if character evidence were limited to traits or behaviors that trigger moral blame. That is, if the trait or behavior invites moral condemnation, it must clear the presumptive ban on character evidence. If, however, the trait or behavior does not invite moral condemnation, it can be treated under the more permissive rules for habit, psychological profile, or physical trait evidence. I will argue that the removal of moral valence from the character evidence rules has destroyed the descriptive validity of character evidence, as it is judgments of immorality that trigger the kinds of attribution errors the character ban was created to prevent.

To make my case, I will explore the admissibility of evidence of addiction—the quintessential bad habit. If someone's addiction is introduced to argue they likely acted in conformity with it on another occasion, this meets the definition of propensity character evidence. But it also fits the evidence of habit evidence, and perhaps evidence of a psychological or physical trait—three very different types of evidence with completely different admissibility rules. So, which is it? The answer, as I will reveal, is it depends quite a bit on the judge.

Addiction evidence is not the only type of behavioral evidence that suffers from this sorting problem. It is present to some degree whenever parties introduce evidence of mental illnesses like autism, pedophilia, schizophrenia, depression, gambling disorder, bipolar disorder, and even psychopathy, to argue someone acted in conformity with these diagnoses. Mental illnesses like these are routinely being used by parties in civil and criminal cases. And they can *all* be described in ways that implicate character, habit, physical, or psychological traits.

Why does this matter? The sorting problem presents a threat to the fairness of trials. First, the lack of precision and validity in the rules allows judges to be instrumental and admit evidence to benefit parties they like, and disadvantage those they do not. History tells us the rules will be unfairly applied to the detriment of those who are already disadvantaged by the legal system—such as those who are poor, criminal defendants, and people of color. Second, and central to my research agenda, the entire legal system loses legitimacy when the

disposition.' While this distinction sets the playing field for admissibility with habit to the more specific side, it does not show us where to draw the dividing line between the two.").

rules are based on outdated views of human behavior. This will lead to distrust of the legal system and its verdicts by employing rules that are incoherent and hard to follow. Indeed, the character evidence ban is already agonizingly complicated; it is the *most frequently litigated* issue in criminal appeals as well as the *most likely basis for reversal*.[18] Judges and attorneys are desperate for more clarity in this area of evidence. A big reason for the confusion is that judges and attorneys cannot reliably determine when they are requiring jurors to draw character inferences, and when they are not. The threshold question of "is this character evidence?" often does not have a black-and-white answer.

To address these various problems, this article will proceed in four parts. In the first part, I will situate this discussion within a larger human tendency to explain behaviors in terms of dichotomies and categories that prove to be false. In the second part, I will explain how modern evidence rules developed to treat character as different from habit, physical, and psychological traits. This was because character was thought of as triggering moral blame while the latter categories of evidence were not. Removing morality from the definition of character has untethered it from its normative roots—which is to prevent unfair attribution errors. In the third part, I will use addiction as a case study to explore the overlapping nature of these evidentiary categories and why this poses problems for fairness. In the fourth part, I explain how the case law reveals confusion over how judges are to treat behavioral evidence like addiction—with the case law going in many different directions. I briefly conclude with a revived call for the evidence rules to acknowledge the powerful role of morality in judge and juror decision-making—not because our moral intuitions are correct but because they are inescapable.

B. Part 1: The Rules of Evidence Employ False Dichotomies

1. Humans Love False Dichotomies

The way societies explain and respond to disorders says more about us than it says about those who are afflicted. Unfortunately, the history of diagnosis is riddled with explaining conduct in terms of pathologies and binaries that eventually prove to be false.[19] Most be-

18. Edward J. Imwinkelried, *Uncharged Misconduct,* 1 CRIM. JUST. 6, 7 (1986).

19. Peter Elbow, *The Uses of Binary Thinking*, 13 J. ADVANCED COMPOSITION, Special Issue: Philosophy and Composition Theory (Winter 1993), pp. 51–78 ("There is an ancient tradi-

haviors exist on a messy continuum. Even so, humans gravitate toward simple explanations of behavior that rely on absolutes. We say that behaviors are caused either by the body or the mind, society or the individual, nature or nurture, or free will or determinism.[20] It is almost never as simple as saying that a behavior is *either* purely nurture or nature, *either* purely voluntary or controlled. If it were, then perhaps juries could do what judges expect of them—which is to be guided by their heads rather than their hearts (another prevalent and false dichotomy). This sort of dichotomous thinking often reinforces power dynamics and cognitive biases.[21]

When our common law evidence rules developed, we assumed that individuals could be completely responsible for causing bad outcomes through the exercise of their free and full agency.[22] It was not contemplated that there could be "semi-volition" or "semi-intent." We either fully intended to do something, or we did not. The poles between voluntary and involuntary action make sense and are useful in many simple cases. However, there is a vast area of gray in between, especially when considering behaviors stemming from mental illness.

False dichotomies are rhetorically appealing. However, frequent reliance on them can indicate cognitive immaturity and personality disorders like psychopathy or narcissism.[23] And yet, simplistic black-and-white thinking litters even the most sophisticated of our intellectual landscapes.[24] It should come as no revelation to the reader that

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tion of binary or dichotomous thinking—of framing issues in terms of opposites such as sun/moon, reason/passion . . . .") (describing the work of Hélène Cixous on binaries and power, and how the feminine pole of the binary is typically diminished relative to the male pole).

20. For an excellent discussion of how the false dichotomy of nature vs. nurture reveals different questions being asked about how to either explain causes or variance, *see* JAMES TABERY, BEYOND VERSUS: THE STRUGGLE TO UNDERSTAND THE INTERACTION OF NATURE AND NURTURE 133–140 (MIT Press 2014).

21. *See* Elbow, *supra* note 19, at 51 ("[B]inary thinking almost always builds on dominance or privilege—sometimes overtly and sometimes covertly."); *see* Peter K. Jonason, Atsushi Oshio, Tadahiro Shimotsukasa, Takahiro Mieda, Árpád Csathó & Maria Sitikova, *Seeing the World in Black or White: The Dark Triad Traits and Dichotomous Thinking*, 120 PERSONALITY & INDIVIDUAL DIFFERENCE 102, 102–06 (2018).

22. Carey K. Morewedge, *Negativity Bias in Attribution of External Agency*, 138 J.L EXPERIMENTAL PSYCH.: GEN. 535, 535–45 (2009).

23. Atsushi Oshio, *An All-or-Nothing Thinking Turns Into Darkness: Relations Between Dichotomous Thinking and Personality Disorders*, 54 JAPANESE PSYCH. RSCH. 424, 424 (2012).

24. Patrick D. McGorry, Barnaby Nelson, Stephen J. Wood, Jai L. Shah, Ashok Malla & Alison Yung, *Transcending False Dichotomies and Diagnostic Silos to Reduce Disease Burden in Mental Disorders,* 55 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1095, 1095 (2020) ("[P]sychiatry constantly falls into the trap of setting up false dichotomies and is plagued by

false dichotomies remain deeply entrenched in legal doctrines and reasoning. This includes the rules of evidence.

2. How False Dichotomies Underlie the Ban on Character

The common law rules of evidence, on which modern FRE are based, developed hundreds of years ago in the United Kingdom. They advance a view of behavior that is outdated, and belongs to these earlier times. To put things in perspective, in the eighteenth century we only had a rudimentary understanding of the causes of behavior. A taxonomy for biology was just being developed. Fields like psychology, sociology, public health, neuroscience or genetics did not exist. Western societies thus explained behaviors in the only way we knew how—by seeing them as isolated events, deliberate, and under an individual's control. Either you caused the bad outcome, or someone else did. There was no room for more complicated, nuanced analyses. With this understanding, individuals could then be rather neatly blamed for *choosing* to be addicts or *choosing* to be mentally ill. If we assume people are acting freely by their own volition, this allows us to blame individuals for bad outcomes rather than to interrogate the messy social and environmental determinants. Likewise, by presuming fully voluntary action, criminal defendants were given the autonomy and space behave differently in the future. This was the initial reason articulated for the ban on character evidence.[25] Once a thief, *not always* a thief.

The idea that harms were caused *solely* by an individual's voluntary action was far too tidy. This view has since been complicated by our greater awareness of the many cultural, familial, nutritional, psychological, genetic, and neurobiological causes of behavior.[26] While we can still punish people for the ultimate choices that they seem to make, we can no longer pretend that the entire process of decision-making is purely autonomous and intentional.[27] Our early environ-

binary thinking . . . . The most fundamental example is the mind–body split, which creates constant tension between biological and psychosocial perspectives on mental illness.").

25. Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 806 (1998) (discussing the assumption of agency and volition embedded in the character evidence rules); Teneille R. Brown, *The Content of Our Character*, 126 PENN STATE L. REV. 4 (2021) ("The ban exemplifies a libertarian spirit of autonomy and rehabilitation: yes, you did bad things before, but there is hope. You can still be reformed.").

26. Adina Roskies, *Neuroscientific challenges to free will and responsibility*, 10 TRENDS IN COGNITIVE SCIENCES, 419, 419 (2006).

27. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCIS. 1775, 1775-85 (2004).

ments and inherited biology play a major role in shaping our future environments, choices, and conduct. And yet, these are things over which we often have very little control. Given this, it is not easy to label any one decision either purely voluntary or involuntary.

3. Common Law Judges Understood the Moral Psychology of Jurors

But hundreds of years ago, we lacked this understanding. And our rules of evidence reflect the naïve idea that actions are either voluntary and moralized (such as character or mental illness)[28] or involuntary and amoral (such as habit, or physical traits). Because past actions could trigger strong inferences of an immoral character, the common law judges were concerned that jurors would give them too much weight. Incidentally, this folk wisdom proved to be correct.[29] Eighteenth-century judges understood that we are quick to attribute behavior to fixed character traits when the behavior is immoral or bad—such as being a drunk or dishonest. We are much less likely to do this when the behavior is praiseworthy or morally neutral. This is due to a well-documented negativity bias that emphasizes the salience of immoral traits.[30]

By the time John Wigmore started writing on evidence in the early 20th century, the understanding of behavior had developed a bit more. Wigmore defined character to be our "actual moral or psychical disposition or sum of traits,"[31] which might be guided by our fates and fortunes as well as our intrinsic virtues.[32] The concern continued to be that jurors would be quick to assume "once a thief, always a thief." However, there was a growing awareness of the role of luck. That is,

28. Tillers, *supra* note 25, at 796 (arguing that there is a strong free will component implicit in the ban on character evidence).

29. Gilbert Harman, *The Nonexistence of Character Traits*, 100 PROC. ARISTOTELIAN SOC'Y 223, 224 (2000).

30. *See* Michael B. Lupfer, Matthew Weeks & Susan Dupuis, *How Pervasive is the Negativity Bias in Judgments Based on Character Appraisal?*, 26 PERSONALITY & SOC. PSYCH. BULL. 1353, 1363 (2000); *see also* Clayton Critcher, Yoel Inbar & David A. Pizarro, *How Quick Decisions Illuminate Moral Character*, 4 SOC. PSYCH. & PERSONALITY SCI. 308, 308 (2012).

31. John H. Wigmoree, EVIDENCE IN TRIALS AT COMMON LAW §52, at 1148 (Peter Tillers ed., rev. ed. 1983). The Oxford English dictionary includes these entries for how this word would have been used at the time, which suggests it meant "psychological" as opposed to "psychic": M. FOSTER *Text Bk. Physiol.* (1878) III. ii. 397. The difficulty of distinguishing between the unconscious or physical and the conscious or psychical factors. 1899 T. C. ALLBUTT et al. *Syst. Med.* VIII. 566. Such symptoms as hysteria, neurasthenia and psychical over-strain. Oxford English Dictionary, Third Edition, Sept. 2007.

32. *See Generally* JOHN HENRY WIGMORE, A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 64 (Gale, Making of Modern Law 1910).

we begin to see arguments that a bad character might be unfairly earned, and it should be kept out for this reason *in addition to* the fact that people should be presumed innocent and capable of reform. Even so, to Wigmore and other scholars, the word "character" was always bound up with inferences about morality and blame.

4. The Modern Rules of Evidence Have Become Unmoored From Morality

Somewhere along the way, this moral definition of character disappeared. The rules expanded to apply to all sorts of traits, capacities, and conduct. No longer is the concern exclusively that jurors will unfairly assume "once a thief, always a thief," which may threaten an individual's presumption of innocence. Character inferences of all types are now technically banned for reasons that are not clearly tied to prejudice or threats to due process.

In 1975 when the Federal Rules of Evidence were adopted, the drafters continued to generally prohibit character evidence under 404(a). However, the text removed any reference to "bad" character or traits.[33] The current text merely states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[34]

Now, evidence that someone was on the high school swim team and a Boy Scout,[35] or served honorably in the military[36], counts as character when used to argue that the party is a certain kind of person who behaves in a particular way. The very thing that made character prejudicial—that is, the sticky inferences from past immoral actions to guilt of present charges—has melted away.

The reasons for this decision are not well documented but appear to be related to the expansion of 404(a) to civil cases. If character were limited to bad acts or immoral conduct, then plaintiffs in negli-

33. Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 UNIV. CIN. L. REV. 299, 303–04 (1982); State v. Crayton, No. W2000-00213-CCA-R3-CD, 2001 WL 720612, at *3 (Tenn. Crim. App. June 27, 2001) ("Although the rule is usually applied to other crimes, wrongful acts, or misconduct, the language of the rule does not require that the acts covered by the rule be either criminal or wrongful.").

34. FED. R. EVID. 404.

35. Aiels v. City of Cedar Rapids, No. C01–0076, 2003 WL 25686841, at *5 (N.D. Iowa Dec. 30, 2003); *see generally* Katherine J. Alprin, *Character Evidence in the Quasi-Criminal Trial: An Argument for Admissibility,* 73 TUL. L. REV. 2073, 2076 (1999).

36. Selliken v. Country Mut. Ins. Co., No. 12-CV-0515-TOR, 2014 WL 12634309, at *2 (E.D. Wash. Jan. 21, 2014).

gence cases could introduce evidence of a defendant's reputation for clumsiness or lack of care. This was considered a bad thing. The expansion of character to include moral and amoral traits also seemed related to concerns that bolstering character evidence may waste the court's time while still being minimally probative.[37] To be sure, "bad acts" evidence continues to receive more scrutiny by courts. However, the character evidence rules no longer restrict their focus to bad or immoral acts.[38] Traits or past acts that are morally neutral or praiseworthy must now also overcome all of the 404-specific hurdles to be admitted.[39]

This unmooring of character from its moral overtones was a big mistake. Because there is little concern that jurors will unfairly condemn someone who is described in either morally good or neutral ways, this expansion has moved the ban away from its normative roots. What's more, it has also made it much more difficult to determine whether the evidence implicates the character evidence ban. This is a problem because recognizing when the ban is triggered has been considered a "minefield"[40] and is one of the trickiest parts of evidence practice.[41]

Too many actions and traits, some with no moral valence at all, are now caught up in the web of character evidence. Most past actions imply some sort of trait—e.g., forgetfulness,[42] childishness,[43] or narcissism. Should testimony related to these traits be categorically banned?

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37. Bolstering evidence was allowed by the accused in criminal cases but not in civil cases, because the common law judges understood that the jury may assume those prosecuted for crimes have a bad moral character that needs to be rehabilitated. *See* 21 AM. JUR. PROOF OF FACTS 3D 629 (Originally published in 1993); Alprin, *supra* note 35, at 2076, 2080.

38. Hon. Robert E. Jones, et al., *Admissibility of Evidence Bearing on Character*, RUTTER GRP. PRAC. GUIDE FED. CIV. TRIALS & EV. Ch. 8E-B, 8:1159.5 (2018) (explaining how prior good acts are inadmissible under Rule 404).

39. *See* Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 7–8 (2003) ("Note that this definition, contrary to the definition of 'character' offered by some commentators, does not necessarily have a moral connotation: the testimony need not concern whether the defendant is in some sense a good or a bad person. This makes sense because a conception of character evidence based solely on morality would be inconsistent with the policy concerns that have led courts to treat such evidence cautiously.").

40. David Plater, Lucy Line & Rhiannon Davies, *The Schleswig-Holstein Question of the Criminal Law Finally Resolved: An Examination of South Australia's New Approach to the Use of Bad Character Evidence in Criminal Proceedings*, 15 FLINDERS L.J. 55, 64–65 (2013).

41. Brown, *supra* note 25, at 17.

42. Erickson v. Robert F. Kerr, M.D., P.S., Inc., 851 P.2d 703, 710 (Wash. Ct. App. 1993) (defendant's forgetfulness treated as impermissible character evidence).

43. Smith v. Wasden, No. 4:08-cv-00227-EJL, 2016 WL 1275603, at *31 (D. Idaho Mar. 31, 2016), *aff'd*, 747 F. App'x 471 (9th Cir. 2018).

If introduced to prove someone acted in conformity with a trait of forgetfulness or narcissism, then this evidence should be banned. It is now the job of attorneys and judges to recognize the countless times this occurs.

This unpredictability means that in many cases the very issue on appeal is whether character evidence was introduced or not. Is a tattoo character evidence?[44] Gang membership?[45] A social media post that makes generic threats?[46] Evidence of a trait of impulsivity?[47] A history of self-harm?[48] Mercifully, the inclusion of morally neutral traits is rarely harmful enough to warrant a reversal or acquittal. But positive, bolstering traits, as well as those that are even slightly negative, may lead to a retrial or reversal.

Because the rule has become divorced from the goal of preventing prejudice, it is no longer narrowly tailored to achieve its objectives. Past acts that imply a negative character trait may fly under the radar,[49] or be routinely and incorrectly admitted for intent or lack of accident under 404(b).[50] Conversely, evidence that is either amoral or triggers a positive character inference might be unnecessarily excluded. The current character evidence rules now exclude *and* permit too much.

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44. State v. White, 2017 WL 3084711, at *2 (Del. Super. Ct. July 20, 2017), *aff'd*, 205 A.3d 822 (Del. 2019) ("Standing alone, the tattoo is not properly considered to be a prior crime, wrong, or act" and does not implicate Rule 404); *see also* People v. Fuentes, No. B270593, 2016 WL 6599579, at *4 (Cal. Ct. App. Nov. 8, 2016) (acknowledging that tattoos can count as character evidence if used for propensity purposes rather than as evidence of a victim's state of mind).

45. *See* Goodman v. State, 8 S.W.3d 362, 366 (Tex. App. 1999) (providing an excellent discussion of how individual judges can disagree about whether gang membership counts as character evidence); *see also* State v. Thompson, 265 N.C.App. 576, 581 (N.C. Ct. App. 2019) (sustaining an objection to inquire into gang membership being treated as character evidence). *But see* United States v. Felder, 993 F.3d 57, 78 (2d Cir.), *cert. denied,* 142 S. Ct. 597 (2021) (holding that a photograph of defendant linked with co-defendant gang members in gang colors, flashing gang signs, was not considered character evidence).

46. *See* Timmons v. State, 807 S.E.2d 363, 366–68 (Ga. 2017).

47. State v. Hallman*,* 668 P.2d 874, 878 (Ariz. 1983).

48. United States v. Staggs*,* 553 F.2d 1073, 1075 (7th Cir. 1977) (finding that psychologist's testimony that "defendant was more likely to hurt himself than to direct his aggressions toward others" constituted "evidence of a character trait.").

49. Explaining how a negative trait can be "touched upon" through indirect means (here a social media post that "used racially charged terms, expressed that Timmons was not afraid to die or go to jail, referred to shooting or killing someone, asserted that if someone "play[ed]" with him "ya family missing ya."). Even so, it may not count as character evidence, and if it does it must come in through opinion or reputation evidence. *See Timmons*, 807 S.E.2d at 366–68.

50. A former federal judge and evidence scholar observed that, "[i]f the prior bad acts involve sexual misconduct, or child abuse, or a combination of both, courts generally find a theory of admissibility [under 404(b)], even if no specific theory of admissibility makes sense." *See* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 227 (2018–19 ed.), quoted in State v. Murphy, 441 P.3d 787, 802 (Utah Ct. App. 2020) (J. Harris, concurring).

In the face of substantial evidence that this particular rule is not working (in the form of frequent appeals, acquittals, grumbling by attorneys and judges), we somehow remain wedded to it. Ironically, even in the United Kingdom, which provided the basis for our character ban, legislators have reformed their rules. Australia has revised their rules as well. In both countries, evidence of past acts and traits are now admissible if justice so requires. Importantly, these countries have continued to limit the application of the rule to *immoral behavior or traits*. In the United Kingdom, the character evidence rules apply only to bad acts that are reprehensible.[51] And in South Australia, the rules focus on "discreditable conduct," which is defined to include any charged and uncharged misconduct.[52] Yes for somewhat vague reasons, in the United States we have continued to expand our rules to cover all sorts of character traits and behavior.

5. Moral Character Assessments Drive Juror Decision-Making

Perhaps without realizing it, the drafters of the FRE have waded into deep philosophical waters.[53] Specifically, the question of whether to inject morality into the rules of character evidence reflects a longstanding debate between the virtue ethics of Aristotle and the consequentialism of Bentham or Mill, or the principlism of Kant. The question posed here is whether jurors be allowed to judge defendants based upon their moral character (as Aristotle suggested in his virtue ethics), or based entirely on the consequences of their actions (Bentham's utilitarianism) or the violation of moral rules (Kant's deontological approach)?

To Aristotle, there was no such thing as "character" without reference to morality.[54] To him, character had to be developed through lived experience and perception, not through memorization or academic learning.[55] Aristotle conceived of character traits as being long-term and relatively stable dispositions to act in particular ways.

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51. Michael Stockdale, Emma Smith & Mehera San Roque, Bad Character Evidence in the Criminal Trial: The English Statutory Common Law Dichotomy—Anglo-Australian Perspectives, 3 J. INT'L. & COMPAR. L. 441, 443–49 (2016) (referencing Elomar v. The Queen, 300 FLR 323 (2014)).

52. Evidence (Discreditable Conduct) Amendment Act 2011 (S. Austl.) pt II div 3 sub-div 34P(1).

53. Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 MIND 47, 49 (2002).

54. *See* Ray et al., *supra* note 13 (manuscript at 2).

55. Jonathan Haidt & Selin Kesebir, *Morality, in* HANDBOOK OF SOCIAL PSYCHOLOGY 797, 798 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed., 2010).

Common law legal doctrines unambiguously pushed virtue ethics aside. At the time our Constitution and the common law rules of evidence developed, it was considered inappropriate for judges and juries to factor in the moral character of the actor. What mattered most was the *impact* of one's voluntary actions or whether someone *violated a rule*. Whether or not they were a good person should be legally irrelevant.

6. Don't Call it a Comeback: Aristotle Lost the Normative Battle, but Won the Descriptive War

You would still be hard-pressed to find legal scholars today who adopt Aristotle's virtue ethics as their guiding light. People should be blamed not for who they are, but for what they do. Indeed, this is the reason for the character evidence ban. But research shows that the goal of the ban was doomed from the start. When we judge people for causing harmful outcomes, we prioritize asking, "is this a *good* person or a *bad* person?" over, "was this specific action he is accused of wrong?"[56] This focus on the individual's moral character when evaluating responsibility is referred to as "person-centered blame."[57] It unfortunately renders the jury's fact-finding process secondary to the evaluation of the target's character.[58]

Attorneys know that assessments of moral character are primary, and negative assessments in particular have been shown to cause "'inflated' judgments of intentionality, causality, and control in cases where an agent seems particularly nefarious."[59] For example, once we hear that someone is "an addict," we will use this evidence to question their morality, inflate their relevant mental states from inadvertence to intent, predict that they likely behaved in keeping with stereotypes of people who use illegal drugs. We will then use these attributions to increase our perception of their moral blame.[60]

The intuition of attorneys has now been confirmed by social psychologists. That is, jurors are constantly, automatically drawing char-

56. *See* David A. Pizarro & David Tannenbaum, *Bringing Character Back: How the Motivation to Evaluate Character Influences Judgments of Moral Blam*e, *in* THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 92 (Am. Psych. Ass'n 2012).

57. *See id.*

58. *See* David A. Pizarro, David Tannenbaum & Eric Uhlmann, *Mindless, Harmless, and Blameworthy*, 23 PSYCH. INQUIRY, 185, 185 (2012).

59. *See* Pizarro & Tannenbaum, *supra* note 56, at 12.

60. *See* Ray et al., *supra* note 13 (manuscript at 13); Heberlein & Saxe, *supra* note 13, at 770 (describing the use of dispositions to infer mental states and predict behavior).

acter inferences based on whatever limited information is available.[61] Indeed, "before we shake a person's hand for the first time, we have most likely already made a judgment about his or her trustworthiness and noticed whether he or she appears hostile or threatening."[62] We then filter additional information through this lens and use it to validate our decision to blame. It seems humans are "intuitive prosecutors,"—using morality and character to interpret behavior and place blame.[63] Morality drives these spontaneous character assessments.

Aristotle lost the normative battle, but he has won the descriptive war. We may not *like* that jurors rely on character information, but the reality is that they do. As compared to utilitarianism, Aristotelian virtue ethics better describes how jurors *actually decide* who is responsible for causing bad actions.[64] We are not completely rational, calculating the costs and benefits of a defendant's actions, or even whether they objectively violated a rule. Moral character invades every aspect of social behavior and decision-making. If jurors are shielded from drawing explicit character inferences, they will fill in the gaps with stereotypes and biases.[65] Recognizing the practical effects of moral character on assessments of behavior has led to a comeback in Aristotle's virtue ethics (called the "Aretaic Turn") in psychology and moral philosophy.[66]

7. Unmooring the Rules from Morality Makes Evidentiary Distinctions Fall Apart

Removing morality from FRE 404 destroyed the descriptive validity of character evidence. Now that character has expanded to in-

61. Pizarro & Tannenbaum, *supra* note 56, at 92.

62. Eric Luis Uhlmann, David A. Pizarro & Daniel Diermeier, *A Person-Centered Approach to Moral Judgment*, 10 PERSP. PSYCH. SCI. 72, 73 (2014); Mark D. Alicke, *Blaming Badly*, 8 J. COGNITION & CULTURE 179, 183 (2008).

63. Eric Luis Uhlmann, David A. Pizarro & Daniel Diermeier, *A Person-Centered Approach to Moral Judgment*, 10 PERSP. PSYCH. SCI. 72, 73 (2014); Mark D. Alicke, *Blaming Badly*, 8 J. COGNITION & CULTURE 179, 183 (2008).

64. *See* Pizarro & Tannenbaum, *supra* note 56, at. According to Pizarro, virtue ethics is experiencing a resurgence. Lay people place a great deal of value on moral character when determining who ought to be responsible and who ought to be blamed.

65. *See* Jennifer L. Ray et al., *supra* note 13, at 556. James A. Macleod, Belief States in Criminal Law, 68 Okla. L. Rev. 497, 536 (2016); State v. Costello, 977 A.2d 454, 459–60 (N.H. 2009)("[H]is heroin addiction, though introduced to show motive, would necessarily fill in the missing logical gaps that Rule 404(b) requires a prosecutor to fill.").

66. Pizarro & Tannenbaum, supra note 56, at 95 (According to Pizarro, virtue ethics is experiencing a resurgence. Empirical evidence demonstrates lay people place a great deal of value on moral character when determining who ought to be responsible and who ought to be blamed).

clude evidence of amoral or positive traits, it also becomes much harder to distinguish character from other types of behavioral evidence. In the next section, I will explain how judges historically differentiated character evidence from habit, physical, and psychological traits. In each case, it was presumed that character was moral while these other categories of evidence were not.

a. Habit Propensity Evidence

i. Habit Propensity Evidence Overlaps with Character

Character evidence is excluded, with few exceptions, because it encourages unfair attribution errors.[67] However, evidence that someone acted in conformity with a *habit* has been welcomed into trials with open arms. Indeed, under FRE 406, habit evidence can be admitted *for any purpose* and even without any eyewitness corroboration.[68] Thus, a great deal rides on the distinction between the two. So, how do the FRE disambiguate habit and character?

The Advisory Committee Notes (ACN) to the FRE acknowledge that character and habit are "close akin."[69] In the ACN, we learn that character is defined as a "generalized description of one's disposition . . . in respect to a general trait, such as honesty, temperance, or peacefulness."[70] Conspicuously, these examples are all traits that are moralized. They speak to one's virtue for choosing to behave in a particular way.

Habit, on the other hand, is thought to cover conduct that is specific, reflexive, and nonvolitional.[71] The examples given in the ACN include behaviors like descending the stairway two stairs at a time or always wearing your seatbelt.[72] Notably, these do not trigger infer-

67. Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1006 (1984); Tillers, *supra* note 25, at 760.

68. *See* Wallis v. S. Pac. Co., 195 P. 408, 409 (Cal. 1921). In cases where there were no eyewitnesses, evidence of habit was considered necessary, and therefore more probative.

69. "'Habit,' in modern usage, both lay and psychological, is more specific [than character]. It describes one's regular response to a repeated specific situation." *See* FED. R. EVID. 406 advisory committee's note to 1972 proposed rules (quoting McCormick, Evidence, § 162, at 340).

70. *Id*.

71. Habit "refers to the type of non volitional activity that occurs with invariable regularity." Weil v. Seltzer, 873 F.2d 1453, 1460 (D.C. Cir. 1989). "A habit is considered to be probative because it is nonvolitional; it has 'a reflexive, almost instinctive quality.'" U.S. ex rel. El-Amin v. Geo. Wash. Univ., 533 F.Supp.2d 12, 26 (D.D.C. 2008); Tucker v. Bos & M.R.R., 59 A. 943, 944 (N.H. 1905); *See* Greenwood v. Bos. & M.R.R., 88 A. 217, 218 (N.H. 1913) ("Evidence of habit, as to involuntary acts, is admissible, while as a general rule evidence of character is not.").

72. Babcock v. Gen. Motors Corp., 299 F.3d 60, 66 (1st Cir. 2002).

ences about someone's morality because they "may become semi-automatic."[73] These examples of habitual behaviors also do not harm anyone.

Traditionally, common law judges considered habit to be quite probative and much less prejudicial than character evidence. This was because "the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character."[74] Additionally, there was never a fear that jurors would punish someone for being "the kind of person" who descends the stairway two steps at a time, or who always drives to work on the same route. Because we tend to blame people for things they do purposefully, and do not attach as much blame for reflexive conduct, this is likely why habits were so easily admitted.

However, the psychological distinction between volitional and non-volitional action is far from clear-cut. Even something as basic as choosing to pick up a coffee cup is mediated by a complex chain of neuronal processes, some of which occur outside of our awareness.[75] Therefore, can we say that we voluntarily picked up the mug of coffee? The answer is both yes and no. There may be aspects of this motor movement that were conscious and deliberate, and other aspects of it that were not.

In more extreme settings, people who have experienced a provoked fit of rage often describe an "out of body" experience. It seems a more protective instinct took control and they felt consumed by a primal, animalistic response. When they look back on this conduct, they sometimes have very little memory of having performed it.

In less extreme settings, Ben Libet famously demonstrated that preparatory motor action, in the form of electromagnetic brain waves, occurs before we are aware of our decision to act.[76] Pairing neuroimaging devices with sophisticated pattern classifiers allows researchers to predict how subjects would act *seconds before they report consciously making the decision*.[77] So, are these decisions voluntary, at

73. Fed. R. Evid. 406 advisory committee's note to 1972 proposed rules (quoting McCormick on Evidence, § 162, at 340).

74. *Id*. (quoting McCormick on Evidence, § 162 at 341).

75. Etienne Combrisson, Marcela Perrone-Bertolotti, Juan LP Soto, Golnoush Alanian, Philippe Kaahane, Jean-Philippe Lachaux, AAymeric Guillot & Karim Jerbi, *From Intentions to Actions: Neural Oscillations Encode Motor Processes through Phase, Amplitude and Phase-amplitude Coupling*, 147 Neuroimage 473, 473 (2017).

76. *See* Benjamin Libet, *Do We Have Free Will?* 6 J. Consciousness Stud. 47, 51 (1999).

77. Kevin D'Ostilio & Gaëtan Garraux, *Brain Mechanisms Underlying Automatic and Unconscious Control of Motor Action*, 6 Frontiers Hum. Neuroscience 1 (2012).

least in the way the law assumes them to be? It may be that in some cases we construct narratives *ex post* to justify implicit, subconscious behavior.[78] Even if this only applies to certain types of conduct, it is clear that human decision-making and movement are much more complicated and semi-volitional than we ever realized. The evidence rules rely on dichotomies that increasingly, in tough cases, prove to be false.

But not everything rides on the behavior being deemed non-volitional. Evidence has been deemed "habit" even if it involves semi-volitional behaviors, so long as they are "capable of almost identical repetition"[79] and are performed with sufficient regularity.[80] So, for example, a dentist's practice of "routinely and regularly" informing patients of risks involved in molar extractions[81] or the "physical manner in which [a] seller routinely collected eggs"[82] have both been considered proper habit evidence. This is despite their both involving conduct that is (hopefully!) thoughtful and not entirely robotic. Indeed, this sort of habit looks a lot like the kind of "character for carefulness" that the drafters of the FRE sought to exclude. However, it is not considered character evidence because it is repetitive, reflexive, and—most importantly—not likely to lead to moral blame.

Because habit and character have the potential for such overlap, modern courts caution, "habit or pattern of conduct is never to be lightly established, and evidence of example, for purpose of establishing such habit, is to be carefully scrutinized before admission."[83] Recent cases emphasize the "adequacy of sampling and uniformity of response" in determining whether evidence amounts to habit under FRE 406 or the state law counterparts.[84] A large sample of uniform behavior is not itself dispositive, however.[85] In one case, a low ratio (the testimony of 5 out of 26 patients prescribed Medrol who testified

78. Joo-Hyun Song & Ken Nakayama, *Hidden Cognitive States Revealed in Choice Reaching Tasks*, 13 TRENDS COGNITIVE SCI. 360, 360–62 (2009).

79. Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1294 (7th Cir. 1988).

80. Wigmore, *supra* note 31, § 92 at 520.

81. Meyer v. United States, 464 F.Supp. 317, 321 (D. Colo.1979), aff'd. 638 F.2d 155 (10th Cir.1980).

82. *Simplex*, 847 F.2d at 1294.

83. Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 511 (4th Cir. 1977) (citing Nelson v. Brunswick Corp., 503 F.2d 376, 380 (9th Cir.1974)).

84. Reyes v. Mo. Pac. R.R., 589 F.2d 791, 795 (5th Cir. 1979) (quoting Fed. R. Evid. 406 advisory committee's note to 1972 proposed rules).

85. "An officer's observation of 75 to 100 such instances did not *require* the conclusion that the putative practice [hand-cuffing inmates to the cell bars] was followed with the necessary regularity." United States v. Newman, 982 F.2d 665, 669 (1st Cir. 1992).

that the defendant physician discussed risks of treatment) was found to be sufficient to establish habit.[86] Another case cited favorably by the ACN upheld the admission of habit evidence that a decedent had flown planes from the defendant's factory on only *four* other occasions, to prove that he was piloting a plane which crashed and killed all on board.[87] As you can see, calling something a habit is a great way to get it admitted without much scrutiny. Upon reflection, the most cited aspects of habit—that it be non-volitional, reflexive behavior—do not appear to be as necessary as the thing which they portend—that is, morality.

ii. Morality Distinguishes Habit from Character Evidence

Habit evidence was not thought to cause undue prejudice because it was not moralized and did not trigger notions of blame. We can discern that habit evidence speaks to morally neutral actions because it typically cannot be used to prove someone acted with a guilty mind. As late nineteenth century cases viewed it, "habit evidence is of no value to prove intent, since a party's state of mind is dependent rather upon his character."[88] This seemingly innocuous statement speaks volumes. It correctly implies that inferring mental states requires drawing inferences about morality. This reveals that early American courts thought of habit as being amoral. To be clear, the modern FRE Rule 406 says nothing about morality. The rule only states:

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.[89]

However, when the behavior is blameworthy, like defrauding customers,[90] being belligerent with police,[91] speeding,[92] or interacting violently with people who insulted you, courts have rarely called this

86. *See* Crawford v. Fayez, 435 S.E.2d 545, 550 (N.C. Ct. App. 1993).

87. Whittemore v. Lockheed Aircraft Corp., 151 P.2d 670, 678 (Cal. Dist. Ct. App. 1944).

88. Arthur Bearns Brenner & James Alger Fee, Recent Decisions, 14 COLUM. L. REV. 445, 453 (1914) (citing State v. Manchester & Lawrence R.R., 52 N.H. 528, 549 (1873); Craven v. Cent. Pac. R.R., 13 P. 878 (Cal. 1887)).

89. FED. R. EVID. 406.

90. Pappas v. Ippolito, 895 N.E.2d 610, 618 (Ohio Ct. App. 2008) ("This is precisely the sort of prejudicial evidence prohibited by Evid.R. 404(B).").

91. Nobles v. United States, No. 10–cv–1997–BEN (DHB), 2012 WL 1598075, at *5 (S.D. Cal. May 7, 2012).

92. McLane v. Rich Transp., Inc., No. 2:11–cv–00101 KGB, 2012 WL 3996732, at *4 (E.D. Ark. Sept. 7, 2012).

behavior habit evidence.[93] Even normally-reliable business habits may be excluded if they speak to conduct that is moral—like "whether defendant had a practice of serving alcohol to minors."[94] In a New Jersey dram-shop case, the plaintiff's testimony that a bar regularly served alcohol to underage customers was impermissible to prove "the general conduct" and "character" of the business.[95] In these and many other cases, "bad habits" are treated as character because they invoke morality.

Kentucky used to be the only state without something like FRE 406 to allow habit evidence. In defending its once "extreme minority" view, the high court explained the tremendous potential for prejudice if bad habits were admitted. Indeed, Kentucky judges were skeptical that habit evidence was fundamentally different from character.[96]

Before 2006, when Kentucky adopted FRE 406 verbatim, one Kentucky judge described how a "scarlet letter" could attach to a defendant "if the prosecutor is permitted to attach the label of 'habit' . . . to watching pornographic videos . . . or of beating his wife on the weekends."[97] This, it went on, is why courts have been "reluctant to admit evidence that a person is a 'habitual drunk' or has a habit of reckless driving [or smoking a joint every morning] [because] such evidence may be more prejudicial than probative with respect to the issues in the case."[98] If the difference between character and habit is *not* morality, then moralized habit evidence is just character evidence by another name.

b. Physical Trait Propensity Evidence

i. Physical Trait Propensity Evidence Overlaps with Character

You have likely never read the phrase "physical trait propensity evidence." That is because it is not subject to any special evidence rules, and is therefore not even treated on its own as a category. Even so, it is routinely admitted. Unlike the meager probative value of character evidence, Wigmore argued that "[w]here a person's physical

93. Morris v. Long, No. 1:08–cv–01422–AWI–MJS, 2012 WL 3276938, at *11 (E.D. Cal. Aug. 9, 2012) ("Defendant has presumably interacted with hundreds, if not thousands, of people over the course of his life, and his aggression toward those who verbally challenge or criticize him is an act of volition, not a reflexive or semi-automatic response.").

94. Showalter v. Barilari, Inc., 712 A.2d 244, 253–54 (N.J. Super. Ct. App. Div. 1998).

95. *Id*.

96. Thomas v. Greenview Hosp., Inc., 127 S.W.3d 663, 670 (Ky. Ct. App. 2004).

97. Burchett v. Commonwealth, 98 S.W.3d 492, 496 (Ky. 2003).

98. *Id*.

power or strength is a proposition to be proved, instances of the person's conduct and acts, manifesting the existence in him of such power and strength, are natural and proper evidence of it."[99] For example, it would be entirely appropriate to admit evidence that a person is left-handed, to prove it is more likely he swung a golf club at someone the way a left-handed person would.[100] Using physical traits in this way is usually admissible, and traditionally not conceived of as character evidence. However, now that character no longer speaks to moralized traits, the character evidence rules *could* prohibit using past actions to imply a trait of left-handedness, to argue conformity with this trait on another occasion.

Compared to the prejudicial and weakly predictive character evidence, physical traits are considered probative and not too prejudicial. My guess is that this is likely because physical traits are thought to be outside of our control, and are thus not moralized.[101] That is, we usually do not blame people for being left-handed, tall, or strong. This is in keeping with Aristotelian virtue ethics, where one's pure physical capacities did not reflect their virtues or vices.[102] The permissive attitude judges had for physical trait evidence strongly suggests that the dividing line between character and non-character evidence was morality.

Thus, for example, to prove that the defendant charged with rape "had the capacity to overcome such resistance as the prosecutrix might have offered," evidence was permitted that he had previously "taken a barrel of flour up in his hands before him and carried it several rods."[103] When determining whether a defendant blocked a train track with heavy objects, jurors were allowed to hear about the defendant lifting heavy objects in the past.[104] Modern cases have likewise found that someone's "weightlifting achievements and extraordinary physical strength" could be introduced to prove he likely acted in

99. Wigmore, *supra* note 31, §§ 219–20; *id*. at § 83 ("[T]he existence or lack of the physical capacity, skill, or means to do an act is admissible as some evidence of the possibility or probability of the person's doing or not doing it.").

100. Berenguer v. Lincoln Nat. Life Ins. Co., No. 2:06cv190, 2006 WL 3327643, at *3 (E.D. Va. Nov. 15, 2006).

101. Wigmore, *supra* note 31, § 219.

102. *See* Pizarro & Tannenbaum, *supra* note 56, at 95. According to Aristotle, it was not enough to just be strong; you had to flex your strength in ways that benefited others to be virtuous.

103. State v. Knapp, 45 N.H. 148, 149 (1863).

104. *Id*.; *see also* Wigmore, *supra* note 31, §§219–20.

conformity with this strength on a particular occasion.[105] This physical trait evidence may also include sensory deficiencies that are "not subject to the restrictions in Rule 404."[106]

If the behavior is classified as a physical trait, it may be admitted despite implying a character trait of violence. Thus, the prosecution's evidence that "defendant had once lifted a grown man off the ground and set him down in a chair" was admitted to prove that "despite defendant's diminutive size, he possessed physical strength necessary to inflict debilitating brain damage."[107] This is propensity evidence, but because it is based on an "amoral" physical trait, courts usually do not treat it as implicating the character evidence ban.

ii. Morality Distinguishes Physical Traits Evidence from Character

The distinction between physical and non-physical traits is present in many legal doctrines outside of the evidence rules. In each instance, physical traits are privileged over non-physical ones.[108] This familiar dichotomy tracks the idea that metaphysical, mental traits like intent are something we can control and be blamed for, while physical traits are not.

The categories between physical and mental are much blurrier than we once realized. Traits as seemingly objective as height[109], strength, or obesity[110] depend on choices we make, such as our environment and nutrition. This makes them much more than just objective, physical traits we inherit.[111] We are beginning to realize the human agency and environment involved in many physical traits. Conversely, whether we develop certain physical conditions that were once thought to be under our control, like depression or substance use disorder, depends almost equally on our physical biology and childhood trauma as it does on personal choice. But we might still be con-

105. Gregor by Gregor v. Kleiser, 111 Ill. App. 3d 333, 335 (1982).

106. *Definition of Character Evidence*, 5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 404.2 (6th ed.).

107. People v. Williams, 165 Ill. 2d 51, 61–62 (1995).

108. Brown, *supra* note 25, at 8.

109. Jessica M. Perkins, S.V. Subramanian, George Davey Smith & Emre Özltin, *Adult Height, Nutrition, and Population Health,* 74 NUTRITION REVIEWS, 149, 149 (2016) (showing evidence across multiple studies indicates that short adult height in low-income countries is driven by environmental conditions and poor nutrition in early years).

110. Erik Hemmingsson, *Early Childhood Obesity Risk Factors: Socioeconomic Adversity, Family Dysfunction, Offspring Distress, and Junk Food Self-Medication*, 7 CURRENT OBESITY REP., 204–09 (2018).

111. Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC'Y 315, 315-42 (1999).

cerned about how this will impact the morality of their mental states and behavior in the future.[112]

Because of the strong link between brain injuries and behavior, we can expect an upsurge in defenses that rely on structural, physical brain traits. In a 2014 case, the defendant argued on appeal that the victim's history of bizarre and violent behavior was not character evidence, but instead was part of a physical medical condition he suffered after undergoing brain surgery. The court did not decide whether the post-surgery behavior was impermissible character evidence under 404, but instead resolved the case by finding that the defendant had failed to preserve this argument for appeal.[113] One can imagine many future cases where a brain lesion or injury, highly predictive of certain unusual behaviors, might be introduced not under 404, but as simply evidence of a physical trait.

Neurological and mental illnesses deconstruct the binary between the physical and the mental—as the brain is a physical thing that enables all mental processes.[114] The dichotomy between body and mind was made famous by Rene Descartes. Cartesian dualism draws a bright line between mental states and actions, or the mind and the body.[115] The ban on character evidence relies on folk understandings of this dichotomy, which permits evidence of motive, intent, or lack of accident because mental states were thought of as entirely different sorts of things than physical actions that imply traits. Of course, as I have written elsewhere, mental states enable actions, and, at a cellular and neurological level, it is difficult to separate the two.[116]

The idea that we are responsible for our mental states but not for our physical traits relies on a false dichotomy that moralizes the former but not the latter. While we have less control over developing certain traits, it is not the case that we are responsible for our mental states or moral character and not responsible for our physical traits.

112. Hannon v. Sec'y, Dep't of Corr., 622 F. Supp. 2d 1169, 1187 (M.D. Fla. 2007), *aff'd*, 562 F.3d 1146 (11th Cir. 2009).

113. People v. Tracey, No. B24917, 2014 WL 4302504, at *13 (Cal. Ct. App. Sept. 2, 2014).

114. This article explicitly adopts a materialist view of the brain, which is overwhelmingly supported by decades of neuroscientific research. *See* Kevin D'Ostilio & Gaëtan Garraux, *Brain Mechanisms Underlying Automatic and Unconscious Control of Motor Action*, 6 FRONTIER HUM. NEUROSCIENCE, Sept. 26, 2012, at 1.

115. Teneille R. Brown, *Demystifying Mindreading for the Law*, WIS. L. REV. Forward 8 (2022) ("Our assumption that the mens rea can be completely separated from the actus reus embodies a sixteenth-century view of the body and the mind called substance dualism. Substance dualism has been refuted by neuroscientists, but it continues to find sanctuary in various legal doctrines.").

116. *See* Teneille R. Brown, *Minding Accidents*, 42 Univ. COLO. L. REV. 89, 119 (2023).

And there may be physical traits (like structural brain damage) that nonetheless increase the risk of developing antisocial, immoral behavior—which would normally be thought of as character evidence.

c. Psychological Profile Propensity Evidence

i. Psychological Propensity Evidence Overlaps with Character

The last type of propensity evidence I will address is psychological profile evidence. Courts vary considerably in their treatment of this type of evidence. Psychological profile evidence includes evidence that someone acted in conformity with a particular cognitive trait, mental illness or disorder on a different occasion. It is therefore propensity evidence. However, it is often permitted under FRE 404.

There are two distinct types of psychological profile evidence, which make slightly different claims. The first is referred to as "social framework" or "syndrome evidence." It involves off-the-shelf findings about how groups of people, like battered women, tend to behave. This sort of evidence can be helpful in explaining to the jury how behavior that seems unreasonable in fact might be quite normal under the circumstances. The second type of profile evidence consists of individual psychiatric diagnoses or traits. The behavior may or may not rise to the level of a diagnosis. In either case, the party is introducing group profiles or individual psychological traits to suggest conformity with this trait on another occasion. This is classic propensity reasoning, and some courts view it as such.[117] But other courts do not.

Some scholars argue that social frameworks evidence does not implicate Rule 404 because it speaks to "*groups* or *other* persons" rather than specific individuals. However, the group profile (such as how people addicted to meth tend to behave) is only relevant if the targeted individual is a member of the described group (himself addicted to meth).[118] Thus, this fits the broad definition of propensity evidence and places profile evidence in the crosshairs of FRE 404.[119]

117. *See* Freeman v. State, 486 P.2d 967, 972 n.8 (Ala. 1971) ("[P]sychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence.).

118. Walker & Monahan, *supra* note 119 at 559 (describing the distinction between off-the-shelf legislative findings, as opposed to adjudicative facts).

119. David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. Chi. L. Rev. 417 (2014). *See also* Carl E. Fisher, David L. Faigman & Paul S. Appelbaum, *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 Univ. Miami L. Rev. 685 (2014).

If we stayed at the group level, and never made a connection to the facts of *this* case, the profile evidence would be irrelevant.

For what it's worth, Laurens Walker and John Monahan, who authored the definitive article on the topic, acknowledge that "the purpose of offering character evidence is similar" to the use of profile evidence.[120] They contend that where character evidence is allowed (e.g., as mercy evidence or speaking to a pertinent trait under FRE 404(a)(2)), psychological profile evidence should be too. Unfortunately, rather than following this advice, many courts treat psychological propensity evidence as avoiding 404(a). It is often admitted, despite sometimes using implied character traits to argue how an individual likely behaved on another occasion.

Some courts hold that psychological propensity evidence violates the character evidence rules.[121] In Delaware, evidence that a defendant did *not* have the psychological traits of a rapist was considered inadmissible character evidence.[122] Military courts also ban psychological profile evidence, "because this process treads too closely to offering character evidence of an accused."[123] Likewise in Ohio, evidence of one's sexual orientation and preferences cannot be introduced by an expert and must come in, if at all, through lay character testimony.[124] However, courts also routinely admit psychological profile evidence, especially if it helps to rehabilitate sympathetic witnesses.

Psychological propensity evidence is thus routinely introduced to explain why a battered woman might stay with an abusive spouse,[125] why "separation violence" is common among abusers,[126] or to argue that a defendant's behavior is (in)consistent with being a sexual deviant.[127] Parties have been allowed to introduce evidence that a defendant met the "profile" of someone who had experienced child sexual abuse,[128] or who himself was a "typical sexual abuser"[129] without sat-

120. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 581 (1987).

121. "Dr. Meloy's testimony was improper character evidence in the form of a profile." United States v. Wells, 879 F.3d 900, 917 (9th Cir. 2018).

122. *See* State v. Floray, 715 A.2d 855, 861 (Del. Super. Ct. 1997).

123. United States v. Traum, 60 M.J. 226, 235 (C.A.A.F. 2004).

124. State v. Ross, No. 22958, 2010 WL 761323, at *9 (Ohio Ct. App. Mar. 5, 2010).

125. Ryan v. State, 988 P.2d 46, 54–55 (Wyo. 1999).

126. Skinner v. State, 33 P.3d 758, 767 (Wyo. 2001).

127. People v. Stoll, 49 Cal. 3d 1136, 1137 (1989); Legler v. Fletcher, No. 14-cv-01497-YGR, 2015 WL 4272701, at *5 (N.D. Cal. July 14, 2015) (permitting lay opinion testimony that defendant did not have the character trait of being sexually attracted to young girls).

128. United States v. Banks, 36 M.J. 150, 152 (C.M.A. 1992).

129. Nolte v. State, 854 S.W.2d 304, 309 (Tex. App. 1993).

isfying the requirements of 404. In other states, evidence that defendants' behavior conforms to certain psychological profiles (like the need for control) may be inadmissible not because it counts as character evidence, but because of state laws that prohibit expert psychological testimony related to a diminished capacity defense.[130]

Courts disagree on whether an expert's involvement exacerbates or mitigates the prejudicial impact of profile evidence. While judges are normally concerned that jurors will *overvalue* expert testimony, in some cases it is the expert's imprimatur that renders profile evidence less prejudicial.[131] In Texas, evidence that would be impermissible character testimony if introduced by a layperson is rendered permissible when presented by an expert psychologist, based on her clinical evaluation.[132] The same is true in Alabama.[133] In other cases, however, the fact that the expert testifies to psychological profile evidence works in the opposite direction, to render it *inadmissible*.[134] In California, expert opinions on someone's sexually deviant propensities are allowed—now by statute—if the testimony is presented by a licensed therapist and based on standardized psychological tests.[135]

Psychological propensity evidence, in the way I am using the term, need not rise to the level of a diagnosis or syndrome. It may also include medical or cognitive traits like intelligence or nervousness.[136] These are used in essentially the same way, only the labels are less clinically precise. Now that character has expanded to cover morally positive and neutral traits, it is intellectually tricky to distinguish cognitive traits from character. Nevertheless, some courts and commentators have tried.

A Washington treatise declared that "deficiencies in a person's memory or sensory abilities may be relevant to [credibility] but they

130. United States v. Kumar, No. 4:17-CR-5-FL-1, 2019 WL 1387687, at *5 (E.D.N.C. Mar. 27, 2019).

131. State v. McDonnell, 409 P.3d 684, 700 (Haw., 2017) (explaining that profile evidence, while potentially prejudicial, should not be excluded categorically).

132. Beckett v. State, No. 05-10-0031-CR, 2012 WL 955358, at *1–2 (Tex. App. Mar. 22, 2012).

133. R.A.S. v. State, 718 So. 2d 117, 121 (Ala. 1998) (Expert character evidence is allowed by defendant to argue his psychological personality profile "does not include a capacity for deviant behavior against children.").

134. State v. Ross, No. 22958, 2010 WL 761323, at * 10 (Ohio Ct. App. Mar. 5, 2010).

135. People v. Stoll, 49 Cal.3d 1136, 1154; *see also* People v. Fernandez, 216 Cal. App. 4th 540, 567 (2013); State v. Gonzalez, 789 N.W.2d 365, 377–78 (2010).

136. *See* Proulx v. Basbanes, 238 N.E.2d 531, 533 (Mass. 1968); *see also* Commonwealth v. Bonds, 445 Mass. 821, 830 n.15, (2006) (discussing Proulx, and how "[n]ot all descriptions of a person's emotional or mental condition are considered character evidence.").

are not evidence of character and are not subject to the restrictions in Rule 404."[137] This appears to be the majority view—that cognitive traits like intelligence or forgetfulness are not character under 404. However, it is not clear why cognitive or personality traits would not implicate the character evidence rules, when used for propensity purposes. Courts' reasoning here is far from uniform. For example, a defendant wanted to introduce evidence of his low intelligence under the "mercy rule" to argue he acted in conformity with this character trait. However, the court refused to consider this a character trait, but somehow still excluded it.[138] Another case said that evidence that the defendant was naïve *should* have been allowed as character evidence under the mercy rule, but its exclusion was harmless.[139] This is a messy, confusing area.

Some judges recognize that it can be a close call disambiguating psychological traits from character. In a Massachusetts case, the prosecution introduced testimony by the victim's mother that she was "too trusting" and therefore easily victimized. An intermediate court held that this was prejudicial character evidence, which was harmful enough to warrant reversal.[140] The high court of Massachusetts disagreed. It reasoned that being overly trusting is not character evidence, but "a specific manifestation. . .and [an] inescapable part of Ellen's mental disorder."[141] While not perfectly explaining how a mental disorder cannot be character, the court relied in part on the disorder's *permanence*.[142] Permanence may suggest that the disorder is fixed and not under the individual's capacity to control, making it more like a physical trait than a moral one. Regardless, cognitive and psychological traits speak to dispositions, and when used to draw inferences about someone's propensity to behave in a particular way, this should be treated as character evidence.

Additional cases affirm that cognitive traits are typically not considered character because they do not speak to a "person's moral standing in [the] community based on reputation."[143] This may be why

137. *Definition of Character Evidence*, 5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 404.2 (6th ed.).

138. U.S. v. West, 670 F.2d 675, 682 (7th Cir. 1982) (rejecting defense argument that intelligence was a character trait within the meaning of Rule 404(a)).

139. *See*, *e.g.,* United States v. Roberts, 887 F.2d 534, 536 (5th Cir. 1989).

140. *Bonds*, 445 Mass at 840.

141. *Id*. at 830.

142. *Id*.

143. BNSF Ry. Co. v. Lafarge Sw., Inc., No. 06-1076 MCA/LFG, 2009 WL 9144601, at *1 (D.N.M. Jan. 27, 2009).

other courts find that cognitive deficiencies, like forgetfulness,[144] or irrationality[145] cannot be character—even when used to make propensity arguments. However, we cannot know for sure why courts classify cognitive traits as non-character, because in many cases they fail to justify this argument and merely state it as self-evident.

When cognitive or mental traits are wrapped up in an official psychiatric diagnosis, they might be even *less* likely to be treated as character evidence. For example, in one case the defendant sought to introduce expert psychiatric testimony that a petitioner's antisocial personality disorder would have made him act aggressively toward authority figures. In allowing this propensity testimony, the court found that the mental disease with which [petitioner] had been diagnosed was properly admitted as expert medical opinion.[146] It was not considered character evidence. In Missouri, evidence that a defendant suffered from Asperger's Syndrome could be introduced as evidence that the defendant did not in fact commit [first degree murder]" as it would be inconsistent with his diagnosis.[147] In Washington, character and psychological propensity evidence are considered separate, with one judge simply declaring that "[a] person's mental health is not considered evidence of character."[148] Courts have only begun to grapple with the practical difficulty of distinguishing mental health and character.

A federal case gives a rare glimpse into how the two might be distinguished, though it still fails to fully justify the unique treatment of psychological propensity evidence. In *Bemben v. Hunt*,[149] the court states that "insanity, or other medically diagnosed ailments are not generally thought of as character traits."[150] The court reasoned that plaintiff's diagnosis of an "organic delusional disorder" and her psychiatric medical records speak to her "state of mind" and are thus proper non-character evidence. The "state of mind" language is likely

144. United States v. Nixon, 694 F.3d 623, 636 (6th Cir. 2012).

145. Bemben v. Hunt, No. 93 C 509, 1995 WL 27223, at *2 (N.D. Ill. Jan. 23, 1995) ("[I]rrational behavior is not evidence of a character trait . . . .").

146. *See* Laprime v. Pallazzo, 100 F.3d 953 (5th Cir. 1996).

147. *Mental Abnormality Evidence When Criminal Responsibility Not at Issue*, 32 MO. PRAC., MISSOURI CRIMINAL LAW § 4:8. (2d ed.).

148. Karl B. Teglanda and Elizabeth A. Turner. Definition of character evidence, 5 Wash. Prac., Evidence Law and Practice § 404.2 (6th ed. West 2023) State v. Kelly, 685 P.2d 564 (Wash. 1984).

149. *Bemben*, 1995 WL 27223, at *2.

150. *Id*.

meant to suggest that psychological evidence is permissible under FRE 404(b) to prove intent, absence of mistake, etc.

However, this is a red herring. The distinction between actions and mental states is artificial. *All character traits* speak indirectly to an individual's state of mind; it is not actually possible to infer character traits without also inferring mental states.[151] When we hear that a defendant has previously exposed his genitals and masturbated in front of children, we will use that past act to infer what kind of person he is, so that we can predict whether his actions were intentional on this particular occasion. This is true with any of the permissible *mens rea* uses under FRE 404(b). We know this from the previously discussed literature on person-centered blame.

What's more, in many cases the mental states and the actions are so inextricably intertwined, that to hear that the defendant had the required *mens rea*—intentionally exposing his genitals to a minor—is to simultaneously prove the *actus reus* of lewdness.[152] This presents a major problem for the common use of 404(b) evidence to prove mental states like intent or motive. When judges instruct jurors not to use evidence of motive to infer a character trait, it is not just that we are asking jurors to do something hard; we may be asking them to do something impossible.

Expanding the definition of *modus operandi* under 404(b) to include psychological profile evidence is yet another convoluted way to allow character evidence by another name. For example, "characteristics" of being a drug trafficker[153] or sex offender are sometimes allowed as M.O. evidence, to argue action in conformity with the profile.[154] This should be improper under 404(b), as these uses do not rule out all other suspects, they merely put the accused within a group of likely suspects. But because attorneys and courts misunderstand

151. *See* Jennifer Ray et al., *supra* note 13.

152. "[T]he gap between the proper and improper inferences can be thin to the point of being theoretical. . . . we are asking a jury to deploy a substantial degree of mental discipline when we ask it to consider a defendant's past acts to assess whether his accuser is making up the allegations, but to simultaneously not consider whether the fact that the defendant has committed the prior acts means he has a propensity to commit those crimes." State v. Richins, 496 P.3d 158, 167 (Utah 2021).

153. "Balbo's testimony regarding Nigerian drug trafficking patterns did not constitute evidence of character traits. Far from suggesting that Doe had a 'propensity' to import or distribute drugs—as, for instance, a dishonest person might have a propensity to lie, or a hot-tempered person might have a propensity to throw the first punch—Balbo's testimony served only to illuminate the *modus operandi* of Nigerian importers of Southeast Asian heroin." United States v. Doe, 149 F.3d 634, 638 (7th Cir. 1998).

154. *See generally* United States v. Romero, 189 F.3d 576 (7th Cir. 1999).

how propensity evidence works, this sort of misapplication of 404(b) is common.

In many cases, psychological profile evidence is simply not treated as implicating the character evidence ban, because it "classif[ies] people by their shared physical, emotional, or mental characteristics."[155] And character evidence classifies people by *what*, exactly? The judicial reasoning in this area is admittedly hard to follow, and thus hard to explain in a way that reconciles the inconsistencies. The saving grace of psychological profile data cannot be that it focuses on groups, because it is ultimately being used in a trial to draw inferences about *an individual's likely behavior*. In many cases, psychological propensity evidence is probably admitted despite violating FRE 404 because courts want it to be. Pure and simple.

Culturally, we seem to be in a bit of an in-between period as it relates to the stigma of mental illness. As the science of mental health has advanced, we have come to appreciate that having certain diagnoses or fitting certain profiles *does* allow us to better predict how someone might behave. However, in some cases possessing a mental health trait may not reflect negatively on someone's moral character, while in other cases it is still heavily stigmatized as blameworthy and under our control. Mental illnesses like autism or intellectual disabilities are treated more like objective, amoral diagnoses. Others, like psychopathy or addiction, still have a long way to go before they will be treated in the same way. The courts' disparate treatment of low intelligence and addiction reveals quite a bit, *sub silentio*, about what the character evidence rules are meant to cover.[156]

ii. Morality Distinguishes Psychological Propensity Evidence from Character Evidence

Unfortunately, some judges bend over backwards to justify the use of psychological profile evidence. But the gymnastics leave our rules in knots. Most psychological profile evidence does not bypass the impermissible propensity inferences of 404(a). Where this kind of evidence is allowed, it appears to be because the diagnosis makes it seem more objective and less moralized, or because judges are being

155. Ryan v. State, 988 P.2d 46, 55 (Wyo. 1999).

156. Petitioner's low I.Q. and his limitations in cognitive functioning were not technically considered character evidence, and were allowed. Smith v. Wasden, No. 4:08-cv-00227-EJL, 2016 WL 1275603, at *31 (Idaho Mar. 31, 2016); *see also* Petetan v. State, 622 S.W.3d 321, 331 (Tex. Crim. App. 2021) (discussing how intellectual disabilities are not considered character traits).

outcome-oriented, and it provides a particularly useful type of propensity evidence. But make no mistake, when it is being used to draw propensity inferences about the "kind" or "type" of person someone is, it is just character evidence by another name.

The difficulty courts have classifying psychological profile evidence is due in part some psychological traits being heavily moralized, and some being morally neutral. Psychological propensity evidence, like habit evidence and evidence of physical traits, straddles the Venn diagram between character and non-character evidence. This can lead to instrumentalism and too much discretion, where judges admit character evidence they want to see admitted, while having plausible deniability to exclude character evidence that ought to be excluded. This is not a recipe for fairness or predictability.

This previous section explained that the dividing line between many types of behavioral propensity evidence has historically been morality. Because we tend to blame people for voluntarily acting in ways that are considered immoral or harmful to others, these sorts of behaviors are thought of as implicating the character ban. We do not tend to blame people for things that are out of their control, like involuntary, reflexive behaviors (habits), objective physical traits, or medical or psychological diagnoses. However, this dam of morality that was previously keeping character, habit, physical and psychological traits from flowing into one another has breached.

We are now in a bit of a flux as to how to classify behavior that stems from mental illness. Society still judges much of this behavior to be immoral, despite increasing awareness of its biological and social roots. As mental illnesses have become medicalized and understood as public health phenomena, we are now confronted with traits that sit on a continuum between voluntary and involuntary, moral and medical, physical and mental, caused by nature *and* nurture. We cannot say that mental illnesses are completely moral and under our control. Nor are they always reflexive and robotic. Nor can we say they are purely physical or diagnostic. Instead, mental illness is a messy hybrid of all of these things.

In the next section, I will apply this understanding to interpretations of addiction evidence. Evidence of someone's addiction was historically treated as a moral, voluntary character trait. However, now that character traits need not be moral, addiction may also be considered a habit. This fits with how it is colloquially described. Addiction is also considered a psychiatric diagnosis, with strong physical risks

and manifestations. So, which is it? At present, judges mostly continue to treat addiction as a moral failing, despite increasing awareness of its biological roots.[157] But this may be changing.

C. Part 3: What is Addiction?

Addiction is the perfect case study for revealing the fuzziness of evidentiary categories. This is due to its complex etiology and its ubiquity in cases ranging from battery, car accidents, theft, domestic violence, child custody and even entitlement benefits.[158] Depending on whom you ask, you may be told addiction is a physical brain disease, a response to trauma, a socially constructed disability, a behavioral compulsion, a mental illness, or simply the result of bad personal choices. Addiction defies easy classification and straddles many binaries. It is physical *and* mental, behavioral *and* psychological, genetic *and* environmental, external *and* internal. There are aspects that involve goal-directed behavior and agency, and aspects that render our free choices severely compromised.[159] Those who become addicted will struggle to resist the compulsion to use the drug, even in the face of severe negative life consequences. They may go through periods of abstinence, but will often relapse.

Perhaps it is the relapsing nature of the disorder that has led us to treat addiction as a sign of a weak will or immoral character. If some people can stop using drugs in the face of negative consequences, why can't the person with addiction disorder? To be sure, throughout history alcoholics and people with addiction have been considered the "lowest of the low."[160] They have been mocked and left to die on the streets.[161] Until the Supreme Court intervened in 1962 to claim that

157. United States v. Hendrickson, 25 F. Supp. 3d 1166, 1168 (N.D. Iowa 2014) ("[T]he law still responds to drug abusers with punitive force, rather than preventative or therapeutic treatment.").

158. *See generally* Mary Taylor, *Parent's Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights,* 20 A.L.R.5th 534, *3 (1994); Linda G. Mills & Anthony Arjo, *Disability Benefits, Substance Addiction, and the Underserving Poor: A Critique of the Social Security Independence and Program Improvements Act of 1994*, 3 GEO. J. ON FIGHTING POVERTY 125, 126 (1996); *see generally* Lisa Lightman, M.A. & Francine Byrne, M.A., *Addressing the Co-Occurrence of Domestic Violence and Substance Abuse Lessons from Problem-Solving Courts*, 6 J. CTR. FOR FAMILIES, CHILD. & CTS 53 (2005).

159. Christian Lüscher, Trevor Robbins, Barry Everitt, *The Transition to Compulsion in Addiction*, 21 NATURE REV. NEUROSCIENCE 247, 247 (2020).

160. Teneille Brown, *The Role of Dehumanization in Our Response to People With Substance Use Disorders*, 11 FRONTIERS IN PSYCHIATRY 372, 1 (2020).

161. Fahmida Homayra, Lindsay A. Pearce, Linwei Wang, Dimitra Panagiotoglou, Tamunoibim F. Sambo, Neale Smith, Rchael McKendry, Bonnie Wilson, Ronald Joe, Ken Hawkins, Rolando Barrios, Craaig Mitton & Bohdn Nosyk, *Cohort Profile: The Provincial Substance Use*

this violated the 8th and 14th Amendments, California even made the *status* of addiction a criminal offense.[162]

People with addiction have often been depicted in the media as non-human—as something *we* could never be.[163] This dehumanization has fed into its stigmatization and its neglect by medicine, researchers, and policymakers.[164] For hundreds of years, people with addiction to alcohol or other drugs, and who lacked the resources to hide these behaviors from the public, have been labeled morally corrupt.[165] This is the view that existed at the time that the character evidence rules developed, which used problem drinking ("intemperance") as one of the quintessential examples of what the character ban was meant to cover.[166]

While not everyone who uses drugs will enter the cycle of addiction—binging, withdrawing and then craving—roughly 10% of those exposed will become dependent and addicted. The more we learn, the more we realize that this has much less to do with moral weakness, and much more to do with factors outside of the individual's control. The opioid crisis, which was initially fueled by physicians over-prescribing pain medications, demonstrated how susceptible *we all are* to substance use disorders. Addiction can affect anyone, no matter their class, race, education, or seeming moral fortitude.[167]

As more people have openly acknowledged their private addictions, and as more research has been done on its biological risks and

Disorder Cohort in British Columbia, Canada, 49.6 INT'L J. EPIDEMIOLOGY 1776, 1776-50 (2020) (describing how much more common homelessness and poverty are in cohorts of people with SUD).

162. Robinson v. California, 370 U.S. 661, 667 (1962).

163. Lasana Harris & Susan Fiske, *Social Neuroscience Evidence for Dehumanized Perception*, 20 EUR. REV. SOC. PSYCH. 192 (2009); MICHELLE ALEXANDER, THE NEW JIM CROW 5 (New York: The New Press (2012)).

164. Petros Levounis, *Addiction: Not a Hangnail, But Not Poverty Either,* 42 ACAD. PSYCHIATRY 277, 277 (2018) ("For the longest time, people who care for addicted patients have been screaming from the rooftops that addiction is grossly underestimated, underappreciated, underdiagnosed, and undertreated."); s*ee also* Dror Ben-Zeev, Michael A. Young & Patrick W. Corrigan, *DSM-V and the Stigma of Mental Illness*, 19 J. MENTAL HEALTH 318, 319 (2010); Bernice Pescosolido, *The Public Stigma of Mental Illness: What Do We Think; What Do We Know; What Can We Prove?* 54 J. HEALTH & SOC. BEHAV. 1, 11 (2013).

165. M.C. Angermeyer & S. Dietrich, *Public Beliefs AAbout and Attitudes Towards People with Mental Illness: A Review of Population Studies*, 113 ACTA. PSYCHIATRICA SCANDINAVICA 163, 170 (2006).

166. *See generally* Fed. R. Evid. 404 advisory committee's notes.

167. Teneille R. Brown, *Treating Addiction in the Clinic, Not the Courtroom: Using Neuroscience and Genetics to Abandon the Failed War on Drugs*, 54 IND. L. REV. 29, 74 (2021) ("While better access to mental health services, affordable housing, childcare, and a mandatory living wage would do wonders in reducing the rates of addiction, these important social accommodations are not going to stamp it out.").

manifestations, it has become clear that addiction is not a moral failing.[168] Some people are at a *much* greater risk of becoming addicted or dependent on drugs, based on their social[169], familial[170], environmental, genetic[171], and neurobiological risk factors.[172] The causes of addiction are multifactorial and interact with one another.[173] This understanding greatly complicates the story we tell about the cause of addiction being a moral failing.[174]

Motivated in part by a desire to reduce the stigma of addiction, neuroscientists have perhaps swung the pendulum too far in the other direction. Now, rather than addiction being described as a matter of weak will, it is presented as a disease of the hijacked brain. Much of the older scholarship surrounding the classification of addiction furthers this dichotomous way of thinking.[175] Addiction is presented as *either* a moral choice or a physical disease. I have argued for abandoning this simplistic way of thinking, in favor of a more nuanced model that reflects the science as well as the lived experiences of people with addiction. Behavioral psychologists and neuroscientists seem to be catching on to this type of thinking. More are now furthering more nuanced models of addiction that reflect its voluntary and involuntary aspects. The modern thinking on addiction is still quite mixed, however. It remains simultaneously a character trait, a habit, a physical disease, and a psychological disorder.

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168. Today, "[a]ddiction is defined as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences." Compulsive drug seeking and use despite harmful consequences certainly characterizes Hendrickson's conduct. Thus, while addiction was once thought of as merely a moral failure, it is now rightly identified as a serious medical condition."
United States v. Hendrickson, 25 F. Supp. 3d 1166, 1172 (N.D. Iowa 2014).

169. Marco Venniro et al., *Volitional Social Interaction Prevents Drug Addiction in Rat Models*, 21 NATURE NEUROSCIENCE 1520, 1520 (2018).

170. Imaneh Abasi &Parveneh Mohammadkhani, *Family Risk Factors Among Women With Addiction-Related Problems: An Integrative Review*, 28 INT J HIGH RISK BEHAV ADDICT e27071, 1 (2016).

171. Nora Volkow et al., *The Neuroscience of Drug Reward and Addiction*, 99 PHYSIOL REV. 2115, 2115-16 (2019).

172. Alan I. Leshner, *Addiction is a Brain Disease*, 17 ISSUES SCI. & TECH. 75, 77–78 (2001); Nora D. Volkow & George Koob, *Brain Disease Model of Addiction: Why Is It So Controversial?*, 2 LANCET PSYCHIATRY 677, 677 (2015); Nora D. Volkow et al., *Neurobiological Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363, 364 (2016); Richard Crist & Benjamin Reiner, Wade Berrettini, *A review of opioid addiction genetics,* 27 CURR OPIN PSYCHOL 31, 31 (2019).

173. Ruth Shim, et al., *The Social Determinants of Mental Health: An Overview and Call to Action*, 44 PSYCHIATRIC ANNALS, 22, 22–26 (2014).

174. Teneille R. Brown, *Treating Addiction in the Clinic*, *supra* note 167, at 54.

175. *See* Daniel Z. Buchman et al., *Negotiating the Relationship Between Addiction, Ethics, and Brain Science*, 1 AJOB NEUROSCI. 36, 38 (2010).

1. Addiction is a Habit

In the psychology literature, habits are defined as conditioned responses to particular stimuli. That is, when we see things that remind us of our cocaine use, we learn to pair them with a feeling of euphoria or craving that we experienced when using. Addictions are therefore the result of overlearning. They are not just evidence of a reliable, semi-automatic habit, they are *one of the strongest habits we can form*.[176] Those who become addicted to drugs develop compulsive behaviors, which short-circuit goal-directed networks and rely more on operant reward learning processes.[177] When someone becomes severely addicted to drugs, their brains are literally rewired to subordinate primary goals (including eating and bathing) to drug use. This is in spite of increasing physical tolerance and decreased euphoric effects of the drug itself. This suggests that even when the drug stops being pleasurable, the drug-seeking can become as habitual as the drug-taking.[178] Addictive behavior "is a compulsion – beyond one's conscious control and without regard for one's rational judgment – to indulge in particular behaviors or in the consumption of certain drugs."[179]

Because habits like drug addiction rely on conditioned responses that are semi-automatic and semi-volitional, they are sometimes presented as the absence of goal-directed behavior.[180] However, more recent models of addiction deconstruct this binary and recognize that there are aspects of even severe addiction that can involve goal-directed choices. Addiction severely diminishes our ability to act intentionally and in goal-directed ways, but rather than "hijacking" our brains, it might just represent an imbalance between our in-tact goal-directed and habitual behaviors.[181]

There are few habits that are harder to break than drug addiction. If the evidence rules find habit evidence probative because of its frequency and reliability, then drug seeking and using behaviors should be admitted under FRE 406 and its state counterparts. If we do not

176. Christian Lüscher, *supra* note 159.
177. *Id*.
178. *Id*.
179. Lily E. Frank & Saskia K. Nagel, *Addiction and Moralization: The Role of the Underlying Model of Addiction*, 10 NEUROETHICS 129, 130 (2017).
180. Youna Vandaele & Patricia H. Janak, *Defining the place of habit in substance use disorders*, 87 PROGRESS IN NEURO-PSYCHOPHARMACOLOGY AND BIOLOGICAL PSYCHIATRY, 22, 22 (2018).
181. *Id*.

think addiction is appropriate evidence under FRE 406, it is not because it does not technically fit the definition of habit under the rules. It is because it forces us to say the quiet part out loud—which is that the rules of evidence are fundamentally about steering folk judgments about morality. Retethering the rules to morality does not mean that jurors *ought* to be making moral judgments. However, it reflects the reality of how jurors automatically infer moral character traits, which leads to the kind of sticky dispositional inferences that the rules were intended to avoid.

2. Addiction is a Physical Trait

The development of severe addiction is almost never entirely under an individual's control.[182] Addiction is often triggered by childhood trauma and inherited biology.[183] The genetic contribution to addiction accounts for a whopping 40% to 50% of the risk.[184] This heritability is "similar to those of diabetes, asthma, and hypertension."[185]

The precision of genetic models of addiction has improved remarkably in the last few years. This is leading to the development of polygenic risk scores to predict addiction risk.[186] Neuroscientists are also exploring specific genetic mutations on three mu-opioid receptors in mice that can drive different pathways to addiction. One particular mutation in mice encourages more euphoria in response to drugs, another mutation leads to quicker physical dependence, and yet another leads to more dysphoria or withdrawal symptoms, which can trigger continued use.[187] All three pieces of the addiction cycle—withdrawal, craving, and binging—might have strongly heritable properties.

In addition to being driven by biological factors, once addiction takes hold it is decidedly a physical thing. Drug addiction can be evidenced by structural and functional changes in the brain as well as

182. Amy Loughman & Nick Haslam, *Neuroscientific Explanations and the Stigma of Mental Disorder: A Meta-analytic Study*, 3 COGNITIVE RES.: PRINCIPLES & IMPLICATIONS, 1, 2 (2018).

183. Kenneth Blum et al., *Genetic Addiction Risk Score (GARS)™, a Predictor of Vulnerability to Opioid Dependence*, 10 FRONTIERS IN BIOSCI. 175, 176 (2018).

184. Volkow & McLellan, *Opioid Abuse in Chronic Pain — Misconceptions and Mitigation Strategies, 374 N. Engl. J. Med. 1253,* 1257 (2016); *see also* Nora D. Volkow & Maureen Boyle, *Neuroscience of Addiction: Relevance to Prevention and Treatment*, 175 AM. J. PSYCHIATRY 729, 730 (2018).

185. Volkow & McLellan, *supra* note 184.

186. Shao-Cheng Wang, et al., *Opioid Addiction, Genetic Susceptibility, and Medical Treatments: A Review* 20 INT'L J. OF MOLECULAR SCI. 4294, 4294 (2019).

187. Emmanuel Darcq & Brigitte Lina Kieffer, *Opioid Receptors: "Drivers" to Addiction?*, 19 NAT. REV. NEUROSCI. 499, 504-05 (2018).

neurochemical abnormalities.[188] Even after someone has been in recovery for years, their brain function and structure may reflect the hallmarks of addiction.[189] Longitudinal neuroimaging studies show alterations in "different regions consisting of gray matter volume reduction, white matter impairment, focal perfusion deficits, as well as neurochemical abnormalities."[190] Addiction is not purely mental, it has reliable physical manifestations that have become visible in the last few decades through breakthroughs in neuroimaging.

Given its strong biological and behavioral basis, addiction is a perfect disease for exploring the interconnectedness of the physical and the mental. Perhaps one day we will treat addiction more like asthma or hypertension—diseases with similar genetic risk. But this is a long way off, given the perceived immorality of drug use. Many among us remain wedded to the idea that addiction is a voluntary mental illness, and thus a sign of weak moral character. Because of this, despite being a physical trait, addiction is very unlikely to be admitted as physical propensity evidence or has habit. But it could be one day.

3. Addiction is a Psychological Profile

In addition to being habitual and physical, addiction is also psychological. Substance use disorder (SUD) is the label given to the psychiatric diagnosis of chronic, relapsing addiction. It has been in psychiatry's Diagnostic and Statistical Manual-5 since 1952.[191] Psychologists sometime refer to the "behavioral endophenotypes" of SUD, which are behaviors that cooccur with the disorder. These include "high impulsivity, negative affect, and lower executive function."[192]

188. *See generally* Muhammed Parvaz, et al., *Structural and functional brain recovery in individuals with substance use disorders during abstinence: A review of longitudinal neuroimaging studies,* 232 DRUG ALCOHOL DEPEND. 109319, 1 (2022).

189. *Id*. ("Neuroimaging studies provide reliable evidence for structural and functional including neurochemical abnormalities in the prefrontal cortex and numerous other cortical and subcortical brain regions with chronic exposure to substances of abuse, irrespective of the specific drug consumed").

190. Andreas Büttner, *The neuropathology of drug abuse*, 13 CURRENT OPINION IN BEHAVIORAL SCIENCES 8, 8 (2017).

191. Michael Norko & Lawrence Fitch, *DSM-5 and Substance Use Disorders: Clinicolegal Implications*, 42 J. AM. ACAD, PSYCHIAT. & LAW 443, 443 (2014).

192. Alexander Hatoum, et al., *The addiction risk factor: A unitary genetic vulnerability characterizes substance use disorders and their associations with common correlates* 47 NEUROPSYCHOPHARMACOLOGY 1739, 1739 (2021).

Specifically, deficits include problems with impulsivity, anxiety[193], depression[194], self-monitoring, insight and metacognition (thinking about thinking), naming their emotions (alexithymia), novelty-seeking, and willingness for behavior change.[195] Because these psychological traits have both physical and biological causes, they have been "linked to neural abnormalities in a diverse network of brain regions encompassing cortical midline areas, insula, and [the] frontal cortex."[196] The profile of addiction is not unique to any one drug of choice, and has been "widely associated with addiction to a broad range of drugs."[197] These behaviors tend to cluster together in ways that create a psychological profile—not too dissimilar from battered women syndrome. Indeed, addiction could easily be compared to the ways in which someone does or does not fit the profile of a sexual deviant or abuse victim. Given how stigmatized addiction is, and how people tend to use person-centered blame, the admission of addiction as psychological propensity evidence (or habit, or a physical trait) could be catastrophic to the presumption of innocence and fairness of trials.

In this previous section, I explained the multifactorial causes of addiction to show how it straddles multiple categories of evidence. When used to argue that one's addiction makes it more likely they will behave a certain way, this squarely meets the definition of character evidence. And yet, evidence of addiction also meets the definition of habit, physical traits, and psychological profile evidence.

D. Part 4: Judges Struggle to Classify Addiction Evidence

In the next section I will explore how addiction evidence is usually classified as character evidence, but increasingly is introduced as habit evidence.[198] A few judges have already used addiction as profile

193. *See generally* Lindy Howe, *Symptoms of anxiety, depression, and borderline personality in alcohol use disorder with and without comorbid substance use disorder*, 90 ALCOHOL 19, 19-(2020).

