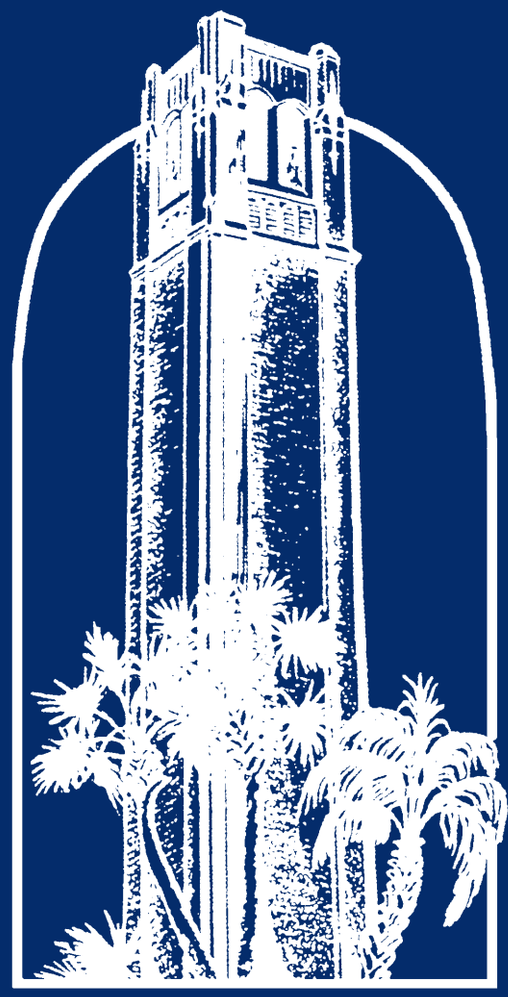


UNIVERSITY OF FLORIDA
LEVIN COLLEGE OF LAW

Vol. 32

Issue 3

UNIVERSITY OF FLORIDA JOURNAL OF LAW & PUBLIC POLICY

SUMMER 2022

UNIVERSITY OF FLORIDA

JOURNAL OF LAW & PUBLIC POLICY

ARTICLES

NOTES

VOLUME 32 | SUMMER 2022 | ISSUE 3

University of Florida Journal of Law & Public Policy

VOLUME 32 SUMMER 2022 ISSUE 3

Editorial Board

Editor in Chief
CLAY TEZEL

Executive Notes Editor
ALEXANDER ADESEYE

Deputy Editor in Chief
SAMA KASEER

Executive Acquisitions Editor
ADRIANTE CARTER

Executive Forum Editor
BRITTNEY TOLBERT

Executive Outreach Editor
VALERIE LAMB

Executive Symposium Editor
MALAKA GOUDY

Executive Research Editor
CHARLISA ODOM

Executive Articles Editor
JORDAN GRANA

Executive Managing Editor
RYAN COOK

Senior Research Editors
ALEX COUTURE
PHILIP SLIGER

Senior Articles Editors
AMBER EDNEY
LUCAS GODA

Senior Managing Editors
MELISSA PETERSON
STEPHANIE SANCHEZ

Research Editors
KAREN BENITEZ
KELSEY KILPATRICK
KEENAN SMITH
JESSICA PEARCE

Articles Editors
HUNTER AMES
BLAKE BACHMAN
CALEB BOWYER
WILLIAM VASQUEZ
ZANE PRICE

Managing Editors
ZACHARY COLE
DAVID LEVINE
RYLEE MURDOCH
ALLYSON WHITTER

Faculty Advisor
STACEY STEINBERG

Staff Editor
LISA-ANN CALDWELL

General Editors

LUC ADECLAT
JORDAN BENATAR
DANIEL BENCIVENGA
MEGAN BIRNHOLZ
HANNAH BLOUNT
MADISON BUCKLEY
ALLISON CARTER
JOHN CLEMENTI
CHARLY DEVITO-HURLEY
MARK GNATOWSKI
MAIYA FUDGE
ASHLEY GRABOWSKI
JEREMY GUNTER
IAN HAMILTON
KATE HELLKAMP
JASMINE HELMS
KARLA HERRERA
MEGAN JACKSON
EMILY JACZKO
EDWARD JOHNSON
LINDSEY JOOST
ALEXANDRA KURTZ
ALICIA LAMAR
SARAH LONG
JARED MACHADO
ANWAR MAHMOUD
GARRETT MOON
KYLEE NEERANJAN
AMANDA NIEMANN
MACKENZIE O'CONNELL
HUNTER PATRICK
CAITLIN POLCARO
KATHRYN POPE
BETHANY RICHEY
DUSTYN RING
AUSTIN ROCKWOOD
JESSICA ROMAN
MADELEINE SCHWARTE
RYAN SCOTT
TAYLOR SCURRY
CAROLYN SHAW
SAVANNAH SPEARS
LIA VACCARO
BRIANNE WENDOL
RYAN WIELE
JON WILLIAMSON

STATEMENT OF PURPOSE

The *University of Florida Journal of Law & Public Policy* is an interdisciplinary organization whose primary purpose is the publication of scholarly articles on contemporary legal and social issues facing public policy decisionmakers. The *Journal* is composed of two governing bodies: the Advisory Board and the Executive Board. The Advisory Board is comprised of faculty and honorary members who provide independent guidance. The Executive Board, which includes both law and graduate students, is responsible for researching and preparing each volume for publication. The Executive Board also selects the articles that are published. All student members must complete a writing requirement and help research and prepare the *Journal* for publication.

ACKNOWLEDGMENT

This issue of the *University of Florida Journal of Law & Public Policy* is a direct result of the collaboration and hard work of the *Journal* members, staff, advisors, sponsors, and contributing authors.

The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the *Journal* in its publication of this issue and for supporting our interdisciplinary journal concept.

Special thanks to our faculty advisor, Professor Stacey Steinberg, and our staff editor, Lisa-Ann Caldwell.

The *University of Florida Journal of Law & Public Policy* (ISSN# 1047-8035) is published three times per year and is sponsored by the Warrington College of Business Administration and the Levin College of Law, University of Florida. Printed by Western Newspaper Publishing Co., Indianapolis, IN.

Editorial and Business Address: Fredric G. Levin College of Law, University of Florida, P.O. Box 117636, 309 Village Dr., 127 Holland Hall, Gainesville, FL 32611. Phone: (352) 273-0671. Email Address: jlpp@law.ufl.edu.

Subscriptions: $60.00 U.S. domestic per volume plus sales tax for Florida residents and $65.00 U.S. international. Single issues are available for $25.00 U.S. domestic and $30.00 U.S. international.

© 2022 *University of Florida Journal of Law & Public Policy*

University of Florida Journal of Law & Public Policy

VOLUME 32 SUMMER 2022 ISSUE 3

ARTICLES

NOTES

PROTECTING AND PRESERVING THE DEAD: GEORGIA CEMETERY LAW AND SEA LEVEL RISE

Hunt Revell[*]

Abstract

Georgia coastal cemeteries are one of many facets of modern life that are at-risk due to the sea level rise—and its increased erosion, flooding, and storm surge—brought on by climate change. The unique historical development and property rights associated with the graveyard require investigation to better understand the opportunities available for environmental mitigation and cemetery relocation. Georgia law, like the law in many states, includes statutes regulating modern "perpetual care" cemeteries, as well as older "abandoned" cemeteries. The statutory factors and requirements for disinterment and relocation require careful analysis and thoughtful planning. Common law in the state also sheds light on the nature of the cemetery easement—the right to access the grave. The unique rights associated with this easement, particularly its inheritability and its potential transferability, are legal concepts to understand and utilize when a cemetery becomes endangered by sea level rise. Key cases emphasize both that a statutory presumption exists in favor of leaving the dead undisturbed and that this presumption may be overcome if preserving human remains requires removing them. Overcoming this presumption involves mixed questions of law and fact, difficult conversations with descendants, changing land use, and considering important equity issues. This Article identifies the current state of cemetery law in Georgia and highlights the strategic tools that courts, communities, municipalities, and advocates can use to disinter and relocate human remains where necessary, as well as the legal ambiguities and practical challenges likely to be encountered along the way.

---

* Hunt Revell is a Georgia Sea Grant Law Fellow at the University of Georgia's Carl Vinson Institute of Government and a recent graduate of Georgia State University College of Law. Prior to attending law school, Mr. Revell managed Athens' Seabear Oyster Bar where he remains a partner, worked as a program coordinator for student academic services at the University of Georgia, and served as an environmental education associate for the Governor's Island Alliance and New York Harbor School. He holds two interdisciplinary degrees: a master's degree in Liberal Studies from the New School for Social Research in New York and a bachelor's degree in Political and Social Thought from the University of Georgia's Honors Program. This Article is based on research conducted for the Georgia Sea Grant Law Program at the University of Georgia. The statements, findings, conclusions, and recommendations are those of the Author and do not necessarily reflect the views of Georgia Sea Grant, the Carl Vinson Institute of Government, the Georgia State University College of Law, or the Vulnerable Coastal Communities Initiative. The Article is part of continuing research into economic and environmental resiliency in coastal Georgia. The Author would like to thank Shana Jones, public service faculty at the Carl Vinson Institute of Government, for this opportunity and her guidance on the project, as well as Karen Johnston and Ryan Rowberry, faculty at Georgia State University College of Law, for their support on this project and in law school.

I. INTRODUCTION: CLIMATE CHANGE AND COASTAL CEMETERIES[1]

According to a recent report by the Union of Concerned Scientists, sea-level rise alone—not including heavy rains or storms—will put more than 300,000 homes and commercial properties, valued at about $136 billion, at risk of chronic, disruptive flooding by 2045.[2] Awareness of the quantity and quality of this kind of research is also on the rise, as industries as disparate and diverse as oyster farming and the Department of Defense analyze the impact that climate change will have on their business interests and make plans accordingly.[3]

Increasingly, activists and scholars emphasize the fact that frontline communities, especially those of color and those with less means, will be especially hard hit by climactic changes.[4] These voices argue that policymakers must "get ahead of the storm," or it will be more difficult, if not impossible, to implement effective policies later, especially policies that produce fairness and equity.[5] One of the first steps is to take a hard look at where the greatest impacts will be in order to discern who will bear the brunt of climate change devastation and loss.[6] Not only should

---

1. The idea for this Article originated with Frank Alexander, Professor Emeritus at Emory Law School. Professor Alexander's work with the Vulnerable Coastal Communities Initiative is an inspiration. The Author would like to thank Professor Alexander for the idea behind this project, continued engagement, and the opportunity to pursue it.

2. LINDSAY OWENS, THE GREAT DEMOCRACY INITIATIVE, SOAKED: A POLICY AGENDA TO PREPARE FOR A CLIMATE-TRIGGERED HOUSING CRASH 7 (July 2020) (noting this figure is expected to increase exponentially, with $1.07 trillion worth of property in today's dollars at risk of flooding by the century's end).

3. *Shellfish Growers Climate Coalition*, THE NATURE CONSERVANCY, https://www.nature.org/en-us/what-we-do/our-priorities/tackle-climate-change/climate-change-stories/shellfish-growers-climate-coalition/ [https://perma.cc/48QA-FZSL] (last visited Feb. 19, 2022); DEP'T OF DEF., OFF. OF THE UNDERSECRETARY FOR POL'Y, CLIMATE RISK ANALYSIS 2 (Oct. 2021), https://media.defense.gov/2021/Oct/21/2002877353/-1/-1/0/DOD-CLIMATE-RISK-ANALYSIS-FINAL.PDF [https://perma.cc/794K-ZWQN].

4. OWENS, *supra* note 2, at 11 (explaining how historic discrimination has placed minorities in the lowest-lying areas, making those communities more likely to experience blight and abandonment instead of receiving aid to rebuild, evidenced in modern experience by Hurricane Katrina in New Orleans).

5. *Id.* at 3, 11.

6. *Id.*

these responses focus on the disparate impacts brought on by climate change in these frontline communities, but they should also prepare to "manage retreat" where the continuous climate risk of flooding, erosion, storm surge, and natural disaster makes living impossible.[7]

On the long list of places, properties, and industries that will suffer serious if not irreparable damage from climate change are cemeteries.[8] Rising sea levels bring water into new places, uncovering graves, and in some cases, sweeping them away entirely.[9] While at-risk states have some hypothetical options with other forms of property—such as buying out homes prone to flooding—cemeteries have a different, if not more complex, set of legal, social, spiritual, and financial considerations, including but not limited to: ownership, access, public health, religious norms, and relocation cost considerations.[10]

With a focus on sea level rise and the environmental and economic coastal resiliency required to combat it, this Article describes key aspects of Georgia cemetery law. Part II provides background on cemeteries, particularly in the American experience and common law context. Part III contains an examination of two statutes, one regulating modern "perpetual care" cemeteries and the other defining "abandoned" cemeteries, as well as the process for cemetery disinterment and relocation permits. Part IV covers Georgia case law that sheds light on the rights and responsibilities of those claiming ownership or access rights to the grave, as well as the public and private sphere context where these rights and responsibilities get exercised. Part V analyzes the key principles of Georgia cemetery law and includes a discussion of other commentators' suggestions for cemetery law, such as court-appointed guardians, land trusts, and equity considerations that might help protect, preserve, and organize cemeteries at-risk of serious damage due to sea level rise.[11] Part VI concludes by refocusing the discussion on climate change. While the special rights and responsibilities of federal and state historical listings and the requirements related to federal and state

7. *See id.* at 5, 26 (arguing that because communities of color will almost certainly experience the deepest economic destruction and are less likely to have insurance or the resources to rebuild, it is important to design a just transition that begins the process of retreat and relocation now, "in the light of day").

8. *See* Adam Aton, *Even the Dead Cannot Escape Climate Change*, SCI. AM. (Oct. 31, 2019), https://www.scientificamerican.com/article/even-the-dead-cannot-escape-climate-change/ [https://perma.cc/U3LR-SYW7] (claiming thousands of cemeteries will be affected by sea level rise).

9. *Id.*

10. *See id.* (noting cemetery damage mitigation attempts in Charleston, Boston, and across Louisiana).

11. *See generally* Hughes v. Cobb Cnty., 441 S.E.2d 406, 407 (Ga. 1994) (recognizing the key difference between private and public cemeteries).

American Indian law are noted in an Appendix to this Article,[12] these subjects ultimately require separate treatment elsewhere.

Because Georgia cemetery law contains an intricate web of considerations—from perpetual care and maintenance to abandonment and from public dedication to private access via inherited easements—communities interested in protecting and preserving their vulnerable cemeteries and related rights in the face of sea level rise need to be proactive about planning and obtaining the funding, labor, expertise, and permits to accomplish their goals. Georgia cemetery law not only creates practical costs that communities must consider, but the subject itself also implicates religious and spiritual considerations—shall the dust be returned to dust (or sea)? Or, shall graves be dug up, removed, and redeposited with a modern American impulse for preservation? Either way, these obstacles require informed, community-based action to have a chance at self-determination with these complicated decisions and perhaps a chance at peace with them when the time (and water) comes.

II. BACKGROUND, HISTORY, AND OVERVIEW OF CEMETERIES AND RELATED RIGHTS

According to historians, burials in the early United States took place in four key places: (1) by pioneers in isolated and unorganized places on the "frontier"; (2) on private family farms, sometimes in a multifamily burying ground; (3) in churchyards, probably open to the public; and (4) for the poor, unknown or criminal, in "potter's fields."[13] The rise of the modern cemetery and the memorial park began with the establishment of the Mount Auburn Cemetery outside Boston, Massachusetts, in 1831.[14] The contemporary form of these cemeteries now contains care and maintenance provisions, intensive recordkeeping, state regulation, and expectations about, as well as plans for, burial plots and graveside services.[15] While abandoned, rural, family, and church cemeteries can present unexpected surprises for property owners and developers, publicly dedicated memorial parks or private commercial enterprises are not as often an issue because they are clearly marked, owned, and organized.[16]

Sea level rise brought on by climate change creates a new dynamic for cemetery issues. While state and federal law has developed mechanisms

12. *See infra* Appendix.

13. C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. U. L. REV. 479, 482 (2003).

14. *Id.* at 485.

15. *See id.* (explaining today's use of "perpetual care provisions such as maintenance trusts, modern recordkeeping, state regulation, and widely agreed-upon expectations and plans" for cemetery caretaking).

16. *See id.* (noting such parcels are "not an issue" for landowners and developers).

to mitigate damage to cemeteries from trespassing and development, it has not been faced with the prospect of needing to relocate cemeteries to preserve them until recently.[17] Many different types of cemeteries may be at-risk as sea levels rise, and coastal and rural, family and church cemeteries, as well as unknown or abandoned cemeteries, present different types of legal problems related to rights and responsibilities, such as ownership, access, maintenance, and development.[18] These cemetery rights and responsibilities also vary across a spectrum, with fully public, municipally owned and operated graveyards with public rights of access on the one end.[19] On the other end are modern, privatized perpetual care cemeteries with governing rules, regulations, registration requirements, and contractual agreements.[20] In between these two ends lie small, private, largely rural burial grounds located on a tract of family or church land that may have been long ago sold to other private individuals or entities. The individual or entity may not even know about the cemetery on the premises and legal maps, plats, deeds or surveys may not designate the burial ground, churches may no longer exist even though their cemeteries remain, or the law may recognize an implied public dedication of a cemetery that is now on private land.[21] Here, legal rights of access—cemetery easements—may restrict the land's private uses, or the issue of cemetery care and maintenance may be more pronounced.[22] Complicating the matter further can be national and state listings for historic places[23] or the inadvertent stumbling upon unknown African-American or Native American burial grounds during development.[24]

The public and private spectrum of scenarios where cemetery rights can be exercised provides important context for the options that may be available to advocates and descendants when cemetery mitigation or relocation become necessary due to sea level rise. While privatized "perpetual care" cemeteries may have more options at their disposal for climate change mitigation through trust funds, relatively clear contractual agreements, and operating procedures, even these more modern iterations of the cemetery plot are probably not enough to handle the soaring costs that mitigation may require, nor do they take into consideration the

17. *See* Aton, *supra* note 8 (noting that "[r]elocation is the most certain solution" to the impact that climate change is having on cemeteries).

18. CHRISTINE VAN VOORHIES, GRAVE INTENTIONS: A COMPREHENSIVE GUIDE TO PRESERVING HISTORIC CEMETERIES IN GEORGIA 3, 5–6 (2003).

19. *Id.* at 41–42.

20. *Id.* at 1.

21. *Id.* at 5, 7, 9, 26.

22. *Id*. at 6.

23. *See infra* Appendix.

24. VAN VOORHIES, *supra* note 18, at 5, 7; *see infra* Appendix.

relocation requirements in Georgia law.[25] In contrast, older family and church cemeteries will likely have more limited resources coupled with additional difficulties such as contacting descendants of those long ago buried in largely abandoned cemetery plots.[26] Ultimately, at-risk coastal cemeteries will have three options with sea level rise—mitigation, relocation, or abandonment—and cemetery property law will ultimately play a role in any of these scenarios.

III. GEORGIA CEMETERY LAW IN TWO KEY ACTS: CARE AND ABANDONMENT / RELOCATION

In 1905, the Georgia Supreme Court professed:

> Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A [hu]man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the [hu]man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death . . . In doing this, the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead, and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between [humans] and brutes.[27]

This Section provides an overview of the Georgia statutes governing cemeteries in the state. While the Georgia General Assembly passed the alternately named Abandoned Cemeteries Act or Georgia Cemetery Relocation Act (the Abandonment and Relocation Act or A&R Act) in 1991, the Georgia Cemetery and Funeral Services Act (the Perpetual Care Act) of 2000 created a more basic framework for what is expected of modern owners of "perpetual care cemeteries."[28] Part A of this Section outlines the Perpetual Care Act's requirements and exemptions to provide a basic understanding of how the law regulates modern cemeteries and which types of cemeteries are *not* regulated. These cemeteries, such as rural family or church plots, may be more at risk to climate change because of their lack of funding, their unclear legal status, and the fact

25. *See infra* Appendix.

26. *See* Aton, *supra* note 8 (arguing that money is the central problem partially because the business in question—cemeteries—are expected to operate forever, but also noting that the Federal Emergency Management Agency can offer financial assistance if someone can prove a family member's grave was disinterred by a presidentially-declared disaster).

27. Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905).

28. GA. CODE ANN. § 10-14-1 (West 2022).

that they are not required to undertake care and maintenance, the lack of which could lead to abandonment. Part B, somewhat anachronistically, takes up where Part A leaves off by outlining the key provisions in the prior A&R Act of 1991, including the definition of "abandonment" and the key requirements of cemetery disinterment and relocation permits.

A. *Act One: The Georgia Cemetery and Funeral Services Act of 2000*

The Perpetual Care Act, codified starting in Section 10-14-1, Georgia Code Annotated (2022), begins with a practical point: "[T]he failure to maintain cemetery grounds properly may cause significant emotional distress."[29] This pronouncement is followed by the normative statement that "every competent adult has the right to control the decisions relating to his or her own funeral arrangements."[30] Together, these parameters guide the Perpetual Care Act's provisions and restrictions for purchasing burial rights, regulating cemetery companies, and other industry services surrounding human burial and cemetery maintenance.[31]

In Georgia, the Secretary of State's Office manages the registration and administration of the state's cemeteries under the Perpetual Care Act, and through the State Board of Cemetarians, cemetery owners must officially register with the Secretary of State.[32] Statutory violations are punishable as misdemeanors with a maximum $1,000 fine or one year imprisonment, unless they involve trust fund misbehavior, which constitutes a felony punishable by a maximum $10,000 fine or one to five years imprisonment.[33] Every cause of action in the statute survives the death of any person who might have been a plaintiff or defendant, indicating some of the long-term implications implicit in cemetery law, and the statute explicitly states that it is intended to limit any other statutory or common-law rights related to burial lots, rights, merchandise, or services.[34] The Secretary of State's Office provides due process, with

29. *Id.* § 10-14-2(a).

30. *Id.* § 10-14-2(b).

31. *Id.* § 10-14-2(a).

32. *About the Georgia Board of Cemeterians*, GA. SEC'Y OF STATE, https://sos.ga.gov/page/about-georgia-board-cemeterians [https://perma.cc/B5SX-68KP] (last visited Aug. 24, 2022); *Georgia Cemetery and Funeral Services Act of 2000 and Rules*, GA. SEC'Y OF STATE, https://sos.ga.gov/page/georgia-cemetery-and-funeral-services-act-2000-and-rules [https://perma.cc/JR5W-4LLX] (last visited Aug. 24, 2022).

33. GA. CODE ANN. § 10-14-20 (West 2022).

34. *Id.* §§ 10-14-20 (c)–(d), -21(e). The statute does indicate, however, that prior law governed actions under facts and circumstances occurring before July 1, 2000, the date of the Perpetual Care Act's passage, so those actions may no longer be brought under the current Act. Administrative orders and conditions upon registration, however, technically remain in effect. *See id.* § 10-14-28.

appeals to the Superior Court of Fulton County, and immunity from liability.[35]

1. Cemetery Defined

The Perpetual Care Act defines the term "cemetery" as "a place dedicated to and used, or intended to be used, for permanent interment of human remains."[36] Perhaps more importantly, however, is what a cemetery is *not*. The statute exempts a significant swath of traditional cemeteries by indicating that the term "shall not include governmentally owned cemeteries, fraternal cemeteries, cemeteries owned and operated by churches, synagogues, or communities or family burial plots."[37] This definition was challenged in federal court under the Equal Protection Clause, but the Eleventh Circuit held that the state had a reasonably conceived rational basis for distinguishing between the various cemeteries.[38]

2. Registration

As noted, at the center of the Perpetual Care Act is the registration requirement.[39] The statute makes it illegal in Georgia for any person to offer or sell any cemetery burial rights, mausoleum interment rights, columbarium inurnment rights,[40] grave spaces, or other physical locations for the final disposition of human remains unless the person is registered as, employed by, or acting under the direction of a cemetery owner.[41] In order to register, prospective cemetery owners must submit a separate application for each cemetery to be owned.[42] Each application must contain, among other things, the name, address, and phone number of the legal owner of the land upon which the cemetery is located, the location of all records related to the cemetery, a copy of the cemetery rules and regulations, any litigation with which the cemetery is involved, any other entities owned by the applicant, the name and address of anyone able to sell grave lots, burial rights, funeral merchandise or burial services

35. *Id.* §§ 10-14-22, -23, -26.

36. *Id.* § 10-14-3(8).

37. *Id.*

38. *See* Ga. Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1320, 1322 (11th Cir. 2003) (citing record evidence that the Georgia Secretary of State's Office mostly received complaints about *church* cemeteries as opposed to *private* cemeteries and that 50–60% of church cemeteries are "abandoned and in complete disrepair" but finding a conceivable rational basis for church or fraternal organizations to be more likely to care for their cemeteries and have a closer relationship with their customers as to avoid the fraud the statute intended to prevent).

39. GA. CODE ANN. § 10-14-4 (West 2022).

40. Columbarium inurnments are spaces for placing urns with cremated human remains, usually within a wall or vault.

41. GA. CODE. ANN. § 10-14-4(a)(1) (West 2022).

42. *Id.* § 10-14-4(b)(1).

by the cemetery, a balance sheet of the most recent fiscal year, evidence of fee simple title to the necessary land and a copy of a plat of survey, and evidence that the land is in the public records of the proper county.[43] This public record must also contain a notice that the property cannot be "sold, conveyed, leased, mortgaged, or encumbered" except by prior written approval of the Secretary of State.[44] Finally, the applicant must provide contact information for a "perpetual trust account," including the trustees, a copy of the perpetual trust fund agreement, and filing fee of $100.[45] The statute also outlines specific application information for "preneed" dealers and burial and merchandise dealers.[46] Registration and application records must be maintained for a period of five years.[47]

After receiving applications, the Secretary of State's Office is required to review them for character, experience, and financial responsibility and then issue a certificate of registration if approved.[48] In August of each year, approved applicants must renew their registration using a renewal application containing any new or additional information,[49] a sworn statement, and a $50 filing fee.[50] Notably, the Secretary of State may issue exceptions to the registration requirement if it finds that registration is not in the "public interest," though these exceptions may only apply to cemeteries that: (1) were in existence before the year the statute was passed (July 1, 2000); (2) contain less than twenty-five acres in size; and (3) are operated by nonprofit entities.[51]

---

43. *Id.* Regulations further indicate that a certified copy of the plat of land must indicate that the land has been recorded with the appropriate government agency with the appropriate index number, the name of the cemetery, and the total acreage of the cemetery property. GA. COMP. R. & REGS. 590-3-3-.01(1) (2022). The regulations reiterate that the applicant must demonstrate "unencumbered fee simple title" to the minimum number of required acres (generally ten) but may show encumbrance for undeveloped property more than that minimum if the cemetery hopes to develop more land. *Id.* 590-3-3-.01(2).

44. GA. CODE ANN. § 10-14-4(b)(1)(L) (West 2022).

45. *Id.* § 10-14-4(b)(1)(M)–(Q). Additional regulations apply to the trustees of perpetual care trust funds, including a list of pre-approved entities who may serve as trustees, as well as a process for notifying the Secretary of State's Office of any requested changes to trustees. *See* GA. COMP. R. & REGS. 590-3-3-.06 (2022).

46. GA. CODE ANN. § 10-14-4(b)(2)–(3) (West 2022).

47. *Id.* § 10-14-5(k).

48. *Id.* § 10-14-4(c).

49. Internal changes to rules or amendments to registration application are also subject to additional regulation. *See* GA. COMP. R. & REGS. 590-3-1-.12(1) (2022) ("No internal rule or regulation or schedule of charges of a cemetery shall be effective until filed with the State Board of Cemeterians and posted as required by Sec. 10-14-16(a) of the Act.").

50. GA. CODE ANN. § 10-14-4(d) (West 2022).

51. *Id.* § 10-14-4(e). Regulation extends the nonprofit cemetery registration exemption to cemeteries that meet a number of factors centered around nonprofit status, lack of compensation to ownership, or lack of any other form of consideration, even if those cemeteries were created after July 1, 2000, so long as they remain under twenty-five acres in size. GA. COMP. R. & REGS. 590-3-3-.11 (2022).

3. Care and Maintenance

The Perpetual Care Act defines "perpetual care" as "the care and maintenance and the reasonable administration of the cemetery grounds and buildings at the present time and in the future."[52] "Care and maintenance" is further defined as "the perpetual process of keeping a cemetery and its lots, graves, grounds, . . . vaults, crypts, utilities, and other . . . structures . . . in a well-cared for and dignified condition, so that the cemetery does not become a *nuisance* or place of reproach and desolation in the community."[53] The definition continues:

> Care and maintenance may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. Care and maintenance may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. Care and maintenance may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. Care and maintenance do not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.[54]

The statute also creates an exception to the required "perpetual care" status for cemeteries in operation on or before August 1, 1986.[55] These cemeteries may continue to operate as nonperpetual care cemeteries without any registration renewal requirement.[56] This exception also applies to "any nonperpetual care cemetery which is shown to be of historical significance and is operated solely for historical nonprofit purposes shall be exempt from registration."[57] Otherwise, the Perpetual Care Act makes it illegal to operate a nonperpetual care cemetery,[58] and perpetual care cemeteries are legally required to provide for "care and maintenance."[59]

---

52. GA. CODE ANN. § 10-14-3(28) (West 2022).
53. *Id.* § 10-14-3(6) (emphasis added).
54. *Id.*
55. *Id.* § 10-14-4(g)(1).
56. *Id.* § 10-14-4(g)(2).
57. GA. CODE ANN. § 10-14-4(g)(3) (West 2022).
58. *Id.* § 10-14-4(g)(4).
59. *Id.* § 10-14-17(i).

4. Trust Funds

The Perpetual Care Act ensures care and maintenance by requiring registered cemeteries to establish and maintain an irrevocable trust fund to pay for it.[60] The initial required deposit is $10,000 and must be made before the cemetery sells any burial rights.[61] If the trust fund balance drops below the $10,000 minimum, the cemetery owner must deposit an amount equal to the "shortfall" within fifteen days of awareness or notice by the Secretary of State.[62] In addition to the initial deposit, cemeteries must make additional minimum deposits to the trust fund when selling burial rights or grave space—either 15% of the burial right sales price or 7.5% of the mausoleum, urn, or crypt price—at a minimum of fifty dollars.[63] Notably, this additional deposit is still required in the event of "repurchase and subsequent sale" of a right or grave or an "in-kind trade" of a right or grave.[64] If the cemetery owner sells more than 50% of the lots on the property, however, the owner may withdraw 95% of the *income* from the trust fund after written notice to the Secretary of State.[65] If the cemetery owner sells the cemetery or a controlling interest in the cemetery, the seller is still liable for any funds that should have been deposited in the perpetual care trust fund.[66]

The cemetery's trustee is required to give the Secretary of State an annual financial report regarding the perpetual care trust fund,[67] and cemetery owners may be held jointly and severally liable for any deficiencies in the trust.[68] A cemetery owner or an officer or director of a cemetery company may be a trustee of the perpetual care trust fund of

60. *Id.* § 10-14-6(b)(1); *see* GA. COMP. R. & REGS. § 590-3-3-.05(2) (2022) (indicating that cemeteries may use trust funds for restoration and maintenance of monuments in disrepair).

61. GA. CODE ANN. §§ 10-14-6(b)(2), (b)(4) (West 2022).

62. *Id.* § 10-14-6(g)(4).

63. *Id.* § 10-14-6(c). The fifty-dollar minimum is also adjusted every three years based on the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the U.S. Department of Labor. GA. ADMIN. CODE § 590-3-3-.05(5) (West 2022).

64. GA. ADMIN. CODE §§ 590-3-3-.08(2)–(3) (West 2022). The deposit is not required if a person with rights or a grave makes an "intra-cemetery trade" for a new or different right or grave location or type. *Id.* § 590-3-3-.08(4).

65. The cemetery owner does have a continuing duty to notify the Secretary of State about any additional land developed for burial purposes. If the further development results in less than 50% of available lots unsold, the income earned from the trust must again be retained by the perpetual care trust fund until more than 50% of the available lots are sold again. *Id.* § 590-3-3-.05(3).

66. Before a sale or transfer, the seller must notify the Secretary of State of the proposed transfer and submit any documents or records required to demonstrate that the seller is not indebted to the perpetual care trust fund. Of course, the purchaser must also submit a registration application with the appropriate information and fees to receive a certificate of registration and begin operation. GA. CODE ANN. § 10-14-9 (West 2022).

67. *Id.* § 10-14-6(i).

68. *Id.* § 10-14-6(j).

their own cemetery if approved by the Secretary of State.[69] The Secretary of State has the authority to "prescribe or approve" trust agreements and otherwise administer, investigate, and enforce all provisions of the Act, but otherwise Georgia trust law governs trust formation and operation.[70]

5. Cemetery Lot Size

Statutory provisions also govern cemetery size, depending on when the cemetery came into existence. Generally, all cemeteries registered after July 1, 1998, must consist of at least ten acres of land.[71] All cemeteries registered prior to August 1, 1986, however, are not subject to this requirement.[72] Cemeteries registered between 1986 and 1998 must consist of at least twenty-five acres of land.[73] However, an exception permits smaller cemeteries in smaller counties where the cemetery contains at least ten acres of land "dedicated solely for burial purposes and located in counties having a population of less than 10,000 according to the United States decennial census of 1990 or any future such census."[74]

6. Other Rules and Regulations

Cemetery owners, of course, may adopt their own rules and regulations governing the "use, care, control, management, restriction, and protection" of the cemetery above and beyond what is required by statute.[75] These rules may include restricting, limiting, and regulating the use of all property within the cemetery, regulating people and gatherings on the property, and otherwise safeguarding the premises and "the principles, plans, and ideas on which the cemetery was organized."[76] Cemetery owners do not have the power to adopt rules or regulations that conflict with statute or are otherwise "in derogation of the contract rights of lot owners or owners of burial rights."[77] The statute does not define what these "burial rights" are.

The Perpetual Care Act also requires cemetery owners to take other actions like marking the place on graves where burial items or "merchandise" are to be installed and then inspecting those places after installation, presumably to ensure the installation occurs in the correct

69. *Id.* § 10-14-12(c).
70. *Id.* §§ 10-14-12(d), -14, -15.
71. GA. CODE ANN. § 10-14-10(a) (West 2022).
72. *Id.* § 10-14-10(b)(1).
73. *Id.* § 10-14-10(b)(2).
74. *Id.*
75. *Id.* § 10-14-16(a).
76. GA. CODE ANN. § 10-14-16(a) (West 2022).
77. *Id*.

place and does not disrupt other burial sites.[78] Regulations allow cemetery owners to require insurance from "merchandise" providers but at set limits.[79] Relatedly, cemetery owners are prohibited from refusing to provide "care and maintenance" for any part of a grave site that has a "monument."[80] The Perpetual Care Act also offers a disclaimer related to "lawful disinterment" that allows cemetery owners to charge a reasonable fee for those services so long as the fee does not exceed either the cemetery owner's normal and customary charges for interment or the actual costs incurred by the cemetery directly attributable to such disinterment, whichever is greater.[81]

B. *Act Two: The Abandonment and Relocation Act of 1991*

Similar to the Georgia Cemetery and Funeral Services Act, the A&R Act begins with a lofty, philosophical view of the dead, declaring that "human remains and burial objects are a part of the finite irreplaceable, and nonrenewable cultural heritage of the people of Georgia which should be protected."[82] The purpose of the Act, therefore, is to "require respectful treatment of human remains in accord with the equal and innate dignity of every human being and consistent with the identifiable ethnic, cultural, and religious affiliation of the deceased individual as indicated by the method of burial or other historical evidence or reliable information."[83]

These aspirations are followed by a set of practical considerations for determining whether a cemetery is "abandoned" and a list of permitting requirements that counties and municipalities must follow to change the land use, maintain the cemetery, or disinter and relocate human remains.[84] The A&R Act also establishes a "presumption in favor of leaving the cemetery or burial ground undisturbed"[85] but leaves some details unexamined, such as the legal designation of easement rights for access to burial sites and the regulation of more modern perpetual care cemeteries outlined above. Penalties are steep statutory violations that constitute misdemeanors of a high and aggravated nature with a fine of up to $5,000 for each grave disturbed without a permit.[86] If the violator

78. *Id.* § 10-14-17(c)(3).

79. GA. ADMIN. CODE § 590-3-5-.01 (West 2022).

80. GA. CODE ANN. § 10-14-17(c)(6) (West 2022). Monument is defined as "any product used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted. *Id.* § 10-14-3(24).

81. *Id.* § 10-14-17(d).

82. GA. CODE ANN. § 36-72-1(a) (West 2022).

83. *Id.*

84. *Id.* § 36-72-8.

85. *Id.*

86. *Id.* § 36-72-16.

knowingly violates the statute, there is additional risk of up to six months imprisonment.[87]

1. Abandonment

The A&R Act defines an "abandoned cemetery" as:

> [A] cemetery which shows signs of neglect including, without limitation, the unchecked growth of vegetation, repeated and unchecked acts of vandalism, or the disintegration of grave markers or boundaries and for which no person can be found who is legally responsible and financially capable of the upkeep of such cemetery.[88]

The Act authorizes counties and municipalities to preserve and protect abandoned cemeteries and burial grounds if they are not being maintained by the individual or entity legally responsible for their upkeep.[89] Counties and municipalities are not, however, required by law to do so.[90] Individuals and entities cannot "knowingly" disturb cemeteries, burial grounds, human remains, or burial objects—even if on land they own or otherwise occupy—without a permit, *if* the disturbance is "for the purposes of developing or changing the use of any part of such land."[91] Because abandoned cemeteries by definition have no owner or operator or even a known location, perhaps they are more commonly the recipients of unintended disturbance. The A&R Act, however, does not limit relocation permits to abandoned cemeteries in any way.

2. Permit Requirements

The statute next outlines the application process for a permit to disinter and relocate human remains requiring: (1) evidence of land ownership "in the form of a legal opinion based on a title search;" (2) a report prepared by an archaeologist containing the number and location of graves; (3) a professional survey showing the location and boundaries of the cemetery or burial ground; (4) a genealogist plan for identifying and notifying the descendants of those buried or believed to be buried in the cemetery or burial ground; and (5) a mitigation proposal specifying "the method of disinterment, the location and method of disposition of

87. GA. CODE ANN. § 36-72-16 (West 2022).

88. *Id.* § 36-72-2.

89. *Id.* § 36-72-3. This "upkeep" is the requisite "care and maintenance" outlined above. While "abandonment" is a term containing deeper property law roots, for Georgia cemetery law purposes it is important to note its relationship with the Perpetual Care Act's "care and maintenance"—terms that seem defined intentionally to prevent the prior A&R Act's definition of abandonment.

90. *Id.*

91. *Id.* § 36-72-4.

the remains, the approximate cost of the process, and the approximate number of graves affected."[92] These requirements also include related action items.[93] Within fifteen days of the completion of this process, the local governing authority must schedule a public hearing with proper notice, and then inform the permittee of its decision in writing within thirty days after the hearing.[94] Notably, the permit, if granted, may still require additional conditions, "including but not limited to relocation of the proposed project, reservation of the cemetery or burial ground as an undeveloped area within the proposed development or use of land, and respectful disinterment and proper disposition of the human remains."[95]

3. Permit Guidance

The A&R Act provides mandatory guidance for the local governing authority in making its decision on permits. First and foremost, the statute creates a "presumption in favor of leaving the cemetery or burial ground undisturbed."[96] Then, the law requires consideration of the concerns and comments of any descendants "and any other interested parties"; the economic and other costs of mitigation; the adequacy of the applicant's plans for disinterment and proper disposition of any human remains or burial objects; and "the balancing of the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment." Finally, the sixth guidance point is a catch-all for any other compelling factors that the governing authority deems relevant.[97]

The A&R Act allows the local governing authority to appoint a board or commission to hear, review, and make decisions on permit applications, but only if the county population exceeded 290,000 in any census since 1980.[98] Appeals to permit application decisions may be made to the superior court of the county in which the cemetery or burial ground is located.[99] The local governing authority, local law enforcement, or presumably any appointed board or commission must inspect the

92. GA. CODE ANN. § 36-72-5 (West 2022).

93. For example, if the human remains include people of aboriginal or American Indian descent, the permittee must contact the Council on American Indian Concerns and notify any culturally affiliated American Indian tribes as part of the genealogist plan. *Id.* § 36-72-5(4). Also, the county or municipality (or other "governing authority") may require "additional reasonable attempts" to identify, locate, and notify descendants to give descendants an opportunity to express interest, be informed of the permit terms, or appear at hearings or appeals related to the disposition of human remains or burial objects. *Id.* § 36-72-6.

94. *Id.* § 36-72-7. The hearing is also important in terms of notifying descendants.

95. *Id.* § 36-72-7(b).

96. GA. CODE ANN. § 36-72-8(1) (West 2022).

97. *Id.* § 36-72-8.

98. *Id.* § 36-72-9.

99. *Id.* § 36-72-11.

application "as necessary" to make sure the permit applicant has (a) ceased or limited development activity pending a grant of the permit, if such cessation was required before permitting or (b) complied with the terms of the permit if the permit has already been issued.[100]

Different procedures apply if the entity requesting a permit is an agency, authority, or other political subdivision of the state. If so, the superior court having jurisdiction over the cemetery or burial ground property has "exclusive jurisdiction" over the permit application and must conduct an investigation to make a determination under the previously outlined statutory provisions.[101] If any adverse effect occurs to the cemetery or burial ground, the agency, authority, or political subdivision must bear the cost of mitigating the harm with the authorized use of public funds to do so.[102] Likewise, if individuals or other entities cause any adverse effects, they must bear the cost of mitigating the harm.[103] Notably, the governing authority bears the cost of mitigating harm caused by unidentified vandalism or *erosion*, though the statute does not indicate in this subsection whether the local governing authority can simply decline to intervene with this type of cemetery maintenance as it does at the outset by "authorizing," but not requiring, intervention with abandoned cemeteries.[104]

Lastly, the A&R Act establishes an exception for the Department of Transportation, which is not required to apply for a permit unless it plans to relocate human remains, though it must confirm the absence of human remains in development projects through an archeological report.[105] The statute confirms that any relocation of human remains must be supervised, monitored, and carried out by the permit applicant's archeologist at the expense of the permittee.[106]

C. *Statutory Takeaways*

The Perpetual Care Act's requirement for statutorily defined "care and maintenance" paid for by a statutorily enumerated trust fund is relevant to Georgia cemetery law for several reasons. First, the *lack* of care and maintenance forms part of the analysis of what constitutes an "abandoned" cemetery, which is defined by law and outlined in cases. Second, "care and maintenance" is precisely what will become financially and practically impossible after repeated flooding or storm damage due to climate change. While modern, privatized, perpetual care

100. *Id.* § 36-72-13.
101. GA. CODE ANN. § 36-72-14 (West 2022).
102. *Id.* § 36-72-14(b).
103. *Id.*
104. *Id.*
105. *Id.* § 36-72-14(c).
106. GA. CODE ANN. § 36-72-15 (West 2022).

cemeteries are required to provide this care and maintenance through a trust fund,[107] certain exemptions apply for older cemeteries and nonprofit entities, as well as more traditional types of cemeteries on family plots or church grounds that do not meet the statutory definition of a "cemetery."[108] While a grandfathering period exists for cemeteries created between 1986 and 2000, pre-1986 cemeteries are subject to prior law, which does not require perpetual care status,[109] nor does it provide for legal action after the Perpetual Care Act's passing in 2000, even if some prior conditions theoretically apply. Pre-1986 nonperpetual care cemeteries are not required to establish trust funds and likely do not have them, so any funding for basic care and maintenance—or much more for climate change mitigation—must come from other financial resources or concerted community action. The financial reality of regular care and maintenance likely makes these pre-1986 nonperpetual care cemeteries or statutorily exempted cemeteries at much greater risk of both legal abandonment and subject to the dangers of sea level rise, with much less money to meet that risk.

The A&R Act, while less regulatory in nature, contains key substantive provisions for taking any action related to an unknown or abandoned cemetery, as well as determining the cemetery's future. Presumably enacted to handle construction and development concerns and to preserve human remains as a part of cultural heritage, the statute also provides a clear mechanism for dealing with disinterment and relocation *for any reason*. The requirements are steep but not insurmountable. Property law principles like ownership or control, proper notice, and title searches apply, as well as the balancing of descendant and development interests. Moreover, while the Perpetual Care Act applies to one specific subgroup of cemetery types, the A&R Act appears to apply any cemetery, known or unknown, whether publicly used or discovered on private land. The A&R Act is thus a bigger piece of the Georgia cemetery law puzzle when considered in the context of threats related to sea level rise. Whereas the Perpetual Care Act highlights the difficult financial realities of modern cemetery mitigation efforts, the A&R Act provides the substantive and procedural process for making relocation possible.

The right to disinter, however, also requires a permit from the "local registrar" under the law governing Georgia public health and vital records.[110] Department of Public Health (DPH) regulations indicate the

107. GA. CODE ANN. § 10-14-6(b)(1) (West 2022).

108. *Id.* § 10-14-3(8).

109. *Id.* § 10-14-4(g)(1)–(2).

110. *See* GA. CODE ANN. § 31-10-20(f) (West 2022) ("Authorization for disinterment and reinterment shall be required prior to disinterment of a dead body or fetus. Such authorization shall be issued by the local registrar to a licensed funeral director or other person acting as such,

"local registrar" may include hospitals, hospices, and funeral homes for the first disposition of human remains.[111] While it is not entirely clear if this permit is distinct from the permit under the A&R Act, DPH regulations also require the "local registrar" to issue a permit for disinterment and reinterment "upon receipt of an order of a court of competent jurisdiction."[112] As a matter of public health, courts may have to at least rubber stamp cemetery relocation permits otherwise granted under the statutory authority of the A&R Act.

IV. GEORGIA COMMON LAW: HISTORY AND RELEVANCE

Georgia cemetery cases demonstrate the historical development of common law in the State and how that law interacts with more modern state statutes. The statutes above, passed in 1991 and 2000, came later than most of the common law rules related to burial rights, such as descendant notification, cemetery and burial ground easements, and the public and private status of burial sites. Cases decided after the statutes were passed still indicate some confusion about who has rights to the dead, probably because the statutes do not address the entire framework of cemetery law, and many cases predate the statutes. The cases discussed below, particularly the *Walker*, *Hughes*, and *Mills* cases, contain more guidance for advocates, descendants, or other individuals and entities hoping to protect and preserve cemeteries as climate change progresses and as the rising of sea levels threatens their communities.

A. *Cemetery Easement Rights*

Perhaps the oldest iteration of the right to access or use a grave site in Georgia common law is found in *Jacobus v. Congregation of Children of Israel*, where the Georgia Supreme Court held that "one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the easement or license of burial.[113] So long as the purchaser has rightful possession of the cemetery lot—the burial place—or holds title to the interest, the purchaser can maintain an action for damages against anyone who trespasses upon, desecrates, or

upon proper application, in the county in which the dead body or dead fetus was originally interred and a local registrar who issues such authorization shall not be civilly or criminally liable therefor if it is issued in good faith. A permit shall not be required when disinterment and reinterment are in the same cemetery.").

111. GA. COMP. R. & REGS. 511-1-3-.23(1)(a) (West 2022).

112. *Id.* 511-1-3-.23(2)(a). While neither this regulation nor the A&R Act create a clear process for challenging disinterment, the requirement of a court order indicates that the matter may ultimately require court intervention, even if the city or county or "local governing authority" grants a permit to relocate under the A&R Act. Likewise, the noted caselaw indicates that individual descendants, entities, municipalities, and even cemeteries can be plaintiffs, defendants or intervenors contesting such orders.

113. Jacobus v. Congregation of Child. of Israel, 33 S.E. 853, 854 (Ga. 1899).

otherwise invades that lot.[114] At issue in *Jacobus* was the unrequested and ultimately unlawful disinterment of two children from a "public" cemetery in Augusta.[115] The children died in infancy, predeceasing their parents who died sometime later and were buried nearby.[116] The court noted that the plaintiffs had actual possession of the easement and they were the heirs at law of the parents, giving them complete title to the easement of burial place—by prescription.[117] The court found that the plaintiffs stated a valid claim based on these facts, not only with regard to the children's disinterment but also for the removal of the children's gravestones, particularly because of their status as heirs.[118] In *Jacobus*, possession and status were enough to allow access and tort actions for invasion of property.

1. Establishing Easement Rights

A few years later, in *Stewart v. Garrett*, the Georgia Supreme Court reiterated the *Jacobus* rule that the heirs of the dead and buried have a right of easement or license to the grave with regard to another "public" cemetery, this time in Columbus.[119] However, the *Stewart* court held that heirs' property rights do not include the right of ejectment—the right to remove others.[120] In another cemetery case, *Nicholson v. Daffin*, the Georgia Supreme Court again relied on the language in *Jacobus*—that one who owns or has an interest in a cemetery for burial purposes "does not acquire any title to the soil, but only an easement or license for the use intended."[121] The *Nicholson* court applied the *Jacobus* rule, which had previously only been applied by courts in cases involving public cemeteries, to a private, family cemetery.[122] The *Jacobus* rule was later adopted by an Oklahoma court in *Heiligman v. Chambers*, which built upon *Jacobus* by determining that the cemetery access easement or license to the grave passes with the fee title of the entire cemetery property.[123] The *Heiligman* case also appears to have settled the idea that

114. *Id.*
115. *Id.* at 854.
116. *Id.*
117. *Id.* at 855.
118. *Jacobus*, 33 S.E. at 855.
119. Stewart v. Garrett, 46 S.E. 427, 427 (Ga. 1904).
120. *Id.*
121. Nicholson v. Daffin, 83 S.E. 658, 658 (Ga. 1914).
122. *Id.*
123. Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959); *see* Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911) ("[W]hen land has been definitely appropriated to burial purposes, it cannot be conveyed or devised as other property, so as to interfere with the use and purposes to which it has been devoted, and when once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust.").

easement and associated rights in a cemetery lot survive until the lot is abandoned, either by the person establishing the plot or the heirs, or by removal of the bodies by the person granted statutory authority.[124]

Later Georgia courts continued to hold that easement rights remain with the descendants or heirs at law by prescription, effectively establishing adverse possession as the opposite of abandonment.[125] The easement gives heirs the right to prevent or to be compensated for trespasses that disturb burial places, the right to consent to or prevent the disinterment of bodies, the right of ingress and egress for visitation of graves, and the right to decorate them.[126] Georgia courts increasingly justified these legal rules philosophically[127] but also showed more willingness to intervene on either side of a cemetery dispute.[128] Still later, in *Walker v. Georgia Power*, a key case that restated the traditional understanding of Georgia cemetery law, the Georgia Court of Appeals found for the first time that a cemetery easement can be abandoned, based in part on the *Heiligman* case.[129]

2. Abandoning Easement Rights

Georgia law currently defines an "abandoned cemetery" as one that "shows signs of neglect" where "no person can be found who is legally responsible and financially capable of the upkeep."[130] Georgia courts

124. *Heiligman*, 338 P.2d at 148.

125. *E.g.*, Turner v. Joiner, 48 S.E.2d 907, 908 (Ga. Ct. App. 1948) (finding right and title derived by prescription where family dead had been buried in rural churchyard cemetery for 36 years as a "matter of courtesy and custom," reasoning the family's cemetery rights with respect to the grave were paramount to anyone except someone who could show a superior title).

126. *See* Habersham Mem'l Park, Inc. v. Moore, 297 S.E.2d 315, 320–21 (Ga. Ct. App. 1982) (finding an easement for right to burial passes to heirs at law, as well as tort actions for interfering with burial); *see also Turner*, 48 S.E.2d at 908 (finding a cause of action existed for intentional interference of a burial); Rivers v. Greenwood Cemetery, 22 S.E.2d 134, 134–35 (Ga. 1942) (finding that while the right of removal is not uniformly recognized as an absolute one belonging to the surviving husband or wife, many courts have held that reinterment rights should be permitted as part of the cemetery easement or license).

127. *See* Tully v. Tully, 177 S.E.2d 49, 49–50 (Ga. 1970) (arguing that disinterment of a body and removal to another burial place is not favored by the law because it is state policy that "the sanctity of the grave should be maintained," and that a body once suitably buried should remain undisturbed).

128. *See* Taylor v. Evans, 208 S.E.2d 492, 492–93 (Ga. 1974) (ordering removal of a headstone and slab erected on a grave by a family member of the deceased who was not an heir at law); *see also* Mayes v. Simons, 8 S.E.2d 73, 74–75 (Ga. 1940) (allowing a purchaser of land, who lacked notice of an abandoned cemetery lying in an obscure location on the land, to continue cultivating over the site).

129. Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) (calling *Heiligman* the "most frequently acclaimed and followed" case on the subject and claiming that Georgia courts have inferentially followed the *Heiligman* public cemetery rule and applied it to family cemeteries, too).

130. GA. CODE ANN. § 36-72-2 (West 2022).

view the issue of abandonment as largely a question of intent—a "mixed question of law and fact"—especially with regard to restrictions on the use of private property for family burial purposes, most recently finding that "[t]his intent is inferable from the acts of the parties, interpreted in the light of all the surroundings."[131] Abandonment, however, applies not only to the cemetery itself but also to the easement, with courts generally requiring affirmative conduct to demonstrate intent to abandon on behalf of the easement holder.[132] But under the facts in *Walker*, even a cemetery easement holder's mere acquiescence to the conduct of the property owner can constitute abandonment, especially if it has the effect of destroying the easement's purpose and no timely objection is made.[133]

In *Walker*, Georgia Power sought to condemn a family cemetery located within a larger tract of land it owned in fee simple and then disinter and relocate the human remains to a tract of land it owned adjacent to a Methodist church.[134] Under the previously existing statutory authority of Section 36-60-6.1, Georgia Code Annotated, Georgia Power petitioned the Monroe County Superior Court to do so.[135] Georgia Power named thirty-one descendants of those buried in the cemetery as defendants but also sought to condemn the "incorporeal hereditaments" of others who might be buried there, seeking a special master to do so.[136] The Monroe County Commission granted a permit and accepted a special master's recommendation that the county condemn the land and compensate the descendants with twelve dollars, the "actual market value of the property."[137] Afterward, a licensed funeral director conducted the disinterment, relocation, and reinterment, enclosing the cemetery plot with a chain link fence and a wrought iron entrance built by Georgia Power.[138] The new plot contained space for fifty additional graves.[139]

131. City of Sandy Springs v. Mills, 771 S.E.2d 405, 408 (Ga. Ct. App. 2015); *see* Arlington Cemetery Corp. v. Bindig, 95 S.E.2d 378, 383 (Ga. 1956) (establishing the "mixed question of law and fact" standard for cemetery abandonment and acknowledging the dedication of land for a public cemetery as an intended restriction on private property use for family burial purposes).

132. *City of Sandy Springs*, 771 S.E.2d at 408; *Arlington Cemetery Corp.*, 95 S.E.2d at 383.

133. *Walker*, 339 S.E.2d at 730–31.

134. *Id.* at 728.

135. *Id. Walker* was decided in 1986, and the events leading up to the decision began in 1975, well before the passing of the A&R Act in 1991, with its permitting policies and procedures noted above. The Georgia Court of Appeals cited Section 36-60-6.1, the statutory section that previously housed more limited provisions related to disturbing burial grounds for land development. GA. CODE ANN. § 36-60-6.1 (repealed 1991). Section 31-21-6, a statute discussing procedures to be followed when human remains are discovered, was not passed until 1992. GA. CODE ANN. § 31-21-6 (West 2022).

136. *Walker*, 339 S.E.2d at 728.

137. *Id.*

138. *Id.* at 729.

139. *Id.*

While the administrative record contained no evidence of disagreement,[140] one descendant eventually filed an appeal against the award in a superior court, where the case sat inactive for five years.[141] After motions and affidavits, the superior court ultimately dismissed the appeal five years later—ten years after the disinterment—holding that the cemetery had been removed according to statute.[142] Importantly, the court found that the descendant retained the same rights she held in the previous cemetery, except in the new location.[143] Though the court did not clarify the legal theory or mechanism by which these rights were retained or transferred, the only candidate seems to be the cemetery easement.

In the Georgia Court of Appeals, the descendant argued she had lost "the right to be buried in the family cemetery with her ancestors, the right to visit, decorate[,] and honor the graves of her ancestors in the place they were laid to rest, and have unimpeded ingress to and egress from the cemetery for these purposes."[144] Georgia Power argued the descendant had no compensable right and therefore had no standing.[145] The court defined the issue as whether the descendant's interest was a compensable interest within the contemplation of the laws of eminent domain.[146] Finding no Georgia law on point, the court then cited other jurisdictions, noting:

> [T]he appropriation of land for a family burial plot is often described as a "dedication," without clarity as to whether a dedication in the strict legal sense is meant or whether a family burial ground was established in a manner other than by a legal dedication . . . , [but] [o]ther cases take the view that a private or family cemetery or rights incident to it can be established or acquired only by a means, other than dedication, which is legally sufficient to accomplish the creation or a transfer of an interest in real property, or an appropriation pursuant to the provisions of an applicable statute.[147]

---

140. *See id.* ("The record shows no objection, complaint or appearance by appellant Walker or any other party before the Monroe County Commission . . . no objection to the grant of the permit or its execution, nor to the location of the relocated cemetery site. No answer, pleading or writing of any kind was filed by the defendants.").

141. *Walker*, 339 S.E.2d at 729.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Walker*, 339 S.E.2d at 730.

147. *Id.* (quoting H.D. Warren, Annotation, *Private or Family Cemeteries*, 75 A.L.R.2d 591, 594 (1961)) (internal quotations omitted) (last pair of brackets in original).

The court also noted:

> Though a common law dedication, in its sense of a commitment to the general public, does not arise to create a private or family burial ground, there is authority for the proposition that owners may, without formal written documentation, establish and set aside a place of burial for the benefit of those included within a family neighborhood and that such may be evidenced by acts, acquiescence or other conduct evincing clearly such a purpose . . . . Whether the legal creation of a family or community cemetery be labeled a "dedication," a "trust" or an "easement" the rights and limitations in the area of the fee owner and of others having an interest are the same and are reasonably well established.[148]

The court confirmed that when a family burial plot is established, an easement is created and legal title passes subject to the easement.[149] Quoting *Heiligman*, the court held: "The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority."[150] The *Walker* court explained, "While the *Nicholson* case cited by the *Heiligman* court involved a public cemetery, we believe the Georgia courts have inferentially followed the *Heiligman* rule as to family cemeteries as well."[151] The court then reiterated the rule that "one who owns or has an interest in a cemetery for burial purposes 'does not acquire any title to the soil, but only an easement or license for the use intended.'"[152] On the facts at hand, however, the court, ultimately found that the descendant had abandoned the easement "by virtue of her acquiescence without objection to the removal and reinterment of the remains of her ancestors in the cemetery."[153] In effect, it appears that a cemetery easement holder in Georgia—an heir or descendant of the dead and buried—who does not make a proper and timely objection to the removal of ancestors from the cemetery has legally abandoned the easement, at least in the original cemetery property, if not in the

148. *Id.* (quoting Mingledorff v. Crum, 388 So. 2d 632, 635–36 (Fla. Dist. Ct. App. 1980) (internal quotations omitted).

149. *Id.*

150. *Id.* (emphasis omitted from original).

151. *Walker*, 339 S.E.2d at 730; *see* Nicholson v. Daffin, 83 S.E. 658, 660 ("When the plaintiff acquired ownership of her easement, there was no rule or regulation passed . . . forbidding lot owners to employ competent and skillful persons to assist them in the care of their lot.").

152. *Walker*, 339 S.E.2d at 730 (quoting *Nicholson*, 83 S.E. at 660).

153. *Id.* at 730–31.

relocation site.[154] Whether this abandonment also requires non-use is unclear.

B. *The Public/Private Distinction and the Presumption Against Disturbance*

The distinction between municipal and family or community cemeteries also has a thread in Georgia cases. In *Hughes v. Cobb County*, the Georgia Supreme Court officially recognized two cemetery categories: public and private.[155] A public cemetery is one that has been "dedicated" for public use, as opposed to a private family cemetery that is more exclusive.[156] The line between the two, however, is not so clear and drawing this distinction may obscure the way cemeteries have historically developed and are encountered in the world.[157] For example, a cemetery dedicated to the public may exist on private land, especially if the dedication is implied, and access may or may not be restricted depending on the circumstances.[158] More traditionally, public cemeteries are owned and operated by counties and municipalities.[159] Private cemeteries can refer to family plots on private land, private cemetery businesses, or churches, and sometimes private church cemeteries still exist even if the church itself no longer does.[160] Yet under *Hughes*, a court may consider the leftover church cemetery "public" if the community that the church served used it frequently for burial.[161] The same is true for family cemeteries.[162] Modern commercial cemeteries are typically more

154. *See* Adam Leitman Bailey & Israel Katz, *Terminating Easements in States East of the Mississippi River*, 31 PROB. & PROP. 38, 39 (July/Aug. 2017) (explaining that *Walker*'s position on easement abandonment is unique because easement abandonment typically requires two things: (1) non-use of the easement and (2) affirmative conduct on the part of the easement holder that manifests an unequivocal intent to relinquish the easement). Bailey and Katz note that Georgia has codified easement abandonment in Section 44-9-6, Georgia Code Annotated (2022), which provides that "[a]n easement may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment." The authors further note that Georgia courts have interpreted this statute to require clear and unequivocal intent on the part of the easement holder to abandon. *Id.* However, nonuse of an easement for the "prescriptive period" or statutory time for adverse possession could be enough to raise a rebuttable presumption that an easement has been abandoned. *Id.*

155. *Hughes*, 441 S.E.2d at 407–08.

156. *Id.*; *see* Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011) (finding a public cemetery by implication where the cemetery had been in existence for more than 40 years before the family acquired the property surrounding it in 1924, evidence existed that the public had long regarded it as a community cemetery, and the family had done nothing to suggest otherwise until 2005—81 years later—when the family tried to take control of it).

157. Shaffer, *supra* note 13.

158. *Id.*

159. VAN VOORHIES, *supra* note 18.

160. *Id.*

161. *Id.*

162. Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011).

private in nature. This section explores the distinctions between public and private cemeteries., highlighting the key *Hughes* case in Georgia case law.

1. Public vs. Private

The first step to establishing public or private status, or any hybrid in between, is figuring out who owns the land on which the cemetery is located.[163] If the land is owned by a county or municipality, the cemetery is likely public, not only in ownership but also in operation in that the general public may bury their dead and visit the premises within reasonable time restrictions.[164] If the land is privately owned, however, the cemetery could still have an express or implied public dedication, found either in the deed records or by use, thereby giving the cemetery some "public" operational and visitation legal status, even though the land is located on private property whether family, church, or other.[165] In these situations, cemetery easement rights become particularly relevant and important for descendants seeking to access the grave site, and private property owners have some limitations and restrictions on what they can do on or with their land, even if those limitations are not express in a deed or contract.[166] These same cemeteries might also be more private, smaller plots on church-owned land that were never dedicated to the community or more generally used.[167] In short, public and private cemeteries are both equally subject to risk of abandonment, permit requirements to alter or move, and any corresponding legal issues.[168] This may be because a cemetery that is deemed abandoned has no owner and is easily subject to the A&R Act.[169] The public or private status in ownership or operation, however, is an important legal consideration and planning tool for cemeteries susceptible to climate change by erosion, flooding, or storm surge brought on by sea level rise.

As a general property law matter, public dedication requires actual or implied intent, actual or constructive delivery, and actual or constructive acceptance.[170] A related Georgia statute states:

---

163. VAN VOORHIES, *supra* note 18, at 5.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. The Georgia Code makes no distinction between public and private cemeteries, especially not with regard to abandonment. *See* GA. CODE ANN. § 36-72-2 (West 2022).

169. *Id.*

170. Banks v. McIntosh Cnty., Ga., No: 2:16-cv-53, 2021 WL 3173597 at *5 (S.D. Ga. July 26, 2021); *see* Watson v. Clayton Cnty., 447 S.E.2d 162, 163 (Ga. Ct. App. 1994) (finding that a private landowner may dedicate land by setting it apart for public use, but it must be accepted by the county before it becomes a county road); Smith v. Gwinnett Cnty., 286 S.E.2d 739, 742 (Ga. 1982) (explaining that the acceptance of property set aside by the owner for a public use will be

> After an owner dedicates land to public use either expressly or by his actions, and the land is used by the public for such a length of time that accommodation of the public or private rights may be materially affected by interruption of the right to use such land, the owner may not afterwards appropriate the land to private purposes.[171]

In the cemetery context, Georgia cases have recognized the following elements for a valid dedication of land to public cemetery use: (1) an intention on the part of the owner to dedicate the property to a public use; (2) an acceptance by the public; and (3) where implied dedication is relied upon, an appearance that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift.[172] After a cemetery is dedicated to public use, it cannot afterward be appropriated to private purposes, though case law citing Section 44-5-230, Georgia Code Annotated, often relates to private development and land use and says nothing direct about relocating cemeteries as method of preserving them for public use.[173] This idea is further outlined below.

