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BROUGHT TO THE BAR: THE CONSTITUTIONALITY OF INDISCRIMINATE SHACKLING IN NON-JURY CRIMINAL PROCEEDINGS

Blake T. Lehr

I. INTRODUCTION

William Blackstone famously opined that a criminal defendant “must be brought to the bar without irons, or any manner of shackles or bonds, unless there be an evident danger of an escape.”¹ While this maxim is centuries old and has its origins in early English common law, American courts have more-or-less followed its command, requiring justification for the shackling of criminal defendants.² Nevertheless, an older woman is brought to the bar for arraignment,³ shackled to the wheelchair she must use because of her deteriorating health.⁴ Similarly, a man with a visual impairment appears before the court with leg irons and one of his hands shackled to his waist—the other hand left unrestrained so that he can use his cane for navigating the courtroom.⁵ These criminal defendants are not restrained for fear of imminent escape, violence, or any other justification particular to the defendant; rather, they find themselves cruelly restrained because such restraint techniques are routine

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1. 5 WILLIAM BLACKSTONE & ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE 322 (1803). The “bar” is the “railing that separates the front area [of the courtroom], where the business is conducted, from the back area, which provides seats for observers.” Bar, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. See Deck v. Missouri, 544 U.S. 622, 626-27 (2005) (explaining that Blackstone’s maxim has been adopted virtually unanimously by American courts to restrict trial courts from routinely shackling criminal defendants without justification). The Court’s discussion of Blackstone in Deck was coupled with a more detailed historical and constitutional analysis, see id. at 626-30. The Court eventually held that the rule against unwarranted shackling applied to all criminal proceedings before a jury, see id. at 633 (“[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.”).

3. “Arraignment” is “[t]he initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea.” Arraignment, BLACK’S LAW DICTIONARY (10th ed. 2014).

4. See United States v. Sanchez-Gomez, 859 F.3d 649, 654 (9th Cir. 2017), vacated as moot, 138 S. Ct. 1532 (2018) (“And another defendant was shackled despite being brought into court in a wheelchair due to her ‘dire and deteriorating’ health.”).

5. See id. (“Another defendant was vision-impaired. One of his hands was free of restraint so he could use his cane, but his other hand was shackled and secured to a chain around his waist and his legs were shackled together.”)
practice in the jurisdictions in which they are facing charges. Both defendants object to the unwarranted shackling, but the court swiftly denies their objections without any meaningful explanation. Shackling— it seems—is just the way it is.

The above illustrations are daily realities for thousands of criminal defendants across the nation. Despite Blackstone's admonition against bringing criminal defendants before the bar in shackles, the Supreme Court of the United States has been notably silent as to whether the Constitution prohibits the routine shackling of criminal defendants in non-jury proceedings, such as arraignments. As the Court has not addressed this issue, lower courts are tasked with determining whether the Constitution affords criminal defendants equal protection against indiscriminate shackling during jury and non-jury proceedings. Nevertheless, this area of law is far from settled, and the constitutionality of such

6. See id. at 653 ("In 2013, the judges of the Southern District of California acceded to the U.S. Marshals Service's request for 'a district-wide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings.'").

7. See id. at 654 (explaining that two criminal defendants with disabilities objected to such restraints at their arraignments but were swiftly denied relief based on nothing more than the jurisdiction's restraining policy, which defers to the U.S. Marshals Service's judgment).


9. See BLACKSTONE, supra note 1, at 322 ("[Criminal defendants] must be brought to the bar without irons, or any manner of shackles or bonds, unless there be an evident danger of an escape.").

10. See Deck v. Missouri, 544 U.S. 622, 633 (2005) (emphasis added) ("[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding."). The Court recently had a chance to take up the issue, but it vacated the case on other grounds. See United States v. Sanchez-Gomez (Sanchez-Gomez II), 138 S. Ct. 1532, 1542 (2018) ("None of this is to say that those who wish to challenge the use of full physical restraints in the Southern District lack any avenue for relief. . . . [However,] because we hold this case moot, we take no position on the question.").


12. See Sanchez-Gomez, 859 F.3d at 666 (holding that a criminal defendant has a constitutional right to be free of unwarranted restraints, regardless of a jury's presence); United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) (holding that the Constitution does not prohibit the shackling of criminal defendant in non-jury proceedings); United States v. Zuber, 118 F.3d 101, 103-04 (2d Cir. 1997) (holding that a specific evaluation of the need for restraints in non-jury proceeding is not needed because juror prejudice is the primary concern for limiting the use of restraints in the courtroom).
shackling techniques remains an open and contested legal question. This Article looks to address this open and contested question, proposing that courts should interpret the Constitution as categorically prohibiting the unjustified shackling of criminal defendants in the courtroom—regardless of a jury’s presence.

Part I of this Article explains the historical origins of shackling restrictions during criminal proceedings. Part II presents the modern rationales supporting the rule against indiscriminate shackling. Part III discusses the case law on shackling restrictions during non-jury criminal proceedings. Lastly, Part IV analyzes the modern justifications supporting the current rule against shackling and proposes a categorical rule against indiscriminate shackling—a rule that would apply any time a criminal defendant enters the courtroom.

II. THE HISTORICAL ORIGINS OF SHACKLING RESTRICTIONS IN CRIMINAL PROCEEDINGS

Shackling restrictions in criminal proceedings have a long history in Anglo-American law. These restrictions may have developed in response to criminal trials’ unique nature in the early modern English period—the late sixteenth and

13. Of the three federal circuit courts that have expressly taken up the issue, two have held that the Constitution does not enshrine a right for criminal defendants to be free of unwarranted restraints during jury proceedings. See LaFond, 783 F.3d at 1225; Zuber, 118 F.3d at 103-04. The Ninth Circuit has recognized that the Constitution does enshrine such a right. See Sanchez-Gomez, 859 F.3d at 666. The Supreme Court, however, vacated that decision, see Sanchez-Gomez II, 138 S. Ct. at 1542, and district courts in the Ninth Circuit have expressed that the shackling jurisprudence in the circuit is somewhat unsettled. See Martin-Perez v. Major, No. 3:18-cv-00996-H-JLB, 2018 WL 2761734, *4 (S.D. Cal. June 8, 2018) (“The Supreme Court’s vacatur of Sanchez-Gomez ... however, leaves the law somewhat unsettled.”).

14. See U.S. Const. amends. V, VI, XIV; see also Sanchez-Gomez, 859 F.3d at 666 (holding that a criminal defendant has a constitutional right to be free of unwarranted restraints, regardless of a jury’s presence).

15. See infra Part I (discussing the early English and American tradition).

16. See infra Part II (discussing the modern justifications for the rule against indiscriminate shackling, as delineated by the Supreme Court).

17. See infra Part III (discussing the federal circuit courts’ decisions expressly taking up the issue of shackling and non-jury proceedings).

18. See infra Part IV (discussing why the considerations that justify shackling restrictions during jury proceedings also justify shackling restrictions during non-jury proceedings).

Criminal trials were not organized proceedings with lawyers and strict procedural rules; rather, criminal trials were direct, relatively unstructured altercations between the accuser and accused, absent defense counsel or prosecution. Accordingly, the ability of a criminal defendant to defend himself or herself was of primary concern. The burdensome physical restraints of the period posed a legitimate threat to that ability, as period restraints inflicted great physical pain on defendants and, consequently, hindered criminal defendants' abilities to use their mental faculties. In response, the common law adopted a rule stating that, absent an evident danger of escape, criminal defendants were to be free of restraints to ensure full use of their reasoning in defending themselves.

While the physical burden of restraints on criminal defendants was a central rationale justifying the early common law rule against unwarranted shackling, it was not the only justification proffered. Early English jurists also recognized that restraints had the potential to skew perceptions of the criminal defendant. One early jurist, in particular, posited that restraints were marks of "Ignominy and
Reproach” that the court was only to employ with sufficient justification.\(^{27}\) Additionally, an early English court opined that having a criminal defendant appear before the court in shackles was an affront to the court’s very dignity.\(^{28}\) Early jurists, therefore, acknowledged that shackles not only physically hinder a criminal defendant, but they also harm the public’s perception of the defendant and the court.\(^{29}\)

A plain reading of period sources suggests that the common law rule against indiscriminate shackling applied to all criminal proceedings.\(^{30}\) Both Coke’s and Blackstone’s seminal treatises ostensibly lay forth categorical maxims that prohibit the unjustified shackling of criminal defendants any time they are brought before the court.\(^{31}\) Nevertheless, the broad, seemingly absolute rule first adopted by courts and influential jurists evolved to apply only during trial proceedings.\(^{32}\) This evolution is evidenced in Blackstone’s seminal treatise, where the ostensibly categorical maxim against indiscriminate shackling in the courtroom is undermined by its mention of the _Trial of Christopher Layer._\(^{33}\) In this early English case, the presiding court distinguished arraignment and trial, and the court permitted the prisoner to be brought to the bar in shackles during his

\(^{27}\) 2 HAWKINS, PLEAS OF THE CROWN 434 (1894) ("[A criminal defendant] ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach, unless there be some Danger of a [Rescue] or Escape.").

\(^{28}\) See _Trial of Christopher Layer_, 16 How. St. Tr. 94, 99 (K.B. 1722) ("I should . . . think that something of the dignity of the Court might be considered in this matter, for a court of justice, the highest in the kingdom for criminal matter, where the king himself is supposed to be personally present, to have a man plead for his life before them in chains seems to be very unsuitable.").

\(^{29}\) See Marouf, supra note 19, at 223-24.

\(^{30}\) See, e.g., COKE, supra note 23, at 34 ("If félons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will."); People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) "It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial, upon his plea of not guilty to an indictment for any offense, was entitled to appear free of all manner of shackles or bonds; and prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape.").

\(^{31}\) See _id_ text accompanying note 24. Specifically, regarding Blackstone, the treatise states that an arraignment "is nothing . . . but to call the prisoner to the bar of the court," suggesting that the rule was initially understood as applying to arraignment, as well as trial. See BLACKSTONE, supra note 1, at 322.

\(^{32}\) See BLACKSTONE, supra note 1, at 322 ("But yet in Layer’s case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment.").

\(^{33}\) See _id_.
arraignment. While the defendant had previously attempted an escape before arraignment—ostensibly providing the court with sufficient justification to shackle him under the common law rule—the court opined that an arraignment is merely an opportunity for a criminal defendant to plead, with the advice of counsel, before the court. The court found it futile to remove the defendant’s chains for pleading, only for the chains to be replaced a few minutes later, suggesting that the court saw no pragmatic value in prohibiting the use of shackles in arraignment proceedings.

If the Trial of Christopher Layer was the first case to distinguish trial and arraignment, it was quite influential, as the routine shackling of criminal defendants during arraignment was standard practice by the mid-eighteenth century. In King v. Waite, an English case from 1743, the presiding court refused to grant the criminal defendant’s request to be free of shackles, informing him that it had no authority to remove a defendant’s shackles before trial. After the defendant pleaded not guilty and was to be brought before a jury, the court immediately ordered his shackles removed. Period sources, therefore, convey that the early common law rule against indiscriminate shackling in criminal proceedings evolved to the extent that English courts understood their power to

34. See id.
35. See The Whole Proceeding Upon the Arraignment, Tryal, Conviction and Attainder of Christopher Layer, Esq; for High Treason, in Compassing and Imagining the Death of the King 3 (1722) [hereinafter Layer Arraignment] (explaining that Layer had been kept in chains because he had attempted an escape).
36. See, e.g., Blackstone, supra note 1, at 322 (a criminal defendant “must be brought to the bar without irons, or any manner of shackles or bonds, unless there be evident danger of an escape”).
37. See Layer Arraignment, supra note 35, at 4-5 (opining that, at arraignment, a criminal defendant “is only called upon to Plead, and to Plead by Advice of his Counsel”).
38. See id. at 5 (“[B]ut when he is only called upon to Plead, and his Counsel by him to Advise him what to Plead, why are his Chains to be taken off this Minute, and to be put on again the next?”).
39. See Richard Burn, The Justice of the Peace and Parish Officer 33 (1836) (emphasis added) (“The prisoner, on his arraignment... must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons. But note, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment.”).
40. King v. Waite, 168 Eng. Rep. 117, 120 (K.B. 1743) (“The prisoner, at the time of his arraignment, desired that his irons might be taken off; but the Court informed him, that they had no authority for that purpose until the Jury were charged to try him.”).
41. Id. (“He accordingly pleaded not guilty; and being put upon his trial, the Court immediately ordered his fetters to be knocked off.”).
order the removal of shackles as limited to trial,\textsuperscript{42} contrasting sharply with the seemingly absolute powers delineated in period treatises.\textsuperscript{43}

Early American courts followed the common law rule against the unjustified shackling of criminal defendants, with published decisions dating back to the late nineteenth century.\textsuperscript{44} The first of these decisions was \textit{People v. Harrington}, a case from the Supreme Court of California.\textsuperscript{45} In \textit{Harrington}, the supreme court recognized a longstanding common law rule prohibiting criminal defendants' indiscriminate shackling.\textsuperscript{46} Like the English courts before it, the supreme court held that the rule was only applicable during trial proceedings, not arraignments.\textsuperscript{47} Importantly, the supreme court also noted that, prior to 1722, a criminal defendant was to be free of unwarranted restraints during arraignment.\textsuperscript{48} The \textit{Trial of Christopher Layer} took place in 1722, suggesting that American courts recognized that decision as a defining moment in shackling jurisprudence.\textsuperscript{49}

Following \textit{Harrington}, several state supreme courts took up the issue of shackling during criminal proceedings.\textsuperscript{50} Without exception, these courts

\textsuperscript{42.} See id.

\textsuperscript{43.} See supra note 24 and accompanying text.

\textsuperscript{44.} See Marouf, supra note 19, at 224.

\textsuperscript{45.} See generally \textit{People v. Harrington}, 42 Cal. 165 (Cal. 1871); see also State v. Smith, 8 P. 343, 343 (Or. 1883) (citations omitted) ("The point was ruled the same way in \textit{People v. Harrington}, which seems to have been the first case in this country where this ancient rule of the common law was considered and enforced.").

\textsuperscript{46.} \textit{Harrington}, 42 Cal. at 167 ("It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial . . . was entitled to appear free of all manner of shackles or bonds.").

\textsuperscript{47.} Id. (explaining that the rule only applied when a defendant was "brought into the presence of a court for trial, upon his plea of not guilty to an indictment for any offense").

\textsuperscript{48.} Id. ("Prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape.").

\textsuperscript{49.} See id.; see also \textit{BLACKSTONE}, supra note 1, at 322 ("But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment.").

\textsuperscript{50.} See, e.g., \textit{Parker v. Territory}, 52 P. 361, 363 (Ariz. 1898); State v. Williams, 50 P. 580, 581 (Wash. 1897); State v. Smith, 8 P. 343, 343 (Or. 1883); Matthews v. State, 77 Tenn. 128, 130 (Tenn. 1882); State v. Kring, 64 Mo. 591, 592-93 (Mo. 1877).
recognized and adopted Harrington's interpretation of the common law rule.\textsuperscript{51} Accordingly, a criminal defendant was not to be brought before the court in shackles during his or her trial, but such shackles were permitted during arraignment.\textsuperscript{52} Many of these courts reiterated previous concerns that physical restraints may impede a criminal defendant’s use of his or her mental faculties.\textsuperscript{53} Some courts also reiterated concerns for the effects visible restraints might have on a jury’s perception of the defendant.\textsuperscript{54} Regardless of underlying justification, American courts adopted the common law rule in full, prohibiting criminal defendants’ shackling during trial.\textsuperscript{55} This iteration of the rule would remain the status quo for over a century,\textsuperscript{56} and the justifications outlined in these early cases continue to justify the rule’s continued existence today.\textsuperscript{57}

III. THE MODERN RULE AGAINST INDISCRIMINATE SHACKLING DURING JURY PROCEEDINGS

Although the criminal justice system has changed drastically since the days of Blackstone, the common law rule against indiscriminate shackling has remained

\textsuperscript{51} See, e.g., Smith, 8 P. at 343 (“[I]t was error to keep the prisoner in fetters during the trial.”); Kring, 64 Mo. at 592 (“[I]t seems very clear, that without some good reason, authorizing the criminal court to depart from the general practice in England and in this country, the shackles of the prisoner, when brought before the jury for trial, should be removed.”).

\textsuperscript{52} See, e.g., Parker, 52 P. at 363 (“[If it were a fact that he was in shackles at the time of arraignment, but not at the time of trial, the court could not consider that he had been unduly restrained of his liberty or deprived of his right to manage and control in person his own defense untrammelled, or that he was under such physical burdens, pains, and restraints as to confuse and embarrass his mental faculties.”).

\textsuperscript{53} See Williams, 50 P. at 581 (“[I]t was resolved that, when prisoners come to the bar to be tried, their irons ought to be taken off, in that they be not in any torture while they make their defense . . . .”).

\textsuperscript{54} See Kring, 64 Mo. at 593 (“When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.”); see also Williams, 50 P. at 581 (quoting Kring, 64 Mo. at 593).

\textsuperscript{55} See, e.g., People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) (“It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial . . . was entitled to appear free of all manner of shackles or bonds.”).

\textsuperscript{56} In 2005, the Supreme Court of the United States ruled for the first time that the Federal Constitution prohibits the unwarranted shackling of criminal defendants in jury proceedings. See Deck v. Missouri, 544 U.S. 622, 633 (2005).

\textsuperscript{57} See Marouf, supra note 19, at 224 (“The rationales set forth in these cases continue to justify the prohibition against the indiscriminate use of restraints in criminal proceedings today.”).
surprisingly consistent in both justification and application,\textsuperscript{58} with two notable exceptions. First, the Supreme Court of the United States has recognized that the rule has a constitutional dimension.\textsuperscript{59} Specifically, the Court has held that the Fifth and Fourteenth Amendments of the Constitution prohibit the use of physical restraints during proceedings before a jury, unless restraining the criminal defendant will serve an essential state interest.\textsuperscript{60} The Court has also strongly suggested that physical restraints during criminal proceedings may interfere with a defendant’s Sixth Amendment rights to counsel and to confront the witnesses against him or her.\textsuperscript{61} Second, the Court has held that the routine and indiscriminate shackling of defendants during all criminal proceedings held before a jury is prohibited, including during sentencing proceedings.\textsuperscript{62} The case setting forth this expansion of the traditional common law rule—\textit{Deck v. Missouri}—was decided on familiar grounds.\textsuperscript{63} The Court explained that while the judicial hostility to shackling may have once primarily reflected a concern for the physical suffering of criminal defendants, modern jurisprudence has focused primarily on three fundamental legal principles—the presumption of innocence, the right to counsel, and the dignity and decorum of judicial proceedings.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{58} \textit{See id.}
\item \textsuperscript{59} \textit{See Deck}, 544 U.S. at 628 ("Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum.").
\item \textsuperscript{60} \textit{See id. at} 629 ("\textit{The} Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.").
\item \textsuperscript{61} \textit{See Illinois v. Allen}, 397 U.S. 337, 344 (1970) ("Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment’s purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. . . . Moreover, one of the defendant’s primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.").
\item \textsuperscript{62} \textit{See Deck}, 544 U.S. at 633 ("\textit{W}e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.").
\item \textsuperscript{63} \textit{See id. at} 630 (explaining that the Court had to “examine the reasons that motivate the guilt-phase constitutional rule and determine whether they apply with similar force in [sentencing]").
\item \textsuperscript{64} \textit{Id.}
\end{itemize}
A. The Presumption of Innocence

The Supreme Court has indicated that the presumption of innocence is integral to a fair criminal justice system. The presumption of innocence is a concept that predates the Common Era, with roots in ancient Greek and Mesopotamian cultures. In its purest form, the principle provides that the accuser must be able to prove his or her accusation against the accused and that the accused must be considered innocent in the interval between accusation and judgment. Originally, the presumption of innocence also acted as a shield against pre-conviction punishment. Unnecessary pretrial confinement was condemned as violating an individual's right to be presumed innocent and treated as innocent until adjudicated guilty.

The presumption of innocence formally entered American jurisprudence in 1894, when the Supreme Court decided Coffin v. United States. In Coffin, the Court opined that a presumption of innocence in favor of the accused lies at the foundation of the nation's criminal law. Diverging from the traditional axiom, the Court explained that the common law presumption of innocence is an "instrument of proof," where a criminal defendant's innocence is presumed until sufficient evidence is adduced at trial to overcome that presumption. While the

65. See Coffin v. United States, 156 U.S. 432, 453 (1894) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.")


67. See id. at 110 ("Because one can be accused of a crime without being a criminal, an elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment.").

68. See id. at 129 (explaining that traditional jury instructions saw judges referring "to the traditional function of the presumption of innocence as a shield against punishment").

69. See id. ("Unnecessary confinements prior to trial were criticized by judges and sanctioned by juries and the co-mingling of convicted felons with 'those who are to be presumed innocent' was condemned in 1779 by a House of Commons Committee overseeing prison conditions." (citing Thomas Battey, The Red Basil Book 53-54 (1797); John M. Beattie, Crime and Courts in England 1600-1800, at 341 (1986))).

70. 156 U.S. 432 (1894); see also Kenneth Pennington, Innocent Until Proven Guilty: The Origins of a Legal Maxim, 63 JURIST: STUD. CHURCH L. & MINISTRY 106, 108 (2003) ("We can know exactly when the maxim formally entered American law: through a Supreme Court decision of 1894, Coffin vs. U.S.").

71. Id. at 453 ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

72. Id.
Court did not address whether the presumption of innocence was solely an evidentiary standard in *Coffin*,\(^{73}\) the Court did conclusively resolve the question nearly a century later in *Bell v. Wolfish*, where the Court used *Coffin* to hold that the presumption of innocence is solely an evidentiary standard with no application to pretrial confinement.\(^{74}\) Thus, the presumption of innocence in American jurisprudence allocates the burden of proof in criminal trials and demands that juries determine a criminal defendant's guilt solely on the evidence adduced at trial, rather than on suspicions from factors not introduced as evidence during the trial.\(^{75}\)

The Court has stated that shackles undermine a criminal defendant's right to be presumed innocent.\(^{76}\) Shackling insinuates that the criminal justice system feels the need to separate the criminal defendant from the rest of society—that he or she is an immediate danger to those nearby.\(^{77}\) The inferences drawn from shackling, therefore, can negatively affect the jury's perception of the criminal defendant,\(^{78}\) unconstitutionally undermining the presumption of innocence and the related fairness of the factfinding process.\(^{79}\) The emphasis, however, remains on the presumption of innocence as an evidentiary standard, not a defendant's abstract right to be treated as an innocent person throughout the criminal

\(^{73}\) *See generally id.*

\(^{74}\) *See Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. . . . 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." (quoting *Coffin*, 156 U.S. at 453)).

\(^{75}\) *Id.*

\(^{76}\) *Deck v. Missouri*, 544 U.S. 622, 630 (2005) ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process."); *see also* *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.").

\(^{77}\) *See Deck*, 544 U.S. at 630 (positing that the shackling of criminal defendants "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large'.")

\(^{78}\) *Id.* at 633 ("[Shackling] almost inevitably affects adversely the jury's perception of the character of the defendant.").

\(^{79}\) *Id.* at 630 ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.").
This emphasis on shackling's prejudicial effects is illustrated by *Deck*, where the Court used presumption-of-innocence principles to find that criminal defendants' routine shackling during sentencing proceedings before a jury is unconstitutional. The Court opined that even at sentencing, where the presumption of innocence no longer applies, there is an "acute need" for reliable decision-making. It further posited that the presence of a criminal defendant in shackles before a jury fundamentally threatens the reliability of their factfinding and, thus, is unconstitutional.

The Court's presumption-of-innocence jurisprudence is predicated on a decisionmaker being influenced by impermissible factors, such as the sight of a criminal defendant's restraints. As judges are presumed to be uninfluenced by impermissible factors in their decision making, courts have focused on shackling's effects on the jury. Jurors, who are generally inexperienced laymen, are prone to making decisions based on impermissible factors and inadmissible evidence. Studies have confirmed that jurors struggle to disregard inadmissible evidence in their decision making, even after a court imposes a limiting instruction. Therefore, the Court's concern for jurors' abilities to

80. See id.; see also Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials."); *Estelle*, 425 U.S. at 503 ("To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process.").

81. See *Deck*, 544 U.S. at 632 ("[T]he defendant's conviction means that the presumption of innocence no longer applies. Hence shackles do not undermine the jury's effort to apply that presumption. Nonetheless, shackles at the penalty phase threaten related concerns.").

82. See id.

83. See id. at 632-33.

84. See id. (emphasizing the effects of visible shackles on the jurors' perceptions of the criminal defendant).

85. See United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) ("We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors, and we make no exception here. We presume that where, as here, the court defers without further inquiry to the recommendation of the Marshals Service that a defendant be restrained at sentencing, the court will not permit the presence of the restraints to affect its sentencing decision.").

86. See *Deck* v. Missouri, 544 U.S. 622, 633 (2005) (emphasis added) ("[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.").


88. See id. (explaining that "many studies have shown that a jury's ability to not consider inadmissible evidence is questionable at best" and that "jurors' decisions seemed unaffected by
compartmentalize and ignore impermissible factors in the factfinding process is warranted.89

Judges, however, are not immune from the influence of impermissible factors in the decision making process.90 Studies have found that some judges are unable to disregard inadmissible evidence in their factfinding.91 In particular, one study found that the introduction of biasing materials heavily influenced both jurors and judges.92 That study further found that both groups’ decisions were not altered if the biasing information was deemed inadmissible.93 Therefore, while courts presume judges are neutral adjudicators,94 the presumption of neutrality may be a work of legal fiction rather than a product of reality,95 calling into question precedent that has assumed the visible presence of restraints does not affect a judge’s decision making process.96

B. The Right to Counsel

The Sixth Amendment provides criminal defendants with a right to legal counsel.97 The Court has described this right as “indispensable to the fair

instructions to disregard or ignore inadmissible evidence”); see generally Joel D. Lieberman & Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 PSYCHOL., PUB. POL’Y, & L. 677 (2000) (containing a review of studies about jurors’ decisions in relation to evidence instructions).

89. See Deck v. Missouri, 544 U.S. 622, 633 (2005) (emphasis added) (“[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.”).

90. See Peer & Gamlil, supra note 87, at 116.

91. See id.; see also Andrew J. Wistrich et al., Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1251, 1259 (2005) (finding that “some types of highly relevant, but inadmissible, evidence influenced the judges’ decisions”).

92. See Peer & Gamlil, supra note 87, at 116 (citing Stephan Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 BEHAVIORAL SCI. & L. 113 (1994)).

93. Id.

94. See, e.g., United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) (“We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors . . . .”).

95. See Peer & Gamlil, supra note 87, at 116; Wistrich et al., supra note 91, at 1259.

96. See, e.g., Zuber, 118 F.3d at 104.

97. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed,
administration of our adversary system of criminal justice."98 Consequently, despite a plain reading of the amendment suggesting that there is only a guarantee of counsel at trial,99 the Court has interpreted the right as applying to both pretrial100 and sentencing hearings.101 The Court has further held that the Sixth Amendment right to counsel applies to felonies and misdemeanors alike,102 making the right to counsel a foundational and pervasive element of the criminal justice system.103

The Court disfavors measures that interfere with a criminal defendant's right to counsel.104 The routine shackling of criminal defendants is one such measure that has drawn the ire of the Court.105 First, shackles threaten a defendant's of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); see also Deck v. Missouri, 544 U.S. 622, 631 (2005) ("Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel.").

98. Brewer v. Williams, 430 U.S. 387, 398 (1977) ("[The right to counsel], guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice.").

99. See U.S. CONST. amend. VI, supra note 97 and accompanying text.

100. See Moran v. Burbine, 475 U.S. 412, 431 (1986) ("[T]he initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel."); Brewer v. Williams, 430 U.S. 387, 401 (1977) (holding that “once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that “the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel").

101. See Mempa v. Rhay, 389 U.S. 128, 137 (1967) (“All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing. We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding.").

102. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

103. See Brewer, 430 U.S. at 398 ("[The right to counsel], guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice.").

104. See Illinois v. Allen, 397 U.S. 337, 344 (1970) (opining that binding and gagging should only be employed as a “last resort” because such restraints can interfere with the accused’s “ability to communicate with his lawyer”); Reece v. Georgia, 350 U.S. 85, 90 (1955) (opining that ineffective counsel interferes with a criminal defendant’s right to counsel).

105. See Deck v. Missouri, 544 U.S. 622, 631 (2005) (citations omitted) ("[T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. The use of physical restraints diminishes that right.").
ability to communicate freely with his or her lawyer, which the Court has posited is one of the primary advantages of a criminal defendant being present during the proceeding. This interference is particularly true of egregious shackling methods, such as binding and gagging, which effectively limit a criminal defendant’s role in the proceeding to physical presence. Less egregious means of shackling may also interfere with a criminal defendant’s ability to freely communicate by preventing the defendant from passing notes to counsel, hindering the defendant’s ability to whisper information regarding his or her defense, or impairing the defendant’s mental faculties. Second, shackles may impair a defendant’s ability to participate in his or her defense by affecting the criminal defendant’s decision to testify on his or her own behalf. For example, a criminal defendant may not want to take the stand due to the prejudicial effect of visible shackles or due to the mental impairment shackles can cause. Therefore, shackles diminish a criminal defendant’s right to counsel and a meaningful defense, and the Court has considered such dangers relevant in justifying the common law rule against indiscriminate shackling.

C. The Dignity and Decorum of Judicial Proceedings

The judicial process exists for the solemn purpose of determining truth. To reflect the gravity and importance of this purpose, judges are tasked with maintaining dignity and decorum in the courtroom and throughout the judicial

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106. See Allen, 397 U.S. at 344 (“[O]ne of the defendant’s primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.”).

107. See id. (explaining that “[t]rying a defendant for a crime while he sits bound and gagged... would to an extent comply with the Sixth Amendment’s purposes that accords the defendant an opportunity to confront the witnesses at the trial” but little else).

108. See Commonwealth v. Boyd, 92 A. 705, 706 (Pa. 1914) (explaining that “the accused has a right to sit with his counsel” and must be afforded “absolute freedom to assist by suggestion and information in his own defense”); Spain v. Rushen, 883 F. 2d 712, 722 (9th Cir. 1989) (explaining that the finding that chains “grossly interfer[ed] with [a defendant’s] ability to cooperate with counsel” was “consistent with the magistrate’s determination that the chains seriously impaired [his] mental faculties.”).

109. Deck, 544 U.S. at 631 (“[Shackles] can interfere with a defendant’s ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf.”).

110. See Spain, 883 F.2d at 722 (explaining both the prejudicial effects of visible shackles and the mental effects of shackles on the criminal defendant).


112. Estes v. Texas, 381 U.S. 532, 540 (1965) (“Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.”).
process. In criminal proceedings, this task is of particular importance, for the matter at issue carries the potential to deprive an individual of his or her liberty, or even life. Accordingly, judges are to maintain a judicial process that reflects the seriousness of its purpose, thereby inspiring the confidence of a society "whose demands for justice our courts seek to serve."

Courts have taken the task of maintaining the dignity and decorum of judicial proceedings seriously, promulgating rules that seek to maintain an environment free of disruption and to promote respect for the dignity of the court, the presiding judge, and the rule of law. For example, courts have imposed dress codes and codes of conduct for all persons who enter the courtroom, where particularly egregious violations of the latter may land a spectator in contempt of court. The Supreme Court has even gone as far as permitting the physical removal of criminal defendants from their own trials due to their disrespectful behavior.

113. See Deck, 544 U.S. at 631 ("[J]udges must seek to maintain a judicial process that is a dignified process."); Illinois v. Allen, 397 U.S. 337, 344 (1970) ("The use of [physical restraints] is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.").

114. See Deck, 544 U.S. at 631 ("The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.").

115. Id.

116. See Jona Goldschmidt, "Order in the Court!": Constitutional Issues in the Law of Courtroom Decorum, 31 HAMLINE L. REV. 1, 49 (Winter 2008) ("Courts promulgate rules of decorum not only to maintain an environment free of disruption so that justice may be meted out in a fair and orderly trial; the other oft-stated purposes of such rules are to promote respect for the dignity of the court, the presiding judge, and the rule of law."); see also Anderson v. Dunn, 19 U.S. 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.").

117. See SUPREME COURT OF THE UNITED STATES, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THIS COURT 3 (2019), https://www.supremecourt.gov/casehand/guide%20for%20counsel%202019_rev10_3_19.pdf ("Appropriate attire for counsel is conservative business dress in traditional dark colors (e.g., navy blue or charcoal gray."); see also Courtroom Dress and Conduct Code, LIBERTY COUNTY OFFICE OF THE CLERK OF COURTS, http://www.libertyco.com/jury/DressCode.html (last visited Jan. 10, 2019); Dress Code for Coming to Court, CITY COURT OF SLIDELL, http://citycourtofs ldell.com/dress.php (last visited Jan. 10, 2019); see generally People v. Wilson, 341 N.E.2d 34 (Ill. App. Ct. 1975). In Wilson, a spectator in the courtroom was told multiple times to remain quiet during the proceedings. Id. at 36. A court bailiff eventually uttered "a few words of anger," and the spectator loudly responded with a "few disrespectful and vulgar words which, when heard by the trial judge, caused him to stop functioning in the midst of a trial." Id. Because the outburst disrupted the proper functioning of the court, the spectator was found guilty of contempt of court. See id.
and abusive conduct toward the court, despite the Court emphasizing the advantages of having a criminal defendant present and free to participate in his or her defense. Therefore, courts are active participants in maintaining the dignity and decorum of the judicial process, imposing strict rules that carry the possibility of criminal sanctions in some instances.

The courtroom's dignity and decorum are about more than maintaining respect for the institution and its officials. The Court has held that the courtroom's formal dignity also includes the respectful treatment of criminal defendants during judicial proceedings, which includes the right of a criminal defendant to be free of unwarranted restraints. Nonetheless, the Court has not clarified whether the courtroom's dignity and decorum is an individual right enforceable by criminal defendants. It is, thus, unclear from precedent whether a criminal defendant, brought before the court in physical restraints, can claim that preservation of the dignity and decorum of the courtroom alone prevents him or her from being visibly shackled. However, as the Court has recognized the dignity and decorum of the courtroom and judicial process as a fundamental legal principle justifying the rule against indiscriminate shackling during jury


119. See id. (explaining that the physical presence of a criminal defendant allows him or her to participate in his or her own defense by communicating with counsel or taking the stand).

120. See, e.g., Anderson, 19 U.S. at 227 (“Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.”).

121. See Wilson, 341 N.E.2d at 36 (holding a spectator in contempt of court for repeated, disruptive outbursts).


123. See id.

124. See id. (opining that “[t]he routine use of shackles in the presence of juries would undermine [the] symbolic yet concrete objectives [of having a dignified judicial process]”; Allen, 397 U.S. at 344 (explaining that shackling is “something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold”).

125. See Deck, 544 U.S. at 655 (Thomas, J., dissenting) (explaining that the majority allegedly misunderstood its precedent, as no prior decision had “ever intimated, let alone held, that the protection of the ‘courtroom’s formal dignity,’ is an individual right enforceable by criminal defendants”).

126. See id. (Thomas, J., dissenting).
proceedings, it would appear that criminal defendants enjoy at least some protection from shackles when entering the courtroom.\footnote{See \textit{id.} at 631-32 (majority opinion).}

The Court has recognized the presumption of innocence, the defendant’s right to counsel, and the dignity and decorum of judicial proceedings as the three fundamental legal principles justifying the modern rule against indiscriminate shackling.\footnote{See \textit{id.} at 630-32.} It has further recognized that these principles justify shackling restrictions during all criminal proceedings before a jury.\footnote{See \textit{id.} at 633 (“[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.”).} It has not, however, clarified whether such legal principles also support a categorical rule against indiscriminate shackling in the courtroom for non-jury proceedings.\footnote{See \textit{id.}} Nevertheless, \textit{Deck} sets forth the ostensible path for future developments in shackling jurisprudence.

\textbf{IV. INDISCRIMINATE SHACKLING AND NON-JURY PROCEEDINGS}

\textit{Deck} marked the first time the Court had expressly taken up the issue of shackling, as its previous precedents only addressed shackling as an ancillary issue.\footnote{See \textit{Deck}, 544 U.S. at 626-29; see also Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986) (“The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial.”); Illinois v. Allen, 397 U.S. 337, 338, 344 (1970) (considering “whether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial” and positing that “[t]rying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment’s purposes that accords the defendant an opportunity to confront the witnesses at the trial.”).} The Court’s decision, however, only addressed the issue of indiscriminate

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shackling in criminal proceedings before a jury. Therefore, while providing lower courts with guidance on how to consider challenges to shackling practices, 

*Deck* left open the issue of indiscriminate shackling during non-jury proceedings. 

In a decision rendered prior to *Deck*, the Second Circuit addressed the question of whether shackling restrictions apply with equal force to non-jury criminal proceedings. In *United States v. Zuber*, the Second Circuit held that judges are not required to make independent evaluations of the need to restrain criminal defendants during non-jury sentencing proceedings. It posited that the possibility of a jury being prejudiced by the presence of visible restraints is a primary rationale for placing strict limitations on their use in court. 

In the absence of a jury, such strict limitations on the use of shackles are unnecessary, as it is assumed that judges, unlike juries, are not prejudiced by impermissible factors like visible restraints. Therefore, according to the Second Circuit, there is no prohibition on indiscriminate shackling during non-jury proceedings. 

Nearly two decades later, the Eleventh Circuit reached a similar result. In *United States v. LaFond*, the Eleventh Circuit held that the rule indiscriminate against shackling does not apply to sentencing hearings before a judge. In

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1. *Deck*, 544 U.S. at 633 ("[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.").

2. See *id*.

3. *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (citations omitted) ("We decline to extend the rule . . . requiring an independent, judicial evaluation of the need to restrain a party in court . . . to the context of non-jury sentencing proceedings.").

4. See *id*.

5. *id* at 103-04 ("The possibility that jurors will be prejudiced by the presence of physical restraints is not the sole rationale for placing strict limitations on their use in court, but juror bias certainly constitutes the paramount concern in such cases.").

6. See *id* at 104 (citations omitted) ("We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors, and we make no exception here. We presume that where, as here, the court defers without further inquiry to the recommendation of the Marshals Service that a defendant be restrained at sentencing, the court will not permit the presence of the restraints to affect its sentencing decision.").

7. See *id*.

8. *See United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015) ("Because the rule against shackling pertains only to a jury trial, we hold that it does not apply to a sentencing hearing before a district judge.").

9. *Id*.
support of its decision, the court cited Zuber as persuasive authority.\textsuperscript{141} Further, it distinguished the criminal proceeding at issue in the instant case with the criminal proceedings at issue in Deck, opining that the Supreme Court made it clear that the rule against indiscriminate shackling was meant to protect only those criminal defendants appearing before a jury.\textsuperscript{142} The Eleventh Circuit, however, did not consider any of the three fundamental legal principles delineated in Deck.\textsuperscript{143}

By contrast, the Ninth Circuit has recognized that the rule against indiscriminate shackling extends to both jury and non-jury proceedings.\textsuperscript{144} In United States v. Sanchez-Gomez, the Ninth Circuit split from its sister circuits and recognized a fundamental right to be free of unwarranted physical restraints in the courtroom, regardless of a jury’s presence.\textsuperscript{145} In reaching this decision, the court focused heavily on the presumption of innocence.\textsuperscript{146} Departing from Supreme Court jurisprudence, which has mostly considered the presumption of innocence a mere evidentiary standard,\textsuperscript{147} the Ninth Circuit recognized that an individual should be free of unwarranted restraints as a matter of principle.\textsuperscript{148} The court emphasized that a presumptively innocent criminal defendant has a constitutional right to be treated with dignity and respect, which entails not being

\textsuperscript{141} See id. ("[T]he Second Circuit has held that the rule does not apply to sentencing proceedings without a jury." (citing Zuber, 118 F.3d at 102)).

\textsuperscript{142} See id. ("And the Supreme Court made clear in Deck that the rule ‘was meant to protect defendants appearing at trial before a jury.’" (quoting Deck v. Missouri, 544 U.S. 622, 626 (2005))).

\textsuperscript{143} See Deck, 544 U.S. at 630 ("More recently, this Court’s opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful). Instead they have emphasized the importance of giving effect to three fundamental legal principles."); see generally LaFond, 783 F.3d 1216. The three fundamental legal principles justifying shackling restrictions are the presumption of innocence, the criminal defendant’s right to counsel, and the dignity and decorum of judicial proceedings. See Deck, 544 U.S. at 630-32.

\textsuperscript{144} United States v. Sanchez-Gomez, 859 F.3d 649, 666 (9th Cir. 2017), vacated as moot, 138 S. Ct. 1532 (2018) (holding that “[t]he Constitution enshrines a fundamental right to be free of unwarranted restraints,” and that the right “appl[ies] regardless of a jury’s presence”).

\textsuperscript{145} Id.

\textsuperscript{146} See id. at 659 (citations omitted) ("At the heart of our criminal justice system is the well-worn phrase, innocent until proven guilty. And while the phrase may be well-worn, it must also be worn well: We must guard against any gradual erosion of the principle it represents, whether in practice or appearance.").

\textsuperscript{147} See, e.g., Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.").

\textsuperscript{148} See Sanchez-Gomez, 859 F.3d at 659.
treated “like a bear on a chain.” In effect, the Ninth Circuit breathed new life into the presumption of innocence, opining that it is not solely an evidentiary standard but rather a right of the criminal defendant against the perception of guilt by anyone who enters the courtroom.

The court further posited that the presumption of innocence is a means of preserving judicial proceedings’ dignity and decorum. As the courtroom is “[t]he most visible and public manifestation of” the nation’s judicial system, courtrooms must live up to their designations as institutions of justice—purveyors of fairness where all who are brought before the court are presumed innocent until proven guilty. The court opined that such a perception of justice is incompatible with the image of presumably innocent criminal defendants being marched into the court with physical restraints. Thus, the court concluded that an expansive prohibition against indiscriminate shackling in the courtroom is warranted to maintain the courtroom’s dignity and decorum.

Beyond the presumption of innocence and courtroom decorum, the Ninth Circuit relied upon the early common law to justify its categorical prohibition on indiscriminate shackling in the courtroom. Sharply juxtaposing with dicta in

149. Id. at 661 (“A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”).

150. See id. (“This right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty. The principle isn’t limited to juries or trial proceedings. It includes the perception of any person who may walk into a public courtroom, as well as those of the jury, the judge and court personnel.”).

151. Id. at 662 (explaining that the presumption of innocence “also maintains courtroom decorum and dignity”).

152. Id. (“The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life. A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent.”).

153. See id. (“A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain gang.”).

154. See Sanchez-Gomez, 859 F.3d at 662 (“[I]nnoent defendants may not be shackled at any point in the courtroom unless there is an individualized showing of need.”).

155. See id. (posing that the early common law did not draw a distinction between arraignment and trial for the purposes of shackling).
Deck, the Ninth Circuit opined that early commentators and jurists did not recognize a bright-line distinction between arraignment and trial for the purposes of shackling, rather, the court contended that Blackstone and the *Trial of Christopher Layer* were evidence of an early common law rule that prohibited indiscriminate shackling at both arraignment and trial. Specifically, the Ninth Circuit posited that Blackstone merely recognized a distinction between arraignment and trial in the sense that shackles were more easily justified during the former, and the *Trial of Christopher Layer* merely evinced this distinction. According to the Ninth Circuit, while Layer was ultimately unsuccessful in his attempt to be rid of shackles, his argument demonstrated that the practice of shackling at arraignment was not common practice—or even permissible absent a showing of need. Layer’s previous attempted escape, however, gave the presiding court justification to keep him shackled.

Despite these justifications applying only to presumptively innocent criminal defendants at arraignment or trial, the Ninth Circuit concluded that the rule against indiscriminate shackling applies to pretrial, trial, and sentencing proceedings. Ostensibly, this expansive holding stems from the court’s recognition of a fundamental right, enshrined in the Constitution, “to be free of unwarranted restraints” in the courtroom. This broad holding is also bolstered by the court’s claim that all criminal defendants have the right to enter the courtroom.

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156. *See* Deck v. Missouri, 544 U.S. 622, 626 (2005) (“Blackstone and other English authorities recognized that the rule did not apply at ‘the time of arraignment,’ or like proceedings before the judge.”).

157. *Sanchez-Gomez*, 859 F.3d at 663 (“The early commentators didn’t draw the bright line between trial and arraignment that the Deck Court seemed to believe they did.”).

158. *See id.* at 664 (“We merely repeat what Blackstone and Layer’s case provide—that shackling at arraignment was allowed after a showing of need. Layer’s case applied the exception to Blackstone’s basic rule: A prisoner ‘must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.’” (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 317 (1769))).

159. *See id.* at 663 (“Shackles at arraignment and trial are different, as Blackstone noted, but only because shackles are more easily justified at the former, which was demonstrated by Layer’s case.”).

160. *See id.* at 664 (“While Layer was ultimately unsuccessful, his argument demonstrates that shackling at arraignment was not a standard practice, or even permissible, absent a demonstrated need.”).

161. *See id.* at 663-64 (positing that Layer’s shackling was permitted on the ground that he had previously attempted escape).

162. *Sanchez-Gomez*, 859 F.3d at 666 (positing that the right to be free of unwarranted restraints “appl[ies] regardless of a jury’s presence or whether it’s a pretrial, trial or sentencing proceeding.”).

163. *Id.* (“The Constitution enshrines a fundamental right to be free of unwarranted restraints.”).
courtroom with “their heads held high,” which echoes the Supreme Court’s statement in Deck that the dignity and decorum of the courtroom involve the respectful treatment of criminal defendants.

In 2018, the Sanchez-Gomez decision was brought before the Supreme Court, allowing the Court to address whether the Constitution categorically prohibits the indiscriminate shackling of criminal defendants in the courtroom. The Court, however, never reached the issue of shackling. Instead, the Court found that the case was moot because federal courts are constitutionally limited to resolving actual and concrete disputes that have direct consequences on the parties involved. As both plaintiffs in the case were no longer in pretrial custody, their cases ending in guilty pleas before the Ninth Circuit issued its decision, there was no such actual and concrete dispute, and the Court held the case as moot. Nonetheless, the Court did not foreclose the possibility that indiscriminate shackling in the courtroom is a fundamental right enshrined in the Constitution. It did, however, vacate the Ninth Circuit’s holding in Sanchez-Gomez, bringing into question the legal significance of the case. Legal significance aside, the Ninth Circuit has manifested its belief that criminal defendants have a fundamental and constitutional right to be free of unwarranted restraints in the courtroom, a belief that surely will not wane in the foreseeable future.

164. Id.
165. See Deck v. Missouri, 544 U.S. 622, 631 (2005) (opining that the dignity and decorum of the court includes the respectful treatment of the criminal defendant).
167. See id. at 1542 (explaining that “[b]ecause we hold this case moot, we take no position on the question” of whether the use of full physical restraints during criminal proceedings is unconstitutional).
168. Id. at 1537 (“This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” (quoting Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 71 (2013))).
169. See id. at 1537, 1542.
170. See id. at 1542 (explaining that the Court’s holding did not foreclose challenges to the use of full physical restraints).
171. Id. (“We vacate the judgment of the Court of Appeals for the Ninth Circuit . . .”).
V. RECOGNIZING A CONSTITUTIONAL RIGHT TO BE FREE OF UNWARRANTED RESTRAINTS IN THE COURTROOM

*Deck* made it clear that the common law rule against indiscriminate shackling has a constitutional dimension.\(^ {174} \) While *Deck* represents a step in the right direction for defendants' rights, the Court stopped short of recognizing a categorical right, enshrined in the Constitution, for criminal defendants to be free of unjustified restraints in the courtroom, limiting the right to criminal defendants who are brought before a jury.\(^ {175} \) The limited scope of the Court's ruling is not surprising, as federal courts have seemingly been reluctant to apply shackling restrictions to non-jury proceedings.\(^ {176} \) Regardless, the limited scope of *Deck*’s holding is inadequate, preserving an antiquated and arbitrary distinction between jury and non-jury proceedings for the purposes of shackling.\(^ {177} \)

The Ninth Circuit attempted to remedy this seemingly arbitrary distinction between jury and non-jury proceedings in *Sanchez-Gomez* by recognizing that the Constitution enshrines a fundamental right for criminal defendants to be free of unwarranted restraints while in the courtroom.\(^ {178} \) However, the court’s decision is far from perfect and is vulnerable to criticism from those opposed to recognizing a broad, categorical prohibition on indiscriminate shackling in the courtroom.\(^ {179} \) Moreover, the precedential value of *Sanchez-Gomez* has been

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174. *See Deck v. Missouri*, 544 U.S. 622, 628 (2005) (explaining that “a criminal defendant has a right to remain free of physical restraints that are visible to the jury” and “that the right has a constitutional dimension”).

175. *Id.* (holding that the “right to remain free of physical restraints” is limited to those restraints “that are visible to the jury”).

176. *See United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015) (“Because the rule against shackling pertains only to a jury trial, we hold that it does not apply to a sentencing hearing before a district judge.”); *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (citations omitted) (“We decline to extend the rule . . . requiring an independent, judicial evaluation of the need to restrain a party in court . . . to the context of non-jury sentencing proceedings.”).

177. *See, e.g., LaFond*, 783 F.3d at 1225.

178. *See Sanchez-Gomez*, 859 F.3d at 666 (holding that “[t]he Constitution enshrines a fundamental right to be free of unwarranted restraints,” and that the right “appl[ies] regardless of a jury’s presence”).

179. *See id.* at 684 (Ikuta, dissenting) (“The ramifications of the majority’s holding will reach into courthouses of every size and capacity, yet the majority never once pauses to consider the consequences of its one-size-fits-all security decree. Indeed, the majority fails even to consider the evidence on this particular record that the Marshals Service is unable to make well-founded individual judgments about what threat, if any, a pretrial detainee poses. Instead, the majority lays down the rule that the Marshals Service can either do the impossible (predict risks based on a dearth of predictive information) or sit idly by and suffer an identifiable, compelling harm (violence in the courtroom).”).
undermined by the Supreme Court’s vacatur of the case on mootness grounds.  

The case is, therefore, little more than an imperfect illustration of how a categorical prohibition on indiscriminate shackling in the courtroom may be realized. A set of justifications are still needed to support this putative constitutional right, requiring an analysis of the early common law and the three fundamental legal principles delineated in Deck.  

A. Early Common Law Tradition

Both the Supreme Court in Deck and the Ninth Circuit in Sanchez-Gomez used the early common law tradition to justify their decisions. However, these courts reached differing interpretations of the early common law. Period treatises suggest that the early English common law did not—at least theoretically—draw bright-line distinctions between arraignment and trial for the purposes of shackling. The act of a criminal defendant being brought before the court was, in and of itself, reason enough for a criminal defendant to be free of unjustified shackles. This categorical rule against indiscriminate shackling during arraignment and trial would remain consistent with early jurists’ concerns


181. In Deck, the Court set forth the ostensible path for expanding the rule against indiscriminate shackling. The Court first considered the early common law tradition. See Deck v. Missouri, 544 U.S. 622, 626 (2005). It then considered the modern justifications for the rule, which the Court deemed were the presumption of innocence, the criminal defendant’s right to counsel, and the dignity and decorum of judicial proceedings. See id. at 630-32.

182. See id. at 626; Sanchez-Gomez, 859 F.3d at 663-64.

183. See Deck, 544 U.S. at 626 (“Blackstone and other English authorities recognized that the rule did not apply at ‘the time of arraignment,’ or like proceedings before the judge.”); Sanchez-Gomez, 859 F.3d at 663 (“The early commentators didn’t draw the bright line between trial and arraignment that the Deck Court seemed to believe they did.”).

184. See Coke, supra note 23, at 34 (“If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.”); Burn, supra note 39, at 33 (“The prisoner, on his arraignment, ... must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons. But note, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment.”); See Blackstone, supra note 1, at 322 (explaining that an arraignment “is nothing ... but to call the prisoner to the bar of the court,” and a criminal defendant “must be brought to the bar without irons, or any matter of shackles or bonds, unless there be evident danger of an escape.”).

185. See Burn, supra note 39, at 33; Blackstone, supra note 1, at 322.
regarding the dignity of the court and the criminal defendant, as well as concerns regarding shackling’s propensity to interfere with criminal defendants’ free use of their mental faculties. This reading of period treatises, however, proves overly simplistic in light of early English case law.

Blackstone’s seminal treatise cites the Trial of Christopher Layer, where the presiding court distinguished arraignment and trial. In Sanchez-Gomez, the Ninth Circuit posited that this distinction merely recognized that the shackling of criminal defendants was easier to justify at arraignment than at trial. Specifically, the Ninth Circuit pointed to the fact that Layer had attempted escape before the arraignment, which ostensibly gave the presiding court sufficient justification to keep Layer in shackles during the proceeding. While it is true that Layer attempted escape prior to arraignment, the presiding court clearly articulated a distinction between arraignment and trial, the former a mere opportunity for the criminal defendant, with the advice of counsel, to plead before the court. The presiding court further noted the short duration of arraignment, questioning why Layer’s chains should be removed only to have

186. See Hawkins, supra note 27, at 434 (“[A criminal defendant] ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach, unless there be some Danger of a [Rescue] or Escape.”); see Trial of Christopher Layer, 16 How. St. Tr. 94, 99 (K.B. 1722) (“I should (with submission) think that something of the dignity of the Court might be considered in this matter, for a court of justice, the highest in the kingdom for criminal matter, where the king himself is supposed to be personally present, to have a man plead for his life before them in chains seems to be very unsuitable.”).

187. See, e.g., Coke, supra note 23, at 34 (“If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.”).


189. See Blackstone, supra note 1, at 322 (“But yet in Layer’s case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment.”).

190. See United States v. Sanchez-Gomez, 859 F.3d 649, 663 (9th Cir. 2017), vacated as moot, 138 S. Ct. 1532 (2018) (“Shackles at arraignment and trial are different, as Blackstone noted, but only because shackles are more easily justified at the former, which was demonstrated by Layer’s case.”).

191. See id. at 663-64 (positing that Layer’s shackling was permitted on the ground that he had previously attempted escape).

192. See Layer Arraignment, supra note 35, at 3 (explaining that Layer had been kept in chains because he had attempted an escape, and such measures prevent a second escape).

193. See id. at 4-5 (explaining that a criminal defendant “is only called upon to Plead, and to Plead by Advice of his Counsel,” at arraignment”).
they put on again shortly thereafter. Therefore, the Ninth Circuit's position paints an incomplete—if not outright inaccurate—picture of the Trial of Christopher Layer that contrasts sharply with other courts' reasonable readings of the case, including the Supreme Court of the United States.

Most damning to the Ninth Circuit's reading of Blackstone and the Trial of Christopher Layer, period case law shows that mid-eighteenth-century English courts understood that their authority to remove shackles was limited to trial. For example, in Waite, the presiding court expressly stated that it did not have the authority to remove the defendant's shackles prior to trial and refused to order their removal until he was brought before a jury. Therefore, despite treatises delineating apparently categorical prohibitions on the indiscriminate shackling of criminal defendants in the courtroom, period case law shows that English courts understood their powers as limited to trial. This understanding was also adopted and enforced by early American courts.

This is not to say that the early common law tradition is entirely contrary to the recognition of a categorical rule against indiscriminate shackling in the courtroom. First, the earliest iteration of the common law rule applied to both arraignment and trial. Prior to 1722—that is, the year of the Trial of Christopher

194. See id. at 5 ("[B]ut when he is only called upon to Plead, and his Counsel by him to Advise him what to Plead, why are his Chains to be taken off this Minute, and to be put on again the next?").


196. See King v. Waite, 168 Eng. Rep. 117, 120 (K.B. 1743) ("The prisoner, at the time of his arraignment, desired that his irons might be taken off; but the Court informed him, that they had no authority for that purpose until the Jury were charged to try him.").

197. Id.

198. See supra note 184 and accompanying text.


200. See, e.g., People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) (explaining that "[i]t has always been the rule at common law that a prisoner brought into the presence of a Court for trial . . . was entitled to appear free of all manner of shackles or bonds" but that this rule only applied when a criminal defendant was "brought into the presence of a court for trial, upon his plea of not guilty to an indictment"); see also Parker v. Territory, 52 P. 361, 363 (Ariz. 1898); State v. Williams, 50 P. 580, 581 (Wash. 1897); State v. Smith, 8 P. 343, 343 (Or. 1883); Matthews v. State, 77 Tenn. 128, 130 (Tenn. 1882); State v. Kring, 64 Mo. 591, 592-93 (Mo. 1877).

201. See BLACKSTONE, supra note 1, at 322 ("But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment."); see also Harrington, 42 Cal. at 167 ("Prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape.").
Layer—courts did not recognize a distinction between arraignment and trial for the purposes of shackling restrictions.\textsuperscript{202} Instead, a criminal defendant was to be free of unwarranted restraints during both proceedings.\textsuperscript{203} While this broad understanding of the rule was narrowed by subsequent case law,\textsuperscript{204} it is evidence that the rule has, in the past, been understood to apply to non-jury proceedings, allowing proponents of a categorical rule against indiscriminate shackling in the courtroom to call upon the rule’s original scope.\textsuperscript{205}

Second, despite case law limiting the rule against indiscriminate shackling to trial,\textsuperscript{206} early treatises recognized a rule that applies to both arraignment and trial.\textsuperscript{207} Almost invariably, these early commentators opined that criminal defendants were to be brought to the bar without restraints, regardless of the proceeding’s nature.\textsuperscript{208} Thus, a prominent school of legal commentators were ostensible advocates of an expansive rule against indiscriminate shackling,\textsuperscript{209} despite burgeoning case law to the contrary.\textsuperscript{210} This advocacy shows that a categorical prohibition against indiscriminate shackling in the courtroom is neither a new nor novel concept; rather, it is a view that has persisted since the rule’s inception.\textsuperscript{211}

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\item \textsuperscript{202} See Blackstone, supra note 1, at 322.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} See King v. Waite, 168 Eng. Rep. 117, 120 (K.B. 1743); Layer Arraignment, supra note 35, at 4-5; see also Harrington, 42 Cal. at 167.
\item \textsuperscript{205} See supra note 201 and accompanying text.
\item \textsuperscript{206} See Waite, 168 Eng. Rep. at 120; Layer Arraignment, supra note 35, at 4-5.
\item \textsuperscript{207} See Coke, supra note 23, at 34 (“If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.”); Burn, supra note 39, at 33 (“The prisoner, on his arraignment, ... must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons. But note, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment.”); Blackstone, supra note 1, at 322 (explaining that an arraignment “is nothing ... but to call the prisoner to the bar of the court,” and a criminal defendant “must be brought to the bar without irons, or any matter of shackles or bonds, unless there be evident danger of an escape”).
\item \textsuperscript{208} See supra note 207 and accompanying text.
\item \textsuperscript{209} See supra note 207 and accompanying text.
\item \textsuperscript{210} See King v. Waite, 168 Eng. Rep. 117, 120 (K.B. 1743); Layer Arraignment, supra note 35, at 4-5.
\item \textsuperscript{211} See, e.g., People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) (explaining that, prior to 1722, the common law did not distinguish between arraignment and trial for the purposes of shackling).
B. Contemporary American Law

In the mid-nineteenth century, American courts began adopting and enforcing the English common law rule against unwarranted shackling, thus adopting a rule whose application was limited to trial proceedings. This understanding of the rule remained the status quo for over a century, only changing upon the Supreme Court’s decision in Deck, which both expanded the rule against indiscriminate shackling to sentencing proceedings before a jury and solidified the rule’s place in American jurisprudence by recognizing that it has a constitutional dimension. In doing so, the Court set forth the formula for expanding the rule against indiscriminate shackling. This formula requires consideration of the three fundamental legal principles delineated by the Court—the presumption of innocence, the right to counsel, and the dignity and decorum of judicial proceedings.

1. The Presumption of Innocence

The presumption of innocence is firmly rooted in the American justice system and is a bedrock principle upon which the rule against indiscriminate shackling is founded. As the presumption of innocence is understood in American jurisprudence as a mere evidentiary standard, shackling jurisprudence has primarily focused on the effects visible shackles may have on

212. See Parker v. Territory, 52 P. 361, 363 (Ariz. 1898); State v. Williams, 50 P. 580, 581 (Wash. 1897); State v. Smith, 8 P. 343, 343 (Or. 1883); Matthews v. State, 77 Tenn. 128, 130 (Tenn. 1882); State v. Kring, 64 Mo. 591, 592-93 (Mo. 1877); Harrington, 42 Cal. at 167.

213. See Deck v. Missouri, 544 U.S. 622, 633 (2005) ("[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.").

214. See id. at 628-629 (recognizing the rule "has a constitutional dimension" and that "the Fifth and Fourteenth Amendments prohibit the use physical restraints visible to jury," absent a showing of need).

215. See supra note 181 and accompanying text.

216. See Deck, 544 U.S. at 630-32.

217. See Coffin v. United States, 156 U.S. 432, 453 (1894) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of [the United States'] criminal law.").


219. See Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").
the factfinder. Therefore, courts have expressed concerns that shackles suggest to the factfinder that the criminal defendant is dangerous and must be isolated from the rest of society, adversely affecting the factfinder’s perception of the defendant.

This focus on the effect of visible restraints on the factfinder has proven a significant hurdle in recognizing a categorical right for criminal defendants to be free of unwarranted restraints in the courtroom. Courts have been willing to accept the possibility that juries are adversely impacted by the sight of a criminal defendant in physical restraints, thereby tainting the factfinding process. For example, in Deck, the Supreme Court applied presumption-of-innocence principles when considering whether to prohibit the indiscriminate shackling of convicted individuals during sentencing proceedings before a jury. The Court opined that, despite the defendant’s conviction, the accuracy of the decision-making in sentencing is paramount, and shackles “almost inevitably [adversely affect] the jury’s perception of the character of the defendant.” Thus, the Court recognized the inherent dangers of shackling in criminal proceedings before juries and mandated that such practices only be permitted upon a finding of need.

220. See Deck, 544 U.S. at 630 (“Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.”); see also Estelle v. Williams, 425 U.S. 501, 503 (1976) (“To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.”).

221. See Deck, 544 U.S. at 630 (positing that the shackling of criminal defendants “suggests to the jury that the justice system itself sees a ‘need to separate a defendant from the community at large’” (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986))).

222. See United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997).

223. See, e.g., Deck, 544 U.S. at 632-33 (explaining that there is an “‘acute need’ for reliable decision-making” and shackles visible to a jury undermine that accuracy by introducing the potential for jurors to rely on that fact rather than the facts adduced at trial (quoting Monge v. California, 524 U.S. 721, 732 (1998))).

224. See id.

225. See id.

226. Id. at 633.

227. See id. at 624 (emphasis omitted) (“We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is ‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial.” (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986))).
Courts have been far more reluctant to accept the possibility that judges will be impacted by the sight of a criminal defendant in physical restraints.\textsuperscript{228} Unlike juries, judges are presumed not prejudiced by impermissible factors, such as the sight of a criminal defendant in physical restraints.\textsuperscript{229} Consequently, courts have found shackling restrictions during non-jury proceedings unnecessary to the extent that they are alleged to adversely affect a judge’s decision making.\textsuperscript{230}

This confidence in a judge’s ability to ignore impermissible factors may be misplaced, however. Studies have shown that judges are not immune to impermissible factors that present themselves in the decision-making process.\textsuperscript{231} One study, in particular, found that both judges and jurors were unable to overcome the influence of biasing materials introduced during their decision-making process, even when the biasing information was deemed inadmissible.\textsuperscript{232} Though the study did not deal with the effects of shackling on the decisionmaker, it nonetheless highlights judges’ fallibility. As shackles have long been recognized as a source of unfair prejudice to the criminal defendant,\textsuperscript{233} the fallibility of judges brings into question the distinction drawn between jury and non-jury proceedings that has prevailed in American shackling jurisprudence.\textsuperscript{234}

To an extent, a categorical rule prohibiting the indiscriminate shackling of criminal defendants in the courtroom would minimize the danger of a judge being influenced by the sight of a shackled defendant. While this danger of prejudice may not be pervasive, it is a real danger to the fairness of the judicial process with
potentially adverse outcomes for criminal defendants.\textsuperscript{235} It is, thus, a danger worthy of attention.

That said, there is an aspect of the judicial system that would undermine the efficacy of a categorical rule against indiscriminate shackling in curbing judicial prejudice; namely, the presiding judge determines whether an essential state interest is met by the shackling of a criminal defendant.\textsuperscript{236} In making this determination, judges must hear and consider factors that support a particular criminal defendant’s shackling, thereby introducing the judge to information that is ostensibly far more prejudicial than the mere sight of the defendant in restraints.\textsuperscript{237} The fact remains, however, that many criminal defendants are physically restrained with no apparent justification and, thus, would not be subjected to such restraints in the absence of jurisdictional policies that allow for indiscriminate shackling during non-jury proceedings.\textsuperscript{238} Moreover, it seems unlikely that the government would pursue the shackling of criminal defendants without some justification. It would simply be too time-consuming of an endeavor without any apparent benefit. Rather, shackling would be reserved only for those criminal defendants whom the state can show their physical restraint serves an essential interest. Therefore, a categorical prohibition on unwarranted restraints in the courtroom would minimize the threat of unfair prejudice and preserve the integrity of the proceeding for those criminal defendants whose shackling serves no essential state interest.\textsuperscript{239}

\textsuperscript{235} \textit{See} Deck, 544 U.S. at 630 (“Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.”); \textit{see also} Coffin v. United States, 156 U.S. 432, 453 (1894) (positing that the presumption of innocence is “axiomatic and elementary,” lying “at the foundation of the administration of our criminal law”).

