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No More Timeouts: Analyzing the Effects of Title IX on the House Settlement

Annika Berg

This article examines the world of college athletics following the Supreme Court decision *NCAA v. Alston* which opened the door for athlete compensation. While *Alston* was a landmark decision in advancing the rights of college athletes, its narrow focus left critical questions unanswered. As the NCAA, schools, and players attempt to make sense of the new landscape that provides space for athlete compensation, several challenges have emerged. Notably, the subsequent House Settlement fails to adequately address the potential ramifications of Title IX within this new economic territory. This article argues that without explicit congressional guidance, the evolving world of college athletics will be met with continued legal challenges as institutions grapple with the competing demands of antitrust law and gender equity.

I. Introduction

In 2021, the Supreme Court decided on *National Collegiate Athletic Association (NCAA) v Alston* (2021), a landmark decision for collegiate athletics. For most of its history, the NCAA fervently maintained the amateur status of college athletes.[1] They emphasized players were first and foremost *student*-athletes compensated through education-related benefits, such as scholarships to cover tuition, fees, and room and board.[2] Yet, the Court's unanimous 9-0 decision rejected the NCAA's "inconsistent" amateur argument for violating antitrust laws and consequently removed restrictions placed on the educational benefits a student could receive.[3] Despite overruling more than 40 years of precedent in the monumental decision, the Court left

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[1] NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art 1.3.1, in 2002-03 NCAA Division I Manual (2002); NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

[2] In re Nat'l Collegiate Athletic Ass'n. Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019).

[3] NCAA v. Alston, 594 U.S. 10, 11 (2021).

many questions unanswered. In his concurrence, Justice Kavanaugh identified the exact "difficult policies" and "practical questions" that have unfolded in the wake of the decision.[4] How might the NCAA address the implications *Alston* gives to non-educational benefits, such as athlete pay? How should funds be distributed? Most crucially, Kavanaugh questioned how the new restructuring of funds could comply with Title IX.[5]

In the three years since *Alston*, with only a narrowly focused Court decision and no additional legislation from Congress to implement guidelines, payment in college athletics has been regarded as the "Wild West."[6] The most promising step forward has come with the recent House Settlement. In the settlement, several athletes have agreed to a backpay deal with the major Power Five conferences and the NCAA. Over the next ten years, $2.576 billion is to be paid to athletes since 2016 "who have been denied compensation for the use of their names, images, and likenesses (NILs) and for their athletic performances."[7] The settlement also outlines a plan for schools to share up to $21 million in athletic revenue with their athletes annually beginning in 2025.[8] These are instrumental steps forward in securing the rights of college athletes.

Yet, in the more than 100-page document of the House Settlement, which meticulously formulates *how* athletes will be paid, there is no mention of how Title IX impacts the back pay or revenue sharing. Given Congress's silence, the extent to which Title IX applies to this reformulation in college athletics remains unclear,

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[4] NCAA v. Alston, 594 U.S. 4 (2021) (Kavanaugh, J., concurring).

[5] *Id.*

[6] William M. Palmer, *Tennessee and Virginia v. NCAA: The Wild(er) West of NIL in College Sports,* Kaufman & Canoles, LLP (Mar. 20, 2024), https://www.kaufcan.com/news/articles/tennessee-and-virginia-v-ncaa-the-wilder-west-of-nil-in-college-sports/.

[7] Pls.' Mot. for Prelim. Settlement Approval, In re Coll. Athlete NIL Litig., No. 4:20-cv-03919-CW (N.D. Cal. Sept. 5, 2024).

[8] The Associated Press, *Damages to college athletes range from few dollars to $1M-plus under settlement,* Fox Sports (July 26, 2024), https://www.foxsports.com/stories/college-football/damages-college-athletes-range-from-few-dollars-1m-plus-under -settlement.

leaving schools in a precarious position. Title IX laws mandate an even distribution of compensation for men's and women's sports, which inevitably requires schools to pull money from higher-revenue generating sports like football to pay field hockey players, even though those players did not generate the revenue. Do the new NCAA rules then open the door for future antitrust lawsuits from male football and basketball players who believe they are entitled to a larger share of funds based on their NIL? On the other hand, if colleges base their payouts solely on revenue, they risk an influx of Title IX suits that demand equal distribution of funds to ensure protections from sex-based discrimination.[9] It is a cycle of lawsuits, neither of which can be fully correct without congressional legislation providing clarity for schools that are currently operating blindly. One thing remains clear: in order for Title IX to hold any meaningful weight in the future—based on its language and history of applicability to college sports— it must be, at least in part, considered in plans of revenue sharing.

II. Revenue Disparity

Today, Division I college athletics are a billion-dollar industry. In the 2022-23 fiscal year, the NCAA generated nearly $1.3 billion in revenue, with more than half distributed back to its Division I members.[10] However, before the NCAA existed, early intercollegiate athletics operated with little oversight. The origins of the NCAA are preceded by "what many regard as the Nation's first intercollegiate competition," a boat race between Harvard and Yale students at Lake Winnipesaukee, New Hampshire in 1852.[11] For the next 50 years, athletes from various schools were enticed by free meals, tuition, and

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[9] Brandon Marcello, *Gut-wrenching choices, Title IX complications face college athletics in wake of House v. NCAA settlement,* CBS Sports (May 30, 2024), 2024.https://www.cbssports.com/college-football/news/gut-wrenching-choices-title-ix-complications-face-college-at hletics-in-wake-of-house-v-ncaa-settlement/.

[10] The Associated Press, *NCAA Generates Nearly $1.3 Billion in Revenue for 2022-23. Division I Payouts Reach $669 Million,* U.S. News (Feb. 1, 2024), https://apnews.com/article/ncaa-revenue-mens-basketball-tournament-d721a558bed2cdcd7b5539173b454945.

[11] NCAA v. Alston*, supra* note 4 at 2.

expensive trips, without rules requiring permanent academic commitment. Many became known as "tramp athletes," traveling from school to school to play their respective sports.[12] By 1905, in combination with rising fears over the dangers of football, President Theodore Roosevelt held a meeting between Harvard, Princeton, and Yale to review collegiate sports rules, ultimately leading to the creation of the NCAA.[13] Functioning as the "standard-setting body," the NCAA expressed early on that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession."[14]Although some forms of compensation slipped through the cracks, by 1948 the NCAA adopted the "Sanity Code" which reiterated their firm opposition to "promised pay in any form."[15] They made minor exceptions in 1956, allowing payments to include room, board, books, and fees, in addition to cash for minor expenses such as laundry.[16]

The Supreme Court enforced the Sanity Code with their ruling in the antitrust suit *NCAA v. Board of Regents of the University of Oklahoma*.[17] When evaluating an antitrust suit, the court can use three levels of analysis based on the extent of the violation and business practices. In the *Board of Regents*, the Supreme Court found enough potential pro-competitive effects to prevent a per se analysis, the most strict level of review.[18] Unlike most businesses that compete on the

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[12] *Id.* at 3.

[13] *Id.*

[14] *Intercollegiate Athletic Association of the United States Constitution By-Laws*, art. VII, §3 (1906); see also *Proceedings of the Eleventh Annual Convention of the National Collegiate Athletic Ass'n* 34 (Dec. 28, 1916).

[15] *Colleges Adopt the 'Sanity Code' To Govern Sports,* N.Y. TIMES, Jan. 11, 1948, at 1, col. 1.

[16] NCAA v. Alston 594 U.S. at 6 (quoting *In re National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.,* 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019)).

[17] *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests,* BONA Law Antitrust & Competition (August 10, 2018), https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick -look-tests.

[18] Eric H. Grush & Claire M. Korenblit, *American Needle and a "Positive" Quick Look Approach in Challenges To Joint Ventures,* Antitrust*,* vol. 25, no. 2 (Spring 2011), https://www.sidley.com/-/media/files/publications/2011/03/american-

open market that would require a per se analysis, the Court recognized the unique nature of college athletics as a business. The NCAA's product required coordination among schools to establish standard rules for eligibility, scheduling, and amateurism to maintain a competitive balance. The Court stated, "Simply put, some level of cooperation was necessary for the NCAA's product—college football games—to be produced at all."[19] In place of per se analysis, the Court used a "quick look approach," the lowest level of review, which did not require an evaluation of the NCAA's market power, something the middle-level "rule of reason approach" would have sanctioned.[20] By avoiding a "rule of reason" approach to examine the NCAA's control on the market, the Court enabled the NCAA to maintain its existing terms of compensation for athletes for over 60 years. In fairness, the Court at the time could not have predicted just how far the NCAA's market presence would eventually reach. Yet, despite the shifts in markets, the NCAA and fans of college sports have made consistent arguments against paying college athletes. Their reasoning typically follows along these lines: fans do not want more professional athletes. Paying college athletes strips the beauty of college amateurism and ruins their youthful desire to put everything on the line for their team, unmarked by financial incentives. In addition, payment increases the risk of bigger schools with more donors usurping all the talent, making most schools non-competitive and as a result, unwatchable. This common sentiment was similar to the arguments presented by the NCAA during *Alston*. They reiterated their arguments from the *Board of Regents* against athlete compensation, emphasizing the "revered tradition of amateurism in college sports…the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics…"[21] The Court, ruling 9-0 in favor of *Alston*, however, was not convinced.

Justice Gorsuch delivered the opinion, primarily focusing on affirming the District Court's use of the "rule of reason" test as

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needle-and-a-positive-quick-look-approa__/file s/view-article/fileattachment/spring11grushc.pdf.

[19] *Id.*

[20] *Id.*

[21] NCAA v. Alston *supra* note 4, at 20.

opposed to a "quick look" sometimes used in joint ventures and previously used in the Board *of Regents*.[22] By establishing the "rule of reason" as the standard of review, the Court could now evaluate the NCAA's expansive market power, and weigh both the pro-competitive and anticompetitive effects of the NCAA's restrictions. With this heightened level of scrutiny, the Court found that given the NCAA's market dominance, the caps on compensation for education-related benefits for athletes were unfair and swiftly struck down.[23] Yet, by treating *Alston* as a purely textualist decision and focusing solely on clarifying the type of antitrust test they used, their unanimous decision not only created unanswered questions but ignored the harm suffered by student-athletes.

Unlike the majority, Kavanaugh's concurrence was filled with support for the athletes who have suffered at the hands of the NCAA's exploitation:

> The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor.[24]

His fiery concurrence is undoubtedly the result of the NCAA's evolution from a modest association managing colleges and universities as it was in the *Board of Regents*, to a sprawling, multi-billion dollar enterprise. The NCAA is responsible for regulating 1,098 colleges and universities, which they organized into three

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[22] *Id.* at 18.
[23] *Id.* at 32.
[24] NCAA v. Alston, *supra* note 5, at 3 (Kavanaugh, J., concurring).

divisions.[25] Unquestionably, Division I sports, specifically football and basketball, generate the most revenue and attention for the organization, which includes more than 350 schools divided across the 32 conferences.[26] Division I conferences function similarly to the NCAA because they "can and do enact their own rules."[27] The NCAA's broadcast contract with CBS and Warner Bros. Discovery for their renowned March Madness basketball tournament is valued at $1.1 billion annually.[28] Beginning in the 2026-27 season, the NCAA worked out a six-year agreement with ESPN for $1.3 billion annually for the new expanded playoff.[29] This is a substantial increase from the NCAA's previous television deal for the College Football Playoffs, worth $470 million per year.[30]As previously mentioned, it is not only the NCAA that profits off the booming athletic industry, as each respective Division I conference earns substantial revenue from in-season games.[31] For example, the Big Ten earned nearly $880 million in total revenue during the 2023 fiscal year, "distribut[ing] about $60.5 million to each of its 12 longest-standing schools."[32]

When looking at the leadership behind the respective conferences, the pay disparities are substantial. The Big Ten's current commissioner, Tony Petitti, is new to the role; therefore, his salary was not reported in the latest tax returns.[33] However, during 2022 the former commissioner, Kevin Warren, earned "$3.7 million in total

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[25] *What is the NCAA?,* NCAA.org, https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx.

[26] NCAA v. Alston, *supra* note 4, at 7.

[27] *Id.*

[28] *Id.*

[29] Heather Dinich, *ESPN agree to deal through 2031-32,* ESPN (Mar. 19, 2024), https://www.espn.com/college-football/story/_/id/39766079/college-football-playoff-espn-agree-deal-2031-32.

[30] NCAA v. Alston, *supra* note 4, at 7.

[31] *Id.*

[32] Steve Berkowitz, *Big Ten outpaced SEC with $880 million in revenue for 2023 fiscal year with most schools getting $60.5 million,* USA Today (May 20, 2024), https://www.usatoday.com/story/sports/college/2024/05/20/big-ten-sec-revenue-2023-fiscal-year/73772300007/.

[33] *Id.*

compensation from the Big Ten in 2022," an increase of $100,000 from 2021.[34] These numbers are consistent across the board at the top conferences. The president of the NCAA earns $4 million a year, top athletic directors earn around $1 million each, football head coaches' salaries are approaching $11 million, and their assistant coaches have surpassed $2 million—yet the athletes never receive a dime.[35] As the emerging House Settlement provides a path forward for athletes to engage in plans of revenue-sharing, many are hopeful the large gaps between athletes and coaches, commissioners, and presidents will be lessened. However, as schools begin attempting to divide their pool of funds among athletes, one key law has been left out of the settlement process.

III. Title IX Background

In 1972 Congress passed *Title IX of the Education Amendments Act*, which declares that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[36] Title IX protects against various forms of sex-based discrimination, from sexual harassment claims to targeted applications of dress code policy to failures providing equal athletic opportunity.[37] These protections apply to all public and private educational institutions that receive federal funds.[38] Because more than 99% of schools fall into this category, Title IX is wide-ranging in its reach, affecting nearly all colleges and universities.[39] Title IX also applies to athletics programs

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[34] *Id.*

[35] NCAA v. Alston, *supra* note 4, at 7-8.

[36] *Title IX Frequently Asked Questions,* NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx.

[37] *Sex Discrimination: Overview of the Law,* U.S. Dep't of Educ., https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html#:~:text=Examples%20of%20the%20types%20of,and% 20math%20(STEM)%20courses%20and.

[38] *Title IX Frequently Asked Questions*, *supra* note 36.

[39] Josh Moody, *A Guide to the Changing Number of U.S. Universities,* U.S. NEWS & WORLD REPORT (Apr. 27, 2021), https://www.usnews.com/education/best-colleges/articles/how-many-universities-are-in-the-us-and-why-that-number-is-changing; Dean Clancy, *A List of Colleges That Don't Take Federal Money,*

at universities since college athletics are "considered educational programs and activities" and is usually seen in three major areas: participation, other benefits, and scholarships.[40] Participation requires men and women to have "equitable opportunities to participate in sports," although schools are not required to offer "identical sports but an equal opportunity to play."[41] The "other benefits" refer to a variety of standards, ranging from requirements of equal training facilities to recruitment policies that emerged after a history of challenges in court.[42]

In *Roberts v. Colorado State Board of Agriculture,* the 10th U.S. Court of Appeals upheld a district court ruling for the university to reinstate softball after it was dropped, even though they also dropped their baseball team.[43] A similar result occurred in *Favia v. Indiana University of Pennsylvania*, when a district court ruled financial considerations did not justify dropping the women's gymnastics and field hockey teams, even though the men's tennis and soccer teams were also discarded.[44] In *Cohen v. Brown University* the appellate court found the university had breached Title IX regulations by cutting university funds for the women's volleyball and gymnastics programs.[45] In *Pederson v. Louisiana State University,* the 5th Circuit of Appeals overturned a lower court decision and upheld the proportional measure of female students to female athletes as the correct test to ensure proper participation when female students sought women's soccer and softball teams.[46]A district court in *Biediger, et al. v. Quinnipiac University* found that Quinnipiac's attempts to get rid of the women's volleyball team violated Title IX. Not only was Quinnipiac ordered to reinstate the volleyball team but they were also required to allocate more scholarships to female athletes and improve the "other benefits" that were in violation of

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DeanClancy.com (Dec. 2, 2017), https://deanclancy.com/a-list-of-colleges-that-dont-take-federal-money/.

[40] *Title IX Frequently Asked Questions*, *supra* note 36.

[41] *Id.*

[42] *Id.*

[43] Roberts v. Colo. State Univ., 814 F. Supp. 1507 (D. Colo. 1993).

[44] Favia v. Ind. Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993).

[45] Cohen v Brown Univ., 879 F. Supp. 185 (D.R.I. 1995).

[46] Pederson v. LSU, 201 F.3d 388 (5th Cir. 2000).

Title IX.[47] The upshot of Title IX's case history reveals the repeated attempts by the courts to combat sex-based discrimination and prevent universities from stripping funding for women's sports. These rulings underscore the Court's commitment to enforcing Title IX protections to promote gender equality in sports, emphasizing that financial constraints cannot be used to justify depriving female athletes of opportunities. Crucially, this legal precedent strengthens current legal protections for Title IX claims.

Finally, Title IX affects collegiate athletics by providing guidelines for "scholarship" disbursement. This details how colleges and universities should delegate the "education-related benefits" between men and women's sports. It specifies, "to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[48] The Office for Civil Rights (OCR) clarified that "if 45% of the participants in the school's athletic program are women, then women should receive about 45% of the available athletic financial assistance."[49] Thus, the number of scholarships for men and women is not required to be equal, but they must be proportional. The semi-flexibility of participation and funding requirements, as opposed to an initial 50/50 split of funds, has facilitated the steady growth of women's sports over the past forty years and shown the durability of Title IX for several reasons.[50] By tying funds to participation instead of a fixed rate, Title IX facilitated the natural expansion of women entering collegiate athletics, as opposed to unnaturally forcing it too soon.

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[47] Biediger, et al. v. Quinnipiac University No. 10-3302 (2d Cir. 2012).

[48] 34 C.F.R. § 106.37(c)(1) - Financial assistance.

[49] U.S. Dep't of Educ., Office for Civil Rights, *Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities* (Feb. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf.

[50] *Advocacy: Title IX Where are Women After 40 Years?,* YWCA OAHU (Nov. 12, 2021), https://www.ywcaoahu.org/blog/2021/11/12/title-ix-where-are-women-after-40-years.

For example, in the early years of Title IX significantly less women participated in sports. An even split of funds, regardless of participation level, would have stripped funding from men's programs, thereby harming the athletic departments, Title IX's popularity, and disproportionately advantaged a statistically small group. Schools also face varying financial situations, and forcing half of their funds into women's programs as they were developing could cause their revenue-generating male programs to suffer, which hinders their athletic programs as a whole. Further, different sports have different roster sizes and equipment requirements. For example, comparing men's football to women's volleyball would have non-practical disproportionate funding effects due to the differences in expenses. Thus, Title IX has been effective in expanding female athletics because of its respect for fluidity amidst the ever-evolving backdrop of college athletics. The "scholarship" criteria has also long covered the role of Title IX in determining athlete "compensation," which before *Alston*, applied to a capped amount of "education-related benefits."[51] Previously, the NCAA set the scholarship amount available per program, between two different types of athletic scholarships, "headcount" and "equivalency."[52] A "headcount" sports scholarship meant athletes earned a full-ride, and an "equivalency" sports scholarship meant they had a percentage or a specific amount of their cost of attendance covered.[53] Only a few sports are considered "headcount" sports, including men's basketball, football (Football Bowl Subdivision schools only), women's basketball, women's gymnastics, women's tennis, and women's volleyball.[54] These sports receive a headcount designation because they generally bring revenue to the school.[55]

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[51] NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984).

[52] *Athletic Scholarships Facts,* Sports Recruits, https://sportsrecruits.com/resources/how-to-get-recruited/athletic-scholarship-facts.

[53] *Id.*

[54] *Id.*

[55] NCSA College Recruiting, *Athletic Scholarships: Head Count Versus Equivalency,* https://www.ncsasports.org/blog/athletic-scholarships-head-count-versus-

While men's football and basketball account for the majority of the revenue, Title IX provisions have elevated more women's sports to headcount status despite not earning as much in revenue.[56]

Now after *Alston,* with the removal of caps on "educational benefits," the NCAA and its schools are creating new avenues of compensation for their athletes. These new forms will almost certainly be classified as "non-educational benefits," such as athletes' pay or sponsorship deals, which will assuredly increase pay for college athletes. Yet, regardless of the amount, both forms are ultimately still considered compensation. Because Title IX applied to the previous form of "compensation," it must now be applied to the new wave of funds being provided to athletes, including the House settlement, unless there is a change in statute from Congress.

IV. The House Settlement

In 2020, former Arizona State swimmer Grant House and social media basketball star Sedona Prince filed a lawsuit against the NCAA, challenging the organization's ban on Name, Image, and Likeness (NIL) payments for athletes. After gaining positive momentum from the *Alston* decision in 2021, the plaintiffs directed their concerns toward the lack of athlete compensation from television broadcast revenue amidst the new era without compensation caps.[57] Later, other collegiate athletes Tymir Oliver, DeWayne Carter, and Nya Harrison joined, and the five athletes became the "class representatives" for the proposed

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equivalency#:~:text=An%20athlete%20who%20receives%20a,bring%20revenues%20to%20the%20school.

[56] *Earning An Athletic Scholarship: A Comprehensive Overview,* Scorability, https://www.scorability.com/blog/earning-an-athletic-scholarship/#Impact.

