ARTICLES

Iantha Haight and Annalee Hickman Pierson 219

The Persistent Treatise [2024-11]
Dana Neacsu and Paul Douglas Callister 257

Beyond the Completion Fallacy: Mission-Based Rightsizing of Academic Law Library Collections [2024-12]
Amanda Bolles Watson 285
American Association of Law Libraries

Editorial Team
Editor: Benjamin J. Keele
Director of Marketing & Communications: Heather Haemker
Production: ALA Production Services

2024–2025 Executive Board
Cornell H. Winston, President; Jenny Silbiger, Vice President/President-Elect; Alex Zhang, Secretary; Miriam Childs, Treasurer; June Hsiao Liebert, Immediate Past President; Kristina Alayan, Shamika D. Dalton, Andre Davison, Diana J. Koppang, Anna Russell, Abby Walters, Board Members; Vani Ungapen, Executive Director.

2024–2025 Law Library Journal Editorial Board
Benjamin J. Keele, Chair; Luis Acosta, Susan Azyndar, John Cannan, Valeri Craigle, Susan Nevelow Mart, Shawn G. Nevers, Sarah C. Slinger, Members; June Hsiao Liebert, Executive Board Liaison; Heather Haemker, Staff Liaison.

Law Library Journal® (ISSN 0023-9283) is published quarterly by the American Association of Law Libraries, 230 W. Monroe St., Suite 2650, Chicago, IL 60606. Telephone: 312.939.4764; email: hhaemker@aall.org.

Advertising Representatives: Innovative Media Solutions, 320 W. Chestnut Street, PO Box 399, Oneida, IL 61467. Telephone: 309.483.6467; email: bill@innovativemediasolutions.com.

All correspondence regarding editorial matters should be sent to Heather Haemker, Director of Marketing & Communications, AALL, 230 W. Monroe St., Suite 2650, Chicago, IL 60606. Telephone: 312.205.8038; email: hhaemker@aall.org.

This publication is provided for informational and educational purposes only. The American Association of Law Libraries does not assume, and expressly disclaims, any responsibility for the statements advanced by the contributors to, and the advertisers in, the Association's publications. Editorial views do not necessarily represent the official position of the Association or of its officers, directors, staff, or representatives. All advertising copy is subject to editorial approval. The Association does not endorse or make any guarantee with respect to any products or services mentioned or advertised in the publication.

Notice
All articles copyright © 2024 by the American Association of Law Libraries, except where otherwise expressly indicated. Except as otherwise expressly provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use or for any other educational purpose provided that (1) copies are distributed at or below cost, (2) author and journal are identified, and (3) proper notice of copyright is affixed to each copy. For articles in which it holds copyright, the American Association of Law Libraries grants permission for copies to be made for classroom use or for any other educational purpose under the same conditions.
# Table of Contents

## General Articles

<table>
<thead>
<tr>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
</table>

## Review Article

<table>
<thead>
<tr>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
</table>
Legal Capital is widely credited with pioneering the introduction of the balance sheet and equity solvency tests for corporate distributions, as well as other reforms in the Model Business Corporation Act and corporation statutes in over 30 states. This edition adds new historical material, updates the statutes and case law on dividends and other distributions in the U.S., and compares the evolution of legal capital in countries around the world.
State Strategies for Fair E-Book Licensing: Lessons from the Library E-Book War*

Iantha Haight** and Annalee Hickman Pierson***

This article reviews how the rise of licensing digital materials destroyed the protection libraries receive from the First Sale Doctrine and endangers library collections of the future. It describes the various government attempts to regulate the library e-book industry, including Maryland’s statute and the accompanying legal battle in AAP v. Frosh. This article makes suggestions for lawmakers and library advocates regarding legislative action, attorney general lawsuits, and improved library advocacy training to protect future robust library collections and publishers’ rights.

Implications for Practice

1. Publisher e-book licensing regimes increase library costs-per-checkout, prevent libraries from preserving material, and occasionally deny library access to titles altogether via embargoes.
2. Maryland’s legislature enacted a statute requiring publishers to sell e-books and digital audiobooks to libraries “on reasonable terms,” but in AAP v. Frosh, the federal court for the District of Maryland quickly struck down the statute on statutory preemption grounds. Other states have considered enacting similar statutes.
3. Maryland made mistakes in how it drafted its statute and defended the subsequent litigation brought by publishers, but publishers marshal more formidable resources than public libraries, including regulatory capture in the U.S. Copyright Office. An incorrect interpretation of two older copyright cases has made it difficult for states to legislate against publisher embargoes.

* © Iantha Haight and Annalee Hickman Pierson, 2024
** Deputy Director, Howard W. Hunter Law Library, Brigham Young University, Provo, Utah, haighti@law.byu.edu, https://orcid.org/0000-0003-2788-3459.
*** Head of Reference and Faculty Services, Howard W. Hunter Law Library, Brigham Young University, Provo, Utah, hickmana@law.byu.edu, https://orcid.org/0000-0002-5584-7458. The authors would like to thank the participants of the Fourteenth Annual Boulder Conference on Legal Information: Scholarship and Teaching, July 15, 2022, for their helpful comments.
4. A statute regulating e-book licenses set in contract law, such as the version drafted by Library Futures, has a much greater chance of surviving a legal challenge than the Maryland version.

5. Librarians should improve their advocacy on this issue and consider making the case for state attorneys general to band together and litigate this issue if necessary.

Introduction .............................................................................................................. 220
How E-Book Licensing Endangers Library Collections ................................................ 222
The History of Traditional Library Lending and the First Sale Doctrine Under
U.S. Copyright Law .................................................................................................... 222
The Rise of Licensing and Publisher Control ............................................................... 225
High Cost Per Checkout .............................................................................................. 226
Preservation .................................................................................................................. 226
Embargoes ................................................................................................................... 228
A Detailed Legislative History of the Multitude of State Efforts ........................................ 229
Maryland ....................................................................................................................... 230
Maryland's Statute ...................................................................................................... 230
Maryland's Defense ..................................................................................................... 231
Judge Boardman's Opinions ....................................................................................... 233
Other States' Proposed Legislation ............................................................................... 233
New York .................................................................................................................... 234
States' Proposed Legislation Pre-Maryland-Litigation .................................................. 235
States' Proposed Legislation Post-Maryland-Defeat .................................................... 239
Congressional Interest in the E-Book Industry .............................................................. 242
Lessons Learned from Maryland's Litigation ............................................................. 243
Copyright Preemption is a High Hurdle ........................................................................ 243
Libraries and Publisher Legal Firepower: David vs. Goliath ........................................ 246
Librarians Need to Be Better Advocates ..................................................................... 247
Data Can Make a Difference ...................................................................................... 249
Libraries Have Support in State Legislatures ............................................................... 250
Moving Forward to Protect Library Collections .......................................................... 251
Library Future's Model Statute .................................................................................... 251
Antitrust ....................................................................................................................... 253
State Attorney General Action .................................................................................... 255
Conclusion ................................................................................................................... 256

Introduction

Public libraries throughout the United States provide access to millions of books and other materials every year to patrons who could not otherwise afford them. The number of digital resources, including e-books and audiobooks, libraries provide to the
Public access to digital resources became essential during the COVID-19 pandemic when most libraries were required to shut their doors. E-books and audiobooks provide many other benefits including accessibility for the visually impaired and those unable to travel to libraries. Checkouts are structured so that patrons cannot incur late fees. Libraries have relied on the First Sale Doctrine for over a century as legal justification when lending out print books and other tangible materials to library patrons, but the First Sale Doctrine does not apply to digital resources. Instead, libraries must purchase licenses for digital resources like e-books from publishers and via third parties to provide access to the e-book for their patrons. These licenses come with strings attached, often limiting the number of patrons who can access the book at a time and the length of time the library “owns” the book. Licensing conditions make e-books more costly for libraries to provide than print books, decreasing the number of resources and services libraries can provide their communities and leaving libraries without anything tangible in their collections when the licenses expire.

Yet publishers are reaping cost savings by not having to print physical books. Some publishers embargo popular new titles, forcing libraries to wait before they can license a new book or audiobook for patrons, something that was not possible with print books. Publishers argue their pricing models are necessary for self-preservation, but they fail to provide support for this contention. Library expenditures for e-books under these models are not sustainable over the long term. Library budgets will be forced to make dramatic cuts, leaving both the public—and, ironically, the publishers who rely on library spending—poorer.

\[1\] Congress seldom passes copyright legislation, and when it does, it usually favors rights-holders.\[3\] State legislatures have been acting to fill in that gap. At least 10 states in the last three years have proposed legislation with the goal of regulating publishers’ discriminatory selling practices against libraries. One state, Maryland, enacted a statute. The Association of American Publishers (AAP) and the Authors Guild quickly fought back against the Maryland statute with a lawsuit in federal district court. Judge Deborah L. Boardman, though sympathetic to the rationale underpinning the statute, granted the publishers’ motion for a preliminary injunction on federal copyright preemption grounds. The lawsuit was resolved in favor of the publishers, and other states considering similar legislation have apparently abandoned their similar proposals. Renewed efforts are underway to draft a new statute that avoids the legal barriers that derailed Maryland’s statute.

---

2. Throughout this article, the term “e-books” includes audiobooks but does not include other media, such as streaming or digital video.
Maryland’s legislators should be commended for their brave efforts to protect robust library collections for their constituents, especially the disadvantaged. Despite being unsuccessful, the Maryland statute and the resulting litigation taught us important lessons, including the following: federal copyright law can be weaponized to discriminate against libraries; publishers have more legal firepower than libraries and state governments; libraries have extensive public support from important groups, including authors; and librarians and state governments need more training on how to best advocate for libraries. Despite the challenges, libraries and their advocates have options moving forward. This article first analyzes the history of the First Sale Doctrine and why licensing creates a significant danger to public access to information and culture. Next, it discusses the various state attempts to regulate the library e-book industry, including the enacted legislation in Maryland, the subsequent lawsuit, and other states’ proposed legislation. Then, it discusses the lessons learned from Maryland’s statute and the resulting litigation. Lastly, it considers how libraries and their advocates can move forward, including other statutory options for states to protect library collections, antitrust, and state attorney general action.

How E-Book Licensing Endangers Library Collections

The History of Traditional Library Lending and the First Sale Doctrine Under U.S. Copyright Law

“Everyone has the right to freedom of opinion and expression; this right includes freedom . . . to seek, receive, and impart information and ideas through any media and regardless of frontiers.”
—Universal Declaration of Human Rights

The purpose of public libraries is to provide public access to information for education, enrichment, and development. While libraries provide many other valuable community services, information access is the fundamental reason public libraries exist. It is difficult for us today to appreciate how radical the idea used to be of a library providing free information access to all members of a community, regardless of their wealth and privilege. The principle of community access to information provides the bedrock foundation for economic success and innovation, individual participation in


7. See U.S. BUREAU OF EDUCATION, 1 PUBLIC LIBRARIES IN THE UNITED STATES: 1876 REPORT, 477 (1876).
democratic government, and cultural development and appreciation. The need for public access to information has only become increasingly more vital as the global information economy has grown. Societies, families, and individuals without widespread information access will face greater struggles to survive and thrive without the means to participate in an economy built on knowledge and information.

¶5 In this digital age where anyone with a cell phone has extensive access to entertainment and information, libraries continue to provide access to resources that have significant value beyond what can be gained from using the open internet alone. Importantly, libraries provide access to books, news, and other resources that are protected by copyright and not freely available. Libraries strive to provide books and resources on a variety of viewpoints and historical issues that readers may not otherwise encounter. Resources like quality books lay the foundation for an educated and informed citizenry and provide critical building blocks for childhood literacy. Unfortunately, many individuals and families are hard-pressured to provide the necessities and struggle to afford quality reading materials.

---

8. See, e.g., Wayne Bivens-Tatum, Libraries and the Enlightenment 100 (2012) (“With [U.S.] citizenship came the necessity of making political choices, and good citizens need to be educated about their society and its government to make those choices responsibly. We have seen this line of thinking in [Benjamin] Franklin, who believed that the diffusion of knowledge through libraries helped create politically aware and democratic citizens.”). See also John Palfrey, Libraries Matter More Than Ever in the Age of Google, Knight Found. (June 2, 2015), https://knightfoundation.org/articles/palfrey-libraries-matter-more-ever-age-google/ [https://perma.cc/3AA-DP9T] (“Libraries provide access to the skills and knowledge necessary to fulfill our roles as active citizens.”).


Despite the importance of libraries to their communities, many people have become complacent about libraries and library resources. That complacency is at least partly driven by the fact that, from the outside, libraries appear as stable as the buildings they are housed in. Most people who grew up in the United States are accustomed to having a well-stocked public library nearby. Libraries, however, have always been fragile. Budgets and resources have always been under pressure, and now there is a new threat to library collections and budgets: digital licensing. One of the greatest threats libraries face today is the direct result of the shift away from library ownership of physical resources to licensing digital resources.

The rights attached to the ownership of a physical book or a CD differ significantly from the rights attached to a digital license for an e-book or a digital audiobook in critical ways that detrimentally affect libraries. U.S. copyright law reserves a bundle of six rights exclusively for the copyright owner, which include the right in section 106(3) “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” This provision appears to forbid selling or lending books and other resources of any kind that remain under copyright protection, even between family members or neighbors. But the long-standing legal doctrine of first sale makes it possible for the lawful owners of copyrighted books to lend or sell as they please. The doctrine provides an exception: “[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” The First Sale Doctrine makes libraries possible.

Libraries in the United States have relied on the codified version of the First Sale Doctrine for over a century and an unwritten, common-law version of the doctrine

14. Susan Orlean, The Outlandish Idea of a Free, Public Library, The Atlantic (Dec. 5, 2018), https://www.theatlantic.com/membership/archive/2018/12/outlandish-idea-free-public-library/577456/ [https://perma.cc/VK8L-W532] (“We’re so used to the idea that these places exist that we take them for granted and pay little heed to what complex, extraordinary, resource-rich places they are. . . . It’s quite an accomplishment, and one that is easy to underappreciate.”).


16. 17 U.S.C. § 106(3) (2020). The full list of rights are: “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”


for even longer. Unfortunately for libraries, the First Sale Doctrine is a product of the physical world that has failed to carry over into the digital realm. Libraries have felt as if the rug was pulled out from under them as publishers aggressively took advantage.

The First Sale Doctrine is the result of a pragmatic view of personal property. Historically, for print books and other personal property (chattels), physical possession has been “a form of title.” Whoever had the book, owned the book. This fact of course made lending risky. Medieval libraries frequently chained library books to desks to prevent patrons from removing books from the library. However, the legal right of book owners and libraries to lend or sell their books and manuscripts to others was never questioned. Early copyright laws controlled only the production and sale of copies. No restrictions were ever placed on the disposal or control of copies once they had been legally produced and vended to the public apart from books that were banned for political or religious reasons. A publisher trying to control the sale price of copies of its books after the first sale led to the Supreme Court affirming the First Sale Doctrine in Bobbs-Merrill Co. v. Straus.

The Rise of Licensing and Publisher Control

Public libraries now spend on average from 25 percent to 40 percent of their materials budgets on digital resources including e-books and audiobooks, a number that is growing every year. Because libraries do not “own” a licensed work, the First Sale Doctrine is not triggered. Library digital resource acquisition and lending are based on contracts between the library and the provider, a legal usurpation of rights that has been accurately described as “contractual override.” The publisher has the power to set the terms. Individual libraries have little or no bargaining power.

The rise of licensing digital resources created three distinct new challenges for libraries: (1) high cost per checkout, (2) preservation, and (3) embargoes.

---

22. Id.
23. L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 909, 920 (2003).
25. LIBRARY JOURNAL, U.S. PUBLIC LIBRARY BUDGET SURVEY RESULTS 2023 at 5, downloadable at https://www.libraryjournal.com/story/research [https://perma.cc/GF96-WF32]. The larger the library, the larger the amount spent on digital materials. Id.
High Cost Per Checkout

¶11 Digital resources are more expensive for libraries than physical resources like print books. Libraries can purchase a print book for the same price a consumer pays and lend that book dozens of times or more. However, libraries generally must pay amounts much higher than retail prices for digital resources with licenses that often expire after a couple dozen checkouts, or within one or two years after purchase, whichever comes first. Then the library must pay for the book all over again if it wishes to make it available. The result is a much higher cost-per-checkout for digital books. 28 Publishers argue that higher costs are necessary to compensate them for a product that does not degrade and therefore never needs replacement, unlike physical books. That may be true to some extent, 29 but publishers’ pricing models for e-books frequently surpass fair pricing. 30

¶12 Even when libraries can purchase “perpetual access” to digital resources, these purchases come with significant caveats. Libraries cannot access or lend the purchases without access to a suitable digital platform, which comes with development, storage, and implementation costs that are usually beyond libraries’ capabilities. Some digital content purchases require libraries to pay annual “continuing service fees” that increase with inflation, meaning that libraries never truly “own” the content. 31 Libraries are reliant on the service platform staying solvent.

¶13 The lack of long-term ownership is also a critical issue for access during challenging economic times. When budgets get tighter, libraries still have their print books purchased in previous years on the shelves. However, when libraries cannot afford to renew a subscription or a license for a digital resource, they are left with empty shelves and nothing to show for their investment. Governments have not fully funded public library budgets for over 30 years, with private donations, grants, and patron fines making up the shortfall of over $4 billion. 32 These pressures lead to shrinking library collections during difficult economic times when patrons need library resources the most.

Preservation

¶14 The preservation of knowledge has always been a primary library function. 33 Libraries collect items such as books and manuscripts to protect them for future generations. 34 Preservation continues to be important. As information storage formats evolve,
not all artistic and informational works are migrated from old formats.\textsuperscript{35} Today’s libraries have virtually no ability to preserve the digital content they pay for. In addition to the contractual restrictions,\textsuperscript{36} publishers impose technological restrictions on digital resources known as digital rights management (DRM) that block libraries from preservation activities.\textsuperscript{37}

\textsection{15} U.S. law provides strong penalties for tampering with DRM protections,\textsuperscript{38} but it allows the Librarian of Congress to make exemptions to the prohibition against circumvention.\textsuperscript{39} Current exemptions include limited provisions that allow libraries to circumvent DRM protections for purposes of preservation.\textsuperscript{40} Even when the law permits libraries to engage in circumvention for lawful purposes, most libraries lack the technological capability, especially since section 1201(a)(2) makes it illegal for librarians (and anyone else) to share information about how to circumvent DRM—even if it is for a legal purpose. Permission to legally circumvent DRM is useless if no one knows how to do it.\textsuperscript{41} Furthermore, circumventing DRM protections illegally carries hefty penalties\textsuperscript{42} that provide a substantial chilling effect.

\textsection{16} The result is that our scientific and cultural heritage is being left in the hands of for-profit publishers. Publishers lack the same values and mission as libraries and are motivated to maintain and provide access to their publications provided it is in their financial interest. This situation results in several problems. First, concentration of digital control creates the risk of disaster if something were to happen to the publisher, such as a catastrophic hacking. Second, access to publications will be limited to only those who can afford to pay, hampering the production of future scientific and artistic works. Finally, limited digital preservation will doom many authors and other creators to

\begin{itemize}
\item \textsuperscript{36} \textit{Library Futures}, supra note 26, at 4.
\item \textsuperscript{37} “DRM is technology that controls access to content on digital devices . . . . [I]t is technology employed to protect the rights of the copyright holder . . . .” Frederick W. Dingley & Alex Berrio Matamoros, \textit{What Is Digital Rights Management?}, in \textit{Digital Rights Management: The Librarian’s Guide} (Catherine A. Lemmer & Carla P. Wale eds., 2016), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1121&context=libpubs [https://perma.cc/N5GN-F72P].
\item \textsuperscript{38} 17 U.S.C. § 1203 & 1204 (2023).
\item \textsuperscript{39} 17 U.S.C. § 1201(a)(1)(C) and (D) (2023).
\item \textsuperscript{40} 37 C.F.R. § 201.40 (2023).
\item \textsuperscript{41} “An exception to a law that is only available if you are a master reverse-engineer is meaningless.” Cory Doctorow, The New DRM-Breaking Exemptions Just Dropped, \textit{MEDIUM} (Oct. 28, 2021), https://doctorow.medium.com/the-new-drm-breaking-exemptions-just-dropped-b990619c91c9 [https://perma.cc/LHP4-HKUQ].
\item \textsuperscript{42} See, e.g., 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317–18 (S.D.N.Y. 2000); further, a judge may set civil statutory damages at any point between $2,500 and $25,000 per violation if the plaintiff does not want to prove actual damages, which can go much higher. 17 U.S.C. § 1203(c)(3) (2020). Criminal penalties can go up to $500,000 or $1,000,000 depending on the offense. 17 U.S.C. § 1204(a) (2020).
eternal obscurity due to their works being lost forever in some publisher’s gigantic digital storehouse like Indiana Jones’s lost ark.

**Embargoes**

¶17 In a few instances, publishers have even refused to sell or license digital books and audiobooks to libraries at all. In one case, the publisher Blackstone had an exclusive contract with online audiobook platform Audible that prohibited it from selling or licensing to libraries for 90 days after publication. This embargo, however, applied both to libraries and individual consumers. In a more notable example, the publisher Macmillan attempted to increase sales to individual consumers in 2018, first via a four-month embargo of its sci-fi and fantasy imprint Tor Publishing, then later by rolling out an eight-week embargo on all of its publications. In one more example, Amazon Publishing refused to work with libraries at all, allegedly because “library lending models [do not] fairly balance the interests of authors and library patrons.” Amazon finally relented in 2021, but continues to withhold its Audible Originals titles from libraries.

¶18 All these embargoes were motivated by increasing profit at the expense of access to the broader community. Publishers have argued that embargoes are necessary to shore up their bottom lines. For example, Macmillan’s former CEO John Sargent told the Wall Street Journal that library access to e-books was “cannibalizing our digital sales.” However, publishers like Sargent have provided no hard data to support their claims. After testing a year-long library embargo with Macmillan’s Tor imprint, Sargent claimed that “Tor’s e-book revenue increased . . . , although he declined to be more

---


44. Id.


specific.” On another occasion Sargent reportedly told a group of librarians that “based on ‘anecdotal’ data, Macmillan believes that ‘if library users cannot gain access to a new e-book from their library, 8% of those waiting will likely buy the e-book.’”

Embargoes have never been a problem for libraries with print books. If a publisher refused to sell a book to a library, the library could simply purchase the book from a bookstore or other distributor like any other customer. With digital materials, publishers control the digital platforms that libraries must use to purchase and lend e-books and audiobooks, giving them complete power over what libraries can purchase or license.

A Detailed Legislative History of the Multitude of State Efforts

For libraries to continue to develop vibrant collections in service of their communities, something must change. Publishers will continue to enact pricing and access policies that maximize the amount of public funds they can take from libraries to put toward their own bottom lines. Congress could make small, simple changes to our current copyright regime that would result in large beneficial impacts to libraries, but it is well documented that Congress has not had the political will to do so and is unlikely to for the foreseeable future. With action by publishers and Congress both off the table, the only remaining options for change are state legislatures and libraries themselves.

Various states have undertaken legislative attempts to regulate the library e-book industry to allow libraries to have more reasonable terms and options. At least in part due to the pandemic, these states have tried to step in and help, though their attempts have been lacking so far. While other scholars have discussed some of these

49. Id.
51. Public libraries most commonly use the digital platform OverDrive with its accompanying consumer-facing app Libby. Gross, supra note 28. Many other options exist in the academic world (e.g., ProQuest’s Ebook Central) and in the legal publishing world (e.g., the LexisNexis Digital Library, Westlaw’s ProView).
52. See, e.g., KENNETH P. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS 9 (4th ed. 2020) (“Almost as significant [as the new legal rights created by Congress] are the failures of Congress to act. Congress continues to avoid the orphan works problem and has taken little action on various proposals affecting a wide range of services by libraries and archives.”).
state attempts, this article is the first to explore in detail the history of the state attempts up to the present day to regulate the library e-book industry.

**Maryland**

¶22 Maryland holds the distinction of being the first state to enact legislation that helps libraries have fairer terms with publishers in e-book contracts. However, this pioneering move also led Maryland to become the first state to face and lose a legal challenge in court.

**Maryland’s Statute**

¶23 The bill for this legislation, titled “Public Libraries - Electronic Literary Product Licenses - Access,” was first proposed on January 15, 2021, by the Ways and Means House of Delegates committee as House Bill 518. Shortly thereafter on January 20, 2021, the Education, Health, and Environmental Affairs Senate committee proposed the same bill as Senate Bill 411.