194. *Id.*

195. *See generally* Julia Marquez-Arrico, et al., *Personality Profile and Clinical Correlates of Patients With Substance Use Disorder With and Without Comorbid Depression Under Treatment,* 9 FRONT. PSYCHIATRY, 1, 6-7 (2019).

196. *See generally* Crista Maracic & Scott Moeller, *Neural and Behavioral Correlates of Impaired Insight and Self-Awareness in Substance Use Disorder*, 8 CURR. BEHAV. NEUROSCI. REP. 1, 9 (2021).

197. Bianca Jupp & Jeffrey Dalley, *Behavioral endophenotypes of drug addiction: Etiological insights from neuroimaging studies*, 76 NEUROPHARMACOLOGY 487, 488 (2014).

198. *See* Michael Davis, *supra* note 6, at 630; *see also* State v. Moreno, 2010 WL 173306, at *5 (Ariz. Ct. App. Jan. 19, 2010).

evidence, adopting the reasoning, if not the term. A 2017 case out of New York comes close to labeling addiction as physical trait evidence.[199] As you can see, because addiction straddles many evidentiary categories, judges have considerable discretion to admit or exclude addiction evidence, perhaps even instrumentally. This leads to unpredictability and potential for unfairness, as evidence of bad habits may be admitted as character evidence by another name.

1. Addiction is Character Evidence

Going back to the Civil War era, evidence of addiction has typically been treated as impermissible character evidence. In one case, a defendant sought to prove that he had a habit of gambling when drunk. He wanted to testify that he was drinking on the day certain promissory notes were executed and so he probably was gambling when he gave away "his own negotiated paper" to pay for his losses at the cards table.[200] In rejecting this as impermissible character evidence that spoke to "moral turpitude," the court stated that allowing him to "give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."[201]

This was a bit of hyperbole, even then. Common law had already developed exceptions to the ban on character evidence if the defendant in a homicide case was alleging self-defense. Thus, there are early American cases where the accused was allowed to prove that the deceased was "a violent and dangerous man when under the influence of intoxicating liquors. . .and may have had one reputation for peace and quiet when sober, and quite another for these same traits when drunk."[202] However, going back hundreds of years, if self-defense or adequate provocation were not alleged, evidence of the deceased's alcoholism was usually considered inadmissible character evidence.[203]

The more modern case of *State v. Hart* reveals how evidence of addiction is still typically treated as character evidence.[204] In a second-

199. *See* Ortiz v. City of N.Y., 2017 WL 5613735, at *9 (S.D.N.Y. Nov. 21, 2017).
200. Thompson v. Bowie, 71 U.S. 463, 471 (1866).
201. *Id*.
202. *See generally* State v. Manns, 37 S.E. 613, 614 (W. Va. 1900).
203. *See* State v. Field, 14 Me. 244, 249 (1837); *see also* State v. McDaniel, 47 S.E. 384, 384 (S.C. 1904); *see also* State v. Collins, 32 Iowa 36, 38 (1871) (finding error in rejecting evidence that deceased, when under the influence of liquor, was "quarrelsome, vindictive, ugly and dangerous."); *contra* Moseley v. State, 41 So. 384, 385 (Miss. 1906) ("[T]estimony is admissible of the character of the deceased when under the influence of cocaine. A man may be peaceable and quiet when sober, but a terror when affected by cocaine.").
204. *See* State v. Hart, 584 N.W.2d 863, 867 (S.D. 1998).

degree murder case, the prosecution's witnesses characterized the defendant as violent when he drank, to suggest he was the first aggressor. However, the defendant had not put his character at issue under the mercy rule, so this was a mistake. On appeal, the defendant argued he should have been able to discredit the state's witnesses with his own testimony of how the victim was *also* violent when drunk. The court found that allowing the evidence showing that Hart was a mean drunk, while not allowing the evidence that the victim was as well, was not an abuse of discretion.[205] The evidence that he was a "violent drunk" likely swayed the jury toward a finding of guilt.

In another case, the defendant sought to discredit a state witness by introducing evidence that he had committed larceny to support his drug addiction.[206] The trial court prevented the defendant from inquiring into the witness's addiction, because it was not "probative of his veracity" and was impermissible character evidence.[207] This decision was not found to violate the defendant's constitutional rights. Of course, if the addiction evidence had been introduced, it would have swayed the jurors' assessment of the witness's credibility.

2. Bad Habits, Like Addiction, Are Not Admissible Under FRE 406

Addiction has historically not been considered habit evidence under FRE 406, despite being the quintessential bad habit. For example, testimony that a witness repeatedly insisted that she be allowed to drive when drunk, was not considered habit evidence. The court stated that "not all conduct that is repeated frequently and consistently" is habit and " a significant factor. . .is the degree of volition required for the activity; the more thought and planning required for the act" the less likely it would count as habit.[208] In this case, the witness's drunk driving amounted to "volitional decisions on her part, and those acts cannot be said to have been performed out of reflex."[209] Thus, the volitional aspect of the behavior is doing the work of morality here, as we typically require that people act voluntarily before we condemn their behavior. Voluntary, immoral behavior is thus character evidence.

205. *Id*. at 868 (Sabers, J., dissenting).
206. State v. Rivera, 240 A.3d 1039, 1048 (Conn. 2020).
207. *Id*. at 1047.
208. Wacker v. State, 171 P.3d 1164, 1169 (Alaska Ct. App. 2007).
209. *Id*.

Likewise, a case decided by the Southern District Court of New York, demonstrated that repeated drinking while battling alcohol addiction may not always be habit evidence. The plaintiff wanted to introduce evidence of the defendant's habit of drinking at a particular bar, to prove he was likely drinking on the day of a car accident. Without explaining why, the court stated this is not the "type" of habit evidence admissible under the FRE.[210] Because the FRE do not speak to any "type" of habit evidence, and indeed the ACN provide examples of habitual behaviors that involve volition, it is not clear what exactly the court meant here. One can only guess that this has to do with the unwritten rule that habit evidence must be amoral.

Another car accident case precluded evidence of defendant's drug and alcohol use as a habit under Rule 406. The defendant driver filed a *motion in limine* to exclude any reference to his addiction. The plaintiff contested this, arguing that defendant's drug use was relevant to the reason he lost his job and his "evasive, irresponsible, and reckless choices."[211] The court granted the defendant's motion, finding the evidence inadmissible. It is not always obvious how evidence of addiction ought to be classified. In any event, cases like this reiterate that bad or immoral habits are typically not allowed under FRE 406.

Given that evidence of obtaining informed consent[212] or following clinical guidelines is allowed as habit by federal judges, it is difficult to argue that habit evidence *must* be wholly reflexive. As we have seen, cases that involve thought and action planning—such as flying a plane or removing a tooth—can be considered a habit. What seems to distinguish these cases from the addiction cases above is that the implicated behaviors are not moralized. While this can only be gleaned from the cases and appears nowhere in the FRE or CAN, it appears *necessary* that character evidence be voluntary, but that alone is *not sufficient* to distinguish habit from character. The additional ingredient that is needed for repeated behavior to count as habit is for it to be morally neutral.

210. *See* Gilman v. McCarthy, 2015 WL 2152802, at *2 (S.D.N.Y. May 7, 2015).
211. Wilcox v. Horne, 2018 WL 8131673, at *1 (D. Wyo. May 3, 2018).
212. *See* Crawford v. Fayez, 435 S.E.2d 545, 550 (N.C. Ct. App. 1993) (finding the testimony of five former patients was sufficient to establish that a doctor had a habit of warning against side effects of prescriptions).

3. In Some Cases, Bad Habits, Like Addiction, Can Be Treated as 406 Evidence

By removing reference to morality under the definition of character, the drafters of the rules of evidence opened the door to moral habit evidence, and strategic attorneys have walked right in. The majority view still appears to be that immoral, "bad habits" like addiction should be treated as character evidence. However, some judges have found that addiction can be admitted under Rule 406.

Some 19th century cases allowed the jury to infer likely behavior from someone's "condition" of alcoholism. In a case challenging insurance coverage for risky behavior, testimony was permitted that the insured "was in the habit of getting intoxicated for three or four days after each pay day; that upon such occasions 'he came home and behaved uproariously,—just as an uproarious drunken man does,—and abused his family."[213] This case was well before psychological profile evidence had been coined as a type of evidence. However, it describes the profile of a drunk man and his propensity to behave as an "uproarious drunk" toward his family.

More recent cases have recognized that evidence of addiction may be used to prove a plaintiff's comparative fault. Despite sometimes being a "close call," evidence of a party's addiction can be admitted for propensity purposes under FRE 406.[214] However, the addiction habit must occur with sufficient regularity and frequency.[215] In a 1985 product liability case, the defendant component part manufacturer was able to present evidence of the plaintiff's alcoholism to prove he could have been drunk on the day of the accident and comparatively at fault. The court allowed this, despite recognizing the danger that it "may afford a basis for improper inferences."[216]

In another personal injury case, an expert was called by the defendant tractor company. The expert wanted to testify that the plaintiff "was either under the influence of drugs or was suffering from

213. United Brethren Mut. Aid Soc. of Lebanon v. O'Hara, 13 A. 932, 934 (Pa. 1888).

214. *See* Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1524 (11th Cir. 1985) ("We do not attempt here to develop a precise threshold of proof necessary to transform one's general disposition into a "habit"; on a close call, we will find the district court's admission of evidence relating to Loughan's drinking on the job rose to the level of habit pursuant to rule 406.").

215. *See* Reyes v. Mo. Pac. R. Co., 589 F.2d 791, 795 (5th Cir. 1979) (ruling that evidence of four prior convictions for public intoxication spanning a three- and one-half-year period was on "insufficient regularity to rise to the level of 'habit' evidence.").

216. Loughan, 749 F.2d at 1524 (citing Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 511 (4th Cir.1977)).

withdrawal symptoms" at the time of his crash, because "Waller was an habitual user of narcotic drugs."[217] The court acknowledged that "evidence of intemperate 'habits' is generally excluded, as it runs too close to the line as being character.[218] However, while there are "there are no hard and fast rules," the court found that the defendant provided "enough of a habit of regular drug use to render the evidence admissible."[219] The plaintiff argued that he would not have taken pain medication unless he could lie down and rest, and so he would not have acted in line with his habit on that occasion. But the court claimed the testimony of plaintiff's addiction was still allowed because the "whole purpose of Rule 406 is to allow proof of a person's conduct by reliable circumstantial evidence of prior behavior."[220] This case illustrates the power of classifying behavior as habit evidence. Once behavior meets the definition of "habit" under 406, it can be admitted even when the conditions for the habit being expressed may not have been present.

Other cases have found that addiction evidence could count as a habit under 406, but that there needs to be a clear link between the habitual behaviors and the present case. For example, if a party wants to introduce evidence that someone is always on his way to buy drugs when he is carrying his drug paraphernalia (to prove that he could not have been present at a murder) then they need to prove that the murder location was different from the location of the heroin purchase.[221] But importantly, the heroin addiction was *not* dismissed as being an inappropriate type of habit evidence.[222]

In another case, opioid addiction was found to be permissible habit evidence, so long as the proponent articulated a "specific situation" the individual was responding to reflexively.[223] It is not enough to just show that an individual has an addiction, and thus acted in conformity with it. In this New Hampshire judge's view, to be admitted as a habit under 406, the addictive behavior must be carefully described, and it must precisely explain relevant behavior in the case.

Sometimes judges within the same jurisdiction disagree about whether addiction is an appropriate habit evidence. Shortly after a

217. Waller v. Massey-Ferguson, Inc., 1995 WL 534882, at *2 (5th Cir. Aug. 15, 1995).
218. *Id*. at *3.
219. *Id*. at *4.
220. *Id*.
221. *See* Tomlin v. Patterson, 2013 WL 4046451, at *23 (S.D. Ala. Aug. 7, 2013).
222. *Id*.
223. *See* State v. Mackenzie, 281 A.3d 212, 216-17 (N.H. 2022).

judge in the Southern District of New York held that someone's alcoholism could not be habit evidence under 406, a different judge in the same district found that testimony that the defendant "used marijuana every day" *was* admissible as habit evidence. The latter judge stated that "[w]hen a party's intoxication is at issue, evidence of regular alcohol or drug use is admissible under Rule 406."[224] What this tells us is that applications of 406 might be driven by "how relevant and probative [the evidence of habit is] to the case at bar"[225] rather than the frequency or type of behavior.

4. Addiction Coupled with Physical Trait Propensity Evidence Can Be Character, or Ordinary Admissible Evidence

Recall that physical trait propensity evidence (such as strength or height) is typically admitted easily without fanfare. However, if that same physical evidence speaks to behavior that is considered immoral, it is much more likely to be treated as impermissible character evidence. This provides yet another illustration of how morality is the practical fulcrum for classifying behavioral evidence.

In an 1838 case where the defendant was alleging he was unlawfully detained, the defense sought to introduce testimony that the plaintiff was violent and capable of physically restraining him when drunk. The defendant argued that on a previous occasion, the plaintiff had "thrown stones'" and "resisted arrest" when inebriated. However, the court found that the reference to intemperance rendered this evidence impermissible.[226]

There are too few cases in this area to discern any trends. However, some judges treat addiction as physical, medical evidence that is properly explained by experts. A 1905 case held that an expert physician could testify as to whether people addicted to opioids tend to keep their addictions secret. Indeed, the court stated that such expert medical testimony "might furnish the only means of proving the fact."[227] Thus regarding the typical behavior of an addict, testimony may be permitted not as character or habit evidence under the predecessors to 404(b) or 406, but rather as expert "medical" evidence.

In a more recent case, a judge permitted the jury to hear about a defendant becoming violent when drinking. During the trial, the judge

224. Dooley v. United States, 577 F. Supp. 3d 229, 236 (S.D.N.Y. 2021).
225. Chomicki v. Wittekind, 381 N.W.2d 561, 565 (Wis. Ct. App. 1985).
226. *See* Ellis v. Short, 38 Mass. 142, 144, 21 Pick. 142, 144 (1838).
227. Buxton v. Emery, 102 N.W. 948, 950 (Mich. 1905).

went to great lengths to argue that this was not permitted to prove character, but instead to prove that "alcohol ha[s] an effect on a person's personality or brains so they act in a way other than they would normally act when they're sober."[228] The court further explained that this evidence was introduced to prove "the chemical reaction of the alcohol in the brain and how the brain is responding to that chemical substance, whether it's alcohol, whether it's heroin, whether it's methamphetamine, that is not character evidence."[229] Here, a moral behavior is combined with a physical trait argument. While it is hard to know exactly why the judge classified this addiction evidence as permissible, it might be because the seeming objectivity of the physical trait propensity evidence reduces or sanitizes any potential prejudice.

A more recent case also gets quite close to calling addiction a physical trait. In a Section 1983 action, the defendants sought to introduce the petitioner's medical records from the day of an alleged civil rights violation by law enforcement. The medical records would have indicated that the petitioner had alcoholism, and had been admitted several times before for alcohol poisoning. The petitioner challenged the introduction of this as impermissible character evidence. In an incredibly interesting opinion, the court states that it is not character evidence, nor is it habit, but rather ordinary, helpful testimony:

"While discussions of the admissibility of evidence of alcohol abuse and alcoholism have existed mainly in the context of character and habit evidence, there is reason for courts to understand alcoholism outside these bounds. Today, alcoholism is considered as much a disease as a reflection of character or habit. Courts have recognized, for example, that alcoholism and other addictions can be considered as diseases or disabilities for the purposes of the American with Disabilities Act. . . Alcoholism, like drug addiction, is an 'impairment' under the definitions of a disability set forth in the FHA, the ADA, and the Rehabilitation Act. There exist ample medical studies dedicated to the study of alcoholism as a medical illness."[230]

228. People v. Mickey, 2012 WL 1652631, at *16 (Cal. Ct. App. May 11, 2012).
229. *Id*.
230. Ortiz v. City of N.Y., 2017 WL 5613735, at *9 (S.D.N.Y. Nov. 21, 2017).

5. Cases Where Psychological Profile Addiction Evidence is Character Evidence

The admissibility of psychological profile evidence is too varied to draw any principled conclusions or trends. It seems to be admitted somewhat randomly and with different justifications, especially when it relates to addiction. Unfortunately, because profile evidence is essentially just evidence of group stereotypes to argue someone conformed to the stereotype, it is not always clear when the stereotypes are being triggered. This results in disparate treatment by courts.

In a California case, the defendant was convicted of distributing and selling narcotics. The chief issue was whether the large amount of methamphetamine could have been for personal use, rather than for distribution. The defendant's expert, a licensed psychotherapist, testified that the "defendant had a severe long-term addiction to methamphetamine, and that he was the type of addict who could easily use 12.5 grams for his personal use."[231] The expert also answered the prosecutor's questions about the defendant's addiction, and his defense attorney failed to object. In finding that this was not ineffective assistance of counsel, the court never even contemplated that this evidence might amount to impermissible character evidence.[232] The psychological expert testimony was used to argue that the defendant acted in conformity with a particular profile of an addict. However, for some reason it did not trigger an analysis of California's equivalent of 404.

Massachusetts has prohibited "negative" profile evidence, which is when a party argues that someone's actions do *not* fit a psychological profile.[233] In drug trafficking cases, the defendant might try to use profile evidence to argue that he was a "vicious heroin addict" that possessed the heroin solely for personal use.[234] More often it is the state that relies on addiction profile evidence, to argue that a defendant fits the profile of a drug-trafficker, based on his conduct. Either way, if the profile evidence is used to argue that someone acted in conformity with a trait on a separate occasion, it implicates the character ban. Addiction profile evidence is not allowed in Massachusetts, because it is "akin to character evidence."[235]

231. People v. Lyons, 2013 WL 6070493, at *1 (Cal. Ct. App. Nov. 19, 2013).
232. *See id*. at *4.
233. *See* Commonwealth v. Torres, 971 N.E.2d 336, 336 (Mass. 2012).
234. *See* Commonwealth v. Walton, 86 N.E.3d 246 (Mass. 2017).
235. State v. Belgarde, 2009 WL 2997912, at *3 (Minn. Ct. App. Sept. 22, 2009).

In addition to being impermissible character evidence when used to predict individual propensity, there is another big problem with using profile evidence. Like stereotypes, the profiles themselves are often quite unreliable. They are rarely validated with sound empirical evidence, and may even be made up by drug agents to fit the facts of the case. A Minnesota court has pointed out how "incongruous and fatuous" the drug courier profile factors have become. For example, drug agents treat "being the first, or one of the first, passengers to deplane; being the last passenger to deplane; and deplaning from the middle"[236] to mean the same thing—that the person is a trafficker. This profile evidence appears to be nothing more than anecdotal.

In a Ninth Circuit criminal case, the defendant challenged the introduction of what he called "drug addict profile" evidence, to argue that he fit the profile of a drug conspirator and was therefore part of a drug conspiracy. The state argued that this was not profile evidence, because the expert was simply asked "whether a drug addict could carry drugs or otherwise function in a drug conspiracy," to which the expert presumably answered "yes."[237] From the record provided, this appears to be propensity evidence, linking someone who is a drug addict with possible behavior of trafficking in drugs. However, the appellate court did not see it this way, and found that this group stereotype evidence was permissible non-character testimony.

In another example, evidence of someone having an "addictive profile" was included in a toxicology report in a criminal case. In addition to identifying the level of drug in defendant's system, profile evidence was also allowed to show defendant's likely conformity with addictive behaviors, such as drug withdrawal and substitution. In *State v. Dilboy*, the expert was allowed to testify that, the defendant was experiencing "peak withdrawal symptoms" which could impair his reaction time, and may produce "risk taking behavior."[238] The expert opined that "a person who ingests heroin two to three times a week, and who substitutes other drugs when unable to get heroin, shows 'an addictive profile.'"[239] The court ignored the fact that toxicology report included profile testimony, and instead interpreted the expert's testimony as going only to "acts which constituted part of the crimes

236. State v. Williams, 525 N.W.2d 538, 547 (Minn. 1994).

237. United States v. McChristian, 47 F.3d 1499, 1505 (9th Cir. 1995).

238. State v. Dilboy, 999 A.2d 1092, 1098 (2010), as modified on denial of reconsideration (June 3, 2010), cert. granted, judgment vacated, 564 U.S. 1051 (2011).

239. *Id*.

charged."[240] It therefore allowed it. From the appellate record, this appears mistaken, as the testimony goes well beyond answering whether the defendant had drugs in his system at the time, and instead speculates about how addicted people tend to behave.

Some judges have found that addiction profile evidence is impermissible, but for reasons other than it being considered character evidence. In an Arizona case, the defendant sought to introduce expert testimony that he has the "profile of a substance abuser" and "an addictive personality."[241] However, the court said it was properly excluded because it had "no probative value" as to whether the defendant committed the robbery and kidnapping in question."[242] This is hard to reconcile with the facts of the case, previous holdings, and the low threshold for finding evidence probative. However, this particular result might have been a convenient way of precluding admission of the defendant's profile evidence under the mercy rule of 404(a)(2).

Conclusion

Because character no longer refers exclusively to a criminal defendant's *bad* reputation for doing immoral things, and because of increasing awareness of the neurogenetic and environmental causes of behavior, character cannot easily be distinguished from other types of behavioral evidence.[243] An expansive definition of character that is stripped of its moral valence means that habit, physical traits and psychological traits begin to resemble character when used for propensity purposes. Traditionally, testimony surrounding these sorts of traits were *not* considered character evidence and could have been rather handily admitted to prove a predisposition to act in a certain way. But if character no longer speaks to virtues and vices, then it is hard to maintain the boundaries between it and these other common types of behavioral evidence.

The previous section demonstrated how unpredictable and blurry the classification of addiction evidence can be. It can be labeled im-

240. *Id*.
241. State v. Winters, 771 P.2d 468, 469 (Ariz. 1989).
242. *Id*.
243. "Character in the law of evidence is an enigma. Advances in psychological research over the past few decades have drastically altered modern conceptions of character and, in the process, have created the potential for confusion as courts determine the admissibility of character evidence." *See* Barrett Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1914 (2012).

permissible character, or permissible habit, physical, or profile evidence. Imprecision in classifying addiction evidence may work to judges' advantage, permitting them to exclude or admit it depending on their personal preference. This arbitrary treatment can lead to instrumentalism rather than a fair, principled approach to applying the rules. This is also no way to protect vulnerable, unsympathetic parties from the kinds of attribution errors the character evidence rules were developed to prevent.

We must stop relying on the big lie of evidence. It is disingenuous to argue that regardless of how the evidence is introduced—as habit, profile evidence, or evidence of *modus operandi* or lack of accident—no character inferences will be drawn because we told jurors not to draw them. However, there is a growing appreciation that even when addiction evidence is admitted for a non-character purpose, it will likely be used to color every aspect of the trial and will inflate ratings of moral blame. We cannot assume that jurors will follow complicated jury instructions to ignore implicit and spontaneous character inferences.[244] Once this stigmatized evidence is heard by the jury, they will engage with the very types of prejudicial attributions the character evidence ban was developed to prevent.

We therefore need to retether character evidence to its roots in controlling attributions of moral blame. Any behavioral evidence that triggers an inference of immoral character—whether framed as reflexive habit, voluntary character, or a physical or psychological trait—should be subjected to the character evidence ban regardless of how it is labeled. In other work, I have argued that the ban should be lifted in favor of a presumption of inadmissibility for immoral traits only.[245] This is still my ultimate goal. However, recognizing that there might not be political will to reimagine and overhaul the rules, at the very least the character evidence ban should apply to all morally-laden behavior used for propensity purposes. This will better protect vulnerable, unsympathetic parties from the very kinds of unfair prejudice the character evidence rules were created to prevent while injecting more descriptive validity into the rules.

244. *See generally* Pizarro & Tannenbaum, *supra* note 56.
245. Teneille R. Brown, *The Content of Our Character*, *supra* note 25.

BOOK REVIEW

Journalism in the Age of Clickbait

GREGORY M. DICKINSON*

SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH. By *Martha Minow*. New York, N.Y.: Oxford University Press. 2021. Pp. xvii, 233. $24.95.

Martha Minow's Saving the News *lays bare a dramatic shift in American news reporting—the decline of local, in-depth, and investigative journalism in favor of attention-grabbing and politically divisive stories that circulate wildly on social media. Her book proceeds to navigate potential constitutional obstacles to reform by showing how, although the First Amendment prohibits Congress from abridging the freedom of speech, it is no bar where Congress acts instead to strengthen speech. This Book Review extends Minow's analysis by considering the human and technological roots of the social-media phenomenon: the Americans who choose to read vapid, misleading news stories and the algorithms that circulate them. Sensationalist journalism thrives not by force-feeding us rotten content, but by employing algorithms to plumb the depths of our minds and feed us the very salacious content we love most. A deeper Big Tech battle thus rages within each one of us, between what we want and what we know is good for us. Social-media reform can succeed by empowering us to choose well.*

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Introduction

Newspapers are the lifeblood of American democracy. At least they were. But the last three decades have seen a seismic shift, with storied and less-storied newspapers closing shop as Americans abandon traditional media in favor of more tailored, narrowly focused, and increasingly digital sources of news.[1] More than half of Americans now rely on social media and other algorithm-curated news sources to help choose the articles they read.[2] And only 16% continue to read newspapers and other print news sources, down from almost 50% as recently as 2013.[3] Local newsrooms have been particularly hard hit, with nearly 1,800 newspapers having closed since 2004.[4]

In her new book, *Saving the News*,[5] Harvard Law School Professor Martha Minow warns that the shift to online news is no mere change to digital window dressing. It is a revolutionary departure that could prove catastrophic for the democratic engagement that news reporting nourishes. Most disruptive to the news industry, says Minow, has been the loss of the subscription revenues that newspapers rely on to fund newsgathering and investigative journalism.[6]

The News We Read

Subscription revenues have been undermined in two ways. First, consumers have become so accustomed to free online content that newspapers have been forced to follow suit—offering up content for free and relying on advertising revenues to fund their operations.[7]

1. *See* Elahe Izadi, *Newspapers Keep Eliminating Print Days. They Say it's for the Best*, WASH. POST (Apr. 12, 2022, 7:00 AM), https://www.washingtonpost.com/media/2022/04/12/gannett-newspaper-print-days/ (discussing newspapers' elimination of print copies and redirection of readers to electronic editions); Lara Takenaga, *More than 1 in 5 U.S. Papers Has Closed. This is the Result*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html (discussing newspaper closings in the preceding fifteen years, drop in number of journalists employed, and the public's turn to social media for news).

2. *See* Nic Newman, Richard Fletcher, Anne Schulz, Simge Andi, Craig T. Robertson & Rasmus Kleis Nielsen, *Reuters Institute Digital News Report 2021,* REUTERS INST. (10th ed. 2021), at 112-13, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf.

3. *Id.*

4. *Id.* at 112.

5. *See generally* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

6. *Id*.

7. Modern news outlets' difficulty generating revenue is a long-standing and well-known problem. *See, e.g.*, Hayley Tsukayama, *Why Yahoo's Troubles Reflect Bigger Problems for Media*, WASH. POST: THE SWITCH (July 17, 2014, 3:01 PM), https://www.washingtonpost.com/news/the-switch/wp/2014/07/17/why-yahoos-troubles-reflect-bigger-problems-for-media/ (documenting Yahoo!'s struggles to generate ad-based revenue); Corinne Steinbrenner, *How Can News "Pa-*

Like many businesses, newspapers have struggled to make the transition. A few marquee publications have successfully migrated their subscriber bases to an online format,[8] but many more have been left scrambling, and largely failing, to attract online views.

Second, the online revolution has pressed newspapers to unbundle their content offerings. Like cable-television providers,[9] newspapers long sold large bundles of content, lumping together everything from national politics to high-school athletics, weather forecasts, and crossword puzzles. Readers interested primarily in national politics and crossword-puzzles subsidized local newsgathering and vice versa. Now, however, readers can play their daily word-puzzle in one place, often for free, and find their political news elsewhere. With so many options available, readers see no need to get everything in one place. This puts newspapers in competition with more streamlined services for niche content and eliminates an important source of revenue.

It would be one thing if newspaper readers were exchanging their print newspapers for digital ones. But for most publications and for most readers, the shift has been more than a change in medium. Readers are not just receiving their old news sources digitally; they are consuming different genres of news altogether. At the heart of the shift, says Professor Minow, are platforms like Facebook, YouTube, and Netflix, whose business models have fundamentally changed our

pers" Make Money on the Web?, B.U. COLL. OF COMMC'N: JOURNALISM (Oct. 27, 2010), https://www.bu.edu/com/articles/how-can-news-papers-make-money-on-the-web/ (explaining newspapers' focus on advertising as a source of revenue).

8. *See* Carmen Ang, *Ranked: The Most Popular Paid Subscription News Websites,* VISUAL CAPITALIST: TECH. (Apr. 26, 2021), https://www.visualcapitalist.com/ranked-the-most-popular-paid-subscription-news-websites/ (showing that, according to online subscriber data, the New York Times, Washington Post, and Wall Street Journal are leading in online subscribers, with 6.1, 3.0, and 2.4 million subscribers, respectively); *see also* Marc Tracy, *Local Papers Find Hints of Success With Online Subscriptions* , N.Y. TIMES: MEDIA (Feb. 9, 2022), https://www.nytimes.com/2022/02/09/business/media/local-news-subscriptions.html (attributing the success of the New York Times and Wall Street Journal in attracting digital subscribers to their national audiences); Peter Kafka, *The New York Times's Old White Democrats Problem*, VOX (Apr. 6, 2022, 7:00 AM), https://www.vox.com/recode/23011969/new-york-times-subscriber-athletic-age-peter-kafka-media-column (explaining how reliance on subscriber rather than advertising revenue was critical to the success of digital New York Times).

9. *See* John Koblin, *Unwrapping the Cable TV Bundle*, N.Y. TIMES: TV TRANSFORMED (Oct. 3, 2015), https://www.nytimes.com/2015/10/05/business/media/unwrapping-the-cable-tv-bundle.html. (discussing cable customers' move to "skinny bundle," choosing smaller bundles of cable channels and using the savings for streaming services like Hulu or Netflix); Chris Brantner, *More Americans Now Pay for Streaming Services than Cable TV*, *Forbes: Consumer*, (Mar. 20, 2019, 4:13 PM), https://www.forbes.com/sites/chrisbrantner/2019/03/20/americans-now-pay-more-for-streaming-services-than-cable-tv (noting a large rise in streaming service customers compared to cable TV customers, with 69% of consumers subscribing to at least one streaming service in 2019, up from just 10% in 2009).

media-consumption habits.[10] Anyone who has found herself scrolling through her Twitter newsfeed or Netflix recommendations is familiar with the new landscape: a virtually infinite variety of content is there for the taking, all tailored to individual preferences. Instead of choosing from whatever is currently playing on the Big Three television networks,[11] viewers now direct their own media consumption.

As platforms become ever more attuned to our preferences, we find ourselves inside individualized content bubbles[12] that show us the things we want to see. This trend has carried over to the news industry.[13] Not only have they changed television viewing habits, Minow explains, but "Amazon, YouTube, and Netflix changed the way vast numbers of people find news."[14] What's more, she laments, decisions regarding users' access to news and other media are made "without even consulting them."[15] "Instead of offering clear choices, digital platforms . . . rely[ ] on analyses of computer data usage that is opaque to users."[16]

The shift toward self-directed Netflix-style news feeds has changed not only *how* Americans read the news but also the *types* of news stories they choose to read. With more and more news being consumed electronically, there is less need for capital investment and bulky, expensive printing equipment required for traditional publish-

10. *See* MINOW, *supra* note 6, at 19 (recounting disruption of the media industry by streaming services that "customize people's access to news . . . without even consulting them").

11. *See* Sarah Whitten, *Nearly 25% of Households Will Ditch Traditional TV by 2022*, CNBC: ENT. (Aug. 6, 2019, 6:00 AM), https://www.cnbc.com/2019/08/06/nearly-25percent-of-households-will-ditch-traditional-tv-by-2022.html (explaining how streaming services are responsible for a significant decline in traditional broadcast and cable television); Dana Feldman, *Just How Bleak Is the Future of Traditional TV?*, FORBES: BUS. (Nov. 19, 2018, 3:12 PM), https://www.forbes.com/sites/danafeldman/2018/11/19/just-how-bleak-is-the-future-of-traditional-tv/?sh=7f3076df35b6 (discussing the decline of broadcast and satellite television).

12. *See* Jihii Jolly, *How Algorithms Decide the News You See*, COLUM. JOURNALISM REV. (May 20, 2014), https://archives.cjr.org/news_literacy/algorithms_filter_bubble.php (explaining how algorithms interact with readers' psychological dispositions to show content readers already agree with); *see also* NICHOLAS DIAKOPOULOS, AUTOMATING THE NEWS: HOW ALGORITHMS ARE REWRITING THE MEDIA 177–80 (Harv. Univ. Press 2019) (documenting the lack of diversity of news sources readers are shown and the role algorithms play in shaping exposure to ideas).

13. *See* Jihii Jolly, *How Algorithms Decide the News You See*, COLUM. JOURNALISM REV. (May 20, 2014), https://archives.cjr.org/news_literacy/algorithms_filter_bubble.php (describing the trend toward individualized content recommendations in the context of news media); DIAKOPOULOS, *supra* note 12, at 177–80 (same).

14. *See* MINOW, *supra* note 6, at 19.

15. *Id.*

16. *Id.*

ers.[17] Low entry costs mean that anyone can become a publisher, whether or not they have any investors, capital, or anything useful to say. Even low-quality, cheaply produced, clickbait-type articles can be profitable as long as they attract enough online viewers to bring in advertising dollars.[18]

Media outlets have responded by adopting strategies that maximize revenues in the era of cheap content and self-directed media consumption. One such strategy is narrowcasting,[19] where a news story is tailored to appeal to a small slice of the population rather than the public at large. Traditional publishing formats required newspapers to design content with broad appeal to attract a large subscriber base.[20] But internet publication is so inexpensive that it is now a viable strategy to develop content for a single, niche audience.[21]

Many media outlets have also begun to focus on sensational stories that rouse emotions and attract views, clicks, and advertising dollars by splitting the public into opposing camps.[22] "The effect", says Professor Minow, "is to make the user into the product and potentially provide easy vehicles for those who profit from increasing social division, fomenting hatred, and undermining democracy."[23] Perhaps most concerning of all, however, is the type of content we are losing: independent news outlets, regional news coverage, state, and local

17. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–07 (1995) (noting that historically free speech has favored popular or well-funded ideas but that the lower costs of electronic distribution change that trend).

18. *See* Melissa De Witte, *What This Stanford Scholar Learned About Clickbait Will Surprise You,* STAN. NEWS (Mar. 21, 2018), https://news.stanford.edu/2018/03/21/this-stanford-scholar-learned-clickbait-will-surprise (explaining that click-based metrics "drive[ ] stories that get higher traffic rather than higher quality stories" but also noting that clickbait articles "can be used to subsidize stories that turn us into more enlightened citizens").

19. *See generally* Miriam J. Metzger, *Broadcasting Versus Narrowcasting: Do Mass Media Exist in The Twenty-First Century, in* THE OXFORD HANDBOOK OF POL. COMMC'N 795–808 (Kate Kenski & Kathleen Hall Jamieson, eds., 2018) (discussing the shift from broadcasting to narrowcasting across media genres).

20. *See* MINNOW, *supra* note 6, at 12–18 (describing the historical shift from the broad, mainstream journalism of the post–World War II era to today's "narrowcasting," which "aim[s] for slices of the community rather than trying to reach everyone).

21. *See id*.

22. *See* Claire Wardle, *Understanding Information Disorder,* FIRST DRAFT (Sep. 22, 2020), https://firstdraftnews.org/long-form-article/understanding-information-disorder (describing as "information disorder" the unreliable state of online news and media content and enumerating online outlets' motivations and techniques for spreading such content); Gilad Edelman, *How Facebook's Political Ad System Is Designed To Polarize,* WIRED (Dec. 13, 2019, 7:00 AM), https://www.wired.com/story/facebook-political-ad-system-designed-polarize (discussing how Facebook's algorithms make it more difficult to overcome partisan barriers to reach readers across the political aisle).

23. *See* MINOW, *supra* note 6, at 20.

politics, and investigative journalism—the sorts of reporting that drive vigorous participation in the political process.

Saving the News thus exposes an important trend in American journalism: tailored, divisive, and potentially addictive online content is supplanting many of the news sources that Americans have relied on for the last century and which have been critical to democratic participation. Professor Minow's critique, however, somewhat overstates the problem. It must be remembered, after all, that the news sources being displaced by digital media bore their own set of flaws—many of them little different from those we see today. Before Buzzfeed's ten-question personality quizzes and "Foolproof Signs Your Partner is Cheating," we had Cosmo and People Magazines. And before Breitbart News and David Avocado Wolfe, we had cable news and radio shock jocks. Sensational journalism, narrowcasting, and other tactics have been around for as long as humans have held idiosyncratic preferences and been attracted to salacious content.[24] Content tailoring and scandal peddling may be cheaper and more targeted in the digital age, but the basic premise is nothing new. Everyone likes a good gossip column.

Free Speech Questions

A second shortcoming is related to the first. Professor Minow levels a powerful critique against Facebook, Twitter, and the clickbait articles that they host. Such "computational propaganda," she argues, "enables a surprising amount of disinformation" by attracting user views (and advertising dollars) with "arresting headlines and attention-drawing ads."[25] That is certainly true, but by stopping there Professor Minnow leaves largely unexplored the other side of the phenomenon—the Americans who repeatedly choose to read such material and whose historical content preferences have trained the algorithms that now fill their social-media feeds. Online content may be vapid, misleading, and even blatantly false; but it is what Americans choose to read.

That is how the whole big-data, social-media machinery operates: Algorithms figure out what we most like to read and then hit us with a never-ending, firehose blast of it. They are Robert Nozick's pleasure

24. *See* Harry Harris, *How the Internet Changed Gossip,* PROSPECT (Jan. 16, 2018), https://www.prospectmagazine.co.uk/philosophy/how-the-internet-changed-gossip (discussing the history, evolution, and social functions of gossip).

25. *See* MINOW, *supra* note 6, at 24.

machines actualized![26] Behind the battle over social media, we thus find the age-old question of individual freedom versus governmental authority to impose well-meaning restrictions in the name of the public good. By approaching Big Tech one-dimensionally, as a malevolent power force-feeding us harmful content, Professor Minow overlooks the struggle within each one of us between what we want at the moment and what we know is good for us.

This criticism of its framing aside, however, *Saving the News* makes at least two important contributions to the debate. First, it brings into unusually stark relief an important trend in American news reporting: the decline of local, in-depth, and investigative journalism. That in itself would be contribution enough. But Professor Minow's work shines even more brightly when it turns to consider the First Amendment's place in the online-news and disinformation debates. Does not the First Amendment, she asks, bar congressional action that would implicate expressive internet content?[27] Were Congress to regulate online news reporting directly, of course, it would almost certainly run afoul of the First Amendment. Adherents to "First Amendment fundamentalism"[28] might see this as the end of the inquiry, but, explains Professor Minow, this view misses an important nuance: Although the First Amendment prevents Congress from *abridging* the freedom of speech, the Constitution is no bar to Congressional action to *strengthen* speech.[29]

The distinction between abridging versus strengthening free speech is the cornerstone of Professor Minow's argument. To illustrate the point, she recounts the history of the Federal Communications Commission's Fairness Doctrine,[30] a rule formally announced by the FCC in 1949, but with roots much earlier, in the first decades of radio and television, when the scarcity of available frequencies limited the number of companies that could broadcast programming. To opti-

26. ROBERT NOZICK, ANARCHY STATE, AND UTOPIA 42–45 (1974) (famously posing a thought experiment where one is asked to choose between true reality and a more pleasurable simulated reality).

27. MINOW, *supra* note 6, at 58–101.

28. *Id.* at 58 (adopting the phrase from VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY (2019)).

29. *Id.* at 60.

30. For a brief overview of the FCC's fairness doctrine and its continuing relevance, *see generally* RODNEY A. SMOLLA & MELVILLE NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 26:5. For a thorough contemporary discussion of the doctrine, *see* Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (1985).

mize the use of the scarce signal spectrum, the FCC adopted the Fairness Doctrine, which placed significant restrictions on radio and television broadcasters' freedom to select content.[31] The rule required that, when discussing controversial issues of public concern, broadcasters must use a portion of their broadcast time to present competing points of view to ensure that all sides of the issue were discussed.[32] Despite these significant restrictions on broadcasters' expressive activity, the Supreme Court upheld the rule against the First Amendment challenge in its famous 1969 decision, *Red Lion Broadcasting Co. v. FCC*, reasoning that the scarcity of available frequencies made broadcast licensees trustees for the public and that the challenged Fairness Doctrine would enhance rather than restrict freedom of expression.[33]

The history of the Fairness Doctrine and the Supreme Court's *Red Lion* decision thus support Professor Minow's basic point: Governmental expansion of avenues for speech on important issues is different from naked restriction of speech, even if some speech must be restricted in the process.[34] Of course, the Fairness Doctrine was abandoned on constitutional grounds by the FCC in 1987.[35] And, Minow concedes, "A fair question is whether it would remain viable legally as the predicate of spectrum scarcity fades, given that content is now carried not just by broadcasting but also over cable and the internet."[36] Yet, even if the Fairness Doctrine itself might no longer be constitutionally sound, Minow urges Congress to take inspiration from it and consider new, alternative measures that would, as the *Red Lion* Court found, "enhance rather than abridge the freedoms of speech and press protected by the First Amendment."[37]

31. *See* MINOW, *supra* note 6, at 66–67 (discussing the fairness doctrine and related regulations by the FCC); 3 SMOLLA & NIMMER, §§ 26–27 (providing a history and overview of broadcast and cable television regulation).

32. MINOW, *supra* note 6; SMOLLA & NIMMER, *supra* note 31.

33. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–388 (1969).

34. *See id.*

35. *See* In Re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y., 2 FCC Rcd. 5043, 5057-58 (1987) (FCC order repealing the Fairness Doctrine); *see generally* Rosel H. Hyde, *FCC Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation*, 38 SYRACUSE L. REV. 1175 (1987) (critique of the FCC's decision to repeal the Fairness Doctrine by Rosel H. Hyde, Acting Chairman of the FCC when it adopted the doctrine).

36. MINOW, *supra* note 6, at 70.

37. *Red Lion*, 395 U.S. at 375.

After introducing this key insight, Professor Minow avoids putting her weight behind any particular reform proposal.[38] Instead, she presents a veritable smorgasbord of ideas.[39] Social media companies might, for example, be required to pay local news sources for their stories, with the hope of reinvigorating local journalism; or consumer protection law might be leveraged to force platforms to remove fake or fraudulent online accounts, or Congress might even adopt the British model and use taxpayer funds to support newsgathering and reporting directly. In a way, what approach we should take is not Minow's point. Her point is that traditional news journalism is in trouble and that we must resolve to do *something* about it, even if we don't yet know exactly *what*.

In *Saving the News*, Professor Minow lays bare a dramatic shift that is underway in American news reporting, and she shows how reform may be possible even within the confines of the First Amendment. There is room to disagree with the proposals she offers, and her account of social media's ills must be tempered by consideration of our own role and the importance of individual self-determination. But Professor Minow offers a compelling account of a shift we have all felt, toward sensationalistic and divisive media content. Anyone who thinks about these issues will benefit from her work.

38. Minow, *supra* note 6, at 101.
39. *Id*. at 101–44.

Hiding In Plain Sight: How the Fourteenth Amendment's Privileges or Immunities Clause Uproots Qualified Immunity and Secures a Constitutional Remedy Against State Violence

AUSTIN LEWIS HOLLIMON[1]

ABSTRACT

The Fourteenth Amendment guarantees to all citizens certain "privileges or immunities . . . that no state shall [ ] abridge." Infamously ambiguous—the Privileges or Immunities Clause has an overlooked but clear meaning. Shortly after passage, the Clause granted federal protection to Black Americans as they endured targeted violence at the hands of former Confederate rebels. This Note centers Black Americans' trials—and, more importantly, *triumphs*—during the Reconstruction Era. By recounting the victory of Black Americans and their government over the first Ku Klux Klan, this Note illuminates the Privileges or Immunities Clause's most obvious purpose—protecting Black Americans from private and state violence through federal power. Justice Clarence Thomas is the only Justice in the Supreme Court's history to wrestle deeply with the Privileges or Immunities Clause's impact on Black Americans. This Note builds upon Justice Thomas' thinking. Ultimately, this Note argues jurists and legal scholars should embrace the original meaning of the Privileges or Immunities Clause. In the future, the Clause should limit qualified immunity,

1. Austin Lewis Hollimon is a 2023 graduate of Howard University School of Law. I dedicate this article to Captain Jim Williams and the thousands of Black Americans who died because the U.S. Constitution—as understood in the 1870s—went unenforced. This work is authored so that their sacrifice might illuminate a pathway towards a more perfect union, even now in the 21st Century. Many thanks to Kufere Laing, Tuneen Chisolm, Cedric M. Powell, Frank Lowrey, Gavin McGimpsey, Princess Jefferson, and the editors of the Howard Law Journal who each contributed to this publication. Any mistakes are my own.

a judicial doctrine that deprives citizens of a federal remedy to State violence today.

INTRODUCTION

"Until the lions have their own historians, the history of the hunt will always glorify the hunter"[2]

On May 25, 2020, the Minneapolis Police Department ("M.P.D.") issued a public statement claiming a "[m]an die[d] after medical incident during police interaction."[3] After allegedly "physically resist[ing] officers,"[4] "the suspect"—later identified as George Floyd—"[was placed] into handcuffs and . . . appeared to be suffering medical distress."[5] M.P.D's public statement suggested no police action had contributed to Mr. Floyd's death.[6] Had it not been for a witness's cell phone video of the incident,[7] the official recollection would have likely been the final word.

A bystander, Darnella Frazier, documented the truth of this fateful encounter.[8] Her cell phone footage shows Officer Derek Chauvin pressing his body weight on a vulnerable, handcuffed George Floyd; Chauvin's knee dug into Floyd's neck. A gathering crowd pleaded with Officer Chauvin to release George Floyd. Despite the bystanders and Mr. Floyd's cries, Chauvin kept his knee in place. Eight minutes elapsed. Under the weight of Chauvin, George Floyd suffered. He begged for mercy, begged for his mother, and he eventually lost consciousness. George Floyd died under the weight of Derek Chauvin and the M.P.D.

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2. Jerome Brooks, Chinua Achebe, The Art of Fiction No. 139, 133 THE PARIS REV. (1994), https://www.theparisreview.org/interviews.1720/the-art-of-fiction-no-139-chinua-achebe/.

3. John Elder (Minneapolis Police Dep't Dir. of Pub. Info.), *Man Dies After Medical Incident During Police Interaction* (May 26, 2020), Jake Tapper (@jaketapper), TWITTER (Apr. 20, 2021, 5:39 PM), https://twitter.com/jaketapper/status/1384622849562873856/photo/1.

4. *Id.*

5. *Id.*

6. *Id.* ("At no time were weapons of any type used by anyone involved in this incident.").

7. Yaron Steinbuch, *Darnella Frazier wasn't looking to be hero by filming George Floyd video: lawyer,* N.Y. POST (June 12, 2020, 9:47 AM), https://nypost.com/2020/06/12/teen-who-recorded-george-floyd-video-wasnt-looking-to-be-hero/.

8. *Id.*

The recording of George Floyd's death exposed the official M.P.D. statement as a public lie. Millions watched George Floyd's last moments on social media.[9] Their reaction, our reaction — a tragic mixture of horror, shock, and despair—inspired marches across the globe. Millions of protestors took to the streets.[10] They pleaded for the state to vindicate something fundamental that Officer Chauvin took from George Floyd: his right to life. This public outcry compelled city officials to investigate Floyd's death. State officials later charged Derek Chauvin with murder.[11] A year later, a jury convicted him of the same.[12] George Floyd's family filed a civil rights lawsuit against Minneapolis, and the City settled for $27 million.[13] In some small way, the state substantiated George Floyd's fundamental rights. Because of the video, M.P.D. had to repudiate its dishonest report. But what if the video never surfaced?

George Floyd would have died like many others before him, without the government substantiating his most fundamental rights against state infringement. In 2013, Ryan Stokes was shot in the back by Kansas City Police as he raised his arms to surrender to them.[14] Mr. Stokes was unarmed,[15] "falsely accused of stealing a cellphone,"[16]

9. Meredith Deliso, *Darnella Frazier, who recorded video of George Floyd's death, recognized by Pulitzer board*, ABC NEWS (June 11, 2021, 2:24 PM), https://abcnews.go.com/US/darnella-frazier-recognized-pulitzer-prizes-george-floyd-video/story?id=78225202. ("A Washington Post-Ipsos poll conducted on June 14, 2020, found that 79% of Americans said they had seen the video.").

10. *See generally* Anne-Christine Poujoulat, *Protests across the globe after George Floyd's death*, CNN (June 13, 2020, 3:22 PM), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html.

11. Colin Dwyer & Vanessa Romo, *George Floyd's Arresting Officer Charged With 3rd-Degree Murder, Manslaughter,* NPR (May 29, 2020, 10:56 PM), https://www.npr.org/2020/05/29/864732088/minneapolis-seethes-over-george-floyds-death-as-trump-calls-protesters-thugs.

12. Janelle Griffith, *Derek Chauvin convicted of murder and manslaughter in George Floyd's death*, TODAY (Apr. 20, 2021, 5:11 PM), https://www.today.com/news/derek-chauvin-convicted-murder-manslaughter-george-floyd-s-death-t215790.

13. The Associated Press, *Minneapolis to pay $27M to settle George Floyd Family Lawsuit*, FOX NEWS (Mar. 12, 2021, 2:32 PM), https://www.foxnews.com/us/minneapolis-to-pay-27m-to-settle-floyd-family-lawsuit.

14. Brief for the Petitioner at 6, N.S. ex rel. Lee v. Kan. City Bd. of Police Comm'rs, 35 F. 4th 1111, 1113 (8th Cir. 2022), No. 22-556 (petition for cert. filed Dec. 9, 2022) 2022 WL 17821209, at *6 ("Mr. Stokes. . .was surrendering to Officer Straub, and was not threatening any of the responding officers.").

15. *Id.* ("Mr. Stokes did not have a gun[.]")

16. Makenzie Koch, *Ryan Stokes' mother can't sue Kansas City officer who killed her son: court,* FOX4KC (Jun. 1, 2022, 3:59 PM), https://fox4kc.com/news/ryan-stokes-mother-cant-sue-kansas-city-officer-who-killed-her-son-court/; *see also id.* at *5 ("Neither Mr. Stokes nor Mr. Cann was involved in the alleged theft that prompted the public disturbance.").

and in a well-lit area.[17] One officer on the scene "re-holstered his firearm" after he witnessed Ryan Stokes "voluntarily put his hands up above his waist and surrender peacefully."[18] At nearly the same moment, Officer William Thompson "shot and killed Ryan Stokes [from behind] for no legitimate reason."[19] No video ever emerged of Ryan Stokes' killing. There was no viral social media post, no mass protest, and no nationwide public chants of "Justice for Ryan Stokes."[20] On the contrary, Ryan Stokes's death was treated mainly as normal,[21] even as it was similarly unjustifiable.

Officer William Thompson was not charged with a crime.[22] The U.S. District Court and Eight Circuit Court of Appeals dismissed a civil lawsuit alleging wrongful death and excessive force against Kansas City.[23] Both Courts found Mr. Stokes' lawsuit barred by qualified immunity, a doctrine this Note seeks to uproot.[24]

"Qualified immunity has served as a shield for officers, protecting them from accountability"[25] for nearly fifty years. The Supreme Court invented qualified immunity to "protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority."[26] Since its creation, the doctrine has deprived victims of officer misconduct and unjustified violence of access to federal courts as a forum for redress.[27] This Note

17. Brief for the Petitioner, *supra* note 14, at *5 ("Mr. Stokes was illuminated by the headlights of the red Monte Carlo, and was in plain view of [the officer who shot him].").

18. *Id.* at *6.

19. *Id.* at *1 ("The record evidence. . . confirms that Mr. Stokes was never a danger to officer safety. He was not armed. He was not threatening any police officers. He was not suspected of a violent crime. He was not resisting arrest. And he did not disobey any officer commands. Instead, he voluntarily raised his hands above his waist in an effort to surrender peacefully to a nearby officer.").

20. *But see* Mohamed Ibrahim, *Fiery chants for justice from marches at Chauvin trial*, THE ASSOCIATED PRESS (Mar. 8, 2021, 7:02 PM), https://www.wlns.com/top-stories/ap-fiery-chants-for-justice-from-marchers-at-chauvin-trial/.

21. *See, e.g.,* Mark Berman et al., *Protests spread over police shootings. Police promised reforms. Every year, they still shoot and kill nearly 1,000 people*, WASH. POST (June 8, 2020) ("Since 2015, police have shot and killed 5,400 people."); *see also* Alicia Victoria Lozano, *Fatal Encounters: One man is tracking every officer-involved killing in the U.S.*, NBC NEWS (July 11, 2020), ("As of July 10, [2020] Fatal Encounters lists more than 28,400 deaths dating to Jan. 1, 2000. The entries include both headline-making cases and thousands of lesser-known deaths.").

22. Koch, *supra* note 16.

23. N.S. ex rel. Lee v. Kan. City Bd. of Police Commissioners, No. 4:16-CV-00843-BCW, 2020 WL 641728, (W.D. Mo. Feb. 11, 2020); N.S. ex rel. Lee v. Kan. City Bd. of Police Comm'rs, 35 F.4th 1111, 1113 (8th Cir. 2022).

24. *Id.*

25. Jamison v. McClendon, 476 F. Supp. 3d. 386, 392 (S.D. Miss. Aug. 4, 2020).

26. Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).

27. *McClendon*, 476 F. Supp. 3d. at 392 ("Qualified immunity has served as a shield for these officers, protecting them from accountability.").

argues that qualified immunity—as applied to these cases—patently violates a long-ignored part of the U.S. Constitution, the Privileges or Immunities Clause.

The Fourteenth Amendment's Privileges or Immunities Clause creates a federal duty to protect individual citizens against state action that infringes upon their most fundamental right: the right to life. This Clause gives George Floyd and Ryan Stokes a federal remedy for the right the police took from them. Most contemporary scholarship focuses on whether the Privileges or Immunities Clause incorporates the Bill of Rights against the states.[28] By contrast, this Note will demonstrate that the Privileges or Immunities Clause secures the fundamental right to redress deprivations of life when the state fails to do so.

No federal jurist connected the relationship between remedying state (and certain private) violence and the Privileges or Immunities Clause until Justice Thomas' concurrence in *McDonald v. City of Chicago*.[29] In that opinion, Justice Thomas reconstructs history with a new lens. He centers Black Americans as the vehicle to best understand the Clause's original meaning. Thomas notes that the Ku Klux Klan committed thousands of violent acts against Black Americans during Reconstruction.[30] In response to the violence, Congress passed three Enforcement Acts to the Fourteenth Amendment,[31] clarifying the ambiguous Privileges or Immunities Clause. Through executive enforcement, the acts also brought peace and order to Black Americans in a dangerous South.[32]

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28. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 647 (2000) ("During the past decade, a number of commentators—most notably, Akhil Amar, Michael Kent Curtis, and Richard Aynes—have scoured the historical materials surrounding the framing of the Fourteenth Amendment and have demonstrated that there was substantial consensus among members of the Thirty-Ninth Congress who crafted the Fourteenth Amendment that the Privileges or Immunities Clause [. . .] would serve as the primary vehicle for protecting individual rights against state infringement."); *see generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 92-130 (1986); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life after Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000).

29. McDonald v. City of Chicago, 561 U.S. 742, 858 (2010) (Thomas, J., concurring).

30. *See* EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 12-15 (3d ed. 2017), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf.

31. *See* First Enforcement Act, ch. 114, 16 Stat. 140 (1870); *see also* Second Enforcement Act, ch. 99, 16 Stat. 433 (1871); *see also* Third Enforcement Act or Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2018)).

32. *See infra* Part III.

In a single case, *U.S. v. Cruikshank*, the Supreme Court eviscerated the federal protection Black Americans enjoyed for this brief time. The Court found the victims of the Colfax Massacre, one of the deadliest race massacres in U.S. history, had no right to seek redress in federal court.[33] *Cruikshank* definitively withdrew federal protection for Black Americans—even in the face of mass death and carnage.[34]

For Justice Thomas, a century of Jim Crow terrorism flowed from the Supreme Court's mangled interpretation of the Privileges or Immunities Clause.[35] Thousands of Black Americans were lynched and murdered because the Federal Government failed to maintain the promise of the Privileges or Immunities Clause.[36] Thomas properly advocates for overruling *Cruikshank*, a ruling some historians reference as "the day freedom died."[37] Unfortunately, Justice Thomas' plea went unheeded.

In *McDonald*, the Court majority—and even the dissent—rejected Thomas' argument.[38] Both claimed there is just not "any consensus"[39] as to what the Privileges or Immunities Clause means. However, rather than throw up their hands, jurists and scholars should turn to Reconstruction to build a working consensus for utilizing this long-ignored constitutional provision.

Under the original public meaning theory, history guides our efforts to understand the Privileges or Immunities Clause.[40] History reveals the Clause's meaning is hiding in plain sight. Hundreds of private citizen Klansmen were imprisoned for violating the "privileges and immunities" of Black citizens.[41] The Reconstruction Era public initially understood the Fourteenth Amendment to confer a federal

33. United States v. Cruikshank, 92 U.S. 542, 554 (1875) ("The Fourteenth Amendment . . . adds nothing to the rights of one citizen against another.").

34. *See* EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876 (2020), https://eji.org/report/reconstruction-in-america/.

35. McDonald v. City of Chicago, 561 U.S. 742, 856 ("Organized terrorism . . . proliferated in the absence of federal enforcement of constitutional rights."); *See infra* Part I-C.

36. *McDonald*, 561 U.S. at 856-57.

37. *See generally* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

38. *McDonald*, 561 U.S. at 758 (2010); *Id.* at 859-60 (Stevens, J., dissenting) ("[T]he original meaning of the Clause is not as clear as [the] petitioners suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent.").

39. *McDonald*, 561 U.S. at 758.

40. *See generally*, James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 436 (2013).

41. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y. U. L. REV. 863, 937 (1986) ("United States . . . brought hundreds of civil

duty to protect citizens from private violent acts.[42] Thomas' concurrence concluded that "guns were the only means of protection"[43] for Black Americans against private violence. This Note takes inventory of Justice Thomas' conclusion, but argues that the Privileges or Immunities Clause secures a right to a federal courtroom rather than a right to bear arms.[44] Victims like George Floyd and Ryan Stokes, who suffer from specific violence—perpetrated either by state action or state indifference—should, therefore, have their right to federal courts protected through the Privileges or Immunities Clause. In cases like theirs, qualified immunity should be barred by the Constitution.

This Note makes a case for a new Constitutional right to federal courts over three sections. Part I explains the history of fundamental rights in the Constitution. After presenting the history of fundamental rights, this article introduces Justice Thomas' *McDonald* concurrence, where Thomas takes inventory of the Supreme Court's role in Black suffering anew. He leverages that suffering into a fresh understanding of the Constitutional promise contained in the Fourteenth Amendment's Privileges or Immunities Clause. Part II defines the original public meaning, Justice Thomas' method for more clearly defining the Privileges or Immunities Clause, as a worthy approach to Constitutional interpretation. This Note then illustrates that both conservative and democratic-leaning Supreme Court justices have embraced the original public meaning as a method of Constitutional interpretation. While I appreciate Justice Thomas' historical foray, this Note then explains *how* Justice Thomas misreads Reconstruction history. Part III tells the story of Reconstruction with a more attentive lens than Justice Thomas could give in *McDonald*. Part III defines the original public meaning of the Privileges or Immunities Clause through the lynching of Captain Jim Williams. In the federal government's response to Captain Williams' murder, the Reconstruction era public defines a 'minimum baseline of rights' that remains relevant today. Ultimately, this Note provides a new avenue for litigants to combat doctrines, like qualified immunity, that restrict access to federal courts.

rights prosecutions under the Enforcement Act of 1870, and the Ku Klux Klan Act of 1871, charging defendants with infringing privileges and immunities of United States citizenship.").

42. *See infra* Part III.

43. *See infra* Part I-B.

44. *Id.*

I. In Plain Sight: A Once Obvious Fundamental Right Made Visible Through The Lens Of State Violence

A. The Fourteenth Amendment as the Constitutional Source of Fundamental Rights

> "The Constitution regulates our stewardship . . . . But there is a higher law than the Constitution."[45]

"Fundamental right" is not a term found in the Constitution's text.[46] And yet, since 1908, the Supreme Court has recognized the Constitution protects "fundamental principles of liberty and justice [that] lie at the base of all our civil and political institutions."[47] Fundamental principles "are of [such] special moral significance"[48] that they "inhere in the very idea of free government which no member of the Union may disregard."[49] In plain language, certain important rights—even if not expressed in the Constitution—must be protected by the national government. These rights are secured through the Constitution's Fourteenth Amendment.

"[A]s the [U.S.] Senate prepared to take its final vote on the proposed Fourteenth Amendment . . . Senator Reverdy Johnson . . . moved to delete the first part of the second sentence, the Privileges or Immunities Clause."[50] Johnson sought removal "simply because [he did] not understand what would be the effect of that."[51] Senator Jacob Howard, introducing the Clause, admitted the ambiguity of the "privileges and immunities" language raised "a curious question to solve . . . ."[52] Senator Johnson's motion was defeated—the Clause remains in the Constitution. Almost a century and a half later, Senator Johnson's quibble with the Clause—its lack of clarity—remains the legacy of this Constitutional provision.

The Fourteenth Amendment's Privileges or Immunities Clause announces, "[n]o State shall make or enforce any law which shall

45. Sen. William Henry Seward, Speech to the United States Senate, (Mar. 11, 1850), http://nationalhumanitiescenter.org/pds/triumphnationalism/america1850/text3/seward.pdf.

46. Timothy Alan Campbell, *Avoiding the Guillotine: The Need for Balance and Purpose in Determining Fundamental Rights Under the Fourteenth Amendment*, 49 CREIGHTON L. REV. 73, 76 (2015).

47. Twining v. N.J., 211 U.S. 78, 102 (1908).

48. John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 Nw. U. L. REV. 900, 932 (1995); *see also Twining*, 211 U.S. at 110.

49. *Twining*, 211 U.S. at 102.

50. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992).

51. *Id.*

52. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

abridge the *privileges or immunities* of citizens of the United States."[53] The clause "clarifies that [ ] citizens have certain rights that cannot be denied to them due to the very nature of their federal citizenship."[54] But what are those rights? Unfortunately, they "ha[ve] been a mystery since its adoption."[55] Without a clear meaning, the Clause has been "problematic."[56] In the resulting confusion, legal scholars and jurists have "simply [ ] throw[n] up their hands"[57] and disregarded the Clause.

The Privileges or Immunities Clause lost its relevance shortly after ratification.[58] In the *Slaughter-House Cases*, the Supreme Court "interpreted the [F]ourteenth [A]mendment's [C]itizenship and [P]rivileges and [I]mmunities [C]lauses as retaining primary citizenship in the states."[59] The Court basically held the Clause did not confer any new federal right.[60] *Slaughter-House* ultimately "emasculated the [F]ourteenth [A]mendment's [C]itizenship and [P]rivileges [or] [I]mmunities [C]lauses, diminished the amendment's scope, and destroyed the national government's authority to secure directly citizens' fundamental rights."[61] Over a century later, "student[s] of constitutional law quickly learn[ ] that [the Clause] was virtually read out of the document by the *Slaughter-House Cases*."[62]

As a result of the *Slaughter-House* decision, "[n]o important line of decision rests on the [Privileges or Immunities] [C]lause . . . ."[63]

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53. U.S. CONST. amend. XIV, § 1. (emphasis added).

54. Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 731 (2003); *see also* McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring) ("On its face, this appears to grant the persons just made United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status.").

55. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1989).

56. Harrison, *supra* note 50, at 1396.

57. *Id.*

58. *See* Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of A Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 427 (1990) ("The privileges or immunities clause, lost in Slaughter-House and never fully revitalized afterwards, constituted an integral part of the [Fourteenth Amendment's] purposes . . . ."); David C. Durst, *Justice Clarence Thomas's Interpretation of the Privileges or Immunities Clause:* McDonald v. City of Chicago *and the Future of the Fourteenth Amendment*, 42 U. TOL. L. REV. 933, 933 (2011) ("THE Privileges or Immunities Clause of the Fourteenth Amendment has oft been called the 'lost clause,' and rightfully so."); *see also* Michael Kent Curtis, *supra* note 28, at 1074.

59. Robert J. Kaczorowski, *supra* note 41, at 937.

60. Harrison, *supra* note 50, at 1415. ("[T]he majority's reading makes the substance of the clause redundant.").

61. Kaczorowski, *supra* note 41, at 938.

62. Harrison, *supra* note 50, at 1387.

63. *Id.*

Only twice since ratification has the Supreme Court found any state law to violate the Privileges or Immunities Clause.[64] While the rights protected in both cases have some value, they "are not readily described as essential to liberty."[65] Put another way, the Privileges or Immunities Clause "ha[s] been rendered almost meaningless."[66]

At its ratification, the Privileges or Immunities Clause was supposed to confer rights that were "in their nature, fundamental."[67] But these fundamental rights found a home in another place in the Fourteenth Amendment—the Due Process Clause. Replacing the Privileges or Immunities Clause as the source of fundamental rights, the Due Process Clause presently guides the Supreme Court when it determines which rights are fundamental.[68] The Due Process Clause establishes that no person shall be "deprive[d] of life, liberty, or property without due process of law."[69] The Due Process Clause "specially protects those fundamental rights and liberties"[70] that are essential to our system of government. There are two categories of fundamental rights: (1) enumerated rights and (2) unenumerated rights.[71]

The Bill of Rights is the source of nearly all Constitutionally enumerated rights.[72] The Supreme Court originally held the protections

64. Kevin Christopher Newsom, *supra* note 28, at 645; *see also* Colgate v. Harvey, 296 U.S. 404, 436 (1935) (setting aside a state income tax charged against in-state residents on interest and dividend income earned out of state); *see also* Saenz v. Roe, 526 U.S. 489, 503 (1999) ("[T]he privileges conferred by th[e] Clause '[are] that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'").

65. McDonald v. City of Chicago, 561 U.S. 742, 809 (2010) (Thomas, J., concurring).

66. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 167 (2019).

67. *See* Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823); *see also McDonald*, 561 U.S. at 756 ("Justice Field opined that the Privileges or Immunities Clause protects rights that are 'in their nature . . . fundamental.'").

68. *See, e.g.,* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (2022) ("any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'[ ] The right to abortion does not fall within this category.") (citations omitted).

69. *See* U.S. CONST. amend. XIV, § 1.

70. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

71. David A. J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 840 (1986)("Indeed, the ratification debates and relevant texts make it clear that all these rights, both enumerated and unenumerated, are *textually* protected.").

72. *See* Duncan v. La., 391 U.S. 145, 148 (1968) (stating that"[the Due Process] Clause now protects the right to compensation for property taken by the State"); *see also* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 257-58 (1897); *see, e.g.,* Fiske v. Kan., 274 U.S. 380, 387 (1927) (holding that the rights of speech, press, and religion covered by the First Amendment); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized); Malloy v. Hogan, 378 U.S. 1, 13-14 (1964) (holding that the right guaranteed by

in the Bill of Rights are "limitation[s] on the exercise of power by the government of the United States; and is not applicable to the legislation of the states."[73] But over time, the Court reversed its position.[74] Through the last century, the Supreme Court secured these enumerated protections for all citizens through "selective incorporation of the Bill of Rights to the states on a case-by-case basis."[75] Through a process called incorporation, the Supreme Court's jurisprudence evolved such that "whenever a case involves a state or local violation of a Bill of Rights provision . . . it involves that provision as applied to the states through the [D]ue [P]rocess [C]lause of the Fourteenth Amendment."[76] In the twentieth century, "the debate over incorporation raged among Justices and scholars"[77] concerning the propriety or impropriety of incorporation. But today, "the issue seems settled."[78] Almost every provision of the Bill of Rights is incorporated through the Due Process Clause.[79] The Bill of Rights "do[es] apply to state and local governments and, in almost all instances, with the same content[.]"[80]

The Due Process Clause has also "long been used to protect a litany of privacy rights as fundamental rights."[81] These rights are implied (or unenumerated) rather than expressed in the Constitution. Such rights include "the right to procreate, the right to custody of

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the Fifth Amendment to be free of compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the right to counsel in criminal cases is guaranteed by the Sixth Amendment); Klopfer v. N.C., 386 U.S. 213, 226 (1967) (concluding there is a right to a speedy trial); In re Oliver, 333 U.S. 257, 278 (1948) (concluding that there is a right to a public trial); Pointer v. Tex., 380 U.S. 400, 407-08 (1965) (concluding that there is a right to confrontation of opposing witnesses); and Wash. v. Tex., 388 U.S. 14, 23 (1967) (concluding that there is a right to a compulsory process for obtaining witnesses)."

73. Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 243 (1833).

74. *See, e.g.,* Hurtado v. California, 110 U.S. 516, 538 (1884) (concluding that grand jury indictment requirement not sufficiently fundamental); *see also* Maxwell v. Dow 176 U.S. 581, 604-05 (1900) (concluding that a 12-person jury requirement is not fundamental).

75. William J. Aceves, *A Distinction with A Difference: Rights, Privileges, and the Fourteenth Amendment*, 98 TEX. L. REV. ONLINE 1, 6 (2019).

76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551 (6th ed. 2020).

77. *Id.* at 553.

78. *Id.*

79. *See Hurtado*, 110 U.S. at 538 (finding the fifth amendment's right to grand jury indictment is NOT incorporated); *see also* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 219 (1916) (holding the seventh amendment right to trial by jury is NOT incorporated); *see also* CHEMERINSKY, *supra* note 76, at 551 (stating that "[t]he Third Amendment right to not have soldiers quartered in a person's home never has been deemed incorporated").

80. CHEMERINSKY, *supra* note 76, at 553.

81. Aceves, *supra* note 75, at 11; *see also* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (holding that the Due Process clause protects "liberty of the person both in its spatial and in its more transcendent dimensions").

one's children, the right to keep one's family together, and the right to make medical care decisions."[82] Establishing these unenumerated rights "raises obvious concerns about the judicial role."[83] In response to these concerns, Supreme Court precedent insists that judges "exercise the utmost care" when identifying unenumerated fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of Members of this Court."[84] The "modern test for determining fundamental rights"[85] is articulated in *Washington v. Glucksberg*.[86] Under *Glucksberg*, a right is fundamental if (1) "a careful description of the fundamental right"[87] is possible and (2) the Court to decides the asserted right is "deeply rooted in this Nation's history and tradition"[88] or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[89]

B. *McDonald* Makes Gun Ownership a Fundamental Right

One of the last—and most controversial—enumerated rights incorporated against the States was the Second Amendment, the right to keep and bear arms.[90] In *McDonald v. City of Chicago*, the Supreme Court considered whether a local "ordinance effectively prohibit[ing] [gun ownership] by almost all private citizens"[91] violated the citizens' fundamental rights. Writing for the Court, Justice Samuel Alito found the right to bear arms "fundamental to *our* scheme of ordered liberty."[92] Using the *Glucksberg* Test, Alito concluded gun ownership was "deeply rooted in this Nation's history and tradition[s]."[93] The Court's plurality found that "[t]he American people have considered the handgun to be the quintessential self-defense

82. Aceves, *supra* note 75, at 12; *see also, e.g.*, Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261 (1990); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Stanley v. Ill., 405 U.S. 645 (1972); Griswold v. Conn., 381 U.S. 479 (1965); Meyer v. Neb., 262 U.S. 390 (1923).

83. Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Roberts J., dissenting).

84. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

85. CAMPBELL, *supra* note 46, at 79.

86. *Id.* at 81.

87. *Id.* (quoting *Glucksberg*, 521 U.S. at 720).

88. *Glucksberg*, 521 U.S. at 721. (citations omitted).

89. *Id.*

90. U.S. CONST. amend. II. ("A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.").

91. Durst, *supra* note 58, at 947.

92. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (citing Duncan v. La., 391 U.S. 145, 149 (1968) and quoting *Glucksberg*, 521 U.S. at 721).

93. *Id.*

weapon."[94] As a result, the plurality held that "citizens must be permitted to use handguns for the core lawful purpose of self-defense."[95] The decision applied well-established Due Process Clause jurisprudence. But Justice Thomas took the occasion to challenge the Court's continuing acceptance of the Due Process Clause as the source of fundamental rights.[96]

Justice Thomas proposed "redirecting fundamental rights jurisprudence to the Privileges or Immunities Clause . . . ."[97] As one scholar observed, Justice Thomas's concurrence "suggest[s] a new basis, drawn from Reconstruction, for the defense of constitutional rights, including the constitutional rights of African Americans[.]"[98] In Justice Thomas' view, resurrecting the Privileges or Immunities Clause "would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability."[99] For Justice Thomas, the Privileges or Immunities Clause confers a "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[100]

Justice Thomas's concurrence highlights a reality most Constitutional scholars have overlooked. With the Privileges or Immunities Clause neutered by the Supreme Court, Black Americans— the intended beneficiaries of the Clause's protections— endured a century-long Jim Crow. Without access to federal courts during Jim Crow, Black people were killed by the thousands.[101] Without their most fundamental rights secured, they were denied the right to vote,[102] segregated from society,[103] and generally held outside of the protections of the Constitution.[104] Justice Thomas's expose of Jim Crow political vi-

94. *Id.* at 767 (quoting D.C. v. Heller, 554 U.S. 570, 629 (2008)).

95. *Id.* at 768.

96. *Id.* at 812 (Thomas J., concurring) ("I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means.").

97. D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas's Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341, 383 (2013).

98. COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 93 (2019).

99. McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring).

100. *Id*. at 811.

101. EQUAL JUSTICE INITIATIVE, *supra* note 30, at 3.

102. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

103. EQUAL JUSTICE INITIATIVE, SEGREGATION IN AMERICA, https://segregationinamerica.eji.org/report/.

104. *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION (1935).

olence offers a "true jurisprudential basis for distinguishing between fundamental and nonfundamental rights."[105]

C. In *McDonald*, Justice Thomas Embraces a Fundamental Right to Protection from Private and State Violence for Black Americans

Justice Thomas centers his concurrence on the tragic, violent consequences Black Americans suffered during Jim Crow. His concurrence shows how far from "ordered liberty" the American South was for Black citizens during both Reconstruction and Jim Crow. Thomas paints this portrait to illustrate that Black Americans both needed protection from the federal government and to illustrate the Fourteenth Amendment conferred this protection.

Shortly after the Fourteenth Amendment's ratification, "[m]ilitias such as the Ku Klux Klan, the Knights of White Camellia, the White Brotherhood, the Pale Faces, [etc.] spread terror among [B]lacks and white republicans."[106] This type of "organized terrorism . . . proliferated in the absence of federal enforcement of constitutional rights."[107] Domestic terrorism against Black Americans reigned unchecked. Southern Blacks were "raped, murdered, lynched and robbed as a means of intimidating[.]"[108] As Justice Thomas urges, there exists a death toll resulting from a Constitution without an enforced Privileges or Immunities Clause.

The historical record shows that "between 1882 and 1968, there were at least 3,446 reported lynchings of [B]lacks in the South."[109] None of these murders led to state convictions. Reckoning with this atrocity, Justice Thomas personalizes this injustice. He highlights the foreseeable tragedy of Emmett Till,[110] a Black child lynched for the crime of "allegedly whistling at a white woman."[111] Till's death—and

105. Broyles, *supra* note 97, at 344.

106. McDonald v. City of Chicago, 561 U.S. 742, 856 (2010) (quoting K. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, 104 (1965)).

107. *Id.*

108. *Id.* at 857.

109. *Id.*; *see also* EQUAL JUSTICE INITIATIVE, *supra* note 30, at 39.

110. The opinion spells the name Emmit, but the newspapers from the era and a body of contemporary sources reflect Mr. Till's first name was spelled Emmett.

111. *McDonald*, 561 U.S. at 857 (citing S. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 15-31(1988)); *see also* Equal Justice Initiative, *Emmett Till's Accuser Admits She Lied*, (Jan. 31, 2017) ("[I]n 2007, at the age of 72 [Carolyn Bryant] told Duke University senior research scholar Timothy Tyson that she had lied about Till having made verbal and physical advances on her."), https://eji.org/news/emmett-till-accuser-admits-she-lied/.

the absence of justice Till's mother found in state courts—places a human face on victims of the Court's failed interpretation of the Privileges or Immunities Clause.

In sum, Justice Thomas explains racial terrorism as a part of "the consequences"[112] of the Supreme Court's failure to interpret the Privileges or Immunities Clause correctly. His concurrence links thousands of Black Americans murdered during Jim Crow to the Supreme Court's failure to properly define the Privileges or Immunities Clause.[113] Justice Thomas does not generalize his grievance. Instead, he blames a specific case for sanctioning this violence:[114] *U.S. v. Cruikshank*.[115]

Historian, journalist, and lawyer, Charles Lane, calls the Colfax Massacre, the triggering event for *Cruikshank*, "The Day Freedom Died."[116] Disputed election results between Democrats and Republicans disturbed the public peace in the small southern town of Colfax, Louisiana.[117] An armed group of white men attacked Black citizens assembled in a public courthouse.[118] The white agitators sought to dislodge Black Republicans from the political offices they held.[119] What started as political posturing devolved into a battle of party militias on Easter Sunday of 1873.[120] The skirmish was man versus man. Republican versus Democrat. Black versus white.[121] The whites killed scores of Black men in the fighting while setting fire to the courthouse.[122] After the Black courthouse defenders surrendered, "a contingent of whites led by William Cruikshank murdered most of the prisoners."[123] At the end of the atrocity, the "white militia [ ] had

112. *McDonald*, 561 U.S. at 855.

113. *See generally Id*. at 855–58.

114. James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014) ("Jurisprudentially, *Cruikshank* may well have been the single most important civil rights ruling ever issued by the United States Supreme Court. It was *Cruikshank*, not the far more famous *Civil Rights Cases*, that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action.").

115. *McDonald*, 561 U.S. at 855–56.

116. *See generally* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

117. *Id.* at 87–90.

118. *Id.* at 108 ("Boys, this is a struggle for white supremacy.").

119. *Id.* at 88 ("To govern Grant Parish, you had to control this building.").

120. *Id.* at 108.

121. *Id.* at 113 ("Only colored men remained in Colfax.").

122. *Id.* at 119 ("Flames leaped from the courthouse into the sky, where clouds were beginning to gather.").

123. Pope, *supra* note 114, at 387.

brutally murdered as many as 165 [B]lack Louisianans[.]"[124] The episode turned into America's bloodiest peacetime massacre.

Responding to this violence, "United States marshals, prosecutors, courts, and troops" worked "to provide the modicum of law and order necessary for African Americans and their allies to exercise basic rights without risking assault, torture, or death."[125] After the Colfax Massacre,"[t]he Justice Department responded to the situation and secured indictments for ninety-seven individuals; only three were convicted."[126] Initially, it appeared the United States would protect Black Americans under her laws.[127] But the Supreme Court's decision in *Cruikshank* completely eviscerated the convictions and circumvented future exercises of federal power to protect Black Americans.

In an opinion vacating the indictment and the convictions, the Supreme Court reasoned, "[t]he [F]ourteenth [A]mendment . . . adds nothing to the rights of one citizen as against another."[128] The Court continued, finding that "the right to peaceably assemble"[129] and the right "to keep and bear arms"[130] were not privilege[s] of United States citizenship as contemplated by the Fourteenth Amendment.[131] The white militia, therefore, "had not deprived the victims of their privileges as American citizens[.]"[132] When Supreme Court Justice Joseph Bradley vacated the convictions, decreeing "the motion in arrest of judgments must be granted,"[133] white citizens, who had packed the trial court in New Orleans to support the perpetrators, erupted in applause.[134]

The ruling "exerted an enormous impact on the ground."[135] The New Orleans Bulletin, a conservative paper, reacted to the opinion observing, "the negro will . . . understand that if he violates the rights

124. McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring).
125. Pope, *supra* note 114, at 392.
126. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U.L. REV. 917, 921 (2009).
127. Ulysses S. Grant, President of the United States, Message Regarding Intervention in Louisiana (JAN. 13, 1875) ("[W]hile every one of the Colfax miscreants goes unwhipped of justice, and no way can be found in this boasted land of civilization and Christianity to punish the perpetrators of this bloody and monstrous Crime."); *see also* LANE, *supra* note 116, at 133 ("Denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.").
128. U.S. v. Cruikshank, 92 U.S. 542, 554 (1876).
129. *McDonald*, 561 U.S. at 809 (quoting *Cruikshank*, 92 U.S. at 551.).
130. *McDonald*, 561 U.S. at 809 (quoting *Cruikshank*, 92 U.S. at 553.).
131. *Cruikshank*, 92 U.S. at 553 (1876).
132. *McDonald*, 561 U.S. at 808–09.
133. LANE, *supra* note 116, at 228.
134. *Id.*
135. Pope, *supra* note 114, at 447.

of the white man he . . . can no longer invoke the [protection] of the Federal Government to protect him in the wrong and outrage upon the rights of others."[136] This decision "terminated the day-to-day federal enforcement of civil rights, effectively ending the effort to reconstruct southern society."[137] In practice, the Court's decision "blocked the national government from assisting official state governments in the preservation of law and order."[138] The Governor of Louisiana, a progressive politician, lamented the decision as "establish[ing] the principle that hereafter no white man could be punished for killing a negro."[139] The opinion "unleashed the second and decisive phase of Reconstruction-era white terrorism."[140]

Despite the impact of *Cruikshank*, "only two Justices have authored opinions disapproving the decision: Thurgood Marshall and Clarence Thomas."[141] Justice Thomas's *McDonald* concurrence is the only one to consider *Cruikshank* in depth. With disdain, Thomas resolved, "*Cruikshank* is not a precedent entitled to any respect."[142] At the end of his exposition, Justice Thomas concluded:

> "*Cruikshank's* holding that [B]lacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive [B]lacks from the voting booth and force them into peonage, an effective return to slavery."[143]

For bringing this story to the forefront of our present Constitutional debate, Justice Thomas deserves commendation. Justice Thomas's use of this history to "redirect[ ] fundamental rights jurisprudence to the Privileges or Immunities Clause"[144] should serve as the Constitutional basis for the federal government to protect victims of State violence today.

