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SYMPOSIUM: A FIFTY-YEAR RETROSPECTIVE ON MAJOR LAWS OF THE 91ST CONGRESS

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Editor's Note

It is my honor to introduce *Chapman Law Review's* first issue of volume twenty-three. This issue consists of our "paper-only symposium," a collection of scholarly works discussing "A Fifty-Year Retrospective on Major Laws of the 91st Congress."

The symposium opens with four articles connected with the topic of this year's written symposium. They take a retrospective look at legislation that was proposed or passed in 1970, which was a critical year for legislation governing a myriad of health, safety, and environmental concerns. Then, we shift our focus to an article which draws close attention to the nuances of contract law. Finally, this issue is wrapped up with two pieces produced by *Chapman Law Review* members.

Professor Denis Binder begins the discussion with an article focusing on and applauding the flexibility of the National Environmental Policy Act in the fifty years since its inception. Next, Professor John D. Blum examines the evolving nature of cigarette smoking, including the introduction of vaping, and the impact package label warnings have had on smoking abatement since 1970 when Congress enacted the Public Health Cigarette Smoking Act. Professor F. E. Guerra-Pujol explores what could have been through his study of the demise of the Family Assistance Act of 1970 and how it would have created a negative income tax had it been enacted into law. Concluding the articles that tie into the themed symposium is Professor Oliver J. Kim's comparative approach to the Controlled Substances Act. Professor Kim compares the CSA with three pieces of modern legislation and examines how they have handled the criminalization of marijuana. Next, Professor Robert D. Brain shifts our attention with an article focusing on the Implied Warranty of Fitness for a Particular Purpose, which is codified in the Uniform Commercial Code, and why its elimination will help solve various practical and theoretical problems. Professor Brain also includes suggested amendments to Article 2 of the U.C.C. Finally, two works written by current *Chapman Law Review* students close out our written symposium. Ms. Bethany J. Ring conducts a quantitative analysis regarding the impacts of United States Supreme Court Opinions on the American body of law and questions whether impacts of notable cases actually pan out as predicted. Ms. Caroline J. Cordova recognizes and discusses the

present confusion and problems associated with service animal laws and presents a proposal advocating for a more uniform solution to address these issues.

Chapman Law Review is grateful for the continued support of the members of the administration and faculty that made this written symposium and the publication of this issue possible, including: Dean of Chapman University Dale E. Fowler School of Law, Matthew Parlow; our faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee, Professors Deepa Badrinarayana, Frank Doti, Ernesto Hernandez, and Kenneth Stahl. A special thank you goes to Professors Donald Kochan and Scott Howe for their assistance in formulating the concept behind this symposium and soliciting scholars. Last but not least, I would like to express my sincerest gratitude to the staff of the 2019–2020 *Chapman Law Review*—without your tireless work, this issue would not have been possible.

Jillian C. Friess
Editor-in-Chief



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NEPA at 50: Standing Tall[©]

*Professor Denis Binder**

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* Professor of Law, Chapman University Dale E. Fowler School of Law. Professor Binder has been teaching Environmental Law for forty-eight years, including writing a personal memoir of the first forty years of Environmental Law. Denis Binder, *Perspectives on Forty Years of Environmental Law*, 3 GEO. WASH. J. ENERGY & ENVTL. L. 143 (2012). He wrote two articles on the twentieth anniversary of NEPA, but never thought he would do a fifty-year study. Professor Binder is indebted to David Auburn, a 2L at Chapman, and Sherry Leysen of the Hugh and Hazel Darling Law Library at Chapman University for their assistance in preparing this Article.

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I. INTRODUCTION

Richard Nixon's Presidency collapsed in infamy on August 8, 1974. He escaped impeachment only by resigning, but his environmental legacy survives.

Lost in discussions of President Nixon's six and a half-year presidency is that he was the most protective president of the environment since President Theodore Roosevelt. He may or may not have privately believed in the environment,¹ but he recognized the growing public concern for the environment.²

The President visited Santa Barbara on March 21, 1969, after the Union Oil blowout on Platform A.³ He said:

What is involved here, and it is sad that it is necessary that Santa Barbara has to be the example that had to bring this to the attention of the American people, but what is involved is something much bigger than Santa Barbara; what is involved is the use of our resources of the sea and the land in a more effective way and with more concern for preserving the beauty and the natural resources that are so important to any kind of society that we want for the future. I don't think we have paid enough attention to this. . . . [W]e are going to do a better job than we have done in the past.⁴

He challenged America in his 1970 State of the Union Address: "The great question of the seventies is, shall we

¹ Reports are that he privately scoffed at environmental protection, but understood the political benefits of supporting environmental legislation. Politicians often say different things in public than in private. President Nixon is reported to have said to Henry Ford II in a 1971 meeting that environmentalists wanted to "go back and live like a bunch of damned animals." TRANSCRIPT #7: PART OF A CONVERSATION AMONG PRESIDENT NIXON, LIDE ANTHONY IACocca, HENRY FORD II, RONALD L. ZIEGLER, AND JOHN D. EHRLICHMAN IN THE OVAL OFFICE BETWEEN 11:08 AM AND 11:43 AM ON APRIL 27, 1971, at 12, (Richard Nixon Presidential Library & Museum, White House Tapes, Conv. No. 488-15 #7, rev. May 2004), http://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/complete/airbag_488-15.pdf [<http://perma.cc/B5KM-7K9S>]. He added, "They're a group of people that aren't one really damn bit interested in safety or clean air. What they're interested in is destroying the system. They're enemies of the system." *Nixon tapes hinted at rapport with Ford, Iacocca*, AUTOMOTIVE NEWS (May 2, 1994, 12:00 AM), <http://www.autonews.com/article/19940502/ANA/405020728/0/search> [<http://perma.cc/E5C3-2KYB>].

² President Nixon was far from alone in pushing for environmental litigation. Senators Gaylord Nelson (D., Wis.), Henry "Scoop" Jackson (D., Wash.), and Edmund Muskie (D., Me.) led the way in the Senate for environmental legislation and Representative John Dingell (D., Mich.) in the House. See, e.g., *Gaylord Nelson*, WILDERNESS SOC'Y, <http://www.wilderness.org/articles/article/gaylord-nelson> [<http://perma.cc/5KS2-9444>] (last visited Nov. 18, 2019); *Henry "Scoop" Jackson*, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/minute/Henry_Scoop_Jackson.htm [<http://perma.cc/C5JN-TZMX>] (last visited Nov. 18, 2019); *Muskie, Edmund Sixtus*, BIOGRAPHICAL DIRECTORY OF UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001121> [<http://perma.cc/TUR5-S4L4>] (last visited Nov. 18, 2019).

³ Remarks Following Inspection of Oil Damage at Santa Barbara Beach, 1969 PUB. PAPERS 233, 233 (Mar. 21, 1969).

⁴ *Id.* at 234–35.

surrender to our surroundings, or shall we make our peace with nature and begin to make reparations for the damage we have done to our air, to our land, and to our water?”⁵

Environmental statutes enacted or expanded upon during the Nixon Administration include: the Water Pollution Control Act (“Clean Water Act”),⁶ Clean Air Act,⁷ Marine Mammal Protection Act,⁸ the Ports and Waterways Safety Act,⁹ the Marine Protection, Research, and Sanctuaries Act,¹⁰ Coastal Zone Management Act,¹¹ the Endangered Species Act,¹² and the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).¹³ Moreover, the National Oceanic and Atmospheric Administration (“NOAA”) was established during his administration.¹⁴

President Nixon stopped the Cross Florida Barge Canal on January 19, 1971.¹⁵ The canal would bisect Florida, running from Jacksonville on the Atlantic to Yankeetown, north of Tampa on the Gulf.¹⁶ The canal would be 107 miles long, twelve feet deep, 150 feet wide, and destroy the Ocklawaha River.¹⁷ The original purpose was to protect American shipping from German U-Boats during World War II, although the idea goes back to the Spanish.¹⁸ The President’s statement in halting construction of the canal revealed he was acting to prevent potentially serious environmental damage:

The step I have taken today will prevent a past mistake from causing permanent damage. But more important, we must assure that in the future we take not only full but also timely account of the

⁵ Annual Message to Congress on the State of the Union, 1970 PUB. PAPERS 8, 12 (Jan. 22, 1970).

⁶ Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012).

⁷ Clean Air Amendments of 1970, 42 U.S.C. §§ 7407–7642 (2012).

⁸ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2012).

⁹ Ports and Waterways Safety Act, 33 U.S.C. §§ 1221–1227 (2012) (repealed 2018).

¹⁰ Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431–1447f (2012), 33 U.S.C. §§ 1401–1445, 2801–2805 (2012).

¹¹ Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2012).

¹² Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

¹³ Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

¹⁴ *Our History*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.noaa.gov/our-history> [<http://perma.cc/2RS7-7J3Z>] (last visited Oct. 24, 2019) (NOAA was established in 1970 as an agency within the Department of Commerce).

¹⁵ See Statement About Halting Construction of the Cross Florida Barge Canal, 1971 PUB. PAPERS 43, 44 (Jan. 19, 1971); Robert B. Semple, Jr., *President Blocks Canal in Florida*, N.Y. TIMES (Jan. 20, 1971), <http://www.nytimes.com/1971/01/20/archives/president-blocks-canal-in-florida-halts-project-to-bar-harm-to.html> [<http://perma.cc/KC76-FEK8>].

¹⁶ Ben Brotemarkle, *Canal Idea Hung on, Finally Failed*, FLA. FRONTIERS (Nov. 17, 2015), <http://myfloridahistory.org/frontiers/article/95> [<http://perma.cc/3J3J-8JQN>].

¹⁷ Semple, *supra* note 15.

¹⁸ *History of the Cross Florida Greenway*, FLA. ST. PARKS, <http://www.floridastateparks.org/learn/history-cross-florida-greenway> [<http://perma.cc/E3VR-3XEC>] (last visited Oct. 24, 2019).

environmental impact of such projects, so that instead of merely halting the damage, we prevent it.¹⁹

The canal was about a third complete when halted.²⁰ The right of way is now the Marjorie Harris Carr Cross Florida Greenway, named for the opponent of the canal.²¹

The focus of this Article is the National Environmental Policy Act of 1969 (“NEPA”),²² one of the most significant acts of a bipartisan consensus of a Republican President and Democratic Congress to protect the environment.

President Nixon created the Council on Environmental Quality (“CEQ”) in 1969, which was formally established by NEPA.²³ The Environmental Protection Agency came into effect on December 2, 1970.²⁴

The post-World War II period hustled in an era of economic growth and development after a decade and a half of the Great Depression and World War II. Victory unleashed pent up consumer demand in the only great industrial society not leveled by the war.²⁵

The boom was great for the economy—but less so for the environment. Emphasis was on the quantity of life—less so the quality. Highways devoured land and split communities. The burgeoning suburbs consumed open space and green lands.²⁶ Rivers were diverted and polluted. The air was poisoned, and toxins were entering the air, soil, and water.²⁷

A classic example of the environmental disregard was the Los Angeles Department of Water Policy’s proposed diversion of waters from Mono Lake to its existing Owens Valley diversion.²⁸ California’s Water Board decision said:

¹⁹ Semple, *supra* note 15. *See generally* STEVEN NOLL & DAVID TEGEDER, DITCH OF DREAMS: THE CROSS FLORIDA BARGE CANAL AND THE STRUGGLE FOR FLORIDA’S FUTURE (2009).

²⁰ *See* Brotemarkle, *supra* note 16.

²¹ *History of the Cross Florida Greenway*, *supra* note 18.

²² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

²³ *Id.* § 4342.

²⁴ *EPA History*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/history> [<http://perma.cc/VD5L-7W32>] (last visited Oct. 26, 2019).

²⁵ *See The Rise of American Consumerism*, PBS SOCAL, <http://www.pbs.org/wgbh/americanexperience/features/tupperware-consumer/> [<http://perma.cc/89BH-JH63>] (last visited Oct. 26, 2019).

²⁶ *See* Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, DISTILLATIONS (June 2, 2017), <http://www.sciencehistory.org/distillations/richard-nixon-and-the-rise-of-american-environmentalism> [<http://perma.cc/8GUX-JAET>].

²⁷ *See* Marc Lallanilla, *The History of the Green Movement*, THOUGHTCO (Feb. 5, 2018), <http://www.thoughtco.com/what-is-the-green-movement-1708810> [<http://perma.cc/4XS4-CV98>]. A common way of disposing of pollution was by discharging it into a body of water, i.e. pollution control by dilution.

²⁸ *See Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cty.*, 658 P.2d 709, 711 (Cal. 1983).

[I]t is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently *nothing that this office can do to prevent it*. . . . This office . . . has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.²⁹

The late 1960s became a time of environmental awakening with four catalysts spurring the environmental movement: Rachel Carson in 1962, with her book, *Silent Spring*, engendered widespread concerns over chemicals in the environment;³⁰ the Santa Barbara oil spill on January 28, 1969, received national attention;³¹ Los Angelinos were suffocating in smog;³² and the Cuyahoga River caught on fire as it flowed through Cleveland on June 22, 1969.³³

The 1970s became the Decade of the Environment. The decade began on January 1, 1970, with the enactment of the National Environmental Policy Act of 1969.³⁴ April 22, 1970, was the inaugural Earth Day.³⁵ President Nixon actively pushed NEPA and the Endangered Species Act, and he endorsed Earth Day.

The Decade of the Environment differed from the earlier twentieth century Conservation Era. Three important statutes enacted in the 1960s—the Wilderness Act,³⁶ the National Historic Preservation Act of 1966,³⁷ and the Wild and Scenic

²⁹ *Id.* at 714. We now know from the public trust doctrine of the Mono Lake litigation in this case that the diversion was an environmental disaster. The Atomic Energy Commission consistently argued prior to the enactment of NEPA “that it had no statutory authority to concern itself with the adverse environmental effects of its actions.” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1972). Similarly, in a Federal Power Commission consideration of a proposed pump storage plant at Storm King Mountain in New York on the Hudson River, the FPC’s opinion said:

Just as the mountain has swallowed the scar of the highway, the intrusive railroad structure and fills, and tolerates both the barges and scows which pass by it and the thoughtless humans who visit it without seeing it, so it will swallow the structures which will serve the needs of people for electric power.

Consol. Edison Co. of N.Y., 44 FPC 350, 384 (1970), *aff’d*, *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 453 F.2d 463, 470 (2d Cir. 1971).

³⁰ RACHEL CARSON, *SILENT SPRING* (1962); *see also* RACHEL CARSON, *THE SEA AROUND US* (rev. ed. 1961).

³¹ *See* ROBERT EASTON, *BLACK TIDE* (1972); LEE DYE, *BLOWOUT AT PLATFORM A* (1971).

³² I remember flying through LAX at 2:00 PM in the mid-1970s, looking out the window, and seeing a beautiful orange “sunset.” It was, of course, smog.

³³ Check out Randy Newman’s song, *Burn On*. RANDY NEWMAN, *BURN ON* (Reprise Records 1972).

³⁴ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

³⁵ *The History of Earth Day*, EARTH DAY NETWORK, <http://www.earthday.org/about/the-history-of-earth-day/> [<http://perma.cc/JDF3-ZJMY>] (last visited Oct. 26, 2019).

³⁶ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012).

³⁷ National Historic Preservation Act, 16 U.S.C. § 470 (2012) (repealed 2014).

Rivers Act³⁸—reflect the twentieth century conservation movement of creating national forests, parks, and monuments, as well as urban parks, to preserve and enjoy the natural resources.³⁹ The Wilderness Act converted forest lands susceptible to development into wilderness areas to be preserved, while the Wild and Scenic Rivers Act preserved free flowing sections of rivers.⁴⁰

The environmental statutes of the Decade of the Environment have a different purpose. They are intended not only to prevent further degradation and pollution, but also to reclaim, restore, and bring back.

NEPA is different in its ambit from the other conservation and environmental statutes. Their provisions may be comprehensive, but they are all regulatory statutes directed at specific problems, such as air pollution, water pollution, oil pollution, toxic contamination, and species preservation.⁴¹ NEPA is the only environmental statute that covers the broad ambit of all environmental issues. Since the “environment” often includes a wide variety of land use issues, its coverage is equally broad, as long as federal action is involved.

NEPA is broad and comprehensive in its application to any major federal action significantly affecting the quality of the human environment. The statute is not limited to federal programs. It covers any environmental or land use issue as long as federal action is involved, whether it be environmental, land use planning, natural resources, or federal lands.⁴² The federal action could be a structure or project, permit, license, land exchange,⁴³ lease, or financing.⁴⁴ It covers airport expansions,⁴⁵ highways,⁴⁶ dams,⁴⁷ bridges,⁴⁸ post offices,⁴⁹ pipelines,

³⁸ Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2012).

³⁹ The twentieth century ushered in the City Beautiful Movement, President Theodore Roosevelt, and the Conservation Movement. *See Theodore Roosevelt and Conservation*, NAT'L PARK SERV., <http://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm> [<http://perma.cc/GM7Z-YWTP>] (last updated Nov. 16, 2017).

⁴⁰ *See* 16 U.S.C. §§ 1131–1136; 16 U.S.C. §§ 1271–1287.

⁴¹ *See, e.g.*, Clean Air Amendments of 1970, 42 U.S.C. §§ 7407–7642 (2012); Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

⁴² The federal government owns 28% of United States land, in addition to 2% controlled by the Defense Department. Much of the government’s land ownership is in the West, such as 79.6% of Nevada and 61.3% of Alaska. CAROL HARDY VINCENT, LAURA A. HANSON & CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2017).

⁴³ *See, e.g.*, Gettysburg Battlefield Pres. Ass’n v. Gettysburg Coll., 799 F. Supp. 1571, 1578–79 (M.D. Pa. 1992).

⁴⁴ *See* Richland Park Homeowners Ass’n v. Pierce, 671 F.2d 935, 937–38 (5th Cir. 1982) (low-income housing).

⁴⁵ *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991).

⁴⁶ *See* Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng’rs, 374 F. Supp. 2d 1116, 1141–42 (S.D. Fla. 2005).

transmission lines,⁵⁰ mass transit,⁵¹ jails,⁵² military projects,⁵³ group homes, low-income housing,⁵⁴ oil and gas leasing,⁵⁵ and the inspection process for horse slaughtering.⁵⁶ It can apply to the action of a state or private party, as long as federal action is involved, but not to purely private or state action.

As we look at the first half-century of NEPA to establish where we are today, we will also look at a few of the more interesting cases that are often overlooked in the larger picture.⁵⁷

II. THE PRECIS: THE STATUTE

Congress often enacts statutes with broad, glowing, flowery preambles, followed by narrower substantive provisions. NEPA is no exception. NEPA's preamble states:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.⁵⁸

Section 101(a) provides:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁵⁹

Section 101(c) states "The Congress recognizes that each person should enjoy a healthful environment and that each

⁴⁷ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴⁸ See *Sierra Club v. Hassell*, 636 F.2d 1095, 1097–98 (5th Cir. 1981).

⁴⁹ See *Chelsea Neighborhood Ass'ns v. U.S. Postal Serv.*, 516 F.2d 378, 386 (2d Cir. 1975).

⁵⁰ See *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 422 (2d Cir. 1972); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 270–71 (8th Cir. 1980).

⁵¹ See, e.g., *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99, 102, 116 (N.D. Ga. 1975); *Lakes & Parks All. v. Fed. Transit Admin.*, 928 F.3d 759, 761 (8th Cir. 2019).

⁵² See, e.g., *Ely v. Velde*, 497 F.2d 252, 252–54, 256 (4th Cir. 1974); *Hanly v. Kleindienst*, 471 F.2d 823, 826–27 (2d Cir. 1972).

⁵³ See *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984).

⁵⁴ See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 223, 228 (1980); *Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 90, 92–93 (2d Cir. 1975).

⁵⁵ See *Sierra Club v. Peterson*, 717 F.2d 1409, 1410, 1412 (D.C. Cir. 1983).

⁵⁶ See *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 27 (D.D.C. 2007).

⁵⁷ For a comprehensive look at NEPA, see ALBERTO M. FERLO, ET AL., *THE NEPA LITIGATION GUIDE* (2d ed. 2012).

⁵⁸ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

⁵⁹ *Id.* § 4331(a).

person has a responsibility to contribute to the preservation and enhancement of the environment.”⁶⁰

NEPA is a simple statute—deceptively simple. The critical Section 102 is only 455 words in plain English.⁶¹ The wording has not been amended in its fifty years of existence.⁶²

The CEQ refers to NEPA as “our basic national charter for protection of the environment.”⁶³ Some use the words “Magna Carta” for the environment, but it is not a “green Magna Carta.”⁶⁴

The problem with these sections is that they are purely precatory. They provide no penalties or other remedies for violations, no judicial review, no private cause of action,⁶⁵ no standards, factors or guidelines, and no weighing or balancing. Professor Caldwell wrote: “The goals and principles declared in section 101 have been treated as noble rhetoric having little practical significance.”⁶⁶ The operative provision is Section 102, which creates the environmental impact statement (“EIS”), the NEPA Statement.

The following outlines the various aspects and processes involved in NEPA.

A. The NEPA Statement

Section 102 of NEPA:

[D]irects that, to the fullest extent possible . . . all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions⁶⁷ significantly

⁶⁰ *Id.* § 4331(c).

⁶¹ Congress has often enacted statutes with hundreds, if not thousands, of pages.

⁶² The author understands in completing this article that the Council on Environmental Quality has proposed amendments to its regulations that will—if adopted, survive litigation, and not be overturned by Congress—narrow the scope of NEPA. For a discussion of the proposed changes, see James McElfish, Jr., *Practitioners Guide to the Proposed NEPA Regulations*, ELI (Feb. 2020), <http://www.eli.org/sites/default/files/eli-pubs/practioners-guide-proposed-nepa-regulations-2020.pdf> [<http://perma.cc/76BS-F2RU>].

⁶³ 40 C.F.R. § 1500.1(a) (2018).

⁶⁴ See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193–94 (D.C. Cir. 1991).

⁶⁵ Many of the federal environmental statutes contain citizen suit provisions, letting private parties act as private “attorney generals” on enforcing the laws if the federal or state officials fail to do so. See *Citizen Suit Provisions in Environmental Law*, ENVTL. RTS. DATABASE, <http://environmentalrightsdatabase.org/citizen-suit-provisions-in-environmental-law/> [<http://perma.cc/8DX2-TTF9>].

⁶⁶ Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205 (1998) (footnote omitted). Professor Caldwell could be considered the father of NEPA.

⁶⁷ A major federal action can include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies,” and “new or revised agency rules, regulations, plans, policies, or procedures.” 40 C.F.R. § 1508.18(a).

affecting the quality of the human environment,⁶⁸ a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁶⁹

Early impact statements on controversial proposals could be quite prolix, covering volumes. The CEQ regulations provide the EIS should be “concise, clear, and to the point,” and “supported by evidence that agencies have made the necessary environmental analyses.”⁷⁰

The NEPA statute does not provide for judicial review of NEPA decisions and filings.⁷¹ It has no implementing provisions. However, the Administrative Procedure Act (“APA”), by default, covers administrative decisions in the absence of specific provisions applicable to an agency.⁷² Lawsuits seeking to enforce NEPA are therefore brought pursuant to the APA.

B. The Role of the Council on Environmental Quality

The CEQ formally came into existence on January 1, 1970 as part of the NEPA statute.⁷³ It was supposed to play a role similar to the Council of Economic Advisors.⁷⁴ President Nixon issued an executive order directing the CEQ to issue guidelines for interpreting and applying NEPA.⁷⁵ The Supreme Court in

⁶⁸ The CEQ regulations define “human environment” as “the natural and physical environment and the relationship of people with that environment.” *Id.* § 1508.14.

⁶⁹ National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2012).

⁷⁰ 40 C.F.R. § 1500.2(b).

⁷¹ See *Sierra Club v. Kimbell*, 623 F.3d 549, 558–59 (8th Cir. 2010).

⁷² See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 557 (2012)).

⁷³ See National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 852 (1970).

⁷⁴ See *The Council of Economic Advisors*, WHITE HOUSE, <http://www.whitehouse.gov/cea/> [<http://perma.cc/XLD6-ACTD>] (last visited Oct. 28, 2019) (The Council of Economic Advisors is charged with providing the President with advice on economic policy).

⁷⁵ See Exec. Order No. 11,514, 3 C.F.R. § 531 (1971).

*Andrus v. Sierra Club*⁷⁶ held that the CEQ NEPA guidelines are entitled to substantial deference.⁷⁷

C. The NEPA Process

The NEPA process seems relatively simple in theory, but the process often takes years, even without litigation. The agency first engages in a scoping process, wherein it seeks input in focusing the impact statement.⁷⁸ It then engages in an Environmental Assessment (“EA”) to decide if an EIS is necessary.⁷⁹ If not, it publishes the EA and a Finding of No Significant Impact Statement (“FONSI”).⁸⁰

A FONSI cannot be justified by a conclusion that an action would only have an insignificant impact on the environment.⁸¹ The agency must provide a “convincing statement of reasons” why the environmental impact would be no more than incidental.⁸²

If an EIS is needed, then a Draft Environmental Impact Statement (“DEIS”) is prepared and circulated for comments.⁸³ The comment period will be at least forty-five days.⁸⁴ The agency responds to the comments in preparing the final EIS, variously referred to as the EIS, NEPA Statement, or FEIS. The process can entail an extended period of time—often years, when litigation is involved. A lengthy litigation process will follow in controversial proposals. One possibility in litigation is that the reviewing court will set aside the impact statement, restarting the process.

D. Standing

The first requirement for filing suit in federal court is “standing.” Article III, Section 2 of the Constitution limits the jurisdiction of federal courts to cases and controversies, which the Supreme Court has construed to mean that the grievant has standing, that the case is not moot, and that it is not an advisory opinion.⁸⁵

⁷⁶ 442 U.S. 347, 358 (1979).

⁷⁷ *See id.* at 358.

⁷⁸ *See* GLMRIS, *What is NEPA Scoping?*, <http://glmr.is.anl.gov/stay-involved/scoping/> [<http://perma.cc/UV2Z-XJ5C>].

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See* *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005).

⁸² *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

⁸³ For a discussion of the comment process, especially from fellow agencies, see Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2012).

⁸⁴ *See* 40 C.F.R. § 1506.1(c) (2018).

⁸⁵ *See* U.S. CONST. art. III, § 2.

Standing is relatively easy for plaintiffs in enforcing NEPA. Section 10 of the Administrative Procedure Act provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁸⁶ The question under the germinal case of *Sierra Club v. Morton* was if a non-economic injury could give standing to a complaint.⁸⁷ The Supreme Court established the parameters of modern standing, opening the doors to substantial private litigation to protect the environment.⁸⁸

The Court held, under Section 10, that standing can be based on an aesthetic and environmental well-being.⁸⁹ It further quoted an earlier opinion, *Association of Data Processing Service Organizations, Inc. v. Camp*,⁹⁰ which said the injured interest “may reflect ‘aesthetic, conservational, and recreational’ as well as economic values.”⁹¹

The Court also held that an organization can represent its members, so long as one of its members has individual standing.⁹² The courthouse door thereby opened for the Sierra Club and other representative organizations to protect the environment, as well as other causes. The organizations have the resources many individuals would lack in bringing these lawsuits. The Supreme Court further held that once plaintiffs have standing, they may argue the public interest to support a claim that the agency failed to comply with statutory requirements,⁹³ thereby not being limited solely to the issue upon which standing was granted.

The Supreme Court, a year later, in *United States v. Students Challenging Regulatory Agency Procedures* (“SCRAP”), held that standing was not excluded because many persons “shared the same injury.”⁹⁴

The Supreme Court in *Lujan v. Defenders of Wildlife* held that standing has three requirements: (1) actual or imminent invasion of a concrete and particularized legally protected interest—an injury in fact; (2) a causal connection between

⁸⁶ Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 702 (2012)).

⁸⁷ 405 U.S. 727, 734 (1972).

⁸⁸ *See id.* at 740.

⁸⁹ *See id.* at 734.

⁹⁰ Ass’n of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970).

⁹¹ *Id.* at 154 (quoting *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965)). *See also Sierra Club*, 405 U.S. at 738 (quoting *Data Processing*, 397 U.S. at 154).

⁹² *See Sierra Club*, 405 U.S. at 739.

⁹³ *See id.* at 737.

⁹⁴ *United States v. Students Challenging Regulatory Procedures*, 412 U.S. 669, 686 (1973).

defendant's actions and plaintiff's injury; and (3) a likelihood, not just speculation, that the injury is redressable by a favorable court decision.⁹⁵

The Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*⁹⁶ followed the *Lujan* standing requirements.⁹⁷ *Friends of the Earth* involved a citizens suit under the Clean Water Act, for illegal discharges on the North Tyger River in Roebuck, South Carolina.⁹⁸ This standing analysis is applicable across the board in environmental disputes in federal court. The Court held standing exists because plaintiffs alleged that the pollution directly affected their recreational, aesthetic, and economic interests.⁹⁹ The injury in fact can include "aesthetic and recreational" values.¹⁰⁰ Another expansion of standing is that only one plaintiff need have standing.¹⁰¹

Another case, *Didrickson v. United States Department of the Interior*, involved a United States Fish and Wildlife Service moratorium on the takings and importation of marine mammals, with a limited exemption for Native Alaskans.¹⁰² The case revolved around sea otters.¹⁰³ Standing was granted to those who observed, enjoyed, and studied sea otters.¹⁰⁴

E. Agency Adaptation and Exhaustion of Administrative Remedies

Agencies were often initially surprised by the application of NEPA to their proposed actions. However, the agencies adapted after a series of judicial opinions impressing NEPA onto the agencies. They learned to include boiler plate discussions, such as alternatives, the language of which would appear in multiple impact statements. They learned how to include an appendix

⁹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁹⁶ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000).

⁹⁷ *See id.* at 180–81.

⁹⁸ *See id.* at 167–68.

⁹⁹ *See id.* at 183. One plaintiff was a neighbor, living a half mile from the facility, who could no longer fish, swim, or picnic in or near the river. Another plaintiff was a resident who lived two miles from the facility. She too could no longer picnic, walk, or birdwatch along the river, due to concerns about the harmful pollutants in the river. She and her husband changed their minds about purchasing a home along the river. A third plaintiff lived twenty miles from the facility. She wanted to use the area south of the facility for recreational purposes, but not in light of the pollution. A fourth plaintiff living near the facility witnessed decreased property value of their residence. Finally, a fifth plaintiff who canoed, would not canoe near the facility. *See id.* at 181–83.

¹⁰⁰ *Id.* at 183.

¹⁰¹ *See Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 518 (2007); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

¹⁰² 982 F.2d 1332, 1334, 1340 (9th Cir. 1992).

¹⁰³ *Id.* at 1334.

¹⁰⁴ *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) (Plaintiffs hiked, hunted, fished, and camped in the area).

with their responses to the comments on a draft impact statement. The responses would show they considered the comments in their decision-making. If opponents failed to comment, then the judicial response would be that the opponents failed to exhaust their administrative remedies.

A standard rule in appealing administrative decisions is to have exhausted administrative remedies. Justice Thomas wrote in *Department of Transportation v. Public Citizen*¹⁰⁵ that since the complainants failed to produce alternatives, they “forfeited” any objections to the alleged failure of the agency to consider alternatives.¹⁰⁶

As such, agencies were able to integrate NEPA requirements into their actions.

III. THE SPLIT BETWEEN THE LOWER COURTS AND THE SUPREME COURT

The Supreme Court, in a number of decisions, has defined the responsibilities of federal agencies under NEPA, while limiting its application as a procedural statute. The two leading cases are *Kleppe v. Sierra Club*¹⁰⁷ and *Vermont Yankee Nuclear Power Corp. v. NRDC*.¹⁰⁸

The Supreme Court has taken a soft look when implementing NEPA, whereas the lower courts have taken a hard look. Two early nuclear energy cases, one by the Supreme Court and the other by the District of Columbia Court of Appeals, illustrate the split in the federal judiciary. The lower courts ran with NEPA as the Magna Carta of environmental protection, while the Supreme Court has consistently taken a narrow approach to implementing NEPA.

A. The Lower Court Approach: *Calvert Cliffs*

Judge Skelly Wright, known for his strong opinions, in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,¹⁰⁹ set the roadmap for the district and appellate courts' interpretation of NEPA early on. The Atomic Energy Commission (“AEC”) contended the agency

¹⁰⁵ 541 U.S. 752 (2004).

¹⁰⁶ See *id.* at 764–65; see also *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) (“We have held that [w]e will not review information that [a party] failed to include in the administrative record or present before [the agency].” (quoting *N.M. Env't Improvement Div. v. Thomas*, 789 F.2d 825, 835–36 (10th Cir. 1986))).

¹⁰⁷ 427 U.S. 390 (1976).

¹⁰⁸ 435 U.S. 519 (1978).

¹⁰⁹ 449 F.2d 1109 (D.C. Cir. 1971).

needed a reasonable time to adjust to NEPA's mandates because of the vagueness of the statute.¹¹⁰ The AEC's rules provided environmental factors would be considered by the agency's regulatory staff, but not by the hearing board, unless raised by an outside party or staff members.¹¹¹

Judge Wright cautioned that NEPA's "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."¹¹² The court held environmental protection is now a mandate of every federal agency and department.¹¹³ Environmental protection must be taken into account, and considered as other matters within the agency's mandate are considered.¹¹⁴ The purposes of the impact statements are to aid in the agency's decision-making process and to inform other agencies and the public, of the environmental consequences of the planned federal action.¹¹⁵

The judge further cautioned that "the phrase 'to the fullest extent possible'" cannot serve as "an escape hatch for footdragging agencies."¹¹⁶ The opinion held that the statute applies to federal licensing and permitting.¹¹⁷ Judge Wright further wrote that environmental issues must be considered at every stage in the decision-making process—"at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs."¹¹⁸

The appellate court was dismayed by the AEC's attitude: "We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act."¹¹⁹ The responsibility of the agency is not to sit back, but "it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation."¹²⁰ Environmental protection is to be considered "to the fullest extent possible."¹²¹ NEPA's purpose is "to tell

¹¹⁰ *See id.* at 1112.

¹¹¹ *See id.* at 1116–17.

¹¹² *Id.* at 1111.

¹¹³ *See id.* at 1129.

¹¹⁴ *See id.* at 1112.

¹¹⁵ *See id.* at 1114.

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 1124.

¹¹⁸ *Id.* at 1118.

¹¹⁹ *Id.* at 1117. *See also* *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 (D.C. Cir. 1973) ("The Commission takes an unnecessarily crabbed approach to NEPA.").

¹²⁰ *Calvert Cliffs*, 449 F.2d at 1119.

¹²¹ *Id.* at 1118.

federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate.”¹²²

NEPA mandates a careful and informed decision-making process. The court wants environmental costs to be weighed against the “economic and technical benefits of [the] planned action.”¹²³ The court threw the gauntlet down to the federal agencies to adhere to NEPA.¹²⁴ Another appellate court held, in *Zabel v. Tabb*, that the Army Corps of Engineers (“Corps”) could use the environmental impacts to deny a dredge and fill permit.¹²⁵

While the District of Columbia Court of Appeals ran with the concept of NEPA as the Magna Carta of environmental protection, the United States Supreme Court has implemented NEPA more narrowly.

B. The Higher Courts’ Approach: *Vermont Yankee*

1. The Court of Appeals

Vermont Yankee was a consolidation of two nuclear reactor cases: one in Michigan¹²⁶ and one in Vermont.¹²⁷ Both involved NEPA questions, with energy conservation in the Michigan case, and the handling of nuclear waste in the Vermont case. A cynic might believe in Nietzsche’s eternal recurrence of history since both issues are still with us today.¹²⁸

The AEC held hearings on licensing the Vermont Yankee nuclear plant.¹²⁹ The AEC had to consider the disposal of the spent fuel in its analysis.¹³⁰ The AEC relied upon a staff report prepared by Dr. Frank Pittman on the waste issue.¹³¹ Intervenors questioned the quality of the report.¹³² The agency’s lawyers

¹²² *Id.* at 1122.

¹²³ *Id.* at 1123.

¹²⁴ See *Izaak Walton League of Am. v. Schlesinger*, 337 F. Supp. 287, 296 (D.D.C. 1971). A district court, shortly after *Calvert Cliffs*, set aside a “temporary” license permitting operation at 20% capacity without a detailed EIS. *Id.* at 289.

¹²⁵ See 430 F.2d 199, 209–10, 214 (5th Cir. 1970).

¹²⁶ See *Aeschliman v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 622 (D.C. Cir. 1976).

¹²⁷ See *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633 (D.C. Cir. 1976).

¹²⁸ See FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 174 (Thomas Common trans., 1917).

¹²⁹ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 527–28 (1978).

¹³⁰ *Id.* at 533.

¹³¹ See *Nuclear Regulatory*, 547 F.2d at 647.

¹³² See *Yankee*, 435 U.S. at 542.

briskly cross-examined the intervenors while treating Dr. Pittman with kid's gloves.¹³³

The primary legal issue for the intervenors, and the Court of Appeals in *Vermont Yankee*, was the standard of review to be accorded to agency action, which entails tremendous health and safety risks to the general public.¹³⁴ The thrust of the intervenors' position can partially be explained by this excerpt from the Court of Appeals decision: "They reiterated repeatedly that the problems involved are not merely technical, but involve basic philosophical issues concerning man's ability to make commitments which will require stable social structures for unprecedented periods."¹³⁵

The staff of the Nuclear Regulatory Commission ("NRC"), successor to the AEC, prepared a Table S-3 Rule using numerical values to reflect the environmental effects of the fuel cycle, which would then be incorporated into a cost-benefit study in individual licensing cases.¹³⁶ The NRC concluded that the effects were relatively insignificant.¹³⁷

The NRC gave great deference to the staff's twenty-page conclusory report.¹³⁸ Conversely, it treated the intervenors with open hostility.¹³⁹ The intervenors were denied the opportunity to question the Commission's staff.¹⁴⁰

In dealing with a substance such as plutonium, which has a half-life of 25,000 years and must be isolated from the environment for 250,000 years before it becomes harmless, society is properly concerned with ensuring its safe handling.¹⁴¹ To the extent that litigation brings these issues before the courts, it is highly foreseeable that many courts will thereby be swayed in their reasoning by staff reports.

Thus, as expressed by Judge Bazelon in a concurring opinion:

Decisions in areas touching the environment or medicine affect the lives and health of all. These interests, like the First Amendment, have "always had a special claim to judicial protection." Consequently,

¹³³ See *Nuclear Regulatory*, 547 F.2d at 633.

¹³⁴ See *id.* at 637.

¹³⁵ *Id.* at 652.

¹³⁶ See *id.* at 638.

¹³⁷ *Id.*

¹³⁸ See *id.* at 647.

¹³⁹ See *id.* at 652.

¹⁴⁰ See *id.* at 651.

¹⁴¹ *Id.* at 639.

more precision may be required than the less rigorous development of scientific facts which may attend notice and comment procedures.¹⁴²

The Commission adopted the following procedures: (1) the report would be made available before the hearing, along with background materials; (2) all participants would be given a reasonable opportunity to present their views, accompanied by counsel if they wished; and (3) written and oral statements, if time permits (persons presenting oral remarks would be subject to questioning by the Commission).¹⁴³ A transcript was available for comment after the hearing.¹⁴⁴

Judicial concern is heightened when the record appears grossly inadequate on a critical matter, such as nuclear waste disposal.¹⁴⁵ On such an important issue as the handling of nuclear waste, with all the long-term implications for humanity, the appellate tribunal was singularly unimpressed with the twenty page conclusory study by Dr. Pittman and the marked reliance on it by the Commission.¹⁴⁶ One comment was “[t]he board’s quiescence regarding Dr. Pittman is in marked contrast to its often hostile questioning of expert witnesses for the intervenors.”¹⁴⁷

The appellate court remanded the case to the NRC with orders that the Commission give the intervenors the right of cross examination.¹⁴⁸

The majority opinion stated, in general:

An agency need not respond to frivolous or repetitive comment [sic] it receives. However, where apparently significant information has been brought to its attention, or substantial issues of policy or gaps in its reasoning raised, the statement of basis and purpose must indicate why the agency decided the criticisms were invalid. Boilerplate generalities brushing aside detailed criticism on the basis of agency “judgment” or “expertise” avail nothing; what is required is a reasoned response, in which the agency points to particulars in the record

¹⁴² *Id.* at 657 (Bazelon, J., concurring) (footnote omitted). In an unusual opinion, Judge Bazelon wrote both the majority opinion and also a separate concurring opinion.

¹⁴³ *See* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 529 (1978).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 549–55.

¹⁴⁶ *See Nuclear Regulatory*, 547 F.2d at 647.

¹⁴⁷ The quote was originally in footnote 53 of the court of appeals decision, *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976), reprinted in 1 Appendix to Petitions for Writs of Certiorari filed September 21 and October 14, 1976 at 61, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (Nos. 76-419, 76-528), but was subsequently ordered removed. *Petition for Review of an Order of the Nuclear Regulatory Comm’n* at 88, *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976). The footnote, however, still appears in the case on LexisNexis.

¹⁴⁸ *See Nuclear Regulatory*, 547 F.2d at 655.

which, when coupled with its reservoir of expertise, support its resolution of the controversy. An agency may abuse its discretion by proceeding to a decision which the record before it will not sustain, in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers.¹⁴⁹

This opinion also stated:

We do not dispute these conclusions. We may not uphold them, however, lacking a thorough explanation and a meaningful opportunity to challenge the judgments underlying them. Our duty is to insure that the reasoning on which such judgments depend, and the data supporting them, are spread out in detail on the public record. Society must depend largely on oversight by the technically-trained members of the agency and the scientific community at large to monitor technical decisions. The problem with the conclusory quality of Dr. Pittman's statement and the complete absence of any probing of its underlying basis is that it frustrates oversight by anyone.¹⁵⁰

The court continued:

To the extent that uncertainties necessarily underlie predictions of this importance on the frontiers of science and technology, there is a concomitant necessity to confront and explore fully the depth and consequences of such uncertainties. Not only were the generalities relied on in this case not subject to rigorous probing in any form but when apparently substantial criticisms were brought to the Commission's attention, it simply ignored them, or brushed them aside without answer. Without a thorough exploration of the problems involved in waste disposal, including past mistakes, and a forthright assessment of the uncertainties and differences in expert opinion, this type of agency action cannot pass muster as reasoned decisionmaking.¹⁵¹

2. The Supreme Court

The Supreme Court strongly disagreed with the D.C. Circuit, reiterating precedence including *Kleppe v. Sierra Club*,¹⁵² and stating, "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"¹⁵³

The Court, again in citing precedence, stated NEPA does not repeal, by implication, any other statute.¹⁵⁴ Nor would it,

¹⁴⁹ *Id.* at 646 (footnotes omitted).

¹⁵⁰ *Id.* at 651.

¹⁵¹ *Id.* at 653.

¹⁵² 427 U.S. 390 (1976).

¹⁵³ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

¹⁵⁴ *Id.* at 548 (citing *Aberdeen & R. R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975)).

therefore, add to the procedures set forth in the Administrative Procedures Act.¹⁵⁵ Indeed, section 104 of NEPA provides the statute would not “affect the specific statutory obligations of any Federal agency.”¹⁵⁶

The Court thereby held that an agency only has to follow the prescribed procedures under NEPA.¹⁵⁷ Therefore, a court cannot require an agency to employ more procedures. The Court reversed to determine if the original rule was adequately justified by the administrative record, cautioning that the appellate court could not substitute its judgment for the agency’s.¹⁵⁸

The Supreme Court limited the role of the federal judiciary in reviewing an EIS to exclude second guessing the substantive decision by the agency. Congress intended “to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency.”¹⁵⁹ Part of the lessons of *Vermont Yankee* and, subsequently, *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, is that the agency is not under a duty to place environmental considerations over other appropriate considerations.¹⁶⁰

The D.C. Circuit in *Aeschliman v. United States Nuclear Regulatory Commission* held the agency had to include energy conservation as an alternative in its EIS on the proposed Consumers Power Company’s twin reactors in Midland, Michigan.¹⁶¹ The Licensing Board rejected energy conservation as “beyond our province.”¹⁶² The “real question” for the agency was which power generating technology was superior.¹⁶³

The agency viewed energy conservation as a novel concept.¹⁶⁴ It therefore shifted the burden to the intervenors, holding they “must state clear and reasonably specific energy conservation contentions.”¹⁶⁵ The appellate court held the agency had to undertake a “preliminary investigation of the proffered alternative to reach a rational judgment” as to whether to pursue it further.¹⁶⁶

¹⁵⁵ *See id.* at 524.

¹⁵⁶ National Environmental Policy Act of 1969 § 104, 42 U.S.C. § 4334 (2012).

¹⁵⁷ *See Yankee*, 435 U.S. at 558.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* 444 U.S. 223, 227 (1980).

¹⁶¹ *See* 547 F.2d 622, 632 (D.C. Cir. 1976).

¹⁶² *Yankee*, 435 U.S. at 532.

¹⁶³ *Aeschliman*, 547 F.2d at 625.

¹⁶⁴ *Yankee*, 435 U.S. at 534.

¹⁶⁵ *Aeschliman*, 547 F.2d at 626.

¹⁶⁶ *Id.* at 628.

The Court cautioned that “[c]ommon sense also teaches us that the ‘detailed statement of alternatives’ cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”¹⁶⁷ The courts are not to substitute their judgment for that of the agency on the merits of the decision.¹⁶⁸ Thus, as the Court said in *Strycker’s Bay*:¹⁶⁹

[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot “interject itself within the area of discretion of the executive as to the choice of action to be taken.”¹⁷⁰

The Supreme Court held that NEPA is a procedural statute—in a sense, an environmental full disclosure act.¹⁷¹ The project could result in an environmental disaster, but as long as the potential consequences were fully disclosed, the project could proceed. The duty on the part of the agency is to take a hard look at the environmental consequences,¹⁷² “to ensure that environmental concerns are integrated into the very process of [federal] agency decisionmaking.”¹⁷³ The purpose of NEPA is not to “mandate particular results,” but to prescribe the necessary process.¹⁷⁴

3. *Vermont Yankee* on Remand: *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*

The Court of Appeals on remand again invalidated the license for *Vermont Yankee* on the grounds that the NRC rules failed to consider the uncertainties of the long-term isolation of high-level and transuranic wastes, as well as an improper consideration of the health, socioeconomic, and cumulative effects of fuel-cycle activities.¹⁷⁵ The NRC’s revised Table S-3 stated that solidified high-level and solidified wastes would remain buried in a federal depository, and thus would have no effect on the environment.¹⁷⁶

Judge Edwards, in his concurring opinion, emphasized the importance of the case:

¹⁶⁷ *Yankee*, 435 U.S. at 551.

¹⁶⁸ See *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

¹⁷¹ See *Yankee*, 435 U.S. at 558.

¹⁷² See *Kleppe*, 427 U.S. at 410 n.21; see also *Strycker’s Bay*, 444 U.S. at 227–28.

¹⁷³ *Morris Cty. Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 274 (3d Cir. 1983).

¹⁷⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

¹⁷⁵ See *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 685 F.2d 459, 478–79 (D.C. Cir. 1982).

¹⁷⁶ See *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 92 (1983).

In this case we are required to review the continuing effort of the NRC to pit human intelligence against the most primordial force of nature. This force, when involved in its most awful manifestation, exceeds the power of flood, fire, pestilence, earthquake, hurricane and volcano. In this century, it has been demonstrated in this and other countries that this force can be employed for peace and war—for warming a baby's bottle and for nuclear holocaust.¹⁷⁷

Judge Wilkey dissented, stating it is clear that the D.C. Court of Appeals has assumed a role of the high public protector of all that is good from the "perceived evils of the nuclear age."¹⁷⁸

The Supreme Court once again reversed the appellate court.¹⁷⁹ The Court reiterated that judicial review under NEPA or the APA is limited to procedural review.¹⁸⁰ The role of the courts is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions,"¹⁸¹ and the "decision is not arbitrary or capricious."¹⁸² NEPA does not require an agency "to elevate environmental concerns over other appropriate considerations."¹⁸³

NEPA serves two purposes: (1) it places an obligation on the agency to consider every significant aspect of the environmental impact of a proposed federal action; and (2) it ensures the agency will inform the public that it has considered environmental concerns in the decision-making process.¹⁸⁴

The Court cautioned that the agency is making predictions within its "area of special expertise, at the frontiers of science."¹⁸⁵ The courts should therefore be most deferential when reviewing informed decisions of agencies involving issues of science, technical expertise, or complex environmental statutes.¹⁸⁶

Thus, we have the split between the appellate court and the Supreme Court. The D.C. Circuit was taking a hard look at the risks and long-term safety of nuclear, and found the regulatory agency wanting. The Supreme Court was consistently willing to defer to the expertise of the agency based on a soft look approach. The Court was adamant in its position on the safety and advisability of nuclear power:

¹⁷⁷ *Nuclear Regulatory*, 685 F.2d at 495.

¹⁷⁸ *Id.* at 517 (Wilkey, J., dissenting).

¹⁷⁹ *Balt. Gas*, 462 U.S. at 108.

¹⁸⁰ *See id.* at 97.

¹⁸¹ *Id.* at 98.

¹⁸² *Id.*

¹⁸³ *Id.* at 97 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980)).

¹⁸⁴ *See id.* at 95–96.

¹⁸⁵ *Id.* at 103.

¹⁸⁶ *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989).

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States . . . which must eventually make that judgment.¹⁸⁷

4. *Kleppe v. Sierra Club*

The Supreme Court held in *Kleppe v. Sierra Club* that an EIS is not required until an agency has issued a report or recommendation on a major federal action.¹⁸⁸ The question is not whether a federal action is contemplated, but whether it is proposed.¹⁸⁹ Two other propositions came out of *Kleppe*. First, the role of the courts is not to “substitute [their] judgment for that of the agency as to the environmental consequences of its actions.”¹⁹⁰ The Supreme Court in *Vermont Yankee* cited *Kleppe* for the proposition that “[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.”¹⁹¹ The courts are not to substitute their judgment for that of the agency on the merits of the decision.¹⁹²

The second critical holding is that the courts’ role is to ensure that the agency took a hard look at the environmental consequences of the proposal.¹⁹³ Thus, as the Court said in *Strycker’s Bay*:

[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot “interject itself within the area of discretion of the executive as to the choice of the action to be taken.”¹⁹⁴

¹⁸⁷ Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 557–58 (1978).

¹⁸⁸ 427 U.S. 390, 411–12 (1976).

¹⁸⁹ *Id.* at 398–99.

¹⁹⁰ *Id.* at 410 n.21 (citing Scenic Hudson Pres. Conference v. Fed. Power Comm’n, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied* Scenic Hudson Pres. Conference v. Fed. Power Comm’n, 407 U.S. 926 (1972)).

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *Id.* (citing Nat. Res. Def. Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

¹⁹⁴ *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

Strycker's Bay involved a low-income housing project on Manhattan's Upper West Side.¹⁹⁵ The Department of Housing and Urban Development approved the location because relocation would result in an "unacceptable delay."¹⁹⁶ Opposition to low-income housing, and now resettlement of the homeless, continues to be a major cause of EIS, both under NEPA if federal action is involved, and under state equivalents, such as the California Environmental Quality Act ("CEQA").¹⁹⁷

Justice Marshall, in his separate *Kleppe* opinion, opined: "[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. . . . [C]ourts have responded in just that manner and have created such a 'common law.'"¹⁹⁸ Lower courts tried, but the Supreme Court envisioned a more restrictive role for NEPA.

IV. NEPA'S LANGUAGE

The language of NEPA was designed to further its purposes of considering potential environmental impacts and disclosing such potential environmental impacts. This section evaluates the key language and terms used throughout NEPA.

A. Alternatives,¹⁹⁹ Perfection, and Flyspecking

The NEPA statement, also known as the EIS, has to analyze all reasonable alternatives.²⁰⁰ The possible alternatives to a proposal, including doing nothing, are limited only by the creativity of project opponents. Thus, a line has to be drawn. The EIS should include a discussion of reasonable alternatives.²⁰¹

Courts have posited that three questions should be answered as to alternatives: (1) what is the purpose of the proposed project; (2) what are the reasonable alternatives in light of the purpose; and (3) to what extent should each alternative be explored?²⁰²

¹⁹⁵ *Id.* at 223.

¹⁹⁶ *Id.* at 226.

¹⁹⁷ California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21189.57 (West 2014).

¹⁹⁸ *Kleppe*, 427 U.S. at 421 (Marshall, J., concurring in part and dissenting in part).

¹⁹⁹ For a general discussion of alternatives, see James Allen, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RESOURCES & ENVTL. L. 287, 287 (2005).

²⁰⁰ See 40 C.F.R. § 1502.14 (2018).

²⁰¹ See *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); 40 C.F.R. § 1502.14.

²⁰² See *Simmons*, 120 F.3d at 668; *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

The starting point is to ascertain the project's purpose. It is axiomatic that the "broader the purpose" of the proposal, the "wider the range of alternatives; and vice versa."²⁰³ The agency should focus its resources on the potentially available alternatives and not the unworkable.²⁰⁴

The EIS should vigorously explore and explain all reasonable alternatives to provide a clear basis for choice among the alternatives.²⁰⁵ "Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective."²⁰⁶ CEQ regulations require alternatives considered by the decision maker to be discussed in the EIS.²⁰⁷ A no-action alternative must be considered in the analysis.²⁰⁸

In 1972, the D.C. Circuit in *Natural Resources Defense Council v. Morton* adopted a rule of reason approach, that an agency must consider all reasonable alternatives, including those outside the agency's jurisdiction.²⁰⁹ The rule of reason approach received support by the Supreme Court in *Vermont Yankee*,²¹⁰ and it has been widely followed ever since.

Opponents of a proposal will nitpick and flyspeck an EIS to find something, anything, to invalidate it, hoping to send it back and delay the project. They will argue that alternatives were either not considered or inadequately considered. They will further claim that the agency did not take a hard look at the alternatives, or the adverse environmental consequences of the project. Courts do not demand perfection in an EIS; however, they do frown upon flyspecking a statement on some little point.²¹¹ The Supreme Court in *Vermont Yankee* cautioned: "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found

²⁰³ *Simmons*, 120 F.3d at 666.

²⁰⁴ *See id.* at 669.

²⁰⁵ *See WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1236 (D. Colo. 2011); 40 C.F.R. § 1502.14.

²⁰⁶ *WildEarth Guardians*, 828 F. Supp. 2d at 1236–37 (citation omitted) (citing *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002)).

²⁰⁷ *See* 40 C.F.R. § 1505.1(e).

²⁰⁸ *See id.* § 1502.14.

²⁰⁹ *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

²¹⁰ *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553–55 (1978).

²¹¹ *See Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176–77 (10th Cir. 2008); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1152 (D. Colo. 2018); *Gov't of Province of Manitoba v. Zinke*, 273 F. Supp. 3d 145, 152 (D.D.C. 2017) (holding that the court would not give credence to looking for a defect no matter how minimal (citing *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006))).

wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”²¹²

B. Arbitrary and Capricious

The general standards of review of the APA are laid out in *Citizens to Preserve Overton Park Inc. v. Volpe*,²¹³ which is often cited to in NEPA cases. The Supreme Court adopted the arbitrary and capricious standard in reviewing a decision under NEPA.²¹⁴

A decision can be arbitrary and capricious if it fails to consider an important aspect of the problem, offers an explanation contra to the evidence before the agency, or is a clear error of judgment.²¹⁵ Another way of establishing that a decision is arbitrary and capricious is if the agency relied on entirely false premises or information.²¹⁶

C. Significant Effect

The CEQ guidelines provide a list of relevant factors, which include: effects on public health and safety; unique characteristics of the geographic area, such as national parks or cultural resources; uncertainty of potential effects; whether special cumulative effects are likely; the degree to which historic districts and landmarks would be affected; the degree to which endangered species might be affected; and the degree of controversy surrounding the effects on the human environment.²¹⁷

The Ninth Circuit in *City of Davis v. Coleman*²¹⁸ held an EIS is required when a plaintiff raises subsequent questions about a proposal’s significant impacts.²¹⁹

D. The Breadth of NEPA: Direct, Indirect, and Cumulative Impacts

NEPA’s application is not narrowly confined to the direct impacts of the proposed federal action. The EIS should include discussions of cumulative impacts and indirect impacts as well.

²¹² *Yankee*, 435 U.S. at 551.

²¹³ 401 U.S. 402, 413–14 (1971).

²¹⁴ See *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 414 (1976) (“We cannot say that petitioners’ choices are arbitrary.”).

²¹⁵ See *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009); *Utah Env’tl. Cong. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir. 2007).

²¹⁶ See *Van Abbema v. Fornell*, 807 F.2d 633, 639 (7th Cir. 1986) (“[A] decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a ‘reasoned decision.’” (quoting *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1035 (2d Cir. 1983))).

²¹⁷ See 40 C.F.R. § 1508.27(b) (2018).

²¹⁸ 521 F.2d 661 (9th Cir. 1975).

²¹⁹ See *id.* at 673.

1. Direct Impacts

Direct impacts should be the easiest to discuss. They are “caused by the action and occur at the same time and place.”²²⁰

2. Cumulative Impacts

Impact statements must also take into account the cumulative impact of a project.²²¹ The CEQ regulations on cumulative impacts provide that “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment,”²²² which is “the impact on the environment which results from the incremental impact of the program which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”²²³ It is not necessarily the result of a single act, but the cumulative impacts of several acts.²²⁴

One approach to cumulative impacts on programmatic or management plans is to tier the impact statements with the general EIS, providing a broad overview on the impacts and leaving the specific details to be discussed on the site-specific impact statements.²²⁵ NEPA allows the statements for multi-stage projects to be programmatic, and to be followed by individual EIS’ on the subsequent developments.²²⁶ The programmatic EIS should analyze the broad impacts.²²⁷

3. Indirect Impacts

Justice Douglas in his dissenting opinion in *Sierra Club v. Morton* talked about the peripheral impact, the growth inducing impacts of projects.²²⁸ For example, think of the commercial development around a major airport or the development on the main streets adjoining a large mall.

Impact statements need to include indirect impacts, which “are defined as being caused by the action and are later in time or farther removed in distance but still reasonably foreseeable.”²²⁹

²²⁰ 40 C.F.R. § 1508.8(a).

²²¹ See *Ocean Advocates v. U.S. Army Corp of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005).

²²² 40 C.F.R. § 1508.27.

²²³ *Id.* § 1508.7.

²²⁴ See *id.*

²²⁵ See, e.g., *Sierra Club v. Marita*, 46 F.3d 606, 614 n.5 (7th Cir. 1995).

²²⁶ See 40 C.F.R. § 1508.7.

²²⁷ See 43 C.F.R. § 46.140(c) (2018).

²²⁸ 405 U.S. 727, 743 n.5 (1972) (Douglas, J., dissenting). Justice Douglas mentioned that an adjoining landowner planned to piggyback his 100 acres into a resort complex. *Id.*

²²⁹ *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1177 (10th Cir. 2002) (citing 40 C.F.R. § 1508(b)).

These can often be viewed as secondary or peripheral developments. Indirect impacts can be growth inducing actions, such as building a highway interchange.²³⁰ For example, as you drive across country along the interstates, you will witness a proliferation of motels, restaurants, and gas stations along the interchanges. Similarly, a large mall encourages substantial development outside its borders. Disneyland and Disneyworld, on a larger scale, have spurred large commercial and residential development in Anaheim and Orlando, respectively. An independent study shows Disneyland contributes \$5.7 billion annually to the Southern California economy.²³¹

E. Exceptions

NEPA has a few exceptions. One little known exception recognized by the CEQ is for emergency actions in which time is of the essence.²³² Besides that unique exception, there are other exceptions that come up more frequently.

1. Lack of Discretion

An agency has no duty to prepare an impact statement if it lacks discretion in the action.²³³

The Department of Housing and Urban Development, by statute, had to approve a subdivision within thirty days as long as the proper disclosures were made.²³⁴ NEPA must give way when a direct conflict exists with another statute.²³⁵

Similarly, the Supreme Court in *Department of Transportation v. Public Citizen*,²³⁶ held the Department of Transportation (Federal Motor Carrier Safety Administration (“FMCSA”)) did not have to evaluate the environmental cross-border operation of Mexican truckers because it lacked discretion to countermand the President’s authorization of the truckers pursuant to the North American Free Trade Agreement.²³⁷ The FMCSA had to grant

²³⁰ See, e.g., *City of Davis v. Coleman*, 521 F.2d 661, 674–75 (9th Cir. 1975).

²³¹ See *Disneyland Resort Generates \$5.7 Billion for Southern California Economy*, DISNEYLAND RESORT PUB. AFFAIRS, <http://publicaffairs.disneyland.com/disneyland-resort-generates-5-7-billion-for-southern-california-economy-2/> [<http://perma.cc/U8AB-LS4E>] (last visited Oct. 6, 2019).

²³² See 40 C.F.R. § 1506.11.

²³³ See *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 791 (1976).

²³⁴ See *id.* at 776.

²³⁵ See *id.* at 788–90.

²³⁶ 541 U.S. 752 (2004). See also *South Dakota v. Andrus*, 614 F.2d 1190, 1194–95 (8th Cir. 1980) (finding that the issuance of a mineral patent was not a “major” federal action).

²³⁷ *Public Citizen*, 541 U.S. at 759. The United States agreed under the North American Free Trade Act to allow Canadian and Mexican truckers to obtain operating permits in the United States. *Id.*

licenses to carriers who met the safety and financial responsibility requirements.²³⁸ The Court held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”²³⁹

NEPA does not supersede other statutes. NEPA’s requirements defer to the other statute in cases of conflict. Indeed, Section 104 provides that NEPA shall not affect the requirements of other statutes, including compliance with criteria or standards of environmental quality.²⁴⁰

2. Congressional Exceptions

Congress, by statute, can carve out exceptions to NEPA.²⁴¹ For example, The Water Pollution Control Act provides no action taken under it shall constitute major federal action within the meaning of NEPA.²⁴² Another example is Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which provides that the Secretary of Homeland Security can waive any law, including NEPA, if necessary to facilitate “expeditious construction” of structures along the Mexican border.²⁴³ This power has been exercised several times, including September 12, 2017 along the San Diego border.²⁴⁴

3. Status Quo

NEPA is geared to analyze changes in the physical environment. An EIS is not required, therefore, to leave nature alone or preserve the status quo.²⁴⁵ Similarly, rebuilding a bridge that was destroyed in a hurricane on substantially the same alignment does not need an EIS.²⁴⁶ A duty to prepare an EIS is

²³⁸ See *id.* at 758–59.

²³⁹ *Id.* at 770.

²⁴⁰ See National Environmental Policy Act of 1969 § 104, 42 U.S.C. § 4334 (2012).

²⁴¹ See Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 435 (1991); Aaron Ehrlich, *In Hidden Places: Congressional Legislation that Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS WEST NORTHWEST J. ENVTL. L. & POL’Y 285, 285 (2007).

²⁴² See Water Pollution Control Act, 33 U.S.C. § 1371(c)(1) (2019).

²⁴³ Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009–546, 8 U.S.C. § 1103 Note (2012).

²⁴⁴ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42829 (Sept. 12, 2017).

²⁴⁵ See *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995).

²⁴⁶ See *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981). The bridge connected Dauphin Island with the mainland of Alabama. *Id.* at 1097.

only triggered by a change in the status quo;²⁴⁷ whereas, rebuilding the bridge restored the preexisting status quo.²⁴⁸

4. Functional Equivalencies

In other situations, such as the Clean Air Act, the analysis to be undertaken by the agency can be viewed as the functional equivalent of an EIS.²⁴⁹ For example, the D.C. Circuit in 1973 held NEPA does not apply when a statute designed to protect the environment includes requirements similar to NEPA.²⁵⁰

In the case of a statute which does not provide for discretion, such as the listing of endangered species under the Endangered Species Act (“ESA”),²⁵¹ NEPA would interfere with the statutory requirements of the ESA and would not further the purposes of the ESA.²⁵² Therefore, where the purposes of consideration and disclosure are met by the requirements of other statutes, they can be excluded from NEPA requirements.

5. Categorical Exclusions

CEQ regulations also carve out categorical exclusions from NEPA. This label covers minor actions, such as routine maintenance, that “do not individually or cumulatively have a significant effect on the human environment.”²⁵³ However, the exemption is inapplicable if a normally excluded activity would have a significant environmental effect.²⁵⁴

F. International (Extraterritorial) Application of NEPA

A case from four decades ago shows the reach of NEPA. Both the Mexican and United States governments were very concerned with marijuana smuggling from Mexico, where it was being grown in the mountains.²⁵⁵ The Mexican government feared two things could happen if they sent the Federales into the mountains: they could be killed or corrupted.²⁵⁶ The solution was to spray the marijuana crops with Paraquat, a potent

²⁴⁷ *Id.* at 1099.

²⁴⁸ *Id.*

²⁴⁹ *See, e.g.,* Wyoming v. Hathaway, 525 F.2d 66, 72 (10th Cir. 1975).

²⁵⁰ *See* Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 384–85 (D.C. Cir. 1973).

²⁵¹ Endangered Species Act of 1973 § 4, 16 U.S.C. § 1533 (2012).

²⁵² *See* Pac. Legal Found. v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981).

²⁵³ 40 C.F.R. § 1508.4 (2018).

²⁵⁴ *See id.*

²⁵⁵ *See* Jesse Kornbluth, *Poisonous Fallout From The War on Marijuana*, N.Y. TIMES (Nov. 19, 1978), <http://www.nytimes.com/1978/11/19/archives/poisonous-fallout-from-the-war-on-marijuana-paraquat.html> [<http://perma.cc/96BA-5WNR>].

²⁵⁶ *Id.*

herbicide.²⁵⁷ The poisoned crops could be inhaled by consumers in the United States.²⁵⁸ The United States was providing technical assistance and \$12 million annually in funding.²⁵⁹

The National Organization of Marijuana Reform (“NORML”) brought suit under NEPA.²⁶⁰ The court found the United States’s action constituted a major federal action affecting the quality of the human environment.²⁶¹ The case was complicated because marijuana use was then illegal in the United States.²⁶² The court thereby refused to enjoin the federal action, but required preparation of an EIS.²⁶³

Another example of the extraterritorial application of NEPA is *Sierra Club v. Adams*, which involved the United States providing funding for the construction of the Darien Gap portion of the Pan American Highway through Columbia and Panama.²⁶⁴ The D.C. Circuit Court of Appeals assumed that NEPA was fully applicable to the construction in Panama.²⁶⁵

Environmental Defense Fund, Inc. v. Massey applied NEPA when the National Science Foundation proposed to burn food waste in Antarctica.²⁶⁶ The commonality between NORML and Antarctica waste burning is that the cases involved American actors or potential victims, which is different from applying NEPA to acts within foreign countries lacking an American actor or victim.

Two themes underlie the extraterritorial application of NEPA. The first is a presumption against extraterritorial application of United States laws.²⁶⁷ The second is the intent of Congress, because Congress can expressly legislate the extraterritorial application of U.S. laws.²⁶⁸ NEPA does not expressly contain such a provision. However, the argument can be made based on one of

²⁵⁷ See *Nat’l Org. for the Reform of Marijuana Laws v. U.S. Dep’t of State*, 452 F. Supp. 1226, 1228 (D.D.C. 1978).

²⁵⁸ Paraquat can affect the liver, kidneys, heart, and respiratory system. It can be deadly if ingested.

²⁵⁹ See *Reform of Marijuana Laws*, 452 F. Supp. at 1231.

²⁶⁰ See *id.* at 1228.

²⁶¹ See *id.* at 1235.

²⁶² See *id.* at 1229.

²⁶³ *Id.* at 1235.

²⁶⁴ 578 F.2d 389, 391 (D.C. Cir. 1978).

²⁶⁵ *Id.* at 392. However, the court noted in a footnote that the government’s brief stated it did not question jurisdiction in the case. *Id.* at 391 n.14.

²⁶⁶ 986 F.2d 528, 529 (D.C. Cir. 1993).

²⁶⁷ See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

²⁶⁸ See *Morrison*, 561 U.S. at 255.

the hortatory statements in NEPA.²⁶⁹ Section 102 provides that all agencies of the federal government, to the fullest extent possible, shall: “[R]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.”²⁷⁰

NEPA’s language allows the legislation to extend its reach beyond the physical borders of the United States of America.

G. *Andrus v. Sierra Club*²⁷¹ and Budget Proposals

The NEPA statute requires impact statements on proposals for legislation. The question in *Andrus* was whether proposed budget cuts to the National Wildlife Refuge System triggered NEPA.²⁷² The district court answered in the positive,²⁷³ and held appropriation requests constitute requests for legislation.²⁷⁴ The court of appeals limited the holding to appropriation requests accompanying a proposal for “taking new action which significantly changes the status” or if it ushers in a considered programmatic course following a programmatic review.²⁷⁵

Justice Brennan wrote the unanimous Supreme Court opinion holding that a budget request is neither a request for legislation nor a major federal action.²⁷⁶ The Court held CEQ’s NEPA interpretation is “entitled to substantial deference.”²⁷⁷ The CEQ regulations provide “[l]egislation’ includes a bill or legislative proposal to Congress,” but excludes “requests for appropriations.”²⁷⁸ The CEQ regulation followed the traditional Congressional distinction between legislation and appropriation.²⁷⁹ The Court’s opinion also reiterated that the CEQ NEPA guidelines are “entitled to substantial deference.”²⁸⁰

The Supreme Court construed Section 102(2)(C) to have two goals. The first is to integrate environmental considerations into the

²⁶⁹ See, e.g., Silvia M. Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT’L L. 115, 122 (1994).

²⁷⁰ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(F) (2012).

²⁷¹ 442 U.S. 347 (1979).

²⁷² See *id.* at 353.

²⁷³ See *id.* at 353–54.

²⁷⁴ *Id.* (quoting *Sierra Club v. Morton*, 395 F. Supp. 1187, 1198–99 (D.D.C. 1975)).

²⁷⁵ *Sierra Club v. Andrus*, 581 F.2d 895, 903 (D.C. Cir. 1978).

²⁷⁶ See *Andrus*, 442 U.S. at 363.

²⁷⁷ *Id.* at 358.

²⁷⁸ *Id.* at 357 (quoting 40 C.F.R. § 1508.17 (2018)).

²⁷⁹ *Id.* at 359–61.

²⁸⁰ *Id.* at 358.

decision-making process by requiring the preparation of an EIS.²⁸¹ The second is to inform the public that the agency considered environmental factors in the decision-making process.²⁸²

H. Worst-Case Analysis: Structures Fail and Tragedies Occur

The catastrophic collapse of the Teton Dam in Idaho on June 5, 1976 killed eleven people and caused \$2 billion in damages,²⁸³ while 25,000 people were left homeless.²⁸⁴ The tragic failure triggered the issue of whether EISs should include worst-case analysis. The Teton Dam EIS was said to be fourteen pages and prepared by one person.²⁸⁵ It simply assumed, without mention, that the dam would not, and could not, fail because the Bureau of Reclamation (“BuRec”) had a stellar reputation for dam safety.²⁸⁶ It was inconceivable that a BuRec dam could collapse on its initial filling, but it did. In reviewing the NEPA challenge that occurred prior to the dam collapse, the Ninth Circuit upheld the NEPA Statement: “Appellants urge that the EIS is inadequate because it fails to discuss many possible environmental consequences. Many of these consequences while possible are improbable. An EIS need not discuss remote and highly speculative consequences.”²⁸⁷

Teton Dam created awareness of the need for worst-case analysis. President Carter directed the CEQ to issue binding regulations on worst-case analysis.²⁸⁸ Its subsequent regulation provided for worst-case analysis in the impact statement,²⁸⁹ but then replaced the regulation by lowering the requirement to now prepare “a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts” and to prepare an evaluation of such impacts “based upon theoretical approaches or research methods generally accepted in the scientific community.”²⁹⁰

²⁸¹ See *id.* at 350.

²⁸² See *id.* at 351–52.

²⁸³ See Luke Ramseth & Bryan Clark, *Teton Dam collapse 40 years ago was worst man-made disaster in Idaho history*, SPOKESMAN-REVIEW (June 5, 2016), <http://www.spokesman.com/stories/2016/jun/05/teton-dam-collapse-40-years-ago-was-the-worst-man-/> [<http://perma.cc/L5QS-EAH8>].

²⁸⁴ See *id.*

²⁸⁵ See F. Ross Peterson, *The Teton Dam Disaster: Tragedy or Triumph?*, UTAH ST. U. 1, 6 (1982).

²⁸⁶ I became involved with the legal aspects of dam safety as a result of Teton Dam’s failure and looked closely at the causes of the failure. The dam failed because of a multitude of engineering and construction mistakes, which trace back to hubris on the part of the agency.

²⁸⁷ *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

²⁸⁸ See Exec. Order No. 11,991, 3 C.F.R. § 123 (1978).

²⁸⁹ 40 C.F.R. § 1502.22(b) (1985).

²⁹⁰ 40 C.F.R. § 1502.22(b) (2018).

Sierra Club v. Sigler is the germinal case for worst-case analysis.²⁹¹ An EIS was prepared for a distribution center and deepwater port in Galveston Bay.²⁹² Concern was raised over the possibility of a supertanker accident with a total loss of oil.²⁹³ The Corps considered the worst-case would not cause a greater probability of an oil spill than currently exists; therefore, it considered a discussion unnecessary.²⁹⁴ The fears, though, were well founded in light of a number of incidents. The Fifth Circuit held the impact statement should include a worst-case analysis before issuing a permit.²⁹⁵ The court held the analysis was necessary, because even if the risk of a supertanker total loss of cargo was small, the potential environmental disaster was great.²⁹⁶

The CEQ responded to these cases by redrafting the worst-case language in the regulations. The revised regulation “retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural ‘worst case analysis.’”²⁹⁷

The Supreme Court upheld the revised CEQ regulations in *Robertson v. Methow Valley Citizens Council*,²⁹⁸ and held that they are entitled to substantial deference.²⁹⁹ The Court further reasoned that the prior CEQ regulation was not a codification of existing NEPA case law.³⁰⁰ NEPA requires a process, but does not mandate a specific result: “[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”³⁰¹

I. Mitigation

Pursuant to *Vermont Yankee* and CEQ regulations, NEPA compels only a “reasonably complete discussion of possible mitigation measures.”³⁰² The Supreme Court consistently held NEPA is an environmental full disclosure act.³⁰³ The question arises whether there is a duty to employ mitigation measures discussed in the EIS. The Supreme Court answered in the

²⁹¹ 695 F.2d 957 (5th Cir. 1983).

²⁹² *See id.* at 962.

²⁹³ *See id.* at 968.

²⁹⁴ *See id.*

²⁹⁵ *See id.* at 975.

²⁹⁶ *Id.* at 973; *see also* S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1479 (9th Cir. 1983).

²⁹⁷ National Environmental Policy Act Regulations, 50 Fed. Reg. 32,237 (Aug. 9, 1985).

²⁹⁸ 490 U.S. 332 (1989).

²⁹⁹ *Id.* at 356.

³⁰⁰ *See id.* at 355.

³⁰¹ *Id.* at 350.

³⁰² *Id.* at 352.

³⁰³ *See id.* at 348.

negative in *Robertson v. Methow Valley Citizens Council*.³⁰⁴ The case involved a Forest Service decision to issue a special use permit for an alpine ski resort in a pristine area of the North Cascades.³⁰⁵ The environmental study suggested a number of mitigation steps that could be taken, but did not prepare a detailed mitigation plan.³⁰⁶

The Ninth Circuit, in *South Fork Band Council*, held NEPA imposes a positive duty to discuss mitigation measures, without necessarily developing a complete mitigation plan.³⁰⁷ Such plan requires an analysis of whether the mitigation measures can be effective.³⁰⁸

The Supreme Court reiterated that the courts are not to substitute their judgment for the judgment of the agencies.³⁰⁹ NEPA does not impose a substantive duty on agencies to decide on environmentally preferable alternatives.³¹⁰ It again stated “NEPA merely prohibits uninformed—rather than unwise—agency action.”³¹¹ The discussion of environmental impacts need only be “reasonably complete.”³¹² The duty to detail mitigation measures is not the same as detailing a mitigation plan.³¹³ Nor is a worst-case analysis mandated.³¹⁴

The only procedure NEPA creates is the requirement to do an EIS.³¹⁵ It does not, for example, create a procedural duty for a public hearing. If, however, a separate statute, rule, or regulation requires a public hearing, then the NEPA statement can be attached to the already required public hearing.³¹⁶

Marsh v. Oregon Natural Resources Council,³¹⁷ a companion decision to *Methow Valley*, included issues of mitigation and worst-case analysis. One of the environmental effects of constructing a proposed dam in Oregon would be an adverse effect on the migration and spawning of anadromous fish, which

³⁰⁴ *Id.* at 352–53.

³⁰⁵ Most of the ski resorts in the West are on government land.

³⁰⁶ See *Methow Valley*, 490 U.S. at 351.

³⁰⁷ See *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 722 (9th Cir. 2009); see also *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1051 (E.D. Cal. 2018).

³⁰⁸ *S. Fork Band*, 588 F.3d at 727.

³⁰⁹ See *Methow Valley*, 490 U.S. at 351.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 352.

³¹³ See *id.* at 352–53.

³¹⁴ See *id.* at 356.

³¹⁵ See *id.* at 350.

³¹⁶ See 40 C.F.R. § 1506.6(c)(2) (2018).

³¹⁷ *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989).

would be mitigated by a fish hatchery.³¹⁸ The Ninth Circuit held the EIS was defective because it did not include a complete mitigation plan or worst-case analysis.³¹⁹ The Supreme Court concluded, based on the same reasons set forth in *Methow Valley*, that a complete mitigation plan is not required under NEPA.³²⁰

The *Methow Valley* opinion contains a pithy comment: “NEPA merely prohibits uninformed—rather than unwise—agency action.”³²¹ In an effort to assist with informed decision-making, the EIS must include details of mitigation measures, but the Supreme Court has held that a detailed mitigation plan is not mandated.³²²

J. Supplemental Impact Statements

Information can become available after an EIS is prepared. If the agency has to redo an EIS every time new information becomes available, it would probably never complete the process. Yet, the agency cannot be oblivious to new information.

CEQ has addressed this issue in its regulations. A supplemental impact statement is necessary if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”³²³ The arbitrary and capricious standard should govern the decision to prepare a supplemental impact statement.³²⁴

K. PANE and Fear

Fear, fear of the unknown, fear of new risks,³²⁵ and fear of health and safety, have been a constant in nuisance litigation for centuries.³²⁶ Fear is also an integral part of NIMBYism (“not in

³¹⁸ See *id.* at 367–68.

³¹⁹ See *Or. Nat. Res. Council v. Marsh*, 832 F.2d 1489, 1500 (9th Cir. 1987), *rev'd*, 490 U.S. 360 (1989).

³²⁰ *Marsh*, 490 U.S. at 369.

³²¹ *Methow Valley*, 490 U.S. at 351.

³²² *Id.* at 352–53.

³²³ 40 C.F.R. § 1502(9)(c)(1)(ii).

³²⁴ See *Marsh*, 490 U.S. at 376.

³²⁵ See Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1025 (1983).

³²⁶ See *Koll-Irvine Ctr. Prop. Owners Ass'n v. Cty. of Orange*, 29 Cal. Rptr. 2d 664 (1994) (fear of explosion of aviation fuel storage tanks at airport); *Brown v. Petrolane, Inc.*, 162 Cal. Rptr. 551 (1980) (fear of LPG facilities); *Nicholson v. Conn. Half-Way House, Inc.*, 218 A.2d 383 (Conn. 1966) (fear of ex-cons in neighborhood halfway house); *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981) (fear of toxic waste landfill); *Balt. v. Fairfield Imp. Co.*, 39 A. 1081 (Md. 1898) (fear of leprosy); *Bd. of Health of Ventnor City v. N. Am. Home*, 78 A. 677 (N.J. Ch. 1910); *Everett v. Paschall*, 111 P. 879 (Wash. 1910) (fear of tuberculosis); *Earl of Ripon v. Hobart* (1834) 40 Eng. Rep. 65, 65 (fear of steam engine draining lowlands). See generally Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83 (1984).

my backyard”). It is often the underlying reason for opposition, even if it is not the legal theory advanced in litigation.

Fear entered into NEPA litigation in *Metropolitan Edison Co. v. People Against Nuclear Energy* (“PANE”).³²⁷ The Three Mile Island Nuclear Reactor 2 (“TMI 2”) outside Harrisburg, Pennsylvania had a partial meltdown on March 28, 1979.³²⁸ Fears existed of widespread radiation exposure in the greater Harrisburg area.³²⁹ TMI 2 was decontaminated and removed. Finally, the remaining TMI 1 was ready to renew operations. The reopening of TMI 1 caused fear in the nearby residents.³³⁰ They alleged “severe psychological health damage to persons living in the vicinity, and serious damage to the stability, cohesiveness, and well-being of the neighboring communities.”³³¹

The NRC refused to take evidence on PANE’s contentions, while it had considered the physical effects of the restart, including the risk of a nuclear accident.³³² Suit was brought, claiming the NEPA Statement was inadequate because it did not include the analysis of mental distress.³³³ The D.C. Court of Appeals held NEPA requires the NRC to evaluate “the potential psychological health effects of operating” TMI 1.³³⁴

The Supreme Court rejected the emotional distress argument.³³⁵ A NEPA statement does not have to consider every impact or effect of the proposed action.³³⁶ Focus is on the impacts and effects on the environment—the physical environment: “a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.”³³⁷

Justice Rehnquist analogized the situation to causation analysis in torts, using “but for” causal connection, and proximate cause; “like the familiar doctrine of proximate cause from tort law.”³³⁸ Justice Rehnquist, writing for the majority, cautioned that taking “environmental” out of context, giving it

³²⁷ 460 U.S. 766 (1983).

³²⁸ *See id.* at 768.

³²⁹ *See id.* at 768–69.

³³⁰ *See id.* at 769.

³³¹ *Id.*

³³² *Id.* at 770.

³³³ *See id.* at 769–70.

³³⁴ *People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm’n*, 678 F.2d 222, 235 (D.C. Cir. 1982).

³³⁵ *See Metropolitan Edison Co.*, 460 U.S. at 775.

