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ARTICLES AND SURVEYS

NOTES AND COMMENTS

POLITICS, POWER & COMMUNITY: CRITICALLY REEXAMINING NOTIONS OF LAW, IDENTITY & CIVIL SOCIETY

MARVIN L. ASTRADA & SCOTT B. ASTRADA*

I. INTRODUCTION

Since its inception in the 1960s, the genesis of modern *identity politics* has had a continual, indelible impact on American political thought and practice.[1] Identity politics, broadly construed, has found expression and provided a foundation for public policy since the founding of the United States as a formal political unit in 1791 through the present.[2] The extremely divisive United States' presidential election of 2016 is but one (albeit significant) event that embodies politicized identity and the identarian basis

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1. Rogers M. Smith, *Identities, Interests, and the Future of Political Science*, 2 PERSPS. ON POL. 301, 302–03 (2004).

2. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 204, 251 (1913) (contending that the structure of the United States Constitution was motivated primarily by the personal financial interests of the Founders, a cohesive economic elite sector that sought to protect the elite minority from the mass majority regarding private property and wealth); Eric Bradner et al., *9 Takeaways from CNN's Equality Town Hall*, CNN: POL. (Oct. 11, 2019, 12:23 AM), http://www.cnn.com/2019/10/11/politics/cnn-lgbtq-equality-town-hall-takeaways/index.html.

of American politics in thought and practice.[3] In this examination, politicized identity ("PI") is conceptualized as a discursive product manufactured for public consumption by various sociocultural, political, and economic group-based platforms, composed of ideological content propagated by the self-appointed leadership of what can be termed *Identity Based Factions* ("IBFs").[4] Thus, IBFs, through PI, have and continue to exercise a substantial degree of influence on the character and content of American law and politics throughout the nation's history, especially in the political and legal process.[5] The need to examine PI as an explanatory variable when analyzing the form and substance of American politics, especially in the realm of ascertaining what exactly constitutes an American national identity or political community, has been recognized as a necessary exercise when considering PI and its impact on democracy, political consensus, and potential authoritarianism.[6]

The intent of this work is to therefore identify and critically discuss the broad impact and potential pitfalls of PI for the character and content of the nexus between American law and politics, generally, and how PI specifically impacts the interrelationship between notions of a national American identity or community and identity within PI sub-groups.[7] This

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3. *See* Daniel Kreiss, *The Media Are About Identity, Not Information*, *in* TRUMP AND THE MEDIA 93, 95–96 (Pablo J. Boczkowski & Zizi Papacharissi eds., 2018); Smith, *supra* note 1, at 304.

4. *See* Kreiss, *supra* note 3, at 95; Smith, *supra* note 1, at 304.

5. *See, e.g.*, the following cases, in which the Court relied upon identity-based binaries such as Black or White to ground its reasoning and holdings: Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (prohibiting racial segregation of public schools because segregation creates a badge of inferiority for non-whites); Bailey v. Patterson, 369 U.S. 31, 33 (1962) (prohibiting racial segregation of interstate and intrastate transportation facilities); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that state laws prohibiting interracial marriage are unconstitutional); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (holding that federal law bars all racial discrimination (private or public) in the sale or rental of property); Lau v. Nichols, 414 U.S. 563, 568–69 (1974) (finding that a city school system's failure to provide English language instruction to students of Chinese ancestry amounted to unlawful discrimination); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (holding that a public university may take race into account as a factor in admissions decisions); Batson v. Kentucky, 476 U.S. 79, 99 (1986) (finding that a state denies Black defendants equal protection when members of his or her race have been purposefully excluded from a jury); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment).

6. *See, e.g.*, Andrew Mason, *Political Community, Liberal-Nationalism, and the Ethics of Assimilation*, 109 ETHICS 261, 262–65 (1999); Smith, *supra* note 1, at 301–04.

7. *See* discussion *infra* Parts II, III; Marvin L. Astrada, *Reevaluating Politicized Identity & Notions of an American Political Community in the Legal & Political Process*, 8 IND. J.L. & SOC. EQUAL. 19, 58 (2020).

work is relevant and timely because PI requires periodic reexamination due to the historical and culturally-contingent nature of identity.[8] Indeed, it is a misnomer to view PI as an essentialist, static state of affairs, although there are differing perspectives when assessing the utility of identarian frameworks and platforms.[9] Also, despite the value that PI purports to bring about as far as giving voice to marginalized groups in society or promoting and obtaining legal protections for oppressed groups in legal and policy discourse, nonetheless, PI requires periodic re-evaluation to ensure that it functions as an actual driver of equity and democracy in the true sense of each term.[10] One must also account for the effects of time as far as affecting the ebb and flow of the basis, meaning, purpose, and consequences that emanate from an identity-based signifier.[11] This work thus seeks to provoke thought, debate, and further exploration of salient themes, concepts, principles, problems, and challenges that PI may pose for American political thought, public policy, and the legal process in the present and going forward.[12]

At the center of this discussion is the interrelationship between PI and the aim of ascertaining whether or not PI, in the present, facilitates democratic civility, genuine political representation and attempts to define and posit an American national identity-based notion of an American political community.[13] Is such an identity desirable, as opposed to the current conduct of politics-based—and to a substantial degree—on fragmented political communities premised on PI?[14] Such questions are key to a re-examination of American political thought and practice in the context of a cohesive political community, unit, identity vis-à-vis law, and public policy spaces.[15] The rise of what can be termed IBFs[16] has profoundly impacted thought, practice, and policy spaces.[17] IBFs, for instance, employ *Identity-Based Metrics* ("IBMs")[18] in the form of biological and sociocultural traits; experientially-based indicators of an identity are politicized and exert

8. *See* Smith, *supra* note 1, at 303.

9. *See, e.g.*, WILL KYMLICKA, THE ESSENTIALIST CRITIQUE OF MULTICULTURALISM: THEORIES, POLICIES, ETHOS 2 (2014).

10. *Id.* at 1; Smith, *supra* note 1, at 305.

11. Astrada, *supra* note 7, at 37, 49.

12. *See id.* at 20.

13. *See id.* at 19–20.

14. *See id.* at 21–22; Jessica Knouse, *From Identity Politics to Ideology Politics*, 3 UTAH L. REV. 749, 751, 761 (2009).

15. *See* Astrada, *supra* note 7, at 20–24.

16. *See id.* at 28.

17. *See id.* at 34, 45.

18. *See* Knouse, *supra* note 14, at 752–53. For the legal framework that has provided, in part, the genesis for modern PI and IBFs. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (positing that discrete and insular minorities may require heightened judicial protection under law).

considerable influence on the political process, legal process, and policy spaces, as well as the overall notion of what exactly constitutes representation and community.[19]

The aforementioned questions seek to explore the complexity of modern PI and IBFs vis-à-vis notions of representation and community.[20] These two states of affairs are key to the articulation of American law and politics.[21] Does PI and the IBFs that advocate identarian-based politics, predicated on notions of discrete and insular political communities, adversely affect the dynamic between sub-PI groups and a broader American national community?[22] Is it accurate to state that if one desires a national community, then this needs to be prioritized over identarian-based political communities?[23] Are these two notions mutually exclusive?[24] Each seems to inform the other; each seems to play a formative role in being a producer and product of the other so that the relationship between the national community and identarian political communities (and subcommunities) needs to be (re-)examined within the legal and political process.[25]

In light of the above, this work explores and critically examines "the complexity of the politics of identity, politicized identity, and notions of American identity and political community as manifested in the political and legal process."[26] More specifically, this work analyzes the tensions immanent in "[PI] vis-à-vis positing an American political community, as well as the impact that it has on the character and content of inclusive representational politics—the medium by which [an] American [national/]political community is framed and posited."[27] What constitutes a PI exactly, and what qualifies an IBF or PI as "politically cohesive"[28] for the purpose of law are equally important questions that this work seeks to critique and analyze.[29] The aim is to contribute to a discourse that seeks to better bridge the gaps between theory and practice, to appreciate and gauge the conceptual and empirical complexity of politicized identity, reveal how the conceptual directly informs the practice of identity politics, and highlight and critically analyze the power-effects of politicized identity in the political

19. *See* Astrada, *supra* note 7, at 45.
20. *See id.* at 26.
21. *See id.*
22. *See id.* at 37.
23. *See id.* at 38.
24. *See* Knouse, *supra* note 14, at 751.
25. *See* Astrada, *supra* note 7, at 19–20.
26. *Id.* at 19, 22.
27. *Id.* at 22–23.
28. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425 (2006).
29. *See* discussion *infra* Section II.

and legal process.[30] Rather than focus on particular IBFs, this work is conceptual and structural in nature.[31] Revisiting PI and IBFs on a macroscopic level of analysis sheds light on the importance of a:

> [S]hared national identity [as] a precondition for the existence of the kind of trust which makes compromise possible in the face of conflicting interests . . . . [A] shared national identity is a necessary condition for a politics of the common good and widespread support for redistribution on [the] grounds of social justice.[32]

It is important to note that identity, as an idea and in practice, is part of a broader phenomenon that involves intense, normative struggle.[33] The struggle to *authoritatively* define identity is pervaded with issues of power and control.[34] To disaggregate and critically assess the politics of identity, critical examination needs to be conducted outside the rules of formation that identity elites employ to manufacture and deploy an identarian discourse for

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30. *See* Astrada, *supra* note 7, at 50.

31. *See id.* at 23, 50.

32. Mason, *supra* note 6, at 263. The difficulties in obtaining this in law and policy are exemplified by the Court's judgment and reasoning in *Evans v. Abney*, 396 U.S. 435, 447 (1970). In *Evans*, the Court held because a public park could not be operated on a racially discriminatory basis, and that the intention of a testator who left property in trust for creation of a public park for the exclusive use of white people could not be fulfilled and that, accordingly, the trust had failed and that the trust property had reverted to heirs of testator, the Georgia court's refusal to apply *cy pres* doctrine to override the testator's will did not violate Black citizens' rights to equal protection and due process under the Fourteenth Amendment. *Id.*

> Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise . . . continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. *The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations*.

Id. (emphasis added).

33. *See* Astrada, *supra* note 7, at 19, 21.

34. *Id.* at 59; Scott B. Astrada & Marvin L. Astrada, *Being Latino in the 21st Century: Reexamining Politicized Identity & the Problem of Representation*, 20 U. PA. J.L. & SOC. CHANGE 245, 262 (2017).

mass consumption.[35] PI can be utilized to perpetuate and preserve the power to control the conceptual mode(s) of identity production.[36] The identity of an epistemic community that monopolizes the character and content of a politicized identity—e.g., an IBF—is intimately bound up with issues and practices of power and control.[37] Critique and analysis are thus not concerned with the subject matter/technical mechanics of official statements of what it means to be part of a PI, nor with the particular actors, personnel, agencies, etc., involved in processes of articulating PI.[38] This work focuses on PI as a structural variable, state of affairs, and how it functions within the larger context of law, politics, power, and control.[39]

The immurement of individuals within discursive modalities that *think* the subject, which produces rather than is the product of the subject, occurs when critical appraisal is not conducted from without the rules of formation propagated by elites that control *legitimate* articulations of a PI through IBFs.[40] Control is a less straightforward state of affairs in identarian discourse.[41] Žižek's notion of prohibition in the law seems applicable to PI and IBFs:

> [T]he true regulating power of the law resides not in its direct prohibitions, in the division of our acts into permitted and prohibited, but in *regulating the very violations of prohibitions*: [T]he law silently accepts that the basic prohibitions are violated (or even discreetly solicits us to violate them), and then, once we find ourselves in this position of guilt, it tells us how to reconcile the violation with the law by violating the prohibition in a regulated way.[42]

This notion of power seeks to understand identity as a structure that creates meaning for the subject, rather than a dynamic of oppressed/oppressor.[43] This is what Zizi Papacharissi calls *affective publics*, i.e., a desire to feel information, events, and political occurrences.[44] This is in line with research finding that "citizens do not rationally weigh policy

35. *See* Astrada, *supra* note 7, at 44, 67.
36. *See id.* at 19, 60.
37. *See id.* at 22, 53.
38. *See id.* at 21, 23.
39. *See id.* at 23; discussion *infra* Parts II–IV.
40. *See* Astrada, *supra* note 7, at 27, 60.
41. *See id.* at 37, 69.
42. SLAVOJ ŽIŽEK, LIVING IN THE END TIMES 19 (2010).
43. *See id.*
44. *See* ZIZI PAPACHARISSI, AFFECTIVE PUBLICS: SENTIMENT, TECHNOLOGY, AND POLITICS 125–26 (Andrew Chadwick & Royal Holloway eds., 2015).

information in the course of an election."[45] "They vote based on their social identities, . . . how they perceive themselves and others, their partisan identities, and their sense of the groups they believe the two political parties represent."[46] PI in this context functions in a related, but distinct, dynamic of power than traditional notions of power and representation.[47] The consumption of identity, while inescapably political, becomes a dynamic of reaffirmation and emotive validation, rather than between a subject and an external oppressor.[48]

The morality, appropriateness, desirability, and practice of particularized IBF and/or PI are beyond the scope of this inquiry.[49] To view PI from without prescribed limits and to move beyond specific iterations of PI guides this analysis.[50] The production of a definitive conclusion is *not* the point of this exercise, but rather to increase our collective intellectual *burden of awareness*—to probe, engage, and problematize the complexity that pervades exercises of power and control.[51] "Objects contain the possibility of all situations."[52] Identity as noun, verb, and adjective defines spaces of thought and practice.[53] A theoretical and normative analysis is not an obscure activity divorced from so-called actuality and practice in the empiric realm.[54] Thought and teleology precede practice;[55] therefore, a continual and critical examination of identity, PI, IBFs, and identity politics is requisite for producing accurate explanations and understandings of the aforementioned.[56] While broad in nature, such a perspective frees one from the constraints of having to focus upon a singular perspective undergirded by mono-causal analysis.[57]

Why critically examine PI and the politics of identity from outside the *proper* discursive parameters?[58] Because a particular *problem* to one individual (or group) can be no problem at all to another; "it depends upon

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45. *See* Kreiss, *supra* note 3, at 95.
46. *Id.*
47. *See id.*
48. *See* Astrada, *supra* note 7, at 21.
49. *See id.* at 38; discussion *infra* Part III.
50. Astrada, *supra* note 7, at 38.
51. *Id.* at 46, 62–63.
52. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 7 (D. F. Pears & B. F. McGuinness trans., Routledge 2002) (1921) (ebook).
53. *See* Astrada, *supra* note 7, at 21.
54. *See* WITTGENSTEIN, *supra* note 52, at xviii–xix.
55. *See* EDWARD H. CARR, THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 8 (2d ed. 1946).
56. *See id.*
57. *See id.* at 8, 10.
58. *See* C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 76 (Fortieth Anniversary ed. 2000); Astrada, *supra* note 7, at 32.

what each is interested in, and upon how aware [an individual] is of his interests; . . . [humans, however,] are not always . . . so rational . . . ."[59] The power to define identity and make it the primary basis for the conduct of politics thus merits scrutiny from without, due to the fact that "students of . . . society assume and imply moral and political decisions" in what is studied and how it is studied.[60] To generate an understanding of the human condition is to look beyond the obvious or stated truth about power and control and subject each to an analysis that attempts to reveal other dimensions that give rise to and/or are engendered from the exercise of power.[61] It is very easy for those enmeshed within the status quo to be dismissive, for if they were to examine some of the foundational aspects of their ideology, e.g., democracy, root causes of poverty, rationality, effects of power, state-corporate-managed "capitalism," class sectors, and "freedom," they would perhaps find serious discrepancies between actuality and the rhetoric espoused.[62] "[Q]uestion[ing] and understand[ing] the fluctuating possibilities, the necessary or contingent historical limits of intellectual discourse," then, is an operative premise underlying this work.[63] To shed light on "the decisions and regulations which are among its constitutive elements, its means of functioning, along with its strategies, its covert discourses and ruses, . . . which are not ultimately played by any particular [actor], but which are nonetheless lived, and assure the permanence and functioning of the institution"[64] of identity underpins this examination.[65] This dimension of inquiry, then, qualifies as a *problem* worth studying, in that identity in thought and practice have immeasurable implications for the workings of the political, which in turn provides the operative context for the ordering of a polity's affairs.[66]

Identity is a highly problematic basis upon which to conduct politics because it is subject to the ebb and flow of multifarious meaning and interpretation.[67] There is no fixed, organic, essentialist point from which one can posit the singular derivation-point, ascent, and clearly confined

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59. MILLS, *supra* note 58, at 76.
60. *Id.*
61. *See id.* at 31, 207–08.
62. *See id.* at 95–96; Astrada, *supra* note 7, at 31–32.
63. Colin Gordon, *Preface to* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977 ix (Colin Gordon ed., Colin Gordon et al. trans., 1980).
64. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977 38 (Colin Gordon ed., Colin Gordon et al. trans., 1980).
65. *Id.* at 73–74.
66. *See* Astrada, *supra* note 7, at 43–44, 57.
67. *See* Smith, *supra* note 1, at 305.

parameters of an identity.[68] Once politicized, identity becomes even more fraught with subjective and relative interpolation.[69] Thus, key notions of IBF discourse such as inclusion, equity, and fairness are not monochromatic in thought and application, but rather, encompass multifarious shades of nuanced meaning and interpretation.[70] As the Court notes (when courts attempt to assess fairness vis-à-vis gerrymandering), "'[f]airness' [is] not . . . a judicially manageable standard."[71]

II. REPRESENTATION, LAW, POLITICS, IDENTITY, AND NOTIONS OF COMMUNITY

It seems to be an inescapable fact that the individual subject functions in the context of Madisonian factions groups, factions in the American representative political system and legal process.[72] In modern identity politics, IBFs have become the primary vehicle by which political interests and goals are conceptualized, articulated, and implemented.[73] As Justice Stewart contends within the context of representation and

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68. *See id.* at 302.

69. *See id.* at 302–03; Kreiss, *supra* note 3, at 95.

70. *See* Vieth v. Jubelirer, 541 U.S. 267, 291, 299 (2004).

71. *Id.* at 291. Justice Kennedy, in his concurrence, went on to note:

> When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention . . . .
>
> That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies . . . involve sorting permissible classifications in the redistricting context from impermissible ones . . . . Politics is quite a different matter.
>
> A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.
>
> The object of districting is to establish "fair and effective representation for all citizens." [I]t might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult . . . . Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.

Id. at 306–08 (Kennedy, J., concurring) (citations omitted).

72. THE FEDERALIST NO. 10 (James Madison); *see also* Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 555 (1997).

73. Smith, *supra* note 1, at 304.

apportionment, "[r]epresentative government is a process of accommodating group interests through democratic institutional arrangements . . . . to insure effective representation . . . by a realistic accommodation of the diverse and often conflicting political forces operating within the State."[74] "Accommodation has been a fundamental ordering principle in the constitutional system."[75] "One major change [that can be] observed in the notion of representation [and accommodation in the present] is the shift from a historical focus on liberty to equality and inclusion . . . ."[76]

> Just as, in the earlier days of anarchy, the most thoughtful men worshipped law, so during the period of increasing State power there was a tendency to worship liberty. . . . The impulse toward liberty, however, seems now to have lost much of its force . . . it has been replaced by the love of equality.[77]

> This shift has noteworthy consequences for how identity-based politics and [IBFs] manifest in thought and practice. Indeed, equality in the form of inclusion—a driving force of [IBFs]—is in line with and has facilitated the power of formal identity-based groups as opposed to a liberty ethos [or] focus[] [regarding] politics and policy. The consequential impact that formal identity groups have on the political and legal process renders them, in essence, [IBFs], which thrive by priming or activating certain identities in the electorate to support or reject specific policy agendas as well as credit or discredit particular politicos or parties.[78]

Representation is quite complex, especially in a nation of 330 million people.[79] "It can be viewed in different ways . . . in a universalist or

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74. Lucas v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

75. *See id.* at 748; Astrada, *supra* note 7, at 34.

76. Astrada, *supra* note 7, at 34.

77. BERTRAND RUSSELL, AUTHORITY AND THE INDIVIDUAL 28–29 (AMS Press 1968) (1949); Astrada, *supra* note 7, at 34.

78. Astrada, *supra* note 7, at 34; *see also* Samara Klar, *The Influence of Competing Identity Primes on Political Preferences*, 75 J. POL. 1108, 1109 (2013).

79. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/ (last updated Feb. 10, 2021); Astrada, *supra* note 7, at 34–35; Vieth v. Jubelirer, 541 U.S. 267, 299 (2004).

> While one must agree with Justice Breyer's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, that is a long and impassable distance away from the conclusion that the Judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent *unjustified* political machinations (whatever that means).

pluralistic community-based framework, which results in very distinctive paradigms for characterizing representation."[80]

> The liberal focus on the individual [for instance,] presupposes difference among citizens: [B]ecause individual ends are not homogeneous, they are incompatible with the existence of an overarching common end. But the universalist assumption at the base of liberal thought is that, because humans are identical in their status as moral beings, moral obligation cannot be contingent on individual attributes, merits, or circumstances. The liberal conception of the moral equality of persons requires that law have universal application: [I]t must treat all persons identically and disinterestedly, and its grant of rights and liberties must extend to all persons in the polity.[81]

"Representation in the United States [national society] is profoundly challenging given the diversity and difference that permeates the national landscape," e.g., regionally, politically, ideologically, socio-economically, and socio-culturally.[82] "Difference permeates norms, values, morals, and other ideational ordering mechanisms that enable a group or groups of people to effectively cohere around a stable and universalizable set of ordering concepts and principles, such as the rule of law," ("ROL").[83] An example of this is within the Latino community.[84] Depending on race and affluence,

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Vieth, 541 U.S. at 299 (citation omitted).

80. Astrada, *supra* note 7, at 34.

81. Note, *The Myth of Context in Politics and Law*, 110 HARV. L. REV. 1292, 1294 (1997); *see also* Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein To Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 375 n.5 (1992).

> Many writers go further and characterize liberal assumptions about value consensus as devious and repressive. The dominant groups in society, on this view, universalize their interests and experience and repress the self-expression of groups (e.g. women and minorities) without power. According to Robert Gordon, one can represent law as a legitimating ideology in the view that "the ruling class induces consent and demobilizes opposition by masking its role in widely shared utopian norms and fair procedures, which it then distorts to its own purposes." Gordon himself seems to proffer an account wherein these preferences are concealed even from the actors themselves because "the discourse of law — its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals — fits into a complex of discursive practices that together structure how people perceive."

Morawetz, *supra*, at 375 n.5 (brackets omitted) (citation omitted).

82. Astrada, *supra* note 7, at 34–35.

83. *Id.* at 35.

84. *See* Marvin L. Astrada & Scott B. Astrada, *Law, Continuity and Change: Revisiting the Reasonable Person Within the Demographic, Sociocultural and Political Realities of the Twenty-First Century*, 14 RUTGERS J.L. & PUB. POL'Y 196, 212 (2017).

being Latino can mean very different things for one's life experience.[85] This experience can result in policy and economic priorities that can be both aligned and contradictory.[86] In the case of ROL, the Court has declared that it "is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals."[87]

A. *Ethics, Homogeny, and Representation: The Inevitability of Resistance*

The question of pluralism within a political economy, composed at its root of heterogeneous individuals' wills and directives, is inescapably an ethical one.[88] A central question at the center of the consideration of political identity is how the group function of consensus processes dissent from *internal* constituents.[89] On the one hand, at the heart of political organizing, is political power through coalescence.[90] A political community leveraging critical mass to drive social change.[91] Yet, when does the question of democratic conflict, or how a community processes *internal* dissent, become relevant?[92] PI, in the context of this article, is paramount when considering this question.[93] Is the historical tradeoff between necessity of uniformity for social influence and the equity of internal diversity simply grafted into the current schema of political identity, or is there an atypical presence of fluidity of political will at the heart of PI?[94] And if this is the case, how does this impact the efficacy of political representation within the scope of national policy?[95] The question of consensus and authoritarianism resides at

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85. *See id.* at 218.

86. IDELISSE MALAVÉ & ESTI GIORDANI, LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS 7 (2015).

> With just over half of Latinos identifying themselves first by national country of origin and residing in communities generally comprised of people from the same region or country, it is apparent that different national origin groups experience being Latino differently in an economic sense (in addition to a more collective experience of ethnic/racial discrimination).

Astrada & Astrada, *supra* note 34, at 253 (citing MALAVÉ & GIORDANI, *supra*, at 86).

87. Jacobellis v. Ohio, 378 U.S. 184, 200–01 (1964) (Warren, J., dissenting).

88. *See* Schuck, *supra* note 72, at 553, 579–80.

89. *See id.* at 571; RUSSELL, *supra* note 77, at 53.

90. *See* Li Tan et al., *Analyzing the Impact of Social Media on Social Movements: A Computational Study on Twitter and the Occupy Wall Street Movement*, 2013 IEEE/ACM INT'L CONF. ON ADVANCES IN SOC. NETWORKS ANALYSIS AND MINING 1259, 1259–62 (2013).

91. *See id.*

92. *See* Mason, *supra* note 6, at 269; Smith, *supra* note 1, at 301, 304–05.

93. *See* Mason, *supra* note 6, at 269; Smith, *supra* note 1, at 301, 304–05.

94. *See* Mason, *supra* note 6, at 272, 274; Astrada, *supra* note 7, at 20–21.

95. *See* Astrada, *supra* note 7, at 19, 26–27.

the heart of the emergence of PI as a prevalent and growing policy function, and can be adumbrated by starting from its most controversial polemic: The presence of *internal* resistance to organizing narratives of identity.[96]

How can the expansion of a PI group, and the meaning it embodies, influence or distort the metaphysical underpinnings of a PI that bestows essential meaning to a group, e.g., the terms *Latinx* or *person of color*?[97] How does expansion and internal fissures or ruptures, and the need to quell them for the sake of unity, become subject to an authoritarian process of ablating dissent, difference, for the sake of functional unity in the public sphere?[98] The fluidity and definitional conflict of what it means to *be* a group constituent, ensures that ideology and ideals do not become ossified or stagnant.[99] Yet, when this internal conflict is recast as a type of treachery, or rebellion against a metaphysical conceptualization, such as *truth*, *equity*, or *progress*, is when the power to classify it is most insidious and establishes its deepest roots.[100] This surreptitious function of power is what makes the notion of community so antithetical to the civil liberties dimension of a subject's individual identity, for example, free speech.[101] This dynamic, or rather potential of the power to classify, must be directly confronted before there can be an answer for subsequent queries about how identity groups can potentially drive radical inclusivity while keeping democracy at the heart of its expansion.[102] This is essential because race plays such a central role for communities of color.[103] For example, seventy-five percent of African Americans view their race as very or extremely important to their identity, while two-thirds of whites say their race is only a little important.[104] This is not surprising when considering *white* is the default (or neutral) locus of perception in a society with roots in discrimination and racism.[105]

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96. Astrada & Astrada, *supra* note 34, at 253, 257–58; Knouse, *supra* note 14, at 762.

97. Astrada & Astrada, *supra* note 34, at 246, 249; Knouse, *supra* note 14, at 755, 763; *see, e.g.*, Note, *supra* note 81, at 1301.

98. *See* CRISTINA BELTRÁN, THE TROUBLE WITH UNITY: LATINO POLITICS AND THE CREATION OF IDENTITY 4, 113–14 (2010) (ebook); Knouse, *supra* note 14, at 752; Mason, *supra* note 6, at 269.

99. *See* Martha E. Gimenez, *Latino/"Hispanic"—Who Needs a Name? The Case Against Standardized Terminology*, 19 INT'L J. HEALTH SERVS. 557, 561 (1989).

100. *See id.* at 559, 561, 562.

101. *See* Mason, *supra* note 6, at 265–66; Note, *supra* note 81, at 1294–95.

102. *See* Note, *supra* note 81, at 1294–95.

103. *See* Anna Brown, *Key Findings on Americans' Views of Race in 2019*, PEW RSCH. CTR.: FACT TANK (Apr. 9, 2019), http://www.pewresearch.org/fact-tank/2019/04/09/key-findings-on-americans-views-of-race-in-2019/.

104. *Id.*

105. *See* Margaret Simms, *After 50 Years of Progress and Protest, America Is Still a Land of Unequal Opportunity*, URB. INST.: URB. WIRE (Sept. 19, 2018),

Here, PI has its strongest potential for ensuring political action (in the name of a community) seeking redress and remediation because of political organizing.[106] Yet, it is also here where the centrality of identity, especially one based on race, is vulnerable to being hijacked by ideological authoritarianism.[107] Authoritarianism, described by Jean Baudrillard, is like hegemony, whereby despite changing a little bit of everything, nothing really changes:

> In its hegemonic function, power is a virtual configuration that metabolizes any element to serve its own purposes. It could be made of countless intelligent particles, but its opaque structure would not change. . . . Soon every molecule of the American nation will have come from somewhere else, as if by transfusion. America will be Black, Indian, Hispanic, and Puerto Rican while remaining America. . . . And all the more bigoted in that it will have become, in fact, multiracial and multicultural. And all the more imperialist in that it will be led by the descendants of slaves. That is the subtle and unassailable logic of power; it cannot be changed.[108]

This stark description of power builds upon the notion that a crucial *first* step of representation and diversity that PI purports to solidify in a political arena, is disruptive and radically equitable because it can just as well serve to reify existing power structures and inequities by simply replacing which PI (or component of a PI) is in the power position.[109] The key question then becomes: Absent an electoral process of any kind, with a legitimate claim to representational *procedural justice*, who gets to decide the priorities of a PI subgroup (even if the only requisite for entry is self-identification)?[110] Influencers?[111] Those with political power or economic

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http://www.urban.org/urban-wire/after-50-years-progress-and-protest-america-still-land-unequal-opportunity; Danyelle Soloman et al., *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), http://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/.

106. Astrada, *supra* note 7, at 37–38.

107. *See* JEAN BAUDRILLARD, THE AGONY OF POWER 65–66 (Ames Hodges trans., 2010).

108. *Id.*

109. *See* Ludwig Hurtado, *What Happens When Latinx People Gentrify Latinx Communities*, VICE (Jan. 31, 2019, 1:05 PM), http://www.vice.com/en/article/mbynkq/what-happens-when-latinx-people-gentrify-latinx-communities; Astrada, *supra* note 7, at 37.

110. *See* Tan et al., *supra* note 90, at 1262–66; Astrada, *supra* note 7, at 37–38.

111. *See* Tan et al., *supra* note 90, at 1262–63.

clout?[112] As with broader concerns for equity, these questions are just as pertinent within the PI as they are without.[113]

A major concern that arises is that a PI definitional process is subject to manipulation and appropriation by the powerful elite of particular groups, causing a disconnect and a representational deficiency between the PI and the group it supposedly reflects and serves.[114] Or, its political power is undercut by relying on social media and/or influencers to serve as unofficial official leaders (this in itself has issues of representational accuracy since research has shown that a small number of "buzz makers" can have a disproportionate impact on social network communities).[115] Thus, how does a PI process resistance from *within* the group and not from an external other that seeks to infringe or displace the group as an entity (which often is a rallying cry for sacrifice to the collective)?[116] How does a concept remain pragmatically useful as a political referent, especially when we consider the ostensible progressive strategy to constantly expand notions of inclusion that perpetually defer the realities of internal conflict and contradiction?[117]

To explore the idea of resistance, we must first discard the broader notion of power as a binary function of voice/voiceless or power/powerless, but rather, view resistance from *within* the space of referential meaning.[118] A referential meaning that not only gives voice to the subject, but speaks in place of its voice, in substitution for the subject's voice.[119] An ulterior PI voice that translates history, ethos, desire, and culture from the past, into the future, absent any dialectical synthesis with the lived experience of the subject.[120] In other words, to be a true group member not only means to identify with a PI group, but to define the world through its logic, and accept and promulgate its truth as a purported realism (rather than as a gospel).[121] Yet, there is always a remainder, a resistance to total inculcation of rational subjects within any social concept that they are emplaced in—resistance that is not in the name of another truth, but rather a refusal to lose the entirety of oneself within external classifications.[122] This is not an unfamiliar notion in

112. *See* Astrada, *supra* note 7, at 37–38.
113. *See* Tan et al., *supra* note 90, at 1259–60.
114. *See* Astrada & Astrada, *supra* note 34, at 271; Astrada, *supra* note 7, at 37–38.
115. *See* Tan et al., *supra* note 90, at 1262.
116. *See* Astrada & Astrada, *supra* note 34, at 271–72.
117. *See id.* at 257–58.
118. *See id.* at 259.
119. *See id.* at 259, 262–63.
120. *See id.* at 258–59.
121. *See* Astrada & Astrada, *supra* note 34, at 271.
122. *See id.* at 258.

the law, i.e., where the individual subject is forced into a larger classification for the sake of pragmatic administration of justice.[123]

This notion of resistance by the individual is illuminated by Jacques Derrida's notion of resistance in the context of psychoanalysis.[124] For Derrida, in the context of *curing* a patient, "[a]n analytic solution untangles, resolves, even absolves; it undoes the symptomatic or etiological knot . . . . And the reason Freud reproaches [his patient] Irma . . . is that she has not accepted *his solution*."[125] Derrida goes on to explain: "In other words, I [as the figure of authority] am responsible for the analytic solution (*Lösung*) but not for the resistance of the patient, who can refuse it and who is thus alone responsible, culpable, accountable for his resistance."[126] Here is the shift of the burden of legitimacy.[127] Once the *true* solution or definition is revealed by an authority, the individual who is on the receiving end of the narrative is accountable to accept the truth offered—one can either accept truth or reject it, but one cannot respond otherwise.[128] When truth is presented in such a manner, the burden is no longer upon the authority figure to justify his solution, but instead on the receiver of the narrative to recognize its validity and accept it.[129] Here is where the asymmetrical power imbalance is at its most dangerous, especially when we tread into the territory of PI and its power to define who is, and who isn't, authentic to their *true* identity.[130]

What if there is an answer to the narrative of power other than solely accepting or rejecting truth?[131] Here is where identity elites in power seek to translate their interpretation of a PI into law, to concretize it into policy spaces.[132] Freud thus gives the example of this dynamic:

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123. *See, e.g.*, Astrada & Astrada, *supra* note 84, at 196 ("[T]hat the Reasonable Person does not adequately reflect reasonableness and the average Everyman in an increasingly diverse population, especially as it relates to the profound demographic changes taking place on the national landscape.").

124. JACQUES DERRIDA, RESISTANCES OF PSYCHOANALYSIS 1 (Peggy Kamuf et al. trans., Editions Galilée 1996) (1998).

125. *Id.* at 7.

126. *Id.* at 8.

127. *See id.*

128. *See id.* at 9.

129. DERRIDA, *supra* note 124, at 7.

130. *See* Astrada, *supra* note 7, at 32; DERRIDA, *supra* note 124, at 7–8.

131. *See* DERRIDA, *supra* note 124, at 9.

132. *See* Marvin L. Astrada & Scott B. Astrada, *Reexamining the Integrity of the Binary: Politics, Identity, and Law*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 173, 193 (2017).

> [T]hat the law's use of the binary-based identity signifier is premised on antiquated assumptions and simplified schemata that, to better recognize rights and apply judicial remedies and protections of individuals and groups that fall outside the binary, will perhaps require the courts to adopt a more flexible approach to identity.