[57] Ranjan Jindal, *Breaking down the House v. NCAA settlement and the possible future of revenue sharing in college athletics,* The Chronicle (May 27, 2024), https://www.dukechronicle.com/article/2024/05/duke-athletics-ncaa-house-settlement-nil-revenue-sharing-college-sports-hubbard-carter.

settlement.[58] Their arguments echoed the sentiment already expressed by the justices in *Alston*: college athletes have been exploited for their labor without fair compensation. With restrictions on education-related benefits removed, the "class representatives" pushed the boundaries of the *Alston* decision. They leaned into Kavanaugh's concurrence,

> The NCAA's business model of using unpaid student-athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student-athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student-athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules. If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue.[59]

The "class representatives" insisted they deserved a fair share of the NCAA's revenue, as they were the main product. They pushed for greater compensation, arguing that the monetary value of broadcasting deals and restrictions on NIL are worth more than uncapped scholarships or other education-related funding.[60]After years of legal battles, they achieved a historical feat in a settlement with the NCAA and five of its largest conferences: The Atlantic Coast Conference (ACC), The Big Ten, The Big 12, The Southeastern Conference (SEC), and Pac-12 Conference, deemed "The Power Five."[61] Steve Berman, an attorney for the plaintiffs,

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[58] Pls.' Mot. for Prelim. Settlement Approval, *supra* note 7.

[59] NCAA v. Alston, *supra* note 5, at 4 (Kavanaugh, J., concurring).

[60] Nicole Auerback & Justin Williams, *What to know about House v. NCAA settlement and a historic day for college sports,* N.Y. TIMES (May 24, 2024), https://www.nytimes.com/athletic/5517461/2024/05/24/ncaa-lawsuit-house-paying-players/.

[61] Stipulation and Settlement Agreement, No. 4:20-CV-03919 (N.D. Cal. July 26, 2024).

stated that "this landmark settlement will bring college sports into the 21st century, with college athletes finally able to receive a fair share of the billions of dollars of revenue that they generate for their schools."[62] The settlement is set to work in a twofold capacity, addressing both concerns of back pay and future revenue-sharing plans for college athletes.

A. Back Pay for Athletes

The back pay settlement totals $2.576 billion to be distributed over the next ten years for Division I athletes since 2016 "who have been denied compensation for the use of their names, images, and likenesses (NILs) and for their athletic performances."[63] Although the NCAA's history of earning massive profits off athletes who were not compensated dates back decades, the 2016 cutoff date was based on the statute of limitations for antitrust claims.[64] The NCAA has agreed to bear 40% of the total cost, using their reserve funds which are separate from their profit.[65] The Division I conferences are responsible for the remaining 60%.[66] Among the conferences, the funds will be split as such: 40% from the Power Five, 17% from the Group of Five, and 22% from the Football Championship Subdivision, with the remaining percentage to be covered by non-football conferences such as the Big East.[67] Thus, the cost for each Division I school depends on their conference. According to a memo obtained by Yahoo Sports, annual costs were estimated at around $1 to $2 million per year for Power Five conference schools,

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[62] *What to know about House, supra* note 61.

[63] Pls.' Mot. for Prelim. Settlement Approval, *supra* note 7.

[64] Dan Murphy, *Answering the 10 biggest questions about the NCAA antitrust settlement,* ESPN (July 28, 2024), https://www.espn.com/college-football/story/_/id/40658452/ncaa-lawsuit-settlement-paying-players.

[65] Auerback & Williams, *supra* note 61.

[66] *What to know about House, supra* note 61.

[67] Shehan Jeyarajah, *How historic House v. NCAA settlement will impact college athletics on and off the field for years to come,* CBS Sports (May 24, 2024), https://www.cbssports.com/college-football/news/how-historic-house-v-ncaa-settlement-will-impact-college-athletic s-on-and-off-the-field-for-years-to-come/.

approximately $400,000 for Group of Five schools, and around $280,000 for Football Championship Subdivision schools.[68]

For most schools, the money they are required to pay back is not immediately available to compensate their student athletes. The college athletic system was built on unpaid labor. Instead of paying their student-athletes, athletics programs funneled money into extravagant locker rooms, unlimited coaches, and other unnecessary administrative salaries. USA Today reported that "programs wasted nearly $200 million on coaching buyouts alone during the 2023 season, an incomprehensible, and frankly offensive, amount of waste."[69] Reportedly, some schools will cover the back pay for players by redirecting the revenue they will earn in future March Madness tournaments, a historically lucrative business venture for the schools who make appearances.[70] This payment scheme, devised by the NCAA and its most profitable conferences in the settlement, has sent alarm bells ringing in smaller conferences whose schools rely on their tournament earnings to sustain their athletic programs. These smaller schools will now be on the hook to pay a disproportionate amount of money to athletes from the Power Five conference.[71] Robin Harris, the executive director of the Ivy League said, "It feels like the N.C.A.A. is bailing out the biggest spenders, and conferences like ours are paying for the majority of the settlement."[72]

On June 20, 2024, Houston Christian University (HCU) filed a motion to intervene, claiming their financial interests "were not adequately represented by the proposed terms of the House settlement that was agreed to in May."[73] HCU general counsel Tyler

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[68] *Id.*

[69] *Id.*

[70] Auerback & Williams, *supra* note 61.

[71] Billy, Witz, *Decades in the Making, a New Era Dawns for the N.C.A.A.: Paying Athletes Directly,* N.Y. TIMES (May 23, 2024), https://www.nytimes.com/2024/05/23/us/ncaa-athletes-payments.html?smid=nytcore-ios-share&referringSource=art icleShare&sgrp=c-cb.

[72] *Id.*

[73] Justin Williams, *Judge denies Houston Christian's motion to intervene in House v. NCAA as settlement nears,* N.Y. TIMES (July 24, 2024), https://www.nytimes.com/athletic/5656185/2024/07/24/ho uston-christian-house-settlement.

Boyd told *The Athletic* last month that they learned only after the initial settlement between the NCAA, power conferences, and plaintiff attorneys, that HCU "would have to pay approximately $3,000,000 over ten years for 'back pay damages,' despite no evidence that HCU deprived anyone of name, image, or likeness rights."[74] Judge Claudia Wilken, the judge tasked with approving the House settlement, responded by noting "HCU has not shown that it satisfies the requirements for permissive intervention" and that HCU lacks standing to object to the settlement agreement because "it is not a class member."[75] Had HSU's motion been successful, they would have been added as a defendant to the case alongside the NCAA and the Power Five, creating a pathway for all other non-Power Five schools to do the same, most likely sending the settlement back to the negotiating table.[76]

The outcome of the House settlement and its effects on smaller conferences will be significant, undoubtedly raising alarm bells that will demand Congress's attention.[77] However, unlike the new revenue-sharing plans discussed in the next section, Title IX's implication on payments from the $2.576 billion in damages, seems easier for schools to navigate. The back pay "is tied to revenue generated almost exclusively by major conference football and men's basketball, whose athletes represent one class of plaintiffs. Another class is women's basketball players in the major conferences. And the final class is everyone else."[78] While every Division I athlete is eligible to collect damages, "the payouts will vary drastically and are determined by sport played, when, how long and what conference an athlete competed in."[79] The next steps in the process for former

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Amanda Christovich, *The Biggest Problem With The Conference Realignment Craze,* Front Of Ice Sports (Sept. 9, 2023), https://frontofficesports.com/newsletter/the-big-problem-with-realignment/#:~:text=Conference%20realignment%20would%20result%20in,director%20Ramogi%20Huma%20told%20FOS.
[78] Witz, *supra* note 72.
[79] Ralph Russo, *Damages to college athletes range from a few dollars to $1M-plus under settlement,* The Associated Press (July 26, 2024).

athletes to determine the extent of their compensation will come after the plaintiffs' attorneys file a motion for preliminary approval. If successful, "a public website will go up in about two months where former college athletes can determine how much they are eligible to receive."[80] The calculations break NIL violations into three pools from which athletes are eligible to receive funds: Broadcast NIL (BNIL), Video Game NIL, and Lost NIL Opportunities– the pools are based on single damage estimates per category by Dr. Rascher, a sports economics and finance professor at the University of San Fransisco.[81]

The BNIL pool applies to athletes who played football, or men's or women's basketball for a Power Five Conference; the Video Game pool only applies to Power Five football or male basketball players and will be determined on a *pro-rata,* proportional basis, considering the "sport the athlete played, the conference in which he or she played, and the year(s) in which he or she played."[82] The Lost Opportunities pool is available to any Division I athlete, but 95% of its funds have been allocated to "the Power Five Football and Basketball Portion, with that distributed in a 75/15/5 ratio across three sports (football, men's basketball, and women's basketball)."[83] This leaves the remaining 5% for "additional Sports Class claimants… if they played certain sports at certain schools outside of the Power Five where their school's team is among the highest revenue generating."[84] Thus, concerning the back pay portion, schools will likely face fewer Title IX suits given that it is meant to remedy judicable past harm, when no other form of non-educational-related compensation was available, for *specific* athletes who obtained *specific* injuries. This results in the possibility for a suit to be brought forth claiming a Title IX violation, but it appears to be beyond the realm of consideration for the back pay settlement based on the specific remedies and criteria agreed upon between the parties. Yet, the distinction between back pay and

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[80] *Id.*
[81] Pls.' Mot. for Prelim. Settlement Approval, *supra* note 7.
[82] *Id.*
[83] *Id.*
[84] *Id.*

revenue sharing remains unclear, as back pay is not divided according to Title IX, inviting potential future litigation. This factor captures all the more reason for Congress to step in and clarify the extent of Title IX. At the very least, based on other dismissals by Judge Claudia Wilken, the Title IX claim to stop this portion of the house settlement will not make it far in the Northern District of California.[85]

B. Revenue Sharing Model

The plaintiffs in the House settlement achieved "ground-breaking injunctive relief."[86] In the agreed ten-year settlement term, NCAA Division I schools can now provide "previously prohibited direct benefits worth up to 22% of the Power Five schools' average athletic revenues each year."[87] The spending limit is derived from a formula that "gives athletes 22% of the money the average power conference school makes from media rights deals, ticket sales, and sponsorships."[88] Any money collected by athletic departments through fees from the general student body, or more importantly through donations, is not included in the formula.[89] At the beginning of the program, schools can spend up to $23.1 million in additional money on athlete compensation, according to projections within the settlement.[90] Most importantly, this compensation will be in addition to "the tuition, stipends, and other benefits schools already provide players every year."[91] The $23.1 million allocated is set to grow 4% each year, increasing as "revenue generated by college sports grows."[92] Notably, "an economist hired by the plaintiffs' attorneys projected that the cap would increase roughly $1 million each year,

[85] Williams, *supra* note 74.
[86] Pls.' Mot. for Prelim. Settlement Approval, *supra* note 7.
[87] *Id.*
[88] Murphy, *supra* note 65.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

ending at $32.9 million per school by the 2034-35 academic year..."[93] The magnitude of these funds is certainly an unprecedented compensation being set aside for college athletes. However, unlike the back pay portion of the settlement which very specifically divides funds among certain pools of athletes, the schools have a considerable amount of freedom to choose how to disburse the revenue among athletes, *if* schools decide to share funds at all. The settlement's plans of revenue sharing are not a requirement, and importantly for the NCAA, are *not* a salary. Yet, when addressing funding disparities between Division I school programs, the plaintiff's lawyers look towards the positive steps taken within the settlement. They recognize that non-Power Five conferences will not generate as much revenue as Power Five schools, "and are likely to spend less than they are permitted to spend on student-athlete compensation."[94] However, the plaintiff's lament, "even if non-Power Five schools spend just three percent as much as Power Five schools on direct compensation… that could result in billions more being paid to college athletes over the next ten years."[95]Clearly, there are innumerable benefits to paying collegiate athletes, no matter the ramifications. But, supporting athlete pay does not mean ignoring the fallout that comes from opening up the door for compensation. Safeguards must be put in place for smaller Division I schools that cannot afford to pay athletes comparable salaries to the Power Five schools who have the funds to usurp every last team.

For purposes of further review, while important, the inequities between conferences and their schools will be set aside to primarily focus on the Power Five conference schools with funds, as that is the group targeted by the settlement. Assuming these schools do hope to maximize the amount of compensation given to their athletes, not for any ethical awakening but for no other reason than to remain competitive with other schools, they face a series of difficult technical questions. For example, how should they divide the funds? Can they give all the money to their football players and basketball stars? Should they? Logically, most schools will take this route because they

[93] *Id.*
[94] Pls.' Mot. for Prelim. Settlement Approval, *supra* note 7.
[95] *Id.*

want the best players to compete in the sports that bring in the most money. Alternatively, what if a school wants to allocate all the funds to a single sport such as men's fencing, in order to attract the best male fencers from around the country because they want to bring home gold medals? The settlement specifies revenue sharing cannot come from donors, yet it is entirely possible a wealthy donor withholds funds from the school until they form the best women's golf team in the country. Consider the fact that this is a plan for revenue sharing, meaning high-revenue sports like football and basketball will presumably provide the funds for all other sports. Thus, schools might be forced to cut the fencing and golf teams to invest more in the basketball facilities as they become outdated because the funds that were previously used to finance the facility are now going to the athletes instead.

Unfortunately, the House settlement fails to provide any specific guidelines as to what current proceedings in adherence to the decision should be. Without national guidelines to guide colleges and universities, each respective state is forced to handle revenue sharing differently, if they involve themselves at all. Because the *Alston* decision is narrowly focused on establishing a "rule of reason review" to strike down caps placed on educational benefits, Kavanaugh's concurrence provides the most helpful language. Although his concurrence essentially identifies the moral problems of not paying college athletes, it is far from providing any sort of justiciable solution. The question remains: how exactly should schools split the money?

V. Discussion

If colleges and universities do not proportionally divide the revenue among "the number of students of each sex participating" in sports, they will face a flurry of Title IX suits, and based on the sound argument that scholarships are comparable to payment, they should lose.[96] If one accepts the premise that the widely recognized form of athlete compensation through "education-related benefits"

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[96] U.S. Dep't of Educ., *supra* note 51.

before *Alston* was scholarships, which applied to Title IX, and can agree that plans for revenue sharing is an updated form of compensation through "non-education-related benefits," then the conclusion must result in the application of Title IX to plans for revenue sharing. While this application of Title IX has to be correct, it does not mean that it should be. The revenue shared amongst athletes will come from "media rights deals, ticket sales, and sponsorships."[97] Unquestionably, football, men's basketball, and increasingly women's basketball will be responsible for the bulk of these funds.[98] Based on this, do these athletes not deserve to receive fair compensation for their work? Why not pay them for the millions they are making for the schools? The players are, after all, the actors that play a critical role in obtaining the aforementioned funds. While this line of thought is reasonable, correct even, the concept of revenue sports such as football and men's basketball being put towards other programs in the athletic department is far from unheard of. Rather, it is a common industry practice. College sports are funded through several different channels, though the majority of funds come from ticket sales, television and media rights, sponsorships, merchandise sales, and donations.[99] As established: football and men's basketball drive these sales, meaning they are responsible for funding many other teams and day-to-day operations within athletic departments.[100] Furthermore, in previous years, football and basketball players received full rides because they were considered headcount sports, but so did women's basketball, tennis, gymnastics, and volleyball. Why? When it comes to compensating athletes, funds have to be split according to Title IX rules, regardless of the amount of revenue. It could be argued that the new composition of funds as described by the House settlement only involving "media rights deals, ticket sales, and sponsorships"

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[97] Murphy, *supra* note 65.

[98] *Id.*

[99] Marygrove College Athletics, *The Financial Side of College Sports: A Closer Look*, https://www.marygrovemustangs.com/the-financial-side-of-college-sports-a-closer-look.html#:~:text=Donations%3A%20Alumni%20and%20other%20supporters,facility%20upgrades%20or%20scholarship%20endowments.

[100] *Id.*

establishes a more direct link of athletes generating revenue rather than the previously included donations, tuition, and other fees students paid. The extent to which donations and tuition come from alumni or students who selected the schools *because* of the athletic programs is unclear.[101] It is not the responsibility of a judge to wade through the specifics of funding, because on its face compensation is ultimately compensation. There has been a precedent of funds being split according to Title IX– regardless of the amount or origin of revenue.

It is critical in future discussions of the NCAA and college sports to remember the purpose of applying Title IX to athletics in the first place. The goal was and continues to be, ending sex-based discrimination in education, which often targets women.[102] Patsy Mink and Edith Green surely did not write the law to no longer apply when parts of the education process progressed. The courts' deciding athletes deserve to be compensated for the revenue generated has led to arguments that disregard Title IX entirely, which cannot be the standard. Even though it appears to be an unintended consequence, it is a consequence that demands attention. Dozens of imaginable hypothetical situations result in female athletes never seeing a dime. Though popular breakout stars such as Caitlin Clark, Angel Reese, or Olivia Dunne will receive their fair share, what about the women's basketball players who enjoyed record-breaking March Madness success? The 2024 women's national championship game "was the most-watched basketball game– men's or women's, college or pro– since 2019."[103] The amount of national attention given to female athletes is only rising across the country, for example, to volleyball players. On August 30, 2023, the Nebraska Cornhuskers set an

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[101] Harvey S. Rosen & Jonathan Meer, *The Impact of Athletic Performance on Alumni Giving: An Analysis of Micro Data,* Economics of Education Review, 28(3): 287–94 (June 2009), https://doi.org/10.1016/j.econedurev.2008.06.003.

[102] Judy Tzu-Chun Wu & Gwendolyn Mink, *How Patsy Takemoto Mink, the First Woman of Color in Congress, Helped Craft Title IX,* Time (June 1, 2022), https://time.com/6174298/patsy-takemoto-mink-title-ix/.

[103] Alyssa Meyers, *By the numbers: A record year for women's March Madness,* Marketing Brew (Apr. 9, 2024), https://www.marketingbrew.com/stories/2024/04/09/record-year-womens-march-madness-iowa-south-carolina.

attendance record for the largest crowd ever at a women's sports match: 92,000 people.[104] With 26 of America's 40 gold medals coming from women, who often train in American colleges, the future is bright.[105] But it is not here yet. Stripping Title IX of all its weight gives schools an avenue to discriminate against female athletes in the revenue-sharing process. It is hard to argue that college sports can remove itself from culpability, considering the difficulties women presently face in securing fair pay. Title IX cannot be pushed aside because scholarships have been changed to revenue sharing. Title IX was never about the method–it was meant to target compensation, to protect female athletes.

This is a fallible argument. There is no plausible counter to the fact that individuals, regardless of gender, deserve fair compensation for their work. If plans for revenue sharing were to disregard revenue, as scholarships had done in the past, do football and basketball players not have a right to sue that they are not being fairly compensated for their NIL? Consider the fact it is the player's faces on the ads, their names on the jerseys, and their talent that sells out the stadium. These facts certainly suggest they are entitled to some level of compensation. The fact is that many football and male basketball players are young black men who come from lower-income backgrounds, and for decades have been exploited by white coaches, university staff, and other directory boards.[106] Despite

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[104] Morgan Smith, *Women's sports could bring in over $1 billion in 2024—record-breaking viewership, stars like Caitlin Clark are driving growth,* CNBC (Mar. 8, 2024), https://www.cnbc.com/2024/03/08/womens-sports-could-bring-in-over-1-billion-in-2024-whats-driving-growth.html.

[105] Kari Anderson, *Women earned the majority of gold medals for Team USA in Paris — here's a list of every American woman who won gold,* Yahoo Sports (Aug. 12, 2024), https://sports.yahoo.com/women-earned-the-majority-of-gold-medals-for-team-usa-in-paris--heres-a-list-of-every-american-woman-who-won-gold-171156767.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALQWDPFeWGC7R2oyW9tkO9jlJJwN80AuK0HRVpEaEMathQOoxnrmo_EZbLkNaoB0pFbMDV7gRxFMox16gil2Pi5mmJe4cJ0Ja-BruBFzr7-879Syi8IUaqYf8sQETBwPDdstsocpN4mYoOp9grICJx6CR6MnBrs6OQUmd2rtgWd.

[106] NCAA v. Alston, *supra* note 5, at 4 (Kavanaugh, J., concurring).

making up around 12% of the population, a 2017 study found African Americans made up 53% of Division I basketball and 44.2% of football players.[107] These are staggering percentages that cannot be overlooked in discussions surrounding athlete pay. It is undeniable that college athletics has disproportionately exploited young black athletes, constantly forcing them to put their health and safety on the line for the financial gain of higher-up officials. In turn, putting out a blanket statement in support of Title IX's division of generated revenue, when other athletes have a fair claim to the money they are owed, overlooks the nuances of difficult conversations. It is possible for the Court to decide on these competing seismic interests; yet, a better course forward exists in a branch with the power to update the statue itself.

VI. What Happens Next?

The future of college athletics remains unclear. The House settlement appears to be moving forward, despite objections from smaller schools and uncertainty about how to divide the revenues. Since the *Alston* decision in 2021, Congress has failed to step in at any part of the process. Their inability to guide the NCAA or colleges and universities has left many athletes unsure of what exactly they are entitled to. There are several options on the table, ranging from Title IX incorporated calculations that will divide shared revenue among players, to dividing funds to only headcount sports. Perhaps they could designate a certain percentage of the revenue-sharing plans for female athletes while leaving the majority of funds for the athletes who generated it. This plan balances Title IX's interest in preventing sex-based discrimination while promoting the athlete's right to compensation. Or, others suggest a more drastic change is necessary such as making collegiate athletes full-blown employees, something the NCAA has heavily protested. Simply, making college athletes employees would increase their standing in antitrust lawsuits, and give the highest-profile athletes "the power to collectively bargain directly

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[107] Eric J. Klimowicz, *Nature or Nurture? The Concentration of African Americans in Specific Sport,* Gettysburg College Student Publications, Fall 2018, at 690, https://cupola.gettysburg.edu/student_scholarship/690.

with universities for salaries and other rights."[108] The NCAA has asked Congress for antitrust exemptions from Congress to prevent this, but "they have seldom found a sympathetic ear."[109] The absence of Congress's defense for changing the NCAA's status is promising for college athletes, yet their silence does not necessarily benefit the players either. The House settlement is just one option for the NCAA to move forward. Though this stance is favored by many current and former players, there is still potential for Congress to step in and provide separate guidelines.