³³⁶ *See id.* at 776–77.

³³⁷ *See id.* at 772, 774.

³³⁸ *Id.* at 774.

the broadest possible interpretation, “might embrace virtually any consequence . . . that someone thought ‘adverse.’”³³⁹

He held NEPA needs a relationship between the effect and the change in the physical environment caused by the major federal action.³⁴⁰ He continued that even if the effect passes the “but for” test, the causal change may be too attenuated, and the harm may be too remote from the physical environment.³⁴¹ Thus, a reasonably close relationship should exist between a change in the physical environment and the effect at issue, like the doctrine of proximate cause in Tort.³⁴²

He may have thought causation analysis is a magic talisman for drawing the line. However, having taught Torts almost every year of my forty-eight years teaching law to date, I can clearly assert that causation analysis is the most incomprehensible subject. No definitive rules, standards, or guidelines exist for drawing the line between proximate and remote cause. Indeed, the Restatement (2nd) of Torts replaced “proximate cause” with “legal cause,” which is equally undefinable.³⁴³

Justice Rehnquist also looked at the issue of fear and risk from a different perspective, noting that risk is pervasive in modern life.³⁴⁴ PANE argued the psychological health damage flows directly from the risk of a nuclear accident.³⁴⁵ Risk, though, is not an effect on the physical environment,³⁴⁶ which is the focus of NEPA. Finally, if this fear and risk were to become a staple of NEPA analysis, then the time and resources necessary for a traditional NEPA analysis would be too limited.

L. Hypothetical NEPA Statements

The Navy was constructing ammunition and weapons storage facilities capable of storing nuclear weapons on Oahu.³⁴⁷ However, the Navy refused to affirm or deny the storage of nuclear weapons.³⁴⁸ It prepared an environmental assessment and concluded no EIS was necessary.³⁴⁹ Actual storage of nuclear weapons is classified and thereby cannot be disclosed in a NEPA

³³⁹ *Id.* at 772.

³⁴⁰ *Id.* at 773.

³⁴¹ *Id.* at 774.

³⁴² *Id.*

³⁴³ RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW. INST. 1965).

³⁴⁴ See *Metropolitan Edison Co.*, 460 U.S. at 775.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 773.

³⁴⁷ *Catholic Action of Haw./Peace Educ. Project v. Brown*, 643 F.2d 569, 570 (9th Cir. 1980).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

statement pursuant to the Freedom of Information Act (“FOIA”).³⁵⁰ Plaintiffs sought to enjoin the project until an EIS was prepared.³⁵¹ The Ninth Circuit held that the Navy had to prepare a hypothetical EIS as if nuclear weapons were stored at the site.³⁵²

The Supreme Court reversed.³⁵³ It recognized the EIS process is subject to FOIA exemptions.³⁵⁴ The Court recognized that materials which are protected from disclosure by the FOIA cannot be disclosed in a NEPA statement.³⁵⁵ FOIA’s purpose has been described as opening up the workings of the government to public scrutiny.³⁵⁶ The first express exemption to FOIA is materials classified to protect national security.³⁵⁷

The Navy could prepare an EIS for internal purposes, but it could not be disclosed to the public. Justice Rehnquist wrote that a hypothetical EIS “is a creature of judicial cloth, not legislative cloth,” which is not mandated by any of the statutory or regulatory provisions which were relied upon in the appellate opinion.³⁵⁸

The Court also cited *Kleppe* for the proposition that an EIS would not be necessary simply because the facilities were capable of storing nuclear weapons.³⁵⁹ That a facility is capable of storing the nuclear weapons is not the same as an actual proposal to store them.³⁶⁰ Therefore, where disclosure of information is exempted under the FOIA, a hypothetical EIS does not become a requirement of NEPA.³⁶¹

V. REMEDIES: INJUNCTIVE RELIEF

The normal remedy under the APA is to reverse the administrative decision and remand the decision. An alternative remedy for ongoing operations is an injunction against the decision.

Injunctive relief developed in courts of equity. Injunctions are not automatic. *Weinberger v. Romero-Barcelo*³⁶² is an example of this premise. The Navy had long used Vieques Island off Puerto

³⁵⁰ *Id.* at 571.

³⁵¹ *Id.* at 570.

³⁵² *Id.* at 572.

³⁵³ *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 147 (1981).

³⁵⁴ *Id.* at 144–46.

³⁵⁵ *Id.* at 143.

³⁵⁶ *McGehee v. CIA*, 697 F.2d 1095, 1108 (D.C. Cir. 1983).

³⁵⁷ *See* 5 U.S.C. § 552(b)(1)(A) (2016).

³⁵⁸ *Weinberger*, 454 U.S. at 141.

³⁵⁹ *Id.* at 146.

³⁶⁰ *Id.*

³⁶¹ *See generally* F.L. McChesney, *Nuclear Weapons and “Secret” Impact Statements: High Court Applies FOIA Exemptions to EIS Disclosure Rules*, 12 ELR 10007 (1982).

³⁶² 456 U.S. 305 (1982).

Rico as a weapons training site.³⁶³ The trial court found a violation of the Clean Water Act for discharging munitions into navigable waters without a permit, and ordered the Navy to seek a permit but refused to grant a permanent injunction.³⁶⁴ The court of appeals reversed, mandating an injunction.³⁶⁵ The tribunal reasoned the Clean Water Act removed equitable discretion.³⁶⁶

The Supreme Court reversed, holding discretion was available under the statute.³⁶⁷ It held the trial court should apply the traditional equitable doctrine of balancing the equities.³⁶⁸ An injunction is an equitable remedy that does not issue as a matter of course.³⁶⁹ The basis of granting injunctive relief in federal court is irreparable injury and the inadequacy of legal remedies.³⁷⁰ The Court directed the lower courts to balance the equities.³⁷¹ The Court cautioned that “[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”³⁷²

The Supreme Court subsequently held in *Amoco Production Co. v. Gambell*³⁷³ that the conditions for a full injunction are essentially the same as for a preliminary injunction.³⁷⁴ The differences are that for a preliminary injunction the plaintiff must show a substantial chance of success on the merits, whereas for the full injunction, the plaintiffs have won on the merits.³⁷⁵

The Court also reversed the Ninth Circuit’s presumption of irreparable injury when the agency fails to thoroughly evaluate environmental impacts.³⁷⁶ No such presumption exists:

[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. . . . “Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”³⁷⁷

³⁶³ *See id.* at 307.

³⁶⁴ *See id.* at 307–08.

³⁶⁵ *See id.* at 310.

³⁶⁶ *See id.*

³⁶⁷ *Id.* at 311.

³⁶⁸ *Id.* at 319–20; *see also* *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987).

³⁶⁹ *See Weinberger*, 456 U.S. at 311.

³⁷⁰ *Id.* at 312.

³⁷¹ *See id.* at 319–20.

³⁷² *Id.* at 312.

³⁷³ 480 U.S. 531 (1987).

³⁷⁴ *Id.* at 546 n.12.

³⁷⁵ *See id.*

³⁷⁶ *Id.* at 545.

³⁷⁷ *Id.* at 542 (quoting *Weinberger*, 456 U.S. at 313).

The non-NEPA *Weinberger* case was followed a decade later in the NEPA case of *Winter v. Natural Resources Defenses Council, Inc.*³⁷⁸ A lawsuit was filed against the Navy for its ongoing sonar-training program, which allegedly harmed marine mammals.³⁷⁹ The Navy issued an environment assessment that the training exercises would not have a significant effect on the environment.³⁸⁰

The district court issued an injunction pursuant to the Coastal Zone Management Act of 1972 and NEPA.³⁸¹ The case reached the Supreme Court after a flurry of district court³⁸² and court of appeals decisions.³⁸³ The lower courts held a preliminary injunction may be issued when plaintiffs show a strong likelihood of success on the merits, even if only a “possibility” of irreparable harm exists.³⁸⁴

Chief Justice Roberts wrote the majority opinion, holding for the Navy.³⁸⁵ He reiterated the standard requirements for plaintiffs seeking preliminary injunctive relief: (1) likelihood of success on the merits; (2) likelihood of irreparable harm, should the injunction be denied; (3) whether the balance of equities weigh on behalf of the plaintiff; and (4) whether an injunction is in the public interest.³⁸⁶

He wrote that a preliminary injunction requires a showing that irreparable injury is likely in the absence of injunctive relief.³⁸⁷ Significantly, any injury to plaintiffs is outweighed by the public interest.³⁸⁸ Courts “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”³⁸⁹ Emphasis was placed on the national security needs of the sonar-training.³⁹⁰ The Court recognized the great deference it gives the military on military matters.³⁹¹ The public interest in the form of military concerns outweighed plaintiffs’

³⁷⁸ 555 U.S. 7 (2008).

³⁷⁹ *See id.* at 14.

³⁸⁰ *See id.* at 16.

³⁸¹ Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2008).

³⁸² *E.g.*, *Nat. Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

³⁸³ *E.g.*, *Nat. Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008).

³⁸⁴ *Id.* at 696.

³⁸⁵ *See Winter*, 555 U.S. at 33.

³⁸⁶ *Id.* at 20.

³⁸⁷ *Id.* at 22. An important factor in the decision is that the training had been ongoing for forty years without problems. *Id.* at 21.

³⁸⁸ *Id.* at 23.

³⁸⁹ *Id.* at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

³⁹⁰ *See id.* at 26.

³⁹¹ *Id.* at 24. The Supreme Court recognized the case involved “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” which call for professional military judgments. *Id.*

environmental concerns in denying the preliminary injunction.³⁹² The Court saw “no basis for jeopardizing national security, as the present injunction does.”³⁹³ The majority then used the same reasoning to deny a permanent injunction, recognizing that an injunction remains a matter of “equitable discretion.”³⁹⁴

The Supreme Court in *Monsanto Co. v. Geertson Seed Farms Co.*³⁹⁵ reaffirmed the four-part test of *Winter*, rejecting the presumption that an injunction is the proper remedy for a NEPA violation, absent unusual circumstances.³⁹⁶

Some courts have held NEPA violations constituted irreparable injury in every case. Hence a balancing of the equities would be unnecessary.³⁹⁷

VI. NEPA’S EFFECTS

NEPA has created impacts both within the United States and beyond its borders. These effects can be categorized based on NEPA’s global impacts, its ability to flush out bad environmental ideas, and how it has been harnessed by the NIMBY movement.

A. Global Impact

The United States has made two great contributions to global environmental protection. The first is the creation of national parks, starting with Yellowstone National Park in 1872.³⁹⁸ The second is the adoption of NEPA, which mandates the preparation of environmental impact statements. CEQ lists thirty-three countries in which EIS laws have been adopted or pending.³⁹⁹ In addition, sixteen states have adopted their variations of NEPA.⁴⁰⁰ The adoption of NEPA has encouraged

³⁹² See *id.* at 26.

³⁹³ *Id.* at 33.

³⁹⁴ *Id.* at 32.

³⁹⁵ 561 U.S. 139 (2010).

³⁹⁶ *Id.* at 156–57.

³⁹⁷ See, e.g., *Sierra Club v. Marsh*, 872 F.2d 497, 505 (1st Cir. 1989).

³⁹⁸ See Thomas Moran, *Birth of a National Park*, NAT’L PARK SERV. (Sept. 17, 2019), <http://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> [<http://perma.cc/5YLH-WARF>].

³⁹⁹ See *International Environmental Impact Assessment*, NEPA.GOV, http://ceq.doe.gov/get-involved/international_impact_assessment.html [<http://perma.cc/S4LG-QTTG>] (last visited Sept. 20, 2019). The list also included Antarctica, the Arctic, Catalonia, Europe, and the United Nations. *Id.*

⁴⁰⁰ See *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, <http://ceq.doe.gov/laws-regulations/states.html> [<http://perma.cc/6NT7-PSQ6>] (last visited Sept. 20, 2019); see also *State environmental policy acts*, BALLOTPEDIA, http://ballotpedia.org/State_environmental_policy_acts [<http://perma.cc/ECC5-9DMD>] (last visited Sept. 20, 2019).

countries around the globe to contribute to environmental protection through the adoption of their own versions of NEPA.

B. Flushing Out Bad Ideas

We can easily think of the environment in broad terms, such as clean air, clean water, and national parks, but NEPA also applies to narrower issues. Specifically, NEPA's information requirement can draw out poor decisions. Paraquat spraying, as discussed above, was one of them.⁴⁰¹ Another was a channelization case.

The Soil Conservation Service ("SCS") had a policy of reducing flood threats by channelizing narrow, winding streams. It would straighten and gouge them out, thereby facilitating flow in flooding events.⁴⁰² We now understand that channelization has severe environmental consequences, including the loss of wetlands and deterioration of the stream banks.⁴⁰³

The proposal in one case was to stabilize the stream banks by planting kudzu on them.⁴⁰⁴ Kudzu had become an infamous exotic vine that was depicted as taking over the South.⁴⁰⁵ The EIS did not disclose how the agency planned to control the Kudzu's growth and the project's possible adverse effects downstream.⁴⁰⁶

C. The NIMBY Effect⁴⁰⁷

NEPA quickly became a main weapon of NIMBYs because of its universality.⁴⁰⁸ NEPA buys time—an important tool for opponents for the proposed action. New adverse information may be uncovered in the interim. Public opposition could mount. Politicians could weigh in. The costs of the delay could result in the project being abandoned. Construction costs historically rise faster than the underlying rate of inflation. Escalating costs can torpedo a project. Delay also provides time for opponents to

⁴⁰¹ See *supra* Part IV(F).

⁴⁰² I was told while teaching at Ohio Northern in rural Ohio that the SCS also placed tiles under farmland to, again, facilitate runoff.

⁴⁰³ See David Shankman & Larry J. Smith, *Stream Channelization and Swamp Formation in the U.S. Coastal Plain*, 25 *PHYSICAL GEOGRAPHY* 22 (2004).

⁴⁰⁴ See *Nat. Res. Def. Council v. Grant*, 355 F. Supp. 280, 288 (E.D. N.C. 1973).

⁴⁰⁵ The joke in the South is that if you stand still long enough, Kudzu would grow up you. See Bill Finch, *The True Story of Kudzu, the Vine That Never Truly Ate the South*, *SMITHSONIAN.COM* (Sept. 2015), <http://www.smithsonianmag.com/science-nature/true-story-kudzu-vine-ate-south-180956325/> [<http://perma.cc/8HSF-HMHB>].

⁴⁰⁶ *Grant*, 355 F. Supp. at 288.

⁴⁰⁷ For a general NIMBY discussion, see Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 *ENVTL. L. REP.* 10264 (2019), and Denis Binder, *NEPA, NIMBYs and New Technology*, 25 *LAND & WATER L. REV.* 11 (1990).

⁴⁰⁸ For a general discussion of NIMBISM, see Denis Binder, *Cutting the NIMBIAN Knot: A Primer*, 40 *DEPAUL L. REV.* 1009 (1991).

acquire additional negative information and promote a public campaign against the proposal.

The Tellico Dam case illustrates the combination of NEPA and the Endangered Species Act.⁴⁰⁹ The NEPA process bought time for new developments, which was the discovery of the Snail Darter, an endangered species. An injunction had been issued against the dam until an adequate EIS was prepared. The court was about to lift the injunction⁴¹⁰ when the Snail Darter was discovered downstream from the dam.⁴¹¹ The Endangered Species case reached the Supreme Court with Chief Justice Burger issuing a strong opinion upholding the broad sweep of the statute:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to insure that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence” of an endangered species or “*result* in the destruction or modification of habitat of such species”⁴¹²

An act of Congress was required to complete the dam.⁴¹³

Litigation can lead to delay, and delay can lead to cancellation. A classic example is the end of the Westway highway program in Manhattan.⁴¹⁴ The existing highway on the west side of Manhattan had deteriorated. Much of it was razed. Westway, a new highway from the Battery to 43rd Street, was planned to replace it. Planning began in 1972. The final impact statement was issued on January 4, 1977, with federal funding approved. The highway would include partial filling of the Hudson River, which could adversely affect the striped bass population.⁴¹⁵ Biological studies continued into 1981. Litigation ensued. Westway was doomed.

The district court enjoined any further action on Westway that would affect the bed or waters of the Hudson River until a

409 For a history of the Snail Darter litigation, see ZYGMUNT J. B. PLATER, *THE SNAIL DARTER AND THE DAM* (2013). Professor Plater was one of the lawyers representing the plaintiffs throughout the long saga.

410 See *Env'tl. Def. Fund v. Tenn. Valley Auth.*, 371 F. Supp. 1004, 1015 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

411 See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 158 (1978).

412 *Id.* at 173 (quoting 16 U.S.C. § 1536 (1976)).

413 PLATER, *supra* note 409, at 322.

414 For a history of Westway, see Sam Roberts, *Battle of the Westway: Bitter 10-Year Saga of a Vision on Hold*, N.Y. TIMES (June 4, 1984), <http://www.nytimes.com/1984/06/04/nyregion/battle-of-the-westway-bitter-10-year-saga-of-a-vision-on-hold.html> [<http://perma.cc/BQ3E-G3VJ>].

415 *Id.*

supplemental EIS was prepared.⁴¹⁶ The Second Circuit affirmed on most of the issues.⁴¹⁷ The project was dropped shortly thereafter.⁴¹⁸

EISs, especially under California's CEQA statute, are used as a weapon to block homeless housing, a critical problem in California.⁴¹⁹ Overall, NEPA has become a tool of the NIMBY movement.

VII. CLIMATE CHANGE⁴²⁰

One commentator began his article by writing, "Global climate change is the preeminent environmental concern of the modern era."⁴²¹ The NRC five decades ago successfully argued it did not need to consider the novel concept of energy conservation. However, energy conservation quickly became a staple in NEPA statements.

Two premises exist with climate change. The first is that almost any human activity of a substantial nature will have an effect, ranging from infinitesimally small to substantial, direct, indirect, and cumulative on the environment. The second is that the climate and weather is global.

The effects of energy development can be both direct and indirect. For example, oil exploration uses energy. The production of oil and gas produces pollution. Transportation of these fossil fuels will produce greenhouse gases ("GHGs"). Downstream consumption fuels consumers, industry, business, and transportation, all contributing directly or indirectly to GHGs. Coal will generate energy, especially electricity, but is also critical in manufacturing steel.

A 1990 case reached a limited view of climate change.⁴²² That holding did not stand for long. The Ninth Circuit in the 2008 case

⁴¹⁶ See *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1016 (2d Cir. 1983).

⁴¹⁷ See *id.*

⁴¹⁸ See Sam Roberts, *The Legacy of Westway: Lessons From Its Demise*, N.Y. TIMES (Oct. 7, 1985), <http://www.nytimes.com/1985/10/07/nyregion/the-legacy-of-westway-lessons-from-its-demise.html> [<http://perma.cc/ZP5Y-EGJY>].

⁴¹⁹ See Liam Dillon & Benjamin Oreskes, *Homeless shelter opponents are using this environmental law in bid to block new housing*, L.A. TIMES (May 15, 2019, 5:00 AM), <http://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html> [<http://perma.cc/7663-24WU>].

⁴²⁰ See generally Bradford C. Mank, *Civil Remedies*, in GLOBAL CLIMATE CHANGE AND U.S. LAW 183 (Michael B. Gerrard ed., 2007); Nicole Rushovich, *Climate Change and Environmental Policy: An Analysis of the Final Guidance of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 27 B.U. PUB. INT. L.J. 327 (2018).

⁴²¹ Aaron J. Kraft, Comment, *NEPA and Climate Change: Beneficial Applications and Practical Tensions*, 25 J. ENVTL. L. & LITIG. 559, 560 (2010).

⁴²² See *City of L.A. v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 484, 490 (D.C. Cir. 1990). The D.C. Circuit held the theoretical increase greenhouse gas concentrations in the corporate average fuel economy (CAFE) standards was insufficient to trigger an EA analysis. *Id.* at 482.

of *Center for Biological Diversity v. National Highway Traffic Safety Administration* held the impacts of GHGs are part of EISs.⁴²³ The court held that even though climate change is a global phenomenon “that includes actions that are outside of [the agency’s] control[,] . . . [it] does not release the agency from the duty of assessing the effects of *its* actions on global warming”⁴²⁴ As with energy conservation, climate change has become a factor in NEPA consideration.

NEPA has been heavily involved in energy development projects in its fifty years of existence. Numerous lawsuits were brought against proposed nuclear power plants⁴²⁵ and dams from the beginning. The D.C. Circuit was in a running battle with the Supreme Court over the safety of nuclear power.⁴²⁶

NEPA is playing a critical role with climate change today as an informational source. CEQ issued guidance on climate change and NEPA and stated, “Climate change is a fundamental environmental issue, and its effects fall squarely within NEPA’s purview.”⁴²⁷

Climate change is at the forefront of environmental policy today, and has thus quickly become embedded in the NEPA process. Climate change does not change the NEPA legal analysis. The standard NEPA issues present on federal government action remain: (1) is a NEPA Statement required; (2) if yes, then is the NEPA Statement adequate; and (3) has the agency taken a hard look at the climate change implications and effects of the proposed action?

An EIS discussion of climate change satisfies the procedural information requirement of NEPA for providing useful information to the decision makers and the public. The agency needs to take a “hard look” at the issue, but it does not mandate a rejection of the proposal because of an effect on climate change.

The CEQ guidelines⁴²⁸ provide that the EIS should consider: (1) the potential effects of the proposed action on climate change, such as carbon emissions and, if applicable,

⁴²³ 538 F.3d 1172, 1179 (9th Cir. 2008).

⁴²⁴ *Id.* at 1217; *see also* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 533 (8th Cir. 2003).

⁴²⁵ For an overview of the nuclear energy cases, *see* Binder, *supra* note 407, at 20–30.

⁴²⁶ *See id.*

⁴²⁷ Christina Goldfuss, *Memorandum for Heads of Federal Departments and Agencies: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, NEPA.GOV 1, 2 (Aug. 1, 2016), http://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf [<http://perma.cc/Q5MU-4SVP>]; *see also* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions, 81 Fed. Reg. 51,866 (Aug. 5, 2016).

⁴²⁸ For a discussion of the CEQ guidelines, *see* Rushovich, *supra* note 420, at 347–48.

carbon sequestration; and (2) the effects of climate change on the proposed action and its environmental impacts. However, the CEQ Climate Change Guidance was rescinded by President Trump on March 28, 2017.⁴²⁹

Perhaps one can fairly assert that, just as energy conservation became a standard alternative to consider in EISs, so too climate change is an impact on the human environment to be included in an EIS. For example, one problem with projecting future impacts of climate change is to rely on past history without taking into account foreseeable climate, such as by projecting future stream flows.⁴³⁰

The key in NEPA statements is to include climate change in the statement and take a hard look at the alternatives and the implications on the human environment.⁴³¹ The hard look includes the direct, indirect, and cumulative consequences.⁴³² Energy development and transportation, especially with fossil fuels, is a prime example of potential for direct, indirect, and cumulative impacts. A common statement by agencies is that the project's effect on climate change is "infinitesimally small" because climate change is a global problem, thereby making their contributions to climate change minimal.⁴³³

A district court opinion recognized a hard look must be taken of an EA or EIS in oil and gas leasing, which includes the reasonably foreseeable irretrievable commitment of resources.⁴³⁴ The Eighth Circuit in *Mid States Coalition for Progress v. Surface Transportation Board* held an EIS for a rail line to transport coal was inadequate because it did not discuss the indirect impacts, although it discussed the direct impacts.⁴³⁵

NEPA does not necessitate a change in the decision to favor reducing the climate change impacts over the project.⁴³⁶ As one case said, the question is not whether the agency made the

⁴²⁹ See Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

⁴³⁰ See *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1233–34 (E.D. Wash. 2016).

⁴³¹ See, e.g., *WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237, 1247 (D. Wyo. 2015) (reviewing federal leasing of coal tracts in Powder River Basin—portions of which are in the Thunder Basin National Grassland).

⁴³² See *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 53 (D.D.C. 2019).

⁴³³ See, e.g., *Bark v. U.S. Forest Serv.*, 2019 U.S. Dist. LEXIS 101649, at *29 (D. Or. 2019), *appeal docketed*, No. 19-35665 (9th Cir. Aug. 7, 2019).

⁴³⁴ See *Zinke*, 368 F. Supp. 3d at 64.

⁴³⁵ 345 F.3d 520, 550 (8th Cir. 2003).

⁴³⁶ See, e.g., *Gov't of Manitoba v. Zinke*, 273 F. Supp. 3d 145, 152 (D.D.C. 2017). The project was the long-planned diversion of water from Lake Sakakawea and the Missouri River to thirsty communities in North Dakota. *Id.* at 150. The waters will cross the Basin Divide with the risk of co-mingling waters of the Missouri River Basin and the Hudson Bay Basin. *Id.*

correct decision, but whether it took a hard look at the environmental aspects of the reasonable consequences.⁴³⁷

A series of district court opinions hold the emission of greenhouse gases is a factor to be considered in indirect and cumulative impacts.⁴³⁸ These EAs and EISs necessitate a hard look at the greenhouse gas emissions, which means the Bureau of Land Management should have estimated the cumulative GHG emissions from the leasing program,⁴³⁹ as well as downstream emissions.⁴⁴⁰ GHGs from proposed fossil fuel developments, such as oil and gas or coal, should almost automatically be a major component of NEPA statements.

VIII. FAILURE TO FOLLOW THE NEPA

The SCS⁴⁴¹ prepared an impact statement to restore the Village of Ogunquit, Maine's eroding mile long white sand dune.⁴⁴² The SCS was unable to dredge sufficient wind-blown beach sand from the estuary to restore the dune. It therefore used inland, coarse, yellow sand and gravel rather than the fine, white quartz sand native to the Ogunquit dune.⁴⁴³ The result was labeled "an ugly yellow bunker."⁴⁴⁴ Neither the draft nor final EIS mentioned the use of inland sand. The EIS failed to describe "the fill to be used, the environmental consequences of using noncompatible materials, and the possible alternatives to their use."⁴⁴⁵

The court of appeals affirmed the district court opinion that held no remedy exists for violating an EIS.⁴⁴⁶ Relief is unavailable under NEPA for "post-completion relief where hindsight reveals inadequacies in an environmental impact statement."⁴⁴⁷ The appellate court was concerned that allowing such relief would flood the courts with belated litigation for

⁴³⁷ *Id.*

⁴³⁸ See *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1156–58 (D. Colo. 2018); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); see also *Mid States Coal.*, 345 F.3d at 549 (evaluating future coal combustion impacts from extension of railroad line).

⁴³⁹ See *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 68–69 (D.D.C. 2019).

⁴⁴⁰ See *id.* at 71–75; see also *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242–44 (D.N.M. 2018).

⁴⁴¹ The SCS is now the Natural Resources Conservation Service (NRCS). USDA, *More Than 80 Years Helping People Help the Land: A Brief History of NRCS*, http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392 [<http://perma.cc/C5UF-GHPB>].

⁴⁴² Ogunquit is one of the Maine coast beach cities attractive to tourists.

⁴⁴³ See *Ogunquit Vill. Corp. v. Davis*, 553 F.2d 243, 244 (1st Cir. 1977).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ See *id.* at 247.

⁴⁴⁷ *Id.* at 245.

failure to completely comply with an EIS.⁴⁴⁸ The court could also not come up with standards to decide those cases.⁴⁴⁹ However, the court could easily have done so in the Ogunquit case, in that the project was authorized for \$804,000, but was completed for \$443,015—a \$400,000 savings by using non-compliant sand.⁴⁵⁰ Other sources were rejected because of cost.⁴⁵¹

Similarly, once federal involvement is over, the role of the EIS is over.⁴⁵² The appellate court was worried about the “implications of affording post-completion relief where hindsight reveals inadequacies in an environmental impact statement.”⁴⁵³ It is quite possible that large projects may not perfectly comply with every detail of an impact statement. Post-completion discrepancies could lead to prolonged litigation and large expenditures of public funds.⁴⁵⁴

A different result was reached in *Oregon Natural Resources Council v. U.S. Bureau of Land Management*.⁴⁵⁵ The timber harvest had already occurred, but the court held a NEPA Statement could still lead to mitigation measures.⁴⁵⁶

IX. CONCLUSION

NEPA has often been referred to as the Magna Carta of United States environmental protection.⁴⁵⁷ However, it is less than that because of its limitations as a procedural rather than substantive statute. Nor is NEPA a panacea for all of America’s environmental problems. However, the days of “Damn the Environment; Full Steam Ahead” are over.⁴⁵⁸

The statute does not create a common law on environmental protection. Nor does it mandate a particular result. It is not even an action forcing a pro-environment decision. NEPA is further limited in that a federal action must be involved. It does not cover purely private actions or state actions. It is, though, a statute that

⁴⁴⁸ *See id.*

⁴⁴⁹ *See id.* at 246.

⁴⁵⁰ Ironically, I was on Ogunquit’s beach in late fall in 1978 and was oblivious to any problems or litigation.

⁴⁵¹ *Ogunquit*, 553 F.2d at 244.

⁴⁵² *See* Gettysburg Battlefield Pres. Ass’n v. Gettysburg Coll., 799 F. Supp. 1571, 1577–78 (M.D. Pa. 1992); *Env’tl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 587–88 (S.D. Ind. 1991).

⁴⁵³ *Ogunquit*, 553 F.2d at 245.

⁴⁵⁴ *Id.*

⁴⁵⁵ 470 F.3d 818 (9th Cir. 2006).

⁴⁵⁶ *See id.* at 820–23.

⁴⁵⁷ *See, e.g.*, Blumm & Nelson, *supra* note 83, at 5.

⁴⁵⁸ This phrase has commonly been used to refer to the mentality that business considerations traditionally prevailed over environmental considerations. *See, e.g.*, *Kent Gilbreath*, *INDUSTRY’S ENVIRONMENTAL ATTITUDES*, 14 EPA J. 18 (1988).

applies throughout the federal government. It is not a pervasive statute of environmental protection, but provides a means through which information of environmental decision-making in almost all types of federal action affecting the environment must be considered. It is not an all-purpose, environmental panacea. It is a means to facilitate environmental protection through other means, such as statutes, regulations, and publicity. NEPA is a mandate of environmental full disclosure for major federal actions substantially affecting the human environment for the benefit of decision makers and the public.

NEPA is a critical tool in furthering public debate on environmental issues not otherwise covered by specific federal statutes or regulations. It can complement existing regulatory statutes and regulations, as well as shape the tone of a debate; but it cannot, by itself, dictate the outcome. As the Supreme Court held in *Methow Valley*: “NEPA merely prohibits uninformed—rather than unwise—agency action.”⁴⁵⁹ NEPA and the FOIA have come a long way in forcing the federal government to disgorge unpleasant information. NEPA’s information provision is a major means of preventing the government from keeping negative facts from the public.⁴⁶⁰

NEPA requires decision makers to take a hard look at the environmental effects of a proposal and then justify them. That is the hard look.

The negative aspect of NEPA is that the NEPA process serves as a NIMBY tool for delay. Delay buys time. Construction costs historically rise faster than the underlying rate of inflation. Escalating costs can torpedo a project. Delay also provides time for opponents to acquire additional negative information and promote a public campaign against the proposal.

The Supreme Court has consistently held NEPA is a procedural, environmental full-disclosure statute. It is not thought to be merely a procedural statute. Failure to follow the procedural requirement of a valid EIS can result in substantial delays, up to years, in the project moving forward. The statute has no fixed deadlines for implementation and judicial review.

However, NEPA is not procedural in a narrow, ministerial sense that the judge checks if precise dates and filings requirements have been met. Judges have discretion in reviewing

⁴⁵⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

⁴⁶⁰ While not a focus of this paper, FOIA is also a vehicle for obtaining government information on a broad basis, unless limited by an express exclusionary provision in the statute. Freedom of Information Act, 5 U.S.C. § 552(b)(3) (2012).

a NEPA Statement. Discretion as to the necessity and adequacy of the NEPA Statement lies with the judiciary. Their decisions determine if the federal action proceeds.

NEPA does not repeal by implication any other federal statute. Nor does it create any new procedures, such as a public hearing, if none is otherwise provided. The analysis of NEPA cases show that EISs do not have to be perfect, and instead are judged by the rule of reason approach.

The genius of NEPA is its flexibility. It does not need amendments to apply to new environmental issues. It was involved in substantial litigation over nuclear energy in its early years, and it is equally applicable today to fossil fuels and climate change.



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Tobacco Product Warnings in the Mist of Vaping: A Retrospective on the Public Health Cigarette Smoking Act

*John D. Blum**

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I. INTRODUCTION

With the 2020 presidential election looming, healthcare reform is emerging as a major campaign issue. Numerous ideas, from creation of a national single payer system, to major overhauls of Medicare/Medicaid, to significantly revising coverage requirements mandated under the Affordable Care Act, are in play. While the scope and details of health reform proposals are highly variable, the underlying issues, which any significant reform initiative will face, are universal and constant. Undoubtedly, the biggest challenge all health reform proposals confront concerns crafting innovative and meaningful approaches to addressing the pervasive fiscal pressures faced by government programs. There is a long history of attempts to “bend the cost curve,” but this complex task remains elusive in the face of evolving demand and supply side pressures.¹ One large point of consensus in the complex arena of cost containment policy is a

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¹ See Ehsan U. Syed, *Will We Ever Bend the Cost Curve in Healthcare?*, AM. HEALTH & DRUG BENEFITS (July 2019), <http://www.ahdbonline.com/issues/2019/june-july-2019-vol-12-no-4/2789-will-we-ever-bend-the-cost-curve-in-healthcare> [<http://perma.cc/ABN5-LY8Z>].

general agreement that there must be a direct assault on chronic health diseases, such as obesity, heart disease, and cancer. It is estimated by the Centers for Disease Control and Prevention (“CDC”) that six in ten adults suffer from at least one chronic disease, and that this category of illnesses is a major driver of our nation’s \$3.3 trillion in healthcare costs.² No comprehensive health reform can succeed unless it promotes strategies to effectively mitigate the burden of chronic diseases.

Few chronic diseases have a greater impact on health costs than substance use disorders. While opioid addiction may be the most current and visible form of substance use disorders, it is part of a broader, ongoing epidemic that includes the abuse of licit and illicit drugs, as well as alcohol.³ One of our nation’s oldest substance use disorders is cigarette smoking—a behavior that is driven by nicotine, the highly addictive chemical found in tobacco.⁴ Cigarette consumption is widely recognized as leading to multiple, serious health problems.⁵ It is an ongoing public health epidemic and has been the focus of regulators and health organizations since the release of the U.S. Surgeon General’s Report on Smoking in 1964.⁶ In the many years in which a war against tobacco has been waged by public and private actors, great progress has been made in reducing the number of smokers in the U.S. from 43% in 1965 to less than 16% currently.⁷ But even in the face of progress, cigarette smoking remains our most preventable cause of death—higher than AIDS, alcoholism,

² *Chronic Diseases in America*, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, <http://www.cdc.gov/chronicdisease/pdf/infographics/chronic-disease-H.pdf> [<http://perma.cc/SKU5-WKLF>] (last updated Sept. 12, 2019). It has also been estimated that four in ten adults suffer from two or more chronic health conditions. *Id.*

³ See *Trends & Statistics*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/related-topics/trends-statistics> [<http://perma.cc/2Y3F-TZJQ>] (last updated Apr. 2017) (estimating the health costs of substance use disorders to be as high as \$250 billion annually). For further details on the opioid epidemic, see *What is the U.S. Opioid Epidemic?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/opioids/about-the-epidemic/index.html> [<http://perma.cc/4MGT-YLUL>] (last updated Sept. 4, 2019).

⁴ See *Is nicotine addictive?*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/tobacco-nicotine-e-cigarettes/nicotine-addictive> [<http://perma.cc/5VQU-B74A>] (last updated Oct. 2019) (discussing the addictive properties of nicotine).

⁵ See Kayla Ruble, *Read the Surgeon General’s 1964 Report on Smoking and Health*, PBS (Jan. 12, 2014, 2:00 PM), <http://www.pbs.org/newshour/health/first-surgeon-general-report-on-smokings-health-effects-marks-50-year-anniversary> [<http://perma.cc/8P85-ELVR>].

⁶ See *id.*

⁷ See *Smoking is down, but almost 38 Million American adults still smoke*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2018), <http://www.cdc.gov/media/releases/2018/p0118-smoking-rates-declining.html> [<http://perma.cc/YEG8-YE8E>]; *Smoking in America: Why more Americans are kicking the habit*, AM. HEART ASS’N (Aug. 30, 2018), <http://www.heart.org/en/news/2018/08/29/smoking-in-america-why-more-americans-are-kicking-the-habit> [<http://perma.cc/EYR8-EB9E>].

murder, suicide, and use of illegal drugs combined.⁸ According to the CDC, smoking-related illnesses cost more than \$300 billion a year in direct medical expenses and lost productivity; it is an addiction that accounts for 8.7% of healthcare spending, of which 60% is paid for by public sources.⁹ The burdens of smoking on our health delivery system continue to be profound and any success we may have in containing healthcare costs will be realized only by continuation of the decades-long struggle to mitigate the tobacco epidemic.

The so-called war against tobacco has a long, detailed, and well-documented history that spans the second half of the twentieth century and continues to the present.¹⁰ This robust history of regulation reveals an assortment of abatement strategies that pit public health actors against individual smokers, powerful manufacturers, retailers, and agricultural interests. Central to this history is the role of law as a basic tool to implement an array of public policies and interventions on both domestic and international levels.¹¹ The ubiquitous presence of law in the struggle against tobacco products has been divided into two distinct periods: the first being a long period in which the focus of regulation rests on tobacco as an agricultural product, and the second characterized by public protection, in which preventing and reducing the health impacts of consumption is dominant.¹² These two periods—private market regulation and public health oversight—are not sequential, but coexist as major focal points of activity.¹³

For decades, the regulation of tobacco as a private product has focused on farming policies, product taxation, and various attempts to promote market competition through antitrust law.¹⁴

⁸ See U.S. DEPT HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 678–79 (2014); *Smoking and Death*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 17, 2018), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [<http://perma.cc/D7HP-UNVD>].

⁹ *Fast facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm [<http://perma.cc/N5Q8-GZDF>] (last updated Feb. 6, 2019); Xin Xu et al., *Annual Healthcare Spending Attributable to Cigarette Smoking*, 48 AM. J. PREVENTATIVE MED. 326, 331 (2015).

¹⁰ See Helene M. Cole & Michael C. Fiore, *The War Against Tobacco: 50 Years and Counting*, 311 JAMA 131–32 (2014) (providing a summary of the turn of public health policy against tobacco).

¹¹ For an overview of the long history of tobacco regulation, see NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *History of Tobacco Regulation*, 1 APPENDIX: MARIHUANA: A SIGNAL OF MISUNDERSTANDING 514 (1972), <http://hdl.handle.net/2027/umn.31951d03118410v> [<http://perma.cc/J8ND-T8KP>].

¹² See *id.*

¹³ See GIDEON DORON, THE SMOKING PARADOX 5 (Michael Connolly et al. eds., 1979).

¹⁴ See *id.* at 5–12.

The focus on public health regulation can be traced to a growing awareness of the correlations between smoking and disease that has gone from anecdotal speculation to scientific certainty.¹⁵ Public good regulations are characterized by a host of mandates, from labeling and advertisement requirements, to age restrictions, to product content oversight.¹⁶ The legal system's impact on smoking has arisen from a *mélange* of statutory directives at all levels of government, in addition to litigation—particularly the 1998 Master Settlement Agreement that promoted widespread adoption of restrictions on tobacco products.¹⁷

A central feature in any consideration of tobacco control concerns the response of the regulated. The growing, manufacturing, and selling of tobacco products is a large, sophisticated, and profitable industry, and even in the face of long-term scrutiny, this sector has been able to adjust to regulations by adopting strategies of aggression and accommodation as needed. Paradoxically, the tobacco companies that adamantly denied that smoking caused health problems during the twentieth century, now caution against this behavior, positing smoking as a matter of adult choice and advocating that smokers switch to their newest product line, e-cigarettes.¹⁸

This Article offers commentary on one legal strategy that has been used in the long-term struggle to control tobacco: the use of package warning labels. First introduced in 1965 in the Federal Cigarette Labeling and Advertising Act (“FCLAA,” also referred to as the Cigarette Act), a label-warning mandate has since become a basic feature of tobacco regulation.¹⁹ It is the second piece of federal legislation enacted during the 91st Congress, the Public Health Cigarette Smoking Act (“PHCSA”),²⁰ that modified cigarette label warning requirements and which will be the springboard for analysis in this Article. This piece will explore the evolution and changes in the law concerning federal cigarette package warnings, tracing legislative iterations in the area from a basic textual requirement originating in the 1960s,²¹ to the

¹⁵ See *id.* at 12–15.

¹⁶ See *id.* at 14–19.

¹⁷ See Pete Levin, *The ABCs of the Tobacco Master Settlement Agreement*, 2 NAAG, Nov. 6, 2007, at 1–2, <http://www.naag.org/assets/files/pdf/gazette/1.2.Gazette.pdf> [<http://perma.cc/U49K-7PEL>].

¹⁸ See *E-Cigarettes: Facts, stats and regulations*, TRUTH INITIATIVE (July 19, 2018), <http://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations> [<http://perma.cc/TR9S-SSEC>].

¹⁹ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, 79 Stat. 282 (codified in 15 U.S.C. §§ 1331–1336, 1338–1340 (2012)).

²⁰ Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87 (codified in 15 U.S.C. § 1340 (2012)).

²¹ See *id.*

much more complex requirement to add graphic health warnings enacted in 2009.²² Undoubtedly the issue of tobacco warning labels is only one of many threads in the larger context of cigarette regulation, but it is one which provides a helpful window into the exploration of policies to address the public health epidemic of smoking. The adoption and changes to warning labels reflect the historic environments in which such anti-smoking policies were developed and demonstrate an ongoing tension between regulators and industry. While tobacco control is a pillar of public health, it is not an exact science, as best practices, such as warnings, are difficult to measure and uncertain in the face of evolving smoking practices, like the use of e-cigarettes. As in other areas of smoking policy, political and legal impediments abound in the warning arena, compromising government capabilities to find an endgame to this persistent epidemic. The goal of this Article is to identify lessons that can be garnered from a review of the law concerning cigarette-package warnings to both improve that process and, more broadly, confront the ongoing challenges smoking poses to our healthcare system.

II. BACKGROUND

The rise and fall of cigarettes is a story ingrained in the twentieth century. The combination of mass production and skillful marketing moved the cigarette from relative obscurity in 1900 to a central place in American life by the 1930s.²³ While tobacco use exploded both domestically and internationally, it was cigarette consumption that dominated and became the epicenter of this behavior.²⁴ Cigarettes were marketed as highly desirable products, and ads depicting smoking as tasteful, healthy, and refreshing were seen for years in all forms of advertising media.²⁵ The advertisements were diverse in character, with various brands arguing that their products were

²² See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (codified in 21 U.S.C. §§ 387, 387a–387u, 387a–1, 387f–1 (2012)).

²³ See ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* 2–3 (2007).

²⁴ See *id.* at 97.

²⁵ See *Cigarette Advertising Themes*, STAN. UNIV., http://tobacco.stanford.edu/tobacco_main/main.php [<http://perma.cc/E8QZ-N36L>] (last visited Sept. 18, 2019). Cigarette advertisements are iconic symbols of American life, often depicting well-known personalities of the day touting the attractiveness of smoking as healthful and refreshing. See *id.* A prime example of characteristic advertising can be found on the pages of America's most popular weekly magazine, *Life Magazine*; the back-cover page of the magazine was often devoted to full page, artful tobacco advertisements that are reflective of the culture surrounding cigarettes. See Stuart Elliot, *Once a Mainstay of Magazines, Cigarette Makers Drop Print Ads*, N.Y. TIMES (Nov. 29, 2007), <http://www.nytimes.com/2007/11/29/business/media/29adco.html> [<http://perma.cc/8YR8-UGTG>].

less irritating to the smoker's throat, thereby cloaking themselves in the imprimatur of medical endorsements.²⁶

At the time cigarette smoking was reaching its zenith, seeds of concern about the health implications had been widely sown. In the early part of the twentieth century, criticism of cigarettes on moral grounds was as common as concerns over health, which somewhat paralleled reactions against alcohol use.²⁷ The public health case against cigarettes evolved over a considerable period of time as the epidemiological proof linking smoking with cancer became more convincing and spilled over from scientific literature into every day parlance.²⁸ Tobacco companies vigorously fought back, orchestrating a massive public relations effort to empathize with health concerns, while simultaneously calling into question the validity of the science linking cigarette consumption to disease.²⁹

In the 1940s and 1950s, the tobacco industry challenged the validity of anti-smoking studies, and even financed its own research that called into question claims that the product was a gateway to serious health problems.³⁰ In addition to adopting a posture of aggressive denials over health claims, tobacco manufacturers began to introduce filtered cigarettes to reduce harmful tar and nicotine content, which paradoxically should not have been necessary had these products not been potentially harmful to begin with.³¹ Another popular strategy used to market cigarettes was for manufacturers to make claims about the low levels of tar and nicotine in a given brand, arguing the result was less throat irritation, and, by implication, constituted a healthier product.³² As more scientific research about the ills of smoking unfolded, the industry shifted from a rejection of causation to arguments that there was simply inadequate proof about the dangers of smoking to reach a definitive conclusion.³³ Through much of the twentieth century, cigarettes were largely

²⁶ See Martha M. Gardner & Allan M. Brandt, "The Doctors' Choice Is America's Choice": *The Physician in U.S. Cigarette Advertisements, 1930-1953*, 96 AM. J. PUBLIC HEALTH 222, 223-24 (2006).

²⁷ *Id.* at 222; see U.S. DEP'T HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 19 (2014).

²⁸ See Gardner & Brandt, *supra* note 26, at 222-23.

²⁹ See *id.* at 223.

³⁰ See Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUBLIC HEALTH 63, 63-64 (2012).

³¹ See Gardner & Brandt, *supra* note 26, at 229-30.

³² Joel B. Cohen, *Smokers' Knowledge and Understanding of Advertised Tar Numbers: Health Policy Implications*, 86 AM. J. PUBLIC HEALTH 18, 19 (1996).

³³ See STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 25 (1996) ("After millions of dollars and over twenty years of research, the question about smoking and health is still open.").

unregulated, with the exception of Federal Trade Commission (“FTC”) oversight, which had control over unfair trade practices.³⁴ The FTC did issue a number of cease and desist orders involving various advertising claims made in particular cigarette brand ad campaigns, but it lacked the capacity to contain an industry that was able to nimbly adjust advertising strategies to circumvent regulatory challenges.³⁵ Following Congressional tobacco hearings in 1957 that highlighted the deceptive nature of tobacco advertising, a movement to attach warning labels to cigarette packaging developed.³⁶

Eventually the weight of science pressured the government to take action to evaluate the accumulating evidence linking smoking and illness, and a government commission was created in 1962 under the auspices of the U.S. Surgeon General to look into the matter.³⁷ In early January of 1964, the U.S. Surgeon General’s Advisory Committee on Smoking and Health issued what has become a seminal report in the history of tobacco control.³⁸ It was a catalyst in the design of multidisciplinary health studies, which also sparked subsequent Surgeon General smoking evaluations.³⁹

The Surgeon General’s Report, based on review of over 7,000 articles on smoking and health, concluded “that cigarette smoking is—[a] cause of lung and laryngeal cancers in men[,] a probable cause of lung cancer in women[,]” as well as a “cause of

³⁴ See Federal Trade Commission Act, 15 U.S.C. § 49 (Supp. IV 1970) (using the subpoena power to investigate instances of unfair methods of competition).

³⁵ See Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule, 29 Fed. Reg. 8325 (July 2, 1964). On September 15, 1955, the FTC issued cigarette-advertising guides. 1960 FTC ANN. REP. at 82. Among other things, they prohibit representations in cigarette advertising or labeling which refer to the presence or absence of any physical effects from cigarette smoking or which make any unsubstantiated claims respecting nicotine, tar or any other components of cigarette smoke, or in any other respects contain misleading implications concerning the health consequences or the advertised brand. See *id.* at 83. In 1960, the Commission obtained the agreement of the leading cigarette manufacturers to discontinue the misleading and unsubstantiated representations of tar and nicotine content which had characterized the so-called tar derby. See *id.* The FTC was limited in its regulatory authority over tobacco as the additional authority granted to the FTC in 1938 through the Food, Drug, and Cosmetic Act did not include tobacco; it took time for the Commission to ban tar and nicotine content, as unsubstantiated health claims, lacking in proof or uniform testing. Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (Supp. IV 1930) (codified as amended in scattered sections of 21 U.S.C.).

³⁶ See BRANDT, *supra* note 23, at 246.

³⁷ See *id.* at 219.

³⁸ U.S. DEPT HEALTH, EDUC., & WELFARE, PUB. HEALTH SERV. PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

³⁹ *Id.*

chronic bronchitis.”⁴⁰ The report did not end scientific issues concerning cigarette smoking, but did resolve any uncertainty about whether there was a link between tobacco and illness, and as such, created an avenue for government to more forcefully address the smoking problem directly.

The Surgeon General’s Report emerged in a period where smoking rates were high and, as noted, product regulation over cigarette content and manufacturing processes was largely non-existent. With cigarettes established as a type of disease vector by the Surgeon General, the initial focus of federal regulatory activity was centered on addressing the myths spawned by aggressive and misleading ad claims.⁴¹ The challenge of moving the report from a scientific analysis to remedial action fell to the FTC, which quickly unveiled a new set of regulations that mandated warnings about the dangers of smoking under the Commission’s authority to safeguard against unfair and deceptive trade practices.⁴² The FTC issued a proposed rule, which, in part, specified that one of two prescribed warnings be prominently displayed in all advertisements and on every cigarette pack, box, or container, as well as in advertisements.⁴³ This FTC rulemaking sparked a national debate on cigarette regulation that shifted the issue from a question of science to one of politics, and raised questions about the scope of regulatory authority in this arena. While the FTC proposal to add powerful warnings concerning the dangers of smoking garnered strong support from most public health groups, surprisingly the American Medical Association (“AMA”) did not endorse tobacco warning labels, but instead, for political reasons, called for increasing research into the public health implications of smoking, rather than adoption of warnings that the AMA felt would likely be ignored.⁴⁴

⁴⁰ *History of the Surgeon General’s Reports on Smoking and Health*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/sgr/history/index.htm [<http://perma.cc/2M8P-49UD>] (last updated Dec. 18, 2018). The Report concluded that the death rates for male smokers from lung cancer were 1,000% higher than male nonsmokers. BRANDT, *supra* note 23, at 224.

⁴¹ See Advertising and Labeling of Cigarettes, 29 Fed. Reg. 530, 530–32 (Jan. 22, 1964).

⁴² See *id.*

⁴³ M. JOYCELYN ELDERS, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 257 (1994) (stating, caution: (a) “The Surgeon General’s Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate”; or (b) “Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.”).

⁴⁴ It has been suggested that the AMA was caught up in its fights against Medicare and Medicaid legislation and did not want to alienate tobacco state members of Congress. BRANDT, *supra* note 23, at 249. In a *JAMA* editorial, the Executive Director of the AMA argued that tobacco had such large and multi-faceted implications that Congress, and not

While the science linking smoking to disease was advanced by the Surgeon General's Report, the tobacco war quickly took on a strong public policy cast as the tobacco lobby, shifted its efforts to the political arena, and waged its battles in Congress. Tobacco had powerful allies in Congress, led by members from tobacco growing states who had close ties to President Lyndon B. Johnson.⁴⁵ While the FTC was pushing for greater regulatory control over cigarettes, the tobacco industry went on the offensive by threatening litigation to block the Commission's expansion of tobacco regulations and proposing its own legislative fixes, which were reflected in Senate Bill 559.⁴⁶ Striking testimony in Congressional tobacco hearings was provided by some of the nation's leading cancer specialists who argued that the statistical link between smoking and health was not powerful enough to discount other multiple causes that might underlie lung cancer.⁴⁷

At this point, the tobacco lobby recognized that the pendulum of science and public opinion about smoking had shifted, thereby making warnings inevitable. So, rather than fight this development, it supported a very diluted warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health."⁴⁸ Ironically, while the smoking lobby continued to question the science around this behavior as uncertain, it supported a warning label as a mechanism to notify consumers about the dangers of smoking, and as a strategy to mitigate potential liability, thus creating an assumption of risk on the part of the smoker.⁴⁹ In addition, the industry sought to restrict FTC regulation and supported placing future labeling and advertising regulations in Congressional control, preempting state and local activities in this area.⁵⁰ On another front, a Tobacco Industry Code of Advertising was adopted in 1964.⁵¹ The Code was a form of self-regulation, directed at prohibiting ads geared toward youth smoking, ensuring accuracy in health

a regulatory agency, should control labeling and advertising. F.J.L. Blasingame, *Full Text of AMA Letter of Testimony to FTC*, in 188 JAMA 31, 31 (1964). In addition, the Tobacco Research Industry Committee in 1964 (renamed the Council for Tobacco Research) had pledged \$10 million to the AMA Education and Research Foundation to conduct research into the possible association between smoking and health. See 21 CONG. Q. SERV., *Health Warning Required on Cigarette Packs*, in XXI CONG. Q. ALMANAC 344 (Henrietta Poynter et al. eds., 1965).

⁴⁵ See CONG. Q. SERV., *supra* note 44, at 344.

⁴⁶ See *id.* at 344–45.

⁴⁷ See *id.* at 348.

⁴⁸ See *id.* at 345.

⁴⁹ See BRANDT, *supra* note 23, at 254.

⁵⁰ *Id.*

⁵¹ John W. Richards, Jr. et al., *The Tobacco Industry's Code of Advertising in the United States: Myth and Reality*, 5 TOBACCO CONTROL 295, 295 (1996).

claims, and creating an administrative mechanism to vet advertisements based on the first two objectives noted.⁵²

In July of 1965, the FLCAA was signed into law by President Lyndon B. Johnson, despite the White House failing to endorse this bill and a lack of unanimity in the Executive branch about how tobacco control should be developed.⁵³ Opposition from key members of Congress, who feared any federal legislation that might adversely impact the economics of tobacco growing and product taxation, certainly played a critical role in what was contained in this legislation.⁵⁴ The tobacco lobby heavily influenced this federal law, and the conditions noted above (warning labels, preemptions, regulatory agency limitations) were incorporated into this statute, making it a very pro-industry enactment.⁵⁵ Nonetheless, even if the law was highly compromised, The Cigarette Act remains significant, as it was the first of several pieces of federal legislation enacted to regulate tobacco products, and represents a foundation on which subsequent tobacco legislation rests. The Cigarette Act required a conspicuous package-warning label that codified the explicit language to be included, by January 1966, on all domestic and imported cigarette packaging.⁵⁶ The warning mandate was a step towards the legal recognition of the dangers of smoking that had been endorsed by the U.S. Surgeon General as a matter of public education, even if it was much less stringent than what health advocates had hoped for.⁵⁷ The Cigarette Act placed a four-year moratorium on any additional federal, state, or local agency regulation of advertisements, as well as restricted federal agencies from requiring language in warning labels beyond what was specified in the statute.⁵⁸ While the FTC still retained its general powers to regulate cigarettes under its authority over unfair and deceptive trade practices, the FCLAA moratorium shifted power to Congress and struck a blow against agency autonomy in this field.⁵⁹ The law required that the Department of Health, Education, and Welfare (“DHEW”) submit regular reports to Congress about the health consequences of smoking,

⁵² *Id.*

⁵³ Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341 (1966).

⁵⁴ See CONG. Q. SERV., *supra* note 44, at 346.

⁵⁵ See *id.* at 345–46.

⁵⁶ *Id.* at 345.

⁵⁷ See NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, *supra* note 11, at 523.

⁵⁸ *Id.* The law prohibited the FTC from requiring that the warning be placed in tobacco advertisements. For a discussion of the preemption question that was later dealt with by the U.S. Court, see CONG. RESEARCH SERV., R40639, THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT AND PREEMPTION REVISITED: AN ANALYSIS OF THE SUPREME COURT CASE *ALTRIA GROUP, INC. V. GOOD* AND CURRENT LEGISLATION 14–16 (2009).

⁵⁹ See NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, *supra* note 11, at 523.

and that the FTC submit reports on the effectiveness of labeling and the impacts of advertising on smoking.⁶⁰

III. THE PUBLIC HEALTH CIGARETTE SMOKING ACT AND THE 91ST CONGRESS

Through ongoing research in the 1960s, it became clearer that smoking causes multiple health problems and that this awareness was taking root in the public consciousness.⁶¹ On the other hand, tobacco sales were at their zenith and smoking rates even increased in 1966 after mandated package-warning labels were legislated in the FCLAA.⁶² The economic power of the tobacco industry and the success of cigarette advertising made smoking a difficult target for public health advocates.⁶³ But there were broader societal health concerns beyond smoking—such as increasing cancer rates generally and growing fears over illnesses caused by environmental toxins—that affected the regulatory climate of the 1960s.⁶⁴ In addition, it was during this time that the country experienced the growth of the consumer movement, in which an emphasis on safety, information, choice, and redress emerged as legal levers to empower individuals in the face of large corporate interests.⁶⁵ These broad societal forces came together during the Nixon administration and it was in this period that the 91st Congress was confronted with deciding what should be included in a new tobacco law in light of the sunset of key portions of FCLAA—particularly those concerning agency authority and package warning requirements.

The concerns about the ill effects of cigarettes did not subside after the passage of the FCLAA, but continued into the late 1960s, driven to a considerable extent on the political side by the Nixon administration's U.S. Surgeon General, Jesse Steinfeld.⁶⁶ Dr. Steinfeld, a cancer researcher from the National Cancer Institute, was a very strong anti-smoking advocate who used his position as Surgeon General as a bully pulpit to attack the tobacco industry; he argued that tobacco companies were

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See* Robert Lichter, *Stop the Fearmongering Over Cancer*, FORBES (June 1, 2010, 11:24 AM), <http://www.forbes.com/2010/06/01/cancer-hysteria-health-media-opinions-columnists-robert-lichter.html#163564cc3348> [<http://perma.cc/M99L-24UH>].

⁶⁵ *See* Richard L. Worsnop, *Directions of the Consumer Movement*, in CQ RESEARCHER 3–4 (1972).

⁶⁶ *See* Alison Snyder, *Jesse Steinfeld*, 384 LANCET 1258, 1258 (Oct. 4, 2014), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61760-8/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61760-8/fulltext) [<http://perma.cc/6FD7-BUHA>].

responsible for millions of related deaths.⁶⁷ Particularly noteworthy was Steinfeld's campaign that cautioned women about the dangers of smoking while pregnant or near children, and his pioneering work in raising concern about the dangers of secondhand smoke that underpinned a call to ban smoking in public places.⁶⁸ Steinfeld's vigorous advocacy proved controversial and unpopular with key political operatives in the Nixon administration who feared backlash from the tobacco industry and political fallout in states that were heavily dependent on this crop as a mainstay of their agricultural economies.⁶⁹ It was also argued that the Surgeon General was overly concerned with the health impacts of smoking, at the expense of taking action to combat other health hazards.⁷⁰

In the period following the FCLAA, a number of important smoking-related developments occurred beyond the vigorous anti-smoking advocacy of the Surgeon General. In 1966, a request was made to television station WCBS to broadcast anti-smoking announcements under the equal time provisions of the fairness doctrine.⁷¹ During this era, cigarettes were the leading product advertised on television, accounting for 8% of advertising time.⁷² The argument was made that the law governing broadcast media required that airtime also be allotted to public health advocates to present information about the health risks of smoking to counter the false representations made in cigarette commercials.⁷³ The Federal Communications Commission ("FCC") supported the use of the fairness doctrine to counteract cigarette ads as a matter of public interest.⁷⁴ Later use of this doctrine was upheld in the federal courts where the argument that it violated First Amendment commercial speech protections was rejected.⁷⁵ While "equal time" was not required for anti-tobacco ads, broadcasters were required to devote a "significant amount of time" to free messages that educated the

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ "Any attacks on tobacco are counter-productive in Kentucky, North Carolina and Virginia, where tobacco-growing and manufacturing are vital to the economy. The same is true to a lesser, but still significant, extent in Tennessee, Georgia, South Carolina, Florida and Maryland." Memorandum for the Att'y Gen. from Lee R. Nunn, Comm. for the Re-Election of the President (Jan. 18, 1972).

⁷⁰ *See id.* at Attachment C.

⁷¹ NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 11, at 524.

⁷² SUSAN WAGNER, CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY & POLITICS 166 (1971).

⁷³ *See Banzhaf v. FCC*, 405 F.2d 1082, 1086 (D.C. Cir. 1968).

⁷⁴ *See id.* at 1087.

⁷⁵ *See id.* at 1100-01.

public about the hazards of smoking, and as such, frequent anti-tobacco spot ads began to populate the broadcast airwaves.⁷⁶

Under the dictates of the FCLAA, the FTC was temporarily prevented from implementing any requirement that tar and nicotine content be listed on cigarette packages.⁷⁷ Still, the FTC, after many years of rejecting industry claims concerning cigarette content, reached a private agreement with tobacco manufacturers in 1966 to allow tar and nicotine content to be advertised.⁷⁸ The Commission had convened a panel of scientists to explore the tar and nicotine issue.⁷⁹ This panel concluded that there was sufficient evidence to support the claim that cigarette smoke that contained lower amounts of these two substances was less harmful and that recommendations should be made to the Surgeon General to support reduction of these harmful chemicals in cigarette smoke.⁸⁰ Cigarette manufacturers were not required to include tar and nicotine content in advertisements, but could choose to do so without facing a regulatory penalty.⁸¹ The FTC required that advertised ingredients be based on accepted smoke testing procedures, even endorsing a particular testing method, and creating its own laboratory to conduct smoke tests.⁸²

In 1967, the FTC released a report on cigarette labeling and advertising, required under FCLAA.⁸³ This report, based on survey data collected from public health professionals and consumers, concluded there was no evidence that the current label warning required in 1965 had any effect on cigarette consumption.⁸⁴ In fact, in the first two months after the warning appeared, product sales actually increased.⁸⁵ Survey respondents overwhelmingly reported that they felt that the current warning label language was insufficient to inform the public of the general hazards of smoking, particularly in the face of massive

⁷⁶ *Id.* at 1086–87.

⁷⁷ NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 11, at 523.

⁷⁸ See Vanessa K. Burrows, CONG. RESEARCH SERV., RS22944, FEDERAL TRADE COMMISSION GUIDANCE REGARDING TAR AND NICOTINE YIELDS IN CIGARETTES (2008). For FTC guidance on tar and nicotine, see FTC, *FTC to Begin Cigarette Testing*, NEWS SUMMARY (Aug. 18, 1967), <http://hdl.handle.net/2027/uiug.30112104343899> [<http://perma.cc/P8YT-34QR>].

⁷⁹ *Cigarette Controls: A Sick Joke So Far*, 33 CONSUMER REPS. 97, 102 (1968).

⁸⁰ *Id.* The tar and nicotine measures were also seen as a helpful tool to dispel the belief that filtered cigarettes were effective in reducing harmful chemicals in smoke, as filtered cigarettes seen as healthier dominated the cigarette market. *Id.*

⁸¹ See Burrows, *supra* note 78.

⁸² See Jeffrey Wigand, *What is the FTC Method of Cigarette Analysis?*, <http://jeffreywigand.com/FTCmethod.pdf> [<http://perma.cc/X9MK-YTPE>] (last visited Feb. 27, 2020); Burrows, *supra* note 78.

⁸³ FTC ANN. REP. at 18–19, 78–79 (1967).

⁸⁴ *Cigarette Controls: A Sick Joke So Far*, *supra* note 79, at 98.

⁸⁵ *Id.*

industry advertising.⁸⁶ The Commission expressed concern about the impacts of advertising on teenagers who appeared to be a prime target of television cigarette promotions.⁸⁷ Tobacco ads depicted smoking as a relatively safe and fashionable behavior, never pointing out the addictive nature of the product.⁸⁸ The FTC noted that the industry did not appear to be following its own self-regulatory guidelines—particularly evident in its promotion of filtered cigarettes and its failure to mention the increasing evidence of the growing health hazards linked to smoking.⁸⁹ The Commission report recommended that package warnings be more stringent, using language that reads, “Cigarette Smoking Is Dangerous to Health and May Cause Death From Cancer and Other Diseases,” and that such warning be expanded from packages to all product advertising, and mandate specific tar and nicotine content information.⁹⁰ In addition, the FTC called for appropriations of funds to support anti-smoking programs, especially for children, as well as support for the development of a “safer” cigarette.⁹¹

The broad health concerns over cancer and environmental pollution became legislative drivers of the 91st Congress and, within this context, the ongoing battle over how tobacco was to be regulated unfolded. Within the cigarette-smoking arena, the aggressive posture of the Surgeon General and the FTC, together with the use of the fairness doctrine mandated by the FCC, drove government’s executive branch smoking activism. A Congressional showdown on tobacco in 1969 was sparked by the sunset provision in the FCLAA concerning warning language and advertisement regulation.⁹² Numerous tobacco bills were introduced in the U.S. House of Representatives in 1969 that posited several primary approaches for ongoing regulation, including a stronger warning label, the inclusion of tar and nicotine levels on packaging and advertisements, prohibition of broadcast cigarette ads, as well as extension of provisions of the 1965 FCLAA.⁹³ During the time period the 91st Congress was deliberating new cigarette legislation, the FCC began rule-making processes to ban the broadcast of cigarette ads on

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *See id.* at 98, 100.

⁸⁹ *See id.* at 100.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *See S. REP. NO. 91-566*, at 1–2 (1969), *as reprinted in* 1970 U.S.C.C.A.N. 2652, 2652–53.

⁹³ Edward Klebe, CONG. RESEARCH SERV., 79-219EPW, ACTIONS OF THE CONGRESS AND THE FEDERAL GOVERNMENT ON SMOKING AND HEALTH 19–24 (1979).

radio and television and the FTC announced an even more stringent package warning than had been suggested in its 1967 Report to Congress.⁹⁴ In the Senate, the focus of their tobacco hearings was centered on industry self-regulation.⁹⁵ As a result of regulatory pressure and the growing impacts of the fairness doctrine pressure, the tobacco industry voluntarily offered to discontinue broadcast advertising—a strategic move to mitigate other legislative initiatives.⁹⁶ In turn, the FTC offered to suspend its efforts to require health warnings in cigarette advertisements until 1971 if broadcasters voluntarily withdrew cigarette ads.⁹⁷

After a long process of hearings and debate, the 91st Congress enacted the second major piece of federal tobacco legislation: the PHCSA of 1969.⁹⁸ The legislation contained five key parts: (1) the suspension of broadcast media cigarette advertising; (2) a change in package label warnings; (3) a prohibition on state and local government regulation of tobacco advertising; (4) the suspension of FTC action on print advertising until July 1, 1971; and (5) a requirement that the FTC and DHEW report annually to Congress on the consequences of smoking, the effectiveness of labeling, and advertising practices.⁹⁹ While the PHCSA was somewhat more rigorous than the FCLAA, the final bill was the product of significant compromise and was, no doubt, heavily influenced by the strong hand of the tobacco lobby.¹⁰⁰ As was the case with the FCLAA, the White House appeared to distance itself from the PHCSA. The strong support from the public health community, and the drive to eradicate cancer that led to the National Cancer Act in the following year, marked a political climate that resulted in President Nixon signing the new cigarette act on April 1, 1970.¹⁰¹

On January 1, 1971 at 11:50 p.m., the last cigarette ad ran on network television, as what was arguably the most significant provision of the PHCSA of 1969 went into effect.¹⁰² Television cigarette advertising was a hallmark of broadcast media, and

⁹⁴ See *id.* at 21.

⁹⁵ *Id.* at 23.

⁹⁶ See *id.*

⁹⁷ *Id.* at 24.

⁹⁸ Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1340 (2012)).

⁹⁹ See *id.* at 87–89.

¹⁰⁰ NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 11, at 525.

¹⁰¹ ANNA D. BARKER & HAMILTON JORDAN, *Legislative History of the National Cancer Program*, in HOLLAND-FREI CANCER MEDICINE (Donald W. Kufe et al. eds., 6th ed. 2003), <http://www.ncbi.nlm.nih.gov/books/NBK13873/> [<http://perma.cc/K2XB-FESB>].

¹⁰² *Nixon signs legislation banning cigarette ads on TV and radio*, HISTORY, <http://www.history.com/this-day-in-history/nixon-signs-legislation-banning-cigarette-ads-on-tv-and-radio> [<http://perma.cc/9JZ3-DH4U>] (last updated July 28, 2019).

was seen as a major influence on children.¹⁰³ In 1970, their final year on the airwaves, tobacco manufacturers spent over \$200 million on TV ads.¹⁰⁴ But even prior to the U.S. ad ban, strict regulation of broadcast tobacco ads in several European countries, and an outright prohibition in the UK, appeared to have little impact on smoking rates in those countries.¹⁰⁵ Curiously, with the ban on cigarette advertising in place, the FCC mandate to require broadcasters to run free public health anti-smoking ads was no longer necessary, thereby abrogating the use of the fairness doctrine.¹⁰⁶ While television ads were eliminated, tobacco manufacturers continued their vigorous marketing elsewhere.¹⁰⁷ They shifted to print media and point of sale promotions, as well as various types of product sponsorships.¹⁰⁸

Broadcasters, on the other hand, were faced with significant revenue losses and challenged the PHCSA ad ban in court, as being in violation of First Amendment commercial speech protections, and Fifth Amendment due process rights.¹⁰⁹ A three judge panel in *Capital Broadcasting Co. v. Mitchell* disagreed with the broadcasters' legal claims and ruled that commercial speech protections were more limited than other forms of speech.¹¹⁰ Congress had the power to ban broadcast media cigarette advertising based on either its authority over regulatory agencies or interstate commerce. The court in *Mitchell* found that the broadcasters' rights to free speech were not violated, as their revenue loss from cigarette ads did not prohibit them from commenting on the issue of smoking and public health.¹¹¹ In a dissenting opinion in *Mitchell*, Judge Skelly Wright argued that the ban on cigarette advertising was a matter of public importance that should receive full constitutional speech protections.¹¹² Judge Wright was particularly concerned that the ban on TV and radio advertising took the issue off the airwaves and, in so doing, denied the use of the fairness doctrine to spark a more balanced discussion of the health impacts of cigarettes.¹¹³

¹⁰³ Lee Lescaze, *Cigarette Advertising*, WASH. POST (Jan. 15, 1979), http://www.washingtonpost.com/archive/politics/1979/01/15/cigarette-advertising/a46e78bd-85e1-4d2a-90d1-e0cbc4c7b8fd/?noredirect&utm_term=.074621ddf8f7 [<http://perma.cc/EGQ9-XSJB>].

¹⁰⁴ *Id.*

¹⁰⁵ See BRANDT, *supra* note 23, at 271.

¹⁰⁶ See *id.* at 271–72.

¹⁰⁷ See *id.* at 272.

¹⁰⁸ See *id.*

¹⁰⁹ *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 583 (D.D.C. 1971).

¹¹⁰ See *id.* at 583, 585–86.

¹¹¹ See *id.* at 586.

¹¹² See *id.* at 587 (Wright, J., dissenting).

¹¹³ See *id.* at 589 (Wright, J., dissenting).

The package warning label requirement in the PHCSA was not a novel legislative provision as the cigarette ad ban was, but rather offered a modest extension of the warning requirement in the FCLAA, with the inclusion of language that added the gravitas of the U.S. Surgeon General to the package label. The original 1965 warning label requirement did not succeed in reducing cigarette consumption, but rather than abandoning the idea of a consumer warning, subsequent legislative initiatives, starting with the 1969 PHCSA, amended the mandatory language to make the warnings more detailed.¹¹⁴ The PHCSA prohibited the FTC from requiring the cigarette warnings apply beyond package labels, but that limitation was only in place until July 1, 1971, and once this moratorium had expired, the Commission, which was strongly committed to use of consumer warnings, expanded the requirement to include all tobacco advertising.¹¹⁵

The use of a product warning has a dual objective of both educating the public about the risks posed by a given product, as well as deterring use of the product. Clearly the goal of use deterrence was not one that was welcomed by cigarette manufacturers and sellers, and so the industry struggled to meet the legal warning requirements in ways that minimized their impact on sales. On the government side, even with ongoing mitigation efforts, there was no centralized voice for tobacco control in either the Executive branch or Congress.¹¹⁶ Pockets of strong opposition to regulation were sparked by pressure from heavy lobbying by tobacco manufacturers and agricultural interests.¹¹⁷ The cigarette warning label requirement in the PHCSA demonstrated underlying tensions in government ranks.¹¹⁸ The regulators in the Executive branch were strong supporters of comprehensive oversight, in opposition to views sparked by economic concerns in Congress and the White House that resulted in favoring more limited approaches to cigarette regulation, including minimal package warnings.¹¹⁹

As previously noted, during the Nixon Administration, Surgeon General Steinfeld was an ardent anti-tobacco advocate, and specific to tobacco warnings, his views aligned with the FTC's position for much more stringent oversight than what was

¹¹⁴ See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 88 (1970).

¹¹⁵ See Klebe, *supra* note 93, at 29.

¹¹⁶ See BRANDT, *supra* note 23, at 277.

¹¹⁷ See *id.*

¹¹⁸ See Memorandum for the Att'y Gen., *supra* note 69, at 1–6.

¹¹⁹ See *id.*

legislated in the PHCSA.¹²⁰ On the other hand, as evidenced in a 1972 Republican memorandum to the attorney general on tobacco regulation, concerns were voiced about anti-smoking measures that were having a negative impact on political support for President Nixon in southern states.¹²¹ In the noted memorandum, the tobacco industry was praised for its willingness to self-regulate and pursue objective scientific research into the health aspects of cigarettes.¹²² Surgeon General Steinfeld was characterized as an anti-smoking zealot with a vendetta against tobacco that was pursued at the expense of dealing with other hazardous substances.¹²³ The warning provision in the PHCSA balances countervailing pressures, as the package label requirement was driven by a regulatory commitment to educate the public about the hazards of smoking, a culture of individualism, and a strong desire not to disrupt the economic status quo.¹²⁴

In his 1968 presidential campaign, President Nixon was asked about his opinion on tobacco warnings. The President characterized the studies concerning smoking and health as controversial, and noted that all the federal government could do concerning cigarettes was provide information about smoking hazards to the public, and let individuals choose.¹²⁵ He expressed skepticism about whether warnings would have any impact on consumer behavior.¹²⁶ Like the prior Kennedy and Johnson administrations, the Nixon White House was very guarded in its support of anti-smoking measures, and while Nixon signed the PHCSA into law, no fanfare accompanied this signing.¹²⁷

IV. BEYOND THE PHCSA: THE TRAJECTORY OF WARNINGS

At first blush, it appears that the legacy of the PHCSA sinks into the sea of laws, regulations, and litigation that developed in the area of tobacco control since 1970. Still, the major components of the 1969 law—the advertising ban, revised warning labels, and preemption of local/state law on advertising—were significant steps in the history of tobacco use abatement measures that remain relevant in the current smoking landscape. Indeed, as the smoking question has

¹²⁰ See Snyder, *supra* note 66, at 1258.

¹²¹ Memorandum for the Att’y Gen., *supra* note 69, at 1.

¹²² *Id.* at 4–5.

¹²³ *Id.* at 1–2.

¹²⁴ See *id.* at 1–6.

¹²⁵ *Id.* at Attachment A.

¹²⁶ *Id.*

¹²⁷ See Nixon signs legislation banning cigarette ads on TV and radio, *supra* note 102.

expanded into new and different forms of nicotine delivery devices beyond traditional cigarettes, the fundamental and long-standing regulatory controls found in the PHCSA remain viable public health tools in the face of the growing use of e-cigarettes and a heightened awareness of the need to control health care costs through more effective prevention.

There are three developments post-1969 concerning smoking mitigation that should be noted in tracking the evolution of tobacco regulation, dealing directly and indirectly with warning labels. First, from the mid-1970s, a major catalyst for ongoing smoking regulation was the growing public concern over the dangers of cigarette smoking, fueled by an awareness of the impacts of secondhand smoke.¹²⁸ With the emergence of solid evidence that non-smokers exposed to cigarette smoke were at risk for numerous medical conditions, the public health focus over smoking broadened.¹²⁹ Smoking abatement was no longer limited to concerns about individual behavior that centered on questions of personal choice, but expanded into a population wide problem.¹³⁰ Numerous laws enacted, at all levels of government, prohibited smoking in various indoor and outdoor spaces.¹³¹ With them came ubiquitous signage declaring no smoking policies.¹³² There was also a growing awareness and concern about nicotine content in cigarettes, as science emerged that cautioned about the addictive nature of this chemical.¹³³

A second development that affected the direction of warnings occurred in 1972 when cigarettes and other tobacco products were excluded from the jurisdiction of the Consumer Products Safety Commission (“CPSC”), thereby closing an avenue for possibly more impactful regulation by another regulatory actor.¹³⁴ In 1973, a request was made to the CPSC to set a maximum level of twenty-one milligrams of tar in cigarettes and ban any cigarettes exceeding that amount from interstate commerce, drawing on the Federal Hazardous Substances Act

¹²⁸ See BRANDT, *supra* note 23, at 292–93.

¹²⁹ See Melissa Conrad Stoppler, *Secondhand Smoke*, MEDICINET, http://www.medicinenet.com/secondhand_smoke/article.htm#secondhand_smoke_facts [<http://perma.cc/JC5Q-4DVA>] (last updated Nov. 13, 2018).

¹³⁰ See *id.*

¹³¹ See Dustin Heap, *No Smoking Laws For All Fifty States*, SIGNS.COM (May 20, 2014), <http://www.signs.com/blog/no-smoking-laws-for-all-fifty-states/> [<http://perma.cc/H5TH-YRKS>].

¹³² See *id.*

¹³³ See U.S. DEPT OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 6* (1988), <http://profiles.nlm.nih.gov/spotlight/nn/catalog.nlm:nlmuid-101584932X426-doc> [<http://perma.cc/XK7B-YXMK>].

¹³⁴ Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207, 1207–08 (1972).

(“FHSA”) as supporting law.¹³⁵ According to the General Accounting Office (“GAO”), who had been referred the matter by the U.S. Comptroller General, the FHSA did not extend to cigarettes, and while the CPSC could regulate matters under the FHSA generally, tobacco oversight was limited to Congress.¹³⁶ Concern about CPSC regulation was great enough to result in legislative action that explicitly excluded tobacco regulation from the FHSA.¹³⁷ In addition, tobacco was further excluded from inclusion in both the Controlled Substances Act (“CSA”), as well as the Toxic Substances Control Act (“TSCA”), in essence leaving cigarettes exempt from the oversight of significant consumer and worker protection regulatory schemes.¹³⁸

A third major development in tobacco control can be found in the evolution of smoking litigation that escalated throughout the second half of the twentieth century. Often, liability claims at state levels raised questions about the impacts of mandated warning labels; but, starting with the FCLAA, such state claims were preempted, spawning a reliance on alternative causes of action.¹³⁹ It would take several decades, but eventually consolidated tobacco litigation culminated in a master settlement between states’ attorney generals in 1998.¹⁴⁰ The settlement resulted in historic payments by the manufacturers to individual states and adoption of an array of measures, particularly oriented to youth, that restricted cigarette advertising and marketing, as well as prohibited industry practices designed to hide health information about the dangers of smoking.¹⁴¹

While the cigarette smoking challenge continued to spark new approaches to regulation, the use of warning labels that came out of the FCLAA and the PHCSA in the 1960s was not abandoned, even in the face of skepticism about the effectiveness of warnings on education and prevention.¹⁴² A review of the

¹³⁵ Klebe, *supra* note 93, at 33–34.

¹³⁶ *Id.* at 34–35. The Consumer Products Safety Commission validated the conclusions of the GAO concerning the Federal Hazardous Substances Act in a three to two vote on May 17, 1974 that the Commission lacked the authority to regulate tar in cigarettes. *Id.* at 35.

¹³⁷ James T. O’Reilly, *A Consistent Ethic of Safety Regulation: The Case for Improving Regulation of Tobacco Products*, 3 ADMIN. L.J. 215, 245 (1989). *See also* 15 U.S.C. § 1262(f)(2).

¹³⁸ O’Reilly, *supra* note 137, at 230.

¹³⁹ *See* Controlled Substances Act, 21 U.S.C. § 802 (1982 & Supp. V 1987); Toxic Substances Controlled Act, 15 U.S.C. § 2602 (1988). These statutes can serve as alternative causes of action.

¹⁴⁰ *See The Master Settlement Agreement: An Overview*, PUB. HEALTH L. CTR. (Jan. 2019), <http://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf> [<http://perma.cc/6WGG-VCFP>].

¹⁴¹ *See id.*

¹⁴² *See* Deborah M. Scharf & William G. Shadel, *Graphic Warning Labels on Cigarettes Are Scary, but Do They Work?*, RAND CORP. (Sept. 30, 2014),

legislative history of tobacco in the 1970s demonstrates that there were ongoing efforts to strengthen warning labels in a number of proposed federal bills, as well as a recommendation by the FTC to expand warnings to include tar and nicotine content in both packaging and advertising.¹⁴³ The FCLAA was amended in 1973 to expand package-warning requirements to include little cigars.¹⁴⁴ In 1981, the FTC, in a report to Congress, concluded that the PHCSA health warning language was no longer impactful on public knowledge and attitudes about smoking, spurring Congress to revisit the labeling issue.¹⁴⁵ In 1984, the Comprehensive Smoking Education Act (“CSEA,” also known as the Rotational Warning Act) was passed.¹⁴⁶ This law required cigarette packages and advertising to use one of four health warnings that included much more explicit language about the adverse health effects of smoking.¹⁴⁷ The four rotational warnings were mandatory for not only packaging, but for all advertisements and outdoor billboards.¹⁴⁸ The 1984 statute contained explicit details about the format of labeling, and required that manufacturers and importers submit advertising plans for approval to the FTC for each brand of cigarettes.¹⁴⁹ CSEA was an attempt to refocus cigarette control efforts, not only by expanding warnings labels, but also by extending anti-tobacco educational efforts, tracking cigarette ingredients, and facilitating interagency coordination of anti-smoking efforts.¹⁵⁰ Not long after CSEA was enacted, mandatory package warnings were extended to smokeless tobacco products.¹⁵¹

The rotational warnings on both cigarettes and smokeless tobacco became a fixture on cigarette packages. Despite a whirlwind of legal and policy developments concerning smoking abatement, this regulatory mandate—a vestige from the

<http://www.rand.org/blog/2014/09/graphic-warning-labels-on-cigarettes-are-scary-but.html>
[<http://perma.cc/3NC2-BX59>].

