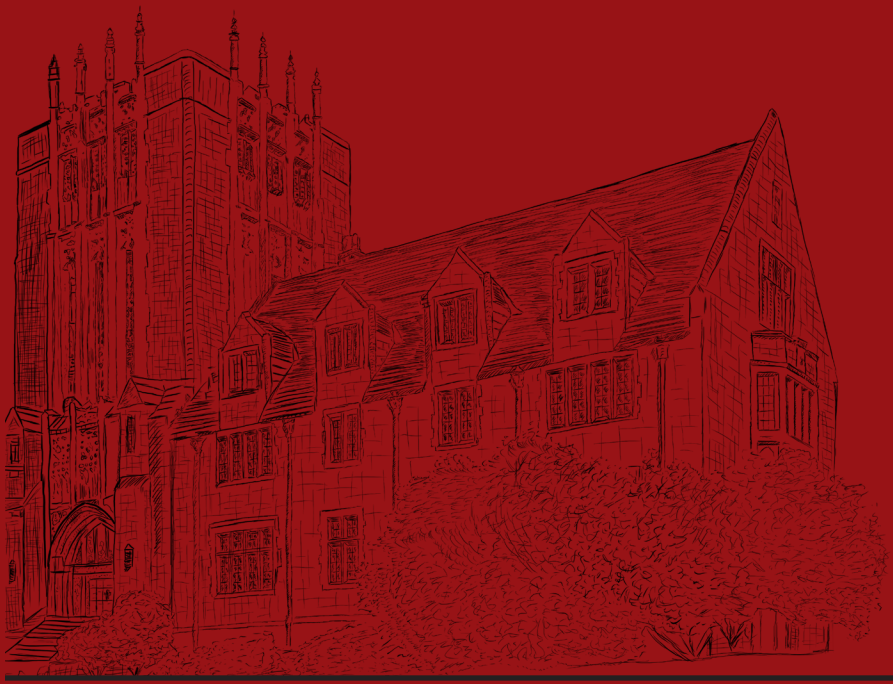
Grove City College

Journal of Law & Public Policy



Volume 15 2024

GROVE CITY COLLEGE

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 21st edition of *The Bluebook*.

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden ’12, Kevin Hoffman ’11, and Steven Irwin ’12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College’s community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been cited in numerous academic publications and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Esteemed Reader,

It is my privilege to offer this 15th volume on behalf of the *Grove City College Journal of Law & Public Policy* as the culmination of our year's efforts to promote legal research and provide a forum for the scholarship of students, faculty, and friends of the College. At the beginning of the academic year, our team quickly finished the editing and distribution of the previously unreleased Volumes 13 & 14 while simultaneously beginning work on this Volume's production. After two years of failing to publish on time, myself and other upperclassmen hoped to lead the *Journal* to not only perform the obligatory duty of releasing an annual volume, but to also lay the groundwork for future growth across multiple areas of *Journal* operation – a promise upon which our executive team has faithfully delivered.

These areas include expanding our online presence with a new website and imminent use of Scholastica to solicit articles, the organization of the *Journal's* first inde-

pendent symposium, and reestablishing our headquarters in the Bridge Office of Crawford Hall beyond the continual effort to become more procedurally efficient and provide a more robust training to our editors. We have the privilege of concluding the academic year in celebration of the *Journal's* 15th Anniversary by hosting a symposium the week Volume 15 is printed, featuring addresses on current legal issues from alumni practitioners and the Hon. William Stickman IV of the Western District of Pennsylvania on the historical and philosophical foundations of law ~ remarks from which will be featured in a forthcoming symposium edition of the *Journal*.

To bring our readership the copy you now hold, student editors have undertaken – on top of their coursework and, for many, law school applications – learning a variety of skills including the use of Bluebook citation methodology, and honing their critical editing abilities within our peer review process. It has been a privilege to see my peers grow not only in their command of tangible skills, but also

in their eagerness to pursue their studies, and ultimately vocations, as callings underscored with a zeal to glorify their LORD in all aspects of life.

Beyond thanking our associate editors, whose hard work and flexibility make the production of this publication possible, I would also like to extend my gratitude to the faculty and alumni who have offered invaluable counsel and championed the cause of the *Journal* on and off campus, including, but not limited to, the Hon. President Paul McNulty for your steadfast mentorship and wisdom, our advisor Dr. Caleb Verbois for the staunch advocacy you undertake on behalf of your students, Jeff Prokovich and Amanda Sposato for providing us with the means to organize a symposium and distribute the *Journal*, Jonathan DiBenedetto for furnishing us (quite literally) with an office space conducive to productivity, Christa Frankenburg for your patience and assistance in making the printing of the *Journal* possible, and Falco Muscante II for your continued dedication to the *Journal*, its editors, and the College.

The *Journal's* ability to provide Grove City students a forum for their scholarship and accessibility to the legal world which they hope to join is made possible by our donors. As an entirely donor-funded organization, we depend on the generosity of our readership to continue to produce this publication and serve the student body free of charge. To that end, consider making a financial gift, requesting additional or previous volumes, or inquiring into how your work can be featured within future volumes at LawJournal@gcc.edu or visiting https://stuorgs2.gcc.edu/lawjournal/. All previous volumes are available in our online archive and on HeinOnline, alongside over 3,000 leading legal publications; submissions for Volume 16 can be submitted directly via email or through Scholastica. On behalf of the *Journal*, thank you for your readership and continued support.

Michael C. Halley III '24

Editor-in-Chief

FORWARD

Dear Reader,

Welcome to Volume 15 of the *Grove City College Journal of Law and Public Policy*. As the advisor to the *Journal*, and the pre-law advisor at Grove City, I have the privilege of working with an excellent group of students who work hard to publish one of the few undergraduate peer-reviewed journals in the country.

Over the past several years I have encouraged the editors to seek out work that addresses the *Public Policy* side of the *Journal of Law and Public Policy*, as well as the *Law* aspect of the *Journal*. As you read this edition, you will see several articles that address public policy, or even better, connect public policy issues with legal theory.

For example, the first memo, by Matthew Martens, applies the command to love one's neighbor to how lawyers should fulfill their calling in the criminal justice system. The second essay, a brief by Isaac Good, deals with student loan forgiveness through the lens of *Biden* v. *Nebraska*. The third essay, from Jaimie Cavanaugh of the Pacific

Legal Foundation, summarizes and argues for the Supreme Court's decision to strike down affirmative action admissions policies in higher education. The fourth essay from Caleb and Lili Pirc, examines the school choice debate through an originalist approach to the question of political uniformity statutes in several states. Finally, the concluding piece is a timely piece that looks at two historical examples of anti-trust enforcement from both an economic and legal standpoint and considers how they might apply to the ongoing case of *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc*.

I am very grateful for the efforts of this group of editors who have worked hard to complete this edition of the *Journal*, in addition to finalizing the work of the last two classes in the Fall of '23.

We hope you will enjoy reading these essays,

Caleb A. Verbois

Professor of Political Science

Christian Love and Criminal Justice

Matthew T. Martens*

**Matt T. Martens is a trial lawyer and partner at an international law firm in Washington, DC. He graduated first in his class both at the University of North Carolina School of Law and at Dallas Theological Seminary. Matt has spent the bulk of his more than 27-year legal career practicing criminal law as both a federal prosecutor and as a defense attorney. Early in his career, he served as a law clerk to Chief Justice William Rehnquist at the U.S. Supreme Court. Matt's writing has appeared in The Wall Street Journal, The Washington Post, and other outlets, and he is the author of a recent book entitled, Reforming Criminal Justice: A Christian Proposal, which was reviewed by The Wall Street Journal. Matt has spoken at schools across the country, including Stanford University, University of Chicago, University of Pennsylvania, Georgetown University, Columbia University, University of Michigan, Baylor University, University of Georgia, and many others.*

In Luke 10, we are told of a lawyer who stood up to question Jesus. “What must I do to inherit eternal life?” he asked.

Jesus turned the question back on the lawyer, asking him what the law said about that question.

The lawyer responded, “Love the Lord your God with all your heart, soul, mind, and strength” (quoting Deuteronomy 6), “and love your neighbor as yourself” (quoting Leviticus 19).

“You answered rightly,” Jesus responded. “Do this and you will live.”

And the lawyer, seeking to justify himself, asked, “Who is my neighbor?”

It was in response to this question that Jesus told what has become one of his most famous parables, the story of the Good Samaritan. Through that parable Jesus shows that the question we should ask is not who is my neighbor, but who am I? Jesus challenges the lawyer to be a neighbor, to love as a neighbor, to love across the deepest ethnic division in that culture.

The command to love our neighbor as ourselves is

one of the most repeated commands in all of Scripture. It appears eight times across the Old and the New Testaments. Its first occurrence is in Leviticus 19 in a passage that reads:

> You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness you shall judge your neighbor. . . . You shall not take vengeance or bear a grudge against the sons of your own people, but you shall love your neighbor as yourself.[1]

In other words, the command to love our neighbors as ourselves was originally rooted in a command to do legal justice to our neighbors. I want to consider here what Scripture tells us are two elements of neighbor-love when it comes to criminal justice.

First, loving my neighbor as myself in the context of criminal justice means that I must love *all* my neighbors – the criminally victimized, the criminally accused, the society impacted by crime – as myself. The Anglican ethicist Nigel Biggar has written the best book I have read on the topic of neighbor-love. The book is actually about just war

1 *Leviticus* 19:15, 18.

theory, but many of its insights apply as much to criminal justice as to war because criminal justice is, like war, an act of state-sponsored physical force. No war is waged without the use of physical force, and likewise no one is arrested and ultimately jailed except by actual or threatened physical force. Writing of war, Biggar says:

> The New Testament does not generate an absolute prohibition of violence, but it does generate an absolute injunction of love. . . . This makes obvious sense when the neighbor in view is the innocent victim of unjust aggression, on whose behalf the just warrior takes up arms. However, the innocent victim is not the only neighbor on site. Since love is an absolute injunction, applying always and everywhere, the just warrior is bound to love the unjust aggressor. His love—as Jesus made plain—must extend itself to the enemy.[2]

In the same way, my obligation to love—your obligation to love—extends not only to those victimized by crime, not only to those impacted by crime, but also to those who perpetrate crime, to those who are, in Biggar's words, "unjust

2 Nigel Biggar, In Defense of War 61 (2013).

aggressors." My Christian obligation is to love my neighbors (plural) as myself.

Second, loving my neighbor as myself means being committed to accuracy in judging between my neighbors. No one is loved by inaccurate verdicts. The wrongly convicted is obviously not loved, because he will now be punished for a wrong he did not commit. The victim too is unloved by a false conviction because he or she is misled into believing that the injustice they have suffered has been vindicated when it has not. Society at large is not loved by a false conviction because they are left exposed to the future wrongs of that wrongdoer. And, critically, the wrongdoer is unloved by a false conviction because he is denied the opportunity for the corrective discipline that a true conviction would bring to bear on him. Loving my neighbors, all my neighbors, depends on the accuracy of the criminal justice system.

So how do we achieve accuracy? To start with, accuracy depends on due process.[3] We are not clairvoyant, we are not mind-readers, we are not omnipresent, and we have no

3 Matthew T. Martens, Reforming Criminal Justice: A Christian Proposal 90 (2023).

time machines. Thus, if we are to achieve accurate results, it will be because we have a process, a fair process, a process that is designed to achieve accurate results, a process that *surfaces and tests* the relevant evidence. Even then, accuracy depends on impartiality. Judging with partiality is to judge on personalities rather than on the facts. And, thus, partiality corrupts the quest for accuracy even when a fair process is followed.

Still further, accuracy requires that our punishments be proportionate. We must not only accurately distinguish right from wrong, and the guilty from the innocent, but we must also speak accurately about *how wrong* a particular wrong was. Not all wrongs are of the same severity, and accuracy requires proportionate punishments that speak truthfully about the degree of the wrong committed.

Finally, accuracy requires accountability for those government magistrates who judge inaccurately. Accuracy, in other words, demands that we tell the truth about both the wrongs of the governed and the wrongs of the governors. As Irenaeus of Lyon put it in his work *Against Heresies*, when the magistrate acts "to the subversion of justice," then

"in these things shall they also perish."[4]

If this is what Scripture demands—accuracy achieved by due process, protected by impartiality, expressed through proportionality, and maintained by accountability—how are we in the United States doing when it comes to criminal justice?

Since the advent of forensic DNA technology in August 1989, 3,433 men and women have been exonerated after having been convicted of crimes they did not commit. Let me be clear, these are not people who later got off on legal technicalities. These are people who didn't do it. And yet collectively, they spent more than 31,000 years in prison for crimes they did not commit before their innocence was discovered. Lest you think the situation is improving, 2022 was a record year for exonerations, with 249—nearly one every business day.[5]

Since the death penalty was reinstated in the US in

4 Irenaeus, *Against Heresies* 5.24, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, ed. Oliver O'Donovan and Joan Lockwood Donovan (Grand Rapids, MI: Eerdmans, 1999), 17.

5 *Exonerations by State*, National Registry of Exonerations (Feb. 18, 2024), https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

1972, just short of 9,000 men and women have been sentenced to death.[6] 196 have been exonerated, meaning they were sentenced to death for crimes that we now know as a fact they did not commit.[7] That's two percent of death sentences. One out of fifty. Those are the ones we know. But exonerations take time, fifteen years on average. Statistical modeling projects conservatively that four percent of those sentenced to death in the US are innocent.[8] One out of every twenty-five. Would you get into a room of fifty (or twenty-five) people knowing that one person in that room would be shot and killed? Would you send your children into that room? Will you send your neighbor into the room?

Why are we getting it so wrong so often? Why are we not more accurate? The truth is that there is no monocausal explanation, but I'll note two contributing factors to our inaccuracy:

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6 *Death Sentences in the United States Since 1973*, Death Penalty Information Center (Feb. 18, 2024), https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year.

7 *Innocence*, Death Penalty Information Center (February 18, 2024), https://deathpenaltyinfo.org/policy-issues/innocence.

8 Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kenney, *The Rate of False Conviction of Criminal Defendants Who Are Sentences to Death* 7234 Proc. Nat'l Acad. Scis. 111 (2014).

First, we do not provide adequate criminal defense counsel for the poor, and it is the poor who we primarily prosecute. In March 1963, in the case of *Gideon v. Wainwright*,[9] the Supreme Court said that the Sixth Amendment right to counsel means that the poor who are prosecuted for crimes in either state or federal court must be provided with counsel if they cannot afford a lawyer. As the Court explained, we aren't truly providing people with due process if we give them a trial in which they must face off against a professional advocate (prosecutor) and navigate complicated procedural and evidentiary rules without the assistance of an attorney. As the Court said, someone might be convicted in that scenario not because they are guilty, but because they don't know how to show their innocence.

But the evidence is overwhelming that, now sixty-one years after *Gideon,* states still don't provide adequate funding for indigent defense. In a state-by-state series of studies, the American Bar Association has concluded that states are funding approximately one third of the lawyers needed to handle the caseloads.[10] In 2017, a federal judge

9 372 U.S. 335 (1963).

10 See, e.g., The Oregon Project: An Analysis of the Oregon

observed that "the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*."[11] In 2018, the Wisconsin Supreme Court observed that the compensation rate for appointed lawyers was so "abysmally low" that "most attorneys will not accept . . . appointments because they literally lose money if they take those cases."[12]

This isn't to malign the skill and dedication of those who serve as counsel for the poor; rather, it's to recognize the limitations of lawyers assigned three times the caseload they can capably handle regardless of skill. Failing to fund sufficient indigent defense counsel is partiality against the poor and will inevitably lead to inaccurate outcomes.

Second, prosecutors and police officers too frequently hide evidence of defendants' innocence but are not held

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Public Defense System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, January 2022), 27 https://www.americanbar.org/; The New Mexico Project: An Analysis of the New Mexico Public Defense System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, January 2022), 5; The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, November 2017), 26.

11 Yarls v. Bunton, 231 F. Supp. 3d 128, 137 (M.D. La. 2017).

12 In re the Petition to Amend SCR 81.02, No. 17-06, slip op. at 2-3, 6-11 (June 27, 2018), https://www.wicourts.gov.

personally accountable when they commit these injustices. In 1963, the US Supreme Court also ruled in the case of *Brady v. Maryland*[13] that criminal defendants are entitled to evidence of their innocence that is uncovered during police investigations. Again, the rationale for this ruling is straightforward: a trial wouldn't be a meaningful exercise of truth-seeking if the state has evidence of a defendant's innocence but is entitled to hide it from the defendant and his counsel.

And, yet, in 2013, a federal appeals court judge appointed by President Reagan observed that "there is an epidemic of *Brady* violations abroad in the land."[14] Sixty percent of the exonerations since 1989 are cases of police and prosecutorial misconduct,[15] usually *Brady* violations. And yet almost nothing is done about it. State bar associations almost never impose any discipline on prosecutors who violate *Brady*.[16] Only one prosecutor has ever gone

13 373 U.S. 83 (1963).

14 United States v. Olsen, 737 F.3d 625m 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc).

15 *Exonerations by State*, National Registry of Exonerations (Feb. 18, 2024), https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

16 Richard A. Rosen, *Disciplinary Sanctions against Prosecutors*

to jail for violating *Brady*.[17] His sentence was five *days* in jail in the case of a man who was wrongly sent to prison for twenty-five years. And the Supreme Court invented the doctrine of absolute immunity for prosecutors, meaning that prosecutors cannot be subject to federal civil rights lawsuits for *Brady* violations, not even intentional ones.[18]

If this is our system, then we should not be surprised that 3,433 people have been wrongly convicted and spent 31,000 years in prison for crimes they did not commit. And if this is our system, it is not a Christian one, meaning it does not align with what the Christian Scriptures teach about neighbor-love. Who is the neighbor to those—crime victim and criminally accused—harmed by this system? The one who sees it and, rather than averting his or her eyes, steps in to help. "Go and do likewise," Jesus commanded. Will you follow him?

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for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 730-31 (1987).

17 Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, Texas Tribune, (November 8, 2013) https://www.texastribune.org/; Claire Osborn, *How Ken Anderson Was Released after Only Five Days in Jail*, Austin American-Statesman, (November 15, 2013) https://www.statesman.com/. To read more about this case, see Michael Morton, *Getting Life* (New York: Simon & Schuster, 2014).

18 Imbler v. Pachtman, 424 U.S. 409 (1976).

Biden v. Nebraska

Isaac J. Good*

**Isaac Good is a sophomore studying Economics and Psychology at Grove City College. Alongside being a student, he enjoys working as both a content editor for the Journal and as a student assistant to President McNulty. In his free time, he enjoys hiking.*

Introduction

On February 28th, 2023, the Supreme Court heard arguments for the case of *Joseph R. Biden, President of the United States, et al. v. Nebraska et al.* That summer, the Court found in favor of the states, preventing the forgiveness of approximately $430 billion in federal student loans. While on the campaign trail, then-presidential candidate Joseph Biden promised student loan forgiveness to borrowers who met certain criteria. Upon taking office and attempting to implement this plan via executive action, the Biden administration was met with opposition from six states, arguing that the plan was a drastic overreach of the Department Secretary's authority. On June 30th, 2023, the Court made its decision. Despite the despair felt by millions of borrowers who would have felt benefitted by the Secretary's plan, America's economy and politics were saved from severe unintended consequences. Had the plan been implemented, the scope of the Secretary's authority would extend far beyond any precedented level, leaving the economy worse than before and violating congressional language by the severe breadth of the plan.

