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The Rising 5%: Our Ancestors' Wildest Dreams

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Host Institution:
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INTRODUCTION:
By: Carletta Sanders, 2021-2022 Editor-In-Chief

ARTICLES:

The *Midwest Journal of Law and Policy (MJLP)* seeks scholarly works from outstanding students, professors, and practitioners that focus on numerous issues surrounding the Black community nationwide. The mission of MJLP is to promote and celebrate black excellence in legal academia and scholarship, connect black law students, develop legal writing, and research skills, foster, and satisfy the intellectual curiosity in various legal and political areas, amplify black voices in the legal community.

MJLP strives to be a forum for sound legal scholarship reflecting the interests of black communities that will stimulate thought and simultaneously trigger positive change. While the *MJLP* primary focus is on the Black populace, it affords writing opportunities to all persons and appeals to a diverse audience.

As a student-run publication, *MJLP* endeavors to provide an outlet for both professional and student-authored works that embody the *MJLP* mission of serving as a vehicle for social, economic, and political progression in Black society.

To contact the *Midwest Journal of Law and Policy* or to order a copy of *Volume II*, please send an email to mwblsa.chiefeditor@nblsa.org.

The *Midwest Journal of Law and Policy 2021-2022 Editorial Team*

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Thank you to everyone who contributed to make this year successful. The following individuals have gone above and beyond in ensuring that this volume was a success:

2021-2022 Midwest Chair, Jessica Fullilove
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THE RISING 5% : OUR ANCESTORS' WILDEST DREAMS

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A STATEMENT FROM THE EDITOR IN CHIEF, CARLETTA M. SANDERS

The *Midwest Journal of Law and Policy* (MJLP) is a premier regional legal publication that serves as a vehicle for important legal commentary on issues related to the social, economic, and political status of the Black community. The home school of the Editor in Chief determines the host institution. *Northern Illinois University College of Law* hosted Volume II. The editorial team was selected from applicants from each of the participating law schools, and we were fortunate enough to have staff from MWBLSA chapters in Illinois, Indiana, Ohio, and Michigan.

I am pleased to introduce scholarly works written by two law students from *Notre Dame Law School* and one law student from *The Ohio State University Moritz College of Law.* Staying true to the Midwest Region's Theme of the Rising 5%: Our Ancestor's Wildest Dreams, we focused on three pillars that bring those dreams into fruition : Education, Equity, and Innovation.

Lastly, I would like to thank the editorial team for the 2021-2022 academic year. Your hard work, diligence, and collaborative efforts have yielded amazing results. It was an honor to serve as the Editor in Chief of the *Midwest Journal of Law and Policy, Vol. II*. I am proud to share our final work product and the work of our talented authors.

CARLETTA M. SANDERS
Editor in Chief, Vol. II

"Education is for improving the lives of others and for leaving your community and world better than you found it." - Marian Wright Edelman

The Thought We Hate: The Case for Regulating Hate Speech in Public Universities

By: Marquan Robertson, Notre Dame Law School

INTRODUCTION

Since the turn of the millennium, college enrollment has sky-rocketed across all demographics in the United States.[1] This is indicative of the importance that universities continue to hold in today's America. Due to their comparative affordability, public universities inevitably carry the burden of increased enrollment.[2] This coincidence has given universities, among other things, the responsibility of educating both the minds and character of America's next generations to shape the discourse of everyday life. A necessary part of this responsibility demands governing many aspects of student, faculty, and staff life on and off the campus. This reality places universities in a precarious position.

On one hand, universities have become responsible for the physical and emotional well-being of its students. On the other hand, public universities must maintain their integrity by propelling forward principles of academic freedom.[3] In recognition of these competing aims, universities have generally been afforded some deference in their role as state actors.[4] The Supreme Court of the United States ("SCOTUS") has gone as far as declaring that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[5] Despite the Court's acknowledgment of this "special niche," it routinely applies strict constitutional limitations when it comes to speech, in any capacity, on the campuses of public universities. This distinction can be reconciled by recognizing the deference courts afford for "purely academic" based decisions (admissions criteria or curriculum) versus issues concerning substantive legal rights (academic freedom or discrimination).[6]

In general, courts do not treat all speech equally; they also do not empower all state actors with the same authority in governing speech. The powers government entities exercise over individuals' speech are best understood on a spectrum. For instance, the stricter side of the spectrum houses concerns like national security, which deserve the utmost and, at times, unquestioned power over the speech of government employees.[7] On the other end of the spectrum lies speech directly in the public square, free from most regulation. Somewhere in between the two ends of this spectrum, one will find educational institutions. At all levels of kindergarten to high school, speech is generally allowed to be policed heavier. Courts

[1] *See* https://nces.ed.gov/programs/coe/indicator_cha.asp for more demographics and indicators of college enrollment in the US.
[2] *Id.*
[3] Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).
[4] *Id.*
[5] Grutter v. Bollinger, 539 U.S. 306, 311, 123 S. Ct. 2325, 2331 (2003).
[6] *Id.*
[7] *See e.g.*, Snepp v. United States, 444 U.S. 507 (1980). (Snepp voluntarily signed an employment agreement that subjected any works he published to pre-approval of his employer, the CIA. Using the compelling interest test, the Court found that the CIA had constitutionally limited Snepp's speech, and that the agreement was enforceable.).

acknowledge that children are far more impressionable in their earlier years, and this has been reason enough to prevent speech that could indoctrinate or otherwise coerce them.[8] Oddly, this concern disappears the very second students enter public universities. Public universities permit far more freedom than elementary and secondary schools. This freedom has allowed harmful rhetoric, like hate speech, to penetrate what would otherwise be a constructive space for the crafting of individuals that hope to be contributing members of society. This places universities closer to speech in the public square when it comes to their authority to police speech on the campus.

Assuming courts and society view speech on a spectrum, perhaps we can use this spectrum to formulate better the level of deference public institutions should be awarded in their effort to control speech. This paper seeks to argue that if universities are tasked with protecting the physical and mental well-being of the population of students that enroll, they must be afforded the level of deference over speech that permits them to accomplish this mission. This is no easy task, as there is plenty of room for disagreement. Generally, people should agree that public universities do not require the level of deference that national security agencies get. But that does not mean they deserve no deference when it comes to speech regulation on campuses. This paper explores where the best fit on the spectrum is for public universities. Also, it proposes a type of framework that would allow universities to flourish in a reality where they had the authority to control hate speech.

Part I provides context on what hate speech is and why defining it has proven so elusive. It will then give some necessary background of relevant Free Speech Clause jurisprudence by touching on a few landmark Supreme Court cases and extracting the logic stemming from each opinion. Part II will examine the evolution of speech on campus, focusing on how universities have tried (and typically failed) to moderate speech. Part III evaluates the necessity of a framework for universities to engage in some disciplinary measures in the event of hateful speech from one of its students/employees, followed by speculation about what that framework might look like by drawing from current legal tests in other bodies of law. Part IV grapples with the implications of such a test by theoretically applying it to a real-world example to measure the possible pros and cons. Part V concludes with an analysis of inherent incentives and mechanisms for public universities to police any imposed speech limitations, examining how proper application of any additional power will be necessary for the self-preservation of a given university.

I. WHAT IS HATE SPEECH AND HOW HAVE COURTS DEALT WITH IT?

A. What is Hate Speech?

Finding a functional definition from the courts is a gateway issue in this type of discussion because courts have yet to provide one. This is pointed out not to be critical of courts but to, instead, acknowledge the difficulty in trying to pin down what should and should not be

[8] *See e.g.*, Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (The Court recognizes that State routinely govern and limit the rights of minors, "a State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees… a State may deprive children of other rights -- the right to marry, for example, or the right to vote -- deprivations that would be constitutionally intolerable for adults.").

categorized as having crossed the threshold into hate speech. Some entities and organizations have made attempts at creating a definition, though. Cambridge Dictionary's definition[9] leaves much to be desired while some private entities that regularly police speech have settled on a sufficiently broad enough language to allow some deliberation by a neutral third party.[10] The most acceptable definition is found in the middle of this spectrum, a definition sufficiently narrow but at the same time cognizant of the range of conduct that could qualify as speech. This happy medium is found in The United Nation's definition.[11] It acknowledges the range of behavior by categorizing "any kind of communication" while still identifying the types of classes that hate speech can be directed at (although the list is certainly not exhaustive).[12] Assuming it is sufficiently narrow without minimizing the scope—although reasonable minds can and probably will disagree on this—it will be the working definition for this paper.[13]

B. How Have Courts Protected Speech Through Legal Doctrine?

There are dozens of doctrine-defining free speech cases at this point. In recognition of this, this paper will focus only on the few that provide potent examples of relevant logic and background necessary to tackle the issues that arise. The cases selected focus on flexibilities in the doctrine, statutes that failed to pass Constitutional muster, and the type of conduct that the First Amendment protects. Additionally, the paper analyzes a State supreme court case because of its relevance to universities.

i. Tinker v. Des Moines Indep. Cmty. Sch. Dist. (Substantial Disruption)

Tinker is not just a chronologically apt starting point but is also appropriate due to the decision being one of the most cited free speech cases for educational settings. In *Tinker*, a group of students and adults organized a protest of the United States' involvement in the Vietnam War. All participants were to wear black armbands throughout the school day. The school found out about the protest and implemented a policy that would require anyone wearing such attire to remove it on the school grounds; refusal to obey would lead to suspension from the school until compliance. In response to this, the students and their parents sought an injunction preventing the suspensions. The Supreme Court reasoned that the school's policies were unconstitutional because the wearing of the armbands to them was closely akin to pure speech and entitled to comprehensive protection under the First Amendment, absent facts that might reasonably have

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[9] *Hate Speech*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/hate-speech (last visited Sept. 6, 2020) (It fails to fully capture the wide range of conduct that falls under the application of speech doctrine by failing to elaborate on what speech is).

[10] Richard Allan, *Hard Questions: Who Should Decide What Is Hate Speech in an Online Global Community?*, FACEBOOK, https://about.fb.com/news/2017/06/hard-questions-hate-speech/. (Sept. 6, 2020, 9:09 PM). ("[H]ate speech is anything that directly attacks people based on what are known as their "protected characteristics" — race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity, or serious disability or disease.").

[11] U.N. Secretary-General, United Nations Strategy And Plan Of Action On Hate Speech, United Nations (May 2019), https://tinyurl.com/y3vowqhk.

[12] *Id.*

[13] It's worth mentioning that a working definition may not be entirely necessary. The US Supreme Court and some organizations (The Foundation for Individual Rights in Education) have chosen to take a common-sense or reasonable minds approach to what should be considered as hate speech. The reasonable minds test lends well to this type of analysis because the determination feels like a question of fact (as opposed to law) and this is the closest thing to a jury deciding as this type of inquiry will ever get.

led school officials to forecast substantial disruption of or material interference with school activities.[14]

It is worth mentioning that the Court provided a great deal of clarity in its decision here; drawing a few boundaries and limitations on just the lengths a school was permitted to go in disciplining speech and symbolism within its halls. First, and perhaps most important, the Court opened up the door for some restrictions in school and the classroom.[15] This is particularly interesting when coupled with the fact that SCOTUS has also grappled with the concept of contracting away some portion of an individual's free speech rights in *Snepp*.[16] Together, the *Snepp* and *Tinker* decisions can create a strong argument for free speech taking a backseat, of sorts, in the interests of a public institution, at least when individuals willingly contract with a government entity [17]

ii. Brandenburg v. Ohio (Imminent Lawless Action Standard)

Brandenburg, a leader of the KKK, shared terrible remarks such as: "bury the niggers," "niggers should be returned to Africa," and "send the Jews back to Israel" at a KKK rally (where they also burned a cross and brandished weapons).[18] He was later arrested and convicted under Ohio statutory law[19] for advocating the duty or necessity of violence in order to incite and use terrorism as a means of political or industrial reform. Brandenburg challenged the statute on First and Fourteenth Amendment concerns; he lost at the trial level and had his appeal dismissed at the state Supreme Court, with SCOTUS subsequently granting certiorari. Ultimately, the Court declared the Ohio statute unconstitutional because it punished incitement, through speech and assembly, in the absence of any imminent or likely danger. The Court reasoned, "the constitutional guarantees of free speech… do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[20] This can be said to stand for the notion that speech itself, in its purest form, cannot be the basis for prosecution.[21]

This case, more than *Tinker*, highlights why universities can be afforded more power in their role as speech-regulators and why courts and Legislatures can remain legally at ease in allowing additional power. In *Brandenburg*, the stakes were incredibly high. Brandenburg, regardless of how you view him personally, had his freedom in jeopardy. The stakes are considerably lowered when it comes to permitting universities to regulate hate speech

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[14] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[15] *Id.* at 513. ("[C]onduct by the student, in class or out of it, which for any reason… materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.")

[16] *Id.*

[17] *See infra* Part III (Creating a framework based off traditional First Amendment principles and *Snepp*. Obvious issues arise in contract law considering these circumstances; age of majority concerns, contract of adhesion, and other basic contract formation concerns.).

[18] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[19] Ohio Rev. Code Ann. § 2923.13. (At the time "made it unlawful, inter alia, to advocate crime or methods of terrorism or to voluntarily assembly with any group to teach or advocate doctrines of syndicalism." Has since been updated in accordance with the *Brandenburg* ruling.).

[20] *Brandenburg*, 395 U.S. at 447.

[21] *Id.* at 457. (In his concurrence, Justice Douglas reasons, in the absence of a clear call to lawless action, speech is actually "immune from prosecution.").

on-campus. No individual's substantive freedom is in jeopardy. Universities are not wielding the same type of power an actual police force does when arresting individuals, and this fact must be taken into account when making a case for affording more deference in this space for universities.

iii. R.A.V. v. City of St. Paul (Content and Viewpoint Discrimination)

In *R.A.V.*, a group of white teenagers created a makeshift cross out of chairs and burned it on an African-American family's lawn. The city charged them under an ordinance that was meant to target displays of symbols which "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[22] The statute was enacted with previously recognized limits for conduct that would amount to legally unprotectable "fighting words"[23] Ultimately, the Court declared the ordinance unconstitutional and reversed the conviction. It reasoned that the ordinance sought to limit content/free speech unnecessarily on the basis of *what* was being said as opposed to the *actions that would follow* the presentment of the symbols.[24] The Court clarified that the fighting words doctrine cannot be used to regulate speech usage on the basis of hostility, or even favoritism, towards any underlying message the speech intends to get across.[25] The ability to do so would, as the Court explains, permit the Government to engage in content discrimination, effectively diluting the "marketplace of ideas"[26] by driving out certain ideas and viewpoints it does not agree with.[27] In the Court's analysis, there is also mention of what types of content-based regulations that would be constitutionally permissible. This typically included speech that is necessarily associated with some secondary effect.[28] Further into the opinion, the Court reasoned that the statute might even constitute a form of viewpoint discrimination (as opposed to only content discrimination).[29] The end of the opinion finds the Court engaging in a brief, compelling interest analysis. The Government has every right—perhaps, even obligation—to protect the basic human rights of law-abiding citizens who wish to live in peace, but on the other end of that spectrum lies the "danger of censorship" of citizens.[30] The dispositive question was reduced to whether the content (perhaps even viewpoint) discrimination by St. Paul was reasonably necessary to achieve its compelling interests, to which the Court retorts, "it plainly is not."[31] Any

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[22] St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990).

[23] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). (The Fighting Words Doctrine originates in There, the Court acknowledged that there were certain "well-defined and narrowly limited" classes of speech that prevention of would never be thought to raise Constitutional concerns. *See e.g.*, In re Welfare of R. A. V., 464 N.W.2d 507, 510 *(*Minn. 1991)).

[24] R. A. V. v. St. Paul, 505 U.S. 377 at 395-96 (1992).

[25] *Id.* at 386.

[26] *Infra* Part III.A.

[27] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 108 (1991).

[28] *See e.g.*, *R. A. V*, 505 U.S. at 389. (Examples mentioned by the Court include; statutes that permit obscene live performances except those involving minors or laws against treason that punish the communication of national secrets.).

[29] *Id.* at 391. (In the Courts' analysis it highlights the distinction between a statute that would punish fighting words versus one, like the one in this case, that effectively punished fighting words "that contain… message of "biasmotivated" hatred and in particular… messages "based on virulent notions of racial supremacy.").

[30] *Id.* at 395. (The Court, of course, does not disagree that there is a compelling interest to protect basic human rights, however mere acknowledgment of the interest is just the first step and is not dispositive.).

[31] *Id.* at 395-6. (Not only was it not reasonably necessary, the Court actually concludes that "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.").

ordinance, not limited to the narrow conduct mentioned, would have the same beneficial effect, and would signal conduct that amounts to viewpoint discrimination.[32]

R.A.V.'s concurrence appears to leave the door open to the exact kind of content-based discrimination the majority claimed was constitutionally impermissible. Relying on ample Court precedent[33], the concurrence reasons that the First Amendment does not, and never will, apply to categories of speech that are "worthless or of *de minimis* value to society."[34] Further, the Court has not departed from the *de minimis* principle, instead emphasizing that "within the confines of [these] given classifications, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake."[35] It is within these articulated principles that a Government entity can regulate speech on the basis of content only upon a showing of a compelling need to do so.[36] Interestingly enough, the concurrence is worried about the jurisprudence of the majority's decision being taken too liberally as a legitimization of hate speech.[37] Put plainly, the concurrence fears that the opinion puts too much value on speech and expression that has little to no societal value (such as burning a cross on a neighbors' front lawn), to the point of devaluing the social interest in "order and morality that has traditionally placed such fighting words outside the First Amendment."[38] It appears that the concerns of the concurrence were not entirely baseless, as the jurisprudence of the First Amendment has appeared to swing to what some might categorize as overprotection of free speech to the detriment of the interests of society.[39]

iv. Tatro v. Univ. of Minn. (Narrowly Tailored Professional Conduct Standards)

While it is not a Supreme Court case, *Tatro*[40] provides some valuable insights on how a university might permissibly get around traditionally difficult First Amendment doctrine. In *Tatro*, a University of Minnesota student faced discipline for Facebook posts she made regarding her mortuary program at the university.[41] Some of the things Tatro posted were: "Amanda Beth Tatro: Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve," and "Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm.. perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy."[42] After being made aware of the posts, the university ultimately decided to allow Tatro to finish her exams; however, Tatro's instructor and the Director of the mortuary program sought sanctions for violations of the University's Student Conduct Code following the completion of the course. The Director relied on the fact that the university's mortuary program, as well as the mortuary field in general, maintains an "emphasis on respect, dignity, and professionalism as a foundation for later working as a funeral director or

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[32] *Id.*
[33] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (the famous shouting "fire" in a crowded movie-theater case). *See also* New York v. Ferber, 458 U.S. 747, 763 (1982). (public officials being the target of libelous publication).
[34] R. A. V., 505 U.S. 377 at 571-572.
[35] *Id.* at 400 .
[36] *Id.*
[37] *Id.* at 402.
[38] *Id.*
[39] Jamal Greene, *Constitutional Moral Hazard and Campus Speech*, 61 William & Mary L. Rev 223 (2019).
[40] Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).
[41] *Id.*
[42] *Id.* at 512.

mortician."[43] The university found this convincing and moved forward with punishments against Tatro for her speech online.[44] Tatro filed suit, alleging that the University of Minnesota unconstitutionally punished her in violation of her right to free speech.

The Minnesota Supreme Court upheld the lower court's findings that the University had not violated Tatro's free speech rights. The decision provided multiple interesting insights. First, it noted that in selecting the standard of review in cases like this, "the "mode of analysis set forth in Tinker is not absolute" and courts must consider "the special characteristics of the school environment."[45] Moreover, it acknowledges that universities have different or "special" aims, and this should allow for more deference where necessary. In finding for the university, the Court also notes that:

> Although a university's interest in academic freedom does not immunize the university altogether from U.S. Const. amend. In challenges, courts have concluded that a university has discretion to engage in its own expressive activity of prescribing its curriculum and that it is appropriate to defer to the university's expertise in defining academic standards and teaching students to meet them. Courts are cautioned to resist substituting their own notions of sound educational policy for that of school authorities, even in areas outside of a narrow instructional context like extracurricular programs.[46]

This can be construed to mean that the door is wide open for universities to structure the curriculum in a way that would discourage hate speech (in all of its programs) in the same manner that the University of Minnesota seeks to discourage the speech Tatro engaged in. In these circumstances, it would seem incumbent of a court to honor the discretion when coming to any decision on if it passes Constitutional muster. The takeaway from this opinion is that "[a] university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for [speech] that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards."[47] If nothing else, this prescribes the manner in which a public university can seek to regulate the speech of its students. The regulation of speech must be narrowly tailored and directly related to established professional conduct standards. While this does not seem to be necessarily the easiest thing to accomplish for hate speech, it does provide a lot of room for creativity for a university in its effort to find a framework that appeases the courts.

II. THE STRUGGLE TO REGULATE HATE SPEECH AT PUBLIC UNIVERSITIES

A. Speech Codes

[43] *Id.* at 514.
[44] *Id.* at 515-15. (Punishment consisted of: "1. Changing Tatro's grade in MORT 3171 to an "F." 2. Completion of a "directed study course" in clinical ethics. 3. A letter to one of the faculty members in the Mortuary Science Program addressing the issue of respect within the program and the profession. 4. A psychiatric evaluation at the student health service clinic and completion of any recommendations made by their evaluation. 5. Placement on probation for the remainder of Tatro's undergraduate career.").
[45] *Id.* at 520.
[46] *Id.* at 522.
[47] *Id.* at 521.

Speech Codes burst onto the public university scene in the 1980s and 90s. It is difficult to trace back which university got the ball rolling, but it is undeniable that the trend spread like wildfire. Some sources approximate nearly 140 college campuses in a five-year span adopting some variant of a speech code for its students.[48] Some estimates placed the percentage of colleges regulating at least race-related forms of hate speech as high as 60% by the early 90s.[49] In short, speech codes are policies or rules that "prohibit speech or conduct that creates an intimidating, hostile, or offensive educational environment."[50] Despite the popularity, courts routinely found speech codes to be nothing more than unenforceable and unconstitutional limits on student speech.[51] The corresponding case law in speech code cases shares a few common themes; overly broad language[52] and inadequate notice of what conduct was punishable[53], ultimately leading to the demise of the speech code due to it being unconstitutionally vague.[54] It is difficult to fight such an uphill battle against the case law, especially when the logic in the application of the First Amendment doctrine is likely correct. Instead, it might be necessary to pivot and create some new framework that may be exclusive to public universities to accommodate its enormous contribution to societal formation.[55]

B. Free Speech Zones

Free Speech Zones represent another system to deal with problematic speech in public universities. These zones operate as such in a public university: universities dedicate a specific space[56] on campus grounds where First Amendment expressions like; speaking, protesting, and gathering signatures[57] are permitted; the nature of what is talked about in these zones are generally unpoliced in exchange for not engaging in the conduct elsewhere on the campus. Originating in the 1960s on college campuses[58]speech zones didn't become mainstream news until the mid-2000s at the height of the 2004 Democratic and Republican Conventions [59]. Proponents of speech zones claim that they are designed to promote free speech and the

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[48] Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins but Race Loses in America*, 6 Mich J. Gender & L.153 (1999).

[49] Carolyn M. Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses,* 13 Whittier L. Rev. 805, 818 (1992).

[50] *See generally* Santa Clara University, *Campus Hate Speech Codes*, (https://www.scu.edu/character/resources/campus-hate-speech-codes/) (last visited May 17 2022).

[51] Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & PUB. POL'y 481 (2009). (Courts have "uniformly" rejected speech codes since their inception).

[52] Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003).

[53] Booher v. Bd. of Regents, CIVIL ACTION NO. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998).

[54] The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

[55] *Infra* Part III.

[56]*See. e.g. Jeremy Bauer-Wolf, The Death of College Free-Speech Zones, Inside Higher Ed* (https://www.insidehighered.com/news/2018/02/02/experts-states-likely-keep-abolishing-free-speech-zones). (The size of these speech zones vary wildly and can reach comical levels; for instance, Pierce College created its free speech zone to be just 600 square feet (the size of two parking lot spaces), while the University of South Dakota required students to reserve a free speech spot at least five days in advance of anticipated usage.)

[57]*See* Emerson Sykes and Vera Eidelman*, When Colleges Confine Free Speech to a 'Zone,' It Isn't Free, ACLU* (Feb. 7, 2019) *https://www.aclu.org/blog/free-speech/student-speech-and-privacy/when-colleges-confine-free-speech-zone-it-isnt-free*.

[58] Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the Caging of First Amendment Rights*, 54 Drake L. Rev.949 (2006).