2. Disturbance vs. Preservation

In *Hughes v. Cobb County*, a landowner applied for a permit to relocate a .196-acre cemetery located on a 12.196-acre tract of land he had purchased four years earlier.[174] As part of the application, the landowner identified and notified the descendants of the cemetery's fifty-two grave sites containing eleven inscriptions, and these descendants then opposed the landowner's application.[175] The local governing authority legally created a commission to review cemetery relocation permits because of the county's population.[176] The commission denied the landowner's permit application based on concerns about the relocation site, but the landowner modified his plan with a second relocation site before the full Cobb County Board of Commissioners granted the

---

implied where it is improved and maintained for such use by authorized public officials out of tax funds).

171. GA. CODE ANN. § 44-5-230 (West 2022).

172. *See* Haslerig v. Watson, 54 S.E.2d 413, 421 (Ga. 1949) (ruling that no particular form of dedication is required—it may be made in writing, by parol, inferred from the landowner acts, or implied in certain cases from long use); *see also* Hutchinson v. Clark, 150 S.E. 905, 905 (Ga. 1929) (defining public cemeteries). *But see* Melwood, Inc. v. Dekalb Cnty., 336 S.E.2d 571, 571–73 (Ga. 1985) (finding no dedication where a two-parcel lot contained one parcel with a distinct cemetery and another parcel in which no burial had ever taken place and that was never actually or impliedly offered for cemetery use).

173. Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011); Hughes v. Cobb Cnty., 441 S.E.2d 406, 407 (Ga. 1994).

174. *Hughes*, 441 S.E.2d at 407.

175. *Id.*

176. *Id.*

permit.[177] Pursuant to the statute, the descendants appealed to the Cobb County Superior Court, arguing that the cemetery had been publicly dedicated.[178] The court found the cemetery to be a family, neighborhood cemetery owned by the permittee whose application sufficiently met the mitigation and notice requirements under Georgia statutory law.[179] The court determined that no evidence suggested the cemetery was used by the public at large and also found the cemetery was abandoned under Section 36-72-2(1), Georgia Code Annotated.[180] The court held that it was appropriate to move the cemetery, reasoning that "relocation would preserve rather than destroy the cemetery's cultural and historical significance."[181]

In reviewing the superior court's decision,[182] the Georgia Supreme Court first identified the distinction between public and private cemeteries, finding a public cemetery requires dedication to the community without any significant use restriction by the landowner on relatives or other members of the public.[183] The court then noted the statutory provision that prohibits landowners who dedicate their land to public use from afterward appropriating the land for private purposes if the exercise of private rights would materially affect the accommodation of the public rights in the property.[184] The descendants argued that the attorney who provided the title opinion did not consider whether the original owner had made a dedication and that their evidence of dedication—consisting of several witnesses as opposed to the landowner's sole witness—was so overwhelming that the trial court erred in ruling that no dedication occurred.[185] The descendants further asserted that if a public dedication had occurred, the landowner would have had to show that the "reappropriation of the property [did] not materially affect the accommodation of the public rights in the property."[186]

177. *Id.*

178. *Id.*

179. *Hughes*, 441 S.E.2d at 407.

180. *Id.* at 408 & n.5.

181. *Id.* at 407.

182. The Georgia Supreme Court also noted the ambiguity in Georgia's abandoned cemetery statute about whether a superior court should conduct a de novo review of a local governing authority's decision on a relocation permit application, or if the superior court should sit as an appellate court but declined to decide the issue because both parties had accepted the de novo review. *Id.* at 408 n.4. An appeal through the superior court system resembles the Georgia statutory procedure for a writ of certiorari for the quasi-judicial decisions of local administrative bodies or authorities. GA. CODE ANN. § 5-4-1 (West 2022).

183. *Hughes*, 441 S.E.2d at 407–08.

184. *Id.* at 408.

185. *Id.* at 407–08.

186. *Id.* at 408 n.3.

However, the Georgia Supreme Court declined to substitute its opinion of the record evidence for that of the fact finder.[187] The court emphasized that the landowner's permit application contained all the requisite materials and that Section 36-72-7(b), Georgia Code Annotated, gives the local governing authority flexibility in adopting the relocation permit application and establishing additional conditions.[188] Therefore, the Cobb County Board of Commissioners had sufficient authority to accept the landowner's second proposed site after hearing before the full commission.[189]

Perhaps most importantly, the Georgia Supreme Court accepted the superior court's rationale that "due to lack of maintenance and inappropriate surroundings, relocation would preserve rather than destroy the 'cultural heritage of this county and this cemetery.'"[190] This rationale was deemed sufficient to overcome the statutory presumption in favor of leaving cemeteries undisturbed, as well as an appropriate balancing of the landowner's interest in disinterment against the "public's and descendants' 'interest in the value of the undisturbed cultural and natural environment.'"[191] *Hughes* thus indicates not only that the presumption in favor of leaving cemeteries undisturbed is surmountable but also that perhaps the best argument to make in favor of a request for relocation is preservation.

C. *The Right to Move Dead Bodies*

In Georgia, the property right to move a dead body from one burial place to another generally lies with the surviving spouse.[192] Under Georgia intestacy law, the surviving spouse has the right to at least one-third of the decedent's estate if the decedent dies intestate, with any children sharing the remainder—a relic of medieval English feudal

187. *Id.* at 408.

188. *Hughes*, 441 S.E.2d at 408.

189. *Id.*

190. *Id.* at 409.

191. *Id.* at 408–09.

192. Rivers v. Greenwood Cemetery, 22 S.E.2d 134, 134–35 (Ga. 1942); *see* Ga. Lion's Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (citing Blackstone's Commentaries for the proposition that in the earlier days of the common law, no property right existed for the body and the matter was left for ecclesiastical courts but arguing that American courts created a "quasi-property right" in the body for relatives and next of kin because no ecclesiastical courts existed); *see also* Pollard v. Phelps, 193 S.E. 102, 107 (Ga. 1937) ("At common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi-property right belongs to the husband or wife, and, if neither, to the next of kin."); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905) (allowing a widow to legally claim her spouse's dead body but not defining the precise nature of the interest).

custom that found its way into British and American common law.[193] In the absence of a surviving spouse, the next of kin or other descendants generally have these rights.[194] More recent cases reiterate that heirs of the deceased may have a "quasi-property right" in the body that can allow for tort claims such as trespass,[195] although some reasonable limitations exist on these claims, including a limit on claims for moving graves within the same cemetery, for which a permit is not required.[196] On the other hand, the removal of the deceased's eyeballs without consent of the surviving spouse apparently allows a quasi-property claim, along with other claims such as intentional infliction of emotional distress.[197] Georgia law establishes the circumstances in which graves may be moved.[198] The unique circumstances of the *Welch* case are explored below, but Georgia public policy officially continues to frown on the disinterment of a body and its removal to another burial place, and it remains good law that, "except in cases of necessity or for laudable

193. GA. CODE ANN. § 53-2-1(c)(1) (West 2022); *see* Welch v. Welch, 505 S.E.2d 470, 471 (Ga. 1998) (explaining that a husband has the right to bury his wife's dead body over and against the rights of her children but granting the children the right to disinter and relocate the body after the husband's death); *see also* William Engelhart, *Equality at the Cemetery Gates: Study of an African-American Burial Ground*, 25 MICH. J. RACE & L. 1, 3–4, 5 n.25 (Fall 2019) (attributing the "seemingly inadequate building blocks" of American cemetery law to the United States' rejection of a single state church, which exclusively governed burial in England, and explaining that under English common law the easement right—"a temporary appropriation of soil"—would terminate with the dissolution of the body).

194. GA. CODE ANN. § 53-2-1(c)(2) (West 2022); *Welch*, 505 S.E.2d at 471. Georgia law does not make it entirely clear whether (a) the body is simply part of the decedent's estate, at least initially, and the rights to the body pass to the descendants or heirs at law after burial, or (b) the body is never part of the decedent's estate, but an executor has the legal power to discharge the body according to testamentary wishes.

195. *See* Ceasar v. Shelton Land Co., Inc., 646 S.E.2d 689, 690–91 (Ga. Ct. App. 2007) (holding an heir of the deceased may bring an action for the desecration and destruction of a family cemetery, trespass, or other torts without having a legal title or easement for burial purposes in the soil where the remains of the deceased loved ones are laid to rest, if they prove they have not abandoned the cemetery); Davis v. Overall, 686 S.E.2d 839, 841–42 (Ga. Ct. App. 2009) (finding the holder of an easement for access to a family cemetery may bring an action for nominal damages or compensatory and punitive damages against a party who intentionally interferes with the use of that easement and an action for trespass against one who interferes with a cemetery easement may plead a claim for the actual damage inflicted and allowable punitive damages).

196. Hill v. City of Fort Valley, 554 S.E.2d 783, 786–87 (Ga. Ct. App. 2001) (explaining that the mere moving of a body in a casket to the wrong burial site, without causing any damage to it, may not be enough for a quasi-property claim, and the relatives of a disinterred and reburied decedent may lack standing to bring a claim of trespass against the persons responsible for the disinterment).

197. Alt. Health Care Sys., Inc. v. McCown, 514 S.E.2d 691, 695–97 (Ga. Ct. App. 1999).

198. GA. CODE ANN. § 36-72-4 (West 2022); *see* Tully v. Tully, 177 S.E.2d 49, 50 (Ga. 1970) (explaining that graves may be moved if there is a "strong showing that it is necessary and that the interests of justice require" relocation).

purposes, the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed."[199]

1. Family Dynamics and Questions of Law

Welch presents a unique set of facts and circumstances that illustrate some of the complexities of cemetery law. When someone dies testate, an executor may have a right to initially bury the decedent's body or remove the body to a different burial site based on the decedent's wishes expressed in their will or testament, but this right is not absolute.[200] In *Welch*, the decedent was buried in a church cemetery at the direction of her executor, who was her son, as stated in her will.[201] Almost two years after the burial, the decedent's husband sought and was granted a permit from the Georgia Department of Human Resources (DHR) under the authority of Section 31-10-20(f), Georgia Code Annotated, to disinter his wife's remains for reburial in land dedicated as the family's cemetery in Mountain City.[202] The husband died shortly thereafter, and the son applied for another permit to disinter his mother's remains and move them to Virginia, against the wishes of the other siblings.[203]

The trial court found that the executor son had "completely satisfied his obligation as executor by directing his mother's burial as instructed by the will."[204] The court further held: "after the initial burial and the death of the testator's husband, the right to control the remains rests in the next of kin, upon a showing that disinterment and reburial are justified by laudable purposes or necessity."[205] If an executor has authority relating to burial or disposition of a body, that authority "terminates after initially discharging any such obligation" in accordance with the will and testament, so the disinterment and reburial by the husband was valid.[206] The Georgia Supreme Court found that the trial court correctly entered a permanent injunction against the second disinterment request by the decedent's son because other siblings were also the next of kin and thus were entitled to authorize the disinterment.[207] Additionally, when looking for "necessity" or "laudable purposes" in allowing a disinterment, the

199. *Tully*, 177 S.E.2d at 50 (quoting 25A C.J.S. Dead Bodies § 4(1) at 496 (1966)); *see* GA. CODE ANN. § 36-72-1 (establishing that human remains are not property to be owned by the person or entity which owns the property where the human remains are interred or discovered but are a part of the "finite, irreplaceable, and nonrenewable cultural heritage" of Georgia and warrant protection).

200. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

201. *Id.* at 471.

202. *Id.* The DHR regulation cited by the Georgia Supreme Court no longer exists.

203. *Id.*

204. *Id.*

205. *Welch*, 505 S.E.2d at 471.

206. *Id.* at 472.

207. *Id.*

trial court did not abuse its discretion by considering the fact that decedent's body had already been disinterred and reburied once before.[208]

Welch was decided in 1998, and the Georgia Supreme Court cited secondary sources for the proposition that "equity has jurisdiction to afford relief in cases of threatened disinterment, disturbance, and removal of human remains,"[209] even though the A&R Act of 1991 places the power to make decisions and issue permits regarding cemeteries with counties or municipalities.[210] Though the court did not follow the factors outlined in the A&R Act, the court allowed the executor to carry out his fiduciary duties, supported the right of the husband as next of kin to disinter and relocate his wife's remains, and then balanced the rights and interests of the executor against the rights and interests of a *majority* of his next of kin siblings.[211] Where *Walker* supported disinterment and relocation when only one descendant among numerous others protested, *Welch* demonstrates the value of a majority of the next of kin descendants submitting a proper and timely request for a court to deny disinterment rights.

2. Questions of Fact and Changing Land Use

In the context of abandonment and relocation issues, the most recent case in Georgia cemetery law is *City of Sandy Springs v. Mills*. The case involved a 1900 deed that John Heard executed in favor of eight named individuals for a one-acre tract of land to be used only as a family burial ground.[212] One hundred and six years later, the plaintiff acquired the property after a tax sale with the grantor—listed as Carl Heard, one of the eight named individuals on the 1900 deed—and after an affidavit of descent and a series of quitclaim deeds.[213] The plaintiff-landowner then sought to build a single-family residence on the portion of the one-acre tract that did *not* have graves, but the city denied his permit application.[214] After the plaintiff-landowner filed suit and the city answered, twenty-eight descendants of John Heard intervened, seeking a declaratory judgement that the cemetery was not abandoned.[215] It was undisputed and confirmed by an archeologist that approximately one-fifth of the one-acre tract contained twenty or more human graves arranged in clusters and rows, as well as the remnants of a fence.[216]

---

208. *Id.*
209. *Id.*
210. GA. CODE ANN. § 36-72-3 (West 2022).
211. *Welch*, 505 S.E.2d at 472.
212. City of Sandy Springs v. Mills, 771 S.E.2d 405, 406 (Ga. Ct. App. 2015).
213. *Id.*
214. *Id.*
215. *Id.* at 407.
216. *Id.*

The trial court and the Georgia Court of Appeals majority agreed that the descendants had an "easement in the cemetery limits," but a genuine issue of material fact existed as to whether the cemetery had been abandoned and precisely what portions of the land had been deeded—and thus dedicated—for cemetery purposes.[217] The appellate court cited *Walker* to emphasize that easement rights pass to descendants until descendants abandon the easement or the bodies are disinterred.[218] The court then explained that abandonment is a mixed question of law and fact and applied public cemetery dedication principles to the private, family cemetery at issue.[219] The court also noted several factual disagreements and arguments between the parties. One side pointed to the cemetery deed and community knowledge of the "Heard Family Cemetery," and the other side emphasized that no burials had occurred since 1971 and no descendants either maintained or paid the taxes on the cemetery property.[220] The Georgia Court of Appeals affirmed the trial court's ruling that denied summary judgement and sent the issue of abandonment to a jury.[221]

Judge McMillian concurred, specially noting the case lacked precedential value under Georgia law.[222] Judge McMillian then mapped out the key pillars in Georgia cemetery law, pointing out the expansion of Georgia law through the A&R Act, which had updated pre-existing provisions cited in *Walker*.[223] Judge McMillian's opinion also emphasized that disinterment and relocation permits for disinterment required by the A&R Act exist not only for land development but also for *changing land use*, which the judge argued was the key issue in the case given that the entire one-acre parcel had been deeded for cemetery use in 1900.[224] Finding the entire parcel to be a "burial ground" as defined by statute, Judge McMillian argued the entire parcel had been dedicated as a *private* family cemetery and had not been used for anything other than that purpose.[225] Judge McMillian then agreed that the issue of whether

217. *Mills*, 771 S.E.2d at 407.

218. *Id.* at 408.

219. *Id.*; *see* Arlington Cemetery Corp. v. Bindig, 95 S.E.2d 378, 382 (Ga. 1956) (finding a valid public dedication of a cemetery where no intent or fact of abandonment was alleged but reasoning that a license or permit to establish a cemetery is a personal privilege and once the public dedication for a cemetery occurs, a license or permit remains with the land even after subsequent sales and county zoning changes, so long as the cemetery has not been abandoned).

220. *Mills*, 771 S.E.2d at 408.

221. *Id.* at 409.

222. *Id.* at 409 n.1 (McMillian, J., concurring).

223. *Id.* at 410.

224. *Id.*

225. *See Mills*, 771 S.E.2d at 410 n.4 (McMillian, J., concurring) ("[A] burial ground is to 'include' privately owned burial plots, suggesting that the term 'burial ground' also includes other portions of the property used for its dedicated purpose.").

the cemetery had been abandoned was proper for a jury to decide, pointing out that even if the jury found the cemetery to be abandoned, the plaintiff would still need a permit from the city, which the city had already denied.[226] Judge McMillian argued that based on the text of Section 36-72-4, Georgia Code Annotated, the statute "appears to apply to the development of all burial grounds and cemeteries, whether abandoned or not," and creates municipal discretion on whether to preserve and protect abandoned cemeteries and burial grounds by controlling permits—a discretion related to the power to acquire land through eminent domain.[227] Finally, Judge McMillian noted that the confusing issue of the remnants of a fence dividing the land—a frequent situation in easement by prescription, adverse possession, and abandonment cases—was a key question to be resolved at trial, though that issue did not change his view that the entire one-acre tract had been deeded and thus dedicated for cemetery purposes.[228]

D. *Common Law Takeaways*

Georgia courts have generally followed and incorporated Oklahoma's *Heiligman* rule that descendants' cemetery easement rights pass with title.[229] Georgia courts also appear to follow this rule across the spectrum of "public" and "private" cemeteries, finding that easement rights only end with abandonment or permitted removal.[230] If a valid easement is created, a purchaser of land takes the land subject to the dedication and use for cemetery purposes.[231] Neither public dedication of cemetery property either for express or implied public use or to a city or municipality—nor private title to land that contains an exclusive right of burial for the owner or for a stranger—appear to be affected by the dissolution, mere nonuse, or sale of a cemetery.[232] At a minimum, the easement is not affected for the easement holder or the easement holder's

226. *Id.* at 410. *But see* Mary Catherine Joiner & Ryan M. Seidemann, *Rising from the Dead: A Jurisprudential Review of Recent Cemetery and Human Remains Cases*, 45 OHIO N.U. L. REV. 1, 21 (2019) ("[T]he only inquiry should be whether human remains, once interred or entombed, are removed from the property.").

227. *Mills*, 771 S.E.2d at 411 (McMillian, J., concurring).

228. *Id.*

229. *E.g.*, Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) ("When a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created . . . *The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority*.").

230. *Id.*; *see Mills*, 771 S.E.2d at 408 (majority opinion) (applying the *Heiligman* rule to a private, family cemetery).

231. *Walker*, 339 S.E.2d at 730.

232. *Id.*; *Mills*, 771 S.E.2d at 408.

descendants until abandonment or relocation with permit, and even with relocation, the easement may continue to exist in the new location.[233]

While the *Walker* case remains the most encompassing decision in Georgia regarding easement rights, questions remain as to the exact nature of such rights. *Walker* indicates that although easement rights terminate upon permitted removal at a given cemetery location, these rights might remain with the descendants of the buried at the relocated cemetery site—even if this easement "transfer" is not explicit in statutory law, common law, or general property law.[234] Other legal analysis and commentary, discussed below, supports this principle hypothetically, and perhaps certain legal mechanisms could be used to better pinpoint it as a practical matter.

Hughes is a key case for both understanding the line between public and private cemeteries and how reviewing courts may analyze relocation permitting decisions. The factual line between public and private cemeteries may be blurry and contested, as also seen in *Mills*. Upon a determination of abandonment, trial courts have the discretion to find facts that support relocation, and a reviewing court may be unlikely to overturn those factual findings.[235] While determining the public or private status of a cemetery may be crucial in some contexts, that determination may be less important than whether the cemetery can be relocated, especially when faced with increased flooding, erosion, and storm surge.[236] Either way, *Hughes* reiterates that relocation requires following the outlined statutory permitting process, with some flexibility and deference to the local governing authority.[237]

The most important takeaway from *Hughes* is not the holding but the rationale that removal and relocation can help preserve "cultural heritage" as well as ensure respect for human remains and burial objects.[238] While a statutory presumption exists "in favor of leaving the cemetery or burial ground undisturbed," this presumption can be outweighed if the permitting requirements are met and if the permitting factors are adequately addressed.[239] This *Hughes* reasoning points to a

233. *Walker*, 339 S.E.2d at 730.

234. *Id.*

235. *See* Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994) ("There is evidence in the record which supports the trial court's conclusions of fact that, due to lack of maintenance and inappropriate surroundings, relocation would preserve rather than destroy 'cultural heritage of this county and this cemetery.'").

236. *Id.*

237. *See id.* at 408 ("The [lower] court found that [the] application [for relocation] contained all of the elements required under § 36–72–5.").

238. *Id.* at 409.

239. GA. CODE ANN. § 36-72-8 (West 2022); *see* Atilano v. Bd. of Comm'rs of Columbia Cnty., 541 S.E.2d 385, 385–86 (Ga. 2001) (finding that the trial court properly considered

path forward for the relocation of cemeteries and removal of human remains for communities that so desire in the face of climate change. If the presumption in favor of non-disturbance can be overcome *and* relocation can help preserve cemeteries, judicial decisions that primarily served to support and defend development interests might also inadvertently help cemeteries survive rising sea levels.

Welch, especially in contrast to *Walker*, shows the importance of family easement holders taking an interest in their cemetery plots. A clear majority of an easement holder's descendants may be sufficient to persuade courts to not only enjoin disinterment as in *Welch*,[240] but also to permit disinterment in the name of preservation as in *Hughes*.[241] The *Mills* case, especially Judge McMillian's concurrence, best summarizes the current status of Georgia cemetery law and highlights the tension between case law and statutory requirements—perhaps charting the best path forward.[242] Judge McMillian emphasized that the relocation permit provisions in the A&R Act apply to all Georgia cemeteries, regardless of public or private status and whether they are abandoned.[243] Moreover, relocation permits are intended and created for the very purpose of addressing changing land use, not only development interests.[244] With the increased erosion, flooding, and storm surge bringing on sea level rise, Georgia's coastal cemeteries will at least experience changing land use, to put it mildly.

V. ANALYSIS AND DISCUSSION

Georgia cemetery law involves an intricate web of considerations, from perpetual care and maintenance to abandonment and inherited (or perhaps relocated) easements and from public dedication to private access and changing land use. Communities interested in preserving and protecting their vulnerable cemeteries in the face of sea level rise have important decisions to make, and they need to be proactive about planning and obtaining the funding, labor, expertise, and permits to accomplish their goals. Regardless of what decisions communities make on whether to abandon or relocate cemeteries or how to mitigate the effects of sea level rise, legal and practical obstacles exist that require community-based decision-making.

---

statutory factors and that the county's interest in relocating the cemetery outweighed all competing interests where only one of nine known descendants opposed the trial court's ruling).

240. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

241. *Hughes*, 441 S.E.2d at 409.

242. City of Sandy Springs v. Mills, 771 S.E.2d 405, 410–11 (Ga. Ct. App. 2015) (McMillian, J., concurring).

243. *Id.* at 411.

244. *Id.* at 410.

A. *"Easement Come, Easement Go"*:[245] *Deciphering the Cemetery Easement*

The cemetery lot is treated unlike almost any other piece of real or personal property.[246] Most states treat cemetery rights as easements or licenses that pass directly to heirs without the need for administration, and Georgia appears to be no exception.[247] While the easement right might also be acquired through adverse possession or prescription, this process seems to largely predate modern cemetery law, including Georgia's statutes for abandonment, relocation, and perpetual care.[248] Additional rights and responsibilities may develop, such as the right to sue for trespass, but other rights, such as the right of ejectment, often do not.[249] Constitutional takings claims are almost universally limited,[250] though Georgia case law indicates those seeking to disinter and relocate graves may need to pay just compensation for the cemetery plot easement, at least to descendants who protest,[251] even in the absence of a valid takings claim.[252]

Georgia law is clear enough that easement rights pass to the heirs at law, both at common law[253] and based on the A&R Act's requirement that a genealogist plan's must be used to locate and contact descendants.[254]

1. The Cemetery Easement

The precise legal nature of the cemetery easement right, however, is less clear. Allen Shaffer has referred to the right to access the grave as a "pseudo-easement," developed out of English common law because the burial of the human body was only a temporary appropriation of space, an "accession to realty."[255] The limited space in English churchyards led to this view—widely shared throughout Europe today—but perhaps the sheer physical space and sense of manifest destiny in the United States

245. *See generally* J. Dwight Tom, *Easement Come, Easement Go—The Cemetery Access Easement: The Exception to the Right to Exclude Whose Time Has Come to Facilitate the Preservation of Nineteenth-Century Texas Family Cemeteries*, 39 ENV'T. L. & POL'Y J. 173 *passim* (May 2016) (discussing cemetery easement rights in the context of Texas law).

246. R.S., *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378, 378 (Jan. 1961).

247. *Id.* at 379.

248. *Id.*

249. *Id.* at 393; Stewart v. Garrett, 46 S.E. 427, 427 (Ga. 1904).

250. R.S., *The Cemetery Lot*, *supra* note 246, at 381 n.25.

251. Walker v. Ga. Power Co., 339 S.E.2d 728, 731 (Ga. Ct. App. 1986).

252. City of Sandy Springs v. Mills, 771 S.E.2d 405, 407 (Ga. Ct. P.App. 2015) (finding no taking in the city's denial of a permit to develop cemetery property).

253. *Id.* at 408.

254. GA. CODE ANN. § 36-72-5(4) (West 2022).

255. Shaffer, *supra* note 13, at 486.

led American cemetery law down a different path. The American path opted instead for eloquent and sometimes grandiose court language that sanctified the dead and created legal fictions out of thin air,[256] eventually leading to the position that "when a body is once interred it shall so remain unless extreme necessity demands its disinterment."[257]

Alfred Brophy more recently deemed the right to access graves by descendants as an "implied easement in gross," which he traces to statutes and case law in many states.[258] Although the term "implied easement in gross" does not appear in the Georgia statutory scheme, it aligns with the way Georgia common law describes cemetery access easements.[259] Unpacking the implied easement in gross, Brophy describes the right as "an easement in gross to cross private property to access a cemetery . . . held by relatives of the person buried in the cemetery . . . [that] descends by operation of law but it is neither devisable [nor] alienable."[260] The permission to bury carries with it an implied permission for relatives to visit the property, and the fact of burial serves as the implied proof of that permission.[261]

Brophy's concept of an implied easement in gross is based on basic property law principles regarding easements. In property law parlance, the land used by or "serving" an easement is referred to as the servient tenement or estate, and the land served by or benefitting from the easement is known as the dominant tenement or estate.[262] While an easement appurtenant typically requires two tracts of land—both the servient and dominant estates—and runs with the land through changes in ownership by express mention in a deed, an easement in gross typically involves a personal right to ingress and egress over the land.[263] Easements in gross essentially belong to the individual but are not transferable, at

256. *E.g.*, Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905) ("Death is unique. It is unlike aught else in its certainty and its incidents."); Ga. Lion's Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (discussing the "quasi property right" in a dead body).

257. Shaffer, *supra* note 13, at 486 (quoting King v. Frame, 216 N.W. 630, 633 (Iowa 1927)) (internal quotations omitted).

258. Alfred Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, BYU L. REV. 1469, 1472 (2006).

259. *Id.* According to Brophy, while the cemetery easement exists by statute in 20% of states, it exists by case law in many other states. Also, while some variation may exist between states, the common law easement seems to be the standard. *Id*. at 1482; Tom, *supra* note 245, at 175–76.

260. Brophy, *supra* note 258, at 1479.

261. *Id.* at 1479–80.

262. DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE WITH FORMS § 8:2 (7th ed. 2021).

263. *Id.* §§ 8:3–4; Adam Leitman Bailey & Israel Katz, *Analyzing Easement Laws and Cases in the States East of the Mississippi River*, 31 PROB. & PROP. 1, 2–3 (Jan./Feb. 2017).

least not at common law, whereas easements appurtenant continue to exist after land ownership changes between individuals or entities.[264]

With cemeteries, if a cemetery is sold, the cemetery easement stays with the easement holder.[265] If the easement holder dies, the easement passes to the holder's descendants,[266] which is not common to easements in gross. While the cemetery easement appears to stay with the land like an easement appurtenant,[267] and does not terminate at the death of the easement holder like an easement in gross,[268] the easement in gross moniker for cemetery easements is appropriate because cemetery plots do not contain both a dominant and servient estate and instead involve one plot of land with an individually held right of access.

However, special considerations apply to cemetery easements that are nonexistent for easements in gross. For example, even when burial land is sold multiple times, the cemetery easement for relatives, or at least the next of kin, still exists.[269] Perhaps more importantly, the fact that the cemetery easement is tied to the next of kin and not the land implies that if the cemetery is relocated, the easement remains with the next of kin in the new location. This implication could be particularly important in the context of climate change.

2. The Climate Change Dilemma

While the bulk of Georgia case law relates to development pressure on cemetery property, sea level rise could create an alternate and seemingly counterintuitive situation in which cemetery advocates, descendants, or community groups might choose to remove and relocate a cemetery, reasoning like the *Hughes* court that relocation would preserve rather than destroy the cemetery's cultural and historical significance.[270] The special nature of the cemetery easement—an implied and inheritable easement in gross that is "neither devisable nor

264. Alan D. Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 110–11 (1986); Bailey & Katz, *supra* note 263.

265. Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959).

266. *See* Brophy, *supra* note 258, at 1479 ("The easement is held by the relatives of the person buried in the cemetery, and it descends by operation of law.").

267. Courts typically favor construction of easements appurtenant. HINKEL, *supra* note 262, § 8:4.

268. *See* Bailey & Katz, *supra* note 263, at 3 ("The traditional view is that all easements in gross are unassignable and non-inheritable.").

269. R.S., *The Cemetery Lot*, *supra* note 246; Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959); City of Sandy Springs v. Mills, 771 S.E.2d 405, 408 (Ga. Ct. App. 2015).

270. *See* Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994) ("[R]elocation would preserve rather than destroy 'cultural heritage of this county and this cemetery.'").

alienable"[271]—could not only imply inheritability but also the ability to transfer or relocate the easement in a new reinterment location.

If descendants are able to meet the extensive statutory permitting requirements under the A&R Act,[272] raise the capital necessary to fund the requisite expertise, and acquire relocation land, the question arises as to whether descendants—as easement in gross holders—would retain the easement to visit their deceased ancestors in the new cemetery location, which is at least implied in *Walker*.[273] Since such an endeavor would likely require ownership of the new cemetery location by an individual or entity,[274] perhaps a non-profit or land trust, ownership could create or allow a right of access even if an easement right no longer existed. Problems could arise, however, as they do in much of Georgia cemetery case law, with future generations when those who relocated the cemetery are no longer alive and their descendants try to exercise in the new location what were formerly easement rights in the old location. These easement rights would not only have to be passed by descendancy—already an unusual quality of the cemetery easement—but also be able to transfer between two parcels of land, which is not even typical of an easement in gross.[275] Thinking to the future when dealing with old human remains is part of the puzzle. In short, climate change's implications for cemetery law are going to lead to a long game.

The *Walker* case offers some insight into how this game could play out. In that case, only one descendant protested the cemetery disinterment and relocation, and even in the context of what seemed like a long, drawn-out process, the descendant filed with the permitting county too late to have a valid claim.[276] The special master awarded "actual" market value, a mere twelve dollars to the descendant, and because the cemetery had been removed according to statute, the superior court claimed that the descendant retained the same rights she held in the previous cemetery, except in the new location.[277] This precedent at least indicates that a cemetery easement could move or otherwise transfer to a new location with the same easement holder. However, without statutory clarity, the *Walker* case—which predates both the Perpetual Care Act and the A&R Act—might rest on sinking sand for descendants seeking surety that their easements rights can relocate intact.

---

271. Brophy, *supra* note 258, at 1479.

272. GA. CODE ANN. § 36-72-5 (West 2022).

273. *Walker*, 339 S.E.2d at 730–31.

274. This ownership would require compliance with the requirements of the Perpetual Care Act, such as registration. GA. CODE ANN. § 10-14-4 (West 2022).

275. Bailey & Katz, *supra* note 263.

276. *Walker*, 339 S.E.2d at 729.

277. *Id.*

B. *Land Ownership and Control Options: Court-Appointed Receivers and Trusts*

Some scholars point to the need for a more comprehensive approach to dealing with cemeteries, especially abandoned ones.[278] Shaffer argues that cemetery protectors and real estate developers alike are able and willing to represent and advocate for their perspectives but often overlook the rights of descendants.[279] Part of the problem Shaffer identifies is the political and economic pressure on local officials who are sometimes tasked with the under-funded care of cemetery sites.[280] Referencing an old church cemetery in Ohio, whose corresponding church long since dissolved, as a paradigm for small rural family and church cemeteries, Shaffer explains how the fee interest in the land was transferred to the trustees of a local township almost one hundred years later, after having been originally gifted by a Revolutionary War soldier to his church.[281] No maintenance funds were associated with the transfer, even though Ohio, like Georgia, appears to have more recently crafted legislation for the continuing maintenance and funding of modern cemeteries through trusts.[282] Distant relatives living in other areas found that they lacked legal standing to challenge the township trustees' performance in conducting care and maintenance of the cemetery, especially with encroaching highways, oil and gas speculation, and gas station development.[283] For Shaffer, this paradigm demonstrates that "the usual adversarial system fails because there is no one with standing to represent the dead."[284] He proposes a "court-appointed receiver" to manage cemetery property rights through the adversarial process.[285]

1. Court-Appointed Receivers

One of the problems that a court-appointed receiver would combat is local officials acquiring both the fee simple interest in the land constituting the cemetery and "the easement of the deceased in trust." Shaffer argues that various groups have economic interests in uninhibited land development, while others are averse to additional taxation for the maintenance of cemeteries containing distantly related or unrelated, long-dead persons.[286] Some may simply favor historic preservation and

278. Shaffer, *supra* note 13, at 480.

279. *Id.*

280. *Id.*

281. *Id.* at 480–81.

282. *Id.* at 481.

283. Shaffer, *supra* note 13, at 480–82. Apparently, the township claimed the cemetery grounds suffered from a rattlesnake infestation. *Id.* at 481.

284. *Id.* at 479–80.

285. *Id.* at 480.

286. *Id.* at 493.

resistance to urban sprawl.[287] The court-appointed receiver is thus intended to represent the interests of the dead and buried and "fulfill their original expectations of perpetual interment in that place with perpetual care of the site."[288] Shaffer envisions that the receiver would be chosen by the court as a paid but forced volunteer or as a legitimate volunteer from community or church groups, historical societies, or other non-profit entities.[289] The court-appointed receiver would be able to "receive" the easement interest in the cemetery plot as a separate legal interest from the cemetery itself, thus at a minimum providing "standing to the dead" for legal actions, fundraising issues, and lawful relocation—relying on the adversarial legal system to work out the details.[290] Shaffer further advocates coupling this receiver with a state-level funding scheme to carry out the statutory mandates and "fulfill the reasonable expectations of the decedents."[291] The combined effect would be to move maintenance costs of abandoned cemeteries to court-ordered trustees with funding.[292]

While Shaffer's suggestions do not exactly fit into Georgia's legal framework, his court-appointed receiver idea has some surface appeal for cemetery disinterment and relocation in the context of sea level rise. To begin, Georgia's relocation statute, the A&R Act, does not impose mandatory requirements on counties and municipalities to preserve and protect abandoned cemeteries—the decision on whether to do so is discretionary.[293] The fact that these decisions are merely discretionary for local officials further supports the idea of using a court-appointed guardian or receiver to better address the problems that coastal family and church cemeteries will face with erosion, flooding, and storm surge. Clear leadership with financial backing would almost certainly be productive for attempts at mitigation and relocation.

Georgia law does not indicate that cemetery easement rights escheat to the state or local governing authority, though the local authority does have the legal right to permit relocation over and above descendant

287. *Id.*

288. Shaffer, *supra* note 13, at 493. Notably, Shaffer cites two Georgia cases—*Warner v. Warner* and *Shingler v. Shingler*—for situations where a court of equity appointed receivers to handle family trust-related disputes and manage fiduciary duties. Neither of these cases, however, relate to Georgia cemetery law.

289. *Id.* at 496.

290. *Id.*

291. *See id.* at 497 (noting a failed attempt in Wisconsin to allocate 15% of cemetery sales to accomplish this goal and reasoning that perpetual care cemeteries with trust funds will not have these needs).

292. *Id.*

293. *See* GA. CODE ANN. § 36-72-3 (West 2022) (explaining that counties and municipalities are *authorized* to preserve and protect abandoned cemeteries); *see also* Smith v. Pulaski Cnty., 501 S.E.2d 213 (Ga. 1998) (holding that Section 36-72-3, Georgia Code Annotated, authorizes but does not compel a county to preserve and protect abandoned cemeteries).

protests,[294] so long as it appropriately follows the statutory requirements. Nonetheless, descendants or cemetery advocates who hope to preserve human remains or burial objects endangered by sea level rise—if they can accrue the property rights, money, and expertise needed to apply for a relocation permit[295]—may benefit from having a court-appointed authority to either support their efforts or serve as a point of access to the court system should a county or municipality choose not to issue a permit. A similar approach could be to seek a declaratory judgment from a court or court-appointed liaison that the appropriate statutory permit requirements were met, perhaps even authorizing or rubber-stamping final disposition permits as a type of "local registrar." This route is less likely to be effective for the very fact that the A&R Act leaves permit discretion to the locality.[296] A court will probably only review a permit application on its merits *after* a permit denial, not before.[297] A court-appointed receiver, on the other hand, could be a neutral individual to whom a court, county, or municipality would defer in precarious, time-sensitive, or emotionally and spiritually fraught circumstances. Indeed, the receiver could be the cemetery advocate, descendant, or community group itself.

2. Trusts

Another possible mitigation technique for cemetery advocates could be the use of trusts to raise and establish capital and to preserve and protect land. As noted, the Perpetual Care Act establishes legal registration and trust funding requirements for private, commercial perpetual care cemeteries.[298] The ownership, control, and financing achieved under the Act theoretically allows for more flexibility and means for preserving and protecting cemeteries. Commentators have noted, however, that even these funds are often not enough to provide for basic "care and maintenance," and perpetual care cemeteries are often subject to similar types of disagreements and conflicting priorities on when and what to take care of and how to maintain the grounds and headstones.[299] Nonetheless, some sort of fundraising mechanism that

294. *See* GA. CODE ANN. § 36-72-8(2) (West 2022) ("The governing authority shall consider the following in making its determination: . . . (2) The concerns and comments of any descendants of those buried in the burial ground or cemetery and any other interested parties."); *e.g.*, Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) (allowing relocation of a cemetery despite protests by one descendant).

295. GA. CODE ANN. § 36-72-5 (West 2022).

296. *Id.* § 36-72-3.

297. *See id.* § 36-72-11 ("Should any applicant or descendant be dissatisfied with a decision of the governing authority, he or she, within 30 days of such decision, may file an appeal in the superior court of the county in which the cemetery or burial ground is located.").

298. GA. CODE ANN. § 10-14-4 (West 2022).

299. Aton, *supra* note 8.

could be organized and agreed upon by advocates and descendants is crucial for the possibility of disinterment and relocation when flooding, erosion, or storm surge brought on by sea level rise becomes an inescapable reality.

In fact, the fundraising should begin immediately in the most vulnerable areas based on predictions by the National Oceanic and Atmospheric Administration (NOAA) or other reasonable modeling. Family, church, and community groups should organize around cemeteries they know need protecting or have already invested preservation time, energy, and funds into maintaining. The most proactive and modern methods of raising, multiplying, and storing capital, however, may be too inefficient and ineffective to finance cemetery relocation without broader policy and statutory support. This support, unfortunately, might only come once the ice caps have melted and two, three, or four feet of sea level rise occurs. Only then, when concurrent erosion, flooding, storm surge, and standing water overwhelm places that have never experienced such phenomena, will broad policy changes be possible. Realistically, the best bet is to organize and prioritize at-risk communities and properties and arm them with the information and procedure needed to strategize their goals. The trust funding of modern perpetual care cemeteries exemplifies one way to set up this process.[300]

Land trusts and land banks are another worthwhile consideration. One of the few analyses of Georgia cemetery law, completed as a thesis project by a historic preservation student named Jason Smith, argues that private, nonprofit land trusts could serve as an effective organizational model for cemetery preservation.[301] Smith emphasizes the express purpose of land trusts in administering and protecting parcels of land in perpetuity, as well as their increasing popularity.[302] Smith also notes the quasi-public nature of many land trusts, including public management and frequent ties to government agencies, which could facilitate custodial monitoring and protection[303]—or in the case of rising seas and flooding, could facilitate disinterment and relocation permitting. In discussing conservation easements as a corollary to land trusts, Smith examines the tension between what he calls an easement in perpetuity, which lasts forever, and an easement in gross, which "takes rights away from one property while not simultaneously granting rights to another," claiming

300. GA. CODE ANN. § 10-14-6(b)(1) (West 2022).

301. Jason Oliver Smith, The Use of Land Trusts to Preserve Graveyards in the American Southeast *passim* (Dec. 2001) (Master of Historic Preservation thesis, University of Georgia).

302. *Id.* at 70–71.

303. *Id.* at 71.

very few state laws allow easements in perpetuity to be acquired by any party other than nonprofit corporations and government entities.[304]

The merits of this contention aside, Smith's primary concern lies with cemetery conservation, similar to much of Georgia case law. If, as *Hughes* suggests, preservation and protection are sometimes best accomplished by relocation,[305] the choice of entity by the relocators and their relation to state and local government remain very important considerations. Absent policy changes that require or encourage government actors to "take title" of cemeteries in need of relocation—a dubious legal proposition in itself—those desiring relocation could benefit from the quasi-public status of non-profit land trust organizations that facilitate acquisition of property rights. Perhaps these organizations could also help secure descendants' in-gross easement rights by establishing them more clearly "in perpetuity" through deeds or court orders. A land trust organization could own both the original and the relocated cemetery property and more easily manage the transfer of descendants' rights between the two. The organization could leverage that ownership to ensure the transfer of rights while also serving as an advocate before the county, municipality, court, or court-appointed guardian.

C. *Equity and Fairness with Human Remains in Marginalized Communities*

One final aspect of cemetery law largely absent from Georgia statutes and cases is the role that equity and fairness play in cemetery controversies. As noted at the outset, communities of color will be particularly hard hit by the changes that will come with sea level rise.[306] As in so many modern circumstances, the contrast will also be stark between those that have means and access to power and those that do not. Persuasive legal scholarship and practical experience related to these issues already exists.[307] A complete conversation about equity and fairness concerning Georgia coastal cemeteries merits specific analysis, probably by someone directly connected to frontline communities of color in impoverished coastal areas. The Author is likely not the ideal candidate for such analysis, but a few preliminary concerns are worth mentioning in the current context.

---

304. *Id.* at 72.

305. Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994).

306. OWENS, *supra* note 2.

307. Engelhart, *supra* note 193; Brad Schrade, *After Missteps and Criticism, UGA to Honor Memory of Slaves on Campus*, ATLANTA J. CONST. (Sept. 7, 2018), https://www.ajc.com/news/state--regional/after-missteps-and-criticism-uga-honor-memory-slaves-campus/dja1Kp61WyTrzzr7BNsRkI/ [https://perma.cc/6YZG-GUV6].

1. Recognizing the Remains

While not coastal or frontline community cemeteries, both the University of Virginia (UVA) and the University of Georgia (UGA) had public controversies related to the treatment of human remains in what were most likely slave cemeteries on the university campuses. William Engelhart examines the UVA controversy in detail and notes, "as a general matter and as a matter of outcomes, African American burial grounds have not received the same legal solicitude as White burial grounds."[308] Cemeteries, like other real property, have been historically "affected by . . . policies of racial segregation that appl[y] in both life and death."[309] This problem is exacerbated with abandoned cemeteries, where easement holders are unlikely to be known or found, leaving descendants with little or no rights even if notice is successful as part of a relocation permit.[310] The abandoned cemetery easement is also more likely to occur in the context of an unknown slave cemetery, where it may be "at worst extinguished, and at best, severely restricted."[311]

Another issue with abandonment when considering equity and fairness is the difference in the way communities choose to mark their burial grounds.[312] This issue has also been extensively documented with regard to African American and Native American cemeteries.[313]

---

308. *See* Engelhart, *supra* note 193, at 1–9 (claiming that the cemetery rights of the descendants of those slaves interred to the northeast of the UVA cemetery are arguably extinguished, or at best unclear, and noting that known and unknown slave cemeteries exist in many other places, on both public and private land, but the uneven application of common law in the United States creates inequity); Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487, 489–90 (2005) (arguing that the history of legal treatment of slave and other long-standing African-American burial grounds has been one of neglect or outright disregard, lacking the same or similar application of legal rights to the grave as white Americans).

309. Engelhart, *supra* note 193, at 10.

310. *See id.* at 11 ("[C]ourts typically require that a cemetery not be abandoned if burial ground rights holders are to have rights at all.").

311. *Id.* at 12.

312. *See id.* (citing a case where a cemetery was considered abandoned because no grave markers were found, even though the graves were not marked because the interred—who were Quakers—purposely did not erect tombstones out of fear of desecration).

313. *See* CHICORA FOUND., GRAVE MATTERS: THE PRESERVATION OF AFRICAN-AMERICAN CEMETERIES 4–7 (1996), https://www.chicora.org/pdfs/Grave%20Matters%20-%20The%20Preservation%20of%20African%20American%20Cemeteries.pdf [https://perma.cc/R9JS-J6Q5] (noting the variety of ways in which African American cemeteries were marked or not marked, including stones, shells, plants, wood slabs, and other "offerings" like pottery or human artifacts, often arranged in a non-linear or scattered manner around the burial ground in stark contrast, for example, to the neatly aligned rows of white crosses at Arlington Cemetery in Washington, D.C.); *see also* Zahra S. Karinshak, *Relics of the Past—To Whom Do They Belong? The Effect of an Archaeological Excavation on Property Rights*, 46 EMORY L. J. 867 *passim* (1997) (creating an analytical framework and key variables for land owners to understand the effect of significant archeological finds on their property); John B. Sinski, *There are Skeletons in the Closet: The*

Engelhart explains this lack of marking at UVA's African American burial ground as part the "oppressive reality of slavery and Jim Crow era policies," arguing it may be likely that slaves did not mark their graves out of fear of grave robbing.[314] In short, it is likely that the American legal regime tends to favor Eurocentric burial practices at the expense of various African American (and Native American) preferences found in the historical and archaeological record for different forms of memorialization.[315]

2. Establishing a Fair and Public Process

Equity issues with cemetery rights in abandoned cemeteries and the lack of recognition of the diversity of burial grounds formulate part of the fairness problem, but another concern is what to do with such burial grounds if or when they are found. This problem is relevant not only for known slave cemeteries but also for small coastal community cemeteries affiliated with churches or cemeteries now on private property that may be owned by wealthy families and were once inhabited by enslaved persons or owned by their descendants. The dialogue about appropriately addressing issues of equity and fairness in these situations is not a simple or straightforward conversation, as evidenced by the controversy regarding a discovered cemetery on UGA's campus.[316]

The UGA controversy arose when human remains were discovered while renovating Baldwin Hall, which is home to UGA's Anthropology and Political Science Departments.[317] After discovering the remains, UGA claimed to consult with the state's archaeology department on how to proceed, but it is not clear whether UGA sought a permit to disinter or relocate the human remains pursuant to Georgia law, and no party appears to have filed a lawsuit against UGA, which argues that it followed the law.[318] Community advocates, particularly in the African American

---

Repatriation of Native American Human Remains and Burial Objects, 34 ARIZ. L. REV. 187 *passim* (1992) (arguing American common law clearly establishes the right of all people, including Native Americans, to protect the burial sites of their ancestors, and to repatriate those remains that have been wrongfully removed from the earth).

314. Engelhart, *supra* note 193, at 12.

315. *Id.*

316. Marc Parry, *Buried Past: How Far Should a University Go to Face its Slave Past?*, THE CHRON. HIGHER EDUC. (May 25, 2017), https://www.chronicle.com/article/buried-history/ [https://perma.cc/P85T-3PFU] (noting the stark contrast between the information UGA sought and followed from the state's archeology office regarding reburial of African-American remains and the strong feelings of local leaders in the university's African-American community who desired a significant and extended period of public discussion).

317. *Id.*

318. *Id.* The faculty report mentions the legal requirements and penalties for knowingly disturbing a grave or disinterring human remains without a permit but also claims that the "accidental" nature of UGA's discovery freed the university from the burden of acquiring these permits. *Id.*

community, took serious issue with the way UGA handled the unmarked graves, particularly after UGA belatedly admitted analysis revealing that most of the graves were African Americans, probably slaves.[319]

The controversy centered around the lack of a clear, deliberative, inclusive, public process about the human remains, what to do with them, and their place in the larger context of UGA's history with slavery—and around the fact that the remains were quietly reinterned in advance of a planned memorial service.[320] UGA's faculty largely supported further inquiry into what happened and eventually issued a report on the matter.[321] Further publicity led to the creation of a documentary film entitled *Below Baldwin* published on YouTube.[322] The UGA History Department and other university members who felt disenfranchised from the process have since published informational websites on UGA's relationship with slavery.[323] While UGA initially contended that it followed the appropriate steps—and some members of the university's and city's African-American community agree—UGA seems to have recognized that it could have created a more inclusive process for handling the matter and eventually appointed its own task force to look into the matter.[324]

Exactly what UGA, as well as UVA, could or should have done is not entirely clear. The fact that large, state public universities, with their diverse membership and interests, were unable to establish a process or tell a story that adequately addressed issues of equity and fairness—or included the communities that wanted to be part of the conversation—points to the difficulty of the issue. Similar dilemmas will undoubtedly be forced upon coastal, frontline communities and their cemeteries as sea

---

319. *Id.*

320. Webpage about the Baldwin Hall Controversy, EHISTORY, https://slavery.ehistory.org/about [https://perma.cc/5ED5-ZZ9A] (last visited Sept. 3, 2022).

321. U. OF GA., REP. FROM THE AD HOC FAC. COMM. ON BALDWIN HALL TO THE FRANKLIN COLL. FAC. SENATE 4, 7, 10 (Apr. 17, 2019), https://www.franklin.uga.edu/sites/default/files/Faculty%20Senate%20ad%20hoc%20committee%20report%204-17-19.pdf [https://perma.cc/2NDB-JR5K] (noting the widely held community belief that Baldwin Hall was "built on the part of Old Athens Cemetery," "any time you have a historic cemetery, you almost always have graves outside the boundary," the lack of preliminary archeological review, and the "guiding principle" of those entrusted with the custody of human remains that the public should have their concerns addressed publicly and should hold some influence over decision-making).

322. Enlighten Media Prods., *Below Baldwin: How an Expansion Project Unearthed a University's Legacy of Slavery*, YOUTUBE (Oct. 9, 2020), https://www.youtube.com/watch?v=mwQcTfGqANQ [https://perma.cc/A4K7-VAR5].

323. *E.g.*, *African American Experience in Athens*, U. GA. LIBR., https://digihum.libs.uga.edu [https://perma.cc/9UZ3-WZL8] (last visited Sept. 3, 2022) ("[T]his site is a collaborative effort from community members and researchers from the University of Georgia from across the university examining the Black experience, an under-recorded history, in Athens and in the University from its founding to today.").

324. Parry, *supra* note 316.

levels rise. The lesson may be to plan ahead for difficult decision-making processes that need to be ably and fairly communicated to the public in a way that cedes power to participants designated by the affected communities while following the letter and spirit of the law.

VI. CONCLUSIONS AND NEXT STEPS: HOW TO PROTECT AND PRESERVE COASTAL CEMETERIES

Opportunities exist under current Georgia law to manage the threat of sea level rise by relocating at-risk coastal cemeteries. These opportunities, however, require community-based dialogue, financing, planning, expertise, and permits. Cemetery owners and advocates will need proof of ownership and control of the cemetery, expertise in the form of archaeologists and genealogists, comprehensive mitigation plans, and cost-covering measures. Owners and advocates must overcome the statutory presumption in favor of leaving the burial ground undisturbed by showing the county or court that relocation will preserve rather than destroy the cultural value of the cemetery.[325] A showing that failure to act will result in serious damage to or destruction of the cemetery—evidenced by changing land use already brought on by increased flooding, erosion, and storm surge of rising seas—may help.[326]

Understanding the human element of any proposed cemetery relocation effort is also crucial. Too often, abandoned or unidentified cemeteries have been the venue for a repetition of historical racial and tribal abuses. Advocates must go above and beyond what the law requires by opening the door to a significant and extended public discussion with descendants and community stakeholders about practical problems and spiritual concerns. This process would benefit from having court-appointed guardians or receivers to ensure the legal standing of the dead.[327] However, if courts, descendants, or community stakeholders resist relocation, one potential consequence could be the loss of cemeteries and human remains. Deciding who will be responsible for the costs of erosion and vandalism should be a part of any community decision not to relocate, since cemetery law may require these costs to be carried locally.[328] At some point, the costs may outweigh the benefits, and the best plan may be to leave the dead where they lay.

Lastly, descendants' legal rights to access relocated cemeteries need to be solidified. The cemetery easement has a winding history, and its application requires looking far into the future because cemetery issues most often arise generations after the dead are buried (or reburied). The

325. GA. CODE ANN. § 36-72-8 (West 2022); Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994).

326. No such argument has been made in a Georgia court to date.

327. Shaffer, *supra* note 13, at 480.

328. GA. CODE ANN. § 36-72-14(b) (West 2022).

rights to the grave remain some of the most emotionally and spiritually tinged human rights, so the more that can be done to alleviate ambiguity in the law on how those rights can be exercised or transferred, the better. A statutory change or court order clarifying the right of descendants to access the graves of their ancestors in relocated locations could ease descendant concerns and help clarify the legal status of the cemetery easement in the future. As a practical matter, "the past never cooperates by staying in the past."[329]

329. Parry, *supra* note 316.

APPENDIX: OVERVIEW OF HISTORIC AND NATIVE AMERICAN CEMETERIES

While Georgia statutes and cases create a framework for negotiating cemetery licensing, abandonment, and relocation, there exists another set of rules and regulations governing two more cemetery designations, which may overlap with other statutory designations. A "historic designation"—meaning the cemetery is listed on the National Register of Historic Places (NR) or the State List of Historic Places—creates a series of benefits and hurdles that property owners must navigate, even if the owner retains the ability to use the property within state law.[330] The designation confers no absolute power to protect or rescue property from imminent destruction or damage.[331] Prehistoric, Native American burial sites may also be eligible for listing on national and state registers, but other requirements exist for such burial sites.[332] While this Appendix does not provide an in-depth analysis of historic registration rights and responsibilities or the intricacies of federal Indian law and tribal rights, certain key points are worth discussing in the context of cemetery protection and relocation in the event of damage or possible destruction brought on by rising seas.

A. *National Register of Historic Places*

The NR is a federal program administered by the National Park Service under the Department of the Interior.[333] A federal statute created the NR in 1966, and the Historic Preservation Division administers the program in Georgia.[334] Cemeteries hold a unique place in the NR listing because even if cemeteries have historic value, they may not be part of a "historic district" that meets NR criteria.[335] "National cemeteries," on the other hand, have been congressionally designated as nationally significant places of commemoration and burial, which means they meet the NR Criteria Considerations for cemeteries and graves that are less than fifty years old and qualify as "historic districts" on their own.[336]

---

330. VAN VOORHIES, *supra* note 18, at 22–23.

331. *Id.*

332. *Id.*

333. *National Register of Historic Places*, NATIONAL PARK SERV., https://www.nps.gov/subjects/nationalregister/index.htm [https://perma.cc/ZY2N-K2RE] (last visited Sept. 3, 2022).

334. National Historic Preservation Act, 16 U.S.C. § 470; VAN VOORHIES, *supra* note 18.

335. ELIZABETH WALTON POTTER & BETH M. BOLAND, NATIONAL REGISTER BULLETIN 41: GUIDELINES FOR EVALUATING AND REGISTERING CEMETERIES AND BURIAL PLACES 15–16 (1992).

336. NAT'L PARK SERV., NATIONAL REGISTER ELIGIBILITY OF NATIONAL CEMETERIES – A CLARIFICATION OF POLICY (Sept. 8, 2011), https://www.nps.gov/subjects/nationalregister/upload/Final_Eligibility_of_VA_cemeteries_A_Clarification_of_Policy_rev.pdf [https://perma.cc/3YV3-KPCW].

Ordinarily, "cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past fifty years" are not considered eligible for the NR.[337] Certain exceptions apply, however, if cemeteries are already "integral parts" of historic districts.[338] These exceptions include: (1) religious properties that derive their "primary significance from architectural or artistic distinction or historical importance"; (2) a building or structure removed from its original location but is primarily significant for architectural value or is the surviving structure most importantly associated with a historic person or event; (3) a birthplace or grave of a historical figure of outstanding importance; (4) a cemetery that derives its "primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events"; (5) a reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan and when no other building or structure with the same association has survived; (6) a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; (7) a property achieving significance within the past fifty years if it is of exceptional importance.[339]

While these exceptions may not often include small family cemeteries or church cemeteries without a surviving church building, larger city or municipal cemeteries—such as Oakland Cemetery in Atlanta, Georgia, or Laurel Hill Cemetery in Savannah, Georgia—have each fell within an exception, as have a number of church cemeteries with adjoining and surviving historic church buildings.[340] Notably, structures that are removed could potentially be given an exception and listed on the NR if they are "importantly associated with a historic person or event"[341]—at least creating the possibility that coastal cemeteries relocated under the proper permitting procedures could obtain a listing that might help with funding or preservation when such cemeteries face erosion, flooding, or storm surge.

337. NAT'L PARK SERV., NATIONAL REGISTER CRITERIA CONSIDERATIONS: IMPLICATIONS FOR FEDERAL PRESERVATION OFFICERS 1 (Nov. 2008), https://www.nps.gov/fpi/Documents/NR%20Criteria%20Considerations.pdf [https://perma.cc/SA94-WJBK].

338. *Id.*

339. *Id.*

340. VAN VOORHIES, *supra* note 18, at 22–23.

341. NAT'L PARK SERV., *supra* note 337.

B. *Georgia List of Historic Places*

While the NR involves federal law on historic properties, state law also plays a parallel role. In 2020, Georgia amended its historic preservation law to transfer the Historic Preservation Commission out of the Department of Natural Resources and into the Department of Community Affairs (DCA).[342] The law empowers the DCA to coordinate with the federal government on its listings as well as maintain its own inventory and register of historic places, along with any plans, programs, project, or recommendations it chooses.[343] The law recognizes the Georgia List of Historic Places, which includes any listings on the NR, as well as any historic properties that meet the DCA's criteria.[344] The DCA also adopted substantive regulations in August 2020 that further define the criteria, application and grant procedures, and relationship between the national and state registers.[345]

C. *Native American Cemeteries*

Another exception to the historical listing rule exists for "prehistoric burial sites" if they likely contain information "important in prehistory or history."[346] The possibility of historical listing aside, a Georgia statute requires contacting the Georgia Council on American Indian Concerns (CAIC) if the genealogist of anyone seeking a permit to disinter and relocate human remains knows or believes that any of the human remains belong to individuals of aboriginal or American Indian descent.[347] The statute intends to protect Indian graves and burial objects from accidental and intentional desecration and facilitate the return of Indian remains and burial objects from Georgia museums whose collections are not subject to federal law.[348] The CAIC is the only state entity specifically authorized to address the concerns of the Native American population in Georgia.[349]

---

342. GA. CODE ANN. § 12-3-50.1 (West 2022).

343. *Id.*

344. *Id.* § 12-3-50.2.

345. GA. COMP. R. & REGS. § 110-37-2-.01 (West 2022).

346. VAN VOORHIES, *supra* note 18, at 23.

347. GA. CODE ANN. § 36-72-5(4) (West 2022). For more information on the Council on American Indian concerns, *see* GA. CODE ANN. §§ 44-12-280(b)–(d) (West 2022) (establishing the Council and enumerating powers and duties). *See generally* GA. COUNCIL ON AM. INDIAN CONCERNS, https://georgiaindiancouncil.com [https://perma.cc/A6AN-C5VB] (last visited Sept. 3, 2022).

348. GA. CODE ANN. § 44-12-283 (West 2022). For an overview of federal law related to American Indian concerns, *see* SARAH BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION IN A NUTSHELL 373–409 (2d ed. 2018) (providing key terms and federal statutory analysis and explaining repatriation and consultation issues); *see also* Karinshack, *supra* note 313 (detailing the origins and complexities of Native American property rights).

349. GA. CODE ANN. § 44-12-283 (West 2022).

CIVIL WAR II: THE CONSTITUTIONALITY OF CALIFORNIA'S TRAVEL BANS

Beckett Cantley[*]

Geoffrey Dietrich[**]

Abstract

California, along with a few other states leaning toward the liberal side of America's political system, enacted a series of laws banning state-funded or state-sponsored travel to other states identifying more as conservative. While other states enacted these mandates through gubernatorial executive orders, California legislated its ban. Multiple states have attempted Supreme Court challenges to California's law under the Court's Article III original jurisdiction. Yet, the Court twice declined the opportunity to hear the issue. Justice Thomas and Justice Alito wrote extensive dissents against the majority's rejection, arguing that the Court must exercise its jurisdiction in controversies between the states. This Article analyzes the Court's history of original jurisdiction cases and seeks to answer why the Court likely did not address the constitutionality of California's laws. Further, this Article analyzes whether California's statute is unconstitutional under Article I of the U.S. Constitution and the Dormant Commerce Clause. Finally, this Article concludes with an analysis of possible likely outcomes of California's laws and other states' reactions.

* Professor Beckett Cantley, University of California, Berkeley, B.A. 1989; Southwestern University School of Law, J.D. cum laude 1995; and University of Florida, College of Law, LL.M. in Taxation 1997. Teaches International Taxation at Northeastern University and is a shareholder in Cantley Dietrich, P.C. Professor Cantley would like to thank Melissa Cantley and his law clerk, Leela Orbidan, for their contributions to this Article.

** Geoffrey Dietrich, Esq. U.S. Military Academy at West Point, B.S. 2000; Brigham Young University Law School, J.D. 2008. Shareholder in Cantley Dietrich, P.C.

INTRODUCTION

"Two households, both alike in dignity . . . from ancient grudge break to new mutiny."[1] Much like the Houses of Montague and Capulet, the individual states within the United States often find themselves diametrically opposed to each other's political views. While America's political divide has undeniably grown deeper over the years, it seems to be widening at a staggering pace recently. Of late, this higher level of political grudge appears in the form of California's legislation banning state-funded or state-sponsored travel to twenty-two sister states.[2] At the forefront of this political showdown is Texas. California and Texas are not only America's two most populous states, but they are also economic and political giants sitting on fundamentally opposite ends of the political spectrum. Sharing a history of fiery disagreements and political clashes, the two states are the exemplification of a country so dangerously divided it is almost reminiscent of a Shakespeare play. The scene opens with California, a Democrat exemplar, escalating historically political disagreements to the economic stage by prohibiting state-funded or state-sponsored travel to any state failing to meet California's civil rights standards regarding sexual orientation, gender identity, or gender expression.[3] Unsurprisingly, the Republican stronghold of Texas is cast as the villain by California and thus made the top of California's list of travel ban states.[4] The metaphorical stage is now set.

If California were a nation, it would be one of many nations banning state-funded travel to countries with whom they have political hostilities.[5]

---

1. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, prologue, l. 1–3.

2. *See* Levon Kalanjian, *The Beginning of an Economic Civil War: The Unconstitutionality of State-Implemented Travel Bans*, 22 U. PA. J. CONST. L. 409, 411 (Feb. 2020) ("California was the first state to enact a statute . . . banning its employees, the nation's largest state-employed workforce, from using state funds to travel to . . . states . . . that have discriminatory laws relating to sexual orientation, gender identity, and gender expression.").

3. *Id.*; Texas v. California, 141 S. Ct. 1469, 1473 (2021) (Alito, J., dissenting).

4. *See* Kalanjian, *supra* note 2, at 411, 421 (listing Texas as one of the many states subject to California's travel ban).

5. *See generally United Nations Security Council Consolidated List*, UNITED NATIONS (July 26, 2022), https://www.un.org/securitycouncil/content/un-sc-consolidated-list [https://perma.cc/FU8Y-RGHC] (listing all regimes subject to sanctions and other measures by the United Nations Security Council).

The United States has similar bans for Venezuela, Cuba, and North Korea, just to name a few.[6] But California is not an independent nation. It is only a state, albeit an influential one, and its legislative lashings are setting an exceedingly dangerous precedent for the nation as a whole. The image of an America in which each state freely imposes state-funded travel bans to other states with whom they have political disagreements is a somber picture to imagine, and one that questions the textual meaning and purpose of a *United* States.