I. Facts of the Case

Biden v. Nebraska is the product of a promise made in 2020 by Joseph Biden. As a presidential candidate, Biden made a promise to cancel upwards of $10,000 of federal student loan debt per borrower. A promise such as this would mean departure from existing provisions under the Higher Education Act of 1965.[1] Title IV of the Education Act[2] oversees student loans among other financial aid mechanisms used by the federal government.[3] Under this Act, the Secretary of Education has the authority to cancel or reduce student loans for those who meet specific criteria. The circumstances in which the Secretary has the power to cancel debt are: 1) if the debtor is a public servant,[4] or 2) if the borrower is deceased, "permanently or totally disabled,"[5] or bankrupt.[6] A borrower whose institution has failed to pay him, has falsely certified him, or has closed down also qualifies for forgiveness under the Act.[7]

1 Hereinafter, Education Act.
2 20 U.S.C. §1070.
3 Biden v. Nebraska, 600 U.S. 477, 477 (2023).
4 20 U.S.C., §1070(a).
5 *Id*., at §1087(a)(1).
6 *Id*., at §1087(b).
7 *Id*., at §1087(c).

The provisions under the Higher Education Relief Opportunities for Students Act[8] are equally important to the case.[9] Under this act, the Secretary has the authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[10] Upon the conclusion of the COVID-19 pandemic in 2022, the HEROES Act was invoked by the Secretary to issue "waivers and modifications" that would decrease or eradicate the federal student debt for most borrowers. Those who qualified for forgiveness of up to $10,000 had received federal student loans and had an income no greater than $125,000 in either 2020 or 2021. Additionally, the recipients of a specific federal loan for students with certain financial needs, known as Pell Grants, could be forgiven for upwards of $20,000 in debt.

The federal student loan forgiveness plan was promptly challenged by six states: Arkansas, Iowa, Kansas,

8 Hereinafter, the HEROES Act, 20 U.S.C. §1098bb(a)(1).
9 20 U.S.C. §§1098(a)(2)(A), 1098ee(2)(C)-(D).
10 *Id.,* at §1098bb(a)(1).

Missouri, Nebraska, and South Carolina.[11] These states moved for a preliminary injunction, making their claim on the basis that the Secretary's statutory authority did not allow for the passing of the loan forgiveness plan. However, the decision from the Eastern District of Missouri held that no state had the standing necessary for challenging the plan,[12] thus, dismissing the suit.[13] The states appealed. The U.S. Court of Appeals for the Eighth Circuit issued a nationwide preliminary injunction to temporarily prohibit the loan forgiveness program until the resolution of the appeal. The Court of Appeals' conclusion was that Missouri, through the Missouri Higher Education Loan Authority,[14] likely had standing. The Supreme Court granted certiorari before judgment.[15]

II. Issues

This case examines two questions of law: First, whether any of the states have the necessary judicial standing enabling them to challenge the student loan forgiveness plan.

11 *Biden,* 600 U.S., at 524 (per Kagan, J., dissenting).
12 Nebraska v. Biden, 636 F. Supp. 3d 991 (ED Mo. 2022).
13 *Biden*, 600 U.S., at 488.
14 Hereinafter, MOHELA or Authority.
15 *Biden,* 600 U.S., at 478.

Second, whether the Secretary's plan exceeds his statutory authority.

III. Decision

In a 6-3 decision, the Court found in favor of Nebraska[16] concluding that the HEROES Act does not authorize the Secretary of Education to implement the student loan forgiveness program. The decision of the Court concluded that Missouri did indeed possess the proper standing to sue, that the language of "waive or modify" does not enable the Secretary to unreservedly rewrite the provisions, and that relevant precedent both old and new enacts the requirement that Congress speak clearly prior to any unilateral alterations made to sizeable sections of the American economy by the Department Secretary.[17]

In doing this, the Court reversed the judgment of the District Court for the Eastern District of Missouri and remanded the case for further proceedings. Additionally, the Court denied the Government's application to vacate the injunction of the Eighth Circuit as moot.

16 Hereinafter, respondents.
17 *Biden,* 600 U.S., at 501.

IV. Reasoning

Chief Justice Roberts began with an analysis of the original language of both the Education Act of 1965 and the HEROES Act of 2003.[18] Following this, the Court addressed the issue of whether states have the standing to challenge the legality of the Secretary's program. Article III of the Constitution makes it so that at least one plaintiff must have a "personal stake" in the case at hand.[19] If so, the case is allowed to proceed.[20] In this case, the Court held that, through the harm suffered by MOHELA, the state of Missouri was indeed injured by the plan and, therefore, had the right to sue.[21]

The harm done to MOHELA is a result of the cost incurred by the Authority if all federal borrowers had their loans discharged. MOHELA is a "public corporation that holds and services student loans."[22] The Authority, as a non-profit government corporation participating in the student

18 *Id.,* at 478-482.

19 TransUnion LLC v. Ramirez, 594 U.S. ___, ___ (2021) (slip op., at 7).

20 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52, n. 2 (2006).

21 *Biden*, 600 U.S., at 490.

22 *Id*., at 488-489.

loan market, owns and services billions of dollars in federal loans. Seeing as MOHELA receives a fee for administrating each federal account serviced by it, if those loans were to be completely discharged, those closed accounts would no longer be serviceable by MOHELA. Consequently, since the Authority is to be a collection of payments and provider of services to borrowers—per the contract between MOHELA and the Department of Education—if the plan was to be implemented, MOHELA would not be able to collect approximately $44 million in fees.[23] This harm done to MOHELA would be transferred to Missouri, given that it is a "public instrumentality" of the State.[24]

Chief Justice Roberts reminds that a similar conclusion was made 70 years prior in *Arkansas v. Texas*.[25] Here, the Court upheld the claim that Arkansas had the authority to treat any injury to the University of Arkansas—an instrumentality of the state—as an injury incurred to itself.[26] On behalf of petitioners, the argument was made that MOHELA must be the entity to bring the suit, not Missouri, given

23 *Id*., at 490.
24 Mo. Rev. Stat. 173.360.
25 346 U.S. 368 (1953).
26 *Id.*, at 368-371.

that it has the autonomy to do so. This claim is a reference to the case of *First National City Bank v. Banco Para el Comercio Exterior de Cuba*.[27] Although a government corporation possesses the power to sue (and be sued), it does not, however, cease to be a part of the greater government.[28] That being said, even when the state has been harmed via injury to a public corporation of its creation, the fact remains that the state incurred harm when carrying out its responsibilities. Therefore, the use of a public corporation does not prohibit the state itself from suing.[29]

With the standing of the states satisfied, the Court turned its attention to the question of merits.[30] The Court maintained that the Secretary, contrary to his assertions under the HEROES Act, does not have the authority to absolve students from debt amassing $430 billion in loan principal. Rather, the Secretary under the Act has the authority to "waive or modify" statutory and regulatory provisions that already exist. Additionally, the provisions

27 462 U.S. 611, 624 (1983).

28 Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 397 (1995).

29 *Biden*, 600 U.S., at 491.

30 *Id.*

must be applied to financial assistance programs covered by the Education Act. Based on precedent, the Court concludes that "modify," as a statutory permission, does not give the Secretary the authority to make "basic and fundamental changes in the scheme" that was designed by Congress.[31] Rather, the term "modify" is intended to imply moderate changes.[32]The additions engendered by the Secretary in this case are no more minor than they are complete transformations of the existing provisions.

The Biden administration[33] argue that the use of the term "waive" allows the Secretary to make such provisions, however, the Court did not find favor with this argument.[34] Chief Justice Roberts concludes that the Secretary failed to specify any provision to be waived, and even a more expansive use of the term would not suffice as justification seeing as it would exceed the legal limits.[35] Further argument is made, this time claiming that the coupling of the two terms, modify *and* waive, is what gives rise to the

31 MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 225 (1994).

32 *Id.*

33 Hereinafter, petitioners.

34 *Biden*, 600 U.S., at 494.

35 *Id.,* at 495.

Secretary's authority to implement his plan. Unsurprisingly, this too fell short of satisfactory for the Court—in no way has the Secretary truly waived or modified any provision of the Education Act that would allow for the specific and limited forgiveness of student loans.[36]

In a last-ditch effort to save face, the Secretary made an appeal to congressional purpose. In support of their claim, petitioners reminded that "the whole point of" the HEROES Act, according to the Government, "[was] to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something."[37] That being said, given the nonpareil breadth of the COVID-19 pandemic, in the eyes of the Court, the Secretary's student loan forgiveness plan was only a reflection of the event that led to its conception. What is misunderstood by the dissent is the question one ought to be asking: This is not a matter of whether or not something needs to be done.[38] Rather, the question is who has the authority to act.[39]

36 *Id.*

37 Tr. Of Oral Arg. 55.

38 *Biden*, 600 U.S., at 496-498.

39 The *Chevron* doctrine is important to mention here. In 1984, the Court held that an agency, in its interpretation and application of the law, is bound to any clear legislative statements. However, when

As the Court considered the significance—both economic and political—of the effect of the Secretary's action, it became clear that the plan, if enacted, would have vast effects altering sizable sections of the American economy. Allowing such authority to be granted to the Secretary would be inconsistent with a recent decision of the Court in *West Virginia v. EPA*.[40] In June of 2022, the Court found it reasonable—given the "history and breadth" of agency's power—to delay before concluding that such authority was conferred to the agency by Congress.[41]

V. Rule of Law

Article III of the Constitution requires the plaintiff to have suffered an injury *de facto*. Injury is to be understood as any imminent harm to a legally protected interest (e.g., money or property), and it is, to an extent, capable of being traced to the opposing conduct and rectified by the

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the situation is ambiguous, the agency may be granted deference from the courts so long as its interpretation is within a reasonable scope. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). To understand the extent of "scope", the reader is directed to Alabama Assn. of Realtors v. Department of Health and Human Servs., 594 U.S. ___ (2021) (per curiam).

40 597 U.S. 697 (2022).

41 *Id.*, at 721 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)).

lawsuit.[42]

The language of "modify" does not allow for the "basic and fundamental changes in the scheme" arranged by Congress. Rather, the term bears "a connotation of increment or limitation," altogether being understood as "to change moderately or in minor fashion."[43] In addition to this, the term "waive" has historically meant the dismissal of certain legal requirements.[44] The use of the two terms together does not alter the original meanings. In regard to congressional purpose—given the scope of the effects of the action in question—the question to be asked is not whether something ought to be done; rather, the question is who possesses the authority to act.

VI. Disposition

The Supreme Court ruled to reverse the judgment of the District Court for the Eastern District of Missouri and to remand the case for additional proceedings in line with the Court's opinion. In addition to this, the application submitted by the Government to vacate the Eighth Circuit's

42 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561.
43 *MCI* 512 U.S., at 225.
44 77 Fed. Reg. 59314; 68 Fed. Reg. 69316.

nationwide injunction was denied by the Court as moot.[45]

45 *Biden*, 600 U.S., at 507.

Students for Fair Admissions v. Harvard &
Students for Fair Admissions v. University of North Carolina

Jaimie Cavanaugh*

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Introduction

In 2023, the U.S. Supreme Court issued a landmark ruling in two challenges to affirmative action programs. In *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina, et al*.,[1] the Court struck down race-conscious admissions policies in higher education. The majority opinion, written by Chief Justice Roberts, rules that race-conscious admissions programs fail strict scrutiny, impermissibly use race as a negative factor for some applicants, perpetuate stereotypes, and lack a logical endpoint. Justice Thomas filed a concurring opinion outlining the strong historical support for the majority opinion. Justice Gorsuch, joined by Justice Thomas, wrote a concurrence explaining that the challenged admissions programs also violate Title VI of the Civil Rights Act of 1964. Lastly, Justice Kavanaugh filed a concurrence emphasizing that the majority opinion comports with past precedent.

Justices Sotomayor and Justice Jackson[2] filed dis-

1 Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,. 600 U.S. 181 (2023) [hereinafter *SFFA*].

2 Justice Jackson did not participate in *Students for Fair Admissions v. Harvard* because she previously served on Harvard's board of

sents. Joined by Justice Kagan and Justice Jackson, Justice Sotomayor's dissent rejects the Equal Protection's color-blindness standard, arguing instead that striking race-conscious admissions programs "subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education[.]"[3] In her view, "the Fourteenth Amendment is properly interpreted to allow the government to use racial classification to redress the exclusion of underrepresented minorities[.]"[4] In her dissent, Justice Jackson, joined by Justice Kagan and Justice Sotomayor, explains what she views as the "universal benefits of considering race" in college admissions from a practical lens.

The fundamental disagreement between the majority and dissents is whether the Equal Protection Clause has an exception that allows institutions to consider race to redress past wrongs to minorities. Yet the majority affirmed that the Constitution protects the right of every person to be treated equally because the "Constitution is color-blind, and

overseers. Her participation and dissent was limited to the case against the University of North Carolina.

3 *SFFA II*, 600 U.S., at 318 (per Sotomayor, J., dissenting).

4 David E. Bernstein, *Students for Fair Admissions and the End of Racial Classification as We Know It*, 2023 Cato Sup. Ct. Rev. 143, 152 (2022–23).

neither knows nor tolerates classes among citizens."[5]

I. Factual Background

a. The Challenged Admissions Programs

In 2022, Harvard received 60,000 applications, admitting fewer than 2,000 students.[6] The University of North Carolina (UNC) reports receiving around 43,500 applications annually for 4,200 spots in each undergrad freshman class.[7] Both schools review and rate each application they receive. At Harvard, the initial review yields a rating between 1–6, where 1 is the best and 6 is the worst.[8] Once each application is rated, admissions subcommittees meet for three to five days to evaluate applications by geographic region.[9] The full committee then reviews the subcommittees' recommendations.[10] It has 40 members and votes on every application to create a list of tentatively admitted students.[11] An applicant's race is considered each step of the

5 *SFFA II*, 600 U.S., at 230 (per Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

6 *See id.*, at 192–93.

7 *Id.*, at 195.

8 *Id.*, at 194.

9 *Id.*

10 *Id.*

11 *Id.*, at 194–95.

way.[12] At the final step, the committee must review some applications a second time to narrow the list.[13] In deciding which applicants to cut, the committee considers only "legacy status, recruited athlete status, financial aid eligibility, and race."[14]

At UNC, admissions office readers review applications and rate them under four categories: academic, extracurricular, personal, and essay.[15] Based on these ratings, the initial reader recommends whether an applicant should be admitted or denied.[16] Race is a consideration and may be a "significant… plus."[17] Next, a review committee approves or rejects each initial reader's decisions.[18] The review committee is also permitted to consider an applicant's race.[19]

b. Petitioners

Students for Fair Admissions (SFFA) is a voluntary membership 501(c)(3) organization formed to "defend human and civil rights secured by law, including the rights

12 *Id.*
13 *Id*., at 195.
14 *Id*.
15 *Id*., at 195–96.
16 *Id*., at 196.
17 *Id*.
18 *Id*.
19 *Id*.

of individuals to equal protection under the law, through litigation and other lawful means."[20] Its members include Asian Americans who applied to and were rejected by Harvard or UNC (collectively "universities").[21]

II. Procedural History

In November 2014, SFFA filed separate actions against the universities with claims under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[22] Both cases went to trial.[23] The district courts upheld the admissions programs in both cases.[24] The First Circuit affirmed the holding as to Harvard's admissions program.[25] The Supreme Court granted certiorari to review the First Circuit's decision and granted certiorari before judgment, allowing it to consider the case against UNC without waiting for an appellate ruling from the Fourth Circuit.[26]

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20 *SFFA v. President and Fellows of Harvard*, 980 F.3d 157, 164 (1st Cir. 2020) (*SFFA I*).

21 *See id*.; *SFFA II*, 600 U.S., at 201.

22 *SFFA II*, 600 U.S., at 197–98.

23 *Id*., at 198.

24 *Id*.

25 *See SFFA I*, 980 F.3d, at 204.

26 *SFFA II*, 600 U.S., at 198.

III. Decision

In a 6-3 decision, the Court reversed the lower courts' decisions, striking down the universities' race-conscious admissions programs under the Equal Protection Clause.[27] Adopted at the end of the Civil War, the "core purpose" of the Equal Protection Clause is to end "all governmentally imposed discrimination based on race."[28] Further, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[29]

The Court previously upheld certain race-conscious

27 The Court also affirmed that SFFA had organizational standing, distinguishing SFFA, a voluntary membership organization, from the state agency plaintiff in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). *SFFA II*, 600 U.S. at 198–201. In *Hunt*, the Court was forced to question the Commission's structure because it was a state agency, not a traditional membership organization. *Id*., at 200. The Commission did not have members in a technical sense, but the Court ruled "the apple growers and dealers it represented were *effectively* members of the Commission." *Id*. (emphasis in original) (citation omitted). In contrast, SFFA was a validly incorporated nonprofit with 47 members when it filed suit, thus an inquiry into how the organization operates is unnecessary. *Id*., at 201. Moving forward, this may make it simpler for other membership organizations to satisfy organizational standing.

28 *SFFA II*, 600 U.S., at 206.

29 Hirabayashi v. U.S., 320 U.S. 81, 100 (1943).

admissions programs, but with "narrow restrictions."[30] The history is as follows.

In *Regents of University of California v. Bakke*, Justice Powell ruled that an educational interest in having a diverse student body is a compelling interest for purposes of a strict scrutiny review.[31] No other justice joined Justice Powell's opinion, and lower courts spent decades grappling with whether Justice Powell's opinion was binding since it was not joined by any other members of the Court.

In 2003, the Court decided *Grutter v. Bollinger*, officially adopting Justice Powell's holding and ruling that a university may assert a compelling interest in obtaining a diverse student body.[32] This interest, however, had limits: schools could not establish quotas, insulate students of certain races or ethnicities from competition, or desire a specific "percentage of a particular group merely because of its race or ethnic origin."[33] *Grutter* also imposed a time limit or "termination point" on race-conscious admissions

30 *SFFA II*, at 213.

31 Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)

32 Grutter v. Bollinger, 539 U.S. 306 (2003)

33 *SFFA II*, 600 U.S., at 211 (citing *Grutter*, 539 U.S. at 329–30) (internal quotations omitted).

programs, providing that such programs must be "temporary."[34]

IV. Standard of Review

Challenges to race-conscious admissions programs are reviewed under strict scrutiny.[35] To pass strict scrutiny, the Court must be satisfied that: (1) racial classification is necessary to "further compelling government interests[,]"[36] and (2) the consideration of race is "narrowly tailored" or otherwise "necessary" to fulfill the compelling interests.[37] Importantly, race-conscious admissions programs must operate "in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny."[38]

V. Analysis

a. The Universities' Admissions Programs Fail Strict Scrutiny

The universities asserted compelling interests in preserving the "educational benefits that flow from a racial-

34 *Id.*, at 212 (quoting *Grutter*, 539 U.S. at 342–43).
35 *Id.*, at 206.
36 *Id.*, at 207 (quoting Grutter, 539 U.S. 306, 326 (2003)).
37 *Id.*, at 207 (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311–12 (2013)).
38 *Id.*, at 214 (quoting *Fisher*, 579 U.S. at 381) (internal quotations omitted).

ly diverse student body."[39] Specifically, they asserted their race-conscious admissions programs provided compelling educational benefits including, *inter alia*: (1) training future leaders; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) educating students through diversity; (4) fostering innovation and problem solving; and (5) "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[40] The Court rejected these interests as compelling because they are not sufficiently measurable.[41] The Court was uncomfortable abdicating its judicial duty to review race-conscious admissions programs narrowly without knowing when or how the universities would accomplish these amorphous educational goals.[42]

Even if these goals were compelling,[43] they fail

39 *See id.*, at 209, 214.