[59] *Id.*

exchange of ideas by carving out space for this, allowing others to know exactly where to go to engage in it.[60] Other free speech advocates claim the opposite effect is much more likely, identifying a few troublesome results of how the zones are typically implemented; first, these zones are abused by universities in an effort to engage in viewpoint discrimination by creating a space that is out of the way of the general public[61], second, they have harmful secondary effects and are enforced against the population that may actually be the desired beneficiaries.[62]

Free speech zones, like speech codes, have also been increasingly eliminated. Although the elimination of speech zones have occurred primarily through the legislature.[63] These types of disputes do not lend well to litigation and become costly to defeat.[64] Having become a politically unifying cause, both sides of the aisle have rallied to destroy speech zones through legislation.[65] In accordance with *Tinker*, universities may still regulate where expressions like protests and controversial speakers are permitted to happen, so long as it is moved to avoid some material disruption on the campus.[66]

III. THE NECESSITY OF A FRAMEWORK

A. Necessity in General

i. The Marketplace of Ideas

Perhaps the most credible argument to withhold (or for withholding) some framework for Public Universities to authoritatively deal with hate speech on campus is the notion that there are already appropriate mechanisms in place to do so. One of the popular mechanisms borrows from economic principles: the marketplace of ideas.[67] This theory proposes that hate speech would effectively be pushed out if allowed in the marketplace of ideas because no rational person would want to hear it or believe it to be true. Justice Oliver Wendell Holmes explains how the marketplace concept can be used to justify a legal right to free speech (implicating hate speech) in his dissent in *Abrams v. U.S.*, "the ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market."[68]

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[60] Mitchell, *supra* note 48.
[61] Majeed, *supra* note 49.
[62] Mitchell, *supra* note 48. (Kevin Shaw, a student at Los Angeles Pierce College, was forced to stop handing out Spanish versions of the US Constitution).
[63] *Id.*
[64] *Id.* (A federal court ruled in striking down a free speech zone at the University of Cincinnati because it only made up about .01% of the available space on campus. Under this logic, a public university would just need to meet a certain threshold to implement a Constitutional speech zone.).
[65] *Id.*
[66] *See generally Tinker*, 393 U.S. 503.
[67] Gordon, Jill, *John Stuart Mill and the "Marketplace of Ideas"*, 23 Social Theory and Practice 235 (1997) ("The metaphor is based, first of all, on a market economy and on free exchange in the market. In such a market many products are available and we, as rational consumers, choose freely what we want from among those available after careful weighing of their relative quality.").
[68] Abrams v. United States, 250 U.S. 616, 630 (1919). (Standing for the notion that untruthful ideas would be rejected by the marketplace, rendering any regulation moot).

There must be some merit to the marketplace of ideas approach? It seems to be the one most advocated for by organizations that regularly litigate and advocate Free Speech claims.[69] A couple of relevant questions are: How much merit does marketplace theory deserve? Does the theory's merit blind the legal field to its shortcomings? The lack of evolution in free speech doctrine or acknowledgment of evolution in other fields (namely Political and Economic fields, where the idea originated) leaves the concept desiring for a modern-day interpretation. This paper attempts to, modestly, update the interpretation in the legal sphere. Speech doctrine's marketplace of ideas approach, in its current form, does not account for clear actualities, such as the inevitabilities of market failure(s).[70] One example is negative externalities.[71] In the free speech marketplace model, a negative externality would be hate speech and its effects on otherwise unwilling participants. Aside from just getting another viewpoint onto the marketplace, hate speech acts as a mechanism to "delegitimize" the targets of the speech to all who listen.[72] In a perfect market, these ideas would be eventually recognized as untrue, and (or at negative consequences would be minimized. Instead, the reality is that society functions as an imperfect marketplace, and this harmful rhetoric only contributes to keeping the targets of the speech low on the social totem pole. This approach to free speech assumes that each party is on equal grounds to try and handle abnormalities and undesirable outcomes in the marketplace. the opposite is actually the case, and the transaction costs are too often insurmountable. At some point, society must move to pass the intellectual appeal of the marketplace of ideas and pass the fantasy of "striking down weak ideas through the force of rational discussion."[73] Recognition of the flaws in a marketplace concept would necessarily entail some form of government involvement to address the various market failures.

ii. Protecting the Bottom Line

Public universities may also need the right to act as doorstops for hate speech on campus to protect their financial interests. Social media titan Twitter routinely regulates speech on their private platforms.[74] This is not because of some abnormal desire to flex its ability to hinder First Amendment principles; but because it knows that to survive, it must listen to the feedback of its participants and adjust accordingly.[75] Recently, Twitter updated its hate speech policy to include language that dehumanizes others on the basis of religion.[76] This addition was directly tied to market research and work with the Anti-Defamation League.[77] Like Twitter, universities must

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[69] The ACLU took out a Pro-Muslim advertisement in Times Square directly after an Anti-Muslim ad declared: "Muslims Go Home" https://www.aclu.org/video/aclu-fight-hate-speech-more-speech.

[70] Dan McGee (@danmcgee), MEDIUM, (Feb. 13, 2017), https://medium.com/@danmcgee/the-marketplace-of-ideas-is-a-failed-market-5d1a7c106fb8 (last visited Nov. 8, 2020). *See also* https://www.researchgate.net/publication/251159990_Hate_Speech_in_the_Marketplace_of_Ideas. (last visited Nov. 8, 2020).

[71] Will Kenton, Externality, INVESTOPEDIA, (LAST UPDATED OCT. 26, 2020) https://www.investopedia.com/terms/e/externality.asp. (last visited Nov. 9, 2020). ("An externality is a cost or benefit caused by a producer that is not financially incurred or received by that producer… externalit[ies] can be both negative and positive and can stem from either the production or consumption of a good or service.")

[72] McGee, s*upra*, note 68.

[73] *Id.*

[74] Jonathan Shiebler, Twitter updates hate speech rules to include dehumanizing speech around religion, TECHCRUNCH, https://techcrunch.com/2019/07/09/twitter-updates-hate-speech-rules-to-include-dehumanizing-speech-around-religion/ (last visited Oct. 31, 2020).

[75] *Id.*

[76] *Id.*

[77] *Id.*

also be wary of the possible economic effects of not addressing hate speech with direct action, disciplinary or otherwise. For example, Cassidy Pyser, a former student at Kutztown University, filed a federal suit against her university due to its alleged failure to address the atmosphere of racism and bigotry on campus.[78] Psyer, a member of the Jewish faith, complained about harassment and intimidation to her residence hall director, campus police, and university officials.[79] Psyer suffered through texts from her roommate depicting images of Adolph Hitler, Jews being burned at the Holocaust, and a member of the KKK standing in a white hood in a watermelon field.[80] Speech was just one component of the injury suffered by Psyer. She was later the victim of vandalism when her mezuzah was smashed.[81] Unable to cope further with the refusal (or more likely inability) of her university to protect her, Psyer withdrew at the end of her Sophomore year.[82]

With no recourse to constitutionally restrict the hurtful speech, Kutztown sought to take a marketplace of ideas approach and usher in a "Hate the Hate" campaign on campus, where it urged students to take the hurtful signs and turn them into objects of art and resistance.[83] Evidently, the campaign has been less than effective and could begin to affect Kutztown University's bottom line. Psyer's case represents the slippery slope of the inability of a public university to nip the bud that is hate speech. Kutztown University is an affordable staple option in the state of Pennsylvania, as such, it only held an endowment of $31.9 million in 2019[84]; suffice it to say that it cannot afford to lose students and potential donating alumni because of its incapability of providing the most basic of protections to its students.

B. The Unique Responsibility of Public Universities

The Supreme Court has recognized that academic environments, especially postsecondary universities, have acquired a "special niche" within the First Amendment.[85] In recognition of this special niche, some scholars have begun a call for the courts (especially the Supreme Court) to incorporate more of an "institutional First Amendment" regime that emphasizes the need for crafting rules around First Amendment principles with a bottom-up approach.[86] In essence, this approach would only require the Supreme Court to identify institutions that "merit recognition as First Amendment institutions" and then give a great

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[78] Peter Hall, *Former Kutztown student claims anti-Semitism forced her to leave the college*, THE MORNING CALL (JAN. 7,2020, https://www.mcall.com/news/education/mc-nws-kutztown-anti-semitic-intimidation-lawsuit-20200107-6phxty26izal nlc5qewh66hi6a-story.html (last visited Oct. 31, 2020).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] U.S. NEWS & WORLD REPORT, https://www.usnews.com/best-colleges/kutztown-university-3322 (last visited Oct. 31, 2020).
[85] *Bollinger*, 539 U.S. at 329.
[86] Horwitz, *supra* note 3. ("Rather than build First Amendment doctrine from the top down… courts might begin with the recognition that a "number of existing social institutions" - such as universities… "serve functions that the First Amendment deems especially important." Building on this foundation, courts could "construct First Amendment doctrine in response to the actual functions and practices" of those institutions that merit recognition as First Amendment institutions.").

amount of deference and autonomy to these institutions as they make decisions within their own confines and expertise.[87]

i. Constitutional Moral Hazard

First Amendment doctrine paralyzes universities and removes the force they need to ensure productive dialogue on campus. This paralysis is well known to the individuals that seek to capitalize on the lack of power; Jamal Greene has referred to this phenomenon under the guise of another economic principle, dubbing it a Constitutional "moral hazard."[88] Moral hazard refers to the increased propensity of insured individuals to engage in costly behavior.[89] It is especially important in the First Amendment context because moral hazard is not necessarily concerned with the population as an aggregate but instead focuses on the problems that arise in the margins as individual actors cause harm they know will be protected (by the state in this scenario).[90] Moreover, it stands to reason that the risky behavior in a given scenario—Hate speech on a college campus for instance—is far more likely to occur if repercussions for that behavior are known to be off the table.[91] Greene posits that how we combat this problem and ultimately deal with (hate) speech, in general, is largely at the whims of the courts and how they value certain activities and institutions; he calls universities "curators of speech"[92] and "speech laboratories"[93] to emphasize the role they play in shaping how we view speech in society.[94] Requiring universities to curate speech while simultaneously robbing them of any ways to curtail speech that serves no purpose in an academic setting is a contradiction that the Court refuses to directly engage within its opinions. Indirectly, however, the Supreme Court has previously given deference to universities to engage in content discrimination and even viewpoint discrimination in the admissions process. The Court has protected a university's choice to convolute the admissions process as much as they deem necessary to enable the attainment of certain diversity goals.[95] This deference allows universities to prohibit students for any number of things, such as; lack of intelligence, likeliness to donate in the future, contribution to the sports teams, and of course the contribution that will be made to the educational experience of their peers.[96] So, as Greene proposes, a student who is demonstrably brilliant by all measurable metrics (GPA, SAT, ACT, etc.) may still be denied from entering the university due to an equally demonstrably showing of being racist; further, this result should be the desired outcome in the admissions process.[97]

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[87] *Id.*
[88] Greene, s*upra*, note 38.
[89] *Id.* at 224.
[90] *Id.* ("Moral hazard is not about how individuals behave in general but on the margins. It concerns the incentive effect of holding security against worst-case scenarios.").
[91] *Id.*
[92] *Id*. at 248. (Greene refers to this as one of the more prominent roles a university has; further explaining that the responsibility "is not just to support experimentation but to encourage civility and to emphasize the role of persuasion in democratic discourse. It amplifies this point to note that the publicity runs in both directions.").
[93] *Id.*
[94] Greene, *supra* note 38.
[95] Allan, *supra* note 10; *See also* Horwitz, *supra* note 3 at 243. ("In other words, universities engage in viewpoint discrimination in admitting students, and they do so pervasively. We need not assume that schools are partisan in their choices, though some may be, but merely that they are attentive to the mix of perspectives students offer and the likely quality of their contribution to the classroom.").
[96] Horwitz, *supra* note 3, at 242.
[97] *Id.*

ii. Academic Freedom

Another role universities assume is the guardian of academic freedom.[98] Academic freedom has come under fire again recently.. An understanding of what the term "academic freedom" means is first necessary in order to analyze how it contributes to the discussion on hate speech. One interpretation of what academic freedom stands for is the notion that public universities should be permitted to achieve their academic and educational goals without significant government interference (including interference from courts).[99] The Court grappled with this in its 2010 *Christian Legal Soc'y v. Martinez* opinion.[100] First, the Court recognized that academic communities require some level of conformity from all parties in the community (even religious ones here).[101] Second, despite potential controversies, it is incumbent upon a university to allocate resources in the pursuit of their role in modern-day democratic society.[102] Lastly, and most important, courts should respect universities' judgments and allow them management over their own affairs.[103] In other words, Public Universities cannot be expected to protect academic freedom with no power. There must be some mechanism by which a university can filter out effects harmful to its duty as a guardian of academic freedom. Hate speech represents one of the harmful effects of modern-day interpretations of academic freedom, and while it may not require action on every occasion, there are undeniably some situations that require university action. Courts should defer to universities on which situations meet that threshold.

Another interpretation of the term can be found in one of the most cited cases in academic freedom jurisprudence: *Sweezy v. New Hampshire*[104]. Although *Sweezy* is directly related to faculty academic freedom, it provides some valuable generalities to be extracted to a larger model of Public Universities as First Amendment Institutions. In *Sweezy*, the Court suggests that the "free and unfettered interplay of competing views is essential to the institution's educational mission,"[105] going so far as to suggest that "[p]olitical power must abstain from intrusion into this activity of freedom."[106] Greene rebuts this presumption directly in his work[107], and in doing so accurately observes that no matter how one construes *Sweezy*, it cannot be done in a way that would suggest universities do not have the power to forbid certain forms of discriminatory speech based on how it interprets its own educational mission.[108]

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[98] Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1957). (Highlights the Court's recognition of academic freedom: "The essentiality of [academic] freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.").

[99] Horwitz, *supra* note 84, at 240. ("What academic freedom means is that it is not for the government-- *including a court*--to decide what is "essential to the [school's] educational mission.").

[100] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010). (It is worth mentioning that the court appears to be providing more deference than usual to the university because it is acting in a role as a "delimiter" of free speech, as opposed to trying to place limits on speech and expression.).

[101] *Id.* at 702.

[102] *Id.* (If a University is to ensure conformity, it must allocate resources to that end).

[103] *Id.*

[104] *Sweezy*, 354 U.S. at 234.

[105] *Id.*

[106] *Id.*

[107] Allan, *supra* note 10.

[108] Horwitz, *supra* note 3, at 241.

C. The Framework Itself

It is important to establish (or reestablish) a few preliminary assumptions prior to considering the analysis of what framework best supports Public Universities in taking action against hate speech on its campus. First, the paper assumes these frameworks are possible because the courts and legislatures would afford Universities the deference needed over speech that occurs on campuses. Second, it must be further assumed that Universities will not behave uncontrollably if given this additional power.[109] With these two presumptions understood, I begin by addressing why having a bright-line rule will be far too inefficient to ever work for something as fact-intensive as speech. I then go over a common framework suggested by scholars: Title VII and harassment/hostile work environment. Next, I present an abstract assessment of balancing tests and the pros and cons of them in this type of framework. Finally, I end on the framework I believe would be best suited to Public Universities. The right framework would blend the desirable elements of harassment and balancing tests but add on some additional elements to tighten up application and add additional legitimacy within the larger student body.

i. The Ineffectiveness of a Bright-Line Rule

Bright-line rules may often fail to meet intent or expectations. Pierre Schlag categorizes the distinction between bright-line rules and flexible standards to recognize two types of triggers and responses that differ between rules and standards: evaluative and empirical.[110] Rules have hard empirical triggers, as well as hard determinate responses.[111] Standards, on the other hand, have soft evaluative triggers and are followed by soft modulated responses.[112] In a speech-like setting, a rule would operate as such: Certain words, combinations of words, expressions, and the like would be forbidden from being used. Usage of these words would warrant some type of disciplinary action that will likely be previously defined and enforced regardless of the facts surrounding.[113] It should be self-evident why this option would be terrible in a hate-speech regulatory scheme. Attempting to thwart hate-speech is not an attempt to destroy speech or academic freedom. Hate-speech has its uses, and a bright-line rule could be misapplied in the context of actual education or enlightenment. What if a university wanted to give a course on hate-speech and its history in the US or abroad? Would the rule prevent this?[114] Clearly, a bright-line rule would rob the university of the ability to use its power as it desires and, instead, would force unintended consequences on the campus population. Without discretion, the risk of what the many who oppose university-regulation of speech fear would become reality; a campus-environment in which the right to not be offended governs. Some variant of a standard would afford the necessary flexibility and functionality necessary to allow reason and common sense to take over.

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[109] *Infra* Part IV.
[110] *See generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).
[111] *Id.*
[112] *Id.*
[113] A novel analogy is the concept of minors or infants in contract law. There is a general bright line rule that affords them the absolute ability to void contracts engaged without a guardian or parental figure. (in the absence of statutory enforcement). Restat. 2d of Contracts, § 14.
[114] Schlag, *supra* note 110. (Schlag begins his paper with an interesting hypothetical, during which he posits that bright-line rules (from the point of view of Justice Holmes) are preferable and that accounting for nuances just require exceptions. I fear what it would look like to have 40 exceptions to a single rule and believe it only bolsters the case for a flexible standard).

ii. Title VII Harassment Framework (Hostile Work Environment)

It is no coincidence that many scholars have toyed with the idea of some form of a Title VII framework when proposing a method for tackling hate-speech on college campuses.[115] The hostile work environment[116] framework lends very well to this type of regulation because it has many of the same desired effects, resulting from the same types of conduct.[117] The Equal Employment Opportunity Commission (EEOC) explains that harassment under Title VII is: "unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information."[118] Further, harassment becomes unlawful when "1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive."[119] As many scholars have already noted, it translates very well to regulation of hate-speech. For example, under the harassment/hostile work environment scheme, punishable conduct includes anything that "**(i)** Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
(ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or **(iii)** Otherwise adversely affects an individual's employment opportunities."[120] For an education scheme this could translate to speech[121] that: **(i)** Has the purpose or effect of creating an intimidating, hostile, or hostile campus environment; **(ii)** Has the purpose or effect of creating a material substantial disruption[122] of an individual's school experience; or **(iii)** otherwise adversely affects an individual's experience on campus. Naturally, reasonable minds will disagree on exactly what the language of such a framework would be, but the point is merely that it can work. Further, the framework here should subject discipline based off of one particular incident to a high degree of scrutiny, to avoid punishing individuals arbitrarily.[123] What is especially desirable about this framework is the fact that there is ample wiggle room for a university to be as strict or lenient as necessary to accurately reflect its intent. For example, one university may suffer from repeated hate speech incidents[124] and choose to implement a framework that is harsher and designed to encourage reporting from students. On the contrary, a school that wants a framework in place as a deterrence or only to be used in extreme cases might

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[115] *See* Charles R. Lawrence II*., If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (1990); *see also* Joshua S. Press, *Teachers, Leave Those Kids Alone - On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory*, 102 NW. U. L. REV. 987 (2008); *see also* S. Cagle Juhan, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA.L. REV. 1577 (2012).

[116] EEOC, https://www.eeoc.gov/harassment. (last visited Oct. 31, 2020). ("Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).")

[117] *Id.* ("Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.")

[118] *Id.*

[119] *Id.*

[120] 58 FR 51266, 51269.

[121] This framework would not be used to govern all speech, only speech that would be categorized as hate speech under the working definition from Part I.

[122] *Tinker*, 393 U.S. 503 (borrowing the *Tinker* material disruption standard here to address the change of setting in the harassment framework).

[123] EEOC, s*upra*, note 116. (The EEOC clarifies that, "[p]etty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.").

[124] Hall, s*upra*, note 78. (Kutztown has evidence of a hate speech problem on its campus).

take up the "severe or pervasive"[125] standard that is necessary in most sexual harassment cases. All this to say that it need not be uniform in its application and should be implemented in a manner consistent with a university's educational mission.

iii. Balancing Tests

Balancing tests[126] are another commonly suggested and equally viable method for Universities to engage in regulation of hate-speech. Patrick McFadden presents a three-layer take on what good balancing tests consist of, with the intention of addressing the different aims that should be balanced; facts, rules, and results.[127] When weighing facts in a balancing test, McFadden emphasizes it should be done to determine whether legally significant states of affairs even exist.[128] An obvious example of balancing that occurs within the facts is the assessment of the credibility of the witnesses or victim.[129] This is especially appropriate in the public university setting; balancing facts would be necessary to assess whether certain events ever even occurred, the content behind those events, and the intent of the accused. McFadden finds rule-balancing to be the most problematic of the three factors he focuses on, largely due to the fact that parties as sophisticated as attorneys seemingly make good arguments on how any one given doctrine should be construed.[130] This is further compounded by a second set of balancing that must occur between the actual rules while still trying to consider broader policy arguments "in an effort to choose among competing formulations of an appropriate rule of law."[131] This should not be as problematic here, as McFadden suggests, largely due to the fact that the problem he highlights is enlarged by the many goals a court must consider in balancing its usage of a rule. Universities should find that whatever rule is implemented aligns perfectly with the broader policy reasons for having put it into effect in the first place.

Also, universities will rarely find themselves in a position where they must consider or balance different rules in assessing and regulating hate-speech. Simply put, courts are required to balance a wide range of rules when deciding which party has best argued a given rule; universities only have to consider a rule for hate speech that it chose, on a confined campus, as it regards to its own educational mission, and protection of its students. Lastly, McFadden addresses result-balancing, which requires a balancing of the actual disposition in a case.[132] This is another area McFadden identifies as problematic because a lot of result-balancing offends

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[125] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").

[126] "A subjective test with which a court weighs competing interests, e.g. between an inmate's liberty interest and the government's interest in public safety, to decide which interest prevails." Balancing Test, Cornell Law Legal Information Institute https://www.law.cornell.edu/wex/balancing_test.

[127] Patrick M. McFadden, *The Balancing Test*, 29 B.C.L. REV.585 (1988)

[128] *Id.* at 597. (e.g., did the purported testator sign the will in the presence of two witnesses? What statements did the defendant make about the stock to the plaintiffs?).

[129] *Id.*

[130] *Id.* at 598; *see also Id*. at 599. (Noting that "Rule-balancing becomes more troublesome if the elements to be balanced are interests rather than arguments.").

[131] *Id.*

[132] *Id.* at 600. (Uses criminal law as an example of results-balancing, "in *Barenblatt*, the Court used a balancing analysis to determine whether Lloyd Barenblatt was properly fined and sentenced to jail for contempt of Congress.")

traditional legal notions in more than one way.[133] A problem that would likely translate to the public university scheme is the balance between *ad hoc* decision making and traditional legal reasoning relying on precedent (traditional legal reasoning).[134] McFadden recognizes the dangers ad hoc reasoning presents in balancing tests because of the necessity to rely on it once it has been used before.[135] However it can be well argued that this is another problem that doesn't translate to any balancing test a university might seek to implement because concepts like *stare decisis* are not obligated to be present. Universities should have the autonomy to consider the totality of the circumstances when limiting, regulating, or punishing hate-speech on its campuses. Any balancing test must consider this point as well by accounting for the fact that an ad hoc decision will be probable. Consider the Psyer[136] case again, part of the fact balancing could be to account for why the roommate felt so compelled to harass Psyer to the point of considering withdrawal. Perhaps, it was due to some inexplicable hatred the roommate had for Jews, and if this was the case the result should be expulsion without second thought. On the other hand, suppose it was discovered that he had some mental defect and could not appreciate the nature of his conduct. The result-balancing problem McFadden identified rears its head now, and it would be more difficult if ad hoc balancing was used to account for the mental defect. The main issue then would be whether the university is now required to take into account and evaluate all claims of mental defect or if it is permitted to do it in this one case without making it obligatory in the future. While there is no easy answer to this question—both in the courts or within this framework—I believe that part of giving universities power here is allowing them to balance it as they see fit, when they see fit, and trusting that the result was reached in good-faith.

iv. The Best of Both Worlds — An Original Framework

Taking in all of the previous considerations, it seems best to stray away from any bright-line rule(s) regarding speech or particular words. Instead, a test that incorporates the desirable traits of balancing with the language of Title VII's hostile work environment claim would more likely better encompass the type of test and effects desired.

Beginning with the principle articulated in *Snepp*: parties to a contract can agree to limit the First Amendment speech protections.[137] It stands to reason that universities can craft a contract, required before stepping foot on a campus, that explains what the university intends to regulate, as it pertains to speech, and also why it intends to do so. From there, students would have to agree to subject themselves to regulation.[138] This would also serve to provide adequate notice to students about the possibility of retribution in the event that they perpetuate hate on the college campus through speech. These contracts should frame the regulation of speech to mirror the idea of professional standards, recognized in *Tatro*.[139] It is also vital that universities provide

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[133] *Id.* at 601-2. ("Result-balancing replaces all of that with a balance of interests. The disposition of the case no longer turns on the existence of a physical fact or on the meaning of a word, but on an evaluation of individual or social values."

[134] *Id.* at 602-3.

135 *Id.*

[136] Hall, *supra*, note 77.

[137] *See generally Snepp*, 444 U.S. 507.

[138] Alternatively, universities that want to ensure the contract can survive legal challenges may want to make the clause optional. Allowing students to opt-out of being subjected to it would, at least on its face, make any punishments that result from the clause be more legitimate.

[139] *Tatro*, 816 N.W.2d at 522. ("[C]ourts have concluded that a university "has discretion to engage in its own expressive activity of prescribing its curriculum" and that it is appropriate to "defer[] to the university's expertise in defining academic standards and teaching students to meet them.")

proper explanation of what hate speech is on the campus, and the actual process of any proposed disciplinary action. With notice and assent taken care of, universities would then move on to establishing exactly how cases are to be handled if and when they arise.