¶24 Originally, the text of the bill described only “electronic books.” It was quickly amended to “electronic literary products” to include books, audiobooks, and other applicable products. After another amendment changing the effective date from July 1, 2021, to January 1, 2022, the proposed bill was passed on April 2, 2021, in the Senate with 47 yeas and 0 nays and on April 5, 2021, in the House with 130 yeas and 0 nays.

---

54. See, e.g., id.; see also Library Futures eBook Bill Tracking, https://docs.google.com/spreadsheets/d/1B9XiRILUtTtuDFEjAHqfoNtdmNq_CvDX8uv5xJOtU/edit#gid=0 (a Google Spreadsheet maintained by the nonprofit organization Library Futures about all the e-book bills in the various states, though it does not appear to have been updated past May 2022); Ebooks Legislative Map, Library Futures https://www.libraryfutures.net/ebooks-legislative-map (This map is broader than the e-books issue in this article and includes many bills not relevant to this article’s discussion.); Jackie McCloud, *It’s Time to Legislate for Library Access to E-Books*, 45 The CRIV SHEET, no. 1 (2022), at 9, https://scholarworks.iupui.edu/bitstream/handle/1805/30444/McCloud_CRIV_2022.pdf?sequence=1; Kyle K. Courtney & Juliya Ziskina, *The Publisher Playbook: A Brief History of the Publishing Industry’s Obstruction of the Library Mission* (2023) (pre-print version), https://dash.harvard.edu/bitstream/handle/1/37374618/The%20Publisher%20Playbook%20Pre-Print%2014.23.pdf?sequence=1&isAllowed=y; Library Futures eBooks Policy Paper: Mitigating the Library eBook Conundrum Through Legislative Action in the States, Library Futures (June 2022), https://www.libraryfutures.net/library-futures-ebooks-policy-paper.

55. January 31, 2024 (when the authors needed to submit their revisions to editors).


¶25 On May 30, 2021, the passed legislation in Maryland was codified in the Education article of the Maryland Code, sections 23-701 and 23-702, to be effective January 1, 2022.60 Section 23-702 provides:

[A] publisher who offers to license an electronic literary product to the public also shall offer to license the electronic literary product to public libraries in the State on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product.61

Section 23-702(b) enumerates allowable license terms, including limitations on the number of users and the number of days a user may access an e-book.62

**Maryland’s Defense**

¶26 Significant publisher opposition arose immediately upon passage of the bill,63 and publishers quickly took steps toward litigation to eliminate the perceived threat to their business model.

¶27 An early step was to reach out to U.S. Senator Thom Tillis of North Carolina. On May 26, 2021, Senator Tillis sent a letter to Shira Perlmutter, the Register of Copyrights and Director of the U.S. Copyright Office, in which he urged her, “in [his] capacity as Ranking Member of the Senate Judiciary Committee Subcommittee on Intellectual Property,” to take notice of the Maryland e-books bill that, he argued, violated federal copyright law.64 On August 30, 2021, Register Perlmutter responded in a letter to Senator Tillis with (1) her analysis of the doctrine of the federal preemption of state laws, including express preemption under § 301(a) of the U.S. Copyright Act and conflict preemption under the U.S. Copyright Act; and (2) U.S. Copyright Act preemption analysis of the state legislation regarding licensing of electronic literary products.65 Register Perlmutter concluded through her analysis that “the state laws at issue are likely to be found preempted.”66 These early actions by a senator and the Register of

---

66. *Id.* at 3.
Copyrights are representative of publishers’ close relationships with and support from influential government actors.

¶28 With the confidence of having U.S. Copyright Office backing, the Association of American Publishers (AAP) filed suit against Brian E. Frosh, in his official capacity as Attorney General of the State of Maryland, on December 9, 2021 in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief on the basis of: express preemption under the U.S. Copyright Act and/or the Supremacy Clause of the United States; conflict preemption under the U.S. Copyright Act and/or the Supremacy Clause of the U.S. Constitution; violation of the Dormant Commerce Clause of the U.S. Constitution; and violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.67

¶29 In its complaint, AAP argued: “The Maryland statute follows the lobbying efforts of a few library groups to fundamentally rewrite U.S. copyright law and profoundly disrupt the vital and delicate publishing ecosystem . . . . Further, at the expense of authors, publishers, booksellers, and readers, they ignore that the public interest comprises much more than just libraries.”68 On December 16, 2021, AAP filed a motion for preliminary injunction,69 with an accompanying memorandum in support70 and declarations in support by Maria Pallante, President and CEO of the Association of American Publishers,71 and Mary Rasenberger, Executive Director of the Authors Guild.72

¶31 On January 14, 2022, Maryland responded with a motion to dismiss,73 including an accompanying memorandum in support74 and nine exhibits, most of which were declarations, testimonies, and support letters from librarians, including from the

---

American Library Association, and Maryland legislators.\textsuperscript{75} Assertions from these filings reveal compelling instances of price gouging\textsuperscript{76} and blanket restrictions.\textsuperscript{77}

\textit{Judge Boardman's Opinions}

\textsuperscript{¶}32 On February 16, 2022, Judge Deborah L. Boardman issued an opinion on the motion for a preliminary injunction.\textsuperscript{78} Although she was sympathetic to libraries, Judge Boardman granted AAP's motion, writing: “Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. Striking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders, however, is squarely in the province of Congress and not this court or a state legislature.”\textsuperscript{79}

\textsuperscript{¶}33 On June 13, 2022, Judge Boardman issued a second opinion concluding that the Maryland law is “unconstitutional and unenforceable.”\textsuperscript{80} By giving AAP declaratory relief, Judge Boardman did not rule for a permanent injunction on the Maryland law, explaining that it would be moot.\textsuperscript{81} The decision was not appealed.

\textit{Other States' Proposed Legislation}

\textsuperscript{¶}34 Several states have proposed legislation similar to Maryland's, with some bills mirroring Maryland's language ("clones"),\textsuperscript{82} while others were introduced before Maryland initiated its legislative process. Additionally, some states attempted to address the issue

\footnotesize{\textsuperscript{75} Table of Exhibits, Ass'n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133).}

\footnotesize{\textsuperscript{76} "Currently libraries pay much higher prices for content that [sic] consumers. For example, the New York Times bestseller Ready Player Two has a list price of $22.05 and the consumer can keep this electronic book forever. The same book license for a public library costs $95 and the library has to renew that license after two years.” Exhibit 3 Sponsor Statement of Nancy J. King to Consolidated Memorandum of Law in Support of Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction, Ass'n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133).}

\footnotesize{\textsuperscript{77} “[Maryland's] bill aims to be pro-reader, not anti-publisher. Some current and past publisher practices impede Maryland's library patrons [sic] access to books. For example, Amazon and Audible currently have between them over 20,000 ‘exclusive’ titles. They will license these titles . . . to consumers, but not to libraries. Additionally, Blackstone, a major provider of audiobooks, currently supplies 10 new titles per month exclusively to Audible. Libraries are not allowed to purchase these titles for three months after release. Macmillan similarly has limited library access to titles for three months.” Exhibit 4 Testimony by Kathleen M. Dumais on Feb. 5, 2021, in Support of House Bill 518—Public Libraries—Electronic Book Licenses—Access to Consolidated Memorandum of Law in Support of Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction, Ass'n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133).}

\footnotesize{\textsuperscript{78} Ass'n Am. Publishers, Inc. v. Frosh, 586 F. Supp. 3d 379 (D. Md. 2022).}

\footnotesize{\textsuperscript{79} Id. at 398.}

\footnotesize{\textsuperscript{80} Ass'n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614, 617 (D. Md. 2022).}

\footnotesize{\textsuperscript{81} Id. at 619.}

after Maryland’s loss but did not sufficiently adjust the language of their bills to distinguish themselves from Maryland. Lastly, some states consciously redrafted their language to avoid Maryland’s pitfalls. As of January 2024, when the research for this article concluded, most, but not all, of the proposed bills had either died or were significantly delayed, with none close to passing. This subsequent discussion will examine these legislative efforts in (1) New York (noteworthy for its substantial efforts and being the only state to technically pass a bill like Maryland did), (2) states pre-Maryland’s loss, and (3) states post-Maryland’s loss.

**New York**

¶ 35 New York first introduced similar bills to Maryland’s in 2019 in both the Senate and the Assembly: Senate Bill 7098 and Assembly Bill 9048. These bills “[r]elate[d] to prohibiting the delay of the availability of e-books to public libraries in the state.” On January 8, 2020, the Senate bill was referred to the Finance Committee, and on January 10, 2020, the Assembly bill was referred to the Libraries and Education Technology Committee, which was the last update to the bill.

¶ 36 In 2020, Assembly Bill 9881 was proposed and then referred to the Consumer Affairs and Protection Committee. Its purpose was “[t]o make e-books equally accessible to public libraries in the state on reasonable terms.” There were no updates to this bill after March 11, 2020.

¶ 37 Then in 2021, amidst the legal skirmish in Maryland, New York remained cautiously proactive as it concurrently crafted a bill that was like Maryland’s, ultimately unanimously passing its bill a month after Maryland did. However, New York’s leadership intently observed the bubbling conflict in Maryland. On December 29, 2021, New York Governor Kathy Hochul vetoed the bill, reciting AAP’s arguments in the Maryland lawsuit as the reason to not move forward with New York’s passed bill. The bill jacket

---

85. Id; Senate Bill S7098, supra note 83.
86. Senate Bill S7098, supra note 83.
87. Assembly Bill A9048, supra note 84.
89. Id.
90. A05837 Summary, New York State Assembly, https://nyassembly.gov/leg/?default_fld=&leg_video=1&bn=A05837&term=&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y [https://perma.cc/4AJX-S7BY]. (When attempted visits to both the original URL and the Perma.cc URL were made by the authors on January 31, 2024, the 2021 bill had been replaced by a non-relevant bill. Research to find the new URL did not prove fruitful.).
91. Id. (and did so without any hearings, apparently).
92. Id.
93. Bill Jacket for Assembly Bill 5837-B at 5 (Dec. 29, 2021) (on file with authors; electronic PDF of
Governor Hochul received in order to make her decision on the bill contained various letters written to her in support of the bill by library associations.94 The jacket also contained letters in opposition of the bill from major publishing groups as well as music, media, film, photography, and fine artist associations.95

¶39 However, the New York State Legislature returned to the issue with renewed vigor over a year later. On May 12, 2023, Senator Chu introduced a revamped e-books bill, Senate Bill S6868.96 Departing from the previous mandate of requiring publishers to extend contracts to libraries, this iteration aligns with recommendations from the Library Futures organization and echoes the suggestions proposed within this article and focuses on regulating any contracts publishers opt to offer libraries.97 The bill’s recent progression saw it referred to another committee on January 3, 2024.98

States’ Proposed Legislation Pre-Maryland-Litigation

¶40 A theme throughout the pre-Maryland litigation is that most draft bills had language requiring publishers to make e-book licenses available to libraries, which invokes the preemption issue the Maryland lawsuit turned on. Another theme is that before the Maryland lawsuit, people and groups did not publicly testify to the legislatures in opposition. It was only after Maryland made significant strides that publishers and publisher-apologists began intervening in the legislative process to influence outcomes in their favor. The legislative history of the state initiatives, prior to the influence of the Maryland lawsuit, are outlined as follows.

¶41 Rhode Island: House Bill 6246 was introduced on April 16, 2021, and it was referred to the House Corporations Committee.99 The text of the bill is similar to other states’ bills, except for notably including schools and educational institutions in the bill along with libraries.100 On April 23, 2021, the bill was scheduled for a hearing and/or
consideration to occur on April 28, 2021.\textsuperscript{101} On April 28, 2021, the committee recommended a measure be held for future study, after which no further action was taken.\textsuperscript{102}

\textsection{42} However, on January 20, 2022, the bill was re-introduced in Rhode Island as House Bill 7113.\textsuperscript{103} Its text is the same as the earlier version.\textsuperscript{104} The bill was scheduled for a hearing and/or consideration, but the House Corporations Committee recommended the measure be held for future study.\textsuperscript{105}

\textsection{43} On April 5, 2022, the bill was re-introduced in Rhode Island as Senate Bill 2842 and was referred to the Senate Education Committee.\textsuperscript{106} On May 18, 2022, the Committee recommended the bill’s passage.\textsuperscript{107} A notable difference in the text of this bill is that it includes language that if anything in the bill violates the U.S. Copyright Act, then those parts of the bill are not enforceable.\textsuperscript{108} This statutory severability provision permits the rest of the bill to remain law, even if the Maryland loss stands. There has been no update on the bill since.

\textsection{44} Massachusetts: House Bill 4120 was proposed on August 13, 2021 and referred to the House Committee on Rules that same day.\textsuperscript{109} On September 9, 2021, a similar bill—Senate Bill 2749—was proposed in the Senate, and it was immediately also referred to the Joint Committee on Rules.\textsuperscript{110} A week later, on September 16, 2021, the bill was referred to the Joint Committee on Tourism, Arts, and Cultural Development.\textsuperscript{111} A virtual hearing\textsuperscript{112} was held on November 19, 2021 during which librarians and library

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{101} Legislative Status Report of House Bill No. 6246, \textit{supra} note 99.
\item \textsuperscript{102} \textit{Id}.
\item \textsuperscript{103} Legislative Status Report of House Bill No. 7113, \textbf{STATE OF RHODE ISLAND GENERAL ASSEMBLY}, https://status.rilegislature.gov/ [https://perma.cc/9WBY-T3EC] (Choose 2022 from dropdown for the “Session Year”; then enter 7113 for the “Bills”; then click “Enter.”).
\item \textsuperscript{104} \textit{Compare} 2022—H 7113, \textbf{STATE OF RHODE ISLAND GENERAL ASSEMBLY}, http://webserver.rilin.state.ri.us/BillText/BillText22/HouseText22/H7113.pdf [https://perma.cc/RXJ7-X5NS], with 2021—H 6246, \textit{supra} note 100.
\item \textsuperscript{105} Legislative Status Report of House Bill No. 7113, \textit{supra} note 103.
\item \textsuperscript{106} Legislative Status Report of House Bill No. 2842, \textbf{STATE OF RHODE ISLAND GENERAL ASSEMBLY}, https://status.rilegislature.gov/ [https://perma.cc/9WBY-T3EC] (Choose 2022 from dropdown for the “Session Year”; then enter 2842 for the “Bills”; then click “Enter.”).
\item \textsuperscript{107} \textit{Id}.
\item \textsuperscript{109} Bill H.4120, \textbf{MASSACHUSETTS LEGISLATURE}, https://malegislature.gov/Bills/192/H4120 [https://perma.cc/B3KV-NA5E].
\item \textsuperscript{110} Bill SD.2749, \textbf{MASSACHUSETTS LEGISLATURE}, https://malegislature.gov/Bills/192/SD2749 [https://perma.cc/U2BY-CL4L].
\item \textsuperscript{111} \textit{Id}.
\item \textsuperscript{112} Joint Committee on Tourism, Arts and Cultural Development, Hearing for Bill H. 4120, \textbf{MASSTRAC} (Nov. 19, 2021) (on file with authors; electronic PDF of the transcript of the hearing for Bill H. 4120 received by the authors on June 10, 2022, from the State Library of Massachusetts).
\end{itemize}
\end{footnotesize}
advocates gave verbal and written\textsuperscript{113} testimony; no verbal testimony was given in opposition of the bill. On February 3, 2022, the House extended the reporting date to June 1, 2022, and the Senate concurred.\textsuperscript{114} The bill subsequently died.

\textsuperscript{¶}45 \textbf{Missouri:} The House introduced its bill on January 5, 2022.\textsuperscript{115} The bill proposed adding two new statutory sections—Missouri Revised Statutes §407.1670 and §407.1675—on electronic literary product licenses, the first section listing definitions and the second section requiring that publishers offer libraries licenses “on reasonably similar terms as those offered to the public.”\textsuperscript{116} A public hearing occurred on January 25, 2022.\textsuperscript{117} Ten witnesses testified in support of the bill, all librarians except for a state public advocate.\textsuperscript{118} Two witnesses testified in opposition to the bill, both associated with AAP.\textsuperscript{119} No other actions with this bill have been listed since this hearing.

\textsuperscript{¶}46 \textbf{Illinois:} A bill with the short description “access electronic literature” was proposed on January 12, 2022,\textsuperscript{120} and by February 10, 2022, the bill was referred for a third time to a committee. The text of the bill is similar to that of other states from this time period.\textsuperscript{121} The last recorded legislative update is that the chief sponsor of the bill changed.\textsuperscript{122}

\textsuperscript{¶}47 \textbf{Tennessee:} A bill to enact the Electronic Literary Product Act was filed for introduction by both the Senate and the House on January 26, 2022.\textsuperscript{123} The text of the bill states that publishers must offer libraries the same products that they offer to the public “on reasonable terms,” while also listing several terms a license may include.\textsuperscript{124} In the Senate, it passed two considerations. No updates to this bill have been made since February 9, 2022; no amendments to this bill have been made either.\textsuperscript{125}

\begin{footnotesize}
\begin{itemize}
\item[113.] Copies of the submitted written testimonies were requested by the authors on July 18, 2022, from the State Library of Massachusetts but were never received; \textit{ELI Gives Testimony on H.4120 eBook Bill in Massachusetts}, \textsc{EveryLibrary Institute} (Nov 19, 2021), https://www.everylibraryinstitute.org/testimony_h_4120_massachusetts_ebooks [https://perma.cc/GU34-AZKG].
\item[114.] Bill H.4120, \textit{supra} note 109.
\item[117.] HB 2210, \textit{supra} note 115.
\item[119.] \textit{Id.}
\item[122.] Bill Status of SB 3167, \textit{supra} note 120.
\item[125.] SB1955, \textit{supra} note 123.
\end{itemize}
\end{footnotesize}


¶48 Connecticut: Much of the popular press has failed to recognize the work done more than a decade ago in Connecticut, where a bill was proposed on the issue of electronic literary product licenses. In January 2013, “An Act Concerning ‘E-Books’ and Libraries” was proposed, with its statement of purpose “[t]o require publishers of electronic books to offer e-books for sale to public and academic libraries at the same rates as offered to the general public.”126 The text of the bill read: “That the general statutes be amended to require publishers of electronic books to offer such books for sale to public and academic libraries at the same rates as offered to the general public.”127

¶49 A public hearing was held on February 1, 2013, during which eight testimonies, all in favor of the bill, were given, and the bill passed both houses in May 2013. On June 6, 2013, the governor signed the bill.128 The then-President of the Connecticut Library Association called this new law “a significant victory in our struggle to get the major publishers to work with public libraries with regard to their e-book pricing practices.”129

¶50 While this event appears revolutionary at first glance, somewhere along its legislative road the bill was amended from a requirement for publishers to a “study regarding the availability of electronic books to users of public libraries,”130 so its passing was much less significant. The study was indeed carried out and published in February 2014.131 While a library writer described the report as “thoughtful[,] . . . even-handed[,] and reasonably comprehensive,”132 the ultimate conclusion of the report was that “recommending legislation to mandate e-book access, or specific terms of dealing . . . were not warranted at this time due [sic] concerns of federal preemption and concerns about interfering with a market that was still in flux.”133

---

133. Id. at 3.
Nevertheless, in 2022, Connecticut made another attempt at passing legislation mandating that publishers who offer libraries e-book licenses do so on reasonable terms. On February 17, 2022, Connecticut proposed a bill entitled “An Act Concerning Electronic Book and Digital Audiobook Licensing,” in which publishers would be required to offer the same contracts to libraries as they offer to the public, and it was referred to the Joint Committee on Planning and Development. On February 25, 2022, a public hearing was held with testimony from the Copyright Alliance and AAP opposing the bill, and 46 testimonies given in support. On March 11, 2022, the bill was amended to remove the requirement for publishers to offer contracts to libraries, most likely instigated by the Maryland loss. Instead, it simply required that if publishers offer contracts to libraries, then they must be on reasonable terms. However, on April 7, 2022, the bill was referred to the Committee on Judiciary, where it died.

Texas, Virginia, and Washington: In 2021, before the publisher groups sued Maryland, the popular press regularly reported that librarians in Texas, Virginia, and Washington were attempting to drum up legislative support to pass similar bills to that of Maryland’s. No evidence of any proposed bills from these three states during that time was found during research for this article.

States’ Proposed Legislation Post-Maryland-Defeat

Post-Maryland defeat, states that made earlier attempts to pass legislation have tried again with adjusted statutory language, and new states joined the legislative fray. More recent efforts likely stem from the inspiration and assistance of Library Futures and its model language. The research in this article is current as of January 2024.

Massachusetts: Library Futures reported that Massachusetts became the first state post-Maryland litigation to propose a bill with language that circumvented Maryland’s 134. File No. 136, CONNECTICUT GENERAL ASSEMBLY, https://www.cga.ct.gov/2022/FC/PDF/2022SB-00131-R000136-FC.PDF [https://perma.cc/U7XM-HZW2]
“problem” on January 20, 2023.141 It was referred to a committee on February 16, 2023, concurrently with a new Senate bill.142 A hearing was held on October 30th,143 during which publishers argued that the new bill would violate copyright law.144

¶55 Hawaii: Only five days after Massachusetts introduced its bill, Hawaii introduced a similar bill. It had nearly weekly updates, including testimonies, committee reports, and amendments through April 27, 2023. The next and final update was December 11, 2023, when it was carried over to the 2024 Regular Session.145

¶56 Rhode Island: On January 18, 2023, Rhode Island presumably tied with Connecticut in proposing the first new bills drafted with the hindsight of Maryland’s experience. House Bill 5148 “[r]equires publishers to provide electronic book licenses to libraries and schools on reasonable terms, when a publisher offers to license electronic books and digital audiobooks to the public in Rhode Island.”146 On February 24, 2023, the bill was scheduled for hearing and/or consideration, but on March 2, 2023, the House Innovation, Internet & Technology Committee recommended it be held for future study. No update has been made since.147

¶57 Connecticut: On January 18, 2023, Connecticut proposed Senate Bill 500, which would require any licenses that publishers offer to libraries to be done on reasonable terms.148 No update has been made since, though another bill was proposed on

143. Id.
147. Legislative Status Report of House Bill No. 5148, supra note 146.
February 24, 2023—House Bill 6800. It lasted long enough to have public hearing testimonies (29 in support and 8 in opposition), but it died on April 25, 2023.

Virginia: On January 20, 2023, Virginia state Senator David W. Marsden proposed a bill that would restrict certain provisions in licensing contracts that publishers offer to libraries. The bill was immediately referred to the Committee on General Laws and Technology. On February 1, 2023, the bill was unanimously passed by the committee. No update since.

Illinois: A bill was filed with the clerk on December 7, 2023. On January 16, 2024, it had its first reading and was referred to the Rules Committee. While the text of the bill was not yet available when the research for this article ended, there was a synopsis that gives insight into the contents of the bill: “Provides that no contract or license agreement entered into between a publisher and library shall preclude, limit, or restrict the library from performing customary operational functions or lending functions, restrict the library from disclosing any terms of its license agreements to other libraries, or require, coerce, or enable the library to violate the Library Records Confidentiality Act.”

New Hampshire: On January 1, 2024, New Hampshire introduced its first bill on library licensing, HB1342. While the full text of the bill was not available by the

---


156. Id.

157. Id.

time the research for this article ended, its bill title was available, which reads: “relative to the licensing of electronic literary materials by libraries.”

¶61 **Tennessee:** On January 29, 2024, a bill was filed in the Senate as SB2161 for introduction and then passed on first consideration on January 31, 2024, while simultaneously being filed for introduction in the House as HB2737—the last day of research for this article. While the actual text of the bill was not yet available, a summary stated that the bill would prevent “certain kinds of provisions in contracts and agreements between publishers and libraries related to the licensing of electronic literary materials.”

¶62 After the publication of this article, a few states such as Illinois, New Hampshire, and Tennessee have the potential to enact statutes beneficial to libraries, though the historical trend has not been positive thus far.

**Congressional Interest in the E-Book Industry**

¶63 There are a two recent instances on record touching on Congress and the e-book industry. On October 15, 2019, the American Library Association (ALA) submitted a statement at Congress’s request about competition in digital markets. In that statement, ALA gave similar examples and statistics as those given by library proponents in state legislative hearings—that the e-book publishers are charging libraries astronomical prices compared to the prices they charge to the public and that the publishers are withholding some titles from being offered to libraries.

¶64 In 2021, two members of Congress “pressed” the major book publishers—Penguin Random House, Hachette, HarperCollins, Simon & Schuster, and Macmillan—for answers and clarity about the e-book contracts those publishers give to libraries. The publishers were given a deadline to respond, but there is no record of their response, or any subsequent action taken by Congress.

159. *Id.*
161. *Id.*
163. See *id.*
Lessons Learned from Maryland’s Litigation

¶65 The Maryland litigation, despite its unsuccessful ending for libraries, offers a compelling narrative, rich with legal insights, strategic maneuvers, and valuable lessons. This article now delves into the multifaceted dimensions of the Maryland litigation, unraveling its implications and lessons for the evolving dynamics between publishers, libraries, and the regulatory landscape.

