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The *Kansas Journal of Law & Public Policy* (ISSN 1055-8942) is published three times per year by students at the University of Kansas School of Law.

CITE AS:

34 KAN. J.L. & PUB. POL'Y (page no.) (2024)

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Annual subscription rates by volume (three to four issues per year) are $45 for individuals and $50 for institutions. All subscriptions are automatically renewed unless timely notice of cancellations is provided. Back issues and individual copies may be purchased, depending on availability.

SUBMIT TO:

The Kansas Journal of Law & Public Policy
University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045

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Website: http://www.law.ku.edu/lawjournal

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Spring 2025

Dear *Journal* Readers,

Welcome to the second issue of Volume XXXIV of the *Kansas Journal of Law and Public Policy*. This second issue presents six insightful articles, each addressing important public policy issues of today.

Our first article is from Dr. Rosalind S. Simson, a Professor of Philosophy affiliated with the Women's and Gender Studies Program at Mercer University. Dr. Simson seeks to persuade those who make laws and policies about school athletics to resist the growing pressure to exclude transgender girls and young women from female school sports teams. She closely analyzes the principal arguments against their inclusion, namely that including them is unfair to cisgender females and undermines Title IX's goal of providing female students with athletic opportunities comparable to those of their male counterparts. She concludes that these arguments ignore differences among types of gender transitions, fail to recognize the limitations of current research into the effects of gender transitions on athletic performance, and misunderstand the meaning of fairness in athletic competitions.

Our second piece is an essay from Professor Richard E. Levy, a leading scholar on administrative law and Professor of Law at the University of Kansas School of Law. In his essay, Professor Levy considers the implications of recent Supreme Court decisions for administrative agencies and administrative law. The essay ultimately concludes that, under what Professor Levy labels "the new administrative law," Presidents will have greater ability to direct agencies to implement their policy agendas, but those agencies will have less power and authority to carry out that agenda.

Our third article is from Adam Bixby, a third-year law student at the Sandra Day O'Connor College of Law at Arizona State University. Mr. Bixby's article seeks to explore solutions to the growing strain on the Colorado River. The article explains the current methods of cloud seeding and evaluates its effect on both the atmosphere and the populations in the Colorado River Basin. Mr. Bixby ultimately concludes that governments in the Colorado River Basin should create an agreement outlining the best practices for cloud seeding and provide a forum for settling legal disputes between parties over cloud-seeded water.

Our fourth article is from Sam Crawford, a third-year law student at the University of Kansas School of Law and Articles Editor for the Journal. Ms. Crawford's article discusses background information on how Kansas diversion programs currently operate, what diversion reform has been considered, and the present challenges to appealing a diversion denial in Kansas courts. Following this analysis, the article makes the case for requiring Kansas prosecutors, by statute, to provide an appealable, written explanation when denying defendants pre-trial diversion.

Our fifth article is from Violet Brull, a third-year law student at the University of Kansas School of Law. Ms. Brull's article draws attention to the reality of bias impacting decision making when vast amounts of data are used to power AI tools. The article explores the inadequacy of current legislative approaches which focus on the impact of bias on the creation of algorithmic tools. Instead, Ms. Brull advocates for the increased protection of consumer data privacy at the state level, particularly in Kansas.

Our final article is from Cassidy K. Terrazas, a third-year law student at the Texas Tech School of Law. Ms. Terrazas's article weighs First Amendment freedom of religion concerns against the best interest of the child standard for custody and visitation disputes. The article briefly explores First Amendment protections for parental religious control, the history of cults within the American legal system, and various formulations of the best interest of the child standard. Ms. Terrazas argues that while courts must ultimately abide by the demands of the First Amendment, the risk of psychological and physical harm is too great in certain religious environments not to be considered in custody or visitation disputes.

I hope that our readers find this issue as captivating as I do. I owe many thanks to the Editorial Board and Staff Editors for their tireless work and countless hours spent bringing this issue to publication. In addition, and on behalf of all *Journal* members, I thank Professors Richard Levy and Corey Rayburn Yung for their advice and support throughout the publication process. Now, please enjoy the scholarship we have prepared in Issue II, Volume XXXIV of the *Kansas Journal of Law & Public Policy*.

Emma Mays
Editor-in-Chief

TRANSGENDER STUDENTS, FAIRNESS, AND THE PROTECTION OF FEMALE SCHOOL SPORTS

*By: Rosalind S. Simson**

I. INTRODUCTION

The inclusion of transgender girls and young women on female school sports teams has become a political wedge issue in American society. Donald Trump and J.D. Vance made the controversy a centerpiece of their 2024 election campaign.[1] Typical of their rhetoric was Trump's promise at a rally in Madison Square Garden that "we will get . . . transgender insanity the hell out of our schools, and we will keep men out of women's sports."[2] Their message resonates with a majority of Americans. A January 2024 poll conducted by the National Opinion Research Center at the University of Chicago found that 66% of U.S. adults believe that transgender girls should "never or rarely be allowed to compete on girls' teams in sports," and 69% take this position on transgender women competing on women's sports teams.[3]

State approaches to this issue vary. Currently, twenty-seven states have total or near-total bans on including transgender students on school teams that align with their gender identities.[4] Of the twenty-three states that lack such laws or regulations, a few require that trans students be allowed to compete on teams

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*Associate Professor of Philosophy, affiliated faculty in Women's and Gender Studies, and former Adjunct Professor of Law at Mercer University. For very helpful comments on previous drafts of this article, the author thanks Mercer philosophy department faculty John P. Jolley and David Swigart and Gary J. Simson, Macon Chair in Law at Mercer University. The author also thanks Bailey Hotard for outstanding research assistance and the Mercer faculty and students who made helpful suggestions at the Global Ethics Day event where I presented a version of this paper.

[1] Bill Barrow, *Trump and Vance make anti transgender attacks central to their campaign's closing argument*, ASSOCIATED PRESS (Nov. 1, 2024), https://apnews.com/article/trump-harris-transgender-politics-61cff97a64fac581ffc5f762be4c57d3 [https://perma.cc/F3A9-LTVR].

[2] *Id.*

[3] *Increasing Understanding of LGBTQ+ Health Equity Issues*, NORC, 13, https://www.norc.org/content/dam/norc-org/pdf2024/norc-lgbtq+-health-equity-topline-final.pdf [https://perma.cc/RY6T-ESZC].

[4] *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Jan. 27, 2025), https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [https://perma.cc/K5JQ-K5S8].

The number of states with such bans is likely to rise. For example, the first bill of the new legislative session in the Republican-controlled Georgia Senate targets transgender student-athletes. Ross Williams, *First Georgia Senate bill of 2025 targets trans girls in school sports as LGBTQ allies vow fight*, GEORGIA RECORDER (Jan. 13, 2025), https://georgiarecorder.come/briefs/first-georgia-senate-bill-of-2025-targets-trans-girls-in-school-sports-as-lgbtq-allies-vow-fight/ [https://perma.cc/FU47-SFKB].

that match their gender identities.[5] Others allow school districts to set their own policies.[6]

Title IX,[7] passed in 1972, is the only federal law that has been applied to trans student participation on school teams. It states that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[8] The right to equal opportunity in athletics regardless of sex has been part of Title IX since 1975.[9] In 2021, the U.S. Department of Education's Office of Civil Rights issued a "Notice of Interpretation" stating that Title IX's prohibition of sex discrimination includes discrimination based on gender identity.[10] It grounded this interpretation on the Supreme Court's reasoning in *Bostock v. Clayton County*, which held that discrimination based on transgender status is encompassed by Title VII's prohibition on sex discrimination in employment.[11] In April 2023, the Department of Education published and invited public comments on various proposed changes to the Title IX regulations, including ones that specified the meaning of gender identity discrimination in school athletics.[12] However, when the Department of Education released its final version of these changes in April 2024, the clarifications about transgender students on school athletic teams were omitted.[13] All that was included was the

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[5] Katie Barnes, *Transgender athlete laws by state: Legislation, science, more*, ESPN (Aug. 24, 2023, 7:00 AM), https://www.espn.com/espn/story/_/id/38209262/transgender-athlete-laws-state-legislation-science [https://perma.cc/S6B6-PWYD].

[6] *Id.*

[7] 20 U.S.C. § 1681(a) (2024).

[8] *Id.*

[9] *FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams*, U.S. DEP'T. OF EDUC. (Apr. 6, 2023), https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams [https://perma.cc/7W29-G7A3].

[10] *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP'T. OF EDUC. (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity [https://perma.cc/NUQ7-Q7RH].

[11] U.S. Dep't of Just., *Title IX Legal Manual*, *Title IX Cover Addendum post-Bostock* (Sept. 14, 2023), https://www.justice.gov/crt/title-ix#Bostock [https://perma.cc/3LW6-RFDH] (referencing *Bostock v. Clayton County*, 590 U.S. 644 (2020)).

[12] *FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams*, *supra* note 9. The proposed regulations sought to prohibit categorical bans on transgender students' participation on school-sponsored athletic teams but allow schools to limit their participation under various loosely specified circumstances. Restrictions on transgender students' participation on a team would have to: "(i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." *Id.* The rules could vary depending "on the sport, level of competition, and grade or education level to which they apply." H.R. 734, 118th Cong. (2023).

[13] *Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule,* U.S. DEP'T. OF EDUC. (Aug. 25, 2024), https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf [https://perma.cc/5WX5-EALS]. To limit political fallout, the Biden

statement that "policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity" may not "impose more than de minimis harm on that student on the basis of sex." [14] The new regulations took effect on August 1, 2024, but only in twenty-four states.[15] Legal challenges blocked their implementation in the remaining twenty-six.[16]

The start of 2025 brought a flurry of activity. In deciding one of the lawsuits challenging the new Title IX regulations, a federal district court judge in Kentucky ruled in early January that the U.S. Department of Education lacked constitutional authority to expand the definition of sex discrimination to include discrimination based on sexual identity.[17] The court also held that its ruling has nationwide effect. Just a few days later, the U.S. House of Representatives went a step further and voted to amend Title IX to expressly bar transgender girls and young women of all ages from competing on female school athletic teams.[18] Senate Democrats filibustered, and because supporters of the bill could not muster the sixty votes needed to overcome the filibuster, the legislation failed to pass.[19] Rather than await the outcome of the Senate vote, President Trump in early February issued an executive order that reinterpreted Title IX as prohibiting transgender girls and young women from competing on female school sports teams. Schools that fail to comply would lose all federal funding.[20]

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administration decided to postpone issuing specific implementation rules until after the November election. Laura Meckler, *Biden Title IX rules for trans athletes set for election-year delay*, WASH. POST (Mar. 28, 2024), https://www.washingtonpost.com/education/2024/03/28/title-ix-trans-athletes-biden/ [https://perma.cc/EA6U-9YVA].

[14] *Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule*, *supra* note 13.

[15] Laura Meckler, *Biden rules protecting trans students take effect—but not everywhere*, WASH. POST (Aug. 1, 2024, 1:18 PM), https://www.washingtonpost.com/education/2024/08/01/biden-titleix-courts-gender-identity-discrimination/ [https://perma.cc/YM2K-8B6G].

[16] Katherine Knott, *Title IX Legal Challenges Target LGBTQ+ Protections*, INSIDE HIGHER EDUC. (June 26, 2024), https://www.insidehighered.com/news/government/2024/06/26/title-ix-legal-challenges-target-lgbtq-protections?utm_source=Inside+Higher+Ed&utm_campaign=53ace861f7-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fcbc04421-53ace861f7-236665714&mc_cid=53ace861f7&mc_eid=71a9631b10# [https://perma.cc/3PR2-FKAS].

[17] Tennessee v. Cardona, 737 F.Supp.3d 510, 521 (E.D. Ky. 2025).

[18] Laura Meckler & Casey Parks, *House votes to ban transgender students from girls' sports*, WASH. POST (Jan. 14, 2025), https://www.washingtonpost.com/education/2025/01/14/transgender-students-sports-bill-house/ [https://perma.cc/7LFL-HQS5].

[19] Laura Meckler, *Senate blocks ban on transgender athletes, as Trump pushes forward,* WASH. POST (Mar. 3, 2025), https://www.washingtonpost.com/education/2025/03/03/senate-vote-transgender-athletes-womens-sports/ [https://perma.cc/HGX9-QSPS].

[20] Hannah Natanson & Laura Meckler, *Trump's new ban on athletes is latest attack on transgender policies*, WASH. POST (Feb. 5, 2025), https://www.washingtonpost.com/education/2025/02/05/transgender-students-trump-executive-order/ [https://perma.cc/L7G2-KNJK].

The NCAA immediately abandoned its long-time policy of allowing governing boards for each sport to set their own rules about transgender participation and announced that effective immediately, competition on women's teams would be restricted to those assigned female at birth.[21] State athletic associations in California, Minnesota, and Maine—states with anti-discrimination laws prohibiting discrimination based on gender identity[22]—made public their intention to ignore the president's executive order,[23] and supporters of trans inclusion in female sports wasted no time in filing legal challenges to its constitutionality.[24]

In this Article, I push back against the groundswell of opposition to including transgender girls and young women on female school sports teams. I argue that, with a few possible exceptions, trans females should be allowed to compete on female school teams and that any obstacles that now or in the future bar them from doing so should be removed. My intended audience is those at the federal, state, and local levels with the authority to make laws and policies about student participation in school sports[25] as well as parents and other

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[21] Glynn A. Hill, *NCAA bans transgender athletes from women's sports after Trump's order,* WASH. POST (Feb. 6, 2025), https://www.washingtonpost.com/sports/2025/02/06/ncaa-bans-transgender-athletes/ [https://perma.cc/K5HF-UAS6]. The National Association of Intercollegiate Athletics (NAIA), which is an association of mainly small colleges and universities, adopted a similarly restrictive approach in August 2024. *Transgender Participation Policy*, NAIA (Aug. 1, 2024), https://www.naia.org/transgender/files/TG_Policy_for_webpage_v2.pdf [https://perma.cc/RY5J-L7S6].

[22] *How Non-Discrimination Protections Vary Across the US?*, FREEDOM FOR ALL AMERICANS, https://freedomforallamericans.org/states/ [https://perma.cc/9Y9V-G2VS].

[23] Jackson Thompson, *California plans to continue allowing trans athletes to compete in girls' sports despite Trump executive order*, FOX NEWS (Feb. 7, 2025), https://www.foxnews.com/sports/california-plans-continue-allowing-trans-athletes-compete-girls-sports-despite-trump-executive-order [https://perma.cc/5RTC-8E3H]; Ben Hovland, *For high school sports, decisions loom: Follow Trump or state law on transgender athletes*, MPR NEWS (Feb. 8, 2025), https://www.mprnews.org/story/2025/02/08/for-high-school-sports-decisions-loom-follow-trump-or-state-law-on-transgender-athletes [https://perma.cc/PG4P-9FCW]; Abby Monteil, *Maine's Governor Stood Up to Trump's Anti-Trans Order. The State Is Now Under Investigation*, THEM (Feb. 24, 2025), https://www.them.us/story/maine-governor-investigation-donald-trump-department-of-education [https://perma.cc/4BUJ-4Y6Q].

[24] Glynn A. Hill, *High schoolers challenge Trump's executive order banning trans athletes*, WASH. POST (Feb. 13, 2025), https://www.washingtonpost.com/sports/2025/02/13/transgender-high-school-athletes-challenge-trump/ [https://perma.cc/XP8G-PS3R]. Courts have struck down some state bans on transgender female participation on school teams under the Equal Protection Clause of the federal constitution. *See, e.g.*, Nate Raymond, *US appeals court blocks Idaho's transgender student athlete ban*, REUTERS (Aug. 17, 2023), https://www.reuters.com/legal/us-appeals-court-blocks-idahos-transgender-student-athlete-ban-2023-08-17/ [https://perma.cc/EXH8-ZBWU].

[25] As discussed above, there is currently controversy over who has the authority to make laws and policies about participation in school sports. If the courts strike down President Trump's executive order withholding federal funding from schools that allow transgender students to compete on sports teams that align with their gender identities, state and local decision-makers will determine participation policies. If courts uphold the executive order, future U.S. Congresses will retain the power to legislate policy change.

members of the general public upon whose votes and support these decision-makers ultimately depend.

Many who argue for trans exclusion from school sports are broadly dismissive of transgender rights.[26] But quite often supporters of transgender rights in other contexts resist allowing trans females to compete on teams that align with their gender identities.[27] A 2023 Gallup poll found that among self-described Democrats who both affirm the morality of gender change and say they support LGBTQ+ rights, only 47% express support for including trans athletes on sports teams that match their gender identities.[28] Among those who generally support transgender rights, opposition to trans inclusion in school sports centers on trans females because of a perception that they, unlike trans males, have genetically based athletic advantages over their cisgender counterparts.

These opponents of including trans females on female teams typically justify their position with one or both of two principal arguments.[29] The first asserts that trans inclusion on female teams is unfair to cisgender female athletes. I will call this the "fairness argument." The second maintains that trans-female inclusion on female teams undermines Title IX's goal of providing female students with athletic opportunities comparable to those of their male counterparts, jeopardizes the safety of cisgender female athletes, and threatens to reverse fifty years of hard-earned progress toward Title IX's still unmet goal of parity in male and female school athletic participation. I will call this the

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[26] Russell Contreras, *The forces behind anti-trans bills across the U.S.*, AXIOS (Mar. 31, 2023), https://www.axios.com/2023/03/31/anti-trans-bills-2023-america [https://perma.cc/76TM-WVTW] On his first day after returning to office, President Trump issued an executive order declaring that there are only two sexes – male and female – and that the federal government will not recognize "the false claim that males can identify as and thus become women and vice versa." Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

[27] *See, e.g.,* Doriane Coleman, Martina Navratilova & Sanya Richards-Ross, *Opinion: Pass the Equality Act, but don't abandon Title IX*, WASH. POST (Apr. 29, 2019, 3:49 PM), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/CT2D-BYHA].

[28] Lauren Camera, *More Americans Say Transgender Athletes Should Only Play for Teams that Match Gender at Birth*, U.S. NEWS & WORLD REPORT (June 13, 2023), https://www.usnews.com/news/national-news/articles/2023-06-13/more-americans-say-transgender-athletes-should-only-play-for-teams-that-match-gender-at-birth [https://perma.cc/XQ3W-T5KC].

[29] Jim Carr, president of the NAIA, offered both these arguments as support for the recently adopted NAIA policies. *See* Jessica Blake, *NAIA Bans Transgender Athletes From Women's Sports*, INSIDE HIGHER EDUCATION (Apr. 10, 2024), https://www.insidehighered.com/news/quick-takes/2024/04/10/naia-bans-transgender-athletes-womens-sports [https://perma.cc/W4JA-BVZW].

"protection of female sports argument."[30] I will argue that these two arguments do not make the case for excluding girls and young women who are transgender from female school sports teams. They typically ignore differences among types of gender transitions, fail to recognize the limitations of current research into the effects of gender transitions on athletic performance, and misunderstand the meaning of fairness in athletic competitions.

I underline at the outset that my discussion in this Article is limited to school athletics. Professional and Olympic sports differ in many ways from school sports. That we have a law—namely Title IX—that details athletic regulations specific to schools is an acknowledgment that school sports differ in important ways from professional and Olympic sports. Exploring the implications of these differences is beyond the scope of this Article. My discussion also focuses on sports widely offered in secondary schools and colleges in the U.S.—for example, basketball, football, soccer, swimming, and track. Because these sports greatly reward strength and speed—attributes more often associated with males than females—they are the ones that critics of trans inclusion typically target. I only briefly discuss sports like gymnastics which are rarely offered in American high schools[31] and that reward some attributes associated with females at least as often as males. Finally, although many of the issues I discuss have implications for transgender male athletes as well as non-binary and intersex athletes, I limit my discussion to transgender female athletes—the group that has generated the most controversy. The principal audience I am seeking to reach in this Article is people who would like to treat transgender individuals justly but who believe that the interests of transgender and cisgender female student-athletes are incompatible.

Part II explains and evaluates the fairness argument. Section II.A examines the available evidence for the claim that transgender females have genetically grounded athletic advantages over cisgender females. Section II.B addresses the question of whether, based on this evidence, it's fair to exclude trans females from female school sports teams. Part III sets out and evaluates the protection of female sports argument. Part IV discusses the case of students who transition socially but undergo no medical intervention—the most difficult context in which to justify transgender inclusion on female teams. Finally, Part V considers the suggestion made by some commentators that the best approach to the issues raised by trans inclusion on female teams is to revamp the system of sex-segregated school sports.

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[30] I include under the broad umbrella of "protection of female sports" the arguments that allowing trans females to compete on female teams is incompatible with cis-females' need for locker room privacy and that it invites cheating by cis males posing as trans females.

[31] Statista Research Department, *Number of participants in high school gymnastics in the United States from 2010/2011 to 2021/2022, by gender*, STATISTA (May 14, 2024), https://www.statista.com/statistics/511355/participation-in-us-high-school-gymnastics/ [https://perma.cc/T8YF-V7W4].

II. THE FAIRNESS ARGUMENT

Here is how the fairness argument is typically explained. Across a wide array of sports, there is a sizable performance gap between cisgender males and cisgender females.[32] The reasons for this performance gap are largely genetic. Compared to cisgender females, cisgender males on average are taller with longer limbs and broader shoulders and have larger hearts and lungs and more red blood cells.[33] When individuals who at birth were designated as male transition to female, their bodies inevitably retain some of the characteristics of their pre-transition sex.[34] This means that in sports that reward speed and strength—which includes nearly all school-sponsored sports—trans females have substantial genetically based athletic advantages over cis females. Allowing trans females to compete on female teams in these sports is therefore unfair to the cis-female athletes on these teams.

Advocates of this fairness argument often point to six-foot-one trans swimmer Lia Thomas, who in spring 2022 became the first transgender athlete to win a Division I NCAA championship. As a male swimmer before her transition, Thomas was ranked number sixty-five in the men's 500-yard freestyle—the event that earned her the title in women's competition.[35] Several weeks before the competition, sixteen of Thomas's thirty-nine teammates on the University of Pennsylvania swim team made this fairness argument for her exclusion in a letter to Ivy League officials.[36] In June 2024, the Court of

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[32] Lydia C. Hallam & Fabiano T. Amorim, *Expanding the Gap: An Updated Look Into Sex Differences in Running Performance,* 12 FRONTIERS IN PHYSIOLOGY 69 (2022); *See also* Doriane Lambelet Coleman, Michael J. Joyner, & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 87–99 (2020) (examining data comparing the athletic performance of elite cisgender males and females).

[33] Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT'L J. ENV'T RES. PUB. HEALTH (2022).

[34] *Id.*

[35] Io Dodds, *Critics Accuse Trans Swimming Star Lia Thomas of Having an Unfair Advantage. The Data Tells a Different Story*, INDEP. (May 31, 2022, 16:27 BST), https://www.independent.co.uk/news/world/americas/lia-thomas-trans-swimmer-ron-desantis-b2091218.html#Echobox=1648093545 [https://perma.cc/WGV9-RUAX].

[36] Mat Bonesteel, *Sixteen Penn swimmers say transgender teammate Lia Thomas should not be allowed to compete*, WASH. POST (Feb. 3, 2022, 4:11 PM), https://www.washingtonpost.com/sports/2022/02/03/lia-thomas-penn-swimming-teammates/ [https://perma.cc/DYD8-QVAL] ("We fully support Lia Thomas in her decision to affirm her gender identity and to transition from a man to a woman. Lia has every right to live her life authentically. However, we also recognize that when it comes to sports competition, that the biology of sex is a separate issue from someone's gender identity. Biologically, Lia holds an unfair advantage over competition in the women's category. . . .").

Arbitration for Sport noted fairness concerns in upholding the decision by World Aquatics to ban Thomas from Olympic competitions.[37]

The fairness argument for excluding girls and young women who are transgender from female school sports teams relies on two premises. The first is that trans females have substantial genetically based athletic advantages over cis females. The second is that these advantages render it unfair to include them on female school sports teams. Section II.A evaluates the first of these premises. Section II.B evaluates the second.

A. How strong is the evidence that transgender females have substantial genetically based athletic advantages over cisgender females?

There are two issues to consider in answering this question: To what extent are the athletic performance gaps between cisgender male and cisgender female athletes the result of sex-linked genetic factors? How much does transitioning from male to female reduce genetically based athletic advantages associated with cisgender males? I'll address these questions in turn.

1. Performance gaps between cisgender male and cisgender female athletes

In the many sports that reward strength and speed, sizable performance gaps between elite cis-male and cis-female athletes clearly exist. For example, in Olympic competitions, the average differences across a variety of events are 10.7% in distance running, 17.5% in jumps, 8.9% in swimming, and 8.7% in sprint cycling.[38] To some extent, these gaps undoubtedly are explained by genetically determined average physiological differences between the sexes. For example, having a long body is a definite advantage in swimming.[39] It's no surprise that Olympic swimmers tend to be tall. A case in point is six-foot Katie Ledecky, who has won nine individual Olympic gold medals.[40] Moreover, height tends to be sex-linked. Globally, men on average are five inches taller

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[37] Sean Ingle, *Transgender swimmer Lia Thomas out of Olympics after losing legal battle*, THE GUARDIAN (June 12, 2024, 12:00 PM), https://www.theguardian.com/sport/article/2024/jun/12/transgender-swimmer-lia-thomas-out-of-olympics-after-losing-legal-battle-swimming [https://perma.cc/2BQX-M6D3]. Although the court's explanation of its decision referenced the fairness concerns, it based its ruling on a determination that Thomas was not eligible to swim in World Aquatics competitions because she was no longer a member of U.S. swimming.

[38] Hallam & Amorim, *supra* note 32.

[39] Roman Trussov, *HERE IS WHY SWIMMERS ARE SO TALL, AND WHAT TO DO IF YOU ARE NOT*, A3 PERFORMANCE (Nov. 16, 2020), https://www.a3performance.com/blogs/a3-performance/swimmers-tall-and-short [https://perma.cc/SS9J-L95C].

[40] *Katie Ledecky*, TEAM USA, https://www.teamusa.com/profiles/katie-ledecky-851377 [https://perma.cc/SVF4-SB8K].

than women: five feet eight inches versus five feet three inches.[41] These differentials are roughly the same for Olympic swimming finalists: in this group, males average six feet two inches and females five feet nine inches.[42]

But tall stature isn't essential for being an elite swimmer. Five-foot eight-inch Tomoru Honda of Japan won the silver medal in the 200-meter butterfly event at the 2021 Summer Olympics.[43] Even more remarkably, Brad Cooper won Olympic gold in the 400-meter freestyle in 1972 despite standing just five foot three.[44] A wide variety of physiological traits in addition to stature influence athletic performance. Some, like height, tend to be linked genetically to sex. One example is an individual's "aerobic capacity," which is the maximum amount of oxygen the body can deliver to its tissues.[45] Another is the strength of an individual's skeletal muscles and the type of fibers—"slow-twitch" or "fast-twitch"—that predominantly compose them. Slow-twitch muscle fibers are important for endurance activities; fast-twitch muscle fibers are important for activities that require bursts of power, such as sprinting.[46] However, other determinants of athletic performance do not appear to be genetically sex-linked. Some are physiological traits, such as the flexibility of an individual's muscles and joints[47] and an individual's coordination, balance, and agility.[48] Others are personality traits. Examples are ambition, determination, discipline, confidence, and resilience.

Social advantage also has a major impact on athletic success. It affects such critical factors as the quality of the training, coaching, and competition individuals can access and the amount of time individuals can devote to improving fitness and honing skills. That performance gaps between cis-male and cis-female athletes are considerably wider for non-elite than for elite athletes[49] is an indication of the role social influences play.

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[41] Melinda Ratini, *Average Male Height*, MEDICINENET (Aug. 23, 2024), https://www.medicinenet.com/height_men/article.htm [https://perma.cc/B3CK-W5BK]; Melinda Ratini, *Average Height for Women*¸ MEDICINENET (Aug. 9, 2024), https://www.medicinenet.com/height_women/article.htm [https://perma.cc/KF73-GYTG].

[42] Trussov, *supra* note 39.

[43] Daniel Takata, *The Shortest Male Swimming Medalist*, SWIMSWAM (Oct. 14, 2021), https://swimswam.com/the-shortest-male-olympic-swimming-medalists/#:~:text=Australian%20Brad%20Cooper%20is%20the,freestyle%20at%20the%201972%20Olympics [https://perma.cc/C4CC-ZZ6W].

[44] *Id.*

[45] MedlinePlus, *Is athletic performance determined by genetics?*, NAT'L LIB. OF MED. (July 8, 2022), https://medlineplus.gov/genetics/understanding/traits/athleticperformance/ [https://perma.cc/M7S4-VQZV]; Hanjabam Barun Sharma & Jyotsna Kailashiya, *Gender Difference in Aerobic Capacity and the Contribution by Body Composition and Haemoglobin Concentration: A Study in Young Indian National Hockey Players*, 10 J. OF CLINICAL AND DIAGNOSTIC RSCH. 12 (2016).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Hallam & Amorim, *supra* note 32, at 2.

Many of the determinants of performance are almost certainly linked to the gendered ways in which children and adults in our society experience athletics. Consider that before puberty, the athletic performances of the very best male and female athletes across a range of individual events in different sports are very comparable.[50] For example, swimming records for the top fifty place girls and boys under age ten are virtually identical.[51] Still, it's very common for young children to participate in athletics on a sex-segregated basis. For example, organized softball is largely a female sport,[52] and girls who play usually begin between the ages of five and seven.[53] Even in the same sport—e.g., soccer—elementary school boys and girls often play on separate teams.[54] And as any observer of grade school sports knows, the level of play on boys' teams is almost always higher than on girls' teams. Male children's typically superior play is partly explained by differences in the ways many families and schools socialize boys and girls. Studies have shown that between the ages of two and eight—an important window for developing fundamental motor skills—girls tend to receive less encouragement than boys to be physically active and are usually afforded fewer opportunities than boys to learn such skills as catching, throwing, and kicking balls.[55]

Another part of the explanation is the role models that children see, both within their own communities and in the culture more generally. In most American school districts, the sport that commands the most interest is football—a sport that embodies societal notions of masculinity and from which girls are almost universally excluded.[56] The professional sports leagues that garner the most attention in the U.S. —i.e., the NFL, the NBA, and MLB—are all male. The entrance of Caitlin Clark and Angel Reese into the WNBA has greatly lifted the profile of the league, but on measures from attendance at games

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[50] David J. Handelsman, *Sex differences in athletic performance emerge coinciding with the onset of male puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017).

[51] In fact, the top five swimming records for girls under the age of ten are three percent faster than for the top five boys. Jonathan W. Senefeld, Andrew J. Clayburn, Sarah E. Baker, Rickey E. Carter, Patrick W. Johnson & Michael J. Joyner, *Sex differences in youth elite swimming*, 14 PLOS ONE (Nov. 22, 2019).

[52] Alexis Peltzer-Harding, *College Softball: A Brief History of one of the NCAA's Female-Only Sports*, GMTM (Sept. 8, 2021), https://gmtm.com/articles/where-it-started-the-history-of-collegiate-softball [https://perma.cc/JTW6-2UE6].

[53] *When Should My Child Start Playing Softball?*, JUSTBATS (Dec. 15, 2023), https://www.justbats.com/blog/post/when-should-my-child-start-playing-softball [https://perma.cc/U7D8-4MV3].

[54] Sheila Mulrooney Eldred, *Why Do Nine-Year-Old Girls and Boys Play Sports on Separate Teams?*, MPLS ST PAUL (July 23, 2019), https://mspmag.com/health-and-fitness/single-sex-sports-teams/ [https://perma.cc/MX5C-H9XG].

[55] ROBIN VEALEY & MELISSA CHASE, BEST PRACTICE FOR YOUTH SPORT (2016), *reprinted in Reasons for Gender Differences in Youth Sport*, HUM. KINETICS, https://us.humankinetics.com/blogs/excerpt/reasons-for-gender-differences-in-youth-sport [https://perma.cc/P27E-AJQA].

[56] In 2022-23, only .35% of high school football players in the U.S. were female. *See* NFHS, *High School Sports Participation Continues Rebound Toward Pre-Pandemic Levels*, NFHS (Sept. 21, 2023), https://www.nfhs.org/articles/high-school-sports-participation-continues-rebound-toward-pre-pandemic-levels [https://perma.cc/9DTZ-9BLM] (finding that out of 1,032,415 participants in eleven-player football, 3,654 were girls and 1,028,761 were boys).

to player salaries to team revenues, the WNBA still lags far behind the NBA.[57] The situation is the same for youth sports. In 2023, viewership for the televised all-girls Little League Softball World Series averaged 340,000,[58] compared to 1,081,000 for the Little League Baseball World Series.[59] When children play sports on single-sex teams in a society that clearly values boys' sports more than girls' sports and where the caliber of play on girls' teams is almost always lower than it is on comparably aged boys' teams, girls' athletic skills tend to lag behind those of boys. Even the best female athletes are less likely to perform up to their potential because they usually aren't challenged as much as they would be on a co-ed team. In this environment, fewer girls than boys develop the ambition, determination, discipline, confidence, and resilience to maximize their talents.[60]

Training and coaching also reflect the historical male dominance in sports. Most training methods were developed for male athletes. Research on best practices in athletic training still typically focuses primarily on males.[61] For example, a recent literature survey found that, despite the interest in girls' and women's soccer, studies of female athletes comprise only about 20% of all the published soccer research.[62] Even the athletic footwear that girls and women wear has traditionally been designed for male feet.[63]

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[57] Christian Jope, *NBA vs WNBA : Revenue, Salaries, Viewership, Attendance and Ratings*, WSN (June 27, 2024), https://www.wsn.com/nba/nba-vs-wnba/ [https://perma.cc/G5J3-GK5K].

[58] Ronce Rajan, *Second Most-Watched Little League Softball World Series Championship Game Ever on ESPN Platforms*, ESPN PRESS ROOM (Aug. 16, 2023), https://espnpressroom.com/us/press-releases/2023/08/second-most-watched-little-league-softball-world-series-championship-game-ever-on-espn-platforms/ [https://perma.cc/P8EF-7RFW].

[59] Andrew Cohen, *Little League World Series Sees Highest Viewership Since 2015*, FRONT OFF. SPORTS (May 29, 2024, 1:33 PM), https://frontofficesports.com/little-league-world-series-sees-highest-viewership-since-2015/#:~:text=The%202023%20Little%20League%20Baseball,year's%20LLWS%20on%20ESPN%20platforms [https://perma.cc/2SZ2-VRRT].

[60] Hallam & Amorim, *supra* note 32, at 2; Allison Torres Burtka, *Girls Play Sports Less Than Boys, Miss Out on Crucial Benefits,* GLOBAL SPORT MATTERS (Oct. 11, 2019), https://globalsportmatters.com/youth/2019/10/11/girls-play-sports-less-than-boys-miss-out-on-crucial-benefits/#:~:text=That%20was%20something%20that%20came,sports%20experiences%2C%E2%80%9D%20she%20said [https://perma.cc/FU6K-J5CB].

[61] Christine Yu, *The Gender Gap*, AM. PHYSIOLOGICAL SOC'Y (July 2021), https://www.physiology.org/publications/news/the-physiologist-magazine/2021/july/the-gender-gap?SSO=Y [https://perma.cc/YS7F-CM6J].

[62] Donald T. Kirkendall & Peter Krustrup, *Studying professional and recreational female footballers: A bibliometric exercise*, 32 SCANDINAVIAN J. MED. & SCI. SPORTS 12, 12 (2022).

[63] Molly Longman, *What If More Women Designed Running Shoes?*, REFINERY29 (Mar. 26, 2020, 6:00 AM), https://www.refinery29.com/en-us/women-vs-men-running-shoe-lasts-feet-difference [https://perma.cc/85CX-594W].

An example of how the paucity of female-centered research has harmed female athletes is long-distance running.[64] Puberty is a critical time in athletic development. Male puberty is associated with a dramatic increase in muscle strength and a decrease in the percentage of body fat.[65] By contrast, female puberty is associated with only a modest increase in muscle strength and an increase in the percentage of body fat.[66] Male running times therefore tend to improve considerably at puberty, whereas female times tend to plateau or even worsen.[67] To reduce the toll that puberty takes on female running times, coaches often encourage girls to reduce their body fat by restricting their calorie intake.[68]

In the short run, this strategy often works. Girls who minimize puberty weight gain or even lose weight often see improvements in their running times.[69] The problem, though, is that caloric restriction to counteract the effects of female puberty is harmful to long-term health. Many female distance runners develop RED-S (Relative Energy Deficiency in Sport).[70] The symptoms include menstrual disturbance (i.e., irregular periods or failure to menstruate entirely), bone density loss, and disordered eating, which is associated with low energy availability. RED-S greatly increases susceptibility to injury and threatens mental well-being. It leads many promising high school and college female runners to abandon the sport.[71] Elite runners who persevere often devote enormous time and energy to injury rehabilitation and frequently miss opportunities to participate in—and perhaps set records in—prestigious competitions.[72] Recent research suggests that left to develop at their natural rates, girls' bodies typically take some time after puberty to find a new

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[64] Lauren Fleshman, *Sports Were Never Designed Around the Female Body*, TIME (Mar. 10, 2023, 7:00 AM), https://time.com/6261404/sports-female-body-inclusivity/ [https://perma.cc/3SWP-SQZN].

[65] Nelson Gord, *Running Against the Clock: Female Athletes Often Slowed by Puberty*, NCSA (June 2, 2023), https://discover.sportsengineplay.com/article/track-field-running-cross-country-running/running-against-clock-female-athletes-often [https://perma.cc/3CGH-ZLZ6].

[66] Kelly A. Brown, Dilip R. Patel, & Daphne Darmawan, *Participation in Sports in Relation to Adolescent Growth and Development*, 6 TRANSLATIONAL PEDIATRICS 150, 152 (2017).

[67] Fleshman, *supra* note 64.

[68] Mary Cain, *I Was the Fastest Girl in America, Until I Joined Nike*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html [https://perma.cc/9P7K-JRG5].

[69] Fresh Air, *The sports world is still built for men. This elite runner wants to change that*, NPR (Jan. 10, 2023, 1:09 PM), https://www.npr.org/transcripts/1147816860 [https://perma.cc/LF3Q-D5RE].

[70] *Relative Energy Deficiency in Sports (REDs)*, BOS. CHILD.'S HOSP., https://www.childrenshospital.org/conditions/red-s [https://perma.cc/UV4K-LSRB].

[71] A similar dynamic around puberty also affects many female swimmers. Rhiannon Myhre & Michael Kid, *Diving Into the Topic of Puberty: Encouraging Conversations between Swimmers, Parents, and Coaches*, SWIMMING WORLD (June 2, 2023, 5:15 AM), https://www.swimmingworldmagazine.com/news/diving-into-the-topic-of-puberty-encouraging-conversations-between-swimmers-parents-and-coaches/ [https://perma.cc/DEQ9-NMMU].

[72] In her recent book, *Good For A Girl: A Woman Running in a Man's World*, Lauren Fleshman, winner of five NCAA championships and two national championships as a professional, describes the heartbreak of missing out on both the 2004 and 2008 Olympics because of injuries related to RED-S. LAUREN FLESHMAN, GOOD FOR A GIRL: A WOMAN RUNNING IN A MAN'S WORLD (2024).

equilibrium, after which girls' running times usually once again begin to improve.[73] Female distance runners on average reach their prime a couple of years later than male runners do.[74] Nevertheless, female athletes and those who coach and train them often feel pressure to conform to a developmental timeline suited to males. Too often, training, injury prevention, and injury recovery protocols continue to be based on studies of males.[75]

I've only discussed a few of the many ways in which our society privileges cis-male over cis-female athletes, but I believe I've said enough to demonstrate that social factors figure prominently in creating and maintaining athletic performance gaps between these groups. Again, I'm not denying that genetic factors play a significant role. My point is rather that documented performance gaps between cis-male and cis-female athletes are certainly not entirely attributable to genetics and we don't know what portion is due to genetics and what portion to social factors.

It's also unlikely that we will know anytime soon. One challenge is that until very recently, a very disproportionate number of research subjects were male, so there's only limited comparative data to draw on.[76] A greater challenge is sorting out and controlling for the large number of relevant variables.[77] A further complication is that environmental factors can cause genetic changes. For example, exercise can activate genes that increase muscle growth.[78] This means that even effects caused by genetic factors are sometimes alterable by social forces.

2. The effect of male-to-female gender transitions on athletic performance

I'll turn now to the second issue pertinent to the claim that transgender females have substantial genetically based athletic advantages over cisgender females: To what extent does transitioning from male to female reduce any genetically based athletic advantages associated with cisgender males? The first step in answering this question is to differentiate among types of gender

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[73] Fleshman, *supra* note 64.

[74] Frank Horwill, *At what age an athlete is likely to achieve peak performance is a big help in planning a training programme*, BRIAN MAC SPORTS COACH (2003), https://www.brianmac.co.uk/articles/scni3a2.htm [https://perma.cc/5M3D-X5JF].

[75] Yu, *supra* note 61.

[76] Kelsey Santisteban, Andrew Lovering, John Halliwill & Christopher Minson, *Sex Difference in VO2max and the Impact on Endurance-Exercise Performance*, 19 INT'L J. ENV'T RES. PUB. HEALTH 1, 2 (2022).

[77] MedlinePlus, *supra* note 4.

[78] *What is an Environmental Factor?*, LEARN.GENETICS, https://learn.genetics.utah.edu/content/genetics/environmental#:~:text=Environmental%20Factors%20Interact%20with%20Genes&text=Environmental%20factors%20often%20influnece%20traits,which%20in%20turn%20affects%20traits [https://perma.cc/UHS9-2D89].

transitions. As reflected in the polls cited earlier of Americans' attitudes toward trans inclusion in sports,[79] popular culture tends to treat gender transitions as a monolith, ignoring important ways in which the process differs among individuals.

Some people transition only socially.[80] This means that they take steps such as adopting a name, using pronouns, and wearing hairstyles and clothing societally associated with their gender identities, but they don't undergo any medical interventions. Social transitions are quite common among trans-identifying students in the age groups eligible to play on school teams.

The reasons for transitioning only socially are varied. For some, social transition is an opportunity to explore gender identity. Supporting social transition is almost always the recommended medical care for prepubescent children who identify as trans.[81] Some people who transition only socially would like to transition medically but face barriers such as a lack of the needed financial resources,[82] unsupportive families,[83] or, increasingly, legal prohibitions on accessing care.[84] Finally, some individuals have no desire to change their bodies.

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[79] *Increasing Understanding of LGBTQ+ Health Equity Issues, supra* note 3; Camera, *supra* note 28.

[80] Orion Rummler & Kate Sosin, *The 19th Explains: Everything you need to know about gender-affirming care*, THE 19TH (June 21, 2023, 6:00 AM), https://19thenews.org/2023/06/everything-to-know-about-gender-affirming-care/?utm_source=google&utm_medium=paidsearch&utm_campaign=19th-marketing&utm_content=traffic&utm_term=genderaffirming&gad_source=1&gclid=EAIaIQobChMI8JSw1ZDjhgMVUUx_AB3rEgEGEAAYAiAAEgL_bPD_BwE [https://perma.cc/QJM8-XYH8].

[81] *Get the Facts on Gender-Affirming Care*, HUM. RIGHTS CAMP, https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care#:~:text=If%20so%2C%20the%20care%20recommended,pronouns%2C%20clothing%2C%20and%20hairstyles [https://perma.cc/H5RJ-DB2W].

[82] *Study Reveals Significant Barriers for TGNC Adults Accessing Healthcare in the U.S.,* JOHN HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH (2024), https://publichealth.jhu.edu/2024/study-reveals-significant-barriers-for-tgnc-adults-accessing-healthcare-in-the-us [https://perma.cc/4D28-NJLY].

[83] Chaya Mangel Pflugeisen, Aytch A. Denaro, & Anna Boomgaarden, *The Impact of Parent Support on Patient Empowerment in Trans and Gender Diverse Youth*, 19 LGBTQ+ FAMILY: AN INTERDISCIPLINARY J. 300 (2023).

[84] HRC Found., *Map: Attacks on Gender Affirming Care by State*, HUM. RIGHTS CAMP., https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/7AJH-Y2YR].

In December 2024, the U.S. Supreme Court heard oral arguments in a case involving a challenge to Tennessee's ban on gender-affirming care for transgender youth. Molly Callahan, *Supreme Court to Hear Case about Bans on Gender-Affirming Care for Transgender Youth*, BU TODAY (Dec. 3, 2024), https://www.bu.edu/articles/2024/supreme-court-gender-affirming-care-case/ [https://perma.cc/ME6X-BCCQ].

The case appears to be proceeding, despite the Justice Department's decision to withdraw its challenge to the ban. John Fritze, *Trump administration withdraws from gender-affirming care dispute at the Supreme Court*, CNN (Feb. 7, 2025), https://www.cnn.com/2025/02/07/politics/supreme-court-lgbtq-skrmetti-switch/index.html [https://perma.cc/9XEG-VVW5].

A federal judge has temporarily blocked a January 2025 executive order by President Trump that withholds federal funding from medical providers who provide gender-affirming care to anyone

Contrary to popular belief, not all individuals who identify as trans have gender dysphoria.[85]

Some adolescents who identify as trans begin taking puberty blockers at the onset of puberty. Puberty blockers suppress the production of the hormones responsible for the development of secondary sex characteristics. By suppressing testosterone production in those transitioning to female, these medications prevent the voice from deepening, slow the growth of facial and body hair, and limit the growth of the penis and testicles.[86] Puberty blockers may be taken for several years, but they can be stopped at any point and puberty will resume.[87] For some who identify as trans, going through puberty in the sex they were assigned at birth can trigger a mental health crisis.[88] These medications give adolescents more time to explore their gender identities[89] and to consider their options.[90]

Some people who identify as trans take gender-affirming hormones to develop secondary sex characteristics that align with their gender identities.[91] Some effects of feminizing hormones are reversible—for example, redistribution of body fat—whereas others are not—for example, breast tissue

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under nineteen. Nate Raymond, *US judge further blocks Trump's order curbing youth gender-affirming care*, REUTERS (Mar. 3, 2025), https://www.reuters.com/en/us-judge-further-blocks-trumps-order-curbing-youth-gender-affirming-care-2025-03-01/ [https://perma.cc/K2FQ-U85J].

[85] GenderGP, *Not All Transgender People Experience Gender Dysphoria*, GENDERGP (July 31, 2024), https://www.gendergp.com/not-all-trans-people-experience-gender-dysphoria/ [https://perma.cc/4ZYF-VVLR].

[86] Mayo Clinic Staff, *Puberty blockers for transgender and gender-diverse youth*, MAYO CLINIC (June 14, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/L67N-NHUQ].

[87] *Id.* Although the use of puberty blockers for children who identify as trans is relatively recent, these medications have been used for decades to treat "precocious puberty," which is puberty that begins before the age of eight in girls and nine in boys. *See Precocious Puberty*, STANFORD MED., https://www.stanfordchildrens.org/en/topic/default?id=precocious-puberty-early-puberty-90-P01973 [https://perma.cc/AZY3-W737].

[88] Allison Parshall, *What Are Puberty Blockers, and How Do They Work?*, SCI. AM. (May 1, 2023), https://www.scientificamerican.com/article/what-are-puberty-blockers-and-how-do-they-work/ [https://perma.cc/F4KS-Q64S].

[89] A recent study that followed 317 trans-identifying children whose median age at the outset of the study was 6.5 years found that five years after transitioning socially 94% still identified as trans, 3.5% identified as nonbinary, and 2.5% identified as the sex they were assigned at birth. Azeen Ghorayshi, *Few Transgender Children Change Their Minds After 5 Years, Study Finds*, N.Y. TIMES, (May 4, 2022), https://www.nytimes.com/2022/05/04/health/transgender-children-identity.html [https://perma.cc/9GN3-8QJA].

[90] Mayo Clinic Staff, *Feminizing hormone therapy*, MAYO CLINIC (July 12, 2024), https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096 [https://perma.cc/Z5BK-HHTQ].

[91] Trans males take testosterone; trans females take both testosterone blockers and estrogen. *See Gender-Affirming Hormones*, TEMPLE HEALTH, https://www.templehealth.org/services/treatments/gender-affirming-hormones [https://perma.cc/3K5T-Q55P].

growth.[92] Young people who proceed directly from taking puberty blockers to taking gender-affirming hormones avoid going through puberty in the sex they were assigned at birth and instead go through it in the sex that matches their gender identities.[93] Those who begin taking gender-affirming hormones after going through puberty in the sex they were assigned at birth essentially go through a second puberty.[94]

Lastly, some older teens and adults undergo one or more types of sex-reassignment surgeries—for example, surgeries to increase or decrease breast size or to transform and reconstruct genitalia.[95] People younger than eighteen very rarely undergo surgical interventions. Because the effects of these surgeries are irreversible and often dramatic, many doctors—including ones who are supportive of gender-affirming hormone treatment for trans youth—are very slow to make them available to people under eighteen, even in states where it is legal to do so.[96]

What we know about the effects of transitioning on trans females' athletic performance varies with the type of transition. There's no published research comparing the athletic performance of trans females before and after social transitions, but the research on cis-male and cis-female performance provides a good basis for drawing inferences. Since there don't appear to be sex-linked genetically based differences in athletic performance prior to puberty, it's highly unlikely that prepubescent trans girls have athletic advantages over prepubescent cis girls.[97] If it were discovered that on average prepubescent trans girls outperform their cis counterparts, the explanation would almost certainly be societal. Individuals who socially transition from male to female after puberty retain any genetically based athletic advantages they previously had. Of course, those who participated in sports as males before socially transitioning probably reaped some athletic benefits from these experiences, so we shouldn't assume that any athletic superiority they might exhibit stems solely from biology.

There has been very little research on the effects of puberty blockers on the athletic performance of transgender girls. However, we can draw inferences about these effects from the research on how puberty ordinarily affects athletic

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[92] Soren Hodshire, How Does HRT Change Your Body During Transition?, HEATHLINE (June 5, 2023), https://www.healthline.com/health/transgender/hrt-effects-on-body#results-of-estrogen-hrt [https://perma.cc/666Y-3CQ9].

[93] Of course, this second puberty does not include menstruation. *See* Mayo Clinic Staff, *supra* note 90.

[94] Maddie Deutsch, *Overview of Feminizing Hormone Therapy*, UCSF TRANSGENDER CARE (July 2020), https://transcare.ucsf.edu/guidelines/feminizing-hormone-therapy [https://perma.cc/C768-T5T8]. Of course, for trans girls, this puberty will not include menstruation.

[95] *Gender Affirmation Surgery*, CLEVELAND CLINIC (Dec. 13, 2023), https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery [https://perma.cc/ZQM3-SHY7].

[96] Aryn Fields, *ICYMI: AP Debunks Extremist Claims About Gender Affirming Care*, HUM. RIGHTS CAMP. (Apr. 25, 2023), https://www.hrc.org/press-releases/icymi-ap-debunks-extremist-claims-about-gender-affirming-care [https://perma.cc/W8CL-M8Q2].

[97] Joshua D. Safer, *Fairness for Transgender People in Sport*, 6 J. ENDOCRINE SOC. 1, 1 (2022).

performance. As noted earlier,[98] in sports that rely on speed and strength, significant differences in the performances of elite cis male and cis female athletes begin to emerge at puberty. Researchers have identified increased testosterone levels as the driver of these changes.[99] Since puberty blockers prevent increases in testosterone in trans girls, it stands to reason that they also prevent testosterone-related changes in their athletic performance.[100] Whether trans girls on puberty blockers tend to have biologically based athletic advantages over similarly aged cis girls who have gone through puberty may depend on the sport. They might have some temporary advantage in long-distance running but their delayed growth spurt would almost certainly be a disadvantage in basketball. There has also been very little research on the athletic performance of transgender girls who proceed directly from puberty blockers to gender-affirming hormone therapy. However, since these girls were never exposed to the high levels of testosterone associated with male puberty, there's no reason to expect that they would have significant athletic advantages over cisgender girls.[101]

Almost all the research on the effects of male-to-female transitions on athletic performance examines the impact of gender-affirming hormones on trans girls and young women who begin hormone therapies after going through male puberty. Recent reviews of the literature on this issue cite studies that have shown that trans individuals who undergo feminizing hormone treatment experience very significant decreases in lean body mass, muscular strength, and blood concentration of red blood cells.[102] These bodily changes correlate with decreased performance on fitness tests. For example, a 2020 study of forty-six members of the U.S. Air Force who began medically transitioning to female while in the Air Force found that taking gender-affirming hormones for two years resulted in substantially slower running times and reduced numbers of sit-ups and push-ups performed per minute. The study also compared the performance data of the trans women to that of the average cis women in the Air

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[98] *See* Handelsman, *supra* note 50, at 68.