¹⁴³ Klebe, *supra* note 93, at 36–40. *See also* Smoker and Nonsmoker Health Protection Act, H.R. 10748, 94th Cong. (1975) (showing an example of proposed federal legislation that included expansion of cigarette warnings); H.R. 3827, 93d Cong. (1973) (requiring a package label reading, “Cigarette Smoking Is Dangerous to Health and May Cause Death From Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema, or Other Diseases”).

¹⁴⁴ Little Cigar Act, Pub. L. No. 93-109, 87 Stat. 352, 352 (1973).

¹⁴⁵ *See* 1981 FTC ANN. REP. 6.

¹⁴⁶ Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200, 2201–02 (1984).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 15 U.S.C. § 1333 (1982), *amended by* 15 U.S.C. § 1333 (Supp. IV 1982).

¹⁵⁰ Comprehensive Smoking Education Act, H.R. 3979, 98th Cong. (1984).

¹⁵¹ Comprehensive Smokeless Tobacco Health Education Act, Pub. L. No. 99-252, 100 Stat. 30, 30–31 (1986).

1960s—held firm. The skepticism, noted above, about the efficacy of cigarette label warnings remained a persistent undertone in this area. In a landmark report on tobacco control in 2007, the Institute of Medicine (“IOM”) voiced support for the use of packaging as an effective vehicle for health communications, but concluded that the warnings stemming from CSEA were inadequate.¹⁵² The IOM called for revised warnings to foster greater public awareness of health risks, as well as to discourage consumption.¹⁵³

The 2007 IOM report was a harbinger of the Family Smoking Prevention and Tobacco Control Act of 2009 (“TCA”), the most comprehensive federal legislation in the tobacco control area to date.¹⁵⁴ Congress crafted the TCA based on key evidence drawn over several decades.¹⁵⁵ Major drivers of the law included reducing smoking among children and adolescents, recognizing the strong link between smoking and addiction to nicotine, and continuing public educational efforts to counter tobacco-marketing efforts.¹⁵⁶ The TCA established a broad framework for ongoing regulation—drawing together in one bill an array of measures posited for some time.¹⁵⁷ In particular, the law designated the federal Food and Drug Administration (“FDA”) as the central authority in this area, giving the Administration the power to regulate the manufacture, distribution, and marketing of cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and any other tobacco product the Administration deems by regulation to be considered a “tobacco product.”¹⁵⁸ The 2009 law provides three pathways for approval of new tobacco products by the FDA in conjunction with its general powers under the Food, Drug, and Cosmetic Act.¹⁵⁹ The three regulatory pathways include a pre-market approval order for all new tobacco products; secondly, a modified risk tobacco product

¹⁵² See INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 289–96 (Richard J. Bonnie et al. eds., 2007).

¹⁵³ See *id.*

¹⁵⁴ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

¹⁵⁵ See *id.* at 1777–81.

¹⁵⁶ See *Nicopure Labs, L.L.C. v. FDA*, 266 F. Supp. 3d 360, 371 (D.C. Cir. 2017).

¹⁵⁷ See *Family Smoking Prevention and Tobacco Control Act—An Overview*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview> [<http://perma.cc/EW6G-K37F>] (last updated Jan. 17, 2018).

¹⁵⁸ See Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.); see also Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products, 79 Fed. Reg. 23,142, 23,142 (2014).

¹⁵⁹ See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 387j, 387k (2012).

category that applies to single products that have been altered to modify health considerations; and thirdly, a substantial equivalence plan for predicate products that came on the market prior to March 2011.¹⁶⁰ It is noteworthy that tobacco products that were unchanged since entering the market prior to 2007—while subject to FDA regulation—are treated as grandfathered brands, not requiring specific Administration approval.¹⁶¹ Another noteworthy feature of the Act is the requirement that cigarette companies disclose all product ingredients, and stop using descriptive words like “light” and “ultra-light” to create the impression that a particular product is a healthy smoking alternative.¹⁶² Critics of the TCA voiced concern that the legislation comes up short.¹⁶³ For example, it allows the FDA to mandate lower nicotine levels in cigarettes, but by not banning this chemical outright, it results in addicted smokers inhaling more deeply and increased consumption by these smokers to feed their nicotine craving.¹⁶⁴

Perhaps the most significant feature of the TCA is that the law, for the first time in twenty-five years, imposes new labels and warnings on tobacco packages and on advertisements.¹⁶⁵ The combined influence of the IOM report’s critique of warnings, along with the adoption of more detailed textual warnings, and startling graphic depictions of illnesses caused by smoking in countries across the globe, spurred a renewed American regulatory effort to invigorate the warning process. The 2006 World Health Organization (“WHO”) Framework Convention on Tobacco Control (“FCTC”) called for the use of packaging warnings that are rotating, “large, clear, visible and legible,”

¹⁶⁰ See *Premarket Tobacco Product Applications*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/premarket-tobacco-product-applications> [<http://perma.cc/RQ8K-KJX6>] (last updated Oct. 25, 2019); *Modified Risk Tobacco Products*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/tobacco-products/advertising-and-promotion/modified-risk-tobacco-products> [<http://perma.cc/9746-TVYP>] (last updated Oct. 22, 2019); FOOD & DRUG ADMIN., DEMONSTRATING THE SUBSTANTIAL EQUIVALENCE OF A NEW TOBACCO PRODUCT: RESPONSES TO FREQUENTLY ASKED QUESTIONS (3d ed. Dec. 2016), <http://www.fda.gov/media/90811/download> [<http://perma.cc/E76U-D22D>].

¹⁶¹ For an interesting discussion of the deeming rule, see *Introducing the FDA Deeming Authority Clarification Act of 2015*, 114th Cong. 5694 (Apr. 28, 2015) (statement of Hon. Tom Cole).

¹⁶² See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1780 (2009).

¹⁶³ Michael Siegel, *Tobacco regulations are no regulations at all*, L.A. TIMES (June 3, 2009), <http://web.archive.org/web/20161226015412/http://articles.latimes.com/2009/jun/03/opinion/oe-siegel3> [<http://perma.cc/7JW7-K79Y>].

¹⁶⁴ *Id.*

¹⁶⁵ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1842–43.

and includes pictures or pictograms.¹⁶⁶ Under the TCA, the FDA was empowered to require that cigarette packages and advertisements bear one of nine new health warnings and that the warnings, with graphics, comprise 50% of the front and rear panels of cigarette packages.¹⁶⁷ The new label warnings are linked to the FDA requirements under the Administration's misbranding provisions, which require that a regulated product include proper labeling.¹⁶⁸ In the case of cigarettes, the product would be considered misbranded if it failed to comport with the necessary language, placement, typography, and graphics.¹⁶⁹ Congress legislated the nine rotational warnings that were to be used, but left the selection of accompanying graphics in the hands of the FDA.¹⁷⁰ The law allows the FDA to adjust the type size, text, and format of cigarette health warnings to ensure that the graphics and accompanying text are clear, conspicuous, legible, and adequately sized.¹⁷¹

In deciding which graphic warnings to be used, the FDA was tasked with balancing a strategy to discourage nonsmokers, especially children, from initiating cigarette use and to encourage current smokers to change their behavior in order to reduce health risks.¹⁷² The Administration analyzed thirty-six graphic images drawn from consumer research on health communications, considering cognitive and emotional reactions.¹⁷³ The FDA concluded that risk information was best communicated through emotional messages, because such messages are more likely to garner a reaction from smokers.¹⁷⁴ The Administration settled on nine graphic images to accompany each of the new mandated warning statements, together with a phone number from the National Cancer Institute's "Network of Tobacco Cessation Quitlines."¹⁷⁵ Selection of the graphic images was based on an 18,000-person Internet survey that focused on

¹⁶⁶ WORLD HEALTH ORG., WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, Art. 11.1(b) (Feb. 27, 2005).

¹⁶⁷ 15 U.S.C. § 1333 (2012) (The warnings include: "[c]igarettes are addictive"; "[t]obacco smoke can harm your children"; "[c]igarettes cause fatal lung disease"; "[c]igarettes cause cancer"; "[c]igarettes cause strokes and heart disease"; "[s]moking during pregnancy can harm your baby"; "[s]moking can kill you"; "[t]obacco smoke causes fatal lung disease in nonsmokers"; and "[q]uitting smoking now greatly reduces serious risks to your health").

¹⁶⁸ See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 387c (2012).

¹⁶⁹ See *id.* § 321(n).

¹⁷⁰ See 15 U.S.C. § 1333.

¹⁷¹ See *id.*

¹⁷² See Required Packaging Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,525 (Nov. 12, 2010).

¹⁷³ See Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,637–38 (June 11, 2011).

¹⁷⁴ *Id.* at 36,639.

¹⁷⁵ *Id.* at 36,681.

whether the proposed graphic increased the consumer's desire to quit or refrain from smoking, expanded knowledge about the risks of smoking and secondhand smoke, and sparked a negative reaction.¹⁷⁶ In its response to criticisms about the new graphic labels, the FDA acknowledged that its study did not permit the Administration to reach firm conclusions about long-term effects of the proposed warnings, but justified the new regulation based on scientific literature and the widespread use of graphic warning labels in other countries.¹⁷⁷

Following the issuance of the final rule implementing the FDA's new graphic cigarette package warnings, the tobacco companies filed two separate lawsuits. In a suit brought in the Western District of Kentucky in *Discount Tobacco & Lottery v. United States*, five tobacco companies and one retailer challenged the legality of the 2009 Tobacco Control Act on several grounds.¹⁷⁸ One such ground claimed that the new labeling requirements violated commercial speech rights under the First Amendment.¹⁷⁹ In overturning a district court grant of summary judgment to the corporate plaintiffs resting on the use of a First Amendment strict scrutiny standard, the court of appeals in the Kentucky case applied a more liberal approach to commercial speech that rested on the state's interest in preventing consumer deception.¹⁸⁰ The court found that the new graphic warnings constituted a form of commercial speech that was accurate, salient, and reasonably related to health protection.¹⁸¹ Further, it found that the labeling requirement did not infringe on the plaintiffs' speech rights, as either an undue burden or an unjustified consumer protection.¹⁸²

Another suit was filed by the tobacco industry that challenged the legality of the FDA graphic warning label regulation, rather than the statutory challenge against the TCA

¹⁷⁶ See *id.* at 36,637.

¹⁷⁷ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1210 (D.C. Cir. 2012), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

¹⁷⁸ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012).

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 522. The court relied on the commercial speech test articulated by the U.S. Supreme Court in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*. *Id.* at 523–24 (citing 471 U.S. 626, 627 (1985)).

¹⁸¹ See *id.* at 522–23, 531.

¹⁸² See *id.* at 530–31. The court of appeals found that the requirement to include a “quit” number on cigarette labels did not fall under the *Zauderer* standard but should be subjected to a more stringent standard of review as it was not designed to directly inform consumers, but rather constitutes a smoking mitigation measure. See *id.* at 522–23. Under the more rigorous *Central Hudson* test, the “quit” number needed greater justification to demonstrate it is the most viable mechanism to meet a government goal; on its face, the “quit” number contradicts the tobacco company message at the point of sale, imposing a significant burden on commercial speech. See *id.* at 522–23, 544.

raised in *Discount Tobacco & Lottery*. The corporate plaintiffs in the D.C. circuit case of *R.J. Reynolds v. FDA* argued that the graphic warning regulation infringed on their First Amendment commercial speech rights.¹⁸³ Unlike the court in *Discount Tobacco & Lottery*, the *R.J. Reynolds* court applied a First Amendment review based on precedents from *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, and a more challenging commercial speech analysis drawn from the case of *Central Hudson Gas & Electric v. Public Service Commission*.¹⁸⁴ The D.C. court reasoned that purely factual and uncontroversial required disclosures per *Zauderer* were allowed under the First Amendment, provided such disclosures were justified and not overly burdensome.¹⁸⁵ The court's analysis next included the application of elements drawn from *Central Hudson*, which required that in order to restrain free speech, the government must demonstrate a valid interest, the advancement of that interest in its exertion of regulatory authority, and a showing that the regulation in question was narrowly cast.¹⁸⁶ The D.C. court concluded that the FDA failed to present any data that enacting the proposed graphic warnings would accomplish the objectives of reducing smoking rates.¹⁸⁷ The court found that consumers could misinterpret some of the required images, and that others failed to convey any warning language at all.¹⁸⁸ The *R.J. Reynolds* court vacated the rule and remanded it back to the Administration. Following the decision, the FDA withdrew the graphic warning rule, even though, as noted, the Western District of Kentucky had supported the constitutionality of the TCA.¹⁸⁹ Shortly after the D.C. decision, the Attorney General of the United States notified Congress that the FDA would undertake research to support a new rulemaking effort consistent with the Tobacco Control Act.¹⁹⁰ In the interim, the warning label requirements that required a textual warning—which had been in place since 1984—remained in force.

The FDA moved very slowly in developing a new tobacco-labeling rule, even in the face of its statutory obligation

¹⁸³ See *R.J. Reynolds*, 696 F.3d at 1211.

¹⁸⁴ See *id.* at 1217.

¹⁸⁵ See *id.* at 1216.

¹⁸⁶ See *id.* at 1217.

¹⁸⁷ *Id.* at 1219.

¹⁸⁸ See *id.* at 1216–17.

¹⁸⁹ See *id.* at 1222.

¹⁹⁰ Letter from Eric Holder Jr., Att'y Gen., to the Honorable John Boehner, Speaker, U.S. H.R. (Mar. 15, 2013) (on file with the Univ. of Cal. S.F. Ctr. for Tobacco Control Res. & Educ.), <http://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/Ltr%20to%20Speaker%20re%20Reynolds%20v%20FDA.PDF> [<http://perma.cc/6HDL-QF7N>].

under the TCA and a 2012 court decision compelling action in this area.¹⁹¹ Frustration with Administration inaction on the part of public health advocates resulted in a legal challenge in the United States District Court for the District of Massachusetts, which alleged that the Administration was unlawfully withholding action in its failings to issue new graphic warning labels.¹⁹² The action sought a court order to compel rulemaking.¹⁹³

The Massachusetts Federal District Court in *American Pediatrics v. FDA* ruled in favor of the plaintiff health care associations, holding that the Administration unlawfully withheld and unreasonably delayed issuing graphic warning labels.¹⁹⁴ The court found that the Administration failed to justify its delay in the face of public health and welfare interests, and absent a showing of competing priorities.¹⁹⁵ The judge ordered the FDA to issue a new proposed rule on graphic cigarette warnings in compliance with the TCA by August 15, 2019, with a final rule to be completed by March 15, 2020.¹⁹⁶

In August of 2019, eight years after the first notice of proposed rulemaking was issued to implement the graphic warning provisions of the TCA, the FDA issued a new proposed rule in compliance with the federal court order in *American Pediatrics*.¹⁹⁷ The Administration proposed thirteen new textual health warning label statements “accompanied by color graphics depicting the negative health consequences of smoking.”¹⁹⁸ These new color graphics are required to “appear prominently on packages and in advertisements, occupying the top 50 percent of the area of the front and rear panels of cigarette packages and at least 20 percent of the area at the top of cigarette advertisements.”¹⁹⁹ The warnings and graphics focus on well-known health risks caused by smoking, such as lung cancer and heart disease, but also include lesser-known risks, like

¹⁹¹ See *R.J. Reynolds*, 696 F.3d at 1222.

¹⁹² *Court Orders FDA to Issue Proposed Graphic Cigarette Warning Rule This Year*, TROUTMAN SANDERS: TOBACCO L. BLOG (Apr. 24, 2019), <http://www.tobaccolawblog.com/2019/04/court-orders-fda-to-issue-proposed-graphic-cigarette-warnings-rule-this-year/> [<http://perma.cc/BRR7-UF8G>].

¹⁹³ *Id.*

¹⁹⁴ *Am. Acad. of Pediatrics v. FDA*, 330 F. Supp. 3d 657, 667 (D. Mass. 2018).

¹⁹⁵ *Id.*

¹⁹⁶ *Federal court orders FDA to issue final rule requiring graphic cigarette warnings*, TRUTH INITIATIVE (Mar. 6, 2019), <http://www.truthinitiative.org/press/press-release/federal-court-orders-fda-issue-final-rule-requiring-graphic-cigarette-warnings> [<http://perma.cc/N555-EW4Y>].

¹⁹⁷ See Tobacco Products; Required Warnings for Cigarette Packages and Advertisements, 84 Fed. Reg. 42,754, 42,754 (Aug. 16, 2019).

¹⁹⁸ *Id.* at 42,757.

¹⁹⁹ *Id.*

bladder cancer and diabetes.²⁰⁰ The FDA developed the new rule in the wake of the *R.J. Reynolds* case, so the commercial speech elements in *Zauderer* and *Central Hudson* became essential parameters in the development of the rulemaking process.²⁰¹ The new rule, driven by the court critiques in *R.J. Reynolds*, was the product of extensive legal, scientific, and regulatory analysis resting on an iterative research process that was much more detailed than the case made for the 2011 rule.²⁰² The FDA regulators posit that the new rule advances a substantial government interest and is no more extensive than is necessary.²⁰³ The Administration believes that its original and expansive research provides a basis for the revised cigarette warnings that offer consumers' new information, sparking greater understanding about the health risks of smoking, and is both more understandable and memorable than prior Surgeon General warnings.²⁰⁴ In addition, the FDA was very conscious of not mandating warnings that are purely emotional in character, but rather took pains to develop labels which simultaneously garner attention and convey substantive messages.²⁰⁵ Under the dictates of the proposed rule, product manufacturers, distributors, and retailers must submit a plan to the FDA for the random display and distribution of required warnings on packages.²⁰⁶ The thirteen new warning labels and the twelve accompanying picture graphics are set to take effect fifteen months after the final FDA warning label regulation is in place, which may occur in 2021.²⁰⁷ It is conceivable that a new commercial speech challenge may be mounted, as the tobacco industry is unlikely to cede the marketing benefits of its packaging without a fight.

V. WARNINGS AND THE DEEMING RULE

While most of the developments concerning tobacco warnings, dating back to the 1970s' FCLAA and PHCSA, center on cigarette packages and advertisements, such mandates also extend to other tobacco products and were motivated by evolving health concerns. As noted earlier, special textual warning requirements for smokeless tobacco products have been in place

²⁰⁰ *See id.* at 42,773–76.

²⁰¹ *See id.* at 42,778–79.

²⁰² *See id.* at 42,778.

²⁰³ *See id.* at 42,777–79.

²⁰⁴ *See id.* at 42,772.

²⁰⁵ *See id.* at 42,778.

²⁰⁶ *Id.* at 42,755.

²⁰⁷ *See id.* at 42,784.

since 1986.²⁰⁸ In a 2000 FTC settlement, the seven largest American cigar manufacturers agreed to include health warnings on packaging and in advertisements.²⁰⁹ The settlement led to the adoption of one of five textual cigar-smoking warnings.²¹⁰ The most significant expansion of tobacco product warning label requirements emerges from the 2009 TCA. Under the TCA, the FDA is granted authority to regulate all tobacco products which includes cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and, very significantly, *any other product it deems, by regulation, to be a tobacco product*.²¹¹ The FDA under its “deeming” authority is able to apply a very broad definition of what a tobacco product is, including “any product made or derived from tobacco . . . including any component, part, or accessory of a tobacco product”²¹² To date, the expanded regulatory power includes electronic nicotine delivery systems (e-cigarettes and e-liquid), cigars, hookah, and pipe tobacco.²¹³ The TCA scheme allows tobacco products that were on the market prior to 2007 to continue being sold without Administration approval, but other tobacco products are subject to regulation, either as equivalent to pre-2007 smoking implements or ones that must obtain a new tobacco marketing order.²¹⁴

In May 2016, under the auspices of the TCA, the FDA issued a final deeming rule that established a regulatory floor for control of so-called “other tobacco products” (“OTP”), with a particular emphasis on electronic nicotine delivery systems.²¹⁵ Under the deeming rule, the Administration may use its power to restrict the sale, distribution, and promotion of OTPs, provided such actions are for public health purposes.²¹⁶ A key feature of this final rule is its focus on the issue of warning

²⁰⁸ See Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (codified as amended at 15 U.S.C. §§ 4401–4406, 4408 (2012)). This law requires smokeless tobacco product packages and advertisements to include health related warning labels on a rotational basis. *Id.* at 31–32.

²⁰⁹ *FTC Announces Settlements Requiring Disclosure of Cigar Health Risks*, FTC (June 26, 2000), <http://www.ftc.gov/news-events/press-releases/2000/06/ftc-announces-settlements-requiring-disclosure-cigar-health-risks> [<http://perma.cc/S9XY-8KZ3>].

²¹⁰ *Id.*

²¹¹ 21 C.F.R. § 1100.1 (2019).

²¹² 21 U.S.C. § 321(rr)(1) (2012).

²¹³ See Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28,974, 29,028 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, and 1143).

²¹⁴ See 21 U.S.C. § 387j (2012).

²¹⁵ Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. at 28,974–75.

²¹⁶ *Id.* at 28,975.

labels.²¹⁷ The warning requirements in the rule are centered on the dangers of nicotine, requiring language that states, “This product contains nicotine. Nicotine is an addictive chemical.”²¹⁸ Packaging and advertising for cigars must continue to use one of five warnings, as well as an addictiveness warning.²¹⁹ Under the deeming rule, health warnings need to appear on at least 30% of each of the two principal display panels of packaging or 20% of print advertisements.²²⁰

In its notice of proposed rulemaking for the deeming rule, the FDA makes a detailed case in support of tobacco health warnings in both packaging and advertisements, to assist current and future smokers in understanding the serious adverse health consequences of smoking.²²¹ The Administration voices concerns it has about consumers’ erroneous and unsubstantiated beliefs that tobacco products, other than cigarettes, are less addictive or not addictive at all.²²² According to the Administration, warnings ought to be directed to adolescents, whose lack of knowledge about the risks of cigarettes and other tobacco products, particularly e-cigarettes, make them very susceptible to resultant health risks.²²³ The FDA strategy encompasses OTPs, which pose novel and unfolding health risks, as the products have changed in the short time since their introduction into the market in 2007.²²⁴ The Administration’s support of package warnings rests on the frequency of exposure to such messages, as warnings are present at the point of purchase, time of use, and impacts are likely to extend beyond vapers to the public at large.²²⁵ Formatting of warning labels and ads is a major issue for the Administration, as research shows that warnings that are made in small font sizes have a much

²¹⁷ *See id.* at 28,988.

²¹⁸ *Id.* at 28,979.

²¹⁹ *See FTC Announces Settlements Requiring Disclosure of Cigar Health Risks, supra* note 209. The deeming rule adopted the cigar warnings that the FTC agreed to in its 2000 settlement with manufacturers. *See Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act*, 81 Fed. Reg. at 29061. The 2016 final rule contained a new cigar warning directed to pregnant women, “[c]igar use while pregnant can harm you and your baby.” *See id.*

²²⁰ *Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, 79 Fed. Reg. 23142, 23205 (Apr. 25, 2014).

²²¹ *Id.* at 23,142.

²²² *Id.* at 23,166.

²²³ *See id.* at 23,146.

²²⁴ *See id.* at 23,144.

²²⁵ *Id.* at 23,164.

lower impact on general consumer awareness than those in larger font.²²⁶

Cigar companies and e-cigarette manufacturers pushed back against the deeming rule, claiming in a number of lawsuits that the regulation was unconstitutional.²²⁷ As the Administrative Procedures Act and the Regulatory Flexibility Act govern the actions of the FDA, typically challenges against the Administration rest on allegations of a violation of one or both statutes.²²⁸

In *Nicopure Labs, L.L.C. v. FDA*, a Florida e-cigarette manufacturer alleged in the District Court for the District of Columbia that the FDA interpretation of a tobacco product that includes e-cigarettes was too broad, and as such, not in accordance with the Administrative Procedures Act.²²⁹ The e-cigarette company argued that premarket certification, validation of health benefits, and nicotine warnings were all unnecessary.²³⁰ A separate challenge in the same district court brought by eleven e-cigarette trade groups, including an allegation that the deeming rule violated free speech rights because of its prohibition on free sample distribution, was consolidated with *Nicopure*.²³¹ In ruling in favor of the FDA, the district court concluded that the allegations did not concern the details of the deeming rule, but rather focused on statutory requirements in the TCA.²³² Under the auspices of the TCA, the Administration had the necessary statutory authority to subject e-cigarette and liquid manufacturers to tobacco product regulation, and such action could not be characterized as arbitrary and capricious.²³³ In using the *Central Hudson* commercial speech test noted earlier, the court in *Nicopure* found that the distribution of free samples of e-cigarette products is not sufficiently expressive

²²⁶ See *id.* at 23,165. The FDA was very influenced by a 2001 European Directive (2001/37/EC) requiring that health warnings consume 30% on the front of the packaging and 40% on the back of the packaging. *Id.*

²²⁷ See *Lawsuits Challenging the FDA's Deeming Rule (2019)*, PUB. HEALTH L. CTR., <http://www.publichealthlawcenter.org/resources/lawsuits-challenging-fda-deeming-rule> [<http://perma.cc/V9QG-U6YP>] (last updated Mar. 5, 2020).

²²⁸ Administrative Procedures Act, Pub. L. No. 116-56, 60 Stat. 238 (1946) (codified as amended in scattered sections of 5 U.S.C.); Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2018).

²²⁹ *Nicopure Labs, L.L.C. v. FDA*, 266 F. Supp. 3d 360, 366, 391 (D.D.C. 2017).

²³⁰ *Id.* at 367–68 (“This case does not pose the question—which is better left to the scientific community in any event—of whether e-cigarettes are more or less safe than traditional cigarettes. The Rule did not purport to take the choice to use e-cigarettes away from former smokers or other adult consumers; the issue is whether the FDA has the authority to require that the choice be an informed one.”).

²³¹ *Id.* at 366.

²³² *Id.* at 368.

²³³ *Id.* at 393.

to constitute speech, and thus the FDA has the power, under the auspices of the TCA, to restrict such conduct.²³⁴

In July of 2017, the FDA announced a new comprehensive plan for tobacco and nicotine regulation to provide a multi-year roadmap—specifically to protect children and reduce tobacco related disease and death.²³⁵ The Administration’s goal is to strike a better balance between appropriate oversight of smoking, while encouraging development of innovative tobacco products that may be less dangerous than cigarettes.²³⁶ As part of its regulatory effort, the FDA rolled back the implementation of the deeming rule to August 2021 for newly regulated tobacco products (cigars, pipe tobacco, and hookah tobacco) and to August 2022 for non-combustible products (“END”).²³⁷ As a result of litigation challenging the FDA rollback, the new tobacco product applications deadline was accelerated to 2020.²³⁸ In 2018, the Administration issued three advanced notices of proposed rulemaking (“ANPR”) dealing with nicotine levels, regulation of flavors, and regulation of premium cigars.²³⁹ In the case of cigars, the ANPR solicited ideas about how current product warnings can be strengthened by adding any additional or alternative language.²⁴⁰ A major focus of the ANPRs concerns the FDA’s interest in establishing maximum nicotine levels that would make tobacco products less addictive, or even non-addictive, demonstrating that future tobacco abatement efforts will center on combating long-term product dependence.²⁴¹

²³⁴ *Id.* at 411.

²³⁵ *FDA announces comprehensive regulatory plan to shift trajectory of tobacco-related disease, death*, U.S. FOOD & DRUG ADMIN. (July 27, 2017), <http://www.fda.gov/news-events/press-announcements/fda-announces-comprehensive-regulatory-plan-shift-trajectory-tobacco-related-disease-death> [<http://perma.cc/DJ5H-ZA7D>].

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *See Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 468, 498 (D. Md. 2019), *appeal docketed*, No. 19-2130 (4th Cir. Oct. 16, 2019). The original deadline of 2021 was challenged by the Vapor Technology Association (“VTA”), which filed suit on August 14, 2019, seeking to enjoin the FDA from enforcing its new deadline of 2020. *See Verified Complaint (Preliminary Injunction Requested)* at 2, *Vapor Tech. Ass’n v. U.S. Food & Drug Admin.*, No. 5:19-cv-00330-KKC (E.D. Ky. Aug. 14, 2019). The VTA suit was subsequently dismissed for lack of standing and causation.

²³⁹ *See Tobacco Product Standard for Nicotine Level of Combusted Cigarettes*, 83 Fed. Reg. 11,818 (Mar. 16, 2018); *Regulation of Flavors in Tobacco Products*, 83 Fed. Reg. 12,294 (Mar. 21, 2018); *Regulation of Premium Cigars*, 83 Fed. Reg. 12,901 (Mar. 26, 2018).

²⁴⁰ *See Regulation of Premium Cigars*, 83 Fed. Reg. at 12,903.

²⁴¹ *See Tobacco Product Standard for Nicotine Level of Combusted Cigarettes*, 83 Fed. Reg. at 11,819.

VI. WARNINGS AND VAPING

Cigarette labeling requirements are part of the universe of increasingly ubiquitous consumer product warnings, driven both by general product liability concerns and statutory health mandates.²⁴² Since their inception in the 1960s, cigarette label and advertisement regulations have been a core element of the tobacco use mitigation strategy. With the emergence of OTPs (e-cigarettes, heat not burn) in recent years, subject to the FDA's expanded authority through the deeming rule, the issue of product warnings arises not as a historical curiosity, but rather as a matter of immediate policy concern. Unlike cigarettes, the newer ENDS products use an e-liquid, varying compositions of chemical flavorings, propylene glycol, as well as vegetable glycerin.²⁴³ Typically these products contain some level of nicotine and come in a dizzying assortment of flavors.²⁴⁴ OTPs are not a single product, but are multiple devices that allow users to inhale an aerosol that simulates cigarette smoke.²⁴⁵ Proponents of e-cigarettes advocate for their use as a safer choice than cigarettes, and promote ENDS as smoking cessation devices.²⁴⁶ Taking a page from big tobacco, e-cigarette companies have combined clever marketing and use of sweet flavor additives to make these products extremely popular with school-aged children.²⁴⁷ The rapid rise in adolescent vaping that may result in a new generation of nicotine addiction—reversing progress in

²⁴² See Thomas Whiteside, *Cutting Down*, NEW YORKER (Dec. 11, 1970), <http://www.newyorker.com/magazine/1970/12/19/the-fight-to-ban-smoking-ads> [<http://perma.cc/K2F7-H2RG>].

²⁴³ See Vaporizers, *E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, U.S. FOOD & DRUG ADMIN. (Sept. 12, 2019), <http://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> [<http://perma.cc/2PC4-MFL6>].

²⁴⁴ But see *Do E-Cigs Contain Nicotine?*, VAPEMOUNTAIN.COM (Apr. 20, 2016), <http://www.vapemountain.com/news/do-e-cigs-contain-nicotine.html> [<http://perma.cc/Q6JJ-BMVV>] (noting that varying levels of nicotine are available in these products).

²⁴⁵ See *What Do We Know About E-cigarettes?*, AM. CANCER SOC'Y, <http://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/e-cigarettes.html> [<http://perma.cc/4V3A-XSH4>] (last updated Sept. 26, 2019).

²⁴⁶ See Michael Joseph Blaha, *5 Vaping Facts You Need to Know*, JOHNS HOPKINS MED., <http://www.hopkinsmedicine.org/health/wellness-and-prevention/5-truths-you-need-to-know-about-vaping> [<http://perma.cc/QU3V-KB93>] (last visited Oct. 13, 2019).

²⁴⁷ See *id.* The CDC estimated that between 2011 and 2015 the use of e-cigarettes among high school and middle school children increased by 900%. *Surgeon General's Advisory on E-cigarette Use Among Youth*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/basic_information/e-cigarettes/surgeon-general-advisory/index.html [<http://perma.cc/Y8UW-L5VP>] (last reviewed Apr. 9, 2019). Several states are suing e-cigarette manufacturers for targeting children through deceptive marketing practices. See Naomi Martin, *Healey files lawsuit against JUUL, alleging a campaign to lure underage teens*, BOS. GLOBE, <http://www.bostonglobe.com/2020/02/12/metro/ag-files-lawsuit-against-juul-alleging-campaign-lure-underage-teens/> [<http://perma.cc/3A7E-ZMTT>] (last updated Feb. 12, 2020, 12:16 PM).

smoking abatement—is a driving force in public health prevention, underpinning FDA action in the OTP arena.²⁴⁸

This growing concern over youth vaping escalated in 2019 as the CDC reported 1,604 lung injury cases in forty-nine states, which included thirty-four deaths in twenty-four states, with the common denominator linking these cases being the inhalation of vapors from ENDS products.²⁴⁹ The vaping-related hospitalizations triggered heightened government scrutiny of e-cigarettes, led by both the FDA and the Centers for Disease Control and Prevention (“CDC”).²⁵⁰ A few local and state governments, following San Francisco’s lead, have placed an outright ban on the sale of e-cigarettes in light of the mysterious outbreaks of serious pulmonary injury.²⁵¹ A more common regulatory reaction against ENDS is likely to result in comprehensive bans on the use of flavor additives such as menthol; both the White House and the FDA are supporting flavor bans.²⁵²

²⁴⁸ See *id.*

²⁴⁹ *Outbreak of Lung Injury Associated with E-Cigarette Use or Vaping, Products*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [<http://perma.cc/HJY4-7CTF>] (last visited Nov. 10, 2019); see also Sydney Lupkin & Anna Maria Barry-Jester, *Mysterious Vaping Lung Injuries May Have Flown Under Regulatory Radar*, KAISER HEALTH NEWS (Aug. 27, 2019), <http://khn.org/news/mysterious-vaping-lung-injuries-may-have-flown-under-regulatory-radar/> [<http://perma.cc/783P-PZ5T>]. In October 2019, the CDC issued new guidelines for vaping related lung injuries, classifying the condition as EVALI (e-cigarette or vaping product use associated lung injury). See 68 Morbidity and Mortality Weekly Report 919–27 (2019).

²⁵⁰ See CDC, *FDA, States Continue to Investigate Severe Pulmonary Disease Among People Who Use E-cigarettes*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 21, 2019), <http://www.cdc.gov/media/releases/2019/s0821-cdc-fda-states-e-cigarettes.html> [<http://perma.cc/A8AP-ZF3Q>].

²⁵¹ See Victoria Colliver, *In California, Juul's problems are only beginning*, POLITICO (Sept. 17, 2019, 5:01 AM), <http://www.politico.com/story/2019/09/17/juul-cigarettes-trump-california-san-francisco-1730095> [<http://perma.cc/Z2XA-MSFD>]; see also CNN NEWSOURCE, *Vape store owners are suing to stop the product bans in New York and Massachusetts*, NEWS CHANNEL 5 NASHVILLE (Oct. 7, 2019, 9:58 AM), [http://perma.cc/E9KY-5CJN](http://www.newschannel5.com/news/national/vape-store-owners-are-suing-to-stop-the-product-bans-in-new-york-and-massachusetts)]; *Vapor Technology Association Files Lawsuit Against New York Department of Health and Public Health and Health Planning Council to Stop Ill-Considered Flavor Ban*, CISION: PR NEWSWIRE (Sept. 25, 2019), [http://perma.cc/N2VS-2K2D](http://www.prnewswire.com/news-releases/vapor-technology-association-files-lawsuit-against-new-york-department-of-health-and-public-health-and-health-planning-council-to-stop-ill-considered-flavor-ban-300925566.html)]; *Read the Lawsuit: Vape Shops Sue to Overturn Gov. Charlie Baker's Four-Month Ban on Sale of Vaping Products*, MASSLIVE (Oct. 2, 2019), [http://perma.cc/RJ23-J4H8](http://www.masslive.com/news/2019/10/read-the-lawsuit-vape-shops-sue-to-overturn-gov-charlie-bakers-four-month-ban-on-sale-of-vaping-products.html)].

²⁵² See Colliver, *supra* note 251; see also Andrew B. Meshnick et al., *How FDA Can Act On E-Cigarettes And Protect The Public Health*, HEALTH AFFAIRS (Sept. 17, 2019), <http://www.healthaffairs.org/doi/10.1377/hblog20190916.952475/full/> [<http://perma.cc/FHZ7-U4FS>]. The crackdown on vaping coming from the Executive branch narrowly focuses on reusable (rechargeable) vaping devices and does not cover cheaper disposable products which are readily available and come in an assortment of flavors. See *Matthew Perrone, FDA*

Two realities define the current public health efforts to combat the ills of smoking and reduce the resultant addiction to nicotine, combining to make this long-standing task a type of double bind for regulators. On one hand, health authorities face the ongoing challenge of traditional smoking health problems, and even in the face of significant reduction in this behavior, there is a seemingly intractable number of smokers who pursue this addiction, unmoved by long standing abatement strategies. On the other hand, public health authorities must now cope with the development of new tobacco products.²⁵³ The rapid growth in use of e-cigarettes, particularly among young people, poses new and novel challenges for anti-smoking advocates.²⁵⁴ Recent events underscore the lack of comprehensive scientific knowledge about the short and long-term physiological implications of ENDS use, underscoring the critical need for research in this area.²⁵⁵ There is, however, enough evidence currently to conclude that e-cigarettes are a nicotine delivery device that can result in addiction and easily act as a gateway to more traditional cigarette smoking.²⁵⁶ Compounding the challenge of e-cigarettes is their increasing use by adult smokers as a seemingly safer alternative to traditional cigarette²⁵⁷—an idea that is being endorsed with a dearth of evidence.²⁵⁸ The power of a global tobacco industry as it moves into ENDS products, along with a host of new smoking options, present formidable challenges to overtaxed public health regulators trying to keep up with the new developments and strength of the tobacco industry.²⁵⁹ An already highly profitable

crackdown on vaping flavors has blindspot: disposables, AP NEWS (Feb. 7, 2020), <http://apnews.com/600c4aa443dde043aad6f70a00251fa0> [<http://perma.cc/H2ZE-7E8L>].

²⁵³ See Ana Aceves, *Vaping May Lead Teens to Adopt Smoking Habits*, PBS SOCAL (Mar. 15, 2018), <http://www.pbs.org/wgbh/nova/article/vaping-teen-smoking-habit/> [<http://perma.cc/JEN3-Y6XJ>].

²⁵⁴ See *id.*

²⁵⁵ See *Outbreak of Lung Disease Associated with the Use of E-Cigarette, or Vaping Products*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [<http://perma.cc/HJY4-7CTF>] (last visited Oct. 13, 2019).

²⁵⁶ See Aceves, *supra* note 253.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ The e-cigarette industry has taken a page from tobacco manufacturers, developing clever marketing strategies to attract youth to their products. See *E-Cigarette Marketing Continues to Mirror Cigarette Marketing*, CAMPAIGN FOR TOBACCO FREE KIDS: BLOG TOBACCO UNFILTERED (June 17, 2015), http://www.tobaccofreekids.org/blog/2015_06_17_ecig [<http://perma.cc/F73L-8Q7J>]. A significant amount of e-cigarette marketing is done via social media sites geared toward children and young adults, in which product warnings and age restrictions are minimized. See Rick Nauert, *Aggressive Online Marketing of E-cigarettes May Target Teens*, PSYCHCENTRAL (Aug. 8, 2018), <http://psychcentral.com/news/2015/10/05/aggressive-online-marketing-targets-teens-for-e-cigarettes/93128.html> [<http://perma.cc/CZH9-9T2L>].

cigarette industry is reinventing itself, setting the stage for new chapters in smoking abatement battles.²⁶⁰

As noted in the beginning of this Article, effective health prevention and promotion is essential to the future of our health system. Addressing population health challenges, like smoking and accompanying nicotine addiction, have strong medical and economic implications. Unless more effective approaches are developed to reduce major preventable public health problems, no systemic reform, whatever its character, will find the elusive balance between cost and quality. To combat the ills of smoking in its traditional and evolving forms, health authorities will need to continue to apply established rules, as well as pursue new approaches to regulation that have the capacity to reduce and possibly eradicate this behavior.²⁶¹ As such, assessment of abatement tools, such as product warnings, should be ongoing as public health enforcement strategies must be adjusted to meet current challenges, particularly in fluid areas like smoking.

In reviewing the history of tobacco regulations over the past sixty years, mandatory product health warnings designed to educate and deter consumption can be characterized as a fundamental and lasting approach to smoking abatement. The review of cigarette warning labels in this piece demonstrates movement in regulation from modest textual warning requirements in the 1960 laws, such as the Public Health Cigarette Smoking Act, to the expansion of four rotational warnings in the 1984 CSEA, and, more recently, to further textual warnings and the addition of picture graphics in the 2009 TCA. While this movement is hardly rapid, it does reflect a deeper understanding of the array of tobacco research and expansion of knowledge about the physiological effects of smoking, with a greater current focus on nicotine exposure from OTPs, as well as a sustained commitment to the viability of warnings as a key public health measure.

²⁶⁰ It is estimated that the e-cigarette market in 2018 in the United States was worth \$11.26 billion and is estimated, by 2024, to grow to \$18.12 billion, with an increase in online sales. See *E-Cigarette Market—Growth, Trends and Forecast (2019–2024)*, MORDOR INTELLIGENCE, <http://www.mordorintelligence.com/industry-reports/global-e-cigarettes-market-industry> [<http://perma.cc/XE2Z-CQE7>] (last visited Oct. 13, 2019); see also Josh Constine, *How Juul made vaping viral to become worth a dirty \$38 billion*, TECH CRUNCH (Dec. 22, 2018, 10:58 AM), <http://techcrunch.com/2018/12/22/juul-me-twice-shame-on-you/> [<http://perma.cc/BQ5L-4RPA>].

²⁶¹ For a discussion on a British perspective on smoking eradication, a goal that transcends borders, see Jason Murugesu, *Will we ever stamp out smoking entirely?*, NEW STATESMAN AM. (Aug. 1, 2019), <http://www.newstatesman.com/politics/health/2019/08/will-we-ever-stamp-out-smoking-entirely> [<http://perma.cc/RDW7-HE8M>].

But nagging questions emerge from a review of tobacco product label warnings. Are tobacco-warning labels necessary? Are labels effective vehicles to inform and deter smoking? Can changes be made in tobacco product labels to make them more impactful? How should warnings be approached in the new landscape of OTPs? Concerning the question of whether there is a need to have warning labels, there are simply no voices of opposition to these warnings.²⁶² They have garnered universal domestic and international support as a core enforcement mechanism from public health policy makers and regulators alike.²⁶³ While product manufacturers and sellers may not appreciate text warnings on packaging, there is no push back from this sector on this requirement—on the menu of possible controls, it does not impose a serious marketing impediment.²⁶⁴ In fact, the e-cigarette manufacturers of their own accord, independent of government directives, added a nicotine-warning label in anticipation of the eventuality of such a mandate, and more importantly, as a mechanism to deter product liability litigation.²⁶⁵

The second question as to whether cigarette-warning labels actually work opens a more controversial line of inquiry. Perhaps President Nixon's guarded opinion about cigarette warnings, noted earlier in this piece, was noteworthy as to the government's responsibility to notify the public about known dangers and let individuals choose to smoke or not.²⁶⁶ President Nixon characterized the science driving warnings as controversial, but currently, with the exception of e-cigarettes, the case against traditional tobacco is definitive, and the quest to avoid dangers to health through safe cigarette alternatives still remains a Sisyphean one.²⁶⁷

President Nixon's other observation expressing doubt about the effect of cigarette warnings on the public mirrors long standing opinions on both sides of the smoking issue. As noted in prior discussion, regulators, as early as 1967, frequently vented their frustrations about the textual package warnings, and in

²⁶² See Abby Ohlheiser, *Big tobacco companies are putting big warning labels on their e-cigarettes*, WASH. POST (Sept. 29, 2014, 10:21 AM), <http://www.washingtonpost.com/news/to-your-health/wp/2014/09/29/big-tobacco-companies-are-putting-big-warning-labels-on-their-e-cigarettes/> [http://perma.cc/L55A-ZZHX].

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See Whiteside, *supra* note 242.

²⁶⁷ See Laurie McGinley, *Forget Those Occasional Cigarettes: There is No Safe Smoking Level*, WASH. POST (Dec. 5, 2016, 8:00 AM), <http://www.washingtonpost.com/news/to-your-health/wp/2016/12/05/forget-those-occasional-cigarettes-there-is-no-safe-smoking-level/> [http://perma.cc/R23E-JUUV].

fact, an outpouring of criticism about the ineffectiveness of such regulation preceded every major tobacco bill.²⁶⁸ The U.S., once the leader in mandating tobacco warnings, fell behind in smoking controls as other nations implemented graphic warning label requirements, spurred by global tobacco abatement policies adopted in the WHO's Framework Convention on Tobacco Control.²⁶⁹ Eventually in 2009, with the passage of the TCA, the U.S. joined the global community in finally requiring graphic warning labels.²⁷⁰ However, as discussed, the regulatory efforts in the U.S. to implement graphic warnings have been stormy, unsettled, and delayed.

Confronting the analytical question of whether text only or graphic warnings work better to prevent and deter smoking behavior places one into the murky waters of behavioral economics. Some studies on the effectiveness of tobacco warnings on youth and adult smokers conclude that textual warnings may increase health knowledge and awareness of risk based on size and design, but, at best, the results are tepid.²⁷¹

On the other hand, studies concerning the impacts of graphic package warning labels are more positive.²⁷² One mega analysis of the area concluded that graphic anti-smoking warnings could elicit “maladaptive psychological responses”—in other words, they could work.²⁷³

No doubt package-warning labels offer a relatively inexpensive mechanism to communicate with smokers at the point of purchase; however, isolating the impacts of pictorial warnings on behavior reduction, independent of other regulatory controls, is largely a matter of speculation. Support for warnings

²⁶⁸ See Luca Paoletti et al., *Current Status of Tobacco Policy and Control*, 27 J. THORACIC IMAGING 213, 215 (2012) (“A 1967 FTC report concluded that ‘the warning label on cigarette packages has not succeeded in overcoming the prevalent attitude toward cigarette smoking created and maintained by the cigarette companies through their advertisements, particularly the barrage of commercials on television, which portray smoking as a harmless and enjoyable activity that is not habit forming and involves no hazards to health.’”).

²⁶⁹ WORLD HEALTH ORG., *supra* note 166, at 9–10.

²⁷⁰ See Family Smoking Prevention and Tobacco Control Act, Pub. L. 11, 123 Stat. 1776 (codified as amended in 21 U.S.C. §§ 387, 387a–387u, 387a–1, 387f–1 (2012)).

²⁷¹ See David M. Erceg-Hurn & Lyndall G. Steed, *Does Exposure to Cigarette Health Warnings Elicit Psychological Reactance in Smokers?*, 41 J. APPLIED SOC. PSYCHOL. 219, 230 (2011); see also William G. Shadel et al., *Do Graphic Health Warning Labels on Cigarette Packages Deter Purchases at Point-of-Sale? An Experiment with Adult Smokers*, 34 HEALTH EDUC. RES. 321, 321–31 (2019). The Shadel article notes that various types of analyses on textual and pictorial tobacco warnings have found that pictorial warnings are recalled more readily, generate more negative cognitions about smoking, and have greater impacts on prevention and smoking reduction. *Id.*

²⁷² See Erceg-Hurn & Steed, *supra* note 271, at 219.

²⁷³ See *id.*

rests as much on intuition as fact. Review of American regulatory history demonstrates that there is a long-standing belief that textual warnings have little effect overtime—the use of graphic labels has been delayed for almost ten years, so, as yet, there is no experience with graphics in the U.S. American cigarette marketplace. Perhaps a better gauge about the impacts of warnings can be drawn from the reactions to expanded warning labels on the part of the smoking industry. As text warnings are relatively benign, occupying a side panel of cigarette packs, displayed in similar fonts and colors blending with the overall container, they became predictable and easily ignored. Graphic warnings, on the other hand, featuring jarring images that essentially change the character of the product package, have not been met with industry acquiescence, but rather sparked vigorous legal challenges that have foiled this initiative for over a decade, which could be indicative of the fact that they may actually work.

It is possible to envision an even more stringent and detailed tobacco warning label requirement than the August 2019 graphic warnings proposed rule, akin to labeling mandates for over-the-counter drugs.²⁷⁴ Another direction that could be taken is to adopt the approach of Australia and a number of other countries that requires cigarettes to be sold in plain packages, containing only a warning, without signature brand designs.²⁷⁵ While plain packaging could be in our future, at this point, graphic warning labels need to be adopted and their effectiveness assessed over a number of years. Such regulatory impact assessments need to occur in a more regular and timely manner than was the case with prior warning label analyses and should be based on more grounded methodological determinations of costs and benefits. The fact that label warnings have been used for many years should not establish them as permanent regulatory strategies that are not frequently revisited and updated—or even abandoned if they have lost their efficacy.

It would be wrong to suggest that the FDA has been a totally absent regulator in the vaping arena.²⁷⁶ Since issuing the

²⁷⁴ See *The Over-the-Counter Medicine Label: Take a Look*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/drugs/resources-you-drugs/over-counter-medicine-label-take-look> [<http://perma.cc/T3L7-SYBA>] (last reviewed Sept. 27, 2017).

²⁷⁵ See Thomas Parker, *From Uruguay to Saudi Arabia: 14 countries that have implemented plain tobacco packaging*, NS PACKAGING (May 28, 2019), <http://www.nspackaging.com/analysis/plain-tobacco-packaging/> [<http://perma.cc/8C8F-5HEH>].

²⁷⁶ See Katie Thomas & Sheila Kaplan, *E-Cigarettes Went Unchecked in 10 Years of Federal Inaction*, N.Y. TIMES (Oct. 14, 2019, 5:12 PM), <http://www.nytimes.com/2019/10/14/health/vaping-e-cigarettes-fda.html> [<http://perma.cc/YT32-E7H3>].

deeming rule in 2016,²⁷⁷ the Administration's Center for Tobacco Products ("CTP") has moved on a number of fronts to address labeling, manufacturing, and marketing of ENDS products.²⁷⁸ In particular, emphasis has been placed on preventing youth sales and use; conducting retailer and manufacturer checks; developing product premarket authorization policies; and sponsoring and promoting research.²⁷⁹ In addition, the FTC is also involved in e-cigarettes, as it continues its traditional role in policing unfair and deceptive practices in the tobacco products arena.²⁸⁰ However, the recent outbreaks of serious lung damage in vapers rightly calls into question the adequacy of the current regulatory structure.²⁸¹

The question arises as to whether the centralized regulatory structure of the 2009 TCA is optimal to meet the challenges posed by vaping—a practice that was barely in existence when the TCA was enacted. Vaping-related lung disease, also known as EVALI, has cast a bright light on the potential hazards in e-liquids, sparking an awareness of both the complexity and lack of knowledge of the underlying health exposures.²⁸² While uniformity in federal regulatory approaches to e-cigarettes is ultimately desirable, given this lack of certainty about the safety of these diverse products and nicotine delivery devices, it may be desirable to consider involvement of other regulatory actors, and processes in framing warning labels in the ENDS area.²⁸³ It is noteworthy that in the 2020 Trump-proposed federal budget there is a recommendation that a new tobacco control agency be created in the Department of Health and Human Services, stripping the FDA of this responsibility.²⁸⁴

²⁷⁷ The decision to regulate combustible cigarettes as tobacco products, primarily under FDA auspices, is the result of many years of effort to centralize tobacco regulation that culminated in the 2009 TCA.

²⁷⁸ See Ned Sharpless, *How FDA is Regulating E-Cigarettes*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/news-events/fda-voices-perspectives-fda-leadership-and-experts/how-fda-regulating-e-cigarettes> [<http://perma.cc/ZB8P-LZ7J>] (last updated Sept. 10, 2019).

²⁷⁹ See *id.*

²⁸⁰ See Jennifer Maloney, *Juul's Marketing Practices Under Investigation by FTC*, WALL STREET J. (Aug. 29, 2019), <http://www.wsj.com/articles/juuls-marketing-practices-under-investigation-by-ftc-11567096073> [<http://perma.cc/7F28-67EC>].

²⁸¹ See Michael Siegel, *POV: New FDA Regulations on Vaping Products a Failure*, BU TODAY (July 13, 2016), <http://www.bu.edu/articles/2016/fda-vaping-regulations> [<http://perma.cc/VBB8-N7FG>].

²⁸² See Jennifer E. Layden et al., *Pulmonary Illness Related to E-Cigarette Use in Illinois and Wisconsin—Preliminary Report*, NEW ENG. J. MED. (Sept. 6, 2019), <http://www.nejm.org/doi/full/10.1056/NEJMoa1911614> [<http://perma.cc/K89Y-ND2L>].

²⁸³ See *What is Vaping?*, VAPING, <http://vaping.org/> [<http://perma.cc/DD6P-8XSX>] (last visited Oct. 13, 2019).

²⁸⁴ Nicholas Florko, *Trump Doesn't Want the FDA to Regulate Tobacco*, STAT (Feb. 10, 2020), <http://www.statnews.com/2020/02/10/trump-doesnt-want-the-fda-to-regulate-tobacco/> [<http://perma.cc/C68W-U62H>]. It is difficult to pinpoint the motivations for this proposal with certainty. On the one hand, the FDA can be seen as a tepid regulator, slow

The FDA regulatory scheme for e-cigarette products follows the dictates of the 2009 TCA and is actualized through the Administration's deeming rule. Other regulatory avenues within the Food, Drug, and Cosmetic Act ("FDCA") have not been pursued since the Supreme Court decision in *FDA v. Brown & Williamson* that held that tobacco products, as marketed, could not be regulated under the FDCA, triggering the subsequent enactment of the TCA.²⁸⁵ While the *Brown & Williamson* case appears to be superseded by the TCA, the 2009 regulatory scheme does not allow tobacco products, without therapeutic value, to be explicitly regulated as either a drug or medical device.²⁸⁶ A federal court in *Sottera v. FDA* reiterated *Brown & Williamson* in upholding an e-cigarette manufacturer's argument that their products could not be regulated separate from the TCA.²⁸⁷ At issue in *Sottera* was whether e-cigarettes could be regulated as unapproved drug device combinations.²⁸⁸ It is noteworthy that a key factor in the *Sottera* analysis limiting the FDA's authority is that the product at issue was not being sold for therapeutic purposes, but rather recreational.²⁸⁹ The conclusion can be made that a device sold for therapeutic purposes would fall within the ambit of Administration oversight as a drug/medical device.²⁹⁰ It is evident that e-cigarettes are being promoted to adults for smoking cessation, and as such, may be regulated as a type of medical device.²⁹¹ This opens the door to another possibility, beyond the TCA scheme, for additional e-cigarette FDA action—such as

to act against the threats posed by the explosion in e-cigarettes, and generally overwhelmed by its overall mandates. But on the other hand, the FDA tobacco regulatory structure is well developed and embodies the requisite authority to be a meaningful public health authority in the e-cigarette arena. Creating a new regulatory body may only serve to further delay necessary oversight at a time when both the products and their markets are far ahead of government control.

²⁸⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

²⁸⁶ See Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products; Amendments to Regulations Regarding "Intended Uses," 82 Fed. Reg. 2,193 (Jan. 9, 2017) (to be codified at 21 C.F.R. pts 201, 801, and 1100).

²⁸⁷ *Solterra, Inc. v. FDA*, 627 F.3d 891, 897–98 (D.C. Cir. 2010).

²⁸⁸ See *id.* at 892.

²⁸⁹ See *id.* at 898. Therapeutic purposes under the FDCA include use in the diagnosis, cure, mitigation, treatment, or prevention of disease, according to 21 U.S.C. § 321 (g)(1) (2018). See *id.* at 893–94.

²⁹⁰ See Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products; Amendments to Regulations Regarding "Intended Uses," 82 Fed. Reg. 2,193.

²⁹¹ See Esther Wang, *Juuling Is Fine, Actually (For Adults Who Want to Quit Smoking Cigarettes)*, JEZEBEL (Sept. 30, 2019, 2:05 PM), <http://jezebel.com/juuling-is-fine-actually-for-adults-who-want-to-quit-1838622453> [<http://perma.cc/Z9EU-FDZM>]; see also Belinda Borrelli & George T. O'Connor, *E-Cigarettes to Assist with Smoking Cessation*, 380 NEW ENG. J. MED. 678, 678 (Feb. 14, 2019), <http://www.nejm.org/doi/full/10.1056/NEJMe1816406> [<http://perma.cc/8N52-4TUN>].

regulating ENDS as over-the-counter medical devices. As an OTC device, it is comparable to other tobacco prevention products. ENDS devices and e-liquids would need to meet more detailed labeling requirements under FDA-OTC regulations.²⁹² Under device labeling mandates, the FDA can tailor an OTC product label to include additional information that is specific to a given health concern and make revisions as new research unfolds. Presently, the FDA can move closer to declaring an OTP as “safer” if the product undergoes a more rigorous review and demonstrates a lower risk to smokers (“MRTP,” or modified risk tobacco product).²⁹³ It is unclear, however, if an MRTP approval can allow the OTP manufacturer to claim that the ENDS device is actually a smoking cessation device.²⁹⁴ Such a claim goes beyond a stipulation that the smoking product is “safer” into the realm of medical devices.²⁹⁵

Vaping entails igniting a chemical cocktail of ingredients, some of which may be quite harmful.²⁹⁶ As such, regulatory oversight could benefit from expanding e-cigarettes into the purview of the Federal Hazardous Substances Act (“FHSA”), under the jurisdiction of the U.S. Consumer Products Safety Commission (“CPSC”).²⁹⁷ The current FDA deeming rule could be strengthened by inclusion of an additional warning mandate focused on chemical exposure; a joint agency-labeling scheme with input from the CPSC concerning hazardous chemicals content would be a more robust labeling scheme. It appears that vaping chemicals meet the criteria required for application of labeling mandates under the FHSA.²⁹⁸ At the time cigarettes were excluded from FHSA jurisdiction by Congress, smoking products did not extend beyond use of plant-based medium, but now clearly fall into the realm of hazardous chemicals.²⁹⁹ Broadening CPSC

²⁹² See *General Device Labeling Requirements*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/medical-devices/device-labeling/general-device-labeling-requirements> [<http://perma.cc/36ZE-WLUY>] (last updated Mar. 27, 2018) (citing 21 C.F.R. § 801 (2018)).

²⁹³ See *Modified Risk Tobacco Products*, *supra* note 160.

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See Carley Thompson, *Meet the 5 Chemicals You Didn't Know Were in Vaping Products*, PUB. HEALTH INSIDER (June 14, 2017), <http://publichealthinsider.com/2017/06/14/meet-the-5-chemicals-you-didnt-know-were-in-vaping-products/> [<http://perma.cc/FQ5X-ATG7>]; see also Katelyn Newman, *Vaping and E-Cigarettes: The New Public Health Problem*, U.S. NEWS (Sept. 30, 2019, 9:00 AM), <http://www.usnews.com/news/healthiest-communities/articles/2019-09-30/vaping-and-e-cigarettes-a-new-public-health-problem> [<http://perma.cc/QTZ2-CEJX>].

²⁹⁷ See Federal Hazardous Substances Act, 15 U.S.C. § 1261 (2012).

²⁹⁸ See *Federal Hazardous Substances Act (FHSA) Requirements*, CPSC, <http://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/FHSA-Requirements/> [<http://perma.cc/D3EY-BWVX>] (last visited Oct. 28, 2019).

²⁹⁹ Klebe, *supra* note 93, at v.

jurisdiction to include e-cigarette regulation builds on existing Commission authority to regulate e-liquid containers.³⁰⁰

Warning label jurisdiction should be expanded to the state level in keeping with the TCA, which generally carves out a greater role for state and local government involvement in tobacco regulation. During this period of uncertainty, it seems reasonable for states to have authority to add their own warning language to e-cigarette products, provided a given state can make the case that the additional information being added to a warning fosters public health interests. Unlike traditional cigarettes, where regulation is the byproduct of years of study, the uncertainties surrounding ENDS products could benefit from regulatory initiatives warranting experiments with use of a variety of OTP warning labels.

Warning labels are only one strategy that can be identified in the long history of cigarette abatement, and as noted in this piece, they are not foolproof and need to be continually assessed and amended to reflect changes in science and public response. However, in the face of e-cigarette triggered lung disease, warning labels take on a significant role in filling a regulatory void in the midst of a public health emergency. Unless these products are actually banned, it becomes critical to both strengthen e-cigarette warnings and expand the field of regulators and their responsibilities for crafting these new vaping warnings. E-cigarette and e-liquid warning labels should go beyond a brief statement about nicotine and also warn about the danger of inhaling chemical constituents of e-liquids that are carriers for the nicotine. The warnings should state that vaping products are dangerous and that it is recommended by medical authorities that individuals refrain from the recreational use of the product, as this practice may result in serious lung damage. Once e-cigarettes and e-liquids have undergone successful premarket review by the FDA, that should also be noted on the product label. In addition, like a food label, the chemical content in the e-cigarette ought to be disclosed, listed on the package, and jointly regulated by the CPSC.

The arguments made by this new industry that e-cigarettes can lead to smoking cessation should not be casually dismissed

³⁰⁰ See Jim McDonald, *An Obscure Safety Rule Could Shut Down the Vaping Industry*, VAPING360 (Apr. 29, 2019), <http://vaping360.com/vape-news/79053/an-obscure-federal-safety-rule-could-cripple-the-vaping-industry/> [http://perma.cc/R5N2-BPTE]; see also Letter from Mary F. Toro, Dir. of Regulatory Enf't Div., Office of Compliance & Field Operations (July 22, 2016), http://www.cpsc.gov/s3fs-public/pdfs/foia_CNPPA07222016_revisedIndustryLetterFINAL.pdf [http://perma.cc/MPW9-P3NT].

but need to be verified through extensive scientific research. The newest entry into the OTP market, the Philip Morris I Quit Ordinary Smoking (“IQOS”), is a heat-not-burn cigarette device that has obtained an FDA Premarket Tobacco Application (“PMTA”).³⁰¹ The IQOS approval was granted based on the conclusion that this heat-not-burn product produces fewer or lower levels of toxins than traditional cigarettes.³⁰² The FDA stresses that the award of the PMTA does not mean that the product is safe, and that the IQOS will be considered a cigarette, necessitating that they meet current labeling and advertising restrictions.³⁰³ The FDA decision is not without controversy, as health advocates have pointed out the lack of research, beyond Philip Morris’ own study, that the IQOS actually helps individuals either reduce smoking generally or that the product is any safer for an individual’s lungs and immune system.³⁰⁴

VII. CONCLUSION

In the annals of public health, few issues have garnered as much attention as cigarette smoking. Although dramatic progress has been made in smoking abatement, the emergence and rapid proliferation of other tobacco products, especially e-cigarettes, results in new challenges emerging in this arena. Package label warnings continue to be a foundational regulation needed to both educate and deter, dating back to the 1970s—the period in which the 91st Congress enacted the Public Health Cigarette Smoking Act. As smoking sparked multiple regulatory interventions, it is difficult to isolate the singular contribution of package warnings in isolation from other abatement measures. The review of the legislative history of tobacco label regulations leads to the conclusion that text-only warnings appear to have had diminishing returns on smoking prevention and cessation. While graphic warnings have garnered global support, there is simply no American experience with this approach and judging their impact prior to implementation, even in the face of more

³⁰¹ See *FDA permits sale of IQOS Tobacco Heating System through premarket tobacco product application pathway*, FDA (Apr. 30, 2019), <http://www.fda.gov/news-events/press-announcements/fda-permits-sale-iqos-tobacco-heating-system-through-premarket-tobacco-product-application-pathway> [http://perma.cc/C7HH-KLMM]. For a deep dive into FDA policy concerning PMTA in the context of IQOS, see Eric N. Lindblom, *The Tobacco Control Act’s PMTA & MRTP Provisions Mean to Protect the USA From Any New Tobacco Products That Will Not Reduce Health Harms—But FDA Isn’t Cooperating*, J. HEALTH CARE L. & POL’Y, (forthcoming 2020).

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See Lisa Rapaport, ‘Heat-not-burn’ cigarettes still damage lungs, REUTERS (Sept. 18, 2018, 10:15 AM), <http://www.reuters.com/article/us-health-iqos/heat-not-burn-cigarettes-still-damage-lungs-idUSKCN1M12CB> [http://perma.cc/48NZ-S33W].

extensive research, is still a matter of speculation. On the other hand, it seems clear that current e-cigarette warnings need to be strengthened, and until the FDA engages in complete review of e-cigarette products, including e-liquids, multiple regulators should be encouraged to contribute to the development of more impactful product warnings.

President Nixon's reflection on cigarette warnings, a half century ago, which concluded that the government's role is to simply provide information about risks and let individuals choose, belies the need for vigilance in addressing this ongoing public health challenge. Our society has paid, and continues to pay, a very high price in placating economic and alleged liberty interests related to tobacco.³⁰⁵ Both individual and population health demand maintenance of an aggressive posture in the smoking area, as this behavior has significant implications on the financial sustainability of the broader health system and the future of reforms in this sector.

³⁰⁵ See *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017–18 (8th Cir. 2002).



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Guaranteed Income: Chronicle of a Political Death Foretold

*F. E. Guerra-Pujol**

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PROLOGUE

This symposium issue of the *Chapman Law Review* is devoted to various landmark laws enacted by the 91st Congress, including the National Environmental Policy Act,¹ the Organized Crime Control Act,² the Bank Secrecy Act,³ the Controlled Substances Act,⁴ and the Housing and Urban Development Act.⁵ This Article, by contrast, will explore what could have been: The Family Assistance Act of 1970 (“H.R. 16311”). Had this historic bill been enacted into law, it would have authorized a negative income tax, thus providing a minimum guaranteed income to all poor families with children.⁶ In the words of Daniel Patrick Moynihan, “Family Assistance was income redistribution, and by any previous standards it was massive.”⁷ Although it passed the House by a wide margin, and although there were sufficient

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1 Pub. L. No. 91-190, 83 Stat. 852 (1970).

2 Pub. L. No. 91-452, 84 Stat. 922 (1970).

3 Pub. L. No. 91-508, 84 Stat. 1118 (1970).

4 Pub. L. No. 91-513, 84 Stat. 1242 (1970).

5 Pub. L. No. 91-609, 84 Stat. 1770 (1970).

6 VINCENT J. BURKE & VEE BURKE, NIXON’S GOOD DEED: WELFARE REFORM 108–09 (1974). This book was the brainchild of Vince Burke, the urban affairs and social welfare reporter for the Los Angeles Times. *See id.* at xv. His wife Vee completed the book after Vince died of cancer in 1973. *See id.* at xvi.

7 DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME 385, 385 (1973).

votes to clear the Senate, the guaranteed income bill never made it to the floor of that august body.⁸

Given that the 91st Congress enacted so many historic laws, why did H.R. 16311 end in failure? The history of the Family Assistance Act has received a great deal of scholarly attention. Previous studies, for example, have surveyed the legislative history of the guaranteed income bill,⁹ scrutinized the economics of the bill,¹⁰ dissected liberal and conservative opposition to the bill,¹¹ or emphasized the spillover effects of the Vietnam conflict on the bill.¹² This Article, by contrast, will narrate the fate of H.R. 16311 in the form of a three-act legislative morality play. To this end, this Article is structured as follows:

Act I will introduce the hero of our story, the idea of a guaranteed income via a negative income tax, and retrace the intellectual origins of this idea. Next, Act II will spotlight the shrewd tactics of the second-most powerful man in Washington, D.C., Representative Wilbur D. Mills, the chairman of the House Ways and Means Committee, who skillfully shepherded the guaranteed income bill through the House of Representatives. Last, Act III will introduce the villain of our story, Senator Russell D. Long, the chairman of the Senate Finance Committee. I make no apologies about casting Senator Long as the villain. This pro-segregation Dixiecrat, who once referred to welfare mothers as “Brood Mares,”¹³ used his position of power to thwart the bill at every turn. A brief epilogue concludes.

Although the hero of our story is an idea, not a person, its fate will be no less dramatic than that of a traditional flesh-and-bones protagonist. At the time, many social liberals and welfare advocates

⁸ For a comprehensive legislative history of H.R. 16311, see CONGRESSIONAL QUARTERLY, *Welfare Reform: Disappointment for the Administration*, in 1970 CONGRESSIONAL QUARTERLY ALMANAC 1030 (1970).

⁹ See generally M. KENNETH BOWLER, THE NIXON GUARANTEED INCOME PROPOSAL: SUBSTANCE AND PROCESS IN POLICY CHANGE 6 (1974); Leland G. Neuberg, *Emergence and Defeat of Nixon's Family Assistance Plan (FAP)* (U.S. Basic Income Guarantee, Working Paper No. 66, 2004).

¹⁰ See Jonathan H. Hamilton, *Optimal Tax Theory: The Journey from the Negative Income Tax to the Earned Income Tax Credit*, 76 S. ECON. J. 860 (2010); see also D. Lee Bawden, Glen G. Cain & Leonard J. Hausman, *The Family Assistance Plan: An Analysis and Evaluation*, 19 PUB. POL'Y 323, 352–53 (1971); Aaron Wildavsky & Bill Cavala, *The Political Feasibility of Income by Right*, 18 PUB. POL'Y 321 (1970), reprinted in AARON WILDAVSKY, THE REVOLT AGAINST THE MASSES 71–100 (2003).

¹¹ See BURKE & BURKE, *supra* note 6, at 106; see also MOYNIHAN, *supra* note 7, at 384–85; see also Hamilton, *supra* note 10, at 871–73.

¹² See Felicia Kornbluh, *Who Shot FAP? The Nixon Welfare Plan and the Transformation of American Politics*, 1 SIXTIES: J. HIST., POL. & CULTURE 125, 125 (2008).

¹³ See 114 CONG. REC. 10,543 (1968) (remarks by Hon. Walter F. Mondale); see also MOYNIHAN, *supra* note 7, at 518–19. For a more forgiving, or nuanced, view of Senator Russell's racist perspectives, see MICHAEL S. MARTIN, RUSSELL LONG: A LIFE IN POLITICS 115–16 (2014).

complained the bill's proposed annual stipend was too low, while at the same time many fiscal conservatives and so-called Dixiecrats (Southern Democrats) thought the plan was too costly.¹⁴ Moreover, how can a guaranteed income bill help the poor without distorting work incentives or increasing taxes on everyone else? These are, of course, mutually incompatible goals. Hence, with apologies to the late Latin American literary giant Gabriel García Márquez, the title of this legislative play.¹⁵

ACT I: A BEAUTIFUL IDEA

The first act of a dramatic work is usually used for exposition and to establish who the main characters are.¹⁶ At some point during the first act, an inciting incident or conflict situation will occur. This incident calls the main character, or protagonist, of the story to action. The hero will have to make a decision—one that will change his life forever.

The hero of our three-act play is not a person, however, but rather an idea: a guaranteed minimum income to all persons via a negative income tax. The idea of a guaranteed income has an illustrious pedigree. Historical figures as diverse as Bertrand Russell, Edward Bellamy, and Thomas Paine—polymath, utopian planner, and patriot alike—all advocated for some form of universal basic income in their day.¹⁷ But it was the conservative economist and future Nobel Laureate, Milton Friedman, along with his wife Rose Friedman, who coined the term “negative income tax” in a best-selling book, *Capitalism and Freedom*, and in the popular press.¹⁸

¹⁴ The bill's proposed annual stipend for a family of four was \$1,600, or about \$10,000 in 2020 dollars. See *infra* text accompanying notes 29–30.

¹⁵ GABRIEL GARCÍA MÁRQUEZ, *CHRONICLE OF A DEATH FORETOLD* (Gregory Rabassa trans., First Vintage International ed. 2003). The Nobel Prize in Literature 1982 was awarded to Gabriel García Márquez “for his novels and short stories, in which the fantastic and the realistic are combined in a richly composed world of imagination, reflecting a continent's life and conflicts.” *The Nobel Prize in Literature 1982*, NOBEL PRIZE, <http://www.nobelprize.org/prizes/literature/1982/summary/> [<http://perma.cc/7WHV-U4N6>] (last visited Feb. 28, 2020). Unlike the great García Márquez, however, I will tell the story of the Family Assistance Act in a linear fashion.

¹⁶ See, e.g., DAVID TROTTIER, *THE SCREENWRITER'S BIBLE: A COMPLETE GUIDE TO WRITING, FORMATTING, AND SELLING YOUR SCRIPT* 5–7 (3d ed. 1998).

¹⁷ See BERTRAND RUSSELL, *THE PROPOSED ROADS TO FREEDOM*, 109–10 (2004); see also Thomas Paine, *Agrarian Justice* (1797), in JOHN CUNLIFFE & GUIDO ERREYERS, EDs., *THE ORIGINS OF UNIVERSAL GRANTS* 3–16 (2004); EDWARD BELLAMY, *LOOKING BACKWARD: 2000–1887* (Daniel H. Borus ed., 1995).

¹⁸ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191–94 (40th Anniversary ed. 2002); see also Milton Friedman, *Negative Income Tax—I* (1968), in MILTON FRIEDMAN, *BRIGHT PROMISES DISMAL PERFORMANCE: AN ECONOMIST'S PROTEST* 348–50 (William R. Allen ed., 1972); Milton Friedman, *Negative Income Tax—II* (1968), in *id.* at 351–53. Professor Friedman would be awarded “The Prize in Economic Sciences in Memory of Alfred Nobel” in 1976. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel*, COLUMBIA

Although the idea of a reverse income tax predates Friedman,¹⁹ it was Milton and Rose Friedman who brought this unorthodox idea to a popular audience and made it palatable to social conservatives. If *Capitalism and Freedom* was destined to become Friedman's most famous work,²⁰ the negative income tax chapter of his book put forth one of his most original, provocative, and beautiful ideas.²¹ In summary, Friedman proposed that the federal income tax should be graduated—not only upward, but also downward. Under Friedman's proposed negative income tax scheme, a person without any income would receive a modest guaranteed income of \$300 per year.²² Later, Friedman would revise this amount upward, recommending a minimum guaranteed income of \$1,500 for a family of four.²³ Friedman's negative income tax thus inspired the 1970 guaranteed minimum income bill: "Had it not been for Friedman's endorsement of the basic principles underlying Nixon's Family Assistance Plan (FAP) . . . it is unlikely that FAP would ever have left the White House."²⁴

But if the hero of our story is Milton and Rose Friedman's negative income tax idea, what is the inciting incident or call to action of our doomed legislative tale? One possibility is a May 27, 1968 letter, which was signed by over 1,000 North American academic economists, calling on Congress to enact "a workable and equitable plan of income guarantees . . ."²⁵ This letter, which was co-authored by a group of leading economists—including such

ECON., <http://econ.columbia.edu/faculty/nobel-laureates/the-sveriges-riksbank-prize-in-economic-sciences-in-memory-of-alfred-nobel/> [<http://perma.cc/96HA-S2KD>]. Although Milton Friedman's name appears as the sole author on the front cover of *Capitalism and Freedom*, he wrote this book in collaboration with his wife, Rose D. Friedman. See LANNY EBENSTEIN, MILTON FRIEDMAN: A BIOGRAPHY 140 (2007).

¹⁹ See BURKE & BURKE, *supra* note 6, at 140–41. As an historical aside, the first Anglo-American person to propose a negative income tax as the mechanism for providing a guaranteed income was Lady Juliet Rhys-Williams. See Peter Sloman, *Beveridge's Rival: Juliet Rhys-Williams and the Campaign for Basic Income, 1942–55*, 30 CONTEMP. BRIT. HIST. 203, 203–04 (2016); see also Evelyn L. Forget, *Canada: The Case for Basic Income*, in MATTHEW C. MURRAY & CAROLE PATEMAN, EDs., BASIC INCOME WORLDWIDE: HORIZONS OF REFORM 83 (2012).

²⁰ According to the University of Chicago Press, for example, *Capitalism and Freedom* has been translated into eighteen languages and has sold over 500,000 copies since its initial publication in 1962. See FRIEDMAN, CAPITALISM AND FREEDOM, *supra* note 18.

²¹ Friedman was one of the most (if not *the* most) prominent North American economists at the time. See, for example, the cover of the December 19, 1969 issue of *Time Magazine*, which is included in Appendix A to this Article.

²² See FRIEDMAN, CAPITALISM AND FREEDOM, *supra* note 18, at 192.

²³ See Friedman, *Negative Income Tax—I*, *supra* note 18, at 349.

²⁴ See MARTIN ANDERSON, WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES 78–79 (1978).

²⁵ The letter, along with the list of 1,228 economists who signed the letter, is found in *Income Maintenance Programs: Hearings Before the Subcomm. on Fiscal Policy of the J. Econ. Comm.*, 90th Cong. 676–90 (1968). The text of this letter is included in Appendix B to this Article.

luminaries as James Tobin (Yale), Paul Samuelson (MIT), and John Kenneth Galbraith (Harvard)—openly called for a national system of income guarantees and made the front page of *The New York Times*.²⁶ Alas, curiously absent from this massive list of signatures was Milton Friedman's.

Why did Friedman demur from the May 1968 letter? Why did he not join his own colleagues in support of his own cause? The most likely reason Friedman jumped off this basic income bandwagon is the letter's choice of words; it omits any reference to the words "negative income tax." Moreover, the May letter not only calls for a guaranteed income, it also calls for *supplements* to this income. In other words, the letter seems to imply that existing social welfare programs should co-exist with a guaranteed income. Friedman, by contrast, supported a guaranteed income concept only if it replaced all, or most, existing social entitlements.²⁷

Here, then, is an alternative inciting incident: President Richard M. Nixon's historic speech on August 8, 1969, calling for a guaranteed income. Between the historic Apollo 11 lunar mission (July 16–24, 1969) and the Woodstock Music Festival in Bethel, New York (August 15–18, 1969), Nixon delivered a televised address announcing one of the most radical and revolutionary poverty-relief proposals in our nation's history: a uniform, unconditional, and guaranteed minimum income for all poor households in the United States.²⁸ Under Nixon's anti-poverty plan, a poor family of four would receive an annual cash stipend of \$1,600—no strings attached—the equivalent of \$10,600 in today's inflation-adjusted dollars.²⁹

In some respects, the proposal Nixon described in his nationwide address would fall far short of his lofty rhetoric; in other respects, however, Nixon's speech understated the radical nature of his plan.³⁰ Overall, Nixon's guaranteed income bill, or "family assistance plan" ("FAP"), had three internal contradictions—time bombs that would eventually cause his plan to

²⁶ See *Economists Urge Assured Income*, N.Y. TIMES, May 28, 1968, at 1. For additional background and a chronology of events leading up to the 1968 petition, see BRIAN STEENSLAND, *THE FAILED WELFARE REVOLUTION: AMERICA'S STRUGGLE OVER GUARANTEED INCOME POLICY 64–70* (2008).

²⁷ For alternative explanations of Friedman's demurrals, see Milton Friedman, *The Case for the Negative Income Tax: A View from the Right*, PROC. NAT'L SYMP. ON GUARANTEED INCOME 49–55 (1966), reprinted in *Collected Works of Milton Friedman Project* (Robert Leeson & Charles G. Palm, eds.), HOOVER INST. ARCHIVES, <http://miltonfriedman.hoover.org/objects/57681> [<http://perma.cc/6WKA-7WRV>].

²⁸ Address to the Nation on Domestic Programs, 324 PUB. PAPERS 640–41 (Aug. 8, 1969).

²⁹ See Ian Webster, \$1600 in 1970, CPI INFLATION CALCULATOR, <http://www.in2013dollars.com/us/inflation/1970?amount=1600> [<http://perma.cc/448X-LE53>].

³⁰ See BURKE & BURKE, *supra* note 6, at 108–10.

self-destruct. First, Nixon's welfare reform plan was a half-hearted one. His plan abolished only one welfare program ("AFDC"), not the welfare state *in toto* as Friedman, William F. Buckley, Jr., and other conservative proponents of a basic income had called for.³¹ At that time, for example, the Department of Health, Education, and Welfare ("HEW") was one of the largest agencies in the entire federal government, with 107,000 employees, a budget of nearly \$60 billion, 135 advisory boards, and more than 270 programs, covering everything from family planning to Social Security.³² Instead of dismantling this bureaucratic behemoth, Nixon's bill left HEW totally intact.³³ This omission would later cause Friedman, the intellectual author of the negative income tax, as well as Buckley, Jr., James J. Kilpatrick, and other leading conservative commentators, to withdraw their support of Nixon's guaranteed income plan.³⁴

Second, instead of showcasing the basic income aspect of his plan, Nixon buried it in the middle of his speech. Worse yet, Nixon bundled his guaranteed income proposal with several other cumbersome legislative proposals, including a costly revenue sharing proposal in which, in Nixon's words, "a set portion of the revenues from Federal income taxes [would] be remitted directly to the States"³⁵ In short, instead of using a negative income tax to replace existing welfare programs, Nixon was simply tacking his proposal on top of these existing programs.

Third, Nixon refused to call a spade a spade. He was unwilling to utter the words "negative income tax," and denied that he was proposing a guaranteed income. Instead, he coined the term "family assistance," called his plan a "floor," and tried to sell it as "workfare."³⁶ Although Nixon told the nation, "What I am proposing is that the Federal Government build a foundation under the income of every American family with dependent children that cannot care for itself—and wherever in

31 In the words of President Nixon, "Under [my] plan, the so-called 'adult categories' of aid—aid to the aged, the blind, the disabled—would be continued" See Address to the Nation on Domestic Programs, 324 PUB. PAPERS 640 (Aug. 8, 1969).

32 See Robert Sherrill, *The Real Robert Finch Stands Up*, N.Y. TIMES, July 5, 1970, at 122; see also MICHAEL KONCEWICZ, THEY SAID NO TO NIXON: REPUBLICANS WHO STOOD UP TO THE PRESIDENT'S ABUSES OF POWER 122 (2018).

33 See COMMITTEE ON WAYS AND MEANS, THE FAMILY ASSISTANCE ACT OF 1970, REPORT OF THE COMMITTEE ON WAYS AND MEANS ON H.R. 16311, H.R. NO. 91-904, at 6.