\textsuperscript{236} \textit{See} Deck, 544 U.S. at 633 (explaining that the rule against indiscriminate shackling during jury proceedings “permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling”).

\textsuperscript{237} \textit{See id.}

\textsuperscript{238} \textit{See} United States v. Sanchez-Gomez, 859 F.3d 649, 653-54 (9th Cir. 2017), \textit{vacated as moot}, 138 S. Ct. 1532 (2018) (noting that two criminal defendants with physical ailments—one bound to a wheelchair and the other vision-impaired—were shackled during arraignment because it was the jurisdiction’s policy to shackle all criminal defendants during arraignment, regardless of justification for the shackling).

\textsuperscript{239} \textit{See id.} at 661-62 (positing that the presumption of innocence is essential to maintaining both the integrity of the proceeding from an evidentiary standpoint and the integrity of the court in the eyes of the public).
2. The Right to Counsel

The criminal defendant’s right to legal counsel is enshrined in the Sixth Amendment of the Constitution. The right to counsel has been heralded as fundamental to the fair administration of the criminal justice system, and the Court has shown particular disfavor towards measures that interfere with a criminal defendant’s ability to effectively communicate with his or her counsel. One such measure that has drawn the ire of the Court is the shackling of criminal defendants. Despite the Court’s disfavor towards shackling’s propensity to interfere with the Sixth Amendment’s guarantee of meaningful legal counsel during criminal proceedings, the Court has only addressed the issue in the context of jury proceedings.

Whether a proceeding occurs before a jury is unrelated to a criminal defendant’s right to meaningful legal counsel. The Court has opined that the Sixth Amendment right to counsel applies to pretrial, trial, and sentencing hearings. Accordingly, a criminal defendant has a cognizable interest in meaningful counsel during all criminal proceedings, regardless of whether those proceedings occur before a jury or a judge. As the Court has already noted shackling’s propensity

240. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); see also Deck v. Missouri, 544 U.S. 622, 631 (2005) ("Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel.").


242. See Moran v. Burbine, 475 U.S. 412, 431 (1986) ("[T]he initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel."); Brewer, 430 U.S. at 401 (holding that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him"); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that "the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel").

243. See Deck, 544 U.S. at 631 (citations omitted) ("[T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. The use of physical restraints diminishes that right."); Illinois v. Allen, 397 U.S. 337, 344 (1970) (opining that binding and gagging should only be employed as a "last resort" because such restraints can interfere with the accused's "ability to communicate" with his lawyer"); Reese v. Georgia, 350 U.S. 85, 90 (1955) (opining that ineffective counsel interferes with a criminal defendant's right to counsel).

244. See Deck, 544 U.S. at 631.

245. See supra notes 97, 100-101 and accompanying text.

246. See supra notes 97, 100-101 and accompanying text.
to interfere with a criminal defendant’s constitutional right to counsel, and has used such a justification to expand the rule against indiscriminate shackling to sentencing proceedings before a jury, it is time the Court recognizes that a categorical rule against indiscriminate shackling in the courtroom is the only way to ensure that all criminal defendants are afforded their constitutional right to counsel.

In light of modern restraints, there is an argument to be made that shackling should not be viewed as innately interfering with the Sixth Amendment right to counsel. In his dissent to the majority opinion in Deck, Justice Thomas asserted that there is no evidence that all restraints interfere with a criminal defendant’s ability to assist in his or her defense. Rather, accommodations can be made to ensure that a shackled defendant retains his or her ability to communicate freely with counsel, such as keeping a hand unchained to enable writing. While Justice Thomas’s critique does have merit, it places the burden of proving interference with constitutionally-guaranteed counsel on the criminal defendant, without placing a similar burden on the state for the shackling of the defendant in the first place. A categorical rule against unwarranted restraints in the courtroom would protect criminal defendants’ constitutional rights to meaningful counsel by creating a presumption that defendants should not be shackled, promising that defendants can assist in their defenses without the burden and restrictions of physical restraints. If the state is able to show that an essential state interest is served by shackling the defendant, the defendant can insist that accommodations be made to ensure that he or she can effectively communicate with counsel and assist in his or her defense. Such requests for accommodations should be limited to instances where the criminal defendant’s shackling has been justified by the circumstances, however. That burden should not be placed on defendants who

247. See Allen, 397 U.S. at 344 (opining that binding and gagging should only be employed as a “last resort” because such restraints interfere with the accused’s ability to freely communicate with his or her lawyer).


249. See id. at 654-55 (Thomas, J., dissenting) (questioning whether modern restraints actually interfere with a criminal defendant’s right to counsel).

250. See id. at 654 (Thomas, J., dissenting) (internal citations omitted) (“I certainly agree that shackles would be impermissible if they were to seriously impair a defendant’s ability to assist in his defense, but there is no evidence that shackles do so.”).

251. See id. at 655 (Thomas, J., dissenting) (positing that Deck did not claim that he could not write down information he wished to convey to counsel, and, if he did, “Deck could have sought to have at least one of his hands free to make it easier for him to write”).

252. See id.
have been shackled merely due to the jurisdiction’s indiscriminate shackling policy.

3. The Dignity and Decorum of Judicial Proceedings

Courtrooms are the “most visible and public manifestation of our [nation’s] criminal justice system . . .”\(^{253}\) Within their walls, judicial proceedings look to determine truth,\(^{254}\) a determination that carries with it the potential to deprive an individual of life or liberty.\(^{255}\) Accordingly, courtrooms should function in a manner that is becoming of their important role in society, inspiring the confidence of all who come within their confines.\(^{256}\)

The routine shackling of defendants in criminal proceedings undermines society’s confidence in the judicial system’s ability to administer justice.\(^{257}\) The Court has opined that the use of physical restraints is “an affront to the very dignity and decorum of the judicial proceedings that the judge is looking to uphold” and that restraints should only be employed as a “last resort.”\(^{258}\) Nevertheless, criminal defendants are routinely brought into the courtroom with shackles, not because their shackling serves an essential state interest and is being employed as a last resort, but because it is an accepted practice in the jurisdiction.\(^{259}\) This practice is a clear affront to the dignity and decorum of the courtroom.\(^{260}\) The notion of a criminal defendant pleading for his or her freedom or life while shackled is repugnant to the very concept of justice and should be

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\(^{253}\) United States v. Sanchez-Gomez, 859 F.3d 649, 662 (9th Cir. 2017), vacated as moot, 138 S. Ct. 1532 (2019) (”The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life.”).

\(^{254}\) Estes v. Texas, 381 U.S. 532, 540 (1965) (”Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.”).

\(^{255}\) See Deck v. Missouri, 544 U.S. 622, 631 (2005) (”The courtroom’s formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment.”).

\(^{256}\) Id. (explaining that the dignity and decorum of the courtroom “reflects a seriousness of purpose that helps to explain the judicial system’s power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve”).

\(^{257}\) See Sanchez-Gomez, 859 F.3d at 662 (opining that the perception of the court as a place where justice is administered is incompatible with the sight of criminal defendants being marched into the courtroom “like convicts on a chain gang”).


\(^{259}\) See supra notes 4-7 and accompanying text.

\(^{260}\) See Allen, 397 U.S. at 344.
condemned through a categorical prohibition on unwarranted physical restraints in the courtroom.\textsuperscript{261}

Highlighting the illogic of current shackling jurisprudence, courtrooms across the nation enforce dress codes that are meant to promote respect for the dignity of the court, the presiding judge, and the rule of law.\textsuperscript{262} These dress codes deem articles of clothing, such as jeans, T-shirts, and hats, inappropriate for spectators of the court.\textsuperscript{263} Yet, courts all-too-often turn a blind eye to the indiscriminate shackling of criminal defendants during non-jury proceedings.\textsuperscript{264} If a hat and T-shirt are inappropriate attire for spectators because such articles undermine the court’s dignity and decorum, so too should shackles be deemed unacceptable in the absence of a showing of need. The Court has already recognized the shackling of criminal defendants during judicial proceedings as an affront to the court’s dignity;\textsuperscript{265} it is time this affront is categorically addressed and condemned in this nation’s courtrooms.

Moreover, indiscriminate shackling practices in criminal proceedings undermine the respectful treatment of criminal defendants mandated by the Supreme Court in Deck.\textsuperscript{266} In Sanchez-Gomez, the Ninth Circuit likened the shackling of criminal defendants in the courtroom to treating defendants like “bear[s] on a chain.”\textsuperscript{267} The egregious nature of the practice is only made more salient when the criminal defendant is presumptively innocent—that is, during arraignment and trial proceedings. In such proceedings, unwarranted shackles tell a criminal defendant that the criminal justice system has already determined him or her to be a danger to society that requires isolation and restraint, despite

\textsuperscript{261} See Sanchez-Gomez, 859 F.3d at 662 (“A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain.”).

\textsuperscript{262} See Goldschmidt, supra note 116, at 49 (explaining the “oft-stated purposes of [rules of decorum] are to promote respect for the dignity of the court, the presiding judge, and the rule of law”).

\textsuperscript{263} See City Court Of St. Louis, supra note 117.

\textsuperscript{264} See supra notes 4-7.


\textsuperscript{266} Deck v. Missouri, 544 U.S. 622, 631 (2005) (explaining that “[t]he Court’s formal dignity . . . includes the respectful treatment of defendants”).

\textsuperscript{267} United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017) (“A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”).
a lack of conviction.\textsuperscript{268} Even after conviction, unwarranted restraints convey to the criminal defendant that the criminal justice system believes he or she is incapable of controlling himself or herself during the proceeding. Unwarranted restraints, therefore, undermine the respect defendants are entitled to during criminal proceedings.\textsuperscript{269} A categorical rule against indiscriminate shackling would ensure criminal defendants are treated with respect and preserve the criminal justice system's integrity.

VI. CONCLUSION

It has been well over two centuries since William Blackstone famously opined that a criminal defendant "must be brought to the bar without irons, or any manner of shackles or bonds, unless there be an evident danger of an escape."\textsuperscript{270} Yet, American courts still cling to an antiquated notion that jury and non-jury proceedings are so fundamentally different that shackling restrictions only apply to the former.\textsuperscript{271} This distinction is called into question when considered under the framework delineated by the Supreme Court in \textit{Deck}.\textsuperscript{272} A study of the early common tradition shows that the initial rule against unwarranted shackling applied to arraignment and trial proceedings with equal force,\textsuperscript{273} and early commentators were ostensible advocates of this expansive interpretation of the rule, even after English courts narrowed its application to trial proceedings.\textsuperscript{274} Further, the presumption of innocence, the criminal defendant's right to counsel, and the dignity and decorum of judicial proceedings all support a categorical rule against the indiscriminate shackling of criminal defendants.\textsuperscript{275} If similar considerations warranted an extension of the rule against indiscriminate shackling no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty.

\textsuperscript{268} Id. ("This right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty.").

\textsuperscript{269} See Deck, 544 U.S. at 631 (explaining that "[t]he Court's formal dignity . . . includes the respectful treatment of defendants").

\textsuperscript{270} BLACKSTONE, supra note 1, at 322.

\textsuperscript{271} See United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 103-04 (2d Cir. 1997).


\textsuperscript{273} See People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) ("Prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape."); BLACKSTONE, supra note 1, at 322 ("But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment.").

\textsuperscript{274} See footnote 207 and accompanying text.

\textsuperscript{275} See supra Part IV.B (applying the three fundamental legal principles that justify modern shackling restrictions, as delineated by the Court in Deck, to non-jury criminal proceedings); see also Deck, 544 U.S. at 630-32.
shackling to all jury proceedings in *Deck*,{276} these considerations should necessitate a further expansion of the rule that applies any time a criminal defendant is brought into a courtroom.

A MODEL FOR INTERPRETING FEDERAL SENTENCING LAW

John F. Schifalacqua∗

Commentators have long complained that federal courts do not engage in consistent methods of statutory interpretation. Perhaps nowhere would consistency be more beneficial than with federal sentencing law. This paper argues that federal judges have amplified discretion and disparity—two issues the Sentencing Reform Act (SRA) sought to curb—through interpretive fiat. As judges interpret federal sentencing statutes, the SRA, and the Sentencing Guidelines, judicial discretion grows as malleable canons and theories of statutory interpretation are applied without consistency or without a reasoned framework. The result favors circuit splits, which lead to disparity among standards applied to defendants across jurisdictions. As a remedy, this paper proposes a clear model for interpreting federal sentencing law that advances its guiding principles. These principles are synthesized by reviewing the history of the SRA and coalescing the recent development of federal sentencing law into values informed by H.L.A. Hart’s theory of punishment, which can both clarify the proper tools of statutory interpretation and guide a court when faced with textual ambiguity. Ultimately, and after reviewing case studies concerning current sentencing ambiguity, this paper proposes textually-constrained purposivism as the appropriate theory for interpreting federal sentencing law.

I. INTRODUCTION

Over a 12-month period ending in 2018, the Administrative Office of the United States Courts reported that about 90% of criminal cases in federal courts were disposed of by way of guilty plea.1 This trend is hardly surprising. The Supreme Court has consistently upheld the constitutional legitimacy of plea-bargaining, with conditions, to encourage an ostensible “mutuality of advantage” founded upon compromise between the government and defendants.2 Such an


2. See Brady v. United States, 397 U.S. 742, 751-52 (1970) (“The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law.”), see also Santobello v. New York, 404 U.S. 257 (1971) (allowing remand to review whether a plea bargain must be enforced where the government failed to keep a commitment concerning a sentencing recommendation); FED. R. CRIM. P. 11 (giving a court discretion to accept, reject, defer, or otherwise modify a plea bargain).
advantage theoretically works to minimize risk in the ‘shadow of trial.’ Often likened to a bilateral contract, plea bargaining offers defendants lower sentences in consideration for the judicial efficiency that redounds to the government’s benefit by streamlining the adjudicatory process. Although a growing body of literature now challenges the accuracy of this explanation by studying the reasons for and efficacy of plea bargaining, the process has indisputably become a “huge edifice” now defining the criminal justice system. The effect of this edifice has been to shift the stakes of any given case away from substantive criminal law toward the process of sentencing. Instead of challenging whether the state can meet its burden of proof, a typical defendant might now focus on developing a narrative about culpability that will yield the most favorable sentence.

Before reform, achieving a favorable sentence at the federal level was akin to reading a judge’s mind. For most of American history, criminal statutes only provided a maximum sentence, which gave judges “power and discretion to impose any sentence—ranging from probation or no sentence at all, up to a maximum prison term fixed by the criminal statute under which the offender was convicted.” Given the variety of justifications for criminal punishment that one could hold—including retributive, utilitarian, deterrence, incapacitation, and rehabilitation—each judge could impose a sentence that would comport with their own theory of punishment. This discretion produced a variability in sentences eventually necessitating reform, especially amid concerns that


4. Justice Scalia observed that, partially as a result of the Supreme Court’s imprimatur, plea bargaining “is no longer a somewhat embarrassing adjunct to our criminal justice system; rather . . . it is the criminal justice system.” Lafler v. Cooper, 566 U.S. 156, 186 (2012).


7. Id. at 93-94 (describing how “American sentencing policy reflected a variety of theories or justifications for criminal punishment . . . .”).
sentencing had become arbitrary, infused with bias, and otherwise inconsistent depending on the “whim” of any particular judge.8

In response, Congress enacted the Sentencing Reform Act (“SRA”) of 1984 to make sentencing more mechanical and precise. The SRA created the United States Sentencing Commission (“Commission”), which is empowered to issue nearly binding sentencing Guidelines to federal courts.9 These Guidelines have become incredibly detailed bodies of work that create formulaic standards for calculating sentences. They calculate, through a range of suggested imprisonment, a “very precise calibration of sentences, depending upon a number of factors” that purportedly “relate both to the subjective guilt of the defendant and to the harm caused by his acts.”10 While the Guidelines may have reduced judicial discretion in sentencing compared to the pre-1984 regime, discretion nevertheless remains and is arguably increasing—especially through different, underappreciated forms.11

This discretion remains an incredibly underappreciated influence on how federal courts interpret the SRA, sentencing statutes generally, and the Guidelines, which are incorporated by reference into the SRA’s statutory factors.12 The sheer volume of the Guidelines has given rise to countless instances of ambiguity among ill-defined terms, which have amplified the judiciary’s opportunity to expand discretion through interpretive fiat. Specifically, courts are deploying canons of statutory interpretation with prevalence to make sense of

8. Id. at 95 (listing three objections to criminal sentencing levied by reformers); see, e.g., Marc Galanter, Frank S. Palen & John M. Thomas, The Crusading Judge: Judicial Activism in Trial Courts, 52 S. Cal. L. Rev. 699, 712-730 (1979) (describing various judicial styles which affected sentencing decisions prior to the Guidelines). See also Peugh v. U.S., 569 U.S. 530, 535 (2013) (“the broad discretion of sentencing courts...had led to significant sentencing disparities among similarly situated offenders.”).

9. A sentence prescribed by the guidelines was formerly mandatory, but the Supreme Court rendered them merely “advisory” in United States v. Booker, 543 U.S. 220, 264 (2005). Judges still need to consider what the Guidelines prescribe, but they are no longer legally binding. Id. at 264. Nevertheless, evidence suggests that the “gravitational pull” of the Guidelines is such that most federal sentences still conform to the Guidelines.” Schwarzschild, supra note 6, at 104 (citing Frank O. Bowman III, Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 U. Chi L. Rev. 367, 374, 376-77 (2010)).


11. Empirical evidence may suggest that increased judicial discretion and inconsistent sentences are a result of the Guidelines becoming advisory. See generally, Crystal S. Yang, Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker, 89 N.Y.U. L. Rev. 1268 (2014). But there is some debate about the source of increased discretion. See infra Part I. This article argues that notwithstanding any proposed reforms to the Guidelines, discretion will always remain in some form if canons of construction are haphazardly applied to interpretive sentencing problems.

12. See 18 U.S.C. § 3553(a) (SRA sentencing factors); see also 28 U.S.C. § 991(b)(1)(A) (requiring the Sentencing Commission to consider the § 3553(a) factors).
the SRA, Guidelines, and various sentencing statutes—thereby reclaiming some of the disconcerting discretion that initially motivated reform because there is no uniform system for statutory interpretation.13

And while the prevalence of plea bargaining and the resultant uptick in the centrality of sentencing have been well-accepted as a modern reality, much less attention has been paid to this tertiary effect of how federal courts go about interpreting the SRA’s remit for contemporary sentencing. This effect presents an opportunity to study the applicability of age-old canons and theories of statutory construction in the context of criminal law, which federal courts are deploying as tools to resolve interpretive sentencing problems. The vast majority of existing scholarship in this area focuses on statutory interpretation within the framework of substantive criminal law.14 In other words, most scholarship focuses on developing a model for how courts ought to interpret what criminal codes have to say about what is or is not criminal behavior.15 But few have sought to offer a model taking into account the shift in criminal law advocacy toward sentencing decisions and the increasingly ambiguous sources of interpretive construction that the SRA, the Guidelines, and the federal sentencing statutes provide.

This paper aims to offer such a model and, in the process, illuminate interpretative discretion federal courts have reclaimed—arguably undermining the original goals of the SRA. Part II begins with an extended discussion of the SRA’s purpose to isolate background principles that can inform how courts address interpretive problems involving federal sentencing. The discussion is particularly focused on summarizing the original aims of the SRA and accounting for the changes to the sentencing regime since its original inception. Part II’s goal is to present a non-contradictory synthesis of competing aims throughout the development of federal sentencing to serve as a reliable baseline for statutory interpretation. Part III presents a condensed version of the current models for interpreting criminal law to distill the key canons and theories at play in any given interpretive problem. Part IV presents case studies—some involving circuit splits—for evaluating how consistent these interpretive canons are with the SRA and the Guidelines’ underlying principles and that of criminal punishment’s animating principles. Part V condenses the above into a model for interpreting federal sentencing problems to forward the SRA’s aims and federal sentencing’s


15. Id. Often due process and fair notice are key considerations.
development generally. Finally, the paper offers several conclusions about interpreting sentencing guidelines and criminal codes in an era where plea bargaining and sentencing have become a focus of criminal law.

Overall, this paper argues that the propensity of federal courts to deploy elastic canons of statutory construction for interpreting federal sentencing law has led to a risk that judges are reclaiming by fiat much of the unguided discretion and the resulting disparity that prompted the SRA in the first place. But the evolution of the SRA and the Guidelines—and their underlying principles—demand a more nuanced interpretive scheme to combat increased discretion rather than blind adherence to textualism or purposivism. Consequently, this paper argues that the federal sentencing sources ought to be interpreted according to a clear model of statutory construction to support consistency in sentencing, predictability, and to cut a fair balance between rival philosophies of criminal punishment. Specifically, this paper advocates for interpreting the sentencing statutes and the Guidelines under the textually-constrained purposivism model of statutory interpretation, emphasizing the evolving principles of the federal sentencing regime as contextualized by H.L.A. Hart’s theories.

II. GUIDING PRINCIPLES OF THE FEDERAL SENTENCING REGIME

To understand the purpose of the federal sentencing regime, it might be tempting to look first to the United States Sentencing Commission for guidance. But far from offering clarity, the Commission seems to acknowledge a competing or otherwise contradictory account of the underlying policies informing the Guidelines. For example, the Commission describes the Guidelines as “incorporat[ing] the purposes of sentencing,” including the sometimes rival theories of just punishment, deterrence, incapacitation, and rehabilitation. Moreover, it simultaneously endorses an aim of “avoiding unwarranted disparity among offenders with similar characteristics” while also hoping for “sufficient judicial flexibility” to account for individualized circumstances. The juxtaposition of these aims is puzzling in the context of long-held arguments that greater individualization of sentences is seemingly “prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency.”


17. U.S. SENTENCING COMM’N, supra note 16.

individual circumstances, the more likely disparity reigns between individuals accused of the same crime. This result can undercut a public sense of an objective rule of law.\textsuperscript{19}

One way to make sense of the Commission’s rationale for sentencing is to interpret it as sanctioning an approach that seeks to achieve equilibrium between various essential but otherwise competing theories of criminal justice. Indeed, this approach is reflective of the SRA itself, which directs a sentencing court to balance seven arguably rival considerations at sentencing.\textsuperscript{20} This equilibrium between considerations is certainly wise in the sense that various theories of punishment and the means for approaching sentencing all have positive and negative attributes.\textsuperscript{21} Insofar as an approach can isolate and balance the best of each, it would seem that the Commission and the SRA’s neutral philosophy are well-tailored. However, not only might this balancing be challenging,\textsuperscript{22} but the

\begin{itemize}
  \item \textsuperscript{19} See, e.g., id. at 5 (describing how significant discretion at sentencing can be “terrifying and intolerable for a society that professes devotion to the rule of law.”).
  \item \textsuperscript{20} 18 U.S.C. § 3353(a) lists seven considerations which, like the Sentencing Commission’s purpose statement, contain seemingly hard to reconcile considerations. These considerations include a desire to take account of the individual circumstances of a defendant (18 U.S.C. §3553(a)(1)) while simultaneously avoiding disparities among defendants with similar records/conduct (18 U.S.C. §3553(a)(6)).
  \item \textsuperscript{21} In fact, punishment has been conceptualized along the lines of a mixed theory to harmonize the values advanced by each theory of punishment. For example, Stephen P. Garvey explained that:
    \begin{itemize}
      \item Punishment’s purpose is utilitarian: to reduce crime and thus protect the rights of all to be secure in their persons and property. But that purpose must be pursued within retribution’s limits. A person can legitimately be punished only if he committed a crime, only in proportion to that crime, and only if doing so would produce a world with less crime.
    \end{itemize}

Stephen P. Garvey, \textit{Lifting the Veil on Punishment}, 7 BUFF. CRIM. L REV. 443, 450 (2004). The philosophical terminology of utilitarianism and retribution are generally inclusive of the specific crime control theories by which the SRA and Guidelines speak (e.g., deterrence, rehabilitation, incapacitation, etc...). See, e.g., H.L.A. HART, \textit{PUNISHMENT AND RESPONSIBILITY} 8-12 (1968) (conceptualizing the aim of punishment as promoting social welfare, which would necessarily include rehabilitative purposes in modern parlance. But Hart also would limit punishment by the moral ethics underpinning retribution, which would necessarily include individualized analysis of a guilty person to ascertain a proportionate sentence); Michael T. Cahill, \textit{Punishment Pluralism, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY} 25 (Mark D. White ed., 2011) (conceptualizing retribution as part of a pluralistic approach to punishment). Criminal statutes have largely followed this mixed approach by explicitly adopting the underlying aims of each theory of punishment in a way which seeks to blend their effects. See, e.g., \textit{MODEL PENAL CODE} § 1.02(2) (2021); N.Y. PENAL LAW § 1.05 (2021); \textit{CAL. PENAL CODE} § 1170 (2021). Harts’ theory is perhaps the most apt way to think about the underlying values of the SRA. See infra Part II. B.
  \item \textsuperscript{22} See, e.g., Kenworthey Bilz & John M. Darley, \textit{What’s Wrong with Harmless Theories of Punishment}, 79 CHI.-KENT L. REV. 1215 (2004) (arguing that it is counterproductive to think about punishment according to well-known theories and instead advocating for an approach that focuses
historical process of building today's modern sentencing scheme is replete with deliberate value judgments that indicate that there are more definite, underlying guiding values to the federal sentencing regime than the Commission or the SRA might otherwise indicate on its face. These underlying values are especially relevant for building a model that can interpret the Guidelines and sentencing statutes.23 With this approach in mind, even a cursory study of the already substantial literature on federal sentencing's history and philosophy reveals the underlying value judgments in play.

A. Context Precipitating the SRA

The history of sentencing reform has been well documented, and the nuances of the SRA's legislative history are beyond the scope of this article.24 What follows is a part of that history summarized according to several commentators. Interposed behind the SRA's history is a political context which reflects underlying principles awash amidst a sea of legislative give and take. The summary begins with federal parole, which although now abolished, was a flashpoint for debate in the years preceding reform. Beginning in 1910, federal parole generally gave parole authorities discretion to determine the release date of a federal prisoner.25 This discretion was not unlimited, but was rather cabined by a nominal, baseline sentence determined by the sentencing judge and a hodgepodge of statutes which would permit only portions of sentences to qualify for "good time" credit reduction, usually after a minimum amount of time served.26 The parole system created a sentencing process whereby "[a] court's nominal sentence effectively determined only the minimum term (usually one-third of the nominal sentence) and maximum term (usually two-thirds of the nominal sentence to be served)."27 The result was a hybrid system through which

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on balancing the specific harm to all parties involved in a specific crime, including harm involved with any potential punishment); see also United States v. Smith, No. 1:06-CR-00394, 2009 WL 249714, at *4 (N.D. Ohio Feb. 2, 2009) (demonstrating the difficulty a typical federal trial judge has in finding a "delicate balance" between "often competing sentencing polices." Note the court's explicit acknowledgement of conflict as engages in its balancing).

23. These principles can be discerned from the face of the text, legislative history, and the general context behind which it was conceived. See William N. Jr. Eskridge, Public Values In Statutory Interpretation, 137 U. PA. L. Rev. 1007, 1018 (1989) (imploring interpreters of statutes to "explicitly acknowledge the importance of rational background understandings" which are "public values ... ").


27. Id. at 227.
judges and parole boards created "partially indeterminate" sentences by nature of a baseline set at sentencing and a recalibration over time depending on the prisoner's conduct. 28

The rationale for this hybrid system was to advance a rehabilitation model of criminal justice which could tailor a sentence to the exact amount of time it took a prisoner to reform. 29 But over decades, this process—and the federal parole system generally—came under heavy criticism. 30 Historians note that the 1950s brought liberal reformers who criticized the system as failing to rehabilitate prisoners, undermining the rule of law by creating disparities in sentence length among similar offenders, and generally fostering an affront to burgeoning notions of equality. 31 Specifically, activists became a concerned that "permitting judges and parole officials to exercise unguided discretion assertedly resulted in 'unwarranted disparity' (including alleged bias against minorities) in criminal sentences." 32 Likewise, conservatives viewed this bias as allowing the system to engage in undue leniency affronting theories of retribution and just deserts. 33

The concern about bias eventually materialized into a growing call for "a scientific and objective means of structuring and institutionalizing discretion in parole release decisionmaking." 34 By the 1970s, this call coincided with an effort to re-codify criminal law to "provide some measure of rationality to the diverse federal criminal statutes that had accumulated during the previous century and a

28. Id.

29. Mistretta, 488 U.S. at 363 ("Both indeterminate sentencing and parole were based on concepts of the offenders possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby minimize the risk that he would resume criminal activity upon his return to society.").

30. Id. at 365 ("Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases." (first citing Norval Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 Mich. L. Rev. 1161 (1974)); and then citing FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSES (1981))

31. Stith & Koh, supra note 24, at 227.

32. Id. (citing Joseph C. Howard, Racial Discrimination in Sentencing, 59 JUDICATURE 121 (1975 - 76). See also U.S. v. Booker, 543 U.S. 220, 292 (2008) (Stevens, J. dissenting) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim.").


half.” However, this re-codification effort was co-opted by the Nixon administration’s political ambitions, such that critics argued its reform provisions largely targeted organized labor, political dissent, and championed a tough-on-crime mentality that often targeted minorities. Thus, notwithstanding the fact that sentencing reform was originally supported by both liberal and conservative voices, it grew increasingly clear the political moment would artificially pit sentencing reform—championed most vigorously by liberal senators like Edward Kennedy and the previous Johnson administration vis-à-vis the Brown Commission—against a re-codification effort informed by the tough-on-crime Nixon administration. But both movements shared a core desire to inject a degree of rationality and objectiveness into the criminal justice system to further their goals.

Through comprehensive studies of the SRA’s legislative history, it appears that this shared desire would eventually serve as the basis for passing sentencing reform amid several years of fits and starts. In perhaps the most complete study of the SRA’s beginnings, Kate Stith and Steve Koh describe how through several Congresses the House and Senate could not agree on the mechanics of sentencing reform. Indeed, a more liberal Senate approach, frequently led in tandem by Senators Kennedy and, oddly enough, Thurmond, clashed with an often obstinate and less hospitable House. The frequency through which the chambers could not settle on sentencing reform resulted in a moderating effect whereby “the Senate’s sentencing reform legislation became increasingly dogmatic and rigid...accomplished by small and nuanced modifications in wording” made over sessions to craft legislation acceptable to both chambers. Historians attribute a

35. Stith & Koh, supra note 24, at 231 (citing: S. 1, 94th Cong., 1st Sess. (1975)).


37. Stith & Koh, supra note 24 at 231.

38. See id. at 234-38 (chronicling how sentencing reform often stalled between the House and Senate for several Congresses). House Judiciary Chairman Peter W. Rodino proudly explained that the House’s hesitance was a result of judgment: “[H]ouse members take the same oath as senators do...and they are entitled to their own independent judgment. To date, that judgment has been that the Senate bill requires more than mere ratification.” Fred Barbash, Hill Blood Boiling at Disparate Efforts at Revising Code, WASH. POST, June 12, 1978, at A3.

39. See, e.g., Stith & Koh, supra note 24, at 236 (describing how the House often took a more cautious approach to reforming the sentencing scheme by retaining a degree of determinate parole terms and discretion for the sentencing judge) (citing H.R. 6915., 96th Cong. (1980); H.R. 1396, 96th Cong., 471, 487-513 (1980)).

40. Stith & Koh, supra note 24, at 238.
shift in politics during the 1980s as a reinvigorating compromise founded upon
the same core desire to inject rationality into criminal justice.\footnote{1} By this time, re-
codifying federal criminal law had morphed into a broader anticrime movement,
which made popular many of the tough-on-crime provisions that were previously
decreed by liberal advocates who opposed the Nixon administration’s co-opt of
re-codification policy.\footnote{2}

For example, “growing public concern about crime and a new President,
Ronald Reagan, keenly interested in toughening and expanding federal anticrime
measures” invigorated both chambers to more fervently address federal criminal
law.\footnote{3} And a staple of this new focus was the introduction of mandatory
minimums to deter drug offenses and violent crimes.\footnote{4} This attention to
minimums brought into stark relief the necessity of sentencing reform to
accomplish the ends of crime control—an incentive lacking when Congress
considered re-codification in the 1970s, during which public opinion was not
fervently behind what was at the time the more academic re-codification
concern.\footnote{5} In fact, scholars argue that “the passage of the Sentencing Reform Act
in 1984 may be attributed not to the inexorable attraction of the radical
sentencing changes” introduced in the 1970s, but to the “inexorable force” of
anticrime bills. The catalyst effect of these anticrime bills for spurring sentencing
reform can perhaps be best explained by the aforementioned moderation of the
Senate’s proposals over time and by the fact that anticrime rhetoric could
appropriate the same calls for objectivity and rationality which originally found
bipartisan support in the early days of federal parole reform.

\begin{footnotes}
\footnote{1} Id. at 258-66.
\footnote{2} See President’s Address to National Conference of U.S. Attorneys, 19 WEEKLY COMP. PRESS.
Doc. 1652 (Dec. 12, 1983) (evidencing President Reagan’s belief that his anticrime policies reflected
“the will of society to punish those who prey on the innocent and the willingness of the leaders ... to enforce that will.”).
\footnote{3} Stith & Koh, supra note 24, at 258.
\footnote{4} Id. at 259.
\footnote{5} At the time there were critics of mandatory minimums who believed such provisions
actually undermined determinate sentencing structures. See generally Gary T. Lowenthal,
Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 CALIF. L. REV. 61 (1993). But most agreed that a catalyst for mandatory minimums—and related
sentencing reform—stemmed from “frustrat[ion] with the persistence of violent crime and a
spreading drug problem during the 1970s and 1980s, [and] Congress saw uncertain and inadequate
penalties as partially to blame.” Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 WAKE
\end{footnotes}
Indeed, it is through this lens that federal courts interpret the messy legislative history condensed above.\textsuperscript{46} For example, in dissent in \textit{United States v. Booker}, Justice Stevens—a frequent analyst of legislative history—interpreted the SRA’s development in comparison to early Senate reform efforts by Senator Kennedy.\textsuperscript{47} He noted that early bills “allowed judges to impose sentences based on characteristics of the individual defendant and granted judges substantial discretion to depart from recommended guidelines sentences.”\textsuperscript{48} But over time, this position was refined, with each refinement making the regime “more, not less restrictive on trial judges direction during trial.”\textsuperscript{49}

The take-away from this political context should be threefold. First, sentencing reform was born in a bipartisan movement skeptical of the rehabilitative ends of criminal justice, particularly regarding the efficacy of parole and the discretion characterized by it for fear of bias that could often target minorities and erode deterrence. Second, reformist proposals were necessarily moderated over time, suggesting an acquiesce to perhaps conflicting anticrime values. Specifically, and thirdly, the final passage of sentencing reform was the product of a common denominator—a goal for objectivity and uniformity in criminal law—first shared between early sentencing reform and re-codification efforts, and later co-opted by a popular anticrime policy which also grew skeptical of rehabilitation but embraced deterrence. Consequently, this political context suggests that at the time of passage, objectivity and a skepticism of the

\textsuperscript{46} One federal court put it bluntly:

What conditions and concerns impelled the Congress to enact the Sentencing Reform Act? To state the obvious to anyone who lived in the United States during the period 1978—1984, this was a time of unprecedented Congressional concern about and absorption in the problem of crime and violence in America, with particular emphasis upon the role of international drug traffic, and the pervasive national misery brought about by so much crime. No one could seriously question that the quality of life in America, especially in its cities, was profoundly degraded during those years by preoccupation with security, fear of the violent felon, and the menace of an ever expanding volume of dangerous drugs into the school, the workplace, and the home.


\textsuperscript{48} \textit{Id.} (citing Stith & Koh, supra note 24).

\textsuperscript{49} \textit{Id.}
rehabilitative aims of criminal law were some values that underscored the movement against discretion, which precipitated the passage of the SRA.50

These values are confirmed in a comparative analysis between the early liberal reform bills of the 1970s and the eventual content of SRA in 1984. As Justice Stevens recognized in Booker, "Congress had countless opportunities over the course of seven years of debate to enact" a particular type of sentencing reform.51 "Congress' repeated rejection of proposed legislation constitutes powerful evidence" informing us about the type of value judgments which successfully propelled passage of eventual reforms amidst various failed versions.52

Stith and Koh highlight some valuable differences between early versions and the SRA's final text. Early versions "retained indeterminate sentencing and parole in some circumstances" for fear of "bias toward incarceration."53 In other words, liberal Senate reformers still wanted to preserve a degree of discretion and flexibility "by both the [sentencing] commission and the sentencing judge in considering mitigating or aggravating personal characteristics of the defendant."54 But the SRA not only abolished federal parole, as it largely reduced this flexibility to "dogmatic and rigid" structures of determinacy.55 Any sense that sentencing reform could further a rehabilitative theory of criminal law was largely sidelined to other purposes, namely those supported by objective, unchanging standards.56

50. See, e.g., United States v. Rhodes, 145 F.3d 1375, 1384 (D.C. Cir. 1998) (Silberman, J., dissenting) (arguing that the "very passage" of the SRA indicated that sentencing judges should be restricted in how often they consider rehabilitation, particularly in the post-conviction context, because "one of the primary goals of the Act was to narrow the wide disparity of sentences imposed on similarly situated defendants.").

51. Booker, 542 U.S. at 293 n.12 (Stevens, J., dissenting).

52. Id.


54. Id.

55. Id.; see also, e.g., U.S. SENT’G COMM’N, GUIDELINES MANUAL, §§ 5H1.4 (U.S. SENT’G COMM’N 2016) (illustrating how determinacy was put into effect by limiting the individual characteristics of a defendant that could be considered).

56. Stith & Koh, supra note 24, at 238. For example, one House proposal sought to require a judge to sentence a defendant to the "least severe" punishment appropriate, with a sentence outside the applicable guideline being a valid reason to depart from the Guidelines under this provision. H.R. 6012, 98th Cong. (1984). The Reagan administration and allies fought hard to oppose (and succeeded) this modest amount of discretion designed to fashion rehabilitative alternatives to prison. See Stith & Koh, supra note 24, at 259-68.
The difficulty was that neither the early versions nor the SRA endorsed any particular philosophy of sentencing. Instead, they "simply identified the four generally recognized justifications for criminal sentencing—retribution, deterrence, incapacitation, and rehabilitation—as factors for the sentencing court 'to consider'...."\(^57\) The only "guiding premise" was that rehabilitation "had fallen into disrepute among both liberals and conservatives" as early as the 1970s and the fact that the SRA was eventually passed on the heels of anticrime legislation—with a prevailing philosophy the exact opposite of rehabilitation—indicates that rehabilitation was likely the least purpose furthered by the eventual reform.\(^58\)

This presumption against rehabilitation is apparent in a few other substantive changes between bills.\(^59\) First, original versions of reform bills permitted sentencing judges to "consider . . . the nature and circumstances of the offense and the history and characteristics of defendants."\(^60\) A judge could consider such characteristics as age, employment, skills, community ties, and other relevant socio-economic factors.\(^61\) But this flexibility quickly lost favor, and the SRA eventually cautioned that "the guidelines and policy statements [regarding a sentence of imprisonment] [should] reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."\(^62\) As Stith and Koh remark, the result of this change was the "further confinement of the sentencing court's independent judgment regarding the proper criminal sentence in a case."\(^63\) Judges seeking to craft a just, personalized sentence—particularly with an eye toward considering any familial or broader social collateral effects of imprisonment\(^64\)—were generally deprived of this flexibility in the SRA's final

\(^{57}\) Stith & Koh, supra note 24, at 239 (citing S. 1437, 95th Cong. § 101 (1978)).

\(^{58}\) Id. at 240.

\(^{59}\) This is not to say that the goals that motivated rehabilitation were entirely case aside. Many reformers believed that sentencing could further rehabilitation, but many thought the means for doing so should be shifted to experts, commissions, and regulatory bodies—not judges. See, e.g., Karl Menninger, The Crime of Punishment (1968).

\(^{60}\) Stith & Koh, supra note 24, at 249 (first quoting S. 1437, 95th Cong. § 101, (1978); and then quoting S. 1772, 96th Cong. §101, (1980)).

\(^{61}\) Id.

\(^{62}\) Id. at 250 (quoting S. 1772, § 125).

\(^{63}\) Id. at 251.

\(^{64}\) Id. (first citing United States v. Johnson, 964 F.2d 124 (2d Cir. 1992); and then citing United States v. Alba, 933 F.2d. 1117, 1122 (2d Cir. 1991)) (adopting a downward departure in recognition of social effects of imprisonment). Sentencing courts today have interpreted the SRA as giving
It was yet another sign that reformers eventually grew skeptical of judges' ability to sentence according to rehabilitative principles even if the SRA did not explicitly reject this philosophy of criminal punishment. In fact, the eventual SRA included several provisions which seemingly sought to further incapacitation and deterrence against the backdrop of anticrime policy. Unlike earlier proposals, the SRA eventually endorsed a position that the commission should promulgate guidelines that merely took prison capacity into account instead of seeking to "assure" that the federal prison population would not grow as a result of any guidelines—an original aim of early reform efforts. Moreover, as enacted, the SRA explicitly endorsed substantial terms of imprisonment for serious crimes, including drug offenders and repeat violent criminals. Indeed, the later versions of the SRA added a subsection that basically operated "almost as a mandatory minimum statute, requiring a ‘term of imprisonment at or near the maximum term authorized’ for repeat violent offenders and drug offenders." Far from discouraging imprisonment, the SRA, as passed, morphed noticeably into a directive that endorsed a cold, discretionless calculus for a large slew of offenders who were the targets of the deterrence policy espoused by the Reagan administration's crime control measures. Even when judges did have discretion, later versions of the SRA expanded the definition of "illegal sentences” to include “not only those outside statutory limitations, but also those imposed in violation of duly promulgated regulations of the [Sentencing] Commission”—thereby shifting any discretion by regulatory fiat. An appellate court could easily use this standard to rationalize leeway to consider collateral consequences, which is an example of federal judges using statutory interpretation to adopt a different meaning from that assumed by those who passed the SRA. See, e.g., United States v. Thavaraja, 740 F.3d 253 (2d Cir. 2014) (recognizing the possibility of deportation as permissible collateral consequence to consider at sentencing). Federal courts in the immediate years after the SRA was passed recognized its restrictive characteristics. See, e.g., United States v. Williams, 891 F.2d 962, 967 (1st Cir. 1989) ("If the guidelines are to provide a coherent system of criminal sentencing, the trial court's right to depart up or down, must be restricted to those instances where some substantial atypically can be demonstrated.").
the illegality of any sentence when compared to the loose contours of any regulation or policy promulgated by the commission.\textsuperscript{71}

Stith and Koh note the irony that the Senate Report leading up to the passage of the SRA "continued to assert, as had its predecessor Reports [since the earliest days of reform], that the legislation 'provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines’" and that "the use of sentencing guidelines will actually enhance the individualization of sentences as compared to the current law."\textsuperscript{72} Nothing could be further from the truth. The SRA—as eventually passed and compared to earlier versions—was guided by value judgments that were deeply skeptical of judicial discretion in the context of sentencing. This view is clearly apparent from the contextual history of the SRA developed above (i.e., its origins when compared to the federal parole and emergence of anticrime policy) and has been wholeheartedly endorsed by federal courts as the outward purpose of the legislation.\textsuperscript{73} But for the present aim of this paper, the implicit value judgments at play are equally significant. Mistrust of judicial discretion was born out of a skepticism of the rehabilitation movement—a skepticism that judges were incapable of making the nuanced evaluations of individual defendants that could adequately take into account their unique circumstances and reform them properly.\textsuperscript{74} Instead, fear of biased and inconsistent sentencing pervaded during a time when such irrationality would be counterproductive to the deterrence of violent crime, which was on the forefront of public consciousness.

As such, scholars note that "it is clear that Congress desired a significant degree of rigidity and harshness in the sentencing guidelines" born out of the above context and leading to policy choices that shunned the use of personal

\textsuperscript{71} For example, in the immediate years following the SRA, appellate courts adopted three-step tests for determining when a trial court improperly departed from the Guidelines. The tests were open-ended and flexible, truly shifting discretion from trial courts to the Sentencing Commission vis-à-vis the Guidelines. See, e.g., United States v. Jackson, 903 F.2d 1313, 1316 (10th Cir.), \textit{reh'g}, 921 F.2d 985 (10th Cir. 1990). See also United States v. White, 893 F.2d 276, 277 (10th Cir.1990) (first citing United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir.), \textit{cert. denied}, 493 U.S. 862 (1989); and then citing United States v. Joan, 883 F.2d 491, 494-96 (6th Cir.1989)).

\textsuperscript{72} Stith & Koh, \textit{supra} note 24, at 273 (quoting S.Rep. No. 98-225, at 78, 52-53 (1984)).


\textsuperscript{74} See, e.g. FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981) (cited by the majority in Mistretta v. United States, 488 U.S. 361, 363-367 (1989)). Allen acknowledges much of the same trends described above and opines that the decline of the rehabilitation movement is attributable to "great impatience with discretion in sentencing; a great desire for something called certainty in sentencing; a great impatience with high levels of criminality; strong support for vigorous . . . law enforcement; strong support for the notion of mandatory minimum sentences; and a strong support for the elimination of parole all together." \textit{Id.} at 150.
characteristics in sentencing and severely decreased discretion for violent, serious, and drug-related crime.\textsuperscript{75} And although the SRA does not explicitly endorse a philosophy of punishment, it all but implicitly endorsed deterrence, especially violent and drug-related crime. Deterrence requires consistency and rationality in sentencing to work properly,\textsuperscript{76} and, as Stith and Koh observe, "it should come as a surprise to no one that in those areas where the statute is ambiguous or otherwise deliberately leaves important policy issues to the Commission, the Commission has generally chosen to increase the rigidity and complexity of its guidelines."\textsuperscript{77}

The Guidelines are the actualization and implementation of the SRA. Nevertheless, the Guidelines’ implementation of the SRA, and its potential aims according to the history above, have not remained static since 1984. Rather, their development, and that of federal sentencing statutes generally, still add further underlying principles of sentencing in addition to those precipitating the SRA’s passage.\textsuperscript{78} They must be reconciled with the view that rehabilitation has made a comeback.

B. Is Discretion Good or Bad?: The Evolving Values in Federal Sentencing.

In the decades following the passage of the SRA, including the continuous promulgation of the Guidelines, much has changed regarding the federal sentencing regime, arguably increasing the opportunity for judicial discretion. After \textit{Booker}, the Guidelines are no longer mandatory but are now advisory.\textsuperscript{79} Appellate courts now review sentencing decisions under the more “deferential

\begin{itemize}
\item \textsuperscript{75} Stith & Koh, \textit{supra} note 24, at 284.
\item \textsuperscript{76} “Deterrence presupposes rationality—it proceeds on the assumption that the detriments which would inure to the prospective criminal upon apprehension can be made so severe that he will be dissuaded from undertaking the criminal act.” United States v. Moore, 486 F.2d 1139, 1243–44 (D.C. Cir. 1973).
\item \textsuperscript{77} Stith & Koh, \textit{supra} note 24, at 284.
\item \textsuperscript{78} Interpreters of statutes should view them “as dynamic rather than static.” See Eskridge, \textit{supra} note 23, at 1018 (“Just as constitutional provisions evolve over time, so may statutes, through practical experience and dialogue. From the evolution, which itself reflects changed legal and social circumstances, the interpreter might extract general statutory principles.”). While textualists might scoff at this view, the sentiment applies in the context of the Guidelines—which are actually promulgated and change over time by the Commission.
\item \textsuperscript{79} United States v. Booker, 543 U.S. 220 (2005). At the state-level, \textit{Blakely v. Washington} had anticipated \textit{Booker} in finding that judges, under the Sixth Amendment, could not increase sentences beyond the statutory maximum based on facts not presented before a jury. 542 U.S. 296 (2004).  
\end{itemize}
abuse of discretion standard,”\(^8^0\) allowing sentencing judges more leeway to use the freedom afforded by Booker to depart from the Guidelines.\(^8^1\) And countless other exceptions and nuances have arguably made a “mess” of the clear-cut determinacy envisioned at the inception of sentencing reform.\(^8^2\)

The effect of these changes has led to some inconsistent trends. On the one hand, as early as 2012, there was evidence that roughly 80% of sentences tended to be within the Guidelines, with the influence of the Guidelines being most pronounced in the cases of drug trafficking, firearms, and certain career criminal cases.\(^8^3\) But subsequent studies suggest a steady increase in inter-judge sentencing disparity since Booker and its progeny.\(^8^4\) While this disparity could result from differences between circuits, demographics, and political values between judges, or even increased prosecutorial discretion,\(^8^5\) it appears that disparity has at least increased by a measurable degree while also coinciding with an increase in sentence length and prison population.\(^8^6\) Given that the original purpose of the SRA and Guidelines was to reduce disparity by introducing objectivity into the sentencing process, these trends should give the legal


\(^{81}\) In fact, it is not necessarily an abuse of discretion for sentencing judges to depart from the Guidelines “based solely on policy considerations, including disagreements with the Guidelines.” Kimbrough v. United States, 552 U.S. 85, 101 (2007).


\(^{84}\) See Crystal S. Yang, Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker, 89 N.Y.U. L. Rev. 1268, 1334-35 (2014) (finding that “increased interjudge disparities persist even after excluding cases in which mandatory minimums were charged, suggesting that judges are not completely anchored to the Guidelines. These findings raise large equity concerns because the [assigned sentencing judge’s identity] contributes significantly to the disparate treatment of similar offenders convicted of similar crimes.”); Ryan W. Scott, Inter-Judge Sentencing Disparity after Booker: A First Look, 63 Stan. L. Rev. 1 (2010) (similar findings).

\(^{85}\) See Yang, supra note 84 at 1305-26 (describing the explanation for disparity).

community pause for many of the same reasons that initiated reform. For present purposes, it calls into question the values which underscore the sentencing regime as it has developed over time.

The apparent tension between the original intent of the SRA and the post-Booker effects has reinvigorated debate on the value of discretion in federal sentencing. Some commentators have bashed the “mechanical legisprudence” of the Guidelines, arguing that “judicial discretion is not an evil in itself, but instead, a means to ensure the punishment fits both the offense and the offender.” These scholars would not necessarily rid the federal system of the Guidelines, but would instead have them “present a presumptive sentence” of a crime, informed by certain paradigms, and allow judges the flexibility to look at personal characteristics and circumstances—something expressly forbidden in the original formulation of the SRA—to calibrate the just punishment. In fact, advocates of this approach have again embraced the incorporation of restorative justice and rehabilitation as main aims of the sentencing regime, arguing that it supports more suitable results—for the defendant, victims, and society alike.

Those criticizing the post-Booker trend of disparity echo many of the same concerns which spurred reform: that bias pervades and sentencing boils down to the temperament of any particular trial judge. But increasingly, defenders of the strict adherence to the Guidelines argue that they are a product of a compromise between branches of government, which delegated, via the SRA, the complex task of balancing the various competing aims of sentencing to a regulatory body (i.e., the Commission) according to “its attributes, real or imagined, of regularity, rationality, and impartiality.” Much in the way


89. Supra Part II, A.

90. Luna, supra note 88, at 101.

91. Id. at 104 (citing Erik Luna & Barton Poulson, Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?, 37 McGEORGE L. REV. 787 (2006)).

92. See, e.g., Schwarzschild, supra note 6, at 104-105 (describing potential biases and “[m]istrust of federal judges was surely animated on the one hand by the idea that judicial discretion invited abuse, specifically that it invited improper discrimination, especially racial discrimination.”).

93. Id.
administrative law justifies deference to executive agencies due to their expertise and technical skill in a matter, these advocates draw the same parallel with the sentencing Commission’s delegation of the duty for developing Guidelines to ensure consistency in sentencing. This deference to the Guidelines, and the consistency it fosters, are especially important in relation to federal criminal law, which crosses state lines and, by its nature, demands a level of uniformity beyond that expected of state criminal law.

All told, the values underlying sentencing today have grown hazier since a desire for rationality and objectivity coalesced into the SRA. But one scholar advances an informative way to think about the evolution of federal sentencing, this time focusing on the concept of uniformity. Michael O’Hear agrees with the historical view described above that the SRA, when passed, seemed to advance “an effort to implement deterrent, incapacitative, and harm-based desert approaches to sentencing.” While these approaches sought uniformity in sentencing, O’Hear’s interpretive move is to suggest that the original intent of the SRA was more nuanced by seeking “to eliminate unwarranted sentencing disparities, but also to provide for warranted disparities.” In other words, the ends of sentencing can be clearly discerned from the legislative history of the SRA and its progeny of case law, but the means for achieving those ends are built upon a fundamental intellectual disagreement about the core principle underlying the sentencing guidelines: uniformity. O’Hear develops the intellectual history of two

94. In fact, early cases challenged (unsuccessfully) the Commission on non-delegation grounds, a common issue in administrative law. Mistretta v. United States, 488 U.S. 361, 374 (1989) ("Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."). Early reformers had great confidence in a regulatory solution to sentencing and "melded the anger and eloquence of radical criminology with a liberal, rationalist sensibility, embodying an implicit faith in the ability of representative legislatures and well-informed experts to ameliorate the social problems of crime and punishment." Michael M. O'Hear, The Original Intent of Uniformity in Federal Sentencing, 74 U. Cin. L. Rev. 749, 763 (2006).

95. See Schwarzschild, supra note 6, at 104 (arguing that an "erosion of trust in public institutions" has supported the creation of technical, bureaucratic bodies like the Commission).

96. Id. at 105 (citing Jeffrey S. Sutton, An Appellate Perspective on Federal Sentencing After Booker and Rita, 85 Denv. L. Rev. 79, 91 (2007) ("Any long-term effort to respect the virtues of individualized sentencing and consistency should account for the role that the federalization of crime has played in creating the problem ... While Ohio has no obligation to sentence those who commit drug offenses within its borders consistently with those who do the same in North Dakota, Congress does have such an obligation."). The push to re-codify federal criminal law, supra, is still relevant.

97. O’Hear, supra note 94, at 798.

98. Id. at 749 (emphasis added).
competing paradigms about uniformity, which clarify the enduring values of sentencing reform today.

The first paradigm focuses on “uniformity as purpose-driven sentencing.”\(^99\) “It requires that all defendants be sentenced so as to advance an explicitly identified purpose or set of purposes of punishment.” The goal is rationality, which lends legitimization to the sentencing process.\(^100\) The second paradigm is identified as “uniformity as predictable sentencing,” which “focuses not on the analytical process, but on the outcome: the final sentence imposed should match pre-sentencing expectations.”\(^101\) Clearly, both paradigms are reflected by the history developed above. Rationality in sentencing—no matter which philosophy of punishment it ultimately supports—can be viewed as a product of the concerns about bias in sentencing, as well the technical trust the SRA put into a quasi-administrative body like the Commission. Whereas predictability echoes the SRA’s favor toward deterrence, particularly against the types of violent crime contextualizing the anticrime sympathies which galvanized support for reform, O’Hear posits that while these paradigms are not necessarily in tension with each other, they can point in different directions. He notes:

Consider first how a uniformity system would be structured under the predictability paradigm. First, predictability would prefer bright-line rules to standards. Second, predictability would prefer to minimize the number of sentencing factors. Third, predictability would disfavor the use of subjective offense characteristics (mens rea, motive, and the like), as well as other sorts of factors that would require the sentencer to draw inferences or make value judgments (disadvantaged upbringing, prior good works, and the like). Fourth, the pre-offense version of predictability would disfavor the consideration of unforeseeable consequences, cooperation, and other post-offense occurrences.

These preferences may be reconciled with the purposes paradigm, but only if the authorized purposes are narrowly circumscribed...Tensions arise under different or more expansive views of purposes. Desert models, for instance, typically place considerable emphasis on subjective offense characteristics. Broader utilitarian approaches support the consideration of a

\(^99\) See id. at 791 (describing how this paradigm originated with a Yale workshop, which ultimately inspired Senator Kennedy’s early sentencing reform bill); see also PIERCE O’DONNELL, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 27 (1977) (the Yale proposal endorsing a purpose driven sentencing).

\(^100\) O’Hear, supra note 94, at 791-92.

\(^101\) Id. at 793. See also Sheldon A. Evans, Categorical Nonuniformity, 120 COLUM. L. REV. 1771, 1801 (2020) (“Uniform application also benefits people by giving them reliable notice.”).
host of factors, including cooperation benefits and the effects of a sentence on third parties, such as children and spouses.\textsuperscript{102} It appears that the post-\textit{Booker} sentencing regime, with its increased discretion to judges, as well as the growing choir of scholars who believe increased sentencing discretion is valuable by endorsing “more expansive views of punishment,” have accentuated these tensions between paradigms.\textsuperscript{103} As such, the trend “seem[s] to point in the direction of unpredictability: large numbers of case-specific factors, subjective determinations by the sentencer, prudential balancing of purposes, important post-offense contingencies, and so forth.”\textsuperscript{104} This unpredictability certainly seems confirmed by some of the studies cited above. O’Hear responds by arguing that a third paradigm should be substituted as sentencing reform’s guiding value,\textsuperscript{105} but proposed solutions do not change the fact that the pre-\textit{Booker} regime more apparently valued the predictability paradigm, whereas the post-\textit{Booker} regime seems to favor more subjective theories of punishment, like rehabilitation, which encourages unpredictability amidst an ever-growing Guidelines designed to encourage predictability.

The challenge, then, is to discern any overarching value judgments about the current sentencing regime which can encompass the conflict between the SRA’s original values and those evidenced by its recent history in a way that authentically serves as a basis for interpretive construction without disclaiming the use of legislative history, purpose, or the original intent of the SRA.\textsuperscript{106} In this regard, H.L.A. Hart’s theories about punishment might be the most instructive, as well as most reflective of how state statutes address the challenge.\textsuperscript{107} Years before sentencing reform began in earnest, Hart argued that any system of punishment must “both state the general aim or value its maintenance fosters” and also espouse certain “principles limiting the unqualified pursuit of that aim

\begin{enumerate}
\item 102. O’Hear, \textit{supra} note 94, at 795.
\item 103. \textit{Id.} at 801 (describing how the opinions in \textit{Booker} hew to the different paradigms of disparity and analyzing how \textit{Booker} ultimately moved way from predictability).
\item 104. \textit{Id.} at 795.
\item 105. O’Hear argues that early reformers “presented uniformity as a matter of fairness to defendants…the system subjected defendants to the unchecked power of another individual, the judge, who might exercise power in malicious or capricious ways.” \textit{Id.} at 805. Thus, O’Hear’s theory is that advancing the dignity of the defendant is the underlying value of the sentencing regime. \textit{Id.}
\item 106. For example, a textualist might argue that the messy development of the sentencing regime only supports the futility of trying to discern some underlying purpose. A purposivist might retort that the caselaw and evolving nature of the Guidelines make the words of the SRA, and the Guidelines, unhelpful guides when interpreting meaning of any particular sentencing statute or regulation.
\item 107. \textit{See} Hart, \textit{supra} note 21, at 8-12.
\end{enumerate}
or value.”

Hart imagined that these limiting principles would be most flexible and adaptive to change over time because they would be the product of reflection from social institutions (like legislative bodies) that “possess a plurality of features which can only be understood as a compromise between partly discrepant principles.”

Although Hart was writing primarily within the British legal tradition, he seems to have anticipated many of the underlying conundrums presented above. Namely, there could be an overall—and most appropriately utilitarian—purpose for sentencing endorsed by a statutory scheme, but there would need to be some mechanism whereby rules for personalized moral ethics could be disseminated for application to any particular defendant. These limiting principles would be “informed by a commonsense scale of gravity.” Hart imagined that there would be no apparent tension between the general aim and the limiting principles so long as the ground for treating defendants who committed the same crime differently was linked only to “some personal characteristic of the offender connected to the commission of the crime” or “the effect of the punishment on him.”

Therefore, Hart’s framework provides the requisite lingua franca—and a structure for the paradigms demanded by critics of sentencing rigidity—for extracting interpretive values from the current sentencing regime that are compatible with conflicting trends about discretion. Early reforms recognized Hart’s influence in this way by endorsing this “hybrid approach” to a sentencing regime’s values “that would attempt to balance all objectives of sentencing” through general aims modified by limiting principles. The historical context and original intent of the SRA—with its focus on objectivity, deterrence, and anticrime principles—are the guiding principles upon which all interpretive applications should begin. Federal sentencing and the Guidelines should be interpreted to support these original aims of sentencing reform. And in the words of commentators who have studied the underlying values of the SRA, this view


109. Id.

110. Id. at 9-12 (agreeing with Jeremy Bentham that utilitarian theories of punishment, namely deterrence and incapacitation, are the more proper aims of a general principle of punishment compared to more subjective theories like rehabilitation or just deserts).

111. Id. at 25.

112. Id. at 24. This aim was not always met given the nature of real-offense sentencing.

means that the relationship between “the seriousness of the offense” and incapacitation of a defendant “for periods of appropriate risk” should be front of mind.\textsuperscript{114} Thus, the paradigm of “uniformity as purpose-driven sentencing” is encapsulated by this guiding aim toward utilitarian rationality, deterrence, and the anticrime goals articulated above. And the paradigm of “uniformity as predictable sentencing” is encapsulated by the fact that these utilitarian purposes lend themselves to predictable outcomes compared to subjective aims like rehabilitation or just deserts.

O’Hear’s concern about more expansive sentencing purposes being represented by post-Booker developments of “warranted disparity” is mitigated by Hart’s framework for limiting these principles. There is a social institution (i.e., the Commission), which by function of its nature as a quasi-legislature / administrative body, possesses “the requisite plurality of features” necessary to balance any principles important to society in a given moment.\textsuperscript{115} As long as there is enough rationality to how these limiting principles can be applied, then it is possible to support “the hazy requirement that all cases be treated alike” even while individualizing sentences and fostering disparity.\textsuperscript{116} In this sense, the so-called “bureaucratic takeover of sentencing” is well-conceived and supports the original purpose of rationality in sentencing, even in a post-Booker world. The ever-expanding Guidelines serve as a chronicle of society’s evolving “commonsense scale of gravity” regarding crimes.\textsuperscript{117} The Commission deliberates and reforms the Guidelines to encompass a calculated, objective reflection of the justifying aim of the SRA and the scale of moral gravity for any given crime (in any given societal moment). The post-Booker discretion allows judges to pursue warranted discretion within whatever rationality articulated by this framework / Guidelines so long as the consideration of personal characteristics are, as Hart suggests, strictly limited to the commission of the crime and the effect of punishment on a particular defendant.\textsuperscript{118} After all, Hart envisioned rehabilitation in this limiting role—rather than as the guiding principle of sentencing—because “reform can only have a place within a system of punishment as an exploitation

\textsuperscript{114} See generally Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 AM. CRIM. L. REV. 19, 84 (2003) (developing the underlying principles of the SRA and Guidelines in a similar fashion to this article, but before most of the post-Booker developments. The author also implies the superiority of Hart’s approach).

\textsuperscript{115} Hart, supra note 108, at 10. Admittedly, whether the Commission truly meets this purpose is a whole other debate. But it was certainly conceived with this goal in mind. See generally Schwarzschild, supra note 6, at 97-98.

\textsuperscript{116} Hart, supra note 108, at 24.

\textsuperscript{117} Id. at 25.

\textsuperscript{118} Id. at 24.
of the opportunities presented by the conviction or compulsory detention of offenders." And such rehabilitation is, by nature, individualized.

Consequently, if the values of the federal sentencing regime are conceptualized according to Hart's framework, the apparent conflict between the original aims of the SRA and the disparity which has perpetuated since Booker can be rationalized into guiding principles consistent with the theories of Hart and O'Hear. More importantly, these principles do not necessarily require a court interpreting the SRA or Guidelines to favor textualism, purposivism, or any other theory of interpretation. The principles themselves—within Hart's framework—can support any theory which best advances those aims. That theory, namely textually constrained purposivism, is articulated in full in Part V, but it is founded upon the critical guiding principles synthesized for easy digestion below.

C. Synthesis of Guiding and Limiting Principles

(1) The guiding principle of the federal sentencing regime is primarily utilitarian. The debates, compromises, and historical context precipitating the SRA reflect a commitment to deterrence and incapacitation, which are supported by the objectivity advanced through the Guidelines. Any interpretation of the sentencing regime should recognize or forward these utilitarian values, at least to a degree.

(2) This utilitarian guiding principle is most secure in the context of violent and drug crimes given the anticrime historical context, which eventually moderated and propelled passage of sentencing reforms. In other contexts, individualized limiting principles can have more sway, particularly if incapacitation is implicated, given the more recent concerns about undue incarceration (and its societal effects).

119. Id. at 26.

120. It also aligns with other critiques of punishment theory—namely, that the traditional theories of punishment do not adequately address the conceptional debate over who is actually harmed by crime. See generally Kenworthey Bilz & John M. Darley, What's Wrong with Harmless Theories of Punishment, 79 CHI.-KENT L. REV. 1215 (2004) (describing how utilitarian and retributivist theories align and diverge in their treatment of criminal harm and calling for a reframing of the punishment debate according to harm). Hart's framework allows this harm theory to play out within the limiting principles articulated by the Commission because the Guidelines can reflect social institutions' changing perceptions about harm caused by a particular crime.

121. This principle preserves the original intent of the SRA, as well as the paradigm of punishment that hinges on predictability and a semblance of objectivity to support the rule of law.