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136. LANE, *supra* note 116, at 230 (quoting the New Orleans Bulletin, June 30, 1874).
137. *Id.*
138. Pope, *supra* note 114, at 391.
139. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 147 (2008).
140. Pope, *supra* note 114, at 447.
141. Pope, *supra* note 114, at 445.
142. McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring).
143. *Id.* at 855–56.
144. Broyles, *supra* note 97, at 383.

Justice Thomas' concurrence piqued an initial flurry of scholarly attention.[145] But because neither Justice Thomas nor the Court has revisited the concurrence since, some scholars now conclude that "the push for the revival of the Privileges or Immunities Clause . . . has finally run its course."[146]

This Note seeks to reverse this trend. Justice Thomas "laid the foundations for a full-blown theory of the Privileges or Immunities Clause."[147] His theoretical framework relies on the original public meaning for its validity. Based upon Justice Thomas' framework, the Privileges or Immunities Clause confers a right to redress in federal courts when states fail—by action or inaction — to protect the lives of any class of citizens. Although Justice Thomas reaches a different conclusion than myself, we both rely upon the validity of the newly ascendant method of Constitutional interpretation: the original public meaning.

II. The Original Public Meaning of the Privileges or Immunities Clause Grants a Minimum Baseline of Rights that Qualified Immunity Abridges

A. The 'Original Public Meaning' as a Method of Constitutional Interpretation

In his *McDonald* concurrence, Justice Thomas seeks to "discern what ordinary citizens"[148] in the Reconstruction era thought of "the original meaning of the Fourteenth Amendment."[149] Justice Thomas asserts the original public meaning "offers a superior alternative"[150] to any other method of Constitutional interpretation. Through original public meaning, Justice Thomas intended to "restor[e] the meaning of the Fourteenth Amendment agreed upon by those who ratified it."[151] He notes the Court's plurality and dissent are mistaken in their interpretation because "neither side argues that the meaning they attribute

145. *See* David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. 823, 824 (2011) ("With Justice Thomas basing his separate opinion squarely on the Privileges or Immunities Clause, scholarly attention to that once moribund part of the Constitution will skyrocket."); *see generally* Broyles, *supra* note 97, at 341; Durst, *supra* note 58, at 933.

146. Jeffrey D. Jackson, *Be Careful What You Wish for: Why* McDonald v. City of Chicago's *Rejection of the Privileges or Immunities Clause May Not Be Such A Bad Thing for Rights*, 115 PENN ST. L. REV. 561, 603 (2011).

147. Durst, *supra* note 58, at 935.

148. McDonald v. City of Chicago, 561 U.S. 742, 813 (2010).

149. *Id.* at 812.

150. *Id.*

151. *Id.* at 813.

to the Due Process Clause was consistent with public understanding at the time of its ratification."[152] While other Justices did not adopt his conclusion in *McDonald*, Thomas' use of the original public meaning finds adherents across all ideological spectrums.

Justice Ketanji Brown Jackson agreed with Justice Thomas' methodology in her Supreme Court confirmation hearings. Without controversy, she testified, "I believe that it's appropriate to look at the original intent, original public meaning, of the words when one is trying to assess [the Constitution's meaning] because, again, that's a limitation on my authority to import my own policy."[153] By invoking "the original intent" and the "original public meaning," Justice Jackson affirmed a consensus position on the Court.[154]

Although "original public meaning" and "original intent" are not without contention,[155] these Constitutional methods of interpretation have been embraced—in some form—by the Court's conservative and progressive justices.

The original intent of the Constitution's framers is a long-established principle of judicial interpretation. The Supreme Court "first used the phrase 'intention of the framers' in 1796."[156] In *Hylton v. United States*, the Court held "it was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports."[157] By referencing the founder's intent, the Court affirmed the judicial philosophy today known as originalism. Since that case, federal and state judges have sought to discern the framers' original intent. Intent analysis asks jurists to infer ambiguities in the Constitutional text from the words of the Constitution's ratifiers.

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152. *Id*. at 811.

153. Randy E. Barnett, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022, 6:38 PM), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063 (quoting Nomination of Judge Kentanji Brown Jackson to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Com. on the Judiciary).

154. *See generally* D.C. v. Heller, 554 U.S. 570, 581 (2008).

155. *See generally* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625 (2008); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); *see also* Monroe v. Pape, 365 U.S. 167 (1967) (where the Supreme Court adopted the original public meaning of a statute to conclude that citizens have a remedy against government actors acting 'under color of law.').

156. Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 235 (1989).

157. *Id.* at 235–36 (1989) (quoting Hylton v. U. S., 3 U.S. (3 Dall.) 171 (1796)).

In recent years, the Supreme Court has steadily moved from "original intent" to "original meaning" and now to "original public meaning."[158] The Court began to conclude that "[w]hen interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted."[159] The most likely public understanding "is not necessarily what the Framers subjectively intended the Constitution to have or what participants at the ratification debates actually understood it to have, but instead what a reasonable person of the era would have thought."[160] Rather than parse the intention of the framers, judges must "discern the **most likely** public understanding of a particular provision at the time it was adopted."[161]

This shift in constitutional interpretation has manifested in several of the Court's most recent decisions, most prominently in *District of Columbia v. Heller*.[162] There, the Court majority "for essentially the first time, interpreted a constitutional provision with explicit, careful, and detailed reference to its original public meaning."[163] In *Heller*, Justice Antonin Scalia authored a majority opinion that parsed a wide-ranging set of documents, including founding-era dictionary references,[164] *The Federalist Papers,*[165] and the Philadelphia Constitutional Convention.[166] In *Heller*, Scalia explained that the Court would be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[167]

158. David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295, 1302 (2009).

159. McDonald v. City of Chicago, 561 U.S. 742, 828 (2010); *see also* D.C. v. Heller, 554 U.S. 570, 602 (2008).

160. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 NYU J.L. & Liberty 494, 498 (2009).

161. *McDonald*, 561 U.S. at 828 (emphasis added); *see also Heller*, 554 U.S. at 602.

162. 554 U.S. 570, 576 (2009) ("[T]he Constitution was written to be understood by the voters. . .") (citations omitted).

163. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246, 246 (2008).

164. *See Heller,* 554 U.S. at 581.

165. *Id.* at 595 (quoting The Federalist No. 46, pp. 329, 334 (B. Wright ed.1961) (J. Madison)).

166. *Id.* at 604 (quoting Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789).

167. *Id.* at 576 (citation omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931) (alteration in original)).

The *Heller* opinion is remarkable because the dissent does not quibble with the original public meaning.[168] Justice Stevens, however, "use[s] [a] more traditional method of originalism which focuses on the intent of the Founders."[169] After reading *Heller*, Supreme Court commentator Dale Carpenter quipped, "[w]e're all originalists now."[170] Original public meaning has an important role to play in interpreting the Constitution.

B. The Warning Label on 'Original Public Meaning' and Justice Thomas' Misread of Reconstruction History

Justice Scalia recognized the ascendance of original public meaning analysis "is also not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly."[171] Adopting the original public meaning of the Constitution "acknowledges the need for a deep immersion in historical context."[172] The judge is tasked with "immersing oneself in the political and intellectual atmosphere of the time— somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer."[173] Part III of this work does the work of historical immersion.

Justice Thomas immerses himself in the history of Reconstruction to understand the Privileges or Immunities Clause in *McDonald*. He concluded that "[t]he use of firearms for self-defense was often the only way [B]lack citizens could protect themselves from mob violence."[174] In my view, Justice Thomas succumbed to a mistake Justice Scalia forewarned. Scalia previously cautioned jurists to guard against "[t]he inevitable tendency of judges to think that the law is what they

168. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 625–26 (2008) (quoting Randy Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J., June 26, 2008, at A13 "Although original-intent jurisprudence was discredited years ago among constitutional law professors, that has not stopped non-originalists from using 'original intent' or the original principles 'underlying' the text-to negate its original public meaning.").

169. *Id.* at 625.

170. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 684 (2009) (quoting Heller *on a First Read*, Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/posts/1214514180.shtml (June 26, 2008, 17:03 EST).).

171. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

172. Konig, *supra* 158, at 1307.

173. Scalia, *supra* note 171, at 856-57.

174. McDonald v. City of Chicago, 561 U.S. 742, 857 (2010) (Thomas, J., concurring).

would like it to be."[175] Scalia continued, "I have no doubt [this tendency will] cause most errors in judicial historiography to be made."[176] Thomas' historical inquiry seeks guidance relevant to the facts in *McDonald v. City of Chicago*.[177] But by limiting himself to the facts in *McDonald*, Thomas misses the "**most likely** public understanding"[178] of the Privileges or Immunities Clause.

The original public meaning "demands evidence of the public's understanding of the meaning of the Fourteenth Amendment, or at least the understanding of those members of the public familiar with the generally accepted meaning of legal terms."[179] Justice Thomas accepts this burden of proof. But I do not believe Justice Thomas presents sufficient evidence to carry this burden. For Justice Thomas, "the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood . . . that the right to keep and bear arms was essential to the preservation of liberty."[180] But I challenge the basis on which he concludes that the "ratifying-era public"[181] believed "the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."[182]

Thomas supports his conclusion by claiming the authors of the Fourteenth Amendment intended to incorporate the Bill of Rights through the Privileges or Immunities Clause. Indeed,"[m]any statements by Members of Congress corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States."[183] Justice Thomas identifies the "most widely publicized statements by the legislators who voted on § 1—Bingham, Howard, and even Hale—point unambiguously toward the conclusion that the Privileges or Immunities Clause enforces at least those fundamental rights enumerated in the Constitution against the

175. Scalia, *supra* note 171, at 864.
176. *Id.*
177. *McDonald*, 561 U.S. at 813 ("The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular Clause in the Constitution protects the particular right at issue here.").
178. *Id.* at 828 (emphasis added).
179. Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 367 (2009).
180. McDonald v. City of Chicago, 561 U.S. 742, 857 (2010).
181. *Id.*
182. *Id.*
183. *Id.* at 834.

States, including the Second Amendment right to keep and bear arms."[184]

Michigan Senator Jacob Howard explained the Privileges or Immunities Clause's purpose during the Amendment's introduction.[185] He concluded that the referenced privileges and immunities "cannot be fully defined in their entire extent and precise nature—**to these should be added** the personal rights guarantied and secured by the first eight amendments of the Constitution."[186] Because of Howard's mention of the Bill of Rights, "scholars have pointed to Howard's speech as evidence that the members of the thirty-ninth Congress believed they were nationalizing both the Bill of Rights and Justice Washington's list of natural and common law rights from *Corfield*."[187] Thomas cites these legislative statements for authority.[188] He also finds their wide publication in newspapers as proof that the public understood them to protect the Second Amendment.[189]

But such a conclusion is incompatible with the original public meaning; Justice Thomas, instead, adopts an expanded version of original intent.[190] Aware of the disfavor of this method, Justice Thomas defends his citations to these legislative statements by claiming these "[s]tatements by legislators can *assist* in th[e] [interpretive] process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase."[191] Justice Thomas argues,

184. *Id.* at 835.

185. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Senator Howard quoted the opinion of Bushrod Washington who wrote "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities WHICH ARE, IN THEIR NATURE, FUNDAMENTAL; WHICH BELONG, OF RIGHT, TO THE CITIZENS OF ALL FREE GOVERNMENTS; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would, PERHAPS, BE MORE TEDIOUS THAN DIFFICULT TO ENUMERATE. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.") Corfield v. Coryell, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823)) (emphasis added).

186. Corfield v. Coryell, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823)) (emphasis added).

187. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 405 (2011).

188. McDonald v. City of Chicago, 561 U.S. 742, 828 (2010) ("Statements made by Members of Congress leading up to, and during, the debates on the Fourteenth Amendment point in the same direction.").

189. *Id.* at 832 ("News of Howard's speech was carried in major newspapers across the country. . . .").

190. *Id.* at 828–29.

191. *Id.* at 828 (emphasis added).

"this evidence [of the legislative intent] is useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean."[192]

Justice Thomas over-relies on these framers' original words. By his own preference for original public meaning, Thomas shoulders the burden of convincing the legal academy that the Reconstruction era public understood the Privileges or Immunities Clause as he argues it—to secure the Second Amendment right to gun ownership. Here, the historical record simply does not support Justice Thomas's claim.

To be sure, there is historical evidence that **some** people in the public space understood the Privileges or Immunities Clause protected the right to keep and bear arms.[193] But each of the examples Thomas uses in *McDonald* contains fatal flaws in reference to Second Amendment incorporation. He presents no wide-ranging consensus view. For instance, Thomas supports his interpretation of the Clause through the Civil Rights Act of 1866.[194] But this Act is silent on the Second Amendment. The Act, however, explicitly confers "equal benefit of all laws and proceedings for the security of person and property."[195]

Similarly, Thomas cites the Freedmen's Bureau Act.[196] But again, this Act entitles all citizens to "full and equal benefit of all laws and proceedings concerning personal liberty and personal security."[197] No mention of the Second Amendment is made in the Freedmen's Bureau Act. Since these Congressional enactments do not confer any explicit right to keep and bear arms, Thomas turns to other public documents from the founding era.

Thomas finds three publications that assert the right to keep and bear arms is fundamental and therefore secured through the Privileges or Immunities Clause.[198] But each cited document was published

192. *Id.* at 828-29.

193. *See, e.g.,* Right to Bear Arms, Phila., Pa., Christian Recorder (Feb. 24. 1866) ("We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms.") (Note: this article is from even before the passage of the 14th Amendment).

194. *McDonald*, 561 U.S. at 833 ("Both proponents and opponents of this Act described it as providing the "privileges" of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms.").

195. *Id*.

196. *Id.* at 834.

197. *Id.* (quoting Act of July 16, 1866, § 14, 14 Stat. 176).

198. *Id.* at 848–49.

before the Fourteenth Amendment's ratification.[199] Justice Thomas' claim that such documents secure the Second Amendment right to bear arms through the Fourteenth Amendment's Privileges or Immunities Clause is not the most persuasive.

Finally, Justice Thomas finds historical support from victims of private mob violence.[200] One of those individuals is a Black man named Eli Cooper.[201] In the face of violent outrages, Mr. Cooper remarked, "pistols and shotguns are the only weapons to stop a mob."[202] Thomas leverages Mr. Cooper's reflection to conclude that "[t]he use of firearms for self-defense was often the only way [B]lack citizens could protect themselves from mob violence."[203] In another reference to Black victims of racial terrorism, Justice Thomas recounts how a man "stood armed at a jail until morning to ward off lynchers."[204] While references to these victims' plight are historically valuable, these conclusions do not define what an ordinary citizen believed of the power conferred by the Fourteenth Amendment at the time of ratification.

Justice Thomas overreads the historical record. Let's concede this point: **some** individuals understood the Privileges or Immunities Clause as conferring the Second Amendment right. U.S. Attorney David T. Corbin, for example, argued: "[t]hrough the '[P]rivileges or [I]mmunities' [C]lause, the first eight amendments became federally enforceable rights."[205] Corbin, who prosecuted Klansmen in South Carolina, "planned his [trial] strategy to secure for [ ] South Carolina

199. *See*, *e.g.,* Right to Bear Arms, *supra* note 193 ("We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms."); *see also* Letter to the Editor, Loyal Georgian, Augusta, Ga. (Feb. 3, 1866) ("Almost every day, we are asked questions similar to [have colored persons a right to carry fire arms.] We answer *certainly* you have the *same* right to own and carry fire arms that *other* citizens have."); *see also* J. TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 56 (1849) (describing the 'right to keep and bear arms' as one of those rights secured by 'the constitution of the United States.').

200. McDonald v. City of Chicago, 561 U.S. 742, 857–58 (2010).

201. *Id.* at 857.

202. *Id*. (quoting *Church Burnings Follow Negro Agitator's Lynching,* CHICAGO DEFENDER, Sept. 6, 1919.).

203. *Id.*

204. *Id.* at 858 (quoting Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO L.J. 309, 354 (1991)).

205. LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872, at 62 (1996); *see also* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (Paul A. Cimbala 2005) (describing other DOJ officials who adopted this interpretation of the Privileges or Immunities Clause).

citizens . . . the Second Amendment right to keep and bear arms."[206] But while the prosecution adopted this interpretation of the Privileges or Immunities Clause, many others did not. Judge Hugh Bond, to whom David Corbin presented his arguments, "rejected the notion that the Fourteenth Amendment transformed the first eight amendments into federally enforceable rights."[207] When pressed, "Judge Bond refused several times to address the Second Amendment [incorporation] issue."[208] Through his silence, Judge Bond "likely . . . rejected the entire notion of federally enforceable [Bill of Rights] under the Fourteenth Amendment."[209] Unlike his fellow Justices and many legal scholars, I do not outright dismiss Thomas' attempt to resurrect the Privileges or Immunities Clause. While I do not fully agree with his reading of history, his concurrence offers a useful framework for the legal academy to defend abridged Constitutional rights.

C. Justice Thomas' 'Minimum Baseline' of Rights Should Include a Right to Government Protection

Justice Thomas' *McDonald* argument could garner support from both "conservative" and "progressive" justices with just slight augmentation. Justice Thomas' defines a "**minimum baseline** of federal rights that the Privileges or Immunities Clause established in the wake of the war over slavery."[210] Justice Thomas reasserts the "minimum baseline" language on four separate occasions.[211] The historical record supports embracing this "minimum baseline" methodology. Thomas is weary of defining this minimum baseline theory using

206. WILLIAMS, *supra* note 205, at 64.
207. *Id.* at 73.
208. *Id.* at 75.
209. *Id.* at 76.
210. McDonald v. City of Chicago, 561 U.S. 742, 858 (2010) (Thomas, J. concurring) (emphasis added).
211. *Id.* at 838. ("I must explain why this Clause in particular protects against more than just state discrimination, and in fact establishes a MINIMUM BASELINE of rights for all American citizens."); *Id.* at 840-41 ("[T]he argument goes, § 1 must not have been understood to accomplish such a significant task as subjecting States to federal enforcement of a MINIMUM BASELINE of rights. That argument overlooks critical aspects of the Nation's history that underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States . . . . "); *Id.* at 850. ("The history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that '[n]o State shall . . . abridge' the rights of United States citizens, the Clause establishes a MINIMUM BASELINE of federal rights . . . ."); *Id.* at 858 ("The record makes equally plain that [the framers of the 14th Amendment] deemed [the Second Amendment] necessary to include in the MINIMUM BASELINE of federal rights that the Privileges or Immunities Clause established in the wake of the war over slavery.").

unenumerated rights because a "discussion of unremunerated rights . . . constitute[s] 'a separate question' without implication in the case before the Court."[212] In my view, the **minimum baseline** theory does not support the Second Amendment right to keep guns as a privilege or immunity of citizenship. Instead, the **minimum baseline** theory supports the Clause granting "full and equal benefit of all laws and proceedings concerning personal liberty and personal security."[213] By faithfully scouring the historical record, this **minimum baseline** interpretation appears not only plausible but is the most supported meaning of the Privileges or Immunities Clause. This Note seeks to augment Justice Thomas' concurrence and respond to his critics on the Court by elevating the **minimum baseline** theory.

In *McDonald*, the majority "decline[d] to disturb"[214] the historical interpretation of the Privileges or Immunities Clause. His opponents "dismissed Justice Thomas's extended argument"[215] because there is not any consensus on the full scope of the Privileges or Immunities Clause's proper meaning.[216] The Court essentially found that "Justice Thomas does not offer a convincing explanation for why the Privileges or Immunities Clause would provide any more of a guiding principle for elucidating fundamental rights than the Due Process Clause."[217]

Other legal scholars argue that Thomas' revival of the Privileges or Immunities Clause is unnecessary "due to the long-established alternative legal avenues that have largely achieved the intended goals of the Privileges or Immunities Clause."[218] But these scholars ignore the grim history of violence— and the present-day concerns—which Justice Thomas' concurrence illuminates. Justice Stevens finds "[t]he burden is severe for those who seek radical change in such an established body of constitutional doctrine."[219] Justice Thomas' concurrence can meet that burden through the **minimum baseline** theory.

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212. Durst, *supra* note 58, at 956–57.

213. *McDonald,* 561 U.S. at 834 (quoting Act of July 16, 1866, § 14, 14 Stat. 176) (emphasis added).

214. *Id.* at 758.

215. Broyles, *supra* note 97, at 343.

216. *McDonald*, 561 U.S. at 758.

217. William J. Aceves, *supra* note 75, at 12; *see also McDonald*, 561 U.S. at 859–60 (Breyer, J., dissenting) ("[T]he original meaning of the Clause is not as clear as [the petitioners] suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent.").

218. Emily Jennings, *Let's All Agree to Disagree, and Move On: Analyzing Slaughter-House and the Fourteenth Amendment's Privileges or Immunities Clause under "Sunk Cost" Principles*, 40 B.C. L. REV. 1803, 1839 (2011).

219. *McDonald*, 561 U.S. at 860.

D. 'Minimum Baseline' Rights Should Limit Qualified Immunity

Since slavery, Black Americans adopted a lifestyle to avoid violence they faced without remedy. During Reconstruction, Black Americans slept in marshes to avoid nighttime terror raids.[220] Their state governments would not lift a finger to prosecute those who terrorized them.[221] During and after Jim Crow, Black Americans spent a century avoiding sun-down towns.[222] When traveling, Black Americans carried Green Books to guide them to seek safe passage during travel.[223] Despite their efforts, thousands lost their lives.[224] A class of American citizens lost voting rights and public access to basic accommodations because of segregation. But the Supreme Court more recently sought to establish a federal remedy where states—and our federal government—so long failed.

In *Monroe v. Pape,*[225] the Court began to remedy the injustice of Jim Crow and Reconstruction. The Court admitted, "by reason of prejudice, passion, neglect . . . state laws might not be enforced and the claims of citizens to the enjoyment of [their] rights, privileges, and immunities" were sometimes denied.[226] The Supreme Court reinvigorated a statute from the Reconstruction Era, presently codified as 42 U.S.C. § 1983,[227] as "afford[ing] a federal right in federal courts."[228] In *Monroe*, the Court rebirthed a federal remedy "in similar circumstances that caused the remedy to be created in the first place—a situ-

220. WILLIAMS, *supra* note 205, at 2.

221. EQUAL JUSTICE INITIATIVE, *supra* note 30, at 47.

222. *See generally* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2006).

223. Evan Andrews, *The Green Book: The Black Travelers' Guide to Jim Crow America*, HISTORY.COM, https://www.history.com/news/the-green-book-the-black-travelers-guide-to-jim-crow-america (last updated: Mar. 13, 2019).

224. EQUAL JUSTICE INITIATIVE, *supra* note 30, at 47.

225. Monroe v. Pape, 365 U.S. 167, 171-72 (1967) ("There can be no doubt at least since *Ex Parte Virginia*, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.") (emphasis added).

226. *Id.* at 180.

227. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

228. *Monroe*, 365 U.S. at 180.

ation where the state government refused to enforce its laws against an entire class of citizens."[229]

Even as the Supreme Court reinvigorated remedies for victims of unconstitutional actions,[230] the Court deprives victims of State violence from accessing federal courts through qualified immunity.[231] Established fully in *Harlow v. Fitzgerald*,[232] qualified immunity protects public officials from lawsuits unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[233] A right is "clearly established" if there is a controlling precedent or a consensus of cases with similar holdings.[234] The "clearly established" standard sends federal judges "in search of factually similar precedent to show clearly established law."[235]

This search has resulted in disaster for those seeking to vindicate their legal rights in federal court.[236] When, for example, a police officer used deadly force, shooting a fleeing suspect in the back,[237] the Supreme Court found a lawsuit against the officer barred by qualified immunity because no controlling precedent "squarely governs."[238] With this standard in place, qualified immunity is extended to acts to

229. Allen H. Denson, *Neither Clear Nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 753 (2008); *see also Monroe*, 365 U.S. at 180 (finding that police officers who rummaged through a home while the victims were naked and detained on open charges may file a lawsuit in federal court. The police were government officials 'acting under color of law.').

230. *See Monroe*, 365 U.S. at 180; *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

231. *See* Butz v. Economou, 438 U.S. 478, 506 (1978) (The Supreme Court saw a need "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."); *see also* Scheuer v. Rhodes, 416 U.S. 232, 242 (1974)("The concept of immunity assumes [officials may err] and goes on to assume that is better to risk some error and possible injury from such error than not to decide or act at all.").

232. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

233. *Id.* at 818; *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) (The standard protects "all but the plainly incompetent or those who knowingly violate the law.").

234. Wilson v. Layne, 526 U.S. 603, 617 (1999).

235. John C. Jeffries Jr., *The Liability Rule for Constitutional Torts,* 99 VA. L. REV. 207, 255 (2013).

236. Jamison v. McClendon, 476 F. Supp. 3d. 386, 391-92 (S.D. Miss. Aug. 4, 2020) ("Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity . . . . Qualified immunity has served as a shield for [ ] officers, protecting them from accountability [for thousands of deaths and other forms of abuse and police misconduct].").

237. *See generally* Brosseau v. Haugen, 543 U.S. 194-95 (2004); *see also* Brief of the Petitioner, *supra* note 14, at *6, No. 22-556 (petition for cert. filed Dec. 9, 2022) 2022 WL 17821209, at *6.

238. *Id*. at 201.

conduct that are "both unconstitutional and unreasonable."[239] As Professor John Jeffries notes, "it does not make sense to bar liability for conduct that is both unconstitutional and unreasonable, simply because it has not specifically been declared so in a prior decision."[240] Unfortunately, qualified immunity governs the Supreme Court and federal circuit decisions.[241]

This Note decidedly leaves the discussion on *how* the Privileges or Immunities Clause might supplant qualified immunity for another day. Nevertheless, let there be no doubt: the Privileges or Immunities Clause is, perhaps, the strongest Constitutional basis on which to challenge qualified immunity. Next, this Note will explore how the Clause helps secure "one of the first duties of government . . . [affording] the protection of the laws, whenever [citizens] receive[ ] an injury."[242]

III. Murder of Captain Jim Williams: The Historical Record Supporting the Privileges or Immunities Clause Conferring a Minimum Baseline of Rights

"Until the lion learns how to write, every story will glorify the hunter."[243]

Through the Fourteenth Amendment, the U.S. government promised to provide "equal protection of the law" to Black American citizens.[244] Despite the Constitutional promise, Black Americans could not rely upon the Federal government to protect their rights until the 1960s.[245] Without access to Courts, the U.S. placed Black Americans outside of "the very essence of civil liberty," which Chief Justice Marshall defined as the "right of every individual to claim the protection of the laws, whenever he receives an injury."[246] Instead, the United States government simply turned away as Black American

239. Jeffries Jr., *supra* note 235, at 257.

240. *Id.* at 256.

241. *But see* Ziglar v. Abbasi, 582 U.S. 120, 160 (2017) (opinion concurring in part and concurring in the judgment)(where Justice Thomas suggests "reconsidering qualified immunity" in an "appropriate case.").

242. Marbury v. Madison, 5 U.S. 137, 163 (1803); *see also* Gregg v. Georgia, 428 U.S. 153 (1976) (White, J., concurring) ("[The] most basic task [of government] is protecting the lives of its citizens . . . through criminal laws against murder.").

243. Chinua Achebe, Things Fall Apart (1958).

244. U.S. Const. amend. XIV.

245. *See* Monroe v. Pape, 365 U.S. 167, 171–72 (1961).

246. Marbury v. Madison, 5 U.S. 137, 163 (1803).

citizens were lynched at the rate of one per week for a century without redress.[247] An entire century.

But it was not always like this. At the apex of Reconstruction, a bright moment beams through an otherwise dark history for Black Americans. That shining moment illuminates the original public meaning of the Privileges or Immunities Clause. Through a compelling exploration of history, this next section will demonstrate the Fourteenth Amendment confers a **minimum baseline** of rights, including the right to federal court for protection from certain types of harm.

A. The Reconstruction Public's Joyful Understanding of Reconstruction's Constitutional Promise

March 30, 1870, was Reconstruction's culminating moment, perhaps, its proudest day.[248] In the afternoon, U.S. Secretary of State, Hamilton Fish, certified that three-quarters of the States ratified the Fifteenth Amendment.[249] With his signature, the U.S. cemented that no man could be denied the right to vote based on his race.[250] Fish's signature completed the Constitutional scheme that comprised the 'Second Founding.'[251]

The passage of the Fifteenth Amendment sparked a raucous celebration that rivaled the joy of emancipation from slavery.[252] Across the country, Black Americans flooded the streets in jubilant celebrations. In New York City, thousands of citizens gathered, holding signs proclaiming, "Now we have peace and equal rights[!]"[253] Cheers erupted as Civil Rights leaders read the text ratifying the Fifteenth Amendment for throngs of delighted citizens.[254] About 3,000 Blacks

247. *See generally* EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR, (3d ed. 2017), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf.

248. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 114 (2019).

249. *Id.*

250. U.S. CONST. amend. XV.

251. FONER, *supra* note 248, at 118; *see also* MARK S.WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE 291 (2006) ("[W]e have lived over a century in the last ten years. The ballot, which is the symbol of power in this Government, has passed into the hands of those who were lately slaves[.]").

252. FONER, *supra* note 248, at 116.

253. *Free and Equal, Our Colored Citizen' Jubilee Celebration in Honor of the Fifteenth Amendment,* N.Y. TIMES, April 9, 1870.

254. *Id.*

participated in a procession held in Boston Public Park.[255] Similarly, Black citizens celebrated Abraham Lincoln, Ulysses S. Grant, and John Brown by carrying oversized portraits in Detroit.[256]

Even after the passage of the Fourteenth Amendment, which secured "the equal protection of the law"[257] and guaranteed them "privileges or immunities,"[258] Black Americans were deprived of true equality without the right to vote. When Black Americans went to court, they "found judges elected by another caste and belonging to this caste themselves[,]" who were almost always prejudiced.[259] Without suffrage, Black Americans could "obtain neither equal justice, nor redress of wrongs, nor even [their] rightful part of protection in society."[260] However, at least nominally, the Fifteenth Amendment cemented that Black Americans were equal citizens. In South Carolina, Black political agents humbly petitioned, "we simply desire that we shall be recognized as men; that we have no obstructions placed in our way; that the same laws which govern white men shall direct colored men. . . that we be dealt with as others in equity and justice."[261] Although the Amendment's passage sparked triumphant celebration, white vigilantes turned to violence to return Blacks to political disenfranchisement. Because of their violent outrages, the U.S. Congress, Executive Branch, and Federal Courts defined—with clarity—the fundamental rights protected through the Privileges or Immunities Clause.

B. The Lynching of Captain Jim Williams

The joy that defined the passage of the Fifteenth Amendment was supplanted by terror shortly thereafter. The events of March 6, 1871, show the danger Black citizens faced during Reconstruction. After sunset, a band of armed, disguised men gathered at Briar Patch, an old muster field in the rolling countryside of Yorkville, South Caro-

255. Xi Wang, *Freedom: Politics: The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI-KENT L. REV. 1013, 1015 (1995) (quoting B.F. Roberts, *Celebration of the Fifteenth Amendment in Boston*, New Era, Apr. 28, 1870, at 1.).

256. *Id.*

257. U.S. CONST. amend. XIV.

258. *Id.*

259. JEAN-CHARLES HOUZEAU, MY PASSAGE AT THE NEW ORLEANS TRIBUNE: A MEMOIR OF THE CIVIL WAR ERA 106 (1984).

260. *Id*. at 107.

261. State Convention of the Colored People of South Carolina, *Address of the Colored State Convention to the People of the State of South Carolina*, Held in Zion Church, Charleston 24, https://historymatters.gmu.edu/d/6514/.

lina.[262] Each of the conspirators was a secret society member—assembled on an evening whose details would be recorded by history.[263]

Chaos descended upon the American South in the wake of slavery.[264] Violent agents "initiated a reign of terror throughout upcountry South Carolina which continued unabated[.]"[265] In December 1870, a mob of disguised men accosted a Negro named Tom Roundtree from his home, slit his throat, then shot him.[266] South Carolina State Court held a "show" trial; still, the alleged perpetrators were acquitted.[267] A similarly enraged mob killed Anderson Brown,[268] a Black man, on the night of February 25,, 1871, after a visit to his home.[269] In a span of fewer than six months, "between three and four hundred" estimated cases of whipping, beating, and personal violence occurred in upstate South Carolina.[270] Terror reigned. State civil authorities "were entirely unwilling to address the problem."[271] Local officials were "either in complicity with the Ku Klux conspiracy, or intimidated by it[.]"[272] Emboldened with no threat of State prosecution, this murderous brood set out to kill again that early March evening.

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262. MARK S. WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE 278 (2006); *see also* Proceedings in the Ku Klux Klan Trials at Columbia, S.C., in the United States Circuit Court, November Term, 1871, 163 (1872); [hereinafter Klan Trial Testimony] *see also* STEPHEN BUDIANSKY, THE BLOODY SHIRT: TERROR AFTER APPOMATTOX 2039 (2008) ("Yorkville lay eighty-three miles northwest of the capital of Columbia, up the mainline of the Charlotte, Columbia, and August Rail Road to Chesterville[.]")

263. *See generally* Proceedings in the Ku Klux Klan Trials at Columbia, S.C., in the United States Circuit Court, November Term, 1871 (1872).

264. RON SHAW, LONDON ONTARIO'S UNREPENTANT CONFEDERATES, THE KU KLUX KLAN AND A RENDITION ON WELLINGTON STREET 25 (2018) ("during a single 10-month period in 1870-1871 [The Klan] murdered 11 [B]lacks and committed at least 600 whippings, beatings and other non-lethal assaults.").

265. WILLIAMS, *supra* note 205, at 16 (2008).

266. J. MICHAEL MARTINEZ, CARPETBAGGERS, CALVARY, AND THE KU KLUX KLAN: EXPOSING THE INVISIBLE EMPIRE DURING RECONSTRUCTION 74 (2007); Klan Trial Testimony, *supra* note 263, at 593; WEINER, *supra* note 262, at 271.

267. *Id.*

268. MARTINEZ, *supra* note 266, at 122.

269. J. Select Comm. on Conditions of Affairs in the Late Insurrectionary States, 42nd Cong., Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, South Carolina, pt. 3, at 1472, https://archive.org/details/reportofjointsel05unit/page/1472/mode/2up?q=Anderson.

270. *Id.* at 1465.

271. Lou Falkner Williams, *The Great South Carolina Klan Trials* 81 (1991) (Ph.D. dissertation, Univ. of Fla.).

272. *Id.* at 82.

The moon beamed full from the heavens upon an otherwise dark York County.[273] Conspiring men gathered under night's cover. Each donned disguises and mounted horses, riding thundering about, two by two,[274] like a Civil War cavalry.[275] Although armed with guns, they most frequently used the leather strap—for whipping.[276] They reserved the rope lash—for hanging. Most conspirators hid their figures with black cloth capes covering their heads.[277] Even their horses were disguised under white sheets.[278] Horns intended to mimic those of the Devil adorned the outfits of some of the Klansmen.[279] As they spoke, they altered their voices through either fake Irish or Dutch accents.[280]

Minutes before the ride began, sixteen-year-old Sam Ferguson came before the group.[281] He was blindfolded and ushered to his knees.[282] After reciting an oath that promised "Death! Death! Death!" to all traitors, the teenager joined the Ku Klux Klan.[283]

From their initiation ceremony, the Klan departed Briar Patch with a vengeance. The thunder of galloping horses rumbled through the countryside, interrupted by only the piercing screams of whistles each Klansman carried.[284] This night-riding conspiracy sought to "whip [negroes] and make them change their politics."[285] Most raids resulted in lashings for the victims.[286] But tonight, the Klan had a new mission: execute Captain Jim Williams.[287]

Captain Williams was a respected community Black man of "intelligence [and] possessed great influence among the members of his race[.]"[288] Williams was a military veteran of the Civil War and a leader of an armed militia entrusted to protect an increasingly danger-

273. SHAW, *supra* note 264, at 35; *see also https://www.moongiant.com/moonphases/march/1871/.*

274. ELAINE FRANTZ PARSONS, KU-KLUX ATTACKS DEFINE SOUTHERN PUBLIC LIFE: THE BIRTH OF THE KLAN DURING RECONSTRUCTION 114 (2016).

275. *Id.*

276. WEINER, *supra* note 262, at 259.

277. Klan Trial Testimony, *supra* note 262, at 259.

278. *Id*. at 204.

279. *Id*. at 498, 242, 246.

280. *Id*. at 634, 480.

281. *Id*. at 270.

282. *Id*. at 271.

283. *Id*. at 175; *see full oath at* SHAW, *supra* note 264, at 21.

284. *Id*. at 480.

285. *Id*. at 203.

286. Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 705 (2002).

287. *See generally supra* note 269.

288. SHAW, *supra* note 264, at 29. (quoting CHARLESTON SOUTH CAROLINA SUNDAY NEWS, Jan. 23, 1921 - James D. Grist.).

ous South Carolina.[289] It is rumored that Williams became a target for execution when he threatened to "kill [all white men] from the cradle to the grave."[290] There is much speculation surrounding the Klan's specific ire towards him.[291] But there is no mistaking that Williams was a proud, politically active Black man. He presented a direct, credible threat to the Klan as a militia captain.[292] He was also a political agent. He boasted one day, "[I] would be damned if [I] would vote for any white man; if there was a white man's name on the ticket, [I] would cut it off."[293] Before reaching Williams, the night riders roved the countryside, leaving damage and destruction in their wake like a tornado. They stopped at around nine homes that evening.[294] In each place, they threatened Black men, whipped them, and took their guns.[295] As they approached various homesteads, they chanted, "Here we come. We are the Ku Klux. Here we come, right from hell[.]"[296] After kidnapping Gadsen Steele from his home, the Klan menacingly threatened, "we are going to kill Williams, and are going to kill all these damn niggers that votes radical ticket; run God damn you, run."

When the Klan finally found Williams's home, his wife explained to questioning Klansmen that he had departed for the evening.[297] Convinced she was lying, the Klan "began prying up the floorboards."[298] As the floorboards gave way to the Klan's prying, Williams appeared from a hiding place beneath the home.[299] The Klansmen whisked their victim into the night. All was not yet lost. Black citizens of York County, some of who were the Klan's recent victims, "raced to assemble Williams's militia company and took off after the Klan."[300] Williams's life remained in limbo.

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289. *Id*.

290. *Id*. at 30.

291. *Id*. at 33. ("Whether Jim Williams ever made (all or any of) the statements attributed to him by the white witnesses who testified before the Congressional Committee may well be in question.").

292. *Id*. ("Williams was, said one Klansman, 'a leading radical amongst the niggers.'").

293. Klan Trial Testimony, *supra* note 262, at 348.

294. WILLIAMS, *supra* note 205, at 77; *see also* Klan Trial Testimony.

295. *Id.*

296. Klan Trial Testimony, *supra* note 262, at 222; *see also* WEINER, *supra* note 262, at 287; SHAW, *supra* note 264, at 35.

297. SHAW, *supra* note 264, at 35.

298. *Id.*

299. *Id.* at 35–36.

300. WEINER, *supra* note 262, at 207.

Williams's posse followed the Klansmen's tracks. They found him in the early morning of March 7.[301] He was hanging from a rope, lifeless. The Klan had left their rope lash. Affixed to Captain Williams's shirt was a sign, "Jim Williams gone to his last muster." Devastated, the Black community of Yorkville had lost a fearless leader.[302] Without state governments willing or able to intervene, the Black Americans of Yorkville could only look towards the federal government for protection. In the Spring of 1871, this seemed like a fruitless dream.

C. White Supremacy's War Against Black Americans' Rights

Black men "slept in the woods and swamps for fear of their lives"[303] across South Carolina. The *Yorkville Inquirer* lamented, "[s]carcely a night passes [without] some outrage. . . perpetrated against the welfare of some in the community. Houses are burned, persons are whipped, and in some instances, killed by parties unknown. These things are not right; they are not prudent."[304]

Pleas from many corners of Southern society begged the federal government to secure the rights of freemen and Republicans in the face of state inaction. Dr. William H. Walling, a reconnaissance agent for a mining operation, reported, "in plain English, the Ku Klux Klan [ ] are riding over the County, every night, whipping negroes, threatening people, and killing whoever opposes them . . . . I hear their shooting, shouting, and blowing their horns every night, and I frankly tell you, I do not like the looks of things."[305]

U.S. Attorney General Amos Akerman "traveled to South Carolina to investigate personally the reports of atrocities in the upcountry."[306] After spending two weeks reviewing evidence accumulated by a special military envoy, the attorney general lamented that "the worst reports which had been heretofore made" regarding the Ku Klux conspiracy "fell far short of the facts."[307] Akerman designed a national policy that required "the federal government [to] terrify evil doers and

301. SHAW, *supra* note 264, at 38.
302. *Id.*
303. WILLIAMS, *supra* note 205, at 2; *see also* STEPHEN BUDIANSKY, THE BLOODY SHIRT: TERROR AFTER APPOMATTOX 44 (2008).
304. H.R. REP. NO. 42-22, pt. 5, at 1540 (1871-72) (quoting Yorkville Inquire, Whipping and House-Burning, February 9, 1871).
305. JERRY L. WEST, THE RECONSTRUCTION KU KLUX KLAN IN YORK COUNTY, SOUTH CAROLINA, 1865-1877, 78 (2002).
306. WILLIAMS, *supra* note 205, at 44.
307. *Id.*

command their respect by the exercise of its powers."[308] He finally concluded:

> "[F]rom the beginning of the world until now . . . no community nominally civilized, has been so fully under the domination of systematic and organized depravity. [These] combinations amount to war . . . and cannot be effectively crushed [under] any other theory."[309]

In response to these reports and rumors, the U.S. Senate commenced its own emergency investigation. The Senate's investigation concerned North Carolina. Still, the Senate findings, published on March 10, 1871,[310] just three days after Williams's murder, reflected a desperate reality across all of Southern society. The report announced three takeaways:

a. [T]he Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, and has sought to carry out its purpose by murders, whippings, intimidations, and violence, against its opponents;
b. [I]t binds its members to carry out decrees of crime but protects them against conviction and punishment; and
c. [O]f all the offenders against the law in this order, (and they must be many hundreds, if not thousands, because these crimes are shown to be committed by organized bands ranging from ten up to seventy-five), **not one has yet been convicted in the whole State.**[311]

The report concluded,

> "Like complaints of murder, scourging, and violence, without redress, and demands for investigation and the protecting arm of the Government against these lawless marauders, have been forwarded from the States of South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Virginia, Kentucky, Texas, and Tennessee."[312]

There was a conspiracy afoot by private actors to deprive Black men of their public rights. The Congressional Report confirmed as much. This report also troubled President Grant.[313] Shortly after reading the contents of the document, he indignantly fashioned a letter to the Speaker of the House. Grant decreed "[e]ven if Congress

308. MARTINEZ, *supra* note 266, at 67 (citations omitted).
309. WILLIAMS, *supra* note 205, at 44-45.
310. S. REP. NO. 42-1, at 31 (1871).
311. *Id.* (emphasis added).
312. *Id.* at 32.
313. MARTINEZ, *supra* note 266, at 68 ("[A] condition of affairs now exists in some of the States of the union rendering life and property insecure.").

could only discuss a single subject in the coming session," it should pass legislation "providing means for the protection of life and property in those sections of the country."[314] Congress's subsequent actions defined the Privileges or Immunities Clause with clarity.

D. Congress Defines the Privileges or Immunities Clause to Protect Black American Rights Against Domestic Terrorism

Congress accepted President Grant's challenge. On April 20, 1871, Congress passed, and the President signed the Third Enforcement Act or Ku Klux Klan Act.[315] The Act was officially entitled "An Act to Enforce the Provisions of the Fourteenth Amendment of The Constitution of the United States."[316] The title serves as evidence of the Act's purpose—coloring the broad language of the Fourteenth Amendment with specific powers. It also "attempted to provide a remedy for private lawlessness."[317] Section Three of the Enforcement Act clarifies the ambiguous Privileges or Immunities Clause. The Act defined "insurrection, [domestic] violence, unlawful combination[s], or conspiracies in any State [that] shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State"[318] as violations that abridge the "privileges and immunities" of citizens. This definition adopted by Congress spells out a heretofore unenumerated Constitutional right.

The law's precise placement of domestic terrorism within the "privileges and immunities" of citizenship established a congressional intent to create a federal duty to secure this fundamental right. Representative Jeremiah Wilson dictated, "it is the solemn duty of Congress, [under the authority of the fifth section of the Fourteenth Amendment] to enforce the protections which the State withholds."[319] The Congressional report revealed that despite the nature of these crimes, "no[t] one instance has there been conviction or punish-

314. Letter from Ulysses S. Grant to James G. Blaine (Mar. 9, 1871) (on file with the Ulysses S. Grant Papers, Series 2, Reel 3, Library of Congress).

315. MARTINEZ, *supra* note 266, at 69.

316. Klan Trial Testimony, *supra* note 262, at 821 (quoting §3 of the Ku Klux Klan Act).

317. WILLIAMS, *supra* note 205, at 42.

318. Klan Trial Testimony, *supra* note 262, at 823 (quoting §3 of "An Act To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For Other Purposes.").

319. CONG. GLOBE, 42nd Cong., 1st Sess. 482 (1871) [hereinafter 42nd Cong., 1st Sess.].

ment."[320] Congress, therefore, endeavored to fulfill the foundational rights that States failed to secure.

In South Carolina, state authorities conducted "[n]o serious investigation of Klan atrocities"[321] until "the United States Army sent Major Lewis Merrill to York County."[322] Congress's intent is clear. But their intent is only one part of the original public meaning analysis. In contrast to Justice Thomas, I will demonstrate the executive branch and general public understood this provision conferred access to federal courts for victims of private violence that States could not or would not protect.

E. The Department of Justice and Federal Courts Define the Privileges or Immunities Clause as Protecting Black Rights

When the sun crested the eastern horizon on October 19, 1871, a new day dawned on South Carolina; a new era began for Black Americans. Thundering herds of horses again rumbled on the grassy plains. But on that morning, the riders were not hooded Klansmen. Instead, "[f]ederal marshals, assisted by the Seventh Cavalry, spread out from Yorkville."[323] They were armed with guns, warrants, and "depending on the element of surprise to catch Klansmen before they had a chance to flee."[324] The calvary's targets were Klansmen who had terrorized Black Americans over the past year. Just two days earlier, under the authority of the Klan Act, President Grant suspended the writ of habeas corpus in the nine South Carolina Counties.[325] As President Grant signed the Third Enforcement Act, he was clear that the Act's purpose was to secure the Constitution's fundamental rights. He explained:

> *"I will not hesitate to exhaust the powers thus vested in the Executive, whenever and wherever it shall become necessary to do so for the purpose of securing to all citizens of the United States the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws."*[326]

320. S. REP. NO. 42-1, at 26.
321. WILLIAMS, *supra* note 205, at 38.
322. *Id.*
323. *Id.* at 46.
324. *Id.*
325. SHAW, *supra* note 264, at 45; *see also* WEINER, *supra* note 262, at 198 (Habeas corpus is the constitutional obligation to justify an arrest or detention before a judge.).
326. 17 Stat. 950 (1871) (describing Ulysses S. Grant's signing of the Third Enforcement (KKK) Act on May 19, 1871).

York, where Captain Williams was murdered, was among the jurisdictions.[327] Federal officials investigated the condition of affairs in South Carolina. After accumulating evidence through an investigation,[328] the Federal government struck a fatal blow against the Klan—giving life to the Privileges or Immunities Clause.

The cavalry and U.S. marshals effected "scores of arrests within just a few days."[329] Over the next several months, "169 military arrests [occurred] in York County before January 1872."[330] In the upper South Carolina region, "472 men had been arrested in the upcountry."[331] U.S. attorneys "brought hundreds of civil rights prosecutions under the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871, charging defendants with infringing privileges and immunities of United States Citizenship."[332] After these indictments, the government was tasked with articulating the meaning of the Fourteenth Constitutional Amendment.

The U.S. Circuit Court in Columbia, South Carolina, opened for trial on November 28, 1871, "amid great excitement."[333] The Charleston Daily Courier wrote, "The Constitution of the United States is on Trial . . . . In the history of this country, no questions more important have ever arisen or been presented to a judicial tribunal for adjudication than are those which will arise in the trials now about to take place."[334] Black citizens "crowded into the city, some to testify, others to attend the court sessions as spectators."[335] Among the hundreds of Klansmen jailed, the first case tried before a jury was *United States v. Robert Hayes Mitchell*. Mr. Mitchell was charged with conspiring on March 6, 1871, with intent to "injure, oppress, threaten and intimidate Jim Rainey, *alias* Jim Williams, a male citizen of the United States, of African descent."[336] Mitchell—a white man—was one of the hooded Klansmen who joined the conspiracy to kill the captain.

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327. RICHARD ZUCZEK, STATE OF REBELLION 98 (1996) ("Counties were York, Chester, Spartanburg, Chesterfield, Laurens, Newberry, Fairfield, Lancaster, and Marion.").

328. *See, e.g.*, WEINER, *supra* note 262, at 213.

329. Richard Zuczek, *The Federal Government's Attack on the Ku Klux Klan: A Reassessment,* 97 S. C. HIST. MAG. 47, 55 (1996).

330. WILLIAMS, *supra* note 205, at 49.

331. MARTINEZ, *supra* note 266, at 150.

332. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 937 (1986).

333. WILLIAMS, *supra* note 205, at 57.

334. *Id.* (quoting Charleston Daily Courier, Nov. 29, 1871).

335. *Id.* at 106.

336. Klan Trial Testimony, *supra* note 263, at 141.

When Joseph Taylor, the Black foreman,[337] returned the jury's verdict to Judge Bond, it rendered a judgment in one word: guilty. A jury of twelve men—ten black and two white—convicted Robert Hayes Mitchell of conspiracy to "unlawfully [ ] hinder or restrain citizens from voting in future elections on account of race, color or previous condition of servitude."[338] Captain Williams became one of the first Black men to have the United States Federal Government secure his rights under the Fourteenth Amendment. In this way, Mitchell's conviction serves as an indicator of the scope of the Privileges or Immunities Clause.

U.S. citizens, both Black and white, understood the Privileges or Immunities Clause as a result of the South Carolina Klan Trials. White former confederates understood that "Klansmen of all social classes and situations sat in jail"[339] on account of their acts against colored men. And their loved ones found themselves "in prayer before Almighty God pleading with him fore his care & protection in these times of sorrow and trouble."[340]

In closing this first trial, District Attorney Corbin defined the moral imperative of the Clause. Corbin spoke on behalf of "the voice of the President, in the language of the new attorney general, and . . . the heart of the American people."[341] Through each of their voices, David Corbin established the Privileges or Immunities Clause meant that "this organization, to defeat the rights of our colored fellow citizens, *must and shall be put down*."[342] The South Carolina Klan convictions "mark[ed] an era in the history of the administration of justice in South Carolina."[343] The convictions "represented a searing dramatization of the nation's commitment . . . to protect its new citizens in their rights."[344] The Federal government secured the privileges and immunities that States could not abridge through their non-enforcement. Captain Williams's rights, secured 150 years ago, should serve as both inspiration and hope today.

337. *Id*. at 163.
338. WILLIAMS, *supra* note 205, at 76.
339. *Id.* at 48.
340. *Id.*
341. Klan Trial Testimony, *supra* note 262, at 449.
342. *Id.* (emphasis in original); *see also* WILLIAMS, *supra* note 205, at 83.
343. Klan Trial Testimony, *supra* note 262, at 448.
344. WEINER, *supra* note 247, at 213.

F. Why Incorporating the Second Amendment Through the Privileges or Immunities Clause is Not Historically Accurate

Federal prosecutors of Williams's killers first adopted Justice Clarence Thomas's position that the "Reconstruction Amendment . . . incorporate[d] the Second . . . Amendment[ ] to secure the right to bear arms."[345] The Klan had taken guns from Williams's home during their raid, so alleging this violation made sense. District Attorney Corbin defiantly penned, "[w]e will never abandon [the second amendment right] until we are obliged to."[346] But the progressive Judge Bond, a man sympathetic to the cause of protecting Black Americans, did not accept their legal theory. Judge Bond "seems likely that he rejected the entire notion of incorporation."[347] He did not rule for that form of Constitutional interpretation. Quite frankly, he recognized, "there is some ambiguity concerning the specific rights the framers intended to secure."[348]

No Court, it must be noted, ever defined the Privileges or Immunities Clause to include the Second Amendment.[349] Instead, Judge Bond "considered the state responsible under the Fourteenth Amendment when the rights of citizens were denied, whether by state law or individual action."[350] For Judge Bond, "state and local officials who failed to protect black rights were involved in a kind of state action that could be punished by the federal government."[351] In a similar case, William B. Woods, a future Supreme Court Justice, found that "[d]enying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."[352] Two years of indictments and subsequent convictions decidedly illustrate the founding era public adopted agreed with this meaning. Judge Bond's ruling comports with the **minimum baseline** of rights that Justice Thomas repeatedly references in *McDonald*. The public understood the Clause's purposes un-

345. Lou Falkner Williams, The Great South Carolina Klan Trials, 1871-1872 122 (Aug. 1991) (Ph.D. dissertation, University of Florida).
346. WILLIAMS, *supra* note 205, at 75.
347. WEINER, *supra* note 344, at 147; *see also* WILLIAMS, *supra* note 205, at 73.
348. KACZOROWSKI, *supra* note 332, at 922.
349. *But see* United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (finding the right to freedom of assembly and speech was among the rights guaranteed in the Constitution's Fourteenth Amendment).
350. WILLIAMS, *supra* note 205, at 72.
351. *Id.*
352. *Hall,* 26 F. Cas. at 81.

til *U.S. v. Cruikshank*, the case Thomas properly sought to overturn, halted Civil Rights enforcement. David Corbin, closing his first Klan jury trial, explained, "the uplifted arm of this nation, otherwise will crush [the conspirators] [and] . . . *if the arm of the American people* has again to be raised to put down this [Ku Klux] organization . . . it will make [Klansmen's] homes *desolate and your fields a wilderness*."[353] The Privileges or Immunities Clause gave the federal government the Constitutional weight to crush the Klan.

G. The South Carolina Klan Trials Establish a Right to Federal Protection in Court

The success of the Ku Klux Klan Trials in suppressing domestic terrorism of the Klan is one of the unsung triumphs of U.S. legal history.[354] It also illuminates why Justice Thomas's concurrence deserves augmentation. Thomas concludes, "the use of firearms for self-defense was often **the only way** [B]lack citizens could protect themselves from mob violence."[355] The Ku Klux Klan Trials proved the public understood the Fourteenth Amendment to mean that "citizen[s] of the United States [are] entitled to the enforcement of the laws for the protection of [their] fundamental rights . . . ."[356] Although Klan violence was once ubiquitous across the South, the outrages almost completely ceased after the trials.[357] Federal courts rather than armed citizens completed the job.

As the indictments turned to convictions and the Klan's thundering terror raids fell silent, Black Americans briefly experienced full citizenship under the equal protection of the law.[358] Not only did they live with freedom, but they also voted at extremely high rates after the Klan Trials.[359] Because of their high voting participation rates, Black

353. Klan Trial Testimony, *supra* note 262, at 449.

354. MARTINEZ, *supra* note at 266, at 196 ("[T]he Klan was broken and never again would it rule a community or state with as much power as it had in the South Carolina Upcountry during 1870-1871.").

355. McDonald v. City of Chicago, 561 U.S. 742, 857 (2010) (Thomas, J. concurring) (emphasis added).

356. United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

357. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876, 88 (2005) ("[T]he election of 1872 was the most violence-free election during the entire period of Reconstruction.").

358. *Hall*, 26 F. Cas. at 81 ("[D]enying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.").

359. Peggy Cooper Davis, *Introducing Robert Smalls,* 69 FORDHAM L. REV. 1695, 1703 ("Black voter turnout in the late 1860s was overwhelming, approaching ninety percent in many elections.").

congressional delegates filled the halls of Congress, especially those delegates from South Carolina.[360]

Black Americans did not cheer when convicted Klansmen boarded ships in Charleston bound for the Federal prison in Albany, New York.[361] They did not celebrate in the streets as the federal government convicted scores of white men who deprived them of their most basic rights.[362] Instead, they did something much more foundational: they slept. In their homes, surrounded by the love of their families, Black Americans slept with a newfound understanding that the U.S. Constitution, through the Privileges or Immunities Clause, secured their most fundamental right—their right to life. Black political leaders wrote grateful letters to President Grant, thanking him "for this public manifestation **of protecting all** wherever the starry banner floats."[363] The South Carolina Klan Trials illustrate the **minimum baseline** of rights that the Privileges or Immunities Clause protects includes a federal duty to secure Black Americans from private harms that state governments cannot or will not protect.[364] During Reconstruction, the federal government conferred "protection of the laws, whenever [her citizens] receive[d] an injury."[365]

CONCLUSION

"A social engineer . . . [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of . . . local communities and in bettering conditions of the underprivileged citizens."[366]

For George Floyd, Ryan Stokes, Emmett Till, Jim Williams, and the thousands of murdered Black Americans our history has overlooked, the Privileges or Immunities Clause secures their right to a federal courtroom. The original public meaning of the Clause tells us

360. *See generally id.* (noting Robert Smalls, Joseph H. Rainey, Richard Cain, Robert B. Elliott, Robert C. De Large, Alonzo J. Ransier—a plurality of the nation's Black Congressmen in Reconstruction—hailed from South Carolina.).

361. STEPHEN BUDIANKSY, THE BLOODY SHIRT: TERROR AFTER APPOMATTOX 141 (2008).

362. *But see* Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI-KENT L. REV. 1013, 1015 (1995).

363. THE PAPERS OF ULYSSES S. GRANT JUNE 1, 1871- JANUARY 31, 1871, 168 (John Y. Simon, ed., 1998).

364. United States v. Hall, 26 F. Cas. 81 (C.C.S.D. Ala. 1871) ("[D]enying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.").

365. Marbury v. Madison, 5 U.S. 137, 163 (1803).

366. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 84 (1983).

this much. Today, the Supreme Court "gut[s] Section 1983 with qualified immunity," leaving "almost no redress for innocent victims of police misconduct."[367] Let this Note's **minimum baseline** interpretation of the Privileges or Immunities Clause ground the remedy for qualified immunity in the Constitution.[368] Those who lose their most fundamental rights because of unjust State violence, in whatever form it takes, should have a federal courtroom hear their grievances.

367. Tilman J. Breckenridge, *Qualified Immunity: History Demands Change,* NBA NAT'L BAR ASSOC. MAG., Jan. 2021, at 12-13.

368. *See* Clarence Thomas, *Toward a Plain Reading of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 991 (1987) ("The task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence—in other words, toward the spirit of the [Second] Founding.").

The Duty to Vote in an American City

NATE ELA*

The duty to vote is making a comeback. Compulsory voting has long struck legal scholars and political scientists as the ultimate game-changing electoral reform—but one almost unimaginable in the United States. Yet even as states controlled by Republicans have made a coordinated effort to limit voting rights, some progressives have begun charting a path to make voting a universal civic duty. Cities offer a promising place to start.

Voting has in fact been made a legal duty in the United States—precisely once. That story has never been told. This article excavates the history of compulsory voting in an American city. In 1889, voters in Kansas City, Missouri approved a poll tax that applied only to eligible voters who failed to cast a ballot in local elections. This duty to vote remained in force during four local election cycles, from 1890 to 1896, when the Missouri Supreme Court struck it down in Kansas City v. Whipple.

How and why did voting become a duty in Kansas City? And what happened during this singular electoral experiment? The article describes how a newspaper publisher brought the case for compulsory voting to Kansas City, by echoing claims made elsewhere that it would

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cure the purported evils of universal suffrage and mitigate the ills of machine politics. The provision was added to the city's first home rule charter following three tumultuous years for local politics, when the rising political power of organized labor and Black leaders had unsettled alliances and begun to reshape the electorate. Ultimately, bureaucratic conflict and legal uncertainty prevented collection of the poll tax. Despite high expectations, it did not substantially increase turnout—either among the responsible businessmen that proponents believed were failing to do their civic duty, or more generally among the city's eligible voters.

Kansas City's unprecedented experiment offers political, practical, and legal lessons for today. It suggests that proposals to make voting a duty might receive political support in places that progressives might find surprising, and for reasons they could find troubling. It highlights how the division of administrative labor in running elections could prevent some U.S. cities from making voting a duty, and empower others. It points to how local government law and specific state constitutional provisions would prove crucial to determining municipalities' power to make voting a duty. Finally, it speaks to recent unfounded concerns that a duty to vote would violate the 24th Amendment.

Kansas City's forgotten experiment offers a key starting point for reconstructing the untold history of compulsory voting in the United States. It also provides crucial lessons for people who would hope to see the duty to vote emerge once again in an American city.

The United States should require all of its citizens to vote. Doing so will push back against voter suppression and tear down barriers to participation because the best way to protect the right *to vote is to underscore that it is also a civic* duty.

-Amber Herrle and E.J. Dionne, Jr. (2020)[1]

Adoption of compulsory voting in the United States is about as likely as being corralled by a red-dyed rope.

-Richard L. Hasen (1996)[2]

Introduction

American democracy, scholars and the public have come to agree, appears increasingly in jeopardy.[3] Democratic backsliding has many causes, among them the strategy of winning elections by creating regulations that selectively disenfranchise voters—a type of "politics without guardrails" aimed at eliminating electoral competition.[4] In the 2021 legislative session, at least 17 states enacted 28 laws with pro-

1. Amber Herrle & E.J. Dionne, Jr., *Why Shouldn't Voting be Mandatory?*, BROOKINGS INSTITUTION (July 24, 2020), https://www.brookings.edu/blog/fixgov/2020/07/24/why-shouldnt-voting-be-mandatory/ (Last accessed Mar. 24, 2023).

2. Richard L. Hasen, *Voting Without Law*, 144 PENN. L. REV. 2135, 2179 (1996).

3. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1-2 (2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 123-124, 238-239 (2018); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265-66 (2022); *Still Miles Apart: Americans and the state of U.S. Democracy half a year into the Biden Administration*, BRIGHT LINE WATCH, June 2021 Survey, http://brightlinewatch.org/still-miles-apart-americans-and-the-state-of-u-s-democracy-half-a-year-into-the-biden-presidency/ (Last accessed Mar. 24, 2023) ("Experts perceive grave threats from bills that encroach on the political independence of local election officials and that restrict mail voting."); Courtney Vinopal, *2 Out of 3 Americans Believe U.S. Democracy is Under Threat*, PBS NEWSHOUR (Jul. 2, 2021) https://www.pbs.org/newshour/politics/2-out-of-3-americans-believe-u-s-democracy-is-under-threat (last accessed Mar. 24, 2023) (reporting that "67% of U.S. adults think the country's democracy is under threat.").

4. LEVITSKY & ZIBLATT, *supra* note 3, at 208 (describing Republican gerrymandering and manipulation of voter registration, voter ID requirements, voting hours, and polling locations as

visions that make it harder for Americans to vote.[5] The Supreme Court has invited and enabled this wave of restrictive measures, by striking down and narrowing key sections of the Voting Rights Act.[6] Congress, meanwhile, has failed to pass legislation to protect voting rights. The right to vote has always been contested.[7] Americans are engaged in a renewed struggle over how much it can be restricted.

What if voting were not simply a right, but also a legal duty? Making voting mandatory could be game-changing for American democracy, as legal scholars and political scientists have periodically observed.[8] Yet scholars have typically concluded it can't or won't happen here.[9] The prospects for such a fundamental reform do seem bleak, especially at the federal level. If the U.S. Senate can't eliminate the filibuster and defend voting rights, how could it make voting a legal duty?[10] Yet as political scientist Arend Lijphart once noted, pessimism can fuel a self-fulfilling prophesy: "if even the supporters of compul-

examples of politics without guardrails); GINSBURG & HUQ, *supra* note 3, at 160-61 (describing strategies of voter suppression, and reluctance of courts to address them).

5. Brennan Center for Justice, *Voting Laws Roundup: May 2021*, BRENNAN CENTER (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 (last accessed Mar. 24, 2023).

6. *See generally* Shelby Cnty. v. Holder*,* 570 U.S. 529 (2013); Brnovic v. DNC, 141 S. Ct. 2321 (2021).

7. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 424 (2000).

8. Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 FORDHAM L. REV. 639, 666 (2021) (concluding that "compulsory voting is a contribution to securing a shared view of equal Black citizenship."); *see generally* Malcolm M. Feeley, *A Solution to the "Voting Dilemma" Problem in Modern Democratic Theory*, 84 ETHICS 235 (1974); *see generally* Alan Wertheimer, *In Defense of Compulsory Voting*, in PARTICIPATION IN POLITICS 276–96 (R. J. Pennock and J. W. Chapman eds. 1975); *see generally* Hasen, *supra* note 2; Arend Lijphart, *Compulsory Voting is the Best Way to Keep Democracy Strong*, CHRON. HIGHER ED. (Oct. 16, 1996), https://www.chronicle.com/article/compulsory-voting-is-the-best-way-to-keep-democracy-strong/ (last accessed Mar. 24, 2023); *see generally* Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 19 AM. POL. SCI. REV. 1 (1997); *see generally* Sean Matsler, *Note: Compulsory Voting in America*, 76 S. CAL. L. REV. 953 (2003); *see generally* Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207 (2006); *see generally Note: The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591 (2007); *see generally* Howard Schweber, *Compulsory Voting*, talk at U. Maryland Constitutional Schmooze (2014), https://digitalcommons.law.umaryland.edu/schmooze_papers/191/ (last accessed Mar. 24, 2023).

9. *See, e.g.*, Wertheimer, *supra* note 8, at 293 ("The very reasons that account for the failure of political thinkers to consider compulsory voting also preclude its adoption."); Hasen, *supra* note 3, at 2179; Matsler, *supra* note 8, at 978 ("[T]he likelihood of such a system ever existing in America remains slim . . . it is all but certain that it would face defeat at the hands of the very political factions whose dominance and legitimacy it threatens."); Schweber, *supra* note 8, at 1 ("I mentioned the practice [of compulsory voting] at a meeting of political scientists and was laughed at quite vocally by a senior colleague who insisted there was no such thing.").

10. Mike DeBonis & Seung Min Kim, *Sinema and Manchin Confirm Opposition to Eliminating Filibuster, Probably Dooming Democrats' Voting Rights Push*, WASH. POST. (Jan. 13, 2022), https://www.washingtonpost.com/politics/biden-set-to-visit-senate-democrats-in-a-final-

sory voting believe that its chances are nil—and hence make no effort on behalf of it—it will indeed never be adopted!"[11]

Some have kept hope alive. In 2015, President Obama mused that the U.S. might do well to make voting a duty.[12] Elections scholar Nicholas Stephanopoulos suggested that compulsory voting might begin at the local level, then spread to state and federal elections.[13] Political science has seen its own turn toward empirical and normative work on compulsory voting,[14] with some scholars anticipating scenarios in which the reform is tested somewhere in the U.S.[15] And the liberal columnist E.J. Dionne and progressive political strategist Miles Rapoport have launched a campaign to turn the policy proposal into reality—through a recent Brookings Institution report targeting politicos, a book written for the general public, and a legislative push in statehouses.[16] Legislators have introduced bills to make voting a duty in Massachusetts, Connecticut, California, and Washington.[17] Their sponsors recognize the bills are unlikely to pass, but together with the

improbable-pitch-for-voting-rights-action/2022/01/13/fde533b6-7475-11ec-8b0a-bcfab800c430_story.html (last accessed Mar. 24, 2023).

11. Lijphart, *Unequal Participation*, *supra* note 8, at 11.

12. Stephanie Condon, *Obama Suggests Mandatory Voting Might be a Good Idea*, CBS NEWS (Mar. 18, 2015), https://www.cbsnews.com/news/obama-suggests-mandatory-voting-might-be-a-good-idea/ (last accessed Mar. 24, 2023) (quoting President Obama as saying, "It would be transformative if everybody voted—that would counteract money more than anything.").

13. Nicholas Stephanopoulos, *A Feasible Roadmap to Compulsory Voting*, THE ATLANTIC (Nov. 2, 2015), https://www.theatlantic.com/politics/archive/2015/11/a-feasible-roadmap-to-compulsory-voting/413422/ (last accessed Mar. 24, 2023) (outlining how compulsory voting might start with a blue city in a red state, and then spread to the rest of the country); Joshua Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1069 (2017) (citing Stephanopoulos for the proposition that a duty to vote implemented at the local level could spread to the rest of the nation).

14. *See, e.g.*, Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. POL. SCI 101, 108 (2019); *see* Sarah Birch, *The Case for Compulsory Voting*, 16 PUB. POL. RSCH. 21, 24-25 (2009); JASON BRENNAN & LISA HILL, COMPULSORY VOTING: FOR AND AGAINST (2014); SHANE P. SINGH, BEYOND TURNOUT: HOW COMPULSORY VOTING SHAPES CITIZENS AND POLITICAL PARTIES (2021).

15. *See, e.g.*, Shane P. Singh & Neil S. Williams, *Compulsory Voting: The View from Canada and the United States*, in A CENTURY OF COMPULSORY VOTING IN AUSTRALIA 235-58 (M. BONOTTI & P. STRANGIO, EDS., 2021).

16. The Working Group on Universal Voting, *Lift Every Voice: The Urgency of Universal Civic Duty Voting*, THE BROOKINGS INSTITUTION (July 20, 2020), https://www.brookings.edu/research/lift-every-voice-the-urgency-of-universal-civic-duty-voting/ [hereinafter *Lift Every Voice*] (last accessed Mar. 24, 2023); E.J. DIONNE JR. & MILES RAPOPORT, 100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING (2022).

17. S.B. 180, 2021 Conn. Gen. Assemb., Jan. Sess. (Conn. 2021); A.B. 2070, 2019-2020 Cal. Legis., 2019-2020 Reg. Sess. (Cal. 2020); H. 653, 191st Mass. Gen. Ct., 2019-2020 Reg. Sess. (Mass. 2019); S.B. 5209, 2023-2024 Wa. Legis. (Wa. 2023).

effort by Dionne and Rapoport they have drawn attention and sparked debate.[18]

In discussions over whether voting can or should be made a duty[19] in this country, a fact is sometimes glossed over, or missed completely: compulsory voting *has* been tried in the United States—precisely once.[20] On April 8, 1889, voters in Kansas City, Missouri approved a city charter that made voting a duty.[21] It did so by creating a poll tax for all eligible voters—at the time, men over age 21—that was waived by turning out to vote in city elections.[22] The city implemented this policy in four local election cycles, starting in 1890, though its efforts to collect the tax were clouded by legal uncertainty.[23] Ultimately, a test case resulted in the Missouri Supreme Court's 1896 decision in *Kansas City v. Whipple,* striking down the charter provision.[24]

We know surprisingly little about the one time that compulsory voting was tried in America. As the historian Alexander Keyssar observed in his landmark account of suffrage in the United States, "the subject of compulsory voting still awaits its historian."[25] This remains the case. Scholars and proponents sometimes cite *Whipple* in passing,[26] but we have no historical account of how and why voting be-

18. Will Haskell & Miles Rapoport, *Connecticut Should Require Voting As a Civic Duty*, HARTFORD COURANT, Jan. 26, 2021; Michael Hamad, *Senate Democrat proposes bill requiring mandatory voting in elections by 2024*, HARTFORD COURANT, Jan. 28, 2021; Karen Fassuliotis, *Opinion: Haskell Bill to Make Voting Mandatory is Unconstitutional*, DANBURY NEWS-TIMES (Jan. 29, 2021), https://www.newstimes.com/opinion/article/Opinion-Haskell-bill-to-make-voting-mandatory-is-15907888.php (last accessed Mar. 24, 2023); Andy Craig, *Mandatory Voting is a Bad and Unconstitutional Idea*, CATO INST. (June 17, 2022), https://www.cato.org/commentary/mandatory-voting-bad-unconstitutional-idea# (last accessed Mar. 24, 2023).

19. This Article focuses on efforts to make voting a legal duty, with some legal consequences, such as a fine or fee, should that duty go unfulfilled. There is, to be sure, an important distinction to be made between various types of duties, and it is possible that voting could be a moral, ethical, or civic duty, but not a legal one. For the sake of brevity, in what follows I generally use "duty" as shorthand for "legal duty."

20. Although this Article examines the only case in U.S. history in which compulsory voting has been enacted as law and implementation attempted, it is worth noting that voting was made a duty in several instances during the colonial period, and that bills to make voting mandatory have been repeatedly proposed in various states since the 1880s. *See* section I.A., *infra.*

21. Kansas City v. Whipple*,* 136 Mo. 475, 478 (1896).

22. *Id.*

23. *Id.*

24. *Id.* at 483-484.

25. KEYSSAR, *supra* note 7, at 424 n. 19.

26. *See e.g.*, Hasen, *supra* note 3, at 2175 n. 163 (citing *Whipple* as counterpoint to First Amendment objections to compulsory voting); Schweber, *supra* note 8, at 11 (noting *Whipple* was never appealed).

came a duty in Kansas City, and what happened when it became the law of the city.

This article tells this story for the first time. It identifies the actors who placed compulsory voting on the agenda in Kansas City; suggests how tumultuous labor and racial politics may have drawn civic leaders from both major parties to the unprecedented policy; describes the arguments proponents made for the reform; traces the struggles to implement and enforce an unprecedented electoral regulation; and maps the legal positions taken as the city defended its penalty for nonvoters in Missouri's courts. This history suggests that the motivation for compulsory voting was not particularly progressive. Kansas City's white political and business elite appears to have been drawn to make voting a duty in hopes of diluting the growing influence of working-class and African-American voters, by ensuring that the city's "responsible" men of business turned out to vote.[27] The impulse to make all men vote in Kansas City resonated with the anxieties of white elites concerning the exercise of suffrage by working-class African Americans and immigrants during the Gilded Age—and particularly in the years between the end of Reconstruction and the rise of Jim Crow disenfranchisement laws.[28]

The story of Kansas City is no mere historical curiosity. As interest in compulsory voting sees a resurgence, the case study developed here offers lessons for people who hope to again make voting a duty, starting with local elections. To assess the democratic potential and possible pitfalls of reviving this reform during a moment that has its own echoes with the Gilded Age and the Redemption Era, we should know what happened last time around.[29]

Kansas City offers three types of lesson: political, practical, and legal. The first challenges the emerging conventional wisdom concerning how, where, and why municipal leaders would want to make voting a duty. The second contributes to recent discussions of policy design, pointing to how the division of labor of election administration would inform how and where a local duty to vote could be imple-

27. *See* sections I.B. and I.C., *infra.*

28. *See* sections I.B. and I.C., *infra.*

29. K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL. REV. 321, 326-27 (2016); Kimberly S. Johnson, *The Neo-Redemption Era? APD in the Age of #Black Lives Matter,* 6 POL., GRPS. & IDENTITIES 120 (2018). I am indebted to Janet Moore for pointing out the resonance not only with the Gilded Age but also with the Redemption Era.

mented.[30] The final set of lessons concerns how state and federal law shape municipal authority to make voting a duty.

In drawing lessons from the case study, I avoid re-treading analysis in prior work. I describe how proponents made their case in Kansas City, but do not intervene in recent normative debates over making voting a duty.[31] Nor do I review how compulsory voting has affected voting behavior in other countries,[32] or opine on whether there is a federal constitutional right *not* to vote.[33] These questions are important, but prior work has helped point the way for proponents or opponents of compulsory voting.

My aim is different: to use history as a means of identifying challenges, opportunities, dilemmas, and contradictions that proponents of compulsory voting may encounter as they seek to make voting a duty in local elections. The first half of the article, in Part I, tells the story of compulsory voting in Kansas City. It places the proposal in the context of skepticism among white elites during the Gilded Age concerning the wisdom of universal male suffrage, and then follows the local campaign to include the policy as part of the municipal charter, make the case for its enactment, and overcome challenges to its implementation. Part I closes by analyzing the logic of the Missouri Supreme Court's decision that compulsory voting violated the state constitution.

The Article then draws lessons from the case study. Part II takes up political and pragmatic lessons. The politics that produced a duty to vote in Kansas City suggests that the path to reform envisioned by today's progressive revivalists might not be so straightforward. Compulsory voting might serve to dilute the influence of organized groups and segments of the electorate that local progressives might otherwise hope to empower. Indeed, it might ultimately be enticing to conservatives concerned about losing their grip on power. The case study also highlights how policy implementation depends on administrative details. As officials in Kansas City realized, a city must be able to iden-

30. Proponents have typically focused on the need to allow for blank ballots, to avoid the problem of compelled speech. *See, e.g.*, *Note: The Case for Compulsory Voting*, *supra* note 8, at 601. More recently, the working group convened by Brookings focused on the need to be attentive to how fines or fees for non-voting are enforced and their distributional effects. *Lift Every Voice*, supra note 16, at 50.

31. *Cf.* BRENNAN & HILL, *supra* note 14.

32. *See generally* Maurice Dunaiski, *Is Compulsory Voting Habit Forming? Regression Discontinuity Evidence from Brazil,* 71 ELECTORAL STUD. 102334 (2021).

33. *See, e.g.*, *Note: The Case for Compulsory Voting*, *supra* note 8, at 598-600 (analyzing whether there is a right not to vote implicit in the U.S. Constitution).

tify its residents, determine which are eligible voters, and then identify and sanction nonvoters. As in Kansas City, municipalities today that rely on county and state agencies to maintain lists of residents and voters, and to carry out local elections, would face hurdles to implementing a duty to vote.

Part III draws legal lessons from the case study. The first concerns municipal authority to administer elections. This issue of local government law arose in Kansas City, and the Missouri Supreme Court struck down the local measure because of a purported conflict with state law. Today, the viability of a duty to vote in local elections would turn on municipal authority. I map where municipalities are empowered to make voting a duty, and conclude the reform is viable in a wider range of states than previously supposed. I also analyze how the intent or likelihood of a reform to create extra-local effects could affect state courts' willingness to uphold compulsory voting at the local level. This, together with the likelihood of state legislative preemption, suggests why proponents should consider how a duty to vote in local elections may be protected by a state constitutional right to local self-government.

Part III also addresses an issue of federal law that opponents of compulsory voting have recently raised. This is the argument that compulsory voting constitutes a poll tax in violation of the 24th Amendment or *Harper v. Virginia State Board of Election*.[34] At first blush, the Kansas City poll tax provision might seem to support this claim. But I conclude that the asserted claim is in fact a non-issue, at least so long as a nonvoter retains the right to vote in subsequent elections. That was the case in Kansas City, and no one today is suggesting anything otherwise.

Making voting a duty could be a game-changer for American democracy. Although it might seem an inherently progressive reform, the experience of Kansas City in the 1880s and 1890s suggests how its reemergence could present twenty-first century progressives with both opportunities and dilemmas. Learning from the past can help today's reformers be thoughtful and strategic as they work to bring about a duty to vote—and envision how cities might serve as launching points for deepening American democracy.

34. Harper v. Va. State Bd. of Election, 383 U.S. 663, 666 (1966) (holding a state poll tax to violate the Fourteenth Amendment guarantee of equal protection).

I. The Duty to Vote in Kansas City

In the late 1880s, Kansas City's political elite came to favor making voting a duty, and managed to enact the policy.[35] People elsewhere had advocated compulsory voting, but this was the only place since independence that would actually try to implement the reform.[36] The history that follows does not aim to identify generalizable factors that are necessary or sufficient to enact a duty to vote in an American city. One case cannot, of course, do so much.[37] And the factors that favored the enactment of compulsory voting 130 years ago are not necessarily the same as those that would favor its reemergence today. Nevertheless, Americans curious about how a duty to vote might reemerge today could learn at least as much from our own relatively neglected history of compulsory voting as from drawing comparisons with a "model case" such as Australia.[38]

This, then, is a deliberately presentist history.[39] "The emergence of new concerns in the present," the historian Lynn Hunt has noted, "invariably reveals aspects of historical experience that have been occluded or forgotten."[40] Renewed interest in compulsory voting, particularly in cities, invites a return to Kansas City in the late 1880s. Revisiting that moment reveals how voting once became a duty in America, and sheds light on how and where the reform might reemerge.[41] This is distinct from imagining that events will unfold in

35. Kansas City v. Whipple, 136 Mo. 475, 478 (1896).

36. *See* section I.A., *infra.*

37. *See* Stanley Lieberson, *Small* N*'s and Big Conclusions: An Examination of the Reasoning in Comparative Studies Based on a Small Number of Cases*, in WHAT IS A CASE? EXPLORING THE FOUNDATIONS OF SOCIAL INQUIRY 108 (CHARLES C. RAGIN & HOWARD S. BECKER, EDS. 1992) (observing that "a small number of cases is an inadequatebasis for generalizing about the process under study.").

38. *See* MONIKA KRAUSE, MODEL CASES: ON CANONICAL RESEARCH OBJECTS AND SITES 32 (2021) (arguing for more studies of neglected cases, since "by focusing on model systems, researchers are not considering the full range of variation . . . [and] some objects that have value in and of themselves may never be studied and understood"). For an example of taking Australia as the model case, *see* Lisa Hill, *Compulsory Voting in Australia: A Basis for a "Best Practice" Regime*, 32 FED. L. REV. 479 (2004).

39. For readers uninitiated to the terms of debate among professional historians, presentism can be understood as "a pejorative for the faulty understanding of the past in terms of the present." Jeffrey R. Wilson, *Historicizing Presentism: Toward the Creation of a Journal of the Public Humanities,* PROFESSION (2019), https://profession.mla.org/historicizing-presentism-toward-the-creation-of-a-journal-of-the-public-humanities/ (last accessed Mar. 24, 2023).

40. Lynn Hunt, *Against Presentism*, PERSPECTIVES ON HISTORY (May 1, 2002), https://www.historians.org/publications-and-directories/perspectives-on-history/may-2002/against-presentism (last accessed Mar. 24, 2023).