40 *Id.*, at 214 (internal quotations omitted).

41 *Id.*, at 214–15.

42 *See id.*, at 217 ("Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.").

43 The Court left open the possibility that military academies may have a "distinct" and potentially compelling interest in using race-based admissions programs. *See id.*, at 213, n.4. The Court may have the opportunity to decide this issue in the coming years. *See* SFFA

strict scrutiny analysis for a second reason. These admissions programs lack a means-ends fit because they are not narrowly tailored to achieving the stated goals.[44] As the Court points out, it is unclear how broadly categorizing people as "Asian," which includes all applicants from South Asia and East Asia, or "Hispanic," which is largely undefined, ensures sufficient diversity. In fact, the current admissions programs would favor an incoming class with 15% of students from Mexico versus a class with 10% of students from several Latin American countries.[45] Because the admissions programs lacked an "exact connection between justification and classification," the Court found they failed strict scrutiny.[46]

b. Race-Conscious Admissions Programs Run Afoul of the Equal Protection Clause

Although the Court had previously upheld some race-conscious admissions programs, it has been clear that the Equal Protection Clause prohibits universities from us-

v. U.S. Military Academy at West Point, No. 23-cv-08262 (PMH) (S.D.N.Y. filed Sept. 19, 2023).

44 *See SFFA II*, at 215–217.

45 *Id.*, at 217.

46 *Id.*, at 217–18 (quoting Gratz v. Bollinger, 539 U.S. 244 at 270 (2003)).

ing race as a negative factor and or using race to stereotype students. Particularly, race-conscious admissions programs cannot "discriminate *against* groups that were not beneficiaries of the race-based preference."[47] Nor can they rely on the assumption that "minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[48] Finally, race-conscious admissions programs must have a logical end point.[49]

First, the Court considered whether race was a negative factor for some applicants. The universities argued that the fact that race is a positive quality for some applicants does not make it a negative quality for others.[50] The Court rejected this argument, writing that "[c]ollege admissions are zero-sum."[51] In other words, if race is a "plus" factor for some applicants, it is necessarily a negative factor for the applicants who will never be able to assert it.

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47 *Id.*, at 212 (emphasis in original).

48 *Id.*, at 211–12 (quoting *Grutter*, 539 U.S. at 333).

49 *Id.*, at 221 (quoting *Grutter*, 539 U.S. at 342); *Grutter*, 539 U.S. at 343 (predicting that race-conscious admissions programs will not be necessary in 25 years); *see also SFFA II*, 600 U.S. at 312–15 (Kavanaugh, J. concurring) (emphasizing the importance of the end point in *Grutter*).

50 *Id.*, at 218.

51 *Id*.

Second, the use of race in these particular admissions programs necessarily relies on stereotyping, thereby "demean[ing] the dignity and worth of a person to be judged by ancestry instead of by his or her or merit and essential qualities."[52] Instead of remedying past wrongs, "such stereotyping can only cause continued hurt and injury."[53]

Third, the race-conscious admissions programs lacked a "logical end point."[54] The universities argued they would stop using race-conscious admissions programs when there is "meaningful representation and meaningful diversity" on their campuses.[55] But the Court noted that to achieve this goal, Harvard has kept the share of black students admitted to each class from 2009 to 2018 between 10%– 11.7%.[56] Likewise, UNC argued it had not yet achieved its diversity-related goals because its percentage of enrolled minority students is lower than the percentage

52 *Id.*, at 220 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000).

53 *Id.*, at 221 (internal quotations omitted). omitted) (cleaned up).

54 *Id*., at 221 (quoting *Grutter*, 539 U.S., at 342).

55 *Id*., at 221 (internal quotations omitted).

56 *Id*., at 222.

of minorities within the general population.[57]

Both approaches are impermissible under the Equal Protection Clause, which requires government to "treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class."[58] The Court previously held that "outright racial balancing [] is patently unconstitutional."[59] Yet the challenged admissions programs "effectively assure that race will always be relevant" thereby thwarting the ultimate goal of eliminating the use of race in admissions programs.[60] Given the foregoing, the majority struck down the universities' use of race-conscious admissions programs.

Conclusion

Some view *SFFA II* as sweeping in a new era of higher-education admissions programs, but the majority opinion takes pains to show that its ruling is consistent with previous affirmative action cases. Past cases may have allowed the use of race in some admissions programs, but with limits. The majority's parting words explain that

57 *Id*., at 223.
58 *Id*. (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995).
59 *Fisher*, 570 U.S., at 311.
60 *Id*., at 224 (internal quotation omitted) (cleaned up).

universities are not prohibited from considering "how race affected [an applicant's] life, be it through discrimination, inspiration, or otherwise."[61] They may not, however, assume that an individual has had a certain experience or viewpoint based on race. Put simply, the Court commands universities to review every application on its own merit and to stop weighing race over individual "challenges bested, skills built, or lessons learned."[62]

61 *Id*., at 230.
62 *Id*.

A Time for Choosing: The Impact of Uniformity Clauses in State Constitutions on School Choice Programs

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Abstract

In response to the rise of the modern school choice movement, opponents of school choice programs have claimed that various constitutional provisions bar school choice programs. Forced to change course after recent Supreme Court decisions, opponents have set their sights on a portion of the education provisions of state constitutions as their new tactic to undermine school choice programs: uniformity clauses. Opponents claim that these clauses prevent states from providing opportunities for parents to choose education options outside the traditional public school systems with public funds. While each clause must be independently analyzed according to its original public meaning, generally, these clauses do not preclude school choice proposals. Advocates of these programs must be aware of their requirements and effects when developing school choice proposals.

**J.D. Regent University School of Law, 2024.*

Introduction

Over the past few years, a groundswell of parents concerned about the influence of the education system upon their children has risen up across America.[1] Their concerns range from the prevalence of harmful ideologies, such as Critical Race Theory[2] and Gender Ideology,[3] to the overwhelming politicization even of educational milestones like learning to read, and events at recent school board meetings show the lengths to which parents will go to protect their children.[4] For some parents, Virginia gubernatorial candidate and former governor Terry McAuliffe provided the straw that broke the proverbial camel's back. In the 2021 gubernatorial race, he said, "I don't think parents should be

1 Corey DeAngelis, *Parents Are the New Electoral Power Players*, Wash. Exam'r (Nov. 11, 2021 11:00 PM), https://www.washingtonexaminer.com/restoring-america/community-family/parents-are-the-new-electoral-power-players.

2 Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, Heritage Found. (Mar. 24, 2022), https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights.

3 Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, Are Rising in Others*, Wash. Post (June 3, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/.

4 Betsy VanDenBerghe, *Is My School Indoctrinated? Inside the Fight Against Progressive Ideology in Education*, Deseret News (Nov. 3, 2022, 11:00 PM), https://www.deseret.com/2022/11/3/23413478/culture-war-public-schools-book-banning-gender-ideology.

telling schools what they should teach."[5] Such a sentiment stands in stark contrast to how most parents feel according to a poll taken at the time, reporting that seventy-eight percent of parents believe they should call the shots on their children's education.[6] This tension hyper-charged the school choice movement.

School choice programs "make it possible for parents to send their children to the school they feel offers their children the best educational opportunities—not just the one the state says they have to attend."[7] School choice programs can include "public school transfer options, charter and magnet schools, home schooling, scholarships, vouchers and tax credits/deductions."[8]

Some oppose school choice, however, including

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5 The Editors of National Review, *Terry McAuliffe's War on Parents*, Nat'l Rev. (Oct. 1, 2021), https://www.nationalreview.com/2021/10/terry-mcauliffes-war-on-parents/.

6 *New Poll: 78% of Parents Want Influence Over What's Taught in K-12*, Am. Fed'n for Child. (June 28, 2022), https://www.federationforchildren.org/new-poll-78-of-parents-want-influence-over-whats-taught-in-k-12/.

7 Jordan Sekulow, *What Is School Choice?*, Am. Ctr. for L. & Just. (June 23, 2020), https://aclj.org/school-choice/what-is-school-choice.

8 Richard D. Komer & Clark Neily, School Choice and State Constitutions: A Guide to Designing School Choice Programs 2 (Inst. for Just. & Am. Legis. Exch. Council 2017).

those who, like McAuliffe, do not believe parents should be in charge of their children's education. Some of the opposition is political, while some is legal. For example, some opponents still point to their respective states' Blaine Amendments as precluding school choice,[9] even though the Supreme Court's decisions in *Espinoza v. Montana Department of Revenue*[10] and *Carson v. Makin*[11] foreclose this argument. Other opponents claim that various provisions of their respective state constitutions prohibit school choice programs, including "uniformity clauses."[12] Uniformity clauses, found in fourteen state constitutions, require the state to provide residents with a "uniform" system of education.[13] Opponents of school choice claim that state governments violate uniformity clauses when the state diverts funds from traditional brick-and-mortar public schools to school choice

9 *See, e.g.*, Jim Jones, *JONES: Don't Be Fooled by Mountain States Policy Center – Idaho Already Has 'School Choice*,' Times-News (Jan. 19, 2023), https://magicvalley.com/opinion/jones-dont-be-fooled-by-mountain-states-policy-center-idaho-already-has-school-choice/article_b92cd0a6-974e-11ed-b5bf-97872dbf4627.html.

10 140 S. Ct. 2246 (2020).

11 596 U.S. 767 (2022).

12 Preston C. Green, III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 B.Y.U. Educ. L.J. 275, 277–79 (2010).

13 *Id.*, at 279.

programs.[14] And some state supreme courts have concluded that these provisions require not a uniformity of funding, school structure, or form, but a uniformity of curriculum—something that should give pause to many in the school choice movement.[15] Thus, it is essential that school choice advocates determine whether school choice programs pass constitutional muster under the original public meaning of their own state's uniformity clause and that the clause does not require participating schools to adopt the very same curriculum they sought to avoid in public schools.

This Note analyzes school choice programs under the uniformity clauses of three states: Wisconsin, Florida, and Idaho. First, this Note provides a general history of uniformity clauses, the backdrop of education litigation against which constitutional analysis in education law takes place,

14 Komer & Neily, *supra* note 8, at 5; *see, e.g.*, Keith Ridler, *Idaho Kills Bill Allowing Public Money for Private Education*, Spokesman-Rev. (Mar. 1, 2022, 5:53 PM), https://www.spokesman.com/stories/2022/mar/01/idaho-kills-bill-allowing-public-money-for-private/. *See generally Private School Vouchers Don't Help Kids*, American Federation of Teachers, AFL-CIO, https://www.aft.org/private-school-vouchers-dont-help-kids (last visited Jan. 3, 2024) ("Private school vouchers take money away from neighborhood public schools . . .").

15 Idaho Sch. for Equal Educ. Opportunity v. State (*Idaho Sch. II*), 976 P.2d 913, 920 (Idaho 1998).

and a brief history of the school choice movement. Then, it analyzes Wisconsin, a state that has specifically upheld a school choice program under its uniformity clause,[16] and Florida, where the uniformity clause's current construction precludes at least one school choice program.[17] Next, this Note analyzes Idaho, a state whose courts have never considered the constitutionality of any school choice program under its constitution's uniformity clause. This Note provides an example of an abbreviated original public meaning analysis of the text of Idaho's uniformity clause. Finally, it provides advocates with recommendations to move school choice forward, noting that each state's constitution must be examined separately to determine its meaning and providing a word of caution to school choice advocates regarding uniformity of curriculum requirements.

I. General History of Uniformity Clauses and State Educational Provisions

Properly understanding state uniformity clauses first requires examining their historical context and the education litigation that informs them. This section first discusses the

16 Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).
17 Bush v. Holmes, 919 So. 2d 392, 407 (Fla. 2006).

history of the school choice movement, then examines the history of uniformity clauses, and finally provides a brief history of the education litigation that forms the legal framework within which future school choice program litigation under uniformity clauses will proceed.

a. History of the Modern School Choice Movement

The modern school choice movement traces its roots to the twentieth century. But parents' ability to direct their child's education existed long before then. In fact, at the time of the founding, no widespread system of public schools existed. Instead, parents chose where and how to educate their children.[18] It was not until the Common Schools movement catalyzed the proliferation of government schools that parental choice in education began to diminish.[19] Then began the modern school choice movement as a response to failing government schools.

School choice programs in America trace their roots to well before the twentieth century. In 1802, Pennsylvania established a voucher program, perhaps the first in the na-

18 *See* Milton Friedman & Rose Friedman, Free to Choose 150 (1980).

19 Jeffrey S. Sutton, 51 Imperfect Solutions 27 (2018).

tion, that provided government reimbursement to church schools and other independent schools to allow poor children to receive an education.[20] New Jersey provided funding for religious schools in the 1840s in "'just and relatable proportion' to the number of children in their care."[21] In 1869, a Vermont law provided that, if a town did not have a public school, town funds would be supplied to pay for the education of that town's children.[22] Maine established the same program in 1873.[23] Fast forward nearly a century to 1959, when Martin and Mae Duggan, parents of five, founded the first national school choice advocacy group in the United States called Citizens for Educational Freedom.[24] The modern school choice movement had begun.

Conservatives and libertarians who sought to return the choice of education to parents soon supported the school choice movement. In 1980, famed economist Milton Fried-

20 Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 Univ. Penn. L. Rev. 111, 162 (2020).

21 *Id.*, at 161.

22 *School Choice Timeline*, Cato Inst., https://www.cato.org/school-choice-timeline (last accessed Jan. 5, 2024).

23 *Id.*

24 James Shuls, *Papists and Pluralists: The Founding of America's First Grassroots School Choice Organization*, 16 J. Sch. Choice 416, 416 (2022).

man and his wife Rose published their revolutionary book *Free to Choose*.[25] In one chapter, they discuss the failure of many public schools due to the "increasing bureaucratization and centralization of the public school system in the United States"[26] and argue that education is no different than any other area of the market in which competition best breeds efficiency and quality.[27] To restore competition and thereby improve the quality of education, the Friedmans contend that parents must be given more control of their child's education.[28] "Parents," they point out, "generally have both greater interest in their children's schooling and more intimate knowledge of their capacities and needs than anyone else."[29] Decrying the educational reformers who "self-righteously" assume that parents have little interest in their child's education and lack the competence to choose

25 Friedman & Friedman, *supra* note 18. This was not the first time Milton Friedman proposed school choice measures, however. Twenty-five years earlier, Friedman wrote about school choice in a short paper entitled "The Role of Government in Education." *See generally* Milton Friedman, *The Role of Government in Education*, *in* Economics and the Public Interest (Robert A. Solo ed., 1955) (discussing government authority for and the proper scope of public education).

26 Friedman & Friedman, *supra* note 18, at 155–56.

27 *Id.*, at 156–58.

28 *Id.,* at 160.

29 *Id.*

their educational path, the Friedmans note that "U.S. history has amply demonstrated that, given the opportunity, [parents] have often been willing to sacrifice a great deal, and have done so wisely, for their children's welfare."[30] Arguing against a system of education that government both compels and provides for, the book quotes free market economist Adam Smith, who wrote "Those parts of education, it is to be observed, for the teaching of which there are no public institutions, are generally the best taught."[31] The Friedmans recommend voucher programs to allow parents the freedom to choose to direct public monies for their children's education at the public or private school of their choice.[32]

The Friedmans' ideas led states across America to implement voucher programs. There are too many examples to list here, but Cleveland pioneered one of the most monumental and exemplary programs. This program led to the Supreme Court's opinion in *Zelman v. Simmons-Harris*, allowing public dollars to be used for children to attend sectarian

30 *Id.*

31 *Id.,* at 171 (quoting ADAM SMITH, WEALTH OF NATIONS II 253 (1776)).

32 *Id.,* at 160.

schools through private choice.[33] Championed by Cleveland native and Ohio Governor George Voinovich, Ohio House Speaker Pro Tem Bill Batchelder, and businessman David Brennan, this program pioneered the use of voucher programs to allow students trapped in failing schools to receive a quality education.[34] Starting with a pilot program that prioritized low-income families, Speaker Batchelder designed a system that, within only three years, was already proving its effectiveness, yielding starkly improved educational outcomes for the thousands of students enrolled in the program.[35] But opponents of school choice challenged this legislation in court,[36] arguing that a program giving public funds to sectarian schools violated the Establishment Clause.[37] This litigation proceeded all the way to the Supreme Court, where Justice Rehnquist recognized the program as one "of true private choice" and, thus, not a violation of the Establishment Clause.[38] Today, due to the courage and foresight of

33 Zelman v. Simmons-Harris, 536 U.S. 639, 643–44, 649–50 (2002).

34 Amul Thapar, The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him 23, 25, 26 (2023).

35 *Id.,* at 30–32.

36 *Id.*

37 *Id.,* at 33.

38 *Zelman*, 536 U.S., at 662–63.

these school choice pioneers, Ohio's school choice programs serve tens of thousands of students across the state.[39]

Support for school choice also found a home beyond conservative and libertarian circles of political thought. Liberals and progressives, including liberal education reformers, leaders in the civil rights movement, and black nationalists, embraced school choice ideology early on in the movement.[40] For example, the 1960s and 1970s saw the rise of "free schools," schools developed by left-leaning reformers and progressive educators with different curricula, structure, and often an overtly progressive political bent.[41] Such schools attracted many, especially members of the African American community, whose children suffered in failing public schools.[42] Progressives also came to support voucher programs.[43] In fact, Cleveland's voucher program developed by Speaker Batchelder was cosponsored by ranking Democrat legislator Patrick Sweeney.[44] On the other side of

39 THAPAR, *supra* note 34, at 43.

40 James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1289 (2005).

41 *Id.*, at 1300–01.

42 *Id.*, at 1301.

43 *Id.*, at 1309.

44 THAPAR, *supra* note 34, at 30.

the country, progressive university professors met with one of California's Democrat congressmen, Rep. Leo Ryan, to strategize bringing a school choice initiative to California.[45] Motivated by the failings of inner city schools to provide education for African American children, many progressive voucher advocates saw these programs as ways to maximize equity and racial justice.[46]

Such broad support catalyzed the implementation of school choice programs from vouchers to tax credits. In 1990, Wisconsin launched the Milwaukee Parental Choice Program, widely considered the first modern private school choice program in the United States.[47] This program is still in operation today.[48] Arizona started the first Individual Income Tax Credit Scholarship Program in 1997.[49] This program, also still in operation, offers tax credits to taxpayers who support School Tuition Organizations (STOs), non-

45 *School Choice Timeline*, *supra* note 22.

46 Forman, *supra* note 40, at 1310–11.

47 *Milwaukee Parental Choice Program*, EdChoice, https://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/ (last accessed Jan. 5, 2024).

48 *Id.*

49 *Original Individual Income Tax Credit Scholarship Program*, EdChoice, https://www.edchoice.org/school-choice/programs/arizona-original-individual-income-tax-credit-scholarship-program/ (last accessed Jan. 5, 2024).

profits that offer scholarships to allow students in need to attend private schools.[50] The program withstood an Establishment Clause challenge at the Supreme Court in 2011.[51] Notably, that year was dubbed "the year of school choice" after twelve states passed legislation adding and expanding school choice programs.[52]

In recent years, support for school choice has skyrocketed. In 2008, forty-four percent of Americans supported publicly funded school choice programs, the highest level since the early 2000s.[53] In 2020, sixty-four percent of Americans supported school choice, and,[54] by 2023, support for school choice had risen to seventy-one percent. As the modern leader of the school choice movement and self-described "school choice evangelist" Corey DeAngelis, proclaimed,

50 *Id.*

51 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).

