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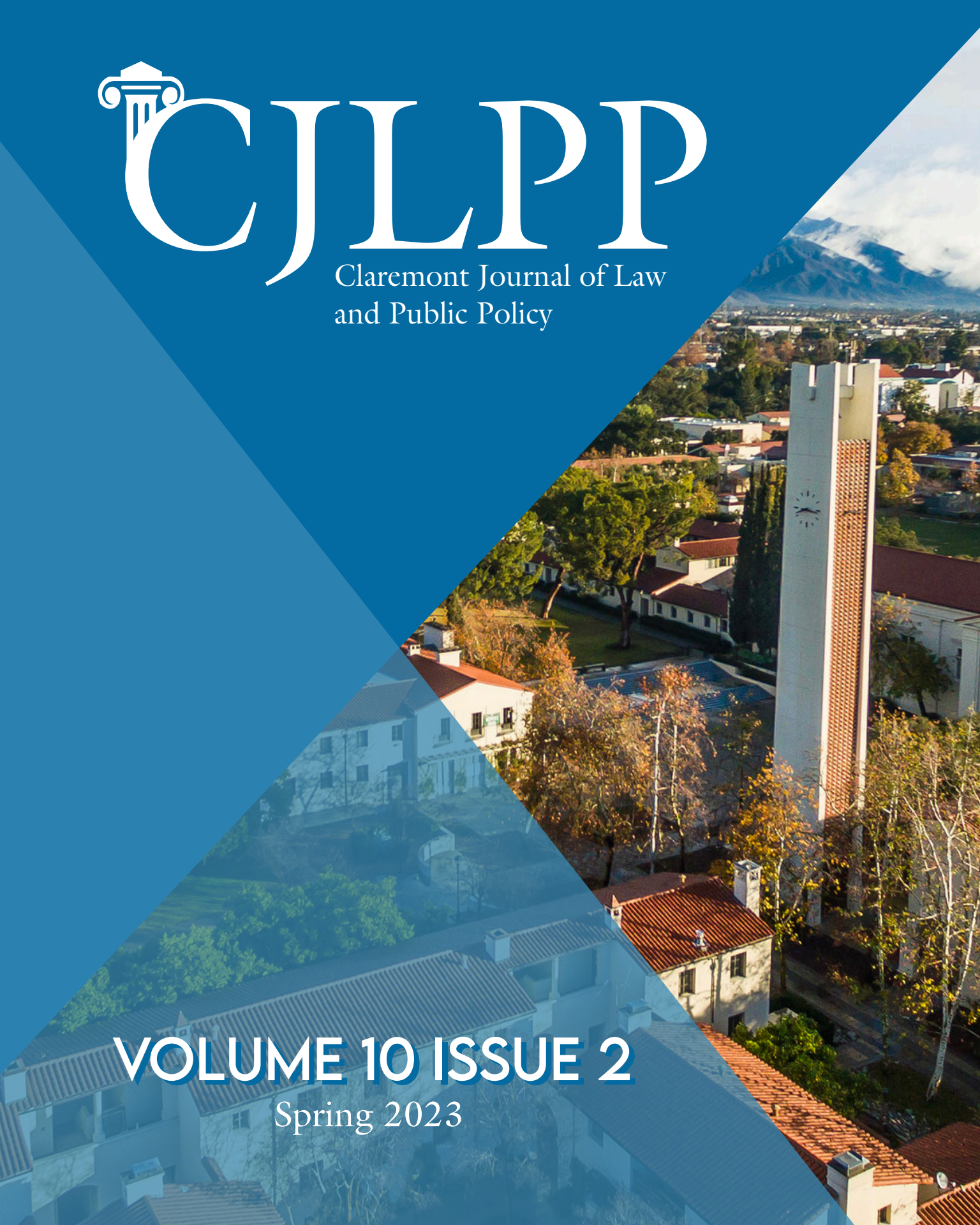

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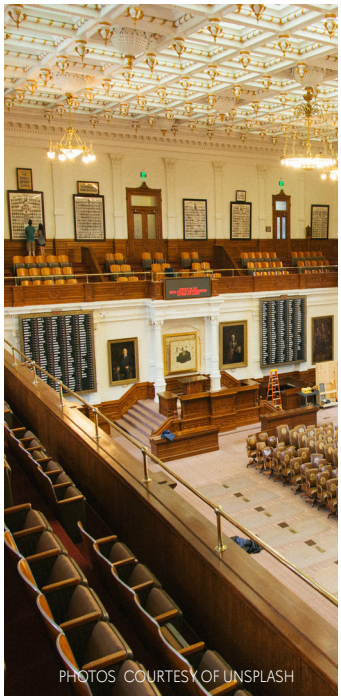
ABOUT

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!



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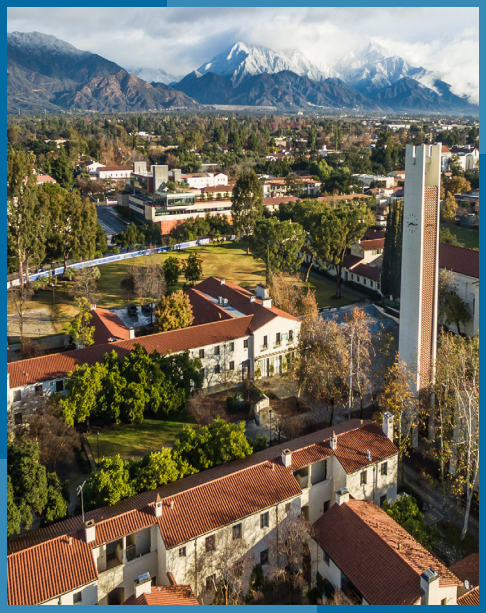

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LETTER FROM *the editors,*

Welcome to Volume 10, Number 2 of the Claremont Journal of Law and Public Policy! This is the second issue of the Journal from the 2022-2023 academic year, worked on by students through the spring semester. Rya Jetha PO ‘23, the Editor-in-Chief, continued leading the Journal with Celia Parry PO ‘23, the Managing Editor. With Jon Burkart studying and interning in Washington D.C. for the semester, Anna Short PO ‘24 was brought on board as an Executive Aid to help with Journal administration, logistics, and events.

This spring, the Journal thrived as a space of learning and community. As our writers worked diligently on their print edition pieces and articles for our website, we celebrated draft milestones with a Thai food spread from Bua Thai, mini pies from I Like Pie, and an end-of-the-semester dinner at Union on Yale. During alumni weekend, we organized “Pie and Pastries with April Xu PO ‘18, HLS ‘21,” to connect current Journal members to a former editor-in-chief of the Journal. Students thoroughly enjoyed the discussion, which included April’s research and language-learning at Pomona, her law school experience, and her current work at an international law firm in New York. This event, along with the alumni panel we organized last semester with Byron Cohen, Greer Levin, Isaac Cui, Sean Volke, April Xu, Katya Pollock, and Ali Kapadia, is part of a growing effort from Journal leadership to connect students with our growing alumni network across the 5Cs. We hope to continue this work next academic year and beyond.

In this issue, our writers explore a wide range of domestic issues including education policy, jury selection, recycling systems, and the Independent State Legislature Theory. Arivumani Srivastava PO ‘26 assesses the state of education policy in Kentucky thirty years after the landmark court ruling Rose v. Council for Better Education. Elena Townsend-Lerdo PO ‘26 analyzes racial discrimination in jury selection. Gina Yum PO ‘25 considers how American recycling systems can improve in the wake of China’s Operation National Sword. Finally, Rob Zintl PO ’23 examines the potential of the Independent State Legislature Theory to earn a place on the Federalist Society’s policy agenda.

We are grateful for the time that contributors, editors, and staff writers put into this edition. Thank you to Arivumani, Elena, Gina, and Rob for their fascinating contributions to this edition. And congratulations to Elena for winning the Byron Cohen Prize for excellence in research, writing, and analysis. Thank you to Anna Short for being a sharp and efficient Executive Aid, and our editors Bryan Thomas, Chloe Mandel, Jordan Hoogsteden, Michelle Lee, and Anna Chiang for working with our writers throughout the semester. Thank you to design editor Gianna Hutton for making this edition a reality. Thanks to our faculty sponsor, Professor Amanda Hollis-Brusky and our longtime partnering organization, the Salvatori Center at Claremont McKenna College. And of course, we want to thank you — our readers — who make this work worthwhile.

At the end of this semester, we held an election to determine Journal leadership for the 2023-24 academic year. Celia Parry and Jon Burkart will be co-Editor-in-Chiefs and Anna Short will be the Managing Editor. Arivumani Srivastava and Grace Zheng PO ‘26 will be Executive Aids. Congratulations and good luck!

PHOTO BY GIANNA HUTTON GONZÁLEZ

best,

Rya Jetha
Editor-in-Chief

Celia Parry
Managing Editor

A WITHERED ROSE:

THE STATE OF EDUCATION FUNDING IN KENTUCKY

In the 1980s, Kentucky's public school system consistently underperformed in numerous metrics of educational attainment and success. Kentucky ranked last in adult literacy and percentage of adults with a high school diploma, forty-ninth in percentage of adults with a college degree, forty-second in per pupil expenditure, and forty-first in pupil-teacher ratio.[1] Drastic measures were taken over the next forty years to address these issues through a court battle and subsequent legislation, resulting in educational improvement.

However, I will argue in this paper that these effects have since waned over time, and the Kentucky legislature now stands at a crossroads between short-term, headline-grabbing legislation on sociocultural issues or long-term investment in Kentucky's civic and economic growth through education. Section I outlines the historical context of Kentucky's education system in the 1980s, which prompted a court case. Section II details the events of this court case, *Rose v. Council for Better Education*, from the initial filing to the state Supreme Court. Section III describes the Kentucky Education Reform Act (KERA) passed in response to *Rose* and the methods it employed to overhaul the Kentucky public school system. The purpose of outlining this history is to affirm and accentuate the far-reaching implications of *Rose* and the constitutional right of all students to an efficient, and thus equal, education underlying Kentucky's public school system. The next four sections focus on *Rose* and KERA in the context of the present.

Section IV examines to what extent *Rose* and KERA have maintained their promises thirty years later, and the educational inadequacies that have arisen since. In Section V, I explore current legislation and the 2022-2024 Kentucky budget that has increased school funding. I argue that while providing some support, these budget increases are still largely inadequate to address the inequities from Section IV. Section VI then outlines policy solutions that can supplement the inadequate improvements from Section V and help substantiate the promises of *Rose.* Section VII will conclude by exploring the current Kentucky political landscape, how it complicates the passage of these solutions, the crossroads the legislature stands at with regard to education investment, and the future implications for Kentucky as a whole. Section VII asserts that in order to restore integrity to the promises of *Rose*, Kentucky lawmakers must make long-term investments in education to maintain the quality of the public school system and plant the seeds for the state's future economic and civic growth.

I. KENTUCKY EDUCATION

The low rankings of Kentucky's education system in the 1980s outlined in the introduction were in large part due to stark funding disparities. In the 1985-1986 fiscal year, the wealthiest Kentucky district spent $4,361 per pupil, compared to only $1,767 per pupil in the poorest district[2]. This funding gap caused gross disparities between Kentucky's property-wealthy and property-poor school districts, with thirty school districts being "functionally bankrupt"[3]. This financial inequality culminated in the correlation of the wealth of a school district with student achievement metrics, student-teacher ratio, class offerings,[4] and graduation rates.[5] These funding disparities can be attributed to two primary factors.

Kentucky's 180 school districts were funded in the 1980s through an archaic system that distributed most education aid through flat grants.[6] Most other funding was sourced through local property taxes, where tax effort was often low due to a combination of legislation that kept property taxes low as property values rose and ineffective property value assessment and tax collection.[7] Additionally, Kentucky's local school districts were filled with corruption. Problems with tax collection, mismanagement and waste of funds, tax fraud, and nepotism resulted in Kentucky schools regularly not receiving their intended funding.[8] This corruption led to a local political climate of public distrust, and thus disinterest, in education, creating conditions for mismanagement to continue to flourish.[9] However, this mismanagement could not account for the entire disparity between wealthy and poor districts—there was a fundamental issue with the way Kentucky schools were funded.[10]

II. *ROSE V. COUNCIL FOR BETTER EDUCATION*

In 1984, the Council for Better Education (CBE) was formed in Frankfort, Kentucky by superintendents from property-poor school districts, with the goal of suing the state for violating its

1 *See* Prichard Committee for Academic Excellence, A Citizen's Guide to Kentucky Education 1 (2016), https://www.kychamber.com/sites/default/files/pdfs/A%20Citizen%27s%20Guide%20to%20Kentucky%20Education.pdf.
2 *See* Ronald G. Dove, *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. Educ. Fin. 83, 84 (Summer 1991).
3 Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 189 (Ky. 1989).
4 *See id.*
5 *See* Dove, *supra* note 2.
6 *See* Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-1995*, 26 Law & Soc. Inquiry 631, 646 (Summer 2001).
7 *See id.*
8 *See* Dove, *supra* note 2.
9 *See* Paris, *supra* note 6, at 655.
10 *See Rose*, 790 S.W.2d at 189.

constitutional obligation[11] to "provide for an efficient system of common schools throughout the state."[12] However, much of their early publicity resulted in a negative image of the CBE as searching for more money to mismanage.[13] Later that year, the CBE met with former Kentucky governor Bert Combs, who agreed to serve as the CBE's primary legal counsel upon learning that sixty-six school districts would join the suit.[14]

The CBE filed their lawsuit with the Franklin Circuit Court in 1985, with the CBE and other educational stakeholders from property-poor districts being the plaintiffs, and the governor, Superintendent of Public Instruction, and other government officials being named the defendants.[15] The plaintiffs collectively sought a declaratory judgment and court order commanding the General Assembly to overhaul and properly fund Kentucky's schools.[16]

After nearly two years of discovery and legislative challenges, the trial was conducted and followed by a six-month recess, where the Department of Education joined the plaintiffs, and two influential Kentucky nonprofits, the Prichard Committee for Academic Excellence and Kentuckians for the Commonwealth, filed an amicus brief supporting the plaintiffs and adding to the mounting evidence of inequitable school funding.[17] This was in tandem with an extensive public engagement campaign led by the Prichard Committee, which helped to organize and mobilize the public in support of the state's education system.[18] After three years of litigation, Kentucky's school financial system was found to be "unconstitutional and discriminatory," and education was deemed a fundamental right of Kentucky youth.[19] The General Assembly immediately appealed, and both parties agreed to go straight to the Kentucky Supreme Court.