Whether athletes are made into employees, the House settlement moves forward, or a new idea emerges, the questions surrounding Title IX's implications on plans for revenue sharing, or even salaries, *must* be answered. The courts cannot provide a holistic plan because they are confined to the outdated Title IX statutes that do not address non-education-related payments. To ensure fair compensation and treatment of female athletes during this new era, Congress must amend Title IX or create new legislation. If Congress fails to update the language of Title IX as it stands, all plans of revenue sharing must follow the same guidelines as "scholarships," which require funds to be allocated "proportional to the rate of participation."[110]Any school that fails to split the shares of revenue proportionally among male and female athletes violates Title IX and consequently loses any lawsuit that follows. As the NCAA continues to face a myriad of lawsuits, with no timeouts left in the game, there is no path forward other than clarification from Congress

[108] Billy Witz, *At What Point Should College Athletes Be Considered Employees?,* N.Y. TIMES (Dec. 23, 2023), https://www.nytimes.com/2023/12/23/us/college-athletes-employees-nlrb-hearing.html.

[109] *Id.*

[110] *Sex Discrimination: Overview of the Law*, *supra* note 37.

A Level Playing Field

Hannah Greer

I. Introduction

The college admissions process is a gauntlet designed to find the best students to fill a university community. With essays to write, scores to receive, and recommendations to secure, students have more than enough on their plates. In the wake of many schools dropping SAT score requirements, one would think that college admissions teams across America have never been more equitable. But what happens when not everyone has an equal opportunity to rise above the ranks in test scores, extracurriculars, or school success? The systematic barriers of education and race are often unseen to those outside of the education system. However, they certainly exist and carry a profound impact on the successes and futures of minority students in the US.

This is the issue that affirmative action attempts to address. By understanding these systematic barriers of entry that disproportionately affect minority students, affirmative action creates a solution that bridges the gap between traditional qualification factors and the admissions process. In an attempt to right the racial wrongs and contentions of the past that seemingly put minority students at a disadvantage, affirmative action seems noble in its quest to pursue equality in higher education. However, this becomes quite contentious when applicants who have had the resources to pursue things like exogenous tutoring, SAT courses, and essay assistance are being slighted due to purely race-based factors. Although affirmative action attempts to promote diversity and right the moral wrongs of a systematically crooked education system, the key to fixing the discrepancy of race equality is not in creating another uneven playing field. Rather, admissions departments should consider factors that contribute to education inequality to level the playing field for all applicants.

II. Issues that Inspired Affirmative Action

Affirmative action is based on righting societal and systematic educational issues that have resulted in barriers to entry on college campuses. It is true that the education system in the United States is not created equal and that schools in certain districts and even in entire states are severely underfunded. This unequal education system has created a slew of academic issues where minority students face a disadvantage in traditional college admission factors like SAT scores. In an article published about 2020 SAT scores—from the College Board's public data—minority students scored 100 points less than White students and nearly 200 points less than Asian students.[1] Likewise, minority students also scored lower on the reading and writing portions of the standardized test. Because SAT scores are generally used for "admissions and financial aid decisions," minority students already face a detriment in the admissions process based on a single aptitude test. This "score distribution," which leaves minority students "at the bottom… influences the extent and type of college enrollment by race", thereby creating less diverse university populations.

Another significant barrier to educational equality stems from economic factors. Lower-class school systems and neighborhoods put students who hail from disproportionately minority backgrounds in positions of injury due to the lack of economic resources for education and admissions. These conditions could mean that while other students are able to receive tutoring for the SAT, take it multiple times, and have a myriad of scores to choose from, lower-class students may only get to take the test once through their school and without prior preparation. In a 2013 census taken by the Population Reference Bureau, 58% of low-income families with one working adult were Black or Hispanic.[2] Despite being less than one-fourth of the population, minorities make up nearly two-thirds of the low-income

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[1] Richard V. Ember Smith, *SAT Math Scores Mirror and Maintain Racial Inequity*, BROOKINGS (2022), www.brookings.edu/articles/sat-math-scores-mirror-and-maintain-racial-inequity.

[2] PBR, *Race/Ethnic Income Gap Growing among U.S. Working Poor Families*, PBR, www.prb.org/resources/race-ethnic-income-gap-growing-among-u-s-working-poor-families/#:~:text=Among%20the%2010.6%20million%20U.S.,is%20now%2025%20percentage%20points. Accessed 23 Feb. 2024.

working population. In areas where low-income families are a majority, school funding is extremely lacking due to the low funds people are able to contribute to local schools. This lack of funding disproportionately affects minority people in the US and is a factor in lower test scores and a disadvantage in access to extraneous educational resources like tutoring. With these economic factors in mind, affirmative action addresses multiple systematic barriers to entry in its policy.

Finally, factors that negatively affect students in school can be social and behavioral.
Cultural and psychological differences appear in school settings and are seen in both teachers and other students. For example, children may exclude members of a race that do not look like them, language barriers may create discrepancies in education, and teachers' own upbringings can negatively impact the education of minority students, even if unintentionally. These disparities arise from cultural misunderstandings or unintentional 'implicit biases' that unknowingly affect people's thoughts and behaviors in the classroom and beyond. Implicit biases from teachers may significantly affect the potential and current environment by shortening the runway on which minority students can run. A study by the Journal of Public Administration Research and Theory found that Black students were 54% less likely to be recommended for gifted and talented programs than their White counterparts when test scores were considered.[3] However, the group also found that Black students are three times more likely to be recommended by a Black or minority-identifying teacher than a White teacher. These studies provide strong evidence for minority students being disadvantaged by social and psychological factors that are outside of their control, contributing to the disparate education systems for students of different races. Also, in this line of reasoning, there is a difference in *expectations* for students of different races. In a study by the Economics of Education Review, it was found that when White and Black teachers "evaluate the same Black student," White teachers are 12% less likely to believe that the student will graduate high school

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[3] Sean Nicholson-Crotty, *Disentangling the Causal Mechanisms of Representative Bureaucracy: Evidence from Assignment of Students to Gifted Program*, 26 J. PUBLIC ADM. RES. THEORY 745 (2016).

and are 30% less likely to believe that the same student will graduate college than their Black teaching counterpart. Whether this is evidence of the bias of the teacher or proof of the failings of the education system, for some reason, minority students are being seen as less prepared and less successful by White teachers than they are by teachers who may understand their background more personally.

Minority students are put at a social disadvantage due to the strong belief found across classrooms in America that they are simply not doing well in school. More importantly, teachers responding to increased racial tensions can inadvertently set students up for failure by not addressing issues early. In the Journal of Educational Psychology, an interesting trend has been discovered that may provide a key piece as to why minority students have garnered a reputation for being unprepared for higher education. Their findings suggest that teachers struggling with their implicit biases may "turn that bias on or off by enhancing or allaying the teachers' concerns that they might appear prejudiced." This implicit bias can manifest in grading minority students with a lighter pen rather than providing needed criticism and extra lessons that would bring them to the level of their White counterparts.[4] This fear of bigotry or name-calling, while understandable, puts students at a disadvantage because they are not receiving the same kind of opportunity to correct and learn that their White counterparts are. Harber explains that "in their attempts to be egalitarian, however, [teachers] might avoid constructive criticism that would benefit Black students". While early education may attempt to be race-sensitive, minority students still suffer from the decisions of their educators, continuously seen as less intelligent, less capable, and less important than White students.

III. Legal Protection for Affirmative Action

According to the ACLU, affirmative action is the right of universities to "consider a student's race along with a wide range of other factors" in order to limit the barriers to entry "that have denied

[4] Kent D. Harber, *Students' Race and Teachers' Social Support Affect the Positive Feedback Bias in Public Schools*, 104 J. EDUC. PSYCHOL. 1149 (2012).

underrepresented students access to higher education".[5] This means that in order to rectify the inequality that is inherent in the education system, proponents of affirmative action assert that the government should permit universities to judge students on race-based factors to create a more equitable learning environment in the face of an inherently unequal system. This legal precedent is affirmed through two major cases: *Regents of the University of California v. Bakke* and *Grutter v. Bollinger*. Both of these cases uphold a statute of affirmative action under the strict scrutiny standard, meaning "creating a diverse classroom environment" represented a "compelling government interest".[6] In the case of *Regents of the University of California v. Bakke,* a man was denied admission to the UC-Davis Medical School, while 16 "qualified minority" individuals were granted admission due to the school's affirmative action policy. The question brought before the Supreme Court was whether UC-Davis violated the 14th Amendment and the Civil Rights Act (CRA) of 1964. Bakke, a white applicant, argued that the UC-Davis medical school's policy of reserving 16 out of 100 seats for minority applicants discriminated against him based on race. He claimed this racial preference denied him equal protection under the law by treating him differently solely because of his race, violating the 14th amendment. Since UC-Davis was a public university receiving federal funding, Bakke argued that its admissions policy violated Title VI of the CRA by discriminating against him because of his race due to the fact that Title VI prohibits racial discrimination in federally funded programs.

Five justices argued that using race in admissions decisions was "constitutionally permissible" and that UC-Davis did not violate the 14th Amendment or the CRA, representing a win for affirmative action in 1977. Justice Powell also stated in the opinion that race may only be considered constitutional if it were a part of an array of factors, without being the most important or leading indicator of admissions. The court's members contended that diversity represents a "compelling government interest" that enriches the lives of students

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[5] ACLU, *What You Need to Know about Affirmative Action at the Supreme Court: ACLU*, AM. CIV. LIB. UNION (2023), www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court.
[6] Regents of the University of California v. Bakke, (1977), www.oyez.org/cases/1979/76-811.

and university campuses, thus legalizing schools' ability to consider race-based factors in college admissions.

Another legal triumph for affirmative action policy was the case of *Grutter v. Bollinger*. A woman was denied admission to the University of Michigan Law School and brought her case before the Supreme Court upon learning that the law school used race as a factor in admissions. The court held in a 5-4 decision that the University of Michigan Law School admissions counsel did not violate the Equal Protection Clause or Title VI of the Civil Rights Act of 1964.[7] In the majority opinion written by Justice O'Connor, the court argued that the strict scrutiny standard protected the law school as their admissions process was so detailed and individualized that it was impossible for race to be a major or discriminating factor in admissions. This decision protects affirmative action policy by establishing a precedent that could be used in other instances of litigious affirmative action, as well as informing judges on what to look for in terms of "compelling government interest" and scenarios that passed the strict scrutiny standard, thus aiding in the solidification and legitimacy of affirmative action policy in higher education.

A recent victory for affirmative action case work was *Fisher v. University of Texas.* In 2016, Abigail Fisher–a white woman–challenged the University of Texas after they denied her application, stating that the university's consideration of race during application review was a violation of the Equal Protection Clause (EPC) of the 14th Amendment. Texas, however, argued that their race-conscious admissions process was in place to promote diversity on campus, fulfilling the compelling government interest requirement under the strict scrutiny evaluation of the EPC.[8] The case debated whether the EPC protects racial consideration in undergraduate decisions. Ultimately, the courts ruled with the *Grutter* decision, enforcing the protection of racial consideration in undergraduate admissions under EPC. This case was extremely important because it attempted to overturn the *Gratz* and *Grutter* decisions but was unsuccessful. If the court had sided with the plaintiff, it would have diminished universities' abilities to consider race under the strict scrutiny

[7] Grutter v. Bollinger, (2003), www.oyez.org/cases/2002/02-241.
[8] Fisher v. University of Texas, (2013), www.oyez.org/cases/2012/11-345.

exception of the 14th Amendment. *Fisher* was crucial to the continuation of affirmative action as it further protected universities' race-sensitive admissions under strict scrutiny and the compelling government interest standard of review. Had this not been done*,* the lower court's ruling that the university's considerations were indeed not uniquely tailored enough would have been the final ruling on this case and would have been detrimental to affirmative action.

IV. The Dark Side of Affirmative Action

While supporters of affirmative action argue that the policy makes college campuses more representative and is righting the wrongs of past racial injustices, opponents argue that it is doing so by cheapening the accomplishments of minority students. Students admitted through affirmative action may wonder if they were admitted based on their academic merit or merely to fill a race quota. Furthermore, top universities that admit minority students who may not anticipate a school's academic rigor put them at a huge disadvantage, placing students "in environments where they can neither learn nor compete effectively".[9] These policies have the opposite effect on the minority students they claim to uplift and protect, "[stigmatizing] minorities, [reinforcing] pernicious stereotypes, and [undermining] the self-confidence of beneficiaries" because they are unable to perform on par with the rigor of the university. Not only will these students struggle to find their footing socially and mentally, but "they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out" than their non-minority counterparts. Other sources link it to a "mismatch" that has unintentional consequences such as "low grades and high dropout rates," which only happens because students were admitted based on their race "rather than their merits".[10] This trend is backed by

[9] Stuart Taylor Richard Sander Jr., *The Painful Truth about Affirmative Action*, ATLANTIC MEDIA COMPANY, Jul. 12, 2021, www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/.
[10] Elizabeth Slattery, *How Affirmative Action at Colleges Hurts Minority Students*, HERIT. FOUND., www.heritage.org/courts/commentary/how-affirmative-action-colleges-hurts-minority-students.

a decade's worth of research, and the minority dropout rate due to affirmative action has become a serious problem. One of the most interesting pieces of data to come from these studies is a finding from the Heritage Foundation, reporting that minority students "admitted due to affirmative action policies and white students admitted as 'legacies' with entering credentials that match have a very similar dropout rate". This indicates that the critical factor in the dropout crisis is not race, but rather the unpreparedness in students accepted on terms other than merit, because "when a student's entering credentials put [them] at the bottom of the class, it should come as no surprise when [they] switch to an easier major, drop out, or fail out" because of the unexpected difficulty they uncover in their classes. This is being seen with affirmative action students who, despite their efforts and accomplishments, are struggling to keep up under new circumstances and are left unsupported by the very system that was intended to uplift them.

The consequences of students being unprepared for schooling due to affirmative action do not stop at dropping out–it has a profound effect on the diversity of the working class and economy. For example, because students who are not fully qualified for the academic rigor are being admitted, "fewer minorities [will] enter careers in science, technology, engineering, and math (STEM) fields" due to the amount of students who find it too challenging because of the school they were admitted to without preparation. Further, this is supported by evidence that it is not because of a lack of interest or talent in the minority students who are looking for STEM careers or studies, it is truly because they flounder once they enter the increasingly rigorous classes at universities where their credentials are not up to par.[11] To say that affirmative action is for the benefit of minority students is to ignore the potential academic and career repercussions the practice may be causing for students. While these policies are meant to enhance diversity, they may be contributing to the failure and dropout rate of minority college students instead.

V. Legal Opposition to Affirmative Action

[11] *Id.*

As there has been legal precedent in favor of affirmative action, there is now case law that diminishes race based consideration in college admissions. In the case of *Gratz v. Bollinger*, the University of Michigan's Office of Undergraduate Admissions denied two white students who were qualified academically, yet admitted to permitting almost every qualified applicant from an "underrepresented minority," into the university.[12] The students brought a class action suit against the admissions office before the Supreme Court, where they raised the question of whether OUA violated the Equal Protection Clause and Title VI of the CRA with their race-based admissions preference. The Court ruled that OUA had violated the students' rights because it failed to demonstrate that its admission policy favoring "underrepresented minorities" met the strict scrutiny standard, which requires a thorough, individualized review of each applicant. Rather than a holistic approach, OUA used race as a near automatic indicator for whether to admit or reject a student. This was a huge blow to schools using similar practices in an attempt to raise diversity as it prohibited universities from admitting students simply based on their race or minority status.

Another important case in this argument involves *Regents of the University of California v. Bakke,* however, not for the justices' previously mentioned views on affirmative action. Although the justices allowed for race to be one of many factors in admissions, they asserted that the "rigid use of racial quotas" was unconstitutional as it violated Title VI of the CRA. This clause states "that no person…on the ground of race, color, or national origin, be excluded from participation in…any program or activity receiving federal financial assistance," which has been outlined by precedent to include public universities.[13] According to the Court, unfairly raising the worth of one race due to past injustices or current inequalities should not come at the cost of lowering the worth of other qualified applicants of a majority race. Instead, schools should focus on the causes of educational inequality, like underfunding and lack of access to

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[12] Gratz v. Bollinger, (2003), www.oyez.org/cases/2002/02-516.
[13] U.S. Department of Housing and Urban Development, *Title VI of the Civil Rights Act of 1964*.

educational resources. If these issues truly persist and need rectification, the statistics will justify the use of other race-conscious factors that truly uplift minority students and acknowledge their struggles.

A lesser-known yet extremely important case pertaining to affirmative action is the *City of Richmond v. J. A. Croson Company*. In this case, the city of Richmond required construction companies who were given government projects to subcontract 30% of their business to "Minority Business Enterprises".[14] J. A. Croson Co. challenged this law under the pretense that it violated the Equal Protection Clause, bringing under review whether Richmond's affirmative action policy was in violation of the 14th Amendment, which the court affirmed as unconstitutional. In the majority opinion delivered by Justice O'Connor, she asserted that "generalized assertions of past racial discrimination" did not permit rigid race quotas instated by affirmative action policies.[15] Considering that the ACLU's principal defense of affirmative action is that it is an "[effort] to overcome the country's shameful legacy of racism and racial inequality," through reparations in race-informed college admissions, this ideology is in direct contrast to legal precedent that states you cannot use past injustices to inform decisions based on race in employment or in government-funded activities like public universities.[16] In fact, the ACLU goes further in this assertion by stating that the decision of *SFFA v. UNC and Harvard* would undo the strides that the universities have made "after over a hundred years of total or near total exclusion of Black students and other students of color," once again proving that their purpose is to repair past injustices through current policy. Though the intent may be admirable, ultimately the methodology is unconstitutional under the 14th Amendment's Equal Protection Clause and the CRA of 1964.

Another case that further solidifies that past injustices are not grounds for current affirmative action policies is *Adarand Constructors, Inc. v. Peña.* In this case, Adarand, a contractor specializing in highway guardrail work, was passed over for a

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[14] City of Richmond v. J. A. Croson Company, (1988), www.oyez.org/cases/1988/87-998.
[15] *Id.*
[16] ACLU, *supra* note 5.

subcontractor job in favor of a subcontractor who would give the lead contractor a payout for his business being labeled a minority-led entity. It was determined that Adarand would have been chosen for the job had his business been certified as a minority company. This raised the question of whether the presumption of race-based disadvantage and consequent favorable treatment violated the Due Process Clause of the 5th Amendment. The *Adarand Constructors, Inc. v. Peña* case is unique in that it tackles affirmative action from a due process argument, yet is similar to various other affirmative action cases as the legislation is still built on reparations. The court ultimately found that the circumstances were in violation of the Due Process Clause of the 5th Amendment because race itself is not a strict enough indicator of disadvantage. More importantly, the justices ruled that even if there was "proof of past injury" due to race, it would not "in itself establish the suffering of present or future injury," and, therefore, could not be an argument for affirmative action legislation.[17] This case strengthens the argument against affirmative action as it further outlines the fact that past racial injustices or injuries are not liable for reparations made in the present, whether in the assigning of federal projects or the college admissions process. This opinion delivered by Justice O'Connor further solidifies the argument that the outlined purpose of affirmative action in college decisions is to repair past racial infractions and the current implications of previous injustices; it is unconstitutional for companies, the government, and universities alike to reward students or assume disadvantage solely based on racial factors.

VI. The True Cure for Systematic Education Inequality

The foundation of this debate is focused on how we as a country might reasonably address systematic educational inequality. The answer comes in the form of a remark from the majority opinion of *Students for Fair Admissions, Inc. v. University of North Carolina (SFFA v. UNC)*: "At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality

[17] Adarand Constructors, Inc v. Peña, www.oyez.org/cases/1994/93-1841.

of character or unique ability that the particular applicant can contribute to the university." This principle highlights the crux of the entire situation. If the proponents of affirmative action claim that minority students are the most underfunded, underrepresented, and at-risk in their communities, then considering factors like environmental context in admissions and acknowledgement of first-generation status will protect and amplify minority applicants without needing to admit them solely on race. The case of *SFFA v. UNC* held that UNC's admissions program violated the Equal Protection Clause due to their race-based admissions system, which did not pass the "strict scrutiny, non-stereotyping, and termination criteria" test as demonstrated by the precedent set in *Grutter v. Bollinger* (*SFFA v. UNC).*[18] While this decision was a major step towards ending affirmative action policy, the precedent is not its most important aspect. As mentioned above, college admissions offices have other resources to statistically boost minority students in the application process without relying solely on the racial background of the applicant. For example, environmental context is a tool used by universities to calculate the risk students face in their high school based on violent crimes in the area, the percentage of lower and lower-middle-class families, and comparative factors like funding with other schools in the state. The College Board's website provides this information via a dashboard showing "crime rates, poverty levels, housing values, educational attainment, family structure, employment levels, and college-enrollment rates" for a given community.[19] This tool also shows "a student's SAT score relative to others in their high school and displays high school-specific data such as AP courses offered and free lunch rates," which allows admissions staff to see how students fair in their learning environments compared to their fellow students who also confronted specific difficulties in their hometown. This consideration is meant to make admissions staff more empathetic to the disproportionately unequal environment students learn in, which should theoretically uplift minority applications. In fact, College Board even speaks to this by claiming

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[18] Grutter v. Bollinger, *supra* note 7.
[19] Kate Colwell, *College Board Rolling Out Tool That Shows 'Environmental Context' for Students' SAT Scores*, THE FEED (2019), feed.georgetown.edu/access-affordability/college-board-rolling-out-tool-that-shows-environmental-context-for-students-sat-scores/.

that the purpose of the tool is that it "enables colleges to witness the strength of students in a huge swath of America who would otherwise be overlooked," due to lower test scores or unseen factors that influence education.