[99] *See* David J. Handelsman, Angelica L. Hirschberg & Stephane Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REV. 803, 805 (2018); Senefeld et al., *supra* note 51.

[100] *See* Safer, *supra* note 97. I am not addressing here the prohibited use of puberty blockers by cisgender female ice skaters to forestall the negative effects of female puberty on performance; *See, e.g.,* Sarah McKenna Barry, *The problems with women's Olympic figure skating go much deeper than doping*, HER (Feb. 18, 2022), https://her.ie/sport/problems-womens-olympic-figure-skating-go-much-deeper-doping-548956 [https://perma.cc/G9Z7-5EZN].

[101] *See* Safer, *supra* note 97, at 2.

[102] *See* Ethan Moreland, Ada S. Cheung, Danielle Hiam, Brendan J. Nolan, Shanie Landen, Macsue, Nir Enyon & Patrice Jones, *Implications of Gender-Affirming Endocrine Care for Sports Participation*, 14 THERAPEUTIC ADV. ENDOCRINOLOGY AND METABOLISM 1, 5 (2023); D. J. Oberlin, *Sex differences and athletic performance. Where do trans individuals fit into sports and athletics based on current research?*, 5 FRONTIERS SPORTS AND ACTIVE LIVING (2023) (reviewing recent literature and its limitations).

Force. It found that after two years of hormones, the trans women's push-up and sit-up performance was no different from the cis women's, but the trans women were still 12% faster—down from 21% before the start of hormone therapy.[103] A study funded by the International Olympic Committee published in April 2024 compared the strength, lower-body power, and lung function of twenty-one cis women to twenty-three trans women who had undergone hormone therapy for at least a year. All study participants were either actively engaged in a competitive sport or reported undergoing physical training at least three times a week. The study found that the trans women had higher handgrip strength—a measure of overall muscle strength—but actually performed worse on tests measuring jumping ability and overall cardiovascular fitness.[104]

We need to be cautious, however, about the conclusions we draw from studies like these. There's a great deal that remains unknown about the size of the effects of gender-affirming hormones on the performance of trans-female student-athletes and the length of time needed for the effects to manifest fully.[105] One factor complicating research is that hormone therapy is tailored to the individual. Personal and family medical history and personal treatment goals affect the types and doses of the drugs that are used.[106] Moreover, age and genetics influence the nature and timing of individuals' responses to the drugs. The subjects in the studies described were on average significantly older than student-athletes.[107] We also need to remember that gender-affirming hormones cause a person to go through puberty—a process whose progress varies substantially among individuals.[108] Finally, the before-and-after performance data used in studies is generally not specific to athletes. Both of the studies described drew inferences about athletic performance from data about fitness, speed, and strength.[109] However, these are only a few of the characteristics that determine athletic performance. Those who perform the best on assessments of fitness, speed, and strength don't always win sports competitions.[110]

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[103] Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, *Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organizations and legislators*, 55 BR. J. SPORTS MED. 577, 580 (2020).

[104] Blair Hamilton, Andrew Brown, Stephanie Montagner-Moraes, Cristina Comeras-Chueca, Peter G. Bush, Fergus M. Guppy & Yannis P. Pitsiladis, *Strength, power and aerobic capacity of transgender athletes: a cross-sectional study*, 58 BR. J. SPORTS MED. 586, 586, 596 (2024).

[105] *Id.* at 596. The section labeled "Study Limitations" in the Olympic Committee report underlines the many limitations of this recent study.

[106] Deutsch, *supra* note 94, at 2.

[107] The mean age of the Air Force research study participants referenced above was 26.2. Roberts et al., *supra* note 103, at 577. The mean ages of participants in the Olympic Committee studies were 30 for ciswomen and 34 for transwomen. Hamilton *et al., supra* note 104, at 586.

[108] Deutsch, *supra* note 94, at 2.

[109] Hamilton et al., *supra* note 104, at 587; Roberts et al., *supra* note 103, at 577.

[110] *See* Theresa Gaffney, *Physicians Say Transgender Sports Bans are a Health Issue*, STAT (Sept. 19, 2023), https://www.statnews.com/2023/09/19/transgender-sports-debate-consider-health-of-trans-youth/ [https://perma.cc/657M-5TD8]. As an indication of the uncertain significance of data based on fitness, speed, and strength for performance in sports competitions, consider that the Air Force study found that before taking gender-affirming hormones, trans females' distance running times were 21% faster than those of cis females. *Id.* One might have expected this differential to be

All the studies of the effects of gender-affirming hormones on trans-female athletic performance are based on small numbers of subjects. The primary reason is the paucity of possible research subjects. The athletic participation rates for transgender girls and young women are very low.[111] Of those who do participate, many haven't undergone hormone therapy, and some participate for the first time only after transitioning. Even among those who satisfy all the criteria—i.e., trans female athletes who have undergone hormone therapy after going through male puberty and who participated in sports both before and after their transitions—there are very few whose athletic performance both before and after the transition has been closely monitored and documented. Since male and female teams often play by different rules—e.g., men's basketball uses a bigger ball than women's basketball does—it's often impossible to make meaningful before and after comparisons.

But doesn't it stand to reason that trans females who transition after puberty would retain an athletic advantage over cis females simply by virtue of their larger skeletal structures, which are unaffected by hormone therapies? Once again, we know less than might initially appear. Feminizing hormones reduce muscle mass, and it's unclear how having a larger stature powered by reduced muscle affects athletic performance.[112]

Lastly, even in the few cases of athletes for whom there is performance data before and after undergoing hormone therapy, there are confounding variables that make it difficult to draw reliable conclusions. One such variable is the time gap between the before-and-after data. During required waiting periods while their bodies respond to hormone therapy, trans athletes have time to work on their technique and strategies and to mature both mentally and physically. On average, swimmers reach their peak performance levels during their early- to mid-twenties.[113] In thinking about Lia Thomas's far higher ranking as a female than as a male swimmer, for example, we need to remember that she won her NCAA women's trophy as a twenty-three-year-old college senior and was ranked number sixty-five among men in the same event as a nineteen-year-old freshman. Another variable is psychological well-being. Before transitioning, transgender people often experience depression and anxiety, and many see dramatic reductions in symptoms after beginning gender-

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comparable to the differential between cis-male and cis-female athletes in competitive meets. However, the study discussed earlier comparing the distance running times of cis-male and cis-female elite athletes in actual competitions found the latter differential to be only 10.7%. *See* Hallam & Amorim, *supra* note 32.

[111] *Play to Win, Improving the Lives of LGBTQ Youth in Sports*, HUM. RIGHTS CAMP. 20, https://assets2.hrc.org/files/assets/resources/PlayToWin-FINAL.pdf [https://perma.cc/JRY7-FQJC].

[112] *See* Safer, *supra* note 97, at 3.

[113] Denis-Peter Born, Ina Stacker, Michael Romann & Thomas Stoggl, *Competition age: does it matter for swimmers?*, 15 BMC RSCH. NOTES 1, 1 (2022).

affirming hormones.[114] Improved mindset can to some extent compensate for the negative physiological effects of hormone therapy on strength and speed. Lia Thomas, for one, has recounted the mental health benefits she experienced that were a factor in her post-transition success.[115]

Research on the effects of gender transitions on athletic performance has largely ignored sex-reassignment surgeries. The tiny pool of potential research subjects makes statistically reliable studies virtually impossible. According to estimates, only about 28% of trans females undergo any sort of gender-affirming surgery,[116] and there is great variation in the nature of these surgeries and the ages at which people undergo them.[117] Furthermore, only a small percentage of those who undergo the surgeries are athletes, and an even smaller percentage are athletes for whom there is pre- and post-surgery performance data.

The fairness argument for the exclusion of girls and young women who are trans from school sports teams rests on the premise that transgender females have sizable genetically based athletic advantages over cisgender females. I have argued that there's a great deal we don't know about the truth value of this premise but that what we do know strongly suggests that any such advantages that trans females might have are considerably smaller than advocates for their exclusion claim. Although postpubescent cis males on average have some genetically based advantages in strength and speed over postpubescent cis females, these advantages only partially explain the disparities in athletic performance between these groups. The further question of whether trans females retain any of the genetically based athletic advantages they enjoyed before transitioning requires a nuanced answer. Those who never experienced male puberty almost certainly lack such advantages, whereas those who transition only socially after undergoing male puberty no doubt retain significant advantages. Whether trans females who undergo hormone-affirming therapies after experiencing male puberty retain any pre-transition genetically based athletic advantages is still uncertain, but the evidence strongly suggests that any advantages that might exist are small and diminish over time.

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[114] Ann & Robert H. Lurie Children's Hospital of Chicago, *Gender-Affirming Hormones Improve Mental Health in Transgender and Nonbinary Youth*, NORTHWESTERN UNIV. FEINBERG SCH. MED. (Feb. 2, 2023), https://news.feinberg.northwestern.edu/2023/02/02/gender-affirming-hormones-improve-mental-health-in-transgender-and-nonbinary-youth/#:~:text=They%20found%20that%20overall%2C%20appearance,during%20the%20follow%2Dup%20period [https://perma.cc/PW6G-THCD].

[115] Katherine Fung, *Swimmer Lia Thomas Felt Weaker, Slower in Competition After Transitioning*, NEWSWEEK (May 31, 2022, 4:10 PM), https://www.newsweek.com/swimmer-lia-thomas-felt-weaker-slower-after-transitioning-1711673 [https://perma.cc/PRN4-P48L].

[116] *Transgender Surgery FAQs*, UVA HEALTH, https://uvahealth.com/services/transgender/transgender-surgery-faqs [https://perma.cc/H9HJ-26HF].

[117] Jason D. Wright, Ling Chen, Yukio Suzuki, Koji Matsuo & Dawn L. Hershman, *National Estimates of Gender-Affirming Surgery in the US*, JAMA NETWORK OPEN (Aug. 23, 2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808707 [https://perma.cc/C8KF-WKG5].

Obviously, it would be desirable to have more reliable data about the effects of gender transitions on trans females' athletic performance. However, taking no position pending more investigation is not a viable option. As I've noted, research on the effects of gender transitions on athletic performance poses so many challenges that definitive answers will almost certainly remain elusive for a long time to come. States and athletics associations have been enacting regulations about trans inclusion in school sports, and the federal government has entered the fray. In trying to inject reason into laws and policies, we have no choice but to make decisions based on the most reliable information we currently have.

B. Given what we know about how transitioning from male to female affects athletic performance, is it fair to include trans girls and young women on female school sports teams?

To answer this question, we must address an issue that the societal debate often overlooks: How do our educational institutions typically understand and apply the concept of fairness in athletic competitions? Most obviously, it's considered fair for some participants in school sports to have large genetically based advantages over others. For example, very few female basketball players—no matter how talented, hard-working, and well-coached—can compete with ten-time WNBA all-star Brittney Griner,[118] who at six foot nine holds the all-time NCAA record for blocked shots.[119]

Some athletes who excel have very unusual—even aberrational—body proportions. For example, many standout basketball players have disproportionately long arm spans, which is the distance between the tips of their middle fingers when both arms are stretched horizontally. The typical person's arm span is roughly the same as their height,[120] but perennial NBA all-star Kevin Durant, who was named College Naismith Player of the Year as a freshman, is

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[118] *Atlanta Dream Sign Brittney Griner in Historic Free Agent Acquisition*, WNBA (Feb. 1, 2025, 1:09 PM), https://www.wnba.com/news/atlanta-dream-acquire-brittney-griner [https://perma.cc/9JK3-P563].

[119] *Brittney Griner*, USA BASKETBALL (Aug. 20, 2024), https://www.usab.com/players/brittney-griner [https://perma.cc/YS39-KXX7].

[120] Da Vinci's famous drawing of the Vitruvian man dramatizes this 1:1 ratio. *See* Leonardo da Vinci, *The Vitruvian Man*, LEONARDODIVINCI.NET, https://www.leonardodavinci.net/the-vitruvian-man.jsp [https://perma.cc/DD4E-7XA]. For typical ratios, *see* Calculator Academy Team, APE Index (Wingspan to Height Ratio) Calculator, Calculator Academy, https://calculator.academy/ape-index-wingspan-to-height-ratio-calculator/ [https://perma.cc/9733-3E6T].

six foot ten with an arm span of seven foot five.[121] Swimmer Michael Phelps, the all-time most successful Olympian in any sport with twenty-three gold medals, has several genetically based anomalies. Not only is his arm span three inches longer than his height,[122] but the joints in his ankles have 15% more mobility than average,[123] which gives his kick unusual range. Moreover, his body produces only half the lactic acid of the typical athlete, which enables him to swim for longer periods without feeling tired.[124] Phelps was ineligible to compete in college, but the reason was not his genetic anomalies. It was his endorsement contract with Speedo, which at the time violated NCAA rules.[125]

Handedness is an interesting example of a genetically based advantage in some sports. Baseball is a prime example. Although lefties are only 10% of the population, they are 25% of major league baseball players[126] and pitch 28% of major league innings.[127] One advantage enjoyed by left-handed batters in both school and professional competition is that swinging the bat from the left side of the plate creates momentum in the direction in which they need to run. Another is that they have a shorter distance to run to first base. Left-handed pitchers have an advantage because the small percentage of lefties in the population means that most batters have far less experience hitting left-handed than right-handed pitching.[128]

Genetic factors have an outsized effect on performance in secondary school sports because they greatly influence the variable ages at which children enter and complete puberty. On average, the stages of puberty span four years and begin for girls between the ages of eight and thirteen and for boys between the ages of nine and fourteen.[129] Some adolescents gain a substantial athletic advantage over others because of the timelines on which their bodies mature.

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[121] Asmir Pekmic, *What is Kevin Durant's wingspan? Here are all the details about the Nets superstar's physical attributes*, SPORTSKEEDA (Nov. 8, 2022, 11:44 AM), https://www.sportskeeda.com/basketball/what-kevin-durant-s-wingspan-here-details-nets-superstar-s-physical-attributes#:~:text=Standing%20at%206%2Dfoot%2D10,one%20of%20the%20best%20scorers [https://perma.cc/LL3E-CYP5].

[122] Ishan Daftardar, *Scientific Analysis of Michael Phelps's Body Structure*, SCI. ABC (Jan. 18, 2024), https://www.scienceabc.com/sports/michael-phelps-height-arms-torso-arm-span-feet-swimming.html [https://perma.cc/XV94-U372].

[123] *The Right To Compete*, GENDER JUST., https://www.genderjustice.us/wp-content/uploads/2021/01/Trans-Equity-in-Sports_Fact-Sheet-Jan-2021.pdf [https://perma.cc/H3ZY-BRB2].

[124] *See* Daftardar, *supra* note 122.

[125] Riley Overend, *Michael Phelps to Serve as Honorary Captain For Michigan Football vs. Penn State*, SWIMSWAM (Oct. 10, 2022), https://swimswam.com/michael-phelps-to-serve-as-honorary-captain-for-michigan-football-vs-penn- [https://perma.cc/G4XD-9SUL].

[126] Josh Levitt, *Baseball Analysis: Why Lefties Rule*, BLEACHER REP. (July 2, 2009), https://bleacherreport.com/articles/210701-lefties-rule [https://perma.cc/6SYU-HW6C].

[127] Guy Molyneaux & Phil Birnbaum, *The Southpaw Advantage*, FANGRAPHS (Sept. 8, 2020), https://blogs.fangraphs.com/the-southpaw-advantage/ [https://perma.cc/4ESP-4XHQ].

[128] David Adler, *Why Being a Lefty Matters in Baseball*, MLB (June 1, 2019), https:/www.mlb.com/news/why-left-handed-pitching-matters-in-baseball [https://perma.cc/KG37-R6Z6],

[129] *Puberty*, CLEVELAND CLINIC (Aug. 26, 2024), https://my.clevelandclinic.org/health/articles/22192-puberty [https://perma.cc/X9AL-K8TB].

Some students derive significant athletic advantages from the timing of their births. Across a variety of sports, those born in the first three months of the age cohort in their grade are overrepresented on school teams.[130] The reason is that a year is a substantial amount of time in a child's physical development. Being just a few months older often confers enough of an advantage to increase the chances of being picked for the team. Because teams provide their players with coaching, practice time, and experience in game situations, those who make teams tend to progress as athletes more quickly than those who don't. Small initial differences in skill level tend to become magnified as time goes on. It's therefore hardly surprising that players born in the first quarter of their selection year are disproportionately represented in professional sports.[131]

Birth order also plays a role in athletic achievement. Highly successful athletes are likelier to have older siblings than to be the firstborn in their families or an only child.[132] One explanation is that children lower in their family's birth order tend to develop their athletic skills at earlier ages because they strive to keep up with their older siblings. Another explanation is that they tend to spend time in informal play with their older siblings and benefit from the extra practice as well as from the instruction their siblings sometimes provide.

Lastly, and probably most importantly, wealth is a huge source of advantage to many young athletes. The best performers on secondary school teams often hone their skills on "travel teams," which are selective youth teams that travel substantial distances to find high-level competition.[133] Many of these same players also attend residential summer sports programs—often led by top college and university coaches.[134] Promising athletes from low- and even middle-income families are typically excluded from these opportunities because the costs are prohibitive. High schools in affluent areas frequently augment the advantages many students derive from travel teams and summer programs by allocating large sums to athletic equipment, facilities, and salaries for

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[130] Tim Wigmore, *Why Athletes' Birthdays Affect Who Goes Pro—And Who Becomes A Star*, FIVETHIRTYEIGHT (Feb. 22, 2021, 10:01 AM), https://fivethirtyeight.com/features/why-athletes-birthdays-affect-who-goes-pro-and-who-becomes-a-star/#:~:text=In%20basketball%2C%20baseball%20and%20ice,in%20youth%20and%20professional%20sports [https://perma.cc/SB8J-ADJS].

[131] *Id.*

[132] Tim Wigmore, *Why Are Great Athletes More Likely To Be Younger Siblings?*, FIVETHIRTYEIGHT (Dec. 1, 2020, 5:58 AM), https://fivethirtyeight.com/features/why-are-great-athletes-more-likely-to-be-the-younger-siblings/?cid=_inlinerelated [https://perma.cc/2NPE-AX6P].

[133] Kayla Witman, *Are Club/Travel Teams Ruining High School Sports Teams?*, MEDIUM (Nov. 18, 2022), https://medium.com/@Kwitbook/are-club-travel-teams-ruining-high-school-sports-teams-f6bc00361d73 [https://perma.cc/PHW5-GV45].

[134] *See, e.g., IMG Academy*, https://www.imgacademy.com/ [https://perma.cc/SHD5-35ZN].

experienced trainers and coaches.[135] As a result, far more wealthy schools than poor ones win championships, which enable students to showcase their abilities to college recruiters.[136] Some high school athletes even bypass their school teams in favor of year-round travel teams because of these teams' proven records of helping students receive college athletic scholarships.[137] Due to these various factors, students from affluent families disproportionately fill the rosters of college teams.[138]

The fairness of including trans females on female school teams must be evaluated in the context of the accepted standards of fairness in school athletics. How do the advantages of trans females over cis females in school sports compare to other athletic advantages that are generally considered fair? Some might wonder whether this is the right question. After all, various widely accepted advantages in school sports don't seem very fair, so why should common practice be used as the standard? My answer is that to evaluate the fairness of policies that exclude trans-female students from female sports teams, it is not necessary to formulate a general theory of fairness in athletic competition. The latter would be a daunting project. After all, inequality is endemic to athletic competition. Winners inevitably have physiological, psychological, or other advantages over losers. Not only is it impossible to neutralize all these advantages,[139] but it's unclear what competition would look like if all advantages were eliminated. Regardless of how we ultimately understand the concept of fair competition, however, it seems evident that applying more stringent standards for athletic participation to trans than to cis students would be unfair.

Do male-to-female transitions confer larger athletic advantages than those widely accepted in school sports? It's impossible to answer this question with anything resembling precision, because of the difficulty of measuring the many types of athletic advantages and because the effects of multiple advantages often intersect. For example, someone with more genetically based physical assets may benefit from playing on a travel team more than someone with fewer. Moreover, there has been comparatively little interest in trying to quantify the degree of advantage conferred by factors other than transgender status.

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[135] Alex Putterman, *Uneven playing field: Rich towns dominate CT high school sports amid deep inequalities*, CT INSIDER (Sept. 23, 2022, 10:47 PM), https://www.ctinsider.com/sports/article/ct-high-school-sports-ciac-inequality-17442595.php [https://perma.cc/3EG2-ADX5].

[136] *Id.*

[137] *High school vs. club sports: Understanding the benefits*, NCSA COLLEGE RECRUITING, https://www.ncsasports.org/recruiting/how-to-get-recruited/club-sports [https://perma.cc/DS8J-K8VC].

[138] James Tompsett and Chris Knoester, *The Making of a College Athlete: High School Experiences, Socioeconomic Advantages, and the Likelihood of Playing College Sports*, 39 SOCIO. AND SPORT J. 129, 135–36 (2022).

[139] *See* Dennis L. Weisman, *Transgender Athletes, Fair Competition, and Public Policy*, REGULATION 18, 19–21 (2022) (suggesting that truly fair competition would require compensating for these advantages); *See also* J. Savulescu, B. Foddy & M. Clayton, *Why we should allow performance enhancing drugs in sport*, 38 BRITISH J. SPORTS MED. 666, 666–670 (2004) (controversially suggesting that to level the genetic playing field some athletes should be permitted to take performance-enhancing drugs).

Nevertheless, the available evidence discussed above strongly suggests that for the great majority of male-to-female transitions the answer to this question is no.

During the period before puberty, trans girls have no biologically based athletic advantages over cis girls. Trans girls who take puberty blockers postpone the athletic advantages associated with male puberty. Compared to comparably aged cis girls who have gone through female puberty, they may temporarily be advantaged in running and swimming but are disadvantaged in most other school sports. Once they cease taking puberty blockers, at most a few years after the onset of puberty, they have no lingering advantages. Controversies about the fairness of trans-female inclusion on school teams usually center on students who take gender-affirming hormones after undergoing male puberty. The evidence clearly indicates that after a year or more of hormone therapy, any remaining advantages are very small—far smaller than many others widely accepted as fair in school sports. As noted earlier, there is scant evidence about the effects of adding gender-affirming surgery to gender-affirming hormones, but there's no reason to think that such surgeries make much difference in athletic performance. If anything, they would be likely to reduce further any advantages trans-female athletes might have.

The only gender transitions that arguably confer advantages as great as or greater than those widely accepted in school sports are post-puberty social transitions. Of course, even after puberty, many cis-female athletes outperform their cis-male counterparts, so we can't assume that athletes who socially transition to female after puberty always prevail over their cis-female opponents. Furthermore, there's more variation in athletic performance among cis females than between cis females and cis males.[140] The same no doubt is true of the performance of cis females and trans females who socially transition after puberty. Nevertheless, in sports that reward speed and strength, those at the high end of athletic performance as males who socially transition after going through male puberty would very likely outperform their cis-female counterparts. Moreover, the average trans female who socially transitions after male puberty would probably perform significantly better than the average cis female of the same age. As discussed in Section II.A, these performance gaps are not entirely the result of genetics, but genetics undoubtedly play a substantial role.

Except for those who transition only socially after puberty, the preceding analysis makes a strong argument for the unfairness of excluding trans girls and young women from female school sports teams. Post-puberty social transitions are a special case. Although the degree of athletic advantage experienced by those in this category may support the judgment that they may be fairly excluded, there are some additional factors to consider before reaching

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[140] *Single-Sex Physical Education Classes: The Foundation Position*, WOMEN'S SPORTS FOUND., 3 (July 20, 2011), https://www.womenssportsfoundation.org/advocacy/single-sex-physical-education-classes-foundation-position [https://perma.cc/LKN5-UCDV].

this conclusion. I address those factors in Section IV below after discussing the second principal argument typically made by those opposed to trans-female inclusion: that excluding trans-females is necessary to protect the integrity of female sports.

III. THE PROTECTION OF FEMALE SPORTS ARGUMENT

This argument has several components, all based on the rationale for Title IX's sex-segregated approach to athletic participation. Athletics is included within the purview of Title IX because of its educational value. Sports participation builds confidence and self-esteem, provides leadership opportunities, and teaches teamwork, sportsmanship, self-discipline, and concepts of fairness.[141] It helps students learn to manage stress, develop a sense of their identities, and improve their ability to see things from others' perspectives.[142] Additionally, it prepares students for life in a multicultural society by helping them recognize and overcome the implicit biases and stereotypes that can interfere with the cohesiveness needed for team success.[143]

Recent research suggests that athletic participation has further benefits for girls and young women.[144] Compared to girls who don't play sports, high school girls who play on teams tend to have more positive body images, fewer unintended pregnancies, better grades, and higher graduation rates.[145] The benefits of school sports are especially important for girls and young women of color who often have few other avenues for accessing these benefits.[146]

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[141] EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 228 (2008); *See also* Dr. Steve Amaro, *Participation in High School Athletics Has Long-lasting Benefits*, NFHS (Jan. 22, 2020), https://www.nfhs.org/articles/participation-in-high-school-athletics-has-long-lasting-benefits/ [https://perma.cc/6TF7-VCWU].

[142] *See* Amaro, *supra* note 141; David A. Grenardo, *It's Worth a Shot: Can Sports Combat Racism in the United States?,* 12 HARV. J SPORTS & ENT. L. 237, 280 (2021).

[143] Grenardo, *supra* note 142.

[144] E. J. Staurowsky, M. J. DeSousa, K. E. Miller, D. Sabo, S. Shakib, N. Theberge, P. Veliz, A. Weaver & N. Williams, *HER LIFE DEPENDS ON IT III: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women*, WOMEN'S SPORTS FOUND. (May 2015), https://www.womenssportsfoundation.org/wp-content/uploads/2017/06/hldoi-iii-report-executive-summary.pdf [https://perma.cc/44YC-8H5E].

[145] *Benefits—Why Sports Participation for Girls and Women*, WOMEN'S SPORTS FOUND. (Aug. 30, 2016), https://www.womenssportsfoundation.org/advocacy/benefits-sports-participation-girls-women/#:~:text=Girls%20and%20women%20who%20play,who%20do%20not%20play%20sports [https://perma.cc/QC38-E6HG].

[146] *The Women's Sports Foundation Announces its 2023 Sports 4 Life Grant Recipients—Using the Power of Sport for Girls of Color to Play and Thrive*, WOMEN'S SPORTS FOUND. (Dec. 13, 2023), https://www.womenssportsfoundation.org/press_release/the-womens-sports-foundation-announces-its-2023-sports-4-life-grant-recipients-using-the-power-of-sport-for-girls-of-color-to-play-and-thrive/#:~:text=According%20to%20WSF's%20Communities%20at,of%20participation%2C%20they%20were%20far [https://perma.cc/7R27-BQPA].

Before the passage of Title IX in 1972, almost all school sports teams were limited to males.[147] To make the educational benefits of school athletics equally available to females, Title IX regulations mandate that schools work toward offering athletic participation slots for male and female students in numbers "substantially proportionate" to the numbers of males and females in their student bodies.[148] At the time the regulations were being debated, it was clear that little progress toward this goal would be made any time soon if girls and young women were simply allowed to try out for existing male teams. Responses to a solicitation by the Office of Civil Rights for public input on the proposed regulations indicated considerable support for a single-sex model that provided girls and young women with a protected, sex-segregated space in which to develop and showcase their athletic skills and talents.[149] Some defended this position by arguing that longstanding practices of excluding females from sports participation had depressed both their athletic skill levels and their interest in joining teams.[150] Others attributed the need for a single-sex approach to genetically based differences in athletic capabilities between the sexes.[151]

The Title IX athletic regulations on sex-segregated sports provide that schools may offer different sports to males and females—for example, football for boys and field hockey for girls.[152] In contact sports or whenever team participation is based on skill level, schools that offer the same sport to males and females may require participants to play on teams that align with their sex.[153] The only mandated exception to this sex-segregated approach is that a school that offers only a male team in a non-contact sport must allow females to try out

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[147] Maria Cramer, *How Women's Sports Teams Got Their Start*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/04/28/sports/title-ix-anniversary-womens-sports.html#:~:text=In%20the%20late%2019th%20century,and%20sexuality%20in%20women's%20sports [https://perma.cc/9ES7-CPVS].

[148] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 44 Fed. Reg. 71418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86). These regulations allow schools that fail to meet this goal to avoid sanction under Title IX if they can demonstrate "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of" their female students, or if this is not possible, to demonstrate "that the interests and abilities" of their female students "have been fully and effectively accommodated by the present program."

[149] Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, SSRN, 4, 11 (2020).

[150] *Id.* at 5-6.

[151] *Id.* at 5. This view is still popular among many commentators today. *See*, *e.g.,* Steve Magness, *There's Good Reason for Sports to be Separated by Sex*, THE ATLANTIC (Sept. 29, 2022), https://www.theatlantic.com/culture/archive/2022/09/why-elite-sports-should-remain-separated-by-sex/671594/ [perma.cc/5P2P-YGWL].

[152] 44 Fed. Reg. 71418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

[153] 34 C.F.R. § 106.41(b) (2020).

for it.[154] There is no comparable exception for males who wish to play a sport that their school offers only to females.

The passage of Title IX led to enormous increases in the number of girls and young women on school athletic teams. Over the years, female participation on high school teams has increased by over 1000% and on college teams by over 600%.[155] Despite these successes, however, most schools today still fail to meet Title IX's participation goals. 75% of boys but only 60% of girls currently play high school sports.[156] Similarly, women are 60% of college students, but only 44% of college athletes.[157]

A common argument for excluding trans females from female school teams is that they pose a significant injury risk to cisgender players and so don't belong in the protected female spaces created by Title IX. President Trump articulated this view when he asserted after signing his executive order withholding federal funds from schools that allow trans-female participation, "we will not allow men to beat up, injure and cheat our women and our girls."[158] Similarly, co-captain of the San Jose State women's volleyball team, Brooke Slusser, cited fear for her own and others' safety as a major impetus for a lawsuit she filed in November 2024 protesting the inclusion of a trans student on her team.[159]

Although trans players have occasionally caused injury to cis players,[160] there is no data showing they do so disproportionately. Injuries are endemic to sports. Since those who transition to female after puberty retain their pre-transition bone structure even if they undergo hormone therapy, they're on

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[154] 34 C.F.R. § 106.41(b) (2020). Although this rule doesn't apply to contact sports, some scholars have argued that constitutional equal protection guarantees require that girls be allowed to try out for male teams even in contact sports. *See* Dana Robinson, *A League of Their Own: Do Women Want Segregated Sports?* 9 J. CONTEMP. LEGAL ISSUES 321, 353–355 (1998). Some courts have agreed. *See Beattie v. Line Mountain Sch. Dist.,* 992 F. Supp.2d 384 (M.D. Pa. 2014) (ruling that a seventh-grade girl must be allowed to participate on her school's all-male wrestling team); *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996) (ruling that a girl must be allowed to wrestle on her high school's all-male wrestling team).

[155] *TITLE IX*, BILLIE JEAN KING, https://www.billiejeanking.com/equality/title-ix/ [https://perma.cc/3UWB-2VS6].

[156] *50 Years of Title IX*, WOMEN'S SPORTS FOUND., https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf [https://perma.cc/2NTM-7844].

[157] *Id.*

[158] Will Steakin, Rachel Scott & Julia Reinstein, *Trump signs executive order banning transgender athletes from women's sports, directing DOJ to enforce*, ABC NEWS (Feb. 5, 2025), https://abcnews.go.com/Politics/trump-sign-executive-order-banning-transgender-athletes-womens/story?id=118468478 [https://perma.cc/PG2S-G4VP].

[159] Bailey O'Carroll, *San Jose State volleyball player on why she outed her transgender teammate*, FOX 10 PHOENIX (Nov. 23, 2024), https://www.fox10phoenix.com/news/why-san-jose-state-volleyball-player-outted-her-transgender-teammate [https://perma.cc/5C6L-N85B].

[160] *E.g.* Chris Nesi, *Volleyball player hurt by trans opponent – and honored by Trump – calls out Democrats for 'failing women,'* NEW YORK POST (Mar. 5, 2025, 5:29 PM), https://nypost.com/2025/03/05/us-news/volleyball-star-hurt-by-trans-opponent-say-dems-are-failing-women/ [https://perma.cc/TAK9-FUX5].

average somewhat taller and heavier than cis females.[161] As discussed in section II.A, however, except for those who transition only socially after puberty, any residual strength advantages are at most very small. Moreover, many cis females are physically larger and stronger than many trans females. Variations in size and strength larger than these are typical in school sports. Nowhere is this more evident than in secondary school where players are often still growing, and some participants are several years older than others. If safety issues are serious concerns, there are far more effective ways to address them than excluding all trans girls and young women. One strategy would be to exclude any players—cis or trans—deemed too big, small, strong, or weak to participate safely. Another solution would be to take account of players' sizes and strengths when assigning them to teams.

Another female-protective argument for trans exclusion rooted in Title IX's embrace of sex-segregated sports is that allowing transgender girls and young women to play on female school teams will reverse years of progress toward achieving Title IX's athletic goals. This argument typically goes like this. Since trans females have substantial genetically based athletic advantages over cis females, there's a good chance they will dominate the competition if they're included on female teams. Cis females will therefore have fewer opportunities than they currently do to develop and showcase their athletic abilities. Some cis females will fail to make teams that they otherwise would have made. The best cis-female athletes will have fewer chances than they currently have—and that their cis-male counterparts have—to shine as stars, win trophies, and, as high schoolers, receive athletic scholarships to colleges and universities.[162] A likely result is that some cisgender girls and young women will become discouraged

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[161] Ada S Cheung, Sav Zwickl, Kirsti Miller, Brendan J Nolan, Alex Fang Qi Wong, Patrice Jones & Nir Eynon, *The Impact of Gender-Affirming Hormone Therapy on Physical Performance*, 109 J. CLINICAL ENDOCRINOLOGY & METABOLISM 455, 461 (Feb. 2024).

[162] *See* David French, *The Legal Foundation of Women's Sports is Under Fire*, N.Y. TIMES (June 25, 2023), https://www.nytimes.com/2023/06/25/opinion/womens-sports-under-fire.html [https://perma.cc/L4TR-JA8X]. Former University of Kentucky swimmer Riley Gaines has spoken out repeatedly about this issue: "From my experience competing against Lia Thomas at the national championships, I watched first-hand women lose out on opportunities. I watched women not become All-Americans, missing that eighth and 16th place because they were displaced by a male."; Joseph Kiran, *"Replace that word 'woman'"—Riley Gaines slams Lia Thomas over trans swimmer's 'heartbreaking' comments*, SPORTSKEEDA (Mar. 13, 2024), https://www.sportskeeda.com/swimming/news-replace-word-woman-riley-gaines-slams-lia-thomas-trans-swimmer-s-heartbreaking-comments [https://perma.cc/M3FA-A8HX]. She and more than a dozen athletes made arguments along these lines in the suit they filed against the NCAA in March 2024; Mark Puleo & Tess DeMeyer, *NCAA facing lawsuit regarding transgender competitors' eligibility*, THE ATHLETIC (Mar. 14, 2024), https://www.nytimes.com/athletic/5342387/2024/03/14/ncaa-transgender-lawsuit-lia-thomas/ [https://perma.cc/5H5F-Q3SA].

from joining school teams,[163] which will widen the gap between male and female participation in school sports. Doriane Coleman, Martina Navratilova, and Sanya Richards-Ross (respectively a Duke law professor, an eighteen-time tennis grand slam winner, and a four-time Olympic gold medalist in track) summed up these sorts of concerns in a widely shared opinion piece in the Washington Post: "Sport is an unusual if not unique institution. It is a public space where the relevance of sex is undeniable, and where pretending that it is irrelevant . . . will cause the very harm Title IX was enacted to address."[164]

This argument is unpersuasive for several reasons. Consider first the claim that allowing trans participation will discourage some cis females from participating in school sports. The evidence discussed in Section II.A strongly suggests that, except for those who transition only socially after undergoing male puberty, trans females on average have few if any athletic advantages over their cisgender peers. Furthermore, transgender people are only a tiny minority of the population. A 2022 study conducted by the Williams Institute at the UCLA School of Law found that .5% of adults in the U.S. and 1.4% of youth ages thirteen to seventeen openly identify as transgender.[165] Additionally, transgender students are underrepresented among the ranks of high school and college athletes. A study by the Human Rights Campaign conducted in 2017 before most of the current restrictions on trans participation were put in place, found that only 12% of openly transgender girls competed on high school teams.[166] As noted above,[167] overall female high school participation is roughly 60%. In 2023, only thirty-two openly trans students—male or female—were on college team rosters.[168] Although more trans girls and young women would undoubtedly play school sports if the environment were more welcoming, the small number of trans females in the population and the, at best, slight advantage of trans female athletes other than those who transition only socially after undergoing male puberty make it unlikely that a significant number of cis-female school athletes will ever compete against an athletically dominating transgender player. Given the many benefits of school sports participation discussed above, it's even less likely that an appreciable number will respond to the situation by quitting or avoiding the team.

There is data to support these inferences. A study of sports participation among high school girls found no change between 2011 and 2019 in states with

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[163] *See* Robyn E. Blumner, *Transgender Women in Women's Sports: What's Fair?*, SKEPTICAL INQUIRER (Nov./Dec. 2023), https://skepticalinquirer.org/2023/10/transgender-women-in-womens-sports-whats-fair/ [https://perma.cc/4ZJX-ZRXE].

[164] Coleman, *supra* note 27.

[165] Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neil, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA WILLIAMS INST. (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ [https://perma.cc/Q3AT-KUJ6].

[166] *See Play to Win, Improving the Lives of LGBTQ Youth in Sports*, *supra* note 111.

[167] *See* Magness, *supra* note 151.

[168] Ariana Figueroa, *National ban on transgender athletes in girls' sports passed by U.S. House panel*, NEBRASKA EXAM'R (Mar. 9, 2023), https://nebraskaexaminer.com/2023/03/09/national-ban-on-transgender-athletes-in-girls-sports-passed-by-u-s-house-panel/ [https://perma.cc/Q3AT-KUJ6].

trans-inclusive policies and a decrease in states with trans-exclusive policies.[169] One possible hypothesis for this disparity is that transphobic fearmongering in states with trans-exclusive policies may deter cisgender participation. Another is that both trans and cis students may find it appealing to join teams that have welcoming policies.

If the goal is to increase female school sports participation, there are far more effective strategies than banning trans females from female athletics. The Women's Sports Foundation, a research and advocacy organization founded by tennis legend Billie Jean King, has made numerous recommendations based on their extensive studies of the reasons that fewer girls than boys go out for sports and that girls leave sports at higher rates than boys.[170] Their proposals target social factors discussed in Section II.A that lead girls and boys to experience sports in gendered ways. One recommendation, for example, is to create educational programs to increase parental awareness of the benefits of female athletic participation and motivate parents to support and encourage their daughters' sports activities.[171] Another is to hire more female coaches and athletic administrators and to instruct them on effective strategies for recruiting and retaining girls.[172]

The argument that trans females should be excluded from school teams because including them diminishes top-performing cis females' chances of winning medals and receiving college scholarships may appear more compelling. When fractions of a second sometimes separate competitors, slight advantages can determine outcomes. If trans females on average have even a tiny edge over their cis-gender opponents, they will be more likely to prevail.

Closer consideration, however, reveals weaknesses in this reasoning. As discussed in Section II.A, there's a great deal we still don't know about how transitioning to female affects athletic performance, but the record of trans-female performance in actual competition belies claims that including trans females on female teams poses a serious threat to cis-female opportunities. Very few trans girls or young women have ever reached the upper echelons of their sport, and even when they have, they rarely have overwhelmed their opponents. For example, since 2003 when openly trans athletes were first allowed to participate in the Olympics, only one, weightlifter Laurel Hubbard, has ever

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[169] Shoshana K. Goldberg & Thee Santos, *Fact Sheet: The Importance of Sports Participation for Transgender Youth*, AM. PROGRESS (Mar. 18, 2021), https://www.americanprogress.org/article/fact-sheet-importance-sports-participation-transgender-youth/ [https://perma.cc/YRD3-GJTJ].

[170] N. Zarrett, P. T. Veliz & D. Sabo, *Keeping Girls in the Game: Factors that Influence Sport Participation*, WOMEN'S SPORTS FOUND. (2020), https://www.womenssportsfoundation.org/wp-content/uploads/2020/02/Keeping-Girls-in-the-Game-Executive-Summary-FINAL-web.pdf [https://perma.cc/7GHM-A9QY].

[171] *Id.* at 5, 7.

[172] *Id.* at 5, 7.

actually competed, and she didn't win any medals.[173] Lia Thomas's winning time in the 500-meter freestyle NCAA championship event was only average among winners for the ten preceding years and ten seconds slower than Katie Ledecky's all-time NCAA record.[174] In Oregon where there are no restrictions on trans students' participation on school teams that align with their gender identities, trans runner Aayden Gallagher recently sparked outrage in many circles when she set a state high school record in the 200-meter event. However, she won her race by only .2 of a second[175]—hardly a field-dominating performance. Given the tiny percentages of elite trans female athletes and their performance thus far in top-level competitions, there's little reason to believe that their presence on school teams significantly threatens cis females' abilities to reap the benefits of their talents.

Fear that members of a group will dominate the competition, furthermore, is not normally considered a good reason for excluding them from athletic teams. For example, there has been no effort by the NCAA to restrict the number of female tennis players from abroad, even though more than 60% of those on women's Division I teams are international students.[176] These students reduce cisgender American girls' chances of receiving college tennis scholarships far more than trans students do. The reason that so many people consider trans students but not international students a threat to female school sports is that they regard trans-female inclusion as unfair. If we reject this view, as I've argued we should, the argument that trans students should be barred from competition because they lessen cis athletes' chances of gaining recognition loses a good deal of its force.

Opponents of trans-female inclusion on female school teams sometimes support their position by arguing that the protected female space created by Title IX should be understood to include female locker rooms.[177] The Women's Sports Policy Working Group, an organization of former elite athletes and sports administrators who have been outspoken about their objections to trans-female

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[173] Micah Mitchell, *IN SPORTS AND IN LIFE, TRANS WOMEN DESERVE EQUAL ACCESS*, ACLU OHIO (Mar. 8, 2023, 11:00 AM), https://www.acluohio.org/en/news/sports-and-life-trans-women-deserve-equal-access#:~:text=Two%20trans%20women%20in%20the,or%20take%20home%20any%20medals [https://perma.cc/YRD3-GJTJ].

[174] Richa Goswami, *Lia Thomas Is Fast but Stats Reveals She Won't Even Make It to Top 10 Against Katie Ledecky*, ESSENTIALLYSPORTS (Apr. 6, 2022, 9:15 AM), https://www.essentiallysports.com/us-sports-news-swimming-news-lia-thomas-is-fast-but-stats-reveals-she-wont-even-make-it-to-top-10-against-katie-ledecky/ [perma.cc/KMW5-8BKF].

[175] Karleigh Webb, *Oregon trans teen Aayden Gallagher wins state 200-meter title, also wins a silver medal*, OUTSPORTS (May 19, 2024), https://www.outsports.com/2024/5/19/24094170/oregon-trans-teen-aayden-gallagher-wins-state-200-meter-title-also-wins-a-silver-medal/#:~:text=The%20defending%20state%20champion%20won,second%20barrier%20in%20the%20event [https://perma.cc/ZEF2-7MQY].

[176] *Trends in the Participation of International Student-Athletes in NCAA Divisions I and II*, NCAA, 6 (Oct. 2019), https://ncaaorg.s3.amazonaws.com/research/demographics/2019RES_ISATrendsDivSprt.pdf [https://perma.cc/KMW5-8BKF].

[177] Title IX doesn't expressly require single-sex locker rooms. *See* 20 U.S.C. §§ 1681–88 (2024).

inclusion, maintains that cis-female athletes are entitled to "a separate safe, private place to shower, change clothes and use the toilet" and that the presence of trans-females can make them feel vulnerable.[178] If forced to share a locker room with trans females, they argue, some cis females will opt out of sports participation.[179]

Regardless of one's views on the importance of locker room privacy, these concerns are not a reason to exclude trans females from female teams. Many students aren't comfortable undressing in front of others. The solution is to make individual toilets, showers, and changing areas available to all students who wish to use them. Low-cost privacy screens can often be used to minimize expenses. Those who remain uncomfortable can change clothes and shower at home.

A final female-protective reason sometimes given for excluding trans girls and young women from school teams is that opening female sports to trans females invites cheating by cis males. Former University of Kentucky swimmer Riley Gaines, a plaintiff in a pending lawsuit against the NCAA for allowing Lia Thomas to compete as a female,[180] has described Thomas as "an arrogant cheat" who "stole a national title."[181] Four-time Olympic swimming medalist Nancy Hogshead-Maker has compared Thomas to the East German swimmers she lost to in the 1970s and '80s who used banned anabolic steroids to win trophies.[182] Tennis great Martina Navratilova stated the argument baldly: "A man can decide to be female, take hormones if required by whatever sporting organization is concerned, win everything in sight and perhaps earn a small fortune, and then reverse his decision and go back to making babies if he so desires."[183]

There's no documented evidence of a single case in which this sort of purposeful deception has actually occurred and good reason to believe that future occurrences are very improbable. To compete on a female team as a trans female, one must live that identity publicly. Not only is it extremely challenging

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[178] *Access to Female Athletes' Locker Rooms Should Be Restricted to Female Athletes*, WOMEN'S SPORTS POL'Y WORKING GRP. (Jan. 24, 2025), https://womenssportspolicy.org/access-to-female-athletes-locker-rooms-should-be-restricted-to-female-athletes-january-28-2023/ [https://perma.cc/56QF-S5RS].

[179] *Id.*

[180] *See* Mark Puleo & Tess DeMeyer, *supra* note 162.

[181] Jack Birle, *Riley Gaines says Lia Thomas 'stole a national title',* WASH. EXAM'R (Mar. 27, 2023, 11:55 AM), https://www.washingtonexaminer.com/news/2752393/riley-gaines-says-lia-thomas-stole-a-national-title/#google_vignette [https://perma.cc/HV9P-SCYE].

[182] Guest Editorial, *Sex Matters: Why Transgender Athletes Must Not Compete Against Biological Females*, SWIMMING WORLD (Jan. 25, 2024, 12:39 PM), https://www.swimmingworldmagazine.com/news/sex-matters-why-transgender-athletes-must-not-compete-against-biological-females/ [https://perma.cc/9TAZ-YYND].

[183] Rob Goldberg, *Martina Navratilova: Transgender Athletes in Women's Sport Is Insane, Cheating*, BLEACHER REP. (Feb. 18, 2019), https://bleacherreport.com/articles/2821380-martina-navratilova-transgender-athletes-in-womens-sport-is-insane-cheating [https://perma.cc/Q9T3-QFW9].

psychologically to present to the world a marginalized sexual identity that isn't one's own, but it almost certainly means enduring the intense harassment that trans people—especially trans athletes—typically experience.[184] If team participation is predicated on taking feminizing hormones, one must undergo bodily changes—some irreversible—that would be anathema to virtually any cis male. Unlike anabolic steroids, feminizing hormones diminish rather than enhance an athlete's strength and speed. How many cis boys and young men would subject themselves to these experiences simply to play, or even to excel, on a female school sports team?

IV. THE CASE OF ATHLETES WHO TRANSITION ONLY SOCIALLY AFTER MALE PUBERTY

On several occasions in the preceding sections, I've acknowledged that student-athletes who transition only socially after undergoing male puberty might be a special case. Since genetically based average differences in athletic performance between trans and cis female athletes are larger for this group of trans females than for others, the fairness and protection of female sports arguments appear to hold special sway in this context. In advocating for inclusive policies for trans females on female teams, it's tempting to make an exception for those who have experienced male puberty and transition only socially. However, there are reasons to hesitate before taking this position.

School sports teams offer benefits for trans youth that go beyond those conferred on all students. Trans children and young adults are disproportionately targets of harassment and violence.[185] Compared to cis students, they have higher rates of depression and suicidality[186] and lower levels of physical fitness.[187] Many feel alienated from school and are frequently absent.[188] Studies have shown that trans students who participate in sports have lower rates of depression and higher grades than those who do not.[189] Even trans students who are not athletes benefit from attending schools that allow students to try out for teams that align with their gender identities. Trans students at these schools are less likely than other trans students to be absent because of safety concerns and more likely to feel connected to their school communities.[190]

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[184] *School Climate for Transgender Students*, HUM. RTS. CAMPAIGN, https://assets2.hrc.org/welcoming-schools/documents/WS_School_Climate_for_Transgender_Students_Data.pdf [https://perma.cc/R4T2-DCEL].
[185] *See* Goldberg & Santos, *supra* note 169.
[186] *Id.*
[187] *See* Safer, *supra* note 97.
[188] *See* Goldberg & Santos, *supra* note 169.
[189] *Id.*
[190] Joseph G. Kosciw, Ph.D., Caitlin M. Clark, Ph.D., Nhan L. Truon, Ph.D., Adrian D. Zongrone, M.P.H., *The 2019 National School Climate Survey Executive Summary*, GLSEN, xxv, (2020), https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf [https://perma.cc/KMW5-8BKF].

If trans girls are to reap the benefits of trans-inclusive school athletic policies—benefits that schools should work to provide to all students—it's not tenable for secondary schools to condition sports participation on taking puberty blockers or gender-affirming hormones. One reason is that large numbers of trans secondary school students simply lack access to these treatments. Many live in states that have passed bans on gender-affirming medical care for minors, and the ability of minors to access this care anywhere in the U.S. is currently under siege.[191] Students not legally barred from receiving such care often lack access for other reasons. Gender-affirming medical care is expensive, and many insurance plans don't cover it.[192] Moreover, minors can't receive such care without parental consent, and many parents of trans youth are not on board.

It's also important that secondary schools avoid creating incentives for trans students to take medicines they might have reservations about taking. A wide array of American medical associations endorse the use of puberty blockers and gender-affirming hormones for trans youth who have been evaluated by qualified medical personnel who determine they would benefit from such treatments.[193] However, there is serious debate among some medical scientists about the long-term effects of some of these drugs and the proper criteria for prescribing them.[194] Adolescents and teens should not be forced to choose between taking these medicines and participating in school sports.[195]

In Section V, I advocate expanding coed opportunities in school sports as a means of accommodating some of the competing considerations I discussed

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[191] HRC Found., *supra* note 84.

[192] *See* Tekla Taylor, *The State of Trans Healthcare Laws in 2025*, A4TE (Jan. 13, 2025), https://transequality.org/news/state-trans-healthcare-2025 [https://perma.cc/MU6W-77AS]; for information on Medicaid coverage for gender-affirming care, *see Medicaid Coverage of Transgender-Related Healthcare*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/medicaid [https://perma.cc/N6RA-M4WF].

[193] *Medical Organization Statements*, ADVOCATES FOR TRANS EQUALITY, https://transhealthproject.org/resources/medical-organization-statements/ [perma.cc/E7G2-TC9X].

[194] The Cass Review, a study published in April 2024 critiquing youth gender identity services in England, has generated considerable controversy. Dr. Hilary Cass, *The Cass Review*, NHS ENGLAND, (Apr. 2024), https://cass.independent-review.uk/home/publications/final-report/ [https://perma.cc/68LY-8AZN]; *But see* Meredithe McNamara, Kellan Baker, Kara Connelly, Aron Johanna Olson-Kennedy, Ken C. Pang, Ayden Scheim, Jack Turba & Anne Alstott, *An Evidence-Based Critique of the Cass Review,* https://law.yale.edu/sites/default/files/documents/integrity-project_cass-response.pdf [https://perma.cc/79RH-VEGU] (extensively critiquing the Cass Review).

[195] Some opponents of trans-female inclusion on female teams deny their proposals preclude trans-female participation in school sports. For example, The Women's Sports Policy Working Group advocates accommodations that "can include competing in the men's category or an 'open' category for everyone who is not female." *See Female Sports Are for Female Athletes*, WOMEN'S SPORTS POL'Y WORKING GRP. (May 5, 2024), https://womenssportspolicy.org/the-resolution/ [https://perma.cc/79RH-VEGU]. Given trans teens' struggles for social acceptance, however, it seems evident that few would find this proposal a palatable option.

earlier. As I explain below, however, coed teams cannot be the whole response. As long as schools continue to field female-only teams—which I believe they ought to do—the question of whether to include on these teams trans females who transition only socially after undergoing male puberty will continue to arise.