> The one that in general commands one to interpret as resistance to analysis, to the solution, to the resolution (*Lösung*), the reservation of anyone who does not accept *your* solution. . . . To analyze anything whatsoever, anyone whatsoever, . . . would mean saying to the other: [C]hoose my solution, prefer my solution, take my solution, love my solution; you will be in the truth if you do not resist my solution.[133]

Here, dissent is recast as a disavowal of truth.[134] This is the undulating concept behind the veneer of PI.[135] When PI is not a representational touchstone anchoring self-effacing contradictory notions tethered to shared lived experiences of group members, but instead is a gospel of truth that recasts resistance and dissent as treachery and treason, is when PI is at its most non-representational and authoritarian.[136] Contrary to this problematic notion of PI, there are two countervailing concepts of community that can provide a comprehensive understanding of the power dynamics occurring at the heart of PI.[137] One such approach, following a theme of deconstruction, is the ultimate primacy of dialogue.[138] This is more radical than the ostensible notion of civic participation; it is a commitment to the internal self-effacement of truth, a commitment to remain constantly in flux in how (and by whom) a community is defined:

> When we accept that every consensus exists as a temporary result of a provisional hegemony, as a stabilization of power, and that it always entails some form of exclusion, we can begin to envisage democratic politics in a different way. A democratic approach which, thanks to the insights of deconstruction, is able to acknowledge the real nature of its frontiers and recognizes the forms of exclusion that they embody, instead of trying to disguise them under the veil of rationality or morality, can help us . . . fight against the dangers of complacency. Since it is aware of the fact that difference is the condition of possibility of constituting unity and totality at the same time that it

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Id. at 173.

133. DERRIDA, *supra* note 124, at 9.

134. *Id.*

135. *See id.*; Astrada & Astrada, *supra* note 34, at 252.

136. *See* Astrada & Astrada, *supra* note 34, at 252.

137. *See* Chantal Mouffe, *Deconstruction, Pragmatism and the Politics of Democracy*, *in* DECONSTRUCTION AND PRAGMATISM 1, 9 (Chantal Mouffe ed., Routledge 2005) (1996) (ebook); Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 111–12 (Ten Speed Press 2007) (1984).

138. *See* Mouffe, *supra* note 137, at 1.

> provides its essential limits, such an approach can contribute to subverting the ever-present temptation that exists in democratic societies to naturalize their frontiers and essentialize their identities.[139]

Here, there is an inverse connotation of consensus—one that requires a constant reformulation of its definitional integrity as a counterpoint to the hegemonic notion of ideological ossification.[140] To view consensus as an obstacle rather than a goal ensures the classifications that emplace residents of PI groups are never captives to the drivers of the collective ideology.[141]

Yet another notion of community that contests the authoritarian notion of PI community is creating a perpetual imbalance of power among individuals within a group, namely, interdependence.[142] From an organizational and political action perspective, Audre Lorde develops the notion of a community—in this case for women—based on interdependence, and it is this notion that counteracts against authoritarianism:

> Without community there is no liberation, only the most vulnerable and temporary armistice between an individual and her oppression. But community must not mean a shedding of our differences, [not] the pathetic pretense that these differences do not exist. Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference—those of us who are poor, who are lesbians, who are Black, who are older—know that *survival is not an academic skill*.[143]

Here is the circumlocution of power, never resting in a single locus, but always shifting as power dynamics are continuously broken down and reformed:

> Interdependency between women is the way to a freedom which allows the *I* to *be*, not in order to be used, but in order to be creative. This is the difference between the passive *be* and the active *being*.
>
> Advocating the mere tolerance of difference between women is the grossest reformism. It is a total denial of the creative function of difference[s] in our lives. Difference must be not

139. *Id.* at 11.
140. *See id.*
141. *See id.* at 8.
142. *See* Lorde, *supra* note 137, at 111–12.
143. *Id.* at 112.

> merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic. Only then does the necessity for interdependency become unthreatening. Only within that interdependency of different strengths, acknowledged and equal, can the power to seek new ways of being in the world generate . . . .[144]

Here, there is empowerment for dialectic, fostering difference for conflict within a community rather than a move for uniformity or a stagnant inclusiveness that smooths over key internal contradictions and differences among PI constituents.[145] This is poignantly disruptive for authoritarianism and recasts the notion of resistance.[146]

III. POLITICAL IDENTITY: IDENTARIAN-BASED POLITICAL COMMUNITIES & SUBCOMMUNITIES

The analytic and thematic notions of *Identarian-Based Political Communities* ("IBPCs") and sundry *Identarian-Based Political Subcommunities* ("IBPSCs") seem to be counter to those of an *American National Community* ("ANC") and *American National Identity* ("ANI").[147] An ANC and ANI in the conduct of actual or *genuine* representative politics, and the role of PI and IBFs in either enhancing/facilitating or negatively impacting representative capacity is one that merits critical examination.[148] At the outset, it is important to note the tensions between the foregoing states of affairs and the potential for some type of resolution in fostering an ANC and identity—irrespective of the prominence of IBPCs and IBFs as the dominant form of political organization and action.[149] Promoting a national identity as a baseline for an ANC is viewed by some as essential for a polity that is characterized by what are termed "liberal" values, viz., liberty (in its comprehensive, variegated forms, such as freedom of speech and travel, individualism, and property), to perpetuate and bolster liberty in a society premised on the rule of law and democratic political representation via universal suffrage.[150]

Cultural diversity, which is a basis for legitimating PI and IBFs as the expositors of identarian-based interests and policy objectives, is viewed by others as working against an ANC based on a shared national identity

144. *Id.* at 111.
145. *See id.* at 111–12.
146. *See id.* at 112.
147. *See* Astrada, *supra* note 7, at 37, 42; Mason, *supra* note 6, at 261.
148. *See* Mason, *supra* note 6 at 261.
149. *See id.*
150. *See id.* at 261–62.

based, in turn, on liberty and the rule of law.[151] This is supposedly the case because an ANC based on "a shared national identity in the face of cultural diversity would require assimilating minority cultures, which can only be achieved (if it can be achieved at all) by oppression."[152] Each of the foregoing perspectives seem to assume that any potential ANC in the context of identarian politics as exposited by IBFs is discordant as far as providing a stable basis for genuinely representative democratic politics and policy spaces.[153] Liberty, in its various forms, does not necessarily have to be hostile toward the diverse IBPCs premised on equality as the overarching mantra that is part and parcel constitutive of the American polity.[154] Can liberty and the rule of law be reconciled with the diversity of IBPCs and the perpetuation of PI via IBFs?[155] Perhaps if legal classifications and signifiers, such as Rule of Law and representation, can provide "a sense of belonging to their polity, even when they lack a shared national identity . . . a belief among them that there is some special reason why they should associate together which appeals to something other than, say, that they happen to live in the same polity."[156]

A sense of belonging to a polity entails, or rather, is characterized by Andrew Mason as indicating that a subject possesses a sense of belonging to a polity if and only if a subject genuinely identifies with and accepts major institutions and central sociocultural, political, and economic practices.[157] When it identifies with the foregoing institutions and practices, it must be able to identify with something outside itself, must be able to perceive it as valuable, at least on balance, and see its concerns reflected in the polity.[158]

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151. *See id.* at 261.

152. *Id.*; *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 165 (1990) (arguing that assimilationist practices in most forms, coercive or non-coercive, constitute oppression).

153. Astrada, *supra* note 7, at 37.

154. *See id.* at 34.

155. *See id.* at 31–32.

156. Mason, *supra* note 6, at 261, 263.

> Why should it be supposed that a sense of belonging together is a necessary condition in practice for the realization of liberal values? There are at least four claims which are relevant here. First, it has been argued that a shared national identity is required in order for the citizens of a state to avoid alienation from their political institutions. Second, it has been maintained that liberal institutions cannot be, or are unlikely to be, stable or enduring unless citizens share a national identity. Third, that a shared national identity is a precondition for the existence of the kind of trust which makes compromise possible in the face of conflicting interests. Fourth, that a shared national identity is a necessary condition for a politics of the common good and widespread support for redistribution on grounds of social justice.

Id. at 263.

157. *Id.* at 272.

158. *Id.*

When one feels at home in a practice or institution, and experiences participation in it as natural, one has a genuine sense of belonging.[159] "In order to be able to feel this way, [one] must not be excluded from the practice or institution or be marginalized in relation to it."[160] When considering the notions of belonging and relatability, the Rule of Law has functioned as the lodestar in positing, maintaining, and perpetuating an inside/outside framework as far as what identity emanates from the politics of identity.[161] The United States Supreme Court has noted the indispensable nature of the Rule of Law as the fundamental basis for an ANC, as well as IBPCs when it comes to PI and IBFs.[162]

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts, individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "*state of nature*."
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only

159. *Id.*

160. Mason, *supra* note 6, at 272; *see also* HORACE M. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES: STUDIES IN THE GROUP PSYCHOLOGY OF THE AMERICAN PEOPLES 79–80, 92, 164, 308 (1924).

161. *See* Boddie v. Connecticut, 401 U.S. 371, 374–75 (1971).

162. *See id.*

> by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has, through years of adjudication, put flesh upon the due process principle.[163]

What is the apperceived value in having an ANC premised on an ANI rather than on (fragmented) IBPCs?[164] J.S. Mill's observations pertaining to federalism seem applicable when examining the tension between ANC and PI in the form of IBF-based IBPCs.[165] According to Mill,

> A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively. This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language, and community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are either indispensable, or necessarily sufficient by themselves.[166]

Can identity-based political interest(s) be channeled into an ANC and identity paradigm?[167] Is PI, as articulated by IBFs, discordant with having a representative political system based on an ANI that fosters an ANC?[168] How does ROL factor into this possibility exactly?[169] The tension, dissonance between an ANC and identity and IBPCs as articulated through IBFs, which, in turn, perpetuate themselves through PI-based legal and political discourse, is readily observed in the factional-nature of law and the policy spaces it produces.[170]

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163. *Id.* (emphasis added).
164. *See* JOHN STUART MILL, REPRESENTATIVE GOVERNMENT 188 (Batoche Books 2001) (1861).
165. *See id.* at 181.
166. *Id.*
167. *See* Mason, *supra* note 6, at 264–65; MILL, *supra* note 164, at 182–83.
168. *See* Mason, *supra* note 6, at 264–65; MILL, *supra* note 164, at 182–83.
169. *See* Mason, *supra* note 6, at 264–65; MILL, *supra* note 164, at 182–83.
170. *See* Mason, *supra* note 6, at 264–65.

The complex and difficult nature of identity in the conduct of politics as expressed in law and the legal process seems to be in line with an overall factional—and thus a conceptual space of engagement premised on contestation and confrontation—mitigating against the fostering of unity among IBFs "united among themselves by common sympathies . . . ."[171] In *Griggs*[172], for example, the Court noted that,

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[173]

The Court's opinion in *Griggs*, in the context of race discrimination in the workplace, is hard to reconcile with Mill's general admonition that,

> [t]o render a federation advisable, several conditions are necessary. The first is that there should be a sufficient amount of mutual sympathy among the populations. The federation binds them always to fight on the same side; and if they have such feelings towards one another, or such diversity of feeling towards their neighbours, that they would generally prefer to fight on opposite sides, the federal tie is neither likely to be of long duration, not to be well observed while it subsists. The sympathies available for the purpose are those of race, language, religion, and, above all, of political institutions, as conducing most to a feeling of identity of political interest.[174]

In seeming support of IBFs and PI, however, sympathies have been far and few in between when it comes to relations between different types of identity-based groups, race being one of many, to include socioeconomic class.[175] In the case of need-based welfare, for instance, the Court has declared that,

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171. MILL, *supra* note 164, at 181.
172. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
173. *Id.* at 430–31.
174. *Id.*; MILL, *supra* note 164, at 188.
175. MILL, *supra* note 164 at 188; *see, e.g.*, Dandridge v. Williams, 397 U.S. 471, 480–81 (1970) (upholding the State's right to determine what constitutes proper

> [i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[176]

In other words, the focus of law is on formal principles and reasoning rather than on the substantive content that is—at least initially—the stimulus for a PI to materialize, and an IBF to champion it.[177] Through the legal and the political process, IBFs are (arguably) able to interject substance into resultant policy postures and spaces.[178]

Although PI has, in some form or other, been a hallmark of American politics, the notion of an ANC, based on a national identity which, in turn, is based on ordering concepts such as Liberty, ROL, and political representation, has been a staple of American political culture since before, and during the founding of the United States as a political unit.[179] An exposition on the role of key ordering concepts and principles, viz., ROL,

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assistance in determining need not tethered to family size, the Court stated that, "[a]s we have noted, the practical effect of the Maryland regulation is that all children, even in very large families, do receive some aid. We find nothing . . . that requires more than this. So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated."); Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing, and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.").

176. *Dandridge*, 397 U.S. at 485 (citations omitted) (first quoting Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78 (1911); then quoting Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69–70 (1913); and then quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

177. *See id.*; Astrada, *supra* note 7, at 20.

178. *See* Astrada, *supra* note 7, at 57.

179. *See* BENJAMIN FRANKLIN, TWO TRACTS: INFORMATION TO THOSE WHO WOULD REMOVE TO AMERICA AND REMARKS CONCERNING THE SAVAGES OF NORTH AMERICA 10 (Burlington-House 1784) (discussing the role of "good laws and liberty" in defining an American NC/NI).

Individualism, Assimilation, and Liberty, as the basis for a traditional notion of an American NC/NI is succinctly articulated by St. Jean De Crevecoeur (1782), in which the immigrant, analytically, is seen as being fodder for the constitution of an *American race*—one that is comprised of a melding of peoples, in which difference is surrendered and sameness embraced as far as an ANC.[180] Traditionally, it seems that identity has been subject to a politicized binary opposition in which there is little room for accommodating the identity that one brings to American society from without.[181] This is especially the case with the notion of assimilation which has buttressed how an American is defined when the immigrant seeks admission to the American polity.[182] Identity thus metamorphizes, so to speak—within the context of and in light of ROL, Individualism, Assimilation, and Liberty—wherein the subject sheds substantial attachments to the identity of origin and adopts a "new" identity in line with an American NI and NC:

> [Americans] are a people . . . united by the silken bands of mild government, all respecting the laws, without dreading their power, because they are equitable. . . . [From] whence came all these people [that have immigrated here]? [T]hey are a mixture of English, Scot[tis]h, Irish, French, Dutch, Germans, and Swedes. From this promiscuous breed, that race now called Americans have arisen. . . . [H]ere they came. Everything has tended to regenerate them; new laws, a new mode of living, a new social system; here they are become men . . . . The laws, the indulgent laws, protect them as they arrive, stamping on them the symbol of adoption . . . . From whence proceed these laws? From our government. Whence the government? It is derived from the original genius and strong desire of the people . . . . What then is the American . . . ? He is either a[] European, or the descendant of a[] European, hence that strange mixture of blood, which you will find in no other country. . . . *He* is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great Alma Mater [(Dear Mother)]. Here individuals of all nations are melted into a new race of men . . . . The American ought therefore to love this country much better than that wherein either he or his forefathers were born. . . . The American is a new man, who acts

180. J. HECTOR ST. JEAN CREVECOEUR, LETTERS FROM AN AMERICAN FARMER 51, 54–55 (Fox, Duffield 1904) (1782).

181. *See* Astrada & Astrada, *supra* note 132, at 181.

182. *See* Mason, *supra* note 6, at 269.

> upon new principles; he must therefore entertain new ideas, and from new opinions.[183]

The notion of a community is one that has found expression in legal and political thought and practice.[184] Yet, it is very important to note that in examining

> "the claims of community"—whether in law or moral and political theory—is to recognize that, as the phrase itself suggests, *more than one claim* is involved. . . . Any assumption that supporters of "community" are coworkers in one and the same enterprise must therefore be firmly rejected. . . . [C]laims of community are several and arise in a number of different contexts relevant to legal scholarship. There is no single communitarian position or debate.[185]

Hence, positing an ANC or ANI may be a very problematic exercise.[186] Assimilation has been touted by proponents of a traditional understanding of American identity and community as a means of bypassing the aforementioned difficulty.[187]

Is it possible to employ ROL and liberty to bypass the pitfalls of PI and the IBFs that promote them in law and policy spaces?[188] "[T]he citizens of a state might in principle have a sense of belonging to a polity without thinking that there is any real sense in which they belonged together."[189] A sense of belonging can be premised on legal concepts or other political formulas based on variegated formulae of citizenship rooted in ROL and legality that are less tinctured with PI, perhaps resulting in a more representative politics that revolves around liberty, and yet, accommodates equality better.[190] In the case of the United States Constitution and ROL, "[b]y establishing authoritative limits, by proclaiming, with the backing of the coercive power of the state, what is forbidden, what is permitted, and

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183. CREVECOEUR, *supra* note 180, at 49–56; *see also* A Farmer, Anti-Federalist No. 3: New Constitution Creates a National Government; Will Not Abate Foreign Influence; Danger of Civil War and Despotism (1788), *in* THE ANTI-FEDERALIST PAPERS 14, 16 (Bill Bailey ed., n.d.), http://perma.cc/XM7Q-XV4B [hereinafter Anti-Federalist No. 3].

184. Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686 (1992).

185. *Id.* at 688.

186. *See id.*; Astrada, *supra* note 7, at 37.

187. *See* Gardbaum, *supra* note 184, at 713; Mason, *supra* note 6, at 269.

188. *See* Mason, *supra* note 6, at 272; Kreiss, *supra* note 3, at 95; Smith, *supra* note 1, at 302–03.

189. Mason, *supra* note 6, at 272.

190. *See id.*

what is required, it creates comprehensive background conditions for, and sets a tone that reverberates throughout, all spheres of our lives."[191]

Mason notes that, in the United States, generally speaking,

> what matters is not shared values, but a shared identity. . . . People decide who [sic] they want to share a country with by asking who [sic] they identify with, who [sic] they feel solidarity with. What holds Americans together, despite their disagreements over the nature of the good life, is the fact that they share an identity as Americans.[192]

Furthermore, it has been contended:

> [T]hat what holds the United States together is a shared sense of belonging to the American polity, expressed, in part, by the way in which American citizens identify with various symbols, practices, and institutions such as "the flag, the Pledge, the Fourth, the Constitution." Or, less ambitiously, it might be maintained that even though American citizens do possess a sense of belonging together in the relevant sense, the most important factor in holding the United States together is a sense of belonging to the American polity.[193]

"Indeed, a sense of belonging to a polity can provide the basis for patriotism, understood simply as a love of its central institutions and practices."[194]

> [A] sense of belonging to a polity is needed to underpin a politics of the common good, but a shared national identity is often unnecessary. If there is a widespread sense of belonging of this kind, then citizens will feel part of the polity of which they are members, and as a result, they are likely to have a sense of sharing a fate with others who are also part of it. That sense of sharing a common fate may often be enough to motivate support for policies which [sic] aim at the common good without there needing to be a

191. Peter Berkowitz, *The Court, the Constitution, and the Culture of Freedom*, POL'Y REV., Aug.–Sept. 2005, at 3, 4.

192. Mason, *supra* note 6, at 273 (emphasis omitted) (quoting Will Kymlicka, *Social Unity in a Liberal State*, SOC. PHIL. & POL'Y, Winter 1996, at 105, 131).

193. Mason, *supra* note 6, at 274 (quoting Michael Walzer, *What Does it Mean to be an "American"?*, 57 SOC. RSCH. 591, 602–03 (1990)).

194. *Id.* at 278.

> deeper sense of belonging together, which a shared national identity would minimally involve.[195]

Perhaps this is a more effective basis for fostering and bolstering a unified political unit rather than balkanized PI camps perpetuated through IBFs, in that premising politics on ANC may be preferable to having an ANI or other forms of PI.[196]

An IBF is, in essence, a vehicle for promoting an imagined political community.[197]

> It is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each, lives the image of their communion . . . . In fact, all communities larger than primordial villages of face-to-face contact . . . are imagined. Communities are to be distinguished . . . by the style in which they are imagined.[198]

The *style* of elitist IBFs is one that may not necessarily enhance representation in the fullest sense of the term, nor may it facilitate accountability.[199] How exactly is an identity group, independent of its individual constituent parts, held empirically accountable exactly?[200] IBFs and the PI that emerges have "finite, if elastic, boundaries . . . regardless of the actual inequality and exploitation that may prevail in each [political community], the nation is always conceived as a deep, horizontal comradeship."[201]

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195. *Id.* at 278–79.

196. *See id.* at 279.

197. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (Verso rev. ed. 2006).

198. *Id.*

199. *See id.*

200. *See id.* at 3–4.

201. *Id.* at 7. The Court, for instance, when considering "the 'totality of circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate" to participate in the political process — crucial to fomenting a sense of community through the political process — has declared that courts look at:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public

IBFs perpetuate an IBM-based PI that is not only premised on sameness, reductionist notions of experiential or traits-based criteria, and selective norms, values, and ideological benchmarks, but also assumes that there is a simultaneity group-based identity that persists in space/time across and above the temporal nature and ever-changing social contexts that give rise to experience and interpretations of identity.[202] "[S]imultaneity [encompasses the] past and [the] future in an instantaneous present . . . . [A]n idea of 'homogenous, empty time,' in which simultaneity is, as it were, transverse, cross-time, marked not by prefiguring and fulfillment, but by temporal coincidence, and measured by clock and calendar."[203] IBFs and PI are embedded in PCs that, if they are stationary in space/time, can become rigid, dogmatic constructs rather than fluid and adaptive constructs that accommodate the intricacy that undergirds social contexts.[204] Identities can reflect complex adaptive systemic changes that are transpiring, or can retreat into the safe confines of a knowable space that is invested in a power dynamic in which a PI is perpetuated in simultaneous space/time.[205] As the Court notes in its election law jurisprudence,

> [t]he recognition of nonracial communities of interest reflects the principle that a State may not "assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls. '" . . . "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to *foster our transformation to a society that is no longer fixated on race*." *We do a disservice to these important goals by failing to account for the differences between people of the same race*.[206]

IBFs perpetuate identarian-based ideological frameworks for incorporation into the field of politics.[207] PI becomes operationalized by IBFs.[208] The means by which PI materializes is based, in part, on what C.

> office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value.

League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425–26 (2006).

202. *See* Note, *supra* note 81, at 1292 n.1.

203. ANDERSON, *supra* note 196, at 24.

204. *See id.* at 25–26.

205. *See id.* at 26.

206. *League of United Latin Am. Citizens*, 548 U.S. at 433–34 (citations omitted) (alteration in original) (emphasis added).

207. *See* Astrada, *supra* note 7, at 37.

208. *See id.*; ANDERSON, *supra* note 197, at 205.

Wright Mills has termed Master Symbols of Legitimization ("MSL").[209] MSLs are part of a general and recognizable nomenclature that has the effect of generating and reifying the self-contained paradigmatic parameters of a particular modality of thought, order, through the use and examination of MSLs.[210] Particular constellations of order deploy a specific lexis—one that embodies distinct ordering assumptions and principles—that utilizes MSL to manufacture and deploy the means by which actuality is conceptualized.[211] PI and its constituent components and expositors are exemplars of MSL that function within a larger superstructure of ideational matrices of signification/meaning pervaded with networks of power.[212] The power of MSLs resides in their ability to authoritatively designate and fix signification; MSLs justify, explain, and reify subject matter without having to rely upon external sources of justification.[213] The legitimacy of the MSL that constitutes identity is "supported, partly independently, by its entrenched status and by the contribution that it makes to the justice and workability of" an IBF and the PI it manufactures and disseminates.[214] It is erroneous to contend, however, that the continuous operation of a particular practice/MSLs confers legitimacy on that which is practiced.[215] Such reasoning is tautological; simply because a particular construct/practice is entrenched does not necessarily mean that it is desirable and/or appropriate to retain it.[216] Context, it seems, determines correctness rather than the intrinsic worth of a particular MSL.[217] A construct is not inherently correct, true, proper, in and of itself, simply because it adequately addresses pragmatic concerns.[218] Objects of knowledge, however, do not await being discovered made *visible* in an objective sense; they do not pre-exist themselves, but function within a complex combine of mutualist discursive relations of power.[219]

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209. *See* A. JAVIER TREVIÑO, THE SOCIAL THOUGHT OF C. WRIGHT MILLS 134–35 (2012).

210. *Id.* at 134–35.

211. *Id.* at 135.

212. *Id.*

213. *Id.*

214. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001).

215. *See, e.g.*, Astrada & Astrada, *supra* note 34, at 245–46; *but see* Fallon, *supra* note 213, at 570.

216. *See, e.g.*, Astrada, *supra* note 7, at 26; *but see* Fallon, *supra* note 214, at 591.

217. *See* TREVIÑO, *supra* note 209, at 134–35.

218. *See* Astrada, *supra* note 7, at 20; *but cf.* Fallon, *supra* note 214, at 570.

219. MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 45 (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969).

MSLs can have the effect of collapsing distinctions between signs and signifiers, of being seduced by the notion that analytic constructs can be reflective and/or constitutive of an actual, tangible real that is conducive to an authoritatively and qualitatively proper state of affairs.[220] Through acts of naming the constituent elements of the actual via MSLs, elites can produce a discourse that establishes the basis for *proper* ordering principles that are either bestowed upon objects and/or *discovered*.[221] Objective and reasoned judgment is based upon the generation of a field of perceptual effects that have their basis in MSL.[222] IBFs rely upon a "community of settled acts which, through their objectifications in the present act, establish the conditions to which that act must conform."[223] Identity-based MSLs, such as IBMs, are the conceptual tools that subjects employ to make judgments about the content of an identity, the basis for identity-based politics, and the inclusion/exclusion binary that a PI will embrace.[224] "Every political judgment . . . modif[ies] the facts on which it is passed."[225] Judgment, while devoid of objective criteria per se, is a form of political thought that "is itself a form of political action."[226] The political dimension of judgment is less about particular categorizations, such as *left* and *right*, than about the shifting, layered and relative bases upon which the true and the real are premised.[227] The lexis, i.e., mode of representation, of PI via IBFs and its logos, i.e., the content of its lexis,[228] is revealed to be operating on a relative, as opposed to objective, plane.[229] Judgment is, therefore, an act of imagination; imagination enables the power to invent criteria for an *objective* settled act of judgment and classification.[230]

A. *Exploring the Political Function of Memory Within IBFs, PI & Community*

An essential consideration for *settled acts* is the role of cultural memory in conflating authenticity and signification, in particular when PI is

220. *See* TREVIÑO, *supra* note 209, at 134–35.
221. *See id*. at 135.
222. ALFRED NORTH WHITEHEAD, SYMBOLISM: ITS MEANING AND EFFECT 37–38 (1927).
223. *See id.* at 36.
224. *See* TREVIÑO, *supra* note 209, at 134–35.
225. *See* CARR, *supra* note 55, at 5.
226. *See id.*
227. *See* Morawetz, *supra* note 81, at 391.
228. JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, JUST GAMING 5 (Wlad Godzich trans., Univ. of Minn. Press 1985) (1979).
229. Astrada & Astrada, *supra* note 34, at 255; Astrada, *supra* note 7, at 67.
230. *See* Astrada, *supra* note 7, at 58.

used as an organizational driver of identity.[231] The metaphysical essentialism of identity, what it means, e.g., to *be* Latinx, or African-American, or Intersectional, relies on a metaphysical notion of an idealized origin—a history that is devoid of the accusation it makes of the present: Oppression of difference, exclusivity, and the inability to tolerate radical diversity.[232] On the one hand, memory acts as a fissure that provides an anchor for history and morality, which is crucial to fostering social equity.[233] This is Ariel Dorfman's notion of memory in the context of reconciliation and accountability for the crimes of dictatorship against a (Chilean) society that is trying to move forward from a traumatic identity-based collective (societal) experience:

> Memory matters. One of the primary reasons behind the extraordinary crisis [of] humanity finds itself in is due to the exclusion of billions of human beings and what they remember, men and women who are not even a faraway flicker on the nightly news, on the screen of reality. One of the ways out of our predicament is to multiply the areas of participation, to create veritable oceans of participation . . . . A nation that does not take into account the multitude of suppressed memories of the majority of its people will always be weak, basing its survival on the exclusion of dissent and otherness.[234]

The memory of a culture, of ancestry, is disruptive to concentrated power because it refuses the status of a relic—an ossified referent that regulates the bestowal of meaning and authenticity—but is receptive to be subject to the same dialectic forces of conflict and progress as civilizations that will proceed and have preceded it.[235]

For PI, cultural memory serves as an unambiguous origin of identity, complete with a metaphysical essence that removes it from historical dialectics, and instead enshrines it outside of history.[236] Memory unseats power when we remember *all* of it.[237] Memory is a function of selective interpretations put forth by the power elite when it excludes nuance, and the dialectical relationship historical subjects had with their culture.[238] To avoid

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231. *See id.* at 62–63.
232. *See id.* at 21, 61–62.
233. *See id.* at 62–63.
234. ARIEL DORFMAN, HOMELAND SECURITY ATE MY SPEECH: MESSAGES FROM THE END OF THE WORLD 59, 72 (2017).
235. *See id.* at 72.
236. *See id.* at 81.
237. Astrada, *supra* note 7, at 62–63.
238. *See id.* at 37–38, 66.

a history that subjugates group constituents, cultural history must engage contradiction and conflict within the heart of ancestry; otherwise, in fetishizing the past, PI does almost as much violence as colonialism to the cultures of antiquity by expelling the dialectical collision of culture and subjects.[239] In the movement of the subject away from their history as an ideal or archetype—even intersectional and completely individualized—to ground PI, there is a movement toward radical diversity that recognizes a subject struggling to grasp the synthesis between abstraction with empiricism.[240] This is aligned with Homi K. Bhabba's contention that "[t]he question of identification is never the affirmation of a pre-given identity, never a self-fulfilling prophecy—it is always the production of an image of identity and the transformation of the subject in assuming that image."[241] The subject, even within the origin culture of a PI group, must struggle with and collide with the culture that surrounds them to exist as a social subject.[242] In other words, to embrace the *essence* of being Incan means struggling to exist as a subject under Incan culture, with all its contradictions, offenses, mysticism and doctrines of knowledge and not to embrace the cultural artifacts of relics and known customs of the tribe.[243] To remember, within political memory, is a function to combat authoritarianism, and opens the lid of history, to disrupt a culturally archived social narrative.[244] PI, in an opposite movement, draws upon memory as a driver of recasting ideology as the beginning of history—i.e., claims of cultural appropriation rely on the implicit assumption that one's culture is the quintessential Adam, the true origin point of all that appears within.[245]

IV. CONCLUSION

IBFs are able to control the character and content PI in determining whose experience qualifies as the controlling standard by which identity is articulated in politics, law, and policy spaces.[246] It can be said that "the

239. *See* BELTRÀN, *supra* note 98, at 4, 5; Gimenez, *supra* note 99, at 564, 566; Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH CTR.: FACT TANK (June 15, 2015), http://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/.

240. *See* BELTRÀN, *supra* note 98, at 62, 109; Gonzalez-Barrera & Lopez, *supra* note 238.

241. HOMI K. BHABBA, THE LOCATION OF CULTURE 45 (1994).

242. *See* BELTRÀN, *supra* note 98, at 6–7, 160; Gonzalez-Barrera & Lopez, *supra* note 238.

243. *See* BELTRÀN, *supra* note 98, at 111.

244. *See id.* at 157–58.

245. *See id.* at 164–65.

246. BHABBA, *supra* note 241, at 64.

distribution of all that circulates in a given society is just if it conforms to something defined . . . as justice itself, that is, as the essence, or the idea, of justice."[247] Justice will therefore manifest itself in conformity with the significations established in discourse that has a monopoly on positing PI.[248] Symbolic signification possesses a protean capacity; symbols can have different meanings for different people under different circumstances.[249] IBFs perpetuate PI through denotative statements.[250] "A just practice will have to conform to denotative statements (statements that denote justice) that are themselves true. This is where the pathos of the conviction is involved: [I]t admits that the statement . . . is true" in and of itself.[251] Herein, then, lies the problem of positing PI, i.e., the articulation of subjective, relative, positional opinions being tendered as objective, unbiased (essentialist) pronouncements that ignore the fact that the "truth of certain . . . propositions belongs to our frame of reference."[252] A critical analysis of denotative statements provides a degree of understanding and explanation regarding the internal, as well as external constraints within which power is exercised.[253]

> [T]he vast machine of political thought that justifies itself, or believes itself to be justified, by what it wants to decree in the realm of practice so that a society be just, so that distribution of what there is to distribute is well carried out, on the basis of a model (e.g. Court ratiocination), all this thought is actually futile, inasmuch as a command cannot find its justification in a denotative statement.[254]

Denotative statements of the true require that the lexis of PI be "definite, manageable, reproducible, and also to be charged with . . . emotional efficacity."[255]

The meta-language provided by IBFs to conceptualize and communicate PI in law and policy spaces is a basis for the exercise of power; an IBF turns to itself, it looks inward, for the very means to perpetuate itself

247. LYOTARD & THÉBAUD, *supra* note 228, at 19.
248. *Id.*
249. WHITEHEAD, *supra* note 222, at 63.
250. *Id.*; Astrada, *supra* note 7, at 34.
251. LYOTARD & THÉBAUD, *supra* note 228, at 20.
252. LUDWIG WITTGENSTEIN, ON CERTAINTY 12e (Geork Henrik Von Wright ed., G.E.M. Anscombe & Denis Paul trans., Harper & Row 1972) (1969).
253. *See* LYOTARD & THÉBAUD, *supra* note 228, at 22.
254. *Id.*
255. WHITEHEAD, *supra* note 222, at 62–63.

in space and time.[256] In all configurations of order, however, there is "no meta-language . . . that [can] ground political and ethical decisions that will be taken as the basis of its statements. There is no meta-language; there are only genres of language, genres of discourse."[257] "All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system."[258] As Lyotard and Thebaud observe:

> [N]o maker of statements, no utterer, is ever autonomous. On the contrary an utterer is always someone who is first of all an addressee . . . he is someone who, before he is the utterer of a prescription, has been the recipient of a prescription, and that he is merely a relay; he has also been the object of a prescription.[259]

IBFs produce identarian discourse that constitutes, in part, the parameters and contours of law, policy, and politics.[260] This has the effect of producing a base of critique and knowledge that centers around IBF

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256. *See* Astrada, *supra* note 7, at 20–24; discussion *supra* Part II. As Wittgenstein notes, "[i]f a thought were correct a priori, it would be a thought whose possibility ensured its truth. A priori knowledge that a thought was true would be possible only if its truth were recognizable from the thought itself (without anything to compare it with)." WITTGENSTEIN, *supra* note 52, at 13.