By encouraging minority students to detail how their unique stories and racial backgrounds have influenced their education, they can showcase their journeys and character development more fully rather than solely emphasizing uncontrollable aspects like skin color. However, disappointingly, many students "don't know what's most unique about them" when writing their personal statement.[20] The responsibility for change falls upon the admissions counselors and the education systems in America to support students in understanding how each of them have been shaped through their unique experiences rather than superficially characterizing them based on race. When students are empowered to embrace their differences, college admissions counselors can see who they really are. By only considering race, the universities are creating a dissolute and weak alternative to truly understanding the student they are admitting into a university.

Furthermore, colleges like The University of Texas at Austin consider aspects like first-generation status as part of a holistic review process and even offer scholarships exclusively to first-generation students. According to studies, nearly half of first-generation college students are classified as minorities, making this another useful factor for uplifting minority students' applications beyond the scope of test scores and GPA.[21] This is the type of holistic and racially informed admissions process that Justice John Roberts is encouraging universities to consider rather than the unideal alternative of race-based admissions). Only when we truly consider the challenges and adversity that students grow up in, especially the disproportionate and systematic factors that push students down in the traditional pile of admissions, will this country see healing for generational errs. Celebrating the perseverance of at-risk and oft-minority candidates

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[20] *Id.*

[21] Yesenia Ayala, *First-Generation Students*, LUMINA FOUND. (2024), www.luminafoundation.org/topics/todays-students/first-generation-students/#:~:text=First%2Dgeneration%20college%20students%20come,Native%20American%20or%20Alaska%20Native.

rather than commodifying race is the true cure to the issue of higher education inequality.

On the Waterfront: The Legal Battle for Control over the New York/New Jersey Docks

Jordan Perlman

I. Introduction

On January 15, 2018, New Jersey Governor Chris Christie unilaterally withdrew New Jersey from the bi-state Waterfront Commission of New York Harbor. His actions ended 65 years of partnership with New York combating mob corruption and discrimination on the ports. Over the ensuing half a decade, the Waterfront Commission and later New York State bitterly fought to keep New Jersey in the Commission in a tumultuous legal battle that was litigated at all three levels of the federal court system. Ultimately, the Supreme Court of the United States (SCOTUS) ruled in *New York v. New Jersey* that New Jersey had the right to withdraw, notwithstanding New York's objections, and dissolve the Waterfront Commission.

Since the 2023 SCOTUS decision, each state independently regulates and polices the waterfront. However, it remains too early to judge their success. It will take several years to evaluate the decision's financial impact and whether the docks of NY and NJ retain their preeminent position on the East Coast. Similarly, it will take time to determine whether these new entities can successfully prevent a resurgence of organized crime on the waterfront without the overriding coordination provided by the old Waterfront Commission.

II. Lead-Up

In 1948, *New York Sun* journalist Malcolm Johnson published 24 Pulitzer Prize-winning articles exposing the deleterious influence of organized crime on the Ports of New York and New Jersey.[1] *Crime on the Waterfront* details how infamous mafiosi such as Frank Costello and Charles "Lucky" Luciano exploited various waterfront practices to

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[1] Sean Murphy, *An Underworld Syndicate: Malcolm Johnson's "On the Waterfront" Articles,* The Pulitzer Prizes, www.pulitzer.org/article/underworld-syndicate-malcolm-johnsons-waterfront-articles (last visited Oct 6, 2024).

enrich themselves and expand their crime syndicates.[2] The cornerstone of this corruption was the 'shape-up,' where pier bosses selected the day's workers from the crowd of men that showed up at the docks each morning.[3] To increase their chances of being chosen, workers gave kickbacks directly to the bosses or indirectly, by patronizing select shops or donating to specific fundraisers.[4] Other illicit activities included cargo theft and running gambling, loansharking, and drug-selling operations on the harbor.[5] Johnson's exposé ignited public outrage, forcing lawmakers to confront the mob's stranglehold on the waterfront.

In 1953, New York and New Jersey created the bi-state Waterfront Commission of New York Harbor (Commission) in response to the "corrupt hiring practices" and "for the protection of the public safety, welfare, prosperity, health, peace, and living conditions of the people of the two States." Its two main goals were to eliminate criminal activity on the ports and guarantee fair hiring and employment practices.[6] The bi-state Commission eliminated the 'shape-up' system, creating Employment Information Centers through which employers hired longshore workers.[7] Additionally, the Commission confirmed and revoked worker licenses, opened the Longshore Workers' Register, and added employees to the register.[8] A 1989 assessment of the Commission, 36 years after its creation, conducted by Peter Levy revealed that the exploitation of dockworkers

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[2] Malcolm Johnson, *Underworld Syndicate, with Ties Abroad, Runs Vast Empire of Crime, Reputed to Include Waterfront Rackets Here,* (1948), www.pulitzer.org/winners/malcolm-johnson (last visited Oct 6, 2024).

[3] Julia Pjevach, *A Comparative Look at the Response to Organized Crime in the Ports of New York-New Jersey and Vancouver,* 6 Cardozo Int'l & Comp. Law Rev. 283 (2022).

[4] Nathan Ward, *Dark Harbor: The War for the New York Waterfront* (1st ed. ed. 2010).

[5] Pjevach, *supra* note 5.

[6] New York State Legislature, *Waterfront Commission Act.,* N.Y. Laws, c. 882, 1953, https://www.wcnyh.gov/docs/wcnyh_act.pdf.

[7] Bradley v. Waterfront Comm., 12 N.Y. 2d 276 (1963).

[8] Linehan v. Waterfront Commission, 347 U.S. 439 (1954).; NOW, et al. v. Waterfront Com. of New York Harbor, 468 F. Supp. 317, 319 (S.D.N.Y. 1979).

"diminished considerably" and racketeering became less brazen.[9] Levy ascribed the continuing presence of organized crime to the Commission's insufficient "manpower and jurisdiction."[10]

In 2015, the Commission successfully completed three criminal investigations: 1) securing convictions against 11 Genovese associates for racketeering and other illicit schemes; 2) sentencing Genovese members along with high-ranking International Longshoremen's Association ("ILA") officials for a "35-year extortion scheme;" and 3) convicting an ILA Atlantic Coast District Vice President for a shakedown operation.[11]

Overall, in the 2014-15 fiscal year, the Commission arrested 118 people, while seizing "over 34 pounds of heroin, 821 pounds of cocaine, 97 pounds of marijuana, 500 Oxycodone pills… [and] over $9.6M in proceeds from drug transactions and loan sharking."[12] Despite these major accomplishments, the Commission faced dissolution from a bill unanimously passed by the New Jersey State Legislature in 2015.[13] However, Governor Chris Christie vetoed the bill, arguing that New Jersey could not unilaterally withdraw from the agency.[14]

The New Jersey Legislature's efforts were led by state Senator Raymond Lesniak, the bill's author. Lesniak asserted;

> The Waterfront Commission was formed in
> 1953 to eliminate control of the waterfront by

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[9] Peter B. Levy, *The Waterfront Commission of the Port of New York: A History and Appraisal,* 42 Industrial and Labor Relations Review 508 (1989), https://www.jstor.org/stable/2524026 (last visited Oct 6, 2024).

[10] *Id.*

[11] Waterfront Comm'n of New York Harbor, *Waterfront Comm'n of New York Harbor Annual Report 2014-2015, (2015),* waterfront.ny.gov/system/files/documents/2023/11/2014-2015_wcnyh_annual_report.pdf (last visited Oct 6, 2024).

[12] *Id.*

[13] Raymond J. Lesniak, et al., Bill S2277 ScaSca (2R), S2277, https://www.njleg.state.nj.us/bill-search/2014/S2277 (last visited Dec. 4, 2024).

[14] Chris Christie, *Conditional Veto: Senate Bill No. 2277,* https://www.google.com/url?q=http://www.njleg.state.nj.us/&sa=D&source=docs&ust=1733350193807762&usg=AOvVaw3fSuZtjhMGttUJeM80F7vf; Joseph Bonney, *NJ Governor Rejects Bill to Withdraw from Waterfront Commission,* Journal of Commerce, https://joc.com/article/nj-governor-rejects-bill-to-withdraw-from-waterfront-commission-5237902 (last visited Oct 6, 2024).

> organized crime. Organized crime does not control the waterfront anymore. There are reputable terminal operators and Shipping Association members who are not tied up and not controlled by organized crime, and their daily hiring practices — in terms of the employment they need to quickly move cargo in and out — are being impaired by this unnecessarily.[15]

Lesniak's complaints centered on the Commission's hiring restrictions and diversity mandates which he claimed were preventing companies from efficiently recruiting labor. Additionally, he argued the Commission had overstepped their authority in interpreting their mandate to regulate hiring as permission to interfere in collective bargaining agreements and require stevedoring companies to hire independent inspectors.[16]

These grievances stemmed from Section 5-P of the Waterfront Commission Act which allowed the Commission to regulate hiring on the docks – specifically, the "closed register statute" and "non-discrimination statute."[17] The closed register statute enabled the Commission to control the number of active longshore workers.[18]Historically, the main method of transporting cargo was called "break bulk shipping," wherein items would be placed into containers such as boxes, barrels, and crates. Each container was loaded and unloaded individually in a time-consuming process, requiring numerous workers.[19] Consequently, any applicant who met

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[15] Ryan Hutchins, *Murphy to Nominate Waterfront Commission Foe to Agency's Board,* Politico (2020), www.politico.com/states/new-jersey/story/2020/01/28/murphy-to-nominate-waterfront-commission-foe-to-agencys-board-1256431 (last visited Oct 6, 2024).

[16] Chris Dupin, *New Jersey legislature votes to withdraw from Waterfront Commission,* FreightWaves (2015), https://www.freightwaves.com/news/new-jersey-legislature-votes-to-withdraw-from-waterfront-commission (last visited Mar 27, 2025).

[17] Ginger Adams Otis, *City Dock Workers Call for Repeal of Provision They Say Gives Waterfront Commission Excessive Hiring Power,* New York Daily News (Jul. 14, 2017), https://www.nydailynews.com/2017/07/14/city-dock-workers-call-for-repeal-of-provision-they-say-gives-waterfront-commission-excessive-hiring-power/ (last visited Oct 6, 2024).

[18] *Id.*

[19] Judah Levine, *The History of the Shipping Container,* Freightos (2023), www.freightos.com/the-history-of-the-shipping-container/ (last visited Oct 6, 2024).

the basic criteria was permitted to join the Longshore Workers' Register, a list of the workers available for hire. However, the advent of shipping containers in the mid-1950s made cranes and other machines more efficient than manual labor at loading and unloading ships. The reduced demand for manpower led to a surplus of workers, making the job prospects of individuals less predictable.[20] In 1966, to mitigate this surplus, the New York and New Jersey legislatures added Section 5-P to the Act, allowing the Commission to control the opening and closing of the register.[21] Lesniak believed this regulation was outdated and prevented companies from adapting to changing demands for manpower.

The non-discrimination statute was added to Section 5-P in a 1999 amendment, to strengthen the Commission's ability to ensure fair hiring practices: the Commission equalized the employment process and required businesses to sign a "fair hiring certification letter."[22] Lesniak argued these measures delayed the hiring of qualified workers in an attempt to fix a non-existent issue.

Lesniak's attacks echoed complaints from major unions representing port workers In 2016, the International Longshoremen's Association, AFL-CIO (ILA), New York Shipping Association, Inc. (NYSA) Metropolitan Marine Maintenance Contractors Association, Inc. (MMMCA) challenged these two statutes. Ruling against the objections, the US Court of Appeals Court for the Third Circuit recognized anti-discrimination as a foundational goal of the Commission, encompassed within the Act's phrase "corrupt hiring practices."[23] In 1953, both state and federal government officials made it clear they sought to end the apparent discrimination that was ingrained in the 'shape up' system and diversify the workforce. As

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[20] *Id.*

[21] Paul E. Babchik & Jeffrey Walden, *"Kid, This Ain't Your Night", in Maritime Crime and Policing 274* (1 ed. 2023), https://www.taylorfrancis.com/books/9781003182382/chapters/10.4324/9781003182382-18 (last visited Oct 6, 2024).

[22] Waterfront Comm'n of New York Harbor, *Waterfront Comm'n of New York Harbor Annual Report 2018-2019, (2019),* waterfront.ny.gov/system/files/documents/2023/11/2014-2015_wcnyh_annual_report.pdf (last visited Oct 6, 2024).

[23] N.Y. Shipping Ass'n, Inc. v. Waterfront Comm'n of N.Y. Harbor, Civil Action No. 2:13-7115, (D.N.J. Aug. 27, 2014).

Rutgers Law Professor Bernard Bell wrote in the Yale Journal on Regulation:

> The unions and shipping association at the New Jersey ports within the Commission's jurisdiction, which lobbied for the withdrawal bill and intervened to defend the law in *Waterfront Commission v. Murphy*, appear to have "tired" of the Commission in part due to the Commission's promulgation of a requirement to combat racial and other discrimination in hiring, and the Third Circuit's decision to uphold that requirement.[24]

These attacks represented a growing sentiment that the Commission was overstepping its authority and restraining the free market. Opponents highlighted that no other East Coast state had a Commission; its closest parallel, Canada's Toronto Harbour Commission, had been dissolved in 1999.[25] The unions and private companies wanted more control over the hiring process and the unilateral ability to add workers to the register. They argued that this overregulation limited the workforce, leading to longer wait times for loading and unloading cargo.[26] As a result, businesses were leaving the New York/New Jersey waterfront.[27] To evidentiate their claims, Hank Sheinkopf, a political consultant speaking in support of the ILA and the Maritime Association of the Port of New York and New Jersey in 2017 stated "New York's share of leaden containers declined from 33.5 percent in 2010 to 30.1 percent in 2015" and the volume of cargo from Asia decreased by 1.5 percent despite increasing at many other

[24] Bernard Bell, *On the Waterfront: Can Compact Agencies Sue A Signatory States?,* Yale Journal on Regulation, https://www.yalejreg.com/nc/on-the-waterfront-can-compact-agencies-sue-a-signatory-states/ (last visited Oct 6, 2024).

[25] *History,* Ports Toronto, www.portstoronto.com/portstoronto/about-us/history.aspx#:~:text=The%20Canada%20Marine%20Act%20originally,the%20harbour%20and%20the%20airport (last visited Oct 6, 2024).

[26] Patrick McGeehan, *On the Waterfront, a Mob Watchdog Is Fighting to Survive,* The New York Times (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/nyregion/waterfront-commission-new-york-new-jersey-mob.html (last visited Oct 6, 2024).

[27] *Id.*

ports.[28] Anger over the drop in cargo, and therefore job opportunities, was heightened by the fact that the Commission was mainly funded through payments by port employers. Opponents believed its responsibilities should be transferred to the New Jersey State Police which would be a cheaper alternative and more amenable to decreasing intrusion into the private sector.[29]

Conversely, Port Authority of New York and New Jersey data shows that total TEUs (a measure of volume meaning twenty-foot equivalent units) increased year-over-year by 10.4 percent in 2015. In 2017 and 2018 the Harbor further increased its total TEUs by approximately 7 percent.[30] In 2019, New York Harbor registered volume increases in contrast to declines at both the Ports of Los Angeles and Long Beach. New York Harbor remains third in the country in terms of total port volume behind Los Angeles and Long Beach.[31]

Another source of contention between New York and New Jersey was the latter's belief that New York was inhibiting the Harbor's growth.[32] The revised 2017/2018 version of the bill, once again urging the governor to withdraw from the Commission, highlighted that New Jersey's growth since "containerization" had significantly exceeded that of New York's: "Today, more than 82 percent of the cargo and 82 percent of the work hours are on the New

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[28] Ginger Adams Otis, *City Dock Workers Call for Repeal of Provision They Say Gives Waterfront Commission Excessive Hiring Power,* New York Daily News (Jul. 14, 2017), https://www.nydailynews.com/2017/07/14/city-dock-workers-call-for-repeal-of-provision-they-say-gives-waterfront-commission-excessive-hiring-power/ (last visited Oct 6, 2024).

[29] Ryan Hutchins, *Christie Foils Attempt to Kill Waterfront Commission,* Politico (2015), www.politico.com/states/new-york/city-hall/story/2015/05/christie-foils-attempt-to-kill-waterfront-commission-021894 (last visited Oct 6, 2024).

[30] *Monthly Cargo Volumes,* Port Authority of New York and New Jersey, www.panynj.gov/port/en/our-port/facts-and-figures.html (last visited Oct 6, 2024).

[31] *2019 Trade Statistics, Port Authority of New York and New Jersey,* www.panynj.gov/content/dam/port/customer-library-pdfs/trade-statistics-2019.pdf (last visited Oct 6, 2024).

[32] *Assembly Panel Releases Mainor, Quijano, Giblin, Wimberly, Pintor-Marin and Spencer Bill to Dissolve the Waterfront Commission of New York Harbor,* New Jersey Assembly Democrats (2014), www.assemblydems.com/DocumentCenter/View/6709/2014-10-Assembly-Panel-Releases-Mainor-Quijano-Giblin-Wimberly-Pintor-Marin-Spencer-Bill-To-Dissolve-The-Waterfront-Commission-Of-New-York--PDF (last visited Oct 6, 2024).

Jersey side of the port." Furthermore, around 90% of the Commission's operating budget came from assessments of New Jersey port employers.[33]

In May 2007, the New Jersey Legislature successfully voted to repeal Section 5-P. However, since the commission affects both states, the law necessitated the New York legislature to pass identical legislation.[34] New York refused to sign, attributing its decision to the ILA's antipathy towards workforce diversity, citing that in 2014, 99 out of the 100 workers it recommended were white.[35] In 2017, New Jersey passed a law that would give each governor the ability to veto Commission policies.[36] Once again, New York refused to pass matching legislation.

Finally, proponents of withdrawal alleged that society had changed and organized crime was extinct. These arguments ignored the hundreds of longshore workers arrested each year for organized crime ties.[37] Making matters worse for the Commission was a massive corruption scandal in the 2000s.[38] Politicians contended that the only

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[33] S. 3502, 217th Leg., Reg. Sess. (N.J. 2017)., https://www.njleg.state.nj.us/bill-search/2016/S3502; Mot. to Expedite & Mot. for Prelim. Relief, at 1, New York v. New Jersey, No. 156, Orig. (U.S. Mar. 14, 2022), https://www.supremecourt.gov/DocketPDF/22/22O156/218536/20220314172901563_NY%20v%20NJ%20Motions.pdf.

[34] Caraballo, Wilfredo, et al. Bill A3123. A3123, https://www.njleg.state.nj.us/bill-search/2006/A3123.

[35] Walter Arsenault, Statement of Executive Director Walter Arsenault Before the New Jersey State Senate Labor Committee in Opposition to SJR36, New York Waterfront Commission (2014), waterfront.ny.gov/news/statement-executive-director-walter-arsenault-new-jersey-state-senate-labor-committee (last visited Oct 6, 2024).

[36] Chris Christie, Letter to Walter Arsenault, (2017), https://ilaunion.org/nj-gov-christie-signs-bill-to-allow-ny-nj-governors-to-veto-actions-by-waterfront-commission/ (last visited Oct 6, 2024).

[37] Waterfront Commission of New York Harbor, Waterfront Commission of New York Harbor Annual Report 2014-2015, (2015), waterfront.ny.gov/system/files/documents/2023/11/2014-2015_wcnyh_annual_report.pdf.; Waterfront Commission of New York Harbor, Waterfront Commission of New York Harbor Annual Report 2018-2019, (2019), waterfront.ny.gov/system/files/documents/2023/11/2014-2015_wcnyh_annual_report.pdf (last visited Oct 6, 2024).

[38] Ralph Blumenthal, Corruption Found at Waterfront Watchdog, The New York Times, Aug. 11, 2009, https://www.nytimes.com/2009/08/12/nyregion/12waterfront.html (last visited Oct 6, 2024).

actual dishonesty on the waterfront was the Commission itself. Without excusing the terrible corruption at the Commission, it is important to mention that the main players involved in the scandal were from New Jersey. The New Jersey Commissioner, Michael Madonna, used his influence to hire three unqualified officers including one who lacked the requisite college diploma and another officer who had failed out of the Port Authority Police Academy.[39] Madonna gave the third officer answers to an examination that he had previously failed twice, despite it being the identical exam each time. In a clear conflict of interest, Madonna also represented the New Jersey State Policemen's Benevolent Association as its president, despite being their manager as a Commissioner.[40] Former New Jersey Prosecutor and later General Counsel for the Waterfront Commission, Jon Deutsch, was similarly entangled with conflicts of interest. Deutsch covered up the drug conviction of a family friend's son and then gave him a license to work on the ports.[41] Additionally, Deutsch investigated and then participated in the questioning of the father of his close friend and former coworker, Al Cernadas, Jr. instead of recusing himself from the case. Deutsch later revealed classified information to Cernadas Jr. concerning the case. In another instance, Deutsch sanctioned and abetted a convicted felon to operate a business that the Commission should have closed.[42] While the Commission had long since reformed by 2018, its reputation remained stained.