The hostile environment framework provides a solid baseline for the type of conduct that would be punished under this hate speech regulation framework. Universities should focus on preventing hate speech that: **(i)** Has the purpose or effect of creating an intimidating, hostile, or hostile campus environment; **(ii)** Has the purpose or effect of creating a material substantial disruption[140] of an individual's school experience; or **(iii)** otherwise adversely affects an individual's experience on campus.[141] While not perfect, the categories do provide adequate leeway for argument by either side in a given dispute and should permit some commonsense conclusions on the basis of the events that are alleged to have occurred. The question that remains then, is who is to decide the winners and losers under this test? Maintaining legitimacy in decisions sits atop of all the considerations that go into proposing a framework. To address this, it seems reasonable to refrain from reinventing the wheel and mimic something like the current court system. An odd-numbered panel that consists of members of both faculty and student populations would provide the type of legitimacy that should avoid suspicions of a fixed or politicized process.

Functionally, the lifecycle of the framework should play out as such: (i) A student would initiate a claim with the committee, (ii) The committee would accept the statement as true, and deliberate amongst themselves on if the conduct alleged would merit further investigation, (iii) Assuming further investigation was necessary, the committee would then solicit a statement from the accused to provide further context, (iv) After reviewing the next statement, if the committee finds that the investigation merits further investigation, it should call both sides in the dispute for a hearing of sorts, (v) The committee would reach a final conclusion based on the hearing and issue discipline in accordance with some predetermined mode of predictability. These five steps are of course a remedial version of what this test would like, but still represent a skeletal version of the process. It should be balanced and include a lot more than a simple accusation. Further, universities would maintain autonomy over exactly what the framework would need to make it legitimate in its student body. For instance, one university might look at discipline differently from another; choosing to incorporate a three-strike system similar to contemporary criminal law. Another university might choose to punish more severely depending on the nature of the offense. Either way, the framework permits the flexibility to accommodate the needs of universities. In lieu of trying to come up with every variation of how this test could be structured to fit loose or strict regimes at universities, it would be best to dive into how application might look under actual hypotheticals.

IV. THE IMPLICATIONS OF THE PROPOSED FRAMEWORK & INHERENT PROTECTIONS

In this part, the paper hypothesizes the proposed test's functionality with a real set of facts, the Psyer situation.[142] This part will conclude with an investigation of the inherent

[140] *Tinker*, 393 U.S. 503.
[141] EEOC, *supra*, note 116.
[142] Hall, s*upra*, note 77.

protections that should protect universities from themselves and maintain legitimacy of the process for as long as it remains relevant in the university space.

A. Application of the Framework Under the Psyer Scenario

Before diving into any analysis, it seems pertinent to note that the first and immediate benefit of a framework like this is that it would stop Psyer from ever having to file suit in the first place. This would help declutter the litigation system in general and also prevent either party from having to engage increasingly expensive. On to the analysis itself, given that the contract Psyer (and presumptively the accused) signed she should be aware of her ability to report her roommate and her boyfriend after the initial anti-Semitic memes, destroying of her personal religious symbols, and refusal to serve Psyer in the cafeteria.[143] In this scenario, it seems likely that any committee would certify her claim for further investigation due to all that's been alleged. Whether the roommate's purpose was to use hate speech to disrupt Psyer's education would seemingly be irrelevant because it certainly had that effect (further evidenced by the fact that Psyer withdrew from the university). Given the effects-focus of this set of facts it stands to reason that no matter what statement the roommate gives, further investigation would be warranted.[144] A hearing should ensue to extract, as well as possible, the intentions of the roommate in engaging in the spree of hateful behavior directed at Psyer. Evidence would necessarily be provided from each side, but in this scenario, it seems difficult to believe the roommate could concoct a legitimate excuse for behaving as they did. What that would mean is that some type of discipline is guaranteed at the end of the proceedings. The punishment part is important because it will encourage others to report behavior on the campus, and also can be an opportunity to provide deterrence of future harms. Kutztown, as previously mentioned, appears to be suffering from an ongoing anti-Semitic climate. Taking this into account, it may choose to take a tougher stance on the roommate and boyfriend to send a clear message that the behavior is not tolerated. This could range from a mandatory suspension from the university to even expulsion. In making the disciplinary decision it would be incumbent upon the university to entertain if the roommate and boyfriend are truly apologetic, aware of the harm caused, and gauge if it was actually meant to be a joke that was extremely inappropriate. All of these extra factors should play into the disciplinary decision and discipline should only be handed down in the event that a majority of the committee agrees.

B. The Inherent Protections Against Abuses of Power by Universities

An obvious concern of allowing universities to wield such arbitrary power over students is that universities might become power-drunk and limit speech, such that no viewpoints or content it disagrees with could be permissible. The framework proposed here, by design, solves many of the issues that might arise under this context. Further, universities have their own interests to protect in ensuring that they are not stigmatized as the university where students are not allowed to be themselves. To the first point, the framework relies on claims to be brought, much like the U.S. legal system.[145] Universities should not have the authority to discipline students unilaterally, or even take action where it was not requested to be taken. Instead, students

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[143] *Id.*

[144] An obvious concern is that individuals will try to claim that their conduct was meant to be taken lightly and jokingly. In these scenarios, I propose to focus more on the effects of the conduct and consider the fact that the student may have been joking in the disciplinary phase.

[145] *See e.g.*, U.S. Const. art. III, § 2, cl. 3 (requiring cases and controversies to be brought before a court to make determinations on the merits.)

would determine what is sufficient enough to request some level of review by the university. This is in recognition of the fact that this framework is only meant to equip universities with the power to resolve these issues, not give them the ability to try and arbitrarily police speech. Also, the framework permits a lot of flexibility to account for all of the relevant facts, it seeks to provide information to those tasked with administering discipline so that the university is as certain as possible about what's transpired. Universities also have a vested interest in avoiding a label as the university that endangers free speech by over-policing within the confines of the campus. Cancel culture is a very real phenomenon today.[146] As such, universities stand to face serious economic consequences through decreased enrollment should they abuse their power to regulate only hate speech using this framework. This, again, gets at the requirement to protect the ultimate bottom line to ensure the survival of the institution. Even in scenarios where the university can survive long-term, it could face short-term consequences if it incorrectly or over broadly limits the speech of one of the students.

CONCLUSION

Hate speech is not a recent or new sensation, the reality is that it is here to stay and will continue to evolve as time progresses. In a way, it has become a part of society as we know it. This paper does not venture to deem hate speech as unequivocally valueless in everyday life; if nothing else, hate speech provides an example behavior that citizens should refrain from mimicking. Instead, this paper seeks to recognize that some public institutions, specifically public universities, should have the power to ensure that hate speech does not hinder the learning and formation of students. All students trust the university they choose to spend some of their most formative years at with the responsibility of protecting them physically and mentally. In recognition of this, universities deserve a special place in the spectrum of First Amendment institutions and doctrine. Universities are charged with transforming individuals into functional and intelligent members of society; hate speech provides virtually zero contribution to this goal. Instead hate speech allows bigoted individuals that have pierced the college community through the admissions process to spend their years terrorizing their peers and grossly hindering their learning experience. Courts should further legitimize the important role universities play in society by extending deference in how they regulate hate speech, not all speech. A framework that would allow for a proper accounting of the nuances of speech, while keeping a wide berth for some commonsense reasoning could successfully catapult universities to a world where hate speech is virtually nonexistent. This paper has sought to propose the type of framework that would accomplish this. No test can perfectly prevent hate-speech, all this seeks to do is remove the handicap that universities have so long been constrained by. Only then, can universities successfully fulfill its duty of protecting the students that traffic its campus.

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[146] *See* Cancel Culture, Dictionary https://www.dictionary.com/e/pop-culture/cancel-culture/ for a definition of cancel culture. ("Cancel culture refers to the popular practice of withdrawing support for (canceling) public figures and companies after they have done or said something considered objectionable or offensive. Cancel culture is generally discussed as being performed on social media in the form of group shaming.")

THE LARGEST GOVERNMENT BAILOUTS IN U.S. HISTORY AND THEIR NEGLECT OF BLACK AMERICANS: The Consequences of Underserving Black Americans in Economic Stimulus Policy

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INTRODUCTION

In 1903, W. E. B. Du Bois said of Black Americans that "to be a poor man is hard, but to be a poor race in a land of dollars is the very bottom of hardships."[2] More than a century later, Black Americans are still a poor race, with eight times less wealth than white Americans[3] and a share of American poverty 1.8 times their share of the U.S. population.[4] While "the overall American economy [has grown] tremendously, the Black economy became locked in a state of perpetual depression."[5] When the nation as a whole falls into economic crisis, the government springs into action to save its people. But it seems they do not save those who need it most, those who are already most vulnerable—Black Americans.[6] On top of an already depressed Black economy—fueled by racial discrimination in day-to-day life, and a history of federal and state policies to undermine Black prosperity—Black Americans suffer most during economic downturns. Policies designed to remedy the economy not only leave Black Americans behind, but they also contribute to the next generation of hardships.

By focusing on housing and employment, including small businesses, this article will explore federal economic stimulus packages during times of crisis in the Great Depression, Great Recession, and the Coronavirus pandemic. The article aims to highlight how government aid systems have excluded or neglected Black Americans and left them more vulnerable to the next economic crisis. Each chapter addresses the following: crisis background; impact of the crisis on the overall population and impact on Black Americans specifically; followed by an outline of the federal recovery package in housing and employment; and how Black Americans received disproportionate benefits. Each crisis, beginning with the Great Depression, is then tied to the proceeding economic crisis, and I demonstrate how the impacts of the previous crisis left Black Americans more vulnerable to the next crisis and less able to recover, making economic instability through housing and employment cyclical. Ultimately, the impacts of discrimination in Great

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2 W.E.B. DU BOIS, SOULS OF BLACK FOLKS 8 (1903).

3 Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances,* FEDERAL RESERVE, (September 28, 2020) https://doi.org/10.17016/2380-7172.2797.

4 John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, CENSUS (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html

5 MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH Gap 5 (The Belknap Press of Harvard University Press 2017).

6 Creamer, *supra* note 4; Bhutta, *supra* note 3 (Black Americans have the lowest wealth, highest poverty rate, and lowest income of any other race in the United States. The conclusion can be drawn that this low access to economic resources would make them more vulnerable than other races.).

Depression era stimulus policy can be seen in the disproportionate impacts of the Coronavirus pandemic on Black Americans.

I. THE GREAT DEPRESSION, NEW DEAL, AND WORLD WAR II VETERAN BENEFITS

A. Crisis: Great Depression

The Great Depression ("Depression") was a global crisis identified as "the worst economic downturn in the history of the industrialized world."[7] In the United States recovery from such an event required a myriad of new fiscal policies and a war time economy.[8] "In all of the fifty largest cities of the country, the need for relief for [Black] families was not only greatly in excess of their proportion in the population, but was higher in 1932 than at any previous time."[9] However, both the New Deal and World War II fiscal policy, failed to aid Black Americans to the same extent they served white Americans.[10]

The Great Depression lasted from the stock market crash of 1929 to 1939,[11] when the U.S. entered World War II. But the United States did not complete its full recovery until 1942.[12] During the Great Depression, consumer spending and investment decreased, which caused drastic declines in industrial output and employment.[13] When the Great Depression reached its lowest point, the unemployment rate was nearly 25%[14] and nearly half the country's banks had failed.[15]

The Great Depression followed the "Roaring Twenties," when the U.S. economy saw its largest ever increase in a 5-year span.[16] During the Roaring Twenties, there were years when the economy "saw a rise in every leading economic indicator; income levels rose…as did business growth, new construction, and stock market trading."[17] The stock market reached its peak in September 1929,[18] but at the height of the market, "production had declined and unemployment

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7 History.com, *Great Depression History*, HISTORY (Feb. 28, 2020), https://www.history.com/topics/great-depression/great-depression-history.

8 J. R. Vernon, *World War II Fiscal Policies and the End of the Gre*at *Depression*, 54 J. OF ECON. HISTORY 850, 867 (1994).

9 National Urban League, *The Forgotten Tenth: An Analysis of Unemployment Among Negroes in the United States and Its Social Costs: 1932-1933*, NATIONAL URBAN LEAGUE 21, 62-63, 63 (The Cities Included in the Special Federal Unemployment Census: January, 1931 showed that Black men who were "Out Of A Job, Able To Work, And Looking For A Job" were always more likely to be unemployed that white men fitting the same criteria. In Detroit, Michigan, the disparity grew as large as 26% higher unemployment for Black men than white men.).

10 *Imfra* Chapter I.

11 History, *supra* note 7.

12 Vernon, *supra* note 8, at 850,

13 Federal Reserve History, *The Gre*at *Depression*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression.

14City University of New York, *U.S. Unemployment Rate, 1930-1945*, SHEC: RESOURCES FOR TEACHERS, https://shec.ashp.cuny.edu/items/show/1510 (Last visited April 5, 2022).

15 History, *supra* note 7; Federal Reserve History, *Banking panics of 1931-33*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/banking-panics-1931-33.

16 Encyclopedia.com, *The Business of America: The Economy in the 1920s*, ENCYCLOPEDIA https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/business-america-economy-1920s (Last visited Jan. 16, 2021).

17 *Id*.

18 Jennifer Latson, *The Worst Stock Tip in History*, TIME (Sept. 3, 2014, 10:30am), https://time.com/3207128/stock-market-high-1929/.

had risen, leaving stock prices much higher than their actual value."[19] Wages were also low, consumer debt was high, drought and falling food prices were causing the agriculture industry to struggle, and banks had an excess of large loans they could not liquidate.[20] Even the boom of the Roaring Twenties was short-lived, because on October 28, also known as "Black Monday," the Dow[21] declined by 13% and another 12% the next day on "Black Tuesday."[22] By end of day on Black Tuesday millions of stock shares were worthless. By 1930, more than 4 million Americans were classified as unemployed and looking for work and, at the Depression's peak in 1933, the number of unemployed had risen to nearly 13 million people[23] and the country's industrial production had dropped by nearly half.[24]

Meanwhile, between 1930 and 1933, four waves of banking panics took place which caused thousands of banks to close their doors.[25] Many investors lost confidence in the solvency of their banks and demanded the money from their accounts in cash, "forcing banks to liquidate loans in order to supplement their insufficient cash reserves on hand."[26] President Herbert Hoover's administration tried supporting failing banks and other institutions with government loans.[27] The hope was that the banks would loan to businesses, and the businesses would be able to hire back their employees.[28] However, by March 4, 1933, "every U.S. state had ordered all remaining banks to close at the end of the fourth wave of banking panics," and the U.S. Treasury had run out of money to pay government employees.[29]

As difficult as the Great Depression was for white Americans, "[Black] Americans were hit hardest, experiencing an unemployment rate two to three times that of white Americans."[30] Prior to the Great Depression, Black Americans were already relegated to lower-paying

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19 History, *supra* note 7.

20 *Id.*

21Ben Judge, *26 May 1896: Charles Dow launches the Dow Jones Industrial Average*, MONEY WEEK (May 26, 2015), https://moneyweek.com/392888/26-may-1896-charles-dow-launches-the-dow-jones-industrial-average/; Kat Tretina and John Schmidt, *Investing Basics: Wh*at *Is A Market Index?*, FORBES, (last updated Jan. 19, 2022, 2:07pm) https://www.forbes.com/advisor/investing/stock-market-index/, (The Dow Jones Industrial Average (Dow) was created in 1896 and has been in its current iteration since 1928. The Dow "is one of the world's most watched and most cited [market] indices containing America's 30 biggest companies." A market index tracks the performance of the stocks included in it and provides the public with an overview of the stock market as a whole. If the Dow sees a significant decline in a day or even in a week, that is a sign that the stock market as a whole is doing poorly.)

22 Federal Reserve History, *Stock Market Crash of 1929*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/stock-market-crash-of-1929.

23 U.S. Bureau of Labor Statistics, *Labor Force, Employment, and Unemployment, 1929-39: Estim*at*ing Methods* 51, BUREAU OF LABOR STATISTICS https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf (Last visited April 11, 2022).

24 Encyclopedia.com, *Industry, Effects of the Gre*at *Depression*, ENCYCLOPEDIA, https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/industry-effects-great-depression (Last visited Jan. 16, 2021).

25 History, *supra* note 7.

26 *Id.*

27 Federal Reserve History, *Banking Acts of 1932,* FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/banking-acts-of-1932.

28 *Id.*

29 History, *supra* note 7.

30 Hannah Traverse, *Moving Forward initi*at*ive: The African American Experience in the Civilian Conserv*at*ion Corps*, ECON THE CORPS NETWORK(Aug. 17, 2017), https://corpsnetwork.org/blogs/moving-forward-initiative-the-african-american-experience-in-the-civilian-conservation-corps/.

professions and had a higher unemployment rate than white Americans.[31] During the Depression, however, the [Black] American unemployment rate in 1932 climbed to approximately 50%,[32] contrasted with the overall unemployment rate of 23%.[33] In fact, the Great Depression was "the only decade between 1890 and 1980 in which the ratio of black-to white average earnings actually declined."[34] Black]Americans experienced the highest unemployment rate of any other race in the 1930s partly because they were the first to see hours and jobs cut.[35]

The presidential election of 1932 saw a change, as Black Americans began to switch their political allegiance from the Republican Party to the Democratic Party, in an attempt to remedy their dire economic situation.[36] This political switch helped to elect Franklin D. Roosevelt ("FDR").[37] In the United States, the Great Depression recovery efforts were two pronged. First, President Franklin D. Roosevelt implemented a series of public work projects, financial reforms, and regulations collectively known as the New Deal.[38] Second, World War II brought about a war time economy with massive government spending and taxation.[39] The New Deal brought about nearly half of the country's recovery and World War II fiscal policy brought on the other half of the recovery.[40]

B. Recovery: The Exclusion of Black Americans from Benefits of the New Deal and World War II Veteran Benefits

With the country in the depths of the Great Depression and more than 25% of the U.S. population unemployed, FDR won an overwhelming victory in the presidential election. Roosevelt believed the federal government should be the principal instrument to bring the country to a

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31 William A. Sundstrom, *Last Hired, First Fired? Unemployment and Urban Black Workers During the Gre*at *Depression*, 52 J. OF ECON HISTORY 415, 415 (1992).

32 Library of Congress, *Race Relations in the 1920s and 1940s*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/race-relations-in-1930s-and-1940s/(Last visited Jan. 16, 2021).

33 Robert A. Margo, *Employment and Unemployment in the 1930s, 7* (2), J. OF ECON. PERSPECTIVES, 43, 59 (Spring 1993).

34 Sundstrom, *supra* note 31.

35 History.com, *Last Fired, First Fired: How the Gre*at *Depression Affected African Americans*, HISTORY (Aug. 31, 2018), https://www.history.com/news/last-hired-first-fired-how-the-great-depression-affected-african-americans.

36 History, Art & Archives, *Party Realignment and the New Deal*, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Party-Realignment--New-Deal/(Last visited Jan. 16, 2021).

37 *Id*.

38 Franklin D. Roosevelt Presidential Library and Museum, *Franklin D. Roosevelt's Periodic Table New Deal Programs*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY AND MUSEUM, *https://www.fdrlibrary.org/documents/356632/390886/periodictablenewdeal.pdf/e1da2435-0af2-4ccb-b9eb-8da7a4fc5bb3* (Last visited Jan. 16, 2021).

39 Vernon, *supra* note 8, at 857.

40 *Id.*at 851; Corona Brezina, *Understanding The Gross Domestic Product And The Gross N*a*tional Product* 4 (The Rosen Publishing Group, Inc. 2012) (Vernon argues that World War II fiscal policy brought on 54% of the U.S. economic recovery from the Great Depression. He asserts that the other 46% of recovery occurred between 1933 and 1940. 1933-1940 were prime New Deal years and I credit the recovery during these years to the New Deal. Vernon measures recovery by evaluating the Gross National Product (GNP), also known as Gross Domestic Product, which is the monetary value of all goods and services produced in a nation over the course of a year. The GNP growth is a very common measure of economic growth and in recovery from downturns. This article does not use GNP in its analysis of the impacts depressions and recessions have on the population, but GNP is an appropriate measure of recovery overall.).

sustainable state of security and stability.[41] Thus, during FDR's first 100 days in office, legislation was passed that focused on stabilizing industrial and agricultural production, creating jobs, and stimulating recovery.[42] FDR instituted a series of projects and programs, such as the Civilian Conservation Corps, the Works Progress Administration, the National Labor Relations Board ("NLRB"), and many others.

While the New Deal purported to bring security and stability to American life,[43] and it was indeed one of the most successful economic recovery plans in history, several of the New Deal's most prominent and successful programs excluded Black Americans if not explicitly, than in the communal benefits they provided.[44]

i. National Labor Relations Act and the National Labor Relations Board

The New Deal reforms had a "common cardinal purpose: not simply to end the immediate crisis of the Depression, but to make life less risky and more predictable, to temper for generations thereafter what FDR repeatedly called the 'hazards and vicissitudes' of life."[45] The National Labor Relations Act ("NLRA" or "Wagner Act") and the National Labor Relations Board together, were reforms FDR intended to provide both relief from the Depression and long-term stability. The Wagner Act was passed in 1935 and was comprised of three critical components: 1) gave employees the right to form and join unions;[46] 2) obligated employers to bargain collectively[47] with unions selected by a majority of the employees; and 3) created the National Labor Relations Board (NLRB), an independent agency, to enforce employee rights under the NLRA and subsequent labor laws enacted by Congress.[48]

Even before the Great Depression, where the races were mixed together in the labor market, "the attention of white workers was focused on developing mechanisms or institutions that reduced, eliminated, or controlled the level of competition between [B]lack and white workers."[49] Unions were one way white workers controlled competition and secured economic mobility for themselves, "[practicing] a form of institutionalized racism that limited the access of Black workers to higher-skilled and better-paying jobs."[50] For example, before the 20th century, white

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41 David M. Kennedy, *What the New Deal Did,* 124 POLITICAL SCIENCE QUARTERLY, 254, 268 (2009).
42 Franklin D. Roosevelt Presidential Library and Museum, *100 Days of Action*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY AND MUSEUM, http://www.fdrlibraryvirtualtour.org/page05-01.asp (Last visited Jan. 16, 2021).
43 Kennedy, *supra* note 41, at 254.
44 Library of Congress, *supra* note 32 ("Although New Deal programs provided [Black] Americans with badly needed economic assistance, they were administered at a state level where racial segregation was still widely, and systemically, enforced.").
45 Kennedy, *supra* note 41, at 254.
46 Employees had long been organizing unions, but the NLRA codified this practice as a right and developed mechanisms of protecting collective bargaining rights.
47 The Law Dictionary, *What is Collective Bargaining*, THE LAW DICTIONARY, https://thelawdictionary.org/collective-bargaining/ (Last visited April 10, 2022) (Collective bargaining is defined as "Good-faith procedure of documented actions between an organization's management and a trade union representing its employees for negotiating wages, working hours, working conditions, and other matters of mutual interest."); See The American Federation of Labor and Congress of Industrial Organizations, *What Unions Do*, AFL-CIO, https://aflcio.org/what-unions-do (Last visited April 11, 2022) for an understanding of collective bargaining and its role in the workplace.
48 National Labor Relations Act, 29 USCA §§ 151 to 169.
49 *Id*. at 61.
50 *Id*. at 62.

men refused to work as railroad firemen, but during the first World War, "through the organization of "strong and exclusionist unions [on the leading railroads]," white men took a role that was made up entirely of Black workers and created a "50-50 ratio between [Black people] and [white people]."[51] It follows that white workers would have intensified this method of organizing to exclude Black workers during the Depression when unemployment was high and jobs were harder to come by.

The NLRA was race-neutral on its face but it is "well-understood" that "the statutory exclusion of agricultural and domestic employees [was a] proxy for excluding [Black people] from statutory benefits and protections made available to most whites."[52] The exclusion of agricultural and domestic workers was implicitly about the exclusion of Black workers because "[more than] half of the [Black people] living in the United States in 1930 lived in the South and Black employment in the South was disproportionately concentrated in unskilled agricultural and domestic labor."[53] For example, in 1940, five years after the NLRA was passed, 31.8% of the Black American population was employed in agriculture and in the south that number was 40.4%.[54]

This legislative exclusion was the most perverse way the NLRA left Black Americans behind in Depression recovery. But the early treatment of the few Black workers in industrial labor who weren't excluded from the NLRA, demonstrated the NLRA's lack of necessary protections against racism in collective bargaining.[55] In fact, during the drafting of the Wagner Act, Black community leaders "advocated for an anti-discrimination provision and made Congress fully aware of wanton union discrimination against [Black people]," but Congress declined to provide such protection.[56]

During the early years of the Great Depression, racial tensions in the workplace were extremely high. For example, in the southern railroad industry, tens of Black southern railroad workers were murdered because they had job seniority and were perceived as taking work from white workers.[57] The union representatives also tried to coerce the Black railroad workers "to sign over to the local representatives of the firemen and engineers the right to bargain for them."[58] When these behaviors didn't reduce competition enough, white workers simply excluded Black workers from unions.[59] For example, "in 1930 no more than 50,000 out of 1,500,000 [B]lack workers engaged in transportation, extraction of minerals, or manufacturing were members of any

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51 George Louis Creamer, *Collective Bargaining and Racial Discrimination*, 17 ROCKY MNTN. L. REV. 163, 167 (1945).