257. LYOTARD & THEBAUD, *supra* note 228, at 28.

258. WITTGENSTEIN, *supra* note 252, at 16e.

259. LYOTARD & THEBAUD, *supra* note 228, at 31; *see also, e.g.*, Veronica Rocha & Brandon Tensley, *CNN's LGBTQ Town Hall*, CNN: POL., http://www.cnn.com/politics/live-news/lgbtq-town-hall-2019/index.html (last updated Oct. 11, 2019, 12:37 AM). The following are examples of how an IBF has managed to make PI an operative basis of political thought and behavior. Rocha & Tensley, *supra*. Whether one agrees or disagrees, it is very important to note the power of PI to set the parameters and affect the character and content of political rhetoric at the highest levels. *Id.* The Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ") Town Hall is an exemplar of the power of IBFs to, in essence, set the terms of engagement for politics, which at one time were dominated by ideological as opposed to identarian based platforms. *Id.* Examples of the aforementioned are: Violence against the LGBTQ community beings classified as a "national emergency" — as opposed to other identity-based groups such as the homeless and homelessness (Cory Booker); "the impact that a country's approach to gay people should have on American foreign policy" (Joe Biden); removing any restrictions on the donation of blood as a top priority for the federal government (Pete Buttigieg); privileging the use of public funds for payment of gender affirming surgery for transgender people over other equally needy groups such as the very poor (Elizabeth Warren); selectively tackling homelessness among LGBTQ youth (Kamala Harris); recognizing "a third gender marker option on a federal level" (Amy Klobuchar); making "foreign aid contingent on how the rights that other nations afford to the LGBTQ community" (forcibly imposing an American-based identity classification — along with the normative —, ideologically-infused trappings of said PI — onto the global community) (Julián Castro); selective "increase oversight over health care access to LGBTQ asylum seekers" (Tom Steyer). *Id.*

260. *See* Astrada, *supra* note 7, at 45; discussion *supra* Part II.

concepts, systematically perpetuating and reifying the internally produced discourse of right and authority that emanates from the exercise of power to posit an identity.[261] Concepts can be analogized to analytic nets that are placed over a particular subject.[262] That is:

> [D]ifferent nets correspond to different systems for describing the world. Mechanics determines one form of description of the world by saying that all propositions used in the description of the world must be obtained in a given way from a given set of propositions—the axiom of mechanics. It thus supplies the bricks for building the edifice of [knowledge], and it says, "Any building that you want to erect, whatever it may be, must somehow be constructed with these bricks, and with these alone."[263]

PI may not, therefore, be the most conducive platform for efficiently effectuating representational politics in the present and going forward.[264] Yet, it may also prove indispensable in any attempt to reconcile the variegated tensions, problems, and contradictions immanent in posting and bolstering an American national community and identity.[265]

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261. *See* Astrada, *supra* note 7, at 46; discussion *supra* Section III.A.
262. *See* WITTGENSTEIN, *supra* note 52, at 82.
263. *Id.*; *see also* discussion *supra* Part III.
264. *See* Vieth v. Jubelirer, 541 U.S. 267, 307–08 (2004); Astrada, *supra* note 7, at 37.
265. *See* Astrada, *supra* note 7, at 43–44.

FLYING TOO CLOSE TO THE SUN: THE ABROGATION OF THE MIGRATORY BIRD TREATY ACT BY THE TRUMP ADMINISTRATION

JENNIFER BAUTISTA*

I. INTRODUCTION

During the age of King Minos, there lived an inventor, Daedalus, and his young son, Icarus. Daedalus lived happily with his son in a cave high above the sea, where he spent his time working and creating inventions for King Minos. Worried over his son's happiness, Daedalus fashioned them a set of wings from candle wax and feathers so they could fly away from the island. As they stood over the ocean, Daedalus warned Icarus: "Fly too close to the sun and the wax will melt and you will lose feathers. Follow my path closely and you'll be fine."

Daedalus and Icarus took to the skies with their new wings. Ignoring the shouts from his father to be careful, Icarus soared up towards the sun. Higher and higher Icarus flew, ignoring his father's desperate pleas to return. But Icarus, lost in his newfound freedom, had flown too high. The wax began dripping down his arms and feathers began to quickly fall around

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him. When Icarus finally realized his mistake, it was too late. By the time he hit the water, there wasn't a feather left.[1]

A migratory bird is a "bird that travels from one place to another at regular times, often over long distances."[2] Because of their nature, migratory birds are seen as some of the most beautiful, "innocent, and highly regarded creatures on the planet."[3] Their migratory nature is not a voluntary choice, but a requirement for survival.[4] And, the journey for many of these birds is often perilous.[5]

Because of the vast distances migratory birds travel, the need to preserve their habitats is essential to their survival and requires international cooperation to conserve them.[6] But, the benefits of conserving these migratory birds are far-reaching.[7] In addition to the pollination of plants, pest control, and serving as food sources for other wildlife, migratory birds also provide a source of recreation for "millions of bird watchers and enthusiasts who provide food and design backyard habitats [that] attract a variety of species throughout the year."[8]

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1. *See* EDITH HAMILTON, MYTHOLOGY 139–40 (1953).

2. *Migratory Birds & Habitat Program*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/pacific/migratorybirds/definition.html (last updated Oct. 28, 2015).

3. Brittany E. Barbee, Comment, *To Kill A Migratory Bird: How Incidental Takes by Commercial Industry Activity Should Be Regulated by a New Civil Penalty Regime, Not the Current MBTA*, 25 BUFF. ENV'T L.J. 91, 94 (2016–2018).

4. Yudhijit Bhattacharjee, *The Epic Journeys of Migratory Birds*, NAT'L GEOGRAPHIC, http://www.nationalgeographic.com/magazine/2018/03/bird-migration-albatross-climate-change (last visited May 12, 2021). Today, it is understood that these birds migrate to avoid declining food supplies and harsh climactic conditions brought about by the seasons. *Id.* For example:

> When winter arrives in North America, the flowers that the ruby-throated hummingbird drinks nectar from and the insects it thrives on vanish. The bird has no choice but to travel to a place where food is plentiful. Upon the return of warmer weather in Canada and the United States, the northern home is attractive once again because its resources have been replenished.

Id.

5. *International Cooperation*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/birds/about-us/international.php (last updated Nov. 20, 2017). As one researcher explained, a migratory bird's journey is comparable to a human walking for eight days straight. *See* Bhattacharjee, *supra* note 4.

6. *International Cooperation*, *supra* note 5.

7. Robert H. Diehl et al., *The Ecology, Behavior, and Conservation of Migratory Birds*, U.S. GEOLOGICAL SURV., http://www.usgs.gov/centers/norock/science/ecology-behavior-and-conservation-migratory-birds?qt-science_center_objects=0#qt-science_center_objects (last visited May 12, 2021).

8. *Id.*

Because of their many environmental and economical contributions, countries have long sought to preserve migratory birds and their habitats.[9] Over a century ago, the United States set forth on its own path of strengthening and protecting these incredible species.[10] The beginning of this path was marked with the passage of the landmark Migratory Bird Treaty Act (the "Act"), which served as a catalyst for many of the environmental regulations in place today.[11] In its current form, the Act boasts protection of over one thousand migratory bird species.[12]

Since its enactment, every branch of government has acted in concert to ensure the protection of these birds.[13] When first enacted, the Act was used to prosecute only those individuals that had killed or *taken* a bird through direct acts, such as hunting, poaching, and trapping.[14] In the 1970s, however, the interpretation of *taking* grew with the industrial stresses placed on our environment.[15] Bird population sizes were once again seeing slashes, but not because of the overbearing hunting habits that first gave rise to the Act.[16]

In response to the substantial drop in bird population numbers, federal prosecutors began prosecuting companies under the *takings* clause of the Act for indirect bird killings.[17] In the wake of these prosecutions, a circuit split emerged over whether a "taking" included the unintentional killing of wildlife, such as migratory bird deaths caused by pollution.[18] In an effort to resolve the circuit split, the Clinton and Obama Administrations established policies mandating a broad interpretation of the "takings" clause.[19]

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9. *International Cooperation*, *supra* note 5.

10. *Id.*

11. 16 U.S.C. §§ 703–712; *see also* Paul Schmidt, *The Migratory Bird Treaty Centennial*, DUCKS UNLIMITED, http://www.ducks.org/conservation/public-policy/the-migratory-bird-treaty-centennial (last visited May 12, 2021).

12. 16 U.S.C. § 703(a); Barbee, *supra* note 3, at 95.

13. *See* Barbee, *supra* note 3, at 105, 108; discussion *infra* Parts II–IV.

14. *See* Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, AUDUBON: NEWS (May 22, 2015), http://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act; Barbee, *supra* note 3, at 104.

15. *See* Greenspan, *supra* note 14.

16. *See* United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978); Barbee, *supra* note 3, at 94.

17. *See* Greenspan, *supra* note 14.

18. *See infra* text accompanying notes 91–92; discussion *infra* section III.A; *FMC Corp.*, 572 F.2d at 908; Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991); Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); United States v. CITGO Petrol. Corp., 801 F.3d 477, 494 (5th Cir. 2015).

19. *See* discussion *infra* Parts II–IV; Greenspan, *supra* note 14.

In 2017, however, the Trump administration began a series of attempts to clip the Act's wings.[20] In stark contrast to a century's worth of precedent, the Trump Administration released a memorandum prohibiting the prosecution of indirect killings under the "takings" clause of the Act, effectively giving companies the freedom to pollute the air, waters, and wildlife habitats without facing criminal prosecution under the Act.[21]

This Article examines the scope of the Act's protections and the consequences stemming from the Trump Administration's divergence from the established path preserving these species.[22] In Part II, the history of the wildlife regulations that made way for the Migratory Bird Act is examined.[23] In Part III, the scope, constitutional challenges, and subsequent conservation efforts following the Act's passage are examined.[24] In Part IV, the Trump Administration's recent acts to unravel the Act are examined.[25] And finally, in Part V, the expected results from the Trump Administration's actions are examined in detail.[26]

II. THE RISE OF WILDLIFE REGULATION

Prior to the Act, there were virtually no regulations in place to protect flying animals.[27] In the 1800s, hunters would "decimate [United States] bird populations, in part so that well-to-do women [could] wear hats adorned with ornamental feathers."[28] The rampant hunting eventually took its toll on the bird population; the 1800s closed with the extinction of the Labrador Ducks and Great Auks, soon followed by the "Passenger Pigeons, Carolina Parakeets, and Heath Hens."[29] The disappearance "of the passenger

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20. *See* discussion *infra* Part IV; Greenspan, *supra* note 14; *President Clinton Issues Executive Order on Migratory Birds*, U.S. FISH & WILDLIFE SERV. (Jan. 1, 2001), http://www.fws.gov/news/ShowNews.cfm?ID=F41A0B75-C574-11D4-A17B009027B6B5D3.

21. *See* Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, U.S. Dep't of Interior, to the Sec'y, Dep't of Interior et al. 2 (Dec. 22, 2017), http://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf.; Jacques Leslie, *Op-Ed: Another Trump Victim: Migratory Birds*, L.A. TIMES: OP. (Feb. 14, 2018, 4:05 AM), http://www.latimes.com/opinion/op-ed/la-oe-leslie-migratory-bird-act-trump-administration-20180214-story.html.

22. *See* Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et. al., *supra* note 21, at 1; Greenspan, *supra* note 14.

23. *See* discussion *infra* Part II.

24. *See* discussion *infra* Part III.

25. *See* discussion *infra* Part IV.

26. *See* discussion *infra* Part V.

27. *See* Greenspan, *supra* note 14.

28. *Id.*

29. *Id.*

pigeon embodied the destructive outcome that commercial hunting had on many bird populations," which had once "darken[ed] the sky for many hours" while in flight.[30]

The impact on bird populations led to public demands for stronger wildlife protection measures.[31] An avid hunter and naturalist, President Theodore Roosevelt "launched an effort to end the careless exploitation of wildlife and to preserve migratory birds and their habitats."[32] His efforts bore the establishment of the first federal bird reservation, Pelican Island, followed by fifty-five other bird reservations.[33] Calling for legislative action, President Roosevelt explained, "[i]t is evident that natural resources are not limited by the boundary lines which separate nations and that the need for conserving them upon this continent is as wide as the area upon which they exist."[34]

Public coalitions soon formed, seeking to save the declining bird populations.[35] Their efforts led to the passage of the first wildlife protection regulation: the Lacey Act.[36]

A. *The Lacey and Black Bass Acts*

The Lacey Act was introduced in early 1900 with the intent of "enlarg[ing] the powers of the Department of Agriculture" to ensure the preservation of various wild birds and commonly hunted animals.[37] The Lacey Act was Congress' attempt to make a "very cautious first step [into] the field of federal wildlife regulation."[38] At its conception, the Lacey Act "gave the [United States] Department of Agriculture authority to preserve and restore game birds and other birds; barred the import of birds and wildlife without a permit; forbade the introduction of certain 'injurious'

30. Barbee, *supra* note 3, at 101.
31. Schmidt, *supra* note 11.
32. *Id.*
33. *Bird Conservation Timeline*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/birds/about-us/timeline.php (last updated Aug. 22, 2018).
34. Schmidt, *supra* note 11.
35. *Id.*
36. *Id.*; The Lacey Act, 16 U.S.C. §§ 3371–3378; *see also* Martha G. Vazquez, Note, *Clipping the Wings of Industry: Uncertainty in Interpretation and Enforcement of the Migratory Bird Treaty Act*, 74 WASH. & LEE L. REV. ONLINE 281, 288 (2017–2018).
37. Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 36–37 (1995).
38. Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HIST. CTR., http://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act (last visited May 12, 2021) (citing MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 15 (3d ed. 1997)).

species; and most importantly, prohibited interstate commerce in game illegally taken and required labeling of game shipments."[39] While the Lacey Act included protection for a variety of animals, it was primarily enacted to preserve bird populations that faced serious decline due to overhunting, the introduction of exotic species in non-native habitats, the millinery industry, and agricultural damage.[40]

The Lacey Act also targeted states' inability to address the rampant wildlife poaching that was decimating the animal and bird populations drastically.[41] At the time, poaching posed two problems for states:

> First, it was common at that time for large numbers of game to be killed by poachers . . . in one state, fraudulently mismarked to avoid detection, and shipped to another state for sale to the public. Once the pothunter had removed the game from its state of origin, that state lacked the jurisdiction necessary to prosecute him . . . A second common problem involved local game killed during a state's closed season and sold under the guise of having been brought into the state from elsewhere.[42]

In response to these issues, the Lacey Act sought to prohibit the importation, exportation, and transportation in interstate commerce of any container of wildlife or fish that was not properly marked, labeled, or tagged as required by state and regulatory law.[43] Violations of its sections was a strict liability offense for the shipper of the game, who faced up to a $200 fine.[44]

Following in Congressman Lacey's footsteps, Congress later enacted the Black Bass Act in 1926 to address the overfishing of small and largemouth bass fish that state regulations could not properly remedy.[45] As a sister-statute to the Lacey Act, the Black Bass Act expanded the Lacey Act's protections to include the regulation and prohibition of interstate shipments

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39. C. Parks Gilbert, III, *The Lacey Act: A Vintage Conservation Tool Still Vital in Today's Global Economy*, 29 NAT. RES. & ENV'T, Winter 2015, at 3, 3.

40. *See id.*; Anderson, *supra* note 37, at 37–38. To highlight the environmental impact on bird populations, Congressman Lacey, who first introduced the Lacey Act, cited to "the extinction of the carrier pigeon, the serious depletion of grouse, prairie chicken, and buffalo populations, and the problems created by foreign species such as the English sparrow and the French pink flower." Anderson, *supra* note 37, at 37.

41. Anderson, *supra* note 37, at 37–38.

42. *Id.* at 38.

43. *Id.* at 39–40; 16 U.S.C. § 3371.

44. Anderson, *supra* note 37, at 40.

45. *Id.* at 44; Black Bass Act of 1926, Pub. L. No. 69-256, § 346, 44 Stat. 576, 576, *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, § 9(b)(1), 95 Stat. 1073, 1079.

of bass and extended penalties to companies, partnerships, corporations, associations, and common carriers.[46] Despite strong opposition from the National Rifle Association and Safari Club International, Congress did not deviate from its goal of eradicating hunting operations that risked "grim environmental consequences."[47] Rather, "Congress was convinced that federal action was necessary to prevent the extinction of these species."[48]

Over the years, the Lacey and Black Bass Acts were continuously amended to expand protections to all types of game, fish, and animals.[49] The amendments authorized federal wildlife enforcement officers to make warrantless arrests, increased penalties, and combined the Black Bass Act and Lacey Act to create a single, all-encompassing Lacey Act.[50]

In its current form, the Lacey Act protects the widest array of wildlife than any other regulation.[51] "However, in the early [twentieth] century, the [Lacey] Act was ineffective in stopping interstate shipments, largely because of the huge profits enjoyed by the market hunters and the lack of officers to enforce the law."[52] The Lacey Act's early failures led to the enactment of the Weeks-McLean Law.[53]

B. *The Weeks-McLean Law*

The Weeks-McLean Law sought to "stop commercial market hunting and the illegal shipment of migratory birds from one state to another."[54] Like the Lacey Act, the Weeks-McLean Law prohibited the shipment of migratory birds across state lines, but also placed all birds under federal regulation.[55] It provided:

> All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and

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46. Anderson, *supra* note 37, at 44–45.
47. *Id.* at 49–50.
48. *Id.* at 44.
49. *See id.* at 45, 46, 49, 51–53.
50. *See id.* at 53; 16 U.S.C. § 3371.
51. Anderson, *supra* note 37, at 36.
52. *Other Relevant Laws*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/birds/policies-and-regulations/laws-legislations/other-relevant-laws.php (last updated Apr. 11, 2019).
53. *Id.*; Weeks-McLean Act of 1913, Pub. L. No. 62-430, ch. 145, 37 Stat. 828, *repealed by* Migratory Bird Act of 1918, §9, ch. 128, 40 Stat. 755, 755.
54. *Other Relevant Laws*, *supra* note 52.
55. Ashley R. Fiest, *Defining the Wingspan of the Migratory Bird Treaty Act*, 47 AKRON L. REV. 587, 591 (2014); Alexander K. Obrecht, *Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NAT. RES. J. 107, 112 (2014).

> insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.[56]

Decimated by constitutional challenges and a strong state ownership doctrine that encompassed much of the legal landscape during the early twentieth century, the Weeks-McLean Law was struck down as unconstitutional in *United States v. Shauver*[57] and *United States v. McCullagh*.[58]

The *Shauver* Court explained that although Congress frequently exercised its power to regulate matters under the states' general police power, "every one of [those prior] acts [were] upheld under some provision of the Constitution."[59] As it related to the Weeks-McLean Law, however, the *Shauver* Court reasoned it was "unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state" and therefore was "forced to the conclusion that the [A]ct is unconstitutional."[60]

Adopting the *Shauver* rationale, the *McCullagh* Court also held the Weeks-McLean Law was an infringement on states' rights under the Tenth Amendment and the state ownership doctrine, which provided states had the right to preserve "a food supply which belongs in common to all the people of the [s]tate, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the [s]tate."[61] Committed to ensuring the protection of migratory birds, Congress quickly replaced the Weeks-McLean Law with the landmark Migratory Bird Treaty Act of 1918.[62]

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56. Obrecht, *supra* note 55, at 112 n.37 (quoting Weeks-McLean Act of 1913, §9, 83 Stat. at 847).

57. 214 F. 154 (E.D. Ark. 1914).

58. 221 F. 288 (D. Kan. 1915).

59. *Shauver*, 214 F. at 159.

60. *Id.* at 160.

61. *See McCullagh*, 221 F. at 294–96; Geer v. Connecticut, 161 U.S. 519, 535 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

62. *Other Relevant Laws*, *supra* note 52; Migratory Bird Treaty, 16 U.S.C. §§ 703–712.

III. THE MIGRATORY BIRD TREATY ACT

In 1916, the United States signed a treaty with Great Britain seeking to preserve the species of birds considered beneficial or harmless to humans.[63] The treaty prohibited hunting of insectivorous birds and established specific hunting seasons for specified game birds.[64]

To memorialize this new treaty, the Wilson Administration passed the Migratory Bird Treaty Act, which criminalized the hunting of migratory birds.[65] It provides:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, [and subsequent treaties] . . . .[66]

The Act's passage demonstrated a uniform, zero-tolerance federal policy for the unnecessary poaching and hunting of these defenseless animals.[67] Like its predecessors, however, the Act was not without challenge.[68] Although the state ownership doctrine no longer controlled, states still sought to strike down the Act as an infringement on their Tenth

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63. Greenspan, *supra* note 14. At the time, "Great Britain [was] acting on behalf of Canada, then part of the British Empire." *Id.*

64. *Id.*; *see also Insectivorous Birds*, THE ENCYC. OF BIRDCARE, http://www.birdcare.com/birdon/encyclopedia/insectivorous+birds.html (last visited May 12, 2021). Insectivorous birds are defined as a "[s]pecies which feed mainly on insects, spiders, and other invertebrates." *Insectivorous Birds*, *supra*.

65. *Insectivorous Birds*, *supra* note 64; Schmidt, *supra* note 11; *see also* 16 U.S.C. § 703(a).

66. 16 U.S.C. § 703(a).

67. *See* Greenspan, *supra* note 14.

68. *See, e.g.*, United States v. Rockefeller, 260 F. 346, 346 (D. Mont. 1919); United States v. Samples, 258 F. 479, 480 (W.D. Mo. 1919).

Amendment rights.[69] In light of these challenges, the Supreme Court held in *Missouri v. Holland*:[70]

> Here, a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is [in] vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.[71]

As the *Holland* decision makes clear: "But for the treaty and the statute, there soon might be no birds for any powers to deal with."[72] Since its enactment, the Act has successfully combated overhunting and extermination and is even credited with helping the Snowy Egret rebound from near-extinction.[73]

On the heels of the Act's initial success, the United States entered into a cascade of similar treaties with Mexico, Japan, and the Soviet Union in a collective effort to protect a greater number of birds.[74] The subsequent treaties included provisions encouraging habitat conservation and pollution abatement.[75] The Act later adopted the treaties to expand its list of protected migratory bird species.[76] Today, the Act protects a total of 1,026 birds under its wings, including native, non-migratory birds.[77]

On a path to expand conservation efforts, legislation was later enacted over the years to protect migratory bird habitats, establish administrative councils tasked with overseeing established flyways, and provide funding to state agencies to develop and implement wildlife conservation plans.[78] The Harding Administration spearheaded several amendments to the Act that limited the means by which birds may be hunted

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69. *See* Hughes v. Oklahoma, 441 U.S. 322, 323 (1979).
70. 252 U.S. 416 (1920).
71. *Id.* at 435 (citation omitted).
72. *Id.*
73. *See Other Relevant Laws*, *supra* note 52; *Congresswoman Liz Cheney Introduces Bird-Killer Amendment*, AUDUBON (Nov. 08, 2017), http://www.audubon.org/news/congresswoman-liz-cheney-introduces-bird-killer-amendment.
74. Greenspan, *supra* note 14.
75. *See id.*
76. *Bird Conservation Timeline*, *supra* note 33.
77. *See* Greenspan, *supra* note 14.
78. *See id.*

during open season and established specific time frames for states' open seasons.[79] And, in 2001, President Clinton issued an executive order expressly requiring federal agencies to "take reasonable steps that include restoring and enhancing habitat, preventing or abating pollution affecting birds, and incorporating migratory bird conservation into agency planning processes whenever possible," and directed federal agencies to collaborate with the United States Fish and Wildlife Service to develop an agreement to preserve the bird species enumerated in the Act.[80]

Despite the extensive efforts to conserve bird populations, in the early 1970s, bird populations were again facing decimation in large numbers due to industrial pressures on the environment.[81] In response, the Department of Justice released a letter warning energy and industrial companies that if they chose to "ignore, deny, or refuse to comply" with infrastructure modifications that could prevent the deaths of these birds, the "matter may be referred for prosecution."[82]

Under this direction, prosecutors began to prosecute oil, gas, wind, and other energy companies under the Act's provisions.[83] Where previously only hunters and poachers were prosecuted under the Act for the direct and intentional deaths of migratory birds, companies now faced criminal liability for the *indirect* death of migratory birds caused by industry operations.[84]

A. *The Takings Clause Split*

In the landmark decision of *United States v. FMC Corp.*,[85] the United States Court of Appeals for the Second Circuit held an energy company strictly liable for unintentional bird deaths resulting from discharge of wastewater from the company's pesticide manufacturing process.[86] As an issue of first impression, the Second Circuit relied on "[the] rule of reason, or even better, common sense" in construing the Act's provisions.[87] The court reasoned:

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79. Warren Harding, *Proclamation—Amendments of the Migratory Bird Treaty Act Regulations*, THE AM. PRESIDENCY PROJECT: DOCUMENTS, http://www.presidency.ucsb.edu/ws/index.php?pid=126369 (last visited May 12, 2021).

80. *President Clinton Issues Executive Order on Migratory Birds*, *supra* note 20.

81. *See* Greenspan, *supra* note 14.

82. *Id.*

83. *Id.*

84. *Id.*; *see also* Rozan, *supra* note 38.

85. 572 F.2d 902 (2d Cir. 1978).

86. *Id.* at 908.

87. *Id.* at 905.

> Imposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party. However, here the statute does not include as an element of the offense 'willfully, knowingly, recklessly, or negligently' . . . Congress recognized the important public policy behind protecting migratory birds; FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability on FMC.[88]

"Although FMC was not aware [that the water quality was] lethal-to-birds, [the court found it was nevertheless] aware of the danger of carbofuran to humans . . . which [it knowingly] pumped . . . into the pond."[89] The Second Circuit warned, "as science, with its technological achievements, produces an ever widening array of poisonous pesticides . . . so the manufacturers of such products will have to be ever on guard lest the waste created in the manufacturing process[es] cause[] damage."[90]

Currently, almost every circuit does not require a scienter element to hold a defendant criminally liable for misdemeanor violations under the Act.[91] Although most circuits have only addressed the issue of prosecuting defendants that intended to hunt, sell, or capture migratory birds, their rationales do not limit the imposition of strict liability only to hunters and poachers.[92] Rather, only three circuits interpret the Act so narrowly—the Fifth, Eighth, and Ninth.[93]

In *Seattle Audubon Soc'y v. Evans*,[94] the Ninth Circuit held the selling and logging of timber from lands within areas that serve as habitats for the northern spotted owl was "harm[ful]" conduct, but did not rise to the

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88. *Id.* at 908.

89. *Id.*

90. *FMC Corp.*, 572 F.2d at 907–08.

91. United States v. Pitrone, 115 F.3d 1, 5 (1st Cir. 1997); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986); United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995); United States v. Morgan, 311 F.3d 611, 615–16 (5th Cir. 2002); United States v. Catlett, 747 F.2d 1102, 1105 (6th Cir. 1984) (per curiam); United States v. Hogan, 89 F.3d 403, 404 (7th Cir. 1996); Rogers v. United States, 367 F.2d 998, 1001 (8th Cir. 1966); United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997). The Eleventh Circuit, District of Columbia, and the Federal Circuit have not addressed the issue. *See Pitrone*, 115 F.3d at 5; *Engler*, 806 F.2d at 431; *Boynton*, 63 F.3d at 343; *Morgan*, 311 F.3d at 615–16; *Catlett*, 747 F.2d at 1105; *Hogan*, 89 F.3d at 404; *Rogers*, 367 F.2d at 1001; *Corrow*, 119 F.3d at 805.

92. *Corrow*, 119 F.3d at 806; *but see* United States v. CITGO Petrol. Corp., 801 F.3d 477, 489–90 (5th Cir. 2015).

93. *CITGO Petrol. Corp*., 801 F.3d at 494; Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991).

94. 952 F.2d 297 (9th Cir. 1991).

level of a "tak[ing]" under the language of the Act.[95] The Ninth Circuit reasoned that the Second Circuit's *FMC Corp.* decision did not "suggest that habitat destruction, leading indirectly to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the [Act]," but rather, imposed liability based on principles of strict tort liability because of the severity of the conduct, which "involved the manufacture of a highly toxic pesticide."[96]

In interpreting the language of the Act, the Ninth Circuit explained the Act's definition of a "taking" describes "physical conduct of the sort engaged in by hunters and poachers, . . . which was undoubtedly a concern at the time of the statute's enactment in 1918."[97] The court reasoned that since its enactment, however, Congress had not amended the Act to define a "taking" as "harm" to bird habitats.[98] Comparing the language of the Endangered Species Act ("ESA"), which explicitly defined "take" to include "harass" and "harm," to the Migratory Bird Treaty Act, the Ninth Circuit concluded:

> [T]he differences in the proscribed conduct under [the] ESA and the [Act] are "distinct and purposeful." The ESA was enacted in 1973. Congress amended the [Act] the following year, but did not modify its [provisions] to include "harm." . . . We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them under the [Act] and the [ESA].[99]

The Eighth Circuit followed suit, unilaterally adopting the Ninth Circuit's rationale and defining the Act's "ambiguous terms 'take' and 'kill' . . . [to] mean 'physical conduct of the sort engaged in by hunters and poachers . . . .'"[100] It determined that the strict liability approach would only "be appropriate when dealing with hunters and poachers."[101] And, in *United States v. CITGO Petroleum Corp.*,[102] the Fifth Circuit also held a "taking" could not include unintentional killings.[103] After analyzing the circuit split issue, the Fifth Circuit aligned itself with the Eighth and Ninth Circuits, reasoning that the Second and Tenth Circuits' interpretations of the Act were

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95. *Id.* at 302–03.
96. *Id.* at 303.
97. *Id.* at 302.
98. *Id.* at 303.
99. *Evans*, 952 F.2d at 303.
100. Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997).
101. *Id.*; *see also* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978).
102. 801 F.3d 477 (5th Cir. 2015).
103. *Id.* at 492.

"broad, counter-textual reading[s]" that failed to "explore[] the meaning of 'take.'"[104] Employing the common law definition of a "taking," which defines "taking" as an act to "reduce those animals, by killing or capturing, to human control," the court concluded that the Act does not prohibit unintentional bird deaths because "[o]ne does not reduce an animal to human control accidentally or by omission; he does so affirmatively."[105]

When read in conjunction with the Fifth and Eighth Circuits' prior decisions, the *CITGO* and *Newton* decisions essentially create a narrow exception in the Act's jurisprudence for the imposition of strict liability only for hunters and poachers.[106] Not only do the decisions seem to misinterpret the holdings of other circuits, they also fail to address the language of their own past precedent.[107] In fact, the Tenth Circuit explained in *United States v. Apollo Energies, Inc.*,[108] that "[n]othing in the structure or logic" of its prior opinion imposing strict liability to hunters "lends itself to carving out an exception for different types of conduct, ... [n]or is there any reason to find that capturing or collecting birds implies a higher mens rea than detaining or controlling them."[109] Rather, the Tenth Circuit reasons that the Act's "plain language" and the 1986 congressional amendment adding the word "knowingly" to the felony offense of selling migratory birds evinces a legislative intent to "invoke[] a lesser mental state for misdemeanor violations."[110] While the court noted that the Act "can test the far reaches in application," it was nonetheless "obvious" that "unprotected oil field equipment can take or kill migratory birds" under the Act's provisions.[111]

B. *The Tompkins Memorandum*

In response to the circuit split, the Obama Administration issued Memorandum M-37041 ("Tompkins Memorandum"), which explicitly provided the Act broadly prohibits the taking or killing of migratory birds,

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104. *Id.*

105. *Id.* at 489; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

106. *See* United States v. Morgan, 311 F.3d 611, 616 (5th Cir. 2002) (holding a defendant strictly liable under the Act for violating the daily bag limit provisions); Rogers v. United States, 367 F.2d 998, 1001 (8th Cir. 1966) (holding "under the [Act], it is not necessary that the government prove that a defendant violated its provisions with guilty knowledge or specific intent to commit the violation").

107. *See Morgan*, 311 F.3d at 616; *Rogers*, 367 F.2d at 1001.

108. 611 F.3d 679 (10th Cir. 2010).

109. *Id.* at 685.

110. *Id.* at 686.

111. *Id.*

including incidental deaths.[112] The Tompkins Memorandum "provided in-depth research and analysis into the international conventions the [Act] implements, text of the [Act] and legislative history, relevant case law, and standard practices of the [United States] Fish and Wildlife Service."[113]

The Tompkins Memorandum found that the conventions, legislative history, and amendments to the Act "broadly support the regulation of the taking and killing of migratory birds by any means, including by industrial or commercial activities unrelated to hunting."[114] And, "for over [forty] years in a variety of contexts, the government has consistently applied the misdemeanor provision of the [Act] to incidental take."[115] It reasoned the United States Fish and Wildlife Service's interpretation of the Act as a strict liability statute was consistent with the Act's text and legislative history because the text of the Act itself does not require a mental state, and the legislative history "refers not only to overhunting as a cause of population decline, but also habitat loss, including the need to protect 'birds for aesthetic and practical reasons unrelated to hunting and poaching.'"[116]

At the close of President Obama's tenure in 2017, the Act had survived a century's worth of failed challenges that attempted to limit or altogether obliterate the scope of its provisions, and a precedent encouraging the expansion and preservation of its protections had emerged in their place.[117] That is, until the Trump Administration took office.[118]

IV. FLYING AWAY FROM A CENTURY OF PRESERVATION

In 2017, the Trump Administration introduced the Cheney Amendment, which sought to codify the prohibition of liability under the Act

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112. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv. 1–2 (Jan. 10, 2017), http://www.eenews.net/assets/2017/02/21/document_ew_01.pdf; *compare Apollo Energies, Inc.*, 611 F.3d at 686 (holding that "the take provision of the Act does not contain a scienter requirement"), *with* United States v. CITGO Petrol. Corp., 801 F.3d 477, 494 (5th Cir. 2015) (stating "the MBTA's ban on 'takings' only prohibits intentional acts . . . .").

113. John K. Powell, *The Migratory Bird Treaty Act: On the Wings of an Executive Branch Reinterpretation*, FLA. B.J., Nov.–Dec. 2018, at 45, 46; *see also* Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 2.

114. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 4; Powell, *supra* note 113, at 46.

115. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 24.

116. Powell, *supra* note 113, at 46; Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 6.

117. *See* Powell, *supra* note 113, at 47–48.

118. *See id.*

for incidental takings.[119] Disguised as an amendment to H.R. 4239, a bill which facilitated oil and gas drilling,[120] the Cheney Amendment would have added the following to the Act's liability provisions: "This Act shall not be construed to prohibit any activity proscribed by section [two] of this Act that is accidental or incidental to the presence or operation of an otherwise lawful activity."[121]

When the Cheney Amendment failed, the Trump Administration quietly released memorandum M-37050 ("Jorjani Memorandum"), which permanently replaced the Tompkins Memorandum less than a year after its issuance, reversing "decades of agency practice."[122] In the limited lens in which the Jorjani Memorandum interprets the Act's language, the Jorjani Memorandum concludes that "consistent with the text, history, and purpose of the [Act], the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."[123] The Jorjani Memorandum makes clear liability will not be imposed in situations where defendants do not intend to kill, capture, or otherwise subject migratory birds to human control.[124]

Not only does the Jorjani Memorandum "expressly recogniz[e] . . . its interpretation was contrary to the historical practices of the [United States] Fish and Wildlife Service," but it also erroneously argues the Act's legislative history was never intended to protect bird habitats or control any action that might have an incidental impact on migratory birds.[125] According to the Jorjani interpretation, the Act was only intended to regulate overhunting.[126] While discussing the extensive legislative, executive, and judicial history that sought to *strengthen* the environmental protections of the Act, the Jorjani Memorandum instead concludes such actions were never an attempt to expand the scope of the Act.[127] For example, it explained:

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119. *See* H.R. REP. NO. 115-1000, at 15 (2017); *Congresswoman Liz Cheney Introduces Bird-Killer Amendment*, *supra* note 73.

120. *See* H.R. REP. NO. 115-1000, at 1.

121. *Id.* at 15.

122. Christine A. Fazio & Ethan I. Strell, *Abrupt Policy Change on Century-Old Migratory Bird Treaty Act*, CARTER LEDYARD & MILBURN LLP (Feb. 22, 2018), http://www.clm.com/publication.cfm?ID=5613; *see also* Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y Dep't of Interior et al., *supra* note 21, at 12.

123. Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 2.

124. *Id.* at 41.

125. Powell, *supra* note 113, at 47; Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 2 n.4.

126. Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 24.

127. *Id.* at 32 n.172.