While leaving office on January 15, 2018, Governor Christie, reversing his position without explanation, signed the unanimously-passed bill (Chapter 324) withdrawing New Jersey from the

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[39] Joseph Fisch, Investigation of the Waterfront Commission of New York Harbor, (2009), www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf (last visited Oct 6, 2024).

[40] Joseph Fisch, Investigation of the Waterfront Commission of New York Harbor, (2009), www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf (last visited Oct 6, 2024).

[41] Joseph Fisch, Investigation of the Waterfront Commission of New York Harbor, (2009), www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf (last visited Oct 6, 2024).

[42] Joseph Fisch, Investigation of the Waterfront Commission of New York Harbor, (2009), www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf (last visited Oct 6, 2024).

Commission and beginning a half-decade of legal battles.[43]

III. *Waterfront Commission of New York Harbor v. Murphy*

Immediately, New York sued the incoming New Jersey Governor Phil Murphy (thus the name: *Waterfront Comm'n of N.Y. Harbor v. Murphy*), arguing that one state could not unilaterally withdraw from the Compact. As the dispute was brought against New Jersey's governor, the case went to the United States District Court for the District of New Jersey, a federal court. On June 1, 2018, District Judge Susan D. Wigenton granted a Preliminary Injunction preventing New Jersey's withdrawal until the end of the trial and rejected motions for dismissal on behalf of the defendants.[44] Concerning the motions for dismissal, Judge Wigenton used the tripartite test from *Lujan v. Defenders of Wildlife* to adjudicate that the Commission's desire to "prevent its extinction" gave it standing in the case: The Commission's dissolution (i) constituted an "injury in fact," meeting the requirement of a concrete and particularized harm; (ii) was "fairly traceable" to the defendant's conduct, as New Jersey's withdrawal directly caused the injury; and (iii) would be "redressed" by a favorable verdict, as such a decision could reverse or mitigate the harm caused.[45] Furthermore, Wigenton ruled that Governor Murphy did not have sovereign immunity under the Eleventh Amendment because New York was alleging that his actions violated a federal law. According to *Cuyler v. Adams*, the Compact became "law of the United States" when it was approved by Congress. Finally, Judge Wigenton dismissed claims that the Commission did not have the power to sue because both commissioners had not approved the lawsuit. She pointed to numerous instances in which the commissioners had delegated to its employees

[43] Patrick McGeehan, On the Waterfront, a Mob Watchdog Is Fighting to Survive, The New York Times, Jan. 17, 2018, https://www.nytimes.com/2018/01/17/nyregion/waterfront-commission-new-york-new-jersey-mob.html (last visited Oct 6, 2024).

[44] Patrick McGeehan, Judge Blocks New Jersey From Backing Out of Waterfront Commission, The New York Times, Jun. 4, 2018, https://www.nytimes.com/2018/06/04/nyregion/new-jersey-waterfront-commission.html (last visited Oct 6, 2024).

[45] Waterfront Comm'n of N.Y. Harbor v. Murphy, (D.N.J. 2018).

the ability to bring suits on the Commission's behalf. The four-pronged test established in *Ferring Pharma., Inc. v. Watson Pharm., Inc.* was used to grant the Plaintiff's temporary injunction: 1) the Commission had a prima facie case based on a combination of prior case law and the fact that a unilateral withdrawal contradicts the rest of the Compact which requires agreement for one state "to dictate the manner and terms of the Commission's dissolution"; 2) the preliminary injunction is the *only* method that adequately protects the Commission from the irreparable harm of dissolution (before a trial decides its fate); 3) the harm from the Commission's dissolution in the meantime (both to the Commission and to the port through any confusion from new licensing and hiring practices) outweighs New Jersey's desire to stimulate economic growth; and 4) the Commission continued existence throughout the trial is in the "public interest."[46]

After the injunction was issued and the dismissals were denied, both parties moved for summary judgment. Summary judgment obviates a trial and allows a judge to make a decision based on submitted evidence and facts. Since there were no disagreements over evidence, the Court granted these motions in February 2018. Over a year later, Judge Wigenton ruled on May 29 2019 in favor of the Waterfront Commission. As the first part of her final ruling, Judge Wigenton reiterated the Commission's authority to sue, despite the fact that the Commissioner from New Jersey recused himself from that decision. Although the defendants argued that Waterfront General Counsel Phoebe Sorial needed both Commissioner's approval, it was previously delegated to Sorial that she had the power to sue. Furthermore, New York Commissioner Ronald Goldstock was the only one "willing or able to express his approval" and thus his consent was sufficient.[47]

Concerning unilateral withdrawal, Judge Wigenton applied the Amednment's section of the Compact *a fortiori* to New Jersey's withdrawal. She reasoned that amendments to the Compact required bilateral agreement, and since termination is "the most substantial type of change," it too must require consent from both parties. In addition, she reiterated her argument in favor of granting the preliminary

[46] *Id.*

[47] Waterfront Comm'n of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019).

injunction. Chapter 324, withdrawing New Jersey from the Commission, effectively enables it to unilaterally dictate the terms of the dissolution as opposed to the Compact which requires bi-state agreement for all changes. Judge Wigenton relied on *Port Auth. Trans-Hudson Corp. v. Feeney*, where Supreme Court Justice William Brennan directly opposed one-sided dissolution and stated that one state should not be completely in control over an interstate agency.[48]

Judge Wigenton continued with an examination of the "Compact Drafters' Intent," concluding that "the legislative record underscores the importance of New York and New Jersey's cooperative efforts." Governor Christie's 2015 veto and subsequent statement were used as evidence in support of the Commission. Judge Wigenton cited examples of the New Jersey State Assembly trying to request Congress to repeal the Compact three times between 2015 and 2018 as evidence that Legislators knew that a compacting state couldn't withdraw. Finally, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.* found that one bedrock feature of a compact is that one party is "not free to modify or repeal its law unilaterally" and compacts that differ on this point often expressly mention this fact. In response to Judge Wigenton's ruling, Governor Murphy and his lawyers appealed the case to the United States Court of Appeals, Third Circuit.[49]

IV. Waterfront Commission of New York Harbor v. Governor of New Jersey

One of the claims made by the defense in its motion for dismissal was the Eleventh Amendment, which dictates that states and their officials can only be sued by their own citizens. However, as Judge Wigenton noted in her opinion, state officials are not immune when violating federal law, according to the Ex parte Young doctrine. New Jersey appealed the District Court's decision on the grounds that the ruling violated sovereign immunity and that Judge Wigenton

[48] *Id.*
[49] *Id.*

incorrectly applied Ex parte Young.[50] To determine whether the doctrine applied, the Third Circuit Court of Appeals had to evaluate whether the lawsuit was against the governor as a state official or against the state itself. Applying the test established in *Pennhurst State Sch. v. Halderman*, the Third Circuit Court of Appeals ruled in favor of New Jersey, finding the Commission was suing the state, not the governor.[51]

In *Ford Motor Co. v. Department of Treasury of Indiana*, the US Supreme Court decided that Ex parte Young doctrine applied only to state officials, not to the states themselves if they are the "real, substantial party in interest."[52] In their appeal, New Jersey alleged that their state was the party at interest, not its governor. In deciding that point in favor of New Jersey, the Third Circuit Court of Appeals used the *Pennhurst* test, which holds that a state is the substantial party if the "judgment sought would expend itself on the public treasury or domain, or interfere with public administration."[53]

The Third Circuit seemingly took both parts of that Pennhurst citation into account when deciding this case in favor of the governor and further emphasizing that state sovereign immunity is a "bedrock principle," a core tenet of the legal system. Concerning the former, the "judgment sought would expend itself on the public treasury or domain," Chief Judge D. Brooks Smith considered the Commission's funding. If dissolved, payments from port employers would be redirected from the bi-state Commission to the New Jersey Treasury. Conversely, maintaining the Commission would divert funding away from the New Jersey Treasury, "thereby operat[ing] against the State," signifying that New Jersey is the party of interest. For the latter half of *Pennhurst*, the Court determined that the Commission "interfered with public administration" because it "seeks 'specific performance of a State's contract.'" Enforcing the contract would not only compel the state to act to comply, but also restrict it from governing its waterfront.

[50] Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., 961 F.3d 234 (3d Cir. 2020).

[51] *Id.*

[52] Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945).

[53] Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., 961 F.3d 234 (3d Cir. 2020).

Since the obligation to involuntarily remain in the Commission predominantly affects the state as opposed to the governor, a state official, the state is the party in interest. Since the state is protected by sovereign immunity under the Eleventh Amendment, the Third Circuit Court unanimously reversed the District Court's decision and dismissed the case on June 05, 2020.[54]

V. Appeals to the Supreme Court

In response to the Third Circuit's decision, the Commission filed a petition for a writ of certiorari on December 4, 2020.[55] Citing *Edelman v. Jordan,* which bars any retroactive financial judgment, the Commission argued that the prospective judgment sought in this case enforced conformance with federal law in the future rather than compensation for past actions.[56] Since the Commission was requesting the governor's future compliance with federal laws, namely the Compact, the effect on the public treasury was only "ancillary."[57] The Commission also claimed that the Third Circuit's reasoning concerning "specific performance" misunderstood that the Commission was not suing the governor for breach of contract, but for violation of federal law. According to *Louisiana ex rel. Elliott v. Jumel*, "specific performance" necessitates that the Court directly manage state affairs, but the Commission was only asking that the Governor (Respondent) follow the Compact, a federal law, which does not fall under sovereign immunity.[58] The Third Circuit's decision countered previous Eighth (*Entergy, Arkansas, Inc. v. Nebraska*) and Tenth (*Tarrant Regional Water District v. Sevenoaks*) Circuit court decisions requiring that SCOTUS hear the cases and settle the "Circuit

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[54] *Id.*

[55] Waterfront Commission of New York Harbor v. Murphy, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/waterfront-commission-of-new-york-harbor-v-murphy/ (last visited Oct 6, 2024).

[56] Edelman v. Jordan, 415 U.S. 651 (1974); Seth P. Waxman, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., No. 20-772 (U.S. Mar. 16, 2021).

[57] *Id.*

[58] *Id.*

Split."[59] The Commission ended their brief by discussing the widespread importance of interstate compacts and how this decision threatened to hinder such cooperation in the future.[60]

In response to the Commission, the Respondent published a brief arguing against granting certiorari focusing on the "illusory" circuit split and the minute impacts of this case. In *Entergy*, the Compact signed by Nebraska was found to include a provision which "constitute[d] a 'clear declaration' of consent to suit in federal court," meaning Nebraska waived its sovereign immunity.[61] However, there was no such provision in the Commission's Compact. In *Tarrant*, the case dealt with a state's "ownership interests in its natural resources," materially different than the revenue dispute between the Commission and New Jersey in this case, and the ruling neither "expend[ed] itself on the public treasury or domain," nor impacted "public administration."[62] Addressing the miniscule impact of the trial, the Respondent argued that there were myriad alternative methods of suit involving states suing other states (what would later occur in this case), the federal government suing a breaching party, or a state forfeiting their immunity such as in *Entergy*. With so many possible methods of holding a state responsible, this narrow holding would only apply in the rarest of circumstances, making it of limited usefulness as a Supreme Court ruling.[63]

The Respondent claimed the Commission's dispute over whether the payments are ancillary was the very sort of case-specific dispute inappropriate for certiorari, as the Supreme Court typically reviews only cases with broader implications. Additionally, the Respondent reiterated that the suit was against New Jersey because, quoting *Pennhurst* "[t]he general rule is that a suit is against the sovereign … if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"[64] The Supreme

[59] *Id.*
[60] *Id.*
[61] Gurbir S. Grewal et al., Respondents' Joint Brief in Opposition to Certiorari, Rogers v. Grewal, No. 18-824 (U.S. Apr. 19, 2019)
[62] *Id.*
[63] *Id.*
[64] *Id.*

Court denied the petition on November 22, 2021.[65]

VI. New York v. New Jersey

With the *Commission v. Governor* case finally settled, New Jersey once again gave New York formal notice of withdrawal. Desperate to prevent the Commission's dissolution, New York (Petitioner) sued New Jersey (Respondent) in the U.S. Supreme Court, which has original jurisdiction in disputes between states.[66] Previously, New Jersey claimed that a lawsuit between states was the proper way to resolve this dispute, unlike the Commission's previous suit against an official. However, the Commission provided an elaborate explanation on why "a suit within the original jurisdiction of this Court is not an adequate substitute for an *Ex parte Young* action" maintaining that this case involved harm to a non-state party (the Commission) and not a state (New York).[67]

In reality, this argument likely masked the true reason New York had not originally sued New Jersey: the Commission feared that New York Governor Andrew Cuomo would not approve the lawsuit. However, with the receptive Governor Kathy Hochul in office and the Commission once again facing the threat of termination, New York moved forward with litigation. On March 24, 2022, New York filed for preliminary relief (a motion that preserves the status quo), and SCOTUS granted New York's motion that same day, temporarily preventing New Jersey from leaving.[68]

Each side received *amicus curiae* briefs in support of their position. New Jersey received five briefs: one brief from a joint

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[65] Waterfront Commission of New York Harbor v. Murphy, SCOTUSblog, https://www.scotusblog.com/case-files/cases/waterfront-commission-of-new-york-harbor-v-murphy/ (last visited Oct 6, 2024).

[66] Governor Murphy and Acting Attorney General Platkin Oppose New York's Last-Minute Effort to Prevent New Jersey's Withdrawal from the Waterfront Commission, INSIDER NJ (2022), https://www.insidernj.com/governor-murphy-and-acting-attorney-general-platkin-oppose-new-yorks-last-minute-effort-to-prevent-new-jerseys-withdrawal-from-the-waterfront-commission/ (last visited Oct 6, 2024).

[67] Grewal et al., *supra* note 61; Waxman, *supra* note 56.

[68] New York v. New Jersey, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/new-york-v-new-jersey/ (last visited Oct 6, 2024).

coalition of states (Texas, Alaska, Louisiana, Montana, Nevada, South Carolina, Utah, and Virginia); one from the Metropolitan Marine Maintenance Contractors' Association; one from law professors Janice Griffith, David Horton, and Christopher Serkin; one from a variety of "Port businesses and other entities"; and a final brief on behalf of the United States. New York received four supporting briefs: one brief from the state of Oregon; one from three interstate compact entities including the Interstate Commission for Juveniles, the Interstate Medical Licensure Compact Commission, and the Interstate Commission of Nurse Licensure Compact Administrators; one from five law professors (Jeffrey B. Litwak, Bernard W. Bell, Phillip J. Cooper, Neal D. Woods, and Ann O'M. Bowman); and one from the Waterfront Commission of New York Harbor.[69]

On March 1, 2023, SCOTUS heard arguments from both parties.[70] Speaking for the Petitioner, Deputy Solicitor General for New York Judith Vale argued that since the Compact required agreement on nearly everything within the compact, including amendments and approval of a budget, the Compact implicitly requires both states to approve its termination. Vale produced 80 contemporary compacts, explaining that the termination clause is omitted in 56 of them: "The history and tradition of compacts leading to 1953 shows the prevailing understanding that unilateral termination is not allowed unless the compact expressly grants that power." In response, the justices expressed concern about the idea of one state signing over their sovereignty in perpetuity, with no exit option. Justice Clarence Thomas ended his first round of questions with the statement, "What I'm hearing you say is that if they say nothing about terminating it, they basically sacrifice their sovereignty permanently, unless the other party agrees." Vale affirmed this characterization.[71] Reporter Ronald Mann summarized the reactions of other justices: "Justice Samuel Alito characterized New York's 'argument [that New Jersey agreed] to surrender this sovereign authority perpetually' as 'an extraordinary thing'; Justice Elena Kagan found it 'a kind of weird thing,' and

[69] *Id.*

[70] Transcript of Oral Argument at 2, New York v. New Jersey, 598 U.S. 218 (2023) (No. 22O156).

[71] *Id.*

Justice Brett Kavanaugh called it 'a big deal.'"[72]

Justices Jackson and Sotomayor contended that the Commission was never supposed to be endless and thus "one party can't keep the other on the hook forever." Sotomayor supported her reasoning using the annual reports given to each Legislature. These reports, which suggest that each state should have meaningful decision-making power, were effectively pointless if each state could veto certain items, but could not take substantive action based on the information, i.e., leave the Commission. Consequently, preventing one party from withdrawing seems contradictory to the reports themselves, which imply that the Commission was never meant to be perpetual. Justice Kagan summarized the opinion of the court to Vale, posing the question, "Do you understand ordinary contract principles to cut against you?" Vale agreed. In standard contract law, if there is no intent from either party as to the end of the contract but there are continuing obligations, one party can unilaterally back out.[73]

Speaking for the Respondent, Solicitor General of New Jersey Jeremy Feigenbaum argued that sovereignty was the central issue of the case. Unlike earlier rulings in the matter which dealt with state sovereignty under the Eleventh Amendment, this sovereignty issue focused on New York's ability to force New Jersey to remain in the Compact. Remaining in the Commission would deprive New Jersey of its "police powers" by preventing it from regulating its own waterfront, therefore, undermining its sovereignty. New Jersey argued that it cannot be trapped indefinitely, against the will of its legislature and its people. With regards to "police powers," Feigenbaum argued that this concession is so "momentous" that to give them up in perpetuity requires clearer language than what was present in the original Compact. At the end of his speech, Feigenbaum addressed Vale's presentation of 80 compacts, arguing that nearly all of those agreements were fundamentally distinct from the Commission's Compact. He reasoned that many involved entirely different issues,

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[72] Ronald Mann, *Justices Dubious of New York's Efforts to Keep New Jersey in Waterfront-Safety Commission*, SCOTUSBLOG (Mar. 1, 2023), https://www.scotusblog.com/2023/03/justices-dubious-of-new-yorks-efforts-to-keep-new-jersey-in-waterfront-safety-commission/ (last visited Mar 28, 2025).

[73] Transcript of Oral Argument at 28, *supra* note 70.

such as settling property or water rights and one specific compact involving the Port Authority had an explicit provision concerning withdrawal and dealt with infrastructure instead of the continued licensing of workers.[74]

On April 18, 2023, one and a half months after oral arguments, SCOTUS issued a unanimous ruling in favor of the Respondent, New Jersey.[75] Justice Kavanaugh, writing on behalf of the court, rejected the District Court's *a fortiori* argument. Since there was no clear text concerning unilateral withdrawal, SCOTUS looked to contract law, which said, "Under the default contract-law rule at the time of the Compact's 1953 formation, as well as today, a contract (like this Compact) that contemplates 'continuing performance for an indefinite time is to be interpreted as stipulating only for performance terminable at the will of either party.'"[76]

Justice Kavanaugh, utilizing Feigenbaum's sovereignty argument, explained that a fundamental right of any state is its ability to "protect the people, property, and economic activity within its borders." The opinion rejected New York's evidence of the history of Compacts before 1953, since they solely concerned either boundary-setting or water-rights allocation. These two groups of compacts, Justice Kavanaugh noted, are distinctly different from the Waterfront Commission and would not be impacted by the court's decision. After five years of legal disputes, New Jersey was finally granted the ability to unilaterally withdraw from the Commission.[77]

VII. Aftermath: New Jersey

Chapter 324 entrusted the management of New Jersey's ports to the New Jersey State Police, who then established the Port Security Section.[78] The Port Security Section comprises three divisions: the Port Operations & Investigations Bureau, the Port Compliance Bureau,

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[74] *Id.*
[75] New York v. New Jersey, *supra* note 68.
[76] New York v. New Jersey, 598 U.S. 218 (2023).
[77] *Id.*
[78] S. 3502, *supra* note 33., https://www.njleg.state.nj.us/bill-search/2016/S3502 (last visited Aug. 7, 2024).

and the Port Regulatory & Licensing Bureau.[79]

The Port Operations & Investigations Bureau protects the ports from crime. The Port Investigations Unit conducts lengthy investigations into organized crime, often in partnership with federal agencies and departments such as the Department of Homeland Security and the FBI. Meanwhile, the Port Operations Unit addresses the day-to-day security of the Port of New Jersey through the training and oversight of private Security Officers, video surveillance, and handling any confidential information.[80]

The Port Compliance Bureau regulates port employers through its Audit & Compliance Unit which ensures that each employer has a clean payroll and is paying the required assessments to the State Treasury. These assessments fund the Port Security Section, similar to how assessments on employers funded the Waterfront Commission of New York Harbor and the current New York Waterfront Commission. The Port Discovery & Adjudication Unit is also under the Port Compliance Bureau and disciplines current workers through scheduling and managing hearings. New York and New Jersey both maintain license suspensions and revocations as punishments for workers on the Waterfront. This unit administers decasualization, which involves taking employees off the Longshore Workers Registry if they fail to make themselves available for work at least 90 days out of every six months.[81]

Finally, the Port Regulatory & Licensing Bureau certifies new workers through the Port Licensing and Background Unit and manages the Telephonic Hiring Employment Information Center (THEIC) using the Port Employment & Hiring Unit.[82]

VIII. Aftermath: New York

The New York Waterfront Commission, established by

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[79] Port Security Section, NEW JERSEY STATE POLICE, https://www.nj.gov/njsp/division/port-security/index.shtml (last visited Aug. 15 2024).