52 Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72, 118-121 OHIO ST. L.J. 95, 96 (2011) (Perea analyzes how the legislative history of other New Deal Acts such as the Social Security Act and the Fair Labor Standards Act, demonstrates that the exclusion of agricultural workers and domestic workers was motivated by Southern Democrats' desire to exclude predominately Black industries from benefits under the New Deal.).

53 *Id*. at 100

54 James Gilbert Cassedy, *African Americans and the American Labor Movement*, 29 (2) FED. RECORDS AND AFRICAN AMERICAN HISTORY (1997), https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html.

55 Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935-1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55, 72 (1991) (Discussing *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen).*

56 *Id*. at 121.

57 Creamer, *supra* note 51, at 169 ("Between 1931 and 1934 there occurred twenty-one known shootings and murders of [Black railroad firemen.]").

58 *Id*.

59 *Id*.

trade union."[60] Though early labor relations decisions granted Black workers some reprieve during the Depression,[61] after recovery, this reprieve was lost and Black workers who attempted to exercise the seemingly race-neutral rights granted under the Wagner Act were "systematically limited in their ability to do so."[62] The NLRB's interpretation of the NLRA protected unions and was a systematic method that ultimately served to disadvantage Black workers in labor relations[63] long after the Great Depression.

The systemic disadvantaging of Black industrial workers was not directly legislated in the NLRA, "rather it was achieved through a series of NLRB and Supreme Court decisions in which the NLRA was initially viewed as possibly providing relief for Black industrial workers, and only later construed as not addressing issues involving certain types of racial discrimination."[64] In *Bethlehem-Alameda Shipyard Inc.*, the NLRB did not remedy the discrimination after they found that segregated unions were "inconsistent with the fundamental purpose of the [NLRA]."[65] Later in *Atlanta Oak Flooring Co.*, the NLRB rejected the contention that [segregated union chapters] were a violation of national policy at all.[66] Through *Foley Lumber & Export Corp,*[67] the NLRB "legitimated union and employer efforts to reserve the skilled, higher-paying jobs as the exclusive domain of whites."[68] In *Foley Lumber, "*the bargaining unit was being challenged…[because] all the maintenance workers in the [unit] were white, while all of the production workers, excluded as a class from the bargaining unit, were Black." [69] The NLRB allowed the composition of the *Foley Lumber* units to stand because of the different job functions,[70] though this ran contrary to previous decisions.[71] Ultimately, the NLRB adopted the policy that "unions had to represent [Black workers] who were members of the collective bargaining unit fairly,"[72] but "any advantage gained by whites or discrimination experienced by Black workers as a result of institutionalized racism was left untouched by the NLRB."[73] The legislative exclusion of agricultural and domestic workers

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60 RAYMOND WOLTERS, Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935, in BLACK LABOR IN AMERICA, 139, 152 (Negro Universities Press 1970).
61 Jordan, *supra* note 55, at 96.
62 *Id.* at 71-77 (Jordan illustrates how the initial interpretation of the NLRA by the NLRB in *In re American Tobacco Co., Inc.* (1938) and *United States Bedding Co.* (1943) was that exclusion from bargaining units must not be based on race, even if disguised as a distinction between job functions. The Board made clear that a "'[collective bargaining] unit must insure to employees of the company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.' Thus, a racially segregated bargaining unit was incompatible with the employees' ability to obtain the full benefit of the rights secured by the Wagner Act." The U.S. Supreme Court later endorsed this interpretation in *Steele v. Louisville & Nashville Railroad* (1944) and *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen* (1944) deeming fair representation a necessary feature of collective bargaining units.).
63 *Id*. at 69. (Stating "the [NLRB] chose to interpret the Act from the perspective of white workers and their interests and, in the process, became an instrument for perpetuating the subjugation of black workers in favor of maintaining the power and privileges of white workers.").
64 *Id.*
65 *Id.* at 81.
66 *Id*. at 83.
67 Foley Lumber & Exp. Corp., 70 NLRB 73 (1946).
68 *Id.* at 78.
69 *Id*.
70 *Id.*
71*See generally* Jordan, *supra* note 55.
72 Jordan, *supra* note 55, at 83 (Or, as was the case in At*lanta Oak*, unions could simply "promise not to discriminate against the black employees in the segregated [unit]" to satisfy the NLRB of nondiscrimination.).
73 *Id.* at 91.

and the institutionalized racism allowed by the NLRB, was not just individualized racism or even private systemic racism, rather it was a policy failure of the federal government.

The impacts of the discrimination in collective bargaining power, left Black workers in a worse position than their white counterparts. Through collective bargaining, unions "play a vital role in labor relations, securing important rights for employees, which they could not bargain for or obtain on their own."[74] Labor unions raise wages and increase benefits for their members, as well as provide more stable work environments with less turnover.[75] White workers having access to unions likely contributed to the racial income gap that persisted. Between 1945 and 1950 the average Black worker never earned more than 59% of the income the average white worker was paid.[76] Even when excluding rural farm work, in which no one of any race could unionize, urban Black workers earned only 66% of what urban white workers earned.[77] For Black workers, the ability to collectively bargain and earn higher wages could have allowed them the ability to save more money and buy homes and invest in the future of their children. The decreased income reduced the economic options of Black Americans and made them more vulnerable to housing discrimination by the **F**ederal Housing Administration.

ii. Home Owners' Loan Corporation and the Federal Housing Administration

Housing reforms were another mechanism the New Deal employed to bring the U.S. out of the Depression and provide the nation with long term stability;[78] this was done through the Home Owners' Loan Corporation, National Housing Act, and the Federal Housing Administration.[79]

First, the Home Owners' Loan Corporation ("HOLC") was created in 1933 to protect homeowners from pending foreclosure and to help banks by refinancing struggling mortgages.[80] The HOLC was the basis for the National Housing Act of 1934, the law which created the Federal Housing Administration ("FHA").[81] The FHA "insured banks, mortgage companies, and other lenders, [and encouraged] the construction of new homes and the repair of existing structures."[82] FHA insurance indemnified lenders from defaulting borrowers which incentivized lenders to give mortgages and reinvigorated the lending industry after the Depression.[83] FHA loans had low down payments and longer terms so homeowners had more assurance they would be able to pay off the

74 Renee L. Powell, *The State of Unions in America: Chipping Away* at *the Union Block*, 23 J. MARSHALL L. REV. 707, 709 n.17 (1990).
75 RICHARD B. FREEMAN AND JAMES L. MEDOFF, WHAT DO UNIONS DO? 20-21 (New York, NY: Basic Books 1984).
76 Mary S. Bedell, *Employment and Income of Negro Workers- 1940-52*, 596, 600, BUREAU OF LABOR STATISTICS, https://www.bls.gov/opub/mlr/1953/article/pdf/employment-and-income-of-negro-workers-1940-52.pdf (Last visited April 16, 2022).
77 *Id*.
78 Kennedy, *supra* note 41.
79 *Id.* at 257 ("Two new agencies implemented the New Deal's housing program, the Home Owners' Loan Corporation and the Federal Housing Administration.).
80 *Id.*
81 National Housing Act, 12 USCA § 1701-1750.
82 Franklin D. Roosevelt Presidential Library and Museum, *75th Anniversary of the Wagner-Steagall Housing Act of 1937*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY AND MUSEUM, https://www.fdrlibrary.org/housing (Last visited April 15, 2022).
83 Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 193 (2005).

mortgage and eventually own the house outright.[84] The improved lending terms established homeownership as an asset-building tool.[85]

Homeownership provides many economic benefits besides stable shelter. For instance, homeowners receive income tax deductions for mortgage interest and property and school taxes.[86] The most notable benefit of homeownership is building equity in the home by paying down the mortgage and by the growing value of the home over time.[87] This home equity can be utilized for generations and homeowners can help their children pay for college or make down payments on their homes.[88] Unfortunately, HOLC and FHA only brought homeownership to white families, granting them 98% of FHA and VA mortgage[89] loans between 1934 and 1962.[90] This federal exclusion of Black Americans from the benefits of homeownership and it's asset building mechanism was done though racial segregation of neighborhoods.

Between 1935 and 1940, the HOLC had neighborhoods appraised and given grades based on the neighborhood's perceived lending risk, creating "security maps" of 239 cities.[91] "The presence of immigrants, poor households, and non-white racial groups were considered detrimental to a neighborhood's assessment" and neighborhoods that had those characteristics were given the lowest grade of D and color coded red on the map.[92] These red neighborhoods were the most difficult neighborhoods to get FHA mortgages in,[93] and this method of categorization gave way to the term "redlining."[94]

By redlining neighborhoods and refusing to lend in them, the FHA effectively prevented non-white homebuyers from buying at all. FHA-insured loans were unique in offering borrowers more financing (lower down payment) than other institutions, but these loans were made as an

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84 *Id.* (Discussing low down payments of 20%, then 10%, and eventually 3%. Mortgages also had longer terms beginning at twenty years, soon twenty-five, and then thirty years.).

85 *Id.* at 194.

86 Nancy A. Denton, *Housing as a Means of Asset Accumulation: A Good Strategy for the Poor? in* ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP 1, 236 (Russell Sage Foundation 2001).

87 *Id*.

88 *Id*.

89 U.S. Department of Veteran Affairs, *VA Home Loans*, VA BENEFITS ADMINISTRATION, https://www.benefits.va.gov/homeloans/(Last visited April 15, 2022) (VA mortgages are "home loans provided [to eligible veterans of the U.S. military] by private lenders, such as banks and mortgage companies. [The U.S. Department of Veteran Affairs] guarantees a portion of the loan, enabling the lender to provide the borrower with more favorable [loan] terms" such as lower interest rates and lower down payments.).

90 Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth through Homeownership*, URBAN INSTITUTE, HOUSING FINANCE POLICY CENTER 1,4 (Updated December 2020),

91 Anderson, et al., *The Long-Run Effects of the 1930s HOLC "Redlining" Maps on Place-Based Measures of Economic Opportunity and Socioeconomic Success*, 86 REGIONAL SCIENCE AND URBAN ECON. 1, 2 (Jan. 2021) ("From 1935 to 1939, government surveyors interviewed local officials and bankers in 239 cities to document what local lenders considered credit risks in different neighborhoods. The surveyors considered a variety of factors, including access to transportation and the quality of the housing. But a primary driver of the grading system was the racial and ethnic makeup of the neighborhood's residents.").

92 *Id*.

93 Gordon, *supra* note 83, at 207 (Stating that the HOLC loaned in predominantly C and D graded neighborhoods but the FHA used the security maps to determine which loans they'd insure and they chose insure mortgage almost exclusively in A and B neighborhoods.).

94 Frances E. Werner, William M. Frej & David M. Madway, *Redlining and Disinvestment Causes, Consequences, and Proposed Remedies*, 10 CLEARINGHOUSE REV. 501, 502 (1976) (Aside from refusal to lend, other redlining tactics included requiring higher down payments than the amount usually required in other neighborhoods; charging higher interest rates than in other neighborhoods, or "refusing to make loans below a minimum value (thus excluding many of the lower-priced properties found in redlined neighborhoods).").

exemption to federal policy.[95] Thus, the only place to get such excellent loan terms was from the FHA. Those who could not afford the high down payments and higher monthly payments offered by conventional mortgages,[96] were excluded from homeownership entirely.[97] Even Black prospective homebuyers who had the financial means to get a conventional mortgage, were still often prevented from buying a home because of FHA redlining. Many conventional mortgage providers adopted the FHA security maps and used the same neighborhood boundaries to determine lending risk,[98] once again limiting or outright excluding Black prospective homebuyers from getting mortgages. If the potential homebuyer could afford to buy outside of the redlined neighborhoods, they met further barriers because the FHA encouraged racial restrictive covenants when giving loans. [99] This meant that sellers in higher-grade neighborhoods where it was easier to get an FHA or conventional mortgage were contractually obligated not to sell to Black people.**100** By 1950, only 5% of outstanding conventional mortgages were made to non-white people compared to a still lower 2.3% of outstanding FHA-insured mortgages.[101]

After all of the HOLC's and FHA's work in stabilizing the home-mortgage market and making it more accessible for some Americans, the racial gap in homeownership was only made worse after the Great Depression.[102] In 1920, the average gap between white and Black male homeownership was 22.86%, by 1940, during the Depression recovery, the gap was 21.9%, and by 1960 the gap had increased to 27.34%.[103] Black people also had lower property values than white homeowners. In 1940, Black owned homes were worth 35% of what white owned homes were worth, and this rose to only 55% in 1960.[104] Lower rates of homeownership and lower property values meant Black Americans could not use homeownership as a means of wealth building and generational growth.[105]

The effects of redlining are still seen in the 21st century.[106] A study by the National Community Reinvestment Coalition ("NCRC"),[107] "shows that racial and economic segregation

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95 Gordon, *supra* note 83, at 195.

96 The use of conventional mortgages in this instance means non-FHA-insured mortgages.

97 *Id.* at 207.

98 William J. Collins and Robert A. Margo, *Race and Home Ownership: A Century-Long* View, 38 EXPLORATIONS IN ECON. HISTORY, 68, 83 (2001).

99 R. Gordon Lowe, *Racial Restrictive Covenants*, 1 ALA. L. REV. 15, 22 (1948) (Citing Harold Black's definition of Restrictive Covenants which "[consist] of private agreements between two or more parties to restrict the use of property to particular tenancies." Racial covenants make these restrictions based on race.); Gordon, *supra* note 83, at 208.

100 *Infra* notes 91-94, 99.

101 *Id.* at 209.

102 Collins, *supra* note 98, at 73.

103 *Id*.

104 *Id*. at 75.

105 Collins, *supra* note 98, at 90 (Collins and Margo conclude that negative impacts of segregation and denial of homeownership cannot be seen in the racial gap in housing wealth accumulation, but it may be visible in the lower property values of Black owned homes. They do this by analysis of homeownership rates in segregated cities. However, redlining is not just about segregation, rather it is also divestment in communities, which invariably lowers property values. It is not segregation alone that hurts Black wealth, it is denial of resources.).

106 Mitchell PhD., *HOLC "Redlining" Maps: The Persistent Structure of Segrega*t*ion and Economic Inequality*, 1,4 (March 2018).

107 National Community Reinvestment Coalition, *About NCRC*, NATIONAL COMMUNITY REINVESTMENT COALITION, https://ncrc.org/about/ (Last visited April 12, 2022) (The National Community Reinvestment Coalition works with "community leaders, policymakers and financial institutions to champion fairness and end discrimination in lending, housing and business." They work with "more than 600 community-based organizations that promote access to basic banking services, affordable housing, entrepreneurship, job creation m and vibrant communities for America's

of neighborhoods in cities today reflect discrimination entrenched in local housing markets in the 1930s."[108] NCRC's study found that communities given D-grades by HOLC are now populated by people earning lower incomes, more minorities, and are showing signs of gentrification.[109] Residents in these neighborhoods also suffer from poor health outcomes and lower life expectancy. Segregated neighborhoods have been linked to heart disease, high blood pressure, diabetes, obesity, asthma, and other negative health conditions.[110] For example, in New Orleans, residents who live in previously redlined neighborhoods, have a life expectancy of 10 fewer years than the city's median life expectancy, and those who live in neighborhoods marked with higher-grades by the HOLC, live 10 years longer than the median life expectancy.[111]

After the New Deal set the U.S.' recovery from the Great Depression on its way, World War II spurred the second half of the recovery,[112] bringing the country to full employment[113] and providing new social safety nets through the Servicemen's Readjustment Act of 1944 ("G.I. Bill").[114] The G.I. Bill granted World War II veterans healthcare and educational benefits, guaranteed home loans, and employment and unemployment benefits, among other things.[115] These G.I. Benefits have been credited with creating the middle class, but it can only be said that it created the white middle class.[116] While the World War II economy served Black Americans by lowering their unemployment rate to 10.8% by 1940 and 6.9% by 1950,[117] they did not see the full benefits of the G.I. Bill. Most notably, the housing benefit was ineffective for Black veterans because it was administered through the same discrimination tactics already employed by the FHA.[118] The result of this discrimination can be seen in the fact that by age 55, the generation of white people born after World War II inherited $109,000 more than Black people of the same generation.[119] In 1984, the median net worth for a white household was 11.5x that of the median Black household and by 2010 the median net worth for a white household was 22.35x that of the median Black household.[120] Because housing has lasting implications for wealth, the exclusion of Black people from FHA lending and the home loan guarantee of the G.I. Bill was seen in the following generations.

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working families." The NCRC provides research, training, and advocacy support, they also build and renovate low- and moderate-income housing, provide financial counseling nationwide, and do antidiscrimination work.).

108 Mitchell, *supra* note 106.

109 *Id*.

110 Jason Richardson, et al., *The Lasting Impact of Historic "Redlining" on Neighborhood Health: Higher Prevalence of COVID-19*, NATIONAL COMMUNITY REINVESTMENT COALITION, 1, 11 (2020) https://www.researchgate.net/publication/355047542_The_Lasting_Impact_of_Historic_Redlining_on_Neighborhood_Health_HIGHER_PREVALENCE_OF_COVID-19_RISK_FACTORS.

111 Tom Shapiro, et al., *The Black-White Racial Wealth Gap*, THE THURGOOD MARSHALL INSTITUTE, 1, 11 (2019) https://tminstituteldf.org/wp-content/uploads/2019/11/FINAL-RWG-Brief-v1.pdf.

112 Vernon, *supra* note 8.

113 *Id*. at 350.

114 Servicemen's Readjustment Act of 1944, 58 Stat. 284

115 Mariano Ariel Corcilli, *The History of Veterans Benefits: From the Time of the Colonies to World War Two*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 47, 52 (2014) (These benefits may collectively be known as "G.I. Benefits").

116 Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 590 (2014).

117 Robert W. Fairlie and William A. Sundstrom, *The Emergence, Persistence, and Recent Widening of the Racial Unemployment Gap*, 52 INDUSTRIAL AND LABOR RELATIONS REV 252, 255 (Jan. 1999).

118 See McCargo, *supra* note 90; Collins, *supra* note 98, at 103.

119 Perea, *supra* note 116, at 602.

120 *Id.* at 603.

The New Deal was a saving grace for the United States broadly and it helped end a decades-long crisis. However, the New Deal not only failed to support Black Americans in their recovery from the Great Depression, it also laid the foundation for decades of housing and employment discrimination, which is still affecting Black people in America nearly a century later through disparities in union benefits, homeownership, and property values. With each new economic crisis these disparities make it more difficult for Black Americans to mitigate damages and recover.

Ultimately, discrimination in the New Deal,[121] particularly through the enforcement of National Labor Relations Act and the Federal Housing Administration's lending practices, laid the groundwork for Black Americans to have lower access to equal employment opportunities and have fewer opportunities to build wealth through ownership. Though redlining had long been outlawed and the Fair Housing Act passed,[122] in 2007, the gap in homeownership between Black people and white people was 23%.[123] After decades of not having generational wealth to build upon and being denied credit, the Black American population was vulnerable to predatory mortgage lending schemes.[124] When Black Americans were able to buy homes in the 2000s they suffered disproportionate[125] foreclosure rates following the housing bubble.

II. THE GREAT RECESSION AND POST-CRISIS RECOVERY PACKAGES

A. Crisis: Great Recession

The Great Recession officially began in December 2007[126] and it was "the longest and deepest recession in generations."[127] Within 21 months, $17 trillion in household wealth evaporated. Low interest rates, easy and available credit, poor regulation, and toxic mortgages caused the collapse of the housing bubble which led to a full-blown crisis in the fall of 2008.[128] In order to remedy the Great Recession, the federal government put together a series of aid packages to stabilize banks and keep people from losing their homes.**129** As was the case, in the Great Depression, these aid packages helped Black Americans much less than white Americans.

i. The 2000s Housing Bubble

121 *See generally* Perea, *supra* note 52 (discussing how all of the New Deal's prominent legislation was written to exclude Black Americans, whether implicitly or explicitly).
122 Fair Housing Act, 82 Stat. 81 (The Fair Housing Act was passed in April 1968 and prohibited discrimination in the sale, rental, and financing of housing based on race, religion, and sex.).
123 William J. Collins and Robert A. Margo, *Race and Home Ownership from the End of the Civil War to the Present,* 101 THE AMERICAN ECON REV, 355, 356 (May 2011).
124 Shapiro, *supra* note 111.
125 Kennedy, *supra* note 41.
126 U.S. Fin. Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, U.S. FINANCIAL INQUIRY COMMISSION 1, 4 (2011).
127 *Id.* at 389.
128 INVESTOPEDIA (December 25, 2020), https://www.investopedia.com/terms/h/housing_bubble.asp (A housing bubble is defined as a period when housing prices are rising above their true value and eventually the prices decline again, often they rapidly decline and cause market disruption.); *Id.* at xvi.
129 *Infra* Chapter II, Section B.

The housing sector was booming with a record 69.2% of the population owning homes in spring 2004,[130] and housing prices rising 188% between 1997 and 2006.[131] The benefits of the housing boom were everywhere with "construction workers, landscape architects, real estate agents, loan brokers, and appraisers [profiting] on Main Street, while investment bankers and traders on Wall Street moved even higher on the American earnings pyramid and the share prices of the most aggressive financial service firms reached all-time highs."[132]

Alongside the boom, traditional 30-year fixed-rate mortgages, with 20% down payments, were losing popularity as non-traditional loans became more common.[133] With the securitization of mortgage bonds and derivatives, more mortgages needed to be written to satisfy demand.[134] To get more people in homes and more mortgages written, "once-rare" nontraditional mortgages such as subprime, interest-only, new variants on adjustable-rate mortgages, called "exploding" ARMs,[135] and many more, became a norm.[136] By mid-2005, nearly 25% of all mortgage borrowers were taking out interest-only loans that allowed them to defer the payment of principal.[137] For some, nontraditional mortgages were the only way they could get a foothold in areas such as the sky-high California housing market.[138] Mortgage debt in the United States climbed from $5.3 trillion in 2001 to $10.5 trillion in 2007 and the mortgage debt of American households "rose almost as much in the 6 years from 2001 to 2007 as it had over the course of the country's more than 200-year history."[139]

ii. The Crash: Housing

Aided by the gains in home prices, households' net wealth reached a peak of $66 trillion in the second quarter of 2007[140] but the housing market began to turn in the spring of 2006, peaking in April 2006, and then declining 9% in 2007.[141] One of the first signs of the housing crash was an increase in borrowers being 60 or more days delinquent within the first year of borrowing.[142] Default and delinquency were most common for subprime borrowers. Subprime adjustable-rate

130 U.S. Fin. Crisis Inquiry Commission, *supra* note 126, at 390.
131 Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1179 (2012).
132 *Id.* at 5.
133 *Id.* at 6.
134 U.S. Fin. Crisis Inquiry Commission, *supra* note 126, at 6-9 (The FCIC found that a culture of selling off the mortgages by banks allowed for them to enter into riskier mortgages, because they wouldn't be around for the consequences, should the borrower default. Potential borrowers were "bombarded" by advertisement encouraging them to take out mortgages.)
135 *See Id.* at 539 for glossary definitions (Subprime mortgages are mortgages made to borrowers with low credit scores; interest-only mortgages are mortgages where the monthly payments consists only of interest payments for the life of the loan, these mortgages usually offer lower payments initially but at the end of the loan the principal of the mortgage is due in a lumpsum; adjustable-rate mortgages are mortgages where the interest rates change over the life of the loan so the monthly payments fluctuate and often increase.).
136 U.S. Fin. Crisis Inquiry Commission, *supra* note 126, at 6.
137 *Id.* at 7.
138 *Id.*
139 *Id.* at 7.
140 *Id.* at 391.
141 *Id.* at 214-215.
142 *Id.* at 215 ("By the summer of 2006, 1.5% of loans less than a year old were in default. The figure would peak in late 2007 at 2.5%, well above the 1.0% peak in the 2000 recession. Even more stunning, first payment de- faults—that is, mortgages taken out by borrowers who never made a single payment—went above 1.5% of loans in early 2007").

mortgages began to show increases in serious delinquency in early 2006 and the rate rose to 20% in 2007.[143] By late 2009, the delinquency rate for subprime ARMs was 40% while the much less risky prime fixed-rate mortgages, "showed a slow increase in serious delinquency that coincided with the increasing severity of the recession and of unemployment in 2008."[144] Between the various loan products, "by the end of 2009, 9.7% of mortgage loans were seriously delinquent."[145] In 2009, 1 out of 45 houses in the United States received at least one foreclosure filing and in the fall of 2010, 1 out of 11 outstanding residential mortgages was at least one payment past due, but not yet in foreclosure.[146]

iii. The Crash: Employment

With a similar nose-dive as housing value, employment prospects disintegrated, and unemployment peaked at 10.1% in October 2009.[147] The average length of time individuals spent unemployed grew exponentially, with a spike of 9.4 weeks in June 2008, 18.2 weeks in June 2009, and 25.5 weeks in June 2010.[148] The "underemployment rate, which includes those who have given up looking for work and part-time workers who would prefer to be working full-time, was above 17%" in November 2010.[149] The "share of unemployed workers who were out of work for more than six months was just above 40%."[150] The United States economy lost 3.6 million jobs in 2008—the largest annual plunge since record keeping began in 1940—and by December 2009 another 4.7 million jobs had been lost.[151]

As is often true, but particularly so during a recession, "minority workers have fewer employment opportunities, lower wages, or both as compared to their white counterparts."[152] Black Americans were also more likely to be unemployed during the recession—at the time the Financial Crisis Inquiry Commission ("FCIC") released their report, they remarked "the labor market is daunting across the board, but it is especially grim among African American workers, whose jobless rate is 16.0%, about 6% above the national average."[153] And while Black people were nearly 30% less likely than white people to be homeowners before the recession[154]--a lasting effect of discrimination in FHA lending and insuring[155]--they were nearly twice as likely to lose their home to foreclosure.[156] The higher foreclosure rate may be due in part to banks like Wells Fargo

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143 *Id.* at 215.
144 *Id.* at 215.
145 *Id.* at 215.
146 *Id.* at 402.
147 The Economics Daily, *Unemployment in October* 2009, BUREAU OF LABOR STATISTICS, (Nov. 10, 2009), https://www.bls.gov/opub/ted/2009/ted_20091110.htm.
148 U.S. Fin. Crisis Inquiry Commission, *supra* note 126, at 390.
149 *Id.* at 22-23.
150 *Id*.
151 *Id.* at 390.
152 Amanda Logan & Christian E. Weller, *The State of Minorities: The Recession Issue*, CENTER FOR AMERICAN PROGRESS (Jan. 16, 2009, 9:00am), https://www.americanprogress.org/issues/race/news/2009/01/16/5482/the-state-of-minorities-the-recession-issue/.
153 U.S. Fin. Crisis Inquiry Commission, *supra* note 126, at 391.
154 *Id*.
155 Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFF. Q. 255, 265 (Jul. 2007).
156 Debbie Gruenstein Bocian, Wei Li, & Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis 2*, CENTER FOR RESPONSIBLE LENDING (2010) https://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

systemically targeting minority borrowers for subprime loans[157] even when they qualified for traditional, prime loans.[158] It is also true that "'borrowers in Black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods, even when controlling for income."[159] Refinancing is the act of getting a new mortgage to pay off an old mortgage.[160] The new mortgage should have better terms than the original mortgage, but, during the housing bubble, borrowers were usually refinancing because the payments on their nontraditional mortgage had increased and they could no longer afford the monthly payments.[161] Unfortunately, borrowers were often just refinancing into the same nontraditional loans they were trying to escape. If the property did not appreciate, as was the case when the housing bubble burst, then the borrower was unable to refinance again, and they were unable to make their monthly mortgage payments-- leading to eventual foreclosure on the house.[162]

Foreclosures bring indirect losses of wealth through depreciation of nearby properties and this loss in value disproportionately impacts communities of color.[163] The Center for Responsible Lending estimated that, between 2009 and 2012, $194 billion would have been drained from Black communities through the indirect losses in property values.[164] In the recovery period between 2009 and 2011, Black households lost 40% of non-home-equity wealth and 13% of wealth more broadly, while white household's had essentially stopped seeing losses in wealth by 2009.[165] The American Civil Liberties Union ("ACLU") estimates that Black wealth will be 40% lower in 2031 than it would've been had the Great Recession not occurred, compared to white wealth being 31% lower.[166] The consequences of such significant disparity in the Great Recession's impacts will be perpetuated at least until the next generation.