With the days of both Texas's and California's independent nationhood long past, their legislative and ideological clash must be confined to the limits of the U.S. Constitution and federal law. However, when Texas challenged California's bans in the U.S. Supreme Court, the motion for leave to file a bill of complaint was denied, despite the Court's majority consisting of Republican justices.[7] This Article examines Supreme Court precedent in deciding cases under its original and exclusive jurisdiction of controversies between two or more states.[8] Additionally, this Article analyzes the possibility of the Court hearing such controversies under the Dormant Commerce Clause instead.[9] Ultimately, the question is not whether the Supreme Court *can* resolve this inter-state brawl, but whether it *will* choose to do so or instead let the people seek out their own resolutions.

As of August 2022, California's travel ban prohibits state-sponsored or state-funded travel to twenty-two states, effectively targeting roughly 44% of the nation.[10] Although the Texas challenge is the most recent, Arizona's motion for leave to file a bill of complaint on this same issue was denied by the Supreme Court in February of 2020.[11] Justice Thomas

---

6. *See Treasury and Commerce Implement Changes to Cuba Sanctions Rules*, U.S. DEP'T OF THE TREASURY (June 4, 2019), https://home.treasury.gov/news/press-releases/sm700 [https://perma.cc/9GRA-P8ED] (describing the national security measures taken by the United States against Cuba).

7. *Texas*, 141 S. Ct. at 1473 (majority opinion); *see* Oriana Gonzales & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (June 24, 2022), https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html [https://perma.cc/DSD2-KFD2] (identifying the political ideologies of the U.S. Supreme Court Justices, with a negative number indicating a more liberal judicial philosophy and a positive number indicating a more conservative judicial philosophy).

8. *See* 28 U.S.C. § 1251(a) (West 2022) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); *see also* U.S. CONST., art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

9. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

10. Soumya Karlamangla, *Why California Bans State-Funded Travel to Nearly Half of States*, THE NEW YORK TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/california-state-funded-travel-bans.html [https://perma.cc/7D8X-HNCE].

11. *See* Arizona v. California, 140 S. Ct. 684, 684 (2020).

and Justice Alito disagreed with the interpretations of the majority, which reads Article III's "[i]n all Cases . . . in which a State shall be [a] Party, the supreme Court shall have original Jurisdiction" to mean that the Court *may* have original jurisdiction.[12] Justice Thomas explained that if the Court does not exercise jurisdiction over a controversy between two states, then the complaining state has no judicial forum in which to seek relief.[13] Yet, in five years of these issues being brought to the Court, Justice Thomas and Justice Alito have failed to persuade other Supreme Court Justices to hear these inter-state issues. Justice Thomas previously held a different opinion, but now "has since come to question" that opinion and believes the Court should accept Arizona's and Texas's invitation to reconsider its discretionary approach.[14] This Article will review the Court's discretionary approaches, comparing Texas and Arizona's precedent. If Article III is not enough for the Court to exercise jurisdiction, this Article explores the alternative of raising the issue through Article I's Dormant Commerce Clause instead.

The U.S. Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15] Although the Commerce Clause only addresses the power given to Congress, the Supreme Court has long recognized that the Commerce Clause also limits states from enacting statutes affecting interstate commerce.[16] This limitation on state power is known as the Dormant Commerce Clause. The Clause's purpose is to prevent a state from "retreating into economic isolation or jeopardizing the welfare of the Nation as a whole" by burdening the flow of commerce across state borders.[17] If any of the affected states were to bring challenges to California's bans through the Dormant Commerce Clause, it could give the Court a window to hear cases in an area with which the Court has a history of frequent involvement. As author Levon Kalanjian warns, these unanswered issues may escalate to an economic civil war between the states.[18] However, it is likely that citizens and U.S. businesses in particular will be at the forefront of either convincing the Court to hear these issues or resolving them through alternative means, like legislation. This Article explores those possibilities as well.

12. *Id.* (Thomas, J., dissenting) (quoting U. S. CONST., art. III, § 2, cl. 2.).
13. *Id.*
14. *Id.*
15. U.S. CONST. art. I, § 8, cl. 3.
16. Kalanjian, *supra* note 2, at 425.
17. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179–80 (1995).
18. Kalanjian, *supra* note 2, at 415.

I. ARTICLE III'S DISCRETIONARY PRECEDENT

The Supreme Court's discretion to hear cases is wide. Under 28 U.S.C.A. § 1254, the Supreme Court may review cases from a court of appeals by either granting a writ of certiorari to review a party's petition in any civil or criminal case, or by certifying questions of law from the courts of appeals.[19] Not every petition is granted a writ of certiorari, and the Supreme Court can deny certifications for questions of law. Similarly, 28 U.S.C.A. § 1257 gives the Court the ability to review decisions from the highest court of any state.[20] Article III of the U.S. Constitution states that, "[i]n all Cases . . . in which a State shall be [a] Party, the Supreme Court shall have original Jurisdiction."[21] The Court also has exclusive power to hear disputes between two states, which leaves no other court in the country to opine on cases brought between the states.[22] There are also protections in place against the Court exercising jurisdiction to hear a case when it should not. The Supreme Court is the only court in the country which can hear cases between California and the states on California's travel ban list. Thus, the question becomes whether the Court has mandatory jurisdiction over cases when the Supreme Court has declined to do so. In America's relatively brief existence, the Court has addressed this issue many times. However, as the Arizona and Texas cases demonstrate, there is still disagreement on the Court's duty in these kinds of cases.

A. Cohens v. Virginia

In *Cohens v. Virginia*,[23] the parties, one of which was the State of Virginia, sought to have their claims heard by the Supreme Court, so they asked the Court to exercise its original jurisdiction instead of its appellate jurisdiction. The case placed a question of law before the Supreme Court,[24] arriving at the Supreme Court through a writ of error in which one party accused the lower courts of misinterpreting the U.S. Constitution. It was argued that in circumstances in which a case can be heard by the Court through either of the two methods, then the Court must exercise original jurisdiction to hear the case.[25] The Court extensively analyzed when it should or must hear a case brought under the Court's

19. 28 U.S.C.A. § 1254 (West 2022).
20. *Id.* § 1257.
21. U.S. CONST. art. III, § 2, cl. 2.
22. 28 U.S.C.A. § 1251 (West 2022).
23. 19 U.S. (6 Wheat.) 264, 375–80 (1821).
24. *Id.* at 375–77.
25. *See id.* at 349 ("[I]t is said, that admitting the Court has jurisdiction where a State is a party, still that jurisdiction must be original, and not appellate; because the constitution declares, that in cases in which a State shall be party, the Supreme Court shall have original jurisdiction, and in all other cases, appellate jurisdiction.").

original jurisdiction. Ultimately, the Court declined to exercise original jurisdiction.[26]

Chief Justice Marshall, writing for the Court, stated, "It is most true that this Court will not take jurisdiction if it should not: but equally true, that it must take jurisdiction if it should."[27] He opined that, unlike the legislature, the judiciary cannot, "avoid a measure because it approaches the confines of the Constitution."[28] Chief Justice Marshall further stated that the Court "[w]ith whatever doubts, with whatever difficulties, a case may be attended" must still hear and decide the case.[29] He was adamant that the Court cannot avoid questions out of a simple preference not to address them.[30] However, Article III does not extend the judicial power to every violation of the Constitution which may possibly take place, only to a case in law or equity.[31] So with this language, it is puzzling when the Supreme Court turns away cases in law or equity in which it has original jurisdiction, as it did with Texas and Arizona. While quarrels between states are to be expected, these disputes often come at a cost to the American people. In *Cohens*, Chief Justice Marshall wrote that American people "believe[] a close and firm Union to be essential to their liberty and to their happiness" and are "taught by experience, that this Union cannot exist without a government for the whole."[32] He opined that Americans are also taught that "this government [is] a mere shadow, that must disappoint all of their hopes, unless invested with large proportions of that sovereignty which belongs to independent States."[33]

In *Cohens*, the Court acknowledged that states have a degree of independence to enact their own laws, while still operating within the constitutional constraints designed to protect against abuse of power by any state.[34] The California travel ban may potentially be such an abuse of power. In many other instances, the Court had little restraint in deciding when states have stepped over the line, but the Court's decision not to do so with the travel ban issue is noteworthy and yet not completely unfounded. However, *Cohens* primarily addressed the Court's appellate jurisdiction. Other precedent is more enlightening on the Court's decision not to take on the assignment to rule in the Texas and Arizona cases.

---

26. *See id.* ("[I]f the jurisdiction in this class of cases be concurrent, it cannot be exercised originally in the Supreme Court.").

27. *Id.* at 404.

28. *Cohens*, 19 U.S. (6 Wheat.) at 404.

29. *Id.*

30. *Id.*

31. *Id.* at 405.

32. *Id.* at 380.

33. *Cohens*, 19 U.S. (6 Wheat.) at 380.

34. *Id.* at 380–81.

B. Louisiana v. Texas

Nearly a century after *Cohens*, the Supreme Court reluctantly decided to hear *Louisiana v. Texas*. The Governor of Louisiana asked the Court for leave to file a bill of complaint against the State of Texas, its Governor, and its Health Officer.[35] Louisiana was permitted to file the bill of complaint because the Court decided that it was the best course of action for the case.[36] Demurrer to the bill was sustained, and then subsequently dismissed.[37] The case concerned two lines of railroad, the Southern Pacific and the Texas & Pacific.[38] The railroads ran directly from New Orleans through Louisiana and Texas, and into other states and territories of the United States and Mexico.[39] The Texas Legislature enacted laws granting the Texas Governor and Health Officer extensive power "over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules . . . for the detention of vessels, . . . and property coming into the state from places infected, or deemed to be infected, with such diseases."[40] At the time, Texas was increasingly concerned about viruses, like yellow fever, spreading through the import of various goods from port cities, including New Orleans.[41]

Yellow fever first appeared in the United States in the 1700s and rampaged through cities for nearly two hundred years, killing hundreds and sometimes thousands of people in a single summer.[42] The virus was especially devastating for Eastern seaports and Gulf Coast cities.[43] The cause of the spread was unknown and occurred in epidemic proportions. In August of 1899, "a case of yellow fever was officially declared to exist in the city of New Orleans."[44] In response, Texas immediately placed an embargo on all interstate commerce between the City of New Orleans and Texas, consequently prohibiting "all common carriers entering the state of Texas from bringing into the state any freight or passengers, or even

35. Louisiana v. Texas, 176 U.S. 1, 2 (1900).

36. *Id.*

37. *Id.*

38. *Id.* at 2.

39. *Id.* at 3.

40. *Louisiana*, 176 U.S. at 3.

41. *See generally* JO ANN CARRIGAN, THE SAFFRON SCOURGE: A HISTORY OF YELLOW FEVER IN LOUISIANA, 1796-1905 *passim* (June 1961) (describing the spread of yellow fever around the United States, including into Texas, and the response by states).

42. *See Major American Epidemics of Yellow Fever (1793-1905)*, PBS, https://www.pbs.org/wgbh/americanexperience/features/fever-major-american-epidemics-of-yellow-fever/ [https://perma.cc/L542-DGVB] (last visited Aug. 15, 2022) (reporting that 8,000 or more individuals died in New Orleans from a yellow fever outbreak in Summer 1853).

43. *Id*.

44. *Louisiana*, 176 U.S. at 4.

the mails of the United States coming from the City of New Orleans."[45] Louisiana accused Texas of trying to destroy commerce from New Orleans, taking "away the trade of the merchants and business men of the city," and transferring that trade to "rival business cities in the state of Texas."[46] The question before the Court was whether the Texas law granting the Governor such extensive power over commerce constituted a controversy between the states.[47] The Court decided that a mere "maladministration" of the laws of a state, to the injury of the citizens of another state, does not constitute a controversy between states, and is therefore not justiciable in the Supreme Court.[48]

Primarily, the Court looked to Article III of the U.S. Constitution to adjudicate the *Louisiana* case. Clauses 1 and 2 of Article II read as follows:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to *controversies between two or more states*; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.[49]

The Court interpreted the words "controversies between two or more states" to mean that "the Framers of the Constitution intended that they should include something more than controversies over territory or jurisdiction."[50] In the Court's words, Louisiana's complaint did not plead enough facts to show that Texas had "authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the

45. *Id.*
46. *Id.* at 5.
47. *Id.* at 12.
48. *Id.* at 22.
49. *Louisiana*, 176 U.S. at 14 (citing U.S. CONST. art. III, § 2, cl. 1, 2) (emphasis added).
50. *Id.* at 15.

meaning of the Constitution."[51] In his concurrence, Justice Harlan noted that the Court has often declared that "the states have the power to protect the health of their people" through regulations.[52] Since Louisiana's complaint was brought against not just Texas, but also the Health Officer and the Governor, the Supreme Court could not deem that this was a suit between two states, and dismissed Louisiana's bill.[53] With this case, the Court began unveiling a pattern of preference in avoiding exercising its jurisdiction on issues between two states.

C. Massachusetts v. Missouri

Several decades later, the Supreme Court opined on an estate and tax related controversy between two states in *Massachusetts v. Missouri*.[54] Massachusetts filed a motion for leave to file the proposed bill of complaint against Missouri asking the Court for an adjudication concerning the right of the respective states to impose inheritance taxes on transfers of the same property.[55] The Supreme Court, predictably, denied the Massachusetts motion.[56] Unlike the Texas and Arizona cases, the Court provided insight into its decision in *Massachusetts*.

The Court found that Massachusetts's proposed bill of complaint did not present a justiciable controversy between the states: "To constitute such a controversy, it must appear that the complaining state suffered a wrong through the action of the other state, furnishing ground for judicial redress."[57] Otherwise, it appear that the state is asserting a right against the other state which is susceptible to judicial enforcement.[58] Massachusetts's prayer for relief was for the Supreme Court to determine which state had jurisdiction to impose inheritance taxes on transfers of property covered by trusts which were created by deceased residents of Massachusetts, including securities held by trustees in Missouri.[59] The Court held that Missouri did not harm Massachusetts by claiming a right to recover taxes from the trustees or in proceedings for collection of taxes.[60] When both states have individual claims, one of them exercising their rights should not impair the rights of the other.[61] The Court decided to deny the bill of the proposed complaint, reasoning that the claims could be litigated in state courts in either Massachusetts or Missouri and thus

51. *Id.* at 22–23.
52. *Id.* at 23 (Harlan, J., concurring).
53. *Id.* at 23 (majority opinion).
54. 308 U.S. 1, 1 (1939).
55. *Id.* at 13, 15.
56. *Id.* at 20.
57. *Id.* at 15.
58. *Id.*
59. *Massachusetts*, 308 U.S. at 15.
60. *Id.*
61. *Id.*

the Supreme Court did not need to exercise its original jurisdiction over the matter.[62]

Article III Section 2 grants the Supreme Court original jurisdiction in cases where a "state is a party, . . . [meaning] those cases in which, . . . jurisdiction might be exercised in consequence of the character of the party."[63] Here, the Supreme Court did not think that Missouri would close its courts to a civil action brought by Massachusetts to recover the alleged tax due from the trustees.[64] However, the Attorney General of Missouri argued against Massachusetts filing such an action in Missouri state courts or a Missouri federal district, saying that such a suit would present a justiciable case or controversy, therefore requiring adjudication from the Supreme Court instead.[65] The Court reasoned that any objections that the courts in one state will not entertain suit to recover taxes due to another state's claim goes to the merits of the case, not the jurisdiction, and therefore raises a question district courts are competent to decide.[66] As a result, the Court avoided yet another instance in which it was asked to settle a question of law between two states.

D. Ohio v. Wyandotte Chemicals Corp.

The 1970s saw the continuation of many liberal movements that started in the 1960s.[67] For example, when Americans voiced a growing concern about the environment, the country legislated the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act all within one decade.[68] With this national trend in the background, the State of Ohio moved for leave to file a bill of complaint seeking to invoke the Supreme Court's original jurisdiction against citizens of other states regarding the pollution of Lake Erie from mercury dumping.[69] The Court denied the motion.[70]

Although the Supreme Court has original and exclusive jurisdiction over suits between states, for suits between a state and citizens of another state, the Court is granted original jurisdiction but not exclusivity.[71] The Court stated that while Ohio's complaint does state a cause of action falling within the compass of original jurisdiction, the Court nevertheless

62. *Id.* at 19.

63. *Id.* (quoting Cohens v. Virginia, 19 U.S. 264, 398–99 (1821)).

64. *Massachusetts*, 308 U.S. at 20.

65. *Id.*

66. *Id.*

67. *The 1970s*, HISTORY.COM (July 30, 2010), https://www.history.com/topics/1970s/1970s-1#section_2 [https://perma.cc/R36J-6SNA].

68. *Id.*

69. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 494 (1971).

70. *Id.* at 505.

71. *Id.* at 495.

declined to exercise that jurisdiction.[72] The Court explained that it had jurisdiction and the complaint on its face revealed the existence of a genuine case or controversy between one state and citizens of another.[73] Previously, the Court declined to review similar cases if a party sought to embroil the tribunal in political questions.[74] Although the question in *Wyandotte* did not involve the political question doctrine and the Court could hear the case, the Court looked to policy rationales to deny Ohio's motion.[75]

The Court recognized that it is a "time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it."[76] Yet, the Court was convinced of changes in the American legal system and American society, which make it untenable, as a practical matter, for the Court to adjudicate all or most legal disputes arising "between one State and a citizen or citizens of another even though the dispute may be one over which the Court does have original jurisdiction."[77] Primarily, the Court noted that its responsibilities in the American legal system have evolved to bring "matters to a point where much would be sacrificed, and little gained by [the Court] exercising original jurisdiction over issues bottomed on local law" and not federal law.[78]

The Court based its reasoning on an analysis of the Court's structure and general functions. The Court explained that it is "structured to perform as an appellate tribunal" but is ill-equipped for fact-finding in original jurisdiction cases.[79] While it is true that the Court most commonly exercises its appellate powers, it is clear the Court is not structured for information-gathering in original jurisdiction cases. It has declined multiple opportunities to exercise original jurisdiction in cases like *Wyandotte*.

The Court further clarified that its denial to hear the case was backed by more than just a lack of structural capability. Its decision was compounded by the fact that, for every case in which it might be called upon to determine the facts and apply unfamiliar legal norms, it would unavoidably reduce the attention the Court could give to matters of federal law and national import.[80] Stated in simpler words: the Court did not want to spend its time and judicial resources on such matters. Because the Court "found even the simplest sort of interstate pollution case an

72. *Id.*
73. *Id.* at 495–96.
74. *Wyandotte*, 401 U.S. at 496.
75. *Id.* at 495–96.
76. *Id.* at 496–97.
77. *Id.* at 497.
78. *Id.*
79. *Wyandotte*, 408 U.S. at 498.
80. *Id.*

extremely awkward vehicle to manage" and the case was extraordinarily complex, the Court decided not to burden itself with the fact-finding required to adjudicate Ohio's claims.[81] The Court's policy analysis of the ever-changing American judicial system and its preference for appellate jurisdiction foreshadowed its decision to decline Arizona's and Texas's bills decades later.

E. Arizona v. New Mexico

Just a few years later, the Supreme Court once again denied a state's motion for leave to file a bill of complaint, this time against another state. The Court denied Arizona's request to invoke the Supreme Court's original jurisdiction when Arizona sought declaratory judgement against New Mexico's electrical energy tax.[82] Arizona argued that the tax was unconstitutionally discriminatory and a burden upon interstate commerce, that the tax denied Arizona due process and equal protection under the law in violation of the Fourteenth Amendment, and that the tax abridged the privileges and immunities secured by the U.S. Constitution.[83] Regardless, the Supreme Court thought that a state court would be a more appropriate forum.[84]

The State of Arizona (as a consumer) and its citizens (as consumers) regularly purchased electrical energy generated by three Arizona utilities operating generating facilities within New Mexico.[85] In 1975, New Mexico passed the Electrical Energy Tax Act, which imposed a tax on the generation of electricity.[86] The Supreme Court explained: "The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after its production. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico."[87]

Other states consuming energy produced within New Mexico, including Arizona, did not receive such credit.[88] Arizona argued that (1) the economic incidence and burden of the electrical energy tax fell upon the state and its citizens and that (2) the tax discriminated, as intended, against the citizens of Arizona.[89] The three Arizona utilities involved chose not to pay the new tax and instead sought a declaratory judgement

81. *Id.* at 504–05.
82. Arizona v. New Mexico, 425 U.S. 794, 795, 798 (1976).
83. *Id.* at 795.
84. *Id.*
85. *Id.* at 794.
86. *Id.*
87. *New Mexico*, 425 U.S. at 794–95.
88. *Id.* at 795.
89. *Id.*

in an action filed in the District Court for Santa Fe County.[90] That action raised the same constitutional concerns as the State of Arizona had in the instant case.[91]

In deciding whether to grant Arizona's motion, the Supreme Court noted that its original jurisdiction should be invoked sparingly.[92] The Court considered the seriousness and dignity of the claim and whether there was another forum available with jurisdiction over the named parties in which the issues could be litigated and in which appropriate relief could be had.[93] In this case, the Court was persuaded to deny Arizona's motion because of the pending action before the New Mexico Supreme Court, which was an appropriate forum for the dispute.[94] Further, the U.S. Supreme Court found it wise to wait to hear the case on appeal if the state court held the energy tax unconstitutional. If the tax was held unconstitutional, then Arizona would be vindicated, and if it was held constitutional, the issues could be appealed to the Court through the direct appeal process.[95] Accordingly, the Court chose not to exercise original jurisdiction because it felt the state courts were able to adjudicate the issues and were the better forum for addressing Arizona's claims.[96]

F. Maryland v. Louisiana

In 1981, the Supreme Court finally chose to exercise original jurisdiction in *Maryland v. Louisiana*.[97] Several states, joined by the United States and several pipeline companies, challenged the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana.[98] Due to the nature of the case participants, a Special Master was appointed to facilitate the handling of the suit.[99] The Special Master filed a report, but exceptions to the Master's Report were filed as well.[100] Justice White, writing for the Supreme Court, held that:

> (1) the individual states, as major purchasers of natural gas whose cost increased as a direct result of the tax, were directly affected in a real and substantial way so as to justify the exercise of the Court's original jurisdiction; (2)

90. *Id.*
91. *Id.*
92. *New Mexico*, 425 U.S. at 795.
93. *Id.*
94. *Id.* at 797.
95. *Id.*
96. *Id.*
97. 451 U.S. 725, 737 (1981).
98. *Id.* at 731–34.
99. *Id.* at 734.
100. *Id.* at 734–35.

> jurisdiction was also supported by the individual states' *parens patriae*; and (3) the case was an appropriate exercise of the Court's exclusive jurisdiction even though state court actions were pending in Louisiana.[101]

After establishing the Court's intention to exercise original jurisdiction, the Court found the First-Use Tax to be unconstitutional under the Commerce Clause.[102] The analysis of the tax's constitutionality under the Commerce Clause will be discussed later in this Article.

Louisiana argued that the states lacked standing to bring the suit under the Court's original jurisdiction and that the bare requirements for exercising original jurisdiction were not met.[103] The Special Master rejected both arguments.[104] The Court agreed with the Special Master.[105] In order to constitute a true controversy between two or more states under the Court's original jurisdiction,

> [I]t must appear that the complaining State has suffered a wrong through the action of the other State . . . or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.[106]

Rejecting Louisiana's arguments that the tax was imposed on pipeline companies and not directly on consumers, the Court reasoned that standing to sue "exists for constitutional purposes if the injury alleged 'fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'"[107] In the instant case, the First-Use Tax was "clearly intended to be passed on to the ultimate consumer," despite it being imposed on pipeline companies.[108] The Court found it "clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's jurisdiction."[109]

---

101. *Id.* at 737, 739–45.

102. *Maryland*, 451 U.S. at 760.

103. *Id.* at 735–36.

104. *Id.* at 735.

105. *Id.*

106. *Id.* at 735–36 (quoting Massachusetts v. Missouri, 308 U.S. 1, 15 (1939)) (internal quotations omitted).

107. *Maryland*, 451 U.S. at 736 (1981) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

108. *Id.*

109. *Id.* at 737.

The Court also found support for exercising jurisdiction "by the "States' interest as *parens patriae*."[110] States cannot "enter a controversy as a nominal party in order to forward the claims of individual citizens."[111] However, a state can "act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way."[112] The Court held that the states "alleged substantial and serious injury to their proprietary interests as consumers of natural gas as a direct result of the allegedly unconstitutional actions of Louisiana."[113] Further, such a direct injury is reinforced "by the States' interest in protecting its citizens from substantial economic injury presented by imposition of the First-Use Tax."[114] The Court explained, "[I]ndividual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small."[115] Instead, the states should represent their citizens in such litigation—a point which supported the Court's choice to exercise original jurisdiction.[116]

The Court deemed the case appropriate for exercise of its exclusive jurisdiction, despite similar claims pending in state courts.[117] The Court elaborated that it determines whether exclusive jurisdiction is appropriate by weighing "not only 'the seriousness and dignity of the claim,' but also 'the availability of another forum with jurisdiction over the named parties.'"[118] Exclusive and original jurisdiction are exercised sparingly.[119] In choosing to exercise exclusive jurisdiction, the Court distinguished *Maryland* from *New Mexico*. Specifically, in *New Mexico*, it was "uncertain whether Arizona's interest as a purchaser of electricity had been adversely affected," but in *Maryland*, the adverse effect upon the plaintiff states' interests were far more certain.[120] The issue in the *New Mexico* case did not "sufficiently implicate the unique concerns of federalism forming the basis of [the Court's] original jurisdiction."[121] In *Maryland*, the magnitude and effect of the tax was far greater because the anticipated 150 million dollars in annual tax was being passed on to millions of American consumers in over thirty states, exactly as

110. *Id.*
111. *Id.*
112. *Maryland*, 451 U.S. at 737.
113. *Id.* at 739.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Maryland*, 451 U.S. at 739–45.
118. *Id.* at 740.
119. *Id.* at 739.
120. *Id.* at 743.
121. *Id.*

intended.[122] The Supreme Court was willing to set the *Maryland* case apart from precedent and justify the use of original jurisdiction. Therefore, when examining recent actions brought by Arizona and Texas, the question becomes: why did the claims of Arizona and Texas fall within the Court's pattern of refusing to exercise original jurisdiction rather than the approach followed in *Maryland*?

G. *Texas and Arizona's Place Within the Precedent*

In denying Texas and Arizona's motions for leave to file a bill of complaint, the Court did not provide its reasoning for denial as it did in *Maryland*, *Wyandotte*, *New Mexico*, *Massachusetts*, *Cohens*, and *Louisiana*. Although Justice Thomas and Justice Alito wrote detailed dissents on why the Court should hear the cases, there was little insight into the majority's decision-making. However, with decades of precedent explaining the need to exercise original jurisdiction sparingly,[123] perhaps the Court's reasoning is not needed. Following the analysis of prior case law, Texas and Arizona's claims would be first judged on their "seriousness and dignity."[124] Essentially, the two states would have to show that they are directly and negatively affected by California's travel bans.[125] The states also would need to persuade the Court that the injury alleged affects the general population of their states in a substantial way.[126] Finally, the states would have to show that there is no other forum that could adjudicate the claims.[127]

Turning to the first point, the states would illustrate their alleged injury: California law bans state-funded travel to over twenty-two states, except under limited circumstances.[128] Specifically, California will not:

> Approve a request for state-funded or state-sponsored travel to a state that . . . has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination

122. *Maryland*, 451 U.S. at 744.
123. *Id.* at 739; Arizona v. New Mexico, 425 U.S. 794, 795 (1976).
124. *Maryland*, 451 U.S. at 740; *Arizona*, 425 U.S. at 795.
125. *Maryland*, 451 U.S. at 737.
126. *Id.*
127. *Arizona*, 425 U.S. at 795.
128. CAL. GOV'T CODE § 11139.8(b)(2) (West 2022).

> against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.[129]

The travel ban has exceptions, which include travel for: litigation; meeting contractual obligations; complying with the federal government committee appearances; participating in meetings or training required by a grant or required to maintain grant funding; completing job-required training necessary to maintain licensure or similar standards; and protecting the public health, welfare, or safety.[130]

Given these exceptions, when does California's travel ban actually apply? It is difficult to imagine an instance where state-funded travel would be banned given the relatively lengthy list of exceptions. California intended the ban to frame the state as a leader in protecting civil rights and preventing discrimination, but even LGBTQ groups accuse California of using the ban as "a cheap political trick to make some headlines for vote-hungry politicians in the blue state."[131] The law's extensive exceptions also make it difficult for the plaintiff-states to illustrate their injury.

College sports provide the most likely example of state injury, but even that has proven difficult. In 2017, California's ban included travel to the State of Tennessee.[132] That same year, the UCLA Men's Basketball Team made it to the "Sweet 16" in the NCAA Tournament.[133] According to the ban, California should have refused to let the team play in the game against Kentucky held in Tennessee, unless the game was moved to another state not on the travel ban list, since UCLA is a state-funded school.[134] Instead, California used "non-state" funds to send the team to Tennessee.[135] Non-state funds are comprised of money that comes from donations and other resources.[136] California keeps these "non-state" funds separate from state funds.[137]

Essentially, when travel does not fit into one of California's many exceptions, the state will still find a way to permit the travel if there is

---

129. *Id.*

130. *Id.* § 11139.8(c).

131. Cyd Zeigler, *California's Travel Ban to Anti-LGBTQ States is a Political Trick*, LGBTQNATION (Apr. 5, 2019), https://www.lgbtqnation.com/2019/04/californias-travel-ban-anti-lgbtq-states-political-trick-heres-actually-works/ [https://perma.cc/DJV6-N2FA].

132. *Id.*

133. *Id.*; Paul Kasabian, *Sweet 16 2017: Complete Schedule, Updated Bracket and Predictions*, BLEACHER REP. (Mar. 23, 2017), https://bleacherreport.com/articles/2699547-sweet-16-2017-complete-schedule-updated-bracket-and-predictions [https://perma.cc/P9FF-CZ 5R].

134. Zeigler, *supra* note 131; Kasabian, *supra* note 133.

135. Zeigler, *supra* note 131.

136. *Id.*

137. *Id.*

substantial state interest.[138] Imagine the following hypothetical: Texas or Arizona host a major sports tournament, California denies funding for its own public university team to travel and compete in the tournament, and the denial causes the tournament to be moved to another state simply to accommodate California's travel ban. One can then imagine the plethora of economic and political injuries to Texas or Arizona. However, a dilemma like this hypothetical has yet to happen. And the U.S. Supreme Court will not exercise its original jurisdiction in a case in which a state's injuries are unclear.[139] The complaints filed by Texas and Arizona demonstrate the exact type of cases the Court detailed as its preference to avoid in *Wyandotte*.[140]

Next, it would have been difficult for the Supreme Court to find that the alleged injury affected the general population of Arizona and Texas.[141] The California travel ban does not target state-funded business with the plaintiff-states or individual businesses or people within the plaintiff-states.[142] Additionally, the travel ban does not in any way restrict the flow of goods or people between California and these states.[143] Aside from knowing the state received California's stamp of disapproval, citizens of Texas and Arizona are not affected by California's travel ban. In *Maryland*, Louisiana's tax affected more than thirty different states, and the burden of the tax was directly passed to the taxpayers in those states.[144] Although there are many states on California's travel ban list,[145] the burden of California's law is not upon the people of those states.

Finally, the Supreme Court likely denied the plaintiff-states' request for adjudication under original jurisdiction in *Arizona v. California* and *Texas v. California* because the states can challenge California's laws in another forum.[146] In *New Mexico*, the Court mentioned its preference of hearing the case on appeal upon the plaintiff-state's loss in defendant-state's courts.[147] In *Maryland*, the Court did not think that a state forum was more appropriate for the claims because it was abundantly clear that

138. *See id.* ("So when they want to get around the law, they make sure those 'separate' funds are used.").

139. *E.g.*, Louisiana v. Texas, 176 U.S. 1, 22–23 (1900) (explaining that mere "maladministration" of state laws is not enough to establish that one state has injured another state and that a controversy exists).

140. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497–99 (1971).

141. Arizona v. California, 140 S. Ct. 684, 684 (2020); Texas v. California, 141 S. Ct. 1469, 1469 (2021).

142. CAL. GOV'T CODE § 11139.8(b)(2) (West 2022).

143. *Id.*

144. Maryland v. Louisiana, 451 U.S. 725, 733, 744 (1981).

145. Karlamangla, *supra* note 10.

146. Massachusetts v. Missouri, 308 U.S. 1, 60 (1939); Arizona v. New Mexico, 425 U.S. 794, 796 (1976); *Maryland*, 451 U.S. at 737.

147. *New Mexico*, 425 U.S. at 796.

the interests of the plaintiff-states were adversely affected.[148] The same is not true in the *Arizona* and *Texas* cases. The Court likely aligned the plaintiff-states' claims with those in *New Mexico*. Even Justice Alito, writing in the dissent for *Texas*, mentioned that the Court would likely reverse if a lower court found in favor of California.[149] Perhaps filing in a different forum is a path the current plaintiff-states should contemplate.

It is clear a controversy exists between two states in both *Arizona* and *Texas*. It is also clear the controversy is mostly political, based solely on California's condemnation of a number of states in the nation who will not align with California's political ideals. The Court can invoke the political question doctrine when there is a lack of judicially manageable standards which prevent the case from being decided on the merits.[150] Although the Court did not explicitly invoke the doctrine, California's politically charged statutory language could have added to the Court's reluctance to exercise original jurisdiction. Ultimately, the Court had a long list of precedent supporting the decision to decline exercising original jurisdiction in both *Texas* and *Arizona*. While actual injury to the travel ban states is not abundantly clear, the plaintiff-states should consider challenging California's law under Article I instead of Article III in federal court.

II. THE ARTICLE I ALTERNATIVE[151]

The Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."[152] The U.S. Supreme Court has long recognized that the Commerce Clause also restricts states from enacting law which may affect interstate commerce.[153] This limit on state power is often referred to as the Dormant Commerce Clause. The Dormant Commerce Clause prevents economic protectionism by prohibiting states from enacting laws designed to benefit in-state economic interests as the expense of out-of-state competitors.[154] State-implemented travel bans are likely to affect interstate commerce, since their sole purpose is to cause negative economic impact on the targets of the ban. Although the earlier discussion about the travel ban's exceptions and practice raise questions as to

148. *Maryland*, 451 U.S. at 743.

149. Texas v. California, 141 S. Ct. 1469, 1469 (2021) (Alito, J., dissenting).

150. Baker v. Carr, 369 U.S. 186, 217 (1962).

151. The Article I analysis to California's travel bans has been analyzed in great detail in scholarship by Levon Kalanjian. Section III in this Article is simply a summary of the thorough analysis presented in Kalanjian's writing. *See* Kalanjian, *supra* note 2.

152. U.S. CONST. art. I, § 8, cl. 3.

153. *See* Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989) ("This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce.").

154. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2007).

whether the California law is truly effective, there are still colorable arguments supporting the law's interference with interstate commerce.

The U.S. Supreme Court's approach for analyzing the Dormant Commerce Clause is a balancing test in which the burden on interstate commerce may not be greater than the benefits to the state.[155] The weight of the balancing depends on whether a state statute is facially discriminatory or facially neutral.[156] State statutes are facially neutral if they treat their residents and other states' residents alike, although the statute may still affect interstate commerce.[157] Facially neutral statutes only violate the Dormant Commerce Clause if the burdens they impose on interstate trade are clearly excessive in relation to local benefits.[158] State statutes that distinguish between residents in their jurisdiction and residents outside their jurisdiction are facially discriminatory.[159] Since California's travel ban explicitly names other states, the statute is facially discriminatory. Even though the ban is facially discriminatory, there are three exceptions to when states may pass facially discriminatory laws, outlined below.

A. *Exceptions to Facially Discriminatory Statutes, Applied to California's Ban*

Facially discriminatory statutes are generally deemed unconstitutional but can still be upheld under three exceptions: (1) Congress authorized them; (2) they serve a legitimate state or local purpose; or (3) the state is acting as a market participant.[160] Below is an analysis of these three exceptions as applied to California's travel ban.

The first exception is Congressional authorization. It is clear from the statute language that California is not relying upon any kind of congressional authority. When Congress permits states to regulate commerce in ways that would otherwise be impermissible, authorization must be unmistakably clear.[161] The legislative history behind California's travel ban clearly shows there was no Congressional authorization to enact such a ban.[162] The legislative history shows reliance upon *Obergefell v. Hodges* to support validation of the ban.[163] This Supreme

155. S. Pac. Co. v. Arizona, 325 U.S. 761, 783–84 (1945).

156. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 331 (2007) ("To determine whether a law violates the dormant Commerce Clause, the Court first asks whether it discriminates on its face against interstate commerce.").

157. Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or., 511 U.S. 93, 98–99 (1994).

158. Maine v. Taylor, 477 U.S. 131, 138 (1986).

159. *Id.*

160. *S. Pac. Co.*, 325 U.S. at 769.

161. Kalanjian, *supra* note 2, at 435.

162. *Id.*

163. *Id.*

Court case upheld marriage equality for LGBTQ individuals,[164] but there is no mention of anything close to the possibility of states enacting travel bans for state-funded travel.[165] In summary, "Congress did not grant California the authority to prohibit other states from discriminating against LGBTQ individuals."[166] Thus, California's travel ban law fails the first exception for facially discriminatory statutes.

Second, for facially discriminatory statutes to be constitutional, they must serve a legitimate local purpose. States must show not only that the regulation serves a legitimate local purpose, but also that the local purpose could not be achieved by any other nondiscriminatory means.[167] Essentially, California would have to prove their clearly punitive travel ban serves a local purpose which could not otherwise be achieved.[168] The California legislative history lists two reasons for enacting the statute: (1) to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people; and (2) to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable.[169] However, punishing other states for not meeting California's civil rights standards does not serve a local purpose in California.[170] On the one hand, California may argue that the law protects state employees who could experience—or fear—LGBTQ discrimination in travel ban states. On the other hand, critics argue that the travel ban does little to protect LGBTQ interests and does "nothing more than exacerbate political divisions."[171] Even if California argues that the statute protects its state employees, California ignores the fact that it must prove there are no other nondiscriminatory alternatives.[172] California's legislative history indicates that the statute was not developed to protect state employees and that other alternatives were not considered. Instead, the legislative history makes it abundantly clear that California intended the statute to punish other states.[173]

The final exception is if a state acts as a market participant, rather than a market regulator.[174] For example, if a city law specifies that construction projects funded by the city must employ a percentage of city residents, then the law does not violate the Dormant Commerce Clause because by funding the city projects the government is acting as a

164. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).
165. Kalanjian, *supra* note 2, at 435.
166. *Id.*
167. *Id.* at 436.
168. *Id.*
169. *Id.*
170. Kalanjian, *supra* note 2, at 439.
171. *Id.* at 440.
172. *Id.*
173. *Id.* at 443.
174. *Id.* at 444.

participant.[175] However, if a state is selling timber and its laws require the successful bidder to partially process the timber within the state before shipping, then this law goes further than simply burdening the market in which it operates.[176] California could attempt to argue that the Dormant Commerce Clause does not apply because the state government is participating in the market for travel. But because the ban imposes restrictions intended to reach beyond California by banning commercial transactions in target states, this argument fails, and the Dormant Commerce Clause applies.

California's travel bans are facially discriminatory and are therefore unconstitutional under Article I of the Constitution. Only the U.S. Congress can regulate the nation's commerce, not the individual states.[177] There is a long history of restricting states from enacting laws that interfere with federal commerce or benefit in-state economic interest by discriminating against other out-of-state actors. California's ban on state-funded travel openly discriminates against almost half of the country by banning state-funded travel to states with whom California disagrees over standards regarding treatment of the LGBTQ community.[178] The desire to be a leading state in the protection of LGBTQ civil rights does not fit into any of the three exceptions that would allow California to enact such a law. California's ban was not authorized by Congress. It serves no local purpose. No nondiscriminatory alternatives were ever discussed or considered. California, in enacting the statute, is acting as a market regulator and not as a market participant. That is unconstitutional.

This analysis leaves critics with disagreements in predicting how, when, or whether California's unconstitutional travel ban will be addressed. Some believe that other states will follow California's example and enact similarly discriminatory laws until the country is entwined in a social and economic civil war.[179] The less dramatic and more likely outcome is a continued lack of enforcement of the statutes, or a demand in statutory change from residents of the states who are legislating such bans.

III. POWER BY THE PEOPLE: THE LIKELY OUTCOME

As previously explained, the U.S. Supreme Court is unlikely to intervene on behalf of states that have found themselves on California's travel ban. The states will likely need to bring their claims in other forums first and then pursue the appeals route to the U.S. Supreme Court. Given the extensive list of exceptions and lack of enforcement in practice, the

175. Kalanjian, *supra* note 2, at 444–45.
176. *Id.* at 446.
177. U.S. CONST. art. I, § 8, cl. 3.
178. Karlamangla, *supra* note 10.
179. Kalanjian, *supra* note 2, at 446.

overarching economic effect (and therefore success) of California's ban is, at best, unclear. It is still disheartening to see that one of our states opted to single out twenty-two sister states seemingly without reason. There are a few consequences that may result from such actions.

The first possibility is other states will enact retaliatory bans or similar bans against states with whom they disagree politically. California's first bans were seen in 2017, and in the past few years, several other states and territories have legislated travel bans.[180] Although New York issued executive orders in 2015 similarly banning state-funded travel to Indiana for LGBTQ discrimination issues,[181] and several other states joined New York in banning state-funded travel to North Carolina for its controversial "bathroom law,"[182] there is little indication that these bans have actually achieved their purpose of negatively impacting the economies of the targeted states. For example, it is calculated that Indiana lost about $60 million in revenue after passing an anti-gay law.[183] Notably, this loss of revenue stemmed from a cut in tourism and the migration of businesses out of Indiana, not because of a lack of state-funded travel from places like California.[184]

Further, when corporations or businesses condemn perceived anti-gay state laws, the ramifications are much more profound than any ban on state-funded travel. California state-funded travel likely has very limited presence in the Texas economy, and so its effect is similarly unnoticed. However, when companies like Apple make business decisions while considering states' laws impacting its LGBTQ population, the results would be felt much more profoundly than the loss of California's state-funded travel. Additionally, if corporations were to act in this arena, they would not be challenging the U.S. Constitution in the same way as California. Yet, Texas has not lost business because of its anti-discrimination laws. On the contrary, Texas has seen an explosion of

180. In 2018, Washington, Minnesota, New York, Vermont, and California had bans against traveling to Mississippi, which passed a law "protecting religious organizations from government interference should they choose to deny services to members of the LGBT community based on their beliefs." Ginger O'Donnell, *Several States Restrict Travel to Those with Anti-LGBTQ Laws*, INSIGHT INTO DIVERSITY (Feb. 12, 2018), https://www.insightintodiversity.com/several-states-restrict-travel-to-those-with-anti-lgbtq-laws/ [https://perma.cc/J8BW-WFNS].

181. Brian Sharp, *Rochester Joins NY in Banning Travel to Indiana in Protest of New Law*, DEMOCRAT & CHRONICLE (Mar. 31, 2015), https://www.democratandchronicle.com/story/news/2015/03/31/travel-ban-indiana-rochester-new-york-religious-freedom-law/70730584/ [https://perma.cc/QQE9-96J6].

182. O'Donnell, *supra* note 180.

183. Neal Broverman, *Indiana Took $60 Million Hit After Passing Antigay Law*, ADVOCATE (Jan. 26, 2016), https://www.advocate.com/religion/2016/1/26/indiana-took-60-million-hit-after-passing-antigay-law [https://perma.cc/DC3P-YN4A].

184. *Id.*

migration of California businesses to Texas.[185] Though these business migrations are linked to lower housing costs, lower tax rates, and fewer regulations, it is still noteworthy that Texas's LGBTQ laws did not deter California tech giants from moving operations to the red state.[186] Texas's experience with tech migration may be unique compared with the other states on California's ban list, but it remains unclear whether California's ban has influenced any state's economy in a substantial way. All things considered, California's legislation purpose is less of an attempt to weaken Texas's or other states' economies and more of an attempt to pander to voters within California.

The true danger of California's travel ban stems from power-hungry and vote-hungry politicians' dedication to making headlines. The ban provides such a plethora of exceptions that its actual effect is severely curtailed to the point of virtual nonexistence. Meanwhile, the political chatter surrounding the law only grows. With such minimal economic effect, even if all the states decide to pass similar laws, then the only thing achieved is more of the political animosity already so prevalent between the two political parties. Another possible consequence is that the law will largely go unenforced, as it is now, and its purpose will diminish and subside out of the nation's attention. A third possible consequence is a challenge to the statute's constitutionality from within California or a repeal of the statute through the legislature. Of the possible outcomes, an economic civil war is truly unlikely. This is a political game with very little economy in the equation. A political civil war might be a different story.

CONCLUSION

California's travel ban now effectively targets about 44% of the nation by prohibiting state-sponsored or state-funded travel to twenty-two sister states.[187] Other states have followed California's example.[188] The challenges to the ban came from the States of Texas and Arizona, which would ordinarily place the cases within the original jurisdiction of the Supreme Court. However, the Supreme Court declined the opportunity to adjudicate the matter in both cases. The Court has a history of avoiding political questions[189] and exercising its original jurisdiction only in extremely limited circumstances.[190] Based on the analysis of Article I,

185. Jean Folger, *Why Silicon Valley Companies Are Moving to Texas*, INVESTOPEDIA (Dec. 17, 2020), https://www.investopedia.com/why-silicon-valley-companies-are-moving-to-texas-5092782 [https://perma.cc/5ZFT-3EKB].

186. *Id.*

187. Karlamangla, *supra* note 10.

188. O'Donnell, *supra* note 180.

189. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496 (1971).

190. Arizona v. New Mexico, 425 U.S. 794, 795 (1976).

California's statute is facially discriminatory. It does not fall within one of the exceptions, so the law is unconstitutional.[191] With the Supreme Court refusing to hear arguments brought by Texas or Arizona, the states will need to seek another path to Supreme Court adjudication.

If the states desire a judicial ruling on the issues, they should find other forums in which to challenge California's law and then appeal any unfavorable decision to the Supreme Court. However, the judicial path may prove problematic for the states, as the lack of true economic effect makes it difficult if not impossible to argue actual damages. California's law failed to impact the economies of the target states, but it succeeded in widening the political divide in the nation. It is no secret that for the past few years, Americans have lived in an increasingly divided country. As LGBTQ organizations have noted, the travel ban does little to promote equality for LGBTQ individuals in red states.[192] Instead, California's legislation serves as a political platform for politicians' reelection campaigns. From a birds-eye-view, the result is something of a Shakespearean play: it's funny, it's tragic, and it's oh-so-dramatic. Hopefully, the nation can end the narrative of the travel ban as a Shakespearean comedy with a happy ending, instead of a Shakespearean tragedy currently looming on the horizon for a divided and weary nation with our collective patience wearing thin.

191. S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).
192. Kalanjian, *supra* note 2, at 440.

MINIMUM WAGE ENFORCEMENT: THE UNFINISHED BUSINESS OF FLORIDA'S CONSTITUTIONAL AMENDMENT

Alexis P. Tsoukalas,[*] *Jenn Round*,[**] *Janice Fine*,[***] *Daniel J. Galvin*[****]

Abstract

Prior to 2004, Florida was one of seven states without its own minimum wage. In 2004, state voters overwhelmingly passed a ballot initiative that enshrined the right to a state minimum wage in Florida's Constitution. In 2020, voters passed a second ballot initiative that gradually raises Florida's minimum wage to $15 per hour. Despite bipartisan voter support, the Authors found that since 2004, the State has taken no formal actions to enforce Florida's minimum wage law. Further, the Authors' analysis of U.S. Census data demonstrated that amid the failure of State enforcement, minimum wage violations rose

* Alexis Tsoukalas, MSW, is a macro social worker and policy analyst at Florida Policy Institute, where she analyzes and proposes state policies to promote economic justice and immigrant inclusion. Her analyses are frequently cited by Florida's local and state media, with national features in outlets like *Forbes*, *The New York Times*, *The Washington Post*, *Politico*, and *The Wall Street Journal*. She was formerly a State Policy Fellow with the Center on Budget and Policy Priorities and a Legislative Chair for the National Association of Social Workers (NASW)-Florida. Her MSW is from Case Western Reserve University, and she is currently pursuing a Ph.D. in Public Affairs (with a Social Work concentration) at the University of Central Florida.

** Jenn Round, J.D., is the Director of the Labor Standards Enforcement Program at the Workplace Justice Lab (WJL) at Rutgers University. In this role, Ms. Round works with agencies, lawmakers, worker organizations, and legal advocates across the United States to protect the rights of low-wage workers. Before joining WJL, she launched and led enforcement at the Seattle Office of Labor Standards. She was integral in creating, evaluating, and revising Seattle's enforcement systems and procedures. She has worked for various legal aid organizations and academic institutions on access to justice and rule of law initiatives in Alaska, Afghanistan, Thailand, Turkey, and Sierra Leone. She received a J.D. from the George Washington University Law School, a LL.M. from the University of Washington School of Law, and a B.A. in Africana Studies from New York University.

*** Dr. Janice Fine holds a Ph.D. from the Massachusetts Institute of Technology in Political Science. She is a Professor in the Department of Labor Studies and Employment Relations and Director of the Workplace Justice Lab at Rutgers University's School of Management and Labor Relations. At Rutgers, she writes and teaches about economic justice movements and organizations as well as historical and contemporary debates within labor movements regarding immigration, labor standards enforcement, and privatization and state capacity for contract oversight. Fine is the lead editor of *No One Size Fits All: Worker Organization, Policy, and Movement in a New Economic Age* and author of *Worker Centers: Organizing Communities at the Edge of the Dream*.

**** Daniel J. Galvin, Ph.D., Yale University, is an Associate Professor of Political Science and a Faculty Fellow at the Institute for Policy Research at Northwestern University. His current research focuses on labor policy and politics, worker organizations, and enforcing labor standards. He is writing a book on "alt-labor" and the efforts of low-wage workers to build power and strengthen their rights and protections in the workplace. He also researches and writes about American politics and government. He is the author of *Presidential Party Building: Dwight D. Eisenhower to George W. Bush*, co-editor of *Rethinking Political Institutions: The Art of the State*, and has published numerous journal articles and book chapters.

dramatically, disproportionately impacting women, Black, Latinx, and immigrant workers. Likewise, of the industries with the highest violation rates, five of the top six are key to Florida's economy. The Authors argue that Floridian workers need a state department of labor to fully realize the promise of Florida's constitutional right to the minimum wage.

INTRODUCTION[1]

In November 2020, Floridians made the historic decision to move an estimated 2.5 million workers closer to a living wage with the passage of Amendment 2, which raised the state minimum wage to $10 per hour in

1. For an explanation of the methodology used by the Authors for statistical analysis in this Article, *see* ALEXIS TSOUKALAS ET AL., FLA. POL'Y INST., RUTGERS UNIV., FLORIDA POLICYMAKERS NEED TO REASSESS HOW THE MINIMUM WAGE IS ENFORCED 9–12 (Mar. 2021), https://uploads-ssl.webflow.com/5cd5801dfdf7e5927800fb7f/632fb6e3d183d2079669024e_RT_Wage_Theft_FINAL.pdf.

2021 and will increase it by one dollar annually until it reaches $15 per hour in 2026.[2] The first phase of Florida's minimum wage increase went into effect in September 2021, increasing from $8.65 to $10 per hour.[3] Prior analysis by one of the Authors shows Amendment 2 is expected to significantly raise pay for more than one in four Florida workers and help bring over one million households out of poverty. These benefits will be especially beneficial for women, Black and Latinx Floridians, and immigrants, reducing longstanding pay inequities. Amendment 2 will also bring many essential employees and service workers closer to a living wage and boost their spending power throughout local communities.[4]

In light of Amendment 2, the Authors assessed the extent to which the state minimum wage has been enforced in recent years, as well as wage theft's impact on workers and the broader state economy. Failing to pay the mandated minimum wage is but one of many forms of wage theft.[5] However, given the recent passage of Amendment 2 and Florida's unnerving distinction as the state with the highest minimum wage violation rate in the U.S.,[6] "wage theft" for this Article will refer solely to minimum wage violations. The Authors analyzed over fifteen years of U.S. Census data and records obtained from the Florida Attorney General's Office, finding, as have earlier research studies,[7] that the state has largely abandoned responsibility to enforce its constitutionally-mandated minimum wage.[8] The Authors complement these findings with historical context regarding efforts to raise Florida's minimum wage and

2. ALEXIS P. TSOUKALAS, FLA. POL'Y INST., A MINIMUM WAGE BOOST WOULD IMPROVE EQUITY FOR 2.5 MILLION FLORIDIANS AND BOLSTER THE STATE'S POST-PANDEMIC RECOVERY 2 (Sept. 2020), https://uploads-ssl.webflow.com/5cd5801dfdf7e5927800fb7f/5f8649e89a8f5af9ed28cec2_RT_Min_Wage_FINAL.pdf [https://perma.cc/969T-UQ4C].

3. *Consolidated Minimum Wage Table*, U.S. DEP'T LAB. (Aug. 30, 2022), https://www.dol.gov/agencies/whd/mw-consolidated [https://perma.cc/5PNT-3WWY]; Jake Stofan, *Florida's Minimum Wage Increases to $10 Per Hour Thursday*, NEWS4JAX (Sept. 29, 2021, 6:05 PM), https://www.news4jax.com/news/local/2021/09/29/floridas-minimum-wage-increases-to-10-per-hour-thursday/ [https://perma.cc/58GQ-VX6E].

4. TSOUKALAS, *supra* note 2, at 4.

5. Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 325 (2016).

6. DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 11 (May 10, 2017), https://files.epi.org/pdf/125116.pdf [https://perma.cc/7Q2L-WYRU].

7. CYNTHIA S. HERNANDEZ & CAROL STEPICK, WAGE THEFT: HOW MILLIONS OF DOLLARS ARE STOLEN FROM FLORIDA'S WORKFORCE *passim* (Jan. 26, 2012), https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2012/wage-theft-how-millions-of-dollars-are-stolen-from-floridas-workforce/wage-theft_how-millions-of-dollars-are-stolen-from-floridas-workforce_finaldocx1.pdf [https://perma.cc/X2M5-VJ7R].

8. Marianne Levine, *Behind the Minimum Wage Fight, A Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 10:40 AM), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644 [https://perma.cc/K2AL-VDQ2].

the state's limited—and contested—wage enforcement infrastructure. Policy recommendations for more robust state-level minimum wage enforcement—including the re-establishment of a state department of labor—are offered.

I. MINIMUM WAGE AND THE NEW FEDERALISM

As defined by the Fair Labor Standards Act (FLSA), minimum wage is a basic labor standard meant to provide a "minimum standard of living necessary for health, efficiency, and general well-being of workers."[9] Thus, minimum wage laws define the lowest rate employers can pay and in turn protect workers from exploitatively low wages. Though minimum wage laws are most directly a critical tool for increasing wages and promoting economic stability for low-income workers across the labor market, the significance of such laws goes beyond simply lifting the wage floor.[10] Research indicates that minimum wage laws can reduce the racial earnings divide,[11] which is now more prominent than in 1979.[12]

In 2007, Congress amended the FLSA to raise the federal minimum hourly wage in three increments.[13] Under the amendment, known as the Fair Minimum Wage Act, the federal minimum wage increased from $5.15 to $5.85 in 2007, to $6.55 in 2008, and to $7.25 in 2009.[14] Since former President George W. Bush signed the last minimum wage increase into law, federal dysfunction has resulted in the most prolonged period in history without a raise.[15] As of this writing, it has been more than twelve

9. Fair Labor Standards Act of 1938, 29 U.S.C. § 202(a).

10. Arindrajit Dube et al., *The Economic Effects of a Citywide Minimum Wage*, 60 INDUS. & LAB REL. REV. 522 *passim* (2007).

11. Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q. J. ECON. 169, 169 (2021).

12. Elise Gould, *Racial Gap in Wages, Wealth, and More*, ECON. POL'Y INST. (Jan. 26, 2017, 11:15 AM), https://www.epi.org/blog/racial-gaps-in-wages-wealth-and-more-a-quick-recap/ [https://perma.cc/88CU-5NGE]; Ellora Derenoncourt et al., *Why Minimum Wages Are a Critical Tool for Achieving Racial Justice in the U.S. Labor Market*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 29, 2020), https://equitablegrowth.org/why-minimum-wages-are-a-critical-tool-for-achieving-racial-justice-in-the-u-s-labor-market/ [https://perma.cc/68YV-TPBB].

13. Fair Minimum Wage Act of 2007, 29 U.S.C. § 206(A)(1).

14. Notably, the minimum wage increases applied only to non-tipped workers. The federal hourly minimum wage rate for tipped workers is $2.13 per hour as long as the employee receives a combination of wages and tips that amount to at least $7.25 per hour. *Id.* § 203(m). The hourly minimum wage for tipped workers has not been increased since 1991. *See* Sylvia Allegretto & David Cooper, *Twenty-Three Years and Still Waiting for Change*, ECON. POL'Y INST. (July 10, 2014), https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/#:~:text= The%20subminimum%20wage%20for%20tipped%20workers%20has%20remained%20at%20%242.13,regular%20minimum%20wage%20was%20increased [https://perma.cc/K6X3-M2ME].

15. This is not the first time that partisanship has interfered with the federal minimum wage. Years of bipartisanship support for minimum wage came to an end during the Reagan Administration. Although abolishing the Fair Labor Standards Act was not politically feasible, the blocking of any increase in the minimum wage during the eight years of Reagan's presidency

years since the last minimum wage increase.[16] The federal minimum wage remains at $7.25 per hour.[17] Significantly, though the minimum wage has stagnated since 2009, inflation has not. When adjusted for inflation, a minimum wage worker in 2022 earns 27% less than their 2009 peers, when adjusted for inflation based on the Consumer Price Index (CPI). By comparison, a minimum wage worker in 1968 earned $12.12 per hour in 2022 dollars.[18] Moreover, Economic Policy Institute estimates that if the minimum wage had tracked productivity increases over the last fifty years, it would currently be higher than $22 per hour.[19]

In the face of federal gridlock, thirty states, Washington, D.C., and forty-six municipalities have enacted laws to increase their minimum wages above the federal level.[20] Predictably, this bottom-up minimum wage boom has been constrained by regional disparities. Southern lawmakers in particular have refused to pass minimum wage increases. Of the twenty states with a minimum wage less than or equal to the federal minimum, ten are in the South.[21] Strikingly, the legal wage floor for approximately 63% of states in the South is $7.25 per hour.[22] By comparison, just 22% of the states in the Northeast (excluding Puerto Rico and the U.S. Virgin Islands), 23% in the West (excluding Guam), and 42% in the Midwest have a minimum wage less than or equal to $7.25 per hour.[23]

---

led to a dramatic erosion of purchasing power. *See* Jennifer Graham, *From Reagan to Romney, A Brief History of Republican Thinking on the Minimum Wage*, DESERET NEWS (Feb. 26, 2021, 12:00 AM), https://www.deseret.com/indepth/2021/2/25/22297995/reagan-to-mitt-romney-a-brief-history-of-republican-thinking-on-the-minimum-wage-milton-friedman [https://perma.cc/5UWU-KQEC].

16. *History of Changes to the Minimum Wage Law*, U.S. DEPT. LAB. (Sept. 1, 2011), https://www.dol.gov/agencies/whd/minimum-wage/history [https://perma.cc/4TTP-J39D].

17. *Id.*

18. David Cooper et al., *The Value of the Federal Minimum Wage Is at Its Lowest Point in 66 Years,* ECON. POL'Y INST. (July 14, 2022, 3:39 PM), https://www.epi.org/blog/the-value-of-the-federal-minimum-wage-is-at-its-lowest-point-in-66-years/.

19. DAVID COOPER ET AL., ECON. POL'Y INST., RAISING THE FEDERAL MINIMUM WAGE TO $15 BY 2025 WOULD LIFT THE PAY OF 32 MILLION WORKERS 1 (Mar. 9, 2021), https://files.epi.org/pdf/221010.pdf [https://perma.cc/DB2K-3VKB].

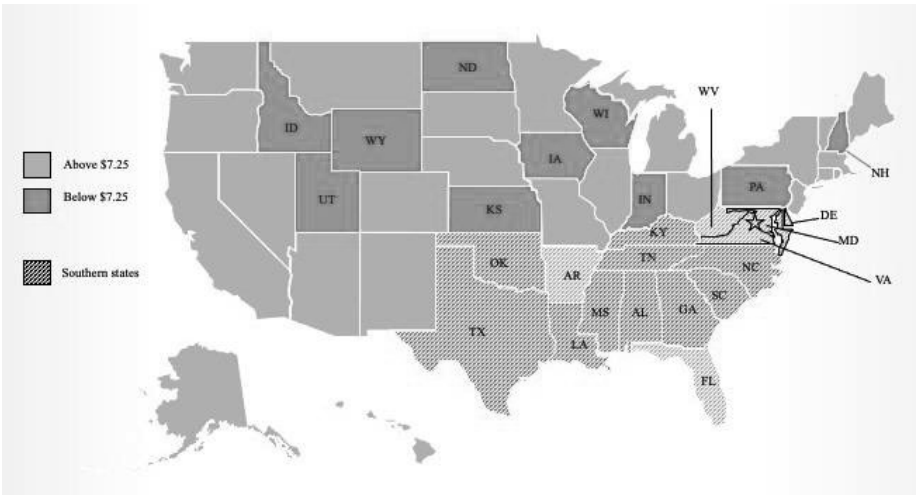
20. *Minimum Wage Tracker*, ECON. POL'Y INST., https://www.epi.org/minimum-wage-tracker/#/min_wage/ [https://perma.cc/7956-FA33] (last updated July 1, 2022); *see infra* Figure 1.

21. *Minimum Wage Tracker*, *supra* note 20; *see infra* Figure 1. "South" as used throughout this Article is defined by the South Census Region. *See Southeast Information Office*, U.S. BUREAU LAB. STAT., https://www.bls.gov/regions/southeast/south.htm [https://perma.cc/X8YD-9A9D] (last visited Sept. 13, 2022).

22. *State Minimum Wage Laws*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage/state [https://perma.cc/P23E-8P5C] (last updated July 1, 2022); *see infra* Figure 1.

23. *State Minimum Wage Laws*, *supra* note 22; *see Geographic Information*, U.S. BUREAU LAB. STAT., https://www.bls.gov/regions/home.htm [https://perma.cc/RD6Y-9MC6] (illustrating

Figure 1: State Minimum Wages Relative to the Federal Minimum Wage ($7.25)[24]



II. THE SURPRISING HISTORY OF FLORIDA'S MINIMUM WAGE

As Figure 1 shows, Florida is a notable exception to Southern states' subpar minimum wage rates in multiple respects. For one, while most states with a minimum wage created the requirement by statute,[25] Florida is one of just four states in the U.S.—and the only state in the South—to enshrine the right to a minimum wage in its constitution.[26] The means through which Floridian workers gained the constitutional right to a higher state minimum wage is likewise significant. In the face of state lawmakers' partisan entrenchment, Florida voters bypassed the

---

the Northeast, West, and Midwest geographic boundaries of the United States by census region); *see infra* Figure 1. These statistics apply to states' non-tipped workers' minimum wages. Of the states in the West, Northeast, and Midwest with a non-tipped minimum wage of $7.25, only Wisconsin, Pennsylvania, Idaho, Iowa, North Dakota, and New Hampshire have a minimum wage for tipped workers that is higher than the federal tipped rate of $2.13 per hour. *Minimum Wage Tracker*, *supra* note 19. However, none of these states tipped minimum wage rates exceed $5.00 per hour. *Id.*; *Tipped Minimum Wage Laws by State 2022*, MINIMUM-WAGE.ORG, https://www.minimum-wage.org/tipped [https://perma.cc/9N9G-WVVL] (last visited Sept. 13, 2022).

24. *Minimum Wage Tracker*, *supra* note 20.

25. *See* Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 374–76 (2018) (noting that beyond the United States, most liberal democracies pass measures to confront poverty and economic inequality through statutory and regulatory means, not through constitutional amendments).