122. This principle reflects the historical context which precipitated passage of the SRA—namely, deterrence of violent and drug crime and the belief that objectivity furthered that end. But it also recognizes that since Booker, disparities are most appropriate with regard to other types of crimes, particularly as concerns about increased incarceration rise.
(3) Objectivity and rationality remain critical to prevent political or other biases. The Commission was conceived in the mold of a technical, bureaucratic quasi-legislative body designed to capture society’s evolving sense of penal gravity while also balancing a plurality of opinions about sentencing. As such, the Commission’s pronouncements (i.e., the Guidelines) can function as legitimately articulating instances in which judges can consider individualized circumstances when crafting sentences. Judges can even depart from the Guidelines, but the underlying value supporting objectivity requires that the sentencing regime nevertheless comports with any implied or explicit rationality articulated by them. In other words, the Guidelines are the vehicle through which limiting principles are considered and articulated according to societal norms captured by the semi-deliberative process.123 Adherence to the text of those considerations is therefore preferred, with interpretive departures being justified only insofar as the rationale behind any particular provision is still supported.124

(4) Individualized circumstances, including rehabilitative aims, can include a focus on personal characteristics. But any such consideration must be connected to the commission of the crime or the effect of punishment on a particular defendant. Thus, the federal sentencing regime should not necessarily endorse the consideration of broad (societal) collateral consequences when fashioning sentencing rules.

These principles will become more apparent when applied in Part IV. But it is important to emphasize for clarity that these are not principles that a judge should necessarily consider when sentencing any particular defendant. The text of the Guidelines serves as the compass rose for the individual federal judge. Rather, these principles are applicable when a federal court is faced with an interpretive problem or ambiguity concerning a provision of the SRA, Guidelines, or a federal sentencing statute generally, much in the way the circuit splits illustrate in Part IV. Here, a federal court is tasked with applying certain canons of interpretive construction to resolve ambiguity. This paper contends that the decision to use certain canons or interpretive rules should be informed by the principles developed above. Some work better than others to forward the aforementioned values, and some work better only in certain contexts. As such, the next task is to lay out the typical constructive tools at the disposal of any

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123. Whether the Guidelines are the right vehicle for articulating these social norms is another question. See Luna, supra note 88, at 40 (describing the Guidelines as “Kafkaesque”). But currently no viable alternative exists which can also support some objectivity and consistency in sentencing.

124. This limiting principle preserves the administrative, bureaucratic function of the Commission as a social institution responsible for representing changing social mores by disseminating Guidelines, while also requiring a degree of rationality that serves to curb the potential of undue disparity.
federal court when faced with ambiguity so that an informed application of these principles can be made.

III. THE CURRENT MODEL FOR INTERPRETING CRIMINAL STATUTES

A federal court faced with an interpretive problem typically begins with the text of the statute or regulation. The Supreme Court has hewed closely to this first textualist step, commonly finding that "in interpreting a statute, '[a court's] inquiry must cease if the statutory language is unambiguous' . . . and 'the statutory scheme is coherent and consistent.'"\(^{125}\) In other words, where the plain meaning of a text is clear, that meaning must win out, even if contrary to any purported legislative purpose or regulation. But when there is ambiguity in the plain meaning,\(^ {126}\) a court has several tools at its disposal.\(^ {127}\) First, a court can deploy linguistic canons of construction to determine whether semantic or contextual rules of thumb can ascertain the proper meaning of a contested provision. Also, a court can deploy relevant substantive canons of construction to determine if certain value judgments demand a particular outcome. When interpreting criminal law, several substantive canons must be applied where relevant usually in support of notions of fair notice and due process. Second, depending on the applicable theory of statutory interpretation (and there are many variations on common theories), a court can look to extratextual sources for clarity or even to justify the presence of ambiguity in the first place. Although these tools present certain unmovable rules, they generally permit a court flexibility and discretion when interpreting ambiguity. As such, what follows are the most common models for interpreting statutes and regulations in the criminal context.

A. Linguistic and Substantive Canons of Construction

Focusing on the text of a statute or regulation, the linguistic canons of construction are often the first tool for courts facing an interpretive problem. These canons employ generalizations about the English language, including syntax and grammar, to inform how to best interpret ambiguity. Some canons focus on semantic or contextual language conventions. For example, the

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126. The permissible origin of any ambiguity—whether linguistically or in references to extratextual sources—is a matter of debate. But see Exxon Mobil Corp. v. Allapatah Servs. Inc., 545 U.S. 546 (2005) (featuring disagreement among the Court and the dissenters over how ambiguities in the relevant statute should be read).

127. See, e.g., United States v. Nadar, 542 F.3d. 713, 717 (9th Cir. 2008) ("If the terms [of a statute] are ambiguous, [a court] may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history.")
expressio unius canon states the common-sense rule that “the expression of one thing implies the exclusion of others.” Likewise, the ejusdem generis canon directs that “where words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.” Other canons are more prudential and substantive: for example, competing interpretations that place the statute’s constitutionality in doubt, or which would alter the common law, are generally disfavored.

All told, there are dozens of linguistic canons courts can deploy in civil and criminal cases alike to discern the preferred meaning of a disputed text. But these canons have long been the subject of critique, often because there are frequently “two opposing canons on almost every point.” Critiquing the semantic canons, scholars suggest that the canons either rest on false assumptions about the legislative process or otherwise encourage discretion by permitting a judge to advocate for her preferred meaning using whatever canon that could facilitate the end result. Nevertheless, these linguistic canons are continually used by federal courts interpreting statutes or regulations. The canons serve as “common sense or practical wisdom” to judges taking up the unenviable task of discerning a legislator’s plain intent.

When interpreting federal criminal law, courts will often “exhaust[] the applicable semantic and contextual canons of construction,” delving deep into dictionary definitions and textual analysis to “seize everything from which aid can be derived” before turning to substantive rules of construction. Even so, there is a noticeable trend of skepticism among courts who seek to apply these canons to interpreting the criminal law. Many acknowledge a “back-and-forth, tennis-matchish analysis” between competing semantic interpretations that hardly solve

129. Id. at xiv.
130. Id. at xiv–xv.
131. Id. at xi–xvii.
133. See Richard A. Posner, Statutory Interpretation— in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 805-18 (1983) (describing how unrealistic and contradictory the linguistic canons can be). See also Part IV for an example of how canons can be inconsistently deployed.
135. United States v. Caniff, 955 F.3d. 1183, 1191 (11th Cir. 2020) (citing Ocasio v. United States, 136 S. Ct. 1423, 1434, n.8 (2016)).
the interpretive problem at hand. Indeed, the general rule that criminal statutes should be narrowly construed seems to explain why many courts would be skeptical of such elastic canons that can often come in conflict with each other or competing interpretations. Consequently, federal courts often turn to key substantive canons of construction in the criminal law, which "are born out of a principle that the law 'must speak in language that is clear and definite' if it is to render something a crime." These substantive canons direct courts to favor a particular interpretation of a statute or regulation that advances some important value. In the realm of criminal law, the rules of lenity, legality, and overbreadth are the predominant (and interrelated) canons that often guide courts.

The rule of lenity stands for the proposition that, between two equally plausible interpretations of an ambiguous criminal statute, the interpretation which most favors the defendant should be privileged. The principle derives from two policies long supported in the common law. First, criminal law should provide fair notice to the world about behavior that is outlawed, and such warning can only be fair insofar as it is communicated clearly. Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should define criminal activity." These values demand a lenient interpretation of criminal edicts when ambiguity compels a court to question a legislature's meaning. A lenient interpretation neither deprives a defendant of fair notice, nor replaces the legislative function by

136. Id. See also, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."); U.S. v. Nishiie, 421 F. Supp. 3d 958, 963 (D. Haw. 2019) (featuring an extensive analysis of a criminal statute using semantic canons, ultimately finding that semantic canons of construction are often "in conflict."); United States v. Rabb, 680 F.2d 294 (3rd Cir. 1982) ("Although the literal meaning of words chosen by Congress is respected, we no longer follow a rigid, semantic approach to statutory construction.").

137. See Dunn v. United States, 442 U.S. 100, 112 (1979) (describing the rule of narrow construction).

138. Caniff, 955 F.3d. at 1191 (quoting United States v. Phifer, 909 F.3d 372, 383 (11th Cir. 2018)).


140. See id. at 348 ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear." (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

141. Id. at 348. (citing HENRY J. FRIENDLY, Mr. Justice Frankfurter and the Reading of Statutes, in BENCHMARKS, 196, 209 (1967) (describing how there is "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.").
allowing the judiciary to legislate from the bench. After all, if a federal court is
drawn into a labored analysis of the meaning of a statute or regulation, it can
hardly be expected that a typical defendant would be on any clearer notice about
outlawed behavior or the consequences of criminal behavior.

Relatedly, the rule of legality rests on this concept of fair notice and the role
of the judiciary. "It means that criminal liability and punishment can only be
predicated on a prior legislative enactment that states what is proscribed as an
offense in a precise and clear manner." If the criminality of a statute or
regulation cannot be discerned clearly enough, then it is void under this legality
principle. But if there are several possible interpretations, then the rule of lenity
applies, and the ambiguous provision is interpreted in the interests of the
defendant.

Finally, these rules of leniency and legality overlap with the doctrine of
overbreadth, which stands for the rule that a criminal statute is impermissibly
overbroad "when its language, given its normal meaning, is so broad that [its]
sanctions may apply to conduct which the state is not entitled to regulate." Usual
examples include overbroad criminal statutes that infringe on First
Amendment rights. But the overbreadth doctrine can extend to any statute
that implicates "a substantial amount of constitutionally protected conduct,"
which is often the case when a statute's bounds are vague. Indeed, "vagueness
of a law affects overbreadth analysis" such that when the rules of leniency and
legality are implicated, concerns of overbreadth can be an appropriate avenue of
scrutiny for a court evaluating potential interpretations of a statute.

There are many nuances and well-developed case law for how a court
interprets challenges to leniency, legality, and overbreadth. But the underlying
rationale for each substantive canon will inform how a court goes about
interpreting an ambiguous or vague criminal statute—namely, whether fair
notice and due process are met. Additionally, a court might interpret a statute
according to other well-known rules of thumb. For example, the distinction

142. John F. Decker, Addressing Vagueness, Ambiguity, and Other Uncertainty in American
Criminal Laws, 80 DENV. U. L. Rev. 241, 244-45 (2002).

143. Id.

186 N.W.2d 245 (Wis. 1971)).


147. Id. at 494 n.6.

148. See Decker, supra note 142, at 284-327 (describing the substantive canons in detail).
between *malum prohibitum* (conduct considered wrong by virtue of positive law) and *malum in se* (inherently wrong conduct) is often relevant to analyzing ambiguous or vague statutes. Even if a criminal statute is ambiguous, a defendant is afforded less leeway for conduct that is inherently wrong. Conversely, an interpretation that adheres to more precise language is often preferred when constitutional rights are implicated, much like the rationale for the overbreadth doctrine. Courts sometimes even infer a duty of caution when applying these substantive canons as evidenced by Justice Frankfurter's belief that "it is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even caution, provided that there is sufficient warning to one bent on obedience." In other words, an interpretation of a statute might not be impermissibly vague or ambiguous if an otherwise reasonable defendant might have received sufficient notice of criminality had she exercised sufficient caution. Thus, like the semantic canons of construction, courts have applied the substantive canons in an equally laborious, sometimes inconsistent way. Any particular logic to the analysis is often informed by the various theories of statutory construction.

### B. Theories of Statutory Construction and Relevance to Criminal Law

How courts apply canons of construction and from where they discern statutory meaning are often informed by competing theories. Despite the variety of theories, it is widely held that "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." But when there is tension between the "letter" and "spirit" of a statute—or ambiguity as to the meaning of its words—courts will analyze, explicitly or implicitly, an interpretive problem according to several commonly held theories of statutory

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149. See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965) (analyzing vague provisions through a lens of specificity when constitutional rights are implicated).


151. See, e.g., Nash v. United States, 229 U.S. 373, 377 (1913) ("The law is full of instances where a man's fate depends on his estimating rightly... the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested more a circumspect conduct.").

construction. These theories include: the classical approach, new textualism, textually-constrained purposivism, and dynamic statutory interpretation.

The classical approach, exemplified by *Holy Trinity Church v. United States*, endorses a purposivist understanding of statutory interpretation. The theory derives from the view that "a statute without an intelligible purpose is foreign to the idea of law and is inadmissible." As such, an interpreter needs to first "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then ... [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can." Purpose can be discerned from legislative history, the title of the act, the motive or remedy of the statute, the overall structure of the statutory scheme, and even the societal values endorsed implicitly or explicitly by the statute. Overall, this approach always privileges the spirit of the law when it comes into conflict with the plain meaning of a statute. Consequently, courts that take this approach will almost always first engage in a thorough analysis of extratextual and contextual sources to discern the purpose of a law and compare it to the text to determine whether there is consistency. If there is inconsistency, then purpose wins out. The utmost aim of this approach is to advance coherence in the law.

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153. See, e.g., Eyston v. Studd, (1574) 75 Eng. Rep. 688, 696, 700 (K.B.) (Plowden's note) ("[I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason is the soul of the law.").

154. As framed by JOHN F. MANNING AND MATTHEW C. STEPHENSON IN *LEGISLATION AND REGULATION: CASES AND MATERIALS* (2d ed. 2013). There are certainly other ways to categorize competing theories of statutory interpretation, but they all generally fall within a continuum from strict textualism to purposivism.

155. 143 U.S. 457 (1892).


157. Id.

158. See generally *Holy Trinity Church*, 142 U.S. at 465-67 (describing the sources for discerning intent).

159. See, e.g., Pub. Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989) (Kennedy, J., concurring) ("It comes as a surprise to no one that the result of the Court's lengthy journey through the legislative history ... ").

160. "Since a statute forms a part of a larger intellectual system, the law as a whole, it should be construed so as to make that larger system coherent in principle." RONALD DWORKIN, *LAW'S EMPIRE* 19 (1986). This view seemingly empowers the judiciary to align the 'purpose' of generations of legislation into an overarching theme. See id.
But this pure purposivism has suffered significant critique, generally because it can promote unfettered judicial activism.\textsuperscript{161} Justice Kennedy wrote that the classical approach should be abandoned because “it does not foster a democratic exegesis for [courts] to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which [courts] are more comfortable.”\textsuperscript{162} Indeed, the competing theory of new textualism opposes pure purposivism because the language of a statute “is a consequence of a compromise”—that is, the deliberative process of legislating led to the selection of specific provisions.\textsuperscript{163} New textualists, therefore, justify their approach because the “application of ‘broad purposes’ of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.”\textsuperscript{164} The conception of broad purpose is also critiqued under the theory that legislative purpose is often malleable, subjective, and multifaceted given the variety of reasons (perhaps unknowable) that can motivate a legislature to make law. Accordingly, the new textualist approach is to stick consistently to what is apparent: the plain meaning of statutory text—informed by necessary semantic and substantive canons—and forgoing any attempt to ascertain the legislative purpose, including the use of legislative history to supplement the plain meaning.\textsuperscript{165}

New textualism has achieved widespread acceptance in this way insofar as it has influenced the widely held view that where the plain meaning of a statute is clear, then that meaning controls.\textsuperscript{166} But if there is ambiguity, the theory of textually-constrained purposivism encourages a court to look to extratextual sources, including legislative history, to ascertain the purpose of a statute to inform an interpretation of its correct meaning.\textsuperscript{167} This approach derives from a view that “Congress legislates at different levels of generality and that the resulting differences reflect evident choices about how much discretion to leave


\textsuperscript{162} Pub. Citizen, 491 U.S. at 473 (Kennedy, J., concurring).


\textsuperscript{166} See supra, notes 163 & 164.

judges and administrators. Through word choice, Congress essentially sends signals to an interpreter. "A precise and specific command signals an implemental purpose to leave relatively little discretion to the law's interpreter. An open-ended and general one signals the opposite." This theory of interpretation thus privileges the text of a statute in ways that classical purposivism does not, but it challenges the interpreter to analyze the statutory text to determine if ambiguity exists by design — thus inviting the interpreter to take into account purposivist sources that might resolve the ambiguity. Some even suggest that the context surrounding a provision can serve this function. Overall, this theory of statutory interpretation is a limited version of classical purposivism anchored in the text, but one which still utilizes many of the extratextual sources that textualism disclaims.

A more expansive version of modern purposivism is the so-called dynamic theory of statutory interpretation. This theory focuses on the fact that laws are enacted in fixed moments in time, and the role of the interpreter is to adapt the intent of the statute to changing circumstances. William Eskridge likens the interpreter to the principal-agent relationship:

Like the relational agent, the judge is the subordinate in an ongoing enterprise and follows the directives by the legislature. . . the legislature will often speak on a specific question just once, leaving it to the judge (agent) to fill in the details and implement the statute in unforeseen situations over a long period of time. Like textually-constrained purposivism, a judge following this theory will ascertain whether the legislature is addressing an issue with specific or general intent, often by starting with the plain meaning of the statute. Where the legislature speaks specifically, that intent will be preserved. But where the statutory scheme implies a general intent, the judge will have more leeway to fashion an interpretation which comports with the general purpose of the law—much like a classical purposivist. In other words, dynamic statutory interpretation invites a range of leeway to the interpreter depending on the intent of the legislature. Unlike textually constrained purposivism, however, whether the legislature is speaking with specific or general intent as to the

168. Id. at 118.
169. Id. at 116.
172. Id. at 125.
173. Id.
mutability of a statute’s meaning can be inferred from all sources, whereas textually-constrained purposivism focuses on the semantics of the words chosen as the primary signal that Congress is inviting judicial discretion to align meaning with extratextual purpose.

Between these four theories of statutory interpretation, courts will approach any interpretive problem along a spectrum varying from pure purposivism to strict textualism. No one theory necessarily lends itself to criminal law, at least on the surface. For example, the underlying rationale supporting the rules of lenity and legality—namely, fair notice and the role of the democratically accountable legislature in formulating punishment—would seemingly support new textualism because its commitment to deriving meaning from plain language, not extratextual sources beyond the view of the average citizen. That might be the case regarding the substantive criminal law, but it does not necessarily extend to all the nuances associated with a criminal statute. For example, in United States v. Bass, the Supreme Court interpreted an ambiguous provision in the 1968 Omnibus Crime Control and Safe Streets Act which dealt with whether simply “possessing” or “receiving” a firearm triggered an “in commerce or affecting commerce” provision that permitted additional punishment. The Court, and those justices in dissent, looked to legislative history and extratextual sources to discern meaning. Federal criminal statutes like the Safe Street Act are detailed enough to give rise to many of these definitional ambiguities which do not necessarily implicate the traditional elements of an offense.

Overall, and despite the variety of approaches, the above discussion illustrates that there is still a general structure to interpreting criminal statutes. An interpreter starts with the plain meaning of the text, resolves apparent ambiguities with canons of construction, and can turn to extratextual sources depending on the theory of statutory interpretation. But while there are concrete rules of thumb, especially exemplified by the substantive canons of construction, the available tools developed above are replete with contradictions and conflicts among approaches. This variety makes it difficult to develop a concrete model for interpreting substantive criminal law beyond the general framework developed above. Indeed, this variety is buoyed by the variety characteristic of federal criminal law itself, which to this day invites re-codification efforts similar to those proposed at the start sentencing reform. However, unlike the hodgepodge of federal substantive criminal law, the sentencing regime was developed with

175. Id. at 342, 352-56.
coherency in mind, and the Commission exists to serve this purpose such that there is a greater opportunity to align its guiding principles to a scheme of interpretation. To do so, it is helpful to ground the effort in interpretive case studies present across several circuits.

IV. CASE STUDIES INTERPRETING FEDERAL SENTENCING

Quickly searching legal databases for cases about the sentencing regime and about statutory interpretation reveals over one-hundred cases in the last three years featuring a federal court interpreting ambiguity. Given the variability among methods of statutory interpretation developed above, and the frequency by which federal courts are confronted with ambiguity in the federal sentencing regime, there is an opportunity for judicial discretion in ways previously unimagined. To the extent that past and present developments in the guiding principles underlying sentencing favor consistency, rationality, and objectivity, this trend certainly suggests that federal courts can recapture some of the discretion that once spurred reform. Unlike the individual determinations that have since been directed by the Guidelines, federal judges now engage in a sort of meta-discretion via interpretive fiat — that is, by interpreting the directions set by sentencing statutes and the Guidelines. What follows are some examples of current interpretive issues that illustrate this trend and how the tools of statutory interpretation can be deployed in competing ways, which all but guarantee the replication of vast discretion absent some structure for interpreting federal sentencing. But if analyzed in reference to the guiding principles developed above, some methods appear preferable.

A. Case Study One: Revocation of Supervised Release

There is disagreement among circuits as to what a sentencing judge can consider when revoking a defendant’s supervised release. 18 U.S.C. § 3583(e) “governs the revocation of supervised release” and states that a district court “may [consider] the factors set forth in ‘section[s] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6) and (a)(7).’” These sections refer to the nature and circumstances of the offense, the need for deterrence, considerations for protecting the public, the need for effective correctional treatment, reduction of disparity, restitution, and policies effectuated by the Guidelines. “Absent from this list is [Section] 3553(a)(2)(A), which allows a court to impose a sentence that ‘reflect[s] the seriousness of the offense [justifying revocation], promote[s]...
respect for the law . . . and provide[s] just punishment for the offense."\textsuperscript{180}

Circuits are split on whether the absence of Section 3553(a)(2)(A) from Section 3583(e) prohibits a sentencing judge from considering these retributive aims when revoking supervised release. The First, Second, Third, and Sixth circuits believe it is not an error for the district court to consider the aims outlined in Section 3553(a)(2)(A). The Fourth, Fifth, and Ninth Circuits conclude that it is an error. Each court deploys, explicitly and implicitly, the tools of statutory interpretation developed above.

For example, in holding that the absence of Section 3553(a)(2)(A) does not prohibit a sentencing court from considering its aims, courts deployed several linguistic canons of construction. The First Circuit implicitly deployed the permissive canon of construction in finding that Section 3583(e) "does not forbid consideration of other pertinent Section 3553(a) factors" by implicit reason of its permissive language (i.e. "the court may consider...").

Additionally, the court looked to the overall context of the statute to justify its finding because "one of the incorporated provisions—the command that a sentencing court must consider the need to afford adequate deterrence, 18 U.S.C. § 3553(a)(2)(B)—leads inexorably to the conclusion that a sentencing court properly may consider a defendant's history of non-compliance with conditions of supervised release."\textsuperscript{182} Here, the court is implicitly deploying the contextual canons of construction which demand that a text be construed as a whole and with logical consistency throughout the text.\textsuperscript{183} The First Circuit was satisfied that these linguistic canons cleared up any potential ambiguity and did not look to extratextual sources, thus implying that it either endorsed new textualism or believed the statute was clear enough.\textsuperscript{184}

The Second Circuit deployed similar linguistic canons, but also sought out legislative history too. Like the First Circuit, it thought that Sections 3583(e) and 3553(a) should be read consistently and logically. In doing so, it could not see how "in order to impose a sentence that will provide adequate deterrence,' [Section] (a)(2)(B), and the protection of the public from 'further crimes of the defendant,'(a)(2)(C), in light of the 'nature and circumstances of the offense,' §(a)(1), the court could possibly ignore the seriousness of the offense."\textsuperscript{185}

\textsuperscript{180} Vandergrift, 754 F.3d at 1308 (quoting 18 U.S.C. § 3553(a)(2)(A)).

\textsuperscript{181} United States v. Vargas-Davalia, 649 F.3d 129, 132 (1st Cir. 2011) (citing United States v. Williams, 443 F.3d 35, 47 (2d Cir. 2006)).

\textsuperscript{182} Id.

\textsuperscript{183} SCALIA & GARNER, supra note 128, at xiii

\textsuperscript{184} Vargas-Davilia, 649 F.3d at 132.

\textsuperscript{185} Williams, 443 F.3d at 48 (quoting 18 U.S.C. § 3553(a)(1)-(2)(B)).
court also looked to a senate committee report describing how Section 3553(a)(1) was meant to encompass "any particular aggravating or mitigating circumstances surrounding the offense." In other words, the legislative history indicates that in permitting a sentencing judge to consider the "nature and circumstances" of an offense leading to potential revocation vis-a-vie Section 3553(a)(1), the legislature implicitly allows for the consideration of retributive reasons for revocation, making the inclusion of Section 3553(a)(2)(A) surplusage had it been written in Section 3583(e)’s list — something that is not encouraged by the surplusage canon of construction. While its approach is not entirely clear, the Second Circuit’s use of legislative history adheres more closely to the purposivism approach in seeking to find whether there is inconsistency between the letter and the spirit of the law, which in this case were consistent in the court’s mind.

The Third and Sixth Circuits delved more deeply into legislative purpose when confronting the issue. The Third Circuit found inspiration in the Guidelines, which purportedly imply that retribution ought to be a consideration because it set “lengthier guideline ranges” for various offenses made in violation of supervised release. And because “the primary purpose of a sentence for the violation of supervised release is ‘to sanction the defendant’s breach of trust,’” the court was sure that the spirit of Section 3583(e) permitted the consideration of just deserts when revoking supervised release. The Sixth Circuit largely mirrored the Third Circuit’s analysis and added that because Section 3553(a)(2)(A) is “consistent with considerations already permissible for revocation sentences,” it makes sense that Congress chose not to list it as a reference in Section 3583(e).

The other circuits deployed the same tools of statutory construction but came out differently. The Fourth, Fifth, and Ninth Circuits have all invoked the expressio unius canon, in one way or another, to argue that “given that [Section] 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a


187. Id. See also Scalia & Garner, supra note 128, at xiii (“If possible, every word and every provision is to be given effect...none should be needlessly given an interpretation that causes it to duplicate another provision or to have no consequence.”).

188. Williams, 443 F.3d at 48.

189. United States v. Young, 634 F.3d 233, 239-241 (3rd Cir. 2011).

190. Id. at 241 (citing U.S. Sent’g Comm’n, Guidelines Manual, §§ 7.B1.4(a) (U.S. Sent’g Comm’n 2016)).

191. United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007).
revocation sentence would be improper."¹⁹² This view heavily implies an adherence to textualism in that it would only be improper insofar as the omission is considered deliberate and a product of the compromises of the legislature. The plain meaning of the omission is that Congress did not want it to be considered, and its inclusion of a list indicates that the provisions named were meant to be exhaustive. But the Ninth Circuit seemingly deployed a textually constrained purposivism in acknowledging some ambiguity¹⁹³ and turned to extratextual sources to support its position. Namely, like the Third and Sixth Circuits, it reads the Guidelines as justifying revocation only as a matter of breach of trust—not as permitting the court to consider the retributive nature of the conduct itself that led to the breach of trust.¹⁹⁴ Thus, even among the textually focused courts, there is variety in how the ambiguity is approached. The juxtaposition between these tools of interpretation is laid bare by a petition for certiorari before the Supreme Court (since denied) which develops several additional lines of argument. First, it argues that in the context of sentencing, the “list of factors to be considered serves to focus attention on the specific purposes of the sentencing process,” thus creating a strong inference that the omission of Section 3553(a)(2)(A) was deliberate.¹⁹⁵ Second, it recasts the legislative history cited by the Second Circuit by finding a committee report which specifically says that supervised release “may not be imposed for purposes of punishment,” which implies, according to the author, that it may not be revoked for purposes of retribution either.¹⁹⁶ Third, it cites the surplusage canon for the reverse proposition implied by the Second Circuit—namely, that “a court should not lightly conclude that Congress has enacted words,” and chosen not to mention others, “that add no meaning to the statute.”¹⁹⁷ While there might be similarities between the provisions included in Section 3583(e)’s list, Congress may have “thought that the just punishment factors identify importantly distinct considerations that were not only worth separate mention in section 3553(a)(2)(A), but also worthy of exclusion from


¹⁹³. See Miqbel, 444 F.3d at 1182 (acknowledging that there is subtle ambiguity in the purpose of supervised release in describing that “we recognize that the difference between sanctioning a supervised release violator for breach of trust and punishing him in order to promote respect for the law is subtle indeed.”).

¹⁹⁴. Id.

¹⁹⁵. Petition for Writ of Certiorari at 20, Lewis v. United States, No. 07-1295, (U.S. Apr. 11, 2008), 2008 WL 1757249 (citing 18 U.S.C. § 3583(c), (e)).

¹⁹⁶. Id. at *20-21 (quoting S. Rep. No. 98-225, at 125 (1983)).

¹⁹⁷. Id. at *24.
section 3583(e)."  

Finally, the petition cites other provisions from the Guidelines which imply that supervised release is a rehabilitative—not a punitive—device which should not be revoked for reasons of retribution, but rather for reasons that might suggest the ineffectiveness of the device in a particular defendant’s changed circumstances.

What accounts for the differences in approach between circuits and the myriad of conflicting arguments? Discretion as a function of statutory interpretation. When ambiguity exists, the tools and approaches of statutory interpretation are elastic enough to permit competing analyses and the juxtaposition between positions such that resolution often comes down to what theory of interpretation is credited by the court. For example, while extratextual sources may be an appropriate guide for this particular issue in the Second, Third, Sixth, and Ninth Circuits, they are not necessarily replacements for the text in the mind of the other circuits. Moreover, the above analyses are replete with dueling canons of semantic construction: for every way to analyze the statute, there are other conflicting heuristics. There seems to be similar inconsistency in how legislative history and purpose are interpreted as evidenced by the competing arguments raised by the Second and Ninth Circuits. For such a narrow issue in sentencing to lead to a variety of approaches and outcomes underscores how interpretation permits wide discretion among federal courts. And yet, it is this inconsistency and variety among circuits which leads to variability and disparity in ways previously underappreciated. Using this specific example, the same defendant who violates supervised release might be sentenced differently depending on whether he is in a circuit which permits a judge to consider retributive aims (i.e., Section 3553(a)(2)(A)). This inconsistency is exactly the type of result the federal sentencing regime was created to avoid, and yet this problem is born not from the proclivities of any sentencing judge, but it is the result of haphazard statutory interpretation.

Haphazard statutory interpretation, however, cannot be tolerated with the federal sentencing regime because it was created with a specific, detailed

198. Id.
199. Id. at *25-26.
200. See Manning, supra note 167, at 113-18.
201. Compare United States v. Miqbel, 444 F.3d 1173, 1181-83 (9th Cir. 2006) with United States v. Vargas-Davalia, 649 F.3d 129, 132 (1st Cir. 2011) (citing United States v. Williams, 443 F.3d 35, 47 (2d Cir. 2006)).
202. See supra text accompanying notes 179 to 200.
structure.\textsuperscript{204} It was created to advance specific purposes which should give shape to how courts interpret federal sentencing law. In fact, the federal sentencing regime is seemingly unique in that it endorses the view that it should be guided by the purposes of sentencing and the SRA.\textsuperscript{205} Therefore, considering this implicit remit to effectuate a purposivist interpretation of the SRA and the Guidelines, the ambiguity in Section 3583(e) should be addressed methodically and consistently to effectuate the guiding principles developed above. In doing so, a few key insights emerge about the tools of statutory interpretation developed above.

First, linguistic or semantic canons should be disfavored. This view is consistent with the broad consensus of scholarship on the issue,\textsuperscript{206} but is especially poignant regarding federal sentencing law. As described above, a key guiding principle to the federal sentencing regime is objectivity, rationality, and utilitarianism.\textsuperscript{207} Rationality is hardly furthered when linguistic canons can be sophistically deployed in competing fashion. It might be true that the expression of factors implies that the omission of others (\textit{expressio unius} canon) was deliberate and intentional by Congress.\textsuperscript{208} But it could be equally true that Congress chose not to include 3553(a)(2)(A) in its Section 3583(e) list because it was superfluous, the statute was sloppily drafted, or perhaps there was even a scrivener’s error.\textsuperscript{209} With little to justify one approach over the other, courts are usually left to their own judgment when deploying these semantic canons. Yet,

\begin{enumerate}
\item \textsuperscript{204} See supra Part I, A.
\item \textsuperscript{205} See U.S. SENT’G COMM’N, supra note 16 (“the sentencing guidelines developed by the commission are designed to incorporate the purposes of sentencing”); see also 18 U.S.C. § 3553 (“the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2),” namely those purposes embodied and endorsed by the SRA). Rarely do statutes or regulatory regimes invite purposivism analysis, but such analysis is understandable given the competing justifications for punishment, see id.
\item \textsuperscript{206} See Posner, supra note 133.
\item \textsuperscript{207} See, e.g., Garvey, supra note 21, at 450; Stith & Koh, supra note 24, at 231 (citing S. 1, 94th Cong., 1st Sess. (1975)); Genego, et al., supra note 34, at 822-23.
\item \textsuperscript{208} See United States v. Crudup, 461 F.3d 433, 438-39 (4th Cir.2006); United States v. Miller, 634 F.3d 841, 844 (5th Cir.2011).
\item \textsuperscript{209} Scrivener’s error accentuates the possible futility of deriving meaning from linguistic canons of construction. The doctrine stands for the proposition that errors in statutes or regulations can be obvious enough to merit judicial correction. See, e.g., Nat’l Bank of Ore. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993) (describing the doctrine and providing an example). But how obvious is obvious enough? The question goes to the heart of the interpretive leeway courts are afforded according to the theories of statutory interpretation. It also implies that the words and structures of statutes can be equally explained by folly as they can be through intentional meaning, which undercuts the interpretive value they can provide. See generally Ryan D. Doerfler, \textit{The Scrivener’s Error}, 110 Nw. U. L. Rev. 811 (2016) [describing the scrivener’s error by arguing that the doctrine is too strict and ought to be applied more flexibly given that courts often “rewrite” statutes through interpretation anyway).
\end{enumerate}
with federal sentencing's focus on the underlying purposes of sentencing law, a federal court in the position to interpret ambiguity hardly furthers the ends of rationality when it uses these loose heuristics in statutory interpretation.

Although none of the circuits explicitly deployed the substantive canons, they offer more conformity in this situation with the guiding principles of the sentencing regime. The ends of due process and fair notice, which serve the basis of the legality principle, would seem to demand that the absence of Section 3553(a)(2)(A) in Section 3583(e)'s list indicates that its retributive aims should not be considered. After all, how could a defendant be on notice about the specific consequences of violating supervised release if he is forced to divine that an omitted criterion actually applies in the way the First, Second, Third, and Sixth Circuits imagine? Thus, the legality principle, while not invalidating the entirety of Section 3583(e), would at least preclude the omitted factor from being read into the statute. This fair notice rule certainly comports with the objectivity, rationality, and utilitarianism that the federal sentencing regime seems to favor. However, there is still ambiguity given that a defendant might be on adequate notice about the potential to be punished retributively given the nature of the provisions included in Section 3583(e). This argument maps onto the First Circuit's point that the inclusion of deterrence as a permissible factor, Section 3553(a)(B), necessarily implies the retributive aims of (a)(A), as does the fact that Section 3583(e)'s permissive language indicates that additional criteria could be considered. A theoretically well-informed, detailed oriented defendant (if that much is reasonable) might be on sufficient notice to satisfy this substantive canon. But notwithstanding the nuances of this type of argument beyond the scope of this analysis, the substantive canons seem to at least provide some consistency and rationality compared to the discretion characteristic of the linguistic canons.

Nevertheless, the competing arguments advanced by the circuits demonstrate how ambiguity can seep into even the most rational substantive canons of construction. Given that the federal sentencing structure is impliedly a purpose driven regime designed to effectuate its underlying goals, the theory of statutory interpretation deployed is relevant to resolving this ambiguity. While the circuits did not go into significant detail other than some looking toward


211. See, e.g., Bass, 404 U.S. at 348 (setting aside conviction based on the contention that fair notice was not afforded to defendant).

212. Compare id. with O'Hear, supra note 94, at 749-50.

213. See United States v. Vargas-Davalia, 649 F.3d 129, 132 (1st Cir. 2011) (citing United States v. Williams, 443 F.3d 35, 47 (2d Cir. 2006)).
legislative history, it is hardly possible to advance purpose using a fully textualist approach when so much of the Guidelines and sentencing statutes invite an analysis of extratextual motives. But pure classical purposivism invites a level of discretion and interpretive ambiguity reminiscent of the semantic canons too. The interpretive differences in legislative history for supervised release evidences the danger in committing purely to the spirit of the law because the same committee reports and extratextual sources were viewed differently between the Second Circuit and the petition for certiorari cited above. These examples show that even extratextual sources can be flimsy and ambiguous.

A prudent middle way might, therefore, require the textually restrained purposivism theory of interpretation. While none of the courts addressed this theory, if they had, they might have viewed the permissive character of Section 3583(e) (i.e., “the court may”) as inviting extratextual analysis. This theory of interpretation requires an ambiguous textual hook through which it can be inferred that Congress, in drafting a statute vaguely, is inviting the courts to consult extratextual sources to resolve an interpretive dispute. Given the issues raised by the circuits, it is quite plausible that the text of Section 3583(e), analyzed in context to the list it includes, meets this standard of ambiguity. A federal court would then be invited to analyze the structure of supervised release in reference to the guiding principles developed above. Namely, given the utilitarian, retributive principles which propelled the passage of the SRA, it would seem that the spirit of the sentencing regime would encourage retributive aims to be considered when revoking supervised release and re-imposing a sentence of imprisonment, particularly if the underlying violation was a violent or drug offense. And as the Guidelines suggest that revocation of supervised release is in violation of breach of trust, the Commission’s pronouncements on the issue would be heavily accredited according to the framework informed above by Hart’s theories and articulated by the technical legisprudence since described by

214. See supra text accompanying notes 179 to 200. This paper contends in part that the uniqueness of the federal sentencing structure is partially its implicit endorsement of the federal sentencing’s various purposes, past and present, which are actualized by the Commission and its Guidelines.

215. It is often imprudent to generalize about legislative history using only one source, as even committee reports can be untrustworthy. See, e.g., Antonin Scalia & John F. Manning, A Dialogue on Statutory and Constitutional Interpretation, 80 GEO WASH. L. REV. 1610, 1612 (2012) (“The more you use legislative history, the phonier it will become. Downtown Washington law firms make it their business to create legislative history... they send up statements that can be read on the floor or statements that can be inserted into committee reports.”).

216. See Vargas-Davalia, 649 F.3d at 132 (citing Williams, 443 F.3d at 47)).

217. See generally supra text accompanying note 205.

commentators.\textsuperscript{219} While there is still room for disagreement as to what the Guidelines suggest, as demonstrated by the differences between the Third Circuit and the petition for certiorari cited above, this theory of interpretation—in tandem with the guiding principles—at least focuses a court to the type of extratextual sources it should carefully consider (namely, the Guidelines) and the underlying principles it should credit, rather than disparate committee reports that often talk past each other.

Unfortunately, one is left to speculate what this interpretive analysis would look like if one of the courts fully analyzed the ambiguities pertaining to the revocation of supervised release in this way. But by applying the theory of textually constrained purposivism, a consistent solution is at least possible.\textsuperscript{220} Unwarranted disparity is minimized by discouraging the use of linguistic canons and focusing on the proper extratextual sources invited by textual ambiguity and constrained by guiding/limiting principles. Doing so leads to an interpretation consistent with the underlying principles of the sentencing structure.

\textbf{B. Case Study Two: Safety Valve Sentencing}

Another interpretive sentencing issue currently disputed among federal courts involves so-called safety valve sentencing. "Under the safety valve provision of 18 U.S.C. § 3553(f), a court is authorized to issue 'a sentence below [an] otherwise mandatory minimum in certain cases of diminished culpability.'"\textsuperscript{221} In other words, it functions as a built-in authorization for a trial judge to exercise discretion based on individualized circumstances—just like the fourth limiting principle developed above encourages individualized consideration of a defendant's characteristics when connected to the commission of a particular crime or the effect of the crime on him.\textsuperscript{222} The provision essentially codifies certain characteristics which can preclude unique consideration of a defendant's circumstances.\textsuperscript{223} Congress recently amended Section 3553(f) in 2018 to include five conditions, Section 3553(f)(1)-(5), which must be met for a

\begin{itemize}
\item \textsuperscript{219} See generally HART, supra note 108.
\item \textsuperscript{220} The dynamic theory might also be a possibility, but it encourages too much discretion by not being constrained by the text in the same way as textually constrained purposivism. Moreover, the Guidelines implicitly serve the same purpose: by being disseminated over time they reflect changing circumstances as to what society, through the Commission, deems as acceptable punishment.
\item \textsuperscript{222} See supra Part II, Section C.
\item \textsuperscript{223} For example, the statute tracks closely along the original purpose of the SRA to reduce discretion in instances of violent crime in that 3553(f)(2)-(3) prevents safety valve sentencing in instances of violent crime or crime that resulted in serious injury. See 18 U.S.C. 3553.
\end{itemize}
defendant to be eligible for safety valve relief.\textsuperscript{224} Several federal courts have recently met interpretive challenges discerning the meaning of these conditions. The process through which these federal courts analyze the conditions not only reinforces the observations argued above concerning the usefulness of certain tools of construction, but it also indicates that textually constrained purposivism is the best method of interpretation to ensure consistency with the guiding principles of the sentencing regime.

The judge in \textit{United States v. Lopez}, a recent case in the Southern District of California, was confronted with ambiguity in Section 3553(f)(1), which permits safety valve relief only if “the defendant does not have” a certain number of criminal history points, the requirements of which are listed in Section 3553(f)(1)(A)-(C).\textsuperscript{225} Subsections (A), (B), and (C) are joined with the conjunctive “and” as follows:

\begin{quote}
“(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines . . .”\textsuperscript{226}
\end{quote}

A defendant before the court had a criminal history that implicated Section 3553(f)(B), but not the others. He argued that “the statute is written in the negative: ‘does not have,’ followed by three criteria in the conjunctive with “and” written after the second criterion, which means that ‘a defendant is safety valve eligible if he does not have A + B & C.’”\textsuperscript{227} Likewise, the defendant claimed “that because he has a three-point conviction that qualifies under [Section] 3553(f)(1)(B), but does not have a conviction that qualifies under part (A) or (C) of the rule, he is eligible for the safety valve.”\textsuperscript{228}

The court began analyzing the text of the statute, focusing on whether the “and” which joined the provisions was conjunctive in the way described by the defendant. The court cited the Cambridge Dictionary for the proposition that in

\begin{itemize}
\item\textsuperscript{225} Lopez, 2019 WL 3974124, at *2 (quoting 18 U.S.C. § 3553(f)).
\item\textsuperscript{226} Id.
\item\textsuperscript{227} Id. at *3 (citations omitted).
\item\textsuperscript{228} Id. (citations omitted).
\end{itemize}
“common, every day meaning, the word ‘and’ conjoins ‘two words, phrases, or parts of a sentence.’”229 Textualism focused courts would have ended the analysis here. But the court quickly qualified its textual observation with a classical purposivist approach by stating that the dictionary meaning would control “unless to do so would thwart the legislative intent of the drafters.”230 This statement is hardly an unbreakable rule, but instead evidences this particular court’s view that the spirit of the text should triumph over the letter. The court did not have to put this view to the test in the face of clear text because it found that the defendant’s and the government’s interpretations were equally reasonable.231 As such, it turned to legislative history for further guidance.232

But at this point in the analysis, it is helpful to point out how this approach contrasts from textually constrained purposivism. Textually constrained purposivism would not unlock the doors to extratextual sources unless there was a certain level of ambiguity in the text—namely, ambiguity that specifically evidences Congress’s intent to invite a court to engage in extratextual interpretation.233 In most cases, the conjunctive meaning of “and,” a single word no less, would hardly meet this standard. One could argue that the analysis should have stopped at the semantic canons deployed, however imperfect they may be, because proceeding to extratextual sources without sufficient ambiguity is an invitation for unwarranted discretion. For example, the court makes the reasonable point that “a statutory phrase must have the same meaning throughout the text in all but extremely unusual situations.”234 Because the parties agreed that “and” was used conjunctively in other parts of the statute, specifically between Section 3553(f)(4) and (5), it could be similarly read conjunctively here too.235 Moreover, if Congress wanted to apply the provisions of Section 3553(f)(1) non-conjunctively, it could have easily used the word “or”


230. Id. (citing 1A NORMAN SINGER & SHARON SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21.74 (7th ed. 2020)).

231. Id. at *4.

232. Id. at *5 (citing United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008)).

233. See generally Manning, supra note 167. Classical purposivism is most radical when the text of a statute is clear. Few courts today apply the Holy Trinity standard of preferring the spirit of the law to the letter when the text is unambiguous. See MANNING & STEPHENSON, supra note 154, at 60 (“One measure of success of the textualist critique of [pure] purposivism is that the Supreme Court has not cited Holy Trinity favorably in a majority opinion in over two decades.”) But like here, when it is ambiguous, the purposivist courts will often totally abandon the implications of the text.

234. Lopez, 2019 WL 3974124, at *3 (citing United States v. Davis, 139 S. Ct. 2319, 2328 (2019)).

235. See id.
instead of “and.” Nevertheless, the court here moves quickly to extratextual sources on the basis of ambiguity in a single word that one is hard-pressed to interpret as sanctioning congressional intent to delve into extratextual sources. The consequence is a level of interpretive discretion, some of which does not align with the guiding principles described above, that illustrates the danger of pure purposivism when interpreting federal sentencing statutes.

For example, the court looks to a lone committee report and a bulletin—both of which the court admits are “non-binding” and represent a “dearth” of legislative history—to conclude that they “indicate that the intent was to remove a defendant from safety valve eligibility if he or she had any one of the criteria listed in section 3553(f)(1)(A)-(C) . . . .” The court then discards guidance from the Guidelines under the rationale that they have not been updated since Section 3553(f) was updated in 2018. Ultimately, the court finds the legislative history and extratextual sources unhelpful in resolving the ambiguity and instead finds for the defendant under the rule of lenity because “ambiguities in the statute must be resolved against the government to protect Defendant’s right to fair warning and due process.”

The court’s final holding is likely the right result under the rule of lenity, but its foray into legislative history and extratextual sources in search of the intent of Congress was ultimately an unnecessary exercise of interpretive discretion and one which could have equally led to a different result under different judge with a different philosophy. This court explicitly admitted that the available legislative history pointed in the other direction, and it was the court’s insistence that the legislative history was “non-binding” that prevented the court from crediting its perspective. But not all judges would have been so resolute in disregarding the legislative history.

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236. See, e.g., Scalia & Garner, supra note 128, at xii (describing expressio unius canon of construction).


238. Id. at *6.

239. Id. at *7 (citing McNally v. United States, 483 U.S. 350 (1987)).

240. Id. at *5.

241. For example, many judges believe legislative history is critical to follow because it clarifies ambiguity and constrains judges:

Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity vel non of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather
followed, more credit should have been given to what the Guidelines had to say on the issue, notwithstanding they may have been out of date. This rule is the result of the Guidelines being the vehicle through which limiting principles are considered and articulated, according to H.L.A. Hart’s framework for societal norms being created by a semi-deliberative process. Until that deliberative process changes the Guidelines, they should otherwise hold, just like statutes are not invalidated until repeal or a superseding statute is passed by Congress. The court acknowledges that it found the Guidelines persuasive, and the court would have found for the government but for them being out of date because the Guidelines “still state[] that a defendant is not eligible for safety valve relief if he or she has more than one criminal history point.” Again, a different judge could have easily come to a different conclusion with only the interpretative philosophy of the judge preventing a different result. All told, seeking to ascertain the intent of legislature from the beginning is a perilous proposition given that this intent can be interpreted widely, which creates the prospect of disparity and inconsistency. And had the court applied the substantive canons first, it would have never needed to look to other sources. Overall, the moral of *Lopez* is to highlight the importance of a court discerning ambiguity in the text, which seems invited by drafters. This proposition is no easy task, but one which can prevent disparity among interpreting courts.

*United States v. Brown* is an example of divining this type of ambiguity well. The court was faced with the question of “whether a defendant whose Guidelines range is above the statutory mandatory minimum is eligible for the safety valve, when all criteria of that statutory provision are met, and thus eligible to be sentenced without regard to that minimum sentence.” The typical safety valve situation features a defendant whose criminal conduct and history qualifies for a sentencing range under a mandatory minimum, thus implicating the purpose of the safety valve: to avoid mandatory minimums where a defendant meets the Section 3553(f) mitigating factors. But here, the defendant, while meeting all the mitigating factors, nevertheless had a criminal history and conduct score that

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242. See supra Part II, Section C.


245. *Id.* at 604.
placed his Guideline range above the mandatory minimum.\textsuperscript{246} Thus, the court was faced with the question of whether the safety valve provision should even be applicable.

The court first focused on the applicable text of Section 3553(f), which states in part that: "the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence . . . ."\textsuperscript{247} Since the guidelines have become advisory post-\textit{Booker}, the court focused on the meaning of "pursuant to the guidelines" and whether it indicates that a defendant with a guideline range above a mandatory minimum disqualifies for safety valve relief.\textsuperscript{248} While the court applied the \textit{expressio unius} canon to no avail,\textsuperscript{249} it ultimately used the constitutional avoidance canon to find that the Guidelines range should not be dispositive to this defendant's situation because to do otherwise would have the effect of making the Guidelines mandatory in safety valve scenarios where they should be otherwise advisory post-\textit{Booker}.\textsuperscript{250} But implied in this analysis is the court's belief that "pursuant to the guidelines" is a statement evidencing Congress's intent to invite this type of interpretation as a consequence of its ambiguous phrasing.\textsuperscript{251} The court views the statute as commanding the court to impose a sentence "in the same way that it does so in any sentencing: by being advised by the Guidelines and the Section 3553(a) factors to arrive at sentence that is 'sufficient, but not greater than necessary.'\textsuperscript{252} In other words, the "pursuant to the guidelines" language is intentionally ambiguous and invites the court to seek out other sources to give substance to its possible meaning as it might in other advisory situations. In this particular fact pattern, the court ended its inquiry at the substantive canon of constitutional avoidance\textsuperscript{253} to find that the safety valve must not be foreclosed when a defendant's sentencing range is

\begin{itemize}
\item \textsuperscript{246} \textit{Id.} at 604 n.7.
\item \textsuperscript{247} \textit{Id.} at 604.
\item \textsuperscript{248} \textit{Id.} at 606.
\item \textsuperscript{249} "\textit{[T]he canon of \textit{expressio unius est exclusio alterius} counsels that because no requirement concerning the defendant's Guidelines range is in the statute, and other prerequisites are expressed, no such requirement existed.}" \textit{Id.} (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978)).
\item \textsuperscript{250} \textit{Brown}, 767 F. Supp. 2d at 607 (citing United States v. Booker, 543 U.S. 220, 258-59 (2005)).
\item \textsuperscript{251} \textit{Id.} at 606.
\item \textsuperscript{252} \textit{Id.} (quoting 18 U.S.C. § 3553(a)).
\item \textsuperscript{253} The rule of lenity could have equally applied here. The court's holding is also favorable to the defendant insofar as it leads to a better outcome compared to a situation in which the Guideline's range was mandatory.
\end{itemize}
above the minimum. 254 All told, Brown can be contrasted to Lopez in that it impliedly approaches its interpretive issue by looking for intentional ambiguity—informed by the context of the post-Booker caselaw—and then privileges substantive canons of construction before turning to legislative history, which was ultimately unnecessary in this case.255 The result is one that hardly includes the same potential for interpretative discretion as in Lopez.

The case of U.S. v. Reynoso provides yet another useful case study.256 The case concerned Section 3553(f)(5), which limits safety valve relief to those defendants who have “truthfully provided to the Government all information and evidence the defendant has concerning the offense.”257 The specific question presented on appeal, and presented before other circuits before, was “whether a defendant who provided objectively false information to the Government nevertheless satisfies the requirement set forth in [Section] 3553(f)(5) if he or she subjectively believed the information provided to the Government was true.”258 The differences in interpretation championed by the majority and the dissent reinforce many of the points above.

The majority surveyed several dictionaries for the definition of “truthful,” noting that some defined it as objective, while others defined it as subjective.259 The majority ultimately concluded that it found “no reason to believe that Congress did not intend for the word “truthfully” in [Section] 3553(f)(5) to encompass both these meanings” and therefore concluded that the text was unambiguous.260 To backstop its conclusion, the majority consulted legislative history, concluding that it also supported its holding that truthful should be defined objectively and subjectively because “Congress intended to provide relief from statutory minimum sentences to those defendants who, but for their minor

255. Compare id. at 604 with Lopez, 2019 WL 3974124, at *2-5.
256. United States v. Reynoso, 239 F.3d 143, 144 (2d Cir. 2000).
258. Reynoso, 239 F.3d at 144; see also United States v. Mejia-Pimental, 477 F.3d 1100, 1105 (9th Cir. 2007) (also addressing the issue); United States v. Altamirano-Quintero, 511 F.3d 1087 (10th Cir. 2007) (similar, but slightly different issue concerning Section 3553(f)(5)).
259. Reynoso, 239 F.3d at 147 (first citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2457 (1976); then citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1378 (1970); then citing THE RANDOM HOUSE COLLEGE DICTIONARY 1612 (1973); and then citing WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1964 (2d ed. 1983)).
260. Id. at 148.
roles in criminal activity, could (and would) have provided the Government with substantial assistance."\textsuperscript{261}

The dissent responds by generally arguing that another semantic interpretation is reasonable, and the legislative history is generally inconclusive, but more realistically cuts the other way.\textsuperscript{262} The substance of these arguments is less important for present purposes than the nature of the ambiguity in dispute. Like Lopez, the source of the issue derives from a single word. And while "truthful" has more substance than "and," it is still hard to conjure intentional ambiguity from a single word. Textualists, and textually constrained purposivism, would not endorse extratextual sources to resolve this dispute because, though there are potentially semantic differences in interpreting "truthful," a rational resolution can nevertheless be reached without extratextualism. And more importantly, sticking to the semantic rules at least focuses on the language that Congress actually enacted and can encourage Congress to change it or specify its meaning if it disagrees.\textsuperscript{263} Otherwise, the legislative history in the case illustrates how much more easily differences can immerge when interpreting extratextual sources. Moreover, it is not immediately clear whether the definition of "truthful" can be informed by the guiding principles developed above. If differences in opinion grow among circuit judges without the ability to latch onto clear extratextual sources, then certainly more discretion and disparity might result between various district judges faced with a similar issue.

There are many more issues of interpretation being actively considered by courts around the country—both regarding the safety valve rule and others—but Lopez, Brown, and Reynoso illustrate how various theories of statutory interpretation can breed disparity via interpretive fiat if the analysis does not require a finding of intentional ambiguity among the words in the dispute.\textsuperscript{264} In

\textsuperscript{261} Id.

\textsuperscript{262} Id. at 150-54 (Calabresi, J., dissenting).

\textsuperscript{263} But see Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 863 (1992) ("The 'statute-is-the-only-law' argument misses the point. No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of words that do make up the statute or the 'law.'").

\textsuperscript{264} There appears to be no hard and fast standard for determining when a statute's semantic meaning is intentionally ambiguous. Some interpretive discretion must always be left to the courts. Broad language and generalized wording can be an indicator, but it is probably true that "statutory clarity is more of a continuum, ranging from extremely clear to totally opaque." See MANNING & STEPHENSON, supra note 154, at 171. But this continuum should not undercut the usefulness of the standard because it is still "a way to remind a court of the primacy of the text." Id. at 172. A court must make an explicit finding that the text seems to invite ambiguity in an intentional way before seeking other interpretive sources. Doing so creates at least a higher standard than the current process of declaring ambiguity without much analysis as to intentionality.
this way, textually constrained purposivism seems to be the most appropriate model because it does not deny that the guiding principles of the sentencing regime can be informative when evaluating extratextual sources, but it limits such analysis to those situations where it seems likely Congress has invited the analysis through broad, ambiguous language like those displayed in *Brown*. To hold otherwise could, on the one hand, constrain the sentencing regime to the tight embrace of textualism, which denies that Congress can invite courts to engage in more expansive interpretation. This flexibility is particularly important in the context of a sentencing regime that implicitly endorses the broad purposes of sentencing and has created an administrative body via the Commission to provide guidance. On the other hand, without requiring purposeful ambiguity, courts can engage in exercises of sophistry—finding ambiguity in single words and divining vagueness in ways displayed by *Lopez* and *Reynoso*—just to turn to legislative history and extratextual sources that can support a range of interpretations. The result generates various standards between courts about how to apply sentencing statutes to defendants, leading to disparity among similar defendants sentenced in different locations.

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Overall, these case studies highlight a few key points. First, using only a fraction of the cases available that feature statutory interpretation, there are stark differences in how courts can interpret sentencing statutes. These differences can breed disparity between circuits that can ultimately trickle down to individual sentencing decisions. This effect undermines the original purpose of the SRA to foster consistency and objectivity in sentencing between similarly situated defendants. The circuit split concerning revocation of supervised release is a powerful example of discretion reclaimed by interpretive fiat that results in different standards across jurisdictions. Second, the case studies illustrate how certain interpretive tools foster or curb this interpretive effect. Specifically, the linguistic canons of construction are particularly problematic given that there are competing canons—and interpretations of these canons—that can justify any perspective. Generally, they should be used with caution if consistency is the end goal. The substantive canons of construction—like the rule of lenity or legality principle—are clearer and more consistently applied, especially in comparison to the guiding principles of sentencing. But even they are subject to competing interpretations when applied to particular facts, and the expansive case law on each only adds to the potential problem. Third, much can be gained by a structured approach to interpretation. Both case studies illustrate the prudence


266. See generally Decker, supra note 142, at 284-327 (detailing the case law on substantive canons).
of textually constrained purposivism as cutting the balance between a level of textualism necessary to support the plain meaning of the statute and the inherent purpose-driven nature of the federal sentencing regime. As the safety valve cases illustrate, the opportunity for interpretive discretion is limited when extratextual sources— and the guiding principles described above—are only consulted when the statute is written in a way that invites ambiguity. This structured approach to statutory interpretation in the federal sentencing context is laid out fully below.

V. A MODEL FOR INTERPRETING FEDERAL SENTENCING LAW

Commentators have long bemoaned the fact that federal courts do not engage in consistent interpretive practices. Some have even suggested that Congress could and should enact official federal rules of statutory interpretation, with the same significance as the federal rules of civil procedure or evidence. Perhaps nowhere would consistent rules be more beneficial than in the context of federal sentencing law. This paper began by laying out the guiding principles that gave rise to and sustain federal sentencing law. The SRA and the subsequent Guidelines were born out of a concern that judicial discretion in sentencing was leading to disparity. But not only have the years since Booker led to increased discretion and disparity, but the vacillation among courts interpreting sentencing statutes and guidelines have led to the potential of disparity as a result of inconsistent statutory interpretation. Among the innumerable federal cases interpreting some aspect of the sentencing regime, the case studies developed above demonstrate how courts can leverage the elasticity of statutory interpretation to lead to different results. One needs to look no further than the circuit split on revoking supervised release to note that a defendant can be evaluated according to different standards (i.e., retributive reasons vs. non-retributive reasons) depending on the jurisdiction in which he is sentenced. This discrepancy between defendants is wholly the result of interpretive fiat and undoubtedly leads to disparity antithetical to the original purpose of the SRA. While commentators may advocate for increased judicial discretion, the result of this haphazard interpretation is to inconsistently define the standards through which judges can consider individualized circumstances in the first place—a reality that all would likely view as problematic. Nevertheless, with the continuous growth of the Guidelines and the subsequent statutory additions/amendments to the relevant sentencing statutes, this problem will only grow over time. In short, federal courts have recaptured an aspect of the


discretion the SRA sought to eliminate, but in a way likely unimagined in 1984: through statutory interpretation.

If courts are serious about effectuating the ultimate purpose of the federal sentencing regime (and they should be given that federal sentencing makes up a large portion of the federal criminal process in the era of plea bargaining), then they need to consistently apply an interpretive method. It is the effort of this paper to propose one such method that is in line with the guiding principles of the sentencing regime. These guiding principles are so relevant to this endeavor, much to the chagrin of ardent textualists, because the federal sentencing regime is implicitly one of purpose. It seeks to advances the ends of punishment, a cornucopia of competing and developing theories, through the semi-bureaucratic entity of the Commission. Applying H.L.A. Hart’s framework of punishment, this paper suggests that the Commission, and the guidelines it promulgates, reflect evolving conceptions of society’s “common sense scale of gravity,” the structure of which is necessarily purposivist, in order to advance whatever they imply about punishment at a given time.\(^\text{269}\)

The difficulty, of course, is coalescing any guiding principles given changes in the law and society since the SRA has passed. As the above chronicle implies, rehabilitative aims of punishment have grown more popular over time, even though the original SRA all but completely disclaimed them. In reviewing the comprehensive legislative history of Stith and Koh, it is clear that the original SRA endorsed rigidity and harshness in sentencing born out of its anti-crime foundations.\(^\text{270}\) As such, personal characteristics in sentencing and discretion were discouraged for violent, serious, and drug-related crimes.\(^\text{271}\) Utilitarian, retributive aims were specifically endorsed to advance objectivity and reduce disparity. Yet the development of the sentencing regime—most noticeable after Booker and with the growth of the Guidelines—seems to have advanced the opposite, or at least made the framework more complex according to commentators like O’Hear.\(^\text{272}\) This paper has attempted to synthesize the original aims of the SRA with the most recent developments and scholarly commentary by deploying H.L.A. Hart’s principles of punishment. The result is the above four guiding/limiting principles that not only synthesize the current scholarship on federal sentencing’s purposes, but also provide a consistent framework. They are summarized briefly as:

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\(^{269}\) \text{HART, supra note 108, at 25.}

\(^{270}\) \text{See Stith & Koh, supra note 124, at 259-84.}

\(^{271}\) \text{Id. at 249-51.}

\(^{272}\) \text{See O’Hear, supra note 94, at 795-805.}
(1) Federal sentencing is a primarily utilitarian regime which ultimately seeks to promote objectivity and consistency.

(2) The first principle is most secure in the context of violent and drug crimes. Interpretations concerning these crimes should especially further the ends of utilitarianism and deterrence. In other contexts, there can be more flexibility to support other ends of punishment.

(3) The Guidelines are the vehicle through which societal norms are converted into limiting principles and society's evolving common-sense scale of gravity is captured. Adherence to the text of these Guidelines is therefore critical, with interpretive departures justified only insofar as the rationale behind the departure supports the other principles.

(4) Individual circumstances and personal characteristics of a defendant, including rehabilitative aims, can be the focus of sentencing. But any consideration must be connected to the commission of the crime or the effect of the punishment on a particular defendant.

Federal courts facing interpretive problems should therefore seek to advance these principles, particularly when seeking to effectuate the purpose of federal sentencing in resolving statutory ambiguity. In other words, these principles are the background values which should inform a court about the proper meaning when looking to disparate legislative history, text, or extratextual sources. The values and framework should always be advanced by any interpretative decision if a federal court is to effectuate the proper purpose of punishment. Effectuating purpose, however, does not mean blind adherence to purposivism. The case studies developed above impliedly highlight a certain tension. Adherence to plain meaning of the text can, at least theoretically, reduce judicial discretion because the meaning of words is often less flexible than the meaning of vast legislative history or extratextual sources, notwithstanding the guiding principles. It is also consistent with the third principle, which encourages strict construal of the Guidelines. But strict textualism might deny these principles, especially if the statute is poorly drafted or exceedingly ambiguous.²⁷³

²⁷³ In essence, this paper challenges the opposite view proposed by other commentators: that strict textualism is the way to curb interpretive discretion and the most proper way of interpreting federal sentencing. See, e.g., Elliot Edwards, Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-Booker Guidelines, 92 Ind. L.J. 817, 844 (2017) (developing a similar analysis, but with the opposite conclusion). The pivot of this paper is to suggest that federal sentencing law is purpose driven—including the Guidelines—with guiding principles that are only consistent and applicable over time when contextualized by H.L.A. Hart’s theories, and which demand the use of certain interpretive tools to effectuate these purposes.
In analyzing how the tools of statutory interpretation apply to the case studies above, this paper proposes a happy middle ground: textually constrained purposivism. Textually constrained purposivism encourages strict textualism, with the plain meaning of a statute usually controlling. But it also recognizes that Congress or regulators sometimes intentionally, or unintentionally, write ambiguously to invite courts to engage in the interpretive process, perhaps to lend malleability to standards which ought to change over time. One would especially expect this invitation in the context of federal sentencing statutes or guidelines given their purpose-driven nature. Plus, the case studies suggest that textually constrained purposivism leads to less interpretive discretion overall, which in turn curbs disparity. Under this theory, a court must deploy linguistic canons of construction to ascertain the plain meaning of a text. If it is clear, then that meaning controls. If it is ambiguous, then the court should deploy substantive canons of construction and its judgment to lend clarity. Only if the court reasons that the writing is so ambiguous that Congress must have intentionally written vaguely to invite extratextual analysis can the court then divine meaning from legislative history or other sources as long as any analysis supports the four principles described above.

In sum, the following framework is proposed when a federal court is tasked with interpreting an aspect of the federal sentencing regime:

A. Start with the plain meaning of the text. If that meaning is clear, then it controls. Otherwise, judges are given too much interpretive discretion, which can lead to inconsistent results. The use of linguistic canons of construction should be used with caution, given their malleability.

B. If the text is ambiguous, the court should attempt clarity by deploying substantive canons of construction—like the rules of lenity, vagueness, and overbreadth, which are essential to criminal law.

C. Only if the court determines that remaining ambiguity is likely intentional, or invariably invites the use of extratextual sources, can the court look beyond the text. Single words or short phrases should rarely meet this standard.

D. In consulting legislative history and other sources for meaning, courts should be aware of the SRA’s origin and development to ensure that any possible meaning it endorses effectuates that history. And the court should evaluate the veracity of any particular source with the above four principles in mind. Not all sources will necessarily support the principles and are therefore less trustworthy.