The federal government implemented several stimulus programs to help mitigate the crisis, including the Troubled Asset Relief Program ("TARP"), the Economic Stimulus Act of 2008, and the Home Affordable Modification Program ("HAMP"), among others. Though the economy turned around to near pre-crisis levels in 2015,[167] Black Americans didn't experience the benefits of the economic programs or growth like their white counterparts.

B. Recovery: The Neglect of Black Americans in Government Programs post-Crisis

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157 Baradaran, *supra* note 5, at 251.
158 Laurie Goodman, Jun Zhu, Rolf Pendal, *Are Gains in Black Homeownership History?*, URBAN INSTITUTE (Feb. 15, 2017), https://www.urban.org/urban-wire/are-gains-black-homeownership-history.
159 Sarah Burd-Sharps & Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations* SOCIAL SCIENCE RESEARCH COUNCIL AND THE AMERICAN CIVIL LIBERTIES UNION 9 (2015), https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf.
160 Alexander Twin, *Refinance*, INVESTOPEDIA (December 17, 2021), https://www.investopedia.com/terms/r/refinance.asp.
161 Levitin, *supra* note 128, at 1200.
162 *Id*. at 1202.
163 Debbie Gruenstein Bocian, Wei Li, & Keith S. Ernst, *Foreclosures by Race and ethnicity: The Demographics of a Crisis* 1, 3 CENTER FOR RESPONSIBLE LENDING (2010).
164 *Id.*
165 Sarah Burd-Sharps & Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations* 1, 2 SOCIAL SCIENCE RESEARCH COUNCIL AND THE AMERICAN CIVIL LIBERTIES UNION (2015).
166 *Id.* at 3.
167 Center on Budget and Policy Priorities, *Chart Book: The Legacy of the Great Recession*, CENTER ON BUDGET AND POLICY PRIORITIES (June 6, 2019), https://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession.

i. Banking: Troubled Asset Relief Program

The Troubled Asset Relief Program ("TARP") was a part of the Emergency Economic Stabilization Act (EESA) passed in October 2008. TARP was allocated $700 billion to rescue the financial system.[168] The U.S. Treasury Department distributed these funds through the Capital Purchase Program ("CPP") which allowed banks to sell the government preferred stock in the bank in exchange for an influx of cash.[169] Not all banks were eligible for the program and each bank who received funding had to apply and be approved.[170] Black owned banks were significantly less likely to obtain TARP funding[171] even though they had a higher need.[172]

Of all of the bank closings, 93% were in low-income neighborhoods.[173] Thus, while there were programs in place to save the financial sector as a whole, low-income communities lost finance jobs and access to lending. Most Black Americans reside in low-income communities,[174] so the closing of these banks removed the ability to work in finance or to bank in their own communities. These programs also failed specifically to save Black-owned and community banks. More than half of Black-owned banks closed between 2000 and 2016.[175] One famous Black bank, ShoreBank, who had not participated in subprime lending, failed after being denied TARP funds after scrutiny from the political right.[176] ShoreBank suffered from the financial disaster plaguing Black Chicagoans post-crisis and from the political failure of federal policy. The bank was taken over by another bank which was a consortium of top Wall Street banks and investors who'd received billions of dollars in TARP funding.[177] Another Black-owned bank, Carver Federal Savings Bank, managed to survive the crisis but only after being taken over by the U.S. Treasury and yet another consortium of Wall Street giants, leaving the bank no longer Black-owned but "Black-controlled," with only 2% of its original ownership remaining after the crisis.[178]

As Black banks failed, those banks that survived were put in the unfortunate position to cannibalize the communities they served as the crisis raged on. For example, in 2012, OneUnited Bank, who received a $12 million TARP bailout, foreclosed on the building that housed the nearly 200-years-old St. Charles Street AME Church, a church that had been a pillar in the Black Freedom Movement.[179] But while the church's survival was paramount to the community, so too was the bank's; it was the bank who invested in the church to begin with. Unlike larger banks to whom foreclosure is the cost of doing (profitable) business, OneUnited needed borrowers to adequately

168 Henry, Theresa F., *TARP Funding: Who and Why? Summary Financial Information for A Sample of Banks Accepting and Declining TARP Funding*, 22 BANK ACCOUNTING & FINANCE (2009).
169 *Id*.
170 *Id*.
171 Lucas Puenta and Linus Wilson, *Racial Discrimination in TARP Investments*, SSRN 2013, 1,18.
172 *Id*.
173 Baradaran, *supra* note 3, at 260.
174 Kimberly Quick & Richard D. Kahlenberg, A*ttacking the Black-White Opportunity Gap Th*at *Comes from Residential Segregation*, 1, 3 THE CENTURY FOUNDATION (Jun. 2019) ("sociologist Patrick Sharkey finds that middle-class African Americans earning $100,000 or more per year live in neighborhoods with the same disadvantages as the average white household earning less than $30,000 per year.").
175 Baradaran, *supra* note 3, at 268.
176 *Id.* at 268.
177 *Id.* at 269 (Urban Partnership Bank is a consortium of banks which includes Goldman Sachs, American Express, Citigroup, Bank of America, JPMorgan Chase, GE Capital, Morgan Stanley, and Wells Fargo).
178 *Id.* at 269 (Baradaran uses the term Black-controlled to describe a bank managed by Black executives.).
179 *Id.* at 271-272.

service their debt because their balance sheets couldn't afford to write off the losses.[180] Similarly, Broadway Federal Bank's, "another one of the pillars in the Black banking sector," loan portfolio was comprised of 55% church loans.[181] Broadway Federal suffered so many losses on its church loans, "in 2011 federal regulators labeled the bank as 'troubled'".[182] The crisis left everyone in a difficult position and Black communities continuously had to sacrifice one crucial institution after another, whether it be the banks themselves or the institutions the banks invested in. Without deliberate government intervention, aimed at Black banks who struggled most during the Recession,[183] the losses Black banks suffered went unchecked. Unfortunately, the decline of Black banks is a part of an economic cycle. Black-owned banks play a crucial role in reinvesting in Black communities and bridging the racial wealth gap,[184] but as the communities they serve lose capital, the banks struggle to survive, further perpetuating the loss of the Black community.

ii. Housing: The Home Affordable Modification Program

The Home Affordable Modification Program ("HAMP") is a federal program that used subsidies to encourage participating mortgage servicers to reduce monthly loan payments ("loan modifications") so homeowners could avoid foreclosure.[185] The program did not serve as many people as it intended, as fast as it intended to, but as of March 2016, "2.8 million people had received permanent loan modifications."[186] However, the impact of the program was significantly less for Black borrowers. Most concerning was that loan servicers foreclosed on Black borrowers quicker than white borrowers which indicated HAMP and its participating servicers needed to be investigated for fair lending practices,[187] this of course did not happen. Black HAMP-eligible borrowers were also almost 50% less likely to receive loan modification than white HAMP-eligible borrowers.[188] Further, Black borrowers who received modifications saw smaller reductions in their loan's interest rate—an average drop of 2.84%—compared to white borrowers who received an average reduction of 3.32%.[189] Black borrowers largely missed out on one of few opportunities to salvage their mortgages and homes which only further perpetuated disparities in home equity and wealth between races.

The housing bubble and Great Recession erased all of the gains in homeownership Black Americans made since the Fair Housing Act.[190] While inequality has persisted for centuries,

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180 Baradaran, *supra* note 3, at 271 (OneUnited wouldn't have received TARP funding without the intervention of a few allies in Congress because they weren't qualified under the program's standards for "healthy" institutions. Thus, as an "unhealthy" institution, even after the bailout they could not afford to carry massive losses, no matter how much bank leadership may have desired they do so. This isn't to say that the church's needs were less important than the bank's, rather it is important to understand that neither entity was in a position to take the loss, the bank just so happened to have the ability to save itself.).
181 *Id.* at 273.
182 *Id.* at 273.
183 Puenta, *supra* note 171, at 15.
184 *Id.* at 275.
185 National Community Reinvestment Coalition, *HAMP Mortgage Modification Survey 2010* 1, 2 NATIONAL COMMUNITY REINVESTMENT COALITION (2010), https://ncrc.org/wp-content/uploads/2010/03/hamp_report_2010.pdf.
186 David Reese, *Feds Call HAMP A Success as Program Ends*, COURTHOUSE NEWS SERVICES 9April 5, 2017) https://www.courthousenews.com/feds-call-hamp-success-program-ends/.
187 Mitchell, *supra* note 106, at 3.
188 *Id.* at 3.
189 *Id.* at 10.
190 Goodman, *supra* note 158.

"without the Great Recession, home equity values for Black and white families at the same income and education levels were headed toward parity by 2050."[191] That is no longer the case.[192] Like the Great Depression before it, the Great Recession weakened the economic health of Black people and left them vulnerable for the next great crisis which would come sooner than anyone expected.

III. THE CORONAVIRUS PANDEMIC AND THE CARES ACT

A. Crisis: COVID-19

In March 2020, Coronavirus ("COVID-19") caused the United States to stand still. COVID-19 is a disease that spreads from person to person and can cause severe illness and death.[193] To protect against the virus, at least 42 states implemented stay at home orders or equivalent mandates by the end of April 2020.[194]

Each state had the authority to designate essential activities for which citizens could leave their homes to partake.[195] Many businesses were designated essential and were able to maintain their operations and workforce, however, even some businesses who were allowed to stay open, suffered from decreased revenues. For example, in most states, restaurants were allowed to remain open but only to prepare and serve food for carry-out.[196] These restrictions contributed to a 59% decrease in restaurants' weekly revenue compared to 2019.[197] Still worse, "hair salons, nail salons, and gyms" lost 41% of their weekly revenue compared to 2019.[198] Meanwhile, the transportation, parking, and lodging industries saw their revenues decrease between 70% to 90% compared to the same week in 2019.[199] All of these reductions in revenues led to large and small businesses reducing their payroll and benefits line items, among other reductions.

i. The Crash: Employment

In March 2020, the U.S. lost 701,000 jobs, "the worst month for American jobs since the depths of the Great Recession in March 2009," and the unemployment rate increased .9%, "the largest single-month change in the jobless rate in 45 years."[200] The job loss was said to be

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191 Mitchell, *supra* note 106, at 4.
192 *Id.*
193 Center for Disease Control, Coronavirus, CDC, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics (Last visited April 14, 2022).
194 Sarah Mervosh, Denise Lu, & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay* at *Home*, NY TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.
195 Mark A Hall et al., *The Legal Authority for States' Stay*-at-*Home Orders,* NEW ENG. J. MED. (2020) (Discussing how state courts have overturned or affirmed governor's authority).
196 National Governors Association, *Reference Chart on State Essential Business Designations*, NATIONAL GOVERNORS ASSOCIATION, https://www.nga.org/wp-content/uploads/2020/03/Reference-Chart-on-State-Essential-Business-Designations_3-25.pdf (Last visited April 27, 2022).
197 Elizabeth Jackson, *Industries Performing Best and Worst During Coronavirus*, CHICAGO TRIBUNE (April 14, 2020) https://www.chicagotribune.com/business/careers-finance/sns-stacker-hardest-hit-industries-coronavirus-20200422-vf7c6lkorvchxa4ntwkqzn5mou-photogallery.html.
198 *Id*.
199 *Id.*
200 Anneken Tappe & Annalyn Kurtz, *The US Economy Lost 701,000 Jobs in March—Worst Report Since 2009*, CNN (Apr. 2, 2020, 1:47pm), https://www.cnn.com/2020/04/03/economy/march-jobs-report-coronavirus/index.html.

temporary;[201] though there was no clear indication of when employment would resume for the impacted workers. March 2020 jobless rates were only the first indication of the impact COVID-19 would have on the economy, as those numbers were derived from a survey conducted only halfway through the month.[202] With 3.3 million initial claims the week ending in March 21, Citi economist Andrew Hollenhorst believed the unemployment rate was as high as 9.5% and could continue to grow in the following weeks.[203] In the week ending March 28, "6.6 million workers filed for their first week of unemployment benefits."[204] By April 2020, the unemployment rate reached 14.7%, higher than the peak unemployment rate of the Great Recession.[205]

The Black unemployment rate "[was] 16.7% [in April 2020], compared with the white unemployment rate of 14.2%,"[206] but, by September 2020, that rate had dropped to 12% compared to white Americans' rate of 7%.[207] Unlike the Great Depression and Great Recession, however, the COVID-19 pandemic came with direct health disparities along with economic disparities. Two-hundred eighty-six thousand people died from COVID-19 by December 8, 2020 and 49,994—17.4%--of them were Black.[208] That is 1 in 800 Black Americans overall[209] and 4% greater than Black people's share of the population.[210] In December 2020, "Black, Indigenous, and Latino Americans all [had] a COVID-19 death rate of more than 2.7 times white Americans, who experience[d] the lowest age-adjusted rates."[211] The financial struggles caused by unemployment and households losing earners to illness and death, led to many Americans' inability to afford housing.

ii. The Crash: Housing

In 2019, before the pandemic started, the homeownership rate for Black Americans hit 40.6%, its lowest rate since 1950, and when the pandemic started, 56% of Black people were renting, compared to 26% of white people.**212** Because Black Americans are twice as likely to rent their homes than white Americans, the instability of renting fell disproportionately on Black people during the pandemic. In October 2020, roughly 25% of Black renters were behind on rent

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201 *Id.*
202 *Id.*
203 Anneken Tappe, *A 3,000% Jump in Jobless Claims Has Devastated the US Job Market*, CNN (Apr. 2, 2020, 11:35am) https://www.cnn.com/2020/04/02/economy/unemployment-benefits-coronavirus/index.html.
204 *Id.*
205 U.S. Bureau of Labor Statistics, *Civilian Unemployment Rate*, U.S. DEPARTMENT OF LABOR, https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm (Last visited April 16, 2022).
206 Elise Gould & Valerie Wilson, *Black Workers Face Two of the most Lethal Preexisting Conditions for coronavirus—Racism and Economic Inequality*, ECONOMIC POLICY INSTITUTE (Jun. 1, 2020). https://www.epi.org/publication/black-workers-COVID/.
207 Reuters Staff, *Racial gap in U.S. Jobless rate Narrows in October*, REUTERS (Nov. 6, 2020), https://www.reuters.com/article/us-usa-economy-jobs-race/racial-gap-in-u-s-jobless-rate-narrows-in-october-idUSKBN27M2DR.
208 APM Research Lab Staff, *The Color of Coronavirus: Covid-19 Deaths By Race and Ethnicity in the U.S.*, APM RESEARCH LAB (Dec. 10, 2020), https://www.apmresearchlab.org/covid/deaths-by-race#counts-over-time.
209 *Id.*
210 U.S. Census Bureau, *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/IPE120219 (Last visited April 27, 2022).
211 APM, *supra* note 208.
212 U.S. Census Bureau, *Quarterly Residential Vacancies and homeownership, First Quarter 2022*, U.S. CENSUS BUREAU (April 27, 2022) https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

compared to approximately 11% of white renters.[213] This delinquency put Black Americans at greater risk for eviction, homelessness, and COVID-19 infection.[214] During the pandemic Black homeowners were also further underwater on their mortgages than white homeowners.[215] In October 2020, 12.3% of Black mortgage borrowers were past due on their mortgage payments compared to only 4.3% of white borrowers.[216] Black borrowers who missed payments beginning in February 2020 were also 9% less likely to have caught up on their payments as of October 2020.[217] This demonstrates that Black mortgage borrowers were: 1) not recovering as quickly as white borrowers from the early financial woes of the pandemic; and 2) going to take longer to get caught up on their mortgages because they'd missed more payments than white borrowers.[218]

With the rise in unemployment and widespread struggles to afford housing, the U.S. federal government needed to act to stabilize the economy and provide individuals with security. On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act which provided approximately $2 trillion in necessary emergency relief[219] designed to "provide emergency assistance and health care response for individuals, families, and businesses effected by the 2020 coronavirus pandemic."[220]

B. Recovery: The Neglect of Black Americans in CARES Act Benefits

The CARES Act included appropriations for an estimated $560 billion for individual relief primarily in the form of cash payments and expanded unemployment benefits.[221] Relief for big corporations was provided in the amount of $500 billion to be distributed primarily through non-forgivable loans.[222] The Act also "[created] a special inspector general to oversee the pandemic recovery" who would "[oversee] all loans and other uses of taxpayer dollars."[223] State and local governments were allocated to receive $339.8 billion in relief, public health was allocated another $153.5 billion, and education received an estimated $43.7 billion in relief funds as well.[224] Small businesses were also granted $377 billion in the Act; allowing for the Small Business Administration to distribute grants and facilitate a "forgivable loan program [known as the Paycheck Protection Program] for companies with 500 or fewer employees."[225] While the U.S. is

213 Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CENTER FOR AMERICAN PROGRESS 1,6 (Oct. 30, 2020), https://cdn.americanprogress.org/content/uploads/2020/10/29133957/Renters-of-Color-2.pdf?_ga=2.262070798.2042475399.1608119255-308025885.1608119255; Bradey Camille Baltz, *Race and the COVID-19 Eviction and Housing Crisis*, ARKANSAS LAW NOTES. 104, 105 (Feb. 2022) Retrieved from https://scholarworks.uark.edu/arlnlaw/10 (Evictions lead to increased contracted of COVID-19 because it disrupts households and forces tenants to seek out new living arrangements and potentially enter crowded homeless shelters.).
214 *Id.* at 7.
215 Kristopher Gerardi, et al., *Racial Differences in Mortgage Refinancing, Distress, and Housing Wealth Accumulation during COVID-19*, FEDERAL RESERVE BANK OF BOSTON. 1, 2 (June 2021).
216 *Id*.
217 *Id.* at 3.
218 *Id*.
219 CARES Act, S. 3548, 116th Cong. (2020); Kelsey Snell, *What's inside the Senate's $2 trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020, 5:34pm), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package.
220 *Id*.
221 Snell, *supra* note 219.
222 *Id.*
223 *Id.*
224 *Id.*
225 *Id.*

still in the midst of the Coronavirus pandemic and its economic crisis, it is already clear that more could be done to protect Black communities. The CARES Act has neglected Black Americans in three areas—public health, housing, and small business relief.

i. Funding and Public Health

The most important factor driving the allocation of the $153.5 billion the CARES Act earmarked for public health was health care providers' past revenue.[226] However, distribution based on revenue is problematic because revenue is lower for hospitals which serve non-white and indigent populations "due to underinsurance and undertreatment," yet these hospitals face the highest COVID-19 burden given the disparities in virus contraction and severity.[227] This allocation model meant that "disproportionately Black communities received the same level of relief funding as counties with less health and financial need."[228] This is particularly concerning because "hospitals under greater financial distress have less favorable patient experience of care, higher readmission rates, and increased risk of adverse patient quality and safety outcomes for both medical and surgical patients."[229] Given that Black people are already more likely to contract COVID-19 and more likely to seek healthcare in an underfunded facility, the allocation of funding from the CARES Act is going to produce a disparate impact. It also does not help that neighborhoods who suffered higher levels of redlining during the 1930s and 1940s, currently have a higher frequency of "adverse health outcomes that are risk factors for COVID-19."[230] These factors combined have likely manifested themselves in Black Americans' higher COVID-19 mortality rate compared to white people and this demonstrates how racial discrimination by the Federal Housing Administration is playing a role in higher rates of illness and death 80 years after the discrimination began.[231]

ii. Mortgage Forbearance, Eviction Moratoriums, and Housing

Nearly 75% of all homeowners in the U.S. have federally backed mortgages, so CARES Act mortgage forbearance relief was widely available during COVID-19.[232] The CARES Act allowed homeowners with federally backed mortgages to receive 180-days in forbearance on their mortgage payments without any late fees or adverse marks on their credit reports.[233] Borrowers could also apply for an additional 180-days if they were still unable to make payments after the initial forbearance and President Joe Biden added yet another 180-days extension to the bill,

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226 Pragya Kakani et al., *Allocation of Covid-19 relief Funding to Disproportionately Black Counties,* J. OF THE AMERICAN MEDICAL ASSOCIATION 1,1 (Aug. 2020).
227 *Id.;* CDC, *Hospitalizations and Death by Race Ethnicity,* CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html.
228 Kakani, *supra* note 226.
229 Dean D. Akinleye et al., *Correlation Between Hospital Finances and Quality and Safety of Patient Care*, PLOS ONE 1,13 (Aug. 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0219124.
230 Richardson, *supra* note 110, at 26.
231 *Id.*
232 United States Government Accountability Office, *COVID-19 HOUSING PROTECTIONS: Mortgage Forbearance and Other Federal Efforts Have Reduced Default and Foreclosure Risks*, GOVERNMENT ACCOUNTABILITY OFFICE 1,1 (July 2021) https://www.gao.gov/assets/gao-21-554.pdf.
233 CARES Act, *supra* note 220, at S. 4022; Federally backed mortgages are mortgages that provide the lender with indemnity from losses in exchange for offering better rates to borrowers.

totaling an available 18-months of mortgage forbearance.[234] Of the Black borrowers who were behind on their mortgage payments, 81% entered the forbearance program.[235] Forbearance is still available to homeowners as of April 2022[236] and it has proven to be an effective form of relief for mortgage borrowers of all races.[237]