Copyright Preemption Is a High Hurdle

¶66 The largest obstacle for Maryland’s e-book statute was its language providing that “a publisher who offers to license an electronic literary product to the public also shall offer to license the electronic literary product to public libraries.”165 Despite Maryland’s desire to frame the statute as a regulation of abusive consumer practices,166 the language of the statute placed it on a collision course with copyright law and federal preemption. In our view, Maryland’s claim that the statute does not impermissibly interfere with copyright is justified. Nevertheless, the current accepted interpretation of copyright preemption case law, though not legally correct and distinguishable from the facts in the Maryland case, weighed against it.

¶67 AAP based its claim for a preliminary injunction on the grounds of conflict preemption and express preemption. Both forms of preemption rest on the Constitution’s Supremacy Clause,167 which declares that federal laws take primacy over contradictory state laws. Conflict preemption, a form of implied preemption, applies when compliance with federal law and a conflict state law is impossible,168 or when the state law serves as an obstacle to compliance with federal law.169 Express preemption occurs when Congress explicitly declares that a law is intended to preempt state law.170

¶68 Judge Boardman found for the publishers on the grounds of conflict preemption. She reasoned that publishers were unable to comply with the library licensing provision and simultaneously exercise their exclusive distribution rights under federal law.171 Brushing aside Maryland’s argument that the statute does not force publishers to sell licenses to libraries as “a distinction without a difference,” Judge Boardman’s opinion agreed with AAP’s arguments that the statute “effectively strips publishers of the exclusive right to distribute . . . .”172

---

166. Consolidated Memorandum of Law in Support of Defendant’s Motion to Dismiss and Opposition to Plaintiff’s Motion for a Preliminary Injunction, supra note 74, at 1–2.
167. U.S. Const. art. VI, cl. 2.
172. Id.
¶ 69 In coming to that conclusion, the opinion misapplied two key cases that were critical to the finding of preemption. The opinion relied upon *Orson, Inc. v. Miramax Film Corp.* 173 and *Stewart v. Abend* 174 for the proposition that current federal copyright law gives AAP the power under law to withhold licenses of e-books and other digital products arbitrarily to any consumer it chooses. *Orson* and *Stewart* do not support that proposition. *Orson* and *Stewart* involve two very different forms of licensing than the kind of licensing involved in AAP v. Frosh.

¶ 70 Judge Boardman found *Orson* to be “[t]he most analogous” to the Maryland litigation. 175 Pennsylvania enacted the statute at issue in *Orson* to regulate the corrupt film distribution industry. 176 For years film distributors had engaged in misleading and dishonest bidding practices with theater owners to exact high licensing fees for less desirable films and to privilege their preferred theater partners with the most popular films. Many states, including Pennsylvania, enacted statutes to curb these unscrupulous practices. Pennsylvania’s statute went further than other statutes by requiring distributors that entered into first-run licensing agreements with theaters for longer than 42 days for a film to also license that film to second-run theaters in the same geographic area. 177 Distributors argued this provision violated their exclusive distribution rights under copyright law and the court agreed. The en banc U.S. Court of Appeals for the Third Circuit 178 struck down the provision, finding that it was preempted by federal copyright law because it was “copyright-based in essence.” 179 The court distinguished Pennsylvania’s statutory provision from a similar statute in Ohio that the Sixth Circuit Court of Appeals upheld because it regulated consumer affairs without “interfer[ing] with any of the rights of the producer-distributors under the copyright statutes.” 180 Judge Boardman found that both the Pennsylvania distribution statute and the Maryland e-book statute “impose[d] on publishers—against their will and interests—an obligation to offer to license copyrighted work to one portion of the public following their initial decision to offer to license the same work to a different portion of the public.” 181

¶ 71 The other case that was important to Judge Boardman’s reasoning is *Stewart v. Abend*, a U.S. Supreme Court case that involved the renewal rights to a short story written by Cornell Woolrich used as the basis for the Alfred Hitchcock movie *Rear Window*. When Hitchcock and Jimmy Stewart obtained the rights to the story to make the film, Woolrich promised to renew the 28-year copyright term when the time came and

---

173. 189 F.3d 377 (3d Cir. 1999).
176. Id. at 383–84.
177. 189 F.3d at 379.
178. Now-United States Supreme Court Justice Samuel Alito Jr. served as a judge on the en banc panel in this case.
180. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 663 (6th Cir. 1982).
reassign the rights to Hitchcock and Stewart, but Woolrich died before he could do so. The Supreme Court found that the filmmakers did not automatically retain their rights to the story after Woolrich's death and thus infringed on Woolrich's successor's copyright in the story when they re-released the film years later. The filmmakers argued that allowing their right to use the short story for the film to lapse would violate underlying copyright policy by stifling the creation of new works. In response, Justice O'Connor wrote: “this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.”

¶72 Both Stewart and Orson are distinguishable from AAP v. Frosh because both Stewart and Orson involved different forms of licensing than the licensing regulated by the Maryland statute. The Pennsylvania statute in Orson applied to licenses to show films in movie theaters. The theater in which a film is shown affects the experience for viewers. Distributors may validly object to showing a film in certain theaters that could negatively impact consumers’ perception of the quality of the film, such as if the theater is dingy and run down. In Stewart, the license involved was a license to create a derivative work (a film) from an original copyrighted work (a short story). Like film producers and distributors, an author may validly object to licensing their work for a derivative work that may affect the original work's reputation and meaning. For example, a children's book author would not want to damage her book's image by licensing it for the development of a pornographic film or an advertisement to sell firearms. The context of the Maryland statute is very different. The licensing involved in Maryland invokes the distribution right, not the derivative right. It is not akin to controlled theatrical releases for films or creating new derivative works, which are completely different forms of licensing.

¶73 Justice O'Connor's statement in Stewart that copyright holders can “arbitrarily refuse to license” their work is similarly inapplicable. Justice O'Conner made the remark to support the statement that copyright holders can lawfully “hoard” their work and refuse to distribute or license the work at all if they so choose. Her statement was based on the holding in Fox Film Corp. v. Doyal, a 1932 U.S. Supreme Court case in which a film distributor argued that state tax law did not apply to copyrighted works because they are instrumentalities of the federal government. The Supreme Court resoundingly rejected this argument by reviewing the private rights that attach to the copyright holder and not to the federal government from the copyright, including the right to “refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.” A copyright holder that chooses not to sell their work at all differs completely from a copyright holder who has chosen to widely sell copies of a copyrighted work to the public but refuses to sell to one

183. Id. This is the same context in which the original statement was made, in the case Justice O'Connor cited: Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). In any event, Fox Film Corp. involved a taxation issue, not copyright distribution issue.
184. 286 U.S. 123 (1932).
185. Id. at 127.
particular type of buyer that they dislike. Justice O’Connor’s statement is therefore not strong support for the contention that publishers can sell e-book licenses to individual consumers and simultaneously refuse to sell e-book licenses to libraries. Judge Boardman’s opinion has become the first case to uphold that proposition that a publisher can selectively choose who they sell books to on the broad commercial market.

¶74 This reading of copyright law is clearly not correct. The Constitution’s copyright clause balances authors’ rights with the public interest. The plaintiff in AAP v. Frosh claims that a 1976 law passed decades before the existence of the World Wide Web still provides a “carefully balanced, and complex federal legal framework” for today’s world.186 Publishers are using ill-fitting court precedent and law not designed for our digital age to line their pockets in a way the Constitution and Congress never intended. The result is discrimination against libraries and the public they serve, especially the economically disadvantaged. Taken further, the holding in AAP v. Frosh could even be used as a weapon to discriminate against certain racial, religious, or other minority groups.

Libraries and Publisher Legal Firepower: David vs. Goliath

¶75 AAP v. Frosh highlights the strength of publisher legal firepower in comparison with that of individual states. Publishers’ deep pockets and experienced industry attorneys vastly outmatched Maryland’s legal team. In cases involving interpretation of copyright law, judges frequently look to federal government attorneys from for guidance. For example, during the Google Books digitization lawsuit,187 Judge Denny Chin sought counsel from the Department of Justice in determining whether the settlement agreement was legal under copyright law. This dynamic, akin to regulatory capture, was very much a factor in the Maryland litigation that played to AAP’s benefit.

¶76 To support its motion for a preliminary injunction, the Association of American Publishers presented declarations from the CEO and President of AAP, Maria A. Pallante, and the CEO of the Authors Guild, Mary Rasenberger. Both Pallante and Rasenberger have significant experience working as legal counsel in the U.S. Copyright Office. Rasenberger worked there as a senior policy advisor and program director for a three-year Section 108 study group, analyzing copyright exceptions for libraries and archives.188 During her 30 years of work in copyright law, Pallante served in the top spot as the U.S. Register of Copyrights for over five years.189 These credentials gave Pallante’s

and Rasenberger’s declarations enormous weight with the court.\textsuperscript{190} They aggressively leveraged their credentials to bolster their arguments.\textsuperscript{191}

\textsection{77} Maryland was unable to counter these copyright heavyweights with equally influential declarants. Maryland filed a declaration from Alan Inouye, the senior director of public policy and government relations for the American Library Association, whose impressive resume includes a PhD and three master’s degrees but no legal training or experience.\textsuperscript{192} The other declarations and statements Maryland filed with the court were from Maryland public librarians, Maryland state Senator Nancy King, who sponsored the legislation, and Maryland state Delegate Kathleen M. Dumais. Their writings described the purpose of the statute and the abuses it sought to correct but did not address the legal issues involved and could not carry the same level of influence as a former U.S. Register of Copyrights. The ALA needs an experienced copyright attorney on staff to increase their impact with the courts, and librarians need more attorney guidance when drafting declarations.

\textbf{Librarians Need to Be Better Advocates}

\textsection{78} For librarians to achieve more successful outcomes in battles against publishers, they need to strengthen their rhetoric. The publishers’ response to the Maryland statute was aggressive, while the librarians were timid. Librarians have a culture of striving to support publishers and authors, advertising their books for free, developing positive relationships with them, and spending millions of dollars on their products annually. But when litigation over library rights is on the line, librarians need to learn how to shift their relationship with publishers to an adversarial one. Publishers certainly have no trouble doing so.

\textsection{79} The publishers and authors groups in AAP v. Frosh came out swinging, portraying Maryland and Maryland public libraries as greedy charlatans who gleefully trample established federal law and authors’ rights and destroy authors’ livelihoods. Here are some examples:

- The Maryland statute is “an unauthorized, unprecedented, and unjustified encroachment by a state into federal protected intellectual property rights” that “commandeers the rights of publishers and authors . . .”\textsuperscript{193}

\begin{footnotesize}
\textsuperscript{190} Alan Inouye stated in a letter to Maryland Attorney General Brian E. Frosh that “[t]he Copyright Office does not have any particular expertise in interpreting the Constitution’s allocation of power between the states and the federal government.” Letter of Alan Inouye to Brian E. Frosh. (Dec. 16, 2021) at 5, Ass’n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133). Judges, however, do regard attorneys from the Copyright Office as representing the viewpoint of the federal government.

\textsuperscript{191} See, e.g. Declaration of the Authors Guild in Support of Plaintiff’s Motion for Preliminary Injunction (Mary Rasenberger) at \textsection{5}.

\textsuperscript{192} Declaration of Alan Inouye in Support of Defendant’s Motion to Dismiss the Complaint at \textsection{2}, Ass’n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133).

\textsuperscript{193} Complaint for Declaratory and Injunctive Relief at \textsection{3}, Ass’n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133).
\end{footnotesize}
• “[T]he Maryland Act is a frontal attack on these federal rights and those who depend upon them to make a living.”\textsuperscript{194}
• “The Maryland Act would put one set of beneficiaries of the copyright system—libraries—in positions of unprecedented control, empowering them to direct and diminish the copyright owners who create and own the intellectual property in demand.”\textsuperscript{195}
• “Libraries have never had unfettered rights to every literary work upon demand…”\textsuperscript{196}
• “Libraries play a critical but carefully prescribed role within a broader copyright value chain—a chain that necessarily begins with authors and is fueled by the publishing houses . . . .”\textsuperscript{197}

\textsuperscript{190} AAP’s attorneys cleverly elevated federal copyright law to the level of moral rights to strengthen its argument with such language as the following: “The authority of the U.S. Congress to control the scope of exclusive rights under copyright . . . is centrally enshrined in the Copyright Clause of the United States Constitution.”\textsuperscript{198} The organization portrayed themselves as the torch bearers for democracy, free speech, and education who are sensitive to library needs. Some examples in this vein include:

• “American publishers serve hundreds of millions of readers each year in both local and global communities, and, for more than two centuries, have been an essential catalyst for democracy and the distribution of knowledge. Yet the vitality of the publishing industry cannot be taken for granted.”\textsuperscript{199}
• “Publishers compete vigorously with one another to craft ever-more innovative and responsive relationships and agreements with libraries . . . .”\textsuperscript{200}
• “Together, these publishers invest in and produce a valuable array of literature, children’s books, history, political books, and countless other genres that are indispensable to public discourse and personal enrichment; critically acclaimed course materials that prepare students to lead and contribute to an increasingly complex world . . . .”\textsuperscript{201}

\textsuperscript{191} Yet Maryland responded in an essentially apologetic fashion. Repeatedly throughout the litigation, Maryland and its supporting declarants used weak terms like “modest,” “only,” and “just.” Compare the following examples of Maryland’s statements in the case with AAP’s statements above:

\begin{itemize}
  \item \textsuperscript{194} \textit{Id.} at ¶ 8.
  \item \textsuperscript{195} \textit{Id.} at ¶ 7.
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{Id.} (emphasis added). This statement begs the question, prescribed by whom? Presumably by publishers.
  \item \textsuperscript{198} \textit{Id.} at ¶ 46 (emphasis added).
  \item \textsuperscript{199} \textit{Id.} at ¶ 2.
  \item \textsuperscript{200} \textit{Id.} at ¶ 65.
  \item \textsuperscript{201} \textit{Id.} at ¶ 13.
\end{itemize}
• “The Maryland Act is modest and sets out terms in the license designed to protect authors and publishers.”
• “Libraries pay agreed-upon prices and work with the publishing industry as partners, as we have historically. Public libraries just want fair access licenses at reasonable terms for Maryland library users.”
• “Libraries only request access to digital content at reasonable terms, which they have not been granted thus far.”

¶82 The declaration of Irene Padilla, a state librarian with the Maryland State Library Agency, unintentionally damaged Maryland’s case. Padilla stated in her declaration that Maryland’s digital lending is healthy and increasing, and she presented data in support. Her statement was an unfortunate mistake because it directly supported one of the arguments made by AAP. However, her remarks were a natural outgrowth of her training and experience as a librarian who must constantly justify libraries’ value to the public. More legal guidance and advocacy training should have been provided to her for the litigation. Indeed, all librarians need better training on advocacy and rhetoric.

Data Can Make a Difference

¶83 A significant challenge in AAP v. Frosh, and in future library litigation and advocacy, is a lack of meaningful data. Maryland used vague and simplistic data in support of its arguments. Both libraries and publishers need to present more data to legislatures and courts to support their positions. The difficulties are different for the

205. Declaration of Irene Padilla in Support of Defendant’s Motion to Dismiss the Complaint at ¶ 3, Ass’n Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614 (D. Md. 2022) (No. 21-03133). Padilla stated: “For fiscal year 2020, 56% of the population held library cards. The total holdings for the Maryland library system were 20,793,517. Of this total, there were 4,733,755 e-book holdings. There was a 32% increase in e-material holding since the last fiscal year. There was also a 31% increase in customer access to digital materials.”
two groups, however. For libraries, the difficulties involve a lack of resources and a lack of data. For publishers, the difficulty is their unwillingness to share.

¶84 When gathering data, libraries should focus on answering the following two questions: (1) How much more is the lending of licensed digital materials costing libraries than lending print books?; and (2) how is library spending returning to boost publishers’ bottom lines in terms of customers who purchase books they learned about through their local libraries? Both questions are difficult for libraries to answer. With respect to the first question, libraries can, and have, made some rudimentary approximations. In the first place, some circulation (or checkout) data is not available to libraries that delete it to preserve reader privacy. Furthermore, gathering and normalizing such a large amount of disparate data requires resources libraries do not have. The second question is virtually impossible to answer, but quality surveys combined with anecdotal data gained from interviews and focus groups could be valuable. Answering the second question requires even more resources than the first. Academic librarians and nonprofit groups should partner with public libraries to answer these questions. The Panorama Project by Overdrive is a good start, but more work is necessary.

¶85 Publishers should focus on assembling data sets for public consumption that show their profitability vis-à-vis print purchases and digital licensing, both with respect to individual consumer purchases and library purchases. Publishers should be willing to share their income and cash flow statements and other financial data, as public companies do, if they are going to argue that libraries are harming profitability. Publishers tend to overstate their claims. They need to provide proof. Of course, privacy and competitive advantage weigh against making the data available, but publishers could develop some useful metrics without opening their books completely to scrutiny. If they are unwilling to share any useful data, then publishers should drop the profit argument completely.

¶86 Copyright is ultimately a pragmatic economic balancing tool between the public on one side and authors and publishers on the other. AAP v. Frosh underscores how good data is required to strike the correct economic balance.

Libraries Have Support in State Legislatures

¶87 The one positive note from the Maryland statute and litigation is that they revealed that support for libraries exists among state lawmakers and can be harnessed for enacting beneficial legislation. Maryland legislators passed the statute unanimously despite opposition from the Association of American Publishers. Legislators in other


212. See, e.g., Hachette Book Group, Inc. v. Internet Archive, no. 20-cv-4160, 2023 WL 5207596 at *1 (S.D.N.Y. Aug. 11, 2023) (order limiting injunction to only books for which publishers were selling e-book versions, not all of publishers’ books).
states have also taken up the cause for libraries. The statute sends a message to the U.S. Congress and publishers that libraries are important to lawmakers and that a problem exists within the current publisher-library relationship.

¶88 Maryland’s resounding loss in the litigation may cause some state legislators to be more cautious about future legislative efforts. Maryland’s unwillingness to appeal indicates timidity or unwillingness to commit further resources in support of the bill. Advocates for future bills must clearly demonstrate to legislators that their efforts are legally sound and likely to prevail in the face of a challenge.

Moving Forward to Protect Library Collections

¶89 Library e-book statutes following the Maryland model collide with federal copyright law as interpreted by Orson,213 making further adoption of such statutes inadvisable. Congressional action to modify copyright law to help libraries is highly unlikely,214 so state action is the best avenue to protect libraries’ ability to provide and preserve resources for the public. This article now considers what libraries and states can do to move forward to solve the three challenges—high costs, preservation, and embargoes—facing libraries related to digital books and audiobooks.

Library Future’s Model Statute

¶90 In response to the disappointing outcome in AAP v. Frosh, the nonprofit organization Library Futures,215 a leading organization for libraries’ digital rights, drafted a model statute designed to avoid triggering the same issues that resulted in the permanent injunction on Maryland.216 Rather than requiring publishers to license e-books to libraries like Maryland’s statute, the model statute is “grounded in state consumer protection, state contract law, state procurement law, and contract preemption.”217

¶91 The model statute’s purpose elaborates: “Due to the unequal bargaining power of publishers and libraries and the pattern of abuse of market power by publishers, the State of [X] has a sufficiently compelling interest in adopting this legislation to protect

213. 189 F.3d 377 (3d Cir. 1999).
214. However, this does not stop scholarship pleading to the contrary. See, e.g., Ali Petot, The $500 Ebook: How Copyright and Antitrust Law Failed America’s Libraries: Extending First Sale Doctrine Protections to Libraries’ Ebook Purchases or Implementing Price Caps as Alternative Solutions to Lower Ebook Costs, 99 Wash. U. L. Rev. 1733, 1738 (2022) (footnote omitted) (“Libraries lack the capacity to address the challenge that high ebook prices present. Congress should address this weakening of a public institution by securing libraries’ right to purchase ebooks at fair prices. This would involve extending First Sale Doctrine protections to libraries’ ebook purchases or implementing price caps on the sales of ebooks to libraries.”).
215. Library Futures, https://www.libraryfutures.net/ [https://perma.cc/PL78-T37E] (the organization’s purpose is to “mobilize a community of experts to encourage the adoption of technologies that uplift libraries in the digital age, promoting new possibilities for preservation of and unfettered access to information”).
217. Courtney & Ziskina, supra note 82.
the interests of [STATE's] citizens in accessing information through the use of libraries.”

Section 1 defines key terms, including publisher, libraries, and electronic literary materials. Section 2 of the model statute does not use the word “library” except for in the heading; it removes the library as the intermediary and situates the licensing relationship as being between publishers and the public. Sections 3 and 4 enumerate prohibited licensing provisions and unfair or deceptive practices by publishers. Section 5 contains a severability clause to preserve the viability of the statute in the event that part of it is struck down by a court.

¶ 92 The structure of the model statute is very different from the Maryland statute. Significantly, as mentioned above, the model statute does not specify in any section that publishers are required to offer a contract with a library for all titles the publisher offers to the public. Instead, the statute enumerates a list of provisions that publishers may not include in contracts that license electronic materials to libraries. Contracts that include any of the forbidden provisions “constitute unfair and deceptive acts” under the statute, and the statute entitles libraries, librarians, library patrons, and the state attorney general to seek relief in court, including an injunction and fines of up to $7,500 for each violation.

¶ 93 Unfortunately, the model statute does not solve the problem of publisher embargoes, but it does ameliorate the problems of preservation and high costs per check-out by banning licensing provisions that restrict preservation activities, interlibrary loan, and the number of times a library can lend an item during the duration of the license period. Furthermore, the model statute stands a much greater chance of withstanding challenges by publishers by being grounded in state procurement law, consumer protection law, and contract law—areas well within states’ legislative purview. Courts have held that laws that regulate “improper market practices” and “only touch copyright works indirectly” are valid exercises of state power. The issue of federal copyright preemption is sidestepped altogether. The statute also forbids non-disclosure clauses, which should result in librarians having greater awareness of the prices other libraries are paying along with other contractual terms, thus increasing library bargaining power. Finally, the model statute has the expertise and resources of Library Futures supporting it. Representatives of Library Futures are willing to meet with state legislators to craft a bill similar to Library Futures’s model statute but tailored to the legislators’ constituencies, thus increasing the chances states will pass it into law.

219. Id.
220. Id.
221. Id.
222. Id.
223. See, e.g., Note, Jennifer Nou, Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts, 118 Yale L.J. 744, 770 (2009) (arguing that procurement contracts are “an important, though largely overlooked, accountability tool”).
¶94 The model statute has weaknesses.225 As stated above, the statute cannot force publishers to provide e-books and digital audiobooks to libraries; it can only impose limitations on licensing terms. Publishers could react to the statute by refusing to provide digital materials to libraries at all to avoid the statutory terms. Critically, it only applies to state entities and not private libraries, such as those funded by private schools. But the model statute provides an excellent foundation from which to build. Librarians should become familiar with it and advocate for its passage in their states.

Antitrust

¶95 Another potential legal avenue to approach this problem is through antitrust. Michelle Wu provided an excellent discussion of the potential for using aspects of antitrust law against abusive publisher licensing practices in a recent paper.226 Her analysis that the antitrust offense of illegal tying arrangements represents a legitimate path toward holding publishers accountable via antitrust law.227 Nevertheless, this tactic presents an uphill battle with significant challenges in the current legal environment when applied to e-book and digital audiobooks.228 An anti-price gouging statute may fare better. This section discusses both strategies.

¶96 A tying arrangement is a form of vertical restraint on trade when “a party [agrees] to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . .”229 In the case of libraries and publishers, the desired product is the e-book or audiobook and the undesired product is the platform that the e-book or audiobook exists on that is used to lend the digital product to borrowers. Publishers require libraries to purchase digital literary products from a specified platform or platforms. They cannot purchase an e-book and move it to a different platform or a platform of their own. The defined market consists of lending platforms, not literary products. This arrangement squashes the ability of competing lending platforms to enter the market.

¶97 Publishers like the tying arrangement because it locks libraries into their licensing terms through technological controls. Libraries would have much more flexibility

225. Library Futures is aware of the weaknesses of the state statutory strategy, proposing it as a temporary mitigation in place of a federal extension of the First Sale Doctrine to digital materials. Library Futures eBooks Policy Paper, supra note 54, at 3 n.8.

226. Michelle M. Wu, Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices, 114 L. Lib. J. 131, 144–55 (2022). Wu also suggests using an unreasonable restraint of trade argument against publishers, namely that publishers have “used their monopolies over copyrighted works to attempt to eliminate whole markets” for booksellers and jobbers. Id. at 153–54.