52 Lindsey M. Burke, Jude Schwalbach, & Jack Rosenwinkel, *Free to Succeed: A Brief History of School Choice*, Heritage Found. (Feb. 3, 2020), https://www.heritage.org/education/commentary/free-succeed-brief-history-school-choice.

53 William J. Bushaw et al., *Americans Speak Out – Are Educators and Policy Makers Listening?: The 40th Annual Phi Delta Kappa/ Gallup Poll of the Public's Attitudes Toward the Public Schools*, 90 Phi Delta Kappan 9 (2008).

54 *New Poll: School Choice Support Soars from 2020*, Am. Fed'n for Child. (July 11, 2023), https://www.federationforchildren.org/new-poll-school-choice-support-soars-from-2020/.

"A universal school choice revolution has ignited."[55]

b. History of State Education Clauses

At the time of the American founding, the broader public school system that has since become commonplace did not exist.[56] Instead, such consistency in public school programs became popular only after many states adopted provisions in their own constitutions in the mid-nineteenth century during the "Common Schools" movement.[57] With efforts led by education official and activist Horace Mann, states across the country quickly adopted widespread government operated public school systems.[58] Responding to Mann's influence, many states added education provisions to their state constitutions, requiring their legislatures to establish public school systems.[59] Today, all fifty states now have an education provision in their respective constitutions.[60]

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55 *The Happy Expansion of School Choice Should Continue in 2024*, Wash. Exam'r (Jan. 6, 2024 8:21 AM), https://www.washingtonexaminer.com/restoring-america/community-family/expansion-of-school-choice-should-continue-in-2024.

56 Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 Va. L. Rev. 1963, 1965 (2008).

57 *Id.*

58 Friedman & Friedman, *supra* note 18, at 153.

59 Sutton, *supra* note 19, at 27.

60 Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU Educ. & L. J. 1, 3 (1997).

Some of these provisions, in conspicuous acknowledgement of their roots in Horace Mann's movement, explicitly guarantee that the legislature will provide for a system of "common schools."[61]

Provision language varies from state to state. One of the most common types of provisions requires the public school system to be "thorough and efficient."[62] Others require their public schools to be "free,"[63] "public,"[64] or "general."[65] And, as this article addresses, fourteen states have provisions mandating a system that is uniform.[66]

c. History of Education Litigation

As education grew into an important issue at the state level, it also grew into one at the federal level. Contemporary court opinions regarding education recognized its vitality to the functioning of society and participation in the political process.[67] Justice Brennan clearly articulated this

61 *See, e.g.*, Idaho Const. art. IX, § 1; Nevada Const. Art. 11, § 2; Oregon Const. Art. VIII, § 3.

62 *See, e.g.*, Pa. Const. art. III, § 14.

63 *See, e.g.*, Mich. Const. Art. 8, § 2.

64 *See, e.g.*, S.C. Const. art. XI, § 3.

65 *See, e.g.*, Wash. Const. art. IX, § 2.

66 Green & Moran, *supra* note 12, at 279.

67 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (holding "separate but equal" schools to be unconstitutional, in large part because the important role that schools play in preparing citizens to

sentiment in his concurrence in *School District of Abington Township v. Schempp*, writing, "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."[68]

This consistent emphasis on the importance of education led many to believe that a right to education could be read into the Fourteenth Amendment as a fundamental right. In 1971, the California Supreme Court recognized a right to education under the Fourteenth Amendment in *Serrano v. Priest*.[69] Just two years later, however, the United States Supreme Court rejected this rationale in *San Antonio Independent School District v. Rodriguez*.[70] In this case, the Court examined a Texas school funding system with large disparities in funding between districts.[71] In his majority opinion, Justice Powell concluded that this disparity in education funding did not infringe upon the rights of the children living in different school districts because there is no fundamental right to education in the United States Constitution.[72] While

engage in the political process).

68 374 U.S. 203, 230 (1963).

69 487 P.2d 1241 (Ca. 1971).

70 411 U.S. 1, 37 (1973).

71 *Id.*, at 4–6, 8, 11.

72 *Id.*, at 37. Interestingly, Justice Powell, as the former chair-

the Court did not expressly preclude the possibility that there might be a level of disparity so great as to impact the rights of individuals to participate in the political process, thereby implicating other fundamental rights, it noted that the levels in the case before it did not necessitate such considerations.[73] While this analysis foreclosed a door for future recognition of a federal fundamental right to education, it did leave open the possibility that educational disparities at the extreme margins could potentially affect other already recognized fundamental rights.[74] To this day, the Supreme Court has not recognized a fundamental right to education under the Fourteenth Amendment.[75]

man of the Richmond School Board, personally knew the challenges of running a school system. SUTTON, *supra* note 19, at 25.

73 *Rodriguez*, 411 U.S., at 36–37 ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the right to speak or the right to vote], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where - as is true in the present case - no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

74 *Id.*

75 *See* Derek W. Black, *The Fundamental Right to Education*,

This was not the end of the story for school funding litigation. In *Rodriguez*, Justice Marshall famously dissented, stating, "[N]othing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[76] Marshall's footnote became the spark that set state courts around the country ablaze with litigation.[77]

This new wave of litigation deluged state supreme courts in arguments for a right to education under their respective state constitutions. As with state constitutional provisions, cases varied but also presented some consistent themes. For example, many states began litigating claims under their thoroughness and efficiency provisions. In Texas, for example, lengthy litigation arose analyzing the state's school funding formula under the efficiency requirement in its constitution.[78] The Texas Supreme Court found the provision to invalidate the funding formula to be unconstitu-

94 Notre Dame. L. Rev. 1059, 1061–62 (2019) (noting that current constitutional jurisprudence does not recognize a federal right to education).

76 *Rodriguez*, 411 U.S., at 133, n.100.

77 *See* Sutton, *supra* note 56, at 1971.

78 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391 (Tex. 1989).

tional under that provision.[79] In addition, the California Supreme Court analyzed Article IX, Section 5 of the California Constitution, which requires the California Legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district ...."[80] The California Supreme Court concluded that these "free schools" and "common schools" clauses did not require the California legislature to allocate equal funding to school districts.[81] Similarly, the New Jersey Supreme Court examined New Jersey's education provision and found that, while it placed certain requirements on the New Jersey legislature, it did not create a right to education under the state constitution.[82] While constitutional terms and language vary between states, the efforts employed to find a state-level constitutional right to education did not.

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79 *Id.*

80 Cal. Const., art. IX § 5.

81 Serrano v. Priest, 487 P.2d 1241, 1248 (Ca. 1971). This case did find, however, a fundamental right to education under the Fourteenth Amendment of the United States Constitution, a premise later rejected in *Rodriguez*. 411 U.S. 1, 37 (1973).

82 Robinson v. Cahill, 69 N.J. 449, 464 (1976). The New Jersey constitutional provision in question in that case states, "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." N.J. Const. art. VIII, § IV, para. 1.

Emboldened by *Serrano*'s analysis of the Fourteenth Amendment, school funding advocates suggested litigation under state constitutional provisions as the ideal vehicle to equalize school funding among districts,[83] even though the California Supreme Court in *Serrano* had rejected the premise under its state constitution.[84] This decision foreshadowed the losses advocates and litigators suffered in their efforts to get courts to find a right to an "adequate education" in state constitutions after *Rodriguez*.[85]

When school choice programs began proliferating, school choice opponents challenged these programs under the Establishment Clause, arguing that any funds to private, sectarian schools were a violation of the First Amendment.[86] In *Zelman v. Simmons-Harris*, the Supreme Court held that such programs did not violate the Constitution.[87] Opponents of school choice provisions then couched their opposition as

83 John Pincus, *The Serrano Case: Policy for Education or for Public Finance?*, 59 Phi Delta Kappan 173, 173–75 (1977) (noting that *Serrano* provides a basis for pursuing equalization of education funding through litigation).

84 *Serrano*, 487 P.2d, at 1248.

85 Atanu Das, *An "Adequate" Education Needs an "Adequate" Approach to School Funding*, 12 Pub. Int. L. Rev. 81, 81–83 (2007).

86 Green & Moran, *supra* note 12, at 277.

87 *Zelman*, 536 U.S., at 639, 662–63 (2002).

based within state versions of the "Blaine Amendment."[88] These amendments, based in anti-Catholic rhetoric, forbade public funds from going to sectarian schools.[89] However, due to a coordinated litigation effort,[90] the Supreme Court would later declare these provisions violative of the First Amendment in *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*.[91]

Since Justice Marshall's footnote, litigation of state education clauses has increased. Under one theory, state education funding programs violate a minimum level of funding required under state constitutional education provisions.[92] Primarily, these claims have been litigated under thoroughness and efficiency provisions.[93] A surprising nearly

88 *See* Green & Moran, *supra* note 12, at 277.

89 Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301, 338 (2000).

90 The Institute for Justice masterfully coordinated and led the litigation efforts for *Zelman*, *Espinoza*, and *Carson*. *See Cleveland, Ohio, School Choice (Federal Case)*, Inst. for Just., https://ij.org/case/zelman-v-simmons-harris/ (last accessed Jan. 6, 2024); *Espinoza v. Montana Department of Revenue*, Inst. for Just., https://ij.org/case/montana-school-choice/ (last accessed Jan. 6, 2024); *Carson v. Makin*, Inst. for Just., https://ij.org/case/maine-school-choice-3/ (last accessed Jan. 6, 2024).

91 Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020); Carson v. Makin, 596 U.S. 767, 789 (2022).

92 Sutton, *supra* note 19, at 30.

93 *Id.*

two-thirds of these lawsuits have been successful.[94] These challenges owe much of their success to a shift from bringing claims under negative right state equal protection provisions to positive right state education funding provisions.[95]

State voucher programs have also been challenged under state uniformity provisions, but case law in this area is limited due to the small number of suits that have been brought.[96] While many of the suits came down in favor of school choice provisions, results have been mixed—primarily between theories of interpreting uniformity clauses adopted by courts in the course of litigation in Wisconsin and Florida.[97]

II. Wisconsin's Uniformity Clause

The Wisconsin State Constitution provides that "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practica-

94 *Id.*

95 *Id.,* at 35.

96 Green & Moran, *supra* note 12, at 285.

97 *See, e.g.*, Davis v. Grover, 480 N.W.2d 460 (Wis. 1992) (upholding a school choice program under the Uniformity Clause of the Wisconsin Constitution); Bush v. Holmes, 919 So.2d 392, 407 (Fla. 2006) (rejecting a school choice program under the Uniformity Clause of the Florida Constitution and distinguishing it from *Davis v. Grover* because Florida's constitution has a paramount duty requirement which is not present in the Wisconsin constitution).

ble."[98] The original state constitution, ratified in 1848, contained this provision,[99] and its text has remained unaltered since.

a. The General Meaning of Article X, Section 3 of the Wisconsin Constitution

Several broad principles animate Wisconsin's uniformity clause according to the Wisconsin Supreme Court. First, the uniformity clause governs "the character of the instruction given" in district schools, not the creation of school districts.[100] Because the Wisconsin constitution refers to "district schools," not "school districts," it has nothing to say about the creation of school districts themselves.[101] The clause "applies to the districts after they are formed . . . rather than to the means by which they are established and their boundaries fixed."[102] Under the uniformity clause,

98 Wis. Const. art. X, § 3.

99 *Constitution of the State of Wisconsin, Adopted in Convention, at Madison, on the First Day of February, in the Year Our Lord One Thousand Eight Hundred and Forty-eight*, Wis. Hist. Soc'y, https://content.wisconsinhistory.org/digital/collection/tp/id/71790.

100 Larson v. State Appeal Bd., 202 N.W.2d 920, 922 (Wis. 1973) (quoting State *ex rel.* Zilisch v. Auer, 221 N.W. 860, 862 (Wis. 1928)).

101 Wis. Const. art. X, sec. 3; s*ee also Larson*, 202 N.W.2d at 922.

102 *Larson*, 202, N.W.2d at 922 (quoting *Zilisch*, 221 N.W. at 862).

a town could validly adopt the township system of school government—a system of managing public schools that simply substitutes the town's border for "the indefinite and irregular territory known as the school district."[103] The uniformity clause likewise has no implications for the size and population of school districts. Petitioners in *Larson v. State Appeal Bd.* challenged the creation of school districts of grossly unequal population and area.[104] While one district of 159 square miles served over 3,500 students, another of 28 square miles served only 620.[105] The court found no violation of the uniformity clause in these districts' creation.[106]

Second, the uniformity clause sets a minimum floor for the standards the "character of instruction" must meet to pass constitutional muster.[107] It does not require absolute uniformity in education,[108] acting not as "a ceiling but a floor."[109] As the court explains, every Wisconsin student

103 The Township System of School Government: Opinions of the State Superintendents of Wisconsin 3 (Oliver E. Wells, ed., 1894); s*ee also* T.B. Scott Lumber Co. v. Oneida Cnty., 39 N.W. 343, 344 (Wis. 1888).

104 202 N.W.2d at 922.

105 *Id.*, at 921–22.

106 *Id.*, at 922 (quoting *Zilisch* 221 N.W. at 862).

107 Kukor v. Grover, 436 N.W.2d 568, 577–78 (Wis. 1989).

108 *Id.*, at 575.

109 Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998).

has the "right to an equal opportunity for a sound basic education,"[110] but nothing in the state constitution "serv[es] as a mandate that every student attend a public school."[111] And the uniformity clause "does not require the legislature to *ensure* that all of the children in Wisconsin receive a free uniform basic education."[112]

Zweifel v. Joint Dist. No. 1, Belleville illustrates the consequences of treating the uniformity clause as a ceiling mandating absolute uniformity in schools.[113] Appellants sued to force a school district to allow their child early admission to kindergarten.[114] Even though it was not the school district's policy to do so, appellants reasoned, this district must allow early admission for exceptional students because other districts do so, thus preserving the state's constitutionally required uniformity of education.[115] The court's opinion, siding with the school district, rendered the appellants' argument absurd:

110 Vincent v. Voight, 614 N.W.2d 388, 408 (Wis. 2000).
111 Green & Moran, *supra* note 12, at 286.
112 Davis v. Grover, 480 N.W.2d 460, 474 (1992) (emphasis added).
113 Zweifel v. Joint Dist. No. 1, Belleville, 251 N.W.2d 822 (1977).
114 *Id.*, at 823.
115 *Id.*, at 824.

> The logical extension of the appellants' contention would be that any school district within the state could dictate the character of education, services, opportunities, etc., throughout the state simply by adopting something new or different and thus requiring all other districts to conform. The constitution does not mandate such a result.[116]

Instead, Wisconsin's uniformity clause only "requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education."[117]

b. School Choice under Wisconsin's Uniformity Clause.

Wisconsin was an early pioneer of the modern school choice program, and its programs have repeatedly withstood challenges in state court.[118] Because the court has construed

116 *Id.*

117 *Davis*, 480 N.W.2d, at 474.

118 Interestingly, Wisconsin allowed public money to go to sectarian education even before *Zelman*, *Espinoza*, and *Carson*. In *Jackson v. Benson*, the Wisconsin Supreme Court held that the Milwaukee Parental Choice Program, the first modern school choice program, allowing public monies to be directed to private sectarian and nonsectarian schools, did "not violate either the state's Compelled Support Clause or its Blaine Amendment because students are not compelled to attend religious schools and any benefits to such schools are incidental." 578 N.W.2d 602 (Wis. 1998).

Wisconsin's uniformity clause only to require the legislature to provide students with the *opportunity* to receive a free uniform basic education in the states' public schools, programs that leave this opportunity undisturbed pass constitutional muster under this clause.

In *Davis*, the Wisconsin Supreme Court concluded that the first modern school choice program, the Milwaukee Parental Choice Program (MPCP), which allowed public funding of private, nonsectarian schools, did not violate the uniformity clause because it did not interfere with "every Wisconsin student ha[ving] an opportunity to attend a public school with a uniform character of instruction."[119] A school financing system did not fail the uniformity requirement for the same reason.[120] Both were "experimental attempt[s]" to build on a foundation of the minimum education the state is constitutionally obligated to provide.[121] When Wisconsin expanded the MPCP to allow sectarian private schools to participate, the court found this minimum education again undisturbed and concluded the MPCP still presented no uni-

119 *Davis*, 480, N.W.2d at 473.
120 Kukor v. Grover, 436 N.W.2d 568, 577 (Wis. 1989).
121 *Davis*, 480 N.W.2d, at 474.

formity issues.[122] Once Wisconsin's "legislature has fulfilled its constitutional duty to provide for the basic education" of Wisconsin's children, it may freely engage in "experimental attempts to improve upon that foundation" without offending uniformity.[123] Critically for Wisconsin's school choice programs, the court has repeatedly held that "the mere appropriation of public monies" does not make a private school into a "district school" governed by the uniformity clause.[124]

Wisconsin courts apply a textualist and originalist framework in analyzing whether the uniformity clause permits school choice programs.[125] When construing a constitutional provision, the court first analyzes the "plain meaning of the words in the context used," then analyzes the debates surrounding that provision's ratification, the relevant practices at the time of ratification, and the "earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution."[126] Beyond theoretical definitions, the plain meaning of "uniform"

122 *Jackson*, 578 N.W.2d, at 628.
123 *Id*.
124 *Id.*, at 627; *see also Davis* 480 N.W.2d, at 474.
125 *Kukor*, 436 N.W.2d, 568, 574 (1989).
126 *Id.*

is unclear, and the ratification debates yield no clues as to its meaning: "Unfortunately . . . no debates ensued relating to the draft of art. X, § 3 at either the 1846 or 1848 constitutional conventions because the provision was wholly uncontroversial."[127] With the uniformity clause ratified during the time of the Common Schools movement, contemporary practice included public funding of both public and private schools—a system quite similar to that of modern school choice programs.[128] And finally, statutes passed shortly after the uniformity clause's ratification allowed various systems of school financing, indicating the uniformity clause's compatibility with a modern school choice program.[129] Thus, with Wisconsin's interpretation of its uniformity clause as providing a minimum baseline of a "character in instruction" offered to Wisconsin children, school choice programs have consistently been held to not violate its uniformity clause.

III. Florida's Uniformity Clause

Article IX, Section 1 of the Florida Constitution reads, in part:

127 Vincent v. Voight, 614 N.W.2d 388, 403 (Wis. 2000).

128 *See* SUTTON, *supra* note 18, at 27 (noting that the Common Schools movement began in the mid-nineteenth century).

129 *Vincent*, 614 N.W.2d, at 404.

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.[130]

Of note, the "free public schools" must be "uniform."[131] The uniformity requirement first was added to the Florida Constitution in 1868, along with the "paramount duty" language, which was deleted in 1885 and re-added in 1998.[132]

a. The General Meaning of Article XI, Section 1 of the Florida Constitution

The Florida Supreme Court's interpretation of Florida's uniformity clause differs starkly from the Wisconsin Supreme Court's interpretation of Wisconsin's uniformi-

130 Fla. Const. art. IX, § 1.
131 *Id.*
132 *Bush*, 919 So. 2d, 392, 402–03 (Fla. 2006).

ty clause.[133] Like Wisconsin's clause, Florida's uniformity clause and enveloping section protect a right to a free public education for all state citizens.[134] However, while Wisconsin's uniformity clause provides a floor for the state legislature to build upon if it so chooses, Florida's is a ceiling. According to the Florida Supreme Court, the provision containing the uniformity clause does not

> establish a "floor" of what the state can do to provide for the education of Florida's children. The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.[135]

While the state constitution apparently vests "the legislature . . . with enormous discretion . . . to determine what provision to make for an adequate and uniform system of free public schools,"[136] the legislature may take no action

133 *Compare id. with* Davis v. Grover, 480 N.W.2d, 460 (1992).