By following this framework, it is possible for federal courts to advance the original meaning of the SRA and its subsequent development, all while
maintaining a rational basis for interpreting statutes. Doing so also advances the ends of the modern federal sentencing regime because the framework reduces the opportunity for inconsistency and disparity resulting from disparate statutory interpretation. Now more than ever, it is important for federal courts to approach the statutory interpretation of sentencing law deliberately and consistently, given the growing prevalence of sentencing as the main adjudicatory feature in criminal cases since the growth of plea bargaining. This paper implores commentators to recognize this issue and feel empowered to appreciate, contest, or otherwise build upon the framework advanced here so that federal courts can better understand the downstream effect that statutory interpretation can have on defendants.
TRIAL COURTS AS CONSTITUTIONAL FIRST RESPONDERS: A HISTORICAL CASE STUDY OF THE ROLE OF THE FRANKLIN COUNTY CIRCUIT COURT IN KENTUCKY’S BIGGEST LEGAL-POLITICAL CONTROVERSIES

Kurt X. Metzmeier*

I. INTRODUCTION

Listeners to Cincinnati-based talk radio station 55 KRC on May 9, 2018, were treated to a shockingly bitter attack on a distinguished Kentucky judge by the state’s governor. Talking to the Brian Thomas Morning Show, which had a large following in conservative Northern Kentucky, Matt Bevin called Phillip Shepherd, the judge of the Franklin County Circuit Court, the most “incompetent hack of a judge, I don’t know if in Kentucky, but certainly one of the worst.”

Bevin was upset because of a ruling in a lawsuit involving Kentucky’s new pension law (a law later struck down by the Kentucky Supreme Court) and went on to complain that “[t]his guy’s a former Democrat operative. He used to be in the previous Democratic administration as an appointee. Now he happens to be a quote-unquote judge.” Despite the governor’s lack of legal training, he accused Shepherd of legal malfeasance: “But the law, and finally and following the law, is of little regard for him. And this is why one of the things we need in this state is legal reform because cause guys like this who don’t take the law seriously should not be sitting on the bench.”

No commentator in Kentucky would dispute that the governorship of Matt Bevin was a contentious one. The assertive former businessman engaged in disputes with everyone from his Democratic attorney general Andy Beshear (who

* Associate Librarian and Professor of Legal Bibliographer at the Louis D. Brandeis School of Law, University of Louisville. I’d like to acknowledge the research assistance of Katie Davidson, the support of deans Susan Duncan and Colin Crawford, and, most of all, my wife Beth Haendiges, who applies her decades of editing skills to reading my increasingly arcane legal history pieces. A special acknowledgement is due Melissa Shields, Dennis Kerley, and Lance Hale of the Kentucky Department of Archives and Libraries, who continued to fulfill my requests for old court records while being asked to assist in reducing the backlog of COVID-19 unemployment insurance claims.


3. See Loftus, supra note 1.

4. Id.
defeated Bevin in his 2019 re-reelection bid) to his own lieutenant-governor—a relationship that ended up in the courts after Bevin abruptly fired her top aides.

However, his testy relationship with the courts was the most surprising, especially his habit of taking to talk-radio and social media to denounce every adverse legal ruling. Other Kentucky politicians had criticized the courts, but Bevin’s tendency to make everything personal and to insert politics into legal decisions disconcerted even loyal members of his party. Typical was his taunt to the Kentucky Supreme Court as it considered his pension plan. Ignoring the legal basis of the decision, he rhetorically challenged the court to come up with its own pension fix.\(^5\)

Bevin cultivated a sharp dislike to the Franklin Circuit Court, the court of general jurisdiction in the capital city and the starting point for lawsuits to challenge and enjoin actions by the governor and disputes between state officers. Bevin’s anger was agitated by several lawsuits by Beshear filed in Franklin to block purported abuses of the governor’s powers.\(^6\) The governor was annoyed not only by the final rulings of the court; he also chaffed at his actions being delayed by injunctions ordered by the Franklin court.

Of the two judges in the division, the key focus of Bevin’s ire was Judge Phillip Shepherd.\(^7\) Shepherd has served as a circuit judge since 2006 and is widely respected for his knowledge of administrative and governmental law.\(^8\) While Kentucky judges are elected in nonpartisan elections, Bevin fixated on the fact that in the early 1990s, Shepherd was secretary of the Natural Resources & Environmental Protection cabinet under Democratic governor Brereton Jones.\(^9\)

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7. See Phillip Shepherd, BALLOTPE IDIA, https://ballotpedia.org/Phillip_Shepherd (last visited July 4, 2020) (explaining that Shepherd’s biography does not support this claim. He graduated the University of Kentucky College of Law in 1980 and clerked with Judge Edward Johnstone of the United States District Court for the Western District of Kentucky. After practicing law for a decade, he was appointed secretary of the Natural Resources & Environmental Protection by Gov. Brereton Jones in 1991, serving four years. From 1994-2001, he served as a commissioner of the Ohio River Valley Sanitation Commission (ORSANCO), a nonpartisan body representing eight states and the federal government and devoted to monitoring and controlling pollution in the Ohio River basin. He returned to private practice until 2006 when he was first elected to the Franklin County Circuit Court); see also About Us, OHI O RIVER VA LLEY WATER SANITATION COMMISSION, http://www.orsanco.org/about-us/ (last visited July 6, 2020).


He repeatedly attacked Shepherd by name and twice tried to force his recusal. The first recusal attempt came when the judge clicked “Interested” for a Facebook event announcing a teacher’s rally at the capital; Shepherd said he wanted to keep track if it would block his parking place near the rally site.\textsuperscript{10} Later, Bevin complained to the Kentucky Supreme Court Chief Justice, urging that Shepherd be prevented from judging another lawsuit filed by the attorney general after Shepherd “liked” a post concerning young volunteers for Beshear’s campaign.\textsuperscript{11} Justice John D. Minton, Jr., removed him from that case, noting that while the judge was always “completely fair, neutral and unbiased” in discharging his duties, the appearance of bias made it prudent to remove him.\textsuperscript{12}

However, the governor wasn’t the first Kentucky politician to decry a decision of a ruling of the Franklin court. Legislators were unhappy in 1959 when Franklin Circuit Court Judge William B. Ardery struck down as unconstitutional the legislature’s popular amendment to pay a bonus to WWII veterans.\textsuperscript{13} Judge Henry Meigs II found himself in the national crossfire when he overturned the disqualification of Dancer’s Image by the Kentucky State Racing Commission, the horse first across the finish line in the 1968 Kentucky Derby, only later to be overruled by the Court of Appeals, sending the roses finally to Forward Pass.\textsuperscript{14} His colleague, Squire N. Williams, Jr., was forced to decide whether legislatively mandated displays of the Ten Commandments be removed from schools. He ruled the displays were constitutional, only to be overruled by the U.S. Supreme Court.\textsuperscript{15} In 2006, then-state Senate Leader David L. Williams was so unhappy with the Franklin circuit court that he filed a 333-page bill removing its jurisdiction from dozens of sections of the Kentucky Revised Statutes (KRS).\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{10} See Tom Loftus, \textit{Bevin Says Judge’s Facebook Response Shows His Bias on Pension Reform}, \textit{Courier J.}, Sept. 18, 2018.
\item \textsuperscript{11} See Tom Loftus, \textit{Bevin Gets Judge Removed from Teacher Sick-Out Case Over Facebook ‘Like,’} \textit{Lexington Herald-Leader}, September 27, 2019, at A3.
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{14} See Ky. State Racing Comm’n v. Fuller, 481 S.W.2d 298 (Ky. 1972); see also Milton C. Toby, \textit{Dancer’s Image: The Forgotten Story of the 1968 Kentucky Derby} (2011); Bob Helinger, \textit{Equine Regulatory Law} 189-235 (Supps. 2012 & 2020).
\item \textsuperscript{15} Stone v. Graham, 599 S.W.2d 157 (Ky. 1980) (because of recusals, the Kentucky Supreme Court upheld Williams on a tie), rev’d 449 U.S. 39 (1980).
Although courts of general jurisdiction are typically discussed by political scientists and legal commentators as purely trial courts, they are by necessity the court of first resort for issues with political import. When a new statute is passed, these courts are where aggrieved parties show up to challenge the act’s constitutionality and motion to stop the law from being enforced, at least until higher courts can make a final decision. In those early moments, courts of general jurisdiction exercise all the powers of a supreme court. When branches of government clash, courts of general jurisdiction must decide whether the judiciary has the right to intervene and, if so, how.

This inevitably makes these courts crucial actors in the first scene in the drama of legal-political conflicts between branches of government or over the legality of statutes, at least until the appellate courts arrive in the last act. Indeed, when one researches these controversies, they are struck by how much press coverage these initial rulings generate in comparison to the final ruling by the appellate courts. The rulings by general-jurisdiction courts are “table-setters” of debate over the issue litigated, especially in capital cities where the state government press corps resides. They become the subject of questions at gubernatorial press conferences, and the topic of op-eds, talk-radio, social media, and scholarly discussion. To scramble Justice Robert H. Jackson’s formulation, courts of general jurisdiction play an important role in political-legal issues not because they are final but because they are first.

These dramas typically play out, in Kentucky and other states, in the court of general jurisdiction that sits in the state capitol. If the matter arises from a regulatory issue, the enabling statute may in fact designate the general court of a capital city to hear appeals from final rulings of an administrative hearings board. However, most typically, that court is drawn in simply by geography. If you sue the state government, the state capitol is the natural place to file it. If a

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17. See infra Part I.

18. The pension lawsuit is a good example. There are dozens of articles on the Franklin Circuit lawsuit, preliminary matters, hearings before the court, and the court’s ruling; but the Supreme Court case generated only a few pieces on the oral arguments--and a large front-page story on the final decision.

19. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

20. See, e.g., S.B. 257, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006) (demonstrating that Sen. David Williams sought to "[a]mend various sections of the Kentucky Revised Statutes relating to the Franklin Circuit Court, to modify standards for venue and jurisdiction in actions involving the Commonwealth and its offices and agencies."). While it failed, it is an excellent index to that court’s role in administrative law.
clash between two entities of state government occurs (like the above dispute between the attorney general and the governor), it makes sense to adjudicate it in the place where those elected officials have their offices.  

This paper will explore the inherent possibility of conflict between the Franklin Circuit Court and the Kentucky governor or legislature against the backdrop of the landscape of similar capitol-city courts across the other forty-nine states. While this issue is not confined to Kentucky, it is impossible to study it granularly outside of the concrete details of an individual state. This examination is by design qualitative, not quantitative, analysis, historical in nature. The author has been an observer and citizen-participant in the political history of Kentucky and is reasonably well-placed to recognize nuance in the sparse sources chronicling the events discussed in the piece. It is hoped that this article could spark other research, in other states, on the role of the court of general jurisdiction in the legal-political conflicts in those states.

This article will begin with a discussion of the place of the court of general jurisdiction in American jurisprudence, noting the unique place played by many such courts situated in their state's capital city. This article will then review the legal and constitutional issues that end up resolved in state courts and the powers that state supreme courts have exercised as final arbiters, with a full understanding that trial courts cannot avoid their role as first responders to these legal-political controversies. Next, this article will move to a discussion of the

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21. The recent disputes between the current governor and attorney-general notwithstanding. See Conclusion.


23. Part of the difficulty is two-fold: historical treatments of state government and politics, particularly recent history, are sparse and when they exist, their treatment of legal issues is not deep. For example, look at Kentucky. For the post-war era that this paper covers, all but one, TRACY CAMPBELL, SHORT OF THE GLORY: THE FALL AND REDEMPTION OF EDWARD F. PRICHARD JR. (Univ. Press of Kentucky, 1998), of the biographical treatments of the era are memoirs. See HAPPY CHANDLER, HEROES, Plain Folks, and Skunks (1989); JOHN ED PEARCE, MEMOIRS: 50 YEARS AT THE COURIER-JOURNAL AND OTHER PLACES (1997); WALLACE WILKINSON, YOU CAN'T DO THAT GOVERNOR (1995); JOHN S. PALMORE, AN OPINIONATED CAREER: MEMOIRS OF A KENTUCKY JUDGE (2003); DONALD C. WINTERSHEIMER, SECRETS OF THE KENTUCKY SUPREME COURT (2010). The rest are oral histories, authorized biographies, or histories by partisans or critics. See CHARLES PAUL CONN, JULIAN CARROLL OF KENTUCKY (1977); FRAN ELLERS, PROGRESS AND PARADOX: THE PATTON ERA, 1995-2003 (2003); JOHN ED PEARCE, DIVIDE AND DISSENT: KENTUCKY POLITICS, 1930-1963 (1979); DON MCKAY, THE UNBRIDLED WORLD OF ERNIE FLETCHER (2006). The best general history is excellent, but it has to cover 210 years of state history in 563 pages. JAMES C. KLOTTER & CRAIG THOMPSON FRIEND, A NEW HISTORY OF KENTUCKY 20 (2018). Only with access to court records, a fulsome newspaper archives, and a memory of many of the events have I been able to survey one state's court system.
history of Kentucky’s capital city court of general jurisdiction, the Franklin Circuit Court, with an emphasis on the modern era. On the theory that the utility of a trial court is in preparing good case files for the appellate courts, it will move on to an analysis of the interplay of the Franklin court and the Kentucky Supreme Court in four major cases in Kentucky’s recent history. I will conclude with a brief analysis of current litigation regarding the executive response to COVID-19 that bypassed the Franklin Circuit Court and what it says, reflexively, about the importance of an experience capital city court of general jurisdiction.

II. COURTS OF GENERAL JURISDICTION IN CAPITAL CITIES

A. Courts of General Jurisdiction: Powerful but Unexamined

Without question, courts of general jurisdiction are the leading trial courts in the fifty American states. In most states, these courts are given original subject matter jurisdiction over all matters civil and criminal not otherwise designated to another tribunal. They, except in densely populated urban areas, are multi-county courts, where judges travel on a regular schedule to preside over trials held in the county seats of those counties. For most of the last two centuries, these courts, whether styled as circuit courts, superior courts, district courts, courts of common pleas, or some other designation, have presided over all trials of importance while leaving small matters and misdemeanors to minor courts of limited jurisdiction. The establishment of separate juvenile courts in


25. See 21 C.J.S. Courts § 6 (2020); see also 20 AM. JUR. 2D Courts § 66 (2020).

26. There are 16 Circuit Courts (AL, AR, FL, HA, IL, KY, MD, MS, MO, OR, SC, SD, TN, VA, WV, WI), 15 District Courts (CO, ID, IA, KS, LA, MN, MT, NE, NV, NM, ND, OK, TX, UT, WV), 15 Superior Courts (AK, AZ, CA, CN, DE, DC, GA, ME, MA, NH, NJ, NC, RI, VT, WA), and 3 Courts of Common Pleas (OH, PA, DE). Michigan has a Court of Claims and New York Supreme Court. Indiana has Circuit Courts in each county and a Superior Court where an additional general jurisdiction court is needed. See, e.g., State Court Web Sites, Nat’l Ctr. For State Cts., https://www.ncsc.org/information-and-resources/state-court-websites (last visited Apr. 9, 2021) (aggregating informational sources about circuit courts, district courts and courts of common pleas).

27. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 25 (3d ed. 1990) (explaining English legal history generally). Prior to the American Revolution, courts of assize, or assizes, were courts held around the country that exercised both civil and criminal jurisdiction. The “justices of assize” travelled six circuits throughout England at the time of the American Revolution. They are the clear inspiration for the American circuit court. Id.

28. See Limited Jurisdiction Courts Resource Guide, Nat’l Ctr. For State Cts., https://www.ncsc.org/topics/special-jurisdiction/limited-jurisdiction-courts/limited-jurisdiction-courts-resource-guide (last visited July 6, 2020) (explaining these courts “handle a variety of case types, and are known by many different names, depending on the state” but are typically confined
the early 20th century started a trend towards some encroachments on their broad jurisdiction, but the basic centrality of courts of general jurisdiction have remained.

One factor encouraging their prominence was the merger of common law and equity jurisdiction in the 19th century, giving common law trial courts the powers of chancery. As most state constitutions gave the power to the state legislature to establish lower courts, their miserly nature encouraged them for as small a few powerful trial courts as their docket would bear. Moreover, the prominence of the county as the center of state politics and state government gave the judges of courts defined by the boundaries of counties innate political power. A system of judges who rode circuit over a multicounty district appealed irresistibly to both the localism and the penny-pinching economy of state legislatures. As such, during the 19th and most of the 20th centuries such courts experienced a golden age.

In the years following World War II, legislatures began to place more restrictions on the autonomy of these courts, both by creating specialized courts like family courts and by placing restrictions in statutes on how judges of general courts could exercise jurisdiction over the objects in these laws. Moreover, the creation of intermediate courts of appeal began to review activities of trial courts with greater scrutiny than a single overworked high court could. Nonetheless, courts of general jurisdiction retain significant power within state judicial systems.

The matters adjudicated by courts of general jurisdiction are myriad. They are the preeminent trial courts, adjudicating serious crimes and felonies, to trying misdemeanors, including municipal ordinances, and civil cases involving smaller sums on money.

29. See generally Robert M. Ireland, The County Courts in Antebellum Kentucky (1972); see also Robert M. Ireland, The County in Kentucky History (1976); Robert M. Ireland, Little Kingdoms (1977); Ralph A. Wooster, The People in Power (1969); Ralph A. Wooster, Politicians, Planters, and Plain Folk (1975).

30. See The Judicial Branch of State Government, supra note 24, at 105-06.

including murder, rape, kidnapping, and assault, as well as all major civil cases, including commercial disputes involving significant sums of money. This civil jurisdiction includes contract disputes, controversies over title and the use of land, and tort claims from medical malpractice to personal injury. Several handle appeals from lower courts regarding matters of civil procedure. They typically also preside over guardianship and mental health inquests, divorce and child custody cases, termination of parental rights and adoption proceedings, probate, and juvenile matters, unless separate courts have been created.

Other matters are more likely to involve them in political controversies. In some states, parties unhappy with the decisions of administrative boards and agencies can either appeal those decisions to the general jurisdiction court or file

32. Trying felonies is the almost universal task of courts of general jurisdiction.

33. CRONIN & LOEYV, supra note 31, at 254-55; KRANE & SHAFFER, supra note 31, at 159; PALMER ET AL, supra note 31, at 103-104; WILLIS & SMITH, supra note 32, at 214.


35. KENNETH T. PALMER ET AL., supra note 31; see also CLUCAS ET AL., supra note 31, at 179; BROWN, supra note 31, at 126.

36. GARCIA, supra note 31, at 134; LANIER & HANDBERG, supra note 31, at 214.


38. NOWLAN, supra note 31, at 141; CLUCAS ET AL., supra note 31, at 179; CRONIN & LOEYV, supra note 31, at 254; BRISBIN, supra note 31, at 193; GERSTON, supra note 31, at 79.

39. See CRONIN & LOEYV, supra note 31, at 254; see also BRISBIN, supra note 31, at 193; BROWN, supra note 31, at 125.

40. CONANT, supra note 31, at 122; BLAIR & JAY, supra note 31, at 228; SRACIC, supra note 31, at 83. In some states, probate powers are invested in a chancery court.

41. CONANT, supra note 31, at 122; GERSTON, supra note 31, at 79; BRISBIN, supra note 31, at 193; CRONIN & LOEYV, supra note 31, at 254. Even when separate juvenile courts are created, they are given the powers of courts of general jurisdiction in those spheres.
a lawsuit to litigate the case. They adjudicate election disputes and lawsuits against the state. Moreover, they have equity powers to grant injunctions and writs of mandamus and prohibition.

Although courts of general jurisdiction are typically discussed by political scientists and legal commentators as purely trial courts, they are by necessity the court of first resort for issues with political import. When a new statute is passed, these courts are where aggrieved parties show up to challenge the act’s constitutionality and to file motions to stop the law from being enforced, at least until higher courts can make a final decision. When branches of government clash, courts of general jurisdiction must decide whether the judiciary has the right to intervene and, if so, how. This inevitably makes these courts crucial actors in the political system.

The neglect of the courts of general jurisdiction in the scholarly literature—both in general and as actors in state governmental systems—is as widespread as it is puzzling. Texts on the role of courts in the American system that are designed for college courses in government and political science should represent the consensus as to the scholarly community’s understanding of the function of the parts of the judicial system, yet a survey of the leading books rarely even hint at a political role for courts of general jurisdiction, if they discuss them at all. Works covering state government, in general, are little better. There are also few monographs discussing such courts, and those that do are extremely narrowly focused, and when they discuss the role of the courts in politics, the

42. See Garcia, supra note 31, at 134; see also Brisbin, supra note 31, at 179.
43. Garcia, supra note 31, at 134.
44. Id.
45. Id.; see also Brisbin, supra note 31, at 193.
46. The literature on courts of general jurisdiction over the decades is amazingly sparse. A title search of “courts of general jurisdiction” in HeinOnline returns only 8 articles on American courts (but several, oddly, on the post-Soviet Russian Federation). See Search for “Courts of General Jurisdiction,” HeinOnline, http://heinonline.org (limit search to search by title; then search “courts of general jurisdiction”; then select “United States of America” for location).
47. See generally Lawrence Baum, American Courts: Process and Policy (7th ed. 2012); see also Michael L. Buenger & Paul J. De Muniz, American Judicial Power: The State Court Perspective (2015); Robert A. Carp et al., Judicial Process in America (11th ed. 2020); see also Hogan, supra note 24; Brian L. Porto, May It Please the Court (3d ed. 2017).
48. See generally David R. Berman, State and Local Politics (9th ed. 1999); see also Todd Donovan et al., State and Local Politics (4th ed. 2013); see also Virginia Gray & Russell L. Hanson, Politics in the American States: A Comparative Analysis (10th ed. 2004); Gary F. Moncrief & Peverill Squire, Why States Matter: An Introduction to State Politics (2020); Kevin B. Smith et al., Governing States and Localities (7th ed. 2017).
focus is on local politics. If you took a class in American government and politics in college, you would not be wrong to imagine that political-legal controversies are immaculately birthed in the lobby of the nation’s state supreme courts, not the end-product of a legal process that winnowed the issues to the most legally relevant ones and had created a record that those high courts to use to help decide those cases.

One would expect more nuance from texts describing governmental systems in a particular state, and indeed one gets a more concrete discussion of the interplay of the judicial branch and the legislative and executive branches in such books as Governing New Mexico and Mississippi Government and Politics, to name but a few. But again, courts of general jurisdictions are only briefly treated as trial courts, and such discussion is focused on them as an admittedly critical part of the criminal justice system. However, there is little mention of their role in the legal-political controversies, which are discussed elsewhere in these books as purely appellate court issues.

B. The Capital City in a Federalist Republic

1. Republican Roots

The development of the state capital city in the United States is intimately connected to the new nation’s political philosophy that government should be exercised by representative democracy and that the powers of the central federal government should be limited, with the states retaining significant sovereignty


50. See Garcia, supa note 31, at 134-35.

51. See Krane & Shaffer, supra note 31.

52. Of all the books surveyed, none spent over a page and a half discussing these courts and for many only a few sentences sufficed. Yet courts in general fare better in 21st century state politics texts. In Kentucky, political scientists rarely discuss general jurisdiction courts in college texts beyond a bare recitation of their existence. One text, Jewell & Cunningham omits courts entirely; another, Miller, has an excellent discussion of the Supreme Court and the blossoming of the judicial branch after the adoption of the amendment reforming the judicial article in 1975. See generally, e.g., John Estill Reeves, Kentucky Government (1955); John Estill Reeves, Kentucky Government (1958); John Estill Reeves, Kentucky Government (1960); Malcolm E. Jewell & Everett W. Cunningham, Kentucky Politics (1968); Joel Goldstein, ed., Kentucky Government & Politics (1984); Penny M. Miller, Kentucky Politics & Government (1994); James C. Clinger, et al., Kentucky Government, Politics, and Public Policy (2013).

53. See Hogan, supra note 24, at 105-106.
because they were closest to the people. So, from the beginning, American democracy had a different geographic nature than the centralizing impulses of the absolutist monarchs residing in London, Madrid, and Paris. The state capital would not be dusty provincial towns; they would be centers of independent power.

In selecting their seats of government, the states were clearly influenced by the example of the creation of Washington, D.C. After the Treaty of Paris was signed in 1781, the American revolutionaries were able to contemplate the creation of a new republic unlike anything else that had gone before it. Turning their thoughts to a new capital city, they knew that the old capitals of Europe had been chosen by history and shaped by the interests of kings. Their capitals, they decided, would be created by representative legislatures and shaped by the people.

The U.S. Constitution contemplated building a capital from virgin soil, erected near the center of population but separate from the sectional divides that animated the Constitutional convention. In Article I of the U.S. Constitution, Congress was given the power to “exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may...become the seat of the government of the United States.” Later historians suggested that the decision to set up a separate district for the capital was a result

54. See The Federalist Nos. 39, 45 (James Madison) (describing the theory of limited federal government and state power); see also, e.g., Joseph J. Ellis, American Creation: Triumphs and Tragedies at the Founding of the Republic (2007) (documenting the history of the Founding Fathers).


56. See Gordon S. Wood, The Creation of the American Republic, 1767-1787 (1st ed. 1969) (describing Americans at the end of the Revolutionary War feeling like a “new people for a new world.” Wood said, “For most Americans, this was the deeply held meaning of the Revolution: they had created a new world, a republican world.”); see also Ellis, supra note 54, at 4. (describing Americans as highly conscious of their opportunity to create a “new kind of political architecture.”).

57. See Ronald E. Dickinson, The West European City 417 (1951) (explaining that the two centuries prior to the founding of America saw the capital city increasingly identified with absolute monarchs. It was an “era of the capital city” as kings and queens who had “processed” through their domains in earlier years, settled into capitals to manage more complex governments and commercialist economies, especially the imperial monarchies like Britain and Spain that the founders were most aware); see also Lewis Mumford, The City in History (1961) (recognizing seventeenth and eighteenth century monarchs redesigned the seats of their power to display that power); Vadim Rossman, In Search of the Fourth Rome: Visions of a New Russian Capital City, 72 Slavic Rev. 505, 506-27 (2013) (explaining that from Russia to London, the urban capital became the center of the court, society, and the economy); James Robertson, Stuart London and the Idea of a Royal Capital City, 15 Renaissance Stud. 37, 37-58 (2001).

of the Pennsylvania Mutiny of 1783, an armed protest by unpaid Continental soldiers that briefly disbanded the Continental Congress sitting in Philadelphia.\textsuperscript{59} However, the published debates of the convention show little evidence for this theory. The real reason for the location of the new capital was that delegates to the Constitutional Convention, well aware of the regional differences between free states and slave states that animated every decision of the body, knew that the capital city of the new union must be independent any state, must be centrally located to both the Northern and Southern states, and must not be associated with an existing commercial city like New York or Philadelphia. Congress settled on a district made up of equal parcels from Maryland and Virginia, although the use of the Virginia lands was avoided as not to unduly benefit President George Washington, who owned land near Alexandria.\textsuperscript{60} The unused land was retroceded back to Virginia in 1847.\textsuperscript{61} The new capital of Washington in the District of Columbia arose out of virgin soil and thus became an apt symbol of a new form of government, making a clean break from the moldy precedents and pediments of Old Europe.\textsuperscript{62}

In most cases, the selection of capital cities in the states was sparked by similar interests.\textsuperscript{63} James Madison explained the most salient factor: "It is important that every part of the community should have the power of sending, with equal facility, to the seat of government such representatives to take charge...

\textsuperscript{59} See William Tindall, Origin and Government of the District of Columbia 31-33 (1903).

\textsuperscript{60} Act of March 3, 1791, ch. 17, 1 Stat. 214-15 (1791); see also Fergus M. Bordewich, The First Congress: How James Madison, George Washington, and a Group of Extraordinary Men Invented the Government (2016); see also George C. Hazelton, Jr., The National Capitol 4 (1914).


\textsuperscript{62} With Pierre Charles L'Enfant's grand design, the United States capital was meant to be a unifying symbol of the nation. However, this began slowly. Early Washington residents were not great patrons of the arts, choosing to spend only on portraits of themselves, Andrew J. Cosentino & Henry H. Glassie, The Capital Image (1983), and to lavish on the homes that were slow to be built, Thomas B. Grooms & Taylor J. Lednum, The Majesty of Capitol Hill (2005). However, as the Capitol Dome rose during the Civil War, the D.C. we know what began to take shape. Fergus M. Bordewich, Congress at War: How Republican Reformers Fought the Civil War, Defied Lincoln, Ended Slavery, and Remade America (Knopf Doubleday Publ'g Grp., 2020).

of your interest as they are disposed to confide in.” 64 To locate the capitol in a location inconvenient to the current or anticipated center of population would “violate the principle of equality” of access to the heart of government.65

Political geographers Engstrom, Hammond, and Scott tested whether Madison’s prescription was followed by mapping the capital cities on the continental U.S. to the statistically determined geographical and population centers.66 They determined that most state capitals have been positioned in a place where the majority of the state population had ready access.67 This is particularly true when the geographical and population center was close; when they were farther apart, the capital location tended to split the difference.68 Interestingly, this proved true in places where the capital was originally sited in areas not then population centers.69 Apparently, legislatures were competent predictors of their state’s future growth.70

Nonetheless, other factors were at play. The potential for economic benefits of capital status was always a factor in new states, with city boosters attempting to influence the selection of initial capital cities and, as the population shifted with growth, seeking to move the capital to more central locations.71 Ultimately, these efforts were less successful than promoters may have imagined, but since many owned lands in the winning city, they likely personally benefited at least from the initial years of possession of the capitol building. Many of these capitols today are still mostly government towns, with commerce centered on servicing that sector (and perhaps on state universities that were later established there).72

Typical are the six Southern states that joined the union between 1812 and the admission of Texas in 1845.73 All included a temporary capital city in their constitutions while creating a method for relocating as the state’s population

64. Engstrom, Hammond & Scott, supra note 55 (quoting a letter written by James Madison dated September 4, 1789).
65. Id.
67. Id.
68. Id. at 234.
69. Id. at 236.
70. Id. at 236-37.
71. See Moussalli, supra note 63, at 58-75.
72. See CHRISTIAN MONTES, AMERICAN CAPITALS: A HISTORICAL GEOGRAPHY (Univ. of Chi. Press, 2014).
73. See Moussalli, supra note 63, at 58-75.
grew and the center of population emerged. The six states also avoided location of the capital in the biggest city. Emblematic was Florida, where the rival towns of Pensacola and Saint Augustine alternated meetings of the territorial legislature, but the legislature opted in 1824 for the then almost uninhabited Tallahassee. That was uncannily perceptive because middle Florida rapidly afterward became the territory's population center. The committee on the seat of government at the 1836 constitutional convention was balanced evenly between East and West Florida representatives who proposed that the capital of the new state “continue at Tallahassee for five years and then be permanently set by the legislature sometime in the succeeding five years.” 74 In Louisiana, where prior to statehood, the city of New Orleans dominated the state’s politics and economy, the constitution simply declared the capital would continue there “until removed by law.” 75 This allowed the developing state to relocate it later to Baton Rouge, which was closer to the geographic and population center of the state. 76

The selection of Frankfort as Kentucky’s capital city in 1792 was one of the first instances of the use of a state constitution to guide the choice of capital since the adoption of the U.S. Constitution. 77 And, although most accounts emphasize the legislature’s choice being guided by the financial inducements of the city’s boosters, a careful analysis indicates that the decision was based on similar concerns of geographic and population centrality and the avoidance of established commercial cities.

Kentucky’s constitution was the end-product of ten statehood conventions, the final of which recognized that statehood was coming and a state charter needed to be drafted. 78 This political process revealed divisions in the state over whether the state was western-facing or eastern-facing, and the degree that its future would be dictated by elites from Virginia or the common farmers of the state, who were spreading out from the established bluegrass. 79 Ultimately, the constitution resolved these divisions by creating a state government where the

74. Id. at 63.
75. Id.
76. Id.
77. See LOWELL H. HARRISON & JAMES C. KLOTTER, A NEW HISTORY OF KENTUCKY 68 (1997); GEORGE MORGAN CHINN, KENTUCKY SETTLEMENT AND STATEHOOD 495 (1975); see also FRANK W. SOWER, REFLECTIONS ON FRANKFORT 13 (1994); NETTIE HENRY GLENN, EARLY FRANKFORT KENTUCKY 11-13 (1986); 2 LEWIS COLLINS & RICHARD H. COLLINS, COLLINS’ HISTORICAL SKETCHES OF KENTUCKY 181-82, 245 (Collins & Co. 1882).
78. See HARRISON & KLOTTER, supra note 77, at 112.
governor and legislature were elected according to universal white male suffrage without property requirements and where the concentration of governmental power was checked by strict separation of powers.  

George Nicholas, a Virginian close to James Madison, was the driving force in drafting the constitution that reconciled these interests, a spirit he brought to his proposal to choose the state’s seat of government. “Recognizing that considerable competition might develop over the location of a state capital,” Nicholas proposed the creation of a five-man committee “to bargain with interested communities over inducements that might be offered to make the final selection.” The provision required the consent of 2/3 of both houses of the legislature to relocate that capitol after the committee’s selection was adopted. His resolution was quickly accepted by the convention.

The first session of the first General Assembly of Kentucky met in June 1792. Governor Isaac Shelby, in his message to the legislature, reminded them that the constitution had to ask them to choose to fix a “place for the permanent seat of government.” On June 18, they chose 21 members who were struck down alternatively until five commissioners were selected on June 20: future U.S. Supreme Court Justice Robert Todd of Fayette County, Thomas Kennedy of Madison County, Henry Lee of Mason County, and John Allen and John Edwards of Bourbon County. All were from the central Bluegrass region and, except for Louisville and tiny Petersburg in Boone County, so were the localities selected to visit for consideration: Lexington; Frankfort, Leesburg, Ledgerswood Bend, all in Franklin County; Delaney’s Ferry in eastern Woodford County; and Boonesborough in Madison County. With a centrally located, bluegrass region selection assured, the commission “frankly indicated that a primary factor would be the inducements offered by communities that sought the status of state capital,” as it sought concrete bids from candidates. Frankfort, a city near a bend in the Kentucky River that had been laid out by Gen. James Wilkinson and later sold to the city’s primary promoter Andrew Holmes, offered significant resources to build the capital, including Wilkinson’s large mansion to use as a temporary

80. See HARRISON, supra note 77, at 112.

81. HARRISON & KLOTTER, supra note 77; see also SOWER, supra note 77, at 13-14 (1994); CHINN, supra note 77, at 495.

82. See HARRISON & KLOTTER, supra note 77, at 112.

83. Id. at 68.

84. Id.

85. 1792 Kentucky House Journal p. 19 (June 18, 1792); p. 22 (June 22, 1792). See also COLLINS & COLLINS, supra note 77, at 245.

86. COLLINS & COLLINS, supra note 77, at 181-82, 245.

87. HARRISON & KLOTTER, supra note 77, at 112.
capital, eight prime lots of land in the center of the city as well as 37 unsold lots, building materials including “ten boxes of 10 by 12 inch glass, 1,500 pounds of nails, 50 pounds of locks and hinges, an equivalent of stone, and scantling (i.e., framing timber) and $3,000 in cash.” 88 The required three members of the commission accepted the Frankfort bid, including Todd, who had significant holdings in Lexington but knew that city, the state’s commercial and cultural center (it billed itself as “the Athens of the West”), had never been seriously considered. 89 The legislature approved the choice on December 22, 1792. 90 Despite the raw politics and without any assistance of geographic information systems, the process had chosen a place that was central in location and in proximity to the electorate. The bluegrass region the committee focused on is roughly the geographic center of an awkwardly wedge-shaped state that resists such reckoning. And even after two centuries, the state capitol remains central to the state’s populace. 91

2. Capitol Towns as Courthouse Towns

All around the country, judges of general-jurisdiction courts in capital city districts face politico-legal issues like those before the Franklin Circuit Court. In just the last few years, Jon Beetem, Cole County Circuit Court in Jefferson City, Missouri, has been asked to invalidate a gasoline tax referendum, 92 block a change to the Missouri civil-service law, 93 review a new Voter ID law, 94 and

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88. Id.
89. Lewis Collins & Richard H. Collins, 2 Collins’ Historical Sketches of Kentucky, at 245.
90. See Harrison & Klotter, supra note 76.
91. United States Census Bureau, Centers of Population by State, 2010, https://www2.census.gov/geo/docs/reference/cenpop2010/CenPop2010_Mean_ST.txt (last visited Apr. 30, 2020) (+ showing that according to the 2010 Census, the geographically determined population center of Kentucky is 37°49'28.2"N, 85°14'54.5"W, a rural spot in Washington County almost exactly 50 miles from Frankfort).
declare the appointment of a lieutenant-governor unconstitutional. In Virginia, lawsuits before the Richmond Circuit included one by a Democratic senator seeking to challenge the Republican lieutenant governor’s right to break a tie on the vote to organize the state Senate, to enjoin an anarchist from publishing certain police documents online, and, in a case by a public interest group, whether eleven districts allegedly gerrymandered by the legislature to benefit incumbents in both parties violated the state constitution’s requirement that the General Assembly districts be “compact.” At one point in the contentious case, Richmond Circuit Judge Riley Marchant held four sitting and two retired state senators in contempt of court for refusing to turn over documents. Arizona’s Maricopa County has a similar docket. Over five years, the court heard constitutional challenges to laws giving tax credits for private school scholarships, a measure putting a homeowners “Bill of Rights” initiative on the ballot, a law that allowed homeowners association disputes to be heard by an administrative law judge instead of a common law court, an abortion waiting-period statute, and a law that allowed a small group of Arizona school districts to spend unused bond money.


99. Williams, supra note 97.


Kansas's two-decade battle over equitable education funding highlights the burden hefted by capital city general jurisdiction courts. The struggle spawned such unwieldy case nicknames as Montoy IV and Gannon VI and involved a revolving cycle of trial court opinions by the Shawnee District Court, followed by appellate court decisions, legislative action, and more court activity to meet the latest standard set by the Supreme Court. The first round started in 1990 with the first of many lawsuits arguing that the state school system was inequitable under Article 6 of Kansas Constitution, and it continued through 2019. Successive legislative plans were offered before the court was provisionally satisfied in 1994. But backsliding began immediately, and the legislature only met the court's standards in 2006 in the fourth and final Montoy decision.

However, in 2012 new Kansas Governor Sam Brownback came into office with a plan to provide a major tax cut for the wealthiest Kansans funded by across-the-board cuts—including major school funding reductions. The theory was that this would spark an economic boom that would flood tax revenues with new money. That did not happen, and a new round of education equity lawsuits began with the first Gannon filing. In January 2013, the Shawnee District Court ruled that it would take $440 million to fund the schools adequately. Brownback's next budget instead provided only $76 million in aid. In March 2014, the Kansas Supreme Court upheld the lower court's decision that funding was inadequate, but that it used the wrong test to determine the price of the remedy. It further ruled that the Kansas legislature must increase parts of education funding by July 1. If they failed to act, the Kansas Supreme Court directed the Shawnee District Court to "make whatever orders it deems appropriate to cure the inequities in


107. See Gannon I, 319 P.3d at 1196.


109. Gannon I, 319 P.3d at 1204. The Court instead mandated the lower court use the standard applied by Kentucky's Supreme Court in Rose v. Council for Better Education, Inc. Id. at 1202. (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989)).
the current system."\textsuperscript{110} In early 2015, the legislature broke with Brownback over state education funding and provided more funding.\textsuperscript{111} However, in June, a three-judge panel of the Shawnee District Court ruled that the block-grant formula for school funding was still deficient under the Kansas constitution.\textsuperscript{112} Ruling in 2017, the Supreme Court agreed with Shawnee District Court that the block grant funding formula was inadequate.\textsuperscript{113} Governor Jeff Colyer, who took over when Brownback resigned midyear to become U.S. ambassador-at-large for international religious freedom, joined the state legislature in declaring themselves ready to make changes, but it took two more rounds of cases before the Kansas Supreme Court finally found the state in constitutional compliance.\textsuperscript{114}

At all the major steps, the Kansas court of general jurisdiction was the high court's partner in holding the political branches to the rulings of the Kansas Supreme Court.

III. THE JUDICIAL POWER OF COURTS OF GENERAL JURISDICTION AS ELEMENTS OF A UNITARY JUDICIARY

A. The Judicial Power in State Courts

When looking at the powers of courts of general jurisdiction, it is important to note that those courts have the power to "say what the law is" that is just as broad as the power held by state courts of appeal.\textsuperscript{115} The difference is that the exercise of this power by trial courts is time-limited and remains effective only until an appellate court hears the case. But this immediacy is powerful itself, and these courts are left to define the legal issues and basic facts that will be essential to the eventual resolution of the legal matter. Because lower court judges don't like to be overruled, judges of courts of general jurisdiction become expert predictors of how their state's high courts are likely to rule in a case.\textsuperscript{116} Judges of

\begin{itemize}
  \item \textsuperscript{111} Dylan Lysen, \textit{Lawmakers Split With Brownback In New Session}, \textit{Ottawa Herald}, Jan. 21, 2015.
  \item \textsuperscript{112} Joshua Vail, \textit{Court Rules Against States Block Grant School Funding Formula}, \textit{Chanute Tribune}, (Jun. 29, 2015), https://www.chanute.com/news/article_89d8463c-1eb6-11e5-addy-c3c2b7172645.html.
  \item \textsuperscript{114} See Gannon IV, 443 P.3d at 295-96.
\end{itemize}
general jurisdiction courts in the capital city—where the high court judges also sit—become particularly astute at this brand of prognostication. Of course, making these predictions is not a mysterious process. Like the lawyers arguing a case, judges make these determinations by reading the best precedents before them, but unlike the lawyers for the parties who use the case law in order to win the case, trial court judges use those precedents to make the right decision.

Moreover, state courts generally exercise more expansive powers than the federal courts because the federal courts are both limited themselves, and the caseload is limited by the restraints on the federal legislative and executive branches whose acts they review.\textsuperscript{117} The drafters of the U.S. Constitution were suspicious of power and limited the exercise of powers that they granted the federal government.\textsuperscript{118} And, through the 10th Amendment, they allocated to the states much of the substance of legal practice of their day such as criminal law, property law, the law of contracts, and the law of divorce.\textsuperscript{119}

\textbf{B. State Courts Come of Age in the 20\textsuperscript{th} Century}

1. The Rediscovery of State Constitutions

While the state courts have long interpreted their own constitutions, in many areas they did so heavily influenced by the U.S. Supreme Court's interpretation of the federal constitution, even when the text under review used different language and was drafted in far different times. Indeed, well into the 1980s, state constitutional law, as one commentator noted, "tended to be a sort of pallid me-tooism."\textsuperscript{120} However, as the Burger court began to restrict the scope of U.S. constitutional law in the late 70s and early 80s, a group of thoughtful jurists began to look again at state constitutions, finding substance in history in its provisions to resolve issues that the federal courts were abandoning. Justices Hans A. Linde of the Oregon Supreme Court,\textsuperscript{121} Robert F. Utter of the Washington Supreme

\begin{itemize}
\item \textsuperscript{118} See ALEXANDER M. BICKEL, \textit{THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS} (2d ed. 1986).
\item \textsuperscript{119} See Stanley Mosk, \textit{Rediscovering the 10th Amendment}, 20 JUDGES J. 16 (1981).
\end{itemize}
Court,Stanley Mosk of the California Supreme Court, and Shirley S. Abrahamson of Wisconsin Supreme Court applied this "new state constitutionalism" to their judicial decision-making and in the articles that they wrote for leading law reviews. Even Supreme Court Justice William Brennan weighed in support of this new approach.

The movement was based on certain principles that have become well-established. Foremost was the idea that state constitutional provisions were separate from those of the federal constitution and had distinctly different textual and historical contexts that must inform jurisprudence. Along these lines, these jurists believed it was irresponsible not to independently analyze the state provision before turning to analogs in the federal constitution.

Second, they believed that protections of fundamental rights under the federal constitution could be supplemented by greater protections under state constitutions without conflict so long as those protections did not run up against another federal protected right. "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution," the U.S. Supreme Court ruled in Arizona v. Evans. The only check on a state court's power to find an individual right in its constitution is that it do so in a written opinion that


128. 514 U.S. 1, 6 (1995).
"indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds," unless otherwise "clearly and expressly" indicated.\textsuperscript{129}

Third, they believed that the U.S. Constitution and state constitutions had different purposes and different approaches. While the founders of the federal constitution presumed unstated inherent rights and only negatively protected against governmental encroachments on those rights (largely with a Bill of Rights added when it seemed necessary to get the Constitution ratified),\textsuperscript{130} state constitutions often begin with long declarations of rights and create positive, affirmative rights like the right to education.\textsuperscript{131}

Moreover, they knew that while the U.S. Constitution was largely an 18th-century document, state constitutions were often revised up through the late 19th and early 20th centuries and were drafted by world-weary delegates who were very suspicious of government institutions like the legislature and of the corrupting power of special interests.\textsuperscript{132} They micromanaged the legislative process and strengthened the balance of power among the three branches.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{129} Michigan v. Long, 463 U.S. 1032, 1040–41 (1983). Because of the concurrent jurisdiction that allows claims in state courts based on both state and federal rights, this is a prudential rule that attempts to separate the two sources of law and avoids confused lines of precedent. In her dissent in Arizona v. Evans, Justice Ginsburg criticized the fact that Michigan v. Long set a legal presumption that when it was unclear whether a state court was based on state or federal law that the U.S. Supreme Court would presume it was based on federal law. Evans, 514 U.S. at 24 (Ginsburg, J., dissenting). Ginsburg believed that a state appellate court with state parties before it should be presumed to be using state law. Id. at 26.
\item \textsuperscript{130} Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788, at 429-433 (2010).
\item \textsuperscript{132} Hambleton Tapp and James C. Klotter, Kentucky: Decades of Discord, 1865-1900, at 263-66 (1977) provides a solid example in its description of the historical background to Kentucky's 1890-91 constitutional convention and its product. The unease of the delegates in reflected in provisions tightly regulating the legislative process, several oddly specific railroad regulations, and three robust open courthouse provisions.
\item \textsuperscript{133} A majority of state constitutions have a provision protecting “separate” and/or “distinct” branches of government. See e.g., Ala. Const. art. III, §§ 42, 43; Ariz. Const. art. III; Ark. Const. art. IV, §§ 1, 2; Cal. Const. art. III, § 3; Colo. Const. art. III; Conn. Const. art. II; Fla. Const. art. II, § 3; Ga. Const. art. I, § 2; Idaho Const. art. II, § 1; Ill. Const. art. II, § 1; Ind. Const. art. III § 1; Iowa. Const. art. III, § 1; Ky. Const. §§ 27, 28; La. Const. art. II §§ 1, 2; Me. Const. art. III, §§ 1, 2; Md. Const. art. DR, § 8; Mich. Const. art. III, § 2; Minn. Const. art. III, § 1; Miss. Const. art. I, §§ 1, 2; Mo. Const. art. II, § 1; Mont. Const. art. III, § 1; N.C. Const. art. I, § 6; Neb. Const. art. II, § 1; Nev. Const. art. III, § 1; N.H. Const. pt. I, B.R., art. 37; N.J. Const. art. III, art. 1; N.M. Const. art. III, § 1; Okla. Const. art. IV, § 1;
\end{itemize}
Many of these restrictions were tied to fears of the growing power of corporations and banks; because of this, state charters had numerous restrictions on economic power, especially railroads and mining corporations.\textsuperscript{134} They strengthened the power of the courts with “open courthouse” clauses that limited the legislature’s ability to provide tort immunity to corporate interests.\textsuperscript{135}

Finally, with the federal government designed to have limited powers, the federal courts have traditionally limited the justiciability of controversies through doctrines like standing and political question.\textsuperscript{136} State courts operate in governmental systems that do not have these constraints and thus frame their versions of these doctrines differently.

2. Justiciability Doctrines in the States

Federal courts have developed many techniques under the general rubric of “justiciability,” a legal term of art that refers to kinds of matters that are appropriate for courts to adjudicate. This concept, which embraces a number of abstention doctrines, is based at the federal level on an interpretation of Article III of the federal constitution that narrowly defines the case or controversy clause.\textsuperscript{137} It includes not only traditional justiciability concepts like standing, mootness, ripeness, but also other federal doctrines like the bar on advisory opinions and the “political question” doctrine that the U.S. Supreme Court have interpreted to impose limits on federal judicial power.\textsuperscript{138}

\textsuperscript{134} KY. CONST. BILL OF RIGHTS, § 23.


\textsuperscript{136} \textit{Bickel, supra} note 118, at 118.


State courts are “not bound by Article III and judicial practice in some states differs radically from the federal model.” Because state constitutions are set up to allocate the significant powers reserved to them under the Tenth Amendment, the subject matter before state courts is broader. The U.S. constitution limits all three branches under a theory of limited government—one that deliberately ceded large swaths of the legal landscape to the states. Far from limiting judicial power, the state constitutions create affirmative rights like the right to an education that invite citizens into the courthouse. This is not to say that state courts don’t have limits. For example, in Kentucky and many other states, the separation of powers, an unstated underlying theory of the federal constitution, is an explicit, written provision of the state charter. State courts are wary of encroaching on the province of other branches. And no courts wish to waste time on non-controversies. Even so, state courts are less eager to characterize live conflicts as nonjusticiable.

Alexander M. Bickel titled his book on the federal courts, especially the U.S. Supreme Court, as “The Least Dangerous Branch,” to reflect his hierarchical view of the three branches of the federal government. He coined the term “passive virtues” to describe various jurisdictional techniques used by the U.S. Supreme Court to avoid or delay controversies before it. Bickel’s judicial branch was inferior to not equal to the other branches; he urged “judicial restraint,” after all, not presidential or Congressional restraint.

Whatever the value of Bickel’s analysis, it is a mistake to apply it to state courts. Hans A. Lindh, a former judge of the Oregon Supreme Court, notes with apparent exasperation:

General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as
the agenda of constitutional litigation. It would cost casebook editors very little just to inform the students that the term [] case or controversy derives from the federal, not [any] state, constitution; that state courts . . . . decide moot cases in order to settle important questions, as well as . . . . decide issues that the Supreme Court declares non judiciable.146

No rule of federal justiciability doctrine is more entrenched than the ban on advisory opinions that started, at least in legal mythology, when U.S. Supreme Court Chief Justice John Jay refused to answer George Washington’s questions.147 By contrast, “some state courts play an explicit and accepted advisory role in the relations with the other branches.”148 States as diverse as Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize the judiciary to give advice when requested to do so by the legislature or governor.149 Helen Hershkoff describes state courts offering advice of such issues as “separation of powers among the three branches of government, the division of power between municipalities and states, the scope of power of unelected institution and government officials, the authority of elected and appointed bodies the powers of the governor and the propriety of various lawmaking procedures.”150 Some states like Kentucky get matters before courts in a more circuitous way. State statutes allow included parties to request legal opinions to the attorney general—and that opinion then can be appealed to the courts.151 While not a direct route, this mechanism clearly allows state courts to take up issues that federal courts would not consider a case or controversy. Indeed, everything on Hershkoff’s list above has been a subject of a Kentucky attorney general’s opinion. Typically challenges of these opinions come before


149. See e.g., COLO. CONST. art. VI, § 2; FLOR. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3; MASS. CONST. ch. III, art. 3; Mich. CONST. art. III, § 8; N.H. CONST. pt. 2, art. 74; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5. In Alabama and Delaware, the legislature has authorized courts to offer advisory opinions. ALA. CODE § 12-2-10 (2018); 10 DEL. C. § 141 (2018).


151. KY. REV. STAT. § 15.025. The Attorney General has promulgated 40 KAR 1:020 “to assure uniformity and clarity as to who may receive opinions and on what subjects” which advises persons and agencies seeking opinions that they will only be furnished “in response to questions relating to current factual situations; they will not be rendered in response to moot, hypothetical, or abstract questions, nor will they be rendered in response to questions involving matters being litigated or questions submitted in contemplation of litigation.” 40 Ky. Admin Reg. 1:020.
the Franklin Circuit Court—without any need to meet the high bar of the case or controversy requirement of federal doctrine.

The federal standing doctrine also limits the reach of Article III courts by “imposing strict entry requirements on litigants.”152 Federal litigants who seek to challenge government actions must jump through hoops to demonstrate standing. They must show an “injury in fact,” to a “legally protected interest” which is “concrete and particularized” and “actual or imminent.”153 That injury must be causally connected to the conduct before the court, and it must be “likely, rather than speculative,” that the injury will be “redressed by a favorable decision.”154 Taxpayers cannot challenge federal expenditures unless there is a specific prohibition on government power.155 And the doctrine denies elected representatives standing to challenge government action.156 States, on the other hand, have “standing rules that do afford citizens, taxpayers, and litigators roles in vindicating shared constitutional interest.”157 They vary from state to state, but taxpayers in “almost every state, however, can challenge the expenditure of public funds” without any individual showing the kind of “injury in fact” required by the cramped federal standing rule.158 Because state constitutions “include many substantive and social and economic provisions,” like Kentucky’s right to education, taxpayer standing is vital.159 One example was Kentucky’s courtship of a Toyota manufacturing plant in 1986. “Like many other states, Kentucky had been actively recruiting foreign businesses to invest in the state, offering incentives and subsidies such as infrastructure improvements, labor assistance, and tax breaks.”160 Kentucky’s winning package, a mix of financing with public and private ownership, would need enabling legislation that passed constitutional muster. As such, the agreement between Kentucky and Toyota mandated that the state “take such actions as may be required for the validation through judicial

152. Hershkoff, supra note 138, at 1852.
156. KEVIN M. LEWIS, CONG. RSCH. SERV., R45636, CONGRESSIONAL PARTICIPATION IN LITIGATION: ARTICLE III AND LEGISLATIVE STANDING (2019).
158. Id. at 1854-55.
159. Id. at 1855.
160. Id. at 1854-55.
proceedings of any legislation which may be enacted by the General Assembly.\footnote{Id.} After signing the authorizing bill, Governor Martha Layne Collins filed a declaratory judgment action to assure investors that the package would not be overturned later by the courts. In a 4-3 decision, the Kentucky Supreme Court upheld the incentive package.\footnote{Id. at 799.} Focusing briefly on the standing issue, the Court noted that:

In a practical sense, the parties who have a real interest are the people of this Commonwealth who have a right to a determination of whether the executive and the legislature have acted within the limitations of their constitutional power, the executive and legislative branches of government who sponsored and enacted the legislation, and Toyota, the industry induced to come to this Commonwealth.\footnote{369 U.S. 186 (1962). Kentucky has adopted the test in Baker v. Carr, Philpot v. Haviland, 880 S.W.2d 550, 553 (Ky. 1994). But in practice, Kentucky has not followed it slavishly. See Bevin v. Commonwealth ex rel. Beshear, 563 S.W.3d 74, 81-86 (2018) (discussed below).}

The “political question” doctrine is another judicially imposed restriction applied by federal courts, conjured into life by the U.S. Supreme Court in Baker v. Carr.\footnote{See Hayes v. State Property and Buildings Commission, 731 S.W.2d 797 (Ky. 1987).} The doctrine “remits entire areas of public life to Congress and the president,” perhaps a reasonable abstention by an unelected judiciary but one best confined to a federal system in which unresolved issues are sadly the norm. The political question doctrine “takes a different tilt in many states”\footnote{Hershkoff, supra note 138, at 1862.} which see no need for it. Linde observes that “there are hardly any state analogues to the self-imposed constraints on justiciability of ‘political questions,’ and the like that occupy students of the [U.S.] Supreme Court.”\footnote{Hans A. Linde, Judges, Critics and The Realist Tradition, 82 YALE L.J. 227, 248 (1972).} “If a ‘political question doctrine’ exists in a state court, I have not heard of it,” the Oregon jurist notes.\footnote{Hans A. Linde, E Pluribus: Constitutional Theories in State Courts, 18 GA. L REV. 165, 189-90 (1984).} When states apply something like the political question doctrine, they ground it firmly in the separation of powers doctrine found in their constitutions instead of the wispy theories of judicial restraint.

If federal justiciability doctrines are based on the limited-government principles of the U.S. Constitution, it is not surprising that states don’t have the same barriers. State constitutions are simply different. The founders of the
federal system purposely invested Congress with the leading role. But state constitutions "do not invest the same level of trust in legislative decision making."\textsuperscript{168} Most were revised after the states had ample evidence of the problems of legislative lawmaking, including poor legal drafting, opaque deal-making, and sharp parliamentary practices. Moreover, the industrial age had heightened dishonest influences of special interests as lobbying became more sophisticated. Kentucky's 1891 constitution is a good example. The delegates who wrote that document, many with legislative experience, believed the legislature could not be trusted to keep special interests from corrupting it.\textsuperscript{169} The state separation of powers clauses of constitutions were drafted to create separate and \textit{co-equal} branches to check the legislature.

Also, state-law making is more complex. Constitutions and legislative enactments allocate power to a multitude of state and local officials, some of which hold both executive and legislative powers.\textsuperscript{170} A good example is the situation of Kentucky's early county courts, whose magistrates adjudicated cases but also sat as fiscal courts, the county legislative body. Those county systems were presided over by an executive, the county judge, who performed all three functions as chief judge and member of the fiscal court.\textsuperscript{171} Courts are often called in to mediate the types of intergovernmental disputes that would be foreign to a federal court.

Moreover, in most states, the executive power is often divided in states between independently elected officials like attorney-general, secretary of state, state auditor, etc. This means that lawsuits over political disputes between these independent executives are not unusual; in fact, litigation between governors and attorneys-general is a recurrent feature of state government. It would be impractical for courts to abstain from resolving these conflicts.

Finally, in most states, judges are elected directly or through retention elections. As popularly elected members of a co-equal branch, these state judges have no reason to defer excessively to officials of the other branches. Strong courts, especially when deciding political constitutional questions, are what separates democratic governments from autocratic ones. When populists with authoritarian impulses successfully capture the statehouse or governor's

\textsuperscript{168} Hershkoff, \textit{supra} note 138, at 1892-93.


\textsuperscript{170} Nationally, 43 states popularly elect their attorneys general. \textsc{Emily Myers}, \textsc{State Attorneys General Powers and Responsibilities} 16 (4th ed. 2018).

\textsuperscript{171} \textit{See} \textsc{Robert M. Ireland}, \textsc{The County Courts in Antebellum Kentucky} 76 (1972). In many Kentucky counties, the judge-executive still serves as both the chief executive of the county and as a legislator on the fiscal court. \textit{See} \textsc{Ky. Legis. Rsrch. Comm'n, County Government in Kentucky, at 41 (2018).}
mansion, state courts can assert the rule of law. But this only happens if those matters are before the court.\footnote{172}

\textit{C. Kentucky Court of Justice}

1. The New Judicial Article and the Reborn Judicial Branch

As returning soldiers and reformers pushed to get “Kentucky On The March” following World War II, the state bench and bar began to discuss steps to modernize the state courts.\footnote{173} The Court of Appeals, then Kentucky’s only appellate court, was nearly overwhelmed by a crowded docket.\footnote{174} The circuit courts faced widely varying caseloads from circuit to circuit. Ordinary citizens had to navigate a profusion of minor courts, wandering from municipal court to police court to county court to find where to appear to challenge their parking ticket.\footnote{175}

But court reform is a hard issue to get on the public agenda, particularly when a constitutional amendment would be necessary for the most essential changes: the creation of an intermediate court of appeals and the replacement of all the varied courts of limited jurisdiction with one, the district court. The first effort occurred in 1966 when the legislature tried to replace the entire state constitutional system, all three branches at once, with a single amendment.\footnote{176} This was too much for the voters who declined to ratify the mammoth measure. After this setback, reformers led by the Kentucky Bar Association and local bar groups like the Louisville Bar Association decided to push to amend the judicial article alone. Starting with the version drafted for the 1966 effort, they planned carefully. After polling Kentuckians, they decided to drop plans for a non-elective judiciary, discovering voters wanted to choose their judges themselves.\footnote{177} In 1975, the judicial article was ratified.\footnote{178} The reorganization of the court system, which followed, along with increased independence of the legislature starting in the 1970s, led to a triad of cases in the early 1980s that asserted the independent

\footnote{172}{Hershkoff, \textit{supra} note 138, at 1841 (reflecting on the role of courts internationally and noting that the "scope of justiciability doctrine is particularly relevant to nations that are making the transition from totalitarian regimes to democratic governments seeking to translate the rule of law values into problems of liberal reform.").}

\footnote{173}{\textit{COMMITTEE FOR KENTUCKY, KENTUCKY ON THE MARCH} (ca. 1940-44).}

\footnote{174}{KURT X. METZMEIER, MICHAEL WHITEMAN & JASON NEMES, \textit{UNITED AT LAST: THE JUDICIAL ARTICLE AND THE STRUGGLE TO REFORM KENTUCKY’S COURTS} (2006).}

\footnote{175}{\textit{Id.}}

\footnote{176}{\textit{Id.}}

\footnote{177}{\textit{Id.} They did opt for nonpartisan elections, which removed judges from party slates.}

\footnote{178}{\textit{Id.}}
co-equal status of the judicial branch, while it clarified the boundaries of all three branches of Kentucky government.

In *Ex parte Farley*, the Kentucky Supreme Court ruled that the court system was not subject to the Open Record Act, noting that "we are firmly of the opinion that the custody and control of the records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation." The court found that while "[t]here is very little in the policies evinced by the Open Records Law that we could not accept as a matter of comity" specific details of the law were "inconsistent with the orderly conduct of our own business." Farley also found that the Kentucky Supreme Court was the only body competent to rule on constitutional matters relating to the organization of the judicial branch. These rulings aside, the case is most important as a first indication of the new independence of the unified court system, a point highlighted in *Ex Parte Auditor of Public Accounts*. Here, the issue was whether the state auditor, one of Kentucky's independently elected executive officer, was legally entitled or required to audit the books and accounts of the Kentucky Bar Association (KBA). The Kentucky Supreme Court found that the 1975 constitutional amendment reforming the judicial branch made the KBA an administrative agency of the court and thus not subject to any member of Kentucky's divided executive branch or to any legislative statute authorizing such audits. The Court pointed to Sec. 110(5)(b) of the state constitution, which stated: "The chief justice of the commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary." The chief justice," the section continued, "shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court." The Court noted, pointedly, that "[t]hese references to administration and administrative functions do not appear in the Judicial Amendment by accident. Their purpose is to make it unmistakably clear that the judicial branch of this state government has exclusive authority to manage its own affairs."
Having defined its own role, the courts turned to the boundaries between the executive and legislative branches. The constitutional portion of *Brown v. Barkley*¹⁸⁷ dealt with the governor’s power to reorganize the offices of elected state constitutional officers when the plan exceeded the powers delegated on the reorganization statute. The Kentucky Supreme Court determined that the governor had no inherent power to do that.¹⁸⁸ *Brown v. Barkley* has been overshadowed, but some of its limits on implied executive power are still relevant. However, legislators and legislative staff read it (incorrectly in Justice John S. Palmore’s mind) to proclaim the superiority of the legislative branch.¹⁸⁹ The legislature decided to exercise this apparent power, leading to the course correction in *Legislative Research Commission v. Brown*.¹⁹⁰ That case, an attempt by the Kentucky legislature to give powers to the Legislative Research Commission (LRC) to check executive decisions during the months when the legislature was not in session, is discussed in detail below.¹⁹¹

2. Kentucky and the New Constitutionalism

The newly constituted Court of Justice soon adopted the new state constitutionalism philosophy, sometimes called the “New Federalism,” perhaps influenced by the spirit of Louisville-born Justice Louis D. Brandeis’s dissent in *New State Ice Co. v. Liebmann*, who averred that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁹² Justice Charles M. Leibson brought the approach to the Kentucky Supreme Court,¹⁹³ and with the active support of then Dean Donald

¹⁸⁷. 628 S.W.2d 616, 618 (Ky. 1982).

¹⁸⁸. Id.


¹⁹⁰. 664 S.W.2d 907, 915 (Ky. 1984).

¹⁹¹. See infra Part IV, Section A.


L. Burnett, Jr., of the Louis D. Brandeis School of Law at the University of Louisville,\textsuperscript{194} to bar meetings and the classrooms of Kentucky law schools.\textsuperscript{195}

The Kentucky Supreme Court soon recognized that declarations of individual rights in state constitutions like Kentucky's allowed it and other state courts to enhance the liberties and protections of the law for its citizens over and above those provided by the federal Constitution. Two examples are Kentucky's fundamental right to freedom from being taxed to finance sectarian schools and the right to privacy.

Kentucky's Constitution has several provisions that prevent the preference of one religion over another. Section 5 proclaims that broad freedom of conscience:

\begin{quote}
No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.\textsuperscript{196}
\end{quote}

But the framers were not satisfied with these protections against established churches and were also particularly concerned that state funds would not be spent on church schools, so in Section 189, they stated that "[n]o portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."\textsuperscript{197} Other provisions limited the spending of state funds to "public purposes only."\textsuperscript{198} Looking away from the U.S. Supreme Court's contentious Establishment Clause jurisprudence, the Kentucky Supreme Court


\textsuperscript{195.} I have a version of his spiral bound textbook. \textit{JUSTICE CHARLES LEIBSON, KENTUCKY CONSTITUTIONAL LAW} (1994).

\textsuperscript{196.} KY. CONST. § 5.

\textsuperscript{197.} KY. CONST. § 189.

\textsuperscript{198.} KY. CONST. § 171.
has interpreted these state provisions to greatly limit the use of state money for sectarian schools. In *Fannon v. Williams*, the court found the use of state funds to buy schoolbooks for private and parochial schools unconstitutional.\(^{199}\) In *Jefferson County v. Brady*, the court rejected a plan to use tax dollars to subsidize student transportation to Catholic schools.\(^{200}\) In 2010, the state supreme court upheld the Franklin Circuit Court’s invalidation under Section 189 of a legislative appropriation of $10 million dollars to establish a pharmacy school at the University of the Cumberlands, a sectarian college.\(^{201}\)

A good example of how the Kentucky courts have taken an independent stance and have found personal liberties in the state constitution that are more expansive than those in the federal constitution is *Commonwealth v. Wasson*, where the Kentucky Supreme Court invalidated the state’s law criminalizing consensual sodomy on the ground that it violated Wasson’s right to privacy and equal protection of the law under Sections 1, 2 and 3 of the Kentucky constitution.\(^{202}\) The court began its analysis by brushing off the federal precedent of *Bowers v. Hardwick*, 478 U.S. 186 (1986) and establishing its independent right to find protections for individual rights in the state charter “so long as state protection does not fall below the federal floor” set by the Supreme Court.\(^{203}\)

The court then determined that the Kentucky Constitution protected an individual’s right to privacy under sec. 1, which states that “[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of enjoying and defending their lives and liberties” and the “right of seeking and pursuing their safety and happiness,” and sec. 2, which declares that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”\(^{204}\) The court opined that when Louis Brandeis and Charles Warren wrote their famous *Harvard Law Review* article, “The Right to Have Privacy,”\(^{205}\) they were merely putting a new label on a concept more familiar to the framers of the 1891 charter as “personal liberty.”\(^{206}\) The court quoted from the debates

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199. 655 S.W.2d 480, 484 (Ky. 1983).