26. FLA. CONST. art. X, § 24. Colorado, Ohio, and New Jersey are the other three states with minimum wage rights in their constitutions. COLO. CONST. art. XVIII, § 15; OHIO CONST. art. II, § 34a; N.J. CONST. art. I, ¶ 23; CONG. RSCH. SERV., STATE MINIMUM WAGES: AN OVERVIEW 17–31 (Sept. 2, 2022), https://sgp.fas.org/crs/misc/R43792.pdf [https://perma.cc/ EMZ7-JXLA].

legislature and amended the state's constitution directly through the ballot initiative process[27] in 2004 with the passage of Amendment 5 and in 2020 with Amendment 2.[28] In a demonstration of strong bipartisan support for a $15 minimum wage,[29] 61% of Florida voters passed Amendment 2, significantly exceeding the margin of victory of any presidential candidate in the 2020 General Election.[30] As a result, Florida assumed the mantle of the state with the highest minimum wage rate passed via ballot initiative[31] and the only state in the United States with a constitutional right to a $15 minimum wage.[32]

---

27. A direct ballot initiative starts with the collection of signatures on a petition. If a sufficient number of signatures are collected, the initiative is put on the ballot for voters to accept or reject without the involvement of the legislature. By contrast, some states have an indirect initiative process which requires a minimum number of signatures. Once achieved, the initiative is sent for legislative consideration before it is allowed on the ballot. Further, while Florida only allows for direct constitutional initiatives, direct and indirect initiatives for statutory reform are available in twenty-three states. *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 303 (2008). For a thorough discussion of state constitutions as a vital yet neglected tool for countering antidemocratic behavior, including political entrenchment, *see* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

28. *Florida Minimum Wage, Amendment 5 (2004)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Minimum_Wage,_Amendment_5_(2004) [https://perma.cc/88CL-DTBN] (last visited Sept. 16, 2022); *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_2,_$15_Minimum_Wage_Initiative_(2020) [https://perma.cc/V3HX-BT87] (last visited Sept. 16, 2022). Florida is one of 16 states that allow for constitutional amendments through direct constitutional initiatives. ARIZ. CONST. art. XXI, § 1; ARK. CONST. amend. VII; CAL. CONST. art. II, §§ 8, 10; *id.* art. XVIII, § 3; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, §§ 3, 5; ILL. CONST. art. XIV, § 3; MICH. CONST. art. XII, § 2; MO. CONST. art. III, §§ 50, 51; MONT. CONST. art. XIV, § 9; NEB. CONST. art. III, §§ 2, 4; NEV. CONST. art. XIX, §§ 2, 4; N.D. CONST. art. III, §§ 1–10; OHIO CONST. art. II, §§ 1a, 1b; OKLA. CONST. art. V, §§ 2, 3; OR. CONST. art. IV, §§ 2–4; S.D. CONST. art. XXIII, §§ 1, 3.

29. Recent research demonstrates that a majority of voters across the United States support a $15 per hour minimum wage. *See, e.g.*, Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising Federal Minimum Wage to $15 an Hour*, PEW RSCH. CTR. (July 30, 2019), https://www.pewresearch.org/fact-tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-hour/ [https://perma.cc/VQ37-NFC8].

30. Specifically, Amendment 2 passed with more than 60% voter approval while former President Donald Trump won Florida with only 51.2%. *See* Fla. Dep't State, *Election Results*, https://results.elections.myflorida.com/Index.asp [https://perma.cc/79FX-Y6CX] (last visited Sept. 16, 2022).

31. CONG. RSCH. SERV., STATE MINIMUM WAGE BALLOT MEASURES: IN BRIEF 2–5 (Jan. 28, 2021), https://crsreports.congress.gov/product/pdf/R/R44706/6 [https://perma.cc/7FBH-VH7U]. Prior to Florida's passage of Amendment 2, $13.50 per hour was the highest minimum wage enacted by a ballot initiative, which was passed by Washington State voters in 2016. *Id.* at 5.

32. CONG. RSCH. SERV., *supra* note 26. Note, however, that New Jersey's 2013 constitutional amendment creating Article I, Paragraph 23, requires employers pay $8.25 per hour or the rate under the New Jersey Wage and Hour Law, N.J. STAT. ANN. § 34:11-56a4 (West 2022), whichever is greater. N.J. CONST. art. I, ¶ 23. Per 2019 amendments to New Jersey's Wage and Hour Law, the state's minimum wage will increase to $15 per hour by 2024. N.J. STAT. ANN.

A. *Amendment 5 (2004)*

Before 2004, Florida was one of only seven states without its own minimum wage.[33] The state legislature had repeatedly refused to set one and even went a step further in 2003 by passing a law that preempted localities from implementing their own wage ordinances.[34] In light of this intransigence, advocates decided to push for a constitutional amendment put directly to voters. In 2004, the Florida Minimum Wage Amendment made it onto the November ballot and passed overwhelmingly.[35] Amendment 5 amended the Florida Constitution to include a state minimum wage of $6.15 ($3.15 for tipped workers), $1 over the then-existing federal minimum wage, which had remained unchanged at the time for seven years.[36] Amendment 5 set Florida apart from other Southern states, which had—and still have—much lower minimum wage rates.[37] Moreover, Amendment 5 mandated that the state minimum wage be automatically indexed to inflation each year, using the consumer price index for urban wage earners and clerical workers (CPI-W) or a subsequent index determined by the Department of Labor.[38]

The initial push for a state minimum wage coalesced under Floridians for All, a coalition led by the Association of Community Organizations for Reform Now (ACORN), with support from numerous state and national progressive groups and labor unions, including MoveOn, America Coming Together, and the Service Employees International Union (SEIU). The campaign began after state polling in 2003 showed strong support for a higher state minimum wage, particularly among people of color and those earning low wages.[39] Considering this polling, ACORN saw a real possibility of winning the state minimum wage

---

§ 34:11-56a4a. (West 2022). Thus, the New Jersey Constitution technically requires a $15 per hour minimum wage. Of course, the $15 minimum wage is not directly mentioned in the state constitution but is indirectly referenced by statute. *Id.*

33. *Groups Launch Ballot Initiative to Raise Florida Minimum Wage*, BRENNAN CTR. FOR JUST. (Aug. 7, 2003), https://www.brennancenter.org/our-work/analysis-opinion/groups-launch-ballot-initiative-raise-florida-minimum-wage [https://perma.cc/8U6A-3DNU].

34. FLA. STAT. ANN. § 218.077(2) (West 2022).

35. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28; *Florida Minimum Wage Amendment 03-29*, FLA. DIV. ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=37732&seqnum=1 [https://perma.cc/M7BJ-A9BL] (last visited Sept. 16, 2022).

36. *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-2009*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/minimum-wage/history/chart [https://perma.cc/CL83-V9HA] (last visited Sept. 16, 2022).

37. *See supra* Figure 1.

38. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28; *Florida Minimum Wage Amendment 03-29*, *supra* note 35.

39. John Atlas, *In Red State Florida, Victory for Working People*, SHELTERFORCE (Jan. 1, 2005), https://shelterforce.org/2005/01/01/in-red-state-florida-victory-for-working-people/ [https://perma.cc/B3MP-WMMR].

fight.[40] ACORN also viewed placing minimum wage on the ballot as a strategy for encouraging disengaged Black and Latinx Floridians to vote, hoping that their turnout would swing votes in the 2004 Presidential Election away from Republican George W. Bush and toward the then-unnamed Democratic candidate (later, John Kerry).[41]

The Coalition to Save Florida Jobs, a committee of business leaders, led the opposition to Amendment 5.[42] The Coalition worked to convince the public that Amendment 5 was harmful to Florida businesses and workers.[43] The Coalition mobilized hundreds of donors and powerful pro-business lobbyists, including the Florida Restaurant Association, Florida Chamber of Commerce, Florida Retail Federation, and large corporations like Publix Supermarkets, Walt Disney World, Burger King, and Walgreens.[44] While the strategy to turn out infrequent voters failed (Florida voted for George W. Bush by a narrow margin),[45] the push to establish a state minimum wage succeeded. On November 2, 2004, Amendment 5 became law when about 5.2 million Floridians voted to pass Amendment 5 while around 2.1 million Floridians opposed it.[46]

B. *Amendment 2 (2020)*

In the sixteen years between the passage of Amendment 5 in 2004 and Amendment 2 in 2020, the only increases to Florida's minimum wage were annual adjustments to keep pace with inflation.[47] Without a meaningful boost to the state minimum wage, efforts were made during this period to enact local minimum wage laws. Specifically, in 2016,

---

40. *Id.*

41. *Id.*

42. *Id.*

43. Christine Selvaggi Baumann, *Restaurant, Retail Industries Oppose Minimum Wage Amendment*, JACKSONVILLE BUS. J. (Sept. 23, 2004), https://www.bizjournals.com/jacksonville/stories/2004/09/20/daily30.html [https://perma.cc/MSK2-MRPN].

44. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28.

45. Atlas, *supra* note 39.

46. *Florida Minimum Wage Amendment 03-29*, *supra* note 35.

47. FLA. DEP'T ECON. OPPORTUNITY, FLORIDA MINIMUM WAGE HISTORY: 2000 TO 2019 (Oct. 2018), https://bit.ly/2EHET47 [https://perma.cc/ADG5-2GEH]. In practice, Amendment 5's provision that the wage adopted in 2005 be automatically indexed to the CPI-W each year did not mean that the minimum wage truly increased. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28. Indexing merely "locks the wage in place," so that as inflation increases, the minimum wage has the same buying power as when it was first implemented. Michael Ettlinger, *Securing the Wage Floor*, ECON. POL'Y INST. (Oct. 12, 2006), https://www.epi.org/publication/bp177/ [https://perma.cc/3LEZ-7S78]. For example, in 2012, Florida's minimum wage was $7.67, which is $1.52 more than in 2005. FLA. DEP'T ECON. OPPORTUNITY, *supra*. Yet because the 2012 wage was price-indexed, $7.67 still buys the same amount of goods and services as $6.15 did in 2005. Ettlinger, *supra*. Therefore, these nominal increases did not appreciably change the standard of living for minimum wage workers; the minimum wage remains far below a living wage. *Id.*

while the state minimum wage hovered at $8.05,[48] the City of Miami Beach passed a $10.31 local minimum wage requirement, set to start in 2018 and increase to $13.31 by 2021.[49] In response, business groups who opposed the statewide minimum wage, like the Florida Chamber of Commerce, sued the City for violating the state statute against setting local wages.[50] The Florida Attorney General publicly supported the business groups' case against the City.[51] Two courts ruled against Miami Beach, striking down the local ordinance, and the Florida Supreme Court refused to hear the appeal in 2019.[52] Amid this political stalemate, Amendment 2, the 2020 minimum wage initiative, emerged.

As with Amendment 5 in 2004, Amendment 2 was on the ballot during a presidential election year and depended significantly on how Florida voted. Unlike 2004, however, the 2020 Election happened during a global pandemic. COVID-19 revealed longstanding inequities while also spotlighting the unique struggles faced by small businesses and nonprofits to stay afloat.[53] Both proponents and opponents of Amendment 2 attempted to leverage the pandemic to publicize their cases.[54]

---

48. FLA. DEP'T ECON. OPPORTUNITY, *supra* note 47.

49. Kyle Munzenrieder, *Miami Beach Approves Raising Minimum Wage to $13.31*, MIAMI NEW TIMES (June 8, 2016, 5:13 PM), https://www.miaminewtimes.com/news/miami-beach-approves-raising-minimum-wage-to-1331-8511868 [https://perma.cc/4RMM-UCE5].

50. Jim Saunders, *Business Groups Fight Higher Miami Beach Minimum Wage*, DAILY COM. (Dec. 15, 2016, 1:01 AM), https://www.dailycommercial.com/story/news/state/2016/12/15/business-groups-fight-higher-miami-beach-minimum-wage/24252046007/ [https://perma.cc/8GU9-6UGT]; FLA. STAT. ANN. § 218.077(2) (West 2022).

51. Joey Flechas, *State of Florida Joins Lawsuit Against Miami Beach's Minimum Wage Law*, TAMPA BAY TIMES (Feb. 2, 2017), https://www.tampabay.com/state-of-florida-joins-lawsuit-against-miami-beachs-minimum-wage-law/2311898/ [https://perma.cc/AA6K-5XQW].

52. Dara Kam, *A Revamped Florida Supreme Court Says No to Miami Beach's Own Minimum Wage Law*, MIAMI HERALD (Feb. 5, 2019), https://www.miamiherald.com/article225553350.html.

53. *See* Steve Contorno & Helen Freund, *The Push for a $15 Minimum Wage in Florida Was Winning. Can It Survive COVID-19?*, TAMPA BAY TIMES (Oct. 15, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/10/15/the-push-for-a-15-minimum-wage-in-florida-was-winning-can-it-survive-covid-19/ [https://perma.cc/4YFC-KCWJ] ("At a time when American labor has been redefined and essential employees are celebrated as everyday heroes, Florida voters in November will decide whether the value of work should change, too . . . . [T]he coronavirus changed the climate for businesses . . . many of which face uncertain futures. Small companies have closed. Big corporations have laid off thousands of workers. The economic lifeblood of the state, the tourism and hospitality sector, took . . . a hard punch.").

54. *See id.* (explaining that raising the minimum wage would "permanently shutter many restaurants and hotels," which were already on "life support" at the time from the pandemic).

Amendment 2 was spearheaded by a wealthy Florida lawyer, John Morgan.[55] The initiative called for gradually increasing the state minimum wage to $15 per hour, starting at $10 in September 2021 and increasing by $1 annually until it reaches $15 in 2026.[56] After that, the minimum wage would be indexed to inflation.[57] Progressive groups like Florida for $15 and Southern Poverty Law Center strongly supported Amendment 2.[58] As in 2004, the Coalition to Save Florida Jobs (operating under the name "Save Florida Jobs") opposed any minimum wage increase, with the Florida Restaurant and Lodging Association and the National Restaurant Association being top donors against Amendment 2.[59] The financial backing of major players like Publix and Walt Disney World was notably absent this time,[60] perhaps because many large employers in Florida were already in the process of raising wages to $15 per hour.[61] Predictably, state Republican leaders, including Governor Ron DeSantis, publicly opposed Amendment 2, but most Democratic elected officials remained silent.[62]

---

55. *Amendment 002*, FOLLOWTHEMONEY.ORG, https://www.followthemoney.org/entity-details?eid=48643469 [https://perma.cc/DR3K-YAQ6] (last visited Sept. 16, 2022); Pete Reinwald, *"Life-Changing": John Morgan Lauds Voter Passage of His $15 Minimum-Wage Initiative*, SPECTRUM NEWS (Nov. 4, 2020, 6:11 PM), https://www.mynews13.com/fl/orlando/news/2020/11/04/john-morgan-amendment-2-florida [https://perma.cc/825H-37TV]; *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, *supra* note 28.

56. *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, *supra* note 28.

57. *Raising Florida's Minimum Wage 18–01*, FLA. DIV. ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=70115&seqnum=1 [https://perma.cc/DQ9W-X86R] (last visited Sept. 16, 2022).

58. *FAQs*, FLORIDA FOR $15, https://www.floridafor15.org/faq [https://perma.cc/J6YM-V428] (last visited Sept. 16, 2022); *SPLC Action Fund: Minimum Wage Increase Will Lift Wages for Millions, Help Get People out of Poverty*, S.L. POVERTY CTR. (Nov. 4, 2020), https://www.splcenter.org/presscenter/splc-action-fund-minimum-wage-increase-will-lift-wages-millions-help-get-people-out [https://perma.cc/SV3Y-B24P].

59. *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, *supra* note 28; Atlas, *supra* note 39.

60. *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, *supra* note 28.

61. Lawrence Mower et al., *Florida Voters Passed a Minimum Wage Increase. What Does That Mean?*, TAMPA BAY TIMES (Nov. 4, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/11/04/florida-voters-passed-a-minimum-wage-increase-what-does-that-mean/ [https://perma.cc/LVJ6-638Z].

62. Jim Turner, *Florida GOP Chairman, Incoming House Speaker Oppose Amendment to Increase Minimum Wage*, S. FLA. SUN SENTINEL (Sept. 29, 2020, 1:51 PM), https://www.sun-sentinel.com/news/politics/elections/fl-ne-top-florida-gop-leaders-oppose-wage-increase-amendment-20200929-jsqj5qewnjg2fei37nuns37ree-story.html [https://perma.cc/N7P2-CDZH]; *DeSantis: 'Now Is Not the Time' for Ballot Amendment 2 Raising Florida's Minimum Wage*, WTXL TALLAHASSEE (Nov. 2, 2020, 7:46 PM), https://www.wtxl.com/news/election-2020/governor-ron-desantis-against-ballot-amendment-2-raising-floridas-minimum-wage [https://perma.cc/93UD-NL98]; Mary Ellen Klas, *'Total Systemic Failure': Florida Democrats Suffer Devastating Election Losses*, TAMPA BAY TIMES (Nov. 4, 2020),

The results of the 2020 Election mirrored the results of the 2004 Election, with the minimum wage amendment succeeding but Florida supporting the Republican candidate for President.[63] Nevertheless, Amendment 2 passed with 6.4 million votes, just over the 60% threshold needed to pass a state ballot measure.[64] This made Florida the eighth state to raise its minimum wage to $15 per hour, and the first in the South to do so by ballot measure,[65] which signaled major policy implications for the rest of the country.

Bills introduced in the 2021 and 2022 Florida legislative sessions threatened to exclude certain workers from Amendment 2, including young people and the formerly incarcerated.[66] Further, the Florida Congress passed new barriers for donations to citizen ballot initiatives in 2021.[67] Fortunately, a federal judge blocked the donation limit bill,[68] and the two disenfranchisement bills never gained traction. The Florida Legislature ultimately boosted worker pay to $13 per hour in 2021 for state employees ahead of Amendment 2's phase-in and again increased state employees' pay to $15 per hour in 2022, demonstrating Florida lawmakers' effort to "get[] out slightly ahead of [the] shift" to $15 per hour by 2026 for all employees.[69] The first phase of Amendment 2 began in September 2021, raising the state minimum wage to $10 per hour.[70]

---

https://www.tampabay.com/news/florida-politics/elections/2020/11/04/total-systemic-failure-florida-democrats-suffer-devastating-election-losses/ [https://perma.cc/JE5R-UNC9].

63. Zachary Fagenson, *Florida Voters Swing Right to Favor Trump, Left to Favor Wage Hike*, REUTERS (Nov. 5, 2020, 6:07 PM), https://www.reuters.com/article/us-usa-rights-wages-florida-trfn/florida-voters-swing-right-to-favor-trump-left-to-favor-wage-hike-idUSKBN27L304 [https://perma.cc/BGH8-BN5B].

64. *Raising Florida's Minimum Wage 18–01*, *supra* note 57.

65. The seven states that passed minimum wage increases eventually reaching $15 per hour prior to Florida were California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, and New York. CAL. LAB. CODE § 1182.12 (West 2022); CONN. GEN. STAT. §§ 31–58 (2022); 820 ILL. COMP. STAT. § 105/4a (2022); MD. CODE ANN., LAB. & EMPL. § 3-413 (West 2022); MASS. GEN. LAWS ch. 151, § 1 (2022); N.J. STAT. ANN. § 34:11-56a4 (West 2022); N.Y. LAB. LAW § 652 (McKinney 2022).

66. S.J. Res. 854, 2021 Leg. (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/854 [https://perma.cc/JF7Z-UY24]; S.J. Res. 382, 2022 Leg. (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/382 [https://perma.cc/SB52-YUAX].

67. S.B. 1890, 2021 Leg. (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/1890 [https://perma.cc/NQY8-BDL5].

68. Renzo Downey, *Federal Judge Blocks Contribution Cap for Ballot Initiatives*, FLA. POL. (July 1, 2021), https://floridapolitics.com/archives/438733-bill-limiting-donations-to-citizen-initiative-campaigns-put-on-pause/ [https://perma.cc/PGX3-J4XW].

69. John Kennedy, *Session Lurches into Overtime as State Worker Pay Raises Approved in Budget Deal*, TALLAHASSEE DEMOCRAT (Mar. 8, 2022), https://www.tallahassee.com/story/news/politics/2022/03/08/legislative-session-pay-raises-okd-state-workers-florida/9424181002/ [https://perma.cc/46ZU-QA8V].

70. Isaac Morgan, *FL Is Set to Boost the Minimum Wage to $10 an Hour–'A Dramatic Difference' for Low-Wage Workers*, FLA. PHOENIX (Sept. 1, 2021, 7:00 AM),

III. ENFORCING THE MINIMUM WAGE: THE U.S. WAGE AND HOUR DIVISION AND THE DESTRUCTION OF THE FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

Unfortunately, the enactment of a minimum wage law does not ensure that workers will be paid in accordance with it. Indeed, the failure to pay workers the wages they are legally due—wage theft—is widespread in low-wage jobs and disproportionately impacts women, immigrants, and people of color.[71] Furthermore, minimum wage violations force law-abiding employers to compete with artificially low labor costs and give employers who cheat their workers a competitive advantage while suppressed wages weaken consumer demand.[72] Unsurprisingly, wage theft also increases the percentage of workers living in poverty and the need for public assistance programs.[73] Thus, robust public enforcement of minimum wage laws is essential for ensuring employer compliance, advancing economic and racial justice, and eliminating unfair competition, especially in low-wage industries.

The U.S. Department of Labor's Wage and Hour Division (WHD) is only empowered to enforce the federal minimum wage.[74] Thus, where a state has a minimum wage that exceeds the federal rate, WHD can only recover up to $7.25 per hour owed to aggrieved workers, leaving the difference between the state and federal minimum wage rates in the pocket of the offending employer.[75] A state mechanism similar to WHD is needed to enforce the higher minimum wage in Florida and ensure compliance with the state law. Such a mechanism often takes the form of an administrative labor standards enforcement agency, usually housed in a state department of labor.

In addition to being authorized to fully recover back pay due to violations of federal minimum wage rates, state labor standards enforcement agencies offer enforcement capacity beyond what is

---

https://floridaphoenix.com/2021/09/01/fl-is-set-to-boost-the-minimum-wage-to-10-an-hour-a-dramatic-difference-for-low-wage-workers/ [https://perma.cc/6L7Q-YDDQ].

71. Annette Bernhardt et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 IND. & LAB. REL. REV. 808, 817–18 (2013); COOPER & KROEGER, *supra* note 6, at 16; Janice Fine et al., *Maintaining Effective U.S. Labor Standards Enforcement Through the Coronavirus Recession*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 3, 2020), https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/?longform=true [https://perma.cc/F7GC-PZSZ].

72. Janice Fine et al., Wash. Ctr. for Equitable Growth, *Strategic Enforcement and Co-Enforcement of U.S. Labor Standards Are Needed to Protect Workers Through the Coronavirus Recession*, *in* BOOSTING WAGES FOR U.S. WORKERS IN THE NEW ECONOMY 13, 17 (2021), https://equitablegrowth.org/wp-content/uploads/2021/01/011421-spitzer-book.pdf [https://perma.cc/7L29-BCDV].

73. COOPER & KROEGER, *supra* note 6, at 8.

74. 29 U.S.C. § 211(a).

75. *Id.*

available at the federal level. Notably, WHD faces a resource deficit that limits its ability to enforce federal wage and hour protections.[76] As of May 1, 2020, WHD employed 779 investigators to protect more than 143 million workers.[77] Accordingly, WHD only has enough resources for roughly one investigator per 183,000 American workers,[78] rendering minuscule the odds that WHD will inspect any given workplace. More than half of the United States' labor standards enforcement capacity rests with states and municipalities.[79]

However, state enforcement capacity is not equitably distributed throughout the country.[80] In line with the regional disparities between state minimum wage rates, differences in state wage enforcement are concentrated regionally, with the South possessing the weakest enforcement capacity in the country.[81] Florida is a notable example. Though Amendment 2 and Amendment 5 positioned Florida to be a minimum wage leader in the South, the state is also a cautionary tale of the failure to enforce it. Despite having one of the highest minimum wages in the South, Florida has the highest minimum wage violation rate of the ten most populous states in the nation.[82] Arguably, this could be

76. COOPER & KROEGER, *supra* note 6, at 5–6.

77. Fine et al., *supra* note 72. The number of investigators WHD employed as of May 2020 is significantly fewer than the 1,000 investigators employed in 1948, when the division was responsible for safeguarding the rights of only 22.6 million workers. *Id.*

78. *Id.*; KATE HAMAJI ET AL., CTR. POPULAR DEMOCRACY, ECON. POL'Y INST., UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 4 (May 2019), https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf [https://perma.cc/Q2L4-BPYA]; Gretchen Morgenson & Lisa Cavazuti, *The Hidden Scourge of 'Wage Theft': When Higher Profits Come Out of Workers' Pockets*, NBC NEWS (Sept. 6, 2021, 12:00 PM), https://www.nbcnews.com/business/business-news/hidden-scourge-wage-theft-when-higher-profits-come-out-workers-n1272238 [https://perma.cc/5TVT-QG7Q].

79. ZACH SCHILLER & SARAH DECARLO, POL'Y MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES *passim* (Nov. 2010), https://www.policymattersohio.org/wp-content/uploads/2011/10/InvestigatingWageTheft20101.pdf [https://perma.cc/SP8W-A8CQ]. Among survey participants, forty-three states and the District of Columbia collectively employ 659.5 investigators who work to enforce wage and hour laws. *Id.* Notably, the survey did not account for enforcement capacity at the local level, which has expanded exponentially in the last decade. Municipalities including San Francisco, Los Angeles, Seattle, Philadelphia, Chicago, and Minneapolis have created and staffed local labor standards enforcement agencies to enforce minimum wage and other worker protection laws. *E.g.*, *Office of Labor Standards Enforcement*, SAN FRANCISCO GOV'T, https://sfgov.org/olse// [https://perma.cc/BLS9-AZQB] (last visited Sept. 16, 2022). These efforts have significantly increased enforcement capacity at the subnational level.

80. Donald Kerwin, *The US Labor Standards Enforcement System and Low-Wage Immigrants: Recommendations for Legislative and Administrative Reform*, 1 J. MIGRATION & HUM. SEC. 32, 35–37 (2013), https://journals.sagepub.com/doi/pdf/10.1177/233150241300100103 [https://perma.cc/P6SP-QDAN].

81. Galvin, *supra* note 5, at 329–30.

82. COOPER & KROEGER, *supra* note 6.

the result of the state's failure to create an administrative apparatus to enforce wage protections for all Floridian workers.

Until 2002, the State of Florida had its own department of labor, the Department of Labor and Employment Security (DLES).[83] Founded in 1978 as an offshoot of the Florida Department of Commerce (dissolved in 1996), DLES included six programs, a support division, and numerous independent entities under its administrative umbrella.[84] Yet only a narrow subset of DLES's duties and budget were allocated to worker protections, with unemployment insurance, worker's compensation, and workforce development constituting the bulk of its responsibilities.[85] The two DLES divisions most relevant to worker protection were the Division of Administrative Services and the Division of Jobs and Benefits, collectively responsible for mitigating child labor and overseeing migrant work, including the enforcement of wages owed to agricultural workers.[86] This targeted labor focus meant only a small number of workers were entitled to state-level wage protection under DLES. Other Floridians who experienced wage violations could only look to WHD or pursue a civil lawsuit against their employers for redress.

Early in his first term (1999 to 2002), Florida Governor Jeb Bush set his sights on dismantling DLES.[87] The introduction of federal welfare reform in the mid- to late 1990s gave states increased flexibility in administering welfare and employment programs[88] and prompted restructuring of state labor agencies.[89] The popularity of "new public management" as a method for administering government in the early 2000s further laid the groundwork for Florida to restructure DLES. New

83. FLA. COMM. ON COM., IDENTIFICATION, REV., & RECOMMENDATIONS RELATING TO OBSOLETE STATUTORY REFERENCES TO THE FORMER FLA. DEP'TS OF LAB. & EMP. SEC., Interim Rep. 2011-107, at 1 (Oct. 2010), https://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/ pdf/2011-107cm.pdf [https://perma.cc/5E74-8YKP].

84. *Id.*

85. OPPAGA, SPECIAL REVIEW: COSTS OF THE DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY'S WORKFORCE DEVELOPMENT PROGRAMS, Rep. 99–28, at 9–10 (Jan. 2000). Expenditures for "protection in the areas of wages, housing and transportation for migrant and seasonal agricultural workers" was the category with the second lowest funding within DLES's labor programs in the fiscal year of 1998 to 1999 at $300,000. *Id.* at 10. Millions of dollars were spent on workforce development, including job placement, training, and unemployment services. *Id.* at 2.

86. FLA. COMM. ON COM., *supra* note 83, at 2.

87. Spencer Woodman, *Remember How Jeb Bush Dismantled Florida's Department of Labor?*, IN THESE TIMES (Feb. 19, 2016), https://inthesetimes.com/article/how-jeb-bush-dismantled-floridas-labor-department [https://perma.cc/BB66-UFW3].

88. *Welfare Reform and State Flexibility*, BROOKINGS INST., https://www.brookings.edu/events/welfare-reform-and-state-flexibility/ [https://perma.cc/PN4W-P7C7] (last visited Sept. 17, 2022).

89. U.S. GOV'T ACCOUNTABILITY OFF., GAO/HEHS-98-109, WELFARE REFORM: STATES ARE RESTRUCTURING PROGRAMS TO REDUCE WELFARE DEPENDENCE *passim* (June 1998), https://www.gao.gov/assets/hehs-98-109.pdf [https://perma.cc/9MAB-XLHT].

public management (NPM) focuses on cost reduction, performance measurement, and outcome budgeting.[90] NPM also emphasizes decentralizing government-run programs to the private sector for efficiency and flexibility.[91] "Doing more with less" was the central message of the NPM movement.[92]

Embracing these trends, Florida passed the Government Performance and Accountability Act in 1994 and increasingly shifted state-run services to corporate boards or subcontracted them to private entities altogether.[93] In 1999, the year Governor Jeb Bush assumed office, the Florida Legislature initiated the abolition of DLES[94] and directed the Office of Program Policy Analysis and Government Accountability to identify workforce development divisions and programs that could be "eliminated, consolidated, or privatized."[95] Given the continued weakening of DLES's role since the mid-1990s, it was all but a formality when the legislature finally abolished DLES in its entirety during the 2002 session.[96] The NPM creed is reflected in a veto letter from Governor Jeb Bush concerning the state budget in fiscal year 2002 to 2003:

> Abolishment of Department of Labor and Employment Security: Since taking office, an important goal of the administration has been the achievement of efficient, limited government that serves Florida's taxpayers well . . . .
>
> Over the last three years, no agency has embodied this positive change more than the Department of Labor and Employment Security . . . . resulting in the streamlining and transference of many programs to other agencies, saving taxpayers a total of $86.5 million.[97]

---

90. Lawrence L. Martin, *Budgeting for Outcomes in State Human Agencies*, 24 ADMIN. SOC. WORK 71, 86 (2000), https://doi.org/10.1300/J147v24n03_05 [https://perma.cc/JMW8-EV9C].

91. Naim Kapucu, *New Public Management: Theory, Ideology, and Practice*, *in* HANDBOOK OF GLOBALIZATION, GOVERNANCE, & PUB. ADMIN. 886, 889 (Ali Farazmand & Jack Pinkowski eds., 1st ed. 2006).

92. Christopher Hood, *A Public Management for All Seasons?*, 69 PUB. ADMIN. 3, 15 (Mar. 1991).

93. Christopher Botsko et al., *Recent Changes in Florida Welfare and Work, Child Care, and Child Welfare Systems*, THE URB. INST. (July 1, 2001), http://webarchive.urban.org/publications/310184.html [https://perma.cc/NEJ5-MBCF].

94. FLA. COMM. ON COM., *supra* note 83.

95. OPPAGA, REVIEW OF THE WORKFORCE DEVELOPMENT SYSTEM, Rep. 99-34, at 1 (Feb. 2000), https://oppaga.fl.gov/Products/ReportDetail?rn=99-34 [https://perma.cc/YS8X-P9WW].

96. FLA. COMM. ON COM., *supra* note 83.

97. Letter from Jeb Bush, Fla. Governor, to Katherine Harris, Fla. Sec'y of State (June 5, 2002), http://floridafiscalportal.state.fl.us/Document.aspx?ID=2864&DocType=PDF [https://perma.cc/DFR8-GPYW].

In the wake of DLES dismantling, child and farm labor enforcement—along with its investigators and subsequent appropriations—were transferred to the Division of Regulation under the Department of Business and Professional Regulation (DBPR), which remains in existence.[98] As of 2022, DBPR maintains sixteen inspectors for functions of the Division of Regulation.[99] DLES's abolition in and of itself did not affect Florida's wage enforcement capacity—it simply passed the torch of state wage enforcement for some workers to DBPR. Some of DLES's responsibilities were transferred to WAGES coalitions and the Agency for Workforce Innovation,[100] which was combined into the Department of Economic Opportunity in 2011.[101] Adopting a mechanism to protect and enforce wage and hour laws for all workers, beyond the limited subset of child and farm workers, was not considered at the time. This resulted in reinscribing a system in which employers could commit wage theft without state interference.[102] Even if this was an unintentional goal of DLES's restructuring, it is what happened in practice.

IV. FLORIDA'S MINIMUM WAGE ENFORCEMENT AFTER THE DISMANTLING OF THE DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

Before 2004, Florida did not have a state minimum wage, so the federal government carried out minimum wage enforcement.[103] In 2005, when Florida's minimum wage went into effect, Florida gained authority to enforce the new statewide wage protections.[104] Yet without DLES or a similar department of labor to carry out administrative enforcement for all Floridian workers, Florida was not well-positioned to take up these new duties. Supporters of Amendment 5 attempted to address this enforcement gap. Included in Amendment 5's ballot language was a

98. *Child Labor*, FLA. DEP'T OF BUS. & PRO. REGUL., http://www.myfloridalicense.com/DBPR/child-labor/ [https://perma.cc/TMP5-ZJ8P] (last visited Sept. 21, 2022); *Farm Labor*, FLA. DEP'T OF BUS. & PRO. REGUL., http://www.myfloridalicense.com/DBPR/farm-labor/ [https://perma.cc/U3CT-FCS2] (last visited Sept. 21, 2022).

99. *Inspection Program*, FLA. DEP'T OF BUS. & PRO. REGUL., http://www.myfloridalicense.com/DBPR/division-of-regulation/inspection-program/ [https://perma.cc/3AWC-SU3D] (last visited Sept. 9, 2022).

100. Botsko et al., *supra* note 93.

101. *Florida Director of Agency for Workforce Innovation*, BALLOTPEDIA, https://ballotpedia.org/Florida_Director_of_Agency_for_Workforce_Innovation [https://perma.cc/F7ZW-F7RB] (last visited Sept. 21, 2022).

102. WORKFORCE FLA., EMPLOYER-SPONSORED BENEFITS STUDY TASK FORCE FINAL REPORT 1, 15 (Jan. 15, 2014), https://careersourceflorida.com/wp-content/uploads/2014/01/TaskForceBenefitsStudyFinalReport.pdf [https://perma.cc/CJ4V-8BXR].

103. FLA. STAT. § 448.110(3) (2022).

104. *Id.*

provision that the Florida Attorney General "or other official designated by the state legislature" may enforce the minimum wage by bringing a lawsuit on behalf of the state.[105] This language provided the legislature with discretion to delegate enforcement authority to an existing administrative agency, like DBPR, or create a new agency and authorize its director to enforce the minimum wage. However, after Amendment 5's passage, the Florida Legislature enacted a statute that only permitted the Florida Attorney General to bring a civil action for enforcement.[106] Thus, the State Attorney General's Office became the sole avenue for the public enforcement of Florida's minimum wage.[107]

---

105. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28; FLA. CONST. art. X, § 24. Notably, Amendment 5 also included a private right of action creating a pathway for workers to sue employers who failed to pay them minimum wage. *Florida Minimum Wage, Amendment 5 (2004)*, *supra* note 28. While private rights of action provide workers with a mechanism to enforce their rights where the government cannot or will not act, private enforcement alone is inadequate, especially for low-wage workers who are most vulnerable to wage theft. Administrative agencies can and should take steps to address this hurdle by protecting the identity of complainants, initiating investigations proactively, and resolving violations for all aggrieved workers. Further, as minimum wage violations tend to impact multiple workers, agencies are better suited to achieve justice for all workers whose rights have been violated, not just those who feel comfortable coming forward. Additionally, unlike a civil suit, enforcement through an administrative agency is free and administrative enforcement processes are set up such that workers are not expected to be represented by attorneys. This is important because, with the exception of legal nonprofits, many attorneys are uninterested in representing low-wage workers in minimum wage lawsuits as the recovery is relatively small. Similarly, where workers are precluded from filing a civil action because of forced arbitration clauses—a trend that the Center for Popular Democracy and the Economic Policy Institute estimates will cover 80% of private sector, nonunion workers by 2024—public enforcement may be the only means available to workers to address minimum wage violations. *See* HAMAJI ET AL., *supra* note 78, at 1, 4, 11, 21.

106. FLA. STAT. § 448.110(7) (2022). In addition to failing to designate an administrative agency to enforce Florida's minimum wage, Florida lawmakers blunted workers' right to enforce the minimum wage through a civil suit. Senate Bill 18B included a provision requiring that before an aggrieved person can file a civil action to enforce the minimum wage, they must first notify their employer in writing of their intent to initiate such an action and include the dates and hours for which payment is sought and the total amount of alleged unpaid wages. *See* S.B. 18B, 2005 Leg., Spec. Sess. B (Fla. 2005). Notably, despite employers' obligations to maintain payroll records under federal law, Florida's requirement to give the employer written notice prior to filing a civil action shifts the obligation of recordkeeping to the worker. *See* 29 U.S.C. § 211(c). Thus, the procedural burdens created by Senate Bill 18B combined with the fear of retaliation that prevents many workers from reporting minimum wage violations almost certainly discourages some low-wage workers from filing minimum wage lawsuits. For a discussion of asymmetries of power and retaliation keeping workers from complaining, *see* Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L. J. 813, 815 (2013).

107. FLA. STAT. § 448.110(7) (2022). The WHD can conduct some state minimum wage enforcement. Though WHD has local offices in Florida, WHD is unable to recover more than $7.25 per hour for minimum wage violations. *Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage [https://perma.cc/L97X-VCQ5] (last visited Sept. 21, 2022). However, WHD does use the state minimum wage rate when it is higher than the

In the years since Amendment 5 was passed and enforcement authority has resided exclusively with the Attorney General's Office, Florida has had four different attorneys general.[108] None seem to have mitigated the rampant wage theft in Florida.[109] From 2016 to 2019, the Florida Attorney General's Office received a total of twenty-nine complaints.[110] In New York State, by contrast, 6,000 complaints were filed in 2014 alone.[111] In Washington—which has a population size that is roughly one-third of Florida's—6,600 wage complaints were filed with the Washington State Department of Labor and Industries in 2019.[112]

Equally troubling is that the Florida Attorney General's Office has failed to meaningfully address any minimum wage complaint for as long as Florida has had a state minimum wage. Legal analysis from 2004 to

---

federal minimum to calculate back wages. *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa [https://perma.cc/77Y5-WBF8] (last visited Sept. 21, 2022). Thus, where back pay is involved, WHD can complement state minimum wage enforcement. *Id.* Wage and hour enforcement by attorneys general have proven effective in some jurisdictions that have dedicated workers' rights units within their attorneys general offices, such as California, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and the District of Columbia. *See* TERRI GERSTEIN, ECON. POL'Y INST., WORKERS' RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL 4 (Aug. 27, 2020), https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/ [https://perma.cc/Z82M-XSM2]. Florida's Office of the Attorney General, however, does not have a worker's rights unit. Moreover, all jurisdictions with attorneys general who are active in enforcing wage protections (excluding Massachusetts) also have state departments of labor. *E.g.*, N.Y. DEP'T OF LAB., https://dol.ny.gov/ [https://perma.cc/44RC-GTX3] (last visited Sept. 21, 2022). Thus, the Office of Attorney General in each of those states provides enforcement resources that supplement the administrative agency's—a significant distinction from Florida's framework in which the attorney general is the sole avenue available for state minimum wage enforcement. FLA. STAT. § 448.110(7) (2022).

108. *Florida Former Attorneys General*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/attorneys-general/past-attorneys-general/florida-former-attorneys-general/ [https://perma.cc/ARK7-JRHZ] (last visited Sept. 21, 2022). From 2004 to 2019, Florida's former attorneys general were Charlie Crist, Bill McCollum, and Pam Bondi. *Id.* The current attorney general is Ashley Moody. *Attorney General Ashley Moody*, FLA. OFF. OF ATT'Y GEN., http://www.myfloridalegal.com/pages.nsf/Main/1515CE372E59D1E885256CC60071B1C4 [https://perma.cc/H2KX-M3AU] (last visited Sept. 21, 2022).

109. Email from Off. of the Att'y Gen. of Fla., to authors (Jan. 11, 2021) (on file with authors); HERNANDEZ & STEPICK, *supra* note 7, at 7; *e.g.*, Michael Auslen, *Florida Democratic Lawmakers Demand Stronger Minimum Wage Enforcement by Pam Bondi*, BRADENTON HERALD (Sept. 17, 2015, 7:26 AM), https://bit.ly/3bAU8bi.

110. Email from Off. of the Att'y Gen. of Fla., *supra* note 109.

111. REBECCA MILLER ET AL., MAKE THE ROAD N.Y., CTR. FOR POPULAR DEMOCRACY, COMING UP SHORT: THE STATE OF WAGE THEFT ENFORCEMENT IN NEW YORK 11 (Apr. 2019), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf [https://perma.cc/N5YT-KEKJ].

112. WASH. STATE DEP'T LAB. & INDUS., WAGE, CHILD LABOR AND PROTECTED LEAVE INVESTIGATIONS 6 (Dec. 2019), https://www.lni.wa.gov/agency/_docs/2019WageChildLaborProtectedLeaveReport.pdf [https://perma.cc/VQ3P-Z6EN].

2011[113] and investigative reporting from 2011 to 2016[114] collectively show that from 2004—the year Floridians first designated a state minimum wage—to 2016, the state failed to file a single civil action to enforce Florida workers' constitutional right to a minimum wage.[115] Likewise, between 2016 and 2019, records demonstrate the Attorney General's Office took no formal enforcement actions and recovered no money, even for the scant number of Floridians who filed wage complaints during those four years.[116]

Amid this weak state enforcement climate, some localities, starting with Miami-Dade County, passed their own wage theft ordinances that created local processes for recovering stolen wages.[117] In response, state Republicans have repeatedly introduced bills to preempt localities' ability to do so.[118] While bills like these have yet to pass in Florida, the message conveyed is that protecting workers' constitutional right to the minimum wage is not a statewide priority.

V. THE INEQUITABLE IMPACT OF UNCHECKED WAGE THEFT

To understand the extent of wage theft throughout Florida, the Authors assessed minimum wage violation rates from 2000 to 2019. This allowed for comparing rates before and after the passage of Amendment 5 (in effect May 2005) and before the passage of Amendment 2 (in effect September 2021). Between 2000 and the end of April 2005, the minimum

113. HERNANDEZ & STEPICK, *supra* note 7.

114. Levine, *supra* note 8.

115. *See* Levine, *supra* note 8 ("Florida . . . did not perform any enforcement action from late 2011 through early 2016, according to records obtained by the publication In These Times and reviewed by POLITICO."); *see also* HERNANDEZ & STEPICK, *supra* note 7, at 7 ("As of December 2011, the Florida Attorney General had not brought one single civil action to enforce the state's minimum wage law.").

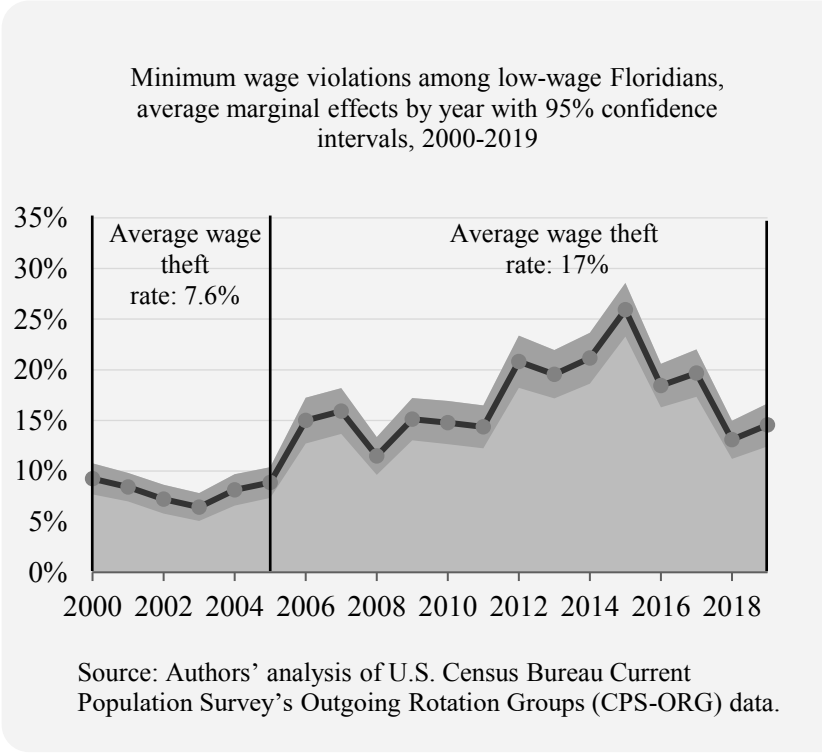
116. Email from Off. of the Att'y Gen. of Fla., *supra* note 109. The records include one email from an employer indicating that the employer increased hourly rates to meet minimum wage requirements. There is no indication that the employer was asked if they paid back wages. Further, the employer provided no documentation or other proof to confirm they had in fact come into compliance with the minimum wage. *Id.*

117. Munzenrieder, *supra* note 49; Kam, *supra* note 52.

118. Bills in six sessions attempted to preempt local wage theft ordinances and other labor regulations, all sponsored by Republican legislators. *See* S.B. 862, 2012 Leg., Reg. Sess. (Fla. 2012), https://www.flsenate.gov/Session/Bill/2012/862 [https://perma.cc/S9EK-MDBC]; S.B. 1216, 2013 Leg., Reg. Sess. (Fla. 2013), https://www.flsenate.gov/Session/Bill/2013/1216/ [https://perma.cc/L6SW-X7T4]; S.B. 926, 2014 Leg., Reg. Sess. (Fla. 2014), https://www.flsenate.gov/Session/Bill/2014/926/ [https://perma.cc/J7MF-U5NK]; S.B. 1158, 2017 Leg., Reg. Sess. (Fla. 2017), https://www.flsenate.gov/Session/Bill/2017/1158 [https://perma.cc/STG7-XA6S]; H.B. 17, 2017 Leg., Reg. Sess. (Fla. 2017), https://www.flsenate.gov/Session/Bill/2017/17 [https://perma.cc/L7KC-QUNT]; S.B. 432, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/432 [https://perma.cc/QA6R-NXVG]; S.B. 1126, 2020 Leg., Reg. Sess. (Fla. 2020), https://www.flsenate.gov/Session/Bill/2020/1126 [https://perma.cc/9UZ7-6VDE].

wage violation rate among Floridians earning low wages—those with incomes in the bottom 20%—averaged 7.6%.[119] As Florida's minimum wage increased and the state made no effort to enforce workers' rights, wage theft rates rose dramatically.

Figure 2: Florida's Wage Theft Rate More Than Doubled After Minimum Wage Boost in 2005[120]



By the fourth quarter of 2005, minimum wage violations had nearly doubled to 13.9%.[121] The same time the following year, violations reached 17%.[122] Minimum wage violations hovered around 15% for several years thereafter before climbing back up again to peak at 26% in 2015—more than three times the violation rate of the early 2000s.[123] Though the minimum wage violation rate settled back down to 14.6% in 2019, this rate is still almost double the rate fifteen years prior.[124]

119. TSOUKALAS ET AL., *supra* note 1, at 4; *see infra* Figure 2.
120. TSOUKALAS ET AL., *supra* note 1, at 4.
121. *See supra* Figure 2.
122. *See supra* Figure 2.
123. *See supra* Figure 2.
124. *See supra* Figure 2.

All told, after the minimum wage increase in May 2005, about 17% of low-wage workers in Florida—or about 250,000 Floridians per year on average—were paid less than the minimum wage they were entitled to by law.[125] As a result, working Floridians lost an average of $1.32 per hour between 2005 and 2019, nearly a 20% cut in the minimum wage to which they were entitled.[126] Notably, this average figure does not account for any lost income above the minimum wage that workers may have been promised or otherwise owed, so the extent of wage theft these workers experienced could have been even more significant. Again, according to the Florida Attorney General's records, none of these wage theft cases were pursued.[127] Moreover, the Authors' minimum wage violation rate estimates are conservative, so the figures likely underestimate the true prevalence of wage theft.

To ascertain industry-specific minimum wage violation rates, the Authors investigated the top industries to experience wage theft—from the time Amendment 5 took effect in 2005 to the present day.[128] Figure 3 displays violation rates for the ten industries with the highest violation rates.[129] Importantly, five of the top six industries are pivotal to Florida's economy, with service industries (such as food, drinking, and laundry services) being significant drivers of Florida's $75 billion-dollar tourism economy.[130]

125. *See supra* Figure 2.

126. *See supra* Figure 2.

127. Email from Off. of the Att'y Gen. of Fla., *supra* note 109.

128. TSOUKALAS ET AL., *supra* note 1, at 5; *see infra* Figure 3.

129. TSOUKALAS ET AL., *supra* note 1, at 5.

130. Alexis P. Tsoukalas, *Florida Workers Make Tourism the State's Top Industry, But Companies Refuse to Share the Prosperity*, FLA. POL'Y INST. (Dec. 20, 2019), https://bit.ly/3hQ44zI [https://perma.cc/NDE6-H27A]; John Jordan, *Growth on the Menu for Florida's Restaurant Sector*, GLOBEST (Aug. 29, 2019), https://www.globest.com/2019/08/29/growth-on-the-menu-for-floridas-restaurant-sector/?slreturn=20220207204957 [https://perma.cc/LN4T-TSQ5]; Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S., Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), https://pewrsr.ch/34QjJeF [https://perma.cc/UAR9-LYQ5]; *see infra* Figure 3.

Figure 3: Top 10 Highest Violation Industries in Florida (2005-2019), with Notable Occupations Included[131]

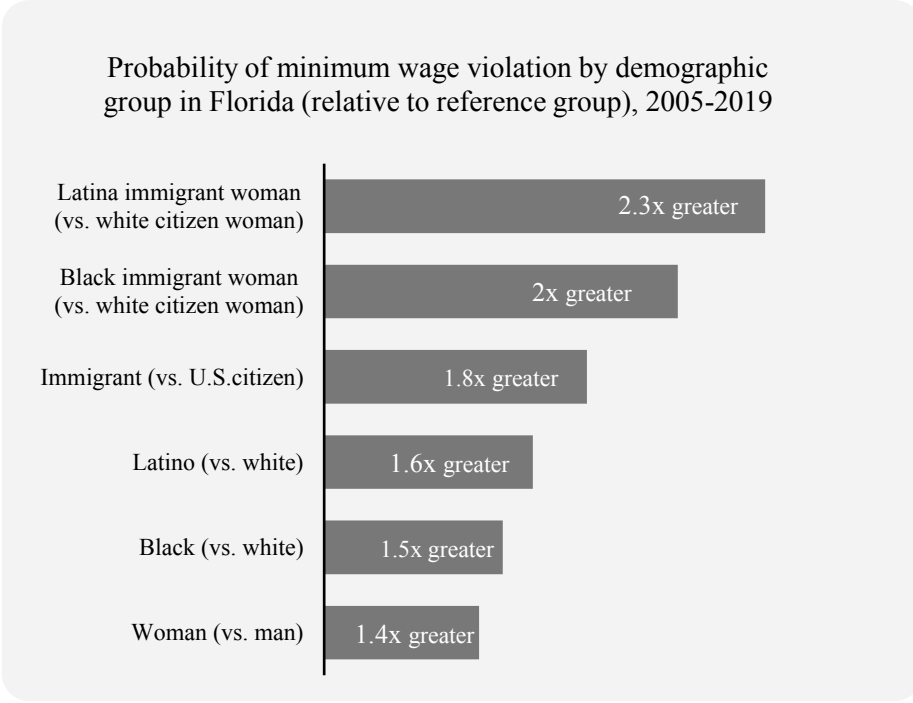
	Industry *Occupation with Highest Wage Theft*	**Minimum Wage Violation Rate**	**Number of Workers Underpaid Per Year**	**Average Hourly Wage Theft**
	**Personal and laundry services** *31% were hairdressers, hairstylists, and cosmetologists*	28%	12,999	$1.36
	**Membership association and organizations** *21% were secretaries and administrative assistants*	24%	4,184	$1.51
	**Agriculture** *75% were miscellaneous agricultural workers (e.g., farmworkers)*	24%	3,900	$1.22
	**Real estate** *50% were real estate brokers and sales agents*	23%	6,334	$1.63
	**Private households** *76% were maids and housekeepers*	23%	5,206	$1.39
	**Food services and drinking places** *36% were waiters and waitresses*	22%	59,583	$1.36
	**Repair and maintenance** *22% were automotive service technicians and mechanics*	20%	3,869	$1.66
	**Transportation and warehousing** *26% were driver/sales workers and truck drivers*	20%	10,529	$1.42
	**Social assistance** *41% are child care workers*	19%	4,785	$1.07
	**Wholesale trade** *31% were sales representatives, wholesale and manufacturing*	19%	5,604	$1.06

The occupational percentages within each industry represent the share that occupation contributes to the industry's total rate of wage theft. For example, among those who experienced wage theft in personal and laundry services, 31% are hairdressers, hairstylists, and cosmetologists.

131. TSOUKALAS ET AL., *supra* note 1, at 5.

The Authors were also determined to identify whether wage theft occurred similarly across demographic groups. Deep inequities were discovered. From 2005 to 2019, the probability of experiencing wage theft in Florida was 1.4 times greater for a woman than a man, 1.5 times greater for Black workers than white workers, 1.6 times greater for Latinx workers than white workers, and 1.8 times greater for immigrants than U.S. citizens.[132] Black and Latina immigrant women were 2 and 2.3 times more likely than white women born in the United States to experience wage theft, respectively.[133]

Figure 4: Immigrants, People of Color, and Women Are More Likely to Experience Wage Theft in Florida[134]



Unsurprisingly, people of color, women, and many immigrants are more likely than their peers to experience wage theft,[135] as these are the same groups who are overrepresented in low-wage work. Substantial pay inequities persist today, positioning white workers at the top of the pay

132. TSOUKALAS ET AL., *supra* note 1, at 6; *see infra* Figure 4.

133. TSOUKALAS ET AL., *supra* note 1, at 6; *see infra* Figure 4.

134. TSOUKALAS ET AL., *supra* note 1, at 6. "Immigrant" refers to any Floridian born outside the United States who is not a naturalized U.S. citizen such as a refugee, asylee, undocumented immigrant, legal permanent resident.

135. *See supra* Figure 4.

scale while relegating workers of color to the bottom.[136] This remains true even when education, experience, and occupation are accounted for.[137] Florida's $15 wage could narrow these pay inequities in the future, especially among women of color.[138] If wage theft among these groups persists, however, this benefit is unlikely to be realized.

VI. WAGE THEFT HURTS THE ECONOMY

While working people suffer the most from wage theft, it is also important to note how wage theft damages the economy. The State of Florida's failure to take a single minimum wage enforcement action against an employer since 2004[139] demonstrates the urgent need for an agency whose mission is to ensure a fair day's pay for Floridians and limit non-compliant firms' ability to undercut law-abiding employers.

Furthermore, by design, minimum wage policies benefit people with low incomes, and economic studies show that low-wage workers are much more likely to spend their increased pay (especially locally) than their higher-earning peers are.[140] This remains true even as businesses moderately increase prices to account for increased labor costs.[141] In 2021, economists explored the impact of the federal government's first round of $600 stimulus checks distributed to most Americans during the COVID-19 pandemic.[142] They found that households with an annual income under $46,000 dramatically increased spending in the month following receipt of the stimulus.[143] By contrast, households with a yearly income above $78,000 only minimally raised their spending.[144]

Finally, the Authors found that Florida's budget could suffer if wage theft persists.[145] Sales tax revenue resulting from higher wages has unique relevance to Florida. The state lacks a personal income tax and over 75%

136. Patten, *supra* note 130.

137. *Id.*

138. TSOUKALAS, *supra* note 2, at 5.

139. Levine, *supra* note 8; HERNANDEZ & STEPICK, *supra* note 7, at 7.

140. Daniel Cooper et al., *The Local Aggregate Effects of Minimum Wage Increases* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25761, Apr. 2019), https://bit.ly/3pTi6DC [https://perma.cc/55V5-JTKQ].

141. ELISA MINOFF ET AL., GEO. L. CTR. ON POVERTY & INEQ., LEADERSHIP CONF. EDUC. FUND, BARE MINIMUM: WHY WE NEED TO RAISE WAGES FOR AMERICA'S LOWEST-PAID FAMILIES (Apr. 2018), https://bit.ly/32LbH43 [https://perma.cc/FLD7-9RAV].

142. RAJ CHETTY ET AL., OPPORTUNITY INSIGHTS, EFFECTS OF JANUARY 2021 STIMULUS PAYMENTS ON CONSUMER SPENDING (Feb. 4, 2021), https://opportunityinsights.org/wp-content/uploads/2021/01/Oi_Secondstimulus_analysis.pdf [https://perma.cc/22RM-F6DM].

143. *Id.*

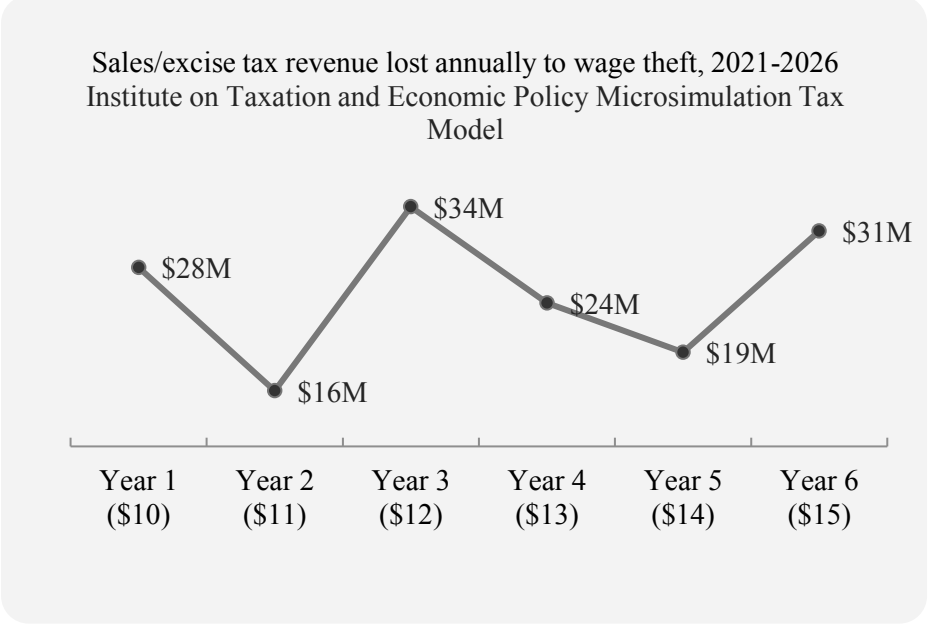
144. Elizabeth Schulze, *A 3rd Stimulus Check Could Be Coming. Here's What Americans Did with the Others*, ABC NEWS (Feb. 24, 2021, 8:54 PM), https://abcnews.go.com/Politics/3rd-stimulus-check-coming-heres-americans/story?id=76094910 [https://perma.cc/GV8K-Y7Y8].

145. TSOUKALAS ET AL., *supra* note 1, at 8; *see infra* Figure 5.

of its general revenue fund comprises of sales tax revenue.[146] General revenue supports critical public areas like education and health and human services.[147] The increased spending Florida can expect from Amendment 2 will pump revenue back into local businesses and the state overall, as sales tax is collected on residents' purchases.[148] Conversely, the Authors determined that if current wage theft trends persist, Florida stands to lose $152 million in sales tax revenue by 2026,[149] once the $15 minimum wage is fully phased in. This equates to $25.3 million, on average, in lost sales tax revenue per year.[150]

VII. A DEPARTMENT OF LABOR THAT WILL ENFORCE THE MINIMUM WAGE

Figure 5: Florida Could Lose Millions in Sales Tax Revenue Each Year During Minimum Wage Phase-in If Wage Theft Persists[151]



146. *Florida Policy Institute: Florida Policymakers Need to Reassess How the Minimum Wage Is Enforced*, INST. ON TAX'N & ECON. POL'Y (Mar. 4, 2021), https://itep.org/florida-policy-institute-florida-policymakers-need-to-reassess-how-the-minimum-wage-is-enforced/ [https://perma.cc/RP5R-DB3H].

147. FLA. LEGISLATURE, FISCAL ANALYSIS IN BRIEF: 2020 LEGISLATIVE SESSION 2, 5 (Sept. 2020), http://edr.state.fl.us/Content/revenues/reports/fiscal-analysis-in-brief/FiscalAnalysisinBrief2020.pdf [https://perma.cc/7SJD-Z8DR].

148. *Florida Policy Institute*, *supra* note 146.

149. TSOUKALAS ET AL., *supra* note 1, at 8; *see infra* Figure 5.

150. TSOUKALAS ET AL., *supra* note 1, at 8; *see infra* Figure 5.

151. TSOUKALAS ET AL., *supra* note 1, at 8.

As demonstrated by the failure of Florida's Attorneys General to initiate a single enforcement action since 2004,[152] Florida workers need an alternative public enforcement mechanism. By re-establishing a state department of labor that engages in robust minimum wage enforcement, providing it with adequate funding and staffing,[153] and arming it with the core powers necessary for effective enforcement of wage and hour laws, Floridian workers stand to finally realize the promise of the constitutional right to the minimum wage. The following powers will be instrumental to the agency's effectiveness:

Developing and overseeing mechanisms through which workers can make complaints. People and organizations must have a well-publicized, accessible avenue to report suspected violations, and the department must make every effort to keep the complainant's identity confidential.[154]

Protecting workers against retaliation and adverse action. The department must be empowered to remedy situations where an employer interferes with, restrains, or takes an adverse action against employees exercising any right protected by Article X, Section 24, of the Florida Constitution. It also must be authorized to provide appropriate relief, including reinstatement, front pay reinstatement with full payment of unpaid wages plus interest, liquidated damages totaling up to twice the unpaid wages, and other appropriate compensatory damages.

Requiring record-keeping. Employers must be required under state law to create and retain adequate records documenting compliance with wage and hour laws, including minimum wages paid to each employee.[155]

Conducting investigations and obtaining evidence and injunctions. The department must have the authority to enter and inspect all places of business or employment; review and make copies of papers, books, accounts, records, payrolls, and documents; question witnesses in private; administer oaths; and petition for an injunction from a trial court for appropriate injunctive relief.

---

152. Levine, *supra* note 8; HERNANDEZ & STEPICK, *supra* note 7, at 7.

153. *See* REBECCA MILLER ET AL., *supra* note 111 (making the same arguments for the state of New York).

154. Florida currently has a hotline to report general complaints to the Attorney General's Office (866-9NO-SCAM), but very few people know about it, and it is not featured prominently on any Attorney General communications. *See File a Complaint*, FLA. OFF. OF ATT'Y GEN., http://www.myfloridalegal.com/pages.nsf/Main/E3EB45228E9229DD85257B05006E32EC [https://perma.cc/GR3S-QKXC] (last visited Sept. 21, 2022).

155. Currently, employers are not required by Florida law to keep records related to minimum wage. The Fair Labor Standards Act does require that employers subject to the Act maintain payroll records, but only for three years. *See* 29 C.F.R. § 516.5(a) (2022). Florida's minimum wage provides a four-year statute of limitations, except for willful violations, which have a five-year statute of limitation. FLA. CONST. art. X, § 24(e). Florida thus needs state recordkeeping requirements that oblige employers to maintain payroll records for five years. This will help ensure that evidence is preserved such that the department is able to adequately investigate and enforce the state's minimum wage protections.

Assessing damages, fines, and penalties. This includes the administrative power to require full payment of unpaid wages plus interest, liquidated damages payable to each aggrieved person, and other legal and equitable relief. The department must also be authorized to collect wages, damages, and other monetary remedies due, seek injunctions, and recover fines payable to the state.

During the 2021 and 2022 legislative sessions, bills were introduced in the Florida Congress to re-establish a department of labor that includes the full enforcement powers described here, but both bills died in committee.[156]

CONCLUSION

The first phase of Amendment 2, which voters of all parties overwhelmingly favored, has been implemented.[157] An estimated 646,000 Floridians stood to benefit from the first phase—increasing the minimum wage to ten dollars per hour—in 2021 alone.[158] More than one in four Floridian workers stand to see a direct pay increase under Amendment 2 when it is fully implemented.[159] All working Floridians deserve effective minimum wage enforcement, including those slated for pay boosts under Amendment 2. Without enforcement, the minimum wage increase will be effectively denied to many workers, predominantly immigrants, people of color, and women—those who are most vulnerable to wage theft.[160] Enforcement is the unfinished business of Florida's groundbreaking constitutional amendment.

156. S.B. 1726, 2021 Leg., Reg. Sess. (Fla. 2021), https://www.flsenate.gov/Session/Bill/2021/1726 [https://perma.cc/6BK4-PGCN]; S.B. 1756, 2022 Leg., Reg. Sess. (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/1756 [https://perma.cc/F6SB-CK5V].

157. Juliana Kaplan & Madison Hoff, *Florida's Minimum Wage Just Went Up. This Map Shows the Last Time Other States Raised Their Wages*, INSIDER (Sept. 30, 2021, 10:01 AM), https://www.businessinsider.com/map-the-last-time-each-state-raised-its-minimum-wage-2021-2 [https://perma.cc/6F7D-GJJT]; FLA. CONST. art. X, § 24.