41. At the same time, we should approach the past, as Hunt suggests, with a sense of humility or wonder, rather than a presumption that people then were morally inferior to those of us who have come after. *Id.* The prejudices of the day—and, as we will see, there were many—

precisely the same way. History may on occasion rhyme, and today's politics do echo those of the Gilded Age and Redemption Era in certain respects.[42] But we should not expect this history to simply repeat.

A note on sources and methods before proceeding. I am aware of no archival collection that reveals the private reflections of the actors in this drama. Instead, I draw extensively on articles from Kansas City newspapers—the *Star,* the *Times*, and the *Daily Journal.* These reports were produced for public consumption—to both inform and persuade readers. In using articles from newspapers that had political agendas, there is some risk that the bias of the sources will skew our understanding of events.[43] Here, however, the sources' bias is part of the story. The slant in how newspapers covered compulsory voting informs the narrative, pointing to why compulsory voting caught the fancy of elites and electoral reformers.

A. Universal Suffrage and Compulsory Voting in the Gilded Age

Compulsory voting was part of political discourse during the Gilded Age, if not a central concern. By the time it came to Kansas City, the reform had been debated and elsewhere for at least a decade. Later, clauses enabling compulsory voting would be written into three state constitutions.[44] The impulse was not particularly progressive. Instead, the notion that voting should be a duty resonated with critiques of the dangers posed by universal suffrage, and the perceived threat of African Americans and women gaining the right to vote. Making voting mandatory was just one of several ideas that reformers proposed to address these threats, and the potential for election fraud.

Proponents of compulsory voting in the late 1800s looked back to colonial-era precedents. As colonies, Georgia and Virginia each enacted laws to levy fines for non-voting, though the former apparently did not enforce the provision and the latter only did so rarely.[45] Pro-

informed elite interest in compulsory voting in Kansas City. Rather than imagining we have overcome such prejudices, we might instead ask how the prejudices of our own time could inform renewed interest in this reform.

42. Rahman, *supra* note 29; Johnson, *supra* note 29.

43. *See generally* Jennifer Earl, Andrew Martin, John D. McCarthy & Sarah A. Soule, *The use of Newspaper Data in the Study of Collective Action,* 30 ANN. REV. SOC. 65 (2004).

44. Such clauses were amended into the constitutions of Massachusetts, North Dakota, and Oregon. Henry J. Abraham, *What Cure for Voter Apathy?,* 39 NAT'L MUNI. REV. 346, 346 (1952). Of the three, Massachusetts is the only in which the provision has not been repealed. MASS. CONST., art. LXI ("The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.").

45. Hasen, *supra* note 3, at 2173-74 n. 154.

ponents also cited local ordinances that mandated voting at some town meetings in colonial Massachusetts and New York.[46]

Civic reformers and legislators in Massachusetts led the way in putting compulsory voting back on the agenda in the late nineteenth century. As early as 1875, Reverend Joseph Cook, an influential Boston clergyman and author, delivered sermons on the need for "compulsory voting, with fines for absence from the polls."[47] He proposed this as part of a set of election and civil service reforms, which would also include disenfranchising the illiterate.[48] By 1883, having visited the Wyoming territory, where women could vote, Cook advocated for compulsory municipal suffrage that included literate women.[49]

In 1885, Hazard Stevens, a Massachusetts legislator famous for making the first documented ascent of təqʷuʔməʔ—the volcano that white settlers named Mount Rainier—introduced a bill to make voting compulsory.[50] In presenting the bill, he noted that nearly one in four of Boston's 66,000 voters failed to turn out at the last election, and made clear who he thought stood to benefit if all turned out:

> These recreant citizens are not the dangerous and debased voters, the mere voting cattle, boutht up with a glass of liquor or a dollar poll tax and voted in swarms at the dictation of others. That class, unfortunely, are always on hand at every polling-place, and always will be as long as unscrupulous politicians and hungry office-seekers furnish a market for their votes. They are always ready to vote often and early.
>
> But these absentee voters, on the other hand, include many intelligent and educated citizens, men of high character and posi-

46. *See Compulsory Suffrage*, BOSTON EVENING TRANSCRIPT, Mar. 9, 1885, at 2. ("An ancient by-law of the towns in 1660 imposed a penalty of six pence on any voter who failed to attend town meeting, and thirteen pence if he left it before it was over."). Political scientist Frederick William Holls, in making the case for compulsory voting in 1891, quoted a 1643 ordinance from Southampton, Long Island:

> It is ordered that whatsoever matters or orders shall be referred to the publick vote euery man that is then and there present and a Member of the Courte shall give his vote and suffrage eyther against or for any such matters and not in any case be a neuter.

Holls, *Compulsory Voting,* 1 ANNALS AM. ACAD. POL. & SOC. SCI. 586, 591 (1891).

47. *Remedies for American Dishonesty*, BOSTON EVENING TRANSCRIPT, Apr. 3, 1875, at 8.

48. *Id*.

49. *The Monday Lectureship*, BOSTON EVENING TRANSCRIPT, Mar. 5, 1883, at 8.

50. DeeDee Sun, *Changing the Name of Mount Rainier? The new effort from Washington tribes,* KIRO 7 NEWS (Apr. 23, 2021), https://www.kiro7.com/news/local/changing-name-mount-rainier-new-effort-washington-tribes/RZ7STJVYDNFMLGPNCHZY62CRWI/ (last accessed Mar. 24, 2023); J. OF THE H.R. OF THE COMMONWEALTH OF MASS. 84 (1885) (reporting that bill introduced by Stevens was reported to the committee on election laws).

> tion. . . who are too much absorbed in private pursuits to attend to their public duty. . .
>
> Thus these absentees are the very voters most needed. They are the intelligent, the industrious, the non-partisan, the very men who cannot be bought, who cannot be cajoled, and who cannot be driven.
>
> Would not the accession of such voters, twenty per cent. of the whole number, raise immeasurably the average of the electors? Would they not more than counterbalance the dangerous and corrupt voters?[51]

Hazard's argument, at least on its first hearing, was unpersuasive. One report noted his 1885 bill "was received with ridicule and almost unanimously voted down."[52]

The next year, Stevens reintroduced the bill, and it fared much better. Although it fell short of passing in the lower house by a vote of 49 to 44, the bill "met with universal respect," according to the *Boston Evening Transcript:* "Those who opposed it did so solely on the ground of expediency or practicability, admitting that the idea and principle of the bill were right."[53] Stevens reprised his argument that "the absentees represent the better, not the worse voters."[54] This time, he suggested that "free suffrage" without compulsory voting posed an existential threat to an urban democracy:

> Already in the larger cities it is openly declared that free suffrage is a failure. If a failure in the cities, which contain one-fifth of the entire population of the country, how long can it last in the nation at large? And when free suffrage fails, when the people no longer govern, who then, sir, is to govern, and how is that ruler to maintain his power?[55]

Stevens cited as precedent colonial-era laws in Massachusetts and Maryland that required freemen to attend town meetings and stay until the end, as well as the fact that every Athenian citizen during the time of Pericles was compelled to "choose his side in every political contention."[56] He observed that the idea was spreading: a Harris J. Chilton of Baltimore had introduced a similar bill in Maryland's legislature.[57]

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51. *Compulsory Suffrage*, *supra* note 46.
52. *Enforcing the Duty of Suffrage*, BOSTON EVENING TRANSCRIPT, Jul. 2, 1886 at 2.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

Chilton, a Baltimore attorney who later moved to Philadelphia, became a leading advocate for compulsory voting.[58] Apart from the Maryland bill, he pushed for a bill in New York, visited Kansas City during its experiment with compulsory voting, and worked to have a bill introduced in Pennsylvania.[59] Like Cook and Stevens, Chilton argued that compulsory voting, bundled with other voting reforms, was needed to cure the ills of urban democracy.[60] "All the evils of government result from neglecting the exercise of the right of the franchise," Chilton wrote in lobbying New York legislators.[61] "It was by this neglect on the part of the citizens of New York that Tweed became master for years in New York City, and was enabled to rob the people of millions of dollars."[62]

Concerns among elite white men about extending suffrage to African Americans and women motivated interest in compulsory voting. Such concerns appeared in the pages of the *North American Review* in the years after the Boston brahmin C. Allen Thorndike Rice bought and began editing the magazine.[63] Harvard professor Francis Parkman, a critic of women's suffrage, wrote in 1878 that "the success of an experiment of indiscriminate suffrage hangs on the question whether the better part of the community is able to outweigh the worse."[64] William Scruggs, a Nashville attorney then serving as President Cleveland's ambassador to Colombia, asserted that states had a duty "to consider whether suffrage may be more beneficially exercised by the many or the few."[65] Scruggs, unsurprisingly, preferred suffrage for the few. Instead of compulsory voting, he explained how state laws disenfranchising the "ignorant and vagrant," whites and African Americans

58. Harris J. Chilton, *An Act to Make Voting Compulsory,* 1 ANNALS AM. ACAD. POL. & SOC. SCI. 611, 611-12 (1891).

59. Harris J. Clinton [sic], *Compulsory Voting Demanded,* 145 N. AM. REV. 685, 685-86 (1887) (urging the New York legislature to make voting a duty, and proposing model language for a bill); *Maryland Will Try It*, KAN. CITY TIMES, July 30, 1893, at 5 (relating Chilton's visit to Kansas City and his plan to introduce a law modeled on its provision in the Maryland legislature during the 1894 session); *Compulsory Voting*, THE SCRANTON TRIBUNE, Oct. 16, 1899 (describing the bill Chilton prepared for the consideration of the Pennsylvania legislature).

60. *See generally* Clinton [sic] *supra* note 59.

61. *Id.* at 685.

62. *Id.* New York's governor would announce his support for a trial of compulsory voting in his annual address for 1889, and again the next year. Holls, *supra* note 46, at 590-91. As with other proponents, he pointed to a local ordinance from the 1600s as precedent—in the case of New York, a 1643 ordinance from Southampton. *Id.* at 591.

63. *See e.g.* Francis Parkman, *The Failure of Universal Suffrage,* 127 (263) N. AM. REV. 1 (Jul.-Aug. 1878); *see e.g.* William L. Scruggs, *Restriction of the Suffrage,* 139 (336) N. AM. REV. 492 (Nov. 1884).

64. Parkman, *supra* note 63.

65. Scruggs, *supra* note 63.

alike, would not violate the Fourteenth and Fifteenth Amendments.[66] These critiques of universal suffrage carried weight. Parkman was a leading opponent of the campaign for female suffrage, and Scruggs sought to justify the restrictions on African American's political rights that marked the end of Reconstruction.[67]

Chilton and his allies did not disagree with the premise of these articles. Chilton's plea for New York to make voting mandatory, which appeared in the *Review* a few years after Scruggs' article, worked from a similar starting point.[68] But it arrived at a different conclusion. Rather than disenfranchising ignorant and vagrant voters, Chilton would instead require the right-thinking, responsible classes to perform their civic duty, and thereby deprive the recently-enfranchised masses of any chance of winning.[69] This strategy echoed that of leading suffragists such as Elizabeth Cady Stanton, who notoriously urged people to "think of Patrick and Sambo and Hans and Yung Tung who do not know the difference between a Monarchy and a Republic, who never read the Declaration of Independence or Webster's spelling book, making laws for Lydia Marie Child, Lucretia Mott or Fanny Kimble."[70]

The push for compulsory voting aligned with other electoral reform projects. The Gilded Age was a time both of machine politics in America's cities, and allegations of widespread electoral fraud.[71] Advocates of compulsory voting also favored reforms ranging from revised nomination procedures to adoption of the "Australian Ballot," which would keep voters' decisions secret (and, as a result, require

66. *Id.* at 496-97.

67. *See* KEYSSAR, *supra* note 7, at 122-24. Historians of the Dunning School would later elaborate on the racist arguments made in the wake of Reconstruction, asserting that the expansion of the franchise to African Americans was a mistake that had produced widespread corruption. Eric Foner, *Foreword* in THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION ix-xii (JOHN DAVID SMITH & J. VINCENT LOWERY, EDS. 2013).

68. *See* Clinton [sic], *supra* note 59.

69. *Id.*

70. *See* Linda Lopata, *Politics of Precedence,* National Susan B. Anthony Museum & House (2020), https://susanb.org/politics-of-precedence/ (citing ANN D. GORDON, THE SELECTED PAPERS OF ELIZABETH CADY STANTON & SUSAN B. ANTHONY, VOL. II: AGAINST AN ARISTOCRACY OF SEX 196 (2000)). I am indebted to Niko Bowie for pointing out this parallel between suffragists and proponents of compulsory voting.

71. *See id.* at 123 (working-class immigrant voters "purportedly were prone to voting illegally, irresponsibly, and against the interests of their betters. Charges of corruption and naturalization fraud were repeated endlessly."); Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age,* 100 POL. SCI. QUARTERLY 669, 686 (1985) (observing that "election fraud, whatever its precise level or influence, was a common characteristic of Gilded Age election").

voters to be able to read a ballot without assistance).[72] Many of these other reforms were implemented around the same time that Kansas City would make voting a duty.[73] Louisville became the first U.S. jurisdiction to adopt the secret ballot in 1888, and New York led the way among states the following year.[74] When voting became a duty in Kansas City's 1890 municipal election, it was also for the first time a secret process.[75]

Compulsory voting might be understood as the less-successful cousin of reforms that gained widespread adoption. In the late 1800s, the secret ballot spread to elections nationwide.[76] More infamously, state laws restricting voting rights swept the South, beginning with Mississippi's institution of a strict residency requirement, poll tax, and literacy test in 1890.[77] Compulsory voting figured in debates around suffrage expansion and electoral reform during this period, but never took hold beyond Kansas City.[78] It became the forgotten cousin of Gilded-Age electoral reforms.

Other jurisdictions did eventually take steps toward creating a duty to vote. By one count, some 57 bills providing for compulsory voting in some form were introduced in Massachusetts, Maryland, New York, Indiana, Connecticut, Wisconsin, Rhode Island, California, Maine, and Kansas between 1888 and 1952; none passed.[79] Legislatures in North Dakota, Massachusetts, and Oregon each advanced constitutional amendments to authorize compulsory voting.[80] Voters in North Dakota and Massachusetts approved these by referenda in 1899 and 1918, respectively; Oregon voters rejected the proposed amendment in 1920.[81] In neither North Dakota nor Massachusetts did the legislature ever act based on this power.[82] Despite the abundance

72. *See* KEYSSAR, *supra* note 7, at 142-43 (describing the role of the Australian ballot in efforts to combat fraud, and its rapid spread after being first adopted in 1888); TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004 98 (2005) (noting "the secret ballot served as an effective tool to disenfranchise poor whites, illiterate immigrants, [and] Southern blacks").

73. KEYSSAR, *supra* note 7, at 142-43.

74. *Id.*

75. *Glorious! Democracy Wins the Day*, KAN. CITY TIMES, Apr. 9, 1890, at 1.

76. KEYSSAR, *supra* note 7, at 143.

77. *Id*. at 111.

78. *Id.*

79. Abraham, *supra* note 44, at 346-47.

80. *Id.* at 346.

81. *Id*.

82. While the provision was later repealed from the constitution of North Dakota, in Massachusetts the legislature still has express authority to make voting a duty. MASS. CONST., art.

of proposals, we know little about the specific circumstances in which they failed to become law.[83]

Although compulsory voting failed to become an American institution, it caught on elsewhere. Belgium made voting a duty in 1892, and around thirty countries have adopted compulsory voting, though fewer have implemented and enforced the duty.[84] Perhaps for this reason, some American election scholars suggest the practice seems foreign—or even un-American.[85] Looking back to Kansas City recovers a vision, even if fleeting, of compulsory voting as an American institution.

B. Setting the Agenda in Kansas City

Voting likely would not have become mandatory in Kansas City but for William Rockhill Nelson. In a letter to his friend Theodore Roosevelt in the summer of 1912, Nelson, the founder and longtime editor and publisher of the *Kansas City Star*, recounted:

> Several years ago I had a charter amendment drawn for Kansas City under which a poll tax was remitted on evidence that the man had voted. This was adopted but was held unconstitutional by a perfectly arbitrary political decision of the Missouri Supreme Court.[86]

Nelson couldn't keep the law from being struck down. But he did succeed, practically single-handedly, in putting compulsory voting on the city's policy agenda.

LXI ("The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.").

83. Understanding the reasons for *non*-enactment could be just as useful for contemporary proponents as the lessons to be learned from the lone case in which a U.S. jurisdiction did make voting a legal duty. I expect to pursue this line of inquiry in future work, but it is beyond the scope of this article.

84. Lisa Hill reports that the countries that have supported and enforced compulsory voting laws include Argentina, Australia, Austria, Belgium, Brazil, Cyprus, Fiji, Greece, Italy (at least until 1993), Liechtenstein, Luxembourg, Nauru, Peru, Singapore, Switzerland (one canton), Uruguay, and Venezuela (until 1993). Lisa Hill, *Compulsory Voting Defended,* in JASON BRENNAN & LISA HILL, COMPULSORY VOTING: FOR AND AGAINST 116 n. 15 (2014).

85. Hasen, *supra* note 3, at 2174 ("Most Americans with whom I discuss the idea, including academics, bristle at the thought of such a law") quoting Michael G. Colantuono, *Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL L. REV. 1473, 1503 (1987) ("Compulsory voting is fundamentally inconsistent with the individualism of American political culture") and RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER 154 (1992) (compulsory voting is "antithetical to American values").

86. CHARLES ELKINS ROGERS, WILLIAM ROCKHILL NELSON: INDEPENDENT EDITOR AND CRUSADING LIBERAL 253 (1948) (quoting letter from William Rockhill Nelson to Theodore Roosevelt, 24 July 1912, part of the Theodore Roosevelt papers in the Library of Congress).

Nelson arrived in Kansas City in 1880, after practicing law and working in local politics in Indiana, where he grew up.[87] On arriving in the boomtown, he founded the *Star,* which he published and edited until his death in 1915.[88] Nelson created the *Star* as a politically-independent newspaper, something new for Kansas City.[89] Although he did not write much that appeared in the paper, the *Star* was seen to communicate Nelson's views. As William Reddig, a *Star* editor, put it:

> [Nelson] could never bear the thought of the *Star* having any voice but his own. "The Star," he said repeatedly and firmly, "is the Daily W. R. Nelson." Readers of the *Star* had the impression that Nelson was speaking to them personally each afternoon.[90]

The paper quickly became a force in local politics. Nelson's mission, and that of the *Star*, was municipal reform: anti-corruption, anti-machine.[91] Nelson was also a real estate developer and a proponent of the city beautiful movement, and is credited with developing the city's parks.[92]

When Nelson took a position, he was committed to winning. Reddig relates an anecdote, possibly apocryphal, that suggests Nelson's willingness to fight.[93] Joseph Davenport, who had served a one-year term as mayor in 1889, tried to make a comeback in 1892, but felt slighted by the *Star*.[94] He came to Nelson's office, spoiling for a fight, and the editor was knocked down.[95] At this point, four *Star* staffers supposedly threw the mayor down a flight of steps.[96] Nelson is claimed to have told them "the *Star* never loses"—which, according to

87. MEMBERS OF THE STAFF OF THE KANSAS CITY STAR, WILLIAM ROCKHILL NELSON: THE STORY OF A MAN A NEWSPAPER AND A CITY 1, 8-9, 15 (1915).

88. *Id.* at 15-16, 134-42.

89. The two leading papers at the time were the Kansas City Journal and the Kansas City Times, which were aligned with the Republican and Democratic parties, respectively. *See* William Littleton McCorkle, Nelson's *Star* and Kansas City, 1880-1898, 56 Ph.D. Dissertation, U. Texas at Austin (1968) (quoting a proclamation in the *Star*'s first issue that it "will be absolutely independent in politics").

90. WILLIAM M. REDDIG, TOM'S TOWN: KANSAS CITY AND THE PRENDERGAST LEGEND 39 (1947).

91. *See* McCorkle, *supra* note 89 at 312-13 (describing the *Star*'s pleas for citizens' tickets in local elections, since neither political machine could be relied upon to provide a good slate of candidates).

92. Timothy C. Westcott, "William Rockhill Nelson (1841-1915)," MISSOURI ENCYCLOPEDIA, https://missouriencyclopedia.org/people/nelson-william-rockhill (last accessed March 17, 2023).

93. REDDIG, *supra* note 90, at 42.

94. *Id.*

95. *Id.*

96. *Id.*

Reddig, "had a humorous sound, as it was usually uttered just after the paper had taken a drubbing at the polls."[97]

Nelson first put compulsory voting on the agenda in 1886. It was pitched in an article with no byline—a typical practice at the time—just after the November elections.[98] William Warner, a Republican, had won a seat in Congress by 700 votes out of 15,000 cast.[99] For Nelson, this was apparently too close for comfort. Total voter registration was about 18,000, which the *Star* observed was probably at least 1,000 shy of all the eligible voters in the city.[100] (At the time, only male citizens over age 21 who met residency requirements were eligible.)[101]

Had there been a full vote in the 1886 general election, the *Star* surmised, Warner would have won handily:

> [T]he conditions of the campaign were such as to make the inference reasonable that the bulk of the unrecorded votes would have gone to Warner. If Warner had been defeated it would have been entirely due to the neglect of probably 4,000 voters in Kansas City to do their duty, and his majority would have been at least 2,700 in the District instead of 700 if the full vote of Kansas City had been polled.[102]

But how to ensure a full vote? The *Star* envisioned a tax that would apply only to nonvoters.[103]

In this initial foray, the *Star* proposed a $25 poll tax that would be waived by casting a ballot.[104] It is difficult to say with accuracy how much this would be in current dollars, but it would have made nonvoting quite costly. Based on purchasing power, a $25 tax then would be about $700 in today's dollars; by other measures it would be several

97. *Id.* at 42-43.

98. *Compulsory Voting*, KAN. CITY STAR, Nov. 5, 1886, at 2.

99. *Id.*

100. *Id.*

101. Eleven years earlier, the U.S. Supreme Court upheld the Missouri Supreme Court's decision holding that the state's denial of voting rights to women did not violate the U.S. Constitution. *See* Minor v. Happersett, 88 U.S. 162 (1875). Women in Missouri would not gain the right to vote until the Nineteenth Amendment was ratified in 1919. When the compulsory voting charter provision was introduced, it applied to "every male person over the age of 21 years, and a resident of the city." *The New Charter*, KAN. CITY STAR, Mar. 29, 1888, at 3. Voting eligibility turned on being resident in Missouri for a year, and in the city for 60 days. *Must Vote or Pay a Tax*, KAN. CITY STAR, Feb. 6, 1890.

102. *Compulsory Voting*, *supra* note 99.

103. *Id.*

104. *Id.*

thousand.[105] The *Star* concluded that no resident would want to pay such a price—and so all would vote.[106]

The *Star* urged legislators to run with the idea.[107] "Missouri should be the pioneer state in this electoral reform," the paper suggested, "and the matter should be brought before the legislature this winter."[108] Kansas City presented the next-best option: "If the legislature is not willing to try the experiment throughout the State it may begin with Kansas City. The charter of this city may be amended to provide the essential conditions."[109] The proposal to make voting a local duty fit with the *Star*'s trademark focus on local news.[110]

Over the next two years, the *Star* kept pitching the idea to legislators in both Missouri and Kansas.[111] Like proponents elsewhere, the *Star* framed the proposal as a way to prevent the ills associated with universal suffrage. Female suffrage soon provided a hook for pushing compulsory voting.[112] Late in 1885, the Kansas legislature passed a bill to give women the right to vote in municipal elections.[113] That winter, with the law having gained the governor's signature, *The Star* looked on with trepidation. "Nearly all of the lower and vicious classes go and vote," it warned, while "many of those belonging to the better classes are indifferent to the blessings and rights of the ballot."[114] The way to lessen "the hazards of universal suffrage" was clear: institute a penalty for not voting, and induce everyone to go to the polls.[115] A later article suggested such a fine "is the only way open for making suffrage universal and securing people from the dangers of a partial and vicious vote."[116]

105. Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount*, 1790 to Present, MEASURINGWORTH, (Sept. 24, 2022, 9:20 PM), www.measuringworth.com.

106. *Compulsory Voting*, *supra* note 99.

107. *Id*.

108. *Id*.

109. *Id*.

110. Susan Jezak Ford, *William Rockhill Nelson: Newspaperman, 1841-1915,* MO. VALLEY SPECIAL COLLECTIONS: BIOGRAPHY (1999), https://kchistory.org/document/biography-william-rockhill-nelson-1841-1915-newspaperman?solr_nav%5Bid%5D=9915f9f4332bc51e1a37&solr_nav%5Bpage%5D=15&solr_nav%5Boffset%5D=11 (last accessed Mar. 24, 2023).

111. KAN. CITY STAR, Feb. 8, 1888, at 2 (proposing that the Missouri legislature impose a $50 poll tax).

112. *LWVK History,* LEAGUE OF WOMEN VOTERS OF KANSAS, https://web.archive.org/web/20220616142933/ https://lwvk.org/about-lwv-of-kansas/lwvk-history (last accessed Mar. 24, 2023).

113. *Id.* In the April elections the following year, Susannah Medora Salter would become the first female mayor of a U.S. city when she won election in Argonia.

114. KAN. CITY STAR, Feb. 11, 1887, at 2.

115. *Id.*

116. *An Inducement to Vote*, KAN. CITY STAR, Feb. 26, 1887, at 2.

The *Star* portrayed the poll tax as an urban reform that should spread nationwide.[117] It urged the Kansas and Missouri legislatures to adopt compulsory voting as a complement to franchise expansion, to "place every city under the government of the law and order people, and prevent a control by the rabble."[118] Eventually, the practice would need to spread: "There will be no complete elections, no absolutely full expression of the popular will of the people, until a law of this nature stands upon the statutes of every state in the Union."[119] Yet despite the *Star*'s ambitions, its pet policy did not find support in either Jefferson City or Topeka.[120]

C. Gaining Traction on Unsettled Political Terrain

After years without action by state legislators, compulsory voting proponents finally gained traction in Kansas City in 1889. What convinced local political elites to make voting a duty, when nowhere else had done so? First, they would soon have the authority. Kansas City was poised to become a home-rule city, with its own charter and power to regulate municipal elections. Second, this new power arrived after three especially tumultuous years for local politics. A surge in organizing by labor and African American political leaders was scrambling party alliances and frustrating business leaders. With the political terrain becoming increasingly unsettled, compulsory voting may have presented a way for leaders from both major parties to dilute the influence of emerging, highly mobilized segments of the electorate.

The Missouri Constitution of 1875 granted municipalities of at least 100,000 residents the power to draft a home rule charter.[121] At the time, Kansas City was not close to this threshold; it grew from 32,000 residents in 1870 to 55,000 in 1880.[122] But the city was booming, and its population more than doubled during the 1880s, reaching 132,000 in 1890.[123] In 1887, the state legislature passed an act authorizing a city census and laying out the process for drafting a city charter.[124] That fall, a board of freeholders was elected to begin drafting

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. MO. CONST. of 1875, art. IX, sec. 16.
122. *Kansas City, Missouri Population History 1870-2021*, BIGGEST US CITIES, https://www.biggestuscities.com/city/kansas-city-missouri (last accessed Mar. 24, 2023).
123. *Id.*
124. James W. S. Peters, *Home Rule Charter Movements in Missouri with Special Reference to Kansas City,* 27 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 158 (1906).

charter provisions.[125] Compulsory voting was not part of the first proposed charter, which was voted down in the fall of 1888.[126] That December, a new board of freeholders gathered to draft a second charter.[127] Again, the poll tax was not on the agenda, at least at first.[128] But proponents soon got their provision added to the draft, as Nelson's paper trumpeted in January of 1889: "Seed planted by *The Star* some time ago has borne fruit in a proposition by the board of freeholders to incorporate in the new charter a poll-tax to apply to municipal elections."[129]

Why would the city's civic leaders have decided to use their newfound power in this unprecedented way? The notion of making voting a duty had been circulating for years both nationally and, thanks to Nelson's efforts, in Kansas City. It is impossible to say for certain why the freeholders now decided to act on it, since the private papers of key actors do not seem to have survived. But the shifting political terrain in the cities on both sides of the Missouri River, and a surge in the power of both organized labor and African American voters, suggests why leaders of both major parties might have felt unsettled—perhaps to the point that compulsory voting offered a way to reinforce the power of white elites and business leaders.

This unsettled political terrain was in part the result of Black political leaders beginning to break with the Republican party, and potentially take large numbers of voters with them. Before the Civil War, when Kansas City was a relatively small city of just 4,400 people, only 190 residents were Black; of these, only 24 were free.[130] After the war, the city grew quickly, in part due to the arrival of formerly enslaved people leaving rural Missouri.[131] During the 1860s, the Black population of Kansas City grew by nearly 20 times; the African American community tripled as a share of the city's population (see Table

125. *Id.*
126. *Id.*
127. *The Freeholders Organize*, KAN. CITY STAR, Dec. 16, 1888, at 7.
128. Instead, committees formed to address topics such as corporate powers, city limits, ward boundaries, powers of council, revenue, appropriation of private property, public improvements, franchises including the water works. There was also a committee for addressing legal issues. For the New Charter, K.C. TIMES, Dec. 19, 1888 at 1.
129. *A Local Poll Tax*, KAN. CITY STAR, Jan. 28, 1889, at 2.
130. U.S. CENSUS, POPULATION OF THE UNITED STATES IN 1860: MISSOURI 292 https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf (last accessed Mar. 24, 2023).
131. 1860 data from U.S. CENSUS, POPULATION OF THE UNITED STATES IN 1860: MISSOURI 292, https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf—(last accessed Mar. 24, 2023).

1).[132] As the city grew over the following decades, the foreign-born and African American share of the population kept pace with the share of U.S.-born whites.[133]

Table 1. Population of Kansas City, 1860-1900[134]

		White			Foreign			Black		
Year	Total Pop.	Census Count	%	% Chg.	Census Count	%	% Chg.	Census Count	%	% Chg.
1860	4,418	4,228	96	-	n/a	-	-	190	4	
1870	32,260	28,484	88	+674	7,679	24	-	3,764	12	+1,981
1880	55,785	46,484	83	+63	9,301	17	+21	8,143	10	+116
1890	132,716	119,016	90	+156	20,858	16	+124	13,700	11	+68
1900	163,752	146,090	89	+23	18,410	11	-12	17,567		+28

The Black population continued to grow through the 1870s.[135] With the fall of Reconstruction, thousands of African Americans "Exodusters" fled political violence and repression in southern states in 1879, heading to Kansas in hopes of freedom and free land.[136] After coming up the Missouri River, many remained in Kansas City, Kansas and its sister city across the river, rather than continuing on to claim farmland.[137]

The growing Black community would become part of a surge of labor activism in the 1880s.[138] As in the rest of the country, the Knights of Labor were a growing force in Kansas City.[139] They became only more so during a strike in 1885 and 1886 against the Union Pacific railroad, along its southwest line; membership in the Kansas City area grew to some 4,000 members across 21 assemblies.[140] As it

132. *Id.*
133. *Id.*
134. *See* SHERRY LAMB SCHIRMER, A CITY DIVIDED: THE RACIAL LANDSCAPE OF KANSAS CITY, 1900-1960, 29 (2002); John McKerley, *The Long Struggle Over Black Voting Rights and the Origins of the Prendergast Machine*, Kansas City Pub. Lib., https://pendergastkc.org/article/long-struggle-over-black-voting-rights-and-origins-pendergast-machine (last accessed Mar. 24, 2023); 1860 data from U.S. CENSUS, POPULATION OF THE UNITED STATES IN 1860: MISSOURI 292 https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf.
135. S. SCHIRMER, *supra* note 134, at 27.
136. *Id.*; McKerley, *supra* note 134.
137. *Id.*
138. LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS, 119-20 (1983).
139. *Id.*
140. *Id.*

did elsewhere in the country, the Knights worked across the color line to forge an interracial working-class coalition.[141]

In the spring of 1886, the Knights flexed their independent political muscle, mobilizing workers to swamp the Republican convention in Kansas City, Kansas and support Thomas Hannan, an Irish stonemason, as the nominee for mayor in the newly-established city.[142] Hannan was swept to office with overwhelming support from Black wards, together with a multi-ethnic white coalition.[143] Hannan's victory shook the political establishment, having split conservative Republicans and Democrats; it ushered in three years of working-class Republican rule on the Kansas side of the river.[144] Hannan used the city's administrative power to take on business interests on both sides of the river, including forcing favorable terms with a powerful cable car company owned by one of the most influential businessmen in Kansas City, Missouri.[145]

Hannan's assertion of working-class power drew the ire of business interests.[146] They railed against him in local business-friendly newspapers, and even threatened that they might have "to rely on an alternate armed force, the Law and Order League"—a vigilante group that had been created to oppose the Knights of Labor during the Union Pacific strike.[147]

Yet despite business opposition, Hannan again won election in the spring of 1887.[148] He appeared to have established a durable, interracial working-class constituency.[149] This "extraordinary new popular alliance," as the historian Leon Fink describes it, included C.H.J. Taylor, an African American lawyer who urged against Republicans taking the Black vote for granted, and had served as city attorney under a prior Democratic administration.[150] In part due to Taylor's support for Hannan, the political alliances of Kansas City's Black community began to split.[151] Some aligned with the Knights backed

141. PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER, 1619-1981, 47-63 (1974).
142. FINK, *supra* note 138, at 123.
143. *Id.*
144. *Id.*
145. *Id.* at 124-25.
146. FINK, *supra* note 138, at 125.
147. *Id.*
148. *Id.* at 128.
149. *Id.*
150. *Id.*
151. FINK, *supra* note 138.

Hannan, while others remained aligned with conservative Republicans who sought to defeat him.[152]

By 1888, the new alliances that had reshaped politics in Kansas City, Kansas seemed poised to cross to the larger city on the Missouri side. As in Kansas, Missouri Republicans had typically spoken in favor of African American voting rights, but had not nominated Black candidates.[153] Now, in March of 1888, Paul Jones, a Black attorney, ran for the Republican nomination for city attorney in Kansas City, Missouri.[154] Jones won an informal poll at the city's Republican convention, but narrowly lost the formal poll to a white candidate.[155] White and Black Republicans alike opposed his candidacy, out of fears that it could drive the city's whites to vote for Democratic candidates, and leave the Black community worse off.[156]

With his candidacy blocked, Jones split with the Republican party and ran on the Union Labor party ticket.[157] In an open letter and at mass meetings, he urged Kansas City's Black voters to defeat the Republicans who had come to take their support for granted.[158] A former city official who had attended the convention observed that "The colored people of the city are more excited over this Jones matter than I have ever known them to be. . . It will result in the colored voters bolting the Republican ticket, or at least a part of it. There are 3,000 negroes registered here and their influence will be felt."[159]

For its part, the *Star* sought to cool tempers, reprinting an article from the *Gate City Press*, a Black newspaper aligned with the Republicans, arguing that the lack of support for Jones' candidacy was simply an honest mistake.[160] The Democratic *Times* rejoiced in the turmoil, repeatedly pushing Black voters to recognize Republican hypocrisy and support Democrats.[161] Taylor, now in Washington as President Cleveland's emissary to Liberia, wrote to endorse Jones and urge

152. *Id.*
153. McKerley, *supra* note 134.
154. *Id.*
155. *Id.*
156. *Id.*
157. *The Three City Tickets*, KAN. CITY STAR, Mar. 27, 1888, at 1.
158. *Will Defeat the Ticket: Colored Republicans Determined to Resent the Insult to their Race*, KAN. CITY TIMES, Mar. 28, 1888, at 8; *Last Night's Meeting*, KAN. CITY TIMES, Mar. 30, 1888, at 1; *In Battle Array*, KAN. CITY TIMES, Apr. 3, 1888, at 8.
159. *Colored Republicans Angry,* KAN. CITY STAR, Mar. 27, 1888, at 1.
160. *A Plea for Sound Sense: The Kansas City Colored People's Newspaper Discusses the Situation*, KAN. CITY STAR, Mar. 31, 1888, at 2.
161. *A Chance to Show Manhood*, KAN. CITY TIMES, Mar. 28, 1888, at 4. *Dependence on Colored Men*, KAN. CITY TIMES, Apr. 25, 1888, at 4.

Black Kansas Citians to recognize the "election in Kansas City [as] the period of your salvation," and elect the Democratic slate.[162] Jones did not win as a third-party candidate, but he secured the most votes of any Union Labor candidate.[163] While the Republican candidate won the race for city attorney, he did so with the narrowest margin of any Republican on the ballot.[164] Meanwhile, a white candidate for auditor who in his prior position as sheriff had a history of going easy on enforcing vagrancy laws against African Americans won as the candidate of another third party, the Law and Order League, in circumstances that suggest Black voters may have thrown their support to him as a way to reject the Republican ticket while not aiding Democrats.[165]

Political alliances remained unsettled through the fall election season. In October, a new African American political organization convened, with the founder arguing for the Black community to split its vote as a way of combating race prejudice.[166] The group met nightly through October, with Taylor, back in town, addressing one meeting and, according to the *Times,* "show[ing] why the colored people should cease being the political slaves of the republican party."[167] Meanwhile, the Union Labor party nominated a full slate of candidates for county offices, and refused to endorse or fuse with Republican candidates.[168] Pastors in the city's Black churches threw their efforts into mobilizing their congregants to vote, with one going so far as to read "the names of all the members of his congregation who had neglected to register, [and] admonish[ ] them against the evil of neglect and the sin of being derelict in their political duties."[169] Reports of rampant registration fraud by African Americans suggest the extent to which white political elites feared the level of mobilization among new Black voters.[170] The recorder of voters threw organizers out of his office, grilled would-be voters on their place of residence, and

162. *A Stirring Indorsement*, KAN. CITY TIMES, Apr. 3, 1888, at 4.

163. McKerley, *supra* note 134.

164. John W. McKerley, *Citizens and Strangers: The Politics of Race in Missouri from Slavery to the Era of Jim Crow*, (Aug. 2008) (Ph.D. dissertation, University of Iowa) (on file at the University of Iowa library).

165. *Id.* at 219-20, 225.

166. *A Colored Democratic Club*, KAN. CITY TIMES, Oct. 6, 1888, at 5.

167. *Independent Colored Men Meet*, KAN. CITY TIMES, Oct. 12, 1888, at 5.

168. *The Union Labor Convention Repels Republican Advances—A County Ticket Named,* KAN. CITY TIMES, Oct. 7, 1888, at 8.

169. McKerley, *Citizens and Strangers*, *supra* note 164, at 219 (quoting KAN. CITY STAR, Nov. 5, 1888).

170. *Fraud Openly Practiced*, KAN. CITY TIMES, Oct. 5, 1888, at 5.

vowed to have those he couldn't prevent from registering investigated and arrested for fraud.[171]

The results of the November election were close.[172] Several local races saw a difference of one percent between Republican and Democratic votes, with votes for Union Labor and Prohibition party candidates accounting for more than the margin between the major party candidates.[173] With the city's racial politics still unsettled, third parties continued to surge.[174] Against this backdrop, it seems plausible that major party leaders saw compulsory voting as means of diluting the influence of mobilized but unpredictable segments of the city's electorate.

D. Making the Case

When the poll tax appeared on the draft city charter in January 1889, some details had changed from what the *Star* had previously pitched.[175] The tax would now be $2.50, and revenues would go to the city's educational fund.[176] The assumptions about the need for the provision and its effects remained the same. The *Star* estimated that at least 4,000 citizens neglected to vote at city elections, and presumed that those votes would be "in the interests of official honesty and public welfare."[177] In February, a front-page headline announced the freeholders had adopted the provision the paper had pushed since 1886.[178]

Now the freeholders needed to make the case for adopting the charter. In March, three of them appeared before the Commercial Club to explain its provisions.[179] O.H. Dean led the discussion.[180] Dean, a Democrat and prominent lawyer who had been in the running for nomination by President Cleveland as a federal judge, chaired the freeholder's legal committee.[181] He explained to the assembled businessmen that "[t]he great disgrace and scandal of this country is the mismanagement of municipal affairs, and the incurring of large city

171. *Id.*
172. *Results in the County and City*, KAN. CITY TIMES, Nov. 8, 1888, at 3
173. *Id.*
174. *Id.*
175. *A Local Poll Tax*, *supra* note 129, at 2.
176. *Id.*
177. *Id.*
178. *Citizens to be Taxed for Not Voting*, KAN. CITY STAR, Feb. 9, 1889, at 1.
179. *The Times Gossiper*, KAN. CITY TIMES, July 28, 1889, at 4.
180. *Id.*
181. *Id*. (Recounting overwhelming support from city's lawyers for Dean to be nominated to U.S. District Court bench).

debts without corresponding improvements. The cause of this has been that businessmen do not take the same interest in public affairs that they do in their personal business affairs."[182] The framers of the new charter, Dean continued, were dedicated to "eliminating politics from and infusing business judgments into municipal affairs."[183] As reported by the *Star*, Dean explained how mandatory voting would protect the interests of capital:

> The great prosperity of Kansas City Mr. Dean attributed to the low tax rates here and the limitations fixed by the organic law upon extravagant expenditures and dishonesty on the part of officials. For this reason eastern capital has come and erected magnificent buildings, knowing that the city taxes would not wipe out the income from their property. As long as the bond raising and tax levying possibilities are kept in bounds this prosperity and influx of capital will continue. Unless the businessmen of the community take an interest in municipal affairs and vote as they should, the tax levying power is liable to be increased and assessments will always be up to the limit. The speaker ventured the assertion that half of those present had not registered for the special charter election. The voters at the general election are fewer in number by far than those in the city. In order to get out a full vote, the freeholders had inserted [the poll tax].[184]

Although Dean was called to explain the poll tax, the provision was a relatively minor part of a charter that would wholly remake municipal power and upgrade the booming city's infrastructure. When the *Kansas City Times* published a sprawling summary of the entire charter, the article ran under the title "The City to Supply Water."[185] The poll tax appeared as the eleventh of fourteen "miscellaneous provisions" buried at the end, after the main sections that redefined the powers of city offices and provided for new infrastructure.[186]

The charter received overwhelming business support, perhaps because the city so needed these improvements. In early April, a meeting of some 150 businessmen endorsed the charter, with only one dissenter.[187] The poll tax received passing notice, when Thomas Bullene, a leading local merchant, asked if the provision included any ex-

182. *Mr. Dean on the Charter*, KAN. CITY TIMES, Mar. 27, 1889, at 8.
183. *Id.*
184. *Id.*
185. *The City to Supply Water*, KAN. CITY. TIMES. Feb. 9, 1889, at 5.
186. *Id.*
187. *The Charter Indorsed*, KAN. CITY TIMES, Apr. 6, 1889, at 2.

ception for disability or absence from the city.[188] Bullene knew his way around city government, having served on council and then briefly as mayor in the early 1880s.[189] The freeholder replied that there was no such exception—since "they wanted to leave no loop hole." The *Times* reported that Bullene drily observed, "The city would have gotten rich this year."[190]

As freeholders made the case for the tax, its revenue potential emerged as a point in its favor. The next night, Dean appeared at another meeting.[191] He now said that revenues would go to "sanitary purposes," and noted that "if the law had been in operation at the last election a snug sum would have been collected for the city hospital."[192] Some nonvoters would not be able to pay, and Dean explained that they could discharge the penalty "by work on the roads."[193]

The charter referendum was held on April 8.[194] In an editorial titled simply "Vote for the Charter," the *Star* observed that "the only section that is liable to create opposition is the section establishing a poll tax, or properly speaking, imposing a penalty for a failure to vote."[195]

The referendum succeeded, on very light turnout.[196] In all, 4,208 votes were cast, far fewer than in other recent elections.[197] For some promoters, this underscored the need for the poll tax. The *Times* praised the fact that the charter surpassed the four-sevenths threshold for approval, with 3,439 votes in favor, and just 769 against.[198] The *Star* found the low turnout dispiriting: "it is unfortunate, to say the least, that a permanent charter for the government of a city of at least 150,000 people, and at least 30,000 voters, should be adopted by 3,430 votes."[199] Nevertheless, the *Star* congratulated citizens on approving three needed provisions: a sewer to replace a polluted creek, street cleaning, and the poll tax.[200]

188. *Id.*
189. Thomas Brockway Bullene (1828-1894) Papers finding aid. The State Historical Society of Missouri Research Center-Kansas City.
190. *The Charter Indorsed*, *supra* note 187, at 2.
191. *It Had No Opponents*, KAN. CITY TIMES, Apr. 7, 1889, at 8.
192. *Id.*
193. *Id.*
194. *Vote for the Charter*, KAN. CITY TIMES, Apr. 8, 1889, at 8.
195. *Id.*
196. *Adopted*, KAN. CITY. TIMES, Apr. 9, 1889, at 2.
197. *Id.*
198. *Id.*
199. *The New Charter*, KAN. CITY STAR, Apr. 9, 1889, at 2.
200. *Id.*

In May, an election was held to select the first cohort of members for the city council's newly-created upper house.[201] The poll tax was not yet in effect, and turnout was light.[202] That "serves to emphasize the wisdom of the $2.50 poll tax," the *Star* concluded.[203] "This section of the charter will be in force at the next general city election, and it is believed that its wholesome effect will be seen in bringing the full vote. . . A majority of men will certainly not be anxious to pay for neglecting to perform a public duty."[204]

In the months leading up to the spring 1890 elections, the threat of a penalty seemed to be driving unprecedented interest in registration.[205] "Perhaps there is no topic in this city at the present time that is accorded more attention than the subject of poll tax," the *Star* reported.[206] "Young and old men who heretofore had taken little or no interest in elections and the movements of assessors are awakening and surveying the situation."[207] The Recorder of Voters predicted a vote of at least 20,000—just shy of the largest vote ever cast in the city.[208]

Expectations continued to build. When ward registration closed at the end of February, the *Times* reported "news from the different ward offices indicates that unusual interest is being taken in the coming election."[209] The *Times* predicted that "the American love of the right of suffrage and the American antipathy to paying $2.50 poll tax will bring about such a full registration by March 18 that the few remaining will be at home sick on election day and afterward, as quietly as possible, pay the $2.50 poll tax."[210] The *Times* hailed this flood of registration.[211] "It is very important that all democrats should see to it that they are registered," the paper exhorted.[212] "The party has an excellent chance of getting hold of the reins of city government this spring and a lack of registration should not prevent it."[213]

201. KAN. CITY STAR, May 24, 1889, at 2.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Must Vote or Pay a Tax*, *supra* note 101.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Ward Registration Closed*, KAN. CITY TIMES, Feb. 27, 1890, at 8.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

Amid the rush to register, the *Star* noted a related rush to become a citizen.[214] Crowds appeared at the courthouse, as residents sought naturalization papers.[215] The paper attributed this to the new provision: "The poll tax. . . is causing many foreigners to qualify as voters."[216] They are also being whipped into qualifying by people "who desire their votes."[217] It seems dubious that the city could have forced a non-citizen to vote or pay a poll tax, particularly since non-citizens could not vote; ultimately, that issue was not raised in the eventual litigation. But if non-citizens were lining up to become naturalized so that they could vote and avoid the tax, at least some may have heeded the warning that there would be no loopholes.

As the deadline for registration at the board of elections central office loomed, the *Times* reported that the recorder had hired "a large force of extra clerks" to handle registration predicted to be "the greatest in the history of the city."[218] Now the recorder estimated total registration of nearly 40,000, reporting that "the indications are that every voter registering will cast his ballot."[219] With many longtime residents registering for the first time, the *Times* predicted turnout would come in several thousand higher than in the 1888 presidential election.[220] The paper expressed confidence in how this would change the electorate.[221] "The remarkable part about it," the *Times* observed, "is that the new registration is made up of wealthy citizens, who would naturally be supposed to take the most interest in good municipal state and national government."[222]

E. Anticipating Problems

Even as expectations built up, so did the problems that city officials and observers began to foresee. Some involved the logistics of implementing compulsory voting. Others pointed to potential legal deficiencies.

Weeks before the April 1890 election, people started to realize the challenges of verifying who had voted, and then taxing nonvoters.

214. *Naturalization Booming*, KAN. CITY STAR, Mar. 8, 1890, at 1.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Eager Voters*, KAN. CITY TIMES, Mar. 16, 1890, at 8.
219. *Id*.
220. *Id.*
221. KAN. CITY TIMES, Mar. 17, 1890, at 4.
222. *Id.*

First, one had to determine who was subject to the tax. As it turned out, some people might be taxed even though they hadn't met the residency requirements. To qualify to vote, one had to have resided in Missouri for a year, and in the city for sixty days.[223] This meant that any man who had moved to Missouri after April 8, 1889 was ineligible to vote—and yet would be subject to the tax if he had moved to Kansas City before January 1, 1890.[224] The *Star* noted the bind this created for some new residents, but did not suggest whether anyone had come up with a way to resolve it.[225]

City officials faced their own predicaments. Different offices were tasked with running elections, keeping the tax rolls, and prosecuting non-payment. The city charter said that the recorder of voters would give voters a certificate, but the recorder was not a city officer.[226] "Recorder of Voters Hope," the *Star* reported, "said that he had nothing to do with the poll tax, but if certificates are required from his office it will require an addition to the force, as there would likely be 20,000 to issue."[227] It was unclear who might foot the bill.

The city treasurer, meanwhile, would be responsible for collecting the tax. He started to think about how to do so. Taxes were due on May 1, meaning the treasurer would have just a few weeks to compare the names of the taxpayers in the tax books with the names of the voters recorded in the poll books.[228] According to the *Star*, Treasurer Peak said it "was likely such an arrangement could be made, though he and Mr. Hope are averse to the removal of the books from one office to the other.[229] If some such plan is not adopted, certificates must be made out, a work requiring an additional force and considerable time."[230] This would again mean more expenses.

People brainstormed for solutions. One city official suggested an ordinance could direct the recorder of voters to either submit his poll books to the city comptroller or treasurer, or, failing that, send along a duplicate list of the names of those who had voted.[231] With about 20,000 names, the official estimated that a clerk could transcribe 1,000

223. *Must Vote or Pay a Tax*, *supra* note 101.
224. *Id.*
225. *Id.*
226. *The Poll Tax's Validity*, KAN. CITY STAR, Feb. 15, 1890, at 2.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Poll Tax Exemption*, KAN. CITY STAR, Feb. 22, 1890, at 3.

per day, for a cost of $100.[232] Another proposal suggested hiring 83 part-time clerks, with one at each precinct to hand out tickets to each voter.[233] This, however, would be about twice as expensive as simply transcribing the names by hand.[234]

Things might have been easier if Kansas City could have created its own voter registration system. Whether the city had that power was discussed soon after the charter was adopted, amid a broader debate concerning which state laws applied to a home rule city.[235] The freeholders agreed that the new charter superseded all prior state laws, but could be abridged by a state law that expressly applied to cities over 100,000.[236] Voter registration was such an exception: the state constitution gave the legislature exclusive authority to provide for voter registration in municipalities over 100,000 inhabitants.[237] Kansas City had gained new powers by adopting its charter, but voter registration was not among them.

Other issues were less straightforward. Two months before the election, a local lawyer argued that the poll tax violated the Missouri Constitution.[238] Byron Sherry, who had previously been a criminal court judge in Kansas, identified the clause that the Missouri Supreme Court would eventually cite in striking down the charter provision.[239] Article 10, section 3 of the Missouri Constitution provided that:

> Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.[240]

Sherry noted that some residents could not qualify to vote, since they had not lived in the state for a year, and concluded that the provision forced them to do an impossible act.[241] "The law discriminates against a class," he argued, "and I do not think it is sound. They might as well undertake to discriminate against a certain color. The law is not uni-

232. *Id.*
233. *Id.*
234. *Id.*
235. *Charter Problems*, KAN. CITY TIMES, Apr. 10, 1890.
236. *Id.*
237. *Id.*
238. *The Poll Tax's Validity*, *supra* note 226.
239. JESSE A. HALL & LEROY T. HAND, HISTORY OF LEAVENWORTH COUNTY KANSAS, 283 (1921). Shelly pointed to Article 10, section 3 of the Missouri Constitution, concerning uniform taxation. *The Poll Tax's Validity*, *supra* note 226.
240. MO. CONST. art. X, § 3.
241. *The Poll Tax's Validity*, *supra* note 226.

form in its operation since some may pay the tax by voting while others cannot."[242]

These concerns triggered discussion of amending the provision before it went into effect. The question arose in mid-February, when a new charter amendment committee convened. After the first meeting, the chairman announced that "there was no disposition to attempt a change in the poll tax system;" another member suggested that it "be let alone for a year or two [since] the charter was yet new and should be fully tested before any experiments were made."[243]

The question persisted. At the next meeting someone proposed to substitute the word "voter" in the charter, as a replacement for resident.[244] Again, the suggestion was batted down. An alderman who sat on the charter revision commission noted that the substitution, "if it were legal, would exempt all who cannot vote and claim that the present law works hardships. City Counselor Slavens holds that the law is constitutional, and I would not like to have it knocked out. There are many laws besides the poll-tax law that have hardships in them."[245] For his part, Slavens said the change "would not do, as the object of the law was not only to make men vote, but also to force them to become qualified voters. If an exception were made in favor of those who are not voters, many of them might not exert themselves in taking out papers, or would not be particular about registering."[246] Even as the poll tax raised bureaucratic and legal issues, officials pushed to implement it, motivated by expectations that it would remake city politics for the better by registering and turning out a wave of responsible new voters.

F. Compulsory Voting in Practice

After months of mounting expectations, turnout in the April 1890 election was underwhelming. Although 9,000 more ballots were cast in the race for mayor than the previous year, "the most surprising feature of the election," the *Star* observed, "was the comparative lightness of the vote."[247] Dissatisfaction with candidates at the top of each

242. *Id.*
243. *The Charter Committee*, KAN. CITY TIMES, Feb. 19, 1890, at 5.
244. *Voters and the Poll Tax*, KAN. CITY STAR, Feb. 25, 1890, at 5.
245. *Id.*
246. *Id.*
247. *Ben Holmes Elected*, KAN. CITY STAR, Apr. 9, 1890, at 1; *The Result*, KAN. CITY STAR, Apr. 9, 1890, at 4.

ticket, the paper suggested, caused "a widespread apathy" among voters.[248] Nevertheless,

> [I]t was supposed that the novelty of the Australian system and the $2.50 penalty for not voting would bring out a full vote. That such was the intention of the people is evident from the fact that over 36,000 names were registered. Of these less than 23,000 persons actually voted, leaving 13,000 stay-at-homes, who, after having taken the trouble to register, preferred to risk the fine of $2.50 for not voting rather than submit to party dictation which was obnoxious to them.[249]

For its part, the *Times* did not focus on turnout. Instead, with Democrats sweeping the mayor's office and most seats on council, it praised how the secret ballot had led to the defeat of the Republican machine.[250] Democrats were pleased, but the duty to vote had not immediately worked the transformation its boosters had envisioned.

What the tax did create was confusion. How would it be enforced? At the beginning of May, the city auditor passed the tax books to the treasurer, along with the names of every male resident against whom the tax might be assessed.[251] The treasurer, however, refused to receive the books or collect the tax, and the city counselor declined to pass any opinion on whether the tax was legal.[252] By early June, the *Star* was pressing the city officials to act, noting that the charter provided for a $25 fine to be imposed daily against any official who failed to carry out an official duty.[253] The treasurer, however, replied that he had always been ready to collect the tax, but no one had approached with an interest in paying.[254] A city councilor, meanwhile, suggested that the poll tax simply be added to the personal tax of anyone unable to produce a certificate demonstrating that they had voted.[255]

To encourage voluntary compliance, the city briefly offered a discount.[256] Notices appeared in the *Times.*[257] "By walking up to the captain's office and settling now the non-voters may secure a discount on their poll tax," one promised.[258] "The charter makes its collection

248. *The Result, supra* note 247.
249. *Id.*
250. *Glorious! Democracy Wins the Day*, KAN. CITY TIMES, Apr. 9, 1890, at 1.
251. *The Poll Tax Situation*, KAN. CITY STAR, Jun. 9, 1890, at 1.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *The Cost of a Vote Lost*, KAN. CITY TIMES, Jun. 10, 1890.
257. *Id.*
258. *Id.*

compulsory and the dodgers will find neglect expensive."[259] Another added that for June there would be a rebate of four percent on the tax, and two percent in July.[260] These efforts fell flat. In early August, the *Times* praised twenty-three "patriotic men" who had approached the treasurer to pay the tax; but compared to some 20,000 nonvoters, this was "lamentably small."[261]

A struggle soon broke out between the treasurer and the recorder of voters. The treasurer had lists of residents that the auditor had spent several thousand dollars to produce.[262] But these were useless without knowing who had voted, and the recorder of voters refused to turn over his books.[263]

The issue dragged on. In August, the treasurer sent a letter to the recorder of voters, explaining that "I am being urged by the medical officer of the city to collect the poll tax," but that he could not do so without a list of nonvoters.[264] The recorder "flatly refused" to hand over his books, but invited the treasurer to send men over to copy the lists by hand.[265] He estimated that would take two men about two weeks' time.[266] Meanwhile, the *Times* reported, the sanitary fund was "lamentably short," and the city physician was pressing to collect the nearly $50,000 that would result from the poll tax.[267]

Rather than taking the matter to the city counselor, the treasurer approached the alderman who chaired the city council's sanitary committee, who had the greatest stake in the potential tax revenue.[268] He was convinced to introduce an ordinance authorizing money to hire the clerks needed to copy the voting rolls.[269]

By early September, clerks from the auditor's office were transcribing lists in the recorder of voters' office.[270] Meanwhile, the treasurer kept trying to collect the tax voluntarily, by mentioning it in

259. *Id.*
260. *Id.*
261. *Twenty-Three Patriotic Men*, KAN. CITY. TIMES, Aug. 8, 1890, at 5.
262. *Id.*
263. *Id.*
264. *Recorder Hope's Decision*, KAN. CITY TIMES, Aug. 9, 1890, at 5.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Municipal Briefs*, KAN. CITY TIMES, Aug. 12, 1890 at 5; *Hayes, Bowes and Thomas*, KAN. CITY TIMES, Aug. 19, 1890, at 8.
269. *Id.*
270. *The Auditor Will Collect*, KAN. CITY. STAR, Aug. 29, 1890 at 6; *Not in a Hurry to Pay*, KAN. CITY TIMES, Sept. 14, 1890.

every notice sent out regarding residents' personal taxes.[271] Yet even as people came in to pay their personal taxes, hardly any paid the poll tax.[272] By the end of the year, only a trickle of revenue had come in from people voluntarily paying their poll taxes.[273] Two hundred and ninety-two nonvoters had paid about $700 in all, but some 13,000 others had paid nothing—despite the fact that their unpaid taxes increased each month by two percent.[274] Once the list of nonvoters was ready, the treasurer would forward it to the city attorney, who would use it to sue every nonvoter delinquent in paying the tax.[275]

If the city was to have any chance of seeing significant revenue—or pushing people to vote—it would have to test the legality of the tax. "The large majority are waiting for someone to test the constitutionality of the law," the *Times* surmised.[276] "There is much doubt on this point and it accounts for the delay in paying the tax."[277] While in theory the tax promised a large source of new revenue for the city hospital, the paper lamented that, to date, "the amount collected will not pay for the printing of the books and the clerk hire."[278] Finally, in February of 1891, the treasurer turned over the poll tax lists to the city counselor, who said that he would file one or two suits to test the legality of the provision, "singling out persons who are able to meet the suit without serious inconvenience."[279]

For months, nothing happened. By summer, the *Star*, and presumably Nelson, were fed up. Declaring the tax a "fizzle," the paper decried the city's failure to follow through on its plan to "bring a test case against some poor individual to be chosen by lot," and use a court's judgment to then enforce against all the other nonvoters who had not paid.[280] The law had become a "dead letter," and would remain as such, the paper argued, until it was repealed or enforced.[281]

The tax did little to drive turnout the following year. In the lead up to the April 1892 elections, both the *Star* and the *Times* cited the

271. *Id.*
272. *Id.*
273. *Few Have Paid Poll Tax*, KAN. CITY TIMES, Nov. 23, 1890.
274. *Id.*
275. *Not in a Hurry to Pay*, *supra* note 270.
276. *Few Have Paid Poll Tax, supra* note 273.
277. *Id.*
278. *Id.*
279. *Will Sue for Poll Tax*, KAN. CITY TIMES, Feb. 21, 1891, at 8.
280. *The Poll Tax Fizzle*, KAN. CITY STAR, June 20, 1891, at 6.
281. *Id.*

tax as a reason for voters to register and vote.[282] "Even though no great effort has been made to collect from those who failed to vote," the *Times* reminded its readers, "every person who does not vote at the election may one day find himself confronted by the tax collector."[283] The tone was decidedly speculative. It does not seem nonvoters were particularly concerned. Turnout in the 1892 mayor's race came in at 15,404—about 25% lower than the prior election.[284] Neither paper mentioned the tax when reporting the results.[285]

Beyond making it doubtful whether the tax would in fact induce turnout, uncertainty regarding whether the city would ever enforce the provision also provoked questions about municipal finances. In the spring of 1892, the *Times* reported that the total value of the city's real estate had fallen nearly $10 million since the year before.[286] This threatened a budget shortfall. The poll tax could, in theory, help close the gap—over 30,000 residents had now failed to pay their $2.50 penalty.[287] But "revenue from this source must remain problematical," the paper concluded, until the legality of the provision was established.[288]

G. The Test Case

When the city finally acted to enforce the poll tax, it did so with little fanfare. After the 1892 election, the city filed a case against B.T. Whipple, a prominent businessman, for his failure to vote in the 1890 elections.[289] Abram W. Allen, a justice of the peace, ruled in favor of the city.[290] The decision received no notice in the city's papers until months later, when Whipple filed for a rehearing of the case in Jackson County circuit court.[291]

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282. *Democrats Should Register*, KAN. CITY TIMES, Mar. 10, 1892 at 8; *No Time for Delay*, KAN. CITY. TIMES, Mar. 10, 1892, at 1; *Get Right with the Recorder*, KAN. CITY TIMES Mar. 11, 1892, at 8; *A Rush of Registration*, KAN. CITY STAR, Mar. 14, 1892, at 2.

283. *Democrats Should Register*, *supra* note 282.

284. *Progress Victorious*, KAN. CITY STAR, Apr. 6, 1892, at 1.

285. *Id.*

286. *The City's Valuation*, KAN. CITY TIMES, Mar. 18, 1892, at 6.

287. *Id.* $45,000 was not an insubstantial sum relative to city revenues. In 1889, the city collected about $800,000 per year in general taxation, and another $1.2 to $1.5 million for special purposes; *Mr. Dean on the Charter*, KAN. CITY TIMES, Mar. 27, 1889, at 8.

288. *The City's Valuation*, KAN. CITY TIMES, Mar. 18, 1892, at 6.

289. *Eight Thousand Interested,* KAN. CITY TIMES, Dec. 12, 1892, at 8.

290. *Id.*

291. *Did you Vote in 1890?*, KAN. CITY STAR, Dec. 21, 1892; *Eight Thousand Interested*, *supra* note 289.

Why did city counselor Frank Rozzelle choose B.T. Whipple, of the thousands of nonvoters who had failed to pay their taxes? It may have been to make an example of a businessman who had failed to do his civic duty. At least, that was how the *Star* described the decision:

> In looking over the list of delinquents who are liable for poll tax Mr. Rozzelle called attention to the fact that it was the rich men of the city who neglected to vote. As a matter of fact, half of the best known business men, bankers and manufacturers, professional men and capitalists, those who have large property interests, will find their names on the list of delinquents. The men who are most directly interested, in a financial way, in the government of the city are the men who seem to take no part in politics and fail or neglect to vote.[292]

This, of course, confirmed the theory that the *Star* and backers of compulsory voting nationwide had promoted all along.

It also helped that Whipple apparently welcomed the lawsuit.[293] He consented to be a defendant when Rozzelle "asked the use of Mr. Whipple's name to make a test case of the law."[294] Bringing suit against a wealthy businessman made practical sense. Whipple had the means to defend the suit. He ran a loan and trust company and often served as a trustee for real estate in the city.[295] And he invested in local commercial projects; in 1892 he was a leading investor in a project to build a $250,000 flour mill and grain elevator.[296] Others might have simply paid the $2.50 tax and moved on, but Whipple could pay to defend himself through multiple appeals. For his first appeal, Whipple brought on a former judge as his defense counsel.[297]

In answer to the complaint, Whipple admitted he had not voted, but argued the charter provision was unconstitutional.[298] The thrust of the argument involved unequal taxation—which would eventually lead the Missouri Supreme Court to strike down the provision.[299] Whipple claimed "that if one man is forced to pay a poll tax every

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292. *Did you Vote in 1890?*, *supra* note 291.

293. *The Provision is Legal*, KAN. CITY STAR, Apr. 22, 1893, at 1.

294. *Id.*

295. The city's newspapers frequently ran advertisements promoting the services of Whipple's company. *See e.g.*, *Advertisement by Whipple Loan & Trust Co.*, KAN. CITY STAR, May 13, 1892.

296. *A Big Flour Mill*, KAN. CITY STAR, Jan. 18, 1892.

297. *Eight Thousand Interested*, *supra* note 289.

298. *It is Your Duty to Vote*, KAN. CITY TIMES, Apr. 23, 1893, at 5. Reports conflicted on whether Whipple was sued by the city for not voting in the elections of 1890, or of 1892.

299. The lower court party briefs are not available, but were summarized by the *Star*.

other man should be subject to the same tax," the *Star* reported.[300] "The city claims that Mr. Whipple is not taxed for not voting, but is subject to a poll tax and it makes no difference to him whether anybody else is taxed or not."[301]

The case came before Judge James Gibson of the circuit court, who handed down his decision in April 1893.[302] In what the *Times* described as "something of a lecture," Gibson emphasized—in much the same terms as the provision's proponents—that the poll tax was good public policy.[303] He wrote:

> It is a fact much to be regretted, but nevertheless true, that in Kansas City, as in all large cities, there exists a certain class of citizens, good businessman and good citizens in other respects, who habitually absent themselves from the polls on election day, deeming the elective franchise unworthy of their attention, or who are too much engrossed in business to attend to that important duty. A certain erroneous idea has crept into the minds of some that it is degrading to vote, some persons seeming to forget that on an intelligent exercise of that right rest the permanency of our republican institutions, especially in the larger cities where congregate certain classes of society who can only be restrained by the conservative elements and such restraint must come from a vigorous and active exercise of the elective franchise. The government of large cities is one of the problems of the age. Good city government comes when honest and efficient officers are chosen to conduct municipal affairs, and bad government is liable to exist when safe and conservative men absent themselves from the polls ignore the duties imposed upon them by the elective franchise and cease to take part in political affairs.[304]

Beyond simply being good policy, Gibson concluded that the poll tax was within municipal authority, and did not conflict with state law or any constitutional provision:

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300. *Testing its Legality*, KAN. CITY STAR, Feb. 3, 1893, at 2.

301. *Id.*

302. It was originally slated for a hearing before Judge Scarritt, who had served as secretary of the charter commission—which, the *Times* observed, "intended to have this ordinance fully operative." *Eight Thousand Interested*, *supra* note 289. Perhaps for this reason, it was moved onto Judge Gibson's docket. For his part, Gibson had also spoken in favor of adopting the charter during a public debate in 1889, but his endorsement was based not on the poll tax provision, but how the charter dealt with payment of special tax bills. *It Had No Opponents*, *supra* note 191.

303. *It is Your Duty to Vote*, *supra* note 298. To the best of my knowledge, Judge Gibson's opinion was not published. These quotations from the opinion appeared in the *Star*'s coverage of the decision. *The Provision is Legal*, KAN. CITY STAR, *supra* note 293. They align with those sections the *Times* quoted.

304. *The Provision is Legal*, KAN. CITY STAR, *supra* note 293.

I uphold the tax in question upon the broad ground that in the enlightenment of the present age it is in the power of the state to compel its voters to exercise the elective franchise, and if the state can do so, the city is invested with the same power. It enforces many duties upon the citizen in order to maintain good municipal government. It can go upon his property and abate nuisances in order to preserve the public health, as has been done in some instances. It may destroy private property to check public conflagrations; in short, it can do almost anything that tends to promote and maintain good government. As one of these attributes of authority it can compel all qualified voters to vote at an election in order to obtain a full and perfect expression of public sentiment, and at the same time secure the election of the most competent and worthy men to official position, and in that manner obtain the best municipal government possible. I can see no legal objection to this. I know this is an advanced position, but I take it, believing that in doing so I am simply declaring the law, there being nothing to the contrary in the United States constitution nor the constitution or laws of Missouri.

THE HIGHEST TYPE OF GOVERNMENT.

It seems to me that the highest type of government is attained when every voter casts his vote and that vote is counted just as it is cast.

If it be claimed that a voter, under our Australian system which confines him to the names on the official ballot, cannot approve of the tickets nominated and appearing thereon, because he does not think the nominees honest or competent, or for other reasons he deems them unfit for the offices for which they were nominated, and by reasons thereof does not wish to vote for any of them, our reply is this. If there are fifty men in the city or county who agree with him in this position, they can by petition have another ticket placed upon the official ballot; if, however, there be not fifty voters of such opinion, then the state or city can well say that in all probability he is mistaken as to the unfitness of some of the nominees on the official ballot; that, at least some thereon are honest and competent, and as a public duty, require him in the interest of society to make a selection from among those whose names are presented.

The charter provision in question does not impair the right to vote, nor does it impede the voter in the exercise of his franchise; it

> imposes no condition whatever upon his voting, but simply requires him to pay a tax provided he fails to vote.[305]

The *Times* noted an irony of the decision. "Nobody—save, perhaps, the freeholders who drafted it—saw the great benefit which would accrue to the city," the paper concluded, noting that the decision empowered the city to collect on nearly $100,000 in unpaid taxes.[306] If citizens who failed to vote in the referendum on the city charter been able to foresee that they would be fined $2.50 each, the paper surmised they in all probability would have defeated the charter.[307]

In addition to upholding the duty to vote, Gibson's decision promised to be a victory for the city's finances and public health. "The city will derive enough revenue from the unpatriotic," the *Times* predicted, "to remove its garbage and keep the town in such prime sanitary condition that a cholera germ would not find a resting place."[308] Observers expected that the city would move to collect the unpaid tax.[309] "As there is a fee in it for those connected with the machinery of collection," the *Times* noted, "some active labors may be expected."[310] And this was right, the paper concluded: thousands of "dollars will go where the most good will be done—to the business of municipal improvement."[311] Within days, however, Whipple announced that he would appeal to the state supreme court.[312] That appeal would take years, during which the city refrained from collecting unpaid poll taxes.[313]

Even though the provision had never been enforced—and might never be—Kansas City during these years continued to be held up as an example that other jurisdictions might follow. Over the summer of 1893, Harris Chilton passed through town on his way to Colorado, and met with Rozzelle to learn about the workings of the law.[314] Chilton assured officials that Kansas City had "become very widely known

305. *Id.*
306. *It is Your Duty to Vote*, *supra* note 298.
307. *Id.*
308. *Id.*
309. *Men Who Forget to Vote Will be Reminded*, KAN. CITY TIMES, Apr. 23, 1893, at 4.
310. *Id.*
311. *Id.*
312. *Will be Appealed*, KAN. CITY TIMES, Apr. 27, 1893, at 8.
313. By the time the case was argued before the Missouri Supreme Court in 1896, the city calculated that nearly $100,000 would be due from residents who had not voted in local elections over the course of five years. *The Poll Tax Case Argued*, KAN. CITY STAR, Feb. 8, 1896.
314. *Advocates Compulsory Voting*, KAN. CITY STAR, Jul. 29, 1893.

through the law," and that he had received inquiries about the provision from a U.S. Senator, a judge in North Carolina, and many others.[315] Since Kansas City had enacted its provision, Belgium had also made voting compulsory, and Chilton relied on these two examples as he tried to convince other states to pass their own provisions.[316] He expressed optimism: Maryland legislators assured him that a compulsory voting bill modeled on Kansas City would pass in the next session (it did not), and Senator Hill from New York had also expressed interest.[317]

In the run-up to the April 1894 election, the poll tax arose once again as a reason that eligible voters should register and turn out to vote.[318] The *Times* suggested that it might inspire people to vote who were not otherwise motivated by appeals to patriotism and good government.[319] For its part, the *Star* noted that the law would actually be enforced in 1894, even though it hadn't in prior elections.[320] Given the disarray of voter lists, the paper suggested that the only effective way to ensure one didn't have to pay the tax was to register and vote.[321]

Turnout in 1894 improved on 1892, but did not reach anything close to full turnout. Of 31,200 registered voters, 22,158 cast ballots.[322] Rather than viewing this as a failure, the *Times* celebrated the revenue that could be raised by taxing nonvoters.[323] If "rigidly enforced," the tax might "swell the city exchequer to fully $25,000. . . [and] add quite enough to the city budget to place it on a par with that of last year."[324] With the case on appeal, the city continued to compile a list of nonvoters, but did not attempt to collect.[325]

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315. *Maryland Will Try It*, *supra* note 59.

316. *Id.*

317. *Id.*; *Advocates Compulsory Voting*, *supra* note 314.

318. *The Usual Clamor for the Voters to Register*, KAN. CITY TIMES, Feb. 19, 1894 (No. 50), at 4.

319. *Id.*

320. *It is the Duty of Every Citizen to Vote*, KAN. CITY STAR, Feb. 17, 1894, at 4.

321. *Id*. The *Star* also called during the 1894 election season for the active and vigorous prosecution of both illegal voters, and nonvoters. *How to Protect the Ballot*, KAN. CITY STAR, Feb. 1, 1894, at 4.

322. *An Available Fund*, KAN. CITY TIMES, Apr. 18, 1894, at 8.

323. *Id.*

324. *Id.*

325. The city assembled lists of nonvoters so that it would be ready to collect the tax if the suit succeeded. *Testing Its Legality,* KAN. CITY STAR, Feb. 3, 1893 ("If the city wins the suit there will be some work for the justices and constables, as suits will then be brought in justice's courts against all who failed to vote last spring.")

The poll tax finally received a hearing before the Supreme Court in January of 1895. Reports of the hearing offer a sense of the arguments:

> The brief of City Counselor Rozzelle raises the following points: The constitution of the state was the only limitation upon the city in framing a charter for its own government; the provision should not be declared unconstitutional unless it conflicts with some specific clause of the constitution; it does not conflict with the section which provides that taxes shall be uniform on all classes of subjects because licenses are laid on various classes in violation of the ad valorem principle; it does not conflict with the section of the constitution which provides that all elections shall be free and open and that voters shall be privileged from arrest except in cases of felony, for instead of the voter being hindered, the charter provides expressly that his failure to pay the poll tax of $2.50 shall not abridge his right to vote.[326]

Rozzell contended that the poll tax did not abridge a voter's right to suffrage any more than San Francisco's cubic air ordinance regulating apartment buildings abridged the natural right of residents to fresh air.[327] He also cited colonial precedent for compulsory voting, including a 1716 Maryland statute that fined nonvoters 100 pounds of tobacco and a provision in Plymouth that fined freemen ten shillings if their failure to vote was not due to an "inevitable impediment."[328]

Rozzelle explained that the provision was a better response to fraud and the problems of universal suffrage than restricting the right to vote. He wrote:

> The 'evils of universal suffrage' is the burden of the vaticinations of our political Daniels and Cassandras and their hoarse voices are never weary prophesying disasters unless the elective franchise is restricted. But we must accommodate ourselves to the final acceptance of this fact that universal suffrage is the cornerstone of our government and that any attempt to hedge it around with prohibitive restrictions and to make it a class privilege will be met with hostility by the people. We believe that the enforcement of this provision of our charter by stimulating the sluggish patriotism and revivifying the enervated public spirit of those citizens who are ignobly content to suffer their elective franchise to 'rust in them unused,' to become in their hands an idle, unmeaning and unap-

326. *Legality of the Poll Tax*, KAN. CITY JOURNAL, Jan. 16, 1895.
327. Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 AM. J. PUB. HEALTH 440 (2009).
328. *Legality of the Poll Tax*, *supra* note 326.

> preciated thing, will lessen the evil of the unintelligent and purchaseable vote and result in pure elections, better public officials and wiser municipal legislation. We believe that the enforcement of this law will be a long step in the direction of reform, and it may be, indeed, the means of rescuing the hope of purification of politics from the iridescent dreamland to which a fanciful Kansas statesman has consigned it and investing it with the soberer hues of near possibility.[329]

To support these claims, Rozzelle quoted statements by the governors of New York and Massachusetts advocating compulsory voting, as well as Professor Holls' 1891 article on the subject.[330]

His policy arguments were not entirely well received. "One of the dignified judges of the dignified supreme court of Missouri got facetious the other day," Rozzelle later recalled:

> I was expatiating on the duty of all intelligent citizens to exercise the right of suffrage, when Judge Gantt interrupted me with the jocular remark that he understood the trouble in Kansas City was to keep the voters from voting too much instead of too little. I explained, however, that the trouble was the intelligent voters too often thought so little of the right of suffrage that they allowed the disreputable elements to usurp the control of affairs and that if the court would uphold the charter and make every voter who did not vote pay a poll tax we should soon have so many honest voters that the criminal elements would be in the minority all the time.[331]

The hearing presumably addressed the points of law raised by the city and Whipple. But the policy question—how to manage the problem of voters deemed unintelligent or even criminal—was front and center.[332] By early June, Rozzelle, now the ex-city counselor, was expecting a positive decision out of Jefferson City.[333] But it didn't arrive. The Court did not issue a decision in 1895, and it would hear a second oral argument in February of 1896.[334]

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329. *Id.*

330. *See* Holls, *supra* note 46.

331. The quote was included in an untitled article soon after the oral argument. KAN. CITY JOURNAL, Jan. 20, 1895.

332. *A Tax of $2.50 if You Don't Vote*, KAN. CITY STAR, Jun. 5, 1895, at 2.

333. *Id.*

334. It is not clear from the available evidence what prompted the rehearing; it may have been related to the departure of Justice Francis Marion Black from the bench in 1894, and the arrival of Justice Waltour Moss Robinson in 1895. Given that the 1896 decision was *per curiam*, it seems unlikely that the Court would have been deadlocked after the 1895 hearing, if it indeed was before just six justices. Nor does Justice Robinson filling the seat that had been occupied by Justice Black seem likely to have altered the outcome.

Despite the lack of a decision, some still pressed the city to enforce the tax. In the fall of 1895, an alderman argued that the city should raise the needed revenue, since the Supreme Court had sustained the circuit court's ruling.[335] (Given the lack of news from the Court, it is unclear what the alderman was referring to.) Public health was again the reason for urgent action. The revenues, the *Star* reported, could help the health department prevent typhoid and diphtheria outbreaks like those raging in St. Louis, or collect garbage yearround rather than just during summer.[336] The paper, and presumably Nelson, seemed inclined to try to get the city to act. "Suits against 8,000 citizens for not voting," the article concluded, "would at least break the monotony in municipal circles."[337] And still, nothing happened. The following February, with the provision slated for a rehearing, the new city counselor told the assessor to prepare poll tax books for 1896, but only to bother doing so if the law were upheld.[338]

H. The Law Struck Down

On December 23, 1896, the Missouri Supreme Court handed down its decision.[339] Before the Court, the parties had argued two central points. First, Whipple contended that the provision violated the Missouri constitution's mandate that taxes apply uniformly to the same class of subjects.[340] Second, Whipple argued that the tax conflicted with the right of suffrage granted by the Missouri constitution.[341] The city argued that the tax did not conflict with either provision, and was "consonant with public policy in that it enlarges participation in public affairs."[342]

In a unanimous opinion by Chief Justice Brace, the Court held that Kansas City had the power to enact its charter provision, so long

335. *To Sue Delinquent Voters*, KAN. CITY STAR, Sept. 30, 1895.

336. *Id.*

337. *Id.*

338. *What Property Escapes Taxes*, KAN. CITY TIMES, Feb. 2, 1896, at 5.

339. Kansas City v. Whipple, 136 Mo. 475, 38 S.W. 295 (1896).

340. *Id.* at 295 (citing MO. CONST. of 1875, art. X, § 3 ("Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.").

341. *Id.* at 297 (citing MO. CONST. of 1875, art. II, § 9 ("all elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.") and MO. CONST. of 1875, art. VIII, § 4 ("Voters shall be privileged from arrest while going to, attending and returning from elections, except in cases of treason, felony or breach of the peace.").

342. *Id.*

as it did not conflict with the federal or state constitutions.[343] The reasoning with respect to the question of unequal taxation was straightforward. If the poll tax "was stripped of its proviso," the Court reasoned, "it would be a legitimate expression of the taxing power of the city," since it would apply equally to all eligible voters' resident in the city.[344] However, since it allowed some voters not to pay the tax, the provision discriminated between subjects of taxation in the same class.[345]

The intent of the tax, the Court concluded, was "to impose a penalty upon the voters of Kansas City for not voting rather than for the purpose of raising revenue to maintain a necessary function of the city government."[346] The purpose of the tax was only underscored by the city's arguments, which referenced "the views of many learned, thoughtful and experienced publicists" that voting is both a right and a duty.[347] Even conceding this point, the Court noted, the provision did not require concluding that such a duty could be enforced by compulsory legislation.[348]

The Court could have rested there, and simply struck down the provision as a tax that impermissibly discriminated between members of a class. Instead, it explained why compulsory voting also conflicted with the right of suffrage granted by the Missouri constitution.[349] The nature of the power to vote was key to the analysis:

> The power is a sovereign power, and in the exercise of it the citizen who possesses it acts as a sovereign; and, standing in the relation of a sovereign to such power, he must have the supreme and independent right of a sovereign to exercise it or not, else it ceases to be a sovereign right.[350]

Working from this premise, the Court distinguished prior laws that had made voting a duty.[351] These had been enacted in a colonial context where the Crown was sovereign, and the people mere subjects.[352] That no law had been enacted to mandate voting since the United States had become independent served to prove that it was incompati-

343. *Id.* at 296.
344. *Id.*
345. *Id.*
346. *Id.* at 297.
347. *Id.* at 296.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*

ble with popular sovereignty in a republic.[353] Because the citizen *qua* elector acts as the sovereign, the court distinguished "the duty of the citizen when he is called on to bear arms, serve on juries, etc."[354] There, where citizens are not acting as sovereign, the legislature may create enforceable duties.[355]

By this logic, the Court concluded that the duty to vote interfered with the right of suffrage protected by the Missouri constitution.[356] If, as the Court noted, "no power, civil or military, shall at any time interfere to prevent the *free* exercise of the right of suffrage"—its emphasis—then "how can a citizen be said to enjoy *the free* exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?"[357] Rather than construing the constitutional provision by its plain meaning—a bar on any interference with the exercise of right to vote—the Court also interpreted the provision as preventing the converse: interference with the freedom to *not* exercise the right.[358]

In a coda, the Court concluded that it was "degrading to the franchise" to compare the act of voting to the types of services that had provided exemptions from other poll taxes—such as volunteering for a fire department or working on the highways.[359] Those services had some monetary value to the public. Voting, by contrast, "is not service at all, but an act of sovereignty above money and above price."[360] To consider voting a mere service would, it followed, put a price on the vote. This the justices were not willing to do.