A reasonable approach may be to allow trans females who transition only socially after male puberty to play on secondary school but not college teams. There are significant differences between these contexts. Although some states have been considering legislation to limit even adult access to gender-affirming hormones,[196] the bans currently in effect apply only to minors—i.e., those under eighteen.[197] Few college students therefore face age-based restrictions. Adults, furthermore, can make their own medical decisions, so parental consent requirements are rarely a legal barrier for college students.[198] Lack of insurance coverage for gender-affirming care is also less of a problem in college than in secondary school because colleges and universities typically offer student health insurance plans. Schools can make sure to offer plans that include coverage for gender-affirming care.[199] Although concerns about coercing athletes to take medicines they are wary of taking are real even in college, older students are more apt than younger students to have the maturity to make reasoned decisions. They're also more likely than younger students to feel confident about their gender identities. Finally, although being eligible to play on a college sports team is a factor in social acceptance at all levels of schooling, it's a much bigger factor in high school than in college. With rare exceptions, college athletes were high school standouts. Most care a great deal about winning trophies and gaining recognition. Some have dreams of a professional career. Only a small percentage of high school athletes have comparable ambitions. Most play for the other benefits discussed earlier. Moreover, student-athletes are a far smaller fraction of college students than high school students. Students who transition only socially have more avenues in college than in secondary school to find community outside of team athletics.

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[196] Kiara Alfonseca, *States move to restrict transgender adult care amid gender-affirming youth care battles*, ABC NEWS (Feb. 14, 2025), https://abcnews.go.com/US/states-move-restrict-transgender-adult-care-amid-gender/story?id=118733720 [https://perma.cc/P5H2-T9GN].

[197] President Trump's executive order withholding federal funding from medical professionals who provide gender-affirming care for children—which is currently being challenged—defines "children" as individuals under the age of 19. Raymond, *supra* note 84.

[198] Since trans-female athletes typically must take gender-affirming hormones for a specified length of time in order to qualify for college competition, barriers to accessing gender-affirming hormones while a minor will prevent some trans-female college students from competing in their first and possibly even second year of college. Although redshirting is not a desirable option for some student-athletes, the implications of requiring trans-female students to undergo hormone treatment before competing still appear to be less problematic in college than in high school.

[199] Ten states currently bar Medicaid coverage for gender-affirming medical care for both minors and adults. *See Equality Maps: Healthcare Laws and Policies: Medicaid*, MOVEMENT ADVANCEMENT PROJECT (Jan. 28, 2025), https://www.lgbtmap.org/equality-maps/medicaid [https://perma.cc/N6RA-M4WF].

V. REVISITING THE SYSTEM OF SEX-SEGREGATED SPORTS

Throughout my discussion thus far, I've taken the continued existence of female-only school sports teams as a given and have posed the question of trans-female inclusion in the ways it's typically posed in societal and legal debates. Some commentators have suggested rethinking the premise that school sports teams should be segregated by sex.[200] After all, sex segregation is a flawed concept. Despite President Trump's executive order proclaiming that there are only two sexes, there is considerable scientific consensus that sex isn't binary. Genetically, anatomically, and hormonally across a variety of species there are many individuals whose sex doesn't fit neatly into the categories of "male" and "female."[201] Furthermore, sex-segregated sports not only presuppose but also reinforce the notion of female athletic inferiority. As long as the sexes are precluded from competing against one another, female inferiority will be a self-fulfilling prophesy. For example, a runner who outstrips her female competition will never know how much faster she might have run in a more competitive coed race.[202] If all sports were played on a coed basis, trans-female inclusion on female teams would be a non-issue.

The obvious problem with simply eliminating single-sex sports, however, is that few girls and young women would currently qualify for coed school teams. Regardless of how much of the male-female athletic performance gap is due to unchangeable biological factors and how much is due to social factors, the performance gaps in sports that reward speed and strength are real.

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[200] *See generally* MCDONAGH & PAPPANO, *supra note* 141 (analyzing the problems of single-sex sports). Other scholars who have critiqued sex-segregated sports are Tracy Turner, *Dismantling the Cage of Binary Sports*, 67 ST. LOUIS U. L.J. (2022) and Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1, 1251 (2018). I have discussed this issue in Rosalind Simson, *The Title IX Athletic Regulations and the Ideal of a Gender-Free Society*, 11 DENVER SPORTS ENT. L. J. 1 (2011).

[201] *See, e.g.*, Christoph Rehmann-Sutter, Olaf Hiort, Ulrike M Krämer, Lisa Malich & Malte Spielmann, *Is sex still binary?*, 35 MED. GENET. 173 (2023); Agustin Fuentes, *Biological Science Rejects the Sex Binary, and That's Good for Humanity*, SAPIENS (May 11, 2022), https://www.sapiens.org/biology/biological-science-rejects-the-sex-binary-and-thats-good-for-humanity/ [perma.cc/8849-HSU6].

[202] Nancy Leong makes this point in *Against Women's Sports*, 95 WASH. U. L. REV. 1251, 1277 (2018). Another example is the different rules for male and female sports. For instance, because female tennis competitions require winning two of three sets while male competitions require winning three of five, girls and women have less incentive than boys and men to maximize their stamina. The assumption that females should play fewer sets because they have less endurance than men is especially troubling in light of women's successes over men in marathon swimming. *See* Ned Denison, *Marathon Swimming: Where Women Have Outperformed the Men*, SWIMMING WORLD (Mar. 8, 2023), https://www.swimmingworldmagazine.com/news/marathon-swimming-where-women-have-outperformed-the-men/#:~:text=Unlike%20competitive%20pool%20swimming%2C%20marathon,head%2Dto%2Dhead%20races [https://perma.cc/ZDQ3-8WVV].

If the sports offered in most U.S. secondary schools and colleges were offered only on a coed basis, teams would be mainly male. Female sports participation and average female athletic skill levels would undoubtedly decrease.

To accommodate competing considerations, The Women's Sports Foundation (WSF) issued a Policy Statement that advocates expanding co-ed opportunities while retaining all-female teams.[203] According to their proposal, all children who have not yet reached puberty—i.e., elementary school children—should play coed sports.[204] Schools should provide all-female teams but not all-male teams for older students. Girls who demonstrate the ability to play on a team previously designated for boys should be allowed to compete there, regardless of whether the school offers an all-girls team in that sport and regardless of whether the sport is a contact sport.[205] When a school offers both all-female and coed teams in the same sport, it should leave it up to any girls who can make the coed team to decide whether a single-sex or a coed team "will most appropriately match their skill level."[206] The WSF takes a more restrictive view of boys playing on all-female teams. It advocates allowing boys to try out for a girls' team in a particular sport only on the rare occasions when a school doesn't offer a coed team in that sport, boys at that school have fewer athletic opportunities than girls, and the boys trying out have strength and skill levels comparable to those of the girls.[207] Like the Title IX athletic regulations, the WSF justifies this asymmetrical model by pointing to the ongoing underrepresentation of girls in school athletics.

Some observers have proposed innovative ways of increasing girls' chances of qualifying for coed teams. One suggestion is to create more competitions that use factors other than sex as the basis for matching competitors. For example, coed wrestling pairs opponents based on weight classes, and some girls have proven to be more than the equal of boys in their weight class.[208] Another proposal is to introduce rule changes to minimize the

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[203] *ISSUES RELATED TO GIRLS AND BOYS COMPETING WITH AND AGAINST EACH OTHER IN SPORTS AND PHYSICAL ACTIVITY SETTINGS*, WOMEN'S SPORTS FOUND., https://www.womenssportsfoundation.org/wp-content/uploads/2019/08/issues-related-to-girls-and-boys-competing-with-and-against-each-other-in-sports-and-physical-activity-settings-the-foundation-position.pdf [perma.cc/B4SS-RLQA]. Others who have made similar recommendations are McDonagh & Pappano, *supra* note 192 at 29 and Karen L. Tokarz, *Separate but Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L. J. 201, 240 (1985). I also advocated this approach in Simson, *supra* note 192 at 28, 42.

[204] WOMEN'S SPORTS FOUND., *supra* note 195.

[205] *Id.* at 2–5. The WSF argues that denying girls the right enjoyed by boys to play on teams suited to their abilities violates the Equal Protection Clause of the federal Constitution.

[206] *Id.* at 4.

[207] *Id.* at 5.

[208] Bill Hutchinson, *No Fluke: Maine girl beats boys to win 2nd straight state wrestling title*, ABC NEWS (Feb. 22, 2024, 1:50 PM), https://abcnews.go.com/US/fluke-maine-girl-beats-boys-win-2nd-straight/story?id=107407141 [perma.cc/33TB-6WFZ]. Seemingly perversely, the upshot of girls having success wrestling against boys has been the creation of more all-female wrestling teams; *See* Clay Masters, *Wrestle Like A Girl: How Colleges Are Pushing The NCAA To Recognize Women's Wrestling*, NPR (Mar. 31, 2018), https://www.npr.org/2018/03/31/596545662/wrestle-like-a-girl-how-colleges-are-pushing-the-ncaa-to-recognize-womens-wrestle [perma.cc/7UZN-ML8B].

significance of differences in physical size. An example in basketball might be to award only one point rather than two for baskets scored within five feet of the basket to neutralize the advantages of being tall enough to dunk the ball.[209] Another option is for schools to diversify their sports offerings to include sports like fencing and gymnastics that reward agility, balance, coordination, and other traits more evenly shared among the sexes.[210]

Expanding coed sports options would benefit all girls and young women. Those interested in playing a sport currently offered only to males at their school—wrestling or football, for example—could try out for the team. And in sports that their school currently offers on a single-sex basis to both males and females, athletically talented females who could make coed teams could have access to the typically greater opportunities there.[211] At those high schools where the level of competition and quality of coaching is far better on the coed than the girls' team, some girls might opt for the coed team in hopes of improving their skills enough to qualify for college scholarships.

If significant numbers of cisgender females qualified for and decided to play on coed school teams, transgender females could try out for these teams without feeling ostracized. This would be an especially welcome alternative for students who transition only socially after undergoing male puberty.

It's important to recognize, however, that the WSF's proposals would only partially defuse debate about trans-female participation on female school teams. As long as all-female teams are retained, the question of whether trans-females should be eligible for them remains. The WSF suggests that schools that offer both a coed team and an all-female team in a particular sport leave it up to the female athletes rather than their coaches to decide which team best matches their skill levels.[212] Girls or young women who could make their school's coed team would thus be free to decide they would be better served on the female team because, for example, they would be more apt to shine there. If cisgender females are free to make this decision based on preference rather than athletic ability, should transgender females have the same option? This question raises all the same issues as the original question of whether trans females should be allowed to compete on female school teams. I have argued in this article that the answer in almost all cases is yes.

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[209] I previously made this suggestion in Simson, *supra* note 187 at 39.

[210] *See* Leong, *supra* note 192 at 1271.

[211] I'm assuming that the advantages of male teams discussed in Section II.A would carry over to coed teams.

[212] WOMEN'S SPORT'S FOUND., *supra* note 195. The WSF doesn't offer justification for this view, but I suspect it's based on a desire to expand not restrict female athletic options. Whatever the WSF's justification, I agree with their position, at least for now. There are currently many unknowns about how many girls and young women could qualify for coed teams and what sort of reception those who join those teams would receive there.

VI. CONCLUSION

There is growing opposition among lawmakers, policymakers, and the general public to including transgender girls and young women on female school sports teams. The principal arguments made by opponents of inclusion are that allowing trans-female students to compete on female teams is unfair to cisgender students and threatens the integrity of female school sports. I have argued that both of these arguments are deeply flawed.

Athletics is included within the purview of Title IX because of the many educational benefits it provides to the students who participate. Among these benefits are lessons in shedding biases and rejecting stereotypes. Nelson Mandela eloquently explained the unifying power of athletics: "Sport . . . speaks to youth in a language they understand. Sport can create hope where once there was only despair. It is more powerful than governments in breaking down racial barriers. It laughs in the face of all types of discrimination."[213]

Although Mandela was undoubtedly not thinking about transgender student-athletes when he said these words in 2000, his insights are relevant to the current controversy. The Biden administration was on the right track when it sought to expand the scope of Title IX's coverage to include discrimination based on gender identity. Resistance to this expansion is fueled in part by misinformation. As I discussed in Section II.A, arguments for trans-female exclusion from female sports typically ignore differences among types of gender transitions, overlook relevant evidence, and fail to recognize the limitations of research into the effects of gender transitions on athletic performance. As I discussed in Section II.B, this resistance is also fueled by a failure to think critically about the meaning of fairness in school athletic competitions. The result is that instead of serving as a driving force for inclusivity, as Mandela envisioned, school sports have become a battleground that has increased the marginalization of transgender youth.

Of course, integrating trans females into female athletics is challenging. I have argued in Section V for the need to think creatively about ways to increase opportunities for coed sports. Since female-only teams remain a needed option, however, we should use the issue of trans-female inclusion as an occasion to remind ourselves that sport's ability to help students confront biases and stereotypes is part of the reason that athletics are included within the purview of Title IX.

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[213] *Celebrating the Legacy of Our Patron on Mandela Day*, LAUREUS (Mar. 15, 2022), https://www.laureus.com/news/celebrating-the-legacy-of-a-hero-on-mandela-day [perma.cc/7FZC-T7AB].

SOME THOUGHTS ABOUT THE FUTURE OF ADMINISTRATIVE LAW

By: Richard E. Levy[*]

I. INTRODUCTION

I have been teaching administrative law at the University of Kansas for nearly forty years. This fall (2024), as the semester began, something unprecedented happened. Students approached me of their own free will to ask about what was happening in the field of administrative law.

These students typically referenced *Loper Bright*[1] or *Jarkesy*[2] and followed up with some variation of the question: "Is administrative law dead?" I usually agreed that those decisions were dramatic while emphasizing that they were part of a much broader pattern of decisions limiting agency authority over the last ten years or so. I also reassured students that administrative agencies would continue to play a critical role in the implementation of government programs, even if administrative law was in a period of profound change.

Some students asked me to do a talk on the subject over the lunch hour, and the student division of the Federal Bar Association offered to sponsor it. To my surprise, the session was very well attended even at a busy time of the year (although the free food likely had something to do with it). Nonetheless, I have been teaching long enough to recognize the rare case in which students actually have a keen interest in administrative law. So I asked the Journal of Law and Public Policy if it was interested in publishing the talk in adapted form,[3] and the Journal graciously agreed to publish this Essay.[4]

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[1] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[2] SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that administrative adjudication of securities fraud enforcement actions brought by agency against brokers violated the Seventh Amendment).

[3] Both the talk and the essay draw on some of the work I did in connection with the forthcoming fourth edition of the administrative law textbook I coauthor, Robert L. Glicksman, Richard E. Levy & David E. Adelman, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT (4th ed.) (forthcoming 2025).

[4] Insofar as administrative agencies are an essential tool for implementing public policy through law, it is fitting to publish the essay in a journal focused on the intersection of law and public policy. In view of the essay format, I have written this in a more casual style and will not comprehensively research and document the issues addressed. In many cases, I have followed the easiest course and cited to my own prior work, which has the added benefit of increasing my citation counts.

Of course, the Supreme Court's decisions from last term faded from our attention as the presidential election approached and thoughts about the future now are naturally focused on the new Trump Administration. Nonetheless, insofar as many of the trends shaping administrative law began or gained momentum during the first Trump Administration, the prospect of a second Trump Administration provides a useful context for considering the practical impact of the new administrative law.

Accordingly, in this Essay I will consider the implications of recent Supreme Court decisions for administrative agencies and administrative law. To make a long story short, I think the death of administrative law is greatly exaggerated, but I also think that the new administrative law will look different than the old administrative law in important ways. Under the new administrative law, Presidents will have a greater ability to direct agencies to implement their policy agendas, but those agencies will have less power and authority to carry out that agenda. Nonetheless, many questions remain unanswered and the judicial response to the incoming Trump Administration's use of agencies to implement policy is likely to tell us a great deal about the new administrative law.

II. THE NEW ADMINISTRATIVE LAW

There can be little doubt that we have entered a new era of administrative law. To understand the new administrative law, however, we must begin with an understanding of the old administrative law, which was, by and large, "pro-agency." The old administrative law used a functional approach to separation of powers that accommodated agency discretion and authority and adopted deference principles and other doctrines that limited judicial interference with agency decisions. These elements reflected a broader judicial perspective under which the courts' role was to facilitate the implementation of statutory programs by agencies. After summarizing these features of the old administrative law, I will then explore three contrasting features of the new administrative law: formalistic separation of powers, judicial activism, and regulatory skepticism.

A. The Old Administrative Law

While administrative law has existed since the time of the founding,[5] it remained largely inchoate throughout most of the nineteenth century.[6] Thus,

[5] The first Congress created essential executive offices, including the Departments of State, War, and the Treasury. Indeed, the Supreme Court's famous decision in *Marbury v. Madison*, has been called "the first great administrative law decision." *See* Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004).

[6] One foundational principle established in *Marbury* and other cases is that executive officers are bound by statutes. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 610 (1838) (requiring postmaster to obey act of Congress rather than directive from President Jackson). The Court also

most of what we understand to be administrative law evolved over the course of the twentieth century. Key landmarks of this evolution included the collapse of judicial resistance to federal programs and agencies, the emergence of deference and other doctrines that limited judicial interference with agencies, and judicial support for agency implementation of regulatory and benefit programs.

From the 1890s through the New Deal period (the "*Lochner* era"[7]), the Supreme Court relied on doctrines such as federalism, separation of powers, and substantive due process to invalidate a number of regulatory programs.[8] In 1937, however, Justice Roberts famously switched sides, casting the deciding fifth vote to uphold regulatory programs.[9] In the aftermath of this New Deal switch, the Supreme Court upheld expansive federal regulatory and benefit programs administered by agencies, including independent agencies.[10]

The growth of regulatory and benefit programs necessitated the adoption of a comprehensive federal statute to govern the agencies that implement them: The Administrative Procedure Act (APA).[11] The APA was compromise legislation that resolved a long and difficult political battle between

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addressed other fundamental administrative law questions in early decisions, including the delegation of statutory authority to agencies, the relationship between agencies and courts, and the appointment and removal of officers. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855) (discussing agency adjudication and the judicial power); Wayman v. Southard, 23 U.S. 1 (1825) (acknowledging nondelegation doctrine but upholding delegation of authority to the judicial branch); Brig Aurora v. United States, 11 U.S. 382 (1813) (acknowledging nondelegation doctrine but upholding delegation of authority to the judicial branch); Marbury v. Madison, 5 U.S. 137 (1803) (discussing presidential power to appoint and remove officers); Hayburn's Case, 2 U.S. 409 (1792) (discussing relationship between judicial power and agency adjudication).

[7] The era is commonly identified by reference to the Court's infamous decision in *Lochner v. New York*. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating state statute limiting the maximum number of hours per week for bakery workers as an interference with liberty of contract).

[8] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (relying on separation of powers to invalidate the National Industrial Recovery Act); *see generally* Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 342–45 (1995) (describing the Court's *Lochner* era jurisprudence).

[9] In *NLRB*, Justice Roberts joined a 5-4 majority in upholding the National Labor Relations Act. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Just one year earlier, Justice Roberts was part of a 5-4 majority invalidating the Bituminous Coal Conservation Act. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). This change is sometimes referred to as the "switch in time that saved nine," which references President Roosevelt's infamous "Court Packing Plan."

[10] *See, e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946) (discussing the SEC's power to regulate holding companies); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–226 (1943) (discussing the FCC's power to regulate airwaves); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (discussing the Interstate Commerce Commission's power to approve railroad consolidations).

[11] Pub. L. No. 79-404, 60 Stat. 237 (1946), (codified as amended at 5 U.S.C. §§ 551–559, 701–706, and scattered additional provisions of 5 U.S.C.); *see generally* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (reviewing the statute and discussing the operation of its provisions).

proponents and opponents of administrative agencies.[12] It by recognized and protected the authority of agencies but imposed baseline procedural constraints and facilitated judicial review of agency action. With the adoption of the APA, it became possible to speak of administrative law as a body of generally applicable rules for agencies, even if the application of those rules was colored by the specifics of the statute that creates and empowers an agency (its "organic statute").[13]

These developments, moreover, laid the foundations for the rise of the administrative state, as the second half of the twentieth century saw tremendous growth in the size and scope of government programs and the powers of agencies that administer them.[14] Thus, for example, a wave of new programs and agencies emerged during the 1960s and 1970s. Under President Johnson's "Great Society" initiatives, Congress created, federalized, or expanded a number of benefit programs, such as Medicare and Medicaid, enlarging agencies or creating new ones to implement these programs. This period also saw the birth of modern environmental law, with the creation of the Environmental Protection Agency (EPA) by a presidential Reorganization Plan, in which Congress later vested authority to administer the Clean Air and Clean Water Acts, as well as other environmental laws. Congress also established other programs and agencies during the 1960s and 1970s to protect workers and consumers.

The administrative law that emerged during this period accepted the premise that the delegation of broad authority to agencies was a necessary and desirable feature of modern government. Building on this premise, the courts read agencies' powers broadly so as to facilitate the effective implementation of their statutory mandates. In *National Petroleum Refiners Ass'n v. Federal Trade Commission*,[15] for example, the U.S. Court of Appeals for the D.C. Circuit upheld the Federal Trade Commission's authority to promulgate legally binding rules to define "unfair trade practices" that violated the statute. Ten years later, in the now famous *Chevron* case,[16] the Supreme Court held that courts must defer to an agency's reasonable construction of an ambiguous provision in its organic statute. The administrative law of the period also protected agency processes from judicial interference in other ways.[17]

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[12] *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (discussing history and purposes of the APA).

[13] *See generally* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 566–71 (2011).

[14] *See, e.g.*, Robert L. Glicksman & Richard E. Levy, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 5–6 (3d ed. 2020).

[15] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973). Because the D.C. Circuit handles an especially high volume of administrative law cases, its administrative law decisions are often considered especially influential.

[16] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[17] *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (holding that the statutory provisions for judicial review in the federal courts of appeals after agency action implicitly precluded pre-enforcement suit in district court to challenge agency authority); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (holding that courts may not require agencies to follow rulemaking procedures beyond those required by statute or due process).

Thus, at the close of the twentieth century, administrative law reflected three essential characteristics. First, courts followed a functional approach to separation of powers under which agencies, including independent agencies, could wield broad power and authority, including the authority to promulgate legally binding rules and to decide cases involving important rights and interests. Second, because Congress delegated policy discretion to agencies with expertise, courts should respect agency authority by deferring to their policy judgments and refusing to interfere with agency processes. Finally, these principles rested on the broader premise that the courts' responsibility was to facilitate the successful implementation of regulatory and benefit programs enacted by Congress, subject only to (limited) constitutional constraints.

B. The New Administrative Law

A number of factors combined to erode the foundations of the old administrative law and set the stage for fundamental change. That change is now upon us, as reflected in the emergence of three critical trends in administrative law—separation of powers formalism, judicial activism, and opposition to regulatory programs. While these trends are already well-established, their full implications are still unfolding and there are many unanswered questions for the new administrative law.

1. The Winds of Change

Even before the close of the twentieth century, there was renewed political, academic, and judicial criticism of agencies and the programs they implement. On the political front, the "Reagan revolution" popularized the view that agencies and regulatory programs are ineffective, wasteful, and excessively burdensome. Likewise, support for many benefit programs eroded, as a result of both rising costs and political attacks that characterized recipients as lazy and undeserving. Academically, the law and economics movement and the rise of public choice theory offered a powerful critique of regulation that lent support to political and legal arguments. Critics of the modern administrative state also renewed separation of powers arguments against administrative agencies, challenging their constitutional legitimacy.[18]

The attacks on the administrative state fundamentally altered the political and legal climate for administrative agencies. Deregulation, regulatory reform, and privatization gained popularity, while any effort to strengthen regulation faced new procedural and structural hurdles such as regulatory impact analysis requirements imposed by statute or executive order. At the same time,

[18] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

growing congressional dysfunction encouraged Presidents to implement policies by regulation and ideological polarization led to increasingly aggressive and partisan agency actions following each change in presidential administration.[19]

Meanwhile, a series of presidential appointments moved the Supreme Court in a conservative direction. By the end of the twentieth century, it was clear that we were entering a new era of administrative law. These changes gained momentum as the Supreme Court moved further rightward with the appointment of additional conservative Justices, first by President George W. Bush and then by President Trump, whose three appointments cemented a solid 6-3 conservative majority. One salient feature of this conservative majority is its evident desire to remake administrative law.

2. Separation of Powers Formalism

The core doctrinal development fueling the new administrative law is the Supreme Court's use of separation of powers formalism to sharply constrain agency power.[20] Under this approach, the legislative power—the power to determine the ends and means of public policy through the enactment of laws—is vested exclusively in Congress, which must act by means of bicameralism and presentment. The execution of those laws by agencies must be under the direct control of the President, in whom the Constitution vests the executive power and the duty to take care that the laws are faithfully executed. Finally, the judicial power to "say what the law is" to resolve cases and controversies is exercised exclusively by the Article III courts, whose judges have life tenure and salary protections and who can conduct jury trials as needed.

First, the Court has emphasized that the legislative power belongs to Congress by limiting the delegation of lawmaking authority to agencies. Under the "nondelegation doctrine," although Congress can and must delegate executive power to agencies to implement the law, it may not delegate the legislative power itself. In the old administrative law, the "intelligible principle" test was a loose functionalist approach to the nondelegation doctrine that tolerated the delegation of rulemaking authority under broad standards.[21] Although the Supreme Court has to this point stopped short of invalidating a statute on nondelegation grounds, a number of Justices have openly called for a reinvigoration of the doctrine.[22] The United States Court of Appeals for the Fifth

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[19] *See* Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, 87 J. KAN. B. ASS'N 46 (2018) (comparing the expansive use of presidential power in the Obama Administration and the first Trump Administration).

[20] *See generally* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088 (2022).

[21] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76 (2001) (discussing cases upholding broad delegations of authority and rejecting nondelegation challenge to EPA's authority to set national air quality standards).

[22] *See* Gundy v. United States, 588 U.S. 128, 149–79 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (arguing that statutory provision at issue violated Article I by delegating the legislative power to an official in the executive branch); *see also id.* at 149 (Alito, J., concurring)

Circuit, which in recent years has twice held that statutes violate the nondelegation doctrine,[23] appears to be heeding these calls.

To this point, however, the more significant development in regard to the delegation of policy authority to agencies is the rise of the "major questions doctrine" as a tool to limit the scope of agencies' statutory power.[24] The major questions doctrine is essentially an interpretive "clear statement rule" driven by the nondelegation doctrine: because the delegation of authority to resolve "major" questions of "vast (or deep) economic and political significance" would potentially violate the nondelegation doctrine, courts will not construe a statute as granting such authority unless it does so explicitly. This doctrine has emerged as a potent tool for the invalidation of agency policies because courts can use it to rewrite statutes in ways that limit agency authority.[25]

Second, the Court has invoked a strong version of the unitary executive theory to enhance the President's control over administrative agencies, especially in relation to the removal of officers.[26] Under the old administrative

("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.").

[23] Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (en banc) (holding that the FCC's administration of the Universal Service Fund was an improper delegation of the taxing power); Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), aff'd on other grounds sub nom., SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that the SEC's standardless discretion to choose between enforcement through administrative adjudication and or a proceeding before an Article III court violated the nondelegation doctrine).

[24] *See* Biden v. Nebraska, 600 U.S. 477 (2023) (relying on major questions doctrine to reject student loan forgiveness program); West Virginia v. EPA, 597 U.S. 697 (2022) (relying on major questions doctrine to reject EPA requirements to shift generation of electricity away from fossil fuels); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022) (relying on major questions doctrine to invalidate OSHA regulation mandating that large scale employers require workers to either be vaccinated against COVID or wear a mask and have weekly tests).

[25] In *West Virginia v. EPA*, for example, the Court held that a statute directing EPA to set performance standards based on the best "system" for reducing emissions, 42 U.S.C. § 7411(a)(1), did not authorize EPA to require power companies to base its standards on a shift in how electricity is generated from fossil fuels to renewable sources. *See* 597 U.S. at 735 ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."). This sort of "generation shifting," however, fits easily within the ordinary meaning of the term "system." *See id.* at 759–60 (Kagan, J., dissenting) (discussing dictionary definitions of "system").

[26] *See* Collins v. Yellen, 594 U.S. 220 (2021) (holding that the good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau violated Article II). The Court has also shored up the President's control over executive officers in other ways. *See* United States v. Arthrex, Inc., 594 U.S. 1 (2021) (holding that Administrative Patent Judges (APJs) could not be responsible for final decisions concerning patent validity unless they were principal officers appointed by the President with the consent of the Senate); Lucia v. SEC, 585 U.S. 237 (2018) (holding that SEC ALJs are "Officers of the United States" whose appointment by subordinate officers within the SEC violated the Appointments Clause). In addition, of course, the President's power to control the executive branch was also greatly enhanced by the Court's

law, cases like *Humphrey's Executor v. United States*[27] and *Morrison v. Olson*[28] accepted the use of "good-cause" removal requirements to insulate executive officers from presidential control and foster policy independence and decisions based on agency expertise. *Humphrey's Executor*, in particular, accepted the creation of so-called "independent agencies" that are insulated from presidential control.

More recent decisions, by way of contrast, indicate that the authority to remove officers is a core presidential power subject only to narrow exceptions.[29] First, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[30] the Court invalidated provisions that added a second level of good-cause protection for inferior officers in independent agencies. More recently, the Court invalidated good-cause provisions that limit the removal of a single officer who is the head of an agency in *Seila Law, L.L.C. v. Consumer Financial Protection Bureau*[31] and *Collins v. Yellen*.[32] These cases rely on the majority's historical understanding of executive power and the premise that only at-will removal ensures political accountability for agency officials.[33]

The Court's removal power cases raise a number of complex issues that are still unfolding.[34] As a practical matter, they make it easier to replace some officials, as reflected in President Biden's removal of Andrew Saul from his position as Commissioner of Social Security in July of 2021 notwithstanding a

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recent presidential immunity decision in *Trump v. United States*, which gives the President substantial legal protection even when ordering administrative officials to violate the law. 603 U.S. 593 (2024).

[27] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (upholding good-cause removal restriction for FTC Commissioners).

[28] Morrison v. Olson, 487 U.S. 654 (1988) (upholding good-cause requirement to remove independent counsel).

[29] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 218 (2020) ("These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.") (internal quotation marks and citation omitted).

[30] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (holding that two layers of good-cause removal protections for members of the Public Company Accounting Oversight Board violated Article II).

[31] *Seila Law*, 591 U.S. 197 (holding that the good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau violated Article II).

[32] Collins v. Yellen, 594 U.S. 220 (2021) (holding that good-cause restrictions on the President's authority to remove the Director of the Federal Housing Finance Agency (FHFA) violated Article II).

[33] *Seila Law*, 591 U.S. at 213–15 (advancing historical and accountability rationales for presidential removal power); *see also Free Enter. Fund*, 561 U.S. at 492 (discussing historical basis for removal power); *id.* at 496–97 (advancing political accountability rationale for invalidating two layers of good-cause protection for members of the Public Company Accounting Oversight Board).

[34] *See* Space Expl. Technolo-Gies Corp. v. NLRB, 741 F. Supp. 3d 630 (W.D. Tex. 2024) (concluding that the independence of the NLRB and its ALJs improperly infringes on the President's removal power); Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755 (S.D. Tex. 2024) (applying Free Enterprise Fund to invalidate dual good-cause restrictions on NLRB ALJs).

statutory good-cause removal provision.[35] Meanwhile, lower courts struggle to unpack the full implications of these decisions in three principal areas:

- ***Implied Good-Cause Removal Protections.*** In some cases, the Court has treated statutes providing for an appointment for a term of years as creating an implicit right to continue in office, thus creating implied good-cause removal protections.[36] The courts of appeal have unanimously declined to infer such a restriction on the removal of the General Counsel of the NLRB, emphasizing the Court's recent decisions invoking a strong presidential removal power.[37] This sort of reasoning may mean that the President in fact has power to remove at will the members of some traditional independent agencies, like the SEC and the FCC, whose statutes do not include explicit good-cause protections.[38]
- ***Dual Good-Cause Protections for ALJs.*** Strict application of the rule from *Free Enterprise Fund* would mean that two layers of good-cause protections for Administrative Law Judges (ALJs) are constitutionally invalid. The Court, however, suggested in a footnote that ALJs might be different from the officials at issue in that case.[39] The lower courts

[35] President Biden relied on advice from the Office of Legal Counsel that the provision in question, 42 U.S.C. § 902(a)(3), was unconstitutional. *See* Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot., 2021 WL 2981542 (July 8, 2021). Lower courts have generally agreed with this conclusion, but they have also concluded that the removal provision can be severed and does not affect the validity of SSA benefit decisions absent proof that the denial of benefits was the result of the President's inability to remove the commissioner. *See, e.g.*, Kaufmann v. Kijakazi, 32 F.4th 843 (9th Cir. 2022).

[36] *See* Marbury v. Madison, 5 U.S. 137, 155–57 (1803) (concluding that Marbury had a right to his commission as Justice of the Peace because once his appointment was complete, he served for a term of years and was therefore not removable at will); *see also* Wiener v. United States, 357 U.S. 349 (1958) (reading silent statute to impose for cause restriction on President's power to remove members of war claims tribunal acting in a quasi-judicial capacity because presidential control might violate due process).

[37] *See* Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519 (6th Cir. 2024); United Nat. Foods, Inc. v. NLRB, 66 F.4th 536 (5th Cir. 2023); NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023); Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022). This is also another practical example of President Biden using the expanded removal power. *See supra* note 35 and accompanying text (discussing removal of SSA Commissioner Saul).

[38] *See* 15 U.S.C. § 78d (providing for the appointment of SEC commissioners for staggered 5-year terms but saying nothing about removal before their terms expire); 47 U.S.C. § 154 (providing for appointment of FCC Commissioners for staggered 5-year terms but saying nothing about removal of commissioners before their terms expire). In *Free Enter. Fund*, the Court assumed that SEC Commissioners could be removed only for good cause. *See* 561 U.S. at 487 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphreys Executor* standard…and we decide the case with that understanding.").

[39] *See Free Enter. Fund*, 561 U.S. at 507 n.10 (stating that "our holding also does not address that subset of independent agency employees who serve as administrative law judges"). The Court

are currently divided on whether dual good-cause removal protections for ALJs are constitutionally permissible.[40]

- ***The Constitutionality of Traditional Independent Agencies.*** Although the Court's recent decisions took care to distinguish *Humphrey's Executor*, which upheld good-cause removal protections for traditional multimember independent agencies, the Court's disdain for *Humphrey's Executor* was evident.[41] Indeed, *Humphrey's Executor* is flatly inconsistent with the Court's historical and accountability rationales for an at will presidential removal power.[42] Although some lower courts have gone to great lengths to distinguish *Humphrey's Executor*,[43] it appears that lower courts will nonetheless treat the decision as "good law" until the Supreme Court overrules it.[44]

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offered two rationales for this limitation. First, it observed that "whether administrative law judges are necessarily 'Officers of the United States' is disputed." *Id*. Second, it noted that "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions. *Id.* The first rationale is no longer valid, as the Court itself has held that ALJs are officers of the United States. *See* Lucia v. SEC, 585 U.S. 237 (2018) (holding that SEC ALJs are "Officers of the United States"). Thus, any exception for ALJs must depend on the nature of their adjudicatory functions.

[40] *Compare* Jarkesy v. SEC, 34 F.4th 446, 463–64 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024) (holding that statutory removal restrictions for SEC ALJs were unconstitutional under *Free Enter. Fund* because they involve at least two layers of protection against removal), *with* Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133–34 (9th Cir. 2021) (relying on footnote in *Free Enter. Fund* to reject claim that good-cause removal for ALJs on the Department of Labor's Benefits Review Board was invalid because Merit System Review Board members, who review removals of ALJs for good-cause, are also protected by good-cause removal restrictions).

[41] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 215 (2020) ("Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"); *id*. at 215 n. 2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); id. at 216 (describing *Humphrey's Executor* as "permitt[ing] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power"); *see also Collins v. Yellen*, 594 U.S. 220, 256 (2021) (referring to *Humphrey's Executor* for the only time in the majority opinion and only for the purpose of describing the removal provision at issue in the case).

[42] Indeed, this issue appears to be headed to the Supreme Court, as President Trump has attempted to remove a member of the NLRB in violation of an explicit good-cause removal requirement. *See infra* note 88 (discussing President Trump's exercise of the removal power since taking office).

[43] *See* Space Expl. Technolo-Gies Corp. v. NLRB, 741 F. Supp. 3d 630 (W.D. Tex. 2024) (distinguishing *Humphries Executor* in part on the basis of differences in the language of their removal provisions and ruling that the good-cause removal provision for the NLRB is invalid).

[44] *See* Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 760 (10th Cir. 2024); Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342, 353, 356 (5th Cir. 2024), on denial of rehearing en banc. 98 F.4th 646 (5th Cir. 2024). The Fifth Circuit decision is especially striking for several reasons. First, that circuit has been especially aggressive in applying separation of powers principles in cases like *Consumers' Research* and *Jarkesy*. Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (en banc) (holding that the FCC's administration of the Universal Service Fund was an improper delegation of the taxing power); Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *aff'd on other grounds sub nom.*, SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that the SEC's standardless discretion to choose between enforcement through administrative adjudication

Third, the Court has also begun to reassert the judicial power as a separation of powers constraint on agency authority, although separation of powers formalism in this area is less fully developed than in respect to legislative or executive power.[45] In one of last summer's high-profile administrative law decisions, *SEC v. Jarkesy*,[46] the Court held that administrative adjudication in an SEC enforcement proceeding violated the defendant's Seventh Amendment right to a jury trial. The statutory cause of action was analogous to a common law fraud action that would have been tried to a jury, so the Seventh Amendment applied even though the statutory fraud provision fundamentally altered the applicable legal standards and provided for public enforcement rather than a private fraud claim.[47] These characteristics, moreover, were also insufficient to justify the treatment of these adjudications as public rights claims, because there were no historical analogs for treating the claim as a matter of public right.[48]

This holding casts doubt on many traditional forms of regulatory enforcement if a regulatory adjudication resembles a common law cause of action. Because of the close relationship between the Seventh Amendment and Article III judicial power, moreover, *Jarkesy* may also signal a reinvigoration of Article III as a limit on agency adjudication of private rights—a position that Justice Gorsuch has espoused in some recent decisions.[49] Another sign of the potential reinvigoration of Article III was *Loper Bright*, which relied in part on the judicial power to "say what the law is" to reject deference to agencies' interpretations of the ambiguous statutes they administer.[50]

Although the use of formalistic analysis to limit agency adjudication is not as far along as the Court's use of formalism to restrict agency policy authority and enhance presidential control over agencies, it seems reasonably

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and or a proceeding before an Article III court violated the nondelegation doctrine); *see also* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022) (holding that the CFPB's ability to self-fund violated the Appropriations Clause), *rev'd*, 601 U.S. 416 (2024). Second, the decision reversed a district court decision in which the court had attempted to distinguish *Humphrey's Executor* on the basis that the CPSC exercised executive powers not exercised by the FTC. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568 (E.D. Tex. 2022). Third, eight judges—just one short of a majority of judges in the circuit—would have granted en banc review, endorsing the district court's effort to distinguish the CPSC from the FTC. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F. 4th 646, 650–57 (Oldham, J., joined by seven other judges, dissenting from the denial of rehearing en banc).

[45] *See generally* Glicksman & Levy, *supra* note 20 (exploring the implications of separation of powers formalism for administrative adjudication).

[46] *Jarkesy*, 603 U.S. 109 .

[47] *See id.* at 120–26 (concluding that the Seventh Amendment applied).

[48] *See id.* at 127–40 (concluding that agency enforcement of civil fraud penalties did implicate public rights).

[49] *See* Thryv, Inc. v. Click-To-Call Techs., LP, 590 U.S. 45, 61–82 (2020) (Gorsuch, J., joined by Sotomayor, dissenting); Oil States Energy Servs. v. Greene's Energy Grp., 584 U.S. 325, 346–56 (2018) (Gorsuch, J., joined by Roberts, C.J., dissenting).

[50] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384–87 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984)).

safe to assume that there will be further developments in this area and that the Court will impose additional limits on adjudication by regulatory agencies. The only real question seems to be how far the Court will go.

Taken as a whole, the Court's formalistic separation of powers decisions sharply constrain agency regulatory authority. Agencies cannot make major policy decisions because broad language delegating authority is insufficient to overcome the major questions doctrine, and it seems increasingly likely that an explicit delegation of authority to make major policy decisions would violate the nondelegation doctrine. Agency adjudication is also constrained, as any agency determination of private rights may be invalid or subject to a de novo jury trial in an Article III court. The Court's unitary executive decisions, conversely, enhance the President's control over agencies, casting doubt on the validity of independent agencies, as well as the independence of ALJs and other inferior officers in agencies. Even when agencies do have the authority to act, moreover, the Court's recent decisions also make it much easier for courts to reject or block the agency's discretionary judgments.

3. Judicial Activism

While the full extent of the Supreme Court's separation of powers formalism is still unfolding, the decisions to date have already reshaped the legal context of agency action in profound ways. One common feature of these decisions is that they exhibit an unapologetic judicial activism. This activism is clearest and most direct when the courts invalidate agency actions as unconstitutional or rewrite statutes using the major questions doctrine, but it is also reflected in a lack of deference to the other branches of government and in doctrines that facilitate legal challenges to agency action, thereby expanding the jurisdiction and authority of the courts.

Separation of powers formalism is clearly an activist doctrine, as it allows the courts to substitute their judgement for the decisions of the political branches. Such decisions override the congressional choice to vest discretion in expert agencies, insulate agency officials from political controls, or authorize agencies to adjudicate regulatory enforcement matters.[51] Equally important, the decisions overturn the agency's policy judgments by denying them the authority to act.

The major questions doctrine, for example, is activist because the Court uses it to essentially rewrite statutes for the purpose of denying agencies the power Congress vested in them.[52] In so doing, the Court rejects not only the agency's expert judgment, but also Congress's decision to authorize the agency to make that expert judgment. It is especially ironic that the Supreme Court has justified the major questions doctrine on the theory that it enhances political

[51] *See supra* Part II.B.1 (discussing separation of powers formalism).
[52] *See supra* notes 24–25 (discussing West Virginia v. EPA, 597 U.S. 697 (2022)).

accountability, given that its effect is to transfer power away from Congress and the Executive to the courts, which are the least politically accountable branch.[53]

The Court's refusal to defer to agencies on the construction of ambiguous statutes also transfers power from agencies to the courts.[54] The courts have long recognized that Congress's choice to delegate policy authority to expert agencies implies that judges should defer to the agency's expert policy judgments.[55] The *Chevron* doctrine rested on the premise that when Congress uses vague or open-ended language, the determination of what that language means in practice is a policy judgment rather than an interpretive question.[56] In *Loper Bright v. Raimondo*,[57] however, the Court overruled *Chevron*, concluding that courts should construe statutes de novo and owe no deference to the agency's views, effectively transferring the power to resolve these policy questions from the agencies to the courts. In a similar vein, the Court has also shown a willingness to apply even traditionally deferential standards of review aggressively to block agencies' regulatory actions.[58]

In addition to these aggressive assertions of judicial power, the Court's decisions also enhance the jurisdiction of the courts at the expense of administrative agencies. Most directly, after *Jarkesy*, courts will now conduct many adjudications that would have been conducted by agencies with only deferential judicial review. This means that the judiciary, rather than the expert body chosen by Congress, will determine the meaning and application of regulatory provisions in those cases. Other decisions make it easier to get into court to challenge and potentially block agency action. In *Axon Enterprise, Inc.*

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[53] *See* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U ENV'T. L.J. 379, 379 (2021).

[54] For a thoughtful debate among the Justices concerning the relationship between legislative, executive, and judicial power in relation to the standards of judicial review, *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (upholding FCC's rescission of its fleeting expletive policy under which it did not prosecute broadcasters for inadvertently airing brief flashes of indecent material).

[55] *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943) (stating that if the contention that challenged rules were arbitrary and capricious "means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea").

[56] Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 843–44 (1984) (observing that agency administration of statutory programs "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" and that when "the legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[57] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[58] In *Ohio v. EPA*, for example, the Court overturned an EPA decision rejecting as inadequate state plans to achieve compliance with the federal air quality standards and promulgating a substitute federal plan. 603 U.S. 279, 292–93 (2024). The Court exhibited little to no deference to EPA, concluding that the agency's explanation was insufficient because it did not respond to an attenuated theory that was barely raised in the comments and to which the agency actually did respond. *See id.* at 306–10 (Barrett, J., dissenting).

v. FTC,[59] for example, the Court held that statutory provisions for review of agency action in a federal court of appeals did not implicitly preclude a regulated entity from going directly to district court to challenge the constitutionality of agency action before the agency process has been completed. This doctrine invites private entities that are the targets of regulatory action to file a preemptive lawsuit to block the action.[60]

In a less famous case from last summer, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[61] the Court held that the statute of limitations for challenges to an agency regulation does not begin to run until the party challenging the agency action has been harmed by it. This holding allows parties such as newly formed companies to challenge a regulation adopted many years earlier if they had not previously been subject to it. Such a challenge could rely on newer decisions like *Loper Bright* or the major questions doctrine, both of which make it easier to win such challenges, perhaps even challenges to regulations previously upheld by the courts.[62]

Consider, for example, *Harner v. SSA, Commissioner*,[63] which upheld a Social Security Administration (SSA) regulation rejecting the so-called "treating physician rule." The treating physician rule was a judge-made doctrine under which courts had required the SSA to give special weight to the opinions of a claimant's treating physician and to articulate specific reasons for rejecting a treating physician's opinion. Although the regulation rejected a judicial construction of the agency's statute, the court relied on *Chevron*, reasoning that the treating physician rule was a judicial construction of an ambiguous statute that the agency could reject.[64] After *Loper Bright*, this sort of reasoning is no longer valid because the courts would owe no deference to the agency construction, so the regulation is vulnerable to a legal challenge under current law. *Corner Post* would permit a claimant in the Eleventh Circuit to challenge the regulation notwithstanding *Harner* and even though it was adopted in 2017.[65]

Another phenomenon that has enhanced the power of the courts is the rise of the nationwide injunction, through which a single district court prevents

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[59] Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

[60] *See also* Sackett v. EPA, 566 U.S. 120 (2012) (concluding that EPA compliance order determining that property was subject to the Clean Water Act was final agency action subject to judicial review before any further actions to enforce the compliance order were taken).

[61] Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024).

[62] *Compare* In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025) (relying on *Loper Bright* to hold that the FCC lacked authority to require broadband internet service providers to follow "net neutrality principles") *with* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (applying *Chevron* deference to uphold previous regulation that was substantially similar).

[63] Harner v. Soc. Sec. Admin., Comm'r, 38 F.4th 892 (11th Cir. 2022).

[64] *See id.* at 898; *see generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

[65] *See* 20 C.F.R. § 404.1520c (2017).

the enforcement of agency rules anywhere against any party.[66] The propriety of this remedy is hotly debated, with proponents arguing that it is the natural remedy for an invalid rule,[67] and opponents arguing that it encourages forum shopping and is not authorized by the APA.[68] Whatever the merits of this debate, in practice the availability of this remedy has encouraged parties to file in a friendly district court, such as district courts in California during the last Trump Administration or district courts in Texas during the Biden Administration.[69] To this point, the Supreme Court has not definitively ruled on the issuance of nationwide injunctions, but it has tolerated the practice.[70]

These new administrative law doctrines exhibit judicial activism in both an institutional and a policy sense.[71] Institutionally, the cases expand judicial authority vis-à-vis other institutions of government, transferring decisional authority away from Congress and administrative agencies and giving it to the judiciary. From a policy perspective, the cases reflect a consistent pattern of anti-

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[66] *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1695–98 (2019) (describing the importance of this issue in immigration matters under the Obama and Trump Administrations); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017) (describing the propriety of nationwide injunctions as "one of the most salient issues of our modern legal system").

[67] *See, e.g.*, O.A. v. Trump, 404 F. Supp. 3d 109, 152–53 (D.D.C. 2019) (describing itself as "at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court"); E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 867 (N.D. Cal. 2018); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1090 (2018).

[68] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017) ("Article III gives the federal courts the 'judicial Power,' which is a power to decide cases for parties, not questions for everyone."); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEORGE MASON L. REV. 29, 30–31 (2019) (arguing that the issuance of a nationwide injunction "undermines rule-of-law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, and erodes the Constitution's careful separation of functions among the branches of government").

[69] *See, e.g.*, Texas v. Cardona, 743 F. Supp. 3d 824, 898 (N.D. Tex. 2024) (Texas district court decision enjoining enforcement of Biden Administration Title IX guidance); *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 867 (California district court decision issuing nationwide injunction against Trump Administration immigration policy).

[70] In *United States v. Texas*, the Supreme Court reversed the Texas district court's decision issuing a nationwide injunction against Biden Administration immigration policies. 599 U.S. 670, 686 (2023). Because the majority focused on the plaintiff States' lack of standing, it did not specifically address the propriety of a nationwide injunction. *See id.* at 675–86. Justice Gorsuch, however, wrote a concurring opinion expressing skepticism that the APA authorized courts to issue nationwide injunctions. *See id.* at 694–95 (Gorsuch, J. concurring). Justice Kavanaugh, by way of contrast, expressed his support for nationwide injunctions in a lengthy concurring opinion in *Corner Post*. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 826–43 (2024) (Kavanaugh, J., concurring) (arguing that vacatur is the appropriate remedy when a federal court holds a rule unlawful).

[71] *See generally* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989) (distinguishing between institutional and policy activism).

agency outcomes, suggesting a broader opposition to agencies and the programs they implement. Although institutional and policy activism do not always align, in the new administrative law, the Court's institutional activism is in furtherance of an ideological agenda that is profoundly anti-agency in character.

4. Anti-Agency Outcomes

Separation of powers formalism and the rejection of judicial deference reflect a more fundamental underlying shift in judicial perspectives. The old administrative law was designed to facilitate agency action, based on the premise that agencies serve essential functions by implementing congressionally created regulatory and benefit programs that further the public interest. The new administrative law is designed to limit agency action, based on the premise that unaccountable agencies are likely to abuse their authority in ways that burden important private interests and deny basic liberties and property rights.

The driving force of the Court's separation of powers formalism is the premise that agencies wield too much power and are insufficiently accountable.[72] Accordingly, agencies cannot be trusted to make important policy choices. Some of the cases reflect the assumption that agencies have inherent incentives to expand their own power and authority that only the courts can check.[73] In other contexts, the courts seem to be more concerned that agencies are prone to capture and that their authority can easily be abused for nefarious purposes.[74] This perspective also goes hand in hand with an unspoken opposition to the regulatory and benefit programs they implement.[75]

Separation of powers formalism responds to these concerns by denying power to agencies. Thus, the nondelegation and major questions doctrines limit the authority delegated to agencies in ways that block significant agency policy

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[72] *See generally* Cass R. Sunstein, Administrative Law's Grand Narrative 1 (Oct. 15, 2024) (unpublished manuscript) (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986085#) [https://perma.cc/YD5P-3ML5] (describing Supreme Court's acceptance of a "Grand Narrative" under which the modern administrative state violates separation of powers).

[73] Chief Justice Roberts noted this concern in his dissenting opinion in *City of Arlington v. FCC*, in which he argued that courts should not apply *Chevron* deference to jurisdictional matters. *See* 569 U.S. 290, 327 (2013) (Roberts, C.J, dissenting) (describing Court's "duty to police the boundary between the Legislature and the Executive" and stating that this "concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power"). Chief Justice Roberts' analysis in *City of Arlington* presaged his adoption of the major questions doctrine in *West Virginia v. EPA* and his opinion in *Loper Bright*. *See supra* notes 24–25 (discussing *West Virginia v. EPA*); *supra* notes 1, 50 (discussing *Loper Bright*).

[74] *See, e.g.*, Consumers' Rsch. v. FCC, 109 F.4th 743, 750–52 (5th Cir. 2024) (en banc) (describing Universal Service Fund as bloated and prone to abuse).

[75] The conservative majority is primarily the result of an extended effort by the Federalist Society and others to reshape the judiciary to promote such libertarian conservative values. *See generally* MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2012); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

initiatives on the theory that only Congress can make those choices. The presidential removal power cases rest on the premise that without at-will removal, agencies are insufficiently accountable to elected officials. The Court may also be poised to hold that only Article III courts, with a jury as appropriate, can adjudicate regulatory enforcement matters that are in any way connected to traditional common law rights.

Likewise, the demise of deference to agencies reflects a profound distrust of agencies and agency expertise. To be sure, deferring to agencies on matters of statutory interpretation is hard to square with the responsibility of the judiciary to say what the law is, but it is also clear that many questions of statutory interpretation are, at bottom, policy choices. Traditional tools of statutory interpretation do not provide clear answers to questions that were unanticipated or purposefully left unresolved. This sort of interpretation is therefore a policy judgment that *Loper Bright* removes from the agency and assigns to the courts.