The Kentucky Supreme Court reached its decision in favor of the CBE, and in writing the opinion, Chief Justice Robert F. Stephens initially penned a narrow ruling focused on school funding itself. However, he soon broadened his opinion in *Rose v. CBE* upon realizing that the inefficiencies of Kentucky schools did not encompass just funding.[20] He declared Kentucky's *entire education system* to be unconstitutional.[21] He also created a directive to the legislature, stating "the laws now in place must be reenacted by the legislature to provide any form or substance to the [school] system in Kentucky."[22] Speaking to the press after reading the opinion, Combs declared "My clients asked for a thimble-full, and they got a bucket-full."[23]

III. THE 1990 KENTUCKY EDUCATION REFORM ACT

After "brief flirtation" with defying the court, the General Assembly responded to the court's decision in 1990 with the Kentucky Education Reform Act (KERA).[24] KERA overhauled the state's education system through reforms in curriculum, governance, and finance.[25] Curriculum reforms focused on expanded frameworks, training, and school accountability. Governance reforms were numerous, with the key change being the employment of school site-based decision-making councils, consisting of school officials and parents.[26] Finance reforms focused on remedying the inequities caused by disparities in school district wealth. These financial reforms resulted in the SEEK formula, which provides a base funding guarantee per student that districts contribute to, as well as numerous add-ons that employ a mix of guaranteed state and minimum local contributions based on different criteria to account for different district needs.[27]

KERA was the most sweeping school reform legislation in any state at its time of passage,[28] and it initially produced results. KERA introduced $490 million in new funding to districts, with seventy-seven percent being state funding. In KERA's first year, per-pupil spending increased, while the range of per-pupil revenue across Kentucky districts decreased by fifty percent.[29] Overall, this led toward a convergence of wealthy and poor districts at a higher *and* equitable level of spending in the years immediately following KERA's passage.[30] The sweeping decision of *Rose* and KERA's widespread reforms later presented a model for other states, resulting in similar litigation in over thirty states challenging the equity of school systems.[31]

IV. KERA,SEEK, AND KENTUCKY SCHOOLS NOW

11 *See* Robert E. Day, *Each child, every child: The story of the Council for Better Education, equity and adequacy in Kentucky's schools* (2003) (Unpublished Ed.D. dissertation, University of Kentucky) (on file with University of Kentucky ProQuest Dissertations), 15.
12 Ky Const. § 183.
13 *See* Dove, *supra* note 2, at 89.
14 *See id*. at 91.
15 *See Rose*, 790 S.W.2d at 190.
16 *See* Dove, *supra* note 2, at 94.
17 *See id.* at 98.
18 *See* Robert F. Sexton, Mobilizing Citizens for Better Schools 110-111 (2004).
19 *Rose*, 790 S.W.2d at 191.
20 *See* Robert E. Day, *Bert Combs and the Council for Better Education: Catalysts for School Reform*, 109 Reg. Ky. Hist. Soc'y 62 (Winter 2011).
21 *See Rose*, 790 S.W.2d at, 189.
22 *Id*. at 219.
23 Mary Ann Roser & Jamie Lucke, *Sweeping School Changes Predicted*, Lexington Herald-Leader, June 7, 1989, at A1.
24 Day, *supra* note 20.
25 *See* Jacob E. Adams Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. Educ. Fin. 318, 327 (Spring 1993).
26 *See id* at 328-29.
27 *See* Kentucky EdGuides, Prichard Committee for Academic Excellence 59 (2017), http://www.prichardcommittee.org/library/wp-content/uploads/2017/03/2017-EdGuides-1.pdf.
28 *See* Day, *supra* note 20.
29 *See* C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education,* 28 U. Mich. J.L. Reform 599, 612 (Spring, 1995).
30 *See id.*
31 *See* Debra H. Dawahare, *Public School Reform: Kentucky's Solution*, 27 U. Ark. Little Rock L. Rev. 27 (Fall, 2004).

In the thirty years since *Rose*, Kentucky has seen tremendous growth in its quality of education. Kentucky jumped fifteen spots in the Index of Educational Progress, a 2016 University of Kentucky report found Kentucky to be ranked twenty-ninth among all states for education attainment and achievement,[32] and Kentucky is now one of only eight states with a high school graduation rate greater than ninety percent.[33] *Rose* has contributed to the previously noted improvements, but these improvements cannot capture the full Kentucky educational landscape. The next natural question, then, is how have *Rose* and KERA held up in the thirty years since?

Despite dramatic improvements, there are still numerous issues in Kentucky's public education system, indicated by Kentucky's ranking at twenty-ninth for education achievement. However, the most concerning and long-term issues for Kentucky schools lie in the erosion of the equality legislators sought to create with KERA and its SEEK formula.

As noted above, KERA and the SEEK formula closed the spending gap between the wealthiest and poorest districts by fifty percent in its first year. Kentucky's spending gaps, however, have reappeared in drastic fashion. A 2021 Kentucky Center for Economic Policy report found that the funding gap between the wealthiest and poorest quintile of Kentucky schools was at $3,049 in 1990 when KERA passed. Adjusted for inflation, this gap dipped to nearly $1,000 in 1997, but has steadily risen since toward pre-KERA levels, reaching $2,949 in 2021.[34] The gap becomes even more glaring when looking at individual districts. For example, according to 2021 Kentucky Department of Education data, a rural county-based district spent just under $14,000 per pupil for total costs in 2021, while a suburban independent district spent nearly $28,000 per pupil.

This increase in the spending gap between wealthy and poor districts can largely be attributed to a steady decrease in the base funding appropriated by the state through the SEEK formula. Inflation-adjusted, the district contribution to the per-pupil SEEK guarantee increased from $1,296 to $1,397 between 2008 and 2022, while the state contribution decreased from $3,524 to $2,603 over the same period.[35]

The ramifications of this growing disparity are evident when examining school data. The state's decrease in funding has impacted districts' spending on necessities such as transportation, course offerings, and staff.[36] This has manifested itself through districts diverting funds away from other spending areas to cover these necessities, cutting spending to these necessities, or a combination of both. A survey of Kentucky school superintendents found that since 2008, forty-two percent of surveyed districts cut student supports such as after-school programming and intervention services, and thirty-five percent of surveyed districts had reduced or eliminated art and music programs.[37] Statewide, the decrease in funding can be seen through staffing: despite a two percent increase in enrollment between 2008 and 2017, the number of teaching certified staff decreased by one percent, and classified staff by five percent.[38]

These data highlight the growing disparities from decreasing SEEK funding and thereby make the erosion of *Rose* and the intent of KERA evident. Kentucky schools are quickly approaching the disparities that warranted their total restructuring in the 1990s, in spite of a record state budget surplus. The next section will explore what recent surplus-financed investments attempted to bridge this growing gap, as well as these investments' flaws. Then, it will explore policy solutions to remedy the increased funding burden placed on districts and restore integrity to the goal of an "equitable and adequate funding program" for Kentucky schools, focusing primarily on appropriations from the surplus.

V. CURRENT INVESTMENTS TO FULFILL *ROSE* AND THEIR FLAWS

Kentucky has seen a record budget surplus as a result of rapid economic recovery from the COVID-19 pandemic. According to Governor Andy Beshear, Kentucky's rainy day fund is nearing $2 billion for the 2022 fiscal year, a record for the state and the "best shape of [Beshear's] lifetime."[39] This puts Kentucky in a strong position to make significant investments in education while still retaining a sizeable budget surplus.

The 2022-2024 biennial state budget already made several investments in education. The budget raises the base SEEK allocation from $4,000 in 2022 to $4,100 in 2023 and $4,200 in 2024,[40] and full-day kindergarten funding is continued through 2024. Additionally, the previously in question teachers' pension system is fully funded, along with medical benefits for all teachers. Other areas receiving funding include early childhood learning, career and technical education, and gifted student programming.[41]

While these investments mark an upward trend from the historic downward trend of Kentucky education funding since KERA and *Rose*, it is also important to contextualize them. The SEEK guaranteed funding increases to $4,200 are still lower than the 2008 guarantee of $4,820 in real dollars. These increases also become negligible when examined against the backdrop of inflation of the US dollar. In order for these SEEK increases to

32 *See* Prichard Committee for Academic Excellence, *supra* note 1.
33 *See* National Center for Education Statistics, Public High School Graduation Rates (2022). https://nces.ed.gov/programs/coe/indicator/coi/high-school-graduation-rates.
34 *See* Ashley Spalding et al., School Funding Task Force Recommendations Include Steps Toward Adequacy and Equity (2021), https://kypolicy.org/school-funding-task-force-recommendations-include-steps-toward-adequacy-and-equity.
35 *See id.*
36 *See* Ashley Spalding, *What to Know About Kentucky School Funding as Kids Head Back to School*, KyPolicy, Aug. 9, 2021, https://kypolicy.org/what-to-know-about-kentucky-school-funding-as-kids-head-back-to-school/.
37 *See* Ashley Spalding, State Budget Cuts to Education Hurt Kentucky's Classrooms and Kids 2 (2018), https://kypolicy.org/wp-content/uploads/2018/01/Cuts-to-Education-Hurt-Kentucky.pdf.
38 *See id.* at 6.
39 Andy Beshear, Largest Budget Surplus in History Adds to Kentucky's Booming Economy (2022), https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=872.
40 *See* Office of State Budget Director & Governor's Office for Policy Management, Commonwealth of Kentucky 2022-2024 Budget in Brief Executive Summary (2022).
41 *See id.*

represent an increase in real dollars, the inflation rate would have to stay below 2.5 percent; an incredibly hopeful outlook given that the most optimistic predictions of inflation see it falling to 2.5 percent by December 2024, and the most pessimistic to only 6.5 percent.[42] Thus, these nominal increases in the SEEK funding do not constitute true increases; in fact, they will likely still continue the trend of decreasing SEEK base funding unless inflation decreases far more than most expect.

There are also numerous questions surrounding the longevity of full-day kindergarten, transportation funding, and teacher salaries. Full-day kindergarten and transportation receive funding in this budget, but current law still allows for half-day kindergarten.[43] Despite a nearly $60 million investment, districts' transportation funding is still uneven, with some districts receiving 100 percent of transportation funding, and others only having seventy percent of their funding needs met.[44] Teacher salaries did not receive direct funding in the budget, but rather a recommendation for districts to provide raises using state funding.[45] This is especially concerning against the backdrop of Kentucky's 11,000 vacancy teacher shortage,[46] decreasing teacher salary in real dollars,[47] and a starting salary of $37,000 that is well below the national average.[48] 2023 House Bill 363 sought to use low-cost measures to address the shortage, but focused on recruitment rather than retention and failed to address Kentucky's steadily decreasing teacher salaries.[49]

The issues outlined above in Kentucky's education investments paint a bleak picture of the future of the Commonwealth's schools. The next section will explore policy solutions that can supplement the above solutions and remedy the increased funding burden placed on districts, thereby providing substance to the goal of an "equitable and adequate funding program" for Kentucky schools.

VI. POLICY SOLUTIONS TO SUBSTANTIATE *ROSE* AND KERA

Kentucky's budget surplus can serve as the source of numerous investments to benefit and sustain the state's public school system as elucidated in *Rose*. Chief among these solutions is a substantial investment by the state into base SEEK funding. Governor Beshear's 2022-2024 executive budget recommended a SEEK base increase to $4,300 in 2023, and $4,500 in 2024, both of which would almost certainly constitute a true increase in base SEEK funding.[50] An investment of this level should only be a starting place—truly increasing the quality of Kentucky's education system will necessitate large-scale, long-term investments in SEEK to create a steady stream of funding to schools, allowing for both new investments and, most critically, maintenance of these investments over time.

Additionally, both legislating a requirement for full-day kindergarten and fully funding it for districts will benefit students substantially. Despite its costs, full-day kindergarten receives praise for its student achievement boosts, benefits for social development, and relief of childcare costs for parents.[51] Thus, it is necessary to both amend KRS 158.060 to no longer allow for half-day kindergarten programs, as well as provide long-term state funding for full-day kindergarten programs. State funding for full-day kindergarten will relieve the burden from already financially strained districts and set Kentucky youth up for success in their K-12 careers.

More aggressive investment in student transportation is also necessary to strengthen Kentucky's education system. Bus driver shortages and inadequate transportation infrastructure have burdened districts across the state, forcing some to even consider changing school start times.[52] This, much like full-day kindergarten, has burdened district budgets and harmed students. Thus, it is necessary to make an investment in line with Beshear's recommendation of $175 million to ensure full funding for all districts,[53] rather than the uneven $60 million investment in transportation made in the 2022-2024 budget.[54]

Kentucky has also seen a substantial shortage of mental health professionals in schools—the average student-counselor ratio in Kentucky schools is currently 363:1, despite an American School Counselor Association recommendation of 250:1 to best meet student's needs.[55] 2019's School Safety and Resiliency Act appropriated money to hire mental health professionals across the state to approach the 250:1 ratio. However, COVID budget cuts resulted in this being only $7.4 million, and the mandate has been left underfunded since.[56] The mental well-being of Kentucky's youth is critical to

42 *See* Lawrence M. Ball et al., *Understanding U.S. Inflation During the COVID Era*, 2022 IMF Working Papers, 29 (2022), https://www.imf.org/en/Publications/WP/Issues/2022/10/28/Understanding-U-S-525200.

43 *See* Ky. Rev. Stat. Ann. § 158.060 (LexisNexis 2023).