34 See *infra* Act III.

35 Address to the Nation on Domestic Programs, 324 PUB. PAPERS 643 (Aug. 8, 1969). According to one scholar, the real purpose of this revenue sharing proposal was to make sure that no current welfare recipient would be worse off under Nixon's guaranteed income plan than under the status quo. See Neuberger, *supra* note 9, at 37.

36 See BURKE & BURKE, *supra* note 6, at 111–12.

America that family may live.”³⁷ He then made the following clarification: “This national floor . . . is not a ‘guaranteed income.’ Under the guaranteed income proposal, everyone would be assured a minimum income, regardless of how much he was capable of earning, regardless of what his need was, regardless of whether or not he was willing to work.”³⁸

This subterfuge was no doubt motivated by politics. After all, how else could Nixon get conservative members of Congress to go along with his revolutionary guaranteed income proposal? As Vincent and Vee Burke wrote in their classic study *Nixon’s Good Deed*, “In public affairs the content of a proposal can be less important than the way it is perceived. Sometimes the label is the most important ingredient.”³⁹ But at the same time, calling his guaranteed income proposal “family assistance” invited a fundamental moral dispute over whose responsibility it was to provide support to children—the government or parents.⁴⁰

Furthermore, the label chosen must bear some relation to the content of one’s proposal. The work requirement in Nixon’s proposal was riddled with exemptions,⁴¹ while the guaranteed income aspect of the bill would more than double the number of families eligible for government assistance.⁴² Perhaps Nixon would be able to fool some members of Congress with his “workfare” subterfuge, but as we shall see in Act III, he would not be able to fool all of them.

Given these internal contradictions, our dramatic question now boils down to this: will Nixon’s call for a guaranteed income—now disguised as a “family assistance plan”—be enacted by the 91st Congress, or will this bill die in committee? Either way, Nixon’s FAP would unleash an epic, multi-year intellectual battle between competing political principles and conflicting ideological worldviews—between social liberals committed to the cause of eradicating poverty and fiscal conservatives opposed to government hand-outs and guaranteed minimum incomes.

The remainder of our story will mostly unfold in the bowels of Congress, specifically, in two of its most powerful congressional committees—the House Ways and Means Committee and the

³⁷ Address to the Nation on Domestic Programs, 324 PUB. PAPERS 640 (Aug. 8, 1969).

³⁸ *Id.* at 640–41.

³⁹ BURKE & BURKE, *supra* note 6, at 119.

⁴⁰ *See id.* at 161.

⁴¹ COMMITTEE ON WAYS AND MEANS, THE FAMILY ASSISTANCE ACT OF 1970, REPORT OF THE COMMITTEE ON WAYS AND MEANS ON H.R. 16311, H.R. NO. 91-904, at 4.

⁴² *See* BURKE & BURKE, *supra* note 6, at 110.

Senate Finance Committee.⁴³ The guaranteed income bill was referred to these committees because it was, technically speaking, a tax measure.⁴⁴ Therefore, our leading protagonists will now include two Southern Democrats: Wilbur Mills, the chairman of the House Ways and Means Committee, and Russell Long, the chairman of the Senate Finance Committee.⁴⁵ In their committees rested the fate of guaranteed income. Even though the 91st Congress was controlled by the Democratic Party, and even though the bill was promoted by a Republican president, the concept of a guaranteed income “was neither a conservative nor a liberal measure in the meanings intended by those terms.”⁴⁶ Would Democrats give Nixon a legislative victory? Would Republicans support a massive income redistribution bill?

ACT II: MILLS TO THE RESCUE

The second act, or middle section of a dramatic work, typically portrays a “*rising* conflict”—one in which the protagonist attempts to resolve the conflict created by the turning point in the first act, only to find himself in an ever-worsening situation.⁴⁷ Act II of Nixon’s guaranteed income bill, however, does not follow this tried-and-tested formulaic blueprint. Far from suffering an initial reversal of fortune, H.R. 16311 sailed through the House Ways and Means Committee by an overwhelming margin (21 to 3) and then sped through the full House of Representatives by a considerable margin (243 to 155).⁴⁸

These early legislative successes in the 91st Congress were due in large part to the skillful maneuvering and strategic tactics of Congressman Wilbur D. Mills, an Arkansas Democrat who was born in the town of Kensett, Arkansas (population 905) and who was first elected to Congress in 1939.⁴⁹ Although his political career would soon come to a crashing end,⁵⁰ at this

⁴³ See *Top Congressional Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/revolving/top.php?display=C> [<http://perma.cc/NH85-2DZ5>].

⁴⁴ See MOYNIHAN, *supra* note 7, at 352 (“Technically it was a tax bill, part of the social security system. . . . If approved it would be a permanent statute, financed by automatic claims on the Treasury.”).

⁴⁵ See MILLS, *Wilbur Daigh*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000778> [<http://perma.cc/K5R9-3SSC>]; see also LONG, *Russell Billiu*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000428> [<http://perma.cc/A4EL-C57F>].

⁴⁶ See MOYNIHAN, *supra* note 7, at 440.

⁴⁷ See, e.g., TROTTIER, *supra* note 16, at 15.

⁴⁸ See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1032.

⁴⁹ See MILLS, *Wilbur Daigh*, *supra* note 45.

⁵⁰ See Richard D. Lyons, *Mills Quits as Chairman; Young Democrats Advance*, N.Y. TIMES, Dec. 11, 1974, at 93; see also Laura Smith, *In 1974, a stripper known as the “Tidal Basin Bombshell” took down the most powerful man in Washington*, TIMELINE (Sept. 18, 2017), <http://timeline.com/wilbur-mills-tidal-basin-3c29a8b47ad1> [<http://perma.cc/B9YZ-4BRC>].

time, Congressman Mills was still the chairman of the House Ways and Means Committee,⁵¹ and was thus considered to be the second-most powerful man in Washington, D.C., or in the memorable words of one fellow Congressman, “I never vote against God, motherhood, or Wilbur Mills.”⁵²

Mills’s power and influence were in large part a function of the committee he chaired since 1958, the House Ways and Means Committee. In brief, the Origination Clause of the Constitution requires that all bills regarding taxation must originate in the House of Representatives,⁵³ and the internal rules of the House, in turn, dictate that all taxation bills must pass through Ways and Means.⁵⁴ To this day, the Ways and Means Committee is still the chief tax-writing committee of the House, and the members of this key committee may not serve on any other House committee unless they are granted a waiver from their party’s congressional leadership.⁵⁵ So, when the original version of Nixon’s guaranteed income bill was first introduced into the 91st Congress on October 3, 1969, the first draft of the bill (H.R. 14173) was referred to Ways and Means.⁵⁶

Between October 15 and November 13, 1969, the House Ways and Means Committee held eighteen days of public hearings on the bill.⁵⁷ But then, on November 13, Chairman Mills abruptly concluded the public phase of his hearings and proceeded behind a special closed-door session.⁵⁸ This was the first of two pivotal procedural moves Chairman Mills would make. Rather than drag out consideration of Nixon’s guaranteed income bill and provide a public forum for opponents of the bill to raise their objections, the bill would remain under closed-door consideration until March of 1970.

⁵¹ See Lyons, *supra* note 50, at 1. Before his political downfall, Congressman Mills would become the longest-serving chairman of the House Ways and Means Committee. See Kay C. Goss, *Wilbur Daigh Mills*, CALS (Apr. 23, 2019), <http://encyclopediaofarkansas.net/entries/wilbur-daigh-mills-1715/> [<http://perma.cc/2LUA-KQGD>].

⁵² Smith, *supra* note 50.

⁵³ See U.S. CONST. art. I, § 7, cl. 1.

⁵⁴ See *Jurisdiction and Rules: Jurisdiction of the Committee on Ways and Means, WAYS & MEANS COMM.*, <http://waysandmeans.house.gov/about/jurisdiction-and-rules/> [<http://perma.cc/8SPW-VRLR>].

⁵⁵ See *id.*

⁵⁶ See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1031. A few days after Nixon’s guaranteed income bill was introduced in Congress, Chairman Mills called the first round of public hearings to order on October 15, 1969. See *id.* at 1032. In addition to Nixon’s income bill, the committee also considered a proposal to increase Social Security benefits (“H.R. 14080”). *Id.*

⁵⁷ See *id.* at 1031.

⁵⁸ For a helpful historical overview of closed-door activities in Congress, see WALTER J. OLESZEK, CONG. RESEARCH SERV., R42108, CONGRESSIONAL LAWMAKING: A PERSPECTIVE ON SECRECY AND TRANSPARENCY 2–5 (2011), <http://fas.org/sgp/crs/secrecy/R42108.pdf> [<http://perma.cc/9758-JN47>].

Chairman Mills had “indicated strong reservations about [Nixon’s] plan” on the final day of public hearings on November 13, 1969.⁵⁹ His hesitation was not surprising. After all, he was a Southern Democrat or “Dixiecrat,” and for various reasons, the South overwhelmingly opposed Nixon’s radical proposal.⁶⁰ Nevertheless, by April of 1970, Mills not only ultimately voted in favor of the bill, he also helped steer it through the House.⁶¹ What happened behind closed doors between November 13, 1969, the last day of public hearings, and April 16, 1970, the day the full House of Representatives approved the measure? In short, why did Chairman Mills change his mind?

One reason for Mills’s change of heart might have had to do with the changing winds of politics. On January 2, 1968, the outgoing president, Lyndon B. Johnson, had appointed a twelve-member presidential commission to study the feasibility of a negative income tax.⁶² This blue-ribbon committee, chaired by Ben W. Heineman, issued its report on November 12, 1969.⁶³ At this time, the House Ways and Means Committee was still holding public hearings on Nixon’s guaranteed income bill.⁶⁴ Although the Heineman commission’s negative income tax proposal ended up being more generous than Nixon’s FAP bill, the commission supported Nixon’s plan in principle.⁶⁵ Also, because the commission was appointed by a Democrat president, Heineman’s report gave Nixon’s guaranteed income bill a boost by putting “the national Democratic party more or less on record as favoring a proposal very like that of the president.”⁶⁶ Furthermore, in addition to the basic income guarantee, Nixon’s proposal incorporated other “liberal” features that would have appealed to progressives, including a complete federal take-over of social welfare.⁶⁷

Another reason for Mills’s change of heart was opportunism: Mills rewrote the bill to his liking. Most everyone at the time agreed that the current welfare system was broken,

⁵⁹ See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1032.

⁶⁰ See BURKE & BURKE, *supra* note 6, at 146–50. When the bill went to the floor of the House on April 16, 1970, congressmen from the eleven states that made up the Old Confederacy voted against the bill by an overwhelming margin of 79 to 17. *Id.* at 147.

⁶¹ See *id.* at 162.

⁶² See POVERTY AMID PLENTY: THE AMERICAN PARADOX 78 (1969).

⁶³ See Jack Rosenthal, *Income Aid Plan Based on Need Proposed by Presidential Panel*, N.Y. TIMES, Nov. 13, 1969, at 1.

⁶⁴ See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1031.

⁶⁵ Under the Heineman plan, for example, the guaranteed income floor for a family of four would be \$2,400, while under Nixon’s plan it was \$1,600. See MOYNIHAN, *supra* note 7, at 361.

⁶⁶ *Id.* at 364. For other possible reasons, see *id.* at 398–438.

⁶⁷ See *id.* at 134.

so “[i]f Congress spurned the Family Assistance Plan it would be responsible for perpetuating the discredited welfare system.”⁶⁸ Furthermore, as Vincent and Vee Burke note in their history of Nixon’s bill, although the term “negative income tax” was coined by the conservative economist Friedman, the idea of a guaranteed income was a Democratic idea.⁶⁹

But at the same time, Mills and his fellow Democrats had to grapple with the following dilemma: if they supported Nixon’s FAP, then Nixon would win a big legislative victory. Mills solved this problem by rewriting the bill to his own liking and making it his own. Specifically, he made two significant changes to the bill: (1) he added a new food stamp subsidy to the bill, and (2) he diverted a greater share of federal funds to the states.⁷⁰ As originally drafted, the bill required those states whose welfare programs paid out higher benefits to families than under Nixon’s proposal (forty-two states in all) to pay the difference.⁷¹ Now, under Mills’s revised bill, the federal government would agree to pay each state thirty percent of any additional benefits the states paid out to existing welfare recipients.⁷² With these revisions, H.R. 16311 or “The Family Assistance Act of 1970” was approved by the House Ways and Means Committee on February 26, 1970.⁷³ Mills’s Committee then reported a clean bill to the full House of Representatives on March eleventh.⁷⁴

Next, Chairman Mills, who “was known for his excessive caution, [his] fastidiousness about legislative details, and his moderation,” had another procedural tactic up his sleeve.⁷⁵ Once his bill was reported out of Ways and Means, he proposed a “closed rule” in order to prevent members of the House from offering any amendments to the bill on the floor.⁷⁶ (An “open

⁶⁸ See BURKE & BURKE, *supra* note 6, at 122.

⁶⁹ See *id.* at 123.

⁷⁰ See *id.* at 152.

⁷¹ See *id.* at 115.

⁷² See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1032.

⁷³ MOYNIHAN, *supra* note 7, at 425.

⁷⁴ See COMMITTEE ON WAYS AND MEANS, THE FAMILY ASSISTANCE ACT OF 1970, REPORT OF THE COMMITTEE ON WAYS AND MEANS ON H.R. 16311, H.R. NO. 91-904. Only three members of Ways and Means voted against the bill: Al Ullman (D., Oregon), Phil M. Landrum (D., Georgia), and Omar Burleson (D., Texas). Among other things, the three dissenters objected to providing a minimum income to the poor: “We do not concur that the cash incentive approach to welfare is either proven or sound.” See CONGRESSIONAL QUARTERLY, *supra* note 8, at 1033.

⁷⁵ See Smith, *supra* note 50.

⁷⁶ See *Family Assistance Act of 1970: Hearing on H.R. 16311 Before the Comm. on Rules*, 91st Cong. 162 (1970).

rule,” by contrast, would have permitted any member of the House to propose any amendment to any part of that Act.⁷⁷)

One member of Congress, David W. Dennis protested that members were being asked to adopt one of the most far-reaching measures ever to come before it without the possibility “of being usefully heard or of changing a single thing on the floor.”⁷⁸ Representative Dennis said the closed rule procedure treated the members “as the idiot children of the whole political process,” while another opponent of the bill, H. Allen Smith, said an open rule would have permitted an effort on the floor by some members to raise the \$1,600 federal minimum benefit.⁷⁹ After the bill is passed, Smith said, the \$1,600 will “start growing and from then on the sky will be the limit.”⁸⁰

Wilbur Mills, however, did not back down. On behalf of the House Ways and Means Committee, Chairman Mills made his closed rule resolution “to provide for an orderly procedure” for consideration of H.R. 16311.⁸¹ Although the vote on April 15, 1970 to adopt the closed rule was a close one (205 to 183), Mills prevailed.⁸² The next day the bill went before the entire House of Representatives, and it passed by a two-to-one margin.⁸³

In short, Chairman Mills used his power and influence to write up his own bill and steer it through Ways and Means and the floor of the House, but his swift and skillful maneuvering may have created a false sense of security among proponents of the guaranteed income bill. A series of events would conspire to kill the measure in the Senate Finance Committee, the “graveyard” of H.R. 16311.⁸⁴ This historic bill would never make it out of this critical committee.

ACT III: DEATH BY COMMITTEE

The third act of a dramatic work usually features a climax or showdown, followed by the resolution of the story’s conflict situation.⁸⁵ The showdown, in turn, is the most consequential moment of the story—the sequence in which the conflict is brought to its most intense point and where the dramatic

⁷⁷ See *About*, HOUSE COMMITTEE ON RULES, <http://archives115-democrats-rules.house.gov/about> [<http://perma.cc/D88C-6D2G>].

⁷⁸ CONGRESSIONAL QUARTERLY, *supra* note 8, at 5.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 4.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ BURKE & BURKE, *supra* note 6, at 213.

⁸⁵ See TROTIER, *supra* note 16, at 16.

question posed by the story is answered, leaving the protagonist with a new sense of who they really are.⁸⁶

Once H.R. 16311 was approved by the House in April of 1970, Nixon's guaranteed income bill went to the Senate.⁸⁷ The fateful showdown will thus take place in the august halls and stately corridors of the United States Senate. In summary, this conflict will consist of a titanic intellectual battle between competing political principles and conflicting ideological worldviews—between social liberals committed to the cause of eradicating poverty, and fiscal conservatives opposed to government hand-outs and guaranteed minimum incomes. Victim to these powerful and irreconcilable political forces, the bill would languish in committee for months until its final defeat on November 20, 1970.⁸⁸

Why does our guaranteed minimum income story end this way? What happened between April 16, 1970, when H.R. 16311 sailed through the House, and November 20, 1970, when the guaranteed income bill finally died in committee? It turns out, however, that most commentators and scholars have been asking the wrong question.⁸⁹ Instead of asking, *what* killed the income bill, we should be asking *who* killed it?

Among the leading culprits is the Chairman of the Senate Finance Committee, the junior senator from the State of Louisiana, Russell B. Long. He delayed consideration of the bill for months on end, tenaciously outmaneuvered supporters of the bill on the floor of the Senate, and defeated the bill in the waning days of the 91st Congress.⁹⁰ This yellow dog Dixiecrat, renowned for his “sheer cleverness and cunning,” was the last scion of the legendary Huey P. Long, the populist politician who was assassinated in 1935.⁹¹

Russell B. Long was appointed to the Senate Finance Committee in 1953, where he served as chairman of the committee from 1966 to 1981.⁹² Like Wilbur Mills in the House, Chairman Long was a powerful political force to be reckoned with. In the words of one Congressman, “In the heyday of the

⁸⁶ *Id.* at 16–17.

⁸⁷ CONGRESSIONAL QUARTERLY, *supra* note 8, at 2.

⁸⁸ *Id.*

⁸⁹ *See, e.g.*, Kornbluh, *supra* note 12, at 136; Neuberg, *supra* note 9; MOYNIHAN, *supra* note 7, at 385; BURKE & BURKE, *supra* note 6, at 186–87.

⁹⁰ *See generally* Alan Ehrenhalt, *Senate Finance: The Fiefdom of Russell Long*, 35 CONG. Q. WKLY. REP. 1905 (1977).

⁹¹ *See id.*

⁹² *See The Russell Long Chair*, LSU LAW, <http://www.law.lsu.edu/ccls/about/russelllongchair/> [<http://perma.cc/66NB-W5RW>].

Southern chairmen, [Long] was at the top of the list of big, strong figures representing the South who were national leaders that every president had to deal with. . . . Nothing could happen without them.”⁹³

Chairman Long called the Senate Finance Committee to order on April 29, 1970.⁹⁴ Would history be made? Would the Senate Finance Committee rise to the occasion? After all, during the presidency of Lyndon B. Johnson, Chairman Long was his party’s Senate floor leader, who helped enact many of President Johnson’s “Great Society” poverty-relief programs, including the creation of the Medicare program in 1965.⁹⁵ But as we shall soon see, it was one thing to provide *services* to the poor; a *guaranteed income* was a whole different ball game.

Not a single senator spoke a single sentence in support of the guaranteed income bill.⁹⁶ The guaranteed income bill was dead on arrival,⁹⁷ or in the words of Daniel Patrick Moynihan, “The hearings were a calamity. The senators had all but made up their minds that [H.R. 16311] would provide disincentives to work”⁹⁸ Indeed, by the second day of hearings, Chairman Long was asking, “Why don’t we junk the whole thing and start all over again?”⁹⁹

The then-Secretary of HEW, Robert H. Finch, testified before the members of the Senate Finance Committee during this first round of hearings.¹⁰⁰ His testimony lasted three days, and during these three days, leading Democrats and Republicans on the Committee voiced their opposition to the bill. Social liberals like Abraham A. Ribicoff did not like the bill because they thought the \$1,600 benefit level was set too low, while fiscal conservatives like John J. Williams did not like the bill because they thought it was too costly.¹⁰¹ In the end, H.R. 16311 would die a slow and painful death, death by delay. Although some last-ditch efforts were made to save the bill in the final days of the 91st Congress, it was a classic tale of too little, too late.¹⁰²

⁹³ See John H. Cushman, Jr., *Russell B. Long, 84, Senator Who Influenced Tax Laws*, N.Y. TIMES (May 11, 2003), <http://www.nytimes.com/2003/05/11/us/russell-b-long-84-senator-who-influenced-tax-laws.html> [<http://perma.cc/MMY4-5QP4>] (quoting Representative Billy Tauzin).

⁹⁴ See MOYNIHAN, *supra* note 7, at 453.

⁹⁵ See Karen Sparks, *Russell Billiu Long*, ENCYC. BRITANNICA (Oct. 30, 2019), <http://www.britannica.com/biography/Russell-Billiu-Long> [<http://perma.cc/T9S5-HSPR>].

⁹⁶ See MOYNIHAN, *supra* note 7, at 473.

⁹⁷ *Id.* at 453.

⁹⁸ *Id.* at 469.

⁹⁹ CONGRESSIONAL QUARTERLY, *supra* note 8, at 6.

¹⁰⁰ See *id.* at 5.

¹⁰¹ *Id.*

¹⁰² *Id.* at 12.

What happened? What went wrong?

In chapter five of his book, *The Politics of a Guaranteed Income*, Moynihan identifies three political blocs the guaranteed income bill would have to win over in order to become enacted into law: “The Liberal Democrats,” “The Conservative Republicans,” and the “Southerners.”¹⁰³ From a purely Machiavellian or political perspective, it might not have been in the interest of Democrats to allow a Republican president to outdo them in social policy.¹⁰⁴ For their part, most conservatives supported the idea of welfare reform and might be expected to support the president’s bill out of loyalty to the president. But what about the third bloc identified by Moynihan, Southerners? In the House, congressmen from the eleven states that made up the Old Confederacy voted against the bill by a margin of 79 to 17.¹⁰⁵

That the Senate Finance Committee was chaired by Russell B. Long, a Dixiecrat out of Louisiana, thus did not bode well for H.R. 16311.¹⁰⁶ Even before he had called his committee to order to debate the merits of H.R. 16311, Chairman Long had criticized the bill’s cost and perverse incentive structure in a speech on the floor of the Senate on April 23, 1970:

Senators should be aware that the welfare bill before the Finance Committee today does not solve the problem—it just makes it cost \$4 billion more. Under the bill, a fully employed father of a family of four with low earnings could increase his family’s total income if he quit work¹⁰⁷

Furthermore, Chairman Long was not alone in seeing the bill in moral terms. Another member of the Senate Finance Committee, Herman Talmadge, a Georgia Democrat who was the bill’s staunchest opponent, framed guaranteed income as “a work dis-incentive.”¹⁰⁸ In his view, a guaranteed income “would undermine the best qualities of this nation.”¹⁰⁹ Senators Long and Talmadge were traditional Democrats; they saw themselves as representing “the *working man*.”¹¹⁰

Furthermore, if Chairman Long was opposed to the guaranteed income bill as a matter of first moral principles, many Republican members of the committee were also worried

¹⁰³ See MOYNIHAN, *supra* note 7, at 352–75.

¹⁰⁴ *Id.* at 441.

¹⁰⁵ BURKE & BURKE, *supra* note 6, at 147. Southern Democrats opposed the bill 60 to 11, while Southern Republicans opposed it 19 to 6. *Id.*

¹⁰⁶ See MOYNIHAN, *supra* note 7, at 393.

¹⁰⁷ *Id.* at 459.

¹⁰⁸ *Id.* at 378.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 362.

about the mechanical nuts and bolts of the bill. During the second day of hearings (April 30, 1970), Senator John J. Williams, a former chicken-feed dealer who was set to retire from politics at the end of the 91st Congress, pointed out a potential problem with the guaranteed income bill.¹¹¹ Based on a series of flawed and misleading cost-benefit calculations, Senator Williams, the ranking member of Senate Finance, concluded that the bill contained perverse anti-work incentives: people would rationally choose not to work under the bill.¹¹²

Stated in simple terms, the problem was this: persons who received a guaranteed income were also eligible to receive additional welfare benefits from the government, such as Medicaid, food stamps, and public housing, but those additional benefits would be lost in their entirety if one's income exceeded a certain threshold.¹¹³ At the margin, an increase in earnings of one dollar would result in a decrease of income of more than one dollar for many individuals.¹¹⁴

Would the Senate Finance Committee tinker with the bill or try to fix these problems, or would those problems be used as a pretext for inaction? Now that Nixon had proposed and the House had passed a guaranteed income bill, four possible strategies were available to the members of the Senate Finance Committee: cooperate, deny, realign, or outbid.¹¹⁵ The most vocal champion of the strategy to outbid the President was Senator Fred Harris, a Democrat from Oklahoma. Although Senator Harris supported the idea of a guaranteed income in principle, he would repeatedly try to outbid Mills and the House's guaranteed income bill, though he ended up voting against the bill.¹¹⁶ Why? Because the House bill did not go far enough. For him, the glass was half-empty.

Another possibility was cooperation. Senator Abraham Ribicoff, for example, a liberal Democrat from Connecticut, was willing to swallow his political pride and cooperate with the President and the House to get some form of guaranteed income enacted into law.¹¹⁷ Indeed, when it became clear that the bill might die in committee, Ribicoff offered an amendment to salvage the bill, proposing a "twelve-month period of 'field

¹¹¹ See BURKE & BURKE, *supra* note 6, at 155.

¹¹² See *id.* at 154–56.

¹¹³ See *id.*

¹¹⁴ See *id.* at 156.

¹¹⁵ MOYNIHAN, *supra* note 7, at 446–52.

¹¹⁶ See *id.* at 451–52.

¹¹⁷ *Id.* at 453.

testing,”¹¹⁸ and President Nixon issued a public statement supporting Ribicoff’s amendment.¹¹⁹

Yet another possibility was realignment. After all, it was Nixon, a polarizing Republican president, who was proposing one of the most radical income redistribution programs in United States history, and it was the House of Representatives, which was controlled by the Democratic Party, that had just approved a bill based on Nixon’s historic proposal. But in the end, most of the members of the Senate Finance Committee would choose to defect. Simply put, they were openly opposed to the bill on moral grounds. Why? Because many senators thought that a guaranteed income would destroy the moral dignity of work—an ethic that was at the very foundation of Chairman Long’s own worldview.

After this disastrous start in the Senate Finance Committee, it became clear that no member of Long’s committee supported H.R. 16311. In fact, Chairman Long suspended the hearings on the third day and asked Secretary Finch to submit a revised bill to the committee.¹²⁰ Alas, Finch was put in an impossible position, for there was no way of solving the work incentive problem to everyone’s satisfaction. On the one hand, eliminating Medicaid, food stamps, and public housing was not politically feasible. Democrats would not allow that to happen, and Democrats were the majority party. A cutoff would have to be drawn somewhere. But where? Any cutoff line would produce a perverse incentive effect.

Worse yet, in the days and weeks after Chairman Long had suspended the hearings, a series of external events would conspire to doom whatever slim chances the bill may have still had in the Senate. Among other things, Daniel Patrick Moynihan, Nixon’s leading spokesman and political strategist in favor of the bill, would privately offer to resign; Robert Finch would suffer a mental health breakdown and would resign as Secretary of HEW; and last but not least, after several conservative voices would begin to turn against the bill, President Nixon himself would begin to waver. The cumulative effect of these tumultuous events—along with Chairman Long’s shrewd delay tactics—would conspire against H.R. 16311, putting the fate of this historic bill into jeopardy.

First, one of Nixon’s domestic-policy advisors, Daniel Patrick Moynihan, quietly offered his resignation on May thirteenth in

¹¹⁸ *Id.* at 520.

¹¹⁹ *Id.* at 521.

¹²⁰ See CONGRESSIONAL QUARTERLY, *supra* note 8, at 6; see also Frank C. Porter, *Hill Unit Sends Welfare Bill Back to Finch for Overhaul*, WASH. POST, May 2, 1970, at A5.

order to resume his academic position at Harvard in the fall.¹²¹ According to one historian, Nixon asked Moynihan to stay until the summer in order “to help get [the guaranteed income bill] through the Senate.”¹²² But with Moynihan’s impending departure, the bill would lose one of its most eloquent supporters.

Second, another champion of the bill, Secretary of HEW Robert Finch, would resign from his post after suffering a mental health breakdown in May 1970.¹²³ According to Haldeman, Finch had agreed to resign as early as June 5, 1970.¹²⁴ (For what it is worth, Nixon may have flirted with the idea of appointing Moynihan as Finch’s replacement at HEW. Although Moynihan expressed an interest in serving as Secretary of HEW,¹²⁵ Nixon eventually appointed Boston-native Elliott Richardson to this position.) But Finch’s departure and Moynihan’s impending resignation were not the only bad omens. One of the intellectual authors of the negative income tax, the conservative economist Friedman, openly withdrew his public support of the bill and applauded Senator Long’s decision to suspend the hearings.¹²⁶

¹²¹ STEPHEN HESS, *THE PROFESSOR AND THE PRESIDENT: DANIEL PATRICK MOYNIHAN IN THE NIXON WHITE HOUSE* 129 (2015).

¹²² *Id.* This account is confirmed by a diary entry of H.R. Haldeman. Haldeman, who served as President Nixon’s Chief of Staff, kept a daily diary throughout his entire career in the Nixon White House (January 18, 1969 to April 30, 1973). An abridged version of these diaries was published as *The Haldeman Diaries* after Haldeman’s death. See *H. R. Haldeman Diaries*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, <http://www.nixonlibrary.gov/h-r-haldeman-diaries> [<http://perma.cc/ATK8-BT5D>] [hereinafter *Haldeman Diaries*]. According to Haldeman’s entry for May 13, 1970:

[Nixon] met privately with Moynihan, who said he feels he has to leave. Wants to go July 1, but President got him to stay until August. Will then return to Harvard—on grounds his two years will be up soon and he wants to start the fall semester. President appears more relieved than concerned to have him go, and this timing should work out pretty well because he always said he was only here for two years.

Haldeman Diaries (May 13, 1970), <http://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/haldeman-diaries/37-hrhd-journal-vol05-19700513.pdf> [<http://perma.cc/XPB2-RCWR>].

¹²³ Haldeman’s May 21, 1970 diary entry states that “[Nixon was] concerned regarding Finch’s health problem, and [is] now convinced he should move out of HEW. Wants Tkach to sell [Finch] on the basis of health. [Finch] is going to Florida to try to recuperate.” *Haldeman Diaries* (May 21, 1970), <http://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/haldeman-diaries/37-hrhd-journal-vol05-19700521.pdf> [<http://perma.cc/KHY9-PX32>].

¹²⁴ Haldeman’s June 5, 1970 diary entry begins with the words “Finch day.” Haldeman then goes on to write: “Ehrlichman and I met with [Finch] in morning, and I made pitch regarding need for him to move out of HEW now. . . . He was obviously ready for it, and went along completely. He felt it should be done as fast as possible—so we went to work on a successor.” *Haldeman Diaries* 1 (June 5, 1970), <http://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/haldeman-diaries/37-hrhd-journal-vol05-19700605.pdf> [<http://perma.cc/838V-9ZQ4>].

¹²⁵ *Id.* at 2.

¹²⁶ See Milton Friedman, *Welfare: Back to the Drawing Board*, NEWSWEEK, May 18, 1970, at 89.

In his *Newsweek* column of May 18, 1970, Friedman identified several problems with the House version of his negative income tax proposal.¹²⁷ But the most fundamental objection Friedman raised was this: “A negative income tax—which is what the Family Assistance plan is—makes sense only if it replaces at least some of our present rag bag of programs. It makes no sense if it is simply piled on other programs.”¹²⁸ Moreover, Friedman was not the only conservative public intellectual to defect. On April 15, 1970, the conservative commentator William F. Buckley explained in his nationally-syndicated newspaper column why he too was casting a “reluctant ‘nay’” against the bill.¹²⁹ Although Buckley was at first open to the idea of a guaranteed income, he had now decided that Nixon’s bill was a bad idea.¹³⁰ According to Buckley, the bill was adding a new and costly welfare program on top of existing social welfare programs, such as public housing, Medicaid, etc., instead of sweeping these old programs away.¹³¹ In addition, Buckley saw through the bill’s watered-down work requirement, disparaging it as “merely . . . boob-bait for conservatives.”¹³²

Another leading conservative commentator, James J. Kilpatrick, went even further. In his syndicated “Conservative View” column of January 15, 1970, Kilpatrick not only retracted his initial praise of Nixon’s proposal; he referred to welfare recipients as “parasites”:

If the Nixon plan were adopted, the present \$5 billion in annual federal payments would at least double. . . . Instead of 9.6 million persons on welfare, we would have nearly 22 million. . . . These would be the permanent poor feeding like parasites on the body politic unto the end of time.¹³³

To make matters worse, Nixon himself may have turned against his own guaranteed income bill. According to his loyal Chief of Staff, H. R. Haldeman, by July of 1970 Nixon had come to the realization that his bill was too costly. The entry in Haldeman’s diary for Monday, July 13, 1970 states, “Regarding Family Assistance Plan, [Nixon] wants to be sure it’s killed by Democrats and that we make big play for it—but don’t let it pass,

¹²⁷ *Id.* According to Friedman, one problem with Chairman Mill’s version of the bill was his decision to reinsert food stamps into the plan instead of abolishing the food stamp program altogether. The other problem, which echoed Senator Williams’s objection during the initial Senate Finance hearings, had to do with the phasing out of state supplemental payments under the House bill. Instead of phasing out these supplemental payments incrementally as the income of an eligible family went up, these payments were phased out too drastically. *Id.*

¹²⁸ *Id.*

¹²⁹ MOYNIHAN, *supra* note 7, at 370.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ BURKE & BURKE, *supra* note 6, at 134.

can't afford it."¹³⁴ Although Haldeman's diary entry does not specify whether the bill was too costly in political terms (the potential loss of support from working class voters), or too costly in financial terms (the bill's price tag), or both, Chairman Long's delay tactics, Finch's abrupt resignation, and Moynihan's impending departure would conspire to defeat the bill by the end of the year.¹³⁵

In any case, on the same day that Chairman Long suspended the hearings (May 2, 1970), President Nixon appointed a special committee to revise the guaranteed income bill.¹³⁶ The revisions, which were announced on June tenth, were a mishmash of costly measures that would fail to appease social liberals or mollify social conservatives.¹³⁷ Among other things, the food stamp program was expanded.¹³⁸ Additionally, "[t]he penalty for 'Refusal to Register for or Accept Employment or Training' was increased from \$300 to \$500."¹³⁹ A "hold harmless" provision was added, such that no state would be required to spend more on welfare than under the existing system.¹⁴⁰ But the most significant change to the bill was a proposed comprehensive, compulsory, single-payer Family Health Insurance Program, which would have been "the nation's first federally subsidized system of health insurance for the poor."¹⁴¹

In short, instead of streamlining or simplifying the guaranteed income bill, HEW had decided to superimpose a grab bag of costly programs and cumbersome requirements on the old

¹³⁴ *Haldeman Diaries* (July 13, 1970), <http://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/haldeman-diraries/37-hrhd-journal-vol05-19700713> [<http://perma.cc/57PJ-A9FA>].

¹³⁵ In public, however, Nixon continued to profess his support of the bill. On August 28, 1970, for example, Nixon agreed to a proposal by Senator Abraham A. Ribicoff (D., Conn.) to test the plan for one year in three areas of the country. "In a statement issued at San Clemente, Calif., Mr. Nixon said, 'The present legislation is too far advanced, the need for reform is too great,' for time to run out on the proposal." CONGRESSIONAL QUARTERLY, *supra* note 8, at 5–6. In addition, Nixon invited several key members of the Senate Finance Committee and their wives to the "Western White House" in San Clemente, California, and to an official State Dinner at the Hotel Del Coronado in San Diego, California on September 3, 1970, including three Democrats—Chairman Russell Long (D., La.), Harry Byrd (D., Va.), and Abraham Ribicoff (D., Conn.), and three Republicans—Wallace Bennett (R., Utah), Jack Miller (R., Iowa), and Paul Fannin (R., Ariz.). Richard Nixon, *President Richard Nixon's Daily Diary*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (Sept. 3, 1970), <http://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/PDD/1970/035%20September%201-15%201970.pdf> [<http://perma.cc/N85Z-EVWN>].

¹³⁶ MOYNIHAN, *supra* note 7, at 490.

¹³⁷ See Neuberger, *supra* note 9.

¹³⁸ MOYNIHAN, *supra* note 7, at 493.

¹³⁹ *Id.* at 495.

¹⁴⁰ See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 83 (1979).

¹⁴¹ MOYNIHAN, *supra* note 7, at 490.

system.¹⁴² When the hearings finally resumed on July 21, 1970, Chairman Long concluded, to no one's surprise: "In significant respects the new plan is a worse bill—and a more costly bill than the measure which passed the House."¹⁴³ Suffice it to say, Long's committee would never report this now-monstrous bill to the floor of the Senate. Instead, the chairman devised a devious strategy to kill the measure: unceasing delay via endless public scrutiny.¹⁴⁴

In fact, when the Senate Finance hearings resumed in July 1970, Chairman Long had decided from the get-go to further delay consideration of the revised bill until after the midterm elections.¹⁴⁵ The Senate, in the cynical words of Senator Long, would be able to "give the plan more thoughtful consideration in the public interest if the bill came up in November."¹⁴⁶ More importantly, in contrast to the bill's swift and stealthy approval in Wilbur Mills's Ways and Means Committee, consideration of the bill in the Senate Finance Committee remained open to the public. By extending the hearings for weeks on end and inviting dozens of witnesses to testify before the committee, the sundry imperfections of the bill came to the fore.

Long's devious delay tactics would seal H.R. 16311's fate. Long's committee called over two dozen public officials representing a wide variety of local and state governments, as well as a long laundry list of representatives from the business world, labor unions, and other public interest groups.¹⁴⁷ The

¹⁴² *Id.* at 503.

¹⁴³ *Id.* at 506.

¹⁴⁴ Or, in the words of Daniel Patrick Moynihan, "Delay now became an open tactic of those opposed to [the guaranteed income bill] and time the greatest enemy of those who supported it." *Id.* at 512.

¹⁴⁵ Recall that Chairman Long had suspended the hearings on May 1, 1970. CONGRESSIONAL QUARTERLY, *supra* note 8, at 6–7.

¹⁴⁶ *Id.* at 5. For his part, Moynihan had been hoping for Senate action before Congress recessed on October fifteenth for the midterm election campaign. See MOYNIHAN, *supra* note 7, at 521.

¹⁴⁷ CONGRESSIONAL QUARTERLY, *supra* note 8, at 9–13. In all, the following individuals representing the following organizations testified before the Senate Finance Committee between July 21 and September 10, 1970: James D. Hodgson, Secretary of Labor; John O. Wilson, Director, Office of Planning, Research and Evaluation, Office of Economic Opportunity ("OEO") (Wilson was asked to testify on the New Jersey graduated work incentive project being conducted by the OEO); Keith E. Marvin, Associate Director, Office of Policy and Special Studies, General Accounting Office; John V. Lindsay, Mayor of New York City; W. D. Eberle, President of American Standard and Co-Chairman of Common Cause (a new citizens' lobby formed by the leaders of the National Urban Coalition); Leonard Lesser, Committee for Community Affairs (a nonprofit corporation representing community organizations of the poor); Harold W. Watts, Professor of Economics and Director, Institute for Research on Poverty, University of Wisconsin; Mrs. Richard M. Lansburgh, President, Day Care and Child Development Council of America Inc.; Mrs. Edward F. Ryan, National Congress of Parents and Teachers; Andrew J. Biemiller, Director of legislation, AFL-CIO; Whitney M. Young Jr., Executive Director, National Urban League, and President, National Association of Social Workers; John E.

cumulative effect of all this nitpicking public testimony was to slow down the bill's momentum and reinforce the senators' various biases against the bill. Given the sheer number of witnesses and the diversity of opinion expressed by them, the bill suffered a death by a thousand cuts in Chairman Long's Finance Committee. Unable to survive the glare of public scrutiny or the paralysis of the delay, H.R. 16311 would eventually die in committee.¹⁴⁸

The irony of the situation is that President Nixon probably had enough votes in the full Senate to get his guaranteed income bill approved. According to Moynihan, at least sixty senators would have voted for the bill had it reached the floor of the Senate.¹⁴⁹ If there were only a way to get the bill to the floor of the Senate.

With time running out and just a few weeks left in the 91st Congress, Senators Ribicoff and Bennett signaled their intention to offer a guaranteed income bill as a floor amendment to a different bill that would reach the full Senate, an omnibus Social Security bill providing a ten percent across-the-board increase in Social Security payments.¹⁵⁰ But in addition to the Ribicoff-Bennett amendment, many other controversial legislative proposals were added to the Social Security bill, including a supplemental authorization for additional foreign aid as well as a new protectionist trade policy with import quotas on foreign goods.¹⁵¹ These additional amendments would seal the fate of the guaranteed income bill.

When Chairman Long introduced the Social Security bill on December sixteenth, Senators Ribicoff and Bennett announced their intention to offer their guaranteed income amendment to the bill the next day during floor debate. The Vice President was even put on alert in case of a tie.¹⁵² Alas, it was not to be. A filibuster broke out

Cosgrove, U.S. Catholic Conference, testifying for the Conference, the National Council of Churches and the Synagogue Council of America; Howard Rourke, Director of the Department of Social Services, Ventura County, California, testifying for the National Association of Counties; Carl B. Stokes, Mayor of Cleveland, testifying for the National League of Cities and the U.S. Conference of Mayors; Karl T. Schlotterbeck, U.S. Chamber of Commerce; A. L. Bolton Jr., President of Bolton-Emerson Inc., Lawrence, Mass., representing the National Association of Manufacturers; William C. Fitch, Executive Director, National Council on the Aging; Frederick S. Jaffe, Vice President, Planned Parenthood-World Population; Warren E. Hearnes, Governor of Missouri and chairman of the National Governors' Conference; Tom McCall, Governor of Oregon; George McGovern, a U.S. Senator from South Dakota; Joseph C. Wilson, Chairman of the board, Xerox Corporation, testifying for the Committee for Economic Development. *Id.*

¹⁴⁸ The final vote in the Senate Finance Committee was 10 to 6 against the bill. *Id.* at 13. Since Chairman Long was able to cast his vote last, he voted for the bill knowing full well that it lacked sufficient votes to be reported out of committee. *Id.*

¹⁴⁹ MOYNIHAN, *supra* note 7, at 518, 525.

¹⁵⁰ *Id.* at 537.

¹⁵¹ *Id.* at 537-38.

¹⁵² *Id.* at 538.

over the foreign aid amendment, and another filibuster was threatened over the import quotas.¹⁵³ In the end, the Ribicoff-Bennett amendments were never voted on.¹⁵⁴ Their last-ditch efforts failed. Time ran out, and the bill perished in the Senate on the last days of the 91st Congress.¹⁵⁵ Guaranteed income was dead.

EPILOGUE

This Article retold the story of H.R. 16311, “The Family Assistance Act of 1970,” the historic guaranteed income bill proposed by President Nixon in the summer of 1969 and enacted by the House in April of 1970, only to die in the Senate in the last days of the 91st Congress. To provide structure to this story, this Article presented the rise and fall of the guaranteed income bill in three dramatic acts featuring such *dramatis personae* as Milton and Rose Friedman, Wilbur Mills, and Russell Long, all of whom played leading roles in this legislative morality play. Here, however, I want to conclude this compelling story by asking a normative question. Specifically, why should the ill-fated history of H.R. 16311 matter to us today? After all, this political theater took place several generations ago; the leading players are all dead. What lessons, if any, can we learn from this legislative debacle?

A lot! Given the resurgence of Universal Basic Income (“UBI”) proposals in our day,¹⁵⁶ the rise and fall of H.R. 16311 offers a compelling case study into the politics of guaranteed income. As Moynihan taught us long ago, “income redistribution goes to the heart of politics: who gets what and how . . .”¹⁵⁷ So, if you are a proponent of UBI or are merely sympathetic to this idea, you will want to avoid repeating the mistakes of the past. But, by the same token, if you are opposed to UBI or are just skeptical of this idea, the story of H.R. 16311 provides an instructive political playbook for how to defeat such proposals.

Although the idea of a basic income or UBI can be located “at almost any point on a spectrum ranging from a prudent and cautious [i.e., incremental] reform of welfare payments to a climactic abolition

¹⁵³ *Id.*

¹⁵⁴ Although the Senate unanimously approved the omnibus Social Security bill—without the import quotas, foreign aid, or guaranteed income amendments—on December 29, 1970, the bill died in conference committee. *Id.* at 538 n.1.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Howard Reed & Stewart Lansley, *Universal Basic Income: An Idea Whose Time Has Come?*, COMPASS (May 23, 2016), <http://www.compassonline.org.uk/wp-content/uploads/2016/05/UniversalBasicIncomeByCompass-Spreads.pdf> [<http://perma.cc/9E38-BC3K>]; see also Jurgen De Wispelaere & Lindsay Stirton, *The Many Faces of Universal Basic Income*, 75 POL. Q. 266, 266 (2004).

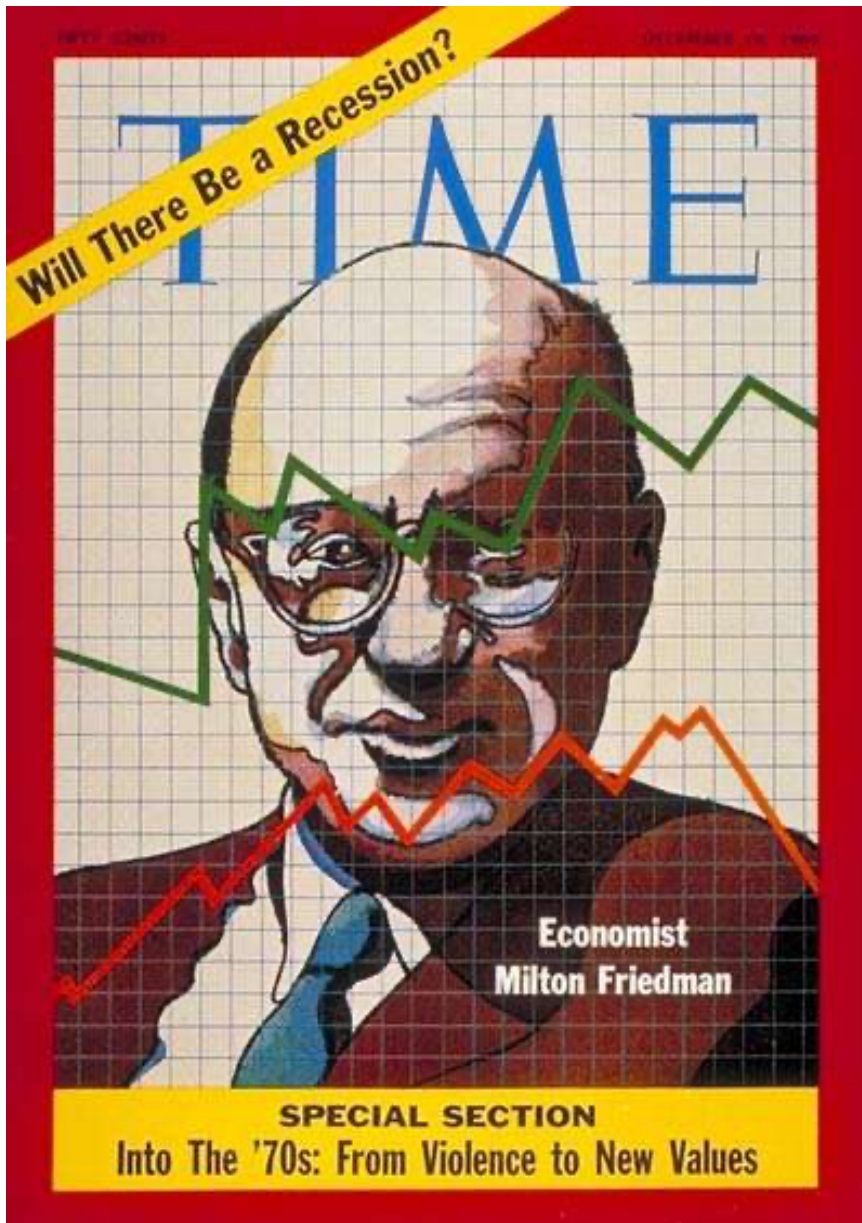
¹⁵⁷ *Id.* at 355.

of the wage system,”¹⁵⁸ in the end H.R. 16311 was negatively framed by its opponents in moral terms: the bill paid people not to work. As a result, the leading lesson of this affair is: any realistic UBI proposal must somehow find a way of passing an impossible political test before it will ever be enacted into law. How can a government provide a meaningful income to the poor, let alone a universal income to all persons, without distorting work incentives and without breaking the bank, so to speak?

Stated bluntly, what is the optimal amount of income that each person should be entitled to? Consider for the last time “The Family Assistance Act of 1970.” Was the proposed \$1,600 annual cash stipend for a family of four—the centerpiece of the bill—too generous and costly, or was it too stingy and miserly? This inherent contradiction, not to mention the delicate questions of race and class looming in the background, cursed H.R. 16311 from the get-go; this contradiction also bedevils all universal basic income schemes today. Supporters of contemporary UBI schemes should take this inherent tension to heart. Unless they can solve this puzzle (how to finance such schemes without distorting the incentive to work), any attempt to enact a universal basic income is most likely doomed to fail.

¹⁵⁸ MOYNIHAN, *supra* note 7, at 441.

Appendix A¹⁵⁹



159 TIME MAGAZINE, Dec. 19, 1969 (noting the presence of Milton Friedman on the cover).

Appendix B¹⁶⁰**A STATEMENT BY ECONOMISTS ON INCOME
GUARANTEES AND SUPPLEMENTS**

May 27, 1968

The statement below was circulated in May of 1968 to 275 universities and research organizations. More than 1,000 economists from 125 universities signed the statement.

The undersigned economists urge the Congress to adopt this year a national system of income guarantees and supplements.

The Poor People's Campaign in Washington is demanding a guaranteed minimum income for all Americans. The Kerner Commission on Civil Disorders called for a national system of income supplements. A group of business leaders recently advocated a "negative income tax." These proposals are all similar in design and purpose.

Like all civilized nations in the twentieth century, this country has long recognized a public responsibility for the living standards of its citizens. Yet our present programs of public assistance and social insurance exclude millions who are in need and meet inadequately the needs of millions more. All too often these programs unnecessarily penalize work and thrift and discourage the building of stable families.

The country will not have met its responsibility until everyone in the nation is assured an income no less than the officially recognized definition of poverty. A workable and equitable plan of income guarantees and supplements must have the following features. (1) Need, as objectively measured by income and family size, should be the sole basis of determining payment to which an individual and/or family is entitled. (2) To provide incentive to work, save and train for better jobs, payments to families who earn income should be reduced by only a fraction of their earnings.

Practical and detailed proposals meeting these requirements have been suggested by individual sponsors of this statement and by others. The costs of such plans are substantial but well within the nation's economic and fiscal capacity.

As economists we offer the professional opinion that income guarantees and supplements are feasible and compatible with our economic system. As citizens we feel strongly that the time for action is now.

Source: "Economists' Statement on Guaranteed Annual Income," 1/15/1968—4/18/1969 folder, General Correspondence Series, Papers of John Kenneth Galbraith, John F. Kennedy Presidential Library.

¹⁶⁰ Income Maintenance Programs: Hearings Before the Subcomm. on Fiscal Policy of the J. Econ. Comm., 90th Cong. 676-90 (1968).

Appendix C¹⁶¹

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, DECEMBER 21, 1970

1683

I remember back in the Depression years—and if this dates me, if you can remember, you can remember, too—of the 1930's, how deeply I felt about the plight of those people my own age who used to come into my father's store when they couldn't pay the bill, because their fathers were out of work, and how this seemed to separate them from others in our school.

None of us had any money in those days, but those in families where there were no jobs and there was nothing but the little that relief then offered suffered from more than simply going without. What they suffered was a hurt to their pride that many carried with them for the rest of their lives.

I also remember my older brother. He had tuberculosis for 5 years. The hospital, the doctor bills were more than we could afford.

In the 5 years before he died, my mother never bought a new dress. We were poor by today's standards, and I suppose we were poor even by Depression standards.

But the wonder of it was that we didn't know it. Somehow my mother and father, with their love, their pride, their courage and their self-sacrifice, were able to create a spirit of self-respect in our family so that we had no sense of being inferior to others who had more.

Today's welfare child is not so fortunate. His family may have enough to get by on and, as a matter of fact, they may have even more in a material sense than many of us had in those Depression years. But no matter how much pride and courage his parents have, he knows they are poor and he can feel that soul-stifling patronizing attitude that follows the dole.

Perhaps he watches while a caseworker—a caseworker who himself is trapped in a system that wastes on policing talents that could be used for helping—he watches while this caseworker is forced by the system to poke around in the child's apartment, checking on how the money is spent, or whether his mother might be hiding his father in the closet.

This sort of indignity is hard enough on the mother. It is enough of a blow to her pride and to her self-respect. But think of what it must mean to a sensitive child.

We have a chance now to give that child a chance—a chance to grow up without having his schoolmates throw in his face the fact that he is on welfare and without making him feel that he is therefore something less than other children.

Our task is not only to lift people out of poverty but from the standpoint of the child our task is to erase the stigma of welfare, illegitimacy, and of apatness, and to restore pride, dignity, and self-respect for every child in America.

I don't contend before this sophisticated audience of critics that our Family Assistance Plan is perfect. Secretary Richardson, who has been before the Senate, will be able to answer questions that you may put to him because he has been before a very, very critical body.

But I am only going to suggest this: In this confused, complex, and intensely human area no perfect program is possible, and certainly none is possible that will please everybody. But this is a good program, and a program immensely better than what we have now, and vastly important to the future of this country—and especially to the neediest of our children. It is time to get rid of the present welfare program and get a new one, and now is the time to do it.

161 Richard M. Nixon, *Remarks at the Opening Session of the White House Conference on Children*, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1677, 1683 (Week Ending Saturday, Dec. 19, 1970).



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Original Intent: Whether Recent Reforms Signal a Legislative Break from Marijuana Criminalization Under the Controlled Substances Act

*Oliver J. Kim**

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“You know, when people think about drugs, they’re just disgusted by it. They just want to lock them up, and throw away the key. But it’s more complex than that.”

- U.S. President Richard Nixon¹

“It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission.”

- U.S. Attorney General Jeff Sessions²

Given the acrimony of our current political moment,³ it is hard to imagine a time when a Republican administration and a Democratic Congress could work together and compromise on key legislation affecting health, the environment, and criminal justice.⁴ And yet, recent developments on drug policy and criminal justice harken back to this period of legislative achievement. One of the laws produced in the era that this symposium is examining—the Controlled Substances Act

¹ Interview with Egil “Bud” Krogh, Jr., *Frontline*, PBS SOCAL (2000), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/krogh.html> [<http://perma.cc/D4HH-XVCM>] (interviewing Krogh, the White House Deputy for Domestic Affairs under President Nixon, and his account of Nixon’s view on addiction).

² THE U.S. DEP’T OF JUSTICE, *Justice Department Issues Memo on Marijuana Enforcement* (Jan. 4, 2018), <http://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [<http://perma.cc/8LCS-F3RF>] (noting rescission of prior guidance on prosecuting marijuana felonies).

³ See Lee Rainie et al., *Trust and Distrust in America*, PEW RES. CTR. 1, 3 (2019), <http://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> [<http://perma.cc/6XTZ-MSMJ>] (“Majorities believe the public’s confidence in the U.S. government and in each other is shrinking, and most believe a shortage of trust in government and in other citizens makes it harder to solve some of the nation’s key problems.”).

⁴ David T. Courtwright, *The Controlled Substances Act: how a “big tent” reform became a punitive drug law*, 76 *DRUG & ALCOHOL DEPENDENCE* 9, 10–11 (2004) (“Nixon declared the 1970s to be ‘a great age of reform of the institutions of American government’ and pressed for changes in any number of federal laws, those governing the draft, welfare system, tax code, revenue sharing, and economic opportunity programs being among the best-known examples.”) (citation omitted).

(“CSA”)—shares some similarities in its development with three pieces of legislation on drug policy and criminal justice that passed in the last five years.⁵ The legacy of the CSA certainly shaped these issues over the last fifty years.

The original intent of the CSA was to be a reform package that sought to harmonize the country’s approach to drug policy.⁶ As part of a Nixon-era set of reforms, the CSA was not intended to be a harsh, punitive approach to drug control; however, in the intervening years, the CSA lost its original purpose, as political winds changed in ways that shifted the focus of the CSA toward more punitive approaches toward this goal.⁷

Despite the political gridlock currently plaguing our federal government, Congress has come together under two very different presidential administrations to pass legislation on substance abuse and criminal justice reform.⁸ Indeed, Congress actually passed legislation focused on the country’s opioid epidemic, not once, but twice: the Comprehensive Addiction and Recovery Act⁹ (“CARA”) in 2016, and then the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (“SUPPORT”) for Patients and Communities Act¹⁰ in 2018. The relative ease by which Congress passed these two bills, as well as the more difficult passage of the criminal justice reform bill, the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (“FIRST STEP”) Act,¹¹ might signal a policy shift and a political change in our views on drug policy and criminalization that we have not seen in decades, and could harken back to returning to the original intent of the CSA of balancing competing policies in its approach to drug policy.

The surprising break in partisanship to address addiction policy might strike some as a sign of an opportune time to make a major reform of the CSA regarding a major public policy problem posing a conflict between a majority of the states and the federal government. Many states are considering whether to legalize marijuana for clinical and non-clinical “recreational” purposes, and some states already have adopted regulatory

⁵ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.) (2012 & Supp. V 2017).

⁶ Courtwright, *supra* note 4, at 10.

⁷ *Id.*

⁸ *Id.* at 12.

⁹ Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016).

¹⁰ Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-721, 132 Stat. 3894 (2016).

¹¹ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

schemes for marijuana,¹² but the federal regulatory scheme under the CSA has put states' ability to legalize marijuana in question. Fifty years after the passage of the CSA, is it not time to reconsider how we approach marijuana? Are CARA, SUPPORT, FIRST STEP, and the changes at the state level precursors for a change to the CSA in an area that seems to be overwhelmingly popular?¹³

The answer to that question might be yes, but I would argue that the political reality is that reform at the federal level is not necessarily coming soon—even if the 2020 elections result in partisan changes in Congress and the federal government. Instead, I argue that, despite these seemingly monumental bills in a time of epic dysfunction, there is no fundamental shift in drug policy at the federal level. This “policy plateau” is evident by the failure to move legislation to amend the CSA in order to give states the ability to regulate marijuana.

While states continue to move forward on drug policy, the conflict with federal law creates conflict in many important policy areas, including medical practice, banking policy, and taxation. Having legal and policy clarity by amending the CSA would provide needed certainty, but several questions still face advocates and policymakers. Are those recent reforms—CARA, SUPPORT, and FIRST STEP—a harbinger for reform of the CSA? How do issues such as class and race play into potential reforms? Are there potential lessons that can be learned in order to alter the CSA? Given the Supreme Court's decision in *Gonzales v. Raich* that federal laws such as the CSA still apply regardless of state regulations, including in the traditional state sphere of medical professionals' scope of practice,¹⁴ these questions are important to answer in order to solve the conflict emerging between states' movement toward legalization and federal inaction.

To answer these questions, this Article will analyze the various aforementioned laws in the context of the current political environment. First, the Article will provide an overview of the CSA's legislative history, particularly looking at the initial intent of the law against how it was subsequently amended in a different political climate. Second, the Article will compare the

¹² Courtwright, *supra* note 4, at 10.

¹³ Hannah Hartig & A.W. Geiger, *About six-in-ten Americans support marijuana legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> [<http://perma.cc/P75F-V85N>].

¹⁴ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

response to the opioid epidemic to marijuana policy at the state and federal level. Third, the Article will discuss the legal, political, and policy conflicts between the opioid legislation and the failure to pass marijuana legislation at both the state and federal level. Finally, the Article will conclude that, despite some advances on bipartisanship reform for drug laws, these small steps are insufficient to change the law at the federal level to decriminalize marijuana. The opioids legislation, CARA, SUPPORT, and FIRST STEP, represent different pieces that share some common threads with the CSA as initially envisioned; however, there are key differences between the efforts to be explored that could help advocates and policymakers.

I. THE CONTROLLED SUBSTANCES ACT AS THE FIFTY-YEAR-OLD FOUNDATION FOR MODERN DRUG POLICY

American drug policy includes both regulation of substances for patient use on the commercial market, as well as interdiction of substances believed to be dangerous for human consumption or only consumed for limited purposes under close supervision. This section provides a brief snapshot of the policy developments that provide the foundation for our current drug regime.

A. Early Federal Regulatory Efforts Prior to the CSA

During the twentieth century, the federal government exercised increasing control over drug policy, by regulating the use of certain drugs through a complex approval process and supervising medical professionals, and by criminalizing other drugs as illegal substances.¹⁵ In one stream of federalizing drug policy, Congress began to formalize the process for demonstrating the safety of prescription drugs starting with the 1906 passage of the Pure Food and Drugs Act.¹⁶ This law, and a series of subsequent laws, led to the creation of the Food and Drug Administration (“FDA”), which became seen as “a ‘gatekeeper’ to protect public health by using its regulatory authority over the drug approval process.”¹⁷ For instance, the FDA began using its authority to regulate the use of addictive non-narcotic drugs after the medical community recognized that drugs such as

¹⁵ Courtwright, *supra* note 4; *see also infra* SPILLANE note 17.

¹⁶ Oliver J. Kim, *Trying and Dying: Are Some Wishes at the End of Life Better Than Others?*, 41 DALHOUSIE L.J. 94, 97 (Spring 2018).

¹⁷ *Id.*; *see also* JOSEPH F. SPILLANE, *Debating the Controlled Substances Act*, 76 DRUG & ALCOHOL DEPENDENCE 17, 19 (2004) (discussing how federal law “created a class of drugs available only on a physician’s prescription, and gave the FDA authority to designate which drugs would be placed in that category”) (citation omitted).

“barbiturates were not addicting in the narcotic sense, but that they were habit forming and subject to improper use.”¹⁸

In another stream of federalization, Congress began addressing the growing concern about the addictive nature of narcotics, ultimately leading to a process of interdiction and criminalization.¹⁹ Initially, Congress used its tax power to pass the Harrison Act²⁰ as a means of regulating narcotics (defined as opioids and cocaine) and, thus, made the Treasury Department the initial regulator of these substances.²¹ This statute marked a substantial shift in regulatory policy, as the states had principally been the primary regulators by enacting a patchwork of policies.²²

The Treasury Department largely resisted adding additional non-narcotics to its responsibilities under its Federal Bureau of Narcotics.²³ But the Bureau’s director, Harry Anslinger, did favor greater criminalization of marijuana at both the state and federal level.²⁴ Congress passed the Marijuana Tax Act in 1937, adding the only non-narcotic drug under the jurisdiction of the Treasury Department’s Federal Bureau of Narcotics.²⁵ Although the Marijuana Tax Act was framed as a revenue law to quell Anslinger’s concerns about the constitutionality of regulating marijuana, it effectively banned the use of marijuana given the high cost of the tax.²⁶ Subsequently, Congress went further in the Boggs Act by adding criminal penalties, including mandatory minimum sentences for possession and trafficking of marijuana and narcotics,²⁷ and the federal government encouraged states to pass similar legislation to standardize drug laws.²⁸

¹⁸ SPILLANE, *supra* note 17.

¹⁹ *Id.* at 18.

²⁰ Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

²¹ SPILLANE, *supra* note 17, at 18.

²² See Kathleen Ferraiolo, *From Killer Weed to Popular Medicine: The Evolution of American Drug Control Policy, 1937-2000*, 19 J. POL’Y HIST. 147, 150 (2007); see also Courtwright, *supra* note 4, at 10.

²³ SPILLANE, *supra* note 17.

²⁴ JOSEPH F. SPILLANE & DAVID B. WOLCOTT, A HISTORY OF MODERN AMERICAN CRIMINAL JUSTICE 233 (2013) (noting that Anslinger “presented marijuana as addictive, a gateway to more serious drugs like heroin, and a source of crime”); Ferraiolo, *supra* note 22, at 153–54.

²⁵ SPILLANE & WOLCOTT, *supra* note 24.

²⁶ Ferraiolo, *supra* note 22, at 154; David Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 173 (2018).

²⁷ SPILLANE & WOLCOTT, *supra* note 24, at 234. See VIRGINIA L. ROTHWELL, *The Boggs Act* in Encyclopedia of Drug Policy 96–97 (Mark Kleiman & James Hawdon, eds., 2011), for a discussion of how the Boggs Act also marked the first time that marijuana and narcotics had been combined in legislation.

²⁸ SPILLANE & WOLCOTT, *supra* note 24, at 234.

During the 1960s, there was a growing recognition of fundamental problems with the differing streams of federal regulation, as “[n]ew substances were being introduced into widespread use faster than research could develop and the traditional addiction model, which had been based on physical dependence, was not adequate.”²⁹ Instead of providing a unified response to the patchwork of state policies, “Congress’s habit of ad hoc legislation, sometimes based on the constitution’s taxing power and sometimes on its commerce power, had produced a patchwork of enforcement agencies with different priorities and resources.”³⁰ The Johnson Administration was unable to formulate legislation in time for consideration before the 1968 election, resulting in the incoming Nixon Administration modifying the initial proposals that ultimately became the CSA.³¹

In 1970, Congress passed the CSA as part of the Comprehensive Drug Abuse Prevention and Control Act³² as an effort to consolidate these different approaches.³³ Policymakers realized the country was facing “three very visible drug problems”: an increase in heroin use in urban areas, as well as among service members stationed in Vietnam, and in young people using marijuana and psychedelics.³⁴ Historians note a difference in political philosophy between the Democratic majority in Congress and the Nixon Administration toward criminal justice, but these opposing partisans were able to merge their differences.³⁵ For instance, “the conventional liberal wisdom [was] that federal officials had botched the psychotropic drug problem while demonizing narcotic offenders and stonewalling maintenance experiments. . . . Above all, the reformers thought that the old sanctions, especially those involving marijuana, were unfair and inflexible, and brought disrepute upon the control system.”³⁶ Key officials in the administration agreed with that assessment and believed “that the new guidelines [under the CSA] would make the system fairer and more workable, while preserving moral distinctions

²⁹ SPILLANE, *supra* note 17, at 21.

³⁰ Courtwright, *supra* note 4, at 10.

³¹ SPILLANE, *supra* note 17, at 21.

³² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

³³ SPILLANE, *supra* note 17.

³⁴ Jerome H. Jaffe, *One Bite of the Apple: Establishing the Special Action Office for Drug Abuse Prevention*, 43, 45 in *ONE HUNDRED YEARS OF HEROIN* (David Musto ed., 2002).

³⁵ For a video discussing how President Nixon had to work with Democrats in order to govern, see *Bridging The Branches—How President Nixon Worked With A Democratic Congress*, RICHARD NIXON FOUND. (Apr. 30, 2018), <http://www.nixonfoundation.org/2018/04/bridging-branches-president-nixon-worked-democratic-congress/> [<http://perma.cc/V7RS-733P>].

³⁶ Courtwright, *supra* note 4, at 12.

among casual users, addicts, and organized criminal traffickers, with the heaviest sentences reserved for the latter.”³⁷

Conversely, the Nixon Administration deemed drug abuse a priority issue because “the problem was getting out of hand.”³⁸ Nixon himself believed that drug misuse and addiction was a cause of crime, and he had campaigned on reducing the supply side of this equation.³⁹ Thus, the administration had determined that the existing legal authorities were inadequate and needed to be replaced with a single modern law that would give the government the appropriate tools and flexibility in order to combat this problem.⁴⁰

Recognizing the need to compromise with the more liberal “establishment”⁴¹ in Congress, President Nixon’s submission to Congress, which became the Comprehensive Drug Abuse Prevention and Control Act, reflected a compromise between interdiction and public health approaches to drug control:

When Nixon submitted his drug bill to Congress in July 1969, he outlined a 10-point action plan. Characteristically, points 1–5 dealt with supply control. Points 6–10 emphasized education, research, rehabilitation, training, and communication. The legislation itself reflected this multi-front approach. The CSA was part (Titles II and III) of . . . the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title I provided authority and money for the Department of Health, Education, and Welfare (HEW) to mount additional prevention and treatment efforts through community mental health centers and public health service hospitals. It authorized the National Institute of Mental Health to increase research and training. It protected the privacy rights of subjects under the care of approved researchers. All of these were unmistakably public-health initiatives, part of the same legislation as the CSA.⁴²

B. The CSA and the Scheduling of Drugs

At the heart of the CSA is its regulatory scheme for classifying drugs under five different schedules. The CSA initially classified certain drugs under these schedules, with marijuana being included under Schedule I.⁴³ The Drug Enforcement Administration (“DEA”) within the Justice Department can add additional drugs to the schedule as a

³⁷ *Id.*

³⁸ *Id.* at 11.

³⁹ *Id.*

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 11.

⁴² *Id.*

⁴³ 21 U.S.C. § 812(c)(d)(1).

“controlled substance.”⁴⁴ Schedule I is the most restrictive category and reserved for substances with no medical value, with Schedule V being the least restrictive.⁴⁵ In order to be classified as a Schedule I controlled substance, the DEA must find that the drug has a high potential for abuse,⁴⁶ there is no currently accepted medical use in treatment in the United States,⁴⁷ and “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.”⁴⁸ The CSA allows the Attorney General to reclassify a controlled substance to a lower schedule or completely remove the substance in question.⁴⁹ But as a political compromise,⁵⁰ the Department of Health and Human Services (“HHS”) or “any interested party” can petition for adding, reclassifying, or removing a drug from the schedule, just as the Attorney General could on “his own motion.”⁵¹

Since the CSA initially classified marijuana under Schedule I, there have been five petitions to reschedule it—all unsuccessful and often lengthy.⁵² As part of a 2016 denial, the DEA laid out a five-part test to determine whether a drug has an accepted medical use, as follows: “[T]he drug’s chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is

⁴⁴ 21 U.S.C. § 812 (2012 & Supp. V 2017).

⁴⁵ For a useful summary with examples of drugs falling under each of the five schedules, see Elizabeth Hartney, *Controlled Drugs in the Controlled Substance Act*, VERYWELLMIND (Sept. 29, 2019), <http://www.verywellmind.com/what-are-controlled-drugs-22310> [<http://perma.cc/HC5N-MCX6>]. Drug schedules are different from the five classes of drugs—narcotics, depressants, stimulants, hallucinogens, and anabolic steroids—that fall under the CSA. *Id.*

⁴⁶ 21 U.S.C. § 812(b)(1)(A).

⁴⁷ 21 U.S.C. § 812(b)(1)(B).

⁴⁸ 21 U.S.C. § 812(b)(1)(C).

⁴⁹ 21 U.S.C. § 811(a) (2012 & Supp. V 2017).

⁵⁰ SPILLANE, *supra* note 17, at 22.

⁵¹ 21 U.S.C. § 811(a). *See also* 21 U.S.C. § 811(c) (explaining that when making this determination, the DEA must consider eight factors laid out in the CSA: “(1) Its actual or relative potential for abuse. (2) Scientific evidence of its pharmacological effect, if known. (3) The state of current scientific knowledge regarding the drug or other substance. (4) Its history and current pattern of abuse. (5) The scope, duration, and significance of abuse. (6) What, if any, risk there is to the public health. (7) Its psychic or physiological dependence liability. (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.”).

⁵² Diane Hoffmann et al., *Will The FDA’s Approval Of Epidiolex Lead to Rescheduling Marijuana?*, HEALTH AFFAIRS: HEALTH AFFAIRS BLOG (July 12, 2018), <http://www.healthaffairs.org/doi/10.1377/hblog20180709.904289/full/> [<http://perma.cc/94UU-ZWF6>] (“The first petition (1972) took 22 years before a decision was issued; the second (1995) took six years; and a 2002 petition was not decided until 2011. The most recent petitions (2009 and 2011) were decided in 2016.”).

not widely available.”⁵³ Several petitioners have attempted to sue the DEA to force proceedings to go forward, but the courts have upheld the DEA’s denials.⁵⁴

Classifying a drug under Schedule I greatly restricts potential research that could demonstrate whether a controlled substance actually has medical use.⁵⁵ Although Congress expanded research at the National Institute of Mental Health at the same time it was passing the CSA,⁵⁶ the Comprehensive Drug Abuse Prevention and Control Act gave greater control to the Justice Department—rather than HHS—to approve research using Schedule I controlled substances under the rationale of preventing such drugs from being diverted inappropriately in clinical trials.⁵⁷

C. The Political Push to Revise the CSA Toward Criminalization

Although the CSA had initially been passed with “something in it for everybody,”⁵⁸ it increasingly became pulled toward criminalization and away from public health. In the 1970s, angry and worried middle-class parents grew fearful of a seemingly growing acceptance of marijuana use among young people.⁵⁹ Concerned about the harms of marijuana and its possible gateway effect to harsher drugs, organized groups of parents successfully lobbied for tougher criminal sanctions and “zero tolerance” laws, rather than pushing for harm-reduction approaches.⁶⁰ Subsequently, as cocaine, and then crack, became cheaper and easier to produce, the government increased its law enforcement efforts, often with bipartisan majorities.⁶¹

These fears, however, accompanied prejudices as illicit drug use was associated with “minority subcultures—musicians, artists, urban African Americans, Hispanic laborers.”⁶² Thus, it was not

⁵³ Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 Fed. Reg. 53688 (proposed Aug. 12, 2016).

⁵⁴ *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 438–41 (D.C. Cir. 2012); *All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 15 F.3d 1131, 1131–33 (D.C. Cir. 1994).

⁵⁵ Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 208–12 (2016).

⁵⁶ Courtwright, *supra* note 4, at 11.

⁵⁷ See SPILLANE, *supra* note 17, at 22–23.

⁵⁸ Courtwright, *supra* note 4, at 13.

⁵⁹ *Id.* While seemingly concerned about the societal costs of potentially losing a generation to drug abuse, Nixon also stoked parents’ fears as a political device by arguing, “It is doubtful that an American parent can send a son or daughter to college today without exposing the young man or woman to drug abuse.” *Id.* at 11.

⁶⁰ *Id.* at 13.

⁶¹ *Id.*

⁶² SPILLANE & WOLCOTT, *supra* note 24, at 260.

just the fear of “white middle-class youth” engaging in drug use, but their association with these perceived undesirable, deviant elements of society.⁶³ While the CSA initially reformed sentencing guidelines, subsequent legislation reversed this trend.⁶⁴

II. A TRIO OF NEW REFORMS: POLICY SUCCESSORS TO THE CSA OR SOMETHING DIFFERENT?

In comparison to the time period that this symposium focuses on, today’s congressional arena has been characterized by gridlock⁶⁵ and deemed a “legislative graveyard.”⁶⁶ Despite this hostile environment, CARA, SUPPORT, and FIRST STEP all achieved rare bipartisan support in an increasingly polarized legislature. This section will provide an overview of each of these laws, as well as some of the political and legislative machinations behind the passage of each law.

A. The Legislative Responses to the Opioid Epidemic

Over the last twenty years, Americans’ use of opioids has increased dramatically: the sales of prescription opioids nearly quadrupled since 1999 due to several potential causes.⁶⁷ At the same time, the death rate due to overdoses tripled to 19.8 per 100,000 individuals, with nearly two-thirds of deaths involving either prescription or illegal opioids.⁶⁸ Deaths due to opioid overdoses exceed automobile accidents in the United States.⁶⁹ The opioid epidemic’s toll on the American public’s health is so extensive that it is linked to a decline in the country’s life expectancy.⁷⁰ In addition to the loss of life, the opioid epidemic has had other public health consequences: nearly two million Americans have a

⁶³ *Id.*

⁶⁴ Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 *WORLD MED. & HEALTH POL’Y* 375, 382–83 (2014).

⁶⁵ Rainie, *supra* note 3, at 14.

⁶⁶ Jordain Carney & Maggie Miller, *McConnell under fire for burying election bills in ‘legislative graveyard’*, HILL (July 27, 2019, 5:50 AM), <http://thehill.com/homenews/senate/454967-mcconnell-under-fire-for-burying-election-security-bills-in-legislative-graveyard> [<http://perma.cc/S4FD-HUDQ>].

⁶⁷ Claire Felter, *The U.S. Opioid Epidemic*, COUNCIL ON FOREIGN REL., http://www.cfr.org/backgrounder/us-opioid-epidemic?gclid=Cj0KCQjwjrvpBRC0ARIsAFrFuV9q18QVmo9U03Pa7jQAz6HUTRZwbFDNRotsevt-y1MMpnTzTGwY6toaAuF_EALw_wcB [<http://perma.cc/D4MH-FSMJ>] (last updated Sept. 17, 2019).

⁶⁸ HOLLY HEDEGAARD ET AL., *DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016* 5 (Dec. 2017), <http://www.cdc.gov/nchs/data/databriefs/db294.pdf> [<http://perma.cc/6JQU-XC7J>].

⁶⁹ Ken Kolosh, *Accidental Injury Becomes #3 Cause of Death in the U.S.*, NAT’L SAFETY COUNCIL (Jan. 22, 2018), <http://www.nsc.org/safety-first-blog/accidental-injury-becomes-3-cause-of-death-in-the-us-1> [<http://perma.cc/4VVS-QM7F>].

⁷⁰ Felter, *supra* note 67.

prescription opioid use disorder, leading to an increase in illicit opioid use and diseases, such as Hepatitis C and HIV.⁷¹

Many Americans, particularly in rural communities, believed that a government response was necessary to stem the tide of opioid misuse.⁷² By the 2018 midterm elections, sponsoring legislation aimed at the opioid epidemic was seen as politically astute.⁷³ Although advocates criticized the legislation because these bills failed to provide sustainable funding for needed services,⁷⁴ politicians viewed introducing legislation as a response to a pressing societal concern, while being fiscally responsible.⁷⁵

1. CARA

By 2014, drug overdose deaths had nearly tripled over a fifteen-year period, and over three out of five of the 47,055 drug overdose deaths that year involved an opioid.⁷⁶ Shortly before the 2014 midterm elections, a small bipartisan group of Senators—mainly from states seeing the beginning of the epidemic⁷⁷—introduced the first version of CARA.⁷⁸ Subsequently, a

⁷¹ Office of the Nat'l Coordinator for Health Info. Tech., *Health IT Playbook*, HEALTHIT, <http://www.healthit.gov/playbook/full> [<http://perma.cc/V88V-7VY4>] (last updated Feb. 28, 2018).

⁷² Danielle Kurtzleben, *Poll: Rural Americans Rattled By Opioid Epidemic; Many Want Government Help*, NPR (Oct. 17, 2018, 5:01 AM), <http://www.npr.org/2018/10/17/656515170/poll-rural-americans-rattled-by-opioid-epidemic-many-want-government-help> [<http://perma.cc/XEV2-SUEE>].

⁷³ See Brianna Ehley & Jennifer Haberkorn, *Tough reelection? Sponsor an opioid bill*, POLITICO (June 16, 2018, 6:37 AM), <http://www.politico.com/story/2018/06/16/lawmakers-opioid-bills-midterms-624926> [<http://perma.cc/URD8-XG5H>]; see also Katie Zezima & Colby Itkowitz, *Flailing on Fentanyl*, WASH. POST (Sept. 20, 2019), http://www.washingtonpost.com/graphics/2019/investigations/fentanyl-epidemic-congress/?wpisrc=al_news_alert-politics-alert-national&wpmk=1 [<http://perma.cc/X9JK-DWT4>] (interviewing the House Republican sponsor of the bill to increase sentencing minimums for trafficking fentanyl, about his belief that the bill was not considered because, “[a]s a Republican from a reliably red district who wasn’t going to face a difficult path to reelection, he didn’t need a legislative success to tout on the campaign trail.”).

⁷⁴ Brianna Ehley, *Congress’ latest opioid bill won’t solve the crisis*, POLITICO (Sept. 17, 2018, 7:28 PM), <http://www.politico.com/story/2018/09/17/congress-opioids-crisis-illegal-drugs-792373> [<http://perma.cc/3SQY-R9H2>] (“Public health experts and first responders say the massive bipartisan legislation . . . takes some important steps toward better access to treatment but lacks the urgency, breadth and steady long-term funding required to quell the emergency . . .”).

⁷⁵ Ehley & Haberkorn, *supra* note 73 (“Republican supporters of the bills say the extended time on the floor reflects how seriously the House takes the opioid issue. Most of the bills sponsored by vulnerable lawmakers are not controversial, in part because they don’t designate new spending.”).

⁷⁶ Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010-2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016).

⁷⁷ Yongwen Jiang et al., *Rhode Island Unintentional Drug Overdose Death Trends and Ranking—Office of the State Medical Examiners Database*, R.I. MED. J. 33, 34 (2018), <http://www.rimed.org/rimedicaljournal/2018/02/2018-02-33-health-jiang.pdf> [<http://perma.cc/P4NY-Q8KB>].

bipartisan group of Representatives⁷⁹ introduced a companion bill.⁸⁰ Because the bills had been introduced so late in the 113th Congress, there was little chance either bill would move; however, advocates responded positively to the legislators' interest and began to plan for the next Congress.⁸¹

The 2014 elections resulted in giving Republicans control of both chambers of the 114th Congress, for the first time since the 2006 elections, while President Obama was in his final two years of office.⁸² Republicans initially used their new majorities in a fruitless attempt to repeal the Affordable Care Act ("ACA"),⁸³ but subsequently, both parties focused on working collaboratively around two major initiatives—the opioid epidemic⁸⁴ and an investment in medical research⁸⁵—in an effort to demonstrate the ability to govern and to produce legislative victories.

Advocates for CARA noted that “the dramatic increase in opioid-related overdose deaths in virtually every Congressional district in America” was tragically one of the leading factors that raised attention to the issue and created a sense of urgency to pass the bill into law.⁸⁶ When CARA was signed into law on July 22, 2016,

⁷⁸ S. 2839, 113th Cong. § 1 (2014).