Unfortunately, most Black Americans are renters and did not benefit from mortgage forbearance. Renters' assistance was much less robust. While the CARES Act provided for an eviction moratorium as well as mortgage forbearance, the eviction moratorium was 2 months shorter than the initial forbearance offered to mortgage borrowers, there was no option to reapply for an additional term, and it did not receive a legislative extension like the mortgage forbearance.[238] This means Congress and the White House only provided 4-months assistance to renters compared to 18-months assistance to homeowners. It was the CDC that stepped in and provided another eviction moratorium which was in place from September 4, 2020 until August 26, 2021.[239] The CARES Act's eviction moratorium was not only shorter than the CDC's moratorium, it also only protected 28% to 46% of renters; while the CDC's moratorium covered "all renters who attest to meeting income and other eligibility criteria set out in the order."[240] However, unlike the CARES Act's moratorium, the CDC's moratorium did not prohibit late fees from accruing[241] which put tenants who were unable to pay in an even more precarious position. To avoid eviction, tenants not only have to have the money to pay back rent, but to pay the fees that have accrued.[242]

The CDC's eviction moratorium is thought to have prevented 1.55 million eviction filings overall[243] and in 2021, 27.9% of the avoided evictions were in predominantly-Black neighborhoods.[244] The relief came to an end on August 26, 2021, when the U.S. Supreme Court

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234 *Id*.
235 Gerardi, *supra* note 215, at 3.
236 Official Guide to Government Information and Services, *Financial Assistance for Food, Housing, and Bills*, UNITED STATES GOVERNMENT, https://www.usa.gov/covid-financial-help-from-the-government (last visited April 16, 2022).
237 Gerardi, *supra* note 215, at 3.
238 CARES Act, *supra* note 219, at S. 4024.
239 Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 FR 55292-01; U.S. Department of Housing and Urban Development, *Centers for Disease Control and Prevention (CDC) Eviction Moratorium FAQs for HUD's Office of Public and Indian Housing,* HUD (June 20, 2021), https://www.hud.gov/sites/dfiles/PIH/documents/HUD_FAQs_July31_CDC_Extension.pdf (President Biden added an additional month after December 2020 to give the CDC an opportunity to extend, modify, or rescind the eviction moratorium and the CDC extended it on January 29, 2021, again on March 31, 2021, and yet again on August 3, 2021).
240 Congressional Research Office, *Federal Eviction Moratoriums in Response to the COVID-19 Pandemic*, U.S. CONGRESS, 1, 2 (March 30, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11516.
241 *Id*.
242 Oksana Mironova and Samuel Stein, *Low-Income New Yorkers Are an Inch Away from Eviction*, COMMUNITY SERVICE SOCIETY, 1,6 (Jan. 6, 2022). https://www.cssny.org/news/entry/low-income-new-yorkers-are-an-inch-away-from-eviction (In New York, households with rent debt are at least 20% more likely to have their credit score lowered, be denied approval on a rental application, or default on a loan.).
243 Jacob Haas, et al., *Preliminary Analysis: Eviction Filing Trends After the CDC Moratorium Expiration*, EVICTION LAB (December 9, 2021) https://evictionlab.org/updates/research/eviction-filing-trends-after-cdc-moratorium/.
244 Peter Hepburn, et al., *Preliminary Analysis: Eviction Filing Patterns in 2021*, THE EVICTION LAB (March 8, 2022), https://evictionlab.org/us-eviction-filing-patterns-2021/.

struck down the moratorium.[245] The Court held that the eviction moratorium was beyond the CDC's authority and "if a federally imposed eviction moratorium [was] to continue, Congress must specifically authorize it."[246] Congress did not act after the initial CARE's Act moratorium expired and it did not act after the Court struck down the CDC's order. In the three months after the Court struck down the eviction moratorium, eviction filings increased 20.4% compared to the final three months of the moratorium.[247] This was to be anticipated because between September 1 and 7, 2020, during the week the CARES Act eviction moratorium expired and the CDC moratorium had yet to be ordered, the percentage of evictions filed jumped 41.5% higher than they were during the same week in 2019.[248]

Before the pandemic, Black renters were already more likely to face evictions than white renters[249] and it appears that pattern will continue due to federal legislators' failure to act to protect the 56% of Black Americans who were renting during the pandemic. It is an important observation that the federal government systemically prevented Black Americans from purchasing homes in the 1930s and 1940s, allowed Black Americans' gains in homeownership to be wiped away during the Great Recession, and then protected homeowners significantly more than it protected renters during the COVID-19 pandemic.

iii. The Paycheck Protection Program and Small Businesses

The Paycheck Protection Program was the largest aspect of the CARES Act, distributing nearly $800 million to businesses between April 2020 and May 2021.[250] Though the PPP was massive, nearly 100,000 small businesses closed in the U.S. by September 2020[251] and many of those were Black-owned. In August 2020, the "number of active Black small-business owners [had fallen] 41% from February through April (nearly twice the rate of non-Black-owned businesses)."[252] This happened in part because many Black business owners struggled to access programs like the Paycheck Protection Program.[253] It is important to note that the demographic data for the PPP is incomplete because applicants were not required to disclose this information

245 Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021).
246 *Id.* at 2490.
247 Haas, *supra* note 243.
248 Hal Martin, *Data Updates: Measuring Evictions during the COVID-19 Crisis*, FEDERAL RESERVE BANK OF CLEVELAND (March 2022) https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20200902-data-updates-measuring-evictions-during-the-covid-19-crisis.aspx?utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz-_SyRl1UbeH_iGt6fJhhGDEXTxcPuqR84B5sNclO8oABlwb7Q7Nns759MsnqJdrEcvc91K.
249 Peter Hepburn, *Racial and Gender Disparities among Evicted Americans*, 7 SOCIOLOGICAL SCIENCE 649, 659 (Dec. 2020) ("Drawing on millions of court records, this study has produced evidence that black and Latinx renters in general, and women in particular, are disproportionately threatened with eviction and disproportionately evicted from their homes").
250 Susan C. Morse, *Emergency Money: Lessons from the Paycheck Protection Program*, 55 U. MICH. J.L. REFORM 175, 176 (2021).
251 Yelp Economic Coverage, *Yelp: Local Economic Impact Report*, YELP (Sep. 2020), https://www.yelpeconomicaverage.com/business-closures-update-sep-2020.html.
252 Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments that Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, FORTUNE (Sep. 28, 2020, 10:25am), https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/.
253 *Id.*

and 75% did not do so.[254] However, the New York Fed found that PPP loans "reached only 20% of eligible [businesses] in states with the highest densities of Black-owned [businesses], and in counties with the densest Black-owned business activity, coverage rates were typically lower than 20%."[255] This low rate of lending in predominantly Black communities is telling, even with incomplete demographic information. The racial disparity in PPP lending can be attributed in part to Black business owners having weaker long-term banking relationships which played a large part in who received PPP loans.

In 2019, fewer than 25% of Black-owned businesses with employees had a recent borrowing relationship with a bank and that number drops to fewer than 10% for those Black-owned businesses without employees.[256] This large number of unbanked business owners may be connected to the loss of banking branches in low-income communities and the closing of more than 50% of Black owned-banks during the Great Recession.[257] However, it could also be connected to the fact that though Black business owners apply for financing at the same rate as white business owners, Black business owners are denied financing more often and, thus, do not develop borrowing relationships with banks.[258] This higher rate of loan denial continued in the COVID-19 era. In an August 2020 survey conducted by the advocacy group Small Business Majority, "23% of Black business owners who didn't receive a PPP or Economic Injury Disaster Loan said their PPP applications were denied, compared to 9% of white business owners."[259]

Banking relationships have proven to be very important for PPP applicants as lenders are compensated through processing fees based on loan amounts[260] and some of the larger U.S. banks, such as Bank of America and Chase, served only customers with existing relationships[261] and allegedly prioritized loan applications for larger amounts.[262] Lenders with assets of $10 billion or more were responsible for 47% of the PPP loans,[263] this includes just three banks—JPMorgan Chase, Bank of America, and PNC— that originated 10% of all loans.[264] The second-round of the PPP attempted to remedy this inequity by setting aside $60 billion for community development

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254 Li Zhou, *The Paycheck Protection Program Failed Many Black-owned Businesses*, VOX (Oct. 5, 2020), https://www.vox.com/2020/10/5/21427881/paycheck-protection-program-black-owned-businesses.

255 Claire Kramer Mills & Jessica Battisto, *Double Jeopardy: Covid-19's Concentrated Health and Wealth Effects in Black Communities*, FEDERAL RESERVE BANKS OF NEW YORK 1,2 (Aug. 2020), https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses.

256 *Id.* at 6.

257 Baradaran, *supra* note 5, at 260, 268.

258 Mills, *supra* note 255, at 6.

259 Zhou, *supra* note 254.

260 U.S. Department of Treasury, *Paycheck Protection Program (PPP) Information Sheet*, U.S. DEPARTMENT OF TREASURY, https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf (Last visited April 13, 2022) (Loan processing fees are as follows: "five (5) percent for loans of not more than $350,000; three (3) percent for loans of more than $350,000 and less than $2,000,000; and one (1) percent for loans of at least $2,000,000").

261 Li Zhou, *Many Small Businesses Are Being Shut Out of a New Loan Program by Major Banks*, VOX (Apr. 7, 2020, 3:40pm), https://www.vox.com/2020/4/7/21209584/paycheck-protection-program-banks-access.

262 Matt Egan, *Big Banks Accused of Favoring More Lucrative Small Business Loans in Coronavirus Program,* CNN (Apr. 21, 2020, 6:40pm), https://www.cnn.com/2020/04/21/business/small-business-loans-ppp-lawsuit/index.html (Lawsuits in New York and California allege that big banks such as Bank of America, Wells Fargo, JPMorgan Chase, and US Bank pushed larger businesses to the front of the PPP line to benefit the banks' business.).

263 U.S. Small Business Administration, Paycheck Protection Program (PPP) Report, U.S. TREASURY DEPARTMENT 1, 3 (Aug. 2020), https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf.

264 *Id.* at 7.

financial institutions and other similar entities.[265] However, this may not have been significantly impactful on the number of Black businesses who received loans, because after the Great Recession there were half as many Black owned banks and banks in Black communities.[266] The reduction in Black-owned small businesses caused by the COVID-19 pandemic and exasperated by the Great Recession's destruction of Black banks, hurts Black communities because it removes a well-documented method of addressing racial wealth inequality.[267]

CONCLUSION

From labor protections to home loans, the New Deal contributed greatly to creating the social safety nets the United States has become accustomed to. World War II veteran benefits are credited with creating the American middle class through the G.I. Bill. However, Black Americans were either legislatively excluded from these stimuli or systemically prevented from exercising their rights to the benefits. When the U.S. population as a whole was increasing its income, buying homes, and creating generational wealth, Black Americans were unable to see the same rate of growth. The discrimination in the New Deal and G.I. Bill left Black Americans economically behind so that even the gains they made throughout the 20th century were slower and less significant than the gains of white Americans. When the 2000s housing bubble arose, Black Americans were still economically behind in income, wealth, and homeownership; so, they were more vulnerable to predatory mortgage lending. The Great Recession hit Black Americans the hardest because they did not have the safety net the New Deal and G.I. Bill provided white Americans in the 1930s and 1940s. The closing of Black banks and the destabilization of Black Americans' housing situation during the Great Recession were key factors in how Black Americans were impacted by the Coronavirus pandemic just over a decade later. Black Americans have died at higher rates than white Americans due to still living in HOLC redlined neighborhoods, not owning their homes, being disproportionately subject to eviction, and working low-wage, "essential" jobs. The closing of Black owned banks who were less likely to receive TARP funding, left Black business owners at a disadvantage when it was time to apply for the Paycheck Protection Program and a disproportionate number of Black small businesses closed due to the pandemic. Nearly a century later, Black Americans are still suffering the consequences of the New Deal and G.I. Bill's racial discrimination in federal crisis recovery.

The federal government must deliberately intervene to stop the ripple effects of its past policies, otherwise these disparities will continue to be perpetuated for another century, from one generation to the next. It must aim future crisis recovery directly at the needs of Black Americans instead of expecting general aid packages to help all citizens. Better yet, before the next economic crisis, the U.S. government should address the everyday disparities that have been built into Black American life and rectify the impacts of low homeownership and the racial wealth gap. Then policymakers must work toward addressing how and why public policy, particularly during crisis, has historically excluded or neglected Black Americans. Proposed legislation such as the Federal

265 Zhou, *supra* note 261.
266 Baradaran, *supra* note 3, at 268.
267 T. Bates, W. E. Jackson, III, and J. H. Johnson, Jr., *Advancing research on minority entrepreneurship*, 613 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 10-17 (2007).

Reserve Racial and Economic Equity Act, which requires the Federal Reserve to take action "to minimize and eliminate racial disparities in employment, wages, wealth, and access to affordable credit,"[268] may be a way for legislatures to preemptively prepare Black Americans to survive the next crisis. Policy makers must make an affirmative commitment to legislating with the goal of avoiding disparate impacts and of remedying historic failure before the next crisis fails yet another generation of Black Americans.

It is worth exploring how a reparations scheme could help reverse the long-term failings of the New Deal and G.I. Bill. If Black Americans who are either decedents of U.S. chattel slavery or whose ancestors were present in the country before the Great Depression received direct cash payments and guaranteed FHA-insured home loans, could they close the wealth gap? How much money would each Black American need to receive and how much would it cost the U.S. government? Whatever the cost, I'd argue it is worth it to make Black Americans whole after the amount of income and wealth, including interest, Black Americans have collectively lost over the last century. The Federal Reserve Racial and Economic Equity Act, has a CBO-Score of $0 and I'd argue that whatever revenue that's lost due its passage,[269] it cannot be nearly as high as the lives lost to 1930s redlining during the COVID-19 pandemic.

268 Federal Reserve Racial and Economic Equity Act, SIL20869, 1, 3, https://www.warren.senate.gov/imo/media/doc/Federal%20Reserve%20Racial%20and%20Economic%20Equity%20Act%20Bill%20Text%2008.05.20201.pdf.

269 Congressional Budget Office, *Cost Estimate: H.R. 2543, Federal Reserve Racial and Economic Equity Act*, SPENDING TRACKER (March 26, 2021) https://spendingtracker.org/bills/hr2543-117 (The Act will cost no additional dollars to implement but may cost $5-$10 million per year in lost revenues.).

The Digital Age of Fashion: A Comparative Analysis of IP Protections

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INTRODUCTION

In 2019, global retail sales of apparel and footwear reached $1.9 trillion. By 2030, that number will rise above $3 trillion.[1] The fashion industry is not just a business; it has significant aesthetic, cultural, and historical value.[2] Coco Chanel once said, "[f]ashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, and what is happening."[3] Fashion is a form of self-expression and creativity for many people, but it is also a complex, nuanced, and lucrative industry. Most people consume fashion by purchasing physical items (i.e., articles of clothing, sneakers, eyewear, etc.).[4] Fashion designers typically own their logos through trademarks.[5] However, as technology has grown and developed, the relationship between ownership rights, fashion designs, and final products has become murky. Thus, the fashion industry presents a compelling challenge to intellectual property and copyright laws because it mixes art and commerce. Some difficult questions this challenge presents are: What happens if a fashion line never makes it to a physical runway but instead is released virtually via live stream? If a customer purchases a digital Balenciaga shirt for an avatar to wear in a video game, does the avatar now own the shirt? Who owns the rights to the original shirt design, Balenciaga or the video game company?

This paper analyzes and compares the current intellectual property protections available for fashion designers in the United States, including the potential impact of the recent Supreme Court decision addressing conceptual separability under copyright law in *Star Athletica, L.L.C., v. Varsity Brands, Inc,*[6] with the intellectual property protections available for fashion designs in the European Union (EU), EU member states

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[1] P. Smith, *U.S. apparel market – statistics and facts.* STATISTICA (Jan. 12, 2022), https://www.statista.com/topics/965/apparel-market-in-the-us/#dossierKeyfigures.

[2] Many prominent museums have devoted their halls to fashion exhibits, such as the Metropolitan Museum of Art's Alexander McQueen exhibit, "Savage Beauty," and the Met's "Punk: Chaos to Couture" exhibit. Fashion exhibits such as these illustrate the artistic, cultural, and historical significance of fashion. *See Alexander McQueen: Savage Beauty*, METROPOLITAN MUSEUM OF ART, http://blog.metmuseum.org/alexandermcqueen/ (last visited Dec. 6, 2021); *see also PUNK: Chaos to Couture*, METROPOLITAN MUSEUM OF ART, https://www.metmuseum.org/exhibitions/listings/2013/punk (last visited Dec. 6, 2021).

[3] Erin Cunningham, *Fashion is in the Sky*, NYU (Dec. 11, 2018), https://confluence.gallatin.nyu.edu/sections/portfolio/fashion-is-in-the-sky.

[4] *See* Dana Thomas, *The High Price of Fast Fashion*, WSJ (Aug, 29, 2019), https://www.wsj.com/articles/the-high-price-of-fast-fashion-11567096637 (Noting that everyday millions of people buy clothes and "as a whole, the world's citizens acquire some 80 billion apparel items annually").

[5] Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union*, 107(6) L.J. INT'L. TRADEMARK ASSOC. 1131, 1132–33 (2017).

[6] 137 S. Ct. 1002 (2017).

of France and Italy, and the United Kingdom (UK). The paper also seeks to assess whether the fashion industry needs stronger IP protections to handle the technological change and advancement the industry is facing. The paper develops in the following manner: Sections I and II outline and analyze copyright and intellectual property protections generally available to fashion designers in the United States and Europe, respectively. Section II specifically focuses on France, Italy, and the United Kingdom, as these countries are home to some of the most prominent fashion empires. Section III looks into the United States' attempts to adopt more favorable standards for fashion designers. In light of Section III, Section IV seeks to answer whether fashion designers need or prefer to have more favorable standards. Lastly, Section V discusses recent developments within the fashion industry due to COVID-19. In the wake of the pandemic and COVID-19 shutdown, the fashion industry has pivoted nearly overnight, launching technology-driven initiatives to provide new customer experiences (i.e., virtual fashion shows) and interact with customers through digital channels. These developments highlight the need for stronger IP protections to help the fashion industry fully immerse into the digital age.

I. U.S. INTELLECTUAL PROPERTY PROTECTIONS FOR THE FASHION INDUSTRY

In the United States, copyright law is the primary source of protection for designs within the fashion realm.[7] The three main categories of intellectual property rights available for fashion design protection are copyrights, trademarks (including trade dress), and patents.[8] Each of these rights presents an opportunity to protect fashion articles, with designers relying heavily on trademark and trade dress protection, design patent protection, and to a lesser degree, copyright protection to gain enforcement rights against marketplace competitors.[9] Trademarks, in particular, are widely used by some more prominent fashion brands to protect themselves in the United States.[10] Some brands have also used design patents to protect staple products sold for more than one season.

a. U.S. Copyright Protections for the Fashion Industry

The Constitution of the United States empowers Congress to create and enact copyright laws, it explicitly gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right

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[7] *See* John Zarocostas, *The role of IP rights in the fashion business: a US perspective*, WORLD INTELL. PROP. ORG. (WIPO) (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html (last visited Apr. 1, 2022).
[8] Witzburg, *supra* note 5, at 1132.
[9] *Id*. at 1132–33.
[10] *See* Jessica Elliot Cardon, *Fashion Law*, INT'L. TRADEMARK ASSOC. 1, 3–5, 8 https://www.inta.org/wp-content/uploads/member-only/resources/industry-impressions/Fashion_La w.pdf (last visited Apr. 1, 2022). (Noting that "Louboutin uses a red sole as a source identifier and trademark in connection with its luxury footwear." Additional examples include Ralph Lauren, Dolce & Gabbana, Vince Camuto, and Hermes.) *Id*.

to their respective Writings and Discoveries."[11] Using this power, Congress passed the Copyright Act of 1790.[12] Initially, this Act protected only limited categories of works, such as charts, maps, and books,[13] but protections have grown over the last two centuries to cover broader works.[14] The current Copyright Act, passed by Congress in 1976, redefined many provisions found in older copyright acts and doctrines.[15] It defines copyrightable subject matter as works of authorship. These include literary musicals; dramatic; pantomimes and choreographic; pictorial; graphic; sculptural; audiovisual; and architectural works. It also includes motion pictures and sound recordings.[16] While this section of the Copyright Act does not explicitly include fashion designs or similar works, it still may protect some aspects of fashion. Copyright law protects "original works of authorship fixed in any tangible medium of expression."[17] A work is considered original if it is "independently created by the author (as opposed to copied from other works, and … possess … at least some minimal degree of creativity."[18] In the U.S., copyright protection is automatic, but copyright owners can still register their copyrights with the U.S. Copyright Office.[19] Registration is a prerequisite for specific remedies, such as the right to sue for copyright infringements.

Under Section 101, The Copyright Act has historically defined clothing as a *useful article*. Clothing classifies as a useful article because it has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[20] The design of a garment can only acquire copyright protection if it "can be identified separately from, and is capable of existing independently of, the utilitarian aspects of the article then those separately identifiable elements and features may be eligible for copyright protection."[21] Before the Supreme Court decision in *Star Athletica,*

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[11] U.S. Const. art. I, § 8, cl. 8.
[12] 17 U.S.C. (2012).
[13] *Id.*
[14] *See Timeline: 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html (last visited Dec. 6, 2021); *Timeline: 1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Dec. 6, 2021); *Timeline: 1950–1997*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-1997.html (last visited Dec. 6, 2021).
[15] *Copyright Law of the United States (Title 17),* U.S. COPYRIGHT OFF., https://www.copyright.gov/title17/ (last visited Dec. 6, 2021).
[16] 17 U.S.C. § 102(a) (2012).
[17] 35 U.S.C. § 171 (2012).
[18] Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J. L. & TECH. 251 (2011).
[19] 17 U.S.C. § 101 (2012).
[20] *Id.* (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information"); *see also* Chosun Int'l v. Chrisha Creations, Ltd., 413 F.3d 324, 328 (2d Cir. 2005) (explaining that useful articles as a whole are ineligible for copyright protection); Whimsicality, Inc. v. Rubie's Costumes Co., 721 F. Supp. 1566, 1572 (E.D.N.Y. 1989) ("[A] garden variety article of wearing apparel is intrinsically utilitarian and therefore a noncopyrightable useful article. Equally noncopyrightable are the elaborate designs of the high fashion industry, no matter how admired or aesthetically pleasing they may be.").
[21] 17 U.S.C. § 101 (2012). *See also* Star Athletica, 137 S. Ct. at 1006; Chosun Int'l, 413 F.3d at 328.

L.L.C. v. Varsity Brands, Inc.,[22] courts construed Section 101 of the Copyright Act as the physical or conceptual separability test.[23] Physical separability exists when the decorative elements could "actually be removed from the original item and separately sold, without adversely impacting the article's functionality."[24] On the other hand, conceptual separability exists when the garment "invokes in the viewer a concept separate from that of the garment's clothing function, and the additional function was not motivated by a desire to enhance the garment's functionality qua clothing."[25] Thus, a fabric design such as a repeated heart print can exist separately from the actual shirt, but the shirt design(the precise tailoring of the and shape of the shirt) cannot exist separately from the shirt.[26] Copyright only extends to the unique portion and not the functional aspect.[27] However, there are categories of articles of clothing with designs that may be copyrightable because they serve an additional function other than the typical function of clothing (covering a person's body). Some examples include costumes, prom dresses, and employee uniforms. In *Chosun v. Chrisha Creations, Ltd.,*[28] the Second Circuit held that copyright law might protect Halloween costumes if the design elements can be separated from the overall function of the costume as clothing.[29] From 1954 until 2017, U.S. courts struggled to apply the numerous separability tests that have emerged to determine whether an article of clothing's design elements are purely utilitarian or are capable of existing separately from the item's utilitarian purpose.[30]

In March 2017, the U.S. Supreme Court issued its decision in the landmark case, *Star Athletica, L.L.C. v. Varsity Brands, Inc*,[31] which established a single test to determine the copyrightability of designs incorporated in useful articles.[32] Varsity Brands Inc. ("Varsity") is a $1.2 billion company owned by the $3.5 billion private equity firm

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[22] Star Athletica, 137 S. Ct. at 1002 (2017).

[23] *See* Jovhani Fashions, Ltd. v. Fiesta Fashions, No. 12-598-cv, 2012 WL 4856412 at *1 (2d Cir. Oct. 2012) (citing Chosun Int'l, Inc. v. Chrisha Creations Ltd., 413 F.3d 324 (2d Cir. 2005) ("We have construed 17 U.S.C. § 101 to afford protection to design elements of clothing only when those elements, individually or together, are separable—'physically or conceptually—from the garment itself.")).

[24] Chosun, 413 F.3d 324, at 329.

[25] *Id.*

[26] Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 2.01[A], § 2.08(H) (1990).

[27] Copyright never protects the mechanical or utilitarian aspects of an article, whether useful or not. No matter how novel, distinctive, or aesthetically pleasure any clasps, motors, or other functioning parts of an article may be, copyright does not protect them. *See Useful Articles,* U.S. COPYRIGHT OFF., https://www.copyright.gov/register/va-useful.html#:~:text=Copyright%20does%20not%20protect%20the,utilitarian%20aspects%20of%20an%20object (last visited Dec. 6, 2021).

[28] 413 F.3d 324.