44 *See* Pam Thomas et al., *State Funding for Education Has Been Stagnant for Many Years, But the 2022-2024 Budget Presents a Unique Opportunity to Begin Reinvesting*, KyPolicy, Feb. 14, 2022, https://kypolicy.org/state-education-funding-2022-2024-opportunity-for-reinvestment/.

45 *See* Office of State Budget Director & Governor's Office for Policy Management, *supra* note 40.

46 *See* Olivia Krauth, *FACT CHECK: How many teacher vacancies does Kentucky have?*, Louisville Courier-Journal, (Feb. 2, 2023), https://www.courier-journal.com/story/news/politics/2023/02/02/kentucky-teacher-shortage-how-many-vacancies-does-the-state-have/69863566007/.

47 *See* Thomas, *supra* note 44.

48 *See* National Education Association, Teacher Salary Benchmarks (2022), https://www.nea.org/resource-library/teacher-salary-benchmarks.

49 H.R. 363, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023).

50 *See* Governor's Office, Kentucky's 2022-2024 Executive Budget 2 (2022).

51 *See* National Education Association, Full-Day Kindergarten Helps Close Achievement Gaps (2015), https://www.nea.org/sites/default/files/2020-07/18001_Full-Day_Kindergarten_Policy_Brief-final.pdf.

52 *See* Dustin Vogt & Sean Baute, *JCPS could change school start times amid bus driver shortage*, Wave, (Feb. 14, 2023), https://www.wave3.com/2023/02/14/jcps-could-change-school-start-times-amid-bus-driver-shortage/.

53 *See* Governor's Office, *supra* note 50.

54 *See* Office of State Budget Director & Governor's Office for Policy Management, *supra* note 40.

55 American School Counselor Association, Student-to-School-Counselor Ratio, (2021), https://www.schoolcounselor.org/getmedia/238f136e-ec52-4bf2-94b6-f24c39447022/Ratios-20-21-Alpha.pdf.

56 *See* Mark Vanderhoff, *Nearly two years after law, most Kentucky school districts don't meet safety requirement*, WLKY, (Aug. 19, 2020), https://www.wlky.com/article/nearly-two-years-after-law-most-kentucky-school-districts-dont-meet-safety-requirement/33649542.

their scholastic success, and the necessity of mental health support has become increasingly evident post-COVID.[57] Thus, it is crucial to allocate additional funding for school mental health professionals to increase access to mental health services for Kentucky youth.

Lastly, it is critical for the state to invest in teacher salaries. While legislation like House Bill 363 provides short-term solutions to address a crisis in vacancies, the teacher shortages Kentucky faces today are largely the result of consistent underfunding addressed in Sections IV and V, a previously in-danger pension system, and a low, stagnant starting salary.[58] Thus, it will be necessary over the coming years to invest in teacher salaries to at least fill teacher vacancies, if not to also incentivize becoming a teacher through higher salaries and other programs such as more aggressive loan forgiveness and stronger benefits. At the minimum, this can be done by fulfilling Governor Beshear's proposed five percent statewide salary increase. However, like the other areas outlined above, mitigating and resolving the teacher and counselor shortage will require sustained, long-term incremental increases to teacher salary to both keep Kentucky competitive with other states' education systems and to incentivize teaching in the first place.

For the policy solutions outlined above, there are two common threads to note. First, undergirding the possibility of all these solutions is Kentucky's record budget surplus—it has continued to grow post-COVID amid a roaring economy and provides substantial room for lawmakers to invest in education without putting the same strain on the budget these investments would have caused five years ago. Second, these investments being made through state funding is critical. By providing state funding for these areas necessary to keep a school system running and successful, districts can utilize their revenue for other areas, such as after-school programming, increasing course offerings and vocational education access, and hiring more out-of-classroom faculty and staff to support student growth. Thus, these investments by the state will have a compounding effect on improving schools, by both directly addressing critical needs in Kentucky's education system and allowing more room for school districts to make additional investments to further improve the quality of education they provide.

These solutions have been identified by numerous stakeholders, including students, teachers, and lawmakers. However, many of them have gone largely unaddressed by the legislature. The next and final section will explore Kentucky's current political climate surrounding education, how it has hindered investments in education, and possible next steps for their passage.

VII. POLITICAL OBSTACLES TO REALIZING *ROSE* AND POSSIBLE SOLUTIONS

Once an issue both sides of the aisle would agree upon, education has become an increasingly partisan issue in the Kentucky legislature, reflecting both national trends in education and Commonwealth-specific fissures.

Schools have become a prominent battleground for the culture wars across America,[59] and Kentucky is no exception. The 2022 legislative session saw numerous bills introduced that reflected growing debates around critical race theory in the classroom with legislation such as House Bill 14, House Bill 18, and Senate Bill 138 all seeking to limit conversations on race in the classroom through different strategies, including criminal penalties for teachers and legislating required readings for history classes.[60] The 2023 legislative session followed national trends on LGBTQ+ issues in education, with Kentucky passing Senate Bill 150, an omnibus on various issues concerning transgender students that has been labeled among the most aggressive anti-trans bills in the United States.[61] Additionally, despite years of staying out of the school choice debate, the 2022 legislative session saw intense debate and the eventual passage of a charter school bill mandating the opening of charter schools in two Kentucky regions.[62] This measure has resulted in litigation by two districts in the regions mandated to open a charter school.[63]

These pieces of legislation dominated headlines in their respective sessions, and often at the expense of other bills seeking to remedy the issues outlined in the previous sections. In 2022, House Bill 66 sought to amend KRS 158.060 to mandate full-day kindergarten statewide,[64] and House Bill 120 sought to increase eligibility for preschool to families within 200 percent of the federal poverty line.[65] In 2023, House Bill 504 sought to revise the way funding is calculated for Kentucky schools to afford them more dollars,[66] and House Bill 390 sought to create a strong student-teacher stipend and loan forgiveness program for teachers.[67] Despite all of the above legislation having bipartisan support, none of them made it out of committee in their respective sessions.

The failure of this legislation was largely due to heated, partisan debates over the aforementioned pieces of legislation following national cultural trends dominating the floor. These pieces of legislation and the policy solutions outlined above are easily marketable as bipartisan—they provide a critical investment in Kentucky's education system that will pay dividends for years to come. This investment comes through

57 *See* Kentucky Student Voice Team, Coping With Covid-19, (2021), https://www.ksvt.org/reports/coping-with-covid-19.
58 *See* Valerie Honeycutt Spears & Monica Kast, *'An absolute emergency.' How KY is working to address the teacher shortage 'crisis',* Louisville Courier-Journal, (Feb. 3, 2023), https://www.kentucky.com/news/local/education/article271161537.
59 *See* Jonathan Zimmerman, Whose America? Culture Wars in the Public Schools 199-201 (2022).
60 H.R. 14, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022); H.R. 18, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022); S. 138, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).
61 S. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); *see* Olivia Krauth, *Despite emotional pleas, one of country's strictest anti-trans bills becomes law in Kentucky*, USA Today, (Mar. 30, 2023), https://www.usatoday.com/story/news/nation/2023/03/29/kentucky-legislature-overrides-veto-of-strict-anti-trans-bill/11564591002/.
62 *See* H.R. 19, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).
63 *See* Bruce Schreiner, *Lawsuit takes aim at blocking Kentucky's charter school law*, Associated Press, (Jan. 10, 2023), https://apnews.com/article/kentucky-state-government-louisville-education-lawsuits-203258f354b724b4ccefa94d60feedf6.
64 H.R. 66, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).
65 H.R. 120, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).
66 H.R. 504, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023).
67 H.R. 390, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023).

creating a capable workforce to continue to drive the state's economy, as well as by fulfilling schools' roles as the "nurseries of democracy,"[68] enabling the growth of civic consciousness in the next generation of voters and leaders.

Rose and KERA sought to overhaul and improve Kentucky's inadequate education system, and while they created strong precedent for state funding and provided a short respite from the previously gaping inequities of education, these inequities have become present once again as outlined by this essay. While seemingly bipartisan, whether the above inequities and issues are addressed will be largely up to the Kentucky legislature and the agenda it chooses to pursue. Lawmakers stand at a critical crossroads—do they want to follow national political trends and create headlines, or invest in their youth and therefore the state's economic prosperity? The direction the legislature will choose is unclear, but the consequences of its choice are not: it will determine whether Kentucky's education system improves, flourishes, and comes closer to fulfilling the sweeping promises of *Rose,* or amplifies already inequitable conditions, straying further from the mandate created by *Rose* at the expense of its youth—and thereby its future.

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68 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

OPERATION NATIONAL SWORD

AN ANALYSIS OF U.S. WASTE SYSTEMS

INTRODUCTION

In July 2017, the Chinese government notified the World Trade Organization that it would amend its waste importation policies to become more stringent on contamination.[1] These policies assure that China will not accept shipments of recyclables that are mixed with trash, the wrong type of recyclables, or low-quality recyclables like greasy paper goods.[2] This initiative was part of a larger move by the Chinese government to tighten restrictions on *yang laji* or "foreign garbage."[3] China stated that stricter regulations were necessary because large amounts of dirty and hazardous materials had been mixed with "imported solid wastes intended for use as raw materials," which was detrimental to the country's public health and environment.[4] Approximately forty percent of recycled materials sent to China as exports contained materials not appropriately recycled.[5] Operation National Sword was introduced as a part of a larger set of legislative measures for China to shift away from imported waste material as a source of raw materials.[6] China was known as the most significant waste importer in the "global waste trade," which refers to the flow of waste from developed to underdeveloped countries.[7] Operation National Sword reduced the contamination threshold requirement from five to ten percent to 0.5 percent for scrap paper and plastics.[8] Through this policy, China banned the importation of a large majority of solid waste from Western countries.[9]

After the Operation National Sword policy was fully implemented in 2018, plastic imports to China from the United States plummeted by ninety-nine percent.[10] This decrease led to widespread waste stream backlogs across countries that relied on China as a waste-importing country. European nations primarily diverted their plastic waste to Indonesia, Turkey, India, Malaysia, and Vietnam.[11] The United States also relied on countries such as Mexico, India, and Indonesia to import waste. The importation rates of these countries could not make up for the lost markets in China, so plastic began accumulating in U.S. domestic landfills.[12] As of 2023, the amount of plastic that gets landfilled and incinerated in the U.S. has increased by 23.2 percent.[13] After decades of overreliance on Chinese recycling systems, Operation National Sword has highlighted the shortcomings of waste systems in the United States.

This paper strives to present how American recycling systems can improve domestic recycling practices and reduce contamination by implementing recycled content minimums and extended producer responsibility in the wake of Operation National Sword. Section I of this paper explains why the Chinese government implemented Operation National Sword. Section II demonstrates how recycling systems within various U.S. states fared following the establishment of Operation National Sword. Section III highlights potential solutions to facilitate improved recycling systems in the United States.

I. REASONS FOR OPERATION NATIONAL SWORD

China began importing scrap materials due to increased plastic usage in the U.S. and other Western nations.[14] At the same time, China's manufacturing and export sectors were booming. Chinese manufacturers did not have access to enough of the raw materials they needed for intensive manufacturing.[15] This environment created a system where cargo ships full of Chinese-made products would be exported to Western ports and return to China full of recycled plastic

1 *See* Jessica Heiges & Kate O'Neill, *A Recycling Reckoning: How Operation National Sword catalyzed a transition in the U.S. plastics recycling system*, 378 J. of Cleaner Prod. No. 134367 (2022).

2 *See* Center for Ecotechnology, *What is the National Sword?,* Ctr. for Ecotechnology (May 9, 2018), www.centerforecotechnology.org/what-is-the-national-sword/.

3 *See* Adam Liebman, *No More of Your Junk,* New Internationalist (Dec. 5, 2018), www.newint.org/features/2018/11/01/chinese-waste-ban.

4 *See* Russell Allan, *China puts recycled to the sword,* 71 Appita: Tech., Innovation, Mfg., Env't. 202, 202 (2018).

5 *See* The National Recycling Strategy: What's Next, The ICCF Group, https://www.internationalconservation.org/issues/marine-conservation/the-national-recycling-strategy-what-s-next (last visited May 4, 2023).

6 *See* Allan, *supra* note 4, at 202.

7 *See* Adomas Balkevicius, Mark Sanctuar, & Sigita Zvirblyte, *Fending off waste from the West: The impact of China's Operation Green Fence on the international waste trade*, 43 The World Econ. 2742 (2020).

8 *See* Allan, *supra* note 4, at 202.

9 *See* Center for Ecotechnology, *supra* note 2.

10 *See* Colin Staub, *China: Plastic imports down 99 percent, paper down a third,* Res. Recycling. (Jan. 29, 2019), www.resource-recycling.com/recycling/2019/01/29/china-plastic-imports-down-99-percent-paper-down-a-third/.

11 *See* Cheryl Katz, *Piling Up: How China's Ban on Importing Waste Has Stalled Global Recycling,* Yale Sch. the Env't. (Mar. 7, 2019), www.e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling.

12 *See* Savant Nzayiramya & John Beghin, The Impact of China's Environmental and Trade Policies on U.S. Plastic and Paper Waste Exports, Univ. of Neb.-Lincoln (Mar. 17, 2021), https://agecon.unl.edu/impact-china%E2%80%99s-environmental-and-trade-policies-us-plastic-and-paper-waste-exports.

13 *Id.*; *see* Aditya Vedantam, Nallan C. Suresh, Khadija Ajmal & Michael Shelly, *Impact of China's National Sword Policy on the U.S. Landfill and Plastics Recycling Industry*, 14 Sustainability 2456 (2022).

14 *See* Robby Berman, *Why American towns are more selective than ever about what they recycle,* The Present (Aug. 24, 2019), www.bigthink.com/the-present/recycling-industry/.

15 *See* Liebman, *supra* note 3.

intended to be used for manufacturing.[16] The "recycling" industry in the United States then boomed. Unfortunately, much of this material was too contaminated to be considered "recyclable." This issue led to plastic buildup within various areas of China. In recent decades, as China's global power and capital has increased, it has gained the ability to withdraw from the "global waste trade" without being economically disadvantaged.