200. 885 S.W.2d 681, 684-87 (Ky. 1984).

201. Univ. of Cumberlands v. Pennybacker, 308 S.W.3d 668, 673-82 (Ky. 2010).

202. 842 S.W.2d 487, 493-94 (Ky. 1992), overruled on other grounds by Calloway Cty. Sheriff’s Dep’t v. Woodall, 607 S.W.3d 557 (Ky. 2020).

203. *Id.* at 492. *Bowers* was later overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

204. *Wasson*, 842 S.W.2d at 494 (citing Ky. CONST. § 2).


206. *Wasson*, 842 S.W.2d at 494.
of the convention and from a decision rendered just after the constitution was adopted which, in the context of home use of prohibited liquor, said "[it] is not within the competency of government to invade the privacy of a citizen's life and regulate his conduct in matters in which he is alone concerned." Using similar arguments, the court also found that Wasson's right to equal protection was violated under Section 2 and Section 3, which proclaims that "all men . . . are equal" under Kentucky's laws.

IV. THE FRANKLIN CIRCUIT COURT IN KENTUCKY HISTORY

In Kentucky, the court of general jurisdiction has been the circuit court, which early on seized that mantle from other experiments with general jurisdiction courts and held it through two constitutional conventions in 1849 and 1890-91, and a major revision of the judicial article of the constitution approved by the voters in 1975. Throughout the period, this court has played a powerful role in Kentucky jurisprudence. This was recognized by the delegates to the 1849 constitutional convention, which grappled with the implications of making the office elective, something demanded by the Jacksonian era they inhabited but nonetheless troubling that body because of those great powers and the corrupting influence of the electoral hustings. They tried to mitigate those dangers by conferring authority to the Court of Appeals to reverse its criminal convictions and by encouraging a written code of practice. These measures increased the professionalism but not the power of the circuit courts, which remained a workhorse of the court system well into the twentieth century. Reforms in the last half-century have equalized its burdens and added a layer of statutory control over the exercise of its jurisdiction, so it remains a critical part of the Kentucky judicial system.

A. Early State Courts of General Jurisdiction

The origins of the Franklin County Circuit Court as a single county court of general jurisdiction are rooted in a typically Kentuckian mixture of good-government aspirations and complex political machinations. This was perhaps inevitable. From the establishment of the commonwealth in 1792, the primary court sitting in the capital, where the institutions of government and the state

207. Id.

208. Id. at 495 (citing Com. v. Campbell, 177 S.W. 383, 385 (Ky. Ct. App. 1909)).

209. Id. at 500; see also Ky. Const. §§ 2 & 3.

treasury resided, was going to have a significantly different docket and judicial challenges than other similarly designed courts.

The establishment of courts in Kentucky happened at a time when most of the state’s population was centered in the Bluegrass region in which Frankfort resided.\textsuperscript{211} The state’s first constitution vested the judicial power in the Court of Appeals and such inferior courts as the legislature established.\textsuperscript{212} That year, the first General Assembly of Kentucky began to create those inferior courts. In doing so, they drew on their past as a part of colonial and early republican Virginia and centered the court system on the county, creating a profusion of lower courts including justice of the peace courts, county courts, and courts of quarter session, all with overlapping jurisdiction.\textsuperscript{213}

The legislature did not create a clear court of general jurisdiction.\textsuperscript{214} The closest was the court of quarter sessions, which consisted of three of the justice of peace appointed for the county in which the court sat. The court had jurisdiction over all causes at common law and equity within the respective county except for criminal cases where conviction required the loss of life (and small civil cases involving “sums less than £5” which fell to the lower courts.)\textsuperscript{215} Those capital cases fell under the jurisdiction of the court of oyer and terminer, which also consisted of three judges drawn from the justices of the peace.\textsuperscript{216} Its jurisdiction was specifically over trying all “treasons, murders, felonies” and other

\begin{itemize}
  \item \textsuperscript{211} The region was then dominated by Lexington, the cultural and commercial center, and, to a lesser degree by Danville, the capital of the Kentucky Territory in the years before statehood. See JAMES C. KLOTTER & DANIEL ROWLAND, BLUEGRASS RENAISSANCE: THE HISTORY AND CULTURE OF CENTRAL KENTUCKY, 1792-1852 (2012).
  \item \textsuperscript{212} KY. CONST. art. 5, § 1 (1792).
  \item \textsuperscript{213} 1792 Ky. Acts ch. 33, (June 28, 1792), compiled in WILLIAM LITTELL, 1 STATUTE LAW OF KENTUCKY, ch. 23 (1809). (Littell is being cited because Kentucky’s early session laws are extremely rare, in poor condition, and often incomplete). This scheme essentially replicated the court system of the English countryside and presumed a gentry, culture of deference, and land ownership system that Virginia shared but Kentucky never truly replicated.
  \item \textsuperscript{214} William E. Bivin, The Historical Development of the Kentucky Courts, 47 Ky. L. J. 465, 466 (1959).
  \item \textsuperscript{215} LITTELL, supra note 213, at 94. Although Congress set the dollar as the official U.S. currency in 1792, Kentucky law measured fines in pounds and shillings, or “hogsheads of tobacco” until in early 1800s because the new coinage took a while to cross the Alleghenies to reach the frontier. Arthur Nussbaum, The Law of the Dollar, 37 COLUM. L. REV. 1057, 1059-64 (1937).
  \item \textsuperscript{216} LITTELL, supra note 213, at 94.
\end{itemize}
crimes and misdemeanors brought before them.\textsuperscript{217} It could summon a grand jury to inquire into these crimes and then a jury of twelve men to try the cases.\textsuperscript{218}

In 1795, the legislature reorganized the court system, creating a true court of general jurisdiction, the district court, abolishing the court of oyer and terminer by implication.\textsuperscript{219} The commonwealth was divided into six districts based on a grouping of counties. Each county in a district had two sittings of the court, which was styled as "the district court of x county."\textsuperscript{220} The district court had jurisdiction over all matters at common law or equity that were brought to it by original proceedings, writs of certiorari, or mandamus.\textsuperscript{221} The courts of quarter sessions were not abolished but demoted to a court with limited jurisdiction over assault and battery cases and suits of slander.\textsuperscript{222} The district court was also given jurisdiction over capital crimes.\textsuperscript{223} However, because of the lack of jails in the other five districts, only the Franklin County court was able to try these felonies.\textsuperscript{224} The judges of the six districts met twice a year in Frankfort as a general court.\textsuperscript{225} The general court's jurisdiction included all cases against public officers, sheriffs, clerks, any collectors of public money, and all cases seeking funds from the state treasury.\textsuperscript{226} It is notable that by 1802, a court sitting in Frankfort was specifically designed to deal with issues involving the state government, powers that were given later to the Franklin Circuit Court.

\textsuperscript{217} Id. at 99. The criminal law as it stood in 1792, deriving from the English common law restated in William Blackstone's Commentaries, including capital misdemeanors. Kentucky soon reformed its criminal laws to limit the death penalty to murder, manslaughter, and rape. HARRY TOULMIN & AND JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY (Frankfort: W. Hunter, Printer to the State, 1804).

\textsuperscript{218} LITTELL, supra note 213, at 157-58.

\textsuperscript{219} William Littell, the compiler and one the era's leading legal scholars, opined in a note preceding the law that the court of oyer and terminer was abolished by having its jurisdiction taken from it, but the law itself is silent. LITTELL, supra note 213, at 321 (The full statute is only preserved by Littell as its first two pages in the Kentucky acts are now lost).

\textsuperscript{220} The styling is evident in the law reports, starting with first volume of Kentucky Reports.

\textsuperscript{221} LITTELL, supra note 213, at 478.

\textsuperscript{222} Id.; WILLIAM LITTELL, 2 STATUTE LAW OF KENTUCKY, 309 (1809).

\textsuperscript{223} LITTELL, supra note 213, at 478.

\textsuperscript{224} Biven, supra note 214, at 8-9.

\textsuperscript{225} LITTELL, supra note 213, at 478.

\textsuperscript{226} Id.
B. The Circuit Court in Kentucky History

The legislature continued to tinker with the district courts until 1799, when Kentucky established a new constitution, partially to deal with issues that had arisen in the political structures of the first. As in the first constitution, the legislature was empowered to create inferior courts. After reconstituting some of the prior courts, the legislature cleared the decks and abolished the district and general courts, and established a new preeminent court of general jurisdiction, the circuit court. The duties of the general court were by statute given to the Franklin Circuit Court.

This ushered in a golden era of the circuit court judge. With the Court of Appeals having no jurisdiction over criminal cases and with no established code of practice, the rulings of circuit court justices on a matter of civil procedure, evidence, and the trial of criminal offenders stood unchallenged. Moreover, as the judges moved along their circuits alongside circuit lawyers with circuit practices, staying in the same inns and taverns, they became acknowledged as leaders of the bar. With good judges, this was a wholesome development in an era without bar associations and formal codes of conduct, as it built professionalism and a sense of ethical responsibility. However, with some more “troublesome” judges, it caused friction and tension. More seriously, it led to the development of circuit-specific law and procedures which balkanized to courts into fiefdoms where “that which is a crime in one circuit, may be no crime...

227. The 1792 created an electoral college to select the governor. The election of 1795 had resulted in a plurality of four men receiving votes. Although the constitution was silent on the issue, the electors decided to have a runoff vote for the top two candidates. The winner, James Garrard, became governor despite not having the most votes in the first round. That candidate, Benjamin Logan, was unhappy with the result and the whole affair assured that a more direct for of electing governors would be on the constitutional agenda. H.E. Everman, James Garrard, in LOWELL H. HARRISON, KENTUCKY’S GOVERNORS 7-11 (2004).

228. KY. CONST. § 1 (1799).

229. WILLIAM LITTELL, 3 STATUTE LAW OF KENTUCKY 37-42 (1811).

230. Id.


In 1849 delegates assembled to debate a new constitution that would go into effect in 1850. For example, during the debates in 1849 that led to the 1850 constitution, lawyers complained that the lack of judicial review and uniform court rules had led to notable situations like the one concerning the benefit of clergy. Most circuits refused to allow the ancient rule by which “clergy,” defined as someone who could read a passage from the Bible, could not be executed. Delegate M.C. Marshall of Bracken related a case where a circuit judge let it benefit of clergy save a murderer from the gallows. These circuit-specific rules of evidence and procedure disadvantaged Kentucky lawyers whose normal practice was in another circuit. As mentioned earlier, the new charter empowered the General Assembly to give the Court of Appeals jurisdiction to review criminal convictions and directed it to promulgate a code of practice for the courts of the commonwealth. The legislature carried out this invitation by passing an 1854 law setting up a criminal appeal, and by appointing a commission which included James Harlan, the father of the future Supreme Court Justice John Marshall Harlan, to draft a code of practice that was accepted adopted in 1851.

However, the primary impetus for the new constitution was the new Democratic age. The new Constitution created a transformational change in Kentucky by mandating that all public officials, including judicial officials, be elected by the voters. Prior to this, all judges were appointed, either by the governor with the concurrence of the legislature or by county courts (which


235. Id.

236. Id. at 690.

237. Delegate Philip Triplett of Daviess County called for “uniformity of decisions” and a “settled, permanent, jurisprudence” arising from “decisions of the court of appeals . . . on all important points” of law. Id. at 685.

238. KY. CONST. of 1850 art. II, § 39 (“The General Assembly may pass laws authorizing writs of error in criminal or penal cases and regulating the right of challenge of jurors therein.”)

239. KY. CONST. of 1850 art. VIII, § 22 (“At its first session after the adoption of this Constitution, the General Assembly shall appoint . . . three other persons, learned in the law, whose duty it shall be to prepare a Code of Practice for the courts, both civil and criminal, in this Commonwealth, by abridging and simplifying the rules of practice and laws in relation thereto; all of whom shall, at as early day as practicable, report the result of their labors to the General Assembly, for the adoption or modification.”).


241. M. C. JOHNSON, JAMES HARLAN, JOHN WHITE STEVENSON, CODE OF PRACTICE IN CIVIL CASES (1851).
constituted a self-perpetuating oligarchy). With elections impending, the 1849 delegates created a section in the constitution explicitly defining the circuit court and setting qualifications for the office of judge, including a then-controversial requirement that candidates have eight years of experience as an attorney.

Because mid-century Kentucky had a vigorous party system, with members of the Democratic Party and the Whig Party exchanging control of the legislature and governorship on a regular basis, the newly elective circuit judges would find themselves on partisan ballots, often slated by party officials. While judges had always involved themselves in politics, the new constitution now required them to go out and ask county and state party organizations to slate them on a ticket, and then go out and seek votes. It ensured that judicial office would be an option for politically ambitious lawyers. Generally, parties would seek to nominate to the highest judicial offices solid distinguished jurists as ornaments to add prestige to the party slate, but lower judicial positions were fair game for intense political competition. And after the Civil War, judicial candidates would occasionally find themselves amid politically motivated feuds in eastern and south-central Kentucky. Even in the 20th century, we will find party politics playing a part in circuit court selection.

Despite some restrictions set by the new code of practice and by the threat of having their rulings overturned by the court of appeals, the circuit courts became even more important to the state judicial system in the late 19th and early 20th century with elected judges. The 1890-91 constitutional convention only strengthened the courts. In summarizing the judiciary committee’s report to the convention, R. P. Jacobs noted that the:

[O]bject of this Circuit Court report is to provide a uniform system of Circuit Courts throughout the State—abolishing all the Common Pleas, Criminal, Equity and Chancery Courts which now exist, with the expectation and belief that Circuit Courts of


243. KY. CONST. art. IV, §§ 3, 6-9, 10, 14 (1850).

244. METZMEIER ET AL., supra note 174.


246. In his memoir, John S. Palmore, who served on both the old Court of Appeals and new Supreme Court discussed how despite his superior legal ability, trial commissioner Osso Stanley could never have been elected as judge because he was a Republican in then Democratic western Kentucky. PALMORE, supra note 23.
sufficient number can be furnished . . . to supply all the wants and necessities of the people growing out of litigation.\textsuperscript{247}

This is not to say the convention didn’t understand the dangers of such a powerful court. In a long debate over whether to place term-limits on the circuit bench, Bennett H. Young of Jefferson County suggested:

\begin{quote}
[A] Circuit Judge has more power than the Governor of the State of Kentucky; and if it came between those two men to say which should be eligible to a second term, I should say let the Governor be eligible and make the Circuit Judge ineligible. I believe he has such power, the wrongful exercise of which would be more dangerous to the welfare of the State, and more hurtful to the interest of the citizen, than the Chief Executive of the State of Kentucky.\textsuperscript{248}
\end{quote}

That inherent power would continue; term-limits were not included in the Constitution ratified by voters in 1891.

The jurisdiction of the circuit courts has changed little over the centuries and are encapsulated in the version in Kentucky’s last full recodification\textsuperscript{249} the 1942 Kentucky Revised Statutes:

\begin{quote}
The circuit court is a court of record. It has original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal, and jurisdiction in all cases where the title to land is in question. . . Each circuit judge is a conservator of the peace throughout the state.\textsuperscript{250}
\end{quote}

In 1911, the Court in \textit{Commonwealth v. Prall} stated the scope of its historical jurisdiction plainly: “The circuit court has jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal, and no statute should be construed to divest it of jurisdiction of any matter unless it is in express terms or clearly so provided.”\textsuperscript{251}

\begin{thebibliography}{9}
\item \textsuperscript{247} Comments of Delegate R.P. Jacobs for Boyle County, E. POLK JOHNSON (ed) 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION at 3269 (1891).
\item \textsuperscript{248} Comments of Delegate Bennett H. Young from Jefferson County, E. POLK JOHNSON, 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION at 3299 (1891).
\item \textsuperscript{249} Kurt X. Metzmeier, \textit{Happy Birthday, KRS!}, LOUISVILLE BAR ASSOCIATION BAR BRIEFS 10 (April 2017).
\item \textsuperscript{250} KY. REV. STAT. § 23.010 (1942). The KRS recodified Kentucky Statutes § 966, 1893 Ky. Acts, c. 221, § 14. The source of the 1893 section was General Statutes (G.S.), ch. 28, Art. IV, §§ 1, 2, as amended 1880, c. 409, and G. S., ch. 28, Art. V, § 4.
\item \textsuperscript{251} 133 S.W. 217 (1911).
\end{thebibliography}
As Kentucky’s regulatory state grew over the 20th century, the circuit courts were “authorized by law to review the actions or decisions of [those] administrative agencies, special districts or boards” so designated by the legislature.\textsuperscript{252} The legislature prescribed that such “review shall not constitute an appeal but an original action.”\textsuperscript{253} The current version also notes that it is “court of record and of continuous session,” with “appellate jurisdiction” over courts of limited jurisdiction as designated by the legislature.\textsuperscript{254}

The number, composition, and calendar of the circuit courts were established early by statute. The legislature set the number of counties in a circuit, and because of the rapid growth of the number of counties in Kentucky (which would top out at 120), and population considerations set by constitutional law, the legislature frequently rearranged the number of counties in circuits and added new circuit courts to accommodate growth.\textsuperscript{255} Moreover, the legislature set the days that the circuit would hold court in each of those counties.\textsuperscript{256} However, this bare framework was filled out by custom and practice. The judges of circuit courts would process through each of the counties in their circuit in fall and spring, sitting for from a few days to a week or two, before moving to the next circuit county seat.\textsuperscript{257} Although a circuit court judge would live and establish their main office in that home county, when sitting in another county in their district, for example, Shelby County, the court would be styled as the “Shelby Circuit Court,” and its records would be stored there. As the circuit court moved through the counties of his district, local lawyers would follow. This created discrete local communities of the bar, with some lawyers largely confining their practices to the counties in their circuit, venturing only rarely into other circuits. New lawyers would apply to circuit court judges to license them to practice law, and they would learn court practice riding circuit, watching their fellow lawyers and discussing the law as they waited for their cases to be called. Bands of lawyers, following judges on the circuit, staying in the same hotels and inns, eating and

\begin{itemize}
  \item \textsuperscript{252} Ky. Rev. Stat. § 23A.010 (2020).
  \item \textsuperscript{253} Id.
  \item \textsuperscript{254} Id.
  \item \textsuperscript{255} Two articles I wrote for a historical journal document the regular revision of the circuit courts as county after county were carved out of existing ones. Kurt X. Metzmeier, Judges of the Kentucky Circuit, 1831-1861, 42 Kentucky Ancestors 151-160 (2008); Kurt X. Metzmeier, Circuit Court Judges Listed in the Kentucky Law Reports, 1825-1903, 47 Kentucky Ancestors 141-56 (2013).
  \item \textsuperscript{256} See supra footnote 255 and accompanying text.
  \item \textsuperscript{257} Id.
\end{itemize}
drinking in the same taverns, are rightly considered to be the origins of formal bar associations.\footnote{258}

**C. The Franklin Circuit Court, 1802-1911**

In many ways, the Franklin Circuit Court was no different from other circuits. It resolved land claims, adjudicated contract disputes, and tried assaults, robberies, and the occasional murder.\footnote{259} It held court in all the counties of its district following the calendar set by the legislature.\footnote{260} The judge stood for election every eight years, just like every other circuit judge.

But it was different. From the beginning, the Franklin court had jurisdiction over suits “against public officers” and “all cases seeking funds from the state treasury,”\footnote{261} and the legislature soon gave it other duties. And it sat in the capital city. It shared lawyers—some the leading attorneys in the state—with the bar of Kentucky’s high court. Leading lawyers tried cases in Franklin Circuit Court while managing their appellate caseload at the less active Court of Appeals.\footnote{262} Until the new capitol was built, the circuit court sat only a block away from the legislature, the chambers of the Court of Appeals, and the governor’s office.\footnote{263} As previously noted, the Franklin Circuit Court’s senior status and jurisdiction over lawsuits seeking money from the state Treasury previously given to the Frankfort-based General Court was transferred to it.\footnote{264}

\footnote{258.} Id. When a judge, or leading elder of the bar circuit bar, died they would don black crepe arm bands, service pallbearers, and memorialize their fallen comrade in banquet both formal and informal.

\footnote{259.} The Franklin Circuit Court tried many celebrated murder cases involving duels, the murder of former attorney general Solomon P. Sharp in 1825, and a bloody shootout between military officers in the lobby of Frankfort’s famed Capitol Hotel. The assassination of Governor William Goebel in 1899 triggered a series of trials of the alleged triggermen and the Republican Party officials accused, but never proved, to have masterminded the murder. It did not host, however, the trial that might interest Broadway and Disney+ fans: The 1800 trial of Aaron Burr for a treason. That took place in the Federal District Court for Kentucky. L. F. Johnson, Famous Kentucky Tragedies and Trials (1916); Winston Coleman, The Beauchamp-Sharp Tragedy: An Episode of Kentucky History During the Middle 1820s (1950); Frank W. Sower, Reflections on Frankfort, 1750-1990 (1994); Peter Hoffer, The Treason Trials of Aaron Burr (2008).

\footnote{260.} See supra footnote 255 and accompanying text.

\footnote{261.} LITTELL, supra note 213, §5.

\footnote{262.} L. F. JOHNSON, HISTORY OF FRANKLIN COUNTY BAR, 1786-1931 (1932).


\footnote{264.} KY. REV. STAT. § 44.020.
Moreover, the Franklin Circuit Court's location at the state capitol pulled it irresistibly into political-legal and constitutional controversies. As the Great Depression and the New Deal response inspired more energetic state government powers, the executive branch began to oversee agencies regulating the health, safety, and to a greater degree than before, the economic activities of the state. It operated using administrative powers delegated to it by the legislature during the over the more than a year and a half of time between biennial sessions.

**D. Creation of Single-Circuit Franklin Circuit Court, 1912-1960**

1. The 1912 Law

   From the beginning of the 20\textsuperscript{th} century, commentators were worried that the workload of the multi-circuit court in which Frankfort resided was being skewed by its growing docket of government-related business. As the legislature began to exercise its powers to regulate consumer safety and public utilities, the judge sitting in the Franklin circuit found themself adjudicating specialized administrative matters, while still overseeing lawsuits and felony trials in that and their other three counties.

   In 1912, the legislature attempted to remedy this by creating a one-county circuit court for Franklin County. The bill offered by Elwood Hamilton removed Franklin from the district it shared with Scott, Bourbon, and Woodford counties, establishing a new, thirty-sixth district. It was approved and signed by Governor James B. McCreary in March 1912. While Frankfort lawyers courted appointment to the new judgeship, R. L. Stout, the circuit judge of the fourteenth judicial district where Franklin had previously resided, challenged the law in the courts, arguing that it violated four clauses of the Kentucky Constitution related to the organization of the circuit courts. Since the current circuit judge was a plaintiff in the case, Judge Charles C. Marshall of the neighboring twelfth

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265. The Kentucky legislature met only every two years until constitutional amendment was agreed to in 2004.

266. *Judicial Circuits*, COURIER-J., Feb. 27, 1912; *Headlight Bill Meets Defeat*, COURIER-J., Mar. 5, 1912. Hamilton was a respected Frankfort lawyer. In 1935, he was appointed as judge of the U.S. District Court for the Western District of Kentucky by Franklin D. Roosevelt who in 1938 elevated him to the U.S. Court of Appeals for the Sixth Circuit.


district was appointed to hear it. Marshall rejected the challenge, sending the case to the state high court, then styled the Court of Appeals.269

In a 5-2 decision, the Court of Appeals ruled that the new district did not meet the Constitution's population requirement for circuit court districts.270 The Stout v. McCreary majority cited language in sections 128 and 132 requiring “the General assembly having due regard to territory, business, and population” should nevertheless “not exceed one district for each 60,000” persons in a county271 unless a county of 40,000 had a city with a population of 20,000.272 Finding that a limitation on the power of the legislature, the court looked to the 1910 census figures of 21,135 for Franklin county and ruled the statute invalid.273

In a spirited dissent against a court action to “destroy[] the deliberate act of a co-ordinate branch of government”274 that was acting within its powers, Judge John Winn argued the constitutional language was intended to be permissive, not mandatory, and that the capital city’s heavy docket of legal business allowed the legislature, as “practical men acting in good sense,”275 to create a single-county district.276

Still, concerns about the overloaded Franklin docket continued. An Efficiency Commission set up in 1920 to survey the state government noticed circuit court disparities:

The Circuit Court situation has also been found to present serious problems. This Court is virtually the backbone of the judicial system since it is the great court of original jurisdiction. Nowhere in the system does this lack of proper organization work such undesirable results. Inquiry into the distribution of work among the judges of the various circuits has revealed wide extremes of comparative idleness and overwork. In several circuits the judges were found to be occupied during 1922 only slightly over one hundred days. The average has been found to be about seven months. Nor does there appear to be any present effective

269. Separate Court for Franklin, COURIER-J., May 15, 1912.
270. See Scott v. McCreary, 147 S.W. 903 (Ky. 1912); Unwise Legislation Undone, COURIER-J., Jun. 15, 1912.
271. Scott, 147 S.W. at 904 (citing KY. CONST. § 128).
272. Id. at 904 (citing KY. CONST. § 138).
273. Id. at 906.
274. Id. at 910 (Winn, J., dissenting).
275. Id. at 909 (Winn, J., dissenting).
276. See id. at 906-10 (Winn, J., dissenting).
means to equalize the burdens put upon the overburdened circuits.\textsuperscript{277}

While the efficiency and burgeoning dockets of Kentucky's courts was a regular topic of discussion of government reformers in the 1930s and 1940s, the Stout decision inhibited innovation in the Franklin circuit.\textsuperscript{278} However, in 1949, rumors of a new effort to alter the circuit court were reported by the well-connected Courier-Journal political columnist Allan Trout—an effort that was reportedly sparked by a political firestorm that the current circuit judge, William B. Ardery, found himself in the middle of.

2. Ripper Rumors: Edward F. Prichard, Jr., William B. Ardery, and the Franklin County Circuit Court

Since the Democratic ascendancy after the Civil War, there had long been factionalism within the party,\textsuperscript{279} and by the 1940s, there was significant enmity between the followers of Albert Benjamin "Happy" Chandler and those who opposed him. Ardery, the Franklin Circuit Court Judge since 1935, was one of Chandler's closest friends. The Bourbon County Democrat advised him in his campaigns, and Ardery hosted Chandler's swearing-in the first at his home when Chandler was first elected governor.\textsuperscript{280} Later, Happy offered him an appointment to a vacant position on the Kentucky Court of Appeals. Ardery turned him down, preferring the circuit court where he wielded both judicial and political power.\textsuperscript{281} Chandler was a larger-than-life personality who adapted himself well to the new radio age. He embraced the popularity of the New Deal at first, but it became clear that his politics were fiscally conservative. As governor, Chandler wielded power autocratically, and his populism placed him closer to Huey Long of Louisiana than to Franklin D. Roosevelt. The divide was highlighted in 1938 when Chandler challenged U.S. Senate Majority Leader Alben W. Barkley, a key supporter of President Roosevelt. A signature moment was when FDR came to

\textsuperscript{277}. THE JUDICIARY OF KENTUCKY: A REPORT BY THE EFFICIENCY COMMISSION (1923).

\textsuperscript{278}. See HARRY W. SCHACTER, KENTUCKY ON THE MARCH (1949).

\textsuperscript{279}. Whether it was conflict between the New Departure Democrats who sought to mute the racism of the prevailing Bourbon faction in order to open up Kentucky to northern business, or the conflict over monetary policy between the Populists and advocates of the gold standard, the Democratic Party had long had two factions competing for power over ideas as well as patronage, the business of finding state jobs for supporters. See JAMES C. KLOTTER, KENTUCKY: PORTRAIT IN PARADOX, 1900-1950 (1996).


campaign for Barkley. Chandler "deftly slid into place next to the President" in FDR's open-topped limousine and "took more than his more of his share of bows" during the parade.\textsuperscript{282} While Barkley fumed, "Roosevelt showed his usual sang-froid" in public but, later, he needled Chandler, the sitting governor, as a promising young man who would perhaps make a "good" senator but would need "many, many years to match" the "knowledge," "experience" and "acknowledged leadership" of Barkley.\textsuperscript{283}

In the 1940s factional strife had calmed with Chandler serving as major league baseball commissioner,\textsuperscript{284} but Ardery's involvement in the prosecution of Kentucky's most prominent young New Dealer would revive it. Almost as a lark, the Harvard Law School-educated Edward F. Prichard, Jr., a New Deal lawyer and rising political star, had engaged in ballot-stuffing in several precincts in his and Ardery's native Bourbon County in the 1948 general election. Rumors of the fraud immediately began circulating, and the FBI had quietly opened an investigation.\textsuperscript{285} On a Sunday in late November 1948, he called his childhood friend Phil Ardery, the judge's son and his former law partner.\textsuperscript{286} "I'm in a heap of trouble and need advice," is what the younger Ardery remembered, but Prichard testified that he said "legal advice."\textsuperscript{287} He called his father to set up a meeting that night, where Prichard confessed all the details of the crime. The judge, who was overseeing a meeting of the Bourbon County grand jury the next day, advised Prichard to admit all in a mass meeting.\textsuperscript{288} Why Prichard talked to the Arderys is unclear. The innocent explanation would be that Prichard was genuinely seeking advice (either political or legal) from old but now estranged friends. The cynic might suggest that Prichard (who was unaware of the federal probe) was seeking favor in any future state prosecution or perhaps attempting to create a situation that would force Ardery to recuse himself in any future trial. It didn't work that way. Judge Ardery became the star witness in Prichard's trial in federal court,


\textsuperscript{283} Id. Franklin D. Roosevelt, President of the United States, Presidential Address at Covington, Ky. (July 8, 1938).

\textsuperscript{284} Chandler had been appointed to replace Kenesaw Mountain Landis in 1944 and was credited with helping to integrate baseball by supporting the Brooklyn Dodger's promotion of Jackie Robinson to the major leagues. PETER GOLENBOCK, BUMS: AN ORAL HISTORY OF THE BROOKLYN DODGERS 108-09, 111-14, 135-36 (2010).

\textsuperscript{285} CAMPBELL, supra note 23, at 140.

\textsuperscript{286} KY. BAR ASS'N, supra note 280, at 27-8.

\textsuperscript{287} CAMPBELL, supra note 23, at 140.

\textsuperscript{288} Id. at 140-41.
brushing aside attorney-client privilege concerns. Prichard’s fall was complete as he was sentenced to two years in the federal prison in Ashland.

Prichard’s conviction hardened relations between the Kentucky New Dealers and Chandler’s faction. Because of his role in the Prichard conviction, and Chandler’s political sabbatical as baseball commissioner, Ardery bore much of the enmity. Like Trout, many observers thought Ardery had “signed his political death warrant.” For many Democrats, whether Ardery was right or wrong was irrelevant; tribal politics demanded a response. The plan Trout sources outlined was that the General Assembly would create a new district by taking Franklin from the 14th district and Anderson from the 12th district. Such a bill would “rip Judge Ardery from his bench at Frankfort and reduce his circuit to the counties of Woodford Scott and Bourbon.” The attempt would be to get around the Scott v. McCleary decision, which required any new district to have a population of at least 60,000 people. Unfortunately, the new district would fall short of that as only about 35,000 people lived in the two counties, and the 1950 census wasn’t likely to change that much.

Despite the rumblings, no such ripper bill was offered in the 1950 legislature, but in late 1951, the state Constitutional Review Commission proposed creating a court that would take over the function of the Franklin Circuit Court in cases concerning the state government. The Commission, chaired by James W. Stites of Louisville, was concerned about the high amount of litigation before the Franklin circuit court, noting “all appeals from decisions of departments, agencies, boards, or commissions” that affected the Commonwealth as well as appeals in other civil litigation involving the state, were filed in that court. As a former Court of Appeals justice, he was not heavily identified with any faction of the Democratic party and appeared to have been motivated by good government concerns. The development of state administrative law had swelled the postwar docket of the Franklin Circuit Court designated as the venue where many

289. Id. at 155-56. In 1949, what constituted an attorney-client relationship or conflict of interest were far less developed than they are now.

290. He served five. Id.


292. Id.

293. Id.


295. Id.

regulations and application must be challenged. He characterized the caseload as "unfair to Franklin Circuit Judge William B Ardery."297 The Courier-Journal editorial board concurred: "circuit courts, especially Franklin Circuit Court, which handles the majority of major cases of statewide significance, are overworked."298 On February 13, 1952, the amendment was proposed in a bill to amend the state constitution.299 The proposed court would be a "roving Circuit Court"300 seated at Frankfort but with the power to "sit from place to place" within the state to "handle the cases now crowding the busy Franklin Circuit Court at Frankfort."301 But after hearings on February 28,302 the bill was killed on March 12.303 As only two constitutional amendments can be placed on the ballot under Kentucky law, the measure lost out to amendments reducing the number of state elected executive officers to the governor, Lieutenant governor, attorney general, and auditor, and a new method for distributing the state school fund to local districts.304 Still, as the Franklin Circuit Court's docket exploded and lawyers complained of long delays in litigating cases,305 reform efforts were not forgotten. And, given Judge Ardery's strong identification with the Chandler faction, politics would, rightly or wrongly, inevitably play a role in any discussion.

3. Bert T. Combs and the new Franklin Circuit Court, 1960

Kentucky's Democratic Party factional split was evident in the 1955 primary when Chandler launched an effort to return to the governor's mansion. Former governor Earle C. Clements recruited Kentucky Court of Appeals Judge Bert T. Combs of Prestonsburg to challenge him. However, Chandler beat Combs in the gubernatorial primary and won the general election in November. Once again, the second-time governor was sworn in by his long-time friend Ardery instead of the chief justice of the Court of Appeals, just as he had at Chandler's first

297. Commission to Propose Amendment Revising Kentucky's Court System, supra note 294.
300. If Steps Are Slow, They Must Advance, COURIER-J., Feb. 18, 1952.
301. Trout, Legislature Gets 2 Bills to Amend Constitution, supra note 299.
304. Id.
305. KY. BAR Ass'n, supra note 280, at 103 (William P. Curlin discusses "overwhelmed" docket of the era).
inauguration. However, in 1959, Combs ran again. Chandler endorsed his lieutenant governor, Harry Lee Waterfield, to succeed him, but Combs united the anti-Chandler wing by convincing Wilson W. Wyatt to drop out and run as lieutenant governor and then dispatched Waterfield easily. He defeated Republican John M. Robsion, Jr., in a landslide.

As the 1960 General Assembly’s opening loomed, the Courier-Journal headlines blared on January 2, 1960, that “friends of the Combs Administration” were preparing to strip Judge Ardery of the Franklin court in order to give it to Aster Hogg, a former Court of Appeals judge.” The plan was familiar—create a new district out of Anderson and Franklin counties. Ardery was quick to decry the effort, saying, “I am unalterably opposed to any change in the judicial district in which I was elected during the term which I was elected.” Combs was quick to disown the rumored plan. “I have no political or personal obligation or desire to interfere in any matter whatsoever with legislation which might be introduced on this subject,” he said. “My only desire will be if legislation regarding a separate district for Franklin County is introduced, that it is considered and decided by the legislature on its merits and on that basis alone.” He questioned the basis of the story, noting “[m]y friends have not requested that the administration sponsor a bill for a separate district in Franklin County” and to my knowledge, Aster Hogg is not an applicant to be the judge of any such district, and certainly I have not made a promise to him. It might be of interest—although certainly not important—that in the last Democratic primary Judge Hogg was supposedly aligned with the Chandler-Waterfield forces and I supported his opponent, the present attorney general of Kentucky.

Combs also denied he was targeting Ardery:


308. Id.


311. Id.

312. Id.
I have a high respect and warm personal regards for Judge Ardery. He has served as a circuit judge long and well. I was in college with his son, Phil Ardery, and our relationship since that time has been cordial and pleasant, and I now regard him as a personal friend. There is no basis, in truth or in fact, for any implication or innuendo that the present administration or anyone connected therewith, so far as I know has any obligation or desire to sponsor or support any ripper legislation.\(^{313}\)

However, Combs went on to make the good-government case for a separate Franklin Circuit Court. “Ever since I came to the Court of Appeals in 1951, there has been talk about the great need that Franklin County be a separate judicial district,” he noted.\(^{314}\) “On December 11, 1959, the Judicial Council of Kentucky . . recommended the creation of a new judicial district composed of Franklin County alone,” he said.\(^{315}\)

The reason as stated by the council, being that there is an abnormal amount of important litigation and the volume of court business therein is such that when combined with the business of any other County, it is impossible for the judge to transact the business and hear cases without a long period of delay, inconvenience, and prejudice to the litigants.\(^{316}\)

Combs recalled that:

> [w]hen I was a member of the [Court of Appeals], I served on the judicial council. As I recall, the average workload of a Circuit Judge in Kentucky was approximately 300 cases per year. It is my information that there was pending as of July 1, 1959, on the docket of the Franklin Circuit Court 579 cases.\(^{317}\)

Nevertheless, the legislature’s exercise of its power to create such a court should be based on “efficiency and economy of government. Emotionalism, prejudice, or partisanship has no place in such matters.”\(^{318}\)

In an editorial published on January 8, the *Courier-Journal* agreed that “Franklin County should be in a separate judicial district.”\(^{319}\) Because it contained

313. Id.
314. Id.
315. Id. See also, JUDICIAL COUNCIL, BIENNIAL REPORT 1960 GENERAL ASSEMBLY 10 (January 18, 1960).
316. Robinson, supra note 310, at 86-89.
317. Id. at 87.
318. Id.
319. Special Court Needs of Franklin County, COURIER J., Jan 8, 1960.
the state capital, Franklin County "is the source of much legal action, and its
docket is disproportionately heavy. Court delays caused by an unduly heavy
caseload can slow the normal processes of state government." The editorial
board went on to argue that the "situation has little to do with the size of
Franklin's population," and is in fact is "caused by conditions that do not exist
elsewhere in the state." "A change in this situation should not be made for
political purposes, but neither should it be delayed or prevented by political
considerations," the editorial noted. The reform is necessary, the editorial
went on to say, "[b]ut it should "rest however, on the solid basis of its merits."

On January 25, the Kentucky Judicial Council formally recommended to the
legislature the creation of a separate single County Franklin Circuit Court, along
with its other recommendations for the legislative session. Noting this current
overload of state course cases in the Franklin Circuit Court, "it is impossible for
the judge to transact business and hear the cases without a long period of delay,
inconvenience, and prejudice to the rights of litigants." Soon after, the Courier-
Journal editorial board weighed in again. In an editorial titled "Bert The Ripper?
No, Says Counsel," the board focused on the Judicial Council's report to the
legislature and absolved Governor Combs of political machinations that the
paper's own reporters and headlines had suggested. The Council's report
"removes the earlier suspicion that the court change was planned as 'ripper'
legislation aimed at Franklin Circuit Judge William Ardery."

The measure was filed on February 25th by Sen. George E. Overlay (D-
Murray). Senate Bill 197 received its second reading on March 11th and
passed the Senate on a close 19-16 vote, receiving its first reading in the House
that day. On the legislature's last day, the bill "rolled to final passage in the

320. Id.
321. Id.
322. Id.
323. Id.
325. Editorial, Bert The Ripper? No, Says Counsel, COURIER-J., Jan. 29, 1960 (Pearce may have
written this editorial as he also served on the paper's editorial board). Combs' friends continued to
insist on his lack of hostility towards Ardery. John Ed Pearce, a Combs speechwriter and Courier-
Journal reporter uses almost words in describing the Franklin Court bill in DIVIDE AND DISSENT:
KENTUCKY POLITICS, 1930-1963, at 114 (1987). Still, it is also true that Ed Prichard was a Combs advisor.
327. Michael Pulitzer, Senate Sends Two-Voting Machines to Governor Combs, COURIER-J., Mar.
12, 1960.
house by a 66-20 margin." The bill that passed was careful to avoid pitfalls perhaps that the 1912 law had identified. That law was invalidated, in part, because it fell afoul of the constitution's provision in Section 138 that provides that "each county having a city of 20,000 and a population including the city of 40,000 or more constitute a judicial district." However, the court in Scott v. McCreary left the legislature a loophole: "Lastly, it is insisted that it must be presumed that the legislature found . . . that the County of Franklin had [the prescribed number of inhabitants] and that this legislative finding is conclusive . . . but it will be observed from the preamble of the act that the legislature made no such finding." This forced the court to make its count upon the evidence, which found the population size wanting. But this language clearly suggested that if the preamble had made a legislative finding, the court would have to accept.

The drafters took the hint, and the law began with a preamble of three paragraphs, each headed with "whereas." The second stated: "[the] General Assembly has found the following facts to exist . . . that the county of Franklin contains a city of the second class of more than 20,000 inhabitants and has a population including the said city of more than 40,000." It went on to say that:

[In said county there is an abnormal amount of litigation and the volume of business therein is such that when combined with the court business of any other County, it is impossible for the court to transact its business in Franklin County without a long period of delay, inconvenience, and serious prejudice to the rights of litigants who are unable to reasonably prompt disability disposition of their litigation.]

The preamble concluded:

The General Assembly finds it to be the intent and purpose of sections 128, 134, and 138 of the Constitution that the General Assembly may establish such number of districts as may be required by reason of the exigency of territory, business and population, not exceeding one district for each 60,000


330. KY. CONST. § 138 (repealed 1975).

331. Scott v. McCreary, 147 S.W. 903, 905 (Ky. 1912).

332. Id.

333. 1960 Ky. Acts 715-16. The preamble or finding of facts is not designated or part of the numbered Act which it precedes.

334. Id.
population of the state excluding districts and counties having a population of 150,000.\textsuperscript{335}

These legislative findings would become more important as the U.S. Census began to release preliminary figures indicating that Franklin’s population was only 29,228, with 16,511 living in the Frankfort city limits.\textsuperscript{336}

The law itself was more straightforward. A new judicial district was to be established consisting of Franklin County and be numbered the 48th judicial district.\textsuperscript{337} It created a new circuit judge and a new commonwealth’s attorney for the district, and until a regular election could be held, they would be filled via the vacancy procedure provided for in Section 152 of the constitution.\textsuperscript{338} It left the 14th judicial district with Bourbon, Scott, and Woodford counties.\textsuperscript{339} It confirmed in office the current circuit judge and commonwealth’s attorney for the 14th judicial district.\textsuperscript{330} Meeting times for both circuits were set out,\textsuperscript{341} and the effective date of the changes would be September 1, 1960.\textsuperscript{342} On March 28th, Governor Combs signed the bill establishing a new Franklin Circuit Court.\textsuperscript{343} The law became effective after the primary date, so Combs would need to appoint a new judge and commonwealth’s attorney to take office on September 1st. The judge would be selected from a list provided by the Franklin County Bar Association, and the appointees would serve until the November 1961 election.\textsuperscript{344}

Ardery did not take the law’s passage quietly. Although he presided for the last time over Franklin Circuit Court on August 20th without ceremony or fanfare,\textsuperscript{345} this was because he was hoping it wasn’t the last time.\textsuperscript{346} He did cause

\begin{itemize}
  \item \textsuperscript{335} Id.
  \item \textsuperscript{336} COURIER-JOURNAL, June 12, 1960.
  \item \textsuperscript{337} 1960 Ky. Acts, 716.
  \item \textsuperscript{338} Id. at 716-17.
  \item \textsuperscript{339} Id. at 716.
  \item \textsuperscript{340} Id. at 717.
  \item \textsuperscript{341} Id.
  \item \textsuperscript{342} Id.
  \item \textsuperscript{343} Paul Beck, Combs Signs Bill Taking Ardery Court, COURIER-J., Mar. 29, 1960, at 1.
  \item \textsuperscript{344} Id.
  \item \textsuperscript{345} Paul R. Jordan, Judge Ardery Presides for Last Time in Franklin Circuit Court, LEXINGTON HERALD-LEADER, Aug. 21, 1960, at 14.
  \item \textsuperscript{346} Ardery did not sue to challenge the law but likely anticipated a challenge, which did of course happen in Harrod v. Meigs, 340 S.W.2d 601 (Ky. 1960).
\end{itemize}
a stir by ruling that a residency requirement in a Kentucky bill offering a bonus to World War II veterans was "unconstitutional." The measure would not have caused as much of a stir if not for the fact that the Court of Appeals, Kentucky's highest court, had found the provision constitutional in a 4-3 decision the week before. Ardery's resistance continued when in September, he refused to convene the Bourbon Circuit Court under the schedule outlined in the Franklin Circuit Court Act. "There is no such thing as of September term of the Bourbon Circuit Court," he said, "until such time as the Court of Appeals says a politician may take away the terms of office of legally elected state officials."

On September 5th, Governor Combs appointed Henry Meigs II as the judge of the new Franklin Circuit Court, a decision that surprised many, including Meigs himself. There had been speculation about Democratic lawyers close to Combs, but the governor instead chose a respected Republican lawyer. Meigs had not been in the spotlight since December 1944 when the Army Air Force flying ace married Sara Lesly Willis, the daughter of Governor Simeon Willis, in the governor's mansion. Even then, the P-38 pilot was nearly ignored by photographers capturing the bride descending the staircase of the "people's house."

"All I know is I was appointed in September of 1960 and I was the most surprised member of the bar," Meigs later said. "[S]peculation had gone on between March and September and centered around one or two Democrats, naturally. I thought I'd be the last one in the world to be selected. There were only at that time four Republicans practicing law in Frankfort." Meigs recalled that:

I met with Governor Combs at the request of a couple Democrat lawyers, who were his close associates, on the day of the employment. I believe I drove to Lexington and met him at the airport. We discussed the matter and he said he had been favorably disposed to appoint me on the recommendation of

348. Id.
350. Id.
353. Id. at 99.
lawyers who were his friends in Franklin County. If I accepted, he would appoint me. 354

He said he had some contact with the administration: “It wasn’t cold turkey that day, but that was the first time I had any contact with Governor Combs about it.” 355

Ardery’s confidence that the law would be challenged was realized when a party to a Franklin divorce case filed a motion arguing that the new 48th division was unconstitutional and that any decree it ordered would not provide the finality sought in a final dissolution of a marriage. Harrod v. Meigs 356 covered the same ground as the 1912 Scott v. McCreary case but was influenced more by Judge Winn’s dissent and a 1948 case involving the reorganization of the circuit courts in southeastern Kentucky. 357 That case, Runyon v. Smith, analyzed the same sections of the constitution as Scott had, but determined that the intent of the drafters was twofold: “speedier justice from the courts and a decrease in expenditure.” 358 Harmonizing the sections, the Runyon court determined that the legislature was permitted “to divide the state into a sufficient number of districts to carry into effect the provisions of the Constitution . . . having due regard to territory, business, and population.” 359 The Harrod court adopted this emphasis on the “business” as docket size and upheld the 1960 law. 360 It not only overruled Scott but did so while quoting an extract of Winn’s dissent so large it makes up over half of the decision. 361

E. Franklin Circuit Court, 1960-2020

1. The Meigs Court, 1960-1983

Judge Meigs put the new Franklin Circuit Court on firm ground, establishing it as part of Kentucky’s judicial firmament. Reducing the docket of administrative cases efficiently, he also heard legal-political cases at a time when Kentucky’s

354. Id. at 99-100.
355. Id. at 100.
357. See Runyon v. Smith, 212 S.W.2d 521 (Ky. 1948).
358. Id. at 525 (quoting E. Polk Johnson, Comments of Delegate Thomas S. Pettit for Daviess County in 3 Official Report of the Proceedings and Debates in the 1890 Convention, 3447 (1891)).
359. Id. at 523.
360. Harrod, 340 S.W.2d. at 603-04.
361. Id. at 604-06 (quoting Scott v. McCreary, 147 S.W. 903, 906-07 (Ky. 1912) (Winn, J., dissenting)).
political system was changing, and its judicial system was reforming—punctuated by the passage in 1975 of the judicial article amendment. Meigs's past as a Republican minimized the impact of his rulings to uphold the state civil-service laws during the administration of Louie B. Nunn, the first GOP governor to be elected since Meigs's father-in-law. One of his more difficult cases involved an antitrust challenge to Kentucky's Distilled Spirits and Wine Fair Trade Act by a national drug store chain, Taylor Drug Stores, Inc., seeking to discount the price of spirits in its stores. However, Taylor really was challenging Kentucky's heavily regulated tripartite system of liquor manufacturer, distributor, and retailer. Meigs ruled for Taylor Drugs on the grounds that the state law violated the federal antitrust laws and violated Sections 1 and 2 of the Kentucky Constitution as an "arbitrary and discriminatory" restraint of trade. The Supreme Court of Kentucky declined to rule on the state constitutional claims but upheld Meigs' ruling that the law violated the Sherman Act.

Clearly, however, Meigs's most memorable case began on the first Saturday of May in 1968 when Dancer's Image nudged out Forward Pass to win the 94th running of the Kentucky Derby. Soon after, saliva and urine samples were collected. A routine screening test of the samples indicated that the horse had tested positive for phenylbutazone, commonly known as Bute, an anti-inflammatory drug using for the short-term treatment of pain that was banned at Kentucky tracks. Kenny Smith, the chief chemist for Kentucky racing chemist, "was attending a post-Derby party at Louisville's Audubon Country Club" when he got a call from the track steward telling him, "We got a Bute positive from today." Stewards sent the samples to Smith's testing laboratory. He ran several tests, and after those appeared positive, he alerted the track stewards who, shocking the racing world, disqualified Dancer's Image. The owners appealed. After an administrative hearing, the Kentucky State Racing Commission upheld the decision, setting off a court case that ended up in Judge Meig's courtroom. Under Kentucky law, the racing commission's decision could be appealed to Franklin Circuit Court. The court's review was "limited to determining whether or not (a) the Commission acted without or in excess of its powers; (b) the order

362. Alcoholic Bev. Control Bd. v. Taylor Drug Stores, 635 S.W.2d 319 (Ky. 1982) (stating that reaching the state grounds was unnecessary and would have required overruling a state case without good cause).


365. Id. at 57-8.


appealed from was procured by fraud; (c) if questions of fact are in issue, whether or not any substantial evidence supports the order appealed from." No additional evidence could be introduced, and the court was to review the commission record. The decision of an agency was to be granted significant deference. In filings, the testing lab’s methods were vigorously attacked by lawyers for the owner of the disqualified horse. Meigs retired to his chambers to pore over the testimony. In his decision, he echoed the attacks on the lab’s work, determining that it had little evidentiary value, and overturned the racing commission’s decision. The case then went to the Court of Appeals, then Kentucky’s highest court, which overturned the circuit court decision. They acknowledged that there were “numerous contradictions” by witnesses but that the racing commission was the body charged with “consider[ing] the credibility of the witnesses and determin[ing] the weight between conflicting statements of witnesses,” not the circuit court. On that basis, there was “substantial evidence supporting the findings and rulings of the Kentucky State Racing Commission.”

In 1974, the legislature created a second division of the Franklin Circuit Court to relieve the court’s growing caseload. Governor Wendell H. Ford appointed former chief justice of Court of Appeals, Squire N. William, Jr., to preside over the new Division 2 of the court. Williams had served ten years on the high court until being defeated by Scott Reed in 1968.

2. Franklin Court’s Second Era, 1983-2006

In 1983, Meigs and Williams, both with more than 20 years then, required to be fully vested in the retirement system, decided not to run for reelection. Lawyers and Frankfort observers recognized it was the end to a “vital chapter” in Kentucky legal history. Ray Corns (former Franklin commonwealth’s attorney) was elected to the first division, defeating Roger L. Crittenden.

369. Id.
370. See Ky. St. Racing Comm’n v. Fuller, 481 S.W.2d 298 (Ky. 1972).
371. Id. at 307.
372. Id. at 309.
Court William L. Graham was elevated to the second division seat. In 1990, Corns resigned to run for lieutenant-governor. The run followed a high-profile few years in the spotlight of the education equity case, *Rose v. Council for Better Education*, discussed below.

From a list of three nominees, Governor Wallace Wilkinson appointed Joyce Albro to be the first woman to preside over the court. The sitting Franklin district judge’s appointment created a legal issue unique to the Franklin Circuit Court. Albro was married to H. Gene Taylor, a deputy commissioner of law at the state natural resources and environmental protection cabinet—an agency whose duty to enforce strip mining and environmental laws brought it frequently before the Franklin Circuit Court, which hears appeals of the cabinet’s administrative decisions. While Albro had not faced this issue as a lower court judge, she found it prudent to request an ethics opinion on whether it was a conflict of interest for her to recuse from all cases involving her husband’s cabinet. Because of the circuit’s “relentless” caseload and the fact that cases involving the cabinet took up “at least 1/3 of the time of the two Franklin circuit judges,” this was no trivial matter. Franklin Circuit Court Judge William Graham said, with some exasperation, “I’m not going to take upon myself all of the natural resources and protection cases because that would mean I do nothing else.” It seems that Albro’s inconveniently employed spouse was proving to be far more troublesome (at least to a grumpy Judge Graham) than the socialite and philanthropist Sally Meigs had been.

Rick Underwood, chairman of the Kentucky Bar Association’s Ethics Committee, agreed it was important that judges should probably disqualify themselves in cases in which their impartiality might reasonably be questioned. He noted, however, that this principle usually applies to cases in which a spouse is a lawyer but “not necessarily those cases where an attorney is affiliated with the law firm where the spouse practices.” The code of judicial conduct only warns judges against hearing cases in which the spouse has a “substantial


379. 790 S.W.2d 186 (Ky. 1989).


382. Id.

383. Id. at B3.
interest.” Albro thought “it was wiser not to hear them . . . than to hear them” but also pointed out that her husband does not have contact with many of the cabinet’s cases as part of his job. Tom Fitzgerald, an active environmental lawyer in Frankfort, said, “I wouldn’t have a problem at all with her because I have absolute faith in her impartiality” but agreed that an ethics opinion was needed to clarify the issue. Taylor also noted she should “err on the side of not giving the appearance of any impartiality.” The Judicial Ethics Committee issued its opinion in January 1991. Noting that Albro’s “husband’s title and position as Deputy Commissioner and the fact that he participates in policy making decisions creates the impression” that he represents the cabinet, “the Committee concludes that the judge should disqualify herself in all cases involving the Natural Resources and Environmental Protection Cabinet unless there is a waiver by the parties.” Committee-member Roger Crittenden recused himself from any participation in the proceedings relating to this opinion. Shortly after, the Franklin County district judge filed to challenge Albro in the 1991 special election. Crittenden, who had lost to Corns in 1983, bested Albro at the polls that fall.

In the “second era” of the independent circuit court, both Graham and Crittenden’s most controversial moments occurred during the administration of Governor Ernie Fletcher, who was elected in 2003 as Kentucky’s first Republican chief executive since Louie B. Nunn, and at a time when control of the state legislature was split between the Democratic House and a Senate narrowly held by Republicans. Judge Crittenden “drew” the conflict over the eligibility of Republican Dana Seum Stephenson, who was elected to the state Senate but whose residency requirements had been challenged before that November 2004 election. This case, which pitted the courts against legislative leaders, is discussed below. Crittenden also had to manage the initial judicial branch response to a constitutional clash between the legislative and executive branches, which flared up after the legislature adjourned with a budget and Governor Fletcher (following the example of his predecessor Paul E. Patton) issued a spending plan which

384. Id.
385. Id.
386. Id.
390. FRAN ELLERS, PROGRESS & PARADOX: THE PATTON YEARS, 1995-2003, at 152-54, 164 (2003). A lawsuit was filed against Patton’s spending plan but wasn’t resolved before he left office.
drew on continuing funds and previously legislated programs.\textsuperscript{391} Crittenden rejected Fletcher’s plan and was upheld by the Kentucky Supreme Court.\textsuperscript{392}

Graham did not avoid the contentious era, overseeing a judicial process that would end with the attorney general and the governor negotiating the resolution of three indictments against the commonwealth’s sitting chief executive. A little more than a year into Fletcher’s term, Attorney General Stumbo, a Democrat, began an investigation of allegations that Fletcher had violated the state merit system law by hiring and promoting protected positions based on the candidate’s political history and perceived loyalty to Fletcher.\textsuperscript{393} On May 25, 2005, “upon motion of the Attorney General, the Franklin Circuit Court summoned a special grand jury” presided over by Judge Graham.\textsuperscript{394} In August, nine administration officials were indicted.\textsuperscript{395} Soon after, Fletcher pardoned those officials and issued general pardon for “any and all persons who have committed, or may be accused of committing, any offense” related to the merit-system investigation.\textsuperscript{396} Despite the blanket-pardon, Graham allowed the grand jury to continue and issued five more indictments. In October 2005, Fletcher filed a motion asking Graham to order the grand jury to stop issuing indictments. In November, Graham dismissed the indictments against Fletcher’s close advisors as being covered by the pardon but allowed the grand jury to continue issuing indictments, a ruling affirmed before Christmas by the Kentucky Court of Appeals.\textsuperscript{397} Immediately after the Court of Appeals’ ruling, Fletcher announced his intent to appeal the ruling to the Kentucky Supreme Court.\textsuperscript{398} In a divided 4-2 opinion in which every judge wrote

\begin{itemize}
\item[392.] See Fletcher, 163 S.W.3d at 857.
\item[393.] Ryan Alessi & Jack Brammer, Cabinet Hirings Are Under Investigation – Attorney General Looks at Alleged Transportation Violations, LEXINGTON HERALD-LEADER, May 5, 2005; see also Fletcher v. Graham, 192 S.W.3d 350, 355 (Ky. 2006).
\item[394.] Fletcher, 192 S.W.3d at 355; Timeline of the Merit System Investigation, COURIER-J., May 12, 2006.
\item[395.] Ryan Alessi, Fletcher Fires 9 for ‘Mistakes’—Also Seeks Resignation of GOP Chairman, Disbands His Statewide Outreach Agency; Attorney General Sees Vindication, LEXINGTON HERALD-LEADER, Sep. 15, 2005.
\end{itemize}
an opinion, the high court overturned the Franklin Circuit Court and Court of Appeals decisions, upholding the issuance of general amnesty pardons. Around the same time, the grand jury handed down indictments against Fletcher for misdemeanor charges of conspiracy, official misconduct, and political discrimination. After a ruling that Fletcher had executive immunity and couldn’t be prosecuted until he left office, Fletcher and Stumbo negotiated a plea deal.

Upset with the Franklin Circuit Court’s decision in the Seum-Stephenson case as well as those involving Governor Fletcher, Senate President David Williams filed Senate Bill 257 to take many cases involving state government away from the court. The bill gave plaintiffs in a variety of types of cases the right to file a lawsuit or administrative appeals in the county they resided in. Not surprisingly, the bill would strip election challenges from Franklin Circuit Court. However, except for election contests, legislative districting disputes, and breach of contract lawsuits against state agencies, most of the bill involved appeals of administrative actions. Looking at the huge workload of administrative cases removed from his court, Judge Graham quipped that “I’m looking at my desk thinking I might go up there and testify in favor of the bill.” More seriously, he and Crittenden, who had both announced that they’d be leaving office that year, pointed out that the bill would drive up the state’s legal cost by forcing state departments to hire or contract the service of additional lawyers to handle cases around the state. Filed just to make a point, the bill went nowhere in the session.

3. The 21st Century Court, 2006-present

Another change in the composition of the Franklin Circuit Court happened in 2006, sparked by a quirk in a new law governing the Kentucky judicial retirement system that meant that judges fully vested in the system would realize thousands
of dollars more in cost-of-living adjustments if they retired by July of the year.\textsuperscript{407} Both Graham, who had served 23 years as a circuit judge, and Crittenden, with slightly more time served on the Franklin district and circuit courts benches, announced their retirements.\textsuperscript{408} The judicial nominating committee selected three nominees for Governor Ernie Fletcher to select to fill the two seats until the November election, Thomas D. Wingate, a Franklin district court judge since 1999; James E. "Jim" Boyd, Franklin county attorney from 1982-2005; and Wendy A. Craig, a trial attorney with the Kentucky Department of Public Advocacy.\textsuperscript{409} Bevin appointed Wingate and Boyd. Wingate drew little opposition, but Boyd was challenged by Phillip Shepherd, a public interest attorney, and former cabinet secretary. The campaign was spirited, with Boyd accusing Shepherd of being pushed by "left-wing interests" to replace "traditional community values" with "California thinking."\textsuperscript{410} Shepherd’s supporters noted a State-Journal article that raised issues with Boyd’s management of the county attorney’s office, including financial mismanagement and a claim of sexual harassment.\textsuperscript{411} Frankfort’s resemblance to Berkeley might not be readily apparent to the naked eye, but its voters elevated Shepherd to the bench by a comfortable margin.\textsuperscript{412}

At this point, the narrative history of the court will give way for a more detailed analysis of the Franklin Circuit Court’s role in some of the landmark cases of the last half-century.

V. THE FRANKLIN CIRCUIT COURT AND THE SUPREME COURT: CASE STUDIES IN THE POWER OF CAPITAL CITY COURTS OF GENERAL JURISDICTION

In order to assess how the Franklin Circuit Court plays a positive or negative role in Kentucky’s unified court system as it adjudicates difficult legal-political and constitutional cases, a qualitative case-study method may be instructive. For this, this article will discuss four cases for analysis. The four cases were selected because of their importance in Kentucky legal history and because there was enough of a public and archival record to fully assess the role of the Franklin Circuit Court in the life cycle of these cases from initial filing to Kentucky Supreme

\textsuperscript{407} Andrew Wolfson, Fletcher May Get to Name Judges: Up to 20 May Retire Early for Extra Pay, \textit{COURIER-J.}, Apr. 21, 2006, at A1

\textsuperscript{408} Press Release, Kentucky Court of Justice, Judicial Nominating Commission Releases Names of Nominees to Fill 2 Circuit Court Judgeships in Franklin County (Jun. 9, 2006) (on file with author).

\textsuperscript{409} \textit{Id.}


\textsuperscript{411} \textit{Id.}

Court adjudication. Factors also considered were that cases studied were decided after the 1975 constitutional amendment when Kentucky’s courts were reshaped; that together they evenly spaced out over the four decades from that reform to the current day; and that they drew public comment and criticism from beyond the legal community and to the citizens of Kentucky as a whole.

A. Legislative Research Commission v. Brown

1. Background

Perhaps the most important case weighing the balance of powers among the three branches of government is Legislative Research Commission v. Brown ("L.R.C. v. Brown"). The L.R.C. v. Brown case involved four laws passed by the Kentucky General Assembly that allowed the legislature and its agencies to monitor and, in some cases, block actions of the executive branch. If any decision of the Supreme Court of Kentucky deserves to be called Kentucky’s Marbury v. Madison, L.R.C. v. Brown is on the short-list. The case pitted the executive branch against the legislative branch in a lawsuit that asked the judicial branch to decide the boundary between the powers of contending branches.

The L.R.C. v. Brown decision came at the end of a decade during which the legislature had begun to increasingly assert its powers against the once all-powerful governor. The control of the governor had been acquired by two means. First, with the authority of the legislature constitutionally limited to a single, 60-day session in odd-years, the executive benefitted from exercising power 365 days a year. Second, the governor’s influence as the leader of a political party meant that members of that party in the legislature tended to follow their lead. This was especially true when the General Assembly was largely made up of true part-time legislators, many who didn’t even focus on the legislative agenda until they arrived in Frankfort in early January. After WWII, a new era of politics was inaugurated. There was an increasing professionalism of legislatures around the country, and state assemblies created statute revision commissions and support agencies to plan and manage legislative work before, during, and after legislative sessions. In Kentucky, the Legislative Research Commission (hereinafter “LRC”) was created in 1948 as a fact-finding and support agency to conduct investigations into statute law, legislation, governmental agencies and institutions, and matters of public policy so as to “aid the General Assembly in performing its duties” and to offer members assistance drafting bills and

amendments, resolutions, and other documents. As time went on, it began to oversee committee staffing, promote and explain the legislature through educational materials, and manage the preparation and printing of the Kentucky Acts, the Legislative Record, and the Senate and House Journals. A permanent interim committee made up of the legislature leadership was created in 1968 as part of an effort to strengthen the committee structure of the General Assembly and make it independent of the governor. (A fortunate side-effect of the election of Republican Governor Nunn was that the majority Democratic body could institute these reforms without the looming gubernatorial presence of a party leader in the executive branch).

Moreover, the new television age had given local legislators more access to the voters to create independent power bases independent of the governor. The new Kentucky Educational Television (KET) system began broadcasting public sessions of the legislature in 1978, allowing many Kentuckians to see the General Assembly in action. Flush with its new sense of power, in 1982, the legislature passed a series of laws which together asserted broad legislative powers to be executed through the LRC. These laws were a direct challenge to the power of the governor, breathing life into a mechanism to block and negate executive actions when the legislature was not in session. One law allowed the LRC to invalidate the governor's reorganization of the executive branch; another gave it the right to veto administrative regulations promulgated after the legislature had adjourned. Other controversial provisions gave the LRC the right to review federal block grant programs and demand access to and perhaps alter the executive budget prior to a legislative session. There were other provisions that bothered the governor, but even neutral observers saw the major provisions raised issues under the balance of powers clause of the Kentucky constitution.