[29] *Id.* at 326; *But see* Jovhani Fashions, Ltd. v. Fiesta Fashions, No. 12-598-cv, 2012 WL 4856412 (2d. Cir. 2012) (explaining that Jovani did not have a plausible copyright claim because the aesthetic and functional features of the prom dress are inseparable); *see also* Galiano v. Harrah's Operating Co., 416 F.3d 411 (5th Cir. 2015) ("Designs were not copyrightable absent showing that they were marketable independently of their utilitarian function as casino uniforms.").

[30] *See generally*, Brief for N.Y. Intell. Prop. L. Ass'n. as Amicus Curiae supporting neither party, Star Athletica, L.L.C. v. Varsity Brands, Inc., 136 S. Ct. 1823 (2016) (No. 15-866).

[31] 137 S. Ct. 1002 (2017). *See also* Mazer v. Stein 347 U.S. 201 (1954); Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411 5th Cir. 2005).

[32] *Id.*

Charlesbank Capital Partners and controls 80 percent of the cheerleading uniform market.[33] Varsity obtained over 200 U.S. copyright registrations for the two-dimensional designs incorporated into and displayed on its cheerleading uniforms. Varsity filed suit against Star Athletica, alleging infringement of five of its registered copyrighted designs.[34] The U.S. District Court for the Western District of Tennessee granted summary judgment in favor of Star Athletica. The court found that Varsity's design "did not qualify for copyright protection, as they served the utilitarian function of identifying the clothing as cheerleading uniforms and could not be separated from such function.[35] In a split decision, the U.S. Court of Appeals for the Sixth Circuit reversed the decision, holding that the cheerleader uniform design elements were capable of existing independently because they could be applied to other apparel or even framed as artwork.[36]

On March 22, 2017, the Supreme Court ruled that copyright law could protect cheerleader uniform designs. The Court established a new two-part test to determine the copyright protection for designs incorporated in useful articles. An artistic feature of the design of a useful article is eligible for copyright protection if the feature:

> (1) can be perceived as a two or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article.[37]

The Supreme Court affirmed the Sixth Circuit's finding that Varsity's cheerleading uniforms satisfied the requirements set out under the new tests. While the decision harmonizes all prior circuit court tests, some scholars argue that the decision raises additional questions.[38] It remains to be seen whether the new rule will help clarify whether fashion articles are consistently protectable under copyright law. Under the new *Star Athletica* imagination test,[39] if a design that is not affixed to a useful article can be protected by copyright, it can be protected even if it is attached to the useful article.[40] In fact, "the new test no longer considers the creator's intent, the design's marketability,

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[33] Leigh Buchanan, *The Battle for the Cheerleading-Uniform Industry is Surprisingly Cutthroat and Appropriately Glittery,* SLATE (Feb. 22, 2016), https://slate.com/business/2016/02/rebel-wants-to-disrupt-the-surprisingly-entrenched-cheerleader-un iform-industry.html. *See also* Morgan E. Pietz & Trevor Maxim, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, GERARD FOX L. (Apr. 1, 2017), https://www.gerardfoxlaw.com/news/thought-leadership/star-athletica-llc-v-varsity-brands-inc.

[34] Varsity Brands, Inc. v. Star Athletica, L.L.C., No. 10-2508, 2014 WL 819422 (W.D. Tenn. 2014).

[35] *Id.*

[36] Star Athletica, L.L.C. v. Varsity Brands, Inc., 799 F.3d 468, 471 (6th Cir. 2015).

[37] Star Athletica, L.L.C v. Varsity Brands, Inc., 137 S. Ct. 1005 (2017).

[38] *See* Leo Burgunder, *Does Star Athletica Raise more Questions than it Answers?*, IP WATCHDOGS (Apr. 13, 2017), https://www.ipwatchdog.com/2017/04/13/star-athletica-raise-questions-answers/id=81977/.

[39] *See* Jonathan E. Moskin, *C-O-P-Y-R-I-G-H-T: What Does That Spell? Star Athletica v. Varsity Brands Reimagines Protection for Useful Articles*, 107 TRADEMARK REP. 776, 777 (2017).

[40] Witzburg, *supra* note 5, at 1139.

and the design's physical separability."[41] Still, Justice Breyer's dissent noted that the application of the new rule could lead to differing conclusions.[42]

Nevertheless, the *Star Athletica's* imagination test raises new possibilities for the fashion industry.[43] The ruling may lead fashion brands to seek greater protection and enforce their rights against fast-fashion companies such as Zara and H&M. Fast fashion companies quickly take runway styles and trends for mass-market retail sales directly to consumers.[44] Shortly after the *Star Athletica* decision, Puma filed an action against Forever 21, alleging infringement of design patents and copyright infringement based on alleged copying of a shoe line collaboration with Rihanna.[45] Puma cited the *Star Athletica* decision, claiming that elements of each shoe involved in the case were separable enough for protection.[46] Puma sought a temporary restraining order and a preliminary injunction barring Forever 21 from selling the shoes at issue, but the judge denied both.[47] Puma issued a public statement to emphasize their disappointment and frustration regarding the decision. Puma argued that "intellectual property holders should be able to rely on U.S. courts to enforce their rights immediately when there has been harm and clear infringement, particularly in the fashion industry where trends are most valuable in the short term, and infringers take advantage of this time frame."[48]

b. U.S. Patent Protections for the Fashion Industry

Like copyright laws, the U.S. Constitution grants Congress the power over patent law "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries."[49] For an invention or discovery to be eligible for a patent, it must be statutory, novel, useful, and nonobvious.[50] An inventor fulfills the novelty requirement unless "the claimed invention was patented, described in a printed publication, or public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention."[51] The nonobvious requirements for patents are as follows:

> A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as outlined in

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[41] *Id.*
[42] Star Athletica, L.L.C v. Varsity Brands, Inc., 137 S. Ct. 1002, 1030–37 (2017) (Breyer, J., dissenting).
[43] *See* Moskin, *supra* note 36.
[44] Witzburg, *supra* note 5, at 1139.
[45] Puma SE v. Forever 21, No. CV17-2523 PSG E, 2017 U.S. Dist. LEXIS 211144, at *1 (C.D. Cal. 2017).
[46] *Id. See also* Loni Morrow, Loni & Jonathan Hyman, *Puma Treads New Territory Hitting Forever 21 with Copyright Allegations after the Supreme Court's Star Athletica Decision,* KNOBBE MARTEN: INTELL. PROP. L. (Apr. 6, 2017); Bill Donahue, *Citing High Court, Puma Sues Forever 21 For Copying* Shoes, L.360 (Apr. 3, 2017), https://www.law360.com/articles/909009/citing-high-court-puma-sues-forever-21-for-copying-shoes.
[47] *Id.*
[48] *Id.*
[49] U.S. Const. art. I, § 8, cl. 8.
[50] 35 U.S.C § 101.
[51] 35 U.S.C § 102.

> Section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.[52]

There are three major types of patents available to inventors in the United States under the U.S. Code: 1) utility patents, 2) design patents, and 3) plant patents. However, applicants rarely submit applications for plant or utility patents. The most common types of patents secured are design patents. Similar to copyright protections, design patents mainly serve a particular subset of designers, those who seek to protect "new, original and ornamental design[s]" for their "article[s] of manufacture."[53]

Design patents provide fifteen years of protection to any new, original and ornamental design for an article of clothing. Clothing, bag, and eyewear designs rarely meet patentability requirements. This presents an issue for fashion designers looking to acquire design patents. Fashion designs rarely possess the necessary novelty requirement since many designs are often combinations of or slightly new takes on existing designs. Similarly, designs often fail the non-obviousness requirement for the same reason. Also, similar to the useful article doctrine in copyright, if the item's design is "essential to the use of the article," the item is ineligible for design patent protection.[54] In this instance, a design patent can only be issued to protect the ornamental, non-functional aspects. Thus, design patents often fail to provide fashion designers with the protections they seek.

c. U.S. Trademark Protections for the Fashion Industry

While the U.S. Constitution does not explicitly grant Congress power over trademark law, Congress does have the power to create federal trademark law through the Commerce Clause of the U.S. Constitution and the Lanham Act. Trademark law provides a form of protection on a fashion article if it operates to identify the source of the goods. As a result, designers may protect their goods by adopting a distinctive mark that allows customers to recognize the fashion article's source.[55] Two requirements must be met for a "mark"[56] to be deemed eligible for trademark protection: they must be used in commerce and original or distinctive from other marks.[57] Trademarks typically fit into four categories of distinctiveness: 1) arbitrary/fanciful, 2)

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[52] 35 U.S.C § 103.
[53] 35 U.S.C. § 171.
[54] 69 C.J.S. Patents § 112 (2019).
[55] Christiane Schuman Campbell, *Protecting Fashion Designs Through IP Law*, DUANE MORRIS (Apr. 14, 2015), https://www.duanemorris.com/articles/protecting_fashion_designs_through_ip_law_5516.html.
[56] 15 U.S.C. § 1127.
[57] *Id.*

suggestive, 3) descriptive, and 4) generic.[58] Suppose a mark is in either arbitrary/fanciful or suggestive category. In that case, it is considered inherently distinctive, and exclusive rights to the mark are determined solely by priority of use. A trademark categorized as descriptive is only protectable as a trademark if it has acquired a secondary meaning in the public's mind.

Designers and brands can also seek trade dress protection in the "overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others."[59] Trade dress may protect a fashion good's non-functional and distinctive elements, such as size, shape, color, and texture.[60]

At common law and under the registration procedures outlined under the Lanham Act, exclusive rights to a trademark are awarded to the first to use it in commerce. The distinctive requirement addresses a trademark's capacity to identify and distinguish particular goods sold by one producer from those sold by another. To function as a trademark, the design itself must identify the source of the fashion article. However, this may be difficult to prove without sufficient evidence of acquired distinctiveness to demonstrate that the consumers have come to recognize the design. As a result, some designers and brands incorporate their logos or marks into their fashion items to distinguish their designers.[61] However, even if a fashion brand obtains protection for the logos incorporated into fashion design, it needs to consider the possibility that if the underlying design becomes popular, copycats may use the same design on their goods without legal consequence since only the logos are protected and not the design itself. Once others begin to use the design, it becomes difficult to prove that the design points to the original creator as the source and functions as a trademark.[62] This gap allows fast-fashion companies to exist.[63]

Unlike copyrights and patents, governing bodies do not require design owners to register their trademarks. If a potential mark owner wants to register their mark, that process occurs at the United States Patent and Trademark Office. Registration can be helpful but unnecessary since a designer only needs to prove that the design is distinctive and used in commerce in a case before a court.

Trademark law in fashion helps designers communicate to the public that they are the sole originator of a unique, distinctive product or type of product. Thus, trademark laws would only help designers police competitors trying to pass off knockoff products as the originals. While some may argue that trademarks provide

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[58] Zatarain's, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786 (5th Cir. 1983). For a description of the four categories see *Trademark Strength*, INT'L TRADEMARK ASSOC. (Nov. 5, 2020), https://www.inta.org/fact-sheets/trademark-strength/.

[59] *Trade Dress Fact Sheets: Types of protection*, INT'L TRADEMARK ASSOC. (Nov. 30, 2015), https://www.inta.org/fact-sheets/trade-dress/.

[60] *See* Michelle Mancino Marsh & Natasha Sardesai-Grant, *Safe Protections/Safe Inspiration: An Introduction to Intellectual Property law for Fashion Designs*, EMERGING ISSUES 6821 (Dec. 12, 2012).

[61] For example, Burberry incorporates its famous plaid design into its products designs.

[62] *See* Jenna Sauers, *How Forever 21 Keeps Getting Away with Designer Knockoffs*, JEZEBEL (July 20, 2011), https://jezebel.com/how-forever-21-keeps-getting-away-with-designer-knockof-5822762.

[63] *See* Witzburg, *supra* note 5, at 1133.

sufficient protection to fashion brands and designers, trademarks only really benefit influential, well-known designers or those with sufficiently unique designs that allow them to be instantly recognizable.[64] Furthermore, trademark law protects only the source-identifying mark within a design, not the design itself. Even if a designer wanted to use trademark law to protect a design, the functionality doctrine would block protection to keep basic, staple designs barred from protection for the sake of competition.

While trademark law adequately serves those designers with distinctive logos, not every designer has a unique, recognizable logo like Ralph Lauren's polo horse or Nike's swoosh. Does this mean that the designers who lack distinctive logos are unworthy of intellectual property protection? Should designers all be forced to create distinctive logos to be eligible for the protection of their unique creations? Other forms of protection are available for designs, as outlined in previous sections. Still, large brands primarily use these protections because they have the resources to secure and enforce protection mechanisms.[65] Up-and-coming designers may not have the financial capital to secure copyrights or design patents. Even if they were the first to use their designs in commerce, brands with more influence could easily challenge that assertion and potentially strip the new designer of their trademark rights. This possibility proves the existence of legal gaps within intellectual property protection in the U.S. fashion industry that need to be addressed. Perhaps Europe's fashion-specific intellectual property apparatus can serve as an example of how the U.S. should think about protecting the creations of new and established fashion designers.

II. EUROPEAN INTELLECTUAL PROPERTY PROTECTIONS FOR THE FASHION INDUSTRY

Despite the emergence of powerful U.S.-based brands, Europe remains the epicenter of fashion. Many of the world's largest fashion houses originated in Europe. Additionally, fashion in Europe generally predates fashion in the United States, which may explain the more expansive intellectual property regime in Europe.[66] In Europe "Intellectual property protection is at the heart of most European fashion business models. The industry is driven by fast paced innovation embodied in the creation of seasonal collections of new fashion designs. Europe remains the center of haute

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[64] *See* Tyler Mccall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law,* FASHIONISTA (Nov. 17, 2017), https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark ("Trade dress, like other forms of trademark, also really only helps out famous designs or big brands that can spend a lot of advertising dollars"). *See also Can you copyright clothing designs?,* NEW MEDIA RTS. (Oct. 27, 2020), https://www.newmediarights.org/business_models/artist/can_you_copyright_clothing_designs ("Clothing designs generally only gain trademark protection in the long term, after widespread sale[s] and advertising").

[65] See Zarocostas, supra note 7.

[66] *Id.* ("I[ntellectual] P[roperty] law for fashion and textiles has existed for much longer and is more expansive in Europe. That is a plus for European designers. So much of the difference between Europe and the United States with respect to the laws governing fashion comes down to history. France was one of the first places to turn out original creative designs. Design protection has been a priority in France since the 15th century").

couture, and the protection of fashion designs is a core feature of its cultural identity and legal regimes."[67]

Unlike the United States, in the European Union, fashion products may be protected under national design laws and national copyright laws.[68] In the European Union, fashion items – including traditional apparel, footwear, and other accessories – are afforded protection under European Union design laws and national copyright laws within European Union member states.[69] The European Union implemented a uniform, EU-wide protection for design rights by first adopting the EU Designs Protection Directive (98/71/EC) (the "EU Directive").[70] This EU Directive required all European Union member states to protect "designs" by registration[71] and defined design as "the appearance of a product resulting from the features of . . . the lines, contours, colors, shape, texture . . . or its ornamentation."[72] Designs must be "novel" and possess an "individual character" to receive protection.[73] "Novelty" is determined by whether there are "identical designs available to the public, and individual character is determined by whether the overall impression, from an informed user's point of view, is different from other designs available to the public."[74]

After the EU Directive took force, the European Union passed EU Regulation 6/2002 (the "EU Regulation"), which implemented a new, unique design right covering unregistered designs in the EU.[75] The EU Regulation created two types of design rights: 1) registered Community designs ("RCDs") and 2) unregistered Community designs ("UCD").[76] This distinction is essential because registered and unregistered Community designs are afforded different rights in the European Union. Registered designs are protected for five years from the application filing date, with the option to renew for up to 25 years.[77] Conversely, the European Union only protects unregistered

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[67] *See* Witzburg, *supra* note 5, at 1141.
[68] *Id.*
[69] *See id.*
[70] Council Directive 98/71, art. 3, 1998 O.J. (L 289) 28, 30 (EC).
[71] *Id.*
[72] *Id.*, art. 1, at 30.
[73] *Id.*, art. 3, at 30.
[74] Emma Yao Xiao, Note, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 23 CARDOZO ARTS & ENT. L.J., 405, 412 (2010) ("This is a heightened standard of infringement because even if a design has not been copied exactly, infringement can occur if it has the same overall impression on an informed user.").
[75] *Id.*
[76] *See* JF Bretonniere & Frédérique Fontaine, *Europe: Using Community Design Rights to Protect Creativity*, BAKER & MCKENZIE 32, 33(2010).
[77] An application for a registered Community design can be filed directly with the EUIPO office. *See Apply Now*, EUR. UNION INTELL. PROP. OFF. (EUIPO), https://euipo.europa.eu/ohimportal/en/web/guest/rcd-apply-now (last visited Dec. 6, 2021). An EU design can also be registered by filing an international application under the Hague System and designate the EU or the individual EU Member States to obtain protection in the respective jurisdictions. For more on the international application process under the Hague Agreement, see *The Hague System for International Registration of Industrial Designs*, WORLD INTELL. PROP. ORG. (WIPO), https://www.wipo.int/edocs/pubdocs/en/designs/911/wipo_pub_911.pdf (last visited Dec. 6, 2021). The Hague System is "an international design registration system administered via the World Intellectual

designs for three years from the date the design was first made available to the public.[78] The EU does not extend the term of unregistered designs.[79] However, unregistered design rights are suitable for protecting "short-life products (e.g., products within the fashion industry)" because the registration process may be lengthy and costly.[80]

This consideration for unregistered designs is similar to trademark laws in the U.S. – if a designer simply uses their mark or design in commerce, they are granted protection. The key difference here is that in the EU if the design is never formally registered, the designer will lose their protection three years after being made available to the public. In contrast, trademark protections in the U.S. do not expire. Nevertheless, European designers are still generally better off even with the three-year expiration because they are not subject to the exact trademark requirements (use in commerce and distinctiveness) in the U.S. The decision in *Karen v. Dunnes*[81] highlights how European designers are better off than their American counterparts.

In January 2007, the famous British Brand Karen Millen filed an action against Dunnes Stores based on an unregistered Community design right in its clothing and commenced proceedings seeking an injunction and damages in the Irish High Court.[82] Dunnes Stores appealed to the Irish Supreme Court, which stayed the proceedings and referred two questions to the Court of Justice of the European Union ("CJEU").[83] The two questions were:

1) Whether the assessment of "individual character" should be based on a comparison between the contested design and any individual design that has previously been made available to the public, or between the contested design and any combination of known design features from multiple earlier designs; and

2) Whether the proclaimed right-holder is required to prove that the design has "individual character," or whether "individual character" is presumed, so long as the proclaimed right-holder merely indicates what elements constitute the "individual character" of the design.[84]

Property Organization ("WIPO") that allows a design owner to file a single international application and designate (i.e., extend protection) to over 66 countries that are a party to the Hague Agreement." *Id.*

[78] The act of making a design available to the public is called 'disclosure.' Disclosing a design and being able to prove it are key to design protection. *See Create your 'design protection strategy',* EUR. UNION INTELL. PROP. OFF. (EUIPO), https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union (last visited Dec. 6, 2021).

[79] *Id.*

[80] *See* Bretonniere & Fontaine, *supra* note 76, at 34.

[81] Karen Millen Fashions Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd, Case C-345/13 (E.C.J., June 19, 2014).

[82] *Id.*

[83] *Id.*

[84] *See The Court of Justice of The European Union Strengthens Unregistered Community Design Rights*, LADAS & PARRY (June 19, 2014), https://ladas.com/education-center/court-justice-european-union-strengthens-unregistered-community-design-rights/.

With respect to the two issues, the CJEU held that:

1) In order for a design to be considered to have individual character, the overall impression which that design produces on the informed user must be different from that produced on such a user, not by a combination of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually; and

2) In order for a Community design court to treat an unregistered design as valid, the right holder of that design is not required to prove that it has individual character within the meaning of Article 6 of that Regulation, but need only indicate what constitutes the individual character of that design, that is to say, indicates [sic] what, in his view, are the element or elements of the design concerned which give it its individual character.[85]

This decision clarified to designers that their unique designs qualify for unregistered design protection and significantly reduces the risk of an infringer successfully challenging the validity of a design based on the existence of individual elements of prior designs.[86] The fashion industry celebrated the decision as a massive win.[87]

a. Examples of European Countries

Individual member states protect EU design rights under national copyright laws. Still, EU members can implement their own design registration schemes as long as it complies with the EU Directive.[88] I will discuss the national laws in France, Italy and the United Kingdom, as they are home to the most prominent fashion houses and are regarded as the birthplaces of fashion.[89] I will also discuss the protection afforded to

i. France

France has long been the home to some of the world's most prominent fashion houses. Thus, it is no surprise that France's copyright system has consistently protected fashion designs.[90] Notably, The French Intellectual Property Code ("IPC") protects "original works of the mind, including works that reflect their author's personality.[91] The Code also expressly lists "the creations of the seasonal industries of dress and

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See* Witzburg, *supra* note 5, at 1144.
[89] *Id*. at 1145.
[90] *Id.*
[91] *Id.*

articles of fashion" as a protected work of the mind in Article L 112-2.[92] The term protection refers to the author's lifetime and 70 years after that.[93] However, an explicit limitation of the IPC is that it only protects registered designs that are new and have individual characters. The IPC does not protect unregistered designs, although such designs are protectable under the EU unregistered design regime.[94] Thus, many French designers face the challenge of showing the original character of their designs because fashion designs usually follow the current trends or mimic the work of previous designers, and therefore may lack originality.[95] In France, designs are granted protection on the date of creation, regardless of the status of the design's registration.[96] French courts have been known to adhere more strictly to the originality requirement for designs and have almost always ruled that commonplace designs are ineligible for copyright protection.[97]

ii. Italy

Italy also protects the work of Italian fashion designers under a national copyright system. The Italian Copyright Law (the "LDA") protects "works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theater or cinematography, whatever their mode or form of expression" and "[i]n particular, protection shall extend to . . . industrial design works that have [a] creative character or inherent artistic character."[98] In Italy, copyright protection does not depend on registration, but "sometimes it could be recommended, in particular for catalogs of those fashion products like sunglasses and garments that are mostly seasonal and for which the design registration may be too expensive or not cost-efficient."[99] Under LDA, fashion designers can seek an ex parte interim injunction to seize any copy of their designs with a creative and artistic value from the Italian courts and then ask for a permanent injunction and damages for unregistered works.[100] A designer's copyrights last for the designer's life plus seventy years after the designer's death.[101] In Italy, designs can also be protected with Italian design registration. The

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[92] Holger Gauss et al., *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws*, A.B.A, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/ (last visited Dec. 6, 2021).

[93] INTELL. PROP. CODE ART. L 123-1, (Fr.).

[94] *See* Julien Scicluna, *Protecting and enforcing design rights: France*, WORLD TRADEMARK REV. (Dec. 11, 2017), https://www.worldtrademarkreview.com/portfolio-management/protecting-and-enforcing-design-rights-france.

[95] Holger Gauss, Boriana Guimberteau, Simon Bennett & Lorenzo Litt, *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws*, A.B.A, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/ (last visited Dec. 6, 2021).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Law No. 633 of April 22, 1941, art. 25, Protection of Copyright and Rights Related to its Exercise (It.)

Italian Industrial Property Code covers designs registered with the Italian Patent and Trademark Office.[102] Like France, Italian national law does not protect unregistered design rights, but unregistered design rights can be protected by EU design protection, as discussed above.

iii. The United Kingdom

In the UK, copyright protection is governed under the Copyright, Designs, and Patents Act of 1988 ("CDPA").[103] Original artistic works obtain automatic copyright protection in the United Kingdom. The CDPA defines an artistic work as "a graphic work, photograph, sculpture, or collage (irrespective of artistic quality), a work of architecture (i.e., a building), or works of artistic craftsmanship."[104] Fashion designs fall under the category of works of artistic craftsmanship.[105] However, case law shows that an artist must meet a high threshold to show that a work is of artistic craftsmanship, making it challenging to assert fashion design protection under copyright law.[106] Under the CDPA, work is considered commonplace in the design field in question at the time of its creation if it is not original for the design right.[107]

The UK also has a national UK registered design regime ("UKRD"). The UKRD "mirrors the Registered Community Design in all substantive areas, including validity and infringement rules."[108] While the popularity of UKRD has waned since the introduction of the Registered Community Design protection in 2002, UK companies may need to rely on this protection after Brexit.[109] UK design law also provides for UK unregistered design rights (UCDs) under the CDPA, but it does not precisely match the Registered Community Design (RCDs) right. The discrepancy in the protections afforded to registered designs but not to unregistered designs has been a concern post-Brexit.[110]

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[102] *See Information/ Italian Design*, SOCIETA ITALIANA BREVETTI (SIB), https://www.sib.it/en/designs/design-registration-in-italy-and-the-eu/italian-designs/ (last visited Dec. 6, 2021).

[103] Copyright, Designs and Patents Act 1988, UK, https://www.legislation.gov.uk/ukpga/1988/48/contents (last visited Dec. 6, 2021). *See* Chapter 48, §4 specifically. *Id.*

[104] *Id.*

[105] *See* Iona Silverman, *Copyright and Fashion: A UK Perspective*, WORLD INTELL. PROP. ORG. MAG. (WIPO) (June 2014), https://www.wipo.int/wipo_magazine/en/2014/03/article_0007.html.