> [A] 2001 Executive Order from President Clinton, which expanded the definition of "take" to include incidental take, was only part of a direction as to how agencies should focus their energies, not an attempt to expand the scope of the [Act] itself (nor could an executive order change the text of a Congressional law.)[128]

Further, the Jorjani Memorandum's rationale centers on the Fifth Circuit's decision in *United States v. CITGO Petroleum Corp.*, which the Thompkins Memorandum found was "technically inaccurate and substantively wrong."[129] As the Thompkins Memorandum explained, "the *CITGO* court . . . failed to recognize the distinction between the existence of a commonly understood meaning of a term, and the assertion that that meaning is exclusive of other possible meanings."[130] Under the Jorjani Memorandum,

> if a state pressure washes barn swallow nests off a bridge in order to prepare the structure for painting, this would constitute an affirmative act whose purpose it was to remove the nests, and consequently a permit would be required. However, if the intent was simply to paint the bridge and nests were accidentally destroyed incidental to that overall process, a permit would not be required.[131]

Thus, "[e]ven if there was a general intent to kill wildlife, [] liability would still depend on the specific facts of the situation."[132]

The Jorjani Memorandum cannot repeal the Act; however, it effectively strips federal agencies under the Department of the Interior from threatening or imposing criminal liability for activity that unintentionally or incidentally impacts migratory birds.[133] As a written opinion issued by the Solicitor for the Department of the Interior, the Jorjani Memorandum is "binding on all other offices and divisions within the Department of the

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128. Jason L. Cassidy, *Bye, Bye Birdie: Summary and Analysis of the Trump Administration's Recent Policy Change of the Migratory Bird Treaty Act*, RYLEY CARLOCK & APPLEWHITE (Jan. 29, 2018), http://www.rcalaw.com/bye-bye-birdie-summary-and-analysis-of-the-trump-administrations-recent-policy-change-of-the-migratory-bird-treaty-act.

129. Memorandum from Hilary C. Tompkins, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 26; Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 32 n.172; 801 F.3d 477.

130. Memorandum from Hilary C. Tompkins, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112 at 25.

131. Powell, *supra* note 113, at 47.

132. *Id.*

133. *See* Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 24.

Interior."[134] As a result, "[it] can only be withdrawn, overruled, or modified by the Solicitor, the Secretary of the Interior, or the Deputy Secretary."[135]

Although a district court later vacated the Jorjani Memorandum, finding it did not warrant any deference because it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[136] the Trump Administration circumvented these issues with the proposal of a federal regulation seeking to codify the Jorjani Memorandum.[137] Spearheaded by the Trump Administration's newly appointed director for the United States Fish and Wildlife Service, the proposed regulation argues the Jorjani Memorandum should be adopted as a matter of policy, even if its interpretations of the Act's provisions are wrong.[138] It calls for a limited interpretation of the Act "as a matter of law and policy," despite its concession that "some entities that currently employ mitigation measures or reduce or eliminate incidental migratory bird take would reduce or curtail these activities given the legal certainty provided by this proposed regulation."[139] Like the Jorjani Memorandum, the proposed regulation contradicts decades of agency practice "consistently interpret[ing] the [Act] to apply to incidentally take, as first expressly manifested in enforcement cases."[140]

The Trump Administration's actions establish a clear pattern to dismantle the protection of migratory birds in favor of energy and industrial companies—a gross divergence from the path of preservation the United States embarked on almost a century prior.[141] While the Biden Administration is expected to take office in 2021 and dismantle much of President Trump's environmentally unfriendly policies, the codification of the Jorjani Memorandum poses a threat to countless migratory birds until it is repealed.[142]

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134. Cassidy, *supra* note 128.

135. *Id.*

136. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 437 (S.D.N.Y. 2019).

137. *See* Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5903, 5923 (proposed Feb. 3, 2020) (to be codified at 50 C.F.R. pt. 10).

138. *Id.*

139. *Id.*

140. *Id.* at 5915; Memorandum from Hilary C. Tompkins, U.S. Dep't of Interior, to Dir., Fish & Wildlife Serv., *supra* note 112, at 12.

141. *See Bird Conservation Timeline*, *supra* note 33; Andy McGlashen, *What Biden's Presidential Win Means for Birds and the Environment*, AUDUBON: NEWS (Nov. 9, 2020), http://www.audubon.org/news/what-bidens-presidential-win-means-birds-and-environment.

142. McGlashen, *supra* note 141.

V. EVERY FEATHER LOST

In their regular course of business, companies are responsible for even more deaths per year than hunters or poachers.[143] In fact, industries "incidentally" kill as many as 1.1 billion birds per year.[144]

> [P]ower lines kill up to 175 million birds per year in the [United States], communications towers kill up to 50 million, oil waste pits trap up to one million and though data on gas flare-related deaths has not been reliably tracked, at least one incident in Canada attracted and roasted 7,500 birds in 2013.[145]

Most of these deaths are preventable through inexpensive infrastructure changes.[146] For example, power lines that are placed far enough apart would help save about 900,000 to 11.6 million deaths per year for long-winged birds that electrocute themselves by touching two lines at the same time.[147] Covering oil pits would help save about 500,000 to 1 million migratory birds per year.[148] Placing wind turbines away from common migratory bird routes could help save about 140,000 to 500,000 birds per year.[149]

Faced with the threat of criminal prosecutions, several industries worked in conjunction with the United States Fish and Wildlife Service to create environmentally friendly protections.[150] Fishing companies started attaching weights to their fishing lines to prevent the dragging of various albatross, petrel, and other seabirds that would often get caught in the nets.[151] Communication towers switched from red lights to flashing lights to prevent airplane and songbird collisions.[152] And, oil and gas companies stored waste

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143. *See* Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to the Sec'y, Dep't of Interior et al., *supra* note 21, at 13; Leslie, *supra* note 21.

144. Leslie, *supra* note 21.

145. Jason Daley, *Five Things to Know About the Recently Changed Migratory Bird Act*, SMITHSONIAN MAG. (Dec. 27, 2017), http://www.smithsonianmag.com/smart-news/five-things-know-about-recently-changes-migratory-bird-act-180967646/.

146. Leslie, *supra* note 21.

147. *Id.*

148. *Id.*

149. *Id.*

150. Elizabeth Shogren, *Trump Administration Rolls Back Protections for Migratory Birds, Drawing Bipartisan Condemnation*, GRIST (Jan. 26, 2018), http://grist.org/article/trump-administration-rolls-back-protections-for-migratory-birds-drawing-bipartisan-condemnation/.

151. *Id.*

152. *Id.*

in closed tanks or place nets over its waste pits to prevent thousands of birds from being trapped in deadly, toxic waste.[153]

Notwithstanding, many of these companies still failed to take the necessary steps to ensure the protection of these birds.[154] Recent years have seen some of the most disastrous and negligent environmental catastrophes, such as the Exxon Valdez oil spill in 1989—which caused almost 36,000 bird deaths, and the Deepwater Horizon oil spill of 2010—which killed another 102,000 birds.[155] Under the Act's penalties, the oil companies responsible for these deaths paid a total of almost $225 million in fines.[156]

Stripped of their ability to criminally penalize these companies for the billions of deaths they cause per year, agencies are now left with only the ability to encourage companies to change their infrastructures to accommodate these quickly dwindling bird populations.[157] Without the ability to prosecute companies whose operations "unintentionally" result in bird deaths, the same emaciation of bird population numbers that incited the Treaty in 1918 will quickly return.[158]

VI. CONCLUSION

For almost a century, our country has taken a firm stance on the protection of wild bird life.[159] In response to the devastating drop in bird populations in the early 1900s, Congress began initiating a series of laws that eventually gave way to the Act.[160] With hundreds of classified bird species protected, the Act was the final, and most monumental, step in a series of legislation enacted to prevent the further destruction of bird and wildlife population numbers.[161]

Since the 1970s, this Act has been used to prosecute industries for indirectly killing these animals.[162] However, barring major environmental and wildlife catastrophes, the United States Fish and Wildlife industry has

153. *Id.*

154. *Id.* "Duke Energy and PacifiCorp Energy were both prosecuted during the Obama administration for failing to take steps to protect birds at their Wyoming wind farms, despite the U.S. Fish and Wildlife Service's efforts to get them to do so." Shogren, *supra* note 150.

155. Leslie, *supra* note 21.

156. *Id.*

157. Cassidy, *supra* note 128.

158. *Id.*

159. *See* discussion *supra* Parts II–IV; *Bird Conservation Timeline*, *supra* note 33.

160. *See* discussion *supra* Part I; *Bird Conservation Timeline*, *supra* note 33.

161. 16 U.S.C. §§ 703–712; *see also* discussion *supra* Part I; Barbee, *supra* note 3, at 95.

162. Greenspan, *supra* note 14.

only used the threat of criminal prosecutions in response to companies that are unwilling, and able, to adjust their infrastructure to include wildlife-friendly practices.[163]

Contrary to a century of precedent, the Trump Administration began an overhaul of these environmental protections.[164] With the release of the Jorjani Memorandum, agencies under the Department of the Interior have been stripped of their ability to threaten criminal prosecutions under the Act.[165] The results of this Memorandum are potentially long-reaching, especially when considering the little recourse available to repeal or amend it.[166] While the Memorandum does not explicitly repeal the Act, it prevents agencies from threatening criminal prosecutions against stubborn industries that do not comply with wildlife-friendly practices and regulations.[167] Even industries that are responsible for catastrophic events that decimate millions of birds per year cannot be criminally fined and penalized under the Jorjani interpretation of the "takings" clause of the Act.[168]

On a fast track to extinction, many of these bird species are now left defenseless against industry practices—which cause almost 1.1 billion indirect bird killings per year.[169] As the story of Icarus teaches, the unbridled abuse of newfound power is deadly.[170] Unlike young Icarus, however, President Trump's divergence from the established path threatens thousands of bird lives fleeing their current habitats.[171] Upon taking office, the Biden Administration should repeal the Jorjani Memorandum and return the United States to its path of conservation, lest we have to wait until every single feather has dropped.*

163. *See* Shogren, *supra* note 150.

164. *See* discussion *supra* Part V; Greenspan, *supra* note 14; McGlashen, *supra* note 141.

165. Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 1.

166. *Id.*; *see also* Cassidy, *supra* note 128.

167. *See* Memorandum from Daniel H. Jorjani, U.S. Dep't of Interior, to Sec'y, Dep't of Interior et al., *supra* note 21, at 1, 41.

168. *Id.*; *see also* Cassidy, *supra* note 128.

169. *See* Leslie, *supra* note 21.

170. HAMILTON, *supra* note 1, at 139–40.

171. *See id.* at 139.

GAME CHANGING LEGISLATION: NCAA FORCED TO REVISE NAME, IMAGE, AND LIKENESS COMPENSATION RULES

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I. INTRODUCTION

"[C]ollege sports are big business, and business is booming."[1] The National Collegiate Athletic Association ("NCAA") is the governing body for all college sports.[2] It "generates nearly three billion dollars [a] year in revenue," thanks mainly to massive television contracts, marketing fees, and, most of all, the athletes who play for the college teams.[3] Its purpose is to fairly govern college athletics while protecting student-athletes from dangerous, exploitative practices comparable to the big leagues.[4] To achieve this purpose, the NCAA has distinguished college athletics from professional sports by way of its amateur model; with it, sports remain integral to the college experience while student-athletes remain "an integral part of the student body."[5]

"[A]mateurism is characterized by nostalgia for a time" when athletes played purely for the love of the game and is a significant part of the NCAA's rules and bylaws.[6] Founders of the NCAA sought to highlight college sports as a way to access higher education.[7] They enforce this model by labeling players *amateurs*, restricting them from receiving compensation for their performances.[8] Thus, any student-athlete paid in exchange for athletic participation is disqualified from playing at the collegiate level.[9] Proponents of amateurism argue that "compensation for play would tarnish

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1. Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 17 (2010).

2. *Id.* at 22.

3. *Id.* at 17; Brakkton Booker, *College Athletes Are Now Closer to Getting Paid After NCAA Board OKs Plan*, NPR (Apr. 29, 2020, 12:00 PM), http://www.npr.org/2020/04/29/847781624/college-players-are-now-closer-to-getting-paid-after-ncaa-board-oks-plan.

4. *History*, NCAA,http://web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history (last updated Nov. 8, 2010).

5. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 507–08 (2008); *see also* discussion *infra* Part II.

6. Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 559 (2009).

7. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 13 (2000).

8. *See* Fitt, *supra* note 6, at 559, 565.

9. Taylor Renk, *The Difference Between Collegiate and Professional Athletes*, CAMPUS: OP. (Jan. 31, 2019), http://alleghenycampus.com/17148/opinion/17148; *see also* discussion *infra* Part III.

the integrity of the game."[10] Critics contend the experience is more akin to "indentured servitude," given the long hours and work-like contracts many student-athletes perform under.[11] The notion that college athletics is "amateur" is a legal fiction that has sheltered the NCAA from adhering to a variety of laws and allowed it to avoid paying student-athletes—who lend their name.[12]

In recent years, the NCAA has come under immense pressure to drop the ruse and recognize that college sports promote anything but amateurism.[13] As recent as March 2020, Florida and California passed legislation overriding archaic NCAA bylaws—which previously restricted a student-athlete from profiting off their name, image, and likeness—"lifting the veil of amateurism in which the NCAA seeks to [conceal] itself."[14] It is of no surprise NCAA president, Mark Emmert, and other college sport stakeholders strongly oppose individual state laws that threaten the rules of profit.[15] "Given the collective power of those whose interests" the "amateur" model advances, it is no wonder it continues to endure.[16] "Whether players . . . should [receive compensation] is [a] seemingly [] age-old question and has been the subject of fierce debate" among student-athletes, coaches, universities, and state legislators.[17] After two FBI investigations into college

10. Will Katcher, *The Dilemma of Amateurism and College Athletics*, MASS. DAILY COLLEGIAN: SPORTS (Mar. 19, 2018), http://dailycollegian.com/2018/03/the-dilemma-of-amateurism-and-college-athletics/.

11. Darren Heitner, *National Letter of Indenture: Why College Athletes are Similar to Indentured Servants of Colonial Times*, FORBES (July 25, 2020, 8:52 AM), http://www.forbes.com/sites/darrenheitner/2012/07/25/national-letter-of-indenture-why-college-athletes-are-similar-to-indentured-servants-of-colonial-times/#547bd82b69d9; Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77, 79 (2013).

12. McCormick & McCormick, *supra* note 5, at 497.

13. *See Paying College Athletes: NCAA Takes First Step in Allowing Players to Cash In*, PITT. POST-GAZETTE (May 6, 2020, 4:53 AM), http://www.post-gazette.com/opinion/editorials/2020/05/06/Paying-college-athletes-NCAA-takes-first-step-in-allowing-players-to-cash-in/stories/202005050014.

14. McCormick & McCormick, *supra* note 5, at 498; Michael Smith, *Biggest Turning Point: California's NIL Law*, SPORTS BUS. J. (Dec. 16, 2019), http://www.sportsbusinessdaily.com/Journal/Issues/2019/12/16/Year-End-Awards/Turning-Point.aspx.; Adam Wells, *Florida to Be 1st State with NIL Rights for NCAA Athletes to Profit Off Likeness*, BLEACHER REP.: CFB (June 12, 2020), http://bleacherreport.com/articles/2895927-florida-to-be-1st-state-with-nil-rights-for-ncaa-athletes-to-profit-off-likeness.

15. *See H.R. 1804: Student-Athlete Equity Act*, GOVTRACK.US, http://www.govtrack.us/congress/bills/116/hr1804/summary (last updated June 5, 2019); discussion *infra* Part V.

16. McCormick & McCormick, *supra* note 5, at 497.

17. Weston, *supra* note 11, at 78–79.

basketball corruption, where high-profile programs were vulnerable to charges of bribery, in late April, the NCAA finally took steps toward revising its current pay-for-play scheme.[18]

As an industry that churns out nearly sixty billion dollars a year and affords its coaches multimillion-dollar salaries, the proliferation of college sports is decidedly no longer an amateur enterprise.[19] Almost every party involved in college athletics—other than student-athletes—relish a financial gain.[20] This article examines the implications of state legislation on the NCAA's amateurism model, allowing student-athletes to profit from their name, image, and likeness.[21] Part II supplies a history of the NCAA's formation, how the need for a regulatory body in intercollegiate athletics has ultimately given the NCAA a stronghold over the college sports market.[22] Part III chronicles a string of violations by member institutions and former student-athletes who threatened the NCAA's pay-for-play model.[23] Part IV considers the growth of commercialism in college sports, while Part V discusses the practical impact state law has on the NCAA's compensation rules.[24]

II. FORMATION AND REGULATORY AUTHORITY OF THE NCAA

Intercollegiate sports began in the second half of the nineteenth century.[25] At the time, academics were concerned with whether college sports were compatible with colleges' and universities' educational values.[26] Traditionally, athletic programs were student-run and operated without any clear safety guidelines.[27] Eventually, the cruel nature of early-day sports resulted in numerous injuries and fatalities—college football was initially played without helmets or pads in an almost "anything goes" fashion—prompting colleges and universities to suspend athletics.[28] Safety was not

18. *Paying College Athletes: NCAA Takes First Step in Allowing Players to Cash In*, *supra* note 13; *see also* discussion *infra* Part III.

19. McCormick & McCormick, *supra* note 5, at 496–97; *see also* discussion *infra* Part IV.

20. McCormick & McCormick, *supra* note 5, at 509.

21. *See* discussion *infra* Parts V, VI.

22. *See* discussion *infra* Part II.

23. *See* discussion *infra* Part III.

24. *See* discussion *infra* Parts IV, V.

25. *See* Robert Litan, *The NCAA's 'Amateurism' Rules: What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), http://www.milkenreview.org/articles/the-ncaas-amateurism-rules.

26. Smith, *supra* note 7, at 11.

27. *History*, *supra* note 4; *see also* Litan, *supra* note 25.

28. *See History*, *supra* note 4; Litan, *supra* note 25.

the only concern.[29] Leading university presidents voiced their fears that the commercialization of college sports was out of control.[30] The then-president of Harvard stated, "[C]ollege athletics had turned amateur contests into major commercial spectacles."[31] Massachusetts Institute of Technology ("MIT") President felt the academic pillars of higher education were crumbling.[32] He opined that if the growth of college sports continued at the rate it was headed, it would not be long before it was a question of "whether the letters B.A. [stood] more for Bachelor of Arts or Bachelor of Athletics."[33]

By the early twentieth century, the steady demand among programs called for a national organization to regulate the game and ensure it remained compatible with collegiate values.[34] In response, President Roosevelt summoned leaders of athletic programs to the White House to consider adopting rules to regulate college sports.[35] In 1905, sixty-two academic institutions founded the NCAA (called the Intercollegiate Athletic Association, initially) to address the industry's difficulties.[36] From the outset, the NCAA established amateurism as the core function of college sports.[37] Amateur athletes were supposed to play purely for the love of the game and focus on developing mental, physical, moral, and social skills.[38] Its founders emphasized that college sports were a channel to higher education, which was of principal priority.[39] As interest in college sports grew, so too did the NCAA's regulating authority.[40]

"In 1948, the NCAA enacted [a] . . . 'Sanity Code,' [a committee] . . . designed to 'alleviate the proliferation of exploitative practices in the recruitment of student-athletes.'"[41] "[T]he 'Sanity Code' [sought to provide] a set of rules that prohibited schools from giving [student]-athletes financial aid . . . based on athletic ability, [which was] . . . not available to ordinary

29. *See* Smith, *supra* note 7, at 11.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Smith, *supra* note 7, at 12.
35. *See id.*
36. *Id.*
37. Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 865 (2016).
38. McCormick & McCormick, *supra* note 5, at 508.
39. *See* Sheetz, *supra* note 37, at 865.
40. Smith, *supra* note 7, at 14.
41. *Id.*

students."[42] However, the Sanity Code was not successful in enforcing rules or investigating violations.[43] The only penalty it could impose was expulsion—except member schools would vote against expelling a school—rendering the committee ineffective and its rules impotent.[44] The Sanity Code was dismantled and replaced by the Committee on Infractions, which was given much broader authority.[45] As more colleges and universities joined the ranks and formed athletic programs, the NCAA created more regulatory rules, expanding its governing power.[46] In time, popular schools challenged the NCAA's regulatory structure.[47] In *NCAA v. Board of Regents of University of Oklahoma*[48] ("Board of Regents"), major football-playing schools banded together against the NCAA, alleging it violated antitrust laws when it monopolized college sports television by restricting the number of televised games.[49] While the NCAA's founding principle is to regulate college sports, too much regulatory authority has proven undesirable.[50]

A. *The Enterprise Strikes Back:* Board of Regents

"Litigation aimed at providing [student]-athletes with pay or . . . [other] benefits . . . has relied on various causes of action" over the decades, most notably, antitrust laws.[51] After World War II, the NCAA faced a crossroads.[52] Radio was no longer the only medium to reach fans, and television became a significant part of the American entertainment model.[53] The advent of television elevated college sports and, with it, its commercial value.[54] As football games were multiplying, member schools grew

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42. O'Bannon v. NCAA, 802 F.3d 1049, 1054 (9th Cir. 2015); *see also* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 85 OR. L. REV. 329, 333 (2007).

43. Smith, *supra* note 7, at 14–15.

44. *Id.* at 15.

45. *Id.*

46. *Id.* at 15–16.

47. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 127 n.2 (1984) (White, J., dissenting) (explaining that the College Football Association brought litigation against the NCAA for antitrust violation, warning the CFA's own developments may have antitrust violations of its own); Smith, *supra* note 7, at 19.

48. 468 U.S. 85 (1984).

49. *Id.* at 88, 112.

50. *See* Smith, *supra* note 7, at 16.

51. Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Name, Image, and Likeness and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 267 (2020).

52. *See* Smith, *supra* note 7, at 14; *History*, *supra* note 4.

53. *See Bd. of Regents*, 468 U.S. at 90; Smith, *supra* note 7, at 14.

54. Smith, *supra* note 7, at 14, 19.

concerned about how television would affect in-person attendance.[55] A decrease in attendance meant a reduction in ticket sales and, ultimately, a drop in revenue.[56] In response, the NCAA commissioned a study by the National Opinion Research Center ("NORC") to determine the effect televised games had on live audiences.[57] The NORC studies indicated that television coverage significantly decreased in-person attendance.[58]

To address these concerns, the NCAA developed a program of controls.[59] These controls included provisions that television exposure would be limited to one televised football game every Saturday.[60] No football team would appear more than twice per season, sponsors would select the teams for broadcast, and any revenue earned would be divided among the selected schools and the NCAA.[61] These controls were first approved by a vote of all NCAA members, including those who did not have football programs.[62] The NCAA then commissioned a Television Committee, which periodically circulated questionnaires to obtain suggestions from members about the current broadcast regulations.[63] Based on their responses, a plan of action was developed.[64] This plan helped form the basis of negotiation with the various telecast networks.[65] Typically, television contracts were between one of the two major networks at any given time, and each deal was for a period of one to two years.[66] In 1977, things changed when the NCAA contracted with American Broadcasting Company ("ABC") for an exclusive four-year contract to cover the 1978 to 1981 college football seasons.[67]

Out of dissatisfaction with the different aspects of the ABC contract and regulatory scheme, several major college football conferences and independent schools banded together to form the College Football Association ("CFA").[68] CFA members resented that schools without football programs had an equal vote on broadcasting controls governing televised

55. *See id.*; *History*, *supra* note 4.
56. *See* Smith, *supra* note 7, at 19.
57. *Bd. of Regents*, 468 U.S. at 90.
58. *Id.*
59. *See id.*
60. *See id.*
61. *See id.* at 94.
62. *See Bd. of Regents*, 468 U.S. at 90.
63. *Id.*
64. *Id.* at 90–91.
65. *Id.* at 90.
66. *Id.* at 91, 94.
67. *Bd. of Regents*, 468 U.S. at 91.
68. *See id.* at 89.

football games.[69] Thus, the CFA's founding purpose was to lobby and promote the interest of major football-playing schools.[70] This faction intended to give a louder voice to those schools, especially during the network negotiation process.[71] Eventually, the CFA took it upon itself to explore possible contracts of its own with television networks for the broadcasting rights to football games.[72] Soon after, the CFA received an offer from the National Broadcasting Company ("NBC") despite the NCAA's ongoing four-year contract with ABC.[73] In response, the NCAA issued an official statement on the matter, affirming that member institutions would be subject to the NCAA's Football Television Plan despite committing to other contracts, indicating that the NCAA held the right to act as the exclusive vehicle for marketing football games.[74]

Nevertheless, the CFA did not yield; instead, it moved forward with negotiating a separate television contract.[75] On August 8, 1981, the CFA negotiated with NBC the television rights of member schools for the 1982 through 1985 football seasons.[76] While the CFA-NBC contract had much of the same provisions found in NCAA-network agreements, the NBC contract was more lucrative and team appearances were more frequent.[77] The new agreement, ultimately, was more desirable.[78] It seemed the NCAA was facing a mutiny, prompting its leaders to speak out.[79] Then-president James Frank made it clear that if CFA members chose to be bound by the NBC contract, they would violate NCAA legislation and face penalties against their football programs.[80] These threats ultimately deterred the CFA from committing to NBC.[81]

1. Rule of Reason

In response to threats of retaliation, the University of Oklahoma and the University of Georgia brought suit against the NCAA, alleging the

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69. *See id.*
70. *Id.* at 89.
71. *Id.* at 94.
72. *Bd. of Regents*, 468 U.S. at 94–95.
73. *Id.* at 95.
74. *Id.*
75. *See id.*
76. *Id.*; Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1286 (W.D. Okla. 1982), *aff'd*, 468 U.S. 85 (1984).
77. *Bd. of Regents*, 468 U.S. at 95.
78. *See id.*
79. *See id.*
80. *Id.*
81. *Id.*

organization violated the Sherman Antitrust Act through its monopolistic control over televised college football.[82] Antitrust laws are creatures of case law and are not easy to apply to college sports but have proven useful for dismantling the NCAA's amateurism rules.[83] "[T]he Sherman Antitrust Act is a federal antitrust statute [that] prohibits [conduct] that restrict[s] interstate commerce and competition."[84] The purpose of the Act is to ensure that no company has a monopoly over an entire market, prohibiting "contracts, combinations, or conspiracies" which place an unreasonable restraint on trade.[85] If a court finds a particular activity is "commercial," the next question is whether the rule governing the activity unreasonably curbs trade.[86]

For the NCAA, a court would need to apply a "rule of reason analysis to determine whether the rule [in question was] unreasonably anticompetitive."[87] The rule of reason "involves three burden-shifting steps."[88] "First, the plaintiff has the burden of proving . . . the restraint creates anti-competitive effects."[89] If the plaintiff can successfully argue this point, the second step is for the defendant to prove the rule fosters procompetitive benefits from the restraint.[90] If the defendant has sufficiently pled, "the burden shifts back to the plaintiff . . . to show that the challenged conduct is not reasonably necessary to achieve" the defendant's alleged benefits or that there are available, less restrictive alternatives that are just as effective and economically sufficient.[91] The courts are charged with weighing the legitimacy of the pro and anticompetitive effects, and must determine whether the virtue of the conduct justifies its adverse impact.[92]

2. NCAA Violates Antitrust

The Supreme Court in *Board of Regents* issued its first and only antitrust decision relating to college sports in 1984.[93] In applying the rule of

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82. *Bd. of Regents*, 468 U.S. at 88.
83. Meyer & Zimbalist, *supra* note 51, at 268.
84. *Id.* at 268 n.93; *see also* 15 U.S.C. §§ 1–38.
85. *See* Meyer & Zimbalist, *supra* note 51, at 268; Carrabis, *supra* note 1, at 26.
86. Meyer & Zimbalist, *supra* note 51, at 268.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 268–69.
91. Meyer & Zimbalist, *supra* note 51, at 269.
92. *Id.*
93. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

reason analysis, the Court found that the NCAA's control on how many football games a college could broadcast, and the price for such broadcasts, were an illegal restraint on trade and illustrative of the type of conduct the Sherman Act was intended to prevent.[94] While member schools mutually accept the vast majority of NCAA policies to preserve competition, this particular NCAA policy was not mutually agreed upon.[95] The NCAA argued that its television plan, like its other regulations, was procompetitive with a seemingly anticompetitive effect.[96] The problem was that the restrictions on the number of televised football games created an exclusive market with limited buyers.[97] Based on the laws of supply and demand, the NCAA could essentially ask for any amount of money to broadcast football games because the product it sells—college sports—is only available through its organization.[98] The fact that no other entity was permitted to offer this product drove up the price, as broadcasting companies competed for the right to televise the games.[99] In a nutshell, the NCAA was price-fixing without a seemingly good reason for doing so.[100] The core of the analysis came to whether the restraints (fixed prices) were unreasonable.[101] The NCAA argued these restraints were reasonable because they sought to promote a "competitive balance" among its member schools, yet not all member schools "competed" with each other, because not all schools had football programs.[102] The schools with football programs were bound by the collective decision of the non-football member schools.[103] In essence, the NCAA imposed restrictions on a source of revenue, more critical to some colleges than to others, without evidence that those restrictions promoted any greater balance than its other policies.[104] The Court held that there were more effective policies in place that promoted a "competitive balance" to maintain amateurism in college sports than the television contract rule.[105]

Ultimately, the Court affirmed that the NCAA restrictions on television contracts violated the Sherman Antitrust Act as an unreasonable restraint on competition.[106] While the ruling was straightforward, the Court

94. *Id.* at 107–08.
95. *Id.* at 99.
96. *Id.* at 104.
97. *See id.* at 106, 111; Meyer & Zimbalist, *supra* note 51, at 269.
98. *See Bd. of Regents*, 468 U.S. at 113.
99. *See id.*
100. *See id.* at 126 (White, J., dissenting).
101. *See id.* at 98.
102. *Id.* at 96, 118.
103. *See Bd. of Regents*, 468 U.S. at 128 (White, J., dissenting).
104. *See id.*
105. *See id.* at 119–20.
106. *Id.* at 120.

added that the NCAA plays a critical role in maintaining the tradition of amateurism in college sports and that the organization should be afforded "ample latitude" to continue in that role—feeding the NCAA a litany of arguments that it has since relied on to justify its refusal to pay athletes.[107] Justice Stevens further stated that, despite this case's incongruence with antitrust, the policies enacted to maintain the integrity of the student-athlete "adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."[108] Although the Court's focus was on the antitrust violations, Justice Stevens went further by stating "[i]n order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid, must be required to attend class, and the like."[109]

While the battle for television rights has settled, the war in antitrust endures.[110] Because the Court never addressed the question whether pay-for-play rules would be a violation of antitrust under the Sherman Act—because payments to athletes was not at issue, rather the legitimacy of the television contracts—the NCAA continued to prohibit student-athletes from receiving compensation for the use of their name, image, and likeness ("NIL").[111]

B. *NIL and Void: Name, Image, and Likeness Litigation*

Before *Board of Regents*, "very few antitrust claims had been asserted against the NCAA."[112] In those cases, the NCAA argued that even if its rules are anticompetitive, they were "necessary to preserve amateurism . . . [and] protect the uniqueness of college sports," its product, and maintain the "demand for [its] brand."[113] Courts tend to be dismissive of antitrust challenges to NCAA regulations and often focus on the organization's alleged "noncommercial objectives."[114] Federal courts hesitate to interfere with the NCAA's portrayal of "a legitimate effort to promote amateurism

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107. *See id.*; Meyer & Zimbalist, *supra* note 51, at 270.

108. *See Bd. of Regents*, 468 U.S. at 120.

109. *Id.* at 102; Weston, *supra* note 11, at 80.

110. *See* Litan, *supra* note 25; *Bd. Of Regents*, 468 U.S. at 120; Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit From Endorsements Next Summer*, ESPN (June 12, 2020), http://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer.

111. *Bd. of Regents*, 468 U.S. at 88; *cf.* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA's prohibitions against pay for name, image, and likeness was a violation of the Sherman Antitrust Act); Meyer & Zimbalist, *supra* note 51, at 270.

112. Lazaroff, *supra* note 42, at 337.

113. Meyer & Zimbalist, *supra* note 51, at 267.

114. Carrabis, *supra* note 1, at 24.

and fair competition in [college] athletics."[115] But some objectives cannot be ignored.[116] Whether the NCAA's rules prohibiting student-athlete compensation violated the Sherman Act was the center of the Ninth Circuit's decision in *O'Bannon v. National Collegiate Athletic Ass'n* ("O'Bannon").[117]

1. The NCAA's Digital Duplicates

In 2008, Ed O'Bannon, a former All-American basketball star at UCLA, discovered he was featured in a college basketball video game.[118] To his shock, when a friend's son played the video game for him, O'Bannon saw an avatar of himself—a virtual athlete who also played for UCLA, who wore the same jersey number, and who was recognizably Ed O'Bannon.[119] Nearly a year later, O'Bannon filed suit against the NCAA for selling his likeness to video game developer Electronic Arts ("EA").[120] The core of O'Bannon's argument was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their name, image, and likeness, were an illegal restraint of trade under the Sherman Act.[121]

"Around the same time, Sam Keller, the former starting quarterback for the Arizona State University," brought a class-action lawsuit against the NCAA and EA games.[122] In the 2005 edition of the NCAA Football video game, the virtual starting quarterback from Arizona State wore a number nine jersey—the same as Keller.[123] The avatar was the same height, weight, and skin tone; he featured the same hairstyle cut and color; he was from the same home state as Keller, sported the same facial features, and was, coincidentally, in the same year in school.[124] Keller alleged that EA Sports had impermissibly used student-athletes' image and likeness in video games,

115. Lazaroff, *supra* note 42, at 337.
116. *See O'Bannon*, 802 F.3d at 1064–65.
117. 802 F.3d 1049 (9th Cir. 2015).
118. *Id.* at 1055.
119. *Id.*
120. *See id.*; Patrick Vint, *Ed O'Bannon vs. the NCAA: Explaining the Major Decision Coming June 20*, SB NATION (May 6, 2013, 10:00 AM), http://www.sbnation.com/college-football/2013/5/6/4291666/ed-obannon-ncaa-lawsuit-next-class-certification; *Keller Sues EA Sports Over Images*, ESPN: NCAAF (May 8, 2009), http://www.espn.com/college-football/news/story?id=4151071.
121. *O'Bannon*, 802 F.3d at 1055.
122. *Id.*
123. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1272 (9th Cir. 2013) (holding EA video game developer's use of the likenesses of college athletes was not protected under the First Amendment and thus former athletes right of publicity claims were not barred by California's anti-SLAPP statute).
124. *Id.*

and that the NCAA had wrongfully, some would argue willfully, turned a blind eye to EA's digital duplicates.[125] The principal complaint was that EA violated the rights of publicity under California law.[126] The two cases were merged and consolidated during pre-trial proceedings.[127] The issue brought under the Sherman Act "was whether the agreement to prevent such payments to athletes for their [name, image, and likeness] was an unreasonable restraint of trade."[128]

The "NCAA bylaws [explicitly] prohibit[ed] the use of . . . names and likenesses of athletes for commercial purposes."[129] The NCAA defended its contract with EA Sports, claiming, "[o]ur agreement with EA Sports clearly prohibits the use of names and pictures of current student-athletes in their electronic games . . . [w]e are confident that no such use has occurred."[130] Nevertheless, upon review of the video game, sources were struck by the uncanny similarities.[131] "Of the 126 [digital] players surveyed, 124 play[ed] the same position as the[ir] real-life [counterparts.]"[132] One-hundred and twenty-two players had an identical height to what was listed on real-life rosters.[133] Only eighty digital players had an identical weight, but most were within a ten-pound variance.[134] All 126 video game characters had the same home state as corresponding real-life players, though not the same hometown.[135] EA went so far as to match the player's skin tones, hair color, and hairstyle.[136] To further ensure that the digital players matched their living, breathing counterparts, EA sent detailed questionnaires to the NCAA team equipment managers to recreate a particular player's idiosyncratic aesthetic.[137] The only meaningful details that EA left out were

125. *O'Bannon*, 802 F.3d at 1055.

126. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d at 1272.

127. *O'Bannon*, 802 F.3d at 1055.