⁷⁹ Jim Sensenbrenner, *Sensenbrenner, Scott, Marino, Bass, Joyce, Ryan Introduce Comprehensive Legislation to Combat Drug Addiction*, JIM SENSENBRENNER (Dec. 10, 2014), <http://sensenbrenner.house.gov/2014/12/sensenbrenner-scott-marino-bass-joyce-ryan-introduce-comprehensive-legislation-to-combat-drug-addiction> [<http://perma.cc/YB77-CAA3>].

⁸⁰ H.R. 5845, 113th Cong. § 1 (2014).

⁸¹ Sensenbrenner, *supra* note 79 (noting that the bill had been endorsed by ninety-three national organizations).

⁸² *Republicans Rule House and Senate for First Time in 8 Years*, NBC NEWS (Nov. 4, 2014, 1:38 PM), <http://www.nbcnews.com/politics/elections/republicans-rule-house-senate-first-time-8-years-n241126> [<http://perma.cc/JW8U-2C96>].

⁸³ Russell Berman, *‘Promise Kept’: The Senate Finally Votes to Repeal Obamacare*, ATLANTIC (Dec. 4, 2015), <http://www.theatlantic.com/politics/archive/2015/12/the-senate-finally-votes-to-repeal-obamacare/418644/> [<http://perma.cc/CZQ2-DQPH>] (noting the Senate's party-line, 52-47, in favor of a reconciliation bill that gutted, but did not fully repeal, the ACA was “purely symbolic” because President Obama vetoed the bill).

⁸⁴ Paul Demko & Brianna Ehley, *Republicans cast opioid bill as their health care achievement*, POLITICO (Sept. 22, 2018, 6:44 AM), <http://www.politico.com/story/2018/09/22/republicans-defend-opioid-bill-achievement-796837> [<http://perma.cc/J3QH-8UEK>]. Note that advocates had urged federal intervention much earlier. Geoff Mumford, *Chasing the dragon: Psychology informs strategies to contain the opioid epidemic*, AM. PSYCHOL. ASS'N (May 2016), <http://www.apa.org/science/about/psa/2016/05/opioid-epidemic> [<http://perma.cc/7A8N-62D3>] (While “it would appear from news accounts that the epidemic reached crisis proportions only recently,” advocates had begun “to raise the alarm as early as 2006”).

⁸⁵ Norm Ornstein, *A Bipartisan Victory for Medical Research in Congress*, ATLANTIC (July 13, 2015), <http://www.theatlantic.com/politics/archive/2015/07/21st-century-cures-act-bipartisan/398369/> [<http://perma.cc/M5MD-MK9R>].

⁸⁶ Jeremiah Gardner & Robert Ashford, *CARA History & Breakdown*, HAZELDEN BETTY FORD FOUND. (July 11, 2016), <http://www.hazeldenbettyford.org/articles/gardner/cara-history-and-breakdown> [<http://perma.cc/Z53T-9SUS>].

advocates hailed it as the “first major federal addiction legislation in forty years and the most comprehensive effort undertaken to address the opioid epidemic, encompassing all six pillars necessary for such a coordinated response—prevention, treatment, recovery, law enforcement, criminal justice reform, and overdose reversal.”⁸⁷

Thus, CARA mirrored some of the original promise of the CSA. First, CARA contained numerous public-health approaches to combating the opioid epidemic. In addition to a general grant program for community-based organizations,⁸⁸ CARA also increased access points for community-based treatment,⁸⁹ training for first responders,⁹⁰ grants targeted at addiction treatment for pregnant and postpartum women,⁹¹ and the types of health professionals who could prescribe medications to treat opioid misuse disorders.⁹² Second, CARA contained several grants aimed at improving law enforcement responses, including for state, local, and tribal law enforcement to pursue innovative approaches to policing,⁹³ and for states to establish prescription drug monitoring programs.⁹⁴ Third, CARA reformed processes at the Department of Veterans Affairs (“VA”) to address how the VA health system treats pain and prescribes opioids.⁹⁵

But critics raised concerns about CARA’s approach. First, critics noted that CARA did not contain actual funding, but rather provided for authorizations for appropriations.⁹⁶ Indeed, including actual funding would have endangered passage in the

⁸⁷ *The Comprehensive Addiction and Recovery Act (CARA)*, CADCA, <http://www.cadca.org/comprehensive-addiction-and-recovery-act-cara> [<http://perma.cc/7QL2-BYGW>].

⁸⁸ *Id.* §§ 103, 601.

⁸⁹ *Id.* §§ 107, 110.

⁹⁰ *Id.* § 202.

⁹¹ *Id.* §§ 501, 503.

⁹² *Id.* § 303.

⁹³ *Id.* § 201.

⁹⁴ *Id.* § 109.

⁹⁵ *Id.* Title IX.

⁹⁶ Bill Heniff, Jr., *Overview of the Authorization-Appropriations Process*, CONG. RES. SERV. (Nov. 26, 2012) (discussing the two-step process for federal spending to carry out a program, which includes: “(1) enactment of an authorization measure that may create or continue an agency, program, or activity as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency, program, or activity.”). CARA authorized a total of \$187 million annually in new appropriations, but there is no guarantee that Congress will allocate that level of funding. See Jeremiah Gardner & Robert Ashford, *CARA History & Breakdown*, HAZELDEN BETTY FORD FOUND. (July 11, 2016), <http://www.hazeldenbettyford.org/articles/gardner/cara-history-and-breakdown> [<http://perma.cc/Z53T-9SUS>]; see also Mumford, *supra* note 84 (“Because funding CARA and passing CARA are separate legislative processes, skirmishes over how to pay for CARA programs may continue to play out long after the bill is successfully conferred and sent to the president for signature.”).

House.⁹⁷ Although Democrats decried the lack of actual funding and unsuccessfully attempted to amend CARA to do so,⁹⁸ they ultimately supported the bill.⁹⁹ Second, there was a question about equity in regards to how Congress was responding to the opioid epidemic versus its prior responses to drug abuse. The Centers for Disease Control and Prevention (“CDC”) found that victims of opioid overdoses were overwhelmingly white, tended to be male, and middle-aged.¹⁰⁰ Four of the five most affected states—West Virginia, New Hampshire, Kentucky, and Ohio¹⁰¹—are rural and tended to lean Republican or be politically competitive.¹⁰² Thus, in addition to the moral and public-health reasons for the response to the epidemic, there was a political incentive for the majority party to respond to this drug epidemic differently than prior federal responses.¹⁰³

2. SUPPORT

A little over two years after CARA’s passage, Congress revisited the opioid epidemic, passing SUPPORT and sending it to President Trump for signature.¹⁰⁴ Although the opioid epidemic was still raging, a cynic might question whether a second bill was needed so quickly or whether SUPPORT was meant to give Republicans a healthcare achievement prior to the 2018 midterm elections. Indeed, prior to the passage of SUPPORT, Congressional

⁹⁷ Burgess Everett & Jennifer Haberkorn, *Anti-opioid bill touted by vulnerable Republicans hits snag*, POLITICO (June 30, 2016, 1:03 PM), <http://www.politico.com/story/2016/06/congress-republicans-opioid-bill-224985> [<http://perma.cc/7SFP-R6UW>] (quoting a key Senate Republican that the issue over including funding was “more of an issue in the House than it is in the Senate—from the standpoint of making sure things are paid for and there isn’t mandatory funding”).

⁹⁸ *Id.*

⁹⁹ *Despite Discord Over Funding, Congress Sends Opioid Bill To President’s Desk*, KHN (July 14, 2016), <http://khn.org/morning-breakout/despite-discord-over-funding-congress-sends-opioid-bill-to-presidents-desk/> [<http://perma.cc/GS74-FAZK>]. In his signing statement, President Obama also indicated that he was “deeply disappointed that Republicans failed to provide any real resources for those seeking addiction treatment to get the care that they need. In fact, they blocked efforts by Democrats to include \$920 million in treatment funding.” Office of the Press Sec’y, *Statement by the President on the Comprehensive Addiction and Recovery Act of 2016*, WHITE HOUSE (July 22, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/07/22/statement-president-comprehensive-addiction-and-recovery-act-2016> [<http://perma.cc/G8JY-68PE>].

¹⁰⁰ Rudd, *supra* note 76, at 1448, 1450 tbls.1 & 2.

¹⁰¹ *See id.* at 1447 fig.1.

¹⁰² *See* Paul Chisholm, *Analysis Finds Geographic Overlap In Opioid Use And Trump Support In 2016*, NPR (June 23, 2018, 8:02 AM), <http://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016> [<http://perma.cc/U86H-NGKS>].

¹⁰³ 162 CONG. REC. 2372 (2016) (statement of Rep. Jackson Lee) (noting that many of those who turned to crack cocaine were incarcerated rather than offered treatment).

¹⁰⁴ *See* Devin Miller, *Opioids bill becomes law; AAP advances key priorities*, AAP NEWS (Nov. 20, 2018), <http://www.aapublications.org/news/2018/11/20/washington112018> [<http://perma.cc/NL9S-J2G9>].

Republicans attempted to repeal the ACA again with the knowledge that President Trump would sign any repeal legislation;¹⁰⁵ however, the congressional repeal effort failed again.¹⁰⁶

SUPPORT faced some of the same criticisms related to sustainable funding as CARA did.¹⁰⁷ But whereas CARA seemed to have some logical themes in its legislative structure,¹⁰⁸ some criticized SUPPORT as “scattershot compared with what is needed.”¹⁰⁹ Legislators noted that the process for developing SUPPORT was “rushed,” as the House considered many different proposals that were ultimately packaged into a single bill.¹¹⁰ House Energy and Commerce then-Ranking Member, Frank Pallone, worried that many of the bills that would ultimately become the foundation of SUPPORT lacked meaningful review:

Due to the rushed timeline, many of these bills are works in progress and are still in discussion draft form. These forced time constraints mean that some bills suffer from lack of technical assistance from our federal agencies or a [fiscal] analysis. Additionally, and equally important, stakeholders have not had the opportunity to adequately evaluate these bills or weigh in on their impact.¹¹¹

Generally, proponents grouped SUPPORT’s provisions into “four buckets: advancing treatment and recovery initiatives, improving prevention, protecting our communities, and bolstering efforts to fight deadly illicit synthetic drugs such as fentanyl.”¹¹²

¹⁰⁵ Maggie Haberman & Robert Pear, *Trump Tells Congress to Repeal and Replace Health Care Law ‘Very Quickly’*, N.Y. TIMES (Jan. 10, 2017), <http://www.nytimes.com/2017/01/10/us/repeal-affordable-care-act-donald-trump.html> [<http://perma.cc/GPY8-4MBG>].

¹⁰⁶ See Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017, 6:53 PM), <http://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832> [<http://perma.cc/V43T-BL4C>] (noting that Trump called on Senate Republicans via Twitter to continue to push forward on repeal efforts).

¹⁰⁷ Abby Goodnough, *In Rare Bipartisan Accord, House and Senate Reach Compromise on Opioid Bill*, N.Y. TIMES (Sept. 26, 2018), <http://www.nytimes.com/2018/09/26/health/opioid-bill-congress.html> [<http://perma.cc/H9PK-5JLB>] (quoting a researcher who stated, “Compared to how we responded to AIDS, it’s a failure,” but that Congress “didn’t want to spend, so they agreed on every second-tier issue they could”). During the legislative debate, Ranking Member Rep. Pallone noted, “The reality is that meaningful policy in this space may cost money, and agreement on appropriate offsets that do not harm people—including the very people that we may be trying to help—is a critical component needed in order for me to support these bills moving forward.” Frank Pallone, Jr., *Pallone’s Opening Remarks at Health Subcommittee Markup of Opioid Legislation*, HOUSE COMMITTEE ON ENERGY & COM. (Apr. 25, 2018), <http://energycommerce.house.gov/newsroom/press-releases/pallone-s-opening-remarks-at-health-subcommittee-markup-of-opioid> [<http://perma.cc/XSL8-FUXF>].

¹⁰⁸ CADCA, *supra* note 87.

¹⁰⁹ Goodnough, *supra* note 107.

¹¹⁰ Pallone, *supra* note 107 (Pallone noted that the committee was considering at least sixty-three bills in “the Chairman’s extremely hasty timeframe to pass opioid legislation”).

¹¹¹ *Id.*

¹¹² Greg Walden, *Thanks to Congress, we’re making real progress in the opioid crisis*, WASH. EXAMINER (June 22, 2019, 12:00 AM), <http://www.washingtonexaminer.com/opinion/op->

3. Funding for the Opioid Response

It is worth discussing further how Congress funded the legislative response, given that the failure to create sustainable streams of funding for opioid recovery was a criticism of both CARA and SUPPORT. While some reforms had little or no fiscal impact, others would require a substantial investment of funding in order to be effective.¹¹³

As aforementioned, most of CARA and SUPPORT used authorizations and did not provide mandatory funding. Following the passage of CARA, Congress included \$500 million in grants to states for both federal fiscal years 2017 and 2018¹¹⁴ to supplement their efforts to address opioid abuse as part of the 21st Century Cures Act.¹¹⁵ Subsequently, Congress agreed to provide \$6 billion in funding as part of an informal deal to pass a larger budget compromise.¹¹⁶ These monies, though, would be allocated through the annual appropriations process.¹¹⁷

Relatedly, both CARA and SUPPORT were passed after Republicans attempted to repeal the ACA, which in itself plays a

eds/thanks-to-congress-were-making-real-progress-in-the-opioid-crisis [http://perma.cc/T4CE-GTCV] (writing, in an editorial, an overview of SUPPORT). *But see* Zezima & Itkowitz, *supra* note 73 (discussing congressional failures to recognize the increasing dangers of the synthetic opioid fentanyl).

¹¹³ Felter, *supra* note 67.

¹¹⁴ A federal fiscal year begins on October 1 and ends on September 30 of the following year. U.S. SENATE, *Glossary Term: Fiscal Year*, http://www.senate.gov/reference/glossary_term/fiscal_year.htm [http://perma.cc/EMW6-TXS4].

¹¹⁵ 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016). For more on this law, see Ornstein, *supra* note 85.

¹¹⁶ See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018) (The \$6 billion commitment—\$3 billion for federal fiscal years 2018 and 2019—was a promise by Senate leadership); see also *Bipartisan Budget Act of 2018*, FIRST FOCUS (Feb. 2018), <http://firstfocus.org/wp-content/uploads/2018/02/BBA2018-Fact-Sheet.pdf>. [http://perma.cc/LXU8-DU43] (“To ease passage of the BBA, Senate leadership committed to several funding priorities . . . including . . . \$6 billion in additional funding for combatting the opioid substance abuse epidemic.”).

¹¹⁷ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018) (shortly after the Bipartisan Budget Act’s passage, the federal fiscal year 2018 was passed into law). “The FY 2018 appropriations bill allocated more than \$4.65 billion across agencies to help states and local governments in their efforts toward prevention, treatment and law enforcement initiatives. That represents a \$3 billion increase over 2017 spending levels.” For an accounting of how these monies were allocated in the first year of implementation, see Holland & Knight, *Memorandum: Opioid Crisis Proposals and Funding* (Apr. 9, 2018), <http://www.hklaw.com/files/Uploads/Documents/Alerts/HealthcareLifeandSciences/040918HealthcareMemoOpioidCrisisProposalsandFunding.pdf> [http://perma.cc/B6UG-MW8H]; German Lopez, *Congress’s omnibus bill adds \$3.3 billion to fight the opioid crisis. It’s not enough.*, VOX (Mar. 22, 2018, 12:20 PM), <http://www.vox.com/policy-and-politics/2018/3/22/17150294/congress-omnibus-bill-opioid-epidemic> [http://perma.cc/CDU8-4XAJ]; *Tracking Federal Funding to Combat the Opioid Crisis*, BIPARTISAN POLY CTR. (Mar. 2019), <http://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf> [http://perma.cc/6JLZ-BLFK].

major role in providing financial support and coverage for treating opioid misuse and other addictions.¹¹⁸ These pivots suggest moving away from a fight that had grown unpopular with the broader electorate,¹¹⁹ but also an attempt to push forward reforms on the cheap.¹²⁰ Had the ACA been repealed and replaced in its entirety, it would have created havoc for many initiatives attempting to fight the opioid epidemic and provide treatment to those suffering from opioid addiction.¹²¹ Several wavering Senators requested that additional funding, specifically for addressing the opioid epidemic, would be included in a repeal proposal, but ACA supporters argued such funds would not be

¹¹⁸ Kendal Orgera & Jennifer Tolbert, *The Opioid Epidemic and Medicaid's Role in Facilitating Access to Treatment*, KAISER FAM. FOUND. (May 24, 2019), <http://www.kff.org/medicaid/issue-brief/the-opioid-epidemic-and-medicoids-role-in-facilitating-access-to-treatment> [http://perma.cc/6PZA-48RL] (Of the “nearly two million nonelderly adults in the United States [who] had an opioid use disorder (OUD) . . . nearly four in ten were covered by Medicaid”). Note that some conservatives believe that the ACA and its Medicaid expansion helped cause the opioid epidemic. See Majority Staff Report of the Comm. on Homeland Sec. & Gov't Affairs, *Drugs for Dollars: How Medicaid Helps Fuel the Opioid Epidemic*, Executive Summary 2 (2018), <http://www.hsgac.senate.gov/imo/media/doc/2018-01-17%20Drugs%20for%20Dollars%20How%20Medicaid%20Helps%20Fuel%20the%20Opioid%20Epidemic.pdf> [http://perma.cc/TY7Z-MBUL]; see also Nicholas Eberstadt, *Our Miserable 21st Century*, COMMENTARY (Feb. 2017), <http://www.commentarymagazine.com/articles/our-miserable-21st-century> [http://perma.cc/DJ25-XQSH] (declaring it “incontrovertible” that “Medicaid inadvertently helped finance America's immense and increasing appetite for opioids in our new century”). Others, however, argue that there is little data to support such a conclusion:

First, trends in opioid deaths nationally and by Medicaid expansion status predate the ACA. Second, counties with the largest coverage gains actually experienced smaller increases in drug-related mortality than counties with smaller coverage gains. Third, the fact that Medicaid recipients fill more opioid prescriptions than non-recipients largely reflects greater levels of disability and chronic illness in the populations that Medicaid serves.

Andrew Goodman-Bacon & Emma Sandoe, *Did Medicaid Expansion Cause The Opioid Epidemic? There's Little Evidence That It Did.*, HEALTH AFF. (Aug. 23, 2017), <http://www.healthaffairs.org/doi/10.1377/hblog20170823.061640/full> [http://perma.cc/4FCZ-S6GM].

¹¹⁹ Ashley Kirzinger et al., KAISER FAM. FOUND., *6 Charts About Public Opinion On The Affordable Care Act*, RAMAON HEALTHCARE (July 19, 2019), <http://ramaonhealthcare.com/6-charts-about-public-opinion-on-the-affordable-care-act/> [http://perma.cc/5KFN-8BTB] (“During Republican efforts to repeal the Affordable Care Act (ACA) during the summer of 2017, KFF Health Tracking Polls began to find a slight uptick in overall favorability towards the 2010 health care law.”).

¹²⁰ Goodnough, *supra* note 107.

¹²¹ Paige Winfield Cunningham, *The Health 202: Trump administration undermines anti-opioid efforts by opposing Obamacare*, WASH. POST (Mar. 28, 2019), <http://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/03/28/the-health-202-trump-administration-undermines-anti-opioid-efforts-by-opposing-obamacare/5c9ba06f1b326b0f7f38f28a/?noredirect=on> [http://perma.cc/2H7G-2CZK] (noting that a repeal of the ACA would “endanger the [federal government]’s anti-opioids effort by leaving around 25 million Americans without health coverage and removing the law’s requirements for insurers to cover substance abuse services as part of 10 essential health benefits”).

sufficient to make up for a repeal of the ACA.¹²² The major repeal proposals would have restructured Medicaid,¹²³ and many opponents of this effort argued that it would have resulted in a cut to safety-net, public-funded behavioral health programs and other state initiatives.¹²⁴ The Medicaid program, which provides federal matching dollars for state health services for low-income adults, provides the financial foundation for many substance misuse disorder programs.¹²⁵ Additionally, opponents of the repeal noted that eliminating the ACA would strike its requirement that substance abuse treatment be considered an essential benefit, as well as protect consumers from being discriminated against for having a pre-existing condition, such as a substance misuse disorder.¹²⁶

B. Criminal Justice Reform: FIRST STEP

In recent years, pundits have highlighted shifts in how some policymakers—particularly conservative ones—have approached criminal-justice issues and how the electorate has responded.¹²⁷ At the federal level, a meaningful attempt to address some of the punitive measures from the amended CSA took shape in 2015

¹²² Dylan Scott, *More opioid funding won't save the Senate health care bill*, VOX (June 29, 2017, 5:20 PM), <http://www.vox.com/policy-and-politics/2017/6/29/15895906/voxcare-bcra-opioid-funding-capito> [<http://perma.cc/T2R7-27HB>] (noting that one key Senator requested \$45 billion in specific funding for the opioid epidemic).

¹²³ CONG. RESEARCH SERV., COMPARISON OF THE AMERICAN HEALTH CARE ACT (AHCA) AND THE BETTER CARE RECONCILIATION ACT (BCRA), 11–22 (2017), <http://crsreportscongress.gov/product/pdf/R/R44883> [<http://perma.cc/C9AT-RRM6>].

¹²⁴ Marianna Sotomayor, *Trump signs sweeping opioid bill with vote to end 'scourge' of drug addiction*, NBC NEWS (Oct. 24, 2018, 1:51 PM), <http://www.nbcnews.com/politics/congress/trump-signs-sweeping-opioid-bill-vow-end-scourge-drug-addiction-n923976> [<http://perma.cc/L9UF-AWFY>] (quoting Pallone regarding SUPPORT, that it would be “disingenuous at best to promise relief to people struggling with opioid addiction while also attempting to cut funding for Medicaid and eliminate protections for people with pre-existing conditions, which include opioid use disorder”).

¹²⁵ Orgera & Tolbert, *supra* note 118.

¹²⁶ Reed Abelson et al., *What Happens if Obamacare Is Struck Down?*, N.Y. TIMES (Mar. 26, 2019), <http://www.nytimes.com/2019/03/26/health/obamacare-trump-health.html> [<http://perma.cc/A2K6-US4N>].

¹²⁷ Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, N.Y. TIMES (Aug. 20, 2019), <http://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [<http://perma.cc/N56G-Q7MD>] (discussing how previously “radical” ideas were being debated as part of the Democratic presidential nomination campaign due to “a seismic shift in how the American public views criminal justice issues,” but likely to be “used by President Trump and his allies to tar whoever becomes the Democratic nominee”). Additionally, several reforms have occurred at the state level, such as restoring voting rights in purple states, like Virginia and Florida. *See id.* (discussing a California initiative limiting the use of deadly force); *see also* Victoria Shineman, *Florida restores voting rights to 1.5 million citizens, which might also decrease crime*, CONVERSATION (Nov. 7, 2018, 2:05 AM), <http://theconversation.com/florida-restores-voting-rights-to-1-5-million-citizens-which-might-also-decrease-crime-106528> [<http://perma.cc/NK4R-P5BX>].

when a key Republican, the Senate Judiciary Chairman Chuck Grassley, agreed to introduce bipartisan legislation to reform federal sentencing laws.¹²⁸ But there was skepticism whether reform efforts would continue after the 2016 election ushered in the Trump Administration and a more conservative Congress.¹²⁹ Although polling found general public support for reforming federal sentencing laws for drug convictions,¹³⁰ the issue did not seem to have the same overt public outcry from the general public as addressing the opioid epidemic.¹³¹

An unusual coalition of disparate interests were able to maintain momentum for criminal justice reforms in the next Congress.¹³² These key discrete constituencies in the unusual political coalition provided the political cover necessary to overcome the “law and order” resistance against the modest

¹²⁸ See Antonio Ginatta, *Dispatches: Strange Bedfellows for US Criminal Justice Reform*, HUM. RIGHTS WATCH (Oct. 1, 2015, 5:09 PM), <http://www.hrw.org/news/2015/10/01/dispatches-strange-bedfellows-us-criminal-justice-reform> [<http://perma.cc/YM94-AR8L>].

¹²⁹ See Miriam S. Gohara, *Keep on Keeping On: Maintaining Momentum for Criminal Justice Reform During the Trump Era*, 14 STAN. J. C.R. & C.L. 1, 1 (2018), <http://law.stanford.edu/wp-content/uploads/2018/05/Gohara-05.28.18.pdf> [<http://perma.cc/N98T-RXZM>]; see also Bill Keller, *How Criminal Justice Reform Died*, VICE (Sept. 28, 2016, 9:00 PM), http://www.vice.com/en_us/article/yvewn7/how-criminal-justice-reform-died-bill-keller [<http://perma.cc/DVL4-CATT>] (discussing political campaigning during the 2016 election cycle and partisan concerns about giving the outgoing Obama Administration a victory); see also Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [<http://perma.cc/MF72-JZJ2>] (quoting a Republican Senator that the Republican leadership did not want the caucus to seem divided on a key issue, as well as noting that then-Republican presidential nominee Trump was campaigning on a “tough-on-crime” message).

¹³⁰ See *Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms*, COMM. ON JUD. (Aug. 23, 2018), <http://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms> [<http://perma.cc/DKC5-UG8C>]; see also *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <http://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<http://perma.cc/GT7R-87DR>].

¹³¹ See John Gramlich, *Voters' perception of crime continue to conflict with reality*, PEW RES. CTR. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality> [<http://perma.cc/AXG3-J4AB>] (“Almost eight-in-ten voters who supported President-elect Donald Trump (78%) said this, as did 37% of backers of Democrat Hillary Clinton” and believed that crime worsened between 2008 and 2016, although “U.S. violent crime and property crime rates fell 19% and 23%, respectively,” from 2008 to 2015); see also *Little Partisan Agreement on the Pressing Problems Facing the U.S.*, PEW RES. CTR. (Oct. 15, 2018), <http://www.people-press.org/2018/10/15/little-partisan-agreement-on-the-pressing-problems-facing-the-u-s> [<http://perma.cc/LX2A-GW9A>] (noting that while Democrats and Republicans shared similar views on whether “violent crime (49% of Republicans, 47% of Democrats) and drug addiction (67% of Republicans, 64% of Democrats)” were priority issues before the 2018 elections, “71% of Democratic voters say the way racial and ethnic minorities are treated by the criminal justice system is a very big problem for the country, compared with just 10% of Republican voters.”).

¹³² Ray Suarez, *Trump's Push For Prison Reform*, ON POINT (May 21, 2018), <http://www.wbur.org/onpoint/2018/05/21/trump-prison-reform> [<http://perma.cc/HW4H-3PSQ>].

reforms in FIRST STEP.¹³³ For instance, although President Trump campaigned¹³⁴—and continues to campaign¹³⁵—on a hardline message regarding “law and order,” and selected a conservative Attorney General known to oppose marijuana legalization and other reforms,¹³⁶ his embrace of FIRST STEP helped overcome some Senate Republicans’ reservations of supporting it.¹³⁷

¹³³ Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <http://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [http://perma.cc/8LHN-KMEX] (“The significant buy-in from the right is the culmination of years of effort from a cadre of libertarian-leaning conservatives, like the anti-tax zealot Grover Norquist, and evangelicals, such as Chuck Colson, the founder of the Christian nonprofit organization Prison Fellowship, who have worked to convince others that the prison system has become too costly, punitive, and government-empowering.”). See also Arthur Rizer & Lars Trautman, *The conservative case for criminal justice reform*, GUARDIAN (Aug. 5, 2018, 6:00 PM), <http://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> [http://perma.cc/SL6L-7AFW] (arguing why “conservatives must go back to the principles of liberty and dignity that first defined their party,” and apply “these principles to criminal justice reform”). Key influential conservatives were moved by the massive costs for maintaining a vast prison system with seemingly little effect on crime rates, SPILLANE & WOLCOTT, *supra* note 24, at 279 (noting “the high social costs of mass incarceration”), as well as an increasing policy presence—particularly by the federal government—that threatened individual liberties. See *Criminal Justice Reform*, CHARLES KOCH INST., <http://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> [http://perma.cc/493E-ECQU]. But see Keller, *supra* note 129 (arguing that the “spectacular mustering of bipartisan solidarity at a time of political polarization and paralysis . . . was not nearly as muscular as it seemed”).

¹³⁴ Hulse, *supra* note 129 (noting that Trump’s 2016 campaign included “warnings of a United States at risk from sinister forces, even though violent crime is low compared with past decades”).

¹³⁵ Christina Wilkie, *Trump praises ‘stop and frisk,’ calls for tougher policing tactics*, CNBC (Oct. 8, 2018, 4:06 PM), <http://www.cnbc.com/2018/10/08/trump-praises-stop-and-frisk-calls-for-tougher-policing-tactics.html> [http://perma.cc/7J96-DYTW]. In relation to the opioid epidemic, Trump seemingly called for the death penalty for drug trafficking. See Ayesha Rascoe, *How Trump Went From Tough on Crime’ To Second Chance’ For Felons*, NPR, MORNING EDITION (Dec. 17, 2018, 5:00 AM), <http://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons> [http://perma.cc/T82Z-HRK5] (quoting President Trump as suggesting “at some point, we’ll get very smart as a nation and give them the ultimate punishment”).

¹³⁶ Jordan Waldrep, *What Replacing Jeff Sessions As AG Means For Marijuana Legalization*, FORBES (Nov. 13, 2018, 8:28 AM), <http://www.forbes.com/sites/jordanwaldrep/2018/11/13/what-replacing-jeff-sessions-as-ag-means-for-marijuana-legalization/#1a138ae0103f> [http://perma.cc/2DAG-7J2K]. Most notably, during his tenure, Attorney General Jeff Sessions reversed the so-called Cole memo, which was guidance issued under the Obama Administration that permitted U.S. Attorneys to focus resources away from marijuana prosecutions in states where its use was permitted. See THE U.S. DEPT’ OF JUSTICE, *supra* note 2.

¹³⁷ Gohara, *supra* note 129. Trump’s son-in-law, Jared Kushner, whose father had served time in federal prison, is often credited for pushing Trump to support FIRST STEP. Rascoe, *supra* note 135. Trump’s embrace of FIRST STEP has led subsequently to strange confrontations over credit for its passage. See Jacey Fortin, *Trump Insults Chrissy Teigen and John Legend, and They Fire Back*, N.Y. TIMES (Sept. 9, 2019), <http://www.nytimes.com/2019/09/09/us/chrissy-teigen-trump-twitter.html> [http://perma.cc/N239-Q6RZ].

Despite this confluence of support, the legislative debate over FIRST STEP was quite divisive and reflective of different positions within conservative philosophy.¹³⁸ Passed shortly after SUPPORT and in the “lame duck” session following the midterm elections,¹³⁹ FIRST STEP represented a series of compromises, again paralleling some of the compromises between the Nixon Administration and the Democratic Congress over the CSA.¹⁴⁰

One of the bill’s Senate Republican sponsors even suggested revising the bill’s sentencing reforms to make it more palatable to opposing Senators.¹⁴¹ Such revisions included a new mechanism for allowing early release, a look at who would be eligible to participate in early release,¹⁴² and what penalties were appropriate for drug offenses.¹⁴³ Senator Tom Cotton, a Republican from Arkansas and the lead opponent of FIRST STEP, argued that the bill’s proponents were incorrect in their public statements as to how the bill would actually work.¹⁴⁴ In a series of opinion pieces outlining his opposition,¹⁴⁵ Cotton argued that the bill would allow a larger segment of felons than the proponents described to be able to seek early release.¹⁴⁶ Cotton

¹³⁸ Everett & Haberkorn, *supra* note 97. Given the limited window for debate on the Senate floor, Senate leaders are generally reluctant to bring up bills that divide their caucus and could delay other competing legislative priorities. Burgess Everett & Elana Schor, *Cotton wields sex offender report to tank prisons bill*, POLITICO (Nov. 26, 2018, 1:26 PM), <http://www.politico.com/story/2018/11/26/tom-cotton-criminal-justice-reform-senate-republicans-trump-1015149> [<http://perma.cc/HE92-RLEV>]. Further, in this particular situation, it was likely that the Senate would pass a bill different than what the House had passed earlier in the legislative session, and because a number of House Republicans were retiring or had been defeated in the 2018 election, it could be difficult to convince the House to remain in session to take up a new bill. *Id.*

¹³⁹ Burgess Everett & Elana Schor, *Criminal justice reform bill still alive as McConnell deliberates*, POLITICO (Nov. 29, 2018, 5:12 PM), <http://www.politico.com/story/2018/11/29/congress-criminal-justice-reform-senate-mcconnell-1032469> [<http://perma.cc/XYU9-7QC3>].

¹⁴⁰ See *supra* notes 21–57.

¹⁴¹ Elana Schor, *Criminal justice deal faces steep Senate hurdles despite Trump’s push*, POLITICO (Aug. 17, 2018, 5:08 AM), <http://www.politico.com/story/2018/08/17/senate-criminal-justice-deal-trump-781876> [<http://perma.cc/2N8F-KCWS>] (quoting Senator John Cornyn, “The sentencing reform stuff begins to divide people, including the administration.”).

¹⁴² First Step Act of 2018, Pub. L. No. 115-391, § 101, 132 Stat. 5193, 5196–98 (2018) (to be codified at 18 U.S.C. § 3632).

¹⁴³ *Id.* at 5220–21.

¹⁴⁴ Tom Cotton, *What’s Really in Congress’s Justice-Reform Bill*, NAT’L REV. (Nov. 26, 2018, 10:48 AM), <http://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/> [<http://perma.cc/VHV7-RWVP>].

¹⁴⁵ See *id.*; see also Tom Cotton, *Lame-duck Congress’ rush for criminal justice reform plan will hurt, not help*, USA TODAY (Nov. 15, 2018, 9:02 AM), <http://www.usatoday.com/story/opinion/2018/11/15/tom-cotton-congress-criminal-justice-reform-bill-opioids-laws-column/2003829002/> [<http://perma.cc/C4LY-2B26>].

¹⁴⁶ Cotton, *supra* note 144. For a response to Cotton’s argument that many early-released prisoners will commit felonies subsequently, see Zak Cheney-Rice, *Tom Cotton’s America Is Not a Free America*, N.Y. MAGAZINE (Dec. 13, 2018), <http://nymag.com/intelligencer/2018/12/toms-cotton-first-step-act.html> [<http://perma.cc/C3YF-3RWF>] (noting that Cotton’s arguments do not

also attacked granting federal judges more discretion to ignore mandatory minimum sentences for those with prior criminal records.¹⁴⁷ Lastly, Cotton invoked the opioid epidemic at least twice: he noted that “[m]ore than 90 percent of traffickers [of heroin and fentanyl] will be eligible for the time credits” toward an early release, and he argued that the bill would result in a repeat fentanyl trafficker potentially serving half of the prison sentence than would be required under current law.¹⁴⁸

In response, Senator Mike Lee, a Republican from Utah, defended FIRST STEP in a parallel editorial.¹⁴⁹ Lee noted that certain federal inmates could seek “pre-release custody—meaning home confinement, supervised release, or a halfway house.”¹⁵⁰ Lee reiterated that the bill explicitly would exclude certain categories of offenders, and only allows inmates to seek the new credits created by FIRST STEP if they are at a minimum or low risk of recidivism.¹⁵¹ Whereas Cotton argued that this determination of recidivism was too reliant on “government bureaucrats” and could be gamed by a future administration,¹⁵² Lee responded that the determinations would be made by “experienced law-enforcement officers.”¹⁵³ Lee also noted that FIRST STEP only granted discretion for federal judges to ignore mandatory minimums in limited circumstances; for instance, such discretion would not be available in cases where defendants “used or threatened violence or possessed a

distinguish between those in federal versus state prison, and thus incorrectly account for those “locked up for drug offenses” and recidivism rates).

¹⁴⁷ Cotton, *supra* note 144.

¹⁴⁸ *Id.*; see also Zezima & Itkowitz, *supra* note 73 (discussing how Senate leadership decided not to bring up a bill for consideration that would increase the sentence for fentanyl trafficking because of concerns that it “would clash with the effort and possibly imperil the bill’s [FIRST STEP’s] passage”).

¹⁴⁹ Mike Lee, *The Truth about the FIRST STEP Act*, NAT’L REV. (Nov. 27, 2018, 10:05 AM), <http://www.nationalreview.com/2018/11/the-truth-about-the-first-step-act/> [<http://perma.cc/VS48-EW6C>].

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Additionally, the Senate Judiciary Committee disputed Cotton’s arguments related to FIRST STEP’s treatment of sex offenders. See Everett & Schor, *supra* note 138 (referring to a committee spokesperson who distinguished between credits for good behavior under current law and changes made by FIRST STEP); see also *Summary of the Revised First Step Act*, *infra* note 156 (“Original text of the bill already excluded sex offenders.”).

¹⁵² Cotton, *supra* note 144 (“But this requires extraordinary faith in the government’s ability to predict the recidivism risk of violent felons. . . . But it is surprising to me that conservatives, and especially libertarians, have faith that government bureaucrats can judge the state of a felon’s soul and predict his future behavior. Even if you trusted the current administration to do so, would you trust a future Democratic administration?”).

¹⁵³ Lee, *supra* note 149; see also Salvador Rizzo, *Does the sentencing bill give early release to drug traffickers, sex offenders?*, WASH. POST (Nov. 30, 2018), <http://www.washingtonpost.com/politics/2018/11/30/does-sentencing-bill-give-early-release-drug-traffickers-sex-offenders/> [<http://perma.cc/2E3D-2U8F>] (discussing the “objective criteria and a point system to assess risk” used by the Bureau of Prisons).

firearm or other dangerous weapon, or if their offense resulted in serious bodily injury or death.”¹⁵⁴ Finally, Lee disputed Cotton’s determination of the time a fentanyl dealer would serve and the amount of qualifying activities such felons could participate in to reduce their sentences.¹⁵⁵

In the end though, the Senate adopted an amendment to FIRST STEP that addressed several of Cotton’s and other opponents’ arguments.¹⁵⁶ Although Cotton and his allies voted against FIRST STEP, it overwhelmingly passed the Senate¹⁵⁷ and then was agreed to by the House.¹⁵⁸

III. MARIJUANA IN THE SHADOW OF THE CSA

As Congress has debated responses to the opioid epidemic and whether to reform federal sentencing for drug offenses, there has been a related debate has been over the treatment of marijuana. Legalization of marijuana is seemingly popular with the electorate, and some policymakers have called for its legalization for medical purposes, and sometimes even recreational use, as well as forgiveness for prior drug offenses related to marijuana. Yet, even while change is happening rapidly at the state level, marijuana remains criminalized by the fifty-year-old CSA. This section will explore the movement at the state level toward legalization of marijuana, the failure to amend the CSA, and the conflict between state and federal law.

A. State Activity on Marijuana

As discussed previously, the federal government often plays a leadership role in influencing and standardizing states’ criminal laws.¹⁵⁹ For instance, when the CSA became law, the Nixon Administration promoted a Uniform Controlled Substances

¹⁵⁴ Lee, *supra* note 149.

¹⁵⁵ *Id.*

¹⁵⁶ See CONG. REC. (daily ed. Dec. 13, 2018) (Sen. McConnell proposing an amendment to S. 756); see also *Summary of the Revised First Step Act*, SENATE COMMITTEE ON JUDICIARY (Dec. 12, 2018), <http://www.judiciary.senate.gov/imo/media/doc/Revised%20First%20Step%20Act%20-%20Summary.pdf> [<http://perma.cc/EV3W-9CTA>]. In order to move quickly through the legislative process, the Senate amended an unrelated bill that had already passed the House with the modified version of FIRST STEP. In response, the House voted on a motion to concur with this Senate amendment, allowing the bill to move to the President for signature. *Summary: S. 756 (115th): S. 756: FIRST Step Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/115/s756/summary> [<http://perma.cc/B4DP-NT6N>] (last updated Dec. 18, 2018).

¹⁵⁷ U.S. S. ROLL CALL VOTE 271, 115th Cong., 2nd Session (passing 87 to 12).

¹⁵⁸ U.S. HOUSE ROLL CALL VOTE 448, 115th Cong., 2nd Session (passing 358 to 36).

¹⁵⁹ SPILLANE & WOLCOTT, *supra* note 24, at 234–35.

Act that eventually was adopted by the states.¹⁶⁰ Although several politicians in the 1960s adopted a tough-on-crime message to capitalize on a general concern about disorder,¹⁶¹ a public health approach to drug addiction also emerged as a competing policy option to criminalization.¹⁶² Additionally, increasing use of marijuana created some public skepticism about criminalizing drugs.¹⁶³ Thus, as aforementioned, advocates for each of these different policy options were able to find compromise in the initial CSA, but subsequently, policymakers amended the CSA and made other policy decisions that favored criminalization and interdiction over a public health approach to drug issues.¹⁶⁴

Advocates for reform, particularly for marijuana reform, looked for other avenues, such as popular referendums, as a means of bypassing resistant legislative majorities.¹⁶⁵ The first success was in California: after several legislative failures, advocates petitioned for a referendum on legalizing marijuana for medical purposes.¹⁶⁶ Advocates focused on the belief that marijuana could provide relief for those with terminal illnesses such as HIV and cancer.¹⁶⁷ Ultimately, in 1996, the referendum, Proposition 215, successfully passed 55% to 44%, making California the first state to legalize medical marijuana.¹⁶⁸ Subsequently, thirty-two more states and the District of Columbia have legalized medical marijuana, either through ballot initiatives or by traditional legislation.¹⁶⁹

Building on these successes, advocates have turned toward legalizing marijuana for recreational or “adult” use, and time will tell if this movement is as successful as efforts to allow for

¹⁶⁰ *See id.* (“Today, every U.S. state has passed this legislation [the Uniform Controlled Substances Act], ensuring that the federal government sets the terms of drug control.”).

¹⁶¹ *Id.* at 254–56.

¹⁶² *Id.* at 235 (discussing the “emerging influence of the mental health profession [as] an alternative approach to the problem of narcotics”); Ferraiolo, *supra* note 22, at 157 (discussing how “mental health professionals responsible for treating addicts gained a voice in policy debates”).

¹⁶³ SPILLANE & WOLCOTT, *supra* note 24, at 235 (“[W]idespread use of marijuana and narcotics created a reality that undermined [federal officials’] horror stories about them.”); Ferraiolo, *supra* note 22, at 157.

¹⁶⁴ It remains to be seen whether CARA, SUPPORT, and FIRST STEP, *supra* Part III, signify a divergence from this course or a temporary aberration.

¹⁶⁵ Ferraiolo, *supra* note 22, at 163.

¹⁶⁶ *Id.* at 163–65.

¹⁶⁷ *Id.* at 167–68.

¹⁶⁸ Proposition 215, *printed in* Cal. Sec’y State, California Ballot Pamphlet: General Election November 5, 1996, at 58 (1996).

¹⁶⁹ *State Medical Marijuana Laws*, NCSL (Sept. 27, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<http://perma.cc/9CBM-CEPH>].

medical marijuana. In 2012, voters in Colorado¹⁷⁰ and Washington¹⁷¹ passed ballot initiatives, making the two states the first to legalize marijuana for adult-use purposes. Subsequently, Alaska,¹⁷² California,¹⁷³ Illinois,¹⁷⁴ Maine,¹⁷⁵ Massachusetts,¹⁷⁶ Michigan,¹⁷⁷ Nevada,¹⁷⁸ Oregon,¹⁷⁹ and Vermont,¹⁸⁰ adopted adult-use policies, often with the expectation of raising state revenues while hoping to reduce enforcement efforts.

In addition to the divergence between medical and recreational use of marijuana, the approach used in each state toward legalization—particularly for recreational use—has varied as well.¹⁸¹

¹⁷⁰ COLO. CONST. amend. 64. A prior amendment, that would have decriminalized marijuana in 2006, had failed. *Colorado Votes In Favor Of Pot Legalization*, CBSDENVER (Nov. 6, 2012, 11:56 PM), <http://denver.cbslocal.com/2012/11/06/no-no-64-concedes-colorado-votes-in-favor-of-pot-legalization/> [<http://perma.cc/C3LH-FWN3>].

¹⁷¹ Initiative Measure 502 (Wash. 2012).

¹⁷² *A Summary of Measure 2, An Act to Tax and Regulate the use of Marijuana*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/states/alaska/a-summary-of-measure-2-an-act-to-tax-and-regulate-the-production-sale-and-use-of-marijuana/> [<http://perma.cc/RJ7W-RDUP>] (discussing successful 2014 ballot measure).

¹⁷³ CAL. CIV. CODE § 1550.5(a)(3) (West 2019) (explaining that AUMA, under the initiative Prop. 215, was enacted into the state legislature).

¹⁷⁴ 410 ILL. COMP. STAT. ANN. 705 (West 2019). Illinois is the first state to approve legal sales through the state legislature rather than a ballot measure.

¹⁷⁵ *As retail stores open across the state, regulators consider delivery, social consumption rules*, MARIJUANA POL'Y PROJECT (Aug. 12, 2019), <http://www.mpp.org/states/maine/> [<http://perma.cc/3W5U-S7HE>] (discussing successful 2016 ballot measure and the delays in implementation).

¹⁷⁶ *Historic victory: The 2016 Yes on 4 Campaign*, MARIJUANA POL'Y PROJECT (Aug. 12, 2019), <http://www.mpp.org/states/massachusetts/> [<http://perma.cc/69SH-HNA6>] (discussing successful 2012 ballot measure).

¹⁷⁷ *Marijuana Regulatory Agency publishes emergency rules to implement legalization*, MARIJUANA POL'Y PROJECT (July 22, 2019), <http://www.mpp.org/states/michigan/> [<http://perma.cc/NFE-QCBF>] (discussing successful 2018 ballot measure).

¹⁷⁸ *States increasingly looking to Nevada as a model*, MARIJUANA POL'Y PROJECT (Nov. 5, 2018), <http://www.mpp.org/states/nevada/> [<http://perma.cc/VY55-38YQ>] (discussing successful 2016 ballot measure).

¹⁷⁹ *The Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act: A Summary of Measure 91*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/states/oregon/summary-of-oregons-measure-91/> [<http://perma.cc/R9FH-2AMD>] (discussing successful 2014 ballot measure).

¹⁸⁰ Vermont became the first state to decriminalize, by legislation, the adult-use of marijuana by decriminalizing possession and limited cultivation of cannabis by adults twenty-one and older. *See Vermonters enjoy legal home-grown cannabis; bill to regulate retail sales passes Senate—House to take up bill in early 2020*, MARIJUANA POL'Y PROJECT (May 28, 2019), <http://www.mpp.org/states/vermont/> [<http://perma.cc/4MUY-9YSW>]. However, this state law did not set up a regulatory system for sales or production. Wilson Ring, *Vermont, New Hampshire Both Could Delay Marijuana Proposals*, CBS BOSTON (May 18, 2019, 2:35 PM), <http://boston.cbslocal.com/2019/05/18/vermont-new-hampshire-could-delay-recreational-marijuana-proposals/> [<http://perma.cc/9J78-GSB2>].

¹⁸¹ Ferraiolo, *supra* note 22, at 149 (“The growing willingness of policy entrepreneurs to invoke the initiative process may heighten political conflict between federal and state institutions and actors with divergent policy priorities.”).

Despite the apparent popularity of marijuana legalization,¹⁸² most states' legalization process came through ballot initiatives, not through legislation.¹⁸³ This difference is even starker in efforts around recreational marijuana. Of the states that have legalized recreational use, only Illinois¹⁸⁴ and Vermont¹⁸⁵ have done so via the legislative process, with high-profile legislative failures in the politically liberal states of Connecticut,¹⁸⁶ New Jersey,¹⁸⁷ New Mexico,¹⁸⁸ and New York.¹⁸⁹ While some opposition focused on oft-cited concerns about criminal activity, other political concerns included the impact on low-income communities and whether these communities would see the economic benefits of legalization.¹⁹⁰

¹⁸² Hartig & Geiger, *supra* note 13.

¹⁸³ A referendum, however, failed in North Dakota that would have legalized marijuana for adult use and expunged prior offenses automatically. *North Dakota Measure 3, Marijuana Legalization and Automatic Expungement Initiative (2018)*, BALLOTPEDIA, [http://ballotpedia.org/North_Dakota_Measure_3,_Marijuana_Legalization_and_Automatic_Expungement_Initiative_\(2018\)](http://ballotpedia.org/North_Dakota_Measure_3,_Marijuana_Legalization_and_Automatic_Expungement_Initiative_(2018)) [http://perma.cc/DY6Q-YXX2].

¹⁸⁴ 410 ILL. COMP. STAT. ANN. 705 (West 2019).

¹⁸⁵ Ring, *supra* note 180 (discussing how Vermont had decriminalized recreational use of marijuana, but had not yet passed a scheme for regulating such use).

¹⁸⁶ Ryan Holz, *Connecticut Joins Other Northeast States in Failing to Pass Recreational Marijuana Legislation in 2019*, JD SUPRA (June 14, 2019), <http://www.jdsupra.com/legalnews/connecticut-joins-other-northeast-97789/> [http://perma.cc/QDY8-PTMD].

¹⁸⁷ Ryan Hutchins et al., *Legal pot bill dead: New Jersey lawmakers to move ahead with 2020 referendum*, POLITICO (May 15, 2019, 11:57 AM), <http://www.politico.com/states/new-jersey/story/2019/05/15/marijuana-bill-dead-new-jersey-lawmakers-to-move-forward-with-referendum-1017330> [http://perma.cc/5FCC-CLZ4].

¹⁸⁸ N.M. MUT., *Recreational marijuana use in New Mexico could pass in 2020. Will your business be ready?*, ALBUQUERQUE BUS. FIRST (June 1, 2019), <http://www.bizjournals.com/albuquerque/news/2019/06/01/recreational-marijuana-use-in-new-mexico-could.html> [http://perma.cc/Z675-NSWT].

¹⁸⁹ Joseph Spector & Jon Campbell, *Why legalizing marijuana in New York failed, but decriminalizing it passed*, DEMOCRAT & CHRON. (June 21, 2019, 8:20 AM), <http://www.democratandchronicle.com/story/news/politics/albany/2019/06/21/why-legalizing-pot-new-york-failed-but-decriminalizing-passed/1521505001/> [http://perma.cc/5Z6T-TUGE].

¹⁹⁰ Vivian Wang, *Final Push to Legalize Pot Fails in New York*, N.Y. TIMES (June 19, 2019), <http://www.nytimes.com/2019/06/19/nyregion/marijuana-legalization-ny.html?module=inline> [http://perma.cc/6GWS-L8QK] (finding that suburban state senators might not have voted for the bill); Nick Corasaniti, *Effort to Legalize Marijuana in New Jersey Collapses*, N.Y. TIMES (Mar. 25, 2019), <http://www.nytimes.com/2019/03/25/nyregion/new-jersey-marijuana.html> [http://perma.cc/Z2TL-K38D] (noting that lawmakers were concerned about the public health impact on minority communities and “challenges faced by other states that have legalized cannabis, including how to keep the drug away from teenagers and prevent people from driving under its influence”); Vivian Wang & Jeffery C. Mays, *Black Lawmakers to Block Legalized Marijuana in N.Y. if Their Communities Don't Benefit*, N.Y. TIMES (Mar. 11, 2019), <http://www.nytimes.com/2019/03/11/nyregion/marijuana-legalization-african-americans.html?action=click&module=RelatedLinks&pgtype=Article> [http://perma.cc/B6MZ-CKQD] (noting that black legislators in New York would withhold support for an adult-use legislation bill unless they were “assured that some of that money will go toward job training programs, and that minority entrepreneurs will receive licenses to cultivate or sell the marijuana”).

B. Recent Federal Activity on Marijuana to Amend the CSA

In contrast to tremendous state activity following the California ballot initiative, little has changed in regard to marijuana at the federal level since the CSA passed some fifty years ago.¹⁹¹ The following subsection will provide a brief overview of federal actions, with a particular focus on federal enforcement of the CSA.

Although several high-profile members of Congress have introduced legislation on marijuana,¹⁹² there has been little movement on these proposals in either the Democratic-controlled House or Republican-controlled Senate.¹⁹³ The issue gaining attention in the 116th Congress is providing a “safe harbor” for financial institutions to do business with state-licensed marijuana companies and related providers.¹⁹⁴ The House passed the Secure And Fair Enforcement (“SAFE”) Banking Act,¹⁹⁵ while the Senate Banking Committee is considering marking up the same or similar legislation.¹⁹⁶ Some advocates, however, have

191 When a majority of states adopt a similar position—even if that position is in contrast to federal law—it can provide political cover for federal policymakers to amend federal law to be consistent with the states. Kim, *supra* note 16, at 94 (noting how state right-to-try laws helped usher a change to federal regulations around access to experimental drugs).

192 Justin Strekal, *4/20: Will Congress advance marijuana legislation in 2019?* HILL (Apr. 20, 2019, 9:00 AM), <http://thehill.com/opinion/civil-rights/439806-4-20-will-congress-advance-marijuana-legislation-in-2019> [<http://perma.cc/9HWV-KZVF>] (“As of this writing, members of Congress have introduced five separate bills to end the federal prohibition of marijuana. In addition, there are also more than half a dozen bills pending before Congress that seek to restrain the federal enforcement of cannabis prohibition in states that have reformed their marijuana laws.”).

193 See, e.g., Caitlyn Kim, *After Years of Stalemate, Federal Cannabis Legislation Finds Traction in Congress*, CPR (July 22, 2019), <http://www.cpr.org/2019/07/22/after-years-of-stalemate-federal-cannabis-legislation-finds-traction-in-congress/> [<http://perma.cc/EY8C-CPW5>]. The Marijuana Policy Project lists a dozen bills—with several having bipartisan support—in the current 116th Congress. See *Several marijuana-related bills filed in new Congress*, MARIJUANA POL’Y PROJECT (Sept. 25, 2019), <http://www.mpp.org/policy/federal/> [<http://perma.cc/5PR4-DUXJ>].

194 Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 620 (2016) (“In addition, anyone conspiring with or aiding and abetting those violating federal law are equally liable for a violation of federal law. This includes, at least in principle, anyone leasing space to marijuana businesses, working for or contracting with them, or providing basic services such as accounting, banking, financial, and legal services.”) (footnotes omitted).

195 H.R. 1595, 116th Cong. (2019) (passing the House by a vote of 321 to 103).

196 Zachary Warmbrodt, *Crapo plans landmark cannabis banking vote*, POLITICO (Sept. 13, 2019, 5:02 AM), <http://www.politico.com/story/2019/09/13/crapo-cannabis-banking-vote-1729925> [<http://perma.cc/5GHD-J7NM>] (noting the committee chairman’s interest “because of questions surrounding transactions with other businesses, like plumbers and hardware stores, that provide services to the marijuana industry”). Notably, Senator Mike Crapo of Idaho, the Banking Committee Chairman, represents a state that does not allow for either medical or recreational marijuana. *2020 medical marijuana ballot petition approved for circulation*, MARIJUANA POL’Y PROJECT (Aug. 15, 2019), <http://www.mpp.org/states/idahof> [<http://perma.cc/8KMU-8G2T>].

raised concerns about addressing the financial issues of the marijuana industry without also addressing some of the systemic issues caused by the federal criminalization of marijuana.¹⁹⁷

Congress has also intervened in the federal enforcement of the CSA. Given the supremacy of federal law, the Supreme Court has held that state legalization does not prohibit federal enforcement of the CSA, even on wholly intrastate activities, such as a patient growing a small amount of marijuana for personal consumption.¹⁹⁸ After receiving criticism on its policy on marijuana prosecutions,¹⁹⁹ the Obama Administration issued guidance in 2013 to federal prosecutors to exercise their discretion whether to prosecute marijuana cases in states with a robust regulatory system for legalized uses of marijuana.²⁰⁰ Subsequently in 2014, Congress included an amendment in an appropriations bill that prohibited the Justice Department from prosecuting those involved in state medical marijuana initiatives.²⁰¹ So far, Congress has continued to include the same funding restriction in the annual appropriations bill for the Justice Department.

IV. POLITICAL REALISM: LOOKING AT WHY MARIJUANA LEGALIZATION HAS FAILED AND ITS LESSONS

As discussed, given the changing attitudes toward drug policy and criminal justice, the changing state landscape on marijuana, and the popularity of legalizing it (at least medical purposes), it would seem that the time would be ripe for Congress to respond by amending the CSA, particularly in the Democratic-controlled House. Indeed, a key committee chairman claimed that marijuana legalization would be one of the first items on the majority's agenda,²⁰² but a month later, the Republican ranking member of

¹⁹⁷ See Natalie Fertig et al., *Advocates ask Pelosi, Hoyer to press pause on cannabis banking*, POLITICO (Sept. 18, 2019, 5:47 AM), <http://www.politico.com/newsletters/morning-cannabis-preview/2019/09/18/advocates-ask-pelosi-hoyer-to-press-pause-on-cannabis-banking-478449> [<http://perma.cc/4JTP-FFH9>]; see also Letter from American Civil Liberties Union et al., to Nancy Pelosi, Speaker, U.S. House of Representatives, and Steny Hoyer, Majority Leader, U.S. House of Representatives (Sept. 17, 2019), <http://www.politico.com/f/?id=0000016d-41d0-db25-a77d-5fd3acdc0000> [<http://perma.cc/YVV5-72WW>].

¹⁹⁸ *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

¹⁹⁹ Kamin, *supra* note 194, at 628–30 (discussing initial inconsistencies in the Obama Justice Department toward prosecution of marijuana cases).

²⁰⁰ Memorandum from James M. Cole, Deputy Att'y Gen. to U.S. Att'ys (Aug. 29, 2013).

²⁰¹ The amendment passed the House by a 219 to 189 vote on May 30, 2014, and was subsequently included in Section 538 of Division B (Commerce-Justice-Science) of the Consolidated and Further Continuing Appropriations Act, 2015 P.L. 113–235.

²⁰² Kyle Jaeger, *House Will Vote To End Federal Marijuana Prohibition Within Weeks*, *Key Chairman Says*, MARIJUANA MOMENT (Mar. 27, 2019), <http://www.marijuanamoment.net/house-will-vote-to-end-federal-marijuana-prohibition-within-weeks-key-chairman-says/>

the House Judiciary Committee complained of the lack of progress on the issue.²⁰³

Yet, change has only happened at the margins on the federal level, such as turning a blind eye to states' legalization activities. Here, I try to offer a few reasons why this process is so difficult, even under the best of circumstances.

A. Is the Public Ahead of Politicians?

Given the polling,²⁰⁴ observers might assume that the public is ahead of policymakers in being ready to advance marijuana legalization. This issue polls well in the general public, and when presented as a ballot measure, bypassing the politicians, legalization efforts have generally, but not always, been successful.²⁰⁵

But there are important caveats to this political assumption. First, ballot measures may fail to address some of the complex, historical issues related to equity that might be better handled through legislation. Even more telling, several states with progressive political environments have failed to pass legislation to legalize marijuana, suggesting that there still remain many barriers based on law, policy, politics, and equity that remain unresolved. High profile failures in New Jersey and New York are not necessarily about legalization itself, as that simple question—should adults be able to consume marijuana legally?—generally had common agreement in those legislatures. Rather, it is the more complex issue of whether communities that have been devastated by the legacy of the CSA should be able to share in the economic benefits that legal sales might bring.²⁰⁶

[<http://perma.cc/BC3L-Z8PR>] (interviewing House Rules Chairman, Jim McGovern, who predicted a vote on legislation to grant states an exemption from the CSA “in a relatively short time, within the next several weeks”).

²⁰³ Tom Angell, *Top GOP Congressman Presses Democratic Majority To Pass Marijuana Bill*, FORBES (Apr. 4, 2019, 10:03 AM), <http://www.forbes.com/sites/tomangell/2019/04/04/top-gop-congressman-presses-democratic-majority-to-pass-marijuana-bill/#1ef04b88faa9> [<http://perma.cc/QZ5P-8G4P>].

²⁰⁴ Hartig & Geiger, *supra* note 13.

²⁰⁵ See, e.g., Tom Angell, *Marijuana Won The Midterm Elections*, FORBES (Nov. 7, 2018, 11:10 AM), <http://www.forbes.com/sites/tomangell/2018/11/07/marijuana-won-the-midterm-elections/#453589c93a91> [<http://perma.cc/8W7F-BQFD>] (“[O]ne clear winner in the midterm elections was marijuana.”). *But see North Dakota Measure 3, Marijuana Legalization and Automatic Expungement Initiative*, *supra* note 183 (noting the failure of a referendum in North Dakota).

²⁰⁶ Wang, *supra* note 190 (noting a disagreement between legislators and the New York governor over how to invest any revenue derived from recreational sales with one legislator arguing, “I’m not willing to create a market that will allow existing wealthy people to gain wealth and leave out the people that I represent.”).

Second, while polling suggests general support, there are differences based on partisan identification and religious affiliation that make it less likely that Republicans would support legalization efforts.²⁰⁷ For instance, a 2018 Pew poll found that, while the overall public supported legalization 62% to 34%, Republicans were far less likely to support it than Democrats and even independents who generally leaned in favor of Republican policies.²⁰⁸ Further, white Evangelicals and Catholics were more likely to oppose legalization while “mainline” Protestants and unaffiliated individuals were more likely to support it.²⁰⁹ Similarly, a poll in New York, shortly after the legalization effort failed, found that, while a majority of the public (55% to 40%) supported such a policy, most Republican voters opposed it (40% to 53%).²¹⁰

Thus, while states may be reforming their marijuana laws, those activities have not necessarily translated to an active debate in Congress.²¹¹ In part, that is because the means of pursuing policy change are not the same at the federal level as in the states.²¹²

B. Difficulties Building an Evidence Base for Policy Changes

Another issue is that policy decisions around marijuana are often being made without strong scientific evidence because of how the CSA classifies marijuana as a Schedule I drug. Rather, states are looking at other states’ experiences with marijuana legalization to learn about best practices and unforeseen issues.²¹³

²⁰⁷ See, e.g., Warmbrodt, *supra* note 196 (noting that Banking Committee Chairman Crapo is open to considering legislation allowing banks to work with marijuana businesses, but does not support amending the CSA to legalize marijuana).

²⁰⁸ Hartig & Geiger, *supra* note 13 (“Republicans are divided, with 45% in favor of legalizing marijuana and 51% opposed. Still, the share of Republicans saying marijuana should be legal has increased from 39% in 2015. Independents who lean toward the Republican Party are far more likely than Republicans to favor marijuana legalization (59% vs. 45%).”).

²⁰⁹ *Id.* (surveying Evangelicals (52% opposed, 43% support), Catholics (44% opposed, 52% support), white mainline Protestants (31% opposed, 64% support), unaffiliated (19% opposed, 79% support)).

²¹⁰ *Voters on End of Session Agenda: ‘Yes’ on Marijuana (55-40%)*, SIENA C. RES. INST. (June 10, 2019), <http://scri.siena.edu/2019/06/10/voters-on-end-of-session-agenda-yes-on-marijuana-55-40/> [<http://perma.cc/8UFY-93BJ>].

²¹¹ Collective state action may be the catalyst for change at the federal level. See, e.g., Kim, *supra* note 16, at 102 (discussing how, after a majority of states passed language authorizing a “right to try” experimental drugs, Congress entered into the policy space to pass a federal version of such a “right”).

²¹² Ferraiolo, *supra* note 22, at 171 (“Policy change in the states has not led to federal reform. Rather, two factors—the ballot initiative (which provided a means for public opinion to be heard and invoked) and policy entrepreneurs’ framing efforts (which emphasized a medical, compassionate image of marijuana and its users)—have allowed the coexistence of two different policy images and approaches.”).

²¹³ J.B. Wogan, *For This Pot Guy, States Are His Biggest Customers*, GOVERNING (Aug. 2017), <http://www.governing.com/topics/mgmt/gov-marijuana-colorado-andrew->

But while the economics of legalization are becoming better known, the CSA restricts research. The National Academy of Medicine (“NAM”) noted in a literature review:

[The] growing acceptance, accessibility, and use of cannabis and its derivatives have raised important public health concerns. Moreover, the lack of any aggregated knowledge of cannabis-related health effects has led to uncertainty about what, if any, are the harms or benefits from its use. . . . As laws and policies continue to change, research must also.²¹⁴

Efforts to expand medical research are slowly moving forward in response to the NAM concern. In 2016, the DEA called for applications from marijuana growers to become licensed medical researchers.²¹⁵ Approval of these applications stalled under then-Attorney General Sessions,²¹⁶ but Attorney General Barr since has announced that the DEA has resumed reviewing the applications.²¹⁷ Some hope that other parts of the federal government are taking actions that suggest they may becoming more receptive to marijuana research.²¹⁸

Such research could be useful in validating prior studies, helping consumers,²¹⁹ and making informed policy decisions—especially

freedman-states-regulation.html [http://perma.cc/H5WT-C29T] (“[A]fter voters approve a marijuana measure, officials look for advice from the few places with some experience in taxing and regulating legal marijuana” with Colorado “field[ing] calls from more than 25 states asking for guidance.”).

²¹⁴ *Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report*, NAT’L ACAD. SCI. (Jan. 12, 2017), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625> [http://perma.cc/2BHG-LCX2].

²¹⁵ Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States, Drug Enforcement Administration, 81 Fed. Reg. 53846 (Aug. 12, 2016).

²¹⁶ See Jeffrey Miron, *Jeff Sessions Stonewalls Permission for Medical Marijuana Research*, CATO INST. (July 12, 2018, 11:30 AM), <http://www.cato.org/blog/jeff-sessions-stonewalls-permission-medical-marijuana-research> [http://perma.cc/3WSK-33UL].

²¹⁷ Sara Brittany Somerset, *The DEA Is Rewriting Obama’s Federal Cannabis Regulations*, FORBES (Aug. 28, 2019, 2:53 PM), <http://www.forbes.com/sites/sarabrittanyosomerset/2019/08/28/the-dea-has-rewritten-obamas-federal-cannabis-regulations/#6d7701553dae> [http://perma.cc/9TGG-MAVM] (noting the difficulties in qualifying because manufacturers that already process marijuana in state-licensed arrangements cannot become federally qualified producers).

²¹⁸ Compare Hoffmann, *supra* note 52 (“[T]he first time that the FDA has found the marijuana plant, in this case an extract, has an accepted medical use.”), with Jerome Adams, *Marijuana Use & the Developing Brain*, HHS (Aug. 29, 2019), <http://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html> [http://perma.cc/74LM-CNWN] (“Science-based messaging campaigns and targeted prevention programming are urgently needed to ensure that risks are clearly communicated and amplified by local, state, and national organizations.”).

²¹⁹ See, e.g., Bridget Small, *Serious health claims for CBD products need proof*, FED. TRADE COMMISSION CONSUMER INFO. (Sept. 10, 2019), http://www.consumer.ftc.gov/blog/2019/09/serious-health-claims-cbd-products-need-proof?utm_source=govdelivery [http://perma.cc/5BT9-3CCB] (issuing a warning against three companies for making health claims about products containing cannabidiol (“CBD”), a chemical compound derived from the cannabis plant).

policymakers looking to amend marijuana policy as a means of addressing the opioid epidemic. For instance, in 2014, researchers found:

States with medical cannabis laws had a 24.8% lower mean annual opioid overdose mortality rate . . . compared with states without medical cannabis laws. Examination of the association between medical cannabis laws and opioid analgesic overdose mortality in each year after implementation of the law showed that such laws were associated with a lower rate of overdose mortality that generally strengthened over time²²⁰

The study became widely used in justifying legalization, not only domestically, but even internationally.²²¹ Others, though, argue that “marijuana is a companion drug rather than substitution drug and that marijuana use may be contributing to the opioid epidemic rather than improving it”—something that could be worrisome if ultimately correct.²²² Thus, reflecting the 2017 NAM position, some researchers worried:

For many reasons, ranging from significant barriers to research on cannabis and cannabinoids to impatience, cannabis policy has raced ahead of cannabis science in the United States. For science to guide policy, funding the aforementioned studies must be a priority at the federal and state level. Many companies and states (via taxes) are profiting from the cannabis industry while failing to support research at the level necessary to advance the science. This situation has to change to get definitive answers on the possible role for cannabis in the opioid crisis, as well as the other potential harms and benefits of legalizing cannabis.²²³

C. Different Faces Produce Different Laws and Policies

The prior two sections raised some fundamental questions about the legacy of the CSA and our country’s approach to the opioid epidemic and lingering resistance to reforming marijuana policy. At a time when policymakers seem to be more sympathetic

²²⁰ Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, 174 JAMA INTERNAL MED. 1668, 1668 (2014).

²²¹ Brittany Flaherty, *Legalizing medical cannabis reduces opioid overdose deaths? Not so fast, new study says*, STAT (June 10, 2019), <http://www.statnews.com/2019/06/10/legalizing-medical-marijuana-opioid-overdose-deaths/> [<http://perma.cc/552B-YDZ3>] (quoting a researcher in Australia that the 2014 study has “been cited in my own country as compelling evidence that medical cannabis reduces opioid overdose deaths”).

²²² Kenneth Finn, *Why Marijuana Will Not Fix the Opioid Epidemic*, 115 MO. MED. 191, 193 (2018), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140166/pdf/ms115_p0191.pdf [<http://perma.cc/CF29-GYFL>].

²²³ Kevin P. Hill et al., *The Role of Cannabis Legalization in the Opioid Crisis*, 178 JAMA INTERNAL MED. 679, 680 (2018).

to addiction issues and rethinking sentencing for drug offenses, why has it proven difficult to rethink the CSA's approach to marijuana?

The same issues continue to repeat themselves: there is a segment of society that is uncomfortable with the criminalization of drug use and addiction, just as there is a segment of society that associates drug use with criminal elements and deviant behavior.²²⁴ Moreover, there is a long history of associating those criminal elements with the poor, minorities, and the youth, and this history parallels the move to amend the CSA towards a law enforcement approach rather than a public health approach.²²⁵

In this light, CARA, SUPPORT, and FIRST STEP seem like an aberration, not a change in course, because the policy response is due to the face of who was affected initially by the opioid epidemic: an older, whiter, and male demographic.²²⁶ Additionally, many of these individuals became addicted, not by choice, but because of failures in our healthcare system. Adding to this sympathy, some conservative commentators wrote:

America's nationwide opioid epidemic has *not* been accompanied by a nationwide crime wave (excepting of course the apparent explosion of illicit heroin use). Just the opposite: As best can be told, national victimization rates for violent crimes and property crimes have both reportedly dropped by about two-thirds over the past two decades.²²⁷

V. CONCLUSION

It is true that many of the contenders for the Democratic presidential nomination support legalization of marijuana, and thus could try to initiate the regulatory process in order to change how it is regulated under the CSA.²²⁸ But in looking at this

²²⁴ SPILLANE, *supra* note 17, at 23 (“[T]wo general and competing models emerge—the ‘deviance’ and ‘victimization’ models of drug abuse.”).

²²⁵

To the extent that drug offenders are perceived negatively, undeserving of assistance, and deserving of punishment, drug policies are likely to reflect and perpetuate these sentiments. Insofar as the population identified with drug use overlaps with other populations—racial minorities and the poor—who are *already* viewed as threatening to social order, then punitive policies can appear justified.

Neill, *supra* note 64, at 377.

²²⁶ Rudd, *supra* note 76, at 1450 tbl.2.

²²⁷ Eberstadt, *supra* note 118. *But see* German Lopez, *Why the opioid epidemic may have fueled America's murder spike*, VOX (Feb. 6, 2018, 10:30 AM), <http://www.vox.com/policy-and-politics/2018/2/6/16934054/opioid-epidemic-murder-violent-crime> [<http://perma.cc/PR6G-4JMB>] (noting that as the opioid epidemic shifts from prescription drug misuse to use of illicit drugs, such as heroin, it may be related to an increase in the murder rate because of violence associated with illegal drug trafficking).

²²⁸ See Paul Demko et al., *How Democrats are failing on legalized marijuana*, POLITICO (May 19, 2019, 7:15 AM), <http://www.politico.com/story/2019/05/19/democrats-marijuana-legalization-1331710> [<http://perma.cc/DNA9-4NW7>] (noting that the overwhelming

exercise as a matter of a legislative initiative for purposes of this symposium, the bottom line, of course, is whether change will occur via Congress. Does the passage of CARA, SUPPORT, and FIRST STEP mean something for marijuana reform and a return to the bipartisan compromise that the CSA was initially built upon?

In looking at the politics behind those bills, I would answer no. Personally, I do believe that the tide is turning on reforming federal law and policy related to marijuana, but as I have argued here, I believe while change is in the future, I do not believe change—particularly if we focus solely on change via Congress—is on the immediate policy horizon yet. Despite well-welcomed changes in the politics and public perception of addiction, these are not enough yet to overcome well-worn attitudes and presumptions in law and politics.



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The Unnecessary Implied Warranty of Fitness for a Particular Purpose

*Robert D. Brain**

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I. INTRODUCTION

You own a dry cleaner shop.¹ In the winter, it gets cold, both for your employees and your customers. But, you have a commercial steamer that has a lot more capacity to produce steam than you ask of it. Maybe you can use that excess steam to run a heater and keep everybody warm.

So, you contact a commercial heating company and explain that you want a heating system that will run off of the excess steam produced by your existing equipment. The owner of the heating company, Pat, comes to your shop, takes some measurements, does some calculations, and recommends a heating system for you.

You sign a contract for the system Pat recommended, looking only to see that the amount you are going to pay and the installation dates are what were agreed upon. You don't notice that there is no promise about the heating system being able to be powered by your existing equipment, because, well, Pat seemed to know what he was doing and you are sure Pat understood what you wanted. And anyway, you're not a lawyer. But when the system gets installed, it turns out it needs more steam to work properly than your steam machine can produce.

You sue the heating company, saying there was a breach of warranty. After all, you told Pat your requirements for the heating system and he suggested and installed one thereafter. Pat's lawyers, however, point out that there was a clause in the contract that disclaimed the warranty of fitness for a particular purpose. You ask your lawyer about it and she says she will fight for you, but Pat's lawyers have a point. She explains if *Pat* had articulated a promise to provide you with a heating system that would be powered by your existing equipment, then Pat would have made an "express warranty"² and the disclaimer in the contract would be inoperative.³ But because *you* said you wanted a heating system that would be powered by your existing equipment, and Pat just recommended a particular unit knowing you were relying

¹ This hypothetical is based on *Thorman v. Polytemp, Inc.*, 1965 WL 8338, 2 U.C.C. Rep. Serv. 772, 774 (N.Y. Cty. Ct. May 11, 1965). For a discussion of the case in greater detail, see *infra* notes 109–115 and accompanying text.

² There would be an express warranty in this situation because the seller would have made an "affirmation of fact" about the heating system, which became part of the "basis of the bargain." See *infra* note 11 for the text of U.C.C. § 2-313, which codifies the requirements to establish an express warranty, and see *infra* note 13 for a discussion of the meaning of the "basis of the bargain."

³ This is the dictate of U.C.C. § 2-316(1), see *infra* text accompanying note 126.

on his recommendation, what you got is what is called a “warranty of fitness for a particular purpose,”⁴ which *can* be disclaimed.⁵

You shake your head and argue that Pat *did* promise to install a system that met your needs—he heard what your needs were, and recommended, sold, and installed such a system. Aren’t Pat’s acts the same as a promise that the product Pat recommended would meet your needs? Your lawyer counsels that it might seem that way to a lay person, but in the law, there is a difference on which warranty you get depending on who first brings up the attribute of the good that constitutes the warranty. And the effectiveness of a disclaimer depends on that as well. You tell your lawyer such distinctions are ridiculous, and the law is an ass if the outcome of your case really turns on who mentions first “the attribute of the good that constitutes the warranty.” You are right.

The premise of this Article is that implied warranty of fitness for a particular purpose, formed in the English common law and now codified in U.C.C. § 2-315,⁶ should be eliminated from Article 2 and American common law.⁷ Not because the

⁴ There would be a warranty of fitness for a particular purpose in this situation because the seller had “reason to know [of the] particular purpose for which the goods [were] required,” and knew that the “buyer [was] relying on the seller’s skill or judgment to . . . furnish suitable goods.” See *infra* note 6 for the text of U.C.C. § 2-315, which codifies the requirements to establish a warranty of fitness.

⁵ This is the dictate of U.C.C. § 2-316(2) and (3), see *infra* text accompanying notes 105–108.

⁶ The current version of U.C.C. § 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017). The provision has been adopted in the commercial codes of all jurisdictions that have fully adopted the U.C.C. See *infra* note 77.

⁷ For clarification, this article is not discussing the property law version of the warranty of fitness for a particular purpose. In property law, the “warranty of fitness for a particular purpose” derives from *Ingalls v. Hobbs*, 156 Mass. 348 (1892), and applies solely to short-term rentals of furnished residential space. The modern implied warranty of habitability developed out of the warranty of fitness for a particular purpose, but the latter has survived alongside the warranty of habitability. The requirements of the doctrine of constructive eviction are not generally a prerequisite for termination of the lease if there is a breach of the warranty of fitness for a particular purpose, even in states in which such requirements must be met to permit termination as a remedy for breach of the warranty of habitability. On the other hand, this Article focuses on the warranty of fitness quality warranty that is generated upon a sale of goods. This Article also does not deal with the warranty provisions of the United Nations Convention for the International Sales of Goods (1980) (“CISG”), which are principally contained in Article 35 of the CISG. However, the if the premise of the Article were adopted by the CISG drafters, Article 35(2)(b), dealing with goods “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract” would be deleted. In its stead, cases that would have previously been decided under Article 35(2)(b) would instead

warranty fails to protect important interests—it does. And not because the plaintiffs who recover under it are not worthy—they are. Rather, the implied warranty of fitness should be eliminated from the Code because the factual situations which give rise to it are more properly analyzed as express warranty claims, thus making the warranty unnecessary.

In addition to the benefits of aligning the legal issue with its proper theory, eliminating the warranty and analyzing fitness cases as express warranty problems will also solve various practical and theoretical problems that have dogged the implied warranty of fitness for decades. These include: (1) eliminating the differential treatment as to warranty disclaimers between express and implied fitness warranties, as discussed above, and installing a more equitable and pro-consumer doctrine in its stead;⁸ (2) abolishing the conundrum that has bedeviled courts and practitioners for almost a century, regarding the proper implied warranty to be alleged and proven where the “ordinary purpose” of a good is claimed to be the buyer’s “particular purpose”;⁹ and (3) installing a proper parol evidence rule analysis when what is currently a fitness warranty is involved.¹⁰

This Article has three major substantive parts. Part II explains why the proper theory for fitness problems is through an express warranty theory. Part III traces a brief history of the fitness warranty in the King’s courts, demonstrating that even from its inception, express warranty was the proper theory to resolve fitness issues. In fact, the judges who decided the inaugural case ushering in the implied warranty of fitness held that the express warranty was the proper theory to decide the case. Part IV explains some beneficial collateral consequences of subjecting fitness problems to the express warranty analysis, including resolving some persistent failings of the Code that have long plagued courts and practitioners dealing with the fitness warranty. Finally, an appendix is attached, with suggested edits to the U.C.C. to bring about the changes suggested by this Article.

be adjudicated under Article 35(1), which requires a seller to deliver “goods which are of the quantity, quality, and description required by the contract”

⁸ For a further explanation and discussion of the disclaimer issue, see *infra* Part IV(B).

⁹ For a further explanation and discussion of the confusion about the proper warranty when the ordinary purpose and particular purposes are coincident, see *infra* Part IV(A).

¹⁰ For a further explanation and discussion of the parol evidence rule issue, see *infra* Part IV(C).

II. WHY A "FITNESS" WARRANTY IS REALLY AN EXPRESS WARRANTY

Perhaps the best way to explain why the express warranty provision is the correct analytical framework for what would currently be a warranty of fitness case, is by illustration:

Situation I: A buyer walks into a dive shop. She walks over to the section of the store that sells watches and says to the storeowner, "My dive watch broke and I'm looking for a replacement." The owner replies, "I like the Acme 200. It's what I use. It stays watertight down to 200 feet." He then selects a new Acme 200 from the display case and hands it to her. The buyer says, "I've been doing some deeper diving lately, so a watch that will be watertight down to 200 feet is just what I need. I'll take your recommendation." She then purchases the watch and takes it on her next dive.

Situation II: The same buyer walks into the same store, and tells the same owner, "My dive watch broke and I am looking for a replacement. I've been doing some deeper diving lately, so I need a watch that will stay watertight down to 200 feet. What do you recommend?" The owner says, "I like the Acme 200. It's what I use," and selects a new Acme 200 from the display case and hands it to the buyer. She responds, "I'll take your recommendation." She then buys the watch and takes it on her next dive.

Traditional warranty law would say that an express warranty is created in Situation I, because there is an "affirmation of fact" by the seller which "relates to the goods" and which "becomes part of the basis of the [sales] bargain."¹¹ On the

¹¹ U.C.C. § 2-313 provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313.

other hand, warranty law would say that an implied warranty of fitness for a particular purpose is created in Situation II, because “the seller at the time of contracting ha[d] reason to know” of the “particular purpose for which the [watch was] required” and because “the buyer . . . rel[ied] on the seller’s skill or judgment to select or furnish suitable goods.”¹² This analytical distinction is nonsense.

Legally, the two situations produce the same contract. In both situations, the law should (and does) protect the buyer’s legitimate expectation of acquiring a watch that will stay watertight down to 200 feet and has a claim against the seller if it does not. As such, the two situations should be analyzed identically, and, as explained below, the express warranty theory is the proper framework for such analysis.

The only *factual* difference between the two situations is that the seller in Situation I initially mentions the warranted attribute of the good, whereas the buyer mentions the warranted attribute of the good in Situation II. However, in both situations, at the time of sale, it can be fairly said that: (1) the seller has promised the buyer that the watch will be watertight down to 200 feet; and (2) the buyer was relying on that promise in deciding to purchase the watch.¹³ As such, both situations should be analyzed and interpreted the same way, namely by protecting

¹² *Id.* § 2-315.