Put simply, in the new administrative law, agency action—especially regulatory action—is inherently suspect. It may be invalid because the agency's structure and authority violates separation of powers. If it is not invalid for that reason, it is likely invalid because the agency lacks statutory authority, has provided an inadequate justification for its action, or has improperly infringed on either state authority or private interests, such as property rights. In addition, the Court has invited regulated entities (and states) with the incentives to challenge agency action to do so, throwing open the courthouse doors and issuing favorable rulings that encourage further challenges to further restrict agency authority.

III. IMPLICATIONS FOR THE TRUMP ADMINISTRATION

As described above, under the new administrative law, agencies will have less power, Presidents will have greater control, and courts will be more willing to override agency action. We can illustrate and explore the implications of these changes by considering their impact on the second Trump Administration. As outlined below, the new administrative law likely means that President Trump will be able to assert greater control over officers in the executive branch, but that those officers will be less able to do his bidding.

A. Presidential Control

One of the hallmarks of the first Trump Administration was his effort to control the executive bureaucracy (the "deep state") so as to ensure that officials would follow his orders. Some of these efforts targeted particular policy

objectives,[76] but the more fundamental goal of many initiatives was simply to assert greater presidential control over all executive officers. There is every indication that President Trump will redouble those efforts during his second term.[77] Some aspects of the new administrative law, particularly the Court's unitary executive cases, will likely facilitate those efforts. On the other hand, the Court's formalist separation of powers analysis might limit President Trump's ability to use some of the tools he relied on during his first term in office.

One strategy President Trump used to assert greater political control over agencies was to remove or limit legal protections for the independence of executive officers. Most prominently, for example, he issued an executive order that created an exception from civil service protections for career positions in the federal service "of a confidential, policy-determining, policy-making, or policy-advocating character."[78] President Biden revoked this order, asserting that it "not only was unnecessary to the conditions of good administration, but also undermined the foundations of the civil service and its merit system principles . . . ."[79]

President Trump also sought to assert greater control over ALJs,[80] issuing an executive order that exempted them from civil service hiring practices[81] and a memorandum from the Solicitor General specifying that the

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[76] The most prominent example of this sort of order is the so-called "2-for-1" order, which required agencies to identify at least two existing regulations for repeal whenever it proposed a new regulation, to offset new costs from a proposed regulation by eliminating existing costs from two prior regulations and imposed an annual cap on the net costs of regulations. Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017). Although the order arguably contravened statutes and exceeded presidential power, challenges to the order failed because plaintiffs were unable to show that the withdrawal, rescission, or delay of a rule was caused by the order or would be remedied by its invalidation. *See, e.g.*, California v. Trump, 613 F. Supp. 3d 231, 236 (D.D.C. 2020); Pub. Citizen, Inc. v. Trump, 435 F. Supp. 3d 144, 147 (D.D.C. 2019). President Biden revoked the order immediately upon taking office. *See* Revocation of Certain Executive Orders Concerning Federal Regulation, Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

[77] *See* Rebecca Jacobs, *Trump has said he Wants to Destroy the "Deep State" 56 times on Truth Social*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Aug. 1, 2024), https://www.citizensforethics.org/reports-investigations/crew-investigations/trump-has-said-he-wants-to-destroy-the-deep-state-56-times-on-truth-social/ [https://perma.cc/Z6E7-F46P] (describing "multi-step plan . . . to 'demolish the deep state' by gutting the civil service, limiting the power of institutions and experts, and replacing career officials with Trump loyalists").

[78] Creating Schedule F in the Excepted Service, Exec. Order No. 13,957, § 1, 85 Fed. Reg. 67631 (Oct. 21, 2020). This exemption applied both to civil service hiring practices and limits on discipline. *Id.*

[79] Protecting the Federal Workforce, Exec. Order No. 14,003, § 2(a), 86 Fed. Reg. 7231 (Jan. 22, 2021). For an empirical analysis of the effects of intra-agency ideological differences between political appointees and career officials, *see* Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2022) (concluding that civil service employees can serve as "ballast" between the oscillating views of presidential administrations of different parties).

[80] *See generally* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020) (describing various threats to the independence of ALJs and arguing for consideration of a federal central panel as a means to protect their independence).

[81] Excepting Administrative Law Judges From the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018). According to one commentator, the Order "dramatically

Justice Department would only defend good-cause removal restrictions if they are interpreted so as to "allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions . . . ."[82] If President Trump's political appointees renew efforts to control ALJs, the Court's presidential removal power cases will help.

A second tactic that President Trump used extensively during his first term was to rely on the Federal Vacancies Reform Act (FVRA)[83] to fill vacancies temporarily without Senate consent through the appointment of acting officers.[84] President Trump's use of FVRA included some high profile and controversial appointments, such as the appointment of Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau,[85] Matthew Whitaker as Acting Attorney General,[86] or Ken Cuccinelli as Acting Director of the U.S. Citizenship and Immigration Services.[87] Reliance on acting officers enhances presidential control because they are easy to name and replace.

The Court's unitary executive cases will likely facilitate some of President Trump's efforts to control the executive branch, but how much remains to be seen. For example, the Court's removal power cases will make it easier for President Trump to remove agency heads, including perhaps at least some traditional independent agencies, either because the Court rejects implicit

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expand[ed] executive control over administrative adjudicators." Paul R. Verkuil, *Recent Developments: Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 464 (2020). Nonetheless, although President Biden repealed many of President Trump's orders, he did not repeal this order and ALJs are still exempt from civil service hiring.

[82] Memorandum from the Solicitor General to Agency General Counsels on Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018), https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf [https://perma.cc/9ZFU-5PGF] (indicating the Department of Justice will only defend good-cause removal requirements for ALJs if those requirements are "properly read").

[83] 5 U.S.C. §§ 3345–3349d.

[84] *See id.* at § 3345(a). It is not necessary to recount the complexity of this statute here. For further discussion, see Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

[85] *See* English v. Trump, 279 F. Supp. 3d 307, 319–320 (D.D.C. 2018) (concluding that Deputy Director of Bureau was unlikely to succeed on the merits of her claim for injunctive relief against President Trump's use of the FVRA to appoint Mulvaney).

[86] A number of lower court cases addressed challenges to this appointment focusing on an alleged conflict between FVRA and the Justice Department succession statute and the constitutionality of appointing an acting Attorney General without Senate consent. *See* United States v. Santos-Caporal, 2019 WL 468795 (E.D. Mo. 2019), report and recommendation adopted, 2019 WL 460563 (E.D. Mo. 2019); United States v. Valencia, 2018 WL 6182755 (W.D. Tex. 2018); United States v. Peters, 2018 WL 6313534 (E.D. Ky. 2018); United States v. Smith, 2018 WL 6834712 (W.D. N.C. 2018). These issues became moot when the Senate confirmed the appointment of William Barr. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1 (D.C. Cir. 2019) (concluding that challenge to regulation promulgated by Acting Attorney General Whittaker was moot because it had been ratified by Attorney General Barr).

[87] *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 24–25 (D.D.C. 2020) (concluding that the appointment was invalid because Cuccinelli did not qualify as a first assistant).

good-cause restrictions or because explicit provisions are invalid.[88] Likewise, to the extent that President Trump seeks to control agency policy through executive orders or exercise delegated authority over personnel matters to enhance his control over inferior officers in the executive branch, it is unlikely that the judiciary will intervene.

On the other hand, the Court's formalistic approach to separation of powers may limit President Trump's ability to *replace* the officers he removes. Cabinet officials, traditional independent agency members, and other heads of agencies occupy positions as "principal officers," whose appointment requires Senate consent. To the extent that FVRA permits such positions to be filled by acting officers without Senate consent, it is arguably unconstitutional—unless the temporary nature of the position converts it from a principal to an inferior officer. The answer to this question is important because the need to get Senate consent for a replacement is an important constraint on the removal of officers.[89]

In the final analysis, it is safe to assume that President Trump will wield more direct and extensive control over officers in the executive branch than during his first term, but there will be constitutional, statutory, and political limits to that control. It is also safe to assume that events in the coming years will test the limits of presidential control in various ways.

B. Agency Power and Authority

While President Trump may hold a tighter rein on federal administrative agencies during his second term, he is likely to find their ability to do what he wants is constrained.[90] I think it is safe to assume that Congress will not enact President Trump's agenda and that he will attempt to achieve his goals through executive action. These efforts, however, may be at odds with the new administrative law, as formalist separation of powers, judicial activism, and anti-agency perspectives may impede his ability to do so. Thus, the coming years may tell us something about the ultimate direction of the new administrative law.

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[88] President Trump has already begun to test the limits of his removal powers by acting to remove officials in violation of statutory requirements, including inspectors generals in many executive agencies, a member of the Federal Election Commission, and a member of the National Labor Relations Board. *See, e.g.*, Daniel Barnes & Dareh Gregorian, *Fired inspectors general sue Trump over their 'unlawful' termination*, NBC NEWS (Feb. 12, 2025, 11:28 AM) https://www.nbcnews.com/politics/donald-trump/fired-inspectors-general-sue-trump-unlawful-termination-rcna191869 [https://perma.cc/V6G9-DRR2]; Ashley Lopez, *Federal election commissioner says Trump is trying to improperly remove her*, NPR (Feb. 7, 2025, 2:57 PM) https://www.npr.org/2025/02/07/nx-s1-5290112/trump-federal-election-commissioner-weintraub [https://perma.cc/F4LF-YPLN]; Andrea Hsu, *Trump fires EEOC and labor board officials, setting up legal fight*, NPR (January 28, 2025, 6:07 PM) https://www.npr.org/2025/01/28/nx-s1-5277103/nlrb-trump-wilcox-abruzzo-democrats-labor [https://perma.cc/X8VD-7BHA].

[89] *See* Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2022) (arguing that elimination of good-cause removal restrictions for independent agencies will not undermine their independence because the requirement of Senate consent for replacements imposes significant costs on presidential removal).

[90] This discussion assumes that the Constitution and the rule of law continue to limit the authority and conduct of the President and officers of the Executive Branch.

If there is one thing that almost everyone agrees on during these polarized times, it is that Congress is dysfunctional. The most recent elections did not alter the basic conditions of our current political moment. Any dreams of a grand legislative agenda are unrealistic even if the Republican Party currently controls the House, Senate, and presidency. Those majorities are slim, temporary, and insufficient to sustain a broad legislative agenda. Like the Biden, Obama, and first Trump Administrations, these conditions may produce a few key legislative initiatives, but it will be a major surprise if Congress passes a "big, beautiful bill" or a series of statutes to enact the entire Trump Administration policy agenda. In the absence of legislative action, President Trump will almost certainly try to implement his policies directly through the executive branch—just as other Presidents have done.[91] The new administrative law will enhance President Trump's control over the executive branch, but it will likely limit the authority of executive branch officials to carry out his wishes.

Consider, for example, the implications of the major questions doctrine for President Trump's well-known intent to impose tariffs. If President Trump tries to impose tariffs by executive action, that will certainly be challenged in court. Although Congress has delegated some discretion to impose tariffs by statute, the major questions doctrine would appear to be a major problem. Certainly, the imposition of massive tariffs would seem like a question of deep economic and political significance that the nondelegation and major questions doctrines would reserve for Congress. Other policy objectives, such as mass deportation of undocumented immigrants, are also likely to be difficult to implement without congressional action. This is not to say that tariffs or other measures are necessarily invalid, but rather to suggest that these doctrines would make it easier to challenge these actions in court.

Likewise, judicial activism invites challenges from opponents of President Trump's policies, just as it facilitated challenges to actions by agencies under President Biden. For example, in *Department of Commerce v. New York*,[92] the Supreme Court showed its mistrust of agency officials during the first Trump Administration when invalidating the Department of Commerce's effort to include a citizenship question on the census, describing the agency explanation as "contrived."[93] Likewise, the decisions that make it easier to get into court to

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[91] *See* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience,* 35 YALE J. ON REG. 549, 550 (2018) (examining "presidential direction of administrative action in the Obama and early Trump Administrations against the backdrop of ongoing debates concerning: (i) the desirability of and appropriate techniques for presidential control of administration and (ii) the relevance of separated powers when American government is under unified political control").

[92] Dep't of Com. v. New York, 588 U.S. 752 (2019).

[93] *Id.* at 784–85; *see also id.* (describing agency's explanation as "incongruent with what the record reveals about the agency's priorities and decisionmaking process" and as exhibiting a "disconnect between the decision made and the explanation given").

challenge agency action will also make it easier to challenge agency action in the Trump Administration. Indeed, we can expect opponents of President Trump's policies to seek friendly district judges from whom they can obtain nationwide injunctions so as to tie President Trump's policies up in court.

The application of the new administrative law to this sort of action during the Trump Administration will tell us more about its underlying purpose. If the primary concern of the new administrative law is the power of agencies, writ large, then we might expect that many Trump Administration initiatives relying on broad assertions of power, such as the refusal to spend funds appropriated by Congress, might be at risk.[94] On the other hand, it appears that the new administrative law is at least to some degree asymmetrical, in that it is primarily focused on agency efforts to regulate private conduct and is less concerned with deregulation or with government benefit programs.

For example, the emphasis in *Jarkesy* (and Article III cases) is increasingly on the protection of traditional common law private rights, with the idea that Article III courts and jury trials are essential protections for the rights of parties burdened by regulatory actions.[95] Government benefits, like those provided under Social Security, Medicare or Medicaid, and other entitlement programs, are public rights, the administrative adjudication of which raises no concerns. In the same way, the rights of regulatory beneficiaries like environmental plaintiffs do not appear to qualify as private rights either and so can be freely resolved by agencies.

The major questions doctrine also appears to operate only when an agency tries to regulate (and not when it fails to do so or rescinds a previously adopted prior regulation). Consider, for example, the FCC's vacillation on whether to require broadband internet service providers (BISPs) to comply with "net neutrality" rules requiring them to treat all internet content, applications, and services equally regardless of their source.[96] In the most recent litigation challenging the net neutrality rule, *In re MCP No. 185*,[97] the U.S. Court of Appeals for the Sixth Circuit held that the FCC lacked the authority to issue the rule. Although the court declined to rule on whether the major questions doctrine applied,[98] a prior unpublished opinion in the case explicitly relied on the doctrine and net neutrality rules would appear to be questions of deep economic and

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[94] *See, e.g.*, Nat'l Council of Nonprofits v. Off. of Mgmt. and Budget, 2025 WL 368852 (D.D.C. Feb. 3, 2025) (granting temporary restraining order against funding freeze); Am. Foreign Serv. Ass'n v. Trump, 2025 WL 435415 (D.D.C. Feb. 7, 2025) (granting temporary restraining order against funding freeze in part); New York v. Trump, 2025 WL 480770 (D.R.I. Feb. 12, 2025) (denying government's motion to dissolve TRO against federal funding freeze).

[95] *See* Glicksman & Levy, *supra* note 20, at 1145 (describing parallel between private rights formalism and the discarded right-privilege distinction).

[96] It is not necessary to detail the convoluted history of these rules here. The key point is that the FCC declined to regulate, then decided to regulate, then rescinded the regulations, and then reissued them, all over a span of about 20 years. *See In re* MCP No. 185, 124 F.4th 993, 997–1001 (6th Cir. 2025) (recounting this history).

[97] In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025).

[98] *See id.* at 1009 ("Given our conclusion that the FCC's reading is inconsistent with the plain language of the Communications Act, we see no need to address whether the major questions doctrine also bars the FCC's action here").

political significance.[99] The point here is that the net neutrality issue has exactly the same economic and political significance whether the FCC adopts a net neutrality rule or declines to adopt (or rescinds) the rule—just in opposite directions. Yet the major questions doctrine only seems to be a problem for the adoption of the rule.

Thus, the courts' reaction to agency decisions during the second Trump Administration will tell us a great deal about the true nature of the new administrative law. If the primary emphasis of the new administrative law is a commitment to restrictions on agency power, then the new administrative law will constrain the Trump Administration in much the same way as it did the Biden Administration. If, however, the new administrative law is about opposition to regulation, then we might expect the Court to tolerate broad assertions of deregulatory power by agencies. And if the Court allows the broad assertion of regulatory authority by the Trump Administration in ways that it denied authority to the Biden Administration, then we might be concerned that the Court is thoroughly politicized.

IV. CONCLUSION

In this Essay, I have come neither to praise administrative law nor to bury it. Instead, my goal has been to illuminate the profound changes that have reshaped the field. Despite these changes, administrative law and administrative agencies will live on and continue to play an essential role in the implementation of public policy.

But the agencies and administrative law we see going forward will be different. The independence of agency officials will be more limited and the President's ability to control agency action will be greater. At the same time, the administrative state will be less powerful. Agencies will wield less policy discretion and have more limited authority to promulgate rules or adjudicate cases.

The full contours of the new administrative law are still unfolding. Much will be revealed by the Court's decisions going forward, especially those that address the validity of agency actions under President Trump. In time, these decisions may tell us whether the primary characteristic of the new administrative law is a general curtailment of agency power, a focused attack on regulation by agencies, or a partisan political tool to block Democratic presidents.

A final note of caution is necessary. This entire Essay is premised on the assumption that administrative law is "law," that it binds agencies and the

[99] *In re* MCP No. 185, 2024 WL 3650468, at *1, *5 (6th Cir. Aug. 1, 2024) (relying on major questions doctrine to conclude that plaintiffs were likely to succeed on the merits of their challenge to the regulation and granting stay).

President, and that the executive branch will comply with the decisions of the courts. Administrative law only matters if the rule of law still constrains the operation of government institutions through binding legal obligations—either because those officials accept law as binding or because the public and our institutions are willing to hold them to account if they do not.

As of this writing, there are disturbing signs that the Trump administration might ignore or directly defy judicial decisions applying administrative law principles to block its actions.[100] Indeed, the American Bar Association recently took the unusual step of reaffirming its support for the rule of law.[101] That such an entity would find it necessary to issue such a statement is a sad commentary on our times.

I have previously written about my support for the rule of law and my concerns that it is entirely dependent on a widely shared norm of respect for the law.[102] Once that norm has eroded, it is unclear how to get it back. As lawyers, we have a special obligation to uphold the rule of law. I hope that my fellow attorneys in the state will join me in renewing their commitment to supporting and defending the rule of law.

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[100] *See, e.g.* New York v. Trump, 2025 WL 440873 (D.R.I. Feb. 10, 2025) (concluding that plaintiff states had presented evidence that the United States "continued to improperly freeze federal funds and refused to resume disbursement of appropriated federal funds" in violation of the "the plain text of the TRO").

[101] *The ABA supports the Rule of Law*, AMERICAN BAR ASSOCIATION (Feb. 10, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law/ [https://perma.cc/QU8G-XFMD].

[102] Richard E. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle*, 56 KAN. L. REV. 899 (2008).

THE SILVER LINING SOLUTION: ALLEVIATING WATER INSECURITY IN THE COLORADO RIVER BASIN THROUGH CLOUD SEEDING

By: Adam Bixby[*]

I. INTRODUCTION

Since ancient times, civilizations have relied on favorable weather conditions for their survival and development. Human history is spattered with a wide array of elaborate ceremonies dedicated to summoning the rain that sustains human civilizations.[1] These ceremonies demonstrate a common goal to reach the very heavens themselves to harness its water for the benefit of their society.[2] As our technology advanced, we employed the use of rockets and cannons in service of weather modification, to blow the water out of the sky.[3] Today, we have the means and the motivation to influence the weather of the United States Southwest.

The Colorado River ("River") is one of the most important natural resources in the United States. The River itself flows across several U.S. states (Colorado, Utah, Nevada, Arizona, and California) and two Mexican states (Sonora and Baja California).[4] The Colorado River Basin ("Basin") comprises portions of seven U.S. states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming), two Mexican states (Sonora and Baja California), and twenty-eight Native American reservations.[5] The Basin contains over forty million people who depend on the water from the Colorado River.[6] It almost goes without saying that the people in the Basin, the states outside the Basin, and the entire U.S. depend on

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[1] Jianlin Chen, *Optimal Property Rights for Emerging Natural Resources: A Case Study on Owning Atmospheric Moisture*, 50 U. MICH. J. L. REFORM 47, 63 (2016).

[2] WILLIAM R. COTTON & ROVER A. PIELKE SR., HUMAN IMPACTS ON WEATHER AND CLIMATE 3 (Cambridge Univ. Press, 2d ed. 2007); *see also* Ray Jay Davis, *Atmospheric Water Resources Development and International Law*, 31 NAT. RES. J. 11, 11–12 (1991).

[3] *See* COTTON & PIELKE SR., *supra* note 2.

[4] *See generally* Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 1–2, 10 (1966).

[5] Rhett B. Larson, *Colorado River Lessons for International Water Law*, 59 JURIMETRICS J. 83, 83 (2018).

[6] Michael L. Connor, *Foreword* to U.S. DEP'T OF INTERIOR, BUR. OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY (2012); *see also* Brooke Larsen, *What the Fed's New Proposal for Management of Colorado River Reservoirs Means*, HIGH COUNTRY NEWS (Oct. 31, 2023), https://www.hcn.org/articles/colorado-river-what-the-feds-new-proposal-for-management-of-colorado-river-reservoirs-means/ [https://perma.cc/8MHM-FHZ9].

this natural resource to thrive and provide the water that sustains our health, businesses, and crops.[7]

Concerns, however, have been growing for years that the Colorado River is being over-exploited to the point that it might no longer be able to provide adequate water to the Southwest, leading to a national water crisis.[8] While some characterizations among media outlets are exaggerated, they all highlight an important concern: the Southwest is facing water security issues that require solutions.[9] The U.S. states, Tribes, and Mexican states have difficult choices to make if they want to see a more prosperous future along the banks of the Colorado River. If they can cooperate and implement solutions to improve water supplies in reservoirs along the Colorado River, they can help remedy many issues stemming from water insecurity.[10] By addressing concerns over the increase in water consumption and decrease in water supplies throughout the Basin, all parties can find solutions to a brighter future.

Scientists, politicians, and concerned citizens have voiced a wide range of ideas on how to best improve water security in the Basin.[11] For example, desalination can turn saltwater into potable water but through a "costly and energy-intensive process[.]"[12] Cities can invest in technology that reclaims and recycles effluent for irrigation, industry, and consumption.[13] States can pass stricter regulations on water-intensive industries like fracking and agriculture to incentivize efficiency, despite a likely spike in energy and food prices.[14] All these options for water resource

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[7] Meyers, *supra* note 4, at 1.

[8] *See*, *e.g.*, Elena Shao, *The Colorado River is Shrinking. See What's Using All the Water*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/interactive/2023/05/22/climate/colorado-river-water.html [https://perma.cc/66TQ-H8FN]; Ian James & Molly Hennessey-Fiske, *The Colorado River is Overused and Shrinking. Inside the Crisis Transforming the Southwest*, L.A. TIMES (Jan. 26, 2023, 5 AM), https://www.latimes.com/environment/story/2023-01-26/colorado-river-in-crisis-the-west-faces-a-water-reckoning [https://perma.cc/6TRP-ZCEF].

[9] *See* Shao, *supra* note 8; James & Hennessey-Fiske, *supra* note 8.

[10] *See* RHETT LARSON, JUST ADD WATER: SOLVING THE WORLD'S PROBLEMS USING ITS MOST PRECIOUS RESOURCE 1–2 (Oxford Univ. Press 2020).

[11] *See, e.g.,* Richard Parker, *Opinion: American Dams are Being Demolished. And Nature is Pushing that Along*, L.A. TIMES, (Oct. 19, 2023, 3:10 AM), https://www.governing.com/infrastructure/american-dams-are-being-demolished-and-nature-is-pushing-that-along [https://perma.cc/4YUW-LCX3]; Kyle J. Paine, *What is Desalination, how can it End War over Colorado River?*, 8NEWSNOW.COM (May 3, 2023, 10:45 PM) https://www.8newsnow.com/investigators/what-is-desalination-how-can-it-end-war-over-colorado-river/ [https://perma.cc/38SA-BJ9U]; Larsen, *supra* note 6.

[12] Rhett B. Larson, *Innovation and International Commons: The Case of Desalination Under International Law*, 2012 UTAH L. REV. 759, 760, 764 (2012).

[13] Geraldine Burrola, *Reclaiming LA's "Mulholland Moment": Wastewater Recycling, the Public Trust Doctrine, and Saving the LA River*, 111 CAL. L. REV. 1551, 1575 (2023).

[14] *See* Hiroko Tabuchi & Blacki Migliozzi, *'Monster Fracks' Are Getting Far Bigger. And Far Thirstier*, N.Y. TIMES (Sept. 25, 2023) https://www.nytimes.com/interactive/2023/09/25/climate/fracking-oil-gas-wells-water.html [https://perma.cc/G754-YDNG]; Liza Gross, *Colorado Frackers Doubled Freshwater Use During Megadrought, Even as Drilling and Oil Production Fell*, INSIDE CLIMATE NEWS (May 22, 2023) https://insideclimatenews.org/news/22052023/colorado-fracking-wastewater-

management are viable but come with inherently difficult cost-benefit analyses. No matter what path the parties in the Basin take, they will have to make tough choices of what costs to bear and what benefits to forsake to achieve a diverse water portfolio and avoid future water insecurity.

But what if there was a new "emerging natural resource," capable of helping these parties manage their water resources and even increase their water supply? As technology has advanced, we have gained access to emerging natural resources that pose great opportunities and greater questions about how we should respond. Emerging natural resources are defined as resources that "are harnessed by recently developed and still-evolving technologies."[15] But as technology and our understanding evolves, our regulatory regimes and control mechanisms for such resources must evolve as well.[16]

Currently, atmospheric moisture can be accessed and extracted through a process called "cloud seeding."[17] This process is intended to affect the precipitation in clouds, which helps manage water supplies in a region.[18] With all members of the Basin facing water insecurity issues, cloud seeding is a possible solution to help mitigate those issues.

This Article argues that, as an emerging natural resource, cloud seeding across the Basin will need a uniform and comprehensive set of regulations. Current legal regimes across the Basin states should be revised to address cloud seeding. Uniform and comprehensive standards help improve the efficiency of the industry and ensure both operators and investors work effectively.[19] These regulations should come from a state commission created under an interstate compact.[20] The creation of such a state commission would require a difficult balancing of interests. It would

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drought/#:~:text=Colorado%20operators%20doubled%20their%20use,that%20time%2C%20the%20analysis%20found. [https://perma.cc/8CKD-T6BW]; Gianna Melillo, *In Drought-Stricken States, Fossil Fuel Production Jeopardizes Limited Water Supplies*, HILL (Feb. 8, 2023) https://thehill.com/changing-america/sustainability/energy/3847883-in-drought-stricken-states-fossil-fuel-production-jeopardizes-limited-water-supplies/#:~:text=Fossil%20fuels%20are%20primarily%20notorious,supplies%20in%20drought%2Dstricken%20states. [https://perma.cc/N2TT-BKZ8].

[15] Chen, *supra* note 1, at 50.

[16] *See id.* at 50–51 (recognizing that technological advancements drive uncertainty in resource utilization, requiring regulatory frameworks to remain adaptable to changing conditions).

[17] *Id.* at 65–66.

[18] *Id.* at 65.

[19] *Cf.* Melissa Currier, *Rain, Rain, Don't Go Away: Cloud Seeding Governance in the United States and A Proposal for Federal Regulation*, 48 U. PAC. L. REV 949, 960 (2017) (explaining that a sweeping federal regulatory scheme on cloud seeding would help reduce conflicts over cloud seeding between states and improve the industry).

[20] *See* Alexandra Campbell-Ferrari, *Managing Interstate Water Resources: Tarrant Regional and Beyond*, 44 TEX. ENVTL. L. J. 235, 237 (2014). An interstate compact is a legally binding agreement between two or more states that Congress consents to and enables states to collaboratively address regional issues, such as the allocation and management of shared water resources. *See id.* at 236–67. By entering into a compact, states relinquish some of their sovereign control over specific matters to create a cooperative framework for resolving disputes and managing shared resources effectively. *Id.*

need to have enough regulatory teeth to be effective but not be so powerful as to dissuade states from joining at risk of losing state sovereignty.[21] Nevertheless, a state commission is the ideal method to create a legal regime regulating cloud seeding technology and tailor such regulations to the Basin and its members' needs.[22]

This Article is broken down into three parts. Part II contains a comprehensive discussion on the importance of cloud seeding and why the Basin states should be proactive in working together to regulate this emerging natural resource. Part III overviews how cloud seeding is currently conducted in the Basin. Finally, Part IV proposes a method of improving regulations on the cloud seeding industry by amending the Colorado River Compact of 1922.[23]

II. THE IMPORTANCE OF CLOUD SEEDING

Weather modification through cloud seeding is complicated and can have a range of impacts. This part sets out factual context on weather modification by discussing the historical evolution of cloud seeding, the inner workings of current cloud seeding technology, the consequences of cloud seeding on the environment, and the legal rights regimes that have been proposed for accessing atmospheric moisture.

A. Background

Through the introduction of computers, satellites, radar, and aviation, we have made significant progress in collecting and interpreting meteorological data.[24] This data gives us greater access to the clouds in the skies and thus, atmospheric moisture.[25] Of course, this knowledge provides great opportunities for growing communities as well as destroying them. Military operations during the Cold War demonstrated the potential offensive capabilities of weather modification by attempting to flood military and civilian precincts.[26] Because of the import of

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[21] Rhett B. Larson, *Interstitial Federalism*, 62 UCLA L. REV. 908, 953–54 (2015).
[22] *Id.*
[23] *See generally* Colorado River Compact, COLO. REV. STAT. § 37-61-101, art. II(e).
[24] *See* Harold D. Orville, *Weather Modification*, *in* HANDBOOK OF WEATHER, CLIMATE, AND WATER: DYNAMICS, CLIMATE, PHYSICAL METEOROLOGY, WEATHER SYSTEMS, AND MEASUREMENTS 433, 444–47 (Thomas D. Potter & Bradley R. Colman eds., 2003); Chunglin Kwa, *The Rise and Fall of Weather Modification*, *in* CHANGING THE ATMOSPHERE: EXPERT KNOWLEDGE AND ENVIRONMENTAL GOVERNANCE 135, 143 (Clark A. Miller & Paul N. Edwards eds., 2001).
[25] Orville, *supra* note 24, at 445.
[26] *See* Noah Byron Bonnheim, *History of Climate Engineering*, 1 WIRES CLIM. CHANGE 891, 893 (2010); *see also* Foreign Relations of the United States, 1964–1968, vol. 28, Laos, Doc. 274 (Oct. 7, 1968), https://history.state.gov/historicaldocuments/frus1964-68v28/d274 [https://perma.cc/JV5U-2C6Q] ("The impact on civilian population will be much the same, in kind, and greater in degree…").

weather modification, the U.S. government and private enterprises have sponsored many research programs to develop weather modification technology.[27]

As weather modification technology has become easier to produce and access, dozens of countries have conducted their own weather modification experiments.[28] Countries such as China, South Africa, Morocco, India, and Australia are currently producing important findings on the efficacy of cloud seeding.[29] Weather modification is a worldwide research project because of the massive import and potential societal benefits of this new industry.[30] Instead of having to build new and expensive water infrastructure, countries can simply take advantage of the hydrologic cycle by making clouds deliver water more efficiently and, at least in theory, provide more water to their respective basins.[31]

B. How Cloud Seeding Works

Cloud seeding requires introducing chemicals (referred to as "seeding agents") into a saturated portion of our atmosphere (a cloud) to change the physical structure of the cloud so it will be more likely to precipitate in the form of rain or snow.[32] Put simply, the seeding agent acts as an impurity in a cloud that is almost entirely pure H2O, and as the impurity moves through the cloud, water molecules attach and form a droplet. The most common seeding agents used are dry ice pellets and silver iodide.[33] But a cloud's temperature and geographic location can affect what seeding agents and dispersal methods are ideal. For example, cold-based

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[27] *See* Charles F. Hutchinson & Stephanie M. Herrmann, *The Future of Arid Lands—Revisited*, 32 ADVANCES IN GLOB. CHANGE RSCH. 1, 47–48 (2008); *see generally* James R. Fleming, *The Pathological History of Weather and Climate Modification: Three Cycles of Promise and Hype*, 37 HIST. STUD. PHYSICAL & BIOLOGICAL SCI. 3, 3 (2006).

[28] William R. Cotton, *Weather Modification by Cloud Seeding—A Status Report 1989-1997*, *in* ANTHROPOGENIC CLIMATE CHANGE 139, 153 (Hans von Storch & Götz Flöser eds. 1999).

[29] *See* Hutchinson & Herrmann, *supra* note 27, at 55; *Weather Modification Inc. Projects Worldwide*, CLIMATE VIEWER MAPS, https://climateviewer.org/history-and-science/geoengineering-and-weather-modification/maps/weather-modificaiton-incorporated-projects-worldwide/ [https://perma.cc/C9C4-CZ6W] (listing projects in over twenty countries including Antigua, Argentina, Australia, Burkina Faso, Brunei, Canada, Greece, India, Indonesia, Jordon, Mali, Mexico, Morocco, Saudi Arabia, Senegal, Spain, Thailand, Turkey, the United Arab Emirates., and the U.S).

[30] Conrad G. Keyes Jr., *Societal, Environmental, and Economic Aspects*, *in* GUIDELINES FOR CLOUD SEEDING TO AUGMENT PRECIPITATION 11, 31 (Conrad G. Keyes Jr. et al. eds., 3d ed. 2016). (explaining that cloud seeding has been widely adopted around the world because the potential benefits outweigh the costs and uncertainties).

[31] *See* Larry R. Dozier, *Colorado River Augmentation*, 37 ABA TRENDS 1, 14 (2006) (explaining that increased rain may also increase the amount of hydropower generated, thereby reducing electricity costs); Conrad G. Keyes, Jr. & Thomas D. DeFelice, *Introduction and Brief Summary*, *in* GUIDELINES FOR CLOUD SEEDING TO AUGMENT PRECIPITATION, 1, 1 (Conrad G. Keyes, Jr. et al. eds., 3d ed. 2016) (discussing how adding more rainwater can benefit agriculture, hydropower, municipal water supplies, and irrigation interests).

[32] *See* Chen, *supra* note 1, at 65–66.

[33] Rhett Larson & Brian Payne, *Unclouding Arizona's Water Future*, 49 ARIZ. ST. L.J. 465, 505 (2017).

continental clouds are seeded with chemicals that are best suited for creating ice crystals.[34] These seeding agents trigger the formation of ice crystals from suspended supercooled liquid water.[35] Conversely, warm and maritime clouds are seeded with hygroscopic seeding agents.[36] These agents attract the water vapor until it forms a droplet large enough to fall from the cloud as a raindrop[37].

The method of dispersal also presents unique variations depending on the circumstances. Depending on the altitude of the cloud, aerial dispersion might be required via aircraft, surface-to-air missiles, or anti-aircraft guns.[38] These methods of dispersal can be expensive, especially for smaller commercial weather modification operators.[39] But as drone technology advances, we could see greater utilization of drones carrying payloads of seeding agents across a wider area than before.[40] Notably, certain clouds, such as orographic clouds, which are formed by the forced lifting of air by topographic features like mountains, can be seeded by ground generators that release the seeding agents as the cloud travels up the mountain.[41] This method is much less expensive than operating aerial methods of dispersal.[42]

The variability of the ideal way to introduce cloud seeding technology suggests a broader point. The best way to conduct cloud seeding operations depends on the climate, geography, and location of the targeted cloud. This technology is only in its infancy and will become more common as it becomes more effective and economically efficient. Compact states must develop a legal regime that can

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[34] Chen, *supra* note 1, at 65–66.
[35] *Id.* at 66.
[36] *Id.*
[37] *Id.*
[38] Robert Glennon, *Water Exchanges: Arizona's Most Recent Innovation in Water Law and Policy*, 8 ARIZ. J. ENVTL. L. & POL'Y 1, 3 (2018); *Chinese Cities Try Cloud Seeding to Beat the Heat*, NBC NEWS (July 22, 2004, 2:38 PM), https://www.nbcnews.com/id/wbna5488201 [https://perma.cc/PV97-PYYT]; Desislava Ivanova, *Masters of Hailstorms*, RADIO BULGARIA (July 7, 2015, 12:33 PM), https://bnr.bg/en/post/100577459/masters-of-hailstorms [https://perma.cc/GC25-CMHC].
[39] *See* Don A. Griffith, *Cloud Seeding Modes, Instrumentation, and Status of Precipitation Enhancement Technology*, *in* GUIDELINES FOR CLOUD SEEDING TO AUGMENT PRECIPITATION 119–20 (Conrad G. Keyes Jr. et al. eds., 2006) (clarifying that while ground based rockets and artillery offer the advantages of both ground and airborne dispersal methods, they are costly and prohibited in areas with high aircraft traffic); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107328, CLOUD SEEDING: COSTS AND CHALLENGES OF WEATHER MODIFICATION PROGRAMS, 18 (2025), https://www.gao.gov/assets/gao-25-107328.pdf [https://perma.cc/GP5E-QKMG] (specifying that while aircraft dispersal can be more effective, it is more costly than ground-based generators); *see also* Chen, supra note 1, at 75–76 (charging cloud seeding operators a flat fee for attaining permits to cloud seed favors large-scale operators while placing a disproportionately heavy burden on small and medium operators).
[40] *See* Woonseon Jung, Joo Wan Cha, A.-Reum Ko, Sanghee Chae, Yonghun Ro, Hyun Jun Hwang, Bu-Yo Kim, Jung Mo Ku, Ki-Ho Chang, & Chulkyu Lee, *Progressive and Prospective Technology for Cloud Seeding Experiment by Unmanned Aerial Vehicle and Atmospheric Research Aircraft in Korea*, 2022 ADVANCES IN METEOROLOGY 1, 1 (2022); *see* Currier, *supra* note 19, at 968–69.
[41] *See* Griffith, *supra* note 39, at 110–15.
[42] *Id.* at 115.

transition alongside this emerging natural resource and our scientific understanding. Failure to develop an efficient legal regime could harm not only our environment, but also the people who depend on the Colorado River.

C. Cloud Seeding's Impact on the Environment

Cloud seeding can be used to help protect the environment by reducing air pollution, suppressing hailstorms, and mitigating flash floods.[43] Such natural disasters can cause significant damage to the environment by devastating landscapes, forests, and cities.[44] But given the effect that cloud seeding can have in creating substantial changes in precipitation, observers have raised several environmental concerns with the practice itself.[45]

The practice of having planes deploying chemical flares over forests and cannons firing volleys of silver iodide from mountaintops can present logical environmental concerns.[46] An observer could naturally wonder if the silver iodide is toxic, poses potential harm to wildlife, or has the potential to cause a natural disaster. Furthermore, the use of frozen carbon dioxide and silver iodide presents unconfirmed concerns over the potential for hazardous bioaccumulation in our environment.[47] Carbon dioxide and silver iodide, however, are not necessarily dangerous.[48] If adequately limited, the risk of toxic bioaccumulation should be

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[43] *See* Robert "Bo" Abrams & Alexis Clark, *Weather Modification Past and Prologue*, 37 NAT. RES. & ENV'T 21, 21 (2022).

[44] *See* Emily Chung, *How Cloud Seeding Can Make it Rain or Prevent Extreme Weather*, CBC NEWS (Apr. 17, 2024, 1:11 PM), https://www.cbc.ca/news/science/cloud-seeding-faq-1.7176435 [https://perma.cc/CYZ4-3E3Q]; *see generally* Vishwambhar Prasad Sati & Saurav Kumar, *Environmental and Economic Impact of Cloudburst-Triggered Debris Flows and Flash Floods in Uttarakhand Himalaya: A Case Study*, 9 Geoenvironmental Disasters 5 (2022), https://doi.org/10.1186/s40677-022-00208-3 (noting that one moderate flash flood destroyed over 50 acres of forest land costing thousands of dollars in economic damage); *see also* Zainab Oyinkansola Akinsemoyin, *Investigating Flash Flood Occurrence Using Negative Binomial Models in Maryland, United States of America* 10 (M.S. thesis, Georgia Southern Univ. 2024), https://digitalcommons.georgiasouthern.edu/etd/2884 [https://perma.cc/9JSV-EYU8] ("The recent flash flood events in North Carolina on September 27, 2024, are a stark reminder of these events' sudden and devastating nature.").

[45] Rhett Larson, *Augmented Water Law*, 48 TEX. TECH L. REV. 757, 763–64 (2016); Erica C. Smit, *Geoengineering: Issues of Accountability in International Law*, 15 NEV. L. J. 1060, 1064–67 (2015); Bonnheim, *supra* note 26, at 893.

[46] Larson, *supra* note 45.

[47] See Larson & Payne, *supra* note 33, at 506*;* Manon Simon, *Enhancing the Weather: Governance of Weather Modification Activities of the United States*, 46 WILLIAM & MARY ENV'T. L. & POL'Y REV. 149, 154–56 (2021).

[48] *Cf.* Karen Bradshaw & Monika U. Ehrman, *Cloud Seeding, Wildfire Smoke Emissions, and Solar Geoengineering: Why is Climate Modification Unregulated?*, 35 GEO. ENVTL. L. REV. 459, 472 (2023) (explaining that hazardous substances are not automatically regulated because they are inherently hazardous, but rather they are only regulated once they reach a certain concentration that creates detrimental effects on human health).

manageable.[49] These environmental concerns pose an obvious political barrier to increasing the deployment of cloud seeding.

Cloud seeding today is used across many countries for a variety of reasons. The U.S. and Australia have used cloud seeding for scientific research purposes.[50] China and Russia have used cloud seeding operations for decades to disrupt unfavorable weather patterns during public events and holidays.[51] For example, during the 2008 Beijing Olympics, China claimed to successfully conduct a large-scale cloud seeding operation to dissipate potential rain clouds before they could reach the area where the games would be held.[52] Such an operation to stop rain from ruining a sporting event can appear innocuous. But the success of this operation, and many others like it, demonstrates the potential for destruction through targeted drought or flood.[53]

The chief environmental concern for cloud seeding should be the question of what if the technology works too well at producing water to the point it causes flood damage. For example, during the Vietnam War, the U.S. attempted to use cloud seeding as a tactical weapon, codenamed, "Operation Popeye."[54] Operation Popeye's goal in using cloud seeding was to soften road surfaces, cause landslides along roadways, wash out river crossings, and maintain saturated soil conditions beyond the normal time span.[55] Operation Popeye and other military efforts eventually led to the International Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977 (ENMOD).[56] ENMOD now provides a general international agreement to prohibit the use of hostile weather modification against enemy combatants and indicates how cloud seeding can be used to induce flood damage.[57]

This Article does not suggest that the utilization of cloud seeding will lead to intentionally targeted floods or droughts throughout the Basin. Rather, this Article is written assuming that cloud seeding operations in the Basin will solely target water

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[49] *See* Nathan LaCross, *Concerns Regarding Silver Iodide Cloud Seeding*, UTAH DEP'T OF HEALTH (2014) https://appletree.utah.gov/wp-content/uploads/2021/10/Silver_Iodide_Cloud_Seeding.pdf [https://perma.cc/269K-P533]; Joel P. Bartlett, *Environmental and Legal Considerations in Weather Modification Activities in the Northern Sierra Nevada*, 12 WATER, AIR, & SOIL POLLUTION 29, 33–34 (1979); *see also* Virginia Simms, *Making the Rain: Cloud Seeding, the Imminent Freshwater Crisis, and International Law*, 44 INT'L L. 915, 921 (2010) (discussing the operations of private weather modification companies).

[50] *See* Chen, *supra* note 1, at 63–64.

[51] *See* Erin Brodwin, *China Spent Millions on a Shady Project to Control the Weather Ahead of the Beijing Olympics — and Dozens of Other Countries Are Doing it too*, BUSINESS INSIDER (Jul. 29, 2016), https://www.businessinsider.com/china-sets-aside-millions-to-control-the-rain-2016-7 [https://perma.cc/RL7C-XG92].

[52] *Id.*

[53] Ed Darack, *Weaponizing Weather: The Top Secret History of Weather Modification*, WEATHERWISE 24, 26 (2019).

[54] Bonnheim, *supra* note 26.

[55] Darack, *supra* note 53, at 26.

[56] James R. Fleming, *The Climate Engineers*, 31 WILSON Q. 46, 56 (2007).

[57] *See* Joanna Jarose, Note, *A Sleeping Giant? The ENMOD Convention as A Limit on Intentional Environmental Harm in Armed Conflict and Beyond*, 118 AM. J. INT'L L. 468, 481 (2024).

reservoirs in the Basin. But, as the cloud seeding industry grows and operations increase in both the number and quantity of water produced, various parties in the Basin will inevitably be affected by this industry for better or worse. As cloud seeding becomes more effective at extracting atmospheric moisture, certain areas could be subject to less rainfall because other areas that are upwind are cloud seeded.[58] Without an effective and efficient legal regime for atmospheric moisture and effective control mechanisms, this emerging natural resource could end up becoming a tragedy of the commons.[59]

D. Cloud Seeding's Impact on People

Cloud seeding poses immense benefits for people throughout the Basin. Cloud seeding projects that aim to refill reservoirs can help mitigate the economic damage from drought that costs the U.S. an average annual economic loss of between six and eight billion dollars.[60] As a proven method of rain and hail suppression, fog diffusion, and mountain snowpack expansion, cloud seeding can be used in a wide range of industries for a multitude of economic benefits.[61] Such uses

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[58] *See* COTTON & PIELKE SR., *supra* note 2, at 75–76 (discussing a 1968 study that strongly suggests that higher concentrations of seeding agents can lead to reductions in rain fall in at least certain clouds and in some regions.); *contra* Davis, *supra* note 2, at 35 n. 127 (citing a 1973 study that strongly suggests that, "if anything, [cloud] seeding has a positive downwind effect" while also suggesting that such "downwind studies rest on inadequate data"). Current weather modification studies focus on cloud seeding's effect beyond a targeted area. One of the biggest concerns facing the cloud seeding industry is downwind ("extra-area") effects that reduce precipitation outside the target area. Simon, *supra* note 47, at 155. The World Meteorological Organization has repeatedly stated that extra area effects cannot be ruled out when conducting cloud seeding. *Id.* at 154. Recent studies show that cloud seeding can increase precipitation outside the target area. T.P. DeFelice, J. Golden, D. Griffith, W. Woodley, D. Rosenfeld, D. Breed, M. Solak, & B. Boe, *Extra Area Effects of Cloud Seeding — An Updated Assessment*, 135–136 ATMOSPHERIC RES. 193, 194 (2014). However, cloud seeding operations still run the risk of unintended consequences including reducing precipitation or causing hail. *See* WORLD METEOROLOGICAL ORG., *WMO Statement on Weather Modification*, 2 (Apr. 27, 2015), https://www.skywaterventures.com/uploads/7/0/6/1/70616003/wmr_documents.final_27_april_1.final.pdf [https://perma.cc/5286-F9KG]. The uncertainty surrounding the precise effects of cloud seeding underscores that cloud seeding poses serious risks and more research is needed.

[59] The "tragedy of the commons" refers to a situation where a shared resource is overexploited by individuals acting in their own self-interest, leading to the depletion or degradation of the resource to the detriment of all. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). In the context of cloud seeding, this could occur if multiple parties extract or manipulate atmospheric water without regulation, potentially disrupting natural weather patterns and exhausting the resource's availability for equitable use. *See generally* Currier, *supra* note 19, at 960 (explaining that if a cloud seeding project affects a neighboring state, it may cause conflict between parties in different states).

[60] *See* Weather Mitigation Research and Development Policy Authorization Act, S. 601, 111th Cong. § 3 (2009).

[61] *See* Bradshaw & Ehrman, *supra* note 48, at 465 (listing the current uses of cloud seeding, including drought mitigation, agricultural, and recreational such as increasing snowpack for ski hills); *see* Currier, *supra* note 19, at 954.

could help prevent the destruction of property and even save lives.[62] But this technology is not just a promise of the proverbial sunshine and rainbows. Besides its wide range of potential benefits, it also has several side effects.[63]

One potential side effect is what has been termed the "extra area effect."[64] Several observers and research studies have pointed out concerns that cloud seeding in one area to induce precipitation may lead to a decrease in precipitation in a neighboring area.[65] Several studies have concluded that cloud seeding causes an increase in precipitation up to 150 kilometers downwind without any "extra area effect" causing other neighboring regions to receive less precipitation.[66] However, other researchers have reached the opposite conclusion.[67] For example, the U.S. conducted cloud seeding over the open seas to suppress hurricanes but ultimately stopped the operation after Mexico cited scientific research suggesting the practice was causing drought conditions there.[68]

Regardless of the scientific consensus as to whether general cloud seeding causes negative extra area effects, researchers have also concluded that cloud seeding can be used to decrease precipitation by releasing an excessively large amount of particulate into the cloud.[69] This process is known as "over seeding."[70] Over seeding operations, such as the ones in China, have been successful in dissipating rain clouds.[71] Cloud seeding affects the hydrologic cycle, but to what extent, scientists still are not certain and further research is required.[72]

We can rest assured that as the industry grows across the Basin and the weather is modified, some will experience, "on one hand, unwanted deprivation of

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[62] *See* U.S. GOV'T ACCOUNTABILITY OFF., CLOUD SEEDING: EVALUATING ITS POTENTIAL BENEFITS AND LIMITATIONS, GAO-25-107328, 11 (2024), https://www.gao.gov/assets/gao-25-107328.pdf [https://perma.cc/US4M-TGZW]; *but see* MacKenzie L. Hertz, *It's Raining, It's Pouring, Weather Modification Regulation Is Snoring: A Proposal to Fill the Gap in Weather Modification Governance*, 96 N.D. L. REV. 31, 35 (2021) (cautioning that while cloud seeding may be used to divert hurricanes and suppress tornadoes, hail, and lightning, cloud seeding may harm others effected by such actions).

[63] Hertz, *supra* note 62, at 35–36.

[64] Weijan Wang, Zhanyu Yao, Jianping Guo, Chao Tan, Shuo Jia, Wenhui, Zhao, Pei Zhang, & Liangshu Gao, Abstract, *The Extra-Area Effect in 71 Cloud Seeding Operations During Winters of 2008–14 over Jiangxi Province, East China*, 33 J. METEOROLOGICAL RSCH. 528, 528 (2019) (120 kilometers); *see also* DeFelice et al., *supra* note 58, at 200 (100 to 150 kilometers).

[65] Wang et al., *supra* note 64; *see also* DeFelice et al., *supra* note 58.

[66] Mark E. Solak, David P. Yorty, & Don A. Griffith, *Estimations of Downwind Cloud Seeding Effect in Utah*, 35 J. WEATHER MODIFICATION 52, 53 (2003); Weijan Wang et al., *supra* note 64; *see also* DeFelice et al., *supra* note 58.

[67] MARSHA L. BAUM, WHEN NATURE STRIKES: WEATHER DISASTERS AND THE LAW 32 (2007).

[68] *Id.*

[69] Michael Brown, *Present and Future Regulation of Cloud Seeding Activities in California*, 43 J. WEATHER MODIFICATION 97, 98 (2011).

[70] *Id.*

[71] Helen Davidson, *China 'Modified' the Weather to Create Clear Skies for Political Celebration – Study*, GUARDIAN (Dec. 5, 2021, 11:28 PM), https://www.theguardian.com/world/2021/dec/06/china-modified-the-weather-to-create-clear-skies-for-political-celebration-study [https://perma.cc/9TUR-TN4A].