128. *Id.* at 1055–56; Meyer & Zimbalist, *supra* note 51, at 271.

129. *Keller Sues EA Sports Over Images*, *supra* note 120.

130. *Id.*

131. Patrick Vint, *126 Top NCAA Football 14 Players Nearly Match Their Real-Life Counterparts*, SB NATION (June 20, 2013, 11:21 AM), http://www.sbnation.com/college-football/2013/6/20/4433024/ea-sports-ed-obannon-ncaa-football-14-players.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Plaintiff-Appellees' Opposition Brief in Response to Nat'l Collegiate Athletic Ass'n Opening Appellate Brief at 15 n.6, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601) [hereinafter Brief for Appellee].

137. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271 (9th Cir. 2013).

the real-life names on the jerseys.[138] However, users were permitted to upload team rosters so that a real-life player's name could attach to his recognizable digital avatar.[139] Sam Keller's attorney expressed his concern, "given that the NCAA says you can't profit from your likeness . . . [then] they do the wink and the nod when EA Sports presents them with the game, which has the likeness of the player."[140]

Admittedly, EA Sports' video games are among its most lucrative product lines.[141] EA has produced successful games such as Madden National Football League ("NFL") Football, Fédération Internationale de Football Association ("FIFA") Soccer, and even has certain licensing rights to Harry Potter.[142] The success of the Madden franchise comes down to consumer demand.[143] The realistic and life-like simulations allow EA Sports to "capture the nuances" of major sporting events "to the fullest extent technology allows."[144] By creating a vividly authentic experience, companies can differentiate sports simulations in the video game market.[145] However, to achieve heightened realism, EA Sports "negotiates with the NFL and [National Basketball Association ("NBA")] players' unions for the right to use their members' [names, images, and likeness]" in their video games.[146] Perhaps the most considerable difference between college and professional sports is where the money for the exclusive rights to market and manufacture these video games goes.[147] EA Sports reportedly pays the NFL and its Player Association nearly fifty million dollars to be the exclusive video game licensee.[148] The company pays an additional two million dollars to use John Madden's name.[149] Presumably, EA Sports held a contract with

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138. *Id.*

139. *Id.*

140. *Keller Sues EA Sports Over Images*, *supra* note 120.

141. *See* John Gaudiosi, *Madden: The $4 Billion Video Game Franchise*, CNN: BUS. (Sept. 5, 2013, 11:51 AM), http://money.cnn.com/2013/09/05/technology/innovation/madden-25/index.html.

142. Brief for Elec. Arts Inc. as Amicus Curiae Supporting the NFL Respondents at 1, 2, Am. Needles, Inc. v. NFL, 560 U.S. 183 (2010) (No. 08-661) [hereinafter Brief for Respondent]; Florentine Lefty, *How EA's FIFA Changed the Game*, TECH. & OPERATIONS MGMT.: MBA STUDENT PERSPS., http://digital.hbs.edu/platform-rctom/submission/how-eas-fifa-changed-the-game/ (last updated Nov. 17, 2016).

143. Brief for Respondent, *supra* note 142, at 2; *see also* Gaudiosi, *supra* note 141.

144. Brief for Respondent, *supra* note 142, at 2.

145. *Id.*

146. O'Bannon v. NCAA, 802 F.3d 1049, 1067 (9th Cir. 2015); *see also* Gaudiosi, *supra* note 141.

147. *O'Bannon*, 802 F.3d at 1055, 1069.

148. Gaudiosi, *supra* note 141.

149. *Id.*

the NCAA to create a college sports video game and paid for the right to do so.[150] Nevertheless, neither O'Bannon, Keller, or any other athlete featured in the video game saw a dime—not right away, at least.[151]

In 2005, EA Sports' representatives explained that their inability to use collegiate players' names, images, and likeness, to the extent legally permissible, was the "number one factor holding back NCAA video game growth."[152] At worst, the NCAA permitted EA Sports to make recognizable character avatars to circumvent having to compensate players or violate its internal rules; at best, it acquiesced.[153] The NCAA maintained that it did not permit EA Sports to create look-alike avatars but merely gave it the license to use stadiums, team names, and identifying trademarks.[154] The NCAA defended its position, pointing out that a real-life athlete's name did not automatically appear on a digital jersey.[155] Allowing EA Sports to use a player's image and likeness without compensation or notice would have been outright exploitation and a far cry from the NCAA's ad hoc beginnings to combat intercollegiate abuses.[156]

The NCAA settled claims against itself and EA Sports over the college-themed video games to the tune of about twenty million dollars.[157] It came as no surprise when the NCAA reported it would not be entering into a new contract with EA Sports, making "NCAA Football 2014" the last edition of the popular video game franchise.[158] The NCAA stated its participation in EA's college football video game is not in its best interest, hoping to foreclose the market for student-athletes to profit from the enterprise.[159]

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150. *See* Dan Lee Rogers, *Ninth Circuit Rules Against EA in Keller v. Electronic Arts*, L. OFF. DAN LEE ROGERS: WRITINGS & PUBS (Aug. 1, 2013), http://dlr-law.com/writings--pubs/countdown-the-5-most-influential-video-game-lawsuits-of-2012-4-of-5-keller-v-electronic-arts; Carrabis, *supra* note 1, at 22–23.

151. *See O'Bannon*, 802 F.3d at 1067, 1079; Rogers, *supra* note 150.

152. *O'Bannon*, 802 F.3d at 1067; *see also* Alex Kirshner, *Blame the NCAA, Not Ed O'Bannon*, BANNER SOC'Y (July 13, 2018, 8:00 AM), http://www.bannersociety.com/2019/8/15/20708592/ed-obannon-ncaa-football-video-games.

153. Rogers, *supra* note 150.

154. *Id.*

155. *Id.*; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014), *aff'd in part*, *rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

156. *See* McCormick & McCormick, *supra* note 5, at 508.

157. *NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA (June 9, 2014, 10:53 AM), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit.

158. *NCAA to End Deal with EA Sports*, ESPN: NCAAF (July 17, 2013), http://www.espn.com/college-football/story/_/id/9486048/ncaa-not-renewing-contract-ea-sports-video-games.

159. *See id.*

2. Less Restrictive Alternatives

In 2014, Judge Claudia Wilken handed down an opinion finding that NCAA's NIL rules were commercial—answering the threshold question—and that the NCAA's compensation rules were unlawful.[160] In applying the rule of reason analysis, Judge Wilken found that the prohibitions on compensation were an anticompetitive restraint of trade and, similar to *Board of Regents*, constituted a "price-fixing agreement."[161] This time, however, all member schools had agreed to abide by these rules.[162] To overcome its anticompetitive restraint, the NCAA provided a few justifications for its rules: that integrating athletics and academics served to increase the quality of an athlete's education and "amateurism played a 'limited' role in maximizing consumer demand."[163] However, Judge Wilken held that two less restrictive alternatives to fulfill the NCAA's twin goals existed, which include: increasing scholarships to include up to the full cost of attendance or equal payments of up to five thousand dollars a year to be held in a trust and later redeemed after an athlete graduates from college.[164]

3. Ninth Circuit Takes a Step Back

On appeal, the Ninth Circuit affirmed in part and reversed in part.[165] Judge Bybee explained, "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."[166] Judge Bybee explained that once the NCAA crossed that line, there would be no turning back and that college sports would mature to "minor league status."[167] However, the Ninth Circuit did agree with the lower court that the NCAA's amateurism rules are not automatically exempt from antitrust scrutiny.[168] The Ninth Circuit clarified that *Board of Regents* did not approve of amateurism "as categorically consistent with the Sherman [Antitrust] Act."[169]

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160. *O'Bannon*, 7 F. Supp. 3d at 963, 975; Meyer & Zimbalist, *supra* note 51, at 271–72.

161. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 105–06 (1984); Meyer & Zimbalist, *supra* note 51, at 271.

162. *See O'Bannon*, 7 F. Supp. 3d at 973.

163. *Id.* at 999, 1001; Meyer & Zimbalist, *supra* note 51, at 272.

164. *O'Bannon*, 7 F. Supp. 3d. at 1008.

165. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

166. *Id.* at 1078.

167. *Id.* at 1078–79.

168. *Id.* at 1053; *see also* Carrabis, *supra* note 1, at 25.

169. *O'Bannon*, 802 F.3d at 1063; *see also* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

Thus, the High Court's nod to amateurism, "though impressive-sounding," was merely dicta.[170]

Moreover, while dicta has its place in every analysis, courts are not bound by it.[171] Thus, the Ninth Circuit was not bound nor persuaded by the language of Justice Stevens in *Board of Regents*.[172] The Court held not every rule in which the NCAA "somehow relates to amateurism is automatically valid."[173] The Court essentially told the NCAA it could not hide behind its amateur model as a method of restricting trade.[174] Additionally, the NCAA tried to cut the NIL conversation short by announcing it was not renewing its contract with EA Sports during litigation.[175] It appeared that the organization would rather cut ties with EA and remove itself from the video game market entirely, rather than share the wealth in a foreseeably lucrative franchise with the players who, in essence, are the reason for its success.[176] The Ninth Circuit found that conduct unpersuasive "[g]iven the NCAA's previous, lengthy relationship with EA [Sports] . . . ."[177] The Court determined that, despite cutting ties with EA, the NCAA could work with another video game developer in the future and would once again need to address its restriction on the use of an athlete's name, image, and likeness.[178] As the Court put it, "[t]here is real money at issue here," and if the NCAA stepped aside, student-athletes could see some of it.[179] In affirming Judge Wilken, the Court suggested the NCAA either change its policy barring the use of NIL or stop enforcing it.[180]

Just when the Ninth Circuit seemed to rebuke the NCAA amateurism model—noting that compensation rules are not mere "eligibility" requirements but rather "substantive restrictions" on trade—it vacated the district court's proposed remedy allowing student-athletes to accept monetary compensation.[181] The Court found that money in a trust violated principles of amateurism as they were untethered to academics.[182] "*O'Bannon* . . . made it clear that NCAA [rules are] subject to anti-trust laws, and the judicial system will provide a remedy for athletes who are exploited

170. *O'Bannon*, 802 F.3d at 1063.
171. *See id.*
172. *Id.*; *see also Bd. of Regents*, 468 U.S. at 102.
173. *O'Bannon*, 802 F.3d at 1063.
174. *See id.*
175. *See id.* at 1057 n.7.
176. *See* Kirshner, *supra* note 152.
177. *O'Bannon*, 802 F.3d at 1067–68.
178. *See id.* at 1068.
179. *Id.* at 1065; *see also* Kirshner, *supra* note 152.
180. *O'Bannon*, 802 F.3d at 1068.
181. *Id.* at 1065, 1079.
182. *Id.* at 1076.

for profit by others," but not at the expense of obtaining "minor league status."[183]

III. ARTIFICIAL AMATEURISM: PENALTIES FOR PAY

Amateurism is problematic and at the heart of the NCAA's industry model.[184] Student-athletes agree to play for a college or university as part of their college experience and are expected to perform for the school in exchange for scholarships and, of course, the love of the game.[185] "The NCAA has extensive rules and penalties" attached to student eligibility, furthering its proclamation that "only an amateur student-athlete is eligible for intercollegiate athletics participation . . . ."[186] If a student-athlete is paid for playing, they are immediately disqualified from participating at the collegiate level.[187]

Plenty of athletes and coaches have been caught up in the pay-for-play scheme.[188] Arizona basketball coach Sean Miller reportedly offered "prized prospect" Deandre Ayton nearly ten thousand dollars a month to play for the Wildcats.[189] Running back Reggie Bush famously returned his Heisman Trophy after he accepted benefits to play for the University of Southern California ("USC").[190] Perhaps the most famous college basketball player to turn pro, Zion Williamson, allegedly received financial benefits to play men's basketball at Duke University.[191] Lastly, the University of Louisville was blemished by a scandal involving exotic dancers hired to

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183. *Id.* at 1079; Agota Peterfy & Kevin Carron, *Show Me the Money!: NCAA Considering Paying Student-Athletes*, 76 J. MO. B. 68, 97 (2020).

184. Weston, *supra* note 11, at 79–80; Katcher, *supra* note 10.

185. *See* Fitt, *supra* note 6, at 559; Weston, *supra* note 11, at 79, 84.

186. Weston, *supra* note 11, at 79–80.

187. Renk, *supra* note 9.

188. Katcher, *supra* note 10; *see also* Alec Nathan, *Report: Sean Miller Discussed Paying Deandre Ayton $100K to Commit to Arizona*, BLEACHER REP. (Feb. 23, 2018), http://bleacherreport.com/articles/2761235-report-sean-miller-discussed-paying-deandre-ayton-100k-to-commit-to-arizona; Tom Goldman, *Reggie Bush to Give Up Heisman Trophy*, NPR (Sept. 14, 2010, 5:25 PM), http://www.npr.org/templates/story/story.php?storyId=129865279; Evan Kolin, *Former Marketing Agent Alleges Zion Williamson Received Benefits to Commit to Duke Men's Basketball*, CHRONICLE (May 10, 2020, 3:47 PM), http://www.dukechronicle.com/article/2020/05/duke-basketball-zion-williamson-marketing-allegations; Colin Dwyer, *Louisville Must Vacate its 2013 National Title After NCAA Upholds Ruling*, NPR (Feb. 20, 2018, 2:09 PM), http://www.npr.org/sections/thetwo-way/2018/02/20/587219151/louisville-must-vacate-its-2013-national-title-after-ncaa-upholds-ruling.

189. *See* Nathan, *supra* note 188.

190. Goldman, *supra* note 188.

191. Kolin, *supra* note 188.

persuade recruits.[192] While unethical conduct should be punished, the "illegal" payouts these players received are dwarfed by the money they earned from their respective institutions.[193] Additionally, the penalties attributed to athletes whose coaches step out of line with NCAA rules punish the entire team; while coaches continue making million-dollar salaries, athletes walk away with no money, no honors, and little to show for their years of committed play.[194]

A. *Heisman History*

Notably, the allegation that Reggie Bush and his family received money in exchange for playing for USC has been vetted.[195] One of the marketing agents involved in the scandal, Lloyd Lake, sued Bush to recoup three hundred thousand dollars in cash and gifts.[196] "The NCAA cited USC for lack of institutional control" following a four-year investigation.[197] Its report mentioned numerous improper benefits given to Bush and former basketball player O.J. Mayo.[198] "[USC paid] a hefty price, as the NCAA handed down [its] toughest [sanctions] since levying Southern Methodist [University] with the 'death penalty' in 1986."[199] The NCAA concluded that Reggie Bush could not identify as a student-athlete beginning in December 2004 and could not have qualified as an amateur to play college football.[200] As a result, USC was placed on probation for four years; its "football program . . . given a two-year postseason ban and a loss of [thirty] total scholarships over the 2011, 2012, and 2013 seasons."[201] USC football was forced to vacate victories from the 2004–2005 season, during which Reggie

192. Dwyer, *supra* note 188.
193. *See id.*
194. *See id.*
195. Goldman, *supra* note 188.
196. *Id.*
197. *Id.*; *NCAA Delivers Postseason Football Ban*, ESPN (June 11, 2010, 3:03 AM), http://www.espn.com/los-angeles/ncf/news/story?id=5272615 [hereinafter *Postseason Ban*].
198. Goldman, *supra* note 188.
199. Nakia Hogan, *Reggie Bush Investigation Results in Major Sanctions for Southern Cal*, NOLA.COM (June 25, 2019, 3:05 PM), http://www.nola.com/sports/saints/article_433465bb-41bc-5257-915e-c6ff20c2e0c1.html; Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), http://time.com/3720498/ncaa-smu-death-penalty/ (stating that "[t]he death penalty, part of the 'repeat violators' rule in official NCAA parlance, wiped out SMU's entire 1987 season and forced the Mustangs to cancel their 1988 campaign as well").
200. *Postseason Ban*, *supra* note 197; *see also* Goldman, *supra* note 188.
201. Hogan, *supra* note 199.

Bush played.[202] And as part of its punishment, the NCAA ordered USC to disassociate itself from Bush.[203] While USC suffered for the impropriety, Reggie Bush suffered a loss too.[204] In 2005, he was on top of the world, rushing over 1700 yards, scoring 18 touchdowns and helping the Trojans reach the national championship against the number two team in the country, the University of Texas.[205] When the time came for the Heisman award, Bush won by a landslide as the top player of the 2005 college football season.[206] "He received 784 first-place votes—the third-most [in Heisman history] . . . ."[207] However, one of the guidelines given to Heisman Trophy voters is that a player must comply with the NCAA rules.[208] Bush was ineligible for the 2005 season because he was no longer an amateur athlete, due to accepting improper benefits from sports agents.[209] Thus, he was technically barred from receiving the Heisman award.[210] While it was unclear whether the Heisman Trophy Trust was seeking to take away the honor, in 2010, Bush decided to return the award before he could be stripped of it.[211] It was the first time in college football history that a recipient returned its top award.[212]

B. *Tainted Reputations*

The University of Louisville was blemished by a scandal involving exotic dancers.[213] In 2015 Katina Powell, a self-described escort, published a book titled "Breaking Cardinal Rules: Basketball and the Escort Queen," where she revealed that Andre McGee, former Louisville Operations Director, paid her to bring strippers to dorm room parties to secure recruits from 2010 to 2014.[214] The parties were hosted at an on-campus dorm where

202. *Id.*

203. Scott Gleeson, *Reggie Bush's Dissociation from USC Ends, Paving Way for Reunion*, USA TODAY: SPORTS (June 10, 2020, 11:48 AM), http://www.usatoday.com/story/sports/ncaaf/2020/06/10/usc-end-reggie-bushs-dissociation-paving-way-reunion/5332444002/.

204. *See* Goldman, *supra* note 188.

205. *Reggie Bush to Forfeit Heisman*, ESPN (Sep. 15, 2010, 1:13 PM), http://www.espn.com/los-angeles/ncf/news/story?id=5572827 [hereinafter *Forfeit Heisman*].

206. *See* Goldman, *supra* note 188.

207. *Forfeit Heisman*, *supra* note 205.

208. Goldman, *supra* note 188.

209. *See id.*

210. *See id.*

211. *Forfeit Heisman*, *supra* note 205.

212. *Id.*

213. Dwyer, *supra* note 188.

214. Bill Chappell, *NCAA Faults Louisville Basketball Program for Ethics and Oversight in Sex Scandal*, NPR (June 15, 2017, 11:40 AM),

dancers were hired to strip naked.[215] Powell explained that McGee would arrange the parties and pay her ten thousand dollars to supply dancers and often paid in cash for "side deals," which included sex with some recruits, the guardians who accompanied them, and current players.[216] One former basketball player admitted that he had sex with a dancer after McGee paid her.[217]

By October 2016, the NCAA caught wind of the story and delivered the University a notice of allegations, claiming that Andre McGee provided impermissible inducement and extra benefits to recruits and student-athletes.[218] Following an internal investigation, the University of Louisville tried to get ahead of the NCAA's Committee on Infractions by banning itself from the 2016 NCAA tournament.[219] It also imposed its own recruiting and scholarship sanctions.[220] In 2017, the University of Louisville responded to the allegations, stating that McGee acted alone.[221] Rick Pitino, Hall of Fame basketball coach and former Louisville head coach, denied knowing anything about the parties.[222] Pitino stated, "[n]ot myself, not one player, not one trainer, not one assistant, not one person knew anything about any of this . . . [i]f anyone did, it would have been stopped on a dime."[223] However, Powell, along with Cardinal fans, found it hard to believe that Pitino did not know.[224] According to Powell, McGee spoke to her about needing to put Louisville in a position to sign recruits, often touting that his job was on the line.[225]

For four years, McGee operated a revolving door of recruits, dancers, basketball players, loud music, and alcohol before anyone took action.[226] The University's self-imposed penalties for the whole affair were

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http://www.npr.org/sections/thetwo-way/2017/06/15/533061934/ncaa-faults-louisville-basketball-program-for-ethics-and-oversight-in-sex-scanda.

215. John Barr & Jeff Goodman, *Former Louisville Recruit About his Visit: 'It was Like I was in a Strip Club'*, ESPN (Oct. 20, 2015, 11:50 PM), http://www.espn.com/espn/otl/story/_/id/13927159/former-louisville-cardinals-basketball-players-recruits-acknowledge-stripper-parties-minardi-hall.

216. *Id.*

217. *Id.*

218. Andy Staples, *Louisville Has Bigger Problems Than a Meaningless Banner Removal*, SPORTS ILLUSTRATED: NCAAB (Feb. 20, 2018), http://www.si.com/college/2018/02/20/louisville-loses-2013-ncaa-national-championship-penalty.

219. *Id.*

220. *Id.*

221. *Id.*

222. Barr & Goodman, *supra* note 215.

223. *Id.*

224. *Id.*

225. *Id.*

226. *See id.*

just the tip of the iceberg.[227] The NCAA required the men's basketball program to forfeit its victories from 2011 to 2015, vacating 123 wins.[228] The most notable forfeiture was the 2013 national championship—Louisville's only national title in the last three decades.[229] The NCAA also required Louisville to return all tournament revenue.[230] Another significant part of the NCAA's penalties included stripping the players who competed through the 2011–2015 seasons of several accolades and honors.[231] A lawsuit was later commenced by five former Louisville basketball players, who believed the NCAA's accusations and penalties impermissibly tarnished their reputations.[232] While these sanctions were intended to address the improper recruitment tactics and deter future exploitation, they consequently affected the students, arguably the victims in this scandal, by stripping them of their well-earned awards.[233] Louisville athletic director Vince Tyra said, in opposition to the player-penalty, that a player's accomplishments deserve recognition.[234] Luke Hancock, former player and party to the suit, asked the NCAA to recognize the students for their accolades, including the honor of winning the 2013 National Championship title.[235] Hancock expressly referred to the NCAA's recognition of his honor as the 2013 Final Four's Most Outstanding Player.[236] While the 2013 title was removed in July 2017, the asterisk next to Hancock's name in the NCAA record books as the Most Outstanding Player of 2013 Final Four in Atlanta was amended to reflect his achievement, as were the statistics of the other players involved in the lawsuit.[237] The agreement between the NCAA and the former basketball players affirmed their eligibility as student-athletes, who were in good standing from 2011 to 2014, and whose awards, honors, and statistics were valid.[238] While these five players got part of what they had hoped for, none

227. *See* Dwyer, *supra* note 188; Staples, *supra* note 218.
228. Dwyer, *supra* note 188.
229. *Id.*
230. *Id.*
231. *See* Danielle Lerner & Justin Sayers, *Ex-Louisville Players Take 'Goliath' of NCAA to Court Over 2013 Title*, COURIER J. (July 11, 2018, 4:13 PM), http://www.courier-journal.com/story/sports/college/louisville/2018/07/11/former-louisville-basketball-players-sue-ncaa/772674002/.
232. *Id.*
233. *See id.*
234. *See id.*; Tim Sullivan, *Louisville Basketball's Luke Hancock Reclaims Rightful Place on NCAA Final Four Ledger*, COURIER J. (Oct. 1, 2019, 6:53 AM), http://www.courier-journal.com/story/sports/college/louisville/2019/10/01/louisville-basketball-luke-hancock-gains-ncaa-settlement/3826853002/.
235. Lerner & Sayers, *supra* note 231.
236. *Id.*
237. *See id.*; Sullivan, *supra* note 234.
238. *See* Sullivan, *supra* note 234.

of the vacated wins were restored, and the rest of the team who helped earn the 2013 championship title suffered.[239] The NCAA did not hesitate to punish an entire athletic program at the expense of the entire team's achievement.[240] In this case, the entire Louisville men's basketball team was punished for several seasons due to the acts of one rogue, Andre McGee.[241] Call it the price of doing business.[242]

C. *The Blame Game*

When the Southern District of New York announced its investigation into the "'dark underbelly' of men's college basketball," it was a reminder to colleges from the powers-that-be, "'[w]e have your playbook.'"[243] The prosecution's confidence fired up college sports fans, as a change was on the horizon.[244] It was the "big guns" under fire this time—multimillionaire coaches at high-profile universities were vulnerable.[245] Nevertheless, there was no change in the landscape; archaic NCAA rules did what they always do, endured.[246]

On February 23, 2018, ESPN reported that an FBI wiretap revealed Arizona's head coach, Sean Miller, discussed paying prospect Deandre Ayton ten-thousand dollars in exchange for his commitment to the Wildcats, with Christian Dawkins, a marketing agent.[247] It was reported that former Adidas consultant Merl Code Jr. had paid Ayton's family an unknown amount of money through Christian Dawkins to get Ayton to attend Adidas

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239. *See id.*
240. *See* Staples, *supra* note 218.
241. *See id.*
242. *See id.*
243. Adrian Horton, *The Scheme: The Crazy Untold Story of Bribery, Business and Basketball*, GUARDIAN (Mar. 31, 2020, 10:56 AM), http://www.theguardian.com/tv-and-radio/2020/mar/31/the-scheme-hbo-documentary-basketball-christian-dawkins/.
244. *Id.*
245. *Id.*
246. *See id.*
247. Mark Schlabach, *FBI Wiretaps Show Sean Miller Discussed $100K Payment to Lock Recruit*, ESPN, http://www.espn.com/mens-college-basketball/story/_/id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation (last updated Feb 25, 2018, 11:21 AM); *see also* Samuel Chamberlain, *Assistant Claimed Arizona Coach Sean Miller Paid DeAndre Ayton $10k per Month*, N.Y. POST: SPORTS (May 1, 2019, 11:21 PM), http://nypost.com/2019/05/01/assistant-claimed-arizona-coach-sean-miller-paid-deandre-ayton-10k-per-month/; Mark Schlabach & Jeff Borzello, *Assistant: Miller Paid $10k per Month to Ayton*, ESPN (May 1, 2019), http://www.espn.com/mens-college-basketball/story/_/id/26647372/miller-paid-10k-per-month-ayton.

sponsored programs.[248] On May 1, 2019, federal prosecutors revealed a second recorded conversation between Arizona assistant coach Book Richardson and Christian Dawkins confirming the ten-thousand-dollar Miller-Ayton agreement.[249] However, when the FBI began handing out indictments, Sean Miller did not make the cut, despite being caught on tape.[250] Sean Miller also never testified during the trial, nor did he see the inside of a courtroom.[251] In fact, no high-profile programs came under fire despite being mentioned throughout the prosecution.[252] Instead of going for the named institutions' head coaches, the FBI went for the low hanging fruit.[253] Arizona's Sean Miller was not the only coach caught up in the scandal.[254] Three former assistant coaches were charged: Arizona's assistant coach Book Richardson; Oklahoma State's Lamont Evans; and USC's Tony Bland—each ultimately pled guilty to the charges.[255] The FBI ultimately charged Code and Dawkins, two low-profile consultants, with funneling money from Adidas to the families of prominent recruits—to convince them to commit to Adidas sponsored colleges—and with bribing assistant coaches to influence student-athletes to hire Dawkins' sports management agency before turning pro.[256]

During the trial, Dawkins defended his position, saying, "[b]y the time those kids get to college, the deals are usually already done . . . . [t]here's no need to pay a college coach because these players are coming to college with agents. This idea that it's an amateur world is not real."[257]

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248. Matt Norlander, *College Basketball Corruption Trial: Former Adidas Consultant Says He Paid 5 Recruits' Families, Including Deandre Ayton's*, CBS SPORTS: NCAA BB (Oct. 10, 2018, 5:56 PM), http://www.cbssports.com/college-basketball/news/college-basketball-corruption-trial-former-adidas-consultant-says-he-paid-5-recruits-families-including-deandre-aytons; Jeff Borzello, *Ex-Adidas Consultant T.J. Gassnola Says He Paid Deandre Ayton's Family*, ESPN (Oct. 10, 2018), http://www.espn.com/mens-college-basketball/story/_/id/24952089.

249. *See* Chamberlain, *supra* note 247; Schlabach & Borzello, *supra* note 247.

250. *See* Chamberlain, *supra* note 247.

251. Jon Wilner, *What's Next for Arizona and Sean Miller: In the Age of Reform, the NCAA Hammer Looms*, MERCURY NEWS: SPORTS (May 6, 2019, 9:29 AM), http://www.mercurynews.com/2019/05/06/whats-next-for-arizona-and-sean-miller-in-the-age-of-reform-the-ncaa-hammer-looms; *see also* Nathan Fenno, *Christian Dawkins Convicted of Bribery Conspiracy in College Basketball Scandal*, L.A. TIMES: SPORTS (May 8, 2019, 1:45 PM), http://www.latimes.com/sports/more/la-sp-college-basketball-corruption-christian-dawkins-convicted-20190508-story.html; John Clay, *NCAA Acting on Corruption Scandal*, LEXINGTON HERALD LEADER, May 17, 2020, at 1B.

252. *See* Wilner, *supra* note 251.

253. *See* Fenno, *supra* note 251.

254. Clay, *supra* note 251; *see also* Chamberlain, *supra* note 247.

255. Chamberlain, *supra* note 247; Fenno, *supra* note 251.

256. Fenno, *supra* note 251.

257. Schlabach & Borzello, *supra* note 247.

Dawkins later testified that, despite the NCAA's prohibitions on compensation, "he [did not] see anything wrong with paying college athletes."[258] He stated that student-athletes "'are the only kids in college who can't get paid legally, . . . [t]here is a need for them to get paid.'"[259] Federal Judge Edgardo Ramos, who presided over the case, steered Dawkins away from the pay-for-play conversation, stating that "[t]here are . . . any number of reasons why families and players get paid, . . . [n]one of them good."[260] Dawkins' attorney Steve Haney claimed, "[t]he only real victims in any of this continue to be the student-athletes making schools hundreds of millions of dollars . . . and receiving no monetary [compensation] for their labor."[261] In the end, Dawkins and Code were sentenced to federal prison for their role in bribing college basketball coaches and prospects to commit to certain schools and to sign with Dawkins' sports management company.[262] No word on how the NCAA intends to move forward since the trial revealed the entanglement of corruption in college basketball.[263] The question is not *if* the NCAA will act, but rather *when*.[264] For Arizona University, Sean Miller, and those named in the federal investigation, it is only a matter of time before the reckoning.[265]

D. *Clinging to Amateur Status*

Considered the best prospect since LeBron James, Zion Williamson was a powerhouse student-athlete and it came as no surprise to college basketball fans when he declared for the 2019 NBA draft.[266] Nearly a week before his big announcement, Williamson signed a five-year contract with Prime Sports Marketing.[267] "The contract called for [Gina] Ford to serve as Williamson's marketing [agent] . . . ."[268] Ford would only represent him

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258. *Id.*
259. *Id.*
260. Fenno, *supra* note 251.
261. *Id.*
262. *Id.*
263. *See id.* At the time of writing this Article, no penalties have been brought against the institutions named in the federal investigation nor have sanctions been levied. *Id.*
264. *See* Clay, *supra* note 251.
265. *See id.*
266. *See* Sam Carp, *Building the Brand of a Number One Draft Pick: Can Zion be as Marketable as LeBron?*, SPORTSPRO (Aug. 28, 2019), http://www.sportspromedia.com/analysis/zion-williamson-brand-marketability-nba-draft-new-orleans-pelicans-lebron.
267. Michael McCann, *Analyzing the Latest Developments in the Lawsuit Against Zion Williamson*, SPORTS ILLUSTRATED: NCAAB (May 10, 2020), http://www.si.com/college/2020/05/10/zion-williamson-lawsuit-developments.
268. *Id.*

during endorsement negotiations, never for prospective professional employment contracts.[269]

By the end of May 2019, Williamson no longer wished to continue with Ford's company and fired her.[270] Williamson replaced Ford's Prime Sports Marketing with Creative Artist Agency ("CAA"), a talent agency positioned to help athletes from draft day to post-career planning.[271] Unlike Ford, the CAA could represent Williamson in both endorsement and professional employment contracts.[272] Williamson alleges that his abrupt termination with Ford's company was because the contract "deceived [him] into consenting to forfeit his college eligibility . . . ."[273] Williamson sought to end the previously agreed upon contract and commenced a lawsuit against Ford and Prime Sports Marketing in North Carolina.[274] Under North Carolina law, the Uniform Athlete Agent Act ("UAAA") requires marketing contracts to alert a student-athlete that by signing the contract, he or she forfeits any remaining NCAA eligibility, i.e., amateur status.[275] Ford also brought suit against Williamson in Miami-Dade County, Florida, seeking one-hundred million dollars for his alleged breach of contract.[276]

Williamson can only be protected under the UAAA if he was considered a student-athlete when he signed the contract with Ford, to include not accepting improper, unauthorized benefits.[277] Williamson alleges that the contract violated UAAA requirements from its inception because it did not properly notify him of his changing status.[278] Ford maintains that Williamson breached the contract when he fired her without just cause.[279] She claims Williamson willingly relinquished his amateur status when he signed with her.[280] Moreover, Ford alleges the UAAA is not applicable because Williamson had previously accepted benefits without NCAA authorization, in violation of the rules, taking him out of amateur status.[281]

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269. *Id.*
270. *Id.*
271. *About CAA Basketball*, CAA, http://www.caa.com/sportstalent/basketball (last visited May 12, 2021).
272. McCann, *supra* note 267.
273. Derek Saul, *Former Duke Men's Basketball Forward Zion Williamson Files Lawsuit to End Agreement with Marketing Firm*, CHRONICLE: SPORTS (June 13, 2019, 9:02 PM), http://www.dukechronicle.com/article/2019/06/zion-williamson-duke-mens-basketball-lawsuit.
274. *Id.*
275. *See* McCann, *supra* note 267.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. McCann, *supra* note 267.
281. *Id.*

Duke University spokesman Michael Schoenfeld weighed in, stating "[a]s soon as Duke was made aware of any allegation that might have affected Zion Williamson's eligibility, we conducted a thorough and objective investigation . . . ."[282] Schoenfeld added that the investigation turned up "no evidence to support any allegation" that Williamson accepted improper benefits.[283] Meanwhile, Ford's attorney filed a request for admissions as part of the Miami case, hoping Williamson would admit that his mother and stepfather received illegal benefits—amounting to about four-hundred thousand dollars—to ensure he attended Duke University and wore Adidas shoes; thus he is not owed the protection of the UAAA.[284] Of course, if Williamson, under oath, "admit[s] that he attended Duke while in violation of NCAA rules or . . . that Duke somehow broke NCAA" recruitment policies, this lawsuit may invite unwelcomed NCAA attention.[285]

The allegation that Williamson received improper benefits during his college career at Duke University, a detail that conveniently never surfaced while Ford remained under his employment, would effectively take Williamson out of amateur status during his time at Duke and possibly bring sanctions against the entire men's basketball team.[286] Unless the case settles out of court, these accusations could trigger investigations into Zion Williamson's entire college career, from recruitment to the 2019 NBA Draft.[287] It appears that anytime a sports contract involving a lucrative prospect goes awry, the disgruntled party always points to the NCAA's amateurism model, hoping to push the prospect into settling the charges rather than fighting it out in court, revealing his or her violations.[288] As the details of this case continue to unfold, one thing is sure: If the NCAA did not have a hard and fast rule prohibiting compensation, Zion Williamson—along with student-athletes, past and present—would not face such legal pressures, tantamount to extortion.[289]

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282. Kolin, *supra* note 188.

283. *Id.*

284. *Id.*; Chris Cwik, *Zion Williamson's Former Marketing Agent Asks Williamson to Admit He Got Illegal Benefits to Go to Duke*, YAHOO!: SPORTS (May 10, 2020, 3:52 PM), http://sports.yahoo.com/zion-williamsons-former-marketing-agent-asks-williamson-to-admit-he-got-illegal-benefits-to-go-to-duke-195203414.html.

285. *See* McCann, *supra* note 267.