227. Id. at 146–53.

228. This argument has much more potential when applied to bundled journal packages in the academic library context, a situation that matches much more closely with past cases in which courts have found illegal tying arrangements. See, e.g., Int’l Salt Co. v. U.S., 332 U.S. 392 (1947) (use of industrial salt machines tied to purchase of vendor’s salt); U.S. v. Loew’s, Inc., 371 U.S. 38 (1962) (license to televise feature films tied to license of less desirable films); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) (sale of replacement parts for photocopier machine tied to repair services).

in setting lending terms if their digital purchases were not tied to a platform. With a platform-free digital purchase, a library could take the purchased e-book to the commercial platform of its choice or host it on its own platform, paying a separate fee for maintenance of the platform. The library could then set its own lending terms for the item depending on community needs.

¶98 Challenging this tying arrangement in court presents serious hurdles, however. In prior cases the courts have treated software tying arrangements very differently from other tying arrangements. In these situations, judges have applied the higher bar of the “rule of reason” analysis instead of the simpler “per se” analysis, which is what courts would apply to a case involving libraries and e-books. Under a per se analysis, a court will declare a tying arrangement invalid if a plaintiff can prove the four elements of a tying claim. Under a rule of reason analysis, courts “require careful consideration of market conditions and a showing of an effect on competition.” The rule of reason requires “a demonstrable impact on competition in the tied product market,” a difficult showing that requires hard data, not speculation. Furthermore, courts have viewed software tying arrangements more favorably than arrangements for other products, even suggesting that such tying arrangements may be procompetitive and beneficial for consumers because they foster efficiencies and innovations that could not exist without the tied relationship.

¶99 It is helpful to consider how the tying argument applied to library e-books would fare considering two significant software tying cases, U.S. v. Microsoft Corp. and Epic Games, Inc. v. Apple, Inc. In both cases, the courts of appeals held that the more stringent rule of reason analysis applied. In U.S. v. Microsoft Corp., the federal government sued Microsoft over its practice of requiring consumers to download its Internet Explorer browser as a condition of purchasing the Windows operating system. The D.C. Circuit Court of Appeals found that the per se analysis applies “when the tying product is platform software” and remanded the case with instructions to the lower court to carefully consider the efficiencies generated for consumers by the arrangement. The D.C. Circuit’s long discussion of the tying issue makes clear its discomfort with applying the simpler per se standard to a new technology integration, much less finding it to be

---

231. The elements of a tying claim are: “(1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.” Id. at 85.
233. Id.
234. Id. at 89 (D.C. Cir. 2001) (“But there are strong reasons to doubt that the integration of additional software functionality into an OS falls among these [illegal] arrangements. Applying per se analysis to such an amalgamation creates undue risks of error and of deterring welfare-enhancing innovation.”).
235. 67 F.4th 946 (9th Cir. 2023).
236. 253 F.3d at 34.
237. Id. at 85.
illegal tying. This discomfort suggests that courts will continue to be reluctant to find that tying is illegal in integrated technology environments.

¶ 100 In the more recent *Epic Games, Inc. v. Apple, Inc.*,²³⁸ the Ninth Circuit Court of Appeals found the rule of reason analysis to apply to a different software integration situation. The court interpreted the holding in *Microsoft* to mean that “per se condemnation is inappropriate for ties ‘involv[ing] software that serves as a platform for third-party applications’.”²³⁹ In this case, Epic Games contended that Apple violated antitrust law by tying its App Store with in-app payment processing, foreclosing Epic’s efforts to steer app users to Epic’s payment system. The court stated that it lacked “the level of confidence needed to universally condemn ties related to app-transaction platforms that combine multiple functionalities.”²⁴⁰ The court explained further that a more aggressive application of antitrust enforcement to Apple’s actions would harm innovation and competition.²⁴¹

¶ 101 Courts would likely have the same reluctance toward applying antitrust law to abusive e-book licensing practices as they had in the Apple App Store and Microsoft Internet Explorer cases. This judicial reluctance would make it very difficult for libraries to win an antitrust case against publishers, despite there being less technical integration, innovation, and potential efficiencies between e-books and platforms than in the Apple and Microsoft cases. Judges will likely be amenable to publishers’ explanations as to the benefits of locking down their products on platforms, especially anti-piracy justifications. Judges will also be likely to accept publishers’ claims that they are entitled to control all lending terms for digital works. For these reasons, a tying claim has a low probability of success.

¶ 102 If states want to try the antitrust route on behalf of their libraries, a state price-gouging statute may have a better chance of succeeding than tying, though it will only remedy the pricing problem. Most price-gouging statutes are only in force during emergencies or natural disasters, but there are exceptions.²⁴² Michigan’s statute forbids “[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold”²⁴³ and has no time or circumstance limitations. Libraries could lobby for more states to pass similarly flexible statutes.

**State Attorney General Action**

¶ 103 State attorneys general (AGs) regularly band together to bring their combined resources and expertise to bear against illegal and abusive consumer practices.²⁴⁴ AGs

---

²³⁸. 67 F.4th 946 (9th Cir. 2023).
²³⁹. *Id.* at 997 (quoting *Microsoft*, 253 F.3d at 89).
²⁴⁰. *Id.* at 997.
²⁴¹. *Id.*
²⁴². JAMES A. WILSON, STATE ANTITRUST LAW, 52-4th Corporate Practice Portfolio Series (BNA) at 142 (2023).
have successfully battled tobacco, opioids, and data breaches, to name just a few. States can, and do, “borrow” an effective statute from one state and piggyback on that statute in shared litigation. These actions have been successful to the tune of billions of dollars and improved consumer protections for millions of people and positive publicity for AGs and state governments.

¶104 This strategy could be used on behalf of libraries with a state antitrust law or consumer protection statute. Dozens of AGs could join in a multistate lawsuit that leverages a pricing-gouging statute like Michigan’s or the Library Futures’s model statute after it has become law in at least one state. AGs can leverage the popularity of libraries to burnish their political images in their states while assisting libraries with this critical issue.

Conclusion

¶105 Libraries are the bedrock of a free and educated society. Despite providing publishers with millions of dollars in annual revenue, incalculable amounts of free publicity, and developing their customer base of readers, libraries are punished by publishers with unfair and punitive terms for purchasing and licensing digital books and audiobooks.

¶106 It is clear from the current multitude of state legislation that state legislators care about helping libraries. State legislatures should look to the Library Futures model statute to create a statute that creates fairer contract language. The model statute’s improved language will pass legal scrutiny where Maryland’s statute failed. Libraries should also consider leveraging price-gouging statutes and AG multistate litigation to counter publisher abuses. Finally, librarians need additional training on how to be better advocates for libraries against aggressive, seasoned copyright attorneys. A successful legislative and litigation strategy will allow libraries to continue to thrive and fulfill their missions in helping all to access knowledge and learning.


248. See Elysa M. Dishman, Enforcement Piggybacking and Multistate Actions, 2019 BYU L. REV. 421, 429 (2019) (footnotes omitted) (”Multistate actions allow multiple states to coordinate together and leverage their shared resources to mount national scale litigation. Multistate actions may serve as an efficient mechanism to . . . hold corporations accountable when individual states may not be able to do so alone.”).
The legal treatise remains a pillar of the American legal system and the rule of law, despite claims it might be dying and variations in quantitative citations to treatises over time. Indeed, several treatises evidence increased citation in U.S. Supreme Court opinions during the last several decades. Surprisingly, the U.S. Supreme Court, including the Robert’s Court in Dobbs v. Jackson Women’s Health Organization, increasingly sees fit to rely on proto-treatises, such as Bracton, Coke, and Blackstone. This article provides empirical data and qualitative analysis to support this claim, highlighting the sometimes declining but nevertheless significant presence of treatises in case law, briefs, law reviews, and journals over time.

Implications for Practice

1. Despite the observed decline in their usage, legal treatises remain a significant source of legal knowledge and authority. Legal information professionals should continue to familiarize themselves with key treatises in their field of practice.
2. The evolving citation patterns of treatises in state and federal courts can provide insights into current legal trends and precedents. Professionals should stay updated on these patterns to inform their legal strategies.
3. The U.S. Supreme Court’s reliance on treatises, including “proto-treatises” or “institutes,” underscores their importance in shaping legal decisions. Professionals should consider these sources when preparing for cases that may reach the Supreme Court.
4. Treatises should be emphasized in the legal curriculum. Educators and students alike should recognize the value of treatises as a foundational element of legal education.

5. The treatise's role in upholding the rule of law highlights its importance in legal practice. Legal professionals should leverage treatises to ensure their practices align with established laws and principles.

Introduction

¶1 This article adds a new layer to the debate about the treatise's alleged demise by asking what jurisprudential role this type of legal writing plays in the common law system. It looks at this question from both quantitate and qualitative perspectives.

¶2 The data cover the wide array of treatise usage: as a finding aid of primary sources, a stand-in for settled law, an explanatory summation or exposition of the law in a particular area, and an in-depth journey through a particular area of law.

¶3 The empirical data gathered for this article cover the citations of 77 treatises over the last six decades. The citations come from cases at the federal and state levels and from trial through courts of last resort. The article also covers citations found in legal briefs and law review articles. The data show that treatise citations have remained significant and healthy—that is to say, treatises persist. However, when analyzed, the data,

---

1. See infra note 13 and accompanying text.
2. The word “persistent” bears particular significance in library and information science, which
even at this nongranular level, show a complex story that needs further research and analysis. Indeed, the percentage of all state and federal cases citing treatises shows a gradual decline over time. But this undifferentiated data, when taken apart, show that treatise citations encompass many variables, including authors’ reputations, the areas of law, and especially the courts’ levels. They also include the political and jurisprudential nature of the cases citing the treatises, whether they follow or break away with stare decisis. In the latter situation, it appears that treatises are cited as authority for what represents the common law tradition of the U.S. legal system.

¶4 Furthermore, in very recent U.S. Supreme Court jurisprudence, this article points out the use of treatises as evidence of what the law is, absent other evidence of authoritative sources. It illustrates the qualitative use of treatise citation by the U.S. Supreme Court in two cases: Roe v. Wade, establishing a new federal right for women, and Dobbs v. Jackson Women’s Health Organization, taking that federal right away from women by holding it did not exist in the first place. “We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”

¶5 Finally, this article supports the argument of the continued prominence of the treatise. It calls for further research to understand the evolving role of legal treatises in the common law tradition, especially given the advent of large-language models and generative artificial intelligence (AI).

**Methodology: Presentation of the Data in Citations in State and Federal Cases**

**Treatise Data Collection—A Brief Explanation**

¶6 Writing in the early twentieth century, Yale University Law Librarian and Professor Frederick C. Hicks described legal treatises as literary works containing “logical classification of materials drawn from authentic sources, and systematic discussion


4. The authority of the Court to overturn Roe is traced to a singular source: Our sole authority is to exercise “judgment”—which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is permanently exempt from evaluation under traditional stare decisis principles. A precedent of this Court is subject to the usual principles of stare decisis under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like Plessy and Lochne would still be the law. That is not how stare decisis operates. 142 S. Ct. at 2278–79.

of the state of the law pointing out difficulties, inconsistencies, and defects, and suggesting possible improvements.”

¶7 Hicks’s definition underlines the technical requirements of the treatise, irrespective of its medium—print or digital—which fits our view of treatises as specific embodiments of techné. This article uses “techné” instead of “technology” to add the philosophical subtleties of art and craft rather than to emphasize modern notions of industrial and digital technologies. Ontologically, in Greek philosophy techné was used as a complex concept, a knowledge-purveying activity. Techné was needed for knowledge production and communication. Given their complexity and the bridge treatises form between literary works and logical and systematic discussions of the law, techné seems the more appropriate generic concept. Besides being a specific, persistent techné, treatises persist as cognitive authority of the profession. Their persistence may soon be related to their incorporation by vendors like Lexis+ in its case law database, by placing citations to treatises right below most case headnotes (see figure 1).

6. Frederick C. Hicks, Materials & Methods of Legal Research 121 (2d ed. 1933). To distinguish other forms of legal literature, and because of the process that was used to select treatises for the study below, it is apparent there are other elements that are also relevant in the definition of a treatise. Treatises are not encyclopedias (which also have logical classification systems), but they are expositions of a defined field or topic of law using rational or pragmatic organization and reflective methodology that become part of the cognitive authority of the legal profession. Treatises are not written by a committee, like Restatements of the Law, but by established authors who are part of the authoritative branding of the work. Treatises endure, or are intended to endure, over time through new editions and updating, and they connect evolving developments in the law to the past in ways that facilitate both stability and flexibility in the law. Generally, they do not consist of works with “contributing” authors each adding their own distinct chapters to the work; rather, if there are joint authors, they merge their contributions into an inseparable and unitary work. Treatises are not guides to the particulars of an attorney’s practice of law, such as transactions, sample pleadings, or forms, but they are part of a techné that aids access to and interpretation of the law and, ultimately, in knowing what the law is, thereby supporting the rule of law. See our definitional aid in appendix C, https://www.aallnet.org/wp-content/uploads/2024/06/Callister-Appendices-V23_FINAL.pdf [https://perma.cc/3FNG-K6CY].

7. It is “[a]n art, skill, or craft; a technique, principle, or method by which something is achieved or created. Also: a product of this, a work of art.” Techné, n., OXFORD ENGLISH DICTIONARY (3d ed. 2010).


9. See id. at 249.

10. See id. at 248–49 (explaining the Greek roots of the word “techné” and its complex meaning going back to Plato and Aristotle to cover techné as skill, knowledge, and instrumentum).

11. Cognitive authority is a concept derived from social epistemology. See Patrick Wilson, Second-Hand Knowledge: An Inquiry into Cognitive Authority, at vi (1983). As a concept, it initially includes an individual’s recognition and trust of particular individuals or institutions as authority. See id. at 81, 89. Within the field of library and information science, the concept encompasses an individual’s trust and recognition of specific texts as authoritative. See id. at 166–68 (texts are accepted as authority in several ways—if authored by trusted individuals or groups, by publication record of the publisher, and through repeated revision of a reference work). Robert Berring notes that cognitive authority is not only relevant to the legal profession (as a social group) but that “[t]heor most of the twentieth century, the legal world had agreed to confer cognitive authority on a small set of resources.” Robert C. Berring, Legal Information and the Search for Cognitive Authority, 88 Calif. L. Rev. 1673, 1676 (2000) (“By ‘cognitive authority’ I mean the act by which one confers trust upon a source.”).
Lexis has selected 170 treatises to add to its headnotes. This figure provides additional evidence that treatises are persisting as relevant cognitive authorities and interpretive aids.

¶8 The data collected treatise citations in all state and federal courts going back to 1962 and organized it by decade. The start date was chosen to ensure sufficient time to predate the instruction of Lexis and Westlaw case law searching, which has given rise to the scholarly debate around the role, and especially demise, of legal treatises.

¶9 Forty years ago, A.W.B. Simpson wrote a seminal article on the history of the treatise in relation to other forms of legal publication and its intended role in organizing law around principles. He thought he had identified the “fall” of the treatise with its commitment to finding principles underlying the law in an age defined by legal realism, which had rejected such notions. Rather than treatises and their commitment to
principles and tradition,\textsuperscript{15} Simpson believed that “[a] system of ready access to such material[,] . . . the professional services, and more recently the online computer systems such as LEXIS and WESTLAW, have arisen to meet this need.”\textsuperscript{16} Perhaps Simpson employed a reductionist and computational view of technology, meaning he thought of technology as a means to turn everything into a consumable,\textsuperscript{17} thinking it’s out of touch with its true essence grounded in techné. This article views it according to the Greek meaning of techné, the organization and skill where usage can be an aid to reflective thought.\textsuperscript{18}

\¶ At about the same time, legal historian Lawrence Friedman characterized Restatement drafting (and presumably treatise writing) as “singularly fruitless” because in the case of Restatements, the authors relied on “reducing [the common law’s] principles to a simpler but more systematic form. . . . They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones.”\textsuperscript{19} The same criticism might be unjustly made of treatises.\textsuperscript{20} However, as shall be shown, treatises continue to thrive, and what this article relies on in its definition is that treatises require a “rational or pragmatic organization and reflective methodology.”\textsuperscript{21}

is that it gives organized structure to law. For this discussion, it is not relevant whether the realists are correct. The problematic element for the treatise is not the philosophy itself but the criticism that treatises are not the prestigious publications they were thought to be.” \textit{Id.} at 272.

\footnotesize{15. Ronald Dworkin, \textit{Law’s Empire} 228–38 (1986).}

\footnotesize{16. Simpson, \textit{supra} note 13, at 678.}

\footnotesize{17. Paul D. Callister, \textit{Law and Heidegger’s Question Concerning Technology: Prolegomenon to Future Law Librarianship}, 99 LAW LIBR. J. 285, 296 (2006), https://irlaw.umkc.edu/faculty_works/22/ [https://perma.cc/J2DP-TYZV], (“Indeed, the profession of law speaks of legal information, like other information, as a resource to be mined, harvested, ordered, quantified (in billable units), packaged, marketed, and, ultimately, consumed to some calculated end or purpose, which in turn will serve some other overarching end or purpose.”). For a more thorough explanation of calculative thinking, \textit{see id.} at 293 to 297.

\footnotesize{18. \textit{See supra} note 7 and accompanying text. For a more detailed explanation of techné, \textit{see}, e.g., Neacsu, \textit{supra} note 8.

\footnotesize{19. \textit{See Lawrence Friedman, History of American Law} 582 (1973) (describing efforts of “massive treatise” authors Samuel Williston and Austin Scott as being in the “strict, conceptual, Langdellian mold.” In the same vein, their work on the Restatements produced “arrangements of principles and rules (the black-letter law) followed by a somewhat barren commentary”). \textit{Id.}

\footnotesize{20. Indeed, the criticism has been made. \textit{See Simpson, \textit{supra} notes 13–14 and accompanying text.

\footnotesize{21. Rationalism and pragmatism are both epistemologies and ways of knowing. Rationalism requires consistency and is best exemplified by geometry (five basic postulates form the basis for all geometric proofs that always are consistent with one another). \textit{See Chancey C. Riddle, \textit{Think Independently} 10–14 (2009); Isaak I. Dore, \textit{The Epistemological Foundations of Law} 34–36, 255–72, 296–98 (Carolina Academic Press, 2007); and Bernard Williams, \textit{Rationalism}, 7 \textit{Encyclopedia of Philosophy} 69–75 (Paul Edwards ed., Collier Macmillan 1967, reprt. ed. 1972). Pragmatism is the simple application of utility. We know something because it works often through repeated experimentation. \textit{See Riddle, \textit{supra.}; Dore, \textit{supra} at 892–900, 913–16; and Gertrude Ezorsky, \textit{Pragmatic Theory of Truth}, 6 \textit{Encyclopedia of Philosophy} 427–30 (Paul Edwards ed., Collier Macmillan 1967, reprt. ed. 1972). Our observation as librarians is that all classification systems require the application of rationalism and pragmatism to produce finding aids. This does not require a commitment in natural law or principles that may never be proven. Nor does this article take a position on any other jurisprudential or philosophical stance in the law. What the article notes is that treatise writers continue to find ways to organize the law with taxonomies, finding aides, and tables of content. The article ends its philosophical inquiry here.
Data for Total Citations to Treatises Since 1962 in Case Law Over Six Decades

11 The data collected about treatise citations show persistence, something quite different from a trend into irrelevance. At first brush, they show that treatises continue to have a healthy, persistent presence in our legal tradition.

12 The data were collected based on the rules listed in Appendix A. We created these rules as we went, constantly asking ourselves what defined a treatise; we then circled back to use them in formulating the definition above.22 Most important, the rules aided us in choosing a representative, manageable sample of treatises cited in all federal and state cases.23 Using the dates of January 1, 1962, through December 31, 2021, we looked at 2,516 “Texts & Treatises”24 on Westlaw Edge, among 32 Practice Areas. We also looked at 2,667 “Treatises, Guides & Jurisprudence”25 as sources for Lexis+, among 50 Practice Centers. The Practice Areas and Practice Centers with the numbers of works selected as treatises appear in Appendix B.26

13 With minor exception, this article limits treatises based on Practice Areas and Practice Centers available on Westlaw and Lexis, respectively.27 The use of Practice Centers becomes important later because the article measures not just the total number of treatise citations but the total number of treatise citations compared to the total

22. See supra note 21 and appendix C.
23. One ripe area of study that time and resources did not allow us to include were state-specific treatises (e.g., B.E. WITKIN, CALIFORNIA EVIDENCE (5th ed., Westlaw Edge updated through 2022)). We were further limited to items available on Lexis or Westlaw.
24. For example, we accessed “Treatises and Texts” on Westlaw Edge by drilling down from “Practice Area” to “Intellectual Property” to “Secondary Sources” and then filtered for “Publication Type” by “Texts & Treatises.”
25. We also accessed “Treatises, Guides & Jurisprudence” in Lexis+ by drilling down from “Practice Area” to “Copyright Law” to “All Copyright Law Treatises, Guides & Jurisprudence.”
27. The article made some exceptions and added four treatises other than through our method of looking at Practice Areas on Westlaw and Practice Centers on Lexis. First, the article added Wright & Miller’s Federal Practice & Procedure (but there is no “civil practice” Practice Area on Westlaw). This beloved treatise is highlighted in Kent Olsen’s conference paper. Wright & Miller is also the most-cited treatise in Table 1 for downloads from 1962–2021. Second, the article includes McCormick on Evidence (ranked fourth in Table 1), but there is no Westlaw Practice Area for “evidence.” Third, the article adds Rotunda & Nowak’s Constitutional Law (which ranked 24th in Table 1), but again, there is no Practice Area for “constitutional law” on Westlaw. All three of these omitted Practice Areas exist on Lexis. Finally, in addition to the three exceptions for Westlaw, the article includes Scott on Trusts (Aspen Publishers), which ranks 23rd on Table 1. We include this in part because Scott on Trusts is such a significant and historical treatise and in part because we wanted to get a sense of how prominent treatises from publishers other than Thomson Reuters and Lexis might fare in citations. We made these inclusions using our expertise as librarians (and that of Kent Olsen, our colleague). These treatises are beloved by users, and the numbers show it. Also, by introducing them, we are aware that we are reinforcing the saying that legal research is both art and science. Furthermore, while within the article’s methodology we tried to be as objective and uniform as possible, these exceptions show that human expertise needs to always play a role in legal research. It also highlights the interface design limitations of products like Westlaw and Lexis in leading users to some of the most important sources of law, indeed at the core of the legal profession’s cognitive authority.
number of cases in a database in a specific Practice Center. Our methodology and rules for identifying treatises (Appendix A), while perhaps missing some things that might be treatises, gave us a representative sampling of 77 treatises to work (Appendix D).

14 The decades for the raw number of citations in the tables were selected because of the advent of online case searching in the 1970s and the criticism suggesting irrelevance of treatises during that time.

15 The full chart of 77 selected treatises is located in Appendix D. Tables 1 and 2 show a much smaller sample of four treatises. Table 1 gives each by title, rank within the 77 total treatises, and Lexis or Westlaw Practice Area. Table 2 shows a per-decade count of how many times each of the four treatises were cited. Darker shading in table 2 indicates higher numbers. Nimmer, for example, peaked in the decade 2002 through 2011, while Wharton's Criminal Law peaked in number of citations between 1962 and 1971. Wharton offers a strong example of how treatises can have tremendous staying power, extending well beyond a century.

### TABLE 1

Sample Treatise Citations, 1962–2021, by Title (full table available in Appendix D)

<table>
<thead>
<tr>
<th>Rank</th>
<th>Total Citations 1962–2021</th>
<th>Title, Author and First Publication Date (from OCLC)</th>
<th>(Searched on Lexis – Federal &amp; State Cases)</th>
<th>Practice Area</th>
<th>Platform</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Federal Practice &amp; Procedure, William Barron (William Webster), 1960?</td>
<td>(&quot;Federal Practice&quot; or &quot;Fed. Prac!&quot;) or &quot;F. Prac!&quot;) /5 (Wright or Miller)</td>
<td>N/A (No &quot;Civil Procedure&quot; Practice Area)</td>
<td>Westlaw</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>McCormick on Evidence, 1972 (1954 for handbook)</td>
<td>Evidence /5 McCormick</td>
<td>N/A</td>
<td>Westlaw</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Nimmer on Copyright, 1963</td>
<td>Copyright /5 Nimmer</td>
<td>N/A</td>
<td>Lexis</td>
<td></td>
</tr>
</tbody>
</table>

This chart is split in two with the chart in table 2, which continues the chart. This first column lists the ranking of the number of citations between January 1, 1962, through December 31, 2021. The treatise title, with a reference to the original author, is listed in the next, followed by the terms and connectors search to find citations, the “area of practice” for Westlaw or Lexis, and the platform that was the source of the treatise.