[80] *Id.*

[81] *Id.*

[82] *Id.*

Governor Kathy Hochul three months after the Supreme Court decision, currently manages the Port of New York.[83] When drafting the new laws governing the Commission, the governor and legislature changed sections of the original compact to better reflect cultural shifts. Gendered language such as longshore*man* or port watch*man* became longshore worker and security officer, and addiction to drugs and other substances is no longer punishable.[84]

The revisions also strengthened the Commission's powers. Definitions for coercion, inimical association, and discrimination became broader, giving the Commission more latitude. The Commission can now regulate gambling within "five hundred feet" of waterfront terminals. Originally, its jurisdiction was only within five feet of the ports. Stevedore's licenses last for five years, up from two, while temporary licenses for both stevedores and workers are effective for six months instead of one. Most importantly, the Waterfront Commission became a permanent state agency, whereas the bi-state compact wished for "the termination of governmental regulation and intervention at the earliest opportunity."[85]

The modern-day Commission has four divisions. The Police Division employs both law enforcement personnel and intelligent analysts who investigate organized crime, including relationships between members of organized crime and longshore workers, and other criminal operations on the ports. The Law, Licensing & Employment Information Center (EIC) Division authorizes and rescinds licenses through administrative hearings while also managing the THEIC and the decasualization program. The Audit & Control Division assesses each employer, raising funds for the Commission, while the Information Technology Division oversees the

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[83] Carl Campanile, *Hochul Wins Fight to Create Mob-Busting Waterfront Commission,* N.Y. POST, (Apr. 18, 2024), https://nypost.com/2024/04/18/us-news/hochul-wins-fight-to-create-mob-busting-waterfront-commission/ (last visited Oct 6, 2024).

[84] Waterfront Commission Act, N.Y. Laws, c. 882 (1953), https://www.wcnyh.gov/docs/wcnyh_act.pdf; N.Y. Exec. Law § 534-C (2024), https://law.justia.com/codes/new-york/exc/article-19-i/534-c/.

[85] Waterfront Commission Act, N.Y. Laws, c. 882 (1953), https://www.wcnyh.gov/docs/wcnyh_act.pdf; N.Y. Exec. Law § 534-C (2024), https://law.justia.com/codes/new-york/exc/article-19-i/534-c/

Commission's technology.[86]

IX. Impact

Despite glaring differences in organizational structure, the laws governing each body are nearly identical. The only difference is New Jersey's governing document omits section 5-P. The Legislature's 2007 elimination of this provision was in limbo until the commission dissolved. While carrying out their charters, New York is more likely to revoke licenses in cases of inimical association, situations in which a port worker is alleged to have a relationship with someone tied to organized crime that could lead to the appearance of impropriety. Additionally, the assessment rate on employer's payrolls is 1.6 percent in New York for FY 2024-2025, but 1.5 percent in New Jersey.[87]

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[86] *Divisions,* NEW YORK WATERFRONT COMMISSION, https://waterfront.ny.gov/ (last visited Oct 6, 2024).

[87] N.J. STATE POLICE, *supra* note 80; *Id.*

Parsing Precedent: Navigating the Changing Tides of the Federal Reserve's Constitutional Validity

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Abstract

In 1787, the framers of the Constitution created the Supremacy Clause, which established the precedence of federal law over state laws and constitutions.[1] Despite this fact, there is an established record of federal and domestic statutes and case law that seem to contradict the Constitution. As concretized in the landmark case of *Marbury v. Madison* (1803), the Supreme Court must serve as the final arbiter of pervasive, controversial issues via its power of judicial review.[2] As such, the Court is best positioned to determine the constitutionality of a broad array of institutions, including an American central bank. This article seeks to analyze the full trajectory of the Federal Reserve's creation and current operation in order to question its constitutionality. During the first half-century after the Revolutionary War, the constitutionality of a national bank was highly contentious, as the Constitution neither expressly permitted nor prohibited the incorporation of a bank by Congress. By tracing the historical tributaries of changing legal thought, this piece will explore differing opinions regarding a national bank, as well as the decisive adjudication of the federal government's ability to incorporate a quasi-governmental corporation. Furthermore, the structure of the modern Federal Reserve has served as a lightning rod for constitutional discord that has only recently been conclusively determined by the landmark decision in *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.* (2010).

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[1] Lii, *Supremacy Clause*, US Law https://www.law.cornell.edu/wex/supremacy_clause.
[2] *Marbury v. Madison*, 5 U.S. 137 (1803)

Introduction

Ensconced within the fabric of the United States' governmental design is a commitment to federalism. The Tenth Amendment guarantees that all powers not granted to the federal government by the Constitution reside with state legislatures and the people.[3] This provision serves as one of many boundaries created by the founding fathers to ensure relative balance between all facets of the government. However, the Tenth Amendment has not prohibited the federal government from endowing itself with certain privileges not expressly written within the Constitution. For example, U.S. Code § 801 (The Controlled Substances Act) allows Congress to regulate the "importation, manufacture, distribution, and possession and improper use of controlled substances."[4] Congress justified the passage of The Controlled Substance Act through its broad, sweeping power under Article 1, Section 8 of the Constitution–to protect the "[G]eneral Welfare of the United States," as well as broader powers contained within the commerce clause.[5] Yet, the application of the Tenth Amendment has long been subject to the discretion of politicians. For instance, regarding Colorado's present stance on legal marijuana, the federal government has now chosen to ignore U.S. Code § 801 in favor of the enumerated powers of state governments under the Tenth Amendment.[6] This reality poses the question: What other perceived constitutional powers of Congress may actually fall under the purview of the Tenth Amendment?

An institution like the Federal Reserve may outwardly seem like an abiding component of the government, similar to one of the branches of Congress or the Treasury. However, upon closer examination, its founding draws into question its constitutionality. Created through a congressional act in 1913, one may logically ask the question: where in the Constitution is the federal government given the right to establish a central bank?[7] The answer to this question has sparked strong discourse

[3]U.S. Constitution, amend. 10.
[4]The Controlled Substances Act, 21 U.S.C. § 801 (1970).
[5]*Ibid*
[6]Colo. Const. art. XVIII, § 16.
[7]The Federal Reserve Act, 12 U.S.C. § 226 (1913).

throughout history. Opponents point to the Tenth Amendment, as well as the powers enumerated in Article 1, Section 8, of the Constitution, as proof that the institution should not exist. Conversely, supporters cite a medley of provisions in Article 1, Sections 8 and 9, as proof that the incorporation of the Federal Reserve by Congress is constitutional. Furthermore, even if the debate regarding the constitutionality of the incorporation of a national bank like the Federal Reserve is resolved, there still remain extant legal issues regarding the appointment and removal process for offices within the Federal Reserve. Ultimately, the Federal Reserve straddles the line between an extended branch of the government and a private, independent corporation. Considering the magnitude of the Federal Reserve's monetary policy decisions, its legal standing is essential to comprehend. The historical spectrum of opinions surrounding the institution range from the fiery vitriol of President Herbert Hoover, who blamed Great Depression-induced speculation on the "Federal Reserve Board's pre-1928 enormous inflation of credit at the request of European bankers," to the love and admiration of politician Nelson W. Aldrich, who made the Federal Reserve his brainchild.[8] Despite the vast array of beliefs, this article will take a nuanced approach to decipher the historical constitutionality of a central bank in America, as well as the more modern constitutional concerns of independent presidents who serve on the Federal Reserve Board of Governors.

Historical Constitutionality of a National Bank: Part I

The implementation of a private national bank to regulate the money supply within a country first originated in seventeenth-century England. Following the Nine Years' War with France, King William III sought to rebuild his military strength; however, English coffers had been exhausted. In order to replenish the country's finances, the King pursued a loan from a Scottish Banker named Sir William Paterson, who offered to create a company that would lend King William one million

[8]Herbert Hoover, 1952, quoted in Peter Conti-Brown, *The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century*, Hutchins Ctr. on Fiscal &Monetary Pol'y, Brookings Inst. 9 (2015).

pounds at a six-percent interest rate.[9] Through a royal charter in 1694, this private institution became the Bank of England and inaugurated the privatization of government subsidization in England. The British experiment with a private national bank holds prominent historical significance as it would later influence the establishment of America's first Bank of the United States in 1791.

During the Revolutionary War, the newly-created United States encountered many issues; chief among them was an inability to fund itself. In 1775, the Continental Congress had created its own currency, the Continental, in order to finance the war effort; however, these notes were not backed by gold or silver and therefore had little value.[10] In desperation, the Congress created the Bank of North America in 1781, America's version of the Bank of England.[11] Although the United States lacked a monarchical figure who could create a private organization to fund government spending, it also did not have a concrete constitution that blocked its right to create a national bank. Instead, there only existed the Articles of Confederation, which did not explicitly grant federal privilege to create a national bank, but simultaneously did not prohibit it.[12] The framers of the Articles of Confederation envisioned a system of government without undue centralization of power and, further, did not prohibit states and individual banks from circulating their own currencies.[13] Therefore, a stronger argument can be made with regard to the Bank of North America being an overreach of Congressional power, as understood within the context of the Articles of Confederation. However, no such constitutional argument can be made, since the Bank of North America lost its status as the main lender

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[9]The agreed-upon loan was later revised: A 1.2 million pound loan at eight percent interest with 400,000 pounds in management fees. Constitutional Law, *Century of Enslavement - The History of the Federal Reserve*, YouTube (Sept. 7, 2014), https://www.youtube.com/watch?v=U5IyUFqUN88.

[10]*Colonial and Continental Currency: A New Nation's Currency*, The Fed. Reserve Bank of San Francisco https://www.frbsf.org/independence/.

[11]Bray Hammond, *Research Guides: This Month in Business History: First Bank of the United States Chartered*, Library of Cong. https://guides.loc.gov/this-month-in-business-history/february/first-bank-united-states-chartered.

[12]Articles of Confederation of 1781, *Yale L. Schl.: Lillian Goldman L. Lib.* https://avalon.law.yale.edu/18th_century/artconf.asp

[13]*Ibid*

to the federal government prior to the penning of the Constitution.[14] That being said, the Bank of North America did draw criticism as an institution that threatened the livelihood of the common man; one of the main concerns with the Bank was its ties to the "wealthy merchant oligarchy" of Continental America.[15] The Bank's stockholders chose all the administrators, which facilitated the Bank's partiality toward the interests of wealthier Americans. This dynamic served as a precursor to the establishment of the Federal Reserve, which would also call into question the people and corporations that would benefit most from its establishment. Despite the concerns of the common person, Alexander Hamilton–the Secretary of the Treasury for President George Washington–viewed a national bank favorably. Hamilton's vision for a new financial system in the United States, predicated on a national bank, would eventually consume national discourse in the decades after the signing of the Constitution in 1787.

Upon a closer examination, the Constitution makes no textual reference to Congress' power to establish a private national bank. Yet, many powers that Congress assumes under the Constitution's various loosely-constructed clauses are also not explicitly written within the framework of the document. Debate regarding the establishment of the First Bank of the United States followed a similar format. The three main actors in this first clash over the constitutionality of a national bank included: Alexander Hamilton, the chief proponent of an American national bank, and James Madison and Thomas Jefferson, two Democratic-Republicans who viewed a private national bank as a power not clearly enumerated within the Constitution.

Following the clash, each party outlined their arguments before Congress and President Washington. Alexander Hamilton carefully framed his proposal for a national bank as constitutional by citing Article 1, Section 8, Clause 1 of the Constitution: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and [G]eneral Welfare of the United States; but all Duties, Imposts and Excises shall

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[14]Robert F Smith, *Bank of North America*, The Encyclopedia of Greater Philadelphia https://philadelphiaencyclopedia.org/essays/bank-of-north-america/.
[15]Janet Wilson, *The Bank of North America and Pennsylvania Politics: 1781-1787*, 66 The Pa. Mag. Hist. & Biography 1 (1942).

be uniform throughout the United States…"[16] If we take the economic condition of the United States into account when Hamilton proposed the First Bank, a link, even if slight, can be made between a national bank and the General Welfare Clause of the Constitution relating to Congress' taxation and collection powers. After the Revolutionary War, public debt soared to 75 million dollars, which could substantiate the creation of a national bank as a lender of last resort for the United States government.[17] As such, one could posit that Congress did indeed have the constitutional power to create the First Bank of the United States. However, through the analysis of a rebuttal drafted by James Madison, the connection made between a national bank and Article 1, Section 8 weakens. On a constitutional basis, he mainly attacked Hamilton's bank as not dovetailing with the enumerated powers of Article 1, Section 8: "The bill did not come within the first power. It laid no tax to pay the debts, or provide for the general welfare. It laid no tax whatever…"[18] As mentioned earlier, the Constitution does not make specific reference to Congress' ability to create a national bank, but the vague nature of the General Welfare Clause allowed Hamilton to argue for the First Bank of the United States on the basis of its necessity. Madison anticipated this claim and refuted it by displaying how Congress had established the Bank of North America out of "necessity" but quickly moved to incorporate it as a state bank.[19] He argued that Congress did this because it realized that the Bank "never could be justified by the regular powers of the Articles of Confederation…"[20] Madison effectively acknowledged Hamilton's argument and challenged Congressional authority to create a national bank on the basis of federalism. Madison's main concern with the Bank was that it would nullify the precedent of the Tenth Amendment by providing Congress with a power not expressly specified by the Constitution. Madison warned: "If Congress could incorporate a Bank…any other

[16]U.S. Const. art. I, § 8, cl. 1.
[17]Bill Fay, *Timeline of U.S. Federal Debt Since Independence Day 1776*, Debt.org. (2021) https://www.debt.org/faqs/united-states-federal-debt-timeline/#:~:text=Shortly%20after%20the%20American%20Revolutionary,decades%20to%20nearly%20%24120%20million.
[18]*Ibid*
[19]*Ibid*
[20]*Ibid*

incorporations might be made by Congress. They could incorporate companies of manufacturers, or companies for cutting canals, or even religious societies…"[21] Ultimately, Madison saw the passage of a national bank as a slippery slope that would give Congress the ability to trump state will with ease. Despite Madison's best attempts to destroy the Bank in the House of Representatives, The Bank Bill of 1791 passed by a margin of 39-20[22] and moved to George Washington's desk. Alexander Hamilton had won his first bout in the path to victory in establishing a central bank.[23] However, he now had to persuade a neutral President George Washington to sign the Bill with an even greater opponent than James Madison waiting to dismantle the Bank: Thomas Jefferson, the first Secretary of State.

With the Bank Bill of 1791 before George Washington, Thomas Jefferson and Alexander Hamilton quickly drafted opinion pieces to sway the President into favoring their respective argument. "Jefferson's Opinion on the Constitutionality of a National Bank" was similar in manner to James Madison's, as Thomas Jefferson called attention to the troubling precedent that the passage of the Bank Bill would establish: "I consider the foundation of the Constitution as laid on this ground: That 'all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.' To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition."[24] Jefferson attempted to display that the Constitution did not mention a national bank; therefore, the power to establish one was not the duty of Congress but rather that of state and local legislatures. Like Madison, he systematically attacked the constitutional basis of the Bill as understood under Article 1, Section 8. Jefferson presented his most convincing arguments with regard to the general phrases of the Constitution: the General Welfare and Necessary and Proper clauses. In Jefferson's view,

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[21] James Madison, *The Bank Bill* art. I, § 8, cl. 1. (1791)
[22] *Congress Establishes the First Bank of the United States*, Nat'l Park Serv. (Dec. 16, 2021), https://www.nps.gov/articles/000/establishing-the-first-bank.htm.
[23] *Ibid*
[24] Thomas Jefferson, *Jefferson's Opinion on the Constitutionality of a National Bank* (1791), in *The Works of Thomas Jefferson* (Ford, Paul Leicester, 1898), https://avalon.law.yale.edu/18th_century/bank-tj.asp.

Hamilton had completely misconstrued the meaning of both clauses. According to Thomas Jefferson: "To lay taxes to provide for the general welfare of the United States is to say, 'to lay taxes for the purpose of providing for the general welfare.'... they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose."[25] In opposition to Hamilton, Jefferson held a very literal definition of the General Welfare Clause. To further impugn the Bank Bill, Jefferson criticized Hamilton's citation of the Necessary and Proper Clause as a means to create a national bank. Specifically, Jefferson emphasized a key issue regarding the expediency of the Bank. According to Hamilton and the other authors of the Bank Bill, an important motivation for establishing the Bank was the convenience it would offer with regard to the collection of taxes. For Jefferson, this presented a complex constitutional dilemma, since in his view, the country's foundational document did not allow Congress to create laws on the merit of "convenience."[26] Instead, as argued by the first Secretary of State:

> [T]he Constitution allows only the means which are 'necessary,' not those which are merely 'convenient' for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the necessary means, that is to say, to those means without which the grant of power would be nugatory.[27]

Ultimately, Thomas Jefferson grounded his argument in the potential domino effect that the Bank Bill could cause. In his view, the passage of one piece of, what he purported to be, unconstitutional legislation would permit the federal government to pass future unconstitutional

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[25] *Ibid*
[26] *Ibid*
[27] *Ibid*

bills under the guise of precedent. Similarly, the paradigm created by the passage or veto of the Bank Bill became a chief consideration of Alexander Hamilton's argument, as seen in his "Opinion as to the Constitutionality of the Bank of the United States: 1791."[28]

In writing his opinion, Alexander Hamilton realized that regardless of the outcome of the Bank Bill, an abiding precedent would be set in the United States. He described feelings of "solicitude" arising from the "principles of construction"[29] espoused by Thomas Jefferson.[30] In Hamilton's view, a very literal interpretation of the Constitution presented key issues: "principles of construction like those espoused by the Secretary of State [Thomas Jefferson]…would be fatal to the just and indispensable authority of the United States."[31] As it related to the Necessary and Proper Clause, Hamilton and Jefferson's competing modes of constitutional interpretation prompted a stark difference of opinion over whether the Bank Bill was permissible. Whereas Thomas Jefferson believed that the government could only enact imperative legislation under the guise of necessity, Hamilton viewed the term "necessary" more liberally. He believed that Jefferson's definition of the word was not only erroneous but problematic for the United States, as underscored by the following condemnation:

> To understand the word [necessary] as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it…The degree in which a measure is necessary, can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency. The relation between the measure and the end;

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[28]Alexander Hamilton, *Hamilton's Opinion as to the Constitutionality of the Bank of the United States: 1791* (Yale L. Sch.: Lillian Goldman L. Libr.), https://avalon.law.yale.edu/18th_century/bank-ah.asp.

[29]Strict Construction, *Cornell L. Sch.: Legal Info. Inst.* (2021). https://www.law.cornell.edu/wex/strict_construction. Construction refers to Constitutional interpretation where "liberal construction" indicates a less literal interpretation of the Constitution whereas "strict construction" stipulates an interpretation of the Constitution as the document was written.

[30]Hamilton, *supra* note 28.

[31]*Ibid*

> between the nature of the mean employed toward the execution of a power, and the object of that power must be the criterion of constitutionality, not the more or less of necessity or utility.[32]

With Hamilton's views regarding the best manner to analyze the Constitution in mind, we must also understand that he believed that the power entrusted to the United States federal government was sovereign. Therefore, he maintained that the government could employ all necessary means to fairly dispense said power as long as the means were "not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society."[33] As per Hamilton, because the power of the United States government was absolute, the government could create a corporation, such as a bank, as long as it had a constitutional rationale. For example, Hamilton argued that the federal government could not create an institution that regulated the police of Philadelphia because Congress has no jurisdiction to regulate law enforcement in a given city; however, Congress could formulate a corporation for the collection of taxes or trade with foreign countries and Native American tribes because "it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."[34] Hamilton clarified that if a bill did not extend any new powers to the government nor contravene an express provision within the Constitution, it was permissible for the government to pass said legislation. In Hamilton's view, relating to the Bank Bill, there was no particular provision within the Constitution that forbade the passage of the Bill. As explored above, under Article 1, Section 8 of the Constitution, Congress is not expressly granted the privilege to create a central bank; however, under Article 1, Section 9, it is also not expressly denied that right.[35] The Bank Bill did not outwardly grant new power to the government or infringe upon an aspect of the Constitution, bolstering the Hamiltonian belief that the

[32]*Ibid*
[33]*Ibid*
[34]*Ibid*
[35]U.S. Const. art. I, § 8–9.

federal government could incorporate a national bank. Outwardly, it seems that both Thomas Jefferson and Alexander Hamilton both outline compelling arguments for their respective positions – the only difference between the two being their modes of constitutional interpretation. Yet, there remains one stark fact cited by both men that requires closer analysis: the right of the government to incorporate a corporation, as understood by the framers of the Constitution.