286. *See id.*; *cf.* Goldman, *supra* note 188; Dwyer, *supra* note 188.

287. *See* McCann, *supra* note 267; *cf.* Goldman, *supra* note 188.

288. *See* Goldman, *supra* note 188.

289. *See* McCann, *supra* note 267; McCormick & McCormick, *supra* note 5, at 508. The case against Zion Williamson is still ongoing. *See* McCann, *supra* note 267.

IV. COMMERCIALIZATION IN COLLEGE SPORTS

Considering the college sports payout controversy, it begs the question: who cares?[290] Who cares if Deandre Ayton was paid a hundred thousand dollars to attend Arizona University?[291] He was still the number one pick of the 2018 NBA draft.[292] Who cares if Reggie Bush accepted benefits to play for the University of Southern California?[293] He was still good enough to win the Heisman Trophy.[294] Who cares if Zion Williamson allegedly accepted benefits to play for Duke?[295] He is still arguably the best basketball prospect since LeBron James.[296] Those who care are the NCAA, the schools, and the coaches who make tons of money and have almost zero incentive to change the system.[297] Nearly every party involved in college sports, except the student-athletes, makes money off the enterprise.[298]

A. *Illegal Payout Dwarfed by Player's Value*

Reggie Bush played football at USC for years before it was discovered his family had accepted money for his commitment to the team.[299] During his college career, he earned the Heisman Trophy and he helped his team achieve several victories.[300] The illegal money did not make Bush a better football player, but his commitment made USC a better football team and, in return, solidified a devout fan base.[301] While the sanction against the university sought to deter schools from engaging in unethical recruitment practices in the future, Reggie Bush was merely punished for knowing his worth, and the NCAA may have devalued his professional potential.[302] Bush was the second overall pick of the 2006 NFL

290. *See* Nathan, *supra* note 188; Goldman, *supra* note 188, McCann, *supra* note 267.
291. Nathan, *supra* note 188.
292. Norlander, *supra* note 248.
293. *See* Goldman, *supra* note 188.
294. *Id.*
295. *See* McCann, *supra* note 267.
296. Carp, *supra* note 266.
297. Horton, *supra* note 243.
298. McCormick & McCormick, *supra* note 5, at 509.
299. *See* Goldman, *supra* note 188.
300. *Id.*
301. *See id.*
302. Jeff Chase, *All Hype, No Bite: Reggie Bush and 10 NFL Players Who Likely Miss College*, BLEACHER REP.: NFL (Nov. 7, 2011), http://www.bleacherreport.com/articles/928010-all-hype-no-bite-reggie-bush-and-10-nfl-players-who-likely-miss-college; Goldman, *supra* note 188.

Draft.[303] He entered the pros projected to be the NFL's next big star.[304] There were high expectations set for Reggie Bush.[305] However, the devastating news of his college exploits disappointed his fans; eventually, his professional performance grew inconsistent, and ultimately, everyone just moved on.[306] The all-American running back retired in 2017 and ironically works for the NCAA, now as a broadcaster.[307]

Another example is Zion Williamson.[308] Williamson is a money-making machine.[309] When the Blue Devils hit the road for the 2019 basketball season, Duke ticket prices soared.[310] The so-called "Zion Effect" took hold, and sales skyrocketed.[311] Thanks to Williamson, ticket prices were up an average of 178% for online ticket retailers when Duke was the visiting team.[312] Capturing an audience of Lebron James, Jay-Z, and former president Barack Obama, fans traveled from far and wide to watch Duke University, i.e., Zion Williamson.[313] Despite his fandom, Williamson never saw a dime.[314] He did go on to be the number one pick of the 2019 NBA Draft and today plays for the New Orleans Pelicans.[315] However, for as long

303. *Id.*
304. *Id.*
305. *Id.*
306. *See id.*
307. Robin Cortez, *What is Reggie Bush Doing Now?*, SPORTSCASTING: NFL (May 4, 2020), http://www.sportscasting.com/what-is-reggie-bush-doing-now/.
308. Carp, *supra* note 266.
309. *Id.*
310. Adam Zagoria, *The Zion Effect: Demand for Duke Tickets Reaches An All-Time High Because of Zion Williamson*, FORBES (Feb. 7, 2019, 9:47 AM), http://www.forbes.com/sites/adamzagoria/2019/02/07/the-zion-effect-demand-for-duke-tickets-reaches-an-all-time-high-because-of-williamson/#790fa4d03285.
311. Michael McCarthy, *The Zion Effect: Duke's Zion Williamson Ignites Ticket Sales*, SPORTINGNEWS: NCAAB (Feb. 20, 2019), http://www.sportingnews.com/us/ncaa-basketball/news/the-zion-effect-dukes-zion-williamson-ignites-ticket-sales/1b5ouskbtvzr1nj29hjkjrlfz.
312. *Id.*
313. *Id.*; Zagoria, *supra* note 310; Scott Gleeson, *Former President Barack Obama Attends Duke-North Carolina, Wishes Zion Williamson Well*, USA TODAY: SPORTS (Feb. 21, 2019, 7:23 AM), http://www.usatoday.com/story/sports/ncaab/acc/2019/02/20/barack-obama-attend-duke-north-carolina-basketball-game/2928677002/.
314. Jeff Arnold, *With Sharp Focus on Zion Williamson, Should NCAA Athletes Have the Right to Profit on Their Name?*, FORBES (May 25, 2019, 9:58 AM), http://www.forbes.com/sites/jeffarnold/2019/03/25/with-sharp-focus-on-zion-williamson-should-ncaa-athletes-have-the-right-to-profit-on-their-name/#49b144387352; *Fandom*, *Merriam-Webster*, http://www.merriam-webster.com/dictionary/fandom (last visited Jan. 31, 2021). Fandom is defined as "the state or attitude of being a fan," "all the fans" (as in sports fans). *Id.*
315. Carp, *supra* note 266.

as Williamson wore his Duke uniform, he remained the NCAA's commercial property.[316] Williamson is currently in a legal battle between former marketing agent Prime Sports Marketing president Gina Ford.[317] Ford alleges Williamson breached their contract, claiming that he fired the agency without cause and accepted improper benefits—of about four-hundred thousand dollars—when he played for Duke University.[318] Perhaps Ford's damages are calculated with all of Williamson's potential in mind—no one quite knows market value like a marketing agent.[319] What is more insightful is Ford's specific request for one-hundred million dollars, demonstrating just where college sports valued Williamson's talent; losing him as a client cost her big money.[320] Inspiring a bigger question: what is *amateur* about a hundred million dollars?[321]

B. *Plenty of Money to Spare*

If the purpose of amateurism is to play for the *love of the game*, the amount of money the NCAA churns out each year threatens this resolve.[322] The propagation of corporate sponsorships and marketing agents has heavily commercialized the industry, moving it away from pure gameplay to games that pay.[323] Today, corporations are intimately involved in promoting major college sporting events.[324] Companies pay various universities, conferences, and tournaments in exchange for advertising space to market their products.[325] NCAA member schools sell student-athlete jerseys and other merchandise bearing a favorite name or team number, generating billions in revenue.[326]

Nevertheless, student-athletes are not welcome to enjoy the proceeds.[327] They are consequently barred from earning compensation—despite contributing their name and talent—for fear pay-for-play profits will

316. Arnold, *supra* note 314.
317. McCann, *supra* note 267.
318. *Id.*; Mark Schlabach, *Zion Williamson's Stepfather Took $400k Payment, Court Filing Alleges*, ESPN (July 10, 2020, 8:37 AM), http://www.espn.com/mens-college-basketball/story/_/id/29436088/court-filing-accuses-zion-williamson-stepfather-taking-400k-payment.
319. *See* McCann, *supra* note 267.
320. *See id.*
321. *See id.*; McCormick & McCormick, *supra* note 5, at 496, 506–07.
322. *See* McCormick & McCormick, *supra* note 5, at 496–97.
323. *See id.* at 536.
324. *Id.* at 539.
325. *Id.* at 536.
326. *Id.* at 540–41.
327. McCormick & McCormick, *supra* note 5, at 540; *see also* Katcher, *supra* note 10.

"tarnish the integrity" of college sports and ruin amateurism as we know it.[328] With so much money to be made, it's no wonder student-athletes are dazzled by illegal signing bonuses and lucrative side deals.[329]

The commercialization of college sports has threatened the NCAA's amateurism model for nearly a century.[330] In 1929, the Carnegie Foundation for the Advancement of Education warned, "[c]ommercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth."[331] Despite the warning, the NCAA continued to further its commercial enterprise.[332] In 2010 the organization secured a ten billion dollar contract with CBS and Turner Sports—later renewed until 2032—turning over the broadcasting rights to the March Madness tournaments.[333] The NCAA reportedly uses the revenue generated from selling the broadcasting rights to support its internal operations and administrative costs.[334] According to Kantar Media, March Madness competes with the big leagues in terms of commercial expenditures.[335] The 2018 basketball tournament attracted more than one billion dollars in T.V. ad spending, leaving the NBA and MLB playoffs in the dust—further blurring the lines between professionalism and amateurism.[336] In fact, men's college basketball is one of the largest sources of NCAA revenue.[337] In 2019, the *must-see* basketball phenom Zion Williamson took college basketball by storm.[338] According to those in the industry, "if March Madness ha[d] a face, it belong[ed] to Williamson."[339] CBS sponsored a "Zion Cam" to exclusively feature the basketball star.[340] This type of "single player focus [was] the first of its kind" and was aimed squarely at exploiting the young athlete's mass popularity.[341]

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328. *See* Katcher, *supra* note 10.
329. Fitt, *supra* note 6, at 568.
330. *See* Smith, *supra* note 7, at 10–11.
331. *Id.* at 13.
332. *See* Arnold, *supra* note 314.
333. *Id.*
334. McCormick & McCormick, *supra* note 5, at 496.
335. Felix Richter, *March Madness Is a Feast for Advertisers*, STATISTA (Mar. 22, 2019), http://www.statista.com/chart/13393/march-madness-tv-ad-spend/.
336. *Id.*
337. Victoria Blackstone, *How Much Money Do College Sports Generate?*, ZACKS: FIN. (Jan. 28, 2019), http://finance.zacks.com/much-money-college-sports-generate-10346.html.
338. *See* Arnold, *supra* note 314.
339. *Id.*
340. *Id.*
341. *Id.*

In terms of university profits, former Ohio State quarterback Cardale Jones knows firsthand what it is like to have fans sport his college jersey number.[342] In 2014, Jones debuted in the Big Ten championship, where he led the Buckeyes to a victory against the Wisconsin Badgers.[343] The next time Jones hit the field, the Buckeyes defeated the number one ranked Alabama Crimson Tide in the Allstate Sugar Bowl, advancing to the College Football Playoff National Championship.[344] During the championship game, Jones once again led his team to victory.[345] After capturing the national title, Jones' popularity grew among fans and peers.[346] It was not long before he saw another classmate wearing a replica of his number twelve jersey.[347] Jones told Forbes Magazine that he was flattered, but began to see his role as a student-athlete "differently."[348] Jones began to realize how much money the university was making off its football program, while Jones and the players who helped make the program saw nothing.[349] Jones stated, "'[y]ou look back and you start to realize what kind of money you were bringing in . . . look at the size of the stadium [where] people [were] paying top dollar to come [and] see these kids play.'"[350] Jones is among those who support compensating student-athletes, stating "'I [do not] think [it is] something you grasp until you realize how important you were to that team and that university.'"[351] Today, the commercialization of college sports is at an all-time high, and prominent universities continue to sell merchandise marketing wildly popular athletes.[352] Not to worry, student-athletes are still labeled as "amateurs" despite the flood of income flowing all around them.[353] Because athletes like Williamson and Jones "generate interest among fans who [would not] necessarily engage [in college sports], it opens . . . the NCAA market to . . . larger audience[s]."[354] "In turn, the more interest that these athletes produce, the more the NCAA and [the] universities . . . benefit—

342. *Id.*
343. Arnold, *supra* note 314; *Ohio State Blows Out Wisconsin for Statement Win in Big Ten Title Game*, ESPN (Dec. 7, 2014), http://www.espn.com/college-football/recap?gameId=400609096.
344. Arnold, *supra* note 314.
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. Arnold, *supra* note 314.
350. *Id.*
351. *Id.*
352. *Paying College Athletes: NCAA Takes First Step in Allowing Players to Cash In*, *supra* note 13; McCormick & McCormick, *supra* note 5, at 540.
353. *See Paying College Athletes: NCAA Takes First Step in Allowing Players to Cash In*, *supra* note 13; McCormick & McCormick, *supra* note 5, at 540.
354. Arnold, *supra* note 314.

both in terms of marketability and in the money fans [are willing to] pay either for tickets or merchandise."[355]

The college sports industry generates nearly sixty billion dollars in revenue.[356] It affords its coaches' multimillion-dollar salaries, yet the antiquated rules governing compensation continue to exclude student-athletes from getting a piece of the pie when they are the core of the NCAA's business model.[357] With the proliferation of collegiate sporting events, major NCAA teams have become exceedingly commercial and decidedly, no longer amateur.[358] However, change is on the horizon as several states have independently addressed the inequities in college sports, starting with compensation for an athlete's name, image, and likeness ("NIL") accompanied by the introduction of federal legislation.[359] Although "[t]he NCAA has dominated college sports for the last century," it is aware that changes are necessary to adapt to the shifting climate.[360]

V. GAME CHANGING LEGISLATION

"The NCAA had [its] chance to get . . . in front of [the NIL] issue" decades ago, to take control of the narrative and allow student-athletes "to earn what the market [would] pay them."[361] With the passage of state laws and proposed federal legislation threatening to seize control over NIL—and perhaps broader compensation issues—the NCAA endeavored to modernize its enduring internal prohibitions on athlete compensation.[362] In early 2020, the NCAA pled Congress to pass federal legislation that would preempt pending state law and codify the restrictions paramount to preserving its amateurism model.[363] In fact, the NCAA has launched an extensive lobbying campaign to convince Congress to roll back certain rights making its way to

355. *Id.*

356. McCormick & McCormick, *supra* note 5, at 496–97.

357. *See id.* at 496, 528–29; Arnold, *supra* note 314.

358. Fitt, *supra* note 6, at 567.

359. *See Florida Governor Signs Bill Allowing College Athlete NIL Pay!*, NAT'L COLL. PLAYERS ASS'N (June 12, 2020), http://www.ncpanow.org/news/releases-advisories/florida-governor-signs-bill-allowing-college-athlete-pay; Peterfy & Carron, *supra* note 183, at 69.

360. Peterfy & Carron, *supra* note 183, at 69, 97.

361. Gregg Doyel, *Chaos to Follow as the NCAA Softens Stance*, INDIANAPOLIS STAR, May 1, 2020, at B.1.

362. *See* NCAA, REPORT OF THE NCAA BOARD OF GOVERNORS OCTOBER 29, 2019, MEETING 3 (2019), http://perma.cc/R3CF-J8UQ; Peterfy & Carron, *supra* note 183, at 71.

363. Murphy, *supra* note 110.

athletes in critical states.[364] The NCAA claims governing college sports with a patchwork of state law would be impossible.[365] The organization has also challenged the integrity of those laws—like the one passed in California last September—arguing that lack uniformity would burden interstate commerce and violate the United States Constitution.[366] Ramogi Huma, president of the National Collegiate Players Association, noted several reasons why compliance with the different state laws would not affect the NCAA's ability to conduct business.[367] However, the NCAA has recently decided to support some of its member schools that chose to resume sport activities sooner than others based on how the individual states chose to lift coronavirus related restrictions.[368] According to the NCAA, whether college sports will return in 2020 is a decision left to the individual states and universities.[369] "Businesses navigate different jurisdictional laws all the time," and the NCAA is not "above the law."[370]

Since April 2019, the NCAA has started engaging in open discourse to support NIL compensation efforts.[371] The caveat being that there will be some restrictions, or "guardrails," to distinguish college sports from professional sports.[372] The NCAA assembled an NIL Committee "to examine the feasibility of NIL payments to student-athletes . . . ."[373] The NIL Committee presented an interim report to the NCAA Board of Governors, which was unanimously adopted, stating that, "it is the policy of the Association that NCAA member schools may permit students participating in athletics the opportunity to benefit from the use of their name, image, and/or likeness in a manner consistent with the values and

364. *Florida Governor Signs Bill Allowing College Athlete NIL Pay!*, *supra* note 359; Cassandra Negley, *NCAA, ACC, Big 12 Spend Nearly $1M to Prevent Athletes from Profiting Off Own Likeness*, YAHOO!: SPORTS (Feb. 10, 2020, 6:28 PM), http://sports.yahoo.com/ncaa-acc-big-12-spend-nearly-1-m-to-keep-athletes-from-earning-money-off-marketing-deals-232823064.html.

365. Murphy, *supra* note 110.

366. *Id.*; Benjamin Kurrass, Comment, *The Swelling Tide of Commercialized Amateur Athletics: How Growing Revenues Have Called Public Attention to the NCAA and Its Member Universities' Tax-Exempt Status*, 27 JEFFEREY S. MOORAD SPORTS L.J. 285, 325 (2020).

367. Murphy, *supra* note 110.

368. *Id.*

369. Garrett Stepien, *Mark Emmert: NCAA Will Not Decide on Return of College Sports*, 247 SPORTS (May 12, 2020, 8:45 PM), http://247sports.com/Article/College-football-2020-season-coronavirus-Mark-Emmert-NCAA-will-not-mandate-sports-return-147090485/.

370. *Florida Governor Signs Bill Allowing College Athlete NIL Pay!*, *supra* note 359.

371. Murphy, *supra* note 110.

372. *Id.*

373. Meyer & Zimbalist, *supra* note 51, at 248.

beliefs of intercollegiate athletics."[374] However, it is not clear how NIL payments may be "consistent with the values and beliefs of intercollegiate athletics" since the NCAA has fought hard to convince courts of just the opposite.[375] Instead, the NCAA's three Divisions are charged with sorting out the details by January 2021.[376] Each Division is tasked with ensuring NIL payments remain consistent with the NCAA's concept of amateurism by only permitting benefits "tethered to education."[377] The report further acknowledged the patchwork of legislation determined to upend its internal reform:

> The current state and federal legislative efforts are in conflict with NCAA values and principles and fail to differentiate the NCAA intercollegiate athletic experience from those of professional athletes. These efforts also undermine the legal precedent that the [Supreme Court of the United States] and other courts have afforded the NCAA to regulate intercollegiate athletics at a national level. What we are proposing within this document is a framework by which all student-athletes in all sports across all three divisions have the opportunity to engage in name, image, and likeness activities without eroding the priorities of education and the collegiate experience.[378]

"While the NCAA may desire to develop [an] NIL rule[]" that preserves its amateurism model, the deference it was once afforded by courts and the general public has eroded.[379] Until the "NIL policy is released . . . [for] its 2021 implementation," there is no way of knowing how *free* student-athletes will be to capitalize on their own identities.[380] To ensure its internal reforms address the core of state concern, the NCAA needs to remain aware of the underlying reasons that inspired such legislation.[381] States may find that the NCAA's proposed changes are insufficient, prompting them to

374. NCAA, *supra* note 362, at 3; Meyer & Zimbalist, *supra* note 51, at 290; *see also* Booker, *supra* note 3.

375. NCAA, *supra* note 362, at 3; Meyer & Zimbalist, *supra* note 51, at 290; O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015).

376. Meyer & Zimbalist, *supra* note 51, at 249, 290.

377. *See id.* at 290–91.

378. FED. & STATE LEGIS. WORKING GRP., REPORT TO THE NCAA BOARD OF GOVERNORS OCTOBER 23, 2019, 2 (2019), http://perma.cc/R3CF-J8UQ.

379. James Landry & Thomas A. Baker III, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming Its Regulation of Athlete Publicity Rights*, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 7 (2019).

380. *Id.*

381. *See* Peterfy & Carron, *supra* note 183, at 97.

pursue further legislation to protect athletes from—what the states may consider—"exploitation."[382]

A. *Proposed Federal Legislation*

The fear of patchy state governance appears unlikely as House Republicans and Democrats come together to overhaul longstanding NCAA rules.[383] While federal law would take precedence, the need to move quickly cannot be understated.[384] There is already one federal bill relating to NIL rights working its way through Washington.[385] In March 2019, U.S. Representative Mark Walker of North Carolina introduced the Student-Athlete Equity Act, a bi-partisan cosponsored Bill that would create a uniform payment directive for college athletes.[386] The Student-Athlete Equity Act is designed to "amend the definition of a qualified amateur sports organization in the tax code," removing the restriction on student-athlete compensation for their "name, image, and likeness—forcing the . . . NCAA to change its current model."[387] Walker believes "[s]igning on with a university, if you're a student-athlete, should not be a moratorium on your rights as an individual."[388] According to Walker, "[t]his is the time and the moment to be able to push back and defend the rights of these young adults."[389] The Student-Athlete Equity Act explicitly "proposes that the Internal Revenue Code of 1986 be amended to condition the NCAA's status as a non-profit" organization, on whether student-athletes are permitted to

382. *Id.*

383. Alex Daugherty & Brian Murphy, *Marco Rubio Leads Senate Effort to Compensate College Athletes*, TAMPA BAY TIMES (Nov. 8, 2019), http://www.tampabay.com/florida-politics/buzz/2019/11/09/marco-rubio-leads-charge-to-compensate-college-athletes/.

384. Dan Murphy, *Congressman to Propose Federal Legislation for Paying College Athletes*, ESPN (Oct. 2, 2019), http://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes.

385. *Id.*

386. Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 2 (1st Sess. 2019); Press Release, Mark Walker, Congressman, Walker Introduces Student-Athlete Equity Act to End NCAA Restrictions on Player's Publicity Rights (Mar. 14, 2019), http://walker.house.gov/media-center/press-releases/walker-introduces-student-athlete-equity-act-end-ncaa-restrictions [hereinafter Walker SAEA]; *see also* Peterfy & Carron, *supra* note 183, at 69.

387. Walker SAEA, *supra* note 386.

388. Brian Murphy, *NCAA Must Allow Players to Profit from Name and Image, NC Republican's New Bill Says*, NEWS & OBSERVER: SPORTS (Mar. 7, 2019, 3:45 PM), http://www.newsobserver.com/sports/article227181209.html; Walker SAEA, *supra* note 386.

389. Murphy, *supra* note 388.

receive payments for their name, image, and likeness.[390] The Act "would force the NCAA to choose whether to keep [its] tax-exempt status or . . . alter its definition of amateurism to allow student-athletes to arrange financial agreements" for themselves.[391] Furthermore, the Student-Athlete Equity Act does not require universities to compensate their athletes; it grants students the ability to solicit and be bound by contracts.[392]

Opponents of the Act argue that the NCAA already compensates its student-athletes through educational scholarships, "where they get to attend college for free."[393] Mark Emmert, NCAA president, pointed out that student-athletes are at the heart of intercollegiate athletics, but they are students first.[394] Their scholarships, in addition to "free room and board, are payment enough."[395] Emmert implored that if payment is what the people want from college sports, "it's not collegiate athletics anymore, [i]t's professional athletics."[396] However, the Student-Athlete Equity Act has attracted the attention of two bipartisan cosponsors: Republican John Ratcliffe of Texas and Democrat Cedric Richmond of Louisiana.[397] In theory, it should gain more momentum as it makes its way through the House Ways and Means Committee because it tends to jibe with Democrats' desire to provide a living wage to Americans and Republicans' stark opposition to "crony capitalism."[398] Consequently, the Student-Athlete Equity Act has inspired further discourse regarding federal legislation on the topic of NIL.[399] U.S. Representative Anthony Gonzalez—former Ohio State receiver—intends to introduce a bill that would allow student-athletes to make endorsement money while protecting them from those he described as *bad actors*.[400]

Similarly, senators have even introduced NIL bills to the U.S. Senate.[401] On June 18, 2020, Marco Rubio presented the Fairness in

390. Michael McCann, *California's New Law Worries the NCAA, but a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED: NCAAF (Oct. 4, 2019), http://www.si.com/.amp/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws.

391. Kurrass, *supra* note 366, at 324.

392. *Id.*

393. *H.R. 1804: Student-Athlete Equity Act*, *supra* note 15.

394. *See id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *H.R. 1804: Student-Athlete Equity Act*, *supra* note 15.

399. *See* McCann, *supra* note 390; Smith, *supra* note 14.

400. Murphy, *supra* note 110.

401. Daugherty & Murphy, *supra* note 383; Ralph D. Russo, *Florida Sen. Rubio Introduces NIL Bill to Push NCAA Changes*, STAR TRIB. (June 18, 2020, 3:50 PM),

Collegiate Athletics Act, requiring the NCAA to establish rules and policies no later than June 30, 2021, permitting student-athletes to earn compensation for their name, image, and likeness.[402] The Bill gives the Federal Trade Commission ("FTC") the authority to enforce the law, and if the NCAA does not meet the June deadline, the FTC could impose financial penalties.[403] Most notably, the Act carves out protections for the NCAA and its member schools, shielding against future antitrust or NIL litigation.[404] The Act also prohibits any state from adopting or effectuating "law[s] related to 'permitting or prohibiting' student athletes from receiving compensation from the use of their [name, image, and likeness,]" effectively preempting states who have already taken action.[405] "The Fairness in Collegiate Athletics Act is an effort to ensure the NCAA implements policies for NIL and even the playing field."[406] Rubio's Bill has received attention and support from several conferences including the Atlantic Coast Conference ("ACC"), the Southeastern Conference ("SEC"), and the Big 12.[407] Meanwhile, Ramogi Huma, executive director of the National College Players Association, stated that Rubio's Bill "undermines economic freedom, states' rights, and gives the NCAA immunity for illegal activities. We encourage him to change course on this issue."[408]

B. *Passed State Legislation*

"California was the first state to take action on the [NIL] issue."[409] In September 2019, Governor Gavin Newsom signed a Bill permitting "California athletes to earn money from . . . their names, images and

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http://www.startribune.com/florida-sen-rubio-introduces-nil-bill-to-push-ncaa-changes/571346832/.

402. Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020); Rudy Hill & Jonathan D. Wohlwend, *Florida Law Will Allow College Athletes to Profit from Name, Image, and Likeness Starting Summer 2021*, BRADLEY (June 25, 2020), http://www.bradley.com/insights/publications/2020/06/florida-law-will-allow-college-athletes-to-profit-from-name-image-and-likeness-starting-summer-2021; Russo, *supra* note 401; *see also* Smith, *supra* note 14. At the time of writing this article the Bill remains in session. *See* S. 4004.

403. Russo, *supra* note 401.

404. Hill & Wohlwend, *supra* note 402.

405. *Id.*

406. Press Release, Marco Rubio, U.S. Senator for Fla., Rubio Introduces Legislation to Address Name, Image, Likeness in College Sports (June 18, 2020), http://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-introduces-legislation-to-address-name-image-likeness-in-college-sports [hereinafter Senate NIL Bill].

407. *Id.*; Russo, *supra* note 401.

408. Russo, *supra* note 401.

409. Peterfy & Carron, *supra* note 183, at 69; *see also* Wells, *supra* note 14.

likenesses, despite warnings from the [NCAA] that the measure would upend amateur sports."[410] California's Fair Pay to Play Act, introduced by Senator Nancy Skinner, captured a national audience—to include NBA stars LeBron James and Draymond Green—all applauding California's "effort to give college athletes a share of the windfall they help [earn] for their universities and [the] NCAA."[411] The Act is set to take effect in 2023.[412]

"The Fair Pay to Play Act . . . allow[s] college athletes in California to sign endorsement deals; earn compensation based on the usage of their name, image, and likeness; and sign all types of licensing contracts that would allow them to earn money."[413] The Act also prohibits the NCAA from penalizing a university for complying with California law.[414] "'This is the beginning of the end of the second class citizenship NCAA sports imposes on college athletes,' said [Ramogi] Huma, whose group advocates for college sports reform."[415] Ramogi Huma added that "'[c]ollege athletes deserve the same economic rights and freedoms afforded to other students and citizens.'"[416] One of the most vocal opponents of the California law, former University of Florida quarterback, Tim Tebow, said allowing pay-for-play would make college athletics—much like his own professional career—ordinary.[417] Tebow stated, "I know we live in a selfish culture where it's all about us, but we're just adding and piling it on to that, where it changes what's special about college football."[418]

In contrast, Ed O'Bannon, the former lead plaintiff in a class-action antitrust lawsuit against the NCAA, supports California's new law.[419] In an interview with CNN, O'Bannon stated, "California[] [is] in a really good position . . . . They are changing the game. And from where we sit, we're

410. Melody Gutierrez & Nathan Fenno, *California Will Allow College Athletes to Profit from Endorsements Under Bill Signed by Newsom*, NAT'L COLL. PLAYERS ASS'N (Sept. 30, 2019, 8:31 AM), http://www.ncpanow.org/news/articles/california-will-allow-college-athletes-to-profit-from-endorsements-under-bill-signed-by-newsom.

411. *Id.*

412. *Id.*; Negley, *supra* note 364.

413. Harmeet Kaur, *Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill is 'Changing the Game'*, CNN: US (Sept. 14, 2019, 1:19 PM), http://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd/index.html; *see also* Kurrass, *supra* note 366, at 324.

414. Gutierrez & Fenno, *supra* note 410.

415. *Id.*

416. *Id.*

417. Kaur, *supra* note 413; *see also* Jenna West, *Tim Tebow on Fair Pay to Play Act: 'It Changes What's Special About College Football'*, SPORTS ILLUSTRATED (Sept. 13, 2019), http://www.si.com/college/2019/09/13/tim-tebow-fair-pay-play-act-playing-college-players-video.

418. Kaur, *supra* note 413.

419. *Id.*

extremely excited about it."[420] In response to California's positive attention, the College Players Association is now calling on other states to do the same.[421]

While California leads the country in passing NIL legislation, Florida takes the crown as the first state to have a NIL bill to go into effect.[422] On July 12, 2020, Florida Governor Ron DeSantis signed the Intercollegiate Athlete Compensation and Rights Bill, permitting student-athletes to profit from their name, image, and likeness beginning as early as July 2021.[423] Florida's law is substantially similar to the law passed in California, except it takes effect much sooner.[424]

> Florida's law includes [additional] restrictions, such as . . . payments to athletes must be "commensurate with market value" . . . to "preserve the integrity, quality, character, and amateur nature of intercollegiate athletics and to maintain a clear separation between amateur intercollegiate athletics and professional sports." The law also states explicitly that colleges and universities are not allowed to pay athletes directly.[425]

State Representative Chip LaMarca, who was instrumental in crafting Florida's NIL bill, stated, "[f]or far too long, the collegiate athletic system professionalized [every aspect of] athletics except for the young women and men who put in all the hard work. Today, we changed that."[426] LaMarca states that he is not concerned "with any legal challenges the NCAA might mount in the future."[427] Both LaMarca and DeSantis say they see Florida's new law as a win for college athletes.[428] Nonetheless, whether state law will level the playing field for college athletes remains to be seen.[429]

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420. *Id.*
421. Gutierrez & Fenno, *supra* note 410.
422. Wells, *supra* note 14.
423. *Id.*; FLA. STAT. § 1006.74 (2020).
424. *Compare* FLA. STAT § 1006.74, *with* CAL. EDUC. CODE § 67456 (West 2020).
425. Murphy, *supra* note 110.
426. *Florida Governor Signs Bill Allowing College Athlete NIL Pay!*, *supra* note 359; Murphy, *supra* note 110.
427. Murphy, *supra* note 110.
428. *Id.*
429. *See id.*

VI. CONCLUSION

The NCAA's hard-pressed infrastructure has slowly dissolved since *O'Bannon*, as its rules have grown inconsistent with its amateur model.[430] Now that Florida's law is official, time is of the essence.[431] The NCAA has less than a year to make internal reforms or risk losing control over NIL.[432] While the NCAA prefers federal intervention on the issue of NIL, such oversight brings bureaucracy.[433] Admittedly, a regulatory structure is necessary to ensure that an open market for NIL will not inhibit student-athletes from receiving an education.[434] The urgency for a federal regulation comes when "[Congress's focus is] elsewhere because of the global coronavirus pandemic."[435] Even if the House and Senate could pass bipartisan reform, what matters is how useful its function will be in preserving the NCAA professed amateur model while promoting financial fairness in college sports.[436] Until federal legislation is passed, states are free to contemplate NIL legislation of their own, following Florida and California.[437]

430. Doyel, *supra* note 361.
431. *See* Murphy, *supra* note 110.
432. *Id.*
433. Meyer & Zimbalist, *supra* note 51, at 303.
434. *Id.*
435. Murphy, *supra* note 110.
436. *See* Meyer & Zimbalist, *supra* note 51, at 303.
437. *See* FLA. STAT. § 1006.74 (2020); CAL. EDUC. CODE § 67456 (West 2020).

E-CIGARETTES AND GEN-Z: HOW A NEW GENERATION OF NICOTINE ADDICTS REVIVED A DYING AGE-OLD TRADE

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I. INTRODUCTION

The United States has seen a dramatic shift in the attitudes toward tobacco use over the past century through an improved understanding of the vast health risks that tobacco products pose and an unsettling statistic: Cigarettes are responsible for more than 480,000 preventable deaths per year in the United States, and more than sixteen million Americans currently live with a disease caused by smoking.[1] However, as the use of cigarettes continues to sharply decline throughout the United States, the use of Electronic Nicotine Delivery Systems ("ENDS")—also known as electronic cigarettes, e-cigarettes, vaporizers, or vapes—has taken their place almost overnight and has become a gripping epidemic targeted at the youth of the Nation.[2]

Electronic cigarettes were first introduced into the United States in 2007 and have been advertised by large vaping and tobacco companies as an alternative to cigarettes because of the potentially less harmful side effects.[3] While preliminary evidence has suggested e-cigarettes play a role in helping people who are already addicted to cigarettes wean off their use, like tobacco-based cigarettes, electronic cigarettes are primarily nicotine delivery devices that are extremely addictive, and like traditional cigarettes, the product has been used to target the youth, and in turn, has potentially created a new generation of life-long nicotine addicts.[4] Through the use of enticing liquid nicotine flavors such as chocolate, cookie dough, cotton candy, mango, peanut butter, and banana split, to name a few, manufacturers have successfully targeted middle school and high school students across the United States; according to the Centers for Disease Control and Prevention ("CDC"), high school student e-cigarette usage has increased by 78% since 2017, and 48% among middle schoolers.[5]

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1. *Smoking & Tobacco Use: Fast Facts*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last updated May 21, 2020) [hereinafter *Smoking & Tobacco Use*].

2. Clark et al., *The Vaping Epidemic and Its Implications in Tobacco Regulation*, 13 INTERNET J.L. HEALTHCARE & ETHICS, no. 1, 2019, at 1, 1–2; Kate Keller, *Ads for E-Cigarettes Today Hearken Back to the Banned Tricks of Big Tobacco*, SMITHSONIAN MAG. (Apr. 11, 2018), http://www.smithsonianmag.com/history/electronic-cigarettes-millennial-appeal-ushers-next-generation-nicotine-addicts-180968747/.

3. Morgan Johnson, Note, *Regulatory Response to E-Cigarettes*, 45 GA. J. INT'L & COMP. L. 645, 648 (2017); Keller, *supra* note 2.

4. *See* Keller, *supra* note 2.

5. Matti Rose Vagnoni, *The Vapes of Wrath: Why the FDA Should Ban Fruity and Sweet Flavored E-Liquids to Preclude Adolescent Use of E-Cigarettes*, 71 ADMIN.