¹³ Of course, there is some disagreement whether the buyer must show reliance in order to recover for an express warranty due to a disagreement over the meaning of the term “basis of the bargain” in the statute. While many courts view the term as a synonym for reliance, see, for example, *Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980) (“The requirement that a statement be part of the basis of the bargain in order to constitute an express warranty ‘is essentially a reliance requirement’” (quoting *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977), *aff’d*, 568 F.2d 770 (3d Cir. 1978))), others believe it means only that the affirmation regarding the attribute of the good need only be said during the bargaining process. See, e.g., *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983) (stating that a showing of reliance is not necessary to give rise to express warranties); see also *Daughtrey v. Ashe*, 413 S.E.2d 336, 338 (Va. 1992) (“In our opinion, the ‘part of the basis of the bargain’ language of Code § 8.2–313(1)(b) does not establish a buyer’s reliance requirement. Instead, this language makes a seller’s description of the goods that is not his mere opinion a representation that defines his obligation.”). There are even some who believe it shifts the burden to the seller to prove there was no reliance. See, e.g., *Hauter v. Zogarts*, 534 P.2d 377, 383–84 (Cal. 1975). See generally Steven Z. Hodaszy, *Express Warranties Under the Uniform Commercial Code: Is There a Reliance Requirement?*, 66 N.Y.U. L. REV. 468, 475–84 (1991); J. David Prince, *Defective Products and Product Warranty Claims in Minnesota*, 31 WM. MITCHELL L. REV. 1677, 1687–90 (2005). The point here, however, is not to argue for the correctness of any one of these views, but rather to establish that the analysis of the contracts arising from Situation I and Situation II should be the same in this regard. At most, a buyer in any jurisdiction would have to establish reliance, which is shown in both Situations I and II. In addition, if a jurisdiction would not require reliance on the part of the buyer to form an express warranty in Situation I, it should not require a greater showing to find an enforceable promise of water tightness in Situation II.

in the same manner the expressed attribute of the good that is an important part of the parties' bargain.

One of the problems in how the law currently approaches fitness cases is that it labels the warranty involved as an "implied" warranty. Analytically, it makes sense to call the implied warranty of *merchantability*, set forth in U.C.C. § 2-314, an "implied" warranty,¹⁴ for what is implied in establishing the merchantability warranty is the warranty itself. That is, no party has to promise or request during the bargaining process that the good will be "fit for the ordinary purposes for which such goods are used,"¹⁵ or be "of fair [and] average quality within the description,"¹⁶ or "pass without objection in the trade under the contract description"¹⁷—which are some of the statutory definitions of merchantability. The parties do not need to utter such terms because, unless disclaimed, those terms are implied-in-law and become part of the contract with a merchant seller *sub silentio*.

On the other hand, with a fitness warranty, the warranted attribute of the good—that the watch is waterproof down to 200 feet in Situation II above—is expressly stated, albeit initially by the buyer. What is implied is the seller's adoption or ratification of the attribute specified by the buyer, i.e., that the seller willingly "stands behind" or vouches for the attribute. However, under any view of normative bargaining, such adoption is fairly attributed to the seller by his or her actions and words. Indeed, the entire warranty of fitness is dependent upon the act of the

¹⁴ U.C.C. § 2-314 provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and
 (b) in the case of fungible goods, are of fair average quality within the description; and
 (c) are fit for the ordinary purposes for which such goods are used; and
 (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 (e) are adequately contained, packaged, and labeled as the agreement may require; and
 (f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-314.

¹⁵ *Id.* § 2-314(2)(c).

¹⁶ *Id.* § 2-314(2)(b).

¹⁷ *Id.* § 2-314(2)(a).

seller in providing a good that meets the buyer's "particular [expressed] purpose." Therefore, in contractual terms, the "implied" part of the implied warranty of fitness arises from an implied-in-fact contract, or one which "arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words."¹⁸ Although it may initially seem that identifying a fitness warranty as an *implied-in-fact* contract may argue against analyzing it as an *express* warranty, just the opposite is true. This is because, analytically, the law treats implied-in-fact contracts identically with express contracts.¹⁹ Further, the notion that an act can have a communicative quality is well established in the law; for example, in waiver and hearsay cases.²⁰ Thus, no "analytical stretch" is necessary to look at fitness situations through the express warranty lens. In fact, the law, and the history of the warranty itself, command it. It is to the latter we turn next.

III. HOW DID WE GET HERE? A BRIEF HISTORY OF THE FITNESS WARRANTY

An appropriate place to start tracing the history of the fitness warranty is the beginning of the nineteenth century, during the time of the Industrial Revolution.²¹ English common law of contract had incorporated the concept of consideration for about a century,²² and contract claims were being brought in

¹⁸ 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2007).

¹⁹ *Weitzenkorn v. Lesser*, 256 P.2d 947, 959 (Cal. 1953) ("The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct. . . . Under the theory of a contract implied in fact, the required proof is essentially the same as under the first count upon express contract, with the exception that conduct from which the promise may be implied must be proved.").

²⁰ See *e.g.*, *United States v. Abou-Saada*, 785 F.2d 1, 8 (1st Cir. 1986) ("We agree . . . that [Defendants'] pointing amounts to hearsay, for it is conduct intended as an assertion."); *People v. Zollbrecht*, 548 N.Y.S.2d 380, 384 (N.Y. Cty. Ct. 1989) ("The Court . . . finds that Mr. Sannicandro's statements made by way of a deliberate blinking of his eyes at a time when he was incapable of verbally communicating are admissible."); *Marles v. State*, 919 S.W.2d 669, 671 (Tex. App. 1996) ("Many nonverbal actions of a defendant at the time of arrest are relevant and admissible."); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:28 (4th ed. 1990) (stating that intention to waive nonperformance of a condition under the Restatement Second of Contracts § 84 may be inferred from the waiving party's actions).

²¹ BRUCE MAZLISH, *THE FOURTH DISCONTINUITY: THE CO-EVOLUTION OF HUMANS AND MACHINES* 64 (1993) ("All of these developments were rooted, if one can use that organic term, in the swelling movement toward mechanization characteristic of the Industrial Revolution. Of course, that revolution drew upon earlier developments, both technical and conceptual. Only the degree and sweep of what happened in the Western world in the period from around 1760 to 1850 justifies the use of the term *revolution*.").

²² 8 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 7 (1925) ("[T]he leading characteristics of consideration . . . emerged in the sixteenth and seventeenth centuries . . .").

assumpsit.²³ Express warranties were well recognized,²⁴ and mostly in the form we have today.²⁵

At the turn of the nineteenth century, *caveat emptor* was still a guiding mercantile principle,²⁶ and because of it, the courts held there was no need for *any* implied warranty—whether merchantability or fitness.²⁷ That is, if the bread was moldy or the cloth too sheer for making a coat, the law assumed buyers would have noticed these defects during the bargaining process, and if they did not, well, that was their “tough luck.” However, as commercial opportunities increased during the Industrial Revolution, English sellers progressively stopped being peripatetic, for they did not have to travel to foreign countries to purchase goods and bring them back to England, a la Marco Polo.²⁸ Instead, they ordered goods from foreign suppliers without first seeing them, or having seen only a sample.²⁹ Rather than telling the English buyers that it was their “tough luck” for dealing with a sharp-practicing foreign seller who shipped inferior goods, the English courts instead instituted an implied warranty of merchantability in 1815, establishing a minimum

²³ *Id.* at 6 (“[I]t was during the latter half of the sixteenth century that *assumpsit* became alternative to debt. . . . By the end of the century, therefore, it had become definitely the chief contractual action of the common law.”).

²⁴ See, e.g., James B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888) (referencing a 1383 case held to be “perhaps, the earliest reported case upon a warranty”); *Denison v. Ralphson* (1682) 86 Eng. Rep. 235, 235; 1 Ventris, 365, 365 (stating that the Defendant was “to deliver to him ten pots of good and merchandizable [sic] pot-ashes, and that not regarding his promise, and to defraud him, he delivered him ten pots of ashes not merchandizable [sic], but mixed with dirt”).

²⁵ See, e.g., *Walker v. Milner* (1866) 176 Eng. Rep. 773, 775 n.a.; 4 F. & F. (“The best definition that can be given of a warranty—that it is a representation made part of the contract—appears to imply that it is a representation of some certain and existing—past or present—matter of fact; known or capable of being known; as that the article is the work of a certain maker or manufacturer . . .”).

²⁶ See, e.g., Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1186 (1931) (“Not until the nineteenth century, did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.”)

²⁷ See, e.g., *Parkinson v. Lee* (1802) 102 Eng. Rep. 389, 391; 2 East 314, 320–21 (“No implied warranty can be raised from a fair price in the sale of hops any more than in the sale of a horse, where it is admitted that it does not exist. . . . If then an implied warranty be to be raised in this, it must in all other cases of sale; and then the maxim of *caveat emptor* will become an exception instead of a general rule.”).

²⁸ See KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 204 (E.M. Morgan ed., 1930) (In “a community whose trade is only one step removed from barter . . . [t]wo vital presuppositions reign: first, that the goods in question are there to be seen; second, either that everybody knows everybody’s goods, individually, in a face-to-face, closed, stable group . . .”).

²⁹ *Id.* at 204 (“Overseas trade in seaports introduces . . . dealing in goods at a distance, before they can be seen. Markets widen with improved transportation . . . [and] [t]his means reliance on distant sellers.”).

quality for commercially traded goods.³⁰ An example of this is shown in *Gardiner v. Gray*, a case dealing with the sale of twelve bags of “waste silk,” where Lord Ellenborough opined:

Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a[n] [express] warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the demonination [sic] mentioned in the contract between them.³¹

Another example is in *Laing v. Fidgeon*, a case dealing with a horse’s saddle, where Chief Justice Gibbs stated, “[T]he [seller] . . . ought to furnish a merchantable article.”³²

The first mention of a fitness warranty in the King’s Courts came ten years later in an opinion by Chief Justice Charles Abbott (Lord Tenterden), who was both the trial judge and one of the appellate judges in *Gray v. Cox*. In his capacity as appellate judge, Chief Justice Abbott said:

At the trial it occurred to me, that [when] a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned brothers think differently.³³

His reasoning did not attract the concurrence of the other judges, but the term a buyer’s “particular purpose,” and the suggestion that a warranty arises when a seller affirms that the goods sold are “fit” for that purpose under it, had made their appearances in the common law.³⁴ However, even taking Chief Justice Abbott’s words at face value, a new implied warranty of fitness was neither needed, nor called for. It would be equally plausible to say that if a seller communicated, directly or

³⁰ Calvin W. Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219, 219–21 (1958).

³¹ (1815) 171 Eng. Rep. 46, 47; 4 Camp. 144, 145.

³² (1815) 128 Eng. Rep. 974, 974; 6 Taunt. 109, 109.

³³ (1825) 107 Eng. Rep. 999, 1002; 4 B. & C. 107, 115.

³⁴ The short summary of the influence of the Industrial Revolution on the gestation and birth of the two implied warranties given above is certainly the traditional view, and is an accurate one if only the decisions in the King’s Courts are examined. See generally Ames, *supra* note 24, at 8–10. I am working on an article tracing warranty’s history in greater detail, and the full story is a bit more nuanced. There are references to cases decided on what we would now call “warranty of merchantability” and “warranty of fitness” theories hundreds of years earlier in alternative, arbitral fora applying the principles of the Law Merchant. See, e.g., 1 SELECT CASES CONCERNING THE LAW MERCHANT, A.D. 1270–1638 91 (Charles Gross ed. & trans., Selden Soc’y No. 23, 1908); 2 SELECT CASES ON THE LAW MERCHANT, A.D. 1239–1633 28–30 (Hubert Hall ed. & trans., Selden Soc’y No. 46, 1930); 2 BOROUGH CUSTOMS 182 (Mary Bateson ed. & trans., Selden Soc’y No. 21, 1906). These fora included the courts of piepowder and staple, as well as other arbitral “courts.” See generally Charles Gross, *The Court of Piepowder*, 20 Q.J. ECON. 231 (1906); Hamilton, *supra* note 26, at 1133.

indirectly, through words or actions, that a good she³⁵ sold would satisfy a “particular purpose” of the buyer, a warranty based on the express promise arising from those words and actions would be established upon the conclusion of the bargain.

The first case ushering in the warranty of fitness as part of the common law’s permanent consumer protection arsenal was decided four years later in *Jones v. Bright*.³⁶ *Jones* serves as an example of hard cases make bad law.³⁷ The case is hard because of its unusual facts, which are unlikely to be repeated. Regardless, as will be shown below, the common interpretation of the case—that it ushered in a new implied warranty³⁸—was incorrect from its inception. In fact, the judges who decided *Jones* thought it was an express warranty case, and the facts certainly fit an express warranty theory.

In *Jones*, the Plaintiff-buyer, Jones, owned a ship called the *Isabella*.³⁹ The Defendant-seller, Bright, owned a business that manufactured and sold copper plates.⁴⁰ The Plaintiff wanted to purchase the Defendant’s copper plates to sheath the underside of the *Isabella*.⁴¹ Copper under-cladding for a ship usually lasted four to five years.⁴²

If the facts of the case were “typical” for a fitness case, the Plaintiff would have gone to Defendant’s shop and had some conversation with the seller about the attributes and suitability of the copper plates for the *Isabella*. The analysis would then be whether the discussion of those attributes constituted a warranty. However, that did not happen. Instead, the following is what we are told:

Fisher, a mutual acquaintance of the parties, introduced them to each other, saying to the Defendants, “Mr. Jones is in want of copper for

³⁵ Single women were traders in England from at least the fourteenth century. 1 BOROUGH CUSTOMS 227 (Mary Bateson ed. & trans., Selden Soc’y No. 18, 1904).

³⁶ *Jones v. Bright* (1829) 130 Eng. Rep. 1167. There can be little doubt that *Jones* was decided as part of the emerging English consumer protection law. Lord Chief Justice Best, one of the judges who decided *Jones*, said:

It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied.

Id. at 1171.

³⁷ See *Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) (“Just as ‘bad facts make bad law,’ so too odd facts make odd law.”); *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 406 (“Hard cases, it has been frequently observed, are apt to introduce bad law.”).

³⁸ See, e.g., Corman, *supra* note 30, at 220; Emlin McClain, *Implied Warranties in Sales*, 7 HARV. L. REV. 213, 218 (1893–1894); *Jones*, 130 Eng. Rep. at 1168.

³⁹ *Jones*, 130 Eng. Rep. at 1168.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;” one of the Defendants answered, “Your friend may depend on it, we will supply him well.”⁴³

It is unclear whether this exchange moderated by Fisher was by letter or in person. On the one hand, it reads as if the introduction and response was by letter, as it is unlikely a defendant would say, “Your *friend* may depend on it,” if Jones was standing right there.⁴⁴ However, one judge later suggested that this was “a loose *conversation* at the time of the sale.”⁴⁵ In any event, this communication constituted the entire reported pre-sale discussion between the parties, and it is thus possible no promise whatsoever was directly communicated between the parties, and was only exchanged through Fisher.⁴⁶

However, either because Jones was part of the “we will supply him well” conversation, or was told about it later, he must have relied on that promise because he thereafter sent his shipwright⁴⁷ to the Defendant’s warehouse. The shipwright rummaged through “sheets of various size, thickness, and weight”⁴⁸ at the facility, and selected several sheets of copper that were purchased by the Plaintiff at “market price as for copper of the best quality.”⁴⁹ While it is unlikely there was no

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at 1171 (opinion of Best, C.J.) (emphasis added).

⁴⁶ *Id.* at 1172 (opinion of Best, C.J.). Sometime after the sale, Defendant sent Plaintiff an invoice which read simply, “Copper for the ship ‘Isabella,’” along with the price for the sheathing. *Id.* at 1168. By today’s commercial standards, we would expect the invoice to be generated at the time of sale, and thus be a potential source of warranty, but apparently that was not the tradition between merchants in England in the late 1800’s. As stated by Chief Justice Best, “An invoice, however, is frequently not sent till long after the contract is completed . . .” *Id.* at 1171 (opinion of Best, C.J.). Only Chief Justice Best dealt with the issue of the invoice stating a warranty, and even he concluded that the promise, “We will supply him well,” was ultimately the warranty on which the verdict should be upheld:

[I]f we look at the invoice alone, we see in the present case that the copper was expressly for the ship “Isabella.” However, I do not narrow my judgment to that, but think on the authority of a case not cited at the bar, *Kain v. Old* (2 B. & C. 634), that “where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination.” . . . Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, “Mr. Jones is in want of copper for sheathing a vessel;” and one of the Defendants answered, “We will supply him well.” As there was no subsequent communication, that . . . amounted to a warranty.

Id. at 1171–72.

⁴⁷ A shipwright is a “[m]an skilled in the building and repairing of ships.” C.W.T. LAYTON, *DICTIONARY OF NAUTICAL WORDS AND TERMS* 341 (Brown, Son & Ferguson LTD, 2d ed. 1967).

⁴⁸ *Jones*, 130 Eng. Rep. at 1168.

⁴⁹ *Id.*

conversation while the shipwright was rummaging through the various plates at Defendant's factory, there is, again, no record of it.

The plates selected by the shipwright were put on the *Isabella*, and the vessel set sail for Sierra Leone. The copper failed on this first voyage, lasting but four months instead of the expected four to five years.⁵⁰ There was a dispute between the parties as to what caused the premature breakdown of the copper. Plaintiff's expert testified the reason was that the copper "might have imbibed more oxygen than it ought to contain" during its manufacture.⁵¹ On the other hand, Defendant claimed the failure was caused "from the singular inveteracy of the barnacles in the river at Sierra Leone, where the ship lay for some time."⁵²

The trial judge left it to the jury "to determine whether the decay in the copper was occasioned by intrinsic defect or external accident; and if it arose from intrinsic defect, whether such defect were [sic] occasioned in the process of manufacture."⁵³

The jury found that "the decay [in the copper] was occasioned by some intrinsic defect in the quality of the copper; but that there was no satisfactory evidence to shew [sic] what was the cause of that defect."⁵⁴ Verdict was therefore entered for the Plaintiff, with damages to be ascertained later by a specially appointed arbitrator.⁵⁵ Hence, while the jury found that the copper was not up to snuff, it did not specifically find a breach of any warranty. As a result, the jury obviously did not identify what that warranty was—that was left to be sorted out by the four appellate judges who heard the case.

The judges were unanimous in holding the Defendant liable because he did not provide copper suitable for sheathing ships regardless of defect or accident.⁵⁶ There were statements by each judge that *could* be read as resting the decision on a new implied fitness warranty. For example, Chief Justice Best explained that the fitness warranty was a natural extension of the implied warranty of merchantability:

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* In addition, the Defendant also asserted a caveat emptor/contributory negligence defense, claiming that, "the quality of copper might always be known by its appearance and malleability;" so that "if there had been any defect in [the copper] sold to the Plaintiff, his shipwright must have discovered it while in the act of sheathing the vessel." *Id.* The jury apparently rejected this argument, as it found for the Plaintiff. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1173–74.

If a man sells an article, he thereby warrants that it is merchantable,—that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise. . . . Whether or not an article has been sold for a particular purpose, is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit.⁵⁷

A second judge, Sir James Park, opined that the fitness warranty had already been established in Chief Justice Abbott's (Lord Tenterden's) opinion mentioned above, *Gray v. Cox*, and that *Jones* was controlled by it:

[I]s there not, where the purchaser cannot judge of the interior of the article, and buys for a particular purpose, an implied warranty, that the article is fit and proper for the purpose for which it is purchased? . . . The principal object of attack has been the case of *Gray v. Cox*, where Lord Tenterden said, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." And this is not to be esteemed an obiter dictum, because the other judges differ from him. It is his judgment formally given, and goes to support the argument for the Plaintiff⁵⁸

Lord Burrough, a third judge in the case, explained his reasoning for upholding the verdict as follows:

The Defendants knew what the copper was wanted for, and made it; . . . The copper, instead of lasting four or five years, lasted only one voyage, and this was proved to have been occasioned by a defect in the manufacture. I cannot comprehend why the action should not lie.⁵⁹

And finally, the fourth appellate judge who heard the case, Judge Gaselee, wrote:

The case has been so fully gone into, that I shall make only one or two observations. . . . [I]t is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose. . . . How far the case might have been altered if the Defendants has not manufactured the copper, I do not say; but as to the warranty, the declaration could scarcely have been, other than it is.⁶⁰

The premise of this Article is that any implied fitness case is really an express warranty case, and such is true here, despite the language above suggesting an implied fitness warranty. None of the quoted language above is inconsistent with there being an express warranty *implied* from the acts and words of the seller. That is, if the focus was on a warranty arising from an expression

⁵⁷ *Id.* at 1172 (opinion of Best, C.J.).

⁵⁸ *Id.* at 1173 (opinion of Park, J.).

⁵⁹ *Id.* at 1174 (opinion of Burrough, J.).

⁶⁰ *Id.* at 1174 (opinion of Gaselee, J.).

of Defendant's needs as communicated by *Fisher*: "Mr. Jones is in want of copper for sheathing a vessel;"⁶¹ then the case could be read as imposing on the Defendant an implied warranty that the copper would meet Jones's needs when he thereafter sold Plaintiff the copper. However, if the focus is instead on the Defendant's promise, "We will supply him well,"⁶² and the act of selling Jones the copper, then the case is more properly understood as a breach of warranty to supply suitable copper for cladding a ship expressly undertaken by the Defendant, since the copper did not "supply" Jones "well." Hence, looking at it from the point of view of the Defendant creating the express warranty, what is "implied" is an express suitability warranty stemming from the words and actions of the Defendant in providing the copper after hearing of its intended use. It is the express promise (or rather the express warranty) of the Defendant under this view that serves as the basis of the claim. As noted above, analysis under such a theory is entirely consistent with the language from the judges quoted above.

If we were to leave the case there, an argument could be made for interpreting it as either resting on an implied fitness warranty basis or an express warranty basis. However, three of the four judges themselves held that the theory on which the case was affirmed was breach of *express* warranty, derived from the "we will supply him well" promise, and the fourth said it did not matter whether the warranty was viewed as an express or an implied one. Chief Justice Best opined:

Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, "Mr. Jones is in want of copper for sheathing a vessel;" and one of the Defendants answered, "We will supply him well." As there was no subsequent communication, that constituted a contract, and amounted to a warranty. . . . *Here there has been, in my opinion, an express warranty.*⁶³

Judge Burrough similarly stated:

[A]fter Fisher had introduced the parties, and stated the purpose for which the Plaintiff wanted the copper, the Defendants warranted the article by undertaking to serve the Plaintiff well. . . . *I put it on the ground of an express warranty* and the finding of the jury that the copper was insufficient, and am of opinion that the verdict for the Plaintiff must stand.⁶⁴

⁶¹ *Id.* at 1172 (opinion of Best, C.J.).

⁶² *Id.*

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* at 1173–74 (opinion of Burrough, J.) (emphasis added).

Sir James Park stated, “the evidence of Fisher . . . goes to *shew* [sic] *an express warranty . . .*”⁶⁵ Finally, Judge Gaselee stated, “*Without enquiring whether the warranty here be express or implied, it is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose.*”⁶⁶

As such, read in its entirety, *Jones* should not be understood as, or used as precedent for, establishing a new implied warranty of fitness. Rather, the case should more properly be read to hold that when a defendant undertakes to supply a good that meets the specifications asked for by the buyer, by words and actions, those words and actions, by implication, constitute an affirmative promise that the goods will meet the specification. Thus, the case is more properly understood as an express warranty case, where the suitability of the copper for cladding the ship flowed from, and was, an implied-in-fact promise of the Defendant based on his sale of the copper to Jones after hearing of its intended use, and based on his promise to serve Jones “well.” As such, *Jones* is fundamentally the same case, and presents the same issues, as Situation II above.

Even though the provenance for ushering in an entirely new warranty was thin in *Jones*, the case was cited throughout the remainder of the nineteenth century as establishing the fitness warranty.⁶⁷ The warranty was thus reasonably well-entrenched in the common law when Sir Mackenzie Chalmers followed the codification urgings of Jeremy Bentham⁶⁸ and

⁶⁵ *Id.* at 1173 (opinion of Park, J.) (emphasis added).

⁶⁶ *Id.* at 1174 (opinion of Gaselee, J.) (emphasis added).

⁶⁷ See, e.g., *Brown v. Edgington* (1841) 133 Eng. Rep. 751, 756 (opinion of Bosanquet, J.); 2 Man. & G. 279, 291 (“In *Jones v. Bright*, . . . the court was of opinion, that the defendants being informed of the purpose for which the sheathing was wanted, an implied warranty arose.”); *Chanter v. Hopkins* (1838) 150 Eng. Rep. 1484, 1487 (opinion of Parke, B.); 4 M. & W. 399, 406 (“Now I agree with the authority which Mr. Byles has referred to, of *Jones v. Bright*, that if an order is given for an undescribed and unascertained thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied.”); *Jones v. Just* (1868) 3 QB 197 at 202–03 (Eng.) (“[W]here a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.”) (citations omitted).

⁶⁸ Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 989–90 (1992) (noting that Jeremy Bentham, a nineteenth century English utilitarian philosopher, wrote a treatise, which was “arguably the most influential among scholars,” in which he attempted to structure and codify English law and urged others to do so).

authored the British Sales Act of 1893.⁶⁹ Section 14(1) of that Act provided:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.⁷⁰

It is interesting that the British Sales Act expanded upon, and changed, the holding of *Jones* a bit. Under the Act: (1) the fitness warranty was limited to merchant sellers; (2) a specific reliance requirement was added before a plaintiff could be successful; and (3) the warranty was described as a condition, and not a term.⁷¹

The implied warranty of fitness set forth in section fourteen of the British Sales of Goods Act was itself rewritten some by Professor Williston when he presented his "Draft of An Act Relating to the Sale of Goods" in 1903,⁷² as he eliminated the merchant limitation and described the effect of meeting the criteria as establishing a warranty term, not a condition, in section fifteen of the Act:

⁶⁹ Chalmers first drafted the bill in 1888 and the draft was submitted to Parliament for comment; a revised draft was submitted in 1889 and referred to the Standing Committee on Law. M.D. Chalmers, *The Codification of the Law of Sale*, 12 J. INST. BANKERS 11, 14 (1891).

Between Chalmers' initial draft and the final form of the UK *Sale of Goods Act 1893*, there were changes in the language of the section concerned with fitness for purpose and merchantable quality that subtly altered meaning. One of these shifts concerns communication of a particular purpose. The initial draft required the buyer, relying on the seller's skill and judgment, to order goods for a particular purpose known to the seller. The April 1893 Bill required the buyer expressly or impliedly to make known to the seller the particular purpose so as to show the buyer relies on the seller. . . . It should also be noted that the side note that said caveat emptor was dropped.

Gail Pearson, *Reading Suitability against Fitness for Purpose—The Evolution of a Rule*, 32 SYDNEY L. REV. 311, 321–22 (2010). See also Corman, *supra* note 30, at 224. (identifying Chalmers as the drafter of section fourteen).

⁷⁰ Sale of Goods Act 1893, c. 71, § 14(1) (Eng.).

⁷¹ Other parts of section fourteen of the British Act, such as the "patent or trade name" exception, were put in different subsections in the American Sales of Goods Act. The idea behind this exception was that, if a buyer asked for a product with a particular trade name, e.g., a Ford F-150 Truck, a buyer could not bring a fitness claim if the truck lacked the towing capacity the buyer also mentioned he or she was looking for, since the buyer had, in essence, selected the product. See Corman, *supra* note 30, at 224–26.

⁷² SAMUEL WILLISTON, DRAFT OF AN ACT RELATING TO THE SALE OF GOODS § 15(1) (1903) (codified as amended at U.C.C. § 2-315 (1951)); see Corman, *supra* note 30, at 224 (identifying Professor Williston as the author of the Uniform Sales Act section fifteen).

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), *there is an implied warranty* that the goods shall be reasonably fit for such purpose.⁷³

The next major statutory adaptation of the warranty in the United States was in the original 1952 draft of the U.C.C., and that version remained unchanged in the 1972 version of the U.C.C.⁷⁴ The U.C.C. drafters kept the Willistonian ideas of having the section be applied as a warranty term (as opposed to a condition), and rejecting the idea that the warranty be limited to only merchant-sellers. In addition, the U.C.C. changed two requirements of section fifteen. First, the requirement of the buyer having to make "known to the seller the particular purpose for which the goods are required," was eliminated and replaced with a requirement that the seller "has reason to know any particular purpose for which the goods are required" from any source, not just from the buyer.⁷⁵ The second change eliminated the requirement that, "it *appear*[] that the buyer relies on the seller's skill or judgment," and replaced it with a requirement that the buyer actually "rely[] on the seller's skill or judgment to select or furnish suitable goods."⁷⁶ The statutory warranty of fitness has largely been

⁷³ WILLISTON, *supra* note 72, § 15(1) (emphasis added).

⁷⁴ The 1952 version of § 2-315 Implied Warranty: Fitness for Particular Purpose states the following:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1952). For comparison, see the 1972 version of § 2-315 Implied Warranty: Fitness for Particular Purpose, which states the following:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1972).

⁷⁵ *Id.*

⁷⁶ *Id.* The U.C.C. also modified the "patent or trade name" exception rule. See Corman, *supra* note 30, at 241. It removed it from the text, and added the following Comment:

The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or

left unchanged since then, and has been adopted without change by every jurisdiction that has fully adopted the U.C.C.⁷⁷

IV. CONSEQUENCES OF ANALYZING “FITNESS” PROBLEMS UNDER AN EXPRESS WARRANTY THEORY

In addition to the jurisprudential benefit of using the proper theory to evaluate a “fitness” case, eliminating the implied warranty of fitness provision and analyzing fitness cases under the express warranty theory would create three other collateral benefits: (A) it would eliminate the problem of trying to decide the proper implied warranty claim where the plaintiff’s particular purpose is the good’s general purpose; (B) the fitness warranty would appropriately be harder to disclaim; and (C) a more accurate application of the parol evidence rule to fitness situations would result.

trade name is not sufficient to indicate non-reliance if the article has been recommended by the seller as adequate for the buyer’s purposes.

U.C.C. § 2-315, cmt. n.5 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1952).

⁷⁷ Alabama: ALA. CODE § 7-2-315 (LexisNexis 2019); Alaska: ALASKA STAT. § 45.02.315 (2019); Arizona: ARIZ. REV. STAT. ANN. § 47-2315 (2019); Arkansas: ARK. CODE ANN. § 4-2-315 (West 2019); California: CAL. COM. CODE § 2315 (Deering 2019); Colorado: COLO. REV. STAT. § 4-2-315 (2019); Connecticut: CONN. GEN. STAT. § 42a-2-315 (2019); Delaware: DEL. CODE ANN. tit. 6, § 2-315 (2019); Florida: FLA. STAT. ANN. § 672.315 (LexisNexis 2019); Georgia: GA. CODE ANN. § 11-2-315 (2019); Guam: 13, GUAM CODE ANN. § 2315 (2019); Hawaii: HAW. REV. STAT. ANN. § 490:2-315 (LexisNexis 2019); Idaho: IDAHO CODE ANN. § 28-2-315 (West 2019); Illinois: 810 ILL. COMP. STAT. ANN. 5/2-315 (West 2019); Indiana: IND. CODE ANN. § 26-1-2-315 (West 2019); Iowa: IOWA CODE ANN. § 554.2315 (West 2019); Kansas: KAN. STAT. ANN. § 84-2-315 (West 2019); Kentucky: KY. REV. STAT. ANN. § 355.2-315 (West 2019); Louisiana: LA. CIV. CODE ANN. art. 2524 (2019); Maine: ME. STAT. tit. 11, § 2-315 (2019); Maryland: MD. CODE ANN., COM. LAW § 2-315 (West 2019); Massachusetts: MASS. GEN. LAWS ch. 106, § 2-315 (2019); Michigan: MICH. COMP. LAWS ANN. § 440.2315 (West 2019); Minnesota: MINN. STAT. ANN. § 336.2-315 (West 2019); Mississippi: MISS. CODE ANN. § 75-2-315 (West 2019); Missouri: MO. ANN. STAT. § 400.2-315 (West 2019); Montana: MONT. CODE ANN. § 30-2-315 (West 2019); Nebraska: NEB. REV. STAT. ANN. § 2-315 (West 2019); Nevada: NEV. REV. STAT. ANN. § 104.2315 (LexisNexis 2019); New Hampshire: N.H. REV. STAT. ANN. § 382-A:2-315 (LexisNexis 2019); New Jersey: N.J. STAT. ANN. § 12A:2-315 (West 2019); New Mexico: N.M. STAT. ANN. § 55-2-315 (LexisNexis 2019); New York: N.Y. U.C.C. LAW § 2-315 (Consol. 2019); North Carolina: N.C. GEN. STAT. ANN. § 25-2-315 (West 2019); North Dakota: N.D. CENT. CODE ANN. § 41-02-32 (West 2019); Ohio: OHIO REV. CODE ANN. § 1302.28 (LexisNexis 2019); Oklahoma: OKLA. STAT. ANN. tit. 12A, § 2-315 (West 2019); Oregon: OR. REV. STAT. ANN. § 72.3150 (West 2019); Pennsylvania: 13 PA. STAT. AND CONS. STAT. ANN. § 2315 (West 2019); Rhode Island: 6A R.I. GEN. LAWS § 6A-2-315 (2019); South Carolina: S.C. CODE ANN. § 36-2-315 (2019); South Dakota: S.D. CODIFIED LAWS § 57A-2-315 (2019); Tennessee: TENN. CODE ANN. § 47-2-315 (2019); Texas: TEX. BUS. & COM. CODE ANN. § 2.315 (West 2019); Utah: UTAH CODE ANN. § 70A-2-315 (LexisNexis 2019); Vermont: VT. STAT. ANN. tit. 9A, § 2-315 (West 2019); Virginia: VA. CODE ANN. § 8.2-315 (2019); Virgin Islands: V.I. CODE ANN. tit. 11A, § 2-315 (2019); Washington: WASH. REV. CODE ANN. § 62A.2.315 (LexisNexis 2019); West Virginia: W. VA. CODE ANN. § 46-2-315 (LexisNexis 2019); Wisconsin: WIS. STAT. ANN. § 402.315 (West 2019); Wyoming: WYO. STAT. ANN. § 34.1-2-315 (2019).

A. Eliminating the Implied Warranty of Fitness Would Eliminate the Problems Associated with Deciding Which Implied Warranty Should Control When the “Ordinary Purpose” of the Good is Coincident with the Buyer’s “Particular Purpose” for the Good

Having fitness cases resolved under an express warranty theory will provide the benefit of eliminating a persistent implied warranty issue, namely, which implied warranty is violated when a buyer’s “particular” purpose is the “ordinary” purpose for which the good is used.⁷⁸ This is an issue because the implied warranty of merchantability is violated when goods are not “fit for the *ordinary purposes* for which such goods are used,”⁷⁹ while, of course, the implied fitness warranty is violated when the goods are not fit for the “particular purpose” of the buyer. To illustrate, suppose a buyer goes into a Home Depot and asks for a barbecue that will allow her “to safely and deliciously barbecue steaks.” Assume the Home Depot representative recommends a particular model, and the customer buys it based on that recommendation. However, the purchased barbecue never gets hot enough to cook a steak properly because of some hard-to-discover manufacturing defect that put a clog in the gas line, which eventually causes the unit to explode. The unit did not fulfill the buyer’s particular purpose—it did not allow the buyer to “safely and deliciously cook steak”—but surely the ordinary purpose of any barbecue sold at Home Depot is to cook meats, like steaks, both safely and deliciously. So which warranty was violated by the defective grill—the warranty of fitness for a particular purpose, the warranty of merchantability, or both?

Many courts have answered that when the buyer’s particular purpose and the good’s ordinary purpose coincide, they merge together to form some sort of “fitability” warranty, and a plaintiff can recover under either theory. For example, in *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, the buyer purchased “pulpwood trailers” in order to transport pulpwood,

⁷⁸ See generally U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1972). To be clear, the situation I am describing is different from the situation in which a buyer conveys a non-ordinary, particular purpose to the seller, the seller furnishes what purports to be a suitable good, but the good turns out to be so shoddy that not only does it fail to serve the buyer’s particular purpose, but it is also unmerchantable. In that case, both implied warranties are violated, as contemplated by the U.C.C.’s drafters, “[a] contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.” Rather, the situation I am speaking about above is that recurring subset of cases where the “particular purpose” of the buyer is the “ordinary purpose” of the goods. See U.C.C. § 2-315, cmt. n.2 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

⁷⁹ U.C.C. § 2-314(2)(c) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1972) (emphasis added).

which was also the ordinary purpose of the trailers.⁸⁰ The trailers did not work very well and the buyer brought suit, claiming a breach of both the warranty of merchantability and of fitness.⁸¹ At trial, however, the buyer only pursued the fitness claim, and the only jury instructions provided were on a fitness theory.⁸² The seller claimed merchantability was the proper theory because it was not aware of any “particular purpose” for the trailers, and since no verdict was entered on that theory, the verdict in Plaintiff’s favor should be reversed.⁸³ The court stated:

Great Dane contends that it was aware only of the ordinary purpose to which the pulpwood trailers would be used—hauling pulpwood—and was unaware of any other purpose. Great Dane . . . states that before it can be liable for a breach of the warranty of fitness for a particular purpose, it must be shown it, as a supplier, knew that a particular purpose was intended by the consumer, Malvern Pulpwood. Instead, Great Dane asserts only the ordinary purpose for which the trailers would be used was shown, giving rise to a warranty of merchantability—a warranty which was not incorporated in the instructions given the jury. Great Dane’s argument overlooks the fact that, under the circumstances of the case, the particular purpose involved was pulpwood hauling. If the particular purpose for which goods are to be used coincides with their general functional use, *the implied warranty of fitness for a particular purpose merges with the implied warranty of merchantability.*⁸⁴

The idea of a merger of the two warranties is clever and has been used frequently by courts for nearly a century in these types of cases.⁸⁵ However, the U.C.C. drafters instructed that

⁸⁰ 785 S.W.2d 13, 14, 17 (Ark. 1990).

⁸¹ *Id.* at 14.

⁸² *Id.* at 17.

⁸³ *Id.*

⁸⁴ *Id.* (emphasis added) (citation omitted). For lists of other cases where courts have merged fitness and merchantability concepts, see 1 JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, UNIFORM COMMERCIAL CODE § 10.36 929 n.1 (6th ed. 2012), 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 4:22 272 n.7 (4th ed. 2014), and 3 DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:139 376 nn.10–11 (3d ed. 2013).

⁸⁵ Professor Corman, in his article on the implied warranty of fitness, observed that appellate courts have upheld “ordinary purpose” claims on fitness grounds since the 1920s:

The parallel growth of this implied warranty and of industry is typified by the automobile. At the beginning of the twentieth century the motor vehicle had scarcely left the inventor’s workshops; by 1929, there were almost thirty-two million cars and trucks in use throughout the world. During the period of initial growth of the automobile industry, courts in England and the United States were liberal in finding both particular purpose and reliance in the purchaser’s favor. Purchases for the purpose of use as a “pleasure car” or “for touring purposes,” or “to convey the purchaser from place to place,” are little more than application of the common or general purpose, and yet were found to justify reliance as purchases for a *particular* purpose. Similar decisions are to be noted in the related areas of trucks and farm tractors.

merchantability and fitness are separate and distinct theories. They have stated in the infamous Comment 2 to 2-315:

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.⁸⁶

Comment 2 may provide more shade than light when trying to adapt it to any particular case; nevertheless, it is fairly read as stating that the two implied warranties are separate because they have different purposes.⁸⁷ That, also, is the prevailing view of leading commercial law commentators. For example, White, Summers, and Hillman say:

Those unfamiliar with the differences between the warranty of merchantability (fitness for the *ordinary* purposes for which such goods are used) and the warranty of fitness for a *particular* purpose often confuse the two; one can find many opinions in which the judges used the terms “merchantability” and “fitness for a particular purpose” interchangeably. Such confusion under the Code is inexcusable. Sections 2-314 and 2-315 make plain that the warranty of fitness for a particular purpose is narrower, more specific, and more precise. . . . [However], [a]n increasing number of courts have held that the 2-315 warranty as to fitness for a particular purpose may arise when the buyer’s “specific use” is the same as the “general use” to which the goods under contract are usually put. We are wary of such cases. They apparently enlarge the scope of the 2-315 warranty beyond the intent of the drafters.⁸⁸

Corman, *supra* note 30, at 222–23 (footnotes omitted). The “fitability” merger theory is also present in cases like *Minneapolis Steel & Mach. Co. v. Casey Land Agency*, 201 N.W. 172 (N.D. 1924). There, the buyer purchased a tractor for use on his farm, saying he needed it, among other things, for plowing. *Id.* at 173. The tractor did not meet the Plaintiff’s needs, and the court had the following to say with regard to situations in which the particular purpose and ordinary purposes are coincident:

The “particular purpose” for which the tractor was purchased was for use in connection with general farm work, discing, plowing, etc. A “particular purpose” is not some purpose necessarily distinct from a general purpose. A particular purpose is, in fact, the purpose expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, “coatings,” or a “hot water bottle.”

Id. at 175.

⁸⁶ U.C.C. § 2-315 cmt. n.2 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1952).

⁸⁷ *Id.*

⁸⁸ WHITE, SUMMERS & HILLMAN, *supra* note 84, at 928–30 n.1 (citations omitted).

The authors of a leading products liability treatise agree:

More fundamentally . . . the fitness warranty is entirely distinct and independent from the implied warranty of merchantability. As lucidly explained in comment 2 to § 2-315, above, this distinction is so perfectly clear that one might reasonably conclude that an “ordinary” use by definition must be separate and distinct from a purpose that is “particular” to a buyer. . . . Notwithstanding the logic of this view, some courts remain confused. Perhaps led astray by comment 2 to § 2-315, a few courts have ruled that an ordinary use under § 2-314 can also amount to a particular purpose under § 2-315.⁸⁹

Another commercial treatise echoes this idea:

The warranties of merchantability and of fitness for a particular purpose are distinct. . . . A court must not confuse the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. However, courts have done so. The fitness of goods for their ordinary use is covered by the implied warranty of merchantability as contrasted with the non-normal use that constitutes a particular purpose.⁹⁰

If fitness and merchantability are thus left as is, courts are left with two unappealing choices in these types of cases: (1) they can fashion a merged “fitability” warranty to ensure deserving plaintiffs will recover, but in doing so, ignore the dictates of the U.C.C.’s drafters; or (2) put the plaintiff (and his or her lawyer) to the task of selecting the “correct” (or at least “correct” in the court’s view) theory, with the possibility that recovery will be denied if the wrong choice is made. Choosing the “correct” theory is not just a matter of pleading—it is also a matter of proof. Going to trial under a fitness theory requires putting on evidence that the seller “ha[d] reason to know” of the buyer’s requirements, and actual reliance by the buyer “on the seller’s skill or judgment to select or furnish suitable goods.”⁹¹ On the other hand, successfully trying a merchantability case requires proof of what the “fair average quality” is of the good delivered, or what are the “ordinary purposes for which such goods are used,” or what characteristics of the good would allow it to “pass without objection in the trade” in order to prevail.⁹²

⁸⁹ OWEN & DAVIS, *supra* note 84, at 271–72 (footnotes omitted).

⁹⁰ FRISCH, *supra* note 84, at 376 (footnotes omitted). *See also* BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 6:4 (2017) (“[T]he courts in many cases treat the two implied warranties as tweedledum and tweedledee, so that the same set of facts can lead to a breach of both.”).

⁹¹ *See* U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

⁹² *See Id.* § 2-314(2). Of course, a successful plaintiff on a merchantability theory could also prevail upon establishing one of the other listed tests for merchantability in U.C.C. § 314(2), such as the good not being “adequately contained, packaged, and

The potential pitfalls in the difference in proof between the two implied warranties was illustrated in *Schenck v. Pelkey*.⁹³ There, the Plaintiff used the swimming pool slide manufactured by Defendants and suffered quadriplegic injuries after sliding down headfirst.⁹⁴

The trial court held for the Defendants.⁹⁵ On appeal, the Supreme Court of Connecticut noted the following confusion by the trial court:

The [trial] court construed the plaintiffs' complaint, which alleged an implied warranty "that said slide would be reasonably fit for the purpose for which it was purchased," to be a complaint invoking . . . the section of the Uniform Commercial Code that describes an implied warranty of fitness for a particular purpose.⁹⁶

In other words, although the Plaintiff alleged a breach of the warranty of merchantability (claiming the slide was not "fit for the ordinary purpose for which" such goods are used under U.C.C. § 2-314), the trial court interpreted the complaint as suing for breach of a warranty of fitness.⁹⁷ The court, therefore, instructed the jury that the Plaintiff had to show that the manufacturer knew of the particular purpose for which the Plaintiff wanted the slide, and relied on some sort of advertised purpose by the Defendants promising to fulfill that purpose to prevail.⁹⁸ Since the Plaintiff's lawyer made no such showing, the jury was left with "virtually no choice other than to find for the defendants on implied warranty."⁹⁹ However, "[t]he plaintiffs claim[ed] that they were entitled to a charge based on the implied warranty of merchantability . . . proof of which requires neither specific representations nor reliance."¹⁰⁰

The Supreme Court of Connecticut reversed, pointing out the confusion of the trial court, and holding that the Plaintiff was entitled to a merchantability instruction, since "[t]he purpose for which this slide was purchased was obviously the ordinary purpose."¹⁰¹ Hence, while the reviewing court eventually set things right, the trial court and the parties were needlessly put to the task of determining which warranty was violated,

labeled." *Id.* But the point still remains that the proof required to establish a merchantability claim is different from that needed to prevail under a fitness theory.

⁹³ 405 A.2d 665 (Conn. 1978).

⁹⁴ *Id.* at 667-68.

⁹⁵ *Id.* at 668.

⁹⁶ *Id.* at 670 (footnote omitted).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 670-71 (footnote omitted).

¹⁰¹ *Id.* at 671.

resulting in a mistaken, outcome-determinative choice by the court, all due to the confusing analysis when a particular and ordinary purpose become conflated. There are other such cases in which the deserving plaintiff was not so fortunate.¹⁰²

If U.C.C. § 2-315 were eliminated, this confusion would go away. If, by words and actions, an express warranty that a good has certain attributes is created, then suit can, and should, be brought on an express warranty theory, regardless of whether the attribute is the ordinary purpose for which the good was sold. There would be no penalty to the plaintiff for also bringing an implied merchantability claim in addition to an express warranty one, since, where reasonable, “[w]arranties whether express or implied shall be construed as consistent with each other and as cumulative” under U.C.C. § 2-317.¹⁰³ More importantly, however, there would also be no penalty to the plaintiff for *not* bringing a merchantability claim in that situation, since the two warranties would act independently, even if they might sometimes cover the same transaction.¹⁰⁴

¹⁰² See *Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging Inc.*, No. 10-cv-5321 (WHW), 2014 U.S. Dist. LEXIS 65338 *1, *31–35 (D.N.J. May 13, 2014), as another example of the perils facing a plaintiff trying to choose the correct implied warranty theory because of the differences in proof between fitness and merchantability. There, the Plaintiff-buyer provided a variety of services to commercial and professional photographers, including making photographic prints. *Id.* at *1, *34. The Plaintiff purchased a printer, seeking a “professional grade machine.” *Id.* at *2. However, the printer did not work, and the Plaintiff brought suit claiming a breach of both fitness and merchantability warranties. *Id.* at *3–5. The court noted that “[i]f there is only one purpose asserted, a plaintiff may not assert claims under both implied warranties,” and that “[t]he particular purpose warranty ‘is not triggered when the buyer communicates to the seller that the buyer intends to use the goods for their ordinary purpose.’” *Id.* at *31–32 (quoting *Ferrari v. Am. Honda Motor Co.*, No. A-1532-07T2, 2009 N.J. Super. LEXIS 346 (Jan. 30, 2009)). Determining that “processing and printing photographic prints for professional operators is ‘the general purpose for which [the machines are] manufactured and sold,’” the court found that there was not a breach of an implied warranty of fitness. *Id.* at *34–35 (citation omitted). The court acknowledged, however, had the Plaintiff “shown that [the] Defendant knew it intended to use its machine in a setting so susceptible to vibrations,” it may have prevailed on a fitness theory; but since that had not been made clear to the seller, a fitness claim could not be sustained. *Id.* at *35. The court also held that the Plaintiff had not proven a breach of the merchantability warranty as “Plaintiff ha[d] failed to create a genuine issue of material fact that the [machine] was not reasonably fit for its ordinary purpose,” since “[t]he record supports only a finding that the machine did not function in the circumstances in which Plaintiff attempted to use it.” *Id.* As such, the verdict for the Defendant was upheld, due to the Plaintiff’s confusion on what had to be proven. *Id.* at *31–36.

¹⁰³ See U.C.C. § 2-317 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017); see also *id.* § 2-315, cmt. n.2 (“A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.”).

¹⁰⁴ See Corman, *supra* note 30, for a situation in which the two implied warranties might justifiably coexist in the same transaction.

B. Eliminating the Implied Fitness Warranty Would Change the Rule as to Disclaiming What are Now Fitness Warranties (and Rightly So)

Another beneficial consequence of eliminating U.C.C. § 2-315 is that warranty disclaimers for what is now the fitness warranty would be more appropriately analyzed and applied.

Under the U.C.C. as it currently stands, two subsections govern the disclaimer of a fitness warranty. The first is U.C.C. § 2-316(2), which provides that to disclaim an implied warranty of fitness, “the exclusion must be by a writing and conspicuous.”¹⁰⁵ The Code does not require the use of any particular word to disclaim the warranty—not even the words “warranty” or “fitness.”¹⁰⁶ However, the Code provides exemplar disclaimer language in § 2-316(2), stating that “[l]anguage to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’”¹⁰⁷

The following subsection, U.C.C. § 2-316(3), provides instruction for how to disclaim both implied warranties—merchantability and fitness—at the same time. It provides that, “all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults,’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.”¹⁰⁸

The case on which the opening to this Article was loosely based, *Thorman v. Polytemp, Inc.*, illustrates the relative ease with which a fitness warranty can be disclaimed.¹⁰⁹ There, the buyer, a dry cleaner, purchased a steam heating unit for its premises.¹¹⁰ It discussed its needs and desires with the Defendant, telling the Defendant that it wanted to get the steam to run the new heating unit from its existing dry-cleaning equipment.¹¹¹ As the court explained:

¹⁰⁵ U.C.C. § 2-316(2).

¹⁰⁶ See generally U.C.C. This is in contrast to a disclaimer of the implied warranty of merchantability, where the drafters have mandated use of the word “merchantability” for any valid disclaimer. *Id.* § 2-316(2).

¹⁰⁷ *Id.* One cannot be faulted for doubting that if the “average Joe” who reads “[t]here are no warranties which extend beyond the description on the face hereof” on a purchase and sale document would immediately come to the conclusion that no warranty of fitness for a particular purpose would apply to the transaction. *Id.* If nothing else changes as a result of this Article, hopefully a U.C.C. drafter will agree that some editing of the exemplar fitness disclaimer is warranted.

¹⁰⁸ *Id.* § 2-316(3)(a).

¹⁰⁹ 1965 WL 8338, 2 U.C.C. Rep. Serv. 772, 774 (N.Y. Cty. Ct. May 11, 1965).

¹¹⁰ *Id.* at 773.

¹¹¹ *Id.* at 773–74.

Plaintiff contends that the contract was for the installation of the space heating unit for operation in the existing steam system in conjunction with the dry cleaning and pressing equipment which was being and was to be supplied from the same boiler; that, having surveyed the existing steam system and having ascertained the boiler's rated BTU per hour output capacity and the requirements of the equipment it was then serving, defendant impliedly warranted that the heater unit it recommended was fit for plaintiff's particular purposes as disclosed to defendant's engineer; [and] that it knew that plaintiff relied on defendant's skill and judgment in the selection and furnishing of a suitable space heating unit to be operable within the existing steam generating system.¹¹²

However, the written contract between the parties had the following disclaimer: "The warranties and guarantees herein set forth are made by us and accepted by you in lieu of all statutory or implied warranties or guaranties [sic], other than title."¹¹³ There was no promise in the written contract concerning the steam from the dry cleaning equipment being sufficient to power the heating unit.¹¹⁴

In finding for the Defendant, the court determined that:

But for the disclaimer provisions of the contract, the facts here established would have sustained a finding that such an implied warranty rose in this case, and that the warranty had been breached. . . . These provisions negate plaintiff's claim of an implied warranty of fitness for a particular or intended use or purpose, and bar his recovery, for he cannot be given the benefit of a warranty which he has expressly waived.¹¹⁵

While a seller can thus relatively easily disclaim fitness warranties, express warranties are much harder to disclaim under the Code. The U.C.C. drafters made it clear that when a seller tries to negate or limit an *express* warranty, any such incompatible words of "negation or limitation [of the express warranty] [are] inoperative."¹¹⁶

Express warranties are difficult to disclaim because a consumer is more likely to be aware of the warranty as opposed to the disclaimer.¹¹⁷ By definition, an express warranty term

¹¹² *Id.* at 773.

¹¹³ *Id.* at 774.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.C.C. § 2-316(1) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

¹¹⁷ See Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI. KENT L. REV. 199, 242-43 (1985) ("It seems safe to assume that sellers are not in the habit of pointing out implied warranty disclaimers to consumers. And it is difficult to believe that consumers actually read such disclaimers at or before the time of the sale. In fact, the realities of much consumer merchandising suggest that, as

must be a “basis of the bargain” for the warranty to apply, and any attempt to dangle an enticing term in front of a buyer, causing him or her to buy the product, and then whisking it away by some sort of written disclaimer on the receipt or in the contract, is abhorrent and not tolerated.¹¹⁸ Indeed, a seller who knows he or she is not going to stand behind a material, “dickered” attribute promised during contract negotiation may have committed fraud, and has demolished an important pillar on which the foundation of the bargain rests.¹¹⁹

*Carpetland U.S.A. v. Payne*¹²⁰ is an example of how the Code deals with disclaimers in an express warranty context. There, Payne was shopping for carpet at the Defendant’s store, and was assisted by a sales representative named Lewis.¹²¹ As the court recounted, Payne testified, “I just asked [Lewis], uh, how long—was there a warranty with it, and he said a year. If anything went wrong, they would replace it”¹²² The carpet unraveled a few weeks after it was installed but Carpetland refused to replace it, relying on the warranty disclaimer found on the reverse side of the sales contract: “EXCEPT FOR DESCRIPTION ON REVERSE SIDE HEREOF, BUYER ACKNOWLEDGES THAT NO EXPRESS OR IMPLIED WARRANTIES (INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS) HAVE BEEN MADE BY SELLER AND SELLER HEREBY DISCLAIMS ALL SUCH WARRANTIES. THERE ARE NO WARRANTIES

compared with other form terms, disclaimers have *less* chance of being read.” (footnotes omitted); *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 330 (1963) (“Some jurisdictions go so far as to require that a seller ‘fairly procure’ his *disclaimer* by bringing it to the actual notice of the buyer.” (emphasis added)).

¹¹⁸ U.C.C. § 2-313.

¹¹⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 164 (Am. Law Inst. 1981); see also, e.g., Kurt M. Saunders, *Can You Ever Disclaim an Express Warranty?*, 9 J. BUS. ENTREPRENEURSHIP & L. 59, 62 (2015) (citation omitted) (“To allow a seller to disclaim an express warranty that the seller freely promised would appear to be illogical. As the comment to section 2-313 states: ‘Express warranties rest on “dickered” aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.’”); accord JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 101 (5th ed. 2011) (“It would, for example, be ludicrous to honor a clause generally disclaiming all express warranties. If given literal effect, such a clause would effectively disclaim even the express warranty arising from a description of the goods.”); Vincent A. Wellman, *Essay: The Unfortunate Quest for Magic in Contract Drafting*, 52 WAYNE L. REV. 1101, 1109 (2006) (“A moment’s reflection confirms that the very idea of disclaiming all express warranties is not only self-defeating, but would be ludicrous in effect. . . . If there were truly no warranties, then a contract to sell a car could be fully satisfied by delivery of a skateboard . . . because the complete absence of warranty would mean that there would be no basis on which to assert that delivery of a skateboard . . . did not satisfy the contract’s terms.”).

¹²⁰ 536 N.E.2d 306 (Ind. Ct. App. 1989).

¹²¹ *Id.* at 307.

¹²² *Id.* at 308.

WHICH EXTEND BEYOND THE FACE HEREOF.”¹²³ The court was little impressed with Carpetland’s supposed disclaimer, and relying on the version of U.C.C. § 2-316(1) in the Indiana Commercial Code and prior case law, the court stated:

If an express warranty and a disclaimer of an express warranty exist in the same sale, an irreconcilable conflict emerges. If it is unreasonable or impossible to construe the language of an express warranty and the language of a disclaimer as consistent, the disclaimer becomes inoperative. In the present case Lewis’s assertion that the carpet was guaranteed for one year and the disclaimer which purported to negate all express warranties were clearly inconsistent. . . . Therefore, the disclaimer is deemed inoperative and its existence cannot stand as a bar to Payne’s recovery.¹²⁴

Surely, if Payne could enforce the carpet replacement guarantee even in light of a disclaimer, the buyer in Situation II above should be able to enforce the representation that the watch would stay watertight down to 200 feet in the presence of a disclaimer as well. The law cannot allow the seller of the watch to dangle the down-to-200-feet dickered term in front of the buyer and then take it away by means of a few printed words on a sales receipt, like in *Carpetland U.S.A.*, especially when it would not countenance such a tactic in Situation I. The buyer in both Situations I and II relied on the articulated promise of the watertight attribute of the watch and would be much more conscious of the warranty promise than any disclaimer slipped into the sales contract. The best way to stop the possibility of having a disclaimer trump a fitness warranty is to treat the warranty for what it is—an express warranty—and to use U.C.C. § 2-316(1)’s direction that words of negation and limitation are inoperable to defeat any express warranty.

C. Eliminating the Implied Fitness Warranty Would Allow for a More Equitable Application of the Parol Evidence Rule

As explained above, analyzing disclaimers of what is now a warranty of fitness using the “words-of-negation” approach of U.C.C. § 2-316(1) is both fairer and consistent with normative bargaining.¹²⁵ However, that approach is subject to one potentially significant limitation—the parol evidence rule. U.C.C. § 2-316(1) provides, in its entirety:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be

¹²³ *Id.* at 309.

¹²⁴ *Id.* (citations omitted).

¹²⁵ See U.C.C. § 2-316(1) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

construed wherever reasonable as consistent with each other; *but subject to the provisions of this Article on parol or extrinsic evidence* (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.¹²⁶

That is, when an express warranty and a disclaimer eliminating that warranty are both in evidence, the inoperative clause of U.C.C. § 2-316(1) directs that the disclaimer be disregarded. However, there is a possibility that an oral warranty made while the deal is being negotiated will never make it into evidence because it will be blocked by the application of the parol evidence rule, leaving only the disclaimer as the controlling term. This is especially more likely when the written contract has an effective integration clause, like in the case of *Silver v. Porsche of the Main Line*,¹²⁷ where the court held that “the fully integrated, written purchase order contract containing an ‘as is’ clause would bar the introduction of parol evidence of pre-contract representations made by the Dealer . . . [because the integration clause] both ‘cancels and supercedes’ any prior agreements”¹²⁸

Because the parol evidence rule might keep an oral warranty from the jury that was crucial to the buyer’s purchase decision, the parol evidence clause should be eliminated from U.C.C. § 2-316(1), as it is a terrible rule. However, its history and the way courts have diminished its impact make for an interesting story.

The original 1951 version of § 2-316(1) had no parol evidence clause, and simply disallowed any express warranty disclaimer or words of limitation.¹²⁹ The only mention of parol evidence was in Comment 2 to the provision, noting that a buyer’s false assertion of express warranty might be kept out of evidence by virtue of the parol evidence rule.¹³⁰ However, in the 1957 version of the Code, the drafters added the parol evidence clause to U.C.C. § 2-316(1), so as to take the idea of protecting a wrongly accused seller with the parol evidence rule from a comment to the text (and it is that version which persists today).¹³¹

The provision has not proven popular with the courts, understandably, because, in most cases, rather than keeping a

¹²⁶ *Id.* (emphasis added).

¹²⁷ No. 1057, 2015 WL 7424848, at *1, *3, *4 (Pa. Super. Ct. Mar. 10, 2015).

¹²⁸ *Id.* at *3–4; *see also*, MURRAY, JR., *supra* note 119, § 101 (“A statement amounting to an express warranty will be inadmissible if the writing of the parties is so final and complete that reasonable parties would certainly include such a statement of fact about the goods in such a writing.”).

¹²⁹ U.C.C. § 2-316 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Proposed Final Draft Spring 1950).

¹³⁰ *Id.*

¹³¹ U.C.C. § 2-202 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1957).

false assertion of warranty out of evidence, it has, in fact, deprived a deserving plaintiff of recovery. As a leading treatise put it, “[C]ourts are somewhat hostile toward efforts to employ the parol evidence rule in this way, particularly in cases involving consumers.”¹³² As a result, courts have come up with a number of ways to limit the application of the parol evidence rule in express warranty cases. These include:

1) Finding that the written contract is only partially integrated, and thus allowing the express warranty into evidence as a “consistent additional term.” As Professor Richards noted, “If the buyer can persuade the court that the written agreement is only partially integrated, parol evidence of express warranties will be admissible as consistent additional terms”;¹³³

¹³² 3 FREDERICK H. MILLER & WILLIAM H. HENNING, HAWKLAND’S UNIFORM COMMERCIAL CODE SERIES § 2A-214:7 (Carl S. Bjerre, database updated June 2019).

¹³³ Janet L. Richards, *As-Is Provisions—What Do They Really Mean?*, 41 ALA. L. REV. 435, 441 (1990); see e.g., *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 580 (8th Cir. 1980) (“There was no evidence that indicated the parties intended the manual or this sentence in the manual to be a final expression of their agreement. Therefore, the parol [express] warranties are not barred.”); *Ltd. Flying Club, Inc. v. Wood*, 632 F.2d 51, 57 (8th Cir. 1980) (“The description of the airplane as set forth in the logbook [the source of the express warranty] is . . . a consistent additional term and may be introduced to explain the actual agreement between the parties.”); *Zutz v. Case Corp.*, No. 02-1776 (PAM/RLE), 2006 WL 463539, at *1, *3 (D. Minn. Feb. 24, 2006) (“The Court finds that the parol evidence is admissible in this case. The purchase order form does not contain a merger or integration clause. . . . Thus, the substance of the alleged express warranties does not contradict the purchase order form.”); *CGBM 100, LLC v. Flowserve US, Inc.*, No. G-15-026, 2016 WL 7475701, at *1, *2 (S.D. Tex. Dec. 29, 2016) (“[T]he merger clause can offer Flowserve no escape since it cannot be seriously contended that Plaintiffs intended the written contract to be a complete and exclusive statement of the terms of the agreement.”); *Potter v. Shields*, 140 N.W. 500, 501-02 (Mich. 1913) (“[T]he contract relied upon consists of a letter written by defendants and its alleged acceptance in an oral conversation. It cannot be claimed that the written instrument is the completed contract; and it has been repeatedly held that in such a case parol evidence may be had to show that a warranty constituted a part of the contract.”); *A & A Discount Ctr., Inc. v. Sawyer*, 219 S.E.2d 532, 535 (N.C. Ct. App. 1975) (“It is our opinion that the printed form contract executed by the parties was not intended to integrate and supersede all of the negotiations, representations and agreements between the parties, and that the evidence of the representation or warranties that the pool would be suitable for commercial use was not excluded by the parol evidence rule”); *Barrientos v. Sulit*, 133 Misc. 2d 1061, 1063 (N.Y. City Ct. 1986) (“The fact that the warranty was oral and the contract of sale was written does not invoke the parole evidence rule to ban proof of the warranty. I find that the written agreement was not intended as a complete and exclusive statement of the terms of the agreement, and thus, evidence of express warranty was admissible.”); *Morgan Bldgs. & Spas, Inc. v. Humane Soc’y of Se. Tex.*, 249 S.W.3d 480, 488 (Tex. App. 2008) (“Considering the surrounding circumstances, we conclude the written purchase agreement was not intended to embody the complete and exclusive terms of the agreement of the parties, and is only partially integrated. Under the parol evidence rule, the trial court could consider evidence of consistent additional terms to explain or supplement the terms of the written agreement.” (citations omitted)); WHITE, SUMMERS & HILLMAN, *supra* note 84, § 13:4 (“A written agreement may be contradicted by parol evidence if it [is] not intended by the parties as a final expression of their agreement.”); CLARK & SMITH, *supra* note 90, § 4:28 (noting that some courts will not only determine that a writing is partially integrated, but also hold

2) Finding that the written agreement is ambiguous, and thus the express warranty should be admitted to explain the vague contract;¹³⁴

3) Finding that the seller who makes an oral express warranty and thereafter attempts to disclaim it, has committed fraud, and the fraud vitiates the disclaimer;¹³⁵

4) Finding that the express warranty was an expression of a course of dealing, course of performance, or usage of trade, and thus admissible to explain the agreement. As one court explained, “the court admitted parol evidence to show that, under the parties’ course of performance, the language contemplated a 30-day warranty against latent mechanical defects that could not be discovered by the buyer’s initial inspection of the car”;¹³⁶ and

5) Finding that the disclaimer is unconscionable.¹³⁷

If the parol evidence provision in § 2-316(1) is not eliminated, these same limitations can be used to allow into evidence the making

that an “oral express warranty is nothing more than an ‘additional consistent term’ for which the writing leaves room”).

¹³⁴ See, e.g., *Ohio Sav. Bank v. H.L. Vokes Co.*, 560 N.E.2d 1328, 1334 (Ohio Ct. App. 1989) (“The purchase order was incomplete since it did not contain the engineers’ actual specifications. Therefore, evidence regarding the engineers’ specifications and how they were compiled, which would constitute additional terms of the contract, should have been admitted to explain or supplement the contract between the parties.”); *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Civ. App. 1973) (“[P]arol testimony [of the express warranty] was properly admitted to remove the said ambiguities with respect to the description of the subject matter of the contract.”).

¹³⁵ See also, e.g., *Pinken v. Frank*, 704 F.2d 1019, 1023–24 (8th Cir. 1983) (“It would be indeed ironic if this court were to blindly apply a fraud preventing doctrine—the parol evidence rule. . . . We simply cannot accept the proposition that the parol evidence rule was designed to foreclose a showing of fraud by preventing the admission of oral misrepresentations contradicting the terms of a written contract.”); *City Dodge, Inc. v. Gardner*, 208 S.E.2d 794, 798 (Ga. 1974) (“In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract. We hold, therefore, that the Uniform Commercial Code does not preclude an action in tort based upon fraudulent misrepresentation” (citation omitted)); *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682, 683 (Va. 1979) (“A buyer can show that a contract of sale was induced by the seller’s fraud, notwithstanding . . . the written contract contains covenants waiving warranties or disclaiming or limiting liabilities. “The express warranty, which purports to be “in lieu of all other warranties” does not render the seller immune from fraud that induced [a] contract. The warranty stands no higher than the contract which is vitiated by the fraud.” (quoting *Packard Norfolk v. Miller*, 198 Va. 557, 565 (1956))).

¹³⁶ *Leveridge v. Notaras*, 433 P.2d 935, 941 (Okla. 1967); see also, e.g., CLARK & SMITH, *supra* note 90, § 4:29 (“§ 2-202(a) provides that a writing may be ‘explained’ or ‘supplemented’ by course of dealing or usage of trade under § 1-205 or by course of performance under § 2-208.”).

¹³⁷ See, e.g., *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668, 671 (Or. Ct. App. 1982) (“[U]nder the UCC, courts are to limit the application of contract provisions so as to avoid any unconscionable result . . . it would be unconscionable to permit an inconspicuous merger clause to exclude evidence of an express oral warranty”); CLARK & SMITH, *supra* note 90, § 4:31 (2017) (noting that courts will invalidate a disclaimer or merger clause on unconscionability grounds in order to admit oral express warranties).

of an express “fitness” warranty, even in the presence of a merger clause, and even in the face of a parol evidence rule argument. That way, the “words of negation . . . being inoperative” doctrine would allow the warranty to be enforceable. Once again, it does not make sense for the buyer in cases like Situation II to be denied warranty protection through application of the parol evidence rule, as occurred in *Silver*, when there are so many arguments to defeat application of the rule in cases like Situation I.

V. CONCLUSION

When buyers express a purpose for which they want a good, and the seller undertakes to supply them with a good that will meet their needs, the seller has made an express promise that the good will suffice when the sale is consummated. Under normative bargaining expectations, that promise is as express as if the seller had actually said, for example, “the watch is watertight down to 200 feet.” As such, the law should treat these situations as express warranty claims, and eliminate as unnecessary the implied warranty of fitness for a particular purpose. Not only does such an analysis make more analytical sense, it also solves some persistent problems that have plagued those seeking to allege and judge an implied fitness warranty case.

VI. APPENDIX

If any state, or the National Conference of Commissioners on Uniform State Laws, is persuaded that U.C.C. § 2-315 should be eliminated and fitness cases should be analyzed as express warranty cases under U.C.C. § 2-313, what follows is suggested language to effect that change, presented in redlined form.

Suggested Amendments to Article 2:

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample, and Action.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Such affirmation of fact can be made by the seller directly, via language conveying such affirmation or promise, or by the seller indirectly, by providing goods purportedly meeting the buyer’s needs after the buyer has made it reasonably apparent that the buyer is looking to the seller to supply goods with particular attributes.

(b) Any description of the goods, whether by language of description provided by the seller, or by the seller's supplying goods in response to a buyer's request to the seller to provide goods with a particular attribute, which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, or that the seller be the one who initially articulates the affirmation, promise or description, so long as the buyer has made it reasonably apparent that he or she is looking to the seller to supply goods which meet specified criteria and the seller thereafter undertakes to provide goods sufficient to meet buyer's needs, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Official Comment

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. ~~"Implied" warranties~~ The "implied" warranty of fitness rests so clearly on a common factual situation or set of conditions with a merchant seller that no particular language or action is necessary to evidence them it, and they it will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied." However, by virtue of the 2019 amendment, it also now establishes that what was previously a warranty of fitness, where a buyer describes the desired attribute(s) of the good and the seller furnishes a good that purportedly meet such attribute(s), creates an express warranty and should be analyzed under this section.

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer, whether directly or indirectly, as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, whether made directly to the buyer or by means of supplying goods to the buyer after learning that the buyer expects the seller to deliver goods with certain attributes, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller, directly or indirectly, about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is first given by the seller or the buyer. A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a “sample” actually drawn from the bulk of goods which is the subject matter of the sale, and a “model” which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods. Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a “sample” does not of itself show whether it is merely intended to “suggest” or to “be” the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer’s initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material nor is whether the words of description or affirmation or samples come first from the buyer or the seller. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional

assurance, the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements or actions of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller, and the actions of the seller in furnishing the good after reasonable notice that the buyer is relying on the seller to furnish goods with particular attributes, do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

=====

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but ~~subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202)~~ words of negation or limitation is are inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), ~~to exclude or modify~~ the implied warranty of merchantability ~~or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.~~ Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." can be disclaimed or modified by: (i) use of the word "merchantability" and in case of a writing must be conspicuous; or (ii) use of expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of the warranty and makes plain that there is no implied warranty unless the circumstances indicate otherwise; or (iii) by course of dealing, course of performance or usage of trade.

(3) ~~Notwithstanding subsection (2)~~

~~(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all~~

faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

~~(b)(a)~~ **(a)** When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty of merchantability with regard to defects which an examination ought in the circumstances to have revealed to him; ~~and~~

~~(e)~~ **(b)** An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Official Comment

Prior Uniform Statutory Provision: None. See sections 15 and 71, Uniform Sales Act.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of the implied warranties of merchantability only by conspicuous language or other circumstances which protect the buyer from surprise.

2. ~~The seller is protected under this Article~~ Protections for the seller against false allegations of oral warranties may be provided, when appropriate, by its this Article’s provisions on parol and extrinsic evidence and against unauthorized representations by the customary “lack of authority” clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

~~5 4.~~ Subsection (2) presupposes that the implied warranty ~~in question of merchantability~~ exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. ~~Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.~~

6 ~~5.~~ The exceptions to the general rule set forth in ~~paragraphs (a), (b) and (c) of subsection (3) (2)~~ are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties ~~of merchantability~~ are ~~is~~ made or that a ~~certain implied warranty~~ it is being excluded.

7 ~~6.~~ Paragraph ~~(a) of subsection (3) (ii) of subsection (2)~~ deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. ~~The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.~~

8 ~~7.~~ Under ~~paragraph (b) of subsection (3), the implied warranties of merchantability~~ may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he or she unreasonably fails to examine the goods before he or she uses them, resulting injuries may be found to result from his or her own action rather than proximately from a breach of warranty. See Sections 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in ~~paragraph (b) subsection (3)~~, it is not sufficient that the goods are available for inspection. There must in

addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand. Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section. The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

§ 8. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the ~~implied warranties may be excluded~~ does not attach. The warranty of fitness for a particular purpose An express warranty would not normally arise since in such a situation ~~there is usually no reliance on the seller by the buyer~~ the specifications are not usually part of the basis of the bargain between the two, since there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. ~~Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.~~

=====

§ 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace an inconsistent implied warranty other than an implied warranty of fitness for a particular purpose warranty of merchantability.

Official Comment

~~Prior Uniform Statutory Provision:~~ On cumulation of warranties see Sections 14, 15, and 16, Uniform Sales Act.

Changes: Completely rewritten into one section.

Purposes of Changes:

1. The present section rests on the basic policy of this Article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of ~~the~~ an express warranty of fitness depends ~~solely~~ on whether the buyer has ~~relied on the seller's~~ asked the seller to use his or her skill and judgment in providing a product that meets any expressed needs of the buyer, or whether the seller has undertaken only to provide the good whose patent or trade name was provided by the buyer. ; ~~the use of the patent or trade name is but one factor in making this determination.~~

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the

seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.



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Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality

*Bethany J. Ring**

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I. INTRODUCTION

United States Supreme Court decisions are like pebbles thrown in the jurisprudential pond, creating ripples throughout the American body of law. A study of the ripples from a single decision pebble yields unique insight into the true impacts of a particular finding, especially when enough time has passed to make reflection on the size and scope of the ripples meaningful. And such an analysis will reveal discrepancies between any hypothesized ripple effects found in post-decision literature and the actual impacts later observed. This Comment examines those phenomena using the 2015 Supreme Court decision in *Reed v. Town of Gilbert*¹ as a case study to compare the repercussions of the holding, as reflected in its subsequent application by state and federal courts, to the impacts predicted by scholars at the time of its resolution. Utilizing the First Amendment,² the *Reed* decision held a municipal sign ordinance, which differentiated the treatment of signs based on category and type, to be content-based on its face.³ The Court applied strict scrutiny, without consideration of the governmental intent that had been often used by lower courts in defense of content-neutrality,⁴ and found the sign ordinance unconstitutional.⁵

¹ 135 S. Ct. 2218 (2015).

² U.S. CONST. amend. I.

³ 135 S. Ct. at 2224.

⁴ Richard Wolf, *What the First Amendment protects—and what it doesn't*, USA TODAY (Apr. 6, 2018, 2:11 PM), <http://www.usatoday.com/story/news/politics/2018/04/06/what-first-amendment-protects-and-what-doesnt/469920002/> [<http://perma.cc/7Q9Y-LN9K>] (“The First

Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time. This Comment posits that characteristics of the pebble itself are often less consequential—it is the reach of the ripples created that matters. But before the ripples can be meaningfully examined, an adequate amount of time must pass to allow the pebble's impact to propagate throughout the legal pond. Then, an analysis of the actual ripples produced can be compared to the results predicted at the time the pebble was tossed.

Not all United States Supreme Court decisions seem momentous. Although some decisions may be highly anticipated—where anticipation may sometimes be directly proportional to media coverage—the Court's judgments that resolve circuit splits or clarify nuances of specific laws are some of the routine functions of our highest Court of the land.⁶ Because they operate as the final say, Supreme Court opinions are oftentimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.

A richer understanding of the true impacts of Supreme Court cases can sometimes be derived by assessing their significance after a sufficient passage of time. It is recognized that, for most cases, a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects. Often the body of initial literature is not reexamined at a later point in time. That is, very few analyses have examined the track record of a decision to determine its more global effects over time. This Comment aims to be different. It investigates the advantages of reflecting on lower courts' treatment and implementation of the Supreme Court's reasoning, and it compares the actual treatment of the opinion with the initial commentary, using *Reed* as an example. This type of exercise can result in confirmation or contradiction. On the one hand, it may sometimes disprove less-evidenced earlier predictions. If the reality of subsequent applications has not mirrored initial prognostications, over-reliance on the body of predictive literature without such reflection has the risk of skewing our perception of a decision's true impact. On the other hand, if applying

Amendment is a mere 45 words. But it's still giving lawmakers and judges fits 227 years after its adoption.”).

⁵ 135 S. Ct. at 2224.

⁶ See, e.g., CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3507 (3d ed. 2019).

this method shows results consistent with earlier predictions, it provides validation through its testing. At the very least, we should embrace such an inquiry to create a more robust understanding of a decision's place within our American jurisprudence.

This Comment adds to the body of literature on the Supreme Court's 2015 *Reed* decision by exploring how courts at all levels have applied and incorporated *Reed*. Part I develops the analogy of Supreme Court decisions to pebbles pitched into the jurisprudential pond, and looks at exemplar cases at each end of the ripple spectrum to get a sense of the analytical frame used in this Comment. Part I also discusses the importance of allowing a sufficient amount of time to pass for examination to be meaningful. Part II chronicles the rise of *Reed* and its journey to the Supreme Court, and it postulates that *Reed* is an ideal test case to analyze. Part III reviews the post-*Reed* literature, noting particularly a variety of predictions forecasting *Reed's* impact. This part paints the backdrop against which the true Supreme Court decision effects will be compared. Part IV presents a comprehensive assessment of *Reed's* application in state and federal courts. Comparisons among jurisdictions are given, as well as topical analyses of holdings citing and relying upon the *Reed* decision. Part V summarizes the *Reed* application results and offers reflections on when similar United States Supreme Court decisions should be examined. In conclusion, although certain areas of First Amendment law have undoubtedly been influenced by *Reed*, it does not appear that the predicted far-reaching impacts of *Reed* have materialized.

This Comment posits that a robust impact analysis of a United States Supreme Court decision is best accomplished after allowing for an adequate passage of time. Such a study controls against two potential risks. First, without giving these decisions time to inversely percolate—a phrase used herein to denote the application of Supreme Court precedent by the lower courts—predictive literature runs the risk of misleading legal practitioners, as well as the general public. Specifically, advertised assumptions about anticipated aftermath may never actualize. Second, to understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required, and will either validate or repudiate any hypothesized applications. Absent such a study, unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining, rather than enhancing, the body of legal analysis surrounding a particular case like *Reed*.

II. THE PEBBLES AND THE POND

The smooth surface of the American legal pond is regularly disrupted by United States Supreme Court decision pebbles.⁷ Even the lightest of these pebbles will produce a ripple. And although the true mass of the pebble may not be known or clearly understood at the time it is tossed, the resulting ripples observed in the jurisprudence are of particular interest.

A. Supreme Court Cases as Pebbles

Case law forms through judicial proceedings. The decisions handed down by the courts form precedent—an essential, dynamic part of our American legal system.⁸ It is no wonder then that when a case is granted certiorari and comes before the United States Supreme Court, curiosity is piqued throughout the legal community to see if the Court's ruling will hold to an established norm or offer valid expostulation to alter a judicial rudder.⁹ The Court's decisions may naturally result in ripples¹⁰ that are unpredictable in scope. Seemingly mundane findings that are passed down without fanfare may produce lasting legal effects.¹¹ And seemingly major holdings that produce immediate uproar among legal scholars and/or the general public may turn out to have limited future impact.¹² It is nigh impossible to accurately predict the exact impacts that will arise from a single

⁷ For example, the October 2018 term has heard sixty-nine cases argued. *See Statistics*, SCOTUSBLOG, <http://www.scotusblog.com/statistics/> [<http://perma.cc/69MH-UKJT>] (last visited May 14, 2019).

⁸ WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 288 (Roger W. Cooley & Charles Lesley James eds., 3d ed. 1914) (“In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law.”).

⁹ See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710–17 (2018), for a history of the development of the modern certiorari process.

¹⁰ Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POLY & L. 499, 556 n.271 (1997) (“Supreme Court opinions obviously have a powerful ripple effect throughout the entire legal system. Particularly when, as I suggest, the Court seems intent on changing the direction of a particular constitutional trend, even the tone and dicta in the opinions can have an enormously influential effect.”). *See also* George D. Brown, *The Constitution as an Obstacle to Government Ethics—Reformist Legislation After National Treasury Employees Union*, 37 WM. & MARY L. REV. 979, 1042 (1996) (noting most Supreme Court decisions have ripple effects).

¹¹ *See, e.g.*, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

¹² *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

decision,¹³ for it may be that although “[t]he Court intended [one] result, . . . there have also been ripple effects it did not foresee.”¹⁴

We should perhaps be cautious of repercussion forecasts. This is because predictive literature may be rendered moot over time if the impacts imagined fail to materialize. It may be prudent, therefore, to draw upon the benefits of a reflective analysis after sufficient time has passed in order to assess predictive counterparts. If a case is revisited after a few years, the true impact it has had on the legal system can be compared to the impacts predicted by the initial literature. Such an examination will produce a more robust understanding of the case as a whole, and may highlight disparities or consistencies between hypothesized and actual impacts.

B. The Spectrum of Resulting Ripples

The existence of Supreme Court decision impacts has long been recognized: “[F]ew Supreme Court decisions stand alone without ‘ripple effects’ beyond their immediate facts.”¹⁵ Since these ripples are part of our legal reality,¹⁶ a further examination is warranted and, indeed, prudent.¹⁷ The potential disconnect between predicted and actual Supreme Court decision repercussions can be demonstrated by examining the two ends of the spectrum—opinions announced without pomp but that had profound impacts, and cases decided amidst a great deal of attention but that resulted in negligible impacts.

At one end of the spectrum are cases that passed through the Court quietly without ruffling any feathers or creating much stir in academia, but nonetheless have left a deep and lasting impression. One such case was *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁸ decided in June of 1984. In the year following, twenty-six law review articles cited the case; however, of

¹³ See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 375 (1993) (“[T]he promulgation of bold new rules, or the abandonment of old ones, can have ripple effects that the Supreme Court may not be well situated to anticipate.”).