Not surprisingly, Governor John Y. Brown, Jr. was unhappy with the changes. Brown was nearing the end of his four-year term, but he wanted to resolve the

419. JEWELL & MILLER, supra note 418, at 100-04.
422. JEWELL & MILLER, supra note 418, at 100-04.
issue for future governors. After negotiations and agreement between the Brown and LRC lawyers, the LRC filed a declaratory judgment action in Franklin Circuit Court to test the laws and to prevent a contentious constitutional crisis in the future. The lawsuit confined itself to the four provisions discussed above.

2. The Proceedings in Franklin Circuit Court

Hearings on the lawsuit were held by Judge Squire N. Williams on August 2 and 3, 1982. (Williams had previously indicated that he would retire later in the year, so this would be a legacy case for him). Former governor Combs and Ed Prichard represented Brown. In the hearing, state Rep. Joe Clark (D-Danville), chair of the House appropriation and review committee, defended the budget provision, arguing that the governor had “an obligation to deliver a budget” prior to the legislative session to facilitate the legislature’s review process (although he cited no provision of the state constitution requiring this). House Majority Leader Jim LeMaster defended the federal block grant review law, arguing it was required by federal regulations and was needed to avoid setting up a gubernatorial “slush fund.” Clark then defended the provision empowering the LRC to veto administrative regulations, arguing that the veto would only affect what he characterized as “unlawful” regulations. However, on cross-examination by Brown’s attorney Combs, Clark admitted that the constitution was silent on the legislature’s reported right to empower the LRC to approve or reject regulations during the period when the legislature was not in session. The next day Combs laid out the executive branch’s case, first calling as a witness Robert L. Warren, the state finance and administration cabinet secretary. Warren argued that the new budget review law empowered a small group of legislators to “conduct [] executive affairs” and he also questioned whether the block-grant legislative review was necessary for the receipt of federal funds. This point was

423. And perhaps himself. He was free to run after an interlude—which did in 1987, losing in a crowded Democratic primary that included two former governors, Brown and Julian Carroll, and two future ones, Steve Beshear and the primary winner Wallace Wilkinson.


427. Id.

428. Id.

429. Anne Pardue, First Hearings End on Suit Over State Legislative Powers, supra note 425.
followed up by Superintendent of Public Instruction Raymond Barber. He argued that the review law might actually negatively impact the distribution of Title I funds to local school districts because federal law required that the state must submit a plan for the use of the grants within 90 days and Barber feared that the LRC review might not finish before the federal deadline. Michael Davidson, director of the state racing commission, complained that the LRC had vetoed two of its regulations on the (in his opinion) legally flawed ground that they exceeded statutory authority but contended that the statute in which under which the regulations were promulgated was “overlooked” during the review process. Legal historian Robert M. Ireland also testified, noting that the “desire to curb the power of the General Assembly was the primary motivation” for calling the convention that wrote the 1891 constitution.

In October, written briefs were submitted to the Franklin Circuit Court. Brown's brief argued that the laws violated a fundamental principle of the Kentucky constitution, the separation of powers between three coequal branches. His lawyers also contended that the legislature had unconstitutionally extended its power beyond the sixty days that the constitution allotted it by attempting to give power to the LRC, which could be exercised well after the legislature adjourned sine die:

The aggregate effect of the statutes involved in this case,” it said, “is to circumvent the will of the people and establish a dominant, continuous legislature through the political backdoor. Indeed, when these statutes are viewed in the aggregate, the sheer sweep of the powers they confer upon the LRC exceeds every anything ever before suggested in this state or any other state.

To call the LRC an independent agency of state government quote was “legal sophistry and doubletalk.” The review power over administrative regulations, the brief continued, was a “potent vehicle for political meddling” that established

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430. Barber was an independently elected official and not strictly a member of “the Brown administration.”

431. Anne Pardue, First Hearings End on Suit Over State Legislative Powers, supra note 422.

432. Id.


435. Id.

436. Id.
the LRC "simultaneously as a rump legislature and bogus court."437 The LRC brief argued that the laws established good government and that end that day made sure that the "people of this Commonwealth will be well served by their government."438 In mid-October, the lawyers met in Franklin Circuit Court for oral arguments on their briefs. Gross Lindsay, a former legislator representing the legislature, downplayed the impact of the new laws suggesting that they only delayed regulations, allowing the legislature time to make a final decision when they met in regular session.439 He reiterated his contention (disputed by Brown's attorneys) that the review of block grants application as required by federal law. Prichard, representing Brown, argued the laws violated the "strong separation of powers in the constitution," which he argued had been accepted by "the highest court of this state in explicit language."440 Brown's other attorney, Combs, took up the point, arguing that the laws made the LRC "a fourth branch of government" with the ability to bring "state government almost to a halt, sowing "harassment, delay and confusion."441 Combs continued: "It won't hurt state government; It will gut it."442

3. Franklin Circuit Court Decision

On November 3, Franklin Circuit Judge Williams ruled the General Assembly's effort to broadly delegate power to the LRC and to direct the work of the executive branch was unconstitutional. Williams wrote that it is "a well-known fact" that the powers of the executive branch "far outweigh" the powers of the legislative branch as the result of the "well calculated plan" of delegates to the 1891 constitution.443 The judge said it was "persuasively argued" that "severe limitations" on the legislature by the state constitution may be ill-advised "but the people have time and time again had the opportunity to amend the offensive sections and have refused to do so."444

437. Id.
438. Id.
440. Id.
441. Id.
442. Id.
444. Id.
Williams' opinion began with a "cursory look at the evolution" of the LRC, and the court then reviewed the Kentucky constitutional provisions defining the separation of powers, Section 27, which divided the powers of state government into "three distinct departments," and Section 28, which barred any "person or collection of persons" from one of those departments from "exercis[ing] any powers belonging to either of the others." Next, it noted Sections 36 and 42, which mandated by the biannual, sixty-day duration of legislative sessions.

Each of the provisions of the four laws under question was then examined in order. The court first looked at provisions purporting to confer power on the LRC to "conduct... any and all business of the legislative department of government except for the passage of legislation" while the legislature was not in session, finding that they violated the "60-day limit on lawmaking."

Next, the law that allowed the LRC to appoint members to boards and commissions was found to have violated the separation of powers because the court found that appointment power was an executive power.

Reading the provisions concerning the budget, Williams determined that the statutes conferred a legislative veto over the budget, which it read as allowing the LRC to "veto... executive decisions" and "promulgate budget instructions" to the executive branch. To the degree that they did so, these actions violated both the legislature's time limitations on its power and the separation of powers by invading the executive function. Moreover, the court rejected the provision of the law that "denigrated" the budget from a bill to a resolution.

Next, the court ruled that the LRC could not interfere with the governor's application of federal block grants because that was an unconstitutional exercise of legislative power outside the time limits of the legislative sessions. For the same reason, Williams struck down the LRC's power to affect the governor's...
reorganization of the executive branch between sessions\textsuperscript{454} and to delay or veto administrative regulations while the legislature was not in session.\textsuperscript{455}

Following the decision, Governor Brown said he was "pleased, but not surprised," by the decision. Brown noted that the leadership of the General Assembly was "very orderly and progressive," but that "some members wanted to become Tarzan and beat on their chest over their newfound power."\textsuperscript{456} The \textit{Courier-Journal} weighed in, calling it "a first step" in "resolving neglected questions about checks and balances in state government."\textsuperscript{457} The paper predicted "few lawyers probably will be surprised" if the Kentucky Supreme Court upholds William's decision.\textsuperscript{458}

Both parties sought to expedite the case to the Kentucky Supreme Court.\textsuperscript{459} As the appeal request was being considered, the judiciary was preparing to enter a general election where not only Squire William's successor would be chosen, but several new justices on the high court would be on the ballot, either because of retirements or vigorous challenges.\textsuperscript{460} Chief Justice John S. Palmore and Justice Marvin J. Sternberg were retiring, and recently appointed justices John J. O'Hara and Boyce Clayton were facing a strong challenge from Donald Wintersheimer and Roy Vance of the Court of Appeals. Recognizing that a change was coming, Sheryl Snyder, part of the executive branch legal team, describes what he considers a notable "historical footnote."\textsuperscript{461} "Attempting to have its appeal heard by the Palmore Court," Snyder contends, the LRC "moved the Supreme Court to dispense with the requirement of additional briefs and to permit submission of the case on the briefs filed in the trial court. The only proceeding in the Supreme Court would have been an oral argument before the Palmore Court."\textsuperscript{462} According to Snyder, "this request was seriously considered by some members of the 'old

\textsuperscript{454} Id. at 15.
\textsuperscript{455} Id. at 15-17.
\textsuperscript{457} Id.
\textsuperscript{458} Id.
\textsuperscript{462} Id. at 199.
There was even discussion of the old Court and new Court sitting en banc,” he says, “and all eleven Justices joining in the decision, a stratagem that had no apparent purpose other than permitting Chief Justice Palmore to author the opinion of the Court after the expiration of his term.” Snyder does not say how he knew of these extraordinary deliberations, but, in any event, Governor Brown’s attorneys strongly opposed the request to dispense with briefs, and it was denied.

The “new” Kentucky Supreme Court would decide alone. Donald Wintersheimer and Roy Vance would win their elections. And Palmore would be replaced by Robert Stephens, who in December would participate in a charming tradition that is emblematic of the small company town that Frankfort truly is. At the annual Christmas parade, riding the lead convertible with Santa Claus, was the appellee Governor Brown, along with his wife, Phyllis, and his young son, Linc. Following behind in another car was a smiling new Chief Justice Stephens, with future Franklin Circuit Court Judge William Graham riding shotgun.

4. Supreme Court of Kentucky Decision

In March 1983, the Kentucky Supreme Court heard oral arguments by the parties. “Forsaking the sunny weather outside,” lawmakers, government employees, and Franklin attorneys “stood two-deep around the walls” of the Kentucky Supreme Court chamber to listen to Kentucky’s finest lawyers debate the state constitution. Along the sidelines was retired Chief Justice Palmore, who would only tell reporters “it was very well argued on both sides.” Representing the executive branch was again Combs and Prichard while arguing the case for the legislature was Lindsay, “the feisty former legislator and advisor to the House leadership.” The standing-room-only turnout highlighted what Combs called a case that “will in effect determine the government of this state certainly for many years to come, I’d say a half century.” Prichard focused his attack on the LRC’s interim powers, which he argued had turned the agency into

463. Id.
464. Id.
465. Palmore, as has been noted earlier, rejects this story entirely. See, e.g., PALMORE, supra note 23
468. Id.
469. Id.
470. Id.
a “bobtail legislature.” When the General Assembly adjourns sine die,” he said, “it dies as far as its legislative purposes are concerned.” It cannot “project itself into the afterlife” after its 60-day session by delegating powers to a subordinate body. Such a Lazarus act is beyond the constitutional powers of the General Assembly. Once having died, that General Assembly cannot bring itself out of the grave one limb at a time.”

Lindsay, on the other hand, urged the court with its ruling to help “modernize” the state’s “antiquated” constitution, but the justices were not convinced. Justice Leibson suggested that perhaps a constitutional amendment was in order, but Lindsay insisted that the power was within the court. In responding to questions from Justice J. Calvin Aker that a particular act was a cursory intrusion by the legislature on the executive, Combs replied that “[t]his is much more than cursory intrusion.”

The Kentucky Supreme Court issued its ruling in January 1984. It affirmed the lower court opinion in the main while reversing in part on legislation it interpreted as purely legislative oversight of the budgetary process. After briefly outlining the procedural history of the case, the decision by Chief Justice Stephens examined the history of the LRC before reviewing the separation of powers doctrine in Kentucky jurisprudence. It reviewed the debates of the 1890-91 constitutional convention on Sections 27 and 28, noting “it has been our view, in interpreting [those sections], that the separation of powers must be 'strictly construed.'” The court rejected the appellant’s view that the General Assembly was the “dominant” branch, which it found a misreading of Brown v. Barkley. The opinion goes on to find no residual legislative powers of the legislature after it adjourns sine die. “There is, simply put, no fourth branch of

471. Id.
472. Id.
474. Id.
475. Id.
476. Id.
478. Id. at 910-11.
479. Id. at 911-14.
480. Id. at 912 (citing Arnet v. Meredith, 121 S.W.2d 36, 38 (Ky. 1938)).
481. Id. at 913.
482. Id. at 915.
government,” the court said, before ruling that the law giving LRC the power to veto regulations unconstitutionally infringed on powers allocated to the executive and judicial branches. After finding the legislative appointment of members to executive boards and commissions unlawful, it turned to the legislature’s role in the budgetary process. Here the court diverged from the Franklin Circuit’s analysis. While that court read these provisions as unconstitutionally invading the executive, the Kentucky Supreme Court saw them as only an exercise of legislative oversight. The court did affirm the Franklin Circuit’s ruling that the law characterizing the budget as a resolution, not a bill, violated Section 88, which gave the governor a line-item-veto in appropriation bills. The court also determined that the LRC could oversee the federal block-grant program before agreeing with the trial court the LRC had no constitutional power to veto an intersession reorganization of the executive branch.

The result in Brown was an exemplar in the interplay between the Franklin Circuit Court and the Supreme Court of Kentucky. The orderly processes of the lower court had developed a record that the high court drew on and quoted from. Its decision had helped framed the legal and constitutional issues. And even though the Supreme Court affirmed and reversed, it did so with a tacit understanding, as it exercised powers to shape constitutional interpretation that the Franklin Court did not have. In examining the budgetary provisions, the Kentucky Supreme Court opined, without citation, that: “Our constitution prohibits the exercise of the functions of one branch of government by another branch, but it also envisions some cooperation between the branches.” If the provision was a “usurpation by the legislative branch of an executive function,” it would be unconstitutional, but if “the degree of intrusion is so limited as to render it entirely reasonable and without any substantive impact,” it is not. That is the kind of fine line only a court of last resort can mark out.

484. *Id.* at 919.
485. *Id.* at 924.
486. *Id.* at 926-27.
487. *Id.* at 927-28.
488. *Id.* at 929-30.
490. *Id.* at 927
491. *Id.* (emphasis in original).
B. John A. Rose v. Council for Better Education, Inc.\textsuperscript{492}

1. Background

In 1985, a complaint was filed in Franklin Circuit Court by sixty-six school districts, seven local boards of education, and twenty-two public school students organized as the Council for Better Education. They argued that the inequality and inefficiency of the Kentucky system of public education violated the Common School clause of the Kentucky Constitution, and they demanded that disparities created by the funding of schools solely with local property taxes be better remedied with state funds.\textsuperscript{493} The plaintiffs argued first that school funding in Kentucky was inequitable and inadequate because some school districts had more money than others to support education due to varying property values throughout the state. Second, they contended that education in the state was inefficient because of the measurably low level of educational achievement in Kentucky. The inequity of funding and lack of educational achievement added up to the Kentucky legislature not fulfilling its responsibility to "by appropriate legislation, provide for an efficient system of common schools throughout the State," as required by Section 183 of the Kentucky Constitution. The remedy the plaintiffs sought was new legislation to appropriate funds to equalize the inequities and provide for an improvement of educational attainment.\textsuperscript{494} As the lawsuit wound through the courts, the legislature could have moved to remedy the concerns, but instead, they attempted to retaliate against the school superintendents participating in the suit (while admitting to reporters that their efforts might be unconstitutional and ill-conceived).\textsuperscript{495}

2. The Proceedings in Franklin Circuit Court

In early 1987, Franklin Circuit Court Judge Ray Corns set an August 4th trial date for the school funding lawsuit, after the Council For Better Education attorney, former governor Combs, told the judge that it would take six months to obtain depositions from educational experts.\textsuperscript{496} The trial opened with Judge Corns presiding and Combs presenting the plaintiff’s case. Combs put four educators on the witness stand. They testified as to classrooms with falling plaster, students

\begin{footnotesize}
\begin{enumerate}
\item Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).
\item All Children Can Learn: Lessons from the Kentucky Reform Experience 29-36 (Roger S. Pankratz & Joseph M. Petrosko eds., 2000).
\end{enumerate}
\end{footnotesize}
enduring long bus rides over bad mountain roads and the difficulties of being dependent on property-tax revenues “in counties with little or no industry and unemployment rates of almost 30%.”

Gene Binion, the Elliott County school superintendent, said 76% of the students in his northeastern Kentucky school system came from poor families. Darrell Boggs of Letcher County said his county could offer advanced science in only one of its three high schools. Morgan County Superintendent Earl Reed related that his district could only afford to teach physics every other year. One witness, former Bullitt County Superintendent Frank Hatfield, argued, “we’re just not funding education to the degree much of our nation funds it.” He also highlighted the inequity, noting “when we have one district that spending twice as much as another the system is not efficient.” If we operated our road system like our school system,” he said, “we might come out of Jefferson County on a four-lane road and enter Bullitt County . . . on a two-lane road.” Witnesses showed that spending per pupil among Kentucky’s 178 school districts ranged from $1,630 dollars per pupil to $4,522 according to the state Department of Education’s latest figures. Districts with large property tax bases could raise up to fifteen times the amount of money poorer ones could. Combs summarized the testimony as proving that “Kentucky was not an efficient school system.” Poor districts, he said, are “not getting enough money to have an adequate school system.” And the state was “actually helping create” problems by slashing the property tax rates that education funding was dependent on, making it “hard for school districts to help themselves.”

498. Id.
499. Id.
500. Id.
501. Id.
502. Id.
503. Cropper, supra note 497.
504. Id.
505. ALL CHILDREN CAN LEARN: LESSONS FROM THE KENTUCKY REFORM EXPERIENCE, supra note 494.
506. Cropper, supra note 497.
507. Id.
508. Id.
3. Franklin Circuit Court Decision

a. Findings of Fact, Conclusions of Law, and Judgment, May 31, 1988

It was late May 1988 when Corns issued his ruling.\(^{509}\) Corns began by framing the issues, which he identified as, first, what does the phrase “an efficient system of common schools” used in section 183 of the Kentucky constitution mean? Second, is education a fundamental right? And, third, did Kentucky’s method of financing public education violate Section 183? Finally, were poor school districts denied equal protection of the laws under the federal and Kentucky constitutions?\(^{510}\)

The court then surveyed modern Kentucky school financing, which it found based primarily on a tax on property in each school district, with those districts permitted to raise additional local funds with local occupational taxes, taxes on local utilities, and an excise tax on the income of residents of the school’s district.\(^{511}\) All the additional taxes “increased rather than diminished financial disparities among the districts” because the “permissive taxes favored the affluent districts with greater density of population, factories and other industries, trading centers, and payrolls.”\(^{512}\) Recognizing there were disparities, the legislature created mechanisms for state financing, the court noted, but these programs required the districts to pass further property taxes to participate.\(^{513}\) Because of the “wide variation in financial resources,” the state school financing systems bore “no rational relationship to the state’s duty to provide an efficient system throughout the Commonwealth.”\(^{514}\) This financing mismatch meant that “curricular offerings are narrower and markedly deficient in poor districts.”\(^{515}\) The problem impacts test scores the level of teacher training, school student-teacher ratios, and school library budgets of poor districts.\(^{516}\) “While marginal differences in revenue per student may not create undue educational disadvantage, it is apparent that revenue differentials as large as those which exist between the


\(^{510}\) Id. at *1-2.

\(^{511}\) Id. at *2-4.

\(^{512}\) Id. at *5.

\(^{513}\) Id. at *7.

\(^{514}\) Id.


\(^{516}\) Id.
more affluent and the poor districts in Kentucky create an inefficient and unequal system of common schools.”517 The court concluded that:

Disparities in expenditures per student among districts, to the extent that they are caused by variations in local fiscal capacity, are without legitimate educational justification and result in unequal educational opportunities for the children and youth of Kentucky’s districts, including the plaintiff districts. Students and property-poor districts receive inadequate and inferior educational opportunities as compared to higher-quality educational opportunities offered to students attending schools in more affluent districts.518

Turning to matters of law, the court answered the four questions it began by posing, finding first that “the General Assembly has failed to provide an efficient system of common schools throughout the state as mandated by section 183” of the constitution.519 It defined “efficient” as requiring an education system that is “adequate, uniform, and unitary.”520 It determined that having been “expressly guaranteed” in the Kentucky constitution, “education is a fundamental right in the Commonwealth.”521 It found Kentucky’s method of school finance failed to provide all of Kentucky’s common school students the “substantially equal educational opportunities that should be afforded in Kentucky.”522 The method of school finance “invidiously discriminated against a substantial percentage of students on the basis of their place of residence.”523 Differences of opportunity to students based on the wealth of the district in which they resided was, the court found, an “unnatural distinction with no reasonable relationship to the state’s duty to provide all common school students with a substantially equal free public education.”524 Finally, after having found that education was a fundamental right and Kentucky’s school financing laws do not assure that right, the court turned to whether or not the equal protection guarantees of Sections 1 and 3 of the state constitution were violated. Finding that they were, the court

517. Id. at 11. See also All CHILDREN CAN LEARN: LESSONS FROM THE KENTUCKY REFORM EXPERIENCE, supra note 494.
519. Id.
520. Id. at *13.
521. Id. at *14.
522. Id.
523. Id.
did not need to go on to determine whether they violated the 14th Amendment to the U.S. Constitution.\textsuperscript{525}

Corns next turned to the remedy and did something so unusual that it would draw disproval on appeal. He declared that he would appoint a “select committee” to advise him on remedies, which he did on June 7, 1988.\textsuperscript{526} He professed that his final order would be determined entirely by the evidence produced at the prior hearings and briefs, but it seemed to many an improper delegation of his duty.

b. Additional Findings of Fact, Conclusions of Law, and Judgment

The advisory group completed its work in September,\textsuperscript{527} and on October 14th, Corns released another decision, his Additional Findings of Fact, Conclusions of Law, and Judgment.\textsuperscript{528} Before discussing a remedy (which was what the parties expected), he first reiterated the findings of fact in his prior decision, but later, Corns seemed to introduce concepts that he failed to harmonize with that document.\textsuperscript{529} His definition of efficiency tended to drift, with a broader scope for “adequacy,” which he now defined as providing “sufficient physical facilities, teachers, support personnel, and instructional materials to advance to enhance the educational process.”\textsuperscript{530} He noted that it was “very clear from the record that the schools in Kentucky’s poorer districts are inadequate and inefficient when measured by these criteria.”\textsuperscript{531} Moreover, he suggested adequacy was not enough, and “each district should strive to achieve excellence.”\textsuperscript{532} In his conclusions of law, Corns, without comment, noted that Kentucky’s education funding violated the Equal Protection Clause of the U.S. constitution—directly contradicting his prior decision when he decided to abstain from ruling on the federal issue.\textsuperscript{533} Also, he now found that the governor had a “constitutional duty to make appropriate recommendations to the General Assembly regarding the

\textsuperscript{525} Id. at *15.
\textsuperscript{526} Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 192 (Ky. 1989).
\textsuperscript{528} Id. at *1.
\textsuperscript{529} Id. at *3. Likely he was influenced by the report of his advisory committee, whose conclusions he summarized but did not explicitly adopt.
\textsuperscript{530} Id. at *5.
\textsuperscript{531} Id.
\textsuperscript{532} Id.
\textsuperscript{533} Additional Findings of Fact, Conclusions of Law, and Judgment, No. 85-CI-1759, at *8.
Nonetheless, he continued to accept that "the judiciary has no authority to tell the General Assembly how the school system should be financed," and ultimately, he only directed the legislature to meet its constitutional mandate. Nonetheless, he continued to accept that “the judiciary has no authority to tell the General Assembly how the school system should be financed,” and ultimately, he only directed the legislature to meet its constitutional mandate. Finally, he noted that because of “the great and immediate public importance of this case,” the court urged an “expeditious” appeal.

4. Supreme Court of Kentucky Decision

The Franklin Circuit Court’s ruling was largely upheld by the Kentucky Supreme Court, on a 5-2 decision with two concurring opinions. The majority opinion, written by Chief Justice Stephens, agreed with the lower court that the Kentucky Constitution required an adequate education for all the state’s schoolchildren and that the funding formulas provided by the legislature failed to provide that. After reviewing the procedural history of the case, the court turned to an analysis of the trial court’s findings of fact and conclusions of law. It reviewed the three documents in the file, which included Corns’ May ruling, the order appointing the “select committee” in June, and the additional order entered in October. Briefly noting that the final document had modified Corns’ previous definition of the efficient system of schools, while “ever-broadening” his definition of constitutionally required efficiency with a “broad brush,” the court admitted that the lower court had “brought into sharp focus a problem that many citizens of the Commonwealth had ‘wrestled’ with for many years.” Before moving to the substantive issues, the court reviewed the history of school financing in Kentucky, noting that “[i]f one were to summarize the history of school funding in Kentucky, one might well say that every forward step taken to provide funds to local districts and to equalize the money spent for poor districts has been countered by one backward step.” The question before it, the court

534. Id. at *10.
535. Id. at *12.
536. Id. at *14.
538. Id. at 191-92.
539. Id. at 192-93.
540. Id. at 193.
541. Id. at 196.
found, was “whether the trial court was correct in declaring those efforts had failed to create an efficient system of common schools in this Commonwealth.”

The Court then examined the evidence the Franklin Court had relied on its decision, consisting of “numerous depositions, volumes of oral evidence heard by the trial court, and the seemingly endless amount of statistical data, reports, etc.” It turned next to the issue of whether the local school boards had the standing to challenge the constitutionality of the state school system and whether service on John Rose, President Pro Tempore of the Kentucky Senate and Donald Blandford, Speaker of the Kentucky House of Representatives, was sufficient to result in jurisdiction over the General Assembly—matters that Judge Corns had largely passed over in his final decision. It found they did. While primarily procedural, this justiciability ruling set an important standard for future lawsuits based on the constitutional right to an education.

The court then turned to the question of what the constitutional framers meant by “an efficient system of common schools,” beginning with a brief survey of the constitutional debates of 1890-91. Summarizing the debates, the court found that the delegates were united in believing that the education of students through a system of common schools funded by the General Assembly was a “vital question and must not be minimized” to the slightest degree and that “education must be provided children of the rich and poor alike.” Moreover, the court found that the drafters of the constitution believed in strong financing of the schools and that “all schools and children stand on one level in their entitlement to equal state support.” Quoting Delegate J. H. Moore, it found that there are to be “no distinctions in the common schools, but all must stand on one level.” The court went on to review the case law, the authority in other states, and the opinion of experts. Before declaring the “system of common

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542. Id.
543. *Rose*, 790 S.W.2d at 196-97.
544. Id. at 199-202, 203-05.
546. *Rose*, 790 S.W.2d at 206.
547. Id.
548. Id. at 206 (quoting Comments of Delegate J. H. Moore for Mercer County in E. Polk Johnson, *4 Official Report of the Proceedings and Debates in the 1890 Convention* 4531 (1891)).
549. Id. at 212.
schools to be constitutionally deficient,” they directed the General Assembly to “create and redesign a system that will comply with the standards.”

The Kentucky Supreme Court defined an “efficient system of common schools” as an “adequate” education for the state’s schoolchildren: “The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.” Such an education “shall be free to all,” “shall be available to all Kentucky children,” “shall be substantially uniform throughout the state,” and “shall provide equal educational opportunities to all Kentucky students, regardless of place of residence or economic circumstances.” Moreover, funding this system is “the sole responsibility of the General Assembly.”

The court then turned to whether the trial court had violated the separation of powers between the judiciary and legislature by “dictating” to the General Assembly and by retaining jurisdiction so that the legislature could report progress to that court. The court rejected the idea that the Franklin court had dictated measures, noting that “the trial judge specifically denied he was directing the General Assembly to enact any specific legislation, including raising taxes.” However, the court did agree that it was improper for the court to issue “such an open-ended judgment.” Moreover, the court specifically disapproved of the Franklin court’s decision to create an advisory committee, finding “no authority that would it justify” it.

Despite Corn’s “broad brush” definitions and unusual use of an advisory committee, the Kentucky Supreme Court decision largely followed the issues he had framed. It also acknowledged benefiting from the record that the Franklin Circuit Court produced and agreed with his overall judgment on the constitutional issues. The mild censure, more implicit than explicit of his failure to harmonize his own orders, was appropriate. Corn’s decision to use an advisory committee to help him devise a remedy was perhaps creative but was well outside of legal precedent or statutory authority. However, in fairness, even the Kentucky Supreme Court struggled to formulate a remedy that upheld what it determined

550. Id.
551. Id. at 213.
552. Id. at 212.
553. Id.
554. Rose, 790 S.W.2d at 214.
555. Id. It should be noted that one of concurrences would have approved the Franklin Circuit Court having an opportunity to remain involved. See id. at 216-18 (Gant, J. concurring).
556. Id. at 215 (majority opinion).
to be a fundamental right without impermissibly encroaching on the legislative power by, in its words, dictating to the General Assembly.

C. Stephenson v. Woodward

1. Background

In 2002, Republican Dana Seum Stephenson and Democratic Virginia L. Woodward were competing for an open state Senate seat in the 37th district in southwestern Jefferson County. The race would be important, because two years earlier, the Republicans had won their first outright control of the chamber, maintaining the tight 20-18 majority it had obtained when two Democrats switched parties. On the day before the election, Woodward filed a motion in Jefferson Circuit Court under KRS 118.176 challenging Stephenson’s qualification for office because she had not resided in Kentucky for the six years “next preceding” her election as required by Section 32 of the Kentucky constitution. However, the voters of the district chose Stephenson over Woodward by a thousand votes. On November 3rd, Woodward presented evidence in court that her opponent did not meet the constitutional residency requirement. On November 22nd, the Jefferson Circuit Court ruled in Woodward’s favor, finding Stephenson ineligible. The court relied on evidence that Stevenson owned a home in Jeffersonville, Indiana, and lived there from 1997 to 2001, during which time she obtained a driver’s license claiming Jeffersonville as her place of residence. It noted that Stevenson had registered to vote in Indiana and had voted in that state during the six years. She also insured her car in Indiana and had listed Indiana as her residence in various documents. Judge Barry Willett ordered the Jefferson County Board of Elections not to count the cast the votes.


559. Paul E. Salamanca & James E Keller, Legislative Privilege to Judge the Qualifications, Elections, and Returns of the Members, 95 Ky. L. J. 241, 246 (2006-2007) (noting that Salamanca represented Senate President David L. Williams in the proceeding and Keller served on the Kentucky Supreme Court at the time).

560. Stephenson, 182 S.W.3d at 164-65.

561. Id. at 165.


563. Id.

564. Id.
cast for Stephenson.\textsuperscript{565} The State Board of Election met on December 13th to discuss the status of the 37th district and unanimously chose not to act on Woodford’s motion to grant her a certificate of election.\textsuperscript{566} Woodward’s theory of the case was that if Stephenson was ineligible, her votes did not count, and thus Woodward had received the most votes for a legitimate candidate.

On December 15th, Woodward brought the original action in the Franklin Circuit Court against the Board of Elections, the Secretary of State, and David L. Williams, the President of the Kentucky Senate, asking the court to put an end to the contest, finalize Stephenson’s disqualification, award Woodward the election certificate, and require Williams and the state Senate to admit Woodward to membership.\textsuperscript{567} Woodford included Williams, as there was evidence that the Republican-held Senate, where Stephenson’s father Dan Seum had served since 1989, would oppose seating Woodward.\textsuperscript{568} Special Judge William Jennings granted her the election certificate but denied any remedy while the Senate was considering the matter.\textsuperscript{569}

In the Senate, Williams set up a Special Select Committee, randomly drawn from the membership, to examine and report on the election contest. The majority concluded that Stephenson was not constitutionally qualified and recommended that Woodward be seated.\textsuperscript{570} On January 7, 2005, the Senate rejected the committee’s ruling and adopted Senate Resolution 35, which concluded that Stevenson was qualified to serve. Standing next to her father, Stephenson swore the oath of office. On the Senate floor, Williams was defiant: “What if someone wasn’t thirty,” he said (the minimum age).\textsuperscript{571} “What if they were twenty-three and someone seated them. It is my position that... if twenty people in this body voted that someone was thirty years old, no court in the land could overturn that.”\textsuperscript{572}

\textsuperscript{565} Id.
\textsuperscript{566} Stephenson, 182 S.W.3d at 166.
\textsuperscript{567} Id. at 165.
\textsuperscript{568} Id.
\textsuperscript{569} See Salamanca & Keller, supra note 559, at 249-50. Jennings was the Circuit Court judge for the 25th Judicial Circuit covering Madison and Clark and only heard this portion of the case. William Graham was the assigned judge.
\textsuperscript{570} Id. at 250.
\textsuperscript{571} Editorial, Senate GOP Steps Over Line, LEXINGTON HERALD-LEADER, Jan. 16, 2005, at F2.
\textsuperscript{572} Id.
2. Further Proceedings in Franklin Circuit Court

With the gauntlet thrown down, on January 14th, Franklin Circuit Court denied motions to dismiss the case by Stephenson and Williams and granted a temporary injunction against Stephenson from taking her seat in the Senate. Stevenson and Williams appealed Judge Graham’s order to the Kentucky Court of Appeals, but on February 1st, the Supreme Court of Kentucky transferred the motions to its own document. In a majority opinion by Chief Justice Lambert, it affirmed the temporary injunction on March 17th, remanding the case back to the Franklin Circuit Court for a final decision on the merits.

3. Final Franklin Circuit Court Decision

Meanwhile, both parties moved for summary judgment in Franklin Circuit Court, which on June 1st entered an order declaring Stevenson ineligible to serve in the Senate but also to denying any relief that would enable Woodward to automatically assume a seat in the Senate. Judge Graham began his opinion by briefly summarizing the background of the case, noting its complicated procedural history. He reviewed the March 17, 2005 ruling of the Supreme Court upholding the temporary injunction and remanding the case back to the Franklin Circuit Court for a decision on the merits. Judge Graham called Justice Keller’s dissent in the March decision of the Supreme Court, “the crux of respondents’ claim.” Justice Keller had opined that the “real issue” was whether both circuit courts “ever had jurisdiction to consider the case,” arguing that the courts’ “jurisdiction evaporated when the polls opened on Election Day.” Thereby, the case could only be decided by the Senate because they were “vested solely with the power to decide elections to its own membership under section 38.”

In his analysis section, Judge Graham noted that “the case stirs up tension between the three branches of government” over the separation of their

573. *Stephenson*, 182 S.W.3d at 166.
574. *Salamanca & Keller*, *supra* note 559, at 251-52.
575. *Id.*
577. *Id.*
powers.\textsuperscript{580} He reviewed the relevant provisions of the Constitution, including Section 27 and 28, which defined the separation of powers, Section 2 of the Kentucky Bill of Rights, which provides that “arbitrary power over the lives, liberty and property of free man exists nowhere in a Republic,” Section 32, which set out the underlying issue of residency including the section requiring a candidate reside “in this state six years next preceding his election,” and Section 38, which gave the legislature the power to judge its members.\textsuperscript{581} Judge Graham also noted KRS 118.176(2), which allowed anyone to challenge the bona fides of any candidate seeking nomination. Discussing Section 38, which gives the General Assembly the authority to judge the qualifications of its members, Judge Graham did not dispute its power but challenged Justice Keller’s “evaporation theory,” suggesting that once the Jefferson Circuit Court had ruled, the Senate had no election contest to judge.\textsuperscript{582}

The court moved on to discuss Section 2. Finding that Woodward had “lawfully invoked the court’s jurisdiction under KRS 118.176 on the day before the polls open,” and that Judge Willett had, after reviewing “overwhelming evidence” that Stephenson was not a resident, issued a ruling to that effect that she had not appealed, Judge Graham suggested that, by ignoring all those factors, the Senate’s vote to seat Stephenson “raises the specter of whether the Senate’s determination was arbitrary.”\textsuperscript{583} The court next reviewed the jurisprudence on the arbitrary use of power Section 2, deciding that “the Senate action must accord with reality or they’re unconstitutionally arbitrary.”\textsuperscript{584} Judge Graham next surveyed the facts regarding Stephenson’s residency,\textsuperscript{585} determining ultimately that given the facts, it would be arbitrary for the Senate to find that Stevenson was a resident.\textsuperscript{586} Nonetheless, Judge Graham declined to compel the Senate to seat Woodward, citing Council for Better Education, Inc.\textsuperscript{587} for the proposition that the judiciary could not issue injunctions, restraining orders, or writs of prohibition against leaders of the General Assembly.

\textsuperscript{580} Id. at *4.
\textsuperscript{581} Id. at *5.
\textsuperscript{582} Id. at *7.
\textsuperscript{583} Id.
\textsuperscript{584} Id. at *11.
\textsuperscript{585} Woodward v. Stephenson, No. 04-CI-1676, at *12-13 (Ky. Franklin Cir. Ct. June 1, 2009).
\textsuperscript{586} Id. at *14.
\textsuperscript{587} Id. at *15 (citing Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989)).
4. Supreme Court of Kentucky Decision

Once again, the Kentucky Supreme Court granted the motion to transfer the case to its docket. On December 22nd, the Supreme Court rendered a divided decision. Justice Martin E. Johnstone wrote for the majority, joined by Justice Lambert, Justice William Graves, and Justice Donald C. Wintersheimer, with concurring opinions by Justice Lambert and Justice Cooper. Justice John C. Roach dissented, as did Justice Will T. Scott, each offering their own opinions.  

Justice Johnstone’s opinion was marked affirming in part, reversing in part, but affirmed the Franklin Circuit Court’s rulings, only disagreeing with the legal grounds for one of them. Whereas Graham had seen the case as one of a Senate that arbitrarily rejected a circuit court decision based on ample evidence, essentially substituting alternate facts for the evidence in the case, Johnstone and his majority avoided constitutional analysis and grounded its opinion on an interpretation of the elections statute, KRS 118.176. It is important to note, discussing that statute, “no party to this action has challenged the constitutionality or validity of this statute.” The Court noted that the General Assembly “has specifically conferred jurisdiction upon the courts to adjudicate challenges questioning the qualification of candidates” through KRS 118.176. Moreover, it characterized the arguments of Stephenson and Williams as being “predicated upon the fundamentally flawed belief that Stevenson was a member of the Senate” when that body took up its challenge. However the mere happening of the election does not instantly transform this senator-elect into a sitting member of the Senate,” the Court noted, but “when the Jefferson Circuit Court rendered its order finding that Stevenson was not a bona fide candidate and therefore ineligible to appear on the ballot, she lost all right to that office.” Turning to Graham’s analysis of Section 2 of the Kentucky constitution, which Woodward was also relying on to be named state senator, the Court determined that having decided the case based on the election statute, it did not need to take

588. Stephenson v. Woodward, 182 S.W.3d 162, 165 (Ky. 2005). Retired Justice Keller’s unpublished dissent in the prior Supreme Court ruling was appended to Roach’s opinion, allowing an eighth justice to speak. Id. at 181-89.

589. Id.


591. Stephenson, 182 S.W.3d at 167.

592. Id.

593. Id.

594. Id. at 167, 168.
up a constitutional analysis.595 “We also reiterate the long-observed principle that constitutional adjudication should be in voided unless it is necessary for a decision in the case.”596 Since there was no election contest for the Senate to rule on, arbitrarily or not, Section 2 wasn’t implicated. Feeling it necessary to counter Justice Keller’s dissent, the court rejected the “evaporating jurisdiction doctrine,” noting that accepting Keller’s analysis of the language of KRS 118.176 would lead to “curious results” not intended by the General Assembly.597 The Court concluded by affirming the Franklin Circuit Court judgment that Stephenson was not qualified for the office of state senator “though for substantively different reasons.”598 The Court also affirmed the Franklin Circuit Court’s decision denying Woodward’s request to compel the Senate to seat her, determining “no election has occurred.”599

The concurrences and dissents display a wide division in thinking about the case. Justice Cooper would have given Woodward the state senate seat, citing precedent ignored by the majority.600 Justice Roach’s dissent adopts Justice Keller’s robust endorsement of the General Assembly’s power to adjudge the case.601 In Justice Scott’s opinion, the courts had no power in the case, and to the degree it conflicted with the legislative power, KRS 118.176 was invalid.602

Chief Justice Lambert’s short concurrence is perhaps the most interesting. It ignores the case and instead praises “all of the opinions” for being “the product of superb scholarship, deep respect for constitutional principles, and personal integrity.”603 He urges “responsible officials” to “reject any notion of defiance or retaliation against the judiciary, for such an attack such an action would be an attack on the constitution itself.”604 Perhaps referring to state Senator Williams, he pleaded that public officials “must honor conclusive constitutional


596. Stephenson, 182 S.W.3d at 168.

597. Id. at 171.

598. Id. at 173.

599. Id.

600. Id. at 176-78 (Cooper, J., concurring in part, dissenting in part).

601. Id. at 178-201 (Roach, J., dissenting) (including Justice Keller’s dissenting opinion):

602. Stephenson, 182 S.W.3d at 201-13 (Scott, J., dissenting).

603. Id. at 175 (Lambert, J., concurring).

604. Id. (Lambert, J., concurring).
interpretation regardless the depth of their disagreement with a particular decision” or else risk a “fundamentally alter[ed]” state.605

With the perspective of time, state Senator Williams’ bold assertion that the legislature could overrule a Constitutional residency deficiency with a majority vote had colored the Frankfort Circuit Court’s decision.606 After all, it is one thing to recognize that there are separate spheres of authority for each of the three branches of government; it is quite another thing to suggest those departments can act arbitrarily in those spheres without being checked by the judiciary—the one branch of government designated to protect the state Bill of Rights. Nonetheless, it was prudent in the circumstances for a cooler-headed Supreme Court to fall back on an interpretation of a statute, avoiding the constitutional issues. Nonetheless, Justice Lambert’s concurrence indicates that Judge Graham was not alone in being alarmed by Williams’ startling discovery of the power of the legislature to substitute its assertions for provable facts.

D. Bevin v. Commonwealth ex rel. Beshear

1. Background

When Matt Bevin was elected governor in 2015, he prioritized reforming Kentucky’s pension fund which had been underfunded over the prior decade and a half by governors of both parties and the legislature. It was estimated that it was only 54% funded and thus was one of the worst of such capitalized funds in the nation.607 Unfortunately, the combative former businessman kept his plans secretive, sparking rumors of a drastically altered system that would threaten vested interests of teachers and state workers, perhaps violating the “inviolable contract” protected by both state law and the contract clauses of the Kentucky and U.S. constitutions.608 Bevin began the year 2017, promising a special session to reform the pension fund, but it came to nothing. In September, consultants he hired released a report on pensions that alarmed state workers and spooked legislators.609 Then in January 2018, he sent a plan to the regular session of the General Assembly that died on arrival even though Republicans controlled both houses. Bevin’s attacks on teachers sparked huge protests by educators in the

605. Id. at 176 (Lambert, J., concurring).

606. See supra Part C, Section 1.


608. Id.

609. Id.
capital, something that did not win over lawmakers, who knew that teachers were very popular among Republicans and Democrats alike.610

Finally, the leadership wrote its own, more modest measure, which on its face raised far fewer legal issues.611 However, Attorney General Andy Beshear issued an opinion saying that the bill contained "multiple legal violations" of the inviolable contract in more than a dozen ways.612 But even the Senate’s own bill struggled to attract enough votes to move forward. Finally, in the last days of the session, the leadership thought it had the votes—but they didn’t have enough time to give three readings. They then took a wastewater bill that had constitutionally required three readings, hollowed it out, and replaced its contents with the pension bill.613 In a late afternoon session, with many legislators still at their day jobs, it was passed with a minimal number of votes.614 On April 10, 2018, the governor signed the pension bill into law.615

Teachers and government workers were outraged. The Kentucky Education Association joined Beshear in filing a lawsuit in Franklin Circuit Court alleging that the last-minute maneuver violated several constitutional provisions designed to limit the legislature from passing bills without due consideration and transparency.616 Meanwhile, teachers continued to protest, shutting down Jefferson County schools as well as more than thirty other districts in the state on April 12th.617

In May, the case was assigned to Judge Phillip Shepherd, who in 2016 had ruled that Governor Bevin’s reorganization of the University of Louisville Board of


611. Morgan Watkins, Revised Ky. Pension Reform Bill to Be Filed, COURIER-J., Mar. 1, 2018, at 7A.


614. Tom Loftus, State Pension Fight Nears End, COURIER-J., Mar. 27, 2018, at 1A; Tom Loftus, Ky. House Passes Pension Bill, COURIER-J., Mar. 30, 2018, at 1A.

615. Morgan Watkins & Mandy McLaren, Bevin Signs Pension Reform Bill, COURIER-J., Apr. 11, 2018, at 1A.

616. Tom Loftus & Morgan Watkins, Beshear Sues Over Pension Bill, COURIER-J., Apr. 12, 2018, at 3A.

617. Darcy Costello & Mandy McLaren, Jefferson County Schools Closed: Teachers Rallying Friday At Capital, COURIER-J., Apr. 13, 2018, at 1A.
2. The Proceedings in Franklin Circuit Court

In a "courtroom crowded with teachers," the Franklin Circuit Court opened hearings on the pension case in early June with Judge Shepherd presiding. Arguing for the plaintiffs was Beshear, representing his office, teachers, and several other state government worker unions. Representing Bevin and defending the new pension law was the governor's counsel, Steve Pitt. Beshear argued that the process the legislature used to pass the law was unconstitutional and "showed us the worst of the worst in state government," when an "11-page sewer bill became a 291-page pension bill and passed both chambers and was placed before the governor in just six hours with no public comment." He went on to say that the constitutional requirement of three readings of a bill was "mandatory," and the framers had intentionally put this language into the constitution to prevent this kind of legislating. Pitt, on the other hand, argued it was "a charade to argue legislators didn't know what they were voting on," asserting that the legislature had "great leeway" to set their own rules and that this kind of legislating had happened before. He went on to argue the merits of the pension bill were more important than the procedures used to pass it, and it was a "reasonable and necessary" reform. In questioning the lawyers, Judge Shepherd seemed to acknowledge that the legislature had to allow for last-minute amendments in lawmaking but suggested that even so the process should
“allow for the public to know what’s in the bill [and] for legislators to know what’s in the bill.”

3. Franklin Circuit Court Decision

On June 20th, Judge Shepherd released his decision, ruling that the pension bill was unconstitutional and enjoined its enforcement by the state. He confined his analysis to the law’s conformity to two provisions of Section 46, deciding whether, as a bill, the law had “three readings on three separate days” in each house and whether the law was a bill “appropriating money or creating debt” which would have required a majority of all members of both houses. On the former question, Judge Shepherd determined that as the bill, as a pension bill, received only one reading in the House and none in the Senate. He rejected the governor’s argument that the readings of the substituted sewer bill could count toward the required number, going to the debates on the 1890-91 constitutional convention where delegates had been concerned about just this kind of “fraudulent substitution of bills.” He found that “the drafters enacted Section 46 ‘to throw guards around hasty legislation, and render it impossible for ... bills to be railroaded through the Legislature.’” Regarding the later issue, whether the pension bill appropriated money or created debt, he determined it clearly created obligations for the state, which was the test set by case law and suggested by language from the constitutional debates. As the bill did not garner a constitutional majority of fifty-one members, it was “void ab initio.” In other rulings, he dismissed the president of the Senate and the Speaker Pro

627. Id.

628. Tom Loftus, Judges Strikes Down Pension Law, COURIER-J., Jun. 21, 2018, at 1A.

629. Commonwealth ex rel. Beshear v. Bevin, Civil Actions No. 18-CI-379 & No. 18-CI-414, at *1, *5-6 (Ky. Franklin Cir. Ct., June 20, 2018). With several members of the 100-member House of Representatives absent, the pension bill only received 49 votes. Loftus, Judges Strikes Down Pension Law, supra note 629.


631. Id.

632. Id. at *21 (quoting 3 DEBATES OF CONSTITUTIONAL CONVENTION 4318-19 (1891) (statement of Ignatius A. Spalding, Union County)).

633. Id. ((quoting 3 DEBATES OF CONSTITUTIONAL CONVENTION 3869 (1891) (statement of Ignatius A. Spalding, Union County)).

634. Id. at *23-27.

Tempore of the House on the grounds of legislative immunity \(^{636}\) and formally rejected Beshear’s initial claim (which he had stopped pursuing) that the bill was invalid because it had been signed by an acting speaker of the House. \(^{637}\)

4. Supreme Court of Kentucky Decision

On December 13, 2018, the Supreme Court issued a unanimous decision that the method by which the pension law had been passed was unconstitutional. \(^{638}\) The majority opinion by Justice Daniel J. Venters began by briefly reviewing the factual and procedural background of the case, starting with the Senate pension bill filed on February 20, 2018, which the court noted had stalled immediately after being introduced due to “[v]ocal oppo[sition]” by current and retired public employees who believed that changes to the calculation of unused sick-leave for current workers and reduced annual cost of living adjustments for retirees violated vested contract-obligations. \(^{639}\) Then, on the “57th day,” a “[c]onsensus on a plan for reform was reached,” but there was not enough time for the bill to “be read at length on three different days in each [h]ouse,” as required by Section 46 of the state constitution. \(^{640}\) The court described the sordid machinations that converted a wastewater bill into a pension bill, \(^{641}\) making a point of noting that the new bill had only one reading in the house and none in the Senate. \(^{642}\)

Next, the court looked at whether it had the power to review whether the legislature had complied with Section 46 of the constitution. They noted that the appellants had raised the “political question” doctrine and argued that “the processes and procedures by which a bill becomes a law or exclusively assigned to the legislative branch” and that any “judicial intrusion into that question would violate the stringent separation of powers doctrine embedded in Kentucky’s constitution.” \(^{643}\) The court noted, however, that they were confronted with not a question of “internal processes and internal rules of the legislature” but the question of “what Section 46 of the constitution means.” \(^{644}\)

\(^{636}\) Id. at *9-10

\(^{637}\) Id. at *29.

\(^{638}\) Bevin v. Commonwealth ex rel. Beshear, 563 S.W.3d 74, 94 (Ky. 2018).

\(^{639}\) Id. at 78.

\(^{640}\) Id. at 79.

\(^{641}\) Id.

\(^{642}\) Id. at 80-81.

\(^{643}\) Id. at 81.

\(^{644}\) Bevin, 563 S.W.3d at 82.
"We must reject the argument that this Court has no voice in that determination," the court stated.

The foundational principle described in Marbury v. Madison... has been a cornerstone of the American Republic for as long as the Republic has endured. "It is emphatically the province and duty of the judicial department to say what the law is... This is of the very essence of judicial duty."645

The court went on to quote the Stephenson case: "Just as this [c]ourt will not infringe upon the independence of the legislature, we will not cast a blind eye to our own duty to interpret the constitution and declare the law."646

Having rejected the argument that the issue before it was a political question, the court instead shifted the issue to whether its ruling in the case would implicate the strong separation of powers doctrine in state constitutional law. Citing Rose v. Council for Better Education, it determined that to avoid deciding the case because of "legislative discretion" would be a "denigration of our own Constitutional duty."647 To let "the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable."648 The court’s power, it noted, "indeed, its duty" is to declare the meaning of constitutional provisions.649 That was a "primary function of the judicial branch in the scheme of checks and balances that has protected freedom and liberty... for more than two centuries."650 The Court then disposed of the governor’s claim that the Baker v. Carr test supported dismissing the case.651 Applying those standards to the facts of the case, it rejected that argument.652 For example, it noted that Section 46 was not a legislative rule "defined, interpreted, and applied exclusively," by the General Assembly but instead was an explicit provision of the constitution.653 Moreover, the issues before the court could readily "be resolved under ordinary rules of constitutional interpretation."654

645. Id. (citations omitted) (quoting Marbury v. Madison, 5 U.S. 137, 177-78 (1803)).
646. Id. at 82 (quoting Stephenson v. Woodward, 182 S.W.3d 162, 174 (Ky. 2005)).
647. Id. at 82 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989)).
648. Id. (quoting Rose, 790 S.W.2d at 209).
649. Id. at 83.
650. Bevin, 563 S.W.3d at 83.
651. Id. at 83-84 (citing Philpot v. Haviland, 880 S.W.2d 550, 553 (Ky. 1994)).
652. Id. at 83-84.
653. Id. at 83.
654. Id.
Furthermore, the case did not involve a policy determination. The court noted that "[o]ur review of § 46 simply follows our normal rules of constitutional construction." Based on this analysis, the court determined that it was "satisfied that judicial review of the meaning of any provision of the Kentucky Constitution is well within the separate powers assigned the judicial branch." 

The court next analyzed whether the three-readings clause of Section 46 was a "mandatory, rather than directory" provision. Reviewing Kentucky case law, they determined the word "shall" in the provision that a bill "shall be read at length on three different days and each house" was "mandatory, rather than directory." The court concluded its analysis by finding that the "plain and ordinary meaning" of the language of Section 46, and the facts in the case, made to clarify that the process followed to enact the bill in question failed to comply with the three-readings requirement of the constitution.

Like Judge Shepherd, the court surveyed the debates of the 1890-91 constitutional convention, finding that those debates showed that the drafters of the three-readings rule intended it to be strictly enforced to prevent the hasty passage of legislation. Summing up, the court declared itself "convinced that the purpose of Section 46 was not simply to assure that the legislators knew what they were voting on. Rather, the purpose was to ensure that every legislator had a fair opportunity to fully consider each piece of legislation that would be bought to vote." Having decided that the three-reading clause was violated, the Court declared they did not need to address issues relating to the inviolable contract provisions nor did it need to determine whether or not SB-150 was an appropriation bill requiring a fifty-one vote majority.

At no point in the opinion was there any criticism of the work of the Franklin Circuit Court. Indeed, in its analysis of Section 46, the court paralleled Judge Shepherd's analysis. Moreover, by citing Marbury v. Madison, the Supreme Court clearly signaled to Governor Bevin it had the power to say what the law was and

655. Id. at 84.
656. Bevin, 563 S.W.3d at 86.
657. Id.
658. Id. at 89.
660. Id. at 92-93.
661. Id. at 93.
662. Bevin, 563 S.W.3d at 94.
enforce the rule of law. The unanimous decision showed that the judicial branch could not be bullied, by implication rejecting the scapegoating of Judge Shepherd for the governor’s unhappiness with constitutional constraints on his powers. And by citing both Stephenson and Rose, the court reminded the legislature and governor that the judicial branch—from the Franklin Circuit Court to the Supreme Court—had a long tradition of accepting the grave duty of defending the Constitution of Kentucky.

VI. CONCLUDING THOUGHTS: BESHEAR v. ACREE, HOUSE BILL 3, AND FUTURE RESEARCH DIRECTIONS

Just as after the Stephenson v. Woodward decision, an unhappy Senator Williams offered a bill to “rip” jurisdiction from the Franklin Circuit Court. In 2019 Senate President Robert Stivers filed an SB-2 to do the same by amending the law to allow that a “special judge” be randomly appointed by the chief justice of the Kentucky Supreme Court if a party before that court requested it.663 The proposed bill drew criticism by Sheryl Snyder, who had tried many cases before the Franklin Circuit Court on behalf of governors from both parties.664 “I think choosing judges at random for those kinds of state government and state constitutional issues would be at the cost of the expertise that the Franklin Circuit judges build up over the years handling those cases,” Snyder said.665 He wondered why it was necessary because the court’s decisions were appealable to higher courts anyway. Robert Lawson, the highly respected retired professor from the University of Kentucky College of Law, called the bill “ridiculous” and thought it was based on the criticism of one judge, Shepherd, who he called a “very fair-minded, very competent” jurist.666 Despite the priority indicated by the bill’s number, SB-2, it failed.

A. Beshear v. Acree

A good test of the value of an experienced capital city court of general jurisprudence occurred in mid-2020 when Governor Beshear’s public health executive orders issued to help fight the coronavirus came under legal challenge by Republicans and some business owners. Lawsuits filed to suspend the


665. Loftus, Bill That Would Let Bevin, Others Avoid Judge Shepherd Is Senate Priority, supra note 665.

666. Id.
governor’s orders were not filed in Franklin Circuit Court. In what appeared to many observers to be court-shopping, lawsuits were filed in Scott Circuit Court and later in Boone County Circuit Court. In each case, the party initiating the lawsuit had local ties, but Attorney General Daniel Cameron soon intervened and took over the prosecution of the case. Another notable fact—especially in the light of prior attacks on Judge Shepherd in the 2018 pension case—was that the judges in the circuits were chosen both had political connections, including their posts on Facebook, that tied them to either Cameron or Agriculture Commissioner Ryan Quarles (who filed the Scott County lawsuit).667

The first lawsuit was filed in late June by Quarles and a central Kentucky apple orchard, claiming that several public health orders by Governor Beshear “restrict the rights and liberties of the members of the public all in violation of the state constitution and administrative procedures act.”668 The lawsuit sought a temporary restraining order to stop the restrictions.669 Soon after, Cameron joined the lawsuit.670 On July 9th, Scott Circuit Court Judge Brian Privett issued a temporary restraining order enjoining Governor Beshear, the Kentucky Department for Public Health, and the Cabinet for Health and Family Services from “enforcing any executive order, secretary’s order, or other order or guidance issued” to prevent the spread of COVID-19 “against any of the 548 agritourism businesses in Kentucky.”671

Meanwhile, in Boone County, a lawsuit was filed by a Florence Kentucky racetrack and a Fort Mitchell daycare center, and, not surprisingly, Cameron immediately joined the plaintiff’s side. Like the Scott County case, the parties claimed the COVID-19 business restrictions unconstitutionally harmed their businesses, and they sought injunctive relief to halt the application of the restrictions. In Cameron’s filing, he alleged that there were many counties in Kentucky with “few coronavirus infections,” and because of this, the governor’s orders should apply differently in each of the state’s 120 counties and be “reasonably tailored in such a way that the emergency response” should only


669. Id.


apply at a “location where it [currently] exists.” Professor Boone Circuit Court Judge Richard A. Brueggemann granted a temporary restraining order and said he would issue a final order on July 17th. Facing two court injunctions calling for a 120-county crazy-quilt response to a deadly virus, Beshear asked the Court of Appeals to lift those orders. But Chief Judge Glenn Acree declined to do so, suggesting that “the innate wisdom and common sense” of Kentuckians would stop the disease better than public health orders. Beshear then filed an original action in the Kentucky Supreme Court, bypassing the Court of Appeals, which urged the court to quickly resolve the issues raised.

As the legal activity continued, levels of COVID-19 in the state began to spike upward, both in numbers of cases and in positivity rates. In Louisville, which had been among the harder hit places in Kentucky, the Courier-Journal voiced alarm. In a “rare page one editorial” in the July 8th paper, it urged Beshear to issue an order requiring that all Kentuckians wear face masks when out in public. Noting that while new COVID-19 cases had been “ranging from around 100 to 300 a day, “the latest figures were “closer to 400 cases than 300.” On July 9th, Beshear issued a 30-day order mandating the wearing of masks in public.

Earlier that day, Scott County Circuit Judge Privett issued an expansive temporary restraining order against “all future” executive orders by the Beshear administration related to the COVID-19 emergency. Cameron disclosed his


belief that Boone Circuit Court would soon issue a ruling in a motion he filed in the case the day before, implying that he had special knowledge that the ruling would be in his favor and would block the governor’s power to fight the coronavirus.679

As Cameron’s announcement filled the next day’s news, the Kentucky Supreme Court acted in a short but powerful order. Citing its power under Section 110 of the Kentucky Constitution to “issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice,” it stayed all “orders issued by the lower courts” until it issued a final ruling.680 “In the midst of a global pandemic that has resulted in the Governor issuing Executive Orders deemed necessary to the protection of the public health and safety,” it noted that “two circuit courts have issued injunctive relief preventing the enforcement” of those emergency measures.681 Furthermore, “[i]t appears that one circuit court has indicated an intent to issue an order shortly that will enjoin all executive orders entered by the Governor and any actions taken pursuant to his public emergency powers,” a seeming dig at Cameron’s midnight announcement.682

“Given the need for a clear and consistent statewide public health policy and recognizing that the Kentucky legislature has expressly given the Governor broad executive powers in a public health emergency,” the court ordered “a stay of all orders of injunctive relief until such time as the various orders are properly before the Court with a full record of any evidence and pleadings considered by the lower courts.”683 It allowed the Boone and Scott Circuit Courts to “proceed with matters before them and issue all findings of fact and conclusions of law” but said no order, however, characterized, shall be effective.684 The Kentucky Supreme Court order was to remain in place until the “full record of proceedings below is reviewed by this Court, all parties have been given the


681. Id.

682. Id.

683. Id.

684. Id.
opportunity to address the orders in briefs, and this Court issues a final order addressing these issues of paramount public importance to all citizens of the Commonwealth.\textsuperscript{685}

The ruling was extraordinary, and one cannot but sense the court's annoyance with the Boone and Scott Circuit Courts. It appeared to have been forced in the “midst of a global pandemic” to tap constitutional powers to “exercise control of the Court of Justice” over two wayward courts whose actions threatened the “protection of the public health and safety” of the Commonwealth.\textsuperscript{686} Its implicit reference to Cameron’s teased ex parte knowledge of Judge Brueggemann’s coming decision, and to “all parties” needing to be “given the opportunity to address the orders,”\textsuperscript{687} showed displeasure with the open court-shopping and deliberate decisions to not give notice to the governor, which is legally allowed in seeking temporary restraining orders but was arguably an unlawyerly breach of collegiality when the matter involved two constitutional officers.

It is likely at least one justice had wondered why the case had not been filed in Franklin Circuit Court. Nonetheless, the Supreme Court set a deadline for briefs by the governor and attorney general, which were both submitted on August 28. Oral arguments were heard September 17, 2020. On November 12, 2020, the Supreme Court of Kentucky ruled that the governor had properly declared a state of emergency under state law and that his executive orders and emergency regulations did not violate the state constitution or the administrative regulations statute.\textsuperscript{688} In the precise decision written by Justice Lisabeth Hughes, the court made no mention of the fact that the plaintiffs had filed their claim in the circuit court district in which they resided instead of Franklin Circuit Court.\textsuperscript{689} While the confused procedural history of the case might have annoyed the court initially, it clearly raised no jurisdictional issue they needed to address in the decision.

B. House Bill 3

In the wake of the Acree decision, the Republican super majorities in the 2020 General Assembly determined to overturn its result, making bills reducing the executive branch’s emergency powers its highest priority. This was reflected in low-numbered bills—chosen to reflect the priorities of the legislative

\textsuperscript{685} ld.


\textsuperscript{687} Id.


\textsuperscript{689} Id.
leadership—House Bill 1 and Senate Bill 1 which respectively stripped the governor of his powers reduce the power of the governor in emergencies. Despite concerns by Democrats over both the substance and constitutionality of the legislation, the bills sailed through the legislature, which later overturned gubernatorial vetoes and made the restrictions on the governor’s powers enacted law.

However, still nursing decades of enmity against the Franklin Circuit Court, the House Republicans reserved the number House Bill 3 for a bit of delayed revenge. The bill attempted to strip the Franklin Circuit Court of its supposed powers, and moved to create a new, statewide “super circuit” court to adjudicate legal-political and constitutional matters. The bill established that in cases where a lawsuit was filed that “challenged the constitutionality” of a Kentucky statute, executive order, administrative regulation, or “order of any cabinet, program cabinet, or department,” the plaintiff or plaintiffs were to first file their complaint with the Circuit Court clerk in the county where the plaintiff or any one of multiple plaintiffs resided. At this point, the Chief Justice of the Kentucky Supreme Court would be commanded to, within three days, randomly choose one circuit judge from each of three large geographic districts (comprising all the circuit court judges of the state). Once chosen these judges would convene as a new three-judge “super circuit” court. In a House Judiciary Committee meeting, Representative Jason Nemes (R-Louisville), a chief of staff for former Chief Justice Joseph Lambert, told the committee that the super circuit bill violated several constitutional provisions by creating a new court without the express power to do so, redistricting without the required prerequisites, and by impermissibly exercising the authority of the courts. Despite his testimony, House Bill 3 passed the House and was sent to the Senate.

In a January 8, 2021, hearing before the Senate Judiciary Committee, Chief Justice John D. Minton, Jr. condemned the bill for creating a “convoluted, complicated, [and] imponderable” “Rube Goldberg” mechanism. He noted that, in the wake of the Washington D.C. insurrection at the U.S. capitol, “the important message from our congressmen and senators is let’s tell the people the truth.” The truth that Minton desired to convey was that the bill was “simply


691. Id.


693. KET Legislative Coverage: Senate Judiciary Committee (KET television broadcast Jan. 8, 2021).

694. Id.
an effort to eliminate the Franklin Circuit Court from the decision-making process in [constitutional] cases."\(^\text{695}\) Recalling the COVID-19 case filed in Boone County, Minton noted that case would not have been tried in that county's circuit court but instead removed to a panel chosen from the "three super circuits that have been created by the General Assembly" (and, implicitly, not created by the state constitution).\(^\text{696}\) He also declared it an "egregious invasion of the separation of powers."\(^\text{697}\) The bill, Chief Justice Minton said, "needs to die."\(^\text{698}\)

Environmental lawyer Tom Fitzgerald also offered testimony of his research into the court, noting that of the number of notices of constitutional claims recorded in 2020 by the Attorney General, only two of those claims were heard in Franklin County and "99.3% of constitutional claims were heard elsewhere."\(^\text{699}\) With the "COVID challenges filed on Boone and Scott Circuit Courts," only 18% of claims filed against state officials or agencies were heard Franklin Circuit Court.\(^\text{700}\) Citing "41 years of civil practice," often before Franklin Circuit Court, Fitzgerald averred that there is "great value in the familiarity of the Franklin Circuit Court Judges with complex constitutional and administrative issues, which benefits all parties."\(^\text{701}\) Ultimately, the provisions objected to by Chief Justice Minton were scrapped and replaced with a Senate Committee Substitute that was as conventional as the House version was radical.\(^\text{702}\)

The elaborate "super circuit" language was replaced by a much simpler clause that gave jurisdiction in state constitutional claims to the circuit court "in the county where the plaintiff resides" or, if there were multiple plaintiffs, to "any county where any plaintiff resides."\(^\text{703}\) A case involving a "plaintiff who is not a resident of Kentucky" would be filed in the Franklin Circuit Court. The amended

\(^{\text{695}}\) Id.