In 2009, President Barack Obama signed into law the *Family Smoking Prevention and Tobacco Control Act* ("Tobacco Control Act").[6] The Tobacco Control Act restricted the marketing of cigarettes and smokeless tobacco products to children and provided the Food and Drug Administration ("FDA") the authority to regulate any products it deemed fell under the definition of a tobacco product.[7] In 2016, the FDA used its deeming authority and issued a Final Rule that deemed electronic cigarettes, among other products, a tobacco product and thus allowed the FDA to regulate the manufacturing of these products, along with implementing rules that would help combat the rising youth e-cigarette epidemic across the United States.[8]

In 2020, amid the youth e-cigarette epidemic and the continued rising popularity of these products among children, the Trump Administration set a temporary ban on many candy and fruit-flavored e-cigarettes.[9] However, the new ban did not extend to menthol-flavored cartridges or refillable, tank-based vaping systems purchased in most vape shops, which users can fill with flavored e-liquid.[10] These exceptions represented a major retreat from an earlier White House plan to bar all flavors other than tobacco.[11]

This Comment will discuss the rise of electronic cigarettes in the United States and the political roadblocks that have made it virtually

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L. REV. 277, 277 (2019); *2018 NYTS Data: A Startling Rise in Youth E-Cigarette Use*, FDA, http://www.fda.gov/tobacco-products/youth-and-tobacco/2018-nyts-data-startling-rise-youth-e-cigarette-use (last visited May 12, 2021) [hereinafter *A Startling Rise in Youth E-Cigarette Use*].

6. TOBACCO CONTROL LEGAL CONSORTIUM, FEDERAL REGULATION OF TOBACCO: A SUMMARY 1 (2009) [hereinafter A SUMMARY OF THE FEDERAL REGULATION OF TOBACCO]; Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

7. *Family Smoking Prevention & Tobacco Control Act - An Overview*, FDA, http://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview (last updated June 3, 2020).

8. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28,974, 28,974 (May 10, 2016) (to be codified at 21 C.F.R. pt. 1100, 1140, 1143) [hereinafter Final Rule].

9. Allison Aubrey, *Trump Administration Issues Partial and Temporary E-Cigarette Ban*, NPR (Jan. 2, 2020, 4:10 PM), http://www.npr.org/2020/01/02/793134344/trump-administration-issues-partial-and-temporary-e-cigarette-ban.

10. *Trump Administration to Ban Most E-Cigarette Flavors, but not Tank-Based Products*, CBS 4: INDIANAPOLIS (Jan. 2, 2020, 1:55 PM), http://cbs4indy.com/news/national-world/trump-administration-plans-to-ban-most-e-cigarette-flavors/.

11. *Id.*

impossible to permanently ban all electronic cigarette flavors, despite an overwhelming amount of research from the FDA that reveals electronic cigarette flavors are one of the main reasons children begin using the products and continue to use the products.[12] First, this Comment will explore how combustible cigarettes first became popular in the United States and discuss how various litigation efforts and laws were set in place in the late twentieth century in order to dismantle the large tobacco companies that cost millions of lives.[13] Second, this Comment will discuss the emergence of electronic cigarettes in the United States and analyze how this relatively new tobacco product used decades-old tobacco company tactics in order to create the current epidemic of nicotine youth addiction that continues to grow at an unprecedented level.[14] Third, this Comment will explain the current laws and regulations placed on electronic cigarettes and how large vaping companies have managed to find various loopholes in the current laws set into place.[15] Lastly, this Comment will discuss how both President Barack Obama and President Donald Trump allowed lobbying and politics to prevent the permanent ban of all flavored electronic cigarettes.[16]

II. THE RISE AND FALL OF CIGARETTES IN THE UNITED STATES

The rise of cigarettes in the United States can be attributed to the significant lack of federal regulation throughout many decades, aggressive and misleading advertising by large tobacco companies, and the lack of longitudinal studies that effectively stated the health consequences of

12. *See* Press Release, Matthew L. Myers, President, Campaign for Tobacco-Free Kids, Obama Administration Takes First Step to Protect Kids from E-Cigarettes, Cigars, But Must Do More to Stop Kid Friendly Flavors in E-Cigarettes (May 5, 2016), http://www.tobaccofreekids.org/press-releases/2016_05_05_ecig [hereinafter *Obama Administration Takes First Step to Protect Kids From E-Cigarettes*]; discussion *infra* Part V.

13. *See* PUB. HEALTH L. CTR., THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW 1–2 (2019); discussion *infra* Part II.

14. *See* Keller, *supra* note 2; discussion *infra* Part III.

15. Sheila Kaplan, *Savvy Teens Find Loophole in Vaping Ban and Dive Through for Flavors*, N.Y. TIMES, Feb. 1, 2020, at A21; *see also* discussion *infra* Part IV.

16. *See* Desmond Jenson & Joelle Lester, *FDA Overruled by White House on Removing Flavored Cigars and E-Cigarette Liquids from the Market*, PUB. HEALTH L. CTR. (June 2, 2016), http://www.publichealthlawcenter.org/blogs/2016-06-02/fda-overruled-white-house-removing-flavored-cigars-and-e-cigarette-liquids-market; Press Release, Harold Wimmer, President & CEO, Am. Lung Ass'n, American Lung Association Disappointed by Reports of Forthcoming White House Announcement to Allow Flavored E-Cigarettes to Remain on Market (Jan. 1, 2020), http://www.lung.org/media/press-releases/reported-federal-guidance-flavored-ecigs; discussion *infra* Part V.

smoking.[17] While cigarette smoking was thought to be socially acceptable and relatively harmless for most of the twentieth century, this outlook took a swift turnaround when thousands of reports were released in 1964 that revealed this habit directly attributed to disease and death and thus, began the slow decline of the use of tobacco cigarettes in the United States.[18]

A. *Rising Up Through Advertisements*

In the early part of the twentieth century, cigarette smoking in the United States grew rapidly following the invention of the automatic cigarette rolling machine and through the use of an unprecedented amount of advertising.[19] By the early 1950s, forty-seven percent of American adults and half of all physicians were smoking cigarettes.[20] While large tobacco industries, such as Marlboro and Camel, appealed to women and men alike by marketing cigarettes as highly desirable and socially acceptable through the use of celebrity spokespeople, glamorous women, rugged men, and sponsorship through both sports and music festivals[21]—released internal documents give conclusive evidence that it was, in fact, children who were the main targets of tobacco industries.[22] The tobacco industry was well aware that nearly nine out of ten daily cigarette smokers try their first cigarette by the age of eighteen.[23] In fact, released documents reveal that the tobacco industry "[e]xamined [children] as young as *five*" in order to successfully market to them, as one executive was quoted saying, "they got lips? we want them" and also "[l]ooked at ways of preventing teenagers from quitting."[24]

During the 1940s and 1950s, as anti-smoking studies began to emerge throughout the United States, large tobacco industries, in turn, began

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17. *See A Brief History of Tobacco*, CNN, http://edition.cnn.com/US/9705/tobacco/history/ (last visited May 12, 2021).

18. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING — 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL iii (2014) [hereinafter *2014 Surgeon General's Report*].

19. K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 AM. ASS'N CANCER RES. 32, 32 (2014).

20. *Id.*

21. *7 Ways E-Cigarette Companies Are Copying Big Tobacco's Playbook*, CAMPAIGN FOR TOBACCO-FREE KIDS (Oct. 02, 2013), http://www.tobaccofreekids.org/blog/2013_10_02_ecigarettes.

22. *See* CLIVE BATES & ANDY ROWELL, TOBACCO EXPLAINED THE TRUTH ABOUT THE TOBACCO INDUSTRY . . . IN ITS OWN WORDS, 32–33 (1999).

23. *Youth & Tobacco Use*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm (last updated Dec. 16, 2020).

24. BATES & ROWELL, *supra* note 22, at 24.

financing their own research in order to question the validity of the anti-smoking studies results that indicated "the product was a gateway to serious health problems."[25] What is even more troubling is the fact that in 1962, a research chemist employed by R.J. Reynolds, the second-largest tobacco company in the United States, wrote that he and many members of the research department at R.J. Reynolds were intensely concerned about the cigarette smoke health problem in the United States—stating that while the company is publicly denying a link between smoking and cancer, the company's research revealed that there was a clear link between the two.[26]

B. *A Shift in the Public Perspective*

A scientist at the British American Tobacco Company ("BAT") once said, "[a] demand for scientific proof is always a formula for inaction and delay and usually the first reaction of the guilty . . . in fact, scientific proof has never been, is not and should not be the basis for political and legal action" (S.J. Green, 1980).[27] "During the first decades of the twentieth century, lung cancer was [relatively] rare."[28] However, as cigarette smoking became increasingly popular, the incidence of lung cancer quickly became an epidemic.[29] As extensive scientific research began to publish information that shed light on the dangers of smoking, the tobacco industry no longer rejected that there was a link between cigarettes and cancer—they simply argued that there was inconclusive evidence about the dangers of smoking and thus, were unable to reach a "definitive conclusion" during that time.[30] While the Federal Trade Commission ("FTC") was in charge of overseeing unfair trade practices in the tobacco industry, the tobacco industry went largely unregulated for most of the twentieth century.[31]

However, the United States saw a significant shift in the public attitudes towards cigarettes in 1964 due to the Surgeon General releasing the first report on the health consequences of smoking.[32] "The report reviewed more than 7000 research articles related to smoking and disease," and

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25. John D. Blum, *Tobacco Product Warnings in the Mist of Vaping: A Retrospective on the Public Health Cigarette Smoking Act*, 23 CHAP. L. REV., 53, 58 (2020).

26. BATES & ROWELL, *supra* note 22, at 6.

27. *Id.* at 1.

28. CDC, *Tobacco Use — United States, 1900–1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 985, 986 (1999) [hereinafter *Morbidity & Mortality Weekly Report*].

29. *Id.*

30. Blum, *supra* note 25, at 58.

31. *Id.* at 58–59.

32. *2014 Surgeon General's Report*, *supra* note 18, at iii.

"concluded that smoking was associated with . . . lung cancer and laryngeal cancer in men, was a probable cause of lung cancer in women, and was the . . . [leading] cause of bronchitis" in the United States.[33] As smoking slowly declined after the release of the report, few could have anticipated the long-term impact it would have on the nation's health.[34]

Following the Surgeon General's 1964 report, the FTC issued a proposed rule that would effectively mandate a prescribed warning "prominently displayed" on all tobacco "advertisements and on every cigarette pack . . . ."[35] The tobacco industry fought back with an aggressive lobbying effort on Capitol Hill, and despite there being strong support from almost all public health groups on implementing this rule, the American Medical Association ("AMA")—due to political reasons—ordered that there be more research before the adoption of these warnings come into effect.[36] Despite the tobacco companies' best efforts, in 1965, the Federal Cigarette Labeling and Advertising Act ("FCLAA") was enacted, which required health warnings on cigarette packages for the first time.[37] This legislation required manufacturers, packagers, and importers to place health warning labels on cigarette packages and advertisements, along with the submission of FTC reports to Congress on the effectiveness of labeling.[38] While the FCLAA prompted Congress to keep consumers completely informed on the health risks of tobacco use, the legislation did not regulate all types of cigarette advertising—especially advertising that targeted the youth population.[39] In 1975, an internal document by R.J. Reynolds outlined its primary marketing goals:

> Increase our Young Adult Franchise: 14–24 age group in 1960 was 21% of the population; in 1975 will be 27%. As they mature, they will account for key market share of cigarette volume for next 25 years . . . We will direct advertising appeal to this young adult group without alienating the brand's current franchise.[40]

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33. *Id.* at 5.
34. *See id.*
35. Blum, *supra* note 25, at 60.
36. *Id.*
37. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 1, 79 Stat. 282, 282 (1965); TOBACCO CONTROL LEGAL CONSORTIUM, THE FEDERAL TRADE COMMISSION AND TOBACCO 1 (2012) [hereinafter THE FEDERAL TRADE COMMISSION AND TOBACCO].
38. *See* THE FEDERAL TRADE COMMISSION AND TOBACCO, *supra* note 37, at 1–2; Lauren L. Greenberg, *The "Deeming Rule": The FDA's Destruction of the Vaping Industry*, 83 BROOK. L. REV. 777, 780–81 (2018).
39. Greenberg, *supra* note 38, at 780–81.
40. BATES & ROWELL, *supra* note 22, at 28.

It would take the United States another thirty-three years before implementing any significant prohibitions and restrictions on tobacco advertising, marketing, and promotional programs—a delay that would result in a substantial amount of smoking-related illnesses, deaths, and the largest civil litigation settlement in United States history.[41]

C. *The Master Settlement Agreement*

By the 1990s, individual states across the United States began to sue large tobacco companies in order to recover the insurmountable costs incurred due to treating sick and dying cigarette smokers.[42] Several studies between 1976 and 1993 revealed that smoking accounted for more than fifty billion dollars in Medicaid expenditures.[43] As a result, in 1998 the four largest cigarette companies at the time—R.J. Reynolds, Philip Morris, Lorillard, and Brown & Williamson—entered into a settlement agreement with forty-six states titled the *Master Settlement Agreement* ("MSA")—the largest civil litigation settlement in United States history.[44] As outlined in the MSA, the Settling States (as defined therein) released all Participating Manufacturers (as defined therein) from past and future legal claims brought by the states for any smoking-related illnesses and death, in exchange for equitable relief.[45] "[T]he Participating Manufacturers agreed to make annual payments in perpetuity to the Settling States . . . ."[46]

The base amounts of these annual payments were designed to steadily increase between the years 2000 and 2018; in 2018, the Participating Manufacturers paid approximately $7.2 billion to the Settling States.[47] In addition to making annual payments, the Participating Manufacturers also agreed to, among other items: (i) implement significant prohibitions and restrictions on tobacco advertising, specifically marketing that directly and indirectly targets the youth, (ii) stop suppressing health-related research, and (iii) cease making misrepresentations about the health consequences that arise due to smoking cigarettes.[48]

As stated in the MSA, the primary goal was to have the Settling States use the annual payments to initiate programs that would decrease

41. *See* PUB. HEALTH L. CTR., *supra* note 13, at 1–2.
42. *Id.* at 1.
43. *Id.*
44. *Id.* at 1–2; Greenberg, *supra* note 38, at 781.
45. PUB. HEALTH L. CTR., *supra* note 13, at 2.
46. *Id.*; Greenberg, *supra* note 38, at 781.
47. PUB. HEALTH L. CTR., *supra* note 13, at 4.
48. *Id.* at 5.

smoking among the youth and promote overall public health.[49] However, the final version of the Settlement Agreement left out any type of provision that would require the Settling States to use the money in this intended form.[50] Nevertheless, the Settling States would follow through with this intended purpose and tackle the health crisis head on by initiating many youth prevention programs and promote the public health, right?[51]

Between 1998 and 2017, the Settling States received over $126 billion in annual payments.[52] However, less than one percent of these funds went towards tobacco prevention programs.[53] Instead, these funds were used to cover yearly budget shortfalls and to address various programs unrelated to tobacco prevention among the youth or any tobacco prevention program for that matter.[54] In fact, each year the Settling States have received their annual payments, tobacco prevention programs received the *smallest* amount of allocated funds.[55] In 2017, seventeen states did not allocate any portion of their annual payment to tobacco prevention or cessation programs.[56] Even worse, select Settling States have even gone as far as selling their annual payments to various investors in exchange for a large upfront lump sum payment rather than waiting each year for payments under the MSA.[57] As a result, these states will no longer receive annual payments from the tobacco companies that entered into the MSA but are still prevented from engaging in any future litigation against these companies—no matter how much healthcare costs rise due to the use of their products.[58]

D. *Family Smoking Prevention and Tobacco Control Act*

In order to bridge the gap in legislation following the MSA, President Obama signed into law the 2009 Tobacco Control Act and gave the FDA the authority to regulate the manufacture, distribution, and marketing of all tobacco products.[59] A large purpose—if not the main purpose—of the Act was to finally put into place adequate and effective restrictions on tobacco advertising and marketing that had been directly targeting minors

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49. *Id.* at 8.
50. *Id.*
51. *See id.* at 5, 8.
52. PUB. HEALTH L. CTR., *supra* note 13, at 8.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. PUB. HEALTH L. CTR., *supra* note 13, at 9.
58. *See id.* at 2, 10.
59. *Family Smoking Prevention & Tobacco Control Act - An Overview*, *supra* note 7; A SUMMARY OF THE FEDERAL REGULATION OF TOBACCO, *supra* note 6, at 1.

since the beginning of the twentieth century.[60] The Act vehemently asserts that tobacco advertising and promotion plays a crucial role in adolescents deciding to become first-time tobacco users and less restrictive approaches have not, and will not, be effective or tolerated going forward.[61] These restrictions, it declares, will significantly reduce the number of minors using and becoming addicted to these life-threatening products.[62] "[The act] also created a new FDA office, [called] the Center for Tobacco Products ("CTP"), which would be completely funded by user fees from tobacco companies."[63]

Under the Tobacco Control Act, when regulating and reviewing products sold or distributed for the use to reduce risks or exposures associated with tobacco products, the FDA will have the power to determine whether manufacturers have adequately demonstrated that tobacco products "meet a series of rigorous criteria, and [that the products] will benefit the health of the population as a whole, taking into account both users of tobacco products and persons who do not currently use tobacco products," otherwise known as premarket authorization.[64]

The Tobacco Control Act made a key compromise with tobacco industries: Tobacco products that were on the market prior to the legislation would fall under a grandfather clause and therefore would effectively not be held to the same standard of scrutiny as new tobacco products entering the market.[65] Under the Tobacco Control Act, only new tobacco products are required to go through premarket authorization.[66] Therefore, any tobacco product commercially marketed in the United States before February 15, 2007 is not required to undergo premarket authorization to be legally marketed.[67] The requirements and regulations under the Tobacco Control Act applied to the following tobacco products: Cigarettes, cigarette tobacco, smokeless tobacco, and roll-your own tobacco.[68] It would take another nine years before the law would extend the FDA's authority to other types of

60. Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1776–79 (2009).

61. *See id.* § 2(31), at 1779.

62. *Id.* § 2(14), at 1777.

63. Jim McDonald, *The Deeming Rule: A Brief History & Timeline of the FDA's Vaping Regulations*, VAPING360: LEARN (Feb. 11, 2019), http://vaping360.com/learn/fda-deeming-regulations-timeline/.

64. Family Smoking Prevention & Tobacco Control Act § 2(36), at 1779.

65. *Grandfathered Tobacco Products*, FDA, http://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/grandfathered-tobacco-products (last updated June 17, 2020).

66. *Id.*

67. *Id.*

68. 21 U.S.C. § 387a(b).

tobacco products such as e-cigarettes, hookah tobacco, cigars, cigarillos, and pipe tobacco.[69]

III. THE EMERGENCE OF ELECTRONIC CIGARETTES

In 1958, a scientist at Philip Morris, an American multinational cigarette and tobacco manufacturing company, acknowledged the various health problems associated with cigarette smoking and stated "[an] all-synthetic aerosol to replace tobacco smoke . . . I know this sounds like a wild program[], but I'll bet that the first company to produce a cigarette claiming a substantial reduction in tars and nicotine . . . will take the market."[70] This statement was most likely met with a few raised eyebrows and chuckles at the time, however, in the year 2020—with electronic cigarettes being the most popular tobacco product among the youth—this statement now reads as an early foreshadowing of the grim reality we live in today as approximately forty million people in the world use electronic cigarettes.[71]

A. *What are Electronic Cigarettes?*

ENDS products were first introduced to the United States market in 2007.[72] ENDS products represent the evolution of tobacco products in the United States.[73] These products were invented initially in 2003 by a Chinese pharmacist, Hon Lik, who created the device in order to help him quit his heavy cigarette smoking habit—a habit that also killed his father.[74] Electronic Cigarettes are non-combustible devices that usually contain nicotine—the addictive additive in traditional combustible cigarettes—and comes in various shapes, sizes, and models.[75] Ordinarily, electronic

69. *See* Final Rule, 81 Fed. Reg. at 28974–75.

70. BATES & ROWELL, *supra* note 22, at 54.

71. *E-Cigarettes: Effective Cessation Tool or New Gateway to Smoking Tobacco?*, UNION INT'L CANCER CONTROL (Oct. 9, 2019), http://www.uicc.org/news/e-cigarettes-effective-cessation-tool-or-new-gateway-smoking-tobacco; *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 5 (2016) [hereinafter E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS].

72. Vagnoni, *supra* note 5, at 277–78.

73. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 6.

74. Sarah Boseley, *Hon Lik Invented the E-Cigarette to Quit Smoking — But Now He's a Dual User*, GUARDIAN: NEWS (June 9, 2015), http://www.theguardian.com/society/2015/jun/09/hon-lik-e-cigarette-inventor-quit-smoking-dual-user.

75. *About Electronic Cigarettes (E-Cigarettes)*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html (last updated Feb. 24, 2020).

cigarettes contain a battery, a heating element or an atomizer, and a reservoir for holding liquid solution ("E-Liquid" or "E-Juice") which contain varying amounts of nicotine and flavorings.[76]

The device works by heating the liquid solution, which then produces an aerosol through which users inhale through their lungs and then exhale the aerosol into the air, creating a smoke-free vapor, where bystanders can also breathe in this aerosol.[77] Users will experience a rush of nicotine similar to that of a traditional combustible cigarette.[78] When electronic cigarettes were first introduced into the United States market, the products were designed to resemble traditional cigarettes (e.g., white body and brown tip) and were closed-system devices, often referred to as the "cig-alike."[79] More recent generations of ENDS developed rapidly, reflecting an increase in technology and a consumer demand to exercise more control over the device.[80] As noted, while electronic cigarettes were created as a way for current smokers to stop smoking tobacco cigarettes, these devices—like tobacco-based cigarettes—are primarily nicotine delivery devices and thus, are highly addictive and dangerous devices.[81]

1. E-Cigarette Market Players

ENDS products were originally sold exclusively by internet retailers, but as popularity grew throughout the United States, the product quickly expanded its market into kiosks at shopping malls and, more recently, to independent "vape shops."[82] As the rapid evolution of both the e-cigarette market and the industry itself has grown at an unprecedented level, large tobacco companies such as Altria and R.J. Reynolds began investing in e-cigarette technology in order to maintain revenue due to a steep decline in cigarette sales.[83] As of 2014, electronic cigarette use rapidly surpassed conventional cigarette use amongst the youth, making e-cigarettes the most

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76. *See id.*

77. *Id.*

78. Johnson, *supra* note 3, at 647.

79. *Id.*; William Tilburg et al., *FDA Regulation of Electronic Nicotine Delivery Systems and the "Deeming" Rule: What's Left for States?*, 20 J. HEALTH CARE L. & POL'Y 27, 30 (2017).

80. Tilburg et al., *supra* note 79, at 32.

81. *See* Jennifer S. Bard, *Introducing New Users to an Old Poison: The Tobacco Industry's Efforts to Thwart the FDA's Regulation of E-Cigarettes*, 8 ST. LOUIS U.J. HEALTH L. & POL'Y 213, 217, 221 (2015).

82. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 149.

83. *See id.* at 150; Johnson, *supra* note 3, at 648.

commonly used tobacco product among the youth and young adults.[84] Big tobacco companies have successfully entered the market, making up half of all e-cigarette sales, and a valuation of $1.5 billion thus far.[85]

While ENDS products were relatively popular in the early 2000s, one brand, in particular, was introduced into the market in 2015 and has dominated e-cigarette sales in the United States—a brand that goes by the name of Juul.[86] Between 2015 and 2017, Juul has transformed from a little-known brand into the largest retailer of electronic cigarettes in the United States.[87] Juul devices are sleekly-designed rechargeable e-cigarettes that closely resemble a USB flash drive.[88] Juul's instant popularity can be accredited towards the "product's ability to mimic the user experience of traditional cigarettes" and through their use of aggressive and strategic marketing.[89] As with most tobacco companies, the creator of Juul has stated that their product was intended solely for adults; however, the device has been extremely popular with teenagers and has aided in creating many first-time smokers.[90] Amongst high school and middle school students, Juuls are incredibly popular due to them being discreet enough that students can use them during school hours while going virtually unnoticed.[91]

In addition, Juul has captivated a more mainstream audience than any other e-cigarette brand has, so much so that when using Juul, users do not consider it to be "vaping"—a verb used when smoking other brands of electronic cigarettes—but is considered "JUULing."[92] In 2018, tobacco giant Altria, the nation's leading tobacco company, invested $12.8 billion into Juul—giving Altria a 35% ownership in the country's most popular e-cigarette.[93] Altria's investment in Juul valued Juul at $38 billion and gave

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84. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 5.

85. Johnson, *supra* note 3, at 648; *see also* Clark et al., *supra* note 2, at 3.

86. Vagnoni, *supra* note 5, at 278–79.

87. Jidong Huang et al., *Vaping Versus JUULing: How the Extraordinary Growth and Marketing of JUUL Transformed the U.S. Retail E-Cigarette Market*, 28 TOBACCO CONTROL 146, 146 (2019).

88. *Id.*

89. Vagnoni, *supra* note 5, at 280.

90. *See* Anne Hurst, Note, *Marketing, Federalism, and the Fight Against Teen E-Cigarette Use: Analyzing State and Local Legislative Options*, 69 CASE W. RES. L. REV. 173, 193 (2018).

91. *See id.*; Angus Chen, *Teenagers Embrace JUUL, Saying It's Discreet Enough to Vape in Class*, NPR: NEWS (Dec. 4, 2017, 11:58 AM), http://www.npr.org/sections/health-shots/2017/12/04/568273801/teenagers-embrace-juul-saying-its-discreet-enough-to-vape-in-class.

92. Chen, *supra* note 91.

93. Jamie Ducharme, *Tobacco Giant Altria Just Made a $12.8 Billion Investment in Juul*, TIME: HEALTH (Dec. 20, 2018, 11:18 AM), http://time.com/5485247/juul-altria-investment/.

Juul direct "access to Altria's 'infrastructure and services,' as well as retail space . . . ."[94] This contradictive duo raised many questions due to Juul's statement that their mission is to give adult smokers a healthy alternative to cigarettes.[95]

A doctor and member of the American Thoracic Society stated that he was "amazingly worried" about how the partnership will affect the already record-high teen vaping rates, and that these two companies together could generate an astonishingly unprecedented number of teens who are hooked on nicotine.[96] This is because large tobacco companies, such as Altria, "have the resources to exploit the gaps in the law" that have been "long prohibited for conventional cigarettes."[97] From a tobacco industry perspective, e-cigarettes are a transformative product because they have the ability to effectively reduce their opposition to anti-smoking public health laws and regulations and shift their current and potential smoking customers to e-cigarettes—a product they are already heavily invested in.[98]

2. Health Risks of E-Cigarettes

As of 2019, "[a]pproximately [forty] million people use e-cigarettes worldwide."[99] According to the Surgeon General, both the youth and young adults have most commonly cited that the reason they started using e-cigarettes was due to curiosity, taste, and because they believed e-cigarettes caused minimal harm in comparison to other tobacco products.[100] The perception that e-cigarettes are not as harmful is most likely due to the products not being on the market long enough for long-term data to tell us otherwise.[101] However, even in the absence of long-term studies, the effects of e-cigarettes have been making an appearance as people begin to vape more and more each day, at an alarming rate.[102] Researchers have indicated that the most worrying aspect of e-cigarettes is nicotine, which studies have

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94. *Id.*
95. *Id.*
96. *Id.*
97. Bard, *supra* note 81, at 215.
98. *See* Eric N. Lindblom, *Should FDA Try to Move Smokers to E-Cigarettes and Other Less-Harmful Tobacco Products and, If So, How?*, 73 FOOD & DRUG L.J. 276, 277, 279 (2018).
99. *E-Cigarettes: Effective Cessation Tool or New Gateway to Smoking Tobacco?*, *supra* note 71.
100. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 6.
101. *See* Amanda Mull, *Vaping's Plausible Deniability Is Going Up in Smoke*, ATLANTIC (Sept. 6, 2019), http://www.theatlantic.com/health/archive/2019/09/vaping-illness/597550/.
102. *See id.*

proven is damaging to brain development and is extremely addictive.[103] During adolescence, the part of the brain that is responsible for impulse control and decision making does not fully develop until about age twenty-five; until then, the brain is still growing.[104] Due to this, younger people are uniquely at risk for long-term, lasting effects when exposing themselves to nicotine.[105] The long-term effects of nicotine include nicotine addiction, mood disorders, and permanent lowering of impulse control.[106] In addition, research has revealed that nicotine also affects the way synapses are formed, which has the ability to harm the parts of the brain that control attention and learning.[107]

In 2019, the CDC reported 450 cases across thirty-three states of a mysterious "vaping illness," now known as "E-Cigarette or Vaping Product Use Associated Lung Injury" ("EVALI") that affects the lungs of people who were previously healthy with no underlying conditions; most of the cases came from people under the age of thirty.[108] As of February 18, 2020, a total of 2807 hospitalized EVALI cases have been reported to the CDC, along with sixty-eight deaths due to EVALI across the United States.[109] Studies have shown the outbreak of EVALI cases might be due to both retailers and users adding vitamin E acetate to their vaping devices, most notably in THC-containing ENDS products.[110] Vitamin E acetate is a vitamin that is usually found in the foods we eat, "including vegetable oils, cereals, meat, . . . and vegetables."[111] While the intake of vitamin E acetate through our food does not usually cause harm to the human body, however, when this vitamin is heated and inhaled, it has the potential to create great interference with normal lung functioning.[112]

Health experts across the United States have also warned that vaping may provide a gateway to smoking conventional cigarettes.[113] Following a

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103. Chen, *supra* note 91.

104. *See* E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 105.

105. *See id.* at 98, 105.

106. *See id.* at 105.

107. *See id.* at 104–05.

108. Mull, *supra* note 101; *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#what-we-know (last updated Nov. 27, 2020).

109. *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, *supra* note 108.

110. *Id.*

111. *Id.*

112. *Id.*

113. Chen, *supra* note 91; E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 221.

two year study conducted at the Yale School of Medicine between the years of 2013–2015, a research scientist found that out of the 808 high school students who participated in the study, students who used e-cigarettes were seven times more likely to smoke cigarettes by the second study, and almost four times more likely to smoke cigarettes by the third survey.[114] Regardless of age, people who use a combination of both cigarettes and ENDS products, "commonly referred to as 'dual use,' present[] a growing public health concern."[115] Many tobacco users believe that cutting down on cigarettes—by adding in another tobacco product—is an effective way to improve their health.[116] Health experts are strongly advising against this method, stating that dual use may result in an increased exposure to harmful toxicants and "an increased risk of negative health outcomes" such as "cardiovascular disease [and] pancreatic and esophageal cancers . . . ."[117] Dual use among current tobacco users usually "prevents, rather than assists," the ability for users to quit smoking.[118] The FDA has currently approved five products that are safe and have been scientifically proven to be effective in helping smokers quit: nicotine patches, gum, lozenges, inhalers, and nasal sprays.[119]

B. *E-Cigarettes—Taking a Page from Big Tobacco Companies' Playbook*

Within the Smithsonian's National Museum of American History lies a collection of over 50,000 advertisements produced by big tobacco companies that range from "magazines, newspapers, billboards, television, and the internet [produced] from the turn of the [twentieth] century to the present day."[120] These advertisements highlight the tobacco industry's efforts to draw the American people into using its products and reveals the depth to which these companies would go to deceive the public about the known health risks during that time associated with using the products.[121] From kid-friendly tobacco advertisements that featured cartoon characters, to enticing flavors such as strawberry, grape, and chocolate, e-cigarette companies have taken note and mirrored most of their advertising and marketing techniques from these infamous—now banned—tobacco

114. Chen, *supra* note 91.
115. Tilburg et al., *supra* note 79, at 41.
116. *Dual Use of Tobacco Products*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/campaign/tips/diseases/dual-tobacco-use.html (last updated Mar. 23, 2020).
117. Tilburg et al., *supra* note 79, at 42.
118. *Id.*
119. *Dual Use of Tobacco Products*, *supra* note 116.
120. Keller, *supra* note 2.
121. *Id.*

strategies in an effort to target the youth and entice a new generation of nicotine users.[122] In the mid-1980s, a marketing report at R.J. Reynolds once said:

> Younger adult smokers have been the critical factor in the growth and decline of every major brand and company over the last [fifty] years. They will continue to be just as important to brands/companies in the future for two simple reasons: The renewal of the market stems almost entirely from [eighteen]-year-old smokers. No more than [five] percent of smokers start after age [twenty-four]. The brand loyalty of [eighteen]-year-old smokers far outweighs any tendency to switch with age. . . . Once a brand becomes well-developed among younger adult smokers, aging and brand loyalty will eventually transmit that strength to older age brackets. . . . [B]rands/companies which fail to attract their fair share of younger adult smokers face an uphill battle. They must achieve net switching gains every year to merely hold share. . . . Younger adult smokers are the only source of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle.[123]

Similar to conventional cigarettes, e-cigarettes fell outside of the FDA's tobacco regulatory powers for almost ten years, and during that time, more than 8,500 vape shops "sprung up in strip malls and stand-alone stores" across the United States, aiding in the current unprecedented amount of new generation tobacco users.[124]

1. Marketing

The Tobacco Control Act of 2009 explicitly stated that research has undoubtedly proven that tobacco marketing plays a large part in the initiation of smoking by youth.[125] Due to this, the use of tobacco advertisements were extremely restricted throughout the United States in order to combat the tobacco youth epidemic.[126] However, when electronic cigarettes were first introduced into the United States market in 2007, the product did not immediately fall under the FDA's jurisdiction and went virtually unregulated

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122. *Id.*

123. BATES & ROWELL, *supra* note 22, at 31–32 (quoting R.J. REYNOLDS TOBACCO CO., YOUNGER ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES i–3 (1984)).

124. *See* Johnson, *supra* note 3, at 649.

125. Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, § 2(5), 123 Stat. 1776, 1779 (2009).

126. *Id.* at 1777.

until 2016.[127] Since electronic cigarettes hit the United States market in the early 2000s, close to 13,000 e-cigarette advertisements across various platforms have been collected, and when placed side-by-side with old tobacco companies' advertisements, the similarities are strikingly almost identical.[128] In 2013, e-cigarette advertisements were rife with celebrity spokespeople, magazine ads featuring glamorous women and rugged men, and had sponsorships with major sporting companies and music festivals—sound familiar?[129]

In 2014, e-cigarette companies spent a total of $125 million on advertising alone.[130] However, this data did not reflect all expenditures for retail marketing, social media, and sponsored events, all of which were essential components of the industries marketing strategies.[131] The leading e-cigarette brand, Juul, had advertisements appearing on billboards in Times Square, YouTube videos, and various magazines which used bright, attention-grabbing colors and designs that illustrated beautiful, young adults dancing and laughing while vaping.[132]

In 2013, BAT received heavy criticism after one of their e-cigarette advertisements appeared on an online children's game.[133] For its launch in 2015, Juul used various social media outlets such as Instagram, Twitter, and YouTube to market their products, which directly targeted the youth.[134] These paid advertisements promoted images that associated Juul with being cool, fun, and embolized a sense of freedom and sexual appeal.[135]

2. From Sponsorships to Scholarships

Following the Master Settlement Agreement in 1998, tobacco companies were banned from participating in any sponsorship with companies and events that had the potential to reach a significant amount of

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127. Johnson, *supra* note 3, at 648.

128. Keller, *supra* note 2.

129. *7 Ways E-Cigarette Companies Are Copying Big Tobacco's Playbook*, *supra* note 21.

130. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 157.

131. *Id.* at 158.

132. Vagnoni, *supra* note 5, at 280.

133. *E-Cigarettes: Marketing*, TOBACCO TACTICS http://tobaccotactics.org/wiki/e-cigarettes-marketing/ (last updated Feb. 5, 2020).