[106] *Id.* In addition, some believe that it may be possible for a one-off piece but may not for mass-products. *See* Michele Woods & Miyuki Monroig, *Fashion Design and Copyright in the US and EU*, WORLD INTELL. PROP. ORG. (Nov. 17, 2015), https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf.

[107] Copyright, Designs and Patents Act 1988, UK, https://www.legislation.gov.uk/ukpga/1988/48/contents (last visited Dec. 6, 2021).

[108] *See* Witzburg, *supra* note 5, at 1147.

109 *Id.*

[110] Ewan Grist & Patricia Collis, *Brexit and your design,* BIRD&BIRD (Jan. 2021), https://www.twobirds.com/en/insights/2016/uk/brexit-and-design-implications.

> Following the Brexit transition period on 31 December 2020, the Community design regime governed by Commission Regulation 6/2002 (the Community Design Regulation) ceased to apply in the UK. Accordingly, both Registered Community Designs (RCDs) and Unregistered Community Designs (UCDs) ceased to have effect in, provide protection in or be enforceable in the UK from that point (although their force and effect will of course continue in the EU). Instead, design protection in the UK is now solely governed by the UK's domestic design legislation, to which changes have been made to compensate for the loss of Community design protection in the UK.[111]

Importantly, "all RCDs that were registered and fully published at the end of the Brexit period were automatically cloned (at no cost to the holders) onto the UK design registry as equivalent national UKRDs. These cloned UKRDs retained the application, registration, and priority dates of their parent RCDs."[112]

To summarize, the copyright protections available to fashion designers in the U.S. relate to the artistic nature of clothing, but not the functional aspect, which can be challenging to navigate. Further, design patent requirements are challenging to meet due to the strict requirements and the temporal barriers (registration proceedings, etc.), which can affect the seasonal aspect of clothes. Trademarks are also challenging to navigate for brands that are not well established due to their lack of influence in the industry and the high costs to secure a trademark. The result of all of this is partial protection for clothing designs within the United States due to the lack of targeted regulations. Conversely, European and UK law automatically protects designs without registration or other formal processes. However, there is limited protection for designers who decide not to register, but the fact that designs are protected from the outset in Europe without any additional steps from the designer shows where the values of each system lie.

III. THE U.S.' ATTEMPTS TO ADOPT MORE FASHION-FORWARD IP STANDARDS

The U.S. may have been late to the fashion industry, but now that there are prominent U.S.-based designers, there should be a push to protect the IP developed within the borders. China is already projected to surpass the U.S. in terms of fashion and luxury goods consumption,[113] and Europe has always been ahead of the curve in terms of IP protection for designers. Congress has considered legislation to protect fashion designs several times over the last fifty years, dating back to the passing of the

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[111] *Id.*

[112] *Id.*

[113] *See* Lauren Thomas, *Global luxury sales are on track for a record decline in 2020, but business is booming in China*, CNBC (Nov. 11, 2020), https://www.cnbc.com/2020/11/18/china-to-become-the-worlds-biggest-luxury-market-by-2025-bain-s ays.html.

1976 Copyright Act.[114] The "original draft of the 1976 Copyright Act contained an additional title that would have acted as a design-protection clause for original designs of useful articles, providing up to ten years of protection for useful articles that were not deemed staple or commonplace."[115] This addition to the 1976 Act would have protected fashion designs in useful articles that were more original and creative. Unfortunately for U.S.-based fashion designers, the additional title was removed right before the 1976 Act was passed.

The United States became a party to the Berne Convention for the Protection of Literary and Artistic Works in 1989.[116] The Berne Convention deviated from the 1976 Copyright Act in a few ways. For example, it included automatic copyright protection, international protection for a work originating in a member state, and protection independent of that provided by the originating member state.[117] One of the most notable provisions was an IP owner's moral right to protection. Moral rights in copyright are viewed as rights of authors to preserve the integrity and dignity of their works. Specifically, authors had the right to prevent distortion of their work, control the work's publication, and withdraw a work after publication.[118] The Convention defines moral rights as "the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action concerning, the work that would be prejudicial to the author's honor or reputation."[119] The protection of moral rights in copyright law seems heavily reliant on general European copyright doctrine, which recognizes literary and artistic works as "inalienable extensions of the author's personality."[120] When the United States became a party to the Convention, U.S. copyright law did not recognize moral rights. The U.S. copyright apparatus had only recognized an author's economic rights in their designs.[121]

In response to criticism that the United States still did not provide sufficient moral rights protection to authors even after the Berne Convention, members of

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[114] *See* Rocky Schmidt, Comment, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861, 865 n.30 (1983) (collecting seventy-three pieces of legislation introduced in Congress from 1914 to 1983 on the topic of fashion design protection, none of which ever became law). *See also* Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); Design Piracy Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

[115] *See* Katelyn N. Andrews, *The Most Fascinating Kind of Art: Fashion Design Protection as a Moral Right*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 188, 189–90, 189 n.2 (2012).

[116] *Berne Convention*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/berne_convention#:~:text=The%20United%20States%20became%20a,by%20citizens%20of%20other%20members. (last visited Apr. 1, 2022).

[117] *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886),* WORLD INTELL. PROP. ORG. (WIPO), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Dec. 6, 2021).

[118] *Id.*

[119] *Id.*

[120] *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994).

[121] *See* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945–46 & 945 n.3 (1990).

Congress introduced two moral-rights-centered bills in 1989 and 1990.[122] One of these bills, the Visual Artists Rights Act ("VARA"), set up protections similar to the Berne Convention. VARA gave artists the right

> (2) To prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor; the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and (3) subject to the limitations set forth in section 113(d), shall have the right (A) to prevent any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[123]

While the provisions outlined in VARA were a step in the right direction, they still fell short of protecting the works of many fashion designers. Many of the moral rights outlined in the legislation only apply to works of visual art, such as paintings, drawings, prints, or sculptures that either exist in a single copy or quantities of 200 or fewer. [124]

The Innovative Design Protection Act of 2012 ("IDPA") was established to amend the Copyright Act's definition of *useful* articles to include apparel.[125] The IDPA proposed to grant protection to fashion designs for three years. The IDPA also prohibits a claim that a fashion design was copied from a protected design if it "(1) is not substantially identical in overall visual appearance to and as to the original elements of a protected design, or (2) is the result of independent creation."[126] However, the debate continues on whether extending copyright protection to fashion designs will help or hurt the U.S. fashion industry. Some heads of fashion companies have lauded "the IDPA as a tool that may finally level the playing field in the counterfeit goods and design infringement cases that have been exploding in recent years due to the ease at which individuals are able to steal designs."[127] While others contend that instead of reducing innovation, copying benefits the U.S. fashion industry.[128] According to Kal Raustiala and Christopher Sprigman, "piracy paradoxically benefits designers."[129] The piracy paradox is the notion that copying promotes innovation and benefits

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[122] S. 1198, 101st Cong., 135 CONG. REC. S6811-13 (daily ed. June 16, 1989); H.R. 2690, 101st Cong., 136 CONG. REC. H3111-16 (daily ed. June 5, 1990).
[123] 17 U.S.C. § 106A(a)(2)–(3) (2012).
[124] *Id*. at § 101 (2012).
[125] *See* Donahue, *supra* note 46.
[126] *See* Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).
[127] Kelly Gruchalla, *Intellectual Property Law: Failing the Fashion Industry and Why the "Innovative Design Protection Act" Should be Passed*, SETON HALL L. STUDENT SCHOLARSHIP 133, 135 (2014).
[128] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).
[129] *Id.* at 1722.

originators.[130] The apparent piracy paradox is likely the reason why no additional action has taken place since the introduction of the IDPA. Critics of the IDPA contend that the further extension of copyright protection to fashion designs will only increase the legal costs for fashion designers as they would need to consult with lawyers to prevent copyright infringement claims.[131] Critics are also concerned about the potential impact on consumers, as fashion designers are likely to increase prices to pass down their increased operating costs to customers.[132]

IV. DOES THE FASHION INDUSTRY NEED MORE PROTECTION?

We have discussed the state of IP protection in the U.S. and Europe and how both systems can help and hurt fashion designers but do fashion designers need help? Do they want more robust protections? Would some up-and-coming designers be better off if they could create designs inspired by another designer's work and not worry about being sued?

Some people in the fashion industry do not believe the industry needs stronger protections and that fashion thrives because of rampant copying.[133] But this analysis tends to focus on the influential, established fashion designers and fast-fashion knockoffs. But not on less-established designers who might have their creative ideas stolen by more well-known designers who can easily get away with infringement and significantly increase their profit margins.[134]

In the knockoff world, the cost of creating fashion designs is low. As a result, many people argue that no one is stealing customers or profits from the copied brand.[135] For example, suppose someone sees their favorite celebrity on Instagram wearing a Birkin bag (an exclusive purse made by Hermes) and wishes to buy it. In that case, they may travel to a Hermes store or another authorized reseller (it's common for consumers to purchase second hand Birkin bags). Upon arrival, they immediately realize they have not done sufficient research on the bag's price. The shopper will conclude that they cannot afford the Birkin bag they saw on Instagram. However, after leaving the store, they see a knockoff Birkin bag being sold on the street for a fraction of the price

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[130] *Id.* *See also* Keymeulen & Nash, *supra* note 66.
[131] *See* Woods & Monroig, *supra* note 106.
132 *Id.*
[133] Raustiala & Sprigman, *supra* note 128, at 1687–89.
[134] *See* Chavie Lieber, *Fashion brands steal design ideas all the time. And it's completely legal*, VOX (Apr. 27, 2018), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m; Matthew Perlman, *How Big Fashion Brands Commonly Steal Designs and Get Away With It*, THE COURTROOM (June 17, 2021), https://thecourtroom.org/how-big-fashion-brands-commonly-steal-designs-and-get-away-with-it/; Sharon Pruitt-Young, *Why Indie Brands Are At War With Shein And Other Fast-Fashion Conpanies*, NPR (July 20, 2021), https://www.npr.org/2021/07/20/1018381462/why-indie-brands-are-at-war-with-shein-and-other-fast-fashion-companies; Shanti Das, *They took my world': fashion giant Shein accused of art theft*, THE GUARDIAN (Mar. 6, 2022), https://www.theguardian.com/artanddesign/2022/mar/06/they-took-my-world-fashion-giant-shein-accused-of-art-theft.
[135] *See generally* Raustiala & Sprigman, *supra* note 128.

and buy it. In this instance, the knockoff seller did not necessarily steal a customer from Hermes because the consumer was never really a Hermes customer.

For this reason, high-end, well-established brands may believe that more legal protections will not help because they are not losing money or customers to knockoff sellers. Many high-end brands target a specific demographic. However, less-established, up-and-coming designers who are disproportionately harmed by illegal copying and the unlicensed sale of knockoff goods would benefit enormously from laws designed to protect them as they build their brands. Furthermore, while established brands may think they are currently not harmed by illegal copying, there may be a time in the near future where they will need more robust protection for their designs as well. Technology will only continue to develop, and the entire fashion industry will need to adapt to more tech-savvy customers.

V. THE FASHION INDUSTRY TODAY

Today, the fashion industry has gone beyond walking into a brick-and-mortar store and purchasing a sweater from Loro Piana or a tote from Louis Vuitton. While those products and experiences are still an integral part of the fashion business, consumers are engaging with the fashion industry in new ways. Malls and other brick-and-mortar storefronts are closing at an alarming rate, and the COVID-19 pandemic has exacerbated this phenomenon.[136] Contemporary designers are opting only to create digital storefronts and marketplaces to avoid hefty startup costs and appeal to a demographic that loves to shop online.[137] Social media platforms like Instagram allow users to take advantage of the infamous Instagram algorithm and other built-in advertising services. Many social media platforms have influencers that promote fashion brands and provide links to purchase the clothing they are wearing. Other platforms like Grailed allow secondhand sellers to market their collections while also giving consumers an inside look into other parts of their lives. All of these changes, good or bad, have already and will continue to change the way brands, both small and large, approach their businesses.

This paper outlines how a combination of copyrights, trademarks, and even design patents protect brand names, logos, drawings and images, and other elements that make up a design. Generally, the product designers own the design rights and the rights to the garment pattern and physical appearance, but what about the design in digital form? When a physical garment is recreated digitally, the original designer's

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[136] Layla Ilchi, *All the Major Fashion Brands and Retailers Severely Impacted by the COVID-19 Pandemic,* WOMEN'S WEAR DAILY (WWD) (Dec. 24, 2020), https://wwd.com/fashion-news/fashion-scoops/coronavirus-impact-fashion-retail-bankruptcies-120369 3347.

[137] *See* Amish Shah, *Digital marketplaces: Examples, benefits, strategies*, THE FUTURE OF CUSTOMER ENGAGEMENT & EXPERIENCE, https://www.the-future-of-commerce.com/2021/05/12/digital-marketplaces/ (last visited Apr. 1, 2022).

ownership rights are not automatically extended to the digital version.[138] Here is a common scenario.

A designer hands their design over to a 3D designer, who then digitally recreates the design for other purposes.[139] At this point, the ownership of the 3D design now resides with the software license holder and not the original designer.[140] Ownership can be transferred back to the original designer if there's a formal agreement in place and if the agreement allows for the transfer.[141] Short-term licensing contracts could also be used to enable the original designer to use the 3D garment for a determined period of time in specified ways. But for unsophisticated, uninformed, or under-resourced designers, this could quickly turn into a situation where the original designer loses their rights. In these instances, the original designer risks losing the right to recreate their design if they do not retain the IP when translating into 3D digital format. Rushing into the digital fashion arena could prove to be lucrative for some designers. Still, without thinking about the legal implications around ownership, there is a risk that many original designers could lose out.

Sometimes when fashion and technology meet, the IP ownership lines blur for the parties involved. Designers use software to experiment with their designs – changing lengths, sizes, colors, and fabrics with just a few mouse clicks. Notable fashion giants like Adidas are working with innovative software shops like Browzwear to transition to 3D design.[142] The software used for these projects is not likely eligible for patent protection or have a very limited scope.[143] Given "the huge economic growth and innovative potential of technology companies that develop products that combine hardware and software, and of the software industry in general, suggest the time is ripe to rethink IP statutes and bring them into line with present-day commercial realities."[144] Interestingly, the end product from these partnerships could be covered by copyright or other design rights, which could be owned by any party involved – software programmer, their employer, the designer, or the consumer – depending on how the agreements (if any) are structured.

Some designers are using technology to remotely and digitally take designs and create samples to virtually dress avatars and consumers from the comfort of their homes.[145] These processes help reduce waste of materials and cut shipping time and costs, which allows an environmentally unfriendly industry to embrace more

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[138] *See* Brooke Roberts-Islam, *Digital Fashion: Who Really Owns The IP Rights?*, FORBES (Nov. 3, 2020), https://www.forbes.com/sites/brookerobertsislam/2020/11/03/digital-fashion-who-really-owns-the-ip-rights/?sh=65bd205a22bf.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Adidas x Browzwear*, *An Innovative Design Sprint Aimed At Pushing the. Boundaries of Fashion Design to Explore 3D Prototyping Software,* FASHION INST. OF TECH, https://dtech.fitnyc.edu/webflow/projects/adidas-browzwear.html (last visited Dec. 6, 2021).

[143] *See* Ania Jedrusik & Phil Wadsworth, *Patent protection for software-implemented inventions*, WORLD INTELL. PROP. ORG. (WIPO) (Feb. 2017), ,https://www.wipo.int/wipo_magazine/en/2017/01/article_0002.html.

[144] *Id.*

[145] *See* Zoe Mutter, *Tech shapes the future of fashion*, AV MAG. (Aug. 27, 2020), https://www.avinteractive.com/features/technology/tech-shapes-future-fashion-27-08-2020/.

sustainable practices.[146] In 2030, the global clothing and textile industry is expected to use 50% more water, emit 63% more greenhouse gases, and produce more waste than in 2015.[147] Hopefully, technological advances in the fashion industry may help to curb some of these staggering figures.

In hopes of returning to pre-pandemic life, however that may look, fashion giants are exploring new ways to innovate, especially because many factories have closed, and at least some global travel restrictions will remain in place for the foreseeable future. Many retailers anticipate that at least some of their consumers will choose to shop from home even after the pandemic ends.[148] Recall, designers can transfer or license their physical or digital creations to sampling companies to transform them to 3D. Technological advances in custom optics, artificial intelligence, body and product image capturing, mapping, and configuring have enabled companies to seek patent protection for their stage in the design process.[149] The resulting 3D image rights presumably belong to the original designer,[150] but who is to say?

During the week of March 26, 2020, Tokyo and Shanghai Fashion weeks were held virtually, given the circumstances imposed by the COVID-19 pandemic.[151] Spectators were able to view events via YouTube and other streaming services. High-end brands live-streamed runway shows from studios across the globe and asked various influencers to Zoom into the event wearing their collections. London Fashion Week was virtual and took digital catwalks to another level. On June 5, 2020, Bigthinx, a technology company known for its' body scan' avatar solution created from just two photos and a selfie, live-streamed the partnership with Fashinnovation's first 3D Virtual Fashion Show.[152] Digital designers and artists provided the 'clothing,' presumably by way of software licenses, and Bigthinx then created and 'dressed' avatars and

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146 *Id.*

147 Sabrine Loetscher, *Changing fashion: The clothing and textile industry at the brink of radical transformation,* WWF (Sept. 2017), https://www.wwf.ch/sites/default/files/doc-2017-09/2017-09-WWF-Report-Changing_fashion_2017_EN.pdf.

148 *Perspectives on retail and consumer goods*, MCKINSEY & COMPANY 1, 11 (Aug. 2020), https://www.mckinsey.com/~/media/mckinsey/industries/retail/our%20insights/perspectives%20on%20retail%20and%20consumer%20goods%20number%208/perspectives-on-retail-and-consumer-goods_issue-8.pdf "Many consumers say they plan to continue shopping online even when brick-and-mortar stores reopen'). In fact, "while many [consumer habits during the pandemic] are seen as a work-around crisis, many at-home solutions to regular activities will likely be adopted for the long run." *Id.*

149 *Digital Fashion – The Emperor's New Clothes or Rags to Riches?*, LEXOLOGY (June 11, 2020), https://www.lexology.com/library/detail.aspx?g=98e679ff-c046-4d57-a762-17f0258a57a8.

150 *Id.*

151 *See* Janelle Okwodu, *Tokyo Fashion Week Is Coming to a Laptop Screen Near You*, VOGUE (Mar. 16, 2020), https://www.vogue.com/article/tokyo-fashion-week-fall-2020-livestreams; *see also* Annachiara Biondi, *The future of fashion week? Look to Shanghai*, VOGUE BUSINESS (Oct. 8, 2020), https://www.voguebusiness.com/technology/shanghai-fashion-week-spring-summer-21.

152 BIGTHINX, *#Virtual Runway Show by FASHIONNOVATION Worldwide Talks 2020 | Powered by BIGTHINX*, YOUTUBE (Jun. 6, 2020), https://www.youtube.com/watch?v=6yi60lPp-Nc.

subsequently applied the appropriate lighting, animation, etc.[153] Fashinnovation broadcasted the end result. While this collaboration led to a groundbreaking event, there could be issues if one of the owners wants to use the creations co-owned by one or more of the other parties in the future.

During the pandemic lockdown, Travis Scott hosted a virtual, socially distant concert in the popular Fortnite video game, which attracted 12.3 million concurrent players and has received over 53 million views on YouTube.[154] Players who virtually attended the event could make in-game purchases of clothing merchandise for their avatar. While the details of this collaboration detail have not been released, it would be reasonable to assume that Travis Scott's legal representatives negotiated a cut based on the IP he shared with the concert (music, merchandise, etc.). Still, it is unclear as to who owns what in this scenario. Other gaming collaborations include Moschino partnering with The Sims to offer a virtual clothing pack.[155] The Animal Crossing video game also allowed players in quarantine to submit their fashion designs for possible use in the game.[156] Balenciaga partnered with a video game company to release a bespoke video game to showcase its fall collection.[157] While these collaborations seem cool and innovative, they raise several questions. Will consumers be happy if the merchandise they created dies with their character? Are they entitled to use the merchandise outside of the game? Again, much will depend on the respective game owners' terms and conditions. Still, it is unlikely the average gamer will have read the small print very carefully before handing over their designs or hard-earned money, leading to potential disputes.

CONCLUSION

The law will take time to catch up whenever significant changes occur within an industry, especially where technology can have a considerable impact. However, one could argue that laws governing IP in the fashion industry were incomplete. The addition of a digital dimension increases the complexity and widens the legal gap that

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[153] Ludmilla Intravaia, *Fashion Tech Recap of London Fashion Week Spring-Summer 2021*, LE BOUDOIR NUMERIQUE (Oct. 15, 2020), https://boudoirnumerique.com/magazine-en/fashion-tech-recap-of-the-london-fashion-week-spring-summer-2021-59235.

[154] Anthony Ha, *Fortnite hosted a psychedelic Travis Scott concert and 12.3M people watched,* TECH CRUNCH (April 24, 2020), https://techcrunch.com/2020/04/24/fortnite-hosted-a-psychedelic-travis-scott-concert-and-12-3m-peopl e-watched/.

[155] Emilia Petrarca, *The Sims is Now High-Fashion,* THE CUT (Apr. 11, 2019), https://www.thecut.com/2019/04/moschino-the-sims-collaboration.html.

[156] Cass Marshall, *Animal Crossing keeps growing a vibrant fashion community*, POLYGON (Sep. 11, 2020), https://www.polygon.com/2020/9/11/21432219/animal-crossing-fashion-influencers-designers-dress-sharing-community.

[157] Barry Samaha, *Balenciaga Launches a Video Game for its Fall 2021 Collection,* HARPERS BAZAAR (Dec. 7, 2020), https://www.harpersbazaar.com/fashion/fashion-week/a34892239/baleciaga-video-game-fall-2021-collection/.

needs to be filled. Collaborations between fashion brands are not new developments per se, but they are becoming more commonplace,[158] and they can also raise questions about ownership.

There are difficult questions that need to be answered. For example, who owns the rights in a digital garment? If a design exists virtually but is copied in reality, will that be an infringement? How can digital infringements be 'seized' from the infringer? When considering fashion events or gaming events that feature fashion designs, who will own the rights to the video and or audio recording of the event when the event was created rather than staged? What about the image rights of those individuals who appear in the event as themselves or avatars?

Some IP law professionals have been able to help clients navigate these nuanced questions as we see more cross-pollination between tech and fashion.[159] However, there should be hard and fast rules in place to address these nuances, especially for those who wish to enter the industry but may not have the resources to retain an experienced IP attorney. Up-and-coming designers should understand their rights before entering this arena, mainly because creatives are often left out of the conversation once they have completed their designs. Even if attorneys manage to address the concerns of their designer clients at the moment, there may be negative implications down the line, and legislation in support of creators can help fill these gaps. There is still much work to be done if we seek a more equitable space for designers to create – especially up-and coming designers who have been taken advantage of by the more prominent fashion brands. U.S.-based designers deserve the same support and protections as other international companies whose success relies heavily on harnessing intellectual property. In the last decade, we have witnessed tech and pharmaceutical companies move their operations abroad because of the lack of support and protection they receive in the U.S., despite their contributions to U.S. markets.[160] U.S.-based fashion designers may decide to follow suit, and if they do, it would be a massive blow to U.S. markets and American culture.

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[158] *See The Big Business of Designer x Mass-Market Collaborations*, TFL (Apr. 15, 2018), https://www.thefashionlaw.com/the-business-of-designer-x-mass-market-collaborations/#:~:text=These%20diffusion%20or%20%E2%80%9Cbridge%E2%80%9D%20lines,and%20then%20taken%20up%20decades (Noting in November 2004, H&M offered an exclusive collection with the Chanel and Fendi that sold out within an hour. Following the success of that collection, H&M also partnered with Maison Margiela, Marni, Balmain, and other brands.) For a discussion on the current trend of collaborations see Nicholas See, *The best fashion collaborations of 2022 (so far)*, ESQUIRE (Apr. 6, 2022), https://www.esquiresg.com/best-fashion-collaborations-2022-so-far/; *These are the new fashion collaborations everyone is talking about for 2022*, THE GLOSSARY (Jan. 13, 2022), https://theglossarymagazine.com/fashion/fashion-collaborations-2022/; Ben Schott, *From Target to Supreme, Branding's Latest Obsession Is Collaboration*, BLOOMBERG (Jan. 23, 2022), https://www.bloomberg.com/opinion/articles/2022-01-23/from-target-to-supreme-branding-s-latest-obsession-is-collaborations.

[159] *Fashion Industry*, KLEMCHUK LLP, https://www.klemchuk.com/industries/fashion-industry-legal-solutions (last visited Apr. 1, 2022)

[160] *See* Michael Sainato, '*When is this going to end?': US factory town devastated by jobs moving overseas,* THE GUARDIAN (June 20, 2021), https://www.theguardian.com/business/2021/jun/20/west-virginia-viatris-plant-jobs-overseas.