28. See infra sections Select Other Treatises as a Percentage of All Cases and Select Treatises as a Percentage of U.S. Supreme Court Cases and Briefs in Certain Practice Areas.

29. Note that no. 4, “Contracts /5 Corbin,” picks up more than Corbin on Contracts. There are various state treatises for Corbin on Contracts, such as Corbin on Massachusetts Contracts, Corbin on New York Contracts, Corbin on Illinois Contracts, and Corbin on Ohio Contracts.

30. See supra notes 13–19 and accompanying text.
TABLE 2

Second Part of Table of Treatise Citations in All Federal and State Courts
(full table available in Appendix D)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1962-1971</td>
<td>819</td>
<td>8,944</td>
<td>19,749</td>
<td>21,221</td>
<td>40,580</td>
<td>56,001</td>
<td>147,314</td>
</tr>
<tr>
<td>1972-1981</td>
<td>2,010</td>
<td>4,892</td>
<td>4,174</td>
<td>2,967</td>
<td>2,752</td>
<td>2,662</td>
<td>20,719</td>
</tr>
<tr>
<td>1982-1991</td>
<td>90</td>
<td>289</td>
<td>676</td>
<td>871</td>
<td>1,396</td>
<td>1,249</td>
<td>4,633</td>
</tr>
<tr>
<td>1992-2001</td>
<td>1,140</td>
<td>1,145</td>
<td>784</td>
<td>589</td>
<td>444</td>
<td>432</td>
<td>4,554</td>
</tr>
<tr>
<td>2002-2011</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,554</td>
</tr>
<tr>
<td>2012-2021</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,554</td>
</tr>
<tr>
<td>Total</td>
<td>1,160</td>
<td>1,145</td>
<td>784</td>
<td>589</td>
<td>444</td>
<td>432</td>
<td>9,536</td>
</tr>
</tbody>
</table>

The shading helps spot the highest citations by a particular decade. For example, *Nimmer on Copyright* ranks 11 in total downloads since January 1, 1962, with 4,633 total citations as of late fall 2022. Between January 1, 1962, and December 31, of 2021, *Nimmer* had 4,571 citations. There are citation numbers from all federal and state courts for each decade between 1962 and 2021 and shading to show the peak, which for *Nimmer* was in the decade 2002 through 2011 (1,396 citations, although 2012 through 2021 was a close second (1,249 citations). On the other hand, *Wharton* (which the authors traced back to the 7th edition in 1874) had its peak citations between January 1, 1962 through December 31, 1971 (1,160) and in the final decade (432). Some treatises, like *Wharton's Criminal Law* can have tremendous staying power, extending well beyond a century.

¶16 To understand the strength of treatises in raw numbers of citations per decade, we devised the tabulation chart shown in Table 3.
### TABLE 3
How Many Treatises Ranked 1-6 Comparing Their Own Citations Decade by Decade and Including Decades with No Citations

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ranked 1</td>
<td>4</td>
<td>6</td>
<td>22</td>
<td>7</td>
<td>16</td>
<td>22</td>
<td>77</td>
<td>-</td>
</tr>
<tr>
<td>Ranked 2</td>
<td>5</td>
<td>10</td>
<td>9</td>
<td>16</td>
<td>24</td>
<td>12</td>
<td>76</td>
<td>1</td>
</tr>
<tr>
<td>Ranked 3</td>
<td>3</td>
<td>4</td>
<td>13</td>
<td>31</td>
<td>15</td>
<td>10</td>
<td>76</td>
<td>3</td>
</tr>
<tr>
<td>Ranked 4</td>
<td>1</td>
<td>10</td>
<td>26</td>
<td>14</td>
<td>10</td>
<td>8</td>
<td>69</td>
<td>6</td>
</tr>
<tr>
<td>Ranked 5</td>
<td>6</td>
<td>28</td>
<td>-</td>
<td>4</td>
<td>9</td>
<td>12</td>
<td>59</td>
<td>19</td>
</tr>
<tr>
<td>Ranked 6</td>
<td>18</td>
<td>-</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>13</td>
<td>36</td>
<td>40</td>
</tr>
<tr>
<td># of No Citations</td>
<td>40</td>
<td>19</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>77</td>
<td>77</td>
<td>77</td>
<td>77</td>
<td>77</td>
<td>77</td>
<td>Average 77.00</td>
<td></td>
</tr>
</tbody>
</table>

For instance, in 1962–1971, just four treatises of the 77 had the most citations (which would be ranked one) in that decade, but 22 treatises had tied for the most citations in the decade 2012–2021 (tied with 1982–1991), another 12 were ranked second, and 24 treatises peaked in the prior decade (2002–2011). This data does not suggest treatises are dying, but quite the contrary: their use is on the rise (at least for current treatises). Continuing the analysis, 18 treatises had their worst number of citations (ranked 6) in the decade 1962–1971. It is tempting to include the decades with no citations, but that would be misleading since a treatise may have not existed or have just been published. Furthermore, some treatises were not cited in multiple decades; for instance, in 1962–1971 and 1972–1981 deciding which ranks last was problematic. Returning to the table, it does show that rankings 1 and 3, corresponding to the last three decades, were highest in terms of raw citations. Such is the pattern on the other end for rankings 4 through 6, which have the fewest numbers of citations.

¶17 It is curious that the highest-ranking decades form a diagonal. This may be the result of measuring current treatises with older treatises not being carried forward (not that treatise with no citations “#/N/A” on our rankings chart—not depicted\(^{32}\) occur predominantly in the early decades and then decline. In addition, there are more cases that can cite to treatises in each decade, so with each decade the possibility of more raw citations to treatises grows. These are only guesses as to why the diagonal pattern forms.

¶18 Notice in Table 3 that the number of no citations diminishes rapidly by advancing through the decades to the present. Indeed, the sharp decline of unranked decades, from 40, 19, 6, 3, 1, and 0, evidences the impact that selecting from treatises on Westlaw and Lexis may have, perhaps, also contributed to the diagonal decent. In the end, the

---

31. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/3DT8-VSSS] (scroll to bottom), at tab 4, cells F82 to O90.

32. See data in table in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu /faculty_works/742/ [https://perma.cc/5ZAM-4XTS] (scroll to bottom), at tab 4, cells G82 to O78. No treatise on the chart had zero citations (and thus no ranking) in the latest decade.
real problem with raw citations is they fail to account for how many cases are before the courts on the topic of a given treatise.

Select Other Treatises as a Percentage of All Cases

¶19 Because of the time it takes to study treatises as a percentage of all cases on the appropriate topic, we studied only the top 10 treatises (in terms of raw citations in all federal and state cases) and a few select treatises outside that range. Also because of limited resources, we restricted our research to the decades beginning in 1962 and later. With few exceptions, from the limited data, there is a noticeable decline in the number of treatises cited per cases on the same subject.

TABLE 4
Top 10 Treatises Based on Total Citations 1962-2021 & Their Percentage Citation in Cases on the Subjects & Citing the Treatise During the Same Period

¶20 While Table 4 depicts the general decline of treatises by decade, some works still received strong support in case law (we considered a benchmark of 5 percent as significant): Wright & Miller’s Federal Practice and Procedure (14.76%), Collier on Bankruptcy (31.2% in the last decade), 33 Moore’s Federal Practice & Civil Procedure (5.40%), Couch

That's five of the top 10 based on total citations between 1962 and 2021. Furthermore, Collier's, Moore's, Couch, and Appleman all had varying degrees in uptick (however, slight) in citation as a percentage of cases on subjects during the last decade.

¶21 Because the top 10 treatises might be skewing the results, we looked at a few other treatises (see table 5), restricting the number due to limits on resources and time.

**TABLE 5**

Select Other Treatises and Their Percentage of Case Citations 1962-2021 for Cases on the Same Subject

Table 5 shows declining usage for *Nimmer on Copyright* (ranked 11), *Wharton’s Criminal Law* (ranked 12), Areeda’s *Antitrust Law* (ranked 21), Dobbs & Hayden’s *The Law of Torts* (ranked 31), Prosser on Torts (unranked because it is a hornbook, although widely cited in the courts), *White & Summers’ Uniform Commercial Code* (ranked 13), and Rotunda & Norwak’s Constitutional Law (ranked 23). However, if a threshold of 5 percent is set, *Nimmer on Copyright*, Areeda’s *Antitrust Law*, and *White & Summers’...*
Uniform Commercial Code still have significant usage. Furthermore, Areeda had a slight uptick in the last decade.

¶22 Also studied was the countertrend of the treatises that went into decline. Some of these are mainstays like Wharton’s Criminal Law, Wharton’s Criminal Evidence, and Nichols on Eminent Domain, which have persisted since the nineteenth and early twentieth centuries but now show diminished usage over the last six decades. The question is why the counterrtrend, especially as the general pattern shows increased raw citations? Table 6 illustrates some treatises in decline.

**TABLE 6**

Treatises Declining in Citations in the Last Six Decades

Despite the declining data, perhaps treatises have lifespans, a rise and fall of usage, although some treatises have lifespans that are extremely long, like Williston on Contracts. Each declining treatise raises interesting questions that can be studied only treatise by treatise.

---

35. The data for this chart are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/89YD-6PEW] (scroll to bottom) at tabs 3 and 3b.

¶23 The rate of change between decades was measured with no discernible pattern to any consistent rate of decline.\textsuperscript{37} This emphasizes the unique character of each treatise and its topic. There may be many reasons for decline in treatise citations. However, the data show a consistent pattern of decline since 1962,\textsuperscript{38} which may have been influenced by the advent of online case law searching and perhaps the rise of legal realism, a theory that questions principles perhaps necessary for legal treatises.\textsuperscript{39} We tend to find more credence with the former explanation but would need to study a prior decade in the twentieth century and include more of our selected 77 treatises before supporting either explanation.

About Methodology for Measuring a Percentage of Cases

¶24 Treatises were identified by searching on Lexis+ Practice Areas. Searches were limited by either core terms or headnotes with terms corresponding to the Practice Area. Subsequently, searches were also run to determine just how many cases there might be in a Practice Area database. The latter became the main denominator and the former the numerator in determining the percentage of cases. Here are two sample searches:

(core-terms(evidence) or headnotes(evidence)) & (Evidence /5 McCormick)

(core-terms(evidence) or headnotes(evidence))\textsuperscript{40}

The first identifies the usage of the treatise in the case law of the Lexis+ Practice Area. The second identifies the scope of the case law database within the Lexis+ Practice Area.\textsuperscript{41} However, some instances demanded much more complex searches.

¶25 For instance, to measure the criminal area of practice for Wharton\textquotesingle s Criminal Law, we had to list a series of terms (which we borrowed from a hornbook or designated ourselves) to measure the breadth of the Criminal Law database.

(core-terms(criminal or crime or solicitation or conspiracy or murder or homicide or “resisting arrest” or manslaughter or “assisting suicide” or “aiding suicide” or assault or stalking or mayhem or rape or kidnapping or prostitution or theft or trespass or embezzlement or fraud or burglary or robbery or “receiving stolen property” or extortion or blackmail or arson or possession or trafficking or dealing) or headnotes(criminal or crime or solicitation or conspiracy or murder or homicide or “resisting arrest” or manslaughter or “assisting suicide” or “aiding suicide” or assault or stalking or mayhem or rape or kidnapping or prostitution or theft or trespass or embezzlement or fraud or burglary or robbery or “receiving stolen property” or extortion or blackmail or arson

\textsuperscript{37} The data on rate of change are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/H5B5-JNJ4] (scroll to bottom), at tab 6.

\textsuperscript{38} See supra Table, 4-6.

\textsuperscript{39} See supra notes 13–18 and accompanying text.

\textsuperscript{40} The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/2HLV-K8A8] (scroll to bottom), at tab 11, cell 3, AD.

\textsuperscript{41} We did not have any way to definitively determine the number of cases in a Lexis+ Practice Area Case Law database.
or possession or trafficking or dealing)) & ((“Criminal Law” OR “Crim. Law” OR “Crim. L.”) /5 Wharton)42

Similar steps were taken for tort law. For studying treaties and briefs, the atleastN( ) command was used.

Treatise Citations in All Briefs in All State and Federal Cases Since 1962 Over Six Decades

§26 At first, consider our top 10 treatises for citations between 1962 through 2021 in briefs (see Table 7).

**TABLE 743**

Top 10 Treatises Based on % Citations 1992-2021
Percentages of Briefs on Topic & Citing the Treatise Per Decade

To ensure the briefs (and later journals) were on the same subject, we used the atleastN( ) command, such as atleast5(bankruptcy), meaning each brief had to reference

42. The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/3TGU-4PZL] (scroll to bottom), at tab 11, cell 13, AD.

43. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/HTU6-R74N] (scroll to bottom), at tabs 5 and 9.
“bankruptcy” at least five times. Because the number of briefs in Lexis databases shrinks with each descending decade, we limited our search to the last three decades. There is a marked decrease in the use of treatises in briefs. *Collier on Bankruptcy*, and *McCarthy on Trademarks & Unfair Competition*; however, all maintained citations above the 5 percent benchmark. These treatises are quite technical and often code-based fields.

¶28 The same is true of journals, which were limited for the study to 1992–2021.44 Table 8 shows a clear downward trend for the last three decades. Only two treatises were above the 5 percent citation level, and several treatises dropped below the level during that time. That said, journals still cite Wright and Miller, Collier, and McCarthy at least 10 percent as of 2012–2021.

### TABLE 845

<table>
<thead>
<tr>
<th>Top 10 Treatises Base on Citations in Caselaw &amp; Their Percentage</th>
</tr>
</thead>
</table>

| Citation in Journal Articles on Subject for Each Decade from 1972-2021 |

¶29 It is noteworthy that the treatises that lead among citations in all state and federal court decisions are the same ones that lead in briefs, law reviews, and journals. This suggests wide agreement on what constitutes the cognitive authority of the legal profession.

44. The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/6NMY-U2F2] (scroll to bottom), at tab 11, column AD.

45. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/3JJT-DL8U] (scroll to bottom), at tabs 5 and 10.
Select Treatises as a Percentage of U.S. Supreme Court Cases and Briefs in Certain Practice Areas

Treatise Citation as a Percentage of Supreme Court Citations on the Same Subject

¶30 The use of treatises by the U.S. Supreme Court continues the trend discussed above, but with some noticeable differences (see Table 9).

TABLE 9

Treatises (Top 10) Cited by Decade as a Percentage of All U.S. Supreme Court Cases in the Practice Area

The picture has changed radically when focusing only on U.S. Supreme Court treatise citations. Five of the top 10 treatises actually have upward trend lines over the last few decades, and the Court cited three of the treatises above (or well above) 50 percent of its cases on the subject, and a fourth treatise in about 45 percent of its cases.

¶31 Table 10 shows a few other select sources.

46. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/355E-WMPU] (scroll to bottom), at tabs 11 and 15.
Tables 9 and 10 illustrate that three of the treatises were relied on more than 80 percent of the time in the last decade: *Collier on Bankruptcy* (95.7%), *Moore’s Federal Practice and Civil Procedure* (82.4%), and *Nimmer on Copyright* (80%). In Table 9, 7 of the top 10 most-cited treatises (in all federal and state courts) are cited at least 5 percent of the time in the last decade by the U.S. Supreme Court. Five of the 10 had an uptick in total citations comparing the last decade with the prior decade. The U.S. Supreme Court relies on treatises (at least the top 10) to a greater extent than other courts (or at least as indicated in a study of all state and federal courts).

¶32 Why? Perhaps because the cases it receives are cases of law or because they are cases of first impression. It raises the question whether other state and federal appellate courts also rely on treatises to a greater extent than trial courts. Unfortunately, this study could not extend so far. There is more work to be done. Furthermore, law faculty, students, judges, and attorneys need to know of the high use of many treatises in the Supreme Court.

47. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/FVW7-93WL] (scroll to bottom), at tabs 11 and 16.
Percentage of Treatise Citations in Supreme Court Briefs on the Same Subject

§33 With respect to briefs written for the U.S. Supreme Court, the pattern indicated in Table 11 is more typical of the tables in the prior section of this article.

**TABLE 11**

Treatises (Top 10) Cited by Decade as a Percentage of All U.S. Supreme Court Briefs

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Collier on Bankruptcy</td>
<td>14.97%</td>
<td>13.02%</td>
<td>16.55%</td>
</tr>
<tr>
<td>Moore's Federal Practice and Civil Procedure</td>
<td>7.86%</td>
<td>7.15%</td>
<td>2.5%</td>
</tr>
<tr>
<td>LaFave's Search and Seizure</td>
<td>5.72%</td>
<td>6.31%</td>
<td>5.81%</td>
</tr>
<tr>
<td>McCarthy on Trademarks and Unfair Competition</td>
<td>21.38%</td>
<td>21.2%</td>
<td>21.44%</td>
</tr>
<tr>
<td>Nimmer on Copyright</td>
<td>27.13%</td>
<td>28.6%</td>
<td>30.72%</td>
</tr>
<tr>
<td>Insurance / Apjian</td>
<td>9.93%</td>
<td>10.03%</td>
<td>9.85%</td>
</tr>
<tr>
<td>Insurance / McCarthy</td>
<td>11.1%</td>
<td>11.2%</td>
<td>11.42%</td>
</tr>
<tr>
<td>Trademarks / Trademark Claims</td>
<td>3.71%</td>
<td>3.7%</td>
<td>3.65%</td>
</tr>
</tbody>
</table>

Again, during the last decade, five treatises are cited at least 5 percent of the time: *Collier on Bankruptcy* (14.97%), *Moore's Federal Practice and Civil Procedure* (7.86%), *LaFave's Search and Seizure* (5.72%), *McCarthy on Trademarks and Unfair Competition* (21.38%), and *Nimmer on Copyright* (27.13%). Only two treatises showed an uptick in usage in the latest decade from the prior decade.

Comparison to Other Secondary Sources in Supreme Court Citations

§34 We could not discover a conclusive way to study the use of treatises compared to other secondary sources, but we did find that even by searching for the word “treatise” compared to other secondary sources in the U.S. Supreme Court—in some instances limiting the practice area to constitutional law or contracts law—there was some interesting data for review.

---

48. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/EF9J-VC39] (scroll to bottom), at tabs 11 and 17.
\[35\] In Table 12, the usage of “treatise” is measured in cases from the U.S. Supreme Court. We also searched for hornbooks, law reviews, *American Jurisprudence* (constitutional and contract law cases only), * Corpus Juris Secundum* (constitutional and contract law cases only), and a series of early sources of the law. Perhaps the most interesting takeaway is how frequently the Supreme Court resorted to *American Jurisprudence* (presumably the second) and the role of early sources of law. No real conclusion can be drawn about the use of treatises (in comparison to other resources) because “treatise” is just a categorical name for a great many works that would have been more likely cited by their proper names, omitting the word “treatise” entirely.

**Granular Data from a Few Select, Landmark U.S. Supreme Court Cases**

**History of U.S. Supreme Court Citation to Earliest Treatises or “Institutes” in Case Law Since Its Inception**

\[36\] Furthering our inquiry, we gathered data that not only show specific U.S. Supreme Court cases but also chart the usage history of certain early treatises and other

\[49\] The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/TKA7-XSFL] (scroll to bottom), at tabs 11 and 18.
sources, such as “Institutes,”50 throughout the history of the Court. One hypothesis for the upsurge in use of these early treatises and sources, starting with the 1980s, is the originalist orientation of recent Supreme Court Justices. The implication is that early law is conservative and reflective of the meaning of the Constitution and origins of U.S. law. Consequently, more conservative, textualist, and originalist Justices are inclined to use the early treatises to find and interpret the law, although as discussed below, liberal judges may use it as well.

A Few Landmark Cases

¶37 In addition to this type of search, for U.S. Supreme Court cases, we also engaged in a more granular data gathering of treatise citations. For instance, as the graphs in Tables 13 and 14 show, we looked at secondary source citations in specific instances. The article arranges six decisions in three groups along the lines of what Supreme Court Chief Justice Roberts recently called “landmark cases overruling prior precedents, [whether because] the passage of time and new developments justified those decisions [or because they] were egregiously wrong on the day they were handed down.”51 Those three groups contain both a landmark case and its subsequent Supreme Court decision overturning precedent: Plessy and Brown v. Board, Lawrence and Obergefell, and Roe v. Wade and Dobbs. We looked at two types of secondary sources cited by each of these six landmark cases. Table 13 shows data for earlier treatises, and Table 14 lists data for treatises, hornbooks, and law reviews.

¶38 In most instances, the case overturning precedent cited more secondary sources in their reasoning (Plessy and Brown were exceptions). More intriguingly, Dobbs, which believed Roe “egregiously wrong,”52 relied most on treatises and other secondary sources. At this point, to understand the role of treatise citations, we engaged in a brief qualitative analysis of the role of those treatise citations.

50. See the definition and treatment of “institutes” and “institutionalist” in John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 Colum. L. Rev. 547, 585–88 (1993). Generally, institutionalists write on a nationalist scope, defining national legal systems, but there are other distinguishing factors that Langbein outlines.
52. Id.
TABLE 13
Citation of Early Treatises in Six Key Supreme Court Cases—Precedent Establishing Cases & the Bases that Overturned Them

53. The data for this table are available in Persistent Treatise Data & Charts Updated 72423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/ZV7W-U7SD] (scroll down to the bottom of the abstract page), at tabs 13 and 14. For a breakdown of the sources searched, see tab 12 (Blackstone lead with 487 citations, followed by “Story /5 Commentaries” with 188, and “Kent /5 Commentaries” with 93).
TABLE 14

Treatises, Hornbooks, and Law Review/Journal/Article in Six Key Supreme Court Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Treatise</th>
<th>Hornbook</th>
<th>Law Review/Journal/Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dobbs v. Jackson Women’s Health Org. (2022)</td>
<td>12</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Roe v. Wade (1973)</td>
<td>0</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Obergefell v. Hodges (2015)</td>
<td>0</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Lawrence v. Texas (2003)</td>
<td>0</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Brown v. Board (1954)</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Plessy (1896)</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

54. The data for this table are available in Persistent Treatise S.Ct. Case Comparison Data from Neacsu.xlsx, tab 4, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/T6ZV-9TMM] (the link to the file is at bottom of the page).
Qualitative Interpretation of Data

¶39 We looked at the citation of treatises in six important cases, which were either overruled by precedent (e.g., *Plessy, Lawrence*, and *Roe*) or overruled precedent (e.g., *Brown, Obergefell*, and *Dobbs*). We noted that the Robert’s court in *Dobbs* and *Roe* made use of early treatises, the most from the six Supreme Court cases (see table 15). However, we found that *Roe* and *Dobbs* made use of early treatises in slightly different ways. Both used them for persuading a particular reasoning. Both used them as evidencing trends in common law. But while *Roe* used treatises to evidence views and interpretation of the law, *Dobbs* used them as evidence of the law itself. For instance, Justice Alito relied on “the great common-law authorities—Bracton, Coke, Hale, and Blackstone” to evidence the common law tradition criminalizing “post-quickening abortion.” They “all write that post-quickening abortion was a crime.” Ergo, it is a crime.

---

55. The data for this table are available in Persistent Treatise S.Ct. Case Comparison Data from Neacsu.xlsx, tab 3, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/83RR-ZJAL] (the link to the file is at bottom of the page).
56. Dobbs, 142 S. Ct. at 2236.
57. Id.
58. Id.
¶40 But perhaps the following Dobbs quote is the most telling for the treatise’s role in current U.S. Supreme Court jurisprudence:

We begin with the common law, under which abortion was a crime at least after “quickening”—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.

The “eminent common-law authorities (Blackstone, Coke, Hale, and the like),” Kahler v. Kansas, 589 U.S. ----, 140 S. Ct. 1021, 1027 (2020), all describe abortion after quickening as criminal. Henry de Bracton’s 13th-century treatise explained that if a person has “struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.” 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).

Sir Edward Coke’s seventeenth century treatise likewise asserted that abortion of a quick child was “murder” if the “childe be born alive” and a “great misprision” if the “childe dieth in her body.” 3 Institutes of the Laws of England 50–51 (1644). (“Misprision” referred to “some heynous offence under the degree of felony.” Id., at 139, 127 S. Ct. 1610.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a “great crime” and a “great misprision.” Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale)). Writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a “quick” child was “by the ancient law homicide or manslaughter” (citing Bracton), and at least a very “heinous misdemeanor” (citing Coke). (1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone)).