\(^{\text{696}}\) Id.

\(^{\text{697}}\) Id.

\(^{\text{698}}\) Id.


\(^{\text{700}}\) Id.

\(^{\text{701}}\) Id.


bill was passed by both chambers and sent to the governor.\textsuperscript{704} The governor’s veto was later overruled.\textsuperscript{705} It is important to point out that the revised bill did not create any new rights for plaintiffs. Plaintiffs in the COVID-19 cases were able to pursue their claims in Boone and Scott Circuit Court lawsuits under then existing law. The only substantive change in the new law was that a plaintiff could not now choose to file their claim in Franklin County Circuit Court unless they reside there—which reduced, not expanded, a plaintiff’s venue options. However, that limitation can be remedied by adding a local plaintiff.

The impact of new law appears underwhelming, although it is an open question whether the mechanism utilized by Attorney General Cameron in Boone and Scott Circuit Court lawsuits and now given a nod by the revised House Bill 3 will be effective in the coming years. The purpose of courts of general jurisdiction in these legal political and constitutional cases will remain the same. They will need to rule rationally and consistently on motions for injunctive relief and to also build an adequate trial record by giving both parties adequate notice to argue and brief their case. This was somewhat lacking in the proceedings before the Scott County and Boone County circuit courts. The question will be whether dozens of circuit judges spread all over Kentucky’s 120 counties have the experience and resources to fulfill these requirements.\textsuperscript{706} Moreover, House Bill 3 increases the danger that plaintiffs in political-legal and constitutional controversies will engage in court shopping to the degree that will complicate the work of appellate courts.

The other issue is whether it will matter at all, given that any group of plaintiffs seeking to file in Franklin Circuit Court need only a plaintiff from that county. And, as the capital city and home base of the press that covers state government, it is still a desirable venue. Most if not all the cases described in this article would likely have taken place in Franklin Circuit Court even under the new law. Certainly, Attorney General Beshear would have filed his lawsuits in Franklin Circuit Court. The same goes for Governor Brown’s 1975 challenge to the Legislative Research Commission’s expanded powers. Advocacy groups like the Council for Better Education seeking statewide change would almost surely have


\textsuperscript{706} In his criticism of the unamended House bill, Chief Justice Minton took care to express confidence in all judges of Kentucky’s courts of general jurisdiction. \textit{See KET Legislative Coverage: Senate Judiciary Committee} (KET television broadcast Jan. 8, 2021).
sought the Frankfort venue even if they need to add an additional plaintiff or incorporated in Frankfort.

One final coda—believing that the 2021 legislature infringed upon the powers of the executive by limiting his ability to fight the coronavirus, on February 2, 2021, Governor Beshear sued to enjoin three new laws.

He filed in Franklin Circuit Court.707

C. Conclusions and Future Research Directions

The passions raised by Kentucky's Franklin Circuit Court clearly demonstrate the importance of courts of general jurisdiction in constitutional and legal-political matters. The effort to reduce the power of the Franklin court highlights also how those passions are heightened in the political hothouse of the capital city. This case study also demonstrates that more research into the neglected role of capital city courts of general jurisdictions in state constitutional matters is needed and that the histories of other states' general jurisdiction courts should be examined. This analysis should assess these courts' function within the court system. That function, this paper argues, is to frame the case correctly, to rationally decide requests for injunctive relief by assessing the likelihood of success based on their knowledge of the appellate courts, and to build a solid record for appellate courts through orderly hearings and the opportunity for both parties to file written briefs.

This case study also raises the greater question of whether political scientists and legal scholars are adequately analyzing legal systems from lower courts through appellate courts as the courts work as a whole. Or, and the evidence suggests so, are they merely describing them as separate parts? Chief Justice Minton's testimony suggests that, to the judges and staffs of these court systems themselves, these lower courts are part of a unified court system, working in tandem with the courts above and performing functions that make it possible for the higher-level decision-making of the state Supreme Court.

The neglect of state courts of general jurisdiction, to borrow from the esteemed justice, must die.

KENTUCKY'S PENALTY FOR EVIDENCE SPOILATION: PROPOSALS FOR REFORM

Henry L. Stephens Jr.*

I. INTRODUCTION

Consider the following factual scenario: plaintiff's decedent dies due to a truck/train collision at a grade crossing on a country road. After filing suit, her lawyers learn that since the date of the accident, the defendant Railroad has destroyed: (1) taped conversations between the dispatcher and the engineer; (2) minutes of safety committee meetings where presumably the unguarded grade crossing would have been discussed; and (3) records showing how many cars made up the train and their weight loads. The Kentucky courts have sanctioned egregious discovery abuses such as these by requiring trial courts to simply inform their juries that they could, but were not required, to infer that the missing evidence would be adverse to the railroad. This is the remedy even where the discovery abuses are so egregious as to prevent a plaintiff from making out a prima facie case, thereby causing plaintiff to suffer a directed verdict or summary judgment.

This article explores the ineffectiveness of Kentucky's "missing evidence" instruction as a remedy for spoliation and proposes an alternative solution. It argues that a relatively simple judicial "fix" obviates the concerns courts have expressed in the past about the creation of separate torts for spoliation while nevertheless providing a more effective deterrent for spoliation.

II. A CASE IN POINT

Russell Bandy loved golf. Seeing a Senior PGA tournament close to home on a beautiful fall morning seemed like an excellent way to spend Saturday, September 23, 1995. Little did he know that his life would end in a violent collision within minutes of leaving the tournament. As stated by the court of appeals upon review of the verdict in the trial court:

On September 23, 1995, Russell Bandy [hereinafter Plaintiff] and Terry Cole were riding in a vehicle driven by Gerald Toney when

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it was struck by a train owned by CNO & TP [hereinafter the Railroad] and operated by McDonald, and Garnett. The vehicle was attempting to cross the railroad tracks on Kearney Hills Road in Fayette County, Kentucky, when it was hit by the train traveling at approximately 52 miles per hour. On September 23, 1995, the railroad crossing on Kearney Hills Road did not have a gate to prevent vehicles from crossing when trains were passing through, however, the crossing was equipped with flashing lights and bells, which were fully operational when the collision occurred.2

On September 17, 1996, Nita Bandy filed a wrongful death action against the Railroad as the administratrix of Russell Bandy’s estate and a loss of consortium claim in her individual capacity as Russell’s wife.3 Although there was ample evidence from which a jury could conclude that Toney attempted to “beat” the train through the grade crossing,4 Plaintiff alleged that the Railroad negligently and carelessly operated the train at an excessive speed that struck the vehicle transporting Bandy and his companions, and that this action was the direct and proximate cause of Bandy’s death.5 Plaintiff also claimed “that [the Railroad] was negligent and careless in its maintenance of the Kearney Hills crossing due to the lack of adequate warning devices and safety precautions.”6

Apparently, the case was dormant for nearly a year before Plaintiff served the Railroad with interrogatories and requests for production of documents on September 10, 1997.7 The court noted that:

In particular, [Plaintiff] requested transcripts of the dispatcher tape generated on the date of the accident; any time tables, bulletins, notices, track warrants, slow orders, special orders, superintendent orders, and train orders in effect on the date of the accident; any documents evidencing [the Railroad’s] safety programs in effect at the time of the collision; all grade crossing safety manuals, safety procedures, inspection procedures, maintenance procedures, and recommendations published by [the Railroad] for a period of ten years preceding the accident;

2. Id. at *1.
3. Id.
4. Id. at *1 n.6 (stating that “[n]umerous witnesses testified to this fact at trial. Moreover, McDonald and Garnett both testified at trial that they were blowing the horn and ringing the bell extensively as they approached the Kearney Hills crossing.”).
6. Id. at *1.
7. Id. at *2.
and all documents detailing or describing any grade crossing safety and improvement programs initiated by [the Railroad] for a period of ten years prior to the accident.\(^8\)

Plaintiff’s spoliation of evidence claim came as a result of the Railroad’s November 18, 1997 response to Plaintiff’s interrogatories and request for production of documents.\(^9\) As explained by the court:

On November 18, 1997, [the Railroad] responded to [Plaintiff’s] request for transcripts of the dispatcher tape by claiming that the tapes had been destroyed pursuant to company policy and thus were no longer available. As for the documents pertaining to [Railroad’s] safety programs, safety manuals, safety procedures, inspection procedures, maintenance procedures, and safety improvement programs, the appellees advised that these documents would be provided “when and if” they were located.\(^10\)

As discovery dragged on into the new millennium, in 2001, Plaintiff sought sanctions against the Railroad for failing to provide the train’s “consist” and the Railroad’s safety committee minutes.\(^11\) Plaintiff “argued that the train’s consist was particularly relevant as it would enable her expert to determine if the emergency brakes on the train were applied before, after, or during impact.”\(^12\) As for the safety committee minutes, Plaintiff alleged that “the minutes were vital to her case-in-chief as they contained the ‘near-miss’ or ‘close-call’ history for the Kearney Hills crossing.”\(^13\) Neither the consist, nor the safety committee minutes were ever provided to Plaintiff, despite the trial court’s order.\(^14\)

As a result of the Railroad failing to produce the consist and safety committee minutes, Plaintiff’s expert could not give an opinion as to whether the emergency

\(^8\) Id.

\(^9\) Id.

\(^10\) Bandy I, 2003 WL 22319202, at *2 (citations omitted) (noting that the Railroad claimed that “[i]n the regular course of business, dispatching tapes are not retained after two months...”) Id at *2 n.11. (emphasis added). Despite whatever may have been the Railroad’s “regular course of business”, the author finds it incredulous that a federally regulated carrier, having been involved in a grade crossing accident with three deaths, would not take steps to preserve the dispatching tapes, even in the absence of a request for same; rather, it destroyed them in the “regular course of business”, two months after the accident.

\(^11\) Id. at *4.

\(^12\) Id.

\(^13\) Id.

\(^14\) Id.
brake on the train had been applied.\textsuperscript{15} The trial court granted Plaintiff’s motion for sanctions.\textsuperscript{16} Consequently, as a penalty, Plaintiff asked the trial court to “strike the appellees’ pleadings and enter a default judgment against the railroad.”\textsuperscript{17} Despite sternly rebuking the Railroad for its discovery abuses,\textsuperscript{18} the trial court declined to impose these remedies and opted simply to give the jury the time-honored “missing evidence” instruction, which went as follows:

During the trial you have heard reference to documents that were not retained by the railroad despite its knowledge of the claim of the plaintiff, Nita Bandy, administratrix of the estate of Russell D. Bandy. You may but are not required to infer that had these documents been retained by the railroad and produced here at trial that these documents would have been adverse evidence to the railroad and favorable to the plaintiff.\textsuperscript{19}

Having suffered a defense verdict at trial, Plaintiff filed post-verdict motions with the trial court, claiming she was entitled to a judgment notwithstanding the verdict, a new trial, or both because of the appellees’ numerous discovery abuses committed throughout the litigation.\textsuperscript{20} The trial court denied Plaintiff’s motion, and thereafter, Plaintiff appealed.\textsuperscript{21}

Plaintiff asked the court of appeals to hold that the trial court abused its discretion by remediying the Railroad’s clear and flagrant discovery abuses with a weak “missing evidence” instruction to the jury, rather than striking the Railroad’s pleadings and entering a default judgment.\textsuperscript{22} Relying on guidance from the Supreme Court of Kentucky, as expressed in \textit{Monsanto Co. v. Reed}\textsuperscript{23}, the court of appeals denied Plaintiff the requested relief and affirmed the trial court, citing \textit{Monsanto} as authority for the proposition that “[w]here the issue of destroyed

\begin{itemize}
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} \textit{Bandy I}, 2003 WL 22319202, at *5.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id. (noting that: “[t]he trial court expressed a great deal of concern regarding [the Railroad’s] conduct throughout the discovery process and noted that the railroad should have been aware that litigation was pending when it destroyed the dispatcher tapes requested by [Plaintiff]. The trial court also concluded that the bar tonnage profile provided by the appellees was not the consist that [Plaintiff] had requested. The trial court also expressed its disapproval of the appellees’ failure to produce the minutes of the safety committee meetings requested by [Plaintiff].”).
  \item \textsuperscript{19} Id. at *6 (emphasis added) [hereinafter, “the missing evidence instruction”].
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} \textit{Monsanto Co. v. Reed}, 950 S.W.2d 811 (Ky. 1997).
\end{itemize}
or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and ‘missing evidence’ instructions.”

Following the jury verdict for the defense in the wrongful death action, Plaintiff filed a separate civil action seeking damages from the Railroad’s spoliation of evidence. That action was filed pursuant to KRS 446.070 and alleged a violation of KRS 524.100, which provides criminal penalties for the destruction, mutilation, or concealment of physical evidence with the intent to impair its availability in an official proceeding. KRS 446.070 provides that “[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.” Notwithstanding the straightforward language contained in KRS 524.100 and KRS 446.070, the Court of Appeals summarily dismissed the notion that a civil action for damages flowing from criminal destruction of evidence was cognizable in Kentucky law, stating “[w]e find no basis for that action in Kentucky law.” One can only conclude that the


26. Id.

27. Id. (citing KY. REV. STAT. ANN. § 446.070 (West)). KY. REV. STAT. § 524.100 provides that “[a] person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he: (a) [d]estroys, mutilates, conceals, removes, or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding...” KY. REV. STAT. ANN. § 524.100 (West).

28. Id. at *3. How the Kentucky Court of Appeals could have reached such a result considering the plain language of the statutes in question, defies conjecture or analysis. KY. REV. STAT. § 524.100 provides that:

“(1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he: (a) [d]estroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding.”.

KY. REV. STAT. § 524.100 (West) (emphasis added). It is inconceivable to the author that in the late 20th century, a national railroad, replete with risk managers attorneys and claims adjusters, would destroy virtually all pertinent records pertaining to the crash “accidentally”, two months after a
Kentucky courts are stubbornly steadfast in refusing any remedy for spoliation other than the "missing evidence" instruction.29 In this regard, the Kentucky courts' position invites inquiry concerning whether the "missing evidence" instruction is an effective remedy for parties aggrieved by an opponent's spoliation of pertinent evidence.

A. The "Missing Evidence" Instruction: History and Required Mental State

The oldest and most common method of dealing with the situation in which one party to the litigation destroys or fails to produce relevant evidence goes back to seventeenth century England and is commonly referred to as the doctrine of *omnia praesumuntur contra spoliatorem*. This is the use of a "presumption" against the destroying party. "[I]ntentional spoliation or destruction of evidence relevant to a case raises ... an inference, that this evidence would have been unfavorable to the cause of the spoliator."30

Kentucky's definition of spoliation, formulated by the Supreme Court in *Monsanto*, while not using the adjective "intentional" to describe the scienter needed to trigger the jury instruction conferring a permissible inference against the spoliator, nevertheless mandates that only those who have engaged in "deliberate" conduct are to be burdened by the "missing evidence" instruction.

Having no policy regarding retention of dispatcher tapes for more than sixty days, even in the event of a fatality, shows such callous disregard for the safety of such evidence that arguably, intent can be inferred. See, e.g., Fowler v. Mantooth, 683 S.W.2d 250, 252 (Ky.1984) (stating that "[m]alice may be implied from outrageous conduct, and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing." (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (4th ed. 1971)). Nevertheless, the court of appeals dismissed the notion that Plaintiff had a cognizable claim out of hand-without so much as a sentence of analysis as to the rationale therefore.

29. Bandy II, 2006 WL 1045491, at *3. The only spoliation remedy that has ever been sanctioned by the Supreme Court of Kentucky is the "missing evidence" instruction notwithstanding arguably more egregious examples of spoliation having been presented to the court prior to Bandy. See, e.g., Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988) (holding the "missing evidence" instruction proper even where the obviously helpful defense evidence was intentionally destroyed by the prosecutor).

and permissible inference. However, as explained by Professor Lawson at the University of Kentucky Rosenberg College of Law, such a "deliberate" destruction need not have occurred in bad faith, "but a mere negligent loss or destruction of evidence will not support such an inference." Through such a formulation, the Kentucky courts are thus invited to inquire into the state of mind of the spoliator. If "mere negligence" will not suffice to support the inference that the missing evidence would have been unfavorable to the spoliator, it would appear that knowledge on the part of the spoliator that the missing evidence would be needed by, or would likely be requested by the opposing party, may be sufficient justification for the missing evidence instruction.

B. The "Missing Evidence" Instruction: Is it an Effective Remedy to Spoilation?

1. The Judiciary's Reluctance to Impose Penalties for Spoliation Fails to Deter, and May Exacerbate the Practice.

While there is no database from which to analyze the number of successful or attempted spoliation instances, numerous commentators, based upon interviews and surveys of litigators, believe it to be a widely employed practice.

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31. Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997) (stating that "the vast majority of jurisdictions have chosen to counteract a party's deliberate destruction of evidence with jury instructions and civil penalties.") (emphasis added). As explained by Professor Lawson at the University of Kentucky in his well respected Kentucky Evidence Law Handbook:

[spoliation of evidence occurs when] destruction of evidence by a party is irrelevant under some circumstances to support an inference that such evidence would have been favorable to the opposing party. The destruction need not have occurred in bad faith, but a mere negligent loss or destruction of evidence will not support such an inference.


33. The court of appeals in Bandy affirmed the trial court's giving of the missing evidence instruction notwithstanding that there was no allegation of "bad faith" destruction, but presumably more than "merely negligent" destruction. See Bandy I, 2003 WL 22319202, at *4-6. The court in Bandy, based on the facts presented, seems to imply that having "inquiry notice" that the destroyed evidence may be valuable to the opposing party will be sufficient to prevent a party from asserting that their destruction of such evidence was "merely negligent".

34. See generally Charles Nesson, Incentives to Spoliative Evidence in Civil Litigation: The Need for Vigorous Judicial Action, 13 CARDOZO L. REV. 793 (1991). The author details numerous demonstrable and egregious instances of spoliation which, even when recognized by the courts, are unsanctioned.
Scholars have noted that "'it would be difficult to exaggerate the pervasiveness of evasive practices,' including intentionally withholding evidence."\textsuperscript{35} Moreover, the incentives to spoli ate evidence are numerous and benefit unethical attorneys. "Spoliation is an effective [and] growing litigation practice which threatens to undermine the integrity of the civil trial process."\textsuperscript{36} It may be late in the discovery process, if at all, before an opponent learns that valuable evidence has been lost or destroyed, evidence which could conceivably make or break his client's case.\textsuperscript{37}

While "fear of getting caught" may serve as a deterrent for unethical lawyers who would otherwise be so disposed, "'[p]opular examples which seem to support the dire warnings against spoliation in fact show the opposite: Spoliators are caught only in the most fortuitous of circumstances.'"\textsuperscript{38} Upon being confronted with an instance of spoliation, one would think that the courts would levy sanctions sufficient to serve as a deterrent force. Unfortunately, an analysis of the cases where spoliation has proved to demonstrate the opposite.\textsuperscript{39}

Thus judges have refused to sanction spoliators on the ground that the victim, for various reasons, did not deserve to be compensated: the victim could have employed discovery devices which would have prevented the spoliation; the victim probably could not have proved his case; or the victim had ample discovery anyway and could not establish prejudice.\textsuperscript{40} Simultaneously, courts have refused to sanction spoliators because the spoliator did not deserve to be punished.\textsuperscript{41}


\textsuperscript{36} Id.

\textsuperscript{37} Id. at 795 (stating that "[d]uring discovery, a litigant often possesses damaging evidence which would be extremely valuable to his opponent, yet it is evidence of which the opponent is unaware. If the litigant spoliates this unknown evidence by destroying or misplacing it, his opponent will find it very difficult to discover the spoliation.").

\textsuperscript{38} Id. at 796 (using Oliver North as an example).

\textsuperscript{39} Id. at 798 (quoting Stephen J. Marzen, et al., Introduction to the Law of Destruction of Evidence, in Destruction of Evidence 14-18 (J. Gorelick, S. Marzen, & L. Solum eds. 1989); Stephen J. Marzen, et al., Discovery Sanctions, in Destruction of Evidence 113-17 (J. Gorelick, S. Marzen, & L. Solum eds. 1989) (stating that "[c]ourts have gone to great lengths to avoid imposing severe punishments on spoliators. For example, courts have conflated the compensatory and punitive rationales for sanctioning spoliation, adopting whichever rationale justified imposing minimal sanctions or no sanctions at all under the particular circumstances at hand.").

\textsuperscript{40} Nesson, supra note 34, at 799.

\textsuperscript{41} Id.
After all, the victim, though prejudiced, had not proved that the spoliator acted intentionally. 42

Unfortunately, the Kentucky courts find themselves in the mainstream when it comes to judicial reluctance and timidity concerning the imposition of sanctions for spoliation. 43 Kentucky’s “missing evidence” instruction is linguistically obtuse; moreover, even if its language is understood, the instruction provides no assistance to the jury concerning what remedies it may impose, even if it believes the adverse inference is appropriate and applicable. Consider the average Kentucky juror hearing the following instruction, given orally by the judge, at the conclusion of a multi-day trial, such as Bandy: “You may, but are not required, to infer that had these documents been retained by the railroad and produced here at trial that these documents would have been adverse evidence to the railroad and favorable to the plaintiff.” 44

Leaving aside for the moment the notion that most, if not all jurors, will (1) not understand the instruction; (2) forget the instruction; or (3) both, assume for the moment that the jury elects not to apply the inference, as perhaps they don’t believe that the documents were important enough to sway them from their ultimate verdict. 45 The jury has determined that the party’s actions were not “actionable” spoliation, necessitating the imposition of some penalty. If, however, the jury believes that the “missing evidence” was important enough to invoke the inference against the party who failed to produce it, what remedy do they employ? Presumably, they could be so annoyed with the fact of spoliation as to find against the spoliating party on the issue of liability and enter a judgment for the non-spoliating opponent. One can assume that such an outcome would be rare, as such outcome would naturally presume that the jury had ignored all other evidence tending to favor the spoliating party. If, on the other hand, the jury believes that the non-spoliating party was prejudiced by the opponent failing to produce the “missing evidence,” the Court’s instruction seems to imply that the jury’s application of the inference is to be applied only to the liability portion of the case, meaning to spoliation egregious enough such that the spoliating party should suffer an adverse judgment. However, if the jury wishes to find for the non-spoliating party but punish the spoliation, the spoliation will go unpunished;

42. Id.


44. See Bandy I, 2003 WL 22319202, at *6.

45. See infra text accompanying notes 41-50. For instance, the court could instruct the jury that if it finds that the inference is applicable, they may increase the damages award to the non-spoliating party as a result of the spoliating party’s actions.
because the court has not instructed the jury concerning the actions it may take if it employs the inference. Accordingly, even the most assiduous jury will likely find itself confused concerning what actions it may take if it finds the inference applicable. This assumes what cannot be assumed: that the jury will both understand and remember the jury instructions. 46

2. Even the Most Diligent Juries Struggle Mightily with Instructions

The notion that jurors will understand and follow a trial court’s formal jury instructions is so axiomatic to American trial practice as to have been embodied in a “jury instruction” presumption affirmed and approved by the appellate courts, including the Supreme Court of the United States. 47 “Because courts subscribe to the notion that questioning the validity of this presumption poses a threat to the survival of our system of justice, in all but a few exceptional situations, appellate courts are unreceptive to claims that jury instructions were incomprehensible.” 48 Illustrative of the court’s unwillingness to allow this presumption to be rebutted by even direct evidence is the U.S. Supreme Court’s opinion in Weeks v. Angelone. 49

In Weeks, the trial court was presented with a note from the jury indicating its confusion about the written instructions it had been given. 50 The trial court’s remedy was simply to tell the jury to reread a portion of the previously given

46. See, e.g., Opper v. United States, 348 U.S. 84, 95 (1954) (stating that “to say that the jury may have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of the jury to follow instructions.”).

47. Id.

48. See Judith Ritter, Your Lips are Moving...But the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions, 69 Mo. L. Rev. 163, 163 (2004) (first citing Weeks v. Angelone, 528 U.S. 225, 234 (2000); then Gacy v. Wellborn, 994 F.2d 305, 312 (7th Cir. 1993); then J. Alexander Tanford, Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions, 25 Law & Soc’y Rev. 155, 157, 164-67 (1991); then Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 Brook. L. Rev. 1081, 1086-99 (2001); and then J. Alexander Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 Ind. L.J. 137, 144-50 (1990)). The author opines that the presumption that jurors will understand and follow instructions is not supported by historical experience nor empirical data.


50. Id. at 229.
instructions.\textsuperscript{51} The Supreme Court sanctioned this remedy, adding the additional presumption that a jury understands the court’s answer to its question.\textsuperscript{52}

With regard to the effectiveness of this seemingly feckless response to sincere questions of jurors simply trying to do their duty, Professor Ritter notes that for many years,

[S]ocial scientists and linguists have been conducting experiments to determine whether jurors are apt to understand many of the more commonly issued legal instructions. The published findings reveal many comprehensibility problems. Across the board, studies failed to provide an ounce of foundation for the jury instruction presumption.\textsuperscript{53}

Many of these studies were conducted utilizing pattern, written instructions.\textsuperscript{54} Thus, Professor Ritter concludes that “[d]espite its lack of grounding, the jury instruction presumption prevails. It should not. There is [no] rationale for the judiciary’s subscription to it. It is both illogical and unfair for our courts to presume that jurors understand that which the evidence shows us they do not.”\textsuperscript{55}

Suppose indeed the presumption that jurors will understand and follow the court’s instruction is to be abandoned. In that case, \textit{a fortiori}, the “missing evidence” instruction should be abandoned as well, since there is virtually no evidence that it serves as an effective deterrent to spoliation. Accordingly, it is

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 234 (\textit{citing} Armstrong v. Toler, 24 U.S. 258, 279 (1826)).


\textsuperscript{54} See generally \textit{id.} at 164-165, 185-187.

\textsuperscript{55} Id. at 206. See also Steele and Thornburg, \textit{supra} note 54 at 78; Nancy Marder, \textit{Bringing Jury Instructions into the 21st Century}, 81 Notre Dame L. Rev. 449, 451 (2006); Michael Higgins, \textit{Not So Plain English}, A.B.A.J., June 1989, at 40, 41 (noting that “[m]any jurors don’t know what it means to ‘draw an inference’, judges and jury experts say. They confuse ‘proximate’ cause with ‘approximate’ cause. They think ‘circumstantial evidence’ refers to weak evidence.”). One can only imagine confusion compounding upon confusion when, as in Kentucky, instructions are delivered orally.
submitted that the "missing evidence" instruction, while seemingly a remedy for spoliation, represents but a "slap on the wrist" for the spoliator that will likely result in no penalty at all because (1) imposition of the punitive inference is purely discretionary with the jury; (2) jurors are unlikely to remember the "missing evidence" instruction when it is often but one of a number of instructions tendered to the jury orally; and (3) even if the jury remembers the "missing evidence" instruction, the courts refuse to instruct the jury concerning the effect of the inference on their ultimate outcome. Thus, the missing evidence instruction to the jury is little more than an exercise that accomplishes nothing, except perhaps to satisfy the court that at least some penalty, however ineffective, was imposed.

C. Are There Better Remedies to Deter Spoliation?

1. An Independent Cause of Action For Spoliation?

In Bandy, Plaintiff failed to convince the court of appeals that any remedy other than the "missing evidence" instruction was warranted under Kentucky law. Plaintiff then sought to convince the court of appeals that an independent action for spoliation existed in Kentucky by virtue of two Kentucky statutes. The court of appeals declined to accept this invitation to create a new tort claim. Relying on its earlier pronouncements in Monsanto, the court solidified Kentucky's stance that spoliation remedies are limited to "missing evidence" instructions and enforcement of sanctions for discovery abuses.

While the opinion in Monsanto does not include a rationale other than precedent for the Court's unwillingness to adopt an independent tort for

56. See Nesson, supra note 34, at 799.


59. Id. at *3.

60. Bandy II, 2006 WL 1045491, at *3 (citing Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997)). In Monsanto, the court stated that "[t]he Court of Appeals recognized that only three states have adopted this tort claim. The vast majority of jurisdictions have chosen to counteract a party's deliberate destruction of evidence with jury instructions and civil penalties.... We will remain among those jurisdictions and not now allow such claims for relief." Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997).
spoliation, it notes that as of 1997, only three states had adopted the tort claim.\(^{61}\) In refusing to adopt the independent tort claim, the Kentucky court, while perhaps short on analysis, appears to have been on the right side of history, given the vacillations of other jurisdictions concerning acceptance of the independent tort.

In 1984, in *Smith v. Superior Court*, California became the first state to recognize a separate cause of action for spoliation.\(^{62}\) In *Smith*, the defendant’s agent destroyed critical evidence from the automobile accident, making it impossible for the plaintiff to recover any damages in the underlying suit.\(^{63}\) The court made new law in California by allowing the plaintiff to bring a separate tort claim against the defendant for *intentional* spoliation.\(^{64}\) While concluding that no victim should go without monetary compensation, the Court was comforted by the recent trend of courts recognizing new torts, such as intentional infliction of emotional distress, invasion of privacy, and infliction of prenatal injuries as the impetus for allowing this new spoliation tort.\(^{65}\)

In addition, in 1984, the Florida Third District Court of Appeals became one of the first courts to recognize an independent tort for *negligent* destruction of evidence.\(^{66}\) The court found that the defendant hospital had a duty to maintain records and had been negligent in undertaking that duty, thus necessitating the creation of the new tort of negligent spoliation to provide adequate compensation to those who have been wronged.\(^{67}\)

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\(^{61}\) Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997). While relying upon precedent affirming the use of the “missing evidence” instruction, neither the court in Monsanto, nor the court in *Bandy II* at any point undertook to explain why the “missing evidence” instruction was an effective remedy for spoliation, or alternatively, why other remedies might not be as, or more, effective.


\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id. (first citing *Keeton, supra* note 29, at § 1 (4th ed. 1971); then citing CAL. CIV. CODE § 3523 (1984); then citing 4 B.E. WITKIN, WITKIN LEGAL INSTITUTE, SUMMARY OF CALIFORNIA LAW: TORTS § 10 (8th ed. 1974); then citing Stills v. Gratton, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976); and then citing Turpin v. Sortini, 643 P.2d 954 (Cal. 1982)).


\(^{67}\) *But see Martino*, 908 So.2d at 347 (holding that the remedy against a first party defendant for spoliation of evidence is not an independent cause of action for spoliation of evidence). However, Florida appellate courts have recognized an independent claim for spoliation against third parties. See Townsend v. Conshor, Inc., 832 So. 2d 166, 167 (Fla. Dist. Ct. App. 2002). *See also* Jost v. Lakeland Reg’l Med. Ctr., Inc., 844 So. 2d 656, 658 (Fla Dist. Ct. App. 2003).
Despite Florida and California taking the lead in the creation of the new tort of spoliation, only Alabama\(^{68}\), Alaska\(^{69}\), Florida\(^ {70}\), Indiana\(^ {71}\), Kansas\(^ {72}\), Louisiana\(^ {73}\), Montana\(^ {74}\), New Mexico\(^ {75}\), Ohio\(^ {76}\), and West Virginia\(^ {77}\) have explicitly recognized some form of an independent tort action for spoliation.

2. Could A Punitive Damages Instruction For Spoliation Have Assisted The Plaintiffs In Bandy?

The creation of independent torts for spoliation, however, comes with significant problems. Perhaps the most significant problem is that there is


70. See Townsend, 832 So.2d at 167; Jost, 844 So.2d at 658.

71. There is no independent cause of action for spoliation in Indiana if the evidence was destroyed or discarded by the alleged tortfeasor in the original action. Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 355 (Ind. 2005). However, negligent or intentional spoliation of evidence is actionable as a separate tort if those alleged to have lost or destroyed the evidence owed a duty to the person bringing the spoliation claim to have it preserved. See Glotzbach, CPA, v. Froman, 827 N.E.2d 105, 108 (Ind. Ct. App. 2005). Thus, in Indiana, it appears that in the absence of a preservation request by the plaintiff, a tortfeasor has no duty to preserve evidence. However, Glotzbach confirms that a preservation request or other independent duty to preserve evidence is actionable if breached. Id. at 109.


73. See Reynolds v. Bordelon, 172 So.3d 589, 600 (La. 2015) (finding no cause of action in tort but potential breach of contract claim in relevant instances where parties that "anticipate litigation" create a contract to prevent spoliation).

74. The Montana courts have adopted the torts of intentional and negligent spoliation against third parties. See Oliver v. Stimson Lumber Co., 993 P.2d 11, 17-23 (Mont. 1999).


76. The Supreme Court of Ohio has held that a cause of action exists in tort for intentional spoliation against parties to the primary action, as well as third parties. Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037, 1038 (Ohio 1993).

77. West Virginia recognizes the tort of intentional spoliation of evidence as an independent tort when committed by either a party to an action or a third party. Hannah v. Heeter, 584 S.E.2d 560, 571 (W. Va. 2003).
frequently no way of knowing what the altered or destroyed evidence would have shown.\textsuperscript{78} Thus, the jury is left to speculate about the fact of harm and the amount of damages.\textsuperscript{79}

Further, the tort of spoliation is derivative in the sense that it arises based upon litigation related to misconduct that occurred in an underlying lawsuit. As stated by the court in Cedars-Sinai, "[f]or our system of justice to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings. To allow a litigant to attack the integrity of evidence after the proceedings have concluded... would impermissibly burden, if not inundate, our justice system."\textsuperscript{80} Moreover, "[m]ost courts hold that available remedies fairly compensate parties harmed."\textsuperscript{81} For negligent spoliation, a negligence cause of action exists; in instances of first-party spoliation, sanctions including issue preclusion, dismissal, and adverse inferences suffice to restore a plaintiff to his original position.\textsuperscript{82}

\textsuperscript{78} Another consideration weighing against recognition of a tort remedy for intentional first party spoliation is the uncertainty of the fact of harm in spoliation cases. It seems likely that in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation.


\textsuperscript{79} Id.

\textsuperscript{80} Id. at 515-16 (quoting Siberg v. Anderson, 786 P.2d 365, 370 (Cal. 1990)).


\textsuperscript{82} Sykes, supra note 81, at 848 (arguing that "[c]ourts adopting that view turn to other bodies of law, negligence law for instance, as well as civil sanctions and criminal penalties to compensate plaintiffs. Particularly in instances of first party spoliation, a court can impose evidentiary sanctions including issue preclusion, dismissal, and adverse inferences which will restore a plaintiff to his original position. In cases of negligent spoliation, a plaintiff can pursue a negligence claim against the tortfeasor. Following this line of reasoning, any independent claim of spoliation would be unnecessary because a plaintiff can be fairly compensated." (citations omitted)).
Finally, recognizing a new tort for spoliation, a derivative claim from preceding litigation, upsets traditional notions of the finality of judgments embodied in the principles of res judicata and collateral estoppel. 83

Although the Supreme Court of Kentucky left its rationale for rejecting the new tort of spoliation to the imagination of the reader, in all likelihood, all of these prudential concerns weighed heavily in the court’s decision to permit the “missing evidence” inference as the preferred judicial remedy for the spoliated evidence.

To the extent that spoliation is a problem to be remedied, one can hardly argue that the “missing evidence” instruction is but an ineffectual, palliative poultice. The Kentucky courts can and should do more.

Having wisely eschewed the creation of a separate tort for spoliation 84, the Kentucky courts, however, have never addressed the appropriateness of a punitive damages instruction in the case of egregious spoliation. Notwithstanding that the Ohio courts have recognized an independent tort for intentional spoliation of evidence, the Ohio courts have also affirmed that a punitive damages instruction concerning spoliation is appropriate in the underlying case, assuming it is warranted through the introduction of evidence sufficient to show that the act of spoliation was not merely negligent or unintentional. 85 Moskovitz v. Mt. Sinai Med. Ctr. concerned a claim of medical malpractice wherein it was established that one of the defendant doctors falsified the destroyed medical records to avoid liability for negligence. 86

83. See, e.g., Stefan Rubin, Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence, 51 Fla. L. Rev. 345, 360, 367 (1999). As stated by the court in Trevino v. Ortega, “[R]ecognizing a cause of action for evidence spoliation would create an impermissible layering of liability and would allow a plaintiff to collaterally attack an unfavorable judgment with a different factfinder at a later time, in direct opposition to the sound policy of ensuring the finality of judgments.” Trevino v. Ortega, 969 S.W.2d 950, 953 (Texas 1998). Additionally, traditional principles encouraging the finality of judgments have no bearing where the plaintiff seeks to recover damages for a third party’s spoliation of evidence, in which third party was not a party to the original proceeding. Id. Courts have been less hesitant to allow an intentional or negligent spoliation remedy when it is asserted against a third party who was a non-party to the original action. See, e.g., Oliver v. Stimson Lumber Co., 993 P.2d 11, 18-20 (Mont. 1999).

84. See supra Part I.

85. See, e.g., Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037, 1038 (Ohio 1993) (holding that the elements of the independent tort of spoliation are: “(1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by the defendant designed to disrupt the plaintiff’s case; (4) disruption of the plaintiff’s case; and (5) damages proximately caused by the defendant’s acts.” (emphasis added)). By requiring that the defendant’s conduct be “willful”, the Ohio court is implicitly holding that “negligent” spoliation is not cognizable in Ohio.

For guidance, the Ohio Supreme Court looked to its earlier decision in Preston v. Murty to establish the requisite mental state requirements justifying a punitive damages instruction. In Preston, the Ohio Supreme Court held that a finding of actual malice, an antecedent necessary for an award of punitive damages, consists of the following: "(1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a significant probability of causing substantial harm."88

In Moskowitz, the Supreme Court of Ohio found the instruction proper under the facts pled and proved, stating that "an intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm."89 Accordingly, Ohio has determined that "willful" conduct is necessary to establish the independent tort of spoliation; "intentional" conduct is necessary for the imposition of the punitive damages instruction for spoliation in the underlying case.90

Despite Kentucky's rejection of an independent tort for spoliation, case law suggests that Kentucky is more willing than Ohio to permit a punitive damages instruction for conduct that is less egregious than intentional conduct. In Horton v. Union Light, Heat & Power Co., the Kentucky Supreme Court squarely faced the

87. Id. at 344 (citing Preston v. Murty, 512 N.E. 2d 1174 (Ohio 1987)).

88. Preston, 512 N.E. 2d at 1176. The Supreme Court of Ohio, in instructing the lower courts concerning the procedures to be employed to determine the appropriateness of the punitive damages instruction, stated:

[B]efore submitting the issue of punitive damages to the jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm. Furthermore, the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety. If submitted to the jury, the trial court should give an instruction in accordance with the law we announce today.

Id.

89. Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331, 334 (Ohio 1994) (emphasis added). Moskovitz appears to stand for the proposition that upon the showing of actual malice a punitive damages instruction may be given "where liability is determined and compensatory damages are awarded." Id. (emphasis added). In Kentucky, if the punitive damages instruction in the underlying case is appropriate, given the required mental state and the conduct of attendant thereto, Kentucky would not require that compensatory damages be awarded in the underlying case as a prerequisite to the award of punitive damages. See Roberie v. VonBorken, No. 2004-SC-000250-DG, 2006 WL 2454647, at *7 (Ky. Aug. 24, 2006).

90. See Smith 615 N.E.2d at 1038.
issue of whether the punitive damages instruction is appropriate where the offending conduct is not deemed to be intentional. In Horton, the plaintiff sought recovery for damages occurring when natural gas leaked into their house, causing an explosion attributed to a break that had occurred in the line outside their house, which was under the local gas company's maintenance obligation, the Union Light, Heat & Power Co. The proof at trial demonstrated that the gas company employees were aware that gas had escaped into the Horton house; that while the gas was probably still there and still leaking into the house, the employees nevertheless failed to cut off the gas supply to the residence, failed to make any effort to determine its concentration or resource both initially and by further monitoring, and failed to suggest that the residents evacuate. Notwithstanding that there was no allegation by plaintiffs that defendant employees' engaged in intentional conduct, the issue of appropriateness of a punitive damages award was submitted to the jury under Kentucky's "gross negligence" instruction, which was not challenged on appeal. This standard allows the jury to award punitive damages if it concludes from the totality of the circumstances that the defendants' actions indicated "a wanton or reckless disregard for the lives, safety or property of others." Defendants, while not objecting to the language of the punitive damages instruction tendered by the trial court, nevertheless asserted on appeal that "punitive damages have outlived their usefulness and should be removed as a separate item of damages from the common law." Citing long-standing Kentucky law and the Restatement (Second) of Torts, the Supreme Court in Horton strenuously disagreed, stating:

In Chiles v. Drake, our court provided a rationale for the award of punitive damages, as viable now as it was then: "They are allowed because the injury has been increased by the manner it was inflicted." The difficulty comes not from the concept of

92. Id. at 384.
93. Id.
94. Id. at 387-388.
95. Id.
96. Id. at 388.
punitive damages, but in defining the type of conduct which should justify such an award.\textsuperscript{99}

Noting that the gas company respondents had confined their punitive damages argument to the propriety of punitive damages for negligent injury, thereby conceding the appropriateness of punitive damages for intentional injury, the court analyzed the nature of the injury which would warrant the imposition of the punitive damages instruction.\textsuperscript{100} In \textit{Horton}, the court began its analysis by adopting the Restatement of Torts view that "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."\textsuperscript{101} In so holding, the Kentucky court recognized that the propriety of a punitive damages instruction depends not upon the actor's mental state but rather the actor's conduct.\textsuperscript{102} All the while focusing on the character of the injury as justifying, or not, the propriety of a punitive damages instruction, the court distinguished the language of the instruction in an intentional tort case from the language of instructions in a gross negligence case:

The instructions in an intentional tort case define this characteristic as misconduct of a character that is "willful, malicious, and without justification," with the understanding that "[m]alice may be implied from outrageous conduct, and need not be expressed so long as the conduct is sufficient to evidence conscious wrongdoing."\textsuperscript{103} The instructions in a gross negligence case properly define this characteristic as was done by the trial court in this case, misconduct of a character evidencing "a wanton or reckless disregard for the lives, safety or property of other persons."\textsuperscript{104}

Thus cumulatively, Kentucky law holds that a punitive damages instruction will be appropriate where the defendant's conduct is outrageous, irrespective of the defendant's mental state i.e., regardless of whether the defendant acted

\textsuperscript{99} Horton, 690 S.W.2d at 388 (emphasis added) (citations omitted) (quoting Chiles v. Drake, 59 Ky. (2 Met.) 146, 151 (Ky. 1859)).

\textsuperscript{100} Id. at 389.

\textsuperscript{101} Id. (emphasis in original) (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. L. INST. 1979)).

\textsuperscript{102} Id. (stating that "punitive damages are not justified just because the injury was intentional"). Citing Johnson v. Tucker, Ky., 383 S.W.2d 325 (1964), the \textit{Horton} court noted that "[f]or instance, in assault the mechanism for injury is intentional, but punitive damages are not justified if there is sufficient provocation." \textit{Id}.

\textsuperscript{103} Fowler v. Mantooth, Ky., 683 S.W.2d 250, 252 (Ky. 1984) (quoting Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759 (1974)).

\textsuperscript{104} \textit{Horton}, 690 S.W.2d at 387-88.
intentionally or willfully, wantonly and recklessly.\textsuperscript{105} In this sense, Kentucky law is broader than that of Ohio, where no case has yet held the propriety of a punitive damages instruction where the defendant’s conduct, while perhaps outrageous, was not intentional.\textsuperscript{106} Accordingly, Kentucky law appears to be more than sufficient to justify the imposition of a punitive damages instruction for spoliation. The conduct resulting in the destruction of the evidence in question was perhaps simply willful, wanton, and reckless irrespective of whether the destruction was undertaken intentionally or not.\textsuperscript{107} While there is no supporting Kentucky law for a punitive damages instruction for purely negligent conduct, the “missing evidence” instruction would seem to suffice for these purposes.\textsuperscript{108} Moreover, to the extent that the party injured by the negligent spoliation can establish damages, negligent spoliation can perhaps be stated under existing negligence law.\textsuperscript{109}

3. Was the Evidence of the Defendant Railroad’s Conduct Sufficiently Egregious to Warrant the Imposition of a Punitive Damages Instruction for Its Spoliation?

In both \textit{Bandy I} and \textit{Bandy II}, plaintiffs sought judicial remedies for the defendant railroad’s spoliation, including summary judgment, default judgment, and striking the defendant railroad’s pleadings.\textsuperscript{110} “The trial court granted Bandy’s motion for sanctions and concluded that a spoliation of evidence instruction was an appropriate remedy for the discovery abuses committed by the appellees.”\textsuperscript{111} Thus, while refusing to impose the more stringent remedies urged by plaintiffs, the trial court nevertheless “expressed a great deal of concern regarding CNO & TP’s conduct throughout the discovery process and noted that

\begin{itemize}
  \item \textsuperscript{105} Id. See also Fowler, 683 S.W.2d at 252.
  \item \textsuperscript{106} See supra text accompanying notes 77, 80-81.
  \item \textsuperscript{108} See, e.g., Horton, 690 S.W.2d at 387 (approving the punitive damages instruction, finding that the gas company’s conduct was more than mere ordinary negligence and constituted gross negligence).
  \item \textsuperscript{109} Some states hold that a claim for negligent spoliation may be brought under existing negligence law. See, e.g., Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill.1995) (holding “that an action for negligent spoliation can be stated under existing negligence law.”).
  \item \textsuperscript{111} Bandy I, 2003 WL 22319202, at *5.
\end{itemize}
the railroad should have been aware that litigation was pending when it destroyed the dispatcher tapes requested by Bandy."\textsuperscript{112} Furthermore, the trial court found "that the bar tonnage profile provided by the appellees was not the consist that Bandy had requested."\textsuperscript{113} The trial court also expressed its disapproval of the appellees' failure to produce the minutes of the safety committee meetings requested by Bandy.\textsuperscript{114}

The court of appeals also found that "the railroad's conduct was 'disturbing' but found no abuse of discretion in limiting the plaintiff's remedies for spoliation to the missing evidence instruction."\textsuperscript{115} Moreover, like the Court of Appeals, the trial court likewise "expressed a great deal of concern regarding the railroad's conduct throughout the discovery process, [noting] that the railroad should have been aware that litigation was pending when it destroyed the dispatcher tapes.\textsuperscript{116}

Clearly, the trial court and the Court of Appeals viewed the railroad's conduct as something more egregious than mere negligence. It requires the willing suspension of disbelief to assume that the railroad simply employed its usual document retention policy, destroying tapes and committee meeting minutes in the ordinary course of events, notwithstanding that the documents in question were related to a death case at a grade crossing occurring within the previous year. One can only surmise that the spoliated evidence would not have aided the railroad's defense; otherwise, one can rest assured greater care to preserve the evidence would have been undertaken.

It should be noted that at no time did the plaintiffs request a punitive damages instruction in lieu of the missing evidence instruction during the course of the proceedings of the trial court; yet, Kentucky law would appear to permit such an instruction.\textsuperscript{117} The plaintiff would have asserted that the railroad's "disturbing" conduct was "outrageous," irrespective of the state of mind its agents employed when it destroyed the spoliated evidence, particularly

\begin{itemize}
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{116} Bandy I, 2003 WL 22319202, at *5.
  \item \textsuperscript{117} See supra Part C, Section 2.
\end{itemize}
considering the fact that the spoliating evidence prevented the plaintiff’s expert from being able to render relevant opinions.\textsuperscript{118}

4. Could The Bandy Plaintiff Have Recovered Punitive Damages Even Though No Compensatory Damages Were Awarded?

Plaintiff suffered a defense verdict at trial. In all likelihood, the jury was persuaded that plaintiff attempted to “beat the train” from the evidence presented.\textsuperscript{119} Nevertheless, due to defendant’s extensive spoliation, plaintiff’s expert was precluded from rendering any opinions which might have been helpful to the jury on subjects such as the train’s speed as it approached the intersection and the weight of the train at the time of impact.\textsuperscript{120} However, picking up on the trial court’s concern over the defendant’s spoliation and discovery abuses, plaintiff could have urged the trial court to issue a punitive damages instruction, arguing that the “disturbing” conduct of the defendants was “outrageous.”\textsuperscript{121} Through such an instruction, plaintiff would have empowered the jury to award damages for the acts of the spoliation, separate and apart from damages attributable to the substantive merits of the case. While perhaps unusual, Kentucky law does not require that a jury award compensatory damages as a prerequisite to its awarding punitive damages.\textsuperscript{122} In \textit{Roberie v. VonBokern}, the defendant asserted that the jury’s failure to award compensatory damages barred the punitive damages award.\textsuperscript{123} The Supreme Court of Kentucky flatly rejected this argument and, citing \textit{Comm. Dept. of Agriculture v. Vinson}.,\textsuperscript{124} The court in \textit{Comm. Dept. of Agriculture v. Vinson} held that “[t]he mere fact that no compensatory damages were awarded does not mean that [the party seeking compensation] did not have compensable injuries. The fact that there is not a quantifiable monetary damage award . . . does not mean that injury did not occur.”\textsuperscript{125}

\begin{footnotesize}
\begin{enumerate}
\item[119.] \textit{Id.}
\item[120.] \textit{Id. at *6.}
\item[121.] \textit{Id. at *6.}
\item[122.] \textit{See, e.g.,} Roberie v. VonBorken, No. 2004-SC-000250-DG, 2006 WL 2454647, at *6-7 (Ky. Aug. 24, 2006) (noting that under Kentucky law, there is no requirement “that compensatory damages be awarded as a prerequisite to an award of punitive damages.”).
\item[123.] \textit{Id. at *7.}
\item[124.] Commonwealth Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 166 (Ky. 2000).
\item[125.] \textit{Roberie}, 2006 WL 2454647, at *6.
\end{enumerate}
\end{footnotesize}
Accordingly, had plaintiff in *Bandy I* sought a punitive damages instruction for the defendant’s egregious acts of spoliation, it is entirely possible that a jury would have been persuaded to award such damages, particularly in light of the fact that the defendant’s spoliation effectively prevented plaintiff from introducing expert opinion, which opinion might have served as an effective counter to the defendant’s testimony to the effect that plaintiff’s decedent attempted to outrun the train.

Thus, notwithstanding that the jury in *Bandy I* did not award compensatory damages, Kentucky law apparently permits a punitive damages instruction to be tendered to the jury (1) for conduct that while egregious and outrageous, does not rise to the level of intentional conduct; and (2) allows for an award of punitive damages for such conduct even in the absence of the compensatory damage award.126

**III. Conclusion**

*Bandy I* and *Bandy II* are emblematic of the egregious harm that can befall a non-spoliating party under the present state of Kentucky law. If the “missing evidence” instruction is designed to be a deterrent to spoliation, its deterrent value is weak, ineffectual, and virtually nonexistent. First, jurors are prone to either not hear, not understand, or misinterpret the instruction when read to them as part of a lengthy set of instructions, prior to retiring to consider their verdict.127 Second, even if jurors grasp the import of the “missing evidence” instruction, the lack of any instructions from the court as to the effect of “adverse inference” to be drawn from the missing evidence is almost designed to lead to jury confusion, thereby stymieing them from imposing any remedy, save only a verdict for the non-spoliating party which the jury may consider not to be warranted under other factual circumstances of the case.128

Alternatively, allowing non-spoliating parties to tender an instruction requesting punitive damages for spoliation will arguably serve as a greater deterrent force for spoliation since properly instructed juries will be able to award punitive damages purely for the spoliation, irrespective of the defendant’s


128. Indeed, in *Bandy I* the jury may have concluded that, notwithstanding the Railroad’s egregious spoliation, finding for Plaintiff to the detriment of the Railroad may have seemed to be too harsh a punishment for the Railroad, given the testimony of witnesses that Plaintiff attempted to “outrun” the train. *See* Bandy v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., Nos. 2001-CA-002121-MR, 2001-CA-002176-MR., 2003 WL 22319202, at *1 n.6 (Ky. Ct. App. Oct. 10, 2003).
conduct in the underlying cause of action. Such a remedy, as opposed to the creation of an independent tort for spoliation, is capable of being easily implemented by the courts and much more easily understood by juries, which having been empowered by the instruction, are capable of levying monetary damage penalties against the violator.

Accordingly, non-spoliating parties should tender punitive damage instructions for spoliation, arguing that it is the only effective remedy to provide a measure of justice for aggrieved parties and a strong deterrent for violators. Unless spoliation is to continue unabated and undeterred, the courts of the Commonwealth are urged to consider giving the punitive damages instruction for spoliation upon sufficient proof that the spoliating party’s conduct was sufficiently outrageous.

KENTUCKY'S ALLOCATION OF FAULT STATUTE: AN ARGUMENT FOR CHANGE

Sarah Benedict

I. INTRODUCTION

Allocation of fault is the process by which a court determines how much each party is responsible for a plaintiff’s injury. Kentucky is a pure several liability state that adopted allocation of fault because it was “fundamentally unfair” for a defendant who was only responsible for a small percentage of fault to pay the entire amount of the plaintiff’s damages. For example, if a plaintiff sues three defendants, the court could determine that the first defendant is ten percent at fault, the second defendant is sixty percent at fault, and the third defendant is thirty percent at fault. The court will then divide the plaintiff’s damages between the defendants to match the percentage that each defendant is at fault. In the above example, if the court awarded the plaintiff a total of $100,000 in damages, the first defendant would pay $10,000; the second defendant would pay $60,000; and the third defendant would pay $30,000. Therefore, each defendant would pay only his own percentage of fault.

However, Kentucky does not allow allocation of fault to a person who is never a part of the case even if he is partly responsible for the plaintiff’s injury. In other words, Kentucky does not allow allocation of fault to non-settling, nonparties.

* Special thanks to Professor Jack Harrison, Professor Dennis Honabach, Associate Dean Lawrence Rosenthal, Holly Duke, Jillian McGraw, and Brendan Sullivan for assistance with specific issues. The views expressed are the author’s alone.


4. Baker v. Webb, 883 S.W.2d 898, 900 (Ky. Ct. App. 1994). However, it is important to note that Kentucky allows allocation of fault to unknown tortfeasors if they are brought into the case as a party. Mem’l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 706 (Ky. Ct. App. 2016) (“Apportionment is available even where tortfeasors are unknown and, if a jury assigns liability to an unknown defendant, this has the result of diminishing the amount of damages that can be obtained against the known defendant.”) (emphasis added). See also Ky. Farm Bureau Mut. Ins. Co. v. Ryan, 177 S.W.3d 797, 803 (Ky. 2005).

5. Baker, 883 S.W.2d at 900 (“When the statute states that the trier-of-fact shall consider the conduct of ‘each party at fault,’ such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large.”).
but it does allow allocation of fault to an impleaded third party and dismissed parties. As a result, the named defendants could pay the full amount of damages despite another person also being at fault. For example, if a plaintiff sues two defendants, but does not sue a nonparty who is also responsible for plaintiff's injury, then the court will allocate fault only between the two named defendants—excluding a possible allocation of fault to the nonparty.

In response, some Kentucky defendants use a procedural workaround to effectively allocate fault to nonparties. These defendants file a meritless third-party complaint, knowing it will be dismissed for a failure to state a claim, because fault can be allocated to a dismissed party. Some Kentucky judges allow these complaints and sua sponte dismiss the claim a few days later to preserve a possible allocation of fault to the third party. Despite this procedural

6. Mem'l Sports Complex, 499 S.W.3d at 707 (explaining that a dismissed third party “can receive an apportionment instruction allowing allocation of fault to them.”). However, if the court dismissed a party because the party was found not liable then allocation of fault will not be apportioned to the party. Jenkins v. Best, 250 S.W.3d 680, 686-87 (Ky. Ct. App. 2007). This is logical because if someone is not at fault then it would be fruitless to allow the factfinder to consider the dismissed party’s fault. Additionally, fault will not be allocated to an immune party. Jefferson Cnty. Commonwealth Att’y’s Off. v. Kaplan, 65 S.W.3d 916, 922 (Ky. 2001).


8. See Baker, 883 S.W.2d at 900.

9. Mem'l Sports Complex, 499 S.W.3d at 708 (Maze, J., concurring) (“[I]n practice, contribution and indemnity merely serve as a basis for impleading third-party defendants who are later dismissed due to their lack of direct liability to the third-party plaintiff. Nevertheless, KRS 411.182 requires that those dismissed defendants be included for purposes of apportionment of fault.”).

10. See Sarah E. Tilley & David L. Haney, Kentucky’s Convoluted Path to Fundamental Fairness for Defendants in Tort Actions, GWIN, STEINMETZ & BAIRD, PLLC (Jan. 31, 2017), https://www.gsblegal.com/kentuckys-convoluted-path-to-fundamental-fairness-for-defendants-in-tort-actions. It is important to note that there are rules of civil procedure that allow judges to sanction attorneys who file frivolous claims. See also, e.g., FED. R. CIV. P. 11. Additionally, filing a frivolous claim violates the American Bar Association’s ethics rules. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020).

11. Compton v. City of Harrodsburg, No. 5:12-cv-302-JMH-REW, 2013 WL 5503195, at *5 (E.D. Ky. Oct. 2, 2013) (“Thus, to preserve Defendants’ apportionment instruction the Court will follow the practice established by other federal courts applying Kentucky law. ‘The practice is to bring the alleged wrongdoer into the case by a third-party complaint only to then have it dismissed.’” (quoting Grimes v. Mazda N. Am. Operations, 355 F.3d 566, 571-72 (6th Cir. 2004))). See also Mem'l Sports Complex, 499 S.W.3d at 707 (“Although [the defendant] will not receive contribution from the dismissed third-party defendants, it will not be responsible for any damages attributed to them because it can receive an apportionment instruction allowing allocation of fault to them.”). But see Commonwealth v. Watson, No. 2015-CA-001610-MR, 2016 Ky. App. Unpub. LEXIS 900, at *12-13 (Ky. Ct. App. Sept. 2, 2016) (“We find these nonbinding, unpublished Federal District Court opinions inapplicable to the instant case.”).
workaround providing a possible solution, it is inconsistently used, and critics argue that the Kentucky Legislature should allow allocation of fault to nonparties to avoid prejudicing the defendants.\textsuperscript{12}

However, even though allocation of fault to nonparties would lessen the prejudice to the defendants, it would not address the potential prejudice to the plaintiff. For example, several liability puts the risk on the plaintiff that a defendant is insolvent. When a defendant is insolvent, the result is that the plaintiff's damages are reduced through no fault of his own. If Kentucky allowed allocation of fault to nonparties, this would increase the plaintiff's risk because the court cannot enforce a judgment against a nonparty, and the plaintiff's damages would be reduced.\textsuperscript{13} In situations when the plaintiff has the ability, but chooses not to sue the nonparty, then the plaintiff has not been prejudiced.\textsuperscript{14} However, if the plaintiff does not have the ability to directly sue the nonparty, his damages are reduced through no fault of his own. Therefore, as a general rule, Kentucky should allow allocation of fault to nonparties to lessen the disadvantages to defendants. However, Kentucky should also reallocate a wrongdoer's fault in limited situations such as when a party is insolvent or when a plaintiff is unable to sue a nonparty. The burden of proof should be on the plaintiff to prove that the nonparty is insolvent or otherwise action-proof because the plaintiff will be the party benefited by reallocation of fault in these situations.

This Note will briefly discuss Kentucky's allocation of fault statute and Kentucky policy. Next, this Note will discuss the third-party procedure courts have utilized to add a nonparty into a case for allocation of fault purposes. Next, this Note will argue that allowing allocation of fault to nonparties would allow a defendant in most cases to pay only for his share of fault. Finally, this Note will argue that in exceptional circumstances, Kentucky should allow reallocation of fault.

\textsuperscript{12} See, e.g., Julie O'Daniel McClellan, Note, Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?, 82 Ky. L.J. 789, 829 (1994) ("The only way to be consistent with comparative negligence principles is to determine a party's percentage of fault by comparing that party's percentage to all of the other parties who contributed to the accident, regardless of whether they were or could have been joined as defendants."). See also Sarah E. Tilley & David L. Haney, Kentucky's Convoluted Path to Fundamental Fairness for Defendants in Tort Actions, GWIN, STEINMETZ & Baird, PLLC (Jan. 31, 2017), https://www.gsblegal.com/kentuckys-convoluted-path-to-fundamental-fairness-for-defendants-in-tort-actions.

\textsuperscript{13} Restatement (Third) of Torts: Apportionment of Liability § 11 (Am. L. Inst. 1999) ("Several liability shifts the burden of insolvency from defendants to plaintiffs and creates a symmetrical unfairness . . . Indeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some are not comparatively responsible for their damages.").

\textsuperscript{14} McClellan, supra note 12, at 811.
II. KENTUCKY’S ALLOCATION OF FAULT STATUTE AND POLICY

Kentucky’s allocation of fault statute provides that the factfinder will determine, unless all the parties agree otherwise, the percentage that each party is at fault.\textsuperscript{15} The factfinder may determine whether the plaintiff, the named defendants, settling defendants, impleaded third parties, or dismissed parties are partially or entirely at fault.\textsuperscript{16} However, the statute does not allow allocation of fault to persons or corporations that were never parties.\textsuperscript{17}

Kentucky began allocating fault to each party because to do otherwise created “fundamentally unfair” results.\textsuperscript{18} For example, the court in \textit{Dix & Associates Pipeline Contractors v. Key} addressed allocating fault to each defendant when it stated, “it is... fundamentally unfair to require one joint tort-feasor who is only 5 percent at fault to bear the entire loss when another tort-feasor has caused 95 percent of the loss.”\textsuperscript{19} Kentucky also expanded allocation of fault to third parties because of “fundamental fairness...”\textsuperscript{20} The court in \textit{Dix & Associates Pipeline Contractors} reasoned that it would be “fundamentally unfair” to prohibit allocation of fault to third parties, “if the only tort-feasor named by the plaintiff in a law suit is only 5 percent at fault and another tort-feasor who is 95 percent at fault is brought in as a third-party defendant.”\textsuperscript{21} Therefore, Kentucky allowed allocation of fault to third parties as well as direct defendants.\textsuperscript{22} Although Kentucky allows allocation of fault to third parties, it does not allow allocation of fault to persons or corporations who were never parties.\textsuperscript{23}

\begin{itemize}
\item[16.] Id.
\item[17.] See Baker v. Webb, 883 S.W.2d 898, 900 (Ky. Ct. App. 1994) (“When the statute states that the trier-of-fact shall consider the conduct of ‘each party at fault,’ such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large.”). However, it is important to note that Kentucky allows allocation of fault to unknown tortfeasors if they are brought into the case as a party. See Mem’l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 706 (Ky. Ct. App. 2016).
\item[18.] Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27-28 (Ky. 1990) (“Our stated reasons for doing so was that simple fairness required, ‘liability for any particular injury in direct proportion to fault.’” (quoting Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984))).
\item[19.] Id. at 27.
\item[20.] Id.
\item[21.] Id.
\item[22.] Id. at 28-29.
\item[23.] Baker v. Webb, 883 S.W.2d 898, 900 (Ky. Ct. App. 1994). However, it is important to note that Kentucky allows allocation of fault to unknown tortfeasors if they are brought into the case as
\end{itemize}
Baker v. Webb shows this.24 The Court of Appeals of Kentucky answered in Baker whether it was proper for the lower court to instruct the jury to allocate fault to a non-settling, nonparty.25 In Baker, the plaintiff was a passenger in a car that her brother-in-law drove.26 After her brother-in-law parked the car, the plaintiff proceeded to exit the vehicle from the passenger’s side.27 At that time, another driver—the defendant—was backing out of a parking spot and hit the plaintiff.28 The plaintiff was pinned between her brother-in-law’s car and the defendant’s car.29 The plaintiff sued the defendant but did not sue the plaintiff’s brother-in-law.30 Additionally, the plaintiff did not settle out of court with the plaintiff’s brother-in-law.31 The trial court instructed the jury to determine the fault, if any, of the plaintiff, the defendant, and the brother-in-law, and the jury found that the plaintiff was 30% at fault, the defendant was 30% at fault, and the brother-in-law was 40% at fault.32

The plaintiff appealed the lower court’s decision to instruct the jury to allocate fault to the non-settling, nonparty brother-in-law.33 On appeal, the defendant argued that to refuse to allocate fault to a nonparty would leave the defendant “to the mercy of the plaintiff . . . .”34 The court rejected the defendant’s argument and explained that defendants have the opportunity to implead third parties, so the jury could allocate fault to the third party.35 In fact, the court stated

a party. Mem’l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 706 (Ky. Ct. App. 2016) (“Apportionment is available even where tortfeasors are unknown and, if a jury assigns liability to an unknown defendant, this has the result of diminishing the amount of damages that can be obtained against the known defendant.” (citing Ky. Farm Bureau Mut. Ins. Co. v. Ryan, 177 S.W.3d 797, 803-04 (Ky. 2005))).

25. Id.
26. Id. at 898 n.1.
27. Id. at 898.
28. Id.
29. Id.
30. Baker, 883 S.W.2d at 898.
31. Id.
32. Id.
33. Id. at 899.
34. Id.
35. Id.
that if a party does not utilize third-party impleader for an allocation of fault instruction, “she does so at her own peril.”

Kentucky began allocating fault to avoid “fundamentally unfair” results. In response to defendants’ arguments that a nonparty was also at fault, courts instructed defendants to utilize the third-party impleader rule. However, utilizing third-party impleader for an allocation of fault instruction is inconsistent with the purpose of Rule 14 impleader, and has created a “procedural tangle” and confusion in subsequent Kentucky cases.