158. *Id.*

159. TSOUKALAS, *supra* note 2.

160. *Id.* at 5–6.

SPECIALIZED JUDICIAL EMPOWERMENT

Zhiyu Li[*]

Abstract

Specialized courts have emerged as a useful addition to courts of general jurisdiction in the contemporary world. These courts allocate judicial resources by assigning complex and technical cases to specialized judges and resolve social problems through legal and non-legal remedies. Countries around the world recognize the benefits of entrusting a specialized judiciary in alleviating generalist courts' dockets, delivering high-quality judgments, and advancing the consistency of law. In the United States, specialized benches have been established at both the federal and state levels. In recent decades, Europe has also experienced steady growth in judicial specialization.

In 2014, the People's Republic of China joined this global trend by setting up three new types of specialized courts in the fields of intellectual property, finance, and the Internet. Drawing on case studies and interviews with Chinese legal practitioners, this Article will illustrate the distinctive role played by specialized courts in authoritarian states. It suggests that subject-matter expertise enables specialized courts to be a unique laboratory for crafting and piloting innovative policies. More importantly, their jurisdictional limitations place these courts in a humble spot on the judicial subordinacy-supremacy spectrum, allowing them to review local bureaucracies' decision-making in a soft and restrictive form. As such, one may expect specialized courts to continue to grow as a competent policymaking body and a versatile governance tool, especially in states where courts are dependent on but, nonetheless, empowered by the regimes.

Yet the Chinese experience only tells us one side of the story. Should the ruling elites of a regime have the power to define and re-define the jurisdictional boundary of generalist and specialized courts, the creation and allocation of specialized jurisdiction would ultimately depend upon the pedigree and reputation of the regime's original legal system as well

---

* Assistant Professor in Law and Policy; Fellow at the Durham Research Methods Centre, Durham University, United Kingdom; J.S.D. from the University of California at Berkeley. This Article has benefited from helpful comments by Pamela Bookman, Benjamin Chen, Xinyue Li, William Lucy, Alvin Hoi-Chun Hung, Kathryn Hendley, Kami Jonski, Chris Kendall, Nancy Maveety, Elizabeth O'Loughlin, Martin M. Shapiro, Olivia Woolley, and Benjamin Yong as well as participants at the Annual Meeting of the American Society of Comparative Law, the RC09 Interim Meeting of the International Political Science Association, the Annual Conference of the Socio-Legal Studies Association, the Annual Conference of the Society of Legal Scholars, and the Durham Law Staff Seminar. The Author is grateful to the Comparative Judicial Studies Committee of the International Political Science Association for the NSF travel grants and to the East Asian Legal Studies Center at the University of Wisconsin Law School for their gracious hospitality. All errors remain the Author's.

as the political relevance of certain subject matters for the time being. Specialized judicial empowerment may, therefore, inform the ongoing discussion about the institutional design of authoritarian courts and, in particular, the strategic use of courts in striking a balance between the subversion of the rule of law and the orderly administration of private spheres.

INTRODUCTION

The expansion of judicial power in many regimes—be they democratic or authoritarian—has been extensively documented by scholars.[1] Either driven by a genuinely progressive constitutionalization of rights or a strategic choice of political elites,[2] judicial empowerment

1. *See* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 1 (1964); *see also* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 2 (2000); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 2 (2002); Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMP. L. 1, 24 (forthcoming).

2. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 93 (2000) ("[J]udicial power has recently been expanded in many countries through the constitutional entrenchment of rights and the establishment of judicial review."); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003); Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819 (2004).

granted courts the authority to review acts of powerful legislatures and executives and to weigh in on contentious policy issues.[3] Over the years, "the influence of courts on politics and the influence of politics on courts" has attracted extensive attention from political and social scientists to explore the potential and limits of judicial institutions.[4] Important theories of judicial politics portray the empowerment of courts as a deliberate action taken by threatened, incumbent ruling parties in hopes of shifting the responsibility of controversial policy decisions from political realms to the judiciary and securing a form of "political insurance" to challenge future legislation passed by their successors.[5] Autonomous courts are also considered beneficial for authoritarian states to consolidate party hegemony and reinforce democratic credentials.[6] Yet many empowered courts have not limited their grip to serving those in power. These courts have gone on to contend with political actors and make a significant impact on social movements and public policy, such as free speech and lesbian and gay rights.[7] At the supranational level, a recent empirical study drew on cases and survey data to demonstrate the interplay between law and politics in Europe. It showed that judges in member states of the European Union (EU) were able to make strategic use of precedent and preliminary references from the Court of Justice of the European Union (CJEU) to influence domestic policy and "challenge the position of their governments."[8] When applying EU law, "judges' political motivations [were found to] play a role in how they cooperate[d] with the CJEU."[9]

---

3. *See* C. NEAL TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER 4 (1995).

4. OXFORD UNIV. PRESS, THE OXFORD HANDBOOK OF LAW AND POLITICS 11–12 (Keith Whittington et al. eds., 2008); *see* Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. L. 296, 296–97 (2017) ("Over the last quarter century, scholars have documented the expansion of judicial power and the consequent judicialization of politics."); *see also* Patricia J. Woods & Lisa Hilbink, *Comparative Sources of Judicial Empowerment: Ideas and Interests*, 62 POL. RES. Q. 745, 745 (2009) ("Th[e] increase in judicial involvement in policy making has led to a virtual explosion in work on comparative and supranational judicial politics.").

5. Hirschl, *Constitutional Courts*, *supra* note 2, at 1854–60; *see* GINSBURG, *supra* note 2, at 18 ("Political uncertainty leads to the adoption of judicial review as a form of insurance to protect the constitutional bargain.").

6. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1687, 1741 (2015).

7. *See, e.g.*, Imelda Deinla, *Public Support and Judicial Empowerment of the Philippine Supreme Court*, 36 CONTEMP. SOUTHEAST ASIA 128 *passim* (2014); Steven D. Schaaf, *Contentious Politics in the Courthouse: Law as a Tool for Resisting Authoritarian States in the Middle East*, 55 L. & SOC'Y REV. 139 *passim* (2021); Miriam Smith, *Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada*, 33 POL. & SOC'Y 327 *passim* (2005).

8. Juan A. Mayoral, *Judicial Empowerment Expanded: Political Determinants of National Courts' Cooperation with the CJEU*, 25 EUR. L.J. 374, 374–75 (2019).

9. *Id*. at 385.

China is no exception in empowering its judiciary. Despite being traditionally perceived as pawns of the party-state, the influence of Chinese courts has been extended in recent decades. Today, the nation's highest court, the Chinese Supreme People's Court (SPC), may create abstract rules through judicial interpretations in the absence of cases or controversies as well as issue exemplary cases to guide local courts' adjudication when written statutes are silent and ambiguous.[10] Courts across the country also exercise the power of judicial review to examine executive actions and the legality of certain regulatory documents.[11] With the obstacles to the independence of the judiciary remaining in place, reforms have been carried out to, for example, elevate the control of court budgets from grassroots to provincial governments,[12] disconnect judges' salaries and compensations from their administrative ranks,[13] and trim the effects of local protectionism through the judicial accountability system.[14] Moreover, the promotion of judicial dynamism ("sifa nengdong") in China has allowed courts to consider extra-legal factors during adjudication and to participate in public administration.[15] The

10. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective June 10, 1981); Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People's Court on the Judicial Interpretation Work] (promulgated by the Sup. People's Ct., Mar. 9, 2007, effective Apr. 1, 2007), art. 6.

11. Zhongguo Renmin Gongheguo Xingzheng Susongfa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990); Zhonghua Renmin Gongheguo Xingzheng Susongfa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015), arts. 53, 64.

12. Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding (中共中央关于全面深化改革若干重大问题的决定) [Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening the Reform] (promulgated by the Communist Party of China, Nov. 12, 2013, effective Nov. 12, 2013), art. 9 (32).

13. Wang Yijun, *2016nian Zhongguo Faguan Dengji Jiangyu Xingzheng Zhiji Tuogou* (2016 年中国法官等级将于行政职级脱钩) [Chinese Judicial Ranks Will be Decoupled from Administrative Ranks], ZHONGQING ZAIXIAN (中青在线) [China Youth Online] (Jan. 24, 2016), http://politics.people.com.cn/n1/2016/0124/c1001-28079709.html [https://perma.cc/48FZ-UT 7P].

14. *See* Zuigao Renmin Fayuan Sifa Zerenzhi Shishi Yijian Shixing (最高人民法院司法责任制实施意见 (试行)) [Opinions of the Supreme People's Court on the Implementation of the Judicial Accountability System (for Trial Implementation)] (promulgated by the Sup. People's Court, July 25, 2017, effective Aug. 1, 2017).

15. Wang Shengjun (王胜俊), *Bawo Sifa Guilü Jianchi Nengdong Sifa Nuli Tuidong Renmin Fayuan Gongzuo Kexue Fazhan* (把握司法规律 坚持司法能动 努力推动人民法院工作科学发展) [Grasp the Rules of the Judiciary, Insist on Judicial Dynamism, Strive to Promote the Scientific Developments of People's Courts' Work], RENMIN FAYUANBAO (人民法院报)

online accessibility of judicial decisions since the late 2000s also constructed a convenient avenue for judges nationwide to consult each other on statutory interpretation when deciding controversial and novel matters. [16] Still, the empowerment of Chinese courts, although incremental, has led to assorted challenges and problems. To just name a few, whether Chinese judges, especially those who have not undertaken any formal legal training or passed the bar, should engage in judicial policymaking or innovations, and whether and to what extent Chinese courts may continue to maintain and even gain more power without posing a threat to the party hegemony.

Inspired by the challenges mentioned above, this Article aims to map and illustrate the causes and consequences of an emerging trend of specialized judicial empowerment in China. Since 2014, China has established three types of specialized courts: (1) intellectual property (IP) courts in Beijing, Shanghai, Guangzhou, and Hainan; (2) financial courts in Beijing and Shanghai; and (3) Internet courts in Beijing, Hangzhou, and Guangzhou.[17] Through case studies and semi-structured interviews with Chinese legal practitioners, this Article seeks to unpack and gauge the role that the specialized judiciary plays in the legal and economic developments of contemporary China and, more generally, in the governance of authoritarian regimes. By empowering a fragment of the judiciary—a group of judicial elites—this Article suggests that China is building a unique lab staffed by specialized and experienced experts to formulate and pilot innovative legal policies before the country ventures the policies into other regions. Benefitting from their status as specialized institutions, these courts' personnel, budgets, and judicial works are under the direct supervision of higher-level authorities, which, to some extent, shield them from local protectionism and offer extra leeway to challenge bureaucrats' decisions at the grassroots level. More importantly, constrained by jurisdictional limitations, specialized courts are likely to lay their focus on matters of IP, finance, and cyberspace rather than intervene in constitutional or fundamental rights issues that might induce political contestations or social unrest. As more skillful, less powerful agents, specialized courts can make refined and innovative

---

[People's Ct. Daily] (May 6, 2010), https://www.chinacourt.org/article/detail/2010/05/id/407279.shtml [https://perma.cc/YN7H-GXUL].

16. Zuigao Renmin Fayuan Yinfa Guanyu Sifa Gongkai de Liuxiang Guiding he Guanyu Renmin Fayuan Jieshou Xinwen Meiti Yulun Jiandu de Ruogan Guiding de Tongzhi (最高人民法院印发《关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知) [Notice of the Supreme People's Court on Issuing the Six Measures on Judicial Openness and Several Provisions on People's Courts Accepting News Media Supervision] (promulgated by Sup. People's Ct., effective Dec. 8, 2009), art. 5.

17. Chenyang Zhang, *Magnificent Four-Level Pyramid – China's Court System*, CHINA JUST. OBSERVER (May 18, 2019), https://www.chinajusticeobserver.com/a/magnificent-four-level-pyramid-chinas-court-system [https://perma.cc/GW7A-E4LU].

policies and rectify the abuse of local powers detrimental to national economic growth without intimidating state power.

To study comparative sources and consequences of judicial empowerment, China presents a unique case for several reasons. First, the Chinese legal system has been undertaking many changes toward globalization and localization. As a result, one may observe the evolving judicial roles in an East Asian jurisdiction embedded with civil law origins, amid its infusion of the Western common law concepts. Second, given the judicial appointments during the early days of China, a closer examination of the revival of judicial specialization will advance a deeper understanding of the impact of judicial elites on law and policy. Furthermore, much like other one-party dominant states, the judiciary in China is apt to expand its power cautiously and incrementally within the tolerance of the ruling party. That is, while advancing their individual and institutional agenda by delivering high-quality, influential judgments or experimenting with innovative policies, judges will ensure that these activities are aligned well with the core interests of political elites. This phenomenon may become even more salient in jurisdictions where judges do not enjoy tenure and can be disciplined or removed by political elites in the absence of predetermined rules. In general, China provides a vivid example of how national governments may work with judicial elites to further their economic agenda and how courts in authoritarian regimes can innovate within constraints and grow with caution.

This Article acknowledges that several other types of specialized courts were established in China before the 1990s, including forest courts, farming courts, military courts, courts of railway and transportation, and maritime courts. Some of these courts have been abolished because of the reduction in demand.[18] Others were restructured because they were in close connection with, or even under the direct supervision of, relevant bureaus.[19] By contrast, the newly established IP courts, financial courts, and Internet courts appear to have a higher standard for selecting judges and keep a finer line with local authorities. This Article will therefore lay its focus on the three new types of specialized courts to capture the revival of judicial specialization in China starting in 2014. In addition, this Article distinguishes specialized courts from specialized adjudication tribunals, which are set up inside some generalist courts. Because these tribunals do not enjoy the same institutional status as specialized courts, their judicial recruitments and budgets follow the rules that apply to generalist courts.

18. Cheng Hu, *Lun Woguo Zhuanmen Fayuan Zhidu de Fansi yu Chonggou* (论我国专门法院制度的反思与重构) [The Reflection and Reconstruction of the System of Specialized Courts in China] 3 ZHONGGUO YINGYONG FAXUE (中国应用法学) [China Applied Juris.] 175, 175–95 (2019).

19. *Id.*

This Article proceeds in four parts. First, Part I introduces the emerging judicial specialization in the contemporary world, followed by an account of how China joined this global trend by setting up courts of limited jurisdiction focusing on IP, finance, and the Internet in 2014. Then, Part I illustrates the general characteristics of the three new types of specialized courts and explains the possible causes of the revival of judicial specialization in China. Through theoretical and case analyses, Parts II and III document and assess the role that specialized courts play as innovative laboratories for policymaking and as skillful but constrained fora for judicial review. Finally, Part IV gauges different approaches to the expansion of judicial powers adopted by states, where courts have traditionally served a subordinate, instrumental function. Using China as an example, it expounds on the possibilities and challenges of entrenching a fragmented, specialized judiciary as an authoritarian solution to judicial empowerment. Results of semi-structured interviews with Chinese legal practitioners who handled cases either in IP, finance, or Internet courts will also be discussed. Part IV concludes by elaborating on the strategic design of generalist and specialized jurisdiction by authoritarian states.

I. THE RISE OF SPECIALIZED COURTS

Unlike general courts, which handle cases on a broad array of legal claims, specialized courts exercise "limited and frequently exclusive jurisdiction in one or more specific fields of the law."[20] In recent decades, specialized courts have emerged as a useful addition to courts of general jurisdiction over the globe. In the United States, for instance, a specialized judiciary has been established to handle certain cases, especially those of a complex and technical nature, such as tax, patent, and commercial matters.[21] In addition, a great variety of specialized courts, often called "problem-solving courts," leverage collaborative, multidisciplinary, and therapeutic approaches to provide criminal offenders with rehabilitative treatment to modify their behavior and reduce recidivism.[22] Similarly, in Europe, there has been steady growth in the number of specialized courts over recent decades.[23] According to a

20. Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT'L J. CT. ADMIN. 46, 46 (2009).

21. *See* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 384–406 (1990).

22. Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs*, 43 CRIM. JUST. & BEHAV. 45, 45–50 (2016); *see also* Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 36–49 (2005).

23. EUR. COMM'N FOR THE EFFICIENCY OF JUST., EUROPEAN JUDICIAL SYSTEMS 75–76 (2008); *see* EUR. COMM'N FOR THE EFFICIENCY OF JUST., EUROPEAN JUDICIAL SYSTEMS CEPEJ EVALUATION REPORT 80–85 (2020); *see also* Carolina Arlota & Nuno M. Garoupa, *Do Specialized Courts Make a Difference? Evidence from Brazilian State Supreme Courts*, 27 EUR. BUS. L. REV.

report issued by the European Commission, "the number of speciali[z]ed courts [among its member states] has increased from 0.75 in 2016 to 0.81 [sic] per 100[,]000 inhabitants in 2018."[24] Globalization of the economy also boosted this trend. Germany, for example, set up two specialized courts, staffed by bilingual judges with extensive expertise and experience in commercial law, to strengthen its judicial competence in handling cross-border business disputes.[25] In the United Kingdom, a new court, currently under construction in London, strives to become a global legal hub to tackle economic crimes, fraud, and cybercrimes.[26]

The benefits of entrusting a specialized judiciary to handle certain cases have been widely recognized. Judges sitting in specialized courts either have strong expertise in specific areas of law before their appointments or become more familiar with the relevant rules and technical aspects of certain cases through day-to-day adjudication.[27] Cases of complex nature, such as IP, cross-border commercial, and tax, often require generalist judges to spend more time and effort in fact-finding and navigating applicable laws and policies.[28] Funneling these cases into specialized courts may therefore relieve the caseload burdens of generalist judges and support a more efficient judicial decision-making process.[29] Proponents of specialized adjudication also explain that

---

487, 487 (2016) ("Many European jurisdictions have embraced court specialization as a top priority for judicial reform.").

24. EUROPEAN JUDICIAL SYSTEMS CEPEJ EVALUATION REPORT, *supra* note 23, at 84.

25. *The Advantages of the Commercial Court*, COM. CT., https://www.commercial-court.de/en/commercial-court [https://perma.cc/G6LZ-UVZA] (last visited Dec. 23, 2020).

26. MINISTRY OF JUSTICE & HM COURTS & TRIBUNALS SERVICE, *World–Class Fraud and Cybercrime Court Approved for London's Fleetbank House Site*, GOV.UK (July 4, 2018), https://www.gov.uk/government/news/worldclass-fraud-and-cybercrime-court-approved-for-londons-fleetbank-house-site [https://perma.cc/6RN6-B37L].

27. Dreyfuss, *supra* note 21, at 378 ("a specialized court's judges would either be chosen for their special expertise or because new appointees could quickly acquire experience in the court's specialty."); Vanessa Casado Perez, *Specialization Trend: Water Courts*, 49 ENV'T L. 587, 592 (2019) ("Judges working on a particular subject area will not only know in detail the rules applicable to the specialized area, they will also be more educated on the technical aspects of the facts and regulations of that subject area.").

28. *See* Zimmer, *supra* note 20, at 46 ("[L]imited jurisdiction courts . . . deal with those issues with much greater frequency, develop the expertise to adjudicate disputes that involve those issues more efficiently and expeditiously than their counterparts . . . [S]pecialized court judges . . . typically do not need to be educated by the bar and, given their expertise, are much more capable of reducing the scope of the legal framework to the vital issues on which resolution of the cases depends."); *see* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991) ("[Specialized courts] relieve the caseload burdens of other courts."); *see also* Ellen R. Jordan, *Specialized Courts: A Choice*, 76 NW. U. L. REV. 745, 747 (1981) ("[G]enuinely contested cases may be poorly suited to a generalist court. Complex tax and patent cases, and highly technical regulatory questions, strain the capacity to understand of even the wisest judge, if he [or she] has not spent a career immersed in the field.").

29. Jordan, *supra* note 28, at 747–48.

specialized courts can deliver high-quality judgments because of their accessibility to larger resources and their judicial staff's jurisdiction-specific expertise and experiences.[30] Some argue that the labor division between generalist and specialized judges may increase public confidence in the judiciary and access to justice.[31] But even in the absence of complex or technical issues, transferring certain cases from generalist court dockets to a specialized judiciary, such as small claims courts introduced in the United States and Brazil, is likely to reduce litigants' costs in money and time.[32] Furthermore, judicial specialization can also achieve the consistent and coherent interpretation of laws by "produc[ing] a bench small enough to maintain the collegiality necessary to speak with a single voice."[33]

Since 2014, China has joined the global trend of judicial specialization by setting up several new courts of limited jurisdiction, focusing on disputes involving intellectual property, finance, and the Internet. These courts are illustrated below in Table I. The IP courts operate at the appellate level and handle appeals from the basic-level people's courts in the province or the prefectural-level city where the IP court sits.[34] They

30. *See* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 549 (2008) ("Experts are likely to write better opinions. They are more familiar with the overall statutory or doctrinal scheme, enabling them to draft opinions that are more coherent and consistent with existing law, to avoid 'accidental errors', and to develop creative solutions to difficult problems."); *see also* Dreyfuss, *supra* note 21, at 378 ("[T]he [specialized] court's expertise should enable it to craft better opinions, especially in fields where a small number of cases are now distributed rather thinly among the regional courts.").

31. Perez, *supra* note 27, at 591–93; Bruff, *supra* note 28, at 331; Zimmer, *supra* note 20, at 47; *e.g.*, Ulf Bjällås, *Experiences of Sweden's Environmental Courts*, 3 J. CT. INNOVATION 177, 183 (2010).

32. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENT COURTS AND TRIBUNALS 14 (2009) ("Many generalist trial and appellate courts are suffering from a crippling backlog of cases, requiring plaintiffs and defendants to wait years before receiving a hearing.").

33. Dreyfuss, *supra* note 21, at 378; *see* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990) ("[Specialized] courts promote the coherence of a statutory scheme . . . . Coherence . . . demands not only that the legal rules of a statutory scheme be consistent but also that they reflect a unitary vision of that scheme."); *see also* Jordan, *supra* note 28, at 748 ("Limiting certain kinds of litigation to a single specialized court would assure uniformity and predictability in the law.").

34. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人大常委会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective Aug. 31, 2014), art. 3; Quanguo Renmin Daibiao Dahui Changweihui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于设立海南自由贸易港知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Intellectual Property Right Court of the Hainan Free Trade Port] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Jan. 1, 2021), art. 2.

also hear first-instance cases that are highly technical, such as patents, technical know-how, and new plant varieties.[35] In addition, the Beijing IP Court exercises exclusive jurisdiction over claims against the State Council's decisions that grant or declare IP rights.[36] Meanwhile, two financial courts were established in Shanghai and Beijing to take over all civil, commercial, and administrative cases in relation to finance that were originally subject to the jurisdiction of intermediate people's courts.[37] Furthermore, the first instance of Internet-related disputes in Beijing, Hangzhou, and Guangzhou, arising from e-commerce, online infringement, and other activities in cyberspace, was taken out of the general court dockets and funneled into the newly built Internet courts in the regions.[38] Leveraging modern technologies, the three Internet courts provide disputants with digital services throughout the litigation process.[39]

35. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at art. 2.

36. Zuigao Renmin Fayuan Guanyu Beijing Shanghai Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (2020 Xiuzheng) (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定 (2020 修正)) [Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai, and Guangzhou over Cases (2020 Amendment)] (promulgated by the Sup. People's Ct., Dec. 29, 2020, effective Jan. 1, 2021), art. 5.

37. Quanguo Renda Changweihui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding (全国人大常委会关于设立上海金融法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Shanghai Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 27, 2018, effective Apr. 28, 2018), art. 2; Quanguo Renmin Dabiao Dahui Changwu Weiyuanhui Guanyu Sheli Beijing Jinrong Fayuan de Jueding (全国人民代表大会常务委员会关于设立北京金融法院的决定) [Decision of the Standing Committee of the National People's Congress to Form the Beijing Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Jan. 22, 2021, effective on Jan. 23, 2021).

38. Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding (最高人民法院关于互联网法院审理案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trials of Cases by Internet Courts] (promulgated by the Sup. People's Ct., Sept. 6, 2018, effective Sept. 7, 2018), art. 2.

39. *Id*. at art. 1; *see* Jason Tashea, *China's All-Virtual Specialty Internet Courts Look Set to Expand into Other Areas of the Law*, ABA J. (Nov. 1, 2019), https://www.abajournal.com/magazine/article/china-all-virtual-specialty-internet-courts [https://perma.cc/L3TP-SVMR] ("[T]he Chinese court system is looking to leverage technology to create a more efficient process. To do that, [I]nternet courts are incubating new technologies and processes.").

Table I: The Three New Types of Specialized Courts in China

Court Type	Hierarchical Level	Location	Year of Founding	Dispute Types	Appeal Court
IP court	Intermediate, appellate court	Beijing	2014	Civil & administrative	Beijing High People's Court or Supreme People's Court
		Shanghai	2014	Civil & administrative	Shanghai High People's Court or Supreme People's Court
		Guangzhou	2014	Civil & administrative	Guangdong High People's Court or Supreme People's Court
		Hainan	2020	Civil, administrative, & criminal	Hainan High People's Court or Supreme People's Court
Financial court	Intermediate, appellate court	Shanghai	2018	Civil, administrative, & commercial	Shanghai High People's Court
		Beijing	2021	Civil, administrative, & commercial	Beijing High People's Court

Internet court[40]	Basic-level, trial court	Hangzhou	2017	Civil & administrative	Intermediate People's Court of Hangzhou
		Beijing	2018	Civil & administrative	No. 4 Intermediate People's Court of Beijing or Beijing IP Court
		Guangzhou	2018	Civil & administrative	Intermediate People's Court of Guangzhou or Guangzhou IP Court

Unlike specialized judges in certain jurisdictions, who are sometimes considered less prestigious and sophisticated than their peers sitting in generalist courts,[41] the overall criteria for judges appointed to the IP, financial, and Internet courts in China are stricter than generalist courts at the same level. For instance, judges serving on IP courts are required to "have had at least six years of adjudication experience in relevant

40. There are differing opinions about whether Internet courts established in China should be categorized as specialized courts, as Internet courts were not explicitly exemplified in a statutory provision prescribing specialized courts. The Internet courts established in Hangzhou, Beijing, and Guangzhou, which exercise limited jurisdiction over Internet-related disputes arising in the region, fall into the scope of "specialized courts" defined by previous literature such as Zimmer (2009) and Revesz (1990). This Article, therefore, includes Internet courts as one of China's new types of specialized courts. *Guanyu Renmin Fayuan Zuzhifa Zhuanmen Fayuan Shezhi de Ruogan Sikao* (关于《人民法院组织法》专门法院设置的若干思考) [Some Thoughts on the Establishment of Specialized Courts Prescribed by the Organic Law of People's Courts], 4 FAZHI YANJIU (法治研究) [Rule of Law Studies] 3, 6 (2017); *see* Zimmer, *supra* note 20; *see also* Revesz, *supra* note 33.

41. *See* Dreyfuss, *supra* note 21, at 381 ("Because of the repetitive nature of the docket, appointments to a specialized bench might not be as highly prized as other federal judgeships. With less prestige—and presumably, the same bad pay as other federal judges—it may be harder to attract the truly talented."); *see also* Zimmer, *supra* note 20, at 49 ("Generally, specialized judges are accorded less prestige and status than judges who are generalists.").

fields" and show a "relatively strong ability to preside over trials and draft rulings."[42] Similarly, twenty of the first twenty-two judges appointed to the Shanghai Financial Court when it was established in 2018 received a master's degree, and all of them had served on an intermediate people's court for several years before the appointment.[43] Not only do these specialized judges have working experience on generalist courts, but their judgments are also reviewed on appeal by a generalist court at a higher level. Through appellate review, commonly recognized shortcomings of decisions given by specialized benches—such as overlooking the interconnection between legal fields and lacking a comprehensive outlook of laws and societal needs—can be mitigated.[44]

The rise of specialized courts in China largely stems from the proliferation of complex and novel disputes arising in relevant fields and the increasing demand for jurisdiction-specific expertise to adjudicate such disputes. Over the last decade, the Internet has become an essential tool for many Chinese people to work, socialize, transact, and entertain.[45] As the Internet transforms many aspects of people's lives, its virtual, cross-regional, and decentralized nature is also "updating legal concepts,

42. Zuigao Renmin Fayuan Guanyu Yinfa Zhishi Chanquan Fayuan Faguan Xuanren Gongzuo Zhidao Yijian Shixing de Tongzhi (最高人民法院关于印发《知识产权法院法官选任工作指导意见（试行）》的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Selecting and Appointing Judges for Intellectual Property Rights Courts (for Trial Implementation)] (promulgated by the Sup. People's Ct., Oct. 28, 2014, effective Oct. 28, 2014), art. 4. According to a SPC report issued in August 2017, aiming "to create a 'talented highland' for intellectual property adjudication," ninety quota judges were selected for the specialized courts and 78.9% of them obtained a master's degree or higher. *Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Gongzuo Qingkuang de Baogao* (最高人民法院关于知识产权法院工作情况的报告) [Report of the Supreme People's Court of People's Republic of China concerning the Work of Intellectual Property Courts], CHINA COURT (Sept. 2, 2017), https://www.chinacourt.org/article/detail/2017/09/id/ 2988073.shtml [https://perma.cc/6TWG-REAG].

43. Shan Ran, *Woguo Shouge Jinrong Fayuan Luohu Shanghai Tamen Jiang Chengwei Shoupi Faguan* (全国首个金融法院落户上海，他们将成为首批法官) [The Nation's First Financial Court Is Established in Shanghai; They Will Become the First Group of Judges], SHANGHAI FAZHI BAO (上海法治报) [Shanghai Legal Daily] (July 14, 2018), https://www.sohu.com/a/241166394_391513 [https://perma.cc/5G27-N9RL].

44. Opinion of the Consultative Council of European Judges on the Specialisation of Judges, at 7, COM (2012) 15 final (Nov. 13, 2003); *see* Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 ABA J. 425, 425–26 (1951) (arguing that a specialized court for patent litigation should not be created since generalist courts allow judges to review patent cases with ample context).

45. In 2017 alone, over 533 million Chinese netizens shopped online, and the profits made by e-commerce platforms, such as Alibaba and JD, exceeded 218 billion yuan. *See* CHINA INTERNET NETWORK INFO. CTR., Zhongguo Hulian Wangluo Fazhan Zhuangkuang Tongji Baogao (中国互联网络发展状况统计报告) [Statistical Report on the Development of China's Internet Network] 36–37, 63–64 (Jan. 2017).

judicial practices, and public expectations for judicial services."[46] Newly-established Internet courts thus aim to break the geographical boundaries between disputing parties by employing technologies and virtual platforms and to formulate rules by adjudicating and researching controversial and unprecedented legal issues.[47] Meanwhile, globalization and technological innovations from China joining the World Trade Organization (WTO) led to an array of challenges facing the adjudication of cross-border financial and IP cases. A competent, predictable legal environment is a necessity for China to realize its ambition of becoming a global economic powerhouse.[48] But the rapid development of the Chinese financial market was followed by outdated rules, ambiguities and gaps in written statutes, and inconsistent legal applications by local judges.[49] On the one hand, entrusting specialized benches in Shanghai and Beijing—the hotbeds for finances and free trade in China—allows many financial cases with large amounts of money in dispute to be handled by experienced judicial experts. These judges are also capable of precipitating strategies and policies when new types of cases or circumstances arise.[50] On the other hand, the dramatic increase in the number and complexity of IP disputes borne out of the first decade of China's WTO membership imposed heightened requirements for judicial

46. Qiao Wenxin & Yu Jianhua, *Shewang Jiufen Huajie Mairu Xinshidai* (涉网纠纷化解迈入新时代) [Internet-Related Dispute Resolution Entered into a New Era], RENMIN FAYUAN BAO (人民法院报) [People's Ct. Daily] (Aug. 19, 2017), http://rmfyb.chinacourt.org/paper/html/2017-08/19/content_129146.htm?div=-1 [https://perma.cc/F444-8WNT].

47. Zhu Shenyuan, *Hangzhou Hulianwang Fayuan Chengli Xinwen Fabuhui Fabugao* (杭州互联网法院成立新闻发布会发布稿) [The Release of the News Conference Regarding the Establishment of Hangzhou Internet Court], ZHEJIANG FAYUANWANG (浙江法院网) [Zhejiang Court] (Aug. 18, 2017), http://www.zjsfgkw.cn/art/2017/8/18/art_109_2456.html.

48. ORG. FOR ECON. CO-OPERATION & DEV., OECD INVESTMENT POLICY REVIEWS: CHINA 2003 PROGRESS AND REFORM CHALLENGES 10, 15–17 (2003).

49. Wang Lina, *Jinrong Fayuan Weihe Sheli* (金融法院为何设立?) [Why Was the Financial Court Established], CAIJING (May 6, 2018), http://magazine.caijing.com.cn/20180506/4447796.shtml [https://perma.cc/Y8VM-JWDT]; Dong Yizhi, *Weishenme Yaozai Shanghai Chengli Shoujia Jinrong Fayuan* (为什么要在上海成立首家金融法院?) [Why Was Establishing the First Financial Court in Shanghai Necessary?], TAI MEITI (Apr. 3, 2018), https://www.tmtpost.com/3166369.html [https://perma.cc/MZ84-LQXF]; *see* US-CHINA BUS. COUNCIL, USCBC 2013 CHINA BUSINESS ENVIRONMENT SURVEY RESULTS 17 (2013), https://www.uschina.org/sites/default/files/USCBC%E2%80%942013Member%20Survey_0.pdf [https://perma.cc/89FH-W779] ("[R]ules and regulations are not applied consistently or equitably in China.").

50. Wang Lina, *supra* note 49. On the first day of the establishment of the Shanghai Financial Court, the Court received twenty complaints, of which the total amount in controversy exceeded one billion yuan. Li Weifeng, *Jindong Fayuan, Jinrong Fazhi de Sifa Xianfeng* (金融法院，金融法治的司法先锋) [Financial Court, the Judicial Pioneer of Financial Governance by Law], 11 FAZHI YU SHEHUI (法治与社会) [L. & Soc'y] 15, 17 (2018).

expertise and legal certainty.[51] During the year when the first IP court was established, China received over 1.5 million domestic and foreign pattern applications, and its annual expenditure on research and development was only behind the United States around the world.[52] Fueled by the national thrust toward innovation, specialized courts were formed in major cities to tackle IP cases, especially those with complex and technical elements, aiming to relieve the caseload burden of generalist courts and strengthen judicial protection of IP rights.[53]

While the specialized courts in China seek to promote the efficiency and quality of adjudication no less than those in other democratic and authoritarian regimes around the world, they may also function as a judicial window that shows global investors the capability of Chinese courts to resolve economic-related disputes promptly and fairly. The diversity and expanse of China are one of its biggest attractions to foreign money and corporations. It is also, however, a major obstacle to transacting business in the People's Republic. Many statutory provisions promulgated in the early years of reform and opening-up ("gaige kaifang") no longer suit China's transition from a command economy to a market-oriented economy and its involvement in the global economic landscape. National laws may not address all the situations that arise in the ordinary course of affairs, creating opportunities for local judges to apply and interpret the law with considerable discretion across regions. Furthermore, as sober-eye observers have extensively illustrated, judicial works of Chinese courts are subject to both internal and external influences. Not only may the adjudication committee in each court review

51. Zhang Xiaoning, *Zhongguo Rushi Shinianlai Zhishi Chanquan Anjian Shuliang Jizeng*, (中国入世十年来知识产权案件数量猛增) [The Number of Intellectual Property Cases Drastically Increased Over the Ten Years Since China Joined WTO], ZHONGXIN WANG (中新网) [China News Serv.] (Dec. 20, 2011), https://www.chinacourt.org/article/detail/2011/12/id/470287.shtml [https://perma.cc/3EDY-3C77]; *see* Du Ying & Zhang Ke, *Zhongguo Zhishi Chanquan Zhuanmen Fayuan de Jiangou* (中国知识产权专门法院的建构) [Construction of Specialized Intellectual Property Court in China], 6 CAIJING FAXUE (财经法学) [FIN. & ECON. L. REV.] 29, 30 (2016).

52. *Are Patents Indicative of Chinese Innovation?*, CHINA POWER (Feb. 15, 2016), https://chinapower.csis.org/patents/ [https://perma.cc/36LV-C88V]; *see Is China a Global Leader in Research and Development?*, CHINA POWER (Jan. 31, 2018), https://chinapower.csis.org/china-research-and-development-rnd/ [https://perma.cc/5ZM8-U629] ("Chinese R&D spending still lagged that of the US by nearly $89 billion in 2018, but the gap between the two countries is rapidly narrowing.").

53. Jieru Jiang, *China Specialized IP Courts: Substance or Theater? Part I*, 54 IES NOUVELLES – J. LICENSING EXECS. SOC'Y 9, 9–13 (2019); *see* The Supreme People's Court of China, Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang (2014) (中国法院知识产权司法保护状况 (2014)) [Intellectual Property Protection by Chinese Courts in 2014] (Apr. 20, 2015), https://wipolex.wipo.int/en/text/371329.

and sway judicial outcomes without hearing the case,[54] but higher courts are also able to have a voice in cases handled by lower courts in the region.[55] Given that "local courts are financially beholden to local governments" and judges are appointed by the standing committee of the People's Congress at the same level, "local party bosses . . . have often influenced the work of the courts."[56] The ability of judges to make impartial and consistent decisions thus concerns foreign businesses furthering their investment in the Chinese market. Such reservations were shown by several official reports issued by transnational organizations. According to surveys fielded to the member companies of the U.S.-China Business Council, the percentage of businesses that remained optimistic about their prospects in the Chinese market dropped from 58% in 2011 to 24% in 2015—"the lowest number reported in ten years."[57] The *2016 American Business in China White Paper* cited "inconsistent regulatory interpretation and unclear laws" as one of the top five business challenges facing foreign companies in China.[58] While being the largest recipient of foreign direct investment in 2020, China was ranked 88th by the Rule of

54. The adjudication committee, which consists of high-ranking judicial officials such as the court president, division heads, and disciplinary inspectors, is the highest decision-making body in Chinese courts. Cases are normally reported to the adjudication committee by the presiding judges, who do not join the discussion of the committee about the case. The minutes of these discussions are, in general, not accessible to the parties of the cases. *See* Xin He, *Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court*, 46 L. & SOC'Y REV. 681, 681–712 (2012) ("[T]he committee reviews and rules on the most complicated, controversial, and significant cases behind closed doors without hearing cases.").

55. *See* ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 189 (2011) ("As regards the 'abnormal' relationship between higher and lower courts, this may be explained by the traditional tendency to regard courts as merely part of the administrative hierarchy, so that it is natural for a higher-rank official to give instructions to a lower-rank official, or for the higher-level organ to exercise 'leadership' over a lower-level organ.").

56. Margaret Woo, *Court Reform with Chinese Characteristics*, 27 WASH. INT'L L.J. 241, 259 (2017); *see* Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) [Judges' Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 23, 2019, effective Oct. 1, 2019), art. 18; *see also* Huang Tao, *Zhuanyexing Jinrong Shenpan Zuzhi de Lilun Poxi* (专业性金融审判组织的理论剖析) [Theoretical Analysis of Specialized Financial Adjudication Institutions], 1 SHANGHAI JINRONG (上海金融) [Shanghai Fin.] 88, 89 ("A phenomenon that commonly existed was that some local government leaders or governmental departments, for the purpose of self or departmental interests, publicly or privately intervened in the independent adjudication of courts, indulged corporations with escaping unpaid debts, and even supported corporations in illegally filing bankruptcy in order to escape debts.").

57. US-CHINA BUS. COUNCIL, 2015 USCBC MEMBER SURVEY REPORT: GROWTH CONTINUES AMIDST ECONOMIC SLOWDOWN, RISING COMPETITION, POLICY UNCERTAINTY 5 (2015), https://www.uschina.org/sites/default/files/USCBC%202015%20China%20Business%20Environment%20Member%20Survey_0.pdf [https://perma.cc/LMW5-T7Q5].

58. THE AM. CHAMBER OF COM. IN THE PEOPLE'S REPUBLIC OF CHINA, 2016 AMERICAN BUSINESS IN CHINA WHITE PAPER (Apr. 2016), http://www.iberchina.org/files/2016/amcham_white_paper.pdf [https://perma.cc/WA3M-JY56].

Law Index among 128 countries, based on factors such as the constraints on government powers, fundamental rights, and civil justice.[59]

Empowering a fraction of the judiciary, with a focus on privatization, may rebuild the confidence of foreign investors and foster economic developments without significantly threatening state power. These sophisticated and specialized courts can help to precipitate and pilot innovative policies before being implemented nationally. That being said, imposing jurisdictional limits on specialized courts—such as concentrating judicial efforts on the private law areas—would place the courts in a humble spot on the judicial subordinary-supremacy spectrum to review local authorities' behavior for the party-state in a restrictive form.

II. SPECIALIZED COURTS AS INNOVATIVE LABORATORIES

Scholars often hold skeptical views toward judges as policymakers in areas where they lack sufficient expertise.[60] Such concerns have become even more salient in China. The legal system of contemporary China was heavily influenced by the civil law tradition under which "the main source or basis of the law is legislation" and "the function of the court is [sometimes said] merely to apply the written law."[61] Moreover, during China's early years, many judges were recruited from the People's Liberation Army and governmental bodies, despite having no knowledge or training in law.[62] Until the late 1990s, judges with an undergraduate degree remained less than 10% in China.[63] Although a civil law judge frequently needs to fill statutory gaps when written laws are silent or ambiguous, a number of generalist judges' lack of sufficient legal knowledge cast doubt on their ability to shape or make policies.

Compared to generalists, having superior expertise in and familiarity with specific subject matters equips specialized judges with a greater capacity to experiment on new policies and "reconceptualize areas when necessary."[64] A study that compared the tax-case decisions made by the

59. UNCTAD, *Global FDI Fell by 42% in 2020*, 38 INV. TRENDS MONITOR 1, 3 (2021); THE WORLD JUST. PROJECT, WJP RULE OF LAW INDEX 2020 58 (2020), https://worldjustice project.org/rule-of-law-index/pdfs/2020-China.pdf [https://perma.cc/GM9L-AMUX].

60. R. SHEP MELNICK, BETWEEN THE LINE: INTERPRETING WELFARE RIGHTS *passim* (1983).

61. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424, 426 (1967).

62. Liu Sida, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75, 82–83 (2006).

63. Ma Junju & Nie Dezong, *Dangqian Woguo Sifa Zhidu Cunzai de Wenti yu Gaijin Duice* (当前我国司法制度存在的问题与改进对策) [Existing Problems of the Contemporary Chinese Legal System and Strategies for Improvements], 6 FAXUE PINGLUN (法学评论) [L. REV.] 25–39 (1998).

64. Cheng, *supra* note 30, at 559; *see* Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135,

U.S. Tax Court and the U.S. District Courts between 1996 and 1997 found that the specialized court "use[d] its expertise to allow a much freer hand in decisions for its judges' policy preferences" than the generalist courts.[65] Challenging the conventional wisdom that specialized courts are policy-neutral, Isaac Unah found that the U.S. Court of Appeals for the Federal Circuit, a specialized appellate court, substantially influenced trade policy to "protect American industries being injured by unfair trade practices."[66] The ability of specialized courts to shape policy is not foreign to civil law jurisdictions. Recently, an empirical analysis based on a provincial dataset indicated that Spain's newly established commercial courts have had a significant impact on business bankruptcy rates in the country.[67]

A. *Infusion of the Common Law Style of Judging*

In common law jurisdictions, judges make policy "by promulgating rules" through judicial decisions and restating those rules in subsequent similar cases under the doctrine of stare decisis ("to stand by decided matters").[68] By contrast, judicial decisions are not an official source of law in a civil law jurisdiction like China, where courts should adhere to written statutes rather than judicial opinions. Although Chinese judges sometimes consult prior judicial decisions when facing statutory gaps and ambiguities, the decisions they consider are rarely cited or mentioned in their judgments.[69] Absent comprehensive case databases and guidance for de facto reference to prior judicial decisions, Chinese courts' handling of novel or controversial matters, for a long period of time, varied

136 (2005) ("Expertise is a significant benefit of a specialized court. Courts are often criticized for influencing or making policy without having any particular knowledge in the particular policy domain. … Familiarity with the policy allows specialized courts to offer expertise and skill in the subject matter.").

65. Howard, *supra* note 64, at 143, 146.

66. Isaac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Actions and the Politics of Protectionism*, 50 POL. RSCH. Q. 851, 863–74 (1997).

67. Claudio Detotto et al., *Did Specialised Courts Affect the Frequency of Business Bankruptcy Petitions in Spain?*, 47 EUR. J. L. & ECON. 125, 132–44 (2019).

68. Edward L. Rubin & Malcom M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 J. CONST. L. 617, 639 (2003); John V. Orth, *The Role of the Judiciary in Making Public Policy*, 4 NC INSIGHT 12, 12–14 (1981).

69. Guo Jinxia et al., Zhichan Anli Zhidao Zhidu: Cong Zunxun Xianli Dao Tongan Tongpan (知产案例指导：从"遵循先例"到同案同判) [Intellectual Property Case Guidance: From "Stare Decisis" to Deciding Like Cases Alike], Renmin Fayuan Bao (人民法院报) [People's Ct. Daily] (Jan. 23, 2017), http://rmfyb.chinacourt.org/paper/images/2017-01/23/06/2017012306_pdf.pdf [https://perma.cc/8XUT-JY94] ("In fact, for a long period of time, it is customary that Chinese judges search for and adhere to prior judgments to make decisions. However, this kind of adherence has been mostly done in an unnoticeable, 'implicit' way.").

between judges and regions.[70] Except for a handful of rules and exemplary cases published by the SPC and regional high courts, there were often no clear wording or lines stressed by previous judgments that could be restarted by subsequent judicial decisions to fill statutory gaps consistently.[71]

However, the situation started to change after the Beijing IP Court was entrusted to build a research base for Chinese-styled IP precedents in 2015.[72] Greater accessibility of IP cases and the extensive adjudication experiences of its judges enabled the Beijing IP Court to grow as a unique lab for pioneering the use of prior judicial decisions and revolutionizing judges' collective involvement in policymaking across the country.[73] By promulgating three sets of normative guidelines,[74] the Beijing IP Court

70. For example, in cases concerning online copyright infringement of film and TV products, courts differed significantly over the years in imposing financial penalties, which could range from several hundred to over ten thousand yuan. This was caused by the disparity between judges and courts in determining the impact of infringement on the product and costs as well as by vague legal reasoning that created obstacles for judges to consult with each other in similar cases. Wang Han, *Leian Butongpan Xianxiang Nengfou Pojie* ("类案不同判"现象能否破解?) [*Can the Phenomenon of "Similar Cases Being Decided Differently" be Overcome?*], MINZHU YU FAZHI (民主与法制) [DEMOCRACY & LEGALITY] (May 14, 2018), https://m.fx361.com/news/2018/0514/6122436.html [https://perma.cc/LUK2-NG6N].

71. Yang Jing, *Zhishi Chanquan Anli Zhidao Zhidu Shijian Yangben* (知识产权案例指导制度实践样本) [Sample of the Practice of the Intellectual Property Case Guidance System], J. SCI., TECH. & L. 398, 409–11 (2016) ("From 'the court holds…' to the main body of the judgment, there is only generic reasoning. Readers are like seeing flowers through the mist and have a hard time to understand.").

72. Guo Jinxia et al., *supra* note 69.

73. Yang Jing, *Anli zai Zhishi Chanquan Shenpanzhong de Yunyong* (案例在知识产权审判中的运用) [The Application of Cases in IP Adjudication], ZHISHI CHANQUAN SIFA BAOHUWANG (知识产权司法保护网) [Jud. Prot. for Intell. Prop.] (Aug. 6, 2017), http://www.chinaiprlaw.cn/index.php?id=4843 [https://perma.cc/7LCS-JY5U] ("Intellectual property is the legal area which embarked on the publication of judicial decisions at the earliest time in China. [Until 2017,] it has more than ten years of experience of online access to judicial decisions . . . . The establishment of IP courts . . . strengthened the specialty, professionalism, and sophistication of IP adjudication and provided talents and systematic foundations for exploring the case [guidance] system."). *See generally* Jeremy Daum, *Unprecedented: Beijing IP Court's Use of 'Guiding Cases'*, CHINA L. TRANSLATE (Aug. 31, 2016), https://www.chinalawtranslate.com/en/beijing-ip-court-making-new-precedent-on-guiding-cases/ [https://perma.cc/5LDZ-3BLW] (explaining the unique position of the Beijing IP Court in the Chinese judicial system and how the Court is implementing an approach to utilize IP Guiding Cases ubiquitously).

74. The three sets of guidelines issued by the Beijing IP court are the "Adjudication Instructions for the Consistency of Litigation, Adjudication, and Judgments" (诉审判一致性审判规范), "Instructions for Adherence and Reference to Cases with Guidance Effects" (指导案例遵循与参照程序指南), and the "Implementation Methods of the Beijing IP Court concerning Case Guidance (Draft)" (北京知识产权法院案例指导工作实行办法(草案)). Yang Jing, *supra* note 71; *see* Yang Jing, *Zhishi Chanquan Anli Zhidao Zhidu de Zhangai yu Kefu* (知识产权案例指导制度的障碍与克服) [Obstacles and Solutions of the Intellectual Property Case Guidance System], 10 FALV SHIYONG (法律适用) [J. L. Application] 69, 74–75 (2016); *see also* Jiang Huiling & Yang Yi, *Yi Xianli Panjue Zhidao Shenpan Gongzuo Zhidu de Chuanxin Shijian* (以

classified nine types of prior judicial decisions based on their precedential values, ranging from Guiding Cases published by the SPC as the most persuasive to foreign courts' decisions as the least persuasive.[75] The Beijing IP Court also formulated a guiding principle for adherence to prior judicial decisions: "up and down, before and after, and left and right ("shangxia qianhou zuoyou)."[76] This means that a court should adhere to its earlier decisions as well as higher courts' prior judgments and that a court may consult its sister courts' well-reasoned judicial opinions.[77] According to an interview with Judge Yang Jing from the Beijing IP Court,

> [The Court] encourages the parties to submit prior judicial decisions in support of their litigation claims and judges to proactively create judgments with exemplary and guiding effects when laws are silent or ambiguous . . . in order to meet new demands of all sectors of society for legal rules in a timely fashion.[78]

To promote more accurate and efficient references to decided cases by later courts, judges are advised to produce a summary that specifies the relevant laws and key points of adjudication for each of their opinions.[79] A consulting committee comprising over 200 legal experts was also formed to study and select model cases nationwide in trademark, copyright, and patent cases.[80] Certainly, the Beijing IP Court is not the

---

先例判决指导审判工作制度的创新实践) [Beijing IP Court: Innovative Practices of Adjudication Work Guided by Prior Judicial Decisions], FAZHI RIBAO (法制日报) [Legal Daily] (Apr. 7, 2016), https://www.chinaiprlaw.cn/index.php?id=3896.

75. Article 7 of "Implementation Methods of the Beijing IP Court Concerning Case Guidance (Draft)" classified different prior judicial decisions into nine levels according to their precedential values. From most to least persuasive, they are: Guiding Cases published by the SPC, Annual Cases published by the SPC, other judgments published by the SPC, typical cases published by high people's courts, reference cases published by high people's courts, other cases published by high people's courts, cases decided by intermediate people's courts, cases decided by basic people's courts, and cases decided by foreign courts. Jiang Huiling & Yang Yi, *supra* note 74.

76. Yang Jing, *Anli Zhidao Zhidu zai Zhishi Chanquan Lingyu de Shijian Tansuo* (案例指导制度在知识产权领域的实践探索) [The Practice and Exploration of the Case Guidance System in the Field of Intellectual Property], RENMIN FAYUAN BAO (人民法院报) [People's Ct. Daily] (July 26, 2017), https://www.chinacourt.org/article/detail/2017/07/id/ 2935072.shtml [https://perma.cc/N6JD-MWLY].

77. *Id.*

78. Wang Han, *Leian Butongpan Xianxiang Nengfou Pojie* ("类案不同判"现象能否破解) [Can the Phenomenon of "Similar Cases Decided Differently" be Overcome?], 5 MINZHU YU FAZHI (民主与法制) [Democracy & Legal Sys.] 27, 28–29 (2018); *see also* Mark Cohen, *More on Guiding Cases, Precedents and Databases…*, CHINA IPR (Nov. 12, 2017), https://chinaipr.com /2017/11/12/more-on-guiding-cases-precedents-and-databases/ [https://perma.cc/TR55-CUD8].

79. Yang Jing, *supra* note 76.

80. Yang Jing, *supra* note 76.

only specialized court that learns from a variety of decided cases to precipitate innovative rules through adjudication. For example, the Shanghai Financial Court has set up a team of twenty-five bilingual judges and judicial assistants to keep the presiding judges informed of novel cases and relevant judicial opinions overseas.[81] The team is dedicated to "spur development in China's financial justice system" and "assist in solving domestic problems with a global perspective" by analyzing and conveying foreign judgments.[82]

Besides pioneering a reliable system of formulating and referring to judicial opinions with precedential values, the specialized judiciary also leverages its expertise to initiate judicial dialogues on controversial legal issues and shape future litigation through published dissenting opinions. Despite several early attempts to reveal bench disagreements in Chinese judgments,[83] publishing judicial dissents remains a rare practice in China as courts under the civil law tradition tend to "issue a collective judgment cast in stylized, impersonal language."[84] The publication of minority opinions challenges the conventional format of Chinese judgments, under which a disagreement raised by one or more judges on the panel should only be recorded in publicly-inaccessible trial transcripts.[85] In addition, such practice is likely to cause concerns about the legitimacy of judgments unsupported by unanimous votes.[86] Stronger academic backgrounds and experiences in the subject matter may, however, furnish specialized judges with a greater capacity to engage in contestations over controversial legal issues compared to generalist courts. Take, for

81. Zhou Wenting, *Court Sets Up Team to Spur Innovation in Financial Justice,* SHANGHAI FIN. CT. (Apr. 22, 2020), http://www.shjrfy.gov.cn/jrfy/English/news_view.jsp?pa=aaWQ9MzIwNQPdcssPdcssz [https://perma.cc/FRS6-HM6R].

82. *Id*.

83. Hao Jun, *Caipan Wenshu Yaobuyao Gongkai Shaoshu Yijian* (裁判文书要不要公开少数意见) [http://opinion.people.com.cn/n1/2016/1108/c1003-2884 3332.html], JINGHUA SHIBAO (京华时报) [Jinhua Times] (Nov. 8, 2016), http://opinion.people.com.cn/n1/2016/1108/c1003-28843332.html [https://perma.cc/WUZ7-8HE3]; *see* Shao Xin & Jiang Yuan, *Sifa Zerenzhi Quanmian Luoshi Beijing Xia Caipan Wenshu Shaoshu Yijian Gong de Zaisikao* (司法责任制全面落实背景下裁判文书少数意见公开的再思考) [Rethinking the Publication of Minority Opinions in Judgments Under the Full Implementation of Judicial Responsibility System], 11 FALV SHIYONG (法律适用) [J. L. Application] 77, 77 (2019).

84. Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2 (2010); *see* Sun Xiaoxia & Zhu Guojian, *Panjue de Quanwei yu Yiyi Lun Faguan Butong Yijianshu Zhidu* (判决的权威与异议 — 论法官"不同意见书"制度) [Authority and Dissent of Judgments: Analyzing the System of "Dissenting Opinions" of Judges], 5 ZHONGGUO FAXUE (中国法学) [China Legal Sci.] 162, 164–65 (2009).

85. Zhang Xiaoxia et al., *Shaoshu Yijian Zairu Panjueshu* ("少数意见"载入判决书) [Minority Opinions Written into Judgments], JUD. PROT. FOR INTELL. PROP. (Dec. 17, 2015), https://www.chinaiprlaw.cn/index.php?id=3255 [https://perma.cc/BVG7-6C6N].

86. Zhang Zetao, *Panjueshu Gongbu Shaoshu Yijian zhi Libi Jiqi Guifan* (判决书公布少数建议之利弊及其规范), 2 ZHONGGUO FAXUE (中国法学) [China Legal Sci.] 182, 185 (2006).

instance, the *MLGB* case.[87] In 2016, the Trademark Review and Adjudication Board annulled a popular street brand, MLGB, given that its pinyin abbreviation could imply an offensive expression commonly used by Chinese netizens.[88] The brand owner, Junke Trade Co., challenged the Board's decision in the Beijing IP Court, arguing the trademark stood for "My Life is Getting Better" instead.[89] In this case, the Court not only published in detail the minority opinion raised by judges sitting on the panel, but also the majority opinion that explicitly responded to the dissenting arguments. For example, in determining whether the registration of MLGB violated Article 10 of the Trademark Law, which prohibited trademarks detrimental to socialist morality,[90] the minority opinion suggested that the emergence of MLGB as a network buzzword in China was recent, and its users were mainly from younger generations.[91] The minority opinion stated, "Social moral norms depend on the majority's perceptions."[92] It also intimated that "there are no habits in Mandarin of using the first alphabet of pinyin to comprehend the meanings of English-letter combinations." In response, the majority opinion did not find sufficient evidence to support a finding that MLGB was a common English abbreviation for "My Life is Getting Better."[93] Agreeing with the dissent that MLGB was perceived as an offensive expression mainly by younger generations, the majority argued that the impact of a trademark's vulgar meaning was not limited to the extent of the meaning being recognized.[94] The adverse effect that the trademark in dispute imposed on certain groups of people, including adolescents, would impact the moral norms of the whole society.[95]

The practice of a specialized judiciary revealing dissenting opinions can be traced back to the early 2000s when the Guangzhou Maritime Court promulgated a new guideline to standardize its judgment format.[96]

---

87. Shanghai Junke Trading Co., Ltd. v. Trademark Rev. & Adjudication Bd. of the State Admin. for Indus. & Com. ADMIN. JUDGMENT NO. 6871 (Beijing IP Ct. 2016); *see* Zhang Tianwei, *Chinese Court Bans Streetwear Brand MLGB for Tarnishing Socialist Values*, WOMEN'S WEAR DAILY (Mar. 4, 2019), https://sports.yahoo.com/chinese-court-bans-streetwear-brand-190620664.html [https://perma.cc/QD4J-H8HV].

88. *Shanghai Junke Trading Co.*, ADMIN. JUDGMENT NO. 6871.

89. *Id*.

90. Zhonghua Renmin Gongheguo Shangbiao Fa (2019 Xiuzheng) (中华人民共和国商标法(2019 修正)) [Trademark Law of the People's Republic of China (2019 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Nov. 1, 2019), art. 10.

91. *Shanghai Junke Trading Co.*, ADMIN. JUDGMENT NO. 6871.

92. *Id.*

93. *Id*.

94. *Id*.

95. *Id*.

96. Guangzhou Maritime Court, *Guangzhou Haishi Fayuan de Youguan Zuofa he Jiaoguo* (广州海事法院的有关做法和效果) [Relevant Approach and Effects of the Guangzhou Maritime

The guideline required the publication of both majority and minority opinions if the collegiate bench disagreed.[97] In addition, the Guangzhou Maritime Court issued the nation's first judgment publishing dissenting arguments.[98] Generalist courts, such as the Shanghai Intermediate People's Court, later followed this initiative and implemented such practice in a handful of cases.[99] While minority opinions still appear infrequently in Chinese judgments, bench disagreements disclosed by several specialized court decisions in recent years gave rise to assorted discussions and attracted media attention nationwide.[100] Former Chief Justice of the U.S. Supreme Court Charles Hughes quoted dissenting opinions as appeals "to the intelligence of a future day."[101] Similarly, when stressing the importance of disclosing judicial dissents, the person in charge of the Beijing IP Court asserted, "[T]oday's minority opinions may become tomorrow's majority opinions."[102] At a national congress meeting, a committee member also advocated the value of published minority opinions in guiding society to re-examine controversial legal issues.[103] Still, subjecting bench disagreements to the oversight of disputants and the masses imposes heightened requirements on judges' analytical and reasoning capabilities.[104] The expertise of specialized judges would, indeed, meet such demands. Because the amounts in dispute are relatively high, litigants in specialized courts are often represented by experienced lawyers who should be capable of identifying statutory gaps and loopholes, avoiding frivolous appeals, and raising well-grounded arguments. If explicitly adopted by judgments, these

Court], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily] (Mar. 24, 2003), https://www.chinacourt.org/article/detail/2003/03/id/46313.shtml [https://perma.cc/HL57-LZPR].

97. *Id*.

98. *Id*.

99. Yang Yueping, *Lun Heyiting Shaoshu YIjian de Gongkai* (论合议庭少数意见的公开) [The Publication of Minority Opinions from the Collegiate Bench], 57 HENAN DAXUE XUEBAO (河南大学学报) [J. Henan Univ.] 44, 45 (2017).

100. *See* Liu Man, *Heyiting Shaoshu Jianyi Shouru Panjueshu Guangzhou Zhichan Fayuan Weihe Zheyangzuo* (合议庭"少数意见"首入判决书，广州知产法院为何这样做？) [Minority Opinions from the Bench Were Written into Judicial Decisions. Why Did the Guangzhou IP Court Do So?], NANFANG DUSHI BAO (南方都市报) [Southern Metropolis Daily] (July 10, 2018), https://www.sohu.com/a/240398182_161795 [https://perma.cc/8N8L-DNLC]; *see also* Zhang Xiaoxia et al., *supra* note 85.

101. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936).

102. Zhang Xiaoxia et al., *supra* note 85.

103. Sha Xueliang, *Weiyuan Jianyi Gongkai Zhongshen Panjue Shaoshu Yijian* (委员建议公开终审判决少数意见) [Committee Member Suggested Publishing Minority Opinions of Final Judgments], JINGHUA SHIBAO (京华时报) [Jinghua Daily] (Dec. 7, 2016), https://news.163.com/16/1107/02/C581JRS5000187VI.html [https://perma.cc/WQE3-3UNU].

104. *See* Zhang Zetao, *supra* note 86, at 186.

arguments may serve as valuable raw materials for future debates and innovations in law.[105]

B. *Experimentation in Abstract Policymaking and Procedural Justice*

Along with infusing a common-law style of judicial decision-making to advance the value of court opinions, the specialized judiciary leverages its expertise to formulate and experiment with abstract rules and policies. For example, in 2019 after a steady increase of mass disputes against capital market crimes, the Shanghai Financial Court promulgated the nation's first normative provisions, which established a model judgment ("shifan panjue") mechanism for securities disputes.[106] In February 2019, the number of investors exceeded 147 million in the Chinese securities market, and over 95% were small- and medium-sized investors.[107] Given the high litigation costs and insignificant amount of judicial awards, these investors rarely had the motivation to seek compensation through legal channels.[108] The model judgment mechanism was therefore designed to reduce financial costs and time spent in litigation for retail investors and to conserve judicial resources on repetitive fact-finding.[109] The mechanism allows a model case to be selected from a series of pending securities disputes, either upon the litigating parties' requests or by the Shanghai Financial Court's assignment.[110] The Court will first hear and

---

105. *Id.* at 189.

106. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding (上海金融法院关于证券纠纷示范判决机制的规定) [Provisions of the Shanghai Financial Court on the Model Judgment Mechanism for Securities Disputes] (promulgated by the Shanghai Fin. Ct., Jan. 16, 2019, effective Jan. 16, 2019).

107. Small- and medium-sized investors are those holding stocks with a total value of less than 500 thousand yuan. Ge Shaoshuai, *Shifan Panjue Kaichu Baohu Touzizhe Quanyi Xinlu* (示范判决开出保护投资者权益新路) [Model Judgments Created a New Path to Protect the Rights and Interests of Investors], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily] (May 19, 2019), http://www.qstheory.cn/zhuanqu/bkjx/2019-05/19/c_1124513854.htm [https://perma.cc/WM2M-EPZM].

108. Lian Jianming, *Zhongguoban Zhengquan Jiti Susong Zhidu Luodi* (中国版证券集体诉讼制度落地) [Chinese Version of the Securities Class Action System Was Launched], XINMIN WANBAO (新民晚报) [Xinmin Evening News] (Aug. 3, 2020), https://baijiahao.baidu.com/s?id=1673962980283154657&wfr=spider&for=pc [https://perma.cc/A9PB-GJXW]; Xu Jing, *China Determined to Advance Securities Dispute Mediation Nationally*, PEKING U. SCH. TRANSNAT'L L. REV. BLOG (June 10, 2019), https://stllawreview.com/index.php/2019/06/10/china-determined-to-advance-securities-dispute-mediation-nationally/#_ftn3 [https://perma.cc/4WNC-U2SU].

109. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding, *supra* note 106, at art. 3; *see also* Lin Xiaonie, Shan Suhua & Huang Peilei, *Shanghai Jinrong Fayuan Zhengquan Jiufen Shifan Panjue Jizhi de Goujian* (上海金融法院证券纠纷示范判决机制的构建) [The Shanghai Financial Court's Establishment of the Mechanism of Model Judgment for Securities Disputes], RENMIN SIFA (人民司法) [People's Judicature] 46, 47 (2019).

110. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding, *supra* note 106, at arts. 2, 5.

decide the model case and then resolve other parallel disputes which share common factual and legal issues through mediation or adjudication.[111] After a judgment of a model case comes into effect, the parties of parallel cases will no longer bear any burden of proof for the common facts determined by the model judgment.[112] In March 2019, the Shanghai Financial Court implemented the model judgment mechanism for the first time in handling securities disputes arising from false statements made by the Founder Technology Group Corporation.[113] The Shanghai Financial Court formed a five-judge collegiate panel to hear the model case and invited third-party experts to help determine investors' damages.[114] After the model case's judgment, 637 parallel cases were resolved timely, and more than seventy million yuan in total were awarded to over a thousand investors.[115] The Vice President of the Shanghai Financial Court, Judge Lin Xiaonie, described the establishment of the model judgment mechanism in an interview as "an important measure for the Shanghai Financial Court to reform the financial adjudication system and create a good financial and rule of law environment."[116] The model judgment mechanism pioneered by the Shanghai Financial Court was later adopted by the normative guidance of several provincial high people's courts[117] and implemented by

111. *Id*.

112. *Id*. at art. 2.

113. Li Shuwei, *Zhongguo Fayuan Shouci Shiyong Shifan Panjue Jizhi Shenli Zhengquan Quntixing Jiufen Shifan Anjian* (中国法院首次适用示范判决机制审理证券群体性纠纷示范案件) [Chinese Courts Applied the Mechanism of Model Judgment to Adjudicate a Model Case of Securities Mass Disputes for the First Time], ZHONGGUO XINWEN WANG (中国新闻网) [China News] (Mar. 21, 2019), https://baijiahao.baidu.com/s?id=1628623567750824761&wfr=spider&for=pc [https://perma.cc/ T2NU-279A].

114. *Id*.

115. Yan Jianlian & Zheng Qian, Shouchuang Buduan Shanghai Jinrong Fayuan de Fazhi Shijian (首创不断！上海金融法院的法治实践) [Nonstop First Innovations! The Rule of Law Practice of the Shanghai Financial Court], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily], July 7, 2020.

116. Zhong Shuwei, *Zhongguo Shouge Zhengquan Jiufen Shifan Panjue Jizhi De Guiding Zaihu Fabu* (中国首个证券纠纷示范判决机制的的规定在沪发布) [China's First Mechanism of Model Judgments for Securities Disputes was promulgated in Shanghai], ZHONGGUO XINWEN WANG (中国新闻网) [China News] (Jan. 19, 2016), https://baijiahao.baidu.com/s?id=1622803370859033742&wfr=spider&for=pc [https://perma.cc/HWV9-DEPC]; *see* Li Yuzheng, *China's First Securities Dispute Demonstration Judgment Mechanism Is Issued in Shanghai*, CHINA–SINGAPORE ONLINE SEA (Jan. 16, 2019), https://www.programmersought.com/article/2859555419/ [https://perma.cc/P2LG-GHFK].

117. Ge Shaoshuai, *Shifan Panjue Kaichu Baohu Touzizhe Quanyi Xinlu* (示范判决开出保护投资者权益新路) [Model Judgments Created a New Path for Protecting Investors' Rights], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily] (May 19, 2019), https://www.chinacourt.org/article/detail/2019/05/id/3925105.shtml [https://perma.cc/7SBA-9UB6]; Shanghai Shi Gaoji Renmin Fayuan Guanyu Quntixing Jinrong Jiufen Shifan Panjue Jizhi de Guiding (上海市高级人民法院关于群体性金融纠纷示范判决机制的规定) [The

generalist courts from various Chinese regions to handle securities-related or other civil disputes.[118]

To reinforce investors' access to justice in mass securities disputes, the Shanghai Financial Court filled in the gaps in the representative action ("daibiaoren susong") provisions prescribed by the Civil Procedure Law and the Securities Law by promulgating abstract rules in March 2020.[119] These rules clarified several issues for ordinary and special securities representative litigation schemes.[120] The Shanghai Financial Court has also provided geographically-distant investors with a more convenient dispute resolution channel by establishing an online litigation platform and simplifying the registration mandates for the participation of representative actions.[121] A few months after the promulgation of the rules piloted by the Shanghai Financial Court, the SPC issued an official judicial interpretation on the very subject, aiming to build the securities representative litigation scheme to be "a convenient and low-cost claim

---

Provisions of the Shanghai High People's Court Concerning the Model Judgment Mechanism for Group Securities Disputes] (promulgated by the Shanghai High People's Ct., Apr. 17, 2021, effective on Apr. 17, 2021).

118. Guanyu Jianli Gongsi Jiufen Shifan Panjue Jizhi de Guiding (关于建立公司纠纷示范判决机制的规定) [Provisions Concerning the Establishment of the Model Judgment Mechanism for Corporation Disputes] (promulgated by the Xiamen Intermediate People's Ct., June 24, 2020, effective on June 24, 2020); Guanyu Jianli Gongsi he Zhengquan Lei Jiufen Anjian Shifan Panjue Jizhi de Yijian (关于建立公司和证券类纠纷案件示范判决机制的意见) [Opinions Concerning the Establishment of the Model Judgment Mechanism for Corporation and Securities-Related Cases] (promulgated by the Jiyuan Intermediate People's Ct., Sept. 1, 2020, effective on Sept. 11, 2020).

119. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Daibiaoren Susong Jizhi de Guiding (上海金融法院关于证券纠纷代表人诉讼机制的规定) [Provisions of the Shanghai Financial Court Concerning the Representative Action Mechanism for Securities Disputes] (promulgated by the Shanghai Fin. Ct., Mar. 24, 2020, effective Mar. 24, 2020) (China); Zhongguo Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective on July 1, 2017), art. 53; Zhonghua Renmin Gongheguo Zhengquan Fa (中华人民共和国证券法) [Securities Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2019, effective on Mar. 1, 2020), art. 95; *see* Yi Chujun & Wu Xuebin, *Woguo Zhengquan Jiufen Daibiaoren Susong Zhidu de Lanshang yu Wanshan* (我国证券纠纷代表人诉讼制度的滥觞与完善) [The Origins and Improvement of the Representative Action System for Securities Disputes in China], 526 NANFANG JINRONG (南方金融) [S. Fin.] 82, 85–87 (2020).

120. Yan Jianlian, *Shanghai Jinrong Fayuan Fabu Quanguo Shouge Zhengquan Jiufen Daibiaoren Susong Jizhi de Guiding* (上海金融法院发布全国首个证券纠纷代表人诉讼机制的规定) [The Shanghai Financial Court Issued the Nation's First Provisions on the Representative Action Mechanism for Securities Disputes], RENMIN FAYUAN XINWEN CHUANMEI ZONGSHE (人民法院新闻传媒总社) [The People's Cts. News & Commc'n Agency] (Mar. 25, 2020), https://baijiahao.baidu.com/s?id=1662142235422226649&wfr=spider&for=pc [https://perma.cc/57NY-K4H7].

121. *Id*.

channel for small and medium volume investors."[122] In May 2021, the Shanghai Financial Court announced its judgment for the nation's first ordinary securities representative litigation following the promulgation of the SPC's interpretation. The Court awarded 315 investors about 123 million yuan in compensation for their investment losses.[123] This securities lawsuit filed against Feilo Acoustics for inflating its profits and revenue in published financial statements was heard by three judges and four expert people's assessors.[124] The collegiate bench also inquired and consulted two specialists in the field.[125] One of the people's assessors, Professor Fang Lehua from East China University of Political Science and Law, has spoken highly of the implementation of securities representative litigation. He suggests that it signifies the establishment of "a securities class action system with Chinese characteristics."[126] Through its innovations in litigation mechanisms such as model judgments and representative actions, the Shanghai Financial Court

122. *China Introduces a Class Action Regime Aimed at Financial Investors*, DEMINOR (Aug. 20, 2020), https://drs.deminor.com/en/news/china-introduces-a-class-action-regime-aimed-at-financial-investors [https://perma.cc/FU6T-DZRP]; Zuigaofa Faguan Liwei Jiangdi Weiquan Chengben Bianli Daibiaoren Susong (最高法法官李伟：降低维权成本 便利代表人诉讼) [The Supreme Court Judge Li Wei: Reduce the Cost of Rights Protection, Facilitate Representative Actions], XINHUA WANG (新华网) [Xinhua News] (Sept. 4, 2020), http://www.xinhuanet.com/finance/2020-09/04/c_1126452945.htm [https://perma.cc/XF7Z-JH2K]; Zuigao Renmin Fayuan Guanyu Zhengquan Jiufen Daibiaoren Susong Ruogan Wenti de Guiding (最高人民法院关于证券纠纷代表人诉讼若干问题的规定) (promulgated by the Sup. People's Ct., July 30, 2020, effective on July 31, 2020).

123. Huang Peilei & Zheng Qian, *1.23 Yiyuan Peichang Kuan Shanghai Jinrong Fayuan Xuanpan Zhengquan Jiufen Putong Daibiaoren Susong Shouan* (1.23 亿元赔偿款！上海金融法院宣判证券纠纷普通代表人诉讼首案) [123 Million Yuan Compensation! The Shanghai Financial Court Pronounced Judgment for the First Case of Original Representation Litigation for Securities Disputes], PUJIANG TIANPING (浦江天平) [Huangpu River Scale] (May 11, 2021), https://mp.weixin.qq.com/s/zsq9MnJVxRJ7-3dWPBKjRA? [https://perma.cc/3CPC-M6U9].

124. Hu Diefei, *Quanguo Shouli Daibiaoren Susong An Kaiting* (全国首例代表人诉讼案开庭) [The Trial of the National First Case of Representative Litigation Started], SHANGHAI FAZHIBAO (上海法治报) [Shanghai Legal Daily] (Apr. 7, 2021), https://new.qq.com/omn/20210407/20210407A0B8JY00.html [https://perma.cc/9HCG-2TLR].

125. *Id*.

126. *Id*. In 2002, the SPC found class actions as an improper forum for plaintiffs to claim compensation for disputes arising from securities-related false statements. Judicial remedies had to be sought through either individual actions ("*dandu susong*") or joint actions ("*gongtong susong*"). A joint action refers to "an action where one or both parties consist of two or more persons with an object of action being the same or of the same category." Sanzhu Zhu, *Civil Litigation Arising from False Statements on China's Securities Market*, 31 N.C. J. INT'L & COM. REG. 377, 400 (2005); Zuigao Renmin Fayuan Guanyu Shouli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi (最高人民法院关于受理证券市场因虚假陈述引发的民事侵权纠纷案件有关问题的通知) [The Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Arising from False Statements on the Securities Market] (promulgated by the Sup. People's Ct., Jan. 15, 2002, effective Jan. 15, 2002), art. 4.

"generated many replicable and generalizable experiences in formulating rules and experimenting with case decisions . . . for the reference of other courts across the country."[127]

Furthermore, technological innovations pioneered in specialized courts also promote procedural justice. As home to some of the world's most popular e-commerce retailers and social media platforms, China has experienced dramatic growth in its online shopping population and Internet users over the last decade.[128] Meanwhile, various disputes have arisen rapidly from cyber-related activities, such as e-commerce transactions and online copyright infringement.[129] Claimants of these disputes, however, encounter procedural barriers in accessing conventional judicial channels, including long-distance travel to the court where the vendor resides and great difficulty with the collection and preservation of digital evidence.[130] In response to these obstacles, Internet courts built in Hangzhou, Beijing, and Guangzhou have enabled disputants to communicate with judicial personnel through messaging and to obtain, preserve, and deposit tamper-resistant electronic evidence through the "Preservation Network" and judicial blockchains.[131] Ranging from complaint filing to trial hearings to judgment deliveries, Internet courts have moved the entire judicial process online.[132] According to an SPC report published in 2019, Internet courts assisted by digital technology spent an average of thirty-eight days to close a case, which is

127. Hu Diefei, *supra* note 124.

128. *The 10 Largest E-Commerce Markets in the World by Country*, BUSINESS.COM (Apr. 14, 2020), https://www.business.com/articles/10-of-the-largest-ecommerce-markets-in-the-world-b/ [https://perma.cc/BSU6-FP2L]; *Number of Online Shoppers in China from 2009 to 2020, Key Figures of E-Commerce*, STATISTA.COM (Mar. 14, 2022), https://www.statista.com/statistics/277391/number-of-online-buyers-in-china/ [https://perma.cc/H6KS-7BHQ]; *Number of Internet Users in China from December 2008 to December 2020, Demographics & Use*, STATISTA.COM (Mar. 14, 2022), https://www.statista.com/statistics/265140/number-of-internet-users-in-china/ [https://perma.cc/B29Y-QZM4].

129. Bryan Lynn, *Robot Justice: The Rise of China's 'Internet Courts'*, SCI. & TECH. (Dec. 11, 2019), https://learningenglish.voanews.com/a/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html [https://perma.cc/HSU8-MPNP].

130. Huang-Chih Sung, *Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China*, 39 COMPUT. L. & SEC. REV. 1, 1–3 (2020).

131. *Id*. at 7–8; Lynn, *supra* note 129; Webpage About Judicial Blockchain of the Hangzhou Internet Court, BLOCKCHAIN NETCOURT, https://blockchain.netcourt.gov.cn/first [https://perma.cc/5PPA-F67R] (last visited Aug. 7, 2022); Webpage About Judicial Blockchain of the Beijing Internet Court, BEIJING INTERNET CT., https://tpl.bjinternetcourt.gov.cn/tpl/ [https://perma.cc/5G46-Q49G] (last visited Aug. 7, 2022); *Judicial Industry Public Cloud Solutions*, ALIBABA CLOUD, https://cn.aliyun.com/solution/govcloud/judicialpubcloud [https://perma.cc/FR5A-HXGG] (last visited Aug. 7, 2022).

132. Tashea, *supra* note 39; Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, THE VERGE (Aug. 18, 2017), https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes [https://perma.cc/ZME3-KQFF].

about half of the time a traditional adjudication proceeding would take.[133] The Vice President of the Hangzhou Internet Court illustrated that the motivation of these procedural innovations is to deliver a quicker resolution to disputants "[b]ecause justice delayed is justice denied."[134] Wu Xuhua, a lawyer at Yingke Law Firm, also stressed the role of Internet courts in promoting transparency.[135] He explained to a reporter that "the cases of the Hangzhou Internet Court are recorded throughout the process and can be checked at any time."[136] "Seen by Chinese policymakers as the breeding ground for experimentation and innovation," Internet courts have tested and incubated online judicial platforms and evidence preservation technology, which many generalist courts across the country later embraced.[137]

Besides engaging in technological innovations, specialized courts also pioneer unprecedented procedural rulings during adjudication. In May 2016, the Guangzhou IP Court encountered a "hard case" where a well-known French brand, Christian Louboutin, demanded a preliminary injunction to refrain three companies in Guangzhou from manufacturing and selling the products in question.[138] Although the SPC has allowed plaintiffs in IP disputes to *seek* a court order halting defendants' alleged infringement before the entry of a final judgment since 2001,[139] such preliminary injunctions had not yet been *issued* by courts in China at the time.[140] As stated by Judge Tan Haihua, the presiding judge in the

133. THE SUP. PEOPLE'S CT. OF PEOPLE'S REPUBLIC OF CHINA, ZHONGGUO FAYUAN DE HULIANWANG SIFA (中国法院的互联网司法) [Chinese Courts and Internet Judiciary] 6 (Dec. 5, 2019).

134. Lynn, *supra* note 129.

135. *Liu Ruihong, Hulianwang Fayuan Rang Gongping Zhengyi Chushou Keji* (互联网法院，让公平正义触手可及) [Internet Courts, Making Fairness and Justice within Reach], RENMIN RIBAO (人民日报) [People's Daily] (Jan. 31, 2018), https://www.chinacourt.org/article/detail/2018/01/id/3195430.shtml [https://perma.cc/BH88-MH8K].

136. *Id*.

137. Mimi Zou, *"Smart Courts" in China and the Future of Personal Injury Litigation*, J. PERS. INJ. L. 1, 5 (June 2020); Tashea, *supra* note 39.

138. Lin Yehan & Xiao Yucheng, *Guangzhou Zhichan Youxuandi shi Zheyang Liancheng de* (广州知产: "优选地"是这样炼成的) [Intellectual Property in Guangzhou: How it Became a Selected Premier Location], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Apr. 24, 2019), https://www.chinacourt.org/article/detail/2019/04/id/3850845.shtml [https://perma.cc/8WUK-DNLU].

139. *See* Zuigao Renmin Fayuan Guanyu dui Suqian Tingzhi Qinfan Zhuanliquan Xingwei Shiyong Falv Wenti de Ruogan Guiding (最高人民法院关于诉前停止侵犯专利权行为适用法律问题的若干规定) [The Supreme People's Court's Provisions Concerning the Application of Law Regarding Stopping the Infringement of Intellectual Property Rights Prior to Litigation] (promulgated by the Sup. People's Ct., June 7, 2001, effective between July 1, 2001 and Dec. 29, 2020); *see also* Zhonghua Renmin Gongheguo Zhuanlifa 2020 Xiuzheng (中华人民共和国专利法（2020 修正）[Patent Law of the People's Republic of China (2020 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective on Oct. 17, 2020), art. 72.

140. Lin Yehan & Xiao Yucheng, *supra* note 138.

Louboutin case, "[g]aps in the field are the doors for a breakthrough."[141] Drawing on the case's open hearings and research, Judge Tan issued China's first patent-related preliminary injunction.[142] In his twenty-six-paged opinion, he created a six-part test to review the preliminary injunction request. He suggested that the court may only order a preliminary injunction if the losses it imposed on the respondent were no more than the damages imposed on the applicant.[143] The Louboutin case established an example in response to the longstanding dilemma facing many patent holders in China, commonly known as "winning the case but losing the market."[144] The reference value of this case for other courts in handling similar cases was further elucidated by the Annual Report of the SPC in 2017.[145]

III. SPECIALIZED COURTS AS SKILLFUL BUT CONSTRAINED FORA FOR JUDICIAL REVIEW

Judicial review, in a broader sense, refers to judicial practices of reviewing the consistency of acts made by the legislative or executive branches with "higher law, namely the constitution (in the case of primary legislation) and statutory law (in the case of executive acts, including secondary legislation)."[146] Public law scholars have illustrated judicial review through a strong-weak spectrum.[147] One end of the spectrum is the U.S.-style, strong-form judicial review, where "the legislature's powers are limited by the terms of a written constitution that courts will enforce."[148] Toward the other end is the "new Commonwealth model," a weak-form judicial review, in which "ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run."[149] Judicial review in China, however, barely falls into this scope.

---

141. *Id*.

142. *Id*.

143. Zhou Qiang, *Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Gongzuo Qingkuang de Baogao* (最高人民法院关于知识产权法院工作情况的报告) [The Supreme People's Court's Report Regarding the Work of Intellectual Property Courts], RENMIN FAYUANBAO (人民法院报) [People's Courts Daily] (Sept. 2, 2017), http://rmfyb.chinacourt.org/paper/html/2017-09/02/content_129691.htm?div=-1 [https://perma.cc/K3KK-68PY].

144. Lin Yehan & Xiao Yucheng, *supra* note 138.

145. Zhou Qiang, *supra* note 143.

146. *Judicial Review*, MAX PLANCK ENCYC. OF COMPAR. CONST. L. (Rainer Grote et al. eds., July 2018); Clifton McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 355 (1966).

147. Stephen Gardbaum, *What's So Weak About "Weak-form Review"? A Reply to Aileen Kavanagh*, 13 INT'L J. CONST. L. 1040, 1041 (2015).

148. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and-Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 813–14 (2003).

149. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 (2003); *see* Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487, 487 (2012) ("Comparative constitutional scholars have noted the

Not only are Chinese courts discouraged from making constitutional interpretations in their judgments,[150] but the party-state has also delegated the authority to perform constitutionality review to the Constitution and Law Committee inside its legislative body instead of the courts.[151] Traditionally, the power of judicial review in China was limited to examining the rationality of executive actions. In 2015, the courts' authority was extended to include judicial review of the consistency of certain regulatory documents with higher laws on which administrative actions were based.[152] That said, courts may not invalidate or strike down any regulatory documents but may declare the illegality of the document and suggest revisions to the issuing authority.[153] Although weaker than the power in liberal democracies, judicial review in China experienced an expansion in its scope and depth over the last decade. This also doubled the number of first instance administrative lawsuits against government agencies, from 101,510 in 2007 to 230,432 in 2017.[154] The empowerment of Chinese courts in auditing executive actions can be explained by well-established studies, which portray the role of courts in authoritarian

---

rise in countries such as Canada, New Zealand, the UK and Australia . . . of what they describe as a new, distinctive model of 'Commonwealth constitutionalism' in which courts have broad authority to interpret constitutional rights provisions, but national parliaments retain equally broad power to override courts' interpretations of rights."). *See generally* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 719–39 (2001) (discussing the new model of constitutionalism in Canada, New Zealand, and the United Kingdom).

150. Guanyu zai Xingshi Panjue zhong Buyi Yuanyin Xianfa Zuo Lunzui Kexing de Yiju de Fuhan (关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函) [Reply Regarding the Constitution Shall Not Be Applied as the Basis for Convictions and Sentences in Criminal Judgments] (promulgated by the Supreme People's Court, July 30, 1955, effective on July 30, 1955) ("From the Criminal Aspect, [the Constitution] does not stipulate issues as to how to convict and impose sentences. Based on this, … in criminal judgments, the Constitution shall not be applied as the Basis for Convictions and Sentencing."); Zuigao Renmin Fayuan Guanyu Yinfa Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan Minshi Susong Wenshu Yangshi de Tongzhi (最高人民法院关于印发《人民法院民事裁判文书制作规范》《民事诉讼文书样式》的通知) [Notice of the Supreme People's Court on Issuing the Specifications for Preparing Civil Judgments by the People's Courts and the Format of Civil Litigation Documents] (promulgated by the Sup. People's Ct. & Sup. People's Procuratorate, June 28, 2016 effective on Aug. 1, 2016), art. 6(4) ("In a judgment, the Constitution…may not be cited as the basis for rendering a judgment").

151. Fan Jinxue, *Quanguo Renda Xianfa he Falv Weiyuanhui de Gongneng yu Shiyong* (全国人大宪法和法律委员会的功能与使命) [The Function and Mission of the Constitution and Law Committee of the National People's Congress], 4 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [ECUPL J.] 13, 13–21 (2018).

152. Zhongguo Renmin Gongheguo Xingzheng Susongfa (effective May 1, 2015), *supra* note 11.

153. *Id.*; *see* Wei Cui et al., *Judicial Review of Government Actions in China*, 1 CHINA PERSP. 35, 35–44 (2019).

154. CHINA L. SOC'Y, LAW YEARBOOK OF CHINA *passim* (2008); CHINA L. SOC'Y, LAW YEARBOOK OF CHINA *passim* (2018).

regimes as "fire alarms" for legislatures to be informed of ultra vires actions of executive bodies and as instruments for ruling elites to strengthen their grip on power by keeping local authorities in line.[155] As Martin Shapiro argues, in regimes that "have enacted statutes authoritarianly" and where "constitutional judicial review is insignificant," administrative judicial review is still significant because it enlists the courts to monitor "whether administrative agencies have acted according to the statutory law."[156]

Whilst judicial review in China has started to have some bite, the traditional barriers to administrative litigation continued to frustrate litigants seeking remedies. According to statistics provided by Judge Wang Zhenyu, the then Deputy Head of the Administrative Division of the SPC, less than 10% of administrative judgments ruled for the plaintiffs in 2014, and in some provinces of China, only 2% of such claims were upheld by courts.[157] Judge Wang partially attributed this phenomenon to some judges' lack of expertise and experience when reviewing regulatory matters.[158] Empirical scholarship in the United States has shown the ability of specialized courts to tackle this dilemma. With greater knowledge of respective fields, the specialized judiciary is "more energetic and confident in overturning [bureaucracies'] decisions"[159] and needs "not . . . to rely on agency interpretation."[160] By concentrating on "a small set of policy areas, specialized court judges are able to monitor agency practices closely . . . [and] make principled decisions that limit the strategic advantages of bureaucrats."[161] Relatedly, the new types of specialized courts which have been established in China

155. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984); Ratna Rueban Balasubramaniam, *Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L.J. 405, 405–15 (2009); Jacqueline M. Sievert, *The Case for Courts: Resolving Information Problems in Authoritarian Regimes*, 55 J. PEACE RES. 774, 775–76 (2018); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283–84 (2014); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARDS RULE OF LAW 394–449 (2009).

156. Martin Shapiro, *Courts in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 328 (Tom Ginsburg & Tamir Moustafa eds., 2008).

157. Zhang Yuwen, *Zhongguo Mingaoguan An Yuangao Shengsulv cong 10nianqian 30% Jiangzhi 10% Yixia* (中国民告官案原告胜诉率从 10 年前 30%降至 10%以下) [The Plaintiff Win Rate of Citizen-Suing-the-Government Cases Dropped from 30% Ten Years Ago to Below 10%], RENMINWANG (人民网) [People.cn] (Nov. 5, 2014, 8:10 A.M.), http://politics.people.com.cn/ n/2014/1105/c1001-25976290.html [https://perma.cc/2CJE-9R7B].

158. *Id*.

159. Wendy L. Hansen et al., *Specialized Courts, Bureaucratic Agencies, and the Politics of U.S. Trade Policy*, 39 AM. J. POL. SCI. 529, 552 (1995).

160. Howard, *supra* note 64, at 136.

161. Unah, *supra* note 66, at 858.

since 2014 are staffed by well-educated, experienced judges.[162] In addition, IP courts regularly appoint technical investigators for one to three years to participate in trial hearings and provide professional opinions for the determination of technical issues in fields such as machinery, materials, computers, and biology.[163] Financial courts and Internet courts also frequently involve nonjudicial experts in complex or controversial cases during adjudication.[164]

In 2015, the Beijing IP Court decided the nation's first case exercising judicial review of regulatory documents, a power granted by the 2015 Amendment to the Administrative Litigation Law ("2015 Amendment").[165] Plaintiff, Anhui Huayuan Medicine Company, challenged Article 4 of a notice issued by the State Trademark Office (STO), which stipulated that any registration applications for newly-added service trademarks filed between January 1 and January 31, 2013 were deemed "same-day applications."[166] Under Article 4, the STO considered the applications filed by the plaintiff on January 4, 2013, and by two other companies on January 11 and January 28 respectively, as same-day applications.[167] As a result, the plaintiff was notified that the

162. Guo Jinxia & Zhao Yan, *Beijing Hulianwang Fayuan Yuanzhang denghuo Renmin* (北京互联网法院院长等获任命) [The President of the Beijing Internet Court and Others Appointed], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Aug. 17, 2018, 8:30 A.M.), http://www.court.gov.cn/zixun-xiangqing-112601.html [https://perma.cc/FN94-U57T]; Zhao Yan, *Beijingshi Renda Changweihui Renming Beijing Jinrong Fayuan Yuanzhang Shoupi Peibei 25 Ming Faguan* (北京市人大常委会任命北京金融法院院长 首批配备 25 名法官) [The Standing Committee of the Beijing People's Congress Appointed the President of the Beijing Finance Court 25 Judges Were Recruited], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily], (Mar. 24, 2021) http://www.legaldaily.com.cn/judicial/content/2021-03/24/content_8465864.html [https://perma.cc/HW92-X4C3].

163. Zhishi Chanquan Fayuan Jishu Diaochaguan Xuanren Gongzuo Zhidao Yijian (知识产权法院技术调查官选任工作指导意见) [Guiding Opinions on Selection and Appointment of Technical Investigators by Intellectual Property Courts] (promulgated by the Sup. People's Ct., Aug. 8, 2017, effective on Aug. 14, 2017), arts. 1–5, 10.

164. *See, e.g.*, Yan Jianyi & Zheng Qian, *Shanghai Jinrong Fayuan Chengli Zhuanjia Weiyuanhui* (上海金融法院成立专家委员会) [Shanghai Financial Court Established an Experts Committee], RENMIN FAYUNBAO (人民法院报) [People's Cts. Daily] (Nov. 2, 2020), http://rmfyb.chinacourt.org/paper/html/2020-11/02/content_173402.htm?div=-1 [https://perma.cc/5MJC-FFGT]; Meng Huanliang & Yue Feng, *Hangzhou Hulianwang Fayuan Chengli Zhuanjia Zixun Weiyuanhui* (杭州互联网法院成立专家咨询委员会) [Hangzhou Internet Court Established an Expert Consulting Committee], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Nov. 11, 2017), https://www.chinacourt.org/article/detail/2017/11/id/3071483.shtml [https://perma.cc/S2EM-65AW].

165. Huayuan Medicine Co., Ltd. v. Trademark Off. of the State Admin. of Indus. & Com., ADMIN. FIRST INSTANCE NO. 177, ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), http://www.calaw.cn/article/default.asp?id=11976 [https://perma.cc/2KUS-V6BV]; Zhonghua Renmin Gongheguo Xingzheng Susongfa (effective May 1, 2015), *supra* note 11.

166. *Huayuan Medicine Co., Ltd.*, ADMIN. FIRST INSTANCE NO. 177.

167. *Id*.

trademark would be granted upon the outcome of negotiations or drawing lots. The plaintiff, therefore, asked the Beijing IP Court to invalidate the decision and requested a concurrent review of Article 4 of the notice.[168] Given that the 2015 Amendment provided no specific guidance for judicial review of normative documents, the Beijing IP Court created a four-factor test. Under the test, courts examined whether the STO was a legally authorized body to issue the notice, whether the STO acted beyond its authority, whether the content of Article 4 was lawful, and whether the issuance of Article 4 complied with statutory procedures.[169] Finding that the STO's prescribed "same day" definition contradicted higher laws and that there was not sufficient evidence establishing Article 4 was a legitimate solution narrowly tailored to the purpose of protecting the interests of trademark users in rural areas, the Court declared the illegality of Article 4 and invalidated the defendant's decision.[170] This judgment excited the legal community in China because the decision showed the capability of the judiciary to boldly audit actions undertaken by bureaucracies at the state level. Furthermore, the Anhui Huayuan case's judgment set a national precedent for other courts to apply the 2015 Amendment in reviewing regulatory documents.[171] The guidance for judicial review issued by the SPC in 2018 mirrored the four-factor test established by the case.[172]

The other cause to which Judge Wang attributes the low win rates of plaintiffs suing bureaucracies is the local political interference facing grassroots courts.[173] In China, many first instance administrative lawsuits end up in basic-level trial courts where judges are appointed or removed by the Standing Committee of the People's Congress at the grassroots level.[174] Like other civil servants in China, judges are ranked in an administrative hierarchy, a determining factor for their salaries and

168. *Id*.

169. *Id*.

170. *Id*.

171. Wang Chunye, *Cong Quanguo Shouan Kan Xingzheng Guifanxing Wenjian Fudai Shencha Zhidu Wanshan* (从全国首案看行政规范性文件附带审查制度完善) [From the National First Case to Study the System of Concurrent Review of Administrative Normative Documents], 2 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 41, 41 (Aug. 2018); Zhu Mang, *Guifanxing Wenjian de Hefaxing Yaojian Shouli Fudaixing Sifa Shencha Panjueshu Pingxi* (规范性文件的合法性要件 — 首例附带性司法审查判决书评析) [The Criteria of the Legality of Normative Documents: Analyze the First Judgment of Concurrent Judicial Review], 11 FAXUE (法学) [LEGAL STUD.] 151, 151 (2016).

172. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Nov. 13, 2017, effective in Feb. 2018), art. 148.

173. Zhang Yuwen, *supra* note 157.

174. Zhonghua Renmin Gongheguo Faguan Fa, *supra* note 56.

compensations.[175] For instance, the president of the basic-level people's court in a city district would have an administrative rank equivalent to the deputy magistrate of the district.[176] Therefore, it is fairly common to see judges handling lawsuits challenging the decision-making of bureaucrats at a higher administrative level. In 2003, a local judgment invalidated provisions of a provincial regulation that conflicted with a national statute.[177] Provisional officials in Henan later criticized the judgment for invading their administrative authority and seriously violating the law.[178] For this reason, the presiding judge, Li Huijuan, was removed from office.[179] Yet the aftermath of this case experienced a sharp turn in March 2004, when the SPC issued a reply which stressed the superior authority of national statutes over local regulations and confirmed that national normative documents would prevail when a conflict arises.[180] It was not counter-intuitive that the central government intended to implement national laws and policies uniformly and effectively across the country. For a while, the weak judicial control left local bureaucracies' discretion in rulemaking and regional protectionism unchecked. While China's economy continued to grow, the inconsistent local application of national codes and excessive mandatory regulatory approvals "resulted in low market efficiency and more corruption."[181] To unify the implementation of national rules and prolong its grip on power, the central government's

175. Wang Yijun, *supra* note 13.

176. *Jiedu Woguo Zuigao Renmin Fayuan Yuanzhang Shi Shenme Jibie* (解读：我国"最高人民法院院长"是什么级别?) [Analysis and Interpretation: What Level Is the President of the Supreme People's Court in China?], LANDUN JUNSHI (蓝盾军事) [LANDUN MINISTRY] (Sept. 8, 2018), https://www.163.com/dy/article/DR63OKG90515H3DQ.html [https://perma.cc/AZ8W-AAUA].

177. Chen Si, *Lvshi Jianyi Quanguo Renda dui Luoyang Zhongzian Jinxing Lifa Shencha* (律师建议全国人大对"洛阳种子案"进行立法审查) [Lawyers Suggested the National People's Congress Performs Legislative Review on "Luoyang Seeds Case"], HENAN DIANSHIWANG (河南电视网) [HENAN TELEVISION] (Nov. 30, 2003), https://www.chinacourt.org/article/detail/2003/11/id/93800.shtml [https://perma.cc/LV7V-JF65].

178. *Id*.

179. *Id*.

180. Guanyu Henansheng Ruyangxian Zhongzi Gongsi yu Henansheng Yichuanxian Zhongzi Gongsi Yumi Zhongzi Daifan Hetong Jiufen Yian Qingshi de Dafu (关于河南省汝阳县种子公司与河南省伊川县种子公司玉米种子代繁合同纠纷一案请示的答复) [Reply to the Enquiry Concerning the Case of a Contract Dispute over Corn Seed Propagation Between Henan Ruyang Seed Company and Henan Yichuan Seed Company] (promulgated by the Sup. People's Ct., Mar. 30, 2004, effective Mar. 30, 2004).

181. *A Potential New Boost for Foreign Investment in China – China Eliminates or Simplifies Certain Governmental Approvals*, WINSTON & STRAWN LLP (Nov. 2012), https://www.winston.com/images/content/1/3/v2/1305.pdf [https://perma.cc/T3HH-9JQZ]; *see* David L. Weller, *The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action*, 98 COLUM. L. REV. 1238, 1239 (June 1998) ("[There are] difficulties of doing business in China. One of the most significant of these difficulties has been the extensive and ad hoc intervention by the State . . . including inconsistent and unpredictable regulation.").

"tacit acquiescence in judicial empowerment has over time transformed into express approval."[182] Still, in authoritarian regimes like China, where the ruling party has no incentives to preserve an independent judiciary as an "insurance"[183] for future political turnovers, the fate of empowered courts is ultimately dependent "upon their ability to refrain from challenging the regime."[184] This can be well illustrated by the "bounded activism" exercised by the Supreme Constitutional Court (SCC) of Egypt.[185] Before the late 1990s, the SCC issued several liberal rulings involving economic and property rights, which the Egyptian government endorsed.[186] In the meantime, the SCC gradually gained support from domestic and international activist groups to monitor constitutional and human rights violations.[187] Essentially, "[a]s the regime grew increasingly nervous about opposition advances through the SCC and the Court's growing base of political support, the regime moved to undermine their efforts."[188]

Judicial review of the newly-established specialized courts in China, either at the central or local level, is constrained by their jurisdictional limitations. Not only do these specialized courts have an economic-related focus, but they are also located in China's most popular destinations for foreign investment.[189] Furthermore, none of their judicial appointments and budgets are controlled by political authorities at a

182. Eric C. Ip & Kelvin Hiu Fai Kwok, *Judicial Control of Local Protectionism in China: Antitrust Enforcement Against Administrative Monopoly on the Supreme People's Court*, 13 J. COMPETITION L. & ECON. 549, 549 abstract (2017).

183. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21, 25 (2003) ("By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain.").

184. Ratna Rueban Balasubramaniam, *Review: Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L. J. 405, 411 (2009); *see* Shapiro, *supra* note 156, at 334 ("If the courts challenge the authoritarian regime in which they are embedded to the extent that the regime openly ignores or controls them, they lose that legitimacy, which is about their only resources and defense against the authoritarians.").

185. TMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 3–11 (2007).

186. *Id*. at 3–9.

187. *Id*. at 6–8.

188. *Id*. at 9.

189. *See The Top 6 Best Cities in China for Setting Up a Business in 2021*, FDI CHINA (Apr. 29, 2021), https://www.fdichina.com/blog/the-top-6-best-cities-in-china-to-set-up-a-business/ [https://perma.cc/5ZLT-TSTU] (listing the most popular cities in China for businesses to establish offices); *see also Official: Hainan FTP Sees Explosive Growth in Foreign Investment*, PR NEWSWIRE (Apr. 13, 2021), https://www.prnewswire.com/news-releases/official-hainan-ftp-sees-explosive-growth-in-foreign-investment-301267326.html [https://perma.cc/ZT23-MBWL] (describing the growth in foreign investment in the Hainan province).

grassroots—county or district—level.[190] Even for the three Internet courts, which have jurisdiction as basic-level courts, their judges are appointed by the standing committee of the people's congress of either a provincial capital city or a centrally administered municipality.[191] The Hainan IP Court, set up in 2021 following the construction of the Hainan Free Trade Port,[192] is also under the direct supervision of the provincial government and high people's court.[193] Being more competent in deciding technical and complex matters and less beholden to the pressure exerted by grassroots officials to favor home litigants,[194] specialized courts can show less deference to local bureaucracies than generalist courts. Among the limited published data, the Beijing IP Court, for

190. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at art. 5; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding, *supra* note 34; Quanguo Renda Changweihui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding, *supra* note 37; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Beijing Jinrong Fayuan de Jueding, *supra* note 37; Zuigao Renmin Fayuan Guanyu Sheli Hangzhou Hulianwang Fayuan de Fangan (最高人民法院印发《关于设立杭州互联网法院的方案》的通知) [Notice of the Supreme People's Court on Issuing the Plan for Establishing the Hangzhou Internet Court] (promulgated by the Sup. People's Ct., June 26, 2017, effective June 26, 2017); Quanguo Zuigao Renmin Fayuan Yinfa Guanyu Zengshe Beijing Hulianwang Fayuan Guangzhou Hulianwang Fayuan de Fangan de Tongzhi (最高人民法院印发《关于增设北京互联网法院、广州互联网法院的方案》的通知) [Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court] (promulgated by the Sup. People's Ct., Aug. 9, 2018, effective Aug. 9, 2018), art. 3 (6), (7).

191. Zuigao Renmin Fayuan Guanyu Sheli Hangzhou Hulianwang Fayuan de Fangan, *supra* note 193; Quanguo Zuigao Renmin Fayuan Yinfa Guanyu Zengshe Beijing Hulianwang Fayuan Guangzhou Hulianwang Fayuan de Fangan de Tongzhi, *supra* note 193.

192. *See* Nicole Zhang et al., *China's Hainan Free Trade Port: Introducing an Innovative Tax Regime to Attract Investment*, INT'L TAX REV. (Sept. 7, 2020), https://www.internationaltaxreview.com/article/b1n8bgfxnnnydw/chinas-hainan-free-trade-port-introducing-an-innovative-tax-regime-to-attract-investment [https://perma.cc/QGJ9-JBD7] ("China's central government released a master plan on June 1, 2020, setting out policies to support the construction of the Hainan Free Trade Port . . . This has the aim of building Hainan Island, on the southern coast of China, into a globally-significant free trade port by 2050 . . . [T]he master plan consist[s] of "zero-tariffs, low tax rates, a simplified tax system, and an enhanced legal system.").

193. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at arts. 3, 4.

194. Woo, *supra* note 56, at 250; *see* Zhou Bin & Jiang Hao, *Duli Xingshi Shenpanquan Xuqu Difanghua Xinzhenghua* (独立行使审判权须去地方化行政化) [Independently Exercising Adjudicative Power Needs to Remove Localism and Bureaucratization], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Nov. 18, 2013), https://www.chinacourt.org/article/detail/2013/11/id/1145826.shtml [https://perma.cc/HW23-P8RN] ("Judicial practices proved, the smaller the administrative region is, the greater possibility of the interference with judicial justice will be."); *see also* Zhang Weiwei, *Dapo Mingaoguan de Xingzheng Ganyu* (打破"民告官"的行政干预) [Overcome the Administrative Interference with "Citizens Suing Bureaucracies"], 22 ZHONGGUO RENDA ZAZHI (中国人大杂志) [Chinese Nat'l People's Congress Mag.] *passim* (2014).

instance, ruled for 49% of foreign litigants in administrative lawsuits between November 2014 and June 2019.[195]

China's specialized courts, with a particular emphasis on privatization, have less potential than constitutional or administrative courts to grow as powerful institutions that political activists can use to challenge the regime on the grounds of human and civil rights. Rather, judicial specialization may help Beijing rein in local bureaucracies' decision-making on issues of special complexity and lend the central government legitimacy for its economic policies. More importantly, equipping these specialized courts with capable judicial personnel and relieving them from local political interference would restore the confidence of international investors and further the regime's core interests in expanding its impact on the global market.

IV. STRATEGIC JUDICIAL EMPOWERMENT IN AUTHORITARIAN STATES

The empowerment of courts has been observed in many authoritarian states. Some states have empowered the whole judiciary, while others have empowered only a fragment of it.[196] Rational strategic theories illustrate that the ruling elites in authoritarian regimes support a more autonomous judiciary in hopes of preserving their policy preferences in future electoral competitions, legitimizing political hegemony, reining in local bureaucracies, and facilitating economic growth.[197] The judicial reform in Mexico under the governance of *Partido Revolucionario Institucional* (PRI), for example, has been elucidated by scholars as an insurance policy "designed to protect a weakening ruling party operating in an increasingly insecure political arena"[198] and a strategic move driven by the PRI's "legitimacy building" interests.[199] The establishment of the SCC in Egypt, with a high level of autonomy from executive control, was expected to demonstrate "an unambiguous commitment to investors that

195. Liu Wenxu & Xie Hao, *Beijing Zhishi Chanquan Fayuan Shewai Minshi Anjian Guowai Dangshiren Shengsulv Jin 7cheng* (北京知识产权法院：涉外民事案件国外当事人胜诉率近七成) [Beijing IP Court: The Litigation Success Rate of Foreign Parties in Civil Cases Involving Foreigners Is Nearly 70 Percent], XINHUASHE (新华社) [XINHUA NEWS] (Oct. 18, 2019), http://www.gov.cn/xinwen/ 2019-10/18/content_5441766.htm [https://perma.cc/YJM4-HCNT].

196. *See, e.g.*, José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & SOC'Y REV. 475, 482 (1975) ("The Spanish judges at present seem fairly independent . . . Selection of new judges is entrusted to the judiciary itself.").

197. *See* Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. OF POL. SCI. 345, 355–58 (2009) (discussing such theories in countries like Chile and Mexico).

198. Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 LATIN AM. POL. & SOC'Y 87, 88 (2005).

199. Silvia Inclán Oseguera, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?*, 62 POL. RSCH. Q. 753, 759 (2009).

property rights would be protected through an independent process of judicial review."[200] To raise its courts' international reputation and attract foreign businesses, Spain allocated jurisdiction over politically-important matters to special tribunals under the close watch of the government. It then empowered generalist judges with lifetime tenure and an appointment system subject to minimum political interference. [201] Portraying Singaporean courts staffed by highly-qualified and well-paid judges as a model for authoritarian regimes and emerging democracies, Silverstein explains how Singapore's judiciary, despite its limitations in ruling on politically-sensitive subjects, became an effective avenue to "build and secure a stable economy" and "shape international perceptions."[202] Silverstein insights about the Singaporean experience are the following:

> By maintaining Fuller's eight formal criteria for the rule of law, Singapore made clear to investors that what they valued was safe and protected, and that their investments were secure. The swift constitutional revisions including the termination of appeals to the Privy Council sparked no capital flight . . .
>
> Singapore therefore presents countries like China with the possibility of an alternative model: while economic reform and prosperity demand the rule of law, the rule of law does not necessarily mean that judicialization—and the expansion of individual rights—necessarily will follow. It is possible to de-link economic and political/social reform.[203]

A. *The Causes and Consequences of Judicial Specialization: The Chinese Experience*

Longing for foreign investments and domestic economic developments after the ten-year cultural revolution, China began its reform and opening-up and a march toward the rule of law in the late 1970s.[204] Since then, the country has launched a series of judicial reforms of independence, professionalization, and transparency. For instance, China heightened the education and qualification requirements for newly

200. Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 885 (2003).

201. Toharia, *supra* note 196.

202. Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 76–86 (Tom Ginsburg & Tamir Moustafa eds., 2008).

203. *Id.* at 82–83.

204. Yingyi Qian, *The Process of China's Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives*, 156 J. INST. & THEORETICAL ECON. 151, 153 (2000).

appointed judges in the early 2000s.[205] Since 2013, the control of court budgets has been elevated from grassroots governments to the provincial level in many regions of China.[206] Driven by the Sunshine Judiciary Campaign, trial hearings and millions of judicial decisions have been made publicly available through online platforms.[207]

There are various narratives about the Chinese judiciary. Taisu Zhang and Tom Ginsburg argue that Chinese courts "have become more *institutionally* independent" from political entities and "are now more professional, independent, and politically powerful than at any point in PRC history."[208] While acknowledging the reforms that were made in China, Donald Clarke challenges the conventional use of terminology to describe dispute resolution in China—"the Chinese legal system," "court," and "judge"—and suggests that "[w]hat China has been building for the last forty years are order maintenance institutions."[209] More recently, Xin He relies on empirical evidence to show that, despite a decline in illegitimate influences on Chinese judges, such as *guanxi* and improper interference by local courts or political leaders, influences that the Party perceives to be legitimate continue to exist.[210] He also asserts, "Chinese courts have become more professional and transparent, but not independent."[211]

This Article does *not* intend to join the debate. Instead, it suggests that if the Chinese judiciary is to be empowered or further empowered by the party-state, specialized courts focusing on the areas of privatization are a safe arena with which to start. This is not the least because of the specialized judiciary's capability to experiment with pilot rules and

205. *Compare* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2001, effective Jan. 1, 2002), arts. 9, 12, *with* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), art. 9.

206. Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding, *supra* note 12.

207. Zhongguo Panjue Wenshu Wang (中国判决文书网) [China Judgments Online], https://wenshu.court.gov.cn/ [https://perma.cc/R777-PVZL] (last visited Aug. 12, 2022); Zhongguo Shenpan Liucheng Xinxi Gongkaiwang (中国审判流程信息公开网) [China Judicial Process Information Online], https://splcgk.court.gov.cn/gzfwww/ [https://perma.cc/8WVQ-ALU5] (last visited Aug. 12, 2022); Zhongguo Tingshen Gongkai Wang (中国庭审公开网) [China Ct. Trial Online], http://tingshen.court.gov.cn/ [https://perma.cc/6ZLW-4NM5] (last visited Aug. 12, 2022).

208. Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 332, 342 (2019).

209. Donald C. Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 543-45, 595 (2022).

210. Xin He, *Pressures on Chinese Judges under Xi*, 85 THE CHINA J. 49, 61–62, 65–66 (2021).

211. *Id*. at 73.

adjudication techniques and to audit bureaucratic acts on complex, novel issues. During the first four decades of the People's Republic, the majority of the judicial corpus comprised of veterans and officials recruited from the army or governmental organs, many of whom lacked sufficient legal education or training.[212] Until 2019, the Judges Law still allowed incumbent judges to be exempted from education requirements by undertaking part-time training.[213] While the implementation of the national judicial examination for aspiring judges[214] and the quota judge system ("faguan yuane zhi")[215] professionalized the Chinese judiciary to some extent, the number of judges has been reduced significantly amid a constant increase of disputes funneled into courts.[216] In China, generalist courts' heavy dockets, which cover assorted types of disputes, do not afford judges ample time or energy to research novel or technical issues encountered during adjudication.[217] Entrusting generalist judges, who are already overwhelmed by their caseloads and other court duties, to experiment with controversial policies and examine the rationality of administrative rulemaking on complex subjects could draw backlash over judicial legitimacy. However, assigning these tasks to informed and experienced judicial experts serving in specialized courts would

212. Sida Liu, *Beyond the Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75, 82 (2006).

213. *Compare* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018), art. 9, *with* Zhonghua Renmin Gongheguo Faguanfa, *supra* note 56, at art. 12.

214. Zhonghua Renmin Gongheguo Faguanfa (effective July 1, 1995), *supra* note 205; Björn Ahl, *Advancing the Rule of Law through Education? An Analysis of the Chinese National Judicial Examination*, 42 ISSUES & STUD. 171–204 (2006).

215. The quota judge system was one of the major judicial reforms carried out by the Fourth Plenary Session of the 18th Party Central Committee of the Communist Party of China in 2014. To promote judicial elitism, the proportion of court personnel authorized to hear cases was capped at 39% for each province. Judges who did not pass internal appraisals were transferred to assistance or administrative roles. Gao Jinghong, *Faguan Yuanezhi de Zhidu Jiazhi he Shixian Lujing* (法官员额制的制度价值和实现路径) [The Value and Fulfillment of the Quota Judge System], TIANJIN FAYUAN WANG (天津法院网) [Tianjin Courts] (July 20, 2015), http://tjfy.chinacourt.gov.cn/article/detail/2015/07/id/1936313.shtml [https://perma.cc/6GZR-EXZ8]; *see* Susan Finder, *Why Are Chinese Judges So Stressed?*, SUPREME PEOPLE'S COURT MONITOR (Feb. 27, 2018), https://supremepeoplescourtmonitor.com/2018/02/27/why-are-chinese-judges-so-stressed/ [https://perma.cc/5JD5-J56Y] ("[A]uthorities decided to reduce the headcount of Chinese judges by comparing the percentage of judges in China with those in major jurisdictions.").

216. *See* Tang Qi, *Zuigaofa: Faguan Pingjun Banan Shuliang Tishengzhi 2008nian de Jinsanbei* (最高法：法官平均办案数量提升至 2008 年的近 3 倍) [Supreme People's Court: The Average Amount of Cases Handled by Judges Raised Nearly Three Times of the Year of 2008], ZHONGGUO XINWENWANG (中国新闻网) [CHINA NEWS] (Aug. 1, 2017), http://www.china.com. cn/news/2017-08/01/content_41323068.htm [https://perma.cc/6CKC-PHDE].

217. *Id.*

minimize such risks. Furthermore, under the principal-agent model,[218] the party-state could delegate the specialized judiciary as a competent but constrained agent to collect information about and remedy bureaucracies' self-interest-seeking violations, especially those that would curb national economic growth. More importantly, because of jurisdictional limitations, the emerging specialized courts in China have little room to challenge the decisions of political and governmental entities outside domains related to IP, finance, and the Internet. Finally, the existence of these specialized benches could maintain and restore the confidence of foreign investors in the Chinese market. As shown in previous research, regions in China with higher gross domestic product (GDP) per capita and foreign capital tend to enjoy a more positive public perception of judicial integrity.[219] If a dispute occurs, investors can be assured that they will receive a fair judgment from a capable and neutral institution set up in one of China's most developed regions with considerable international capital flows.[220]

Given the activities carried out by the IP, financial, and Internet courts over the last decade, China appears to be granting more power to its specialized judiciary. Not only did these specialized courts craft and pilot new policies in the relevant fields, but some also obtained cross-regional jurisdiction and the authority to audit state-level bureaucrats.[221] Moreover, perceived as a "judicial window" connecting China with the world, the specialized judiciary has pledged to deliver equal protection for foreign parties in its official media outlets and reports.[222] The push for

218. *See, e.g.,* Sean Gailmard, *Accountability and Principal-Agent Models*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 11–12 (Mark Bovens et al. eds., 2014) ("One should understand Congress as a principal and various bureaucrats as its agents. Therefore one should interpret bureaucratic institutions and legislative-bureaucratic interaction . . . as promoting the interests of the principal to the greatest extent possible. This is the central premise of thought on bureaucratic institutions based on principal-agent theory.").

219. Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 THE CHINA J. 43, 55–57 (2013).

220. *See* Sievert, *supra* note 155, at 776.

221. *See* Zuigao Renmin Fayuan Guanyu Shanghai Jinrong Fayuan Anjian Guanxia de Guiding (最高人民法院关于上海金融法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of the Shanghai Financial Court] (promulgated by the Supreme People's Court, Apr. 21, 2021, effective Apr. 22, 2021), art. 3; Zuigao Renmin Fayuan Guanyu Beijing Shanghai Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (2020 Xiuzheng), *supra* note 36, arts. 2, 5.

222. *See, e.g.,* Liu Wenxu & Xie Hao, *supra* note 195; Wu Haiping, *Fuwu Baozhang Lingang Jinrong Kaifang Shanghai Jinrong Fayuan Tui 15tiao Jucuo* (服务保障临港金融开放 上海金融法院推 15 条举措) [Serve and Safeguard the Openness of Lingang Finance the Shanghai Financial Court Put Forward 15 Measures], KANKAN XINWEN (看看新闻) [KNEWS] (July 30, 2020), https://baijiahao.baidu.com/s?id=1673621358102707741&wfr=spider&for=pc [https://perma.cc/K7BQ-BRH8]; Zhishi Chanquan Sifa Baohu Zhuangkuang (知识产权司法保护状况) [Judicial Protection Conditions for Intellectual Property] 15–16 (2015–2019), http://www.hshfy.sh.cn/css/2020/04/15/20200415151254151.pdf [https://perma.cc/A8JQ-AA2X].

a global judicial presence is indicated by the comments given by the President of the Shanghai Financial Court, Zhao Hong. In an interview, Judge Zhao explained that one of the main reasons for establishing the first financial court in Shanghai was to "set a Chinese adjudication standard for international financial dispute resolution and to advance the international credibility and impact of [China]'s financial judiciary."[223] In 2020, the Shanghai Financial Court formed an expert panel consisting of eight international financial law academics and practitioners to consult on the adjudication of important and influential cases and the formulation of financial rules and policies.[224] The panel is described as "one of PRC's most convincing efforts so far to create a very strong legal environment and robust judicial practice for the protection of foreign investors in China."[225] Similarly, Jay Kesan, a law professor at the University of Illinois at Urbana-Champaign, considers the establishment of IP courts to be the most important development for IP protection in China to date.[226] According to Kesan, "it's in China's best interest to have good IP protection," since it "will help Chinese companies within China, help Chinese companies go abroad . . . [and] also make China a more attractive place for foreign companies."[227]

To better understand the causes and consequences of China's emerging judicial specialization, I interviewed eleven lawyers who handled cases either in IP, financial, or Internet courts in China.[228] The interviews were semi-structured and conducted through voice calls from August 5 to October 17, 2021. Due to the disparity in the amount and type of cases handled by interviewees, the depth of discussions and opinions varied between respondents and across questions. The length of each interview ranged from forty to a hundred minutes. Several main themes arose from our conversations.

---

223. Yu Dongming & Huang Haodong, *Shanghai Jinrong Fayuan: Dakai Zhongguo Tongwang Shijie de Jinrong Sifa Zhichuang* (上海金融法院：打开中国通往世界的"金融司法之窗") [Shanghai Financial Court: Open China's "Financial Judicial Window" to the World], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Aug. 20, 2019), http://legal.people.com.cn/n1/2019/0820/c42510-31305343.html [https:// perma.cc/Z5ZV-FRKR].

224. Yan Jianyi & Zheng Qian, *supra* note 164.

225. *Professor Emilios Avgouleas to Advise Shanghai Financial Court on International Investment Treaties*, UNIV. EDINBURGH L. SCH. (June 21, 2021), https://www.law.ed.ac.uk/news-events/news/professor-emilios-avgouleas-advise-shanghai-financial-court-international [https:// perma.cc/389R-BSN8].

226. Yamei, *Spotlight: How China's Judicial Protection of IP Rights Will Benefit Its Economy*, XINHUA NEWS (June 4, 2019), http://www.xinhuanet.com/english/2019-06/04/c_138116303.htm [https://perma.cc/X36B-S3PH].

227. *Id.*

228. Pursuant to requirements for human participants research by the Research Ethics Committee in United Kingdom, identifiable information has been redacted from the interview transcripts, and the respondents were referred to by their last names only during the interviews.

First, respondents generally spoke positively about the experience and subject matter expertise of specialized courts. They attributed such phenomenon either to the heightened selection standards of individual judges or the "elite group" effects.[229] Judges serving on IP courts "were selected and transferred from the whole region of Shanghai, [and were] regarded as experienced elites."[230] Sharing common expertise in specific subject matters, specialized judges learn from each other not only from conversations on the benches but also through national judicial conferences and training in relevant legal areas.[231] As lawyer Li explained,

> Like doctors, these judges have tried many cases [and] handled different issues, so they have the confidence . . . to try something controversial and develop their own reasoning and philosophy . . . They are experts in the field, who are already better trained than [their peers from] IP tribunals or generalist courts. When you have a group of quite prominent judges, [there is] a group effect, which will only make them better.[232]

In addition, several respondents illustrated that even in specialized tribunals of generalist courts, judges could not always handle cases in specific areas due to internal job rotations, which took place every one to two years.[233] Some judges serving in the tribunals were also recent law graduates who did not have much adjudication experience.[234]

In part because of their expertise and experience, specialized courts are perceived by the respondents as being more receptive to lawyers' arguments during trial hearings than specialized tribunals or generalist courts in their respective fields. Drawing on their legal practice, lawyers Tan and Hu explained that superior knowledge in particular subject matters equips specialized judges with the capacity to evaluate the importance of arguments raised by both parties and with an open mind to consider precedents, "policy-oriented" reasoning, and "rules from foreign jurisdictions."[235]

Compared to generalist courts, specialized courts are more likely to encounter novel or complicated cases, which allows ample room for

---

229. Telephone Interview with Zheng, Lawyer (Aug. 10, 2021); Telephone Interview with Li, Lawyer (Aug. 14, 2021); Telephone Interview with Zhu, Lawyer (Aug. 18, 2021); Telephone Interview with Hu, Lawyer (Sept. 4, 2021); Telephone Interview with Yu, Lawyer (Sept. 16, 2021); Telephone Interview with Chi, Lawyer (Oct. 16, 2021).

230. Hu, *supra* note 229.

231. Yu, *supra* note 229.

232. Li, *supra* note 229.

233. Telephone Interview with Tan, Lawyer (Aug. 12, 2021); Hu, *supra* note 229.

234. Hu, *supra* note 229.

235. *Id.*; Tan, *supra* note 233.

arguments.[236] During trial hearings held by specialized courts, several respondents were comfortable citing academic findings, internationally recognized rules, and foreign precedents.[237] For example, the firm that lawyer Hu worked for often invited university professors to roundtable workshops, which helped to prepare expert opinions on "important, novel, and controversial cases" to be submitted to courts for consideration.[238]

Efficiency was another main aspect brought up by most respondents. With a good understanding of and familiarity with technical terms and applicable rules, specialized benches appear to grasp key evidence and legal issues in a timely fashion. For example, lawyer Zheng stated, "In these specialized cases, both judges and lawyers have relevant expertise, which eliminates a lot of obstacles in their communications . . . In most situations, they understand each other and it is easier [for judges] to identify and summarize the focus of contention."[239] Internet courts, in particular, make all evidence and other materials available to the parties through virtual platforms.[240] "[T]he adjudication process is more concentrated and smoother," Zheng added.[241] Furthermore, some respondents pointed out that specialized judges show a strong capability to make prompt and firm decisions, especially in novel and controversial cases.[242] "You can imagine that a [complex] case might take a very long time for a generalist court to decide," lawyer Fu said, "because the presiding judge would need to understand [the issue] first, and then discuss it with other bench members."[243] If the case is influential or involves a large amount of money in dispute, it needs to go through the adjudication committee or be reported to the court at a higher level.[244] Fu stated, "[I am] not saying that the same type of cases would definitely be handled better in specialized courts, [the difference is that] judges in specialized courts can decide these cases more efficiently, which would send a positive signal to the market."[245] Lawyer Fu further elaborated:

> Financial activities prioritize efficiency . . . if important and typical financial disputes take a long time, or even several

236. Zheng, *supra* note 229.

237. *Id.*; Telephone Interview with Zhong, Lawyer (Oct. 17, 2021); Tan, *supra* note 233; Li, *supra* note 229; Hu, *supra* note 229.

238. Hu, *supra* note 229.

239. Zheng, *supra* note 229.

240. *Id*.

241. *Id*.

242. Telephone Interview with Fu, Lawyer (Aug. 5, 2021); Telephone Interview with Wang, Lawyer (Aug. 24, 2021); Hu, *supra* note 229; Li, *supra* note 229; Chi, *supra* note 229; Zheng, *supra* note 229; Tan, *supra* note 233.

243. Fu, *supra* note 242.

244. *Id*.

245. *Id*.

> years, to decide, this type of financial activities could be paused as both transactional parties would want to learn the rules... [Specialized courts] can deal with cases that may significantly affect financial affairs more promptly so that all parties will have rules to apply and judgments to refer to . . . This will guarantee the stability of finances and investments.[246]

Respondents also shared their experiences where specialized courts managed to make innovations when laws were silent.[247] Lawyer Wang handled several securities disputes arising from false statements in the Shanghai Financial Court.[248] She explained that to subject accounting firms and stock brokerages to any damages in civil or commercial cases in the past, courts had to await the decisions of violations and penalties made by administrative agencies.[249] This common practice, however, delayed many investors in getting their money back.[250] When the publicly listed companies bearing substantial liabilities had no assets to compensate, investors could hardly receive any remedies.[251] After the Shanghai Financial Court issued a judgment that imposed monetary penalties on accounting firms and stock brokerages before administrative decisions for the first time, "the Securities Regulatory Commission of China held a press conference and stated that they would revise relevant regulatory measures according to the judgment."[252] In Wang's view, the case showed how the Shanghai Financial Court "exerted influence on legal enforcement entities and the regulatory environment through its judgment."[253]

In 2014, lawyer Zhong and his team represented a defendant company who hyperlinked a source publishing other people's work without authorization in a public account on Weibo.[254] The case was first decided by a generalist court, and the defendant challenged the first-instance judgment in an IP court.[255] At the time, there were no applicable rules to determine whether hyperlinking should be deemed to be copyright infringement if the hyperlink provider did not know and should not have known about the infringement committed by the anchored source.[256]

---

246. *Id*.

247. *Id.*; Telephone Interview with Zhong, Lawyer (Oct. 17, 2021); Zheng, *supra* note 229; Tan, *supra* note 233; Li, *supra* note 229; Wang, *supra* note 242; Chi, *supra* note 229.

248. Wang, *supra* note 242.

249. *Id*.

250. *Id*.

251. *Id*.

252. *Id*.

253. Wang, *supra* note 242.

254. Zhong, *supra* note 247.

255. *Id.*

256. *Id*.

Zhong argued that the court should distinguish infringement committed by the original wrongdoer from the hyperlinking provider and consider the intent of hyperlinking providers.[257] His argument was rejected by the generalist court.[258] Zhong said, "It was a novel case in 2014. There were no specific rules… You explained [the hyperlinking issue] to the [generalist] court. They did not understand at all. What can you do?"[259] However, in the second instance, the specialized court considered Zhong's legal opinions and found the hyperlinking provider did not have the intent of infringement and thus bore no liability for damages.[260] This has become the common approach for determining the liability of hyperlinking providers in the following years.[261]

In another example raised by respondents, a financial court filled a statutory gap by clarifying the scope of banks' obligations in risk disclosure when selling private equity products to clients.[262] Lawyer Chi commented, "That the court so decided in the absence of clear provisions in law was an innovation . . . [F]rom the perspective of the society, [the court] protected consumers' interests and identified an inadequacy of the financial organization, . . . which helped banks to make relevant amends."[263] He thought the case would have an exemplary effect on future adjudication in terms of regulating powerful financial institutions like banks.[264] "The first-instance court contemplated from a traditional contract law aspect, while the [specialized] court's way of thinking on adjudication and [its] formulation of rules was more advanced," he added.[265]

When I asked about the driving forces behind the innovations of the specialized judiciary, lawyer Zheng's comments were insightful.[266] He said,

> [As] the function bore by specialized courts is to push the boundary of innovations and to engage in judicial innovations, judges have greater motivations and wider politically correct grounds to innovate. [G]eneralist judges, however, do not have such systematic protection. [Furthermore,] specialized courts are more likely to produce typical judicial cases. That is why judges have the motivation to engrave their names in provincial or national

257. *Id*.
258. *Id*.
259. Zhong, *supra* note 247.
260. *Id.*
261. *Id*.
262. Chi, *supra* note 229.
263. *Id*.
264. *Id*.
265. *Id*.
266. Zheng, *supra* note 229.