In February 2013, the Chinese Government formally implemented the Operation Green Fence policy, which launched an aggressive inspection effort to reduce contamination levels in the plastic waste it imported from Western nations.[17] In the first year of Operation Green Fence, almost seventy percent of all incoming containers loaded with recyclables were subjected to thorough inspections.[18] This effort to enforce existing regulations was implemented because the quality of the recyclables sent to China was poor. Most of the plastics, scrap metal, and fiber entering China contained too much food, trash, and other contaminants to be recycled. The excess residue could not be sent through proper recycling processes, which left Chinese manufacturers responsible for sorting and disposing of the contaminants. This policy curtailed a significant flow of waste material from the U.S. and other Western countries to China.

Once the stricter inspections began, both recyclers and shippers in Western countries took notice. Anyone shipping sub-quality material could have their license revoked. If recyclers tried to ship materials to China for recycling, and the materials were not recyclable, they would face the financial burden of paying to ship the container of non-recyclable materials back from China. Although the number of containers found to hold unrecyclable materials was proportionally low, about 0.04 percent of total containers shipped, this number was still numerically large. Almost 22,000 were sent back within the first year of the implementation of Operation Green Fence.[19]

Following Operation Green Fence, owners and managers of U.S. recycling centers quickly adapted new process changes, added quality control stations, and developed plans to upgrade recycling centers to improve the quality of recyclables. China continued to heighten restrictions on waste imports. China implemented the 2017 National Sword Policy to decrease the importation of low-quality plastics that are difficult to sort and recycle and were accumulating in trash dumps and at recyclers. Before the ban, China imported ninety-five percent of plastics collected in the European Union and seventy percent of plastics collected in the U.S.[20] Most of these plastics were considered low quality because of single-stream collection and the increased complexity of separating different colors and types of plastic. China's green policies have created a global economic shock because recyclables have been one of the most outsized exported materials to China since 2007.[21] Because China imported so much foreign waste for so long, extensive levels of mercury, lead, and other dangerous substances have endangered many of the country's inhabitants.[22] This crisis has been internationally publicized through the creation of popular documentaries, like *Plastic China*. The Chinese government has been steering the country away from low-value sectors like waste and instead focusing more on higher-earning industries like tech.[23]

II. RECYCLING AFTER OPERATION NATIONAL SWORD

As a result of Operation National Sword, the global recycling system has been crumbling. Plenty of cities in the U.S. are now struggling to figure out what to do with their recycled goods.[24] The University of Georgia has estimated that China's ban on imported recyclables will leave 111 million metric tons of trash worldwide with nowhere to go by 2030.[25] Western countries attempted to continue exporting their recyclable materials to other countries, predominantly in Southeast Asia right after the implementation of Operation National Sword.[26] Since then, over 200 nations that have dealt with exported waste from Western nations have agreed to place stricter limits on plastic waste exports.[27] U.S. groups have not responded well to these stricter limits. In 2020, a group representing the world's largest petrochemical makers lobbied for U.S. trade negotiators to push Kenya's government to continue importing foreign plastic garbage.[28] U.S. processing facilities and municipalities have had to either pay more to recycle, or discard waste. In 2017, Stamford, CT made $95,000 by selling recyclables; by 2018, it had to pay $700,000 to remove them.[29] Bakersfield, CA used to earn $65 a ton from its

16 *See* Berman, *supra* note 14.

17 *See* Will Flower, *What Operation Green Fence has Meant for Recycling,* Waste 360 (Feb. 11, 2016), www.waste360.com/business/what-operation-green-fence-has-meant-recycling.

18 *See id.*

19 *See id*.

20 *See* Christopher Joyce, *Where Will Your Plastic Trash Go Now That China Doesn't Want It?,* Nat'l. Pub. Radio (Mar. 13, 2019), www.npr.org/sections/goatsandsoda/2019/03/13/702501726/where-will-your-plastic-trash-go-now-that-china-doesnt-want-it.

21 *See* Flower, *supra* note 17.

22 *See* Aimin Chen, Kim N. Dietrich, Xia Huo, & Shuk-mei Ho, Developmental Neurotoxicants in E-Waste: An Emerging Health Concern, 119 Envtl. Health Perspective 431, 432(2010).

23 *See* Christopher Balding, *China Is Nationalizing Its Tech Sector,* Bloomberg (Apr. 11, 2018), www.bloomberg.com/opinion/articles/2018-04-12/china-is-nationalizing-its-tech-sector.

24 *See* Matt Logan, *Plastic China,* (2020), https://www.asianstudies.org/wp-content/uploads/LoganReviewWinter2020EAA.pdf; *See*, Chavie Lieber, *Hundreds of US cities are killing or scaling back their recycling programs,* Vox (Mar. 18, 2019), www.vox.com/the-goods/2019/3/18/18271470/us-cities-stop-recycling-china-ban-on-recycles.

25 *See* Amy L. Brooks, Shunli Wang, & Jenna R. Jambeck, The Chinese import ban and its impact on global plastic waste trade, 4 Sci. Advances #6 (June 2018).

26 *See* Kimiko de Freytas-Tamura, *Plastics Pile Up as China Refuses to Take the West's Recycling,* N.Y. Times (Jan. 11, 2018), www.nytimes.com/2018/01/11/world/china-recyclables-ban.html.

27 *See* Hiroko Tabuchi & Michael Corkery, *Countries Tried to Curb Trade in Plastic Waste. The U.S. Is Shipping More.,* N.Y. Times (Mar. 12, 2021), www.nytimes.com/2021/03/12/climate/plastics-waste-export-ban.html.

28 *See* Hiroko Tabuchi, Michael Corkery & Carlos Mureithi, *Big Oil Is in Trouble. Its Plan: Flood Africa With Plastic.,* N.Y. Times (Aug. 30, 2020), www.nytimes.com/2020/08/30/climate/oil-kenya-africa-plastics-trade.html.

29 *See* Michael Corkery, *As Costs Skyrocket, More U.S. Cities Stop Recycling,* N.Y. Times (Mar. 16, 2019), www.nytimes.com/2019/03/16/business/local-recycling-costs.html.

recyclables. After 2018, it had to pay $25 a ton to eliminate them.[30] Over seventy of these facilities and municipalities have entirely ended curbside recycling at one point or another after the implementation of the ban.[31] Most programs have increased costs to residents while others limited what materials they would accept. After the introduction of Operation National Sword, various cities across the U.S. turned to landfills to discard waste that was once considered "recyclable." [32] Philadelphia is now incinerating about half of the "recycling" material collected from its 1.5 million residents.[33] The Memphis international airport still has recycling bins around the terminals. However, the airport landfills every collected can, bottle, and newspaper.[34] Without demand from the Chinese market, much of the collected "recyclable" material has been piling up, and the global commodity prices of many scrap materials have plummeted in response.[35]

Unlike many other nations, the United States has not had a national recycling strategy for long. In fact, a national recycling strategy was only introduced in 2021 when Operation National Sword highlighted U.S. challenges, like reduced markets for recycled materials, lack of recycling infrastructure, and confusion around which materials are recyclable.[36] This discrepancy makes it difficult to compare the reactions of the U.S. and other Western nations to the aftermath of Operation National Sword. There have been differences in how U.S. areas handled the recycling crisis that formed following Operation National Sword. Some regions, like Los Angeles, have been particularly strong in their municipal recycling approach. Los Angeles currently recycles almost eighty percent of its waste, intending to recycle ninety percent by 2025.[37] Restaurants must compost their food waste, and companies get a tax break based on how much they recycle. In addition, an initiative called "Rethink LA" helps residents understand the importance of recycling and composting.[38] In a public-private partnership, the city collects recyclables curbside for its residents and transports the waste to private recycling facilities. LA's recycling industry contributes an annual $200 million to the city's economy.[39]

When comparing the impact of Operation National Sword on the United States to its impact on Australia, another country that lacked a national recycling strategy until after the implementation of Operation National Sword, it is evident that the two countries underwent similar issues.[40] For example, in 2018, the Ipswich council announced it would transfer certain recyclables to the landfill due to an additional $2 million funding request from contractors.[41] Plastic waste for both countries was immediately diverted to landfills following Operation National Sword because of a lack of national recycling infrastructure for collection and sorting. The two countries also lack a proper standardization system for recyclable materials. Government officials in Australia do not enforce legislation mandating the polymer material categorization of imported goods.[42] Not having a standardized system reduces consumer awareness of proper recycling and makes it difficult for recycling haulers to sort through waste materials.

III. POTENTIAL SOLUTIONS

Despite Chinese demand for recyclable waste plummeting, the global market for high-quality recycled materials is growing. Globally, demand for paper and cardboard will grow by 1.2 percent a year, mainly due to the growth in e-commerce and the need for packaging.[43] As a result, companies are trying to enhance the quality of the post-consumer recycled plastic they use as well as increase the amount of the plastic they incorporate. To meet this demand, the U.S. must develop its domestic market for plastic recycling. Luckily, in 2021, the U.S. finally adopted a national recycling strategy.[44] After China's Operation National Sword policy highlighted the importance of a domestic recycling framework, the U.S. Environmental Protection Agency announced a new national recycling strategy promoting a "circular economy approach to materials management."[45] This approach would ensure that resources will be recovered and reused in producing new goods, decreasing reliance on landfills.[46] The U.S. EPA's National Recycling Strategy introduced a plan for the U.S. to achieve a fifty percent recycling rate by 2030.[47] President Joe Biden's Infrastructure Investment and Jobs Act

30 *See* Renee Cho, *Recycling in the U.S. Is Broken. How Do We Fix It?,* Columbia Climate Sch. (Mar. 13, 2020), www.news.climate.columbia.edu/2020/03/13/fix-recycling-america/.

31 *Id*.

32 *See* Corkery, *supra* note 29.

33 *Id*.

34 *Id*.

35 *See* Liebman, *supra* note 3.

36 *See* Environmental Protection Agency, *EPA Releases Bold National Strategy to Transform Recycling in America,* Envtl. Prot. Agency (Nov. 15, 2021), www.epa.gov/newsreleases/epa-releases-bold-national-strategy-transform-recycling-america.

37 *See* Cho, *supra* note 30.

38 *Id.*

39 *See Tiffany Duong, Recycling in the U.S. Is Failing, But These 7 Cities Are Doing Things Right,* EcoWatch (Apr. 21, 2021), www.ecowatch.com/best-cities-for-recycling-2652630134.html.

40 *See* Allan, *supra* note 4, at 203.

41 *See id.* at 204.

42 *See* Rumana Hossain, Md Tasbirul Islam, Anirban Ghose, Veena Sahajwalla, *Full circle: Challenges and prospects for plastic waste management in Australia to achieve circular economy*, 368 J. Cleaner Prod. No. 133127 (2022).

43 *See* Cho, *supra* note 30.

44 *See* Environmental Protection Agency, *supra* note 36.

45 *Id.*

46 *Id.*

47 Environmental Protection Agency, What is a Circular Economy?, Environmental Protection Agency, https://www.epa.gov/circulareconomy/what-circular-economy (last visited May 4, 2023).

will allocate $350 million to assist the EPA in reaching this goal.[48] However, many recycling groups have pointed out that this bill will likely not have much impact on a local level for years.[49] Ultimately, a national recycling strategy is crucial to increase proper recycling rates. There is a need for more policy initiatives with enforcement measures due to the fragmented nature of recycling infrastructure in the U.S. Research has even shown that the U.S. might require a comprehensive regulatory solution with enforcement measures similar to the E.U. Circular Economy Package to turn the tide on plastic pollution.[50] Multiple policies and legislative solutions have been proposed to address the recycling crisis. Extended producer responsibility and recycled content minimums are the most encouraging of these proposals.

Extended producer responsibility (EPR) is a policy approach in which producers are "expected to internalize the disposal costs of waste generated by their packaging."[51] A company would do this by paying for a facility to process the post-consumer products or physically overseeing its end-of-life process.[52] For example, California's Food and Agricultural Code Section 12841.4 requires first sellers using specific pesticide containers to participate in a recycling program and annually submit certifying documents to the director of the Department of Pesticide Regulation.[53] EPR creates a strong financial incentive for producers to redesign products using less material and to improve recyclability. Currently, the federal government does not materially incentivize manufacturers, retailers, consumers, and waste management companies to account for recycling needs. EPR laws not only financially incentivize manufacturers to be less wasteful but also provide funding for creating infrastructure like sorting facilities. Additionally, EPR laws mandate equal access to the same recycling options in all urban and rural communities. Extended producer responsibility laws would subsidize the creation of recycling infrastructure. After analyzing seven countries varying in size, location, and specific EPR policy approach, the Recycling Partnership found that the recycling rates for target materials after EPR implementation across five of the jurisdictions surged to over seventy-five percent and rose to over sixty percent in the remaining two.[54]

Interest in EPR policy has surged in recent years. Currently, four U.S. states—California, Maine, Oregon, and Colorado—have implemented extended producer responsibility laws.[55] In 2021, Australia also released a national plan to deal with recyclables where they expressed support for "industry-led product stewardship schemes."[56] In 2021, New York State Senator Todd Kaminsky attempted to introduce Senate Bill S1185 which utilizes the EPR method.[57] Sen. Kaminsky stated that the bill would "create green jobs and…perhaps more importantly for the taxpayers, this is going to help fund a lot of their municipalities' costs in recovering this material."[58] Kaminsky also said that similar programs in Europe and Canada have not shown increases in consumer costs. Although the S1185 bill did not pass, New York lawmakers are currently trying to pass multiple EPR bills, as are legislators in many other states.[59]

States that have enacted these EPR laws have only done so recently, following the surging interest in EPR policies, so it is difficult to gauge their success thus far. However, many countries with developed economies have found long-term success in large-scale EPR programming. For example, the United Kingdom implemented its Producer Responsibility Obligations (Packaging Waste) Regulations in 1997 as well as the Packaging (Essential Requirements) Regulations in 1998. The overall recovery rate for U.K. packaging waste increased by sixty-eight percent and material-specific recycling rates increased by forty-five percent from 1998 to 2004.[60]

Policies implementing recycled content minimums (RCMs) also seem highly promising in addressing the solid waste crisis in the U.S. Nilda Mesa, director of the Urban Sustainability and Equity Planning Program at the Earth Institute's Center for Sustainable Urban Development stated that "what has worked is where institutions and cities require a percentage of recycled content for their purchasing, for example, requiring 100 percent recycled paper, or recycled materials in building materials."[61] California Governor Gavin Newsom recently signed into law Assembly Bill 793, which requires a post-consumer plastic recycled content standard of fifteen percent which will increase to fifty percent in 2030.[62] This law will help improve the market for recycled plastic by increasing the demand for the material, which will then increase the scrap value of the material for recycling centers. Subsequently, these RCMs will reduce the emissions associated with material production, resource extraction, and

48 *See* Megan Quinn, *Biden signs infrastructure bill with more than $350M for recycling, but local effects still years away,* WasteDive (Nov. 11, 2021), www.wastedive.com/news/biden-infrastructure-investment-jobs-act-recycling/609882/.