¹⁴ James E. von der Heydt, *Ripple Effects: The Unintended Change to Jurisdictional Pleading Standards After Iqbal*, 60 CLEV. ST. L. REV. 799, 801 (2012) (footnote omitted).

¹⁵ Brown, *supra* note 10, at 1042. See also Fallon, *supra* note 13, at 375 (noting ripple effects may be unanticipated).

¹⁶ Haney, *supra* note 10, at 556 (“Supreme Court opinions obviously have a powerful ripple effect throughout the entire legal system.”).

¹⁷ This seems especially true in our current society which appears to be developing an increased tendency to jump to conclusions without due consideration of the validity of underlying facts or analysis. See, e.g., Kim Hart, *The snap decision society*, AXIOS (Apr. 4, 2019), <http://www.axios.com/snap-decisions-society-jumping-to-conclusions-14bf251e-d51e-4685-bcf9-9e948496353b.html> [http://perma.cc/ZF6U-ZFZG].

¹⁸ 467 U.S. 837 (1984).

these, seventeen referred to the holding only in footnotes,¹⁹ four gave it no more than a passing mention,²⁰ and one simply compared it to prior court findings.²¹ The six remaining articles voiced cautious opinions, hedged with words such as “may,” “perhaps,” “if,” and “suggests.”²² *Chevron* certainly did not seem to cause important legal reverberations at the time it was decided.²³ But the resulting doctrine of “*Chevron* deference” is well-established and widely relied upon today.²⁴ This “icon of administrative law”²⁵ is an example of a case with little to no predicted impacts, but one that has had a large, long-lasting influence in reality.

¹⁹ See, e.g., Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 385 n.27 (1985); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 n.250 (1985); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 26 n.114 (1985).

²⁰ James E. Alexander, *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 15 ENVTL. L. 325, 336 (1985); Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 306–07 (1985); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1242–43 (1985); Andrew Joseph Siegel, *The U.S.–Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT'L L. & ECON. 577, 600 (1985).

²¹ Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549–53 (1985).

²² *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 247, 247 (1984) (“[T]he Court’s opinion last Term in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which upheld EPA regulations on air pollution as a reasonable exercise of administrative discretion, suggests that courts have a very limited role in reviewing agency decisions”) (footnote omitted); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 225 (1984) (“This approach, if adhered to by the Court, will maximize agency discretion.”); Jack L. Landau, *Chevron, U.S.A. v. NRDC: The Supreme Court Declines to Burst EPA’s Bubble Concept*, 15 ENVTL. L. 285, 287–88 (1985) (“The United States Supreme Court’s decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, may signal an end to this hostile regulatory climate.”) (footnote omitted); Stephen M. Lynch, *A Framework for Judicial Review of an Agency’s Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469, 470 (1985) (“In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court may have forged the analytic framework for assessing the validity of an administrative agency’s construction of the statute that it is charged with administering.”) (footnote omitted); Eric Redman, *Statutory Construction in the Supreme Court: A Northwest Power Act Example*, 15 ENVTL. L. 353, 354 (1985) (“Thus, *Chevron* is perhaps more likely than *ALCOA* to have a lasting impact”).

²³ Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014) (“Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later.”). See also FedSoc Films, *Chevron: Accidental Landmark*, FEDERALIST SOCIETY (Dec. 19, 2018), <http://fedsoc.org/commentary/videos/chevron-accidental-landmark> [<http://perma.cc/B68U-MNVQ>] (discussing the origins of the *Chevron* doctrine and how it rose to become an “accidental landmark”).

²⁴ See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579 (2006).

²⁵ Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 (2018).

At the other end of the spectrum, there are cases that approached the Court with high-level publicity or political hype, and with great attention paid by the general public. For example, *Burwell v. Hobby Lobby Stores, Inc.*²⁶ came before the Supreme Court in 2014 in the middle of a media storm.²⁷ The case sought to answer whether a Christian-owned corporation which objected on religious grounds to the mandatory provision of post-conception contraceptives could be exempted from the requirement.²⁸ While the press coverage was extensive, the actual ruling's impact was minor: "*Burwell v. Hobby Lobby Stores*[.] . . . despite significant media attention, has virtually no current impact . . ."²⁹ This case seemed, at the time, destined to create a fire storm, but produced minor sparks in reality. These two cases together illustrate that unanticipated effects may subsequently emerge, or anticipated effects simply may not materialize.

C. The Importance of Time

Supreme Court decisions need time to unfold. Each one inevitably takes on a life of its own as it is fostered by the lower courts.³⁰ Some remain in the background, simply adding to the broad base of authority on a particular subject. Some grow up to be seminal cases in their field, earning their place in hornbooks

²⁶ 573 U.S. 682 (2014).

²⁷ See Jaime Fuller, *Here's what you need to know about the Hobby Lobby case*, WASH. POST (Mar. 24, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/?utm_term=.c74ae27a7a4f [<http://perma.cc/T7WP-XEL3>]; Julia Mirabella & Sandhya Bathija, *Hobby Lobby v. Sebelius: Crafting a Dangerous Precedent*, CTR. FOR AM. PROGRESS (Oct. 1, 2013, 9:08 AM), <http://www.americanprogress.org/issues/courts/reports/2013/10/01/76033/hobby-lobby-v-sebelius-crafting-a-dangerous-precedent/> [<http://perma.cc/K9F5-N9HR>].

²⁸ 573 U.S. at 688–90.

²⁹ Matthew J. Schenck & Jennifer L. Berry, *Supreme Court's Hobby Lobby Decision: Little Immediate Impact on Employers*, PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP (July 1, 2014), <http://www.paulplevin.com/blog/supreme-courts-ihobby-lobbyi-decision-little-immediate-impact-on-employers> [<http://perma.cc/U7LE-NYUK>]. See also Gregg Fisch, *The Supreme Court's Ruling in Hobby Lobby that Closely Held, For-Profit Companies Should Receive Religious Exemptions From ObamaCare's Conception Mandate Likely Will Have Little Practical Impact Immediately in the Employment Arena*, L. & EMP. L. BLOG (June 30, 2014), <http://www.laboremploymentlawblog.com/2014/06/articles/discrimination/the-supreme-courts-ruling-in-hobby-lobby-that-closely-held-for-profit-companies-should-receive-religious-exemptions-from-obamacares-conception-mandate-likely-will-have-little-practi/> [<http://perma.cc/45H3-788Y>] (“[I]t is easy to understand why this case has touched such a political nerve and is causing such a heated response. In terms of practical effects in the employment arena, however, the immediate impact on employers and employees likely will be limited for the foreseeable future.”); Emma Green, *The Supreme Court Isn't Waging a War on Women in Hobby Lobby*, ATLANTIC (June 30, 2014), <http://www.theatlantic.com/national/archive/2014/06/hobby-lobby-isnt-waging-a-war-on-women/373717> [<http://perma.cc/QC9A-WREE>] (quoting the White House Office of Faith-Based Initiatives director, John J. Dilulio Jr., as saying, “Love it or loathe it, the Hobby Lobby decision is limited in scope.”).

³⁰ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865–66 (1994).

across the land. This growth can be thought of as a type of percolation in reverse. The “concept of percolation” refers to the process by which “cases involving constitutional or statutory interpretation are generally granted certiorari only when they have been sufficiently vetted in the lower courts and have risen to the level of a dispute or split.”³¹ I will refer to this reverse type of percolation as “inverse percolation.” Just as the initial percolation is a beneficial element of our judicial system,³² there is also value in inverse percolation, whereby a Supreme Court decision becomes infused into the general jurisprudence via lower court application.

The inverse percolation process does not occur overnight. It takes time for cases to arise with factual and legal patterns appropriate for lower court application of a particular Supreme Court opinion. And it takes time for such cases to reach the high state courts, and to be found throughout the various federal circuit courts. Eventually, Supreme Court decision influence will surface in the lower courts as they comply with the reasoning handed down, but this compliance may not always be automatic.³³ Indeed, it has been suggested that other factors, like the age of an overruled precedent, for example, will play into a lower court’s decision of how quickly it will implement such precedent.³⁴ But when sufficient time has passed, an investigation of the inverse percolation results can be fruitful. Thus, time is an essential element in reflective analysis, reasonably requiring several years.

I suggest four years is an adequate inverse percolation time window to capture a well-developed snapshot of lower court application, misapplication, or in-application of the precedent set by a Supreme Court decision. *Reed* is, therefore, a good case to examine. At the time of its release, the decision evoked strong reactions among commentators who shared dire predictions

³¹ Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL’Y & L. 299, 348 (2008). See also *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

³² See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 439 (2004) (“Embracing the concept of percolation demonstrates a willingness to tolerate disuniformity for a time—the period needed for multiple lower courts to address an issue and flesh out the relevant considerations—but not necessarily forever.”).

³³ See, e.g., Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 534 (2002).

³⁴ *Id.* at 537.

about the breadth and scope of its impacts.³⁵ A meaningful assessment of *Reed*'s effects may now be conducted because time has passed, and the inverse percolation process has been active for several years. Before looking at the literature the decision generated or the categorization of courts' post-*Reed* applications, a review of the *Reed* litigation, its journey to the Supreme Court, and the Court's analysis of its First Amendment issue will be useful. The next Part takes on that task.

III. A PEBBLE IS CAST

Reed is an interesting case on its merits alone, especially to First Amendment scholars and practitioners, since it addressed an important First Amendment issue dealing with content-based regulations and mended a circuit split on the same. More importantly here, however, it is a case that is well-situated for the type of examination described in this Comment. *Reed* was decided in 2015.³⁶ The Court's decision in *Reed* induced a reaction among constitutional law professors and other scholars who predicted far-reaching impacts.³⁷ We are at a good spot now to reflect and see if any of those predicted impacts have materialized.

The *Reed* case involved how, why, and to what extent a city could regulate the placement of signs around town for various events.³⁸ Seemingly simple on its face, the Supreme Court granted certiorari to resolve a three-way circuit split on determining content-neutrality and, thus, the appropriate level of scrutiny. The level of scrutiny applied in *Reed* hinged on whether the laws regulating the signs were content-based or content-neutral.³⁹ Thus, the question before the Court focused on the subsection of First Amendment jurisprudence dealing with content-neutral analyses.⁴⁰ The *Reed* case evolved as follows.

A. *Reed v. Town of Gilbert*

1. Background

In the Town of Gilbert, Arizona, Clyde Reed served as the pastor of Good News Community Church, a small congregation that owned no building and held Sunday services at various

³⁵ See *infra* Part III.

³⁶ *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

³⁷ See *infra* Part IV(A).

³⁸ *Reed*, 135 S. Ct. at 2221–22.

³⁹ *Id.* at 2228.

⁴⁰ See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1204 (2013) (“In examining the First Amendment’s protection of freedom of expression . . . any law can be reviewed to determine whether it is content-based or content-neutral . . .”).

locations throughout the town.⁴¹ To inform the public and its parishioners of each weekend's service location, the church would post fifteen to twenty signs every Saturday morning and remove them midday on Sunday.⁴² The signs were mainly posted in public right-of-way areas.⁴³

Unfortunately for Pastor Reed, the Town of Gilbert had enacted the Gilbert, Arizona Land Development Code ("Sign Code") which regulated signs throughout the city.⁴⁴ The Sign Code required parties posting outdoor signs within the town's limits to obtain a permit, but it exempted twenty three categories of signs from the permitting provision.⁴⁵ Pastor Reed's signs qualified as "Temporary Directional Signs Relating to a Qualifying Event" ("Qualifying Event Signs"), one of the exempted classifications, and, as such, were subject to restrictions on size, placement, and display duration.⁴⁶ The church was cited by the town twice for leaving signs up longer than the permissible thirteen hours, and, when Pastor Reed attempted to negotiate with the Sign Code Compliance Department, he was informed "there would be 'no leniency under the Code' and . . . any future violations" would be punished.⁴⁷ Pastor Reed and the Good News Community Church sued the Town of Gilbert, claiming the Sign Code violated the First Amendment by abridging their freedom of speech.⁴⁸

2. *Reed* Analysis and Holding

The Court analyzed the question presented in *Reed* by examining the varying constraints on three Sign Code exceptions: Ideological Signs, Political Signs, and the aforementioned Qualifying Event Signs.⁴⁹ By noting the obvious differences in restraints on each sign category, the Court pointed out the Sign Code favored some types of signs over others;⁵⁰ therefore, the Sign Code was content-based on its face.⁵¹ This conclusion triggered strict scrutiny, whereby, in order to be constitutional, the Sign Code needed to be found to serve a compelling government interest and needed to achieve that

⁴¹ *Reed*, 135 S. Ct. at 2225.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2224.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2224–25.

⁴⁷ *Id.* at 2225–26.

⁴⁸ *Id.* at 2226.

⁴⁹ *Id.* at 2224–25.

⁵⁰ *Id.*

⁵¹ *Id.* at 2227.

interest in the least restrictive manner possible.⁵² Although the government had offered justifications for enacting the Sign Code in the lower court, the Supreme Court deemed these justifications irrelevant in light of the fact that the ordinance was content-based on its face.⁵³ The Supreme Court refuted each of the arguments the government presented in support of content-neutrality.⁵⁴ Then, the Court systematically dismantled the Ninth Circuit's finding of content-neutrality based on lack of governmental intent to discriminate,⁵⁵ as well as assertions that there existed no differential treatment based on viewpoint or speaker.⁵⁶ The Sign Code did not survive strict scrutiny. The Court found the Sign Code to be unconstitutional because the City of Gilbert had no valid reason for crafting it in a manner that showed favoritism to some categories of signs but not to others.⁵⁷

3. *Reed* Concurrences

Although one adage claims “great minds think alike,” I prefer Thomas Paine’s quip: “I do not believe that any two men . . . think alike who think at all. It is only those who have not thought that appear to agree.”⁵⁸ Perhaps this observation is well-suited to describe many Court opinions, and so it was in *Reed*. Justice Thomas penned the majority opinion described above, and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor.⁵⁹ However, three concurring opinions were also put forth by the Court.

Justice Alito, joined by Justices Kennedy and Sotomayor,⁶⁰ filed a concurring opinion in which he noted that “[p]roperly understood, today’s decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”⁶¹ This is because Justice Alito took the view that, although the *Reed* regulations were “replete with content-based distinctions, and . . . must satisfy strict scrutiny. . . . This does not mean . . . municipalities are

⁵² See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006).

⁵³ *Reed*, 135 S. Ct. at 2227.

⁵⁴ *Id.* at 2228–31.

⁵⁵ *Id.* at 2228–29 (“[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.”).

⁵⁶ *Id.* at 2230 (“[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”).

⁵⁷ *Id.* at 2232.

⁵⁸ THOMAS PAINE, *Rights of Man. Part the Second. Combining Principle and Practice*, in SELECTED WRITINGS OF THOMAS PAINE 262, 360 (Ian Shapiro & Jane E. Calvert eds., 2014).

⁵⁹ *Reed*, 135 S. Ct. at 2223.

⁶⁰ *Id.* at 2233 (Alito, J., concurring).

⁶¹ *Id.* at 2233–34.

powerless to enact and enforce reasonable sign regulations.”⁶² He then provided a non-comprehensive list of “rules that would not be content based,” including rules “regulating the size of signs,” “distinguishing between on-premises and off-premises signs,” and “restricting the total number of signs allowed per mile of roadway,” to name a few.⁶³

Although Justice Breyer also concurred in the judgment,⁶⁴ he wrote a solo opinion arguing that “content discrimination . . . cannot and should not *always* trigger strict scrutiny”⁶⁵ because “virtually all government activities involve speech, many of which involve the regulation of speech. . . . [And] [r]egulatory programs almost always require content discrimination.”⁶⁶ Thus, according to Justice Breyer, “to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.”⁶⁷ He further expressed fears of “watering down” strict scrutiny, and offered:

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule . . . but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool . . . to determine the strength of a justification.⁶⁸

Justice Kagan entered a third concurring opinion, joined by Justices Ginsburg and Breyer,⁶⁹ in which she opined that the majority was reaching too far. “We apply strict scrutiny to facially content-based regulations of speech . . . when there is any ‘realistic possibility that official suppression of ideas is afoot.’”⁷⁰ Furthermore, the “concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when ‘that risk is inconsequential, . . . strict scrutiny is unwarranted.’”⁷¹ Justice Kagan found the “Town of Gilbert’s defense of its sign ordinance . . . [did] not pass strict scrutiny, or

⁶² *Id.* at 2233.

⁶³ *Id.* Additional content neutral categories of rules were offered by Justice Alito in his concurrence: rules regulating the locations in which signs may be placed; rules distinguishing between lighted and unlighted signs; rules distinguishing between signs with fixed messages and electronic signs with messages that change; rules that distinguish between the placement of signs on private and public property; rules distinguishing between the placement of signs on commercial and residential property; and rules imposing time restrictions on signs advertising a one-time event. Again, Justice Alito does “not attempt to provide anything like a comprehensive list,” but opines that the rules he has listed would not be content-based. *Id.*

⁶⁴ *Id.* at 2234.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2235.

⁶⁹ *Id.* at 2236.

⁷⁰ *Id.* at 2237 (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007)).

⁷¹ *Id.* at 2238 (quoting *Davenport*, 551 U.S. at 188).

intermediate scrutiny, or even the laugh test.”⁷² She concluded: “I suspect this Court and others will regret the majority’s [finding] today . . . [as] [t]his Court may soon find itself a veritable Supreme Board of Sign Review.”⁷³

It is doubtful that the *Reed* case ruling generated many cheers outside the realm of those directly involved. Rather, it produced furrowed brows, uncertainty, and disagreement,⁷⁴ as the concurrences seemed to suggest varying avenues of thought would ultimately converge in upholding a decision in Pastor Reed’s favor. It has yet to be determined how significant the effects of *Reed* will eventually be and how far its reach will eventually extend.

B. Journey to the U.S. Supreme Court

Reed had appeared to call for a straight-forward application of the First Amendment by the Ninth Circuit. But cases like *Reed* can find their way in front of the United States Supreme Court because there has been disagreement among the lower courts over how they should be handled.⁷⁵ Indeed, *Reed* presented the Supreme Court with the opportunity to resolve a circuit split and instruct on the appropriate test to use in similar situations. The Court’s resolution of this split aligned with four of the circuits, leaving those in the remaining circuits to question the Court’s wisdom, and to postulate on widespread application of *Reed* to the detriment of First Amendment jurisprudence.⁷⁶

1. Ninth Circuit’s Dealings with *Reed*

Reed was originally filed in the U.S. District Court for the District of Arizona in 2008,⁷⁷ and the Ninth Circuit was afforded two opportunities to rule on the matter.⁷⁸ When the District Court first concluded the Sign Code was content-neutral and survived intermediate scrutiny, the Ninth Circuit affirmed and remanded the case to consider whether the differential treatment of “Ideological . . . , Political . . . , and Qualifying Event Signs” was

⁷² *Id.* at 2239.

⁷³ *Id.*

⁷⁴ See, e.g., David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 360 (2015) (referring to *Reed* inter alia, “I argue that the Court has struck the wrong doctrinal balance in these areas . . .”).

⁷⁵ See, e.g., WRIGHT ET AL, *supra* note 6, § 3506.

⁷⁶ See *infra* Part III.

⁷⁷ *Reed v. Town of Gilbert, Ariz.*, No. 07-CV-522-PHX-SRB, 2008 WL 11339947 (D. Ariz. Sept. 30, 2008).

⁷⁸ *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966 (9th Cir. 2009) [hereinafter *Reed I*]; *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057 (9th Cir. 2013) [hereinafter *Reed II*].

constitutional.⁷⁹ On remand, the District Court repeated its previous findings regarding content-neutrality and the satisfaction of intermediate scrutiny,⁸⁰ and the Ninth Circuit again affirmed.⁸¹ The United States Supreme Court granted certiorari to resolve a three-way circuit split over how to properly distinguish between content-based and content-neutral laws.⁸² It has been suggested that the three-way circuit split developed out of lower courts' "discomfort" with the idea that "all distinctions between speech based on content are presumptively impermissible."⁸³ In other words, it seems that courts may have trouble concurrently applying the idea that speech may not be categorized and treated disparately, yet some types of speech, such as commercial speech, are deemed to be of lower value.⁸⁴

2. Circuit Split

An "on-its-face" test, such as was applied in *Reed*,⁸⁵ had not been uniformly applied across the circuits for determining content-neutrality pre-2015. The Fourth, Sixth, and Ninth Circuits, among others, deemed laws to be content-neutral if the government could offer a content-neutral justification or pure legislative motive for the law.⁸⁶ These "practical" circuits⁸⁷ employed a "motive-based test" that allowed content-neutrality to be found in the absence of a showing of governmental intent to create content-based law.⁸⁸ In contrast, the "absolutist"⁸⁹ First,

⁷⁹ *Reed I*, 587 F.3d at 973, 983.

⁸⁰ *Reed v. Town of Gilbert*, 832 F. Supp. 2d 1070, 1078 (D. Ariz. 2011).

⁸¹ *Reed II*, 707 F.3d at 1077.

⁸² *Id.* at 1057, cert. granted, 573 U.S. 957 (July 1, 2014) (No. 13–502).

⁸³ Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015) [hereinafter Bhagwat, *(Dis)content*]. See also Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1429–30 (2017) ("[T]he reason why lower courts disagree about the definition of content discrimination, and why the Supreme Court itself has not been consistent on this question, is an unstated discomfort with the implications of the all-speech-is-equal premise. The truth is that this premise simply does not coincide with the instincts of most citizens and—importantly—most judges. As a result, when a law that regulates fully protected speech that seems less socially valuable than speech at the core of First Amendment's protections is coupled with a strong, albeit likely not 'compelling,' government reason to restrict the speech, judges regularly look to avoid labeling the law as content-based, even when it is clearly so."); Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235 (2016) ("[N]otwithstanding the conflicting instructions they received from the Supreme Court, lower courts frequently held that laws that made facial content distinctions were content-neutral.").

⁸⁴ See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000).

⁸⁵ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

⁸⁶ Petition for Writ of Certiorari at 18, *Reed*, 135 S. Ct. 2218 (2015) (No. 13–502).

⁸⁷ Leah K. Brady, *Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment Purposes?*, 21 SUFFOLK J. TRIAL & APP. ADVOC. 319, 333 (2016).

⁸⁸ See, e.g., *Brown v. Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013) (holding a law "may distinguish speech based on its content so long as its reasons for doing so are not

Second, Eighth, and Eleventh Circuits judged content-neutrality by examining the law's terms,⁹⁰ characterized as a "text-based test."⁹¹ And the Third Circuit developed a more complex five-part "context-sensitive" test⁹² that weighed the value of the message at a given location against the underlying regulatory interests.⁹³ In light of this discontinuity, it is not surprising that the Supreme Court granted certiorari in *Reed*.

C. *Reed's* First Amendment Application

In resolving the circuit split, the Supreme Court used *Reed* to establish a uniform test for determining whether a law is content-based or content-neutral.⁹⁴ This test begins with "the crucial first step" of "determining whether the law is content neutral *on its face*."⁹⁵ It follows that "[a] law that is content based on its face is subject to strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."⁹⁶ Thus, if a municipal code "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny"⁹⁷

Reed solidified how courts should approach content-neutral versus content-based analyses, and the ensuing effect is best understood by examining subsequent court interpretations and applications of *Reed*. It may appear that, strictly speaking, *Reed* addressed an extremely narrow portion of First Amendment law,

based on the message conveyed"); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621 (6th Cir. 2009) (finding an ordinance to be content-neutral as long as "the regulation was not adopted because of disagreement with the message that the speech conveys"). See also the Ninth Circuit's rationale in *Reed I* and *Reed II*.

⁸⁹ *Brady*, *supra* note 87, at 333.

⁹⁰ Petition for Writ of Certiorari, *supra* note 86, at 19.

⁹¹ *Id.* at 21. See also *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) (holding sign code distinctions based solely on the message conveyed to be impermissible); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (finding exemptions from obtaining a permit to fly a flag bearing government or religious insignia to be content-based); *Nat'l Advert. Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990) (ruling exemptions of political signs and signs identifying a grand opening, parade, festival, fund drive, or similar occasion from a general sign ban unconstitutional); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (noting a sign code that facially banned political signs but permitted for sale, professional office, and religious and charitable cause signs to be content-based).

⁹² Petition for Writ of Certiorari, *supra* note 86, at 25.

⁹³ *Id.* at 18–19. See also *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1087 (3d Cir. 1994) (finding a "For Sale" sign to be entitled to greater First Amendment protection than a political sign).

⁹⁴ 135 S. Ct. 2218, 2228 (2015).

⁹⁵ *Id.* (emphasis added).

⁹⁶ *Id.* (emphasis added) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

⁹⁷ *Id.* at 2231.

only applying to how municipalities regulate signs. But it can be argued the actual reach of the opinion is much wider. As of 2012, there were 35,886 municipalities and townships in the United States,⁹⁸ each of which would be subject to suit for any facial distinctions in their sign regulations if we use the narrowest possible application of *Reed*. If that application is expanded to examine facial distinctions in *any* municipal ordinance, regardless of subject, it is likely the effects from the *Reed* decision would expand significantly.

For the purposes of this Comment, *Reed* is an important case chronologically because it is not so far past as to create an unmanageable review of its subsequent appearance in general jurisprudence. The number of cases that have cited to *Reed* is currently high enough to yield a significant population to be examined and categorized, but is not so high as to make the review of the citations daunting. Therefore, this case analysis will be illuminating. Before examining the cases that have cited to *Reed*, it will be useful in the next part to review the literature that the *Reed* decision spawned—literature which expressed fears of how far *Reed*'s impacts would be felt. These *Reed* predictions will then be measured against the actual manifested repercussions summarized in Part IV.

IV. THE PREDICTED RIPPLES

A survey of the post-*Reed* literature is instructive, as it contains predictions of *Reed*'s reach. By reviewing the variety of published and expressed impact forecasts, a backdrop can be painted against which *Reed*'s effects become apparent. That is, comparison of *Reed*'s implementation by the lower courts to the hypothesized repercussions expressed in law reviews and the public forum yields a richer understanding of the decision's true reach, and enables us to judge the accuracy of its predictive literature.

In the immediate aftermath of *Reed*, colorful remarks such as “*Reed* has set off a firestorm”⁹⁹ were not unfamiliar. The *Reed* decision was handed down by the Court in June 2015 and, almost immediately, prophecies about how lower courts would use the decision as an excuse to run rough-shod over other areas of First Amendment law arose in the public forum and in legal literature.¹⁰⁰ Such forecasts have continued to trickle out in law

⁹⁸ *Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. Census Bureau (Aug. 30, 2012), <http://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [<http://perma.cc/AH9Z-ZC9R>].

⁹⁹ Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 66 (2017).

¹⁰⁰ See *infra* Part IV(A).

review articles since.¹⁰¹ The current body of literature that cites to *Reed* ranges from single footnote mentions that are largely inconsequential, to textual allusions assuming pre-existing *Reed* knowledge,¹⁰² to brief fact and holding descriptions,¹⁰³ to analyses of *Reed*'s impact on particular doctrines or topics,¹⁰⁴ to entire articles devoted to the *Reed* case and its ensuing doctrine.¹⁰⁵

This Part reviews the *Reed* impacts prophesized by those in the public forum and by authors of law review articles, as well as consequences noted from the bench. Although many commentators addressed how they felt *Reed* would affect American jurisprudence in general, some focused on its significance with respect to particular doctrines, while some expressed estimations of exaggerated eventualities.

A. *Reed*'s Hypothesized Impacts

1. Impacts Recognized in the Public Forum

When *Reed* was decided on June 18, 2015, a posting by law professor Eugene Volokh appeared on *The Washington Post* website the same day.¹⁰⁶ The post summarized the *Reed* case, the Court holding, and the three concurrences, then critically raised questions about the decision's ramifications on the secondary effects doctrine, on *Hill v. Colorado*, and on the preservation of the marketplace of ideas.¹⁰⁷ Altogether, Volokh felt *Reed* had reached too far in mandating the application of strict scrutiny, noting that “[w]e can administer our content-regulation doctrine

¹⁰¹ For example, on Westlaw there are two law review articles published in 2019 that substantially address *Reed*. See e.g., Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMM. L. & POL'Y 191 (2019).

¹⁰² See Mark Chenoweth, *Expressions Hair Design: Detangling the Commercial-Free-Speech Knot*, 2016–2017 CATO SUP. CT. REV. 227, 234; Mary Christine Brady, Comment, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771, 774 (2018).

¹⁰³ See Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 849 (2017); Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 732 (2018).

¹⁰⁴ See Ashutosh Bhagwat, *When Speech is Not "Speech"*, 78 OHIO ST. L.J. 839, 847 (2017); Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385, 388 (2017); Joseph Mead, *Why We Need Reed: Unmasking Pretext in Anti-Panhandling Legislation*, 7 CONLAWNOW 37, 38 (2015).

¹⁰⁵ See Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 570 (2015); Urja Mittal, Note, *The "Supreme Board of Sign Review": Reed and Its Aftermath*, 125 YALE L.J.F. 359, 359 (2016).

¹⁰⁶ Eugene Volokh, *Supreme Court reaffirms broad prohibition on content-based speech restrictions, in today's Reed v. Town of Gilbert decision*, WASH. POST (June 18, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/?utm_term=.501e5173cee0 [http://perma.cc/9WX4-F5RB].

¹⁰⁷ *Id.*

with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.”¹⁰⁸

That same summer, another criticism of the High Court’s *Reed* decision surfaced in the public forum.¹⁰⁹ On August 17, 2015, *The New York Times* published an article by its Supreme Court correspondent, Adam Liptak, that analyzed *Reed* as “the sleeper case of the last Supreme Court term.”¹¹⁰ Liptak claimed *Reed* had “transformed the First Amendment” and “mark[ed] an important shift toward treating countless laws that regulate speech with exceptional skepticism.”¹¹¹ Robert Post, the Dean of Yale Law School, opined in the article that the *Reed* “decision was so bold and so sweeping that the Supreme Court could not have thought through its consequences.”¹¹² Moreover, Dean Post claimed “the [*Reed*] majority opinion, read literally, would so destabilize First Amendment law that courts might have to . . . rethink what counts as speech . . . or . . . water down the potency of strict scrutiny.”¹¹³

2. Impacts Predicted in Law Review Articles

One exemplar of the law review coverage of *Reed* concluded that “[a]lthough prominent legal minds differ in their reactions to the decision, most agree that [*Reed*] will have influential and significant effects on laws that regulate speech.”¹¹⁴ As of this writing, there are over 340 law review articles available on Westlaw that cite to *Reed*.¹¹⁵ Some discuss the case; some refer to it only via footnote. Of the approximately fifty-five articles criticizing *Reed*, the common thread seems to be an expressed apprehension over expansive application of the *Reed* result to other areas of First Amendment law, and beyond. A sampling of these articles is discussed below.

Some of the initial articles written in the latter half of 2015 conveyed concerns such as: “[I]n *Reed v. Town of Gilbert*, the U.S. Supreme Court may have opened the door to a broader

¹⁰⁸ *Id.*

¹⁰⁹ Adam Liptak, *Court’s Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html> [<http://perma.cc/6TLE-RX22>].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Jacquelyn M. Lyons, Comment, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 928 (2017).

¹¹⁵ As of January 30, 2019, Westlaw had linked 342 law review articles to the *Reed v. Town of Gilbert* case under the Secondary Sources subsection of the associated Citing References tab. WESTLAW, <http://westlaw.com> (from 135 S. Ct. 2218, follow “Citing References” tab; then filter by “Secondary Sources” and “Law Reviews”).

application of strict scrutiny”¹¹⁶ since “the opinion is startlingly broad and attempts to apply a one-size-fits-all approach despite the nuances of First Amendment doctrine.”¹¹⁷ Additionally, it was feared that “the Courts [sic] ruling was so broad that . . . it has transformed First Amendment jurisprudence as a whole. . . . [It] appears to greatly expand the reach of First Amendment rights.”¹¹⁸ These initial worries of a sweeping application of the decision have remained a theme in *Reed* critiques, although some articles focused on *Reed*’s impact on a particular subject or doctrine.

a. Broad Application

The fear of broad application has been addressed by many commentators. For example, in 2016, Genevieve Lakier authored an article titled, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*,¹¹⁹ in which she decried *Reed*’s sweeping application: “*Reed* thus represents an important change in First Amendment doctrine, and one that will in all likelihood have a significant impact in many areas of law.”¹²⁰ Whereas some pre-*Reed* jurisprudence applied intermediate scrutiny to laws where the government could demonstrate no intent to discriminate, Lakier opined that *Reed*’s approach of first subjecting the statute or ordinance to an on-its-face evaluation of content-neutrality “likely imperils many laws that pose no significant threat to First Amendment interests.”¹²¹ She worried:

This may only be the tip of the iceberg. By insisting that strict scrutiny applies to all laws that treat speakers differently because of the content of their speech, *Reed* potentially imperils the hundreds, even perhaps thousands, of local, state, and federal laws that make subject matter or viewpoint distinctions.¹²²

Lakier claimed *Reed* produced “a test of content-based lawmaking that is both too broad and too narrow.”¹²³

Such concerns were echoed the following year in a note by James Andrew Howard titled, *Salvaging Commercial Speech Doctrine: Reconciling Reed v. Town of Gilbert with Constitutional*

¹¹⁶ Erika Schutzman, Note, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2051 (2015).

¹¹⁷ *Id.* at 2054–55.

¹¹⁸ Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, 103 ILL. B.J. 15, 15 (2015).

¹¹⁹ Lakier, *supra* note 83, at 233.

¹²⁰ *Id.* at 235.

¹²¹ *Id.* at 274–77.

¹²² *Id.* at 235. Lakier suggested that this result is perhaps not surprising, as it “demonstrates once again the pronounced deregulatory tilt of the Roberts Court’s First Amendment jurisprudence.” *Id.* at 235–36.

¹²³ *Id.* at 296.

Free Speech Tradition.¹²⁴ Howard claimed that “if taken at face value, [*Reed*] would reverse the Court’s extensive case law determining that certain categories of speech are more valuable than others, and thus, that different categories may be regulated in different ways.”¹²⁵ In particular, Howard opined that *Reed*’s impacts could not have been fully realized by the Court as the “decision unintentionally overturns thousands of federal, state, and local regulations, implicitly revokes clearly established Supreme Court case law, and ignores other governmental and public interests”¹²⁶

Claudia Haupt, in her article, *Professional Speech and the Content-Neutrality Trap*,¹²⁷ suspected *Reed* of being a harbinger of First Amendment change: “*Wollschlaeger v. Governor of Florida* . . . reflects a new form of aggressive content neutrality on the rise in First Amendment jurisprudence beginning with *Reed v. Town of Gilbert*.”¹²⁸ Haupt felt that “*Reed* ushered in what may turn out to be a dramatic shift in the way courts employ content-neutrality as a core principle of the First Amendment.”¹²⁹ Although the article addresses professional speech, Haupt notes that “[t]aken literally, [*Reed*] could plausibly encompass ‘any regulation that even incidentally distinguishes between activities or industries.’ In short, the potential doctrinal impact of *Reed* is sweeping.”¹³⁰

Moreover, according to Emily Jessup in *When “Free Coffee” Violates the First Amendment*,¹³¹ after the Court in *Reed* gave a “sweeping definition of ‘content based,’”¹³² it was “likely setting the stage for many more challenges across the country.”¹³³ She pointed out that “the majority [has] departed from previous standards”¹³⁴ and “‘rearticulated the standard for when regulation of speech is content based,’ possibly changing the

¹²⁴ James Andrew Howard, Comment, *Salvaging Commercial Speech Doctrine: Reconciling Reed v. Town of Gilbert with Constitutional Free Speech Tradition*, 27 GEO. MASON U. CIV. RTS. L.J. 239, 239 (2017).

¹²⁵ *Id.* at 243.

¹²⁶ *Id.* at 244.

¹²⁷ Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150 (2017).

¹²⁸ *Id.* at 150.

¹²⁹ *Id.*

¹³⁰ *Id.* at 162 (footnote omitted) (quoting Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1987 (2016)).

¹³¹ Emily Jessup, *When “Free Coffee” Violates the First Amendment: The Federal Highway Beautification Act After Reed v. Town of Gilbert*, 16 FIRST AMEND. L. REV. 73 (2017).

¹³² *Id.* at 75.

¹³³ *Id.* at 94.

¹³⁴ *Id.* at 80.

content-neutrality analysis for all government ordinances.”¹³⁵ Thus, similar to the opinions expressed by Howard, Jessup concluded that the “Supreme Court’s decision [in *Reed*] . . . has had far-reaching effects, . . . [which have] fundamentally changed the content-neutrality analysis”¹³⁶

These commentators are just a few who expressed the common thought that the *Reed* decision was too broad and sweeping, and potentially impacted a wide range of government regulations.¹³⁷ Yet another commentator provided a good summary of these concerns, opining that *Reed* presented a “[d]octrinal distortion,”¹³⁸ because usually there is a “very low likelihood that forbidden governmental motives are involved . . . [and there is a] limited extent to which such ordinances are likely to distort the marketplace of ideas.”¹³⁹

b. Topical Application

The literature criticizing the Court’s ruling in *Reed* is also peppered with applications of the *Reed* reasoning to specific topics and doctrines. One such topic of concern was commercial speech,¹⁴⁰ as it was feared that “[f]ull [a]pplication of *Reed* [w]ould [e]viscerate [c]ommerical [s]peech [d]octrine.”¹⁴¹ Since it was handed down in 1980, the four-part *Central Hudson* test¹⁴²

¹³⁵ *Id.* at 78 (quoting Anthony D. Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1105 (2016)) (footnote omitted).

¹³⁶ *Id.* at 94.

¹³⁷ See also Margaret Rosso Grossman, *Genetically Engineered Animals in the United States: The AquAdvantage Salmon*, 11 EUR. FOOD & FEED L. REV. 190, 199 (2016) (“[T]he *Reed* decision may pose barriers to required labels on GE food.”); Shaakirrah R. Sanders, *Ag-Gag Free Detroit*, 93 U. DET. MERCY L. REV. 669, 678 (2016) (“*Reed* may constitute a game changer with regard to the constitutionality of ag-gag legislation”); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 179 (2016) (“[W]ere *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional.”); Nat Stern, *Judicial Candidates’ Right to Lie*, 77 MD. L. REV. 774, 796–97 (2018) (“[*Reed*] criterion appears to collapse the distinction between content regulation and subject-matter regulation.”); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 381–82 (2016) (applying *Reed* to federal law governing trademarks, via the Lanham Act).

¹³⁸ Han, *supra* note 74, at 405.

¹³⁹ *Id.* at 407.

¹⁴⁰ Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 968 (2017) (“[C]ommerical speech, quite simply, is speech which does ‘no more than propose a commercial transaction.’” (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976))).

¹⁴¹ *Id.* at 983.

¹⁴² Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful

has been applied to commercial speech regulations imposing intermediate scrutiny,¹⁴³ because commercial speech is accorded lesser protection than other speech on the grounds that speech proposing a commercial transaction takes a subordinate position in the scale of First Amendment values.¹⁴⁴ To extend *Reed* to commercial speech would demand such ordinances pass strict scrutiny. It was feared, therefore, that the well-developed commercial speech doctrine would be undermined by a heightened level of review, and more—if not most—commercial speech regulations would now be found unconstitutional.¹⁴⁵ This hypothetical was perhaps not far-fetched, as it is not an irrational stretch to think—at least for signs—that courts could find a commercial sign regulation content-based on its face simply because it differentiates between commercial and non-commercial signs. When one commentator doubted that such an application would be made, he nonetheless noted that tension exists in this area of First Amendment law.¹⁴⁶

It was also feared that application of *Reed* would destroy the secondary effects doctrine under which government agencies were permitted to craft statutes “designed to combat the undesirable secondary effects” of speech.¹⁴⁷ Again, although the Supreme Court was silent in this regard in *Reed*, concern was voiced that the *Reed* whale would swallow the secondary effects Jonah.¹⁴⁸ *Reed* seemed, to some, to “signify a coming . . . change

activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

¹⁴³ *Id.* at 564.

¹⁴⁴ *See, e.g.*, Post, *supra* note 84, at 3.

¹⁴⁵ Howard, *supra* note 124, at 244 (“If *Reed* is to be taken on its face, then any separate distinctions for commercial speech must be implicitly overturned.”); Mason, *supra* note 140, at 983 (“Based on this straightforward reading, then, one could argue that content-based regulations, whether facial or justification based, will trigger strict scrutiny, even with respect to commercial speech. Although this solution seems straightforward, complete application of *Reed* to commercial speech would essentially overrule all existing commercial speech doctrine.”); Shanor, *supra* note 137, at 179 (“*Reed sub silentio* overruled decades of commercial speech precedent, including landmark commercial speech cases such as *Central Hudson* and *Zauderer*.”).

¹⁴⁶ Shanor, *supra* note 137, at 179 (“While it strains credulity, in the words of the late Justice Scalia, to suggest that the Supreme Court hid such an elephant in the mouse hole of a relatively obscure case about an Arizona sign ordinance, *Reed*, . . . signals growing tension between various First Amendment sub-doctrines.” (footnote omitted)).

¹⁴⁷ *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986) (observing the secondary effects doctrine is mainly applied to adult entertainment regulations).

¹⁴⁸ Jacobs, *supra* note 104, at 388–89 (“[T]he Supreme Court has shot a missile into its own [secondary effects] reasoning. . . . It could be that the six Justices in the *Reed* majority meant to sweep away four decades of precedent and subject the full range of detailed zoning, public health and safety regulations imposed by localities across the country . . . to the most demanding level of Free Speech Clause scrutiny. But this conclusion would ignore the Justices’ steadfast cultivation, development, and embrace of

in how American municipalities regulate their streets”¹⁴⁹ All in all, many suspected that *Reed* had “complicat[ed] government efforts to regulate speech in furtherance of state interests.”¹⁵⁰

c. Extreme Views

Various, rather unlikely, predictions of *Reed* have been offered as well, such as: “*Reed* is so wildly inconsistent with so much of existing law that the Court probably did not mean what it said;”¹⁵¹ “It is hard to tell what weight to give to *Reed*, because it is hard to believe the Court is serious;”¹⁵² “Justice Thomas’s doctrine would have courts repent of these earlier sins and hew to the formal variant unbendingly in all future cases;”¹⁵³ and “*Reed*’s hard line is almost certainly too extreme to hold”¹⁵⁴

Additionally, others predicted that “[i]n *Reed*, Justice Thomas articulated a new standard for courts to assess the content neutrality of laws regulating speech, a move likely to have profound consequences on a broad array of subjects.”¹⁵⁵ Or, that “the term ‘content-based’ as recently used in *Reed* is unsustainably overbroad,”¹⁵⁶ thus a “corrosive First Amendment . . . emerges from *Reed*.”¹⁵⁷ These predictions of improbable results demonstrate the severity of suspicion with which some viewed the *Reed* outcome.

3. Impacts Noted from the Bench

Critiques of the *Reed* holding was not limited to the academic legal community or the public forum. Judges applying *Reed* expressed their opinions on the case in the midst of their written decisions as well. The following examples illustrate:

[T]he Supreme Court complicated matters when it issued its opinion in *Reed*.¹⁵⁸

Secondary Effects Analysis, in the face of persistent and persuasive external and internal criticism over many years.” (footnotes omitted).

¹⁴⁹ Anthony D. Lauriello, Note, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1106 (2016).

¹⁵⁰ Anna S. Roy, Comment, *Ninth Circuit Applies Intermediate Scrutiny to Mandated Abortion Clinic Notices*—Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016), *Cert. Granted in Part Sub Nom.* Nat’l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (U.S. Nov. 13, 2017) (*mem.*), 50 SUFFOLK U. L. REV. 771, 775 (2017).

¹⁵¹ Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1133 (2016).

¹⁵² *Id.* at 1159.

¹⁵³ Langvardt, *supra* note 103, at 851.

¹⁵⁴ *Id.*

¹⁵⁵ Lauriello, *supra* note 149, at 1106 (footnote omitted).

¹⁵⁶ Tushnet, *supra* note 137, at 412.

¹⁵⁷ *Id.* at 423.

¹⁵⁸ *Free Speech Coal., Inc. v. Attorney Gen. U.S.*, 825 F.3d 149, 174 (3d Cir. 2016) (Rendell, J., dissenting).

Our sister circuits have also noted that *Reed* represents a drastic change in First Amendment jurisprudence.¹⁵⁹

The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation.¹⁶⁰

Reed v. Town of Gilbert then worked a sea [of] change in First Amendment law.¹⁶¹

[A]mbiguity . . . remains in the wake of *Reed* regarding how broadly or narrowly courts must interpret the subject matters between which a government speech restriction distinguishes¹⁶²

“*Reed* did not relate to commercial speech, or mandatory disclosures as a part of commercial speech, and therefore did not have occasion to consider those doctrines.” To view it as doing so, and “to find a new First Amendment principle between the lines of *Reed*, is like trying ‘to find a black cat in a dark room, especially if there is no cat.’”¹⁶³

Additionally, Judge Gerald Tjoflat dissented in the Eleventh Circuit’s *Wollschlaeger* decision because of “the uncertainty introduced by *Reed*” and its “pernicious and far reaching effects.”¹⁶⁴ He opined that “[t]he First Amendment trajectory created by the *Reed* majority carries with it the dangerous potential to legitimize judicial interference in the implementation of reasonable, democratically enacted laws. The First Amendment does not require such rigorous interventionism”¹⁶⁵

B. The Role of Lower Courts

Commentary on the role of the lower courts is also instructive. For example, Minch Minchin opined in his article, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*:

[T]he Supreme Court has been sending mixed signals to the lower federal courts by oscillating between definitions of the [First Amendment] doctrine, selectively applying it and carving out *ad hoc* exemptions that circumvent the doctrine’s purpose. Perhaps worse still, the high Court in *Reed* has now permitted an already-muddled doctrine to be possibly applied to a much greater number of cases, thus potentially pouring a generous measure of perplexing potion into the cauldron of confusion.¹⁶⁶

¹⁵⁹ *Id.* at n.7 at 176 (majority opinion).

¹⁶⁰ *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015).

¹⁶¹ *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017).

¹⁶² *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 475 (S.D.N.Y. 2017).

¹⁶³ *Roland Dig. Media, Inc. v. City of Livingston*, No. 2:17-CV-00069, 2018 WL 6788594, at *9 (M.D. Tenn. Dec. 26, 2018) (citations omitted) (quoting *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017)).

¹⁶⁴ *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1331 (11th Cir. 2017) (Tjoflat, J., dissenting).

¹⁶⁵ *Id.* at 1333.

¹⁶⁶ Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 150–51 (2017) (footnote omitted).

Furthermore, he suggested that “[s]uch a broad, ill-defined canon has been of little use to federal jurists, who have essentially been asked to hit an amorphous and mobile doctrinal target.”¹⁶⁷ But some of this application process that Minchin seems to denounce is an inevitable, par-for-the-course part of the structure of our legal system.¹⁶⁸

For example, when decisions such as *Reed* are handed down by the Supreme Court, it is the duty of the lower courts to apply the case law developed therein.¹⁶⁹ However, findings do not come with an instructional manual on how to apply them. Details as to exactly how, when, and where the application should be made are not necessarily included in the four corners of the opinion. The lower courts, thus, take on the important task of absorbing high Court decisions into current jurisprudence.¹⁷⁰ Although commentators like Minchin may be critical of some of the confusion this process can create, it is nonetheless the normal course of business in our American legal world.¹⁷¹

Ashutosh Bhagwat suggested in his article, *Reed v. Town of Gilbert: Signs of (Dis)Content?*, that the existence of the *Reed* case “demonstrate[s] a fundamental confusion among the lower courts about the meaning of the phrase ‘content based.’”¹⁷² He also opined that there is “resistance on the part of the lower courts to the Supreme Court’s insistence that all content-based restrictions on protected speech are presumptively unconstitutional”¹⁷³ because of their “discomfort with the foundational principle of modern free speech doctrine.”¹⁷⁴ Similar resistance and discomfort most likely gave rise to the circuit split discussed earlier,¹⁷⁵ thus prompting the Supreme Court to grant certiorari in *Reed*. Whether *Reed* helped relieve that discomfort and quell that resistance has yet to be determined; but, if such discomfort causes movement towards resolution, its results, as described by Minchin, may not be a bad thing. After all, “*Reed*’s potentially more radical implications may be domesticated by the lower courts.”¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g.*, WRIGHT ET AL., *supra* note 6, § 4478.3.

¹⁶⁹ *See, e.g.*, Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–82 (2012).

¹⁷⁰ *Id.*

¹⁷¹ *See, e.g.*, WRIGHT ET AL., *supra* note 6, § 4478.3.

¹⁷² Bhagwat, *(Dis)content*, *supra* note 83, at 137.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 144.

¹⁷⁵ *See supra* Part III.

¹⁷⁶ Lakier, *supra* note 83, at 293.

C. Existing Studies

The mass of *Reed* literature was dense directly following the decision, but tapered off over time. The immediate articles tended to offer application predictions, but seemed to give way over time to more topical analyses of *Reed's* influence. One of the only attempts to measure the reach of *Reed* did not surface until several years after the case, and only calculated the extent of the reach along a narrow strand of metrics.

In April 2019, an article examining *Reed's* influence was published in the Taylor & Francis Online journal, *Communication Law and Policy*.¹⁷⁷ Authored by Dan Kozlowski and Derigan Silver—professors of communication, and media and journalism, respectively¹⁷⁸—the article provided a look at U.S. Circuit Court of Appeals cases which cited to *Reed* from the time of its decision in June 2015, up through July 2018.¹⁷⁹ It started off by detailing the distinctions between content-neutral, content-based, and viewpoint-based regulations¹⁸⁰ and courts' historic approaches to content,¹⁸¹ before moving into a circuit-by-circuit examination of the cases, particularly noting idiosyncrasies and inconsistencies in *Reed* application within and among the circuits.¹⁸² The article then shifted to a discussion of whether *Reed* has operated as a clarifying lens through which content-based regulations can be viewed, or if it has only further muddied already murky waters.¹⁸³ It concluded “that *Reed* has not produced the First Amendment revolution of Armageddon proportions that some commentators predicted.”¹⁸⁴

It is encouraging that their study reached a conclusion consistent with this Comment, although it is important to recognize that Kozlowski and Silver limited their examination to the subset of U.S. Circuit Court of Appeals cases applying *Reed*. The authors justified the constraint, saying “Circuit court cases were chosen because of the courts' ability to set precedent and influence the law within their jurisdiction.”¹⁸⁵ However, for *Reed*-citing cases

¹⁷⁷ See generally Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMM. L. & POL'Y 191 (2019).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 191–92. The article notes that sixty-eight cases, resulting from a LexisNexis search of *Reed* citations, were reviewed by the authors. *Id.* at 192 n.7. However, only cases related to *Reed's* approach on content discrimination were addressed. *Id.* at 215 n.176. The latest *Reed*-citing case in the article, *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, is dated July 31, 2018. *Id.* at 254 n.460.

¹⁸⁰ See Kozlowski & Silver, *supra* note 177, at 193–97.

¹⁸¹ See *id.* at 197–208.

¹⁸² See *id.* at 215–59.

¹⁸³ See *id.* at 263–70.

¹⁸⁴ *Id.* at 259.

¹⁸⁵ *Id.* at 192 n.7.

available through the time of this writing, such a limitation means examination of only 17% of the total cases available.¹⁸⁶ The subset chosen by Kozlowski and Silver is an excellent introduction to the inquiry, but expansion of the set of cases examined is a profitable endeavor that reveals possible skews introduced by the choice of their subset. This Comment, therefore, considers *all* available State and Federal Court cases in order to paint a more detailed picture of how *Reed* has been accepted and implemented at all available court levels.

The smaller subset of cases reviewed by Kozlowski and Silver enabled the authors to provide details of each case, as well as scrutiny of the reasoning of individual judges in each circuit.¹⁸⁷ There is value to such an in-depth assessment, particularly for attorneys deliberating whether to appeal a content-analysis case at the federal level. That level of analysis was manageable with their small sample. The same level of inspection on the almost 500 cases which currently cite *Reed* would be daunting, and has not been attempted here. A higher-level review of State and Federal cases at all levels, noting only if *Reed* was applied and its result, however, is feasible and can provide a valuable alternative and wider angle from which to assess the impact of a case. Part IV of this Comment undertakes this type of altitudinous analysis, allowing a broader picture of *Reed*'s application to be painted.

Kozlowski and Silver have provided an exemplary starting point for the type of analysis advocated herein. Their article is a welcome contribution to the body of literature on *Reed*, but, by the nature of its narrow focus, it creates an opportunity for extension. The gap they left open acts as an implicit invitation to fill it. This invitation for a broader review of courts at all levels, over an extended time frame, is accepted here and results in a broader, more detailed understanding of how the *Reed* approach has melded into our jurisprudence as a whole.

The cases reviewed in Part IV of this Comment include, but are not limited to, the cases that Kozlowski and Silver studied, and the data gathered for this Comment's analysis contains the same findings noted in the Kozlowski and Silver article. In addition to expanding the scope of courts analyzed and thereby increasing the size and diversity of the sample set of cases, this Comment's analysis also benefits from a wider range of time studied, namely ten months of jurisprudential development beyond the Kozlowski and Silver analysis.

¹⁸⁶ See *infra* Table 1 (83 U.S. Circuit Court of Appeals cases / 477 cases total = 17%).

¹⁸⁷ See Kozlowski & Silver, *supra* note 177, at 215–59.

As will be seen in Part V of this Comment, Kozlowski and Silver reach similar conclusions about the predictive literature. They found that “*Reed* has not been the basis of a First Amendment revolution,”¹⁸⁸ thus, “[p]laintiffs have found . . . crying out ‘*Reed*’ does not instinctively bully a court into declaring that a regulation is content based.”¹⁸⁹ Rather, their article concludes that “although *Reed* seemingly had the potential to be revolutionary,”¹⁹⁰ so far it “hasn’t triggered any sort of dramatic overturning of First Amendment jurisprudence.”¹⁹¹ This Comment, therefore, reinforces Kozlowski and Silver’s conclusions and builds upon their foundation by expanding the scope and diversity of courts, and by extending the time frame of court opinions considered.

In summary, the *Reed* decision was not universally welcomed. The above review of hypothesized consequences provides a contextual backdrop against which the reality of *Reed*’s standing in case law today can be compared. We turn now to an examination of *Reed*’s actual application by lower courts.

V. THE ACTUAL RIPPLES

The import of a Supreme Court decision to American jurisprudence may not always be accurately measured by the extent of publicity or the volume of literature written immediately following the ruling. The true impact from the decision is best gauged by examining how the lower courts applied or distinguished the finding in the subsequent development of case law. As previously mentioned, this process of inverse percolation takes several years, but the study of its consequences yields a fuller understanding of a case’s true repercussions.

A. Gathering the Data

The data examined herein are cases that quote or cite to the *Reed* decision. An initial comparison of the number of *Reed*-linked cases available on LexisNexis versus Westlaw yielded a slightly higher number of cases on Westlaw; thus, Westlaw was chosen as the preferred repository from which cases were drawn for this impact investigation. Imposing a cut-off date for my review as May 21, 2019, I downloaded 477 cases. The cases were initially categorized as “State” or “Federal,” divided into calendar years, and then further parsed by jurisdictional level (i.e., U.S. District Courts, U.S. Courts of Appeals, U.S. Supreme Court, State

¹⁸⁸ *Id.* at 193.

¹⁸⁹ *Id.* at 263.

¹⁹⁰ *Id.* at 270.

¹⁹¹ *Id.* at 259.

Appellate Court, and State High Court). This basic break-down is summarized in Table 1.¹⁹²

Table 1: Categorization of *Reed* Cases by Jurisdiction and Year

Federal Cases	2015	2016	2017	2018	2019	TOTAL
U.S. District Court	40	76	82	81	46	325
U.S. Courts of Appeals	11	22	24	18	8	83
U.S. Bankruptcy Court	0	0	0	2	0	2
U.S. Supreme Court	4	0	1	1	0	6

State Cases¹⁹³

State Appellate Court	5	9	7	15	7	43
State High Court	2	5	2	6	3	18

The distribution of State Cases among the states was fairly uniform, ranging from zero to four, with the exception of Ohio, Illinois, and Texas, which listed seven, nine, and fifteen cases, respectively. Overall, the State High Court level addressed 30% of the total number of *Reed*-citing State Cases.¹⁹⁴

Refining the Federal Case categories, the U.S. District Court cases were next grouped according to their respective Circuit. These totals are compared to the U.S. Courts of Appeals cases for each circuit in Table 2. Overall, the number of appellate level cases citing *Reed* was 20% of the total number of Federal Cases.¹⁹⁵

¹⁹² It is noted that Westlaw (and LexisNexis) includes only state appellate and high court cases. The state trial courts produce such a sheer overwhelming volume of cases that inclusion is nigh impossible, and unwieldy at best.

¹⁹³ State Cases were grouped by court level using the lists at Ballotpedia. *See State supreme courts*, BALLOTPEDIA, http://ballotpedia.org/State_supreme_courts [http://perma.cc/2L6S-GP5W] (last visited June 3, 2019); *Intermediate appellate courts*, BALLOTPEDIA, http://ballotpedia.org/Intermediate_appellate_courts#List_of_state_intermediate_appellate_courts [http://perma.cc/Y8SF-CGSU] (last visited June 3, 2019).

¹⁹⁴ *See supra* Table 1 (Calculated as: (number of State High Court cases) / (number of State Appellate Court cases + number of State High Court cases) = 18 / (43 + 18) = 30%).

¹⁹⁵ *See supra* Table 1 (Calculated as: (number of U.S. Courts of Appeals cases) / (number of U.S. Courts of Appeals cases + number of U.S. District Court cases) = 83 / (83 + 325) = 20%). For each Circuit individually, the number of U.S. Courts of Appeals cases over the total number of U.S. District Court cases and U.S. Courts of Appeals cases was, on average, 21%, with outliers being the D.C. Circuit (44%) and the Tenth Circuit (6%).

Table 2: Federal *Reed* Cases by Jurisdictional Level

U.S. Circuit	U.S. Courts of Appeals Cases	U.S. District Court Cases
1	6	19
2	2	18
3	5	17
4	9	77
5	4	18
6	7	25
7	9	36
8	4	22
9	21	50
10	1	17
11	6	17
D.C.	7	9
Federal	2	-
TOTAL	83	325

B. Summarizing the Data

Having all the cases in-hand, I developed a spreadsheet to fill out as I reviewed each case. Included were the basics (case name, citation, date, court, case subject) and answers to a series of questions:

- (1) Does the case address First Amendment issues?
- (2) Are the *Reed* citations found in the body of the holding or only in footnotes?
- (3) Did the court apply *Reed*, and if so, how did the case fare?
- (4) If the court chose not to apply *Reed*, why not?
- (5) What level of discussion/analysis was given to *Reed* in the case?

The spreadsheet was done in Excel to facilitate cross-parsing comparisons and the creation of tables.¹⁹⁶

C. Examining the Data

Initial examination of the results necessitated a reduction of the data set to a meaningful subset. Since this Comment examines the impact of *Reed* on case opinions, I first chose to

¹⁹⁶ Completed spreadsheet is available from author upon request.

exclude cases that only cited *Reed* in a footnote,¹⁹⁷ as well as those which only mentioned *Reed* tangentially, as abrogating another case or applying the Fourteenth Amendment, for example.¹⁹⁸ Also eliminated were intermediate rulings on any case¹⁹⁹—including remands of cases to be considered in light of *Reed*²⁰⁰—since the interest here is limited to the ultimate application of the *Reed* decision. Finally, the cases that considered *Reed*, but whose holdings ultimately rested on other grounds, were omitted.²⁰¹ Thus, the data set discussed below contains 162 cases.

1. *Reed* Distinguished

Recall that the fears expressed in Part III above were mostly concerned with broad application of *Reed* to areas outside of municipal sign ordinances. Hence, we would have expected, based on these predictions, that the lower courts would rarely distinguish *Reed*, but instead use a broad reading to apply it to almost any situation. The data did not exhibit such a pattern. Rather, in forty-five of 154 cases,²⁰² i.e., 29% of the time, the court distinguished *Reed* for the subjects listed in Table 3. That is, for the cases indexed in Table 3, the lower courts found that *Reed*—examining first content-neutrality, then applying strict scrutiny to content-based regulations—did not apply for their review of the law at issue.

¹⁹⁷ Out of 477 cases examined, fifty-one contained reference to *Reed* in a footnote only.

¹⁹⁸ Included here are the sixty-one times a cited case was abrogated by *Reed*. See, e.g., *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 749 (4th Cir. 2018) (“*Brown v. Town of Cary*, 706 F.3d 294, 299 (4th Cir. 2013), abrogated on other grounds by *Reed v. Town of Gilbert, Ariz.*, — U.S. —, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015).”); *Retfalvi v. United States*, 335 F. Supp. 3d 791, 796 (E.D.N.C. 2018) (“*Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by *Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015).”). In four cases, *Reed* was only used to apply the Fourteenth Amendment. See, e.g., *Kemp v. Liebel*, 229 F. Supp. 3d 828, 835 (S.D. Ind. 2017). One case quoted *Reed* in support of a definition. See *Mason v. Range Resources-Appalachia LLC*, 120 F. Supp. 3d 425, 446 (W.D. Pa. 2015) (referring to *Reed* to establish that the phrase “as well as” applies in the several sense). In addition, one case was stayed in light of pending resolution of a parallel case. See *Meza v. Sirius XM Radio, Inc.*, No. 17-CV-2252-AJB-JMA, 2018 WL 4599718, at *5 (S.D. Cal. Sept. 25, 2018).

¹⁹⁹ There were eighty-one cases with additional appearances below. Most cases had 1–2 such appearances. *Thomas v. Schroer*, filed in the U.S. District Court for the Western District of Tennessee, had seven prior rulings. 116 F. Supp. 3d 869, 873–74 (W.D. Tenn. 2015). This category often intersected with the categories noted in footnotes 173–75 above.

²⁰⁰ Eight cases fell in this category.

²⁰¹ This description forms a set of 139 cases.

²⁰² Because eight “Signs” category cases applied *Reed* as straightforward precedent, 154 cases are examined here to see if they are distinguished (i.e., 162 – 8 = 154).

Table 3: Summary of Cases Distinguishing *Reed*

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	<i>TOTAL</i>
Abortion Protests	1	1	0	0	<i>2</i>
Bankruptcy ²⁰³	—	—	—	—	<i>2</i>
Billboards	4	0	2	0	<i>6</i>
Commercial Speech	8	1	1	0	<i>10</i>
Picket/Boycott	0	2	0	0	<i>2</i>
Privacy	2	0	0	0	<i>2</i>
Regulations ²⁰⁴	5	0	0	0	<i>5</i>
Secondary Effects	3	1	1	0	<i>5</i>
Signs	4	1	0	0	<i>5</i>
T.C.P.A. ²⁰⁵	0	1	0	0	<i>1</i>
Other ²⁰⁶	2	3	0	0	<i>5</i>

The fact that 29% of the cases analyzed distinguished *Reed* should help assuage fears of broad-brush application. Indeed, it appears the concern that “*Reed* signaled a potentially vast shift in the Court’s content-neutrality doctrine, . . . superseding whole swaths of doctrine,” has not come to fruition, at least not in whole.²⁰⁷ In particular, courts at both state and federal levels did not extend *Reed* to the Commercial Speech category, applying instead, and leaving untouched, the commercial speech doctrine developed and refined by the courts over the past half-century.²⁰⁸ The courts also did not attempt to use *Reed* to overrule the secondary effects doctrine, thus declining the opportunity to up-end the forty-year-old judiciary treatment of regulations on adult entertainment establishments. Instead, relying on unrelated precedent, unedited by *Reed*, the courts allowed governmental

²⁰³ U.S. Bankruptcy Court is separate and distinct from the District and Circuit Courts. Rather than exclude the two bankruptcy court cases at the outset, they are included here to demonstrate an area of law in which *Reed* held no sway.

²⁰⁴ The Regulations category cases deal with enforcement of a variety of state and municipal regulations, such as home-sharing (i.e., Airbnb), professional practice without a license, etc.

²⁰⁵ T.C.P.A. is the Telephone Consumer Protection Act, 47 U.S.C. § 227. This category includes “robocall” cases under state statutes as well.

²⁰⁶ Other category topics include cell phone radiofrequency emissions, product labeling, impersonation, etc.

²⁰⁷ Mason, *supra* note 140, at 956.

²⁰⁸ See, e.g., Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 503 (2015).

ordinances regulating these businesses to stand as constitutional because, despite being content-based on their face, the government had a compelling interest in combating any undesirable secondary effects from such enterprises.²⁰⁹

Not all of the topics listed in Table 3 were uniquely distinguished by the courts. For example, Billboard and Picket/Boycott cases were sometimes subjected to the *Reed* content-neutrality analysis and failed strict scrutiny.²¹⁰ Similarly, the categories of Privacy, Regulations, T.C.P.A., and Other were sometimes distinguished, sometimes failed strict scrutiny, and sometimes passed the same.²¹¹ The Signs, Billboards, and T.C.P.A. categories will be discussed further in the Subject Summaries section below.

2. *Reed* Applied

Again, the relatively high percentage of times the lower courts distinguished *Reed* seems to contradict the predictive literature and raises doubts as to the validity of such predictions. Further insight can also be gained by examining the results obtained by courts when *Reed* was not distinguished. Consider the cases where the *Reed* content-neutrality analysis was applied. Recall from Part II, that this analysis begins with the “crucial first step [of] . . . determining whether the law is content neutral *on its face*,”²¹² and then applies strict scrutiny if the inquiry finds the law to be content-based.²¹³ Table 4 summarizes the complement of cases distinguishing *Reed*, i.e., the set of cases where *Reed* was applied.

²⁰⁹ See, e.g., CHEMERINSKY, *supra* note 40, at 1226.

²¹⁰ See *infra* Table 5.

²¹¹ See *infra* Table 5 & Table 6.

²¹² *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (emphasis added).

²¹³ *Id.* (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))).

Table 4: Summary of Cases Applying *Reed*²¹⁴

	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	<i>TOTAL</i>
Content Neutral	28	11	4	2	45
Fails Strict Scrutiny	34	8	5	4	51
Passes Strict Scrutiny	14	3	4	0	21

We see from Table 4 that laws were found to be content-neutral about 38% of the time.²¹⁵ That is, the courts deemed 38% of the laws examined in this data set to be content neutral on their face, thus passing the initial inquiry posed by a *Reed* analysis. Perhaps of greatest note from this result is the encouragement that it is not only possible to write regulations and ordinances in content-neutral language, but instances where such language is being debated before the courts, it passed the test one-third of the time. This outcome does not bolster the predictions of far-reaching effects found in the literature, but rather supports an opposite conclusion.

a. Failed Strict Scrutiny

For those laws found to be content-based, strict scrutiny was applied. In 71% of these strict scrutiny cases, the test was not satisfied.²¹⁶ Table 5 summarizes the topics addressed by cases that applied strict scrutiny and found that the regulations failed to meet the standard, so that the regulation, law, or ordinance at issue was deemed unconstitutional.

²¹⁴ One case declined to give a standard of review and was not included in these results. See *Otto v. City of Boca Raton, Fla.*, 353 F. Supp. 3d 1237, 1257 (S.D. Fla. 2019).

²¹⁵ See *supra* Table 4. (Calculated as: (number of cases with a content-neutral finding) / (total number of cases where *Reed* was applied) = 45/117 = 38%).

²¹⁶ See *supra* Table 4. (Calculated as: (number of content-based cases that failed strict scrutiny) / (total number of content-based cases) = 51/72 = 71%).

Table 5: Summary of Cases that Applied *Reed* and Failed Strict Scrutiny

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	TOTAL
Ballot Selfies	1	1	0	0	2
Billboards	2	0	0	0	2
Panhandling	8	0	0	2	10
Picket/Boycott	1	0	0	0	1
Privacy	5	0	2	0	7
Regulations	5	0	0	0	5
Signs	4	3	1	0	8
Speech ²¹⁷	3	1	1	0	5
T.C.P.A.	2	2	0	0	4
Other ²¹⁸	3	1	1	2	7

Again, if a regulation has failed strict scrutiny in this analysis, it means (1) the regulation was content-based on its face, and (2) either it could not be shown that the legislature passed the law to further a compelling governmental interest, or the law was not narrowly tailored to achieve that interest, or both.²¹⁹ For example, in the two Ballot Selfie cases listed in Table 5, laws prohibiting the taking and disclosing of photos of completed ballots were not narrowly tailored to serve a compelling government interest because the states failed to show a vote-buying problem existed.²²⁰

b. Passed Strict Scrutiny

When some judges and commentators refer to strict scrutiny as “fatal scrutiny,”²²¹ it may be a misnomer. At least, in examining the post-*Reed* cases, we can see from Table 4 that, of the seventy-two times the *Reed* content-neutrality analysis passed a case along to be subjected to strict scrutiny, the

²¹⁷ The “Speech” category included topics such as false political campaign statements and criticisms voiced at school board meetings.

²¹⁸ Other category topics included, for example, conversion therapy, child support arrears, doctor-patient communications, etc.

²¹⁹ See Winkler, *supra* note 52.

²²⁰ See *Ind. Civil Liberties Union Found., Inc. v. Ind. Sec’y of State*, 229 F. Supp. 3d 817, 824–26 (S.D. Ind. 2017); *Rideout v. Gardner*, 838 F.3d 65, 72 (1st Cir. 2016).

²²¹ *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (“[S]trict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”) (Marshall, J., concurring).

governmental action satisfied the test 29% of the time.²²² Similar to instances when courts distinguished *Reed*, these cases, where the application of *Reed* was not fatal to the regulation in question, undermine the literature predictions of sweeping changes instigated by *Reed*, and show that, even applying heightened scrutiny, government regulations are constitutional a significant portion of the time. The subjects where strict scrutiny was satisfied are summarized in Table 6.

Table 6: Summary of Cases that Applied *Reed* and Passed Strict Scrutiny

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	<i>TOTAL</i>
Ballot Selfies	1	0	0	0	1
Panhandling	1	0	0	0	1
Privacy	1	1	1	0	3
Regulations	1	0	0	0	1
Speech	1	0	0	0	1
T.C.P.A.	7	1	0	0	8
Other ²²³	2	1	3	0	6

For example, in contrast to the Ballot Selfie cases that failed strict scrutiny, the District Court for the Southern District of New York determined a similar New York election law passed strict scrutiny.²²⁴ The court found the State had a compelling interest in preserving the integrity of its election process, and the law was narrowly tailored to prevent vote buying, voter intimidation, and voter coercion.²²⁵ A comparison of additional cases separated by subject is given in the next section.

3. Subject Summaries

Topics which the courts have generally treated inconsistently warrant further study. For these subjects, the court findings appear at odds, sometimes distinguishing cases from *Reed* and sometimes applying *Reed's* standard. Table 7 combines the information from the tables above for an easy comparison of the

²²² See *supra* Table 4. (Calculated as: (number of content-based cases that passed strict scrutiny) / (total number of content-based cases) = 21/72 = 29%).

²²³ Other category topics included, for example, intimidation of a flight crew, juvenile probation terms, etc.

²²⁴ See *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 481 (S.D.N.Y. 2017).

²²⁵ See *id.*

previous results, arranged by subject. Table 7 is rich with information that could be further analyzed; however, this Comment provides particular focus on Sign, Billboard, and T.C.P.A. cases.

Table 7: Inconsistent Topic Treatment

	Distinguished	Passed Strict Scrutiny	Failed Strict Scrutiny
Ballot Selfies	0	1	2
Billboards ²²⁶	6	0	2
Panhandling ²²⁷	0	1	10
Picket/Boycott	2	0	1
Privacy ²²⁸	2	3	7
Regulations ²²⁹	5	1	5
Signs	5	0	8
Speech ²³⁰	0	1	5
T.C.P.A.	1	8	4
Other ²³¹	5	6	7

Given the subject matter of *Reed* itself, the Billboards and Signs categories are interesting to consider. These two categories were originally differentiated because sign ordinances were limited to individual municipalities, whereas regulations governing billboards tended to be county or state ordinances. Both categories apply *Reed* in the same manner. Perhaps not surprisingly, none of the facts of the billboard or sign cases were found to support a compelling government interest accomplished in a narrowly tailored manner; i.e., none passed strict scrutiny. The courts' analyses in these cases were, for the most part, a

²²⁶ Compare *GEFT Outdoor LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d 1002, 1004, 1016–17 (S.D. Ind. 2016), with *Lamar Cent. Outdoor, LLC v. City of L.A.*, 245 Cal. App. 4th 610, 613, 624–25 (2016).

²²⁷ Compare *Gbalazeh v. City of Dallas, Tex.*, No. 3:18-CV-0076-N, 2019 WL 1569345, *1–2 (N.D. Tex. Apr. 11, 2019), with *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 659, 666 (E.D. La. 2017).

²²⁸ Compare *Dahlstrom v. Sun-Times Media, LLC*, 346 F. Supp. 3d 1162, 1170–72 (N.D. Ill. 2018), with *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1114, 1121 (9th Cir. 2017).

²²⁹ As previously mentioned, the Regulations category cases deal with enforcement of a variety of state and municipal regulations, such as home-sharing (i.e., Airbnb), professional practice without a license, as well as business permits, animal rights, etc.

²³⁰ The “Speech” category included such topics as false political campaign statements and protests during the presidential inaugural parade.

²³¹ The “Other” category includes all previously mentioned “Other” categories including, but not limited to: cell phone radiofrequency emissions, conversion therapy, intimidation of a flight crew, juvenile probation terms, child support arrears, etc.

straightforward application of *Reed* and its reasoning.²³² Of the case holdings that distinguished *Reed*, all found the content at issue to be commercial in nature, and, in line with the results presented above, deigned to extend *Reed* to commercial speech.²³³

The T.C.P.A. cases also present an interesting distribution: one was distinguished, eight passed strict scrutiny, and four failed strict scrutiny. The distinguished case found a Minnesota T.C.P.A. extension statute to be based on phone receivers' consent, differentiating it from statutes delineating content restrictions.²³⁴ Five cases addressing state robocall statutes, also attempting to expand the T.C.P.A., passed strict scrutiny twice and failed three times. These state robocall cases were found unconstitutional twice because the court recognized residential privacy as only a substantial interest, not a compelling state interest.²³⁵ In the remaining case, *Cahaly v. Larosa*, the U.S. Court of Appeals for the Fourth Circuit ruled that the statute was overinclusive and not narrowly tailored.²³⁶ Interestingly, of the seven cases addressing the T.C.P.A. directly,²³⁷ all had been found to satisfy strict scrutiny under the *Reed* application until the Fourth Circuit found the debt-collection exemption failed as underinclusive and ordered it severed from the T.C.P.A. regulations.²³⁸ It appears robocall and T.C.P.A. legislation has yet to be fully refined.

Looking at these categories of cases helps us understand *Reed's* true impact. For cases on-point dealing with the same subjects and similar fact patterns to those found in the initial *Reed* dispute, the lower courts applied *Reed* and obtained similar results. When *Reed* was applied to different facts and types of regulations, however, the particular facts of each case controlled if and how *Reed* would impact the finding. This is not surprising. Although predictive literature seemed to view *Reed* as an excuse the courts would use to strike down regulations across the board, *Reed* has inversely percolated in a seemingly straightforward manner, wherein the lower courts appear to have exercised reasonable restraint instead of rubberstamping broad swathes of governmental regulation unconstitutional as was feared.

²³² See, e.g., *Cent. Radio Co. v. City of Norfolk, VA.*, 811 F.3d 625, 628 (4th Cir. 2016).

²³³ See, e.g., *Contest Promotions, LLC v. City of S.F.*, 874 F.3d 597, 601 (9th Cir. 2017).

²³⁴ *Gresham v. Swanson*, 866 F.3d 853, 856 (8th Cir. 2017).

²³⁵ See, e.g., *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 970 (E.D. Ark. 2016).

²³⁶ 796 F.3d 399, 406 (4th Cir. 2015).

²³⁷ See *Am. Ass'n of Political Consultants v. Sessions*, 323 F. Supp. 3d 737, 744 (E.D.N.C. 2018), *vacated and remanded*, *Am. Ass'n of Political Consultants, Inc. v. Fed. Comm'ns Comm'n*, 923 F.3d 159 (4th Cir. 2019).

²³⁸ See *Am. Ass'n of Political Consultants*, 923 F.3d at 167.

D. Conclusions from the Data

Has “*Reed* ushered in . . . a dramatic shift in the way courts employ content neutrality as a core principle of the First Amendment”?²³⁹ Is “Justice Thomas’s formulation of the content-neutrality test . . . a radical shift in doctrine”?²⁴⁰ Has *Reed* “render[ed] the Supreme Court’s commercial speech jurisprudence moot”?²⁴¹

These questions, reflecting the general post-*Reed* fears, can be answered in the negative. *Reed* has had repercussions on subjects like sign ordinances, but the lower courts have not extended *Reed* to topics such as the commercial speech doctrine or the secondary effects doctrine. That is, the lower courts have resisted the potential to upend First Amendment doctrine by imposing a uniform application of strict scrutiny across the board.

Furthermore, the *Reed* decision itself may have resulted in behavioral changes among potential parties, thereby keeping some cases from being filed or from reaching the population of cases examined herein. For example, if a sign code interpretation arose on-point for a *Reed* analysis and the ruling seemed predestined, there is little chance that the case would have made it through the legal system far enough to fall within the orbit of cases considered here. Additionally, it is likely that many municipalities revisited their sign and city codes after *Reed*—or upon threat of lawsuits based on *Reed*—and redrafted their codes where possible to preempt parallel attacks, thereby keeping the number of on-point cases filed since *Reed* to a minimum. Thus, the narrow application of *Reed* by the lower courts has most likely contributed to the reduction in the number of these types of cases over time.

VI. WHEN SHOULD RIPPLES BE EXAMINED?

Examination of the *Reed* impact shows that many of the fears hypothesized in predictive literature failed to materialize. The lower courts did not wield *Reed* to hack away at First Amendment jurisprudence, nor did they use *Reed* as an excuse to cast broad application of strict scrutiny across a wide variety of legal matters. For *Reed* in general, predictions did not become reality. By observing the divergence of *Reed*’s actual impacts and those predicted in the literature, we can see that the lower courts have “best protect[ed] core First Amendment values . . . by

²³⁹ Haupt, *supra* note 127, at 150.

²⁴⁰ Lauriello, *supra* note 149, at 1132.

²⁴¹ Daniel D. Bracciano, *Commercial Speech Doctrine and Virginia’s ‘Thirsty Thursday’ Ban*, 27 GEO. MASON U. CIV. RTS. L.J. 207, 228 (2017).

refusing to let the content-based tail wag the First Amendment dog.”²⁴² Specifically, the inverse percolation of *Reed* has remained tame compared to the envisioned far-reaching effects that have not come to fruition.

This evidenced disparity between predictions and reality relating to the *Reed* case raises the question of when such an analysis should be done on other Supreme Court opinions. Clearly such a study is useful, whether the inverse percolation results parallel and validate the forecasts, or diverge from the predicted effects. But the degree to which hypotheses and realities are out of phase may not be evident until sufficient time has passed for the incongruity to be recognizable. I assert that four or more years is an acceptable amount of time for the inverse percolation of a case through the lower courts into general jurisprudence to produce statistically significant results, and, thus, for a richer understanding of the true repercussions originating from a Supreme Court opinion to be obtained. Failure to allocate sufficient time for this process may introduce a risk of misleading conclusions about the impacts of individual Supreme Court decisions, as well as a risk that uncertain predictions of a decision’s impact may be accepted as accurate.

A robust impact analysis of the results of inverse percolation, as described herein, is useful for evaluating the true place a particular Supreme Court decision holds in American jurisprudence. Conducting a reflective study on a decision by reviewing the actual manner in which the lower courts have applied a Supreme Court holding after a few years allows for a broader understanding of the decision in general. The analysis also enables the researcher to compare such application to the corresponding predictive literature, and confirm or correct any impact prophecies. Thus, this type of impact analysis reflects a more evidence-based way of narrowing in on a decision’s true significance, and its utility counsels others on the informational benefits available from undertaking similar studies to revisit prior impact predictions via an evidence-based analysis of actual effects.

²⁴² Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1982 (2016).



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Preventing the Delegitimization of Service Animals: A Proposal to Keep Service Animal Law from Going to the Dogs

*Caroline J. Cordova**

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* J.D. Candidate, Expected December 2020, Chapman University Dale E. Fowler School of Law. I would like to dedicate this Note to all the animals who have ever, or will ever, spend their lives providing immeasurable service to all those who rely on them. And specifically, to the one who sparked the original inspiration for this topic, Philomena.

I. INTRODUCTION

“Service dogs are more than a vest.”¹ This is more than true for individuals like Peter Morgan and his service dog, Echuka.² Morgan suffers from a spinal disorder that prevents him from being able to bend over without pain.³ Echuka is specially trained to pick up items that Morgan cannot.⁴ Morgan’s ability to have Echuka with him wherever he goes is what disability laws are designed to protect.⁵ He is allowed to travel in public with his service dog to places where animals would normally be prohibited, such as in businesses and restaurants.⁶ Providing this protection is necessary for disabled individuals like Morgan to be independent and able to fully function in society.⁷ However, the growing number of individuals trying to pass off their pets as “service animals” poses a serious threat to handlers and service animals like Morgan and Echuka.⁸ “In the last few years, the questions and the looks I get have radically changed’ . . . ‘Now wherever I go, I see fraudulent service dogs. I have been kicked out of businesses because employees think I’m an impostor,’” Morgan expressed in response to the growing number of individuals abusing the service animal system.⁹

Laura Palacio and her service dog, Bauer, are also all too familiar with these problems.¹⁰ Palacio uses a wheelchair for her disability.¹¹ Prior to getting Bauer, she had stopped going out into public for nearly four years due to challenges with her disability.¹² Just as many individuals with service animals have expressed,¹³ Palacio credits Bauer with improving her life, stating, “He’s the one that got me back out into public.”¹⁴ However, she too has struggled and become frustrated with the

¹ *A Service Dog is More than a Vest*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/get-involved/advocate.html> [<http://perma.cc/8L3P-HZCE>] (last visited Apr. 11, 2019).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See *Frequently Asked Questions about Service Animals and the ADA*, ADA.GOV (July 20, 2015), http://www.ada.gov/regs2010/service_animal_qa.html [<http://perma.cc/4N62-AJNJ>].