> top ten cases on certain subjects. Therefore, when specialized courts handle novel cases, judges favor detailed reasoning. [Lawyers] arguing something theoretically innovative can be acceptable because [these cases] are novel, and relevant statutory and adjudicatory rules are not clear . . . [The specialized judiciary] is to show the whole world China's judicial strengthens, so it has the motivation to [innovate].[267]

Lawyer Chi contended that the specialized courts also explore different ways of adjudicating cases in specific fields that, if successful, could be implemented nationwide.[268] Indeed, with China's recent trend toward judicial transparency and the national implementation of the "similar-case-search" mandates,[269] the judgments of specialized courts could have an impact on generalist courts across Chinese regions. Eight out of eleven respondents told me they would search for and consult similar cases decided by specialized courts even when handling cases in courts sitting elsewhere.[270] Lawyer Hu considered this approach to be "very necessary."[271] She elaborated, "As the purpose of establishing specialized courts is to gather a group of judges with adjudication experience and expertise to [decide certain types of cases], the judgments given by [these judges] have very strong guiding effects, and we will definitely look for [their] judgments of similar cases."[272] She said she would consult prior judicial decisions handed down by specialized courts, including those not from the region where she was litigating.[273] When lawyer Wang handled a novel, controversial securities case in an intermediate court in Fujian province, she submitted to the court over ten judgments given by specialized courts.[274] She said, "Although the court has yet to decide, during trial hearings, I could tell judges considered [the judicial decisions I submitted]."[275]

---

267. *Id*.

268. Chi, *supra* note 229.

269. Zuigao Renmin Fayuan Yinfa Guanyu Tongyi Falv Shiyong Jiaqiang Leian Jiansuo de Zhidao Yijian Shixing de Tongzhi (最高人民法院印发《关于统一法律适用加强类案检索的指导意见（试行）》的通知) [Notice by the Supreme People's Court on the Guiding Opinions concerning Unifying the Application of Law and Strengthening the Retrieval of Similar Cases (for Trial Implementation)] (promulgated by the Sup. People's Ct., July 15, 2020, effective July 31, 2020).

270. Zheng, *supra* note 229; Li, *supra* note 229; Hu, *supra* note 229; Chi, *supra* note 229; Zhu, *supra* note 229; Yu, *supra* note 229; Wang, *supra* note 242; Fu, *supra* note 242.

271. Hu, *supra* note 229.

272. *Id*.

273. *Id*.

274. Wang, *supra* note 242.

275. *Id*.

In addition, a favorable ruling from specialized courts could help some lawyers get their cases accepted by generalist courts. Lawyer Zheng shared his tactics with me.[276] One of his clients was a company in Hangzhou, which lent private loans to car buyers and ended up with over 200-million-yuan of non-performing assets.[277] "Many courts would not want to accept cases filed by these kinds of companies. Because once a case is accepted, thousands of [parallel] cases will be funneled in," he explained.[278] Given the Hangzhou Internet Court's greater ability in batch-processing cases through its automated adjudication system, the Court would be more likely to accept such cases.[279] Therefore, lawyer Zheng first brought a series of disputes arising from the company's non-performing loans to the Hangzhou Internet Court.[280] Once he received a favorable judgment, he used it as proof and filed similar cases in generalist courts from other regions.[281] Although "[i]t doesn't mean [the generalist courts] have to decide in the same way, [the disputes] all have very similar facts and applicable laws," so a favorable judgment in a specialized court gives them solid ground for arguments.[282]

Interestingly, foreign clients represented by the respondents showed a particular interest in bringing their lawsuits to specialized courts.[283] Take IP cases, for instance. Lawyer Zhu told me that if a case had any connections with Beijing or Shanghai and could be filed in the IP court, her foreign clients would prefer to sue in the IP court.[284] A general concern her clients had was that "if the defendants were from a region with massive forgeries, [they] would not be able to overcome local protectionism."[285] "Because jurisdiction [over IP cases] has different determinants, such as the place where the alleged infringement occurred and the defendant's domicile," some of Zhu's foreign clients secured jurisdiction by collecting and notarizing infringement evidence at industrial expositions hosted in Shanghai.[286] In so doing, Shanghai became the location where the alleged infringement took place.[287] "Especially [with] foreigners," Zhu explained, "their trust over the judicial environment in Beijing and Shanghai is higher . . . The more

276. Zheng, *supra* note 229.
277. *Id*.
278. *Id*.
279. *Id*.
280. *Id*.
281. Zheng, *supra* note 229.
282. *Id.*
283. Tan, *supra* note 233; Li, *supra* note 229; Zhu, *supra* note 229.
284. Zhu, *supra* note 229.
285. *Id*.
286. *Id*.
287. *Id*.

developed a region is, the more open and transparent it gets."[288] Lawyer Li attributed his foreign clients' preference of litigating in specialized courts to transparency, experience, and predictability:

> [A]ll three IP courts have their WeChat channels and all kinds of social media platforms. They are active in writing articles that express their opinions about certain judgments, including the ones they handed down. That is something making them more visible to the community, compared to IP tribunals and generalist courts… My clients often read the articles published by these [specialized] courts.[289]

In addition, when asked whether specialized courts were less subject to external influences from local authorities and large businesses than generalist courts when handling cases of the same kind, eight out of eleven respondents either felt indifferent or indicated that it was hard to determine.[290] However, among the three respondents with a positive answer, all of them mentioned that the cross-regional jurisdiction of specialized courts helped avoid local protectionism.[291] Specialized courts follow their own rules for personnel, finances, and facilities. Their budgets and appointments are overseen by provincial-level governments.[292] As such, lawyer Zheng thought specialized courts "are more independent and likely to detach themselves from local authorities."[293] While the centralization of court management was a part of judicial reform for generalist courts, "the difficulties facing [generalist courts in] . . . achiev[ing] this goal [are] far greater than specialized courts . . . Because specialized courts are [set up] for pilots and experimentation, they have the condition to realize such an objective," he explained.[294]

To illustrate the potential impact of local companies on judicial outcomes, lawyer Zheng used the example of Tencent, infamously known as "who must triumph in Nanshan ('Nanshan bishengke')," a tech giant that has won a large majority of cases in the basic-level generalist court of Nanshan district where the headquarter of the company is.[295] He

---

288. *Id*.

289. Li, *supra* note 229.

290. Telephone Interview with Lv, Lawyer (Oct. 17, 2021); Fu, *supra* note 242; Tan, *supra* note 233; Wang, *supra* note 242; Hu, *supra* note 229; Zhong, *supra* note 242; Zhu, *supra* note 229; Yu, *supra* note 229.

291. Zheng, *supra* note 229; Li, *supra* note 229; Chi, *supra* note 229.

292. *See* Zheng, *supra* note 229.

293. *Id*.

294. *Id*.

295. *Id.*; *see* "Longgang Wudishou", "Nanshan Bishengke", "Haidian Budaowen", Ningde Shidai: "Cangshan Bulaosong" ("龙岗无敌手"，"南山必胜客"，"海淀不倒翁"，宁德时代："仓山不老松") ["Longgang Unbeatable," "Nanshan Who Must Triumph," "Haidian Tumbler",

added, "Alibaba has lost several cases in the Hangzhou Internet Court, and some interpreted this as the Internet court making known its position."[296] Lawyer Li commented on the elevation of appellate courts for highly technical IP judgments to the SPC as a bold move to ensure the quality of IP courts' decisions and their autonomy from local interference.[297] He stated,

> This is different from before when [IP] cases would not go beyond the province-level. [In the past,] although these judgments could be reviewed by courts at a higher level, first-instance courts would not "lose face" in the Supreme People's Court. Now the second instance of certain cases is tried by the SPC. Everyone involved will have some concerns . . . [L]ocal protectionism will be less and less.[298]

Overall, the interviews revealed legal practitioners' feedback based on their own interactions and experiences with the three new types of specialized courts established in China over the last decade.[299] The findings generally hint at the causes of China's recent revival of judicial specialization and the impact of judicial elites on legal and economic developments. Most of the respondents noted the greater willingness and capabilities of specialized courts to innovate in the course of adjudication and decision-making, especially when handling novel and controversial cases. This phenomenon might be due to their institutional status as a national hub for policy experimentation and their judges' superior knowledge of specific subject matters. Because of the accessibility of decided cases and the implementation of the similar-case mandates, the reasoning crafted by specialized judges could impact and inspire their peers sitting in general courts across the country. Furthermore, specialized courts, with a focus on private rights and their detachment from grassroots authorities, seem to be a more efficient and transparent

---

Contemporary Amperex Technology: "Cangshan Forever-young Pine"], Zhichan Qianyan (知产前沿) [IP ForeFront], https://zhuanlan.zhihu.com/p/392966579 [https://perma.cc/265Z-FEHH] (last visited Aug. 12, 2022).

296. Zheng, *supra* note 229.

297. Li, *supra* note 229; *see* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhuanli deng Zhishi Chanquan Anjian Susong Chengxu Ruogan Wenti de Jueding (全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定) [Decision of the Standing Committee of the National People's Congress on Several Issues concerning Judicial Procedures for Patent and Other Intellectual Property Cases] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019), arts. 1, 2.

298. Li, *supra* note 229.

299. It is worthwhile to note that lawyer Lv did not observe any differences between specialized and generalist courts. He thought that the disparities in judicial capabilities were greater between urban and rural regions than the specialized-generalist division. However, he said this "ignorance" might be because he had not dealt with any controversial or complex cases in specialized courts. *See* Lv, *supra* note 290.

forum for dispute resolution. Deliberately or organically, such courts were set up in regions that attract some of the country's most international capital flows. Foreign clients of our respondents showed their growing interest in bringing lawsuits to specialized courts.

B. *The Creation and Allocation of Specialized Jurisdiction: A Model for Institutional Design*

As Martin Shapiro explains,

> [A]nxious to attract foreign investment, authoritarian regimes can be persuaded to institutionalize relatively independent and effective courts to assure investors of legal protections . . . Because they provide an authoritarian regime benefits in terms of assuring international investors, such a regime will begin to tolerate, indeed encourage, judicial decisions protecting property rights.[300]

By establishing a sophisticated and autonomous judiciary to resolve "disputes between property or business owners, or between owners and the state itself," regimes, regardless of their chosen political apparatus, "signal[] to potential investors that [they are] willing to play by the rules and be subject to the laws of the state."[301] One might ask whether every authoritarian government with economic incentives should establish a specialized judiciary for commerce. Singapore, for instance, was able to emerge and maintain itself as a global business hub without much help from specialized courts. Even among states that put extra effort into setting up specialized benches, the types of cases transferred out of the dockets of generalist courts varied. Specialized judicial empowerment therefore might respond to deeper inquiries about the institutional design of authoritarian courts.

Assuming that elites in authoritarian states have the power to assign any type of case to either generalist or specialized courts, the delimitation of jurisdiction would depend on the history, reputation, and pedigree of the original courts of the regime as well as the political character of subject matters. To be more specific, in a regime where an independent and reputable judiciary has long existed (an "inherited legal system," see Table II), dismantling the original court system would either be infeasible to accomplish or would impose a considerable burden on the operation of private spheres if the general law could no longer provide sufficient protection for civil or economic activities. Instead, the ruling class could withdraw politically relevant matters from the jurisdiction of ordinary courts and turn them over to specialized courts. The English Court of Star Chamber was initially created in the reign of King Henry VII to offer

300. Shapiro, *supra* note 156, at 330.
301. Sievert, *supra* note 155, at 776.

"relatively fast, flexible solutions to problems that other courts could not address."[302] However, before its abolishment by parliament in 1641, the Star Chamber had become a court that held proceedings in secrecy and exercised discretion to punish the accused without due process.[303] Whilst the traditional law governing private affairs remained intact, King James I and King Charles I used the Star Chamber to suppress political and religious dissents as well as nobles resisting royal commands.[304] In Nazi Germany, where the "Prerogative State" exercised jurisdiction over political matters, the "Normative State" was nonetheless well kept to maintain the orderly administration of economic domains.[305] Meanwhile, the autocratic leaders created special benches, such as the courts-martial, to try prisoners of war and rebels of German or foreign descents in the Prerogative State.[306] As Fraenkel explains, "The Dual State refer[red] political crimes to a special court, despite the fact that they [we]re political questions."[307] Because the jurisdiction of the Prerogative State was not legally defined in the Dual State, any types of disputes could be removed from or allocated to the Normative State.

For regimes where the courts are traditionally perceived as less independent and competent ("rebuilt legal systems," see Table II), creating a specialized jurisdiction for commerce is beneficial provided that property rights and commercial activities are protected by relatively professional, autonomous judicial institutions. In 2004, to combat the detrimental effect of corruption on economic growth, Indonesia removed the jurisdiction over anti-corruption cases from the generalist courts and assigned it exclusively to the newly-established Tipikor courts.[308] These specialized courts set up at the central and provincial levels, with the involvement of *ad hoc* legal experts, were created to "circumvent entirely a judicial system known to be complicit in protecting corruptors" and free judges from "undue influence by politicians or other powerful actors."[309] Another notable example is the establishment of the SCC in Egypt. Given

302. INST. OF HIST. RSCH., STAR CHAMBER MATTERS: AN EARLY MODERN COURT AND ITS RECORDS 1 (K. J. Kesselring & Natalie Mears eds., 2021).

303. *See* Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 738 (1913).

304. *See id.* at 737, 742, 746–47.

305. ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 96–97, 99–102 (2017).

306. Peter Lutz Kalmbach, *The German Courts-Martial and Their Cooperation with the Police Organizations During the World War II*, 8 J. ON EUR. HIST. OF L. 2, 2–3 (2017).

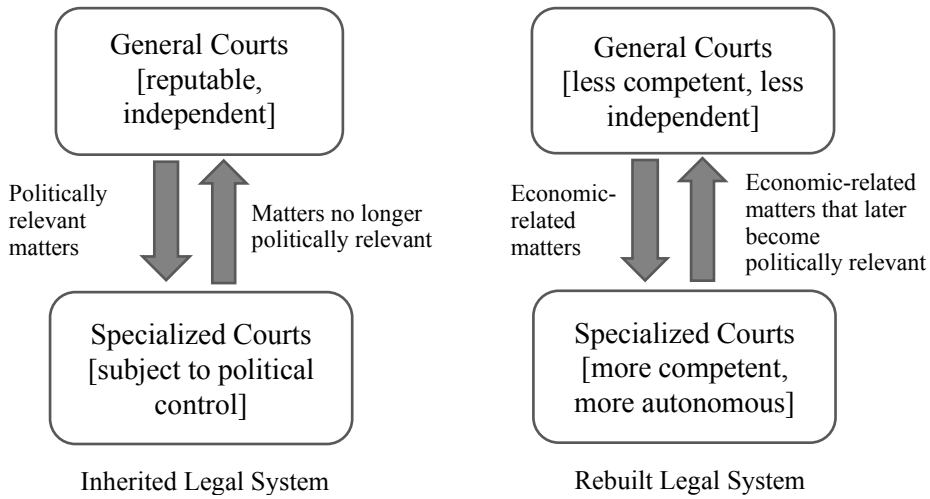
307. FRAENKEL, *supra* note 305, at 50.

308. Lígia Mori Madeira & Leonardo Geliski, *An Analytical Model of the Institutional Design of Specialized Anti-corruption Courts in the Global South: Brazil and Indonesia in Comparative Perspective*, 64 DADOS – REVISTA DE CIÊNIAS SOCIAS 1, 10 (2021).

309. *Id*. at 10; MATTHEW C. STEPHENSON & SOFIA A. SCHÜTTE, U4, SPECIALIZED ANTI-CORRUPTION COURTS: A COMPARATIVE MAPPING 12 (Dec. 2016), https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf [https://perma.cc/KZ3R-HBVC].

that the original legal system was not held in high repute by investors, the government created autonomous, specialized benches to support economic liberalization.[310]

Table II: The Allocation of General and Specialized Jurisdiction



Furthermore, whether and to what extent a subject matter is politically important can vary with time, circumstances, and the party in power. Take a rebuilt legal system, for instance. If a case becomes vital to the state's core interests at a later time, the ruling elites should still be able to, at any point, channel the case from the specialized courts back into the generalist courts. Accordingly, the specialized courts mainly play one of two functions: (1) handling certain cases by professional judicial elites or (2) increasing the costs of political intervention to withdraw any cases from the specialized benches. When Indonesia first established Tipikor courts, the government did not seem enthusiastic to handle anti-corruption cases exclusively in the courts subject to its control. However, Tipikor courts and the Corruption Eradication Commission, with growing capacity and integrity, went on to target powerful corruptors, including senior parliamentarians and a close family member of the President.[311] Once the jurisdiction over corruption became more politically sensitive, the power of the specialized judiciary started to face increasing political

310. Moustafa, *supra* note 200, at 885.

311. Simon Butt, *Asian Law in Translation: Translator's Note on the Indonesian Corruption Court Law. The Unravelling of Indonesia's Anti-Corruption Framework Through Law and Legal Process*, 11 AUSTRALIAN J. ASIAN L. 302, 303–04 (2009).

suppression.[312] Due to the specialized courts' heightened transparency, external interference with their affairs drew significant public backlash which might, to some extent, restrain the leviathan.[313] Similarly, the political interest of the People's Republic in IP, financial, and cyberspace cases might be lukewarm at present while relatively autonomous specialized courts were created in respective areas to attract foreign capital. Still, the government retains the power to withdraw this jurisdiction from the specialized judiciary, whenever it turns out to be more politically relevant. Thus, what the establishment of the specialized courts may assure global investors is that government intervention in any IP, financial, or cyberspace cases handled by these courts will be more visible and costly than before.

CONCLUSION

The transformation of the Chinese economy is one of the greatest events in the last half-century. Since its reform and opening-up in 1978, China's economic liberalization and advancement has made it a top destination for international businesses. Yet foreign investors' reservations about the country's legal environment and judicial capability continue to grow. These concerns often involve whether investors' private rights are adequately protected in the Chinese market, whether local protectionism will prevent companies from receiving a fair judgment against bureaucracies and home enterprises, and whether courts are able to respect international rules and resolve disputes timely and effectively. To maintain and boost global investors' confidence in the legal environment, Beijing could draw on the Singaporean experience by furnishing courts across the country with a higher level of autonomy and a more selective and independent judicial appointment system. This goal would, however, take considerable time and resources to realize. More importantly, its fulfillment could allow judges to obtain more leverage for policy reform and social movements than political elites would prefer. Alternatively, China could mirror the practices of Egypt and Spain by empowering a fragment of its judiciary. But unlike their approaches, China has not created a powerful forum for grievances against violations of fundamental rights, and no efforts have been made to grant generalist judges life tenure and place economic-related cases in the hands of special tribunals under the state's close watch. Instead, China has embarked on the empowerment of courts with expertise in areas that align with the nation's core economic interests but their abilities to generate political contestation are constrained by their jurisdictional limitations.

312. Madeira & Geliski, *supra* note 308, at 12; Christian von Luebke, *The Politics of Reform: Political Scandals, Elite Resistance, and Presidential Leadership in Indonesia*, 29 J. CURRENT SE. ASIAN AFFS. 79, 85–89 (2010).

313. von Luebke, *supra* note 312, at 87–88.

As more skillful, less powerful agents, specialized courts can be entrusted by the party-state—the principal—to deliver prompt, refined judgments, formulate innovative rules in the fields of IP, finance, and the Internet, and rectify local power abuses detrimental to national economic growth.

From a comparative perspective, the Chinese experience represents one of many possible designs of courts in authoritarian regimes. Depending on the history and reputation of the country's original courts, different authoritarian regimes might require different distributions of general and special jurisdiction. In addition, the types of disputes that are politically relevant could change over time. Consequently, the regime would need to re-allocate certain subject matters between generalist and specialized jurisdiction. Thus, a thorough assessment of specialized judicial empowerment can shed light into the strategic use of courts by authoritarian regimes in subverting the rule of law while fostering commerce and keeping private affairs in order.

As an early effort to investigate specialized judicial empowerment, this Article invites scholars to further explore the functions of specialized courts in policymaking and state governance. Important questions to investigate may include, but are not limited to, whether judgments of specialized courts have a statistically significant impact on future judicial outcomes of generalist courts, whether there are any substantial differences between opinions by generalist and specialized courts in fields subject to both courts' jurisdiction, and whether the type of regime—either authoritarian or democratic and either developing or developed—plays a role in the growth and impact of an emerging specialized judiciary.

* * *

"I DON'T WORK FOR FREE": THE UNPAID LABOR OF CHILD SOCIAL MEDIA STARS

Amber Edney[*] [**]

Abstract

Today, some of the biggest child stars are not getting their start on the silver screen. Instead, they are finding success through their (or their parent's) smartphones. The explosion of social media over the past few years has created a new type of child star: the kid influencer or "the kidfluencer." These children appear alone or alongside their families to discuss child's clothing, toys, and other family-related topics. If they gain enough followers, they may be able to monetize their social media accounts and obtain sponsorships from big brands such as Walmart and Mattel. Even though the method of achieving celebrity status has changed, certain problems with child stardom remain the same. Some parents are willing to sacrifice their children's privacy, freedom, and mental health in their quest for fame and fortune. To make matters worse, these children are not always entitled to the money they make. This Note explores the protections (or lack thereof) afforded to children in monetized social media content. It will review what measures are being taken to protect children online in the United States and overseas. The Note ends by offering potential solutions aimed at safeguarding kidfluencers and the money they make.

---

* *Editor's Note:* This Note won the Barbara W. Makar Writing Award for the best Note submitted to the *Journal* among the editors of the Class of 2022.

** Amber Edney is a 2022 graduate of the University of Florida Fredric G. Levin College of Law (UF Law). Before attending law school, Amber obtained a Bachelor of Science in marketing from the University of South Florida and was the social media specialist for a nonprofit organization. While at UF Law, Amber was a member of the *University of Florida Journal of Law and Public Policy*, the Entertainment and Sports Law Society, and the Art Law Society. She recently passed the Florida Bar Exam. Amber would like to thank her family and UF Law Professor Stacey Steinberg for serving as her note advisor.

INTRODUCTION

On May 27, 2020, a popular family of YouTubers, Myka and James Stauffer, announced that they were placing their autistic son, Huxley,[1] whom they had adopted from China three years prior, with a new family.[2] Myka had started posting on her personal YouTube channel in 2012 .[3] Her early videos centered around health (giving followers advice on how to improve their wellness) and lifestyle (sharing stories about her personal life, interests, and shopping habits) content.[4] After her health and lifestyle videos failed to take off, Myka started leaning more into family content, posting videos featuring James and their biological children from their home in Ohio.[5] Myka created a separate channel, *The Stauffer Life*, which focused on her relationship with James and their expanding family.[6] Myka continued posting on her personal channel, which no longer featured her family.[7] Both channels were monetized,[8] meaning that they received money from video viewership and advertisements generated by YouTube.[9]

---

1. Even though Huxley is a minor who deserves privacy, his name is used in this Article because it has already been publicized by his former adoptive parents and multiple news organizations.

2. Stephanie McNeal, *A YouTuber Placed Her Adopted Autistic Son from China with a New Family — After Making Content with Him for Years*, BUZZFEED NEWS (May 28, 2020, 8:45 PM), https://www.buzzfeednews.com/article/stephaniemcneal/myka-stauffer-huxley-announcement [https://perma.cc/7Z3B-84RZ].

3. Caitlin Moscatello, *Un-Adopted: YouTubers Myka and James Stauffer Shared Every Step of Their Parenting Journey. Except the Last.*, THE CUT (Aug. 18, 2020), https://www.thecut.com/2020/08/youtube-myka-james-stauffer-huxley-adoption.html [https://perma.cc/9BT8-7QWB].

4. Moscatello, *supra* note 3. *See generally* David Woutersen, *20 Most Popular YouTube Channel Types to Start*, OUT OF THE 925 (Aug. 5, 2022), https://outofthe925.com/most-popular-youtube-channel-types/ [https://perma.cc/894R-UXTZ] (listing the most successful types of YouTube channels, including health and lifestyle).

5. Moscatello, *supra* note 3.

6. *Id.* Content on *The Stauffer Life* channel was deleted. *Myka Stauffer: Backlash After YouTubers Give Up Adopted Son*, BBC NEWS (May 28, 2020), https://www.bbc.com/news/world-us-canada-52839792# [https://perma.cc/W3HH-BLPY].

7. Moscatello, *supra* note 3.

8. McNeal, *supra* note 2.

9. MINT, *How Much Do Youtubers Make & How to Become a Youtuber*, INTUIT: MINT LIFE (Aug. 24, 2022), https://turbo.intuit.com/blog/relationships/how-much-do-youtubers-make-5035/ [https://perma.cc/CK5J-W9TQ]; John Lister, *What Does "Monetize" Mean on YouTube?*,

In 2016, the Stauffers announced that they planned to adopt an infant from China.[10] Typically, adoption experts and agencies advise prospective parents to avoid sharing information about a child's adoption before it is official in order to prevent putting the adoption in jeopardy.[11] Myka ignored this recommendation and uploaded twenty-seven (later deleted) videos about her family's "adoption journey."[12] She began asking her fans for donations to help with the adoption expenses and created a campaign in which "every person who donated $5 would unlock a different piece of a 1,000-piece puzzle, which would . . . be a photo of Huxley that she would reveal to the world" once completed.[13]

The adoption agency and a physician revealed to the Stauffers that Huxley had "brain damage" and would require extensive care.[14] Even though the couple was initially opposed to adopting a child with a disability and the doctor cautioned them about doing so, they continued through with the process.[15] In October 2017, the Stauffers traveled to China to adopt their son and meet him for the first time.[16] They posted a video of the trip entitled "Huxley's EMOTIONAL Adoption VIDEO!! GOTCHA DAY China Adoption" that Myka dedicated to "all of the orphans around the world."[17] The video accumulated over 5.5 million views, and people from around the world watched as "Huxley, then only 2 and a half, crie[d] and flail[ed] in Myka's arms, the camera still fixed on him."[18]

Myka continued to post updates as Huxley adjusted to his new family and country.[19] She uploaded sweet videos of Huxley connecting with his new siblings, laughing, and playing.[20] She also, however, shared videos of some not-so-sweet moments:

AZCENTRAL, https://yourbusiness.azcentral.com/monetize-mean-youtube-22360.html [https://perma.cc/6XAK-NCJ4] (last visited Sept. 5, 2022).

10. McNeal, *supra* note 2.

11. Moscatello, *supra* note 3.

12. McNeal, *supra* note 2.

13. *Id*.

14. *Id.*; Moscatello, *supra* note 3; Brittany Galla, *Myka Stauffer Opens Up About Adoption*, PARADE (May 29, 2020), https://parade.com/918868/brittany_galla/international-adoption-special-needs-myka-stauffer/ [https://perma.cc/S8QD-WNM5].

15. Moscatello, *supra* note 3.

16. *Id.*

17. McNeal, *supra* note 2. Despite its popularity on social media, "Gotcha Day" is a term that many members of the adoption community have criticized. *The Controversy of 'Gotcha Day'*, CONSIDERING ADOPTION, https://consideringadoption.com/the-controversy-of-gotcha-day/ [https://perma.cc/U9CX-HFDS] (last visited Sept. 5, 2022).

18. Moscatello, *supra* note 3.

19. *Id.*

20. *Id.*

> Myka and James continued to post videos about Huxley's medical prognosis as well as his struggles with the apparent aftereffects of food insecurity (a relatively common issue for adopted and foster children, who may hoard or fixate on food), communication challenges, and meltdowns. Myka spoke regularly about struggling with some of Huxley's behaviors. There were also on-camera moments that would later concern some viewers: In one video, Huxley appeared with his thumb duct-taped, seemingly to prevent him from sucking it (in [a] sheriff's-office report, one of the Stauffers told a deputy he would suck his thumb so raw "he would have blisters"). In another, Myka followed the child with a camera while he cried, asking him, "Are you done fitting?"[21]

The Stauffers' popularity and wealth continued to grow.[22] They collaborated with other popular family vloggers and started participating in brand deals.[23] Myka shared sponsored videos focusing on Huxley's adoption and Instagram advertisements featuring her son.[24] She also wrote pieces for online magazines where she talked about Huxley's medical history.[25]

By the time the Stauffers announced they had "rehomed," or placed Huxley with another family,[26] the couple had amassed over one million subscribers on their two family-centered accounts (James had created a third channel focused on car detailing).[27] The Stauffers are estimated to have earned between "$4,100 to $66,700 from their three channels in April and May 2020, . . . a number that does not include revenue from sponsorships."[28]

The Stauffers' announcement about giving away their son was met with intense backlash.[29] Many commentators felt the Stauffers had

---

21. *Id.*

22. *Id.*

23. Moscatello, *supra* note 3.

24. *Id.*

25. Galla, *supra* note 14.

26. *See* Michele Jackson, *What is Adoption Rehoming, Disruption, Dissolution?*, MJL ADOPTIONS (May 20, 2014), https://mljadoptions.com/blog/adoption-rehoming-disruption-dissolution-20140520# [https://perma.cc/E6EU-W8DF] ("*Adoption Rehoming* is a non-legal term describing the practice of placing an adoptive child in another family's home."); *see also* Megan Testerman, *A World Wide Web of Unwanted Children: The Practice, the Problem, and the Solution to Private Re-Homing*, 67 FLA. L. REV. 2103, 2107 (Mar. 2016) ("Historically, people have used the term 'private re-homing' to discuss finding new placements for pets, but now it describes custody transfers of children handled in much the same way.").

27. Moscatello, *supra* note 3.

28. *Id.*

29. Alexander Kacala, *YouTube 'Influencers' Face Backlash After Giving Up Custody of Adopted Son*, TODAY (May 28, 2020, 3:32 PM), https://www.today.com/parents/youtuber-criticized-giving-custody-adopted-son-t182639 [https://perma.cc/V4WY-FUKS].

exploited Huxley for financial gain and called for the removal of any monetized content featuring Huxley.[30] While any discussion about the Stauffers' decisions to pursue a YouTube career and adopt Huxley would be mainly speculation, the controversial rehoming of Huxley serves as a backdrop for an issue that is sure to receive increased attention as user-created shared content becomes more popular in society: what is being done to make sure that children in monetized social media content like Huxley are not being taken advantage of?

The answer is: currently, not much.[31] Even though Huxley was shuffled between multiple homes and had his medical history and temper tantrums publicized all over the Internet, Huxley and other children across the United States receive very little protection from regulations aimed at protecting privacy or financial earnings.[32] There are no federal or state laws which indicate that the Stauffers should have paid Huxley for his appearances on their YouTube channels or sponsored Instagram posts.[33] There is also very little Huxley could have done to protect his privacy or control his image.[34] In fact, had Myka not taken it upon herself to take down the videos featuring Huxley, Myka most likely could have continued to profit from Huxley's story with little government interference.[35]

This Note will attempt to shine a light on the lack of protections afforded to children in monetized social media content. Part I will explain the concept of "sharenting" and the rise of monetized social media content featuring children. Part II will discuss the potential social media has for exploiting children financially, physically, and emotionally and will introduce measures states have taken to protect children in traditional entertainment roles as well. Part III will highlight some existing laws that protect children online, while Part IV will address the issues the government has with trying to regulate social media content featuring

30. *See* Cynthia Martin, *I'm an Autism Expert Who Adopted 2 Children with Special Needs. Myka Stauffer Shouldn't Have Apologized for 'Rehoming' Her Adopted Son*, INSIDER (July 6, 2020, 1:29 PM), https://www.insider.com/myka-stauffer-shouldnt-have-apologized-for-rehoming-her-son-2020-7 [https://perma.cc/4A5W-QSLJ] ("Myka should've should've [sic] apologized for using her son as a prop for her picture perfect family — and for monetizing him on social media along the way.").

31. Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them from Parents*, THE HOLLYWOOD REPORTER (Aug. 20, 2019, 6:00 AM), https://www.hollywoodreporter.com/news/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968 [https://perma.cc/XF7Y-4C7P].

32. Stephanie McNeal, *Will Huxley Stauffer's Story Be the Wake-Up Call That Leads to Protections for Children of Influencers?*, BUZZFEED NEWS (May 29, 2020, 8:00 AM), https://www.buzzfeednews.com/article/tanyachen/will-huxley-stauffers-story-be-the-wake-up-call-that-leads [https://perma.cc/42T4-FQZF].

33. Lambert, *supra* note 31.

34. McNeal, *supra* note 32.

35. *Id*.

children and what is currently being done to address the problem in other countries. Finally, Part V will consider ways to address the issue of sharenting for financial gain. In general, this Note will focus primarily on YouTube and Instagram, as they are two of the most popular social media platforms for influencers and user-created monetized content.[36] More recent applications, such as TikTok, are developing a new crop of child stars that will also need protection.[37]

The purpose of this Note is not to villainize social media or suggest that parents should never be allowed to share information about their children or receive financial compensation for their posts. Social media has proven to be an excellent tool for connecting people and giving individuals from marginalized communities a platform to share their stories.[38] There are also parents who are very conscious of their children's online presence and how it can impact their future both financially and emotionally.[39] However, social media is still a relatively new forum, so there is room for improvement, and issues arising from sharenting are often overlooked in discussions centered around children online.[40]

I. THE RISE OF SHARENTING AND THE NEW AGE OF CHILD STARS

As the Internet began to take off and more people began to share information about their lives online, the term "sharenting" was coined to describe the practice of parents using social media to disclose information

36. *Most Used Social Media Networks for Influencer Marketing*, SOCIALPUBLI.COM (Apr. 9, 2019), https://socialpubli.com/blog/most-used-social-media-sites-for-influencer-marketing/ [https://perma.cc/DZN3-EGM8].

37. *See* Rachel E. Greenspan, *TikTok Is Breeding a New Batch of Child Stars. Psychologists Say What Comes Next Won't Be Pretty*, INSIDER (July 9, 2020, 1:42 PM), https://www.insider.com/psychologists-say-social-media-fame-may-harm-child-star-influencers-2020-5 [https://perma.cc/8SGH-RSS6] ("Experts warn that these young [TikTok] influencers will face the typical hurdles of child fame, but with the additional complication of real-time social media surveillance by millions and an algorithmically programmed addiction to the instant gratification of a never-ending barrage of notifications."); *see also* Deanna Ting, *'Every Kid Wants to Be an Influencer': Why TikTok Is Taking Off with Gen Z*, DIGIDAY (Feb. 7, 2020), https://digiday.com/marketing/every-kid-wants-influencer-tiktok-taking-off-gen-z/ [https://perma.cc/8SGH-RSS6] ("TikTok appeals to Gen Z . . . because of the way it's been designed from the very beginning; it emphasizes short-form video content, it's easy to use and it's even easier to go viral on the app than other more established social media platforms. It also feeds in perfectly to Gen Z's desire for entrepreneurship and being a creator.").

38. Naomi Day, *Everyone Can Learn from How Marginalized Communities Use Social Media*, ONEZERO (Jan. 15, 2020), https://onezero.medium.com/marginalized-communities-know-the-upside-of-oversharing-on-social-media-8bee5f908197 [https://perma.cc/9MRA-VC5B]; *Marginalized Groups Use the Internet to Broaden Their Networks, Rather Than Reinforce Ties*, SCIENCE DAILY (Nov. 16, 2015), https://www.sciencedaily.com/releases/2015/11/151116152215.htm https://perma.cc/697T-MMEW].

39. Some parents of child YouTubers have pledged to save their children's earnings for when they become an adult. *See* Lambert, *supra* note 31.

40. McNeal, *supra* note 32.

about their children.[41] According to the Pew Research Center, around eight in ten parents share information about their children on social media.[42] Parents usually share information about their kids to keep their friends and family updated on their lives, to connect with them, and learn from other parents going through similar situations.[43] For example, many parents of children who have medical conditions have found support through Facebook groups.[44]

Although sharenting can positively impact parents who feel isolated while raising their kids, there is a growing concern among critics about parents who tend to overshare and the potential long-term effects information disclosure may have on their children.[45] USA Today reported that "[s]eventy-four percent of parents say they know a parent who has shared too much information about a child on social media, including, fifty-six percent who said they knew someone who shared embarrassing information about a child."[46] While this trend may not be an issue if the information is shared between a small group of close friends and family, nothing on the Internet is truly private.[47] Any post has the potential to

41. *Sharenting*, COLLINS DICTIONARY, https://www.collinsdictionary.com/submission/11762/Sharenting [https://perma.cc/JRR7-RR9U] (last visited Sept. 6, 2022); *Sharent*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/buzzword/entries/sharent.html [https://perma.cc/GW6V-EPLH] (last visited Sept. 6, 2022).

42. *See* Brooke Auxier et al., *Parents' Attitudes – and Experiences – Related to Digital Technology*, PEW RSCH. CTR. (July 28, 2020), https://www.pewresearch.org/internet/2020/07/28/parents-attitudes-and-experiences-related-to-digital-technology/ [https://perma.cc/DA4S-VF9N] ("82% of parents who use social media say they have posted photos, videos or other information about their children on these sites.").

43. Nione Meakin, *The Pros and Cons of 'Sharenting'*, THE GUARDIAN (May 18, 2013, 2:00 PM), https://www.theguardian.com/lifeandstyle/2013/may/18/pros-cons-of-sharenting [https://perma.cc/F8L4-TUC5]; *see* Maeve Duggan et al., *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015), https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/ [https://perma.cc/26BX-6Q8X] ("59% of social-media-using parents indicate that they have come across useful information *specifically about parenting* in the last 30 days while looking at other social media content . . . 42% of these parents have received social or emotional support from their online networks about a parenting issue in the last 30 days.").

44 *See* Sarah Catrin Titgemeyer & Christian Patrick Schaaf, *Facebook Support Groups for Rare Pediatric Diseases: Quantitative Analysis*, 3 JMIR PEDIATRICS & PARENTING 1, 8 (2020) (finding that the use of Facebook by parents as a tool for pediatric disease support groups is expected to increase).

45. Meakin, *supra* note 43.

46. Mary Bowerman, *Do You Overshare About Your Kids Online?*, USA TODAY (Mar. 16, 2015, 1:07 PM), http://www.usatoday.com/story/tech/2015/03/16/parents-over-sharing-online/24825981/ [https://perma.cc/7MYH-GLSB].

47. *See* Joshua Hawkins, *Why Social Media Will Never Offer True User Privacy*, LIFEWIRE (July 12, 2021, 2:00 PM), https://www.lifewire.com/why-social-media-will-never-offer-true-user-privacy-5192229 [https://perma.cc/RU2Z-8VWP] ("Even with the release of more consumer-focused privacy features, experts say privacy always will be an issue on social media because there are too many variables involved with keeping your information and content from being shared.").

become a news story overnight.[48] Photos and other information about a child can also easily find their way into the hands of pedophiles[49] and can cause a child to be subjected to bullying from both peers and strangers online.[50]

Experts warn that even when a child is young or unaware of their presence online, parental overshare may still have a negative impact on a child's digital footprint.[51] Once information is put online, it is hard to control since "[i]nformation shared on the Internet has the potential to exist long after the value of the disclosure remains, and therefore disclosures made during childhood have the potential to last a lifetime."[52] A child (or their future employer) may stumble upon embarrassing photos, stories about them getting in trouble, or information regarding their physical and mental health later in life.[53]

Despite these drawbacks, parents continue to share online, and many have found ways to profit off disclosures of their children's lives.[54] A sizeable number of parents have begun monetizing their children's lives

48. *These Kids Went Viral on the Internet. Here's How Their Families Dealt with the Aftermath*, THE LILY (Mar. 15, 2018), https://www.thelily.com/these-kids-went-viral-on-the-internet-heres-how-their-families-dealt-with-the-aftermath/ [https://perma.cc/GEL4-VDEF]; Aya Tsintziras, *20 Kids Who Went Viral for the Best Reasons*, MOMS (Aug. 12, 2018), https://www.moms.com/20-kids-who-went-viral-for-the-best-reasons/ [https://perma.cc/8QDK-84Q9].

49. *See* Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 847 (2017) ("[A] mother posted pictures online of her young twins during toilet training. She later learned that strangers accessed the photos, downloaded them, altered them, and shared them on a website commonly used by pedophiles."); *see also* Lucy Battersby, *Millions of Social Media Photos Found on Child Exploitation Sharing Sites*, SYDNEY MORNING HERALD (Sept. 30, 2015, 12:23 PM), https://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55.html [https://perma.cc/6U4 Q-68MM] ("Innocent photos of children originally posted on social media and family blogs account for up to half the material found on some paedophile [sic] image-sharing sites.").

50. Steinberg, *supra* note 49, at 854–55.

51. *Id.*

52. *Id.* at 846.

53. Meakin, *supra* note 43; Phoebe Maltz Bovy, *The Ethical Implications of Parents Writing About Their Kids*, THE ATLANTIC (Jan. 15, 2013), https://www.theatlantic.com/sexes/archive/2013/01/the-ethical-implications-of-parents-writing-about-their-kids/267170/ [https://perma.cc/H3Q4-R5VE].

54. Allie Volpe, *How Parents of Child Influencers Package Their Kid's Lives for Instagram*, THE ATLANTIC (Feb. 28, 2018), https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/ [https://perma.cc/8YXQ-DH49]; Ines Novacic, *"It's Kinda Crazy": Kid Influencers Make Big Money on Social Media, and Few Rules Apply*, CBS NEWS (Aug. 23, 2019, 8:08 AM), https://www.cbsnews.com/news/kid-influencers-instagram-youtube-few-rules-big-money-cbsn-originals/ [https://perma.cc/KUC8-AUQ8]; Taylor Mooney, *Companies Make Millions Off Kid Influencers, and the Law Hasn't Kept Up*, CBS NEWS (Aug. 26, 2019, 6:19 AM), https://www.cbsnews.com/news/kid-influencers-companies-make-millions-law-hasnt-kept-up-cbsn-originals/ [https://perma.cc/2N53-UKXL].

through sponsored YouTube videos and Instagram pictures.[55] The trend has created a new type of child star: the "kidfluencer."[56] Brands like Walmart pay families to have their children use brand products or clothes and share the experience online with the families' thousands—sometimes millions—of followers in order to expand the brand's customer base.[57]

It's no secret why parents and children would want to get into the influencing business. Social media is a multi-billion-dollar industry that anyone with a computer or smartphone can access.[58] The influencer industry is projected to bring in fifteen billion dollars by 2022.[59] There are influencers that cover almost every interest and niche community on the Internet.[60] Seeing as 40% of the United States is made up of families with children under the age of eighteen, there is a large market for family- and children-oriented products and social media content.[61] In fact, in 2019, the highest-earning YouTuber in the world was an eight-year-old boy who made an estimated twenty-two million dollars reviewing toys on the channel *Ryan ToysReview*.[62] Many other families have found success online as well, with some making upwards of $5,000 for a single Instagram post.[63]

---

55. Volpe, *supra* note 54; Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, N.Y. MAG. (Apr. 17, 2017), https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html [https://perma.cc/4BE2-DP3Y].

56. Keepface, *The Rise of the "Kid Influencers": Meet the New Generation of Influencers*, MEDIUM (Oct. 30, 2019), https://keepface-com.medium.com/the-rise-of-the-kid-influencers-meet-the-new-generation-of-influencers-752f223b9cfb [https://perma.cc/2DKB-2ZJW] (last visited Sept. 6, 2022).

57. Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html [https://perma.cc/U8B2-BNH3].

58. Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, PULSE NIGERIA (Dec. 17, 2019, 8:14 PM), https://www.pulse.ng/bi/tech/influencer-marketing-state-of-the-social-media-influencer-market-in-2020/neenqtm [https://perma.cc/HZ35-SXP6].

59. *Id.*

60. *Id*.

61. *Share of Family Households with Own Children Under 18 Years in the United States from 1970 to 2020, by Type of Family*, STATISTA (June 2, 2022), https://www.statista.com/statistics/242074/percentages-of-us-family-households-with-children-by-type/ [https://perma.cc/Z2D5-LZAV].

62. Amanda Perelli, *The World's Top-Earning YouTube Star is an 8-Year-Old Boy Who Made $22 Million in a Single Year Reviewing Toys*, BUS. INSIDER (Oct. 20, 2019, 9:45 AM), https://www.businessinsider.com/8-year-old-youtube-star-ryan-toysreview-made-22-million-2019-10 [https://perma.cc/5U3F-CRE7].

63. Volpe, *supra* note 54.

II. SOCIAL MEDIA'S POTENTIAL TO EXPLOIT CHILDREN AND HOW STATES HAVE PROTECTED TRADITIONAL CHILD STARS

Children have been a staple in the entertainment industry for more than a century. One of the first known child performers, Lotta Crabtree, began her career at six years old.[64] Lotta was a singer and dancer during and after the California Gold Rush in the 1850s.[65] As the popularity of motion pictures rose in the early 1900s, so did the popularity of traditional child performers.[66] Many child actors, singers, models, and dancers found success on screen and on stage.[67] Stars such as Jackie Coogan, Shirley Temple, Judy Garland, and Elizabeth Taylor established themselves as household names in the entertainment world before their eighteenth birthdays.[68] A number of child actors, dancers, models, and singers continue to dominate the entertainment world today.[69]

With fame, money typically follows. This can lead to legal issues, especially when minors are involved. Many child stars are left defenseless against the biggest threat to their fortunes: their parents.[70] In almost every state, there is a common law rule that parents are entitled to their children's earnings.[71] The United States adopted this common law rule from traditional English law, under which the rule dictated that "the services and earnings of a minor child belong[] absolutely to the child's father while the child live[s] with and [i]s supported by him."[72] The rationale behind the rule is that giving parents their children's earnings compensates the parent for supporting their child:

> The right to a child's services and earnings is reciprocal to the duty to support. In discussing the father's right to the child's earnings, it is said: It is certainly perfect while the period of the child's nurture continues. But if this is all, it can be of little consequence, because the child's labor and

64. *Lotta Crabtree*, WOMEN HISTORY BLOG, https://www.womenhistoryblog.com/2013/12/lotta-crabtree.html [https://perma.cc/582Z-NN29] (last visited Sept. 9, 2022).

65. *Id.*

66. *ChildStars*, ENCYCLOPEDIA.COM (Nov. 31, 2020), https://www.encyclopedia.com/children/encyclopedias-almanacs-transcripts-and-maps/child-stars [https://perma.cc/68V4-UCLQ].

67. *Id.*

68. *Id*.

69. *See* Matt Berger, *15 Child Stars to Look Out for in the 2020s*, SCREEN RANT (Jan. 13, 2021), https://screenrant.com/hollywood-child-stars-look-out-for-up-coming-2020s-elsie-fisher-noah-jupe/ [https://perma.cc/2DYA-JZGC] (discussing today's well-accomplished young actors).

70. *See* Destiny Lopez, *7 Celebs Whose Parents Decimated Their Fortunes*, BUS. INSIDER (Apr. 2, 2014, 5:47 PM), https://www.businessinsider.com/7-celebs-whose-parents-decimated-their-fortunes-2014-4 [https://perma.cc/Q4UD-6WJP] (listing child actors whose parents squandered their fortunes).

71. *See* Jules D. Barnett & Daniel K. Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Childrens' Earnings*, 5 PEPP. L. REV. 673, 675 (1978).

72. *Id.* at 677.

> services are for that period of little value; nor could compensation be thus afforded for the many years when the child was entirely helpless. His right to their [his children's] services, like his right to their custody, rests upon the parental duty of maintenance, and it is said to furnish some compensation to him for his own services rendered to the child.[73]

In the 1930s, California was the first state to challenge this rule by creating a law aimed at protecting the wages of child entertainers.[74] The statute—which was revised in 2000 to offer even more safeguards[75]—was named the "Coogan Act" after famed child star Jackie Coogan.[76] In 1938, Coogan sued his mother for spending almost all of the four million dollars he had earned as a child star and for refusing to give him what was left.[77] He eventually recovered about $125,000, a far cry from the fortune he had worked for years to amass.[78] The updated version of the Coogan Act states that money earned by minors in the entertainment industry is the property of the child and not their parents.[79] The Act "also requires that 15% of all minors' earnings . . . be set aside in a blocked trust account commonly known as a Coogan Account."[80] These accounts must be created at a California bank.[81]

A few other states have adopted their own version of the Coogan Act or created laws that have similar effects.[82] In New York, after obtaining a child performer permit, parents are required to open up either a Uniform

---

73. Wardrobe v. Miller, 200 P. 77, 79 (Cal. Ct. App. 1921) (internal quotations omitted) (brackets in original).

74. CAL. FAM. CODE §§ 6752–53 (2020).

75. Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 434–35 (2000).

76. *See* Brad Smithfield, *Coogan Act: Stopped Parents of Famous Child Actors Seizing All the Childs Money*, THE VINTAGE NEWS (Oct. 29, 2016), https://www.thevintagenews.com/2016/10/29/coogan-act-stopped-parents-of-famous-child-actors-seizing-all-the-childs-money/ [https://perma.cc/79FW-DQ87] (discussing the life and career of Jackie Coogan, who starred in Charlie Chaplin's *The Kid* and played Uncle Fester in *The Adam's Family*).

77. Jennifer Robin Terry, *The Wolf at the Door: Child Actors in Liminal Legal Spaces*, 11 J. HIST. CHILDHOOD & YOUTH 57–8 (2018); Deepa Pokharel, *The Story of Actor Jackie Coogan — A Millionaire Child, Who Was Beaten to the Ends by His Own Parents*, MEDIUM (Oct. 31, 2019), https://medium.com/the-dustbin/the-story-of-actor-jackie-coogan-a-millionaire-child-who-was-beaten-to-the-ends-by-his-own-8d319ab9b02c [https://perma.cc/CK4H-3CE2].

78. *Four States Protect Children's Earnings with Coogan Accounts*, THINK GLAMOR (Dec. 8, 2018), https://thinkglamor.com/lifestyle/young-actors-models/four-states-protect-childs-earnings-with-coogan-accounts/ [https://perma.cc/FU2A-DGMB].

79. *Coogan Law*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/young-performers/coogan-law [https://perma.cc/Y98B-PYH9] (last visited Sept. 9, 2022).

80. *Id.*

81. *Id.*

82. Siegel, *supra* note 75, at 435–38; *Four States Protect Children's Earnings*, *supra* note 78.

Transfers to Minors Act (UTMA) or a Uniform Gift to Minors Act (UGMA) compliant trust account.[83] These accounts have different rules regarding withdrawal than Coogan Accounts and can be opened in any bank in any state.[84] Like California, New York's child entertainer statute requires a minimum of 15% of the child's earnings to be deposited into the trust.[85] Failure to comply with the trust requirement will prevent the child from having their child performer permit renewed by the Department of Labor, which means the child will no longer be legally able to work as a child performer.[86] New Mexico, Louisiana, and Kansas also have laws similar to the Coogan Act but have different rules about when trust accounts are needed.[87]

Instead of following a traditional Coogan Act system, the Florida Labor Code states that "upon approval of a contract, 'all earnings, royalties, or other compensation earned or received by the minor pursuant to said approved contract shall become the property of the minor,'"[88] and does not require that the money be put into a trust account.[89] However, the Florida law only applies "when a contract is subject to court approval. If the contract is never approved, then the earnings still belong to the parents."[90] As a result, "The statute cannot be truly effective because . . . there is rarely a motive to have the contract approved in the entertainment industry today."[91] In Massachusetts, earnings do not belong to the child outright.[92] Instead,

> The employer is required to have the contract approved by the probate and family court in the county where the child resides in order for the child to be employed. Once the contract is approved, the court then uses the factors in section 85P(d)(2) to ensure that there is a protection plan for the child's earnings. By requiring contract approval, Massachusetts retains for the court the opportunity to intervene to protect a child's earnings.[93]

This law gives children in Massachusetts slightly more court protection than those in Florida, but it also does not set specific guidelines

---

83. N.Y. LAB. LAW § 151 (2022); *Coogan Law*, *supra* note 79.
84. *Four States Protect Children's Earnings*, *supra* note 78.
85. N.Y. LAB. LAW § 151 (2022).
86. *Id.*
87. CAL. FAM. CODE §§ 6752–53 (2022); N.M. STAT. ANN. §§ 50-6-19(A), (I) (2022); LA. STAT. ANN. §§ 51:2132(A), :2133(A)(1) (2022); KAN. STAT. ANN. § 38-620(b)(1) (2022).
88. Siegel, *supra* note 75, at 437; FLA. STAT. ANN. § 743.08(3)(b) (2022).
89. Siegel, *supra* note 75, at 437; FLA. STAT. ANN. § 743.08(3)(b) (2022).
90. Siegel, *supra* note 75, at 437.
91. *Id.*
92. *Id.*; MASS. GEN. LAWS ANN. ch. 231, § 85P ½ (West 2022).
93. Siegel, *supra* note 75, at 437–38.

for setting aside and depositing the child's earnings like the laws in California and New York.[94]

While not perfect, the Coogan Act and similar statutes have given child stars such as Macaulay Culkin,[95] Gary Coleman,[96] and LeAnn Rimes[97] the ability to fight against parents stealing their paychecks.[98] These laws, however, do not apply to children on social media, which can be a major problem because children under the age of thirteen cannot own accounts on YouTube and Instagram.[99] Even California, which has the strictest regulations for child entertainers in the country,[100] offers very little protection for minors' Internet-based content and affords parents the right to their minor children's services and earnings by statute.[101] Child labor laws regarding work time limits and education requirements also do not apply to kidfluencers.[102]

While uploading a couple of photos and short videos online may not seem as demanding as spending three to six months filming a motion picture or touring in a stage production, there is a downside to trying to make it as an influencer. There are thousands, if not millions, of social media users trying to become influencers,[103] and companies only have so much money they can spend on influencer marketing. To get paid, social

---

94. *Id.* at 438; MASS. GEN. LAWS ANN. ch. 231, § 85P ½ (c)–(d) (2022).

95. Macaulay Culkin starred in the holiday classic *Home Alone* at the age of ten years old. *Macaulay Culkin*, IMDB, https://www.imdb.com/name/nm0000346/bio?ref_=nm_ov_bio_sm [https://perma.cc/KD4A-B6KX] (last visited Sept. 4, 2022).

96. Gary Coleman, "THE child TV star of the late 1970s and early 1980s," was best known for his role in *Diff'rent Strokes. Gary Coleman*, IMDB, https://www.imdb.com/name/nm0171041/ [https://perma.cc/2NPE-ELGR] (last visited Sept. 9, 2022).

97. LeAnn Rimes is a singer and actress who recorded her first album at eleven-years-old. *LeAnn Rhimes*, IMDB, https://www.imdb.com/name/nm0005361/bio?ref_=nm_ov_bio_sm [https://perma.cc/8ZET-RBZN] (last visited Sept. 9, 2022).

98. Culkin, Coleman, and Rhimes have all filed related financial claims against their parents. *See* Jessica Fecteau, *Family Feuds: When Child Stars and Their Parents Collide in Court*, PEOPLE (Apr. 9, 2015, 8:15 AM), https://people.com/crime/child-stars-who-have-sued-their-parents/ [https://perma.cc/S57B-YRXR].

99. Julia Carrie Wong, *'It's Not Play If You're Making Money': How Instagram and YouTube Disrupted Child Labor Laws*, THE GUARDIAN (Apr. 24, 2019, 1:00 PM), https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws [https://perma.cc/F87W-8DLE].

100. Lambert, *supra* note 31.

101. CAL. FAM. CODE § 7500(a) (2022).

102. E.W. Park, *Child Influencers Have No Child Labor Regulations. They Should.*, LAVOZ NEWS (May 16, 2022), https://lavozdeanza.com/opinions/2022/05/16/child-influencers-have-no-child-labor-regulations-they-should/ [https://perma.cc/H98Y-MHG2].

103. *See* Sarah Min, *86% of Young Americans Want to Become a Social Media Influencer*, CBS NEWS (Nov. 8, 2019, 4:49 PM), https://www.cbsnews.com/news/social-media-influencers-86-of-young-americans-want-to-become-one/ [https://perma.cc/9J6S-R986] ("About 86% of young Americans surveyed said they're willing to try out influencing on their social media platforms . . . 'Social media star' has become the fourth-most popular career aspiration for kids.").

media stars have to show they have, and can keep, a large number of followers.[104] This creates pressure for creators to maintain their online presence by continuously posting content and experimenting with new (and sometimes extreme) ideas to gain views.[105] When children are involved, such pressure can cause them to feel overworked and put them in traumatizing situations.

For example, an eleven-year-old girl who started a YouTube channel about her doll collection for fun quickly found herself being pressured by her mother to create more videos after the channel became popular enough to earn advertisement revenue.[106] The girl spent all night editing videos, trying to fulfill her mother's request that she become famous and generate an income sufficient to provide for the entire family.[107] The child knew that her online career would allow her parents to quit their jobs and remembers her mother "always told [her] that she would never touch a cent, and then it became, 'I want 30%; I want 50%; I'm owed this.'"[108] The girl eventually developed an anxiety disorder, moved out of her mother's house to live with her father, and gave up her doll collection.[109]

Protecting child social media stars has often required police and court intervention. The creators of the YouTube channel *DaddyOFive*, Michael and Heather Martin, were each sentenced to five years' probation and lost custody of two of their five children for sharing videos of their children that many characterized as abusive.[110] The videos often featured the two parents "swearing and screaming at [their children] until they cr[ied]."[111] For example, "In one video, Michael smashed his son's Xbox with a hammer in front of him. (It wasn't his real Xbox, but the child did not

104. Viral Access, *Is It Hard to Be an Influencer?*, MEDIUM (Oct. 8, 2019), https://medium.com/@viralaccess/is-it-hard-to-be-an-influencer-3c222f997a39 [https://perma.cc/8MHD-UHCF]; Leanna Garfield, *What It Takes to Achieve Fame and Fortune on YouTube*, BUS. INSIDER (Sept. 10, 2016, 10:00 AM), https://www.businessinsider.com/how-to-be-a-youtuber-2016-9 [https://perma.cc/CT2J-86EK].

105. Viral Access, *supra* note 104; Garfield, *supra* note 104.

106. Dunphy, *supra* note 55.

107. *Id.*

108. *Id.*

109. *Id.*

110. *DaddyOFive Parents Lose Custody 'Over YouTube Pranks'*, BBC NEWS (May 2, 2017), https://www.bbc.com/news/technology-39783670 [https://perma.cc/C9SN-8URD]; Neal Augenstein, *'DaddyOFive' Parents Found Guilty of Neglect, Avoid Jail*, WTOP NEWS (Sept. 11, 2017, 1:05 PM), https://wtop.com/frederick-county/2017/09/parents-behind-daddyofive-prank-videos-plead-guilty-neglect/ [https://perma.cc/T429-N4SY].

111. KC Baker, *Controversial 'DaddyOFive' YouTube Parents Lose Custody of 2 Children Featured in Prank Videos*, PEOPLE (May 3, 2017, 5:28 PM), https://people.com/crime/controversial-daddyofive-youtube-parents-lose-custody-of-2-children-featured-in-prank-videos/ [https://perma.cc/QH7F-X92B].

know this.)"[112] In another video, the family tried to convince their youngest son that another family was adopting him.[113] The court forbade the Martins from making and posting videos featuring their other children.[114] Still, they continued to do so from a second YouTube account (this time *FamilyOFive*) until the website banned them.[115]

As a second example, Michelle Hobson, a mother who ran the popular channel *Fantastic Adventures*, was arrested for allegedly molesting and abusing her seven adopted children.[116] Police claimed that she would punish her children for forgetting their lines or for not participating in her videos.[117] She would allegedly "withhold food and water for days at a time, pepper-spray them, force them to take ice baths and lock them in a barren closet."[118] Her children also claimed she took them out of school so that they would have more time for filming and touched at least one of them inappropriately.[119] Hobson died before standing trial, and her assets were distributed to the children who appeared in her videos.[120]

Had Hobson lived, there is no guarantee that her children would have been compensated for the work Hobson forced them to do, even though *Fantastic Adventures* is estimated to have generated a maximum of 1.7 million dollars per year.[121] While money could never rectify the trauma that Hobson's children and other exploited kidfluencers have faced, it would at least allow children to regain some control, as they would no longer be financially dependent on their parents.

---

112. Madison Malone Kircher, *Sentence Reduced for Parents in Abusive YouTube 'Prank' Videos*, N.Y. MAG. (Jan. 10, 2019), https://nymag.com/intelligencer/2019/01/daddyofive-abusive-youtube-parents-get-reduced-sentence.html [https://perma.cc/5NYJ-V7Z2].

113. *Id.*

114. *Id.*

115. Natalie Wolfe, *'FamilyOFive' YouTube Channel Deleted After Months of Backlash*, NEWS.COM.AU (July 21, 2018, 3:55 PM), https://www.news.com.au/lifestyle/parenting/kids/familyofive-youtube-channel-deleted-after-months-of-backlash/news-story/faf103b8e20d309c2757244d8dd4f07f [https://perma.cc/GD33-7T5J].

116. Eric Levenson & Mel Alonso, *A Mom on a Popular YouTube Show Is Accused of Pepper-Spraying Her Kids When They Flubbed Their Lines*, CNN (Mar. 27, 2019, 7:43 PM), https://www.cnn.com/2019/03/20/us/youtube-fantastic-adventures-mom-arrest-trnd/index.html [https://perma.cc/CZL2-V9GX].

117. *Id.*

118. *Id.*

119. *Id.*

120. *Official: 'YouTube Mom' Accused of Abuse Dies in Scottsdale*, ABC15 ARIZ. (Nov. 13, 2019, 8:12 PM), https://www.abc15.com/news/region-northeast-valley/scottsdale/official-youtube-mom-machelle-hobson-dies-at-hospital-in-scottsdale [https://perma.cc/RN3M-7QW].

121. Lily Altavena, *How YouTubers Like Mom Accused of Child Abuse Make Money Off Popular Videos*, AZCENTRAL (Mar. 21, 2019, 4:19 PM), https://www.azcentral.com/story/news/local/pinal/2019/03/20/how-fantastic-adventures-youtube-mom-machelle-hobson-made-money-off-videos/3224280002/ [https://perma.cc/5JJS-8BS9].

III. EXISTING RULES TO PROTECT CHILDREN ONLINE

Some steps have been taken to protect kidfluencers from online exploitation. In 1998, Congress enacted the Children's Online Privacy Protection Act (COPPA).[122] The Act, amended in 2013, is designed to help parents protect their children's privacy online.[123] As a part of the Act, the Federal Trade Commission (FTC) is required to regulate "commercial websites and online services directed to children under 13 or knowingly collecting personal information from children under 13."[124] The FTC requires websites and online services to:

> (a) notify parents of their information practices; (b) obtain verifiable parental consent for the collection, use, or disclosure of children's personal information; (c) let parents prevent further maintenance or use or future collection of their child's personal information; (d) provide parents access to their child's personal information; (e) not require a child to provide more personal information than is reasonably necessary to participate in an activity; and (f) maintain reasonable procedures to protect the confidentiality, security, and integrity of the personal information.[125]

To avoid being subject to COPPA and FTC's guidelines, almost all social media websites and applications require users to be at least thirteen years old to make an account.[126] There is nothing, however, to prevent children from lying about their age or making accounts using their parent's information.[127] Originally, social media companies were able to get away with having relaxed guidelines for protecting children on their platforms because they claimed they were not directly targeting

122. 15 U.S.C. §§ 6501–06 (2022).

123. *Children's Online Privacy Protection Act*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/statutes/childrens-online-privacy-protection-act [https://perma.cc/F627-BQJD] (last visited Sept. 11, 2022).

124. *Id.*

125. *Id.*

126. *Age Restrictions on Social Media Services*, CHILDNET (Apr. 25, 2018), https://www.childnet.com/blog/age-restrictions-on-social-media-services [https://perma.cc/4PYF-2M52].

127. Paul Harper & Catherine Micallef, *CHILD'S PLAY How Old Do You Have to Be to Have Facebook and Instagram Account? Social Media Age Restrictions Explained*, THE SUN (June 8, 2022), https://www.the-sun.com/lifestyle/tech/289567/how-old-do-you-have-to-be-for-snapchat-facebook-instagram-accounts-social-media-age-restrictions-explained/ [https://perma.cc/K7LH-LD7K].

children.[128] However, in recent years, the FTC has been more strict about holding social media platforms accountable for violating COPPA.[129]

In 2019, YouTube and its parent company, Google, paid the FTC and the State of New York 170 million dollars in a settlement for violating child privacy laws.[130] The settlement arose out of allegations that "while YouTube claimed to be a general audience site, some of YouTube's individual channels—such as those operated by toy companies—[were] child-directed and therefore [had to] comply with COPPA."[131] The FTC and New York Attorney General further alleged that YouTube knew that there were multiple child-oriented channels on the website, but continued to collect personal information from viewers of such channels without parental consent.[132]

As a part of the settlement, YouTube was required to take a more active role to protect children using its platform.[133] In general, YouTube does not require users to have an account to watch most of the videos on its platform.[134] This meant that, prior to YouTube's changes, children were able to watch videos at any time without YouTube's knowledge, which was an issue when trying to avoid collecting children's data. In order to prevent further COPPA violations, YouTube started requiring all content creators to notify the company if their content was geared toward children and began limiting data collection and personalized advertisements on child-oriented videos.[135] YouTube also disabled the comment section on videos featuring children to prevent pedophiles from

---

128. *See Social Media: Defending Children's Legal Rights to Privacy*, IDX (Feb. 19, 2020), https://www.idx.us/knowledge-center/social-media-defending-childrens-legal-rights-to-privacy [https://perma.cc/EV75-6M2A] ("So, many businesses . . . ignored COPPA altogether, claiming that their content is not directed solely to young children.").