49 *See* Megan Quinn, *EPA's 2030 recycling strategy turns focus to circular economy and environmental justice,* WasteDive (Nov. 15, 2021), https://www.wastedive.com/news/epa-national-recycling-strategy-circular-economy-takeaways/610076/.

50 *See* Vedantam, Suresh, Ajmal & Shelly, *supra* note 13.

51 *See* Eugénie Joltreau*, Extended Producer Responsibility, Packaging Waste Reduction and Eco-design,* 83 Envtl. and Res. Econ. 527, 529 (2022).

52 *See* Carola Hanisch*, Is Extended Producer Responsibility Effective*?*,* 34 Envtl. Sci. & Tech. 170, 171 (2000).

53 CA Food & Agri Code § 12841.4 (2021).

54 *See* The Recycling P'ship, Increasing Recycling Rates with EPR Policy (2023).

55 *See* Dan Felton, Four States Enact Extended Producer Responsibility Laws for Packaging*,* Packaging World (Sept. 21, 2022), https://www.packworld.com/news/sustainability/article/22419036/four-states-enact-packaging-epr-laws.

56 *See* The Australian Government, National Plastics Plan 2021, 6 (2021).

57 N.Y. S.B. S1185 (2021).

58 *See* Caroline Magavern, *Long Island Lawmakers Propose* '*Polluter Pays*' *Model For Recycling,* WSHU (Jan. 11, 2021), www.wshu.org/news/2021-01-11/long-island-lawmakers-propose-polluter-pays-model-for-recycling#stream/0.

59 N.Y. S. 1064 (2023); N.Y. S. 4246 (2023).

60 *See* Yamini Gupt & Samraj Sahay*, Review of extended producer responsibility: A case study approach,* 33 Waste Mgmt, & Res. 595, 598 (2015).

61 Cho, *supra* note 30.

62 CA A.B. 793, §§ 14549.3, 14547, 18017 (2020).

energy consumption.[63]

Critics of EPR laws in the United States have pointed out that producers will likely increase consumer prices after facing increased production prices. A study done in Oregon, however, found that "consumer prices increased by less than a full cent, at $0.0056 per item."[64] In 2021, companies ranging across the packaging value chain, such as Coca-Cola, Nestlé, and PepsiCo, even signed onto a shared statement indicating their support of EPR policies.[65] Many large companies recognize the reputational risk they face in the wake of the growing waste crisis in a world where consumers are becoming increasingly concerned about climate change.

Recycled content minimums increase demand for recycled packaging by requiring producers to use a certain amount of post-consumer recycled content in the packaging of their products.[66] While doing so, RCM legislation directly reduces demand for oil extraction and energy consumption that goes into creating virgin plastic materials. RCM legislation will drive companies to increase their post-recycled content in packaging materials by incrementally increasing their stipulated recycled content levels, thus incentivizing technological improvements.[67] Various states have already implemented RCM laws, like California's Assembly Bill 478, which requires thermoform plastic containers to contain more than thirty percent recycled plastic by 2030.[68] Other recycled content minimum laws concern different types of plastic products, like bags, bottles, and wrappers. The versatility of these laws allows states to adapt recycled content minimums according to their own needs. Many companies have also voluntarily implemented their own post-consumer plastic content commitments.[69] Introducing mandatory RCM legislation will ensure that all companies will be able to follow suit and minimize an individual corporation's cost of using post-consumer recycled content.

Currently, most products that use post-consumer recycled materials are considered durable goods because of cost.[70] For recycled content minimums to be as successful as possible, they must be accompanied by other legislation to increase recycling facility capacity. To successfully decrease the demand for virgin plastic materials and increase the demand for recycled plastic materials, the U.S. government must increase facility capacity and reduce contaminant issues.

Director Mesa, previously quoted, stated that implementing policies, like EPR and RCMs, that address the circular economy will allow for "growth of markets for reused and recycled materials, as well as facilities that can process them."[71] To reduce misconceptions regarding recyclable contamination, the federal government must promote widespread education about recyclables and increase funding for waste infrastructure.

CONCLUSION

Operation National Sword revealed the lack of comprehensive domestic recycling systems within the U.S. and other Western nations. Governments, politicians, and economists have proposed various solutions to deal with the solid waste crisis after China and other previous importers in the global waste trade enforced stricter regulations for accepted materials. Implementing these solutions has been particularly difficult for the United States due to the fragmented nature of its waste systems. Because this issue has been pushed into the limelight recently, local and national government officials have prioritized finding policy solutions. This newfound attention to recycling issues has increased governmental funding sources for recycling infrastructure. Due to this increased focus, hope for the United States solid waste system is still strong. This hope will ideally lead to investment in national recycling infrastructure that creates green jobs, helps combat the climate crisis, and strengthens local economies.

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63 *See* Ocean Conservancy, Recommendations for Recycled Content, 39 (Kacky Andrews, 2022).
64 *See* Flavia M. Scotto d'Antuono, *Policy Strategies to Solve the U.S. Recycling Crisis,* The. Cupola 1, 15 (2022).
65 *Id*.
66 *Id*. at 16
67 *See* Andrews, *supra* note 63, at 7.
68 CA A.B. 478, §§ 14506.7, 14549.5, 42375 (2021).
69 *See* Andrews, *supra* note 63, at 6.
70 *Id*.
71 *See* Cho, *supra* note 30.

THE NOT-SO-"IMPARTIAL" JURY:

RACIAL DISCRIMINATION IN U.S. JURY SELECTION

INTRODUCTION

In the Declaration of Independence of 1776, Thomas Jefferson cites the importance of the jury system among the litany of grievances against King George III and the English government: "For depriving us, in many cases, of the benefits of Trial by Jury."[1] Fifty-six signatures later, America's Founding Fathers made trial by jury a right for which they famously pledged "[their] lives, [their] fortunes, and [their] sacred honor."[2] The right to trial by jury is protected by the federal Constitution as well as the constitutions of every state. The Sixth Amendment asserts that "in all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[3] References to the jury in America's founding documents suggest that the Founders viewed juries as a critical safeguard against the power of government.

The faculty of the jury is anything but understated; not only does the jury put a human face on the law, but it also reinforces our belief that everyday people can make the right decision and that America has an open, democratic government. The law may be created by a distant legislature, but the jury applies it locally. As the Supreme Court has noted, "Community participation in the administration of the criminal law … is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[4] Given that jury composition affects trial outcomes, this paper concerns whether modern jury selection methods compromise or maximize justice. How has the jury selection process developed over time? How do legal actors control jury composition? Are those methods fair and equitable? Most importantly, what is an "impartial jury" and how do we modernize or reform the jury to better serve its intended purpose? This paper contends that lawyers, judges, legal academics, and court observers must both reconsider the systems that keep citizens of color out of the courtroom and develop a more nuanced understanding of what it means to be impartial.

I. HISTORY OF THE AMERICAN CRIMINAL JURY

A jury made up of ordinary citizens is intended to act as a stronghold of liberty for individuals accused of a crime by reining in overzealous or corrupt prosecutors and exposing judges who fail to protect the rights of the accused.[5] The jury system originated in the Anglo-Saxon courts and was formed so that wealthy landowners could advise the King in inventorying riches.[6] The jury existed as a body that fixed law rather than deciding its appropriate application; the earliest English juries were "self-informing," meaning they came to trial with knowledge of the matter in dispute and their body was hugely homogenous, consisting only of white, property-owning men.[7] Over the next few centuries, however, jury processes began increasingly relying on testimonial evidence; the juryman became the auditor rather than the producer of proof.[8] The role of the jury transitioned from a panel that resolved property disputes between private parties to a body that protected the rights of defendants against the might of the state.[9] By the time early English settlers transported the jury system to America, it had evolved to become a largely independent and democratic arm of government (new features included a body size of twelve, a body make-up of mostly "middle-rank" men, and a requirement of unanimity).[10] Per the Magna Carta, a jury of peers was a panel of neighbors who were expected to be empathetic to the defendant[11]; by colonial times, a "peer" had become somebody who knew nothing about the defendant's life.[12] Today, a jury of peers is interpreted to be a panel encompassing a cross-section of the community in which the criminal case is being tried.[13]

II. NEGOTIATING THE IMPARTIAL JUROR

Unlike judges, who are typically appointed by government officials or elected after expensive political campaigns, jurors are community members with diverse experiences and backgrounds who better reflect the "conscience of the community."[14] Scholar W. Lance Bennett asserts that jurors reconstruct legal facts as stories, "whose plausibility depends on understandings drawn from experience."[15] Jurors who come from different social contexts may disagree about the meaning

1 Declaration of Independence, para. 20 (U.S. 1776).
2 *Id*.
3 U.S. Const. amend. VI § 1.
4 Taylor v. Louisiana, 419 U.S. 522 (1975).
5 *See, e.g.*, Stephan Landsman & James F. Holderman, *The Evolution of the Jury Trial in America*, 37 Litigation 32 (2010).
6 *See id.*
7 3 William M. Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, at 349–67, 370–81, 383–85 (1768).
8 *See* Landsman & Holderman, *supra* note 5.
9 *See id.*
10 *See id*.
11 Magna Carta [manuscript] § 29.
12 *See* Landsman & Holderman, *supra* note 5.
13 *See, e.g.*, 28 U.S.C. § 1861.
14 Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
15 W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom – Justice and Judgment in American Culture*, 81 Mich. L. Rev. 1009 (1981).

and plausibility of the same stories.[16] In other words, there is not just one reasonable view of the facts. By this logic, the impartial jury is a diverse jury: if jurors perceive the key facts and legal issues of a case differently, then jurors must be drawn from a variety of social contexts. Specifically, if life experience is the most important factor in a juror's evaluation of evidence,[17] and race is a significant and distinctive aspect of that experience,[18] then jurors must be drawn from a variety of racial and ethnic contexts. According to progressive constitutionalism, one must deduce, then, that when the Sixth Amendment asks America to pull together an impartial jury, what it really demands is a racially diverse jury. Perhaps diversity is not what the framers of the Constitution had envisioned, but it is what their demands require in the context of America today – and it is exactly this failure to create diverse juries that lies at the heart of American criminal injustice.

III. METHODS OF IMPROPER DISCRIMINATION IN JURY SELECTION

The unconstitutional jury box is executed at four levels: when the court system creates lists of potential jurors, when potential jurors are notified to come to court, when judges decide which potential jurors are qualified to serve, and when prosecutors use peremptory strikes to remove potential jurors.[19] The consequences associated with an unrepresentative jury box are grave: a comprehensive report published by the Equal Justice Initiative titled *Race and the Jury: Illegal Discrimination in Jury Selection* finds that, compared to representative juries, all-white juries spend less time deliberating, consider fewer perspectives, and make more mistakes.[20] The Equal Justice Initiative also finds all-white juries especially counterproductive in capital trials, citing studies that show that less representative juries convict and sentence Black defendants to death at significantly higher rates than they do white defendants.[21] White jurors are also less likely to consider critical mitigating evidence supporting a life sentence—rather than the death penalty—for Black defendants.[22] In contrast, racially representative juries engage in a more deliberative fact-finding process, are more likely to point out missing evidence, and are more willing to discuss issues that are often overlooked by all-white juries, such as racial profiling.[23] Likewise, representative juries are better able to assess the credibility of witness testimony, evaluate the accuracy of cross-racial identifications, and avoid the presumption of guilt.[24] In other words, representative juries are indispensable to reliable, fair, and accurate trials. The absence of racial diversity on juries not only inflicts injury on people of color who are excluded but leads to outcomes that are less reliable, undermining the integrity of the entire criminal justice system.