The most pivotal component of Thomas Jefferson's rejection of the Bank Bill was his erudite assertion that, during the Constitutional Convention, the right of the government to extend charters of incorporation[36] had been thwarted. During the Philadelphia Convention, the framers extensively debated the idea of instituting an anti-monopoly clause to promote fair competition and prevent abuses of power by the federal government.[37] Although against the centralization of power, James Madison supported the idea of monopolies in cases where they would provide the government with a benefit.[38] In line with this reasoning, he proposed granting the federal government the right to establish "charters of incorporation," but the measure was voted down.[39] With this standard established, Jefferson argued that the Bank Bill, which proposed the incorporation of a national bank, contravened the intentions of the framers of the Constitution, whereas Alexander Hamilton held a different viewpoint. The Secretary of the Treasury conceded that the power of incorporation was not expressly granted to Congress under the Constitution but reaffirmed that Congress was not denied the power to create a corporation. In his argument, Hamilton did not mention the Constitutional Convention. Instead, he and other supporters of the Bank Bill regarded the vote against "charters of

[36]Extending charters of incorporation refers to Congress' ability to create new corporations.
[37]Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*, Northwestern Univ. Sch. Law Scholarly Commons 1 (2012).
[38]James Madison*, The Records of the Federal Convention of 1787,* ed. Max Farrand (New Haven: Yale Univ. Press, 1911). Vol. 2.
[39]*Id.*. The right to extend charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent was rejected by a vote as follows: [Ayes — 3; noes — 8.]. The right to grant charters of incorporation in cases where the U. S. may require them and where the objects of them cannot be obtained by a State was rejected by a vote as follows: Neg. 6 Noes. 3 ay. 1 State divided.

incorporation" during the Convention as insufficient grounds to deny the Bill; in their eyes, Madison's proposal may have been rejected because it was superfluous, and not because it was unconstitutional.[40] However, if we carefully analyze "The Records of the Federal Convention of 1787," we can see that the idea of incorporation was not rejected simply because it was considered an unnecessary additive. Rather, concerns regarding the establishment of a national bank were voiced by Rufus King, a representative from Massachusetts, who argued that because of "charters of incorporation": "[t]he States will be prejudiced and divided into parties by it— In Philadelphia & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities."[41] Further, Virginia representative George Mason rejected the proposal based on the potential monopoly power it would create. For Mason, the establishment of a clause of incorporation would allow the federal government to create "monopolies of every sort" that would destroy state industry.[42] Like Madison and Jefferson, Mason greatly valued the Tenth Amendment and feared federal encroachment into state affairs. Ultimately, it is inaccurate to assume that the right to incorporation was rejected during the Constitutional Convention on the basis of it being unnecessary or frivolous. Instead, as outlined, the founding fathers raised logical constitutional fears. It is vital to take note of this fact because, as will be explored, the word "incorporate" appears in line 1 of the 1791 Bank Bill, as well as in the 1816 and 1832 Bank recharter bills.[43] Even at present, there remain questions regarding the constitutionality of the incorporation of the modern Federal Reserve. Such queries will be further explored throughout this analysis.

Despite objections raised by both Thomas Jefferson and James Madison, President Washington sided with Alexander Hamilton and

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[40]Jack Rakove, *Alexander Hamilton and the National Ban*k, (Stanford Univ. Press). https://billofrightsinstitute.org/essays/alexander-hamilton-and-the-national-bank
[41]Madison*, supra* note 38.
[42]*Ibid*
[43]U.S. Congress, *An Act to Incorporate the Subscribers to the Bank of the United States*, 1 (1791). https://fraser.stlouisfed.org/title/act-incorporate-subscribers-bank-united-states-1791-1124. See also *An Act to Incorporate the Subscribers to the Bank of the United States* (1816).

signed the Bank Bill into law.[44] Washington, like Hamilton, was a proponent of a liberal interpretation of the Constitution and thus found little fault with the proposition of a national bank. The individual components of the Bank charter also warrant analysis. Firstly, it is important to recognize that the First Bank of the United States was created as a quasi-governmental organization. The initial charter provided capital stock of ten million dollars for the bank, eight million of which was sold to private investors.[45] These initial stockholders had tremendous liberty in establishing rules and regulations of the Bank. For example, as evidenced by section 7, article 3 of the Bank Bill, only stockholders were eligible to be directors of the bank.[46] Therefore, it is reasonable to infer that the First Bank had an adamantine tie to the wealthy[47] private class. While this is not a constitutional issue, similar concerns have been raised with regard to the Federal Reserve. A potential legal issue with the Bank can be found in the established voting process for directors. As granted by the charter, the first twenty-five directors were voted upon by the Bank's shareholders, a system in which the number of votes one could cast was proportional to the amount of stock he owned.[48] Although not outwardly prohibited by the Constitution, it is important to recognize that the Bank's lack of direct accountability to the government is constitutionally problematic. When we consider that the Bank acted as the fiscal agent for the government, one could argue that a corporation with such power should at least be partially overseen by a branch of the government.

Furthermore, between 1796 and 1802, the government sold its twenty percent stake in the First Bank of the United States, which made the corporation an entirely private institution. Therefore, Congress and the President had no direct control over the election of directors within

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[44]Rakove, *supra* note 40

[45]Andrew T Hill, *The First Bank of the United States* (2015), Fed. Reserve History https://www.federalreservehistory.org/essays/first-bank-of-the-us.

[46]U.S. Congress, *An Act to Incorporate the Subscribers to the Bank of the United States*, 1 (1791). https://fraser.stlouisfed.org/title/act-incorporate-subscribers-bank-united-states-1791-1124

[47]Ian Webster, *$400 in 1790 is worth $13,811.78 today*, CPI Inflation Calculator https://www.officialdata.org/us/inflation/1790?amount=400. Individual Bank Shares sold for four hundred dollars a share which would be the modern equivalent of $13,290.91.

[48]U.S. Congress, *supra* note 46, at 9

the Bank.[49] Separation of powers and checks and balances are enshrined as core tenets of regulation among the three branches of the government, since the framers of the Constitution desired to limit the authority of any one branch. Although the Bank of the United States was not a direct part of the government, a valid assertion can be made that, as a quasi-independent component, it is unconstitutional for the directors of the Bank to not have immediate accountability to either Congress or the President. If we analyze the Appointments Clause of the Constitution, there stands an even more compelling case regarding the lack of constitutionality in the election of directors by stockholders within the Bank. Article 2, Section 2, Clause 2 of the Constitution establishes:

> [The President]…shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.[50]

This provision gave the President and Congress sweeping power to appoint public servants. As a result, directors of the Bank of the United States, who were tasked with promoting the nation's financial well-being, could be considered public servants. As such, a tenable argument could be made that, constitutionally, the directors should be selected by the President and confirmed by Congress. This being said, precedential case law is the quintessential method of judicial decision-making.[51] When the United States established the Bank of the United States in 1791, it was still a fledgling country that did not have the capacity to build up such precedents. Furthermore, English common law

[49]David Cowen, *The First Bank of the United States* (Robert Whaples ed., 2008), EH.net Encyclopedia https://eh.net/encyclopedia/the-first-bank-of-the-united-states/.
[50]U.S. Const. art. I, § 2, cl. 2.
[51]*Case Law,* Legal Info. Inst., Cornell L. Sch. (2020). https://www.law.cornell.edu/wex/case_law#:~:text=Case%20law%20is%20law%20that,and%20regulations%20are%20written%20abstractly.

did not support or reject the ability of unaccountable private directors to serve on the board of a quasi-governmental organization. However, in the modern era, the aforementioned issue has been decisively adjudicated (*See* Constitutionality of the Modern Federal Reserve, Paragraph 2). Ultimately, it is important to make note of the constitutionality surrounding the private appointment of the First Bank of the United States' leadership by stockholders as a reference point for the modern Federal Reserve.

Historical Constitutionality of a National Bank: Part II

In the two decades following the establishment of the First Bank of the United States, America enjoyed relative financial and geopolitical stability. However, in 1809, James Madison, a chief opponent of the Bank, took office as President and maintained his ardent displeasure with a national bank. By 1811, a combination of factors, including the uncertainty of the Bank's constitutionality, caused Congress to forgo renewal of the initial charter; however, a new military conflict with Britain changed the discussion. As a result of the War of 1812, the United States' debt climbed from 49.2 to 119.2 million dollars from 1812 to 1814, which caused immense strife reminiscent of the financial calamity during the Revolutionary War.[52] The need to finance the War sparked dialogue regarding the establishment of a second national bank. Even James Madison agreed that a Second Bank of the United States was necessary.[53] By 1815, the tide shifted yet again as the War of 1812 abated. In January 1815, with peace between Great Britain and the United States on the horizon, James Madison changed his stance on having a National Bank. Despite Congress passing a new Bank Bill, Madison decided to rescind the legislation. In his veto, Madison chose not to make a constitutional argument with regard to his decision. Instead, he contended that a national bank was an insufficient remedy for the pressing financial issues of the United States: "[T]he proposed

[52]Bill Fay, *Timeline of U.S. Federal Debt Since Independence Day 1776*, Debt.org (2021). https://www.debt.org/faqs/united-states-federal-debt-timeline/#:~:text=Shortly%20after%20the%20American%20Revolutionary,decades%20to%20nearly%20%24120%20million.
[53]Andrew T. Hill, *The Second Bank of the United States*, Fed. Reserve Bank of St. Louis (2015). https://www.federalreservehistory.org/essays/second-bank-of-the-us

bank does not appear to be calculated to answer the purposes of reviving the public credit, of providing a national medium of circulation, and of aiding the Treasury by facilitating the indispensable anticipations of the revenue and by affording to the public more durable loans."[54] Madison believed that a new bank would not be able to raise adequate capital to improve public credit and questioned its ability to provide a sufficient medium of exchange considering the high volume of treasury notes it would issue.[55] Despite his initial reservations, the country's continued financial decline in the months after the War of 1812 led Madison to reconsider his position. Finally, when state-chartered banks abated their collection of treasury notes, he decided to compromise.[56] The Second Bank of the United States was created in 1817 and operated similarly to the First. It is important to analyze the specific functions of the Second Bank of the United States to draw similarities to the First and highlight key constitutional issues.

The Second Bank eclipsed its predecessor in both size and power; the starting capital of the former exceeded the latter by twenty-five million dollars.[57] Much like the First Bank, the stock of the Second was split between private investors and the government, a state of affairs in which the private stockholders held a majority stake in the corporation.[58] Therefore, it is apt to label the Second Bank as quasi-governmental, being a continuation of the First. This fact will be revisited regarding the Federal Reserve and its constitutionality. Furthermore, the Second Bank's official charter exhibited a crucial departure from its precursor. Whereas the First Bank was composed of twenty-five directors appointed by its private stockholders, the Second was split between a group of five directors appointed by the President and confirmed by the Senate and another twenty appointed by the private directors.[59] This fact alone does not substantiate the claim that the Bank was either a private or governmental corporation. The question

[54]James Madison, *January 30, 1815: Veto Message on the National Bank*, U. Va. Miller Ctr. https://millercenter.org/the-presidency/presidential-speeches/january-30-1815-veto-message-national-bank
[55]*Ibid*
[56]Hill, *supra* note 53
[57]*Ibid*
[58]*Ibid*
[59]U.S. Cong., *supra* note 46.

of what factors make a corporation a component of the government was not answered until the 1995 Supreme Court case *Lebron v. National Railroad Passenger Corporation*, when the Court clarified: "[If the] [g]overnment creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[60] Considering that the President and Congress had the ability to appoint a portion of the directors for the Bank, a definitive argument as to whether the selection of a majority of the directors by private stockholders was unconstitutional becomes less clear than in the case of the First Bank of the United States. To that end, comparing the charters of the First and Second Banks reveals that the government had greater means to control the Second. For example, as evidenced by Section 8 of the "Act to Incorporate the Second Bank of the United States," the President could remove any of his appointed directors.[61] Moreover, Section 23 allowed either House of Congress to inspect the books of the Bank.[62] These two measures, which were not components of the original Bank Bill of 1791, allowed the federal government to duly check the power of a national bank. However, a debate over whether these measures were constitutionally sufficient is relevant, since the Constitution does not explicitly grant the President the authority to remove appointees to federal offices. This issue was finally addressed by the Supreme Court cases of *Myers v. United States* (1926) and *Humphrey's Executor v. United States* (1935). In the former case, the Court ruled that only the President held the right to remove appointed officials, with the exception of federal judges. In the latter, it held that the leaders of independent federal agencies could only be removed by the President with due cause.[63] Therefore, one could technically characterize the removal process enshrined within the Second Bank Bill as an unconstitutional power delegated to the President. Ultimately, when the Second Bank of the United States was founded in 1816, legal questions

[60] *LeBron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).
[61] *Ibid*
[62] *Ibid*
[63] *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) and *Myers v. United States,* 272 U.S. 52 (1926).

regarding appointments and removals of offices within the Bank remained. However, the constitutionality of a national bank's incorporation by Congress was decisively adjudicated via the landmark decision of *McCulloch v. Maryland* (1819).

Even after the Second Bank of the United States was ratified in 1816, opponents of a national bank challenged its authority, especially Democratic-Republicans, who still viewed the Bank as unconstitutional and an overreach of the Tenth Amendment. The issue peaked when Maryland, a Democratic-Republican state, imposed taxes on the Second Bank of the United States in 1818.[64] In response, James W. McCulloch, a federal cashier at the Bank's Baltimore branch, refused to pay the tax, and Maryland filed suit accordingly.[65] The dispute reached the Supreme Court and the justices voted unanimously in favor of Mr. McCulloch. Chief Justice John Marshall penned the majority opinion in which he affirmed the federal government's authority to create a national bank and outlined the inability of states to tax "[an] operation of an instrument employed by the government of the Union to carry its powers into execution."[66] It is important to closely examine Justice Marshall's reasoning as to the constitutionality of the Second Bank of the United States.

Marshall believed the constitutionality of a national bank had been supported by previous historical debates, and he decisively refuted the dissenting idea that its re-establishment was unconstitutional.[67] He also strongly disagreed with Maryland's view that the Constitution emanated from the sovereign power of the states and not from the people.[68] He argued that in calling conventions during the ratification of the Constitution, the states assented to the Constitution, but the power to accept or reject the document ultimately resided with the citizenry.[69] This perspective greatly limited the perceived power of state governments in relation to that of the federal government. This allowed Justice Marshall to frame his argument in a way that accentuated the

[64] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
[65] *Ibid*
[66] *Ibid*
[67] *Ibid*
[68] *Ibid*
[69] *Ibid*

legislative scope of the government. Similarly to Alexander Hamilton, John Marshall preferred a liberal interpretation of the Constitution. He believed that the Constitution's framers desired to omit certain restrictive words present in the Articles of Confederation in order to allow for implied powers.[70] Considering that the Constitution was written because of the flaws of its predecessor, primarily the presence of confining vernacular, Marshall's argument proves to be cogent. He clarified that the government was not at liberty to exercise authority that was expressly denied; however, he viewed the creation of a national bank as a means to an end instead the formation of an expressly new power. With this in mind, Marshall reasoned that: "a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution."[71] In essence, Marshall established that the government had the full authority to create corporations that aided in one of its many entrusted powers. Because the Second Bank of the United States assisted the government in the collection of taxes, as all tax revenues were stored in the Bank, the institution had sound constitutional grounding.[72] Lastly, and most importantly, Marshall helped establish the definition of "necessary" in the Necessary and Proper Clause. For the Chief Justice, the word did *not* imply absolutely necessary. Instead, he viewed the Clause as subject to a more nuanced level of interpretation: "To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the [Constitution], and give it the properties of a legal code." As a result, Justice Marshall forged a critical paradigm for constitutional interpretation.

Furthermore, he firmly grounded the primacy of the federal government's ability to endow itself with certain tools to assist in discharging its enumerated powers. *McCulloch* established the right of the federal government to duly reserve the power to create legislation that dovetails with constitutional clauses such as the Necessary and Proper Clause and the General Welfare Clauses. The previously cited U.S. Code § 801 (*See* Introduction) coheres with the precedent created

[70] *Ibid*
[71] *McCulloch v. Maryland*, 17 U.S. 316 (1819)
[72] U.S. Cong., *supra* note 46.

by this case. However, states still retain sovereignty in accordance with the Tenth Amendment, as evidenced by the current stance of Colorado and many other states that have legalized marijuana use in spite of § 801. The example of marijuana domestic case law relates to a broader national emphasis on states' rights, echoing President Andrew Jackson's chief concern when he ultimately vetoed the Second Bank of the United States.

While *McCulloch v. Maryland* provided valuable precedent regarding the constitutional authority of the government to establish a national bank, it did not change the opinion of opponents of the Second Bank of the United States. Many, especially individuals from trans-Appalachia, distrusted the paper currency issued by the Bank and viewed it as an unconstitutional component of the American elite and foreigners.[73] Their grievances garnered support from President Andrew Jackson. The seventh President gained traction as the champion of the common man and viewed the Second Bank of the United States as an unconstitutional monopoly.[74] Particularly, he loathed the Bank's president, Nicholas Biddle, who, in Jackson's eyes, represented the wealthy strata of Philadelphia. Although Biddle was very intelligent, he was not a skilled politician and often incited the Bank's opponents. For example, when the Senate questioned whether state banks had ever been injured by the country's national bank, Biddle responded: "Never. There are very few banks which might not have been destroyed by an exertion of the powers of the [Second Bank of the United States]. None has ever been injured."[75] Despite his incendiary rhetoric, the success of the United States' economy after he assumed presidency of the Bank kept widespread national dissent at a minimum. However, this did not prevent Andrew Jackson from formally voicing his complaints with the national bank in an 1829 message to Congress. In his view, the Second

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[73] *Conflict with the Executive: The Bank War*, National Archives. https://www.archives.gov/exhibits/treasures_of_congress/text/page9_text.html#:~:text=This%20bill%20passed%20Congress%2C%20but,with%20the%20Bank%20and%20would

[74] *Andrew Jackson The 7th President of the United States*, The White House, https://www.whitehouse.gov/about-the-white-house/presidents/andrew-jackson/ (site no longer available).

[75] H.A. Scott Trask, *The Independent Treasury: Origins, Rationale, and Record, 1846-1861*, Von Mises Inst. (2005). https://cdn.mises.org/asc8-trask.pdf

Bank of the United States had failed in "establishing a uniform and sound currency" and should have been replaced with a new national bank "founded upon the credit of the Government and its revenues…"[76] A key grievance shared by both Jackson and his supporters was the Banks' reluctance to loan money to ordinary Americans, specifically farmers.[77] Jackson believed he could remedy the aforementioned issue with his improved version of a national bank.[78] With the charter of the Second Bank of the United States set to expire in the year 1836, there remained uncertainty over whether Biddle and his supporters would be able to successfully renew the Bank while Andrew Jackson remained in office. The latter assumed his position in 1828, and if he were to win reelection in 1832, he would have the power to veto a renewal of the Bank in 1836.[79] Biddle calculated that he could garner adequate future support in Congress in order to pass a recharter; however, in his estimation, he did not possess enough backing to override a veto. As such, Biddle and his advisors attempted to make the matter an election issue and they successfully switched the time for the consideration of a new Bank Bill from 1836 to 1832.[80] In conjunction with this move, Henry Clay, a firm supporter of the Bank, founded the National Republican Party and ran against Jackson largely because of his stance against chartering a Second Bank of the United States.[81] Despite this political pressure and passage of the recharter by a significant margin in Congress, Jackson decided to veto the Second Bank of the United States.[82] Analyzing President Jackson's Veto Message Regarding the Bank of the United States is crucial to understanding his rationale and concerns.

Andrew Jackson constructed his veto message based on his considerations of the Second Bank of the United States' constitutionality and ties to American and foreign elites. He conceded

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[76]*Ibid*

[77]Frank W. Garmon Jr., *Andrew Jackson's Veto of the National Bank, Christopher*, Bill of Rights Inst.. https://billofrightsinstitute.org/essays/andrew-jacksons-veto-of-the-national-bank

[78]Scott Trask, *supra* note 74.

[79]Garmon Jr., *supra* note 77.

[80]*Ibid*

[81]*Ibid*

[82]*Conflict with the Executive*, *supra* note 73.

that a national bank was both “convenient” and “useful” to the government and people, but viewed the bank charter as incompatible “with justice, with sound policy, or with the Constitution of our country.”[83] Specifically, Jackson underscored the financial boon that the Bank’s recharter would spur specifically for wealthy Americans and foreigners who were stockholders in the corporation. As per the seventh president, the proposed bill would raise the par value of the Bank’s stock by thirty percent and pay an annual annuity of 200,000 dollars.[84] Jackson did not seek to achieve equality of outcome with regard to the economic gain of the recharter bill, but he felt that there was insufficient opportunity for average Americans to access the institution's profit. Moreover, he cited other privileges held by the Bank that ordinary Americans could not enjoy. Specifically, whereas state banks could use paper currency circulated outside of their state to pay debts at the Bank of the United States, an average American was prohibited from having the same right and instead “must sell [the paper currency] at a discount…”[85] Ultimately, Jackson painted America’s national bank as a cog in a broader machine that did not represent the interests of the common man.