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With that, Missouri's seven justices ended Kansas City's brief experiment—which remains today the United States' only experience with compulsory voting. Rather than being simply a historical curiosity, the case of Kansas City offers lessons for people envisioning how the duty to vote might once again emerge in an American city.

353. *Id.*
354. *Id.* at 297.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.* at 297.
360. *Id.*

II. Political and Practical Lessons from Kansas City

This section considers political and practical lessons that can be drawn from the experience of Kansas City. Where might the conditions of political possibility be ripe for this sort of experiment? And what might be the practical obstacles to pushing it forward? The case study of Kansas City, and the obstacles to implementing its duty to vote, offer lessons for contemporary proponents.

A. Rethinking the Conditions of Political Possibility

If there exists a conventional wisdom about compulsory voting in the United States today—other than that it would clash with Americans' sense of freedom—it is that conservatives would oppose the creation of a duty to vote, and progressives would favor it. It was the conservative Paul Weyrich, after all, who infamously told fellow activists that "our leverage in the elections quite candidly goes up as the voting populace goes down."[361] Inspired by this instinct, Republicans have pushed state-level legislation that aims to make voting more difficult.[362]

Progressives, meanwhile, have generally pushed to increase participation by making voting easier. States and counties controlled by Democrats worked to facilitate ballot access during the Covid-19 pandemic.[363] And they have experimented with ways to expand the franchise in local elections to teenagers and even non-citizens.[364]

Progressives have also pushed recent proposals for compulsory voting. Democratic state legislators introduced bills in Connecticut, Massachusetts, California, and Washington.[365] And the working group on compulsory voting assembled by the Brookings Institution was led

361. Andy Kroll, *The Plot Against America: The GOP's Plan to Suppress the Vote and Sabotage the Election*, ROLLING STONE (July 16, 2020), https://www.rollingstone.com/politics/politics-features/trump-campaign-2020-voter-suppressionconsent-decree-1028988.

362. Nick Corasaniti, *Voting Battles of 2022 Take Shape as G.O.P. Crafts New Election Bills,* N.Y. TIMES, Dec. 5, 2021, (noting 33 laws limiting voting passed in 19 states in 2021, with 245 similar bills set to carry over into 2022 legislative sessions), https://www.nytimes.com/2021/12/04/us/politics/gop-voting-rights-democrats.html.

363. Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic,* ABCNEWS, Sept. 22, 2020, https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089.

364. Grace Ashford, *Noncitizens' Right to Vote Becomes Law in New York City,* N.Y. TIMES, Jan. 9, 2022, https://www.nytimes.com/2022/01/09/nyregion/noncitizens-nyc-voting-rights.html; J.B. Wogan, *Takoma Park Sees High Turnout Among Teens After Election Reform,* GOVERNING (Nov. 7, 2013), https://www.governing.com/news/headlines/gov-maryland-city-sees-high-turnout-among-teens-after-election-reform.html.

365. *See* bills cited *supra* note 17.

by the prominent liberal commentator E.J. Dionne and longtime progressive strategist Miles Rapoport.[366]

This might lead one to assume that if this reform were to reemerge in the United States, it would happen in cities controlled by progressives. That is possible; cities have indeed been innovators when it comes to electoral reforms such as proportional representation, instant-runoff voting, and campaign finance reform.[367] But it would also be at odds with the tendency of progressive cities to set the timing of local elections in ways that depress turnout.[368] Shifting local elections to align with state and national elections, for example, can substantially increase voter participation, and produce an electorate that is more representative in terms of race, class, and partisanship.[369] Yet cities maintain off-cycle elections, and by so doing shape electorates that elect representatives who may be more likely to serve the interests of organized groups such as city employees than those of the median resident.[370] Judging by how local elections are timed, one might expect progressives to prefer *low* turnout in local elections. Indeed, were voting to be mandatory progressives might find it harder to remain in office, and deep-blue cities could in fact become *less* progressive.[371]

The experience of Kansas City further scrambles the conventional wisdom. Voting was not made a duty to support working class policies. Instead, the impetus was fear that the wrong people were voting, and that the right people—responsible men of business—were not. Rather than favoring downward redistribution of power and resources, the push for compulsory voting arose from the same anxieties

366. *Lift Every Voice*, *supra* note 16.

367. *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J. L. & Pol. 1, 3-4 (2006).

368. *See generally* Sarah F. Anzia, Timing & Turnout: How Off-Cycle Elections Favor Organized Groups (2014).

369. Zoltan Hajnal et al., *Who Votes: City Election Timing and Voter Composition*, 116 Am. Pol. Sci. Rev. 1, 374 (2022).

370. Anzia, *supra* note 368; Adam M. Dynes et al., *Off-Cycle and Off Center: Election Timing and Representation in Municipal Government,* 115 Am. Pol. Sci. Rev. 1097, 1097-98 (2021).

371. This would contrast with the policy effects of enacting compulsory voting, which comparative research has generally found to be progressive, inasmuch as the practice tends to reduce inequality. In her study of compulsory voting in Western Europe and Latin America, Sarah Birch concludes that "mandatory attendance at the polls promotes social equality." Sarah Birch, Full Participation: A Comparative Study of Compulsory Voting, 131 (2008). However, as Professor Lijphart suggests, it may be that "special features of the American political system, like having so many elections at different levels, may have the impact of not helping progressive causes." Personal communication with Arend Lijphart, (Mar. 14, 2022) (on file with author).

about universal suffrage that elsewhere produced poll taxes and literacy tests meant to disenfranchise poor and African American voters.

The political lesson of Kansas City could be that incumbents will only support compulsory voting when they believe both that nonvoters will support their policy priorities and that forcing them to the polls would dilute the power of a highly-motivated segment of the electorate. This contrasts with research that has explained expansions of the franchise as a strategic choice by elites to accept redistributive social policy and decrease destabilizing social pressure.[372]

Instead, Kansas City suggests that compulsory voting could gain traction when incumbent political and economic elites are motivated to dilute the power of new, motivated segments of the electorate. This aligns with research explaining why parties elsewhere have supported compulsory voting.[373] For example, Rúben Ruiz-Rufino and Ria Ivandic explain the adoption of compulsory voting in Belgium and western Europe in the late 1800s and early 1900s by noting that the reform came "as an institutional response from old conservative parties to counterbalance the strength of the Left in the early 1800s. . . [compulsory voting] was adopted only when old elites could increase their support by activating idle voters or by co-opting new ones."[374] It is unclear whether the provision in Kansas City would have had such an effect.[375] Nevertheless, this explanation for why elites come to

372. *See, e.g.*, Daron Acemoglu & James A. Robinson, *Why Did the West Extend the Franchise? Democracy, Inequality, and Growth in Historical Perspective,* 115 QUARTERLY J. ECON. 1167 (2000); *cf.* Adam Przeworski, *Conquered or Granted? A History of Suffrage Extensions,* 39 B.J. POL. SCI. 291 (2009).

373. Case studies have pointed to the conservative politics favoring adoption of compulsory voting. *See, e.g.,* Anthoula Malkopoulou, *The Conceptual Origins of Compulsory Voting: A Study of the 1893 Belgian Parliamentary debate*. 37 HIST. POL. THOUGHT 152 (2016); Sara John & Donald A. DeBats, *Australia's Adoption of Compulsory Voting: Revising the Narrative Not Trailblazing, Uncontested or Democratic*, 60 AUSTRALIAN J. POL. & HIST. 1 (2014); Germán López, *Un Estudio Sobre la Reforma Electoral Conservadora de 1907 y sus Posibilidades Democratizadoras*, 48 SAITABI 185 (1998); Arturo Maldonado, *The Origins and Consequences of Compulsory Voting in Latin America*, 22-54 (Dec. 2015) (Ph.D. Diss., Vand. U.) (on file online with Vanderbilt University).

374. Rúben Ruiz-Rufino & Ria Ivandic, *The Devil is in the Detail: The Strategic Adoption of Compulsory Voting in Western Europe* 2 (n.d.) (Working Paper), https://www.rubenruizrufino.com/s/CompVoting.pdf). Other multi-country analyses have come to similar conclusions. *See* ANTHOULA MALKOPOULOU, THE HISTORY OF COMPULSORY VOTING IN EUROPE: DEMOCRACY'S DUTY? (2014); Gretchen Helmke & Bonnie M. Meguid, *Endogenous institutions: The origins of compulsory voting laws (U. of Rochester, Working Paper, 2014) (under review),* https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/helmke_and_meguid.pdf.

375. Not only was it never enforced, but mobilization by groups like the Knights of Labor declined for other reasons soon after Kansas City adopted its charter. FINK, *supra* note 138, at 133-34.

favor compulsory voting fits better than analogies to elite decisions to expand the franchise.

Kansas City helps us think beyond two scenarios in which progressives might envision compulsory voting coming to an American city. In the first, blue city in a blue state creates a duty to vote—the Berkley/Takoma Park scenario. This would fit a trend of progressive local electoral experimentation—from instant-runoff voting and campaign finance regulations to the enfranchisement of teens and non-citizens.[376] Of course, as noted above, compulsory voting might make a blue city *less* progressive.[377] But it is still possible that local elites might want to be a first-mover, and adopt a reform that could boost progressives' chances in state and federal races, even if risked their own reelection.

Progressives might also envision a second scenario. Here, a progressive city in a purple state could enact compulsory voting in hopes of driving turnout in statewide or national races. This could move a tipping-point state like Wisconsin, Michigan, or Pennsylvania to the left—even if it again jeopardized progressives' chances in local races. Separately, Nicholas Stephanopoulos and the Brookings report envision something like this scenario: a move by one city produces statewide effects, which pushes other cities and states to respond in kind, starting a virtuous spiral.[378] As I discuss below, this spillover scenario would raise challenging questions of municipal authority.[379]

Kansas City points to a third scenario, which might surprise progressives. This scenario—call it Red-in-Purple—would echo the experience of Kansas City and western European countries. Conservative county or municipal leaders would turn to compulsory voting to activate idle voters seen as necessary to dilute the influence of an emerging liberal segment of the electorate. Conservatives would be

376. *See* Briffault, *supra* note 367.

377. This could run counter to the effects that scholars have suggested compulsory voting has produced in other settings. *See, e.g.,* Michael M. Bechtel et al., *Does Compulsory Voting Increase Support for Leftist Policy?* 60 AM. J. POL. SCI. 752 (2016) (concluding, based on a study of Switzerland, that compulsory voting increases support for leftist policy positions in referenda by up to 20 percentage points, by mobilizing citizens at the bottom of the income distribution).

378. Stephanopoulos, *supra* note 13 ("To start, a blue city in a purple state—such as Miami, Florida, Columbus, Ohio, or Philadelphia, Pennsylvania—would have to adopt compulsory voting for its own elections. . . Why would the city make this switch? . . .[partly] for the sake of partisan advantage. Registered non-voters lean substantially more Democratic than registered voters. If they were required to go to the polls, election outcomes would shift markedly to the left."); *Lift Every Voice*, *supra* note 16.

379. *See* section III.A.4, *infra.*

called to do their civic duty—perhaps despite skepticism of electoral systems often said to be "rigged."

The notion of conservative elites compelling people to vote, rather than seeking to make voting harder, might seem implausible—at odds both with rhetorical appeals to freedom, and longstanding use of voter suppression and disenfranchisement as electoral strategy. Kansas City, however, reveals how compulsory voting and obstacles to voting can be two sides of the same coin. Each offers a way to fix the supposed problem of universal suffrage, which lets the "wrong" people win elections by voting *en masse*.

This third scenario could emerge in red states where demographic changes—urbanization, the arrival of immigrants from the coasts or abroad, or generational shifts—are making the electorate less conservative. Consider a conservative county that contains a booming city where new arrivals tend to vote more liberal. Comal county in Texas, a deep red jurisdiction which contains New Braunfels, the fastest-growing city in the United States, could be such a place.[380] Or rural counties might embrace compulsory voting to remain dominant in statewide races, by staving off the progressive threat posed by growing cities and suburbs.[381] In Georgia, for example, low turnout among rural whites was key to the Republican losses in the 2020 U.S. Senate runoffs.[382] Similarly, in blue-trending Texas, turnout by rural voters was key to both Senator Ted Cruz's 2018 victory over Beto O'Rourke and President Trump's ability to carry the state in 2020.[383] Of course, making voting more difficult in some places is not incompatible with mandating it elsewhere. While the compulsory voting path might seem more plausible if state laws that erect obstacles to voting are struck down, it is also possible that conservatives could look to require turnout by voters in their strongholds, even as they simultaneously seek to make voting more difficult in liberal communities.

380. Edgar Sandoval, *How This Texas Town Became One of America's Fastest-Growing Cities,* N.Y. TIMES, Aug. 19, 2021, https://www.nytimes.com/2021/08/19/us/new-braunfels-texas-growth-census.html.

381. The suburban vote was critical to Biden's victory in 2020. William H. Frey, *Biden's Victory Came from the Suburbs,* BROOKINGS INSTITUTION (Nov. 13, 2020), https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs/.

382. Stephen Fowler, *Who Stayed Home More in Georgia's Senate Runoff Campaigns? Rural White Republicans*, GEORGIA PUB. BROAD. (Apr. 22, 2021), https://www.gpb.org/news/2021/04/22/who-stayed-home-more-in-georgias-senate-runoffs-rural-white-republicans (last accessed Mar. 24, 2023).

383. Patrick Svitek & Alex Samuels, *Rural Texans Have Long Helped Republicans. Will That Hold True on Tuesday?* THE TEXAS TRIBUNE (Nov. 2, 2020), https://www.texastribune.org/2020/11/02/texas-rural-republicans-2020/ (last accessed Mar. 24, 2023).

This scenario might initially seem implausible. It foregrounds a dynamic that does not jibe with contemporary progressives' conventional wisdom, but that was explicit in Kansas City. Compulsory voting can be aimed at diluting the power of a voting block—whether working class and African American voters shifting toward third parties in the late 1800s, or particularly mobilized ethnic or racial communities in the 2020s.

B. Practical Obstacles

Kansas City also highlights the administrative challenges that compulsory voting can pose for a city. As they made the case for compulsory voting, proponents in Kansas City devoted relatively little attention to the practical matter of how to implement the duty to vote. Only after the provision became law did they grapple with the administrative details. Were a city today to consider compulsory voting, the obvious implementation challenges might dissuade people from even experimenting with the policy.

The practical question, then and now, is whether a city can identify nonvoters in local elections and penalize their failure to cast a ballot. Kansas City illustrates the challenge. A city needs a list of all residents who are qualified to vote; a list of everyone who cast a ballot in a local election; people who can compare these two lists; officials who can issue and collect fines; and the resources to pay for these steps as well as the inevitable litigation.

Kansas City struggled with these requirements. It used the assessor's rolls to identify residents, and relied on the recorder of voters to provide lists of those who had voted.[384] When the recorder refused to turn over his books, copying and comparing the lists proved costly.[385] The city eventually mustered the funds needed to collect the poll tax, and seemed ready to have done so had it won the test case.[386]

Today, database technology is much advanced, but similar challenges would confront any city hoping to enforce a duty to vote. Identifying residents who are qualified to vote would be difficult and costly. A list might be compiled by drawing on public records—vehicle registrations, property and local income tax rolls—but that would

384. See text accompanying notes 226-29, *supra*.
385. See text accompanying notes 230-34, *supra*.
386. See text accompanying note 324-25, *supra.*

require cooperation from state agencies. As Kansas City illustrates, such cooperation is not assured.

Alternatively, cities could try to go it alone. Some have created rental registries, but these typically do not include tenants.[387] Others have city vehicle taxes, which would provide lists of residents who own cars.[388] At greater expense, a city could purchase data from a firm that compiles public records.[389] In either case, the city would have to deal with missing, incorrect, and outdated records. It is not clear that Kansas City did in fact identify all eligible voters living in the city on January 1, 1890. It is similarly unclear if a city today could accurately assemble such a list—or would be willing to foot the expense.

Alternatively, the duty could apply only to registered voters, rather than all residents eligible to vote. This would let cities focus on voter rolls. Those cities administering their own elections would be in the best position to do so. There, city officials could develop and maintain lists of voters and nonvoters, assess fines to nonvoters, and collect that revenue.

A limited number of states do grant cities direct control over administering local elections. In New England—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut—as well as Michigan, the work of election administration is left entirely to towns and cities, with counties having no role.[390] In places like Massachusetts, where city clerks have the responsibility to carry out a census of voters, such a routine survey of eligible voters could support the implementation of a duty to vote.[391] In some other states—including

387. *See, e.g.,* Baltimore County Government Rental Housing Registration, https://www.baltimorecountymd.gov/departments/pai/rental-registration/ (last accessed Mar. 24, 2023) (requiring landlords to register buildings used for rental housing, but with no provision for information about tenants).

388. *See e.g.* Vehicle Stickers, Office of the City Clerk of Chicago, https://ezbuy.chicityclerk.com/vehicle-stickers (last accessed Mar. 24, 2023) (requiring all Chicago residents driving or parking a vehicle in the city to pay for a sticker and submit information provided on the vehicle registration card and the resident's driver's license or state ID).

389. Dozens or even hundreds of companies are in the business of compiling databases of personal information and providing access for a fee. See *Here are the Data Brokers Quietly Buying and Selling Your Personal Information,* FAST COMPANY, Mar. 2, 2019, https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information (last accessed Mar. 24, 2023).

390. U.S. Election Assistance Commission, OMB Control No. 3265-0006, 2020 ELECTION ADMIN. AND VOTING SURVEY [hereinafter "EAVS"] (2020) https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys (last accessed Mar. 24, 2023).

391. In Massachusetts, a resident's failure to respond to the town census results in the resident being placed on the inactive voter list. *See* Town of Concord, *Annual Town Census*, https://

Florida, Illinois, Maryland, Minnesota, Wisconsin, and Virginia—the work of election administration is divided between counties and cities, with at least some, and in some cases all, towns and cities having control over local elections.[392] In these states, cities would be best positioned, at least as a practical matter, to have the voter data needed to make voting a duty.

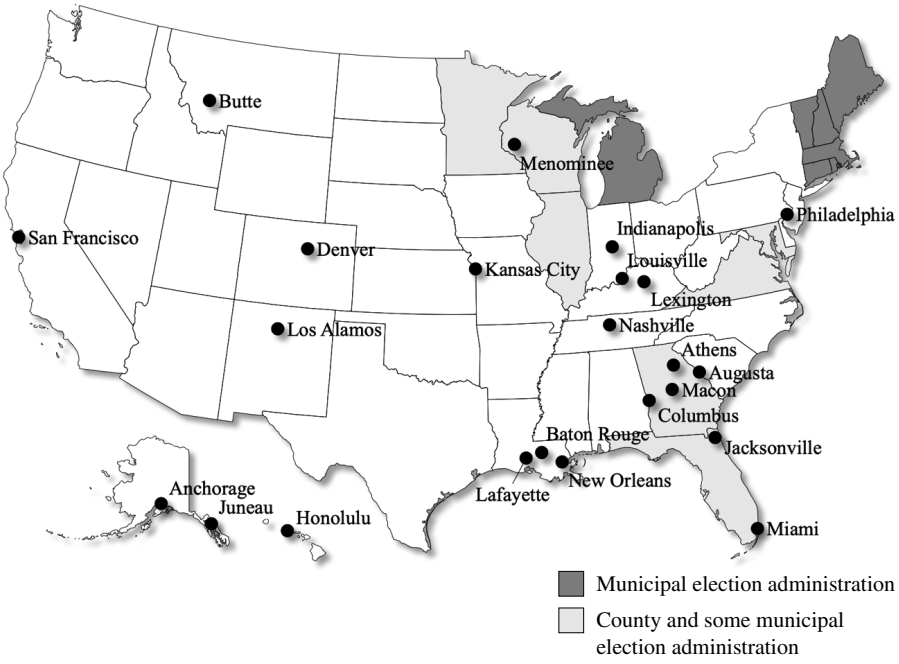
Administering a duty to vote could also be straightforward in places with consolidated city-county governments. Combined with the states mentioned above, this yields a map of places where, at least in practical terms, cities are well-positioned to administer and enforce a duty to vote. The map includes consolidated city-counties such as Denver, San Francisco, Philadelphia, Miami/Dade County, and Louisville/Jefferson County; as well as a range of smaller places like Menominee, Wisconsin; Lexington/Fayette County, Kentucky; and Athens/Clarke County, Georgia.[393]

concordma.gov/381/Census-Annual-Town (last accessed Mar. 24, 2023). A similar census could in principle be used to identify residents who are eligible or registered to vote but have failed to turn out in local elections. I am grateful to Niko Bowie for noting how such a census could aid in implementing a duty to vote.

392. *Id.* Some municipalities in Florida have municipal clerks or canvassing boards that manage elections. Georgia provides in certain situations for joint county-municipal administration. In Illinois, some but not all municipalities have boards of election commissioners. In Maryland, some but not all municipalities have city clerks. By contrast, in other states—such as Minnesota, Wisconsin, and Virginia—counties as well as all cities and towns have local election officials.

393. There is an extensive list on the Wikipedia entry Wikipedia Consolidated city-county, https://en.wikipedia.org/wiki/Consolidated_city-county#List_of_consolidated_city-counties (last accessed Oct. 15, 2022).

Election Administration



Beyond these states and consolidated jurisdictions, however, municipalities would need cooperation from county- or state-level agencies. This would be the case in most of the country: 36 states give counties exclusive control over election administration.[394] There, city officials would, as in Kansas City in the 1890s, depend on intergovernmental co-operation or simply public access to voter lists to find out which residents were registered to vote, and whom among those had in fact cast a ballot.

In some of these states, city officials could gain access to voter records under existing state law. At a minimum, they would need information about voters' addresses and voting history—data that 16 states and the District of Columbia make available to the public in some form.[395] Whether municipalities would be able to use this data

394. EAVS, *supra* note 390. In Louisiana, the power rests with parishes.

395. The states are Arizona, Colorado, Delaware, Maine, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, Wisconsin, and the District of Columbia. *See* NATIONAL CONFERENCE OF STATE LEGISLATORS, *Access to and Use of Voter Lists* (Aug. 5, 2019), https://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx (last accessed Mar. 24, 2023).

for the purpose of identifying and fining nonvoters in local elections would depend on state law. In Delaware, the case is clearest: "any state agency, county or local government for use in conducting government business may request voter lists for free."[396] In other states, lists may be requested by any member of the public,[397] though some, like Tennessee, specify that it may be used only for "political purposes."[398] In places like Ohio and Arizona, city officials would be in essentially the same situation as Kansas City's clerks; they would have to go in person to the county or state office, and copy lists by hand.[399] In New Hampshire, where people may view but not duplicate the database, they would be out of luck, at least when it comes to directly accessing data managed by state agencies.

There is, however, another option. In places where local governments have limited access to voter information managed by state- or county-level agencies, local officials could turn to private databases.[400] Companies like Catalist and TargetSmart have developed comprehensive lists of registered voters, and many unregistered voters as well.[401] These voter data services are relatively affordable, and for a local government inclined to experiment with making voting a duty they could prove an invaluable and worthwhile investment.

Even in places where municipal officials can access the data needed to make voting a duty, actually enforcing that duty would entail costs. The city would have to dedicate funds to administering the new voting mandate. If the ordinance were upheld, it is conceivable that the revenue it generated would eventually pay for its own administration. Recall that Kansas City officials aspired to both cover the costs of collecting the poll tax and use the surplus to fund city services. But until revenues started coming in, the city would have to pay for staff to maintain and compare lists, and to prepare for the process of collecting fines. Ultimately, of course, if the goal were full participa-

396. *Id*.

397. *Id*. These include Colorado, Missouri, and North Carolina, among others.

398. *Id*.

399. *Id.* Ohio law provides that voter data is "Open to public inspection at all times when the office of the board of elections is open for business. Arizona makes voter data "available for public inspection at local election offices."

400. I am grateful to Nick Stephanopoulos for noting how private databases could help local officials implement a duty to vote.

401. *See, e.g.,* Catalist, *Dynamic National Database,* https://catalist.us/data/ (last accessed Mar. 24, 2022) (describing 15 years of work in building the "first ever national voter file not owned by political party or individual campaign); TargetSmart, *Data,* https://targetsmart.com/services/ (last accessed Mar. 24, 2022) (describing databases that include over 191 million voters and 58 million potential voters).

tion in local elections, the optimal result would be very little new revenue—since there would be few nonvoters left to fine. In that ideal situation, administrative costs would remain, even as revenues declined.

If a city did not administer its own elections, or gain access to voter data controlled by a county board of elections, a local duty to vote might well be a dead letter. This has happened in cases where local governments have sought to expand voting rights, but have faced opposition from county election agencies. For example, after voters in Yellow Springs, Ohio approved a referendum to permit non-citizens to vote in local elections, the Ohio Secretary of State found the local expansion of voting rights in conflict with state law and ordered the county board of elections not to cooperate.[402]

In many states, then, the practical question of how to administer a local compulsory voting provision would likely become a legal question of municipal authority over elections.

III. Legal Lessons from Kansas City

Kansas City's experiment demonstrates the importance of state and local government law to whether a city can make voting a duty. Prior scholarship has focused on questions of federal law, such as whether compulsory voting would violate the First Amendment.[403] Recent work such as the Brookings report on the duty to vote has begun to recognize how local government law would shape the potential for compulsory voting to re-emerge in America.[404] This section examines in depth the question of local authority to make voting a duty, before turning to a federal issue that some opponents of compulsory voting have raised.

A. The Duty to Vote and Municipal Authority

In *Whipple,* Kansas City's authority to regulate elections was not an issue. Missouri had led the way in granting home rule powers to municipalities, and Kansas City had recently passed the population threshold to adopt its home rule charter. The parties stipulated and

402. Megan Bachman, *Noncitizen Voting Under Fire*, YELLOW SPRINGS NEWS, Aug. 13, 2020, https://ysnews.com/news/2020/08/noncitizen-voting-under-fire (last accessed Mar. 24, 2023).

403. *See, e.g. The Case for Compulsory Voting in the United States, supra* note 8.

404. *Lift Every Voice*, *supra* note 16, at 29-30 (noting that "[a] local government would have to consider both the state constitution and state statutes to determine if it has the authority to mandate participation in local elections").

the Missouri Supreme Court agreed that Kansas City had the legislative authority to levy a poll tax, so long as it did not conflict with state law.[405]

For any city seeking to make voting a duty today, its authority and the question of conflicts with the state constitution and state statutes would be front and center. An initial question would be whether the city has the power to regulate local elections. Professor Joshua Douglas has provided a useful fifty-state survey of this authority.[406] He identifies 25 states where there is no clear statutory or state constitutional impediment to at least some cities regulating elections.[407] In six other states, home rule provisions constrain cities' authority to change voter *qualifications* defined by state law, but may not bar a local law that obligates qualified voters to cast a ballot in local elections.[408] Massachusetts and Vermont empower municipalities to regulate local elections and to amend their charters, respectively, but each requires approval by the state legislature.[409] Only nine states either prohibit cities from altering election procedures or provide that the state's election code exclusively regulates municipal elections.[410] In a few states, it is unclear whether home rule authority would grant power to municipalities to regulate elections in this way.[411]

405. *See Whipple*, 136 Mo. 475 (1896).

406. Douglas, *supra* note 13, at 1101-11.

407. *Id.* at 1101-10. These states include Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

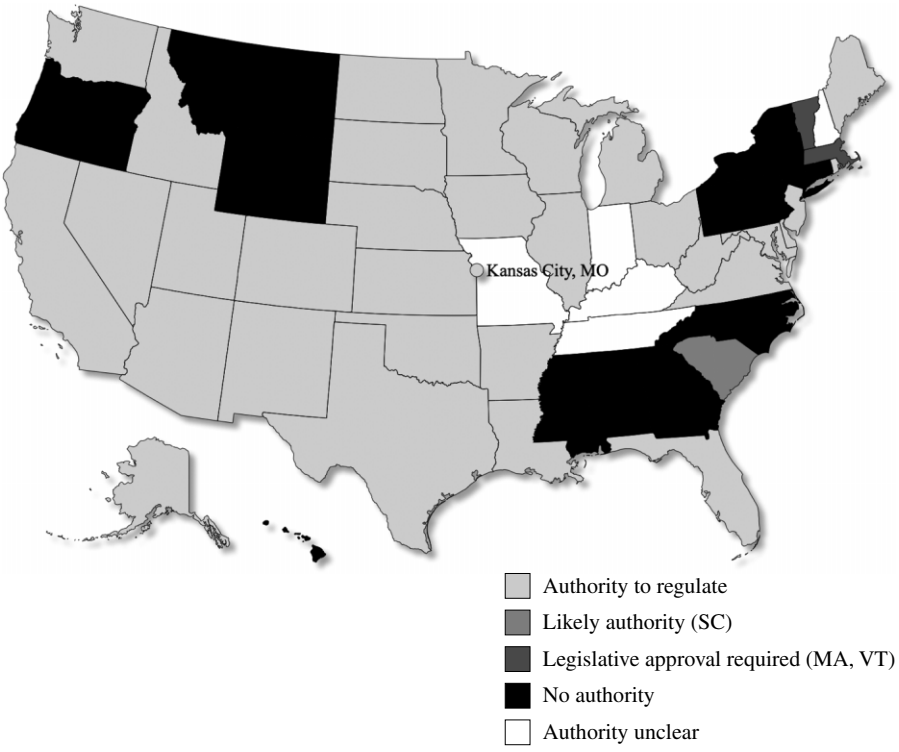
408. *Id.* at 1101-09. These states include Alaska, Connecticut, Delaware, Maine, North Dakota, and South Carolina.

409. *Id.* at 1105 n. 334 (Massachusetts), 1109 n. 370 (Vermont).

410. States with statutes that bar municipalities from changing voting procedures, or provide that the state election code exclusively regulates local elections, include Georgia, Hawaii, Mississippi, Montana, New York, North Carolina, Oregon, Pennsylvania, and Wyoming. *Id.* at *1103-11.*

411. Indiana prohibits municipalities from regulating conduct already regulated by a state agency, and while the Indiana Secretary of State regulates elections it is possible that a court would find the Secretary of State's regulations do not speak to making voting compulsory, thus allowing a municipality to act. *Id.* at 1104 n.326. Kentucky permits municipalities to take action that is in furtherance of a public purpose, but does not grant authority where "there is a comprehensive scheme of legislation on the same general subject." Professor Douglas observes it is possible that the election code is not a "comprehensive scheme" on the issue of voter qualifications, *Id.* at 1104 n.329, and the same could hold true with respect to compulsory voting. Minnesota's state election code covers municipal elections, except when home rule charter cities regulate local elections in their charter; this could mean that if a city charter makes voting a duty the state election code's provisions would not apply. *Id*. at 1105 n.338. It is also unclear whether the powers granted by New Hampshire's home rule statute would encompass the authority to make voting a duty. *Id*. at 1107 n.347. Tennessee's home rule statute does not expressly grant authority to make voting a duty in its list of home rule powers, though it is possible a court would interpret a municipality as having that power. *Id*. at 1109 n.365.

Municipal authority to regulate elections



Of course, even in states that empower municipalities to regulate elections, any such regulation may not conflict with a state statute or state constitution. We can identify a few potential conflicts. One, analyzed in the Brookings report, is the constitutional definition of the right to vote.[412] *Whipple* points to two other potential conflicts: clauses involving the free exercise of the right of suffrage, and uniform taxation. I discuss these in turn.

1. The Duty to Vote and the Right to Vote

A local duty to vote could conflict with a state's definition of the right to vote. This informs the analysis in the recent Brookings report of where impediments exist to a duty to vote in municipal elections.

412. To develop a list of states where there are less likely to be impediments, the Brookings working group asked how each state constitution defines voter qualifications. *Lift Every Voice, supra* note 16, at 30. This distinguishes between states that define voting qualifications as "grants" and states that define them as "restrictions." Douglas, *supra* note 13, at 1084.

The working group identified thirteen states where municipal authority exists to regulate elections, and where a duty to vote would not conflict with the state's definition of the right to vote.[413]

Kansas City provides a limit case. Suppose a city, like Kansas City, tried to compel *all* adult residents—registered or not, citizen or non-citizen, adult or teenager, felony conviction or not—to cast a ballot. Such a provision would conflict with state constitutional or statutory provisions that define voter qualifications in restrictive terms.[414] Any provision so expansive would be struck down, even in states where municipalities have the power to regulate local elections.

That sort of conflict, however, is easy to avoid. A municipal compulsory voting provision could simply state that all residents who are qualified voters—as defined by the state constitution—must vote in municipal elections. Incorporating the state's definition of qualified voters would avoid the potential conflict, and remove at least this impediment to a city enacting a duty to vote.

2. Free Elections Clauses

Whipple points to another potential conflict, between compulsory voting and state constitutional provisions that prohibit interference with the free exercise of the right of suffrage. While this was one basis for the decision in *Whipple*,[415] contemporary proponents have strong arguments that the opinion of the Missouri Supreme Court was poorly reasoned and should not be followed.

In *Whipple,* the Court held that Kansas City's charter provision conflicted with a clause providing that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[416] A legal duty to vote, Chief Justice Brace reasoned, interfered with the free exercise of the right of suffrage—since the charter provision deprived Kansas Citians of the freedom *not* to exercise their right of suffrage.[417]

Opponents today might argue that this type of clause conflicts with a state or local duty to vote. Fourteen state constitutions have

413. *Lift Every Voice*, supra note 16, at 30 (identifying some or all cities in Arkansas, California, Illinois, Maryland, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Washington, and Wisconsin).

414. *See., e.g.,* Douglas, *supra* note 13, at 1082 n.211 (listing states that restrict the definition of qualified voters in a way that bars municipalities from expanding on the definition).

415. 38 S.W. at 297 (1896).

416. MO. CONST. of 1875, art. II, § 9. Today, the clause appears as MO. CONST. art. I, § 25.

417. Whipple, 38 S.W. at 297 (1896).

clauses identical or substantially similar to that in the Missouri constitution.[418] In all, some 30 states have a constitutional requirement that elections be "free."[419] Voting rights advocates hail such clauses as instances of state constitutions providing more substantial protection for the right to vote than does the U.S. Constitution.[420] However, were other state supreme courts to adopt the logic of *Whipple*, such clauses—and particularly those identical to Missouri's "free exercise of the right" clause—could provide a basis for striking down compulsory voting laws. Such an interpretation would not only jeopardize local provisions, but also state statutes creating a duty to vote—contrary to some observers' suggestion that pursuing compulsory voting at the state level would be "relatively easy."[421]

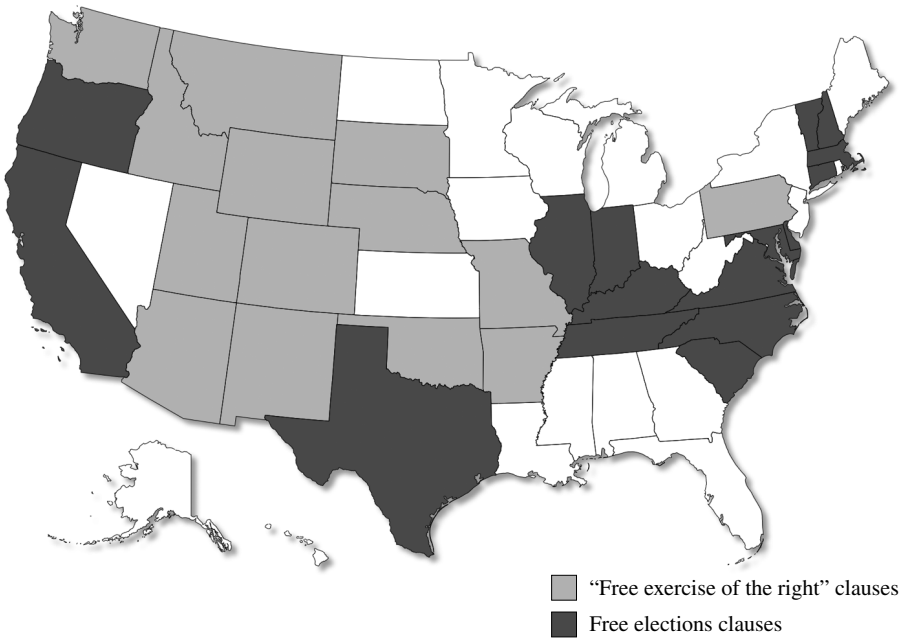
418. ARIZ. CONST. art. II, § 21 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"); ARK. CONST. art. 3, § 2 ("No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof."); COLO. CONST. art. II, § 5 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); IDAHO CONST. art. I, § 19 ("No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage"); MONT. CONST. art. II, § 13 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); NEB. CONST. art. I, § 22 ("there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise"); N.M. CONST. art. II, § 8 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); OKL. CONST. art. III, § 5 ("No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage"); PA. CONST. art. I, § 5 (no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); S.D. CONST. art. VII, § 1 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); UTAH CONST. art. I, § 17 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); WASH. CONST. art. I, § 19 ("no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); WYO. CONST. art. I, § 27 ("no power, civil or military, shall at any time interfere to prevent an untrammeled exercise of the right of suffrage.").

419. *Free and Equal Election Clauses in State Constitutions*, Nat'l. Conf. of State Legislators, https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx (Nov. 4, 2019) (citing constitutional provisions from Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming).

420. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 89 (2014) ("Virtually every state constitution includes direct, explicit language granting the right to vote, as contrasted with the U.S. Constitution, which mentions voting rights only implicitly."); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions,* 119 MICH. L. REV. 859, 871 (2021) (noting that dozens of states provide electoral protections via clauses that declare elections shall be "free," "free and equal," or "free and open").

421. *Lift Every Voice*, *supra* note 16, at 29 (suggesting the answer to whether state law would allow the implementation of civic duty voting "is relatively easy if a state wishes to adopt the practice for statewide elections: States have the authority to regulate their own elections for state offices so long as the rules do not violate the U.S. Constitution or federal law.").

Free Elections Clauses



Compulsory voting proponents will need to convince state courts not to follow the reasoning of the Missouri Supreme Court in *Whipple*, the only state supreme court case to address the issue. They will be given an assist by Chief Justice Brace's flawed reasoning, which fails to apply the plain meaning of "free exercise of the right" and "free elections." These indicate that elections and the act of voting should be free from outside domination; voters should make their own choices, rather than voting the preferences of others.[422] "Free exercise of the right" is best understood as freedom from third-party influence on voters' decisions, rather than the choice of whether to cast a ballot in a particular election. This interpretation permits voters to make any choice they like when casting a ballot—for any listed candidate, a write-in, or none of the above. Courts would apply the clause in cases involving undue influence on the choice made by voters. Non-interference with the free exercise of the right of suffrage does not imply the converse—i.e. a right not to participate in elections.

422. *Free, Merriam Webster Online Dictionary,* (defining the adjective as "2c: enjoying political independence or freedom from outside domination" and "3b: determined by the choice of the actor or performer") https://www.merriam-webster.com/dictionary/free (last accessed Feb. 14, 2023).

A purposive interpretation of these clauses reaches the same result. The object of these clauses is to protect elections in general, and voters' choices in those elections, from undue influence. Their point is to help qualified voters exercise their right to vote and express their will, without being dissuaded or coerced by others.[423] The aim of the election clauses is to promote a full and accurate expression of the people's will. To interpret the clauses as helping people *not* to vote would contradict this aim. For voters who prefer not to support any candidates on the ballot, compulsory voting could simply provide a "none of the above" or spoliation option.[424]

Finally, the original intent of the framers of these clauses likely leads to the same conclusion. A full elaboration of this point would turn on the historical details of the drafting and ratification of the relevant clause in each state constitution—a project beyond the scope of this article. But those debates would presumably reveal no concerns about compulsory voting interfering with the free exercise of the right of suffrage, or free elections more generally.[425] This was almost cer-

423. State courts have interpreted the free elections clauses of their respective constitutions along these lines. *See, e.g.*, Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS, at *337 (Sept. 3, 2019) ("[T]he meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people."); Wallbrecht v. Ingram, 175 S.W. 1022, 1026 (Ky. Ct. App. 1915) ("[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the [Kentucky] Constitution."); Moran v. Bowley, 179 N.E. 526, 531 (Ill. 1932) ("[a]n election is free where the voters are exposed to no intimidation or improper influence and where each voter is allowed to cast his ballot as his own conscience dictates. Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot."); Winston v. Moore, 91 A. 520, 523 (Pa. 1914) ("[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him."); League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 804-09 (Pa. 2018) (interpreting meaning and purpose of free elections clause in Pennsylvania constitution by reference to its history and in comparison with similar clauses in other states).

424. Proponents of compulsory voting have frequently proposed this option. *See, e.g.*, Feeley, *supra* note 8, at 241-42; Matsler, *supra* note 8, at 974-76. In practice, when such an option is not made available, "[t]he proportion of spoilt ballots is regularly used in states with mandatory electoral participation as a means of assessing levels of popular disaffection." BIRCH, *supra* note 371, at 55.

425. A North Carolina court has traced the source of that state's free elections clause, incorporated in the 1776 North Carolina Declaration of Rights, to similar clauses in states such as Virginia, Pennsylvania, and Virginia; these, in turn, drew inspiration from the 1689 English Bill of Rights. *Common Cause*, 2019 N.C. Super. LEXIS 56, at *340; *see also* John V. Orth, *North Carolina Constitutional History,* 70 N.C. L. REV. 1759, 1797-98 (1992); League of Women Voters

tainly the case of the clause included in the 1875 Missouri Constitution; compulsory voting was not on the agenda in the state in the years leading up to its ratification.

An analysis of how and when such clauses appeared in other state constitutions would likely yield similar results. Arkansas, for example, first adopted a "free exercise of the right" clause in its 1874 Constitution.[426] The most similar clause in the 1868 Arkansas constitution makes clear that the concern was not compulsory voting, but instead fraud and undue influence: "The right of suffrage shall be protected by laws regulating elections and prohibiting, under adequate penalties all undue influence from bribery, tumult, or other improper conduct."[427] A scan of the debates concerning free elections clauses would likely reveal concerns regarding fraud that were typical of the Gilded Age, rather than concerns about compulsory voting.

3. Uniform Taxation Clauses

Whipple points to a second potential conflict between state constitutions and state or local compulsory voting provisions. The primary basis of the decision was the Missouri constitution's requirement that taxation be uniform. One analysis of state constitutional provisions concerning tax uniformity identified twelve other states that have similar provisions, mandating that taxes be uniform upon the same class of subjects.[428]

It seems unlikely that contemporary proponents would frame compulsory voting as a tax. No one, after all, is fond of new taxes.[429]

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of Pa. v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018) ("In accordance with the plain and expansive sweep of the words "free and equal," we view them as indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.").

426. ARK. CONST. of 1874, art. III, § 2. ("Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector's name; or whereby such right shall be impaired or forfeited, except for the Commission of a felony at common law, upon lawful conviction thereof.").

427. ARK. CONST. of 1868, art. I, § 19.

428. WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION, 10 (1959). The states, in addition to Missouri, are Colorado, Delaware, Georgia, Idaho, Louisiana, Minnesota, Montana, New Mexico, Oklahoma, Oregon, Pennsylvania, and Virginia.

429. Polling by the Brookings working group on civic duty voting found that 63% of those who strongly oppose making voting a legal duty cite the statement "there are already too many government taxes and fines" as a major reason for their opposition. DIONNE & RAPOPORT, *supra* note 16, at 95.

Perhaps for this reason, the authors of the Brookings report analyze the constitutionality of "fees" and "monetary penalties" for not voting, and conclude that they, along with alternatives such as community service, would survive constitutional scrutiny.[430] Beyond the many good practical reasons to frame the consequence of non-voting as a penalty or a fee, doing so could also help avoid the conflict presented in *Whipple.*

Framing a duty to vote in terms of a tax *benefit*, however, could prove attractive to some promoters. Rather than penalizing non-voting, a policy framed as a tax rebate or waiver, as in Kansas City, could be defended both politically and legally as an incentive to encourage (but not require) voting.[431] Indeed, Dionne and Rapoport suggest that, at least in some states, a refundable tax credit might be a legal means of incentivizing voting.[432] Such a tax rebate, made universally available to eligible voters even if not universally claimed, would presumably not violate a state constitution's requirement that taxes be uniform.[433]

4. Extra-Local Effects

A further question is whether courts would find a municipal duty to vote as having impermissible statewide effects. This question would

430. *Lift Every Voice*, supra note 16, at 28; *see also* DIONNE & RAPOPORT, *supra* note 16, at 78 (envisioning "monetary penalties, in amounts similar to parking fines").

431. The question of how voting might legally be incentivized has received some scholarly attention. *See, e.g.*, Richard L. Hasen, *Vote Buying,* 88 CALIF. L. REV. 1323, 1355-59 (discussing the legality and normative case for payments to increase turnout); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System,* 80 VA. L. REV. 1455, 1472-73 (suggesting that "perhaps the government ought to pay eligible citizens to vote" and addressing the concern that this would commodify the vote). I am grateful to Shane Singh for emphasizing that this was how the Kansas City provision was structured, and Nick Stephanopoulos for suggesting that this approach might be more politically palatable and legally defensible than a fine used to punish the failure to vote.

432. *See* DIONNE & RAPOPORT, *supra* note 16, at 80 (relying on legal research by Allegra Chapman, Joshua Douglas, Cecily Hines, and Brenda Wright to identify Alaska, California, Mississippi, Minnesota, Nebraska, New Hampshire, New Mexico, Pennsylvania, South Carolina, Washington, West Virginia, and Wyoming as states with statutory language that might support a tax incentive for turning out to vote). Incentives have been upheld by courts reviewing payments for gas needed to drive to polls in Alaska, (Dansereau v. Ulmer*,* 903 P.2d 555, 561-64 (Alaska 1995).), and a lottery organized by a candidate to promote turnout in a local election in Mississippi, (Naron v. Prestage*,* 469 So. 2d 83, 87 (Miss. 1985).).

433. I am grateful to Josh Douglas for underscoring this misunderstanding by the court in *Whipple*, and pointing out that a tax can be uniformly applied, even if a rebate is only claimed by some. The real basis for the court's objection seems to be that, by offering that rebate, the policy put a monetary value on voting, which is a different matter than the question of tax uniformity. Scholars have addressed the objection of commodification. *See, e.g.,* Karlan, *supra* note 431, at 1473 (proposing that voters could receive vouchers that they might use to pay for public transportation, or donate to nonprofit organizations).

inform how courts might analyze a claim that a duty to vote in local elections exceeds municipal authority. As Richard Briffault has observed in situations of local political innovation, "What really seems to matter is the judicial recognition that local control of local governance or politics is both of central importance to the local self determination that is home rule while simultaneously posing little or no threat or cost to the localities or the state beyond local borders."[434] All things being equal, a municipality that hopes to see its policy survive in court would seek to limit its extra-local effects.

Limiting external effects, however, is in tension with the aspirations of some proponents. Recall that Professor Stephanopoulos imagines a virtuous cycle in which one city adopts compulsory voting, and thereby incentivizes other cities and eventually states to follow suit.[435] By making voting a duty and aligning election dates with non-local elections, one city could maximize the influence of its residents' votes on statewide races, and possibly start this cycle.

In many states, a court would consider such a situation by asking whether the extra-local impacts of a local duty to vote implicate a matter of statewide concern. A city that simultaneously makes voting mandatory and aligns its election day with statewide races would present the hardest test. A court might well interpret a local regulation of elections as being intended to create extra-local effects.

Even if the intent were to simply maximize participation in local elections,[436] limited evidence suggests that making voting a duty in one type of election has spillover effects on other races held concurrently. When residents in one Swiss canton were required to vote on federal referenda, turnout on those questions increased by about 30 percent.[437] When federal referenda appeared on ballots concurrently with local referenda and elections for federal office, for which voting was not compulsory, turnout in those latter races also rose, by around 24 percent and 53 percent respectively.[438] The duty to vote in one race drove turnout in other non-mandatory races.

434. Briffault, *supra* note 367, at 19.

435. *See* Stephanopoulos, *supra* note 13.

436. Moving local elections on-cycle raises turnout, as does making voting mandatory. *See* Hajnal et al., *supra* note 369, at 374.; BIRCH, *supra* note 371, at 79 (analyzing turnout effects across jurisdictions and concluding, in line with prior studies, that "compulsory voting—especially when accompanied by sanctions—is associated with higher overall turnout levels.").

437. Michael M. Bechtel et al., *Compulsory Voting, Habit Formation, and Political Participation,* 100 REV. ECON. & STATS. 467, 473 (2018).

438. *Id.* at 474.

A city in such a situation could contend that increased turnout in non-local races does not implicate statewide concerns. Making voting mandatory in local races might lead more of a city's voters to vote in statewide races, but that does not deprive anyone of their right to vote.[439] Nor does it make statewide elections less free or equal, or implicate the free exercise of the right of suffrage by any residents—either in the municipality or beyond. Nor does it affect the integrity of the electoral process, which some courts have considered an important statewide concern.[440] If anything, a duty to vote would make elections *more* pure, by ensuring equal participation.

If a court found a local duty to vote to have statewide effects, that would not necessarily be fatal. Such effects, after all, would be overwhelmingly positive. States have an interest in increasing democratic participation, which is served by a duty to vote. Similarly, aligning municipal and statewide elections enhances democracy both locally and at the state level.

Even if a judge found a local duty to vote to have negative statewide effects, the provision might still be upheld as being intrinsic to local government. Here, cities would argue that the policy falls within a core municipal capacity—determining the selection of local officials. Courts have upheld local election regulations that implicate statewide concerns when those policies are core home rule powers. The Arizona Supreme Court, for example, has held that all administrative matters such as election scheduling and procedure, as well as the constitution of the electorate are squarely municipal concerns—even though statewide concerns may exist in legislating in the area of municipal elections.[441] The same court upheld the city of Tucson's decision to keep off-cycle municipal elections as an exercise of a "purely municipal concern," despite a direct conflict between the ordinance and a valid state statute that aligned municipal elections with state and federal elections.[442]

Other scenarios would pose less of a challenge for a city to prevail. In San Francisco, for example, the city and county hold off-cycle

439. State ex rel. Brnovich v. City of Tucson, 484 P.3d 624, 631 (Ariz. 2021) (concluding that "if low voter turnout results from disinterest in strictly municipal issues in off-cycle elections decoupled from state and national elections . . . that does not deprive those voters of their constitutional right to vote.")

440. Briffault, *supra* note 367, at 19 (citing Johnson v. Bradley, 841 P.2d 990, 991 (Cal. 1992)).

441. *See* City of Tucson v. State, 229 Ariz. 172, 178 (Ariz. 2011).

442. *See Brnovich*, 484 P.3d at 632.

elections for some local offices, while elections for local ballot measures and other local offices appear on the same ballot with races for state and federal office.[443] If San Francisco created a duty to vote in all local races, that would presumably increase turnout for on-cycle elections, without standing out as an opportunistic change to the *status quo*.

Cities would also be in a strong position where local election dates are different, or are moved from on-cycle to off-cycle. In most states, this would be the scenario presented.[444] While there would presumably still be some spillover—in the Swiss study, mandatory voting in one election was predicted to slightly increase turnout even in non-concurrent elections—it would not be as readily apparent or easily tied to the reform.[445]

5. Preemption and Local Self-Government

Ultimately, proponents of compulsory voting will still face the challenge of express preemption. State legislatures have aggressively preempted progressive policies enacted by cities.[446] Other than where a blue city enacts a duty to vote in a blue state—if, for example, San Francisco were to do so in California—one could expect a state legislature to consider preempting any local effort to make voting a duty. Short of fundamentally remaking home rule authority, there is little that can be done about this.[447] Existing work on compulsory voting at the local level has not considered how to address the threat of preemption.[448]

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443. *Future Elections,* CITY AND CNTY. OF S.F. DEP'T OF ELECTIONS https://sfelections.sfgov.org/future-elections (last accessed Feb. 14, 2023).

444. Dynes, *supra* note 370, at 1101. (noting that "most local governments in the US (78% in our sample [of the roughly 1,600 American cities with populations over 20,000]) are chosen in off-cycle elections").

445. Bechtel et al., *supra* note 437, at 473-74.

446. Kim Haddow et al., *The Growing Shadow of State Interference: Preemption in the 2019 State Legislative Sessions,* LOC. SOLS. SUPPORT CTR. AND STATE INNOVATION EXCH. (March 19, 2019), https://stateinnovation.org/the-growing-shadow-of-state-interference-preemption-in-the-2019-state-legislative-sessions/.

447. A group of local government law scholars have proposed to adjust the balance of power between state and local governments by creating a presumption against state preemption, which would require a state legislature to both expressly preempt a power of a home rule city, and articulate a substantial state interest that is narrowly tailored. *Principles of Home Rule for the 21st Century,* NAT'L LEAGUE OF CITIES 54-55 (2020), https://www.nlc.org/resource/new-principles-of-home-rule/ (last accessed Mar. 24, 2023).

448. *See, e.g.*, Stephanopoulos, *supra* note 13 (envisioning compulsory voting emerging in cities and spreading to states, but not addressing preemption); *Lift Every Voice*, *supra* note 16.

There are two strategies proponents might develop in anticipation of preemption. First, they could ground their efforts in the legal principle that cities have a constitutional right to self-government. A duty for residents to vote in local elections would fall squarely within the ambit of that right. Second, proponents could recognize that some state governments will inevitably preempt municipal compulsory voting. Proponents should plan to use such a defeat to raise the profile of civic duty voting, and to set an agenda for enacting the reform elsewhere. I consider each of these strategies in turn.

The move to make voting a duty in local elections is bolstered by recent scholarship on how state and federal constitutions promote democracy and self-government.[449] Most important in this regard is Nikolas Bowie's recent excavation of the history of the assembly clauses in the federal and state constitutions.[450] Bowie traces the origins and motivations behind the original assembly in the constitutions that Pennsylvania, North Carolina, and Massachusetts drafted and ratified prior to the U.S. Constitution. Massachusetts had a tradition of colonial-era town meetings, but Pennsylvania and North Carolina, which did not have such traditions, adopted nearly identical clauses. In each case, the framers appear to have been motivated by the meetings that were called to decide democratically on matters of local governance in the years leading up to 1776. John Adams and Samuel Adams, who each wrote on the importance of popular sovereignty and a form of government modeled on town meetings, were involved in drafting the Massachusetts provision; they advised the framers of the Pennsylvania and North Carolina provisions.[451] Bowie concludes that the history surrounding the drafting of these original assembly clauses demonstrates that "a central purpose of protecting the right to assemble was to protect self-government, not expression alone."[452]

Assembly clauses now appear in 47 state constitutions. These were adopted from the late 1700s through the 1800s, often without debate, and typically with only minor modifications from the models set by Massachusetts, Pennsylvania, and North Carolina.[453] In interpreting the meaning of these clauses, courts have looked to the intent

449. *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 420, at 879-80, 894-95; Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L. J. 1935, 1936-67 (2003).

450. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L. J. 1651, 1652-53 (2021).

451. *Id*. at 1698-99.

452. *Id.* at 1727.

453. *Id*. at 1732-34.

of the framers of the constitutions from which the clauses were copied. An appeals court in Oregon, for example, recently traced the assembly clause included in that state's constitution in 1859 back to the context in which the clause had been adopted in Massachusetts.[454]

Bowie suggests various areas in which applying the state assembly clauses could realize a constitutional right of local self-government. These range from offering a basis for laws that vindicate the people's right to meaningfully participate in a representative government,[455] to questioning the assumptions of the home rule regime that undercuts the powers of local governments vis-à-vis state legislatures.[456] Local civic duty voting provisions would fit squarely within the areas protected by state constitutional assembly clauses. Such provisions, by ensuring full and equal participation in local elections, realize the vision for representative government declared by John Adams. In extending the right of the people to assemble and govern themselves, Adams wrote, such a government should be "in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them."[457]

Recognizing assembly clauses as supporting the right to local self-government could help proponents of a duty to vote in local elections. It offers a constitutional basis, in nearly every state, for municipal authority to regulate local elections in ways that increase participation and contribute to local government being an accurate representation of the people, even if not an "exact portrait." State constitutions could be understood to support municipal authority to make voting a duty, rather than conflict with it. A more aggressive argument would be that any state statute purporting to preempt an ordinance in an area fundamental to local self-government—such as ensuring adequate representation via local elections—violates the assembly clause and is invalid. This would test the traditional conception of state and local authority.[458] But even the more limited reading would find constitutional

454. *Id*. at 1734-35 (citing *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 682 (Or. Ct. App. 2005)).

455. *Id*. at 1735-36.

456. *Id*. at 1743-45.

457. JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (Phila. John Gill 1776), in 4 PAPERS OF JOHN ADAMS 87 (Robert J. Taylor ed., 1979), quoted in Bowie, *supra* note 450, at 1699.

458. Bowie notes that his proposed powers of local government to self-govern would be subject to state and Congressional preemption. Bowie, *supra* note 450, at 1744. However, as he notes, this reading of the assembly clause would support proposals to change the balance of power between state and local government by constitutional amendment. *Id.* (citing *Principles of Home Rule for the 21st Century*, *supra* note 447, at 23-27). In principle, a state supreme court

support for a local duty to vote, and undercut any attempt to revive the dicta in *Whipple* that compulsory voting conflicts with popular sovereignty.[459]

Despite this constitutional basis for local action, some state legislatures would still preempt a duty to vote in local elections. Proponents should consider how to turn preemption to their benefit. This might mean enacting such a provision even in the face of preemption. Scholars of litigation and social movements have noted how even cases that are likely to lose can help set a broader political or movement agenda.[460] Cities have long tested the limits of their authority, to press for change on issues ranging from slavery and immigration to same-sex marriage and abortion.[461] A dispute concerning a municipality's power to increase participation in local democracy, and a state's effort to depress turnout, could draw attention to the issue—whether from national media, lawmakers in other jurisdictions, or the public at large. Picking such a fight would only make sense after developing a compelling frame for the dispute, and tactics for using a loss in one preemption fight to advance civic duty voting nationally. Polling on attitudes toward civic duty voting could point toward a strategy in which losses in preemption battles form part of a broader campaign to make voting a duty.[462]

B. The Duty to Vote is Not (Necessarily) a Poll Tax

Litigation over a local compulsory voting policy would focus on matters of local government law and state constitutional interpreta-

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could vindicate the right to self-government by interpreting an assembly clause to require express preemption, articulation of a substantial state interest, and narrow tailoring.

459. *See* text accompanying notes 350-55, 360; *See* Whipple, 38 S.W. at 296-97 (1896).

460. *See, e.g.*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2010); Steven A. Boutcher et al., *Getting on the Radar Screen: Homeschooling Litigation as Agenda Setting, 1972-2007* 23 MOBILIZATION 159, 160 (2018); Anke Wonneberger & Rens Vliegenthart, *Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government*, 15 ENV. COMMC'N 699, 699-700 (2021).

461. *See, e.g.*, Daniel Farbman, *"An Outrage Upon Our Feelings": The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2107-08 (2021) (comparing local government resistance to the Fugitive Slave Law of 1850 and contemporary deportation policies); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (describing the decision by San Francisco officials to perform same-sex marriages in violation of state law); Sarah L. Swann, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 833-37 (2022) (describing the effects of attempts by cities to prohibit constitutionally-protected services such as abortion).

462. *Lift Every Voice*, *supra* note 16, at 31-37 (describing results of a survey on making voting a duty).

tion. But there are federal issues, such as whether compulsory voting constitutes compelled speech in violation of the First Amendment.[463] Rather than retreading terrain covered by others, I consider a different issue that some opponents have recently raised: whether a duty to vote violates the U.S. Constitution's prohibition on poll taxes.[464] As I explain, this should be a non-issue.

Although the duty to vote was created as a poll tax in Kansas City, that framing is unlikely to be repeated. Contemporary proponents have been careful to propose a small fine, rather than a tax, as the penalty for failing to cast a ballot.[465]

Opponents, nevertheless, have seized on the notion that the duty to vote is a poll tax. Or, as some have put it, a "reverse poll tax." This framing was used by noted voting rights opponent Hans A. von Spakovsky, in responding to President Obama's suggestion that the United States consider compulsory voting.[466] More recently, it has been deployed to oppose a compulsory voting bill in Connecticut.[467] Whether as a poll tax or a "reverse poll tax," opponents claim that compulsory voting would violate the Twenty-Fourth Amendment. (Although opponents generally do not cite *Harper v. Virginia State Board of Elections*, they would presumably also claim it violates the equal protection clause of the Fourteenth Amendment.[468])

They are wrong. The Amendment provides that "The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax."[469] *Harper* similarly addressed a situation in which the right to vote depended on payment of a tax.[470] Had either been the rule at the time of Kansas City's experiment with a poll tax, it would not have barred the city from making voting a duty. Kansas City framed its provision as a poll tax, but it did not prohibit nonvoters who failed to pay the tax from voting in subsequent elections.

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463. *See, e.g.*, SINGH & WILLIAMS, *supra* note 15, at 241-43; Matsler, *supra* note 8, at 972-76.

464. Fassuliotis ,*supra* note 18*;* Hans A. von Spakovsky, *Compulsory Voting is Unconstitutional,* THE HERITAGE FOUND. COMMENT.: POL. PROCESS (Apr. 1, 2015), https://www.heritage.org/political-process/commentary/compulsory-voting-unconstitutional (last accessed Mar. 24, 2023).

465. *E.g.*, *Lift Every Voice*, *supra* note 16, at 8.

466. Von Spakovsky, *supra* note 464.

467. Fassuliotis, *supra* note 18.

468. Harper v. Va. State Bd. of Elections, 383 U.S. 663,670 (1966).

469. U.S. CONST. AMEND. XXIV, § 1.

470. Harper, 383 U.S. at 666 (holding that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

Recent bills have proposed to levy a small fine against nonvoters. None of these has provided that people who failed to pay those fines would lose their ability to vote. This fact won't stop opponents' hand-waving about the Twenty-Fourth Amendment and "reverse" poll taxes. But proponents can safely regard such protestations as mere rhetoric, without any basis in the Constitution.

Conclusion

Bringing compulsory voting to an American city is both a new idea and a very old one. Just as William Rockhill Nelson did in the 1880s, compulsory voting proponents are once again looking to cities as a starting point for bringing this game-changing democratic reform to state and federal elections. As they do so, there is much to learn from history. The story of how voting became a duty in Kansas City is neither a roadmap for replicating the reform today, nor an indication that any revival would be similarly doomed to fail. Kansas City's experiment with compulsory voting is a largely forgotten moment in America's electoral history, worth remembering both for its own sake and as a means of anticipating dilemmas, contradictions, and opportunities for today's democratic reformers.

Recognizing that the United States has a history of compulsory voting also demands a shift in method. Scholars have often approached compulsory voting as something that has happened elsewhere, beyond our shores. This frames the question of how or whether this reform could happen here as a matter for comparison across space—how do the circumstances of enactment elsewhere compare to conditions here? It also presents the question as an opportunity for hypothetical ruminations on law and morality—were this reform somehow possible, would it be constitutional, or just?

When we appreciate that people in the United States *have* tried to make voting a duty—not just once, but repeatedly—our questions and methods must shift. Comparisons can now be made across time, not just space: how and why have reformers repeatedly sought to use compulsory voting to fix perceived flaws in American democracy?[471] Rather than posing hypotheticals that float in the realm of theory, we

471. *Cf.* Jeffrey Haydu, *Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving,* 104 AM. J. SOC. 339, 340-41 (1998) (describing a method that compares how reformers have pragmatically addressed an enduring problem during sequential historical periods).

can ground answers in empirical data that reveal what happened during previous moments when people tried to make voting a duty.

The case study of Kansas City told here is just a part of the history of compulsory voting in America. It offers an invitation to dig further, to uncover as-yet untold stories. This account is based on relatively low-hanging fruit: digitally archived newspaper articles describing the one case where compulsory voting was enacted. Here, the barrier to implementing the duty to vote is clear: the Missouri Supreme Court's unwillingness in *Whipple* to contemplate the constitutionality of compulsory voting. This helps identify legal obstacles to a duty to vote. But it says less about the political hurdles a reform must clear to become law in the first place.

To better understand the political prospects for compulsory voting—how to prevent a bill from being tabled, or how to keep enabling legislation from becoming a dead letter—we will need to study other moments, and other places. If the history of compulsory voting in America offers one positive case, in Kansas City, it includes many more negative cases—from Massachusetts and Maryland to New York and North Dakota. These could point to the political conditions that have prevented voting from becoming a duty. To appreciate the possibilities for creating a duty to vote in an American city, one must first visit Kansas City. To develop a broader history of compulsory voting in the United States—and to better analyze the prospects for its reemergence—there remain many roads yet to travel.

Bad Math, Bar Sauce and the ABA as a Shill for the NCBE

RORY BAHADUR & DR. KEVIN RUTH[1]

Table of Contents

1. Rory Bahadur is the James R. Ahrens Chair in Tort Law, Washburn University School of Law. Dr. Kevin Ruth completed his Ph.D. in mathematics at the University of Miami in 1999. He has successfully completed the 100, 110, and 120 Actuary Exams. His doctoral thesis was *Favorable Red and Black on the Integers with a Minimum Bet*, and after two decades in academia, he now travels the world applying his predictive model to playing blackjack at casinos.

The authors would like to thank Jason Scott (AccessLex Institute) for his guidance on the use of logistic regression that was invaluable to our research, Professors Nancy Levit, Associate Dean for Faculty and Curator's Professor and Edward D. Ellison Professor, University of Missouri-Kansas City School of Law; Dr. John L. Rury, Professor Emeritus, School of Education and Human Sciences (ELPS) University of Kansas; Marsha Griggs Associate Professor of Law and Director of Academic Enrichment and Bar Passage Washburn University School of Law; Catherine Christopher, Dean's Distinguished Service Professor of Law; Director for Bar Success, Texas Tech University School of Law; Frédéric G. Sourgens, Senator Robert J. Dole Distinguished Professor of Law Washburn University School of Law; Steven Foster, Instructor of Law & Director of Academic Achievement Oklahoma City University School of Law; and Paula J. Manning, Professor of Law, Assistant Dean, Academic Success and Bar Preparation University of Detroit Mercy School of Law for their comments on early drafts of this article. We would also like to thank Janet Todwong of the Washburn Law Library for her assistance with webhosting of appendices and Jacob Overbey for his research assistance.

INTRODUCTION

The bar examination does not validly test lawyer competency. Institutional bar performance—the pass rate by school—is an illusory metric which has never been accurately measured. Using institutional bar pass rates as a proxy for institutional performance is one of the most significant injustices the legal academy condones, and yet, despite this, the American Bar Association (ABA) relies on institutional bar performance to determine law school accreditation. Perhaps even more egregious is the ease with which the academy accepts current erroneous measurements of institutional performance on the bar examination and fictional explanations for these flawed metrics.

One explanation for the presumed validity of the institutional bar performance metric is recent scholarship purporting to use sophisticated regression analyses and statistics to measure institutional bar performance and claiming to have identified institutional reforms that increase institutional bar performance.[2] By examining two of these influential articles recently published in the Nebraska and Florida Law Reviews, we demonstrate that law reviews do not conduct the stringent checks on empirical mathematical research necessary to validate the research before publishing it. The result is the memorialization of seemingly convincing but erroneous studies that misguide our approaches to bar examination success and inexcusably name, praise, and shame law schools based on erroneous measures of bar performance.

Apart from this critique, our unique contribution to the research is that we develop and explain two novel, mathematics-based recommendations for developing valid measures of bar performance. We also prove measuring bar performance is a far more complex endeavor than current scholarship understands. Accurately measuring bar performance, if such a thing is possible, requires access to institutionally specific matriculating, transferring, attrition, and bar examination timing data that are not currently publicly available.

Ultimately, the ABA has a responsibility to be more exacting than student editors to ensure that its accreditation decisions are based on valid metrics of bar performance . But the current use of Standard 316[3] indicates the ABA either does not employ mathematicians, or the ABA is simply a shill for its accreditation decisions and the National Conference of Bar Examiners (NCBE) by conveniently understating the complexity of institutional bar performance metrics.

Attempts to oversimplify or generalize bar success distract us from asking the more important questions. Questions about the NCBE's continued role and presumed necessity in lawyer admission, and why we continue to rely on an examination that ineffectively measures lawyer competency and very effectively excludes people of color from the practice of law.

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2. *See* Christopher J. Ryan & Derek T. Mueller, *The Secret Sauce: Examining Law Schools that Overperform on the Bar Exam*, 75 FLA. L. REV. 65, 65 (2023); Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 205 (2020).

3. Gregory G. Murphy, *Revised Bar Passage Standard 316: Evolution and Key Points*, 88 Bar Examiner 21 (2019), https://thebarexaminer.ncbex.org/article/summer-2019/revised-bar-passage-standard-316-evolution-and-key-points/.

Part I of this article illustrates how legal scholars and law reviews perpetuate misinformation about institutional bar success metrics by misapplying mathematics theory. Part II proposes improved modeling methods, ultimately concluding that given the publicly available data, it is not currently possible to compare institutions' relative bar performance. Part III of the article analyzes the ease with which the ABA and the legal community accept erroneous studies and assume a continued role for the NCBE in lawyer admission and suggests this is a manifestation of systemic racism.

1. HOW LAW REVIEWS PERPETUATE BAR EXAM MISINFORMATION

The genesis of misinformation about institutional bar performance can be attributed to the normative differences between the academic disciplines of law and mathematics.[4] Mathematicians, as scientists, are precise and cautionary in highlighting the limitations of their calculations and conclusions. Conversely, lawyers, as advocates, must convince people that their championed position is correct. In our adversarial justice system, an advocate's posited theory is deemed correct unless the opposition points out the flaws and inconsistencies in the theory.[5] As we illustrate, law review editors appear incapable of discerning the flaws and inconsistencies in mathematics-based research in part because they are not trained for this mission.

Incoming matriculant indicators—primarily Undergraduate Grade Point Average (UGPA) and Law School Admission Test

4. *See* Paul Fruitman, *Why Lawyers Hate Math (and Should Get Comfortable with Numbers)*, 37 ADVOCATES' J. 27, 27–28 (2019), https://www.lolg.ca/docs/default-source/default-document-library/why-lawyers-hate-math.pdf?sfvrsn=ea195cd5_0 (explaining the typical lawyer's aversion to math); *see also* Elie Mystal, *Law Practice: For Rich Kids Who Don't Like Math*, ABOVE L. (Mar. 25, 2014, 5:47 PM), https://abovethelaw.com/2014/03/law-practice-for-rich-kids-who-dont-like-math/ ("[The] law is a refuge for people who are afraid of numbers."); *see also* Debra C. Weiss, *Posner: Lawyers Bad at Math are an Increasing Concern; Inmate's Blood-Pressure Suit Shows Why*, ABA J. (Oct. 29, 2013, 12:51 PM), https://www.abajournal.com/news/article/posner_math_block_lawyers_an_increasing_concern_inmates_blood-pressure_suit ("'Innumerable are the lawyers who explain that they picked law over a technical field because they have a 'math block.'").

5. *See* Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution,"* 9 OHIO STATE J. DISP. RESOL. 203, 205 (1994) ("The adversary system of justice requires party presentation of evidence in a competitive setting. In other words, parties or lawyers present conflicting versions of the facts and the law."); *see also* W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J. L. & HUMAN. 105, 111 (2015) ("Our adversarial system of litigation presupposes that each party and its advocate will have its own perspective on the [factual] truth and be permitted to argue for it, and introduce evidence in support of it, at trial.").

(LSAT) scores—undoubtedly influence institutions' bar passage rates.[6] Institutions whose graduates pass the bar on the first try at a much higher rate than expected are said to have a "secret sauce" bar pedagogy or "bar sauce" that, when applied, results in higher-than-expected bar performance.[7] Higher than expected performance is termed "overperformance," and lower than expected performance is called "underperformance."[8]

The Nebraska Law Review and Florida Law Review recently published articles from authors utilizing complicated and intimidating mathematics and purporting to have identified the secret sauce or the institutional reforms that result in bar exam overperformance.[9] In this section, we review these influential articles and highlight the fundamental mathematical errors that impeach the credibility of the articles' conclusions. We suggest that law reviews must do more to vet the empirical work they publish, or they will be complicit in the perpetuation of meritless proposals to improve institutional bar passage.[10] That said, we are not blind to the irony that in order to address this issue, we too must generate a work that uses the same

6. Numerous studies confirm this correlation between LSAT score, UGPA, and bar passage.

7. *See, e.g.,* Ryan & Mueller, *supra* note 2, at 75 (explaining expected bar passage rates are based on matriculating credentials).

8. *Id.*

9. We suspect that part of the reason the law reviews published these articles was the intimidation factor of the language used in them. *See generally* Ryan & Mueller, *supra* note 2; *see also* Ruiz, *supra* note 2, at 144, 190–206.

10. Perhaps we add one more data point to the long list of scholarship suggesting that the law review selection process that the academy imbues with meritocracy is flawed, elitist, and perverse.

> Student editors are both rational and bright. They find themselves in an impossible situation: they have to pick articles, they lack sufficient knowledge, and they are severely pressed for time. So[,] students do the logical thing. They rely on proxies. . . . [like where] the author teaches and [where they went to school]. . . . Proxies are just that, and reliance on them is deeply troubling. Articles are what journals should be accepting, not authors. There is plenty of room for skepticism that what any author published elsewhere at another time—let alone where they teach—is a very reliable measure of the quality of a given piece. Worse yet, reliance on credentials creates a feedback loop or self-fulfilling prophecy, in which those at the top simply reinforce their positions.

See, e.g., Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1314–15 (2018); s*ee also* Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 420 (1989); Deborah J. Merritt*, Research and Teaching on Law Faculties: An Empirical Exploration,* 73 CHI KENT L. REV. 765, 793 (1998); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study,* 71 ALB. L. REV. 565, 571 (2008); Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601, 611 (1999).

intimidating mathematics we condemn.[11] In a way, this very article is itself part of the problem, but we hope that acknowledging the uncomfortable elephant in the room will, at the very least, kickstart the conversation. Math is hard for lawyers. We all make mistakes. For example, in a previous paper, before having a math Ph.D. as a co-author, I erroneously assumed that if the academic attrition rate at FIU did not change significantly from before 2012, then academic attrition could not be used as an explanation of the increased bar passage rates observed from 2015 onward.[12]

Other Bar researchers also made this identical error because they misunderstood how multiple variables sometimes operate simultaneously.

> In mathematics, "delta" means "change." The general idea is that if a change in a dependent variable, such as bar passage rate, is due to the influence of an independent variable, such as the number of transferred or academically dismissed students, there must be change in the independent variable to account for the change in the dependent variable. In other words, if the transfer/ attrition theory helps explain the 2015 increase in the bar pass rate, the transfers and attrition numbers must have changed between 2014 and 2015. If so, we would see, say, five transfers in the 2014 bar exam cohort, and twenty in the 2015 group; and we would further see five students attritted in the 2014 bar exam cohort and twenty in the 2015 cohort. ***Thus, if the transfer/ attrition theory is valid, the bar pass rate increase had to coincide with a statistically significant change in the transfer and attrition numbers between those two years***.[13]

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11. This article uses logistic regression, explains odds ratios, goodness of fit, heteroscedasticity and other aspects of mathematics that are not typically observed in law review publications.

12. I argued:

> For example, provide the public with data, documenting transfer and attrition rates for the period before 2011, the first year the ABA 509 forms were required. The school only opened in 2000 so this should not be an onerous task and my personal recollection (although likely faulty) is that the transfer/attrition rates observed in 2012 and beyond are higher than those observed until the time I left South Florida in 2007.
>
> Without that data, there is no way to ascertain the merit of recent publications by FIU suggesting their method is the only method for improving bar passage that works. This is problematic because commercial companies are already beginning to sell programs purporting to incorporate the "FIU way" into bar passage at other schools.

Rory Bahadur, *Blinded by Science? A Reexamination of the Bar Ninja and Silver Bullet Bar Program Cryptids*, 49 J.L. & EDUC. *241, *282–83 (2020).

13. Academic Support, *Does Academic Support Matter? A Brief, Preliminary Response to Blinded by Science and its Progeny*, *Part Two*, L. SCH. ACAD. SUPPORT BLOG, (Oct. 10, 2021) https://lawprofessors.typepad.com/academic_support/2021/10/does-academic-support-matter-a-brief-preliminary-response-to-blinded-by-science-and-its-progeny-part-two.html.

Of course, we now know this is false because the quality of entering students improved drastically over the relevant years,[14] and the same unchanged academic attrition rate for the lower credentialed students would not have the same impact on bar passage as when the school, beginning in 2012, enrolled students with higher entering credentials. In other words, if a school has an academic attrition rate of X with lower credentialed students and continues to have an academic attrition rate of X with higher credentialed students, then it is simply incorrect to say, "[t]hus, if the transfer/attrition theory is valid, the bar pass rate increase had to coincide with a statistically significant change in the transfer and attrition numbers between those two years."[15] We simply cannot ignore the impact of matriculant credentials.[16]

The bottom line is that the errors I point out in the next section should not be interpreted as chastising the authors for their studies, but rather we should be grateful for the studies and continue the iterative process of trying to study the bar examination.

A. Non-Cognitive and the Oddity of Odds Ratios Leveraging

Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law (*Noncognitive*)

14. *Id.*

15. *Id.*

16. Bahadur & Ruth found:

> The first year that FIU had a higher 75th UGPA matriculating class than the University of Florida and the highest in the State of Florida was 2012. Unsurprisingly, three years later, in 2015, its bar passage dominance began. The FIU 75th percentile matriculating UGPA scores remain virtually identical to the University of Florida's scores until matriculant year 2017, when the University of Florida once again began enrolling classes with higher 75th percentile UGPAs.
>
> Additionally, in terms of the years 2012–2018 (bar examination 2015–2021), FIU had the highest average score (tied with UF) in 75th percentile UGPA, the single most important variable for predicting school bar passage rates. Its 75th percentile UGPA numbers remained largely unchanged during the downturn. . . .
>
> This is important because it demonstrates that the pre-2012 academic attrition rates at FIU are not as important as I initially thought in explaining the post-2012 bar results. Pre-2012 attrition at FIU occurred with a different matriculant pool relative to the rest of the state compared to post-2012 attrition. The massive impact of UGPA previously documented would confound any single correlation of attrition rates and bar passage. Attrition and transfer data before 2012 are of limited utility in allocating causality to pedagogy.

Rory Bahadur & Kevin Ruth, *Quantifying the Impact of Matriculant Credentials & Academic Attrition Rates on Bar Exam Success at Individual Schools*, 99 UNIV. DET. MERCY L. REV. 6, 20, 21 n.31 (2021), https://law.udmercy.edu/students/law-review/articles/vol099/Bahadur-Ruth-Matriculant-Credentials.pdf.

was published by the Nebraska Law Review in 2020.[17] In that article, the author uses odds ratio analysis to conclude the following:

> The odds ratio for Undergraduate GPA is significantly higher than that for LSAT. While LSAT has some predictive value, the Undergraduate GPA has a much more significant impact in predicting bar exam success utilizing only incoming 1L predictors. The marginal effect of LSAT is a 6.7% increased probability of bar passage for each additional point, while every tenth of a point for undergraduate GPA provides about a 15% increased probability of bar passage. This information is useful for the early identification of students that may pose a higher than average risk of an unsuccessful bar exam event.[18]

And the author explains that these results were derived from a complex statistical analysis involving a binary logistic regression.[19] Furthermore, these results were published by the Nebraska Law Review as the blueprint upon which a successful bar preparation program should be based.[20]

Yet, because the law review editors, like most legal scholars,[21] are not mathematics experts, the faulty calculations were never discovered. Had the article been more stringently reviewed, the editors would have discovered that *Noncognitive* erroneously confuses odds ratios, probability, and percentages resulting in massive errors regarding the predictive values of incoming matriculant credentials. Understanding this error requires an explanation of binary logistic regression and odds ratios.

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17. Ruiz, *supra* note 2, at 141–43.

18. *Id.* at 194.

19. Ruiz argued:

> For our analysis, I utilized the R189 statistical programming language to evaluate the data and generate the multiple models discussed *infra*. I created several scripts to parse my data file and produce textual and graphical representations of the results, which were then verified multiple times to detect errors. . . .
>
> For the statistical models that were created, I established the appropriate level of statistical significance, also known as alpha, at a value of 0.05. This means that if we observe a p-value of $p<0.05$, we will reject our null hypothesis. All predictors in the models were checked for multicollinearity utilizing variance inflation factors, and none presented issues of multicollinearity in our final models. Descriptive data on all the predictors utilized in creating the models are provided in the appendix.

Id. at 192–93.

20. *Id.* at 192.

21. Author and law professor Rory Bahadur self-identifies as mathematically challenged. However, co-author Kevin Ruth has a Ph.D. in mathematics, and it is through his expertise we can demonstrate why perhaps a more cautious approach is needed before law reviews publish math-based work.

Noncognitive's use of binary logistic regression is laudable because it is the generally accepted model for regressions involving nonlinear data with a binary variable.[22] Binary logistic regression is used to predict a binary outcome based on a set of independent variables.[23] The Bar examination results in one of two outcomes, pass or fail, and therefore binary logistic regression is ideal for ascertaining the relationship between independent variables such as UGPA or LSAT score and the dependent binary variable of fail or pass on the bar examination.[24]

Logistic regression is especially useful for non-linear data like the relationship between matriculant credentials and bar performance because, rather than producing a straight line like linear regression equations, the logistic regression equation explains the relationship between variables using a sigmoid curve.[25] Because a sigmoid curve is a "curve,"[26] this regression model is more suited to discerning relationships between variables that are non-linear or curved.