A. IMPROPER DISCRIMINATION VIA THE JURY POOLING PROCESS

The Constitution requires choosing jurors from a "fair cross-section" of the community.[25] As such, the first step in the jury selection process is the creation of a random pool of potential jurors that reflects the community's demographics. These pools are not representative, however.[26] To pull names for the jury pool, most courts rely heavily on voter registration databases, meaning they aren't necessarily pooling a group of citizens—rather, they are pooling a group of registered voters.[27] The catch here is that socioeconomic and geographic obstacles to voter registration, such as voter ID laws, impede many racial and ethnic groups from making it onto these source lists.[28] In effect, the potential of the jury for fair cross-sectionality is skewed from the start. Following initial pooling, the court will mail jury summonses to a random group of citizens directing them to appear at voir dire.[29] However, because many courts fail to regularly update mailing address records of low-income people, who move frequently, an average of twelve percent of national jury summons are returned as "undeliverable."[30] Black Americans and Americans of color, who are disproportionately burdened by poverty, are more likely, then, than white prospective jurors to be excluded at this level.[31] In other words, even Black Americans who overcome systemic hurdles to voter registration and make it onto the source lists for jury selection are

16 *See id*.
17 *See id.*
18 *See, e.g.,* Pew Research Center, *Race in America 2019*, at 39 ("In addition to their different assessments of the current state of race relations and racial inequality in the United States, Americans across racial and ethnic groups also see race and ethnicity playing out differently in their personal lives"), https://www.pewresearch.org/social-trends/2019/04/09/the-role-of-race-and-ethnicity-in-americans-personal-lives/.
19 *See, e.g.*, Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), https://eji.org/report/race-and-the-jury/.
20 *Id.*
21 *Id*.
22 *Id*.
23 *Id*.
24 *Id*.
25 U.S. Const. amend. VI § 1.
26 *See, e.g., Race and the Jury*, *supra* note 19.
27 *See* Administrative Office of U.S. Courts, *The Federal Court System in the United States* 30 (4th ed. 2016).
28 *See, e.g.*, Julie A. Cascino, *Following Oregon's Trail: Implementing Automatic Voter Registration to Provide for Improved Jury Representation in the United States*, 59 Wm. & Mary L. Rev. 2575, 2578-79 (2018) ("Due to the low registration rates of these groups, voter rolls often do not accurately represent the proportion of eligible minority, low-income, or young voters in a specific community. Accordingly, jury pools are less representative of that community as well."); Camille Fenton, *A Jury of Someone Else's Peers: The Severe Underrepresentation of Native Americans from the Western Division of South Dakota's Jury-Selection Process*, 24 Texas J. Civ. Lib. & Civ. Rights 119, 139 (2018).
29 *See The Federal Court System in the United States*, *supra* note 27.
30 Gregory E. Mize, Paula L. Hannaford-Agor & Nicole L. Waters, *State-of-the-States Survey of Jury Improvement Efforts* (2007).
31 *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L. J. 103 (2019); Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 Mich. J. L. Ref. 1, 10-11 (2018) (studies of jury selection procedures in federal courts in Massachusetts, Illinois, Florida, and California revealed "mounting loss of minority jurors…due primarily to the disproportionate impact [of] undeliverable qualification questionnaires and non-response to jury forms"); *see also* Israel v. United States, 109 A.3d 594, 604 (D.C. 2012) ("The expert reports that were before the court indicated that African Americans were overrepresented among those whose summonses were returned to the Juror Office as undeliverable.").

excluded at the jury summons level due to the courts' failure to account for housing insecurity. In practice, the constitutional right to a representative jury pool is close to meaningless.

B. IMPROPER DISCRIMINATION VIA THE DEFINITION OF THE "LEGALLY-QUALIFIED" JUROR

The courts' failure to correct for systemic inequalities in its summons process carries over to the summoned pool's initial day in court. When registered voters with a permanent address arrive for jury duty, they are first asked whether they meet the 'legal qualifications' for jury service.[32] To legally qualify as a juror, an individual must meet several criteria. These include a) be a U.S. citizen, b) be at least eighteen years of age, c) having resided primarily in the judicial district for one year, d) be adequately proficient in English to satisfactorily complete the juror qualification form, e) never have been convicted of a felony (unless civil rights have been legally restored), and f) not be requesting an excusal from service for financial hardship.[33]

Of all the criteria for "legally-qualified" status, it is perhaps the final—that a juror must not be requesting an excusal from service for alleged financial insecurity—that is the most problematic. In most American jurisdictions, employers are not required to compensate employees for jury duty.[34] This means that prospective jurors who depend on daily income and cannot afford to lose wages, salary, or commission due to jury service are excluded from consideration.[35] Any juror who fails to meet each of the above criteria is eliminated from the pool by the judge via a challenge for cause.[36] A study involving 1,300 felony trials and almost 30,000 prospective jurors throughout North Carolina found that Black Americans were thirty percent more likely to be removed through challenges for cause than white Americans.[37] In Mississippi, eighty percent of challenges for cause were used to remove Black prospective jurors, even though only thirty-four percent of prospective jurors in the county were Black.[38] In action, these exemptions, which are designed to protect prospective jurors from undue financial hardship,[39] are at the same time denying people with low incomes the opportunity to serve on juries—and, by proxy, denying defendants the right to an impartial jury.

C. IMPROPER DISCRIMINATION VIA THE DEFINITION OF THE "IDEAL" JUROR

Jurors who receive summons and meet the demands of the "legally-qualified" juror are then subject to a preliminary examination by counsel known as voir dire.[40] To narrow the group of legally qualified jurors down to the bench that ultimately hears the case, attorneys wield peremptory challenges. A peremptory challenge or strike allows each party in the trial to excuse a specific number of jurors without the court's approval.[41] Unlike challenges for cause, peremptory strikes can be used to remove qualified jurors for "any reason at all."[42] In most states, peremptory challenges are defined by statute. The general egalitarian goal of the peremptory strike is to allow for the removal of a juror based on a gut assumption that a juror will not behave favorably to the attorney's case.[43] However, prosecutors routinely wield peremptory challenges to remove Black people from the jury, feeding into the systemic exclusion of Black Americans from civil service.[44] "Gut reactions" are often the product of implicit biases that correlate with racial stereotypes; "gut reactions" form all-white juries.[45] A study of nearly 700 cases by the California Courts of Appeal from 2006-2018 concerning objections to prosecutors' peremptory challenges found that district attorneys struck Black jurors in seventy-two percent of cases, Latinx jurors in twenty-eight percent of cases, and Asian-American jurors in >3.5 percent of cases. White jurors were struck in just 0.5 percent of cases.[46]

D. IMPROPER DISCRIMINATION VIA BATSON CHALLENGES; BATSON V. KENTUCKY (476 U.S. 79)

In 1986, the United States Supreme Court ruled in *Batson v. Kentucky*[47] that a prosecutor's use of a peremptory challenge in a criminal case — the dismissal of jurors without stating a valid cause for doing so — may not be used to exclude jurors based solely on their race. The case rose to the Court's discretion after James Kirkland Batson, a Black man accused of burglary and receipt of

32 *The Federal Court System in the United States*, *supra* note 27.

33 28 U.S.C. § 1865.

34 *See* Anna Offit, *Benevolent Exclusion*, 96 Wash. L. Rev. 653 (2021).

35 *See* Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 Colum. J. L. & Soc. Probs. 1, 2 (2012) ("For many, this inadequate compensation is simply inconvenient, but for those who are self-employed, hold multiple part-time jobs, or are dependent on tips as part of their compensation, the potential loss of income is critical and they do whatever they can to avoid [jury duty].")

36 28 U.S.C. § 1865.

37 *See* Ronald F. Wright, Kami Chavis & Gregory S. Parks., *The Jury Sunshine Project: Jury Selection Data As A Political Issue*, 2018 U. Ill. L. Rev. 1407; *see also McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1259 (11th Cir. 2009) (finding pattern of discrimination when "[t]he State used challenges for cause to remove [eight] African-American jurors and [sixteen] of [twenty-two] peremptory challenges to remove all of the remaining African-American jurors," leaving an all-white jury in a county that was fifty-five percent African American).

38 Frampton, "For Cause," 796-98, 796 n.44; Will Craft, "Mississippi D.A. Doug Evans Has Long History of Striking Black People from Juries," *APM Reports*, June 12, 2018, https://features.apmreports.org/in-the-dark/mississippi-da-doug-evans-striking-black-people-from-juries/.

39 28 U.S.C § 1861.

40 *Id.*

41 *Id.*

42 Batson v. Kentucky, 476 U.S. 79 (1986).

43 *See* Swain v. Alabama, 380 U.S. 202 (1965).

44 *See, e.g.,* Elisabeth Semel, *et al., Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

45 *See* Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871, 878 (2015); *see also* John T. Jost, *et al*., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psychol. 881, 889-90 (2004).

46 *Id.*

47 Batson v. Kentucky 476 U.S. 79 (1986).

stolen goods, waged that the Kentucky state prosecutor used his peremptory challenges to explicitly remove all four African Americans from the jury pool. Batson challenged the removal of these jurors as violating his Sixth Amendment right to an impartial jury, as well as the Equal Protection Clause of the Fourteenth Amendment. In a 7-2 decision, the Court held that while a defendant is not entitled to a jury completely or partially composed of people of his own race, neither is the state permitted to use its peremptory challenges to automatically exclude potential members of the jury because of their race: "The Equal Protection Clause guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors."[48]

The *Batson* challenge refers to the act of objecting to the validity of a peremptory challenge on the grounds that the other party used it to exclude a potential juror on the basis of race. Under *Batson*, discriminatory peremptory challenges are evaluated using a three-part test. First, the defense must show that the opposing attorney used the challenge for a discriminatory reason;[49] second, the prosecutor must provide a race or gender-neutral reason for the challenge;[50] third, the defense has the burden of proving intentional discrimination.[51] The Court reasoned that the harm from discriminatory jury selection extended beyond that inflicted upon the defendant by excluding jurors to the entire targeted community and undermining public confidence in the fairness of the justice system.[52] In theory, the *Batson* challenge ends the systemic exclusion of black Americans from juries. A *Batson* challenge catches bias in action, a diverse jury is seated, the defendant is served justice, and systemic racism in the criminal justice system is repaired. In practice, the law has failed colossally.

Batson challenges are rarely successful. In the last thirty years, the California Supreme Court has reviewed 142 cases involving *Batson* claims and found a *Batson* violation only three times (2.1 percent of cases).[53] Attorneys rely on a lengthy stock list of court-approved "race-neutral" reasons to explain their challenges.[54] So long as a lawyer can assert any facially neutral reason for the strike, the *Batson* framework — and thus the judges who employ it — tend to allow the peremptory. Secondly, *Batson*'s "intentional discrimination" framework does not account for implicit biases. In the context of peremptory challenges, a party may not intend to discriminate against a juror based on the juror's race, but it may nonetheless act on biases without realizing it. This means that Black people are removed from juries for "race-neutral" reasons that are, in reality, the products of institutional racism. For example, an empirical analysis of California's appellate court shows that prosecutors routinely and successfully cite distrust of law enforcement to justify a peremptory strike against a juror.[55] District attorney training manuals on peremptory challenges encourage discriminatory strikes in at least three additional respects by defining the ideal juror as somebody who:

1. Is "attached to the community, employed, educated, stable, [and] professional[]."[56]
2. Does not harbor animosity towards the criminal legal system due to negative personal or family experiences with the law.[57]
3. Does not cause the attorneys negative "gut reactions" (gut reactions are triggered by jurors' facial expressions, body language, clothing, and hairstyle)[58]

Under *Batson v. Kentucky*, peremptories justified by implying a violation of one of the four aforementioned characteristics routinely escape judicial inquiry.[59]

Despite *Batson*'s inadequacy, the insufficient framework has largely remained the law across the country. But *Batson*'s failure to remove anything but intentional discrimination from the legal system was not unforeseen: in concurrence with the Court's 1986 ruling, Justice Thurgood Marshall warned that *Batson*'s three-step procedure would ultimately fail to end racially discriminatory peremptory strikes. Though he described the decision as a "historic step," he predicted that peremptory challenges would continue to "inject" racial discrimination into jury selection.[60] Thirty-four years later, Justice Marshall's prophecy proves to have materialized. Courts that fail to create jury lists that fairly represent their communities face no repercussions, and prosecutors who unlawfully strike Black people from juries are not fined, sanctioned, or held accountable.[61] This impunity has enabled illegal discrimination in the jury selection process to survive unchecked since the Constitution's signing, which has likely contributed to higher incarceration rates for Black Americans.[62]

In their failure to source representative

48 *Id.* at 86.
49 *Id.* at 96
50 *Id.* at 97
51 *Id.* at 98
52 *See id.*
53 *See* Semel, *supra* note 44.
54 *See, e.g.*, Santa Clara Cty. Dist. Attorney's Office, *The Inquisitive Prosecutor's Guide* 4-5, 73-79 (2016) [hereinafter *Inquisitive Prosecutor's Guide*]. ("Although the guide is a Santa Clara County publication, the manual is likely used by prosecutors statewide as it is available on a password-protected portal on the CDAA website").
55 *See* Semel, *supra* note 44.
56 *See Inquisitive Prosecutor's Guide*, *supra* note 54, at 45.
57 *See id*.
58 *See id* at 15.
59 *See* Batson v. Kentucky 476 U.S. 79, 96 (1986); People v. Winbush, 2 Cal. 5th 402, 436-37, 387 P.3d 1187 (2017); *see supra,* note 46 (discussing the California Supreme Court's well-established precedent that a juror's negative experience with or negative attitude toward law enforcement as well as a juror's skepticism about the fairness of the criminal legal system are race-neutral reasons for a peremptory challenge).
60 *Batson*, 476 U.S. at 102-03.
61 *See, e.g., Race and the Jury*, *supra* note 19.
62 *Id.*

juries and their negligence in the discriminatory wielding of peremptory strikes, the courts are denying Black Americans the chance to exercise their citizenship by effectively implying that systemic racial inequity in the criminal legal system makes them ineligible for service. Given America's history and practice of systemic discrimination against Black Americans in every sector of the legal system,[63] it is nearly impossible to hold its definition of the "ideal juror" and not seat an all-white, if not all-white-presenting, jury. The surface-level reader would hereby suggest that the courts eliminate peremptory challenges. In reality, the solution is more nuanced. Race impacts people's personal experiences, which influences how they interpret legal stories, which impacts how they rule.[64] In trial outcomes, race matters; if the courts disband peremptory challenges, they are signaling that it does not. The goal of the courts, then, should be to devise a system of jury selection that takes race into account—not by using knowledge about race to form non-diverse juries through peremptory challenges, but by using it to give the accused a fair trial.