[72] DeFelice et al., *supra* note 58, at 201.

precipitation or, on the other, an undesired increase in precipitation."[73] For example, cloud seeding projects could produce unwanted excesses of rain or snow resulting in floods. Weather modification could be used to direct storms away from population centers but toward others.[74] Also, suppressing hail and thunderstorms may protect crops or airports, but that suppression will inevitably suppress precipitation that others downwind or downstream may depend on.[75]

Cloud seeding across the Basin reveals pressing legal questions. How do we regulate operations that can redirect rainwater, harming neighboring lands? How do we resolve conflicting ideas between public and private entities about what are the ideal weather conditions to induce?[76] Currently, these are issues that each state's cloud seeding regulatory entity answers.[77] But each state answers them independently of any other state.[78] Such state agencies only assess the costs and benefits of their regulations and operations as they concern their state.[79] They do not assess the costs and benefits of a cloud seeding operation on another state.[80] If each state in the Basin is left to craft its own legal regimes, control mechanisms, and regulatory goals, then the likelihood of states being drawn into conflict as clouds travel across state borders only increases.[81]

State courts have overseen litigation regarding cloud seeding disputes for over fifty years.[82] In 1959, the Texas Supreme Court reviewed a case brought by ranchers seeking a preliminary injunction on cloud seeding activities by a weather modification operator.[83] Both sides argued over whether cloud seeding would cause more or less damage to their crops from hail.[84] This early case did not help foreclose litigation over rights to atmospheric moisture that would continue to come before courts. Cross-boundary disputes over cloud seeding have persisted for decades. For

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[73] Hertz, *supra* note 62, at 35.
[74] Jamie Harris, *Law and Technological Change: The Case of Weather Modification*, 3 YALE REV. L. & SOC. ACTION 26, 30 (1973).
[75] *See* Abrams & Clark, *supra* note 43; *see* Hertz, *supra* note 62, at 36.
[76] *See* Chen, *supra* note 1, at 67.
[77] *See generally id.* at 69–92.
[78] *Compare* N.M. STAT. ANN. § 75-3-7 (1965) (avoiding the use of the term professional and only requiring applicants to "demonstrate[] . . . skill and experience necessary to accomplishment of weather control without actionable injury to property or person"), *with* ARIZ. REV. STAT. § 45-1603.A.3 (2010) (requiring would-be operators to provide information related to their professional qualifications during the application process but not expressly requiring that applicants possess any particular level of expertise to receive a permit or license).
[79] *See* Chen, *supra* note 1, at 81–82.
[80] *See id.* at 83 (discussing how three states reached three different conclusions regarding ownership of atmospheric pressure, none of which assessed costs and benefits to another state).
[81] *See* Larson, *supra* note 21, at 920 ("Neighboring states can thus have dramatically different legal regimes, not to mention policy aims, governing water use and management. These differences inevitably led to water disputes between states over transboundary waters.").
[82] *See*, *e.g.*, Slutksy v. City of New York, 97 N.Y.S. 2d 238, 239 (N.Y. Sup. Ct. 1950); Sw. Weather Rsch., Inc. v. Duncan, 319 S.W.2d 940, 941 (Tex. Civ. App. 1958); Pennsylvania. Nat. Weather Ass'n v. Blue Ridge Weather Modification Ass'n, 44 Pa. D. & C.2d 749, 749 (Pa. Com. Pl. 1968).
[83] Sw. Weather Rsch., Inc. v. Jones, 327 S.W.2d 417, 419 (Tex. 1959).
[84] *Id.*

example, in 1992, North Dakota sued the Board of Natural Resources and Conservation over its rejection of North Dakota's application for two permits to conduct cloud seeding activities just twenty miles inside Montana's border, known as the "buffer zone."[85]

Intrastate and cross-boundary disputes over cloud seeding in the Basin could present a substantial increase in transaction costs and make using atmospheric moisture highly inefficient.[86] Because of the potential for cloud seeding to improve our water management or wreak havoc and cause disputes, the Basin will need a coordinated and comprehensive legal regime to best utilize this emerging natural resource. This Article next addresses several proposed legal regimes for atmospheric moisture.

E. Current Competing Legal Regimes for Atmospheric Moisture

Cloud seeding can be an effective means of augmenting water supplies.[87] But conducting weather modification operations over such a wide area with so many diverse peoples and parties will inevitably lead to disputes.[88] One of the guiding principles of American jurisprudence is the deep reverence for property rights and personal autonomy.[89] Weather modification activities to extract atmospheric moisture over other people's land presents a complicated legal quagmire without an obvious solution. Since the advent of weather modification technology following World War II, the issue of ownership has always been a salient question in legal discussions of weather modification.[90] American jurisprudence on the legal arrangement for atmospheric moisture could develop into either private ownership or state ownership.[91]

Developing a legal regime that would allow for atmospheric moisture to be privately owned, however, is highly unlikely. Generally, all water in the U.S. is a public trust resource.[92] This means that it is owned by the government and held in trust for the benefit of all citizens.[93] Unlike property such as land which can be

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[85] North Dakota Atmospheric Res. Bd. v. Bd. of Nat. Rsch. & Conservation, No. ADV-92-918, 1992 Mont. Dist. LEXIS 60, at *2 (1st Jud. Dist., Lewis & Clark Co., Mont. Jul 24, 1992).
[86] Chen, *supra* note 1, at 56–57.
[87] *See generally* Larson, *supra* note 45 (arguing that cloud seeding could be a viable means of enhancing precipitation, thus increasing access to water resources).
[88] *See* Chen, *supra* note 1, at 68–69.
[89] *See* Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1548 (2007) (highlighting that personal autonomy is a central principle that has helped shaped how American law has developed over time).
[90] *See Who Owns the Clouds?*, 1 STAN. L. REV. 43 (1948) (discussing legal ownership of atmospheric moisture following the technological progress of advances in flight and weather modification of WWII).
[91] *See* Tarek Majzoub, Fabienne Quilleré-Majzoub, Mohamed Abdel Raoud, & Mire El-Majzoub, *"Cloud Busters": Reflections on the Right to Water in Clouds and A Search for International Law Rules*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 321, 330–32 (2009).
[92] *See* The Daniel Ball, 77 U.S. 557, 564 (1870); *see generally* Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (1892).
[93] *See The Daniel Ball*, 77 U.S. at 564; *Illinois Cent. R. Co.*, 146 U.S. at 458 (quotation omitted).

owned individually, the government gives usufructuary rights to water.[94] And with the federal government also owning the airspace above all lands,[95] it is very difficult to imagine a court finding that the clouds above a public or private entity's land to be anything other than a public trust resource. Providing landowners with exclusive control over atmospheric water would go against current jurisprudence of treating bodies of water as a public trust resource.[96] For over a century, courts have treated bodies of water as public resources to be reviewed under the public trust doctrine.[97]

State ownership of water in clouds is the better legal arrangement and has largely been adopted in the U.S.[98] Under a state ownership system, for an individual to access water in clouds, they must get consent from the government agency responsible for granting licenses to conduct cloud seeding operations in U.S. airspace.[99] Conversely, under a private ownership system, an individual could be required to gather consent from each landowner the cloud passes over.[100] Under private ownership, ownership of atmospheric moisture can be asserted through ownership of the underlying land.[101] Allowing each property owner to claim rights to the clouds passing over their land would create prohibitively high transaction costs due to the expensive and impractical consent-gathering process required.[102]

Under state ownership, ownership of atmospheric moisture would be held by the state in trust for the general benefit of the public.[103] This proposal would classify atmospheric moisture as either *res communes*, meaning it is common property available for public use and enjoyment, or *res nullius*, meaning it belongs to no one.[104] Under these doctrines, the government, either through state or federal authorities, would have the authority to regulate and implement control mechanisms

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[94] Alan W. Witt, Comment, *Seeding Clouds of Uncertainty*, 57 JURIMETRICS J. 105, 121 (2016).
[95] Sovereignty and Use of Airspace, 49 U.S.C. § 40103(a)(1) (1994).
[96] *See The Daniel Ball,* 77 U.S. at 564 (holding that bodies of navigable water at the time of statehood are to be held in trust by the government for the benefit of all people).
[97] *See* James L. Huffman, *Speaking of Inconvenient Truths–a History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 57, 62 (2007) (explaining how *Illinois Central Railroad* has been the "lodestar" of the modern application of the public trust doctrine which affirms that states can only subject water bodies to private ownership so long as it does not prevent the state from meeting its trust responsibilities).
[98] *See* Chen, *supra* note 1, at 69–92.
[99] *Id.* at 71–74.
[100] *See id.* at 83–84 (highlighting that Texas and Pennsylvania courts concluded private landowners can bring injunctions against cloud seeding companies by asserting a property interest in the clouds that pass over their land in certain circumstances).
[101] *See* Simms, *supra* note 49, at 929; *but see Who Owns the Clouds?*, *supra* note 91, at 48–49 (concluding that the *ad coelum* doctrine does not support and has never supported the assertion that private land ownership extends to atmospheric moisture).
[102] *See* Chen, *supra* note 1, at 55.
[103] *Cf.* Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (1892). This case states that water, as a public trust resource, is held in trust by the government for the benefit of all citizens. *See id.* at 452. Thus, if water in clouds were to be concluded as a public trust resource it would likely be treated similarly.
[104] *See* Chen, *supra* note 1, at 68–69.

to manage atmospheric moisture.[105] Treating atmospheric moisture as *res communes* would be consistent with current Western and American jurisprudence as it would run parallel with the public trust doctrine.[106]

It is because American jurisprudence is best suited for treating atmospheric moisture as *res communes* under state ownership that the Basin states should work together to create a state commission on weather modification.[107] Creating such a commission would allow states to cooperate and create a well-informed regulatory apparatus that can meet the water management needs of the Basin.[108] Developing such a commission would require a thorough understanding of how the cloud seeding industry is currently operating throughout the Basin.

III. CLOUD SEEDING IN THE COLORADO RIVER BASIN

This Part lays out how cloud seeding is currently conducted in the Basin and the challenges it poses.

A. Current Cloud Seeding Projects in the Basin

Cloud seeding has been conducted in the Basin since the 1960s for operational and research purposes.[109] With well over six decades of research and water scarcity in the Basin implying water will be an even more valuable resource, monetary incentives for water augmentation are climbing.[110] Public agencies and private parties invest millions of dollars in cloud seeding projects across the Basin.[111]

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[105] *Cf.* Samuel T. Ayres, *State Water Ownership and the Future of Groundwater Management*, 131 YALE L.J. 2213, 2224, 2284–85 (2022) (explaining that when the state controls a natural resource, it allows the state to manage and regulate the resource).

[106] *See* Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENV'T L.J. 3, 33–34, 46–48 (2007) (explaining that oceans have been considered *res communes* "since the time of Grotius" and that American jurisprudence over the decades has developed to become consistent with the public trust doctrine to protect *res communes* resources); Huffman, *supra* note 97, at 21–22.

[107] *See infra* Part IV.

[108] *Id.*

[109] Steven M. Hunter, *Potential Water Augmentation from Cloud Seeding in the Colorado River Basin,* 38 J. WEATHER MODIFICATION 51, 51 (2006).

[110] *See*, *e.g.*, Sophie Quinton, *Why Cloud Seeding Is Increasingly Attractive to the Thirsty West*, STATELINE (Feb. 20, 2018, 12:00 AM), https://stateline.org/2018/02/20/why-cloud-seeding-is-increasingly-attractive-to-the-thirsty-west/ [https://perma.cc/J4CH-ZV9C].

[111] *See*, *e.g.*, Brittany Peterson, *Feds Spend $2.4 Million on Cloud Seeding for Colorado River*, ASSOCIATED PRESS (Mar. 17, 2023, 12:00 PM), https://apnews.com/article/climate-change-cloud-seeding-colorado-river-f02c216532f698230d575d97a4a8ac7b [https://perma.cc/JW57-ENW8]; Katie Brigham, *How States Across the West are Using Cloud Seeding to Make it Rain*, CNBC (Dec. 17, 2022, 9:00 AM) https://www.cnbc.com/2022/12/17/how-cloud-seeding-can-help-replenish-reservoirs-in-the-west.html [https://perma.cc/3V9A-5TJ2]; Sarah A. Tessendorf, Jeffrey R. French, Katja Friedrich, Bart Geerts, Robert M. Rauber, Roy M. Rasmussen, Lulin Xue, Kyoko Ikeda, Derek R. Blestrud, Melvin L. Kunkel, Shaun Parkinson, Jefferson R. Snider, Joshua Aikins, Spencer Faber, Adam Majewski, Coltin Grasmick, Philip T. Bergmaier, Andrew

Many of these projects are conducted in the Upper Basin states like Utah because the state's topography, climate, and water infrastructure are cost-effective for such projects.[112]

There is also a great deal of interest in Lower Basin states to ensure that cloud seeding projects in Upper Basin states are effective.[113] While all Basin states depend on precipitation, states vary in the sources they depend on for their water supply.[114] For example, states in the Lower Basin not only depend on precipitation from local clouds, but they also depend on Colorado River water that has made it all the way from the melting snowpack in the Rocky Mountains down to the Lower Basin.[115] Ninety percent of the stream flow of the Colorado River originates in the Upper Basin.[116] Thus, if it rains and snows more in the Upper Basin, more water will enter the Lower Basin.[117]

The cloud seeding projects that successfully produce more rain or snow result in more water that flows down the Upper Basin.[118] That water then travels into various reservoirs of the Upper Basin and naturally flows through the Colorado River system until it reaches the crossing point between the Upper and Lower Basin.[119] While water is in the Upper Basin, it is subject to the use of Upper Basin water users until it passes into the Lower Basin.[120]

B. The Overall Goal of Cloud Seeding Projects in the Basin

Despite having a long history of experiments researching whether cloud seeding is possible, many states are only recently realizing that not only is cloud

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Janiszeski, Adam Springer, Courtney Weeks, David J. Serke, & Roelof Bruintjes, *A Transformational Approach to Winter Orographic Weather Modification Research: The SNOWIE Project*, 100 BULL. AMER. METEOR. SOC. 71, 73 (2019).

[112] UTAH DEP'T NAT. RES., *Cloud Seeding: Enhancing Our Water Supply*, UTAH, https://water.utah.gov/cloudseeding/#:~:text=The%20Cloud%20Seeding%20Act%20of,it%20helps%20form%20ice%20crystals [https://perma.cc/S422-HCHZ].

[113] *See* Peterson, *supra* note 111.

[114] *See* Tessendorf et al., *supra* note 111; Quinton, *supra* note 110.

[115] *Id.*

[116] Daniel Hogan & Jessica D. Lundquist, *Recent Upper Colorado River Streamflow Declines Driven by Loss of Spring Precipitation*, 51 GEOPHYSICAL RSCH. LETTERS, 16, 1 (2024).

[117] *See id.*

[118] *See* TODD FLANAGAN, N. AM. CONSULTANTS, INC., ANNUAL CLOUD SEEDING REPORT 8, 10, 50–51 (2024) (concluding that several Utah rivers in the basin received an estimated 5-13% increase in streamflow due to a 5-6% increase in precipitation and snowpack from cloud seeding).

[119] *Id.* at 2, 9–10 (explaining that lower basin states worked together to fund an extension period for the central and southern Utah cloud seeding program, which was expected to increase precipitation to tributaries of the Colorado River).

[120] Colorado River Compact, COLO. REV. STAT. § 37-61-101, art. III(e).

seeding possible, but it is economically feasible.[121] Private cloud seeding projects have been increasing as technology becomes cheaper and more effective.[122]

Cloud seeding is one of the most cost-effective means of acquiring more water through augmentation.[123] In 2023, Utah lawmakers invested an unprecedented $12 million into the cloud seeding program of the Utah Division of Water Resources.[124] The Director of Natural Resources for Utah commented that this program can produce water between $2 and $15 per acre-foot.[125] This small cost per acre-foot is quite appealing when considering that the Bureau of Reclamation has offered Colorado River water users compensation between $330 and $400 per acre-foot of unused water.[126] This ability to produce water at such a cost-effective rate is driving parties to invest.[127]

Public institutions are investing quite heavily in out-of-state projects with the hope of creating more water in a cost-effective way.[128] The Central Arizona Project (CAP), Southern Nevada Water Authority (SNWA), and California's six agency committee ("California Agencies") currently fund weather modification projects in Upper Basin states such as Wyoming, Colorado, and Utah.[129] The Central Arizona Water Conservation District (CAWCD) commits $650,000 annually to weather modification projects in Colorado.[130] Like SNWA and the CAP, California Agencies intend their investment to generate greater runoff volumes in the Colorado

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[121] *See* Leia Larsen, *Utah Put Millions Into Cloud Seeding This Year. Here's What It Expects in Return*, THE SALT LAKE TRIBUNE, (Sep. 29, 2023, 3:48 PM), https://www.sltrib.com/news/environment/2023/09/29/utah-put-millions-into-cloud/ [https://perma.cc/HE8V-B2AC] ("[w]hen you compare [cloud seeding] to anything else we do . . . it is hands-down a fraction of the cost of any other water [conservation] program").
[122] Witt, *supra* note 94, at 128.
[123] *See* Larsen, *supra* note 122.
[124] *Id.*
[125] *Id.* (quoting Joel Ferry, director of Utah's Department of Natural Resources).
[126] Letter from Jacklynn Gould, U.S. Department of the Interior, Bureau of Reclamation, on Funding Opportunity for Voluntary Participation in the Lower Colorado Conservation Efficiency Program, to Interested Parties (2022) (available at https://www.usbr.gov/inflation-reduction-act/docs/LC-Conservation-Program-Letter-with-Enclosures.pdf.).
[127] *See* Larsen, *supra* note 122.
[128] *See Weather Modification Projects*, CENT. ARIZ. PROJECT, https://www.cap-az.com/water/water-supply/building-resiliency/weather-modification-projects/ [https://perma.cc/2YBG-Y4JQ]; Angus M. Thuermer Jr., *Officials Scrutinize Cloud Seeding Program,* WYOFILE (Nov. 30, 2021), https://wyofile.com/officials-scrutinize-cloud-seeding-program/ [https://perma.cc/GU73-TNMM].
[129] *Weather Modification Projects*, *supra* note 128.
[130] CENTRAL ARIZONA PROJECT, BIENNIAL 2024-2025 BUDGET 2-19 (2024).

River.[131] This funding allows cloud seeding operations in the Upper Basin states, such as Utah, to expand substantially.[132]

These ideal economic circumstances are also driving private entities, such as utilities, to invest heavily in cloud seeding projects.[133] Private utility companies, such as the Idaho Power Company, substantially fund cloud seeding projects.[134] Many private utility companies receive a significant portion of their power from hydroelectric projects like dams.[135] More freshwater in rivers translates to better conditions for generating hydroelectric power.[136] Private company interests can drive investment for projects across multiple states.[137]

As this industry grows, so too will the expectations that investors have when funding out-of-state projects. In practice, investors would fund projects that create water with the reasonable expectation that they will be able to use that cloud -seeded water.[138] Investing in a project with the expectation that in return for your capital, you will receive water effectively creates a water market.[139] But when a party from the Lower Basin invests in a project that will take place in the Upper Basin, that water in the Upper Basin needs to be generated, accounted for, transported through the Colorado River system, and then delivered from Lake Mead to the

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[131] *See, e.g.*, *Utah Holds Its First Cloud Seeding Symposium*, UTAH DEP'T NAT. RES. (Sept. 28, 2023), https://water.utah.gov/utah-holds-its-first-cloud-seeding-symposium/ [https://perma.cc/CL7V-38M2] (quoting Tom Ryan, Resource Specialist of the Metropolitan Water District of Southern California as stating "[c]ollaboration between states is not only about improving individual programs but also has the intention of providing more water supply for the entire region").

[132] TODD FLANAGAN & GARRETT CAMMANS, N. AM. WEATHER CONSULTANTS, INC., ANNUAL CLOUD SEEDING REPORT: SOUTHERN & CENTRAL UTAH PROGRAM 2022-2023 WINTER SEASON, 1, 4 (2023) (reporting that funding from Lower Basin states extending the cloud seeding period has resulted in early-season (November 1–15) and late season (March 16–April 15) extensions to the cloud seeding program since 2010).

[133] Tessendorf et al., *supra* note 111.

[134] *Id*.

[135] U.S. ENERGY INFO. ADMIN., *Hydropower Explained*, (last updated April 20, 2023) https://www.eia.gov/energyexplained/hydropower/ [https://perma.cc/X6HS-G5H9] (noting that across the entire U.S., total annual electricity generated between 2001 through 2022 was almost a seven percent average).

[136] *See* Tessendorf et al., *supra* note 111, at 72; Samantha Young, *Governments Turn to Cloud Seeding to Fight Drought*, PHYS.ORG (Dec. 10, 2009), https://phys.org/news/2009-12-cloud-seeding-drought.html [https://perma.cc/JU6G-6J4B].

[137] *See*, *e.g.*, Peter Maloney, *SMUD, Among Other Utilities, Uses Cloud Seeding to Increase Hydropower*, AM. PUB. POWER ASS'N (Jan. 22, 2018), https://www.publicpower.org/periodical/article/smud-among-other-utilities-uses-cloud-seeding-increase-hydropower [https://perma.cc/PQ9C-B2ML]; Tessendorf et al., *supra* note 111 (showing multiple utilities both privately and publicly owned across several states have made substantial investments in cloud seeding to generate greater runoff for hydropower).

[138] *See* James A. Lochhead, *An Upper Basin Perspective on California's Claims to Water From the Colorado River*, 4 U. DENV. WATER L. REV. 290, 322 (2001).

[139] *See id.* at 322–24 (arguing that implementing marketing mechanisms that allow for the purchase and/or transfer of water between the Upper and Lower Basins constitutes a water market).

ultimate state of use and, finally, to the ultimate water user in the Lower Basin.[140] Such a system where a Lower Basin user could purchase the legally enforceable right to water in the Upper Basin likely qualifies as an inter-basin transfer.[141] But inter-basin transfers are a type of transaction that comes with many complications.

C. Interstate Cloud Seeding Projects Qualify as an Inter-basin Sale or Transfer

The diversion of water from one water source basin to another constitutes an inter-basin transfer.[142] However, cloud seeding presents a new problem not yet addressed through an inter-basin transfer lense. A Lower Basin water user funding a cloud seeding project in the Upper Basin does not necessarily constitute an inter-basin transfer. Hypothetically, if a user in Arizona were to fund a cloud seeding project in Colorado with only the hope that this other state would not increase its consumptive use, then the additional water that flowed from one basin to another would not likely constitute an inter-basin sale or transfer. This is because there would be no contractual obligation or formal arrangement ensuring the water's availability to the Lower Basin. In other words, this investor would simply be gambling on the fact that the Upper Basin will continue to underutilize its consumptive use allocation, and the excess water will make its way down to the Lower Basin for their benefit.

Conversely, if that same user were to fund the same project with the belief that they would have a legally enforceable right to the cloud-seeded water, that would likely constitute an inter-basin water transfer. To have such a right to this water, they would likely have needed to contract for the right to ownership of that water with an Upper Basin State in the process of securing their state permit to conduct cloud seeding operations.[143]

All water users in the Lower Basin, both public and private, would be able to contract with Upper Basin water users for water from cloud seeding while it is still in the Upper Basin, thus creating a water market of inter-basin sales.[144]

D. Inter-basin Transfers are Currently Illegal Under the Colorado Compact

The Colorado Compact ("the Compact"), also referred to as the Law of the River, is the result of a complex negotiation between Upper and Lower Basin states over how to allocate the consumption of water.[145] The Lower Basin states wanted major regulatory structures to alleviate the threat of flooding and create opportunities for water development.[146] The Upper Basin states wanted to avoid the interstate

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[140] Lochhead, *supra* note 138, at 328.
[141] *Id.* at 327.
[142] Barbara Cosens, *The Eternal Quest for Water: Historical Overview and Current Examination of Interbasin Transfers of Water*, 55 ROCKY MT. MIN. L. INST. 17-1, § 17.01 (2009).
[143] *See* David J. Guy, *When the Law Dulls the Edge of Chance: Transferring Upper Basin Water to the Lower Colorado River Basin*, 1991 UTAH L. REV. 25, 28 (1991).
[144] *See* Lochhead, *supra* note 138, at 323.
[145] *Id.* at 292 n. 5.
[146] *Id.* at 323.

imposition of the prior appropriation doctrine and to protect future development rights in the Upper Basin.[147] The Law of the River struck a bargain between the conflicting interests and helped alleviate some of the controversies between Upper and Lower Basin states.[148] The Upper Basin received a specified perpetual allocation of the right of consumptive use of water.[149] In exchange, the Upper Basin agreed to let any water for which it lacked a reasonably anticipated consumptive need to pass to the Lower Basin without charge.[150] Allowing inter-basin transfers over cloud-seeded waters would do more harm than good by going against the very basis of that bargain.[151]

The Compact does not apportion water itself, but rather the use of water.[152] Pursuant to Article III(a), both the Upper and Lower Basins are apportioned from the Colorado River System in "perpetuity . . . the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum[.]"[153] Furthermore, Article III(e) states that the Upper Basin shall not withhold excess water for its own use if there is a demand for it in the lower basin.[154]

To determine each basin's consumptive use, the Compact states that the place of use is determinative.[155] Two requirements must be met for the Lower Basin to be charged with use.[156] First, the water must have passed Lee Ferry, Arizona.[157] Second, the water must be used in the Lower Basin.[158] Thus, according to the Compact, that water does not belong to either basin until it is determined at what place the water is used.[159]

Moreover, there is very little legal precedent, if any, to create a system that could effectively account for inter-basin transfers over cloud-seeded water between the basins.[160] Apportioning cloud-seeded water in the Upper Basin for Lower Basin

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[147] Lochhead, *supra* note 138, at 323.
[148] *See id.* at 324
[149] *Id*. (citing Colorado River Compact, COLO. REV. STAT. § 37-61-101, art. III(a)).
[150] Sandra Zellmer, *The Anti-Speculation Doctrine and Its Implications for Collaborative Water Management*, 8 NEV. L.J. 994, 1000–01 (2008).
[151] Providing water to the Basin via cloud seeding is a benefit, but if it comes at the potential cost of opening a "Pandora's box" of allowing all other kinds of inter-basin transfers, Compact states will rightfully reject proposals to expand cloud seeding operations between Upper and Lower Basin members. *See* John Ruple, *The Navajo-Gallup Project: Legality of Intrastate/Interbasin Diversions Under the Colorado River Compact*, 24 J. LAND RES. & ENV'T. L. 475, 478 (2004).
[152] Lochhead, *supra* note 138, at 324 (citing § 37-61-101, art. III).
[153] § 37-61-101, art. III(a).
[154] *Id.* § 37-61-101 Art. III(e) ("The States of the Upper Division shall not withhold water, and the States in the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic agricultural uses.").
[155] Lochhead, *supra* note 138, at 325; § 37-61-101 Art. I ("To these ends the Colorado River Basin is divided into two Basins, and an *apportionment of the use* of part of the water of the Colorado River System *is made to each of them* with the provision that further equitable apportionments may be made") (emphasis added).
[156] Lochhead, *supra* note 138, at 325.
[157] Colorado River Compact, § 37-61-101, Art. III(d).
[158] *See id.* at Art. III(a).
[159] *See id.* at Art. I; III(a); Lochhead, *supra* note 138, at 325.
[160] Lochhead, *supra* note 138, at 326.

use would require some kind of debit-credit system.[161] Because the Compact does not reference any kind of debit-credit system, some authorities argue the sale of inter-basin water "would allow the Lower Basin to consumptively use the amount of the water sale in excess of 75 m.a.f. every ten years and require the use of the Upper Basin to deliver the same."[162] Creating an open market for this kind of water between the basins would blur the clear line of the Compact that apportioned the right of use between the two basins in perpetuity and would complicate the right of development between the two basins.[163]

States are also powerless to unilaterally allow for the selling of rights to cloud-seeded water while it is in the Upper Basin.[164] The Compact, as federal law ratified by each state legislature and Congress, imposes terms on each state that limit the ability to confer rights on water.[165] States are so limited that Upper Basin states cannot confer upon any water user or government agency the right to sell, lease, or transfer the right to use water in a Lower Basin state.[166] Such a right does not exist under the Compact.[167] If any state attempts to grant such a right, it may be sued by another Compact member.[168] Alternatively, the Compact member could sue the federal government if it seeks to grant such a right involving accounting or delivery through a federal reservoir.[169]

E. Assuming Inter-basin Transfers do not Pose a Concern, Cloud-Seeded Water Would Likely Violate Prior Appropriation Regimes

Stepping away from the issues posed by cloud seeding between Upper and Lower Basin water users, cloud-seeded water poses other challenging issues to prior appropriation regimes that need to be addressed. Water from cloud seeding does not neatly fit into either of the typical categories contemplated in water law: groundwater

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[161] Lochhead, *supra* note 138, at 325–26. A debit/credit system in this context would function as an accounting mechanism to track and balance the allocation and use of water between basins. *See id.* Under such a system, "credits" would represent water contributed or made available by one basin (e.g., through cloud seeding), while "debits" would account for water consumed or withdrawn by the other basin. *See id.* This approach would ensure transparency and equity in water transfers, but it would require complex agreements and consistent monitoring to implement effectively. *See id.*

[162] Lochhead, *supra* note 138, at 325–26.

[163] *See* Zellmer, *supra* note 150, at 1000 (explaining that Chevron Oil's proposal to lease water from the Upper Basin of Colorado to the Lower Basin of Nevada was resisted by Compact states "for fear of encouraging commoditization of water and opening up unfettered water markets between Upper and Lower basins," which the Compact sought to avoid); Lochhead, *supra* note 138, at 324.

[164] *See* Lochhead, *supra* note 138, at 326.

[165] *Id.*

[166] *Id.*

[167] *See* Colorado River Compact, COLO. REV. STAT. § 37-61-101–104 (2000).

[168] The U.S. government may be sued under federal law by states should any officer or agency fail to adhere to the compacts, international treaties, or Supreme Court Decrees or the Colorado River Storage Project Act. *See* 43 U.S.C § 620m (1994).

[169] Lochhead, *supra* note 138, at 326.

or surface water.[170] Water law principles, while helpful in many cases, fall short in helping to resolve disputes over innovative means of water augmentation.[171]

"Water rights in the arid Western United States are generally based on the doctrine of prior appropriation."[172] Prior appropriation allocates the relative priority of water rights based on the date a user first put a specified amount of water to beneficial use.[173] This regime requires an observer to know the quantity, use, and relative priority date of each water right.[174] Additionally, this regime relies on an important distinction between "developed" and "salvaged" water.[175]

The distinction between whether water is developed or salvaged is critical because it determines whether the water in question is subject to the prior appropriation regime.[176] Developed water is water brought into a system from outside the Basin where it did not originally exist.[177] Salvaged water refers to water within the river basin that was previously inaccessible or unusable but has been made usable through human intervention.[178] The party that develops water retains ownership of it, regardless of the prior appropriation system.[179] Thus, the "party that imports water into a prior appropriation basin owns that water without it being subject to senior priority claims."[180] Salvaged water, on the other hand, remains part of the priority system, and the party that salvaged the water has no superior claim to the water.[181]

Cloud-seeded water throws a rather large wrench into the mechanics of this distinction. On one hand, it is developed water because the water is from clouds that typically fly high *above* the Basin.[182] Assuming those clouds are not considered part of the Basin, the water brought down through cloud seeding would likely be classified as developed water, allowing it to be used outside the prior appropriation system. However, cloud seeding can occur at a wide range of altitudes.[183] Orographic cloud seeding operates by having ground generators emit cloud seeding particulate from elevations as little as ten feet.[184] These low-altitude orographic clouds that form in response to the Earth's topography could be considered part of the Basin. The

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[170] Larson, *supra* note 45, at 767.
[171] *Id.* at 765, 767.
[172] *Id.* at 765; John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 1988–89 (2005).
[173] Alexandra B. Klass, *Property Rights on the New Frontier: Climate Change, Natural Resource Development, and Renewable Energy*, 38 ECOLOGY L.Q. 63, 86 (2011).
[174] *See id.*
[175] *See* S.E. Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1325 (1974).
[176] *Id.*
[177] Larson, *supra* note 45, at 766.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *See id.* at 765–67 (highlighting how the law has not provided any answers to whether the water in a cloud is temporarily part of the basin while it floats above or is only part of the basin once the water hits the basin ground, of if cloud seeded water is truly developed or salvaged water).
[183] Chen, *supra* note 1, at 66.
[184] Griffith, *supra* note 39, at 100–01.

ranging altitudes of clouds and cloud seeding operations present a difficult question of at what point is a cloud no longer part of the basin it travels across.

On the other hand, cloud-seeded water could be categorized as salvaged water.[185] The water in clouds has always traveled across basins and contributed to the Basin's hydrologic cycle but was previously inaccessible until it happened to rain.[186] Through human intervention, water that was once suspended in the atmosphere now has a significantly higher likelihood of descending from the skies and being put to beneficial use.[187] This interpretation, however, assumes that the cloud was already part of the Basin prior to any human intervention.[188]

Water generated from cloud seeding does not neatly fit into the typical distinctions used by courts to decide the legal status of a person's right to use certain kinds of water.[189] Asking the judicial branch to resolve a complex issue like classifying water from cloud seeding as developed or salvaged water and how that affects the Compact is a heavy lift.[190] Furthermore, recent Supreme Court precedent has put the responsibility of statutory interpretation more squarely on the shoulder of the courts and away from administrative agencies such as the Environmental Protection Agency and its goal to regulate the "waters of the United States."[191] Courts also face resource and institutional constraints in resolving such complex issues.[192]

Constraints such as the judicial system's relative lack of expertise in water law are a substantial factor.[193] Signatories to the Compact would be wise to avoid asking courts to impose a rule on how cloud-seeded water is to be categorized under the compact. Instead, they should negotiate among themselves to compromise on how to legally define water from cloud seeding operations, how it is handled in the context of the Compact, and how it should be regulated.

IV. Proposed Compact Amendment to Regulate Cloud Seeding

This Part lays out what provisions the amendment should include, why amending the Colorado River Compact is the best option for addressing the challenges posed by cloud seeding, and the limitations of this proposal.

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[185] Larson, *supra* note 45, at 775.
[186] *See* Larson & Payne, *supra* note 33, at 504 (discussing how salvaged water is water that is part of the basin but was previously unusable whereas developed water is water that is not part of the basin and must be imported).
[187] *See* Chen, *supra* note 1.
[188] *See* Larson, *supra* note 45, at 766.
[189] *Id.* at 767.
[190] *See* Larson & Payne, *supra* note 33, at 507.
[191] *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); Sackett v. Env't Prot. Agency, 598 U.S. 651, 661 (2023).
[192] Larson & Payne, *supra* note 33, at 507.
[193] *Id.*

A. The Necessary Elements of the Compact Amendment

The Basin states should negotiate an amendment to the Colorado Compact of 1922 to add three provisions. First, the states should specify how cloud-seeded water in the Basin will be regulated under the Compact.[194] Second, the states should specify how cloud-seeded water will be classified as either developed or salvaged water concerning each member state's water rights regime.[195] And third, the states should create the Interstate Commission on Weather Modification for the Colorado Basin (ICWMB), a hypothetical entity proposed for illustrative purposes.

The Compact member states should create an interstate water commission known as ICWMB. This commission would generally parallel The Weather Mitigation Research and Development Policy Authorization Act (WMA).[196] ICWMB should have the power to regulate cloud seeding activities in the Basin, issue permits, provide operational guidelines, and conduct research on improving methods of cloud seeding. ICWMB should be made up of voting members from each of the seven member states. The member states should create the Commission so that the twenty-eight indigenous tribes are represented to facilitate stakeholder participation in an inclusive and transparent manner.[197] It is unlikely that the seven states would agree to give each tribe a vote,[198] but some sort of representation on the Commission through advisory boards or grouping upper and lower basin tribes as groups with a single vote may be more realistic. ICWMB should also have an advisory board made up of experts who are familiar with emerging cloud seeding technology to create an effective Commission.[199]

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[194] *See supra* Part III.

[195] *See supra* Part III.

[196] *See* Currier, *supra* note 19, at 961 n. 139; Weather Mitigation Research and Development Policy Authorization Act, S. 601, 111th Cong. (2009). The WMA establishes a Research Program within the National Science Foundation's Geosciences Directorate, headed by a Program Director appointed by the Director of the Geosciences Directorate. S. 601 § 5(a). The WMA also creates an eleven-member Working Group, composed of representatives from states that support weather mitigation programs and experts in cloud dynamics, precipitation physics, hydrology, and related fields. *Id.* § 5(c). Similarly, ICWMB would form a commission where each participating state appoints a voting member, while the federal representative is designated by the Director of the Geosciences Directorate. However, ICWMB would extend beyond the advisory role of the WMA's Working Group, as it would have the authority to establish regulatory standards and decide whether to grant or deny cloud-seeding applications. Conversely, the WMA's Working Group primarily advises on research priorities and coordinates federal-state research efforts.

[197] *See* Larson, *supra* note 5; *see also* Larson, *supra* note 21, at 955.

[198] There are thirty federally recognized tribes within the Basin. *Tribes*, WATER & TRIBES INITIATIVE: COLO. RIVER BASIN, https://www.waterandtribes.org/tribes [https://perma.cc/T6KT-L78R]. To give each tribe a vote on the commission would create a large voting block that outweighs the seven states. The states are not likely to allow tribes to dilute their voting power. *See* Erica Porvaznik, *Renegotiating the Colorado River Compact: How a One Size Fits All Approach Has Led to a State Centric Future, and How the Commerce Clause Can Solve It*, 43 N. ILL. U. L. REV. 120, 150 (2023) ("As it currently stands, the states are willing to negotiate with the country of Mexico regarding any new negotiations but remain wary about allowing tribes access to the negotiations and the water.").

[199] Currier, *supra* note 19, at 969.

The operators who receive permits from this Commission would likely conduct operations that affect several states in the Basin and their citizens.[200] As such, it seems reasonable to allow a state commission to set the standards for an operator's license by implementing licensing requirements, operational guidelines, and a fee collection structure.[201] The ICWMB's goal should be to issue binding decisions and regulations that are comprehensive and specific. But it should also be flexible enough to leave room for innovative means of weather modification so that the industry can maximize efficiency and grow to help provide more fresh water to the Basin.[202]

B. Amending the Compact so it can Regulate Cloud Seeding is the Best Option

There are several competing options when deciding the best method of regulating weather modification.[203] Federal regulation, while able to standardize cloud seeding regulation and backed by adequate resources for enforcement, is bureaucratically stifling and notoriously expensive.[204] State administrative regulations, on the other hand, provide more flexibility, allowing each state to tailor its policies to address its unique circumstances.[205] But compartmentalizing cloud seeding regulation to each state fails to address the cross-boundary movement of clouds between states and does not address how to resolve disputes between states.[206]

This Article proposes that the parties of the Compact amend it as a middle ground between state and federal governance. Instead of relying on the federal government to regulate cloud seeding in the Basin or leaving it up to each state, the Compact signatories should convene to narrowly negotiate the issue of regulations related to cloud seeding and the inter-state movement of clouds.[207]

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[200] Currier, *supra* note 19, at 970.

[201] *See id.*, *contra* LOUIS J. BATTAN, RITA F. TAUBENFELD, PETER H. WYCKOFF, RALPH W. JOHNSON, RAY J. DAVIS, SHO SATO & ARTHUR MURPHY, CONTROLLING THE WEATHER: A STUDY OF LAW AND REGULATORY PROCEDURES 21 (Howard J. Taubenfeld, ed., 1970) ("since weather respects no state boundary and since operators are likely to conduct activities in many states and to affect the citizens of many states by their activities, it seems reasonable to suggest that federal standards for an operators' license be set and that a federal entity issue the license once an individual shows his competence").

[202] Currier, *supra* note 19, at 972

[203] *Compare id.* at 965, *with* Hertz, *supra* note 62, at 53.

[204] *See* Currier, *supra* note 19, at 961 (discussing failed attempts to pass federal weather modification legislation); Hertz, *supra* note 62, at 53.

[205] Hertz, *supra* note 62.

[206] *See* Currier, *supra* note 19, at 959–60 (discussing how current state and local cloud seeding regulation fails to adequately account for cross boundary projects and leads to a market inefficiency).

[207] *Id.* at 972; Lochhead, *supra* note 138, at 326 (recognizing that signatories cannot agree to amend the Compact without congressional approval). While achieving congressional approval for a multi-state compact would be difficult to achieve, such a proposal would likely be less controversial than a national policy change on weather modification. *Id.* at 971–72. Furthermore, prior weather modification legislation likely failed because research at the time was not sufficient

Amending the Compact to create an effective regulatory agency would provide several benefits. Such an approach best complies with the internalization prescription typical for water resource management.[208] Additionally, Basin states, which are the most competent at evaluating their respective interests, will have the most control in articulating and advocating the specific provisions of the compact.

Furthermore, ICWMB would be able to impose consistent and unified operational standards across the Basin. Currently, operational guidelines and standards vary across the Compact states with some arguably too lax.[209] Experts agree that for the cloud seeding industry to reach optimal efficiency, licensing standards need to be sufficiently strict.[210] ICWMB would implement binding and uniform standards across the Basin. Consistent and unified standards would increase industry efficiency, promote safe practices for all involved, and make cloud seeding research more accurate.[211]

C. Amending the Compact Will be Limited in What it Can Fix

Relying solely on the Compact as the vehicle to create solutions for cloud seeding is not without its pitfalls. First, ratifying the Compact in 1922 was already a historic feat that took a tremendous amount of negotiation and powerful political circumstances that pushed states to the negotiation table and incentivized ratification.[212] Convincing the Compact members to come back to the table and amend the Compact is easier said than done.

While this Article argues that states should agree on a method to account for the water precipitating into the Colorado River, member states have argued for years regarding the accounting of water evaporating from the Colorado River system without success. For example, Compact states have yet to reach a sensible agreement on how the Compact should account for evapotranspiration.[213] Currently, all states in the Basin agree that they want a collaborative solution to water insecurity along

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to convince Congress. *Id.* at 972. Data only recently forthcoming now supports its effectiveness. *See* Bradshaw, *supra* note 48, at 465; *see also* Currier, *supra* note 19 at 972 ("If new legislation were introduced with the means and purpose of continuously gathering up-to-date research, Congress's fears should be abated.").

[208] For example, amending the Compact would ensure that a cloud seeding commission has the appropriate authority to act, integrate diverse stakeholder interests—including tribe and non-state actor interests—through a transparent and inclusive process, and balance legitimacy with effective governance to manage cloud seeding projects. *See* Larson, *supra* note 21, at 955.

[209] *See generally* Chen, *supra* note 1, at 70–77; *see also* Currier, *supra* note 19, at 971.

[210] Currier, *supra* note 19, at 971.

[211] *See* BATTAN et al., *supra* note 201, at 136.

[212] *See generally* Lochhead, *supra* note 138, at 293–295.

[213] Evapotranspiration, in a general sense, encompasses all water loss from the Earth's surface to the atmosphere. *See* Water Science School, *The Water Cycle*, U.S. GEOLOGICAL SURVEY, https://www.usgs.gov/special-topics/water-science-school/science/water-cycle# [https://perma.cc/DMS2-LPPM]. However, within the context of ADWR's usage, evapotranspiration specifically refers to the water released from plant leaves and soil. ARIZ. DEP'T WATER RES., FOURTH MANAGEMENT PLAN: PHOENIX ACTIVE MANAGEMENT AREA, Hydrology 2–3 (2020).

the River but have yet to reach an agreement to account for the 1.5 million acre-feet of water lost along the River due to evapotranspiration.[214]

It is also difficult to develop a large regulatory body that has meaningful authority and sufficient resources.[215] If the regulatory body is too effective at passing and enforcing regulations, states may be dissuaded from participating out of fear that if the regulatory body is co-opted by a member state, then the regulatory body could be used against the interest of other members.[216] The creation of a hegemon within the regulatory body could harm state sovereignty and is a significant factor when trying to incentivize stakeholder participation.[217]

Additionally, ICWMB's resources and ability to enforce regulations will likely be far more limited than if it were backed by the federal government.[218] One possible solution to the relative lack of funding is for ICWMB to increase licensing fees above what state agencies currently charge.[219] This increase in fees for cloud seeding operations could hypothetically help offset at least some costs. Additionally, technological advances in cloud seeding equipment such as the use of drones could lower operation costs and help offset an increase in fees.[220]

V. CONCLUSION

Human civilization has evolved a great deal from ceremonial prayers for rain to the development of technologically advanced methods of weather modification. Through time, collaboration, and the scientific method, humanity is closer to manipulating the clouds that travel over our heads to provide us with greater access to freshwater. The new emerging resource that is atmospheric moisture, like any great innovation, comes with costs and benefits to our society.

Those costs and benefits of cloud seeding have important implications in the legal context for states in the Colorado River Basin. Cloud seeding is a growing industry in the Colorado River Basin but is currently affronted by several legal obstacles. Cloud seeding operations between parties of the Upper and Lower Basin would likely constitute an inter-basin sale or transfer which is prohibited under the

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[214] *See* Greg Haas, *Here's What 7 States Say About Solving the West's Water Crisis*, KLAS 8 NEWS NOW (Sept. 9, 2023, 9:55 AM), https://www.8newsnow.com/news/local-news/heres-what-7-states-say-about-solving-the-wests-water-crisis/ [https://perma.cc/E7LV-QJUX].

[215] *See* Rhett B. Larson, *Water Security*, 112 NW. U. L. REV. 139, 178 (2017).

[216] *See id.* at 221–22.

[217] *See id.*; Larson, *supra* note 21, at 942.

[218] *See generally* Currier, *supra* note 19, at 970.

[219] For example, Colorado's Department of Natural Resources charges commercial weather modification application two percent of their contract or budget to cover regulatory costs, absent a waiver for extraordinary circumstances. *See* 2 COLO. CODE REGS. § 401-1:5(E) (2024).

[220] Matt Weiser, *Cloud Seeding, No Longer Magical Thinking, is Poised for Use This Winter*, SACRAMENTO BEE (last updated Oct. 6, 2014, 8:47 PM), http://www.sacbee.com/news/local/article2582373.html [https://perma.cc/MU8U-CAHK]; Lauren Sommer, *It's Not Magic On The Mountain, It's A Rain-Making Machine*, NPR (Jan. 9, 2014), http://www.npr.org/2014/01/09/261070150/its-not-magic-on-the-mountain-its-a-rain-making-machine [https://perma.cc/N98G-VLPE] (quoting Jeff Tilley of the Desert Research Institute).

Law of the River. Additionally, water from cloud seeding operations does not neatly fit into the salvaged and developed water distinctions common to the prior appropriation regimes of the Upper and Lower Basin states. These legal obstacles could stop or seriously hinder the progress of a growing industry that could help mitigate water security issues facing the Basin.

These obstacles can best be solved by the Compact states reconvening to narrowly negotiate the issue of cloud seeding. In addition to adding provisions defining how water from cloud seeding should be treated under the law, the states should also ratify the creation of an interstate commission on weather modification. Such a commission would impose regulations on cloud seeding operators throughout the entire Basin. This commission, made up of U.S. states, Mexican states, Indigenous tribes, and weather modification experts should be able to create comprehensive and effective policy that will guide this growing industry away from stormy legal weather.

"IN THE INTERESTS OF JUSTICE": THE CASE FOR REQUIRING KANSAS PROSECUTORS TO PROVIDE AN APPEALABLE, WRITTEN EXPLANATION WHEN DENYING DEFENDANTS PRE-TRIAL DIVERSION

*By: Sam Crawford**

I. INTRODUCTION

Everybody makes mistakes, whether we like to admit it or not. Perhaps you have gotten the time of an important work meeting wrong and missed it. This author, for one, consistently walks out of the house unintentionally with mismatched socks on. Most of the mistakes we make cause simple annoyance, or temporary consequences at worst. But some mistakes carry the potential to haunt their makers for the remainder of their lives—particularly mistakes that turn an ordinary individual into a criminal defendant.

Take, for example, the story of Ethan Scott.[1] Ethan, a twenty-year-old Kansan, and his two friends drove to a farm south of their hometown to pick up an ATV four-wheeler that one of Ethan's friends was promised.[2] Unfortunately for the trio, the deal fell through.[3] They began to return home empty-handed and

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[1] Ethan Scott's story, as told in this Article, is fictional but inspired by the real facts surrounding David Morey's pre-trial journey as told in a New Hampshire news article. *See* Paul Cuno-Booth, *A Felony Could Have Ruined His Life. This Program Gave Him a Second Chance.*, THE KEENE SENTINEL (Jan. 5, 2021), https://www.sentinelsource.com/news/local/a-felony-could-have-ruined-his-life-this-program-gave-him-a-second-chance/article_36b52fe2-ecfe-5348-a3de-24d1dbdc9613.html [https://perma.cc/7NVX-8TY9]. Factual substitutions were made to better reflect a potential Kansan's pre-trial journey.

[2] *Id.*

[3] *Id.*

disappointed.[4] On their way back to town, however, the group saw two four-wheelers parked on the corner of a different farm with no owner in sight.[5] Taking this as a sign of divine intervention, the trio took the four-wheelers for a joyride.[6] They carefully placed the four-wheelers back where they found them hoping no one would notice that they were ever moved.[7] Confident in their scheme, the trio decided to return and take them on another joyride the next day.[8] But when they returned to park the four-wheelers this time, the owner was waiting for them with crossed arms and a scowl.[9]

For his part, Ethan was later charged with two counts of felony theft.[10] Ethan, who had never faced a criminal charge before, began to face the reality of his situation and the potential consequences of his mistake. In Kansas, felony theft is a Level 9 felony[11] punishable by up to seven months in prison for each count;[12] Ethan could be sentenced to a year and a half prison term.[13] If incarcerated, Ethan will be one of over 8,900 prisoners in the Kansas Department of Corrections ("KDOC").[14] He will also have a 26.77% chance of recidivating, or re-offending, meaning that this may not be the last time he sits behind bars.[15] Further, if branded as a felon, he could face other stigmas and challenges throughout the remainder of his life including voter disenfranchisement, trouble obtaining housing, and scrutinization from potential employers.[16]

Incarceration is designed to punish and deter criminal conduct, but incarceration is also designed to rehabilitate offenders back into society.[17] Mass incarceration, recidivism, and post-release stigma all cut against rehabilitating

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[4] Cuno-Booth, *supra* note 1.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] KAN. STAT. ANN. § 21-5801(b)(3) (2024).
[12] Because Ethan has no criminal history, a Severity Level 9 felony places him in a "Presumptive Probation" sentencing box at the cross of Severity Level 9 and criminal history I. *See* KAN. SENT'G GUIDELINES MANUAL: SENTENCING RANGE—NONDRUG OFFENSES app. E (KAN. SENT'G COMM'N 2024). Although probation is the presumed sentence, there is no guarantee that Ethan is sentenced to probation; the sentencing court may dispositionally depart his sentence upward from probation to prison. *See* KAN. STAT. ANN. §§ 21-6803(g), 6818(c) (2024). Additionally, if Ethan is sentenced to probation but violates its terms, the court can revoke his probation and require him to serve the underlying prison sentence. *Id.* § 22-3716(b)(3)(B)(iii).
[13] *See* KAN. SENT'G COMM'N, *supra* note 12.
[14] *See* KAN. DEP'T OF CORRS., ANNUAL REPORT FISCAL YEAR 2023 9 (showing the KDOC male population at 8,160 and female population at 767 for an overall KDOC population of 8,927 in Fiscal Year 2023).
[15] *See id.* at 11 (showing that Kansas recidivism in 2019, the most recent year of data available, was 26.77%).
[16] *See* Steven D. Bell, Note, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 8–11 (2014) (discussing how formerly incarcerated individuals face many challenges including disenfranchisement, receiving public assistance, obtaining housing, gaining employment, and others).
[17] *See* State v. Proctor, 280 P.3d 839, 928 (Kan. Ct. App. 2012) (recognizing rehabilitation, in addition to retribution, deterrence, and incapacitation, as a goal of criminal sanctions).

former inmates.[18] These issues have grasped the attention of Kansas lawmakers. Efforts to reduce mass incarceration and recidivism have been topics greatly discussed in the Kansas Legislature in recent years.[19] So too has remedying the stigmas and challenges that formerly incarcerated people face after being released.[20] These efforts are incredibly important for criminal justice reform in Kansas, but they only address the problem after the damage is already done. It is often said that prevention is better than a cure.[21] So what preventative measures exist to address the problems of mass incarceration, recidivism, and post-release stigma? Does Ethan have any other option except to hope for the judge's mercy?

Perhaps. For example, diversion programs offer a different path. "In the interests of justice," Kansas prosecutors may offer a defendant diversion as an alternative to criminal prosecution.[22] In a diversion, prosecutors "divert" a criminal defendant to some form of supervised program instead of proceeding with prosecution.[23] Upon successful completion of the terms and conditions agreed to, the defendant's charges are dismissed with prejudice and the case is over.[24]

Despite evidence showing that diversion programs benefit defendants and the community at large, the chances that a Kansas prosecutor diverts Ethan to a program are very low.[25] If Ethan's diversion application is denied, the

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[18] *See* Zoe R. Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH. PUB. POL'Y & L. 550, 550 (2021) ("Compared to persons without prior legal system involvement, individuals with a history of incarceration are more likely to experience unemployment, poverty, and homelessness as well as psychological impairment, substance abuse problems, disruptions in health care access, and mortality in the weeks and years following release.") (citation omitted).

[19] *See* CSG JUSTICE CENTER, THE JUSTICE REINVESTMENT INITIATIVE IN KANSAS: IMPROVING SUPERVISION AND EXPANDING DIVERSION 1 (2022) (discussing the Kansas Legislature's work in "developing appropriate policy recommendations that prioritize corrections spending on effective recidivism-reduction strategies").

[20] *See id.* (discussing proposals to remove prior offenders from the public online drug registry and improving post-release supervision resources).