Logistic regression is a regression that uses a formula like:[27]

$$f(x) = \frac{1}{e^{-(\beta_0+\beta_1 x)}+1}$$

When exploring how bar passage probability increases in relation to LSAT score, in the equation above, x would be the fictional LSAT score, and $f(x)$ would be the probability of passing the bar.

To illustrate this scenario, we used a random number generator and Mathematica software to generate fictional students' LSAT scores and whether they passed or failed the bar. Random LSAT scores were generated using a uniform distribution of scores between 120 and 180,

22. *See R Nonlinear Regression Analysis – All-inclusive Tutorial for Newbies!*, DATAFLAIR, https://data-flair.training/blogs/r-nonlinear-regression/ (last visited Feb. 8, 2023).

23. Anamika Thanda, *What is Logistic Regression? A Beginner's Guide*, CAREERFOUNDRY, https://careerfoundry.com/en/blog/data-analytics/what-is-logistic-regression/ (last updated Dec. 19, 2022) (showing that a binary outcome is one where only one of only two possible outcomes may occur).

24. *Id.*

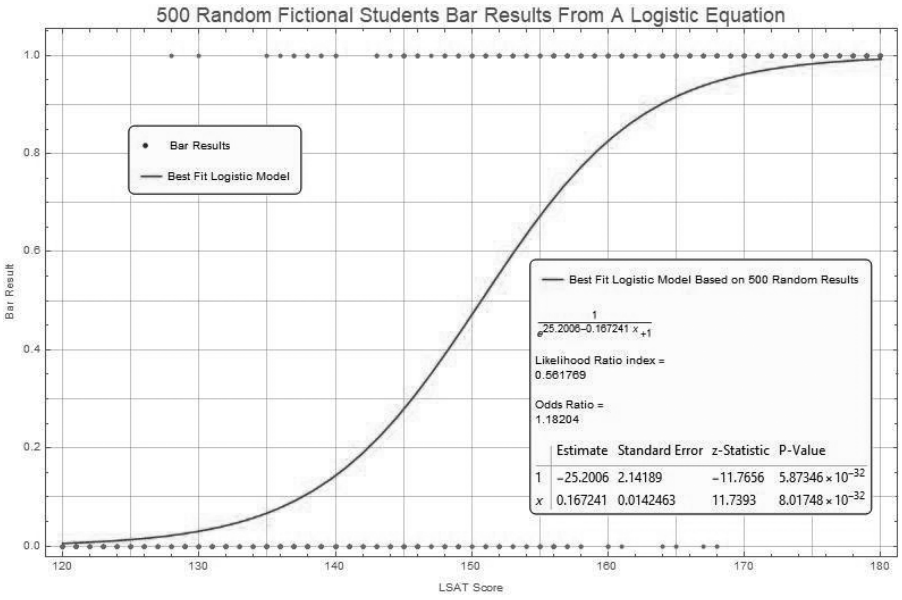
25. *See* Rory Bahadur, Kevin Ruth, & Katie T. Jones, *Reexamining Relative Bar Performance as a Function of Non-Linearity, Heteroscedasticity, and a New Independent Variable*, 52 N.M. L. REV. 119, 122 (2022) [hereinafter *Reexamining Relative Bar Performance*] (stating that the data is nonlinear and heteroskedastic); *see also* Ryan & Mueller, *supra* note 2 (manuscript at 10) (agreeing that the data is nonlinear and heteroskedastic).

26. Deniz Tuzsuz, *Sigmoid Function*, LEARNDATASCI, https://www.learndatasci.com/glossary/sigmoid-function/.

27. *Id.*

which represents the range of possible LSAT scores.[28] We used the following formula to generally replicate the reality that students with higher LSAT scores have a higher probability of passing the bar exam.

After generating our fictional students' data, we calculated a logistic model to fit the data. Here is a graph of our fictional data and logistic model.



The resulting logistic regression equation calculated to fit this fictional data was (this can be seen on the graph):

$$f(x) = \frac{1}{e^{(25.2-0.0.167x)}+1}$$

We can conceive of the resulting fictional data as a series of pairs. The first item in the pair is the fictional LSAT score, and the second item in the pair is either a zero or one representing the Bar failure or passage, respectively. Unlike linear regression that produces a linear relationship between the dependent variable and the independent variable over the independent variable's range, logistic regression results in a curve.[29]

28. Law School Admission Council, *LSAT Scoring*, https://www.lsac.org/lsat/lsat-scoring (last visited Feb. 13, 2023).

29. David G. Kleinbaum, Logistic Regression 6–7 (3rd ed. 2010).

This is significant because the impact of the independent variable on the dependent variable changes over the independent variable's range. In the case of LSAT scores, a one-point change in LSAT score at the lower and higher LSAT ranges has a smaller impact on the probability of a student passing the bar examination than the same exact change in the middle of the data range.[30]

Because the effect of the same numerical change in LSAT score affects the probability of passing the Bar over the range of LSAT scores differently, the rate of change in the probability of passing the Bar relative to changes in LSAT is not *consistent or constant* over the range of LSAT scores as it would be in a linear regression. What is consistent over the range of logistic regression is the odds ratio. The odds ratio estimates what effect, if any, a one-unit increase in one of the independent variables (LSAT score) has on the dependent variable (probability of passing the Bar).[31] To understand the odds ratio, we must understand the concept of odds and distinguish it from probability.

For most people, probability is a natural and straightforward way to understand the likelihood of event *A*.[32] It is a number between zero and one, with one meaning 100% likely and zero meaning 0% likely.[33] It can be described using a percent, fraction, or decimal.[34] The probability of event *A* can be represented as *P(A)*.

The concept of odds is related to probabilities, but it is *not* the same. The odds in favor of an event are the ratio of the probability that the event will occur over the probability that the event will not occur.[35] For example, the odds in favor of event *A* are:

$$\frac{P(A)}{1-P(A)}.^{36}$$

Odds against event A is:

$$\frac{1-P(A)}{P(A)}.^{37}$$

30. This is because the slope of the curve is steepest in the middle of range of the independent variable.

31. Magdalena Szumilas, *Explaining Odds Ratios*, 19 J. CAN. ACAD. CHILD ADOLESCENT PSYCHIATRY 227 (2010).

32. BYJUS, *Probability*, https://byjus.com/maths/probability/ (last visited Feb. 13, 2023).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

For example, if the probability of passing an exam is 75%, then the odds in favor of passing is:

$$\frac{\frac{75}{100}}{\frac{25}{100}} = \frac{75}{25} = 3.$$

This is commonly written as 3:1 and pronounced "three to one." It can be understood as three chances of passing for one chance of not passing.

When the probability of an event is getting close to one, a small increase in the numerical value of the probability can mean a large increase in the numerical value of the odds. For example, if the probability of an event is 95%, the odds in favor of the event is:

$$\frac{0.95}{1-0.95} = \frac{0.95}{0.05} = 19.$$

The odds in favor of the event are nineteen to one. Now suppose the probability changes to 99%. Then the odds in favor change to:

$$\frac{0.99}{1-0.99} = \frac{0.99}{0.01} = 99.$$

The odds in favor of the event are now ninety-nine to one, which is also written as 99:1. We use this illustration to emphasize that odds ratios should not be conflated with probabilities like *Noncognitive* did.[38]

The odds ratio, as used in logistic regressions and in *Noncognitive,* is the ratio of two odds. This is confusing because the odds itself, as explained above, is a ratio. So as explained below, the odds ratio is a ratio of ratios. More specifically, the odds ratio is the ratio of the odds after increasing the independent variable by one unit to the original odds of the event.[39]

If we wanted to calculate the odds ratio for a given independent variable in a logistic model, for example, calculating the effect on the Bar passage of a change in LSAT of one point, say from 150 to 151, we would calculate the odds ratio as follows:

38. *See* Ruiz, *supra* note 2, at 194 tbl. 3.
39. *See generally* Szumilas, *supra* note 31.

$$\text{Odds ratio} = \frac{P(pass|151)/P(fail|151)}{P(pass|150)/P(fail|150)}.$$

Again, odds ratio is a constant value across the entire range of the independent variable. Therefore, if we assume for a particular logistic regression that the odds ratio is 1.1, this means that if we increase *x* from 140 to 141, the odds in favor of the event will increase to 1.1 times the original value. If we increase *x* from 154 to 155, again, the odds in favor of the event will increase to 1.1 times the value it was at 154. Remember though, this does NOT mean that the probability of the event increases to 1.1 times the probability of the event at the lower score.

Suppose a probability increases from seventy-five percent to eighty percent. We could say that the probability has increased by (5/75) = 6.67%. We can also say that the probability has increased by five percentage points. But how much have the odds increased?

$$\frac{\frac{75}{100}}{\frac{25}{100}} = 3 \text{ and } \frac{\frac{80}{100}}{\frac{20}{100}} = 4$$

The odds have increased from 3:1 to 4:1. The odds have increased by a factor of 1.33. We could also say that the odds have increased by thirty-three percent.[40] The odds ratio, in this case, is 1.33. Ultimately odds and probability are not the same, and the calculations for each are different.

Recall that for a linear regression, the resulting linear regression equation will have a slope coefficient.[41] This coefficient tells us how a one-unit increase in the independent variable affects the dependent variable.[42] The dependent variable increases by an amount equal to the value of the slope, and this is constant across all in the domain.[43] This is not true for a logistic regression because the curve produced by

40. *Convert Percent and Factor*, RECHNER ONLINE, https://rechneronline.de/anteil/percent-factor.php (providing a tool that calculates percentage change into a change factor). The formula for expressing a percent change as a factor or a factor as a percent change is:
Factor = (percentual value + 100) / 100 or
Percentual value = 100 * factor - 100

41. *See Reexamining Relative Bar Performance*, *supra* note 25.

42. Jake Adams, *How to Find the Slope of an Equation*, WikiHow, https://www.wikihow.com/Find-the-Slope-of-an-Equation (last updated Feb. 10, 2023).

43. *Id.* 3.7 Logistic Functions, cK-12, https://www.ck12.org/book/ck-12-precalculus-concepts/section/3.7/ (last modified Aug. 4, 2017).

logistic regression is always bending as it is not straight.[44] However, the odds ratio does tell us the effect of any one-unit increase in the independent variable, in terms of odds, anywhere in the domain.

In our graph above of random students' LSAT scores, we see an odds ratio of 1.18. This means that an increase in LSAT score from 130 to 131, 140 to 141, 158 to 159, etc., all increase the odds of the student passing the Bar by a factor of 1.18. We might describe this as an eighteen percent increase in the odds of passing the Bar. Note, though, that this does not mean the probability of passing the Bar increases by eighteen percent or by eighteen percentage points.

This is where *Noncognitive* made an error. *Noncognitive* summarizes the regression data showing the relationship between incoming 1L predictors and first-time bar passage in a table.[45] According to that table, the odds ratio of LSAT in the model is 1.067.[46] *Noncognitive* conflates probability and odds ratio to erroneously conclude that a one-point LSAT increase would result in a 6.7% increase in the probability of passing the Bar examination.[47]

In reality, the regression analysis in *Noncognitive* indicates only that the *odds* of passing the Bar examination increase by a factor of 1.067 with a one-point increase in LSAT.[48] While it is true that the *odds* of passing the Bar increases by 6.7%, *this does not mean that the probability of passing the Bar increases by 6.7%* for every one-point increase in LSAT score, as *Noncognitive* concludes.

In fact, determining *the* increase in the probability of the Bar passage caused by an increase in LSAT score is impossible because the slope of a curve, unlike the slope of a straight line, is always changing. This means that increasing LSAT scores have varying effects on the probability of passing the Bar among the range of the LSAT scores. For the high LSAT scores, the increase in the probability of passing the Bar associated with a one-point change in the LSAT score is smaller than the changes in the middle of the LSAT score range.

Noncognitive also makes a different computational error when calculating the odds ratio of a tenth of a point increase in UGPA. An

44. 3.7 Logistic Functions, cK-12, https://flexbooks.ck12.org/cbook/ck-12-precalculus-concepts-2.0/section/3.7/primary/lesson/logistic-functions-pcalc/(last modified Aug. 11, 2022).

45. *See* Ruiz, *supra* note 2, at 194 tbl. 3.

46. *Id.*

47. *See id.* ("The marginal effect of LSAT is a 6.7% increased probability of bar passage for each additional point . . .").

48. *See* Szumilas, *supra* note 31.

odds ratio of 2.516[49] does *NOT* mean that the effect of a tenth of a point increase in UGPA is a fifteen percent increase in the *probability* of the Bar passage.[50]

Noncognitive calculates a change factor for odds ratios of 2.516 for a one-point change in UGPA and, from that, concludes that this equates to a fifteen percent increase in the chance of passing the Bar for each .1-point change in UGPA.[51] Presumably, *Noncognitive* arrives at this number as follows.[52] A change factor of 2.516 is equal to a 151.6% change in the odds of passing the Bar exam.[53] And if the change in odds is 151.6% for a one-point change in UGPA, then *Noncognitive* divides 151.6 by ten to arrive at the "approximately fifteen percent" for a 0.1-point change in UGPA as noted in the article.[54] Apart from erroneously labeling the change in odds as a change in probability, it is incorrect to simply divide the odds ratio for a one-point increase by ten to determine the odds ratio for a 0.1-point change in UGPA.

Odds ratio calculations involve calculating a change in odds for a change of one unit in the independent variable.[55] In this case, the independent variable is UGPA.[56] So, for example, an odds ratio calculation would describe the change in odds of passing the Bar for a student with a 3.0 UGPA and a student with a 4.0 UGPA. *Noncognitive* erroneously assumed that simply dividing the odds ratio for a change in UGPA of one point by ten would generate the odds ratio for a 0.1 change in UGPA.

To calculate the effect of a 0.1-point change in UGPA, consider that a one-point increase in UGPA is the same as ten separate 0.1-point increases, and for each 0.1-point increase in UGPA, the odds increase by the same factor. So, the factor that the odds increase by, for a 0.1-point increase (maybe we call this a "mini odds ratio"), when multiplied by itself ten times, should give the odds ratio of 2.516 re-

49. Ruiz, *supra* note 2, at 194 tbl. 3.

50. *Id.* (erroneously concluding "every tenth of a point for undergraduate GPA provides about a 15% increased probability of bar passage").

51. *Id.*

52. *See id.*

53. *See generally Convert Percent and Factor*, *supra* note 40.

54. Ruiz, *supra* note 2, at 194 tbl. 3.

55. *How Do I Interpret Odds Ratios in Logistic Regression?*, UCLA ADVANCED RSCH. COMPUTING STAT. METHODS & DATA ANALYTICS, https://stats.oarc.ucla.edu/stata/faq/how-do-i-interpret-odds-ratios-in-logistic-regression/ (last visited Jan. 24, 2023).

56. *See generally* Ruiz, *supra* note 2.

ported by the model in *Noncognitive*, which corresponds to a one-point increase in UGPA.

The relevant "mini odds ratio" can be found by solving the equation

$$x^{10} = 2.516,$$

Where x = the "mini odds ratio."

To solve this, we can apply a one-tenth exponent to both sides of the equation:

$$(x^{10})^{\frac{1}{10}} = (2.516)^{\frac{1}{10}}$$

Which leads to

$$x = (2.516)^{0.1} = 1.097.$$

Thus, the odds increase by a factor of 1.097 when UGPA increases by 0.1 points. This can also be stated as a 9.7% increase in the odds in favor of passing the Bar, for a 0.1-point increase in UGPA.

But these odds ratios, whether calculated correctly or incorrectly, as in *Noncognitive*, *are not probabilities.* It is a fundamental error to represent them as probabilities as N*oncognitive* does because doing so perversely distorts the impact of UGPA and LSAT scores on bar passage. None of these errors were discovered by the Nebraska Law Review editors.[57] The result though is that an article was published and downloaded 577 times on Social Science Research Network (SSRN), which means that it was an influential article.[58] The reality, though, is that it was an erroneous article.

And this erroneous data is what *Noncognitive* claims should be part of a school's Bar passage program in terms of identifying high-risk students and making admissions decisions.[59] If this data is really a basis for institutional Bar passage decision-making, then it results in

57. *Id.*

58. *See generally* Ruiz, *supra* note 2.

59. Ruiz argued:

> This information is useful for the early identification of students that may pose a higher-than-average risk of an unsuccessful bar exam event. Additionally, this information is relevant for those tasked with making admissions decisions to ensure that admitted students are capable of passing their bar exam and that schools satisfy the obligations for ABA accreditation.

Ruiz, *supra* note 2, at 194.

many students being erroneously classified as high-risk because a very minor decrease in GPA or LSAT score would lead institutional decision-makers to grossly overestimate the impact on a student's chance *or probability* of passing the Bar examination. This is particularly disturbing given the documented disparity in LSAT scores for African American students.[60]

B. Secret Sauce and the Irresponsibility of Ranking Institutional Bar Performance

I. A Difficult Recipe to Discern

The *Secret Sauce: Examining Law Schools That Overperform on the Bar Exam* (*Secret Sauce*) is a paper that claims it "identif[ies] the relationship between student characteristics and first-time [B]ar exam passage rates."[61]

> [The study] predicted an expected first-time pass rate based on incoming students' credentials—their grade-point averages and scores on the Law School Admission Test. Then [the authors] looked at aggregated first-time [B]ar exam results from 2014 through 2019 in an analysis that controlled for the relative difficulty between state [B]ar exams. The authors then surveyed law schools to learn what approaches are working.[62]

It is a mixture of quantitative and qualitative research.[63] Quantitatively, it claims to identify the schools that overperform on the bar examination the most and those that underperform the most.[64] Qualitatively, *Secret Sauce* surveyed the schools they identified as the most overperforming to discern what those schools were doing to improve bar examination performance.[65] *Secret Sauce* then created a list of the common methods the schools identified as the most overperforming employed in their bar preparation programs.[66] Ultimately, *Secret*

60. *See e.g.*, Marisa Manzi & Nina Totenberg, *Already Behind: Demystifying the Legal Profession Starts Before the LSAT*, NPR, Dec. 22, 2020, https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat.

61. *See* Ryan & Mueller, *supra* note 2, at 69.

62. Debra Cassens Weiss, *Which Law Schools Overperformed on the Bar Exam? Some Are Unranked by US News*, ABA J. (Feb. 8, 2022, 4:31 PM), https://www.abajournal.com/news/article/which-law-schools-graduates-did-better-than-expected-on-the-bar-exam-some-are-unranked.

63. *See* Ryan & Mueller, *supra* note 2, at 71.

64. *See id*. at 71-72.

65. *See id.* at 72, 85.

66. *See id*. at 107.

Sauce concluded that this list of methods was the secret sauce of bar passage.[67]

The empirical bases of the study are hard to discern and replicate. Initially the study does not formally identify the regression technique it employs, nor does it include the data and calculations that it is based on.[68] In other words, it does not "show its work," so the methodology can be reproduced and calculations checked. From a computational science perspective, the publication of this study is unacceptable.[69]

Given this dearth of empirical support, it is possible *Secret Sauce* perfectly represents the disturbing reality in the Bar performance research–the use of sophisticated language, and mathematical terms are enough to bamboozle law review editors into believing a particular study and its results are valid and worth publishing without providing any empirical support for the conclusions. We ultimately conclude *Secret Sauce* employed an erroneous quantitative model for measuring Bar performance and, in so doing, misidentified the schools that overperform on the bar examination. The qualitative research suffers because the recommendations *Secret Sauce* identifies and suggests are not the recommendations from the most overperforming schools on the bar examination, but rather the recommendations of schools that are misidentified as overperforming on the bar examination.

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67. *See id.* 105-106.

68. *See id.*

69. Generally speaking, the scientific method requires testing and retesting to ensure accuracy of results:

> Computational scientists generally use the term reproducibility to answer just the first question—that is, reproducible research is research that is capable of being checked because the data, code, and methods of analysis are available to other researchers. The term reproducibility can also be used in the context of the second question: research is reproducible if another researcher actually uses the available data and code and obtains the same results. The difference between the first and the second questions is one of action by another researcher; the first refers to the availability of the data, code, and methods of analysis, while the second refers to the act of recomputing the results using the available data, code, and methods of analysis.
>
> In order to answer the first and second questions, a second researcher uses data and code from the first; no new data or code are created by the second researcher. Reproducibility depends only on whether the methods of the computational analysis were transparently and accurately reported and whether that data, code, or other materials were used to reproduce the original results. In contrast, to answer question three, a researcher must redo the study, following the original methods as closely as possible and collecting new data. To answer question four, a researcher could take a variety of paths: choose a new condition of analysis, conduct the same study in a new context, or conduct a new study aimed at the same or similar research question.

See NAT'L ACADS. OF SCI.S, ENG'G, AND MED., REPRODUCIBILITY AND REPLICABILITY IN SCIENCE 45 (2019), https://www.ncbi.nlm.nih.gov/books/NBK547546/.

II. Heteroskedasticity and Non-linearity Persist

Secret Sauce explains it is "applying a predictive modeling technique based on a composite index of LSAT and UGPA that measures the distance between predicted [B]ar passage rates and actual bar passage rates for the same cohort three years after beginning law school."[70] And *Secret Sauce* is careful to explain that because the relevant data is non-linear and heteroskedastic, a linear regression model would not be appropriate for this analysis because it reduces the accuracy of the results.[71]

After acknowledging this flaw in linear regression, *Secret Sauce* proceeds to use a linear regression model,[72] but asserts that it overcomes heteroskedasticity and non-linearity.[73]

Secret Sauce explains:

> However, to provide one example of how we account for heteroskedasticity, we use a unique, and statistically standardized, composite of each school's [B]ar passage rate differential—that is, the distance between a given law school's [B]ar passage rate in a given state in a given year from that state's average in the given year—rather than a law school's raw, reported [B]ar passage rate.[74]

It further explains:

> Because this Article standardizes the input and outcome composite variables, the data necessarily complies with another assumption of OLS: that the error term has a population mean of zero. And

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70. *See* Ryan & Mueller, *supra* note 2, at 71 n.12.

71. Ryan & Mueller found:

> To the extent that a linear regression model is used to predict raw bar passage rates as an outcome variable, the model would be biased from the start. This is because bar passage rates are fixed within a 0 to 100 percent range, with a substantial majority of law schools achieving actual bar passage rates above 75 percent, indicating non-linearity. And a linear regression model using LSAT or UGPA medians as input variables to predict a certain outcome variable—like bar passage rates—would also be biased, because these measurements are also fixed to scales (0 and 4.00, and 0 and 180, respectively) but the vast majority of law schools' LSAT or UGPA medians settle around the 150-165 range, also indicating non-linearity. . . .
>
> Likewise, the underlying ABA and NCBE data are heteroskedastic. This means that the variance of the residuals—or error terms—is not evenly distributed across the data's independent variables, as function of the dependent variable. Because an even distribution of residuals is required to meet another assumption upon which OLS regression relies, failing to account for the heteroskedasticity in the underlying data reduces the precision of the estimates provided by a linear regression model.

See id. at 74-75.

72. Incredibly this article was published by the *Florida Law Review* even though the regression method is *never* specified. One can glean that it is a linear regression model they are applying because they do mention their transformations are designed to satisfy OLS requirements.

73. *See id.*

74. *Id.* at 75.

> this statistical standardization provides the added benefit, divined through further analysis, of ensuring that the independent variables are uncorrelated with the error terms and the observations of the error term are uncorrelated with each other—two more assumptions of linear regression. sion.[75]

To summarize, *Secret Sauce* asserts its linear regression accounts for non-linearity and heteroskedasticity of the data "through multiple methods"[76] and "transformative iterations,"[77] and is therefore an improvement on previous regression models of Bar performance.

We now demonstrate that, unfortunately, *the multiple methods and transformative iterations used in Secret Sauce do not correct for non-linearity and heteroskedasticity.* As a result, the conclusions of *Secret Sauce's* linear regression analysis suffer from the same defects that *Secret Sauce* acknowledges as a reality of any linear regression of this data.

A careful reading of the paper reveals that these "multiple methods" and "transformative iterations" consisted entirely of doing the following:

1. Defining the dependent variable for linear regression.
   a. The dependent variable *Secret Sauce* uses for linear regression is a weighted average bar passage differential.[78]
   b. This bar passage differential is then "standardized" by using z-scores instead of raw data.[79]
2. The independent variable *Secret Sauce* uses is a "performance ind[ex]."[80] This index was created by:
   a. Taking the average of the 25th percentile, 50th percentile, and 75th percentiles of LSAT scores and of UGPA and dividing the LSAT result by 180 to get a number between

75. *Id.*

76. *Id.* at 74.

77. *Id.* at 81.

78. As *Secret Sauce* explains:

> To create this variable, the authors weighted each law school's differential from the state bar passage rate in a given year by the proportional fraction of exam takers from a given school in that jurisdiction over all exam takers from that law school in a given year (so long as the law school had ten or more graduates sit for the bar in that jurisdiction for the first time).

See id. at 80.

79. *See id.* ("Interpreting the values that this variable yields would have been tricky, if not pointless, if the values of this dependent variable were not standardized along the same lines that the input variable—or composite index—had been standardized. As such, the authors standardized this output variable as well.").

80. *See id.* at 79.

zero and one and dividing the UGPA result by four to get a number between zero and one.[81]

b. Calculating a "Composite Index" which is defined as 0.6 * (LSAT index) + 0.4* (UGPA index).[82]

c. Standardizing the results in step 2(b) above by using z-scores instead of raw data.[83]

3. Computing a linear regression of the bar pass differential z-scores (dependent variable) versus the composite index z-scores (independent variable).[84]

4. Adding the residual from the regression in step three to the z-scores of the weighted bar pass differential calculated in step 1(b) to come up with a final score or ranking.[85]

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81. Specifically, *Secret Sauce* states:

> In creating the performance indices upon which the value-added analysis is predicated, the authors performed a few calculations to normally distribute the data for the main independent variables, LSAT and UGPA. First, the authors created indices for LSAT and UGPA that were scaled by the total points available in each category (4.00 and 180, respectively) along the three components of each independent variable available (seventy-fifth percentile, median, and twenty-fifth percentile) and summed the result.
>
> For example:
>
> *lsat_index = (1/3)*(lsat_75pct/180) + (1/3)*(lsat_median/180) + (1/3)*(lsat_25pct/180)*
>
> and
>
> *gpa_index = (1/3)*(gpa_75pct/4) + (1/3)*(gpa_median/4) + (1/3)*(gpa_25pct/4)*

Id.

82. *Secret Sauce* states:

> These indices provide a new scaled value, between zero and one for each law school in a given year for each of the principal independent variables. Then, the authors created an overall composite index for each law school in a given year, roughly weighted by the predictive power of the LSAT (0.6), reserving the rest of the performance index for UGPA (0.4). For example:
>
> composite_index = 0.6*lsat_index + 0.4*gpa_index

See id.

83. *See id.* ("Next, the authors standardized—or z-scored—this weighted composite index. Standardization is preferable even to the aforementioned scaled and weighted composite index because it fits—as closely as possible—the data on a normal distribution, given a mean of zero. .").

84. *Secret Sauce* states:

> From these standardized independent and dependent variables, the authors began the value-added modeling analysis. This entails: (1) regressing the standardized bar passage differential for a given law school in a given year on the three-year lag standardized composite LSAT/UGPA index; and (2) predicting the "y-hat," or expected outcome of the standardized bar passage differential value from the OLS regression model in step one, based on the coefficients of the three-year lag standardized composite LSAT/UGPA index. In other words, the standardized composite index for a given law school (e.g., Pepperdine University Caruso School of Law) in a given year (e.g., 2016) is used to predict that cohort's standardized bar passage differential value of that cohort three years later (e.g., 2019).

See id. at 80.

85. *See id.* at 80-81.

1. Using Weighted Average Bar Passage Rate as the Dependent Variable[86]

Secret Sauce establishes that the data comparing matriculant LSAT/UGPA to Bar passage three years later is non-linear and heteroskedastic, and confirms that this would render linear regression problematic.[87] For raw Bar passage rates, as opposed to Bar passage differentials, every jurisdiction has the same maximum potential passage rate of 100%. It is this ceiling of 100% that causes the problems of non-linearity and heteroskedasticity.[88]

When using Bar passage differentials,[89] instead of just the raw Bar passage rates, each state has a different pass rate. So, for some states the highest possible score "ceiling" might be 10% while for others it might be 40%.[90] Using data from different states with different ceilings simultaneously might make the heteroskedasticity and non-linearity harder to identify, but there is no mathematical reason to assume this process renders the data linear and homoscedastic.

Using the 2014 matriculant data and the 2017 bar passage results, we now demonstrate that the steps taken in the *Secret Sauce* method do not mitigate heteroskedasticity or non-linearity.

2. Using the Average of the 25th, 50th, and 75th Percentiles for LSAT and UGPA as the Independent Variable.[91]

Using the average of the 25th, 50th, and 75th percentiles for LSAT and UGPA has no impact on heteroskedasticity or non-linearity as the following graphs demonstrate using the 2014 LSAT data and the 2017 Bar passage rates.[92]

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86. *See id.* at 80.

87. *See id*. at 74.

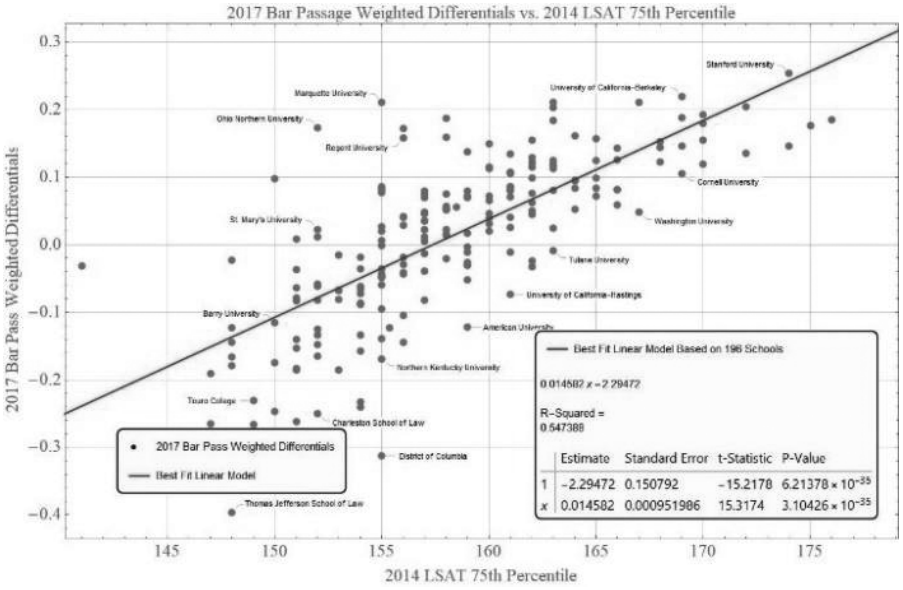
88. *See Reexamining Relative Bar Performance*, *supra* note 25, at 151–52.

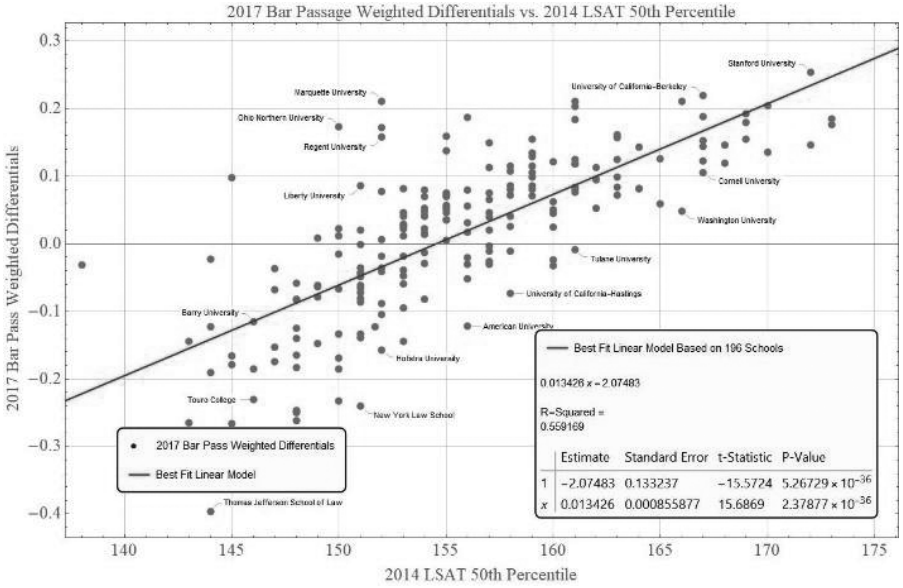
89. A bar pass differential is the difference between a school's bar passage rate and the average bar passage rate.

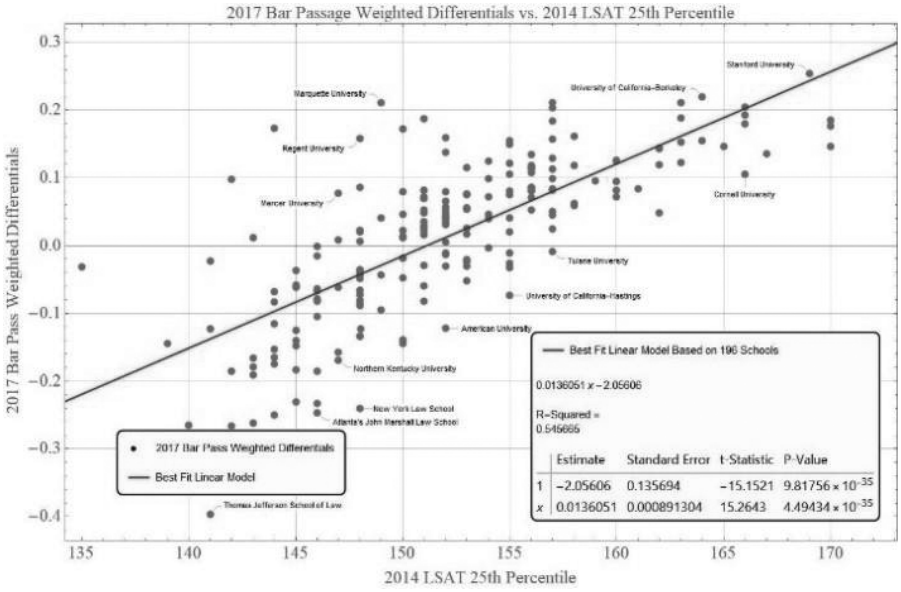
90. *See Reexamining Relative Bar Performance*, *supra* note 25, at 151–52.

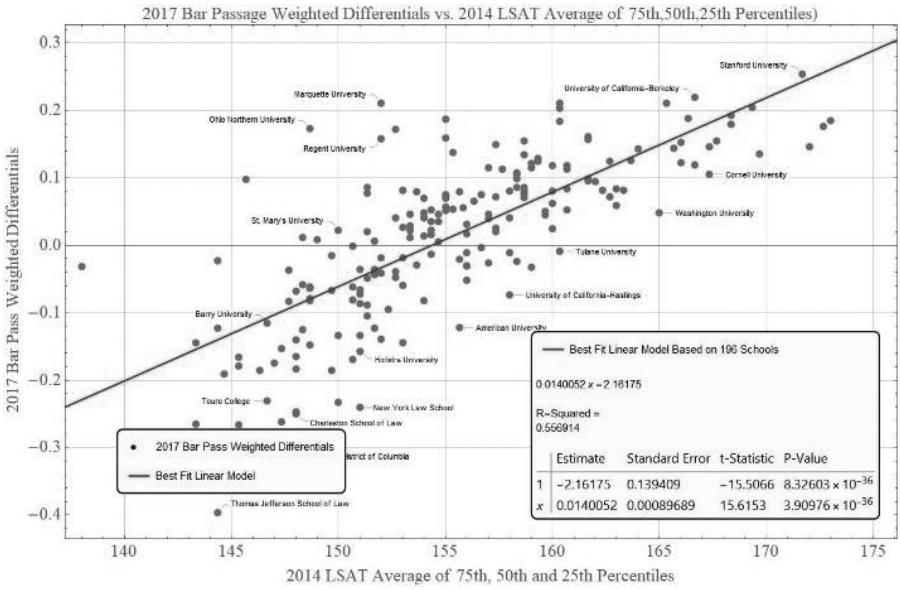
91. *See* Ryan & Mueller, *supra* note 2, at 79.

92. Mathematically this is an unremarkable reality. Averaging the 25th, 50th, and 75th percentiles will approximate the 50th percentile in any normal distribution. *See also Appendix 1: Averaging the 25th, 50th and 75th UGPA Percentiles Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/4MS4-9W7E.


2017 Bar Passage Weighted Differentials vs. 2014 LSAT 75th Percentile
2017 Bar Pass Weighted Differentials
2014 LSAT 75th Percentile
Stanford University
University of California–Berkeley
Marquette University
Ohio Northern University
Regent University
Cornell University
Washington University
St. Mary's University
Tulane University
University of California–Hastings
Barry University
American University
Northern Kentucky University
Touro College
Charleston School of Law
District of Columbia
Thomas Jefferson School of Law
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Best Fit Linear Model Based on 196 Schools
0.014582 x − 2.29472
R–Squared = 0.547388
Estimate Standard Error t-Statistic P-Value
1 −2.29472 0.150792 −15.2178 6.21378 × 10^−35
x 0.014582 0.000951986 15.3174 3.10426 × 10^−35


2017 Bar Passage Weighted Differentials vs. 2014 LSAT 50th Percentile
2017 Bar Pass Weighted Differentials
2014 LSAT 50th Percentile
Stanford University
University of California–Berkeley
Marquette University
Ohio Northern University
Regent University
Liberty University
Cornell University
Washington University
Tulane University
University of California–Hastings
Barry University
American University
Hofstra University
Touro College
New York Law School
Thomas Jefferson School of Law
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Best Fit Linear Model Based on 196 Schools
0.013426 x − 2.07483
R–Squared = 0.559169
Estimate Standard Error t-Statistic P-Value
1 −2.07483 0.133237 −15.5724 5.26729 × 10^−36
x 0.013426 0.000855877 15.6869 2.37877 × 10^−36



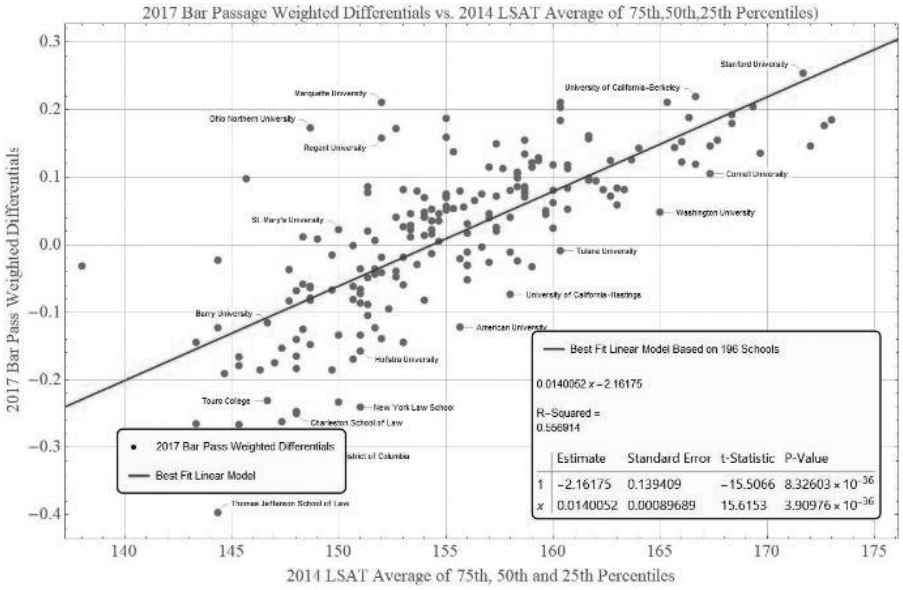


Each of these four graphs display similar goodness of fit (as per the R-squared measure) and approximately equal amounts of heteroskedasticity and non-linearity if they are present. This suggests that averaging the LSAT scores does not mitigate heteroskedasticity or non-

linearity.[93]The same holds true if we use UGPA as the independent variable instead of LSAT and it is true over multiple years as shown in Appendix 2.[94]

3. Dividing LSAT by 180 and Dividing UGPA by Four to Arrive at a Number Between Zero and One.[95]

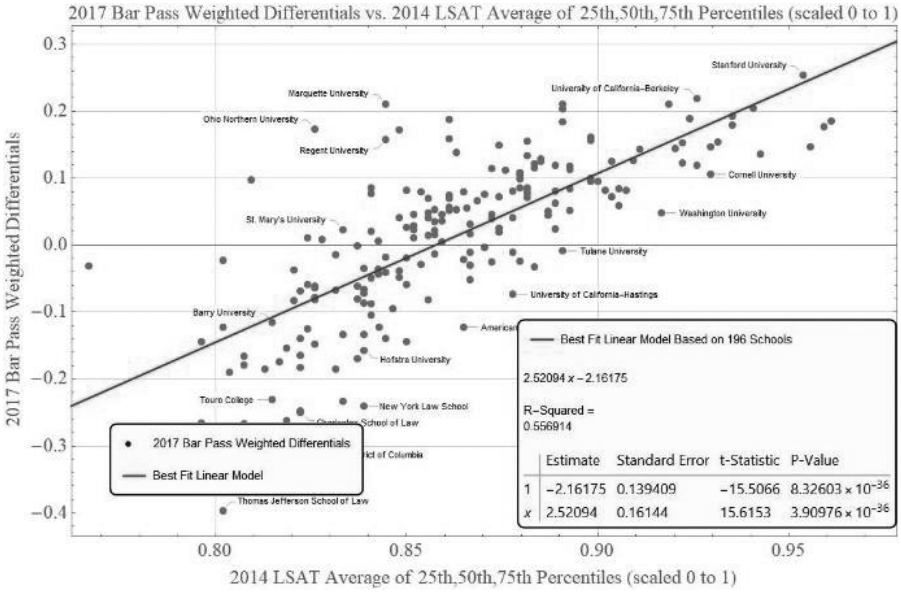
Dividing LSAT by 180 affects neither the data's non-linearity nor heteroskedasticity in a regression of LSAT versus Bar passage weighted differential. Neither does dividing UGPA by four. Compare these graphs of 2017 Bar passage rate weighted differential versus 2014 LSAT average percentile raw scores out of 180, and average UGPA raw scores out of four:

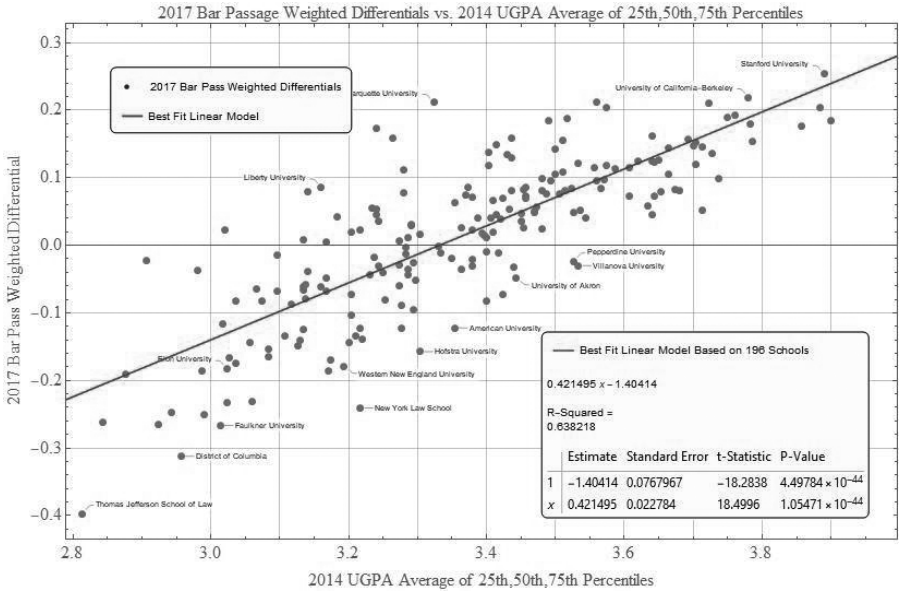


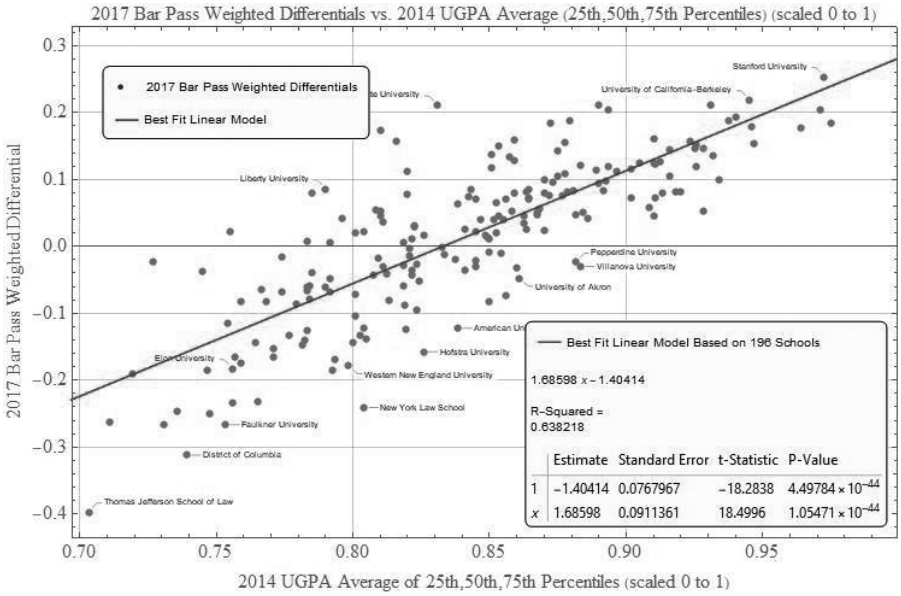
93. This is unsurprising if we consider that the main cause of non-linearity is the fact that there is a ceiling of 100% for bar pass rate which cannot be exceeded. Also, as we approach the 100% pass rate it gets harder to make even small improvements in the pass rate. Proximity to the ceiling pass rate of 100% is also part of the reason for the heteroskedasticity – there is simply much less room for (positive) wide variations in bar passage for schools with high bar passage rates. *See Reexamining Relative Bar Performance*, *supra* note 25, at 136–53 (explaining the non-linearity and heteroskedasticity of the relevant data).

94. *See Appendix 2: Averaging the 25th, 50th and 75th UGPA Percentiles Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/T8UA-VGTP.

95. *See* Ryan & Mueller, *supra* note 2, at 79.


2017 Bar Pass Weighted Differentials vs. 2014 LSAT Average of 25th,50th,75th Percentiles (scaled 0 to 1)
2017 Bar Pass Weighted Differentials
2014 LSAT Average of 25th,50th,75th Percentiles (scaled 0 to 1)
Stanford University
University of California–Berkeley
Marquette University
Ohio Northern University
Regent University
Cornell University
Washington University
St. Mary's University
Tulane University
University of California–Hastings
Barry University
Hofstra University
Touro College
New York Law School
Thomas Jefferson School of Law
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Best Fit Linear Model Based on 196 Schools
2.52094 x – 2.16175
R–Squared =
0.556914
Estimate Standard Error t-Statistic P-Value
1 –2.16175 0.139409 –15.5066 8.32603 × 10^–36
x 2.52094 0.16144 15.6153 3.90976 × 10^–36


2017 Bar Passage Weighted Differentials vs. 2014 UGPA Average of 25th,50th,75th Percentiles
2017 Bar Pass WeightedDifferential
2014 UGPA Average of 25th,50th,75th Percentiles
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Stanford University
University of California–Berkeley
Liberty University
Pepperdine University
Villanova University
University of Akron
American University
Hofstra University
Western New England University
New York Law School
Faulkner University
District of Columbia
Thomas Jefferson School of Law
Best Fit Linear Model Based on 196 Schools
0.421495 x – 1.40414
R–Squared =
0.638218
Estimate Standard Error t-Statistic P-Value
1 –1.40414 0.0767967 –18.2838 4.49784 × 10^–44
x 0.421495 0.022784 18.4996 1.05471 × 10^–44



Dividing (or multiplying) by 180 or four (or any other number) changes nothing except the horizontal scale. Both regressions have identical shapes. Non-linearity, heteroskedasticity, and the goodness of fit as measured by R-squared therefore remains unchanged. The residual plots in Appendix 3[96] reinforce that the only thing changing is the horizontal scale. And Appendix 4[97] demonstrates the same holds true when UGPA is divided by four.

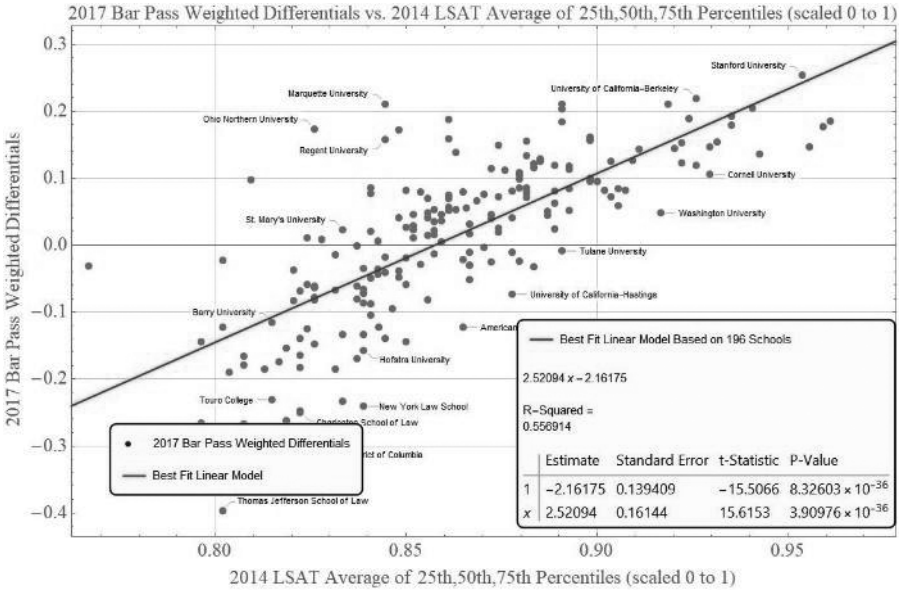
4. Calculating a Composite Index 0.6*LSAT Index + 0.4*UGPA Index[98]

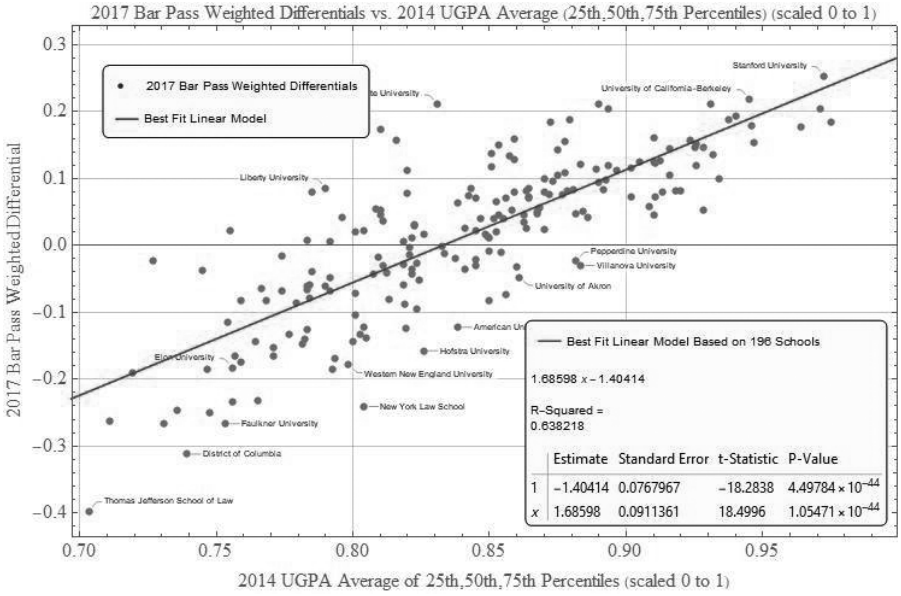
Using a composite index does not change any non-linearity or heteroskedasticity that may be present as the following graphs suggest:

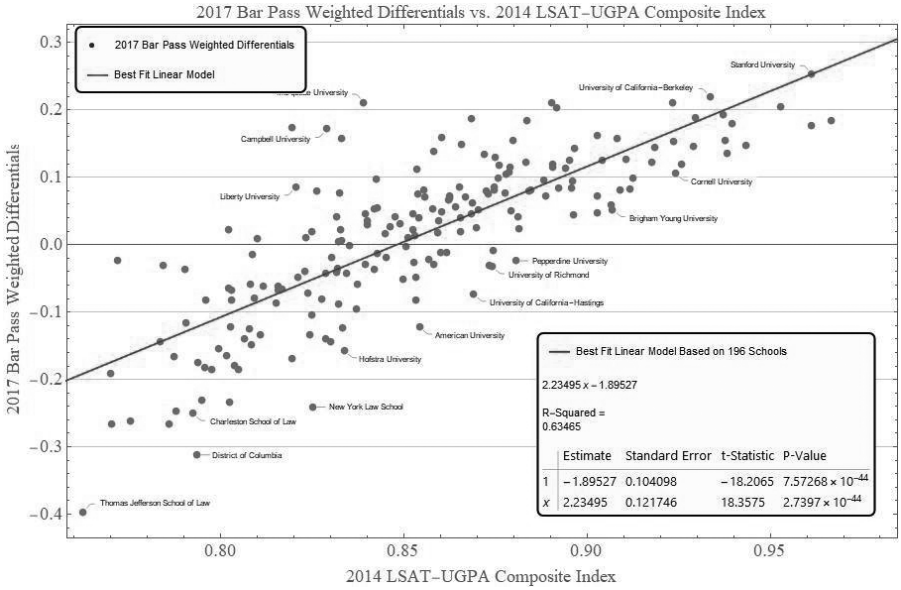
96. *See Appendix 3: Scaling LSAT Between 0 and 1 Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/58M3-8BW7.

97. *See Appendix 4: Scaling UGPA Between 0 and 1 Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/T6CW-2HB8.

98. *See* Ryan & Mueller, *supra* note 2, at 79


2017 Bar Pass Weighted Differentials vs. 2014 LSAT Average of 25th,50th,75th Percentiles (scaled 0 to 1)
2017 Bar Pass Weighted Differentials
2014 LSAT Average of 25th,50th,75th Percentiles (scaled 0 to 1)
Stanford University
University of California–Berkeley
Marquette University
Ohio Northern University
Regent University
Cornell University
Washington University
St. Mary's University
Tulane University
University of California–Hastings
Barry University
Hofstra University
Touro College
New York Law School
Thomas Jefferson School of Law
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Best Fit Linear Model Based on 196 Schools
2.52094 x – 2.16175
R–Squared =
0.556914
Estimate Standard Error t-Statistic P-Value
1 –2.16175 0.139409 –15.5066 8.32603 × 10^–36
x 2.52094 0.16144 15.6153 3.90976 × 10^–36


2017 Bar Pass Weighted Differentials vs. 2014 UGPA Average (25th,50th,75th Percentiles) (scaled 0 to 1)
2017 Bar Pass Weighted Differential
2014 UGPA Average of 25th,50th,75th Percentiles (scaled 0 to 1)
2017 Bar Pass Weighted Differentials
Best Fit Linear Model
Stanford University
University of California–Berkeley
Liberty University
Pepperdine University
Villanova University
University of Akron
Hofstra University
Elon University
Western New England University
New York Law School
Faulkner University
District of Columbia
Thomas Jefferson School of Law
Best Fit Linear Model Based on 196 Schools
1.68598 x – 1.40414
R–Squared =
0.638218
Estimate Standard Error t-Statistic P-Value
1 –1.40414 0.0767967 –18.2838 4.49784 × 10^–44
x 1.68598 0.0911361 18.4996 1.05471 × 10^–44



In Appendix 5,[99] we display similar comparisons for each year from 2011/2014 to 2016/2019.

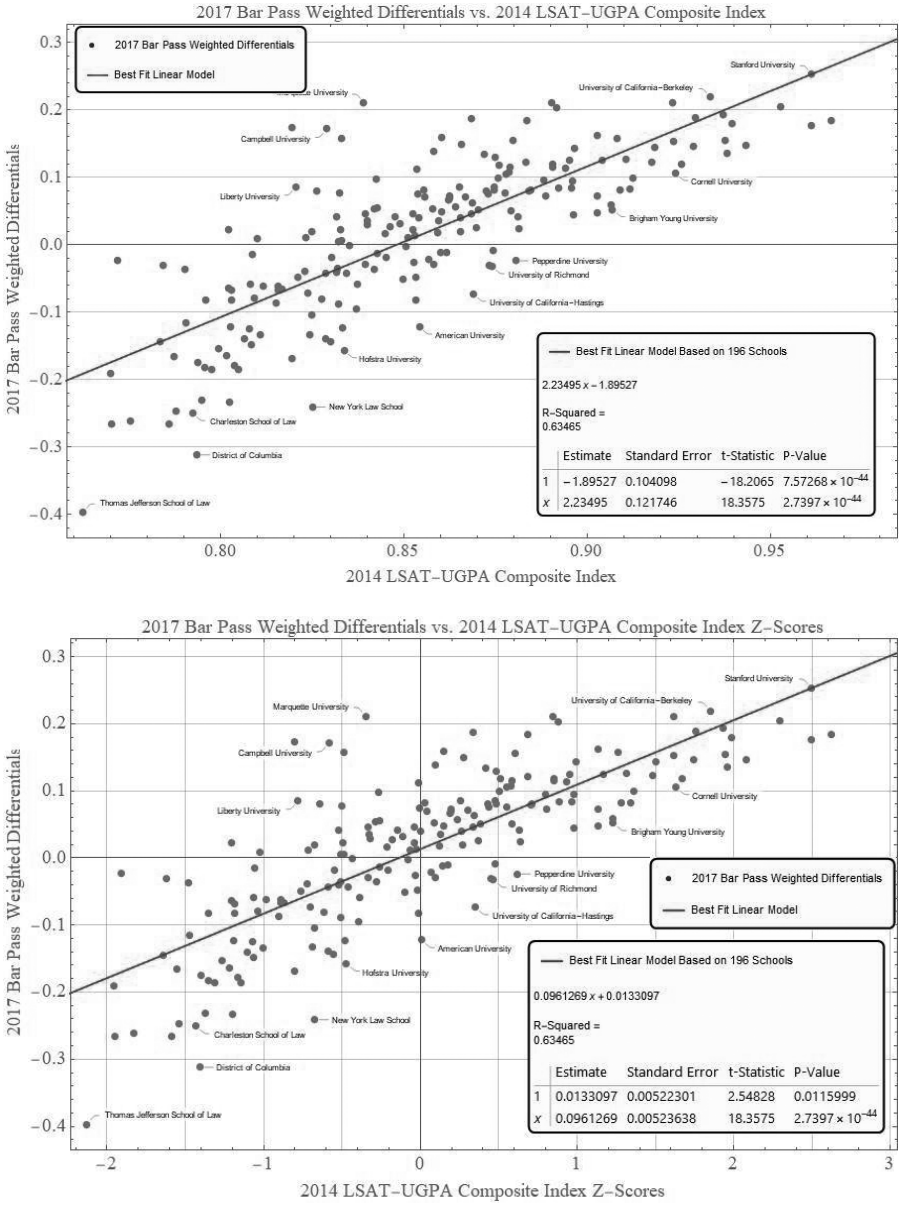
5. Converting the Dependent and Independent Variables to Z-Scores[100]

Converting the composite index to z-scores does not affect the non-linearity, heteroskedasticity, goodness of fit, or R-squared. Below are graphs comparing linear regressions of the 2017 Bar passage weighted differential versus the 2014 LSAT/UGPA Composite Index before and after standardizing the Composite Index.[101]

99. *See Appendix 5: Using a Composite Index of LSAT and UGPA is Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/R2YV-9TVQ.

100. *See* Ryan & Mueller, *supra* note 2, at 79.

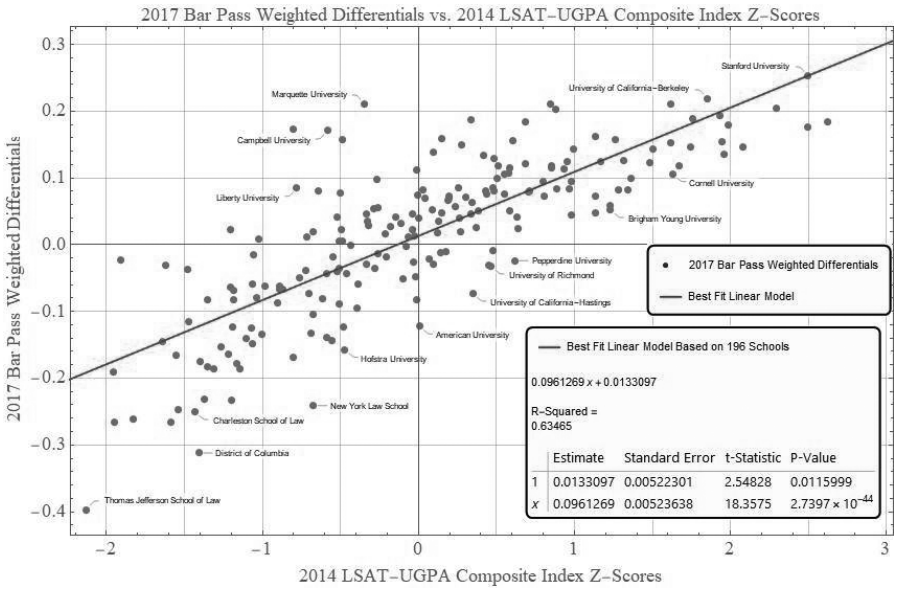
101. *Appendix 6: Standardizing the Composite Index Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/GXE9-B8S6.

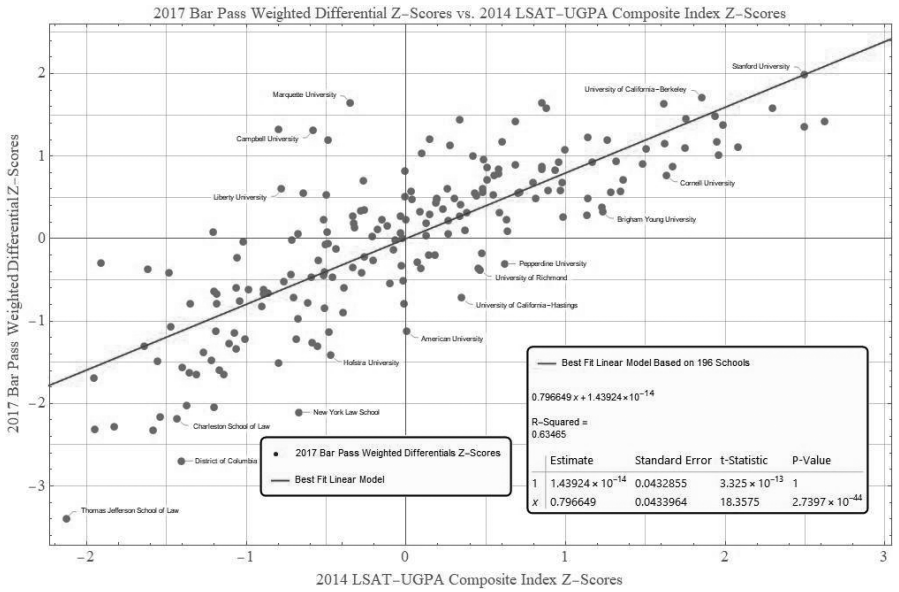


Once again, heteroskedasticity, non-linearity, R-squared, and goodness of fit remain unchanged and plots of the residuals available in Appendix 6[102] reinforce this reality.

102. *See id.*

Converting the bar pass differentials to z-scores similarly has no impact on non-linearity or heteroskedasticity:[103]

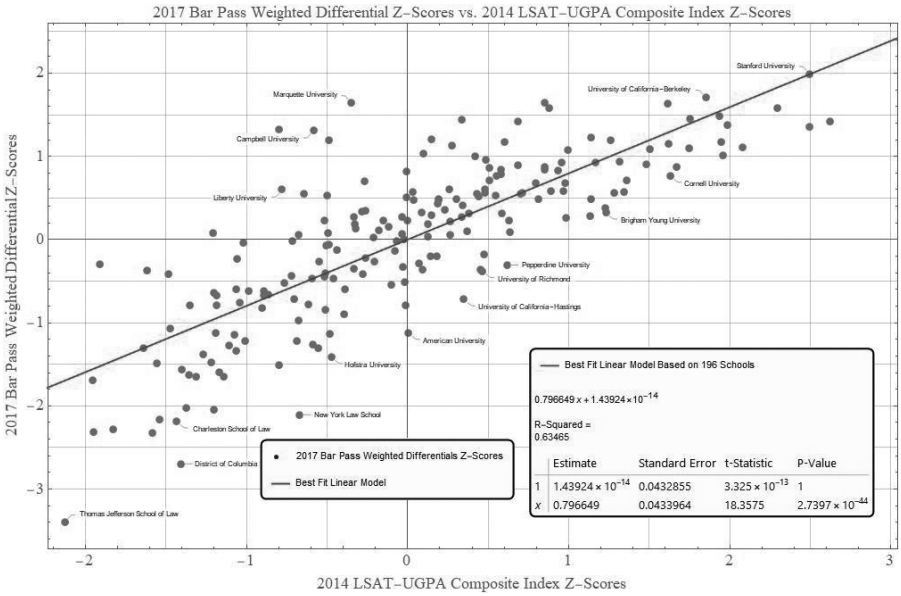




103. *Id.*; *Appendix 7: Standardizing the Weighted Average Bar Passage Differential Has No Effect on Non-Linearity or Heteroscedasticity*, https://perma.cc/E5GN-HJH5 [hereinafter *Appendix 7*].

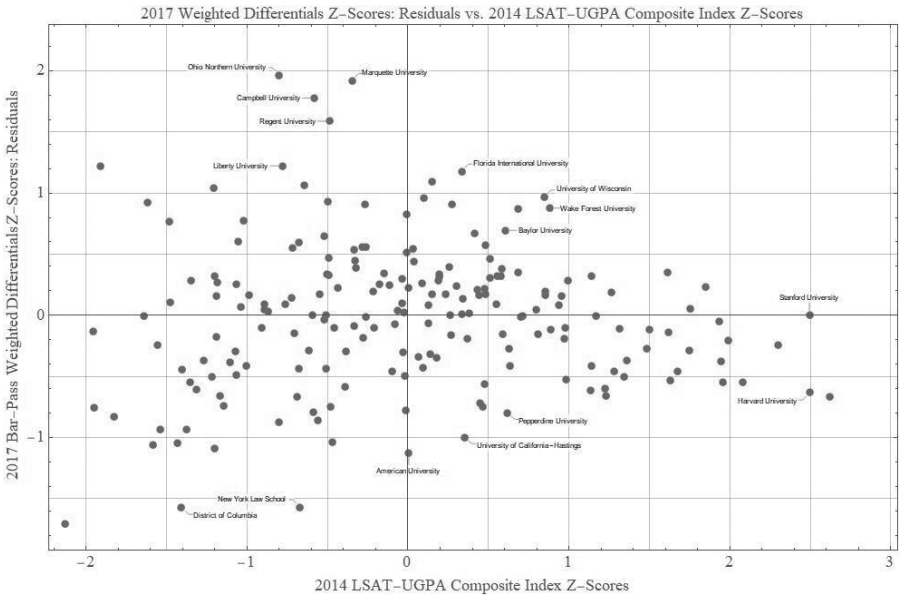
In Appendix 7,[104] we display similar side-by-side comparisons for each year and include residuals.

The last graph displays the final linear regression achieved if we complete all the secret sauce steps and plot the z-scored weighted Bar pass differential against z-scored composite index of LSAT and UGPA.[105]



Once again, to the naked eye this data appears to be heteroskedastic because data points are more spread out above and below the x-axis on the left side compared to the right side of the graph. The residual plot of this data set demonstrates this even more clearly.[106]

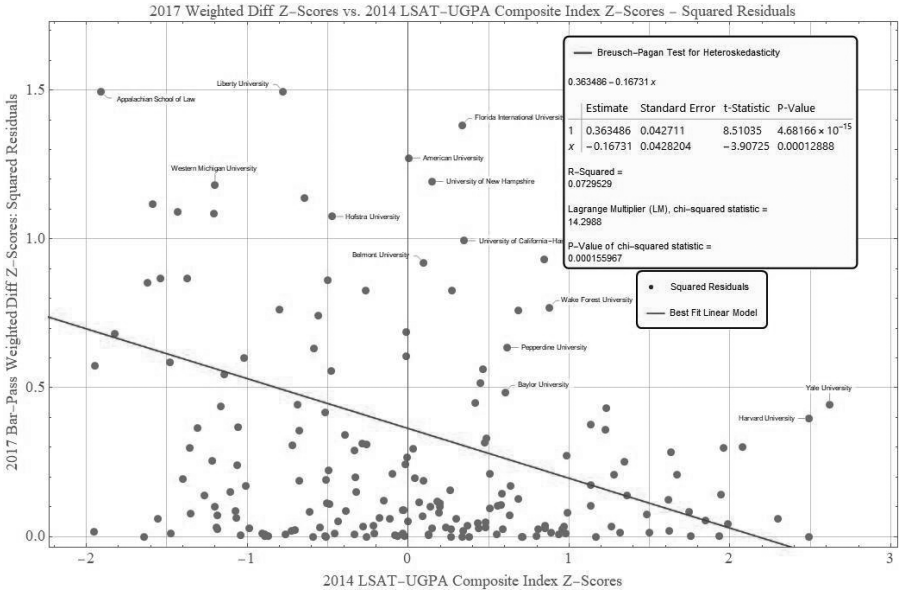
104. *See Appendix 7*, *supra* note 102.
105. *Id.*
106. *Id.*



Apart from the visual evidence, we formally tested for heteroskedasticity using the Breusch-Pagan test which is a test for heterosedasticity of data.[107] The results of that test are seen on the graph below:[108]

107. Zach, *The Breusch-Pagan Test: Definition & Example*, Sstatology, Dec. 31, 2020, https://www.statology.org/breusch-pagan-test/.

108. *See also Appendix 8: Breusch Pagan Tests for Heteroscedasticity* https://perma.cc/2H9Y-SXKL (where we document the Breusch Pagan results for multiple years).



The squared residuals do not form a particularly good straight line, but there are more large square residuals on the left side. For the Breusch-Pagan test, we calculated the Lagrange multiplier by multiplying the number of observations by the R-squared for this regression. This is a chi-squared statistic that, for this data, is equal to 14.3 as displayed on the graph. The p-value associated with this chi-squared value is 0.00016. Because this p-value is less than 0.01, we can reject the null hypothesis that the data is homoscedastic.

Despite *Secret Sauce*'s assertions to the contrary, heteroskedasticity is not mitigated by its methodology. Regarding non-linearity, we do not know of a standard statistical test, but we can clearly see that near the top portion of the graph, almost all the dots are below the line, which is consistent with non-linear data.

Secret Sauce did one final thing that they describe as a modified value-added model.[109] They added the residual of each school's Bar passage data point to the raw Bar passage differential z-score.[110] Given the persistence of heteroskedasticity and non-linearity, to this point, there is no mathematically valid basis for assuming this final step solves the problems of non-linearity and heteroskedasticity.

109. *See* Ryan & Mueller, *supra* note 2, at 81-82.
110. *Id*.

III. Differential Bias and the Appearance of "Top Schools" in the Rankings

We have proven empirically that the *Secret Sauce* methodology does nothing to mitigate heteroskedasticity and non-linearity. The only evidence *Secret Sauce* presents supporting their assertion that heteroskedasticity and non-linearity do not infect its model is that some highly ranked schools appear in their overperforming list that are not present in the Kinsler list.[111] We admittedly struggle to understand how the appearance of schools ranked highly in U.S. News Rankings is evidence of reduced or mitigated heteroskedasticity.

The following table compares the Kinsler and *Secret Sauce* lists and we have bolded the schools in the *Secret Sauce* list that are in the top sixty of the 2023 U.S. News Law School Rankings.[112]

111. *See* Ryan & Mueller, *supra* note 2, at 70, 74; *Reexamining Relative Bar Performance*, *supra* note 25, at 125–26 chart 1. The Kinsler list is a list ranking schools based on bar performance that was calculated using a linear regression method. The list is reproduced and 0065plained in *Reexamining Relative Bar Performance*, *supra* note 25, at 125–26.

112. *2023 Best Law Schools*, U.S. News & World Rep. (2022), https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings.

	Kinsler Top 25[113]	**Secret Sauce Top 25**[114]
1	Belmont University	Florida International University
2	Florida International University	**Stanford University**
3	Liberty University	**University of Southern California**
4	Campbell University	**University of California Berkeley**
5	Texas A&M University	**University of North Carolina**
6	Duquesne University	Belmont University
7	Louisiana State University	**University of Michigan**
8	Georgia State University	**Florida State University**
9	Texas Tech University	**University of California Los Angeles**
10	University of New Hampshire	**University of Virginia**
11	Regent University	Campbell University
12	University of South Carolina	**Yale University**
13	Seton Hall University	Louisiana State University
14	Cleveland State University	**University of Georgia**
15	University of Oklahoma	**Duke University**
16	Saint Louis University	**Harvard University**
17	University of North Carolina	**Wake Forest University**
18	University of Missouri-Kansas City	Georgia State University
19	Washington and Lee University	**University of Chicago**
20	Northern Illinois University	**University of Pennsylvania**
21	Drake University	**University of Illinois**
22	University of Tulsa	**Baylor University**
23	South Texas College of Law Houston	**Washington and Lee University**
24	Florida State University	Liberty University
25	University of Missouri	**Vanderbilt University**

Again, we struggle to understand how the appearance of highly ranked U.S. News schools in the *Secret Sauce* ranking indicate that heteroskedasticity and non-linearity do not exist.[115] *Secret Sauce* may

113. *Reexamining Relative Bar Performance*, *supra* note 25, at 125–26 chart 1; Jeffrey S. Kinsler, *The Best Law Schools for Passing the Bar Exam* 3 (2021) (unpublished manuscript) (on file with AccessLex).

114. *See* Ryan & Mueller, *supra* note 2 (manuscript at 41–45 app. tbl 1).

115. *See id.* at 75 nn. 24-26 (saying that this is evidence that their methodology solves the problems caused by non-linearity and heteroskedasticity of the data).

have relied on our previous article that proved that non-linearity and heteroskedasticity prevented schools with high LSAT/UGPA matriculants from making the top twenty-five overperforming school list in Kinsler's study.[116] But that is a far cry from concluding that an entirely new ranking system—one which classifies schools with high LSAT/UGPA matriculants as overperforming on the bar examination—proves that heteroskedasticity and non-linearity are irrelevant.

Differences between the *Secret Sauce* rankings and the Kinsler rankings are unremarkable. Initially, Kinsler used different years than *Secret Sauce* for his regression analysis,[117] and Kinsler used four different regressions, only two of which involved bar pass differentials.[118]

Secret Sauce by contrast used only weighted Bar pass differentials in their regressions.[119] Specifically, *Secret Sauce* took the average of the 25th, 50th, and 75th percentiles of LSAT and UGPAs, scaled the LSAT and UGPA to get a number between zero and one, calculated a composite index 0.6 * (LSAT result) + 0.4* (UGPA result), and calculated z-scores for the composite index for each school. *Secret Sauce* then calculated the weighted average of the Bar pass differentials for up to five jurisdictions and standardized this average differential by converting them to z-scores.[120]

Their final scores and rankings were based on A+B, where A is the Bar pass differential, or how much higher or lower than the aver-

---

116. Ryan & Mueller indicates:

> But, to reinforce the argument that this Article transformed heteroskedastic data to homoscedastic data, as OLS requires, the presence of many schools with high LSAT scores at the top of the rankings—and, as an aside, that eleven of the law schools in the top twenty-five of our rankings are also ranked in the top twenty-five of the U.S. News & World Report law school rankings—suggests that the data in this Article is, in fact, homoscedastic and satisfies the concerns voiced by Professor Rory Bahadur, et al., that "it [is] mathematically impossible for schools with higher entering credentials to be ranked as a top overperformer in bar performance. Kinsler's model is strongly biased against schools [with the highest entering credentials] because they are predicted to have very high bar passage rates, which leaves little room for improvement."

See id. at 75 n.26.

117. Kinsler uses 2015–2019 and *Secret Sauce* uses 2014–2019. *See Reexamining Relative Bar Performance*, *supra* note 25 at 125; Ryan & Mueller, *supra* note 2 (t 65).

118. Kinsler did the following linear regressions:

1. Median LSAT versus Composite Average First-Time Bar Pass Rate
2. Median UGPA versus Composite Average First-Time Bar Pass Rate
3. Median LSAT versus Composite Average First-Time Bar Pass Rate Differential
4. Median UGPA versus Composite Average First-Time Bar Pass Rate Differential"

Then Kinsler calculated standard deviations for each of those four and "aggregated" those four standard deviations. *See* Jeffrey S. Kinsler & Jeffrey O. Usman*, Law Schools, Bar Passage, and Under and Overperforming Expectations*, 36 Quinnipiac L. Rev. 183, 190 (2018).

119. *See* Ryan & Mueller, *supra* note 2, at 74 n.22, 79, 80–83.

120. *See supra* Section 1.B.II (explaining the *Secret Sauce* methods); *see also id.* at 77-83.

age Bar pass rate in the jurisdiction a school performed.[121] This is a raw number not generated by a regression analysis, but instead based solely on comparing a school's performance to the average score in the jurisdiction.[122]

Secret Sauce describes B as the "value added."[123] And it is important we describe how B is determined. *Secret Sauce* performs a linear regression of the Bar pass differentials (calculated above as A) versus the actual bar pass rate observed for each school.[124] Actual Bar pass rate is calculated simply as passers/takers for a particular Bar examination.[125]

A more mundane, and we think reasonable, explanation for the appearance of greater numbers of higher LSAT/UGPA schools in the *Secret Sauce* ranking is because *Secret Sauce* used only Bar differentials and not a combination of raw Bar scores and differentials like Kinsler did. To reiterate, a Bar differential is a measure of how much better than the jurisdictional average a school performed on a particular bar examination.[126] We can expect the high LSAT schools to be more represented in a model that uses only Bar differential as one half of the overperformance measure because they tend to do better on the Bar examination than other schools in the jurisdiction. Kinsler even acknowledged this in his study and explained that this is why he chose to include both raw pass rates and differentials as input measures.[127]

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121. *See* Ryan & Mueller, *supra* note 2, at 81-82.

122. *See id.*

123. *Id.* at 81-83.

124. *Id.* at 79-80 (explaining from these standardized independent and dependent variables, the authors began the value-added modeling analysis. This entails: (1) regressing the standardized bar passage differential for a given law school in a given year on the three-year lag standardized composite LSAT/UGPA index; . . .).

125. *See generally supra* Section 1.B.II (explaining in detail the steps Secret Sauce performed).

126. See Ryan & Mueller*, supra* note 2, at 81.

127. Kinsler & Usman found:

> The Composite Average First-Time Bar Pass Rate Differential, however, also has several deficiencies. These bear a relationship to some of the structural problems with Standard 316 that are addressed above. First, in states that have only one or two law schools, a "school's test-takers likely *set,* or play a large part in setting, the statewide average, making it virtually impossible for those schools" to fall much above or below the state average. Maine is a good example. In 2015, the University of Maine—which contributed nearly 50% of the test-takers in the state of Maine—had a first-time pass rate in that state of 67%; not surprisingly, the law school's pass rate was quite similar to the state-wide pass rate (69%).
>
> Second, in some states, a single under-performing law school can drag down the statewide pass rate. In Arizona, for example, the state's 2015 first-time pass rate was 66%. If Arizona Summit Law School is removed from this data, the pass rate increases to 79%.

However, we also replicated the *Secret Sauce* methodology[128] and demonstrated the model is biased in favor of high LSAT/UGPA schools.

If we define value-added in terms of increasing students' chance of passing, relative to their LSAT/UGPA credentials as *Secret Sauce* does,[129] then an unbiased value-added performance measuring methodology would give schools in every part of the LSAT/UGPA spectrum an equal opportunity to obtain a high or low score. This is especially true when comparing schools across the whole LSAT/UGPA spectrum for value-added, as *Secret Sauce* does.[130]

An effective way to assess whether the method is biased for or against any LSAT/UGPA range is to examine a graph of the final scores versus the independent variable(s) in our regression. For example, here is a graph of final scores versus LSAT/UGPA composite index z-scores, for the 2014 matriculant/2017 Bar exam results, using the method found in *Secret Sauce*.[131]

> Thus, one law school caused a 13-percentage point drop in the state-wide average; this is the equivalent of giving the other law schools in Arizona a 13-point bonus in the Composite Average First-Time Bar Pass Rate Differential. As a consequence, Arizona State and the University of Arizona both ranked in the top 25 in UGPA and LSAT when considering the Composite Average First-Time Bar Pass Differential, but between 94 and 109 based upon both UGPA and LSAT when considering Composite Average First-Time Bar Rate.
>
> Third, not all states have law schools that are equal in terms of LSAT and UGPA of entering students. In states with predominantly weaker law schools, it is much easier to meet or exceed the state-wide average. For example, in 2012, the average Median LSAT scores and UGPAs of the twelve Florida law schools was 151.5 and 3.23, respectively; by contrast, the average Median LSAT scores and UGPAs of the 21 California law schools were 158.52 and 3.38, respectively, and the average Median LSAT scores and UGPAs of the five Tennessee law schools was 157.40 and 3.42, respectively. Not surprisingly, four Florida law schools ranked in the Top 15 in the LSAT and Composite Average First-Time Bar Pass Rate Differential regression analysis, but no California law schools and only one Tennessee law school ranked in the Top 15.
>
> Fourth, graduates of in-state law schools usually perform better on the bar exam than graduates of out-of-state law schools. This may result from in-state law students learning more local law and taking local bar review courses. In California, for example, graduates of California ABA-approved law schools have a higher pass rate (often by 10-percentage points or more) on the past 10 bar exams than graduates of out-of-state ABA-approved law schools. This makes it easier for in-state law schools to meet or exceed the statewide average.