134 Scavella v. Sch. Bd. of Dade Cnty., 363 So. 2d 1095, 1098 (Fla. 1978).

135 *Bush*, 919, So. 2d at 408.

136 Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

to expand upon this mandatory educational minimum outside of the public school system. Directing public monies to other means of education thus offends the Florida Supreme Court's notion of uniformity.

While the uniformity clause's current construction requires the legislature to work solely within the public school system, the court also acknowledged that some inequities are inevitable even between public schools. For example, "the constitutional mandate [regarding funding] is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts."[137] Likewise, the uniformity clause requires neither that "each county have the same number of school board members"[138] nor that sources of school funding be "uniform" across counties.[139] Thus, even the court concludes that uniformity cannot

137 St. Johns Cnty. v. Ne. Fla. Builders Ass'n, Inc., 583 So. 2d 635, 641 (Fla. 1991).

138 Sch. Bd. of Escambia Cnty. v. State, 353 So. 2d 834, 837 (Fla. 1977).

139 *St. Johns Cnty*., 583 So. 2d, at 641.

precisely mean equality.

b. School Choice under Florida's Uniformity Clause

Unlike the Wisconsin Supreme Court, the Florida Supreme Court construed its uniformity clause to preclude at least one school choice program directly. The Opportunity Scholarship Program (OSP) provided state funds to any student attending a failing public school so that the student could "attend a higher performing public school or use a scholarship provided by the state to attend a participating private school."[140] In *Bush v. Holmes*, the court invalidated the OSP under the uniformity clause, concluding that the clause prohibited the state legislature from "provid[ing] educational options beyond those in the public schools."[141] In other words, "the state may use public funds only for traditional public schools and may not provide additional educational opportunities outside the traditional public system."[142] The uniformity clause prohibits funding "private alternative[s] to the public school system" like the OSP.[143] Notably, however, *Bush* does not affect programs that are "structurally different

140 *Bush*, 919 So. 2d, at 400.
141 KOMER & NEILY, *supra* note 8, at 23.
142 *Id.*, at 22.
143 *Bush*, 919 So. 2d, at 408.

from the OSP."[144]

The court tried to distinguish Florida's uniformity clause from Wisconsin's uniformity clause because, unlike Florida's education provision, Wisconsin's education provision contains no explicit language denoting the provision of an adequate education as a "paramount duty of the state."[145] Herein lies the difference between the two states' uniformity clauses, according to the Florida Supreme Court: because Florida's duty to provide educational opportunities is a "paramount" one, the court considered the uniformity requirement as a ceiling, not a floor. Unsurprisingly, the Florida Supreme Court also has construed the Florida uniformity clause to govern all schools receiving public funding, including private schools.[146]

IV. Idaho's Uniformity Clause

Article IX, Section 1 of the Idaho Constitution reads, "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and main-

144 *Id.*, at 412.
145 *Id.*, at 407, n.10.
146 *Id.*, at 410.

tain a general, *uniform* and thorough system of public, free common schools."[147] Opponents of school choice point to the uniformity clause as the primary constitutional hurdle for school choice legislation to overcome,[148] noting that the education provided to children will not be uniform if some students attend traditional brick-and-mortar public schools while others use a school choice program to participate in different forms of education.[149] Alternatively, school choice opponents argue that school choice programs divert funds from traditional public schools[150] or that school choice is unconstitutional because of Idaho's Blaine Amendment.[151] After *Espinoza v. Montana Department of Revenue*[152] and *Carson v. Makin*,[153] however, the latter argument is disingenuous.[154]

147 Idaho Const. art. IX, § 1 (emphasis added).

148 *See, e.g.*, Green & Moran, *supra* note 12, at 27813.

149 *See generally id.* (noting that uniformity provisions may preclude voucher programs because they do not provide a precisely uniform system of education).

150 Jones, *supra* note 9.

151 *See, e.g.*, Jim Jones, *What an Idaho School Funding Lawsuit Might Look Like*, Idaho Capital Sun (Feb. 13, 2023), https://idahocapitalsun.com/2023/02/13/what-an-idaho-school-funding-lawsuit-might-look-like/ (arguing that any school choice legislation will violate Idaho's Blaine Amendment and ignoring changes to current law as reflected by Supreme Court precedent in *Zelman*, *Espinoza*, and *Carson* invalidating such provisions).

152 140 S. Ct. 2246, 2251 (2020).

153 596 U.S. 767, 772 (2022).

154 *Blaine Amendments*, Inst. for Just., https://ij.org/issues/

As of yet, there are no state court cases addressing a school choice program's validity under the uniformity clause.

a. The General Meaning of Article IX, Section 1 of the Idaho Constitution

Idaho case law interpreting Article IX, Section 1 does not specifically address the constitutionality of school choice principles, but it presents several relevant principles. First, there is no fundamental right to education.[155] Rather, parents retain the right to choose how to educate their children. This is one of the highest principles in Idaho law.[156] Second, the uniformity clause requires uniformity in curriculum, not funding for education or school facilities.[157]

First, in *Thompson v. Engelking*, the Idaho Supreme Court made clear that there is no fundamental right to education under the Idaho Constitution.[158] Thus, school choice programs are not subject to strict scrutiny.[159] In making this

school-choice/blaine-amendments/#:~:text=Blaine%20Amendments%20are%20controversial%20state,government%20from%20funding%20Catholic%20schools. (last accessed Jan. 6, 2024).

155 Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975).

156 Martin v. Vincent, 201 P. 492, 492 (Idaho 1921).

157 *Idaho Sch. II*, 976 P.2d, 913, 920 (Idaho 1998).

158 *Thompson*, 537 P.2d, at 647.

159 Olsen v. J.A. Freeman Co., 791 P.2d 1285, 1289 (Idaho 1990) (holding that fundamental rights receive strict scrutiny analysis under Idaho law).

determination, the court specifically rejected the framework articulated in *Rodriguez* for determining whether a right is fundamental—namely whether it is "explicitly or implicitly guaranteed" by the United States Constitution.[160] Refreshingly, the Idaho Supreme Court did not march in lockstep with federal jurisprudence and developed its own standard for evaluating fundamental rights.[161] Instead of strict scrutiny, the court used rational basis scrutiny to determine the constitutionality of funding schemes, thereby giving deference to reasonable attempts by the Idaho Legislature to conform to the constitutional requirement.[162] In developing its rationale, the Idaho Supreme Court quotes an important passage from its decision in *Andrus v. Hill*:

> Traditionally, not only in Idaho but throughout most of the states of the Union, the legislature has left the establishment, control and management of the school to the parents and taxpayers in the community which it serves. The local residents

160 *Thompson*, 537 P.2d, at 644.

161 *See generally* SUTTON, *supra* note 19, at 16–21 (arguing that state courts should look to the historical meaning of their constitutional provisions rather than simply looking to federal courts' interpretations of similar provisions in the United States Constitution).

162 *Thompson*, 537 P.2d, at 645.

> organized the school district pursuant to enabling legislation, imposed taxes upon themselves, built their own school house, elected their own trustees and through them managed their own school. It was under these circumstances that the "Little Red School House" became an American institution, the center of community life, and a pillar in the American conception of freedom in education, and in local control of institutions of local concern. In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.[163]

This historical information supports the idea that parents making educational decisions for their own children comports with the historical meaning of the uniformity clause. The court's decision in *Thompson* interpreted the uniformity clause according to this state history, reasoning that, because the legislature is the closest political body to the people, rational basis scrutiny is most consistent with the clause's text and original public meaning.[164]

163 *Id.*, at 645 (quoting Andrus v. Hill, 249 P.2d 205, 207 (Idaho 1952)).

164 *Id.* However, even rational basis scrutiny does not prevent

Idaho's uniformity clause does not exist in isolation and is not paramount.[165] It must be interpreted in the context of the entire Idaho Constitution and the principles that undergird it.[166] One such constitutional principle is the importance of parental decision-making in a child's education. In addition to parental control's rich national legacy, discussed in *Andrus* and *Thompson*,[167] the court has expressly noted that Article IX, Section 1's existence does not override the right retained by the people to exercise "supervision and control of the education of their children."[168] The court derived this principle in part from the general principles which undergird and express themselves in Idaho's parental custody laws.[169] This specific language from the custody provisions carried

the court from intervening when it sees a clear violation of the Idaho Constitution. The court left itself that option with a bold statement in support of judicial supremacy, "[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government." Idaho Sch. for Equal Educ. Opportunity v. Evans (*Idaho Sch. I*), 850 P.2d 724, 728 (Idaho 1993).

165 *Idaho Sch. II,* 976 P.2d, 913, 921 (Idaho 1998).

166 *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (discussing the whole-text cannon of legal interpretation, mandating that texts be construed as wholes).

167 *Andrus*, 249 P.2d, at 207.

168 Electors of Big Butte Area v. State Bd. of Educ., 308 P.2d 225, 231 (Idaho 1957).

169 *Id.*, (citing Martin v. Vincent, 201 P. 492, 492 (Idaho 1921)).

weight: "The right of a parent to the custody, control, and society of his child is one of the highest known to the law."[170] Idaho law consistently reaffirms the irreplaceable role of parents in their child's life, and this principle informs the court's reasoning in education litigation, as exemplified in *Electors of Big Butte Area v. State Board of Education*.[171]

Second, much like the Wisconsin Supreme Court, the Idaho Supreme Court concluded that Idaho's uniformity clause requires uniform curriculum in state-funded schools, not uniform funding of those schools.[172] Likewise, uniformity does not apply to funding school facilities and other district activities.[173] As is proper, the court interpreted its own constitution instead of relying on other state constitutions, specifically rejecting the Arizona Supreme Court's interpretation of the Arizona Constitution's uniformity clause.[174] Instead, the court remained steadfast in concluding that the Idaho Constitution's uniformity requirement applies to curriculum, not funding.[175]

170 *Martin*, 201 P., at 492.
171 308 P.2d, at 231.
172 *Id.*
173 *Idaho Sch. II*, 976 P.2d, 913, 920 (Idaho 1998).
174 *Id.*
175 *Id.*

b. School Choice under Idaho's Uniformity Clause

Where does this leave the objections to school choice proposals? Are school choice proposals constitutional under the Idaho Constitution? The answer to these questions depends on several factors, but such proposals are most likely at least facially constitutional.

While the Idaho Supreme Court has not addressed the constitutionality of school choice programs directly, the Idaho Attorney General's Office issued an opinion about school choice legislation.[176] The legislation in question provides income tax credits for families who choose not to utilize the public school system but otherwise comply with established compulsory education statutory requirements.[177] The Attorney General specifically distinguished between an income tax credit program and both school vouchers and tuition tax credits.[178] While the state gives school vouchers in advance, tuition tax credits are awarded after the payment has occurred and limited to the amount of tuition actually paid.[179]

176 Idaho Att'y Gen., Attorney General Opinion No. 97-2, *as reprinted in* 1997 Att'y Gen. Ann. Rep., at 13–24.

177 *Id.*, at 13–15.

178 *Id.*, at 14.

179 *Id.*

The Attorney General ultimately concluded, "There appear to be no state or federal constitutional impediments which would prohibit the legislature from granting a tax credit to a parent or guardian who complies with the state's compulsory education law by means other than the public school system and without using public school resources."[180] Presumably, then, many school choice programs do not present a facial constitutional issue under the uniformity clause.

As noted earlier, school choice legislation generally receives two primary objections (besides the now invalid objection under Idaho's Blaine Amendment): (1) the program inherently creates a school system that is not entirely uniform and (2) such a program would pull funding from public schools which would impact the state's ability to maintain uniform public schools.[181]

The first argument clearly contradicts the precedent of the Idaho Supreme Court. As discussed, the court has interpreted this provision specifically not to require uniformity of funding for either education funding distribution schemes

180 *Id.*, at 13.
181 *See* Jones *supra* note 9; Ridler *supra* note 14.

or programs for funding educational facilities.[182] And, logically, there is no system more uniform than one that gives each parent the same amount of dollars to spend for each child's education, as a voucher system does. Arguments that claim funding schemes which assign the same resources to each student are somehow not uniform defy logic and the plain and ordinary meaning of "uniform."

The second objection also falls flat because the uniformity clause contemplates directing public funds to private schools. At the time when states began adding educational provisions guaranteeing access to public education to their constitutions, states without such provisions did not boast systems of widely available private schools.[183] Rather, they directed their education funds to random assortments of private and parochial schools that did not provide for the educational needs of all children within each state.[184] By default, public funds went to private schools. Proponents of adding education provisions to state constitutions sought to create systems of "common schools" that did not already exist.[185]

182 *Idaho Sch. I*, 850 P.2d, 724, 728 (1993).
183 *See* Sutton, *supra* note 56, at 1975.
184 *Id.*
185 *Id.*

School choice programs do not aim to turn time back to the pre-common school proverbial dark ages that required families without access to a school to scrounge up an education from the crumbs of the earth for their children. Far from it. Instead, these programs try to ensure that every child gets the same educational opportunity—regardless of residence, socio-economic status, or any other factor—by offering parents and children access to both public and private schools. The choice is theirs.

School choice programs offer parents educational choice consistently with two principles that animate Idaho's education law. First, education greatly impacts one's ability to engage in the political process.[186] As Article IX, Section 1 of the Idaho Constitution so eloquently puts it, "The stability of a republican form of government depend[s] mainly upon the intelligence of the people."[187] Second, the right of parents to make educational choices for their children is paramount.[188] There is no better system to allow parents to make these choices than empowering school choice legisla-

186 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

187 Idaho Const. art. IX, § 1.

188 Andrus v. Hill, 249 P.2d 205, 207 (Idaho 1952).

tion. Thus, Idaho's uniformity clause likely does not prohibit school choice programs.

V. The Path Forward for School Choice Advocates

As supporters of school choice programs seek to establish said programs in states across America, they must first look to their state constitutions to ensure that their proposed programs are constitutional. Additionally, advocates should look at how courts have interpreted their respective uniformity clauses so that school choice programs are not forced to teach the same curriculum their public-school counterparts do, thereby defeating much of the program's purpose. These steps are essential to ensure that school choice programs pass constitutional muster and achieve the results desired by advocates.[189]

189 While most courts will review the constitutionality of school choice programs under their uniformity clauses, there is a possibility that a court may deem the issue a non-justiciable political question. In *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, the petitioners alleged that the state's school choice program violated its uniformity clause by diverting funds from its public schools to private schools. 262 So. 3d 127, 131 (Fla. 2019). The trial court not only conceded that "variability necessarily exists between school districts" but also determined that the issues remained "political questions best resolved in the political arena." *Id.*, at 132. On appeal, the First District Court of Appeal of Florida concluded that the education provision, including the uniformity clause, contained no language or authority "that would empower judges to order the enactment of educational policies regarding teaching methods and accountability, the

a. Determining the Meaning of State Constitutional Provisions and the Possibility of Constitutional Amendments

Before putting forth a school choice program, advocates should try to make the particular program constitutional under the state's uniformity clause.[190] One of the most problematic aspects of these uniformity clauses is their

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appropriate funding of public schools, the proper allowance of charter schools and school choice, the best methods of student accountability and school accountability, and related funding priorities." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1166 (Fla. Dist. Ct. App. 2017), *approved*, 262 So. 3d 127 (Fla. 2019). Although the Florida Supreme Court said that they did not agree with the First District that claims under the clause could *never* be justiciable, they affirmed the decision dismissing the challenge as non-justiciable. *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 135 (Fla. 2019). Because the legislature is generally tasked with implementing these education clauses, states may be successful in defending their programs by noting that the determination of whether it meets the standard is left by the constitution to the legislature, thus making it a non-justiciable question. Courts will likely receive these arguments with hesitation, but it is worth considering when defending such programs.

190 Of course, uniformity clauses are not the only state constitutional provision school choice advocates should be aware of when drafting legislation. Advocates must look to a broad array of provisions, including thoroughness, efficiency, aid, and other clauses. For example, in Arizona, even though the state has a uniformity provision in its state constitution, the Arizona Supreme Court struck down a voucher program under its Aid Clause, not its uniformity clause. *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009). Thus, while this Note serves as a resource about uniformity clauses, school choice advocates and legislators should conduct broad review of their state's constitutional provisions prior to introducing legislation establishing school choice programs.

somewhat vague and imprecise nature, leaving courts who do not carefully seek out their original public meaning with the power to exploit their apparent vagueness and then implement their own policy agendas under the guise of state constitutional interpretation.[191] For almost all states, the question is not whether school choice programs are constitutional but rather how to write them so that they are so.[192]

As illustrated by differences in the Wisconsin and Florida decisions, the fundamental question facing courts in uniformity clause interpretation is whether the clause requires the legislature to provide a baseline level of educational opportunity or create a system that is uniform in its totality.[193] As Richard Komer, the attorney who argued *Espinoza*,[194] and Clark Neily, the senior vice president for

191 *See* David M. Primo & Jake Jares, *Education Innovation, Fiscal Policy, and State Constitutions*, Mercatus Center Geo Mason (Nov. 20, 2017), https://www.mercatus.org/research/policy-briefs/education-innovation-fiscal-policy-and-state-constitutions.

192 Komer & Neily, *supra* note 8, at 2.

193 For example, the Indiana Supreme Court, in a challenge to its voucher system held that the voucher program was in addition to the state's public school system and therefore did not implicate the uniformity clause as it was in addition to the system of public schools. Meredith v. Pence, 984 N.E.2d 1213, 1224–25 (Ind. 2013).

194 Linda Greenhouse, *The Supreme Court's Collapsing Center on Religion*, N.Y. Times (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/opinion/supreme-court-religion.html.

legal studies at the Cato Institute,[195] noted, "[S]chool choice opponents have begun arguing, illogically, that such provisions do not simply require the government to establish public schools for all children within the state, but forbid the government from going beyond that baseline requirement by providing education through means other than the traditional public school system."[196] They proceed to note that almost no states' precedents support this argument—with the notable exception of Florida.[197] Uniformity clauses, they argue, were designed to ensure that public schools possessed certain minimum characteristics, not to impose a limit on the "educational innovation and creativity" of legislators in executing their constitutional duties.[198] "If a state chooses to go above and beyond that constitutional requirement, a uniformity provision should not be a bar."[199]

Of course, no system can be *entirely* uniform.[200] Thus, the question becomes one of which areas must be uni-

195 *Clark Neily*, Cato Inst., https://www.cato.org/people/clark-neily (last accessed Jan. 6, 2024).

196 Komer & Neily, *supra* note 8, at 5, 6.

197 *Id.*

198 *Id.*

199 *Id.*

200 Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 Cornell L. Rev. 1359, 1406 (2018).

form and the degree of uniformity required.[201] The options are not a binary choice. Rather, they exist on a continuum; "schools and school systems are neither . . . uniform [n]or not uniform."[202] Requiring all education to be completely uniform in curriculum and structure would necessarily harm students by removing the adaptability necessary to tailor education to each student's needs.[203] Thus, the opportunities need not be uniform across students. The system itself must be uniform, rather than its application to each school or educational experience.[204]

When advocates defend their programs in states in which this question of the extent of uniformity has not been decided, they should argue that their provision merely requires a baseline. If courts follow Florida's reasoning in *Bush*, their decisions will most likely preclude funding for any education outside of the traditional public school system.[205] If, however, courts follow the approach of Wisconsin,

201 *Id.*

202 Aaron J. Saiger, *School Choice and States' Duty to Support Public Schools*, 48 B.C. L. Rev. 909, 937 (2007).

203 *Id.*, at 938.