¶41 Thus, the Dobbs Court found abortion of a “quick fetus” to have been a crime, in contradiction of Roe. In Dobbs, in each instance, the persuasive authority of these early treatises is evident due to the qualifying adjectives such as “eminent” and the verbs “describe” and “writing” and “explained.” This use is within Hicks’ view of the role of treatises as summarizing the law or may be described as “evidencing” it. However, more intriguing is the Dobbs’s sentence following the rather impressive quote mentioned above: “English cases dating all the way back to the thirteenth century corroborate the treatises’ statements that abortion was a crime.” Is Justice Alito saying that the early treatises are authoritative beyond the persuasive role the legal profession expects? Is the sentence mentioning primary, official sources and cases a minor aberration? Or is it telling of a new change in the U.S. Supreme Court jurisprudence where treatises are used to evidence tradition and, as such, minimize the disruptive effect of not following stare decisis, thus breaking with a cherished tradition of our common law system? The Court in Dobbs does limit stare decisis in constitutional contexts. “We have long recognized, however, that stare decisis is ‘not an inexorable command,’ . . . and it ‘is at its weakest when we interpret the Constitution.” Having given less deference to stare decisis, it would also appear, especially from Table 15, that the Supreme Court is reemphasizing the early treatises, institutes, and sources of law to great effect, and in a way

59. Id. at 2249.
60. Id. (emphasis added).
61. Id. at 2262 (citations omitted).
that supports originalism by returning to the texts of the Founders and the early Justices of the Court. Of course, more research needs to be done to analyze the use of particular sources in the Roberts’s Court, not only in this particular case.

¶42 Unlike the use by the Robert’s court of treatises in Dobbs, in Roe, treatises were used to evidence views and interpretations of the law rather than the law itself. The qualifiers in Justice Blackmun’s opinion were more nuanced. The reasoning relied on the “predominant view, following the great common-law scholars.” Coke’s words were further qualified as taking a position, which then Blackstone then followed. Those treatise writers did not define what the law was, but, in Blackmun’s opinion, they too opined about the law, interpreting it, and leaving room for others to interpret it.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the thirteenth century, thought it homicide. But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman “quick with child” is “a great misprision, and no murder.” Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), “modern law” took a less severe view. A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a “misprision,” a term they translated to mean “misdemeanor.” That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

¶43 Thus, Blackmun found that even destruction of a quick fetus in Roe was not a crime. It is his interpretation of the common law sources such as Coke that Dobbs overturned. This brief analysis of the use of early treatises in both Roe and Dobbs is meant to illustrate what we view as another facet of the persistence of treatises as cognitive legal authority. Of course, more research needs to be done.

Conclusion: The Persistence of the Treatise

¶44 As shown here, the persistence of the treatise is a complex research question. Raw numbers of citations in state and federal courts show a general trend upward in the decades since 1962. Some treatises have respectable levels of citations (at least 5 percent in our limited study). Select treatises cited as a percentage of cases in the U.S. Supreme Court show an increased number of citations in many instances. This continued robust presence raises questions for further research in state and federal appellate jurisdictions.


63. Roe, 410 U.S. at 134–36 (emphasis added).
Most significant, there is a pronounced upward trend for the U.S. Supreme Court to cite early treatises, Institutes, and other sources of law that were available to the Founders and early Court Justices.

¶45 On the other hand, treatise citations in law reviews and briefs (whether all states and federal courts or the U.S. Supreme Court) are noticeably down. Furthermore, more study needs to be made of treatises not selected as this article’s “top 10,” and especially treatises, other than those published by Lexis and Westlaw and its affiliates, need to be studied as well.

¶46 Finally, the study of the Roberts Court’s new trend of increased used of early treatises, Institutes, and sources of the law, remains a goldmine for scholars of our Rule of Law. It may be that this trend comports with increased originalism among Justices on the Court, but other scholars may pursue other theories or rationales.
Beyond the Completion Fallacy: Mission-Based Rightsizing of Academic Law Library Collections*

Amanda Bolles Watson**

The long-held view that bigger collections equal better libraries has distorted law library practices. Rather than striving for comprehensiveness, law libraries should “rightsize” collections by removing unneeded materials. Ongoing assessment and planning will ensure that collections align with evolving institutional missions. Thoughtful rightsizing can improve accessibility and demonstrate law library value. This article urges libraries to abandon notions of “complete” collections and embrace mission-based, quality-focused curation.

Implications for Practice

1. Law librarians should evaluate their collections based on how well they support their institution’s unique needs and goals, not based on having the largest collection possible. The size of a collection does not necessarily indicate its quality or usefulness.
2. Law libraries can thoughtfully “rightsize” their collections by removing outdated, irrelevant, or unnecessary materials. This rightsizing can improve the discoverability and accessibility of more useful resources.
3. Law librarians should engage in ongoing assessment and planning to ensure their collections remain tailored to their institutions’ evolving needs. As missions change, collections may need to be adjusted.
4. Law libraries should consider sharing collections or resources through consortia agreements to reduce duplication of materials across institutions. With smaller, more focused collections, reliance on resource sharing may increase.
5. Law librarians may need to educate stakeholders that removing materials through rightsizing is not wasteful or harmful, but a way to better utilize limited space and budgets.

* © Amanda Bolles Watson, 2024.
** Associate Professor of Law, Associate Librarian, Director of the Law Library, University of Houston Law Center, Houston, Texas, watson@central.uh.edu, https://orcid.org/0000-0001-8254-1158.
Introduction

¶1 In my initial hiring conversations with the dean of the University of Houston Law Center, he shared his vision of opening a new law building, and we discussed the exciting challenge of designing a law library. Years later, in 2022, I stood with him as we opened the O’Quinn Law Building, the top two floors occupied by the new law library. Between those two moments were years of the crushing realizations of bridging the enormous gap between the collection I inherited and the collection my institution needed to support its missions. Those years contained what could be seen as professional victories and defeats for the library and, surprisingly, a lot of personal fear in the decisions I faced. As I looked through the square footage totals for the top 100 law schools and compared them to the architectural drawings of the new O’Quinn Law Building, I worried about what it would mean to have one of the smallest physical law libraries among those law schools.¹

¶2 In those same years, I was involved in scholarly work about issues that engaged me: when to choose electronic formats, the status of the legal treatise, scholarship formats chosen for scholarly impact studies, and mission-based assessment. The convergence of this work crystallized for me that my library collection did not match the needs of my institution. The convergence of my scholarship and the work on our collection also revealed a larger, systemic truth that hiding behind large volume counts is a looming risk to academic law librarianship: the misplaced belief that all academic law libraries should be large spaces filled with massive physical collections has created, over many years, a

¹ U.S. News ranked the top 100 law schools in 2021, listing their libraries’ sizes as ranging from 13,750 to 116,269 square feet, with an average of 53,254 square feet. The University of Houston Law Library is just over 20,000 square feet. U.S. NEWS & WORLD REP., Academic Insights, 2021 Leaderboard, https://ai.usnews.com/ai (on file with author).
false vision of law libraries as oversized, expensive warehouses of idle materials rather than individualized, responsive hubs of scholarship, research, and innovation. Instead of valuing libraries based on how they meet their missions, this distorted view distills the quality of libraries to merely the size of their uncontextualized collections.

¶3 This basic misunderstanding of the purpose of law library collections damages the profession because it often creates an obvious mismatch between the work that librarians do and how libraries appear. This mismatch threatens the credibility of law librarians and the larger profession. Someone walking through stacks of dusty, questionably relevant materials could be led to believe collections require no stewardship or specialized knowledge and expertise needed to maintain them. These thoughts could lead to the conclusion that print collections have little value in the modern legal education environment, and that analogously law libraries and law librarians have little value. 2

¶4 This misunderstanding endangers useful materials because their relevance is obscured by their irrelevant shelf-mates, and their discovery is cluttered by the idle materials accompanying them in search results. This has the effect of hiding relevant items among other materials and making the overall quality of our collections hard to determine.

¶5 The complexity behind these collections, which do not necessarily align with their institutional needs, ultimately stems from a story of fear. Fear of loss. Fear of being wrong. Fear of discarding something someone might need. Fear that discarding anything at all will be seen as an error or a moral fault. Fear that if our library collections cannot at least attempt to emulate those massive, beautiful, well-maintained collections at the large Ivy League law schools from which most of our faculty hail, we cannot be perceived as being high quality. But perhaps most of all, fear that the worth of law librarians is in what we hold, not what we do.

¶6 Due to the cost of library materials, law library budgets are a significant piece of the overall law school budget and physical footprint, making them an attractive “cookie jar” to raid for other needs. Many librarians, in turn, have had little choice but to protect their budgets and spaces by clinging to the requirement of large collections. Ironically, the intended protection of standards that require large collections fails to protect them and provides further burden of an outsized, dormant collection. The consequences of this dynamic are in full view when librarians and law school administrators have not successfully reached a place of understanding about the high costs of legal materials and what materials are needed to support their law school’s educational, scholarly, and research needs. As a result of this failure, many libraries face inadequate budgets for purchases and criticism from administrators due to legal publishing pricing models and skyrocketing profit margins beyond their control, all while being forced to retain outdated materials.

¶7 Change is almost always a difficult thing, but many law librarians see change as loss. Budgets, physical space, and librarian staffing seem to endlessly decrease while law

2. While virtual collections are critically important to law libraries, they are not addressed in this article because they have not been as severely impacted as their print counterparts by the focus on outsized retention.
librarians are asked to produce more. Instead of being judged by their own stories of successes, law librarians have been held to the evaluation of external entities judging them by their collection size for over 100 years.³ This long legacy of external evaluation by nonlibrarians must give way to law librarians communicating the very real successes of their own libraries.⁴

¶8 Academic law libraries differ from one another because their institutions differ. All are partners to law schools, so of course they share common characteristics, but their needs and priorities fluctuate school to school, and even year to year. The programs librarians pursue sometimes require them to hold large physical collections because they have chosen to do so, based on their own funding, space, and needs. For instance, the University of Iowa Law Library’s vision statement incorporates this language: “We pursue, support, share, and preserve law, legal information, and legal scholarship created each day for researchers in the present and into the future.” Iowa intentionally created this goal to hold and maintain a large physical collection not only for its current users but for the broader community in perpetuity.⁵

¶9 But for others, not engaging in deselection represents an unintentional choice rooted in fear of both loss and the work required to overcome obstacles created by the pervasive problem of deferred collection maintenance, decreasing budgets, and loss of staff positions. The path to a highly relevant, findable collection is intellectually intensive. Mass deselection might expose the library in ways that are non-optimal and create problems that are difficult to solve.⁶ While most law libraries have done very intentional work in choosing what materials they acquire, have they practiced the same intentional-ity in choosing what to retain?

¶10 Of the 162 law libraries that provided collection size data to U.S. News & World Report in 2003 and 2021, only 10 libraries showed signs of massive deselection, having lost at least 10 percent of their title count between the 2003 and 2021 rankings.⁷ Another 12 libraries remained about the same, showing less than 10 percent loss or no more than 10 percent gain of their title count in that same period. The remaining 140 libraries grew by more than 10 percent, 35 of which grew over 100 percent during those years.

¶11 Not only must a library’s collection meet the needs of its institution, but it also must consider the larger law library community. Each law library belongs to the larger organism of law libraries in the United States and the world. As law libraries depend on each other's collections, they create a collective collection that must be curated in the

---


4. For a deeper conversation about law library external evaluation, see Amanda Watson et al., Demonstrating Law Library Value Through Mission-Centered Assessment, 115 LAW LIBR. J. 5 (2023).

5. Interview with Carissa Vogel, Law Library Director & Professor of Instruction, University of Iowa Law Library (Feb. 27, 2023) (email on file with the author).

6. For instance, a common time for libraries to rightszie is when they move into new space. Without a move, the question of what to do with newly vacant space creates sizable facility issues.

same way as individual collections. Individual law libraries have different relationships to the collective law library community and must take holistic views of this work.

¶12 Engaging in the deselection process requires nothing short of a paradigm shift. There are two branches to this shift: the work—both mental and physical—of librarians; and the challenging task of navigating the complicated feelings of stakeholders regarding the removal of volumes. The difficult work of both branches of the paradigm shift must be done to reconcile realities and remove the risk of credibility loss created by housing unjustified collections while defining what it means to be responsible to our institutions and the larger law library community.

**Law Library Collection Size Must Be Examined**

¶13 When law libraries were created in the U.S., understanding the size of a collection was a reasonable way to understand how much legal information one might be able to access through that library. Many changes to how legal information is published and accessed have fundamentally and universally changed law libraries, but the practice of counting titles persisted under the theory that collection size can measure quality. This practice has created a harmful distortion of law libraries. Law libraries are not one-size-fits-all organizations. They support their schools and communities in many ways and must curate collections that aid them in their work. The quality of those collections cannot be captured merely by evaluating their size.

**Completeness Paradigm**

¶14 Today, masses of legal information resources can be accessed at no cost to anyone with access to the internet or a public law library. But in the early days of the United States, law was a small body, accessible almost entirely to those with financial resources. At that time, access could be achieved only in the physical realm, and even then, it was open to only a specific subset of people. Until 1861, when the Government Printing Office was founded, newspaper printers contractually printed government documents. The U.S. Code was published in piecemeal pamphlets until the late 1800s and sent to various government officials. Similarly, until the late 1800s, court reports were held in individual courthouses. The legal treatise tradition came over wholesale from England as existing treatises were reprinted in the States and then continued with original

---


9. Ralph H. Dwan & Ernest R. Feidler, The Federal Statutes—Their History and Use, 22 MINN. L. REV. 1008, 1009 (1938) (originally statutes were published individually in newspapers, and copies were sent to congressional members and state officials).


works on U.S. law starting in 1795.\textsuperscript{12} Public access to treatises, however, was no different from access to other sources of law. If one could not pay for access, one could not access the law.\textsuperscript{13} The first treatise on U.S. law cost $4 in 1795,\textsuperscript{14} or about $95 in 2023 when adjusted for inflation.\textsuperscript{15}

\textsection{15} Because the United States was a new nation, not a lot of actual law existed to access. Complete physical collections were integral to accessing the law: without a key volume, an area of law would be virtually unreachable. The relative completeness of a law collection was paramount, and the idea of having a relatively complete law library represented an attainable and laudable goal. Law libraries counted titles and volumes as key indicators of their success in providing access to the law. This “completeness theory” reasonably judged the success of a library by the completeness of its collection. The idea was not that a bigger library was a better library, but that in providing a complete collection, a patron could access the law.

\textsection{16} The idea that completeness of a legal collection was a proxy for library quality was given weight by an 1876 report that gave the location, date established, and volume count for 51 law libraries.\textsuperscript{16} The report stated that 21 of the 38 law schools in the United States had established academic law libraries and that these libraries’ collections ranged in size between 300 and 15,000 volumes. The report advised that academic law libraries should collect at a minimum “the reports of the State in which they are situated, those of the Supreme Court of the United States, and a selection of the principal treatises upon American and English law.”

\textsection{17} Also in 1876, the entrepreneurs who later formed the legal publishing conglomerate Thomson Reuters began publishing and selling case law directly to lawyers, along with proprietary finding aids.\textsuperscript{17} Later, the federal government published compiled, subject-based codes.\textsuperscript{18} Law reviews took hold and exploded in number in the next decade,\textsuperscript{19} and with them, the legal textbook.\textsuperscript{20} During the same period, around 1,000

\begin{itemize}
\item \textsuperscript{12} Zephaniah Swift, A System of the Laws of the State of Connecticut (1795).
\item \textsuperscript{13} Some public law libraries existed at the turn of the century: Allegany County (NY) (1806), and Sullivan County (NY) (1809), as well as general public libraries like Boston Public and Philadelphia Library Company that held law titles. Dep’t of the Interior, Bureau of Educ., Public Libraries of the United States of America: Their History, Condition, and Management 169-70, 33, 100 (1876). The existence of free libraries, while important, does not address those without the means and opportunity to travel to those libraries.
\item \textsuperscript{14} The William & Mary library archive holds a copy of Swift’s treatise with the price noted. Many thanks to Special Collections Librarian Carolyn Wilson and Director Leslie Street for their assistance in finding this and the librarians at William & Mary for their excellent 1796 notetaking toward assessment.
\item \textsuperscript{16} See Public Libraries, supra note 13, at 168 (compiled by Stephen Griswold, Librarian of the Law Department of the New York State Library, presented the location, name, date established, and volume counts for 51 public state, public county, court, law association, and academic law libraries in 17 states).
\item \textsuperscript{17} Berring, supra note 10, at 1692.
\item \textsuperscript{19} 1 Yale L.J. (1892); 1 Harvard L. Rev. (1887); 1 Am. L. Reg. (1853).
\item \textsuperscript{20} Arthur Sutherland, The Law at Harvard 175 (1967).
\end{itemize}
treatises were published. These explosions of legal information content in a rapidly growing country (the United States almost doubled its population between 1870 and 1900) necessitated a fundamental shift in law library collections.

By the turn of the twentieth century, the idea that a law library could be complete became practically ridiculous. Regional reporters, finding aids, and secondary sources were sold for profit; the number of legal periodicals boomed; and the internet was invented, and the concept that a law library could ever be “complete” was far-fetched. However, academic law libraries remained in the regular practice of quantifying their collections by counting titles and volumes. Although the concept behind this quantification was once grounded in the theory that collection completeness created access to the law, that once-reasonable idea gave way to the orphaned concept that a big law library was, by virtue of its size, a good library.

The American Bar Association (ABA) adopted a standard for each member law school in 1921 that required it to have simply “an adequate library.” This evolved into a specific requirement to report information about the law library collection. Minimum volume counts were expected, as well as minimum expenditures. There were not many other requirements concerning the library, placing outsized significance on the physical collection. In subsequent decades, the ABA specified which titles were necessary for a “core collection.” The revision of this standard attempted to contextualize the library’s title count by seeking to quantify the exact materials necessary to demonstrate a successful law library. The same revision required a yearly report to the ABA on volume counts and other law library inputs. This revision signaled that merely owning a lot of books was not enough to meet the standard; for the first time, the standard incorporated the idea that collections must have some curation and be accessible.

Completeness as a Fallacy

In 1995, the ABA standards were revised to emphasize the entirety of law library offerings and shifted the collection count report to the end of the questionnaire. These changes reflected that a law library could not be held to a standard “core

27. See Hirsch, supra note 24, at 73.
29. AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard
collection” but must instead be responsive to its institution and mission. The revisions also gave law libraries the freedom to acquire “through ownership or reliable access” a collection “sufficient in quality, level, scope, quantity, and currency.” At around the same time as those revisions, *U.S. News* released a ranking of law schools. One of the factors used for this ranking was the size of the law library’s collection, a practice that reinforced the idea that collection size was a relevant indicator of a library’s quality.

Paragraph 21

In 2014, the ABA made changes to its accreditation standards that finally eliminated the idea that collection size reflected law library quality. The standards were revised to require that the collection “effectively support the law school’s curricular, scholarly, and service programs.” The ABA no longer asked for a regular report of collection size but instead required that the law library support the law school in its program of legal education. Unfortunately, this newfound freedom from the ABA was only symbolic, as the *U.S. News* requirement to report collection size remained virtually unchanged for 20 years. This persuaded most law librarians to continue to protect the size of their collections in an effort not to hamper their institution’s ranking. In 2020, law librarians entered discussions with *U.S. News* that ultimately resulted in collection size no longer being used to rank as of 2022. Though in theory law libraries were finally free to properly curate their collections, the legacy left by 100 years of external evaluation based on collection count is deeply engrained and requires substantial effort to shift.

Law Libraries Are Not Created Equally or on a Scale

Paragraph 22

The use of collection size as an approximation for quality created the damaging idea that all law libraries need to hold large collections. The practice of counting physical titles and volumes, and equating those counts with quality, is deeply entrenched in academic law librarianship. However, not all law libraries are created equally or on a scale. Rather than all law libraries trying to be more like one particular law library model, striving to meet a singular and practically unreachable ideal, each should do its best to meet the individual needs of its users and institution. Each law library has a unique mission, budget, pool of librarian talent, and administrative and university support levels. Although comparisons between libraries can certainly be made, law libraries cannot be held to and graded on a single standard or scale.

Paragraph 23

Law libraries are required by the ABA to serve their institutions, and because those institutions have different missions, no two law libraries should look the same. Law

---

30. *Id.*
33. *Id.*
35. Am. Bar Ass’n, Standards for Approval of Law Schools and Interpretations, Standards
libraries have varied missions, and those missions require them to hold different types of collections. Libraries, of course, have overlapping elements of both their missions and collections, but this overlap should not be mistaken for singularity. Having patron groups or materials in common does not mean libraries should strive to be identical or be judged by simply comparing differences in their data. It is essential that libraries be evaluated with an understanding of their individual priorities and their progress toward achieving those goals.

¶24 The concept of mission is a layered one. Institutions generally have a public mission or vision, which is often seen on beautifully photographed websites and in print brochures. These broad statements about institutional goals are one piece of the larger issue of missions, needs, and priorities. Behind these public-facing missions, institutions have a set of more private and pragmatic needs. The insiders of a school know what is being doggedly pursued each day. These needs are addressed in policies and goals around the school but are not advertised in the same way to the public. The next layer is the individual priorities of each unit and employee at a school. In law libraries, all these layers should inform the work librarians do each day.

¶25 Although all law schools have faculty, and faculty quality is certainly inherent in the public missions of our schools, the private needs of each school differ based on the work the faculty do. This includes elements as obvious as scholarly topic but goes deeper into what work the school asks the faculty to do. Not all faculties publish on the same level or engage in the same types of pedagogy, so the needs and priorities in support of faculty quality shift and conform to the individual institution. In the same vein, all schools want students to succeed, but the actual needs and priorities of what success means varies by institution.

¶26 Some law libraries’ missions include a robust collection, so numerous physical titles and high volume counts might be part of assessing whether those institutions are meeting their missions, needs, and priorities. However, others might focus on different needs, so collection size might not be part of their assessments. For those libraries, the type and discoverability of materials might be a more appropriate assessment measures.

Paradigm Shift

¶27 There is a story of an administrator plucking a book off the shelf and asking the last time it was circulated. It is no surprise that the book in the story had not circulated in some time, and this felt like proof to the administrator that the library was “wasting” space. Of course, there is a more complicated story than just space waste happening, but it is also certainly true that many law libraries are full of materials that are less than useful.36


36. Use is defined in line with traditional library thinking: “reading, consultation, study, research, etc.” Library Use, ONLINE DICTIONARY OF LIBRARY & INFORMATION SCIENCE, https://odlis.abc-clio.com/odlis_l.html [https://perma.cc/GG8M-75GU].
Defining Collections

¶28 Although total collection size has long been the focus of quality measurement, overall collections contain subcollections such as course books, general reserve volumes, or topical or otherwise defined special collections. These subcollections serve different purposes and are very individual to the law library in question. There is not a universal definition for what it means to have a reserve collection or a special collection. Some schools have a reserve collection that encompasses almost all their high-use titles, while others use a reserve collection to control one type of material. A library with a topical collection strength, like maritime law, might have in print certain preeminent works like *Benedict on Admiralty* but still differ in holdings from other maritime collections. For any of these collections, size is not the sole measure of quality. A size limitation might be based on shelf space or other physical limitation, but no perfect collection size applies across schools. Nor is a bigger subcollection necessarily a better subcollection. Some will collect in greater depth than others, but that choice is one that should be considered, not assumed.

¶29 The quality of the materials chosen to meet the law library’s mission and the discoverability of and access to those materials determine how successful any subcollection might be in achieving its goal. Quality, of course, does relate to how well written the material is. But assessment must go deeper and ask how well the content meets the needs of the collection.

¶30 Collection development policies are a required part of the ABA reaccreditation process. Law librarians have correctly invested time in writing relevant collection development policies that mirror the missions of their institutions. For decades, most law library budgets have not had room for excessive purchases, and the need for deselection should not be confused with a decrease in budgets. Selection is already the subject of careful rightsizing in law libraries.

¶31 Collection development policies have functioned as buying policies for most law libraries rather than as guides for retaining existing collections. This is a reasonable practice under the bigger is better paradigm, where even as new resources come in,


43. *Id.* at 14.
regular deaccession cannot be prioritized because of the constant need to tally big collection counts to equate library value. Thus, collection policies may not generally function as total collection policies but rather as acquisitions policies. The life cycle beyond purchase may often be restricted to a must-keep model where fear of loss outweighs other factors, so the plan itself is truncated.

**Deselection Is Critical to Access**

¶32 Selection is not the only important process of curating a collection. Intentional deselection is just as important. Deselection helps a collection be more discoverable and accessible. Discoverability refers to users’ ability to match specific materials to their needs; in other words, can they determine what materials they need for their use? Access furthers that idea by asking how easily users can retrieve items once they identify them. Without both discoverability and access, items have little to no value to a collection. Items that are not findable and usable may as well not exist. As discoverability and access are necessary parts of the collection quality equation, then collections should focus equally on what to put on the shelf and what to pull off.