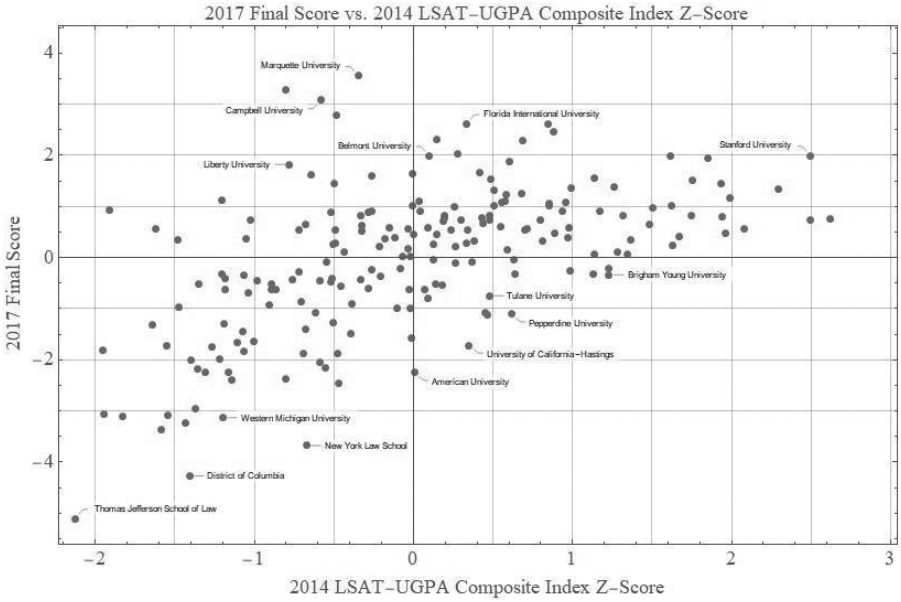
Kinsler & Usman, *supra* note 119, at 195–97.

128. We replicated as best we could, considering the previously mentioned lack of detail about the methodology.

129. *See* Ryan & Mueller, *supra* note 2, at 69, 81.

130. *Id.* at 18.

131. *See supra* Section 1.B.II (explaining in detail the steps *Secret Sauce* performed).



If a performance-measuring method (and rankings methodology) is unbiased, then a graph of final scores versus independent variable(s) would indicate approximately equal numbers of high LSAT/UGPA, low LSAT/UGPA, and middle LSAT/UGPA schools above the x-axis (above zero) and below the x-axis. In the high, middle, and low LSAT/UGPA ranges, we would hope to see approximately half of the schools above the x-axis and approximately half of the schools below the x-axis.

In the high LSAT/UGPA region of the graph above, more than half of the schools are above the x-axis, and fewer schools are below the x-axis. On the low LSAT/UGPA side of the graph, more than half of the schools are below the x-axis, and fewer schools are above the x-axis. Also, most schools above the x-axis are from the high LSAT/UGPA side of the graph. The data is also heteroskedastic, which affects middle LSAT/UGPA schools by exaggerating their overperformance or underperformance.

We want to reaffirm here that we have not yet been able to design a model that is unbiased in measuring Bar performance, and we remain uncertain that such a model can be created with only the publicly available data. The overarching point of this article is that given the lack of valid models for measuring bar performance, we should

not be in the business of measuring and publishing about Bar performance and hinging accreditation decisions on Bar performance.

IV. Why Heteroskedasticity is Problematic

Secret Sauce calculates over-performance and underperformance using what it describes as a modified value-added model.[132] This value-added model has two components. The first component is what *Secret Sauce* calls *bar-pi*.[133] *Bar-pi* is nothing more than the school's weighted average bar differential, for up to five jurisdictions with at least ten exam takers, or how much higher the school performed compared to the average Bar performance across those jurisdictions.[134] The simplest way to describe this metric is that it is a measure of how much lower or higher a school's pass rate was than the average Bar pass rate for those jurisdictions.[135] This component therefore is a raw numerical value and not derived from a regression analysis.

The second part of the value-added metric is dependent on a regression analysis and this is where heteroskedasticity is problematic. It is worth explaining how this second metric is calculated.[136]

After establishing the bar pass differentials, *Secret Sauce* performs a regression analysis with the independent variable being the standardized composite index score and the dependent variable being the standardized Bar pass differential which was calculated as the first component described immediately above.[137]

That regression process yields a graph similar to the graph below:[138]

---

132. *See* Ryan & Mueller, *supra* note 2, at 81.

133. *Id.*

134. *Id.* at 80.

135. *Id.*

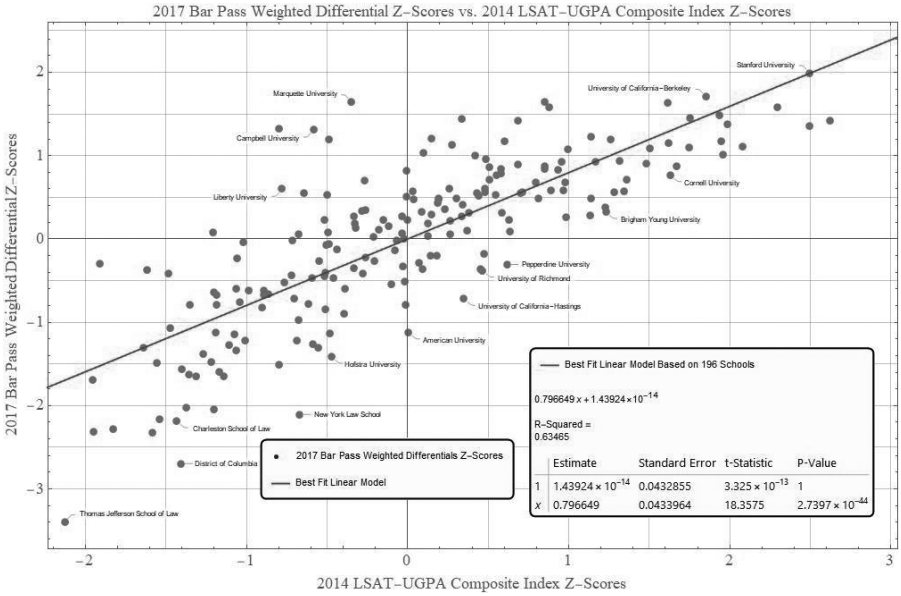
136. *See generally id.* at 80.

137. Ryan & Mueller explain:

> From these standardized independent and dependent variables, the authors began the value-added modeling analysis. This entails: (1) regressing the standardized bar passage differential for a given law school in a given year on the three-year lag standardized composite LSAT/UGPA index; and (2) predicting the "y-hat," or expected outcome of the standardized bar passage differential value from the OLS regression model in step one, based on the coefficients of the three-year lag standardized composite LSAT/UGPA index. In other words, the standardized composite index for a given law school (e.g., Pepperdine University Caruso School of Law) in a given year (e.g., 2016) is used to predict that cohort's standardized bar passage differential value of that cohort three years later (e.g., 2019).

Id.

138. *See Appendix 7*, *supra* note 102.



The regression line in the graph above is essentially a predictor of how well a school is expected to perform based on its entering credentials. The distance between the actual data points and the line generated by the data points is called the residual.[139]

We previously described this heteroskedasticity as resulting in increased variance in the middle of the independent variable's (LSAT/UGPA)[140] range and *Secret Sauce* reiterates that this is problematic.[141] We further demonstrated, using the Breusch-Pagan test, that standardizing the independent variable and using a composite index does nothing to alter this heteroskedasticity.[142]

Ultimately, this means that the variance is highest and the potential for the largest residuals occurs in the middle of the independent

139. Ryan & Mueller state:

> The last step in the value-added modeling analysis is to look at the actual standardized bar passage differential value of that cohort and measure the distance between the actual and predicted standardized bar passage differential values of that 2023 cohort. The difference between the actual and predicted values is known as a "residual," and this residual, one can argue, is the value added—or value subtracted—by the cohort's having attended the law school.

See Ryan & Mueller, *supra* note 2, at 80-81.

140. *See Reexamining Relative Bar Performance*, *supra* note 25, at 152.

141. *Id.*; *see also* Ryan & Mueller, *supra* note 2, at 10 ("Because an even distribution of residuals is required to meet another assumption upon which OLS regression relies, failing to account for the heteroskedasticity in the underlying data reduces the precision of the estimates provided by a linear regression model. This is to be avoided.").

142. *See infra* Section 1.B.II.5.

variable's range. The second part of the metric that is based on the size of the residuals, results in the schools in the middle LSAT/UGPA range benefitting or suffering from the largest residuals.

With heteroskedastic data, a linear model might still produce unbiased predictions, but in *Secret Sauce*, the size of the residuals is actually used to calculate the value added.[143] Therefore, the unequal or non-constant variance caused by the heteroskedasticity, exaggerates the residuals or errors in the middle of the independent variable's range, rendering the residuals used to calculate the second part of the value-added metric incorrect.

V. Four Transformative Iterations?

One other aspect of *Secret Sauce* is that it describes "four transformative iterations" that they develop to generate the modified value-added metrics.[144] In reality, the four iterations are neither four nor transformative, but involve simply just adding the bar differential to the residual for every school.

> *Secret Sauce* describes the first iteration as:
>
> Thus, law schools that have a positive value for their standardized bar passage differential rate (or bar_pi)—meaning that their students did better than average on the bar exams that their graduates took—and beat their predicted bar passage differential rate were rewarded by having their value-added residual added to their bar_pi. .[145]
>
> *Secret Sauce* describes the second iteration as:
>
> [L]aw schools with positive values on their bar_pi but that did not beat their predicted bar passage differential rate (i.e., had a negative value-added score) should get the penalty of having their residual—or value-subtracted—added to their bar_pi, resulting in a decrease to their observed bar_pi. .[146]
>
> *Secret Sauce* describes the third iteration as:
>
> [L]aw schools with a negative bar_pi value that managed to beat their predicted bar passage differential rate (i.e., had a positive

143. *See* Ryan & Mueller, *supra* note 2, at 81 ("Thus, this Article improves upon the classic value-added model by considering both the value-added residual and the actual standardized bar passage differential rate—which the authors call "bar_pi" below, short for bar performance index—collectively, and not the residual solely, as the measure of value that the law school adds to its graduates.").

144. *Id.* ("This improvement on the model is represented in four transformative iterations of the model described below.").

145. *Id.*

146. *Id.* at 82.

> value-added score) should get the benefit of having their value-added residual added to their bar_pi.[147]

And finally, *Secret Sauce* describe the fourth iteration as:

> [L]aw schools with a negative bar_pi that also did not beat their predicted bar passage differential rate should get the penalty of having their value-subtracted residual added to their bar_pi, taking them further away from the mean of zero.[148]

Despite the "four transformative iterations" language, the identical method was used to calculate the value added for every school. Simply put, for every school, no matter where the school performed, they added the bar differential (*bar-pi*) and the residual to calculate a modified value-added.[149]

Some bar differentials are negative numbers, some are positive numbers, and some are zero. If a school performed above the jurisdictional average, then that Bar differential would be positive; if it performed below the jurisdictional average, it would be a negative number; and it would be zero if the school performed at exactly the jurisdictional average. Similarly, the residuals generated by the linear regression above are zero, negative, or positive. If the school ended up above the line in the graph above, then the residual was a positive value; if the school ended up below the line, then the residual was a negative value; and if the school ended up on the line, then the residual value was zero.

And for each and every school, Bar differential was simply added to the residual to get the value-added score. These are not four iterations of anything, it is simply (A+B) where both A and B can be zero, positive, or negative.

VI. Academic Attrition Impacts Bar Performance Ranking

Secret Sauce suggests that academic attrition does not impact their model and that models that do not include academic attrition are more precise.[150] This statement is incorrect as we now demonstrate.

147. *Id.*
148. *Id.*
149. *See id.*
150. *See id* at 78 n.32 ("By removing other predictors, such as race, attrition and transfer variables, the precision of model's estimates actually improved."). Ryan & Mueller state:

> In the initial prediction model, the authors considered other characteristics of the law school class cohort, including race, gender, attrition, and incoming transfer students. However, given that the regression analysis revealed that the predictive impact of most of these control characteristics was absorbed by the incoming student credential predictors (LSAT and UGPA), the authors streamlined the predictive model to include

We replicated the *Secret Sauce* methodology[151] to calculate the most overperforming schools on the Bar exam for the matriculant years 2011-2015 and the corresponding Bar exam years 2014-2018. We used only the ABA dataset, as opposed to the NCBE dataset, so our rankings are slightly different but this in no way undermines the proof that academic attrition must be included in a measure of Bar performance.

Then, we adjusted for academic attrition by calculating a Bar pass rate that was not passers/takers, but passers/(takers + academically attrited students). In other words, we assumed that students who were academically attrited would likely have failed the bar exam.[152] In the table below the left column represents the rankings generated when we did not consider attrition and the right column shows how the rankings changed when academic attrition was factored in.

only a cohort's entering credential variables.32 In other words, the authors found that the credentials on the front end were so closely related to bar exam performance on the back end that other factors were largely baked into those front-end credentials.

See id. at 78.

151. *See generally supra* Section 1.B.II (explaining in detail the steps *Secret Sauce* performed).

152. This methodology is a replication of the methodology we employed in our online article, *Impact of Matriculant Credentials*, and is fully explained there. *See Impact of Matriculant Credentials*, *supra* note 16, at 25.

	Overperformance Rankings	**Overperformance Rankings Including Academic Attrition**
1	Florida International University	University of North Carolina
2	University of Southern California	University of Southern California
3	University of North Carolina	University of New Hampshire
4	University of California-Berkeley	University of California-Berkeley
5	University of New Hampshire	Florida International University
6	Campbell University	Florida State University
7	Stanford University	Stanford University
8	University of California-Los Angeles	University of California-Los Angeles
9	Florida State University	Washington and Lee University
10	Louisiana State University	Louisiana State University
11	Georgia State University	Georgia State University
12	University of Georgia	University of Georgia
13	Washington and Lee University	Wake Forest University
14	Wake Forest University	University of Florida
15	University of Michigan	University of Miami
16	Loyola Marymount University-Los Angeles	University of California-Irvine
17	University of California-Irvine	Baylor University
18	University of Florida	Duquesne University
19	University of Virginia	University of Michigan
20	University of Miami	University of California-Davis
21	Baylor University	Stetson University
22	Belmont University	University of Virginia
23	University of California-Davis	Arizona State University
24	Duquesne University	Loyola Marymount University-Los Angeles
25	Duke University	Concordia Law School

We reiterate that these are flawed rankings, and the purpose of this exercise is to demonstrate that even for these flawed rankings, academic attrition affects the measurement of "Bar performance." The magnitude of the change caused by academic attrition might not appear large when we adjust these flawed rankings. We now discuss in detail the complexity of including academic attrition and demonstrate that in-

cluding academic attrition improves the measurement of Bar performance.

2. IMPROVED MODELING WITH ACADEMIC ATTRITION

A. Basic Fractions and Horticulture

In a previous article, we discussed how academic attrition can affect a school's bar pass rate even though a linear regression of academic attrition versus bar pass rate usually does not show correlation.[153] In fact, there may even be a slightly negative correlation.[154] We explained that this is because of confounding variables, and we do not intend to repeat that explanation here.[155]

For the sake of illustration; however, one such confounding variable is LSAT scores. If a school has students entering with high LSAT scores, they are less likely to do poorly in law school and to be academically dismissed. They are also more likely to pass the bar exam. So, we might not be surprised to see a lack of a positive correlation between academic attrition and bar passage rates.

In an abundance of caution, we will use a horticultural example to show why models that do not account for academic attrition and transfer, should *never* be the basis on which schools are ranked in terms of bar performance. Currently the research identifies Bar success at institutions as number of passers divided by number of takers for a particular bar examination. An example rooted in horticulture makes the absurdity of this metric patent.

Suppose we decide to measure the success rate of a gardener in growing plants from saplings into mature plants. We allow that gardener to select any 100 saplings out of a pool of 1000 available saplings that they believe they can successfully grow into adult plants. The gardener selects 100 of the healthiest plants they can find. At the end of the first of the three years it takes for saplings to become adult plants, gardeners can tell fairly accurately which plants will survive to adulthood and which ones will not.

So, after the first year the gardener realizes that twenty-five of the plants he selected, using his own criteria, run a high risk of not making it to adulthood. The gardener discards those twenty-five plants and after three years, he has grown the seventy-five remaining

153. *Reexamining Relative Bar Performance*, *supra* note 25, at 203.
154. *Id.*
155. *Id.*

saplings into adult plants. If you are asked to rate the success rate of the horticulturist in converting saplings to adult plants, you would not say the horticulturist has a 100% success rate, but rather say the horticulturist has at best a 75% success rate because the appropriate denominator in the success fraction is 100 not seventy-five.

Yet, in the context of Bar success, we would say the horticulturist has a 100% success rate. In case it is not clear, the saplings are matriculants, and the adult plants are those that pass the Bar exam. The twenty-five discarded saplings are academically attritted students. It should now be apparent that when we measure Bar success as number of passers/number of takers we are using the wrong denominator. This is because the number of takers does not include the academically attrited students or the students the school determined, despite all its institutional efforts, programming, and secret sauces would fail the bar.

To contextualize how transfer students need to be factored into measuring bar success, further assume that at the same time the gardener got rid of the twenty-five plants that were unlikely to make it to adulthood, the gardener took in ten one-year old plants from other gardeners (transfer students) that—based on their first year of growth (1L GPA)—were very likely to make it to adulthood (pass the bar), and those ten plants made it to adulthood two years later in the transferee garden.

Now the gardener would have grown eighty-five plants to adulthood. But according to the "math" used to measure Bar success, we would again say this gardener has a 100% success rate in bringing saplings to adulthood. And again, that conclusion would be false and not at all account for the fact that the gardener took healthy plants from other gardens.

We maintain that meaningful Bar performance measurements are impossible with publicly available data. However, what we add to Bar performance modeling is evidence that logistic regression is superior to linear regression for assessing Bar performance, and we also develop a model that indicates Bar performance cannot be ascertained unless academic attrition is factored into the calculation of Bar performance.

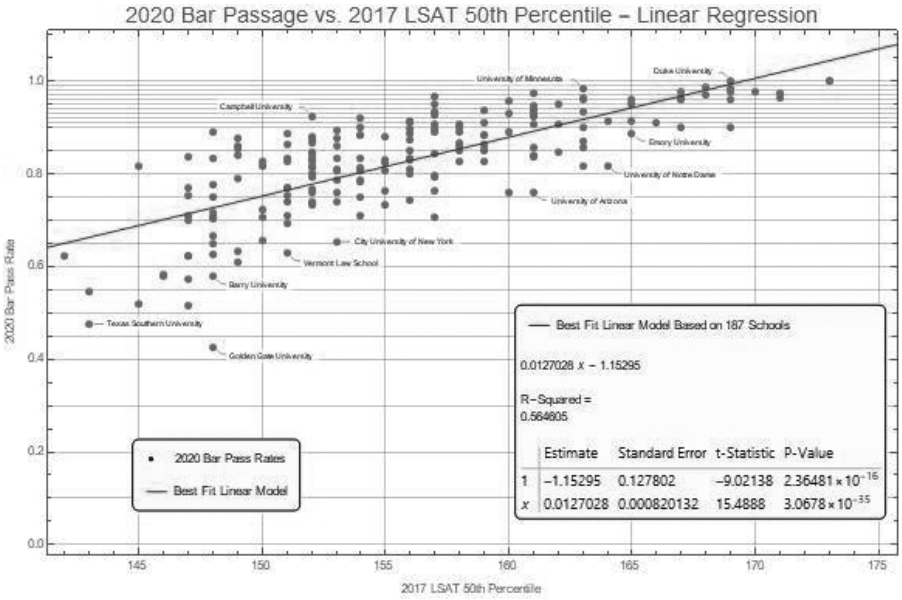
Like academic attrition, transfer rates must also be factored into any measure of Bar performance, but we demonstrate that the current publicly available data set does not allow the accurate modeling of the impact of transfer data on Bar performance. But before modeling the

data, it is important to decide which regression model is more suitable for the data. We concluded that logistic regression is more suitable than linear as shown here.

B. Using Logistic Rather Than Linear Regression

Just for the sake of comparing the two regression models we include below a linear and a logistic regression, respectively, for the independent variable 2017 LSAT 50th percentile[156] versus the dependent variable of 2020 Bar Passage Rates of 193 law schools.[157]

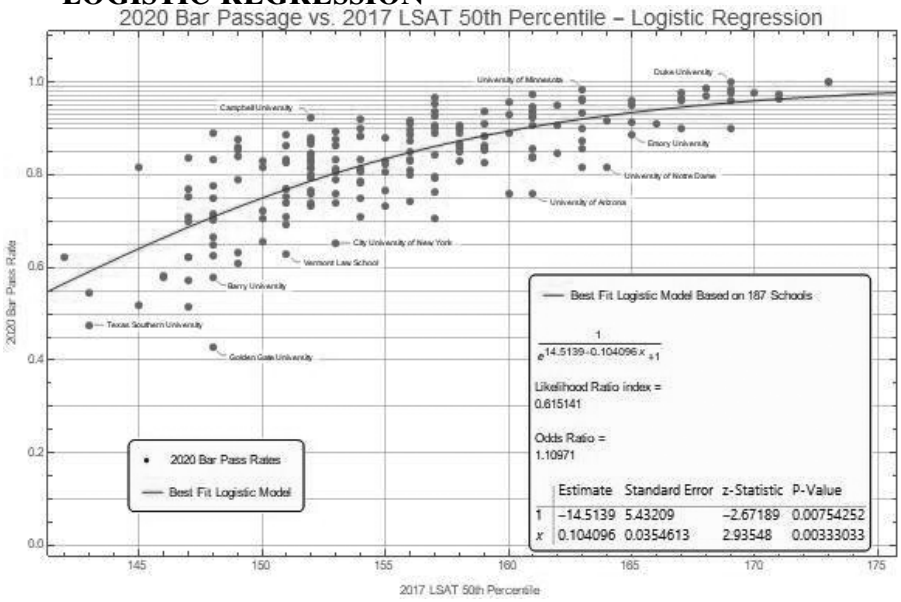
LINEAR REGRESSION



156. *See Appendix 10: Comparing Rankings Using Linear and Logistic Regression*, https://contentdm.washburnlaw.edu/digital/collection/miscellaneous/id/96/rec/1 [hereinafter *Appendix 10*].

157. *Id.*

LOGISTIC REGRESSION



Initially, both heteroskedasticity and non-linearity reduce the efficacy of using linear regression. We have also discussed and explained in detail the shortcomings of linear regression for this data set in a previous article.[158] In the linear regression plot $R^2 = 0.565$. This value is sometimes used as a measure of how well the regression model fits the data or measures "goodness of fit."[159]

For the logistic model, heteroskedasticity is still an issue, but the curved nature of a logistic regression partially addresses the model misspecification caused by the data's non-linearity. Comparing the goodness of fit of linear and logistic regression is not a simple matter, as there are several (twelve or more) different measures of goodness of fit seen in the statistics literature for logistic regressions, and no clear consensus as to which one is the most appropriate.[160] Some of the more well-known pseudo *R*-squared measures for logistic regres-

158. *Reexamining Relative Bar Performance*, *supra* note 25, at 120–22.

159. Jonathan Bartlett, *R squared and goodness of fit in linear regression*, THE STATS GEEK (Jan. 25, 2014), https://thestatsgeek.com/2014/01/25/r-squared-and-goodness-of-fit-in-linear-regression/.

160. Will Kenton, *Goodness of Fit*, INVESTOPEDIA (Sept. 21, 2022), https://www.investopedia.com/terms/g/goodness-of-fit.asp (Explaining "No one has come up with a perfect measure of goodness of fit for statistical models although there has been and continues to be much research in the area").

sions include the Cox and Snell R^2, McFadden R^2, Nagelkerke R^2, and the likelihood ratio R^2.[161]

Ultimately though, logistic regression does not include the same correlation coefficient as a measure of goodness of fit. We included the likelihood ratio R^2 in the logistic graph above as it can be considered as the one that is most analogous to the *R*-squared for linear regression, but we reiterate these comparisons are not perfect.

Comparing the goodness of fit for linear and logistic regression of the data is not easy because of the various measures used, the lack of agreement in the statistics community regarding the logistic regression *R*-squared measures, and the lack of a perfect analogy of the linear regression *R*-squared for the logistic regression. However, notice the likelihood ratio *R*-squared for the logistic regression is 0.615.

To compare the models in a more direct way, we might add the total of the errors or residuals for both models and then compare those. The model with the smaller total error value might be considered a better fit.[162]

As demonstrated in Appendix 10,[163] the total of the squared residuals for the linear model is 1.024, and the total of the squared residuals for the logistic model is 0.923.[164] The logistic model reduces the sum of squares of residuals by close to 10%. This might be an indication that the logistic model is a better fit. We reiterate we are not concluding this is the best fit or even a good fit, just that it suggests that the logistic model is a better fit than the linear model for this data.[165]

We definitively state that given the current state of the modeling research, no ranking of schools based on Bar performance should ever be considered quantitatively valid. But we ranked the schools based on under/overperformance in Appendix 10[166] solely for the purpose of

161. Jonathan Bartlett, *R squared in logistic regression*, THE STATS GEEK (Feb. 8, 2014), https://thestatsgeek.com/2014/02/08/r-squared-in-logistic-regression/.

162. In performing this comparison, we added the squared residuals, because some residuals are negative, and it is necessary to ensure negative residuals do not cancel out positive residuals, erroneously reducing the total.

163. *See Appendix 10*, *supra* note 158.

164. *Id.*

165. Note for example, that a model which fits better in the middle LSAT region and very badly in the high LSAT region could actually have a lower total sum of squared residuals due to the fact that variance in the middle LSAT region is much higher than variance in the high LSAT region.

166. *See Appendix 10*, *supra* note 158.

demonstrating that even the regression choice impacts the ranking of schools.

> We observed the following differences between linear and logistic regression:[167]
>
> 1. Schools with higher LSATs, especially 170 or more, generally moved up the rankings when switching from a linear regression to a logistic regression.
> 2. None of the top LSAT schools are near the top in either ranking, probably due to heteroskedasticity favoring the middle-LSAT region schools which had better than predicted pass rates.
> 3. Almost all schools with LSAT scores in the 150 to the low 160 range moved down in the rankings (a negative rank difference) when switching to a logistic regression.
> 4. Almost all schools with LSAT scores of 150 or lower moved up in the rankings when switching from linear to logistic regression.

This is consistent with the statements we made in a previous article describing the bias in favor of the middle LSAT schools and against high LSAT schools in a linear model.[168] Interestingly, the top ten or twenty rankings did not change much when we switched from linear to logistic regression. This is because the data are heteroskedastic,[169] and neither of these simple linear or logistic models effectively addresses this.

C. Proposed Logistic Models Incorporating Academic Attrition in the Measure of Institutional Bar Performance

We now demonstrate how incorporating attrition in the measurement of bar performance improves the measure.

Some articles and the ABA in its accreditation decisions measure Bar performance as follows:[170]

$$r = \frac{p}{t} * 100,$$

where

167. *See id.*
168. *Reexamining Relative Bar Performance*, *supra* note 25, at 120–22.
169. *Id.* at 122.
170. *See* Kinsler & Usman, *supra* note 119, at 185; *see also Ryan & Mueller*, *supra* note 2, at 8; *see also* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023, 17–27 (2022).

p = the number of exam passers
t = the number of exam takers
r is the percentage of exam takers who pass the exam.

This is the simplest, most obvious way to measure pass rate, make models and determine satisfactory performance. It is the pass rate reported on the ABA forms.[171] However, this measure ignores academic attrition, students transferring out and in, and "other" attrition students. We think this is inexcusable considering our earlier horticulture example.[172]

It is not worth arguing about whether failing out the most at-risk students (academic attrition) at the end of the first year improves Bar performance two years later.[173] We think that it is simply an undeniable mathematical reality.[174] High academic attrition improves Bar passage rate, but using that resulting higher Bar passage rate alone as a measure of Bar performance, as the ABA and others currently do, is quite frankly deliberate blindness and an invalid measure.[175]

And to explain why it is an invalid measure, consider an example where schools A and B both matriculate 100 students with similar matriculating credentials. School A academically attrits twenty students and eighty students write the Bar exam with sixty passing, then under the Standard 316 the resulting Bar passage rate is 60/80 or 75%. If School B however, does not academically attrit any students and 100 students write the Bar exam and sixty pass, under the ABA standard school B has a lower pass rate of 60%. Remarkably and incredulously, according to the ABA standard measure of rate $r = p/t$, school A has a much higher pass rate than school B and is not in danger of losing its accreditation.[176] How this asinine measure of "Bar performance" persists is in our view inexplicable. As a result, we propose

171. Managing Director's Guidance Memo, Standard 509 (July 2014), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/guidance-memo-509-december-2019.pdf (explaining that bar pass percentages are calculated by comparing the number of takers and number of passers).

172. *See infra* Section 2.A.

173. *See* Ryan & Mueller, *supra* note 2, at 77-78 nn.30-32.

174. *Reexamining Relative Bar Performance*, *supra* note 25, at 123–24, 154–55, 202–03.

175. For example, schools that do not attrite many students on the basis of first year grades unjustifiably suffer reduced bar passage rates under this current measure of bar performance.

176. Standard 316 requires 70% ultimate bar pass rate. Citation Needed. (ABA Standard previously suggested in cite above)

three models for measuring Bar performance that incorporate academic attrition.[177]

I. MODEL 1

To adjust for academic attrition, we might consider using the following alternative pass rate:

$$r_1' = \left(1 - \frac{a}{m}\right) * r,$$

where
a = the number of academically attritted students
m = the number of matriculating students
$r = p/t$ as above

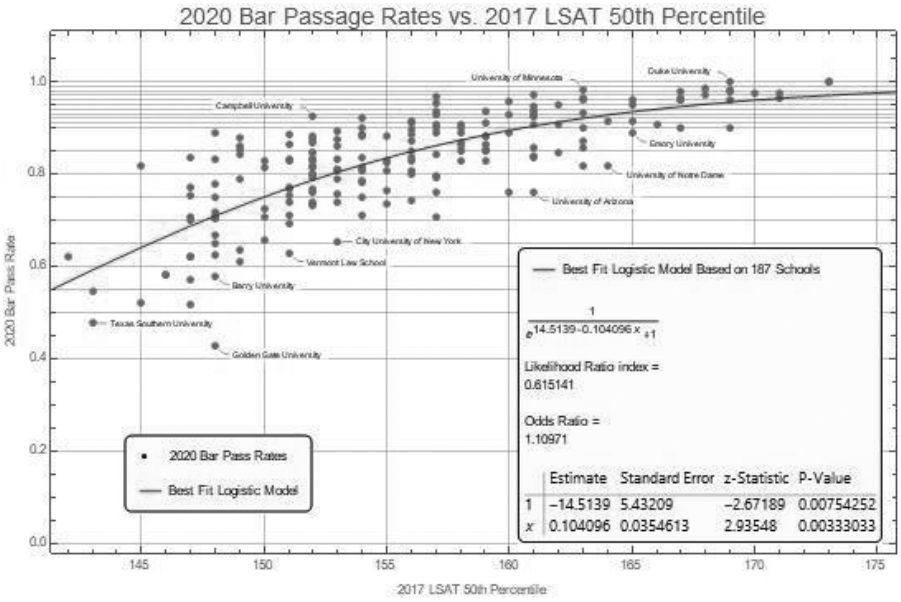
r_1' is equal to r, reduced by a factor equal to the academic attrition rate percentage. For example, if the school's actual passing rate r = 70% and if the school has academic attrition rate of 10%, then the adjusted bar passage rate would be r_1'= (90%)*(70%) or 63%.

As the following graph and the data in Appendix 11[178] demonstrates adjusting the Bar passage rate in this way changes the measure of Bar performance significantly. Here is a graph of the logistic regression for r = passers/takers with no adjustment for academic attrition:[179]

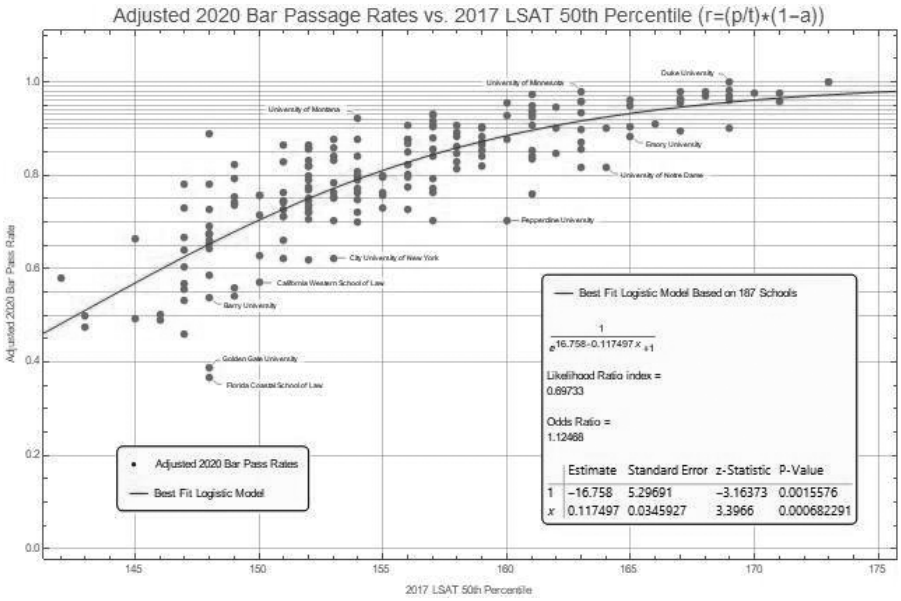
177. As we previously explained, because of confounding variables it is erroneous to try to ascertain the relationship between Bar passage and academic attrition by modeling academic attrition as an independent variable. So, our three models for assessing the impact of academic attrition instead adjust the Bar pass rate by incorporating academic attrition. *See Reexamining Relative Bar Performance*, *supra* note 25, at 203.

178. *See Appendix 11 Comparing Rankings Before and After Academic Attrition Adjustment*, https://contentdm.washburnlaw.edu/digital/collection/miscellaneous/id/97/rec/2 [hereinafter *Appendix 11*].

179. *Id.*



And after adjusting for academic attrition, using $r_1' = \left(1 - \frac{a}{m}\right) * r_{180}$



180. *Id.*

The graphs demonstrate the likelihood ratio index for the unadjusted regression is $R^2 = 0.615$ and for the adjusted regression its $R^2 = 0.697$. This suggests that the model fits better when we adjust for academic attrition and including academic attrition in the Bar performance model improves the model.

Appendix 11 also clearly indicates how bar performance ranking changes after we adjust for academic attrition using Model 1.[181] Most of the schools with remarkably high attrition moved down in the bar performance rankings after we adjusted for academic attrition.[182] The schools with low LSAT scores might be expected to have higher attrition and this might explain why the trend of high attrition reducing Bar performance rankings is less noticeable for these schools. Similarly, if a school was near the bottom even with high attrition,[183] they might not move much because there is not much room to move.

II. MODEL 2

Another way to incorporate academic attrition into the measurement of bar performance is to use a bar pass rate established as follows:

$$r_2' = \frac{p}{t+a} * 100,$$

where
p = number of exam passers
t = number of exam takers
a = number of academically attritted students from that matriculating class

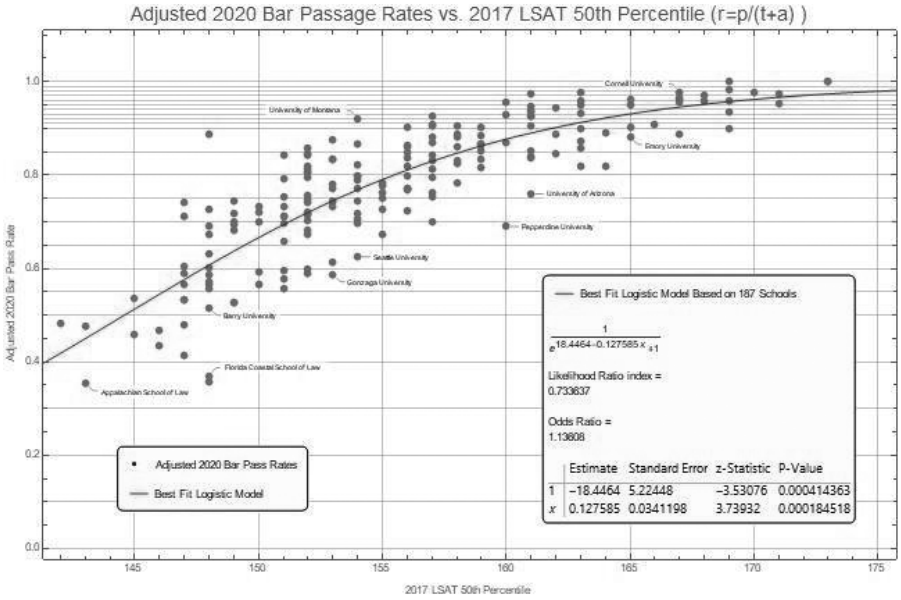
r_2' is the pass rate percentage if we pretend that the academically attritted students were not attritted but wrote the bar exam and failed. This measure makes an adjustment for the effects of academic attrition.

We have previously used this model and demonstrated the relatively substantial impact it has on Bar performance in an article where we compared the Florida schools' Bar performance before and after

181. *Id.*
182. *See id.*
183. For example, a school with low entering credentials.

adjusting the Bar pass rate for academic attrition.[184]Both rates r_1' and r_2' attempt to make comparisons between schools with vastly different academic attrition fairer. This is kind of like comparing "apples to oranges."

The following graph demonstrates, this model improves the measurement of Bar passage even more than Model 1 above, with a higher likelihood ratio index $R^2 = 0.734$.[185]



And Appendix 11[186] illustrates how the Bar performance rankings change when this model is used to incorporate academic attrition into the pass rate.

III. MODEL 3

Another variation of pass rate to account for attrited students is using the formula:

$$r_3' = \frac{p}{m} * 100,$$

184. *Impact of Matriculant Credentials*, *supra* note 16, at 17.
185. See Appendix *11*, *supra* note 179.
186. *Id.*

where
p = number of passers
m = number of matriculants
r'_3 is the percentage of matriculants to the school who pass the Bar exam on their first attempt, three years after entering law school. This measure directly measures a matriculating student's likelihood of passing the Bar exam and does not account for various factors such as transfers and students who do not take the exam three years after entering.

We mention this model only to demonstrate how complex the idea of accounting for attrition can be. Others may be able to generate even more accurate models that account for Bar passage than we have here. All we are demonstrating is that we are far from a place where the ABA should be using their current measure of Bar performance as the basis of accreditation decisions. That model is far too flawed for that.

Also, note here that simply by changing the modeling, many of the schools identified in *Secret Sauce* as underperforming and overperforming move out of those categories. And to demonstrate the empirical uncertainty of measuring Bar performance each of the pass rate models discussed so far are impacted by large numbers of students transferring in or out.

D. A Brief Word About Transfer Students

Proposing a model that accounts for transfer numbers in and out of an institution and the impact on bar performance is beyond the scope of this article, but it is important to not discount the impact of this metric. The following should provide context for why it is likely unethical and at least unjust to not account for transfer students in ranking institutional Bar performance.

During the 2021-2022 academic year, I was a visiting professor at Touro Law School and was shocked by the sheer number of requests from strong students asking me to write transfers for them at the end of their 1L year.

1. In 2018, Touro lost 18[187] students to transfer at the end of the first year out of a matriculant pool of 177 students admitted the year before[188];
2. In 2019, Touro lost 24[189] students to transfer out of a matriculant pool of 209[190] students admitted the year before;
3. In 2020, Touro lost 24[191] students to transfer out of a matriculant pool of 197[192] students admitted the year before;
4. In 2021, Touro again lost 24[193] students to transfer out of a matriculant pool of 208[194] students admitted the year before.

While Jerome Organ has compiled thorough data sets about transfer students in law school, my firsthand observations were that it was the strongest performing 1L students who were seeking to transfer out. The transfer students were largely students who were denied admission to schools with higher LSAT and UGPA matriculating credentials but admitted to Touro and excelled way beyond their matriculating credentials suggested in their first year and were at or near the top of the class by the second semester of the first year.

These top students then transferred to other schools based on their first-year grades, and their Bar success will be attributed to the schools they transferred into. Despite this reality which obviously reduces the Bar passage rate at Touro as currently measured by the ABA, the ABA ignores this completely for the purposes of Standard 316.[195] How can this reality and its impact on Bar passage be ignored in good conscience by the ABA and by the publishers of studies that ignore transfer numbers and unjustifiably rank Touro as one of the lowest Bar performing schools?[196] And, how can Bar performance be measured at the schools which receive large numbers of these top

187. *Touro University - 2018 Standard 509 Information Report*, A?. B?? Ass'?, https://www.abarequireddisclosures.org/Disclosure509.aspx [hereinafter *2018 Standard 509 Report*].

188. *Touro University - 2017 Standard 509 Information Report*, A?. B?? Ass'?, https://www.abarequireddisclosures.org/Disclosure509.aspx.

189. *Touro University - 2019 Standard 509 Information Report*, A?. B?? Ass'?, https://www.abarequireddisclosures.org/Disclosure509.aspx [hereinafter *2019 Standard 509 Report*].

190. *2018 Standard 509 Report*, *supra* note 186.

191. *Touro University - 2020 Standard 509 Information Report*, A?. B?? Ass'?, https://www.abarequireddisclosures.org/Disclosure509.aspx [hereinafter *2020 Standard 509 Report*].

192. *2019 Standard 509 Report*, *supra* note 188.

193. *Touro University - 2021 Standard 509 Information Report*, A?. B?? Ass'?, https://www.abarequireddisclosures.org/Disclosure509.aspx.

194. *2020 Standard 509 Report*, *supra* note 190.

195. *Id.* (indicating that the ABA does not take into consideration transfers under Standard 316).

196. *See* Ryan & Mueller, *supra* note 2, at 77 n.30, 78 n.32, 114-15 app. tbl. 2 (failing to account in their modeling and ranking for the relevant reality that large numbers of Touro's strongest students are lost to transfer).

transfer students without accounting for this influx of large numbers of students likely to pass the Bar based on their 1L grades at the institutions they transferred from?[197]

Access schools with diverse student populations like Touro end up being punished by the ABA for giving students with lower matriculating credentials an opportunity to enter the legal profession. After one year of law school, when these students overperform their entering credentials, they transfer to the very same, less diverse[198] schools that would have denied them admission. When these students pass the Bar at these "higher performing schools," it is these schools that get the credit in terms of Bar passage rates and no credit is given to a school like Touro. In fact, the ABA and *Secret Sauce* essentially punish Touro for admitting these successful students who, had they stayed at Touro, would likely have passed the Bar and increased the institution's Bar passage rate. This is simply an unconscionable redistribution of merit to perpetuate a racist status quo.[199]

E. Shortcomings of Any Model Incorporating Academic Attrition and Transfer Students

Despite the improvements we think incorporating attrition and transfer in the Bar performance metric create, the limitations of publicly available data create shortcomings to any model attempting to do so.

1. It is impossible to accurately assess the impact of transfers in and out, unless we have data on each individual student, to which school the student transferred, and what their Bar result was at that institution.
2. Some transfer students transfer for reasons unrelated to law school performance or ranking; to be closer to home, for example.
3. Our models and the apparent norms in modeling[200] compare matriculant credentials to Bar pass rates three years later, but unless we know when each individual matriculant took and

197. I documented a similar reality in South Florida years ago, and it has fallen on deaf ears obviously as studies of Bar performance continue to ignore transfer and attrition. I do not know what else must be done for this current and unjust measurement of Bar performance to stop.

198. *See* Rory D. Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 St. Mary's L.J. 991, 1016 tbl.1, 1041 (2022) [hereinafter *The Impossibility of Anti-Racism*] (indicating that diversity increases as we go down the rankings).

199. *See id.* at 1051, 1054.

200. *See* Ryan & Mueller, *supra* note 2, at 71 n. 12,n79, 80; *see also* Kinsler & Usman, *supra* note 117, at 193, 195.

passed the Bar we can only approximate the impact of academic attrition and transfer. For example, some students write the Bar exam two years after matriculation if they are in an accelerated program, part-time matriculants take more than three years. And some students delay writing the exam for other reasons.

4. We can assume that an academically attrited student after one year was an exceptionally low performing student and unlikely to pass the Bar. And ethical norms support this assertion,[201] but there may also be exceptions to this rule and some students academically attrited may have passed the Bar exam if they would have excelled in their second year of law school and beyond if they were not academically attrited.

All of this ultimately suggests that we are incapable of measuring and comparing institutional Bar performance in a meaningful way using the publicly available data.

The ABA's current measure using passers over takers is unacceptable. It is clear this metric, which supports Standard 316 is arbitrary, unjust and should be discarded. Unless the ABA is willing to track every transfer student in or out, when each matriculant sits for the Bar examination, specific attrition numbers for each institution and evaluate each institution individually and adjust for attrition and transfer the ABA should not and cannot compare institutional Bar performance.

Ultimately, though, the ABA's continued reliance on and support for this metric is distracting and prevents us from asking the bigger and more important questions about the Bar examination and its presumed validity and efficacy. In our next section, we suggest that the ABA either does not have a mathematician on staff or is a shill for the NCBE.

3. THE ABA EITHER DOES NOT HAVE A MATHEMATICIAN ON STAFF OR IS A SHILL FOR THE NCBE

Previously, we demonstrated that law reviews are incapable of properly vetting and discerning the validity of articles using mathematics.[202] Apparently, the ABA is also incapable of discerning which bar success theories are valid and which are not.

201. *See Impact of Matriculant Credentials*, *supra* note 16, at 8.
202. *Infra* to Section 1.

On February 11, 2022, the ABA sent a nationwide email[203] containing a link to *Secret Sauce* titled, *Which Law Schools Overperformed on the Bar Exam? Some are Unranked by US News*.[204] That link led to a description of the article and named the top 25 overperforming schools. Without reservation, the ABA emphatically repeated claims about Bar passage without even checking the accuracy of the study. For example, the ABA summary states:

> [The school] [ ] ranked No. 88 [ ] is another overperformer, but the result is less surprising because it has "invested heavily" in its students' success, the study said.
>
> Overall, top-performing schools are "not spending extravagantly more resources, and in many instances are spending less, than other schools to achieve bar success," the study said.[205]

Some legal scholars believe "law schools have a moral and professional obligation to graduate a diverse student body that is both prepared to practice law and prepared to pass the bar exam."[206] As the entity in charge of legal education, the ABA has an exponentially larger responsibility than law schools –and their 3L law review editors–to be more cautious before it repeats the results and recommendations of and places its imprimatur on studies it has not verified. This article has already demonstrated the injustice of posting first time Bar passage rates without posting more supporting information about the institution's attrition and transfer rates. And yet, the ABA managed to outdo itself by proffering an unverified study as a blueprint for meeting its own arbitrary accreditation standards.

One harm caused by the ABA's conduct is that it implies that Bar performance is a tangible and measurable metric when it is not. But the greater harm is that the ABA's conduct reaffirms the falsity that the Bar examination is valid because it subtly suggests that there are tangible transferable methodologies a school can and should employ to increase its performance on the examination. And we (the ABA) have determined it is so reliable an indicator of institutional efficacy and lawyer competency that we condition accreditation on the metric.

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203. *Id.*

204. *See* Debra C. Weiss, *Which Law Schools Overperformed on the Bar Exam? Some are Unranked by US News*, ABA J. (Feb. 8, 2022), https://www.abajournal.com/news/article/which-law-schools-graduates-did-better-than-expected-on-the-bar-exam-some-are-unranked.

205. *Id.*

206. *See generally* Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 20 (2019).

This is essentially very skillful advocacy for the continued use of the Bar examination.[207]

The ABA's behavior and accreditations standard seem to actively distract from the fact that the Bar examination was never designed to test competency but, from the beginning, was an exam designed to limit entry into the law profession and reduce competition among lawyers.[208] In some cases, it was adopted solely to keep people of color and immigrants out of the profession.[209]

South Carolina, for example, granted diploma privilege to law school graduates until 1886, but in 1888 the law was changed to give diploma privilege to graduates of only the all-white University of South Carolina.[210] In 1950 when South Carolina was forced to open a separate school for Black law students, the legislature introduced the Bar examination via a bill unapologetically designed to "bar Negroes and some undesirable whites' from the legal profession."[211] The current Bar examination administered by the NCBE remains horrifyingly efficient at keeping people of color out of the legal profession.[212]

In part, because of the gap between Black and white examinees on all standardized tests, law is one of the least diverse professions in the United States[213] and the ABA's own study demonstrates the Bar examination significantly causes this result.

> The ABA found a twenty-two percent discrepancy in the 2020 bar pass rates of white and Black examinees. Note that this disparity did not occur at the point of law school graduation; rather, it was the

207. *Id.* at 24 ("The intersection of plummeting bar passage rates, less qualified bar candidates, and inimical sentiment about the quality of state bar exams crease a perfect storm for the UBE to present itself as the savior for the bar exam.").

208. Michael S. Ariens, *The NCBE's Wrong-Headed Response to the COVID-19 Pandemic* 1, 7, 12 (Apr. 28, 2020) (unpublished manuscript) (on file with St. Mary's University School of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751.

209. Catherine M. Christopher, *Modern Diploma Privilege: A Path Rather Than a Gate* 7 (Oct. 5, 2021) (unpublished manuscript) (on file with Texas Tech University School of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936649.

210. *Id.* at 7.

211. *Id.* at 7–8.

212. *See generally The Impossibility of Anti-Racism*, *supra* note 197; *see also* Christopher, *supra* note 208, at 7 ("To take these rationales out of order, bar exams may have been deliberately designed 'to stunt the growth of new law schools that generally had less rigorous admission criteria and predominantly served immigrants and racial minorities.'").

213. Scripps News Staff, *There is a Lack of Diversity in the Law Profession*, Scripps News: In The Loop (Feb. 22, 2022), https://scrippsnews.com/stories/there-is-a-lack-of-diversity-in-the-law-profession/#:~:text=Law%20is%2C%20and%20has%20always,Americans%20account%20for%20about%208%25.

> bar exam itself that fenced many Black examinees out of the profession at an enormously disproportionate rate.[214]

The NCBE, recently published a short article that seeks to cast doubt on whether the Bar examination is exclusionary on the basis of race.[215] In that article the ABA suggests that the Bar examination is not exclusionary because "7.9% of examinees who took the bar from that [the 2019] class were Black, and 7.1% of examinees who passed the bar exam within the ABA's *two-year window* were Black."[216] The fact that the NCBE would publish this to reduce debate about racial inequities in the field without mentioning that "the passage rate for white first-time test-takers was more than 20% higher than the rate for Black first-time test-takers,"[217] should make us even more wary of the NCBE's self-advocacy for the Bar examination in its own publication.[218]

Given what we know about the power of system justification[219] and the Bar exam's track record of excluding people of color from the practice of law,[220] the ABA's continued reliance on the NCBE to determine who should and should not be allowed to practice law defies logic. Even worse, somehow, the ABA's insistence on basing accreditation decisions on bar passage unreasonably grants the NCBE the functional authority to determine which institutions should and should not be preparing future generations of attorneys for law practice.

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214. Christopher, *supra* note 210, at 34 (citing Karen Sloan, *New ABA Data Shows Stark Contrast in Bar Pass Rates Among Racial Groups*, LAW.COM (June 22, 2021), https://www.law.com/2021/06/22/new-aba-data-shows-stark-contrast-in-barpass-rates-among-racial-groups/).

215. *See* Danette Waller McKinely, *Focus on Diversity: The Bar Examination and Racial/Ethnic Diversity in the Legal Profession*, 91 BAR EXAMINER 12, 12–15 (2022), https://thebarexaminer.ncbex.org/article/fall-2022/focus-on-diversity-fall-2022/.

216. *Id.* (emphasis added).

217. Christine Charnosky, *New ABA Data Shows Disparities in Bar Passage Rates Among Racial Groups Persisted in 2021*, LAW.COM (May 2, 2022, 1:41 PM), https://www.law.com/2022/05/02/new-aba-data-shows-disparities-in-bar-passage-rates-among-racial-groups-persisted-in 2021/#:~:text=Radzinschi%2FALM,New%20ABA%20Data%20Shows%20Disparities%20in%20Bar%20Passage%20Rates%20Among,first%2Dtime%20test%2Dtakers.

218. The reality is:

> About 83% of law school graduates passed the bar exam on their first try last year, the ABA survey released Tuesday found. White first-time test takers passed at a rate of 88% in 2020, compared with 80% of Asians, 78% of Native Americans, 76% of Hispanics and 66% of Black test takers. By comparison, Whites passed at a rate of 85% in 2019, compared with 74% of Asians, 72% of Native Americans, 69% of Hispanics, and 61% of Blacks.

Sam Skolnik, *Bar Exam Race Gap Shown in New Passage Rate Data for Law Grads*, BL: BL ANALYSIS (June 22, 2021, 6:37 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/bar-exam-race-gap-shown-in-new-passage-rate-data-for-law-grads?context=Article-related.

219. *The Impossibility of Anti-Racism*, *supra* note 199, at 993–94, 96.

220. *See id.* at 1040 n.203.

Maybe it is circular inertia.[221] The ABA bases its accreditation decisions on bar performance, causing law school faculty to inevitably "turn to the NCBE for resources and allow it to play an even greater role in the legal education process."[222] And by increasingly injecting itself into the legal education process, the "unregulated and autonomous NCBE lurks in the shadows capitalizing on an opportunity to convince law schools that it, and only it, knows what law students should be taught and how to test them."[223] But it is worth asking if something more nefarious is afoot, because I can think of no more unproven testing metric which has not only survived but continues to be more widely accepted.[224]

The NCBE and the efficacy of the psychometric rationales for the exam structure are also shrouded in mystery and William Kidder demonstrates that "[a]t several critical junctures the NCBE's bar research has had a troubling tendency to minimize the disparate impact and unfairness of the bar for people of color."[225]

> Too frequently, it is the dreams and aspirations of people of color that are needlessly deferred because what the legal profession is most comfortable measuring (bar exams, law school grades, LSAT scores) results in greater racial/ethnic stratification than that which is not measured but is just as relevant to success in the legal profession. This bias is only exacerbated by recent efforts to raise bar-passing standards, a trend that is all the more ironic given that bar standards and law school admission standards were both more lenient when the legal profession was the exclusive province of white men.[226]

Since 2004, Kidder has demonstrated the inequity of the bar exam and dispelled the suspect studies the NCBE has conducted in support of the bar examination.[227] The bar examination's economic realities, in tandem with this nation's economic stratification, obviates the reality that the bar examination disproportionately harms people of color.[228]But when these racist realities are combined with the fact

221. It has always been this way, and continues to be this way, simply because it has always been this way.

222. Griggs, *supra* note 205, at 54.

223. *Id.*

224. *Id.* at 19, 42.

225. William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 581–82 (2004).

226. *Id.* at 582.

227. See *id.* at 566–67 (referring to insular scholarship).

228. Christopher explains:

that the bar exam does not measure minimum competency,[229] it becomes practically impossible to deny that the continued use of this horrible examination is a reality of American life: that money talks and reality walks.

Some suggest the NCBE is a monopoly,[230] and that may explain the power and persistence of its empirically unsupported refrain that the purpose of the bar examination is to protect the public by assuring that lawyers are minimally competent. As Catherine Christopher points out, this is a patently baseless narrative, and it is both remarkable and incredible that the ABA has not quashed this narrative.[231]

Steven Foster also recently demonstrated that performance on the bar has little to do with competency for the practice of law.[232] And remarkably, even though he asked the NCBE to participate in his

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> The financial advantage required to "devote ten weeks to unpaid memorization of legal principles" is more likely to accrue to white applicants than applicants of color Furthermore, bar examinees of color in 2020 were also preparing for the bar exam not only during a pandemic but during the social upheaval surrounding the police killings of unarmed Black men and women such as George Floyd, Ahmed Aubrey, Breonna Taylor, and too many others.

Christopher, *supra* note 210, at 36.

229. Specifically, Christopher argues:

> High cut scores on bar exams contribute to this lack of diversity, and if we as a profession were certain the bar exam accurately measured competence to practice, that would be one thing. But we aren't, so artificially high cut scores are merely serving a gatekeeping function to keep diverse lawyers out of the profession.

Id. at 35 (indicating that we are not certain the bar exam measures competency).

230. *See* Griggs, *supra* note 2057 at 38, 54; *see also* Ariens, *supra* note 209, at 2.

231. Christopher argues:

> Setting a minimum passing score for a bar exam thus risks being either underinclusive or overinclusive. No matter where a bar exam cut score is set, the licensure system will experience a "ratio of regret"—the system will either regretfully keep competent people out of the profession (if the passing score is set too high) or allow incompetent people into it (if the passing score is set too low.) In deciding where to set their jurisdiction's minimum passing score, licensure authorities must simply decide which direction and how much error they're comfortable with.
>
> Yet there is little to no guidance on what score on a bar exam constitutes "minimum competence." The NCBE, which authors the Uniform Bar Exam (adopted by 39 jurisdictions and counting), insists that a bar exam—its bar exam—is the most effective way to assess competence, but nevertheless expresses absolutely no opinion on what score on the UBE establishes minimum competence. This is puzzling, to say the least. The organization that holds its instrument out as the only psychometrically valid assessment of lawyer competence nevertheless leaves to individual jurisdictions to determine what score on the UBE constitutes a passing score. Leave the assessment to us experts, the NCBE urges, because jurisdictions don't have resources or expertise to write a bar exam. But somehow those jurisdictions are expected to know best what score on the NCBE's exam equals passing in their jurisdiction. The NCBE's abdication of expertise on this crucial point undermines the validity of the exam as an assessment mechanism.

Christopher, *supra* note 210, at 32.

232. Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. ONLINE 31, 33 (2021), https://kb.osu.edu/bitstream/handle/1811/92328/OSLJ_Online_V82_031.pdf?sequence=1&isAllowed=Y.

study, the NCBE refused.[233] Unless the NCBE is ready to go outside of its insular and imperial research bubble,[234] the NCBE should not have the large stake in legal education that it does. Hopefully, the ABA finally decides to get off its hypnotic inertia train and demand this as a condition of its continued use of and reliance on this exam.

But nothing dispels the notion that the bar exam is a measure of competency and professionalism more ironically and effectively than the state of Wisconsin. The NCBE is headquartered in Madison, Wisconsin.[235] And the state of Wisconsin does not require a bar exam for its graduates, but rather they grant diploma privilege to the graduates of their schools who practice in the state of Wisconsin.[236] Unsurprisingly Wisconsin lawyers are no less competent or professional than lawyers anywhere else.[237]

There is no empirically valid data in supporting the bar examination's efficacy to test competence and professionalism. But there is copious data about the harms the bar exam causes and the perpetuation of racial disparities in the profession.[238] There simply is no real or valid explanation the ABA continues to perpetuate the fantasy and

233. *Id.* at 35.

234. *See* Kidder, *supra* note 226, at 566–67 (explaining how this research is not shared or disclosed and uses a lot of self-citation).

235. Ariens, *supra* note 209, at 18.

236. *See id.* at 14, 18.

237. *Id.* at 18. Christopher argues:

> A study of Wisconsin attorneys analyzed those who were admitted via diploma privilege and those admitted by bar examination and found that "passing a bar exam had no strong statistical correlation with the number or rates of attorney disciplinary [matters] (ethical and/or incompetent representation) in Wisconsin." Nationwide, Wisconsin is average in terms of the rate of complaints against attorneys, and it files fewer disciplinary charges than other states, which does not suggest that diploma privilege causes a cesspool of unethical attorneys.

Christopher, *supra* note 210, at 37.

238. Curcio states:

> Pretending the existing exam is a valid screening measure brings unfortunate results. First, the current exam may delay or exclude from the practice some people who might be quite capable of being good lawyers-the kind of lawyers who research and think about a question before answering it, who look up the law that they do not know, who consult with more experienced counsel for issues they cannot answer, and who are more apt to work with underserved communities and do public service work. Thus, the exam may delay or exclude from the practice people who might be good lawyers but who are not good multiple-choice or timed test takers. The second unfortunate result of the current exam is that it admits into the practice people who do not possess the necessary breadth of skills new lawyers need. Under the current licensing process, people who can answer multiple-choice questions may get a law license even though they cannot stand up in court and answer a judge's question, cannot research the law, and cannot negotiate or perform factual investigations. Can we really claim to protect the public from incompetent lawyers when our licensing process does nothing to measure these skills that are so critical to good lawyering?'

Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 423 (2002).

pretend that the bar exam measures anything relevant to the practice of law and lawyer competence or incompetence. And according to Bloomberg Law 60% of the legal profession thinks the bar exam fails in its purpose of testing lawyer competency.[239]

In light of recent studies challenging some of the NCBEs claims,[240] this monopolistic and racist approach to bar admissions cannot continue. We, and many other authors, have suggested it is time for "the American Bar Association, state supreme courts, bar examiners, the Law School Admissions Council, the NCBE, and law schools to join efforts to share information, resources, and expertise in order to better assess student learning, law school curriculum, and bar exam performance."[241]

Even if the ABA refuses to thoroughly reexamine its reliance on the bar examination, at a minimum it must stop reporting bar passage rates and relying on these metrics to make accreditation decisions. If the ABA insists on permitting the reporting of first-time bar passage rates, then fundamental justice also requires these reports contain at the bare minimum:

1. What the bar passage rate would have been if the school did not academically attrit any students. In other words, these students need to be added back into the denominator of the fraction passers/takers which is currently used for calculating bar pass percentages
2. A report of how many of the students passing the bar were students who transferred into the school. Ideally these students should not be counted as "passers" in the passers/takers fraction because they were likely admitted to the school they graduated from because their first-year performance at another school indicated they did better than their matriculating scores indicated, and they were at very low risk for bar failure. To count these transfer-in students in the passers/takers fraction gives the transferee school undeserved credit.
3. Schools should also have to report how many of their top students transferred out. As mentioned in Section 2(D), to not ad-

239. Rachael Pikulski, *Analysis: Should the Bar Be Reconsidered? Lawyers Weigh In (1)*, BL: BL ANALYSIS, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-should-the-bar-exam-be-reconsidered-lawyers-weigh-in (last updated Aug. 8, 2022, 11:13 AM).

240. *See, e.g.,* Scott Johns, *Testing the Testers: The National Conference of Bar Examiner's LSAT Claim and a Roller Coaster Bar Exam Ride*, 35 MISS. COLL. L. REV. 436 (2017) (dispelling the NCBE's attempt to justify the continued use of the bar examination).

241. *Id.* at 463.

> just bar performance for the loss of large percentages of the top students at a school is inexcusable.

CONCLUSION

Writing this article is painful and frustrating and it challenges both authors' naïve immigrant views of the justice and fairness that distinguishes America from the rest of the world. It is absolutely heartbreaking to know we live in a world where money and system justification of an unproven examination render invisible the bar exam's systemic injustice and disparate impact on people of color. As Marsha Griggs points out, this article will fall on deaf ears, as the NCBE's empirically void claims and the ABA's apathy or laziness fuel a "juggernaut" that is dishearteningly unstoppable.[242]

Derek Bell reminds us,

> Discourse about race in America is mired in the sugarcoated myth that equality for blacks will be found just around the corner, as soon as the country completes its fitful but inevitably progressive journey toward enlightenment and justice.
>
> The myth is sweet but ultimately disabling and dangerous, he believes, because it denies to both blacks and whites understanding of a truth that is almost exactly the opposite: that racism is not a passing phase but a permanent feature of American life, and that the path is marked not by real progress but by occasional short-lived judicial or legislative victories that serve to obscure the underlying truth even more.[243]

Nothing reinforces this truth more than the spread of the UBE[244] and now the ABA's wholesale buy-in on the next gen bar exam. The fact that many law professors who sincerely believe they are anti-racist but still assist the same private Wisconsin corporation—with a history of racist[245] exams and secrecy—to create this new iteration of the

242. *See* Griggs, *supra* note 207, at 5, 19, 55.

243. Linda Greenhouse, *The End of Racism, and Other Fables*, N.Y. TIMES ARCHIVE, https://archive.nytimes.com/www.nytimes.com/books/00/06/04/specials/bell-well.html?scp=26&sq=End%2520of%2520tenure&st=Cse (last visited July 22, 2021).

244. *See* Griggs, *supra* note 207, at 5.

245. Harriot argues:

> The lack of a racist intent at the ABA or NCBE is irrelevant to racism, and Michael Harriot describes arguments to the contrary as "bullshit," that perpetuate[ ] racism because [they] allow the people playing keep-away with equality to concentrate inwardly instead of actually doing the hard work required to correct the persistent problems of white supremacy.

bar exam, only reinforces the impossibility of fairness and justice when powerful economic realities are at stake.

One small, but inadequate, step in the right direction would be for the ABA to repeal Standard 316, or at the very least work with mathematicians to develop a metric that does not willfully ignore attrition and transfer in evaluating bar performance. Until the ABA forbids the publishing of bar performance numbers based on passers/takers, they will continue to misinform the public and implicitly justify the validity of an unjust exam. Quite simply, the ABA is complicitly perpetuating the disenfranchisement of people of color in legal education and the practice of law, and it is up to us as legal scholars to hold them accountable.

See Michael Harriot, *Americans Don't Disagree About What Racism Is . . . White People Do*, THE ROOT (Nov. 20, 2018), https://www.theroot.com/americans-dont-disagree-about-what-racism-is-white-p-1830573275.

"Pioneers of an Interesting and Exciting Destiny": The Lives and Legacies of Howard's First Law Graduates

JOHN G. BROWNING

I. INTRODUCTION

When Philadelphia journalist John W. Forney regaled his readers in the fall of 1871 with a report on the commencement ceremony for Howard Law School's first graduating class, he grasped not only the significance of the moment, but also the adversity the newly-minted lawyers would encounter:

> I doubt whether the older and more extensive Law School connected with Columbia College, where the offspring of the other, and what is called the superior race, are educated, could show, all things considered, an equal number of graduates as well grounded and as completely armed for the battle of the future . . . They are the pioneers of an interesting and exciting destiny. With them, unlike their more fortunate white brethren, the bitterest struggle begins when they receive their sheepskins. They go to war against a tempest of bigotry and prejudice. They will have to fight their way into society, and to contend with jealousy and hate in the jury-box and in the court-room, but they will win, as surely as ambition, genius, and courage are gifts, not of race or condition, but of God alone.[1]

Indeed, the first graduates of Howard University's fledgling "Law Department," as it was then called, would be "pioneers of an interesting and exciting destiny," going on to blaze new trails as the first Black lawyers in multiple states. The paths they forged were beset with obstacles. In the most extreme cases, the hatred and bigotry predicted by John Forney manifested in racial violence, and for nearly all of the new lawyers, financial success remained elusive. And while some were political organizers and advocates for civil rights, all of

1. JOHN W. FORNEY, ANECDOTES OF PUBLIC MEN 180–81 (1873).

these first Howard Law graduates are as significant for who they were as for what they accomplished. They are "forgotten firsts," professional antecedents who paved the way for the Charles Hamilton Houston's and Thurgood Marshall's, the Constance Baker Motley's and the Pauli Murray's, who would inspire later generations of Black lawyers. A century and a half later, on the historic occasion of the nomination of the first Black woman to the United States Supreme Court, Justice Ketanji Brown Jackson acknowledged that she stood "on the shoulders of many who have come before [her]."[2] Later, upon her confirmation to the Court, she would evoke the "true pathbreakers" who made her achievement possible.[3]

Yet despite their historical significance as legal trailblazers, and as mentors and role models for successive generations, these first Howard graduates have been largely overlooked by historians. This article aims to remedy this injustice by examining the lives and legacies of these pioneers. First, this article will look at how John Mercer Langston—himself one of the nation's first Black lawyers—set out as Howard's inaugural law dean to create a national center for the training of Black lawyers, a distinction the school holds to this day. At a time when most lawyers, white or Black, entered the profession without formal training but having "read the law," Langston envisioned a rigorous training ground that combined coursework, practical exercises, and moot court arguments. After this introduction, the article will focus on the individual lawyers themselves.

Readers will note that this article examines more than just the ten lawyers known to have constituted Howard's first class of graduates of 1871. That is because records are not as clear as they could be, leading to ambiguity and contradiction about whether certain graduates were in the Class of 1871 or the Class of 1872. For example, while Howard's first female graduate, Charlotte Ray, was a member of the Class of 1872, Dean Langston insists in his autobiography that the

2. *Supreme Court Nominee Ketanji Brown Jackson's Confirmation Hearing Statement*, NPR (Mar. 21, 2022, 3:52 PM), https://www.npr.org/2022/03/21/1087889741/ketanji-brown-jackson-opening-statement-supreme-court-confirmation-hearing.

3. *Remarks by President Biden, Vice President Harris, and Judge Ketanji Brown Jackson on the Senate's Historic, Bipartisan Confirmation of Judge Jackson to be an Associate Justice of the Supreme Court*, THE WHITE HOUSE (Apr. 8, 2022, 12:33 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/08/remarks-by-president-biden-vice-president-harris-and-judge-ketanji-brown-jackson-on-the-senates-historic-bipartisan-confirmation-of-judge-jackson-to-be-an-associate-justice-of-the-supreme-court/.

school's "first class numbered ten persons, one lady and nine gentlemen."[4]

For every milestone like the confirmation of Justice Jackson, there are sobering reminders of the inequities that persist and the challenges that still remain in bringing diversity and inclusiveness to the legal profession. Incredibly, the percentage of Black attorneys actually decreased between 2011 and 2021, from 4.8% to 4.7%.[5] Understanding how the forgotten firsts of the past—attorneys who had to fight prejudice within the profession even as they struggled to protect civil rights before often biased, unsympathetic white judges and juries—became de facto advocates for social change yields valuable insights for the racial justice struggles of our present.

II. A LAW SCHOOL RISES

The official history of Howard University School of Law gives a fairly dry, brief account of how the institution came into existence: that after being chartered by Congress on March 2, 1867, "during a time of dramatic change in the United States," the leaders of Howard University realized that "[t]here was a great need to train lawyers who would have a strong commitment to helping [B]lack Americans secure and protect their newly established rights."[6] In reality, by the time of its charter, it had already been decided that the school was "to have six departments: first, normal; second, collegiate; third, theological; fourth, law; fifth, medicine; sixth, agriculture. While it is to be open to all persons, without regard to race or color, it is designed chiefly for colored men."[7] With regard to the law department itself, the *New York Evening Post* found it to be a "worthy" cause that "commends itself to the benevolent."[8] As it described the mission of such a law school, "[t]he colored race are [sic] entitled to have agents, advocates, and leaders of their own color, and can hardly have a better security

4. JOHN MERCER LANGSTON, FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL 298 (1894).

5. Karen Sloan, *New lawyer demographics show modest growth in minority attorneys*, REUTERS (July 29, 2021, 6:12 PM), https://www.reuters.com/legal/legalindustry/new-lawyer-demographics-show-modest-growth-minority-attorneys-2021-07-29/.

6. *Our History*, HOW. UNIV. SCH. OF L., http://law.howard.edu/content/our-history (last visited Feb. 17, 2023).

7. William Stearns, *The Early Histories of Historically Black Colleges and Universities, Part 1: Howard University*, READEX (June 17, 2021), https://www.readex.com/blog/early-histories-historically-black-colleges-and-universities-part-1-howard-university.

8. *Id.*

for their rights than a class of men trained to understand and apply the principles of jurisprudence."[9]

Getting a law school off the ground posed significant difficulties for the school's namesake and new president, Freedmen's Bureau Commissioner Gen. Oliver O. Howard, and Howard University's Board of Trustees. Critics of the university delighted in every setback; when a portion of the Howard University Hospital (formerly the Freedmen's Hospital) collapsed due to allegedly faulty bricks, newspapers around the country made accusations of rampant fraud and self-dealing.[10] Racism threatened the professional aspirations of young Black men and women. In 1870, the American Medical Association ("AMA") refused the credentials of Howard University, the medical department of Georgetown College, and other medical schools "because they permit consultation with colored physicians, even though they are regularly graduated."[11] And, of course, the two biggest obstacles loomed: money and leadership for the new law school.

For leadership, Gen. Howard and his committee turned to a person uniquely qualified to lead the vanguard of Black legal education: John Mercer Langston. On September 13, 1854, Langston had been admitted to the Ohio bar, becoming the first Black man to do so and only the fourth Black lawyer in U.S. history.[12] It had not come easily for Langston. Born in 1829 on the Virginia plantation of his white father, Captain Ralph Quarles, and his Black and Indigenous free mother, Langston had led a privileged life and graduated from Oberlin College with honors in 1849.[13] But when his ambitions turned to law, he found it a daunting task. As Langston would later recall:

> For the courts were all composed of white men and so were all the juries, and on the part of the former and the latter alike prejudice, strong and inveterate, existed against the colored litigant. Moreover, the very language of the law was so positively against the colored man in many cases, and construed often so as to affect his interests, so vitally and seriously . . . Thus the young colored man

9. *Id.*
10. *Id.*
11. *Id.*
12. WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829–1865, at 233–34 (1996).
13. *Id.* at 117.

> was invited to this calling by no prospect of success, by no example of a daring and courageous forerunner.[14]

John Mercer Langston would become that "daring and courageous forerunner" for future generations of Black lawyers. He was rejected by the two law schools to which he applied, the Cincinnati Law School and a private law school run by attorney J.W. Fowler at Ballston Spa in Saratoga County, New York.[15] When Fowler proposed that the light-skinned Langston "pass" as a Spaniard or Frenchman, Langston indignantly responded, "I am a colored American; and I shall not prove false to myself nor neglect the obligation I owe to the Negro race!"[16] After wondering "shall [B]lack talent be buried?" Langston first went back and obtained a theology degree from Oberlin, and then "read the law" under the tutelage of Philemon Bliss, a white lawyer and ardent abolitionist in Elyria, Ohio.[17] When Bliss pronounced Langston ready for the qualifying examination that would be administered by a committee of three local attorneys, Langston's troubles were far from over.[18] Despite the examining committee reporting to the district court that Langston was intellectually qualified to practice, of appropriate moral character and age, and a citizen of Ohio and the United States, the two Democrat lawyers on the committee pointed out that Langston was Black.[19] While state law did not recognize free Black people as entitled to the same rights of a white citizen, the court proclaimed Langston "white enough" and admitted him to the bar.[20]

Langston went on to a successful law practice in Ohio and became a national voice in the abolitionist movement. He lectured nationally on behalf of the National Equal Rights League, and helped recruit three Black infantry regiments for the Union Army during the Civil War.[21] After the war, he campaigned extensively for the Republican Party and for Ulysses S. Grant's 1868 presidential campaign, and he worked as an agent of the Freedmen's Bureau inspecting schools

14. LANGSTON, *supra* note 4, at 105.

15. *Id.* at 106; CHEEK & CHEEK, *supra* note 12, at 132.

16. LANGSTON, *supra* note 4, at 108.

17. CHEEK & CHEEK, *supra* note 12, at 226–27.

18. *Id.*

19. LANGSTON, *supra* note 4, at 125–25; CHEEK & CHEEK, *supra* note 12, at 234.

20. The court in all likelihood was mindful of an 1842 Ohio Supreme Court case establishing that a "nearer to white than [B]lack" person of mixed racial heritage was entitled to the rights of a white man. *See* Jeffries v. Ankeny, 11 Ohio 372 (1842).

21. CHEEK & CHEEK, *supra* note 12, at 391–96.

throughout the South.[22] All of these activities, showcasing his skills as a lawyer, orator, reformer, and administrator, brought him to the attention of Gen. Howard and the Board of Trustees. Only one obstacle remained: an 1867 resolution adopted by Howard's board prohibited the employment of any official of the university who was not a member of some evangelical church.[23] After Langston informed Gen. Howard that he was not a church member, the board voted to rescind the resolution. On October 12, 1868, John Mercer Langston was named dean and professor of law at Howard.[24]

The next hurdles to overcome would be recruiting a law faculty and housing the school. For the faculty, Langston turned to an ardent abolitionist and former wartime Congressman from Ohio: Albert Gallatin Riddle. Riddle was a well-connected Washington attorney. Judge Charles C. Nott of the U.S. Court of Claims also agreed to serve on the inaugural faculty, as did instructor Henry D. Beam, the chief clerk of the Freedmen's Bureau.[25] Langston's compensation as dean and professor of law was $3,000 annually.[26] Thus, Howard's law department began with something no other law school would achieve for years to come—a racially integrated faculty. As for where to hold classes, due to a lack of available space, classes were initially held three evenings a week in the homes and offices of the faculty members.[27] Later, and until space could be allocated in the main university building (Lincoln Hall), arrangements were made for the law department to use a room in the Second National Bank located at 509 Seventh Street NW.[28]

During the law department's developmental stage, Langston had traveled to multiple Southern states giving speeches about the embryonic law school and encouraging Black men and women to apply.[29] It wasn't an "easy sell" to convince Black freedmen to consider law school as an option. First, with only a handful of Black lawyers then practicing nationwide, most of those in Langston's audiences had

22. *Id.* at 7.

23. LANGSTON, *supra* note 4, at 297–98.

24. *Id.* at 298.

25. *Id.*

26. LANGSTON, *supra* note 4, at 299; RAYFORD W. LOGAN, HOWARD UNIVERSITY: THE FIRST HUNDRED YEARS, 1867–1967 (N.Y. 1969).

27. *Our History*, *supra* note 6.

28. *Id.*

29. David A. Straker, *The Negro in the Profession of Law*, 8 A.M.E. CHURCH REV. 178, 179 (1891).

likely never even met a lawyer who looked like them.[30] In addition, as of the late 1860s, the overwhelming majority of lawyers in the United States had received their legal education not from formal training in a law school, but through reading the law in the offices of an established member of the bar.[31] But as the Howard Law catalog from 1870–1871 indicates, admission requirements were fairly flexible:

> While a certain degree of mental discipline is indispensable to enable the student to master the principles of law, and while such preliminary training is recommended, any person of suitable age and good moral character may be admitted to the classes and exercises of the Department, the graduation of each depending on the regularity of his attendance, the diligence of his application, his proficiency in the studies pursued, and his success in passing the final examination and in presenting and delivering a legal dissertation acceptable to the Faculty, at the close of the course.[32]

From the backgrounds of the students who made up Howard's pioneering first class, a pattern emerges of a new class of young Black elites—formally educated, employed in professions like teaching or government service, politically active, and committed to equipping themselves with the legal acumen needed to protect the interests of the Black community. Those who fit this pattern included John H. Cook, David A. Straker, Charlotte E. Ray, Moses W. Moore, Abram W. Shadd, and George Mabson. However, Langston cast a wide net in his travels, and made a point to encourage young Black men who impressed him with their leadership skills to apply. This was certainly true of one member of the Class of 1872, Milton M. Holland of Texas, who had earned a Medal of Honor at the Battle of Chaffin's Farm as a sergeant major in the 5th U.S. Colored Infantry.[33]

Ultimately, with what the Board of Trustees called "a respectable number [having] already applied for admission," Howard's Law De-

30. Langston has been only the fourth Black person to earn admission to practice law in the United States. The first was Macon Bolling Allen (admitted in Maine in 1844, and in Massachusetts in 1845); the second was Robert Morris (Massachusetts 1847); and the third was George Vachon (New York 1848). *See* John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 Berkeley African Am. L. & Pol'y (2021).

31. Maxwell Bloomfield, American Lawyers in a Changing Society, 1776–1876 (Harv. U. Press 1976); Roscoe Pound, The Lawyer From Antiquity to Modern Times, 177–87 (1953).

32. *1870–1871: Catalog of Officers and Students of Howard University*, How. Univ. Catalogs 74 (1870), https://dh.howard.edu/cgi/viewcontent.cgi?article=1078&context=hucatalogs.

33. Howard University Alumni Directory, 1870–1919 (Howard U.); *Milton M. Holland – Working for Higher Education: Advancing Black Women's Rights in the 1850s*, Colored-Conventions.org; https://coloredconventions.org/women-higher-education/biographies/milton-m-holland/.

partment officially opened its doors on January 6, 1869.[34] It began with only six students, but by the close of June, enrollment had increased to twenty-two students.[35] After the "pre-law period," law classes began in September 1869. To enable students to afford their legal education (tuition was $40 per year), Langston and his colleagues used their connections to secure employment for the students in various federal government offices, especially the Freedmen's Bureau.[36]

The curriculum was rigorous. There were roughly twenty-eight courses, including common and commercial law, contracts, personal property, and equity jurisprudence. First-year texts included Walker's *Introduction to American Law*; Blackstone's *Commentaries*; Kent's *Commentaries*; and *Smith on Contracts*.[37] During the second year, students read *Greenleaf on Evidence*, *Hilliard on Torts*, *Washburne on Real Property*, *Stephen on Pleading*, *Bishop on Criminal Law*, *Parsons on Bills and Notes*, and *Adam's Equity*.[38] These subjects were taught via the lecture method, with classes meeting from five to eight o'clock p.m. at least three nights per week.[39] There were also forensic exercises one evening each week, consisting of "orations, both extemporaneous and written, debates, and essays upon legal topics."[40] Special attention was paid to "composition, elocution, and the essentials of correct and effective speaking."[41] For upper-class students, there was also a weekly moot court requirement, where students acting as counsel were "required to draw all papers and pleadings incident to the institution and conduct of the course and to deliver a carefully and thoroughly prepared argument."[42] On Sunday mornings, Dean Langston gave lectures on legal ethics.[43]

As part of the graduation requirements, each student had to pass a final written examination consisting of 100 questions on all areas of

34. Bd. of Trs. to L. Dep't., Jan. 4, 1869, *in* Langston Papers, How. Univ.

35. LANGSTON, *supra* note 4, at 305.

36. In his autobiography, Langston boasts that he had secured government employment for "as many as a hundred persons, male and female, colored and white." LANGSTON, *supra* note 4, at 105. This figure seems somewhat inflated, since total enrollment during his tenure did not exceed eighty-five.