204 *See, e.g.*, Kiddie Korner Day Sch., Inc. v. Charlotte-Mecklenburg Bd. of Ed., 55 N.C. App. 134, 138, 285 S.E.2d 110, 113 (1981).

205 Green & Moran, *supra* note 12, at 288.

then the state is free to adopt programs that provide for additional educational opportunities above and beyond the minimum requirements of their respective state constitutions.[206] A baseline approach will center the court's consideration of uniformity around a minimum standard of adequacy rather than any attempt to achieve equality.[207] Courts, however, must be careful not to intervene and define what adequacy means—that is the role of the state legislature.[208]

b. Uniformity of Curriculum: A Cautionary Note

A note of caution is in order for school choice proponents. Many states that have upheld these programs have concluded, as explained above, that the uniformity requirement necessitates a baseline, not total uniformity. To which issues that baseline standard applies is a separate question. Some states, like Idaho and Wisconsin, have held that this uniformity requires a certain uniformity in instruction.[209]

206 *Id.*

207 *Cf.* Vincent v. Voight, 614 N.W.2d 388, 406–07 (Wis. 2000) ("Under the adequacy approach, a state generally lists the types of knowledge that a child should possess to guide a legislature in fulfilling its constitutional obligations. This type of standard articulates the content of an adequate education." (cleaned up)).

208 *Id.*

209 Larson v. State Appeal Bd., 202 N.W.2d 920, 922 (1973); *Idaho Sch. I.*, 850 P.2d, 724, 728 (1993).

Wisconsin requires uniformity in the "character of instruction."[210] Idaho requires uniformity in *curriculum*.[211] With much of the push for school choice coming from concerns regarding what is taught in the public school system, perhaps a school funding program that forces everyone to use the *same curriculum* would not advance the educational goals of many parents. The concern that "regulation follows funding" has led many, especially homeschoolers, to oppose school choice measures.[212] After all, if school choice programs using public funds are required by their constitution to be uniform in curriculum, then those who accept program funds will be required to use the same curriculum as the public schools. For many, concerns about faith discrimination,[213] the spread of Critical Race Theory,[214] and the pervasiveness

210 *Larson*, 202 N.W.2d, at 922.

211 *Idaho Sch. I.*, 850 P.2d, at 728.

212 Jeremy Poff, *Why Home School Advocates Are Lobbying Hard Against Universal School Choice Bills*, Wash. Exam'r (March 20, 2023 4:30 AM), https://www.washingtonexaminer.com/policy/education/homeschooling-legal-group-balks-at-school-choice.

213 James R. Mason, *The Civic Virtue of Private Home Education*, Home Sch. L. Def. Ass'n (Aug. 1, 2018), https://hslda.org/post/the-civic-virtue-of-private-home-education.

214 Gary W. Houchens & John Garen, *Why We Should Advance School Choice, Not Critical Race Theory*, Courier J. (Jan. 20, 2022 8:02 AM), https://www.courier-journal.com/story/opinion/2022/01/20/opinion-advance-school-choice-not-crt-give-parents-more-say-education/6518624001/.

of woke ideology[215] in public schools inform the desire for alternative forms of education. Developing a system that requires those same features in curriculum for alternative schools is antithetical to many of the goals of school choice advocates.

Simply because there is a requirement that "curriculum" or the "character of instruction" be uniform does not mean that all school choice programs will lead to the incorporation of such ideology. Rather, if carefully written, school choice legislation should set the basic level of minimum standards for education without imposing regulations upon private schools or homeschoolers who accept program funds. Additionally, these programs should never be compulsory. No program should preclude parents from choosing to educate their children outside any government system, not even one that provides choice. While many express valid concerns that school choice initiatives may lead to more regulation of private schools or homeschools, if structured correctly and made optional, school choice programs can be

215 Jay Greene & Ian Kingsbury, *Empowering Parents with School Choice Reduces Wokeism in Education*, Heritage Found. (Nov. 15, 2022), https://www.heritage.org/education/report/empowering-parents-school-choice-reduces-wokeism-education.

used to break the public school monopoly and provide educational opportunities for all children to excel outside the broken public school system.

Conclusion

With the growth of the modern school choice movement and the increase of Supreme Court precedent favorable to school choice, proponents of school choice should consider their state uniformity clauses when drafting school choice legislation to ensure constitutionality. Contrary to the arguments of critics, these provisions do not generally preclude school choice programs, but some states, like Florida, may interpret them as doing so. Knowing the original public meaning of the uniformity clause in a state is essential to complying with constitutional demands when preparing school choice proposals that have the potential to provide opportunities for parents to give their children the best educational opportunities possible. The time of standardized, one-size-fits-all educational systems is past, and a time for choosing is here.[216]

216 *See generally* Ronald Reagan, *A Time for Choosing Speech Oct. 27, 1964*, Ronald Reagan Pres. Libr. & Museum (Oct. 27, 1964), https://www.reaganlibrary.gov/reagans/ronald-reagan/time-choosing-speech-october-27-1964.

Anti-Competition, Anti-Consumer: A Critical Examination of American Antitrust Enforcement

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Abstract

This paper sets out to provide a critique of American antitrust enforcement, both in historic and modern settings. Three cases are singled out for study: Standard Oil Co. of New Jersey v. United States (1911), United States v. Microsoft Corp. (2001), and F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc. (2023). By providing a survey and analysis of the literature on these cases, this paper's purpose is threefold: to provide an overview and analysis of the historical cases, to demonstrate how the errors in the government and courts' logic have pervaded into the modern Microsoft case, and to better illuminate the special interests and rent-seeking prevalent in each of these cases. Through a thorough evaluation, guided by a praxeological understanding of economics, this paper concludes that Microsoft has demonstrated a greater degree of preparedness in their 2023 case than they did in 2001, due in large part to similarities between the 2023 case and the two historical examples. The history of the American antitrust system is assessed in the conclusion.

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Introduction

Since the passage of the Sherman Antitrust Act in 1890, the regulatory apparatus of the American government has purported to protect competition in the marketplace by quashing monopolistic practices. As safeguards of competition, however, the Sherman Act and similar pieces of legislation often fall short of their desired ends. The inadequate economic foundations and flawed utilization of antitrust regulation have been widely discussed in the literature, which begs the question: how are pervasive problems in the historical application of antitrust laws in the United States reflected in modern cases, and how have they altered the actions of firms going through these proceedings? The faulty reasoning and special interests at work in historic applications of antitrust law are reflected in modern cases and have altered the strategies of the defendants in these proceedings. The historical examples this paper will examine are *Standard Oil Co. of New Jersey v. United States* (1911) and *United States v. Microsoft Corp.* (2001), with further analysis extended to the ongoing case *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc*. (2023).

The purpose of this paper is threefold: first, to provide an overview and analysis of the two historical cases which is more objective than that generally presented in much of the anti-monopoly orthodox literature; second, to demonstrate that there is truly nothing new under the sun with respect to the systemic errors in U.S. antitrust enforcement; and third, to shed light on the influence of special interests and rent seekers.[1] The cases selected for examination are historically significant, relevant to modern antitrust enforcement, and applicable to the case surrounding the current Microsoft-Activision merger. *Standard Oil Co. of New Jersey v. United States* (1911) was the first landmark case in U.S. antitrust law and underscored the consumer welfare intention[2] of antitrust regulation. *United States v. Microsoft Corp.* (2001) was decided in the context

1 A deep examination of monopoly theory is outside the scope of the paper. However, its development has been guided by praxeological principles and the work of several Austrian economists; notably, Murray N. Rothbard, Man, Economy and State with Power and Market 681 (2nd ed. 2009) [hereinafter Rothbard, Man, Economy and State] and Ludwig von Mises, Human Action: A Treatise on Economics 354-375 (1998).

2 For a more detailed look at the consumer welfare conception of U.S. antitrust enforcement, see Christine Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, Luncheon Keynote Address at George Mason (2019).

of a growing computer software market the courts failed to adequately comprehend. Additionally, both cases were rife with influence from special interests and rent-seekers. The flaws demonstrated throughout the *Standard Oil* and *Microsoft* cases are reflected in Microsoft's current court battle surrounding their attempt to acquire Activision-Blizzard, and their influence on the parties at work in the case is apparent.

I. *Standard Oil Co. of New Jersey v. United States* (1911)

In order to truly understand the antitrust suit against Standard Oil, it is crucial to examine the socio-political landscape in the United States at the time the company gained its power. The so-called "Progressive Era" at the turn of the 20th century was a time of rapidly-shifting economic, social, and political conditions that gave rise to increased government involvement in American life. Interests ranging from "big business groups, anxious to replace a roughly laissez-faire economy [with] a new form of mercantilism… [and] newly burgeoning groups of intellectuals, technocrats, and professionals… anxious for power and lucrative employment at the hands of the State"

to "arms manufacturers… [and] labor unions" managed "to transform America into a welfare-warfare imperial State, where people's daily lives were controlled and regulated to a massive degree."[3] Perhaps no one felt the impact of this paradigm shift more so than "robber-barons" such as John D. Rockefeller.

Like many of the other heads of trusts in his day, Rockefeller was able to take advantage of the rapidly evolving market to grow Standard Oil's market share. In fact, during the ten years following the company's founding in 1870, its market share rocketed from 4% to a staggering 85%.[4] This dominance led to increased scrutiny from government actors and the progressive journalists known as "muckrakers," who felt threatened by the emergence of large trusts. In Standard Oil's case, the aggregation of several factors allowed these interested parties to negatively influence the public's perception of the trust. At its inception, Standard did not seem to hold any advantage in

3 Murray N. Rothbard, The Progressive Era 37-38 (2017) [hereinafter Rothbard, The Progressive Era].

4 Thomas J. DiLorenzo, *The Truth About the "Robber Barons,"* The Ludwig von Mises Institute (Nov 1, 2017), https://mises.org/library/truth-about-robber-barons, [hereinafter DiLorenzo, *The Truth*].

efficiency over the rivals they quickly grew to dominate; rather, their rapid rise seemed to coincide with the rebates they received through agreements with railroads.[5] Rockefeller also earned himself, and consequently his company, a reputation for using underhanded tactics to ward off regulators. Under his direction, Standard Oil was politically active, seeking to prop up friendly party bosses and pressure prosecutors to stay away.[6] However, the forces that sought to weaken Standard Oil's position could not be quelled forever, and, from 1910 to 1911, Standard Oil found itself before the Supreme Court.

Chief Justice Edward White authored the Court's decision, in which he provides a statement of the purpose of antitrust regulation:

> the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had

5 Naomi R. Lamoreaux, *The Problems of Bigness: From Standard Oil to Google*, 33 The Journal of Economic Perspectives 94, 96 (2019).

6 *Id*., at 97.

> not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce.[7]

White also states that without restrictions on monopoly, companies that dominate their market will wield the power to fix prices, restrict output, and reduce the quality of their product without competitors being able to punish them for doing so.[8] In order to determine whether Standard Oil was guilty of monopolizing the market for refined petroleum, the Supreme Court turned to the "rule of reason."

The Court uses two types of rules to determine whether an action taken by a firm was a violation of the Sherman Antitrust Act: the *per se* rule and the rule of reason. In *Standard Oil*, the rule of reason was used to govern the court's analysis of the facts at hand. This method of evaluation calls for an "extensive evidentiary study of (1)

7 Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
8 *Id*., at 52.

whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint."[9] In other words, the court in *Standard Oil* was tasked with weighing the magnitude of the benefits of the trust's actions against the limitations these actions placed upon other firms' ability to compete. White, in applying the rule of reason, began from three undisputed facts: "[t]he creation of the Standard Oil Company of Ohio… [t]he organization of the Standard Oil Trust of 1882… [and] the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations."[10] Upon analyzing the progression of the Standard Oil Trust past this starting point, White concluded that,

> no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from

9 *Elements of the Offense,* U.S. DEP'T OF JUST., (Nov. 2017), https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

10 *Standard Oil Co.*, 221 U.S., at 70.

> the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view.[11]

In summary, the Court ruled that if Standard Oil was allowed to exist in that present state, the market would suffer harm far exceeding the benefits it reaped from Standard's superior efficiency; as a result, the trust should be dissolved.

a. Analysis of the Decision

A closer examination of the Supreme Court's reasoning reveals several key flaws. First, it is unclear that Standard Oil rose to prominence through any means other than its superior efficiency[12] and the entrepreneurial fore-

11 *Id*., at 77.

12 Standard Oil did not begin as a more efficient firm than its competitors, but thanks to Rockefeller's leadership and technological innovation they quickly became the most efficient firm in the market for refined oil.

sight of John D. Rockefeller; therefore, it should not have faced accusations of monopolization. In regard to Rockefeller, the "robber-baron" at the head of the trust, DiLorenzo argues that there is a distinction between "market entrepreneurs" and "political entrepreneurs"; Rockefeller is, contrary to popular belief, one of the former. Unlike the "political connivers and manipulators" of his time, Rockefeller managed to grow his company by "selling a newer, better… [and] less expensive product on the free market."[13] In addition, it is unclear whether Standard Oil was truly a monopoly in the sense that it would have been able to defend its high market power from potential entrants as its share of the refined petroleum industry had plummeted by 24% in the 11 years preceding the Supreme Court's decision.[14] This slump began years before the initial petition against them was filed in 1906, and was likely driven by " increasingly conservative, stodgy, and bureaucratic management" in the wake of Rockefeller's retirement.[15]

The second flaw in the Court's ruling derives from

13 DiLorenzo, *supra* note 5.
14 *Id.*
15 Rothbard, *supra* note 4, at 97.

its use – or, rather, misuse – of the rule of reason.[16] Armentano argues that an unbiased examination of the Court's decision reveals that, in fact, the rule of reason was not properly applied through a sophisticated analysis of the facts surrounding Standard Oil's business practices during the time period in question; rather, the Court resorted to the assignment of ill intent to the trust based on its dominance.[17] Had the rule of reason been applied as required, it is possible that the ruling in the case would have been reversed. Chief Justice White contended that Standard Oil's

16 Justice Harlan wrote an opinion concurring in part and dissenting in part. While he agreed that Standard Oil "constitute[d] a combination in restraint of interstate commerce," he went a step further than White in his reasoning. He argued that the purpose of the Sherman Act was to prohibit *all* purported restrictions of competition, not just "undue" restrictions, and that the Court should not have adopted a rule of reason at all (*Standard Oil Co.*, 221 U.S., 1, 83, 97, 1911).

17 Dominick Armentano, Antitrust and Monopoly: Anatomy of a Policy Failure 72-73 (1982): The Supreme Court's willingness to accept an *ex facto jus oritur* approach to legal interpretation in the years preceding the *Standard Oil* decision is certainly noteworthy. Muller v. Oregon, 208 U.S., 412, 1908 marked a shift in the temperament of the Court, as it was finally willing to rely (in large part) on statistical evidence to make its decision. Louis Brandeis presented a unique type of brief which contained "only two scant pages of 'law' and over a hundred of extralegal sources" in: Alpheus T. Mason, The Case of the Overworked Laundress 199 (John A. Garraty 1987). This case, decided a mere three years before *Standard Oil*, could certainly play a part in explaining how the court's application of the rule of reason was governed more by statistical considerations than a full-bodied analysis of the actions undertaken by the firm in question.

practices would have been detrimental to the petroleum market, namely through price increases, restrictions in output, or decreases in quality.[18] However, Standard Oil was never able to use its iron grip on the market to restrict its production and raise prices, nor did it ever demonstrate this intention.[19] Instead, prices fell[20] and output skyrocketed under Standard Oil's watch, leading to demonstrable benefits reaped by consumers.

Finally, the main charges brought by the government can be disproven. Although a plethora of allegations were brought against Standard Oil, three stand out as particularly notable: the issue of the supposedly collusive rebates the company received from railroad companies, the practice of buying out competitors, and accusations of predatory pricing. On the issue of railroad rebates, which many during this time period saw as proof of foul play by Standard Oil, Rothbard writes that all refineries received rebates from the railroad industry; in fact, some smaller com-

18 *Standard Oil Co.*, 221 U.S., at 52.

19 Rothbard, *supra* note 4, at 96.

20 "[T]he price of refined oil plummeted from more than 30 cents per gallon in 1869 to 10 cents in 1874 and 8 cents in 1885." DiLorenzo, *supra* note 5.

petitors received larger rebates than Standard Oil.[21] These "volume discounts" offered by railroads are fairly standard; Cornelius Vanderbilt publicly offered equal rebates to any competitors who could match Standard Oil's output.[22] The accusation that these railroad rebates gave Standard Oil an anticompetitive advantage and allowed them to increase their efficiency is a reversal of the truth; Standard Oil became the most efficient firm in the market and was then able to reap the rewards of their superior production through volume discounts on shipping.

The proposition that Standard Oil pursued total control of the market through mergers is equally unsubstantiated. Even though Standard Oil was easily the largest firm in the market for refined petroleum, they never would have been able to take total control of said market due to the sheer quantity and size of some of their notable competitors.[23] Rockefeller's practice of buying competitors to bolster Standard Oil's position in the market quickly ran into roadblocks as he inadvertently created a market for "the

21 Rothbard, *supra* note 4, at 95.
22 DiLorenzo, *supra* note 5.
23 *Id.*

building of oil refineries solely for the purpose of 'forcing' Rockefeller to buy them."[24] These refineries were often built so hastily that they were incapable of actually refining oil, leading Rockefeller to give up on the idea of achieving a monopoly through mergers.[25] Even when examining the heyday of Standard's acquisitions of competitors, the question of what harm was suffered by the market as a result remains unanswered. This "horizontal integration" simply reallocated assets from small, poorly-managed oil refineries to more efficient uses.[26] If anything, these mergers benefited consumers by allowing Standard Oil to produce a higher quantity of oil and sell it at lower prices, as the company was known to do.

The accusation of predatory pricing is rebutted by both economic theory and an empirical analysis of Standard Oil's actions. In his analysis of "cutthroat competition," Rothbard writes that predatory pricing occurs when "a 'big' firm, for example, deliberately sells below the most profitable price… The 'stronger' firm, with the capital resourc-

24 Rothbard, *supra* note 4, at 95.
25 *Id*., at 95-96.
26 DiLorenzo, *supra* note 5.

es to endure the losses, then drives the 'weaker' firm out of business."[27] However, he points to several arguments against the efficacy of this practice and the supposed harm it causes consumers. First, he argues that it is natural in markets for efficient firms to survive while less efficient firms fail due to consumer preferences, a process that, he writes, "harms no owner of any factor it employs and injures only the entrepreneur who miscalculated in his advance-production decisions."[28] Even after this hypothetical dominant firm is able to force other producers out of business, freeing itself to raise prices for consumers, "[w]hat is there to prevent this monopoly gain from attracting other entrepreneurs who will try to undercut the existing firm and achieve some of the gain for themselves? What is to prevent new firms from coming in and driving the price down to competitive levels again."[29] No firm, regardless of its size, can sustain losses indefinitely. Firms that desire to practice predatory pricing as a strategy to weed out competitors require a high level of profit to subsidize these prac-

27 Rothbard, *supra* note 2, at 681.
28 *Id.*
29 *Id.*, at 684.

tices, a level of profit that predatory pricing theory merely assumes into existence.[30]

Firms engaging in predatory pricing are also not immune to consumer preferences and will only succeed if customers accept their product at lower prices over the alternatives provided by competitors: "For selling a product at very low prices, even at short-term losses, is a bonanza to the consumers, and there is no reason why this gift to the consumers should be deplored… if the consumers were really indignant about this form of competition, they would scornfully refuse to accept this gift and instead continue to patronize the allegedly 'victimized' competitor."[31] In other words, even if one firm is successful in driving others out of the market through predatory pricing, this is not a reflection of that firm acting anticompetitively; it shows that this firm was better able to meet consumer preferences than were its competitors.