129. *Id.*

130. *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law*, FED. TRADE COMM'N (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations [https://perma.cc/AK2Z-AK3N].

131. *Id.*

132. *Id.*

133. *See Better Protecting Kids' Privacy on YouTube*, YOUTUBE OFFICIAL BLOG (Jan. 6, 2020), https://blog.youtube/news-and-events/better-protecting-kids-privacy-on-youtube/ [https://perma.cc/9BB4-RBRG] ("All creators will be required to designate their content as made for kids or not made for kids in YouTube Studio, and data from anyone watching a video designated as made for kids will be treated as coming from a child, regardless of the age of the user.").

134. *See* Gretchen Siegchrist, *What to Watch on YouTube*, LIFEWIRE (Feb. 12, 2020), https://www.lifewire.com/youtube-what-to-watch-1082424 [https://perma.cc/A35C-6HRC] ("You don't need an account to watch YouTube videos, but it helps.").

135. Susan Wojcicki, *An Update on Kids and Data Protection on YouTube*, YOUTUBE OFFICIAL BLOG (Sept. 4, 2019), https://blog.youtube/news-and-events/an-update-on-kids [https://perma.cc/ZLS7-MYU5]; *Better Protecting Kids' Privacy*, *supra* note 133.

interacting with children and each other.[136] While YouTube has made great strides in protecting children's privacy, YouTube and other companies have largely failed to address the issue of children *appearing* in social media content. This leaves parents and others free to violate children's privacy online by sharing pictures and information that children might not want the world to see.

IV. ISSUES WITH REGULATING SHARENTING FOR FINANCIAL GAIN AND ATTEMPTS TO COMBAT THEM

States' few attempts to regulate children in monetized social media content and sharenting in general have mostly failed. In 2018, California lawmakers put together "a bill that attempted to add 'social media advertising' to the definition of employment in child labor law."[137] As a part of this bill, kidfluencers and other children working in the digital space "would have to obtain a work permit and follow measures similar to those required by the Coogan Law."[138] In 2019, the bill was signed into law, but it was water-downed from the original proposal:

> [The law] exempts young digital creators from obtaining work permits if their performance is unpaid and shorter than an hour . . . [S]crapping the work permit provision effectively prevented the bill from enforcing Coogan Law protections, because in Hollywood they're a package deal: If a parent doesn't provide the studio with a Coogan account number, his or her child's work permit is voided. And if work permits aren't mandatory for kidfluencers, their parents have no legal obligation to open a Coogan account.[139]

Critics argued that enforcing permits would be nearly impossible because "[u]nlike traditional media, which is subject to strict schedules and studio oversight, digital content can be filmed whenever and wherever a creator wants."[140] This can also make adhering to scheduling and education requirements extremely difficult.[141]

---

136. Julia Alexander, *YouTube Is Disabling Comments on Almost All Videos Featuring Children*, THE VERGE (Feb. 28, 2019, 1:53 PM), https://www.theverge.com/2019/2/28/18244954/youtube-comments-minor-children-exploitation-monetization-creators [https://perma.cc/DFF3-WV8P]; *see* Ron Lyons, *YouTube Keeps Having to Make Changes to Make Itself Safe for Kids*, SLATE (June 5, 2019, 4:30 PM), https://slate.com/technology/2019/06/youtube-children-streaming-exploitation-history.html [https://perma.cc/PPQ5-ZJGL] ("March 2019: YouTube disabled comments on many videos featuring children.").

137. Lambert, *supra* note 31.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Even if the California law more rigorously safeguarded kidfluencers' financial futures, the law still only applies to minors in California.[142] Traditional child stars would be better protected if just a few more states implemented laws like the Coogan Act and stricter child labor regulations since such children primarily work with film studios and production companies based inside state lines. Kidfluencers, however, create social media content from across the United States. So even though YouTube and Instagram are California-based companies, there are no laws ensuring that Huxley from Ohio and the Hobson children in Arizona get a fair share for their work.[143]

One roadblock for regulating sharenting for financial gain on a national level is federal child labor laws. The Fair Labor Standards Act (FLSA), which sets the federal guidelines for child employment, including both work hour limits and wage requirements, does not apply to minors who work for their parents.[144] FLSA also exempts child entertainers employed in "motion pictures, theatrical productions, radio or television productions," but does not specify how the exemption applies to children on social media.[145] Regardless, the first exemption regarding minors employed by their parents means that federal law does not require the children of family bloggers to be paid a minimum wage or have set work hours.[146] Even if parents were required to pay their children under federal law, the common law presumption that parents are entitled to their children's earnings would essentially render the federal rule meaningless.[147]

Another issue with regulating sharenting is the reluctance of courts to tell parents how to raise their children, even if such reluctance results in compromising the minor's privacy.[148] A parent's right to control their children's upbringing was established in cases such as *Meyer v. Nebraska*[149] and *Pierce v. Society of Sisters*.[150] In *Meyer*, the U.S. Supreme Court determined that parents have the right to control their children's education.[151] The right is protected by the Fourteenth Amendment's provision against the deprivation of liberty without due

142. Wong, *supra* note 99.

143. *Id.*

144. U.S. DEPT. OF LAB., CHILD LABOR PROVISIONS FOR NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT 3 (2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/childlabor101.pdf [https://perma.cc/C5VT-T5UA].

145. *Id.*

146. *Id.*

147. *See infra* Part II.

148. Steinberg, *supra* note 49, at 856.

149. 262 U.S. 390, 400 (1923).

150. 268 U.S. 510, 534–35 (1925).

151. *Meyer*, 262 U.S. at 399–401.

process.[152] The Court revisited this right in *Pierce*, where it concluded that a law requiring children eight through sixteen years old to go to public school was unconstitutional because it "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[153] While *Meyer* and *Pierce* involved the education sector, both cases generally stand for the rule that parents have a right to raise their children as they deem proper.[154]

Because parents have a right to control their children's upbringing, the U.S. Supreme Court will only intervene in cases about children working for their parents when a child's well-being is at issue. For example, in *Prince v. Massachusetts*, the Court held that the State of Massachusetts could prohibit children from selling publications on the street without infringing on parental rights because of the potential harm that could come to children from street preaching on the highway.[155]

In regard to a minor's privacy interests, courts have also found that the interests of the state and the parents can take precedence over those of the child. In *Nguon v. Wolf*, a federal California court ruled that a school was entitled to inform a young girl's mother that she had violated the school's policy regarding inappropriate displays of public affection even though it meant revealing that the girl was in a same-sex relationship, which the girl did not want her parents to know.[156] The court agreed with the school that the student's mother needed to be informed to ensure that the student's due process rights were protected.[157]

This long line of cases, along with the constitutionally protected right to free speech and press,[158] makes putting a blanket ban on sharenting nearly impossible in the United States. Other countries have had more success with regulating sharenting and children in monetized social media content. On October 9, 2020, France passed a law focused on protecting child social media stars.[159] The law gives kidfluencers the

152. *Id.* at 391.

153. *Pierce*, 268 U.S. at 534–35.

154. *Parental Rights Cases to Know*, ABA (Feb. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/february-2016/parental-rights-cases-to-know/ [https://perma.cc/L3RZ-JB3E].

155. Prince v. Massachusetts, 321 U.S. 158, 165–69 (1944).

156. Nguon v. Wolf, 517 F. Supp. 2d 1177, 1195–96 (C.D. Cal. 2007).

157. *Id.*

158. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

159. Kerry Breen, *New Law Aims to Protect Finances, Privacy of Child Social Media Stars*, TODAY (Oct. 9, 2020, 6:43 PM), https://www.today.com/parents/law-protects-finances-privacy-child-social-media-stars-t193881 [https://perma.cc/AH63-7VBL]; *Enfants influenceurs: adoption de la proposition de loi* [Child Influencers: Adoption of the Bill], ASSEMBLÉE NATIONALE [National Assembly] (Feb. 12, 2020) (Fr.), http://www.assemblee-nationale.fr/dyn/actualites-accueil-hub/enfants-influenceurs-adoption-de-la-proposition-de-loi [https://perma.cc/5928-MXQJ].

same protections afforded to French child models and actors.[160] Specifically,

> The multi-part legislation guarantees that the conditions of employment' for social media influencers under the age of 16 are 'compatible with his schooling and the safeguard of his health. The majority of a child's income garnered from social media influencing must be paid to a specific French public sector financial institution, which will hold and manage that money until the child comes of age. The law also places limits on how many hours a child can work as an influencer.[161]

Additionally, the law requires social media platforms to actively monitor and remove any "problematic audiovisual content."[162]

The French law also gives children a "right of erasure," which enables children to demand that websites take down any images of them that they no longer want to appear online.[163] The right of erasure is not a new idea in Europe. Also known as the "right to be forgotten," the "doctrine effectively allows individuals to change their digital footprint."[164] The doctrine gained traction in 2014 after a Spanish man successfully sued to have some of his personal information removed from Google search results because it was damaging his reputation and did not reflect who he currently was as a person.[165] The court decided that "the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense and this would also encompass the mere wish of the person concerned that such data not be known to third parties."[166]

By adding a "right of erasure" to its child social media law, the French Legislature ensured not only that children in monetized social media content would be paid for their work but also that they would not be haunted later in life by any potentially embarrassing videos or parental overshares from their youth. If the United States passed a similar law, children like Huxley, whose adoption story and medical history were shared all over the Internet without his consent, would have the opportunity to gain back some control over their online image. A right of erasure, however, would be challenging to implement in the United States. Digital information in the United States is classified as speech,

160. Breen, *supra* note 159.

161. *Id.*

162. *Id.*; *Enfants influenceurs*, *supra* note 159.

163. Breen, *supra* note 159; *Enfants influenceurs*, *supra* note 159.

164. Steinberg, *supra* note 49, at 864.

165. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 616.

166. *Id.*

which is protected by the First Amendment,[167] but in European countries, digital information is viewed as data that can be removed if it is no longer necessary.[168]

V. PREVENTING THE NEXT JACKIE COOGAN SCANDAL

Because influencer marketing has just started to reach its peak, there are still many unknowns about its effect on children. Most research has focused on children who are being targeted by social media advertisements and the dangers of influencers on child development.[169] While these subjects are important, it is critical to remember that children may also be pressured by both companies and parents to appear in social media content. If the history of child performers in Hollywood is any indication, the United States may start seeing more social media families in court once child stars turn eighteen and ask what happened to their money. To prevent this, the government should take proactive steps to protect child social media stars. Additionally, society should change the way it thinks about social media influencing and sharenting.

First, federal and state governments should follow France's lead and enact legislation geared toward protecting kidfluencers. The federal government should implement a national Coogan Act that requires at least 15% of all earnings by child entertainers and models, including those featured in monetized social media content, to be set aside in a trust that cannot be accessed until the child reaches eighteen. In *United States v. Darby*, the Supreme held that Congress has the right to enact the Fair Labor Standards Act (FLSA) as a part of its power to regulate interstate commerce.[170] Since digital entertainment content is spread all over the country, Congress should have the power to set standards for child entertainers.

By modifying the FLSA to include Coogan Account protection, Congress could not only protect social media influencers but also standardize financial protections for all child performers no matter which state they live in. In order to do this, Congress will most likely need to modify the FLSA's exemption for children who work for their parents[171] to exclude those working in social media. Even without an exclusion from the exemption, one could argue that kidfluencers are working for the

---

167. U.S. CONST. amend. I.

168. Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J.L. & TECH. 463, 466 (2014).

169. *See, e.g.*, Marijke D. Veirman et al., *What Is Influencer Marketing and How Does it Target Children? A Review and Direction for Future Research*, 10 FRONT. PSYCHOL. 1, 1 (2019) ("This paper therefore aims to shed light on why and how social media influencers have persuasive power over their young followers.").

170. United States v. Darby, 312 U.S. 100, 121–26 (1941).

171. U.S. DEPT. OF LAB., *supra* note 144.

social media companies and brands that pay them, not for their parents.[172] States should also modify their regulations about work hours and schooling requirements for child performers to include children in monetized social media content.

To prevent a situation like California's, where the implementation of child work permits that are impossible to enforce renders the child social media protections moot,[173] the burden of adhering to regulations should be placed on the companies wishing to advertise. In Florida, the Division of Jobs and Benefits already requires companies to apply for a permit before employing minors.[174] New York also requires anyone who employs a child performer to have a "certificate of eligibility to employ a child performer."[175] Production companies must renew this certificate every three years to avoid being accused of illegally employing a child.[176] States legislatures or the U.S. Congress could enact laws requiring companies wishing to advertise on social media to work only with kidfluencers covered by Coogan protections in order to receive a permit to employ minors. This way, the government would avoid the issue of regulating parenting, which is unconstitutional,[177] and instead shift its focus to child exploitation and labor, which can be regulated "to guard the general interest in youth's well-being."[178]

For these changes to be effective, Americans should change the way they perceive kidfluencers and sharenting. Many people use social media daily for casual use,[179] so they might undervalue the amount of work and energy that influencers and digital creators put into making new content every week. The average time it takes to make a YouTube video is about seven hours for every one to five minutes of edited footage.[180] Even creating a single Instagram post can take weeks of planning.[181] In

172. *See* Wong, *supra* note 99 ("You could argue that YouTube is the joint employer of the child . . . YouTube controls what the child can and cannot do. They control the dissemination of the money. They would very likely be considered joint employers under California wage laws and child labor laws.")

173. *See infra* Part IV.

174. FLA. STAT. § 450.132(2) (2022).

175. N.Y. LAB. LAW § 151 (McKinney 2022).

176. *Id.*

177. Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).

178. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

179. Brooke Auxier, *8 Facts About Americans and Instagram*, PEW RSCH. CTR. (Oct. 21, 2020), https://www.pewresearch.org/fact-tank/2020/10/21/8-facts-about-americans-and-instagram/ [https://perma.cc/Z5P5-85KD].

180. Vidya Narayanan, *How Long Does It Take to Create a YouTube Video?*, MEDIUM (Sept. 25, 2019), https://medium.com/rizzle/how-long-does-it-take-to-create-a-youtube-video-266ae3496bf3 [https://perma.cc/7UER-ZH5X].

181. Natalie Zfat, *Here's How Long It Takes Your Favorite Influencer to Create an Instagram Post*, FORBES (Aug. 22, 2019), https://www.forbes.com/sites/nataliezfat/2019/08/

addition, most influencers spend time interacting with followers, traveling and doing promotional events, planning content and merchandise, and fulfilling any other contractual obligations they have with brands.[182] This can be strenuous work for a child even if adults are helping them.

Still, many parents of social media stars do not see the need for regulations. Parents argue that creating social media content with their children is "a family endeavor, their kids are having fun, and it should not necessarily be considered 'labor.'"[183] For example, when asked about the need for regulations, Tyler Oakley, whose three-year-old twins have over 3.6 million followers on Instagram, said, "Who gets to decide who does the work? You know, my girls are in a picture—they're in a picture and that qualifies as work?"[184]

Child advocates disagree. Sheila James Kuehl, a former child star and co-author of a law that overhauled California's labor protections for child performers, contends, "I don't care if it's simply unboxing presents, that's work . . . It is not play if you're making money off it."[185] The co-founder of BizParentz, a nonprofit focused on protecting children in the entertainment industry, agrees with Kuehl's stance: "If you're lending your image and you're doing something to sell a product, it's work. If it's work, then your money should be protected."[186]

Another point should also be considered: while being an influencer might be fun for children when they are young, what happens when they want out later? As shown in Part II, some parents are willing to go to extremes to obtain the views they need to make money. Even parents who try not to be overbearing still admit to bribing their children to ensure they fulfill their brand deal obligations: "If there're days they're totally not into it, they don't have to be . . . Unless it's paid work. Then they have to be there. We always have lollipops on those days."[187] Considerations regarding work hours and consent should be made for children who may

---

22/heres-how-long-it-takes-your-favorite-influencer-to-create-an-instagram-post/?sh=798cde183f46 [https://perma.cc/TT88-YG97].

182. Viral Access, *supra* note 104; Jessica Booth, *What It's Really Like To Be an Instagram Influencer*, THE LIST (Feb. 7, 2019 12:40 PM), https://www.thelist.com/144932/what-its-really-like-to-be-an-instagram-influencer/ [https://perma.cc/3K58-L48B]; Clare Brown, *5 Things People Don't Tell You About Being an Influencer (So We Will)*, OCTOLY MAG. (June 13, 2018), https://mag.octoly.com/5-things-people-dont-tell-you-about-being-an-influencer-so-we-will-6c5dea6401c1 [https://perma.cc/6Z7Q-W33E].

183. Mooney, *supra* note 54.

184. Novacic, *supra* note 54.

185. Wong, *supra* note 99 (internal quotations omitted).

186. Lambert, *supra* note 31.

187. Emma Grey Ellis, *Child Stars Don't Need Hollywood. They Have YouTube*, WIRED (Feb. 6, 2019, 12:51 PM), https://www.wired.com/story/age-of-kidfluencers/ [https://perma.cc/R3XK-E5D6].

not want to be involved with social media long term, especially as more parents are quitting their jobs to pursue social media full time with their family.[188]

While the American public waits for child labor regulations to catch up with technology, it must remain cognizant of social media's potential to exploit children. By redefining influencing as an occupation instead of a hobby, both social media consumers and parents of kidfluencers can ensure that children's interests are protected. In fact, some talent managers already require that any kidfluencers they sign have a Coogan Account set up.[189] Additionally, some parents of child social media stars, including Ryan from *Ryan ToysReview*, have pledged to set money aside for their children and try to make sure they have a healthy work-life balance.[190] While these parents have made a good start, greater effort is needed to make the public aware of the lack of protections afforded to children in monetized social content. Such effort could go a long way in creating accountability both for parents and the government as they work to create legislation.

Conversations also need to be had about issues of privacy and children being unable to consent to their image being online. Increasingly, "more and more . . . children and young people . . . do not want to have an online presence or . . . are faced with an online identity created by their parents."[191] While it is unlikely that anything can be done from a legal standpoint to stop parents from posting about their children online, fostering discussions about sharenting and how it can negatively impact children can encourage parents to make sure they act responsibly when it comes to influencing. Professor Stacy Steinberg encourages the use of a public health model approach to sharenting and details several considerations parents should think about before posting on social media.[192] Two of these suggestions, allowing children to exercise "veto" power over content they are featured in and refraining from sharing "photos of [children] in any state of undress,"[193] could allow child social media stars to exert some control over their digital image.

CONCLUSION

While social media has proven to be an excellent innovation for creating online communities and giving creators a platform to share their work and stories, it has also opened a new door for child exploitation,

188. *Id.*

189. Lambert, *supra* note 31.

190. Ellis, *supra* note 187; Lambert, *supra* note 31.

191. Suzanne Bearne, *Would You Let Your Child Become a 'Kid Influencer'?*, BBC NEWS (Aug. 22, 2019), https://www.bbc.com/news/business-49333712 [https://perma.cc/CV79-EXSY].

192. Steinberg, *supra* note 49, at 877–84.

193. *Id.* at 881.

especially from a privacy and financial standpoint. Unlike child performers who work in traditional outlets such as television, theater, and print modeling, very few regulations protect child social media stars or the money they make online. This means that minors like Huxley and the Martin and Hobson children can have their entire childhoods displayed on the Internet, be put into potentially abusive situations, and still end up with nothing.

While most parents are conscious of social media's impact on their children and work to protect their privacy and financial interests, even one child being exploited is one too many. To prevent exploitation, federal and state governments should work on implementing laws that provide some of the same protections that apply to traditional child entertainers to children in the digital space, particularly the Coogan Account system, which would require a percentage (at least 15%) of the child's earnings to be set aside until they reach adulthood. In the meantime, Americans should rethink the way they perceive influencers and sharenting. While parents most likely will never be, and should never be, banned from posting about their children online, we can work to ensure that children do not regret their social media fame once they reach adulthood.

SPLITTING HEIRS: HOW HEIRS' PROPERTY CONTINUES THE LEGACY OF CHALLENGES TO THE ACCUMULATION OF WEALTH FOR BLACK AMERICANS

Ryan Cook[*]

What happens to a dream deferred?
–Langston Hughes[1]

Abstract

When people die without executing estate planning instruments, their real property is divided to their heirs as tenants in common. Property owned in this arrangement is called heirs' property. The issues associated with heirs' property are compounded when several generations pass without proper estate planning, and interest in the real property becomes highly fractionated. African Americans are more likely to die without wills, so the risks of heirs' properties are disproportionally felt by people of color. One threat to heirs' property arises when third parties buy out one heir's share to force a partition sale. The Uniform Partition of Heirs Property Act (UPHPA) provides procedural safeguards for these partition sales. This Note explains the history behind Black land ownership in America, the problems associated with heirs' property, and the provisions and shortcomings of the UPHPA.

---

* Ryan Cook is a joint J.D./L.L.M. candidate with a certificate in Estate Planning at the University of Florida Levin College of Law (expected December 2022). He served as the Executive Managing Editor for the *University of Florida Journal of Law & Public Policy* during the 2021–2022 school year. He received a Bachelor of Arts in English from Brigham Young University—Idaho in 2018. Special thanks go to Professors Danaya Wright and Lee Ford Tritt for their guidance.

1. LANGSTON HUGHES, *Harlem*, *in* THE COLLECTED WORKS OF LANGSTON HUGHES (Vintage Classics 1990).

INTRODUCTION

Heirs' property—which is land or other property owned by a family jointly due to intestacy—presents unique challenges to the accumulation of wealth and the free enjoyment of property. In this Note, I will explain how these challenges contribute to the cycle of poverty, particularly in Southern Black American communities. The Uniform Law Commission and other groups have successfully passed some protections for cotenant owners of inherited property, which are being adopted in many states.[2] I will discuss the Uniform Partition of Heirs Property Act and state responses to it. Lastly, I will discuss the gaps in the Act and the specific actions that counties and states can take to offer much needed protections. The problems facing property owners range from unscrupulous developers to the dwindling ability to enjoy and profit from over-fractionated land. States have a legitimate need to take an active role in clearing land titles, not only to protect impoverished families and communities but also to facilitate greater alienability and efficiency in resources. While the issues surrounding heirs' property affects people of all races with lower- and middle-class incomes, the issues disproportionally affect Black Americans. This disparate impact plays a part in the ubiquitous propensity for American law to disinherit and impoverish people of color—whether intentionally or unintentionally.

I. HISTORY OF BLACK PROPERTY: NO ACRES, NO MULES

America has a long history of denying Black Americans the right to own property. Many systems have contributed to keeping whole communities in perpetual poverty. These systems remain in our laws today, and Black Americans continue to feel the disparate effects. For most of American history, Black people could not own property, as they

2. *Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails [https://perma.cc/52U6-5QD2] (last visited July 16, 2022).

were considered property themselves.[3] Furthermore, marriages among slaves were not legally recognized, and families were often torn apart by the slave trade, making genealogy an almost impossible feat.[4] Without any property in an estate to devise or bequest, and no legally-recognizable family to receive property (intestate or otherwise), slaves had no ability to accumulate wealth over time.

Slavery was abolished with the ratification of the Thirteenth Amendment,[5] and while Black Americans could theoretically hold property, they did not have access to the tools and means necessary to create wealth. For one, the famed and scanty "forty acres and a mule" promise under Order 15, which led many freed families to believe they would have a right to claim forty acres of land to themselves, was outright denied.[6] The land that Black Americans worked as slaves was still owned by slave masters, and many found themselves employed as sharecroppers for their former masters.[7] Sharecropping kept workers tied to the land without giving them any rights to it.[8] Workers were barred from moving to better opportunities and were often forbidden from selling their share of crops to anyone but the landowner.[9] This system did not begin losing favor until the 1940s.[10]

Additionally, years of segregated neighborhoods and schools, coupled with a lack of equal access to the courts, kept Black Americans from the lion's share of property of any real value, and Jim Crow laws sowed distrust of the legal system in Black communities.[11] Presently, the effect of segregation lingers in many ways. The current life expectancy in America is averaged at seventy-seven years.[12] Assuming this life

3. *Slave Codes*, U.S. HISTORY, https://www.ushistory.org/us/6f.asp#:~:text=Legally%20considered%20property%2C%20slaves%20were,a%20white%20person%20was%20doomed [https://perma.cc/543P-S5HE] (last visited Oct. 25, 2020).

4. *Id.*

5. U.S. CONST. amend. XIII, § 1.

6. Sarah McCammon, *The Story Behind '40 Acres and a Mule'*, NPR (Jan. 12, 2015, 6:02 PM), https://www.npr.org/sections/codeswitch/2015/01/12/376781165/the-story-behind-40-acres-and-a-mule [https://perma.cc/3Y8M-5CZ6].

7. *Slavery by Another Name*, PBS, https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/#5:~:text=Though%20both%20groups%20were%20at,fade%20away%20in%20the%201940s [https://perma.cc/ZL8S-2QFC] (last visited Sept. 24, 2021).

8. *See id.* ("Sharecropping is a system where the landlord/planter allows a tenant to use the land in exchange for a share of the crop.").

9. *Id.*

10. *Id.*

11. *See generally* Sarah Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1270–74, 1307 (arguing that civil legal institutions may aid in perpetuating inequality and exclude certain groups from public institutions).

12. SHERRY MURPHY ET AL., MORTALITY IN THE UNITED STATES, 2020 (Nat'l Ctr. for Health Stat. ed., Dec. 2021), https://www.cdc.gov/nchs/data/databriefs/db427.pdf [https://perma.cc/CXM8-9YLG].

expectancy, the average person dying today was born in or around 1945. People who were nineteen at the passage of the Civil Rights Act of 1964 are currently at life expectancy today, and the same demographic was approximately twenty-three at the passage of the Fair Housing Act of 1968. It is no temporal wonder to conclude that Black Americans dying at life expectancy today have had to acquire their property in an environment hostile to their rights to own it. Furthermore, 50% of Black Americans die intestate, leaving what property they do own heavily fractionated and burdensome to probate.[13] This problem is difficult to cope with because Black Americans are far more likely to invest in real property than in stock, and real property is harder to evenly distribute.[14] Many Black Americans choose more tangible forms of investment because they seem safer.[15] The problem with any low-risk investment is diminished reward. In addition, attitudes and tradition have diminished Black Americans' access to, general know-how of, and trust in the processes necessary to plan for and protect one's property.[16] The next section specifically explores several factors about how the theme of inequality for Black Americans and Black property is affected and compounded by death.

II. THE PROBLEM WITH DEATH

While commenting on the durability of the U.S. Constitution, Benjamin Franklin famously observed that only two things are certain in this world: death and taxes.[17] And while what happens to a person after they die is one of the great mysteries of life, the impact of that death on the living can be a similarly confusing and cloudy matter. Many Americans die without effective estate planning, and this can have adverse consequences on a family's ability not only to accumulate

13. Tomi Akitunde, *50% Of African Americans Die Without A Will—It's Time To Change That*, MATER MEA, https://www.matermea.com/blog/estate-planning-basics-african-americans-black-families [https://perma.cc/E54R-JL4E] (last visited May 26, 2022).

14. Stan Choe, *Stocks are Soaring, and Most Black People are Missing Out*, ASSOCIATED PRESS NEWS (Oct. 12, 2020), https://apnews.com/article/virus-outbreak-race-and-ethnicity-business-us-news-ap-top-news-69fe836e19a8dfe89d73e8e4be6d480c [https://perma.cc/B2LN-5V2T].

15. Glenn C. Lowry, *Opting Out of the Boom; Why More Blacks Don't Invest*, N.Y. TIMES (June 7, 1998), https://www.nytimes.com/1998/06/07/magazine/opting-out-of-the-boom-why-more-blacks-don-t-invest.html [https://perma.cc/8K25-BW9C].

16. *See* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, CORNELL J. L. & PUB. POL'Y 1, 15 (2008).

17. NCC Staff, *Benjamin Franklin's Last Great Quote and the Constitution*, NATIONAL CONSTITUTION CENTER (Nov. 13, 2021), https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution [https://perma.cc/6BSA-4ARE]; BENJAMIN FRANKLIN, THE WRITINGS OF BENJAMIN FRANKLIN 69 (Albert Henry Smyth ed., Nabu Press 2010) (1907).

generational wealth but also in staying out of homelessness and poverty.[18] Conversely, 21% of American households can attribute almost a quarter of their wealth to deathtime transfers.[19] It is a surprising figure to reckon with, but it shows how a state's treatment of property at death contributes to the accumulation of wealth. Unsurprisingly, this kind of transfer tends to benefit white Americans more than it benefits Black Americans.[20] So while death and property seem to be nebulous concepts, the American system is reliably predictable in who it benefits.

Estate problems disproportionally affect the Black community.[21] The cycle of poverty in lower-income neighborhoods is stronger in Black communities, in which people are less likely to have a valid will or other estate planning tools in place.[22] And this problem is not merely an issue of accumulating property in life but also of having access to the tools that make title in the property durable.[23] Black Americans managed to acquire fifteen million acres of land between the end of the American Civil War and 1919, but today, 97% of that land is no longer in their ownership.[24] The loss of wealth galvanizes the poverty cycle so that it is more difficult to break. This Note discusses the modern issues with probate that disproportionally affect Black communities and families. Specifically, this Note will address the loss of property that occurs with heirs, the current legislation to remedy these problems, and possible solutions to the gaps in these laws.

III. WHAT HAPPENS WHEN WE DIE?

First, it is important to explain a possible discrepancy in estate planning statistics. While 78% of Americans aged eighteen to thirty-six do not currently have wills, 81% of Americans aged seventy-two and

18. *See* Ann Margaret Carrozza, *Don't Let Bad Estate-Planning Make You Homeless!*, HUFFPOST (May 9, 2012, 8:52 PM), https://www.huffpost.com/entry/dont-let-bad-estate-planning-make-you-homeless_b_1503720 [https://perma.cc/78MX-49V3].

19. Edward N. Wolff & Maury Gittleman, *Inheritances and the Distribution of Wealth or Whatever Happened to the Great Inheritance Boom?*, J. ECON. INEQ. 440, 463 (2013).

20. Janelle Jones, *Receiving an Inheritance Helps White Families More Than Black Families*, ECON. POL'Y INST. (Feb. 17, 2017), https://www.epi.org/publication/receiving-an-inheritance-helps-white-families-more-than-black-families/ [https://perma.cc/3Q8L-Y765].

21. *See id.*

22. Akitunde, *supra* note 13; *see* Michelle Fox, *'We are in a State of Emergency.' More than 70% of Black Americans Don't Have a Will. Here's why a Plan is Key*, CNBC (Feb. 7, 2022), https://www.cnbc.com/2022/02/07/70-percent-plus-of-black-americans-dont-have-wills-why-estate-plans-are-key.html [https://perma.cc/AJ5P-DVM4] (explaining that Black Americans are less likely to have a will or engage in estate planning).

23. Greene, *supra* note 11, at 1270.

24. Sheila McGrory-Klyza, *Preserving African-American Land Heritage*, LAND TRUST ALLIANCE, https://www.landtrustalliance.org/success-story/preserving-african-american-land-heritage [https://perma.cc/7D4D-62E6] (last visited Sept. 22, 2021).

older do.[25] People lack the prescience to know the day or hour of their death, so it is prudent for everyone to plan for their property. However, for the purposes of generational wealth accumulation, the problem has less to do with the amount of living people without wills or other estate planning tools and more to do with how many people actually die without plans for their property. Black Americans are more likely to die without a will than white Americans.[26] Additionally, dying testate does little to help anyone if the will is invalid, especially in states with strict requirements for creating testamentary documents, such as Florida.[27] This makes access to good estate planning resources crucial.[28] Many people hold off making a will until they have enough assets to divide after their debts and expenses, but that is not necessarily the best idea.[29] Intestacy affects even modest estates in ways that a will, trust, or other estate planning tools may have prevented.[30] In this section, I will cover some of the common intestacy processes and protections and how they still fall short in protecting generational wealth.

The default fate of intestate real property is a tenancy in common divided among a decedent's heirs.[31] State intestacy laws govern how, how much, and to whom property descends. Each recipient has a fractional

25. *More Than Half of American Adults Don't Have Wills, 2017 Survey Shows*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey/2017-survey/#:~:text=Age%20and%20assets%20are%20the%20greatest%20barriers&text=According%20to%20the%20survey%2C%2081,do%20not%20have%20a%20will [https://perma.cc/NEX6-E32F] (last visited Sept. 22, 2021).

26. Fox, *supra* note 22.

27. Some states, including Florida, have strict will requirements. If a testamentary document is deemed invalid, a whole will may be thrown out. Generational mistrust in the legal system and of lawyers adds to this problem because without effective counsel, wills are more likely to have mistakes. *See Florida Will Execution: Strict Compliance with Statute Required*, ADRIAN PHILIP THOMAS, P.A. (Mar. 26, 2019), https://www.florida-probate-lawyer.com/blog/2019/march/florida-will-execution-strict-compliance-with-st/ [https://perma.cc/P7AB-2DHB]; *see also Proper Will Preparation and Execution*, ADRIAN PHILIP THOMAS, P.A. (Apr. 26, 2010), https://www.florida-probate-lawyer.com/blog/2010/april/proper-will-preparation-and-execution/ [https://perma.cc/3XBS-RFA7].

28. *See Florida Will Execution*, *supra* note 27.

29. Barbranda Lumpkins Walls, *Haven't Done a Will Yet?*, AARP (Feb. 24, 2017), https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html#:~:text=The%20top%20two%20reasons%20of,documents%20and%20plans%20in%20order [https://perma.cc/3VA8-KWNH].

30. *See Avoiding Probate: The Small Estate*, NOLO, https://www.nolo.com/legal-encyclopedia/avoid-probate-small-estate-29629.html [https://perma.cc/G8XH-9PYD] (last visited Sept. 22, 2021).

31. Joan Flocks et al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. BAR J. 57, 57 (2018), https://www.floridabar.org/the-florida-bar-journal/the-disproportionate-impact-of-heirs-property-in-floridas-low-income-communities-of-color/ [https://perma.cc/Y24K-HRLX].

interest in the whole property.[32] Extreme fractionation can occur when there are multiple heirs.[33] Ownership can continue to splinter into smaller and smaller shares as more people die, as tenancies in common have no rights of survivorship.[34] Tenancies in common are tricky forms of ownership.[35] Most banks will not accept a cotenant's share as collateral for loans.[36] And identifying each cotenant can be difficult and expensive.[37] Cotenants have few rights in the property but share the burden of taxation and maintenance.[38] It is often unclear who is required to maintain the property, and the incentive to maintain is reduced by the very few rights that maintenance can yield.[39] This problem is compounded by how probate law is established to assume and favor a nuclear family—which is less common in predominately impoverished areas.[40] It is no mathematical marvel that divorce, remarriage, and children born within different marriages increase the number of intestate takers in many probate estates.[41]

The Southeast has the largest concentration of heirs' property, and a disproportionate numbers of these heirs' properties are owned in predominately Black communities.[42] For example, 2.62% of residential property in Alachua County, Florida, is identified as heirs' property.[43] The highest concentration is found on the east side of Gainesville, in a

---

32. *Id.*

33. *How is Land or a House Divided Among More Than One Heir?*, HEIRBASE, https://heirbase.com/dividing_real_estate_among_heirs/ [https://perma.cc/A6QX-ZX75] (last visited Sept. 26, 2021).

34. Candace Webb, *Why Tenants in Common Have No Rights of Survivorship*, SFGATE (Jan. 15, 2019), https://homeguides.sfgate.com/tenants-common-rights-survivorship-1434.html [https://perma.cc/EBW5-VQKE].

35. *See* Brette Sember, *Joint Tenancy v. Tenants in Common*, LEGALZOOM (May 2, 2022), https://www.legalzoom.com/articles/joint-tenancy-vs-tenants-in-common [https://perma.cc/DNY9-84X4] (noting that transfers of tenancy in common can lead to "sticky" situations).

36. Flocks et al., *supra* note 31, at 58.

37. *See* Sember, *supra* note 35 (explaining that tenancy in common can result in co-owners not knowing each other).

38. Flocks et al., *supra* note 31, at 57–58.

39. *See* Faith Rivers, *Inequality in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMPLE POL. & CIV. RTS. L. REV. 1, 51 (2007) ("[T]here are no corresponding obligations to contribute to the ongoing costs of maintaining the property.").

40. *See, e.g.*, Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J. L. & PUB. POL'Y 1, 5–6 (2015).

41. *See* Mary Randolph, *How an Estate Is Settled If There's No Will*, NOLO, https://www.nolo.com/legal-encyclopedia/how-estate-settled-if-theres-32442.html [https://perma.cc/S6J5-G4PA] (explaining that, depending on state law, a child who is adopted by a stepparent may inherit from the biological parents).

42. Flocks et al., *supra* note 31, at 57.

43. *Id.*

community that is traditionally majority Black.[44] Rural counties suffer more than non-rural counties, and areas with higher than 2.41% heirs' property are considered at-risk.[45] To reiterate, even when possessing the means to invest, Black Americans are likely to invest in more tangible, concrete investments, such as real estate as opposed to stock, to build wealth for themselves and their families.[46]

IV. WHAT RISKS DO THESE PROPERTIES FACE?

A purported tactic among land developers is to find fractionated heirs' properties and buy out one of the cotenant's shares.[47] The developer then forces a partition sale of the whole property, forcing the remaining cotenants to accept less than what their share is actually worth.[48] Forced partitions of heirs' property have been described as "buying one share of Coca-Cola, and being able to go to court and demand a sale of the entire company."[49]

The *Gainesville Sun* in Alachua County, Florida, reported on the forced partition of a seventy-acre farm owned by the Buchanons since the 1800s.[50] After two generations had passed the property with wills, the property was lost when one owner failed to make a will, believing his heirs would follow verbal instructions.[51] Years later, a ninety-eight-year-old cotenant of the property decided to sell her share and the property was lost.[52] Forced partitions have been heavily reported on over the years.[53] A series published by the Associated Press called *Torn from the Land* details the systemic obstacles Black Americans face trying to build lives in America.[54] The Associated Press reported that of the 80% of lost Black

---

44. *Id.*

45. *Id.*

46. Choe, *supra* note 14.

47. Ann Carpenter et al., *Understanding Heirs' Properties in the Southeast*, FEDERAL RESERVE BANK OF ATLANTA (Apr. 2016), https://www.frbatlanta.org/community-development/publications/partners-update/2016/02/160419-understanding-heirs-properties-in-southeast [https://perma.cc/89KC-XDE6].

48. *See* Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, THE AUTHENTIC VOICE, https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/ [https://perma.cc/6PUU-RF98].

49. *Id*.

50. Danielle Ivanov, *City to Address 'Heirs' Property' Changes*, THE GAINESVILLE SUN (Aug. 8, 2020, 2:21 PM), https://www.gainesville.com/story/news/local/2020/08/08/city-to-look-at-lsquoheirs-propertyrsquo-changes/42194027 [https://perma.cc/5CR2-9TS5].

51. *Id*.

52. *Id.*

53. *E.g.*, *Torn From the Land, The Associated Press*, THE AUTHENTIC VOICE, https://theauthenticvoice.org/teachersguide/teachersguide_tornfromtheland/ [https://perma.cc/R2JV-A6DU] (last visited July 16, 2022) (detailing the Associated Press's project studying forced partitions); *see also* Lewan & Barclay, *supra* note 48.

54. *Torn From the Land*, *supra* note 53.

property, at least half is attributable to forced partitions.[55] The coordinator for the Federation of Southern Cooperatives described forced partitions as "the all-time, slam-dunk method of separating blacks from their land."[56] Even worse, the Associated Press reported that many of these partitions were not forced by descendants, but by their own lawyers.[57] While partition in kind is the preferred form, it is rarely considered in these heirs' property cases.[58] The *Gainesville Sun* reports that Alachua County will address heirs' properties problems to foster racial justice.[59]

Another problem heirs' properties face is back taxes, extra taxes, and other debts.[60] Tenancies in common are subject to not only the decedent's creditors, but to state and local governments for property tax.[61] It is not hard to imagine why tenants in common, who failed to probate the decedent's property in the first place and who may not even know they have a share in the property, may not know they owe the county for their share of property taxes.[62]

V. THE UPHPA: A DUE PROCESS PROTECTION

The Uniform Law Commission (ULC) recognized the ubiquity of these forced partitions and devised a model act that would offer cotenants some procedural protections against partitions called the Uniform Partition of Heirs Property Act (UPHPA).[63] Many states in the Southeast United States have adopted the UPHPA to address their counties at risk for these partitions. The ULC has described the UPHPA as follows:

> UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.[64]

The UPHPA is the product of research conducted by the ULC. The research revealed that the heirs' property problem was extensive enough

---

55. *See* Lewan & Barclay, *supra* note 48.
56. *Id.*
57. *Id.*
58. *Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).
59. Ivanov, *supra* note 50.
60. Flocks et al., *supra* note 31, at 58.
61. *See* James Chen, *Tenancy in Common (TIC)*, INVESTOPEDIA (Oct. 22, 2021), https://www.investopedia.com/terms/t/tenancy_in_common.asp#:~:text=Property%20Taxes%20With%20Tenancy%20in%20Common&text=This%20stipulation%20means%20each%20of,level%20or%20percentage%20of%20ownership [https://perma.cc/2G6L-43Z5].
62. Flocks et al., *supra* note 31, at 58.
63. *Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).
64. *Partition of Heirs Property Act*, *supra* note 2.

to warrant action, and that many such property owners are "depriv[ed] . . . of the fair market value" of their interests.[65] So far, twenty-one states and American jurisdictions have adopted some form of the UPHPA, with currently introduced bills in eight states including the District of Columbia.[66] The first of the States to adopt the UPHPA was Nevada in 2011, and Utah and Maryland were the most recent enactments in 2022.[67] This section will define what properties are protected and go over the protections and their potential shortcomings.

Crucial to understanding the UPHPA is what kinds of properties it protects. The first part of the UPHPA provides factors for determining how to identify heirs' property:

> (5) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:
>
> (A) there is no agreement in a record binding all the cotenants which governs the partition of the property;
>
> (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and
>
> (C) Any of the following applies:
>
> (i) 20 percent or more of the interests are held by cotenants who are relatives;
>
> (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
>
> (iii) 20 percent or more of the cotenants are relatives.[68]

There are three main conjunctive identifiers after establishing a tenancy in common in real property. First is the "no agreement" requirement in Section 2(5)(A) of the UPHPA.[69] This provision is important because properties with agreements that have already undergone probate (or another kind of legally binding administration of the property) do not need the same protections. If an agreement has been made to the partition, the agreement was probably reached by informed consent. These kinds of agreements are enforced by the court and can even be used to override a valid will.[70] Protections for agreed-to

65. Flocks et al., *supra* note 31, at 60.
66. *Partition of Heirs Property Act*, *supra* note 2.
67. *Id.*
68. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM'N 2010).
69. *Id.* § 2(5)(A).
70. *In re* Pendergrass' Will, 112 S.E.2d 562, 566–67 (N.C. 1960).

procedures most likely lie in contract remedies and therefore are out of the scope of the UPHPA.

Next is the "acquired title from a relative" provision in Section 2(5)(B).[71] Section 2(5)(B) is an interesting provision because it facially provides for more than just intestacy (whether living or deceased).[72] This may be to protect the interests of cotenants who received their shares by representation of a disclaiming heir, for example. Section 2(5)(B)'s definition requires property to be family-owned to be considered heirs' property.[73] The history described previously helps identify why this language is required.

Finally, the "cotenant relatives" provision in Section 2(5)(C)(i–iii) is satisfied in one of three ways.[74] These three options may be hard to distinguish. If (1) twenty percent of the property is family property (regardless of the number of members of that family), (2) twenty percent of the property is held by one person under requirement 2(5)(B), or (3) twenty percent of the people who have an interest are family (regardless of the collective percentage of the pie), then the property is protected.[75]

So, the absence of an agreement, relationship between owners, and a percent threshold of interest constitute the definition of heirs' properties.[76] This definition covers a good range of different scenarios where heirs' property may present themselves. It balances the number of heirs and the number of shares in a way that protects controlling family interests.

A. *Notice*

The first procedural protection the UPHPA makes is notice.[77] Because of Section 4 of the UPHPA, heirs' properties receive the same protections under each adopting state's laws for notice by publication.[78] Section 4 requires a petitioner to place a conspicuous notice on the property.[79] However, some states have recognized the shortcomings of this provision. The Central Alabama Fair Housing Center urged the Alabama Legislature to extend the notice requirement:

> The petitioner shall only be permitted to use notice by publication after stating in an affidavit that a reasonable effort has been made to locate the owners that remain

71. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(B) (UNIF. L. COMM'N 2010).
72. *Id.*
73. *Id.*
74. *Id.* § 2(5)(C)(i–iii).
75. *Id.*
76. *See id.* § 2(5).
77. UNIF. PARTITION OF HEIRS PROP. ACT § 4 (UNIF. L. COMM'N 2010).
78. *See id.* § 4(b).
79. *See id.*

> unknown and providing a description in the affidavit of the steps taken to locate the missing owner. Further, the petitioner shall send a notice to that owner's last known address.[80]

This inclusion, importantly, has a similar flavor to the holding in *Mullane v. Central Hannover Bank & Trust Company*,[81] which required more than constructive notice to individuals whose interests are at stake. This strikes at the heart of procedural protections. After all, "when notice is a person's due, process which is a mere gesture is not due process."[82] The reason these properties need protection is because the owners tend to not understand how direly their property interests are at risk.[83] Many of the heirs that need notice might not even be aware of their interests depending on how tangled and clouded the title is. At the very least, the Alabama proposal adds a level of deterrence to a petitioner that would otherwise abuse a partition sale. The petitioner would be required to make the effort to find all individuals with an interest in the property.[84] Untangling the title in such a notoriously tricky case adds a much-needed layer of protection.

B. *Appraisal*

The next protection offered by the UPHPA is appraisal for cotenants who agree to a partition by sale. If the court decides that a property to be partitioned is heirs' property, then the court will determine the fair market value of the property, granted certain conditions are met.[85] Section 6 of the UPHPA lays out the procedure for determining fair market value.[86] The first subsection expresses that family agreements on a value are accepted by the court.[87] This follows the trend in probate that courts play a passive role in probate administration.[88] Next, the cost of the appraisal should not exceed the evidentiary value of the property.[89] Appraisals can

---

80. Letter from John Pollock, Cent. Fair Housing Ctr. to Thomas Mitchell (Oct. 24, 2007) (on file with author).

81. 339 U.S. 306, 313–14 (1950).

82. *Id.* at 315.

83. *See Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010) ("Many if not most of these heirs property owners have little or no understanding of the legal rules governing partition of tenancy-in-common property.").

84. *See* Letter from John Pollock, *supra* note 80.

85. UNIF. PARTITION OF HEIRS PROP. ACT § 6(a) (UNIF. L. COMM'N 2010).

86. *Id.* § 6(a)–(g).

87. *Id.* § 6(b).

88. *See* UNIF. PROB. CODE art. III cmt. (UNIF. L. COMM'N 2019) ("Overall, the system accepts the premise that the court's role in regard to probate and administration . . . is wholly passive until some interested person invokes its power to secure resolution of a matter.").

89. UNIF. PARTITION OF HEIRS PROP. ACT § 6(c) (UNIF. L. COMM'N 2010).

cost anywhere from $300 to $400.[90] In such a case, the court determines the fair market value by an evidentiary hearing and sends notice to all parties.[91] This ensures that, through these legal proceedings, cost of appraising will not drive up the total partition price.

Barring family settlements and very low-value property estimations, the court appoints an independent property appraiser.[92] To determine fair market value, the appraiser assumes the price of the property for sole ownership in a fee simple absolute.[93] This maximizes the value of the property, since tenancies in common and other fractioned shares are worth considerably less than fee simple ownership.[94] The procedure for appraisal may be affected by state law—some states require *all* property sales to be appraised in court.[95]

In addition to appraisal rights, the UPHPA provides for the procedure of providing notice of appraisal to the parties.[96] If necessary, the parties can admit additional evidence to challenge the appraisal value.[97] This provides not only a safeguard against accidental discrepancies in valuation, but also threatens continued litigation, which drives up the risk of legal fees, thereby making partition less and less attractive.

C. *Right of First Refusal*

A right of first refusal is "[a] potential buyer's contractual right to meet the terms of a third party's higher offer."[98] It gives the potential buyer the ability to enter into an agreement before any other person or entity.[99] The right of first refusal grants cotenants in heirs' property the right to accept or decline an offer from a partitioner before any other

90. Ramsey Solutions, *How Much Does a Home Appraisal Cost?*, RAMSEY (June 20, 2022), https://www.daveramsey.com/blog/how-much-do-home-appraisals-cost [https://perma.cc/6FTQ-YCJA].

91. UNIF. PARTITION OF HEIRS PROP. ACT § 6(c) (UNIF. L. COMM'N 2010).

92. *Id.* § 6(d).

93. *Id.*

94. *See* Aaron Stumpf, *Higher Valuation Discounts for Undivided Interests?*, STOUT (Mar. 1, 2010), https://www.stout.com/en/insights/article/higher-valuation-discounts-undivided-interests [https://perma.cc/8M99-HAPY] ("The detrimental economic characteristics of undivided interests permit the application of valuation discounts when estimating their values. For example, if an asset is held through a Tenancy in Common and has a market value of $100 in fee-simple interest, it is unlikely that a 25% undivided interest would be worth $25. In fact, . . . the value of an undivided interest may be substantially less than a pro-rata share of a fee-simple interest.").

95. UNIF. PARTITION OF HEIRS PROP. ACT § 6 cmt. 1 (UNIF. L. COMM'N 2010).

96. *See id.* § 6(e).

97. *See id.* at § 6(f).

98. *Right of First Refusal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99. James Chen, *Right of First Refusal*, INVESTOPEDIA (Sept. 13, 2020), https://www.investopedia.com/terms/r/rightoffirstrefusal.asp#:~:text=Right%20of%20first%20refusal%20(ROFR,free%20to%20entertain%20other%20offers [https://perma.cc/6AER-8ZHG].

party.[100] This gives cotenants an option to buyout instead of engaging in a forced partition sale. A right of first refusal also protects cotenants in heirs' property by effectively forbidding negotiations with third parties before the qualifying cotenants decline to accept an offer.[101] In essence, the difficulty in entering pricing negotiations makes it harder to sell the property, thus making less attractive the acquisition of shares in heirs' property for the purpose of buying families out of their inherited land.

The right of first refusal is codified in Section 7, entitled "Cotenant Buyout," of the UPHPA, and is the longest and most detailed section of the UPHPA. Section 7 lays out the procedures for a cotenant to affect a partition sale.[102] This can only take place after the court-supervised appraisal rights, outlined in Section 6, have been followed.[103] The Official Comment to Section 7 explains that the mechanics are laid out to help judges understand and implement the math and steps in the buyout process, as many judges in this field may not be familiar with the way the procedure mirrors contractual rights of first refusal and corporate subscription agreements.[104]

D. *Fair Share*

The next due process protection the UPHPA provides heirs' properties is triggered if any cotenants remain after the right of first refusal, and a partition in kind would not result in a great manifest prejudice as a group.[105] The provisions under Sections 8 and 9 conveying these rights ensure a court-supervised sale, so the remaining cotenants receive a reasonable fair share of the commercial price of the sold property.[106]

PARTITION IN KIND

The first step after appraisal is to determine whether a partition in kind is more appropriate than a partition by sale.[107] In a partition in kind, the property is split up into unfractionated ownership according to each cotenant's share.[108] For example, a cotenant with 5% ownership in the property could become the sole owner of a parcel representing 5% of the property. Partitions in kind are favored by the court, and Section 9 of the

100. *Id.*
101. *See id.*
102. UNIF. PARTITION OF HEIRS PROP. ACT § 7 (UNIF. L. COMM'N 2010).
103. *See id.* § 7(a).
104. *Id.* § 7 cmt. 2.
105. *Id.* § 8(a).
106. *See id.* §§ 8, 9.
107. *See id.* § 8(b).
108. *Partition by Sale vs Partition in Kind*, KING LAW, https://kinglawoffices.com/blog/estate-planning/partition-proceedings/partition-by-sale-vs-partition-in-kind-2/ [https://perma.cc/7SBP-RE8C] (last visited July 4, 2022).

UPHPA provides a set of factors to consider in determining whether a partition in kind would be a great prejudice.[109] While not all factors need to be present to order a partition in kind, no single factor is dispositive and the totality of all relevant factors and circumstances should be considered.[110]

Many of the factors in Section 9 contain practical, economic, and even sentimental considerations for the propriety of the partition form:

> (1) whether the heirs property practicably can be divided among the cotenants;
>
> (2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;
>
> (3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;
>
> (4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;
>
> (5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;
>
> (6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and
>
> (7) any other relevant factor.[111]

The UPHPA does not provide how much weight the court should assign each factor. This may give the court ample discretion to unjustifiably order partition by sales. However, discretion serves an important purpose. The Comment to Section 9 provides that while economic considerations are very important, some land has important

109. UNIF. PARTITION OF HEIRS PROP. ACT § 9(a) (UNIF. L. COMM'N 2010).
110. *Id.* § 9 cmt. 1.
111. *Id.* § 9(a).

ancestral or religious significance.[112] However, the Comment makes clear that if a partition in kind is impractical or it diminishes the separate fair market value, the court should order a partition by sale.[113] This partition determination procedure is designed to differ from specific state partition determinations. The UPHPA provides greater protections against states disproportionally ordering partitions by sales.[114] "Great prejudice" is at least nominally a high standard to meet.[115] Furthermore, the Comment to Section 8 suggests that some states may wish to amend the act to allow for a partial partition in kind and by sale.[116]

PARTITION ALTERNATIVES

If cotenants do not exercise their right of first refusal, and the court decides that partition by sale is most appropriate for the property in question, the court is responsible for supervising the sale and ensuring the cotenants receive their fair share.[117] Section 10 of the UPHPA provides that the sale must be done in an open-market sale unless the court finds that an auction or sealed bid would be more economically advantageous to the parties.[118]

VI. STILL UNDER THREAT: WHAT THE UPHPA DOESN'T COVER

The UPHPA is undoubtedly well-intentioned, but mere intention is no guarantee that it is well-drafted. As a response to another article published by the Florida Bar Journal, Manuel Farach published: "The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem."[119] Farach argues that the UPHPA's due process protections are already covered by Florida law.[120] Because Florida identifies partitions as adversary proceedings, strict notice requirements are in place.[121] Farach

112. *Id.* § 9 cmt. 4.

113. *Id.* § 9 cmt. 2.

114. *See Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010) ("[C]ourts in a large number of states typically resolve partition actions by ordering partition by sale.").

115. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 8(a) (UNIF. L. COMM'N 2010).

116. *See id.* § 8 cmt. 1 ("This Act neither prescribes nor prohibits a partition in kind of part of the heirs property and partition by sale of the remainder.").

117. *Id.* §§ 8(b), 10(a)–(b), 10(e).

118. *Id.* § 10(a).

119. *See* Flocks et al., *supra* note 31 (describing how heirs' property issues disproportionately affect Black Americans in Florida); *see also* Manuel Farach, *The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem*, 92 FLA. BAR J. 56, 56 (2018) ("A recent article in The Florida Bar Journal extolled the virtues of the Uniform Partition of Heirs Property Act.").

120. Farach, *supra* note 119, at 58–59.

121. *Id.* at 58.

also points out the difficulty in ordering partition in kind.[122] Partitions in kind are often improper because of the easements and other access problems that partitioning introduces to properties.[123] It is also difficult to partition land in so many fractioned shares while maintaining a fair distribution.[124]

The Gainesville Sun article seems to posit that the Buchanon farm was unjustly forced into partition by remnants of racist legal regimes.[125] However, much of the genealogical research cited to by the article was researched and presented by the attorney of the selling cotenant, Adam Towers of Bogin, Munns & Munns, P.A. Apparently, the ninety-eight-year-old cotenant who decided to sell her share approached Towers to initiate the sale because the land was otherwise no use to her or any other heir.[126] This insight highlights two problems with the UPHPA. First, in keeping with the Gainesville Sun article, news outlets have no issue presenting partition sales in a light that may exaggerate the issue addressed by the UPHPA. Second, and more importantly, the UPHPA was meant to help low-income communities freely enjoy their land as they saw fit, but as Farach argues, the UPHPA hindered families more than it helped. Extra appraising fees and time in court over-encumber the property.[127] Also, selling cotenants may be barred from getting any benefit from the sale because of the UPHPA's rights of first refusal and the auctioning process.[128]

Another issue is the difficulty in identifying which properties are at risk. First, since the decedents failed to effectively plan for their property after death (whether by conscious decision, lack of resources, or lack of awareness), these estates are predisposed to fall through the cracks. The decedents' heirs own only a fractional share of the land, so many of these heirs lack the resources, incentive, and know-how to properly clear title to the land.[129] Courts determine whether a property is an "heirs' property," but the issue is circular: a deficiency arising from a lack of access to the court cannot have an effective remedy that requires access to the court. As discussed, the UPHPA addresses the problem of heirs' property having its clouded title taken advantage of by unethical opportunists.[130] The procedural walls the UPHPA places around heirs'

122. *Id.*

123. *Id.*

124. *Id.*

125. Ivanov, *supra* note 50.

126. Letter from Adam Towers, S'holder, Bogin, Munns & Munns, P.A., to author (Feb. 24, 2021) (on file with author).

127. *See* Farach, *supra* note 119, at 58 ("The act unfortunately does not take into account these practicalities and unintentionally creates more costs and time delays for the parties.").

128. UNIF. PARTITION OF HEIRS PROP. ACT §§ 7, 10 (UNIF. L. COMM'N 2010).

129. *Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).

130. Lewan & Barclay, *supra* note 48.

property rights make it more cumbersome to swoop into family-owned property. However, other problems still affect heirs' property. While the UPHPA protects against forced partition sales, it does not address the problems non-probated estates and tenancies in common (the cause and effect of intestacy) have on title and free alienability.[131] The added court costs and procedures only further encumbers the process of allowing families to benefit from their own land.[132]

The UPHPA provides procedural and due process safeguards in partition actions, but the issue remains that the longer a title is clouded, the cloudier a title becomes: the number of cotenants increase exponentially as more people die and pass their property rights (many intestate), and the cotenants become more difficult to identify. Furthermore, it takes time to track down these heirs. Difficulty with identification is compounded by divorces, children born out of wedlock, children from different marriages, and the fact that some estates go decades without being probated. The property then passes further and further out to more distant branches of the family tree. This is a problem because the court and attorney's fees are still paid through the partition sale.[133] All this genealogical and title research could potentially eat up the full sale price unless the property is a large, profitable tract of land. The UPHPA therefore does little to protect smaller, residential properties—potentially family homes.

Land can be tied up in an unclear title for years. The families that lacked the means or foresight to plan for the future are unlikely to effectively carry out probate. Many times, the name of a deceased original owner or deceased cotenants remain on the title for years, possibly for the duration of ownership.[134] Fixing this problem is timely and tedious.[135] Lawyers at county and city levels would need to identify heirs' property at their own initiative and prepare the necessary documents to transfer title to the rightful owners. The U.S. Department of Agriculture has identified the volatile nature of heirs' property and the consequences it has on communities and governments.[136] The study aims to help local governments to identify heirs' properties, but the local

131. Flocks et al., *supra* note 31, at 59.

132. *See* Farach, *supra* note 119, at 59 ("The act also brings with it some unintended consequences, the most troubling being . . . the resulting increased litigation and attendant costs the act would impose on parties due to its numerous required procedures.").

133. *Prefatory Note to* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).

134. *Should You Remove a Deceased Owner from a Real Estate Title?*, DEEDS.COM, https://www.deeds.com/articles/should-you-remove-a-deceased-owner-from-a-real-estate-title/ [https://perma.cc/R49Q-EP5Z] (last visited Sept. 30, 2021).

135. SCOTT PIPPIN ET AL., U.S. DEP'T AGRIC. FOREST SERV., IDENTIFYING POTENTIAL HEIRS PROPERTIES IN THE SOUTHEAST UNITED STATES 10 (Sept. 2017), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs225.pdf [https://perma.cc/N3U6-R3WQ].

136. *Id.* at 8–9.

governments must try to verify the findings and identify the properties themselves.[137] The issues lie beyond the free market, unethical purchasers, and inaccessible banks. Federal and state taxes still need to be paid on these properties, and "[b]ecause it is so difficult to keep track of who should be paying taxes, property can be lost through tax sales."[138] Identifying heirs' properties is not merely an altruistic act by the government or a facilitation of the free market. Inasmuch as property is subject to and threatened by the state, the state should bear some burden in identifying who owns and owes what.

VII. POSSIBLE SOLUTIONS

Firstly, the UPHPA should be narrowed to ensure it only covers the types of sales it purports to monitor. Cotenant heirs ought to be free from the UPHPA's restrictions and protections, and the UPHPA should only apply when non-heirs seek a partition. Because similar protections already exist for probate and partition actions, the UPHPA should be narrowly tailored to only extend protections in particularly suspect situations.

The current role of courts in managing estates is passive.[139] To require courts to intervene in these delicate family situations is no light matter. It would be inappropriate for a court to identify and resolve all these problems. The burden of addressing these issues should fall on the entities that benefit from heirs' properties. Local government agencies levy and collect property taxes.[140] Therefore, local governments ought to take responsibility in propelling these solutions. Farach mentioned pro bono services throughout Florida providing low-income individuals and the elderly with will services.[141] A similar approach could be taken to clear heirs' property titles.

County and municipal governments should institute programs to identify heirs' properties. Local governments face the issue of the cost of clearing title. Adam Towers mentioned that Bogin, Munns & Munns advanced the costs of the partition to allow the Buchanon farm to be sold before any lawyers were paid.[142] Had the property not sold, there may not

137. *See id.* at 21 n.79 ("[T]his methodology attempts to quantify . . . the heirs property . . . by using existing sources of aggregate parcel-level data. Unless and until the owners associated with a property are contacted . . . absolute verification of the property's status is generally not possible.").

138. *Id.* at 9.

139. *See* UNIF. PROB. CODE art. III cmt. (UNIF. L. COMM'N 2019) (describing the role of the courts as "wholly passive" in the area of probate and estate administration).

140. *Florida Tax Guide*, STATE OF FLORIDA.COM (2021), https://www.stateofflorida.com/taxes/#:~:text=Though%20the%20state%20government%20does,the%20value%20of%20the%20property [https://perma.cc/BN6D-5QEJ].

141. Farach, *supra* note 119, at 56.

142. Letter from Adam Towers, *supra* note 126.

have been any payment at all. If local governments advance the costs of identifying, appraising, and facilitating a clear title, attorneys will have a greater incentive to help these families maximize their enjoyment of their property.

The problem with localized solutions is the lack of centralized effort—all local governments would need to keep tabs on this problem and remedy it. Because the courts play passive roles in estate administration,[143] and because these families are less likely to seek out the legal help they need, local officials and attorneys must take the lead in finding and advertising the procedure that families should follow to protect their property rights.

Admittedly, any approach that requires lawyers and city officials to step in and tell families what they need to do might feel too paternal. However, inasmuch as America's standing legal tradition holds low-income families (particularly Black low-income families) from accumulating property by sowing distrust and limiting access, the onus is on the officers of that tradition to rectify its mistakes. Furthermore, there are larger economic implications and incentives for local governments to get involved. Whatever solution states decide on, it is crucial to remember that efforts need to extend beyond protecting not only agricultural property but also residential property as well.

CONCLUSION

Heirs' property concerns more people than just the heirs involved. More land tied up in clouded title means less efficient municipal, county, and state development. Free alienability lies at the core of American property law but is routinely unrealized in hundreds of acres of heirs' property. In addition to helping communities break the cycle of poverty and decrease the wealth gap, land presently tied up in non-probated estates will be free and open to the market and to the owners for full beneficial use of their property. The UPHPA provides at least some protection for these families to do with their property what they will.

The problem remains that the UPHPA mainly helps commercial, agricultural, and otherwise valuable land. Residential properties where taxes are missed are slipping through the cracks. Effective steps must be taken to ensure title is vested in the proper individuals in a timely manner. A real problem here is striking the proper balance between ensuring the government helps protect property in poorer communities and preventing the government from over-exerting its authority or taking a parental role in citizens' lives. At the very least, if the government will seize property from a de facto owner for failure to pay taxes, then the government should play a role in ensuring that property owners have notice before their land

143. UNIF. PROB. CODE art. III cmt. (UNIF. L. COMM'N 2019).

is in jeopardy. If heirs bear the risk of adverse government action, then it stands to reason that they should be afforded the rights and benefits of title.