Aside from his structural concerns with the Second Bank of the United States, Jackson also cited convincing legal issues with the corporation. First and foremost, Andrew Jackson disagreed with the notion that precedent established by the Supreme Court could exclusively determine constitutionality. Instead, he contended:

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as

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[83]Andrew Jackson, *President Jackson’s Veto Message Regarding the Bank of the United States; July 10, 1832*, Yale L. Schl.: Lillian Goldman L. Lib. https://avalon.law.yale.edu/19th_century/ajveto01.asp

[84]*Ibid*

[85]*Ibid*

> well settled…If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.[86]

On its face, Jackson's commentary appears to fly in the face of the procedural adjudication of constitutional issues; however, the present legal climate indicates that his opinion merits due consideration. For example, after the 2022 overturning of *Roe v. Wade* (1973) via *Dobbs v. Jackson*, the issue of federal codification of *Roe* has gained traction in spite of established legal precedent to the contrary.[87] Thus, it is incorrect to characterize Jackson's above-cited opinion as a novel departure from modern jurisprudence. On the other hand, he displays a unique perspective concerning his interpretation of the Second Bank's suitability under the more broadly construed Necessary and Proper Clause. In contrast with Jefferson, Jackson did not solely seek to redefine necessity. Still, he desired to display how certain aspects of the Second Bank of the United States did not fit within the broader context of the clause. For example, he viewed the ability of the government to charter a bank only once every one to two decades as arbitrary and inconsistent with the Necessary and Proper Clause:

> If Congress possessed the power to establish one bank, they had power to establish more than one if in their opinion two or more banks had been 'necessary' to facilitate the execution of the powers delegated to them in the Constitution…But the Congress of 1816 have taken it away from their successors for twenty years, and the Congress of 1832 proposes to abolish it for fifteen years more. It cannot be 'necessary' or 'proper' for Congress to

[86] *Ibid*

[87] Linda C. Mcclain, *What Would It Mean to Codify* Roe *Into Law?*, yes! Solutions Journalism (2022). https://www.yesmagazine.org/democracy/2022/07/01/codify-roe-v-wade-law and *Roe v. Wade*, 410 U.S. 113 (1973), and *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___ (2022).

> barter away or divest themselves of any of the powers-vested in them by the Constitution to be exercised for the public good.[88]

Jackson provided additional insights regarding the legal qualms he had with the Bank recharter. Specifically, it is vital to mention his analysis of the voting process for directors of the Bank. The President viewed the Bank's election system as hazardous. As previously noted (*See* Historical Constitutionality of a Central Bank: Part 1, Paragraph 8), a minority of directors of the Second Bank of the United States were appointed by the federal government, whereas a majority were selected by private stockholders.[89] In Jackson's view, considering that foreign stockholders–who were denied enfranchisement–represented one-third of the private shareholders, voting was concentrated in the hands of a small American minority.[90] Concomitantly, he believed that foreign ownership of the bank was skyrocketing, which would, in turn, allow, "[t]he entire control of the institution [to] necessarily fall into the hands of a few citizen stockholders. There is danger that a president and directors would then be able to elect themselves from year to year…"[91] In turn, this fact would present legal issues for the Bank, as the government, which was granted the right to appoint only five directors, would potentially lose its ability to substantively check the power of the national bank. In totality, Jackson also viewed the recharter bill as antithetical to the Constitution and, in a broader context, contradictory to the interests of common Americans. Ultimately, Jackson's veto destroyed the Second Bank of the United States. In Congress, the bill did not garner the two-thirds majority needed to override a presidential veto.[92] In response, Nicholas Biddle intentionally recalled many of the Bank's loans to induce a financial calamity that would cause the country to oppose Jackson.[93] Instead, Biddle's actions heightened national vexation with the Bank. Andrew Jackson responded by transferring the

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[88]Andrew Jackson, *President Jackson's Veto Message Regarding the Bank of the United States; July 10, 1832*, (Yale L. Schl.: Lillian Goldman L. Lib.). https://avalon.law.yale.edu/19th_century/ajveto01.asp

[89]U.S. Congress, *supra* note 46.

[90]Jackson, *supra* note 88.

[91]*Ibid*

[92]Garmon Jr., *supra* note 77.

[93]*Ibid*

federal government's treasury notes from the Bank to state banks, and the institution dissolved in 1836.[94] For the following seventy-seven years, the United States lacked a quasi-governmental national bank, relying instead on an independent treasury to store tax revenues and individual private and state-chartered banks to extend loans. However, the idea of a national bank remained at the back of the nation's mind.

Creation of the Modern Federal Reserve

Following the Financial Panic of 1837–a calamity induced by President Andrew Jackson's redistribution of treasury deposits from the Second Bank of the United States into state banks–the federal government attempted to remedy the issue by creating a more secure system by which the government's money supply would be managed.[95] In order to accomplish this, the independent treasury system was signed into law under the administration of President James K. Polk in 1846.[96] Essentially, the government utilized the United States Treasury to store its monetary funds, officially divorcing independent banking.[97] The independent treasury remained in effect until 1913 and managed inflation more successfully than its predecessor.[98] Despite its ability to restrain inflation, the independent treasury has received historical condemnation as a catalyst of financial afflictions, such as the Panics of 1873 and 1892. Taking the Panic of 1873 as a case study, we come to find that the economic crisis had little to do with the independent treasury system and instead was primarily the result of a European stock market crash.[99] Furthermore, financial downturns were not unique to the seventy-seven year period when the independent treasury replaced a

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[94]*Ibid*
[95]Johnathan Barth, "The Independent Treasury System and Free Banking Era in Antebellum America (HOM 24)", (Youtube).
https://www.youtube.com/watch?v=r6k7kNr3Q3w
[96]*Ibid*
[97]*Ibid*
[98]H.A. Scott Trask, "The Independent Treasury: Origins, Rationale, and Record, 1846-1861," (Von Mises Institute). https://cdn.mises.org/asc8-trask.pdf
[99]"Financial Panic of 1873," (U.S. Department of the Treasury).
https://home.treasury.gov/about/history/freedmans-bank-building/financial-panic-of-1873#:~:text=The%20Panic%20of%201873&text=One%20of%20the%20worst%20happened,in%20American%20projects%2C%20particularly%20railroads.

national bank. For example, the Panic of 1819 occurred during the tenure of the Second Bank of the United States. While these crises do not prove that the independent treasury was an inadequate organization, a connection exists between these economic declines and the creation of the modern Federal Reserve. As we will explore in the following paragraph, the Panic of 1907 directly contributed to the formation of this new central banking system.

In the wake of the Second Industrial Revolution (1870-1914), a period of American history in which the United States experienced unparalleled technological progress and economic growth, the Treasury pursued a laissez-faire monetary policy in order to spur innovation.[100] As a result, speculative investments soared in an unbridled manner, and uncollectible loans fell through, sending the entire economy spiraling.[101] This chain of events was parallel to the contemporary Great Recession, but unlike 2008, the federal government did not have access to a large central bank to bail out financial institutions; instead, it relied upon private lenders such as financier J.P. Morgan.[102] The inability of the government to quickly draw aid from a central corporate body renewed discourse regarding the establishment of another quasi-governmental bank. Many influential bankers and members of Congress met in secret off the coast of Georgia in order to draft a reform proposal.[103] During the meeting, these men created what would be known as the Aldrich Plan- a new methodology of banking whereby fifteen regional banks would hold the power of a central bank.[104] This plan, if approved by Congress, would have presented many constitutional issues, primarily because the banks would only have been accountable to a group of commercial bankers. However, the bill was summarily defeated in the

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[100]Joel Mokyr, "The Second Industrial Revolution, 1870-1914," (Northwestern University). https://faculty.wcas.northwestern.edu/jmokyr/castronovo.pdf

[101]Michael J Boyle, "Bank Panic of 1907: Causes, Effects, and Importance," (Investopedia). https://www.investopedia.com/terms/b/bank-panic-of-1907.asp

[102]*Ibid*

[103]Aldrich Plan (1910), (University of Groningen). http://www.let.rug.nl/usa/essays/general/a-brief-history-of-central-banking/aldrich-plan-(1910).php#:~:text=Everyone%20knew%20Wall%20Street%20wanted,national%20board%20of%20commercial%20bankers.

[104]*Ibid*

House of Representatives.[105] When President Woodrow Wilson took office in 1912, he disliked the idea of a central bank that primarily served the interests of commercial financiers, as was the case with the Aldrich Plan, and preferred an institution whereby power was dispersed.[106] Additionally, Republicans and Democrats alike offered competing visions for a new national banking system. The former preferred a singular central bank that held the government's reserves and dictated monetary policy, whereas the latter wanted a bill that conformed to Aldrich's vision.[107] In the end, Woodrow Wilson brokered a compromise and signed the Federal Reserve Act into law. The new legislation called for a public Federal Reserve Board in Washington D.C. that worked in conjunction with twelve private Reserve Banks stationed across the country.[108] Unlike the previous Bank of the United States, this new Federal Reserve dictated monetary policy. Further, it is important to recognize the President intended to give the regional banks "a very large measure of independence."[109] Wilson accomplished this by insulating the Reserve Banks from being under the directional purview of the government. The Constitution clearly rejects the ability of the government to create a corporation with no accountability to the government, as seen under the Appointments Clause. However, in 1913, there was no precedent established by the Supreme Court that directly prohibited the government from incorporating an institution that had partial answerability to the government. If we analyze the Federal Reserve Act of 1913 in detail, we find that the public board was accountable to the government: "The Board of Governors of the Federal Reserve System (hereinafter referred to as the ''Board'') shall be composed of seven members, to be appointed by the President, by and

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105 *Ibid*
106 *Ibid*
107 Peter Conti-Brown, "The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century," (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf
108 Federal Reserve Act Signed into Law, December 23, 1913, (Federal Reserve History). https://www.federalreservehistory.org/essays/federal-reserve-act-signed
109 *Ibid*

with the advice and consent of the Senate…"[110] Thus, the Federal Reserve Act of 1913 cannot be characterized as unconstitutional solely due to the lack of complete oversight by the government. However, a potential constitutional problem may arise in the employment of federalism as a mode of governance in the Federal Reserve system. As indicated by Carter Glass, a member of the House of Representatives who co-sponsored the Federal Reserve Act of 1913, the Federal Reserve was a microcosm of the federal government: "The regional banks are the states and the Federal Reserve Board is the Congress."[111] The notion that Congress has the power to create a quasi-governmental organization that mimics the federal government seems to go against the intended framework of the Constitution. The principle of federalism, as enshrined by the Tenth Amendment, is meant to be applied to the relationship between states and the federal government.[112] Therefore, although there is not a bastion of constitutional insight to support the claim that extending federalism to a quasi-governmental organization is an overreach of the Constitution, it is hard to imagine the Framers intended to allow the extension of this power. . As will be presented, the federalist construction of the new national bank also posed practical concerns that spurred its reform in 1935.

Federalism allows for the coexistence of the federal government and state governments in a manner in which neither party infringes upon the clearly defined constitutionally-granted powers of the other. Conversely, the power dynamic between the Federal Reserve Board and Reserve Banks, under the Federal Reserve Act of 1913, was not concretely memorialized in writing; instead, the bill was left purposely ambiguous to discourage either entity from exerting an undue

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[110]"Federal Reserve Act: Section 10. Board of Governors of the Federal Reserve System," (Board of Governors of the Federal Reserve System: Washington, D.C.). https://www.federalreserve.gov/aboutthefed/section10.htm

[111]Carter Glass, 1913, quoted in: Peter Conti-Brown, "The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century," (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf

[112]U.S. Constitution, Amend. 10. https://constitution.congress.gov/constitution/amendment-10/

advantage.[113] As such, the Federal Reserve occasionally lacked the ability to act in a decisive manner to implement monetary policy because the Reserve Board and Banks sometimes advocated divergent solutions to economic issues. A prime example of this was during the Great Depression, during which the Federal Reserve failed to act as a lender of last resort to the government and corporations due to disagreements regarding the best means to ameliorate the prevailing banking crisis.[114] The inability of the Federal Reserve to decisively stop the economic bleeding associated with the Depression relegated the corporation to a state of neglect. In the years following, the need for reform of the Federal Reserve became a pressing issue.

A crucial turning point for the Federal Reserve arose during the presidency of Franklin Delano Roosevelt (FDR). In 1934, the President appointed Marriner S. Eccles, a successful Utah banker, to the position of governor of the Federal Reserve Board.[115] Eccles declined the position because he believed that the split in power between the Reserve Board and the Banks was extremely inefficient. Eccles proposed a reform of the bank through the extraction of individual power from the Reserve Banks. He stated: "Although the Board is nominally the supreme monetary authority in this country, it is generally conceded that in the past it has not played an effective role and that the system has been generally dominated by the Governors of the Federal Reserve Banks."[116] FDR supported Eccles' standing, spurring the watershed Banking Act of 1935, which remains the foundational basis of the

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[113]Peter Conti-Brown, "The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century," (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf

[114]"The Great Depression 1929-1941," (Federal Reserve History). https://www.federalreservehistory.org/essays/great-depression

[115]"Mariner S. Eccles, (Federal Reserve History)." https://www.federalreservehistory.org/people/marriner-s-eccles

[116]"Memo from Eccles to Roosevelt, November 3, 1934, OF 90, box 2, Franklin D. Roosevelt Library," *quoted in:* Peter Conti-Brown, "The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century," (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf

current Federal Reserve. It is important to recognize that Eccles was not successful in completely eliminating the Reserve Banks.[117] Instead, in deference to Carter Glass, the Reserve Banks were preserved but completely lost their autonomy.[118] The Federal Reserve Board now dominated the newly restructured Federal Reserve system, renamed the Board of Governors, which was composed of seven governors appointed by the President and confirmed by the Senate and five of twelve independent presidents from Reserve Banks around the country who served on a rotating basis.[119] In the exact same fashion as the Federal Reserve Act of 1913, these presidents were not directly accountable to any branch of government. Again, as was the case with the aforementioned Act, no Supreme Court precedent was established in 1935 that directly forbade the appointment and removal of some actors within quasi-governmental agencies by factions outside the federal government. As we will explore below, the landmark decision of *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.* finally resolved the matter. Prior to an analysis of the *Free Enterprise Fund*, we must examine a key constitutional concern regarding the Federal Reserve that was raised in 1935.

Constitutionality of the Modern Federal Reserve

Although the Banking Act of 1935 reformed the structure of the Federal Reserve, it did not extinguish the constitutional issues regarding the institution. Specifically, we find no clear statement of the goals of the Federal Reserve Board regarding the employment of its power to control the country's credit.[120] As a result, after its passage, opponents

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[117] Banking Act of 1935, (Fraser: Discover Economic History Federal Reserve). https://fraser.stlouisfed.org/title/banking-act-1935-983

[118] Peter Conti-Brown, The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century, (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf

[119] *Ibid*

[120] "Constitutionality of Statement of Objectives in Banking Act of 1935," (Fraser: Discover Economic History Federal Reserve). https://fraser.stlouisfed.org/files/docs/historical/eccles/013_03_0001.pdf?utm_source=direct_download

of the Federal Reserve argued that Congress had delegated some of its constitutional powers to the national bank, such as that of Article 1, Section 8, Clause 5: "[t]o coin Money [and] regulate the Value thereof…"[121] If Congress truly gave the Federal Reserve this specifically delegated authority, it would directly violate the Constitution. Article 1, Section 1 of the Constitution clearly outlines: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[122] Therefore, in an attempt to resolve concerns of unconstitutionality, the 1935 Act was amended to include the following stipulations for the Federal Reserve:

> It shall be the duty of the Federal Reserve Board to exercise such powers as it possesses in such manner as to promote conditions conducive to business stability and to mitigate by its influence unstabilizing fluctuations in the general level of production, trade, prices, and employment, so far as may be possible within the scope of monetary action and credit administration.[123]

Critics of the Banking Act's implementation believed that the scope of power delegated from Congress to the central bank was unconstitutional.[124] The Supreme Court decision of *Schechter Poultry Corporation, et al v. United States* (1935) ruled that the delegation of specifically outlined powers by Congress is not explicitly prohibited, but clarified that Congress cannot assign unfettered legislative authority.[125] An argument can be made in support of the Federal

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[121] *Ibid*
[122] Article 1, Section 1
[123] "Constitutionality of Statement of Objectives in Banking Act of 1935," (Fraser: Discover Economic History Federal Reserve).
https://fraser.stlouisfed.org/files/docs/historical/eccles/013_03_0001.pdf?utm_source=direct_download
[124] *Ibid*
[125] "Constitutionality of Statement of Objectives in Banking Act of 1935," (Fraser: Discover Economic History Federal Reserve).
https://fraser.stlouisfed.org/files/docs/historical/eccles/013_03_0001.pdf?utm_source=direct_download *and* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), (Justia U.S. Supreme Court).
https://supreme.justia.com/cases/federal/us/295/495/

Reserve's ability to exercise power so "as to promote conditions conducive to business stability," Congress had indeed given the Federal Reserve unrestrained authority in monetary policy. However, America's central bank did not have legislative authority. Therefore, for purposes of our analysis, we will not use the Supreme Court's precedent in *Schechter Poultry Corporation* to label the Federal Reserve's power as unconstitutional. Nonetheless, it is crucial to understand that the main constitutional issue regarding the Federal Reserve is not associated with the broad, sweeping dominion given to it by Congress. Rather, open questions arise about the existence of independent presidents on the Board of Governors.

As previously observed (*See* Creation of the Modern Federal Reserve, Paragraph 4), the Banking Act of 1935 did not eliminate the private Reserve Banks created by the Federal Reserve Act of 1913, but curtailed their power. However, the banks still comprise a minority on the board of governors. As we have explored, the issue of individuals who served a key role and lacked direct accountability to the federal government within a national bank has been persistent since the establishment of the First Bank of the United States. In 2010, a juridical exemplar was finally established via the landmark Supreme Court decision of *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.* In 2002, the Public Company Accounting Oversight Board (PCAOB) was constructed via the Sarbanes-Oxley Act as an independent organization meant to oversee the audits of public companies.[126] The Board was composed of five individuals who could only be appointed and removed by the Securities and Exchange Commission (SEC) and not the President or Congress.[127] Additionally, the President could not remove a member of the SEC solely on the grounds that the aforementioned member refused to terminate an official of the PCAOB. As such, those appointed to the PCAOB had a double layer of protection from the President. In 2004, the PCAOB

[126]"Public Company Accounting Oversight Board (PCAOB)," (Investor.gov U.S. Securities and Exchange Commission). https://www.investor.gov/introduction-investing/investing-basics/glossary/public-company-accounting-oversight-board-pcaob

[127]*Free Enterprise Fund v. Public Company Accounting Oversight BD*. (No. 08-861) 561 U.S. 477 (2010)
(Cornell Law School).

performed an audit that indicated nearly half of the public companies they oversaw had grave inadequacies.[128] In response, the Free Enterprise Fund, a non-profit organization dedicated to safeguarding organizations from government overreach sued the PCAOB and posited that the organization was not constitutional.[129] In 2010, in a 5-4 split, the Supreme Court found that the established removal process for members of the PCAOB was indeed unconstitutional.[130] The majority concluded that a double layer of protection violated the Constitution's guarantee of separation of powers: "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[131] The Court clarified that the appointment of these officers by the SEC was not unconstitutional; however, the ability of the President to remove those who assisted him in carrying out his duties was "the rule, not the exception."[132]

If we apply the precedent established by the *Free Enterprise Fund* to the modern Federal Reserve, it appears that the inclusion of independent presidents on the Board of Governors is unconstitutional. Presently, if the U.S. President wanted to terminate a president of a Reserve Bank who serves on the Board of Governors, he or she would be prohibited from directly doing so. Instead, the President of the United States must first indicate his or her request for removal to each of his seven appointees on the Board of Governors. Next, these governors would, in turn, have to petition the private directors & the individual Reserve Bank to vote in favor of terminating the president. Finally, the directors could fire him without due cause.[133] Just as in the *Free*

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[128]*Ibid*

[129]*Free Enterprise Fund v. Public Company Oversight Board,* 561 U.S. 477 (2010) (Oyez). https://www.oyez.org/cases/2009/08-861

[130]*Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010)
(Ballotpedia).
https://ballotpedia.org/Free_Enterprise_Fund_v._Public_Company_Accounting_Oversight_Board

[131]Peter Conti-Brown, "The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century," (Hutchins Center on Fiscal & Monetary Policy at Brookings). https://law.stanford.edu/index.php?webauth-document=publication/874541/doc/slspublic/Conti-Brown-fed_banks_21st_century.pdf

[132]*Ibid*

[133]*Ibid*

Enterprise Fund, Congress has insulated Reserve Bank presidents from the U.S. President's excision authority, providing "multilevel protection" from the President. Therefore, as of 2010, the construction of the Federal Reserve's Board of Governors stands in direct violation of the Constitution.

Conclusion

Debate regarding the constitutionality of a national bank has been a constant in national thought since America's genesis. In the United States' infancy, discourse revolved around the notion of whether the Constitution permitted the creation of an overarching fiscal authority. The parties who were in opposition to each other mainly disagreed over the interpretation of the Constitution. Individuals of the Hamiltonian school of thought believed in a liberal interpretation, whereas Jeffersonians espoused the idea of textualism, which means that the Constitution should be construed in accordance with the intent of the framers.[134] Furthermore, the lengths to which federalism could be applied were judiciously weighed. Ultimately, the issue was not formally resolved until the Supreme Court decision of *McCulloch v. Maryland*. Despite the eventual destruction of the country's national bank via Andrew Jackson's 1832 veto, Supreme Court precedent should be given the highest regard consistent with America's tradition of reliance upon common law and the institution's recognized power of judicial review. Therefore, the federal government possesses the right to incorporate a national bank. However, the Federal Reserve, as currently structured, violates the established precedent of *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.* As a result, its present construction is in direct contravention to the Constitution. While spirited wits may agitate for the reversal of established Supreme Court precedent, they must employ constitutional

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[134]"Intro.8.2 Textualism and Constitutional Interpretation," (Constitution Annotated: Analysis and Interpretation of the U.S. Constitution). https://constitution.congress.gov/browse/essay/intro.8-2/ALDE_00001303/#:~:text=Textualism%20is%20a%20mode%20of,in%20which%20those%20terms%20appear.

means, such as Congressional attempts to codify opposing opinions into law.