IV. REFORMS

The task of creating a representative jury requires ground-level reform that expands the definition of the "legally-qualified" juror to include Americans of color. State and federal courts must adopt policies and procedures to ensure that people of color are fully represented in jury selection pools. Counties should rely on multiple source lists that accurately represent the proportion of Black citizens and citizens of color in the population. That implies drawing pools not just from voter registration records or state ID card databases, but also from unemployment insurance records, lists of income tax filers, and child support payor and payee record databases.[65] In August of 2022, the New Jersey Supreme Court adopted similar changes aimed at "enhancing fairness" in the jury selection process, making it easier for Americans of color to legally qualify as jurors.[66] New Jersey courts will now rely on state labor records, rather than voter registration information, to generate jury lists.[67] Additionally, judges and court staff are mandated to participate in implicit bias training and the state's juror qualification questionnaires are to include questions about potential jurors' gender and ethnicity.[68] Along with the changes, the New Jersey Supreme Court has recommended that lawmakers pass legislation to a) absolve the prohibition to serve on juries for people convicted of certain crimes and b) increase the overall compensation jurors receive for time in court.[69]

A. RECONCEPTUALIZING THE "LEGALLY-QUALIFIED" JUROR

1. The more daunting, but equally necessary, task for the courts is to draft a new definition of the "ideal" juror. This reform comes not from broadening participation and representation in the jury system, but from eliminating racial discrimination in jury selection. In practice, that means acknowledging the influence of race in jury composition by explicitly condemning the improper usage of peremptory strikes. In 2018, Washington's Supreme Court adopted General Rule 37, a list of reasons for a peremptory strike that judges must treat as invalid because they have been "associated with improper discrimination in jury selection."[70] These new invalid reasons include:

    1. Having prior contact with law enforcement officers;
    2. Expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
    3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime;
    4. Living in a high-crime neighborhood;
    5. Having a child outside of marriage;
    6. Receiving state benefits

    Additionally, the court shall consider if certain conduct-based reasons for peremptory challenges have also historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection. "Such reasons include allegations that a prospective juror: was sleeping, inattentive, staring, or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers."[71] By passing legislation that deems *Batson* responses such as those specified by Washington's General Rule 37 as definitively not race-neutral, the courts signal an emerging understanding that fair and impartial administration of justice requires deep consideration of race in jury selection.

63 *See* Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (Vera Institute of Justice 2018).

64 *See* Bennett & Feldman, supra note 15, at 1009–1015.

65 *See Letter to Clerk, Southern District of California Regarding Proposed Changes to Jury Selection Plan*, Dec. 30, 2020 ("The use of supplemental source lists, including driver's license and state ID lists, could improve the diversity of the jury pool."), https://voiceofsandiego.org/wp-content/uploads/2021/01/FINAL-Orgs-Letter-for-Delivery-002.pdf; Judge William Caprathe (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, ABA Judges Journal, May 1, 2016, https://www.americanbar.org/groups/judicial/publications/judges_journal/2016/spring/assessing_and_achieving_jury_pool_representativeness/ ("If the master jury list does not meet this threshold, supplementing with additional juror source lists such as welfare, unemployment, or state income tax rolls should be encouraged."); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims must be Expanded*, 59 Drake. L. Rev. 762, 780 (2011) (noting that the "vast majority of state courts and a sizeable number of federal courts" have adopted the use of multiple lists: "The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broadbased lists."); *see also* Abramson, *supra* note 31, at 36-37 (noting studies in Oklahoma and Oregon indicating that supplementation of lists increases diversity of jury pool).

66 *See* Tennyson Donyéa, "N.J. courts to make changes to jury selection process; advocates push lawmakers to do more," *WHYY,* Aug. 21, 2022, https://whyy.org/articles/nj-changes-to-jury-selection-process/; *see also* New Jersey Courts, *Jury Reforms and Attorney-Conducted Voir Dire Pilot Program* (2022),https://www.njcourts.gov/attorneys/jury-reforms.

67 *Id.*

68 *Id.*

69 *Id.*

70 Wash. Gen. R. 37 (2018).

71 *Id.*

B. RECONCEPTUALIZING THE "IDEAL JUROR"

In her 1998 analysis, Georgetown University Law Center professor Abbe Smith examines the ethics of race-conscious jury selection in the context of criminal defense. Smith cites research indicating that jurors of the defendant's same race are more likely to assume innocence than jurors of another race (that defendants in criminal cases are disproportionately poor and of minority demographics is an important consideration here).[72] Smith asserts that criminal lawyers who seek same-race jurors are doing so not because they want jurors who are partial, but because they want jurors who are impartial and with whom counsel can be assured unconscious racism will not play a significant role in jury deliberations.[73] If race and gender significantly influence a prospective juror's attitudes and life experience, then a defense lawyer who is appropriately concerned about his or her client must take them into account when selecting a jury.[74] Similarly, legal ethicist Peter A. Joy asserts that counsel failing to question potential jurors about bias may result in stacking the jury against the accused. Referencing an essay by Patrick Brayer titled *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson,* Joy insists that if "voir dire" really does mean "to speak the truth," as its Anglo-Norman roots indicate, then speaking with the potential jury about race and current events that potential jurors may see implicated in the case is necessary for an honest trial.[75] Legal actors must harness our evolving understanding of race in legal decisions to negate the unfair advantage—to even the scales, not to tilt them.

V. CONCLUSION

The American courts' reconception of the "ideal" juror may not be so far off. Legal scholar Sonali Chakravarti breaks down the jury that convicted Derek Chauvin in the spring of 2021, citing its selection process and composition as a significant departure from the norm and a potential step toward reform.[76] Where historically judges have conveyed to Black jurors that their past experiences with the law make them ineligible for service, attorneys and judges in Chauvin's trial not only asked questions about racial bias in the legal system and Black Lives Matter, but also refrained from treating critiques of the legal system as something that would inherently bias a juror, inverting the old paradigm which saw an absence of such critiques as a herald of neutrality.[77] The court's recognition that jurors can hold views about the reality of systemic racism while still being able to perform their role as impartial jurors is a monumental shift toward a more inclusive, representative, and constitutional jury. Despite the jury selection process' history of skewing impartiality and current-day selection practices that perpetuate inequality, Chauvin's trial hints at a future where jury selection methods are used to maximize justice – not to compromise it.

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72 Abbe Smith, *"Nice Work If You Can Get It'": "Ethical" Jury Selection in Criminal Defens*e, 67 Fordham L. Rev. 523 (1998).
73 *See id.*
74 *See id.*
75 Peter A. Joy, *Race Matters in Jury Selection*, 109 Nw. U. L. Rev. Online 180 (2015); Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 Nw. U. L. Rev. Online 163 (2015).
76 *E.g.*, Sonali Chakravarti, *The Chauvin Trial's Jury Wasn't Like Other Juries*, The Atlantic (Apr. 28, 2021). https://www.theatlantic.com/ideas/archive/2021/04/what-was-different-time/618735/.
77 *See id.*; *see also Race and the Jury*, *supra* note 19.

THE INDEPENDENT STATE LEGISLATURE:

THE INDEPENDENT STATE LEGISLATURE: THEORY, RAMIFICATIONS, AND THE CONSERVATIVE COUNTERREVOLUTION

INTRODUCTION

The biggest story in American politics last year was Dobbs v. Jackson Women's Health Organization,[1] the landmark Supreme Court case overturning the precedent established in Roe v. Wade[2] that the Constitution provides a right to receive an abortion. Dobbs was neither an accident nor a surprise—the decision represented the culmination of a decades-long project to mobilize a conservative counter-revolution and strengthen GOP control over American politics via the judiciary.[3] That effort was masterminded by the Federalist Society, a conservative legal organization founded in the early 1980s to combat the perceived ideological dominance of liberals at U.S. law schools.[4]

Since then, the organization has grown into a massive network of students, professors, and legal professionals, wielding tremendous influence over the American legal landscape.[5] The Federalist Society does not officially take positions on unresolved legal questions.[6] However, the group has strong ideological homogeneity[7] and many members frequently play direct and indirect roles in litigation regarding issues such as abortion,[8] gun control,[9] and election law.[10] Overturning Roe was one of the society's unofficial projects for decades;[11] with that goal now achieved, it's fair to wonder where its efforts will turn next.

A number of signs point to election law, specifically the independent state legislature theory (ISL), as a potential focal point for legal advocates within the Federalist Society network. Once obscure, the theory rose to prominence as a result of numerous state-level legal battles around the 2020 election.[12] A case concerning the doctrine (Moore v. Harper[13]) currently sits before the Supreme Court, and its outcome could seriously impact federal elections as soon as 2024.

Section I of this paper introduces Moore v. Harper, providing background for the case itself. Section II provides a more comprehensive discussion of ISL theory, including its textual basis, criticisms, and potential ramifications. Section III discusses ISL as a potential inflection point for the Federalist Society in its efforts to reshape law and politics in America. Ultimately, this paper argues that the ISL theory may become central to the Federalist Society's policy project moving forward. Because of the organization's influence, court observers should pay close attention to the relationship between the Federalist Society and ISL theory.

I. MOORE V. HARPER

In 2019, the Supreme Court decided Rucho v. Common Cause,[14] a landmark case regarding the constitutionality of partisan gerrymandering. In the decision, penned by Chief Justice John Roberts, the Court ruled that cases of partisan gerrymandering pose nonjusticiable "political questions"[15] over which federal courts do not have decision-making jurisdiction. As a result of the decision, gerrymandering litigation began funneling toward state courts, which had not been affected by Rucho.[16]

One such case arose in North Carolina. It concerned the new district maps drawn by the state legislature in the aftermath of the 2020 Census.[17] The suit argued that the new maps were gerrymandered along both racial and partisan lines.[18] Ultimately, the state supreme court agreed, and eventually ordered a special master team of outside experts to redraw the maps along fairer lines in advance of the 2022 elections.[19]

1 Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).
2 Roe v. Wade, 410 U.S. 113 (1973)
3 Amanda Hollis-Brusky, Ideas with Consequences 1 (2015).
4 *Id*.
5 *Id*. at 3.
6 About Us | The Federalist Society, https://fedsoc.org/about-us#FAQ (last visited May 23, 2023).
7 Hollis-Brusky, *supra* note 3, at 10-11.
8 Jonaki Mehta & Courtney Dorning, *One man's outsized role in shaping the Supreme Court and overturning Roe*, NPR (June 30, 2022, 5:00 AM ET),
9 Hollis-Brusky, *supra* note 3, at 33.
10 *Id*. at 62.
11 Mehta & Dorning, *supra* note 8.
12 Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, Brennan Center for Justice (June 6, 2022), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained.
13 Harper v. Hall, 868 S.E.2d 499, 572 (N.C. 2022), *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022).
14 *See generally*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019).
15 *Id*. at 2506-07.
16 The Federalist Society, *Litigation Update: State Legislatures, State Courts, and Federal Elections*, YouTube, (July 29, 2022), https://www.youtube.com/watch?v=89WmL-NGWfts 45:30.
17 Court Case Tracker | Moore v. Harper, Brennan Center for Justice, https://www.brennancenter.org/our-work/court-cases/moore-v-harper, (last visited May 23, 2023).
18 Eliza Sweren-Becker & Ethan Herenstein, *Moore v. Harper, Explained*, Brennan Center for Justice (Aug. 4, 2022), https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained.
19 *Id*.

In February 2022, North Carolina Speaker of the House Timothy Moore petitioned the Supreme Court for an emergency stay upon the newly redrawn maps, on behalf of the entire legislature.[20] Although the Supreme Court declined to intervene so close to the primaries in May, they later granted certiorari and agreed to hear the case (now known as Moore v. Harper).[21] Oral arguments took place this past December,[22] and the Court is expected to deliver a decision in the coming months.

II: THE INDEPENDENT STATE LEGISLATURE DOCTRINE (ISL)

a. What is ISL?

In Moore v. Harper, the legislature structured its case around the independent state legislature theory. ISL is a long-dormant legal theory that relies upon an aggressive interpretation of the Elections Clause in Article I of the Constitution. The text of the clause itself reads as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations..."[23]

Additional textual support for ISL is drawn from the Electors Clause in Article II:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"[24]

Supporters of ISL posit that these sections of the text grant complete power over state-level election law to the legislature, and the legislature alone. They argue that this power cannot be constrained by state courts—which, since Rucho, have been the only avenue of judicial recourse against partisan gerrymandering. Furthermore, under the ISL interpretation, the legislatures are not required to act in accordance with their state constitution when writing election laws. During oral arguments for Moore v. Harper, petitioners' lawyer David Thompson stated: "it is our position" that the state constitution has "no role to play - period" in determining the manner of federal elections.[25]

Critics of ISL theory argue that because state legislatures were created by the state constitutions, they are inherently bound to the legislative process that the state constitution sets forth.[26] In all fifty states, the prescribed lawmaking process intentionally places various checks on the legislature's power (such as ballot initiatives and the gubernatorial veto) and therefore the legislature can never be empowered to set new election laws unilaterally.

Furthermore, critics have pointed out that the ISL interpretation of the Elections Clause is in direct conflict with the expressed opinions of several Founding Fathers. Madison in particular was famously distrustful of state legislatures and asserted during the Constitutional Convention that their power to set election laws should not go unchecked. "The Legislatures of the States ought not to have the uncontrouled right of controlling the times places and manner of elections… It was impossible to foresee all the abuses that might be made of the discretionary power."[27] Madison feared that state lawmakers would "mould their regulations as to favor the candidates they wished to succeed" and preferred to leave safeguards in place against them. This account appears to suggest that ISL is incompatible with originalism; however, proponents have been able to construct originalist arguments in favor of the theory, which could play a major role in determining its future.

The relationship between ISL and originalism is a key factor because it could influence the Court's receptiveness to the doctrine. Accounting for the recent addition of Justice Jackson,[28] a majority of the justices on the Court are now self-proclaimed originalists.[29] Accordingly, as the Court has grown increasingly conservative over the past decade, originalist arguments have become both more frequent and more influential. Virginia Solicitor General Andrew Ferguson emphasized this point while speaking at a Federalist Society conference last October, saying that observers can expect to see "brief after brief of heavily historically inflected arguments, which just reflects the market at the Supreme Court now."[30] Just as Ferguson predicted, originalist arguments are on full display in amicus briefs submitted in support of both sides in Moore v. Harper.[31]

If the Court chooses to address the validity of ISL theory head-on, it's fair to assume that the decision will include at least some discussion of the Framers' intentions regarding the Elections Clause

b. What are the potential ramifications of a ruling in favor

20 Court Case Tracker | Moore v. Harper, *supra* note 16.

21 Adam Liptak, *Supreme Court May Hear '800-Pound Gorilla' of Election Law Cases*, The New York Times (June 6, 2022), https://www.nytimes.com/2022/06/06/us/politics/supreme-court-state-legislatures-elections.html.