37. *See generally* LANGSTON, *supra* note 4; Howard University Law Department, 1870–1871 (Pamphlet) (Howard U., 1871).

38. *Id.*

39. *Id.*

40. *1870–1871: Catalog of Officers and Students of Howard University*, *supra* note 32, at 51.

41. *Id.*

42. *Id.*

43. *Id.*

law, and to complete and deliver "a legal dissertation acceptable to the Faculty at the close of the course."[44] In addition, at the commencement exercises, graduating students were expected to deliver an oration on a given legal topic.[45]

On February 3, 1871, the commencement for Howard University Law School's first graduating class—ten strong—took place in the First Congregational Church of Washington, D.C.[46] It was historic in many ways, not the least of which is the fact that up until that date, a law degree had only been conferred on one Black person—George Lewis Ruffin at Harvard in 1869 (Langston himself was the first Black American to hold the title of "law professor").[47] It featured some of the most important speakers of the time: Howard University's president, Gen. Oliver O. Howard, Civil War hero Gen. William Tecumseh Sherman, Senator Charles Sumner, U.S. Attorney General Amos T. Ackerman, and Ohio Senator John Sherman.[48] All of them were keenly aware of the significance of the occasion, and all pointed to the progress made by the Black community since Emancipation. Senator Sumner, in particular, reminded the graduates of the great responsibility awaiting them.[49] He urged them to "always be on the side of human rights" and stated that "belonging to a race which for long generations has been oppressed and despoiled of rights, you must be vigilant and sensitive defenders of all who suffer in any way from wrong."[50]

John Mercer Langston would remain as dean of Howard Law School until 1875.[51] Although the school's enrollment continued to increase at first, the national economic downturn in 1873 resulted in financial struggles.[52] The law school actually closed in 1876 before

44. *1870–1871: Catalog of Officers and Students of Howard University*, *supra* note 32, at 51; *see also* LANGSTON, *supra* note 4, at 304.

45. *Id.*

46. *1871 - Howard University Law Department Commencement*, HOW. UNIV. COMMENCEMENT PROGRAMS (1871), https://dh.howard.edu/cgi/viewcontent.cgi?article=1001&context=hugradpro.

47. Jessie H. Ray, *Colored Judges: Judge George Lewis Ruffin*, 28:6 NEGRO HIST. BULLETIN 135 (Mar. 1965).

48. *1871 – Howard University Law Department Commencement*, *supra* note 46.

49. Address of Hon. Charles Sumner *in* Howard University Law Department, 1870–1871, at 14–15; *see also* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 44 (1993).

50. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 44 (1993).

51. *Id.* at 43.

52. LOGAN, *supra* note 26.

being revived in 1877.[53] Langston would go on to serve as a diplomat (first as U.S. Minister Resident to Haiti, and then as U.S. Minister Resident to the Dominican Republic), before becoming Virginia's first Black congressman.[54] But he always kept a close eye on Howard's first law graduates, noting their achievements with pride in his autobiography. Dean Langston had predicted that Howard's inaugural law graduates would have an outsized impact. He predicted that "[in] spite of popular prejudice," these graduates would be "called to the bench, to the senate, to fields of business enterprise, or the self-sacrificing struggles of reform."[55]

In the twentieth and twenty-first centuries, Howard University Law School has enjoyed the reputation of a key training ground for leading Black lawyers, judges, civil rights advocates, and politicians. But as this examination of the "forgotten firsts" of Howard's earliest law graduates reveals, it is a reputation that dates back to the law school's very beginning. The progress of Black men and women in the legal profession and the gains of the Civil Rights Movement would not have been possible without the trails blazed by these graduates.

III. MOSES WENSLEYDALE MOORE

Whether motivated by ignorance, the casual racism of the times, or perhaps a desire to overdramatize the achievement of Howard's inaugural law class, Philadelphia journalist John Forney made sweeping generalizations about the young graduates, proclaiming that "[s]ome of them had only a year before been unable to read and write . . . [n]early all had been slaves."[56] In reality, most had been born free and had attained some level of education. Moses Wensleydale Moore was one such graduate.

Strangely, while the Howard Law Commencement Program does not list Moore among the school's ten law graduates of 1871,[57] the *Howard University Directory of Graduates, 1870–1963* compiled by the University Registrar does list a "Moses Wensleydale Moore" as earning the LL.B. degree in 1871.[58] In addition, the *1870–1871 How-*

53. *Id.*

54. LANGSTON, *supra* note 4; William Cheek, *A Negro Runs for Congress: John Mercer Langston and the Virginia Campaign of 1888*, 52 J. NEGRO HIST. (Jan. 1967).

55. SMITH, *supra* note 50, at 45.

56. FORNEY, *supra* note 1.

57. *1871 – Howard University Law Department Commencement*, *supra* note 46.

58. HOWARD UNIVERSITY DIRECTORY OF GRADUATES, 1870–1963 (courtesy of Howard University Registrar's Office).

ard University Catalog of Officers and Students includes an "M.W. Moore" of North Carolina as being a member of the senior law class.[59] To confuse matters even further, the *1871–1872 Howard University Catalog of Officers and Students* lists "Moses Wensleydale Moore" of North Carolina as a 1872 graduate on pages 45–46.[60] In light of the fact that Moore was admitted to practice in the District of Columbia in 1871, and in November 1871 was admitted to practice in Alabama, the likelihood of Moore not graduating from Howard until 1872 is practically nonexistent. A more likely explanation is that staggered starting and completion dates led to some students not fulfilling Howard's graduation requirements by the time of the law school's February 1871 commencement.[61] While no corresponding commencement program exists, at least one scholar has noted that following the first commencement, "[t]hree more students received degrees in a special ceremony the following July."[62] Moore receiving his law degree in July, followed by his District of Columbia admission shortly thereafter and his November admission in Alabama, makes the most sense.

So who was Moses Wensleydale Moore? He was born on February 15, 1841, in Demerara, British Guiana (today the nation of Guyana), and so was a free man and citizen of the United Kingdom.[63] Moore was evidently educated; the passenger manifest of the ship *Koomar*, on which Moore traveled from London to the United States, lists his occupation as "schoolteacher."[64] Moore arrived on the *Koomar* at the Port of New York on October 19, 1867.[65] His initial sixteen months in the United States, before becoming one of Howard's first law students in 1869, are a mystery.[66] Howard's records list him as being from New Bern, North Carolina, and it is likely that some time after his arrival in New York, Moore found work—perhaps as a schoolteacher— in North Carolina.[67]

59. *1870–1871: Catalog of Officers and Students of Howard University*, *supra* note 32.

60. *1871–1872: Catalog of Officers and Students of Howard University*, HOW. UNIV. CATALOGS 74 (1871), https://dh.howard.edu/cgi/viewcontent.cgi?article=1003&context=hucatalogs.

61. *Id.*

62. Maxwell Bloomfield, *John Mercer Langston and the Rise of Howard Law School*, 72 RECS. OF THE COLUM. HIST. SOC'Y 432 (1972).

63. John G. Browning, *Blazing the Trail: Alabama's First Black Lawyers*, ALA. STATE B. (Dec. 27, 2021), https://www.alabar.org/news/from-the-alabama-lawyer-blazing-the-trail-alabam as-first-black-lawyers.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

As was the case with his fellow Howard graduates, Moore was first admitted to the District of Columbia Bar. For reasons unknown, Moore then made his way to Mobile, Alabama to start a law practice. In the former Confederate state, Black attorney candidates encountered difficulties entering the legal profession, despite admission standards being notoriously low. With formal legal education a rarity throughout much of the nineteenth century, most aspiring lawyers (white or Black) "read the law" in the offices of an established member of the bar. In Alabama, starting in 1819, lawyers wishing to practice before the state Supreme Court were required to stand for an unspecified examination; just two years later, the legislature enacted a law permitting "any two" circuit judges to license a candidate to practice in the circuit or county courts.[68] By 1852, the Alabama Code allowed any circuit or chancery judge to issue licenses to practice in trial courts.[69] This Code also specified that attorney candidates must be white men, aged twenty-one years or older, who would adhere to certain ethical obligations to be honest in court, courteous to opponents, and friendly to the "cause of the defenseless or oppressed."[70] Practically speaking, admission requirements remained what one scholar has described as "indulgent," yet as late as 1867, the Alabama Code still limited eligibility to "[a]ny white male."[71] In 1879, a report given to the fledgling Alabama State Bar Association by its Standing Committee on Legal Education and Admission to the Bar bemoaned the fact that the state's trial judges historically licensed a number of "persons so little prepared for the discharge of professional duties."[72]

Moses Moore was not among this ill-prepared crowd. After arriving in Mobile, the Howard graduate presented himself for examination for admission to the Alabama Bar in November 1871.[73] Circuit Judge John Elliott asked Lyman Gibbons, a retired justice of the Alabama Supreme Court, to test Moore.[74] The novelty of a Black man, and one with such impressive legal acumen, seeking admission to practice was noted by the city's newspaper:

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id*. Not until 1876—5 years after Moore's admission—did the Alabama Code replace that language with "any male." *See* ALA. CODE § 782 (1876).

72. Browning, *supra* note 63.

73. *Id.*

74. *Id.*

> . . . [the] examination was conducted in open court. A great deal of interest was manifested on the part of the bar . . . from the fact of the applicant's color. He passed a very satisfactory examination, and an order was made by the Court admitting him to the bar. This is the first negro admitted to the bar in Mobile.[75]

In fact, Moore was the first Black attorney admitted in the entire state.[76] Four months later, while living in Selma, Moore sought admission to practice before the Alabama Supreme Court. As the Minutes of the Supreme Court reflect, Moore was admitted on January 4, 1872. His sponsor was Patrick Ragland, then serving as the Court's Marshal and Librarian. The Court's record noted that Moore was "of lawful age and of good moral character," and that he had been admitted to practice law in the Supreme Court of the District of Columbia.[77] It pronounced him fit to be "licensed as an attorney of law and solicitor in Chancery in all the courts of law and equity in this state . . . ."[78] One Alabama newspaper lauded Moore's achievement in a decidedly backhanded fashion, welcoming his admission as initiating "an age of progress, [for] ten years ago who would have believed that a Negro was capable of learning the law sufficiently to practice in the Supreme Court."[79]

Despite breaking the Alabama Bar's color barrier, little else is known of Moore's practice in Alabama. By June 12, 1879, he was married and living in Lowndes County, Mississippi.[80] According to government records, while in Mississippi, Moore applied for a U.S. passport.[81] According to the *New York Globe*, Moore was working in France at Paris' Academe Polytechnique by 1883.[82] What could have compelled Moses Moore to leave his unique and hard-won status as Alabama's first—and, for a time, only—Black lawyer? There are many possible explanations, one of which is lack of financial success. Prospective clients who were white were not likely to hire a Black lawyer, while Black clients often lacked the means to hire one of their

75. *Id.*

76. *Id.* While John Carraway is sometimes identified as Alabama's first Black lawyer, the circumstances surrounding Carraway's purported 1870 admission are dubious, and contemporary newspaper accounts contradict Carraway's claim of having passed an examination. Carraway's death just months later did not clarify the question.

77. *Id.*

78. *Id.*

79. MONTGOMERY DAILY STATE J., Jan. 5, 1872.

80. Browning, *supra* note 63.

81. *Id.*

82. *Id.*

own, and those that did frequently thought they would stand a better chance of success with white representation. As a result, it was not uncommon for early Black lawyers to supplement their income through teaching or journalism, or to seek political patronage jobs in the federal government.[83]

Racially motivated hostility is an equally plausible explanation. As one historian observed, "assaults against [B]lack lawyers were prevalent in Alabama before 1895."[84] When A.A. Garner, a Black lawyer in Montgomery, defended Jesse C. Duke —the editor of a Black newspaper who had written an anti-lynching article suggesting that white women could be sexually attracted to Black men and pursue consensual relations with them—Garner was given twenty-four hours to leave town.[85] Additionally, when Thomas A. Harris, a Black lawyer admitted in Montgomery in 1890, later tried to start a practice in Tuskegee, a white mob shot him in the leg and "chased . . . Harris out of the city for establishing a law practice."[86] Harris' assailants were never indicted.[87] Across the South, as federal troops withdrew with the end of Reconstruction and as violence against Black people escalated, many of them (including lawyers) fled for jurisdictions that promised more tolerance and better opportunity, such as Kansas and Oklahoma.

Of course, Moses Moore was just one of the early trailblazers to come out of Howard and others would follow.

IV. JOHN H. JOHNSON

At Howard's first law school commencement, among members of the graduating class chosen to give an oration was John H. Johnson of St. Louis, Missouri. He spoke about the "Exclusion of Evidence."[88] Had he been given the opportunity, no doubt Johnson could have also waxed eloquently on the bitter byproducts of racial hatred that he had encountered in his life leading up to his 1871 graduation. After all, just 50 years earlier, Missouri had entered the Union as a slave state, the result of the first congressional attempt to broker a solution to

83. SMITH, *supra* note 50, at 104.
84. *Id.* at 273.
85. William L. England, Jr., The Coalition of Southern Negros, 1886-1889, As Viewed by the New York Age, 98-99 (June 17, 1972) (Master's thesis, Butler University).
86. Manning Marable, *Tuskegee and the Politics of Illusion in the New South*, 8 BLACK SCHOLAR 13, 16 (1977).
87. *Id.*
88. *1871 - Howard University Law Department Commencement*, *supra* note 46.

America's tolerance of slavery—the Missouri Compromise.[89] As a border state, Missouri witnessed brutal violence by multiple factions during the Civil War and racialized violence abounded during Reconstruction. As General Clinton Fisk, a senior official with the Freedmen's Bureau, described post-war Missouri:

> Slavery dies hard. I hear its expiring agonies and witness its contortions in death in every quarter of my district . . . late slave owners . . . have driven their Black people away from [the old plantations] with nothing to eat or scarcely to wear. The consequence is . . . the poor Blacks are rapidly concentrating in the towns and especially at garrisoned places. . . . There is much sickness and suffering among them; many need help.[90]

Violence flourished, in part due to the fact that unlike the slaveholding states of the Deep South, Missouri had never officially seceded from the Union and was not placed under federal military occupation or required to ratify the Reconstruction Amendments to the Constitution in order to rejoin the Union.[91] Lacking resources, training, and education, freed Black people were subjected to violence and a wide range of anti-Black sentiment. Even many who had opposed slavery resented the newly-freed numbers who were crowding into towns and cities, and editorials calling for Black migration to Liberia—forced or voluntary—were not uncommon. As one account in the *Lexington Weekly Caucasian* proclaimed:

> We want to see [ex-slaves] all quietly and happily settle in Liberia, where they may indeed enjoy the full blessings of liberty . . . equality, and fraternity . . . Here, these blessings can never be enjoyed by the African, and he is an enemy to the race who would legislate enactment, or by persuasion, induce him to believe otherwise . . .[92]

While John H. Johnson's early life remains a mystery, he clearly came of age at a time when racial prejudice in Missouri was rampant. Yet, even without Black lawyers to look to for role models, Johnson was determined that he could break the profession's color barrier. After graduating from Howard in February 1871, Johnson returned to

89. To maintain a balance in the Senate, Sen. Henry Clay proposed 1821's Missouri Compromise, under which Maine entered as a free state and Missouri sought admission as a slave state.

90. LORENZO J. GREEN, GARY R. KREMER & ANTONIO F. HOLLAND, MISSOURI'S BLACK HERITAGE 91 (2d ed. 1993).

91. WALTER JOHNSON, THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES 141 (2020).

92. GREEN ET AL., *supra* note 90, at 92.

St. Louis to prepare and seek admission to the Missouri Bar.[93] On December 7, 1871, at a time when more than two-thirds of Black males in Missouri were eking out a living as farm laborers and the color of his skin prevented him from being allowed inside a St. Louis streetcar—John H. Johnson became Missouri's first Black lawyer.[94] Predictably, the novelty of the occasion made the newspapers with the *New National Era* writing, "In St. Louis on Thursday last an unusual scene in the Supreme Court of that city, it being the enrolling as a practicing lawyer of the State of John H. Johnson, belonging to an old Creole family in St. Louis."[95]

The newspaper's deliberate reference to Johnson's purportedly multiracial background as a member of "an old Creole family" was similarly predictable. Multiple newspaper accounts of early Black lawyers in various states take great pains to note these lawyers' mixed heritage, as though only the presence of white or other non-African ancestry could account for the intellectual achievement of becoming a lawyer.[96] Less predictable, however, was the identity of the lawyer who sponsored Johnson for admission, A.J.P. Garesche.

Described as a "bitter Democrat and secessionist during the war," Garesche nevertheless supported the notion of Black lawyers being admitted to the bar as a matter of political right. Despite the newspaper's description of Johnson as "a talented and highly cultivated young man,"[97] Garesche made it clear that he would never accord Black people to the same social standing as whites:

> [W]hile I will maintain ever the distinction between political and social equality, I shall necessarily deny that they are synonymous terms, but the law has granted to the people of color political equality and however I may depreciate the manner in which it has been brought about, still it is an accomplished fact, and I do honestly believe that lasting, though peace will never be secured, or real harmony obtained, until a cheerful acquiescence is given to the principle.[98]

In a state that would not end the segregation of it law schools until 1938,[99] John H. Johnson took the courageous step of integrating

93. *See generally id.*
94. *A Colored Lawyer*, New Nat'l Era and Citizen, Dec. 14, 1871.
95. *Id.*
96. *See, e.g.*, John G. Browning & Carolyn Wright, *We Stood on Their Shoulders: The First African American Attorneys in Texas*, 59 How. L.J. 55 *passim* (2015).
97. *A Colored Lawyer*, *supra* note 95.
98. *Id.*
99. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

Missouri's Bar 67 years earlier. Johnson does not appear to have been active as a practicing attorney (perhaps due to the challenges of attracting enough clients to sustain a practice); instead he was employed as a clerk in the Customs House in St. Louis, working there since at least 1874.[100] But, he also served as an advocate for the Black community. In particular, he was active in the Colored Emigration Aid Society.[101] Originally founded to assist Black people uprooting their lives after the Civil War, the Society's work took on new importance with the need to assist those fleeing the increased racial violence and dispossession in Southern States that accompanied the end of the Reconstruction Era and the withdrawal of federal troops.[102] Thousands of such "Exodusters" relocated to Kansas and other states. Many in this mass exodus arrived in St. Louis beginning in 1879 and Johnson helped mobilize aid in feeding, housing, and supplying the impoverished immigrants.[103] He served as the treasurer of this "colored refugee board of St. Louis."[104]

However, Johnson's importance was not just limited to coordinating humanitarian aid. He was a powerful voice for the suffering refugees, testifying in 1880 before a special U.S. Senate Committee on the Black flight from the South.[105] Johnson's testimony is heartbreaking, as he described the plight of the "destitute and helpless" flooding into St. Louis: "[S]ome of them had nothing but rags and some had on old clothes very much worn; they were very poor for the commencement of the fall down South, let alone the winter in St. Louis."[106]

Testifying that if the typical Black person "had his rights under the Constitution he would remain" in the South, Johnson shared with the Senators the reasons Black people were fleeing, from white landowners keeping the formerly enslaved in a different form of economic servitude, to denial of their rights, to terroristic killing and sexual violence:

> They stated that they had no security for life, limb, or property; that they worked year in and year out, and notwithstanding [that] they

100. Willie J. Epps, Jr., *Black Lawyers of Missouri: 150 Years of Progress and Promise*, 86:1 Mo. L. Rev. 13 (2021).
101. *Id.* at 14.
102. *Id.* at 14–16.
103. *Id.*; *see also* Nell Irvin Painter, Exodusters: Black Migration to Kansas After Reconstruction (1976).
104. John Aaron Wright, Discovering African American St. Louis: A Guide to Historic Sites, 16–17 (2d ed. 2002).
105. Negro Exodus From Southern States, S. Rep. No. 46-693, pt. 2, at 288–302 (1880).
106. *Id.* at 290.

> raised good crops, they were at the end of the year in debt; that they were charged exorbitant prices for provisions, and all these things kept them down and in debt. The high prices charged the for lands and the denial of their rights as citizens induced them to leave there and seek a genial spot where they could have an opportunity to build themselves and their families. Some of them stated that they had been on plantations alongside of theirs where men were shot down for political purposes, and the women stated all the impositions practiced on colored women in the South.[107]

Some of the narratives conveyed by Johnson are akin to wartime atrocities:

> One old lady stated to me, when I saw her at the levee, that she was from Louisiana, and that while she and another colored woman were on their way to the boat to come to Kansas some White people met them and asked them if they were going to Kansas; they said that they were, and this White man said, "God damn it, you will get there some time or other." One of the women was seven months gone in a family way, and she said she was going to join her husband, when the White man pulled out his revolver and shot her; and the child came to life and he took it and mashed its brains out. There were other cases of the same kind which were stated to me by various parties.[108]

Like his fellow first graduates of Howard's law school, John H. Johnson made his mark as the first Black lawyer in a previously lily-white bar. And while he did not leave behind a legacy of cases argued, he was a humanitarian when the Black community desperately needed one, as well as an activist who gave voice to his people's suffering.

V. CHARLES N. THOMAS

Charles N. Thomas's Howard graduation oration was on "Trial by Jury," and it may have been prophetic: he would go on to earn a reputation as a skilled trial lawyer in the District of Columbia's courts. A Pennsylvania native, there is no indication that Thomas ever sought to return and practice in his home state, and perhaps with good reason. The Keystone State had a history of racist treatment of Black lawyer candidates. George Boyer Vashon was rejected by the Allegheny County bar on racial grounds when he sought admission in 1847, but

107. *Id.*
108. *Id.* at 290–91.

was admitted without issue in New York. In 1867, Vachon applied again to the Allegheny County bar, only to be denied again (he was admitted to the U.S. Supreme Court bar in 1868, and became the first Black lawyer admitted to practice in the District of Columbia in 1869). In 2010, the Pennsylvania Supreme Court posthumously admitted Vashon.[109] Jonathan Jasper Wright, who eventually became the first Black lawyer admitted in Pennsylvania (and who would go on to not only be admitted in South Carolina, but to serve as a justice on that state's Supreme Court) was also initially denied admission to the Pennsylvania bar.[110]

Thomas's career got off to a fast start, thanks to Professor Riddle moving for the members of the Class of 1871's admission to practice in the District of Columbia. Thomas's first job was actually working in Riddle's law office, not only on matters pending before the D.C. Supreme Court, but also on property damage disputes before the various war claims commissions.[111] As proof that the law makes for strange bedfellows, Thomas the Black lawyer handled claims before the Southern Claims Commission, representing "Southern loyalists against the government for . . . supplies taken or furnished to the U.S. Army during the rebellion."[112] Thomas knew that as one of the few Black lawyers, he had to market himself particularly to the Black community to succeed. He advertised in publications like Frederick Douglas' *New National Era and Citizen*, a weekly newspaper intended to "cheer and strengthen [the recently emancipated slaves]."[113] Frequently, the Black press would also assist their advertisers, and new lawyer Thomas was no exception:

> We call the attention of our readers in the South to the advertisement in another column of Charles N. Thomas, Esq. Mr. Thomas is prepared to prosecute the claims of any against the government; we can recommend him as an energetic and highly trustworthy lawyer. Colored men of the South having claims against the government can do no better than to put their affairs in his hands. We will gladly

109. John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. OF AFR. AM. L. & POL'Y 1, 13 (2021).

110. J. Clay Smith, Jr., *The Reconstruction of Justice Jonathan Jasper Wright*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA (James L. Underwood & W. Lewis Burke, Jr. eds. 2000).

111. SMITH, *supra* note 50, at 130.

112. NEW NAT'L ERA AND CITIZEN, July 20, 1871, at 4.

113. *Id.*

> accept through our offices any charges to be entrusted to Mr. Thomas.[114]

But it would not be a steady diet of wartime damage claims for Thomas. In 1873, he made history as the first Black lawyer to try a criminal case in the District of Columbia. It was a widely-covered murder case, in which Thomas (aided by his former law professor, Albert Riddle) defended Sam Rainey, who was charged with killing J.A. Tucker.[115] Thomas' skilled advocacy received praise in the media, with one newspaper describing his closing argument as "legal, able, and convincing."[116] After his persuasive display, the prosecution agreed to reduce the murder charge to manslaughter in what was called a "triumph for the defense."[117]

Thomas's growing reputation expanded beyond government claims and criminal defense to domestic relations matters as well.[118] In addition to legal work, a government appointment came along as his professional profile grew. In 1873, Governor Alexander R. Shepherd of the District of Columbia appointed Thomas as one of the District's fire commissioners, a position that meant a steady federal salary to supplement his practice income.[119]

Unfortunately, that appointment may have cost Thomas a chance at becoming the District of Columbia's first Black judge (not to mention one of just a few Black lawyers nationally to join the ranks of judicial officers). Thomas was considered for the post of justice of the peace for the District of Columbia, a position that was a presidential appointment.[120] Cognizant of the importance to the Republican Party of courting the Black vote, President Rutherford B. Hayes had chosen to bestow at least one of the judicial slots to a worthy Black lawyer. But when word spread that Thomas was being vetted for the post, the *Washington Star* charged that there was a conflict of interest, likely because of Thomas's federal pay from his fire commissioner role.[121] Instead of Thomas, the plum historic appointment was given to John A. Moss, an 1873 Howard law graduate known as "Common-Law John" because of the cases he handled before the Supreme Court of

114. New Nat'l Era and Citizen, Feb. 16, 1871.
115. Charles N. Thomas, Esq., New Nat'l Era and Citizen, Sept. 25, 1873.
116. *Id.*
117. *Id.*
118. New Nat'l Era and Citizen, Feb. 15, 1872.
119. Daily Nat'l Republican, Mar. 26, 1873.
120. *Id.*
121. Wash. Star, June 17, 1878.

the District of Columbia.[122] Moss would become a Washington fixture, and be reappointed by Presidents James Garfield and Grover Cleveland.[123]

It was once said that being one of the pioneering Black lawyers in Washington, D.C. demanded "a combination of moral strength, mental resourcefulness and physical completeness."[124] Charles N. Thomas certainly embodied these qualities.

VI. GEORGE L. MABSON

George L. Mabson was the only member of Howard's first law graduates to not avail himself of the opportunity for admission to the District of Columbia bar. That might be because the young man from New Hanover County, North Carolina always knew he would return to the Tar Heel State to pursue a career in law and politics. He forged alliances, like one early on with a former Union General, Joseph C. Abbott. Abbott, newly elected as a U.S. senator in 1868, helped Mabson secure a coveted position as a police officer of the U.S. Capitol, "with the understanding that he was to devote his leisure hours to the study of law."[125] In 1869, Mabson enrolled in Howard's new law department and its two-year program. But even in law school, Mabson's political ambitions were also clear.

At a May 2, 1870, parade and "Day of Jubilee" in Wilmington to mark the passage of the 15th Amendment, a number of politicians and other dignitaries spoke. But the *Wilmington Post* seemed particularly taken with one of the speakers, Howard Law student George Mabson, who spoke not only about celebrating, but about the need for change—particularly where racial equality was concerned:

> The Fifteenth Amendment is today a part and parcel of the fundamental law of the land, and we are citizens of this great republic in land and in fact . . . But while it is true that a great battle has been fought and won, won too by the Republican Party, the mission of that party is not consummated. Upon the statute books of this nation the word "white" still remains. Our laws are still unequal . . . [U]ntil we strike out the word "white" from our naturalization laws, which is the last remaining vestige of slavery, we will have failed to

122. *John A. Moss, Landmark of Court, Dies, Oldest D.C. Colored Attorney Called "Common-Law John" Dead at 77*, THE EVENING STAR (Washington), May 5, 1921.
123. *Id.*
124. *Attorney at Law and Examiner in Chancery*, WASH. BEE, June 22, 1918.
125. NEW NAT'L ERA AND CITIZEN, June 29, 1871.

> do an essential thing to make citizenship to the colored men of America glorious and sublime."[126]

Upon graduating from Howard in 1871, Mabson faced the daunting task of making history by becoming the first Black lawyer admitted in North Carolina.[127] Mabson was examined by three justices of the North Carolina Supreme Court: Chief Justice Richmond M. Pearson, Justice Edwin G. Peale, and Justice William B. Rodman.[128] Mabson's certificate of good moral character was signed by the required three members of the practicing bar, in this instance Adam Empil, Griffith J.M. McRea, and Congressman A.M. Waddell.[129] As the newspaper later reported, the justices "acting like true and honorable men to their calling . . . only demanded of Mr. Mabson what they did of white men —proof of good moral character and sufficient knowledge of the law."[130] And so, on June 16, 1871, George L. Mabson was admitted to the bar in Raleigh, becoming "the first colored man . . . ever permitted to be a lawyer in North Carolina."[131]

"Permitted to be a lawyer"—it is a curiously honest phrase betraying a tacit recognition of the fact that the equality of Black intellectual talent was a given. It was simply a matter of whether or not Black lawyers would be allowed the same opportunities as white candidates. And Mabson would have the chance to prove his worthiness soon enough. Just days after his admission, Mabson defended Wesley Nixon in a murder trial in Edgecombe County.[132] He won an acquittal.[133] Not long after that, Mabson defended Jemmie Lee in another murder trial, this time in Raleigh. Again, he prevailed with an acquittal for his client.[134]

Mabson, long a Republican political organizer and activist, was appointed a justice of the peace by Governor William W. Holden, but his sights were set higher. He was elected to North Carolina's state senate in 1872,[135] but was unsuccessful in a bid for a congressional seat

126. *The Day of Jubilee*, WILMINGTON POST, May 5, 1870.
127. SMITH, *supra* note 50, at 201–02; *see also George Lawrence Mabson, Lawyer Born*, AFRICAN AM. REGISTRY (aaregistry.org).
128. NEW NAT'L ERA AND CITIZEN, *supra* note 125.
129. *Id.*
130. *Id.*
131. *Id.*
132. NEW NAT'L ERA AND CITIZEN, July 20, 1871, at 4.
133. *Id.*
134. *Id.*
135. Monroe N. Work, Thomas S. Staples, H. A. Wallace, Kelly Miller, Whitefield McKinlay, Samuel E. Lacy, R. L. Smith & H.R. McIlwaine, *Some Negro Members of Reconstruction Conventions and Legislatures and of Congress*, 5:1 J. NEGRO HIST. 78 (1920).

in 1874.[136] But, a consistent theme in Reconstruction politics was the tension and infighting between white Republicans (the so-called "Conservatives") who welcomed the Black vote but not necessarily Black officeholders, and the Black members of the party who sought an equal voice in governance. One such example of this divide was the 1870 dispute over whether to abolish special courts created under North Carolina's 1868 constitution. The courts in Wilmington and New Bern heard local criminal matters, and Black leaders credited them with restraining crime and reducing disorder. George Mabson published a letter supporting the courts, crediting them with the "improved condition of the public morals and the public peace."[137] But, Democrats and many white Republicans were leery of leaving this much governance in the hands of a majority Black electorate rather than by appointment, and on March 30, 1871, the special courts were abolished.[138]

Mabson's political success could be attributed to a number of factors, including his intellect, ambition, and legal training. He also had a background of military service, serving first in the U.S. Navy and then the 5th Massachusetts Cavalry Regiment during the Civil War. He was also the nephew of formerly enslaved Union sailor William Gould, whose diary provided a rare glimpse into the life and service of Blacks during the Civil War.[139] But undeniably, Mabson's status as one of the educated Black elite helped make him more acceptable to both white and Black voters. As one scholar has pointed out: "In the 1870s, one strategy of Wilmington's [B]lack political class was to embrace respectability as a way to combat Democratic portrayals of wild and unready blacks dominating their white superiors."[140] Mabson, the recognized biracial son of a Black woman, Eliza Moore, and a prominent member of Wilmington's antebellum white gentry, George W.

136. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 192 (La. State U. Press 1996).

137. WILMINGTON POST, Dec. 11, 1870.

138. Act of Dec. 11, 1870, ch. 160, 1870 N.C. Sess. Laws 242 (abolishing the special courts of Newbern and Wilmington).

139. *See, e.g.*, WILLIAM B. GOULD IV, DIARY OF A CONTRABAND: THE CIVIL WAR PASSAGE OF A BLACK SAILOR (Stan. U. Press 2002).

140. Thanayi Michelle Jackson, "Devoted to the Interests of His Race": Black Officeholders and the Political Culture of Freedom in Wilmington, North Carolina, 1865–1877 (2016) (Ph.D. dissertation, University of Maryland) (on file with the Digital Repository at the University of Maryland).

Mabson had a comfortable upbringing and was educated in Boston.[141] He moved, whether easily or not, between two very different worlds.

VII. ABRAM W. SHADD

Abram W. Shadd of Pennsylvania gave his Howard Law graduation oration on "Popular Prejudices"; as a member of a free Black family of active abolitionists, certainly the topic of prejudice was a familiar one.[142] Shadd was one of thirteen children born to a free Black couple, Abraham Doras Shadd and Harriet Burton Parnell.[143] The family originally lived in Wilmington, Delaware, where Abraham had a shoemaker's shop. Later, they moved to nearby West Chester, Pennsylvania after it became illegal to educate Blacks in Delaware. In both states, Shadd was active as a conductor on the Underground Railroad and in the American Anti-Slavery Society.[144] In 1833, he became President of the National Convention for the Improvement of Free People of Color in Philadelphia.[145]

Abram was born in Pennsylvania in 1844. But in 1851, soon after the passage of the Fugitive Slave Act of 1850 put both escaped slaves and free Black people at risk of being kidnapped and sold into slavery, his father moved the family to Canada. The Shadds eventually settled in North Buxton, Ontario.[146] In 1858, Abraham Shadd became one of the first Black men elected to political office in Canada after being elected Counsellor of Raleigh Township Ontario.[147] His son Abram received his early education in Ontario and was a young teacher there in the early days of the Civil War. His older siblings, Isaac Shadd and Mary Shadd, were active abolitionists who edited a newspaper, *The Provincial Freeman*.[148] Abram enlisted in the 55th Massachusetts Regiment, and during the Civil War rose from the rank of private to sergeant major.[149] After briefly returning to teach in Canada after the

141. *Id.* at 326.

142. *1871 – Howard University Law Department Commencement*, *supra* note 46.

143. Jane Rhodes, Mary Ann Shadd Cary: The Black Press and Protest in the Nineteenth Century 63 (Ind. U. Press 1999).

144. Mary Ellen Snodgrass, The Underground Railroad: An Encyclopedia of People, Places, and Operations 480 (Routledge 2015).

145. *Id.*

146. *Id.*

147. *Id.*

148. Rhodes, *supra* note 143, at n.26.

149. *Abram Shadd*, BuxtonMuseum.com (last visited Feb. 17, 2023).

war, Abram moved to Detroit, where he operated a photography shop and read the law.[150]

With the opening of Howard's law department, Shadd promptly enrolled. In a historic moment, his sister Mary did as well, becoming one of the first two women admitted to an American law school.[151] Unlike his sister, however, Abram completed his studies and graduated with the inaugural class in 1871. After graduation, Shadd had some uncertainty about where he would begin his practice. Like nearly all of his classmates, he was admitted to practice in the District of Columbia, and he explored getting admitted to practice in Louisiana. After the Louisiana Supreme Court denied his application, there is no indication that he pursued admission there further. Instead, he moved to Washington County, Mississippi in 1872.

His older brother Isaac had already moved to Mississippi in 1871, where he worked as a bookkeeper and was active in politics. Isaac served in the Mississippi House of Representatives from 1872 to 1875, becoming speaker of the house in 1874.[152] Abram, too, was bitten by the political bug. Although one source has incorrectly credited him with service in the Mississippi state legislature, Abram's sights were set a bit lower. He won election as clerk of the court in Washington County, and later in Issaquena County.[153] Abram's political success at the local level may have been helped by his ownership of a saloon.[154]

His practice expanded beyond Mississippi's borders, and on March 25, 1872, Shadd was admitted to practice in Arkansas.[155] While his practice was primarily focused in the Greenville, Mississippi area, Shadd also maintained a presence in nearby Chicot County, Arkansas—not long after the violent events there that claimed the life of his Howard classmate, Wathal Wynn.[156] Abram Shadd died in 1878 in Mississippi.[157] His older sister Mary, however, not only continued her work as an educator and activist for women's suffrage, but would follow in her late brother's footsteps by graduating from Howard's law school in 1883.[158]

150. *Id.*
151. SMITH, *supra* note 50, at 55.
152. FONER, *supra* note 136, at 192.
153. *Id.*
154. *Id.*
155. Judith Kilpatrick, *(EXTRA) Ordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950*, 53 ARK. L. REV. 299, 338–39 (2000).
156. *Id.*
157. FONER, *supra* note 136, at 192.
158. SMITH, *supra* note 50, at 300.

Abram Shadd may not have been the first Black lawyer in Mississippi; that distinction belongs to James H. Piles, an Oberlin College graduate who had read the law and been admitted in Ohio in 1869, and later that same year in Mississippi.[159] However, he was only the second Black lawyer admitted in the state, and certainly the first formally trained lawyer there. Shadd was a true legal pioneer, from a family of proud Black pioneers.

VIII. DAVID AUGUSTUS STRAKER

While David Augustus Straker may not have been among Howard's first ten law graduates (like Moses W. Moore, he is listed in some sources as a member of the Class of 1872, perhaps incorrectly), he was undoubtedly among its earliest and was a trailblazing Black attorney across multiple career paths: as a lawyer, law dean, and professor; as a politician; and as a civil rights activist and leader. He was an innovator in the courtroom, and delivered a groundbreaking appellate victory on desegregation decades before *Brown v. Board of Education*.

Like Moses Moore, David Straker was born outside the United States. He was born in Bridgetown, Barbados in 1842, and had a happy childhood, recounted in his book *A Trip to the Windward Islands, or Then and Now*.[160] Straker was educated at Codrington College, a school that catered to the local British upper class as well as "poorer, but academically able" native Barbadians.[161] After graduating in 1863, Straker taught at St. Mary's High School. But in 1868, at the suggestion of an Episcopal priest named Benjamin Smith, the man born free in a British colony took the unusual career step of moving to Kentucky to teach recently freed slaves at a freedmen's school in Louisville. The experience was clearly a life-altering one, as Straker decided he could do the most good not in education, but in fighting for equality through the courts. In 1869, he traveled to Washington, D.C. and enrolled at Howard's fledgling law school.

Like Moses Moore, Straker is listed in certain sources as graduating from Howard in 1871,[162] despite Howard's own not entirely relia-

159. *Id.* at 302; *see also* Irvin C. Mollison, *Negro Lawyers in Mississippi*, 15 J. NEGRO HIST. 38 (1930).

160. DAVID A. STRAKER, A TRIP TO THE WINDWARD ISLANDS, OR THEN AND NOW (Detroit: Press of James H. Stone & Co. 1896).

161. JOHN W. HOLDER, CODRINGTON COLLEGE – A BRIEF HISTORY (Codrington College 1988).

162. FONER, *supra* note 136, at 205.

ble records from that time identify him as a member of the Class of 1872.[163] In any event, Straker briefly settled in Washington, D.C., marrying Annie M. Carey, working as a first class clerk in the Treasury Department for about three years, and becoming a nationalized citizen.[164] But in 1875, Straker moved to South Carolina, where he joined a Black-owned law firm started by Robert Brown Elliott. Elliott had been one of the first three Black lawyers admitted to practice in South Carolina, and like Straker was of West Indian descent.[165] Elliott was also a prominent figure in South Carolina politics during Reconstruction, serving in the state assembly.[166]

Straker quickly made a name for himself as a sharp, forceful trial lawyer, practicing in Orangeburg, Lexington, Kershaw, Fairfield, and Richland Counties.[167] He gained a reputation for taking challenging cases. Straker pioneered the use of medical expert testimony and the use of an insanity defense in criminal cases such as the murder trial of James Coleman in Columbia.[168] He represented former Judge Samuel Lee in contesting the result of a congressional election in 1880.[169] In 1878, he represented a client in a divorce matter filed before the effective date of a legislative repeal of the divorce statute.[170] When it was held that the repeal applied retroactively to his client and the court dismissed the divorce, Straker appealed it to the South Carolina Supreme Court, ultimately losing.[171] Straker was also an able appellate lawyer, winning two of his five appeals while garnering praise from white appellate judges.[172]

Yet even as he honed a reputation as a skilled advocate, Straker encountered the typical obstacles facing early Black lawyers. Building a private practice was difficult because, as Straker observed, the Black lawyer was "looked upon in the community . . . as the lawyer for the

163. *1871–1872: Catalog of Officers and Students of Howard University*, *supra* note 60, at 45.

164. SMITH, *supra* note 50, at 218.

165. The ancestry and early life of Mr. Elliott was the subject of contradictory accounts during his lifetime. The most authoritative modern biography of Elliott concludes that he was born in Liverpool, England to West Indian parents. *See* PEGGY LAMSON, THE GLORIOUS FAILURE: BLACK CONGRESSMAN ROBERT BROWN ELLIOTT AND THE RECONSTRUCTION IN SOUTH CAROLINA, 26–30 (1973).

166. *Id.*

167. W. LEWIS BURKE, ALL FOR CIVIL RIGHTS: AFRICAN AMERICAN LAWYERS IN SOUTH CAROLINA, 1868–1968, at 107 (Univ. Ga. Press 2017).

168. State v. Coleman, 20 S.C. 491 (1884).

169. BURKE, *supra* note 167, at 107.

170. *Id.*

171. Grant v. Grant, 12 S.C. 29 (1879).

172. *See, e.g.*, State v. Shuler, 19 S.C. 140 (1883); Green v. Spann, 25 S.C. 273 (1886).

colored people, and his practice is by arbitrary custom circumscribed to those of his own race."[173] At the same time, a Black lawyer could not expect respect from his white colleagues since "they shun him . . . as one not expected to do their business."[174] Physical threats were not uncommon. During one 1883 court hearing, a white witness testified that he wanted to unload a six-shooter into Straker, but the trial judge refused to even find the witness in contempt.[175] Whitewashing of juries and the exclusion of Black people from jury service was another persistent problem that Straker, like all pioneering Black lawyers, faced. In one trial where the majority of the jurors were Black, the trial judge tried to install one of the five whites as foreman —but was frustrated when none of the white jurors could read or write, necessitating the selection of a literate Black juror.[176]

Straker's reputation in the courtroom led to him following in his law partner Elliott's footsteps by venturing into politics. In 1876, Straker won election from Orangeburg County to South Carolina's House of Representatives. However, like many Black officeholders after the end of Reconstruction and the withdrawal of federal troops, Straker was driven out of office.[177] He ran twice more in 1878 and 1880, winning a majority both times only to be denied his seat by the white Democrats.[178] Frustrated by his political setbacks and struggling in his practice, Straker took a job as an inspector of customs at Columbia from 1880 to 1882.[179]

In 1882, another opportunity presented itself. Straker firmly believed that the fundamental rights guaranteed to Black people meant little without the education needed to protect such rights and to advance economically. Later, he wrote: "Our need is education, money and opportunity to participate in the industries of life equally with our white brethren."[180] In 1882, the newly-opened Allen University in Columbia—a school named for the African Methodist Episcopal

173. M. Sammy Miller, *David Straker and Other Reconstruction Jurists*, 81 THE CRISIS 9 (1974).

174. *Id.*

175. *Court of General Sessions*, COLUMBIA DAILY REGISTER, July 4, 1883.

176. DAVID A. STRAKER, THE NEW SOUTH INVESTIGATED 73 (Detroit: Ferguson Press 1888).

177. FONER, *supra* note 136, at 205.

178. *Id.*

179. *Id.*

180. D. Augustus Straker, Address to Citizens' Meeting at Bethel A.M.E. Church, Detroit, Michigan (July 17, 1892), *in* 9 A.M.E. CHURCH REV. 188, 192 (1892).

Church's first bishop, Richard Allen—opened a law school.[181] Straker was appointed its first dean.[182] It would be, as Straker proudly described it, a Black school for Black students.[183] When Allen Law School opened— ironically, in the former mansion of a prominent slaveholder—it had eight students and three professors (including Straker).[184] Like Howard, Allen had a two-year curriculum, offering classes during the late afternoons and evenings so that students could still work.[185] The school had four in its first graduating class.[186] Although Straker stepped down in 1886, the school continued to exist with varying degrees of success until 1906.[187] As one scholar has observed, Allen Law School had a "remarkable record," with more than thirty graduates; among Black-led law schools in the South, only North Carolina's Shaw University had more graduates during this period.[188]

In 1887, Straker left South Carolina for Detroit, Michigan. Once again, money—or the lack of it— seems to have been a driving force in this decision. As the *Columbia Daily Register* (a white-owned newspaper) explained his departure:

> The personal and property rights of his colored clients have been faithfully and in most cases successfully represented, their poverty as a class has left his labor in their behalf unremunerative and compels him to seek another field for the exercise of legal talents which will win renown and money under other conditions than those which interpose an insuperable barrier here.[189]

While the ability to earn a living undoubtedly factored prominently in Straker's decision to leave, his later published reflections on his time in South Carolina reveal other factors. He noted that the state's Black citizens had been disenfranchised twice over —first "by blood and murder" and then by legislative schemes to restrict or deprive them of the right to vote.[190] The condition of the state's Black

181. BURKE, *supra* note 167, at 90–91.
182. *Id.*
183. STRAKER, *supra* note 176, at 46.
184. BURKE, *supra* note 167, at 90–91.
185. *Id.* at 91.
186. *Id.* at 92.
187. *Id.* at 96.
188. *Id.* at 91.
189. Conrad Harper, *Some Black Lawyers in the Post-Civil War South*, 3 LITIGATION 41 (1977).
190. Ferguson v. Gies, 82 Mich. 358, 364–65 (1890).

community, he wrote, was the result of a perfect storm of "poor wages, bad laws, and race prejudice."[191]

In Detroit, Straker resumed practicing law, and it didn't take him long to make his mark. The same year he arrived, he took on the case of William Ferguson, who was forced by a restaurant owner to move to a segregated section of the restaurant.[192] Six years before the U.S. Supreme Court would uphold the "separate but equal" doctrine in *Plessy v. Ferguson*, Straker won for a different Ferguson before the Michigan Supreme Court.[193] Straker, as the first Black lawyer to argue before Michigan's highest court, convinced them that "separate but equal" was unconstitutional. In *Ferguson v. Gies*, the Court held that "no line can be drawn in the streets, public parks, or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure . . . "[194]

Straker continued practicing after that landmark civil rights victory, appearing before the Michigan Supreme Court seven more times.[195] In 1893, he was elected to a judicial office, Wayne County Circuit Court Commissioner, and went on to serve two terms.[196] Besides his frequent writings, Straker also founded the National Federation of Colored Men (serving as its first president), and founded a weekly newspaper, the *Detroit Advocate*.[197] On February 14, 1908, Straker passed away.[198]

Today, the Michigan Bar Association's Black Bar Association is named for D. Augustus Straker. Its stated mission is "to increase minority representation in the legal profession, support and encourage legal practice opportunities for minorities, and facilitate equal justice for all citizens."[199] As a pioneering graduate of Howard Law, Straker led as a practicing lawyer, politician, law dean, judge, and civil rights activist. His legal education opened doors for him, and in turn, Straker

191. STRAKER, *supra* note 176, at 87.

192. Ferguson, 82 MICH. at 364–65 (1890).

193. *Id.*

194. *Id.*

195. Carrie Sharlow, *Michigan Lawyers in History: David Augustus Straker*, 94 MICH. B.J.42, 43 (2015).

196. FONER, *supra* note 136, at 206.

197. Sharlow, *supra* note 195, at 42, 43.

198. *Id.*

199. *History and Mission*, D. AUGUSTUS STRAKER B. ASS'N, https://strakerlaw.org/about.php (last visited Feb. 17, 2023).

helped pave the way for future generations. The legacy he left is a rich one, indeed.

IX. JOHN HARTWELL COOK, LOUIS A. BELL, AND WATHAL G. WYNN: PIONEERS GONE TOO SOON

A. John Hartwell Cook

For some of Howard's first law graduates, the trail grows cold and they faded into history with much of their potential unrealized, in some cases due to dying young. John Hartwell Cook gave his Howard commencement oration on "Law vs. Public Sentiment," and given his achievements, it was an appropriate subject.[200] Cook was born free in 1838 in Washington, D.C.[201] He graduated from Oberlin College in Ohio, as did his wife, Isabel "Belle" Lewis. In late 1864 or early 1865, the Cooks moved to Louisville, Kentucky, where John had a position teaching freedpeople under the auspices of the Bureau of Refugees Freedmen and Abandoned Lands (commonly referred to as the Freedmen's Bureau).[202]

During the two years he spent teaching in Kentucky, Cook caught the attention of the Bureau Commissioner, General Oliver Otis Howard. Howard promoted him to chief clerk, a position that involved managing Howard's official correspondence, and brought him to Washington D.C. in 1867. A close friendship grew out of this professional relationship, and the pair's shared religious faith—Congregationalism—proved central to Cook's first foray into activism.

In 1867, Washington, D.C. was undergoing a transformation. With the influx of Republican-aligned officials and thousands of formerly enslaved people from neighboring Maryland and Virginia, several men with ties to Congregational churches in New England felt that the time was ripe for this staunchly anti-slavery denomination to start a church in Washington, D.C. General Howard, who had personal ties to Congregationalism and wanted to attend a church with progressive racial views, was among the first members of First Congregational (located at the corner of Tenth and G Street). As he later wrote, "Being engaged in a struggle for what I have called *the struggle*

200. *1871 – Howard University Law Department Commencement*, *supra* note 46.

201. *Cook, Isabel and John Hartwell*, NOTABLE KY. AFRICAN AMERICANS DATABASE (last updated Aug. 7, 2020), https://nkaa.uky.edu/nkaa/items/show/2258.

202. *Id.*

of the black man . . . I naturally carried the same efforts with me into the church, with which I was connected."[203]

But soon a crisis would ensue that would test just how committed to its professed belief in racial equality the church, its white majority of congregants, and its first minister Charles B. Boynton really were. In October 1867, John Cook presented himself for membership at First Congregational.[204] Not long after interviewing Cook, Rev. Boynton preached a sermon clearly directed at Cook and other educated Black people stating that they best serve their race in "institutions of their own."[205] The sermon received national attention in newspapers around the country in light of the divergence between the denomination's stated commitment to equality and Rev. Boynton's call for racial separation.

Cook turned to his friend and mentor General Howard for help. He implored him:

> Because of your long and tiring and consistent course as the practical Christian advocate of the rights of all humanity and especially the negro may we not still hope and expect much from you? . . . [Here] is a grand opportunity to begin right . . . Here shall we have a Church composed of members whose lives will be molded by their religion and not their religion by their lives.[206]

Cook felt the church's refusal to accept him and other Black congregants as equals would set a dangerous example, as "the public mind gladly seizes anything looking towards a sanction of the old state of things."[207] Howard agreed, and led the opposition to Rev. Boynton.[208] Over the next 17 months, his campaign included drafting and circulating a protest petition signed by fifty other members; publicizing his views in the Congregationalist Church's national publication, the *Congregationalist and Boston Recorder*; and forcing an ex parte church council in November 1868 and a general church council in Jan-

203. Oliver Otis Howard, Autobiography of Oliver Otis Howard (VOLUME ONE) 88 (1907).

204. Peter Porsche, *Strategic Alliance: John Hartwell Cook, O.O. Howard, and the Postwar Fight for Equality at First Congregational Church*, J. Civil War Era (Aug. 14, 2020).

205. Charles Brandon Boynton, The Duty Which the Colored People Owe to Themselves: A Sermon Delivered at Metzeroff Hall, Washington, D.C. (1867) (Daniel Murray Pamphlet Collection, Library of Congress).

206. Letter from John H. Cook to Oliver Otis Howard (Dec. 1, 1867) (on file with the Bowdoin College Library).

207. *Id.*

208. Porsche, *supra* note 204.

uary 1869.[209] The Church's internal strife received national media attention.[210] Ultimately, Rev. Boynton and a number of his followers admitted defeat and left the church. John Cook, his family, and more than thirty other Black people became members of First Congregational, integrating that formerly all-white space as equals. Equally important, the broader Congregational Church publicly affirmed racial equality and denounced racial separation. For General Howard, the episode drew an even sharper contrast between his alignment with the causes of the freedpeople and the virulent racist policies of President Andrew Johnson, who opposed the Bureau at every turn. For Cook, the campaign illustrated how Black Americans could leverage relationships with white allies to challenge institutional racism.

After graduating from Howard's law department, Cook went on to become a respected member of the District of Columbia Bar and gained a reputation as a savvy criminal lawyer.[211] Yet he remained a leader and in 1877 was appointed as dean of Howard University's law school.[212] Tragically, Cook's tenure lasted less than two years due to his declining health, and he resigned in 1878 shortly before dying of tuberculosis.[213]

Of course, General Howard was not the only mentor and role model to impact John H. Cook's life and career path. As a young Oberlin student, Cook witnessed a murder trial in Medina County, Ohio, in which the defendant was represented by future Howard Law dean John Mercer Langston —then one of only a handful of Black lawyers in the country. As Cook would later write, he learned a valuable lesson about the "jealousy and manifest lack of courtesy" that white lawyers and judges would show to Black counsel.[214] He also saw hope that sheer skill might triumph over prejudice, as Cook observed Langston's "praiseworthy display of legal ability in the examination of witnesses" and "an eloquent and convincing argument to the jury" led to an acquittal, with Langston and his client being carried off from the courtroom on the shoulders of supporters.[215]

209. HOWARD, *supra* note 203, at 432–35; Walter L. Cliff, *History of the First Congregational Church*, FIFTIETH ANNIVERSARY OF THE FOUNDING OF THE FIRST CONGREGATIONAL CHURCH, 92–93 (1915).

210. *See, e.g.*, *The Boynton and Howard Unpleasantness*, NEW ORLEANS CRESCENT SUN, Nov. 29, 1868; *A Christian Quarrel*, BURLINGTON TIMES, Dec. 5, 1868.

211. SMITH, *supra* note 50, at 46.

212. *Id.*; LOGAN, *supra* note 26.

213. *Death of John H. Cook*, THE NATIONAL REPUBLICAN, Mar. 10, 1879.

214. *John H. Cook*, THE NATIONAL REPUBLICAN, Feb. 11, 1870.

215. *Id.*

B. Louis A. Bell

Louis A. Bell, who was voted "Class Orator" and who gave an address on "Divorce and Divorce Legislation" as a member of Howard's first law graduating class, is another example of great potential for leadership that ended all too soon, with an early death at age 32. Originally from New Orleans, little is known about Bell's life in Louisiana before he attended and graduated from Howard at the age of twenty-nine. What is known is that he had to fight from the very start for what white law graduates received as a matter of course.

Due to the intercession of Professor Albert G. Riddle, nine of the first ten Howard law graduates were admitted to practice by the Supreme Court of the District of Columbia on February 4, 1871 (the tenth graduate, George Mahson, was admitted that year to the North Carolina Bar). When two of the graduates, Abram W. Shadd and Louis Bell, petitioned for admission to practice in Louisiana before the Louisiana Supreme Court, their applications were denied.[216] The reason given was that local rules permitted the admission of only those out-of-state applicants who had previously been admitted to a "state court," and so the District of Columbia did not qualify.[217] Professor Riddle, "incensed at the treatment of his former students and perhaps sensing a racial motive," took swift action and moved the District of Columbia court not to recognize the admission of members of the Louisiana Bar to the Bar of the District of Columbia.[218] The motion was granted.[219]

At some point, the standoff between bars must have been resolved because in June 1871, Louis Bell became only the second Black lawyer admitted to practice in Louisiana (C. Clay Morgan, a free Black man listed in 1860 as practicing in New Orleans, is regarded as the first).[220] Not surprisingly, Bell's accomplishment received attention in the local press, with the *New Orleans Semi-Weekly Louisianian* noting that "the admission to the bar . . . by the Supreme Court, of a colored man is remarkable only for its entire novelty here."[221] The newspaper went on to recognize that because of the obvious prejudice

216. SMITH, *supra* note 50, at 76 n.122.
217. *Id.*
218. SMITH, *supra* note 50, at 76 n.122.
219. Minutes of the General Term of the Supreme Court of the District of Columbia, May 4, 1863 to Oct. 9, 1871.
220. Rachel L. Emanuel, *History: Black Lawyers in Louisiana Prior to 1950*, 53 LA B.J. 104–05 (2005).
221. *A Colored Attorney*, NEW ORLEANS SEMI-WEEKLY LOUISIANAN, June 22, 1871.

which such Black legal trailblazers could expect to encounter, "colored lawyers will for a long time be 'few and far between' and for obvious reasons their field of practice must be limited."[222] To put it into perspective, the 1872 Census reported 663 lawyers practicing in Louisiana; assuming C. Clay Morgan was still practicing, Bell would have been one of only two Black attorneys in the state.[223]

Because he had a steady job as chief clerk of the surveyor's office, Bell was not dependent on generating income from a legal practice.[224] During his brief legal career, Bell's most lasting achievement was his creation and stewardship of a law "department" (school) at Straight University, a historically Black university in New Orleans founded in 1869 by the American Missionary Association (in 1935, it would be merged into what is now Dillard University).[225] Due to the common exclusion of Black students from law schools in the South, Straight's leadership turned to Louis Bell to develop, lead, and teach at a home-grown law school. Relying on his experiences at Howard, Bell developed a curriculum that included recitations, written essays on legal topics, moot court exercises, lectures on civil, common, and constitutional law, and a "well-sustained" examination.[226] Graduates of the two-year program enjoyed diploma privilege with the Louisiana Bar, and Bell attracted distinguished New Orleans judges and lawyers to serve as faculty members.[227] For several years, the law program was regarded as Straight's strongest department, attracting both white and Black students.[228]

Sadly, Bell died in 1874, before he could witness his first graduating class.[229] The seeds of what he planted, however, continue to bear fruit.

C. Wathal G. Wynn

Wathal (sometimes identified as "Walthall," including in the Howard Law commencement program) G. Wynn is known for two primary distinctions: he was the first Black lawyer to be licensed in

222. *Id.*
223. Emanuel, *supra* note, 220.
224. *Id.*
225. Shawn C. Comminey, *The Origin, Organization, and Progression of Straight University 1869–1880*, 51.4 LA. HISTORY: J. OF THE LA. HIST. ASS'N 404, 413–14 (2010).
226. *Id.* at 414.
227. *Id.*
228. *Id.*
229. Rachel L. Emanuel, *History: Black Lawyers in Louisiana Prior to 1950*, 53.2 LA. B. J. 104, 105 (2005).

three jurisdictions, and he was the first Howard lawyer to die as a result of racial violence.[230] Originally from Richmond, Virginia, Wynn's story is unique in one other respect: his death at the hands of three white men was one of the few instances of racial violence against a Black person that prompted retaliatory lynchings of whites by a Black mob.[231]

Little is known of Wynn's background before he graduated in Howard's inaugural law class and gave a commencement presentation on "Insanity."[232] Like eight of his fellow graduates, he was immediately admitted to practice before the Supreme Court of the District of Columbia.[233] A month later, Wynn was admitted to the bar of the Hustings Circuit Court in Richmond on March 9, 1871, on the motion of Judge Alfred Mortan.[234] As a result, Wynn became the first Black lawyer admitted to practice in Virginia.[235] However, he stayed in Virginia for only six months before relocating to Arkansas.[236]

That fall, Wynn sought and received admission to practice in his third jurisdiction, becoming a member of the Arkansas Bar on September 25, 1871.[237] He settled in the town of Lake Village in Chicot County.[238] It seemed to be a wise choice: before the Civil War, the county had been one of the most prosperous in the state, with large plantations along the lake that had produced cotton, corn, and fruit. With former Confederates disenfranchised, the county's Black majority had played a key role in Republican political domination, resulting in county offices being in Republican hands—often with Black officeholders.[239]

One such politician was James W. Mason, the Oberlin-educated biracial son of Elisha Worthington, one of the wealthiest landowners (and biggest slaveholders) in the state.[240] Mason was the first Black postmaster in the United States (from 1867 to 1871) and had served in

230. *See generally 1871 – Howard University Law Department Commencement*, *supra* note 46; see also SMITH, *supra* note 50, at 76.
231. *Id.*
232. *Id.*
233. SMITH, *supra* note 50, at 76 n.122.
234. SMITH, *supra* note 50, at 225; *see also Wathal G. Wynn*, THE RICHMOND WHIG, Mar. 10, 1871.
235. *Id.*
236. *Id.*
237. SMITH, *supra* note 50, at 322; *see also* FORT SMITH WEEKLY NEW ERA, Dec. 29, 1871.
238. Jack Schnedler, *Uproar in Chicot County*, ARK. DEMOCRAT-GAZETTE (Dec. 5, 2021, 2:00 AM), https://www.arkansasonline.com/news/2021/dec/05/uproar-in-chicot-county/.
239. *Id.*
240. *Id.*

the Arkansas State Senate from 1868 to 1869 and again from 1871 to 1872.[241] His intellect, charisma, and familial wealth and connections made Mason a force to be reckoned with. In late April 1871, new U.S. Senator (and former governor) Powell Clayton appointed Mason as the Chicot County probate judge.[242] Unfortunately, he also appointed Major Ragland to the same office and later instructed the senate not to consider Mason's appointment.[243] However, that minor inconvenience did not dissuade Mason from assuming office, while armed supporters of his forced Ragland to leave the county that July, along with the county sheriff (who had balked at obeying Mason's orders).[244] After a sit-down with Mason, Ragland, and acting governor Ozro Hadley in August, Mason ultimately became the county judge.[245]

In early December, a public meeting was held to consider the issue of whether the county should appropriate money for two railroads being built through the Northern section of Chicot County.[246] It was the subject of much debate, and an argument supposedly over this issue ensued between Wathal Wynn and three white men at a local store.[247] The white men (storeowner Curtis Garrett, Jasper Duggan, and John M. Saunders, who has variously been named "Sanders") had been antagonistic toward the Freedmen's Bureau in the past, and James Mason would later accuse the three of being Ku Klux Klan members.[248] While the other two prevented Wynn's escape, Saunders killed him (in some accounts, the murder weapon was said to be a knife, while in others, it was a gun).[249]

The three men were brought before now-Judge Mason, who ordered them jailed.[250] According to at least one account, Wynn and Mason were related by marriage; at the very least, they were friends.[251] Mason wrote to Wynn's former professor, Albert G. Rid-

241. Nancy Snell Griffith, *Chicot County Race War of 1871*, ENCYCLOPEDIA OF ARK. (last updated Jan. 30, 2023), https://encyclopediaofarkansas.net/entries/chicot-county-race-war-of-1871-7615/.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*; *see also* Schnedler, *supra* note 238.
250. *Id.*
251. *See* Schnedler, *supra* note 238. According to Griffith's account, Mason and Wynn were friends who had dined together not long before Wynn's murder. Griffith, *supra* note 241.

dle, and called for martial law to be imposed throughout the entire South, saying Wynn had been killed by Klan members for being a Black lawyer sworn to "uphold the right, and to speak in behalf of the weak and needy."[252] The letter was published in the *Washington Chronicle* and reprinted in *The New York Times*.[253]

Wynn's body was placed on view in the county courthouse.[254] An incensed mob of more than 300 Black people descended upon the jail, forcibly removed the three white murder defendants, and shot them dead.[255] Fearing the worst from Black citizens, white residents of Chicot County fled the area.[256] A visitor to the area described the atmosphere for the *Memphis Daily Appeal*:

> Homes are desolated, buildings going to decay, stock all gone, lands grown up in weeds, almost every white woman in the county gone, white men afraid of their lives and getting away as fast [as] possible, every plantation for sale at a fraction of its former worth . . . negroes riding in the streets and roads with their guns.[257]

While other newspapers disputed such accounts, the white Southern press eagerly spread the word of the "bloody riot" and "African barbarism."[258] Although the governor downplayed the unrest, he did send a detachment from his State Guard, and 250 federal troops later arrived as well.[259] Calm was eventually restored. Mason managed to retain his political power and was elected county sheriff in November 1872 (he died in 1875 of unknown causes).[260] After the end of Reconstruction and the withdrawal of federal troops from the South, many Black officeholders left or were "persuaded" to relinquish their positions. Yet in Chicot County, Arkansas, where Black people had organized and pursued vigilante justice for the murder of Wathal Wynn, almost all elective offices were still held by Black people as late as 1883.[261]

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252. *The Arkansas Troubles*, N.Y. TIMES, Dec. 27, 1871.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. O.E. Moore, *Our Great Calamity*, MEMPHIS DAILY APPEAL, Jan. 31, 1872, at 1.
258. *See, e.g.*, *Chicot: The Bloody Riot—Effect of the News in Little Rock*, MEMPHIS DAILY APPEAL, Dec. 25, 1871, at 17; *Arkansas: Given Over to African Barbarism*, NASHVILLE UNION AND AMERICAN, Feb. 10, 1872, at 11; *Murder and Pillage by Armed Negroes*, EDGEFIELD ADVERTISER (South Carolina), Dec. 28, 1871, at 2.
259. Griffith, *supra* note 241.
260. *Id.*
261. *Id.*

X. THOMAS B. WARRICK, GEORGE D. JOHNSON, AND JOHN H. WILLIAMS

For several of Howard's first law graduates, being credentialed as a lawyer did not translate into a legacy in law or politics or even into a legal career. Some faded without a trace into the recesses of history, perhaps remaining in a civil service post or other careers that didn't employ their legal training. Thomas B. Warrick, for example, gave his commencement oration on common law.[262] Other than the expected admission, post-graduation, to the District of Columbia bar, it is unknown where Warrick practiced. He goes unmentioned in any of the scholarly discussions of early Black lawyers in Virginia and similarly does not appear in any other state.[263] However, his former dean, John Mercer Langston, does include Warrick (misspelled as "Warwick") in his autobiography's brief mention of those early graduates "now settled in business in various sections of the country," but no specifics are given.[264] Similarly, John H. Williams of North Carolina, who gave his graduation address on equity, is never listed in accounts of that state's first Black lawyers,[265] nor does he appear to have practiced in other states. The same appears to be true of George D. Johnson of Pennsylvania,[266] though Johnson apparently died young. Langston's autobiography lists him among "those of the first class . . . all able as young lawyers, well-educated and promising" who "too prematurely sickened and died, in some cases from exposure and overwork in their inhospitable situations in the South."[267]

XI. CHARLOTTE E. RAY

Another pioneering early graduate of Howard's law school was a member of its Class of 1872—its first female graduate, Charlotte E. Ray. In addition to being Howard's first female law graduate, Ray was the first woman admitted to the bar of the District of Columbia, the first Black woman in the United States to practice law; and only the fifth woman in the United States admitted to the bar of any

262. *1871 – Howard University Law Department Commencement*, *supra* note 46.

263. *See, e.g.*, SMITH, *supra* note 50; Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107, 107–64 (1994).

264. LANGSTON, *supra* note 4, at 305.

265. *See, e.g.*, SMITH, *supra* note 50; Kenneth W. Lewis, *The History of Black Lawyers in North Carolina*, N.C. ASS'N OF BLACK LAWYERS (Apr. 2020), https://nc-abl.org/wp-content/uploads/2020/04/History-of-Black-Lawyers-Kenneth-W-Lewis.pdf.

266. SMITH, *supra* note 50.

267. LANGSTON, *supra* note 4, at 305.

state.[268] At least one writer seems to have originated and perpetuated the story that Ray disguised her gender in order to gain admission to Howard,[269] leading some scholars of women's legal history to conclude that "Howard seems initially to have resisted the admission of black women to its law classes."[270]

The "clever ruse" cannot be documented, and Charlotte Ray is listed by her full name in Howard's catalogue of law graduates in the Class of 1872. Further doubt on any supposed gender bias can be found in Mary Shadd Carey's enrollment in the original 1869 class (with no corresponding story about her using her initials to divert attention from her true gender) before her studies were interrupted and her eventual 1883 graduation.[271] Casting further doubt on the notion that Ray was not welcome and had to resort to subterfuge to gain admission is the fact that Dean John Mercer Langston took particular pains to single out Ray's historic achievement:

> It was in the law department of Howard University that the first class of colored law students ever known in the United States was organized, and for the first time in the history of the world, a young lady was found in the class, sustaining full membership, who graduated with her associates in June, 1872. Miss Charlotte B. (sic) Ray, leading all her sisters in that course of study and with full purpose of professional labor, graduated with high honor. In all her examinations and in the public exercises occurring in connection with the graduation of the class, in which she took part, reading a paper on *Equity*, as she had prepared it, this young lady from New York City, the daughter of Rev. Charles B. Ray, a person well and favorably known, showed herself thoroughly fitted for service in her profession.[272]

Dean Langston was not alone in being impressed by Charlotte Ray. Howard University's then-president, Gen. Oliver O. Howard, remarked in his third annual report (dated July 1872) that at the commencement, a trustee of the law school had been amazed to find "there was a colored woman who read us a thesis on corporations, not

268. *Id.* at 141.

269. Lelia J. Robinson, *Women Lawyers in the United States*, 2 THE GREEN BAG 10, 28 (1890). Specifically, Robinson states that Ray's admission "was secured by a clever ruse, her name being sent in with those of her classmates as C.E. Ray . . . She was thus admitted although there was some commotion when it was discovered that one of the applicants was a woman."

270. KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT 145 (Boston: Beacon Press 1988).

271. HOWARD UNIVERSITY ALUMNI DIRECTORY, 1870–1919, *supra* note 33.

272. LANGSTON, *supra* note 4, at 303–04.

copied from the books but from her brain, a clear incisive analysis of one of the most delicate legal questions."[273]

Nor does there appear to be any doubt about her appearance as a woman. One Howard classmate, James Napier, described Ray as "a Negro girl about the complexion of Frederick Douglass, with long straight hair. There was never the least doubt that she was what we term a Negro. She was an apt scholar."[274] A writer for the journal *Daughters of America* marveled at the fact that:

> in the city of Washington, where a few years ago colored women were bought and sold under sanction of law, a woman of African descent has been admitted to practice at the Bar of the Supreme Court of the District of Columbia. Miss Charlotte E. Ray, who has the honor of being the first lady lawyer in Washington, is a graduate of the Law College of Howard University and is said to be a dusky mulatto, possessing quite an intelligent countenance. She doubtless has also a fine mind and deserves success.[275]

So who was Charlotte Ray, the first female Howard Law graduate, and this country's first Black woman lawyer? She was born in New York City on January 13, 1850, one of seven children born to Reverend Charles Bennett Ray and his second wife, Charlotte Augusta Burroughs.[276] Rev. Ray, the pastor of Bethesda Congregational Church, had been a leading abolitionist, conductor on the Underground Railroad, and editor of the newspaper *The Colored American*.[277] Charlotte and her two older surviving sisters (Florence and Cordelia) all received a college education.[278] Charlotte attended the Institution for the Education of Colored Youth, a school founded by white abolitionist Myrtilla Miner.[279] She graduated in 1869 and began teaching at Howard University's Normal and Preparatory Department

273. GEN. OLIVER O. HOWARD, THIRD ANNUAL REPORT, HOWARD UNIVERSITY, WASHINGTON, D.C. (1870).

274. MORELLO, *supra* note 270, at 146.

275. PHOEBE HANNAFORD, DAUGHTERS OF AMERICA 643 (Augusta, True & Co. 1882).

276. J. Clay Smith, *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 HOW. L.J. 365, 369 (1997).

277. Charlotte E. Ray: First African-American Woman Lawyer and First Woman Admitted to Practice Law Before the D.C. Supreme Court, BLACKHISTORYHEROES.COM (Feb. 2020), https://www.blackhistoryheroes.com/2020/02/charlottes-e-ray-first-african-american.html.

278. *Id.*

279. Druscilla J. Null, *Myrtilla Miner's "School for Colored Girls": A Mirror on Antebellum Washington,* 52 RECORDS OF THE COLUM. HIST. SOC'Y 254, 254–68 (1989). Forced to move twice in its first three years due to racist attacks, the school eventually became what is now known as the University of the District of Columbia.

immediately afterward.[280] Shortly thereafter, she enrolled in law school.

After graduating from Howard in 1872, Ray was admitted to and began practicing in the District of Columbia.[281] Information about the specifics of her practice is limited, but one observer in 1893 described her courtroom presence as eloquent "for her sex," and stated that her "special envisionments" "make her one of the best lawyers on corporations in the country."[282] Significantly, the historic nature of her status as a practicing attorney made her a role model. White women denied admission to other state bars because of their gender cited Ray's admission to practice in the District of Columbia as a legal precedent for their own admission before state supreme courts.[283]

Ray hung out her own shingle as a solo practitioner and, like several of her contemporaries, advertised her services in Frederick Douglass's newspaper, the *New National Era and Citizen*.[284] A case that is one of Ray's known dockets from those early days of practice is a domestic relations case, *Gadley v. Gadley*. Martha Gadley, an illiterate Black woman, and domestic violence victim was seeking to leave her abusive husband. Her initial pro se attempt at a divorce petition was rejected by a white judge in 1875, and she turned to Charlotte Ray. Ray's vividly-worded pleading (signed not only by Ray but also by one of her Howard classmates, Charles N. Thomas) proved successful, and Martha Gadley's divorce was granted.[285] One leading scholar pointed to this pleading as demonstrating that Ray had "the technical knowledge and skills to plead and practice before the courts of the District of Columbia, making her one of the first women lawyers in the nation to practice law."[286]

Despite the occasional success, however, Ray found that laboring under the dual discrimination that came with being a Black woman lawyer was crushing. As an acquaintance of Ray's, Wisconsin lawyer Kate Kane Rossi would later tell the *Chicago Legal News*, "Although a lawyer of decided ability, on account of prejudice [she] was not able to obtain sufficient legal business and had to give up . . . on active

280. SMITH, *supra* note 50, at 277.
281. LANGSTON, *supra* note 4, at 303.
282. M.A. MAJORS, NOTED NEGRO WOMEN 183–84 (1893).
283. *See, e.g.*, *In re* Miss Lavinia Goodell, 39 Wis. 232, 239 (1875).
284. NEW NATIONAL ERA AND CITIZEN, Aug. 13, 1874. Ray gave her address as "L Box 81, Washington, D.C.".
285. J. Clay Smith, *Charlotte E. Ray Pleads Before Court*, 43 HOW. L.J. 121, 122 (2000).
286. *Id.* at 122.

practice."[287] By 1879, Ray had returned to New York, where she began teaching in the Brooklyn school system and married a man whose last name was Fraim.[288] She was active in the National Association of Colored Women, advocating for women's suffrage. The end of her life is a subject of some debate: at least two sources infer that Ray died in 1897,[289] while others maintain that she died on January 4, 1911, following a severe bout of bronchitis.[290]

Charlotte E. Ray, as not only one of Howard's first law graduates but as its first female graduate, threw open doors that had previously been closed on the basis of race and gender. The first woman to practice law in the District of Columbia, she may have been the first woman to practice law, period—not simply to earn the right to practice. Her example was a beacon of hope to other aspiring female lawyers, and as an advocate for at least one woman, Martha Gadley, she may have represented the difference between life and death.

XII. CONCLUSION

In his autobiography, Howard's inaugural law dean, John Mercer Langston, would look back with pride on the students he had worked with during his tenure. He noted that they came from "every State of the South," several of the North, and as far away as the West Indies, and that many of the graduates "are now occupying conspicuous and desirable positions in the profession."[291] This was not only true of Dean Langston's entire seven-year tenure, but also of the pioneering first Howard Law graduates. Moses Moore and David Straker came from abroad, while others came from Northern states like New York (Charlotte Ray), Pennsylvania (Abram Shadd, Charles Thomas), Ohio (John Cook), or the border state of Missouri (John H. Johnson). Others came from the former Confederate states like Virginia (Wathal Wynn, Thomas B. Warrick), Mississippi (Louis Bell), and North Carolina (George Mabson, John H. Williams). But regardless of where these pioneering students originally hailed from, many chose to blaze new trails in Southern states during Reconstruction—becoming the first or at least one of the first Black lawyers those states had ever

287. CHICAGO LEGAL NEWS, Oct. 23, 1897.
288. SMITH, *supra* note 50, at 141.
289. CHICAGO LEGAL NEWS, *supra* note 288; *Colored Female Lawyer*, CINCINNATI ENQUIRER, Sept. 19, 1897, at 1, col. 4.
290. Larry E. Martin, *Charlotte E. Ray*, *in* NOTABLE BLACK WOMEN, 922–24 (Jessie C. Smith ed. 1991); MORELLO, *supra* note 270, at 207.
291. LANGSTON, *supra* note 4, at 308.

seen. In the course of doing so, they encountered the truth of Professor Albert G. Riddle's admonition that they would face hostile environments where they could not afford to fail and where they had to "not only equal the average white competitor . . . [but] must surpass them . . . [for the] world has already decided that a colored man who is not better than a white man is nobody at all."[292] These first graduates, true to journalist John W. Forney's prediction, would "have to fight their way into society, and to contend with jealousy and hate in the jury box and in the courtroom."[293]

The hate these first graduates experienced sometimes manifested in physical violence. Dean Langston lamented those who were "killed because of their earnest and manly defense of dark-hued clients, whom they sought to protect in the use of such legal and professional means as they deemed just and proper," such as Wathal Wynn.[294] Even more pervasive than the threat of violence was the common attitude in a white-dominated society of Black inferiority. During Reconstruction and beyond, it was common for local papers writing about the novelty of a Black lawyer appearing in their community to evoke surprise (as though a circus act had shown up in the courtroom) or to make derogatory jokes. Sometimes, journalists felt compelled to give physical descriptions of Black lawyers, especially those of mixed ancestry, as though to offer an "explanation" of sorts for the lawyer's intellectual ability by pointing to some evidence of white heritage.[295]

By their very existence, much less what they would go on to accomplish, these first Howard graduates would be proving the lie of racist notions of inferiority, of being "less than." As Frederick Douglass's newspaper, *The New National Era*, commented about these graduates,

> These young men go forth into the world . . . to give to the false and hate-inspired charge of the black man's natural inferiority a living, forcible and effective denial. Belonging to the race that has been crushed till not a spark of humanity could scarce be expected in them, this graduating class of men has shown [itself to be], by its achievements in acquiring knowledge of one of the highest branches of study . . . the peer of any race.[296]

292. ALBERT G. RIDDLE, LAW STUDENTS AND LAWYERS, THE PHILOSOPHY OF POLITICAL PARTIES, AND OTHER SUBJECTS 41 (1873).
293. FORNEY, *supra* note 1.
294. LANGSTON, *supra* note 4, at 305.
295. *See, e.g.*, Browning & Wright, *supra* note 96.
296. NEW NATIONAL ERA, Feb. 9, 1871.

Even well-meaning white journalists like John Forney helped perpetuate the myth of inferiority by exaggerating the academic leap the graduating class had made. In describing the class, Forney wrote: "Some of them had only a year before been unable to read and write, and one bright black fellow was especially patronized by the Professor [Langston], because six months before he did not know his alphabet. Nearly all had been slaves."[297]

In reality, nearly all had been born free and boasted a level of education that—combined with their completion of a formal legal education at Howard—made them more academically accomplished than many of the white attorneys who had "read the law" in the jurisdictions where they would practice. That is not to say that Howard's first law students were universally well-prepared for the rigors of legal education. Since these initial scholars were "almost totally lacking in foundation for law," the school's leaders determined that a "preparatory business course in law studies" would be implemented before starting on the actual required legal curriculum.[298] Moreover, for "those young men deficient in English grammar and composition," auditing such courses outside of the law department was recommended.[299] In addition, in the law school's early years, the regular two-year curriculum was expanded to include a third or pre-law year "to take of whatever educational inadequacies existed."[300] However, feeling that this was unnecessarily duplicative of other university courses, this "pre-law period" was soon dropped.[301]

In his remarks at Howard's first law graduation, U.S. Attorney General Amos T. Ackerman predicted that these first graduates "would hold positions of influence among their race, and use that influence for the good of all men."[302] Indeed, these trailblazing first graduates, "pioneers of an interesting and exciting destiny," would fulfill that prophecy. They were successful lawyers and leaders, and among them were future politicians, judges, and law school deans. They influenced and inspired others through their writing, their speak-

297. FORNEY, *supra* note 1.

298. William F. Cheek, Forgotten Prophet: The Life of John Mercer Langston 127–28 (1961) (Ph.D. dissertation, University of Virginia).

299. *Id.*

300. Bloomfield, *supra* note 62, at 429.

301. Walter Dyson, *The Founding of Howard University*, 1 HOW. UNIV. STUD. IN HIST. 5, (1921).

302. HOW. L. SCH. BULLETIN, *supra* note.

ing, their political organizing, their courtroom advocacy, and even their very existence.

Former Howard Law Dean Charles Hamilton Houston famously said that "a lawyer is either a social engineer or a parasite on society."[303] The pioneering first law graduates from Howard were social engineers in every sense. First, merely by becoming lawyers—and often the first Black lawyer in the jurisdiction where they chose to practice—they became living proof of the possibility of Black accomplishment and success. Next, by simply opening up a practice, these lawyers made legal services available to Black clients in their communities who otherwise would not have been likely to have access to such a resource. Third, most became leaders in the Black community, using their skills and training to seek office, advance causes, or lift up others in the community.

Finally, their mere presence undermined the pervasive psychology of racism. At a time when jails were segregated, when Black people were routinely excluded from juries, when Black witnesses could be barred from testifying against whites,[304] and when even separate Bibles were used to swear Black witnesses, Black lawyers still sat at the same counsel tables where white lawyers traditionally sat and stood in the same spot as white lawyers when addressing the court. Every time a Black lawyer won a case against a white lawyer, he or she exposed the fraud of white supremacy. Even in defeat, Black lawyers demonstrated competence to white judges, lawyers, jurors, and observers that belied the myths of Black inferiority.

These "forgotten firsts" of Howard Law deserve to be remembered and celebrated. They not only made an impact themselves —they also began the tradition of Howard serving as the training ground for generations of Black lawyers, a tradition that continues today.

303. José Felipé Anderson, Genius for Justice: Charles Hamilton Houston and the Reform of American Law, 43 (2022).

304. Merely months after Howard's first law graduates were admitted to the bar, the U.S. Supreme Court held that a state law barring a "negro, or Indian" from giving testimony against whites was constitutionally permissible. Blyew v. United States, 80 U.S. 581, 592 (1871).