⁶ *Id.*

⁷ See *Service Dogs*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/assistance-dogs/Our-Dogs/Service-Dogs.html> [<http://perma.cc/ZD6P-LQWM>] (last visited Apr. 11, 2019).

⁸ *A Service Dog is More than a Vest*, *supra* note 1.

⁹ *Id.*

¹⁰ Katrina Tilbury, *Fake Service Dogs, Real Problems*, AP NEWS (May 16, 2018), <http://www.apnews.com/1a28f8e528424fdca2040ea8139e3014> [<http://perma.cc/TT5Z-A43J>].

¹¹ *Id.*

¹² *Id.*

¹³ See *generally Our Stories*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/about/stories/> [<http://perma.cc/F3UB-TFBS>] (last visited Apr. 11, 2019).

¹⁴ Tilbury, *supra* note 10.

rising level of fraudulent service animals plaguing the country.¹⁵ While eating at a frozen yogurt shop, an employee tried to kick Palacio and Bauer out,¹⁶ likely due to bad experiences with fake service animals beforehand. The employee forcefully took Bauer away from Palacio, who described how the employee “tried to pull my dog outside . . . while I was trying to turn around in my electric chair to get my dog back from him,” resulting in an upsetting and, in regard to the employee, illegal situation.¹⁷

Unfortunately, the problems do not stop there. The threats to handlers and their service animals also lead to safety issues for the animals themselves. Kim Wilson, a disabled individual who resides in New Mexico, has had three service dogs.¹⁸ After only a year and a half, Wilson’s first service dog was attacked by a fraudulent service dog and was forced to retire.¹⁹ Her second service dog, Kilworth, was attacked on two separate occasions at a mall in Colorado, both times by fraudulent service dogs who should not have been permitted on the premises.²⁰ Finally, Wilson’s third service dog was also attacked while in a craft store after a small emotional support animal jumped out of its owner’s purse and chased Wilson and her service dog throughout the store.²¹

Service dogs provide a vast range of reasonable accommodations for individuals with disabilities—from guiding the individual, to alerting of imminent medical emergencies, to reminding individuals to take their medication.²² For many, having a service animal is not merely having an ordinary pet, but a life changing situation that allows them to be productive, happy, and successful members of society. Similar to Morgan’s relationship with Echuka, many individuals who use service animals have testified to these animals changing their lives for the better.²³ However, there is an unfortunate side effect to this positive system. Along with the use of legitimate service animals, there is prevalent abuse of the system. This is evidenced by the recent media coverage about unorthodox service of emotional support animals, the impact the abuse has on society, and its effect on legitimate handlers.²⁴ Looking at the history of service

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *A Service Dog is More than a Vest*, *supra* note 1.

²⁴ See, e.g., Jeff Deminski, *Let’s Get Real on Fake Service Dogs*, N.J. 101.5 (Oct. 10, 2018), <http://nj1015.com/lets-get-real-on-fake-service-dogs/> [<http://perma.cc/4LX4-LQNN>]; Tristin Hopper, *They’re s---ing all over’: Scenes from a world taken over by fake service animals*,

animals and the law, these issues are far more complex than they seem at first glance. The laws, while designed to protect those who use service animals,²⁵ are so vague and riddled with loopholes that they are easy to circumvent,²⁶ allowing abuse of the system to become far too common.

Part II of this Note briefly discusses the background of service animals, and provides a foundation of relevant federal and state laws. In Part III, this Note describes the current problems plaguing the service animal system in America. This part covers the current confusion in laws, the unregulated system of selling service animal equipment, and the consequences that stem from these issues. Finally, Part IV proposes a detailed three-part proposal for eliminating these issues: (1) limiting the definitions of service animals, (2) implementing a certification process, and (3) strictly enforcing fraud and discrimination laws at both federal and state levels.

II. BACKGROUND

A. History of Service Animals

Service animals have been a part of society for longer than people realize, and longer than the law has recognized them.²⁷ The first recorded instances of service animals originate all the way back to World War I, when dogs aided wounded soldiers.²⁸ Over the years, there has been an increase in both the use of service animals and the services they provide.²⁹ Service animals are personally trained to perform specific tasks for disabled individuals and are generally limited to dogs being the only

NAT'L POST (Feb. 2, 2018, 1:49 PM), <http://nationalpost.com/news/canada/theyre-s-ing-all-over-scenes-from-a-world-taken-over-by-fake-service-animals> [<http://perma.cc/MPA7-KZAC>]; Megan McCluskey, *'Emotional Support Squirrel' Gets Woman Kicked Off Flight and Then Everyone Just Had to Deplane*, TIME (Oct. 10, 2018), <http://time.com/5420467/emotional-support-squirrel-flight/> [<http://perma.cc/MC3E-4MTA>]; *Woman denied emotional support peacock on United flight*, CBS NEWS (Jan. 31, 2018, 11:28 AM), <http://www.cbsnews.com/news/woman-denied-emotional-support-peacock-on-united-flight/> [<http://perma.cc/C7ZE-UG5Y>].

²⁵ *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5; *see also A Service Dog is More than a Vest*, *supra* note 1.

²⁶ *See* Mark Davis, *Is That Service Dog a Fake? Under Federal Law, You Can't Even Ask*, KAN. CITY STAR (Nov. 3, 2017, 1:44 PM), <http://www.chicagotribune.com/lifestyles/ct-service-dog-fake-20171103-story.html> [<http://perma.cc/S7RK-4PG2>].

²⁷ *See* Mark Ostermeier, *History of Guide Dog Use by Veterans*, 175 MIL. MED. 587, 587 (2010).

²⁸ *Id.*

²⁹ *See generally Guide Dogs and Service Dogs*, NAT'L LIBR. SERV. FOR BLIND & PRINT DISABLED, <http://www.loc.gov/nls/braille-audio-reading-materials/lists-nls-produced-books-topic-genre/listings-on-narrow-topics-minibibliographies/guide-dogs-service-dogs/> [<http://perma.cc/J35U-VSUG>] (last modified July 2017) (offering a library of information regarding the evolution of service dogs and personal accounts evidencing their increased presence over that time).

acceptable service animal.³⁰ This differentiates service animals from ordinary pets or emotional support animals.³¹ There are some tasks that animals are used for that the public generally associates with service animals, such as guiding blind individuals or picking up items for those in wheelchairs.³² These animals can also perform much larger swaths of tasks that include “alerting individuals to the presence of allergens, . . . providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.”³³ Nowadays, there are multiple institutions that specialize in specific training for service animals, including organizations such as Guide Dogs for the Blind, founded in 1942,³⁴ and Canine Companions for Independence, founded in 1975.³⁵

There has also been a rise in what are called “emotional support animals,” which further complicates the issue. While service animals are defined by federal law as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability,”³⁶ emotional support animals instead “provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias, but do not have special training to perform tasks that assist people with disabilities.”³⁷ Additionally, there are no strict limitations on the species of animals that can be classified as emotional support animals.³⁸ While emotional support animals may heighten the quality of life for many individuals, it is a

³⁰ 28 C.F.R. § 35.104 (2018); *see also* *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5; *A Service Dog is More than a Vest*, *supra* note 1.

³¹ *See* *A Service Dog is More than a Vest*, *supra* note 1.

³² *See* April Childers, *10 Service Dog Tasks for Handlers with Wheelchairs*, ANYTHING PAWSABLE (Sept. 6, 2019), <http://www.anythingpawsable.com/10-service-dog-tasks-for-handlers-with-wheelchairs/> [<http://perma.cc/58SW-KCAS>].

³³ 28 C.F.R. § 35.104.

³⁴ *About Us*, GUIDE DOGS FOR BLIND, <http://www.guidedogs.com/meet-gdb/about-us> [<http://perma.cc/6ADJ-Q4F2>] (last visited Apr. 11, 2019) (“[W]e prepare highly qualified guide dogs to serve and empower individuals who are blind or have low vision from throughout the United States and Canada.”).

³⁵ *Who We Are*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/about/who-we-are.html> [<http://perma.cc/6FEE-A9FR>] (last visited Apr. 11, 2019) (describing that they train dogs for a variety of services including helping perform daily tasks, aiding in educational, judicial, or health care situations, and allowing independence for those with cognitive disabilities).

³⁶ JACQUIE BRENNAN, SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS at iii (Vinh Nguyen ed., 2014), <http://adata.org/publication/service-animals-booklet> [<http://perma.cc/S8DX-6G6S>].

³⁷ *Id.* at 3.

³⁸ *Emotional Support Animals*, AVMA, <http://www.avma.org/KB/Policies/Pages/Emotional-Support-Animals.aspx> [<http://perma.cc/E5V5-DMC8>] (last visited Apr. 11, 2019).

broad category. The vagueness of the standard makes it difficult to control. Furthermore, service animals are trained to perform specific tasks³⁹ and to behave appropriately in stressful and unfamiliar situations.⁴⁰ Emotional support animals are not held to any training standards that would differentiate them from an average pet.⁴¹

Emotional support animals do not have any mandatory training on how to behave in public; they are not required to be calm in stressful environments,⁴² nor are they required to be attentive to their handlers' every need in distracting environments.⁴³ Emotional support animals are not even required to learn how to behave appropriately towards people and other animals.⁴⁴ Pets, even if they are emotional support animals, are not allowed in certain environments, such as restaurants and other businesses, because their behavior is unpredictable and, therefore, can be dangerous or destructive.⁴⁵

Service animals are exempt from these prohibitions, not only because they aid people with disabilities, but because they are trained to act appropriately in public.⁴⁶ Service animals are trained to relieve themselves only on command.⁴⁷ They are trained not to play with other animals, unless given permission.⁴⁸ Perhaps most impressively, the animal is trained not to eat treats that accidentally drop on the floor.⁴⁹ These examples of behavioral training are extremely important in understanding why service animals are allowed where other animals are not.⁵⁰

³⁹ Jen Karetnick, *Service Dogs 101—Everything You Need to Know*, AM. KENNEL CLUB (Sept. 24, 2019), <http://www.akc.org/expert-advice/training/service-dog-training-101/> [<http://perma.cc/T8JC-VKSV>].

⁴⁰ See *Final Goal Behaviors*, GUIDE DOGS FOR BLIND (Feb. 2019), <http://www.guidedogs.com/uploads/files/Puppy-Raising-Manual/Puppy-Raising-Final-Goal-Behaviors.pdf> [<http://perma.cc/68ZU-BEBT>].

⁴¹ See *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5; see also Cecily Sailer, *What's the Difference Between an Emotional Support Animal and a Service Dog?*, DOG PEOPLE, <http://www.rover.com/blog/difference-emotional-support-animal-and-service-dog/> [<http://perma.cc/5859-TGJM>] (last visited Nov. 11, 2019).

⁴² See *Emotional Support Dog Requirements*, SERVICE DOG CERTIFICATIONS: BLOG (Aug. 15, 2017), <http://www.servicedogcertifications.org/emotional-support-dog-requirements/> [<http://perma.cc/8Q49-RD5A>].

⁴³ See *id.* (explaining generally that emotional support dogs do not require any specialized training whatsoever, unlike service dogs).

⁴⁴ See *id.*

⁴⁵ See *Where Can I Take Emotional Support Animals?*, ESADOCTORS, <http://esadoctors.com/where-can-i-take-emotional-support-animals/> [<http://perma.cc/WM4F-JKE4>] (last visited Nov. 11, 2019).

⁴⁶ See *Final Goal Behaviors*, *supra* note 40.

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ These are only a few of the numerous behavior standards that guide dogs are trained to provide. See generally *id.*

B. Current Federal Laws

Over time, with the increasing use of service animals, standards and laws have developed. A critical part of understanding service animal law is that, while there are federal and state laws that lay out several details, there is a surprising lack of specificity in several key aspects. This leaves the area open to fraudulent exploitation.

The foundation of service animal law comes from the Americans with Disabilities Act (“ADA”).⁵¹ This Act lays the groundwork for service animal laws and remains the main pillar that holds them up today. The ADA protects individuals with disabilities⁵² regarding employment, public entities, and public accommodation.⁵³ This was not only the first major civil rights law that sought to protect individuals with disabilities,⁵⁴ but it also defined what “service animal” meant.⁵⁵ In 1992, the ADA defined service animals broadly, as a dog or other animal that would be individually trained to work or perform tasks for a disabled person.⁵⁶ However, such a broad definition allowed for individuals to either intentionally or accidentally misclassify their pets as service animals.⁵⁷ In more recent years, the ADA drastically limited the scope of service animals to include only dogs and miniature horses, indicating the Legislature’s intent for a limited definition.⁵⁸ The ADA does not include protections for emotional support animals at all.⁵⁹ While strict on the type of animals protected, the ADA is broad on many other aspects of service animal law. There are no official standards for animal training, there is no official certification process, and other interested individuals are only allowed to ask a two-part question to test the validity of a service animal.⁶⁰ Additionally, while there are organizations that train service animals,⁶¹ individual handlers are also allowed to personally train their own service

⁵¹ See Tom Coleman, *Service Dog Laws*, PAWSITIVITY SERVICE DOGS (Apr. 13, 2019), http://www.pawsitivityservicedogs.com/rules_and_regulations [<http://perma.cc/D4CD-N5CR>].

⁵² See generally 42 U.S.C. § 12101 (2012); see also *id.* § 12102(1)(A) (defining a person with a disability as someone with “a physical or mental impairment that substantially limits one or more major life activities . . .”).

⁵³ See generally *id.* §§ 12101–12213.

⁵⁴ See generally *id.*

⁵⁵ 28 C.F.R. § 36.104 (2018).

⁵⁶ *Id.*

⁵⁷ Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 ANIMAL L. 325, 328–29 (2017).

⁵⁸ 28 C.F.R. § 36.104; 28 C.F.R. § 35.136(h)–(i) (2018).

⁵⁹ *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5.

⁶⁰ 28 C.F.R. § 35.136(f) (“A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform.”); *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5.

⁶¹ *E.g.*, *About Us*, *supra* note 34.

animals.⁶² Although the ADA may aim to protect disabled individuals from being subjected to harassment about their service animals, these aspects are in fact where the issues stem from.

Most people think the ADA controls all disability law in the United States. However, when it comes to traveling, particularly by air, the treatment of disabled persons is governed by the Air Carrier Access Act of 1986 (“ACAA”).⁶³ The ACAA applies to anyone who wishes to travel with their animals on an airplane in the United States.⁶⁴ Even though they both deal with public spaces, the ACAA has much broader regulations than the ADA,⁶⁵ which demonstrates the beginning of the confusing web that is service animal law. Unlike the ADA, the ACAA protects the use of both service animals *and* emotional support animals.⁶⁶ Additionally, while the ADA prohibits the requirement of handlers showing documentation to prove the legitimacy of a service animal, airlines are allowed to ask for said proof in certain situations, such as for handlers who suffer from psychiatric or non-visible disabilities.⁶⁷ Another significant aspect where the ACAA differs from the ADA is that the ACAA does *not* limit the species of animals in the same way. The airline can bar animals that are impractical or dangerous for air travel, but other than that, there are few limitations on the species allowed on airplanes.⁶⁸

The third major piece of federal law with service animal implications is the Fair Housing Act (“FHA”),⁶⁹ which protects the use of service animals in private housing.⁷⁰ The FHA mandates that housing providers are not allowed to discriminate against individuals with disabilities from living on the property.⁷¹ Part of the requirement is to make sure to provide “reasonable

⁶² *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5 (“People with disabilities have the right to train the dog themselves and are not required to use a professional service dog training program.”).

⁶³ 49 U.S.C. § 41705 (2012).

⁶⁴ *See id.*

⁶⁵ *See “Service Animals” and “Assistance Animals:” What Are My Rights?*, STATESIDELEGAL (July 2015), <http://statesidelegal.org/service-animals-and-assistance-animals-what-are-my-rights> [<http://perma.cc/Y5Q5-U2J8>].

⁶⁶ 14 C.F.R. § 382.117 (2019).

⁶⁷ *Id.* § 382.117(d)–(e) (explaining how, in cases of emotional support animals and handlers with psychiatric disabilities, airlines can request proof from the handler).

⁶⁸ *Id.* § 382.117(f).

⁶⁹ *See generally* 42 U.S.C. §§ 3601–3607 (2012).

⁷⁰ *Id.* § 3604(f)(3)(B). The following proposal will be focused on analyzing the ADA and the ACAA, as the fraud of service animals being discussed deals mainly with the issue of public spaces. However, the inclusion of the FHA here is to help illustrate the issues of service animal laws and how it is easy to confuse them with one another, even at the most basic level.

⁷¹ *Id.* § 3604(f)(1).

modifications” for those with disabilities, which includes allowing service animals on the premises where they live.⁷² Similar to the ACAA, the FHA includes emotional support animals along with traditional service animals.⁷³ To further confuse the issue, the FHA refers to service animals instead as “assistance animals,” differing from the ADA and the ACAA’s terminology.⁷⁴ While in substance its definition mirrors the ADA’s, the fact that the FHA uses the word “assistance”⁷⁵ instead of “service” just adds to the pile of unnecessarily confusing details that do nothing but make the public unsure of what animals are covered by what laws.

Since this issue involves both federal and state laws, the question of preemption arises. However, as an appendix to the ADA clarifies, “The ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA.”⁷⁶ This allows states to create their own service animal laws, as long as they do not lessen the protections provided by the ADA.⁷⁷

C. Current State Laws

States also have their own individual laws regarding the regulation of service animals. State legislatures are passing more and more laws as these issues continue to plague our society at a rapid rate.⁷⁸ However, they are far from consistent. There are several categories of state service animal laws.⁷⁹ These include topics such as the definition of service animals,⁸⁰ accommodation laws,⁸¹ harassment/interference with service dog laws,⁸² and

⁷² *Id.* § 3604(f)(3).

⁷³ OFF. OF FAIR HOUSING & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUSING AND URB. DEV., FHEO NOTICE: FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS, 1 (2013).

⁷⁴ *Id.* at 1–2.

⁷⁵ 49 U.S.C. § 41705 (2012).

⁷⁶ 29 C.F.R. app. § 1630 (2018).

⁷⁷ *Id.* (“This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to prepare and maintain an affirmative action program under section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA.”). Based on the design of the ADA and the lack of any preemption issue, there are no commerce clause concerns here either.

⁷⁸ Michael Ollove, *Several states crack down ‘fake’ service animals*, USA TODAY (Oct. 29, 2017, 3:31 PM), <http://www.usatoday.com/story/news/2017/10/29/several-states-crack-down-fake-service-animals/807676001/> [<http://perma.cc/UEJ7-ELD3>].

⁷⁹ See generally Rebecca F. Wisch, *Table of State Service Animal Laws*, ANIMAL LEGAL & HIST. CENTER (2019), <http://www.animallaw.info/topic/table-state-assistance-animal-laws> [<http://perma.cc/W5PW-R33E>].

⁸⁰ *E.g.*, HAW. REV. STAT. § 347-2.5 (2019).

⁸¹ *E.g.*, IDAHO CODE § 18-5812A (2019).

⁸² *E.g.*, NEB. REV. STAT. § 28-1009.01 (2019).

driving laws.⁸³ The two categories of service animal laws that are most relevant to service animal fraud are licensing laws and fraudulent representation of service animal laws. To further add to the confusion, the statutes also vary significantly state to state, and many do not even have laws regarding these aspects of service animals.⁸⁴

It is important to look at state law in addition to federal law when analyzing the lack of a mandated certification system. While some states have laws on licensing of service animals, they are not necessarily what one would assume. Some of these states have laws in place that provide a form of “certification” in the sense that they provide service animal equipment free of charge or tax exempt if the handlers can show that their animal is properly trained.⁸⁵ The existence of such laws indicates that there is some form of statutory precedent for having a certification system in some states. However, they do not go as far as creating a required certification program, but more so help provide materials for those with service animals. While these laws do provide some assistance to handlers, they do not go far enough. Federal law still disallows proprietors from actually asking for any certification that a handler may have, no matter the state laws.⁸⁶ In fact, some of these state laws align with the current federal standard and disallow or exempt any licensing or certification.⁸⁷ Finally, many of the states simply do not have any laws regarding certification or licensing.⁸⁸

The more striking aspect of state law is the number of states that regulate and punish service animal fraud. As of early 2019, thirty-one states had some form of law that criminalizes service animal fraud.⁸⁹ These laws demonstrate that more and more states are attempting to crack down on service animal fraud and provide examples of potential punishments. While, overall, the states with fraud laws follow the same general format, once again there are differences. For example, in states such as

⁸³ *E.g.*, OKLA. STAT. tit. 7, § 12 (2019).

⁸⁴ *See* Wisch, *supra* note 79.

⁸⁵ *E.g.*, CONN. GEN. STAT. § 22-345 (2019) (“Any blind, deaf or mobility impaired person who is the owner or keeper of a dog which has been trained and educated to guide and assist such person in traveling upon the public streets or highways or otherwise shall receive a license and tag for such dog from the town clerk of the town where such dog is owned or kept [at] . . . no fee.”); HAW. REV. STAT. § 143-4 (2016).

⁸⁶ *See* 28 C.F.R. § 35.136 (2018).

⁸⁷ *E.g.*, COLO. REV. STAT. § 24-34-803 (2014); LA. STAT. ANN. § 46:1958 (2014).

⁸⁸ Wisch, *supra* note 79.

⁸⁹ *See Fraudulent Service Dogs*, ANIMAL LEGAL & HIST. CENTER, <http://www.animallaw.info/content/fraudulent-service-dogs> [<http://perma.cc/HW3E-3THZ>] (last visited Apr. 11, 2019).

California⁹⁰ and Maine,⁹¹ the laws state that any person who knowingly and fraudulently represents themselves as a handler or trainer of a legitimate guide, signal, or service dog shall be guilty of fraud.⁹² Additionally, some states, such as Maine, include that “[p]roviding false documents [or k]nowingly providing to another person documents falsely stating that an animal is a service animal or an assistance animal” also constitutes fraud.⁹³ This law is a crucial step for recognizing the problems that come from businesses that sell service animal paraphernalia to anyone. However, in some states, such as Nebraska, the law is less expansive, making it a misdemeanor when “[a] person . . . unlawfully us[es] a white cane or guide dog if he is not blind as defined by law and carries, displays, or otherwise makes use of a white cane or guide dog.”⁹⁴ Nebraska has no laws regarding fraud of any other type of service animals beyond a guide dog for a blind individual.⁹⁵ While many states either already have, or are working toward, implementing stricter regulations regarding punishments for service animal fraud, the problem is far from fixed.

III. CAUSES AND ISSUES

A. The Root of the Problem

The cause of the problem with service animals stems from the laws themselves. The relaxed nature of the ADA and the inconsistency among state laws has opened the door to widespread fraud and abuse.

The ADA contains few checks on the service animal process. More importantly, the ADA contains no certification process.⁹⁶ And, in fact, such a process has received little governmental

⁹⁰ CAL. PENAL CODE § 365.7 (West 2019) (“Any person who knowingly and fraudulently represents himself or herself, through verbal or written notice, to be the owner or trainer of any canine licensed as, to be qualified as, or identified as, a guide, signal, or service dog, as defined in subdivisions (d), (e), and (f) of Section 365.5 and paragraph (6) of subdivision (b) of Section 54.1 of the Civil Code, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, by a fine not exceeding one thousand dollars (\$1,000), or by both that fine and imprisonment.”).

⁹¹ ME. STAT. tit. 17, § 1314-A (2016).

⁹² Based on the available state laws on service animals, the lowest end of the penalties include fines of twenty-five dollars or community service. The higher end of the penalties includes up to one year in jail and fines of up to \$1,000. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 118 (McKinney 2017); FLA. STAT. § 413.08 (2015); N.M. STAT. ANN. § 28-11-6 (2013).

⁹³ ME. STAT. tit. 17, § 1314-A.

⁹⁴ NEB. REV. STAT. § 28-1313 (2019).

⁹⁵ *Id.*

⁹⁶ See *Service Dogs and the Americans with Disabilities Act (ADA)*, AM. HUMANE, http://www.americanhumane.org/app/uploads/2018/05/Service-Dog-Laws-for-Businesses_3_7_18.compressed.pdf [http://perma.cc/56DB-SP4H] (last visited Jan. 11, 2020).

support.⁹⁷ Some organizations, such as Canine Companions for Independence, are accredited by Assistance Dogs International,⁹⁸ which is “a worldwide coalition of non-profit programs that train and place Assistance Dogs.”⁹⁹ While Assistance Dogs International has accredited over 134 service animal programs across the globe,¹⁰⁰ the ADA does not officially support this program or any other certification program. Therefore, this accreditation holds little to no weight for individuals trying to assert their legal rights.¹⁰¹ Additionally, individuals and businesses can only question the legitimacy of a service animal by asking the handler “if the animal is required because of a disability and what work or task the animal has been trained to perform.”¹⁰² These questions are both awkward to ask and easy to circumvent by lying. Finally, the differences in both terminology and scope of the ADA, in comparison to the ACAA and the FHA, creates confusion about what laws apply to what animals, to what people, and in what situations. Consequently, the confusion over these different federal laws also makes them easy to avoid. Having so many different definitions and standards for everything from species of animals allowed, to the type of documentation needed, and to the level of service provided, opens the door to misunderstandings and legal problems.

Although state legislatures have begun addressing the problem of fraud,¹⁰³ these efforts fail to solve the problem at a larger level and further add to the confusion. Like the ADA, the ACAA, and the FHA, the differences between the state laws cause additional confusion about what laws apply and where. While different states have countless differing laws, the ADA overpowers the states’ ability to adequately stem the flow of service animal fraud. As mentioned, while many states have laws

⁹⁷ See Lee, *supra* note 57, at 329.

⁹⁸ *Results for Members serving California*, ASSISTANCE DOGS INT’L, <http://assistancedogsinternational.org/index.php?src=directory&view=programs&category=California> [<http://perma.cc/X4ET-9ZH3>] (last visited Apr. 11, 2019) (listing other organizations that are accredited by Assistance Dogs International).

⁹⁹ *Who we are*, ASSISTANCE DOGS INT’L, <http://assistancedogsinternational.org> [<http://perma.cc/2PZ8-SAXZ>] (last visited Apr. 11, 2019) (“The objectives of Assistance Dogs International are to: Establish and promote standards of excellence in all areas of assistance dog acquisition, training and partnership; [f]acilitate communication and learning among member programs; [and] [e]ducate the public to the benefits of Assistance Dogs and ADI membership.”).

¹⁰⁰ *2018 Fact Sheet*, ASSISTANCE DOGS INT’L, <http://assistancedogsinternational.org/clientuploads/ADI-Fact-Sheet.pdf> [<http://perma.cc/38MS-CF5U>] (last visited Apr. 11, 2019).

¹⁰¹ See 28 C.F.R. § 35.136 (2018); see also *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5.

¹⁰² 28 C.F.R. § 35.136.

¹⁰³ See *States Lead Efforts to Curtail Rampant Abuse of Emotional Support Animal Requests*, NAA (Mar. 21, 2018), <http://www.naahq.org/news-publications/states-lead-efforts-curtail-rampant-abuse-emotional-support-animal-requests> [<http://perma.cc/VEE7-CKXV>].

punishing those who fraudulently abuse the system,¹⁰⁴ the restrictions set out by the ADA—limiting what people can do to prove legitimacy and the disallowance of a certification program—undermines the states’ abilities.¹⁰⁵ There is no recourse for states like California or Missouri to be able to punish individuals, because they are not even allowed to adequately prove fraud has occurred without running the risk of dragging legitimate handlers into court over and over again. While on paper the states have laws in place to fix these issues, practically, this problem is far from over without change at the federal level.

B. The Problem of Fraud

While there are many people defrauding service animal accommodations, it is far more complicated than it might seem at first blush. Some individuals intentionally abuse the system, and simply lie their way into having their pets with them whenever they want.¹⁰⁶ While their intent may be clear, it is still very difficult to prove, since these individuals may easily lie when asked the questions that are permitted under the ADA. This leaves no recourse for businesses or entities to prevent these illegitimate service animals from coming on their premises without facing the possibility of serious legal action.¹⁰⁷

A clear situation where the intent to defraud under service animal laws occurs when businesses intentionally sell fraudulent certificates and service animal equipment. Nowadays, all it takes is less than ten dollars and an Amazon Prime membership, and anyone can label their pet as a “service animal” in as little as two days.¹⁰⁸ Service animal organizations are making note of this problem.¹⁰⁹ The CEO of Guide Dogs for the Blind publicly stated that “[c]onfusion between legitimate service dogs and pets is fueled by how easy is it to obtain fake service or emotional support animal certification online.”¹¹⁰ The ADA clearly recognizes this as a serious issue, as it states on its official webpage, “There are individuals and organizations that sell

¹⁰⁴ See *Fraudulent Service Dogs*, *supra* note 89; *e.g.*, CAL. PENAL CODE § 365.7 (West 2019).

¹⁰⁵ 28 C.F.R. § 35.136; see also *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5.

¹⁰⁶ STACY FROMGOLDS, *Confession: My “Service Dog” Is a Total Fraud*, in A PETFUL SPECIAL REPORT: FAKE SERVICE DOGS, REAL PROBLEM 5, 6 (2012), <http://www.petful.com/service-dog-report.pdf> [<http://perma.cc/T8PJ-UJ6T>].

¹⁰⁷ See Tilbury, *supra* note 10.

¹⁰⁸ See, *e.g.*, *Service Dog TAG*, AMAZON, http://www.amazon.com/K9King-Service-Federal-Protection-Harness/dp/B06XX8W133/ref=sr_1_5?ie=UTF8&qid=1540674607&sr=8-5&keywords=service+animal [<http://perma.cc/73M4-7PA8>] (last visited Apr. 11, 2019).

¹⁰⁹ Christine Benninger, *Greetings from the CEO*, GUIDE DOG NEWS, no. 1, 2019, at 3, 3.

¹¹⁰ *Id.*

service animal certification or registration documents online. These documents do not convey any rights under the ADA and the Department of Justice does not recognize them as proof that the dog is a service animal.”¹¹¹ However, there has been a shocking lack of action to remedy this issue. For example, one can look to the story of Stacy Fromgolds, who openly admits that she bought “credentials” online to claim her ordinary pet as a service animal simply since she “really like[s] having [her] dog with [her],” despite not suffering from any disability.¹¹² She describes how easy the process was, as she “simply paid \$50 on the United States Service Dog Registry website to get a kit that provided [her] with incredibly official-looking credentials.”¹¹³ Although Fromgolds chose to go by a pseudonym for her article, thus admitting that even she knows her actions are wrong,¹¹⁴ there is little the government has done to combat these situations. Individuals like Fromgolds continue to plague legitimate handlers and the animals they rely on to this day. These “certifications” are still widely available online¹¹⁵ and incidents involving the fraudulent labeling of animals are still ongoing. To further illustrate the widespread fraud, beyond just a few individuals like Morgan and Palacio, a 2016 survey of handlers who received service dogs from Canine Companions for Independence revealed that 77% of them have had encounters with a fraudulent service animal.¹¹⁶ Over 25% of those surveyed have had ten separate encounters with these fraudulent service animals.¹¹⁷ This is not a small problem that can be ignored.

Finally, with all the confusion in the law, there is another group of people who are also misusing the service animal system, albeit less intentionally. There may be individuals who accidentally or unknowingly use fraudulent service animal labels or break related service animal laws. The haphazard nature of these laws cannot be ignored in analyzing these situations. These individuals may think they received their animal from a legitimate trainer, or may simply not be able to figure out what their animal is classified as, or even what law applies in different situations. While the explicit intent to defraud would not be

¹¹¹ *Frequently Asked Questions about Service Animals and the ADA*, *supra* note 5.

¹¹² FROMGOLDS, *supra* note 106, at 5–6.

¹¹³ *Id.* at 6.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., *Doggie Stylz Service Dog Harness Vest*, AMAZON, http://www.amazon.com/Doggie-Stylz-Reflective-Patches-Ordering/dp/B074XCBGFK/ref=sr_1_19?keywords=service+animal&qid=1552507178&s=gateway&sr=8-19 [<http://perma.cc/YG73-RJ7N>] (last visited Apr. 11, 2019).

¹¹⁶ Tilbury, *supra* note 10.

¹¹⁷ *Id.*

present in this case, it can still lead to similar issues of inadequate animal training, safety issues, property hazards, and hurting the reputation of legitimate service animals. This leads into the discussion of the problems resulting from this rampant service animal misuse.

C. The Problems *Created by* Fraud

While defrauding any aspect of the law is unacceptable, there are specific reasons as to why this is particularly harmful when it comes to service animals. First, there are issues of safety for both humans and animals. Even domesticated animals are still *animals*. Untrained animals put in public situations that they have not been trained to handle can lead to injuries—from biting people, all the way to violent attacks against legitimate service animals.¹¹⁸ This problem has been encapsulated by a recent statement from Christine Benninger, President and CEO of Guide Dogs for the Blind, who said:

Fraudulent service and emotional animals pose a threat to legitimate service dogs because they have not had the extensive training of a service dog and can become uncomfortable and even fearful in public situations. Recently, incidents of aggression involving fraudulent service and emotional support animals have jumped alarmingly. Even one dangerous encounter between a working team and an untrained animal could have catastrophic consequences and result in the permanent retirement of the guide dog.¹¹⁹

Second, there is the risk of property damage. When animals are not trained properly, it can lead to biting or even urinating in public and on other people's possessions.¹²⁰ These situations can lead to legal issues beyond discrimination¹²¹—such as personal injury and destruction of property claims—which can result in more litigation that does nothing but unnecessarily clog up the court system.

Stemming from these issues arises the third, and by far the biggest, problem with fake service animals: the harm to disabled individuals who rely on legitimate service animals. The prevalence of these incidents involving fraudulent service animals makes the issue so public, that entities and individuals are now far less likely to believe that *any* service animal is

¹¹⁸ See Hopper, *supra* note 24.

¹¹⁹ Benninger, *supra* note 109.

¹²⁰ Hopper, *supra* note 24.

¹²¹ See, e.g., *Hardesty v. CPRM Corp.*, 391 F. Supp. 2d 1067, 1069–70 (M.D. Ala. 2005); *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 839–41 (9th Cir. 2004) (explaining how a quadriplegic with a small service dog was not believed when she asserted her right to have her service dog with her).

legitimate—the exact issue that Morgan discussed facing regularly when bringing Echuka with him in public.¹²² Due to what is supposed to be a protection under the ADA that does not require handlers to carry certification or documentation of any kind, handlers cannot affirmatively prove their legitimacy to the satisfaction of those inquiring. Even if they could, somehow, it should not be on the handler to force their animal to perform tasks on the spot, like a circus act, in order to prove that their animal is actually trained. The nature of the “protections” set forth in the ADA and the ACAA, that are designed to protect handlers from the extra burden of carrying identification or having to certify their animals’ training, have placed service animal law in the perfect position to be regularly defrauded. This leads people to question whether service animals are ever legitimate. A perfect real world example is the case of *Hardesty v. CPRM*, where Mr. Jolly, who had an artificial leg and had been legally blind for nearly twenty years, and his service dog, Bronson, were excluded from staying at a hotel due to a past “service dog’s” destruction of property, which forced him to turn to the courts.¹²³ The hotel in this case filed a motion for summary judgement; however, the court found the alleged discrimination serious enough for the case to proceed to trial.¹²⁴ Discrimination against Americans who rely on service animals is something the courts take very seriously.¹²⁵ Additionally, sometimes the victims of these fake service animals are the legitimate service animals who are attacked by their improperly trained counterparts, thus in turn harming both the animal itself and the disabled individual who relies on them.¹²⁶

Airlines have been one of the main areas of issue for fraudulent service animals. These situations have been gaining publicity in the media as well.¹²⁷ Nowadays, airports are filled with both a variety of species passing as “service animals” and just as many people wondering whether any of them are legitimate. For example, in October of 2018, a woman was kicked off a Frontier Airline’s flight and all of the passengers were forced to deplane, when the woman refused to disembark her emotional support animal—which turned out to be a squirrel.¹²⁸ Another situation that arose in 2018 was when a United Airlines passenger attempted to board the airplane with a fully-grown peacock, claiming that it was an emotional support animal and

¹²² *A Service Dog is More than a Vest*, *supra* note 1.

¹²³ *Hardesty*, 391 F. Supp. 2d at 1069–70.

¹²⁴ *Id.* at 1075.

¹²⁵ *See, e.g., id.*

¹²⁶ *See* Benninger, *supra* note 109.

¹²⁷ *See, e.g.,* McCluskey, *supra* note 24.

¹²⁸ *Id.*

should be allowed on board.¹²⁹ While the peacock was turned away due to health and safety concerns, the passenger had already been informed three times before arriving at the airport that the peacock would not be allowed on the plane.¹³⁰ This demonstrates the blatant disregard people have for service animal laws and rules. While these incidents illustrate the frustration and the issues of illegitimate animals when they are denied passage on an aircraft, there are many more situations that arise in the small cabin of the aircraft. In 2014, a flight had to make an unscheduled landing when a “service dog” repeatedly defecated in the aisle of the plane, resulting in imminent and serious health consequences for the other passengers on board.¹³¹ In 2017, an alleged emotional support animal, a fifty-pound dog sitting on the lap of its owner in the middle seat, severely bit a fellow passenger on the face, which resulted in the victim being escorted off the plane by paramedics.¹³² This misuse of the law damages the legitimacy and lives of handlers who depend on service animals because they fear going out in public will result in harassment by business establishment, accusations of having a fraudulent animal, or risking their animal’s safety. These incidents are only the tip of the iceberg to a larger problem that is far from over.

Beyond just the health and safety concerns, fellow patrons have noted their displeasure and rage at the problem of misbehaving animals on social media.¹³³ This is important because it not only indicates that the public wants stricter regulations, but it also publicizes these incidents, which then in turn leads to the public losing trust in the system.

The combination of the easy standards under the ADA (and other service animal laws), the systematic selling of fraudulent service animal paraphernalia, and the rising incidents in the media involving fake service animals has led to the opposite of what the ADA was set out to do. It has instead directly led to the delegitimization of authentic service animals and created harm to the handlers who rely on them.

With all the issues stemming from service animal fraud, there has been a surprising lack of action to remedy this

¹²⁹ *Woman denied emotional support peacock on United flight*, *supra* note 24.

¹³⁰ *Id.*

¹³¹ Hopper, *supra* note 24.

¹³² Nathalie Pozo, *Passenger bitten by emotional support dog on Delta flight*, FOX 5 ATL (June 6, 2017), <http://www.fox5atlanta.com/news/passenger-bitten-by-emotional-support-dog-on-delta-flight> [<http://perma.cc/P7CP-TQN2>].

¹³³ *See, e.g.*, Hopper, *supra* note 24; McCluskey, *supra* note 24; *Woman denied emotional support peacock on United flight*, *supra* note 24.

situation on any national or uniform level. The Legislature has remained silent on the reasons behind their inaction, even though both the public and service animal organizations are calling for change.¹³⁴ Even in the changes that were made to the ADA in 2010, the reasoning behind the Legislature's choices were absent.¹³⁵ This lack of action means that a solution to these current problems is long overdue.

IV. CLOSING THE LOOPHOLES: A POTENTIAL SOLUTION

The problems caused by service animal fraud and the increase in emotional support animals continue to plague both handlers and the public across the country. A nationwide solution needs to be put into place. In order to create a system that allows for the best protection for disabled individuals, and prevents the most fraud possible, a multi-faceted plan is the best approach. This Note proposes the following three-part solution: (A) creating a consistent and *limited* definition for service animals, consolidated across all federal and state laws, (B) implementing an official certification process for service animals, and (C) implementing laws for punishing those who use both fake service animals and those who sell falsified service animal paraphernalia. Federal and state certification systems have been independently proposed before.¹³⁶ But this Note argues that for this solution to work, there must be *both* federal and state changes. Furthermore, for each of these proposals to work as effectively as possible, this approach argues that it is critical they are used in tandem with one another.

A. Limiting Definitions in Service Animal Law

The ADA, the ACAA, and nearly every state have their own independent definitions of what constitutes a service animal. There are definitions regarding “service animals,” “assistance animals,” “emotional support animals,” and other group classifications for these working animals. As formerly mentioned, and as any quick search into this area will show, this provides for mass confusion about who and what is covered by these laws. In order to provide a legal definition that helps disabled individuals, the ADA's definition of “service animal” should be implemented

¹³⁴ *The unseen dangers of fake service dogs in Central Florida*, WESH 2 (May 14, 2018, 11:34 PM), <http://www.wesh.com/article/the-unseen-dangers-of-fake-service-dogs-in-central-florida/20681912> [<http://perma.cc/MCNS-BWVZ>].

¹³⁵ *ADA Requirements: Service Animals*, ADA.GOV (July 12, 2011), http://www.ada.gov/service_animals_2010.htm [<http://perma.cc/FUL8-SYJ6>].

¹³⁶ Susan D. Semmel, Comment, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 BARRY L. REV. 39, 60 (2002).

across the board for all public spaces, including air travel (thus amending the ACAA). This change would limit all service animals to specially trained dogs¹³⁷ and remove any emotional support animals from federal protection in public spaces.¹³⁸

At first glance, it may seem that limiting the scope of which species can become service animals, and disallowing emotional support animals on planes, would in fact harm the handlers that need them. In fact, others have proposed that it would be better to expand the definition of service animals to encompass more species and provide protection for emotional support animals under the ADA. For example, Rebecca J. Huss argues that the ACAA should not be limited to only service animals, and emotional support animals should still be allowed on flights.¹³⁹ She discusses how the airline companies are allowed to put their own regulations in place about which animals are permitted on planes, such as the number of animals allowed on one flight and how animals must be confined to an approved pet carrier.¹⁴⁰ She argues that “it would be inexplicable to narrow the definition of service animals” for airplanes and that “the ACAA’s current process, with its clear rules, appears to be working to a large degree and should not be altered to make it more difficult for persons with disabilities to be accompanied by their service animals.”¹⁴¹ Additionally, she argues that limiting the definition of service animals to the ADA’s definition would be potentially detrimental to disabled individuals.¹⁴²

However, the current system of the ACAA is not working. Allowing emotional support animals—even with limited restrictions on species—has impacted airlines and patrons alike, forcing the Department of Justice to revisit the issue.¹⁴³ The number of incidents involving emotional support animals (or

¹³⁷ See *I heard that miniature horses are considered to be service animals by the ADA. Is this true?*, ADA NAT’L NETWORK, <http://adata.org/faq/i-heard-miniature-horses-are-considered-be-service-animals-ada-true> [<http://perma.cc/MT4X-VK29>] (last updated Oct. 2019), for a discussion of how miniature horses are service animals under the ADA. See also Kea Grace, *Miniature Horses as Service Animals*, ANYTHING PAWSABLE (Aug. 10, 2019), <http://www.anythingpawsable.com/miniature-horses-as-service-animals/> [<http://perma.cc/Z2JJ-FGWM>].

¹³⁸ To ensure states also follow the same strict definition, the federal government could either preempt the states’ ability to define the term “service animals” for public spaces (including airplanes), or could incentivize the states to adopt the federal definition, which is further discussed in subsection B of this Part.

¹³⁹ Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1215–16 (2010).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1216.

¹⁴² *Id.*

¹⁴³ *Id.* at 1180–82.

fraudulent service animals) on airlines has become alarming.¹⁴⁴ There have been serious incidents involving the public's health and safety because of the more relaxed system employed by the ACAA.¹⁴⁵ These concerns cannot continue to go unchecked. Limiting the ACAA to a stricter definition of service animals could lead to great improvement in combatting these serious issues by ensuring only appropriately trained animals are allowed on confined aircrafts. The vague differentiations of emotional support animals allow too much room for people to manipulate the system. Those who are currently using emotional support animals would be able to have their animals certified as an actual service animal, thereby ensuring that they are adequately trained to be in public. While many people use emotional support animals and find them helpful, having untrained and inexperienced animals in certain public spaces,¹⁴⁶ such as the grocery store or inside a restaurant, is not an appropriate accommodation. Emotional support animals that are unable to pass the training necessary to be certified should in fact not be permitted on airlines, considering the stressful and potentially dangerous situation that presents itself.¹⁴⁷ Thus, limiting the definition would still permit appropriately trained and relied upon dogs to be able to accompany their handlers where needed, even if at the moment they are classified as an emotional support animal.

Additionally, limiting the species permitted to be classified as service animals will help prevent fraud and protect the safety of all involved, while still leaving room for later adjustments. The service animal definition under the ADA is limited to dogs, but there is currently an exception for miniature horses.¹⁴⁸ While it is crucial to have a limited definition of service animals, there has been research indicating that miniature horses have many traits and abilities that make them successful and safe service animals, similar to dogs.¹⁴⁹ Due to this background, the ADA's current

¹⁴⁴ See, e.g., Pozo, *supra* note 132.

¹⁴⁵ See, e.g., *id.*

¹⁴⁶ This Note is not suggesting that pet dogs should be restricted from *all* public spaces. They should still be permitted to go where pets and animals have historically been allowed—public parks, sidewalks, and outdoor events. Additionally, this would not limit a business or private entity's ability to allow ordinary pets or service animals on its premises, if it so chooses.

¹⁴⁷ See, e.g., *id.* The FHA could still allow emotional support animals in housing without the animal passing official service animal certification, since that is not an issue of public safety or concern. Thus, many people with emotional support animals could continue to have support and companionship in their own home without any changes or new requirements for them to meet.

¹⁴⁸ 28 C.F.R. § 35.136(i) (2018).

¹⁴⁹ Grace, *supra* note 137.

inclusion of only this specific exception to dogs, and the undue burden that it would put on those currently using miniature horses, the ADA should continue to allow this exception (for the purpose of this proposal, the vast majority of the animals discussed are assumed to be dogs, however it all applies to miniature horses as well). The law could later be amended to allow for other species of animals at the recommendation of professionals who can testify about a need for inclusion and the proposed species' ability to be trained appropriately and safely for service animal work. Currently, the laws should still be limited to the parameters set forth in the ADA. Also, people already have (or should already have) been adhering to these limitations for the public accommodation of service animals. Thus, it will not cause an undue burden on handlers. At this point, the confusion of opening the definition up to *more* species, when the situation is already out of control, would likely cause more harm than good.¹⁵⁰

Limiting service animals to the ADA's definition will help prevent people from abusing the cracks in the system. Congress amended the ADA itself in 2010 for this very reason,¹⁵¹ and Congress should follow this precedent and make the same changes to the ACAA. Having a consistent definition of service animals that applies to public spaces, including airplanes, will allow for the public, pet owners, and handlers to better understand which animals are allowed in what public spaces. Service animals have been trained not only to perform specific tasks (e.g., opening doors), but they have also been trained to remain calm, be attentive to their handler, and interact appropriately with other animals in public spaces.¹⁵² Emotional support animals are not required to have such public situation training.¹⁵³ Therefore, by allowing only service animals to be protected, airlines and other entities will not be left to decipher each individual animal on a case by case basis with unclear and ambiguous standards.

Some may argue that individuals who rely on the current ACAA for bringing their unorthodox animals on planes would be negatively affected by this change. However, airlines currently have the ability to prevent emotional support animals from coming on planes because of their size, species, or other safety concerns. Therefore, there is no guarantee that any animal will be allowed on a plane even today. With a strict definition, those

¹⁵⁰ See Hopper, *supra* note 24.

¹⁵¹ Lee, *supra* note 57, at 328–29.

¹⁵² See *Final Goal Behaviors*, *supra* note 40.

¹⁵³ See *ADA Requirements: Service Animals*, *supra* note 135; Sailer, *supra* note 41.

who have a properly trained dog are still allowed to bring them, and in fact would be better protected from discrimination and potential dangers. The concerns for human and animal safety, as well as discrimination issues for those with disabilities, far outweigh the concerns of individuals who wish to have an untrained animal with them in a confined space. A strict definition of service animals will still allow those with legitimate disabilities to have their necessary service dogs help them in the public aspects of their lives, without having to justify their presence over and over due to the public's continual loss of faith in the system.

Having a strict definition of service animals introduces another problem—how do we know whose service animal is legitimate? This leads to the next step in reforming the shape of service animal law today—creating a system of certification for service animals.

B. Creating a Mandatory Certification System

1. A Need for Certification

Currently, neither federal nor state law regulate any form of certification for service animals, which contributes significantly to the widespread fraud seen today. In fact, Congress explicitly rejected the implementation of such a system.¹⁵⁴ Thus, current law limits the public's ability to question the validity of service animals to two questions: (1) is the animal required due to a disability, and (2) what work or task has the animal been trained to perform.¹⁵⁵ While it may seem that this process is adequate, that is far from the truth. Not only are these questions potentially awkward and could lead to many individuals feeling too uncomfortable to approach someone to ask, they are easy to circumvent. Anyone presenting a dog as a service animal can easily lie when asked questions, without having to provide official documentation to support their claims, thereby allowing them to slip by effortlessly. This is a huge factor in the rampant fraud in the system. Furthermore, it directly leads to handlers being more burdened and harassed because they are asked uncomfortable questions and, more importantly, they have to deal with the public not believing them, even when they are completely in the right. These two questions are not enough. By amending the ADA to incorporate an official certification process,

¹⁵⁴ Lee, *supra* note 57, at 329.

¹⁵⁵ 28 C.F.R. § 35.136 (2018).

the law can more adequately protect both handlers and the public from unnecessary burdens.

While there is no certification process in place, there has been growing support for such an idea. For example, some scholars have compared America's lack of a certification system to other countries' processes, calling for America to follow suit and make a comparable federal system.¹⁵⁶ Others have indicated a similar desire, differing only in that they suggest the state legislatures take the lead instead of the federal government.¹⁵⁷ Additionally, there has been a call, even outside of the academic and legal world, for action to be taken.¹⁵⁸ Legitimate service animal foundations have explicitly been looking for a solution.¹⁵⁹ For example, "Guide Dogs for the Blind is firmly committed to advocating for solutions to crack down on fraudulent service and emotional support animals to ensure the safety and independence of [its] clients,"¹⁶⁰ and "Canine Companions for Independence has lobbied the Department of Justice to come up with a solution which may involve creating a national registry for service dogs."¹⁶¹ With organizations like Assistance Dogs International and the work they do to accredit service animal programs around the world, the framework for a certification program is practically already in existence, it is just missing the legal weight behind it.¹⁶²

2. Federally Encouraged

To have the most successful system possible, a service animal certification process should be implemented at the federal level first. While there has been some suggestion that each state could take this process into their own hands, that would not be as effective as a federal mandate. First, since the ADA is the most significant and controlling law for service animals, the certification system should be initially incorporated as a part of the ADA. Second, leaving this to the states alone will do little to help with the current problem. While some states may establish

¹⁵⁶ Paul Harpur et al., *Regulating 'Fake' Assistance Animals—A Comparative Review of Disability Law in Australia and the United States*, 24 ANIMAL L. 77, 96 (2018) (discussing how America should emulate the Australian system and implement a federal system for service animal certification); Semmel, *supra* note 136, at 60.

¹⁵⁷ *E.g.*, Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771, 796 (2016).

¹⁵⁸ Fremonta L. Meyer et al., *Controversies Regarding Service Animals in the Ambulatory Oncology Setting*, 14 J. ONCOLOGY PRAC. 141, 142 (2018).

¹⁵⁹ *See* Benninger, *supra* note 109, at 3.

¹⁶⁰ *Id.*

¹⁶¹ *The unseen dangers of fake service dogs in Central Florida*, *supra* note 134.

¹⁶² *Summary of Standards*, ASSISTANCE DOGS INT'L, <http://assistancedogsinternational.org/standards/adi-standards/> [<http://perma.cc/Z5HC-JLHR>] (last visited Apr. 11, 2019).

certification systems, some may not, which does little to cure the problem of the laws being confusing and inconsistent. Also, trying to make all fifty states implement similar programs along similar timelines would be next to impossible without federal intervention. Without consistent implementation, this system could do little to help the problem. For example, if California implements a certification process and Arizona does not, when an Arizona resident brings their dog to a California restaurant and the manager asks for certification, they are at a legal standoff. This exemplifies how this could get out of hand quickly and may in fact backfire, resulting in more litigation from individuals trying to assert their rights. From the perspectives of both the manager and the handler, both would technically be “correct” in their assumptions. A federal system created with no state input could lead to states being completely passed over and pushed to reject such a change. In creating this system of certification, there are two major parts: (1) the training standards, and (2) the implementation process. Federal law should prescribe the basics for both, in order to create the stability and consistency the current system lacks. While the federal government does not have the ability to force the states to adopt this program, it can offer states conditional funding in order to try and ensure nationwide compliance.¹⁶³

The first feature of the certification process is the training standards for service animals. Luckily, there are several legitimate training programs already in place that can function as blueprints for a nationwide system. For example, Guide Dogs for the Blind publishes their training standards for their service dogs.¹⁶⁴ The basic guidelines of these standards can be provided in the ADA. An example would be that the ADA could provide that the certification standards must include training for appropriate behavioral aspects (non-aggression, calmness in public places, distractibility), general commands (sit, stay, recall), and specific service training (seizure or illness detection, picking up items, leading the blind or hearing impaired). Additionally, federal law could mandate that while any breed is technically allowed under the certification system, each individual dog must be able to meet all necessary standards of training in order to be a *legal* service dog. These are just a few

¹⁶³ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (explaining how conditional funding can be given to the states to encourage compliance with federal goals, which, in this case, was in the context of a minimum drinking age). This concept demonstrates how the federal government can encourage state participation for the proposed solution this Note suggests.

¹⁶⁴ See *Final Goal Behaviors*, *supra* note 40.

examples of the types of guidelines that the federal system can set forth for animal training. Overall, the training standards should focus on making sure the underlying policy is supported—that all service animals should be able to safely and adequately aid their handlers in all aspects of life, both private and public.

The second portion of this certification system is the implementation process. Organizations such as Guide Dogs for the Blind or Canine Companions for Independence would be required to comply with the standards set forth by the federal law. By receiving a service animal from one of these institutions, the certification requirements would be met and would require no other additional training or documentation by the handler (as the organization would provide all of the necessary materials). To be able to provide legal certification, any institution or organization, such as these, would merely have to comply with these standards and laws—which they likely would already be doing without much change in current operations.¹⁶⁵ Individuals who train their own dogs (which the ADA currently allows)¹⁶⁶ should be required to take their dog to an official organization and pass a training examination. Organizations such as Assistance Dogs International could become crucial players in this system for both training institutions and examining independently trained animals. By continuing to provide consistent and rigorous accreditation, they could ensure that everyone involved complies with all legal requirements put forth by an official certification system.¹⁶⁷

3. State Executed

To stem state push back, the best way to go about this is to make a certification system federally regulated and encouraged through the ADA, but leave the specifics of training and implementation to the states. While some may argue that this dual federal-state system of regulation is convoluted or impractical, that is not the case. For service animal certification, the states will have the ability to regulate the specifics of their individual processes. While the federal government can create consistency and stability, the states are left to make decisions that best suit the individual needs and wants of their citizens.

¹⁶⁵ *See id.*

¹⁶⁶ *See Frequently Asked Questions about Service Animals and the ADA, supra* note 5.

¹⁶⁷ *See Summary of Standards, supra* note 162 (“The ADI Standards Committee works year round on the continued development of ADI Standards. The ADI Standards are continually evaluated to ensure they are up-to-date with current industry practices and remain focused on continuous improvement of the assistance dog industry.”).

The details that are provided in training materials from institutions such as Canine Companions for Independence¹⁶⁸ or Guide Dogs for the Blind¹⁶⁹ can aid states in establishing training standards as well. The more detailed aspects of what exactly a service dog needs to do to get certified can be left to the states. For example, all dogs must be trained to do the basics listed in the above section: calmness, attentiveness, and commands. The specifics of programs, such as how many months a dog must be in training, if a probationary period is necessary, or the breeding process for the animals, can all be left to the states. States could also choose if there are breed restrictions, as long as they do not conflict with the federal requirements of trainability. States can still have independence to create standards they find appropriate, without undermining the policy of ensuring safe and reliable service animals consistently across the country.

The states would also have a crucial role in the implementation process. While it may seem daunting to put together a program for widespread certification, there are precedents to aid in the process. States would follow the basics set forth by the federal law, but would be given leeway on adding any additional requirements for organizations providing certification. For individuals who train their own animals, the handler and the dog would be required to pass an examination which demonstrates all the training elements required by both the federal and state standards. States could be left to decide the specifics of such an examination and the application process, as these details are more minor and would likely not lead to widespread inconsistencies. After all, under the ADA, all service animals would need to meet the same general requirements. As an example, the precedent to look at would be the application process for receiving a handicap placard for one's car.¹⁷⁰ This application includes information such as who is eligible to apply, appropriate uses of the placards, applicant information, and medical provider information.¹⁷¹ Additionally, this application provides relevant legal information such as the illegality of misusing, counterfeiting, loaning, or selling one's disability

¹⁶⁸ See *Training Tips*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/about/resources/training-tips.html> [<http://perma.cc/3EV6-2Z2J>] (last visited Nov. 14, 2019).

¹⁶⁹ See *Puppy Raising Road Map*, GUIDE DOGS FOR BLIND (Sept. 2019), <http://www.guidedogs.com/uploads/files/Puppy-Raising-Manual/Puppy-Raising-Road-Map.pdf> [<http://perma.cc/8G3W-U49F>].

¹⁷⁰ See STATE OF CAL. DEP'T OF MOTOR VEHICLES, APPLICATION FOR DISABLED PERSON PLACARD OR PLATES (2018), [http://www.dmv.ca.gov/portal/wcm/connect/aebb95cd-c20a-49bd-bc13-dd74120044fc/reg195.pdf?MOD=AJPERES&CVID=\[http://perma.cc/C9KJ-RMAN\]](http://www.dmv.ca.gov/portal/wcm/connect/aebb95cd-c20a-49bd-bc13-dd74120044fc/reg195.pdf?MOD=AJPERES&CVID=[http://perma.cc/C9KJ-RMAN]).

¹⁷¹ *Id.*

placard.¹⁷² All of this information could be easily transferable to an application for a service animal. Applicants for service animals would have to also include information about their requested animal, their examination passage, and any other information that the states feel necessary to include.¹⁷³ The section regarding the legal aspects of having a handicap placard would be a critical section that should be included in a service animal counterpart, as it would help alert people to the ramifications of service animal fraud and emphasize the seriousness of potential consequences. Even small factors such as these, supported by the force of an official process, will help in slowing the fraud happening today.

Because the ADA does not preempt implementing their own standards, this is a realistic possibility. The service animal certification system could mirror the handicap parking system. This idea is supported by specifically looking at the ADA's requirements for handicap spaces in parking lots.¹⁷⁴ The ADA provides numerous guidelines and standards that states should follow, but gives them discretion for making their own changes based on individual needs. Looking at the official ADA Compliance Brief for restriping handicap parking spaces illustrates this idea.¹⁷⁵ For example, the brief explicitly states that “[w]hen a business or State or local government restripes parking spaces in a parking lot or parking structure (parking facilities), it must provide accessible parking spaces as required by the 2010 ADA Standards for Accessible Design.”¹⁷⁶ This demonstrates how states are required to follow the basic standards set out by federal law. Further, the brief mentions that while the boundaries of the parking area must be clearly marked under federal law, “[s]tate or local laws may address the color and manner that parking spaces and access aisles are marked.”¹⁷⁷ This illustrates the states' discretion in implementing the specific requirements. These examples show that a federally mandated and state implemented process is not only possible, but directly applicable to disability laws governed by the ADA.

¹⁷² *Id.*

¹⁷³ All of these application requirements would also need to be met if an individual is receiving a service animal through an organization or institution. However, the organization could decide when, in the process of getting the service animal, the individual would need to provide this information, as long as it was prior to the completion of any certification.

¹⁷⁴ U.S. DEP'T OF JUST., ADA COMPLIANCE BRIEF: RESTRIPING PARKING SPACES (Dec. 2015), http://www.ada.gov/restriping_parking/restriping2015.html [<http://perma.cc/6YUG-REJ8>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Some may be hesitant to support a nationwide certification system for service animals, but there are two strong precedents in place that support this concept. First, there is the legal framework that the ADA already has for other areas of disability law, such as handicap parking, where the federal government issues regulations for the states to execute. Second, there is the pre-existing service animal training guidelines that provide the substance for service animal certification. A legalized system for service animal certification can be established by taking the current legal framework and adding the existing training standards.

4. Certification is Not Unduly Burdensome

Finally, the implementation of this system will not be unduly burdensome for disabled Americans who want to receive a service animal. One large concern is that changing service animal laws will create a burden on both current and future users of service animals. However, this concern can be ameliorated. The process of applying for certification would be a comparable burden to having to apply to receive a handicap placard, which is clearly permitted under federal and state laws.¹⁷⁸ The official certification can be shown upon request in public situations. The certification could be proven through an identification that the handler holds or the animal itself wears (such as on a collar tag or in a vest pocket). In fact, in conjunction with the third prong of this proposal, as discussed in a later section, the service dog's vest itself could act as proof of certification. States could also choose to have the service animal certification be a part of the handler's driver's license to keep handlers from having to carry an additional identification card. For example, as states include indications on driver's licenses if the driver needs to wear glasses or is an organ donor, a license could be fit with another indicator for having a service animal. A comparable situation to showing an identification is how places that serve alcohol must check identification to see if patrons are at least twenty-one years old. In fact, this would even be simpler for service animals because it would not be required for a business or public entity to check the identification of an individual with a service animal, it is merely optional if the business chooses to do so.¹⁷⁹ Simply showing an identification card briefly would be far less burdensome and more accurate for

¹⁷⁸ See STATE OF CAL. DEP'T OF MOTOR VEHICLES, *supra* note 170.

¹⁷⁹ For example, if an individual enters a store with a very obvious disability, such as being in a wheelchair, and is accompanied by a service dog, business owners would likely not even have to bother checking identification since it would be fairly clear that the animal is legitimate.

all parties than asking the two questions that the ADA currently has in place.¹⁸⁰

Furthermore, the implementation of the system will not be overly burdensome on people who currently are using service animals. Handlers who have received their service animal through a reputable organization could already be considered “certified” under the new system and merely need to fill out an application as more of a formality, without changing anything about their training (as it is likely that the organizations would already be in compliance). These institutions have already trained and vetted the animals appropriately—even with how the current laws stand.¹⁸¹ For those with legitimate service animals that they have trained themselves, they would need to apply for certification as described above. However, the amendment to the ADA should provide for a period of time in order for individuals to comply and ensure that certification could be achieved for minimal or no cost to the handlers. For example, in some states there are already laws in place that, with proof of legitimacy, handlers can receive the appropriate equipment either free of charge or tax exempt.¹⁸²

Service animal equipment makes up another large part of service animal fraud. There is a prevalence of service animal equipment, from a variety of sources—ranging from the legitimate training institutions to numerous random sellers on Amazon.¹⁸³ In order for certification to work successfully, the source of the service animal certificates, identification, and equipment are a crucial piece that cannot be forgotten when analyzing other aspects of fraud.

C. Further Criminalizing Fraud

In this multifaceted approach, fraud needs to be addressed with criminal penalties, both federally and statewide. Just like the other aspects of this proposal, the amendments to the ADA in regard to fraud would be much broader than the state laws. A concern is that enforcement of these laws may be expensive or impractical. However, when enforcement is paired with the

¹⁸⁰ 28 C.F.R. § 35.136 (2018). Additionally, if a business owner continually asked a disabled individual to show his or her identification/certification in one single visit, it could be considered a form of harassment and there could be additional laws in place to prevent this, similar to how currently, under the law, individuals are not allowed to ask more personal questions besides the two that the ADA currently provides. *Id.*

¹⁸¹ See *Final Goal Behaviors*, *supra* note 40.

¹⁸² NEB. REV. STAT. § 54-603 (2015); OHIO REV. CODE ANN. § 955.011 (2011).

¹⁸³ See, e.g., *Service Dog TAG*, *supra* note 108.

limited definition and certification system proposed above, it becomes far more realistic than one might expect.

1. Federal Offenses

First, selling or producing counterfeit or unauthorized service animal equipment, paraphernalia, or certifications should be a federal offense. As this is the most prevalent, broad sweeping cause of fraud, it needs to be addressed federally.¹⁸⁴ Additionally, since a large portion of service animal equipment is sold online,¹⁸⁵ it would be best to regulate this at a federal level so the sale of equipment would be consistent across state lines. Critical to such federal regulation is the fact that this is only possible with a legitimate certification system in place. Without a system of official certificates and equipment, there is virtually no way to test if the sales of this equipment are to legitimate handlers or not. If laws changed to make equipment available only through reputable organizations (such as Assistance Dogs International, Canine Companions for Independence, etc.), there would be no need for these online shops, and any that continued to provide equipment could be easily prosecuted.

Next, for protecting legitimate handlers, the ADA needs to provide that any discrimination by a business or public entity that turns down a legitimate service dog with certification will be punished as a federal offense, either civilly or criminally.¹⁸⁶ Since the ADA is aimed at protecting individuals with disabilities, there ought to be consequences for those who actively deny these individuals their rights.¹⁸⁷ Once again, with a certification system in place, public entities would be able to consistently check legitimacy with minimal hassle. Furthermore, it would allow the government to consistently punish those who are systematically discriminating against these disabled individuals and denying them their legal right to have a service dog. While everyone must adhere to the federal laws, the government could

¹⁸⁴ See Benninger, *supra* note 109, at 1, 3.

¹⁸⁵ See, e.g., Michelle Kulas, *The Best Service Dog Vests And Harnesses (2019 Reviews)*, PET LIFE TODAY (Sept. 26, 2019), <http://petlifetoday.com/best-service-dog-vests-and-harnesses/> [<http://perma.cc/YG8L-LHHY>]; *Service & Support Dog Harnesses & Vests*, CHEWY, <http://www.chewy.com/b/service-dog-2575> [<http://perma.cc/FBU8-28MJ>] (last visited Apr. 11, 2019); *Service Dog Collection*, SITSTAY, <http://sitstay.com/collections/service-dog> [<http://perma.cc/9NQA-ART5>] (last visited Apr. 11, 2019).

¹⁸⁶ This distinction could be left for Congress to determine.

¹⁸⁷ See Semmel, *supra* note 136, at 60 (“[T]he ADA should be amended to allow for compensatory and punitive damages in a private cause of action under all of its Titles. Anti-discrimination laws strive to make persons with disabilities equal to the non-disabled. Discrimination causes emotional distress, which is a bona-fide injury, particularly for persons with disabilities and compensatory damages should be permitted by statute.”).

encourage and incentivize states to take action in creating their own independent service animal laws for a more expansive system that takes into account individual states' needs.

2. State Offenses

While the federal level covers broad legal consequences of fraud, states also have a role to play. There are several laws that are currently in place that provide a statutory framework for states to look to for guidance. There are two areas of state law that provide this: service animal laws and disability persons placard laws.

As previously mentioned, there are several states that already have some sort of law in place for criminalizing service animal fraud,¹⁸⁸ but this should be expanded. For this system to work effectively, *all* states should implement these types of laws. The statutory frameworks available indicate the general punishments states find to be appropriate for fraud of this kind. Generally, states have made service animal fraud a misdemeanor.¹⁸⁹ While each of these states have their own specifics of what constitutes fraud, there are in fact some similarities. States typically pursue individuals who fraudulently represent pets as service animals.¹⁹⁰ These laws are crucial in preventing fraud. However, there are far fewer laws currently implemented which target people selling “fake” service animal paraphernalia. This gap in the law may be due to the fact that there is little to no way to prove who is legitimately selling merchandise and who is not, since there is no certification system in place. Therefore, it is crucial for each aspect of this proposal to be implemented together. The fact that it is currently so easy to buy equipment makes little sense, since it makes defrauding the system very simple.¹⁹¹ Limiting the sale of equipment to people with certifications and criminalizing sales to uncertified individuals will allow for greater protections than currently exist. The problem will not be fixed while this merchandise is still for sale to the public.

Some may argue that stopping these sales will not stop the problem, because people could still find a way to make counterfeit equipment. Yet, fake identification cards, such as driver's licenses, are illegal, and while some might still slip through the cracks of the system, they are definitely not for sale

¹⁸⁸ *E.g.*, CAL. PENAL CODE § 365.7 (West 2019); FLA. STAT. § 413.08 (2015).

¹⁸⁹ *E.g.*, CAL. PENAL CODE § 365.7; IDAHO CODE § 18-5811A (2019); MO. REV. STAT. § 209.204 (2005); NEB. REV. STAT. § 28-1313 (2019); N.C. GEN. STAT. § 168-4.5 (2018).

¹⁹⁰ *See, e.g.*, CAL. PENAL CODE § 365.7.

¹⁹¹ *See* FROMGOLDS, *supra* note 106, at 5, 6.

on places like Amazon. Additionally, there are laws to prosecute people who sell fake driver's licenses.¹⁹² This should be the same for service animals, and some states have already begun to take those steps. Maine has laid out much more detailed laws in regard to service animal fraud¹⁹³ than other states.¹⁹⁴ For example, Maine's laws explicitly list that providing false service animal documents is a violation of the law.¹⁹⁵ Similarly, other states should follow this lead and criminalize the selling of falsified service animal certifications or equipment. For the states that have not yet implemented these types of laws, they can use the existing ones as a framework for the creation of their own service animal fraud laws.

While service animal law is still growing and expanding, states might be hesitant to take on these new laws. As this is a newer field with increasing publicity, states may be concerned with creating new legislation for fear of unknown backlash that could come with implementing more regulations. While some states, such as Maine, have more detailed service animal fraud laws,¹⁹⁶ many other states have either broader sweeping laws or none at all. However, there are other areas of disability law that provide a solid precedent of what should be included—the disabled person's disability placard and plate laws. To illustrate this idea, one can look to the laws of California. The California Vehicle Code provides several specific violations for misusing a disabled person's placard.¹⁹⁷ For example, there are laws

¹⁹² *Laws and Penalties for Underage Drinking*, ILL. LIQUOR CONTROL COMMISSION, <http://www2.illinois.gov/ilcc/Education/pages/under21laws.aspx> [<http://perma.cc/DR77-SXMZ>] (last visited Apr. 11, 2019).

¹⁹³ ME. STAT. tit. 17, § 1314-A (2016) (“A person who knowingly misrepresents as a service animal any animal that does not meet the definition of “service animal,” . . . commits a civil violation. A person who knowingly misrepresents as an assistance animal any animal that does not meet the definition of “assistance animal,” . . . commits a civil violation. Misrepresentation as a service animal or an assistance animal includes, but is not limited to: 1. False documents. Knowingly creating documents that falsely represent that an animal is a service animal or an assistance animal; 2. Providing false documents. Knowingly providing to another person documents falsely stating that an animal is a service animal or an assistance animal; 3. Harness, collar, vest or sign. Knowingly fitting an animal, when the animal is not a service animal, with a harness, collar, vest or sign of the type commonly used by a person with a disability to indicate an animal is a service animal; or 4. Falsely representing animal as service animal. Knowingly representing that an animal is a service animal, when the animal has not completed training to perform disability-related tasks or do disability-related work for a person with a disability. For a civil violation under this section a fine of not more than \$1,000 for each occurrence may be adjudged.”).

¹⁹⁴ *See, e.g.*, IDAHO CODE § 18-5811A (“Any person, not being an individual with a disability or being trained to assist individuals with disabilities, who uses an assistance device, an assistance animal, or a service dog in an attempt to gain treatment or benefits as an individual with a disability is guilty of a misdemeanor.”).

¹⁹⁵ ME. STAT. tit. 17, § 1314-A.

¹⁹⁶ *Id.*

¹⁹⁷ CAL. VEH. CODE § 4461 (West 2010).

protecting people from falsely using paraphernalia that is not provided for them, as “a person shall not display a disabled person placard that was not issued to him or her or that has been canceled or revoked.”¹⁹⁸ Further, it provides that a violation of this section of the California Vehicle Code “is subject to the issuance of a notice of parking violation imposing a civil penalty of not less than two hundred fifty dollars (\$250) and not more than one thousand dollars (\$1,000).”¹⁹⁹ These laws also have sections applying to the selling of falsified placards and/or license plates.²⁰⁰ Specific laws like these can easily be translated to service animal fraud laws with minimal change. These laws easily mirror those currently in place (or that should be in place) for service animal fraud and indicate that these punishments are both appropriate and have precedent to help enact them at the level of specificity needed. By leaning on the established precedent from a familiar area of disability law, states can feel more confident in the implementation of new service animal laws, while taking the necessary steps to help stop this fraud.

D. The Funding Process

One of the most prevalent arguments against this proposed system revolves around the question of who is going to pay for its implementation. First, many of the programs that are needed to make this process work are already in place. Organizations that have provided service animals for decades all across the country are generally run as non-profits.²⁰¹ Institutions such as these rely heavily on generous donations of both money and time from volunteers to help these programs function as they currently do.²⁰² Service animal organizations are very upfront with their funding situations. Right on the front page of the Guide Dogs for the Blind website, there is a statement from the President and CEO Christine Benninger stating, “All of our services are free, and we don’t receive any government funding. Support our life-changing

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ For example, California law states that any person who “[a]lters, forges, counterfeits, or falsifies a certificate of ownership, registration card, certificate, license, license plate [or] [u]tters, publishes, passes, or attempts to pass, as true and genuine, a false, altered, forged, or counterfeited [license] knowing it to be false, altered, forged, or counterfeited” shall be “guilty of a felony and upon conviction thereof shall be punished by . . . imprisonment in a county jail for not more than one year.” *Id.* § 4463.

²⁰¹ *E.g.*, *Who We Are*, *supra* note 35; *Make a Donation Today*, GUIDE DOGS FOR BLIND, <http://www.guidedogs.com/support-gdb/donate> [<http://perma.cc/4YET-5YUN>] (last visited Apr. 11, 2019).

²⁰² Tax deductions provide additional incentives for people to make donations. *Make a Donation Today*, *supra* note 201 (“Guide Dogs for the Blind is a non-profit, charitable organization under the provisions of section 501(c)(3) of the Internal Revenue Code (tax ID #94-1196195). Donations are tax-deductible as allowed by law.”).

mission today.”²⁰³ Little to nothing about these institutions that provide a large amount of service dogs would need to be changed with these new provisions. Second, any fees (even nominally) that are charged as a part of a state’s certification process should go back into the system of service animals, whether going towards paying for equipment, certification examiners, or training organizations. Any additional funding needed to make this system work would not be extreme given that so much of the system is already in place.

Additionally, the publicity of this new certification system and amended laws could lead to an increase in the public recognition of service animal organizations. Just as the public is aware of some large non-profit organizations, such as the Wounded Warrior Project for supporting veterans²⁰⁴ or Feeding America for fighting hunger,²⁰⁵ the publicity with this legislation could help lead the public to being more engaged with the service animal process. While this idealistic proposal may seem potentially far-fetched, in actuality there is some precedent for it. Training organizations have been consistently working to try to publicize their work and help shed a positive light on service animals in general.²⁰⁶ Although it is not currently widely publicized, the month of September is the month to celebrate service dogs and spread awareness.²⁰⁷ There has also been some statutory movement—in Texas, the legislature has enacted a statute where “[t]o ensure maximum public awareness of the policies set forth in this chapter, the governor shall issue a proclamation each year taking suitable public notice of October 15 as White Cane Safety and Service Animal Recognition Day.”²⁰⁸ This shows the small steps that some states have taken to try to help this cause. By implementing these proposed amendments to disability law, and creating a certification system, public attention will be directed to this issue. This will allow for an ideal

²⁰³ GUIDE DOGS FOR BLIND, <http://www.guidedogs.com> [<http://perma.cc/8FY3-GZZE>] (last visited Apr. 11, 2019).

²⁰⁴ WOUNDED WARRIOR PROJECT, <http://www.woundedwarriorproject.org> [<http://perma.cc/LB99-U2W9>] (last visited Apr. 11, 2019).

²⁰⁵ *Our Work*, FEEDING AM., <http://www.feedingamerica.org/our-work> [<http://perma.cc/67SZ-LQTP>] (last visited Apr. 11, 2019).

²⁰⁶ See *Social Media: Follow Us*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.cci.org/news-media/follow-us.html> [<http://perma.cc/R6L5-HMZJ>] (last visited Apr. 11, 2019).

²⁰⁷ Vicki Clinebell, *Celebrate National Service Dog Month September 2017*, DOGTIME, <http://dogtime.com/lifestyle/27981-celebrate-national-service-dog-month-september> [<http://perma.cc/6UZ2-89BK>] (“September is National Service Dog Month, a time designated to raising awareness and showing appreciation for the extraordinary work service animals do every day for the people in their care. National Service Dog Month honors these working dogs for making millions of lives better and safer.”).

²⁰⁸ TEX. HUM. RES. CODE ANN. § 121.008 (West 2014).

opportunity to embrace that attention and further direct it to positive outcomes, instead of the negative publicity currently surrounding service animals. There is a lack of education in the area of service animals—so, these laws could help educate as to the legal scope of service animals and aid in building the strength of the system across the nation.

Some may argue that these sources of funding are either too minimal or too unpredictable; however, that is not enough to stop this progress in its tracks. While it may require the government to spend some amount of funding to implement this process, that is a critical part of fixing this issue. The government laid out these laws as they currently are, and while they were an attempt to protect disabled Americans, unfortunately, this has not been the case. It is the responsibility of the government to provide a *successful* system for its disabled citizens, and simply leaving things as they are is not enough. Additionally, since this is a self-regulating industry²⁰⁹ that is privately funded through donations,²¹⁰ the government's main role would simply be enforcing this new legal framework. While there is a real concern for the financial aspects of any new regulation, the protection of the disabled individuals that rely on these laws should outweigh these concerns. Particularly, since the amount would likely be minimal due to the significant pathways that are already in place.

V. CONCLUSION

Service animals provide an immeasurable service to disabled individuals across the country.²¹¹ Unfortunately, what began as a legitimate effort to aid these disabled Americans has become a system that allows for rampant fraud and abuse. The ADA's limitations on public entities of allowing only two verbal questions as the form of proving legitimacy is not enough.²¹² The prevalence of service animal equipment and fake certifications available online has rendered this protection nearly moot.²¹³ The ACAA, while trying to be inclusive, with a broad definition of animals allowed on aircrafts, has unfortunately led to many incidents and puts the health and safety of the public at risk.²¹⁴ Public entities and businesses currently have to balance the risk of discriminating against disabled individuals with legitimate

²⁰⁹ See *Summary of Standards*, *supra* note 162; *Final Goal Behaviors*, *supra* note 40.

²¹⁰ See *Make a Donation Today*, *supra* note 201.

²¹¹ See generally, *Our Stories*, *supra* note 13.

²¹² 28 C.F.R. § 35.136 (2018).

²¹³ See, e.g., *Doggie Stylz Service Dog Harness Vest*, *supra* note 115; FROMGOLDS, *supra* note 106, at 6 (“I simply paid \$50 on the United States Service Dog Registry website to get a kit that provided me with incredibly official-looking credentials.”).

²¹⁴ See Hopper, *supra* note 24.

service animals and the risk of untrained and potentially dangerous or destructive animals wreaking havoc in their place of business. However, the biggest victims of this abuse are the disabled handlers and their service animals. The current fraud in the system has caused the public to distrust the legitimacy of any service animal, thus leading to the very real discrimination of disabled Americans.²¹⁵ Additionally, the prevalence of untrained pets masquerading as service animals in areas that disallow animals has led to legitimate service animals being harassed, attacked, and injured.²¹⁶

This is an important issue that requires a thoughtful solution. However, by looking at programs and laws that are already in place, there is a strong framework for implementing a realistic solution. First, federal and state laws should amend their definitions of service animals to match the ADA's limited definition in order to help regulate the number of inadequately trained animals in certain public places. Second, the federal government should require certification of service animals and prescribe the basics by amending the federal law to allow for such a program. States should implement their own detailed requirements for such certification systems while also complying with the basic federal regulations. By relying on programs such as Assistance Dogs International, Canine Companions for Independence, and Guide Dogs for the Blind, the process of implementing a certification system is largely already established.²¹⁷ Finally, by using a combination of current state laws regarding service animals²¹⁸ and the laws in place that regulate disabled persons parking placards, federal and state legislatures have a nearly complete framework for implementing further laws to regulate service animal fraud.²¹⁹ Specifically, implementing laws that criminalize the selling of fake service animal credentials online is a critical step to stemming the current fraud of the system. Because of the practically self-regulating nature of this industry,²²⁰ the fact that it is privately funded without government aid,²²¹ and the existence of laws and programs that can be easily adapted to fit service animal issues,²²² the main role the government would play in this process is one of enforcement. This multi-faceted proposal would

215 *A Service Dog is More Than a Vest*, *supra* note 1.

216 *E.g.*, Tilbury, *supra* note 10.

217 *See Summary of Standards*, *supra* note 162; *Final Goal Behaviors*, *supra* note 40.

218 *E.g.*, ME. STAT. tit. 17, § 1314-A (2016).

219 CAL. VEH. CODE § 4461 (West 2010).

220 *See Summary of Standards*, *supra* note 162; *Final Goal Behaviors*, *supra* note 40.

221 *See Make a Donation Today*, *supra* note 201.

222 *See e.g.*, STATE OF CAL. DEP'T OF MOTOR VEHICLES, *supra* note 170.

make great strides in protecting disabled individuals all across the country, with minimal practical changes to how the system is currently working. It may be impossible for fraud to ever be stopped entirely, but with changes to the service animal system, fraud can be significantly reduced, and thus provide greater protections to those who use service animals.

While animals are an amazing part of life, and the companionship they bring to an individual can be undeniably and significantly life changing, that does not mean individuals are allowed to delegitimize and destroy the accommodations of millions of disabled Americans just because they love their pet. Just because an individual may want to park closer to the store, does not mean he can just park in the handicap spot. Just because someone loves his dog, does not mean he gets to take it with him anywhere he wants with no regard for the law. Federal and state governments should work to ensure that disabled Americans and the service animals they rely on, such as Morgan and Echuka, are adequately protected and able to live their lives to the fullest, without the fear and hassle that the current system creates.