III. THE PROCEDURAL QUAGMIRE OF UTILIZING THIRD-PARTY IMPLEADER FOR ALLOCATION OF FAULT

As mentioned, if a defendant does not file a third-party complaint against someone whom the defendant believes to be at fault, he “does so at [his] own peril” because the jury cannot allocate fault to a nonparty in Kentucky. However, a defendant does not have a right to implead a third party. Thus, some courts will not allow defendants to implead a third party for allocation of fault and claim that it is an improper use of third-party impleader. The proper use of third-party impleader is limited to a derivative claim that states that the third party is liable to the defendant, which is normally a claim for contribution or indemnity. Allocation of fault addresses who is liable to the plaintiff. In other words, a third party is not a “necessary” party in the case, and a judge has

36. Baker, 883 S.W.2d at 899.
38. Baker, 883 S.W.2d at 900.
41. Flynn, 2020 WL 3124677, at *10-11. The same is true in federal court. Am. Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800, 805 (6th Cir. 2008) (“Third-party pleading is appropriate only where the third-party defendant’s liability to the third-party plaintiff is dependent on the outcome of the main claim.”). See also STEVEN S. GENSLER & LUMEN N. MULLIGAN, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 14 (2020 ed.) (“The distinguishing and essential characteristic of a Rule 14 claim is that the third party’s liability to the original defendant must, in some way, derive from and be conditional upon a finding that the original defendant is liable to the original plaintiff. Classically, actions for subrogation, indemnification, or contribution meet this test.”).
42. Ky. R. Civ. P. 14.01 ("A defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the
discretion to deny a motion to file a third-party complaint for reasons unrelated to allocation of fault.43

Regarding the proper use of impleader, a proper third-party complaint states a cause of action that a third party is liable to the defendant that filed the third-party complaint for some or all of the plaintiff's claim against the defendant.44 "Third-party practice or impleader is permitted only where the defendant can show that if he is found liable to the plaintiff[,] then the third-party . . . will be liable to him."45 One type of a proper use of third-party impleader is when the defendant and the third party are in a contractual relationship, and the contract has an indemnity clause.46 For example, a store contracts with a de-icing company to deice the sidewalks in front of the store.47 The deicing company is negligent, and a plaintiff is injured by falling on the icy sidewalk. The plaintiff sues the store, but not the company. Here, the store may have a cause of action for indemnity and could properly file a third-party complaint against the deicing company. This would relieve some of the store's burden of paying for the plaintiff's injury when the store is not the only tortfeasor.

On the other hand, an improper use of third-party impleader is when a defendant claims that the third party is directly liable to the plaintiff.48 ") (emphasis added). See also STEVEN S. GENSLER & LUMEN N. MULLIGAN, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 14 (2020 ed.) ("Rule 14 impleader is both permissive and discretionary. It is permissive because the party with the derivative liability claim may assert it via impleader or in a separate action. It is discretionary because courts have broad discretion whether to allow the impleader claim to proceed with the main action, even when the requirements for impleader are met.").

43. See Commonwealth, Dep't of Highways v. Louisville Gas & Elec. Co., 346 S.W.2d 536 (Ky. 1961) ("We have held that the court has discretion in allowing or rejecting interpleading authorized by CR 14." (citing Gray v. Bailey, 299 S.W.2d 126 (Ky. 1957))).

44. KY. R. CIV. P. 14.01; FED. R. CIV. P. 14.

45. Flynn, 2020 WL 3124677, at *10-11 (citing 6 KURT A. PHILLIPS, JR., ET AL., KENTUCKY PRACTICE RULES OF CIVIL PROCEDURE ANNOTATED, Rule 14.01 (2019)).

46. Enerfab, Inc. v. Ky. Power Co., 433 S.W.3d 363, 366 (Ky. Ct. App. 2014) ("Indemnity is 'a duty to make good any loss, damage, or liability incurred by another[,] and 'arises from a promise by the indemnitor to safeguard or hold harmless a party against an existing or future loss, liability, or both.' . . . 'The right of an indemnitee. . . is well recognized.'" (First quoting Frear v. P.T.A. Indus., Inc. 103 S.W.3d 99, 107 (Ky. 2003); then citing 41 AM. JUR. 2D Indemnity § 1 (1995); and then quoting U.S. Fid. & Guar. Co. v. Napier Elec. & Constr. Co., 571 S.W.2d 644, 646 (Ky. Ct. App. 1978))). For a discussion on other types of indemnity see Degener v. Hall Contracting Corporation, 27 S.W.3d 775 (Ky. 2000).


inappropriate." Due to the limited scope of impleader, there have been cases in Kentucky where another party is also at fault for the plaintiff’s injury but the defendant cannot state a valid claim against that third party. 

Implieder is governed by Federal Rule of Civil Procedure 14 in federal court. Kentucky Civil Rule 14 mirrors the federal rule. In both federal and state court, the defendant does not have a right to implead a third party. Impleading a third party is, “both permissive and discretionary.” When a defendant files a motion to file a third-party complaint, the judge will consider various factors and either grant or deny the motion. Although a consideration of whether allowing an impleader will prejudice a party is part of the analysis, none of the factors in either state or federal court expressly includes considering how a denial of the motion will impact allocation of fault.

Therefore, one judge could deny a motion to file a third-party complaint because it is an improper use of Kentucky Civil Rule 14, while another judge could utilize the procedural workaround by granting the


51. FED. R. CIV. P. 14

52. KY. R. CIV. P. 14


54. 6 KURT A. PHILLIPS, JR., ET AL., KENTUCKY PRACTICE RULES OF CIVIL PROCEDURE ANNOTATED, Rule 14.01 (2020) (“A defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.”) (emphasis added). See also STEVEN S. GENSLER & LUMEN N. MULLIGAN, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 14 (2020 ed.) (“Rule 14 impleader is both permissive and discretionary. It is permissive because the party with the derivative liability claim may assert it via impleader or in a separate action. It is discretionary because courts have broad discretion whether to allow the impleader claim to proceed with the main action, even when the requirements for impleader are met.”).


motion and *sua sponte* dismissing it a few days later to preserve allocation of fault.57

Federal courts sitting in Kentucky show the practical effects of the current Kentucky allocation of fault statute. Some of the federal courts sitting in Kentucky utilize the procedural workaround in order to preserve a possible allocation of fault, and some will not.58 The United States District Court for the Eastern District of Kentucky in *Asher v. Unarco Material Handling, Inc* denied a defendants’ motion for leave to file a third-party complaint and allocation of fault instruction.59 In *Asher*, the defendants allegedly caused a carbon monoxide leak in a Walmart distribution center in London, Kentucky.60 The plaintiffs alleged that the defendants negligently operated welders that were propane-powered, which caused the gas leak in the enclosed freezer area of the center.61 All plaintiffs in this action were employees of the distribution center, and claims against the defendants were for negligence and loss of consortium.62

The defendants filed a motion for leave to file a third-party complaint approximately six weeks after the plaintiffs amended their complaint; however, the motion for leave to file a third-party complaint was approximately one month after the scheduling order deadline.63 The court found that, “granting the motions to implead would result in unjust delay and prejudice to the Plaintiffs that outweighed any potential prejudice to the Defendants in pursuing a later action for indemnity . . . and that [defendant’s] motion to implead [a third party] was not appropriate for third-party practice.”64 In response, the defendants filed motions for reconsideration, and separately, the defendants filed an additional motion for leave to file a third-party complaint.65


60. *Id. at* *4.*

61. *Id.*

62. *Id.*

63. *Id. at* *5-6.*

64. *Id. at* *5.*

The defendants argued that a separate action for indemnity against a third party would not be appropriate because of the Kentucky apportionment of fault statute. The court rejected the defendants' argument because defendants are not entitled to an apportionment of fault instruction and impleading a third party would cause delay that would prejudice the plaintiff.

Citing to the Kentucky Supreme Court, the court explained that indemnity and apportionment are two distinct concepts. The court clarified, "apportionment applies when two or more tortfeasors are acting in pari delicto, that is, when they 'are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiff’s damages.' However, indemnity applies when both tortfeasors are at fault but the third party is "more ‘responsible’ or more ‘culpable’" than the defendant. After reviewing the defendants' motion for reconsideration, the court explained that the defendants are "presenting a claim for indemnity against a party with whom they are not in pari delicto, and the Supreme Court of Kentucky has expressly held that apportionment has no application to such claims." The court further explained, "[a]lthough impleader is permissible with regard to claims for indemnity, it is not required under [Kentucky's allocation of fault statute]."

The court concluded that the defendants did not properly assert that the third party was liable to the defendants. Instead, in the defendants' motion, the defendants alleged that the third party was liable to the plaintiff which was an improper use of third-party impleader. The defendants argued that despite the improper use of impleader, the court should have granted the motion. The defendants quoted a Kentucky Court of Appeals case holding that even if the impleader was improper because the third party was not liable to the defendants, defendants should still assert a third-party claim because without an assertion of

66. Id. at *6.
67. Id. at *6-7, 7 n.1.
68. Id. at *7 (citing Degener v. Hall Contracting Corp., 27 S.W.3d 775 (Ky. 2000)).
69. Id. at *9 (quoting Degener, 27 S.W.3d at 778).
70. Id. at *10 (quoting Johnson v. Uptown Cafe Co., No. 3:04CV-80-H, 2005 U.S. Dist. LEXIS 7391 at *3-4 (W.D. Ky. Feb. 7, 2005)).
72. Id.
73. Id. at *23.
74. Id. at *22.
75. Id.
a claim, the court cannot apportion liability to the third party.\textsuperscript{76} The court rejected
the defendants' argument, stating that the defendants "failed to even attempt to
assert that [the third party was] liable to them."\textsuperscript{77} Therefore, despite defendants' theory of apportionment of liability, the court denied the third-party motion because the defendants failed to show "any duty or relationship which indicate[d] derivative liability as required under Rule 14."\textsuperscript{78}

The procedural quagmire of third-party impleader in Kentucky disadvantages defendants and creates inconsistent decisions. If a defendant does not file a third-party complaint against someone whom the defendant believes to be at fault, he "does so at [his] own peril."\textsuperscript{79} However, a defendant does not have a right to implead a third party, and some courts will deny the motion because it is an improper use of the impleader rule. To avoid disadvantages to the defendant and inconsistent decisions, Kentucky's General Assembly should allow allocation of fault to nonparties. The next section will discuss allocating fault to nonparties.

\subsection{A. Allocation of Fault to Nonparties}

The Kentucky practice of some courts granting defendants' motions for leave to file third-party complaint only to sua sponte dismiss them a few days later is a procedural loophole that allows allocation of fault to an otherwise nonparty.\textsuperscript{80} The policy reason is that each party should only pay the amount that he or she is at fault.\textsuperscript{81} Otherwise, the results are "fundamentally unfair."\textsuperscript{82} However, if Kentucky's allocation of fault statute remains in its current form, it will continue to produce inconsistent, and sometimes "unfair," results because third-party impleader is an insufficient mechanism to allow allocation of fault to nonparties.

\begin{footnotesize}
\begin{enumerate}
\item[76.] Id. at *22-23 (quoting Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc., 842 S.W.2d 873, 873 (Ky. Ct. App. 1992)).
\item[77.] Asher, 2007 U.S. Dist. LEXIS 76850, at *23.
\item[78.] Id. at *25.
\item[80.] Mem'l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 708 (Ky. Ct. App. 2016) (Maze, J., concurring) ("[I]n practice, contribution and indemnity merely serve as a basis for impleading third-party defendants who are later dismissed due to their lack of direct liability to the third-party plaintiff. Nevertheless, KRS 411.182 requires that those dismissed defendants be included for purposes of apportionment of fault.").
\item[81.] Regenstreif v. Phelps, 142 S.W.3d 1, 6 (Ky. 2004) ("The core principle of comparative negligence is that 'one is liable for an amount equal to his degree of fault, no more and no less.'" (quoting Stratton v. Parker, Ky., 793 S.W.2d 817, 820 (1990))).
\item[82.] Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27-28 (Ky. 1990).
\end{enumerate}
\end{footnotesize}
Therefore, the Kentucky legislature should amend its allocation of fault statute to include nonparties.

If Kentucky Revised Statute 411.182 remains as it is, some defendants will continue to pay for the fault of nonparty wrongdoers merely because the wrongdoers are not named as a "party." The failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than attributable to their fault. If Kentucky wants a defendant to pay only for his or her portion of fault, then the General Assembly's next logical step is to allow allocation of fault to nonparties. To serve as a guide, the General Assembly can look at other states that have enacted statutes allowing allocation of fault to nonparties. Indiana's statute states that, "[t]he jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty." The defendant bears the burden of proof and must affirmatively plead a nonparty defense.

The Indiana case of Hubbard v. Bader is illustrative. In Hubbard, the plaintiff was a passenger in a car that was struck by the defendant's car in an intersection. In the defendant's answer, she named as nonparties the Indiana Department of Transportation and the Washington County Highway Department. The defendant conceded that she partially caused the accident, but she asserted that the condition of the road caused the accident as well. To

83. See e.g., Baker v. Webb, 883 S.W.2d 898, 900 (Ky. Ct. App. 1994) (noting that Kentucky limits allocation of fault "to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement.").


89. Id. at *2.

90. Id. at *4.

91. Id. at *3.
prove her nonparty defense, the defendant submitted public records from the Indiana Department of Transportation, which “proposed reconstruction plans to address visibility problems associated with the intersection,” and the defendant proved the records to be authentic by submitting an affidavit by an Indiana Department of Transportation employee. The court allowed the admission of the defendant’s authenticated records into evidence to support her nonparty defense. Additionally, the court explained allocation of fault to nonparties in Indiana:

Indiana’s Comparative Fault Act allows defendants to assert a “nonparty defense,” which means defendants may attempt to attribute fault to a nonparty rather than themselves. When a defendant asserts such a defense, a jury must decide the percentage of fault to be attributed to each party and nonparty. Under Indiana law, a nonparty is “a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant.” Because a nonparty is not legally liable to the plaintiff, a successful nonparty defense will reduce the plaintiff’s potential award and the defendant’s possible liability.

Both the plaintiff and the named defendant can admit evidence to establish the nonparty’s fault or lack thereof, but a nonparty cannot be bound by the court’s ruling. Therefore, the sole purpose of establishing a nonparty’s fault is for apportionment purposes.

If Kentucky allowed allocation of fault to nonparties, then it would end the procedural quagmire of allowing meritless third-party complaints and enable Kentucky to reach the equitable goal that all parties are “liable for an amount equal to his degree of fault, no more and no less.” However, several liability also

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92. *Id.* at *10 n.5.
93. *Id.* at *13.
95. *Cf. id.* (stating that “a nonparty is not legally liable to the plaintiff”).
96. See Restatement (Third) of Torts: Apportionment of Liability § 11 cmt. a (Am. L. Inst. 2000) (“The purpose of submitting those nonparties is not to adjudicate their liability, but to enable defendants’ comparative share of responsibility to be determined.”).
97. Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990). Courts have expressed that there has been confusion regarding allocation of fault and a claim for contribution. Mem’l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 708 (Ky. Ct. App. 2016) (Maze, J., concurring). If Kentucky allows allocation of fault to nonparties, it will resolve the confusion because in most cases there would be no claim for contribution. Restatement (Third) of Torts: Apportionment of Liability § 11 cmt. c (Am. L. Inst. 2000).
creates inequitable results for the plaintiff, and allowing allocation of fault would increase that effect. In the next section, this Note will explain some ways that plaintiffs are disadvantaged by several liability and how they will be further disadvantaged by allocating fault to nonparties. Then, this Note will argue that a solution to the plaintiff’s disadvantage is reallocating fault between the named parties.

B. Disadvantages of the Plaintiff and Reallocation of Fault

Prior to adopting several liability, Kentucky was a joint and several liability state. In a joint and several liability state, the plaintiff can sue any or all wrongdoers and recover the full amount. One problem with joint and several liability is when one of the wrongdoers is insolvent. In a joint and several liability state, the plaintiff has the option to sue only the defendant with “deep pockets.” If this occurs, the defendant cannot be reimbursed from the insolvent wrongdoer, and the defendant will likely pay the full amount of the plaintiff’s damages despite being only partially at fault for the plaintiff’s injury. As a result, in a joint and several liability state, defendants bear the risk that a fellow wrongdoer is insolvent.

To correct this unfairness toward defendants, Kentucky adopted pure several liability. As stated earlier, pure several liability allocates fault between the

98. Cf. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (AM. L. INST. 2000) (“Indeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some are not comparatively responsible for their damages.”); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C19 note (AM. L. INST. 2000) (Comments e and f) (“[E]mploying a rule of pure several liability unfairly imposes on the plaintiff all of the share of responsibility attributable to the immune party.”).


100. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (AM. L. INST. 2000).

101. Id. at cmt. a.


103. Id.

104. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. a (AM. L. INST. 2000) (“Joint and several liability imposes the risk that one or more tortfeasors liable for the plaintiff’s damages is insolvent on the remaining solvent defendants, while several liability imposes this insolvency risk on the plaintiff.”).

parties in case and, ideally, each party pays a percentage of the damages in accordance with his percentage of fault. However, although several liability reduces the unfairness towards defendants, plaintiffs now bear the burden when one of the defendants is insolvent. Therefore, if a named defendant is insolvent in Kentucky, the effect is that the plaintiff’s damages are reduced through no fault of the plaintiff. The Restatement Third of Torts states, “several liability shifts the burden of insolvency from defendants to plaintiffs and creates a symmetrical unfairness . . . [i]ndeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some are not comparatively responsible for their damages.” Therefore, several liability can potentially disadvantage plaintiffs, while joint and several liability can potentially disadvantage the defendants.

Another disadvantage for the plaintiff in a pure several liability jurisdiction arises when it is impossible for the plaintiff to sue one of the wrongdoers through no fault of the plaintiff. An example is a products liability case when a plaintiff is unaware of the nonparty’s existence until after the statute of limitations passes. The plaintiff may not have access to the information that would lead the plaintiff to discover another potentially liable manufacturer. Currently, unless the additional manufacturer had notice that it could be sued, the plaintiff cannot amend its complaint to sue the manufacturer. However, after the plaintiff’s statute of limitations has passed, the additional manufacturer can still be

106. KY. REV. STAT. ANN. § 411.182 (LexisNexis 2020).

107. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (AM. L. INST. 2000) (explaining that “several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some are not comparatively responsible for their damages.”).

108. Cf. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A19 reporter’s note cmt. e (AM. L. INST. 2000) (explaining that unfairness exists in several liability jurisdictions because the plaintiff bears the risk of insolvent parties.)


110. Id. Specifically, the Restatement provides:

it is difficult to make a compelling argument for either a pure rule of joint and several liability or a pure rule of several liability once comparative responsibility is in place. Each of these alternatives has the handicap of systematically disadvantaging either plaintiffs or defendants with the risk of insolvency.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. a (AM. L. INST. 2000).

111. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. a (AM. L. INST. 2000) (“Several liability imposes the risk of insolvency on plaintiff.”).

112. See KY. R. CIV. P. 15.03
impleaded by a defendant.\textsuperscript{113} The result under current law is that the plaintiff's damages are reduced by the amount of the third party's fault.\textsuperscript{114} In other words, the plaintiff's damages are reduced through no fault of his own without the ability to be made "whole" for his injuries because the plaintiff was unaware of the wrongdoer’s existence until the passing of the statute of limitations.

A third problem for plaintiffs under current law is when the identity of the party is unknown throughout the litigation. Currently, allocation of fault can be allocated to an unknown party in a case.\textsuperscript{115} A typical example of an unknown party is when the wrongdoer leaves the scene of the accident in a vehicle hit-and-run collision. If the wrongdoer is technically named as an “unknown party” in the case, then fault can be allocated to him.\textsuperscript{116} Here, again, plaintiff's damages are reduced.

All the problems explained above would continue if Kentucky allocated fault to nonparties.\textsuperscript{117} Therefore, when a party is insolvent, or when the plaintiff is unable to sue a nonparty through no fault of the plaintiff, Kentucky should allow reallocation of the nonparty’s fault between the named parties in the case.\textsuperscript{118}

Reallocation of fault occurs when the burden of an uncollectable amount of damages is shared between the plaintiff and defendants in proportion to his or her percentage of fault.\textsuperscript{119} When reallocation of fault is implemented, no one

\textsuperscript{113} See, e.g., Roehrig v. Louisville, 454 S.W.2d 703, 703 (Ky. Ct. App. 1970) (citations omitted) (permitting third-party complaint for contribution against the city for an automobile accident because the statute of limitations ran from when the claim for contribution arose). See also Keleket X-Ray Corp. v. United States, 275 F.2d 167, 169 (D.C. Cir. 1960) (finding that statute of limitations accrues at the point that the defendant is sued by the plaintiff); 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1447 (3d ed. 2020) ("The running of the statute of limitations on any claim that plaintiff might have against a third-party defendant also should have no effect on defendant's right to implead.").

\textsuperscript{114} Mem'l Sports Complex, LLC v. McCormick, 499 S.W.3d 700, 707 (Ky. Ct. App. 2016) ("Thus the dismissal of the third-party defendants cannot harm [the defendant]. [The plaintiff] is the only party who can suffer the negative consequences of not receiving damages for any fault attributed to the dismissed third-party defendants.").

\textsuperscript{115} Id.

\textsuperscript{116} See Ky. Farm Bureau Mut. Ins. Co. v. Ryan, 177 S.W.3d 797, 803 (Ky. 2005).

\textsuperscript{117} See Raupp, supra note 87, at 275-76 (demonstrating a plaintiff's burden when nonparties are added by explaining that plaintiffs may be forced to assert "a full case of negligence" against a nonparty).

\textsuperscript{118} See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (AM. L. INST. 2000). The Restatement (Third) of Torts mentions reallocation of fault in a several liability state as a viable alternative. Id. § 10 cmt. a ("Either of these systems can, however, be made more attractive by providing a reallocation provision when one or more defendants is insolvent.").

\textsuperscript{119} RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C21 (AM. L. INST. 2000).
party shoulders the entire burden.\textsuperscript{120} An article by Professors Gifford and Robinette published by the University of Maryland Francis King Carey School of Law illustrated a concise example of reallocation of fault when it gave the example of a plaintiff who suffered $100,000 in damages.\textsuperscript{121} The jury found that the first defendant was sixty percent at fault, the second defendant was ten percent at fault, and the plaintiff was thirty percent at fault.\textsuperscript{122} However, the first defendant, who was sixty percent at fault, was “uninsured and judgment-proof, immune from liability, or beyond the jurisdiction of the court.”\textsuperscript{123}

Focusing exclusively on the plaintiff and the remaining solvent defendant, the authors explained that the plaintiff in this example has three times the fault of the solvent defendant.\textsuperscript{124} In other words, the plaintiff was thirty percent at fault and the solvent defendant was ten percent at fault.\textsuperscript{125} If we combine those percentages, that equals forty.\textsuperscript{126} Out of this forty percent, the plaintiff is three-fourths at fault (thirty out of the total of forty) and the solvent defendant is one-fourth at fault (ten out of the total of forty).\textsuperscript{127} Applying that to the insolvent defendant’s share ($60,000), the solvent defendant should bear only one-fourth of this amount, which is $15,000.\textsuperscript{128} The end result after reallocating the insolvent defendant’s amount between the plaintiff and the other defendant is that the plaintiff receives $25,000, the solvent defendant pays $25,000, and the insolvent defendant pays nothing.\textsuperscript{129} The solvent defendant is liable for his original $10,000 in addition to the reallocated amount.\textsuperscript{130}

\textsuperscript{120} See id. See also, e.g., Bishop v. GenTec Inc., 48 P.3d 218, 222-23 (Utah 2002) (quoting Field v. Boyer Co., L.C., 952 P.2d 1078, 1081-82 (Utah 1998)) (noting legislative determination that policy which reallocated fault between plaintiff and defendant was superior to “forcing the plaintiff to bear the full burden of the immune party’s fault.”).

\textsuperscript{121} Donald G. Gifford & Christopher J. Robinette, Special Feature, Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability, 73 Md. L. Rev. 701, 756 (2014).

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 760.

\textsuperscript{125} Id.

\textsuperscript{126} See Gifford & Robinette, supra note 121, at 760.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.
Professors Gifford and Robinette describe a situation when a defendant is “uninsured and judgment-proof, immune from liability, or beyond the jurisdiction of the court,” and it follows that in certain limited situations, reallocation of fault of nonparties in Kentucky would be ideal. As stated previously, one situation is when the plaintiff is unable to directly sue the nonparty in any forum because the plaintiff did not know of the existence of the nonparty until the passing of the statute of limitations. When it is not the defendant’s fault or the plaintiff’s fault, the parties should share the burden by reallocating the fault. However, when a plaintiff can directly sue the nonparty, courts should not use reallocation. The plaintiff may not wish to sue the nonparty, as the plaintiff is the “master of his complaint.” If the plaintiff can bring the nonparty into the case but chooses not to, the defendants should not be disadvantaged. Therefore, the general rule should be that the court should allow allocation of fault to nonparties and the plaintiff should bear the burden of proving that reallocation of fault is warranted.

As stated previously, another exceptional situation is when the tortfeasor is unknown and remains unidentified throughout the litigation. When this occurs, Kentucky should consider allowing reallocation of the unidentified tortfeasor’s fault. Although Kentucky has already allowed allocation of fault to an unknown tortfeasor if he is brought into the case as a party, Kentucky should consider utilizing reallocation of fault whether the unknown tortfeasor is a party or a nonparty. This would allow the known parties to shoulder the burden in accordance with their percentages of fault.

131. Id.


133. See discussion supra Part III, B.


136. Id.

137. See discussion supra Part III, B.
IV. CONCLUSION

Kentucky's goal is that "[o]ne is liable for an amount equal to his degree of fault, no more and no less." 138 However, the current allocation of fault statute disadvantages both defendants and plaintiffs. A defendant is disadvantaged because he may have to pay for a nonparty's wrongs. 139 On the other hand, a plaintiff is disadvantaged when he is unable to sue an unknown or insolvent party. 140 To remedy the disadvantage to defendants, Kentucky should allow allocation of fault to nonparties. Additionally, to remedy the disadvantage to plaintiffs, Kentucky should allow reallocation of fault when a plaintiff is unable to sue a nonparty, or when a party is insolvent.

138. Regenstreif v. Phelps, 142 S.W.3d 1, 6 (Ky. 2004) (quoting Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990)).

139. See discussion supra Part II.

140. See discussion supra Part III, B.
A PRIME CHOICE FOR LOCAL MEAT PROCESSING IN KENTUCKY

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I. INTRODUCTION

The COVID-19 pandemic caused massive upheaval in the daily lives of many Kentuckians. Retail store inventories were significantly impacted.\(^1\) In the food sector, stores restricted purchases while they tried to adapt to the sudden change in demand.\(^2\) Stock issues were assuaged in many product categories by updated retail orders and increased manufacturing.\(^3\)

Some sectors of the food supply chain could not quickly adapt, however. Consumer demand for meat products caused empty cases at stores and secondary outages of products like deep freezers.\(^4\) Retailers attempting to adjust to the new meat demand found the challenge compounded by issues within the supply chain itself.\(^5\) By the end of July in 2020, COVID-19 had affected at least 239 American meat processing facilities and 17,358 employees.\(^6\) Several of the nation’s largest plants were forced to stop operations during the outbreaks,

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creating concern over an ongoing and serious meat shortage.\textsuperscript{7} As much as 25% of the nation’s meat processing capacity suddenly halted, and some estimated that this number could increase to 80% in a short time.\textsuperscript{8}

President Trump responded to the looming crisis by issuing an executive order declaring the processing facilities as critical infrastructure; they could now be forced to remain open during the pandemic.\textsuperscript{9} The CDC established guidelines for meat processing facilities trying to combat the spread of the virus.\textsuperscript{10} Unfortunately, the processing pause had already caused a ripple effect to some farmers who were unable to sell their animals.\textsuperscript{11} With no processors to buy the livestock, some were forced to depopulate animals instead.\textsuperscript{12} In this logistical conundrum, euthanized animals were wasted while consumers demanded meat that was not available for purchase.\textsuperscript{13} As the nation grappled with the developing pandemic, consumers and livestock producers alike were handcuffed by a sickened processing sector in between.\textsuperscript{14}

Many American consumers were shocked by a possible meat shortage because farm families comprise only 2% of the country’s population.\textsuperscript{15} On

\begin{itemize}
\item \textsuperscript{12} \textit{Supra note 11.}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Fast Facts About Agriculture & Food}, AM. FARM BUREAU (Feb. 24, 2021, 4:00 PM), https://www.fb.org/newsroom/fast-facts.
average, one U.S. farm feeds 166 people. Unsurprisingly, consumers wondered why meat shelves remained empty. There was no shortage of livestock; the problem was the processing.

While the pandemic progresses, this predicament has reignited a debate about the meat processing industry’s consolidation. For decades, the challenge of matching local meat processing with varying local livestock producers’ demand has troubled economists, processors, and farmers alike. Many farmers and ranchers want the option to have their livestock processed locally. However, processing is a labor-intensive business with thin margins. Smaller local processors often cannot survive without a guaranteed steady demand for their services. Achieving and maintaining inspection status is no small or inexpensive feat, making it impossible for most small processors to match the ebb and flow of normal market fluctuations while staying profitable. Initial facility costs, ongoing inspection expenses, and variable demand are all barriers to sustainable small meat processors.

There are several proposed legislative changes to improve the meat processing industry. These include legislation approving short-term grants for

16. Id.
20. Gwin, supra note 19, at 989.
21. Id. at 993.
22. Id. at 992-93.
23. Id.
24. Id. at 993.
existing processors to move toward inspection status, investigation into existing intrastate sales programs, allowing state inspected meat products to be sold beyond the state's borders, and expanding exemptions for custom processors to provide products for sale within the same state.26 This Note argues that the approach most beneficial to Kentucky farmers, processors, and consumers is the Processing Revival and Intrastate Meat Exemption Act (PRIME Act).27 While other measures could benefit processors ready to transition to federal inspection, they do not address the ongoing need for flexibility to react to local demand.28 The PRIME Act adds flexibility within the local meat industry and increases opportunities for consumers to purchase local products.29 Addressing food safety concerns, the PRIME Act could be amended to include capacity limitations similar to existing exemptions for poultry processing.30 Kentucky's surrender of its state inspection program also precludes any benefit of changes to state inspected restrictions, making the PRIME Act the change most likely to permanently benefit Kentuckians.31

II. EFFECTS OF CONSOLIDATION IN THE MODERN MEAT PROCESSING INDUSTRY

A century of transformation within the livestock production and processing industry contributed to the COVID-19 meat supply issues. In the 1880s, the expanded railroad system created an easier way to transport livestock to centralized slaughter facilities in places like Chicago.32 Demand in export markets also drove consolidation within the "meat packing" industry to increase production.33 Larger processors were able to produce a higher volume of meat

26. Id.


at a lower cost. Early on, this increased efficiency caused subpar working conditions and dangerous food safety standards. In his classic 1905 book *The Jungle*, Upton Sinclair's description of deplorable conditions in the Chicago meat packing industry sparked a real-life public outcry. By 1906, investigations revealed the book’s descriptions were accurate and helped to pass the Federal Meat Inspection Act (FMIA). The FMIA prohibited the sale of adulterated livestock products and imposed regulations to ensure sanitary meat processing.

In the decades following the FMIA’s passage, the livestock industry and regulation of food inspection became more sophisticated. The United States Department of Agriculture began inspecting all cattle, swine, sheep, goats, and horses before and after processing. Completion of highway systems and the availability of refrigerated trucks allowed large slaughter facilities to exist in more locations, prompting further growth of large-scale meat packers. Poultry products were added for required inspection and sanitary processing in the Poultry Productions Inspection Act (PPIA) of 1957. A year later, the Humane Slaughter Act added laws to mandate how livestock were to be rendered unconscious before processing.

As the large meat packers consolidated and grew, smaller local processors struggled to survive. The Wholesome Meat Act passed in 1967 created another

34. Id.
35. Id.
37. Drexler, supra note 36.
40. See U.S. DEP’T AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 32.
41. Id.
42. Id.
43. Id.
44. INST. OF MED., supra note 33.
burden for these small businesses.\textsuperscript{45} This act expanded requirements for state meat inspection programs, requiring the state programs to be “at least equal to” the federal program administered by the Food Safety and Inspection Service (FSIS) or surrender the oversight to the federal agency.\textsuperscript{46} Consolidation of the meat processing sector charged on.\textsuperscript{47}

By 2007, 80\% of the nation’s meat supply was processed by only four large processing companies.\textsuperscript{48} Some industry representatives argue this imbalance leads to anti-competitive behavior that impacts the country’s hundreds of thousands of independent cattle producers.\textsuperscript{49} Typically, cattle are born and spend time growing on these smaller farms and ranches.\textsuperscript{50} Kentucky contributes substantially to this segment, producing the most beef cattle of any state east of the Mississippi River and ranking eighth nationally in production of beef cattle.\textsuperscript{51} In 2019, Kentucky cattle sales exceeded $692 million.\textsuperscript{52} In contrast to the consolidated national meat packing companies, the state’s roughly 38,000 beef cattle farms are primarily small family operations.\textsuperscript{53} These farms have an average of twenty-seven head of cattle.\textsuperscript{54} Most of the cattle are eventually transferred to larger feeding operations in other states where they continue to grow until optimal weight for processing.\textsuperscript{55}

Unlike the small and primarily family-owned farms at the beginning of the supply chain, feeding operations are typically larger-scale.\textsuperscript{56} The businesses grow

\begin{itemize}
\item \textsuperscript{46} See generally \textit{Our History}, U.S. DEP’T AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 32.
\item \textsuperscript{47} See generally INST. OF MED., supra note 33 (summarizing the progression of meat inspection).
\item \textsuperscript{49} See generally Bill Bullard, \textit{Under Siege: The U.S. Live Cattle Industry}, 58 S.D. L. REV. 560, 609 (2013) (arguing that anticompetitive practices in cattle production are “so deeply ingrained” that it hinders the development of the cattle industry).
\item \textsuperscript{50} Id. at 561 (citations omitted).
\item \textsuperscript{53} KY. CATTLEMEN’S ASSOC., supra note 51.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Bullard, supra note 49, at 570-71.
\item \textsuperscript{56} Id.
\end{itemize}
larger and more consolidated as the animals transition closer to the conglomerate processors.\(^\text{57}\) To the dismay of some livestock farmers and ranchers, some of the largest feeding operations are owned by the same companies that operate the meat packing facilities.\(^\text{58}\) Critics argue that this vertical integration destroys bargaining power for individual farmers and ranchers.\(^\text{59}\) Alarmed producers point to the poultry and pork industries, where vertical integration has progressed so far that corporations like Tyson often own the birds from hatching to processing.\(^\text{60}\) This allows the companies to contract with farmers only for labor and management of the birds.\(^\text{61}\)

The meat packing sector is already one of the most concentrated industries in the country.\(^\text{62}\) The "CR4" is a common measure of market consolidation; it calculates the combined market share of the top four companies within a field.\(^\text{63}\) In 1976, the CR4 for meat processing was 25.1% and by 2007 it had skyrocketed to over 80%.\(^\text{64}\) This consolidation and the increased costs of regulatory compliance has continued to shrink the number of small and independent processors throughout the country.\(^\text{65}\) As the big meat packers grew, farmers and ranchers watched their market power diminish and their options for processing dwindle.\(^\text{66}\) Many independent livestock producers claim that this consolidation is used by the large packers to manipulate and control the entire cattle market.\(^\text{67}\)

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57. Id.


59. Id. at 574-76. See also Note, Challenging Concentration of Control in the American Meat Industry, 117 HARV. L. REV. 2643, 2660-61 (2004).


61. Id.


63. Id.

64. Id.


66. Id.

67. See Bullard, supra note 49, at 561; Note, supra note 59 (alleging that "vertical integration . . . [has] the potential to restrain commerce . . .").
However, anti-trust litigation hoping to quell the meat packers’ influence over the live cattle market has failed.\(^{68}\) In *Pickett v. Tyson Fresh Meats*, the United States Court of Appeals for the Eleventh Circuit held that although Tyson’s contracting behavior had lowered the overall market price for cattle, the company’s actions had a competitive justification and therefore did not violate the provisions of the Packers and Stockyards Act.\(^{69}\) Similarly, United States Court of Appeals for the Fifth Circuit has rejected claims of market manipulation by a large poultry processor in *In Re: Pilgrim’s Pride Corporation* because there was a competitive justification.\(^{70}\)

This ongoing battle shifted into the public’s view during the early days of the pandemic.\(^{71}\) As large meat packers shut down or reduced capacity in response to the virus, farmers tried to adapt to the bottleneck by utilizing the remaining local processors.\(^{72}\) Within weeks, smaller processors within Kentucky and other states were booked to capacity for a year into the future. Current regulatory requirements made it impossible for new facilities to quickly open or for facilities operating as “custom exempt” to process meat for sale.\(^{73}\) Despite high demand and adequate supply, the lack of processing power precluded transactions. The consolidated market sector’s vulnerability was on full display.\(^{74}\)

### III. CURRENT PROCESSING OPERATIONS AND REGULATORY RESTRICTIONS

A century’s worth of rapid consolidation and regulation led to a processing sector that includes three categories of inspected facilities in the United States: federally inspected, state inspected, and custom exempt.\(^{75}\) Kentucky has

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69. *Pickett*, 420 F.3d at 1287.

70. See *In re Pilgrim’s Pride Corp.*, 728 F.3d 457 (5th Cir. 2013).


74. See, e.g., Corkery, supra note 71.

federally inspected and custom processors. The commonwealth has also created a unique mobile unit for poultry processing.

A. Continuous On-Site FSIS Inspection Facilities (Federally Inspected)

On-site FSIS inspected facilities must work with an FSIS representative present at all times for inspection of both live animals and finished meat products. The inspector also monitors for humane slaughter procedures and compliance with sanitation regulations. There are a total of 699 beef processing establishments with continuous USDA inspectors during operation, versus 618 that handle pork products and 255 for chicken. These processors are commonly referred to as "federally inspected".

Facilities must request federal inspection status by submitting an application. Requirements for approval are extensive, including plans for sanitation, hazards, and food recalls. Specific regulations exist for the required equipment, utensils, employee hygiene, sewage systems, lighting, plumbing, and even record-keeping. When inspection is granted, processors are required to provide appropriate office space for FSIS personnel and a set work schedule. Some inspector wages are paid by FSIS; holidays and overtime must be paid by

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82. Id.


the facility.\textsuperscript{85} The speed of processing animals is regulated, as well as packaging labels and inspection marks.\textsuperscript{86} Per the Code of Federal Regulations, \textquotedblleft[n]o operations requiring inspection shall be conducted except under the supervision of an Inspection Service employee\textquotedblright, meaning the FSIS inspector must be present to observe every action taken for inspected meat products from the live animal's arrival to the labeling and storage of products.\textsuperscript{87} In exchange for all this, federally inspected meat products can be sold in interstate and international commerce.\textsuperscript{88}

Kentucky has approximately twenty-five processing facilities with continuous federal inspection.\textsuperscript{89} Twenty-two of these facilities handle beef processing, twenty-five process pork, and seven process poultry.\textsuperscript{90} Many facilities process multiple categories of animals.\textsuperscript{91} Only twenty-three of Kentucky's 120 counties have a federally inspected beef processing facility.\textsuperscript{92}

B. Continuous On-Site State Inspection Facilities (State Inspected)

States may also maintain their own meat inspection programs to regulate processing facilities, known as Meat and Poultry Inspection Programs.\textsuperscript{93} These continuously inspected facilities may be in addition to federally inspected ones, or in lieu of them.\textsuperscript{94} Twenty-seven states currently operate their own state

\begin{itemize}
\item \textsuperscript{85} 9 C.F.R. \textsuperscript{§} 307.5 (2021).
\item \textsuperscript{86} 9 C.F.R. \textsuperscript{§§} 316.1-317.24 (2021); 9 C.F.R. \textsuperscript{§} 310.26 (2021).
\item \textsuperscript{87} 9 C.F.R. \textsuperscript{§} 381.37 (2021).
\item \textsuperscript{89} \textit{Meat, Poultry, and Egg Product Inspection Directory}, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 80 (select \textquotedblleft KY\textquotedblright for state section and select \textquotedblleft beef\textquotedblright, \textquotedblleft goat\textquotedblright, \textquotedblleft lamb\textquotedblright, \textquotedblleft other meat\textquotedblright, \textquotedblleft pork\textquotedblright, and \textquotedblleft sheep\textquotedblright for livestock slaughter section).
\item \textsuperscript{90} \textit{Id.} (select \textquotedblleft KY\textquotedblright for state section, select \textquotedblleft beef\textquotedblright or \textquotedblleft pork\textquotedblright for livestock slaughter section, or select \textquotedblleft chicken\textquotedblright, \textquotedblleft goose\textquotedblright, \textquotedblleft duck\textquotedblright, \textquotedblleft other poultry\textquotedblright, and \textquotedblleft turkey\textquotedblright for poultry slaughter section).
\item \textsuperscript{91} \textit{Id.} (select \textquotedblleft KY\textquotedblright for state section; then select multiple individual types for livestock or poultry slaughter sections; and then hover over map to view facilities with multiple inspection activities).
\item \textsuperscript{92} \textit{Id.} (select \textquotedblleft KY\textquotedblright for state section; then select \textquotedblleft beef\textquotedblright for livestock slaughter section; and then hover over locations to view facility location).
\item \textsuperscript{94} \textit{Id.}
\end{itemize}
inspection program while others, like Kentucky, have surrendered it.\textsuperscript{95} In 1967, the Wholesome Meat Act expanded requirements for these programs, requiring them to be "at least equal to" the federal program administered by the USDA’s Food Safety and Inspection Service.\textsuperscript{96} The facilities are still monitored by the FSIS, but continuous inspection is handled by a state-employed inspector.\textsuperscript{97} “State inspected” meat products are usually only allowed for sale within the origin state.\textsuperscript{98}

The Cooperative Interstate Shipment Program (CIS) was established in 2011 and allows some state-inspected facilities with twenty-five employees or less to sell meat products across state lines.\textsuperscript{99} The state and the facility itself have to apply for approval to participate.\textsuperscript{100} Processors must be able to comply with the requirements for federally-inspected facilities: a Standard Sanitation Operation Program, label approval, water source and sewer system approval, a Hazard Analysis Critical Control Point Plan, and federal sanitation standards.\textsuperscript{101} Later expansion beyond twenty-five employees would end the processor’s eligibility for the program.\textsuperscript{102} Nine years after the CIS Program’s creation, only nine states and eighty facilities participate in it.\textsuperscript{103} Facilities with over twenty-five employees, those in states not approved for the CIS Program, or unable to comply with the federal facilities requirements cannot produce meat for sale across state lines.\textsuperscript{104}


\textsuperscript{97} State Inspection Programs, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 93.

\textsuperscript{98} Id.


\textsuperscript{100} Id.

\textsuperscript{101} Id. See also 9 C.F.R. §§ 416.1-416.5 (2021) (establishing guidelines for sanitation in meat facilities).

\textsuperscript{102} Cooperative Interstate Shipping Program, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 99.

\textsuperscript{103} Id.

\textsuperscript{104} Id.
Kentucky has no state inspected processing facilities. The commonwealth surrendered the remainder of its state meat inspection program in 1972 and the USDA assumed inspection duties at appropriate plants at that time. With no state inspected processors, Kentucky does not participate in the Cooperative Interstate Shipment Program.

C. Custom Exempt Processing Facilities

Custom slaughter facilities are typically inspected by both the USDA and the state in which they reside, but are not continuously inspected for every process and every animal. These processors are often smaller businesses regularly monitored by the health department, similar to restaurants, with impromptu annual inspection by the FSIS. The Meat Inspection Act partially exempts meat processed in custom facilities (“custom exempt”). Livestock processed in these facilities can be consumed by the owner of the animal, the owner’s employees, or the owner’s non-paying guests. Custom facilities are also popular in states with large participation in wild game hunting, because they can transition from wild game to beef and back again based on demand. These establishments must comply with federal sanitation requirements but are still not allowed to package meat for sale, even locally.

Kentucky’s “custom exempt” slaughter and processing facilities are monitored and inspected by the health department and are required to meet sanitation and food safety standards. Therefore, Kentucky’s custom facilities

106. Id.
107. Id.
112. See generally Gwin, supra note 109 (providing general background on custom exempt requirements).
can legally process livestock into meat products for the livestock owner, as well as the owner's household, employees, and non-paying guests. Custom exempt processors cannot legally process livestock into meat products for sale, even to a neighbor or family member outside the household.

D. Special Exemptions for Select Poultry Processing

Exemptions exist for some poultry processors. Farmers that raise poultry may process up to 1,000 birds at their own location without adhering to the Poultry Products Inspection Act's regulations. Basic food safety protocols are still required, including requiring that only healthy animals are harvested and basic sanitation. This exemption can apply as long as the producer does not buy or sell other poultry products and the product created does not move in "commerce". In this sense, commerce refers to transactions taking place across state lines. Therefore, poultry products processed under this exemption can legally be packaged and sold to consumers in the same state.

A similar exemption exists for farmers or small business processors who harvest and process 20,000 or less birds per year. These businesses can sell the product to consumers, restaurants, retailers, or distributors within the same state. Basic food safety practices and general regulations apply but the businesses are not required to comply with the extensive requirements of the
Poultry Products Inspection Act. These 1,000 and 20,000 bird exemptions have been successfully adopted by many states for years.

Kentucky has not totally adopted these exemptions, however. Therefore, Kentucky poultry farmers were originally not able to sell any poultry products raised on their farm outside of transporting them to one of the seven federally inspected facilities within the state.

With no appropriate facility available in most counties, a cost of about eight dollars per bird for inspected processing, and the expense of a considerable drive, small poultry producers struggled to find a feasible option. In 2001, several of the state's universities worked with other sectors of the agricultural community to develop the Mobile Poultry Processing Unit (MPU). The MPU provides processing equipment for use by individual producers once they have completed a day of training. The facility is subject to health department regulations as well as annual USDA inspections, but operates exempt from the rest of the Poultry Products Inspection Act's regulations. While it is an affordable option for poultry farmers, access to the unit is currently limited to only the three locations where it docks within the state. It is not available for beef or pork processing.

IV. PROPOSED LEGISLATIVE SOLUTIONS

The pandemic's effect on meat supply was a spotlight on the effects of consolidation within the industry. With investigations into the largest processing companies for antitrust and price-fixing behavior in the background,

126. Id.
129. Id.
130. KY. STATE UNIV., supra note 77.
131. Id.
132. Id.
133. Id.
134. Id.
135. KY. STATE UNIV., supra note 77.
136. See Linnekin, supra note 25.
several legislative options have been proposed to alleviate the strain on the industry in the future.\textsuperscript{137}

A. RAMP-UP Act

The Requiring Assistance for Meat Processing Upgrading Plants (RAMP-UP) Act would amend the Agricultural Marketing Act of 1946.\textsuperscript{138} It allows grants of up to $100,000 for existing facilities to upgrade in hopes of becoming continuously inspected by the USDA.\textsuperscript{139} The grant could be used for improvements to the facility itself as well as planning to achieve inspection requirements.\textsuperscript{140} If the processor did not either achieve or make a good faith effort to achieve inspection status within thirty-six months, the funds would have to be repaid.\textsuperscript{141} The RAMP-UP Act would usually require the processor to match the grant amount awarded, but this requirement is waived for grants awarded in the fiscal years 2020 and 2021 to incentivize immediate participation in the program.\textsuperscript{142}

In addition to grants, the RAMP-UP Act requires the Secretary of Agriculture to work with the states to improve the existing Cooperative Interstate Shipment Program.\textsuperscript{143} A report would be due within a year to several congressional committees with any recommendations for improvements to the CIS Program.\textsuperscript{144}

B. PRIME Act

The Processing Revival Interstate Meat Exemption Act seeks to expand on current exemptions within the Meat Inspection Act (MIA).\textsuperscript{145} Under this Act, meat products from a custom harvest facility would be exempted from the MIA’s regulations and instead subject only to applicable state laws.\textsuperscript{146} This exemption would allow meat products processed at custom facilities to be sold directly to

\textsuperscript{137} Id.
\textsuperscript{138} RAMP-UP Act, H.R. 7490, 116th Cong. (2020).
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} H.R. 7490.
\textsuperscript{144} Id.
\textsuperscript{145} See PRIME Act, H.R. 2859, 116th Cong. (2020).
\textsuperscript{146} Id.
consumers, restaurants, hotels, and grocery stores within the state.\textsuperscript{147} Currently the PRIME Act does not contain limitations based on volume of animals harvested.\textsuperscript{148} Detractors argue that the PRIME Act would increase food safety concerns by allowing meat products to be sold to consumers without continuous FSIS inspection.\textsuperscript{149}

\section*{C. New Markets For State Inspected Meats And Poultry Act}

The New Markets for State Inspected Meat and Poultry Act would negate the need for the existing CIS Program by allowing meat products from state inspected facilities to be sold in interstate commerce.\textsuperscript{150} The Act has a potential partner in House Resolution 7162, the Expanding Markets for State-Inspected Meat Processors Act of 2020.\textsuperscript{151} The benefit for many processors across the nation would be immediate; there would no longer be a restriction on the meat products from state inspected facilities being sold across state lines.\textsuperscript{152} These Acts would eliminate the extra steps involved for states and facilities to qualify for the CIS Program, expanding access to interstate commerce for those state inspected products.

\section*{D. Direct Interstate Retail Exemption for Certain Transactions Act}

The Direct Interstate Retail Exemption for Certain Transactions (DIRECT) Act would amend the Federal Meat Inspection Act to allow interstate internet sales of certain meat and poultry products from state inspected facilities.\textsuperscript{153} “Any retail store, restaurant, or other retail-type establishment” could use online transactions to sell the meat products to consumers in other states.\textsuperscript{154}

Supporters of the DIRECT Act point out that the virtual transactions would simplify safety recall tracking and increase the opportunity for retailers to buy or

\begin{itemize}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{150} \textit{See New Markets for State Inspected Meat and Poultry Act, S. 1720, 116th Cong. (2020)}.
\item \textsuperscript{151} \textit{See Expanding Markets for State-Inspected Meat Processors Act of 2020, H.R. 7162, 116th Cong. (2020)}.
\item \textsuperscript{152} \textit{See S. 1720}.
\item \textsuperscript{153} \textit{See DIRECT Act, H.R. 7425, 116th Cong. (2020)}.
\item \textsuperscript{154} \textit{Id.}
\end{itemize}
sell meat products across state lines. Because most interstate transactions for meat purchases would be done online, the Act would also reduce the need for state inspected processors to take extra steps for participation in the CIS Program. Still, the Act only allows expansion for retail businesses doing online transactions, unlike the New Markets for State-inspected Meat and Poultry Act which would make all state inspected products eligible for interstate sale.

E. Strengthening Local Processing Act

The Strengthening Local Processing Act is the most recent legislative proposal. It focuses on decreasing the cost of state meat inspection programs. The Act would increase the federal share of costs from 50% to 65% for state inspection operations and from 60% to 80% for facilities participating in the CIS Program. It also includes grants to cover some training costs for facility inspection. Theoretically, this would decrease the costs to states and facilities that have state-inspected operations. A decreased cost of operation could potentially incentivize new state inspected processing facilities to be established in eligible states.

V. THE PRIME ACT PROVIDES THE MOST BENEFIT TO KENTUCKY PARTIES

Legislative changes to expand or streamline the marketability of state inspected meat products are common sense improvements that should be implemented to improve the industry. However, because Kentucky surrendered its meat inspection program in 1973, these changes do not legally create more options for Kentucky farmers, consumers, or processors.

Kentucky’s current meat processing structure makes the Processing Revival Intrastate Meat Exemption Act the most beneficial for permanent improvement. The PRIME Act would increase market access and opportunities for Kentucky farmers and processors. In turn, Kentucky consumers would have greater opportunity to purchase locally produced meat products. The Act should be


157. Id.

158. Id.

159. Id.

amended to exempt operations based on volume limits; this would alleviate some food safety concerns and be consistent with successful poultry volume exemptions in other states.

A. Other Proposed Changes Create Minimal Benefit for Kentucky Parties

The RAMP-UP Act does provide some incentive for existing custom facilities to transition to federally inspected status through potential $100,000 grants.\(^\text{161}\) However, the number of facilities benefitted would depend on the individual processor’s building conditions and the cost to complete required upgrades. Processors would also have to consider whether the future demand for product warrants the long-term investment of continuous FSIS inspection. A consistent demand for services is required if they are to commit to ongoing costs of the higher inspection status; this may prevent some facilities from applying for the RAMP-UP Act’s grant.\(^\text{162}\) The grant incentive would decrease after fiscal year 2021 when processors would be required to match any grant funds.\(^\text{163}\) In addition, the Kentucky Agricultural Development Board has already instituted forgivable loan opportunities of up to $250,000 for these types of facilities; it is unclear whether additional funding would result in more federally inspected facilities given the long-term requirements.\(^\text{164}\)

The CIS Program investigation included within the RAMP-UP Act might benefit other states but would not be an immediate boon for Kentuckians. Kentucky’s surrender of its own meat inspection program precludes the commonwealth’s processors from CIS Program participation because it requires state inspection status.\(^\text{165}\) Thus, investigating the CIS Program’s effectiveness would not impact Kentuckians.\(^\text{166}\)

Similarly, the New Markets for State Inspected Meat and Poultry Act’s changes would not apply to any Kentucky facilities because there is no state meat

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163. H.R. 7490.


165. See *State Inspection Programs*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., supra note 93.

166. Id.
inspection program. This Act could negatively affect Kentucky farmers trying to market their products to consumers and retailers. Neighboring states like Ohio with robust state meat inspection programs could easily provide state inspected products to Kentucky consumers and restaurants. This would increase competition for Kentucky livestock farmers that might otherwise fill this demand.

The DIRECT Act also provides no immediate benefit for Kentuckians. With no state meat inspection program, there are no restaurants or retail stores that would benefit from the ability to sell state inspected meat products through interstate commerce. Kentucky only has federally inspected facilities and custom exempt facilities, so it does not have state inspected products. The DIRECT Act might instead provide retailers in neighboring states an advantage in marketing their state inspected products to Kentucky consumers without reciprocal competition from Kentucky businesses.

Kentucky’s lack of a state meat inspection program also renders the Strengthening Local Processing Act useless for Kentuckians. This Act would have no immediate effect because Kentucky has no state inspected facilities to benefit from the cost share arrangement. The marginal decrease in cost to the state for inspection is likely not enough incentive to recreate the state’s own program, especially when most of the potentially impacted facilities are federally inspected.

Improving the processing sector’s flexibility within Kentucky requires more than changes to state inspected facilities and their products. The PRIME Act offers true change for Kentucky livestock farmers, consumers, and processors.

B. The PRIME Act Increases Market Access for Kentucky Livestock Producers

The PRIME Act would most directly benefit farmers in Kentucky by expanding the capabilities of existing custom slaughter facilities. Custom processors, free from overly burdensome continuous inspection requirements, could legally transform Kentucky livestock into for-sale meat products. Unless further restricted by state law, these products could be sold directly to consumers, restaurants, and retail businesses throughout the commonwealth.


168. *Id.*

169. See Part III, B.


171. *Id.*
Eliminating the constant inspection requirements would allow the small processors to easily scale their business up as demand warranted. Processors could also scale back down as demand subsided, a critical component to long-term sustainability.\textsuperscript{172} In the current environment, a processor could not as easily do this due to the need for facility approval and upgrades, inspector assignment, office space requirements, and designated work hours for the FSIS inspector.\textsuperscript{173} The DIRECT Act or the New Markets for State Inspected Meat would also not offer this benefit, even if Kentucky created a state meat inspection program again.\textsuperscript{174} Facilities operating under state meat inspection programs must comply with regulations that are "at least equal to" federal inspection requirements; the DIRECT and New Markets Acts cannot offer the same flexibility as the PRIME Act for small processors.\textsuperscript{175} In periods of peak demand, processors may hire additional personnel or flex part-time personnel to increased hours, instead of paying mandatory and costly overtime to federal inspectors. Reduced costs and regulatory burden would allow small processors to respond more effectively to the demand of local livestock farmers and consumers.

The PRIME Act's benefits to the business opportunities and flexibility of small processors would also incentivize the opening of additional facilities.\textsuperscript{176} With a more affordable startup cost and less commitment to the ongoing expense of continuous inspection status, new processors would face a lower barrier to entry for the market.\textsuperscript{177} This increases choices for farmers when animals are ready for processing.

Livestock farmers would be able to sell their products directly to the public without relying solely on federally inspected facilities. Historically, these producers have been less likely to sell products directly to the public compared to their produce or fiber producing counterparts.\textsuperscript{178} Transporting cattle to a continually inspected FSIS facility several counties away is costly, even when

\begin{itemize}
  \item \textsuperscript{172} Gwin & Thiboumery, supra note 19.
  \item \textsuperscript{173} See 9 C.F.R. §§ 412.1-418.4 (2021).
  \item \textsuperscript{175} See supra note 174 and accompanying text.
  \item \textsuperscript{176} See generally Stillman, supra note 73 (describing the challenges impeding local meat processors).
  \item \textsuperscript{177} See generally FreedomWorks' Bill of the Month, FREEDOMWORKS (July 14, 2020), https://www.freedomworks.org/content/freedomworks%E2%80%99-bill-month-july-2020-processing-revival-and-intrastate-meat-exemption-prime (stating that many smaller processors cannot afford the expense of full-time FSIS inspection).
  \item \textsuperscript{178} Johnson, supra note 162.
\end{itemize}
those facilities had the capacity. "Shrink" in cattle weight while traveling could be reduced when closer local facilities are able to handle for-sale meat products.\textsuperscript{179} This could also lead to less fuel expense, more efficient operations, and less transportation stress on the livestock. In addition, more established processors could prevent supply chain struggles during pandemics or other crises. The net effect is a benefit for producers, processors, and consumers alike.

C. The PRIME Act Allows More Kentucky Consumers to Purchase Local Meat

Consumer demand for local food products continues to grow across the United States.\textsuperscript{180} As many as two-thirds of grocery shoppers in a 2013 study were interested in buying local foods to support the local economy, with most identifying “local food” as that produced within 100 miles or within the same state.\textsuperscript{181} From 1997 to 2007, direct-to-consumer marketing of agricultural food products increased 118% to 1.2 billion dollars.\textsuperscript{182}

The PRIME Act would create new opportunities for farmers and processors to sell directly to the public, increasing the consumer’s ability to find and purchase local meat products.\textsuperscript{183} Regulatory limitations on local meat sales play an important role in the development of local food systems.\textsuperscript{184} With processors able to produce for-sale meat products in a greater number of counties, more farmers can take advantage of this opportunity to expand their income streams.\textsuperscript{185} Consumers could buy more locally produced meats in individual cuts instead of buying a whole animal.\textsuperscript{186} This would allow a greater number of lower income consumers the choice between conventionally processed or locally raised


\textsuperscript{181} Id.

\textsuperscript{182} Johnson, \textit{supra} note 162.

\textsuperscript{183} See generally Act Now For the Prime Act, \textit{Farm-To-Consumer Legal Def. Fund} (May 5, 2020), https://www.farmtoconsumer.org/blog/2020/05/05/act-now-for-the-prime-act-and-increase-access-to-local-meat/#text=The%20PRIME%20Act%20repeals%20the%20federal%20ban%20on%20processed%20meat%20custom%20slaughterhouse%20within%20a%20state.


\textsuperscript{185} \textit{Farm-To-Consumer Legal Def. Fund}, \textit{supra} note 183.

\textsuperscript{186} Id.
Consumers without significant freezer space could more easily buy local meats as well.  

D. Amending the PRIME Act Could Limit Food Safety Risks

Criticism exists about the PRIME Act’s potential to increase food safety risks. Allowing consumers, retailers, and restaurants the option to purchase meat from custom facilities that are not continuously inspected creates hesitancy among some industry participants. The National Pork Producers Council issued a statement opposing the PRIME Act; it expressed concerns with meat products that were not continually inspected.

However, custom exempt slaughter facilities are currently and will remain to be regulated and inspected, just not continuously and to the extent of federal inspection standards. In Kentucky, custom facilities are inspected annually or more often by the FSIS if concerns arise regarding sanitation or records. Custom processors are also inspected regularly by the health department, similar to restaurants, for food safety assurances. In general, the facilities are required to conduct humane and sanitary procedures to ensure food safety. Continuous inspection is not the only possible form of regulatory safeguard.

The potential new volume of custom processed meat compared to the existing large processors who handle over 98% of beef processing weakens the safety risk argument as well. In 2019, there were eighty-six recalls of federally

187. Id.
188. Id.
190. Id.
191. NAT’L PORK PRODUCERS COUNCIL, supra note 149.
193. Id.
194. Id.
195. Id.
196. Johnson, supra note 162.
inspected products, including beef, pork, poultry, fish, and eggs. Reasons for these recalls included possible contamination from e-coli, listeria, undeclared allergens, extraneous material, and salmonella. The recalls effected more than 18.8 million pounds of product. With custom processors providing a fraction of the volume of meat products to the marketplace, food safety concerns and recall numbers are not likely to change substantially with the PRIME Act’s passage.

In reality, consumer trust in local meat products has already spurred innovative arrangements to legally circumvent restrictions surrounding meat from custom slaughter facilities. These arrangements include a livestock producer selling a live animal in two or four “shares” to local consumers. The animal is then transported to the custom processing facility, where it is processed into meat cuts and distributed to the consumers as owners. Idaho has validated this method of ownership transfer. In Deiter v. Coons, consumers purchased one half of a steer from the producer, agreeing that it would be slaughtered by a custom exempt processing facility and then delivered to a meat processor for packaging. The Supreme Court of Idaho validated that ownership of the steer passed while it was a live animal as it was delivered to the initial processor. Because the livestock producer sold a live animal and arranged for delivery to the processing facilities, it was not a violation of the Federal Meat Inspection Act even when it was not a federally inspected processor.

Minnesota courts tested individual rights to sell farm products without a license against the regulatory requirements imposed on processed meat


198. Id.

199. Id.


201. Id.

202. Id.


204. Id. at 89.

205. Id. at 95.

206. Id.
owners of a small farm were charged criminally for selling processed meat products from their farm without a license from the state; they argued that the state constitution exempted these types of products. From a divided Minnesota Supreme Court, a strong dissenting opinion said the restriction on custom processed meat was unconstitutional. The dissent said that it was inconsistent to allow custom processors to return meat to farmers for the use of their household and employees, but not for sale to neighbors or the public. It concluded that “[i]f the former does not present a public health risk, it is difficult to see how the latter does, especially considering the low volume of sales normally associated with sales by a single farmer.”

Courts have also upheld the validity of some inspection exemptions for poultry products against preemptive food safety arguments. In Food & Water Watch, Inc. v. Vilsack, the plaintiffs sought to prevent the Secretary of Agriculture from implementing exemptions for some poultry processors. Food & Water Watch argued that permitting employees of processing facilities to perform some inspection duties in lieu of constant inspector presence endangered consumer safety. The District Court for the District of Columbia held that the plaintiffs suffered no injury-in-fact. It explained that hypothetical harm from some future change in procedure is not enough; the risk must be substantial and imminent. In this case, the court found no evidence that changes in exempted inspection procedures necessarily created increased food safety risks. In fact,

207. State v. Hartmann, 700 N.W.2d 449 (Minn. 2005).
208. Id. at 452.
209. Id. at 460 (Anderson, J., dissenting).
210. Id. (Anderson, J., dissenting).
211. Id. at 461 (Anderson, J., dissenting).
213. Id.
214. Id. at 190.
215. Id. at 191.
216. Id. at 188-89 (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1149 (2013); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).
217. Id. at 191.
the court described the plaintiff’s claims as “unsupported and overblown.”\textsuperscript{218} The ruling was affirmed on appeal.\textsuperscript{219}

Some uncertainty about the PRIME Act’s exemption of continuous inspection requirements for custom processors could be also assuaged by restricting the exemption based on processor volume. This approach would be consistent with similar exemptions that already exist for poultry in the Poultry Products Inspection Act.\textsuperscript{220} The exemptions exist successfully in most states and allow farmers to process their own birds for sale directly to consumers, limited by the quantity per year.\textsuperscript{221} Many Kentucky consumers have shown that they are comfortable purchasing homegrown food products; Kentucky already provides exemptions for smaller egg producers.\textsuperscript{222} Producers can sell up to sixty dozen locally-produced eggs per week without being required to obtain a license.\textsuperscript{223}

Instead of a blanket exemption from continuous inspection for custom slaughter facilities, the PRIME Act could be amended to create exemptions based on processor volume. This could reduce the theoretical risk of meat processed without continuous inspection. The volume limit would by its nature limit the quantity of the product entering the marketplace and quantify any potential liability created. If successful, states could move to a greater volume exemption or progress to a straight exemption for custom processors.

VI. CONCLUSION

Kentucky’s surrender of its state meat inspection program means that many of the proposed legislative solutions to the meat processing bottleneck would not impact the Commonwealth. As a result, there would be no increase in opportunities for farmers, consumers, or processors within the Commonwealth. Legislation like the RAMP-UP Act is beneficial in transitioning some custom processors to federal inspection status but does not address the need for future flexibility in responding to demand.\textsuperscript{224}

\textsuperscript{218} Food & Water Watch, Inc., 79 F.Supp.3d at 192.


\textsuperscript{220} 9 C.F.R. § 381.10 (2021).

\textsuperscript{221} Id.


\textsuperscript{223} Id.

\textsuperscript{224} See RAMP-UP Act, H.R. 7490, 116th Cong. (2020).
In contrast, the PRIME Act would give more processing and marketing options to Kentucky livestock producers. It would allow existing custom exempt facilities to create for-sale meat products while granting them the flexibility to adapt to the market without overly burdensome regulations, creating more sustainable businesses. Kentucky consumers would benefit from increased access to local meat products. The changes would increase the processing sector’s overall resiliency to crises that impact production. Amended to limit liability and product exposure based on processor volume, the PRIME Act would most directly benefit Kentucky parties.