Most importantly, though, the charges of predatory pricing brought in this case were not based in reality. John S. McGee, upon examining the facts presented during trial,

30 DiLorenzo, *supra* note 5.

31 Rothbard, *supra* note 2, at 682.

wrote that he "[could] not find a single instance in which Standard used predatory price cutting to force a rival refiner to sell out, to reduce asset values for purchase, or to drive a competitor out of business," ultimately concluding, "I do not believe that Standard even tried to do it; if it tried, it did not work."[32] While it is certainly true that Standard's reign atop the petroleum market led to dramatic price decreases, this was not a result of some anticompetitive agenda forwarded by Rockefeller and Standard Oil; rather, it was born out of the company's "quest for efficiency and customer service."[33]

b. Special Interest Influence

If the case against Standard Oil was not conceived out of sound economic analysis nor on the basis of anticompetitive behavior undertaken by the company, what caused it to ultimately be brought to trial? An investigation into the factors at play during the Progressive Era reveals one possible answer: special interests.[34] The first

32 John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 The Journal of Law & Economics 137, 157 (1958).

33 DiLorenzo, *supra* note 5.

34 While it is important to note the existence of ulterior interests, it is equally crucial to acknowledge that the people responsible for these criticisms of and actions against Standard Oil were not solely

party whose motivations merit further exploration is Ida Tarbell, one of the aforementioned muckrakers and author of *The History of the Standard Oil Company*, a "classic of antibusiness propaganda" that helped to shift the public perception of the company.[35] Of course, it is not uncommon for investigative journalists to publish criticisms (often exaggerated) of large and powerful corporations, and in most cases it would not be worth noting as an example of special interests at work. However, this instance is substantial because Tarbell's brother served as the treasurer for one of Standard Oil's competitors, the Pure Oil Company.[36] Some would argue that this fact is insignificant, as fears of exploitation by unchecked monopolies could have been the primary motivation for this work. It is curious then, as Rothbard points out, that Tarbell's only noteworthy anti-monopoly publication targeted Standard Oil and that she was complimentary of various trusts throughout her other

motivated by these considerations. In the spirit of fairness, the purpose of this paper is not to disparage the character of these individuals; rather, this analysis seeks to provide a more balanced view of the issues inherent in the *Standard Oil* case than is commonly presented in the literature.

35 DiLorenzo, *supra* note 5.

36 *Id.*

works.[37] Private actors, however, were the least of Rockefeller and Standard Oil's problems during this era.

Through Rockefeller's conflicts with Teddy Roosevelt and his political benefactors (namely, the Morgan family), Standard Oil was placed squarely in the crosshairs of powerful businessmen and politicians. Increased oil refining capabilities in Russia challenged Standard Oil's dominance in the European oil market, and the breakdown of potential collusive agreements led to a struggle for dominance between Rockefeller and the Rothschild and Morgan families known as the International Oil War.[38] This event marked a point of no return for the relationship between the Rockefellers and the Morgans, whose influence can be found throughout the Roosevelt administration generally and the *Standard Oil* lawsuit specifically. Notably, Roosevelt's attorney general, Philander Knox, was a former lawyer for the Morgan family.[39]

The Rockefellers certainly did not improve their situation through their aforementioned political activities,

37 Rothbard, *supra* note 4, at 410, n. 25.
38 *Id.*, at 230-233.
39 *Id.*, at 233.

as they repeatedly aggravated Roosevelt during his years as president. As Roosevelt sought to codify unprecedented business regulations in the form of the Bureau of Corporations bill, John Rockefeller Jr. lobbied senators in an attempt to stop the bill from passing into law.[40] In contrast, the Morgan interests sought to ingratiate themselves with Roosevelt and his administration. George Perkins, a Morgan partner, was crucial to the bill's passage.[41] Is it any wonder, then, that once Roosevelt began to build his reputation as a trust-buster, his demarcation between "good" and "bad" trusts often seemed to include Morgan trusts among the examples of the former and their opponents (Rockefeller's Standard Oil chief among them) as cases of the latter?[42] Roosevelt admitted that political considerations were at the forefront of his mind in *Standard Oil*, whether or not he was willing to admit that these factors were the driving force behind the antitrust suit. In his testimony before Congress, Roosevelt stated, "[Standard Oil] antagonized me before my election, when I was getting through

40 *Id.*, at 218-219.
41 *Id.*, at 218.
42 *Id.*, at 12.

the Bureau of Corporations bill, and then I promptly threw down the gauntlet to it."[43] Sadly, *Standard Oil* does not stand alone as an egregious misuse of antitrust law in the United States; instead, it is merely one of many examples which can help to illuminate the issues endemic to the antitrust system.

II. *United States v. Microsoft Corp.* (2001)

Much like Standard Oil, Microsoft's dominance can only be understood through the lens of the emerging market for its product. Melese elucidates Microsoft's "natural monopoly"[44] in the realm of operating systems and describes how they leveraged this advantage into an "'unnatural monopoly' in software applications." In short, Microsoft was able to promulgate its products by "convincing PC makers to accept its software as a condition for licensing its operat-

43 *Campaign Contributions: Before a Subcomm. of the S. Comm. on Privileges and Elections,* 62nd Cong. 193 (1912) (statement of Theodore Roosevelt).

44 It is certainly worth noting that, despite the vast amount of ink that has been spilled on the supposed natural monopolies held by many large firms, there is great debate as to whether or not a natural monopoly is actually possible in the absence of government intervention. Dominick Armentano, *Antitrust Policy Is Both Harmful and Useless,* The Ludwig von Mises Institute (Feb. 21, 2019) [hereinafter Armentano, *Antitrust Policy*], writes about this debate within the Austrian tradition.

ing system."[45] Microsoft's 2001 appeal was also notable as it was the culmination of a years-long legal battle between Microsoft and federal regulators. The source of the government's ire in this case was Microsoft's practice of bundling their web browser, Internet Explorer, with Windows. Microsoft had agreed to a settlement with the Department of Justice in 1995 which barred them from requiring companies to tie their software into their operating system in order to license it.[46] The government argued that Microsoft violated the terms of the settlement through its treatment of Internet Explorer, but Microsoft countered by citing the fact that the nature of operating systems had changed since 1995. According to Melese, "Microsoft claim[ed] that the definition of an operating system has grown to include an integrated web browser."[47] The government found this argument uncompelling, and *United States v. Microsoft Corp.* began in 1998.

The case was first heard in district court and was appealed in 2001. The District Court found Microsoft guilty

45 Francois Melese, *Pile on Microsoft,* The Ludwig von Mises Institute (Feb. 1, 1998), https://mises.org/library/pile-microsoft.

46 *Id.*

47 *Id.*

of three violations: "Microsoft had maintained a monopoly in the market for Intel compatible PC operating systems… attempted to gain a monopoly in the market for internet browsers… [and] illegally tied two purportedly separate products, Windows and Internet Explorer."[48] Microsoft took issue with the lower court's findings and its proposed penalties, which would have forced Microsoft to break up. On appeal, the court affirmed the first finding in part, reversed finding two, and remanded the third back to a lower court due to the fact that an application of the rule of reason, rather than the *per se* rule, was necessary to determine whether the alleged tying violation had actually occurred. The Appeals Court argued that the procedure undertaken by the District Court had been inappropriate. While "the District Court itself appears to have conceded the existence of acute factual disagreements between Microsoft and plaintiffs," it did not permit an evidentiary hearing; therefore, "the District Court erred… by consulting only the evidence introduced during trial and plaintiffs' remedies phase submissions, without considering the evidence Microsoft sought to

48 U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

introduce."[49] The Appeals Court also agreed with Microsoft that the proposed remedy should be overturned "for the additional reason that the court has failed to provide an adequate explanation for the relief it ordered."[50] The Appeals Court's decision was certainly an improvement over that of the District Court, but it did not outright strike down two of the District Court's findings of wrongdoing.

a. Analysis of the Decision

The first charge brought by the District Court was that Microsoft had maintained a monopoly in the market for operating systems. However, as Armentano notes, "[t]o arrive at a so-called monopoly market share, the trial court accepted a definition of the relevant market ('single user desktop PCs that use an Intel-compatible chip') that conveniently excluded all of the computers and networking software made by Microsoft's major rivals."[51] This finding emphasizes a key flaw in antitrust law: when the market is defined narrowly enough, any firm is a monopolist. If the market was defined in a less restrictive manner, then it is

49 *Id.*
50 *Id.*
51 Armentano, *supra* note 46.

unlikely that Microsoft could still have been classified as a monopolistic firm. This definition excluded "all of the operating systems sold at retail, those downloaded from the Web, and all 'naked' computers shipped without any operating system installed at all."[52] Due to this flawed, overly restrictive conception of the relevant market, the courts erroneously found that Microsoft had monopolized the market for operating systems.

The additional count remanded by the Appeals Court was the illegal tying of Internet Explorer and Windows. This bundling agreement was seen as an anticompetitive measure undertaken with the goal of driving competitors (namely, Netscape's Navigator browser) from the market. However, this narrow view is economically flawed. This bundling was first and foremost beneficial for consumers. Armentano points out that consumers seek to maximize the total amount of products they can obtain for the least cost; from this viewpoint, receiving Internet Explorer with Windows is preferable to the two being separate.[53] In addition, the bundling arrangement did not

52 *Id.*

53 Dominick Armentano, *Antitrust and Microsoft,* The Ludwig

"coerce" manufacturers into accepting Internet Explorer. Market forces dictated that it was more profitable to provide additional free features to consumers, and competition would have driven out those producers who withheld the browser.[54] Finally, the assertion that Microsoft attempted to leverage a "natural monopoly" in operating systems into an "unnatural monopoly" in software, as claimed by Melese, is fallacious.[55] Microsoft's elevated market share in operating systems only existed via the government's restriction of the definition of the market, which casts doubt on the idea that Microsoft ever possessed a "natural monopoly" which they could leverage. In fact, Netscape was the dominant firm in the market for internet browsers; Microsoft was merely a company that sought to compete by slashing the cost of their browser for consumers.[56] The idea that these actions precluded Netscape from competing in the market is equally dubious, as "PC users downloaded millions of copies of Netscape's browser during the period of alleged exclu-

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von Mises Institute (Sept. 1, 1998), https://mises.org/library/antitrust-and-microsoft.

54 *Id.*

55 Melese, *supra* note 47.

56 Armento, *supra* note 55.

sion."[57] In fact, Microsoft did not even prevent competing software from being downloaded on its own operating system.[58] It is clear, then, that the charges that survived the appeals process in some capacity are not backed by sound economic analysis.

The proposition that Microsoft's dominance was dangerous to consumers is equally inimical to the truth. Since Microsoft had no government protection against competition, there was no reason to fear Microsoft "exploiting" consumers because artificially high prices[59] and "monopoly profits" would induce entry into the market. Melese provides the example of AT&T, once seen as a monopolist in the telecommunications industry, as an example of a firm whose dominant market position quickly crumbled in the face of strong competition. Microsoft rose to dominance in an emerging market, and, by satisfying consumer preferences better than competitors, they have been able to

57 *Id.*

58 *Id*.

59 In addition, it is unclear whether such concepts as a "competitive" and "monopoly" price actually exist. "In the market, there is no discernible, identifiable competitive price, and therefore there is no way of distinguishing, even conceptually, any given price as a 'monopoly price.'" Rothbard, *supra* note 2, at 688.

maintain this control until the present day.[60] The argument that they provided consumers with free goods in a competitive environment in an attempt to drive other firms out of business and then ratchet up prices is a misrepresentation of the facts.

b. Special Interest Influence

This prosecution was, like that of Standard Oil, fueled in part by a variety of individuals and corporations with sometimes clouded motivations.[61] The first individual whose actions must be examined is Judge Thomas Penfield Jackson, who presided over the District Court which passed down the decision Microsoft appealed. In the appellate court, it was found that Judge Jackson had acted inappropriately in handling the case:

> [W]e vacate the Final Judgment on remedies, because the trial judge engaged in impermissible ex parte contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of

60 Melese, *supra* note 47.

61 Again, this section is not an attempt to disparage any of these individuals or corporations, but to shed light on the interests at work in the Microsoft prosecution that have been woefully underrepresented in orthodox analyses of this case.

> the courtroom, giving rise to an appearance of partiality. Although we find no evidence of actual bias, we hold that the actions of the trial judge seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process.[62]

While the court did not go as far as to attribute bias to Judge Jackson's work on the case, his harsh treatment of Microsoft is curious to observe.[63] Whether driven by some personal vendetta against the company or his general views, it is troubling to see the judge who ruled that Microsoft should be broken up seemed to harbor disdain towards the firm or its lawyers. As a result, the appellate court ruled that the divestiture proposed by the trial court would not be upheld and that Judge Jackson would not be allowed to preside over the remanded bundling charge.

The case against Microsoft was also bankrolled by a variety of Microsoft's competitors, who brought government officials amicable to their cause forward to legitimize their proposed suit. Netscape, Microsoft's rival in the mar-

62 United States v. Microsoft, 253 F.3d 34, 46 (D.C. Cir. 2001).

63 *See* John Heilemann, Pride Before the Fall 157 (2001), for specific examples of Judge Jackson's conduct during trial.

ket for internet browsers, sponsored a meeting with Senator Orrin Hatch which proved to be the beginning of the prosecution effort.[64] This meeting was, in reality, an "anti-Microsoft three-ring circus," during which lawyers and representatives for "a number of Microsoft's competitors, including Netscape, Sun, and Sabre," sought to demonstrate that Microsoft intended "to gain a chokehold over all of online commerce."[65] The case sprung forth quickly, with "resumé-building bureaucrat… Joel Klein" and Senator Hatch, the "political benefactor" of Microsoft's competitors, providing support to the prosecution on the governmental level.[66] Hatch even managed to bring Bill Gates forward to testify at a hearing on Capitol Hill, during which "not a single member of the Senate Judiciary Committee… offered a serious defense of Microsoft."[67] This testimony served as means for the anti-Microsoft interests to gauge the government's support for a potential prosecution, and these forces in turn saw that few, if any, members of Con-

64 Thomas J. DiLorenzo, *The Microsoft Conspiracy*, Mises Institute (2001), https://mises.org/library/microsoft-conspiracy.

65 John Heilemann, HarperCollins, https://www.harpercollins.com/blogs/authors/john-heilemann-880000015172.

66 DiLorenzo, *supra* note 66.

67 Heilemann, *supra* note 67, at 157.

gress would seriously object.

The primary force in support of the case both financially and logistically was the group ProComp, which consisted of a variety of ex-government officials and Microsoft competitors. Notably, the group employed former Kansas senator Bob Dole. Despite the fact that Dole "ha[d] come down strongly against government regulation, even where Microsoft is concerned," he quickly changed his tune after his hiring at ProComp for an undisclosed amount of money.[68] ProComp was not, however, the only supporter of the prosecution. Sun Microsystems, a Microsoft competitor which had been represented at the Netscape-sponsored meeting with Senator Hatch, "invested $3 million in… an actual mock case against Microsoft to be presented to the Clinton-Gore 'Justice' Department."[69] Additionally, John Doerr, a venture capitalist and supporter of the prosecution, was able to leverage his close friendship with the Vice President into a meeting between the anti-Microsoft forces

68 Heather McCabe, *Anti-Microsoft Group Enlists Bob Dole,* Wired (Apr. 21, 1998), https://www.wired.com/1998/04/anti-microsoft-group-enlists-bob-dole/.

69 DiLorenzo, *supra* note 66.

and John Podesta, President Clinton's Chief of Staff.[70] More so than in *Standard Oil*, there was explicit cooperation between those in business and government who had vested interest in the failure of Microsoft. Is it any wonder, then, that DiLorenzo called the case "the most odious example in all of antitrust history of the law being used by a cabal of sour-grapes competitors to thwart competition in their industry?"

III. F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc. (2023)

The video game industry has undergone a tremendous upheaval since the days of *Pac-Man* and *Donkey Kong* in arcades. The first gaming console, the Magnavox Odyssey, was released in 1972, bringing interactive digital entertainment into the home for the first time.[71] Since then, seven additional generations of home consoles have come and gone. Previous giants within the industry have gone out of business, replaced by new competitors. Within the relatively young ninth generation of consoles, only two firms

70 *Id.*

71 *The 8 Generations of Video Game Consoles*, BBC, https://www.bbc.co.uk/archive/the-8-generations-of-video-game-consoles/zvcjkty.

have thrown their hats into the ring thus far: Sony and Microsoft, two firms which have been diametrically opposed since the sixth generation of gaming in what has come to be known as the "Console Wars." In their efforts to make their own console more attractive, Microsoft has embarked on an effort to purchase Activision-Blizzard, one of the premier firms in the market for video games. This move caught the attention of federal regulators, who summarily moved to block the acquisition through the application of antitrust law.

The FTC's initial complaint seeking an injunction against the proposed merger contains four arguments in favor of the government's claim that the market would be negatively affected. The FTC first asserts that "Microsoft and Sony control the market for high-performance video game consoles."[72] If the merger was allowed, the FTC alleges that "Microsoft would have the ability and increased incentive to withhold or degrade Activision's content in

72 *Complaint for a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act*, Federal Trade Commission (2023), https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/FTC-v-Microsoft/FTCComplaint.pdf [hereinafter *Complaint for Restraining Order*].

ways that substantially lessen competition."[73] Indeed, history seems to demonstrate that the FTC may be correct that Microsoft intended to make Activision's games exclusive after the merger, as "Microsoft has acquired over ten third-party studios and their titles in recent years to expand its offerings… [and] has frequently made those acquired titles exclusive to its own consoles."[74] The FTC also accuses Microsoft of pursuing vertical integration – "through its in-house game studios, it develops and publishes popular video game titles such as Halo" – and argues that a merger with Activision would empower Microsoft in this quest.[75] Finally, the FTC lays out the dangers posed by Microsoft's dominance in the realms of "cloud gaming" and subscription services. These arguments fail to demonstrate a trustworthy economic foundation, and many of them run parallel to past claims brought against Standard Oil and Microsoft.

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73 Staff in the Office of Technology, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission (2022), https://www.ftc.gov/about-ftc/mission/enforcement-authority (last visited Mar 25, 2024).

74 *Complaint for Restraining Order*, *supra* note 74.

75 *Id.*

a. Analysis of the Complaint and Microsoft's Amended Strategy

Much like the two historical cases, the government's argument contains several key errors. Unlike in their 2001 case, however, Microsoft has managed to alter their business strategy to greatly increase their chances of victory. The first issue comes in the form of the FTC's definition of the relevant market as "high-performance video game consoles").[76] By this definition, the FTC states that they mean only Microsoft's "Xbox Series X|S" and Sony's "PS5."[77] This conception of the market for video game consoles, however, employs the same ruse the government used in its 2001 definition of operating systems: it limits the market to eliminate relevant competition. No reasonable person would argue that there are more than two companies in the market as defined by the FTC, but this is not because Sony and Microsoft form a duopoly in the gaming industry. Instead, this definition is restricted to exclude several crucial competitors.