134. *4 Marketing Tactics E-Cigarette Companies Use to Target Youth*, TRUTH INITIATIVE (Aug. 9, 2018), http://truthinitiative.org/research-resources/tobacco-industry-marketing/4-marketing-tactics-e-cigarette-companies-use-target.

135. *Id.*

youths.[136] E-cigarettes, on the other hand, did not have any such sponsorship regulations before 2016.[137] In 2011, Blu, an electronic cigarette brand owned by tobacco giant Imperial Brands, sponsored a NASCAR driver and even had its own car in some races.[138] In addition, in 2013, Blu and six other e-cigarette companies distributed free samples during large events and even sponsored events at large music festivals.[139] Even as recent as 2018, Juul sponsored the "Music in Film Summit" at the 2018 Sundance Film Festival in Utah.[140]

What is even more troubling is the fact that several e-cigarette companies, in a mission to combat negative studies being released on the dangers of e-cigarettes, began offering scholarships to students with a value of up to $5,000 through which students were asked to write essays on topics like whether vaping could have potential benefits and whether e-cigarettes minimize the negative effects of smoking.[141]

3. Flavors and Addictive Additives

Electronic cigarette flavors such as chocolate, cookie dough, mango, peanut butter, and pistachio played a major role in attracting youth e-cigarette users before the recent temporary flavor ban was implemented in 2020 by President Donald Trump in order to combat the vaping youth epidemic.[142] As e-cigarettes became more popular in the United States, more than 7,000 unique e-liquid flavors became available to e-cigarette users.[143] In 2013, a study was released that revealed young adults between the ages of eighteen and twenty-four were more likely to be enticed into smoking flavored tobacco products than of those in older age groups.[144] Over eighty-one percent of youths who use e-cigarettes have stated that it was the flavors that ultimately drew them into initiating the use of the products.[145] Flavors such as the ones listed were previously used by tobacco companies before

136. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 159.
137. *Id.*
138. *Id.*
139. *Id.* at 159, 163.
140. *4 Marketing Tactics E-Cigarette Companies Use to Target Youth*, *supra* note 134.
141. *Id.*
142. Aubrey, *supra* note 9; Vagnoni, *supra* note 5, at 277.
143. THE NAT'L ACAD. OF SCI. ENG'G & MED., PUBLIC HEALTH CONSEQUENCES OF E-CIGARETTES 172 (Kathleen Stratton et al. eds., 2018).
144. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 164.
145. Hurst, *supra* note 90, at 190.

the Tobacco Control Act banned them in 2012 in order to prevent youth use of tobacco and thereby reduce future healthcare costs across varying states.[146]

In 2016, it was discovered that the founders of Juul mimicked decades-old tobacco company strategies by adding in nicotine salts to their devices—salts that contained up to three times more nicotine found in previous e-cigarettes.[147] The owners of Juul acknowledged that they intentionally copied this decade-old tobacco company strategy but said that it was to satisfy cravings of adult smokers, not children.[148] Nonetheless, "[d]octors [believe that] nicotine salts allow [for] the chemical[s] [in ENDS products] to 'cross the blood-brain barrier and lead to potentially more [damaging] effect[s] on the developing brain in adolescents.'"[149] Thus, it follows that a large amount of new generation nicotine addicts have already been established and may have already been exposed to damaging effects on the brain due to Juul's products and their additives.[150]

IV. CURRENT REGULATIONS ON ELECTRONIC CIGARETTES

The United States has taken many critical steps in a relatively short time frame to regulate electronic cigarettes and decrease the current epidemic of youth nicotine addiction.[151] The FDA, in conjunction with health experts, has successfully advocated for laws that significantly restrict the ability for large tobacco companies to sell ENDS products to minors, and even raised the minimum tobacco purchasing age from eighteen to twenty-one.[152] However, much more work is needed to be done in the eyes of health experts due to large vaping and tobacco companies finding loopholes in order to continue fueling the electronic cigarette epidemic amongst youth and young adults.[153]

146. *See id.* at 190 n.105.

147. Al Cross, *Juul Labs Used Research that Tobacco-Cigarette Manufacturers Wanted to Use to Get Young People to Become Addicted to Nicotine*, KY. HEALTH NEWS (Dec. 2, 2019), http://ci.uky.edu/kentuckyhealthnews/2019/12/02/juul-labs-used-research-that-tobacco-cigarette-manufacturers-wanted-to-use-to-get-young-people-to-become-addicted-to-nicotine/.

148. *Id.*

149. *Id.*

150. *See id.*

151. *Obama Administration Takes First Step to Protect Kids from E-Cigarettes*, *supra* note 12.

152. *See* McDonald, *supra* note 63.

153. Kaplan, *supra* note 15.

A. *The Final Rule*

Cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco were immediately regulated when President Obama's 2009 Tobacco Control Act went into effect.[154] For other kinds of tobacco products not listed in the initial act, the Tobacco Control Act authorizes the FDA to issue regulations, "deeming" them to be subject to such authorities.[155] Once the FDA declares a tobacco product "deemed," the product's sale and distribution may be restricted, which includes age-related access restrictions and advertising and promotion restrictions.[156] This final rule has two purposes:

> (1) To deem all products that meet the definition of a "tobacco product" under the law, except accessories of a newly deemed tobacco product, and subject them to the tobacco control authorities in chapter IX of the FD&C Act and FDA's implementing regulations; and (2) to establish specific restrictions that are appropriate for the protection of the public health for the newly deemed tobacco products.[157]

In delegating this authority to the FDA, the FDA can aggressively and successfully take action in reducing the amount of deaths and diseases that result from the use of newly introduced tobacco products in the United States.[158] In 2016, the FDA decided to use their deeming power to issue a final rule that would deem various products which met the statutory definition of "tobacco product" to be subject to the Federal Food, Drug, and Cosmetic Act ("the FD&C Act"), as amended by the Tobacco Control Act.[159] The newly deemed products included e-cigarettes, cigars, hookah, pipes, and pipe tobacco.[160] After the FDA deemed ENDS products to meet the statutory definition of tobacco products, the FDA's authority extended to e-cigarette components and parts, such as: e-liquids, atomizers, batteries, tank systems, flavors, and programmable software.[161] However, their related accessories would not be regulated under the FDA's authority due to the FDA believing

154. *See* 21 U.S.C. § 387a.
155. Final Rule, 81 Fed. Reg. at 28,974, 28,975.
156. *Id.*
157. *Id.* at 28,975.
158. *Id.*
159. *Id.*
160. McDonald, *supra* note 63.
161. Final Rule, 81 Fed. Reg. at 28,975.

that accessories of newly deemed tobacco products pose little to no direct impact on the public health.[162]

Consistent with the statute, the deeming provisions included a federal minimum age limit of eighteen to purchase ENDS products, mandated health warnings on product packages, severely limited e-cigarette vending machine sales, and subjected ENDS products to the premarket approval requirement.[163] In addition, the Deeming Rule mandates that ENDS producers and retailers must first obtain permission from the FDA before stating that their products are less dangerous than tobacco cigarettes or that there are potential health benefits from switching to e-cigarettes from tobacco cigarettes.[164] This regulation falls "[u]nder the Tobacco Control Act, [which states that] it is illegal to sell a 'modified risk tobacco product' (MRTP) without FDA approval."[165] While the Obama administration took the first critical step in protecting future youth generations from the dangers that are associated with using tobacco products, there is still much more work to be done in the eyes of health experts due to the rule failing to restrict e-cigarette marketing targeted at the youth; failing to ban flavored e-cigarette products—including menthol—which has been proven to be a key reason children begin using tobacco products in the first place; and not taking strong enough steps to prevent online sales of e-cigarettes to children under the age of eighteen.[166]

B. *Youth Tobacco Prevention Plan*

In 2017, the FDA put forth a comprehensive plan for tobacco and nicotine regulation.[167] This regulatory effort placed nicotine, and the issue of addiction to nicotine—specifically amongst the youth—at the forefront of the agency's regulatory efforts.[168] A major component of this plan was the Youth Tobacco Prevention Plan ("YTPP"), which aimed to combat the rising epidemic levels of e-cigarette use among the youth by implementing

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162. *Id.*

163. Jonathan H. Adler, *Regulatory Obstacles to Harm Reduction: The Case of Smoking*, 11 N.Y.U. J.L. & LIBERTY 712, 735 (2017); McDonald, *supra* note 63.

164. Adler, *supra* note 163, at 744.

165. *Id.*; Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111–31, § 911, 123 Stat. 1776, 1813 (2009).

166. *Obama Administration Takes First Step to Protect Kids from E-Cigarettes*, *supra* note 12.

167. *Youth and Tobacco*, FDA, http://www.fda.gov/tobacco-products/public-health-education/youth-and-tobacco (last updated Feb. 13, 2020) [hereinafter *Youth and Tobacco*].

168. *Id.*

vigorous enforcement of the FDA's regulatory rules announced in 2016.[169] In 2019, the FDA took several actions against brick-and-mortar storefronts who have notoriously ignored the law and illegally marketed and sold e-cigarettes and other tobacco products to children under the age of eighteen.[170] Over the years, these storefronts have simply paid the associated fines and penalties and written it off as a cost of doing business.[171] One popular brick-and-mortar storefront in particular, Walgreen Co., has on numerous occasions—1,800 times to be exact—violated the FDA's rules on selling tobacco products to the youth.[172] Walgreen Co., who pride themselves with being a health-and-wellness minded business, is currently the top violator among all pharmacies across the United States who has illegally sold tobacco products to minors.[173]

On March 4, 2019, the FDA announced that they sent a letter to the corporate management at Walgreen Co. and requested a meeting to discuss the possibility of a corporate-wide issue of illegally selling tobacco products to children, and to discuss the important role they play, as a nationwide retailer, in curbing the youth e-cigarette epidemic.[174] However, Walgreen Co. is not alone when it comes to ignoring the law and illegally selling tobacco products to minors.[175] Wal-Mart, Mobil, 7-Eleven, Family Dollar, and Exxon, to name a few, have all been identified as storefronts who have illegally sold tobacco products to children since the inception of the FDA's retailer compliance check inspection program in 2010.[176]

The FDA has also sent warning letters to several companies whose ENDS products have failed to include the required nicotine warning statement.[177] Research has shown that consumers—especially children—are misinformed of the presence of nicotine in tobacco products and of the risks that nicotine tobacco products may pose.[178] The FDA has stated that

169. *FDA Statement: Statement from FDA Commissioner Scott Gottlieb, M.D., on Forceful New Actions Focused on Retailers, Manufacturers to Combat Youth Access to E-cigarettes as Part of FDA's Youth Tobacco Prevention Plan*, FDA (Mar. 4, 2019), http://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-forceful-new-actions-focused-retailers-manufacturers [hereinafter *FDA's Youth Tobacco Prevention Plan: Fighting Youth Access to E-Cigarettes*].

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *FDA's Youth Tobacco Prevention Plan: Fighting Youth Access to E-Cigarettes*, *supra* note 169.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

continued failure to place the required nicotine warning statement on ENDS products may result in enforcement action in the near future.[179]

C. *Tobacco 21*

In March 2015, the National Academy of Medicine released a landmark report that stated if the government raised the minimum tobacco purchasing age from eighteen to twenty-one, such a law could prevent over 223,000 deaths among people born between 2000–2019, including reducing over 50,000 deaths caused by lung cancer.[180] The American Lung Association ("ALA") applauded this study and commemorated Congresswoman Diana DeGette on her efforts to require the FDA to conduct mandatory studies about raising the age limit to twenty-one during the passage of the Tobacco Control Act.[181] Prior to the passage of the federal law, sixteen states across the United States increased the legal sales age for tobacco products, including e-cigarettes, to twenty-one.[182] The list of these states are as follows: California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, Ohio, Oregon, Pennsylvania, Utah, Vermont, Washington, and the District of Columbia.[183]

On December 20, 2019, President Donald Trump signed into legislation an act that raised the federal minimum age of the sale of tobacco products from eighteen to twenty-one.[184] This legislation amends the FD&C Act, and makes it illegal for a retailer to sell any tobacco product—including cigarettes, smokeless tobacco, hookah tobacco, cigars, pipe tobacco, and ENDS products along with e-liquids—to anyone under the age of twenty-one.[185] In order to carry out this legislation, the FDA will conduct

179. *FDA's Youth Tobacco Prevention Plan: Fighting Youth Access to E-Cigarettes*, *supra* note 169.

180. *Tobacco 21 Laws: Raising the Minimum Sales Age for All Tobacco Products to 21*, AM. LUNG ASS'N: POL'Y & ADVOC. (Feb. 26, 2020), http://www.lung.org/policy-advocacy/tobacco/prevention/tobacco-21-laws.

181. Press Release, Am. Lung Ass'n, American Lung Association Applauds Congress for Increasing Age of Sale for Tobacco Products to 21 (Dec. 16, 2019), http://www.lung.org/media/press-releases/congress-includes-tobacco-21-year-end-package.

182. *Tobacco 21 Laws: Raising the Minimum Sales Age for All Tobacco Products to 21*, *supra* note 180.

183. *Id.*

184. *Newly Signed Legislation Raised Federal Minimum Age of Sale of Tobacco Products to 21*, FDA, http://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21 (last updated Jan. 15, 2020).

185. *Id.*

compliance check inspections of tobacco product retailers.[186] Following this legislation and protocols, experts predict that there will be a huge reduction in the use of e-cigarettes amongst the youth.[187] As research has shown, youth under the age of eighteen have often sought after older classmates as a source for tobacco products and raising the minimum age to purchase tobacco products, in theory, drastically lowers the ability for this transaction to occur.[188]

D. *Temporary Ban on Flavors*

On January 2, 2020, President Donald Trump and his administration announced a partial and temporary ban on all flavored e-cigarette cartridges, except for the flavors menthol and tobacco.[189] The exception to continue to allow menthol-flavored e-cigarette cartridges is a large step back from the Trump administration's previous announcement a few months prior, which stated their intention to ban fruit, mint, and dessert flavors, including menthol, in an effort to combat the rising rates of youth nicotine addiction.[190] The temporary ban applies to pre-filled nicotine cartridges—cartridges popularly sold by Juul out of gas stations and convenient stores.[191] However, the flavor restriction does not ban refillable tank-based systems; therefore, users will continue to be able to purchase these products and fill their device with the flavor of their choice.[192] While this temporary ban represents the Trump Administration's efforts to combat the e-cigarette epidemic among the youth, "the decision to permit menthol and exempt tank-based vapes was immediately condemned by anti-tobacco advocates who have [urged] the Trump [A]dministration to follow through on its initial [plan] to ban all flavors except tobacco."[193]

In addition to not banning refillable tank-based systems, the policy also permits all flavors to be continually sold in devices that cannot be

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186. *Tobacco 21*, FDA, http://www.fda.gov/tobacco-products/retail-sales-tobacco-products/tobacco-21 (last updated Feb. 12, 2020).

187. *U.S. State and Local Issues: Raising the Tobacco Age to 21*, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/what-we-do/us/sale-age-21 (last updated Jan. 9, 2020).

188. *Id.*

189. Aubrey, *supra* note 9.

190. Stephanie Ebbs, *Trump Administration Restricts Most Flavored Vaping Cartridges but not Menthol*, ABC NEWS (Jan. 2, 2020, 5:03 PM), http://abcnews.go.com/Politics/trump-administration-effectively-ban-flavored-vaping-cartridges-menthol/story?id=67986224.

191. *Trump Administration to Ban Most E-Cigarette Flavors, But Not Tank-Based Products*, *supra* note 10.

192. *See id.*

193. *Id.*

refilled and are designed to be disposed of after the flavored nicotine has run out.[194] While this has effectively diverted students away from using Juul products, it has, in turn, led them to use a new mysterious e-cigarette company called Puff Bar, whose products are disposable.[195] Established in 2019, Puff Bar's brightly colored e-cigarettes and fruity flavors such as orange, mango, and banana have handsomely profited from this temporary flavor ban on refillable nicotine cartridges.[196] This controversial multi-million dollar company has effectively found a loophole, and concerns continue to rise as lawmakers and numerous public health advocates have been unable to clearly pinpoint who is really in control of the company.[197] Through diligent research, it appears that Puff Bar is entangled with many other companies in the United States and China.[198] The co-founder and medical professor of a program called Stanford Research into the Impact of Tobacco Advertising has stated that his research team has discovered that the first trademark application for a Puff Bar product was made by a Chinese company, and has said that many of the producers of Puff Bar's products are concentrated in China.[199] When investigations on Puff Bar were close to unraveling who the owner was of this mysterious company, on July 9, 2020, two men in California claimed to be the CFO and CEO; however, they refused to disclose who originally hired them or anything about the company for that matter.[200] In an interview, the two men stated that despite their titles, their job was to run the Puff Bar website.[201]

As the novel coronavirus pandemic continues to surge throughout the United States, public health and anti-smoking groups have urged the FDA to punish Puff Bar for using ads that target children after evidence has demonstrated that the use of e-cigarettes leads to worse outcomes for coronavirus patients.[202] Recently, an Illinois Democrat has demanded the

194. Kaplan, *supra* note 15.

195. *Id.*

196. *See What are Puff Bars?*, TRUTH INITIATIVE (Jan. 31, 2020), http://truthinitiative.org/research-resources/emerging-tobacco-products/what-are-puff-bars; Eli Wolfe, *Lifting the Veil on a Controversial E-Cigarette Company*, SALON (July 18, 2020, 1:24 AM), http://www.salon.com/2020/07/17/lifting-the-veil-on-a-controversial-e-cigarette-company-_partner/.

197. *See* Eli Wolfe, *Controversial E-Cigarette Company Puff Bar Says It's Suspending U.S. Sales*, FAIRWARNING (July 13, 2020), http://www.fairwarning.org/2020/07/e-cigarette-company-suspends-sales/.

198. *Id.*

199. Wolfe, *supra* note 196.

200. *See* Wolfe, *supra* note 197.

201. *Id.*

202. *See id.*; Raja Krishnamoorthi, *FDA Can Boost the Coronavirus Battle by Pausing the Sale of E-Cigarettes*, THE HILL (Apr. 29, 2020, 2:30 PM),

FDA take action and ban the sales of Puff Bar due to the company targeting children.[203] On July 13, 2020, the Puff Bar website stated that they would suspend sales in the United States until further notice.[204] However, health experts are concerned and expecting that these highly addictive products will soon be reintroduced to the United States' market, under different brand names, and continuing this seemingly endless rat-race.[205]

V. POLITICAL ROADBLOCKS PREVENTING A PERMANENT BAN ON FLAVORED E-CIGARETTES

Throughout the twenty-first century, there has been insurmountable evidence that points to the sweet flavors of electronic cigarettes as the cause of what initially entices youth and young adults into initiating the use of electronic cigarettes.[206] While there have been notable attempts by both health experts and the FDA over the past five years to ban all flavored e-cigarettes; these attempts have fallen by the wayside, as aggressive political roadblocks have successfully prevented the placement of such a ban.[207]

A. *White House Block on E-Cigarette Flavor Ban in 2016*

When the FDA exercised its deeming authority under the Tobacco Control Act and extended its jurisdiction over cigarettes and smokeless tobacco to e-cigarettes and other tobacco products in the 2016 Final Rule, the FDA's own data indicated that there was a high public health danger posed by sweet electronic cigarette flavors, including menthol.[208] The FDA's research, published in an October 2015 study in the Journal of the American Medical Association ("JAMA"), revealed that 81.5% of current youth e-cigarette users began and continued to use ENDS products because they were available in the various flavors that they enjoyed.[209] As the youth e-cigarette epidemic began to spread like wildfire across the United States at an unprecedented level, the FDA announced plans to place sweeping

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http://thehill.com/blogs/congress-blog/healthcare/495269-fda-can-boost-the-coronavirus-battle-by-pausing-the-sale-of-e.

203. Wolfe, *supra* note 197.

204. *Id.*

205. *Id.*

206. E-CIGARETTE USE AMONG YOUTH & YOUNG ADULTS, *supra* note 71, at 164.

207. *See* Press Release, Am. Lung Ass'n, *supra* note 181.

208. *See* Final Rule, 81 Fed. Reg. at 28974, 28975; *Obama Administration Takes First Step to Protect Kids from E-Cigarettes*, *supra* note 12.

209. *Obama Administration Takes First Step to Protect Kids from E-Cigarettes*, *supra* note 12.

restrictions on newly deemed flavored tobacco products in the Final Rule.[210] The FDA stated that their draft of the Final Rule would extend the current ban of flavored cigarettes to flavored ENDS products—including the flavor menthol—absent specific evidence proving that a certain flavor or flavors was necessary and "appropriate for the protection of the public health."[211] However, the final document that outlined the Final Rule, released in 2016 by the Obama Administration, failed to include these restrictions despite the FDA's recommendation.[212]

The FDA's initial draft of the Final Rule did not fall short of their intended promise to protect future youth generations from the well-established dangers associated with ENDS products as they dedicated an entire section—spanning across fifteen pages—titled *Flavored Tobacco Products*, which explained at great length how flavored tobacco disproportionately impacts youth and young adults.[213] In this section, the FDA stated that since flavoring ensures a pleasant taste and makes tobacco products easier to use, this "increases their appeal among new users, most notably, among [youth and] young [adults]."[214] It was also stated that internal tobacco company studies confirmed that sweeter flavors appealed to new tobacco users by "masking the strong tobacco taste" and evoking the perception that these products were somehow more mild than traditional tobacco.[215]

The FDA's research also revealed, as stated in the *Flavored Tobacco Products* section, that the flavored chemicals used when making flavored tobacco products largely overlapped with the same chemicals used in several brands of candy and Kool-Aid drink mix, concluding that the chemicals from candy and Kool-Aid were shockingly similar to flavored tobacco flavors such as "cherry, grape, apple, peach, and berry . . . ."[216] Similarly, menthol-flavored products would be treated the same as other characterizing flavors "because when it is used as a characterizing flavor, menthol has a similar impact on a product's appeal to youth and [other] adults as such other characterizing flavors."[217] However, the FDA stated that tobacco-flavored

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210. Jenson & Lester, *supra* note 16.

211. Stanton A. Glantz, *ASH & AATCLC Sue FDA for Continuing to Allow the Sale of Menthol Tobacco Products*, UCSF CTR. FOR TOBACCO CONTROL RSCH. & EDUC. (June 17, 2020), http://tobacco.ucsf.edu/ash-aatclc-sue-fda-continuing-allow-sale-menthol-tobacco-products/.

212. *See* Final Rule, 81 Fed. Reg. at 28974; Jenson & Lester, *supra* note 16.

213. *See* FDA, DEEMING FINAL RULE REDLINE CHANGES 167 (2014), http://beta.regulations.gov/document/FDA-2014-N-0189-83193.

214. *Id.* at 170.

215. *Id.* at 171.

216. *Id.*

217. *Id.* at 169.

products would not be banned and/or restricted, because unlike other characterizing flavors (as stated therein), tobacco-flavored products were not as appealing to youth and young adults when compared to their appeal to older adults.[218]

Unfortunately, this monumental attempt from the FDA to protect the youth from becoming addicted to newly deemed tobacco products was deleted by the White House Office of Management and Budget ("OMB") prior to the release of the rule, opting to keep these youth-attractive flavored products on the market despite the insurmountable evidence provided by the FDA that proved these flavors would continue—if not increase—the addiction levels among the youth in the United States.[219] The OMB is an organization within the White House, staffed mostly by economists, whose role includes: (1) coordinating the Executive Administration's financial management and regulatory policies; (2) assisting the President in overseeing the preparation of the Federal budget; and (3) supervising the Federal budget's administration.[220] The OMB is responsible for overseeing all federal rules that may potentially have a large impact on the national economy and has the authority to make significant changes that impact the public health, safety, and welfare of the United States.[221]

When a reporter at the *Los Angeles Times* asked why the White House decided to strike this provision, officials said that a cost-benefit analysis revealed that "the economic burden on vape shops appeared to outweigh [the] potential health benefits" that would accrue from the ban.[222] According to the CDC, "[t]here were 1.5 million more . . . youth e-cigarette users in 2018 than 2017," and in 2018, 4.9 million middle and high school students were current tobacco product users.[223] After the Final Rule took effect in 2016, Juul sales increased more than six-fold, and essentially erased decades of progress on the prevention of youth smoking in the United States.[224] The Obama Administration's decision to strike this key provision in the Final Rule has led millions of youth and young adults to become

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218. FDA, *supra* note 213, at 169.

219. *See id.* at 167, 170; Jenson & Lester, *supra* note 16.

220. *Office of Management and Budget's Home Page*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Feb. 9, 2009), http://obamawhitehouse.archives.gov/omb/gils_gil-home.

221. Jenson & Lester, *supra* note 16.

222. Emily Baumgaertner, *The FDA Tried to Ban Flavors Years Before the Vaping Outbreak. Top Obama Officials Rejected the Plan*, L.A. TIMES (Oct. 1, 2019, 3:00 AM), http://www.latimes.com/politics/story/2019-10-01/vaping-flavors-obama-white-house-fda.

223. *Tobacco Use by Youth Is Rising*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 21, 2019), http://www.cdc.gov/vitalsigns/youth-tobacco-use.

224. Baumgaertner, *supra* note 222.

addicted to e-cigarettes and "quashed an important opportunity to protect the public health of all Americans . . . ."[225]

B. *Lobbying Efforts*

In October 2019, the *Los Angeles Times* released an investigation on why the White House decided to strike down the FDA's proposed rule to ban all flavors of newly deemed tobacco products in 2016.[226] The investigative report indicated that lobbying had a large part to do with the Obama Administration's Final Rule, as reports revealed that over the course of forty-six days, more than one-hundred large tobacco industry lobbyists and small business advocates met with OMB officials as they decided on whether to include the ban on flavors in the Final Rule or not.[227] As stated earlier, OMB officials ultimately decided to side with the vape shops and large tobacco industries as they stated the economic burden on these companies outweighed the benefits that would result from the ban.[228] In 2015, over $20 million was spent on lobbying tobacco.[229] In 2019, the Trump Administration announced a plan that would direct the FDA to remove all non-tobacco flavored e-cigarettes from the market due to the rising concerns of youth use and related vaping illnesses believed to be correlated with vaping.[230] When the Trump Administration initially sketched out their plans to remove flavored e-cigarettes, menthol was among the flavors listed.[231] President Donald Trump was quoted during the announcement saying that the country needed "strong rules and regulations" in order to make these

225. *See* Stanton A. Glantz, *The White House Told FDA That Black Lives Don't Matter*, UCSF CTR. FOR TOBACCO CONTROL RSCH. & EDUC. (June 6, 2016), http://tobacco.ucsf.edu/white-house-told-fda-black-lives-don't-matter [hereinafter *The White House Told FDA That Black Lives Don't Matter*].

226. *See* David Dayen, *Big Tobacco Lobbied to Save Vaping: Now It Controls the Leading E-Cigarette Company*, AM. PROSPECT (Oct. 4, 2019), http://prospect.org/health/big-tobacco-lobbied-to-save-vaping-juul-altria/.

227. *Id.*

228. Baumgaertner, *supra* note 222.

229. *Industry Profile: Tobacco*, OPENSECRETS.ORG, http://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2015&id=A02 (last visited May 12, 2021).

230. *See* Press Release, Harold Wimmer, President & CEO, Am. Lung Ass'n, American Lung Association Responds to Trump Announcement to Remove Flavored E-cigarettes from Market, (Sept. 11, 2019), http://www.lung.org/media/press-releases/flavored-e-cigarettes-announcement.

231. *See* Press Release, Matthew L. Myers, President, Campaign for Tobacco-Free Kids, Trump Administration Breaks Its Promise to Kids and Families to Eliminate Flavored E-Cigarettes, Prioritizes Industry Over the Health of Our Kids (Jan. 1, 2020), http://www.tobaccofreekids.org/press-releases/2020_01_01_trump_admin_broken_promise.

harmful devices less appealing to youth.[232] It is important to note, that as of 2020, all e-cigarette products that are on the market have essentially slid by without many rules or any regulations due to the fact that all e-cigarettes on the market are currently there illegally because no e-cigarette product has yet to apply for approval from the proper FDA channels.[233] This lack of regulation is due to the United States Department of Health and Human Services ("DHHS") deciding to allow these products to be sold illegally in order to determine whether or not they could effectively serve their initial purpose of off-ramping adults who are currently addicted to combustible cigarettes.[234] More recently, however, the Secretary of DHHS was quoted stating "[the] off-ramp from addiction must not come at the expense of these [e]-cigarette[s] becoming an on-ramp for addiction for a new generation of children, which is what is occurring today."[235]

In spite of these statements from both President Donald Trump and Secretary of DHHS, when the list of temporarily banned electronic cigarette flavors was finalized and released, the Trump Administration left menthol off the list—breaking their promise to health experts and families across the United States who are in the midst of fighting the youth epidemic of nicotine addiction driven by flavored electronic cigarettes.[236] This decision was a large retreat from the Trump Administration's initial plan to ban menthol flavored e-cigarettes and vaping cartridges and comes after President Donald Trump met with large vaping industry representatives in November to discuss the potential e-cigarette regulations amid the nationwide outbreak of vaping-related injuries and deaths.[237] On the day the Trump Administration's plan was released, the ALA President and CEO stated in a press release that he was *deeply disappointed* that President Donald Trump decided to allow menthol-flavored products—along with thousands of other flavors of e-cigarettes—to continue to be sold on the market, and also stated that it was disturbing to see how these results were a product of industry lobbying.[238] The retreat from the original plan is a compromise with large vaping industries and "will preserve a significant portion of the multibillion-

232. Ebbs, *supra* note 190.
233. *Id.*
234. *Id.*
235. *Id.*
236. Press Release, Myers, *supra* note 231.
237. Ebbs, *supra* note 190; *see also* Doina Chiacu & Tim Ahmann, *Trump to Meet with Vaping Industry as He Mulls Tighter Regulation*, REUTERS: HEALTHCARE & PHARM. (Nov. 11, 2019, 9:17 AM), http://www.reuters.com/article/us-health-vaping-trump/trump-to-meet-with-vaping-industry-as-he-mulls-tighter-regulation-idUSKBN1XL1SP.
238. Press Release, Wimmer, *supra* note 16.

dollar vaping market."[239] Thus, it follows that large tobacco companies, such as Altria and R.J. Reynolds, who are also major players in the vaping market, have yet again defeated public health advocates in their mission to combat the current vaping epidemic amongst the youth.[240]

In addition, White House advisors advised President Donald Trump that a total flavor ban could potentially have political consequences and cost him votes in the next upcoming election.[241] This advisement comes from the aggressive social media launch by industry groups, including Vapor Technology Association, which released a campaign called "#IVapeIVote" and has had a successful following by current electronic cigarette users who are against a total flavor ban.[242]

C. *Proposal to Remove FDA's Authority over Tobacco Regulation*

Another attempt by the White House to undermine the FDA's ability to effectively regulate e-cigarettes was taken on February 10, 2020, as President Donald Trump presented a $4.8 trillion budget proposal, for the 2021 fiscal year, that included moving the oversight of all tobacco products out of the FDA's hands and into a new agency within the DHHS, that would be led by a Senate-confirmed Director appointed by the President.[243] This announcement was released shortly after a promising new bill began to make waves on Capitol Hill titled *Protecting American Lungs and Reversing the Youth Tobacco Epidemic Act of 2020*, that would, among other items, ban menthol in e-cigarettes and "prohibit marketing and advertising that 'appeals to . . . individual[s] under [twenty-one] years of age.'"[244] On February 28, 2020, this bill was introduced and passed by the House of Representatives.[245]

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239. *Trump Administration to Ban Most E-Cigarette Flavors, But Not Tank-Based Products*, *supra* note 10.

240. Richard Harris, *Politics, Industry Backlash Stall White House Ban on Flavored Vaping Products*, NPR (Nov. 18, 2019, 5:13 PM), http://www.npr.org/sections/health-shots/2019/11/18/780562607/politics-industry-backlash-stall-white-house-ban-on-flavored-vaping-products.

241. *Trump Administration to Ban Most E-Cigarette Flavors, But Not Tank-Based Products*, *supra* note 10.

242. *Id.*

243. Andrew Nagy, *Trump's Budget Would Create New Tobacco Regulation Agency*, CIGAR AFICIONADO (Feb. 11, 2020), http://www.cigaraficionado.com/article/trump-s-budget-would-create-new-tobacco-regulation-agency.

244. Executive Office of the President, Statement of Administration Policy: H.R. 2339 - Reversing the Youth Tobacco Epidemic Act of 2019 (Feb. 27, 2020), http://www.whitehouse.gov/wp-content/uploads/2020/02/SAP_HR-2339.pdf; *see also* Protecting American Lungs and Reversing the Youth Tobacco Epidemic Act of 2020, H.R. 2339, 116th Cong. (2019).

245. H.R. 2339.

However, just a day before, on February 27, 2020, the Executive Office of the President published a statement showing its concerns about the current version of the bill:

> The bill takes the wrong approach to tobacco regulation. Rather than continuing to focus on the FDA's Center for Tobacco Products, Congress should implement President Trump's Budget proposal to create a new, more directly accountable agency within the Department of Health and Human Services to focus on tobacco regulation. This new agency would be led by a Senate-confirmed Director and would have [a] greater capacity to respond to the growing complexity of tobacco products and respond effectively to tobacco-related public health concerns. If presented to the President in its current form, the President's senior advisors would recommend that he veto the bill.[246]

While the Administration makes a less-than-reassuring statement that it is "committed to protecting the Nation's youth from the harms of tobacco," this wage of war on the FDA could lead to new legislation to amend the Tobacco Control Act, which would potentially open the doors to large delays in the current efforts at combatting the youth nicotine addiction epidemic.[247] The American Heart Association's Executive Vice President of Advocacy stated that the Trump Administration "has repeatedly placed the needs of the [large] tobacco industr[ies] on equal footing with public health" and should allow the FDA to continue exercising its authority it has been granted in order to protect the public health; and in turn, the Trump Administration should focus its attention on creating "meaningful efforts to end youth tobacco . . . and nicotine [use]."[248]

VI. CONCLUSION

At the beginning of the twenty-first century, health experts lowered their swords as nicotine addiction in the United States drastically minimized and the stigma of smoking cigarettes was seemingly here to stay.[249] However, this victory was relatively short-lived, as electronic cigarettes entered the United States' market in 2007, and with the help of decade-old

246. Executive Office of the President, *supra* note 244.

247. *Id.*; *see also* Michael Nedelman & Jen Christensen, *Trump Budget Plan Could Push Tobacco Oversight Out of the FDA*, CNN: HEALTH, http://www.cnn.com/2020/02/10/health/tobacco-regulation-fda-trump/index.html (last updated Feb. 10, 2020).

248. Nedelman & Christensen, *supra* note 247.

249. *See 2014 Surgeon General's Report*, *supra* note 18, at iii.

tobacco product strategies, created a new generation of nicotine addicts without any of the stigma and without virtually any regulation for the first ten years.[250]

While it would be remiss to ignore the milestones that have been set in place over the years, which range from the Final Act in 2016—which allowed the FDA to gain authority over ENDS products—to raising the minimum tobacco purchasing age from eighteen to twenty-one, there is still much more work to be done before health experts lower their swords.[251] The temporary ban of flavored e-cigarette cartridges is a step in the right direction, however, the only way to successfully end the worsening of the youth e-cigarette epidemic is to permanently eliminate all flavored e-cigarette flavors, including menthol, and to place public health over large tobacco companies.[252]

250. *See* Johnson, *supra* note 3, at 648–49.

251. *See* McDonald, *supra* note 63; *Newly Signed Legislation Raised Federal Minimum Age of Sale of Tobacco Products to 21*, *supra* note 184.

252. Press Release, Myers, *supra* note 231.


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