¶33 Law libraries that hold extensive collections bear a responsibility to provide discovery systems and staffing to guide users to the appropriate materials. Large collections require a lot of other assets to be accessible and should not be held without a commitment to maintain those collections, including discoverability, accessibility, and usability.

¶34 Shelf serendipity, the idea that a user can happen upon material that is useful while simply browsing the stacks, is a long-held and beloved belief often invoked in academia. What appears to be serendipity is the visible manifestation of deeply intentional, intellectual curation by legal information experts, namely librarians. Behind every seemingly effortless research experience is the work of a team of experts that has spent time designing the collection and physical space to make that experience possible. Although often invisible to researchers, it is difficult intellectual work. This work is part of the equation of discoverability and accessibility, and law librarians must be the ones trusted to engage in this work. If law librarians are not allowed to regularly deselect materials, relevant materials will be hidden by shelf after shelf of books like selected statutes and bound newsletters from the 1970s. Law librarians have long been too quiet about our own work, and instead of being silent creators of magical experiences, we must become vocal about our role as thought partners in our communities.

**Books as Sacred**

¶35 Librarians sometimes face the challenge of stakeholders who believe books are sacred objects or that recycling or discarding them does some oblique harm to society or removes some wealth of knowledge.44 Books and their content are not one and the same. Physical books are paper and ink. They do not always have value outside their

content, and that content might not be best preserved through a paper copy. Consider a collection about enslaved peoples. Some material could be harmful to the unintentional user. But if the material is scanned into a repository that carefully describes the content, access is provided to those who need it. When those books are recycled and objections are raised, not everyone understands the careful decisions and processes that led to deselection.

§36 Sometimes books do have value outside their contents: that is, value as objects. But most library materials do not rise to the level of museum pieces, despite some exceptions. Some libraries also need books as decorative objects. That use should not be dismissed as books can invoke feelings of seriousness and success that are important for library environments. But the choice to use books as decoration inside the library should be the choice of the librarian. Books that are held on open shelves without any protection from harm are not being archived, they are simply being held. These concepts cannot be conflated.

§37 When any large-scale deselection process is planned, the law library must consider how to educate the law school administration, faculty, students, and perhaps the community. The heart of librarianship is not necessarily the same as an archivist or curator, who regularly works to keep materials as significant objects, but rather matching users to desired materials. In this way, what a law librarian selects for purchase is no more important than what a law librarian selects for removal. Of much more importance to the profession than threats of space reduction, law librarians can reclaim meaningful access to materials.

Rightsizing, an Alternative to Completeness

§38 The concept of weeding collections is certainly not novel. Weeding is the process of systematically removing materials from a collection. The concept of weeding does not fully encompass the process many academic law libraries find themselves in need of now. Because many law libraries have not invested deeply in weeding due to the need to count titles and volumes, many deferred deselections—often hundreds of years’ worth—must be performed.

§39 The process fundamentally changes collections because of the pervasive culture of mass retention. There must be a paradigm shift in the attitudes toward collections. Law library collections should no longer be judged as successful because of their size but, instead, because their collections usefully contribute to the goals of the law library and law school.

§40 This process can be called rightsizing. Rightsizing requires many considerations personal to each law library. It also calls for strategic thinking, and an understanding of planning and assessment. In considering how to rightsize an academic law library collection based on mission, it can be helpful to consider various elements of the institution

while prioritizing its needs and planning its goals and assessments. Here law libraries can consider their schools’ missions, curriculum, specialties, faculty, and students.

¶41 Because every law school has its own unique mission, rightsized collections differ between schools. While one school might laser-focus on bar passage, for example, another might invest in increasing faculty scholarship output. Of course, law schools typically have more than one articulated need. Law librarians should then extrapolate what these needs mean to law library efforts, including collections. The first library would seek out bar preparation resources and perhaps various types of resources in test-taking skills or bar-tested subjects. The other library would seek a highly responsive collection based on the faculty’s varied scholarship needs.

¶42 In their collections policies, many law libraries are already working to fulfill these missions. In rightsizing, a thought exercise might determine almost all bar preparation materials that have remained on the shelves for more than a couple of years can be recycled. While some test-taking and bar-subject materials might be retained, they most certainly could take a heavy-handed deselection process. In the same way, while preeminent treatises and a solid law journal collection might remain in the collection, monographs or particular issues of serials purchased for specific research projects should be considered for deselection. This second, faculty research–focused library should engage in acquisitions notes that are revisited as papers publish and faculty change so the collection remains relevant.

¶43 In addition to its school’s mission, the law library should consider its curriculum. While some overlap is expected, a school’s curriculum should inform its collection. For instance, some would say a law library collection should hold all preeminent treatises. However, if a school does not include trademark in its curriculum, it would be difficult to justify purchasing expensive trademark treatises in print, even if they are of the highest quality. By the same token, existing materials about trademark should likely be deselected with a heavy hand. If, however, a school has a very popular intellectual property class with a paper requirement, older materials will likely find more use, allowing librarians a different approach to deselection.

¶44 Another consideration is any specialties within the school but outside the curriculum, such as an institute or even a popular student team or association. A law librarian whose school does not focus on international arbitration may still decide to retain older arbitration materials because the school’s award-winning arbitration team uses the materials every year. These types of decisions need assessment based on internal factors to make sure that when the needs of the collection shift, the collection is responsive to change.

¶45 Even if faculty research is not part of a school’s mission, the faculty’s research needs must still be considered in this deselection process. It is common for faculty to have an allotment to purchase new materials for themselves, and some law library budgets will make this allotment more necessary than others. But for deselection, there are other considerations.

¶46 The habit of collecting as many titles as possible has created some buying policies based on format that need reevaluation. For instance, a collection development policy
might discourage duplications across formats, meaning if a title is held electronically, it should not be held in print. This decision is based on having as many titles as possible rather than carefully evaluating each title and the best format for that title. Although format is certainly part of decision-making, the paramount consideration should be alignment with mission, needs, and priorities.

¶47 Some believe that the internet holds everything, so all physical materials lack utility. Others believe digital formats could become unreliable, so the scholarly record must be preserved in print. Neither absolute is true or particularly useful to libraries. The concept of assessing digital and physical formats is not novel or a changemaker in libraries. The internet was invented in the 1980s, and librarians have had decades of negotiating what digital formats mean to their collections. Although some materials will be deselected because they are held in a more compact format, this was already true due to microforms; it should not be the sole reason behind collection size evaluation. Format considerations should be evidence-based and focused on the needs of the users. Keep in mind that evaluation may find multiple formats are appropriate for a title. Format can be a consideration in this process, but it should not be the primary driver.

¶48 As law librarians work to meaningfully plan and assess their retention practices, they need to evaluate many factors. How collections function, what goals they aid, and what roles they play in meeting goals outside the institution are all important. No one consideration should stand alone as a reason to deselect, but rather should be used as a tool to measure whether material is useful to the collection.

¶49 The process of understanding an institution’s missions and needs requires an insider’s point of view: in this case, that of the institution’s law librarians. Those librarians then carry the burden of consistently engaging in their communities so they can gather information and buy-in from other groups. There must be trust between groups that are built on multiple instances of meaningful and useful communication.

**Rightsizing**

**Institutional Considerations**

¶50 Often faculty are familiar enough with the law library to reshelve materials without their use being counted. This is a practice that should be discouraged as it makes assessment difficult. There is an issue between faculty’s perceptions of their library use and their actual use. There is also a harsh contrast between faculty who think virtually no books are necessary and those who think a law school cannot be successful without a vast print collection. Like many things, the mere possession of books is not, within itself, harmful or helpful. As with librarian expertise, faculty expertise in a subject should not be disregarded, but considered even in time periods when their use does not match their enthusiasm. In the end, it is understanding that the law librarians’ judgment is key to finding each institution’s rightsized collection that is most important.

¶51 Much like faculty needs, student needs outside the stated mission deserve attention but should also be questioned directly, not only by asking students but by being part of the community. Perhaps the most important part of deselection in this context
is working to reveal the materials students should access by removing materials that may distract them. Each law library must decide for itself what this means and understand that like any assessment-based work, this will change from year to year as students and student needs change.

¶52 Law librarians must exert expertise at the same time they recognize their limitations. For example, students may request the purchase of commercial brief books, even though copying from commercial briefs instead of learning to brief might harm their skill development. Law librarians might use their expertise to collect study aids that will be effective, without harming skills. They might also use their skills to host a display or guide explaining how to use study materials to the best advantage that explains why commercial briefs are not part of the collection.

¶53 One reason given for holding onto massive collections is “just in case” someone needs it. That is, material that was previously useful might become so again. The likelihood that someone will need, for example, an older edition of a treatise outside the school’s curriculum is small, but not zero. But in reality, many materials will not return to usefulness at a later date. Each library must decide for itself what material to keep and why, but decisions about preservation should not be based on fear. The practice of keeping a book “just in case” is less relevant now, and a meaningful process of deselection is almost always valid.

¶54 Books being out of print or too rare to obtain through digital or physical interlibrary loans is not common, and there will rightly be law libraries that continue to intentionally hold very extensive collections or subcollections. Libraries should focus their collections on their actual needs, and only consider their perceived future needs as relevant.

¶55 Law librarians should also prioritize how they can decolonize and diversify their materials. Intentional collection of minority authors and materials on topics related to diversity and inclusion should play a part in every deselection. A decision between two very similar materials should weigh a minority author or editor, as so many long-standing preeminent works were created because of systemic racial and gender discrimination by White, male authors.47 Our collections should match our communities to the extent possible, and as the legal profession becomes more diverse, so should our collections.

Collection Functions

¶56 The nature of large collections means law librarians have not always had to think deeply about the different functions of their collections. Certainly, some libraries have archives, some have museum pieces, and some hold books as objects or decorations, but the practice of holding large collections to improve title and volume count means we must now examine the place and use of our materials more carefully. Previously law librarians had so many volumes to store that if they used a material as

---

mere decoration, there was not necessarily a goal behind that use, but rather a thankfulness that they had the space to hold the needed volumes. As law librarians work to remove idle collections, they should consider whether they will only hold a library collection or have a need for materials for other purposes.

§57 Before considering other types of collections, the first and generally most important are the materials used for research, instruction, and reference. What is collected and kept in the library collection has many influences. The most important factor when rightsizing the library portion of a collection is the content of the material. But other types of collections, with other factors, may also play a part in our rightsizing.

§58 A library might find itself with certain artifacts meaningful to the community, like a book that was owned by a special alumnus. The most important consideration with these books is not necessarily the content but the special designation given to it by some external factor. One stunning example is the Library of Congress’s collection of the library of Thomas Jefferson. The collection is encased in a clear case, protecting the books while allowing patrons to view them. Although the titles can be browsed casually, the content of the books is not accessible, nor does it need to be. What matters is who owned the collection, and perhaps to some extent the type of books that were owned, making this a wonderful museum exhibit. Some law libraries have museums as part of their structure. If an institution desires a museum exhibit, they must fund it through space and talent. Law libraries without funding, space, and staff for museum materials should, as appropriate, donate museum artifacts to a library or museum that has the mission and means to maintain them. Law libraries should not be asked to be ad hoc museums if they lack the mission, facilities, and skills necessary to preserve materials properly.

§59 Archives are made up of materials kept primarily for preservation. The need for preservation might be rooted in many causes, but the materials should be safely stored for long-term preservation. Not every law library will have an archive, and it is important for stakeholders to understand that libraries and archives are not the same things. Archives must be funded and staffed with priorities of their own. Although there will be libraries with missions that overlap and invite archival work, there will also be libraries that do not align with having an archive. Libraries should not be forced to hold materials intended for archives without the proper consideration and support. Doing so can lead to disaster as the intention for the material cannot be met by the space and talent held by the library.

48. “An organized collection of the noncurrent records of the activities of a business, government, organization, institution, or other corporate body, or the personal papers of one or more individuals, families, or groups, retained permanently (or for a designated or indeterminate period of time) by their originator or a successor for their permanent historical, informational, evidential, legal, administrative, or monetary value, usually in a repository managed and maintained by a trained archivist.” Archives, Online Dictionary of Library & Information Science, https://odlis.abc-clio.com/odlis_a.html#archives [https://perma.cc/4Q3V-2ASU].


¶60 At times a library will need materials for decoration. Here it is not necessarily of chief concern what the content is but rather that the materials invoke the necessary aesthetic. Using materials as decoration may seem trivial, but using materials to aid the environment can be effective. It is hard to deny that sitting in a room of beautiful old volumes feels important. Studies show that students who find themselves in beautiful study environments do benefit from the aesthetic. A library may decide to keep materials simply because they are beautiful and it has room and the need for elevated décor.

¶61 As law librarians work through planning and assessment on any goal, they can consider the types of collections and how the material impacts their decisions. Some of these considerations might mean retaining a material that would otherwise be deselected, but others could shift the scale to donating a material. The Legal Information Preservation Alliance is an important source of information on how to preserve legal materials.

**Community Connections**

¶62 It is very important that law libraries work from their institutional missions and needs, but there is another group of factors that must also be considered. This second group of factors relates to the understanding that law libraries are a community and work with one another to provide access to as many resources to as many users as possible. Especially in a time of rapid sharing and collaboration, the interplay of libraries necessitates that they step into their role in the large body of academic law libraries.

¶63 One concept often discussed by law librarians is that of the scholarly record. The scholarly record is an idea that as academia goes about the business of teaching and learning, someone should be gathering the records of that work. Practically for law librarians, this means that the work of their academic communities should be gatherable on some level. That level is not universally defined, and there is naturally some variable need for these materials. It is certainly true that law libraries may have space in their collections to keep some materials because they are part of the scholarly record and that a particular library might have the means to commit to keeping them for that purpose. This type of work is best done in a more formal agreement, where law libraries agree and extend themselves to maintain a set of resources. When done less formally, a library may

---

Law Library holds the papers of Judge John R. Brown, but they were damaged in a tropical storm after being held in the basement of the law library.)


seek to rely on a material being commonly held, but there is no guarantee that those libraries will maintain those materials in the way the relying library would hope.

¶64 Another important consideration is a library’s geographic location and its potential need to collect and keep regional materials. Again, this is quite specific to the library in question. Some libraries will not need to pay much attention to their geography, if, for example, they find themselves one of many in their area or not in the strongest position among their co-geographical libraries to maintain regional collections. But others may be the only ones in their area or be in a financial and/or space situation to be the collector.

¶65 A library can also balance the options of interlibrary loan, consortia, or more casual library cooperation models when deciding what to deselect. Choosing to rely on other collections for rarely needed materials involves the difficult process of predicting whether the material will be available in the future. To be able to borrow something for a “just in case” need, some library (and preferably several libraries) will be able to loan it. While it is perhaps unlikely that every library would deselect the same materials, the type of uncoordinated effort that isolated rightsizing entails would make it difficult to know when materials invertedly became rare. The possibility of a common resource becoming uncommon by mass deselection is worth thinking about. However, deselection based on commonness is not as important as focusing on relevance, quality, and other more individualized factors.

¶66 One useful tool in these decisions are library consortia. Library consortia allow libraries to make formal agreements about what will be kept by each library, so they are allowed to make deselection decisions with less need to gaze into their crystal balls about other libraries’ future holdings. Consortia that enable collection sharing among members are critical to this work. Without planned sharing, law libraries may unintentionally discard materials that should be retained. Although good consortia models exist, more efforts are needed to fully harness the power of the collective collection.

¶67 When consortia are not appropriate, libraries may still decide to cooperate with one another.\textsuperscript{54} If law libraries are to rightsize their collections, these types of consortia and cooperative agreements become paramount to effectively managing small collections. Although there are certainly some schools, like the University of Iowa, that will continue to hold massive amounts of print as part of their mission, effective interlibrary loans and digital sharing require more than just a few libraries willing to hold a material. Law librarians should reach out to one another based on their various needs and work together as they need to make more stable decisions about relying on other libraries’ collections. They should also continue to invest in resources like the Internet Archive and other archives, which more consistently have long-term retention materials as their goal. Some law libraries that had not considered themselves as holders of an archive might come to understand through planning and assessment that archiving is

part of their mission. That decision is perfectly valid but should come through planning and assessment toward the law library mission, not fear of loss.

**Assessment and Planning**

¶68 Because of fear-based retention practice, our collection development policies may lack process and proof. A well-formed plan should have the actual plan, as well as a process for carrying out the plan, and then proof that the plan is in place and working.\(^{55}\) After law librarians carefully plan their collections to meet their institutional needs and priorities, they then need to provide a process for the plan to take shape. Part of this process should include planning beyond purchase because every law library material should have a life cycle or retention schedule. Some of these life cycles will continue into the archive, but many, if not most, should end in being donated or recycled.\(^{56}\) It is perfectly reasonable for there to be a default plan where a group of materials are retained until a determined time and then reconsidered. Often this type of process will have a default for different types and/or locations of materials.

¶69 This does mean some materials purchased are intended for eventual recycling. Though some consider this wasteful, every material has a useful life cycle.\(^{57}\) For some, that life cycle may be many centuries. But for many, it may be only months. Consider, for example, newsletters. The purpose of a newsletter is to inform its readers of new items. But often, newsletters are stored in large binders taking up many linear square feet of shelving. Sometimes this may be intentional, but each law library must decide whether it has a valid reason to physically retain newsletters.

¶70 Next, the proof of a plan should be noted in the plan and obvious in the actual collection. Law librarians should understand and describe how they will assess and know their collection plan is working. In discovering the collection in print or online, the librarian should ask: does the result of the discovery prove the plan? Or do the results show that the law library simply holds a lot of materials, some of which are likely not useful?

¶71 To effectively manage access and discoverability of materials that meet the institution’s mission, law librarians must embrace robust mission-centered planning and assessment in their collections. Specifically, this approach should inform rightsizing collections based on mission. It is impossible to perform meaningful assessments without good, meaningful planning.

¶72 Planning and assessment are not a one-size fits all solution. The processes will likely look different for each institution and, even then, will vary year to year as their populations, staffing, mission, and other factors evolve. There is no magic book or tool that will plan and assess a law library collection. Planning and assessment are processes

---


56. Most often serials have been given a life cycle or retention schedule. These do not always make their way into the collection policy but instead are documented through the careful planning of team members.

57. See Miller & Ward, supra note 44, at 9–10.
that require engagement at all levels of the group. Each engaged group must use a variety of tools to identify the extent to which their library meets its mission and how to further strengthen their work.

¶73 Planning and assessment are the processes of setting goals that help meet a mission, and at the same time gathering information to understand how and the extent to which goals are met. Law librarians first decide what is to be accomplished. Then, as they design resource collections, programs, instruction, or other offerings, they also decide what data to gather. The data can then be analyzed and interpreted to draw conclusions about the progress toward the goals. During this process, the project will adjust as information lends an understanding of what is working and what might work more efficiently. As goals are set, projects are designed, measured, and adjusted, and a cycle of continuous improvement is created.

¶74 It is important to remember that assessment requires a library to be in this continuous state of improvement, meaning its librarians must understand that shortcomings will happen, and should not be thought of as good or bad, but simply as part of an ever-evolving process. Planning and assessment must always be approached with an understanding that information will show flaws as well as successes. Without understanding flaws, a library cannot improve. Shortcomings must be embraced as the community engages in a cycle of continuous improvement. In this cycle, the community understands its strengths, but also how to make itself stronger through understanding its weaknesses.

¶75 Work in rightsizing will almost certainly result in some mistakes. A fear of making mistakes might keep a library from attempting rightsizing. But what must be clear is that not engaging in planning and assessment around collections retention is also a failure and should not be ignored. Moreover, mistakes should be reframed as opportunities to learn, innovate, and adapt. It is important to remember that institutions evolve, so success in one year might not yield success in the next, or success at one institution may not translate to another. It is only through meaningful, regular planning and assessment that librarians can understand what things are working or not working for their organization and, importantly, why things are working or not working, so they can continue in the cycle of continuous improvement.

Conclusion

¶76 I am compelled to note, for any administrators who might read this, that this shift is not budget related. Any hope that rightsizing will cost less money is misplaced. Law libraries are often already carefully planning new acquisitions and spending their budgets wisely. Unfortunately, there are money and labor costs associated with rightsizing that temporarily will increase operations budgets. The physical work to remove volumes is laborious, dirty work accompanied by digital cleanup that increases the work even further. This article also does not take on the issue of space rightsizing, which is a

58. See Watson et al., supra note 4, at 21–22.
separate issue. Often law libraries will need every inch of space they might release from holding materials for other uses. But this correction to the way we conceptualize our entire physical collections must still happen.

¶77 At the University of Houston, the physical collection of the law library was reduced to about one-third of its previous size. We deselected over 100,000 volumes, purchased thousands of new volumes, and realigned our subcollections. This rightsizing work was done by careful use of planning and assessment to select the materials that would move to the new O’Quinn Law Building. The remainder were considered for any other value outside content and then donated or recycled. What remains is the collection that best serves our institution. Through careful planning and assessment, our library worked to examine our collection. As I stand in my new, physically smaller law library, I can say I am proud of every item in our collection, and understand that our discoverable, accessible collection has become in some ways larger because it is more relevant, consistently high-quality, findable, and usable. I know that each item was selected intentionally to help fulfill the missions, needs, and priorities of the institution.

¶78 Academic law libraries have long been held hostage by the idea that very large collections are required for a law library to be successful. Though some law libraries will choose to support goals that continue to require very large collections, many others can now start the necessary paradigm shift toward rightsizing their collections to support their own goals. Rightsizing will likely be a long and tedious process but will result in a more authentic reality of what law library collections are and can be. It will also correct a long-told lie about the necessity of space and volumes for law libraries and, in this action, positively impact the authenticity of the profession.

¶79 The status of law librarians is said to be in decline or at risk. Credibility in the academy is not something that can be achieved without the difficult work of telling the truth and communicating our stories meaningfully to our institutions and colleagues in the academy. How can law librarians ask for more status as they seemingly guard large, unused collections? As law library collections are rightsized, questions around credibility will dissolve as carefully curated collections take the place of large, unassessed collections. The profession must abandon the idea that bigger is always better. Instead of protecting size, in the number of square feet or titles and volumes, law librarians must root themselves in the actual beneficial work they do each day. The worth of law librarians and librarians is not in what we hold, but what we do.

59. For libraries that cannot reconfigure their physical spaces, they might still rightsize and use a subcollection for the deselected or historical materials until they can donate and recycle them.

60. See DEI and De-Credentialization, RIPS L. LIBR. BLOG (Dec. 12, 2022), https://ripslawlibrarian.wordpress.com/2022/12/12/dei-and-de-credentialization-why-dropping-degree-requirements-wont-make-academic-law-librarianship-more-diverse-but-will-make-it-more-inequitable/ [https://perma.cc/BGA5-ZJV7].
Keeping Up with New Legal Titles*

Compiled by Chava Spivak-Birndorf** and Matt Timko***

Contents

Verified: How to Think Straight, Get Duped Less, and Make Better Decisions About What to Believe by Mike Caulfield and Sam Wineburg

Aimee Self Pittman 308

Legal Phantoms: Executive Action and the Haunting Failures of Immigration Law by Jennifer M. Chacón, Susan Bibler Coutin, and Stephen Lee

Katie Siler 309

Disabilities and the Library: Fostering Equity for Patrons and Staff with Differing Abilities edited by Clayton A. Copeland

Sophia Kingsley 311

Crash Course in Collection Development by Wayne Disher

Samantha Ginsburg 313

The Critical Librarianship and Pedagogy Symposium: Reflections, Revisions, and New Works edited by Yvonne Mery and Anthony Sanchez

Sasha Minton 315

Copyright and Course Reserves: Legal Issues and Best Practices for Academic Libraries by Carla S. Myers

Matt Clemens 317

* If you would like to review books for “Keeping Up with New Legal Titles” please email book review editors Chava Spivak-Birndorf (cys28@drexel.edu) and Matt Timko (mtimko@niu.edu).

** Research and Instructional Services Librarian and Adjunct Professor of Law, Drexel University Thomas R. Kline School of Law, Philadelphia, Pennsylvania, http://orchid.org/0000-0002-5510-9690.


*Reviewed by Aimee Self Pittman*

¶1 In today’s digital age, where information spreads rapidly across the internet, it has become increasingly challenging to determine what is true. Mike Caulfield and Sam Wineburg’s book, *Verified: How to Think Straight, Get Duped Less, and Make Better Decisions About What to Believe*, addresses this critical issue by providing readers with a practical “driver’s manual” for navigating the online world. Using lots of examples from current news and internet events and providing a handful of takeaways at the end of each chapter, it is an easily accessible book addressing the tangled web of the internet and information.