Nintendo is arguably the most iconic brand in

76 *Id.*
77 *Id.*

gaming post-1980. Since the release of the Nintendo Entertainment System during the third generation of gaming, Nintendo has maintained a dedicated fan base through its ability to produce in-demand home and portable consoles as well as video games. The only reason that Nintendo is not a competitor in the market for "high-performance video game consoles" is because they have not produced one, opting instead to continue onward with the highly successful Nintendo Switch. As of this year, the Nintendo Switch surpassed the PlayStation 4, Sony's entry into that generation of gaming consoles, in total sales.[78] Considering the fact that the total sales of Microsoft's Xbox One were dwarfed by the PlayStation 4, it is hard to conceive of a reason why the government would craft a definition of the market that excludes Nintendo unless, as in 2001, they are simply seeking an unfair definition with which they can easily defeat Microsoft.[79]

78 Dominik Bošnjak, *Nintendo Switch has now surpassed PS4 sales*, Game Rant (2023), https://gamerant.com/nintendo-switch-surpassed-ps4-sales/.

79 Tom Warren, *Microsoft Finally Admits Xbox One Sales Were Less than Half of the PS4,* The Verge (2022), https://www.theverge.com/2022/8/15/23306068/microsoft-xbox-one-sales-lifetime-versus-ps4-sales.

Nintendo is not the only relevant competitor who is excluded. The FTC shrewdly only includes console gaming in its relevant market in order to ignore gaming on personal computers. Steam, a massive online gaming service, saw 132 million users per month in 2021.[80] Given that the Xbox One sold 58 million units worldwide and the Xbox Series X has sold a mere 21 million units, it is clear that Steam has been a serious competitor to Microsoft (and all in-home video game consoles) throughout the two most recent generations of gaming.[81] Personal computer services such as Steam have been a staple of the gaming community for decades, so it is hard to conceive of a reason for its exclusion from the government's proposed market. In addition, recent attempts at entry into the market for video game consoles have been made by major firms pioneering virtual reality headsets. Meta's Quest has sold nearly 20 million units to date, belying the government's claim that "the same trio of companies… have been manufacturing consoles for

80 *Steamworks development - steam - 2021 year in Review - Steam News*, Welcome to Steam (2022), https://store.steampowered.com/news/group/4145017/view/3133946090937137590.

81 Ahmed Sherif, *Xbox Series X Unit Sales 2023*, Statista (2023), https://www.statista.com/statistics/1124788/unit-sales-xbox-series-x-worldwide/.

decades with no meaningful new competition."[82] This categorization of the market likewise ignores the revenue titan of the gaming world: "casual" games. This category, which includes mobile games and digitized versions of several popular board and word games, "account[s] for over 50% of all video game revenue."[83] In summary, the government has once again proposed a definition of the relevant market which is at best misleading and at worst a purposeful misrepresentation.

The government's second charge, that Microsoft's purchase of Activision would restrict competition, is likewise flawed. First and foremost, it is impossible for the government to ascertain Microsoft's intentions *ex ante*, and the firm's recent actions have driven this point home. While the government can certainly argue that Microsoft's history of restricting games produced by the companies they have purchased in the past could prove troublesome to competitors, thus far Microsoft's actions have completely laid that accusation to rest. Sony and Microsoft agreed to a

82 *Id.*

83 Jack Caporal, *Video Game Spending Statistics*, The Motley Fool (2023), https://www.fool.com/the-ascent/research/video-game-spending-statistics/.

10-year deal which would keep the Call of Duty franchise – Activision's key product – on Sony's consoles as part of Microsoft's battle to push the merger through.[84] Microsoft proceeded to render this charge obsolete by going even further, "formally submitt[ing] a new plan… to transfer the streaming rights to license all current and future Activision games to Ubisoft Entertainment, a rival game publisher."[85] This key concession means that even if Microsoft wished to restrict Activision games to their own streaming platforms, they would be unable to do so. The government leveled similarly unfair accusations of intent to restrict production against Standard Oil in their landmark 1911 antitrust suit. Microsoft expected this challenge to be brought up during this case, and prepared a knockout blow to counter these claims.

Another critique of this charge is historical. If the government wants to examine historical examples of Mic-

84 Tom Warren, *Sony Agrees to 10-Year Call of Duty Deal with Microsoft*, The Verge (2023), https://www.theverge.com/2023/7/16/23792215/sony-microsoft-call-of-duty-cod-deal-signed.

85 Karen Weise, Kellen Browning & David Mccabe, *How Microsoft Turned the Tide in its Regulatory Fight Over Activision*, New York Times (2023), https://www.nytimes.com/2023/10/13/technology/microsoft-activision-antitrust-regulators.html.

rosoft's mergers within the gaming industry, it is only fair to examine the results of these practices. A quick glance at sales figures over the past few generations of video game consoles (the period during which these mergers took place) reveals an irrefutable truth: Sony is competitively dominating Microsoft. During the eighth generation of gaming, the Xbox One sold less than half as many units as Sony's PlayStation 4.[86] This trend has continued in the ninth generation, with Sony's PlayStation 5 outselling the Xbox Series X "roughly two-to-one" so far.[87] If these mergers, which the government cites as a threat to the competitive marketplace, are so lucrative, then why has Sony remained uninterested in pursuing this strategy? The answer is that Sony, the company which has demonstrated both superior foresight and ability to fulfill consumer preferences, recognizes that these mergers are not an effective way to pursue success in the market. This phenomenon was also observed in *Standard Oil*, and these measures were similarly ineffective then.

86 *Id.*

87 J. Brodie Shirey, *PS5 Console Sales Way Ahead of Xbox*, Game Rant (2023), https://gamerant.com/ps5-console-sales-xbox-numbers-comparison/.

The third charge is so inconsequential that it is barely worth mentioning. The government is certainly correct that Microsoft produces first-party games; however, this point is easily dismissible. Since the inception of home console gaming, every major company has produced first-party games. Sony, the supposedly victimized competitor in this market, produces wildly popular franchises such as Uncharted and The Last of Us through their subsidiary Naughty Dog, LLC. Sony has also engaged in some of the same types of mergers as the one Microsoft is being prosecuted for, such as their 2022 acquisition of Bungie.[88] Nintendo is perhaps the prime example of producing first-party games, as they have released some of the most successful franchises of all time exclusively for their own companies. Through controlled studios such as Sora Ltd., Nintendo has consistently released new entries in various series such as Mario, Pokémon, The Legend of Zelda, and Kirby. If the government wishes to decry this practice as vertical integration when Microsoft does it, it should stand in equally

88 Amrita Khalid, *Sony Closes $3.6 Billion Deal to Buy Bungie*, Engadget (2022), https://www.engadget.com/sony-closes-bungie-acquisition-playstation-studios-190623763.html.

vigorous condemnation of Sony and Nintendo.

It is also worth noting that the specific games offered on each console are only one of the trade-offs consumers must weigh when considering two different video game consoles. During the seventh generation of gaming, the PlayStation 3 and Xbox 360 differed in terms of backwards compatibility, processing power, and hardware.[89] These hardware differences have persisted through the generations of gaming, and even the newest set of "high-performance" consoles are different in several key ways.[90] Even though Microsoft, Sony, and every other relevant competitor in the market produce a variety of first-party games, the FTC errs in its identification of these game offerings as essentially the sole determinant of market success for these firms.

The final component of the government's complaint centers around Microsoft's advantage in the emerging markets for cloud gaming and subscription services. The FTC

89 Jesse Schedeen, *Xbox 360 vs. PlayStation 3: The Hardware Throwdown*, IGN (2011), https://www.ign.com/articles/2010/08/26/xbox-360-vs-playstation-3-the-hardware-throwdown.

90 Samit Sarkar, *PS5 and Xbox Series X Hardware Specifications Compared*, Polygon (2020), https://www.polygon.com/21287744/ps5-xbox-series-x-specs-comparison-next-gen.

contends that the Microsoft-Activision merger would make Xbox Game Pass exponentially more attractive than PS Plus, and Microsoft would be able to successfully leverage this interest into an advantage in the console market. This proposition is unpersuasive. Microsoft has been losing the Console Wars for two generations of gaming despite their edge in the total number of patrons of their subscription service and the variety of mergers they have already engaged in.[91] The prospect of this particular merger flipping the console market, which swings two-to-one in Sony's favor, through further improvements to Microsoft's already-dominant Xbox Game Pass seems dubious.

The FTC's claims in regard to Microsoft's advantage in cloud gaming can be countered in a similar manner. Cloud gaming's popularity is a relatively recent development within the gaming world as the capabilities of technology increase rapidly. This revolutionary development utilizes "remote servers in data centers" and requires only "a reliable internet connection to send gaming information

91 Dom Peppiatt, *Xbox Game Pass Subscribers Way Ahead of PS Plus Tiers, Says Sony in Latest Attempt to Make Itself Look Small*, VG247 (2022), https://www.vg247.com/playstation-ps-plus-behind-xbox-game-pass.

to an app or browser installed on the recipient device," meaning that cloud gaming services "[eliminate the] need to download and install games on a PC or console."[92] Microsoft has quickly asserted itself as the dominant firm in the cloud gaming realm, holding a market share of 60-70% with Xbox Cloud Gaming, while Steam's Nvidia GeForce Now service and Sony's PlayStation Cloud combine for a mere 20-40% of the market. Again, however, this tremendous advantage has not translated into a higher user base for Microsoft gaming products. PlayStation and Steam far dwarf the number of Xbox users, regardless of developments within the market for cloud gaming.

b. Special Interest Influence and Microsoft's Counter

As in the aforementioned historical cases, special interests from competing firms are backing Microsoft's pledge to allow Ubisoft to license Activision Blizzard's games further counters the FTC's claims in the realms of subscription and cloud gaming, as it is now impossible for Microsoft to decide that Activision's games should only ap-

92 Jacob Roach & Kevin Parrish, *What is Cloud Gaming?* Digital Trends (2021), https://www.digitaltrends.com/gaming/what-is-cloud-gaming-explained/.

pear on Game Pass and not PS Plus. This judicious decision demonstrates how Microsoft's prior experience in dealing with government-led antitrust suits has prepared them to nip many of the charges brought against them in the bud. The firm's actions during this trial demonstrate a far superior strategy than the one they employed in 2001 and a better understanding of antitrust proceedings in the United States, certainly aided in large part by their previous experience. Unlike in these cases, however, Microsoft has come forward with a clear strategy to mitigate their influence on the prosecution. Sony has been the largest industry voice in support of blocking the merger, submitting a 22-page document to regulators in the UK describing the anticompetitive harm they believe would arise if the merger was allowed to go through.[93] Domestically, Sony has been a part of the FTC's case, although this process has largely been a public relations embarrassment. They and the FTC have engaged in a variety of "documented hypocrisy[94]… and utter

93 Sherif Saed, UK Government Publishes Sony and Microsoft's Full Arguments in Activision Blizzard Acquisition Case VG247 (2022), https://www.vg247.com/microsoft-sony-arguments-activision-blizzard-acquisition-case-uk-government-cma.

94 Yin-Poole, *PlayStation Boss Jim Ryan 'Pretty Sure' Call of Duty Will Remain on PlayStation in Bombshell Email*, IGN (2023),

cluelessness" during the proceedings.[95] Luckily for them, Microsoft swiftly acted to remove them from the table altogether and allow them to save face by negotiating for their blessing to carry out the merger. Microsoft's original offers to Sony were even more favorable than the accepted 10-year Call of Duty deal: they first offered to "[keep] all existing Activision console titles on Sony, including future versions in the Call of Duty franchise or any other current Activision franchise on Sony [consoles]."[96] Microsoft's downfall in their operating systems battle was the rival firms involved in the case. These firms were able to spur on government support for the prosecution through lobbying and funding, and Microsoft remained virtually on its own.

In this case, however, Microsoft has chosen to placate these rivals. Microsoft quickly leapt into negoti-

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cites several examples of Sony's hypocrisy which were revealed at trial. The head of PlayStation, Jim Ryan, sent an email claiming that "[the merger is] not an Xbox exclusivity play at all… [and] we will continue to see COD [Call of Duty] on PS for many years to come." Additionally, Ryan reportedly told Activision Blizzard executives, "I don't want a new Call of Duty deal. I just want to block your merger."

95 Paul Tassi, *The FTC-Sony Case Against the Microsoft Activision Deal is Very Bad*, Forbes (2023), https://www.forbes.com/sites/paultassi/2023/06/25/the-ftc-sony-case-against-the-microsoft-activision-deal-is-very-bad/

96 *Id.*

ations with Sony, which included offers "[to] keep[] 'all existing Activision console titles on Sony, including future versions in the Call of Duty franchise or any other current Activision franchise on Sony [consoles].'"[97] The company has also chosen to cooperate with other potential competing interests before they were able to become a factor in this case at all: "[Microsoft] made an agreement with Nintendo to bring Call of Duty to Switch. And it entered into several agreements to, for the first time, bring Activision's content to several cloud gaming services."[98] Microsoft's decision to give the licensing rights for Activision games to Ubisoft is also a prudential move, as Ubisoft was one of Activision's largest competitors before the merger. Microsoft has also positioned itself to receive aid from allies in this case. "[S]even venture capital firms filed a 'friend of the court' brief in support of the Microsoft-Activision deal… [and] 30 [additional] venture capital firms [wrote a statement to] fully endorse the positions stated in the original 'friend of the court' brief."[99] Microsoft has managed to better defend

97 Warren, *supra* note 86.

98 *Id.*

99 Jon Palmer, *38 VC Firms and Investors Advocate for a Thriving Innovation Ecosystem*, Microsoft On the Issues (2023), https://

itself against intra-industry interests this go-around, but there are other factors at play in this prosecution.

Officials in government are still an issue for Microsoft. FTC chair Lina Khan has spearheaded the Microsoft prosecution.[100] While her tenure as the head of the FTC has been relatively short, it has not been free from controversy. Khan has been an outspoken critic of big tech firms in the past, so much so that "the FTC's top ethics officer [wrote a memo] recommending that Khan recuse herself from the Meta/Within case."[101] Fortunately for those in favor of competition, Khan's efforts have thus far been an abject failure.[102] In a refreshing turn of events, it has been Microsoft outfoxing government regulators throughout this case, but this should not detract from the danger Khan and the

blogs.microsoft.com/on-the-issues/2023/12/05/venture-capital-microsoft-activision-ftc-appeal/.

100 It is important to recognize that Lina Khan does not fit the traditional special interests mold in that her incentives to prosecute Microsoft are not tied to the firm's success or failure as are the interests of competitors like Sony. However, Khan benefits from her job as head of the FTC; she earns her paycheck through raising litigation.

101 *Failing upward*, City Journal (2023), https://www.city-journal.org/article/ftc-chair-lina-khan-fails-upward.

102 The FTC's antitrust failures under Khan are not limited to the Microsoft case. See Kang, *F.T.C.'s Court Loss Raises Fresh Questions About Its Chair's Strategy*, New York Times (2023), for further examples.

FTC pose to competition in the United States. Many of her critics in government have accused her of overstepping her bounds, with Representative Jim Jordan going as far as to claim that she had acted to "[give] herself and the FTC 'unchecked power'" in her pursuit of big tech regulation. The prosecution of Microsoft cannot be properly understood without contextualizing it within the modus operandi of the current FTC leadership: Khan believes that the government should have increased power to regulate markets, and her apparent disapproval of big tech has given her the means to pursue this power.

Conclusion

History tends to repeat itself, and this has certainly been the case in U.S. antitrust enforcement. The faulty economic reasoning and special interests at work in historic applications of antitrust law are reflected in modern cases and have altered the strategies of the companies going through these proceedings. This phenomenon is demonstrated through an analysis of *Standard Oil Co. of New Jersey v. United States* (1911), *United States v. Microsoft Corp.* (2001), and *F.T.C. v. Microsoft Corp., and Activision Bliz-*

zard, Inc. (2023). *Standard Oil* parallels Microsoft's current predicament through both the government's condemnation of mergers and the attribution of anticompetitive intentions to the defending firms' actions. *Microsoft*'s (2001) influence has come back in full force through the FTC's deceptive definition of the relevant market and unsound conception of a volatile technological market. These cases further reveal that, as Armentano asserts, it is near-impossible to properly apply a 19th-century law to the technological markets of the 21st century.[103]

Given the sheer number of instances in which the shortcomings of American antitrust enforcement are laid bare, its critics have been proven right. Yet more and more antitrust lawsuits emerge from the regulatory apparatus of the U.S. government, proving that there is still a need to shed light on these pervasive issues. The United States

103 Perhaps it would be better to say that it is absurd to apply this 19th century law in any instance. Dominick Armentano, *A Critique of Neoclassical and Austrian Monopoly Theory*, The Ludwig von Mises Institute (2013) https://mises.org/mises-daily/critique-neo-classical-and-austrian-monopoly-theory, notes, through an analysis of a gamut of previous antitrust cases, that the courts' condemnation of supposed monopolization has ranged from confused to downright outlandish; to cite one specific instance, "Alcoa's superior skill, foresight, and industry were condemned as 'exclusionary' and illegal" by Judge Learned Hand (111-112).

has seen a slew of antitrust cases since the *Standard Oil* decision, and more of these historical cases can be included to demonstrate the unsound foundation of modern-day charges. The depth of knowledge on *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc.* will also increase with time, particularly on the issue of rent-seeking parties who aim to dip their hands into the proverbial cookie jar; as such, it is important that this case is re-examined after a sufficient amount of time passes.

These cases illuminate many of the problems caused by America's antitrust regime. Rent-seeking firms like Sony, Netscape, and Pure Oil petition the government to strike down competitors, producing a less competitive marketplace overall. Interestingly, it does not seem to make a difference who is the dominant firm in the market. While Standard Oil was undeniably the dominant firm in its market, Sony has been the largest firm in the market for video game consoles for years, and Netscape controlled the browser market when the cases they were involved in went to trial. Along with reducing market competitiveness, these cases often reduce market efficiency by allowing less effi-

cient firms to punish more efficient competitors, as demonstrated through *Standard Oil*. Innovators have historically been at risk of prosecution under American antitrust law. Standard Oil rose to dominate the market by slashing its costs through vertical integration and its advanced refining techniques. Microsoft was prosecuted for freely bundling its browser with its operating systems, a practice which became common in future years. Once again, Microsoft is being punished for its investments into cloud gaming, an emerging market. Even when firms are found innocent, consumers are harmed by these prosecutions. Firms under investigation are forced to devote enormous amounts of time and resources into defending themselves, meaning that they must reallocate capital and attention away from fulfilling consumer demand and innovating. Antitrust enforcement; therefore, can oftentimes be anti-consumer and anti-competition.

There was a flicker of hope for the safety of the American gaming market when the FTC dropped their case during 2023, but they quickly extinguished it by deciding

to move forward in September.[104] While it seems likely that Microsoft will be victorious in this suit due to the FTC's recent struggles in court, the market will be in a worse position should they lose. In the wake of *Standard Oil*, the output of petroleum was restricted, prices rose, and competition was constrained through further government intervention. As DiLorenzo writes, capitalism gave way to modern mercantilism. These negative market effects are the precise reason that it is crucial that American antitrust enforcement is continuously critiqued despite the fact that a vast quantity of literature has already been written on the subject. Consumers have the most to lose if markets are less competitive, and this has been, paradoxically, the effect of antitrust regulation. If the glut of economically-unsound antitrust cases continues to grow, consumers will continue to suffer, subsidizing the government's "antitrust" snipe hunts, which line the pockets of less efficient businesses and other rent-seekers.

104 Ed Nightingale, *FTC Resumes Case Against Microsoft's Acquisition of Activision Blizzard*, EUROGAMER.NET (2023), https://www.eurogamer.net/ftc-resumes-case-against-microsofts-acquisition-of-activision-blizzard.