22 Nina Totenberg *The Supreme Court considers the 'independent state legislature' theory*, NPR (Dec. 7, 2022, 4:37 PM), https://www.npr.org/2022/12/07/1141372560/the-supreme-court-considers-the-independent-state-legislature-theory.

23 U.S. Const. art. I, § 4, cl. 1

24 U.S. Const. art. II, § 1, cl. 2

25 Totenberg, *supra* note 22.

26 *See, e.g.*, Judd Legum, *The radical legal theory that could upend the 2024 election*, Popular Information (Sept. 12, 2022),https://popular.info/p/the-radical-legal-theory-that-could.

27 James Madison, The Writings of James Madison, Vol. 4, 153 (Gaillard Hunt ed., 1900).

28 Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, The New York Times (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html.

29 Ilan Wurman, *What is originalism? Did it underpin the Supreme Court's ruling on abortion and guns? Debunking the myths*, The Conversation (July 8, 2022, 8:17 AM ET), https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440.

30 The Federalist Society, *2022 Texas Chapters Conference, Panel 3: SCOTUS Review and Preview*, YouTube, (Oct. 21, 2022), https://www.youtube.com/watch?v=8FZai5MpG1Q.

31 *Compare* Brief for Steven Gow Calabresi et al., as Amicus Curiae, Moore v. Harper (in support of respondents), *with* Brief for Honest Elections Project as Amicus Curiae, Moore v. Harper (in support of petitioners), *and* Brief for the Republican Nat'l Redistricting Trust as Amicus Curiae, Moore v. Harper (in support of petitioners).

of ISL?

As the nation awaits a ruling, many have discussed the potential impacts of a decision in favor of the petitioners.

First, a ruling for the legislature would immediately strike down the special master maps and reinstate the ones originally drawn. Additionally, such a decision could set up ISL as a national precedent, empowering state legislatures to exert near-unchecked control over all aspects of federal elections, including voter registration procedures, polling locations, vote-by-mail, and much more.

The practical ramifications of setting such a precedent are subject to debate. In the aftermath of the 2020 election, Donald Trump and his legal team used ISL theory to argue that state legislatures had the constitutional power to override voting results and unilaterally appoint their own slate of electors[32]—and it's possible that a favorable ruling from SCOTUS could empower lawmakers to attempt this in the future. Claremont Institute Senior Fellow John Eastman reiterated this argument in an amicus brief submitted to the court regarding Moore v. Harper. Eastman writes that "the power assigned to the state legislatures under the Article II Electors Clause to direct the 'manner' of choosing presidential electors…was 'plenary.'"[33] The possibility that ISL theory will allow legislatures to choose alternate electors is, at least, under consideration by the Court.

However, many legal experts have pushed back against this expansive interpretation. Andrew Grossman, an adjunct scholar at the Cato Institute, argued: "it's atextual, with no grounding in case law, and it's based on a deliberate misrepresentation of the power that's conferred by the electors clause."[34] Grossman has a much narrower view on the potential impact of a decision in favor of the legislature—in his view, if the Court chooses to embrace ISL in Moore v. Harper, the only major effect would be a reduction in partisan gerrymandering cases in state courts: "That's what this comes down to, is the viability of bringing those cases."[35]

Although a favorable ruling would greatly expand the power of state legislatures to control federal elections, Grossman summarily dismisses the idea that ISL poses a threat to voting rights or equal protection. "None of those things really has anything to do with Moore v. Harper…a decision for the legislature in this case simply would not undermine those rights."[36]

However, Grossman's opinion is far from a consensus, as other legal experts believe that basic voting rights could be endangered by a ruling in favor of ISL. Many voting rights and election procedures are protected under state constitutions[37]—including voter registration processes, the right to a secret ballot, and voting by mail.[38] Some states—including Michigan, Florida, and Ohio—even have clauses that specifically prohibit partisan gerrymandering.[39] The potential ramifications of nullifying all of these provisions could be catastrophic. During oral arguments, respondents' lawyer Neal Katyal described these concerns directly to the justices: "Frankly, I'm not sure I've ever come across a theory in this court that would invalidate more state constitutional clauses as being federally unconstitutional - hundreds of them, from the founding to today. The blast radius from [ISL] theory would sow elections chaos."[40]

The true scope of the impact will not be known until the Court issues a definitive ruling on ISL theory. The Court could choose to completely embrace the theory, flatly reject it, or adopt a diluted version of the doctrine as they see fit. However, any decision in favor of the legislature will surely prompt additional litigation, as political parties and outside advocacy groups will search for the upper limit to state legislatures' expanded power.

III. ISL AND THE FEDERALIST SOCIETY

In her book Ideas with Consequences, constitutional law scholar and Federalist Society expert Amanda Hollis-Brusky argues that the group operates as a political epistemic network (PEN).[41] A PEN is a set of interconnected experts with shared beliefs, who actively work to translate those beliefs into policy.[42] Although somewhat decentralized, as a PEN the Federalist Society's scattered membership is unified by four common characteristics:[43]

- A shared vision of the proper arrangement of social and political life
- Shared beliefs about how to realize that vision
- Shared interpretations of politically contested texts (shared notions of validity)
- A common policy project

For decades, a strong unifying force amongst the ranks of the PEN was the belief that Roe had been wrongly decided.[44] The case was a frequent topic at Federalist Society events and conferences. Properly credentialed network members

32 Legum, *supra* note 25.
33 Brief for The Claremont Institute as Amicus Curiae, 3, Moore v. Harper.
34 The Federalist Society, *supra* note 15, at 24:00.
35 *Id.* at 45:30.
36 *Id.* at 28:00.
37 Hansi Lo Wang, *The Supreme Court is weighing a theory that could upend elections. Here's how*, NPR (Jan. 22, 2023, 5:00 AM ET), https://www.npr.org/2023/01/22/1143086690/supreme-court-independent-state-legislature-theory-moore-v-harper.
38 *Id.*
39 Redistricting Criteria, National Conference of State Legislatures, https://www.ncsl.org/redistricting-and-census/redistricting-criteria%20(last%20visited%20May%2023,%202023,%204:43%20PM%20ET).
40 Totenberg, *supra* note 21.
41 Hollis-Brusky, *supra* note 3 at 10-11.
42 *Id.*
43 *Id.* at 13.
44 Peter S. Canellos, *'A Moment of Truth for the Federalist Society': Politics or Principle?*, Politico (Nov. 10, 2022, 4:30 AM ET), https://www.ncsl.org/redistricting-and-census/redistricting-criteria%20(last%20visited%20May%2023,%202023,%204:43%20PM%20ET).

were placed in key government positions,[45] while others worked to generate a strong foundation of intellectual capital[46] that could eventually provide legal justification for reversing the Burger Court's decision.[47] The organization scored a series of key victories over the course of the Trump presidency, during which three of their members were nominated and confirmed to the Supreme Court: Justices Neil Gorsuch,[48] Brett Kavanaugh,[49] and Amy Coney Barrett.[50] Eventually, this forty-year effort culminated triumphantly with the release of the Dobbs decision in May 2022.

Overturning Roe was a major pillar of the Federalist Society's common policy project throughout the organization's existence.[51] Now, its reversal has left a gaping hole in the unofficial organizational agenda,[52] and there appears to be at least a moderate degree of discord regarding what direction the group should take in order to fill that void. However, several indicators suggest that ISL is becoming a main focus for certain legal advocates within the PEN. For example, the doctrine has been a focal point at recent Federalist Society conferences in Texas,[53] North Carolina,[54] and Florida.[55] Furthermore, prominent individuals within the organization's leadership structure are taking direct action on ISL.

Most notably, longtime Federalist Society co-chair Leonard Leo has recently begun directing significant resources toward election law initiatives, including ISL. In January 2020, not long after securing the Court majority necessary to overturn Roe, Leo stepped away from the Society's day-to-day operations.[56] According to reports, this change was prompted by a $1.6 billion donation from conservative businessman Barre Seid,[57] for the purpose of creating and funding political advocacy groups to focus on election law initiatives.[58]

One of these groups is the Honest Elections Project (HEP). Claiming to be a nonpartisan organization,[59] HEP filed an illuminating brief in support of the legislature in Moore v. Harper. In the first sentence of the introduction, the brief opens its discussion of ISL by referencing "the Constitution's original public meaning,"[60] immediately grounding itself in originalist terms. The brief argues that the Founders' use of the word "legislature" was both specific and intentional,[61] and that the Court must firmly embrace ISL in order to "vindicate the founders' 'structural allocation of primary authority over federal elections.'"[62] From start to finish, the HEP brief portrays ISL as the true meaning of the Elections clause, as it was originally understood.

Federalist Society members have frequently cited their commitment to originalism as "the single most important thing" that unifies their PEN.[63] By portraying ISL as an originalist viewpoint, Leo makes a strong attempt to tie the doctrine into the group's larger policy project.

However, it does not appear that ISL is receiving universal support from Federalist Society leadership. Steven Calabresi, the organization's other co-chair, is opposed to ISL; not long after the HEP amicus brief was submitted to the Court, Calabresi wrote and filed an amicus brief of his own in support of the respondents. Well aware of the originalist "market"[64] at the Supreme Court these days, Calabresi likewise grounded his arguments in originalist language. He provided a brief discussion of the meaning of the word "legislature" in the context of the federal and state constitutions in the 18th century,[65] and claims that "the Founding generation understood 'legislature' here to mean not an institution, but a lawmaking system."[66] His argument concludes with a concise and direct message to the justices: "Principled originalism compels rejection" of ISL.[67]

Calabresi is not alone in his rejection of ISL. Several other prominent

45 Hollis-Brusky, *supra* note 3, at 153-155.
46 *Id.* at 25-26.
47 *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2241 n.2 (2022); *accord* Dean John Hart Ely, The Federalist Society, https://fedsoc.org/contributors/john-hart-ely (last visited May 3, 2023, 1:22 PM PT).
48 Hon. Neil M. Gorsuch, The Federalist Society, https://fedsoc.org/contributors/neil-gorsuch (last visited May 23, 2023, 4:56 PM ET).
49 Hon. Brett M. Kavanaugh, The Federalist Society, https://fedsoc.org/contributors/brett-kavanaugh (last visited May 23, 2023, 4:57 PM PT).
50 Hon. Amy Coney Barrett, The Federalist Society, https://fedsoc.org/contributors/brett-kavanaugh (last visited May 23, 2023, 4:58 PM PT).
51 Canellos, *supra* note 43.
52 *Id*.
53 The Federalist Society, *supra* note 29.
54 The Federalist Society, *Recent and Future Developments in Election Law [2022 North Carolina Chapters Conference]*, YouTube, (Sept. 29, 2022), https://www.youtube.com/watch?v=5qt2-TqWyeo.
55 The Federalist Society, *Panel 4: Perspectives on the Independent State Legislature Doctrine [2022 FL Chapters Conference]*, YouTube, (Mar. 27, 2023), https://www.youtube.com/watch?v=Sbd29sVxRDg.
56 Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society*, The New York Times (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html.
57 Kenneth P. Vogel & Shane Goldmacher, *An Unusual $1.6 Billion Donation Bolsters Conservatives*, New York Times (Aug. 22, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html.
58 Legum, *supra* note 25.
59 About Us, Honest Elections Project, https://www.honestelections.org/about/ (last visited May 23, 2023).
60 Brief for The Honest Elections Project as Amicus Curiae, 1, Moore v. Harper.
61 *Id.* at 4-5.
62 *Id.* at 3.
63 Hollis-Brusky, *supra* note 15, at 20.
64 *See supra* note 29.
65 Brief for Steven Gow Calabresi et al., as Amicus Curiae, 7-14, Moore v. Harper.
66 *Id*. at 20.
67 *Id*. at 1.

Federalist Society network members also submitted amicus briefs in support of the respondents, including Professor Evan Bernick[68] and Georgetown Law School Dean William Treanor.[69]

With mixed signals from leadership (and the revered originalists on the Court yet to weigh in), it remains unclear to what extent the general Federalist Society membership will pursue ISL as a goal of their policy project. Over the past year, the organization has hosted a number of events related to Moore v. Harper and ISL theory. Digital broadcasts of these events convey that amongst the speakers and panelists, there was no clearly dominant consensus regarding how the Court will decide the case, nor any potential ramifications. However, the vast majority expressed at least moderate support for the theory, which seems to indicate that ISL could become a larger pillar of the PEN's common policy project moving forward. The varying professional backgrounds of the panelists (including litigators, judges, and legal professors) indicate that the appetite for ISL is not confined to a small subset of Federalist Society membership. During the discussions, common rhetorical points frequently emphasized to the audience the importance of empowering state legislatures as representatives of the people, and they consistently portrayed the textual foundation of ISL as solid and indisputable. Most notably, Phil Strach (the lead trial lawyer in Rucho) said of Moore v. Harper: "that's all it is…the Court's being asked to enforce the actual text of the Constitution."[70] Strach's word choice echoes the language used in the amicus brief submitted by HEP.

Ultimately, the future of ISL as a pillar of the Federalist Society's policy project will hinge upon the Court's decision in Moore v. Harper. With clear discordance among the PEN regarding the theory, a definitive ruling from SCOTUS could very well tip the scales. An incomplete rejection of ISL—or any ruling inviting a reframed version of the doctrine in future litigation—is sure to rejuvenate its proponents and spur additional debate and conflict over the theory's legitimacy under originalism.

Although it is impossible to know how Moore v. Harper will play out later this summer, the Federalist Society's relationship with ISL should undoubtedly stay on the radars of legislators, policy advocates, and voters across the spectrum.

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68 Brief of Professor Evan Bernick as Amicus Curiae, Moore v. Harper.
69 Brief of William M. Treanor as Amicus Curiae, Moore v. Harper.
70 The Federalist Society, *supra* note 53, at 16:20.

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