[21] *Prevention is better than cure*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prevention%20is%20better%20than%20cure [https://perma.cc/RST9-7Z76].

[22] KAN. STAT. ANN. § 22-2907(a) (2024).

[23] *See, e.g.*, Joseph B. Cox, Note, *Kansas Diversion: Defendant's Remedies and Prosecutorial Opportunities*, 20 WASHBURN L.J. 344, 344 (1981); KAN. STAT. ANN. § 22-2911(b) (2024).

[24] *E.g.*, KAN. STAT. ANN. § 22-2909(a)(1) (2024). A case "dismissed with prejudice" bars the prosecutor from filing a later suit against the defendant based on the same charge and facts. *See With Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[25] *See* KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, SUMMARY OF FELONY CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019 (2019), https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Felony-Caseload-Summary.pdf [https://perma.cc/MG3Q-X9CG] (showing that out of 21,395 felony case dispositions, 1,222 were dispositioned by deferred adjudication/diversion, a total of 5.71%).

prosecutor is not required to explain why he was denied diversion.[26] Ethan may never know whether the prosecutor properly considered his age, clean record, willingness to cooperate, or any other potential mitigating circumstances—factors the prosecutor must consider under Kansas law.[27] Ethan will also not know whether the prosecutor denied Ethan's diversion based on mistaken facts. Without a written explanation, Ethan will have little to no chance of successfully appealing a diversion denial for either of these reasons.[28]

"In the interests of justice" that the Kansas diversion statutes seek to effect, this Article discusses the case for requiring Kansas prosecutors, by statute, to provide an appealable, written explanation when denying defendants pre-trial diversion. Section II discusses background information on how Kansas diversion programs currently operate, what diversion reform has been considered, and the present challenges to appealing a diversion denial in Kansas courts. Section III introduces this Article's proposal with an eye toward other states that currently require an appealable, written explanation for diversion denials. Section IV discusses the effectiveness of this Article's proposal and addresses the counterarguments against it. Finally, Section V drafts a statutory provision of this Article's proposal for legislative consideration.

Although the Kansas Legislature has discussed various reforms to the state's diversion programs,[29] it has not considered implementing this Article's proposal. Moreover, no scholarship has specifically focused on requiring prosecutors to provide an appealable, written explanation when denying defendants pre-trial diversion.[30] This Article is the first to make this case and does so specifically for the state of Kansas.[31]

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[26] *See* KAN. STAT. ANN. §§ 22-2906–2912 (2024) (containing no appealable, written requirement when denying defendants diversion).

[27] KAN. STAT. ANN. § 22-2908(a).

[28] *See infra* Section II.C for a discussion on the current challenges of appealing diversion denial in Kansas.

[29] *See* KAN. CRIM. JUST. REFORM COMM'N, REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2022 KANSAS LEGISLATURE app. at 2–5 (2021); KAN. CRIM. JUST. REFORM COMM'N, REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2021 KANSAS LEGISLATURE app. at 6–18 (2020).

[30] Scholarship surrounding diversion programs has called for other areas of diversion reform including reducing the financial costs of diversion programs, expanding diversion eligibility to other offenses, and navigating the difficulties of implementing diversion programs in rural areas. *See* Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439 (2022); Sarah J. Long, Note, *The Case for Extending Pretrial Diversion to Include Possession of Child Pornography*, 9 U. MASS. L. REV. 306 (2014); Madison McWithey, Note, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints*, 61 B.C. L. REV. E-Supp. I.-49 (2020).

[31] Diversion programs enacted by statute are well established in forty-four states and in the District of Columbia. *Pretrial Diversion*, NAT'L CONF. OF STATE LEGISLATURES (April 10, 2024), https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion [https://perma.cc/6BJC-Z22Q]. Although aimed at the Kansas Legislature, this Article's rationales could be applied to similar state statutes that do not require an appealable, written explanation requirement when denying defendants diversion.

II. BACKGROUND

Diversion programs were designed and developed with the recognition that it is not necessary, and may even be detrimental, to pursue formal prosecution for every criminal violation.[32] As such, diversion programs often include treatment and prevention measures for the underlying cause of the criminal conduct including programs for drug use, driving under the influence ("DUI"), and other educational courses.[33] Some programs even facilitate restorative justice measures by requiring diverted defendants to meet with victims or community members and take responsibility for their criminal conduct.[34] Pre-trial diversion programs are most often used for misdemeanor charges[35] but are even more effective for those facing felony charges.[36] Diversion programs prevent an additional individual from being incarcerated in already overcrowded facilities.[37] Diversion programs also give individuals the tools needed to address and change their behavior.[38] Overall, pre-trial diversion programs are very successful in reducing conviction, mass incarceration, and recidivism rates.[39]

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[32] U.S. DEP'T OF JUST., NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 74 (1973) ("[I]f all law violations were processed officially as the arrest-conviction-imprisonment model calls for, the system obviously would collapse from its voluminous caseloads. . . .").

[33] *See* MELISSA LABRIOLA, WARREN A. REICH, ROBERT C. DAVIS, PRISCILLIA HUNT, MICHAEL REMPEL & SAMANTHA CHERNEY, NAT'L CRIM. JUST. REFERENCE SERV., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS ix (2018) (noting that thirteen of the fifteen diversion programs studied provided some form of education about "relevant problem behavior").

[34] *See id.* (noting five of ten studied jurisdictions had diversion programs facilitating restorative justice).

[35] *See* KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, SUMMARY OF MISDEMEANOR CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019 (2019), https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-MisdemeanorCrimPending.pdf [https://perma.cc/2H5D-A8YE] (showing that 19.7% of misdemeanors were dispositioned by diversion or deferred adjudication).

[36] Matthew W. Epperson, Leon Sawh, Sadiq Patel, Carrie Pettus & Annie Grier, *Examining Case Dismissal Outcomes in Prosecutor-Led Diversion Programs*, 34 CRIM. JUST. POL'Y REV. 236, 254 (2023) ("[P]eople charged with a felony . . . may be more motivated to complete the Diversion program and have their felony charge dismissed and avoid more serious consequences, compared to Diversion participants charged with misdemeanors.").

[37] *See* WORLD PRISON BRIEF, *United States of America: Overview*, https://www.prisonstudies.org/country/united-states-america [https://perma.cc/A4NE-ZJ8W] (reporting U.S. county jail and state and federal prison populations are at 95.6% capacity).

[38] *See* LABRIOLA et al., *supra* note 33.

[39] *See* Robert C. Davis, Warren A. Reich, Michael Rempel & Melissa Labriola, *A Multisite Evaluation of Prosecutor-Led Pretrial Diversion: Effects on Conviction, Incarceration, and Recidivism*, 32 CRIM. JUST. POL'Y REV. 890, 905 (2021).

The Kansas Legislature first articulated an opportunity for diversion in 1978[40] as part of a significant package of corrections legislation.[41] Tasked with examining existing pre-trial diversion programs in other states, the then-existing Special Committee on Corrections ("Committee") recommended adopting a pre-trial diversion program.[42] The Committee noted that the purpose of a diversion program is to offer an alternative method of rehabilitation to effect the offender's future compliance with the law.[43] Ultimately, the Committee expressed that diversion should be granted in cases where it is "in the interests of justice" and "of benefit to the defendant and the community."[44]

"[I]n in the interests of justice" continues to be the guiding standard for a prosecutor's decision to grant or deny diversion under current Kansas law.[45] But the law surrounding Kansas diversion program requirements and diversion use has developed over the years. This Section focuses on what diversion currently looks like in Kansas, recent discussions surrounding diversion program reform, and the difficulty of challenging a diversion denial in Kansas courts.

A. Diversion in Kansas

Kansas law requires each district attorney to "adopt written policies and guidelines for the implementation of a diversion program."[46] The various statutes governing diversion in Kansas impose certain requirements for each county's diversion program while simultaneously granting prosecutors immense discretion in operating their respective programs.[47] Accordingly, this Section first focuses on the statutory requirements for Kansas diversion programs and then turns to the implementation of the program across Kansas counties.

1. Statutory Requirements for Kansas Diversion Programs

Kan. Stat. Ann. section 22-2906 *et seq*. defines the requirements for diversion programs.[48] As previously mentioned, section 22-2907(b) requires each district attorney to adopt a written policy implementing a diversion program.[49] Prosecutors may propose diversion to a defendant if diversion is "in

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[40] *See* KAN. STAT. ANN. § 22-2907 (2024) (originally enacted as L. 1978, ch. 131, § 2 (1978)).
[41] Cox, *supra* note 23, at 345.
[42] *See* SPECIAL COMM. ON CORRS., REPORT ON KANSAS LEGISLATIVE INTERIM STUDIES TO THE 1978 LEGISLATURE 48–49 (1978).
[43] SPECIAL COMM. ON CORRS., *supra* note 42, at 48.
[44] *Id.* at 48–49.
[45] KAN. STAT. ANN. § 22-2907(a) (2024) ("[I]f it appears to the district attorney that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the district attorney may propose a diversion agreement to the defendant.").
[46] *Id.* § 22-2907(b).
[47] *See infra* Section II.A.2.
[48] KAN. STAT. ANN. §§ 22-2906–2912 (2024).
[49] *Id.* § 22-2907(b).

the interests of justice" and "of benefit to the defendant and the community."[50] Upon successful completion of the diversion agreement, the district court must dismiss the charges with prejudice.[51]

Section 22-2908(b) lists several criminal charges that are ineligible for diversion in Kansas.[52] Those charged with severe crimes against other persons, such as Level 1, 2, or 3 person felonies,[53] are ineligible for diversion.[54] So are defendants facing a drug severity Level 1, 2, or 3 felony[55] charge.[56] Additionally, second-time DUI charges, DUI charges involving a commercial driver's license-holding defendant, or DUI charges involving death are ineligible for diversion.[57] Further, certain domestic violence offenders are ineligible for diversion.[58] There are a wide-variety of eligible offenses, however, including felony theft[59] (luckily for Ethan), burglary,[60] possession of illegal substances,[61] driving without a license[62] and many others.

If a defendant is not precluded from diversion under section 22-2908(b), the prosecutor must consider several factors to determine whether diversion would be in the interests of justice.[63] Section 22-2908 enumerates twelve factors, including the nature of the crime, the defendant's circumstances

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[50] KAN. STAT. ANN. §§ 22-2907(a) (2024).
[51] *Id.* § 22-2911(b).
[52] *See id.* § 22-2908(b).
[53] In Kansas, those convicted of Level 1 person felonies face the highest possible penalties; possible penalties decease as the level number increases. *See* KAN. SENT'G COMM'N, *supra* note 12. Person felonies are the most serious for criminal history purposes, which greater enhance the penalties for repeat offenders with person felony convictions on their record compared to those with nonperson felony convictions. *See id.*
[54] KAN. STAT. ANN. § 22-2908(b)(3) (2024). Level 1, 2, and 3 felonies encompass severe crimes such as rape, commercial sexual exploitation of a child, and aggravated robbery. *See id.* § 21-5503(b)(1)(A) (listing rape as a severity Level 1 person felony); *Id.* § 21-6422(b)(1)(B) (listing repeated commercial sexual exploitation of a child as a severity Level 2 person felony); *Id.* § 21-5420(c)(2) ("Aggravated robbery is a severity Level 3, person felony.").
[55] Like Kansas nondrug felonies, drug felony penalties decrease as the level number increases. *Compare* KAN. SENT'G GUIDELINES MANUAL: SENTENCING RANGE—DRUG OFFENSES app. E (KAN. SENT'G COMM'N 2024), *with* KAN. SENT'G COMM'N, *supra* note 12.
[56] KAN. STAT. ANN. § 22-2908(b)(3) (2024). Level 1, 2, and 3 drug felonies include drug crimes involving the sale or manufacture of drugs such as one kilogram or more of narcotics, the manufacture of a controlled substance (not meth or fentanyl), and the cultivation of narcotics of less than fifty plants. *See id.* § 21-5705(d)(1)(D) (listing the sale of narcotics of one kilogram or more as a Level 1 drug felony); *Id.* § 21-5703(b)(1) (listing the manufacturing of a controlled substance as a Level 2 drug felony); *Id.* § 21-5705(d)(8)(A) (listing the cultivation of narcotics of less than fifty plants as a Level 3 drug felony).
[57] KAN. STAT. ANN. § 22-2908(b)(1)–(2) (referencing the Kansas DUI statute); *see also id.* § 8-1567.
[58] KAN. STAT. ANN. § 22-2908(b)(4).
[59] *See id.* § 21-5801(b)(2).
[60] *See id.* § 21-5807(c)(1)(A)–(B).
[61] *See id.* § 21-5706(c)(1).
[62] *See id.* § 8-235(a).
[63] *Id.* § 22-2908(a).

or special characteristics, whether the defendant is a first-time offender, and any other mitigating circumstances present.[64] Prosecutors are not limited to considering only these factors.[65] But prosecutors must consider at least each of these twelve factors when deciding whether to grant or deny a defendant diversion.[66]

2. Use of Diversion in Kansas

The language of sections 22-2906 *et seq.* allows prosecutors immense discretion in how they choose—or choose not—to implement their respective diversion programs. Some counties provide opportunities for numerous defendants whereas other counties limit defendants' eligibility by imposing additional disqualifications on top of the statutory disqualifications.[67] For example, Finney County only automatically disqualifies defendants from diversion according to Kansas statute.[68] Conversely Saline County imposes additional disqualifications that are not listed in the statute including disqualifying defendants charged with a mere traffic infraction.[69] Not only do programs differ in who may be eligible, but counties also have different diversion application processes.[70] Many counties do not even have a formal diversion application.[71] Additionally, diversion application fees vary widely—ranging from $0 to $250.[72]

Because each diversion program is run by the district attorney, determining how often diversion programs are being utilized is difficult. Statistics on diversion program use and success are relatively limited across the country.[73] Kansas is no different. Very few Kansas counties keep track of

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[64] KAN. STAT. ANN. § 22-2908(a)(1)–(12).
[65] *Id.* § 22-2908(a).
[66] *Id.*
[67] *See generally* ACLU KAN., CHOOSING INCARCERATION: KANSAS PROSECUTORS' REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES app. B at 25–30 (2017) (reporting which Kansas counties limit diversion eligibility to certain defendants).
[68] *See* FINNEY CNTY. ATTY'S OFF., *Finney County Diversion Program,* https://www.finneycounty.org/DocumentCenter/View/7335/Diversion-Policy?bidId= [https://perma.cc/U4DQ-H3YD].
[69] *See* SALINE CNTY., *Saline County Attorney Diversion Program Policy*, https://www.salinecountyks.gov/diversion [https://perma.cc/2TCP-EP8L].
[70] *Compare* OFF. OF THE DIST. ATT'Y, 18TH JUD. DIST. OF KAN., *Application for Pretrial Diversion Program*, https://www.sedgwickcounty.org/media/58989/cr-diversion-application.pdf [https://perma.cc/TE32-86HV], *with* DIST. ATT'Y DOUGLAS CNTY. KAN., *Adult Criminal Diversions, What Procedures Must I Follow?*, https://www.douglascountyks.org/district-attorney/adult-criminal-diversions [https://perma.cc/PK93-VKXF].
[71] ACLU KAN., *supra* note 67 (reporting which Kansas counties offer formal diversion applications and which counties do not).
[72] *Id.* (reporting each Kansas county's diversion application fees).
[73] Sean Flynn, Robin Olsen & Maggie Wolk, *Innovative Approaches to Diversion Data*, 9 CRIM. L. PRAC. 38, 38 (2020) ("[L]ess than one third of respondents reported collecting information about compliance with office policies on which cases should be diverted, referred to as a problem-solving court, or deferred.").

application numbers and approvals.[74] Counties that do keep track of diversion use do not follow any uniform method for doing so. For example, former Labette County Attorney Stephen Jones once reported keeping a color-coded spreadsheet of diversions that have been offered, denied, and completed as his method to monitor the use and success of his diversion program.[75] But this information, and other internal diversion practice data that may exist, is not publicly available.

Turning to public information, the Office of Judicial Administration ("OJA") in Kansas submits an annual report each year detailing each Kansas court's caseload and case dispositions.[76] According to the OJA's most recent report,[77] Kansas prosecutors offer diversions for misdemeanors at a rate of 19.7%.[78] That rate drops substantially for felonies, which prosecutors only grant diversions 5.7% of the time.[79] This is much lower than the 9% national average for granting diversions or other methods of deferring adjudication.[80] Sixteen Kansas counties did not grant any felony diversions at all.[81] This low use of diversion in Kansas prevents many defendants and communities from obtaining the benefits of diversion programs.[82]

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[74] ACLU KAN., *supra* note 67, at 15 ("Of counties that responded to requests for information for this report, only 10 said that they keep any kind of running record of application numbers and approvals.").

[75] ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING: FINDINGS FROM 2018 NATIONAL SURVEY OF STATE PROSECUTORS' OFFICES 9 (2018).

[76] *Case Statistics*, KAN. JUD. BRANCH, https://www.kscourts.org/Cases-Decisions/Case-Statistics [https://perma.cc/NRZ7-K8W9].

[77] The last report available on the OJA's website is from 2019—six years old as of this Article's publication. KAN. JUD. ADMIN., *supra* note 35. The lack of publicly available data on diversion use in Kansas makes continuously improving diversion programs much more difficult and should be addressed. *See* ACLU KAN., *supra* note 67, at 2–3.

[78] KAN. JUD. ADMIN., *supra* note 35 (showing that out of 14,325 misdemeanor case dispositions, 2,818 were dispositioned by deferred adjudication/diversion, or 19.7%).

[79] KAN. JUD. ADMIN., *supra* note 25 (showing that out of 21,395 felony case dispositions, 1,222 were dispositioned by deferred adjudication/diversion, or 5.71%).

[80] BRIAN A. REAVES, U.S. DEPT. OF JUST., BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 24 (2013).

[81] KAN. JUD. ADMIN., ANNUAL REPORT ON THE COURTS OF KANSAS, CRIMINAL CASE DISPOSITIONS BY JUDICIAL DISTRICT (2019), https://kscourts.gov/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Criminal-Terms.pdf [https://perma.cc/2UYC-2M9T] (listing that Atchison, Jewell, Washington, Elk, Greenwood, Rawlins, Wallace, Clark, Clay, Lane, Wichita, Reno, Ottawa, Sumner, Wilson and Woodson counties granted zero felony diversions in 2019).

[82] Defendants who are denied diversion and reach the sentencing stage are sentenced to either probation or incarceration. *See* KAN. SENT'G COMM'N, *supra* note 12. Incarcerated defendants clearly miss out on the benefits diversion programs offer. *See* Davis et al., *supra* note 39. Defendants on probation also miss out on diversion program benefits, particularly because as the number of adults under probation rises, the lower the quality of supervision—all leading to high

B. Discussion Surrounding Kansas Diversion Reform

The low use of diversion programs in Kansas has prompted a response from both advocacy groups and the Kansas Legislature. In 2016, the American Civil Liberties Union ("ACLU") of Kansas released a report heavily criticizing Kansas diversion programs in 2016 after surveying all of the state's 105 counties.[83] The ACLU of Kansas report describes Kansas diversion programs "like a patchwork quilt, varying from county to county depending upon the proclivities of individual prosecutors."[84] It further emphasizes that Kansas prosecutors grant felony diversions at a rate half the national average, directly contributing to more incarceration and costs to Kansans.[85] After identifying several problems with how Kansas diversion programs are implemented,[86] the report called upon both the Kansas Legislature and local prosecutors for diversion reform.[87]

The ACLU of Kansas has also attempted to address the problems with Kansas diversion programs in the courtroom. In 2018, the ACLU of Kansas sued the Montgomery County Prosecutor "for failing to implement diversion programs in accordance with Kansas law and for pursuing the expensive and disproportionately harsh prosecution of individuals posing minimal community risks."[88] Montgomery County agreed to make several diversion program improvements and settled the case,[89] but the ACLU of Kansas continues to call upon prosecutors to utilize diversion more often.[90]

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levels of probation program failure and future incarceration for new convictions. *See Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW (Sept. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities [https://perma.cc/K3MR-CZZA].

[83] *See* ACLU KAN., *supra* note 67, at 2 ("Diversion works, but it is a strategy that is not being used effectively by elected prosecutors in Kansas. In fact, Kansas prosecutors use diversion at just half of the national average, or in about 5% of all felony cases, despite the fact that 94% of Kansans want their local prosecutor to use diversion *more* often.").

[84] *Id.* at 10.

[85] *Id.* at 2, 9 ("Expanding the use of felony diversion would result in fewer people being sent into the state's over-crowded prisons, and reduce expenditures on correctional facilities.").

[86] *See id.* at 10–17 (identifying lack of formal diversion policies, harsh eligibility guidelines, program secrecy, excessive fees, data limitations, program capacity challenges, and prosecutor refusal to use diversion programs as reasons why diversion is underused in Kansas).

[87] *Id.* at 18–19.

[88] *ACLU Sues Kansas County Prosecutor for Hiding Diversion Opportunities from Defendants and Failing to Combat Mass Incarceration*, AM. CIV. LIBERTIES UNION (June 8, 2018, 9:45 AM), https://www.aclu.org/press-releases/aclu-sues-kansas-county-prosecutor-hiding-diversion-opportunities-defendants-and [https://perma.cc/C2SZ-B3DV].

[89] Tim Carpenter, *ACLU Settles Diversion-Agreement Lawsuit with Montgomery County Prosecutor's Office*, KAN. REFLECTOR (May 5, 2022), https://kansasreflector.com/2022/05/05/aclu-settles-diversion-agreement-lawsuit-with-montgomery-county-prosecutors-office/ [https://perma.cc/B9ME-WY8P].

[90] *Id.* (quoting an ACLU staff attorney as stating "hopefully, more prosecutors will choose diversion and other alternatives over incarceration").

The Kansas Legislature recently considered diversion program reform.[91] In 2021, the Kansas Criminal Justice Reform Commission ("Commission") was charged by the Kansas Legislature with analyzing Kansas diversion programs.[92] As a result, the Commission created a Diversion Subcommittee ("Subcommittee").[93] The Subcommittee considered several reform proposals including (1) permitting diversions to be granted before prosecutors file charges, (2) setting minimum statewide standards for diversion, and (3) providing a method for sealing or removing diversions from criminal records.[94] The Subcommittee, however, has not yet considered how to ensure prosecutors properly consider the section 22-2908 factors or how to address the challenges surrounding appealing a diversion denial.[95]

C. Challenging Diversion Denial in Kansas Courts

Defendants can challenge a diversion denial in Kansas courts,[96] but those who do face an uphill battle. Prosecutors have immense discretion in determining how to conduct any individual case,[97] but prosecutors are not immune from judicial review of that exercise of discretion for arbitrariness.[98] While a prosecutor's discretion in this area is broad, Kansas courts have held that such discretion is subject to review at least for equal protection violations based on a particular classification of defendants.[99]

Kansas law holds a prosecutor's denial of diversion to the same standard of review as a prosecutor's decision not to prosecute.[100] When reviewing diversion denials, Kansas courts evaluate the prosecutor's reasoning for arbitrariness or equal protection violations.[101] Although Kansas law requires that prosecutors consider several factors before granting or denying a diversion,[102] prosecutors do not have to explain how they weighed these factors or why they

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[91] *See* REPORT OF THE KANSAS CRIMINAL JUSTICE REFORM COMMISSION TO THE 2022 KANSAS LEGISLATURE, *supra* note 29.
[92] *See id.* at 0-9.
[93] *See id.* at app. 2.
[94] *Id.*
[95] *See id.*
[96] *See, e.g.,* State v. Kacsir, 251 P.3d 632, 635 (Kan. Ct. App. 2011) (reviewing a defendant's challenge that her diversion was denied arbitrarily and unreasonably).
[97] Charles E. MacLean, James Berles & Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 HOFSTRA L. REV. 151, 156–57 (2015) (noting the numerous areas of a criminal case that prosecutors retain discretion and power over).
[98] State v. Greenlee, 620 P.2d 1132, 1139 (Kan. 1980).
[99] *Id.*
[100] State v. Clinkenbeard, 197 P.3d 904 (Table), 2008 WL 5401333, at *3 (Kan. Ct. App. 2008).
[101] *Id.*; *Kacsir*, 251 P.3d at 635.
[102] *See* KAN. STAT. ANN. §§ 22-2908(a)–(b) (2024).

denied an individual defendant's diversion application.[103] This makes challenging a diversion denial very difficult; prosecutors do not have to commit to a particular reason for denying a defendant diversion until challenged in court.[104]

State v. Clinkenbeard illustrates this problem.[105] In *Clinkenbeard*, the defendant, Dylan Clinkenbeard, was charged with DUI in Shawnee County, Kansas.[106] Clinkenbeard applied for the DUI diversion program operated by the Shawnee County District Attorney but was subsequently denied.[107] The prosecutor initially stated diversion was denied because Clinkenbeard was "previously arrested for DUI in Shawnee County, where he was driving erratically through the neighborhood in which he was stopped."[108] On first blush, this appears to be a fair use of the prosecutor's discretion; prosecutors are well within their discretion to deny second-time DUI offenders diversion.[109] The problem? Contrary to the prosecutor's understanding, Clinkenbeard was never previously arrested for a DUI.[110]

When confronted at a later hearing, the prosecutor admitted the mistake of fact.[111] But instead of reconsidering the denial, the prosecutor re-justified it with new reasons. The prosecutor pointed to Clinkenbeard's other criminal history, his high blood alcohol content, and his reckless driving.[112] Clinkenbeard argued that the prosecutor should not have been allowed to re-justify the diversion denial with these new reasons.[113] Clinkenbeard argued that the prosecutor had access to his criminal history report and the underlying facts of the offense, and could have articulated that as a reason in the original denial, but failed to do so.[114]

The Kansas Court of Appeals panel rejected Clinkenbeard's argument.[115] After reviewing the limited caselaw on diversion denial challenges in Kansas,[116] the court eventually discussed its denial of the abuse of prosecutorial discretion claim.[117] The court concluded that "[a]lthough the original reason for denying diversion may have been wrong, the [prosecutor] was able to articulate specific factors for [his] decision."[118]

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[103] *See Generally* KAN. STAT. ANN. § 22-2908 (containing no provision requiring prosecutors to provide a written explanation when denying defendants diversion).
[104] *See Clinkenbeard*, 2008 WL 5401333, at *1.
[105] *See id.* at *1–7.
[106] *Id.* at *1.
[107] *Id.*
[108] *Id.*
[109] *See* KAN. STAT. ANN. § 22-2908(b)(1)(B) (2024) (disqualifying second-time DUI offenders from diversion eligibility).
[110] *Clinkenbeard*, 2008 WL 5401333, at *1.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at *5.
[116] *Id.* at *3–4.
[117] *Id.* at *5.
[118] *Id.*

Notably, the court recognized that the prosecutor's ability to change the reasons for denying diversions is not ideal.[119] The court cited the statute of another state that requires prosecutors to commit to their reasoning for denying diversion at the time of denial instead of on appeal.[120] "[I]t might be a better practice," the court noted, however, "this is not explicitly the law in Kansas."[121]

III. ADDRESSING THE PROBLEM: GUIDANCE FOR KANSAS FROM OTHER STATES

Section II of this Article reveals two interrelated problems that can both be addressed with one small step. First, the limited data available on the use of diversion in Kansas reveals that diversion use is incredibly low in Kansas, particularly for higher-level offenses where diversion offers the most benefits.[122] Second, challenging a diversion denial is incredibly difficult because prosecutors do not need to commit to their reasoning for denying diversion until challenged in court.[123] Ensuring that Kansas prosecutors thoroughly consider the statutorily required factors laid out in section 22-2908 when determining whether to grant or deny diversion can help address both problems. Explicit law requiring prosecutors to provide an appealable, written explanation when denying defendants pre-trial diversion is a small step to improving diversion use in Kansas.

Requiring an appealable, written explanation is not a novel concept in the diversion context. This Section focuses on two states that presently require, by statute and caselaw, an appealable, written explanation when denying defendants diversion: Tennessee and New Jersey.[124] These two states can serve as examples for what this Article's proposal may look like in Kansas—both in statutory language and in practice. After reviewing these two states' programs, this Section summarizes what an appealable, written explanation requirement should look like in Kansas.

A. Tennessee

Tenn. Code Ann. section 40-15-101 *et seq.* governs diversion programs in Tennessee.[125] Like under the Kansas statute, Tennessee prosecutors must consider certain factors when determining whether to grant or deny a defendant

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[119] *Clinkenbeard*, 2008 WL 5401333, at *6.
[120] *Id.* at *6 (citing State v. Lopes, 673 A.2d 1379 (N.J. 1995)).
[121] *Id.*
[122] *See supra* Section II.A.2; *see also* Epperson et al., *supra* note 36.
[123] *See supra* Section II.C.
[124] State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993) (citing Tenn. Code Ann. § 40-15-105 (2024)); N.J. STAT. ANN. § 2C:43-12(f) (2024).
[125] TENN. CODE ANN. §§ 40-15-101–107 (2024).

diversion, including all evidence that tends to show that the defendant is amenable to correction and not likely to commit additional crimes.[126] After consideration, Tennessee prosecutors are required, by caselaw, to respond to and inform the defendant of the final decision.[127] If pre-trial diversion is denied, prosecutors are required to provide defendants with a formal, written explanation.[128]

Tennessee courts have explained the rationale behind imposing a written explanation when denying defendants pre-trial diversion.[129] Tennessee courts recognize that without such a requirement, certiorari review of a decision to deny diversion is severely limited.[130] To facilitate effective review, prosecutors must provide in their written denial: "1. [a]n enumeration of all the evidence considered; 2. [t]he reason for denial: that is, an enumeration of the factors considered and how some factor(s) controlled the decision and some explanation of why certain factors outweighed others; and 3. [a]n identification of any disputed issue of fact."[131]

Accompanied with a written explanation, denied defendants also have a statutory right to petition the trial court for review of the denial under an abuse of prosecutorial discretion standard.[132] Upon review, "the trial court should examine each relevant factor in the pretrial diversion process" to determine whether the prosecutor actually considered that factor and whether the prosecutor's findings are "supported by substantial evidence."[133] The trial court must focus on the prosecutor's methodology rather than "the intrinsic correctness" of the prosecutor's decision.[134] If the trial court finds that the prosecutor abused their discretion, the trial court may order the prosecutor to place the defendant on diversion.[135] If unsuccessful at the trial court level, defendants may appeal that decision to the Tennessee Court of Criminal Appeals and the Supreme Court of Tennessee.[136]

Statutorily requiring prosecutors to explain diversion denial ensures that eligible defendants are not improperly denied diversion in Tennessee.[137] In *State v. McKim*, the Supreme Court of Tennessee granted review of Steven McKim's diversion denial for a criminally negligent homicide charge.[138] McKim, a youth minister, was facing the charge due to the tragic death of his seven-month-old

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[126] State v. Webb, 2011 WL 5332862, at *6 (Tenn. Crim. App. 2011).
[127] *Id.*
[128] *Winsett*, 882 S.W.2d at 810 (citing TENN. CODE ANN. § 40-15-105 (2024)).
[129] *See, e.g.*, *id.*
[130] *See, e.g.*, *id.* ("If the decision is to deny pretrial diversion, a recognition of the limited nature of certiorari review mandates that this response be formal and written.").
[131] *Id.*
[132] TENN. CODE ANN. § 40-15-105(b)(3) (2024).
[133] State v. Yancey, 69 S.W.3d 553, 559 (Tenn. 2002).
[134] *Yancey*, 69 S.W.3d at 558–59.
[135] TENN. CODE ANN. § 40-15-105(b)(3).
[136] State v. McKim, 215 S.W.3d 781, 784 (Tenn. 2007) (explaining the procedural history of the diversion denial appeal in Tennessee at the trial court, Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court levels).
[137] *See id.* at 788.
[138] *Id.* at 785–786.

daughter who was mistakenly left in a hot car for approximately two hours.[139] In his explanation denying McKim diversion, the prosecutor opined that "criminally negligent homicide should not be a divertible offense."[140] After reviewing the factors a prosecutor is permitted to consider for a diversion application, the court concluded that the prosecutor committed an abuse of discretion by relying on his own opinion, noting that it was "a clearly irrelevant factor" to consider.[141] The court further noted that the prosecutor erroneously did not consider McKim's amenability to correction, but rather the prosecutor's own opinion of what should be a divertible offense.[142]

After the ruling, McKim was granted diversion on the condition that he serve fifty hours of community service and pay a $100 fine.[143] McKim was able to return to his family to grieve the tragic loss of their daughter, instead of his family being further torn apart by the improper opinion of an individual prosecutor.[144] "Make no mistake," a reporter on the case noted after the final decision was rendered, "McKim is serving a lifelong sentence at home."[145]

B. New Jersey

Originally a New Jersey Supreme Court Rule,[146] N.J. Stat. Ann. section 2C:43-12 *et seq.* governs diversion programs in New Jersey.[147] Like under the Kansas statute, New Jersey prosecutors are required to consider various factors when deciding to grant or deny diversion.[148] These factors are enumerated in section 2C:43-12(e).[149] A few of these factors include the motivation and age of the defendant[150] and the existence of personal problems and character traits that

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[139] *McKim*, 215 S.W.3d 781 at 784–85; *Bartlett Youth Minister Won't Serve Time for Leaving Daughter in Hot Car,* WMC ACTION NEWS 5 (Mar. 6, 2007, 2:58 PM), https://www.actionnews5.com/story/6184936/bartlett-youth-minister-wont-serve-time-for-leaving-daughter-in-hot-car/ [https://perma.cc/R69M-6PM2].
[140] *Id.* at 788–89.
[141] *Id.* at 788–90.
[142] *Id.* at 788.
[143] *Bartlett Youth Minister Won't Serve Time for Leaving Daughter in Hot Car*, *supra* note 139.
[144] *Id.*
[145] *Id.*
[146] *See* N.J. Ct. R. 3:28 (1970) (current version at N.J. Ct. Rs. 3:28-1–10 (2024)).
[147] N.J. STAT. ANN. §§ 2C:43-12–22 (2024). Notably, New Jersey refers to its diversion programs as "pretrial intervention" programs. *Id.* § 2C:43-12. "Diversion" itself has a negative connotation, as if defendants are simply avoiding consequences of their own actions. *See Diversion*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A deviation or alteration from the natural course of things[.]"). Perhaps Kansas should also consider renaming diversion to "intervention" for adult offenders, a step the Kansas Legislature has already taken for its juvenile diversion programs. *See* S.B. 367, §§ 28(j), 53(b)(2), 2015–2016 Reg. Sess. (Kan. 2016) (enacted) (renaming Kansas juvenile diversion programs to "immediate intervention" programs).
[148] *Compare* N.J. STAT. ANN. § 2C:43-12(e), *with* KAN. STAT. ANN. § 22-2908(a) (2024).
[149] N.J. STAT. ANN. § 2C:43-12(e).
[150] *Id.* § 2C:43-12(e)(3).

may be related to the defendant's crime that may be better addressed by treatment rather than incarceration.[151] After considering these factors, if a diversion application is denied, the prosecutor must precisely state the prosecutor's findings and explain the facts and reasons for the denial.[152] The statement of reasons "must demonstrate that the prosecutor has carefully considered the facts in light of the relevant law."[153] Denied applicants have a statutory right to appeal such a denial to the judge assigned to the case.[154]

The New Jersey Supreme Court has clearly articulated the rationales behind the written, appealable explanation requirement.[155] N.J. Stat. Ann. section 2C:43-12(f) serves four primary purposes: "(1) [i]t facilitates effective judicial review; (2) it assists in evaluating the success of the [diversion] program; (3) it affords the defendant the opportunity to prepare a response; and (4) it dispels suspicions of arbitrariness."[156] To ensure these rationales are fully realized, a prosecutor's rejection letter typically addresses each of the factors listed in N.J. Stat. Ann. section 2C:43-12(e).[157]

Upon review of a diversion denial, New Jersey courts review the prosecutor's denial and written explanation for a gross abuse of prosecutorial discretion.[158] Even if there is no gross abuse of discretion, a court may remand to the prosecutor for reconsideration if the court finds the denial was "arbitrary, irrational, or otherwise an abuse of discretion."[159]

Statutorily requiring prosecutors to explain diversion denial ensures that eligible defendants are not improperly denied diversion in New Jersey. In *State v. K.S.*, the Supreme Court of New Jersey granted review of the defendant's diversion denial, which the defendant had applied for when charged with DUI and third-degree aggravated assault of a law enforcement officer.[160] The defendant's application was initially reviewed by a diversion program director, who recommended denial because of the "assaultive nature of the offense" and the defendant's "past anti-social behavior" based on prior, but dismissed, assault charges against him.[161] The prosecutor adopted this recommendation and sent the required written denial to the defendant explaining why.[162] The defendant appealed the denial, arguing that the prosecutor improperly relied on the defendant's prior record of dismissed charges and failed to consider his bipolar disorder when evaluating his diversion application.[163]

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[151] N.J. STAT. ANN. § 2C:43-12(e)(5).
[152] *Id.* § 2C:43-12(f).
[153] State v. Wallace, 684 A.2d 1355, 1359 (N.J. 1996).
[154] N.J. STAT. ANN. § 2C:43-12(f) (2024).
[155] *See, e.g.*, State v. Nwobu, 652 A.2d 1209, 1215 (N.J. 1995).
[156] *Id.*
[157] *See* State v. Hayden, 2017 WL 3255364, at *8 (N.J. Super. Ct. App. Div. Aug. 1, 2017).
[158] *Id.* at *5–6
[159] State v. Wallace, 684 A.2d 1355, 1358 (N.J. 1996).
[160] State v. K.S., 104 A.3d 258, 261 (N.J. 2015).
[161] *Id.* at 261–64.
[162] *K.S.*, 104 A.3d at 261.
[163] *Id.* at 262.

The court reversed the prosecutor's denial.[164] First, the court concluded that the prosecutor's heavy reliance on the defendant's prior dismissed charges to conclude he was violent and dangerous was improper.[165] Second, the court noted that the prosecutor had briefly considered the defendant's bipolar disorder but did not thoroughly consider it.[166] The court ultimately held that the prosecutor's denial was based on "consideration of inappropriate factors or not premised upon a consideration of all relevant factors."[167] The defendant's case was remanded back to the prosecutor for reconsideration.[168]

The court's decision regarding this defendant's diversion denial ensured that his application was considered properly by the prosecutor. Without the written explanation, the court would likely not have been able to ensure the prosecutor properly followed the statute—a problem that New Jersey courts have recognized since the diversion program's early days.[169] Overall, the written explanation requirement promotes prosecutorial accountability in New Jersey.[170]

C. An Appealable, Written Explanation Requirement for Kansas

Both Tennessee's and New Jersey's written, appealable explanation requirements for diversion denial are effective at ensuring defendants are not denied diversion without adequate consideration.[171] The Kansas Court of Appeals itself noted the effectiveness of New Jersey's written requirement, citing it as "a better practice" in the diversion process.[172] New Jersey's diversion statute precisely codifies the written portion of the requirement.[173] Tennessee's statute makes clear that defendants have a statutory right to judicial review of

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[164] *K.S.*, 104 A.3d at 266.
[165] *Id.* at 265–66 ("Use of prior dismissed charges alone as evidence of . . . a pattern of anti-social behavior, where defendant's culpability or other facts germane to admission into [diversion] have not been established in some way, constitutes an impermissible inference of guilt.") (citation omitted).
[166] *Id.* at 266.
[167] *Id.* (quotations omitted).
[168] *Id.*
[169] State v. Leonardis, 363 A.2d 321, 336 (N.J. 1976) ("Too often the rationale for discretionary decisions is undisclosed and unstated. Simply requiring written statements for each decision forces the process to become more open while it also permits administrative or judicial review.").
[170] *Id.* ("The first step in establishing accountability is to disclose the basis of decisions.").
[171] *See supra* Sections III.A, III.B.
[172] State v. Clinkenbeard, 197 P.3d 904 (Table), 2008 WL 5401333, at *6 (Kan. Ct. App. 2008).
[173] *See* N.J. STAT. ANN. § 2C:43-12(f) (2024). Tennessee's written explanation requirement derives from caselaw, rather than Tennessee's statute itself. *See* State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983) ("Such factors must, of course, be clearly articulable and stated in the record . . . .").

the diversion denial.[174] Because both statutes contain clear language to generate this Article's proposal, the Kansas Legislature should turn to both statutes to formulate its own written, appealable explanation requirement.

The Kansas Legislature should turn to N.J. Stat. Ann section 2C:43-12(f) for statutory language imposing a written explanation requirement when denying Kansas defendants pre-trial diversion.[175] The Kansas Legislature should require prosecutors to "precisely state [their] findings and conclusion," "include the facts upon which the application is based," and "include . . . the reasons offered for the denial."[176] This portion of the proposed statute should explicitly refer prosecutors to Kan. Stat. Ann. section 22-2908(a) which enumerates the factors that Kansas prosecutors must consider when making the diversion decision.[177] Additional language should require Kansas prosecutors to then rely on the section 22-2908 factors when explaining their reasoning for denying a defendant diversion.

The rationales for creating a written explanation requirement can only be realized if the Kansas Legislature also codifies a right to appeal the written explanation. Accordingly, the Kansas Legislature should turn to Tenn. Code Ann. section 40-15-105(b)(3) to formulate a statutory right to appeal a diversion denial for judicial review of the written explanation.[178] This portion of the proposed statute should clearly state that the defendant has a right to appeal or petition for a writ of certiorari "to the trial court for an abuse of prosecutorial discretion."[179] This portion should also detail that the reviewing court may either remand the diversion denial for reconsideration[180] or "order the prosecuting attorney to place the defendant in a diversion status."[181] Overall, taking guidance from both New Jersey and Tennessee will ensure that any new legislation passed in Kansas is effective.

IV. EFFECTIVENESS OF THE SOLUTION

Requiring prosecutors to provide an appealable, written explanation when denying defendants diversion has proven successful in Tennessee and New

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[174] *See* TENN. CODE ANN. § 40-15-105(b)(3) (2024). New Jersey's diversion statute also codifies a right to appeal a diversion denial but does not state the appropriate standard of review or grant the trial court the ability to place the defendant on diversion status. *Compare id.*, *with* N.J. STAT. ANN. § 2C:43-12(f) (2024).

[175] *See* N.J. STAT. ANN. § 2C:43-12(f).

[176] *See id.*

[177] KAN. STAT. ANN. § 22-2908(a) (2024).

[178] TENN. CODE ANN. § 40-15-105(b)(3).

[179] *Id.*

[180] As the New Jersey Supreme Court has noted, remand to the prosecutor for reconsideration consistent with the reviewing court's opinion may be a more appropriate remedy than a court ordering diversion status. *See* State v. K.S., 104 A.3d 258, 264 (N.J. 2015) ("A remand to the prosecutor affords an opportunity to apply the standards set forth by the court 'without supplanting the prosecutor's primacy in determining whether [diversion] is appropriate in individual cases.'") (citation omitted).

[181] TENN. CODE ANN. § 40-15-105(b)(3).

Jersey.[182] Adopting this requirement in the Kansas diversion statute will also prove successful in Kansas. This Section discusses how an appealable, written explanation requirement has several benefits, making it an effective solution. This Section then addresses potential counterarguments against the solution, ultimately concluding that the requirement is justified.

A. Benefits of an Appealable, Written Explanation Requirement

To address the problems with diversion use in Kansas, this Article sought a solution that would ensure Kansas prosecutors thoroughly consider the factors laid out in section 22-2908 when determining whether to grant or deny diversion.[183] Not only does an appealable, written explanation achieve this goal, such a requirement has additional benefits. There are three primary benefits to this Article's proposal: (1) accountability of prosecutors, (2) transparency to stakeholders, and (3) facilitation of plea-bargaining negotiation.

1. Accountability of Prosecutors

Each district attorney in Kansas is ultimately responsible for whether a defendant may be granted diversion.[184] Currently, the Kansas diversion statute makes holding prosecutors accountable in the diversion process difficult, if not impossible, as demonstrated in *State v. Clinkenbeard*.[185] The Kansas Court of Appeals in *Clinkenbeard* noted that a written statement could be "a better practice" and facilitate appellate review.[186] An appealable, written explanation requirement will hold prosecutors accountable for their implementation of diversion programs.

Kan. Stat. Ann. section 22-2908 clearly mandates that prosecutors "*shall* consider at least the following factors" when making the diversion decision.[187] By requiring paper proof of prosecutor consideration of the section 22-2908 factors, prosecutors will need to carefully consider each case and commit to their reasoning early in the proceedings. Denied defendants will then have an opportunity to evaluate the prosecutor's reasoning for any errors or abuses of discretion. Finally, the initial right to appeal to the trial court gives courts the ability to hold prosecutors accountable. The court will be able to turn

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[182] *See supra* Sections III.A, III.B.
[183] *See supra* Section III.C.
[184] KAN. STAT. ANN. § 22-2907 (2024).
[185] *See* State v. Clinkenbeard, 197 P.3d 904 (Table), 2008 WL 5401333, at *5–6 (Kan. Ct. App. 2008) (holding that the prosecutor did not abuse his discretion in denying Clinkenbeard diversion, despite the prosecutor changing his reasoning between the initial denial and the court hearing).
[186] *See id.* at *6 (citing State v. Lopes, 673 A.2d 1379 (N.J. 1995)).
[187] KAN. STAT. ANN. § 22-2908(a) (2024) (emphasis added).

to the prosecutor's written explanation as a proper record of evidence to review, without the prosecutor adding to or changing the reasoning later.

If an abuse of discretion is found, courts will have two options to hold the prosecutor accountable: (1) remand back to the prosecutor for proper consideration of the section 22-2908 factors or (2) grant the defendant diversion itself. Both options ensure that prosecutors properly conduct the diversion decision analysis, whether by being ordered to reconsider with court guidance or by being directly overruled on the diversion decision by the court itself.

2. Transparency to Other Stakeholders

An appealable, written explanation requirement will certainly shed light on the prosecutor's diversion decision process for each individual defendant applying for diversion. But prosecutors and defendants are not the only parties impacted by individual adjudications; community members also have a stake in prosecutorial decisions.[188] The Kansas Legislature recognizes the community's interest in the diversion context by adding it as a factor in section 22-2908.[189] Requiring an appealable, written explanation will also provide transparency to the diversion process for community members.

Kansas district attorneys are elected officials.[190] Increasingly, communities are becoming concerned that prosecutors make decisions based on self-interests, including re-election or to advance their political careers.[191] Although the diversion decision is not nearly as public as trial, diversion can be an incredibly controversial and public topic of discussion within the community.[192] Kansans desire for pretrial diversion to be used more often.[193] When defendants who are deemed worthy by the public are denied diversion, the community can turn to the prosecutor's written explanation for the reasons why. Additionally, the public can turn to the written explanations to determine

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[188] *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 622 (2019) ("It is important for the public to engage in informed discussion of the work of all public officials, including prosecutors.").

[189] *See* KAN. STAT. ANN. § 22-2908(a)(8).

[190] *See id.* § 22a-102.

[191] Green, *supra* note 188, at 604.

[192] *See Bartlett Youth Minister Won't Serve Time for Leaving Daughter in Hot Car*, *supra* note 139; Pierre Thomas, Aaron Katersky & Lucien Bruggeman, *Hunter Biden Updates: Plea Deal on Tax Charges Potentially Ends DOJ Probe*, ABC NEWS (June 20, 2023), https://abcnews.go.com/US/live-updates/hunter-biden-charges/?id=98765518 [https://perma.cc/24N2-CHLX] (discussing Hunter Biden, son to President Joe Biden, entering into a pretrial diversion agreement); *Ray Rice OK'd for Diversion Program*, ESPN.COM NEWS SERVS. (May 20, 2014), https://www.espn.com/nfl/story/_/id/10960822/ray-rice-baltimore-ravens-accepted-pretrial-diversion-program [https://perma.cc/7754-MHE6] (discussing former Baltimore Ravens running back Ray Rice's pretrial diversion agreement).

[193] ACLU KAN., *supra* note 67, at 17 (finding that 94% of Kansans surveyed support local prosecutors using diversion more often).

whether campaign promises are kept or not.[194] Overall, a written explanation gives the diversion process greater transparency to members of the community. In turn, this informed public inquiry will encourage prosecutors to use their power wisely.[195]

3. Facilitation of Plea-Bargaining Negotiation

While accountability and transparency are readily apparent benefits of an appealable, written explanation requirement, it also benefits defendants beyond the diversion process by facilitating plea-bargaining negotiation. Writing an explanation for diversion denial using the section 22-2908 factors will help Kansas prosecutors recognize factors that weigh in favor of the defendant.[196] Perhaps the defendant is a young adult who is incredibly remorseful for his not-so-bright decision to borrow some four-wheelers with his buddies, like Ethan, who has a high probability of cooperating with and benefiting from a diversion program.[197] Despite factors such as these being present, the prosecutor could still legitimately find that a defendant is ineligible for diversion.[198]

But even if defendants are ultimately ineligible for diversion, providing a written explanation places these mitigating factors in the prosecutor's mind.[199] These mitigating factors may help, with a defense attorney's advocacy, influence prosecutors to plea the defendant to a lesser charge or recommend a lesser sentence.[200] Both defendants and prosecutors in future cases will similarly

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[194] For example, Douglas County Attorney Suzanne Valdez ran her campaign partially on the promise of "prosecuting serious crimes." *See* Abby Shepherd, *District Attorney-Elect Suzanne Valdez Details Her Plans Once in Office*, U. DAILY KANSAN (Nov. 11, 2020), https://www.kansan.com/news/district-attorney-elect-suzanne-valdez-details-her-plans-once-in-office/article_a184fb1a-2449-11eb-83a3-8fee8cf4f38d.html [https://perma.cc/RH3Q-25SB]. One of the section 22-2908 factors is "[t]he nature of the crime charged and the circumstances surrounding it" and a written explanation requirement denying diversion could reveal that the diversion was denied because of the seriousness of the crime. *See* KAN. STAT. ANN. § 22-2908(a)(1) (2024).

[195] Green, *supra* note 188, at 625.

[196] *See* Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 102 (2015) ("Even in decisions where a prosecutor denies diversion, that prosecutor may find some factors that weigh in favor of the defendants.").

[197] *See* Cuno-Booth, *supra* note 1.

[198] *See* State v. Hogan, 2022 WL 1276124, at *2–4 (N.J. Super. Ct. App. Div. 2022) (finding diversion denial appropriate, despite the presence of mitigating factors); State v. Farley, 2023 WL 6855854, at *3, *8 (Tenn. Crim. App. 2023) (finding diversion denial appropriate, despite the defendant's amenability to correction, lack of criminal record, and other mitigating factors).

[199] Oliver & Batra, *supra* note 196.

[200] *See* Megan S. Wright, Shima B. Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS. L. REV. 2133, 2155–56 (2022) (discussing factors prosecutors consider when charging cases that defense attorneys may highlight during plea negotiations).

benefit from this requirement. New defendants can point to a prosecutor's identification of a specific factor as mitigating in a previous case to negotiate a plea when the same factor is present in their case.[201] Further, judicial opinions resulting from appeals of a prosecutor's written explanation will provide both defendants and prosecutors with authority and guidance on whether specific mitigating factors warrant diversion or lesser charges.[202]

B. Addressing Potential Counterarguments

An appealable, written explanation when denying diversion requirement does raise a few practical counterarguments. But these counterarguments are either justifiable or avoidable. This section addresses concerns surrounding the appealable, written explanation requirement's impact, or lack thereof, on (1) prosecutorial discretion, (2) prosecutorial workload, (3) the courts' workload, and (4) improving diversion program utilization itself.

1. Prosecutorial Discretion

Former U.S. Attorney General Robert Jackson once said that the "prosecutor has more control over life, liberty, and reputation than any other person in America."[203] Prosecutorial power derives from the vast array of decisions prosecutors must make and the lack of restrictive legal limitations on these decisions.[204] Kansas courts recognize that the diversion decision primarily belongs to the prosecutor, comparing the decision to a prosecutor's decision not to prosecute a case.[205] Courts are often reluctant to interfere with prosecutorial discretion, raising separation of powers and the need for flexibility concerns.[206]

Prosecutors serve as an extension of the executive branch and, as such, even the United States Supreme Court tries not to unnecessarily impair prosecutorial discretion.[207] Concededly, requiring an appealable, written requirement may result in more courts overturning prosecutorial decisions. But "the doctrine of separation of powers does not prevent court intervention in appropriate circumstances."[208] The appealable, written explanation requirement provides prosecutors with an opportunity to demonstrate and exercise their discretion. Further, the abuse of prosecutorial discretion standard of review will ensure that ordinary discretion is given its due weight. Ultimately, courts are

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[201] Oliver & Batra, *supra* note 196.
[202] *See id.* ("[T]he judicial decisions provide another source of appropriate criteria for prosecutors to consider in deciding whether leniency ought to be granted.").
[203] Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. Rev. 171, 171 (2019).
[204] Green, *supra* note 188, at 597.
[205] *See* State v. Clinkenbeard, 197 P.3d 904 (Table), 2008 WL 5401333, at *3 (Kan. Ct. App. 2008).
[206] Brandon K. Crase, Note, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 480 (2007).
[207] *Id.* (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).
[208] State v. Mulleneaux, 512 P.3d 1147, 1153 (Kan. 2022) (quoting Comprehensive Health of Planned Parenthood v. Kline, 197 P.3d 370, 395 (2008)).

required to prevent prosecutorial abuse of the judicial process.[209] Therefore, any impact an appealable, written explanation requirement may have on the separation of powers doctrine is justified.