¶2 One of the book’s key insights is the recognition that the old guard of gatekeepers in media (editors, publishers, newsroom managers, etc.) has been replaced by a decentralized landscape where anyone can disseminate news via social media, bypassing the traditional editorial and fact-checking processes. While this democratization of information has its merits in terms of diversity and inclusivity, it also poses significant challenges in verifying the credibility of sources and claims.

¶3 Based on 13 research studies involving over 10,000 people in the U.S., Canada, Sweden, and the UK, Caulfield and Wineburg reveal that people tend to struggle with critical thinking when assessing information on the internet. The problem, however, is not necessarily a lack of critical thinking skills; rather, it lies in the ability to put new information into its proper context. By encouraging readers to consider their own expertise, interests, and biases when evaluating information, along with evaluating the source of the information and the context of the claim itself, Caulfield and Wineburg present a more nuanced understanding of the realities of the digital information ecosystem.

¶4 At the heart of their approach lies the SIFT strategy, a modern alternative to older media literacy models like RADCAB (Relevancy, Appropriateness, Detail, Currency, Authority, and Bias), ABC (Antecedent, Behavior, and Consequence), and CRAAP (Currency, Relevance, Authority, Accuracy, and Purpose) that are more suited to evaluating traditional print and broadcast media. SIFT, an acronym for Stop, Investigate, Find, and Trace, equips readers with practical tools to evaluate the credibility of sources, verify claims, and trace information back to its origins. A reader should (1) *stop* and take a moment to consider what they know about the claim being made and the person sharing that claim; (2) *investigate* and assess the trustworthiness of the source (who are they, what is their bias, and why are they sharing this information?) and examine whether they have firsthand knowledge of the claim; (3) *find* other coverage—cross-reference the claim with other trusted news sources to see if they are reporting the same information or if it is only present on social media, taking advantage of the expertise of major news organizations’ cadre of editors and fact-checkers; and (4) *trace* the claim back to its origins.
original context and source—this is especially important on social media, where the original source can be a critical piece of information to help evaluate a claim. Is the person originally posting the claim in a position to know what they are claiming to know?

¶5 The book offers a timely response to the challenges posed by the digital age. It points out that older credibility indicators can be manipulated with the ease of creating polished websites, spoofed URLs, and fake or paid-for verified status on social media sites. Moreover, the book explores the role of emotion in sorting through news, acknowledging that even when we know or have reason to believe something is false or fake, we may still be tempted to share it when it aligns with our beliefs or interests.

¶6 The book also highlights the erosion of Google as a trustworthy source due to search engine optimization (SEO) manipulation and pay-to-play tactics and proposes lateral reading (using the internet to cross-check information found on the internet) as a quick and easy verification strategy. By consulting multiple reputable sources to contextualize information encountered online or in other texts, rather than depending on the reader’s deeper evaluation of the source text, the reader can harness the internet to determine whether a claim is credible.

¶7 In an era where misinformation can have far-reaching consequences, integrating the SIFT strategy into law school curricula makes sense, especially in legal research instruction where we strive to foster a generation of discerning and informed researchers. Students often arrive in our classrooms without the necessary knowledge to critically evaluate online information. They may have learned less effective predecessors to SIFT, forgotten what they learned, or were never taught these skills due to other pressures in their previous educational experiences. By incorporating the SIFT strategy and the easily actionable steps outlined in Verified, we can better equip law students with the tools they need to navigate the complex and ever-evolving information landscape, enabling them to make more informed decisions and better serve the interests of justice.

¶8 When boundaries between news and advertisements blur, and where the concept of truth is increasingly malleable, Verified serves as a vital tool for readers seeking to navigate this complex terrain. Caulfield and Wineburg’s work not only provides a roadmap for verifying information, but also prompts reflection on the societal implications of misinformation in a digital age. By urging readers to question not just what they read but why they believe it, the book encourages a deeper engagement with the information landscape and a more critical approach to consuming news.


Reviewed by Katie Siler*

¶9 Diving into America’s piecemeal approach to immigration laws, especially for a reader not versed in the 2012 Deferred Action for Childhood Arrivals (DACA) program
and subsequent policies (DACA+), can be daunting. In *Legal Phantoms: Executive Action and the Haunting Failures of Immigration Law*, readers find a welcoming entry point: a concise, readable overview of immigration legislation from 2012 to 2022 and a humanized story of what immigration means in the United States. Through interviews with DACA and DACA+ applicants, advocates for those applicants, and government officials, the book interweaves discussions of broader immigration policies. As the push for immigration reform collides with the stark realities faced by affected individuals, *Legal Phantoms* presents readers with a full picture of the U.S. immigration story. Authors Chacón, Boutin, and Lee highlight “legal shapeshifting,” (p.172) the ability to move and push boundaries in an uncertain legal field, but ultimately conclude that illusory programs are not enough to eliminate the uncertainty that continues to haunt migrant communities.

¶10 The research methodology used throughout *Legal Phantoms* places the publication in the center of immigration law and social science scholarship. The “book is the product of a thwarted research plan” (p.18) according to Chacón, Boutin, and Lee who initially developed the concept of *Legal Phantoms* in 2013, when the Obama administration began conceptualizing far-reaching immigration policy reforms. In keeping with a pattern evidenced throughout *Legal Phantoms*, these 2013 reforms never came to pass. So, Chacón, Boutin, and Lee pivoted, tooling their research to explore the experiences of immigrants in a time of legal uncertainty. Between 2014 and 2017, the authors and their research team interviewed over 135 individuals deeply engrained in the immigration process. The research team explored local and federal immigration laws, administrative guidance, news materials, and advocacy organization materials to corroborate the interviews and stories. The depth and thoroughness of the team’s research process and findings is commendable; the research team kept consolidated data and timeline information on their corresponding website, The Southern California Deferred Action Project,¹ and *Legal Phantoms* shines as an exemplar in exhaustive research and in-depth legal analysis.

¶11 The first half of *Legal Phantoms* focuses on DACA and DACA+, so-called “phantom” programs because “after they disappeared, the programs continued to structure the political and legal landscape, to influence advocacy, and to haunt potential beneficiaries with the memory of what might have been” (p.12). This overview is uniquely helpful for immigration law researchers because it also maps how deeper criminal law principles intertwine with the phantom programs. And while administrative data without corresponding background information can be difficult to digest, *Legal Phantoms*’ systematic investigative approach provides readers with the context needed to fully understand such data. For example, “in the period from 2012 to 2022, the number of DACA recipients fell from 830,000 students to fewer than 610,000” (p.51). *Legal Phantoms* evaluates this attrition through conducting interviews with

---

lawyers and advocates and monitoring federal and judicial action, finding that some individuals “lost their deferred action status ‘because they get DUIs or have other, like, criminal things happening in their lives’” (p.51). The conclusion logically follows that “police contacts threaten to obstruct future paths toward regularizing immigration status . . . [and] push people out of liminal forms of protection that they may have” (p.51).

§12 While the book’s research is scrupulous, the research team limited their studies to California’s Los Angeles and Orange Counties. The counties are unique: Los Angeles tends to have broad support programs and immigrant serving resources, and Orange County retains relatively small immigration assistance programs. This contrast makes Legal Phantoms a valuable resource for any reader, but scholars doing a deep dive into immigration law and sociology should note the limitations that come with a region-specific study. For example, Legal Phantoms outlines how phantom immigration programs create an uncertain legal atmosphere for invested players, emphasizing that immigration advocates can engage in some maneuvering within the ambiguous landscape to help ease some immigration issues. In both Los Angeles and Orange Counties, Legal Phantoms describes advocates who “‘shapeshifted’ existing institutions by envisioning a world in which distinctions between citizens and noncitizens would become insignificant, and which a criminal offense would cease to define individuals’ futures” (p.172). But this shapeshifting is likely to vary significantly based on geographic location. Immigration laws and reform could hold different levels of priority in states outside California; with different communities served and different advocacy goals, the meaning of reform could change based on location. It is unclear whether the advocacy efforts Legal Phantoms studies in California would have the same influence in other states.

§13 Overall, Legal Phantoms offers a meticulously researched narrative, enriched with profound analysis that renders it indispensable for those engaged in immigration law or exploring the nexus of law and immigration sociology. It stands as a valuable addition to any academic library. Interlacing life narratives within a detailed examination of legal and social frameworks shaping immigration in the United States, Legal Phantoms maintains readability. These personal accounts anchor discussions of the immigration system in lived experiences, producing a work that authentically captures the immigration journey in the United States.


Reviewed by Sophia Kingsley*

§14 Dr. Clayton A. Copeland’s work as director of the Laboratory for Leadership in Equity of Access and Diversity at the University of South Carolina, as well as her past scholarship, prompts libraries of all kinds to question their practices regarding patrons

with disabilities. Her latest work, *Disabilities and the Library: Fostering Equity for Patrons and Staff with Differing Abilities*, fills a crucial gap in the literature. In addition to patrons, those evaluating disability practices should consider the needs of all people with disabilities who interact with the library, including co-workers, supervisors, and, perhaps most importantly, for a profession seeking to diversify its ranks and potential employees.2

¶15 Copeland compiles work from self-advocates with disabilities and information professionals without disabilities. This diversity of perspectives enables thorough coverage of the history of disability rights legislation and activism, the role of libraries from the early 1800s onwards, and the diversity of disabilities and perspectives on disability. Most chapters focus on circumstances in the United States.

¶16 Libraries have played a key role in prioritizing and including patrons with disabilities. Sadly, this attitude does not always translate to equitable treatment of library staff with disabilities. Thus, the penultimate section of the book, which focuses on hiring practices, is highly suggested reading for leaders in law librarianship. It is worth challenging whether our profession’s traditional hiring methods are resulting in artificial restrictions of the candidate pool. Copeland spurs librarians to ask ourselves what we are doing to ensure that the largest minority group in the country (26% of the population) is not excluded by our job posting, interviewing, and hiring processes (p.427). Increased representation of law librarians with disabilities could similarly benefit both our profession and our patrons, akin to how universal design benefits everyone. Guidance such as example language for job postings that encourages people with disabilities to apply demonstrates, yet again, the exceptional practicality of Copeland’s compilation.

¶17 It is important to note this is not a disability law textbook; the authors make it clear that readers can find disability legal information easily online. Instead, the chapters focus on practical advice regarding what libraries and existing technology can accomplish in service of patrons and library staff with disabilities. Much of the programming advice would require significant adaptation to implement in a law library setting. Chapters 8, 9, and 10 focus on book selection for young children and inclusive programming for middle schoolers. Nonetheless, it is easy to find practices suggested by the author to consider right away. For example, law libraries can investigate the availability of audiobooks, as recommended in the chapter “Serving Patrons with Dyslexia.” The practicality of the information presented is reinforced by the usefulness of the book’s features. These features include a web accessibility checklist, discussion questions about workplace stigma, and lists of organizations with accessibility resources.

¶18 The clear organizational structure of the book also lends itself to a highly readable text. One section of the book is organized by diagnoses, allowing the reader to

---

2. I refer to “people with disabilities” because this is a term recommended by the National Center on Disability and Journalism. Throughout *Disabilities and the Library*, authors use a wide variety of descriptors: “differently able,” “with differing abilities,” “people experiencing disabilities,” etc. Dr. Copeland states, it is “always imperative to be mindful and respectful of the language preferences of each person with whom a librarian interacts” (p.xxii).
explore differing conditions individually. Although these tools are not specifically intended for law librarians, their versatility is apparent. For instance, Westlaw Edge and Nexis Uni (LexisNexis) both have completed accessibility documentation, which is easy to locate based on the chapter on removing barriers in online libraries. Overall, the consistent helpfulness and utility across over 500 pages is impressive.

¶19 This hefty page count allows for thorough coverage by many authors with diverse perspectives but, unfortunately, also with a degree of repetitiveness. There are multiple vocabulary lists containing the same terms with the same definitions. This is not an entirely negative aspect as nuanced terminology is essential when describing differing abilities and the spectrum of perspectives on those terms. However, a single reference point such as a glossary with terms listed next to all their varying definitions could have resulted in improved readability and a shorter page count. The reading experience is also adversely impacted by the citation style at times; having full URLs as in-text citations can be distracting and is contrary to e-reader accessibility standards.

¶20 All libraries have patrons with disabilities and every library benefits, knowingly or unknowingly, from the efforts and scholarship of librarians with disabilities. Disabilities and the Library increases the reader’s understanding of how these partnerships can advance both the profession and what Copeland refers to as “access to life” (p.3). We have the power to facilitate at least one aspect of “access to life” by providing more equitable employment in law libraries.

¶21 This book is most useful to librarians, particularly leaders and hiring committees, who want to reduce stigma, improve access to their institutions for individuals with disabilities as both users and librarians, and fill positions with people from a large swath of the population who, unlike other traditionally marginalized groups, have been largely ignored in our efforts to recruit and diversify the law librarian profession.


Reviewed by Samantha Ginsburg*

¶22 The diminishing presence of print collections in law libraries is driven by factors such as cost, space limitations, and reduced usage while attorneys and law students increasingly depend on legal databases to meet their research needs. Maintaining an effective collection that meets the current needs of patrons requires an understanding of the weeding process and its place within the responsibilities of a collection development librarian as well as concerns related to managing electronic collections and licensing agreements.

¶23 Crash Course in Collection Development by Wayne Disher not only addresses these issues but also effectively provides an intensive and condensed narrative that covers the major collection development topics in a manageable length. While not specifically tailored to law libraries, the text integrates examples and discussions relevant to various

library settings, including several mentions of law school libraries, court libraries, and even law firm libraries. This inclusivity is particularly notable given the author’s background as a retired public library director and lecturer at San Jose State’s School of Information. Indeed, it is Disher’s experience, including his focus on print materials and community needs in public libraries that translates nicely into principles that are widely applicable across all library types, making the book a great resource for librarians working in just about any library setting.

¶24 One of the greatest strengths of Crash Course is that it provides a foundational starting point and framework for someone with limited-to-no collection development experience. Much like the approach to legal research, where one might begin with consulting a legal dictionary, encyclopedia, or treatise, this book equips librarians with fundamental concepts, considerations, and areas of general awareness essential to developing a collection.

¶25 Additionally, Disher is cognizant of the fact that every library possesses its own distinct culture, shaped not only by library type, but also by its geographical location, surrounding community, and larger institutional structure or parent organization. Still, despite many differences among libraries, the central focus of collection development practices relies on efficiently meeting patrons’ information needs and allocating resources toward items that will be used or circulated effectively.

¶26 While the author does not get into the intricate details of budget management or offer a definitive list of indispensable resources for one's collection, the book does highlight critical aspects of collection development to keep in mind. For instance, Disher emphasizes the importance of understanding one’s budget cycle and allocating that budget accordingly.

¶27 The author also includes a chapter on the necessity of a collection development policy. Disher argues that, while non-binding, a strong collection development policy serves as a benchmark for acquisitions decisions and can be referred to if there is ever a question or complaint regarding items in the collection. The chapter also helpfully outlines the general steps for writing and implementing such a policy.

¶28 The “Collection Maintenance” chapter thoughtfully presents weeding as an accessibility issue. This chapter is entirely appropriate for law libraries, particularly as many law libraries continue to reduce their print collections and rely more on digital resources and even interlibrary loan services for obscure materials. The author assures the reader that while discarding books may feel uncomfortable, especially if purchased with public funds, weeding ultimately streamlines access to highly sought-after materials and creates space for items that are more likely to be accessed. Additionally, the chapter outlines how to initiate the weeding process, emphasizing the importance of developing a plan and establishing retention evaluation criteria. Soliciting input from all levels of library stakeholders is also advised, from administrators to frontline staff, which is particularly insightful considering the daily interaction circulation staff have with the collection and with patrons using the collection.

¶29 The concluding chapter, “Collections for the Digital Age,” addresses e-resource licensing. The author raises points regarding ownership and provides a fundamental
understanding of access considerations, such as types of licenses and potential patron limitations. This structured approach of addressing typical options that collection developers should be mindful of denotes the strength of this book. For example, the author lists and describes various lending models outlined in the chapter on acquisitions and clarifies the distinctions between purchasing directly from a publisher versus utilizing a vendor, including an explanation of how vendors and publishers operate. It highlights why this book would be a beneficial read for individuals looking to embark on any collection development endeavor with much of the content adaptable to any library.


Reviewed by Sasha Minton*

¶30 Picture the law school classroom scenes in movies such as *The Paper Chase* or *Legally Blonde*—the parts where one watches the humiliation and shaming of students by teachers engaged in a harsh implementation of the casebook method of positivist knowledge acquisition. Flip that picture upside-down to get a different way of teaching, questioning not only law as truth but also one's own implicit biases, privileges, and authority as teachers in a society layered with inequities to create “a co-learning environment rooted in mutual respect” (p.127). This paradoxical example provides a glimpse into what this book says critical librarianship and pedagogy is trying to achieve.

¶31 *The Critical Librarianship and Pedagogy Symposium: Reflections, Revisions, and New Works* is an anthology that is expanded from various presentations given at the biennial Critical Librarianship and Pedagogy Symposium at the University of Arizona Libraries since 2016. The book has 10 chapters organized into five parts: Critical Pedagogies in the Classroom, Feminist Library Practices, The Labor of Librarianship, Practices of Care, and Community Archives. Despite these divisions, there are many overlapping themes that unite the five parts into a whole, including defining what critical librarianship is today and how to embody it in practice as a teacher, reference librarian, cataloguer, and archivist. It is an intellectually invigorating collection with well-researched insights. Several personal perspectives of the authors enliven the readings. Moreover, many of the authors give specific recommendations for starting on one’s critical librarianship journey, including trainings on specific techniques, forming learning groups with colleagues, gaining support from leadership, and seeking input from organizations that represent marginalized communities.

¶32 On the other hand, some of the authors in this anthology do not fully grapple with limitations of the theories and practices they promote. For example, in Chapter 1, the author urges librarian instructors to utilize intergroup dialogue during library

training to open discussion about implicit biases, privileges, and authority. One of the
techniques the author suggests is for instructors to call out when “members of a privi-
leged group [are] dominating the conversation” and ask the group to talk about it (p.10).
Although the author’s intent of ensuring equitable participation of diverse group mem-
bers is laudable, some research suggests a technique like this may increase the possibil-
ity of intergroup conflict if privileged group members who are called out feel threatened,
especially in a competitive academic environment where participants may not have
agreed to engage in this kind of pedagogy.3

¶33 Likewise in Chapter 7, the authors argue that librarian instructors should focus
less on skill-building through just-in-time learning tools, such as LibGuides, online
tutorials, and standardized lesson plans, because in the interest of efficiency they may
take away from engaged critical pedagogy in a way that “dehumanizes teaching librar-
ians” (p.131). However, the authors do not fully address the benefits of these tools,
including that students may rely on them to reinforce learning. Moreover, librarians
should be able to utilize these tools to provide flexibility in an increasingly online world,
while at the same time instructing their students with the “connectedness, relational
work, and mutual respect” (p.136) that the authors support.

¶34 A couple of the authors do play devil’s advocate for their theories, which
strengthens the credibility of their arguments. For example, while the authors in
Chapter 2 advise using universal design for learning (UDL) for librarian instruction to
ensure inclusion for disabled patrons, they also address how UDL needs to be sup-
ported by more research and specific operationalization to avoid its conflation with the
discredited learning styles theory. In Chapter 5, the author advocates for situated open
metadata with the caveat that Indigenous data sovereignty needs to be respected. Most
theories in general have both strengths and challenges, and one feels respected as a
reader when provided with the whole picture.

¶35 While this book is not specifically about the law librarian experience, many of
the authors’ tools for approaching teaching and reference will be applicable to a law
librarian. Indeed, what makes this a good pick are the thought-provoking ideas the
authors have for improving librarian reference and instruction. Worth highlighting is a
reflection by Anastasia Chiu in Chapter 9 on how to deftly communicate with patrons
about the boundary between legal information and legal advice. This section is an
important read for anyone in the legal information field.

¶36 The articulated aims of all the librarian authors in this anthology are to increase
equity, social justice, empathy, and inclusion in libraries. The authors’ dedication to
these values and the ways in which they are trying to make them a reality makes one
excited about the future of librarianship because of the impact librarians can have on
students and society. They offer different ways forward that foster empowerment, com-
munity, and care for all in the library. In this way, this anthology helps readers explore
how critical librarianship can be incorporated into their professional development.

3. See Thomas F. Pettigrew & Linda R. Tropp, When Groups Meet: The Dynamics of Inter-
group Contact 187, 200 (2011).
¶37 Whether you are dipping your toes into the waters of critical librarianship for the first time or accustomed to wading deep into those waters, *The Critical Librarianship and Pedagogy Symposium: Reflections, Revisions, and New Works* is recommended for a law library’s professional development collection, especially for those libraries whose librarians are in teaching positions, work at the reference desk, or provide instruction in some other way.


*Reviewed by Matt Clemens*

¶38 U.S. copyright law is notoriously perplexing and amorphous. The exact definitions and legislation governing it often lie in a realm of broad obscurity and flux, where the individual interpretations of judges and juries on ethereal concepts like originality, transformativity, and creativity determine copyright’s legal implications in the real world. The advent of the digital age, marked by digital copies and AI, has only further complicated the intellectual property landscape. Given this complexity, it is not surprising that academic libraries and other institutions often take a conservative approach when dealing with copyrighted materials. Luckily, authors like Carla S. Myers have developed guidebooks to help academic libraries and other institutions navigate these IP labyrinths.

¶39 *Copyright and Course Reserves: Legal Issues and Best Practices for Academic Libraries* functions both as a guidebook and compendium for academic libraries as they manage their course reserves in the face of ever-changing copyright laws. Myers’s book consists of 14 chapters divided into three parts: Reserve Administrative Considerations, Copyright and Course Reserves, and Additional Legal Considerations for Reserve Services. In juxtaposition to the intricacy of copyright law, the three parts are written in simple, straightforward prose that do not require fluency in legal terms of art; even the structure of the writing has been formatted for accessibility with bold topic headings that help direct the reader to their paramount concerns.

¶40 In addition to the value of intelligibility evidenced by the writing structure, Myers also ensures the book’s flexibility and utility. The book is not intended to be commandments that one must obey to ensure a library’s success. Instead, it asks the reader to first consider the composition of their course reserves, and then how copyright might affect those reserves. Myers wants the reader to consider situational questions such as: What is your library’s funding? Who are your library’s patrons? What type of materials do your instructors use? By asking these questions, Myers refreshingly insists that the characteristics of a library’s course reserves matter when applying her suggestions—there is no one-size-fits-all solution to this complex issue.

¶41 Myers further breaks down the organization of the book by providing guidelines for the potential management of a library’s unique reserves. Chapter 3 (Electronic and
Media Reserves Administration and Management) is a particularly excellent example. The chapter discusses the potential service parameters of electronic reserves and provides workflow and procedural suggestions for managing an electronic reserve service system.

¶42 Myers continues this pedagogical approach to course reserves in her examination of copyright law and its effect on libraries and librarians. She introduces U.S. copyright law, an analysis of the critical sections within Title 17 of the United States Code, and counsels on where these major copyright law facets will appear within libraries and how to navigate them. The strength of these analyses is Myers’s inclusion of case studies, which give a tangible understanding of how U.S. copyright functions when interacting with reality instead of hypotheticals. For example, the nuances of First Sale Doctrine and ownership are more comprehensible when exemplified by the challenges to their interpretation in cases such as Kirtsaeng v. Wiley.4

¶43 The potency and utility of Myers’s guide come from its straightforwardness. There is often an expectation that for a work to be worthwhile it must have a grand purpose or intention. Myers’s work is not a verbose or daring exposition that elucidates the creative stagnancy within U.S. copyright law. Nor is it a call for an expansion of library exceptions to copyright that champion user rights. Rather, it is a guidebook that seeks to assist academic libraries in the management and administration of their course reserves while navigating the confounding seas of U.S. copyright law. The uncomplicated prose and topic-based formatting provide an understandable set of definitions, suggestions, and practices that do not require law school debt to decode.

¶44 The simplicity of Myers’s work makes it a fantastic primer for a beginner in copyright law or a librarian recently assigned to create a course reserves system, but for a veteran in copyright law or course reserve administration, the material probably will not provide any revelations. Myers’s book is not a substitute for legal counsel on tricky U.S. copyright law questions, but if you are seeking clear guidance on the parameters of your library’s course reserves, consider picking up Copyright and Course Reserves: Legal Issues and Best Practices for Academic Libraries. This book is recommended for any academic library that offers course reserve services for faculty and students and as an introductory guide for any librarian looking to understand the interactions between libraries and U.S. copyright law.

Iantha Haight and Annalee Hickman Pierson 219

The Persistent Treatise [2024-11]
Dana Neacsu and Paul Douglas Callister 257

Beyond the Completion Fallacy: Mission-Based Rightsizing of Academic Law Library Collections [2024-12]
Amanda Bolles Watson 285