Prosecutors also need to maintain flexibility to allow for the effective use of their limited resources to seek justice.[210] Imposing an appealable, written explanation requirement could be seen as inhibiting the need for flexibility by imposing an additional step for prosecutors to complete before finalizing diversion decisions. But as an "administrator of justice,"[211] the prosecutor is not merely a "case-processor."[212] Rather, the prosecutor "should seek to reform and improve the administration of criminal justice."[213] The appealable, written explanation requirement would improve the administration of criminal justice in Kansas.[214] Therefore, any impact on the prosecutor's need for flexibility is justified.

2. Prosecutorial Workload

Inherent from this Article's proposal is the pushback that requiring a written explanation will add to the work that prosecutors already conduct daily. County prosecutors in Kansas have noted the impact of having limited resources for the vast amount of cases they must handle.[215] Even the Kansas Attorney General's Office is not immune to resource shortages, such as lack of staff.[216] Arguably, an appealable, written explanation requirement adds another responsibility to prosecutors' workloads that may prove burdensome.

Any potential burden, however, is relatively avoidable. Each prosecutor's office can develop a standard form for the written explanation requirement that can be filled out for an individual case.[217] As prosecutors continue to generate written explanations, they will become more familiar and

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[209] State v. Schamp, 262 P.3d 358 (Table), 2011 WL 5143056, at *3 (Kan. App. 2011) (citation omitted).
[210] Crase, *supra* note 206.
[211] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION standard 3-1.2(a) (AM. BAR ASS'N 2017).
[212] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION standard 3-1.2(f) (AM. BAR ASS'N 2017).
[213] *Id.*
[214] *See supra* Section III.C.
[215] *See, e.g.*, Krista Blaisdell, *Attorney*, GEARY CNTY., https://www.gearycounty.org/202/Attorney [https://perma.cc/KZ7R-4JZX] (explaining how "the limitations placed on [the] office by the sheer volume of numbers" impacts the actions of the Geary County Attorney Krista Blaisdell's office).
[216] Andrew Bahl, *Kansas Attorney General's Office Fighting Exodus. Can Kris Kobach Turn it Around?*, TOPEKA CAP. J. (Mar. 27 2023), https://www.cjonline.com/story/news/state/2023/03/26/kris-kobach-kansas-attorney-general-office-struggles-with-staffing/70011872007/ [https://perma.cc/7X6C-54N2].
[217] Kansas prosecutors, such as the Sedgwick County Attorney, develop standard forms for several areas of the prosecutor's work. *See Forms*, SEDGWICK CNTY., https://www.sedgwickcounty.org/district-attorney/forms/ [https://perma.cc/EJ6W-DWJ6].

efficient with the process. Further, if this Article's proposal is adopted by the Kansas Legislature, Continuing Legal Education events can be created to educate Kansas prosecutors on the process before it is implemented.[218]

Additionally, deficiencies in statutes naturally require modifications, even if such modifications impose additional burdens. The New Jersey Supreme Court noted that New Jersey's diversion program has its own history of deficiencies that warranted modification.[219] Quoting Justice Brandeis, the court noted that programs such as diversion should be continuously developed by addressing deficiencies.[220] The Kansas diversion statute itself is guided by "the interests of justice."[221] The interests of justice are furthered with an appealable, written explanation requirement. Therefore, any impact this requirement may have on prosecutorial workload is justified.

3. The Courts' Workload

Inherent in many proposals for criminal justice reform is the counterargument that courts must take on more work to implement the proposal. Trial courts throughout the United States are overworked,[222] creating several problems including delayed case resolutions,[223] inadequate court budgets,[224] and the need to expand existing courts.[225] Kansas courts are not immune to this

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[218] For example, the University of Kansas School of Law hosts a "Recent Developments in the Law" CLE program each spring. UNIV. OF KAN. SCH. OF L., *Recent Developments in the Law CLE*, UNIV. OF KAN., https://law.ku.edu/recent-developments [https://perma.cc/8RMC-23CH].

[219] *See* State v. Leonardis, 363 A.2d 321, 339–40 (N.J. 1976) (explaining that the deficiencies identified in the New Jersey diversion program warranted modification, not dissolution of the entire diversion program).

[220] *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[221] KAN. STAT. ANN. § 22-2907(a) (2024).

[222] *See* CT. STATS. PROJECT, *CSP STAT Overview: Caseload Detail – Grand Total*, COSCA, NAT'L CTR. STATE CTS. (Oct. 2024), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview [https://perma.cc/2ZS7-MRST] (reporting the incoming trial court caseload in thirty-five states and outgoing caseload in twenty-five states, most of which have more incoming cases than outgoing cases).

[223] *See* Tanya Settles, *Justice Delayed: The Growing Impact of Judicial Backlogs*, AM. SOC'Y PUB. ADMIN. (Sept. 20, 2024), https://patimes.org/justice-delayed-the-growing-impact-of-judicial-backlogs/ [https://perma.cc/WV8A-ECMR]. This problem is perhaps the most concerning issue with overworked courts, as the legal maxim goes: "justice delayed is justice denied." *Id.*

[224] *See "1,000 Cases Each Day:" Chief Justice Mike McGrath's State of the Judiciary*, 36 MONT. LAW. 20, 21 (2011) (discussing how overworked courts with inadequate budgets are "bad for business" and "inevitably result in delay and court backlogs"); *see also Proposed FY 2024 Funding Levels Would Hurt Courts and Public, Letter to Congress Says*, U.S. CTS. (Aug. 1, 2023), https://www.uscourts.gov/data-news/judiciary-news/2023/08/01/proposed-fy-2024-funding-levels-would-hurt-courts-and-public-letter-congress-says [https://perma.cc/6R2E-42R9] (discussing how inadequate budgets and federal court caseloads greatly impact federal criminal defendants' access to representation).

[225] *See, e.g.,* Hon. Alan D. Scheinkman, *Finding the Perfect Number*, 17 JUD. NOTICE 46, 57 (2022) (advocating to increase the number of justices sitting on New York Appellate Court panels to handle the "crushing" caseload).

situation.[226] Several county court systems in Kansas do not have enough attorneys to handle the current caseload, placing the state court system "on the verge of a constitutional crisis."[227]

But this Article's proposal would not contribute to a constitutional crisis in Kansas. As explained, requiring prosecutors to write an explanation denying diversion would facilitate the plea bargaining process,[228] resolving cases well before a trial—which places the highest burden on court systems.[229] Further, only written denials involving abuse of prosecutorial discretion are appealable under this Article's proposal.[230] This Article presumes that most prosecutors, with the help of a standard form, would properly exercise their discretion when writing a diversion denial explanation, thus limiting the number of possible appeals.[231] Successful appeals could also result in quicker case resolutions by requiring prosecutors to properly divert defendants instead of taking the case to trial.[232] Put together, these factors would alleviate the Kansas court system's workload instead of adding to it.

Even if this Article's proposal placed an additional burden on courts, the need for criminal justice often outweighs the comfort of the courts. The Kansas Legislature implemented its diversion program to facilitate "the interests of justice," subjecting the court system to a completely new program it had not worked with before.[233] Courts play a crucial role in remedying deficiencies in our system, especially in experimental programs to improve the criminal justice system as a whole.[234] Courts should be involved in—and review—programs designed to further criminal justice such as diversion programs.[235] Although perhaps burdensome up front, reviewing appealable, written explanations when

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[226] *See* SUZANNE TALLARICO & JOHN DOUGLAS, KANSAS COURT SERVICES OFFICER WEIGHTED WORKLOAD STUDY: FINAL REPORT iii (Nat'l Ctr. State Cts. 2018) (finding that Kansas courts need approximately 115 additional court services officers to manage the caseload properly).
[227] KAN. RURAL JUST. INITIATIVE, COMMITTEE FINAL REPORT TO THE KANSAS SUPREME COURT 17 (2024).
[228] *See supra* Section IV.A.3.
[229] Both felony and misdemeanor cases that go to a bench or jury trial take significantly longer to process than cases resolved by plea or diversion. *See* BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 25 (Nat'l Ctr. State Cts. 2022) (reporting felony and misdemeanor disposition times by median days and disposition type).
[230] *See supra* Section III.C.
[231] Attorneys cannot not "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." Kan. R. Prof'l Conduct 3.1.
[232] *See supra* Section III.C (permitting courts to order the prosecutor to divert the defendant).
[233] KAN. STAT. ANN. § 22-2907(a) (2024); *see also* Cox, *supra* note 23, at 345.
[234] *See* State v. Leonardis, 363 A.2d 321, 340 (N.J. 1976).
[235] *Id.* at 336 ("If diversion programs are to perform as they are intended, then the decisions of those referring to these programs must be subject to review and evaluation.").

denying pretrial diversions would likely alleviate the burden of the courts in the long-term by improving diversion use.

4. Improving Diversion Program Utilization

The ultimate issue for any proposed legal reform is whether it will even work. One of the problems identified by this Article is the alarmingly small use of diversion programs by Kansas prosecutors.[236] The Kansas diversion statute, even with an appealable, written explanation requirement, leaves prosecutors with immense discretion to implement their respective programs.[237] While prosecutors must consider "at least" the factors in sections 22-2908, prosecutors are allowed to consider other factors.[238] And even the enumerated factors in section 22-2908 are incredibly broad.[239] A key question, therefore, is whether an appealable, written explanation requirement will improve the rate diversion is used in Kansas given the breadth of discretion prosecutors have in this area.

An appealable, written explanation requirement alone is unlikely to completely "fix" the low use of diversion in Kansas. Improving the diversion use rate will likely require several areas of reform including tracking diversion use more clearly, standardizing applications across the state, and reducing diversion fees for defendants, among others.[240] Each of these proposals should be explored and discussed within the Kansas legal community but are simply beyond the scope of this Article. Ultimately, this Article is designed to spark a legal discussion surrounding diversion reform in Kansas. By taking the small step of requiring an appealable, written explanation when denying diversion, Kansas can begin to improve diversion programs across the state.*

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[236] *See supra* Section II.A.2.
[237] *See* KAN. STAT. ANN. §§ 22-2907(a)–(b), 2908(a) (2024).
[238] *Id.* § 22-2908(a).
[239] Several of the section 22-2908 factors contain incredibly broad language. *See, e.g.,* KAN. STAT. ANN. §§ 22-2908(a)(1), (a)(12).
[240] ACLU KAN., *supra* note 67, at 18–19. The ACLU of Kansas has called for numerous diversion program reforms at both the state legislature and individual prosecutor levels. *See id.*
* Remainder of the page is left intentionally blank to facilitate convenient use of the Draft Statutory Provision included in Section V.

V. DRAFT STATUTORY PROVISION

The following is draft legislation implementing this Article's proposal. This statute is drafted as if it were its own provision, but because it directly references the section 22-2908 factors, adding this language to section 22-2908 is advised.

> (a) After considering at least the factors in K.S.A 22-2908(a), if the county or district attorney determines that it is not in the interests of justice or benefit to the defendant or community to grant the defendant diversion the county or district attorney shall precisely state the findings and conclusion in a written memoranda which shall include:
>
> (1) the facts upon which the application is based; and
>
> (2) the reasons, based on K.S.A. 22-2908(a) or otherwise, offered for denial.
>
> (b) Upon receiving the written memoranda denying diversion, the defendant shall have the right to petition for a writ of certiorari to the district court for an abuse of prosecutorial discretion. If the district court determines that the county or district attorney has committed an abuse of discretion in failing to divert, the district court may:
>
> (1) remand the diversion decision to the county or district attorney for proper reconsideration; or
>
> (2) order the county or district attorney to place the defendant on diversion on the terms and conditions as the trial court may order.
>
> (c) The defendant may further appeal the district court's decision to the appropriate appellate court.

While this Article has chosen specific language from the New Jersey and Tennessee statutes, the two statutes are ultimately offered as guides for Kansas lawmakers. An exact copying of this language is not necessary to gain the benefits of an appealable, written explanation requirement.

VI. CONCLUSION

An appealable, written explanation requirement when denying defendants diversion furthers the "in the interests of justice" standard on which the Kansas diversion statute is premised.[241] This requirement will facilitate judicial review of diversion denials and commit prosecutors to their reasoning for denying diversion at an early stage—improving prosecutorial accountability. This requirement will also ensure prosecutors properly evaluate the section 22-2908 factors—improving diversion program transparency. Additionally, this requirement will present the mitigating factors of a defendant's case to both the prosecutor and defense attorney—facilitating diversion arguments and plea-bargaining negotiations. Overall, this requirement can serve as a first step to improving the low usage rate of diversion by Kansas prosecutors and give defendants like Ethan a true chance of rehabilitation.

[241] *See generally* KAN. STAT. ANN. § 22-2907(a) (2024).

FOILING CLEVER HANS: STATE-LEVEL DATA PRIVACY PROTECTION AS A MITIGANT FOR AI HARMS

*By: Violet Brull**

I. INTRODUCTION

Clever Hans could do arithmetic.[1] Wilhelm von Osten had been touring with Clever Hans around Germany since 1891 demonstrating this remarkable capability, and the German scientific community was reeling with the implications of Clever Hans's abilities.[2] Because, apparently, Clever Hans could do *arithmetic*.[3] Clever Hans was a *horse* who could do *arithmetic*.[4]

The act itself was simple enough: A questioner would present Clever Hans with a series of questions ranging from numeral identification to simple multiplication and division.[5] The horse would respond by dutifully tapping out the answer with one hoof.[6]

"Hans, what is the product of 2 and 6?"

Twelve taps.

"Say, Hans, what number is this?"

Eight taps.

"Excellent, Hans! Here, have a sugar cube." And so on.[7]

As best anyone in the scientific community could tell, it wasn't a fraud.[8] Professional horse trainers had verified that if anyone was giving the horse a signal, it was not one that they had ever seen used to train horses before.[9] Multiple scientific and skeptical investigators verified that Hans could perform

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* J.D. Candidate, May 2025, University of Kansas School of Law. I would like to thank my close friend Eleazar Hazel for providing practical professional insight and stoking my interest in the legal aspects of this topic, my faculty advisor Professor Najarian R. Peters for providing invaluable feedback and research assistance, and all my friends and family who supported me throughout the writing and publication process.

[1] Philip M. Ferguson, *Clever Hans*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Clever-Hans [https://perma.cc/JD3R-Z4VB].

[2] *Id.*

[3] OSKAR PFUNGST, CLEVER HANS (THE HORSE OF MR. VON OSTEN) A CONTRIBUTION TO EXPERIMENTAL ANIMAL AND HUMAN PSYCHOLOGY 1 (Carl L. Rahn trans., 1911).

[4] *Id.*

[5] *Id.* at 20, 34–35.

[6] *Id.* at 19.

[7] An imagined interaction.

[8] PFUNGST, *supra* note 3, at 1 ("A horse that solves correctly problems in multiplication and division by means of tapping. Persons of unimpeachable honor, who in the master's absence have received responses, and assure us that in the process they have not made even the slightest sign. Thousands of spectators, horse-fanciers, trick-trainers of first rank, and not one of them during the course of many months' observations are able to discover any kind of regular signal. That was the riddle.").

[9] *Id.* at 6–7.

his work even in the absence of his owner, or, indeed, anyone who they thought could be giving any kind of signal.[10] What could this mean for the field of animal intelligence? For the study of education? For our entire understanding of humanity and its place in the world?[11]

It wasn't until Oskar Pfungst, a student at the Psychological Institute at the University of Berlin, performed several carefully designed experiments that the baffling puzzle was solved.[12] In a series of controlled trials, Pfungst was able to ascertain that when no one present, *including the questioner*, knew the answer to the question presented, Clever Hans was utterly unable to perform.[13] The horse had been reading the subtlest of body language from his questioners to determine the exact moment he should stop tapping his hoof for a reward.[14]

In today's world, we face a deluge of increasingly "clever" AI[15] tools.[16] Unfortunately, these tools, just like Clever Hans, can appear to make perfectly intelligent decisions while in fact relying on observations that have nothing to do with the actual tasks we assign them.[17] This presents a distinct danger as these tools are increasingly involved in critical decisions about employment and consumer lending: Bias can creep into the decision-making process along with the vast amounts of data used to power these new tools.[18] People can be unfairly denied loans or employment through no fault of their own.[19] At particular risk

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[10] PFUNGST, *supra* note 3, at 2.
[11] *See id.* at 15–19.
[12] Ferguson, *supra* note 1; *see generally* PFUNGST, *supra* note 3.
[13] *See, e.g.*, PFUNGST *supra* note 3, at 34–35.
[14] Ferguson, *supra* note 1.
[15] The acronym "AI" stands for "artificial intelligence."
[16] Robert Geirhos, Jörn-Henrik Jacobsen, Claudio Michaelis, Richard Zemel, Wieland Brendel, Matthias Bethge & Felix A. Wichmann, *Shortcut Learning in Deep Neural Networks*, 2 NATURE MACH. INTEL. 665, 1–2 (Nov. 21, 2023) (accessed via arXiv; this edition is paginated 1–29), https://arxiv.org/pdf/2004.07780.pdf [https://perma.cc/WW4J-G78L] [hereinafter *Shortcuts*].
[17] *Id.* at 2.
[18] *See, e.g.*, Ruha Benjamin, *Assessing risk, automating racism: A health care algorithm reflects underlying racial bias in society*, SCIENCE, Oct. 25, 2019, at 421, 421, https://www.science.org/doi/10.1126/science.aaz3873 [https://perma.cc/4UQU-4EFY].
[19] Fisher Phillips, *How is HR Using AI? An Employer's List of Tools and Potential Pitfalls*, JD SUPRA NEWSTEX BLOGS (Aug. 14, 2023), https://www.jdsupra.com/legalnews/how-is-hr-using-ai-an-employer-s-list-5615442/ [https://perma.cc/PJM8-5XFD]; Kali Bracey & Grace Wallack, *New AI Lending Tech Could Exacerbate Old Bias Risks*, LEXISNEXIS LAW360 EXPERT ANALYSIS (Aug. 17, 2023), https://plus.lexis.com/api/permalink/21c39dca-7d4c-4cc6-9647-d12726b82fcb/?context=1530671 [https://perma.cc/58J8-USZY]; Rohit Chopra, *Algorithms, artificial intelligence, and fairness in home appraisals*, Consumer Fin. Prot. Bureau Blog (June 1, 2023), https://www.consumerfinance.gov/about-us/blog/algorithms-artificial-intelligence-fairness-in-home-appraisals/ [https://perma.cc/4Z4U-DMEN]; Charles Lane, *Will Using Artificial Intelligence To Make Loans Trade One Kind Of Bias For Another?*, NPR (Mar. 31, 2017), https://www.npr.org/sections/alltechconsidered/2017/03/31/521946210/will-using-artificial-intelligence-to-make-loans-trade-one-kind-of-bias-for-anot [https://perma.cc/V9R4-9ZC8]; F.T.C., *Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf [https://perma.cc/4A96-BV5F] [hereinafter *FTC Big Data*].

are historically disadvantaged groups, whom these tools can subject to the inherited prejudices of past decision makers.[20]

Current legislative approaches to solving this problem are inadequate.[21] Scholars and policy makers often focus on seeking out and preventing concealed, nefarious intentions or human bias and error in the creation of algorithmic tools, advocating for and effecting legislation that polices procedural fairness in the use of big data.[22] These efforts to police the *use* of consumer data are important, but they neglect to address the possibility that the data *itself* can be the vehicle for institutional discrimination.[23] The current body of law, then, is beneficial and provides an important backstop of protection, but is not sufficient.

To provide the supplement necessary to materially protect the rights currently espoused in modern legislation, this Article advocates for the increased protection of consumer data privacy at the state level, particularly in Kansas. When data is the vehicle for discrimination and consumer harm, it is only sensible to address the problem at the level of data collection. Further, this is an approach that can be effectively pursued at the state level. State-level implementation of comprehensive data privacy protection would bypass the sluggishness of the national legislative process. It may also garner greater bipartisan support than would similar legislation introduced at a federal level.

While many sources discuss the potential harms of mass consumer data collection[24] or of irresponsible AI use,[25] few directly propose data privacy legislation as a mitigant for AI harms.[26] Furthermore, most sources discussing desirable features for newly drafted data privacy legislation focus on federal- rather than state-level solutions.[27] This Article, by contrast, advocates a pragmatic state-level approach to data privacy protection, espousing its value in specific light of modern AI developments. This Article also signposts important

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[20] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 673–74 (2016) [hereinafter *Disparate Impact*].

[21] *Id.* at 674–75.

[22] *Id.*

[23] *Id.* at 673–74.

[24] *See, e.g.*, *FTC Big Data supra* note 19*; Disparate Impact*, *supra* note 20.

[25] *See, e.g.*, Benjamin, *supra* note 18.

[26] Karl Manheim and Lyric Kaplan's *Artificial Intelligence: Risks to Privacy and Democracy* does take this stance, but focuses solely on federal implementation and cannot fully contemplate the burgeoning capabilities of AI brought by the passage of the half-decade since its publication. Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J. L. & TECH. 106 (2019) [hereinafter *AI Risks*].

[27] *See, e.g.*, *AI Risks*, *supra* note 26; Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection [https://perma.cc/F32J-J7DR]; Jessica Rich, *After 20 years of debate, it's time for Congress to finally pass a baseline privacy law*, BROOKINGS: COMMENTARY (Jan. 14, 2021), https://www.brookings.edu/articles/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/ [https://perma.cc/U3JK-53LZ].

features that legislators should incorporate into any new state-level data privacy protection legislation.

Part II of this Article will lay the basic technical foundation necessary to understand the issues surrounding AI technologies covered by the remainder of the Article, as well as a similar foundation around modern "big data" collection and use practices. Part III will discuss how institutional discrimination can be perpetuated by these practices. Part IV will propose the solution of state-level consumer data protection as a strong mitigant, noting the inadequacy of current legislation to address the problems at hand. Part V will address several potential counterarguments.

II. BACKGROUND

An understanding of the field of machine learning is critical when attempting to solve the novel problems presented by today's AI tools.[28] If one ignores the nuances involved in understanding the broad field of machine learning, one risks developing solutions for the problems it raises that fail to adequately address all cases.[29] Section A of this Part will thus begin under the broad umbrella of AI and progress in detail to a brief explanation of deep learning models and the datasets used to train them.

Since this Article advocates for increased consumer data privacy protections, a general understanding of the field of big data analytics is also necessary. Section B of this Part will provide information on the field, its history, and the problematic practices of many of its companies.

A. Machine Learning & Artificial Intelligence

The term "artificial intelligence" has two main understandings.[30] The first is "artificial general intelligence," a term which describes systems that endeavor to make intelligent decisions on their own in a broad field of applications.[31] The second is "intelligence augmentation," a term which describes systems that endeavor only to aid humans in making complex decisions.[32] This Article will not strongly distinguish between the two, since the border is nebulous and has a tendency to shift over time as intelligence augmentation tools become more and more capable.[33] It is important to recognize, however, that the field of AI is extremely broad and includes a plethora of systems produced by many different methods.

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[28] David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 669 (2017) [hereinafter *Playing with the Data*].
[29] *Id.*
[30] KEVIN P. MURPHY, PROBABILISTIC MACHINE LEARNING: AN INTRODUCTION 28 (2022), probml.ai.
[31] *Id.*
[32] *Id.* at 29.
[33] *See id.*

Machine learning, one such method, is a process by which a computer program, given some curated experience, improves at a task over time.[34] In other words, the program "learns" through "training."[35] Many different specific techniques fall under the definition of "machine learning," and each can be used in a variety of practical applications.[36] Recently, the field of AI has become increasingly reliant on machine learning.[37] While it was long-thought that the path forward in developing AI was in hand-coding the "intelligent" systems, the difficulty of actually encoding all the knowledge such systems need in order to be useful has necessitated the adoption of machine learning approaches to allow systems to acquire the requisite knowledge for themselves.[38]

One specific machine learning technique, deep learning, has largely powered the recent explosion in AI technologies.[39] Deep learning is a type of machine learning that uses artificial neural networks, with structures that emulate the ways in which human and animal brains function, as the basis for the training process.[40] A deep learning "model" or "algorithm" is an individual instance of the process: a set of "rules" that are learned over time through training on a dataset.[41]

A dataset is a collection of input-output pairs that can be used to facilitate machine learning.[42] For example, one dataset might contain pairs where the input is an audio clip and the output is the transcribed text of that clip.[43] Such a dataset could be used in training an AI model to transcribe audio.[44] While machine learning (and specifically deep learning) has been the vehicle for recent AI developments, the availability of increasingly large datasets has been the fuel.[45] In previous eras, the collection of these datasets was seen as the limiting factor in the field's development.[46] Now, these newly-available large

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[34] MURPHY, *supra* note 30, at 1.
[35] *See id.*
[36] *Id.* at 27–28.
[37] *Id.* at 28.
[38] *Id.*
[39] *Shortcuts*, *supra* note 16, at 1.
[40] *What is AI?*, MCKINSEY & CO. FEATURED INSIGHTS (Apr. 24, 2023), https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-ai [https://perma.cc/3F7T-XP4G].
[41] *Playing with the Data*, *supra* note 28, at 671–72.
[42] Amandalynne Paullada, Inioluwa Deborah Raji, Emily M. Bender, Emily Denton, and Alex Hanna, *Data and its (dis)contents: A survey of dataset development and use in machine learning research*, 2 PATTERNS 1, 2 (2021) [hereinafter *Data and its (dis)contents*].
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1.
[46] *Id.*

datasets, commonly referred to as "big data," provide the foundation needed to support the wave of growth in machine-learning technologies.[47]

B. Big Data

Big data doesn't start big.[48] The collection process begins, frequently, on consumer devices.[49] As users interact and shop online, online advertisers, retailers, social media companies, and others collect and compile information about their habits and history.[50] Companies known as "data brokers" specialize in this collection and compilation process.[51] Data brokers gather consumer information en masse, using it to build extensive profiles—each containing thousands of datapoints—on nearly every U.S. consumer.[52]

Sometimes, this collection process is carried out in a relatively transparent manner.[53] When, for example, a consumer logs into an online retailer's website before making a purchase, they may reasonably expect that the purchase transaction will be associated with their account, and in turn with the consumer themself.[54] Sometimes, however, data brokers rely on more underhanded tactics to obtain consumer data without the consumer's permission or even knowledge.[55] Data brokers and others may use tracking cookies,[56] browser or device fingerprinting,[57] and even history sniffing[58] to surreptitiously

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[47] *Data and its (dis)contents*, *supra* note 42, at 1.
[48] *FTC Big Data*, *supra* note 19, at 3.
[49] *Id.* at 3–4.
[50] *Id.*
[51] *Id.* at 4.
[52] *Id.*; F.T.C., *Data Brokers: A Call for Transparency and Accountability*, 46–47 (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [https://perma.cc/WXY7-REM4] [hereinafter *FTC Data Brokers*].
[53] *See FTC Big Data*, *supra* note 19, at 3.
[54] *See id.*
[55] *FTC Data Brokers*, *supra* note 52, at 46; *see FTC Big Data*, *supra* note 19, at 3.
[56] Cookies are small text files stored on user devices for a variety of purposes, such as maintaining user preferences or remembering the contents of user shopping carts. Tracking cookies are cookies that keep track of which webpages a user has visited and potentially communicate that information to a third party, frequently without the user having any visibility or control over the process. *What are cookies?*, CLOUDFLARE: LEARNING CENTER, https://www.cloudflare.com/learning/privacy/what-are-cookies/ [https://perma.cc/RXC6-X9EH].
[57] Fingerprinting methods use characteristics of a user's device (such as which type of graphics card or CPU is installed in the device) to identify users even when they avoid identification via tracking cookie. *See* Yinzhi Cao, Song Li, & Erik Wijmans, *(Cross-)Browser Fingerprinting via OS and Hardware Level Features*, NETWORK AND DISTRIBUTED SYSTEM SECURITY (NDSS) SYMPOSIUM (2017) [https://perma.cc/69MG-D72M].
[58] History sniffing is the practice of obtaining information about a user's browser history without the consent or knowledge of the user. Ioana Patringenaru, *These New Techniques Expose Your Browsing History to Hackers*, U.C. SAN DIEGO TODAY (Oct. 31, 2018), https://today.ucsd.edu/story/history_sniffing [https://perma.cc/CN7K-K26M]. While web browsers try to prevent history sniffing, new techniques are being developed over time that maintain the effectiveness of this category of attacks. *Id.*; *History sniffing with CSS and JS: Learn how and why it still works in 2022.*, HACKINGLOOPS, https://www.hackingloops.com/css-browser-history-sniffing/ [https://perma.cc/P98X-B4JF].

connect data about a given consumer from disparate sources.[59] In some cases, companies can gain even more information about a consumer by tracking the consumer's identity across multiple devices (e.g., the consumer's phone, laptop, smart home devices, and wearables) and combining the data received from each source.[60] Data brokers can also use the above techniques to pair information gained about a consumer from offline sources, such as voting registration, bankruptcy information, or even product warranty registrations, with information about that consumer's online activity, such as their online purchase history, advertisement interaction, and social media activity.[61]

Once data brokers have collected consumer data, they can combine and analyze the various data they collect to make potentially sensitive inferences about consumers.[62] Data brokers place consumers into categories based on certain inferred demographic characteristics, which are then marketed to advertisers as potential segments of new customers.[63] While some of these categories are relatively innocuous (e.g., "Dog Owner," "Winter Activity Enthusiast," or "Mail Order Responder"), some of the categories are far more concerning, implicating the ethnicity, income level, marital status, education level, and medical concerns of the segmented consumers.[64] For example, categories that have been used by data brokers for this purpose include "Urban Scramble" and "Mobile Mixers," both of which disproportionately contain people in minoritized ethnic groups with low income, "Rural Everlasting," a category including "single men and women over the age of 66 with 'low educational attainment and low net worths,'" "Married Sophisticates," a category containing thirty- to forty-year-old individuals who are wealthy and married without children, and categories implicating medical concerns such as "Expectant Parent," "Diabetes Interest," and "Cholesterol Focus."[65]

Data brokers may further offer "data append" services.[66] Clients of these services provide the data broker with identifying information about one or more consumers (e.g., names and addresses), and data brokers in turn provide additional information about those consumers back to the clients.[67] This information can include, for example, direct information about individual consumers' gender, occupation, religious or political affiliations, or even height and weight.[68]

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[59] *FTC Big Data*, *supra* note 19, at 3–4.
[60] *Id.* at 4.
[61] *FTC Data Brokers*, *supra* note 52, at 46–47.
[62] *Id.* at 47.
[63] *Id.* at 28, 47.
[64] *Id.* at 47.
[65] *Id.*
[66] *Id.* at 24.
[67] *Id.*
[68] *Id.* at 24–25.

Even prior to the dawn of AI ubiquity, unscrupulous companies could use big data to target vulnerable populations for exploitation.[69] Companies could potentially use big data analytics to find vulnerable populations to target with scams or misleading offers.[70] Online retailers have, in the past, used big data analytics to increase prices for customers from low-income communities, where they face less competition from brick-and-mortar stores.[71] When companies collect and analyze large bodies of data for the purpose of making predictive decisions, the process carries the inherent potential to cause adverse outcomes for entire sociodemographic groups.[72]

The lack of transparency surrounding data brokers' practices has only worsened the issue. Unlike consumer reporting agencies ("CRAs"), traditional sources of consumer information that are bound by the Fair Credit Reporting Act (the "FCRA"), most data brokers are not required to provide consumer access to the data they collect about individual consumers.[73] Even those data brokers that do provide consumer access often restrict that access to a consumer's raw data alone, rather than the results of any analysis performed by the broker.[74] This means that a data broker could file a consumer into a category that implies sensitive information about that consumer (which may or may not be true) and provide that categorization to a client company, all without the consumer having any way to know this was occurring.[75]

With the proliferation of internet-connected consumer devices comes the proliferation of opportunities for companies to collect data on consumers.[76] With the proliferation of that opportunity comes the proliferation of commercially available consumer data.[77] Ultimately, access to broad swathes of consumer data gives companies powerful opportunities to facilitate either inclusion or exclusion—to advance the interests of historically disadvantaged populations or to exploit the same.[78] In a perfect world, companies would solely use consumer data in ethical ways, advancing the common good and protecting vulnerable communities. Reality, unfortunately, is far from perfect.

III. BIG DATA, AI, AND THE PERPETUATION OF INSTITUTIONAL DISCRIMINATION

In today's world, machine learning technologies are used to make myriad decisions about individual people, ranging from the relatively

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[69] *FTC Big Data*, *supra* note 19, at 10–11.
[70] *Id.* at 10.
[71] *Id.* at 11.
[72] *Disparate Impact*, *supra* note 20, at 673.
[73] *FTC Big Data*, *supra* note 19, at ii; *FTC Data Brokers supra* note 52, at 42.
[74] *FTC Data Brokers*, *supra* note 52, at 42.
[75] *See id.*
[76] *FTC Big Data*, *supra* note at 19, at i.
[77] *Id.*
[78] *Id.* at 12.

inconsequential to the highly impactful.[79] For each machine-learning model employed, the journey from data to trained model is fraught with numerous complexities and obstacles, many of which provide opportunities for the inadvertent injection of harmful biases that can be reflected in the final product.[80] Section A of this Part will examine the difficulties of constructing an equitable dataset for machine learning use. Section B of this Part will discuss the impracticability of remedying bias in most existing datasets. Section C of this Part will highlight the pitfalls in model training and use that could result in the derivation of bias, even from the perfectly vetted dataset.

A. Obstacles to Equitable Dataset Construction

The ill-considered development and use of large datasets can lead to troubling societal impacts, despite apparent progress.[81] Even industry professionals admit that using massive-scale analytics to attempt to find useful but non-obvious patterns in enormous consumer datasets is a relatively recent practice, and that companies are still learning how to avoid the potential ill consequences it could cause.[82] If the collection and compilation process for a body of data reflects bias towards or against certain sociodemographic groups, that bias can bleed through into the statistical relationships supposedly discovered through the analysis of that data.[83]

The introduction of machine-learning technologies into the already-problematic space of big data analytics has only exacerbated the issue. Among many professionals in the machine learning field, the unrestricted distribution of datasets is seen as an unequivocal good.[84] Scholars in the field have argued that such distribution is necessary for the review and verification of new discoveries in machine learning methodology.[85] When data gathered for one purpose is

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[79] MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN 64 (2019) [hereinafter THE ETHICAL ALGORITHM]; Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 1, 1 (2018) [https://perma.cc/VRA6-JBWJ] [hereinafter *Gender Shades*]; Sylvia Lu, *Data Privacy, Human Rights, and Algorithmic Opacity*, 110 CALIF. L. REV. 2087, 2090–91 (2022).

[80] *See Playing with the Data*, *supra* note 28, at 681–702.

[81] Emily M. Bender, Timnit Gebru, Angelina McMillan-Major & Shmargaret Shmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*, *in* FACCT '21: PROCEEDINGS OF THE 2021 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 610, 610 (Mar. 2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445922 [https://perma.cc/4YT5-W2S2] [hereinafter Stochastic Parrots.]; *Data and its (dis)contents*, *supra* note 42, at 1.

[82] *FTC Big Data*, *supra* note 19, at 5.

[83] *Id.* at 8.

[84] *Data and its (dis)contents*, *supra* note 42, at 7.

[85] *Id.*

reused for a different purpose, however, it can raise myriad ethical concerns and cause a variety of social harms.[86]

A concerning case study illustrating this point is the story of the Pima Indians Diabetes Dataset (the "PIDD"), housed at the University of California, Irvine Machine Learning Repository.[87] This dataset was originally collected by the National Institutes of Health from the Indigenous community living at the Gila River Indian Community Reservation, whose members refer to themselves as Akimel O'odham.[88] The Akimel O'odham people have historically been the subject of numerous anthropological and biomedical studies, including the longitudinal study that produced the PIDD, due to the unusually high prevalence of diabetes among their community.[89] While these studies have advanced medical understanding of diabetes as a disease, they have not resulted in any substantial decrease in the rates of obesity or diabetes in the community itself.[90]

Furthermore, the PIDD has been used thousands of times in the development of machine learning algorithms as a "toy" dataset.[91] In these myriad cases it has been used not to further studies of diabetes, or even human health in general, but rather only as fodder for machine learning development.[92] This use, normalized among members of the machine learning field, raises concerns over the reproduction of the exploitative patterns of colonialism.[93] It further calls the flawed ethical practices surrounding the collection and preservation of Henrietta Lacks's cervical cells[94] uncomfortably to mind. Concerns like these have caused some scientists to call for more rigorous ethical norms, such as those of human-subjects research, to be applied to the burgeoning field of data science.[95] In traditional human-subjects research, institutional review boards and informed consent requirements help to protect vulnerable populations from exploitation.[96] In the field of machine learning, these critical protections remain absent.[97]

Even when data analysts carefully purpose-build their datasets, though, rather than using inappropriately acquired data created for an incompatible

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[86] *Data and its (dis)contents*, *supra* note 42, at 6–8.
[87] *Id.* at 7.
[88] *Id.* at 7; Joanna Radin, *"Digital Natives": How Medical and Indigenous Histories Matter for Big Data*, 32 OSIRIS 43, 44 (Jan. 2017), https://www.journals.uchicago.edu/doi/full/10.1086/693853 [https://perma.cc/C8N9-Y3SS].
[89] Radin, *supra* note 88, at 44; *Data and its (dis)contents*, *supra* note 42, at 7.
[90] Radin, *supra* note 88, at 50; *Data and its (dis)contents*, *supra* note 42, at 7.
[91] *Data and its (dis)contents*, *supra* note 42, at 7.
[92] *Id.*
[93] Radin, *supra* note 88, at 45.
[94] Henrietta Lacks was treated for cervical cancer at Johns Hopkins Hospital in 1951. Lacks passed away shortly afterward, but cells from a tumor biopsied during this treatment were cultured into the HeLa cell line, a cell line still widely used in medical research to this day. Lacks's consent to use her cells for medical research was neither sought nor given, and neither Lacks nor her family were ever compensated for the cells. Indeed, Lacks's family was not even made aware of the cell line until decades after Lacks's death. *See generally* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010) (providing background on Henrietta Lacks's history).
[95] *Data and its (dis)contents*, *supra* note 42, at 6–7.
[96] *Id.*
[97] *Id.* at 7.

purpose, the resultant datasets can be fraught with flaws introduced during their creation. In recent years, researchers have increasingly found that many prominent machine learning datasets contain either a troubling lack of representation or outright harmful misrepresentation of certain sociodemographic groups.[98] To give a few examples: People with darker skin-tones are underrepresented in datasets used in facial recognition, and, worryingly, those used in training self-driving cars to recognize pedestrians.[99] Female pronouns and female-coded names are underrepresented in several datasets used to train AI models for natural language processing ("NLP").[100] Datasets used to develop NLP models also frequently reflect social biases and stereotypes around race, gender, disability and more, such as a dataset being used to train a model to detect "toxic" text that disproportionately associated words used to describe queer identities with toxicity.[101]

These types of bias can come from several sources. The most obvious and direct of these is the actual conscious or unconscious prejudice of dataset creators, which can be veiled and abstracted by the complexities of the analytics process.[102] This is far from the only possible source of bias, however. Inherent barriers to the collection of certain types of data can prevent the population sampled during the creation of the dataset from ever truly aligning with the population to whom the resulting algorithm will be applied.[103]

For example, a lending company looking to identify loan candidates who are likely to default on their loans might sample the population of previous loan recipients to see which of them had defaulted.[104] But the population sampled, namely "everyone who has received a loan in the past," does not align with the population to whom the trained model will presumably be applied, namely "everyone who applies to receive a loan, whether or not that loan is granted."[105] This type of inherent barrier to accurate data sampling can cause disproportionate harms to historically disadvantaged populations.[106] The

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[98] Stochastic Parrots, *supra* note 81, at 613; *Data and its (dis)contents*, *supra* note 42, at 3.
[99] *Gender Shades*, *supra* note 79, at 2–3; *Data and its (dis)contents*, *supra* note 42, at 3.
[100] *Data and its (dis)contents*, *supra* note 42, at 3. The phrase "natural language processing" refers to the useful processing of human language by computers, for purposes such as engaging in conversation with human users or translating text "intelligently" from one human language to another. *See* DANIEL JURAFSKY & JAMES H. MARTIN, SPEECH AND LANGUAGE PROCESSING: AN INTRODUCTION TO NATURAL LANGUAGE PROCESSING, COMPUTATIONAL LINGUISTICS, AND SPEECH RECOGNITION 1 (2d ed. 2008).
[101] *Id.*; Stochastic Parrots, *supra* note 81, at 614–15; *see generally* TOLGA BOLUKBASI, KAI-WEI CHANG, JAMES ZOU, VENKATESH SALIGRAMA & ADAM KALAI, MAN IS TO COMPUTER PROGRAMMER AS WOMAN IS TO HOMEMAKER? DEBIASING WORD EMBEDDINGS (2016) [https://perma.cc/S86P-CR88] (describing a famous example of this problem).
[102] *Disparate Impact*, *supra* note 20, at 675–76.
[103] *Playing with the Data*, *supra* note 28, at 680.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 680–81.

hypothetical model based on data from "everyone who has received a loan in the past" will inevitably perform worse for populations about which it has less data—populations who have been disproportionately denied loans in the past.[107]

One demonstrable inherent barrier to equitable data collection arises in the creation of large text datasets from online sources.[108] Not only are people from wealthier countries overrepresented on the internet generally, young adult men are the predominant authors of the specific bodies of online text frequently used to create these datasets, such as the user-written content of sites like Reddit, Wikipedia, and X (formerly known as Twitter).[109] When equitable data collection is so hindered by the structural problems of these frequently used sources, it is no wonder at all that the resulting datasets demonstrate the flaws they do.[110]

The actual task of creating a dataset presents an additional technical challenge.[111] A data scientist must not only decide which input data to measure and how to measure it, but also, much of the time, how to translate this slew of complex information into a concrete and specific outcome variable (called the "target variable") that the computerized model trained with the dataset will predict.[112]

Imagine a straightforward, if frivolous, example: A data scientist wishes to design a dataset for use in training a model to recognize whether there is a horse in a given image. In this case, the input data will be a large set of images, each of which may or may not contain a horse. The target variable will be a simple "true" or "false" for each image, indicating whether or not the image contains a horse.

Consider the decisions the dataset's designer needs to make, even in this relatively simple hypothetical. First, the designer would have to answer several questions about which input data to measure, and how to measure it. For example, how should the training images be digitally encoded? Should the dataset include the color of each pixel of the image? The brightness? Should greyscale images be allowed in the dataset, or will the dataset be restricted to only color images? How should it handle images of different sizes? Should the dataset even include images of different sizes? Where will the designer get that large body of images (some of which contain horses) in the first place?

Having answered these questions, the designer might breathe a sigh of relief, thinking the hardest part of their work behind them. After all, once these difficult technical questions have been answered, all that remains is to hire some plucky intern to slog through every picture in the dataset and indicate whether that picture does, in fact, contain a horse.

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[107] *Playing with the Data*, *supra* note 28, at 680–81.
[108] *See* Stochastic Parrots, *supra* note 81, at 613.
[109] *Id.* This is due, at least in part, to structural issues such as poor moderation that can expose many would-be authors with diverse voices to severe online harassment or even result in the victims of harassment being ousted from the platform rather than the offenders. *Id.*
[110] *See id.*
[111] *Playing with the Data, supra* note 28, at 668.
[112] *Id.*

To the designer's dismay, however, the intrepid intern reports in with a barrage of new questions about what does or does not constitute a horse's presence in an image. If an image contains only a horse's head—the remainder of the horse being out of frame—does it contain a horse? What if it contains only the horse's tail? The horse's legs? How about half of a horse? Sixty percent of a horse? Forty? Half of one horse and half of another? What if the image is of a *painting* of a horse? What if the image contains, not a full-grown horse, but a foal? What if it contains a zebra? A donkey?

When data scientists answer questions like those raised by our hypothetical intern, they make tacit assumptions about which measurable facts can stand in for which underlying concepts.[113] The intern's questions force our hypothetical designer to consider, in excruciating detail, what it means for an image to "have a horse in it." Our weary scientist now faces the challenge of accurately defining the dataset's target variable.

Defining a target variable is a deeply subjective task, since it involves taking an often-hazy real-world concept and translating it into hard numerical values based on available data.[114] It is so subjective, in fact, that it is often referred to as the "art" in data analysis.[115] To be successful in this task, one must have a deep understanding of the underlying subject matter.[116] One could imagine, for example, how much more difficult our hypothetical dataset designer's job would be if, instead of ordinary pictures which may or may not contain horses, the dataset contained microscopic images which may or may not contain a particular type of bacteria, or architectural schematics which may or may not contain a particular design element. Even when an analyst possesses the requisite understanding and operates with the utmost care in creating a target definition, though, it is still possible for the analyst's personal prejudices or simple mistakes to introduce unfair bias into the dataset.[117]

Sometimes, the process of defining a target variable is further complicated by the fact that the supposed underlying concept has no concrete basis in reality.[118] When the underlying question the model is trying to predict an answer for has a concrete basis (e.g., "Does this picture contain a horse?"), the process of defining the question is difficult enough.[119] When the question itself hinges on an arbitrary and abstract definition (e.g. "How creditworthy is this person?"), the process of defining it accurately becomes nigh-impossible.[120] It is, again, possible for bias to creep into the dataset at this point; some

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[113] *See Playing with the Data, supra* note 28, at 674-75.
[114] *Disparate Impact*, *supra* note 20, at 678.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 679.
[119] *See id.* at 678–79.
[120] *Id.* at 679.

definitions of several important questions have been shown to result in more adverse outcomes for certain protected classes than other definitions of the same questions.[121] All told, while concerns about AI models' accuracy in answering important questions are absolutely legitimate, at least as legitimate are concerns about the ability of data scientists to accurately define the questions themselves.[122]

Despite all of these complexities, industry professionals in the field of machine learning have not typically taken adequate care when assembling new datasets.[123] Rather than proceeding with meticulous caution when gathering data, as is the norm in other scientific fields, machine learning professionals have operated with "*laissez-faire*" sensibilities when it comes to the collection and curation of new datasets.[124] Current culture around dataset creation, collection, and use, possessed of a single-minded focus on rapid expansion of machine learning capabilities, flies in the face of scientific and ethical concerns about its ambivalence to the harms lack of care in dataset development can cause.[125]

B. Obstacles to Dataset Remedy

Even though the problem of biased datasets is pervasive in the machine learning space, detection and subsequent correction of bias in an individual dataset can be extremely difficult. The principal factor leading to this difficulty is the size of the datasets in question: Machine learning datasets *have* to be big.[126] While there is no strict lower bound on the size of dataset which can effectively be used to train a model, having a number of input-output pairs that does not measure in at least the tens of thousands is frequently insufficient.[127]

Modern datasets are frequently so large as to make manual review at best impracticable and at worst impossible.[128] Even the most sophisticated approaches to automating the process are prone to many of the same pitfalls that would be encountered in the use of the biased data.[129] In other words, when applied to the datasets where automated review is the most necessary, that review is often at its least effective.[130]

Even when bias is detected in a dataset, remediation of that bias is not easy or even always possible. The twin problems of underrepresentation and stereotype-aligned misrepresentation tug in opposite directions.[131] If one tries to combat under-inclusion of a certain population by artificially increasing that population's representation in the dataset, one runs the risk of magnifying the

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[121] *Disparate Impact*, *supra* note 20, at 680.
[122] *Id.*
[123] *Data and its (dis)contents*, *supra* note 42, at 4.
[124] *Id.*
[125] *Id.* at 9.
[126] *Playing with the Data*, *supra* note 28, at 678–79; *Data and its (dis)contents, supra* note 42, at 5.
[127] *Playing with the Data, supra* note 28, at 678–79.
[128] *Data and its (dis)contents, supra* note 42, at 5.
[129] *Id.* at 5–6.
[130] *Id.*
[131] *Id.* at 3.

harms associated with misrepresentation, and vice versa.[132] Even more difficult to remediate are biases introduced to the data through past intentional discrimination.[133] In these cases, there is often no clear way to systematically remove bias from the data itself, and attempts to sway the results of an algorithmic decision after the fact can rely on practices that could spark both political and legal controversy.[134]

In summation, not only is it incredibly difficult to design a large dataset in such a way as to avoid introducing bias, it is also incredibly difficult to cure a dataset of that bias if and when it is discovered.

C. Correlations Genuine and Spurious

Were the perfect dataset nonetheless created and maintained, despite the myriad labors involved, issues of bias could still arise in application due to that quintessential misunderstanding reinforced by the mystique surrounding machine learning technologies: equivocation of correlation with causation.

Correlation is *not* causation.[135] Fundamentally, machine learning techniques are automated ways to discover often-complex correlations in data.[136] If companies make decisions based on mere correlations uncovered using AI tools without understanding the underlying causal relationships (or lack thereof), those decisions can lead companies to do harm to consumers, other companies, and themselves.[137]

Using an AI that makes decisions based on faulty correlations is analogous to asking Clever Hans whether a particular candidate would be a good hire. Clever Hans will give you an answer, but that answer will not in any way be based on the candidate's objective qualifications. While all machine learning techniques harbor the potential to allow users to make such faulty reliances, deep learning models can actively encourage this type of behavior in two important ways.

First, deep learning models are capable of learning unintended "shortcut" strategies for moving from input to output.[138] For example, a deep learning model trained to recognize and describe the contents of images (the selected input) with a string of text (the selected output) might accurately

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[132] *Data and its (dis)contents, supra* note 42, at 3.; *see also* Stochastic Parrots, *supra* note 81, at 613–14 (providing a more detailed example of this phenomenon).
[133] *Disparate Impact*, *supra* note 20, at 671.
[134] *Id.*
[135] *See generally* John Aldrich, *Correlations Genuine and Spurious in Pearson and Yule*, 10(4) STATISTICAL SCI. 364 (1995); *see also* Randall Monroe, *Correlation*, XKCD, https://xkcd.com/552/ [https://perma.cc/CT5U-H59F].
[136] *Playing with the Data*, *supra* note 28, at 671.
[137] *FTC Big Data*, *supra* note 19, at 9.
[138] *Shortcuts*, *supra* note 16, at 2.

describe a picture of sheep grazing in a field.[139] However, when shown a picture of the same field without the sheep, it might respond with the same string of text, asserting that the sheep, though clearly absent to any human observer, are present and happily grazing away.[140] If it did, it would likely be because the model has learned the shortcut of associating the grassy field with the phrase, "sheep grazing in a field," rather than identifying the sheep themselves.[141] The same model may entirely fail to recognize sheep outside the context of a grassy field for them to graze in.[142]

When deep learning models form these types of shortcuts, they often perform perfectly well within the limited training environment, failing in unexpected ways only when they are exposed to the complications of actual application.[143] When this failure results in an empty pasture being misidentified as containing grazing sheep, the ill consequences are minimal. In other situations, however, the possibility of error on this axis is cause for greater concern.[144]

Second, deep learning models encourage reliance on faulty spurious correlations through the very nature of the process of employing such a model. In selecting or creating a dataset to use in training a deep learning model, one presupposes a connection between the input and output variables of their dataset.[145] This can cause issues, since it is entirely possible to construct a dataset where the input and output have no meaningful causal relationship, but which does contain spurious correlations that can allow a deep learning model to convincingly assert such a relationship despite its absence.[146]

For example, one could interview ten thousand people, asking each to choose a random number between one and ten, and then asking each what they had eaten for dinner the previous evening. The interviewer could then connect the two categories of information as input-output pairs and even train a deep learning model on the resulting dataset, but that would not manifest any actual causal relationship between arbitrary culinary and numerical choices in general.

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[139] *Shortcuts*, *supra* note 16, at 2.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Data and its (dis)contents*, *supra* note 42, at 3.
[144] *See* Sam Levin, *Imprisoned by algorithms: the dark side of California ending cash bail*, THE GUARDIAN: US NEWS (Sep. 7, 2018), https://www.theguardian.com/us-news/2018/sep/07/imprisoned-by-algorithms-the-dark-side-of-california-ending-cash-bail [https://perma.cc/G3J9-B9ZH]; Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/ES9G-LE58] [hereinafter *Machine Bias*]; *Gender Shades*, *supra* note 79, at 1; Benjamin, *supra* note 18, at 421.
[145] *See Data and its (dis)contents, supra* note 42, at 4.
[146] *Id.*; *see also* Erika Andersen, *True Fact: The Lack of Pirates Is Causing Global Warming*, FORBES (Mar. 23, 2012), https://www.forbes.com/sites/erikaandersen/2012/03/23/true-fact-the-lack-of-pirates-is-causing-global-warming/?sh=176670983a67 [https://perma.cc/PW3B-47V6?type=image]; *see generally Spurious Correlations*, TYLERVIGEN.COM, https://tylervigen.com/spurious-correlations [https://perma.cc/4X8J-Z68T] (illustrating several humorous examples of input-output pairs containing spurious correlations).

A deep learning model trained on the dataset, however, might find spurious flukes within the limited scope of the training data that allow it to outperform the baseline of a random guess when asked to determine someone's number choice based on their dinner.[147] Its performance would then falsely imply the existence of an actual connection between the two variables, and a careless researcher might begin to believe in the false implication.[148]

The same logic applies across all possible input-output pairs: Just because an AI model discovers a correlation between two variables does not mean such a correlation actually exists. Just because one *can* construct a dataset with an input of online spending habits and an output of lending risk, or with an input of a resume and recorded interview and an output of predicted value to an employer, does not mean that those input-output pairs have any sort of actual connection, despite the fact that AI models using heuristics based on those supposed relationships can outperform baseline predictions within their dataset.

IV. THE NECESSITY OF DATA PRIVACY PROTECTION

Section A of this Part examines the inadequacy of current law to address the potential harms of new AI technologies. Section B proposes the specific solution of increased data privacy protection at the state level. Section C identifies and advocates key features of the ideal state-level data privacy protection legislation.

A. Inadequacy of Extant Law

Law established before the rise of big data analytics does not adequately protect against the systemic discrimination which can result from data mining.[149] Indeed, extant law does not adequately protect against discrimination in general.[150] Discrimination in American housing, employment, lending, and consumer markets is pervasive and persistent. It finds its roots both in the active prejudice of decision-makers and in the institutional momentum of systems that tend to passively punish historically disadvantaged groups.[151] New approaches to decision-making based on big data analytics only exacerbate the problem with their potential to sidestep existing civil liberty protections.[152]

Flaws in data which result in the reinforcement of extant societal biases or the prejudices of the data's creators are pervasive, and many of these flaws can only be remedied, if at all, *before* a trained model is put to use in the real

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[147] *See Data and its (dis)contents* at 4.
[148] *See id.*
[149] *Disparate Impact*, *supra* note 20, at 675.
[150] *See id.* at 673–74.
[151] *Id.* at 673–74.
[152] *Id.* at 674.

world.[153] Decisions made prior to the release of a model are made less inscrutably and with far more human involvement than decisions reached by that model in practice.[154] Thus, the time before a model is released would be the ideal time for legislation aiming to control the harms of AI misuse to target.[155] Under current frameworks, though, any adjudication on the complex steps of the data mining process under major statutory consumer protections requires subjective and fact-bound judgments, dramatically reducing the possibility for effective enforcement.[156] Tort law is also ineffective at protecting consumers—the privacy protections offered under most states' (including Kansas's[157]) common law do not effectively defend against the broad, systemic harms perpetuated by big data analytics.[158]

The novelty of the problem and the inadequacy of current legal frameworks are not secrets. In October of 2022, the White House Office of Science and Technology Policy published *Blueprint for an AI Bill of Rights*, a document aimed at setting policy goals around consumer protection from the new threats posed by AI technology.[159] A year later, President Biden issued an executive order setting out administrative policies for this technology's responsible development and use, again recognizing threats to privacy, equity, and civil rights.[160]

Our nation needs a new approach to defending our citizens against these threats. The fact of that need is demonstrated by the clear inadequacy of current law to address the proliferation of discriminatory harms brought about by the rise of AI and its misuse. The only remaining question, then, is what form that new approach should take.

B. Data Privacy Protection: A Strong Mitigant

The dawn of AI technologies driven by machine learning has dramatically increased the incentive to over-collect and overuse consumer data.[161] Because of data's role in advancing machine learning technology, consumer data has immense value.[162] In the modern economic and technological climate, companies are incentivized to pursue the collection of private and

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[153] *Disparate Impact*, *supra* note 20, at 675.; *Playing with the Data*, *supra* note 28, at 655–57.
[154] *Playing with the Data, supra* note 28, at 657.
[155] *See id.*
[156] *Disparate Impact, supra* note 20, at 676.
[157] *See* Munsell v. Ideal Food Stores, 494 P.2d 1063, 1074-75 (Kan. 1972); Pattern Inst. Kan. Civil 127.61.
[158] *AI Risks*, *supra* note 26, at 121.
[159] WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/87S4-YVUY].
[160] Exec. Order No. 14110, 88 Fed. Reg. 75191, §§ 2(d)-(f) (Oct. 30, 2023) [hereinafter *Exec. Order: Responsible Development and Use*].
[161] *AI Risks, supra* note 26, at 121.
[162] *Id.* at 119.

potentially sensitive data at an ever-increasing scale, even when legal and ethical boundaries must be pushed or crossed to do so.[163]

Companies and government entities are then further enticed by the promises of AI to make ethically questionable decisions when using this ill-gotten data. Take, for example, the credit card company that, without informing its customers, began assigning higher credit risk to customers who used their cards to pay for marriage counseling, therapy, or tire-repair services.[164] Or, for a far more concerning illustration, look to the multiple algorithms actively used by criminal justice agencies that "learned" to falsely flag Black defendants as having a high risk of recidivism based on the intrinsically biased data they were given.[165]

The solution, at least in part, is greatly enhanced protections for consumer data privacy. State governments have long played a role in protecting specific elements of consumer privacy, but data privacy issues in particular are currently skyrocketing in importance in state legislatures across the nation.[166] President Biden's October executive order also recognizes data privacy protections as an important piece of safe and equitable AI development and usage.[167] Many state legislatures are considering legislation that could protect aspects of consumer online privacy, and several have even enacted comprehensive (or "omnibus") consumer data privacy protection laws.[168] In addition to the five states that had enacted omnibus statutes before 2023, at least eight more states enacted such statutes in 2023 alone.[169] Unfortunately, Kansas's state legislature has been one of the least active in this area.[170] As of February of 2025, not a single bill regarding consumer data privacy has been considered by the state legislature.[171]

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[163] *AI Risks, supra* note 26, at 119.
[164] *FTC Big Data*, *supra* note 19, at 9.
[165] Levin, *supra* note 144; *Machine Bias*, *supra* note 144.
[166] Heather Morton, *2023 Consumer Data Privacy Legislation*, NAT'L CONF. STATE LEGISLATURES (Sep. 28, 2023), https://www.ncsl.org/technology-and-communication/2023-consumer-data-privacy-legislation [https://perma.cc/P4MY-TEBA].
[167] *Exec. Order: Responsible Development and Use*, *supra* note 160.
[168] Morton, *supra* note 166.
[169] *Id.* Additionally, New Jersey and New Hampshire passed omnibus consumer privacy laws in early 2024. Nancy Libin, David L. Rice, John D. Seiver & Benjamin Robbins, *New Jersey Governor Signs Comprehensive Privacy Law*, DAVIS WRIGHT TREMAINE LLP (Jan. 22, 2024), https://www.dwt.com/blogs/privacy--security-law-blog/2024/01/new-jersey-data-privacy-law-signed [https://perma.cc/YM2Q-K9A3]; David P. Saunders & John C. Ying, *And Another: New Hampshire Passes New Consumer Privacy Law*, MCDERMOTT WILL & EMERY (Jan. 24, 2024), https://www.mwe.com/insights/and-another-new-hampshire-passes-new-consumer-privacy-law/#:~:text=Overview,take%20effect%20January%201%2C%202025 [https://perma.cc/6K8P-53T3].
[170] Morton, *supra* note 166.
[171] *See US State Privacy Legislation Tracker*, IAPP (Feb. 24, 2025), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/#state-privacy-law-chart [https://perma.cc/JL4Z-WPMK].

When Oscar Pfungst wanted Clever Hans to stop making decisions based on the information the horse gleaned from his questioner's body language, he contrived to cut off that source of information. If we want our machine learning algorithms to stop making discriminatory decisions based on consumer data, the only sure path to that destination must include severing access to that data at the source. Due to the direct link between the overcollection and misuse of consumer data and the harms caused by AI decision-making, the best course of action moving forward is for state legislatures, including the Kansas legislature, to adopt broad statutory protections for consumer data privacy.

C. Features of an Ideal Approach

The ideal legislation would be an omnibus-style bill that uses common definitions and principles borrowed from the European Union's (EU) General Data Protection Regulation (the "GDPR"), covers all consumer data (as opposed to only certain categories deemed most sensitive), features affirmative requirements for all personal data processing (rather than relying solely on notice-and-choice), and establishes a regulatory agency to manage the implementation of the law. The remainder of this Section will discuss each of these elements in turn.

1. Omnibus Approach vs. Sectoral Approach

At the federal level, data privacy is protected only in bits and pieces, with bodies of legislation separated by industry.[172] In practice, this approach places very little restraint on the ability of companies to process and use immense quantities of consumer data.[173] The separation of the various bodies of law encourages heavy industry lobbying to the point of regulatory capture.[174] This leaves large gaps in the overall effectiveness of federal regulation.[175] When it comes to catching problematic practices and abuses of privacy, the sectoral approach is less a leaky bucket and more a rusty sieve.

Commentators have bemoaned the inadequacies of the federal sectoral approach for years, noting that the complexities of navigating multiple bodies of law can frequently leave consumers without knowledge of which of their data is actually protected.[176] The EU, on the other hand, leads the world in data protection regulation with its omnibus-style GDPR.[177] The GDPR, unlike the federal sectoral approach, provides individuals with meaningful control over their data across all industries.[178] There is nothing the Kansas legislature can do to correct the catastrophe that is current federal privacy law, but Kansas can at

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[172] *AI Risks*, *supra* note 26, at 161.
[173] Lu, *supra* note 79, at 2093.
[174] *AI Risks*, *supra* note 26, at 161–63.
[175] *Id.*
[176] *See* O'Connor, *supra* note 27.
[177] Lu, *supra* note 79, at 2095; *AI Risks*, *supra* note 26, at 161.
[178] *AI Risks*, *supra* note 26, at 167–68.

least avoid duplicating the federal government's mistakes. As more and more states follow the far-more-effective example of the EU, the legislatures of states like Kansas whose state does not yet have any sectoral data privacy laws should take the opportunity to adopt omnibus legislation that offers Kansans the privacy and control they deserve over all aspects of their personal data.

2. Adoption of GDPR Principles and Common Terms

The GDPR is the single main body of data privacy protection law in the EU.[179] It stems, philosophically and legally, from the recognition of data privacy as a fundamental human right.[180] To set the course for enforcing this right, it lays out six key principles for the use of personal data.[181] First, data must be processed lawfully, fairly, and transparently with regard to the individual associated with that data (the "data subject").[182] Second, data must be collected only for specified, limited, explicit purposes, and processed only to the extent compatible with those purposes.[183] Third, data not required for the specified purposes may not be collected.[184] Fourth, the accuracy of collected personal data must be maintained, or else the entity holding the data must dispose of it.[185] Fifth, the data must be stored only as long as the specified purpose requires, and any identifying portions of the data must be stripped away as soon as possible.[186] Sixth and finally, the data must be processed in a manner providing appropriate security, integrity, and confidentiality.[187] These principles form a robust starting point for any legislative scheme, and should be adopted as the foundation of the ideal Kansas bill.

Many U.S. states have additionally elected to adopt portions of the terminology and definitions used in the GDPR.[188] Kansas should mirror this approach. The less friction that businesses face in understanding and complying with the patchwork of state laws forced by the lack of uniform federal protections, the more effective those state laws can be. It makes no sense to

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[179] Lu, *supra* note 79, at 2093.
[180] *Id.*
[181] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), 2016 O.J. (L. 119) 1-88, art. 5(1) [hereinafter GDPR].
[182] *Id.* at art. 5(1)(a).
[183] *Id.* at art. 5(1)(b).
[184] *Id.* at art. 5(1)(c).
[185] *Id.* at art. 5(1)(d).
[186] *Id.* at art. 5(1)(e).
[187] *Id.* at art. 5(1)(f).
[188] Sheila A. Millar & Tracy P. Marshall, *The State of U.S. State Privacy Laws: A Comparison*, NAT'L L. REV. (May 24, 2022), https://www.natlawreview.com/article/state-us-state-privacy-laws-comparison [https://perma.cc/D28U-L6YF] [hereinafter *Privacy Laws: A Comparison*].

reinvent the wheel when it comes to the terminology Kansas uses to implement its law.

3. Extent of Protection

The GDPR protects all "personal data" which is broadly defined as any data relating to an identified or identifiable natural person, even if that person is identified only through reference to any one of a broad field of characteristics.[189] The breadth of this protection is not accidental.

Part II of this Article discussed how user data from many sources could be conglomerated to form an uncomfortably detailed and accurate dossier about most U.S. consumers.[190] This might lead one to mistakenly believe that if access to a consumer's most sensitive characteristics were shut off, the entire conglomeration would be stymied and most of the problem would be solved.

Unfortunately, sensitive characteristics can be determined with statistical significance from seemingly innocuous data.[191] For example, researchers were able to use a person's publicly available list of "likes" to determine that person's gender, political affiliation, religion, use of cigarettes and alcohol, and even whether that person had experienced parental divorce before the age of 21.[192] This issue thwarts attempts to prevent discrimination on the part of machine learning models by screening the datasets used to train them.[193] Even when data miners are extremely careful to avoid using any data containing inherently discriminatory flaws, algorithms can still pick up on proxy indicators of people's protected attributes, effectively negating the entire effort.[194]

Furthermore, data that has been anonymized by stripping away all obviously identifying portions can frequently be de-anonymized using modern AI technologies.[195] In other words, simply avoiding the practice of providing AI models with specific sensitive data is not enough to prevent flawed, discriminatory decision-making based on those data. Kansas and other states adopting new omnibus legislation should ensure that the protections provided under that legislation are as broad as practicable, or else they might as well not legislate at all.

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[189] GDPR, *supra* note 181, at art. 4(1) ("[A]n identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.").

[190] *See supra* Part II.

[191] THE ETHICAL ALGORITHM, *supra* note 79, at 52.

[192] *Id.*

[193] *See Disparate Impact*, *supra* note 20, at 674.

[194] *Id.*

[195] *AI Risks*, *supra* note 26, at 128.

4. Notice and Choice

"Notice-and-choice" is the name given to the approach to online privacy protection wherein entities that wish to collect and process consumer data must inform the consumer of which data they wish to collect and what uses they wish to put it to ("notice"), then receive consent from the consumer to do so ("choice").[196] The notice-and-choice paradigm forms the basis for most modern data privacy regulation, but it is nonetheless fraught with shortcomings.[197]

Legislative solutions that rely solely on consumer notice-and-choice are naive at best.[198] Requiring consumers to read and understand the myriad complex privacy agreements they encounter on a day-to-day basis is completely impracticable.[199] Even in the EU, where citizens are protected under comprehensive notice-and-choice consent requirements, only a small fraction of people actually read privacy policies in full.[200] This problem is further compounded by the fact that many data brokering companies operate without coming into contact with consumers in the first place, so consumers do not get meaningful chances to give or revoke consent.[201] To address this issue, legislation should include affirmative duties for all companies handling personal data, such as the affirmative duty to strictly limit the use of collected data, or even a "duty of care" to consumers writ large for large tech companies which effectively treat consumers as their products.[202] At the very least, legislation should forbid conditioning access to a good or service on the provision of information not necessary to provide that good or service.[203] Such an approach would sidestep the impracticability of direct consumer engagement with the complexities of privacy law and cut straight to the goal: protecting state consumers.

5. Establishing a Regulatory Agency

As part of its original omnibus data privacy bill, California created and funded a new agency to facilitate the implementation and enforcement of its

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[196] John A. Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 561–62 (2018).
[197] *See generally id.*
[198] *See* Rich, *supra* note 27.
[199] *Id*.
[200] Lu, *supra* note 79, at 2111.
[201] Rich, *supra* note 27.
[202] *See id*. (noting recent legislative approaches to addressing the issues with notice-and-choice reliance); *AI Risks*, *supra* note 26, at 119 (describing the business models of companies such as Facebook and Google). This is not to say that such protections should come at the expense of consumers' ability to directly assert rights to access, correct, delete, or limit the collection of their personal data—the ideal legislation would provide both, so that consumers are enabled to see and control their data actively as a supplement to the passive protection of the law.
[203] Rothchild, *supra* note 196, at 647.

statutory scheme.[204] Given the complexity and rapidly changing nature of the field, this approach makes intuitive sense. Expecting legislators to individually track the highly technical minutiae required to effectively prevent abuse of the regulatory scheme is simply unreasonable.[205] Furthermore, the enforcement provided by such an entity could allow for the protection of the rights of those unable to bankroll expensive private litigation.[206]

The creation of this entity, however, should not eclipse a private right of action. The threat of class action claims can help to hold large tech companies accountable for their misuse of data and can do so largely on private dime.[207] A well-funded agency working hand-in-hand with litigators exercising a measured private right of action would thus provide the most robust state-level protections possible for consumers without unduly burdening the system.[208] For this reason, states such as Kansas should establish and appropriately fund a regulatory agency dedicated to the protection of consumer privacy while also providing for a private right of action against violating companies.

V. COUNTERARGUMENTS

Two main arguments are routinely brought against state-level implementations of consumer data privacy to mitigate AI harms: first, that any regulation on data privacy should be federal- rather than state-level, and second, that merely enhancing data privacy is not sufficient to protect consumers against all the threats posed by AI misuse. Section A of this Part will address the former, and Section B will address the latter.

A. State vs. Federal Implementation

While states have increasingly been stepping up to fill the gaps in federal privacy law, the patchwork system of state-level regulation can present its own issues.[209] When multi-state or even international businesses are required to interact with the overlapping and sometimes conflicting regulations of multiple states, it can be costly, unfeasible, or even impossible for those businesses to comply with all relevant law.[210] Additionally, states drafting legislation in the area must contend with the possibility of future preemption by

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[204] *Privacy Laws: A Comparison*, *supra* note 188.
[205] *See* Amy Keller, *'Paper Tiger' State Privacy Laws Worse Than Having No Law at All*, BLOOMBERG L. (Oct. 12, 2023, 3:00 AM), https://news.bloomberglaw.com/privacy-and-data-security/paper-tiger-state-privacy-laws-worse-than-having-no-law-at-all [https://perma.cc/22B2-UDNT].
[206] *See* Katie Mansfield, *State-Level Consumer Data Privacy Laws Get the Ball Rolling, But On Their Own, Represent a Piecemeal Approach to Regulation*, JOLT DIG. (Oct. 25, 2023), https://jolt.law.harvard.edu/digest/state-level-consumer-data-privacy-laws-get-the-ball-rolling-but-on-their-own-represent-a-piecemeal-approach-to-regulation [https://perma.cc/CM7C-V5RT].
[207] *Id.*
[208] *See id.;* Keller, *supra* note 205.
[209] *AI Risks*, *supra* note 26, at 162–63.
[210] *Id.*

federal statute, which would at least partially invalidate the time, effort, and funds states spend enacting and enforcing their regulations.[211]

There are also issues of cynical practicality: much of the effectiveness of the GDPR stems from the ability of the EU to wield its economic weight to enforce fines steep enough to incentivize even large international corporations to change their business practices to comply.[212] Kansas (or any single state, with the possible exception of California) simply cannot leverage the same degree of economic power and weight as the collective EU in its enforcement, and therefore cannot make demands as large or provide protections as complete as those of the GDPR.

Sadly, despite the shortcomings inherent to state-level solutions, state governments cannot rely on the federal government to enact reform any time soon. Congress has made numerous fruitless efforts to pass comprehensive data privacy legislation over the past twenty years.[213] As just one example, the bipartisan American Data Privacy and Protection Act, the most recent of these attempts to gain serious momentum as of late 2023, died without a vote after being introduced by the House Energy and Commerce Committee.[214] If states want to see their citizens protected in the age of AI, in other words, it is imperative that they take action on their own.

B. Insufficiency of Data Privacy Alone

Several scholars rightly note that data privacy protection alone cannot solve all the novel problems that arise with the ever-increasing use of AI technologies.[215] Scholars have noted that even the GDPR does not adequately protect consumers against all of these harms.[216] This should not, however, discourage lawmakers—half a loaf is far better than none, and the increased consumer protections provided by data privacy legislation are an important piece of any full solution. Moreover, many states have begun to include a right against automated decision-making in their omnibus legislation, helping to mitigate AI

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[211] *See generally* Lauren Zabierek, Tatyana Bolton, Brandon Pugh, Sofia Lesmes, & Cory Simpson, *Preemption in Federal Data Security and Privacy Legislation*, HARVARD KENNEDY SCHOOL: BELFER CTR. FOR SCI. AND INT'L AFFS. (June 14, 2022), https://www.belfercenter.org/publication/preemption-federal-data-security-and-privacy-legislation [https://perma.cc/V35U-EDXL].

[212] *AI Risks*, *supra* note 26, at 166.

[213] Rich, *supra* note 27.

[214] CONGRESS.GOV, *H.R.8152 - American Data Privacy and Protection Act* (2022), https://www.congress.gov/bill/117th-congress/house-bill/8152.

[215] *See generally* Lu, *supra* note 79; *AI Risks*, *supra* note 26.

[216] Lu, *supra* note 79, at 2093–94.

harms further than would be possible with data privacy protection alone.[217] While this Article lacks the scope to fully explore this regulatory option, the author strongly urges legislators to consider such a provision when drafting future data privacy statutes.

VI. CONCLUSION

The dawn of AI has ushered in a new chapter in the age of data, one where the slow surfacing of problems with U.S. privacy law has begun to rapidly accelerate. In the modern world, most U.S. consumers are effectively subjected to constant surveillance through their use of technologies that have become a necessary part of everyday life.

The introduction of state-level data privacy protections cannot, unfortunately, solve all the novel problems presented by AI use and misuse, nor can it necessarily provide the permanent protections desperately needed by all U.S. citizens. Even so, our unprotected states must begin to pass omnibus privacy bills that work within existing paradigms, create broad protections (both active and passive) over consumer data, and provide for development and enforcement through both administrative agencies and private action. The passage of such legislation is the only pragmatic path towards relief from the Orwellian world created by the unfortunately prevalent harms of our advancing modern technology.

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[217] *See, e.g.*, Avi Gesser, Robert Maddox, Anna Gressel, Mengyi Xu, Samuel J. Allaman & Andres S. Gutierrez, *New Automated Decision-Making Laws: Four Tips for Compliance*, DEBEVOISE & PLIMPTON DATA BLOG (Jun. 25, 2022), https://www.debevoisedatablog.com/2022/06/25/new-automated-decision-making-laws-four-tips-for-compliance/ [https://perma.cc/L3PU-FNBQ]; Kirk J. Nahra, Ali A. Jessani & Samuel Kane, *California Privacy Protection Agency Publishes New Draft CPRA Cybersecurity and Automated Decisionmaking Regulations in Advance of December Board Meeting*, WILMERHALE PRIV. & CYBERSECURITY L. BLOG (Nov. 30, 2023), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20231130-california-privacy-protection-agency-publishes-new-draft-cpra-cybersecurity-and-automated-decisionmaking-regulations-in-advance-of-december-board-meeting [https://perma.cc/8YU5-FPJ3]. The GDPR includes a limited protection against automated decision-making, but in June 2024, the EU also enacted a separate AI bill to provide more complete and well-tailored protections. GDPR Art. 22; REGULATION (EU) 2024/1689 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

HOW FAR IS TOO FAR?: WEIGHING FREEDOM OF RELIGION WITH THE BEST INTEREST OF THE CHILD STANDARD

By: Cassidy K. Terrazas[*]

I. INTRODUCTION

A mother and father of four children divorced in 2016.[1] Prior to their divorce, both parents were members of a polygamous religious community known as the "Order."[2] However, upon divorce, the mother left the group and sought custody of their four children, arguing that the teachings of the Order were not in the best interest of the children.[3] Even outside scenarios like this, in modern American society, there has been an increase in "religiously mixed" marriages.[4] When situations such as these arise, it is not necessarily clear how courts are to consider religion in custody determinations without infringing on the First Amendment.[5]

The effects of the 2008 raid of Yearning for Zion Ranch in Eldorado, Texas, further illustrated this dilemma.[6] In that case, the Texas Department of Family and Protective Services (the "Department") removed 437 children from the Fundamentalist Latter-Day Saints community, led by Warren Jeffs, following an anonymous tip.[7] What followed was the largest child custody battle in our country's history—the primary concern being in regards to "child sexual abuse" due to the Church's promotion of arranged marriages between underage girls and much older, adult men.[8] However, in the resulting court proceedings,

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[1] Kingston v. Kingston, 532 P.3d 958, 961 (Utah 2022).

[2] *Id.*

[3] *Id.* at 961–62.

[4] Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 383 (1989).

[5] *See* Jennifer Benning, *A Guide for Lower Courts in Factoring Religion into Child Custody Disputes*, 45 DRAKE L. REV. 733, 748 (1997).

[6] *See* Katy Vine, *The Raid on YFZ Ranch, Ten Years Later*, TEX. MONTHLY (Apr. 6, 2018), https://www.texasmonthly.com/the-culture/raid-yfz-ranch-ten-years-later/ [https://perma.cc/44PM-QT25].

[7] *Id.*

[8] *Id.*; Carol Guensburg, *Sorting Through the Texas Polygamist Custody Case*, NPR (May 8, 2008, 6:25 PM), https://www.npr.org/templates/story/story.php?storyId=90300335 [https://perma.cc/2FKY-R9KR].

a Texas court ruled that child welfare officials were to return many of the children to the Yearning for Zion Ranch.[9] In doing so, the court concluded that those selected children should be returned due to the Department's failure to show evidence of physical danger to the male children or female children who had not yet reached the age of puberty.[10]

The question posed by these examples is: How much weight does the First Amendment truly hold—or in other words, how far is too far? Part II of this Article will discuss the protections provided by the First Amendment, the history of cults in the American legal system, and the best interest of the child standard. Part III of this Article will follow with an analysis of the definition of the term "cult," as well as the harms posed to children raised in these communities—arguing the need for courts to consider the risk of future physical and psychological harm to the child. Ultimately, this Article will conclude that while a court must abide by the constitutional protections for religion, the risk of psychological or physical harm to children is too great to not be considered in custody or visitation disputes.

II. LEGAL HISTORY OF RELIGION, CULTS, AND CHILD CUSTODY

The term "cult" is understandably controversial.[11] Commonly, this term has been used to describe a group with "socially deviant" beliefs and practices.[12] In Western society, many groups throughout history have been dubbed cults: including, Peoples Temple (led by Jim Jones), the Manson Family (led by Charles Manson), and the Branch Davidians (led by David Koresh).[13] In today's society, the most common groups to be considered cults by Americans are Mormon denominations and Scientologists.[14] Regardless, due to First Amendment protections, it is very rare for any religious group to be deemed illegal by a court on the sole basis of "social deviance."[15] Because of this, there is no clearly defined legal definition for "cult."[16] Even though the Constitution provides for the freedom of religion, the government is still permitted to impede

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[9] Howard Berkes, *Court: Polygamist Group's Kids Must Be Returned*, NPR (May 29, 2008, 7:35 PM), https://www.npr.org/2008/05/29/90970877/court-polygamist-groups-kids-must-be-returned [https://perma.cc/NE8Q-PARK].

[10] *In re* Steed, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, at *10 (Tex. Ct. App. May 22, 2008).

[11] Lauren Zazzara, *4 Notorious Cults in American History*, HEINONLINE BLOG (Oct. 13, 2023), https://home.heinonline.org/blog/2023/10/4-notorious-cults-in-american-history/ [https://perma.cc/WN5S-M4F9].

[12] Tina Rodia, *Is it a Cult, or a New Religious Movement?*, PENN TODAY (Aug. 29, 2019), https://penntoday.upenn.edu/news/it-cult-or-new-religious-movement [https://perma.cc/7855-ZZ9X].

[13] Zazzara, *supra* note 11.

[14] Rodia, *supra* note 12.

[15] *See id.*; *Are Cults Legal?*, HG.ORG, https://www.hg.org/legal-articles/are-cults-legal-35055#:~:text=Illegal%20Cults&text=In%20essence%2C%20the%20First%20Amendment,on%20the%20rights%20of%20others [https://perma.cc/U5TH-7ND8].

[16] *Are Cults Legal?*, *supra* note 15.

the exercise of religion if the conduct would infringe on the rights of others.[17] This Part will discuss the protection of the freedom of religion found in the First Amendment, the legal history of cults, and the best interest of the child standard.

A. First Amendment Protections and the Freedom of Religion

The freedom of religion is a liberty clearly deeply rooted in American history.[18] In fact, this liberty is evident in the history of the Founding Fathers leaving Europe due to the lack of religious tolerance in Europe at the time.[19] As a result, the First Amendment of the Constitution provides: "Congress shall make no law respecting an *establishment of religion,* or *prohibiting the free exercise* thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[20]

The First Amendment protects only the freedom to believe in any religion, and not the freedom to act on those beliefs.[21] In the 1944 case *United States v. Ballard*[22] members of the religious movement, I AM were indicted and convicted for conspiring and using mail to defraud.[23] The members used mail to promote their religious movement,[24] which had values rooted in Christianity and American Patriotism.[25] Members of this specific religious group believed that their leader, Guy W. Ballard, was the reincarnation of George Washington who would receive messages for followers from God.[26] In regard to First Amendment protections, the Supreme Court in *United States v. Ballard* provided:

> The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion...Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second

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[17] *Are Cults Legal?*, *supra* note 15.
[18] *See* Robert T. Miller, *Religious Conscience in Colonial New England*, 50 J. CHURCH & STATE 661, 661 (2008).
[19] *See id.*
[20] U.S. CONST. amend. I (emphasis added).
[21] United States v. Ballard, 322 U.S. 78, 86 (1944).
[22] *Id.* at 78.
[23] *Id.* at 79.
[24] *Id.*
[25] J. Gordon Melton, *I AM Movement*, BRITANNICA, https://www.britannica.com/topic/I-AM-movement [https://perma.cc/77PN-VLBW].
[26] *Id.*

cannot be."[27]

When the government intrudes on the freedom of religion, the "*Lemon* test"[28] was historically used by courts.[29] Coming from the case *Lemon v. Kurtzman*, the Supreme Court provided that the government action may be constitutional if (1) it has a secular legislative purpose; (2) the principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion.[30] However, in recent years, the Supreme Court has moved away from the *Lemon* test, instead adopting a new test.[31] This new test draws the line of permissible and impermissible government action between what is in accord with the history and understanding of the Founding Fathers.[32] This means that there is no longer a multi-pronged analysis or specific factors for a court to consider.[33] However, in general, courts have held that under the First Amendment, legislation should adopt the least restrictive alternatives to prevent infringement upon religious beliefs.[34]

In regard to the upbringing of children, parents have a fundamental right to make decisions related to the care, custody, and control of their children.[35] Moreover, parents are provided with the right to determine the child's religious upbringing that is derived from the Free Exercise Clause of the First Amendment and the right to make care and custody decisions.[36] This is because, as the Court in *Wisconsin v. Yoder* stated, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[37] In cases of divorce or custody disputes, it has been held that courts do not have the authority to choose which religion a child is to be reared under.[38] This creates uncertainty amongst courts when assessing whether a specific

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[27] *Ballard*, 322 U.S. at 86 (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)).
[28] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
[29] Joshua D. Smeltzer, *Should Faith-Based Initiatives Be Implemented by Executive Order?*, 56 ADMIN. L. REV. 181, 198 (2004) (stating that "[t]he traditional starting point for legal analysis is the three-part test outlined in *Lemon v. Kurtzman*.").
[30] *Lemon*, 403 U.S. at 612–13.
[31] *See e.g.,* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022); Town of Greece v. Galloway, 572 U.S. 565, 576 (2014); Aislinn Comiskey, Kennedy v. Bremerton School District*: A Touchdown and a Victory for Establishment Clause Jurisprudence*, 31 JEFFREY S. MOORAD SPORTS L.J. 67, 92–93 (2024).
[32] *Kennedy*, 597 U.S. at 535–36; Comiskey, *supra* note 31, at 93.
[33] Comiskey, *supra* note 31, at 93.
[34] Shawn McAllister, *Holy Wars: Involuntary Deprogramming as a Weapon Against Cults*, 24 T. MARSHALL L. REV. 359, 373–74 (1999) (citing Peterson v. Sorlien, 299 N.W.2d 123, 129 (Minn. 1980)).
[35] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[36] Joanne Ross Wilder, *Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests*, 22 J. AM. ACAD. MATRIM. LAWS. 411, 413 (2009).
[37] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
[38] *See* Siegel v. Siegel, 472 N.Y.S.2d 272, 273 (N.Y. App. Div. 1984).

religious group's activities are harmful to a child.[39]

B. Legal History of American Cults

The Supreme Court has long held that the First Amendment protects the freedom to believe, but not necessarily the freedom to act.[40] In other words, while a court is not permitted to deem particular religious beliefs illegal, certain religious practices may be.[41] A foundational example of these types of restrictions can be found in the 1878 Supreme Court case *Reynolds v. United States*, which ultimately upheld the prohibition of polygamist relationships despite the argument that the prohibition violated the First Amendment right to freedom of religion.[42] However, it is important to note that while the government may restrict those practices that are harmful, it is impermissible to target particular religious practices unless the regulation is justified by a compelling governmental interest and is narrowly tailored to advance that interest.[43]

The tension between religious freedom and harmful practices can be evidenced by contemporary legal examples as well. A modern example of this is the prosecution of NXIVM co-founder Keith Raniere, who was convicted on charges of forced labor, sex trafficking, sexual exploitation of children, wire fraud, and violations of federal anti-racketeering law for conduct related to his religious practices.[44] In the past, former cult members have also sought tort liability based on fraud and intentional infliction of emotional distress from harmful religious practices.[45] In situations such as these, a plaintiff may be able to introduce "brainwashing" as evidence for their claims.[46] Additionally, a conservatorship order may be rendered in cases in which a minor is subject to a destructive cult.[47] In such instances, a plaintiff would need to establish that a parent, or relative, lacks the degree of judgment adequate to conduct daily

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[39] *See* E.A. Gjelten, *Child Custody and Religion*, NOLO (Mar. 27, 2023), https://www.nolo.com/legal-encyclopedia/child-custody-religion-29887.html [https://perma.cc/9XTW-P3R5].
[40] United States v. Ballard, 322 U.S. 78, 86 (1944).
[41] *See id.*
[42] *See* Reynolds v. United States, 98 U.S. 145, 165 (1878).
[43] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 896 (1990) (O'Connor, J., concurring); *Smith*, 494 U.S. at 890 (upholding the denial of unemployment compensation for individuals that used peyote because of their religious beliefs); *but see* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533, 545, 547 (1993) (finding that an ordinance specifically prohibiting Santerían animal sacrifices is unconstitutional).
[44] Amanda Ottaway, *Trial of NXIVM Leader to Put Spotlight on Cult Prosecutions*, COURTHOUSE NEWS SERV. (May 2, 2019), https://www.courthousenews.com/trial-of-nxivm-leader-to-put-spotlight-on-cult-prosecutions/ [https://perma.cc/DU4H-YUWE].
[45] McAllister, *supra* note 34, at 380.
[46] *Id.* at 381.
[47] *Id.*

responsibilities.[48] However, because of the First Amendment, courts are hesitant to issue such orders "for the purpose of 'deprogramming'" the individual from the alleged cultic beliefs.[49]

While there are no state or federal prohibitions against cults, there are a number of laws that provide criminal penalties for or civil remedies against certain harmful practices.[50] Specifically, rape laws, state and federal antistalking laws, and the federal Violence Against Women Act provide these potential penalties or remedies.[51] These examples go to show that while Americans are provided the freedom of religion under the First Amendment, a court may still interfere in circumstances where the religious practices are harmful.[52]

C. Honor Your Father, Mother, and the Best Interest of the Child Standard[53]

The best interest of the child is a standard commonly used by courts in determining child custody.[54] This standard has been adopted by the Uniform Marriage and Divorce Act.[55] In applying this standard, a court may consider a series of factors including, but not limited to: the wishes of the child (subject to other conditions), the child's adjustment to home, the financial conditions of the parents, and the physical health of the child and/or parents.[56]

The permissibility of considering the moral and spiritual well-being of a child varies by state.[57] Generally, the religious training of a child is left to the discretion of the parents and is outside of the courts' control.[58] However, the tension between best interest determinations and a parent's constitutional rights has been a problem for decades.[59] A parent's religion may become a consideration when the religious practices pose a risk of physical harm to the child.[60] In other words, while courts should maintain an attitude of impartiality between religions in custody and visitation cases, a court may consider religious beliefs when they may affect the general welfare of the child.[61]

Currently, there is no universal approach in considering religious

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[48] *Id.*
[49] *Id.*
[50] Robin A. Boyle, *Women, the Law, and Cults: Three Avenues of Legal Recourse: New Rape Laws, Violence Against Women Act, and Antistalking Laws*, 15 CULTIC STUD. J. 3, 3 (1998).
[51] *Id.*
[52] *See* United States v. Ballard, 322 U.S. 78, 86 (1944).
[53] *See Ephesians* 6:2–3 (New International Version).
[54] *Best Interests of the Child*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/best_interests_of_the_child [https://perma.cc/2WN3-S3WD].
[55] George L. Blum, Annotation, *Religion as Factor in Child Custody Cases*, 124 A.L.R.5th 203 (2004).
[56] *Id.*
[57] Benning, *supra* note 5, at 738.
[58] Blum, *supra* note 55.
[59] Benning, *supra* note 5, at 738.
[60] *Id.* at 742–43.
[61] *See* Compton v. Gilmore, 560 P.2d 861, 863 (Idaho 1977); LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990); Sanborn v. Sanborn, 465 A.2d 888, 893 (N.H. 1983).

practices within the best interest of the child.[62] Instead, many courts are left with differing standards—commonly classified in three approaches: (1) the actual or substantial harm approach; (2) the risk of harm approach; and, (3) the no harm required custodial preference approach.[63] The first of these approaches restricts a court from taking action that intrudes on a parent's religious beliefs or conduct unless there is evidence that the practice of that religion is causing actual or substantial harm to the child.[64] This approach is illustrated by the court's decision in the Texas case, *In re Steed*, which involved the raid of Yearning for Zion Ranch.[65] In *In re Steed*, the court emphasized the need for immediate danger to the physical health and welfare of the child in order for removal to be necessary.[66] Under the risk of harm approach, courts have the ability to interfere with a parent's religious rights if there is a possibility of future harm to the child.[67] If the Texas court had taken this approach in *In Re Steed*, the court would have had the ability to remove the male and pre-pubescent female children if the court found that there was a risk of future harm (specifically a risk to the girls that may later be married to older men before reaching the age of the majority).[68] The final approach inherently rejects both of the previous approaches and provides parents unrestricted control over religious decisions.[69]

III. THE NEED FOR COURT INTERVENTION WHEN CHILDREN ARE HARMED BY RELIGIOUS PRACTICES

Children do not have a say in what religion they are to be raised in nor do they choose to be a part of a cult.[70] Rather, that decision is usually made for them by their parents or guardian.[71] Thus, it is important to critically examine whether court interference is necessary to protect children from harmful

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[62] Elizabeth Newland, *Extreme Religion, Extreme Beliefs: Comparing the Role of Children's Rights in Extremist Religions Versus Extremist Cults (QAnon)*, 42 CHILD.'S LEGAL RTS. J. 121, 129 (2022).
[63] *Id.* at 131.
[64] *Id.*
[65] *Id.*
[66] *In re* Steed, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, at *3 (Tex. Ct. App. May 22, 2008) ("However, it is a step that the legislature has provided may be taken only when the circumstances indicate danger to the physical health and welfare of the children and the need for protection of the children is so urgent that immediate removal of the children from the home is necessary."), *aff'd sub nom. In re* Tex. Dep't of Fam. & Protective Servs., 255 S.W.3d 613 (Tex. 2008).
[67] Newland, *supra* note 62, at 131.
[68] *In re Steed*, 2008 Tex. App. LEXIS 3652, at *10.
[69] Newland, *supra* note 62, at 132.
[70] Steven A. Hassan, *Protect Children from Harm by Destructive Cults*, PSYCH. TODAY (May 8, 2021), https://www.psychologytoday.com/us/blog/freedom-mind/202105/protect-children-harm-destructive-cults [https://perma.cc/WVD6-FKVT].
[71] *Id.*

practices. This Part will first discuss how a court should define the term "cult" and follow with how practices typically associated with cults negatively impact children both physically and psychologically. Finally, this Part will further analyze the previously mentioned approaches courts use in determining the best interest of the child when religious practices pose an issue.

A. Defining a "Cult"

There is currently no clear legal definition of the term "cult"[72] and a dilemma presents itself when attempting to create one because society's perception of what is and is not a "cult" may change over time.[73] The possibility exists that what may be deemed a "cult" in today's society may one day be a mainstream religion.[74] In fact, many prominent religious figures such as Saint Augustine, John Calvin, and Martin Luther were once seen as "deviant" figures.[75] Therefore, when considering whether a religion crosses the line into being a "cult," it is important for a court to be mindful.

Before examining what factors may define a "cult," the definition of "religion" must first be considered.[76] Black's Law Dictionary has provided the following definition for "religion":

> A system of faith and worship usu[ally] involving belief in a supreme being and usu[ally] containing a moral or ethical code; esp[ecially], such a system recognized and practiced by a particular church, sect, or denomination. In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term *religion* broadly to include a wide variety of theistic and nontheistic beliefs.[77]

While there is no definition for "cult" in Black's Law Dictionary, legal scholars have noted the different characteristics of a "cult."[78] Margaret Singer, who is considered to be an expert in cults, provided eight features that describe cults and their leaders:

> 1. Cult leaders are self-appointed, persuasive persons who claim to have a special mission in life or to have special knowledge;

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[72] *Are Cults Legal?*, *supra* note 15.
[73] Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1, 9 (2004).
[74] *Id.*
[75] *Id.*; *see* Rodia, *supra* note 12 (describing "cults" as a group with "socially deviant" beliefs and practices).
[76] *See* Guobin Zhu, *Prosecuting "Evil Cults:" A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China*, 32 HUM. RTS. Q. 471, 474 (2010).
[77] *Religion*, BLACK'S LAW DICTIONARY (12th ed. 2024).
[78] McAllister, *supra* note 34, at 362.

2. Cult leaders tend to be determined and domineering and are often described as charismatic;
3. Cult leaders center veneration on themselves;
4. *Cults are authoritarian in structure;*
5. Cults appear to be innovative and exclusive;
6. Cults tend to have a double set of ethics;
7. Cults tend to be *totalistic*, or all-encompassing, in *controlling their members' behavior* and also ideologically totalistic exhibiting zealotry and extremism in their world view; and
8. *Cults tend to require members to undergo a major disruption or change in life-style.*[79]

Due to the First Amendment, it is unlikely that the United States government will ever provide a true legal definition for the term "cult."[80] However, a court should still consider the above-mentioned features in child custody cases concerning the harmful effects of one, or both, of the parents' religion.[81] To avoid unconstitutional infringement on one's religious beliefs, it is best that the court not classify a particular religion or certain religious practices as being of a "cult."[82] In other words, instead of classifying a religious group as a "cult" in child custody determinations, a series of factors, such as Margret Singer's, should be adopted for the court's consideration as to whether a particular practice is harmful to a child.[83]

B. The Impact of Harmful Religious Practices on Children

Unfortunately, children raised in environments with harmful religious practices may be subjected to the risk of physical and psychological harm.[84] Additionally, because of their minority, these children likely do not have the resources to protect themselves.[85] This Part will discuss both the physical and psychological harm children raised in these environments may face.

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[79] Cynthia Norman Williams, *America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 LAW & PSYCH. REV. 171, 172–73 (2003) (emphasis added); Catherine Wong, *St. Thomas on Deprogramming: Is It Justifiable?*, 39 CATH. LAW. 81, 86–87 (1999) (emphasis added).
[80] *See Are Cults Legal?*, *supra* note 15.
[81] Williams, *supra* note 79, at 172–73; Wong, *supra* note 79, at 86–87.
[82] *See* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533 (1993) (reasoning that laws violate the First Amendment when they target religious beliefs as such or the object of the law is to restrict religion).
[83] *See* Williams, *supra* note 79, at 172–73; Wong, *supra* note 79, at 86–87.
[84] Hassan, *supra* note 70.
[85] *Id.*

1. The Physical Harm Children May Face

Because many cults are isolated from society, a child may be at a higher risk of sexual and physical abuse.[86] Consider situations such as the mass murder-suicide at Jonestown, where over 200 children died.[87] In Jonestown, members of the Peoples Temple created a makeshift settlement isolated from the rest of society in the jungle of Guyana.[88] Members were then asked to consume a drink laced with cyanide, resulting in the deaths of more than 900 members.[89] In other cases, a child may be forced into sex trafficking or become a victim of sexual abuse through "sex cults."[90] Moreover, child marriage is another issue presented by cults.[91] In America, between the years 2000 to 2018, nearly 300,000 minor children were legally married.[92] However, a concern with child marriages is the undermining of statutory rape laws.[93] Of the nearly 300,000 underage marriages, between 34,943–40,224 of those marriages occurred at an age in which the spousal age difference would have constituted a sex crime.[94] In this way, the state creates a "get out of jail free" card for engaging in sexual relations with a minor and inherently creates situations where children are at risk of danger under what would otherwise fit the legal definition of "rape."[95] Additionally, these statistics are drastically unfavorable to young girls compared to young boys.[96] While the physical well-being of a child is a "best interest" consideration, the potential risk of children's physical harm is not a universal consideration.[97]

2. The Psychological Harm Children May Face

While certain practices, such as physical child abuse, are already inherently considered in the best interest of the child standard, negative psychological impacts are not always considered.[98] One of the primary concerns regarding a child's psychological well-being when raised in a cult is the fact that

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[86] Sam Jahara, *The Psychological Impact on Children Who Grow Up in Cults*, BRIGHTON & HOVE PSYCHOTHERAPY (Aug. 6, 2023), https://www.brightonandhovepsychotherapy.com/blog/the-psychological-impact-on-children-who-grow-up-in-cults/ [https://perma.cc/7TJL-VNFZ].
[87] *Jonestown*, FBI, https://www.fbi.gov/history/famous-cases/jonestown [https://perma.cc/ZQK7-43AK].
[88] *Id.*
[89] *Id.*
[90] Hassan, *supra* note 70.
[91] *Id.*
[92] *Child Marriage – Shocking Statistics*, UNCHAINED AT LAST, https://www.unchainedatlast.org/child-marriage-shocking-statistics/ [https://perma.cc/7V23-LHAC].
[93] Fraidy Reiss, *Child Marriage in the United States: Prevalence and Implications*, 69 J. ADOLESCENT HEALTH S8, S9 (2021).
[94] Reiss, *supra* note 93, at S9.
[95] *Id.*
[96] *Id.* at S8.
[97] *See In re* Steed, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, at *10 (Tex. Ct. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Fam. & Protective Servs., 255 S.W.3d 613 (Tex. 2008).
[98] *Id.* at *9–10.

trauma may negatively impact brain development.[99] Children in such groups often experience a sense of guilt for failing to live up to the "cult standards," thus putting them at risk for suicide.[100] Some of the other potential risks of psychological effects on children can be seen through the researched impact on adult former cult members. After leaving a cult, former cult members were found to exhibit many of the following psychological traits or symptoms: dissociation, cognitive deficiencies—such as simplistic black/white thinking and difficulties in making decisions—depression, anxiety, and some psychotic symptoms.[101] Former members may face additional psychiatric disorder diagnoses.[102] The former members facing "cult indoctrinee syndrome" tend to exhibit symptoms such as: drastic catastrophic alteration of the individual's value system, reduction of cognitive flexibility, narrowing and blunting of affect, regression of behavior to child-like levels, and delusional thinking.[103] In accordance with the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), a former member may additionally face a diagnosis of Post-Traumatic Stress Disorder (PTSD).[104]

Cults may also discourage outside education.[105] Some cults rely on homeschooling minor members through an unqualified cult leader while others outright ban the internet and other information critical of the cult.[106] Without proper education, a child cannot reasonably be expected to develop critical thinking skills, thus relying on what group leadership may tell them.[107] Therefore, adoption of a universal method in evaluating cases where a parent's religious practices may impede on a child's best interest is needed.

IV. THE NEED TO ADOPT A UNIVERSAL STANDARD IN WEIGHING THE BEST INTEREST OF THE CHILD AND RELIGIOUS UPBRINGING

As previously discussed, because there is no universal standard for considering religious practices regarding the best interest of the child, there are three approaches commonly utilized by courts: (1) the actual or substantial harm approach; (2) the risk of harm approach; and (3) the no harm required custodial

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[99] Chantal Kern & Johannes Jungbauer, *Long-Term Effects of a Cult Childhood on Attachment, Intimacy, and Close Relationships: Results of an In-Depth Interview Study*, 50 CLINICAL SOC. WORK J. 207, 208 (2020).

[100] *Cf. id.* at 211–13 (discussing how cult teachings on sex generates feelings of guilt for former cult members in sexual relationships, leading to thoughts of suicide).

[101] Jodi Aronoff et al., *Are Cultic Environments Psychologically Harmful?*, 20 CLINICAL PSYCH. REV. 91, 100 (2000).

[102] *Id.* at 101.

[103] Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 69–72 (1977).

[104] Aronoff et al., *supra* note 101, at 101.

[105] Hassan, *supra* note 70.

[106] Hassan, *supra* note 70.

[107] *Id.*

preference approach.[108] While the first approach may alleviate concerns of unconstitutionally infringing on a parent's freedom of religion, the potential risks a child may be subjected to are far too great.[109] Arguably, this first approach is unhelpful in protecting children that are at risk of harm and will, more likely than not, cause children to face actual or substantial harm in the near future.[110] Additionally, while the third approach also protects freedom of religion, it completely ignores and belittles physical and psychological harm posed to children in these environments.[111]

The second approach, which looks to the risk of potential harm, is the best standard to be universally applied as it protects children from the potential physical, psychological, or sexual harm they may be subjected to. In understanding the application of this standard, the court in *In re Steed*, would have likely allowed the additional removal of male children and pre-pubescent female children.[112] While utilization of this standard should never be interpreted to allow a court to unreasonably infringe on a parent's First Amendment rights, the harm children may be subjected to through damaging religious practices cannot be ignored. Children are not provided a choice in the religious practices of their parents and do not have a voice to protect themselves from harmful practices.[113] Thus, courts should apply the second standard in protecting the best interest and well-being of a child.

V. CONCLUSION

While a court should never be eager to deem a religion as a cult due to its own biases, a court should consider the religious practices that would harm the child because the right to rear a child in any religious belief should not be absolute.[114] Because of the risk of severe physical and psychological harm a child may face, a universally preventive approach, mirroring the actual or substantial harm approach, must be adopted.[115] While this standard would require a case-by-case analysis, it is necessary because ignoring the harm or waiting for actual or substantial harm to protect First Amendment rights does not provide the necessary justice owed to children raised in dangerous environments.[116] Regardless of the religious reasonings, the abuse of a child, and arguably the prevention of future risk, is the business of anyone who knows

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[108] *See* Newland, *supra* note 62, at 131.
[109] *See id.*
[110] *See id.*
[111] *See id.* at 132.
[112] *See In re* Steed, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, at *10 (Tex. Ct. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Fam. & Protective Servs., 255 S.W.3d 613 (Tex. 2008).
[113] *See* Hassan, *supra* note 70.
[114] *See* Newland, *supra* note 62, at 127; *see* United States v. Ballard, 322 U.S. 78, 86 (1944).
[115] *See* Newland, *supra* note 62, at 139; Hassan, *supra* note 70.
[116] Newland, *supra* note 62, at 139.

about it.[117] Therefore, adoption of this universal standard is absolutely necessary to provide guidance for American family courts.

[117] *See Follow the Money*, in *The Program: Cons, Cults and Kidnapping*, NETFLIX (2024) https://www.netflix.com/watch/81616650?trackId=255824129 [https://perma.cc/X3NW-HLG4] ("The abuse of a child is the business of anyone who knows about it.").